No. 21-_____

In the
Supreme Court of the United States

JEREMY BATES, derivatively on behalf of the United States of America,

Petitioner,

v.

DONALD J. TRUMP, in his personal capacity, and the UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JEREMY BATES
21 West Street Apt. 21J
New York, New York 10006
jeremybates3@gmail.com
917-626-2473
Petitioner pro Se,
derivatively on behalf of the United States of America

Questions Presented

This petition offers a way to close a persistent gap in constitutional safeguards. The gap opens when the President breaches duties to the United States, causing damages; and yet the Department of Justice ("DOJ") fails to sue the sitting President. The Chief Executive then sees no bar to further abuse of power.

If executive misconduct and attorney inaction are alleged in private entities, the remedy is established. Courts allow stakeholders—stockowners, partners, nonprofit members—to bring their entities' claims. Such private stakeholders have Article III standing to sue officers derivatively.

In early 2021 Jeremy Bates, a citizen-taxpayer, sued then-President Donald Trump derivatively, claiming breach of duty to, and seeking damages for, the United States. Bates alleged that then-President Trump had extorted Ukraine, obstructed justice, and incited the January 6, 2021 attack on Congress.

DOJ moved under Rule 12(b). The district court dismissed. The Second Circuit affirmed for lack of Article III standing. It also held that Bates could not "assert any standing the United States may have" absent a "statutory exception" to 28 U.S.C. § 516. That provision reserves conduct of litigation to DOJ, "[e]xcept as otherwise authorized by law."

The questions presented are:

1. Whether a citizen may have standing to sue the President derivatively on behalf of the United States.

2. Whether, in light of 28 U.S.C. § 516, this action may proceed derivatively.

Proceedings

Bates v. *Trump*, No. 1:21-cv-02402-LAK, U.S. District Court for the Southern District of New York. Judgment entered May 24, 2021.

Bates v. *Trump*, No. 21-1533, U.S. Court of Appeals for the Second Circuit. Judgment entered February 15, 2022.

Table of Contents

Table of Contents—Continued

Table of Authorities

Page

Cases

Table of Authorities—Continued

Table of Authorities—Continued

Table of Authorities—Continued

Table of Authorities—Continued

Table of Authorities—Continued

Table of Authorities—Continued

Constitutional Provisions

Table of Authorities—Continued

Table of Authorities—Continued

Page

Other Authorities

Table of Authorities—Continued

Page

Jeremy Bates, derivatively on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions

The Second Circuit's order (Pet. App. 1–6) is unpublished but is available at 2022 WL 453397.

The district court's order (Pet. App. 8–9) is not reported in the Federal Supplement or in Westlaw.

Jurisdiction

The Second Circuit's judgment was entered on February 15, 2022. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

"The judicial Power of the United States, shall be vested in one supreme Court…." U.S. Const. art. III, § 1.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States…;—[and] to Controversies to which the United States shall be a Party…." U.S. Const. art. III, § 2.

"Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516.

Statement

A. Derivative Claim

In January 2021 Bates sued then-President Donald Trump personally in New York state court. Bates did so derivatively, on behalf of the United States, which he named as the Nominal Defendant.

The Complaint set forth one claim. Bates alleged that then-President Trump breached his fiduciary duty to the United States by failing to disclose material information, failing to exercise due care, and failing to serve U.S. interests, instead of his own. Bates alleged that Trump delayed military aid to Ukraine, obstructed justice, lied about covid-19 and about election "fraud," and incited the Capitol attack.

Bates alleged demand futility—that on the date of filing (when futility is assessed), to demand that DOJ sue then-President Trump would have been futile.

Bates alleged four types of damages.

First, Bates alleged that as a faithless fiduciary, then-President Trump should disgorge benefits that he received. Bates valued them at over $150 million.

Second, Bates alleged consequential damages. (The Capitol attack cost "more than a million dollars of property damage." *United States* v. *Little*, 2022 WL 768685, *1 (D.D.C. March 14, 2022).)

Third, reputational damages. Photos and videos of a mob storming the Capitol were seen by hundreds of millions of people globally. Bates alleged that the resulting reputational damages exceeded $1 billion.[1]

---

[1] *See* Brett Bruen, *America is going to need to spend massive amounts of money to rebuild its tarnished global reputation*, Business Insider (March 6, 2021) ("The US normally spends about two billion dollars a year on public diplomacy programs."), https://www.businessinsider.com/america-must-spend-billions-dollars-rebuild-diplomacy-global-image-2021-3.

Indeed, a historian assessed that "[t]he greatest defeat the United States ever suffered in the realm of political warfare came at the Capitol on January 6."[2]

Fourth, the breaches were reckless, wanton, or criminal. Bates demanded punitive damages of over $1 billion. (*See Eastman* v. *Thompson*, 2022 WL 894256, *22 (C.D. Cal. Mar. 28, 2022) (finding "more likely than not" that Trump committed obstruction); *id*. at *24 (conspiracy to defraud United States).)

Bates demanded all these damages for the United States. For himself, he requested costs and fees. (Bates is *pro se*. There are no attorney's fees yet.)

B. Dismissal for Lack of Standing

DOJ removed the case to the Southern District.

The Secret Service blocked efforts to serve Trump. Bates moved for special service. That motion was terminated when DOJ's motion was granted.

DOJ moved to dismiss under Rules 12(b)(1) and 12(b)(6). DOJ framed its 12(b)(1) motion as "facial," imposing "no evidentiary burden." On reply, DOJ requested dismissal without prejudice.

In moving, DOJ did not argue presidential immunity or any analogue to the business-judgment rule. Rather, DOJ contended constitutionally that Bates could not show any particularized injury to himself and statutorily that under 28 U.S.C. § 516, he lacked authority to sue for the United States.

