No. 24-

IN THE

Supreme Court of the United States

MICHAEL D. COHEN,

Petitioner,

v.

UNITED STATES OF AMERICA, DONALD J. TRUMP, WILLIAM P. BARR, MICHAEL D. CARVAJAL, JON GUSTIN, PATRICK MCFARLAND, JAMES PETRUCCI, ENID FEBUS, AND ADAM PAKULA,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, Michael Cohen, was eligible for release from federal prison to home confinement for health reasons. But Respondents conditioned his release on his agreeing to waive his First Amendment right to criticize Respondent Trump, who was then the President of the United States. When Cohen questioned this condition, Respondents revoked his release, returned him to prison, and placed him in solitary confinement. Cohen sought a writ of *habeas corpus*, and the District Court granted it, finding that his confinement was unconstitutional and retaliatory. But when Cohen brought the present action, seeking damages under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the District Court granted Respondents' motion to dismiss. The court did so even though it recognized that Respondents had violated his civil liberties and that injunctive relief and *habeas* relief did not adequately remedy the harm he had suffered and would not deter future violations of constitutional rights. The Second Circuit affirmed and subsequently denied Cohen's petition for rehearing en banc.

The questions presented are:

1. Whether a cause of action exists under *Bivens* when federal officials imprison a critic in retaliation for his refusal to waive his right to free speech and there is no remedy to deter them from doing so?

2. Whether the retaliatory imprisonment of a President's critic presents a "most unusual circumstance" under the Court's ruling in *Egbert v. Boule*, 596 U.S. 482 (2022), that necessitates recognition of a new *Bivens* claim.

PARTIES TO THE PROCEEDING

Petitioner Michael D. Cohen was the plaintiff in the United States District Court for the Southern District of New York and the appellant in the United States Court of Appeals for the Second Circuit.

Respondents United States of America, Donald J. Trump, William P. Barr, Michael D. Carvajal, Jon Gustin, Patrick McFarland, James Petrucci, Enid Febus, and Adam Pakula were defendants in the United States District Court for the Southern District of New York and the appellees in the United States Court of Appeals for the Second Circuit.

John and Jane Doe (1–10) were defendants in the United States District Court for the Southern District of New York, but did not participate in Petitioner's appeal to the Second Circuit.

RELATED PROCEEDINGS

This case arises from the following proceedings:

United States Courts of Appeals for the Second Circuit:

- *Cohen v. Trump*, No. 23-35 (Mar. 2, 2024) (order denying rehearing en banc);

  and

- *Cohen v. Trump*, No. 23-35 (Jan. 2, 2024) (order affirming the District Court's judgment dismissing Plaintiff's claims).

United States District Court for the Southern District of New York:

- *Cohen v. United States*, No. 1:21-cv-10774 (Nov. 14, 2022) (order granting Defendants' Motion to Dismiss).

Petitioner states that, under Supreme Court Rule 14.1(b)(iii), there are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael D. Cohen ("Cohen") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unpublished, but available at *Cohen v. Trump*, No. 23-35, 2024 WL 20558, (2d Cir. Jan, 2, 2024); Pet. App. 1a–9a. The Second Circuit's order denying rehearing en banc is likewise unpublished, but is available at *Cohen v. Trump*, No. 23-35, 2024 WL 20558 (2d Cir. Jan. 2, 2024). The order of the United States District Court for the Southern District of New York is reported at *Cohen v. United States*, 640 F. Supp. 3d 324 (S.D.N.Y. 2022). Pet. App. 10a–52a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Second Circuit issued its opinion and order affirming the District Court's dismissal on January 2, 2024. Pet. App. 1a–9a. On March 7, 2024, the Second Circuit denied rehearing en banc and entered judgment. Pet. App. 53a–54a. On May 24, 2024, Cohen filed a request for an extension of 35 days, up to and including July 10, 2024, to file the petition for a writ of certiorari. *See* Application to Associate Justice Sonia Maria Sotomayor for an Extension of Time to File a Petition for Writ of Certiorari, May 24, 2024. Justice Sotomayor granted this request on May 30, 2024.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides, in part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

STATEMENT OF THE CASE

In 1760, British parliamentarian John Wilkes published an item in his newspaper, *The North Briton*, criticizing King George III for a recent speech concerning his handling of the French-American War in the colonies. Incensed, the King locked Wilkes away for the crime of "seditious libel." Over the ensuing 30 years, the colonies declared their independence from the King, won the subsequent war, and founded a new form of government with a constitution that protected people who criticized the government from being thrown in prison without good cause. Since then, the courts have zealously protected Americans who criticized their government from being arbitrarily imprisoned for exercising their right to free speech.

