No. 24-41

IN THE
Supreme Court of the United States

MICHAEL D. COHEN
Petitioner,
v.

DONALD J. TRUMP, FORMER PRESIDENT OF THE UNITED STATES, ET AL.
Respondents.

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

BRIEF OF AMICI CURIAE CONSTITUTIONAL SCHOLARS AND FORMER FEDERAL OFFICIALS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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?

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INTEREST OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37, *Amici Curiae* (identified below, "*Amici*") respectfully submit this brief in support of the petitioner, Michael D. Cohen. *Amici* include constitutional scholars and former senior and longtime federal officials from all three branches of government who have collectively spent decades defending the U.S. Constitution, the interests of the American people, and the rule of law. They are thus well qualified to address the significance of maintaining a private damages remedy under *Bivens v. Six Unknown Named Agents of Fed. Bur. Of Narcotics*, 403 U.S. 388 (1971) as a means of deterring misconduct by federal officials. *Amici* and their backgrounds (for identification purposes only) are as follows:

Lee C. Bollinger served as President of Columbia University (2002-2023) and is currently President Emeritus, the Seth Low Professor of the University, and a member of the faculty of the Law School at Columbia University.

Louis E. Caldera served as United States Secretary of the Army, (1998-2001); Director of the White House Military Office (2009); President, University of New Mexico (2003- 2006); California State Assembly member (1992-1997); United States Army officer (1978-

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[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of Claudine Schneider's intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief.

Pursuant to Rule 37.6, *Amici* affirm that: (i) no counsel for a party authored this brief in whole or in part; (ii) no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and (iii) no person other than *Amici* or their counsel made such a monetary contribution.

1983); and serves currently as a Senior Lecturer of Business Administration, Harvard Business School.

Tom Coleman served as Assistant Attorney General of Missouri (1969-1972); Missouri State Representative (1973-76); and Member of Congress (1976-1993).

Mickey Edwards served as Representative of the Fifth Congressional District of Oklahoma (1977-1993); is a founding trustee of the Heritage Foundation; and is the former National Chairman of both the American Conservative Union and the Conservative Political Action Conference.

John J. Farmer Jr. served as New Jersey Attorney General, appointed by Governor Christine Todd Whitman (1999-2002); Chief Counsel to Governor Whitman (1997-1999); Deputy Chief Counsel to Governor Whitman (1996-1997); Assistant U.S. Attorney for the District of New Jersey in the George H.W. Bush and Clinton Administrations (1990-1994); and Senior Counsel to the 9/11 Commission (2003-2004).

Stuart M. Gerson served as Acting Attorney General (1993); Assistant Attorney General for the Civil Division (1989–1993); and Assistant United States Attorney for the District of Columbia (1972–1975).

Judge Nancy Gertner served as District Court Judge for the U.S. District Court of Massachusetts, appointed by President Bill Clinton (1994-2011) and is a Senior Lecturer on Law at Harvard Law School.

Philip Allen Lacovara served as Deputy Solicitor General in the Nixon Administration in charge of the government's criminal and national security cases (1972-1973); Counsel to the Special Prosecutor, Watergate Special Prosecutor's Office (1973-1974); and drafted the brief for the United States and presented

arguments in *United States v. Nixon*, 418 U.S. 683 (1974).

Trevor Potter served as Chairman of the Federal Election Commission (1994); and Commissioner of the Federal Election Commission, appointed by President George H.W. Bush (1991-1995).

Alan Charles Raul served as Associate Counsel to the President (1986-1988); General Counsel of the Office of Management and Budget (1988-1989); General Counsel of the U.S. Department of Agriculture (1989-1993); Vice Chairman of the Privacy and Civil Liberties Oversight Board (2006-2008); and currently serves as a Lecturer on Law at Harvard Law School.

Claudine Schneider served as a Member of the U.S. House of Representatives (R-RI) (1981-1991).

Robert Shanks served as Deputy Assistant Attorney General in the Office of Legal Counsel (1981-1984).

Abbe Smith is the Scott K. Ginsburg Professor of Law at Georgetown University Law Center, a member of the American Board of Criminal Lawyers, and was previously the Deputy Director of the Criminal Justice Institute at Harvard Law School.

