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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Second Circuit correctly find that Petitioner's claim does not warrant an extension of the *Bivens* doctrine?

2. Is Petitioner's claim barred by the doctrine of presidential immunity?

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STATEMENT

The Petition should be denied because the decisions by both the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York to dismiss the action commenced by the petitioner, Michael D. Cohen ("Petitioner"), did not involve the creation of any new or novel proposition of law and likewise did not conflict with the law of any other circuit. To the contrary, these courts faithfully applied this Court's precedent to find that Petitioner lacks a legally cognizable claim against the respondent, President Donald J. Trump ("President Trump"), and that the Complaint is entirely devoid of merit. More specifically, both courts recognized that this matter involves several significant factors which counsel against the extension of the highly disfavored *Bivens* doctrine, including the existence of adequate alternative remedies and the grave separation-of-powers concerns that would arise if Petitioner's claim were allowed to proceed. In addition, dismissal was also warranted on the independent basis that Petitioner's Complaint—which overtly seeks to hold President Trump liable for acts taken within the "outer perimeter of his official responsibility" as President—is absolutely barred by the doctrine of Presidential immunity. *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

Accordingly, for the reasons set forth below, the District Court and the Second Circuit correctly dismissed Petitioner's claim.

ARGUMENT

I. Petitioner Has Failed to Assert an Actionable *Bivens* Claim.

There is no judicially recognizable remedy for the alleged constitutional deprivations Petitioner claims to have suffered, and the circumstances of this case do not warrant an extension of the *Bivens* doctrine.

To date, this Court has codified an implied *Bivens* cause of action in only three specific circumstances. First, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, this Court held that federal law-enforcement officers may face personal monetary liability for participating in a search or seizure that violates the Fourth Amendment. 403 U.S. 388 (1971). Next, in *Davis v. Passman*, this Court extended *Bivens* to permit a damages suit against a congressman for gender discrimination in violation of the Due Process Clause of the Fifth Amendment. 442 U.S. 228 (1979). Finally, in *Carlson v. Green*, this Court permitted a *Bivens* claim to proceed against individual federal prison officials for an alleged violation of the Eighth Amendment's Cruel and Unusual Punishment Clause. 446 U.S. 14 (1980).

Aside from these narrow contexts, this Court has "otherwise consistently declined to broaden *Bivens* to permit new claims." *Doe v. Hagenbeck*, 870 F.3d 36, 43 (2d Cir. 2017); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) ("[W]e have consistently refused to extend *Bivens* liability to any new context or new category of defendants."). In the four decades since *Carlson*, there has been a "notable change in th[is] Court's approach to

recognizing implied causes of action" and this Court has "made clear that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Ziglar v. Abbasi*, 582 U.S. 120, 121 (2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)); *see also Hernández v. Mesa*, 140 S. Ct. 735, 741 (2020) ("*Bivens*, *Davis*, and *Carlson* were the products of an era when the Court routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated.") (quoting *Ziglar*, 582 U.S. at 132.). During that span, this Court has "retreated" from and "abandoned" its original, short-lived *Bivens* approach, *Malesko*, 534 U.S. 61, 67, n.3 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)), as it has come "to appreciate more fully the tension between [its prior] practice [of implying a remedy] and the Constitution's separation of legislative and judicial power," *Hernández*, 140 S. Ct. at 741-42.

In the current era, this Court has "consistently rebuffed requests to add to the claims allowed under *Bivens*," and declined to extend the doctrine to a single new factual scenario. *Hernández*, 140 S. Ct. at 743. Specifically, since *Carlson*, this Court has reviewed twelve separate *Bivens* claims and has refused to recognize any of them as actionable. *See Egbert v. Boule*, 596 U.S. 482, 493 (2022) (denying to extend *Bivens* doctrine to the facts of plaintiff 's claim); *see also Hernandez v. Mesa*, 140 S. Ct. 735, 744 (2020); *Ziglar v. Abbasi*, 582 U.S. 120 (2017); *Minneci v. Pollard*, 565 U.S. 118 (2012); *Hui v. Castaneda*, 559 U.S. 799 (2010); *Wilkie*, 551 U.S. 537 (2007); *Malesko*, 534 U.S. 61 (2001); *FDIC v. Meyer*, 510 U.S. 471 (1994); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); and *Chappell v. Wallace*, 462 U.S. 296 (1983).