Until this case. Here, Petitioner Michael Cohen, a well-known critic of Respondent Trump, was scheduled to be released from prison to home confinement. But before releasing him, the Respondents demanded that he waive his First Amendment right to criticize Respondent Trump. When Cohen, who was writing a book critical of Trump, did not agree immediately to waive his right to free speech, he was summarily sent back to prison and thrown into solitary confinement. Given these facts, the

Southern District of New York did not hesitate to find that the government had retaliated against Cohen for his speech and to grant Cohen's petition for a writ of *habeas corpus* and order him released. Stipulation and Order, *Cohen v. Barr*, No. 1:20-cv-05614 (S.D.N.Y. Jan. 26, 2021), ECF No. 36.

But when Cohen brought the present action under *Bivens*, seeking damages for the Respondents' unconstitutional conduct, the district court dismissed, finding that this Court's opinions interpreting *Bivens* foreclosed Cohen's claim. The district court reached this result reluctantly, recognizing the "profound violence" it inflicted on Cohen's civil liberties and the inadequacy of *habeas corpus* and injunctive relief in deterring future misconduct. *Cohen v. United States*, 640 F. Supp. 3d 324, 340-41 (S.D.N.Y. 2022), ECF No. 76. The Second Circuit affirmed, though the panel likewise questioned at oral argument the adequacy of injunctive relief to deter governmental misconduct.

Thus, as it stands, this case represents the principle that presidents and their subordinates can lock away critics of the executive without consequence. That cannot be the law in the country the Founders created when they threw off the yoke of the monarch who had imprisoned Wilkes.

For these reasons, this case presents important and recurring issues that require this Court's resolution. Applying the facts of this case, this Court must discern the remaining contours of an implied damages action under *Bivens*. *Bivens* created a private right of action for damages against federal officers who conducted an

unlawful search in violation of the Fourth Amendment. 403 U.S. at 391–92. In the following decade, this Court extended *Bivens* to the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and the Cruel and Unusual Punishment Clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980). Since then, the Court has declined to extend *Bivens* to any new contexts.

But, despite numerous opportunities to discard *Bivens* entirely, the Court has instead stated unequivocally that *Bivens* remains good law. *Egbert v. Boule*, 596 U.S. 482, 486 (2022). In doing so, this Court has stated that a new *Bivens* claim can be recognized in "the most unusual circumstances." *Id.* at 486. Petitioner respectfully submits that this is that case. Cohen alleges, supported by the findings of the District Court in his *habeas* case, that a former President and his subordinates conspired to use the federal prison system to silence one of the President's most vociferous and prominent public critics by revoking his approved release from prison to home confinement when the critic did not agree to waive his rights to speech. More "unusual circumstances" in need of a deterrent *Bivens* remedy are difficult to imagine.

And this Court has repeatedly stated that deterrence is the primary purpose of a *Bivens* claim. *See Egbert v. Boule*, 596 U.S. 482, 498 (2022) (noting that "*Bivens* 'is concerned solely with deterring the unconstitutional acts of individual officers'—*i.e.*, the focus is whether the Government has put in place safeguards to 'preven[t]' constitutional violations 'from recurring'") (citation omitted); *Hernandez v. Mesa*, 589 U.S. 93, 125 (2020) (noting that "[t]he purpose of *Bivens* is to deter the

officer") (emphasis in original); *Ziglar v. Abbasi*, 582 U.S. 120, 145 (2017) ("There is a persisting concern, of course, that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution."); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 62, 70 (2001) ("*Bivens*' purpose is to deter individual federal officers . . . from committing constitutional violations."); *Carlson v. Green*, 446 U.S. 14, 20–21 (1980) (in applying a *Bivens* remedy to an Eighth Amendment violation, the Court stated, "It is almost axiomatic that the threat of damages has a deterrent effect, . . . surely particularly so when the individual official faces personal financial liability").

Both the District Court and, at oral argument, the Second Circuit recognized that the remedies available to Petitioner outside of a *Bivens* action—namely, a successful application for the writ of *habeas corpus* and for an injunction against a second imprisonment—would not deter federal officials from imprisoning the government's critics. Yet, the Second Circuit's opinion affirming the dismissal was silent on the issue of deterrence. Instead, the Second Circuit held Petitioner's *Bivens* claim foreclosed because the *habeas* and injunctive remedies exist and, therefore, constitute a sufficient alternative to a *Bivens* claim. Thus, the Second Circuit's decision conflicts with this Court's precedent emphasizing the role of deterrence in considering the need for extending *Bivens* to a new context.

