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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner : No. 12-1038

v. :

JOHN DENNIS APEL :

- - - - - x

Washington, D.C.

Wednesday, December 4, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

BENJAMIN J. HORWICH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Petitioner.

ERWIN CHEMERINSKY, ESQ., Irvine, California; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this morning in Case 12-1038, United States v. Apel.
5 Mr. Horwich.

6 ORAL ARGUMENT OF BENJAMIN J. HORWICH

7 ON BEHALF OF THE PETITIONER

8 MR. HORWICH: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 Section 1382 makes it a misdemeanor for a
11 person to reenter a military base after having been
12 ordered not to do so by the commanding officer. Now,
13 the Ninth Circuit here added another requirement for
14 conviction, which is that the defendant must be found in
15 a place that, as a matter of real property law, is
16 within the exclusive possession of the United States.

17 That requirement isn't anywhere in the text
18 of the statute, no court has ever given an explanation
19 of where it comes from, and Respondent no longer defends
20 that requirement.

21 JUSTICE GINSBURG: But it is -- it is in the
22 Air Force manual and in a JAG opinion, was the exclusive
23 possession criterion.

24 MR. HORWICH: Well, I think I would say a
25 couple things about those sources, Justice Ginsburg.

1 First of all, the -- they reflect, essentially,
2 conservative legal advice that recognizes that some
3 courts had made a reference to such a requirement. So
4 the responsible thing to do if you're in a JAG rendering
5 an opinion on what the right way to structure a lease is
6 or whether a particular place is, in fact, covered by
7 1382 is to confirm that, yes, this would meet the
8 criteria the courts have established.

9 But that doesn't -- certainly doesn't make
10 it binding on this Court and other courts have held to
11 the contrary.

12 JUSTICE GINSBURG: Has -- since this case
13 has been pending quite a while, has the manual changed,
14 has -- to -- to delete the exclusive possession?

15 MR. HORWICH: If Your Honor is referring to
16 the -- the U.S. Attorneys' manual, no. It hasn't been
17 altered. Although I -- I would say that the very first
18 section of the U.S. Attorneys' manual makes clear that
19 it -- it doesn't -- it's not intended to create rights,
20 it's not intended to bind the Department of Justice or
21 otherwise modify the meanings of criminal statutes.
22 It's simply a reference guide.

23 And it is a reference guide that certainly
24 would be accurate in some circuits, we think incorrect,
25 and that's what, of course, this Court is now in a

1 position to resolve the disagreement between the courts
2 on that -- on that subject.

3 So what Respondent does argue -- because, of
4 course, Respondent isn't even defending that requirement
5 here, is that -- and what the case then comes down to, I
6 guess, is that Vandenberg Air Force Base is not a
7 military installation. Now, we think it is. And we
8 think all of it is.

9 And the reason for that is that the statute
10 refers comprehensively to a long list of places,
11 reservation, fort, post, arsenal, yard, station,
12 installation, that covers the range of places that are
13 subject to military command. And Vandenberg is, of
14 course, a place that's subject to military command. And
15 in particular --

16 JUSTICE KAGAN: How do we tell that,
17 Mr. Horwich? What's the test for determining when a
18 place is subject to military command?

19 MR. HORWICH: Military command is a question
20 of lawful authority. What might be thought of, in a
21 civilian context, as the extent of the commanding
22 officer's jurisdiction. And so what -- the way things
23 are set up is that the civilian leadership in the
24 Department of Defense defines bases, and then the
25 military commanders who are appointed by the president,

1 then, through appointing subordinate commands, will have
2 units assigned to particular bases, and the commanding
3 officer of the unit will be the commanding officer of
4 the base to which the unit is assigned.

5 JUSTICE ALITO: Well, some military
6 installations are located in very rural areas. Now,
7 suppose you have an installation in such a place and
8 there are buildings and -- and facilities that you can
9 see in one part of this territory, but there's a lot of
10 open -- there are a lot of open fields around it.
11 Would -- and suppose there's -- it's not posted. Would
12 that still be a military installation if somebody goes
13 on that?

14 MR. HORWICH: It -- it would, although let
15 me say a few things about that.

16 Your description, actually, is pretty apt as
17 to Vandenberg itself. It's in a rural area. There are
18 large areas of what you, I think, accurately described
19 as open fields, that are there precisely to serve as
20 a -- kind of a buffer zone around these enormous rocket
21 launches. And some parts of it are particularly posted;
22 other parts aren't.

23 We do think that there would -- that a
24 defendant needs to be put on notice in some -- in some
25 respect. We refer to it, I think, inartfully in our

1 brief as actually that the defendant would have
2 knowledge. I think it's more the defendant needs to be
3 on notice.

4 And like ascertaining the extent of any
5 geographic place, the place to look, for starters, is a
6 map. If you look at a-- if you go -- nowadays, you go on the
7 Internet, pull up any map, it will show you an area
8 marked off as Vandenberg Air Force Base.

9 JUSTICE KAGAN: But a map, presumably,
10 reflects who owns the property, and you, yourself, say
11 that that's not what's significant. And I took your
12 point in your brief to suggest some kind of more
13 functional test, is this property being used for
14 military purposes? Am I -- am I wrong in ascribing that
15 to you?

16 MR. HORWICH: Yes, yes. We don't -- we're
17 not suggesting a functional test. What we're suggesting
18 is that the coverage of 1382 should be coextensive with
19 the commander's authority, which is, essentially, as I
20 sort of suggested, in the nature of a jurisdictional
21 test. Where does the commander's regulatory and barmment
22 authority extend to as a matter of military law?

23 It should be backed up by the misdemeanor
24 sanction in 1382.

25 JUSTICE SOTOMAYOR: But I'm not sure that I

1 can -- that I follow that completely. When I look at
2 the list of items mentioned in the statute --
3 reservation, post, fort, arsenal, yard, station, or
4 installation -- I don't think of command separate from
5 operational control or being run by and used by the
6 military. Each of those terms has an operational
7 quality to it that mere ownership, which I equate with
8 command, doesn't.

9 It makes no sense, in answer to Justice
10 Alito's question, to say you need notice, unless that
11 facility has a military flavor to it that someone could
12 know about. And you talk about this particular camp,
13 but you've got a whole green line around it to tell
14 people which sections you are actually considering the
15 camp, and he was found outside of that green area.

16 You've got a public school, a public
17 highway. I'm not quite sure how you can keep a person
18 off of lands that the military is not using in its
19 operations.

20 MR. HORWICH: Well, I guess, just to take
21 the last point there, I would disagree with the premise
22 that the military is not using these lands in their
23 operation. I mean, to take -- to take one example,
24 there will be -- there's a launch tomorrow at
25 Vandenberg, and the other highway that's kind of

1 indistinguishable from Highway 1, for these purposes, is
2 going to be closed down because it's in the area that's
3 dangerous because it's in the potential impact zone --

4 JUSTICE SOTOMAYOR: Well, you close down --
5 you close down roads for parades. You close down areas
6 for other public needs.

7 MR. HORWICH: Certainly. But I would be
8 clear that the reason that is being closed down is
9 because the commanding officer at Vandenberg has
10 determined that that property, which is owned by the
11 United States, is placed under his -- placed under his
12 authority as a commanding officer, is -- is -- is
13 assigned to the Department of the Air Force for
14 administration, he has determined that his military
15 needs require closing that -- that part on that day.

16 JUSTICE KENNEDY: And that's confirmed in
17 the terms of the easement, if you look at the easement
18 between the U.S. and the County of Santa Barbara.

19 MR. HORWICH: Precisely so, Justice Kennedy.

20 JUSTICE KENNEDY: The -- it makes it very
21 clear that the military commander has authority to
22 exercise control over the easement property.

