No. 20-138

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *PETITIONERS*,

v.

SIERRA CLUB, ET AL., *RESPONDENTS*

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

BRIEF OF RIO GRANDE LANDOWNERS COALITION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF RIO GRANDE LANDOWNERS COALITION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The Rio Grande Landowners Coalition (RGLC) is comprised of diverse individuals and entities—ranchers, developers, small-business owners, small landowners, single-family homeowners, a bank, a college, a low-income housing project, and an orphanage—who own riverfront properties on the Rio Grande in the U.S. Border Patrol's Laredo Sector.[1] RGLC's members, and their respective counsel, are listed in the appendix.

Two Executive Branch agencies are pursuing plans to take substantial portions of RGLC properties for the purpose of constructing a border wall. Each agency has targeted a different area. North of the Laredo-Colombia Bridge in the Laredo Sector, 52 miles of riverfront properties lie in the path of border-wall construction planned by the Department of Defense (DoD). South of the bridge, 71 miles of riverfront properties lie in the path of border-wall construction planned by the Department of Homeland Security (DHS).

Wall construction both north and south of the bridge cannot proceed unless and until the Executive acquires RGLC properties through permanent condemnation. Although RGLC's members support border security generally, they oppose the agencies' compulsory acquisition of their lands to build a border wall. More specifically, they challenge the agencies' selection of a 30-foot-high wall across their properties as the one-size-fits-all solution to border security in the Laredo Sector,

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. All parties have either filed blanket consents to the filing of amicus briefs or provided their individual consents to the filing of this brief.

without considering alternatives that are less destructive, more efficient, and more effective.

This particular decision-making shortfall has been faulted by DHS's own Inspector General. His July 2020 Report criticized DHS's failure "to assess and select the most effective, appropriate, and affordable solutions to obtain operational control of the southern border as directed," and failure to "use sound, well-documented methodology to identify and prioritize investments in areas along the border that would best benefit from physical barriers." DHS OIG Report, *CBP Has Not Demonstrated Acquisition Capabilities Needed to Secure the Southern Border*, DHS OIG Highlights (7/14/2020) https://www.oig.dhs.gov/sites/default/files/assets/2020-07/OIG-20-52-Jul20.pdf. The Inspector General further observed that DHS "instead relied on prior outdated border solutions to identify materiel alternatives for meeting its mission requirement." *Id.*

RGLC's primary objection to federal seizure of their properties is that the appropriations statutes upon which DHS and DoD rely do not authorize border-wall construction in the Laredo Sector—the only public purpose that would support permanent condemnation of properties there. RGLC thus agrees with Plaintiffs-Respondents (Plaintiffs) that the Executive may not flout Congress's command and divert taxpayer dollars for wall construction that were appropriated for military purposes, and that Plaintiffs may obtain judicial redress to enjoin it.

RGLC has two independent bases to seek redress, one of which is shared with Plaintiffs. Like Plaintiffs, redress is available to RGLC's members due to the protections afforded them by the Constitution's Appropriations Clause. *See* U.S. Const., art. I, § 9, cl.7. And like Plaintiffs, RGLC's members challenge federal agencies

which contend that their congressionally unauthorized actions are shielded from judicial review.

RGLC has another, independent basis upon which to obtain redress—the Fifth Amendment. *See* U.S. Const. amend. V. In the Laredo landowners' situation, the Executive's actions go one step further than in Plaintiffs' situation. The Laredo landowners face the Executive's permanently taking title to vast portions of their lands. The unique aspects of eminent domain further illuminate the untenability of Petitioners-Defendants' (Defendants) sweeping arguments here. And all these circumstances show why RGLC is so vitally interested in the outcome of this case.

Under the Declaration of Taking Act (DTA), upon the filing of suit for permanent condemnation and deposit of what the Executive unilaterally "estimate[s]" to be "just compensation," "title to the estate or interest specified in the declaration vests in the Government." 40 U.S.C. §§ 3114(a)(5), (b)(1). But under the DTA, the interest the Executive acquires is "only a *defeasible* title." *Catlin v. U.S.*, 324 U.S. 229, 241 (1945) (emphasis added). In defense, a landowner, rather than accept compensation, may request the court to revest title. This Court has found "no necessary inconsistency between the provisions for transfer of title upon filing of the declaration and making of the deposit and at the same time preserving the owner's preexisting right to question the validity of the taking as not being for a purpose authorized by the statute under which the main proceeding is brought." *Id.* at 241.