I. FACTUAL BACKGROUND

A. Cohen's Incarceration and Plan to Write a Book Critical of Donald J. Trump

For more than ten years, Petitioner Cohen was employed by Respondent Trump as his personal attorney. Pet. App. 12a.[1] In August and November 2018, Cohen pled guilty to crimes committed at the direction of Trump during his tenure as Trump's employee, and as a result, was sentenced to thirty-six months incarceration. *Id.* On May 6, 2019, Cohen voluntarily surrendered to officials at FCI Otisville to begin the service of his sentence. Pet. App. 3a.

While incarcerated, Cohen began writing a book detailing his experiences with Trump. Pet. App. 3a–4a. Cohen's work on the book was consistent with all Bureau of Prisons ("BOP") and FCI Otisville rules and regulations. Cohen publicly announced the book's forthcoming publication, including statements that his book would be unfavorable to Trump and would provide additional support for his prior congressional testimony that Trump was "'a cheat, a liar, a conman, [and] a racist.'" Pet. App. 12a (alteration in original).

Prior to and throughout 2020, Trump was running for re-election. He was aware of Cohen's testimony before Congress concerning his behavior and character.

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1. Because this is an appeal from an order granting a motion to dismiss, the facts alleged in the Complaint must be accepted as true. *Cohen v. United States*, 640 F. Supp. 3d 324 (S.D.N.Y. 2022), ECF No. 76.

Cohen's book, if published, could have damaged Trump's reputation and 2020 candidacy. Pet. App. 12a–13a.

B. Cohen's Approved Release and Sudden Remand

In 2020, in response to the COVID-19 pandemic, Respondent and then-Attorney General William Barr authorized federal prison officials to release certain categories of federal inmates to home confinement to combat the spread of COVID-19. Pet. App. 13a. On May 12, 2020, following the BOP's approval of Cohen's petition for early release under Barr's policy, Cohen was released from FCI Otisville on furlough to home confinement. Pet. App. 4a, 13a. During his furlough, Cohen continued making public statements on social media about his forthcoming book. Pet. App. 13a–14a.

On July 9, 2020, Cohen was instructed to appear at the United States Probation and Pretrial Services ("PTS") office to effectuate his transition to home confinement. Pet. App. 14a. During his visit to the PTS office, Respondents Adam Pakula and Enid Febus, who were PTS probation officers, provided Cohen with a Federal Location Monitoring Program Participant Agreement ("FLMPP Agreement") to review and sign. Pet. App. 14a. The form did not bear the standard identification number stamped on official government documents. Pet. App. 15a. The first paragraph of the FLMPP Agreement provided:

> No engagement of any kind with the media, including print, tv, film, books, or any other form of media/news. Prohibition from all social media platforms. No posting on social media and a requirement that you communicate

> with friends and family to exercise discretion in not posting on your behalf or posting any information about you. The purpose is to avoid glamorizing or bringing publicity to your status as a sentenced inmate serving a custodial term in the community.

Pet. App. 14a. (punctuation, spelling, and syntax in original).

This was not a standard provision in an FLMPP Agreement. Pet. App. 15a. It would have prevented Cohen from publishing his book and speaking publicly about Trump. *Id.* Cohen and his attorney asked if this apparently bespoke provision could be removed. *Id.* The probation officers responded that they would consult with their superiors. Pet. App. 15a–16a. After Cohen waited for an hour and a half, three United States Marshals entered the room and served Cohen with an order of remand signed by Respondent Patrick McFarland, a BOP employee, directing Cohen be returned to prison for allegedly refusing to agree to the FLMPP Agreement. Pet. App. 16a.