Geoffrey Stone is the Edward H. Levi Distinguished Service Professor of Law at the University of Chicago; the former Dean of the University of Chicago Law School (1987-1994); and the former Provost of the University of Chicago (1994-2002).

Laurence H. Tribe is the Carl M. Loeb University Professor of Constitutional Law Emeritus at Harvard

University and the former Director of the Office of Access to Justice in the U.S. Justice Department.

Olivia Troye served as Special Advisor, Homeland Security and Counterterrorism to Vice President Mike Pence (2018-2020).

William F. Weld served as U.S. Attorney for Massachusetts (1981-1986); Assistant U.S. Attorney General in charge of the Criminal Division (1986-1988); and Governor of Massachusetts (1991-1997).

SUMMARY OF ARGUMENT

The petition here raises questions that go to the heart of ordered liberty and the rule of law. More than 50 years ago, this Court in *Bivens* held that the "very essence of civil liberty" mandated the existence of an independent cause of action for constitutional violations committed by federal officials. 403 U.S. at 397 (quoting *Marbury v. Madison*, 5 U.S. 137, 163 (1803)). In *Bivens* and its progeny, this Court recognized that where an individual's constitutional rights are violated by federal officials, the victim must be able to seek damages from the violators in order to deter future misconduct. Otherwise, officials may do it again, knowing that the worst consequence is an order stopping them from continuing the misconduct, rather than liability for what they have done. In the decades since, this Court has reaffirmed the critical rationale underlying *Bivens*: "to deter the officer" from violating the constitutional rights of the individuals over whom officers wield the power of the federal government. *Ziglar v. Abbasi*, 582 U.S. 120, 140-41 (2017) (quoting *F.D.I.C. v. Meyer*, 510 U. S. 471, 845 (1994)).

Although *Bivens* remains good law that this Court has declined to overrule on multiple occasions, it has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 68 (2001). As a result, the lower courts are left to wonder whether the high bar this Court has set to overcome the "caution" it has urged in recognizing a *Bivens* cause of action is impossible to clear.

This is the case for the Court to answer that question. The extraordinary facts alleged here illustrate the essential necessity of deterrence to the rule of law.

Petitioner's complaint alleges that, after serving time in prison, he was furloughed and scheduled to be released to home confinement pursuant to a federal policy related to COVID-19. But then, at a processing meeting with prison officials, petitioner was asked to sign a non-disclosure agreement that would have prevented him from writing about then-President Donald Trump. When he and his lawyers asked questions rather than simply sign the agreement, prison officials took him back into custody, returned him to prison, and placed him in solitary confinement. He was released from prison again only weeks later after a federal court granted his *habeas* petition.

Petitioner then filed this *Bivens* claim seeking damages from the defendants responsible for the egregious violation of his rights. The District Court recognized that the complaint alleges "nothing short of the use of executive power to lock up the President's political enemies for speaking critically of him." *Cohen v. United States*, 640 F. Supp. 3d 324, 341 (S.D.N.Y. 2022), aff'd sub nom. *Cohen v. Trump*, 23-35, 2024 WL 20558 (2d Cir. Jan. 2, 2024). But it dismissed the complaint anyway, reluctantly holding that *Bivens* provides no cause of action for damages even in the extraordinary circumstances of this case. The courts below reached that shocking conclusion because they interpreted this Court's *Bivens* caselaw to require it.[2] But under the circumstances of this case – involving an attempt to hold accountable members of the political branches for unconstitutionally punishing political criticism – there is no reason to think Congress, one of those two branches, would be better equipped to create a

[2] The Second Circuit similarly indicated that it felt bound by existing precedent to affirm the dismissal. *See* Pet. App. 9a.

damages remedy, and thus under this Court's precedent, the courts should find a remedy under the Constitution.

The stakes could not be higher. The decision below sends a clear signal to federal actors that critics of the government can be punished without repercussion for exercising their constitutional rights. A federal court may ultimately order the critic released from custody, but the official remains undeterred from engaging in the same misconduct again. *Amici* urge this Court to grant the petition for writ of certiorari and reverse the judgment of the court of appeals.

