No.

In the Supreme Court of the United States

CHARLES WILKIE, ET AL., PETITIONERS

v.

HARVEY FRANK ROBBINS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves a damages action brought against officials of the Bureau of Land Management in their individual capacities based on alleged actions taken within the individuals' official regulatory responsibilities in attempting to obtain a reciprocal right-of-way across private property intermingled with public lands. The following questions are presented:

1. Whether government officials acting pursuant to their regulatory authority can be guilty under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, of the predicate act of extortion under color of official right for attempting to obtain property for the sole benefit of the government and, if so, whether that statutory prohibition was clearly established.

2. Whether respondent's *Bivens* claim based on the exercise of his alleged Fifth Amendment rights is precluded by the availability of judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or other statutes for the kind of administrative actions on which his claim is based.

3. Whether the Fifth Amendment protects against retaliation for exercising a "right to exclude" the government from one's property outside the eminent domain process and, if so, whether that Fifth Amendment right was clearly established.

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The Solicitor General petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 438 F.3d 1074. An earlier opinion of the court of appeals (App., *infra*, 76a-84a) is reported at 300 F.3d 1208. The opinion of the district court (App., *infra*, 27a-48a) is unreported. An earlier opinion of the district court (App., *infra*, 49a-75a) is reported at 252 F. Supp. 2d 1286.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2006 (App., *infra*, 85a-86a). A petition for rehearing was denied on March 14, 2006. On June 5, 2006, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including July 12, 2006. On June 28, 2006, Justice Breyer further extended the time to August 11, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> * * * *nor* shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V.

The Hobbs Act provides, in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. 1951.

STATEMENT

1. a. Under its Property Clause power, Congress has enacted numerous statutes governing the use of federal lands. The Secretary of the Interior is authorized under 43 U.S.C. 1761(a), a provision of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, to grant

rights-of-way over federal lands. FLPMA requires the Secretary to "take any action necessary to prevent unnecessary and undue degradation of the lands." 43 U.S.C. 1732(b). Similarly, under 43 U.S.C. 315(a), a provision of the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, the Secretary has the authority to grant owners of land adjacent to grazing districts rights-of-way over federal land in those districts. The Secretary has the power to "do any and all things necessary" to accomplish the purposes of the Act. 43 U.S.C. 315a.

The Bureau of Land Management (BLM), an agency within the Department of the Interior, has provided that it is the Secretary's objective to grant rights-of-way to business entities, among others, and to "regulate, control and direct" the use of those rights-of-way on public land to "[p]rotect the natural resources associated with the public lands" and to "[p]revent unnecessary or undue environmental damage to the lands and resources." 43 C.F.R. 2800.0-2, (a) and (b). BLM may, if it determines it to be within the public interest, require persons applying for a right-of-way over public land, as a condition for obtaining such right-of-way to give the government a reciprocal "equivalent right-of-way that is adequate in duration and rights." 43 C.F.R. 2801.1-2.

If an applicant for a right-of-way refuses to grant BLM a reciprocal nonexclusive easement, his application may be denied. *Charles Ryden*, 119 I.B.L.A. 277, 279 (1991); see *Frank Robbins*, 146 I.B.L.A. 213, 219 n.4 (1998) (regulation authorizes BLM to "require that a road [right-of-way] applicant grant an equivalent, reciprocal [right-of-way] to the United States as a condition to receiving" a right-of-way under FLPMA). BLM's regulations likewise provide that the agency may include in a grazing permit a "statement disclosing the requirement that permittees or lessees shall provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public lands." 43 C.F.R. 4130.3-2(h).

b. BLM actions are subject to administrative review, including review by the Interior Board of Land Appeals (IBLA). IBLA decisions are subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* *Hoyl* v. *Babbitt*, 129 F.3d 1377, 1382 (10th Cir. 1997).

2. Respondent, Harvey Frank Robbins, owns the High Island Ranch and Cattle Company, a commercial guest ranch near Thermopolis, Wyoming. Some of the ranch's activities involve use of a Special Recreational Use Permit (SRP), under which ranch guests may participate in cattle drives over federal lands. App., *infra*, 28a-29a. The ranch's private lands are intermingled with public lands. Access to the ranch is over a lengthy dirt road, called the South Fork, Owl Creek Road. C.A. App. 48. The road wanders generally westward from a county road some miles to the east, and it crosses both federal and private lands, including land owned by respondent.

Respondent acquired the High Island Ranch from George Nelson in May 1994. Nelson had obtained a right-of-way over the federal lands along South Fork, Owl Creek Road, which allowed him to perform maintenance on the road. As a condition of that right-of-way, BLM asked Nelson to provide a reciprocal right-of-way in the form of a nonexclusive easement for the same road. Nelson agreed and signed the necessary document, but, apparently because a corporate seal was missing, BLM returned the document to Nelson. Before Nelson sent back the document with a corporate seal, he sold the ranch to respondent, who recorded the deed. BLM determined that this recording of the deed without the easement in favor of the government rendered the easement unenforceable. App., *infra*, 2a; C.A. App. 48-49.

