No. 06-219

In the Supreme Court of the United States

CHARLES WILKIE, ET AL., PETITIONERS

v.

HARVEY FRANK ROBBINS

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

BRIEF FOR THE PETITIONERS

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QUESTIONS 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.

PARTIES TO THE PROCEEDINGS

Petitioners are Charles F. Wilkie, Darrell C. Barnes, Teryl Shryack, Michael Miller, Gene J. Leone, and David L. Wallace. Respondent is Harvey Frank Robbins, Jr.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 433 F.3d 755. An earlier opinion of the court of appeals (Pet. App. 76a-84a) is reported at 300 F.3d 1208. The opinion of the district court (Pet. App. 27a-48a) is unreported. An earlier opinion of the district court (Pet. App. 49a-75a) is reported at 252 F. Supp. 2d 1286.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 2006. A petition for rehearing was denied on March 14, 2006 (Pet. App. 85a-86a). 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, and the petition was filed on that date. The petition for a writ of certiorari was granted on December 1, 2006. The jurisdiction of this Court rests on 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. To this day, much of the American West resembles a complex checkerboard of intermingled parcels of federal, state, and private lands. See *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979). The management of those lands, along with attendant resources such as wildlife, land values, grazing

allotments, and livestock, presents unique challenges for federal officials and depends on negotiation and cooperation between federal, state, and private landowners. Under its Property Clause power, Congress has enacted numerous statutes governing the use and management of federal lands. Pursuant to those laws and implementing regulations, the federal government has granted private landowners thousands of rights-of-way and grazing permits to enable them to access and use public lands for particular purposes. In turn, private landowners have agreed through reciprocal rights-of-way and other instruments to grant federal officials the access needed over private lands to reach and manage public lands. Both the federal government and private landowners alike benefit from those arrangements. Indeed, given the interspersed nature of lands, public as well as private land use in the West would be severely impeded in many areas without such give and take.

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 or undue degradation of the lands." 43 U.S.C. 1732(b). Similarly, under 43 U.S.C. 315, 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 the Secretary may grant rights-of-way to business entities, among others, and "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) (2004). When it determines it to be in the public interest, BLM may require persons applying for a right-of-way over public land to give the government an "equivalent right-of-way that is adequate in duration and rights." 43 C.F.R. 2801.1-2 (2004).[1]

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). Because BLM must often cross private lands to access public land, BLM would not be able to carry out its statutory management duties without such reciprocal rights.

BLM actions are subject to a comprehensive system of 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.* *See Hoyl* v. *Babbitt*, 129 F.3d 1377, 1382 (10th Cir. 1997).

2. This case involves an expanse of land in Hot Springs County, Wyoming, located near the foot of Washakie Needles Peak and buttressed by the Shoshone National Forest to the west and the Wind River Indian Reservation to the south. As illustrated by the map reproduced on page 136 of the Joint Appendix, the area consists of scores of intermingled parcels

[1] The regulations were altered in 2005, but analogous provisions are currently set forth in, *inter alia*, 43 C.F.R. 2801.2, 2804.25(d)(3), and 2805.12(i)(7).

of federal, state, and private lands and is divided up into various grazing allotments managed by BLM. The area also has significant natural resources, including wildlife such as elk, mule deer, pronghorn antelope, prairie dog colonies, and sage grouse, that BLM is responsible for managing along with other federal officials.

A privately owned cattle ranch—the High Island Ranch—runs for miles through the heart of this area, intersecting federal and state lands, as well as other private lands, and spanning several grazing allotments. In many places, it is not possible to get from one part of the ranch to another without crossing federal, state, or other private land. A dirt road known as South Fork, Owl Creek Road (denoted as BLM 1310 on the map, J.A. 136) wanders generally westward from a county road (County Road 29) several miles to the east along the southern portion of the ranch. Along the way the road crosses federal, state, and private land. The road is the only access route for parts of the ranch as well as public lands intermingled with the ranch. J.A. 45-46.

The High Island Ranch is a working cattle ranch that also has engaged in commercial operations including a guest ranch offering cattle drives and a big game hunting outfit. Because the ranch is interspersed with public lands and has used large tracts of public lands as part of its commercial and private ranching operations, a mutually beneficial legal relationship developed between the government and the previous owner of the ranch. BLM granted George Nelson, who owned the ranch before 1994, a livestock grazing permit, a special recreational use permit (SRP) enabling him to conduct guest activities including cattle drives and hunting on public lands, and a right-of-way allowing him to use and perform maintenance on South Fork, Owl Creek Road on a 53-acre portion of public lands. See Pet. App. 28a-29a; J.A. 97-103. In exchange, Nelson agreed to various conditions on the use of public lands. In addition, he granted the United States a reciprocal right-of-way in the form of a nonexclusive easement to use and main-

tain the South Fork, Owl Creek Road on a 15.5-acre stretch of the ranch's land. J.A. 90-93.

Respondent acquired the High Island Ranch from George Nelson in May 1994. Pet. App. 28a. While respondent sought to continue to utilize the grazing permits, SRPs, and right-of-way that BLM granted Nelson in order to conduct his commercial and private ranching activities on public lands, respondent wanted none of the reciprocal arrangements that had accompanied those privileges. An issue quickly arose over the right-of-way over South Fork, Owl Creek Road. When Nelson acquired the right-of-way over the road on public land, he signed a document granting the United States a reciprocal right-of-way over the road on his land. But, apparently because a corporate seal was missing, BLM returned that document to Nelson. Before Nelson sent the document to BLM 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. *Id*. at 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 on federal land. 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 any such 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. C.A. App. 49. "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) (2004), 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. *Id.* at 48.

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." *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. 4130.3-2(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 BLM's administrative access over the ranch constitutes a taking under the Fifth Amendment. *Id.* at 62. Respondent did not seek judicial review of those orders.

Respondent also had a dispute with BLM over his SRP. Respondent had assumed 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 BLM's denial of the renewal 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), and under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, charging BLM employees with seeking 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), 28 U.S.C. 1346, precluded a *Bivens* cause of action in this context. J.A. 33-40.

The court of appeals reversed and remanded. Pet. App. 76a-84a (*Robbins I*). First, it held that respondent had adequately pleaded damages in support of his RICO claim. *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, the court further held that, because the APA does not provide a remedy "for constitutional violations committed by individual federal employees unrelated to final agency action," respondent's allegations of misconduct "unrelated to any final agency action" are "properly within the scope of a *Bivens* claim." *Id.* at 81a-82a. The court also rejected the argument that respondent's *Bivens* claim was "precluded by potential claims under the FTCA." *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. Pet. App. 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 state law. Pet. App. 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 right 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 L. 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. Pet. App. 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." Pet. App. 10a-11a. The court rejected petitioners' threshold contention that respondent's *Bivens* claim is completely precluded by the APA, pointing to its decision in the prior appeal in this case. *Id.* at 25a.

As to the merits of the *Bivens* claim, the court acknowledged that "the government has not effected a taking in this case," but nonetheless held that respondent had pleaded a violation of a clearly established Fifth Amendment right. Pet. App. 13a. The court explained that the Fifth Amendment not only protects a "right to exclude" the government from one's property by requiring just compensation, but "prevent[s] 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."). And, according to the court, that "Fifth Amendment right" 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." Pet. App. 15a. Although the court recognized that there was no precedent supporting a right against retaliation for the exercise of a Fifth Amendment right, the court pointed to a Tenth Circuit retaliation case in the First Amendment context and held that a plaintiff need only show "that the right retaliated against be clearly established." *Id.* at 16a. The court, therefore, held that petitioners were not entitled to qualified immunity on the *Bivens* 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." Pet. App. 18a. The court also concluded that respondent had stated a RICO predicate act of extortion under Wyoming law. *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.