The dwindling viability of the *Bivens* doctrine is consistent with this Court's contemporary view that "Congress is best positioned to evaluate 'whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government' based on constitutional torts." *Hernández*, 140 S. Ct. at 742 (quoting *Abbasi*, 137 S. Ct. at 1856.). This Court has even gone so far as to suggest that had *Bivens*, *Davis*, and *Carlson* been decided today, "it is doubtful that [this Court] would have reached the same result." *Hernández*, 140 S. Ct. at 742-43 (citing *Ziglar*, 137 S. Ct. at 1856).

As with the Court's recent encounters with *Bivens*, the instant matter does not justify an extension of the disfavored doctrine. Traditionally, this Court has "framed the [Bivens] inquiry as proceeding in two steps." *Egbert*, 596 U.S. at 492. The first step in the inquiry is "whether the request involves a claim that arises in a new context or involves a new category of defendants." *Hernández*, 140 S. Ct. at 743 (citation and internal quotation marks omitted). If the claim arises in a new context, the Court proceeds "to the second step," asking "whether there are any 'special factors that counsel hesitation' about granting the extension." *Id.* (brackets and citations omitted). But as this Court recently clarified, "those 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." *Egbert*, 596 U.S. at 492; *see id.* at 496 ("A court faces only one question: whether there is any rational reason (even one) to think that Congress is better suited to 'weigh the costs and benefits of allowing a damages action to proceed.' "). The answer to that question "in most every case," as here, is that "no *Bivens* action may lie." *Id.* at 492.

Here, Petitioner's claim fails on all fronts. Petitioner openly admits that his *Bivens* claim arises from a new context and involves a new category of defendants; there are many "special factors that counsel hesitation" against expanding *Bivens*, including the adequacy of Petitioner's alternative remedies and the extent to which Petitioner's claim would disrupt the constitutional separation-of-powers; and there are a vast number of reasons why Congress is better equipped to create the type of damages remedy that Petitioner seeks. Therefore, like every other *Bivens* claim this Court has reviewed in nearly half a century, Petitioner's *Bivens* claim must be dismissed.

A. This Case Presents a New and Unique *Bivens* Context.

"[T]he first question a court must ask [is] whether the claim arises in a new *Bivens* context." *Ziglar*, 582 U.S. at 147. Petitioner's claim undoubtedly does.

Notably, Petitioner does not dispute that his claim presents a new context which would require an expansion of the *Bivens* doctrine. Nor can he. As Plaintiff readily concedes, the facts alleged in Petitioner's Complaint differ significantly from those present in *Bivens*, *Davis*, and *Carlson*. *See* Pet. App. at 20 ("If this case does not constitute the 'most unusual circumstances,' then what case would?"). The "rank of the officer involved" is another distinguishing factor, as Petitioner has asserted a claim against the highest-ranking officer in the nation—the President of the United States. *Ziglar*, 582 U.S. at 122. Finally, the "risk of disruptive intrusion by the Judiciary into the functioning of other branches" is at its apex here, where Petitioner is asking this Court to impose

liability on President Trump for acts allegedly performed within the scope of his responsibilities as President—a scenario that would singlehandedly abolish the concept of Presidential immunity and "seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government." *Trump v. United States*, 144 S.Ct. 2312, 2333-34 (2024) (citing *Nixon*, 457 U.S. at 745). Thus, both the District Court and the Court of Appeals properly determined that Petitioner's *Bivens* claim arises in a new context. *See* Pet. App. 7a ("[W]e cannot infer a Bivens cause of action for Cohen's claims because there is reason to hesitate before extending Bivens to this new context."); Pet. App. 27a ("[T]he Court's broader *Bivens* jurisprudence forecloses his Fourth Amendment claim as well; there is no question that it is factually distinct from the Fourth Amendment claim implied in *Bivens*. . . . ").