In February 1995, a BLM employee discussed with respondent the possibility of receiving an assignment of Nelson's right-of-way over federal lands, and in April 1995, Charles Wilkie wrote to respondent explaining that such an

assignment was necessary if respondent intended to maintain the road or engage in other than casual use of the road. The letter confirmed that "a condition of the right-of-way is the reciprocal grant of a non-exclusive easement to the United States for administrative access across your deeded lands in the Rock Creek area." The letter enclosed a copy of the easement that Nelson had signed and asked respondent to sign it. C.A. App. 30-39. Respondent did not respond to the letter. On June 16, 1995, BLM issued an interlocutory decision cancelling the right-of-way that Nelson had obtained because respondent had not made the required annual payment and had not signed a reciprocal non-exclusive easement. *Id.* at 40-41. Respondent did not respond, and on July 21, 1995, BLM issued a final decision cancelling the right-of-way. *Id.* at 42-43. Although this final decision was subject to administrative review before the IBLA and judicial review in district court, respondent did not seek review. *Id.* at 49-50.

In July 1997, BLM issued respondent a "cease and desist" notice, which alleged that respondent had "bladed" parts of the road on public land without a right-of-way. "Blading" is a smoothing operation in which loose material is pulled from the side of the road or material is used to fill surface irregularities and restore the road crown. Under 43 C.F.R. 2801.3(a), the use of public lands requiring a right-of-way without authorization is a trespass. In response, respondent submitted an invoice "for emergency repairs to South Fork Road in order to access private property—$2250.00." C.A. App. 49; *id.* at 44. BLM offered to settle the trespass charges for $1617 and offered to entertain an application for a right-of-way, stating explicitly that the reciprocal easement required of respondent would simply allow "access for federal employees in conjunction with their official duties; it would not allow any other type of access." *Id.* at 45. Respondent did not respond, and BLM issued a decision finding that he had trespassed and owed BLM $1617.

Respondent sought review before the IBLA, which upheld the decision. The IBLA held that respondent had admitted the blading when he sent his bill to BLM for the repair and that he had "repeatedly failed to respond to BLM offers concerning the existing [right-of-way], the filing of an application for a new [right-of-way] and, thereafter, the settlement of the trespass." *Frank Robbins*, 146 I.B.L.A. at 218. The IBLA also rejected respondent's allegations that BLM was trying to "blackmail" him into providing a reciprocal right-of-way, and it held that "[t]he record effectively shows * * * intransigence was the tactic of [respondent], not BLM." *Id.* at 219. Respondent did not seek judicial review of this decision.

Respondent also had disputes with BLM over his grazing permit. Based on 43 C.F.R. 4310.3-2(*h*), the permit stated that respondent was required to "provide reasonable administrative access across private and leased lands to the [BLM] for the orderly management and protection of the public lands." C.A. App. 54. Respondent, however, insisted that BLM employees obtain his advance written permission. The IBLA found that "BLM is authorized reasonable administrative access across [respondent's] private and leased lands" and that "[a]dvance written permission from [respondent] shall not be required." *Ibid.* The IBLA later ruled that "administrative access is an implied condition of a grazing permit" when such access is necessary for BLM to carry out its statutory duties. *Id.* at 56; see *id.* at 61. The IBLA explicitly rejected the argument that administrative access constitutes a taking under the Fifth Amendment. *Id.* at 62. Respondent did not seek judicial review of these orders.

Respondent also had a dispute with BLM over his Special Recreational Use Permit. Respondent had taken over Nelson's SRP, which had a five-year term, but after respondent had committed numerous violations of the SRP's terms, BLM suspended the SRP in 1995 and reduced it to a one-year term, a form of probation. In June 1999, BLM denied respondent's

application to renew the SRP, citing the earlier suspension, the blading incident described above, ten grazing trespass notices respondent had received, some in conjunction with SRP activities, and his noncompliance with his grazing permit and allotment management plan on at least 20 occasions other than the trespasses. C.A. App. 70-76. The IBLA upheld the cancellation of the SRP, holding that "the entire record and the pattern of violations represented by the repeated notices he has received since receiving the first SRP in 1994 provide more than a reasonable factual basis for BLM's decision in this case not to renew the permit." *Id.* at 75. Respondent did not seek judicial review of that order.

3. In August 1998, respondent brought an action against petitioners under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), claiming various constitutional violations, and under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, charging the BLM employees with attempting to extort a reciprocal easement from him. Petitioners moved to dismiss for failure to state a claim and based on qualified immunity. The district court granted that motion. It dismissed the RICO claims on the ground that the plaintiff had not sufficiently pleaded damages, and the *Bivens* claim on the ground that the availability of judicial review under the APA, 5 U.S.C. 701 *et seq.*, and the Federal Tort Claims Act (FTCA) precluded a *Bivens* cause of action in this context.

The court of appeals reversed and remanded. App., *infra*, 76a-84a (*Robbins I*). First, it held that at the pleading stage, RICO plaintiffs could make general allegations of damages. *Id.* at 78a-80a. Second, the court held that respondent's *Bivens* claim was precluded to the extent that it was based on final agency action. However, because the APA does not provide a remedy "for constitutional violations committed by individual federal employees unrelated to final agency action," the court held that respondent's allegations of miscon-

duct "unrelated to any final agency action" are "properly within the scope of a *Bivens* claim." *Id.* at 81a-82a. The court further held that "the existence of a potential FTCA claim is an insufficient basis for the district court to preclude [respondent's] *Bivens* claim." *Id.* at 83a.

