

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

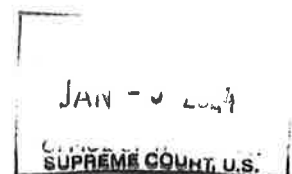
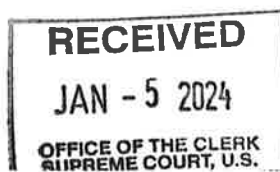
Motion for Leave To File Petition for Rehearing Out of Time

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

PETITION FOR REHEARING

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SUPREME COURT, U.S.

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Jeremy Bates, derivatively on behalf of the United States, respectfully petitions for rehearing of his petition for a writ of certiorari, docketed at 21-1389.

Reasons for Granting Rehearing

A petition for rehearing must be based on “intervening circumstances of a substantial or controlling effect” or on “other substantial grounds not previously presented.” Sup. Ct. R. 44.2.

Both exist, in this case. Intervening, controlling circumstances—decisions of this Court—reinforce the cogent reasons why this action *may* proceed. Other new and substantial grounds reinforce why it *should*.

I. Several Recent Decisions by This Court Favor Rehearing.

Since June 27, 2022, when certiorari was denied, the Court’s jurisprudence has developed in ways that support rehearing. The Court has reiterated the rule that a public official owes fiduciary duties to the employing government and to the public. The Court again emphasized the critical distinction between jurisdictional limits and claims-processing rules. And currently the Court is about to decide whether to delineate the scope of presidential impunity.

A. The Court reiterated in *Percoco* that the agents of governments are fiduciaries.

The petition for certiorari here called the rule that “[p]ublic officials are fiduciaries” an “antecedent point” that the Second Circuit had just “restated.” Pet. at 5 (citing *United States v. Percoco*, 13 F.4th 180, 188–89 (2d Cir. 2021)).

On June 30, 2022, the Court granted certiorari in *Percoco*. The Court decided *Percoco*, however, long after the time for Bates to seek rehearing as of right.

The Court reversed the Second Circuit, but it also noted that “[a]n ‘agent owes a fiduciary obligation to the principal,’” and so “an agent of the government has a fiduciary duty to the government and thus to the public it serves.” *Percoco v. United States*, 598 U.S. 319, 329–30 (2023) (quoting 1 Restatement (Third) of Agency § 1.01, Comment *e*, p. 25 (2005)).

Justice Gorsuch, joined by Justice Thomas, argued that the criminal statute at issue in *Percoco* is vague: “[N]o one can say what sort of fiduciary relationship is enough to sustain a federal felony conviction.” *Id.* at 337 (Gorsuch, J., concurring in the judgment).

Despite that explicit concern, no Justice in *Percoco* expressed any qualm at the general principle that government agents are fiduciaries and that they owe fiduciary duties to the government and to the public.

B. The Court has re-emphasized the key distinction between jurisdictional limits and claims-processing rules.

In affirming dismissal of this derivative action, the Second Circuit held statutorily that “Bates cannot assert standing to sue [derivatively] on behalf of the United States.” Pet. App. 5 (citing 28 U.S.C. § 516). That court said, “Bates points to no statutory exception to section 516’s requirements.” *Id.*

In seeking review, Bates argued that § 516 is not jurisdictional and it may have equitable exceptions. *See* Pet. at 22–26.¹ Yet half an hour after denying certiorari, the Court held that another provision, with comparable “except as authorized” language, was not

¹ *See Arellano v. McDonough*, 598 U.S. 1, 14 (Jan. 23, 2023) (“If the text and structure favored Arellano, the nature of the subject matter would garnish an already solid argument.”); *id.* at 14 n.3 (declining to address “other equitable doctrines”).

jurisdictional. *Xiulu Ruan v. United States*, 597 U.S. 450, 460 (2022) (“Nor is the ‘except as authorized’ clause a jurisdictional provision....”).