As such, the very "newness" of Petitioner's proposed claim and the uncertainty of "predict[ing] the 'systemwide' consequences of recognizing a cause of action" are, in and of themselves, "special factor[s] that foreclose[ ] relief." *Egbert*, 596 U.S. at 493 (citing *Hernández v. Mesa*, 885 F.3d 811, 818 (5th Cir. 2018) (en banc) ("The newness of this 'new context' should alone require dismissal.") On this basis alone, Petitioner's claim is worthy of dismissal.

B. Several 'Special Factors' Counsel Against The Expansion Of The *Bivens* Doctrine

This Court has made clear that a "*Bivens* remedy will not be available if there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Ziglar*, 582 U.S. at 121 (quoting *Carlson*, 446

U.S. 14 (1980)); *see also Arar v. Ashcroft*, 585 F.3d 559, 573 (2d Cir. 2009) ("When the *Bivens* cause of action was created in 1971, the Supreme Court explained that such a remedy could be afforded because that "case involve[d] no special factors counseling hesitation in the absence of affirmative action by Congress'") (citing *Bivens*, 403 U.S. at 396). Indeed, the existence of even a single special factor forecloses a *Bivens* remedy. *See Egbert*, 596 U.S. at 492 ("If there is even a single reason to pause before applying *Bivens* in a new context, a court may not recognize a *Bivens* remedy." (quotation marks omitted)); *id.* at 496 ("A court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to weigh the costs and benefits of allowing a damages action to proceed." (quotation marks omitted; emphases in original)).

In addition to the new context of Petitioner's claim, there are several other "special factors" which should prevent this Court from recognizing Petitioner's proposed *Bivens* claim. As the Court of Appeals astutely noted, these factors include the adequacy of alternative remedial schemes and the significant separation-of-powers concerns which would arise from Petitioner's claim. Pet. App. 8a-9a. For the reasons set forth below, these special factors weigh definitively against Petitioner and foreclose the possibility of his *Bivens* claim proceeding against President Trump.

i. Petitioner's *Bivens* Claim Would Disrupt the Constitutional Separation-of-Powers.

Petitioner concentrates the majority of his brief on the perceived inadequacy of the alternative forms of relief that were accessible to him and that he indeed pursued.

Notably absent from his Petition is any acknowledgment of the glaring and significant separation-of-powers concerns that would arise if his claim were allowed to proceed against President Trump.

This Court has emphasized that the "central" consideration with respect to the "special factors" inquiry is whether an action would run afoul of the "separation-of-powers principles." *Abbasi*, 137 S. Ct. at 1857; *see also Hernandez*, 140 S. Ct. at 749 ("[T]his case features multiple factors that counsel hesitation about extending *Bivens*, but they can all be condensed to one concern—respect for the separation of powers."); *Ziglar* 582 U.S. at 136 ("[T[he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide."); *Egbert*, 596 U.S.at 489 n.3 (recognizing that a *Bivens* claim "is an extraordinary act that places great stress on the separation of powers.").

Permitting a *Bivens* claim to proceed against the head of the Executive Branch, for acts allegedly performed within his official capacity as President, would undoubtedly raise grave separation-of-powers concerns. *See*, *e.g.*, *Nixon*, 457 U.S. at 754, n. 34 ("The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department[.]") (citing *Kendall v. United States*, 12 Pet. 524 (1838)); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) ("The President is the only person who alone composes a branch of government."). This Court has already affirmed that a President is "entitled to absolute immunity from damages liability predicated on his official acts." *Nixon*, 457 U.S. at 749. In justifying the creation of the Presidential immunity doctrine, this Court noted that

it was a "functionally mandated incident of the President's unique office" which is "rooted in the constitutional tradition of the separation of powers." *Id.* at 749. This Court went on to emphasize the indispensable nature of this protection, noting that, without it, a President's ability to effectively serve his country would be severely impaired. *See id.* at 752 (absence of Presidential immunity would risk "distract[ing] a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve."); *Trump*, 144 S. Ct. at 2333-34 ("[I]t would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government if [i]n exercising the functions of his office, the President was under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry.") (citation and internal quotations omitted). Most recently, in *Trump v. United States*, this Court recognized that Presidential immunity plays a key role in maintaining the balance between the three co-equal branches of government, proclaiming that such immunity is "required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution." 144 S. Ct. 2312, 2331 (2024).