But what happens in the interim, while the parties engage in litigation over "the validity of the taking"? *Id.* This is a pressing question, given that DoD and DHS plan to immediately move forward with wall construction on the lands they take.[2] Interim relief is critically important,

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[2] *See, e.g., A Rush to Expand the Border Wall That Many Fear Is Here to Stay*, N.Y. Times (Nov. 28, 2020), https://nyti.ms/3o8EUz5.

especially because the destructive impact that a border wall would have on Laredo landowners' properties is difficult to overstate. The Executive plans to construct a 150-foot wide enforcement zone adjacent to its 30-foot high wall, thereby splitting each property in two.[3] From the landward side of the wall, the landowner's vistas over the river would be obliterated. And the remaining portion of each property that lies south of the planned wall and north of the river would become a "no man's land."[4] This would have a dramatic effect not only on the utility of each parcel that suffers condemnation, but also on all aspects of local economic, social, and civil life.

To prevent this catastrophic, and congressionally unauthorized, destruction of their lands, Laredo landowners must be able to seek and obtain injunctive relief against border-wall construction during the pendency of litigation over the validity of the takings. The law furnishes them the means to do so. Landowners can request an order under the DTA to withhold the Government's taking possession of the property. *See* 40 U.S.C. § 3114(d)(1). And they can request the court to "take appropriate injunctive action to enforce its order." *See United States v. 162.20 Acres of Land*, 639 F.2d 299, 305 (5th Cir. 1981).

However, it is foreseeable, and RGLC reasonably anticipates, that the Executive will oppose its members' requests for injunctive relief by making the same sort of baseless arguments presented in opposition to the injunctive relief Plaintiffs seek here. Like Plaintiffs, RGLC's members will argue that the appropriations statutes that the Executive invokes do not authorize the

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[3] *See* https://www.expressnews.com/news/local/article/Border-Patrol-reveals-where-border-wall-funding-12794957.php.

[4] John Burnett, *Between President Trump's Border Wall and the Rio Grande Lies a 'No Man's Land,'* NPR, Morning Edition (2/14/2020) https://www.npr.org/2020/02/14/805239927/between-president-trumps-border-wall-and-the-rio-grande-lies-a-no-man-s-land.

border-wall construction it plans to pursue, and that constitutional prohibitions prevent such actions as well. In response, one can foresee that the Executive will advance the same arguments as presented in this case, i.e., (i) the statutes in question do not themselves authorize landowners to obtain judicial review, (ii) review is unavailable to them under the APA, and (iii) constitutional review is unavailable based on the Executive's assertion that the landowners' claims are *statutory*, not *constitutional*.

Thus, the correct resolution of the threshold legal issue before the Court in this case will guide (if not outright determine) any future constitutional battles in the Laredo Sector. As the Court decides how broadly to read *Dalton v. Specter,* 511 U.S. 462 (1994), upon which the Executive heavily relies, the Court should consider not only the Appropriations Clause prohibition addressed by Plaintiffs, but also the Fifth Amendment prohibition implicated by the Executive's planned permanent taking of RGLC's members' properties.

Given the direct impact of a physical wall on their property rights and the welfare of the local community, RGLC and its members have a distinct and compelling interest in the proper resolution of this case.

INTRODUCTION

Despite admonitions by both landowners and local authorities to first allow the judicial system the opportunity to determine whether DHS possesses the requisite authority, that agency has already awarded over a *billion-dollars'* worth of contracts to construct 71 miles of 30-foot-tall border wall in the Laredo Sector, without having yet acquired a single parcel of property upon which to build it.[5] The contractors to whom DHS

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[5] *See* https://www.cbp.gov/newsroom/national-media-release/cbp-announces-contract-award-new-border-wall-system-texas (CBP's

awarded these cart-before-the-horse contracts are chomping at the bit for the Executive Branch to permanently condemn the massive stretches of properties along the Rio Grande so that they can begin to bill their contracts. *See* p. 3, n.2, *supra.*