SUMMARY OF ARGUMENT

The court of appeals' decision in this case subjects federal officials to damages actions and threat of personal liability under RICO and *Bivens* for carrying out their regulatory duties to manage public lands. That decision represents an unprecedented expansion of RICO, *Bivens*, and the Fifth Amendment, contravenes settled qualified immunity principles, and should be reversed by this Court.

I. Petitioners did not violate RICO or any clearly established right against extortion in attempting, through the exercise of their lawful regulatory authority, to secure a reciprocal easement for the United States in exchange for the right-of-way that BLM granted respondent over public lands. RICO —an organized crime statute—was never designed to reach federal officials acting to further legitimate governmental aims. In addition, to establish the predicate offense of extortion, a plaintiff must show both that government officials act with a "wrongful" intent, *i.e.*, that they seek something of value that they are not due in exchange for official conduct, and that the officials actually "obtain" something of value for the private benefit of themselves or another. Both of those traditional elements of the common law offense of extortion are absent here.

Petitioners did not take any of the alleged actions based on a "wrongful" intent to obtain property, and, more to the point, the court of appeals assumed that all of petitioners' actions were within their regulatory authority. Moreover, in seeking a reciprocal easement, petitioners did not seek anything that was not "due" to them or BLM. To the contrary, it is well-established that BLM may require persons who apply for rights-of-way over public land to agree to grant the government a reciprocal easement over private land. Likewise, petitioners did not "obtain" any property through their official conduct for the private gain of themselves or another.

They sought the reciprocal easement at issue for "the UNITED STATES OF AMERICA, and its assigns." J.A. 86.

Regulators who act within their lawful authority and seek to obtain property on behalf of the United States are neither racketeers nor extortionists. There are numerous checks in place to deter and prevent overzealous regulation, including the APA. But Congress never intended to subject aggressive regulators to the threat of personal liability and treble damages under RICO. The court of appeals' decision extending RICO to such conduct not only represents a radical extension of RICO, but threatens to chill government officials in a broad range of regulatory contexts from engaging in appropriate and vital regulatory actions, including the negotiation of reciprocal rights to facilitate access to and management of the millions of acres of public lands in the West that are intermingled with private lands.

II. Respondent's unprecedented *Bivens* claim based on the alleged violation of his Fifth Amendment "right to exclude" the government from his property fares no better. As a threshold matter, this Court has repeatedly refused to extend the constitutional cause of action inferred in *Bivens* to new contexts and there is no reason to reverse course here. Indeed, claims—like respondent's—grounded on the Fifth Amendment's Just Compensation Clause are fundamentally incompatible with *Bivens* because that Clause itself specifies a money remedy, *i.e.*, "just compensation," and for nearly 200 years before the *Bivens* decision was handed down Congress created specific mechanisms for dealing with takings and just compensation claims that did not require the courts to infer a direct cause of action in the courts.

Moreover, the APA's comprehensive scheme for challenging agency action in itself precludes a *Bivens* action over the types of agency actions at issue, which respondent had an opportunity to challenge—and in numerous respects did challenge—before the agency with a right of APA review in the courts. Although the APA does not permit challenges to

non-final agency action, there is no basis to infer a constitutional *Bivens* action to cover actions that Congress deemed to be too premature or insignificant to warrant a judicial remedy under the APA. A *Bivens* action was designed to provide a remedy for a victim for whom it was damages or nothing; it is not a gap-filler for perceived holes in the APA.

In any event, even if this Court were to extend *Bivens* to this new context, the court of appeals erred in holding that the Fifth Amendment embodies an anti-retaliation right, much less that such a Fifth Amendment right was clearly established. The constitutional retaliation doctrine has thus far been limited solely to the First Amendment context. That squares with the special nature of expressive activity and the unique concerns that this Court has identified about chilling such activity. Those concerns are absent or greatly reduced in the Fifth Amendment context because the textual guarantee of "just compensation" itself provides a powerful incentive for vindicating Fifth Amendment rights, and the Fifth Amendment tolerates a broad degree of government interference that is wholly alien to the First Amendment. While the Fifth Amendment does not confer an anti-retaliation right, the First Amendment protects individuals who petition the government for redress of alleged Fifth Amendment violations. No such First Amendment claim, however, is presented here.

Furthermore, respondent has not alleged the violation of any substantive right protected by the Fifth Amendment's Just Compensation Clause. Respondent has made clear that he is not alleging that any of his property rights have been *taken* by the government. Instead, he claims that he is entitled to enjoy a right-of-way over *public* land (along with other privileges such as grazing rights and special use permits for the use of public land) while refusing to grant the government a reciprocal easement over his own land. This Court has never held that the Fifth Amendment erects a constitutional barrier to the sort of give and take that is customary between

neighboring landowners. Indeed, in *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 681 (1979), the Court specifically envisioned that "negotiation" and "reciprocity considerations" would be utilized to ameliorate disputes concerning interlocking parcels of public and private lands. Nothing in the Fifth Amendment or this Court's cases confers upon respondent the right to use public lands for his private benefit while denying BLM the reciprocal right-of-way it seeks to manage and protect interlocking public lands.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REJECTING PETITIONERS' QUALIFIED IMMUNITY DEFENSE TO RESPONDENT'S RICO CLAIM

RICO provides civil remedies for "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C.] 1962." 18 U.S.C. 1964(c). Section 1962 in turn makes it unlawful, *inter alia*, for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). Racketeering activity includes extortion as defined under the Hobbs Act, 18 U.S.C. 1951(b)(2), and "any act or threat involving * * * extortion * * *, which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. 1961(1)(A) and (B).

The court of appeals held that a RICO predicate act of extortion under the Hobbs Act or state law may be shown by allegations that government officials, whose actions were authorized by law, had an extortionate intent to obtain property for the sole benefit of the government and the public, with *no allegation that they sought any private gain* for themselves or another. That holding expands RICO to an entirely new context and disregards essential requirements of the predi-

cate offense of extortion. Aggressive regulators are already subject to the check of review under the APA or the statute authorizing agency action, as well as by government ethics requirements, inspectors general, and other protections against government misconduct. The enormous threat of personal RICO liability was never designed to check overzealous regulation in itself. Thrusting RICO into this context would chill government officials in a broad range of regulatory contexts from engaging in appropriate and vital regulatory actions.

A. Government Officials Do Not Become Racketeers Or Extortionists Merely By Taking Overzealous Regulatory Actions

The court of appeals' RICO decision underscores the growing concern that civil RICO has evolved far beyond its animating concern—combating organized crime. See *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 2004 & n.7 (2006) (Thomas, J., concurring in part and dissenting in part). Whatever the outer boundaries of RICO outside the organized-crime context, there is no evidence that the Congress that enacted RICO sought to hamstring the ability of the federal government to regulate by subjecting individual federal officers—even overzealous regulators—to the threat of treble damages and personal liability for acting within their lawful regulatory duties in order to advance the legitimate interests of the government, as opposed to their own personal interests. Moreover, even apart from the limits of the RICO cause of action itself, the predicate act of extortion has never been available for the type of regulatory conduct at issue in this case.

