

No. 21-1389 / 23M_____

In the Supreme Court of the United States

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

Petitioner-Movant,

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

Motion for Leave To File Petition for Rehearing Out of Time

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*Petitioner-Movant pro Se, derivatively on
behalf of the United States of America*

December 21, 2023

Petitioner *pro Se* Jeremy Bates, derivatively on behalf of the United States, moves for leave to file out of time a petition for rehearing of a petition for certiorari. (See *Bates v. Trump*, No. 21-1389, *cert. denied* (June 27, 2022).)

Bates asks the Court to consider two periods of time: 18 minutes and 3 years.

Eighteen minutes—because that was all it took, after the Court denied certiorari at 9:30 a.m. on June 27, 2022, for Respondent Donald J. Trump to commit further misconduct. As alleged in an indictment obtained by the United States, immediately after the order list came down, at 9:48 a.m. that very same morning, a Trump employee committed obstruction. Even so, this alleged crime came to light only in July 2023, a year after the time for Bates to seek rehearing as of right.

Three years—because three years is the limitations period that applies to most fiduciary-duty claims under the law of New York, where the United States was organized; or of the District of Columbia, where the breaches largely occurred.

Bates has argued that the United States has a fiduciary-duty claim against Trump but failed to bring it. This failure of justice persists. At last, after two-and-a-half years, the United States Department of Justice (“DOJ”) has begun, by a belatedly appointed Special Counsel, to prosecute Trump criminally. But does the Special Counsel have *civil* jurisdiction to *sue* Trump, before the claim will expire? Nothing public suggests that DOJ is doing anything to advance anything civilly.

Meanwhile, Trump’s strategy is clear—to campaign again for the presidency; if elected, to block any proceeding by DOJ against him and his aiders and abettors; and from that high office, to pardon his co-conspirators.

So the Republic is again facing the dilemma that it confronted on January 19, 2021, when Bates brought this action. We face the prospect of an unaccountable Chief Executive again abusing power to breach fiduciary duties for his own ends.

Faced with such recurring faithlessness, private stakeholders long have had a traditional remedy: derivative standing. For centuries, courts of equity allowed derivative actions to protect private entities and to avert intolerable grievances.

Here, the entity to be protected is nothing less than the United States. And especially in cases where public interests are at stake, this Court has inherent and equitable power to protect the Nation and to prevent failures of justice. The failures of civil justice here have already been catastrophic and could prove so again.

The Court should clarify that if Trump were again to obtain power, he will be held accountable. The Court should now defend the People and their Constitution. The Court should hold that no matter who is President, civil justice will be done.¹

Background

This Motion seeks to revive a derivative, fiduciary-duty claim that was filed against then-President Donald Trump on January 19, 2021. Pet. App. 10, 37.

The claim arises in part out of Trump's false narrative of election fraud, and the resulting attack on the Capitol on January 6, 2021, as Congress was meeting to certify the result of the 2020 election. Pet. App. 33–34. The Complaint demands damages for the United States of at least \$2.1 billion. Pet. App. 38.

¹ The Court may prefer to consider this Motion slowly. For example, the Court could request the views of the Solicitor General and await events that might render this Motion moot. Yet Bates would also submit that if derivative standing to sue a sitting President is possible as a matter of law, then the Court should say so soon. Such potential derivative liability would be a material condition of employment. For the sake of simple fairness, all the candidates who seek to be Chief Executive should have notice of the law that will govern the office to which they aspire.

DOJ removed and then moved to dismiss the Complaint under Rule 12(b)(1) and 12(b)(6). Pet. App. 9. The Southern District of New York (Kaplan, J.) tersely dismissed. *Id.* The Second Circuit affirmed, reasoning that Bates lacked standing to sue a sitting President derivatively on behalf of the United States. Pet. App. 4.

Bates petitioned for certiorari. The Solicitor General waived the right of the United States to respond (thus arguably also waiving 28 U.S.C. § 516).

This Court denied certiorari on June 27, 2022.

Reasons for Granting This Motion

This Motion for leave to file out of time may be granted because Rule 44.2 is a claims-processing rule and is not jurisdictional.

As the Court has recently reiterated, a procedural rule enacted in a statute is jurisdictional only if Congress clearly states that it is. *Santos-Zacaria v. Garland*, 598 U. S. 411, 416 (2023); *Wilkins v. United States*, 598 U.S. 152, 157 (2023).

Here, the Court should apply that clear-statement standard to its own Rules.

Rule 44.2 does not contain any jurisdictional language; indeed, Rule 44.2 contrasts with another Rule that does contain such language. *Compare* S. Ct. Rule 44.2 (providing that time in which to petition for rehearing “will not be extended,” without stating by whom) *with* S. Ct. Rule 13.2 (“*The Clerk* will not file any petition for a writ of certiorari that is *jurisdictionally* out of time.”) (italics added).

The Court has the power to consider a petition for rehearing outside the time in Rule 44.2. *See, e.g., United States v. Ohio Power Co.*, 353 U.S. 98 (1957) (granting certiorari out-of-time so that the “case might be disposed of consistently with []

companion cases”); *id.* at 99 (“We have consistently ruled that the interests in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.”); *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26–27 (1965) (granting untimely petition for rehearing where “intervening circumstances of substantial . . . effect” merited grant of certiorari after deadline).

Attempts To Elicit DOJ’s Position

At 7:20 a.m. today, Bates e-mailed the Solicitor General’s office, stated that he would file this Motion later today, and requested DOJ’s position by 5:30 p.m.

At 8:35 a.m. today, Bates e-mailed the Solicitor General’s office a near-final draft of this Motion. As of 6:10 p.m., DOJ has not responded.

The Secret Service blocked service on Trump in the district court. Therefore he was not a party, and he did not appear, below. Nor did he appear in this Court.

Conclusion

Using powers inherent and equitable, the Court should grant this Motion and permit the petition for rehearing to be filed out of time.

Dated: New York, New York
December 21, 2023

Respectfully submitted,

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