No. 1

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 THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether it violates the First Amendment for a person who was previously barred from a military installation to be convicted under 18 U.S.C. §1382 for peacefully protesting on a fully open public street, which has been designated as a public protest area, outside the closed military installation.
2. Whether a person who was previously barred from a military installation may be convicted under 18 U.S.C. §1382 for peacefully protesting on a public roadway easement outside the closed military installation.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over the Institute's 30-year history, including *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).[2] One of the purposes of the Institute is to advance the preservation of the most basic freedoms our nation affords its citizens – in this case, the constitutional right of citizens to engage in freedom of speech, expression, and assembly in the nation's public spaces.

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of *amicus* briefs on behalf of either or neither party.

[2] *See Snyder*, 131 S. Ct. at 1213 (citing Brief for Rutherford Institute as *Amicus Curiae*).

SUMMARY OF THE ARGUMENT

In the instant case, this Court is confronted with a very narrow question that lends itself to an intuitive answer. At issue is whether a military debarment order can be used to completely prohibit speech that would otherwise be protected under the First Amendment on land that is owned by the federal government, but is subject to a right of way easement that has been held by the state and county for open and unrestricted public travel. Respondent Denis Apel was convicted of violating 18 U.S.C. § 1382, which prohibits "reentry" into a military installation by an individual who has previously received an order barring entry to that installation. Resp't Br. 19. However, the location where Mr. Apel is alleged to have "reentered" military land is on a stretch of public highway on California State Highway 1 that is subject to an unrestricted right of way easement originally held by the state of California, and since relinquished to the county of Santa Barbara. Resp't Br. 12-13. Further, it is uncontested that primary law enforcement authority over the area resides with the State and County. Resp't Br. 2; Joint Appendix ("J.A.") 40; Court of Appeals Excerpts of Record ("C.A.E.R.") 8, 167.

Citing 18 U.S.C. § 1382, Mr. Apel was arrested on the pubic side of a roadway, outside of the confines of the closed military installation, around 100 yards from a public middle school. Resp't Br. 1-2. At the time of his arrest, Mr. Apel was fully within the designated protest zone, and was engaging in protected protest speech activities. Resp't Br. 9. In justifying his arrest, the government argued that despite the unrestricted

easement, it retained the right to enforce the debarment order against Mr. Apel, claiming the land to be part of the military installation subject to the debarment order. *Id.*

This Court should affirm the Ninth Circuit's reversal of Mr. Apel's convictions, and find that Vandenberg Air Force Base's debarment order did not apply to the protected speech activities engaged in by Mr. Apel. In addition to the guiding precedent from *Flower v. United States*, 407 U.S. 197 (1972), well-covered by Respondent, broader constitutional concerns counsel in favor of affirming the Ninth Circuit's *per curiam* opinion applying the "exclusive control and ownership" test adopted in *United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011).

The federal government is, by far, the single largest landowner in the United States.[3] Considering the breathtaking amount of property that the United States government now owns, failing to adopt an "exclusive control and ownership" standard in the application of § 1382 and similar criminal statutory provisions would create far too much uncertainty about the status of important constitutional rights on millions of acres of government property. Given this, it is essential that this Court require that the government establish a degree of control and use over land that is greater than mere ownership before it can deprive private citizens of essential constitutional rights.

Further, because debarment orders are issued on a fully discretionary basis by the installation

[3] U.S. Congressional Research Service. Federal Land Ownership: Overview and Data. (R42346, February 8, 2012) at 1.

commanders, a contrary ruling by this Court would grant installation commanders virtually limitless discretion in restricting speech and other protected activities outside of the physical confines of a closed base – a result surely not intended when § 1382 was enacted.

Finally, applying the same logic used for justifying the restriction of constitutionally protected rights under § 1382, the broad language of the government's chosen interpretation of the statute could open the door to similar restrictions on government owned properties other than military installations.