The predicate act of extortion under color of official right addresses the classic situation of abuse of public office for *private* gain. It addresses the *corrupt* public official, not the overzealous regulator. An elaborate web of administrative law is addressed to the latter problem, but it is not the proper

target of the criminal law or civil RICO liability. Where government officials acting pursuant to their authority act unreasonably or exceed legal limits in seeking a benefit for the government or the public, any individual harmed by their conduct may seek to block those actions in administrative proceedings or in court under the APA or other statutory review mechanisms. But they may not hold those officials personally liable for treble damages under RICO. RICO liability is far too blunt an instrument to be used as a check on administrative overreaching, and it was never designed to do so. Fear, violence, and corruption are the trademarks of the prototypical extortionist or racketeer, not due process, elaborate procedural protections, and the right to judicial review.[2]

It is not surprising, therefore, that the one court of appeals that has addressed the application of RICO to a claim of overzealous regulation found such an application to be "ludicrous on its face." *Sinclair* v. *Hawke*, 314 F.3d 934, 943 (8th Cir. 2003). In *Sinclair*, the Office of the Comptroller of the Currency took increasingly severe actions against a bank, eventually threatening to issue a safety and soundness order that would have made it difficult for the bank to undertake the kind of lending it planned to engage in and later issuing a notice of charges against the bank. The Eighth Circuit characterized the question before it as "whether Congress has authorized wide-ranging judicial review of regulators' motives in personal damage actions [under RICO] that might have a chilling effect on their willingness to aggressively" carry out their regulatory functions. *Id.* at 939. The court rejected the

[2] In this case, respondent blocked the government's request for a reciprocal easement by simply refusing to agree to it. Respondent also had the right to administrative and judicial review of BLM's decision to cancel the right-of-way the ranch had obtained under previous ownership, but he did not exercise that right. He did seek administrative (but not judicial) review of other actions by the government and raised the "blackmail" (*i.e.*, extortion) argument, unsuccessfully, before the IBLA. See Part II.A, *infra*.

bank's RICO claim, holding 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. *Id.* at 943. In other words, the court declared, "regulators do not become racketeers by acting like aggressive regulators." *Id.* at 944.

By holding otherwise, the court of appeals below has exposed BLM and Forest Service officials like petitioners who regulate intermingled public lands; bank regulators like the defendants in *Sinclair*; and potentially countless other government officials who negotiate with private parties on behalf of the government to extortion charges under RICO, along with the prospect of personal liability and treble damages, for taking tough regulatory actions or driving hard bargains, even if the officials have no personal interest in the property they seek on behalf of the government. There are many reasons to discourage overzealous regulatory behavior and, accordingly, there are many statutory and regulatory checks on such conduct (including administrative and judicial review under the APA), but nothing in law or logic supports the conclusion that Congress sought to capture—and, indeed, criminalize—such conduct under RICO.

B. Extortion Requires Showing Both That Government Officials Acted With "Wrongful" Intent And That They "Obtained" A Private Benefit For Themselves Or Others

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). A distinguishing feature of extortion, therefore, is the conditioning of an official act on *private* gain, and it is precisely the taking of property "not due" to the individual official in exchange for official conduct that renders the individual officer's action "wrongful." See *id.* at 260 n.4 ("Blackstone described extortion as 'an abuse of public jus-

tice, which consists in an officer's unlawfully taking, *by colour of his office*, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.' 4 W. Blackstone, Commentaries *141."); *Scheidler* v. *National Org. for Women, Inc.*, 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.") (emphasis added). Where a "wrongful" or extortionate intent is lacking, government officials may still be guilty of overreaching or otherwise acting unreasonably or unlawfully, but they are not guilty of extortion.[3]

2. Another critical difference between an overzealous regulator and an extortionist is that an extortionist must actually "obtain" the victim's property for himself or another private party. *Scheidler*, 537 U.S. at 404; see *United States* v. *Gotti*, 459 F.3d 296, 324-325 (2d Cir. 2006) (holding that extortionist must "obtain the right for himself, rather than merely to deprive the victim of that right"). Both of the sources of law that Congress used in drafting the Hobbs Act—the Penal Code of New York and the Field Code—defined extortion as

[3] The requirement that the government official act with a "wrongful" or extortionate intent is well established. One of the New York statutes upon which the Hobbs Act was modeled, for example, provided that an individual committed extortion "under color of official authority" only if he acted "unlawfully," as well as "maliciously," in seizing or injuring another's property. N.Y. Penal Law § 854 (Consol. 1909). See, *e.g.*, *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973) ("extortion requires an intent 'to obtain that which in justice and equity the party is not entitled to receive' ") (quoting *People* v. *Cuddihy*, 271 N.Y.S. 450, 456 (Gen. Sess. 1934)); 11th Cir. Pattern Crim. Jury Instr., Offense Instr. 66.2 ("Extortion 'under color of official right' is the wrongful taking or receipt by a public officer of property not due to the officer knowing that the payment or property was taken or received in return for [performing] [withholding] official acts. The term 'wrongful' means to obtain property unfairly and unjustly by one having no lawful claim to it.").

"the *obtaining* of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." *Scheidler*, 537 U.S. at 403 (citing 4 Commissioners of the Code, *Proposed Penal Code of the State of New York* § 613 (photo. reprint 1998) (1865) (*Field Code*); N.Y. Penal Law § 850 (Consol. 1909)) (emphasis added). The Field Code expressly described extortion, along with three other property crimes—robbery, larceny, and embezzlement—as involving "the criminal acquisition of * * * property." *Field Code* § 584 note, at 210. And "New York case law before the enactment of the Hobbs Act demonstrates that this 'obtaining of property' requirement included both a deprivation and *acquisition* of property." *Scheidler*, 537 U.S. at 403 (emphasis added) (citing *People* v. *Ryan*, 133 N.E. 572, 573 (N.Y. 1921); *People* v. *Weinseimer*, 102 N.Y.S. 579, 588 (App. Div.) (noting that in an extortion prosecution, the issue that must be decided is whether the accused "receive[d] [money] from the complainant"), aff'd, 83 N.E. 1129 (N.Y. 1907)). Thus, as this Court reiterated in *Scheidler*, "[e]xtortion under the Hobbs Act requires a '"wrongful" *taking* of . . . property.'" 537 U.S. at 404 (quoting *United States* v. *Enmons*, 410 U.S. 396, 400 (1973)) (emphasis added in *Scheidler*).

The case law does not always require that the official himself benefit from the extortion; there may be extortion if payments are made to a third party at the official's direction. Cf. *United States* v. *Green*, 350 U.S. 415, 420 (1956) (extortion by union through threats of force) ("extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property"); *United States* v. *Clemente*, 640 F.2d 1069, 1079-1080 (2d Cir.) (aiding payment of kickbacks to another), cert. denied, 454 U.S. 820 (1981). But the gravamen of extortion under color of official right historically has been and remains the abuse of public office for *private* gain. See *United States* v. *Deaver*, 14 F. 595, 597 (W.D.N.C. 1882) (explaining that, under the "technical meaning [of extortion] in the common law, * * * [t]he

officer must unlawfully and corruptly receive such money or article of value *for his own benefit* or *advantage*").

C. Petitioners Did Not Act With A "Wrongful" Or Extortionate Intent And Did Not "Obtain" Any Property For The Private Benefit Of Themselves Or Others

1. Petitioners did not take any action based on a "wrongful" intent to obtain property not due to them in exchange for official actions. Indeed, the court of appeals assumed that petitioners' actions were within their regulatory authority. Pet. App. 17a-18a ("Although Defendants do not enumerate specific regulatory provisions permitting each of their actions, the regulatory authority may exist."). But it nevertheless held that the allegation of an intent to "extort" made their conduct actionable. *Id.* at 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."). That was error. Where, as here, government officials act within their regulatory authority—as the court of appeals expressly assumed—and seek to benefit only the government and the public, they act precisely how government officials are expected to act, and there is nothing remotely "wrongful" or extortionist about their actions or intent.

That is particularly true in the context of this case, where, as authorized by regulation, the government sought to obtain reciprocal treatment of interlocking parcels of land. Petitioners did not seek anything that was "not due" to the government. As discussed above, it is well-established that BLM may require persons applying for a right-of-way over *public* land to agree to give the government a reciprocal easement over private land, and that, where private individuals refuse to grant such reciprocal rights, the government may deny them a right-of-way over public land. See pp. 3-7, *supra*. Respondent has never directly challenged the lawfulness of that common-sense regulatory regime in this litigation. In-

stead, his claim is predicated on the extravagant notion that it was extortionate for petitioners even to seek reciprocity.