Laredo landowners who comprise the Rio Grande Landowners Coalition argue that the Executive's planned construction of a border wall in the Laredo Sector, and condemnation of properties on which to build it, would not "'merely'" constitute official action "'in excess of the authority delegated . . . by the Congress," but would also be "'contrary to . . . constitutional prohibition[s].'" *Dalton*, 511 U.S. at 472 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 396–97 (1971)). Specifically, permanent condemnation of RGLC's members properties for the purpose of constructing a congressionally unauthorized border wall would deprive landowners of rights secured to them by both the Appropriations Clause and the Fifth Amendment. Thus, in their defense of condemnation suits planned by the Executive, regardless of whether RGLC's members may challenge wall construction and condemnations under the APA, the Executive's "'actions may still be reviewed for

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May 8, 2020 announcement of $275.5-million contract award to construct 14 miles of contiguous "30-foot tall steel bollard wall" in Laredo Sector)

https://www.dropbox.com/s/t7xljaupzhsgu70/Laredo%20Contract%20Award%202-%20Press%20Release%2008032020%20FINAL%20v2.pdf?dl=0 (CBP's August 3, 2020 announcement of $289.5-million contract award to construct 17 miles of contiguous border wall in Laredo Sector)

https://www.cbp.gov/newsroom/national-media-release/contract-awards-additional-border-wall-system-laredo-texas-1 (CBP's September 30, 2020 announcement of $283,150,000 contract award to construct 27 mile of contiguous border wall in the Laredo Sector, and of $201,250,000 contract award to construct 13 miles of contiguous border wall in Laredo Sector)

constitutionality.'" *Dalton*, 511 U.S. at 469 (quoting *Franklin v. Mass.*, 505 U.S. 788, 801 (1992), citing, *inter alia*, *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952)).

This is comparable to Plaintiffs' argument here. Plaintiffs may judicially challenge the Executive's unlawful diversion of billions of dollars from various military accounts to fund border-wall construction beyond Congress's authorization. This was not "merely" official action in "'excess of [statutory] authority,'" it was also "'contrary to [a] constitutional prohibition.'" *Dalton*, 511 U.S. at 472. Defendants' actions violate the Appropriations Clause's prohibition that, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl.7. And because Plaintiffs seek to enjoin a *constitutional* violation, they are not required to satisfy a *statutory* "zone of interests" requirement. *See* Resp. Br. 30–34.

As previously noted, Laredo landowners face permanent condemnation of their properties by two different Executive Branch agencies—DoD and DHS. To simplify the discussion, this amicus brief will focus exclusively on the condemnation actions planned by DHS. Those planned condemnations provide a concrete example of the hypothetical concern Plaintiffs have already expressed: "Under Defendants' view . . . had President Truman invoked some statute in support of the seizures that did not itself afford the mill owners a cause of action, they would have been precluded from challenging the seizure [as unconstitutional]." Sierra Club Br. Opp. 20. The Laredo landowners' present-day plight brings this hypothetical concern to life. Under Defendants' view, because DHS has invoked a statute in support of its claimed authority to permanently condemn the Laredo landowners' properties that does not itself afford the landowners a cause of action, the landowners are precluded from challenging those takings as

unconstitutional under the Fifth Amendment and the Appropriations Clause.

As Plaintiffs have explained, Defendants' view cannot be the law. When matters progress to the point that DHS files suits to permanently condemn RGLC's members' properties, the Court's decision in this case will guide lower courts' resolution of the Laredo landowners' Fifth Amendment and Appropriation Clause challenges. Thus, the controversy before the Court here presents constitutionally critical questions that impact an identifiable group of litigants beyond the named parties. The Laredo landowners' scenario provides an apples-to-apples comparison with another private-property-rights scenario: *Youngstown*. Thus, RGLC submits this amicus brief to permit the Court to view the threshold issue in this case through another constitutional lens beyond the Appropriations Clause: that of the Fifth Amendment.

ARGUMENT

I. *Youngstown* underscores why both Plaintiffs and Laredo landowners have a cause of action.

This Court has recognized the fundamental right to own property, and the threat that eminent domain poses to that right. "The exercise of the power of eminent domain is against common right. It subverts the usual attributes of the ownership of property." *W. Union Tel. Co. v. Penn. R.R. Co.,* 195 U.S. 540, 569 (1904). Due to the "serious nature of the right of eminent domain . . . it is accompanied and restrained by inexorable limitations." *Id.* at 567. The core limitation is that the Executive Branch cannot exercise the power of eminent domain without a delegation of authority "given in express terms or by necessary implication." *Id.* at 569.

