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

REPLY BRIEF FOR PETITIONER

JON-MICHAEL DOUGHERTY
Counsel of Record
GILBERT LLP
700 Pennsylvania Avenue, SE,
Suite 400
Washington, DC 20003
(202) 772-2200
doughertyj@gilbertlegal.com

Attorney for Petitioner

332979

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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REPLY—BRIEF FOR PETITIONER

The oppositions from the Government and Donald J. Trump ("Respondents") ignore the central contentions of Petitioner Michael Cohen's opening brief. In *Egbert v. Boule*, 596 U.S. 482, 486 (2022), this Court made clear that a new *Bivens*[1] remedy should be recognized when a case involves the "most unusual circumstances" and presents no reason to defer to Congress for the creation of a deterrent remedy. Respondents' oppositions fail to undermine Petitioner's demonstration that this case features the most unusual circumstances. A judge of the United States District Court for Southern District of New York found, as a matter of law, that the federal government returned Petitioner to prison in "retaliat[ion] . . . [for] [Petitioner's] exercise [of] his First Amendment rights." *Cohen v. Barr*, 20 Civ. 5614 (AKH), 2020 WL 4250342, at *1 (S.D.N.Y. July 23, 2020). Respondents point to no compelling reason to defer to Congress to ensure such abuses are deterred, noting only that Congress has passed laws related to prison administration. Respondents do not claim that imprisoning critics for speaking is not the sort of misconduct that needs to be deterred.

All that is left is what has been apparent to every court that has examined this case: the Court is presented with an unprecedented scenario, in which the Executive's power over the Department of Justice and the prisons was abused to silence a President's critic. If no *Bivens* remedy is available here, as United States District Judge Lewis Liman recognized, there is no deterrent at law that

1. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

prevents future abuses by future officials against future critics. That cannot be the law of the United States of America.

The Court should defend the liberties granted to this country's citizens from encroachment by the country's political branches. If this Court accepts the petition, it states clearly that it will, at minimum, ensure that the questions presented are given close and careful attention, as befits such an unprecedented case. If this Court declines the petition, it states clearly that the courts will not deter an Executive determined to incarcerate their critics. That statement would threaten the freedoms this country was founded to protect and upon which so many areas of American life depend. This Court should grant the Petitioner's request for the writ of certiorari.

I. PETITIONER HAD NO ALTERNATIVE REMEDY, BECAUSE ONLY A *BIVENS* REMEDY PROVIDES THE ESSENTIAL DETERRENCE.

"*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 prevent constitutional violations from recurring." *Egbert*, 596 U.S. at 498 (emphasis added) (internal quotation marks and alterations omitted). This statement in *Egbert* was the latest reinforcement of this Court's consistent recognition of the importance analyzing the need for deterrence when considering a *Bivens* claim. *See* Pet. for Cert. at 4–5.

In his Opposition, Trump suggests that deterring the Executive Branch from incarcerating its critics will somehow prevent it from "taking urgent and lawful action

in a time of crisis." Trump Br. at 14 (quoting *Ziglar v. Abassi*, 582 U.S. 120, 145 (2017)). This fear is unfounded and divorced from the facts of this case. *Ziglar* involved the Executive Branch's activities concerning national security following the September 11, 2001 terrorist attacks; the Court expressed a reluctance "to intrude upon the authority of the Executive in military and national security affairs[.]" 582 U.S. at 143 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)). Here, there are no military or national security affairs at stake. This case does not involve an exercise of power to take "urgent and lawful action in a time of crisis." *Id.* at 145. It involves the sitting President personally and unlawfully intervening to hold a United States citizen in prison for criticizing him.[2] There is no risk that deterring *that* conduct will discourage government officials from taking urgent, lawful action. There is a grave risk that a failure to deter *that* conduct will enable and encourage government officials to take unlawful action and to chill the exercise of fundamental liberty.