But DOJ did not contest duty, breach, causation, or damages. Nor did DOJ contend that it would have sued then-President Trump. So, for motion purposes, DOJ conceded claim elements and demand futility.

---

[2] Zachary B. Wolf, *How US intelligence got it right on Ukraine*, CNN (Feb. 26, 2022), at https://www.cnn.com/2022/02/26/politics/us-intelligence-ukraine-russia/index.html.

By handwritten order, the district court dismissed "on the ground that plaintiff lacks standing to sue on behalf of the United States substantially for the reasons advanced by the government." Pet. App. 9.

The district court did not mention Rule 23.1. *Id.* Rule 23.1 does not apply here. Fed. R. Civ. P. 23.1(a).

C. Summary Affirmance

On appeal, Bates argued constitutionally that the United States was injured and that courts extend derivative standing based on injuries to entities.

Statutorily Bates argued that § 516 is ambiguous, allows nonstatutory exceptions, and ought not be interpreted to require the Executive to sue itself.

In addition to its earlier arguments, DOJ hinted that this action would violate sovereign immunity. Bates replied that the sovereign would recover here.

By summary order, the Second Circuit affirmed.

Constitutionally, the court of appeals held that "Bates has failed to establish a concrete, particularized injury sufficient for Article III standing." Pet. App. 4. That court reasoned that to allow Bates to proceed derivatively would contravene this Court's case law. *Id.* (quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 573–74 (1992), and *Lance* v. *Coffman*, 549 U.S. 437, 440 (2007)).

Statutorily, the court of appeals did not mention Rule 12(b)(6) or the standard of review thereunder. Even so, the Second Circuit held that "Bates cannot assert standing to sue on behalf of the United States." Pet. App. 5 (citing 28 U.S.C. § 516). That court reasoned that "Bates points to no statutory exception to section 516's requirements." *Id.*

That court did not mention prudential standing. Bates had raised that issue, but DOJ forfeited it.

Reasons for Granting Certiorari

This Court should grant certiorari (i) to remedy conflicts that prevent DOJ from suing the President; (ii) to extend derivative standing to stakeholders in the United States as it is extended to stakeholders in private entities; and (iii) to interpret § 516 correctly.

But first, an antecedent point: Public officials are fiduciaries. *United States* v. *Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979), *on reh'g* 602 F.2d 653 (4th Cir. 1979) ("[T]he Governor of the State of Maryland is trustee for the citizens and the State of Maryland and thus owes the normal fiduciary duties of a trustee e. g., honesty and loyalty."); *id.* at 1362 (describing "fiduciary duties" of "honest, faithful and disinterested service").

The Second Circuit just restated this rule. *United States* v. *Percoco*, 13 F.4th 180, 188–89 (2d Cir. 2021), *petition for cert. filed* (Feb. 17, 2022) (No. 21-1158).

In 2020 DOJ sued the former National Security Adviser and also a former West Wing volunteer for breaching fiduciary duties. *United States* v. *Bolton*, 496 F. Supp. 3d 146, 152 (D.D.C. 2020); *United States* v. *Winston Wolkoff*, No. 1:20-cv-02935-CKK (D.D.C. 2020). (In 2021 DOJ dismissed both cases.)

Civil liability of this type has been approved by this Court. *United States* v. *Snepp*, 444 U.S. 507, 510 (1980) (holding that CIA agent was under contractual duty and "breached fiduciary obligation").

Most public fiduciaries are executive personnel. But this Court too may have "a duty of care." *Trump* v. *MazarsUSA, LLP*, 140 S. Ct. 2019, 2031 (2020).

From the established law that public officers are fiduciaries, this case follows. If the sitting President breaches duties and injures the United States, then does the Republic have a remedy?

I. The Court Should Remedy the Conflicts That Afflict Attorneys at DOJ.

The Court should grant certiorari to provide the Republic an effective remedy for presidential wrongs. When the United States ought to sue the incumbent President, DOJ fails to act. This failure at Justice persists across administrations because of conflicts that are structural, ethical, and personal.

A. Structurally, DOJ Attorneys Will Not Sue Their Superior Officer.

The Constitution vests "Executive power... in a President of the United States of America." U.S. Const. art. II, § 1. By statute, "[t]he Department of Justice is an executive department." 28 U.S.C. § 501.

DOJ's "head," the Attorney General, is appointed by the president, 28 U.S.C. § 503; serves at the president's pleasure; and may be removed by the president. The Attorney General "is the hand of the president in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses be faithfully executed." *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922).

A result of these executive arrangements, as an Attorney General once testified, is that "a conflict of interest may exist when the Justice Department of any particular Administration investigates the highest ranking officials of that Administration."[3]

Understandably, the "hand of the president," 258 U.S. at 262, is loath to sue the President.

DOJ even has a policy against prosecuting the sitting President. *See* 24 U.S. Op. O.L.C. 222 (2000).

---

[3] Janet Reno Stmt. to Govt'l Affairs Comm., at https://www.justice.gov/archive/ag/testimony/1999/aggovern031799.htm.

For criminal investigations, one workaround is the special counsel. But regulatorily, a special counsel may be appointed only if the Attorney General determines that a criminal investigation is warranted. 28 CFR § 600.1. Thereafter a special counsel may proceed civilly only if "specifically granted such jurisdiction by the Attorney General." 28 CFR § 600.4(c).

Another option is to appoint an outside lawyer to represent the United States. This workaround too requires official action. 28 U.S.C. § 515.

Such workarounds may have Article III problems, on a unitary view of executive power. For it is a "long-recognized general principle that no person may sue himself." *United States* v. *I.C.C.*, 337 U.S. 426, 430 (1949). This is true for the United States. *Luckenbach Steamship Co.* v. *United States*, 315 F.2d 598, 604 (2d Cir. 1963) ("[T]he Government, no more than any other person, can sue itself.") (Friendly, J.).

