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.

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

BRIEF FOR THE UNITED STATES ET AL. IN OPPOSITION

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QUESTION PRESENTED

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized a cause of action for damages for certain violations of the Constitution. The question presented is whether *Bivens* should be extended to a claim alleging that federal officials violated the Fourth Amendment in deciding to transfer a federal inmate from release on furlough back to custody at a federal correctional institution to serve the rest of his sentence.

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The Solicitor General respectfully submits this brief on behalf of respondents United States of America, William P. Barr, Michael D. Carvajal, Jon Gustin, Patrick McFarland, James Petrucci, Enid Febus, and Adam Pakula.

OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1a-9a) is available at 2024 WL 20558. The opinion and order of the district court (Pet. App. 10a-52a) is reported at 640 F. Supp. 3d 324.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 2024. A petition for rehearing en banc was denied on March 7, 2024 (Pet. App. 53a-54a). On May 30, 2024, Justice Sotomayor extended the time within

which to file a petition for a writ of certiorari to and including July 10, 2024. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In general, a person who is sentenced to a term of imprisonment for a federal offense is "committed to the custody of the Bureau of Prisons." 18 U.S.C. 3621(a). The Bureau may place the person in a prison and may at any time transfer him from one prison to another. See 18 U.S.C. 3621(b). The Bureau also may, in certain circumstances, release a prisoner on furlough, see 18 U.S.C. 3622, or place him in home confinement, see 18 U.S.C. 3624(c)(2). A furloughed prisoner remains "in the legal custody of the U.S. Attorney General, in service of a term of imprisonment," 28 C.F.R. 570.38(b)(1), and must agree to and abide by various requirements, see 28 C.F.R. 570.38(b) and (c).

In 2018, petitioner pleaded guilty to multiple federal felonies, including making false statements to Congress and violating federal campaign-finance laws. See Pet. App. 12a. He was sentenced to a 36-month term of imprisonment. See *id.* at 3a. In May 2019, he began serving his sentence at the federal correctional institution in Otisville, New York. See *ibid.*

Petitioner alleges that, at the start of the COVID-19 pandemic, he asked the Bureau to be placed on furlough and then in home confinement. See Pet. App. 4a. The Bureau approved his request, placing him on furlough in May 2020. See *ibid.* While on furlough, petitioner made public statements about his plans to publish a book describing his experiences with then-President Donald Trump. See *id.* at 3a-4a.

In July 2020, petitioner and his lawyer met with two federal probation officers to review paperwork relating to his transition from furlough to home confinement. See Pet. App. 14a. Petitioner alleges that the officers asked him to sign an agreement that prohibited him from engaging with the media or using social media; that he and his attorney asked the officers to change or remove that language; and that, after a delay, three Deputy U.S. Marshals arrived with an order remanding petitioner to prison for failure to sign the agreement. See *id.* at 4a, 14a. Petitioner further alleges that he was taken back to the Otisville prison and placed in solitary confinement for 16 days. See *id.* at 17a.

Petitioner filed a petition for a writ of habeas corpus. See Pet. App. 5a. The district court granted relief, concluding that the government had reassumed physical custody over petitioner in order to "retaliat[e]" against him for "desiring to exercise his First Amendment rights to publish a book critical of the President and to discuss the book on social media." *Id.* at 5a & n.2. The Bureau released petitioner to home confinement, where he remained until he completed his sentence. See *id.* at 5a.

2. Petitioner sued respondents—the United States, former President Trump, former Attorney General William P. Barr, former Bureau Director Michael D. Carvajal, and federal prison officials—in the U.S. District Court for the Southern District of New York. See Pet. App. 18a. As relevant here, petitioner invoked *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to assert Fourth Amendment claims against the individual defendants. See Pet. App. 18a-19a.

The district court dismissed petitioner's complaint, holding that petitioner lacked a cause of action under *Bivens*. See Pet. App. 10a-52a. The court observed that this Court's cases preclude extending *Bivens* to a "new context" if "special factors" counsel hesitation about the extension. *Id.* at 25a (citation omitted). The court determined that this case presents a new *Bivens* context because it involved claims against the "former President," "former Attorney General," and "members of the Bureau of Prisons" and because it concerns "a remand of a federal prisoner who had already been sentenced to a term of incarceration." *Id.* at 27a. The court then explained that "special factors" counsel against extending *Bivens* to that context because of the availability of alternative remedies such as habeas corpus. See *id.* at 28a-35a.

The Second Circuit affirmed. See Pet. App. 1a-9a. The court determined that this case presents a new *Bivens* context because it involves "new categories of defendants"—namely, a former President, a former Attorney General, and Bureau of Prisons officials. *Id.* at 7a-8a (brackets and citation omitted). The court then explained that special factors counsel against extending *Bivens* to that context because petitioner could seek (and successfully sought) "alternative forms of judicial relief." *Id.* at 9a (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 12-25) that this Court's decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), provides him with a cause of action to sue respondents for allegedly violating his Fourth Amendment rights. The court of appeals correctly rejected that contention, and its decision does not conflict with

any decision of this Court or of any other court of appeals. This case would also be a poor vehicle for considering petitioner's arguments because his allegations of retaliation for speech fit more naturally under the First rather than the Fourth Amendment, and the Court has already declined to extend *Bivens* to First Amendment retaliation claims. The petition for a writ of certiorari should be denied.