The government, no less than a typical property owner, may seek through lawful means to encourage a neighboring property owner to agree to a reciprocal property right. The government may have more means at its disposal in negotiating such an arrangement than the typical private property owner, and that may justify a legislature 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 by government officials to obtain reciprocal property rights for the benefit of the public into RICO extortion or, as discussed in Part B, *infra*, a *Bivens* claim.[4]

2. Nor did petitioners "obtain" anything of value through their regulatory actions either for their private benefit or the benefit of another. There has never been an allegation in this case that any individual sought or received a benefit as a result of petitioners' administrative actions, and no individual gained or sought to gain any control over respondent's property. Nor could such an allegation have been made. The reciprocal easement, if granted, would have benefitted only "the

[4] Of course, when it comes to managing public lands, the federal government does stand in different shoes than the typical property owner in an important respect. As this Court has held, the Property Clause gives the federal government broad power over public lands, including the power "to control their occupancy and use, to protect them from trespass and injury and to prescribe conditions upon which others may obtain rights in them." *Kleppe* v. *New Mexico*, 426 U.S. 529, 540 (1976) (quoting *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405 (1917)). Moreover, the government has a duty to manage and protect the Nation's public lands. The facts that this case arises over a dispute involving the management of public lands and that respondent essentially claims a right of access to public lands without having to agree to traditional conditions placed on their use therefore only bolsters the legitimacy of petitioners' actions.

UNITED STATES OF AMERICA, and its assigns," not petitioners or any other individual. J.A. 86.

Petitioners, therefore, are even further removed from the plain terms and purposes of RICO and the Hobbs Act than the petitioners in *Scheidler*, who the Court recognized personally exercised some degree of control over the abortion clinic's business as a result of their illegal and violent acts, even if they did not "obtain" property within the meaning of the Hobbs Act. See 537 U.S. at 404-406 (discussing distinction between extortion and "coercion," a separate common-law offense). Thus, the Court explained that the petitioners in that case "may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property" because they "neither pursued nor received 'something of value from' respondents that they could exercise, transfer, or sell." *Id.* at 405 (citation omitted). While this case may concern a more tangible property interest than the interest involved in *Scheidler*, there is not even an allegation that petitioners here—government officials acting within the scope of their regulatory authority to protect and further the interests of the government and the public—pursued or received something of value from respondent that they themselves "could exercise, transfer, or sell." The only thing of value underlying respondent's extortion claim is a reciprocal easement for "the UNITED STATES OF AMERICA, and its assigns." J.A. 86. At no point could petitioners, either individually or collectively, have exercised, transferred, or sold the United States' easement.[5]

[5] In *Scheidler*, the Court refused to replace the Hobbs Act's requirement "that property must be obtained from another * * * with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion." 537 U.S. at 405. Thus, the Court concluded that there was "no basis" to find that the petitioners committed extortion, even though there was "no dispute * * * that petitioners interfered with, disrupted, and in some instances completely

D. The Regulatory Actions At Issue Cannot Support A Claim Of Extortion In Any Event

The specific regulatory actions respondent alleges do not support his claim of extortion for additional reasons. He alleges (Br. in Opp. 10-11) that government employees trespassed on his land, but trespass is not in its nature extortionate. Moreover, what underlies his claims of trespass by BLM officials is really his disagreement with formal IBLA adjudications concerning certain terms in grazing and special recreation permits granting BLM rights to administrative access over respondent's land to inspect interlocking parcels of public land and ensure proper compliance with the limitations contained in the permits. See *Frank Robbins*, 154 I.B.L.A. 93, 95-96 (2000) (describing, *inter alia*, respondent's repeated efforts, in direct violation of IBLA orders, to interfere with BLM's management and protection of interspersed public lands by filing notices of trespass against BLM employees with the local sheriff); see also C.A. App. 61 (noting respondent's continued and mistaken assertion that authorized administrative access over respondent's land to reach interlocking parcels of public lands without prior written consent constituted trespass). BLM's right to such administrative access was established over respondent's objections through proper

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deprived respondents of their ability to exercise their property rights." *Id*. at 404, 409. Such interference, the Court held, might be covered by the "separate crime of coercion," but because the "petitioners did not 'obtain' respondents' property," they could not be guilty of extortion. *Id*. at 405. The RICO extortion claim in this case fails for the same reasons. Indeed, respondent's action is premised on the fact that the government has *not* taken his property, and instead that all of the "actions [at issue] were taken as part of an ongoing scheme to *coerce* [respondent] to grant the BLM an easement." J.A. 76 (emphasis added); see J.A. 77. Thus, even if it were true that petitioners "interfered with, disrupted, and in some instances completely deprived respondent[] of [his] ability to exercise [his] property rights," under *Scheidler* there would be "no basis" upon which to find extortion. 537 U.S. at 404, 409.

administrative proceedings, and respondent declined to invoke his APA right to challenge the results of those proceedings in court.

Respondent also alleges (Br. in Opp. 10-11) that petitioners caused a false criminal charge to be filed against him. But his malicious prosecution claim was resolved against him by the district court, see Pet. App. 62a-67a, and he has not challenged that holding on appeal. Moreover, after respondent was acquitted on the criminal charge at issue, he sought attorney's fees on the ground that the government's position was "vexatious, frivolous, or in bad faith," Act of Nov. 26, 1997, Pub. L. No. 105-119, § 617, 111 Stat. 2519 (18 U.S.C. 3006A note). The district court rejected his claim, finding that his allegations of bad faith and improper motive "obviously do not meet the most liberal reading of the requirements for recovery" under the statute. *United States* v. *Robbins*, No. 97-CR-0092, slip op. at 9 (D. Wyo. Apr. 8, 1998) (order denying application for attorney's fees and costs). The court further held that respondent "simply failed to make any showing that the Untied States' position was without color or was baseless, was asserted to harass [respondent], or was asserted for any other improper or malicious purpose." *Id*. at 13. Accordingly, respondent's claim of false criminal charges could not support his extortion claim either.

The central harm that respondent alleges in his RICO and *Bivens* claims stems from BLM's administrative decisions to cancel his right-of-way on interlocking government lands and his grazing and special use permits on government land. The fundamental premise of this action is that petitioners took those regulatory actions to coerce respondent into granting the government a reciprocal easement on his land. See J.A. 76 (Complaint). But it is too late for respondent to allege in this action that the government improperly cancelled his easement and special use and grazing permits. If, as respondent alleges, those actions were taken without authority or were otherwise illegal, he could have challenged them through tra-

ditional administrative and judicial avenues when the actions were taken. Having either failed in or passed on his challenges to the very regulatory actions at issue here through appropriate and timely administrative and judicial means, he cannot now use those actions as the basis for his RICO and *Bivens* claims. See, *e.g.*, *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 421 (1966) (applying *res judicata* principles to issues litigated in federal administrative proceedings); accord *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 484-485 n.26 (1982); *University of Tenn.* v. *Elliott*, 478 U.S. 788, 797-798 (1986); see also Part II.A., *infra*.[6]

E. At A Minimum, Petitioners Did Not Violate Any Clearly Established RICO Right

For the foregoing reasons, petitioners did not violate respondent's rights under RICO. But even if this Court disagrees, petitioners are still entitled to qualified immunity because, at a minimum, they did not violate any *clearly established* rights. See *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). A right is clearly established only if "in the light of preexisting law the unlawfulness [is] apparent." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (citation omitted). That is, "[t]he relevant, dispositive inquiry in determining whether a right is

[6] Respondent's allegation that petitioners also violated Wyoming's extortion law adds nothing material to the RICO analysis. As the court of appeals recognized, the Wyoming offense could constitute a predicate act for RICO purposes only to the extent that it encompasses the generic offense of extortion, which is the same offense contained in the Hobbs Act. Pet. App. 24a; see *United States* v. *Nardello*, 393 U.S. 286, 290 (1969) (holding that a state offense cannot qualify as a predicate act unless it is capable of being "generically classified as extortionate"); *Scheidler*, 537 U.S. at 409-410 (same). Thus, for RICO purposes, any differences between the Hobbs Act and Wyoming's extortion statute are irrelevant, and the absence of any wrongful intent or effort by petitioners to seek private gain forecloses any RICO extortion claim. Moreover, given that petitioners acted at all times pursuant to their federal regulatory authority, they could not be charged for a state law extortion offense in any event. See *In re Neagle*, 135 U.S. 1, 75 (1890).

clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier*, 533 U.S. at 202 (emphasis added). Respondent cannot come close to that threshold. No other court has held that land management officials may be held liable under RICO for seeking to obtain a *reciprocal* right-of-way on behalf of the *government*, and, as noted, the one court of appeals to have addressed the application of RICO to a claim of overzealous regulation found such an application to be "ludicrous on its face." *Sinclair*, 314 F.3d at 943.