ARGUMENT

I. This Court Has Consistently Declined to Overrule *Bivens*

This Court first recognized the existence of a cause of action for violations of constitutional rights by federal officials in *Bivens*. There, agents of the Federal Bureau of Narcotics allegedly violated the plaintiff's Fourth Amendment rights by using excessive force while searching his apartment and arresting him, without probable cause. 403 U.S. at 389-90. Although the Constitution does not expressly authorize a civil damages claim by parties deprived of their constitutional rights, the Court held that such a right was implicit in the Constitution. *Id*. at 396. Because a federal "agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own" (*id.* at 392), the Court determined that the "very essence of civil liberty" mandated the existence of an independent cause of action for constitutional violations committed by

individuals in such capacity. *Id.* at 397 (quoting *Marbury*, 5 U.S. at 163).

In *Davis v. Passman*, the Court again recognized a cause of action for damages where the plaintiff alleged that a U.S. Congressman violated her Fifth Amendment rights by terminating her employment on the basis of her sex. 442 U.S. 228, 231 (1979). Quoting from James Madison's presentation of the Bill of Rights to Congress in 1789, the Court recognized the judiciary's historical responsibility to protect the constitutional rights of the American people from encroachment by the political branches:

> If these rights are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Id. at 241-42 (quoting 1 Annals of Cong. 439 (1789)) (internal alterations omitted). According to the Court, "unless such rights are to become merely precatory," individuals with "no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Id.* at 242.

One year later, in *Carlson v. Green*, the Court held that a plaintiff could seek damages under *Bivens*, when federal prison officials violated a prisoner's Eighth Amendment rights by failing to provide him with proper medical attention. 446 U.S. 14, 16 n.1

(1980). In response to the defendants' argument that a *Bivens* remedy should not be available because the legislature created an express cause of action against the United States, the Court emphasized that the existence of a direct cause of action against the individual defendants "serves a deterrent purpose" that would be lacking unless "the individual official faces personal financial liability." *Id*. at 21.

Consistent with the Court's reasoning in *Carlson*, the Court has subsequently stated that "*Bivens* 'is concerned solely with deterring the unconstitutional acts of individual officers'…." *Egbert v. Boule*, 596 U.S. 482, 498 (2022) (quoting *Corr. Serv. Corp.*, 534 U.S. at 61). It is intended "to deter the officer" from violating the constitutional rights of the individuals over whom they wield the power of the federal government. *Ziglar*, 582 U.S. at 140 (quoting *F.D.I.C.*, 510 U.S. at, 845).

However, since *Carlson* was decided, the recognition of a *Bivens* remedy to deter unconstitutional conduct has become "a disfavored judicial activity." *Egbert*, 596 U.S. at 483 (quoting *Ziglar*, 582 U.S. at 135). Beginning in 1983, the Court has issued twelve consecutive decisions in which it declined to recognize a *Bivens* remedy for a constitutional violation.[3] As the Court stated in *Ziglar*, during this period, "the Court adopted a far more cautious course before finding

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[3] *See Chappell v. Wallace*, 462 U.S. 296 (1983); *Bush v. Lucas*, 462 U.S. 367 (1983); *United States v. Stanley*, 483 U.S. 669 (1987); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *F.D.I.C.*, 510 U.S. 471; *Corr. Servs. Corp.*, 534 U.S. 61; *Wilkie v. Robbins*, 551 U.S. 537 (2007); *Hui v. Castaneda*, 559 U.S. 799 (2010); *Minneci v. Pollard*, 565 U.S. 118 (2012); *Ziglar*, 582 U.S. 120; *Hernandez v. Mesa*, 589 U.S. 93 (2020); *Egbert*, 596 U.S. 482.

implied causes of action." 582 U.S. at 132. In recognition of the potential costs to the government in the form of defense or indemnification of claims against its officials, and the potential administrative burdens involved in litigation, among "other reasons, the Court's expressed caution as to implied causes of actions under congressional statutes led to similar caution with respect to actions in the *Bivens* context, where the action is implied to enforce the Constitution itself." *Id*. at 133-34.