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2. Petitioner's *Bivens* claim is premised on what Judge Hellerstein found to be the unlawful reincarceration of Cohen. A claim relating to the lawfulness of a person's incarceration is a claim for a violation of the Fourth Amendment to the Constitution of the United States, as this Court has recognized. *Manuel v. City of Joliet, Ill.*, 580 U.S. 357, 357 (2017) ("[T]he Fourth Amendment establishes the minimum constitutional 'standards and procedures' not just for arrest but also for 'detention[.]'" (internal quotation omitted)). Judge Hellerstein determined this "unreasonable seizure" was motivated by a desire to retaliate against Petitioner for his speech. That motivation may make the Respondents' misconduct here more "unusual" and more offensive to ordered liberty, but it *does not* convert Petitioner's Fourth Amendment *Bivens* claim into a First Amendment *Bivens* claim, as claimed by the Government. *See* Gov't Br. at 10–11. The Government offers no reason to conclude otherwise.

The Government—unable or unwilling to argue that a petition for the writ of habeas corpus or the grant of an injunction deters government officers from committing future constitutional violations—pretends that Petitioner's concern is that he was not compensated for past harm. *See* Gov't Br. at 7. The Government attacks a straw man of its own creation, focusing on this Court's holdings that a remedy is not inadequate solely because it does not make a plaintiff whole. *See* Gov't Br. at 7–8.

But Petitioner does not complain of a lack of complete compensation. Petitioner's concern is the same as Judge Liman's—habeas and injunction are inadequate remedies because they provide no deterrence. Habeas and injunction are not "remedial process[es] that [Congress or the Executive] find[] sufficient" to deter the government from imprisoning the President's personal foes. *See Egbert*, 596 U.S. at 498. They tell officials to stop the wrongs and to not repeat the wrongs committed against *this* person in *this* case. They do not give the Government a reason to refrain from wrongful imprisonment in the future, as a *Bivens* claim would.

The Government also resurrects its argument—rejected by both the District Court and the Second Circuit—that Petitioner could have availed himself of the Administrative Remedy Program ("ARP"). Gov't Br. at 6; *see also* Trump Br. at 12–13. As the District Court aptly explained, "it is hard to imagine that the same individuals who committed the constitutional violations against Cohen would, in any meaningful sense, provide a remedy for those violations." *See Cohen*, 640 F. Supp. 3d

324, 339 (S.D.N.Y. 2022).[3] Said differently, the ARP is not an adequate alternative remedy for the injuries Petitioner suffered because it would ask the adjudicators of any ARP claim to be the judges in their own case. *Accord Williams v. Pennsylvania*, 579 U.S. 1, 8–9 (2016) (reciting "the due process maxim that 'no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome'" (citation omitted)).

II. NO SPECIAL FACTOR COUNSELS HESITATION.

Neither Respondent identifies a single "special factor" that indicates "that 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 (emphasis added) (quoting *Ziglar*, 582 U.S. at 136). This is an unprecedented case presenting a new threat to the balance between liberty and power. A federal judge found that the Executive used the prisons to punish and silence a President's personal foe and critic. The Judiciary is this country's traditional guardian of liberty. There is no conceivable reason to leave it to one political branch—the Legislature—to ensure that the other political branch—the Executive—is sufficiently deterred from imprisoning critics for their speech. Respondents offer no reason to conclude otherwise.

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3. *See also Oral Argument Recording*, *Cohen v. Trump*, at 12:50–13:10 (Dec. 14, 2023), https://ww3.ca2.uscourts.gov/decisions/isysquery/d75bf216-3e8a-42bd-a7da-20f4bbadb73c/11-20/list/ (GOVERNMENT: "[The ARP] would have allowed him within the context of the Bureau of Prisons to raise his grievances within the agency and give the agency the opportunity to address those grievances in the first instance." JUDGE PARKER: "You aren't seriously suggesting that in the context of the facts in this case, that was a viable remedy, are you?").

The Government imagines that this case involves issues typically "entrusted to the political branches"—prison administration. The Government believes that Congress's extensive legislation in the arena of prison administration is a special factor preventing courts from recognizing a *Bivens* remedy here. Gov't Br. at 6–7 (quoting *Hernandez v. Mesa*, 589 U.S. 93, 104 (2020)).[4] Trump relatedly argues that recognizing a deterrent remedy for the incarceration of critics would raise "glaring and significant separation-of-powers concerns." Trump Br. at 8. But prison administration is not the issue. Petitioner is unconcerned with the Bureau of Prisons' authority to transfer a prisoner to a different facility or alter the conditions of his imprisonment.