If executive power is unitary, delegated from the President, the executive cannot sue the Executive.

Here, these considerations of structure support demand futility. Bates alleged that DOJ would not have prosecuted the then-President. Pet. App. 36.

A fortiori, DOJ would not have sued him. *Id.*

Below, DOJ did not argue otherwise.

B. Ethically, DOJ Attorneys Represent the Sitting President.

DOJ's predicament is sharpened by professional rules. For if DOJ lawyers filed suit against a sitting president, that filing could raise ethical concerns.

In addition to being executive employees, DOJ lawyers are also officers of courts and are subject to ethical rules. 28 U.S.C. § 530B(a). These rules include prohibitions on conflicts of interest—

especially the strict ban on suing current clients. *See*, *e.g.*, N.Y. R. Prof'l Cond. 1.7(b)(3) & cmt. 17.

But "whenever the United States, its agencies, or officers are involved in litigation, an attorney-client relationship exists between DOJ attorneys and an affected federal agency and its officers." *Blue Lake Forest Prod., Inc.* v. *United States*, 75 Fed. Cl. 779, 792 (2007) (citing 28 U.S.C. § 516 & 5 U.S.C. § 3106).

Thus lawyers at Justice represent the incumbent president. *See* 28 CFR § 50.15.

And if one client of a lawyer should sue another client of the lawyer, then that lawyer may not represent either of those clients in that litigation. N.Y. R. Prof'l Cond. 1.7, 1.9. Such conflicts are imputed throughout firms. N.Y. R. Prof'l Cond. 1.10.

Below, DOJ did not discuss ethics. DOJ never mentioned its conflicts. DOJ silently conceded that its conflicted position includes ethical issues.

C. Personally, Some DOJ Attorneys Abet Presidential Misconduct.

DOJ attorneys may also have personal conflicts. For when the incumbent President breaches duties, some DOJ officials may also be liable.

Certainly history shows that faithless presidents appoint attorneys general who abet wrongdoing.

Fifty years ago, courts held to account the Nixon Administration's bad actors, including John Mitchell. *See United States* v. *Haldeman*, 559 F.2d 31, 51 (D.C. Cir. 1976) (affirming Mitchell's conviction as part of "unprecedented scandal at the highest levels of government"). Mitchell had joined the Watergate conspiracy while he was Attorney General. *Id.* at 52.

In the 1980s a prosecutor concluded that Attorney General Edwin Meese's "attempt to signal other

Cabinet members" that President Reagan had not known about illegal arms sales "required evaluation as an effort to obstruct a congressional inquiry." Lawrence E. Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters*, 526, No. 86-6 (D.C. Cir. 1993). Six years later, "the trail was cold." *Id*.

President Trump tutored the entire world—including future presidents—in how to corrupt DOJ.

Attorney General Jeff Sessions was fired because "Trump blame[d] him for allowing the Russia investigation to begin and thought Sessions should have intervened to end it."[4]

Under Attorney General William Barr, lawyers at DOJ interfered in prosecutions of Trump associates. Pet. App. 36 (alleging that DOJ "intervened in the criminal-sentencing process to favor… Roger Stone" and "moved to dismiss a federal criminal case against Michael Flynn" even after Flynn pled guilty).

Before the 2020 election, as President Trump began to push his false narrative of election fraud, Attorney General Barr echoed that false narrative.[5]

---

[4] Amber Phillips, *An emboldened Trump says the quiet part out loud about why he fired Jeff Sessions*, Wash. Post (March 4, 2020), https://www.washingtonpost.com/politics/2020/03/04/an-emboldened-trump-says-quiet-part-out-loud-about-why-he-fired-jeff-sessions/; *see* Peter Baker, Katie Benner, & Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. Times (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html ("President Trump fired Attorney General Jeff Sessions…, replacing him with a loyalist who has echoed the president's complaints about the special counsel investigation… and will now take charge of the inquiry.").

[5] *E.g.*, Wolf Blitzer, *A.G. Barr on Trump Accusing Obama and Biden of Treason... Barr: Mail-in Voting Is "Playing with Fire"*, The Situation Room, CNN (Sept. 2, 2020), https://transcripts.cnn.com/show/sitroom/date/2020-09-02/segment/01.

Bitter experience also shows that a bad leader can spoil DOJ. When the President and the Attorney General align in illegality, some DOJ lawyers resign. Others do the President's unlawful bidding.

Thus in 1973 the Attorney General and a Deputy Attorney General resigned, rather than fire a special Watergate prosecutor. The Solicitor General then carried out President Nixon's obstructive command.

In 1988 six DOJ attorneys, including the Deputy Attorney General and the head of the Criminal Division, quit due to the Attorney General's legal issues.

President Trump engineered departures of U.S. Attorneys whom he deemed insufficiently loyal to his interests. This abuse caused district-court judges to appoint a U.S. Attorney, lest that post go unfilled. *See In re App't of Audrey Strauss as U.S. Attorney*, No. M10-458 (S.D.N.Y. Dec. 22, 2020).

The Senate Judiciary Committee issued a report, *Subverting Justice*, that established—

> New details of [the] Acting Assistant Attorney General of the Civil Division['s] misconduct, including [efforts] to induce [Acting Attorney General] Rosen into helping Trump's election subversion scheme by telling Rosen he would decline Trump's offer to install him in Rosen's place if Rosen agreed to aid that scheme.
>
> New details around Trump forcing the resignation of U.S. Attorney [BJay] Pak because he believed Pak was not doing enough to support his false claims of election fraud….[6]

[6] U.S. Senate Judiciary Committee, Majority press release (Oct. 7, 2021), at https://www.judiciary.senate.gov/press/dem/releases/following-8-month-investigation-senate-judiciary-committee-releases-report-on-donald-trumps-scheme-to-pressure-doj-and-overturn-the-2020-election.