ARGUMENT

A. This Court Should Interpret § 1382 To Require "Exclusive Possession And Control" Of The Government Land For The Application Of Criminal Sanctions For Violation Of A Debarment Order

The federal government currently owns 640 million acres of land, or approximately 28% of the total land in the United States. U.S. Congressional Research Service. Federal Land Ownership: Overview and Data. (R42346, February 8, 2012) at 1. Within that number, the Department of Defense manages over 19 million of those acres for military bases and training ranges alone. *Id.*

Adopting the government's chosen interpretation of § 1382 would instantly turn these millions of acres of property – even those portions that are abandoned, subject to easements, undeveloped, or inarguably serve no sensitive military purpose – into no-man's-lands, where a single government official is vested with the unchallengeable authority to define constitutional rights by fiat.

Given this, it is essential that a restrictive standard be applied to determine which government properties are properly of the type where important constitutional rights can be unilaterally deprived, and which are not. In *Parker*, implicitly applying this Court's logic in *United States v. Flower*, 651 F.3d 1182 (1972), its own previous holdings, and the government's understanding of the law (as determined by both the Air Force and United States Attorneys' Manuals), the Ninth Circuit held that the appropriate test for establishing when important constitutional rights could be deprived under § 1382 turned on whether or not the government maintained exclusive ownership and control over the properties. This Court should adopt that determination and affirm the Ninth Circuit's holdings in *Parker* and *Apel* below.

i. Existing Restrictions On Constitutional Rights Within The Military Context

It is beyond dispute that installation commanders face a special set of challenges in properly managing and securing sensitive government lands. Within the domain of closed military installations, commanders are granted a great deal of leeway in restricting the speech and conduct of military and non-military personnel within the commander's control, often in instances that would otherwise be considered violative of their constitutional rights.

In *United States v. Jenkins,* 986 F.2d 76, 78 (4th Cir. 1993), the Fourth Circuit found that it was well established that searches on closed military bases "have long been exempt from the usual Fourth Amendment requirement of probable cause." In *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986), this Court dismissed a Free Exercise challenge to an Air Force regulation that prevented an Orthodox Jewish rabbi from wearing a yarmulke with his uniform, finding that "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." And in *Parker v. Levy*, 417 U.S. 733 (1974), this Court upheld a court martial finding against an army officer in the face of a First Amendment vagueness challenge, stating that "the fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Similar such examples are myriad.

In a similar vein, § 1382 is meant to serve as a tool that allows commanders the flexibility to determine on a case-by-case basis the level of protection necessary to adequately secure their

sensitive assets. As the government forcefully argues and Respondent concedes, the Constitution can tolerate such limitations within the property of the closed military bases as specifically necessary for properly protecting sensitive government assets. Pet'r Br. 25.

However, broadening the scope of coverage to include civilian activity outside of the physical confines of installations would result in a restriction of protected rights that the constitution cannot bear. Despite the cited cases above allowing for severe restrictions on constitutional rights while within military installations, there is little doubt that the attempt to apply analogous restrictions against civilians outside of the military installation would be declared unconstitutional. The government would not contend, for example, that the Fourth Amendment probable cause standard for searches of vehicles driving along Highway 1 could be eliminated simply by virtue of the government's ownership of the property, nor would it argue that the Free Exercise rights of students at Vandenberg Middle School, or on the nearby beach could be restricted in a similar manner.[4]

[4] *See* Brief for Respondents, noting that the middle school is "[d]irectly across from Vandenberg's main gate entrance, on the shoulder of Highway 1 and on federally owned land." Resp't Br. 19, 39 citing C.A.E.R. 8; J.A. 64, 93.

B. The Government's Broad Interpretation Of § 1832 Provides No Limiting Principle And Would Empower Installation Commanders With Unlimited Discretion In Restricting Protected Speech In Violation Of The First Amendment

In the civilian context, this Court has consistently cautioned about the dangers of vesting the right of unbridled discretion in the hands of government officials, especially with respect to First Amendment rights. In *City of Houston, Tex. v. Hill*, 482 U.S. 451, 455-465 n.15 (1987), this Court struck down a statute that made it illegal to "in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty," cautioning that it gave too much discretion to "policemen, prosecutors, and juries to pursue their personal predilections," and "the moment-to-moment judgment[s]" of when to and when not to pursue prosecution.