To protect property rights from unauthorized condemnation by the Executive Branch, nations following the common law tradition have vested the sovereign power of eminent domain in the Legislative Branch alone.

"The power of eminent domain is a high sovereign power that has been allotted to the legislative branch of the government since the Magna Carta." *Abbott v. Beth Israel Cemetery Ass'n of Woodbridge*, 100 A.2d 532, 540 (N.J. 1953) (citing Blackstone's Commentaries (Browne's ed.1897), at 39, 44; Jahr, Law of Eminent Domain (1953), §1, at 1-5).

Our Constitution is consistent with this centuries' old common-law tradition: "The exercise of the power of eminent domain is vested in the legislative branch of the Government." *2,953.15 Acres of Land v. U.S.,* 350 F.2d 356, 359 (5th Cir. 1965). "No entity, public or private, other than the legislature, can claim the sovereign authority to condemn property—a 'direct, significant legally protectable interest'—unless Congress has delegated that authority to the party." *United States v. 36.96 Acres of Land*, 754 F.2d 855, 858 (7th Cir.1985), *cert. denied*, 476 U.S. 1108 (1986) (quoting *Youngstown*, 343 U.S. at 585).

The Executive Branch's attempt to exercise eminent domain for border-wall construction in the Laredo Sector harks back to a situation previously addressed by this Court. President Trump's proclamation of a national emergency requiring federal officials to seize landowners' property for a border wall is analogous to President Truman's proclamation of a national emergency and issuance of an executive order directing the Secretary of Commerce to take possession of the Nation's steel mills during the height of the Korean war. *See Youngstown*, 343 U.S. at 579.

In *Youngstown*, the Court held that the constitutional allocation of eminent-domain authority to Congress is not altered by presidential decree of a national emergency—not even in wartime. The Court did not refute that, due to "[t]he indispensability of steel as a component of substantially all weapons and other war materials," a nationwide steelworkers' union strike in the midst of the Korean War justified the President's proclamation of a

national emergency. *Id.* at 583. However, even the indisputable existence of that national emergency did not alter the fundamental tenet that "[t]he President's power, if any, to issue the [seizure] order must stem either from an act of Congress or from the Constitution itself." *Id.* at 585.

The Court found no such power in the Constitution. It held, first, that the President's order to seize property "cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces." *Id.* at 587. The Court held, second, that "the seizure order [cannot] be sustained because of the several constitutional provisions that grant executive power to the President." *Id.*

Having found no authority in the Constitution itself for the President to seize steel mills, the Court searched for an act of Congress that would support his exercise of eminent domain, and again found none:

> There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.

Id. at 585.

Applying *Youngstown*, courts addressing the Laredo landowners' challenges to DHS's authority to permanently condemn their properties must analyze whether that authority can be found either in the Constitution or in an Act of Congress. This Court's *Youngstown* holding already has established that not even President Trump's declaration of a national emergency suffices to confer constitutional authority on DHS to seize the Laredo landowners' property. *See id.* at 587. The only remaining question under *Youngstown* is whether an Act of Congress confers such authority, either expressly or by fair implication. Simply put, DHS may not

exercise the power of eminent domain "unless Congress has delegated that authority to [DHS]." ***36.96** Acres of Land*, 754 F.2d at 858.

As demonstrated below, Congress did not delegate authority to DHS to condemn landowners' properties in the Laredo Sector for the purpose of constructing a border wall. Thus, like Plaintiffs here, Laredo landowners are entitled to pursue injunctive relief to enjoin such unconstitutional construction, and no decision by this Court suggests otherwise.

II. *Dalton* does not change the *Youngstown* analysis.

Defendants rely heavily on *Dalton*, but that case does not change the *Youngstown* analysis. In *Dalton*, this Court held the mere fact that an Executive Branch official takes action that exceeds his statutorily delegated authority does not, without more, support a constitutional challenge. *Dalton*, 511 U.S. at 471–72. The Laredo landowners understand that not "every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Id.* at 472. But neither is the converse invariably true, i.e., that every action by the President, or by another Executive Branch official, in excess of his statutory authority is *ipso facto* ***not*** in violation of the Constitution.