Following a remand, respondent filed a second amended complaint, and petitioners moved to dismiss on the ground of qualified immunity. The district court granted the motion in part and denied it in part. App., *infra*, 49a-75a (*Robbins II*). The court held that respondent had alleged violations of clearly established law under the Hobbs Act, 18 U.S.C. 1951 (extortion), and under Wyoming law of blackmail. App., *infra*, 60a-61a. The court also held that respondent had alleged the violation of a clearly established *right* not to be retaliated against for the exercise of a Fifth Amendment to exclude others from his property. *Id.* at 72a-74a. But the court dismissed claims under the Fourth Amendment for malicious prosecution, *id.* at 62a-67a, and under the Fifth Amendment for procedural and substantive due process, *id.* at 67a-72a.

Limited discovery ensued. Petitioners then moved for summary judgment based on qualified immunity. Respondent also filed a third amended complaint, mostly reiterating the allegations of the second amended complaint and adding petitioner David Wallace as a defendant. The district court again denied petitioners' motion. Pet. App. 27a-48a (*Robbins III*). Based on its earlier decision, the court held that both the law underlying the RICO claim and the constitutional right at issue in the *Bivens* claim were clearly established and that qualified immunity had to be denied. *Id.* at 33a-39a. The court declined to reconsider its holding based on the materials submitted on summary judgment. *Id.* at 39a-48a.

4. The court of appeals affirmed. App., *infra*, 1a-26a.

The court began with respondent's *Bivens* claim that petitioners' "conduct violated his right to be free from retaliation

for exercise of his Fifth Amendment right to exclude others from his property." App., *infra*, 10a-11a. The court rejected petitioners' threshold contention that respondent's *Bivens* claim is completely precluded by the APA. It explained that, in the prior appeal in this case, the court had held that "only [respondent's] allegations involving individual *action* unrelated to final agency action are permitted under *Bivens*." *Id.* at 25a. But the court concluded that petitioners had failed to ask the district court on remand from the prior appeal to review respondent's complaint "to determine which allegations remain and which are precluded" under that ruling. *Ibid.* Accordingly, the court declined to determine which particular allegations were precluded under the reasoning of its prior decision.

As to the merits of the *Bivens* claim, the court first held that the Fifth Amendment not only protects a "right to exclude" the government from one's property by requiring just compensation, but protects a property owner from takings outside the eminent domain process. App., *infra*, 12a-13a. The court explained that, "[i]f the right to exclude means anything, it must include the right to prevent the government from gaining an ownership interest in one's property outside the procedures of the Takings Clause." *Id.* at 13a; see *id.* at 14a ("[Respondent] has a Fifth Amendment right to prevent BLM from taking his property when BLM is not exercising its eminent domain power."). In addition, according to the court, that "right to exclude others from one's property" outside the eminent domain process was clearly established. *Id.* at 15a.

The court further held that the Fifth Amendment "right to exclude" includes an anti-retaliation prohibition. The court explained that, "[b]ecause retaliation tends to chill citizens' exercise of their Fifth Amendment right to exclude the government from private property, the Fifth Amendment prohibits such retaliation as a means of ensuring that the right is

meaningful." App., *infra*, 15a. Although the court recognized that there was no precedent supporting a right against retaliation for the exercise of a Fifth Amendment right, it held that *DeLoach* v. *Bevers*, 922 F.2d 618 (10th Cir. 1990), a First Amendment case, "requires only that the right retaliated against be clearly established." App., *infra*, 16a. The court, therefore, held that petitioners were not entitled to qualified immunity on the Fifth Amendment retaliation claim.

The court also denied qualified immunity on the RICO claim. The court rejected petitioners' argument that the predicate act for extortion under color of official right under the Hobbs Act required a showing that the alleged conduct was independently wrongful. Although the court did not question that petitioners had regulatory authority to take each of the allegedly retaliatory acts, it concluded that "if [petitioners] engaged in lawful actions with an intent to extort a right-of-way from [respondent] rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO." App., *infra*, 18a. The court also concluded that respondent had stated a RICO predicate act under the Wyoming law concerning blackmail. *Id.* at 24a. The court further held that, viewed at the "proper level of generality," respondent had alleged a violation of "clearly established statutory rights." *Id.* at 21a-22a.

5. Petitioners filed a petition for rehearing en banc, but the petition was denied on March 14, 2006. App., *infra*, 85a-86a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case holds that government officials may be subject to damages actions under RICO and *Bivens* for engaging in regulatory activity that the court assumed to be within the employees' duties and without the purpose of personal gain. The basic regulatory activity giving rise to this case—attempting to secure a reciprocal

right-of-way over private land intermingled with public lands—is one in which federal officials routinely engage in managing federal lands. The court of appeals' ruling takes the kind of give and take that is a standard aspect of negotiations between property owners with interlocking and interdependent parcels and transforms it into a constitutional tort. Because that kind of give and take is authorized by regulation, the decision is of critical importance to the government's land management responsibilities. But the decision's analytical reach is even greater because it potentially transforms lawful regulatory activity into *racketeering* activity under civil RICO whenever a plaintiff alleges that a government official exercised such authority with an intent to extort.