Cohen was shackled and transported back to FCI Otisville. *Id.* Respondent James Petrucci, the prison's warden, placed Cohen in solitary confinement where Cohen spent roughly twenty-three-and-a-half hours a day alone in a cell with poor ventilation, no air conditioning, and a broken window. Pet. App. 17a. Temperatures regularly exceeded 100 degrees in Cohen's cell. *Id.* Cohen's health suffered, with his blood pressure becoming dangerously high, resulting in severe headaches, shortness of breath, and anxiety. *Id.* While in solitary confinement, Cohen

was unable to complete his book or make any public statements. *Id.*

C. Cohen's Release from Prison

On July 20, 2020, Cohen petitioned the United States District Court for the Southern District of New York for a writ of *habeas corpus* and a motion for an emergency temporary restraining order ("TRO"). *Id.*; *see also* Verified Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2241, *Cohen v. Barr*, No. 1:20-cv-05614 (S.D.N.Y. July 20, 2020), ECF No. 14; Notice of Petitioner's Emergency Motion for a Temporary Restraining Order, *Cohen v. Barr*, No. 1:20-cv-5614 (S.D.N.Y. July 20, 2020) ECF No. 4. On July 23, 2020, the district court held a hearing and ordered Cohen's release to home confinement, and also issued an injunction prohibiting the government from returning him to prison for his speech. Pet. App. 5a, 17a. Judge Hellerstein found that Cohen had been imprisoned for exercising his constitutional right: he stated that the "purpose in transferring Cohen from release on furlough and home confinement back to custody was retaliatory in response to Cohen desiring to exercise his First Amendment rights to publish a book critical of the President and to discuss the book on social media." Pet. App. 5a n.2; *see also Cohen v. Barr*, No. 1:20-cv-05614, 2020 WL 4250342, at *1 (S.D.N.Y. July 23, 2020). After sixteen days of solitary confinement in a sweltering cell at FCI Otisville, Cohen was released to home confinement. Pet. App. 5a.

II. PROCEDURAL HISTORY

A. The District Court Proceedings

On December 16, 2021, Cohen filed the present action in the United States District Court for the Southern District of New York. His complaint asserted, among others, a *Bivens* claim against Respondents for violations of his Fourth and Eighth Amendment rights. Respondents moved to dismiss. On November 14, 2022, the district court granted the motion. Judge Liman reasoned that Cohen's claim for damages under *Bivens* was precluded by this Court's decisions limiting *Bivens*. Pet. App. 10a–11a; *see also Cohen v. United States*, 640 F. Supp. 3d 324, 340–41 (S.D.N.Y. 2022). Nonetheless, Judge Liman was disturbed by the "profound violence" his dismissal did to Cohen's constitutional rights:

> Cohen's complaint alleges an egregious violation of constitutional rights by the executive branch—nothing short of the use of executive power to lock up the President's political enemies for speaking critically of him. The Supreme Court's precedents ensure that there is at best a partial remedy for the abuse of power and violation of rights against the perpetrators of those wrongs. And those precedents rest on a mistaken proposition—that the Court's reluctance to imply a damages remedy for statutorily created rights where Congress did not explicitly intend for there to be such a remedy necessarily must extend to a reluctance to find such a remedy for *constitutionally guaranteed* rights.
>
> . . .

> [A] proper inquiry . . . would look to whether the framers—in the language they used, the structure of the government they established, the limitations they intended to place on executive power, and the authority they gave to the federal courts—intended for there to be such a remedy. There are powerful reasons to believe that, in many circumstances, the answer to that question will be yes, . . . if one's rights are violated by executive officials, the courts provide a legal remedy for that violation.

Id. at 341–42 (emphasis in original) (internal citations omitted). And though Judge Liman noted the availability of injunctive relief and a writ of *habeas corpus* further supported the dismissal of Cohen's claim under existing law, he acknowledged that injunctive and *habeas* relief did not suffice to deter constitutional violations. *Id.* at 340–41.

B. The Court of Appeals Proceedings

Cohen appealed, Pet. App. 6a, and on December 14, 2023, the Second Circuit heard oral argument. Judges Myrna Pérez and Barrington D. Parker, Jr., questioned whether the Government could reconcile its position that *habeas corpus* and injunctive relief—which serve to stop and prevent the repetition of executive abuse, but do not deter it in the first place—are adequate remedies consistent with the Supreme Court's statements that an adequate *Bivens* remedy's primary function is to deter future misconduct by federal officials.[2]

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2. *See* Oral Argument Recording, *Cohen v. Trump*, at 15:50–16:10 (Dec. 14, 2023), https://ww3.ca2.uscourts.gov/decisions/isysquery/667e277b-c1d5-4cdd-aab0-ce04eb7537d7/11-20/list/.