This accumulated history is damning. It shows that when a faithless president begins to injure the United States, some DOJ lawyers abet the abuse.

At that point, an administration may resemble Shakespeare's Richard III: "in So far in blood that sin will pluck on sin." Legally unchecked, presidencies may become criminal conspiracies. And the Republic suffers repeated injury at its officers' hands.

Enough is enough. No entity should tolerate such recurring lawlessness among its officers and lawyers. And no private entity would—because for centuries, courts have allowed stakeholders to sue derivatively.

II. The Court Should Make the Law of Derivative Standing More Uniform.

The Court should grant certiorari to determine if derivative standing on behalf of the United States should be treated like private derivative standing.

In a "dispute about the Constitution's meaning or application, long settled and established practice is a consideration of great weight." *Houston Cmty. Coll. Sys.* v. *Wilson*, 142 S. Ct. 1253, 1259 (2022) (cleaned up). Therefore a "'regular course of practice'" may "illuminate" our "founding document's 'terms & phrases.'" *Id.* (quoting James Madison).

The dispute here is about what the Constitution means by vesting the "judicial Power" in this Court and by extending it to "all Cases, in Law and Equity, arising under this Constitution [or] the Laws of the United States." U.S. Const. art. III, §§ 1, 2.

If these terms are illuminated by settled practice, then Bates has constitutional standing. By tradition, derivative standing is representational. And here, such standing would repair breaches in the separation of powers and would buttress it for the future.

A. Derivative Remedies Are a Traditional Protection Against Officer Misconduct.

Standing ensures that "courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc.* v. *Robins*, 578 U.S. 330, 338 (2016). Standing requires that courts decide only "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 798 (2021).

Measured by this metric—tradition—derivative standing is available expansively.

The roots of derivative actions go as deep as the 1740s, when a corporation sued its directors in the Court of Chancery, seeking an accounting. The Earl of Hardwicke, Lord High Chancellor, allowed the bill because courts have power to lay hold of, or to reach, frauds by faithless trustees:

> I will never determine that a court of equity cannot lay hold of every such breach of trust. I will never determine that frauds of this kind are out of the reach of courts of law or equity; for an intolerable grievance would follow….

Charitable Corp. v. *Sutton*, 2 Atk. 401, 406 (Ch. 1742).

Chancellor Kent foresaw a complaint "on the part of stockholders, of misconduct"; and wrote, "[P]ersons who… exercise corporate powers, may, in their character of trustees, be accountable to this [c]ourt for a fraudulent breach of trust," calling this a "plain and ordinary head of equity." *Att'y Gen.* v. *Utica Ins. Co.*, 2 Johns Ch. 371, 389 (N.Y. Ch. 1817).

In 1832 a New York court allowed stockholders to sue derivatively. *Robinson* v. *Smith*, 3 Paige Ch. 222 (N.Y. Ch. 1832). Chancellor Walworth held that the distinction between a charitable corporation and a

joint-stock one (then fairly new) made no difference: "[N]o injury [that] the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy." *Id*. at 232. Therefore stockholders could sue when their corporation would not:

> [A]s this court never permits a wrong to go unredressed merely for the sake of form, if it appeared that the directors of the corporation refused to prosecute by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names….

Id. at 233; *cf*. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("[E]very right, when withheld, must have a remedy, and every injury its proper redress.").

Those early cases extended charitable principles to joint-stock firms. *Robinson*, 3 Paige Ch. at 232 ("[S]ince the introduction of joint stock corporations... the principles which were formerly applied to charitable corporations in England, may be very appropriately extended to such companies here.").

In 1855 this Court recognized derivative standing. "It is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations at the instance of one or more of their members." *Dodge* v. *Woolsey*, 59 U.S. 331, 341 (1855) (allowing derivative suit).

"[T]he circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought." *Id*. at 344.

Rules then developed for derivative actions. *See Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 530 n.5 (1984) (explaining rules' history). But the derivative form is jurisdictionally proper. *Venner* v. *Great N. Ry. Co.*, 209 U.S. 24, 34 (1908) ("Neither the rule [then, Equity Rule 94] nor the decision from which it was derived [*Hawes* v. *Oakland*, 104 U.S. 450 (1881)] deals with the question of the jurisdiction of the courts, but only prescribes the manner in which the jurisdiction shall be exercised."); *accord* 28 U.S.C. § 2072(b) (Rules Enabling Act); Fed. R. Civ. P. 82.

Given the settled practice, when courts determine to extend derivative remedies to new situations, courts do not look to legislatures for permission.

For example, in predicting that New York would allow limited partners to sue derivatively, the Second Circuit held that the lack of statutory authority was not dispositive. Rather, that court found no "clear mandate against limited partners' capacity to bring an action like this." *Klebanow* v. *N.Y. Produce Exch.*, 344 F.2d 294, 298 (2d Cir. 1965).

The New York Court of Appeals agreed—because derivative remedies are independent of statutes:

> It is fundamental to the law of trusts that *cestuis* have the right, 'upon the general principles of equity' (*Robinson v. Smith*, 3 Paige Ch. 222, 232) and 'independently of [statutory] provisions' (*Brinckerhoff v. Bostwick*, 88 N.Y. 52, 59), to sue for the benefit of the trust on a cause of action which belongs to the trust if 'the trustees refuse to perform their duty in that respect' (*Western R.R. Co. v. Nolan*, 48 N.Y. 513, 518).

Riviera Congress Assoc. v. *Yassky*, 18 N.Y.2d 540, 547 (1966) (allowing partners' action) (brackets original).

Later, that same court determined that "members of a limited liability company [ ] may bring derivative suits on the LLC's behalf, even though there are no provisions governing such suits in the [LLC] Law." *Tzolis* v. *Wolff*, 10 N.Y.3d 100, 102 (2008). As the highest court of New York observed, "courts have repeatedly recognized derivative suits in the absence of express statutory authorization." *Id*. at 106.