Accordingly, petitioners had no reason to believe that they were violating RICO or any clearly established right against extortion in attempting to obtain a reciprocal easement for the United States through the exercise of their lawful regulatory authority. To the contrary, they were acting consistent with the well established statutory and regulatory guidelines for managing public lands. See pp. 3-4, *supra*.

II. THE COURT OF APPEALS ERRED IN REJECTING PETITIONERS' QUALIFIED IMMUNITY DEFENSE TO RESPONDENT'S *BIVENS* CLAIM

A. The Fifth Amendment, Tucker Act, And APA Preclude A *Bivens* Cause Of Action In This Context

Respondent's *Bivens* claim under the Fifth Amendment is precluded by the availability of judicial review under the APA and the Tucker Act, and by the nature of the Fifth Amendment right itself. At the very least, there are powerful reasons counseling hesitation in fashioning such a remedy. In the nearly 40 years since *Bivens* was decided, there is no precedent permitting a *Bivens* action against individual government employees for a violation of the Fifth Amendment's Just Compensation Clause. Indeed, only one circuit court has even been willing to assume *arguendo* that such an action was available. *F.E. Trotter, Inc.* v. *Watkins*, 869 F.2d 1312, 1314 (9th Cir. 1989) ("Although we are unaware of any case extend-

ing *Bivens* to the fifth amendment's takings clause, we will assume without deciding that a *Bivens* action is also available under that constitutional provision."). The complete absence of Just Compensation/*Bivens* claims in the last 40 years reflects the reality that the Just Compensation Clause uniquely spells out the need for reimbursement and that Congress provided alternative mechanisms to provide just compensation for nearly 200 years before *Bivens* was decided. There has never been any need for the courts to create a judicial remedy in this context. Moreover, even aside from the mismatch between the Fifth Amendment's just compensation right and the *Bivens* remedy, the availability of APA review precludes respondent's *Bivens* action in its entirety. A *Bivens* remedy is not available to fill perceived gaps in the APA; this Court has reserved the step of inferring a cause of action for circumstances in which it was damages or nothing. Because respondent's novel *Bivens* action is precluded in its entirety, it must be dismissed.

1. A Bivens *action is inconsistent with claims under the Fifth Amendment's Just Compensation Clause*

Bivens is fundamentally ill-suited for claims, like respondent's, founded on the Just Compensation Clause of the Fifth Amendment.[7] In *Bivens*, the Court inferred a cause of action against federal officers for money damages for violations of the Fourth Amendment. In doing so, the Court observed that "the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for consequences of its violation." 403 U.S. at 396. Unique among the

[7] Respondent's complaint grounds his *Bivens* claim in the "Fifth Amendment * * * 'right to exclude others from private property.'" J.A. 78. That right must derive from state law, not the Just Compensation Clause, which simply requires the payment of just compensation as a condition on the lawful acquisition of property by the federal government. As discussed below, however, the Fifth Amendment does not protect against the alleged wrongs in this case.

Bill of Rights, however, the Fifth Amendment's Just Compensation Clause explicitly specifies a payment of money (or its equivalent)—*i.e.*, "just compensation"—as a condition that must be satisfied for a taking of property by the government to be lawful. Accordingly, for over 100 years before a damages remedy was inferred by this Court in *Bivens*, Congress has provided specific mechanisms to effectuate the constitutional guarantee of just compensation. As a general matter, the Tucker Act, 28 U.S.C. 1491, affords a forum for obtaining that compensation. See *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985) ("[T]aking 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). There is no call for supplanting those congressionally sanctioned mechanisms with a judicially created cause of action for damages at this stage.

A damages remedy against *individual* federal officials, moreover, is fundamentally inconsistent with the nature of the Fifth Amendment right to just compensation, which this Court has repeatedly held is a right that is owed by (and can be violated only by) the government itself, not by federal officials in their individual capacity. See, *e.g.*, *Hooe* v. *United States*, 218 U.S. 322, 335-336 (1910) ("The constitutional prohibition against taking private property for public use without just compensation is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, * * * to do so by some act of Congress, is not the act of the Government."); *United States* v. *North Am. Transp. & Trading Co.*, 253 U.S. 330, 333 (1920) (same).

That Fifth Amendment claims cannot be brought against individual officials necessarily follows from the fact that the

Fifth Amendment does not prohibit the government from taking property but simply requires the government to pay just compensation if it does. Thus, if the government provides a mechanism for obtaining just compensation for a taking (as the Tucker Act does), the taking does not violate the Fifth Amendment at all. *Williamson County*, 473 U.S. at 194 ("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"). See also *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999) ("Had the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone.").

It is clear, therefore, that no *Bivens* action would be appropriate for an *actual* taking of property under the Fifth Amendment. The fact that respondent cannot even allege that any actual property has been taken in this case does not make his novel attempt to import a *Bivens* remedy into the Fifth Amendment's Just Compensation Clause context any more appropriate.

2. The APA precludes respondent's Bivens *action in its entirety*

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. Similarly, in *Chilicky*, the Court refused to extend *Bivens* to claims involving the denial of social security benefits, where the social security disability claimants had recourse to both administrative and judicial remedies. This Court, finding "special factors counselling hesitation," 487 U.S. at 423, explained that "Congress chose specific forms and levels of protection for the rights of persons affected by incorrect eligibility determinations" and that "[a]t no point did Congress choose to extend to any person the kind of [damage] remedies that [they] seek in this lawsuit," *id.* at 426.

The reasoning of *Bush*, *Chilicky*, and *Malesko* compels the conclusion that the APA's comprehensive scheme for challenging agency action precludes a *Bivens* remedy with respect to agency actions like those at issue here. Indeed, those circuits that have confronted the issue have held that the availability of relief under the APA generally precludes a *Bivens* action for damages. See, *e.g.*, *Sinclair*, 314 F.3d at 940 ("When Congress has created a comprehensive regulatory regime, the existence of a right to judicial review under the

Administrative Procedure Act is sufficient to preclude a *Bivens* action."); *Nebraska Beef, Ltd.* v. *Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (APA precludes *Bivens* remedy "even when the administrative remedy does not provide complete relief."), cert. denied, 126 S. Ct. 1908 (2006); *Miller* v. *United States Dep't of Agric.*, 143 F.3d 1413, 1416 (11th Cir. 1998) ("[T]he 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) (*Bivens* action precluded by APA, coupled with "some indication" that Congress meant to confer less than complete relief); *Sky Ad, Inc.* v. *McClure*, 951 F.2d 1146, 1148 & n.4 (9th Cir. 1991) (*Bivens* remedy against allegedly unconstitutional agency rulemaking precluded by APA right to judicial review), cert. denied, 506 U.S. 816 (1992).

