No. 12-1038

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
JOHN DENNIS APEL,
Respondent.

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

BRIEF OF *AMICUS CURIAE* NUCLEAR AGE PEACE FOUNDATION IN SUPPORT OF RESPONDENT

Kevin J. Minnick
300 South Grand Avenue
Suite 3400
Los Angeles, California 90071
(213) 687-5000

Matthew D. Umhofer
Counsel of Record
SPERTUS, LANDES &
UMHOFER LLP
1990 South Bundy Drive
Suite 705
Los Angeles, California 90025
(310) 826-4700
Matthew@spertuslaw.com

COUNSEL FOR AMICUS CURIAE
NUCLEAR AGE PEACE FOUNDATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE* [1]

Since 1982, the Nuclear Age Peace Foundation ("NAPF") and its supporters have exercised their First Amendment freedoms to advocate for a just and peaceful world that is free of nuclear weapons.

Accordingly, supporters of the Santa Barbara-based NAPF regularly engage in peaceful, lawful protests in the very same protest area in which Respondent John Dennis Apel ("Apel") was cited for violating 18 U.S.C. § 1382 ("Section 1382"). Although it is on a public California highway and within an easement held by the State of California and the County of Santa Barbara, that protest area is also within the concurrent jurisdiction of the Vandenberg Air Force Base ("Vandenberg"), the site of periodic nuclear-capable intercontinental ballistic missile test flights. The location of the protest area, and its proximity to missile test launches, is therefore of vital importance to the NAPF's disarmament message, and its supporters often assemble there just prior to or during the very missile test launches NAPF protests.[2]

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Court's docket confirms that counsel for the parties have executed blanket consents to the filing of *amicus* briefs.

[2] NAPF also regularly disseminates information regarding nuclear-capable missile testing, in general and at Vandenberg. This expressive activity is aimed at its own constituency as well as the public through various media outlets, and seeks an end to nuclear testing at Vandenberg and elsewhere.

As a result, the NAPF has an interest in the continuing application of the full protections of the First Amendment to the road-side public forum where Apel was cited while engaging in peaceful protest. The NAPF respectfully submits that the Court may benefit from the point of view of those who have exercised and wish to continue exercising their First Amendment rights in the location at issue in this appeal.

SUMMARY OF ARGUMENT

This case tests whether the government violates the First Amendment when it prosecutes a citizen for engaging in a peaceful protest along the side of a public highway. Apel was cited for appearing in a protest area on a public highway within the concurrent jurisdiction of Vandenberg after he was barred from that military installation. As a result, although Apel's protest was aimed at Vandenberg's activities, Vandenberg was the one place the government says Apel could not be.

For all the reasons set forth in the Respondent's Brief, the highway in question is a traditional public forum (or at least a designated public forum) and the government's application of Section 1382 to Apel fails to withstand scrutiny. To highlight the important First Amendment concerns implicated in this case, this brief does two things. First, it highlights the important relationship between the location of speech and the message of that speech. Second, it urges the Court to clarify – at the very least – that no *per se* rule prevents the application of traditional public forum doctrine to sites subject to the concurrent jurisdiction of a U.S. military installation in appropriate cases.

1. Criminalizing a protest because it occurs close to the object of the protest distorts the content of the protestor's message. Location is integral to message because the place of a protest is part of the content of the speech that happens there. The link between a speaker's message and where he or she assembles to deliver that message is beyond dispute in this case, where the Vandenberg leadership has itself established a protest area near the gate of the installation, used by individuals who exercise their First Amendment freedoms to protest the tests that occur there. It should be clear to all why the protest area is *there* and not in downtown Santa Barbara, for instance.

Nevertheless, after the government barred Apel from Vandenberg, the public forum near Vandenberg's gate became the one place Apel could not legally assemble to deliver his message, without any regard paid to how important that site is to the content of his protest activity.[3] Thus, enforcing the facially neutral Section 1382 on a public highway near Vandenberg's entrance strains the limits of content neutrality by punishing speech critical of Vandenberg only near Vandenberg.