In his Complaint, Petitioner explicitly seeks to hold President Trump liable for acts allegedly performed in his official capacity as President. *See Cohen v. United States of America, et al.*, No. 1:21-cv-10774 (S.D.N.Y. Dec. 17, 2021), ECF No. 3 at ¶ 37 (the "Complaint"). ("At all times relevant herein, defendant Donald J. Trump was President of the United States[.]"); *Id.* at ¶ 47 ("*[A]t all relevant times herein, [President Trump] acted within*

the course and scope of [his] employment[.]") (emphasis added). For all the reasons stated in *Nixon* and *Trump*, such a claim cannot be allowed to proceed. Among other things, it would upend the constitutional separation-of-powers, curtail the President's ability to effectively perform his duties, and destroy the very concept of Presidential immunity. It is therefore imperative that this Court decline to expand the *Bivens* doctrine to encompass Petitioner's claim. *See*, *e.g.*, *Egbert*, 596 U.S. at 496, 498 n.3 (*Bivens* so imperils the "separation of powers," and so "impair[s] governmental interests," that courts have a responsibility to *sua sponte* "evaluate any grounds that counsel against *Bivens* relief."); *Nixon*, 457 U.S. at 743, (recognizing the "special solicitude due to claims alleging a threatened breach of essential Presidential prerogatives under the separation-of-powers.").

At bottom, the Court of Appeals correctly found that there are "significant separation-of-powers concerns" which prohibit Petitioner from asserting his proposed *Bivens* claim against President Trump. Pet. App. 8a. Petitioner has failed to address this point at all, much less provide any compelling argument in favor of upending decades of constitutional jurisprudence and disrupting the delicate balance of power between the Judiciary and Executive Branch. Therefore, his Petition must be denied.

ii. There Are Adequate Alternative Remedies Of Which Petitioner Took Full Advantage.

The District Court and the Court of Appeals both correctly recognized that an extension of the *Bivens* doctrine was unwarranted due to the existence of adequate alternative remedies of which Plaintiff could have, and did, take advantage.

This Court held in *Egbert* that "a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure.'" 142 S. Ct. at 1804 (quoting *Ziglar*, 582 U.S. at 137). This holds true even if the remedial structure does not provide complete relief, *id.* (citing *Bush v. Lucas*, 462 U.S. 367, 388 (1983)), or even provides no relief at all to the particular plaintiff in a given action, *see Schweiker*, 487 U.S. at 421-422 ("The absence of statutory relief for a constitutional violation, for example, does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.). As this Court has explained, "[s]o long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Egbert*, 596 U.S. at 498.

Petitioner acknowledges that he applied for a writ of *habeas corpus* and was ultimately successful in this endeavor. *See* Pet. App. 9. He argues, however, that the writ of *habeas corpus* does not foreclose his *Bivens* claim because the writ, on its own, lacks a deterrent element. Petitioner does not identify any relevant authority in support of his position; instead, he points to questions that were raised by certain members of the panel during oral argument before the Court of Appeals. Pet. App. 15-16. Of course, these questions carry no authoritative weight and did not dissuade the Court of Appeals from concluding that Petitioner's writ of *habeas corpus* was an adequate alternative remedy which prevents him from asserting a *Bivens* claim. *See* Pet. App. 9a ("Under the circumstances presented here, a successful petition

for habeas relief is sufficient to foreclose Cohen's *Bivens* claims.") (quoting *Ziglar*, 582 U.S. at 144-145.). Indeed, the Court of Appeals noted that this precise issue was addressed in *Ziglar*, where this Court recognized that a *habeas* petition effectively defeats a petitioner's ability to bring a *Bivens* claim. *See Ziglar*, 582 U.S. at 144-145 (The "habeas remedy" may "provide [ ] a faster and more direct route to relief than a suit for money damages."). Thus, the existence of this "alternative, existing process . . . constitutes a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Minneci*, 565 U.S. at 125–26.