Youngstown provides the correct constitutional analysis: If *neither* the Constitution *nor* an Act of Congress affirmatively confers on DHS the authority to seize private property to build a border wall, (i) DHS may not do so, and (ii) the landowners may challenge the action in court. The *Youngstown* analysis yields this result regardless of whether DHS lacks congressional authority because (i) there is no statute at all authorizing the action (as in *Youngstown*) or (ii) the action is not authorized by an existing statute (as in Laredo). Nor is the "zone of interests" requirement implicated in such a

case. As Judge Bork explained, "[w]ere a case like [*Youngstown*] to arise today, the steel mill owners would not be required to show that their interests fell within the zone of interests of the President's war powers in order to establish their standing to challenge the seizure of their mills as beyond the scope of those powers." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987).

Dalton does not dictate a different result. The Court there recognized that under certain circumstances—even when the Executive Branch actor is the President, not merely a federal agency—"the 'President's actions may still be reviewed for constitutionality.'" 511 U.S. at 469. The central question, then, boils down to this: when is review truly constitutional and not merely statutory? *Dalton*'s quotation of this Court's decision in *Bivens* cuts to the heart of the matter, drawing a bright line distinction between (i) "'actions contrary to [a] constitutional prohibition,'" and (ii) "'those 'merely said to be in excess of the authority delegated . . . by the Congress.'" *Dalton*, 511 U.S. at 472 (quoting *Bivens*, 403 U.S. at 396–97).

The Laredo landowners' scenario brings into relief both sides of the *Bivens* line. Like the *Dalton* complainants, the Laredo landowners are prepared to argue that any DHS action to permanently condemn their properties for the purpose of building a border wall would "[exceed] the authority delegated . . . by the Congress." *Bivens*, 403 U.S. at 397. However, unlike the complainants in *Dalton*, absent judicial redress the Laredo landowners face the permanent loss of rights protected by the Constitution—specifically, by the Fifth Amendment and the Appropriations Clause. Thus, under *Bivens*, DHS's planned condemnation of properties in the Laredo Sector, without having received the requisite delegation of authority from Congress for doing so, would

be "contrary to . . . constitutional prohibition[s]." *Id.* at 396–97.

That DHS lacks congressional authority to permanently condemn properties in the Laredo Sector for the purpose of building a border wall is beyond legitimate dispute. As authority for its planned construction of 71 miles of border wall in the Laredo Sector, DHS has invoked the Fiscal Year 2020 Consolidated Appropriations Act (FY2020 CAA). *See* p. 5 n. 5, *supra* (CBP announcing with each award of a construction contract: "This project is funded by CBP's Fiscal Year (FY) 2020 appropriations."). That Act appropriates $1.375 billion for border barrier construction. *See* CAA, 2020, Pub. L. No. 116-93, div. D, tit. II, 133 Stat. 2317, 2511-12 § 209 (2019). For two, independent reasons, the FY2020 CAA authorizes neither construction of a border wall in the Laredo Sector, nor the condemnation of properties upon which to build it.

First, DHS flatly disobeyed Congress and never submitted the "expenditure plan" that Congress demanded as an absolute condition for DHS to "obligate[]" any FY2020 CAA funds. *Id.* § 208 (mandating that "no such amounts may be obligated prior to the submission of such a plan" to Congress). With no appropriated funds available for obligation or expenditure in the Laredo Sector, DHS has no authority under the FY2020 CAA to permanently condemn properties there for the purpose of border-wall construction.

Second, DHS never submitted the updated "Border Security Improvement Plan" mandated by Congress in the FY2020 CAA. *Id.* § 209(b)(2), (e). Thus, DHS has no updated Plan it can point to as authority for construction, much less an updated Plan that identifies the Laredo Sector as one of "the highest priority locations" for barrier construction—the *only* locations where such construction may occur using FY2020 funds. *Id.* §§ 209(b)(2) ("The amount designated in subsection (a)(1) [$1.375 billion]

shall only be available for barrier systems that are constructed in the *highest priority locations as identified in the Border Security Improvement Plan*.") (emphasis added)). Moreover, in DHS's February 2019 request to DoD for assistance to construct 218 miles of border barriers—to be funded by the $2.5 billion in DoD Section 284 funds at issue in this case, *see* Resp. Br. 7-8—DHS has already identified its highest priority locations for construction of barrier systems. None of those locations is in the Laredo Sector. *See* J.A. 80, 94-95 (DHS designating "in order of priority" its 11 highest priority barrier construction projects—all in California, Arizona, and New Mexico).