2. The Court should also disavow any *per se* rule against applying the public forum doctrine to roads found within the concurrent jurisdiction of a military installation. *See United States v. Albertini*,

---

[3] Although the government has argued that barring Apel from Vandenberg was supported by the military's security interests, there is no evidence, and no one has argued, that Apel was anything but peaceful and orderly in his protest activities on the occasions he was cited.

472 U.S. 675 (1985); *Greer v. Spock*, 424 U.S. 828 (1976); *Flower v. United States*, 407 U.S. 197 (1972). The government's brief comes close to suggesting that *per se* rule, but such a rule is impossible to square with the Court's holding in *Flower*, which found a public forum within the technical limits of a military installation. 407 U.S. at 198-99. Nor is such a rule required by *Greer* or *Albertini*, both of which upheld restrictions on speech within military installations, but stopped short of announcing that a public forum can never exist where the military has concurrent jurisdiction.

Moreover, given the prevalence of public easements running through military installations across the nation, *see Albertini*, 472 U.S. at 698 (Stevens, J., dissenting), any rule that categorically removes those spaces from the public forum doctrine would drastically disrupt the reasonable free speech expectations of the untold numbers of people who travel those rights-of-way every day. Thus, the Court should clarify and confirm that a public forum can exist within the jurisdiction of a military installation where the particular site at issue otherwise meets the well-settled tests for identifying a public forum, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983), and where the facts support the conclusion that "the military has abandoned any claim that it has special interests" in regulating who speaks in the forum, *Flower*, 407 U.S. at 198.

ARGUMENT

I. CRIMINALIZING PROTEST UPON A PUBLIC FORUM IN CLOSE PROXIMITY TO THE OBJECT OF THE PROTEST DISTORTS THE CONTENT OF THE PROTESTOR'S MESSAGE

The First Amendment's free speech clause protects expression and engenders a marketplace of ideas by mandating that "the government may not prohibit all communicative activity" in archetypal traditional public fora, and by requiring that content-based exclusions in those fora withstand strict scrutiny to be enforceable. *Perry*, 460 U.S. at 45. Indeed, "'[s]treets are natural and proper places for the dissemination of information and opinion.'" *Flower*, 407 U.S. at 198 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)). However, in order to make a particular point, disseminate a precise message, or communicate a specific opinion, not every street is as good as any other. Location is integral to the message conveyed.

The importance of location to a protest's message is not reasonably disputable on the facts presented in this case. The very fact that Vandenberg has a protest area within its jurisdictional boundaries reveals that even Vandenberg's leadership agrees that assembling near the base's gate means something different than a protest in downtown Santa Barbara, for instance. Otherwise, it is hard to imagine why the protest area, which was established by the government's settlement of a 1989 litigation, would be found within Vandenberg's jurisdiction at

all. (*See Fahrner v. Oliverio*, CV 88-05627-AWT(Bx), C.A. E.R. 7, 50-53.)[4]

Thus, applying the facially neutral Section 1382 to exclude a protestor from a zone established *in a particular spot* for just such expressive assembly strains the limits of content neutrality. As scholar Timothy Zick has observed, "[i]n terms of communicative behavior, place is as critical to expressive experience as voice, sight, and auditory function. . . . Speech, however, does not occur in the abstract, in spaces. If it did, it would make no difference to the speaker where she was when she delivered her message. Speakers, however, often fight for access to specific places because speech *there* is qualitatively and quantitatively different from speech *elsewhere*." Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 Geo. Wash. L. Rev. 439, 460 (2006) (emphasis added). Indeed, myriad familiar examples demonstrate the relationship between place and content: sit-ins at segregated schools and restaurants, protests at fertility clinics, demonstrations about gay rights in front of the Court or and animal cruelty demonstrations in front of stores that sell fur clothing. *See Galvin v. Hay*, 374 F.3d 739, 749 (9th Cir. 2004) ("In common experience, speakers rely upon location to inform the content of their speech."). Removing a peaceful protestor from a par-