The court of appeals' far-reaching decision in this case directly conflicts in several different respects with the precedents of this Court and other circuits. The court's holding that a RICO predicate act of extortion under color of official right may be shown by merely alleging that government officials had an extortionate intent to obtain property for the benefit *of the government*—with no allegation that they had any personal interest in the property or acted outside the scope of their lawful regulatory duties—conflicts with a decision of the Eighth Circuit. *Sinclair* v. *Hawke*, 314 F.3d 934 (2003). Indeed, the Eighth Circuit found the proposition embraced by the court of appeals here to be "ludicrous on its face," and explained that "regulators do not become racketeers by acting like aggressive regulators." *Id.* at 943.

The court of appeals' decision to allow respondent's *Bivens* claim to proceed is novel and unfounded in at least three different respects. First, as a threshold matter, the court's ruling that the availability of APA review for all the major incidents in this context did not preclude respondent's *Bivens* action conflicts with the decisions of at least three other circuits, which have held that the APA's remedial scheme precludes a *Bivens* claim challenging administrative

action, "even when the administrative remedy does not provide complete relief." *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006). Second, the court of appeals' ruling that respondent had a Fifth Amendment right to exclude the government from his property *except through the eminent domain process* conflicts with decisions of this Court recognizing that the Fifth Amendment does not entitle individuals to prevent the government from taking their property (but instead affords them a right to just compensation when a taking occurs), and that takings may occur outside the eminent domain process. Third, the court of appeals' ruling that the Fifth Amendment confers a right against retaliation is, by the court's own admission, the first decision of its kind. App., *infra*, 14a-16a.

The last two aspects of the court of appeals' Fifth Amendment analysis, when combined, transform the normal give *and* take between owners of intermingled parcels of private and public lands into unconstitutional state action. There is nothing sinister about the government seeking an easement *from* an adjoining property owner "outside the eminent domain process," and conditioning an easement over public land on a reciprocal easement over interlocking parcels of private land is not unconstitutional retaliation. The court of appeals' contrary decision effectively creates a constitutional impediment to responsible federal land management.

The court of appeals' denial of qualified immunity in the context of this first-of-its-kind decision is even more problematic. This Court has made clear that, even when a plaintiff has properly alleged the violation of a constitutional or statutory right, a defendant is entitled to qualified immunity unless the plaintiff shows that "the law *clearly established* that the [official's] conduct was unlawful in the circumstances of the case." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001) (emphasis added). At a minimum, the court of appeals failed to identify the violation of any *clearly established* right. This Court has

repeatedly stressed the importance of the qualified immunity doctrine to ensure that government officials are not inhibited in the exercise of important government responsibilities. See, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). The court of appeals' decision completely disregards bedrock immunity principles and warrants this Court's review.

A. The Court of Appeals' RICO Holding Conflicts With A Decision Of The Eighth Circuit And Would Expose Public Officials To Personal Liability, Including Treble Damages, For Taking Lawful Regulatory Acts

The court of appeals held that a RICO predicate act of extortion under color of official right may be shown by a mere allegation that government officials, whose actions were authorized by law, had an extortionate intent to obtain property for the sole benefit of the government, with no allegation that they had any personal interest in the property. That holding directly conflicts both with this Court's case law on extortion and *Sinclair* v. *Hawke*, 314 F.3d 934 (8th Cir. 2003).

1. Extortion under color of official right requires a showing that "a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans* v. *United States*, 504 U.S. 255, 268 (1992); see also *Scheidler* v. *NOW*, 537 U.S. 393, 402 (2003) ("At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that was not due to him under the pretense that he was entitled to such property by virtue of his office."). Moreover, there must be a *quid pro quo* for the payment—*i.e.*, an understanding that the payment is in exchange for official acts. *McCormick* v. *United States*, 500 U.S. 257, 273 (1991).

It is not always necessary that the defendant himself benefit from the extortion; there may be extortion if the payments are made to a third party, or entity, at the direction of the defendant. Cf. *United States* v. *Clemente*, 640 F.2d 1069,

1079-1080 (2d Cir.), cert. denied, 454 U.S. 820 (1981) (aiding payment of kickbacks to another). But no precedent holds that a government official may extort property solely by attempting to facilitate transfer of the property *to the government itself* pursuant to entirely lawful procedures. There is a critical difference between an overzealous regulator and an extortionist; an alleged extortionist must attempt to "obtain" the victim's property. *Scheidler*, 537 U.S. at 404. This requirement reflects the reality that, if the government demands property to which it is not legally entitled, the owner of that property may block the government in court or seek judicial review of the government's action. But just as the government itself cannot be guilty of extortion, neither can the government's agent who makes the demand *on behalf of the government*, unless he or some other non-governmental party is to receive a personal benefit as a result.

2. The court of appeals did not dispute that petitioners' actions were within their regulatory authority, but it nevertheless held that the allegation of an intent to "extort" made their conduct actionable. App., *infra*, 18a (If petitioners "engaged in lawful actions with an intent to extort a right-of-way from [respondent] rather than with an intent to merely carry out their regulatory duties, their conduct is actionable under RICO."). An intent to "extort" is not possible when one assumes that government action is authorized and there is no allegation of personal benefit. That is particularly true in this context, where, as authorized by regulation, the government seeks to obtain reciprocal treatment of interlocking parcels.