23 MR. HORWICH: The -- precisely so, Justice
24 Kennedy. And I think that gets to the bigger picture
25 point here, which is that it would be a very odd result

1 to say that a -- that a military commander has to
2 maximally inconvenience the public by shutting a place
3 down at all times in order to preserve the misdemeanor
4 sanction that backs up his authority.

5 JUSTICE GINSBURG: If -- if your position is
6 right, then I -- I think there would be nothing left of
7 Flowers, because Flowers, the government owned that area
8 as well. Is there anything left -- I mean, that -- in
9 this case, the -- the property is used as a public
10 highway, and people go back and forth.

11 In Flowers, it was a street. So are you
12 urging that Flowers is essentially overruled?

13 MR. HORWICH: No, not at all,
14 Justice Ginsburg. In fact, I think Flowers is
15 supportive of our position here, on the statutory point,
16 precisely because the Court thought to resolve Flower on
17 the constitutional grounds.

18 And there was no question there that it was
19 covered by 1382, notwithstanding the fact that it is --
20 that it could be described as a public street, it was
21 also property that was under the command of the
22 commanding officer at Fort Sam Houston in that -- in
23 that case. And so the Court went to the constitutional
24 question.

25 I'm happy to talk here, if the Court is

1 interested, about the -- the constitutional differences
2 between this case and Flower. But Flower does -- does
3 strongly imply that coverage of 1382, which the Court
4 would ordinarily address first before reaching the
5 constitutional question, wasn't in doubt there, nor was
6 it in doubt in any of the cases that this Court has
7 decided under 1382, each of which has involved a
8 military installation that is, to some greater or lesser
9 extent, in some places or other, open to the public.

10 So --

11 JUSTICE ALITO: Suppose that the Respondent
12 in this case didn't want to protest. He just wanted to
13 take a drive up to Santa Barbara or -- I don't know --
14 maybe it's -- I don't know -- if it's not illegal to
15 walk in Southern California, maybe he wanted to walk
16 along the Pacific Coast Highway.

17 Would he -- would he commit a misdemeanor by
18 doing that?

19 MR. HORWICH: So his -- the terms of his
20 barment order and the ordinary terms on which barment
21 orders are issued at Vandenberg is that there's an
22 exception carved out for him to traverse along the
23 easement, which, again, is in the nature of a concession
24 to public convenience, which it seems quite unfair to
25 sort of -- to say that, well, the military has wound up

1 worse off by trying to accommodate its -- trying to
2 accommodate itself, to the extent consistent with its
3 security needs, to public use and convenience.

4 JUSTICE GINSBURG: And where is this? Where
5 is the exception? Is it -- was it in the bar order?

6 MR. HORWICH: Yes, it's on page 64 of the
7 Joint Appendix. And it's in the middle of paragraph 2
8 on 64. It says, "Effective immediately, you are ordered
9 not to enter onto Vandenberg Air Force Base, except to
10 traverse," meaning to travel "to or from Lompoc and
11 Santa Maria on Highway 1 and to and from Lompoc and
12 Amtrak Surf Station on Highway 246," which passes
13 through Vandenberg's property.

14 JUSTICE SOTOMAYOR: He couldn't go to the
15 public school, though? Or the stores or any other
16 facilities that the public's invited to?

17 MR. HORWICH: That's -- that's correct.
18 But, of course, there's a reason for that, which is that
19 he has been individually identified as posing a threat
20 to the order and security of the base. Now, we would
21 point out, he was barred --

22 JUSTICE SOTOMAYOR: It seems such an odd
23 thing for a Class B misdemeanor to be used to protect
24 the national security; that Congress has determined that
25 the threat is so great, that the only thing you need is

1 a Class B misdemeanor to protect the U.S.

2 MR. HORWICH: Well, it's certainly not the
3 only thing. In our -- in our opening brief, we have a
4 footnote that runs through kind of the hierarchy of
5 sanctions that might be --

6 JUSTICE SOTOMAYOR: There are some pretty
7 severe ones.

8 MR. HORWICH: There are some severe ones.
9 So we think of this as being sort of a first line of
10 defense, if you will.

11 JUSTICE SCALIA: Are there no sanctions for
12 trespassing upon Federal property that is not a military
13 base?

14 MR. HORWICH: Justice Scalia, absolutely,
15 there are. There's a statute like that for the National
16 Park Service. There's a statute like that for the
17 Bureau of Land Management. There's a statute like that
18 for the -- for the Forest Service.

19 JUSTICE KAGAN: Do you think, Mr. Horwich,
20 that there is any point at which a military installation
21 can lose its character as such? I mean, I'll give you
22 an example. Suppose -- you know, that in this -- in
23 this base area, the government -- the military decided
24 to allow four private condo buildings and six
25 restaurants and three movie theaters, and it really just

1 turned into a regular old town.

2 And -- and it entered into agreements
3 whereby all the policing was being done by local law
4 enforcement officers, rather than by the military. Is
5 there any point at which it just becomes too much not
6 like a military base, where you lose the ability to do
7 this, even though it's under the formal command of a
8 military officer?

9 MR. HORWICH: Well, I think, if it's still
10 under the formal command of the military officer and the
11 military officer is empowered to issue regulations and
12 issue barments, which this Court has long recognized is
13 the necessary concomitant of the functioning of a
14 military installation, then, no, it continues --

15 JUSTICE SCALIA: I -- I assume it would be
16 contrary to -- to his orders to permit such
17 installations, without his ability to control them.

18 MR. HORWICH: Exactly --

19 JUSTICE SCALIA: Including by issuing
20 debarment orders. He has no authority to do that, does
21 he?

22 MR. HORWICH: No, that's exactly right. So,
23 for example, to Justice Kagan's hypothetical -- and,
24 Justice Sotomayor, you referred to the -- the school
25 that -- that is on the base. There are couple --

1 actually, a couple of schools on the base.

2 One of them is leased to a school district,
3 but it is, nonetheless, still subject to the commander's
4 command authority. The commander does respond to
5 dangerous weapons or drugs being brought there. And
6 that's necessary. It's right --

7 JUSTICE KAGAN: So what happens, for
8 example, at -- at the school if there's an assault on
9 school premises? Who deals with that?

10 MR. HORWICH: In the -- in the school
11 premises, I -- I believe -- I don't want to be quite
12 certain about this, but I believe that the -- well,
13 certainly, the elementary school and I believe, also,
14 the middle school is within the area that is -- within
15 the exclusive legislative jurisdiction of the United
16 States. It's been ceded to the United States.

17 So the -- the proper response there would
18 need to be by Federal law enforcement. Crimes would be
19 prosecuted under the Assimilative Crimes Act.

20 JUSTICE KAGAN: Federal -- I'm sorry. Is
21 that military police or is that --

22 MR. HORWICH: No.

23 JUSTICE KAGAN: Who -- who comes
24 in -- is it -- is it members of the military? Or is it
25 members of the county police force? Or is it --

1 MR. HORWICH: No. If -- if we're talking
2 about an area that's under the exclusive Federal
3 jurisdiction, the military -- the military police or --
4 or security forces, as they're now -- as they're now
5 called, are not empowered to make arrests in that formal
6 sense. They can -- they can detain so that law
7 enforcement officers who are empowered to make arrests
8 can then respond.

9 So, for example, if you have the more common
10 things, a traffic stop, maybe, on one of the roads off
11 the highway or something like that, they will need to
12 detain and wait for an appropriate -- an appropriate law
13 enforcement official to respond.