1. In *Bivens*, this Court created a cause of action for a plaintiff who alleged that federal narcotics agents had manacled him in his home and threatened his family while conducting a warrantless search. See 403 U.S. at 389-390. Since *Bivens*, however, the Court has recognized that "creating a cause of action is a legislative endeavor" and that "the Judiciary's authority to [create a cause of action] is, at best, uncertain." *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022). Fashioning a *Bivens* remedy is accordingly "a disfavored judicial activity." *Ibid.* (citation omitted).

In deciding whether a plaintiff may seek a remedy under *Bivens*, a court must first determine whether the case presents "a new *Bivens* context." *Egbert*, 596 U.S. at 492 (citation omitted). If it does, "a *Bivens* remedy is unavailable if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Ibid.* (citation omitted). Potential special factors include the existence of an "alternative remedial structure," *id.* at 493 (citation omitted); the fact that the case arises in a field that is "entrusted to the political branches," *Hernandez* v. *Mesa*, 589 U.S. 93, 104 (2020) (citation omitted); and "legislative action suggesting that Congress does not want a damages remedy," *Ziglar* v. *Abbasi*, 582 U.S. 120, 148

(2017). "If there is even a single 'reason to pause before applying *Bivens* in a new context,' a court may not recognize a *Bivens* remedy." *Egbert*, 596 U.S. at 492 (citation omitted).

Petitioner concedes (Pet. 5) that this case—a suit against a former President, former Attorney General, former Director of the Bureau of Prisons, and other federal prison officials for remanding him to custody rather than allowing him to serve the rest of his sentence in home confinement—presents a new *Bivens* context. The only question, then, is whether there is at least "a single 'reason to pause'" before extending *Bivens* to that context. *Egbert*, 596 U.S. at 492 (citation omitted). There is.

First, Congress and the Executive have provided "alternative remedial structures." *Egbert*, 596 U.S. at 493. Petitioner could have sought a writ of habeas corpus; indeed, he did so, obtaining an order requiring the Bureau to release him from imprisonment to home confinement. Pet. App. 9a; see *Abbasi*, 582 U.S. at 145 (treating the availability of habeas corpus as a special factor and noting that it would typically "provide[] a faster and more direct route to relief than money damages"). Petitioner could also have invoked the Bureau's Administrative Remedy Program, which allows inmates "to seek formal review of an issue relating to any aspect of his/her own confinement." 28 C.F.R. 542.10(a); see *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001) (identifying the availability of the Administrative Remedy Program as a special factor).

Second, this case arises in a field that is ordinarily "entrusted to the political branches," *Hernandez*, 589 U.S. at 104 (citation omitted)—namely, administering prisons. "Running a prison is an inordinately difficult

undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches." *Turner* v. *Safley*, 482 U.S. 78, 84-85 (1987). "[S]eparation of powers concerns" therefore "counsel a policy of judicial restraint." *Id.* at 85. In light of those concerns, courts are "at least arguably less equipped than Congress," *Egbert*, 596 U.S. at 492, to weigh the costs and benefits of permitting damages actions for decisions about whether an inmate will be placed in prison or home confinement.

Finally, "legislative action suggest[s]" that Congress may not "want a damages remedy." *Abbasi*, 582 U.S. at 148. In the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Tit. VIII, § 803, 110 Stat. 1321-70 (42 U.S.C. 1997e), Congress "made comprehensive changes to the way prisoner abuse claims must be brought in federal court," but "d[id] not provide for a standalone damages remedy against federal jailers." *Abbasi*, 582 U.S. at 148-149. That statute at least arguably suggests that Congress "chose not to extend" the *Bivens* damages remedy to new types of prisoner claims. *Id.* at 149.

2. Petitioner's contrary arguments lack merit. Petitioner primarily contends (Pet. 13-19) that habeas corpus is an inadequate alternative remedy because it does not compensate a plaintiff for past harm. But this Court has specifically identified "habeas corpus" as an alternative remedy that precludes extending *Bivens* to a new context, *Abbasi*, 582 U.S. at 145, and has thus rejected the argument that the habeas remedy is inadequate because it fails to "provide plaintiffs with redress for harms they have *already* suffered," *id.* at 173 (Breyer, J., dissenting). More broadly, it has explained that courts should not ask whether the alternative remedy

would "provide complete relief" or would be "as effective as an individual damages remedy." *Egbert*, 596 U.S. at 493, 498 (citations omitted). "So long as Congress or the Executive has created a remedial process that it finds sufficient," "the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Id.* at 498.