Delaware courts have extended double-derivative actions to alternative entities, although no statute specifically allows double-derivative actions there. *Bamford* v. *Penfold, L.P.*, 2020 WL 967942, *26–27 (Del. Ch. Feb. 28, 2020).

Notably, derivative cases extend beyond business entities. Nonprofit members may sue derivatively even though they cannot receive any inurement.

Thus derivative actions are available to members of social clubs and homeowners' associations. *See Star* v. *TI Oldfield Dev., LLC*, 962 F.3d 117, 127 (4th Cir. 2020) (describing "derivative action… on behalf of the Club and Association"); *id*. at 124 (describing both as not-for-profit LLCs).

Likewise union members may sue derivatively. *Romain* v. *Seabrook*, No. 16-CV-8470 (JPO), 2017 WL 6453326, *1 (S.D.N.Y. Dec. 15, 2017) ("Plaintiffs filed this suit derivatively on behalf of COBA."); *id*. at *4 ("COBA is a New York not-for-profit corporation.").

So "the law pertaining to derivative suits applies to a non-profit corporation exactly the same as if it were a business corporation." *Bourne* v. *Williams*, 633 S.W.2d 469, 472 (Tenn. Ct. App. 1981) (citing 13 Fletcher Cyc. Corp. § 5950 (Perm. Ed. 1980)).

As D.C.'s highest court described a direct claim:

> [I]t would seem almost self-evident that members of a nonprofit organization whose revenue depends in large part upon the regular recurring annual payment of dues by its members have standing to complain when allegedly the organization and its management do not expend those funds in accordance with the requirements of the constitution and by-laws of that organization.

Daley v. *Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 729 (D.C. 2011).

Rather than extend derivative standing by virtue of statutes, courts use reasoning that predates the Revolution and resonates deeply in American law. Our courts "continue to heed the realization that influenced Chancellor Walworth in 1832, and Lord Hardwicke 90 years earlier: When fiduciaries are faithless to their trust, the victims must not be left wholly without a remedy." *Tzolis*, 10 N.Y.3d at 105.

Two centuries ago, trustees were subject to the "superintending power of the court of chancery... as possessing a general jurisdiction, in all cases of an abuse of trust, to redress grievances and suppress frauds." *Trustees of Dartmouth Coll.* v. *Woodward*, 17 U.S. 518, 676 (1819) (Story, J., concurring).

This tradition extends to public fiduciaries alike. *Richardson* v. *Blackburn*, 41 Del. Ch. 54, 55 (Del. Ch. 1963) (Seitz, Ch.) ("Plaintiffs sue only derivatively as members of the taxpayer class because the State through the then Attorney General refused to sue."). *Richardson* was against government employees, *id.*, so the action was "at least substantially analogous" to stockholder cases, *id.* at 56. The Delaware court had jurisdiction and the action went forward. *Id.*

B. Derivative Plaintiffs Have Representational Standing.

Derivative cases are representational. Derivative plaintiffs derive standing from injured entities. Certain requisites being met, if nominal defendants have standing, then the derivative plaintiffs do too.

This results from such cases' two-fold structure. "First, [a derivative action] is the equivalent of a suit by the shareholders to compel the corporation to sue. Second, it is a suit by the corporation, asserted by the shareholders on its behalf, against those liable to it." *Aronson* v. *Lewis*, 473 A.2d 805, 811 (Del. 1984), *overruled on other grounds by Brehm* v. *Eisner*, 746 A.2d 244 (Del. 2000).

Considered separately, either action—*Stakeholder* v. *Entity*, to compel suit; or *Entity* v. *Officer*, on the claim—would be direct. But if those two vectors are summed—giving *Stakeholder* v. *Officer* on the claim, along the corporate hypotenuse—then the action is derivative. *See In re Activision Blizzard, Inc. Shareholder Litig.*, 124 A.3d 1025, 1045 (Del. Ch. 2015).

Whether a claim is derivative is usually a question of state law. *See KPMG LLP* v. *Cocchi*, 565 U.S. 18, 21 (2011). In Delaware, "[a] wrong is derivative in nature when it injures the shareholders indirectly and dependently through direct injury to the corporation." *In re Gaylord Corp. S'holder Litig.*, 747 A.2d 71, 80 (Del. Ch. 1999). "Where all of a corporation's stockholders" would recover only "because they are stockholders," then "the claim is derivative." *Feldman* v. *Cutaia*, 951 A.2d 727, 733 (Del. 2008).

If a plaintiff alleges "indirect loss in common with other shareholders," the suit is derivative. *Enterra Corp.* v. *SGS Assocs.*, 600 F. Supp. 678, 689 (E.D. Pa. 1985). If injury occurs "to all… shareholders alike,"

"[t]hat is precisely the situation in which derivative actions are required." *Weston* v. *Weston Paper & Mfg. Co.*, 74 Ohio St. 3d 377, 379 (Ohio 1996).

Thus no derivative plaintiff has any particularized injury. What distinguishes derivative claims is that they are based on actual, concrete, *entity* injuries that indirectly affect all stakeholders alike.[7]

And there, the courts below thought, lies the rub.

For standing, plaintiffs must show "injury in fact." *Uzuegbunam*, 141 S. Ct at 797. This is an "invasion of a legally protected interest" that is concrete, particularized, and actual. *Lujan*, 504 U.S. at 560. The pleading must clearly allege such injury-in-fact. *Spokeo*, 578 U.S. at 338.

To be sure, federal courts do not hear cases that raise "only a generally available grievance about government" or "every citizen's interest in proper application of the Constitution and laws." Pet. App. 4 (quoting *Lujan*, 504 U.S. at 573–74).