Even though the Laredo Sector condemnations would involve actions by an Executive Branch agency—DHS—rather than directly by the President, the right to challenge this constitutional violation is as important in the Laredo landowners' scenario as in the present case. In *Dalton*, "the President's actions were not reviewable under the APA, because the President is not an 'agency' within the meaning of the APA." 511 U.S. at 469. In the Laredo Sector, DHS sought to achieve similar non-reviewability of its actions under the APA. In May 2020, DHS's Acting Secretary, Chad Wolf, listed in the Federal Register as waived the APA and 26 other statutes in Webb County and Zapata County, Texas, where all of RGLC's members' properties are located.[6] Thus, by administrative fiat, Acting Secretary Wolf undertook to insulate from judicial review under the APA all of DHS's and its contractors' actions in the Laredo Sector.

Assume, for purposes of argument, that the Acting Secretary's waiver of the APA was lawful.[7] In that event,

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[6] https://www.federalregister.gov/documents/2020/05/15/2020-10383/determination-pursuant-to-section-102-of-the-illegal-immigration-reform-and-immigrant-responsibility.

[7] Although it was not: Every court to consider the issue has determined that Wolf "did not possess statutory authority" under the

DHS's actions in the Laredo Sector, like the President's actions in *Dalton*, would "not [be] reviewable under the APA[.]" 511 U.S. at 469. That situation tees up this core

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Homeland Security Act "when he assumed the role of Acting Secretary in November 2019." *Batalla Vidal v. Wolf*, 16CV4756NGGVMS, 2020 WL 6695076, at *8 (E.D.N.Y. Nov. 14, 2020); *see also Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, No. 20-CV-09253-JD, 2021 WL 75756, at *4 (N.D. Cal. Jan. 8, 2021); *Nw. Immigrant Rts. Project v. United States Citizenship & Immigr. Servs.*, CV 19-3283 (RDM), 2020 WL 5995206, at *24 (D.D.C. Oct. 8, 2020); *Immigrant Legal Res. Ctr. v. Wolf,* 20-CV-05883-JSW, 2020 WL 5798269, at *9 (N.D. Cal. Sept. 29, 2020); *Casa de Md., Inc. v. Wolf*, 8:20-CV-02118-PX, 2020 WL 5500165, at *23 (D. Md. Sept. 11, 2020).

Recently, Wolf issued a memorandum purporting to ratify his "delegable prior actions as Acting Secretary[.]" *See* https://www.dhs.gov/sites/default/files/publications/20_0113_undersecretary-wolf-ratification-delegable-prior-actions.pdf. However, the waivers Wolf issued under the REAL ID Act were not "delegable." They were committed to the "sole discretion" of the Secretary of Homeland Security. Public Law 104-208, Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C 1103 note), as amended by the REAL ID Act of 2005, Public Law 109-13, Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 note), as amended by the Secure Fence Act of 2006, Public Law 109-367, section 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, Div. E, Title V, section 564, 121 Stat. 2090 (Dec. 26, 2007). Moreover, at least one court has rejected attempts by Wolf to ratify his own actions. *See Immigrant Legal Res. Ctr.*, 2020 WL 5798269, at *9 ("The effectiveness of the Ratification depends upon a valid appointment.").

Thus, Wolf was acting without authority when he waived the APA and 26 other statutes in Webb County and Zapata County. Therefore, those waivers must be set aside under the APA. *See* 5 U.S.C. § 706 (a "reviewing court shall . . . hold unlawful and set aside agency action" that is "in excess of statutory . . . authority" or "not in accordance with law").

question: May DHS's permanent condemnation of Laredo landowners' properties "'still be reviewed for constitutionality'"? *Dalton*, 511 U.S. at 469.