Petitioner notes (Pet. 23) that the "sole basis for the Second Circuit's decision" was its determination that petitioner could (and did) obtain redress through a petition for a writ of habeas corpus. But "[i]f there are alternative remedial structures in place, 'that alone,' like any special factor, is reason enough" not to extend *Bivens*. *Egbert*, 596 U.S. at 493 (citation omitted). In any event, a prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered" by the lower courts. *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Here, there are at least two special factors—apart from the availability of alternative remedies—which independently justify declining to extend *Bivens*. See pp. 6-7, *supra*.

Petitioner also contends (Pet. 14) that a court should recognize a *Bivens* remedy in this case because the case involves what petitioner describes as a "gross violation of civil liberties." Contrary to petitioner's suggestion, however, the availability of a *Bivens* remedy does not depend on a court's assessment of the egregiousness of the alleged misconduct. The inquiry instead focuses on whether "the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Egbert*, 596 U.S. at 492 (citation omitted). And in conducting that

inquiry, a court must consider not just the allegations in the case before it, but also the "impact on governmental operations systemwide." *Id.* at 491 (citation omitted). Here, Congress is better equipped than courts to "predict the 'systemwide' consequences" of creating a damages remedy for prison-placement decisions. *Id.* at 493 (citation omitted).

Finally, petitioner states (Pet. 18) that, the courts, as "traditional guardians of the boundary between power and rights," "are best positioned to craft" a remedy for the alleged violation of his rights. He also asserts (Pet. 24) that, even "in the absence of *Bivens* relief," courts should proceed to invent "some [other] remedy." But those arguments flatly contradict this Court's admonition that "creating a cause of action" to vindicate constitutional rights is "a legislative endeavor." *Egbert*, 596 U.S. at 491.

3. Petitioner does not assert that the decision below conflicts with the decision of any other court of appeals. To the contrary, he contends (Pet. 20-21) that other courts "have yet to meaningfully analyze" the arguments that he raises here. In making that statement, he disregards decisions in which other courts of appeals have—as the court below did—treated the availability of habeas corpus as an alternative remedy that precludes extending *Bivens* to a new context. See, *e.g.*, *Hornof* v. *United States*, 107 F.4th 46, 66 (1st Cir. 2024); *Wilson* v. *Rackmill*, 878 F.2d 772, 775 (3d Cir. 1989); *Mirmehdi* v. *United States*, 689 F.3d 975, 982 (9th Cir. 2012), cert. denied, 569 U.S. 972 (2013); *Alvarez* v. *USCIS*, 818 F.3d 1194, 1209 (11th Cir. 2016), cert. denied, 582 U.S. 930 (2017). In any event, the fact that other courts "have yet to meaningfully analyze" an issue, Pet. 20, usually weighs *against* granting review to

consider that issue. See, *e.g.*, *McCrory* v. *Alabama*, 144 S. Ct. 2483, 2483 (2024) (statement of Sotomayor, J., respecting the denial of certiorari) ("I vote to deny this petition because [the questions presented] have yet to percolate sufficiently through the federal courts.").

Petitioner also contends (Pet. 20) that the decision below allows federal officials "to retaliate against critics with imprisonment, without any consequence for or check against the officials engaged in such retaliation." That is incorrect. As an initial matter, this case does not involve the "imprisonment" of "free citizen[s]" for "critic[izing]" the government. *Ibid.* Rather, it involves a determination whether someone who has already been convicted of a crime and sentenced to imprisonment should be allowed to serve a portion of his sentence in home confinement. In addition, "officials engaged in such retaliation" *are* subject to "check[s]." *Ibid.* A court can award prospective relief, and the Bureau can respond to administrative grievances. Concerns about the adequacy of those remedies are properly directed to Congress, not to the courts.

In the final analysis, petitioner asks this Court to resolve a narrow, case-specific issue: whether to recognize a *Bivens* claim on the particular facts alleged in this complaint. Petitioner makes no meaningful effort to show that the legal issues raised by this case recur in other cases. Petitioner thus seeks the type of "error correction" that is "outside the mainstream of the Court's functions." Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at 5-45 (11th ed. 2019).

This case would in any event be a poor vehicle for considering petitioner's arguments. His claim—that government officials "retaliated against [him] for his speech," Pet. 3—would fit most naturally under the

First Amendment, which prohibits officials from "subjecting an individual to retaliatory actions" for protected speech. *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006). But this Court has already held that "there is no *Bivens* action for First Amendment retaliation." *Egbert*, 596 U.S. at 499. Petitioner tries (Pet. 14) to circumvent that precedent by shoehorning his claim into the Fourth Amendment instead. But the Fourth Amendment focuses on objective reasonableness of the challenged search or seizure, not the "motivations of the individual officers involved." *Whren* v. *United States*, 517 U.S. 806, 813 (1996). The mismatch between petitioner's legal theory (a Fourth Amendment violation) and his factual allegations (retaliation for speech) provides a further reason to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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