Here, though, the Complaint does allege injury-in-fact to the United States. (*See* Stmt. A, *supra*.) Our Republic suffered injury—specific, direct, and grievous—that was caused by then-President Trump.

Nor did the Second Circuit hold otherwise. It even adverted to "any standing the United States may have to sue." Pet. App. 5.

So, for pleading purposes, the United States does have standing and Bates may derive it.

The dismissal below for lack of standing was error. To correct it, this Court should grant certiorari.

---

[7] This Court recently revived an ERISA suit by participants, apparently suing derivatively for a plan, without discussing standing. *Hughes* v. *Northwestern Univ.*, 142 S. Ct. 737, 739–42 (2022). Statutory claims cannot transgress Article III limits. *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2206–07 (2021).

C. Derivative Standing Here Would Repair the Separation of Powers.

Normally, this case might implicate the separation of powers. "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive," not of plaintiffs or courts. *Lujan*, 504 U.S. at 576 (italics original).

But here, the Executive was a primary violator. And Congress failed to remove him. So both political branches, to which courts defer for vindicating the public interest, instead abandoned it. And that abandonment calls for a strong judicial response.

Respect for the Executive does not require courts to allow illegality. It is one thing to say that some choices may be nonjusticiable because, like business judgments, they are discretionary. It's another when the Executive causes injuries or commits crimes.

In business, "one cannot act loyally" as a director "by causing the corporation to violate the positive laws it is obliged to obey." *Guttman* v. *Huang*, 823 A.2d 492, 506 n.34 (Del. Ch. 2003).

Torts and crimes are not within executive power, properly understood and separated. *See* U.S. Const. art. II, § 3 (requiring President to "take Care that the Laws be faithfully executed"); *Al Shimari* v. *CACI Premier Tech., Inc.*, 840 F.3d 147, 158 (4th Cir. 2016) ("[W]hen a military contractor acts contrary to settled international law or applicable criminal law, the separation of powers rationale underlying the political question doctrine does not shield the contractor's actions from judicial review.").

President Trump, though, said the Constitution gave him "the right to do whatever I want."[8]

On that unlawful view, he ran amok. And when presidential push came to faithless shove, DOJ was not a barrier to, but rather an instrument of, abuse.

The House of Representatives in 2019 impeached. The Senate did not remove. Like a conflicted board, the Senate failed to act in the entity's interest. The President then incited a violent attack on Congress.

After the Executive instigates an attack on the Legislature, courts will act. At stake is no nicety of balancing. The entire Constitution is imperiled.

And in these circumstances, courts need not defer to arrangements that deprive the United States of loyal attorneys. DOJ is inevitably conflicted, and faithless presidents take ruthless advantage of the conflicts. (*See* Part I.A–C, *supra*.) It is well within the judicial power to prevent those conflicts from affecting court proceedings. (*See* Part III.B.2, *infra*.)

The executive power to conduct litigation—if used to *shield* the Executive *from* litigation—must be countered by judicial power to ensure that litigation against the Executive is conducted, if necessary.

Here, Bates alleged presidential wrongdoing and DOJ inaction. So on the filing day, the United States resembled a corporation where—absent a derivative remedy—"there would be failure of justice because the conflicted fiduciaries could prevent the corporation and its stockholders from pursuing valid claims," "including claims against its own directors

---

[8] M. Brice-Saddler, *While bemoaning Mueller probe, Trump falsely says the Constitution gives him 'the right to do whatever I want,'* Wash. Post (July 23, 2019) at https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/.

and officers." *Quadrant Struct. Prod. Co., Ltd.* v. *Vertin*, 115 A.3d 535, 554, 549 (Del. Ch. 2015).

Determining where the power to block suit ends, and lawlessness begins, is a judicial function. "[T]he Constitution assigns to the judiciary the power to resolve what the law is," *Al Shimari*, 840 F.3d at 162 (Floyd, J., concurring) (cleaned up), and to hear cases about whether the law was violated.

By embracing this constitutional assignment here, the Court will not open any litigation floodgate. "A [ ] derivative action is an action of last resort." *Gonzalez Turul* v. *Rogatol Dist., Inc.*, 951 F.2d 1, 2 (1st Cir. 1991). And this action is a last resort, filed after DOJ had years to sue the then-President, on behalf of the United States, but failed; and after the Senate could have removed him, but failed.

Nor need this Court worry that other courts might be constrained by an exercise here of inherent power. Equity's hallmark is flexibility. *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). The "essence of equity" is "the power of the Chancellor… to mould each decree to the necessities of the particular case." *Id*.

Tailoring a remedy that meets the necessities here will not require any court to exercise any inherent, equitable power in any similar way in the future.

Rather, equitable remedies are granted on a case-by-case basis. And "specific circumstances" may "warrant special treatment in an appropriate case." *Holland* v. *Florida*, 560 U.S. 631, 650 (2010).

This is that case. The Court need not wait for another executive wolf to raven through the halls of Congress, much less howl outside a courthouse door.

The Court should grant certiorari to protect the United States in the same way that courts have long protected private entities.

III. The Court Should Correct the Second Circuit's Misreading of 28 U.S.C. § 516.

By answering the first question, the Court would decide whether the Constitution allows the sitting President to be sued derivatively. If the Court does that much, then the Court should also answer the second, statutory question.

Section 516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 516. The Second Circuit construed this provision to bar this derivative action, absent a "statutory exception to section 516's requirements":

> Federal law generally grants the authority to bring litigation on behalf of the United States only to the Department of Justice under the direction of the Attorney General. See 28 U.S.C. § 516.... Bates points to no statutory exception to section 516's requirements that would apply to his case. We thus conclude that he cannot assert any standing the United States may have to sue.

Pet. App. 5. That conclusion was wrong.

A. Section 516 Is Not Jurisdictional.

If that court relied on § 516 for 12(b)(1) purposes, as delineating subject-matter jurisdiction, it erred.