In the instant case, a similar concern exists with respect to the discretionary authority of commanders to both issue debarment orders and to enforce existing debarment orders. Although some interpretive guidelines exist, the decision to issue a debarment order against civilians by an installation commander is solely within the discretion of the installation commander. *United States v. Albertini,* 783 F.2d 1484, 1487 (1986). Further, each installation commander is granted the power to debar only for her own installation. 32 C.F.R. § 809a.2(b) *et seq*. This combination of factors allows

for the potential of varying degrees of protection of constitutional rights, based solely on the personal proclivities of individual installation commanders. As a practical reality, the types of activities considered to warrant debarment in one military installation will not receive the same treatment at another.

Of particular concern to this Court in cases like *Hill* is the fact that such unilateral, unconstrained decision-making authority often leads to the targeted suppression of minority viewpoints. This concern about the targeted suppression of certain viewpoints is of particular relevance here, where installation commanders may be unfamiliar with the special considerations unique to civilian populations.

While such inconsistency may be tolerable within the physical confines of military installations for the reasons discussed above, the same justifications cannot support the varied treatment of the core First Amendment rights of civilians outside the walls of military installations.

Furthermore, the fact that commanders know that their decisions to debar are unreviewable enhances the danger that installation commanders might exploit the power to debar as a way to limit dissent in fora in a manner unintended by § 1382, and repugnant to the Constitution. Indeed, the very purpose of the "protest zone" set up in the instant case was to satisfy the terms of a lawsuit settlement requiring that the government maintain protected speech activity in this public space. Resp't Br. 21.

Because these protest zones remain relatively rare, they can be hotbeds of political debate and

discussion, and can draw a great deal of public attention or media coverage. If, as the government contends, by maintaining the right to issue unreviewable debarment orders, it can also bar protesters from engaging in expressive activities in these areas, then § 1382 would give the government vast power to unilaterally shape the terms of debate in these zones. Instead of representing truly free zones of speech and ideas, installment commanders would be able to suppress competing or controversial views, just by applying their debarment powers.

Additionally, there is no reason to believe that if the government's preferred interpretation of § 1382 is granted, the suppression of constitutionally protected rights would be limited only to debarment orders, or only to military bases. Broadly interpreted, the government's understanding of its power to seek criminal sanctions under § 1382 could be applied to restrict constitutional rights in any circumstance where the government maintains any possessory right over a piece of property – even in instances where the government has abandoned any right to otherwise restrict access to that property. *Flower*, 407 U.S. 198. Indeed, the government's continued emphasis on the requirement in § 1382 that the property merely be "within the jurisdiction of the United States" in order for it to apply criminal liability under the statute does not instill any confidence on this point.

C. This Court Treats The Application Of Military Regulations That Deprive Private Civilians Of Important Constitutional Rights With Particular Caution, Even *Within* The Boundaries Of Military Installations

Further, even with regard to the rights of civilians *on* military installations, this Court affords civilians certain rights that members of the military are not afforded. In *Reid v. Covert*, 354 U.S. 1, 4 (1957), this Court considered a request for a habeas corpus petition by a woman accused of murdering her service-member husband abroad, on military base property. Attempting to try her by a military court-martial tribunal, the government invoked Article 2(11) of the Uniform Code of Military Justice, which purported to subject all persons "serving with, employed, or accompanying the armed forces" to the court-martial provisions of the UMCJ. *Id.* at 42 n.1. Declaring Article 2(11) unconstitutional, this Court opined on the necessity of adequately ensuring the Fifth and Sixth Amendment rights of civilians, in contrast to the comparatively fewer protections available for servicemen in the same circumstances. *Id.* at 21. *See also Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 249 (1960) (dismissing the court-martial trial of the dependent wife of a soldier, who lived on base housing, for a non-capital offense, on the grounds that she was "protected by the specific provisions of Article III and the Fifth and Sixth Amendments," and that her prosecution was thus "not constitutionally permissible).

These cases demonstrate the seriousness with which this Court is willing to treat the summary suspension of the constitutional rights of civilians, even for conduct within the confines of military installations.

CONCLUSION

For the reasons set forth above, *Amicus* respectfully asks this Court to affirm the Ninth Circuit's decision below, reversing Mr. Apel's convictions, and formally adopting the "exclusive possession and control" requirement for lawful convictions under § 1382.

Respectfully submitted,

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