The Court most recently addressed the viability of a *Bivens* cause of action in *Egbert*, where a U.S. Border Patrol agent allegedly used excessive force against the plaintiff while conducting a search on his property. 596 U.S. at 489. Prior to *Egbert*, the Supreme Court case law described a two-step analysis for the recognition of a *Bivens* remedy: first the court must determine if the claim involves a "new context" that is "meaningfully different" from the causes of action recognized in *Bivens*, *Davis*, and *Carlson*;[4] then, if the context is new, the court must determine if any "special factors" warrant refusal to recognize a new

[4] By the time *Egbert* was decided, the Court had endorsed a "broad" view of new contexts for this purpose. *See Hernandez*, 589 U.S. at 102. Indeed, a claim could be deemed "meaningfully different" from previously recognized causes of action based on any of the following, non-exhaustive, considerations: "[1] the rank of the officers involved; [2] the constitutional right at issue; [3] the generality or specificity of the official action; [4] the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; [5] the statutory or other legal mandate under which the officer was operating; [6] the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or [7] the presence of potential special factors that previous *Bivens* cases did not consider." *Ziglar*, 582 U.S. at 140.

remedy. *Egbert*, 596 U.S. at 492. In *Egbert*, the Court explained that those two steps "often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Id.* "[I]f there is any reason to think that 'judicial intrusion' into a given field might be 'harmful' or 'inappropriate' … or even if there is the 'potential' for such consequences, a court cannot afford a plaintiff a *Bivens* remedy." *Id.* at 496. (internal quotations omitted)

Despite these decisions, the Court has consistently declined to "dispense with *Bivens* altogether…." *Id.* at 491. Nor has the Court rejected the principle that deterrence of constitutional violations by federal agents – the chief aim of *Bivens* and its progeny – is important for the protection of individual rights and the values embodied in the U.S. Constitution. Thus, the Court left open the possibility that in "the most unusual circumstances" when there is no reason to think judicial intervention would be inappropriate, a cause of action for damages may still be available to victims of constitutional violations that are not identical to the claims asserted in *Bivens*, *Davis*, and *Carlson*. *Egbert*, 596 U.S. at 486.

This case involves allegations of politically motivated constitutional violations by one of the political branches of the federal government, designed to chill political speech that is critical of or unfavorable to the political party in power. Such allegations present the kind of unusual circumstances where judicial intervention would not be inappropriate, and a damages remedy should be available. The Court should grant Mr. Cohen's petition for a writ of certiorari to clarify the viability of *Bivens* in this "most unusual" and most significant context.

II. A Damages Remedy is Essential to Deter Federal Officials From Imprisoning their Critics Lawlessly

In this case, Mr. Cohen, a prominent public figure, was allegedly placed in solitary confinement by agents of the executive branch to punish Mr. Cohen for his plans to publish a book critical of the president. Such conduct is "nothing short of the use of executive power to lock up the President's political enemies for speaking critically of him." *Cohen v. United States*, 640 F. Supp. 3d 324, 341 (S.D.N.Y. 2022), aff'd sub nom. *Cohen v. Trump*, 23-35, 2024 WL 20558 (2d Cir. Jan. 2, 2024).

Mr. Cohen is a former personal attorney of respondent Donald Trump. Pet. App. 12a. Mr. Cohen alleges that, after pleading guilty to crimes committed at the direction of Mr. Trump, he publicly announced his intention to publish a book featuring critical and unfavorable information about Mr. Trump, who was then President of the United States and running for re-election. Pet. App. 12a.-13a. Subsequently, while finalizing a previously-approved transition of his sentence to home confinement, Mr. Cohen was informed that the first condition of his transition was a waiver of his right to engage with the media, including books and social media. Pet. App. 14a. In retaliation for Mr. Cohen's request to eliminate that term, he was remanded to prison and placed in special segregated housing or solitary confinement until his release was ordered by a federal judge of the U.S. District Court for the Southern District of New York. Pet. App. 16a-18a. While in solitary confinement, Mr. Cohen spent all but thirty minutes of each day alone in a twelve by

eight-foot cell with poor ventilation, no air conditioning, and temperatures frequently over one hundred degrees, causing significant health problems. *Id*.