14 So, again, there is somewhat of a -- of a
15 different situation obtains on the highway, because
16 there -- there is authority for the -- the county
17 police, for the county sheriff, for example, to respond. So
18 there's -- there's a different status there. But
19 that's --

20 JUSTICE KAGAN: Well, I guess I'm just
21 wondering with respect to each of these places, I mean,
22 the highway, the school, the Amtrak station, who's
23 actually in control when something goes wrong in these
24 places?

25 MR. HORWICH: Well, let me bracket off the

Official

1 Amtrak station because we don't think the Amtrak station
2 is under military command, and I'll -- I can explain
3 why.

4 In the other places, it's often the case
5 that the first response will be by the security forces
6 because they are in the area, and they will be
7 patrolling.

8 JUSTICE KAGAN: The security forces
9 meaning --

10 MR. HORWICH: The military.

11 JUSTICE KAGAN: -- the military.

12 MR. HORWICH: The military-- Now, they will detain --

13 JUSTICE KAGAN: So do military personnel
14 actively patrol this entire area?

15 MR. HORWICH: Yes. Yes. The -- the Amtrak
16 station I should say, though, is -- is different
17 because, there, the station and the tracks that actually
18 run -- you know, to and from the station, are actually
19 on a narrow strip of land that is owned in fee by a
20 railroad.

21 It is -- it is not owned by the United
22 States. It's not under Air Force Department
23 administration. It's not part of the military
24 commander's command authority there. So that -- that
25 part's not covered.

Official

1 So in the situation of -- you know, somebody
2 asks, well, can somebody go to the train station and
3 take a train, if they've been barred, well, yes, they're
4 allowed to travel on the highway that goes there, and
5 they're allowed to wait at the train station and go.

6 And that arrangement, obviously, has been
7 determined by the appropriate officials to be sufficient
8 to protect the -- the military's interests. If it -- if
9 it weren't, I imagine we would see a different
10 arrangement, but the accommodations have been made.

11 I think the larger point here, though, is
12 that, if the commanding officer has the authority to
13 issue these regulations and has the authority to issue
14 these barments, it seems -- across the whole area, which
15 I think is not really subject to dispute here, the command -- as
16 Justice Kennedy points out, the easement says he can
17 regulate the use of the highway.

18 If you have that authority, why put the
19 sanction there.

20 JUSTICE GINSBURG: It could have said -- it
21 could have said that Apel can't use the highway. That
22 would -- that dispensation was a matter of grace?

23 MR. HORWICH: Yes.

24 JUSTICE GINSBURG: Is that what you're
25 saying?

1 MR. HORWICH: Yes, it would be, in -- in --
2 in the same way that the commanding officer can
3 determine that any particular use of the highway is
4 inconsistent with the military's needs. That's why the
5 reservation is in there, precisely to -- to reserve, as
6 Justice Scalia suggests, the appropriate authority to
7 the commander to do what he needs to do to run the
8 installation.

9 JUSTICE KENNEDY: I suppose, if the
10 commander thought it was necessary, he could stop trucks
11 with flammable materials from coming through at the time
12 when a launch is being prepared and so forth?

13 MR. HORWICH: Precisely so. And -- and if
14 he -- and the odd result here, under Respondent's
15 reading, because, of course, Respondent's reading turns
16 on the coverage of what "military installation" means,
17 and that covers the first paragraph of Section 1382 as
18 well, which deals with the -- with enforcing
19 regulations, the oddity of his reading is that, if a
20 truck then did drive on the highway bringing the
21 flammable materials, the truck would be in violation of
22 the regulation.

23 But it's sort of the sound of one hand
24 clapping because it wouldn't actually be a misdemeanor
25 because the statute wouldn't cover that part of the

1 commander's command area. That incongruity is very
2 strange.

3 We wouldn't say -- say, in the national
4 parks context, if the Park Service has a rule that says
5 you can't feed the grizzly bears, it means you can't
6 feed the grizzly bears anywhere in the park. It doesn't
7 mean, yeah, you're not supposed to, but it won't be a
8 misdemeanor if you feed them on the road, but you -- you
9 can't feed them off the road, and it is a misdemeanor.

10 That's -- that's essentially the regime that
11 Respondent suggests this statute --

12 JUSTICE ALITO: Mr. Horwich, can I ask you
13 this, which is -- this question is stimulated by what
14 Justice Kagan asked.

15 Is it -- my understanding is that, if you
16 look at many military reservations, you may need a very
17 detailed map to figure out -- and a crime is committed
18 someplace on there or other Federal lands -- you may
19 need a very detailed map to determine whether criminal
20 jurisdiction over that particular offense is exclusively
21 Federal or Federal and concurrent.

22 Now -- and I would assume that that could be
23 true of a military base that is completely sealed off to
24 the public.

25 MR. HORWICH: That's -- I could --

1 JUSTICE ALITO: Now, do you understand that
2 the -- the Ninth Circuit's holding to be based on access
3 or to be based on jurisdiction over crimes that are
4 committed there?

5 MR. HORWICH: No, I understand it to be
6 based on neither of those things. I understand it to be
7 based on a real property analysis, which says, at this
8 point, where Respondent was found, there is an easement,
9 so there is a real property interest that is held by
10 someone other than the United States; therefore, the
11 United States does not exclusively possess it.

12 JUSTICE SCALIA: But that's not Respondent's
13 theory here.

14 MR. HORWICH: No, it's not Respondent's
15 theory here. But if I might just say one word about the
16 absurdities -- the kind of absurdities that the Ninth
17 Circuit's position seems like it might lead to is that
18 it doesn't seem like it's limited to easements. I mean,
19 Respondent, of course, as we know, wasn't using the
20 easement for its purpose, so it's just sort of
21 coincidence he's also on the easement.

22 And so, on the Ninth Circuit's approach,
23 maybe there's a utility easement, or maybe there's a
24 subsurface mineral rights that has with them an entry
25 and egress rights or something, and I guess that also

1 would defeat on the Ninth Circuit's approach the
2 application of 1382, which seems very strange.

3 JUSTICE ALITO: Well, there may be --
4 suppose property is leased to -- I don't know whether
5 this actually ever occurs -- but suppose it's leased to
6 the United States and used for a military reservation.

7 Would there be exclusively Federal criminal
8 jurisdiction there, or would there not be concurrent
9 jurisdiction?

10 MR. HORWICH: Well, the way -- that's -- that's
11 a matter that is decided under the -- the Enclaves
12 Clause of the Constitution, it says that the State has
13 to cede to the United States --

14 JUSTICE ALITO: Right.

15 MR. HORWICH: -- that jurisdiction. So the
16 State has ceded to the United States that jurisdiction
17 over -- over the base. The United States, I believe
18 it's correct, the United States retroceded that
19 jurisdiction back to the State as to the highways, so
20 that highway patrol officers could -- could go along
21 those -- could go along the highways.

22 But that's really a separate issue from
23 what's presented here because that would control the
24 application of the Assimilative Crimes Act, for example,
25 but this statute -- this statute is not -- this statute

1 is a freestanding Federal statute.

2 And I would say, in the example that you
3 give, I think this -- it's worth talking for a moment
4 about the situation, where the United States leases
5 property and places it under military jurisdiction and
6 gives it to a military command.

7 There certainly are such places, and that's
8 why an ownership test isn't quite right. I think an
9 ownership test, Justice Kagan, is sort of right about 95
10 percent of the time because it's usually true that the
11 United States is going to want to own the places that it
12 puts under military command, but it's not perfect in the
13 leasing context.

14 It's also -- it's also problematic in the
15 situation that comes up in some of the courts of appeals
16 cases regarding Coast Guard or naval security zones,
17 which are designated waters adjacent to a base that are
18 appurtenant to the commander's authority over the base,
19 and those aren't kind of owned in -- in exactly the same
20 way.

