No. 06-219

IN THE

Supreme Court of the United States

CHARLES WILKIE, ET AL.,

Petitioners,

v.

HARVEY FRANK ROBBINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF BROOKS REALTY AND BURGETT GEOTHERMAL GREENHOUSES, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF BROOKS REALTY AND BURGETT GEOTHERMAL GREENHOUSES, INC. AS AMICI CURIAE SUPPORTING RESPONDENT

Brooks Realty & Advisory Group and Burgett Geothermal Greenhouses, Inc., as amici curiae, respectfully submit that the judgment below should be affirmed.[1]

INTERESTS OF AMICI CURIAE

Amicus curiae Brooks Realty & Advisory Group is one of the nation's most successful ranching real estate developers. Founded in 1969, Brooks Realty is synonymous with the development and marketing of large ranch properties throughout the western United States, having developed nearly half a million acres of land. Brooks Realty and its subsidiaries have offices throughout the West.

As a major landowner and developer, Brooks Realty's business depends on vigorous protection of property rights, especially the right to exclude the government and the public from private property. In addition, Brooks Realty has a direct interest in ensuring that federal officials charged with federal land oversight cannot retaliate with impunity against landowners who exercise their right to exclude the government from their private property.

Amicus curiae, Burgett Geothermal Greenhouses,

[1] Pursuant to this Court's Rule 37.6, amici Brooks Realty and Burgett Geothermal Greenhouses, Inc. state that no counsel for a party authored this brief in whole or in part. No one other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties.

Inc., is the largest employer in Hidalgo County, New Mexico and owns the largest geothermal greenhouse in the United States. Burgett ships twenty-five million roses to markets in the southwestern United States. Burgett's greenhouse complex is on privately owned land; however, the mineral rights (geothermal heat) used to heat Burgett's 30-acre greenhouse complex are owned by the federal government. Burgett leases the geothermal heat from BLM. The ownership of the mineral rights has been the subject of much litigation between Burgett and the United States. *See, e.g.*, *Burgett Geothermal Greenhouses, Inc. v. United States*, 277 F.3d 1222 (10th Cir. 2002).

Burgett has a direct interest in ensuring that BLM officials respect private property rights, including the right to exclude the government from its property. Indeed, Burgett has been subjected to retaliatory treatment, including the heavy-handed treatment that petitioners euphemistically refer to as "give and take."

STATEMENT OF THE CASE

At bottom, this case rests on the integrity of the Fifth Amendment's protection of property rights. Do the protections afforded property owners contained in the Fifth Amendment support respondent's *Bivens* claim, or are property rights relegated to the position of a "poor relation" to other constitutional rights deemed more robust, such as First Amendment rights, which do support anti-retaliation rights? *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

Because this case arises in the posture of a motion for summary judgment, the Court is required to view all facts and draw all reasonable inferences in favor of the nonmoving party, the respondent. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

In 1994, respondent, Harvey Frank Robbins, purchased the High Island Ranch, a cattle ranch located in Wyoming, from George Nelson. There was nothing in the chain of title to suggest to respondent that the title was encumbered by an easement owned by the government. J.A. 44. Apparently, however, the Bureau of Land Management (BLM) had negotiated an agreement for an easement with Mr. Nelson, but BLM failed to record the easement before respondent purchased the property and recorded his warranty deed. The recordation of the warranty deed extinguished BLM's unrecorded easement over the property. *Id.* at 45.

Once BLM learned of its mistake in not timely recording the easement, BLM began demanding that respondent grant BLM an easement without compensation. *Id.* at 46. When respondent refused, BLM officials engaged in a series of malicious, retaliatory acts designed to extort the desired easement from respondent. For instance, they threatened to cancel a right-of-way respondent needed to access the upper portions of his Ranch. *Id.* at 64-66. Petitioners encouraged respondent's neighbor to file criminal charges against respondent. *Id.* at 68-71. BLM officials told respondent's neighbors that they were prepared to wage "a long war" that would "outlast" and "outspend" respondent. *Id.* at 132. In short, they promised to "bury Frank Robbins." *Id.* at 67.