Similarly, in the Section 1983 context, this Court has generally declined to hold that a federal statute is actionable under Section 1983 if the statute may be enforced through a "private judicial remedy" or "even a private administrative remedy." *Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 121 (2005); see *ibid.* ("[I]n *all* of the cases in which we have held that § 1983 *is* available for a violation of a federal statute, we have emphasized that the statute at issue * * * *did not* provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated."); *id* at 121-122 (citing cases); see also *id.* at 128-129 (agreeing that Section 1983 did not provide a cause of action to enforce federal rights that were subject to a "*procedural and judicial review scheme resembl[ing] that governing many federal agency decisions*") (Breyer, J., joined by O'Connor, Souter, and Ginsburg, JJ., concurring) (emphasis added). The same principles of separation of powers and judicial restraint that led the Court to that conclusion in the context of Section 1983—an express statutory cause of action—apply with even more force in the context of *Bivens*—an inferred constitutional cause of action.

Although it acknowledged that the APA generally precludes a *Bivens* action arising out of final agency action, Pet. App. 81a, the court of appeals purported to carve up respondent's *Bivens* claim into two separate categories: (1) allegations of final agency action (which the court held had to be pursued under the APA) and (2) allegations it deemed insufficiently related to final agency action (for which, it held, a *Bivens* action was appropriate). *Id.* at 82a. That dichotomy is seriously flawed, both as a matter of law and of fact. As a matter of law, the observation is flawed because *Bivens* is not available as a mere gap-filler to allow an additional cause of action to address administrative actions too premature or too insignificant to merit APA review. See pp. 34-37, *infra*. As a matter of fact, all of the allegations at issue, properly viewed, are related to the same final agency action—the cancellation of the right-of-way granted to respondent's predecessor at the ranch—and to respondent's refusal to grant a reciprocal right-of-way to the government.

Moreover, all of respondent's arguments against the regulatory actions he now alleges as the basis for his RICO and *Bivens* claims were either raised and resolved against him during his administrative challenges to those actions, or could have been raised in those or similar challenges. For example, in the IBLA decision concerning the cancellation of his easement on public lands and his administrative trespass penalty, the Board expressly rejected respondent's contentions that BLM's actions resulted "in an unconstitutional 'taking' of his property" and that BLM acted with improper motives, bad faith, or an intent to "blackmail" him into agreeing to a reciprocal easement. *Frank Robbins*, 146 I.B.L.A. 213, 219 (1998) (finding, among other things, respondent's allegations of "blackmail" and an unconstitutional taking to be "unsupported"). Respondent chose not to seek judicial review of the IBLA's decision.

Similarly, in challenging BLM's proposed cancellation of his grazing permit, respondent expressly argued that BLM's

actions constituted an uncompensated taking under the Fifth Amendment and this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 837 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374, 387 (1994). The IBLA rejected that claim as being utterly baseless in light of the numerous blatant violations of the terms of those permits, which the IBLA determined were the real and sufficient grounds for the cancellations. C.A. App. 62 (*HD Ranch*, IBLA No. 99-279, slip op. at 5 (May 20, 1999) (order denying petition for stay of cancellation of grazing permit)). Again, Robbins did not seek judicial review of the IBLA's decisions upholding the cancellation of his permits.

Respondent cannot contend, on the one hand, that "*[a]ll*" of the actions alleged in his complaint "were taken as part of an ongoing scheme to coerce [him] to grant the BLM an easement," J.A. 76, and simultaneously maintain, on the other, that certain of those acts (those not leading to final agency action) are unrelated to the final agency actions (the cancelling of his right-of-way and permits) that he claims primarily caused his injuries. That conclusion is further confirmed by the fact that respondent's complaint states only a single *Bivens* claim predicated on an alleged violation of the Fifth Amendment. See J.A. 78-79.

3. None of the limitations of the APA warrant the extension of a Bivens *remedy in this context*

The fact that the APA provides no remedy for certain agency action—*i.e.*, that involving acts "unrelated to final agency action," Pet. App. 82a—does not mean that a *Bivens* action may be inferred with respect to that conduct. To the contrary, 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 con-

sequence of inferring a *constitutional* cause of action for money damages only as to those incidents that Congress considered too premature or insignificant for judicial review under the *statutory* cause of action established by the APA. The APA, rather than personal liability under *Bivens*, establishes what Congress deemed to be the appropriate mechanism for judicial review in this context. Whatever the merit of inferring causes of action when it is damages or nothing, see, *e.g.*, *Malesko*, 534 U.S. at 75 (Scalia, J., concurring), it cannot be justified as a means of perfecting or filling gaps in a comprehensive statutory scheme like the APA.

Similarly, the fact that the APA does not permit an award of damages does not justify extending *Bivens* to this context. 5 U.S.C. 702. The APA provided respondent the opportunity to challenge each of the key regulatory actions that now form the basis of his *Bivens* claim—the cancellation of his easement on government land, the filing of trespass charges against him, and the cancellation of his grazing and special use permits on government land—and to ask a court to reverse or enjoin those regulatory actions, thereby avoiding the very harms he now attempts to claim under *Bivens*. Among other things, the APA permits a court to set aside agency action found to be "contrary to constitutional right." 5 U.S.C. 706(2)(B). Respondent was entitled, therefore, to raise any constitutional challenge he may have had to petitioners' actions in a suit for judicial review under the APA, and he in fact did raise such challenges in administrative proceedings (though he chose not to pursue them in court). See pp. 7-8, 33-34, *supra*. Because the APA provides the opportunity to challenge unlawful adverse agency actions at the outset, and thereby avoid the monetary harm that may otherwise result from those agency actions, it provides a comprehensive reme-

dial scheme that precludes a *Bivens* action, even in the absence of a right to money damages.[8]

Furthermore, when a comprehensive statutory remedial scheme exists, it does not matter whether a particular plaintiff will have any remedy under that scheme. Cf. *United States* v. *Fausto*, 484 U.S. 439, 455 (1988). Indeed, it is settled circuit law that *Bush* and *Chilicky* prevent the creation of a *Bivens* remedy even when the particular plaintiff has *no* relief at all under the comprehensive statutory remedy. See, *e.g.*, *Pipkin* v. *United States Postal Serv.*, 951 F.2d 272, 275 (10th Cir. 1991) (holding that where Congress has created a comprehensive remedial scheme, courts may not create additional remedies, "even where a particular litigant does not have a remedy available under the statutory scheme"); accord *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], courts will not create a *Bivens* remedy.") (citing cases); *Saul* v. *United States*, 928 F.2d 829, 840 (9th Cir. 1991) (same). See also *Volk* v. *Hobson*, 866 F.2d 1398, 1402 (Fed. Cir.), cert. denied, 490 U.S. 1092 (1989); *Spagnola* v. *Mathis*, 859 F.2d 223, 228 (D.C. Cir. 1988) (en banc).

Accordingly, 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. Congress provided an APA remedy by which respondent could have challenged the actions taken by BLM, and it is not the province of this Court to supplant that careful statutory remedial scheme by inferring a markedly different

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[8] The APA remedy also offers a plaintiff something unavailable in a *Bivens* action: the potential for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d). Attorney's fees are unavailable in *Bivens* actions. *Kreines* v. *United States*, 33 F.3d 1105 (9th Cir. 1994), cert. denied, 513 U.S. 1148 (1995); cf. *Premachandra* v. *Mitts*, 753 F.2d 635 (8th Cir. 1985) (en banc) (no fees in injunctive action against federal employees for constitutional violations).

constitutional cause of action for money damages against individual officials.

B. There Is No Fifth Amendment Right Against Retaliation For The Exercise Of Property Rights

Even assuming a *Bivens* action might be inferred under the Just Compensation Clause in certain circumstances, respondent's claim here is without merit, because not only has he failed to show a substantive violation of the Fifth Amendment (as explained below), but the Fifth Amendment does not embody the novel anti-retaliation right conceived of by the court below. Pet. App. 15a. Until the decision below, no court of appeals had ever recognized a constitutional right against retaliation outside the context of activity protected by the First Amendment, much less in the context of property rights protected by the Fifth Amendment's guarantee of just compensation. That unprecedented aspect of the court's decision provides a sufficient reason for reversing the court of appeals' *Bivens* ruling.