21 But they're, nonetheless, under military
22 command, and the courts of appeals had no difficulty
23 seeing that they're covered.

24 JUSTICE KAGAN: But I -- I had thought that,
25 in your brief, you thought that the ownership test was

1 both underinclusive and overinclusive.

2 MR. HORWICH: Yes, I think that's correct,
3 too, because there are certainly property that the
4 United States owns -- plenty of property -- most
5 property that the United States owns isn't under
6 military command.

7 And so it's not just Federal ownership,
8 it's -- although I would -- I would point out that, with
9 respect to these other statutes that deal with other
10 agencies of the government that -- that administer
11 lands, it is generally true -- I can't say that it's
12 exclusively -- it's true across the board -- but it's
13 generally true that there's a statute, something like
14 this one, that corresponds to the regulatory authority
15 of a land management agency.

16 So -- and, again, we wouldn't punch holes in
17 the misdemeanor sanctions that back up those other land
18 management agencies' authority, so I don't see why we
19 would punch holes in this statute, either.

20 JUSTICE ALITO: Could I just ask you what we
21 should make of this -- what we should make of this green
22 line?

23 MR. HORWICH: Yes.

24 JUSTICE ALITO: What is the significance of
25 the green line?

1 MR. HORWICH: The -- speaking outside the
2 record, it seems like it was probably drawn to guide
3 road crews in the parts of the road they should be
4 resurfacing because one of the terms of the easements is
5 that California is responsible for maintaining the road.

6 And so -- you know, when the California
7 Department of Transportation road crew comes out to
8 repave it or something, they need to know how -- how
9 wide, how far are we supposed to go, so there is --
10 there's this green line.

11 There are some other green lines scattered
12 on other places of the base in various shades of being
13 worn down. But they're -- I think they can be taken to
14 demarcate the extent of the easement. So -- so on the
15 Ninth Circuit's approach, the green line is significant
16 for that reason because it tells you which side is
17 which.

18 But I would point out that this particular
19 place does just lie within a road that is miles inside
20 the actual perimeter -- outer perimeter of the base.
21 It's a couple of miles, as the crow flies. It's several
22 miles as you travel on the road. So it's -- it's not as
23 if it sort of lies out -- outside of the edge.

24 If I could reserve?

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Chemerinsky.

2 ORAL ARGUMENT OF ERWIN CHEMERINSKY

3 ON BEHALF OF THE RESPONDENT

4 MR. CHEMERINSKY: Good morning, Mr. Chief
5 Justice, and may it please the Court:

6 This is a case about the right to peacefully
7 protest on a fully open public road, in a designated
8 protest zone. For decades, every lower Federal court,
9 and, for that matter, the United States itself,
10 interpreted 18 United States Code Section 1382 to apply
11 only if there's exclusive Federal possession. Any other
12 interpretation would raise grave First Amendment issues.

13 As Justice Ginsburg pointed out, this case
14 is indistinguishable from this Court's prior holding in
15 *Flower v. United States*. *Flower* involved a street that
16 was on a military base. It involved an individual, John
17 *Flower*, who was subjected to a bar order --

18 JUSTICE KENNEDY: But that -- that was a
19 First Amendment case and the -- and the problem there
20 was that he was barred for a peaceful protest the first
21 time around, and that's not -- that's not this case.

22 JUSTICE GINSBURG: *Flower* -- *Flower* was with
23 the street.

24 JUSTICE SCALIA: It was not argued in that
25 case that the statute didn't apply, and that's what

1 you're arguing here.

2 MR. CHEMERINSKY: Your Honor, there are two
3 arguments here. One is that 1832 -- 1382 does not apply
4 because military installation requires exclusive
5 possession. The second argument --

6 JUSTICE GINSBURG: On your Flowers point, I
7 think Mr. Horwich said that -- that there was no doubt
8 that 1382 applied. It was only a constitutional
9 question --

10 MR. CHEMERINSKY: That's correct.

11 JUSTICE GINSBURG: -- in Flowers.

12 MR. CHEMERINSKY: Yes, Justice Ginsburg.
13 But there's no dispute in Flower that 1382 would apply
14 because it was a street within the military base.

15 But to go to Justice Kennedy's question,
16 this Court in Albertini was very clear that what Flower
17 means is that, when there is a fully open public route,
18 there is a right to use it for speech activities.

19 JUSTICE KENNEDY: Well, that -- that's a
20 First Amendment case. But let's concentrate first on --
21 on the argument you make under this statute. It seems
22 to me that the statute should be construed according to
23 normal rules of easements, and the owner of the
24 subservient easement, the easement holder, cannot
25 overburden that easement.

1 It cannot -- I've got an easement on the
2 back of my property for the utility company. They can't
3 hold a picnic there. They can't do that.

4 MR. CHEMERINSKY: Yes, Your Honor.

5 JUSTICE KENNEDY: That's overburdening the
6 easement, and this is standard stuff. And it's right in
7 the easement agreement with the City of Santa Barbara,
8 that the police -- that the military commander can make
9 reasonable regulations.

10 MR. CHEMERINSKY: Your Honor --

11 JUSTICE KENNEDY: Now, you may -- you have a
12 First Amendment argument. I understand that. But let's
13 just concentrate on the property ownership.

14 MR. CHEMERINSKY: Yes. In terms of the
15 easement, when an easement goes towards a public road,
16 that easement includes the right to use the public road
17 for speech activities. You're right, Your Honor, that
18 the rule in paragraph --

19 JUSTICE KENNEDY: You're back on the First
20 Amendment case. It -- it may or may not. If the -- if
21 the commander wants to close the base for a rocket
22 launch, he certainly -- he certainly can. That's set
23 forth in article -- or a condition of paragraph 4 of the
24 easement.

25 MR. CHEMERINSKY: Paragraph 4 says that

1 there can be rules and regulations with regard to the
2 easement. Your Honor, those rules and regulations must
3 be consistent with the Constitution. For example, the
4 commander couldn't exclude African Americans from that
5 road. And that's why the --

6 JUSTICE SCALIA: You keep sliding into the
7 First Amendment issue, which is not the issue on which
8 we granted certiorari. We're only interested in whether
9 the statute applies.

10 MR. CHEMERINSKY: But, Your Honor, in
11 interpreting the statute, it must be done so as to avoid
12 constitutional doubts. That's why the First Amendment
13 comes up. Also, of course, as this Court repeatedly has
14 held, Respondent can raise any issue that was raised
15 below to defend the judgment, which is also why the
16 First Amendment is here.

17 But Your Honor --

18 JUSTICE SCALIA: You can raise it, but we
19 don't have to listen to it.

20 MR. CHEMERINSKY: Of course, that's right.

21 JUSTICE SCALIA: That's -- that's what I'm
22 saying.

23 JUSTICE BREYER: To go back to --

24 MR. CHEMERINSKY: Of course, Your Honor, and
25 I will address the meaning then of "military

1 installation."

2 Yes, Justice Breyer?

3 JUSTICE BREYER: The difficulty that I'm
4 having is the Ninth Circuit said the reason that your
5 client won is because the -- the piece of grass between
6 the road and -- and the sign was not -- it was subject
7 to an easement and the government lacked the exclusive
8 right of possession.

9 All right. When I saw that, I thought,
10 well, there -- there are thousands of different kinds of
11 easement, as Justice Kennedy just said. They're there
12 for utilities. They're for -- they're there for people
13 might want to -- I mean, I can imagine a million, as
14 you can, too.

15 So not all of those would involve First
16 Amendment anything, and -- and, yet, the -- the Ninth
17 Circuit would seem to say that your client could go and
18 demonstrate, as long as the utility company had an
19 easement.