Petitioners' conduct included numerous violations of respondent's property rights—notably the right to exclude the government from his property. The record is replete with

instances in which BLM officials simply entered onto respondent's property whenever they felt like it. *See, e.g.*, 47, 54.

Petitioners also singled out respondent and treated him differently than neighboring ranch owners. Petitioners issued citations to respondent though his neighbors were not cited in identical situations. Petitioners prosecuted respondent for frivolous livestock trespasses. *Id.* at 49. Petitioners used these trespass allegations to justify revoking respondent's grazing permits. *Id.* at 51.

In another attempt to "get [respondent's] permits and get him out of business," petitioners revoked respondent's permit to run guest cattle drives—respondent's primary source of income for the Ranch—over federal land. *Id.* at 49, 126. When respondent began operating guest cattle drives entirely on his property, petitioners interfered with those drives by trespassing onto respondent's Ranch to videotape the guests while on the cattle runs. *Id.* at 52.

After enduring years of such abuse, respondent filed suit against the BLM officials responsible for the retaliatory behavior in their individual capacities, alleging that petitioners had, among other things, engaged in a pattern of extortion and blackmail in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968. Respondent also sought relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for violations of his constitutional right to exclude the government from his property.

SUMMARY OF ARGUMENT

If the Constitution stands for anything, it stands for the proposition that government officials cannot punish or retaliate against a citizen for exercising a right secured by the Constitution. *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.") (internal citations omitted). In this case, the Tenth Circuit held that that the unconstitutional retaliation doctrine includes a citizen's well-established Fifth Amendment right to exclude the government from his private property. *Robbins v. Wilkie*, 433 F.3d 755, 765–67 (10th Cir. 2006).

Petitioners urge this Court to reverse this holding, asking the Court to hold that the government can retaliate against citizens who exercise their constitutionally protected right to exclude others from their property. In fact, petitioners suggest that to require BLM officials to respect private property rights, notably the right to exclude others, might "chill government officials in a broad range of appropriate and vital regulatory actions . . . ." Pet. Br. at 13.

Chilling unconstitutional behavior, of course, is exactly what the Framers of the Constitution hand in mind. As Justice Brennan explained in his famous dissenting opinion in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1980):

> [L]and-use planning commentators have suggested that the threat of financial liability for unconstitutional police power regulations would help to produce a more rational basis of decisionmaking that weighs the costs of restrictions against their benefits. Such

> liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. After all, if a policeman must know the Constitution, then why not a planner?

450 U.S. at 661 n.26 (citations omitted). Here, we might likewise ask, why not a BLM employee? The very purpose of the *Bivens* cause-of-action against individual government employees is to chill unlawful government behavior. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61, 70 (2001) ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.").

Petitioners' argument that Fifth Amendment rights are somehow either less important or less in need of protection than First Amendment rights is not consistent with the drafter's intent with respect to property rights protection. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 132 (1996) ("The United States was one of the first republics ever to enshrine freedom of speech in its Constitution, a freedom originally understood as rooted in an individual's natural property right in his information.").

Petitioners attempt to confuse the question by arguing that the unconstitutional retaliation doctrine was not clearly established in specific connection with the right to exclude. There is no more firmly established right among the bundle of rights associated with property rights protection than the right to exclude others from one's property. *See, e.g.*, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others.");

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). Therefore, as the right to exclude is clearly established, no reasonable government official would think that he could retaliate against a citizen for that citizen's exercise of his right to exclude. Accordingly, the Tenth Circuit was correct in concluding that petitioners were not entitled to qualified immunity.

The Tenth Circuit was also correct in determining that petitioners were not entitled to summary judgment with regard to respondent's allegation that petitioners' conduct violated RICO. There is no exception to the rule that the beneficiary of extortionate conduct can be a third-party for situations where the third-party beneficiary is the United States. This proposed exception is not supported by the language of the Hobbs Act, nor can petitioners cite any case so holding. Here, the conduct of petitioners was plainly wrongful and unlawful and, therefore, fits within the Hobbs Act prohibition.