While respondent has alleged an elaborate conspiracy by petitioners to obtain a reciprocal right-of-way on behalf of the government, he does not allege that any of them had a personal stake in that goal. Respondent's theory is that petitioners were trying to "extort" from him a reciprocal easement for the benefit of the government. He makes no allegation that petitioners had a *personal* interest in obtaining such an

easement. Moreover, the government was acting like a typical property owner in seeking through lawful means to encourage another owner to agree to a reciprocal property right. The government at times may have more means at its disposal in negotiating such an arrangement than the typical private property owner, and that may justify giving the private property owner greater recourse against the government to avoid overreaching, such as the availability of APA review. But there is no basis for converting a legitimate effort to obtain reciprocity for the government into RICO extortion or, as discussed below, a *Bivens* claim.

3. The court of appeals' decision holding that such conduct may subject government officials to RICO liability directly conflicts with the Eighth Circuit's decision in *Sinclair* v. *Hawke*, *supra*. In *Sinclair*, the Office of the Comptroller of the Currency took escalating regulatory actions against a bank, eventually threatening to issue a safety and soundness order that would have hampered its lending efforts and later issuing a notice of charges against the bank. The Eighth Circuit rejected the bank's civil RICO claim, explaining that "federal employees who take regulatory action consistent with their statutory powers [do not] engage in a 'pattern of racketeering activity' if those actions are adverse" to a particular business; "regulators do not become racketeers by acting like aggressive regulators." 314 F.3d at 943-944. Indeed, the Eighth Circuit went so far as to observe that the contrary proposition—the basic theory adopted by the decision below—is "ludicrous on its face." *Id.* at 943.

The court of appeals attempted to distinguish *Sinclair* on the ground that it involved no disputed issue of fact as to the regulators' extortionate intent. App., *infra*, 21a ("In this case, however, there is a factual dispute, not present in *Sinclair*, regarding whether Defendants were merely enforcing the law or using their otherwise lawful authority to extort a right-of-way from [respondent]."). But insisting on a recip-

rocal right-of-way was part of the regulatory regime that petitioners were enforcing. And the court was mistaken in speaking of an extortionate intent, because there is no allegation in this case that petitioners sought any *personal benefit* from the property. Instead, respondent fully admits petitioners were trying to obtain the interest in property for the government, which does not rise to an extortionate intent.

The court of appeals' RICO ruling has potentially severe consequences for government officials who have direct regulatory contact with private citizens. Under the decision below, BLM and Forest Service officials like petitioners who regulate intermingled public lands; bank regulators like the defendants in *Sinclair*; and potentially countless other regulatory officers may be subject to extortion charges under RICO, along with the prospect of personal liability and treble damages, for taking tough regulatory actions, even if those actions are authorized by law and the officials have no personal interest in the property they have sought on behalf of the government. There, of course, need to be checks (such as the APA) against unauthorized or excessive regulators, but the prospect of RICO liability based on a mere allegation of extortionate intent is not an appropriate check and threatens to chill appropriate and vital regulatory actions.

B. The Court Of Appeals' Holding That Respondent's Retaliation Claim Based On His Alleged Fifth Amendment "Right To Exclude" Others From His Property States A Claim Under *Bivens* Conflicts With Precedents Of This Court And Other Courts Of Appeals.

The court of appeals' conclusion that respondent's *Bivens* claim should proceed to trial also warrants review. First, the court erroneously rejected petitioners' threshold contention that the *Bivens* remedy was completely precluded in light of the administrative review mechanism established by the APA. Second, the court erroneously embraced—as "clearly estab-

lished," no less—respondent's novel claim of a constitutional right to be free from retaliation for the exercise of a Fifth Amendment "right to exclude" the government from one's property. Those rulings also conflict with the decisions of this Court and other courts of appeals.

1. The court of appeals erred in holding that respondent's Fifth Amendment retaliation claim was actionable under *Bivens*. In *Bivens*, this Court inferred a private action for damages against federal law-enforcement agents who violated a person's Fourth Amendment rights. But in recent years, this Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001); see *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). That restraint corresponds with the Court's "retreat[]" from its "previous willingness to imply a cause of action where Congress has not provided one." *Malesko*, 534 U.S. at 67 n.3; see *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001).

The Court has emphasized that the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Malesko*, 534 U.S. at 69 (quoting *Chilicky*, 487 U.S. at 421-422). To the contrary, when "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," the Court has declined to create additional remedies under *Bivens*. *Chilicky*, 487 U.S. at 423. Thus, for example, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court refused to create a *Bivens* cause of action for federal employees seeking to challenge personnel decisions even though "existing remedies [did] not provide complete relief," *id.* at 388, and there was no remedy at all for certain personnel actions against probationary employees, *id* at 385 n.28.

In the initial appeal in this case, petitioners argued that the remedial mechanism established by the APA—which permits judicial review of final agency action that is allegedly contrary to a "constitutional right, power, privilege, or immunity," 5 U.S.C. 706(2)(B)—precluded respondent's *Bivens* claim. The court of appeals rejected that argument in part, reasoning that *Bivens* was precluded only to the extent that respondent challenged final agency action. Thus, under the court of appeals' initial ruling—which the court reaffirmed below, App., *infra*, 25a-26a—*Bivens* is available with respect to allegations that are "unrelated to final agency action." *Id.* at 82a; see *id.* at 81a-82a. Because "[n]ot all of [respondent's] allegations serving as a basis for his *Bivens* claim involve individual action leading to final agency decisions reviewable pursuant to the APA," the court held that respondent's *Bivens* claim was entitled to proceed. *Id.* at 82a.