20 So how are we supposed to interpret the
21 statute to avoid the First Amendment problem without
22 getting into an interpretation that, to me, would seem
23 ridiculous.

24 MR. CHEMERINSKY: Your Honor, the question
25 is what does the phrase "military installation" mean?

1 One way of defining it would be all of the property
2 that's owned by the United States. But as Justice Kagan
3 pointed out, the United States rejects that
4 interpretation in Footnote 1 of its reply brief.

5 The alternative interpretation is exclusive
6 possession, and that's the one that all of the lower
7 courts --

8 JUSTICE BREYER: Now, why does the First
9 Amendment allow a person to go to the heart of the
10 military base, put on any demonstration they want, the
11 statute doesn't apply for the reason that, once every
12 four months, the PG&E has an easement to go out and read
13 the meter.

14 MR. CHEMERINSKY: Your Honor, we would not
15 take that position. We would --

16 JUSTICE BREYER: Now, that's exactly -- I
17 know you wouldn't --

18 MR. CHEMERINSKY: That's right.

19 JUSTICE BREYER: -- and that's why I want to
20 know what your position is as to the interpretation of
21 the statute that avoids my absurd PG&E result, but,
22 nonetheless, does what you want, which is to protect the
23 First Amendment interests.

24 MR. CHEMERINSKY: And I think that's exactly
25 Justice Kennedy's question of the difference between an

1 easement for a public road and an easement for your
2 backyard or the easement for a utility, and that's why I
3 don't think that the First Amendment aspect of this case
4 can be separated from the statutory aspect.

5 JUSTICE SOTOMAYOR: Why are you buying into
6 the real property being the definition here at all? I
7 mean, it seems to me that when I read the -- the other
8 definitions of the statute, I keep going back to that
9 it's a function analysis and not a real property
10 analysis because that would answer why this particular
11 electrical meter reading -- that area still being
12 operated by the military for a military function, that's
13 what forts do, reservations, yards, I don't know why we
14 would read installation any differently.

15 But you're buying into this real property as
16 being the defining term.

17 MR. CHEMERINSKY: No, Your Honor, I'm not.
18 I completely agree with what you just said. I think it
19 is a functional analysis. Here, the military has built
20 a fence perimeter around Vandenberg. They have drawn a
21 green line where they said that the control begins. On
22 the other side of the green line is Highway 1 that
23 anyone can drive down. There are no signs that indicate
24 that you're part of the military base, and where
25 there's a --

1 JUSTICE SCALIA: They don't say control
2 begins at the green line. To the contrary, they say
3 they have control over the whole installation. Do you
4 deny that, that the -- that the commanding officer has
5 the right to control the entire installation?

6 MR. CHEMERINSKY: Your Honor, there is a big
7 difference between the authority of the commanding
8 officer within the close confines of the base and
9 outside the base. For example, civilians cannot be
10 prosecuted for what they're doing on that public road.
11 They're under the memorandum of understanding that
12 California Highway Patrol --

13 JUSTICE SCALIA: Because -- because the
14 commanding officer agreed to that, because that's the
15 term of the -- of the easement.

16 MR. CHEMERINSKY: Yes, Your Honor, but I
17 will go back to what Justice Sotomayor said. There is a
18 functional difference between the public road and the
19 designated protest zone.

20 JUSTICE SCALIA: There may well be, but is
21 there -- is there a difference in the authority of the
22 commanding officer? That's what's crucial.

23 MR. CHEMERINSKY: Well, under the memorandum
24 of understanding, the high -- the commanding officer has
25 ceded control over that public road to the Highway

1 Patrol -- the United States wants it both ways. They
2 want the benefits of having an easement there, in the
3 sense that the State is responsible for maintaining the
4 road, the State is liable for any harms on the road, the
5 State enforces crimes on the road, but they also want to
6 claim that they have all of the control over that public
7 road as they would within the base.

8 JUSTICE SCALIA: They're entitled to have it
9 both ways. It's their base. And if that's the deal --
10 you know, take it or leave it, State. We -- we'll give
11 you this easement, but the -- the terms are what we have
12 said. What's wrong with that?

13 MR. CHEMERINSKY: But, Your Honor, they
14 shouldn't have it both ways. Once they've created a
15 public road, once they've created a designated protest
16 zone, it is different, functionally, than the rest of
17 the base.

18 JUSTICE KAGAN: Well, Mr. Chemerinsky, does
19 that mean --

20 CHIEF JUSTICE ROBERTS: So you raised a --
21 you -- you mentioned the green line, and Mr. Horwich
22 represented some facts about it outside the record,
23 quite properly alerted us that it was outside the
24 record, I just want to give you a chance to respond to
25 that.

1 MR. CHEMERINSKY: Sure. We know that the
2 United States treats its easement as -- its control as
3 beginning within the green line area. So, for example,
4 when Mr. Apel crossed the green line previously, that
5 was the place at which he was convicted for trespassing.

6 In other cases that are cited in both of our
7 briefs, lines on the road were taken as defining the
8 area where military jurisdiction begins. So the Sixth
9 Circuit's McCoy case, it was a white line, and the
10 military said, once somebody crossed the white line,
11 that's where Section 1382 began.

12 JUSTICE SCALIA: But if -- if your colleague
13 is correct, that the green line marked the edge of the
14 easement, it would be entirely proper not to -- not to
15 arrest him for violating the base until he left the
16 easement; that is, when he crossed the green line. It
17 has nothing to do with the -- the commanding officer
18 saying this is the only part of the installation that we
19 care about.

20 MR. CHEMERINSKY: No, it's not about --

21 JUSTICE SCALIA: It marks the end of the
22 easement.

23 MR. CHEMERINSKY: Well, you're absolutely
24 right, Your Honor. The green line is taken by the
25 United States marking the end of the easement. And the

1 United States, therefore, can enforce 1382, once
2 Mr. Apel or anybody else crosses the green line.

3 But, when it is on the public side of the
4 green line, on that public road, in that protest area,
5 to go back to what Justice Sotomayor said,
6 functionally --

7 JUSTICE KAGAN: Well, Mr. Chemerinsky, does
8 that mean that the -- the government could not have
9 issued this barment order in the first place?

10 MR. CHEMERINSKY: No, Your Honor, we do not
11 challenge the barment order.

12 JUSTICE KAGAN: Well, then I'm -- I'm
13 perplexed because if the government has sufficient
14 commanding authority to issue the barment order to say,
15 notwithstanding that Mr. Apel had not crossed the green
16 line, that -- you know, he just can't be here, and he's
17 excluded, then why don't they have sufficient authority
18 to prevent him from reentering?

19 MR. CHEMERINSKY: In both of the instances
20 that led to barment orders, he crossed that green line
21 that was on the military base side, and if he does that,
22 then 1382 applies.

23 JUSTICE KAGAN: I see. So --

24 JUSTICE GINSBURG: But the -- but the
25 barment order that Mr. Horwich just read to us says that

1 he can use the road, but that's not -- because the road
2 is outside the statute, that's because the government,
3 as a matter of grace, said right in the order, right in
4 the bar order, you can use the road.

5 So there's a sharp difference. The
6 government says the road is under military control, if
7 the commander so chooses, but we're going to let him use
8 the road. The government treats the -- the domain as
9 including the road, as including this protest area.

10 MR. CHEMERINSKY: Your Honor, there is a
11 difference between the road and the area within the
12 green line. And so what I was saying to Justice Kagan
13 is the reason why the barment orders were permissible is
14 he crossed the green line.