There is only one constitutional way to acquire private property from a property owner not willing to enter into a voluntary agreement—through the provision of just compensation. As this Court has held in cases such as *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), government actions can result in the extortion of private property from property owners. Here, petitioners could have condemned an easement under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1785, which specifically provides them with the authority they needed to acquire necessary access to public lands. Rather than utilizing their lawful powers of eminent domain, as provided for in FLPMA, petitioners chose to subject

respondent to systematic harassment, hoping to acquire an easement for free through extortion.

For all of these reasons, this Court should affirm the Tenth Circuit's denial of petitioners' motion for summary judgment.

ARGUMENT

I. The Fifth Amendment Protects Against Retaliation for Exercising the Right to Exclude and that Right was Clearly Established

Encountered with a campaign of threats, harassment, and intimidation launched by BLM employees to circumvent the constitutional limitations on their authority, the Tenth Circuit properly applied established legal principles in rejecting petitioners' qualified immunity defense to respondent's *Bivens* action. Petitioners have asserted that the Tenth Circuit's decision with regard to their qualified immunity from a *Bivens* claim was incorrect because, according to petitioners, the "Court's constitutional retaliation doctrine is limited to suits alleging retaliation for the exercise of First Amendment rights." Pet. Br. at 37. Contrary to petitioners' assertion, the principle that a government official may not retaliate against a citizen for that citizen's exercise of a constitutionally protected right extends beyond the First Amendment. Thus, as the Tenth Circuit properly recognized, where there is a clearly established constitutional right, such as the right to exclude the government from one's private property, the Constitution proscribes retaliation for the exercise of that right.

Petitioners' assertion that the constitutional retaliation doctrine only applies to suits alleging retaliation for the exercise of First Amendment rights is incorrect for at least

two reasons. First, nothing in the doctrine of unconstitutional retaliation or its rationale limits the doctrine to the protection of First Amendment freedoms. Second, even if this Court were to conclude that the unconstitutional retaliation doctrine depends on the fundamental nature of the underlying right, the property rights protected by the Fifth Amendment are sufficiently robust to support the anti-retaliation right applied by the Tenth Circuit.

Moreover, the constitutional protection against retaliating for a citizen's exercise of his right to exclude is clearly established. That is, no objectively reasonable government official would believe that he could retaliate against a citizen for exercising his clearly established constitutional right to exclude the government from his property. Accordingly, as there is a clearly established right to be free from retaliation for the exercise of the right to exclude, the Tenth Circuit was correct in determining that petitioners cannot assert a defense of qualified immunity to respondent's *Bivens* action.

A. The General Terms of the Unconstitutional Retaliation Doctrine do not Limit the Doctrine to the First Amendment

In general terms, and without reference to the First Amendment, this Court has recognized that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1977). That is to say, the government may not punish or retaliate against its citizens for the exercise of their fundamental constitutional freedoms. Thus, for example, the Constitution prohibits retaliating against a criminal defendant who successfully exercises his Due Process right to appeal his conviction by imposing a greater sentence upon reconviction, *North*

Carolina v. Pearce, 395 U.S. 711, 725 (1969), or by reindicting the defendant on more serious charges, *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974).

Although it is true that the unconstitutional retaliation doctrine has arisen most frequently in cases involving free speech and free association, in recognizing the unconstitutional retaliation doctrine, this Court has not relied on any principle specific to the protections of the First Amendment. Rather, the Court has acted on the general principle that "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher*, 434 U.S. at 363 (citation omitted); *see also United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right.") (internal citations omitted). The Tenth Circuit has also relied on a general principle in unconstitutional retaliation cases in that circuit: "An action taken in retaliation for the exercise of a constitutionally protected right is actionable. . . ." *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990).

