

No. 14-874

In the Supreme Court of the United States

JOHN DENNIS APEL, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.

Solicitor General

Counsel of Record

LESLIE R. CALDWELL

Assistant Attorney General

DAVID M. LIEBERMAN

Attorney

Department of Justice

Washington, D.C. 20530-0001

SupremeCtBriefs@usdoj.gov

(202) 514-2217

QUESTION PRESENTED

Whether a person who has been previously barred from a military installation by a commanding officer for trespassing and vandalism may, consistent with the First Amendment, be prohibited from reentering an area of the installation designated for public protest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 767 F.3d 800. The order of the district court (Pet. App. 38-48) is unreported. A prior opinion of this Court rejecting petitioner's statutory claim (Pet. App. 9-33) is reported at 134 S. Ct. 1144. A prior opinion of the court of appeals (Pet. App. 34-35) is reported at 676 F.3d 1202.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2014. A petition for rehearing was denied on October 22, 2014 (Pet. App. 7-8). The petition for a writ of certiorari was filed on January 19, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following two bench trials in the United States District Court for the Central District of California, petitioner was convicted of three misdemeanor counts of reentering a military installation after having been ordered not to reenter, in violation of 18 U.S.C. 1382. Pet. App. 39-40. He was ordered to pay \$355 in fines and fees. *Id.* at 17. The court of appeals reversed petitioner's convictions, holding that Section 1382 did not apply to the area of the military installation where petitioner was arrested. *Id.* at 34-35. This Court vacated the court of appeals' judgment. *Id.* at 9-28. On remand, the court of appeals affirmed petitioner's convictions and fines. *Id.* at 1-3.

1. Vandenberg Air Force Base is located in a rural area near the coast of central California, approximately 170 miles northwest of Los Angeles. Pet. App. 12-13. Vandenberg is the site of sensitive missile- and space-launch facilities, and in part for that reason it is generally closed to the public. *Id.* at 13. Vandenberg's commander, like the commander of any military installation, possesses "the historically unquestioned power * * * summarily to exclude civilians from the area of his command" as the "necessary concomitant of the basic function of a military installation." *Greer v. Spock*, 424 U.S. 828, 838 (1976) (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 893 (1961)).

The base is, however, crossed by two state roads—Highway 1 and Highway 246—that are open to the public for vehicular travel. Highway 1 runs across the eastern part of the base and provides the most direct route between the closest town to the north (Santa Maria) and the closest town to the south (Lompoc).

Highway 246 runs across the southern part of the base, and it allows travelers to reach a beach and a train station on Vandenberg's western edge. Pet. App. 13.

The land crossed by Highways 1 and 246 is owned by the United States and under the control of the Department of the Air Force, which has granted roadway easements to the State of California and Santa Barbara County. Pet. App. 13, 40. Such easements are common on military bases. See *United States v. Albertini*, 472 U.S. 675, 698 (1985) (Stevens, J., dissenting) (“[H]ighways or other public easements often bisect military reservations.”). In granting those easements, the Air Force retained jurisdiction over the roadways; it simply agreed to exercise concurrent jurisdiction with the State and the County. Pet. App. 13-14, 40. For example, in the instrument granting the easement for Highway 1 (the roadway at issue in this case), the Air Force expressly provided that the roadway's use “shall be subject to such rules and regulations as [the Base commander] may prescribe from time to time in order to properly protect the interests of the United States.” *Id.* at 14 (brackets in original). Moreover, the United States “‘reserves to itself rights-of-way for all purposes’ that would not create ‘unnecessary interference with . . . highway purposes.’” *Ibid.* (citation omitted).