That ruling conflicts with the decisions of the other circuits that have addressed the availability of *Bivens* in this context. Those circuits have recognized that the APA precludes the creation of a *Bivens* remedy, even where the scope of the two remedies may not be entirely coextensive. As the Eighth Circuit has explained: "When Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the [APA] is sufficient to preclude a *Bivens* action." *Sinclair* v. *Hawke*, 314 F.3d at 940; see *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005), cert. denied, 126 S. Ct. 1908 (2006). That is true, the Eighth Circuit underscored, "even when the administrative remedy does not provide complete relief." *Nebraska Beef*, 398 F.3d at 1084. The Eleventh and Ninth Circuits have reached the same conclusion. See *Miller* v. *United States Dep't of Agriculture*, 143 F.3d 1413, 1416 (11th Cir. 1998) ("the existence of a right to judicial review under the APA is, alone, sufficient to preclude a federal employee from bringing a *Bivens* action"); *Moore* v. *Glickman*, 113 F.3d 988, 994 (9th

Cir. 1997); *Sky Ad, Inc.* v. *McClure*, 951 F.2d 1146, 1148 & n.4 (9th Cir. 1991), cert. denied, 506 U.S. 816 (1992).

Respondent's complaint states only a single count of retaliation allegedly in violation of the Fifth Amendment. That claim ultimately is based solely on respondent's refusal to grant the government a reciprocal right-of-way, which BLM regulations expressly granted petitioners the regulatory authority to pursue. Thus, the fact that the APA provides no remedy for certain conduct—*i.e.*, that involving acts "unrelated to final agency action," App., *infra*, 82a—does not mean that a *Bivens* action may be inferred with respect to that conduct. Indeed, inferring such a *Bivens* action would be inconsistent with Congress's decision to *shield* non-final agency action from review under the APA. 5 U.S.C. 704; see *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). Given that the major incidents that give rise to respondent's claim involve final agency action, the court of appeals' rule has the perverse consequence of inferring a constitutional action only as to those incidents that Congress considered too trivial or too tentative for judicial review in the APA context. The APA establishes what Congress deemed to be the appropriate mechanism for judicial review in this context. The court of appeals erred in supplanting that scheme with *Bivens*.

Moreover, this Court's decisions in *Bush* and *Chilicky* prevent the courts from creating a *Bivens* remedy simply because a particular plaintiff has *no* relief at all under a comprehensive statutory review mechanism. See *Bush*, 462 U.S. at 372; *Chilicky*, 487 U.S. at 425; see also, *e.g.*, *Jones* v. *TVA*, 948 F.2d 258, 264 (6th Cir. 1991) ("In the field of federal employment, even if no remedy at all has been provided by the [Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1111], courts will not create a *Bivens* remedy.") (citing cases); *Saul* v. *United States*, 928 F.2d 829, 840 (9th Cir. 1991) ("the CSRA precludes even those *Bivens* claims for which the act prescribes no alternative remedy"); *Volk* v. *Hobson*, 866 F.2d

1398, 1402 (Fed. Cir.), cert. denied, 490 U.S. 1092 (1989) ("The lesson of *Bush* is not that courts should assess the efficacy of existing remedies, but that they should abstain completely from inventing other remedies when Congress has set up a complete, integrated statutory scheme."); *Spagnola* v. *Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc) (interpreting *Chilicky* to require preclusion when the plaintiff has "no remedy whatsoever" in the remedial scheme).

The APA establishes a comprehensive remedial mechanism governing challenges to administrative action, including to the type of administrative challenge underlying this case. See p. 18, *supra*. The fact that the APA does not confer a remedy with respect to every one of respondent's allegations underlying his Fifth Amendment claim does not provide a basis for inferring a cause of action under *Bivens*. More fundamentally, extending *Bivens* to this context would radically expand *Bivens* in direct contravention of this Court's precedents and principles of judicial restraint. See *Malesko*, 534 U.S. at 69 ("So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.").

The court of appeals rejected petitioners' argument that respondent's *Bivens* claim is precluded in its entirety because of the availability of judicial review under the APA in the prior appeal and reaffirmed that ruling in the decision below. See App., *infra*, 25a-26a.[1] Because that threshold argument is inextricably intertwined with petitioners' defense of qualified immunity as to the *Bivens* claim, it was properly before

[1] In their brief below, petitioners argued not only that particular allegations should be dismissed under the reasoning of the court of appeals' initial ruling, but also that the entire *Bivens* claim was precluded. See Pet. C.A. Br. 21 ("Since the decision to deny [respondent] a right-of-way absent easement is subject to administrative and judicial review under the APA, [respondent's] *Bivens* action should, strictly speaking, be precluded as to *all* of the allegations.").

the court of appeals in the interlocutory appeals of the district court's qualified immunity rulings and is properly before this Court. See, *e.g.*, *Hartman* v. *Moore*, 126 S. Ct. 1695, 1702 n.5 (2006) (holding that Court had jurisdiction in qualified immunity appeal to address elements of *Bivens* causes of action for malicious prosecution and retaliatory prosecution because the question of the elements of the *Bivens* claim was "directly implicated by the defense of qualified immunity" and was therefore "properly before [the Court] on interlocutory appeal" concerning qualified immunity).