In short, the fact that the unconstitutional retaliation doctrine is often applied in First Amendment cases, does not mean it only applies in such cases. Where a public official misuses his power to retaliate against a citizen for exercising his property rights, there is no reason the general principle behind the unconstitutional retaliation doctrine is not broad enough to apply.

B. Property Rights Protected by the Fifth Amendment Are Sufficiently Robust to Support an Anti-Retaliation Right

Moreover, even if this Court were to determine that the unconstitutional retaliation doctrine only applies to fundamental rights, the property rights protected by the Fifth Amendment are sufficiently robust to support an anti-retaliation right. In order to support the petitioners' notion that First Amendment rights stand above property rights, petitioners invite the Court to strip the Constitution's protections over property rights down to a mere requirement that the government provide just compensation for property actually taken. Ignoring the fundamental importance the Framers placed on property rights, petitioners assert that the Fifth Amendment does not embody an anti-retaliation right and that the unconstitutional retaliation doctrine is limited to suits alleging retaliation for the exercise of First Amendment rights. Because the Court "has long shown a special sensitivity to the exercise of First Amendment rights" (Pet. Br. at 37), petitioners argue that the Fifth Amendment "presupposes a degree of permissible governmental interference with property rights that is wholly alien within the context of First Amendment speech rights." Pet. Br. at 39.

Petitioners' argument is flawed for three reasons. First, the First Amendment rights that petitioners concede support an anti-retaliation right are rooted in property rights protection. Thus, petitioners' alleged dichotomy between property rights and free speech rights is false. Second, the Framers intended that property rights were to be as vigorously protected as any other constitutionally protected right. Petitioners' arguments against the Constitution's robust protections of property rights put aside at least six material guarantees regarding property rights found in the

Bill of Rights alone. Finally, constitutional protection of property rights means more than just that the government must provide compensation for private property that it takes.

1. First Amendment Rights Are Rooted in Property Rights Protection

Petitioners argue that First Amendment rights are "supremely precious" and "delicate" and "vulnerable" and thus are afforded special protections not afforded to other constitutional rights, such as property rights. Pet. Br. at 37–38.

Petitioners' argument, however, is at odds with the property-rights pedigree of the First Amendment. As noted constitutional scholar, Professor John O. McGinnis, has observed, "[t]he United States was one of the first republics ever to enshrine freedom of speech in its Constitution, a freedom originally understood as rooted in an individual's natural property right in his information." John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 132 (1996). Professor McGinnis further notes that,

> the most sophisticated philosophical defense of the Whig theory of government and the primacy of property rights, namely John Locke's Second Treatise on Government, provided direct theoretical inspiration to James Madison-the drafter of the First Amendment. Indeed, the echoes of the Second Treatise in Madison's most extensive discussion of the philosophical wellsprings of the First Amendment make it obvious that he adapted Lockean principles to defend freedom of speech on the grounds

> that it was an aspect of the individual's property right in his information.

Id. at 60.

James Madison, the author of the First Amendment, was explicit in his intent to link property rights with free speech protection, an understanding that should not lightly be discarded:

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.

James Madison, *Property* (1792), *reprinted in James Madison: Writings* 515 (Jack N. Rakove ed., 1999).

Thus, petitioners are flat wrong in claiming that "the Fifth Amendment was not intended to encourage a particular type of expressive citizen activity that could be chilled if not robustly protected." Pet. Br. at 38. To the contrary, that is exactly what the Framers intended—to fully protect property rights, including free speech rights. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights."). Simply put, property rights and personal rights cannot be disjoined. Accordingly, if censorship can create a

"chilling effect" on free speech, certainly economic retaliation can have an equal effect on property rights.