In this matter, not only was the writ available to Petitioner, but he utilized it to his success. As result of his *habeas* filing, Judge Hellerstein ordered Petitioner's transfer to home confinement for the remainder of his sentence, *see Cohen v. Barr, et al.*, No. 20-cv-5614, ECF Nos. 30, 36. While Petitioner may be dissatisfied with the purported adequacy of said relief, an alternative remedy need not "provide complete relief " for the alleged violation or be as "effective as an individual damages remedy" to foreclose a *Bivens* remedy. *Egbert*, 596 U.S. at 498 (quotation marks omitted); *see also Malesko*, 534 U.S. at 69 ("So long as the plaintiff ha[s] an avenue for some redress, bedrock principles of separation of powers foreclose judicial imposition of a new substantive liability."). Petitioner's arguments are therefore unavailing.

Petitioner also had other potential avenues for redress that he could have pursued but chose not to, including the Bureau of Prison's Administrative Remedy Program and injunctive relief. The Administrative Remedy Program allows inmates to file grievances "relating to any aspect

of his/her own confinement." 28 C.F.R. § 542.10, and this Court has affirmed that the "administrative review mechanisms crafted by Congress provided meaningful redress and thereby foreclosed the need to fashion a new, judicially crafted cause of action." *See Malesko*, 534 U.S. at 68. In *Malesko*, this Court explained that the Administrative Remedy Program "provides yet another means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring." *Id*. at 64. Moreover, as the District Court noted in its holding, injunctive relief was another avenue of relief that Petitioner could have pursued. *See* 32a; *see also*, *Ziglar*, 582 U.S. at 144 (denying *Bivens* claim where injunctive relief challenging "large-scale policy decisions concerning . . . conditions of confinement," as well as possible habeas petition, were available to plaintiff). Petitioner asserts that injunctive relief "provide[s] no deterrence for similar abuses by federal officials." *See* Pet. App. 13. This unsupported contention, however, flies in the face of this Court's holding in *Malesko*, wherein it was stated that "injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Malesko*, 524 U.S. at 74. Thus, given the availability of the Administrative Remedy Program and injunctive relief, Petitioner had several additional forms of adequate alternative relief that he could have pursued.

Finally, Petitioner's deterrence argument is entirety devoid of merit when viewed in the context of the instant matter. Petitioner argues that 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." Pet. App. 24. But Petitioner has it backwards. In *Ziglar*, this Court grappled with the question of whether "absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution." *Ziglar*, 582 U.S. at 145, and determined that the risks presented by subjecting high-ranking officers to *Bivens* liability outweighed any threat of a perceived lack of deterrence. This Court reasoned: "If *Bivens* liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office." *Id.*

This concern applies with extra force when the potential defendant is the President of the United States. Indeed, this Court has repeatedly emphasized the gravity and uniqueness of the President's position and the need for the President to operate *without* undue deterrence and free from the fear of civil reprisal:

> Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government . . . [A] President must concern himself with matters likely to "arouse the most intense feelings." *Pierson v. Ray*, 386 U.S., at 554, 87 S. Ct., at 1218. Yet, as our decisions have recognized, it is in precisely such cases that there exists the greatest public interest in providing an official "the maximum ability to deal fearlessly and impartially with" the

> duties of his office. *Ferri v. Ackerman*, 444 U.S. 193, 203, 100 S. Ct. 402, 408, 62 L.Ed.2d 355 (1979). This concern is compelling where the officeholder must make the most sensitive and far-reaching decisions entrusted to any official under our constitutional system. Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.

Nixon 457 U.S. at 752-753; *see also Trump*, 144 S.Ct. at 2331 (noting that Presidential immunity is necessary "to enable the President to carry out his constitutional duties without undue caution.").

This Court's reasoning in *Nixon* and *Trump* is directly on point and wholly invalidates Petitioner's deterrence argument. Taken to its logical conclusion, Petitioner's proposal that this Court subject Presidents to *Bivens* liability as an "effective, practical and adequate deterrent" would collapse the protections afforded by Presidential immunity and render a President "unduly cautious in the discharge of his official duties." *Nixon*, 457 U.S. at 752, n. 32. This outcome is precisely what this Court has repeatedly cautioned against and actively sought to avoid. Therefore, Petitioner's core argument on deterrence is fundamentally misguided.