Highway 1 runs past Vandenberg's main gate. Near that gate, the base commander has designated an area for public protesting. Pet. App. 14; see *id.* at 29-30 (satellite views of protest area). That area, which is part of the base, was delineated as a protest area following litigation in the late 1980s. *Id.* at 40-41; Pet. 4 n.1. In an exercise of his command over Van-

denberg, the base commander has issued guidelines and restrictions to facilitate the orderly use of the protest area, addressing such subjects as public access, scheduling, and leaflet distribution. Pet. App. 14-15, 25. One of the restrictions is that anyone barred from Vandenberg may not enter the base for any reason, including to protest in the designated area. *Id.* at 15. Base rules explain that for any person “currently barred from Vandenberg AFB, there is no exception to the barment permitting you to attend peaceful protest activity on Vandenberg AFB property.” *Ibid.* The rules further explain that “[i]f you are barred and attend a protest or are otherwise found on base, you will be cited and detained for a trespass violation due to the non-adherence of the barment order.” *Ibid.*

2. Petitioner has twice been barred from Vandenberg, the first time in 2003 for trespassing beyond the protest area and vandalizing base property, and the second time in 2007 for trespassing. Pet. App. 16. Petitioner does not challenge the validity of either barment order. *Id.* at 2. The second barment order was still in effect in 2010, when petitioner reentered Vandenberg on three occasions to protest in the designated area. Each time, security personnel reminded petitioner of the existing barment order and asked him to leave Vandenberg. Pet. App. 17. Each time, petitioner refused, and he was cited for violating 18 U.S.C. 1382, which makes it a misdemeanor to reenter a federal military installation “after having been * * * ordered not to reenter by any officer or person in command or charge thereof.” 18 U.S.C. 1382; see Pet. App. 17. Petitioner was then escorted and released outside Vandenberg. Pet. App. 17.

3. A magistrate judge convicted petitioner of the misdemeanor offenses and ordered him to pay \$355 in fines and fees. Pet. App. 17. Petitioner appealed his convictions on both statutory and constitutional grounds, and the district court affirmed. *Id.* at 38-48. The court rejected petitioner's defense that Section 1382 did not apply to the designated protest area. *Id.* at 47-48. The court further concluded that petitioner's convictions did not violate the First Amendment. *Id.* at 44-47. The court explained that the designated protest area is not a public forum and that, in any event, respondent's previous barment order was a content-neutral basis for his exclusion. *Id.* at 44, 46-47. Regardless of whether the protest area is a public forum, the court explained, "the military may properly exclude recipients of valid bar letters * * * without violating the First Amendment." *Id.* at 46. The court explained that petitioner was not prosecuted under Section 1382 for engaging in speech, but for reentering Vandenberg after being barred. *Id.* at 46-47.

4. The court of appeals reversed in a per curiam opinion. Pet. App. 34-35. The court held that Section 1382 applies only to areas over which the federal government exercises an exclusive right of possession. Because the designated protest zone where petitioner was arrested is subject to an easement with the State of California, the court reasoned, petitioner's convictions under Section 1382 could not stand. *Id.* at 35.

5. This Court vacated the court of appeals' judgment. Pet. App. 9-28. The Court interpreted Section 1382 to "reach[] all property within the defined boundaries of a military place that is under the command of a military officer." *Id.* at 27. The boundaries of the military property "do not change when the

commander invites the public to use a portion of the base for a road, a school, a bus stop, or a protest area, especially when the commander reserves authority to protect military property by, among other things, excluding vandals and trespassers.” *Id.* at 28. The Court declined to consider petitioner’s alternative claim that his convictions violated the First Amendment, and it remanded the case to the court of appeals for further proceedings. *Id.* at 27-28; see *id.* at 31-32 (Ginsburg, J., joined by Sotomayor, J., concurring) (expressing First Amendment concerns, but agreeing that the Court properly reserved that issue); *id.* at 33 (Alito, J., concurring) (noting that the Court’s opinion should not be interpreted to embrace any First Amendment concerns).

6. On remand, the court of appeals affirmed petitioner’s convictions without addressing his First Amendment claim. Pet. App. 4-6. The court then issued an amended per curiam decision addressing that claim. *Id.* at 1-3. The court held that regardless of whether the protest area on Vandenberg Air Force Base qualifies as a public forum for purposes of the First Amendment, “the military may properly exclude recipients of valid bar letters, such as [petitioner], without violating the First Amendment.” *Id.* at 3 (citing *Albertini*, 472 U.S. at 687-689).