2. The Framers of the Constitution Intended that Property Rights Be Vigorously Protected

The position taken by petitioners in this case, that property rights should not be as robustly protected as free speech rights because property rights "presuppose[] a degree of permissible governmental interference," is supported neither by the text nor the original understanding of the Constitution. Pet. Br. at 39. The Framers realized that robust protection of property rights fortifies liberty by diffusing power and protecting individual autonomy from government control. Indeed, as understood by the Framers, personal rights, such as free speech or privacy rights, were inseparable from property rights: "Government is instituted no less for the protection of property, than of the persons of individuals." *The Federalist No. 54* (James Madison); *see also* James Madison, Speech in the Virginia Constitutional Convention, *reprinted in James Madison: Writings* 824 (Jack N. Rakove ed., 1999) ("[T]he rights of persons, and the rights of property are the objects, for the protection of which Government was instituted. These rights cannot well be separated.").

In *Lynch v. Household Finance*, 405 U.S. 538 (1972), this Court likewise stated:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a personal right,

> whether the property in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither would have meaning without the other.

405 U.S. at 552 (citations omitted); *see also* Richard A. Epstein, *Takings* 138–39 (1985) ("Can anyone find a society in which freedom of speech flourishes where the institution of private property is not tolerated? A country in which there is a free nationalized press?").

Thus, although the word "property" does not appear in the Preamble of the Constitution,

> the Federalist Papers make it very clear that each objective enumerated in the Preamble involved, in part, the protection of the citizen's property rights. In fact, using the Madisonian conception that property includes all of the fundamental aspects of the integrity of the human person, life, liberty and property, the whole preamble is about protecting the citizens rights in property and property in rights.

Hon. Loren A. Smith, *Life, Liberty, & Whose Property?: An Essay on Property Rights*, 30 U. Rich. L. Rev. 1055, 1056 (1996). As constitutional scholar, Bernard H. Siegan wrote:

> Consistent with the prevailing ideas of their times, the Framers supported protection of private property rights as essential both to the fulfillment of the human condition and to the advancement of society. During the

> Constitutional Convention of 1787, Madison asserted that in civilized society the preservation of property, as well as other personal rights, was an essential object of the law. . . . A government "which [even] indirectly violates [individuals'] property in their actual possessions," concluded Madison, "is not a pattern for the United States." For him, protection of property was a necessary by-product of the freedom of action he deemed an essential part of liberty.

Bernard H. Siegan, *Property and Freedom* 14 (1997) (footnotes omitted).

Accordingly, it is no accident that the Bill of Rights contains a variety of interrelated rights (in addition to the Just Compensation Clause), a fair reading of which anchor a variety of personal liberties on the protection of property rights: the prohibition on infringing people's right to keep and bear arms (Second Amendment); the prohibition on quartering soldiers on private property (Third Amendment); the prohibition on unreasonable searches and seizures of property (Fourth Amendment); the prohibition on depriving any person of life, liberty, or property without due process of law (Fifth Amendment); the right to trial by jury for controversies exceeding twenty dollars (Seventh Amendment); and the prohibition of excessive bails and fines (Eighth Amendment). *See* Siegan, *Property and Freedom* at 20.

3. Constitutional Protection of Property Rights Means More Than Just That the Owner Gets Paid if the Government Interferes With His or Her Property Rights

Petitioners' suggestion that the constitutional protection of property rights only means that the government must pay the owner if the government decides to invade an owner's property rights trivializes beyond recognition the purpose behind property rights protection. The very structure of government was designed to ensure that the government would not nullify private property rights, so as to safeguard the civil liberties of the minority, or individual, against the majority:

> By consistent division of authority, the Founders sought to prevent concentration of governmental power against property rights. Under such division, the polity "will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority." The very structure of government would ensure that the rights of property would not be nullified "by the superior force of an interested and overbearing majority."

Bernard Schwartz, *The Rights of Property* 21 (1965) (footnotes omitted) (quoting *The Federalist Nos. 51* and *10* (J. Madison)).

