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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 barment  
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



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.

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. CHERMERINSKY: 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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