2. This Court's review is also warranted to address the denial of qualified immunity on the ground that respondent adequately alleged that "[petitioners'] conduct violated his right to be free from retaliation for exercise of his Fifth Amendment right to exclude others from his property." App., *infra*, 11a.

a. It is common ground that individuals possess a "right to exclude" others—including the government—from their property. This Court has held that such right to exclude was "[o]ne of the main rights attaching to property" found at common law, see *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978), and that the right's contemporary source is state law. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984).

Respondent's *Bivens*-based retaliation claim is predicated entirely on the Fifth Amendment. App., *infra*, 10a-16a.[2] The

[2] While the right to exclude may be connected at a general level with the right to be free from unreasonable searches and seizures under the Fourth Amendment, *Roth*, 403 U.S. at 577; see App., *infra*, 13a, this case does not involve any allegations of an improper search or seizure. A malicious

Fifth Amendment, however, protects the right to exclude provided by state law vis-à-vis the government *only* by way of the Takings Clause's guarantee of just compensation. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979); see *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994). The right to exclude thus is not absolute; it is qualified by the government's eminent domain authority. Equally important, the right to exclude is not a right to exclude without consequence. With interlocking or interdependent parcels of land, exercising the right to exclude and denying an easement can be expected to result in the denial of a reciprocal easement. When the government is one of the property owners, its efforts to maximize both owners' interest in their property by negotiating reciprocal easements do not infringe the right to exclude.

Respondent does not allege any taking in violation of the Fifth Amendment, and thus has not sought just compensation for any taking.[3] Rather, his basic claim is that the BLM *tried* to take his property by allegedly pressuring him to give the government a reciprocal right-of-way over his property. Far from alleging that the government has taken his property, respondent's Fifth Amendment *Bivens* claim is predicated on his assertions that he is being denied the use of *public* lands (*i.e.*, maintenance of the federal portion of the road and grazing privileges on federal lands) because he will not consent to a reciprocal right-of-way over his portion of the road.

The court of appeals held that "[respondent] has a Fifth Amendment right to *prevent* BLM from taking his property when BLM is not exercising its eminent domain power."

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prosecution claim founded on the Fourth Amendment was dismissed by the district court. App., *infra*, 67a. That claim, however, is not before the Court in this action.

[3] Respondent made a takings claim in one of the administrative actions that he filed against the BLM. The IBLA rejected that claim and respondent did not seek judicial review of that order. See *High Island Ranch*, No. 98-180R (IBLA May 20, 1999), slip op. 5 (C.A. App. 62), discussed p. 6, *supra*.

App., *infra*, 14a (emphasis added). But this Court has made clear both that individuals have no Fifth Amendment right to *prevent* a taking (only a right to just compensation to remedy the taking), *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. at 1016, and that takings may occur outside of the eminent-domain process, see *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (noting that the Court has recognized since 1922 "that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment").

The court of appeals also ignored the statutory remedy for takings. Respondent may not sue individual government employees for a taking (or for an attempted taking); rather, his sole remedy under the Fifth Amendment is to seek just compensation under the Tucker Act once a taking has occurred. See 28 U.S.C. 1491. That necessarily follows from the fact that the Takings Clause does not prohibit the government from taking property but simply requires the government to pay just compensation if it does. Thus, if the government eventually provides just compensation for a taking, the taking itself does not violate the Fifth Amendment. *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."); see *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) (purpose of the Fifth Amendment is "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"); *id.* at 314 (Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power").

Kaiser Aetna—the principal case on which the court of appeals relied, App., *infra*, 12a-14a—is not to the contrary.

That decision makes clear—in language omitted by the court of appeals—that the "right to exclude" *may* be taken so long as just compensation is paid. 444 U.S. at 179-180 (footnote omitted and emphasis added) ("the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take *without compensation*") (emphasis added). Respondent, however, does not claim any taking and thus has never pursued the statutory remedy for an alleged taking. Accordingly, any takings claim would be premature in any event. *Williamson County*, 473 U.S. at 195 ("taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491"); accord *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990). Especially in the context of interlocking properties, the careful scheme of the Takings Clause cannot be replaced by individual officer liability when the negotiation process for a reciprocal easement breaks down.

b. The court of appeals further erred in holding that the Fifth Amendment confers a right to sue for money damages for retaliation for the exercise of alleged Fifth Amendment rights. To begin with, respondent cannot claim retaliation for the exercise of his Fifth Amendment rights, when he has not exercised the right protected by the Fifth Amendment—the right to receive just compensation for any taking. His Fifth Amendment retaliation claims fails for that reason alone. In any event, the court of appeals erred in holding that the Fifth Amendment confers its own anti-retaliation right.