Despite raising this question at oral argument, the Court of Appeals affirmed the District Court. Pet. App. 1a–9a. The Court of Appeals conducted the two-step inquiry this Court first articulated in *Ziglar v. Abbasi*, 582 U.S. 120 (2017). For the first step, the court examined whether the claim at issue arises in a "new context" or involves a "new category of defendants[,]" and concluded that Cohen's *Bivens* claims involved new categories of defendants not found in *Bivens* and that the claim therefore differed enough from the one in *Bivens* to constitute a new context. Pet. App. 7a–8a.

Applying the second step of the *Ziglar* inquiry, the Court of Appeals then asked whether any special factor existed to justify extending *Bivens* to a new context. *Id.* In a brief analysis, the Court of Appeals stated that, "[u]nder the circumstances presented here, a successful petition for *habeas* relief is sufficient to foreclose Cohen's *Bivens* claims." Pet. App. 9a. Despite recognizing at oral argument the importance of deterrence in assessing the adequacy of an alternative remedy, the Court of Appeals' opinion did not discuss deterrence. Pet. App. 1a–9a. The opinion also did not address Cohen's argument that these are the "most unusual circumstances" that *Egbert* posited might present a new *Bivens* context. Nor did the Second Circuit discuss Cohen's argument that, in the absence of *Bivens* relief, *some* form of deterrent remedy must be available when a federal judge finds the Government violated an individual's right to speech by locking them in prison. *Id.*

(**Judge Parker:** "[t]he defendant here is the executive, the allegation is that the wrong was perpetrated by the executive. . . . [C]onfer[ring] with the executive in a case like this to fashion an adequate remedy . . . doesn't make any sense.").

Cohen petitioned for rehearing en banc. On March 7, 2024, the Second Circuit denied the petition. Pet. App. 54a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT INCORRECTLY APPLIED THIS COURT'S PRECEDENTS

A. Habeas and Injunctive Relief Are Inadequate Remedies

The remedies of writ of *habeas corpus* and injunctive relief are inadequate remedies under this Court's *Bivens* precedents because they provide no deterrence for future similar abuses by federal officials. In *Egbert*, this Court reiterated that the purpose of a *Bivens* action is to deter unconstitutional behavior by federal officials. *Egbert v. Boule*, 596 U.S. 482, 498 (2022) ("*Bivens* 'is concerned solely with deterring the unconstitutional acts of individual officers'—*i.e.,* the focus is whether the Government has put in place safeguards to 'preven[t]' constitutional violations 'from recurring.'" (quoting *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). Courts are barred from "superimposing a *Bivens* remedy" only if "Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence . . ." *Id.*

As an initial matter, there is no doubt—and the Respondents do not contest—that Cohen suffered a violation of his constitutional rights in need of some remedy. Cohen's complaint, supported by Judge Hellerstein's

ruling, alleges that, at the direction of Trump,[3] Cohen was reincarcerated after he was approved for release to home confinement and placed him in an uninhabitable cell because he did not waive his right to speak critically of the President. The revocation of Cohen's approved release to home confinement and incarceration in squalid conditions in retaliation for his refusal to waive his speech rights is a clear violation of his Fourth Amendment rights.[4]

The question then arises—what is the appropriate remedy for such a gross violation of civil liberties? Judge Liman and Second Circuit, in reasoning through this Court's line of *Bivens* cases, found that *habeas* and injunctive relief were adequate remedies. But they are not, because they do not vindicate this Court's emphasis on deterrence. *Habeas* and injunctive relief do not provide

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3. The allegation that President Trump personally ordered Cohen's remand is supported by the one-and-a-half-hour delay between Cohen's review of the FLMPP and the appearance of the U.S. Marshal's bearing Respondent McFarland's remand order, and by the reasonable conclusion that mid-level federal officials would not unilaterally decide to revoke the approved release of one of the federal prison system's highest-profile prisoners simply for asking a question about the conditions of his release without orders from his or her superiors. At the motion to dismiss stage, the Plaintiff's allegations are accepted as true. Discovery will reveal what role President Trump and other officers had in ordering Petitioner's remand to Otisville.

4. Prisoners have a liberty interest in less restrictive forms of confinement. Once a less restrictive form of confinement is granted, it may not be revoked without a valid reason and a hearing to contest. *See Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole); *Young v. Harper*, 520 U.S. 143 (1997) (pre-parole); *Tracy v. Salamack*, 572 F.2d 393 (2d Cir. 1978) (temporary release); *Kim v. Hurston*, 182 F.3d 113 (2d Cir. 1999) (work release).

a reason for a President or any subordinate officer *to refrain from incarcerating a critic* *in the first place*. These remedies only say "stop" (*habeas*) and "don't do it again" (injunction). In the absence of an "adequate level of deterrence" in the legislatively- approved remedies, the courts are empowered to consider a *Bivens* claim. *Egbert*, 596 U.S. 482 at 498.