"Because the Framers greatly valued the rights of property owners, they could not have envisioned a constitutional system in which the protection of property consisted of mere legal possession stripped of economic

value." James W. Ely, Jr., *Property Rights and Judicial Activism*, 1 Geo J. L. Pub. Pol'y 125, 127 (2002). Therefore, Madison warned people against government that "indirectly violates their property, in their actual possessions, in their labor that acquires their daily subsistence. . . ." James Madison, *Property* (1792), *reprinted in James Madison: Writings* 515 (Jack N. Rakove ed., 1999). What Madison feared "was not straightforward confiscation, but more indirect infringements." Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy* 30 (1990).

The purpose behind the inclusion of property rights protection in the Constitution was to ensure the existence of a free society. That purpose is not effectuated by merely requiring that the government provide just compensation—just compensation is only part of the constitutional protection. "Underlying all of our political and intellectual freedoms which make for a civilized society is a foundation of widely dispersed private property, and all the attributes of that system that Madison so clearly understood." Hon. Loren A. Smith, *Life, Liberty, & Whose Property?: An Essay on Property Rights*, 30 U. Rich. L. Rev. 1055, 1060 (1996). For Madison the requirement of just compensation evidenced "pride[] . . . in maintaining the inviolability of property." James Madison, *Property* (1792), *reprinted in James Madison: Writings* 515 (Jack N. Rakove ed., 1999). But more broadly for Madison, the just compensation requirement embodied a national commitment to personal freedom. Thus, "[i]n Madison's view, . . . enunciation of the just compensation principle in the Bill of Rights had extremely broad ramifications." William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694, 713 (1985).

C. No Reasonable Government Official Would Think He Could Retaliate Against Respondent for Exercising His Constitutional Right to Exclude

Implicit in the concept of ownership of property is the right to exclude others. Indeed, the right to exclude is one of the most fundamental of all property rights. *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."). As this Court held in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." 458 U.S. at 179–80; *see also College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others."). More recently, this Court explained in *Lingle v. Chevron USA, Inc*., 544 U.S. 528 (2005):

> physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering or using her property – perhaps the most fundamental of all property interests.

544 U.S. at 539.

As the right to exclude is well-recognized, it may not seriously be contended that it is not clearly established. Petitioner asserts, however, that any interference with this clearly established right short of actually taking

Respondent's property without providing just compensation is not unconstitutional such that it would support a *Bivens* action. Pet. Br. at 41–43. This is because, according to petitioner, property rights do not include a constitutional right to be free from retaliation for exercising them or, at the very least, the anti-retaliation right is not so clearly established that a reasonable government official would be aware of the right.

Petitioner's argument is incorrect in that as the right to exclude is clearly established, it is axiomatic that no objectively reasonable government official would think it was permissible to retaliate against a citizen for that citizen's exercise of the right to exclude. "It is well-established that a public official may not misuse his power against an individual for the exercise of a valid constitutional right." *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("An action taken in retaliation for the exercise of a constitutionally protected right is actionable. . . ."). Thus, it is clearly established that the property rights protection afforded by the Fifth Amendment includes the right to exclude, and it is clearly established that public officials may not retaliate against a citizen for the exercise of constitutional rights. Therefore, by deduction, the right to be free from retaliation for exercising the right to exclude is clearly established. Accordingly, as government officials are not entitled to qualified immunity for violating clearly established rights, petitioners do not have a qualified immunity defense to respondent's *Bivens* claim.

Although it is true that retaliation has to this point arisen most frequently in cases involving the First Amendment, there is no reason why the unconstitutional retaliation doctrine should not apply equally to all fundamental constitutional rights. As explained above,

property rights are every bit as fundamental as the First Amendment rights petitioners hold so sacrosanct. In fact, as discussed above, First Amendment rights are rooted in property rights protection and there is no meaningful way to distinguish between personal liberties and property rights. With this in mind, it is clear the general language of the rule against retaliation quoted above—it is well-established that a public official may not misuse his power against an individual for the exercise of a valid constitutional right—should apply as equally to the Fifth Amendment as it does to the First Amendment.