ARGUMENT

Petitioner contends (Pet. 9-15) that the court of appeals’ decision rejecting his First Amendment claim conflicts with this Court’s decision in *Flower v. United States*, 407 U.S. 197 (1972) (per curiam), in which the Court concluded that the military-base location at issue was a traditional public forum. *Id.* at 198-199. He alternatively contends (Pet. 16-17) that the protest

area is at least a “designated public forum,” where speech restrictions are likewise subject to strict scrutiny. The court of appeals’ decision is correct, consistent with this Court’s interpretation of *Flower in United States v. Albertini*, 472 U.S. 675 (1985), and not in conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. The First Amendment principles that govern petitioner’s claim are well settled. A private speaker’s right to access government property for expressive activity generally depends on whether the government has created a forum for expression, and if so, what type of forum. “Traditional public fora are defined by the objective characteristics of the property, such as whether, ‘by long tradition or by government fiat,’ the property has been ‘devoted to assembly and debate.’” *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)). Restrictions on expression in traditional public fora must be narrowly drawn to achieve a compelling state interest. *Ibid.*; see *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (*ISKCON*). The same test applies to designated public fora, property that the government “has opened for expressive activity by part or all of the public.” *Ibid.*

a. *Flower* addressed a situation where a civilian had received a barment letter for distributing unauthorized leaflets on an open military base, and who faced arrest under Section 1382 when he returned to the base to again distribute his leaflets. 407 U.S. at 197. The Court summarily reversed the civilian’s conviction on the premise that he was arrested on “a

completely open street” within the base where the military had “abandoned any claim that it has special interests in who walks, talks, or distributes leaflets.” *Id.* at 198 (citation omitted). Under those circumstances, the base commander could “no more order [the civilian] off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street.” *Ibid.*

The Court has since clarified that the decision in *Flower* “is limited by [its] unusual facts.” *Albertini*, 472 U.S. at 685. The Court noted that *Flower* had determined that the military had “abandoned not only the right to exclude civilian traffic,” but also “any right to exclude leafleteers” from the road where the civilian was arrested. *Ibid.* As a result, that military road acquired the characteristics of a municipal street—a traditional public forum “held in trust * * * for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Greer v. Spock*, 424 U.S. 828, 835-836 (1976) (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)). And *Flower*’s prior barment letter had rested on “the very activity”—distribution of leaflets in a public forum—“that *Flower* held [was] protected by the First Amendment.” *Albertini*, 472 U.S. at 685; *id.* at 686 (distinguishing the acts of vandalism that resulted in *Albertini*’s bar letter).

Subsequent decisions have rejected the notion that an area of a military base becomes a “public forum” under *Flower* whenever “members of the public are permitted freely to visit.” *Greer*, 424 U.S. at 836. In *Greer*, the commander barred two political candidates from the base for distributing campaign literature in

violation of base regulations and threatened them with prosecution under Section 1382 if they returned. *Id.* at 832-833 & n.4. This Court affirmed the commander's authority to exclude the candidates, finding no evidence that he had abandoned his interest in regulating access to and activities on the base. *Id.* at 837. Similarly, in *Albertini*, the Court affirmed the conviction under Section 1382 of a civilian who, despite having a barment order, reentered the military base during a public open house. 472 U.S. 677-678. The commander's decision to invite the public onto the base "d[id] not suggest that the military so completely abandoned control that the base became indistinguishable from a public street as in *Flower*." *Id.* at 686.

b. As in *Greer* and *Albertini*, the record in this case dispels the inference that the military "so completely abandoned" its control and regulation of Highway 1, including the Vandenberg protest area. As this Court previously observed, "[t]he Base commander at all times has retained authority and control over who may access the installation, including the protest area." Pet. App. 25 (citation and internal quotation marks omitted). For instance, the commander may "restrict the manner of protests in the designated area" through notice requirements and limitations on pamphleteering. *Ibid.* The district court similarly found, after hearing testimony, that "the [g]overnment exercises substantial control over the designated protest area, including, for example, patrolling the area." *Id.* at 48.

Petitioner nevertheless equates Highway 1—the street where the Vandenberg protest area is located—

to the open street in *Flower*, but his comparison rests on either insufficient or incorrect assertions.