This brings us full circle to *Youngstown*. Constitutional review and injunctive relief were available to the mill owners there because seizing the mills would have been "contrary to [a] constitutional prohibition," *Bivens*, 403 U.S. at 396–97, i.e., "amounting to lawmaking, a function that 'the Constitution has expressly confided to the Congress and not to the President.'" Pet. App. 247a (quoting *Youngstown*, 343 U.S. at 582). "To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress." *Id.* at 609 (Frankfurter, J., concurring). Moreover, injunctive relief was appropriate to enjoin seizure of the mills because such relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

The same is true as to DHS's planned permanent taking of RGLC's members' properties. And, under the same reasoning, Plaintiffs are entitled to judicial review because Defendants' actions are contrary to the constitutional prohibition embodied in the Appropriations Clause. *See Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (holding that the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.") (quotation marks and citation omitted).

Whether an Executive Branch official acts in the complete *absence* of statutory authority (as in *Youngstown*) or *in excess of* statutory authority (as in Laredo), the official's action is not authorized by Congress. And when the unauthorized act consists of the official's taking of private property protected by the Fifth

Amendment, that act is unconstitutional not "*merely*" because it is "in excess of [statutory] authority," but *also* because it is "contrary to [a] constitutional prohibition." *Bivens*, 403 U.S. at 396–97 (emphasis added). Along the same lines, when the unauthorized act itself violates the Appropriations Clause by spending funds that Congress has not appropriated for that purpose, that act is unconstitutional not "*merely*" because it is "in excess of [statutory] authority," but *also* because it is "contrary to [a] constitutional prohibition." *Id.* (emphasis added). Because neither the Constitution nor an Act of Congress authorizes such action, *Youngstown* instructs that the action is subject to judicial redress. *See* 343 U.S. at 585.

By purporting to waive application of the APA in the Laredo Sector, Acting DHS Secretary Wolf may have hoped to insulate from judicial review DHS's planned permanent condemnation of landowners' properties there. But the effort fails because these condemnations would constitute "actions contrary to . . . constitutional prohibition[s]." *Bivens*, 403 U.S. at 396–97. Consequently, even if judicial review is unavailable to Laredo landowners under the APA, DHS's actions "'may still be reviewed for constitutionality.'" *Dalton*, 511 U.S. at 469. In sharp contrast, the *Dalton* complainants did not, and could not, argue that the President's exercise of discretion to close a military base was "contrary to [a] constitutional prohibition." *Bivens*, 403 U.S. at 396–97.

Consistent with these precepts, the Second Circuit squarely held in a case involving the Secretary of the Interior's condemnation of a parcel of property for the Appalachian Trail that "condemnation decisions by governmental entities to which Congress has delegated eminent domain authority are subject to judicial review." *U.S. Dep't of Interior v. 16.03 Acres of Land*, 26 F.3d 349, 355 (2d Cir. 1994). When a condemnation action is challenged as *ultra vires*, the governing standard "requires the reviewing court to examine the challenged action for the purpose of determining whether the officials effecting the taking acted outside the scope of

their taking authority." *Id.* (citing *Catlin*, 324 U.S. at 240). "[T]he 'ultra vires' standard requires the reviewing court to ascertain the scope of the acting officials' statutory authority and determine whether the officials' action conformed with their authority." *Id.*

This is precisely the challenge that will be available to RGLC's members against DHS's *ultra vires* reliance on the FY2020 CAA, which is a legally insupportable basis for taking their properties. This Court should decline to undermine Laredo landowners' constitutionally protected property rights by issuing a decision the effect of which would be to peremptorily deny them judicial challenge of DHS suits for permanent condemnation.

The claims in *Dalton* were not subject to judicial review because they lacked the constitutional allegation that is present here (Appropriations Clause violation), in the Laredo landowners' scenario (Fifth Amendment and Appropriations Clause violations), and in *Bivens* (Fourth Amendment violation). In each of these instances, the Executive Branch official's actions were contrary to constitutional prohibition. But not in *Dalton*.

CONCLUSION

To preserve the constitutional force of *Youngstown*, which *Dalton* does not diminish, *amicus curiae* RGLC respectfully urges this Court to affirm the decisions below.

Respectfully submitted,

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APPENDIX

APPENDIX – LIST OF RIO GRANDE LANDOWNER COALITION MEMBERS

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