This Court "do[es] not read a statute or rule to impose a jurisdictional requirement unless its language clearly does so." *Cameron* v. *EMW Women's*

Surg. Ctr. P.S.C., 142 S. Ct. 1002, 1009 (2022). If a statute "provides no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes," then the statute has none. *Henderson* v. *Shinseki*, 562 U.S. 428, 439 (2011).

Section 516 has no jurisdictional requirement. Nothing about it hints, much less clearly indicates, that Congress wanted any such attribute.

To read § 516 jurisdictionally is a mistake.

B. Section 516 Does Not Affect Courts' Inherent Power or Discretion in Equity.

If the court of appeals relied on § 516 for purposes of Rule 12(b)(6), then any such reliance was incorrect both procedurally and substantively.

1. By raising § 516, DOJ violated the corporate-neutrality rule.

Procedurally, under the law of derivative actions, DOJ may not raise any merits argument now.

The United States is the Nominal Defendant here because the claim-owning entity is a necessary party. *Meyer* v. *Fleming*, 327 U.S. 161, 167 (1946); *see Grgurev* v. *Licul*, 229 F. Supp. 3d 267, 282 n.10 (S.D.N.Y. 2017) (stating that "default way" to join entity "initially" is to name it as nominal defendant).

After joinder, though, the nominal defendant—if it chooses to remain the nominal defendant—may do very little. *Cotter on behalf of Reading Int'l, Inc.* v. *Kane*, 136 Nev. 559, 563 (2020) (Nevada law) ("In line with the majority of jurisdictions, we conclude that a nominal corporate defendant cannot oppose a derivative action on the merits."); *In re Internet Navigator Inc.*, 293 B.R. 198, 206 (Bankr. N.D. Iowa 2003) (Iowa law) ("The corporation... should take a strictly neutral part.").

This neutrality rule is supported by an "overwhelming weight of authority." *Sobba* v. *Elmen*, 462 F. Supp. 2d 944, 947 (E.D. Ark. 2006) (Arkansas law).

Here, Bates raised neutrality below. DOJ kept silent about it. But if § 516 were to matter under Rule 12(b)(6), then that would be a merits argument, not properly made by a neutral nominal defendant.

2. Courts retain inherent power to protect judicial proceedings.

Substantively, § 516 does not divest courts of their inherent power to protect judicial proceedings.

"Article III's grant of '[t]he judicial Power' imbues each federal court with the inherent authority to regulate its *own* proceedings." *United States* v. *Tsarnaev*, 142 S. Ct. 1024, 1041 (2022) (Barrett, J., concurring) (italics original).

This is so because "'certain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

These inherent powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs." *Link* v. *Wabash R. Co.*, 370 U.S. 626, 630 (1962).

Among them is an "inherent power to preserve the integrity of the adversary process." *United States* v. *Prevezon Holdings Ltd.*, 839 F.3d 227, 241 (2d Cir. 2016). "[A] court's ability to enter orders protecting the integrity of its proceedings" is "so essential" to the judicial power as to be "indefeasible." *Chambers*, 501 U.S. at 58 (Scalia, J., dissenting).

Here, the ability to allow a derivative action is an inherent power. *See* Adv. Comm. Note to 1966 Addition of Fed. R. Civ. P. 23.1. (framing Rule 23.1 as exercising courts' "*inherent power* to provide for the *conduct* of proceedings in a derivative action") (italics added). Essentially, derivative remedies protect the integrity of judicial proceedings by taking the control of litigation away from conflicted fiduciaries.

Because the power to allow derivative actions is inherent and indefeasible, § 516 has no effect here. To read § 516 to deprive this Court of inherent power would raise constitutional questions.

3. Courts retain discretion in equity to fashion appropriate remedies.

The derivative action is also a remedy in equity. *Ross* v. *Bernhard*, 396 U.S. 531, 534 (1970).

"Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982). Therefore, "absent a clear statement to the contrary, legislation should not… be interpreted to oust a federal court's equitable power." *Daingerfield Island Protective Soc.* v. *Lujan*, 920 F.2d 32, 36 (D.C. Cir. 1990) (Bader Ginsburg, J.) (ellipsis original).

Moreover, where public interests are involved, "equitable powers assume an even broader and more flexible character" than they do in private cases. *Porter* v. *Warner Hldg. Co.*, 328 U.S. 395, 398 (1946).

Here, § 516 does not necessarily or inescapably restrict any equitable remedy requested on behalf of the United States. (*See* Part III.C, *infra*.)

Section 516 does not explicitly refer to jurisdiction, standing, inherent power, or equity. So § 516 ought not be read as limiting any of these things. *See FBI* v. *Fazaga*, 142 S. Ct. 1051, 1060 (2022) (rejecting displacement argument because "absence of any statutory reference" to privilege is "strong evidence" that its availability "was not altered in any way").

DOJ argued that Congress "never contemplated… 'derivative' actions against [sic] the United States." (CA2 Doc. 38-1 at 11.) If that is right, then § 516 carries no legislative intent here at all—much less any quantum of considered intent that might suffice to limit the scope of remedies permissible here.

C. Textually, § 516 Allows This Action.

Even if § 516 somehow affected inherent power or equity, the court below still got it wrong. Textually, this Court has a cornucopia of corrective options.

1. "[L]aw" includes more than statutes.

In requiring a "statutory exception" to § 516, Pet. App. 5, the court below erred. Section 516 admits of exceptions authorized not by statute, but by law.

The Constitution itself is "the supreme Law." U.S. Const. Art. VI, cl. 2. And the judicial power includes inherent or equitable power to allow derivative suits. Therefore this case is authorized by the supreme law.

Additionally, this Court makes law.