The First Amendment is the only context in which this Court has recognized a constitutional anti-retaliation right. But the Court has long showed heightened sensitivity to concerns about chilling protected activity in the First Amendment context. See, *e.g.*, *Bates* v. *State Bar*, 433 U.S. 350, 380 (1977) ("First Amendment interests are fragile interests, and a person who contemplates protected activity might be dis-

Nor do the same concerns exist in the Fifth Amendment context about chilling protected activity. Unlike the First Amendment, the Fifth Amendment was not intended to encourage a particular type of citizen activity that could be chilled if not robustly protected. Moreover, unlike the First Amendment context, the Takings Clause, with its guarantee of a remedy, assumes a degree of permissible interference with property rights. Nor is the Takings Clause primarily an absolute prohibition of government action, but rather a means of ensuring the remedy of just compensation. And especially in the context of interlocking properties and reciprocal easements, there is a broad scope of legitimate give and take that makes liability for going too far in retaliating for failing to grant a reciprocal easement particularly troubling. The ability to obtain just compensation for any taking is itself a robust incentive for invoking one's Fifth Amendment rights. The court of appeals' unprecedented creation of a civil damages remedy for retaliation in the Fifth Amendment context accordingly warrants this Court's review.[5]

C. The Court of Appeals' Qualified Immunity Analysis Is Fundamentally Flawed And At Odds With This Court's Teachings

At a minimum, the court of appeals erred in holding that the foregoing RICO and Fifth Amendment rights were *clearly established*. Even when a plaintiff has properly alleged the violation of a constitutional right, a defendant is entitled to qualified immunity unless the plaintiff shows that "the law *clearly established* that the [official's] conduct was

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criminal investigation. The right to retain and consult with an attorney, however, implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech." 922 F.2d at 620.

[5] Of course, retaliation for First Amendment protected speech could take the form of interference with the speaker's property rights (including interferences short of a taking), but that is not the nature of respondent's claim.

unlawful in the circumstances of the case." *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001) (emphasis added). Moreover, the determination whether a right was "clearly established"—"it is vital to note"— "must be undertaken in light of the specific context of the case, not as a broad proposition." *Ibid.*; see *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (to determine whether a right is clearly established, it must be "defined at the appropriate level of specificity"). That requirement "serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable." *Saucier*, 533 U.S. at 201.

As this Court explained in *Wilson* v. *Layne*, *supra*, a right is clearly established if "in the light of preexisting law the unlawfulness [is] apparent." 526 U.S. at 615. That is, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. at 202; see *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (it must be clear to a reasonable official "that his conduct was unlawful in the situation he confronted"); *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987) ("The contours of the right must be sufficiently clear that a reasonable official would understand that what *he* is doing violates that right.") (emphasis added).

Petitioners in this case had no reason to believe that they were violating any clearly established right in attempting to obtain a reciprocal right-of-way from respondent through the exercise of their lawful regulatory authority. No previous decision of any court suggests that petitioners' conduct would violate any statutory or constitutional right. Indeed, the court of appeals itself acknowledged that "no court has previously explicitly recognized the right to be free from retaliation for the exercise of Fifth Amendment rights." App., *infra*, 16a. That admission, alone, entitles petitioners to qualified immunity on respondent's novel Fifth Amendment retali-

ation claim. As discussed above, the court of appeals' RICO extortion ruling is similarly unfounded. Particularly given the potential breadth of the court's RICO and Fifth Amendment rulings and its sharp departure from existing precedent, the court of appeals' ruling that petitioners are not entitled to qualified immunity warrants further review.

D. The Court Of Appeals' Decision Could Severely Disrupt Important Government Functions And Subject Government Employees To Threat Of Civil Damages Actions Simply For Performing Their Lawful Regulatory Duties

The court of appeals' decision in this case could severely disrupt legitimate regulatory activity and, in particular, land management functions. In the American West, millions of acres of publicly owned lands are intermingled in a patchwork fashion with private lands. Indeed, the patchwork nature of western land forms a unique part of our history. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979). At the same time, however, the intermingled nature of these lands raises a host of property law issues, including questions about reciprocal access and rights-of-way between adjoining landowners.

For example, BLM has the authority to require any applicant for a federal right-of-way across public lands to provide the United States with a reciprocal right of access. See 43 C.F.R. 2901.1-2. In addition, like private landowners, BLM has the authority to deny an application for a federal right-of-way where BLM determines that a reciprocal right-of-way is in the public interest, and the applicant refuses to agree to such reciprocal access. BLM has without incident negotiated thousands of such reciprocal rights-of-way across private lands intermingled with public lands. Such reciprocal rights are a longstanding and indispensable feature of the federal land management scheme given the patchwork nature of public and private lands in large tracts of the West. Reciprocal rights are vital to the government's ability to maintain public

lands and facilities, such as the South Fork, Owl Creek Road at issue in this case, engage in resource and wildlife management, and conduct other important government functions.

In addition, the BLM administers over 21,000 grazing permits nationwide, including nearly 3500 permits in Wyoming alone. The great majority of those permits involve circumstances similar to that involved in this case where private land is intermixed with federal lands. BLM is statutorily required to administer such public lands under, *inter alia*, the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, and the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701. Where a grazing permit involves intermingled lands, BLM's authority to enter private land to the extent necessary to administer the terms and conditions of the permit is an implied condition of the permit. See p. 3, *supra*.

The court of appeals' decision in this case subjects federal officials to damages actions and threat of personal liability for carrying out their regulatory duties in attempting to secure reciprocal rights-of-way. The very nature of reciprocal easements means that the refusal to agree to a mutually beneficial easement will result in a denial of a one-sided easement. Insistence on reciprocity cannot be viewed as unconstitutional retaliation without undermining the government's ability to deal with its interlocking parcels. What is more, the decision subjects such employees to the threat of civil RICO damages if a jury finds that they had an "extortionate" intent in seeking to secure reciprocal rights through the exercise of lawful regulatory authority. The decision below therefore could severely disrupt the administration of critical land management responsibilities by the government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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