The District Court, based on its reading of *Egbert* and other authority from this Court, indicated that it felt compelled to dismiss Mr. Cohen's complaint, but also expressed considerable reluctance in doing so and identified the important constitutional values at stake. As the District Court stated, the facts alleged in the complaint "raise fundamental questions about the meaning and value of constitutional rights, the relationship between a citizen and the government, and the role of the federal courts in protecting those rights." *Cohen*, 640 F. Supp. 3d at 330. The District Court not only emphasized the dangers of government officials' punishing an individual for political speech protected by the First Amendment, but it also underscored the need for a remedy when such government action occurs:

> The ability to publicly criticize even our most prominent politicians and leaders without fear of retaliation is a hallmark of American democracy; political speech is core First Amendment speech. '[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.' *Bridges v. California*, 314 U.S. 252, 270 (1941). And it is a further hallmark of American democracy that, where one's rights have been violated, one may seek to vindicate those rights in the courts. In the oft-quoted words of Chief Justice John Marshall: '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.' Marbury v. Madison, 5 U.S. 137, 163 (1803).

Cohen, 640 F. Supp. 3d at 340 (cleaned up). The Second Circuit similarly indicated that it felt bound by existing precedent to affirm the dismissal. *See* Pet. App. 9a.

Under the unique circumstances alleged – a politically motivated violation of the petitioner's constitutional rights, intended to chill speech critical of an elected official – judicial involvement is particularly appropriate to deter future misconduct. A *statutory* remedy for such unconstitutional deprivations of liberty would require action by Congress with the concurrence of the President, subject to congressional override by supermajority vote. *See Perez v. Mtge. Bankers Ass'n*, 575 U.S. 92, 118 (2015). As a matter of common sense, it is unrealistic to think that the members of the two political branches would be motivated to create a mechanism for holding them to account for the actual damages that they cause by unconstitutionally punishing a person for engaging in *political* criticism. Thus, if the American people are to have any protection against unconstitutional punishment of political speech, as a practical matter, the judicial branch cannot wait for an express act by the other branches. *See Davis*, 442 U.S. at 241-42 (recognizing judiciary are "in a peculiar manner the guardians" of individual constitutional rights against encroachment by the other branches) (quoting 1 Annals of Cong. 439 (1789)).

The need for deterrence is especially important in this unique context. If the defendants' goal in this case was to chill protected political speech, that goal was accomplished when Mr. Cohen was punished for refusing to waive his rights. Now, "all but the most intrepid" individuals taking note of this example will have reason to pause before risking similar punishment by exercising their First Amendment rights to criticize members of the federal government. *Cohen*, F. Supp. 3d at 340.

If *habeas corpus* or injunctive relief were the only remedies available, deterrence would be nonexistent. Agents of the political branches seeking to curtail unfavorable speech are free to punish critics with impunity, taking comfort that the most severe repercussion will be an instruction, by way of injunction, to cease punishment. *Id.* at 340; *see also* Laurence Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2007 Cato Sup. Ct. Rev. 23, 60 ("Without the threat of personal liability under *Bivens*, officials working for a federal agency that seeks" to achieve an unconstitutional goal "have nothing to lose and much to gain" by violating the constitutional rights of individuals). And where the punishment of political speech favors the party in control of a federal agent's governmental branch, as alleged here, a grievance to that agent's supervisors is particularly unlikely to result in internal punishment or deter future misconduct. *Cf. Egbert*, 596 U.S. at 498 (finding "no warrant to doubt" that grievance procedure "secured adequate deterrence").

The right to speak critically of public officials is a "prized American privilege" protected by the U.S. Constitution. *Bridges v. California*, 314 U.S. 252, 270 (1941). Denying Mr. Cohen a damages remedy under

the highly unusual circumstances alleged sets a precedent that could have devastating consequences for this important constitutional right, and there is every reason to conclude that only the courts are capable of fashioning a meaningful remedy for this kind of constitutional violation. *Cf. Egbert*, 596 U.S. at 496. The Second Circuit's decision affirming the District Court's dismissal of the complaint should be reversed in order to prevent such a result.

CONCLUSION

This Court should grant the petition.

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