15 JUSTICE KAGAN: But you're saying that if he
16 had not crossed the green line, he could not have been
17 excluded?

18 MR. CHEMERINSKY: That's correct.

19 JUSTICE KAGAN: And you're saying that the
20 military cannot exclude any person from any of this area
21 outside the green line?

22 MR. CHEMERINSKY: That's correct. 1382 only
23 applies to that which is in the exclusive possession of
24 the United States, which is the area in the green line.

25 JUSTICE SCALIA: So we're back to the real

1 estate test. I -- I thought that you were not relying
2 on the -- on the exclusive ownership test. You are?

3 MR. CHEMERINSKY: Our brief very much doubts
4 the exclusive possession test.

5 JUSTICE SCALIA: Oh, okay.

6 MR. CHEMERINSKY: Though I do believe, as
7 Justice Sotomayor said, there's a functional reason for
8 this. It is the difference between the public road and
9 the area inside --

10 JUSTICE SCALIA: So you're defending the
11 Ninth Circuit's?

12 MR. CHEMERINSKY: We're very much
13 defending --

14 JUSTICE BREYER: Oh, that's what I don't
15 understand. Let me press -- at the risk of repetition,
16 the reason I'm asking this question is the record is not
17 developed. I looked at the Google maps.

18 It looked to me like this area is sort of a
19 suburban house with a lawn in front of it, and you drive
20 along the street, and you suspect that the street may
21 belong to the city a little way up the lawn; but beyond
22 that, it probably belongs to the homeowner.

23 And when you try to see where does the green
24 line cross that grassy area, you can't easily tell,
25 and -- and it may be just a foot or two. So it may have

1 been inconceivable that your client didn't cross the
2 green line or maybe he didn't. I don't know.

3 So, therefore, you're back to a more basic
4 test, and you say, we agree with the Ninth Circuit that,
5 if they do not have exclusive control, the military
6 can't enforce this statute.

7 But what do we do, which was my question,
8 about instances where the military does not have
9 exclusive control, but the reason it doesn't has nothing
10 to do with roads, nothing to do with green lines, it has
11 to do with thousands of other easements that have
12 nothing to do with this case; therefore, I'm pressing
13 you to get a definition of this statute that will serve
14 your ends without getting into all these other kinds of
15 easements.

16 MR. CHEMERINSKY: And I think the functional
17 approach that Justice Sotomayor suggested is exactly
18 that.

19 JUSTICE BREYER: And what is that, in your
20 understanding?

21 MR. CHEMERINSKY: I think, here, it is the
22 area that the United States government has determined by
23 where it's built a fence and drawn the green line, that
24 it has exclusive possession.

25 JUSTICE ALITO: Really, Mr. Chemerinsky, I

1 didn't mean to interrupt your sentence. But, I mean, I
2 may own a parcel of property, and I may put up a fence
3 around my property, and I may not put the fence right at
4 the very edge of the property. I may leave a little
5 border between the edge of my property and the place
6 where the fence is.

7 Now, are you saying that I have ceded
8 exclusive control over this area between the fence and
9 the end of the property?

10 MR. CHEMERINSKY: No. And, in fact, that's
11 exactly the situation here, and it goes to answering
12 what Justice Breyer began a moment ago. Here, what you
13 have is a fully fenced perimeter. About 200 yards from
14 that fenced perimeter, where there is a gate, a green
15 line was drawn on the ground.

16 On just the other side of that green line is
17 a designated protest zone in Highway 1. And that's, of
18 course, where these activities occurred. And what I was
19 saying to Justice Breyer is there are reasons why every
20 court of appeals that has considered this has adopted
21 the exclusive possession tests.

22 It serves the interest of the public in
23 giving clear notice for when they're on a military
24 base --

25 JUSTICE ALITO: What do you mean by,

1 "exclusive possession"? Does the fence have any
2 relevance? What is the relevance of the fence?

3 MR. CHEMERINSKY: Well, the fence is
4 tremendously relevant, in determining where the
5 government believes the military installation begins,
6 and also, it's very important in terms of national
7 security.

8 JUSTICE ALITO: But there are bases that
9 have no fences. So what, there? None of that is under
10 the exclusive possession of the government?

11 MR. CHEMERINSKY: No, Your Honor. The
12 government gets to decide the area of exclusive
13 possession. So take the Greer case as an example. In
14 Greer, this case emphasized that Fort Dix, even though
15 it was open, still was in the exclusive possession. In
16 fact, the first paragraph of this Court's opinion in
17 Greer says, "exclusive possession."

18 Maybe the analogy that is closest to this
19 case, then, is this Court's decision in United States v.
20 Grace, where this Court drew a distinction between the
21 sidewalks that run outside this building and the
22 building itself.

23 And the Court said, as to those sidewalks,
24 even though they abut the Supreme Court, it still is
25 open for speech purposes. Sidewalks, public roads are

1 inherently open --

2 JUSTICE ALITO: I'm still completely
3 confused about the test that you are asking us to -- to
4 apply. Either -- either fences are relevant or they are
5 not relevant. If you can have exclusive governmental --
6 exclusive military possession of a base where there are
7 no fences, I don't really see what the significance is
8 of the fence here.

9 That's just -- that's just for starters.

10 MR. CHEMERINSKY: Obviously, the fence is
11 significant, in terms of answering the government's
12 concerns with regard to national security. I think the
13 fence is also important to go, to Justice Sotomayor's
14 point, with regard to the functional approach. My
15 answer to your question --

16 JUSTICE SCALIA: Excuse me. What about the
17 portion of the base on the other side of the road
18 easement, where the government does have exclusive
19 possession?

20 MR. CHEMERINSKY: Well --

21 JUSTICE SCALIA: Is that okay? That's still
22 part of the base.

23 MR. CHEMERINSKY: But what's interesting, as
24 was pointed out --

25 JUSTICE SCALIA: Yes or no, under your

1 theory?

2 MR. CHEMERINSKY: The government does not
3 have not exclusive possession there. There is a public
4 school there, for example, that anyone can drive and go
5 to.

6 One of the consequences of the government's
7 interpretation of 1382 is that, if Mr. Apel had a child
8 attending that public school, he could not go pick up
9 his child at school, but you or I or anyone else could
10 drive --

11 JUSTICE SCALIA: That may be very bad, but
12 is it bad because the government does not have exclusive
13 possession of every --

14 MR. CHEMERINSKY: Yes.

15 JUSTICE SCALIA: You know, when you talk
16 about the road, they've given an easement, so you can
17 say, oh, yeah, they don't have exclusive possession.
18 But the other side of the road, that vast tract, you are
19 saying the government, what, does or does not have
20 exclusive possession?

21 MR. CHEMERINSKY: The government does not
22 have exclusive possession. The --

23 JUSTICE SCALIA: Then the word "possession"
24 means nothing. You are -- you are applying solely a
25 functional test. It only possesses that which it is

1 using for military purposes. That is not a possession
2 test. It's a purely functional test.

3 MR. CHEMERINSKY: But, Your Honor, Congress
4 didn't, in 1382, say, "all land owned by the military."
5 It used the phrase "military installation," and whenever
6 that phrase has been defined, it always refers to the
7 area that is reserved to be used for military purposes.

8 The United States can draw the green line
9 and build the fence wherever it chooses. Here, it
10 decided to do so in a particular place, leaving open a
11 fully open public road with a designated protest zone.

12 JUSTICE SOTOMAYOR: I'm sorry. I have the
13 same problem that Justice Breyer has. PXes belong to
14 the military, generally, the land, but they are run by
15 outside contractors, sometimes. Are you saying because
16 they've given up exclusive control of the PX, that they
17 fail your test?

18 So does the utility company. I don't know
19 if it's possible that military bases generate their own
20 utilities, but I presume that, somewhere, they don't,
21 and they have an easement to drive up and read their
22 meters.