Nonetheless, the district court correctly recognized that *habeas* relief neither "compensate[s] Cohen for or address[es] the harms Cohen had already suffered prior to the issuance of the injunction," nor "eliminate[s] the deterrent effect that imprisonment (in solitary confinement) can have on all but the most intrepid." *Cohen v. United States*, 640 F. Supp. 3d 324, 340 (S.D.N.Y. 2022). At the December 14, 2023 oral argument, Judges Barrington D. Parker, Jr. and Myrna Pérez questioned whether the Government could reconcile its position that *habeas* and injunctive relief are adequate remedies with this Court's statement that an adequate remedy would deter future unconstitutional behavior by federal officials:

> JUDGE PARKER: Which of the remedies you've outlined has a deterrent component to it?
>
> GOVERNMENT: So, I think habeas relief and injunctive relief. Injunctive relief generally does have a deterrent effect. It provides—it provides notice to all of those who may be in a similar situation that those actions were found to be unlawful.
>
> JUDGE PÉREZ: Right, but there's no—how—where's the deterrence in that? The notice, like

> the 'after the fact you're not going to get away with it,' is not actually precluding somebody from doing something in advance.
>
> …
>
> JUDGE PARKER: The Defendant here is the Executive. The allegation is that . . . the wrong was perpetrated by the Executive. So, your suggestion that you've got to confer with the Executive in a case like this, to fashion an adequate remedy, I may be missing something, but it doesn't make any sense to me.[5]

The record is thus clear that both the District Court and a majority of the Second Circuit panel believed that injunctive relief and *habeas* relief do not adequately serve the deterrent purpose at the heart of *Bivens*. This Court has never held that "remedies providing no relief to the individual whose constitutional rights have been violated are 'adequate' for the purpose of foreclosing a *Bivens* action." *Egbert,* 596 at 524. This Court's precedents make plain that deterrence is of paramount importance in assessing the adequacy of an alternative to

5. *Id.* at 14:04–16:11. When pressed further, the Government shifted its argument, asserting instead that this Court in *Egbert* said Congress and the Executive must determine whether a remedy affords adequate deterrence. The Second Circuit panel noted the Government's retreat. *See* Oral Argument Recording, *Cohen v. Trump*, at 14:45–15:17 (Dec. 14, 2023), https://ww3.ca2.uscourts.gov/decisions/isysquery/667e277b-c1d5-4cdd-aab0-ce04eb7537d7/11-20/list/ (**Judge Perez**: "Okay, but now that's walking away. So, your position is not that either of those two remedies that you suggested provide deterrence, but Congress is the one that gets to do it."). The Government's alternative argument is addressed at pp. 16–17 below.

a *Bivens* remedy, and that the need for a *Bivens* remedy is heightened when the facts of a case demonstrate the need for deterrence.

1. The Second Circuit Did Not Articulate a Reason to Defer to Congress for the Creation of a Deterrent Remedy.

Despite a majority of the panel recognizing the importance of deterrence in assessing the inadequacy of *habeas* and injunctive relief as alternatives to a *Bivens* remedy, the Second Circuit ultimately held that, "[u]nder the circumstances presented here, a successful petition for habeas relief is sufficient to foreclose [Cohen's] *Bivens* claims." *Cohen v. Trump*, No. 23-35, 2024 WL 20558, Doc. 119-1 at 7 (2d Cir. Jan, 2, 2024). But in reaching that decision, the Second Circuit did not meaningfully engage in the core analysis this Court has laid out for a *Bivens* claim—whether there is "any reason" to defer to Congress for the creation of a remedy. *See Egbert*, 596 U.S. at 483. (The "two-step inquiry often resolves to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.").

Here, there is no good reason to think Congress intended for *habeas* and injunctive relief to be the sole remedies against the unprecedented incarceration of the President's critics. There is no good reason to think that Congress, and not the courts, should craft the remedy to prevent and deter the executive from incarcerating critics. To the contrary, there are numerous reasons that the courts, whose traditional role is the guarding of civil liberties from the encroachments of the political branches of government, have the duty to ensure that there is a

meaningful check against federal officials who would silence critics by imprisoning them. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973) ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."). The Second Circuit's opinion did not engage with any of these reasons. It is thus left to this Court to decide whether there is any consequence for executives who incarcerate their critics.