The ability of motorists and pedestrians on Highway 1 to ordinarily “come and go as they please” is not sufficient. Pet. 10. The property at issue in *Greer* held the same open character: “there are no guard houses at the entrance gates,” “[t]he State of New Jersey retains rights of way over four county roads and the state highway that pass through Fort Dix,” “[c]ivilians who are not dependents of military personnel are * * * permitted to visit nonrestricted areas,” and “[a] large sign at the entrance * * * states ‘Visitors Welcome.’” U.S. Br. at 9-10, 12-13, *Greer, supra* (No. 74-848) (citation omitted); see *Greer*, 424 U.S. at 830; *id.* at 851 (Brennan, J., dissenting). Furthermore, an exhibit to the record in *Greer* (reproduced at 12-1038 U.S. Reply Br. App. 1a) depicts the two plaintiffs distributing pamphlets on a sidewalk inside the base just before their arrest. Notwithstanding the open nature of this base, the Court rejected the plaintiffs’ reliance on *Flower* and affirmed the military’s right to exclude them as trespassers from areas of the base where other “members of the public are permitted freely to visit.” *Greer*, 424 U.S. at 836. The same rationale applies to Highway 1.

Nor did the military “cede[]” Highway 1 “to the public * * * by granting an easement to the State and the County.” Pet. 11. “[T]he easement itself specifically reserves to Vandenberg’s commander the authority to restrict access to the entire Base, including Highway 1, when necessary ‘to properly protect the interests of the United States,’ and likewise ‘reserves to the United States rights-of-way for all purposes.’” Pet. App. 25-26 (brackets omitted) (quoting

easement). That language demonstrates that, unlike the base officials in *Flower*, the Vandenberg “authorities have *not* abandoned [their] claim” of regulating civilians’ access to and conduct on Highway 1. *Greer*, 424 U.S. at 837.

Finally, petitioner wrongly asserts (Pet. 13) that his arrest occurred “on a public road outside of a closed military base” and, thus, beyond the base commander’s authority of exclusion. This Court’s prior opinion establishes that petitioner’s arrest occurred *inside* the base. Pet. App. 24-25.*

c. Petitioner also fails to show (Pet. 15) “significant confusion” over the proper interpretation of *Flower*, *Greer*, and *Albertini*. The courts of appeals, including in the three cases petitioner cites (*ibid.*) to support his contention that there is confusion in the lower courts (without further explanation), have consistently declined to characterize military property as public fora, finding no evidence that the military had abandoned its interests to the extent required by *Flower*. See

* Attempting to revisit that issue for First Amendment purposes, petitioner quotes (Pet. 14 n.2) the United States’ brief in *Albertini*, which observed that the defendant could “engage in a demonstration just outside the gate of a military installation.” U.S. Br. at 35 n.15, *Albertini*, *supra* (No. 83-1624). The cited passage addressed the characteristics of Hickam Air Force Base, where all military property was fenced off, accessible through a series of gates. See *Albertini*, 472 U.S. at 678. Any demonstration outside the Hickam gates would necessarily occur on non-military property. The observation does not apply to Vandenberg, which lacks enclosures over large portions of its property, including Highway 1, but is still “clos[ed].” Pet. App. 24. Despite the lack of fencing, petitioner knew that he had stepped onto base property in this case, as Vandenberg personnel informed him of the trespass and afforded him a chance to leave the base before each of his arrests. *Id.* at. 17.

United States v. LaValley, 957 F.2d 1309, 1314-1315 (6th Cir.), cert. denied, 506 U.S. 972 (1992); *Brown v. Palmer*, 944 F.2d 732, 739 (10th Cir. 1991) (en banc); *United States v. McCoy*, 866 F.2d 826, 833 (6th Cir. 1989); *M.N.C. of Hinesville, Inc. v. United States Dep't of Def.*, 791 F.2d 1466, 1473 n.3 (11th Cir. 1986); *Persons for Free Speech at SAC v. United States Air Force*, 675 F.2d 1010, 1015-1016 (8th Cir.) (en banc), cert. denied, 459 U.S. 1092 (1982); see also *Shopco Distrib. Co. v. Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 172 (4th Cir. 1989) (“Only once have portions of a military base been found to be a public forum.” (citing *Flower*)).