---

[4] Although the location of a particular public street makes a significant difference in the content of messages communicated in the forum, that location should not typically affect whether the traditional public forum test applies. "No particularized inquiry into the precise nature of a specific street is necessary," because streets are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988).

ticular public forum when he or she has chosen that forum precisely for its location has a debate-altering effect and distorts the marketplace of ideas. *See Hill v. Colorado*, 530 U.S. 703, 767 (2000) (Kennedy, J., dissenting) ("By confining the law's application to the specific locations where the prohibited discourse occurs, the State has made a content-based determination. The Court ought to so acknowledge. Clever content-based restrictions are no less offensive than censoring on the basis of content.").

Here, after Apel was barred from all spaces within the jurisdiction of Vandenberg, it became illegal for him to peacefully assemble along Highway 1, no matter how important the location of his protest activity to his message. By requiring Apel to protest the testing that happens *at Vandenberg* only very f*ar from Vandenberg itself*, the government distorted the permissible content of his message and interfered with the marketplace of ideas. His choice of protest forum was not random, and neither is the choice of that forum by others who have something to say about what happens on Vandenberg; the location of that protest activity is part of the message of the protest itself.

In sum, for those similarly situated to Apel, including supporters of NAPF, the right to protest in Vandenberg's protest zone is crucial to what they say about nuclear-capable missile testing at Vandenberg. Indeed, the long tradition of assembly and protest by those who favor nuclear disarmament depends on the ability to make statements in particular places, where the message and the location go hand in hand. And, because U.S. nuclear weapons policy is not routinely up for a popular vote, peaceful assembly near military installations is an effective way for those in

favor of disarmament to have their voices heard. If the government can apply Section 1382 to protests on public streets unrestrained by the strict scrutiny that would apply to any other public street, the effect will be distortion of the debate, a hindrance to the marketplace of ideas, and a damper on the public conversation about U.S. nuclear policy.

II. THE COURT SHOULD CLARIFY THAT A PUBLIC FORUM CAN EXIST WITHIN THE JURISDICTIONAL LIMITS OF A MILITARY INSTALLATION

The Government comes dangerously close to suggesting a *per se* rule against applying public forum analysis to land within the jurisdictional limits of a military installation. (Br. of Pet. 27.) Such a rule cannot be squared with even the narrowest interpretation of *Flower*, and is not required by the Court's other military installation cases, *Greer* and *Albertini*. Moreover, given the prevalence of public easements across military installations nationwide, *see Albertini*, 472 U.S. at 698 (Stevens, J., dissenting), categorically removing the whole of every military installation's jurisdiction from the traditional or designated public forum doctrines would precipitously disrupt the public's reasonable expectations about their free speech rights while traveling public rights-of-way. *See id.* The Court should therefore clarify and confirm that a public forum can exist within the legal limits of a military installation where the particular site at issue otherwise meets the well-settled tests for identifying a public forum, *see Perry*, 460 U.S. at 45-46, and where the facts support the conclusion that "the military has abandoned any claim that it has special interests" in regulating who speaks in the forum, *Flower*, 407 U.S. at 198.

The Court's *per curiam* decision in *Flower* reversed the Section 1382 conviction of a leafletter arrested on New Braunfels Avenue within the limits of Fort Sam Houston in San Antonio. 407 U.S. at 197. In doing so, the Court identified the familiar authority holding that "'streets are natural and proper places for the dissemination of information and opinion,'" *id.* at 198 (quoting *Schneider*, 308 U.S. at 163), which undergirds this Court's foundational explanation of the public forum doctrine, *see Perry*, 460 U.S. at 45 (citing *Schneider*). The Court treated New Braunfels Avenue as it would "any public street" after finding that no sentry guarded the well-used and important traffic artery, from which the fort commander had chosen not to exclude the public. *Flower*, 407 U.S. at 198. "Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue," leaving the Court to apply the First Amendment to a public street as it would in any other case. *Id.* No *per se* rule was established as regards military installations.