Embedded in petitioners' argument that only the First Amendment supports an anti-retaliation right is an assertion that the Tenth Circuit's analysis in this case is illegitimate judicial activism. However, the Tenth Circuit's recognition that retaliation may affect a citizen's property rights to the same degree as a citizen's First Amendment rights is but a modest step toward according property rights the same degree of judicial solicitude as other provisions of the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

II. Government Officials Can Be Guilty Under RICO for the Predicate Act of Extortion if Their Actions Take Private Property Rights Without Payment of Just Compensation

Petitioners are mistaken in their belief that the Fifth Amendment's protection of private property rights does not forbid the government (and its employees) from extorting private property from its citizens. Pet. Br. at 18–24. The

Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(a). Extortion under color of official right, is defined as "the use by a public official or employee of the power or authority of the office [he or she] occupies in order to obtain money, property, or something of value from another to which that government official or employee or *that government office have no official right*." 2A K. O'Malley, et al., *Federal Jury Practice & Instructions* § 53.09 (5th ed. 2006) (emphasis added).

Here, petitioners assert that their actions do not fit within the Hobbs Act framework for two reasons. First, petitioners assert that "an extortionist must actually obtain the victim's property for himself or another *private party*." Pet. Br. at 19 (emphasis added) (internal quotations omitted). Second, petitioners assert that the petitioners "did not seek anything that was 'not due' to the government" and, therefore, there was nothing unlawful about their actions. Pet. Br. at 21. Neither of these reasons exculpates petitioners' conduct in this case.

A. Petitioners' Conduct Constitutes Extortion Even if the United States Was the Intended Beneficiary

Contrary to petitioners' assertions, there is no compelling reason to exonerate petitioners' extortionate conduct simply because they sought the property at issue for the United States. This Court has previously held that "extortion as defined by the [Hobbs Act] in no way depends upon having a direct benefit conferred on the person who obtains the property." *United States v. Green*, 350 U.S. 415, 420 (1956). In other words, in determining whether an action is extortionate, the Court must recognize that the "gravamen of the offense is loss to the victim," *United States v. Frazier*,

560 F.2d. 884, 887 (1977), not the identity of the beneficiary. It is irrelevant under the Hobbs Act whether petitioners were motivated by an economic purpose; the text of the Hobbs Act contains no requirement of an economic motive. The definition of extortion under color of authority quoted above indicates this result explaining that the use of power or authority to obtain property for a "government office" constitutes extortion. *Federal Jury Practice & Instructions* § 53.09.

Were it otherwise, government officials and employees could hijack property owners under color of official right and not be guilty of extortion simply because the intended beneficiary was the United States. Extortion recognizes no exception, however, for the United States as the beneficiary of the extortionate action. Indeed, this Court and others have applied the concept of extortion to attempts to obtain property for the benefit of the government in a number of similar contexts. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

B. Petitioners' Actions Were "Wrongful" or "Unlawful" and, Therefore, Constitute Extortion

Petitioners concede that, properly construed, the Hobbs Act is violated upon the *unlawful* taking of property under color of official right: the Hobbs Act covers "those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *United States v. Enmons*, 410 U.S. 396, 400 (1973). Yet, that is exactly what has occurred here (or at least it is exactly what would have been the result of petitioners' actions had their scheme to extort an easement from respondent been successful). There is only one lawful

way for the government to take property—through providing just compensation. Anything short of providing just compensation to a property owner unwilling to part with his property is unconstitutional and, therefore, *unlawful*. As the taking of private property by the government without the payment of just compensation is unlawful or wrongful, by petitioners' own argument their actions constituted extortion.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court held that government officials can, even if carrying out otherwise legitimate public purposes (such as protecting visual access to the ocean), engage in actions so "completely adrift from [their] constitutional moorings" that those actions constitute "out-and-out extortion." *Id.* at 387 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14–15 (N.H. 1981) (stating that government officials "have a constitutional duty" to protect property rights and they "may not attempt to extort from a citizen a surrender of his right to just compensation for any part of his property that is taken from him for public use as a price for permission to exercise his right to put his property to whatever legitimate use he desires subject only to reasonable regulation"); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) ("The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury.").