B. The Defense of Civil Liberties Is the Duty of the Courts, Not Congress

The Court has said that if there is a "single reason" to defer to Congress for the creation of a remedy for a constitutional violation, the courts should refrain from recognizing a new *Bivens* remedy. *Egbert*, 596 U.S. 482 at 491. Here, *there is no reason* to defer to Congress to stop the executive from incarcerating its critics. There are *many reasons* to think the courts should be the bulwark against such abuses.

The defense of civil liberties has always been a job for the Courts. *See Nixon v. Fitzgerald*, 457 U.S. 731, 789–90 (1982) ("First, it is not the exclusive prerogative of the Legislative Branch to create a federal cause of action for a constitutional violation.") As the traditional guardians of the boundary between power and rights, the courts are best positioned to craft the urgently needed mechanism to prevent the abuse heaped on Petitioner from befalling anyone else who speaks critically of our government and its leaders.

As Judge Liman stated:

> [A] proper inquiry . . . [–]one that would honor the important distinction between rights conferred by a legislative majority and rights conferred by the Constitution—would look to whether the framers—in the language they used, the structure of the government they established, the limitations they [] place[d] on executive power, and the authority they gave to the federal courts—intended for there to be such a remedy. There are powerful reasons to believe that, in many circumstances, the answer to that question will be yes, . . . if one's rights are violated by executive officials, the courts provide a legal remedy for that violation.

Cohen v. United States, 640 F. Supp. 3d 324, 340–42 (S.D.N.Y. 2022).

This Could should conduct the analysis Judge Liman suggests and safeguard the constitutional rights of Cohen by granting him an adequate deterrent remedy. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[W]here there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded. . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

II. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

The questions presented in this petition are of paramount importance. The possibility that the federal government has the power to retaliate against critics with imprisonment, without any consequence for or check against the officials engaged in such retaliation, is a chilling prospect. This Court should not turn its eyes away from this profound breach of the contract between a government of limited powers and a free citizenry.

A. A New *Bivens* Claim Is Warranted to Address This "Most Unusual Circumstance"

While this Court has narrowed the availability of a new *Bivens* claim, it has nonetheless declined to overrule *Bivens*. Thus, *Bivens* remains good law. And the Court has made clear that it is still willing to find a new *Bivens* claim in the "most unusual circumstances." *See Egbert*, 596 U.S. at 486. This is that case.

It is more than the "most unusual circumstances" for a President to abuse his power by placing one of his critics in prison. In this country's 250-year history, it is an unprecedented act that violates the most fundamental values of our constitutional republic. If this case does not constitute the "the most unusual circumstance," then what case would?

This Court has not yet decided a case explaining what would constitute "the most unusual circumstances." The Circuit courts have noted the significance of the Court's introduction of this exception, but have yet to

meaningfully analyze it or find any case to be sufficiently "unusual." *See Mejia v. Miller*, 61 F.4th 663, 669 (9th Cir. 2023) (plaintiff sought *Bivens* remedy against a Bureau of Land Management's officer's alleged use of excessive force; "In short, under *Egbert* 'in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts.' . . . This case is not the rare exception."); *see also Quinones-Pimentel v. Cannon*, 85 F.4th 63, 74 (1st Cir. 2023) (plaintiffs brought *Bivens* action against federal prosecutors, FBI agents and employees alleging unconstitutional searches and seizures of company offices and data center; "[E]ven a single reason to pause before applying *Bivens* in a new context" is sufficient to preclude relief, because "in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts."); *see also Xi v. Haugen*, 68 F.4th 824, 836 (3d Cir. 2023) (plaintiff brought a *Bivens* action against an FBI counterintelligence agent involved in investigation of plaintiff; "'[I]n all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts,' . . . Such is the case here, where one overriding special factor counsels against the creation of a judicially-implied *Bivens* remedy: the implication of national security interests.")

The Fourth Amendment recognizes that every person is to be free from unreasonable seizure. There is no question that Cohen's claim is premised on an unreasonable seizure. The Second Circuit failed to address whether this particular unreasonable seizure amounted to the "most unusual circumstances" sufficient to warrant what the Government asserts is a new *Bivens* claim. Certiorari is thus warranted here.