2. Petitioner alternatively contends (Pet. 16-17) that the Vandenberg protest area is a “designated public forum” where speech restrictions are subject to strict scrutiny. That contention lacks merit.

“The decision to create a public forum must * * * be made ‘by intentionally opening a nontraditional forum for public discourse.’” *ISKCON*, 505 U.S. at 680 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). Courts have applied this test scrupulously in disputes over military property, which “generally becomes public in character *only* when the government has intentionally abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression.” *PMG Int’l Div. L.L.C. v. Rumsfeld*, 303 F.3d 1163, 1170 (9th Cir. 2002) (quoting *General Media Commc’ns, Inc. v. Cohen*, 131 F.3d 273, 279 (2d Cir. 1997), cert. denied, 524 U.S. 951 (1998)).

Petitioner contends (Pet. 17) that Vandenberg officials created a designated public forum when they adopted policies recognizing the protest area. But

petitioner conceded the opposite below, agreeing that “[Vandenberg’s] intentions, as manifested in its policy statements and regulations, are for its property to be a nonpublic forum.” Pet. C.A. Br. 20-21.

In any event, Vandenberg’s policies governing the protest area evidence no intent to designate the land as a public forum. As this Court previously observed, “[t]he Base commander has enacted several restrictions to control the protest area, including reserving the authority ‘for any reason’ to withdraw permission to protest and ‘retaining authority and control over who may access the installation.’” Pet. App. 14-15 (brackets omitted). The commander has also exercised this authority and closed the area to address security threats and to protect military missions. *Id.* at 26. Those decisions further demonstrate that the “primary business” of Vandenberg (including Highway 1 and the protest area) is “to train soldiers, not to provide a public forum.” *Greer*, 424 U.S. at 838.

3. Finally, this case would present a poor vehicle in which to address whether petitioner was arrested in a traditional public forum (Pet. 9-15) or a designated public forum (Pet. 16-17). Section 1382 is a “content-neutral” law that “serves a significant [g]overnment interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security.” *Albertini*, 472 U.S. at 687. The government may enforce such “facially neutral regulation[s]” in public fora without violating the First Amendment. *Ibid.*; see, e.g., *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding content-neutral restriction on picketing on a public street).

Petitioner resists this conclusion (e.g., Pet. i, 8) by mischaracterizing the terms of his debarment and the

basis of his convictions, asserting that he was “peacefully protesting on a fully open public street” and “was convicted for engaging in speech.” That is incorrect. Petitioner was barred from *all* of Vandenberg, *whatever* his purpose, except that the commander made a concession to convenience in permitting petitioner to traverse the base on Highway 1 and Highway 246. See 12-1038 J.A. 63-64 (available at 2013 WL 4396745). Petitioner’s ability to engage in such travel, as well as the ability of the general public to access the highway and certain areas of the base, see Pet. App. 32 (Ginsburg, J., concurring), did not relinquish the base commander’s authority to enforce the barment letter in the circumstances of this case. Petitioner was convicted for being found in a place from which he had been barred because of his prior criminal vandalism and obstructive conduct. He was not initially barred for his speech, nor was he later convicted for his speech. Cf. *Albertini*, 472 U.S. at 686 (“There is no suggestion that respondent’s acts of vandalism in 1972, which resulted in the issuance of the bar letter, were activities protected by the First Amendment.”). Accordingly, even if the protest area is viewed as a designated public forum (Pet. App. 31 (Ginsburg, J., concurring)), petitioner’s conviction under Section 1382 was not based on the content of his speech and served the significant government interest of maintaining the security of a military base.

This Court rejected an identical argument in *Virginia v. Hicks*, 539 U.S. 113 (2003). That case involved, *inter alia*, a provision “authorizing the police to arrest those who return to [a certain housing complex] after receiving a barment notice.” *Id.* at 123. The Court explained that, “[e]ven assuming the

streets of [the complex] are a public forum,” applying that provision “to persons whose postnotice entry is * * * for the purpose of engaging in constitutionally protected speech” would not offend the First Amendment:

[T]he notice-barment rule subjects to arrest those who reenter after trespassing and after being warned not to return—*regardless* of whether, upon their return, they seek to engage in speech. Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the First Amendment.

Ibid. The same is true here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

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