23 There may be easements for repairs of
24 certain underground things that -- that supply the base.
25 That's not exclusive control, so I'm -- or possession.

1 So what -- what does your test mean?

2 MR. CHEMERINSKY: It is where the United
3 States chooses to exercise exclusive possession. The
4 United States, for example, in Greer, said, we are
5 claiming we have exclusive possession over the entire
6 area of Fort Dix, even though there was a public road.
7 If the government wants to say, even as to the PX within
8 Vandenberg, that's within our exclusive possession, they
9 can do so.

10 But the government, by granting the easement, by
11 allowing the public road, by creating the designated
12 protest zone, has done something very different than
13 exclusive possession.

14 JUSTICE SOTOMAYOR: So that -- that road for
15 the public utility for which there is an easement of
16 travel is not exclusive to the U.S.? So anybody can
17 travel into the base at any time they want to?

18 MR. CHEMERINSKY: No, Your Honor, because,
19 in order to come on to that utility easement, you would
20 need the express permission of the base commander. So
21 that utility easement would still be an exclusive
22 control, to go to Justice Breyer's question --

23 CHIEF JUSTICE ROBERTS: You need the express
24 permission of the base commander to drive down the road.
25 It's just that he has given it to -- to the public at

1 large.

2 MR. CHEMERINSKY: Well, Your Honor, everyone
3 has the authority to drive down that road. Somebody
4 who --

5 CHIEF JUSTICE ROBERTS: Because it's been
6 ceded by the United States for the convenience of the
7 traveling public.

8 MR. CHEMERINSKY: Exactly. And then the
9 question is, once the United States has ceded the
10 easement, under 1382, can a person be prosecuted? And,
11 once the United States has ceded that easement, does it
12 violate the First Amendment, in light of this Court's
13 decision in *Flower*, to prosecute --

14 CHIEF JUSTICE ROBERTS: I thought you just
15 answered the question from Justice Sotomayor by saying,
16 no, no, the utility easement doesn't work because the
17 military commander has not granted permission to anybody
18 else to use that easement.

19 Here, we have a public road easement, and
20 you said that's different. And my question was: No,
21 it's not, because the military commander has given
22 permission to use that easement. Now, I want to know
23 what distinguishes the two cases.

24 MR. CHEMERINSKY: And this goes to
25 Justice Kennedy's question, earlier, if we are talking

1 about an easement. An easement that is created for a
2 public road inherently has free speech rights attached
3 to it.

4 In fact, many lower court cases have always
5 said an easement for a public road includes the right to
6 use it for speech purposes. That is very different than
7 an easement that exists for purposes of the utility.

8 JUSTICE SCALIA: It seems to me a First
9 Amendment argument and not an argument that goes to the
10 scope of Section 1382.

11 MR. CHEMERINSKY: No, Your Honor, because
12 you need to interpret the statute to avoid the
13 constitutional issues. If you interpret the statute to
14 allow excluding speech on this public road easement in
15 the designated protest zone, then interpreting the
16 statute that way would raise grave First Amendment
17 issues.

18 JUSTICE SCALIA: So you are saying we should
19 read the statute to say it only applies when it doesn't
20 violate the First Amendment. Of course, we'd read it
21 that way.

22 MR. CHEMERINSKY: Of course, you should read
23 it that way.

24 JUSTICE SCALIA: But not because it has
25 anything to do with the scope of authority of the

1 government. It's what the government can do. I -- I
2 don't know how to read that -- that text, in such a way
3 that it will avoid all First Amendment problems. There
4 is no way to do that.

5 MR. CHEMERINSKY: I disagree, Your Honor. I
6 think that the reason that every lower court and the
7 United States government itself have read "military
8 installation" as exclusive possession is that,
9 otherwise, it would raise First Amendment problems.

10 JUSTICE ALITO: Well, you are arguing that
11 the military cannot grant an easement across a military
12 installation for the purpose of allowing the public to
13 drive from a point, let's say, to the south to a point
14 to the north, without also granting an easement that
15 would allow people to linger along the road and engage
16 in First Amendment activity. That -- is that your
17 argument?

18 MR. CHEMERINSKY: No, it is not, Your Honor.

19 JUSTICE ALITO: Because I can understand why
20 the military might be willing to say, well, fine, we
21 understand that it would be very inconvenient to make
22 everybody drive around the installation. We'll allow
23 them to drive through, but we do not want people
24 lingering here because that does create security
25 concerns.

1 MR. CHEMERINSKY: No, Your Honor, that is
2 not my position. If the government wanted to have a
3 closed base and say, we're going to allow this road to
4 go through, but there were signs to let everyone know
5 they were still on the closed base, there were guards
6 that were there, that is Greer. That is not this case,
7 and that's not Flower.

8 JUSTICE KAGAN: Your -- your argument is
9 sort of a use it or lose it argument, is that -- is that
10 correct? That the government has this commanding
11 authority, unless the government uses it to its full
12 extent every day of the week, it loses it?

13 MR. CHEMERINSKY: Well, in a sense, yes,
14 Your Honor. The sense is that the government gets to
15 decide where to draw the green line. The government
16 gets to decide where to put the fence. And when they
17 decided to create a public road with a protest zone
18 outside of it, then to interpret 1382 applied, as I said
19 to Justice Scalia --

20 JUSTICE KAGAN: One of the arguments that
21 the government makes is, look, what the military wants
22 to do here is something very sensible. It keeps tight
23 what it needs to keep tight, but it allows to be more
24 open areas that can -- that it -- it doesn't have an
25 interest in securing entirely.

1 And that's for the convenience of military
2 personnel. It's for the convenience of other people who
3 live around the base. What's wrong with that?

4 MR. CHEMERINSKY: Your Honor, what's wrong
5 with that is there is no need to exclude peaceful
6 protesters from the public road in a protest zone, in
7 order to achieve the national security interest of the
8 government.

9 CHIEF JUSTICE ROBERTS: Well, that's usually
10 the sort of determination that's left to the military
11 commander. I can think of a lot of reasons why the
12 commander would not want a gathering of people on the
13 road, but would be willing to let people drive through
14 the road.

15 MR. CHEMERINSKY: That's exactly right, Your
16 Honor. The military commander gets to decide that. But
17 by creating a designated protest zone outside of that,
18 it's indicative that the military commander doesn't
19 perceive any national security threat from allowing a
20 gathering there.

21 CHIEF JUSTICE ROBERTS: Well, it indicates,
22 as the -- the barment order does, that he does see some
23 kind of threat by allowing somebody in there who's
24 vandalized the base in the past.

25 MR. CHEMERINSKY: Your Honor, but we -- this

1 Court has never said there's a permanent forfeiture of
2 First Amendment rights because somebody misbehaved at
3 one time.

4 CHIEF JUSTICE ROBERTS: Is there -- can
5 there be a temporary forfeiture of First Amendment
6 rights?

7 MR. CHEMERINSKY: Of course, there can be.
8 People can be in prison and lose their First Amendment
9 rights. There can be restraining orders issued.

10 CHIEF JUSTICE ROBERTS: Well, I'm talking
11 about what this case is about, which is the temporary
12 exclusion. Would your case be the same if Mr. Apel was
13 barred for one year?

14 MR. CHEMERINSKY: Well, he can be barred
15 from coming onto the base, as drawn by the green line,
16 for one year of --

17 CHIEF JUSTICE ROBERTS: No, he can traverse
18 it. He can traverse. There -- there's no question of
19 that. Could he be barred from participating in protests
20 for a year because he vandalized the base?