The issue is whether the government can revoke a prisoner's approved release to home confinement as punishment for his speech criticizing the president and to prevent further such speech. This case is analogous to this Court's seminal cases protecting Americans' rights, the sorts of cases this Court has not hesitated to review over the centuries. *See*, *e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 677 (2015) ("The idea of the Constitution 'was to

4. The Government's argument that Congress has already legislated in this arena and chose not to create a damages remedy rings hollow. *See* Gov't Br. at 7. The Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997(e), "made comprehensive changes to the way prisoner abuse claims must be brought in federal court." *Ziglar*, 582 U.S. at 148. But this legislation is irrelevant to this case. Congress's action in "the way prisoner abuse claims must be brought in federal court" cannot reasonably be interpreted to mean that Congress has already decided that a *Bivens* remedy is unavailable when the Executive incarcerates a critic for their speech—an unprecedented fact pattern unimaginable to any Congress before or since that which passed the 1995 Reform Act.

withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.' . . . This is why 'fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.'" (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)); *Miranda v. Ariz.*, 384 U.S. 436, 467–68 (1966); *Griswold v. Conn.*, 381 U.S. 479, 485 (1965). The Court should not hesitate to undertake a review here.

III. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY WHAT REMAINS OF *BIVENS*.

In *Egbert*, this Court recognized that, in "the most unusual circumstances," where there is no reason to defer to Congress for the creation of a deterrent remedy, courts may create such a remedy. *Egbert*, 596 U.S. at 486. This case—involving the retaliatory imprisonment of a president's critic—presents those "unusual circumstances." Respondents have not presented a single credible reason that the courts should defer to Congress for the creation of a deterrent remedy against the incarceration of critics. As such, this case provides the Court with a singular, clarion opportunity to explain further when a *Bivens* remedy may be available—or if any such remedy would in fact ever be available.

As described above, *see supra*, Section II, the Government views this case as a simple matter of prison administration. Gov't Br. at 2, 10. Nothing in this case involves the usual administration of prisons. That is why Judge Liman wrote at length about the implications of

a lack of a deterrent remedy. *See Cohen*, 640 F. Supp. 3d at 340–42. It is why the Second Circuit at argument questioned the Government at length, to no avail, concerning the availability of a deterrent remedy. *See Oral Argument Recording*, *Cohen v. Trump*, at 14:08–21:10 (Dec. 14, 2023), https://ww3.ca2.uscourts.gov/decisions/isysquery/d75bf216-3e8a-42bd-a7da-20f4bbadb73c/11-20/list/. This case is simply *not* about how the government runs its prisons.

What this case is about is the balance between fundamental constitutional rights and Executive power. It asks whether the courts will provide a deterrent remedy when Executive power tramples those rights in ways that would have been unimaginable to every generation of American past and present. It is about the exercise of a type of power with which the Founders were well-acquainted and against which they fought a war for independence. *See* Pet. for Cert. at 2.

In short, this case presents exactly the "unusual circumstances" envisioned in *Egbert*. It is difficult to imagine a case more unusual or offensive to American values and that cries out more loudly for deterrence. It therefore presents the Court an opportunity to provide lower courts with guidance and to clarify the circumstances in which the Judiciary can recognize a new *Bivens* remedy.

The Government also argues the Court need not examine whether this case constitutes "unusual circumstances," because courts of appeals have already found habeas relief to be an adequate alternative remedy in other cases. Gov't Br. at 9. The Government's cited cases mainly predate *Egbert*; they therefore do not analyze whether the circumstances of those cases were sufficiently "unusual" to warrant *Bivens* relief.[5] The one case that post-dates *Egbert*, *Hornof v. United States*, 107 F.4th 46, 64 (1st Cir. 2024) (citation omitted), underscores the need for this Court to clarify *Egbert*: therein, the First Circuit Court of Appeals simply stated that expanding *Bivens* "is now a disfavored 'judicial' activity," without analyzing either the Court's clear *Egbert* holding that some window for a new *Bivens* claim remains open or whether the circumstances of that case would pass through that window. For the Court's words in *Egbert* to have any meaning, this Court must clarify their significance.