This Court's constitutional retaliation doctrine is limited to suits alleging retaliation for the exercise of *First* Amendment rights. The Court has long shown a special sensitivity to the exercise of First Amendment rights, see, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415, 433 (1963) (First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society"); *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 discouraged by the *in terrorem* effect of the statute."), and government action retaliating for unwelcome speech can readily be seen as abridging free speech. When someone suffers retaliation for exercising First Amendment rights, the Court has, accordingly, permitted an action for damages to compensate for such retaliation. See *Hartman* v. *Moore*, 126 S. Ct. 1695, 1701 (2006) ("[T]he law is settled that as a general matter the First Amendment prohibits government officials from

subjecting an individual to retaliatory actions * * * for speaking out.") (citation omitted); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).[9]

Neither this Court nor any circuit court other than the court below has held that other constitutional provisions include an anti-retaliation component. While government retaliation for unwelcome speech can be seen as action abridging free speech, government retaliation—stopping short of a taking—for the exercise of a property right cannot be readily characterized as a taking or Fifth Amendment violation. Indeed, the court of appeals itself did not ground its decision recognizing a newfound Fifth Amendment anti-retaliation right in any particular reading or historical understanding of the Fifth Amendment, but rather in *dictum* in a First Amendment case. Pet. App. 15a-16a (citing *DeLoach* v. *Bevers*, 922 F.2d 618, 620 (10th Cir. 1990), cert. denied, 502 U.S. 814 (1991)).

While the Fifth Amendment is of course entitled to equal footing with the First, the concerns about chilling protected activity that motivate the anti-retaliation doctrine in the First Amendment context are not present, or at least are greatly reduced, in the Fifth Amendment takings context. Unlike the First Amendment, the Fifth Amendment was not intended to encourage a particular type of expressive citizen activity that could be chilled if not robustly protected. Moreover, individuals have an inherent and strong interest in vigorously resisting unwarranted government interference with their prop-

[9] The Court's recognition of a specialized First Amendment right against retaliation is consistent with the fact that the Court has developed a variety of other legal doctrines that apply in the First Amendment context alone. See, *e.g.*, *Virginia* v. *Hicks*, 539 U.S. 113, 118 (2003) (overbreadth); *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) (least restrictive alternative); *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 530 (2002) (prior restraints); *Village of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) (third-party standing); *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648-649 (2000) (independent review of fact finding).

erty, and the Fifth Amendment's guarantee of just compensation for taking of any protected property interest itself creates a robust incentive for invoking one's Fifth Amendment rights.

Furthermore, the Fifth Amendment, which requires the availability of just compensation in order for a taking to be valid, presupposes a degree of permissible governmental interference with property rights that is wholly alien in the context of First Amendment speech rights. Indeed, the scope of permissible government interference is sufficiently broad in the Fifth Amendment context that this Court has made clear that typically no constitutional violation occurs at the time the property in question is taken by the government. Instead, "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." *Williamson County*, 473 U.S. at 195; see *id*. at 194 n.13. Thus, because the Fifth Amendment's Just Compensation Clause (unlike the First Amendment) is not primarily an absolute prohibition of government action, but rather requires the availability of just compensation for any taking that may occur, the anti-retaliation right created for the First Amendment is ill-suited for this markedly different constitutional context.

That conclusion is particularly true in the present context of interlocking properties and reciprocal easements that are common in public land management in the West. In that context, there is a broad scope of legitimate give and take that makes liability for going too far in allegedly "retaliating" for another landowner's failure to agree to a reciprocal easement particularly troubling. The Fifth Amendment provides substantial leeway for such give and take—establishing a prohibition on the government's conduct only when it actually takes property and, even then, only when it does so without provid-

ing just compensation. It is therefore telling that respondent in this case has pointedly declined to allege any taking.

Finally, any practical value of creating a separate Fifth Amendment right against retaliation is severely diminished by the fact that the well-established First Amendment right against retaliation protects citizens seeking to invoke their Fifth Amendment protections by petitioning the government for just compensation or other administrative means of redress. That is because the First Amendment protects the underlying activity of petitioning the government for redress. In this case, however, respondent has never asserted any First Amendment retaliation claim against petitioners. Instead, his claim is grounded exclusively in the state-law right to exclude and the Fifth Amendment's Just Compensation Clause, which lacks any independent anti-retaliation component. See J.A. 78-79.

C. Respondent Has Not Alleged The Violation Of Any Right Protected By The Fifth Amendment

Respondent does not allege that any of his property rights were actually taken by the government, or that the right to just compensation guaranteed by the Fifth Amendment has otherwise been triggered by any of the regulatory actions about which he complains.[10] Instead, his *Bivens* claim is premised on the theory that the Fifth Amendment's guarantee of just compensation entitles him to enjoy a right-of-way over *public* land (and other rights to public land relating to grazing and commercial recreational activities) while refusing to grant the government a reciprocal easement over his own land. Remarkably, the court of appeals not only accepted respondent's novel theory of the Fifth Amendment, it held that the rights asserted were sufficiently clearly established as to give

[10] Respondent made takings claims in the administrative actions he filed against BLM. The IBLA rejected those claims and respondent did not seek judicial review of that order. See pp. 7-8, 33-34, *supra*.

rise to personal liability for petitioners. That holding is profoundly wrong.

1. The Fifth Amendment guarantees only the right to just compensation

By its terms, respondent's *Bivens*-based retaliation claim is predicated entirely on the Fifth Amendment. Pet. App. 10a-16a. The Fifth Amendment, however, does not by its terms guarantee the right to exclude others from one's property. Rather, it guarantees the availability of just compensation as a condition to the taking of property. That is not to say that the right to exclude is not a protected property interest. It is common ground that individuals possess a "right to exclude" others—including the government—from their property. But although this Court has held that the 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, 144 n.12 (1978), the Court has made clear that the right's contemporary source is state law, see *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972); see also *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984). The Fifth Amendment thus protects the state law right to exclude by the same means it protects other state law property rights against action by the government: by the guarantee of just compensation if that right is lawfully "taken" within the meaning of the Just Compensation Clause. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979); see *Dolan*, 512 U.S. at 384.[11]

Because the only guarantee of the Fifth Amendment is the availability of just compensation (which is presumptively

[11] State law still protects the right to exclude through non-constitutional means, including the tort of trespass. Federal officials who enter private property without the requisite authorization may commit the tort of trespass, and such trespasses may be remedied under the FTCA.

available under the Tucker Act), respondent has no Fifth Amendment right to preclude the government from taking his property (or under his theory, from seeking to coerce him to grant property to the government). Thus, the court of appeals plainly erred when it held that "[respondent] has a Fifth Amendment right to *prevent* BLM from taking his property when BLM is not exercising its eminent domain power." Pet. App. 14a (emphasis added); see *ibid.* ("Under the Takings Clause, the government may take private property for public use so long as it provides just compensation. U.S. Const. amend. V. When the government has chosen not to exercise its eminent domain power, however, citizens remain free to exclude even the government from their private property. *Kaiser*, 444 U.S. at 179-80."). Indeed, this Court has made clear both that an individual has no Fifth Amendment right to *prevent* a taking (only a right to just compensation for the taking), and that takings may occur outside of the formal eminent-domain process.

In *Williamson County*, the Court declared that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 473 U.S. at 194. Likewise, in *Monsanto*, this Court held that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." 467 U.S. at 1016 (footnote omitted). As the Court explained, nothing in the Fifth Amendment "require[s] that compensation precede the taking." *Ibid.*; see *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-128 (1985).

In addition, this Court has long held 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 fact that petitioners were not exercising eminent-domain powers therefore does not elevate respondent's state law right to exclude the government from his land to a guarantee of the Fifth Amendment (as opposed to a state law property right protected by the Fifth Amendment's guarantee of just compensation). And the fact that respondent has not alleged that petitioners actually took his property outside the eminent domain process provides another reason that his claim is outside the ambit of the Fifth Amendment.