III. THIS CASE IS AN IDEAL VEHICLE FOR THE COURT TO CLARIFY EXISTING *BIVENS* PRECEDENTS AND IDENTIFY WHAT IS AN ADEQUATE ALTERNATIVE REMEDY

The remaining scope of *Bivens* is an important and recurring issue. This case squarely presents a singular opportunity for this Court to clarify the continuing force of *Bivens*. The issue at the center of this case—what is an adequate remedy for the retaliatory imprisonment of a President's critic—is of paramount and (hopefully rarely) continuing importance. A case involving such fundamental questions of the relationship between a government of limited powers and a citizenry imbued with inalienable rights presents an ideal vehicle for the Court to make clear just how much life is left in *Bivens*.

This case presents an ideal occasion for the Court to *Bivens* and its progeny. This Court made clear in *Egbert* that it *is* possible for a court to recognize a new *Bivens* context in "the most unusual circumstances," and that a litigant must demonstrate that, in such rare circumstances, there must be no reason to defer to Congress for the creation of a damages remedy. 596 U.S. at 486, 491–92. However, the Court has never addressed what constitutes "the most unusual circumstances" that warrant extension of a *Bivens* claim, leaving a gap in the *Bivens* jurisprudence, which is evidenced by the dearth of analysis under existing precedents. The Court has not explained what sort of reason would counsel a court to cede the defense of fundamental civil liberties to Congress, when the alleged violation threatens the fundamental relationship between a limited executive and a free citizenry. This case provides a clean opportunity for this Court to fill in these gaps.

This case is also an ideal vehicle for this Court to clarify what constitutes an adequate alternative remedy to a *Bivens* action. The sole basis for the Second Circuit's decision was its conclusion that Cohen's *Bivens* claim is foreclosed because Cohen had available alternative forms of judicial relief, namely, his successful petition for *habeas* and an injunction. But, as discussed above, the defining characteristic and rationale for *Bivens* has always been deterrence. The need for deterrence will never be more acute than in a case involving the President's use of the prisons to silence his critics, strongly favoring the recognition of a new *Bivens* cause of action, or some other deterrent remedy.

Both the district court and the majority of the appellate panel at oral argument recognized that *habeas* and injunctive relief do not suffice to deter federal officials from retaliatory incarceration of governmental critics. Nevertheless, relying on *Ziglar*, the Second Circuit found *habeas* and injunctive relief to be adequate alternative forms of relief, precluding Cohen's *Bivens* claims.

In *Ziglar*, the Court considered new *Bivens* claims brought by detainees held in the aftermath of the September 11, 2001 terrorist attacks. The Court recognized the need to prevent officers from violating the Constitution, especially those executive actions that have the "sweeping potential to affect the liberty of so many[.]" *Id.* at 145–46. The Court expressly stated that injunctive relief or a writ of *habeas corpus* is appropriate to address "large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners." *Id.* at 144. As *Ziglar* involved a national-security policy after the worst attack in this nation's history, the Court rejected the

detainees' *Bivens* claims for fear that recognizing them may deter high officers from taking "urgent and lawful action in a time of crisis." *Id.* at 145.

In contrast to *Ziglar*, Petitioner's claim does not call into question "large-scale policy decisions." The circumstances here do not reflect a need to balance officials' ability to take "urgent and lawful action in a time of crisis" against civil liberties. *Id.* at 144–45. Rather, Petitioner challenges an individual instance of a constitutional violation as repugnant as any imaginable—the incarceration of critics for their refusal to cease their criticism. The high rank of the executive officials named in Petitioner's suit and the implications of the lack of a deterrent remedy against them and similarly situated future officials underscores the special risks presented by this case and the need for an effective, practical, and adequate deterrent. *Habeas* and injunctive relief will not by themselves "secure an adequate level of deterrence . . . ." *Egbert*, 596 U.S. at 498. It is apparent that to deter individual officers' wrongdoing like the one in this case, it is *Bivens* or nothing. Thus, this Court's review is warranted and urgently needed.

IV. IF *BIVENS* IS UNAVAILABLE, SOME REMEDY MUST EXIST TO DETER THE RETALIATORY INCARCERATION OF CRITICS

The Second Circuit's opinion was silent on Cohen's argument that, in the absence of *Bivens* relief, there must be some remedy when a federal judge finds the Government violated an individual's right to speech by confining him to prison. As Judge Liman recognized, a nation of ordered liberty must afford a significant deterrent remedy beyond "stop" and "don't do it again"

when the executive incarcerates its critics. Presidents are not kings and John Wilkes's fate should not be possible in this country.

CONCLUSION

For the reasons discussed, the Court should grant the petition for writ of certiorari.

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