In habeas, "clearly established federal law" is "determined by" this Court. 28 U.S.C. § 2254(d)(1). In qualified immunity, clearly established law turns on this Court's cases. *City & Cty. of San Francisco, Calif.* v. *Sheehan*, 575 U.S. 600, 613 (2015).

So this action might become "authorized by law in the sense of [this Court's] decisions." *Kern River Co.* v. *United States*, 257 U.S. 147, 155 (1921).

Other courts make law. *See Norfolk & W. Ry. Co.* v. *Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) (holding that phrase "all other law" does not distinguish "between positive enactments and common-law rules"). A judicial decision, once issued, is law of that case and law that persuades elsewhere.

In this parlance, the derivative area is like others. Courts refer to it as "law." *Culverhouse* v. *Paulson & Co., Inc.*, 791 F.3d 1278, 1281 (11th Cir. 2015) ("[T]he Delaware Supreme Court clarified the law of derivative suits."); *Leach* v. *FDIC*, 860 F.2d 1266, 1273 (5th Cir. 1988) ("law of derivative suits").

It might be said that such references are to law in the sense of judge-made law, and that equity and law differ. Yet Congress ought not be held to a level of clarity that courts do not achieve. *Cf. Nicole Gas Prod., Ltd.*, 916 F.3d 566, 574 (6th Cir. 2019) (noting that legislature wrote statute "with knowledge of the existing common law of derivative suits"); *Thorsen* v. *Sons of Norway*, 996 F. Supp. 2d 143, 160 (E.D.N.Y. 2014) (choosing "law of derivative standing").

Besides, equity is a body of law—a supplemental system of doctrines, rules, and remedies that was developed by courts. *In re Garden Ridge Corp.*, 386 F. App'x 41, 43 (3d Cir. 2010) (referring to "common law of equity"); *Mantek Div. of NCH Corp.* v. *Share Corp.*, 780 F.2d 702, 708 n.11 (7th Cir. 1986) (same).

"Equity is law about law." Henry E. Smith, *Equity As Meta-Law*, 130 Yale L.J. 1050, 1054 (2021). And "principles of equity, securing complete justice, should not be yielded to… doubtful construction." *Brown* v. *Swann*, 35 U.S. 497, 503 (1836).

The construction below of § 516 was very doubtful.

This present action is authorized by existing law—or will be by law that this Court may decide to make.

2. "[C]onduct" differs from initiation.

Exceptions aside, the main clause of § 516 does not affect the initiation of derivative actions.

The text reserves to DOJ the conduct of litigation. But the Second Circuit cited, Pet. App. 5, to a case where this Court distinguished between conduct and initiation. *See United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888) (describing Attorney General as "officer who has charge of the institution and conduct of the pleas of the United States"); *id.* at 282 ("No question was made of the right of the attorney general to institute the suit, and conduct it."); *id.* at 285 (discussing private lawyer who "instigated the suit, and conducts the same").

At first, what a derivative plaintiff does is initiate. "At the start of the derivative suit, the [ ] plaintiff only has standing, as a matter of equity, to set in motion the judicial machinery on the corporation's behalf." *CalSTRS* v. *Alvarez*, 179 A.3d 824, 847 (Del. 2018); *accord Smith* v. *Stone*, 128 P. 612, 621 (Wyo. 1912) (stating that stakeholder "is permitted to sue" derivatively "simply in order to set in motion the judicial machinery of the court") (quoting 3 Pom. Eq. Juris. (3d ed.) § 1095); *Mount* v. *Radford Tr. Co.*, 93 Va. 427, 430–31 (1896) (same).

Even in § 516's own terms, only after a suit is filed can anyone other than the plaintiff reliably ascertain who is party to it and who may be interested in it. No one can be party to a case that is not yet filed.

Read with care, § 516 reserves conduct at most.

3. "[O]r" is disjunctive.

Lastly, § 516 cannot restrict this litigation, filed against the then-President.

Section 516 reserves litigation conduct where "the United States... or officer thereof" is a party or is interested. 28 U.S.C. § 516. This text is disjunctive: it refers to the United States *or* an officer thereof.

But here, upon filing, both the United States *and* its then-President were parties or were interested.

And their interests here were sharply adverse.

So—at least in cases like this—§ 516 cannot mean exactly what it says. All the conduct of *United States* v. *President Thereof* cannot be reserved, for both sides, to DOJ. That reading would intensify conflicts at DOJ (*see* Part I, *supra*) and generate other issues.

In sum, the second question should be answered. As our Nation's constitutional castellan, this Court ought not shut a main, Article III gate against abuse of presidential power, and yet allow the very same intolerable grievance through a statutory postern.

Conclusion

In business contexts, "derivative suits have played a rather important role in *protecting shareholders… from the designing schemes and wiles* of insiders who are willing to betray their company's interests." *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966) (italics added). There, courts extend standing derivatively in order "to place in the hands of the individual shareholder a means to *protect the interests of the corporation from the misfeasance and malfeasance* of 'faithless directors and managers.'" *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95 (1991) (italics added) (quoting *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 548 (1949)).

To protect all Americans from schemes and wiles, and the Republic from misfeasance and malfeasance, derivative standing is now necessary here.

Repeated governance crises teach that if a Chief Executive who commits misconduct is to be brought to account, then civil litigation must be set in motion by someone who is independent of that Executive.

Nor were lawsuits against the highest executive unfamiliar at the Founding. *Marbury*, 5 U.S. at 163 ("In Great Britain the king himself is sued in the respectful form of a petition.") (Marshall, C.J.).

This Court should grant certiorari to determine that the sitting President may be sued derivatively, on behalf of the United States.

Respectfully submitted,

Jeremy Bates
21 West Street Apt. 21J
New York, New York 10006
jeremybates3@gmail.com
917-626-2473
Petitioner pro Se,
derivatively
on behalf of the
United States of America

April 19, 2022