II. Presidential Immunity Presents an Insurmountable Obstacle to Petitioner's Claim.

Even assuming *arguendo* that this Court were to find that a *Bivens* action could theoretically be maintained by Petitioner, any such claim would inherently fail against President Trump since it would be independently barred by the doctrine of Presidential immunity. The same goes for any hypothetical remedy (which Petitioner asks this Court to create) that would afford relief "when a federal judge finds the Government violated an individual right to speech by confining him in prison," which Petitioner asks this Court to create. Pet. App. 24.

It is black-letter law that a President is "entitled to absolute immunity from damages liability predicated on his official acts." *Nixon*, 457 U.S. at 749; *see also Trump*, 144 S.Ct. at 2332 ("Presidential immunity is required for official acts to ensure that the President's decisionmaking is not distorted by the threat of future litigation stemming from those actions."). This precedent was established in the seminal case of *Nixon v. Fitzgerald*, wherein this Court held that this wide-spanning, unqualified form of absolute immunity is "a functionally mandated incident of the President's unique office," *id.* at 749, which extends to acts within the "outer perimeter of [the President's] official responsibility," *id.* at 756. The 'outer perimeter' includes all presidential conduct that is "not manifestly or palpably beyond [the President's authority]." *Trump*, 144 S.Ct. at 2333 (citation omitted). This test is an objective one—it is focused on the nature of the act in question, not the alleged motive behind it. *Nixon*, 457 U.S. at 756 ("[A]n inquiry into the President's motives could not be avoided under the kind of 'functional' theory asserted both by respondent and the dissent. Inquiries of this kind could be

highly intrusive."); *Trump*, 144 S.Ct. at 2333 ("In dividing official from unofficial conduct, courts may not inquire into the President's motives. Such an inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect.").

Here, no inquiry is necessary since Petitioner has affirmatively pled that he is seeking to hold President Trump liable for his "official acts." *Nixon*, 457 U.S. at 749. In the Complaint, Petitioner squarely alleges that "***at all relevant times herein, [President Trump] acted within the course and scope of [his] employment***" as President.[1] Compl. at ¶47 (emphasis added). As a result of this allegation, Petitioner's claim incontrovertibly falls within the purview of the Presidential immunity doctrine. There is no daylight between Petitioner's claim that President Trump was "acting within the course and scope of his employment" as President and the inevitable conclusion that he was acting within the "outer perimeter of his official responsibility." *Nixon*, 457 U.S. at 756. Accordingly, by Petitioner's own admission, Presidential immunity is an absolute bar to his claim.

The upshot is that, if permitted to proceed forward, Petitioner's claim would effectively destroy the doctrine

1. Petitioner also identified President Trump in the caption of the Complaint as "DONALD J. TRUMP, former *President of the United States*." Compl. at 1 (emphasis added), and, in the "Parties" section, stated that "[a]t all relevant times herein, defendant Donald J. Trump was President of the United States . . . was head of the Executive Branch of the Federal Government . . . [and] was responsible for the oversight and enforcement of the laws of the United States." *Id*. at ¶ 37.

of Presidential immunity. Not only would this upend decades of Supreme Court jurisprudence and eradicate an important historical doctrine, but it would also have a devastating practical impact on "not only the President and his office but also the Nation that the Presidency was designed to serve." *Nixon*, 457 U.S. at 753; *see also Trump*, 144 S.Ct. at 2341 ("[T]he interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency."). This Court has proclaimed that Presidential immunity serves "the greatest public interest," *Nixon*, 457 U.S. at 752; that it "safeguard[s] the independence and effective functioning of the Executive Branch," *Trump*, 144 S.Ct. at 2331; and that it "enable[s] the President to carry out his constitutional duties without undue caution," *id.* Absent this critical protection, the Nation would face "unique risks," *Nixon*, 457 U.S. at 751, which could "seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government," *id.* at 745 (citation omitted). This outcome must be avoided absent the most compelling and urgent justification, of which Petitioner has none.

Therefore, to maintain the integrity of Presidential immunity and the important policy considerations behind it, Plaintiff's *Bivens* claim must be dismissed. Plaintiff's request that this Court craft a new remedy tailored to the circumstances of his case must also be denied for this same reason, and because he has not even attempted to explain how such a remedy is justified by law. *See also Devillier v. Texas*, 601 U.S. 285, 286 (2024) ("Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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