21 MR. CHEMERINSKY: Yes, Your Honor, a
22 sentence could include that. There's no doubt that
23 there could be -- or if somebody was perceived --

24 CHIEF JUSTICE ROBERTS: Now, here, as I
25 understand it, he was barred permanently, subject to the

1 right of him to apply for removal of the barment.

2 MR. CHEMERINSKY: That's correct, Your
3 Honor. There is the ability to appeal a bar order to
4 the commander.

5 JUSTICE BREYER: It's more than that. It
6 says I mean -- you know, if you wanted to take someone
7 to school. It said -- first, if you need medical
8 treatment, you can just go in, and then it said you --
9 you have to receive prior written approval from me, the
10 commander, or my designee, but if you get it -- so I
11 suppose if he had a child at the school, he would ask
12 and they'd give it to him.

13 I mean, it didn't seem to me an absolute
14 bar. It seemed to me a bar for purposes of going to
15 that particular --

16 MR. CHEMERINSKY: He can ask the commander
17 of the base who issued the bar order for permission to
18 use it. Your Honors --

19 JUSTICE BREYER: Do we have to get into any
20 of that? Do we -- just like I don't know where he
21 really was physically. I don't know whether that grass
22 strip is within something, without something. These all
23 sound like First Amendment relevant matters.

24 MR. CHEMERINSKY: But they're also relevant
25 to the statute. They're relevant to interpret the

1 statute to avoid constitutional doubt. They're relevant
2 because --

3 CHIEF JUSTICE ROBERTS: To avoid -- just to
4 interrupt -- to avoid grave constitutional doubts.

5 MR. CHEMERINSKY: Yes, Your Honor.

6 And, Your Honor, also, since every other
7 court has interpreted the statute, as we're suggesting,
8 there's at least ambiguity, which, under the Rule of
9 Lenity, means it has to be construed in favor of a
10 criminal defendant.

11 Like so many cases to come before you, this
12 one is about where do you draw the line. Here, the
13 government has drawn the line, and it's a green line.
14 Now, on this side of the green line, there is a First
15 Amendment right to speak.

16 CHIEF JUSTICE ROBERTS: I'm sorry. The Rule
17 of Lenity, you said in favor of a criminal defendant.

18 MR. CHEMERINSKY: Yes, Your Honor.

19 CHIEF JUSTICE ROBERTS: We're talking about
20 barment here. Is that a criminal sanction?

21 MR. CHEMERINSKY: 1382 is the criminal
22 statute that he was convicted of violating.

23 CHIEF JUSTICE ROBERTS: Right, but this
24 doesn't -- you're not allowed to collaterally attack the
25 barment decision.

1 MR. CHEMERINSKY: No, Your Honor. What
2 we're saying is you have to interpret the words
3 "military installation." There are two different
4 interpretations or perhaps more has come out. What
5 we're saying is you have to choose the interpretation
6 that favors the criminal defendant.

7 So we are using the Rule of Lenity, relative
8 to interpreting the statute, and that's why we believe
9 that both, in terms of the statute and in terms of the
10 First Amendment, the Ninth Circuit should be affirmed.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Horwich, five minutes remaining.

14 REBUTTAL ARGUMENT OF BENJAMIN J. HORWICH

15 ON BEHALF OF THE PETITIONER

16 MR. HORWICH: Thank you. Just a couple of
17 points.

18 I -- I think the colloquy with my friend
19 sort of shows that taking this functional approach to
20 where the statute applies day-to-day, place-to-place, is
21 really just not going to prove workable. And we have
22 to, remember, this is a misdemeanor prosecution. This
23 is not something that should entail an extremely
24 extensive subtle inquiry that is going to vary from
25 place-to-place.

1 And So I think that that shows the wisdom of
2 what the Court said in the Benson case, which we quote
3 at page 15 and 16 of our reply brief, which explains.
4 It says that, "When a tract has been legally reserved
5 for military purposes, courts follow the action of the
6 political department of the government and will not
7 inquire what the actual use is to which any portion of the
8 reserve is temporarily put."

9 As for the Ninth Circuit's approach, which
10 is this sort of real estate based analysis, I think
11 there have been a number of hypotheticals offered that
12 show why that's going to produce some borderline absurd
13 or entirely absurd results.

14 And so that's why we come back to, again,
15 respecting the decision to place -- to place the
16 installation under military command and that
17 Section 1382 provides the sanction to enforce the orders
18 entered pursuant to that lawful command.

19 I might say one word about the green line
20 and its -- its relevance. My friend says that it is
21 sort of the threshold across which 1382 applies or
22 doesn't apply. The relevance in a 1382 prosecution of
23 the green line comes in a prosecution under the first
24 paragraph for violating a regulation.

25 At Joint Appendix 51, there's the

1 commander's order closing the base, and what it says is,
2 "Pursuant to my authority, Vandenberg Air Force Base is
3 a closed base. General rule covering the entire command
4 authority."

5 Paragraph 2, "The roadway easements through
6 Vandenberg have limited use as provided," et cetera, et
7 cetera. "Use and occupation is for these purposes only
8 and is subject to any rules and regulations the
9 installation commander may prescribe," and so forth.

10 So what the green line is, is it's defining
11 the boundary between the closed base -- the generally
12 closed base -- and the road, which is open. So that is
13 what ensures that someone who is driving on the road is
14 not committing an offense against the commander's
15 regulations, if they are just an ordinary member of the
16 public.

17 And, of course, if they cross over the line,
18 then they are violating the closed base regulation if
19 they don't have the commander's permission to cross that
20 line.

21 So the -- what is different, of course,
22 about Respondent is that he's been barred from the base,
23 so the rules that apply to the general public don't
24 apply to him. Of course, that's the very purpose of the
25 second paragraph of Section 1382, is to recognize that

1 commanders can make individualized determinations that
2 the rules that work, generally, for the public don't
3 work for particular people who show themselves to be
4 willing to vandalize government property or disobey the
5 instructions to remain within the areas that they may
6 lawfully be present in.

7 And, of course, that's the basis for why
8 Respondent was barred.

9 JUSTICE KAGAN: May I just ask a background
10 question, Mr. Horwich? What's the history of this First
11 Amendment area? What -- when did this speech area come
12 into being?

13 MR. HORWICH: There -- there was a
14 settlement of litigation with the commander in the late
15 1980s. It's in the -- it's reproduced -- part of it is
16 reproduced in the Joint Appendix -- which I guess shows
17 a couple things -- in which the commander agreed that there
18 would be a place on the base where --

19 JUSTICE KAGAN: Was the litigation
20 essentially like this one, basically saying that this
21 was not under military command?

22 MR. HORWICH: To be honest, I'm not familiar
23 with the particular legal contentions there. But I
24 think what the settlement does show is that if it's the
25 commander who is authorizing this, the commander remains

1 in charge of this.

2 And, of course, the current protest policy,
3 which is reproduced in the Joint Appendix, is quite
4 clear that the commander retains authority to -- and
5 control the time and place of the protests and, of
6 course, makes it clear that people who are barred can't
7 come back.

8 So on that point, with respect to the
9 constitutional avoidance argument, I think, as the Chief
10 Justice pointed out, it needs to be a serious
11 constitutional doubt. And I think what this Court has
12 said in Virginia against Hicks puts any of those doubts to
13 rest.

14 The Court said, in that -- in that case,
15 that the First Amendment permits, quote, "The punishment
16 of a person who has, pursuant to lawful regulation, been
17 banned from a public park" --- so I think a fortiori a
18 military base -- "after vandalizing it and who ignores
19 that ban in order to take part in a political
20 demonstration."

21 The Court has -- so the Court I think has
22 already settled this.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

1 (Whereupon, at 11:03 a.m., the case in the
2 above-entitled matter was submitted.)
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