Relatedly, a plaintiff may not sue individual government employees for a taking; 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. And if the government eventually provides just compensation for a taking, the taking itself does not violate the Fifth Amendment at all. See pp. 29-30, *supra*.

Kaiser Aetna—the principal case on which the court of appeals relied, Pet. App. 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 ("[T]he '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*.") (footnote omitted and emphasis added). Respondent, however, does not claim any taking and thus has never pursued the statutory avenue to obtain compensation for an alleged taking. *Williamson County*, 473 U.S. at 195 ("[T]aking 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.

2. Respondent cannot claim that petitioners imposed an unconstitutional condition on either his property rights or his right to access public lands

As indicated, respondent does not allege that any of his property was actually taken, but that BLM tried to take his property by pressuring him to give the government a reciprocal right-of-way over his property. In fact, far from alleging that the government has actually taken any of 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.*, a right-of-way on and maintenance of the federal portion of the road, and grazing and recreational use privileges on federal lands) because he will not consent to a reciprocal right-of-way over his portion of the road. In this regard, this case is not about the "right to exclude" the government from one's *own* property as much as it is the right to obtain access to *public* land (and benefit from other valuable public privileges such as grazing and special use permits on public lands) while refusing to grant the government any reciprocal rights on private land. Whatever else is true, the Fifth Amendment does not confer upon respondent a right to use public lands for his private benefit while denying BLM the reciprocal right-of-way necessary for BLM to manage and protect interlocking public lands.

Relying, *inter alia*, on this Court's decisions in *Nollan* and *Dolan*, respondent asserts that "[t]he Constitution forbade petitioners from conditioning respondent's right to other government benefits (*e.g.*, grazing permits, road maintenance, etc.) on his waiver of his Fifth Amendment rights," because "[t]he denial of those benefits had no relationship to the BLM's legitimate regulatory interests relating to grazing, road maintenance, etc., and was nothing more than an 'out-and-out plan of extortion.'" Br. in Opp. 26-27 (citation

omitted). But respondent's reliance on the *Nollan* line of cases is fundamentally misplaced for several reasons.

First, the only regulatory action BLM took that can be fairly characterized as being based on respondent's refusal to grant the United States a reciprocal easement on his land was the cancellation of the right-of-way the government had granted to respondent—which was conditioned on the receipt of the reciprocal easement. But it may not seriously be contended that the conditioning of a right-of-way on public land on the receipt of a reciprocal easement on private land—in the context of a road that passes over interlocking parcels of both public and private lands—constitutes a taking under the Fifth Amendment.

Indeed, seeking to obtain such reciprocal property rights is a reasonable and commonplace feature of federal land management, just as it is for private landowners. Consistent with its statutory responsibilities, BLM has determined that, in certain circumstances, it is appropriate to grant rights-of-way on public lands to business entities, among others, and to "regulate, control and direct" the use of those rights-of-way 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) (2004). BLM has also determined that it may be consistent with the public interest to condition the grant of a right-of-way over public land on the receipt of a reciprocal "equivalent right-of-way [on the applicant's land] that is adequate in duration and rights." 43 C.F.R. 2801.1-2 (2004). Where, as here, an applicant for a right-of-way refuses to grant BLM a reciprocal easement, his application may be denied without running afoul of the Fifth Amendment. Especially in the context of interlocking parcels of public and private lands, conditioning a right-of-way on public land on the receipt of a reciprocal easement is eminently reasonable and easily satisfies any requirement of an "essential nexus" between a legitimate state interest and the condition of a recip-

rocal easement, *Nollan*, 483 U.S. at 837, or a "rough proportionality" between the terms of the reciprocal easement and the government's objectives, *Dolan*, 512 U.S. at 391.

The reciprocal easement at issue in this case simply represents a logical consequence of the considerations discussed in this Court's decision in *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), which also arose because of the interlocking nature of public and private lands in Wyoming. The dispute in that case arose when the government simply cleared a dirt road over private land so that the public could access a reservoir over a "checkerboard configuration" of lands that made access to the reservoir impossible without crossing private land. *Id.* at 678. The Court in *Leo Sheep* refused "to accommodate some ill-defined power to construct public thoroughfares without compensation" over checkerboard lands in the West to guarantee public access to public lands. *Id.* at 687-688. But at the same time, the Court understood that there remained ready alternatives to either exercising eminent domain or rendering public lands effectively unusable, including "negotiation" and "reciprocity concerns." *Id.* at 681; see *id.* at 686 (Congress believed that "the ordinary pressures of commercial and social intercourse would work itself into a pattern of access roads" in the West over interlocking public and private lands). Respondent here now seeks to subject federal officials to the pain of RICO liability and *Bivens* claims for precisely the sort of give and take that both Congress and this Court have recognized has been instrumental to ensuring that public lands are not stranded and rendered inaccessible to the public.

Second, respondent is precluded from claiming in this *Bivens* action that petitioners impermissibly conditioned other regulatory benefits, such as his grazing and special recreation permits, on his granting a reciprocal easement to the government. As found in respondent's administrative challenges to each of the complained-of regulatory actions, petitioners had independent and sufficient regulatory reasons for

each of the actions taken. Respondent—like the land owners in *Nollan* and its progeny—could have sought judicial review of those adverse administrative adjudications and, if he could establish that they were unlawful, could have prevented those actions from occurring. He did not do so. He therefore should not now be able to avoid dismissal of this extraordinary *Bivens* action on the ground of qualified immunity by merely alleging an improper objective as a way of circumventing the customary channels of administrative and judicial proceedings. See, *e.g.*, *Utah Constr.*, 384 U.S. at 421-422 (applying principles of issue and claim preclusion to administrative adjudications); accord *Kremer*, 456 U.S. at 484-485 n.26; *Elliott*, 478 U.S. at 797-798.

Third, in the *Nollan* line of cases, there was an actual interference with property owned by the private citizen. In *Nollan* itself, for example, the property owners were denied a building permit on their land unless they agreed to a public easement. In concluding that the public easement condition lacked an "essential nexus" to any legitimate land-use regulation, the Court expressed particular concern for cases, such as *Nollan* itself, "where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." 483 U.S. at 841.

Here, in stark contrast, respondent alleges—at most—that petitioners placed an improper condition on an asserted right to use *public* lands. Respondent claims that he is being denied the use of public lands—namely, the right to conduct maintenance of the federal portion of South Fork, Owl Creek Road and grazing and special-use privileges on federal lands—because he will not consent to a reciprocal right-of-way over his portion of the road. While a property owner is free to argue that conditions on the use of public lands violate his due process or equal protection rights, there is no support for the rule adopted by the court of appeals that the government's

reasonable efforts to secure reciprocal property rights as a condition of access to public lands constitutes a taking under the Fifth Amendment. And such a rule would radically upset settled expectations in numerous areas, including land management in the West, where the government and private parties negotiate mutually beneficial reciprocal arrangements that involve valuable public benefits, including rights-of-way over public lands.

D. At a Minimum, Petitioners Did Not Violate Any Clearly Established Fifth Amendment Right

Finally, even if this Court were to adopt a theory of constitutional retaliation that for the first time extended to rights under the Fifth Amendment, petitioners in this case still would be entitled to qualified immunity. As we explained above, whether a right is clearly established must be analyzed very specifically in the narrow context presented. 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*, 533 U.S. at 202. That inquiry is conclusively determined in this case by the fact that the court of appeals itself admitted that "no court has previously explicitly recognized the right to be free from retaliation for the exercise of Fifth Amendment rights." Pet. App. 16a. Nor has any court previously recognized a *Bivens* cause of action in this context. That is the end of the qualified immunity inquiry.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss the complaint.

Respectfully submitted.

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