Thus, this Court has observed on a number of occasions that, "[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Dolan, 512 U.S. at 396 (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922)).

In *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), this Court likewise faced an effort by the government to acquire an easement from a private landowner that refused to grant the easement to the United States:

> After negotiation with these owners failed, the Government cleared a dirt road extending from a local county road to the reservoir across both the public domain lands and fee lands of the Leo Sheep Co. It also erected signs inviting the public to use the road as a route to the reservoir.

Id. at 678.

The private landowner filed a quiet title action and this Court held that the government did not retain an implied access right across private property to reach its land, which was arranged in the checker-board configuration. Accordingly, the Court explained, the government was required to purchase any rights-of-way it wished to acquire. *Id.* at 687 ("When the Secretary of the Interior has discussed access rights, his discussion has been colored by the assumption that those rights had to be purchased."). Moreover, the Court stated that the private landowner was well within its rights to refuse to grant a right of way to the government unless the government paid just compensation. *Id.* at 686. The *Leo Sheep* Court held that the federal government was not entitled to claim an implied easement because the government's inherent power of eminent domain eliminates any need for an implied easement. That is, if the government needs access, it can always condemn a right-of-way. *Id.* at 680. ("Jurisdictions have generally seen eminent

domain and easements by necessity as alternative ways to effect the same result.").

Here, petitioners made no offer to purchase the access rights that the government wished to acquire from respondent. Rather, once respondent made clear that he would not transfer a public easement to the BLM (without payment of just compensation), petitioners embarked on a scheme to extort the property interest from respondent. *See, e.g.*, J.A. at 37.

The record shows that far from the innocuous "sort of give and take that is customary between neighboring landowners" that petitioners describe, Pet. Br. at 14–15, petitioners engaged in a concerted effort to obtain respondent's property rights by a shorter cut than the well-established constitutional way of paying for the property that the government seeks to acquire.

The government not only has a constitutional duty to purchase property that it desires and cannot acquire through voluntary agreement, the government, as a sovereign, has the ultimate right to acquire any property that it deems important to achieving a legitimate public purpose through its power of eminent domain. *Kelo v. City of New London*, 545 U.S. 469, 126 S. Ct 2655 (2005); *see also United States v. Carmack*, 329 U.S. 230, 236 (1946) ("If the United States has determined its need for certain land for a public use that is within its federal powers, it must have the right to appropriate that land. Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of Congress to his personal will."). The power of eminent domain is vested in the legislative branch, with oversight and review by the judicial branch. *Kelo*, 126 S. Ct. at 2664 ("For more than a century, our

public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."); *United States v. Parcel of Land with Improvements Thereon in Square South of 12*, 100 F. Supp. 498, 504 (D.C.D.C. 1951) ("While the power of eminent domain is an inherent right of sovereignty, it is not open to question that such power lies dormant until legislative action is had pointing out the occasions, modes, agencies and conditions for its exercise.").

The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1785, specifically authorizes the federal government to acquire (including through condemnation) access rights to public lands when necessary:

> Notwithstanding any other provisions of law, the Secretary, with respect to the public lands and the Secretary of Agriculture, with respect to the acquisition of access over non-Federal lands to units of the National Forest System, are authorized to acquire pursuant to this Act by purchase, exchange, donation, or eminent domain, lands or interests therein: Provided, That with respect to the public lands, the Secretary may exercise the power of eminent domain only if necessary to secure access to public lands, and then only if the lands so acquired are confined to as narrow a corridor as is necessary to serve such purpose.

43 U.S.C. § 1715(a). Accordingly, rather than engaging in the systematic harassment of respondent, the only lawful avenue petitioners had to acquire an easement from respondent (who was unwilling to enter into a voluntary

agreement) was to acquire the easement through FLPMA. Rather than using the authority granted to petitioners in FLPMA, however, petitioners wrongfully and unlawfully attempted to extort an easement from respondent.

CONCLUSION

For all of these reasons, the decision by the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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