Finally, the Government contends that the Court's review is unwarranted as "the legal issues raised by this case [do not] recur in other cases." Gov't Br. at 10. To be sure, these issues have not yet been presented elsewhere.

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5. Additionally, to the extent the Government contends that the adequacy of habeas relief in those cases means that habeas relief is sufficient *here*, the Government is wrong. The circumstances in those cases are nothing like those presented here. *See Hornof*, 107 F.4th at 51 (challenging the Coast Guard's detention of non-citizens in connection with a criminal investigation and prosecution); *Alvarez v. ICE*, 818 F.3d 1194 (11th Cir. 2016) (challenging detention and deportation practices employed by immigration officials); *Mirmehdi v. United States*, 689 F.3d 975 (9th Cir. 2012) (same); *Wilson v. Rackill*, 878 F.2d 772, 775 (3d Cir. 1989) (challenging parole hearing procedures).

Rarity is required to be the "most unusual." Issues that "percolate sufficiently through the federal courts" cannot meet this definition. *See id.* (quoting *McCrory v. Alabama*, 144 S. Ct. 2483, 2483 (2024) (Sotomayor, J.)). The incarceration of a president's critics should not need to repeatedly recur before this Court intervenes. This Court must take action to ensure the incarceration of critics *never* recurs.

IV. PRESIDENTIAL IMMUNITY DOES NOT BAR PETITIONER'S CLAIMS.

Trump alone argues that, as President, he is immune from civil liability for his actions. Trump Br. at 16. A president is "entitled to absolute immunity from damages liability predicated on his *official acts*." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (emphasis added). But "[a]s for a President's unofficial acts, there is no immunity." *Trump v. United States*, 603 U.S. ___, 144 S. Ct. 2312, 2332 (2024).

First, Trump's immunity argument would be a defense to a well-pled *Bivens* claim. It is not a basis on which Trump may argue a *Bivens* claim cannot exist on the facts pled in Petitioner's complaint. For this independent reason, the Court should refrain from issuing any ruling with respect to any supposed presidential immunity at this stage of this particular litigation.

Second, it is unclear that Trump would be immune to a well-pled *Bivens* claim under the facts alleged here. Directing officers within the Department of Justice and the Bureau of Prisons to retaliate against an outspoken

critic with incarceration is an unofficial act, under any imaginable sense of the word "unofficial." As Judge Liman recognized, such an act may be taken "under the color of authority," but its inherent and obvious unlawfulness places it far outside the realm of an "official act" within the President's constitutional authority. *See Cohen*, 640 F. Supp. 3d at 342 n.6.

And the Court's acceptance of the petition would not require this Court or any lower court to examine the motivation for this unofficial act. *See Trump*, 144 S. Ct. at 2333–34. Judge Hellerstein has already determined the motivation, as a matter of law: the "purpose . . . was *retaliatory*. . . . " *Barr*, 2020 WL 4250342, at *1 (emphasis added). This Court's precedents are clear that there is no immunity for such acts. *See Trump v. Vance*, 591 U.S. 786, 795 (2020) ("But, as Marshall explained, a king is born to power and can 'do no wrong.' . . . The President, by contrast, is 'of the people' and subject to the law." (internal citation omitted)).

Finally, were the Court to reach the question of Trump's alleged immunity and were then to conclude that immunity applied here, that finding would not resolve the dispute with respect to the sub-presidential Respondents. Thus, the Court must first consider the viability of Petitioner's *Bivens* claim against all Respondents, prior to engage in any analysis concerning presidential immunity.

CONCLUSION

For the reasons discussed above, Petitioner Michael D. Cohen respectfully requests that this Court issue a writ of certiorari.

Respectfully submitted,

JON-MICHAEL DOUGHERTY
Counsel of Record
GILBERT LLP
700 Pennsylvania Avenue, SE,
Suite 400
Washington, DC 20003
(202) 772-2200
doughertyj@gilbertlegal.com

Attorney for Petitioner

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