Nor does *Greer* require such a rule. In *Greer*, the Court upheld regulations governing the military installation at Fort Dix, New Jersey against a First Amendment challenge. 424 U.S. at 838. There, however, the individuals who were denied access to the installation to distribute campaign literature "d[id] not contend[]that the Fort Dix authorities had abandoned any claim of special interest in regulating the distribution of unauthorized leaflets or the delivery of campaign speeches for political candidates within the confines of the military reservation." *Id.* at 837. On the contrary, the record established that the federal government exercised exclusive jurisdic-

tion over the state and county roads running through Fort Dix, upon which military police could and did "stop civilians and ask them the reason for their presence." *Id.* at 830.

The Court stopped short of establishing a *per se* rule against applying the public forum doctrine to all land within a military installation's jurisdiction; otherwise, it would have overruled *Flower*. Instead, the Court rejected the opposite *per se* rule – "that the respondents *could not be prevented* from entering Fort Dix for the purpose of making political speeches or distributing leaflets" – as the Third Circuit had held. *Greer*. 424 U.S. at 834-35 (emphasis added); *see also id.* at 836 (criticizing the Third Circuit for "announcing a new principle of constitutional law . . . that *whenever* members of the public are permitted freely to visit a place owned or operated by the Government then that place becomes a 'public forum' for purposes of the First Amendment.") (emphasis added).

In *Albertini*, the Court again rejected the notion that *all* publicly accessible military bases are public fora, but stopped short of holding that such spaces can *never* contain a public forum simply because the forum is within the legal jurisdiction of the installation. 472 U.S. at 686 (holding only that "[m]ilitary bases *generally* are not public fora") (emphasis added). The Court explained that, after *Greer*, "*Flower* must be viewed as an application of established First Amendment doctrine concerning expressive activity that takes place in a municipality's open streets, sidewalks, and parks." 472 U.S. at 684-85. In other words, once the facts establish that "a portion of a military base constitutes a public forum because the military has abandoned any right to ex-

clude civilian traffic and any claim of special interest in regulating expression," the First Amendment applies on the military installation just as it would on any other street or park. *Id.* at 685-86.

The Court's application of the First Amendment to this case should at the very least clarify that no *per se* rule prevents the public forum doctrine from applying to land within the jurisdictional boundaries of a military installation. As noted, permitting such a *per se* rule would instantly disrupt the settled expectations of those using public rights-of-way all across the country. For instance, in his dissent from *Albertini*, Justice Stevens noted that "a substantial portion of the main runway at Honolulu International Airport lies inside the boundaries of Hickam Air Force Base" and "highways or other public easements often bisect military reservations," as is the case here. 472 U.S. at 698 (Stevens, J., dissenting). In fact, the public easement crossing Vandenberg carries an untold number of Californians to the Surf Beach Amtrak station nestled between Vandenberg and the Pacific Ocean. (*See* Gov't C.A. Br. 4-5.) Across from the main gate of Vandenberg, there is a public middle school, and nearby is a public bus stop and visitors' center. (C.A. E.R. 8; J.A. 79.) A *per se* rule altering the application of the First Amendment to people traveling these routes is unnecessary and out of step with the careful avoidance of categorical holdings exhibited in *Flower*, *Greer*, and *Albertini*.

CONCLUSION

This Court should affirm the Ninth Circuit's decision on the grounds that Mr. Apel's convictions violate the First Amendment.

Dated: October 28, 2013

Respectfully submitted,

Kevin J. Minnick
300 South Grand Avenue
Suite 3400
Los Angeles, California 90071
(213) 687-5000

Matthew D. Umhofer
Counsel of Record
SPERTUS, LANDES & UMHOFER LLP
1990 South Bundy Drive
Suite 705
Los Angeles, California 90025
(310) 826-4700

COUNSEL FOR AMICUS CURIAE
NUCLEAR AGE PEACE FOUNDATION