In the 2022 Term, the Court continued to explain what makes a statute jurisdictional. The Court held that an administrative-exhaustion requirement for removals, 8 U.S.C. § 1252(d)(1), is not jurisdictional, *Santos-Zacaria v. Garland*, 598 U.S. 411, 416 (2023). The Court noted a contrast between § 1252(d)(1) and “unambiguous jurisdictional terms” elsewhere. *Id.* at 419. Likewise, the Court held that a time bar for certain quiet-title suits, 28 U.S.C. § 2409a(g), is also a “nonjurisdictional claims-processing rule.” *Wilkins v. United States*, 598 U.S. 152, 155 (2023). Hence a procedural rule is jurisdictional “only if Congress ‘clearly states’ that it is.” *Id.* at 157 (quoting *Boechler v. Commissioner*, 596 U.S. 199, 203 (April 21, 2022)).

This Term, the Court will decide a further case of the same type. *Harrow v. Dep’t of Defense*, No. 23-21, *cert. granted*, __ U.S. __ (Dec. 8, 2023).

Therefore controlling circumstances—*Percoco* and the claims-processing cases—favor rehearing here.

C. The Court may soon take up questions of presidential accountability or impunity.

Additionally, the Court may soon grant certiorari in a suite of cases that raise questions of presidential accountability. *See United States v. Trump*, No. 23-624, *motion to expedite granted* (Dec. 11, 2023); and *Blassingame v. Trump*, __ F.4th __, No. 22-5069 (D.C. Cir. Dec. 1, 2023) (allowing private, civil suit based on allegations related to allegations here).

Along with those cases, the Court may find it useful to consider this case. *See* Part III, *infra*.

II. New and Substantial Developments Elsewhere Support Rehearing.

Substantial grounds not previously presented also support rehearing. Among them are developments after June 27, 2022, involving Trump that show that Bates was correct to say that when DOJ should sue a sitting president civilly, “DOJ fails to act.” Pet. at 6.

A. DOJ now alleges that Respondent Trump’s misconduct was criminal.

In April 2022, Bates contended that Trump’s breaches of fiduciary duty justified punitive damages because they were “reckless, wanton, or criminal.” Pet. at 3. DOJ has now conceded as much—slowly.

Only in August 2022, after the time to petition for rehearing as of right here had run, did DOJ obtain a probable-cause warrant and search Mar-a-Lago.

That search proved that Respondent Trump did breach fiduciary duties to the United States, and in yet another way: by taking documents. (Bates did not know about that when he drafted the complaint).

Trump then ensnared DOJ in a special-jurisdiction proceeding in the Southern District of Florida. Four days before an Eleventh Circuit oral argument, DOJ appointed the Special Counsel and thus appeared to admit another point that Bates has emphasized—that DOJ attorneys are not sufficiently independent of the Executive to handle such matters.

Only in 2023 did the Special Counsel obtain two federal indictments of Respondent Trump. In the second, DOJ essentially alleged that while in office, Trump was a faithless fraudster. *Compare* Pet. *passim* (urging derivative remedy to protect against executive officers who defraud the United States).

B. Other cases hold that Trump may be liable civilly for acts while in office.

Besides the federal criminal cases against Trump, there are many civil litigations against him. And in two such cases, the D.C. Circuit and the Second Circuit have just held that Trump may be civilly liable for torts he allegedly committed while in office.

Weeks ago, the D.C. Circuit held that Trump is not absolutely immune from civil liability for his alleged misconduct connected to the Capitol attack. *Blassingame v. Trump*, __ F. 4th __, __, No. 22-5069, slip op. at 4 (D.C. Cir. Dec. 1, 2023) (under Rule 12).

Days ago, the Second Circuit held that absolute presidential immunity is not jurisdictional. *Carroll v. Trump*, __ F. 4th __, __, Nos. 23-1045-cv & 23-1146-cv, slip op. at 5 (2d Cir. Dec. 13, 2023).

If Trump petitions for certiorari in those cases, then the Court may decide whether to delineate the scope of presidential immunity in private, civil cases. Perhaps then the United States will ask to be heard as to public, civil claims. If not, Bates respectfully suggests rehearing here, so that the Court may— together with cases on civil and criminal immunity— also examine derivative standing to sue the sitting President on behalf of the United States.

C. The statute of limitations on a claim by the United States may be about to run.

Rehearing is also appropriate for a further reason: DOJ does not seem inclined to bring any civil action against Trump on behalf of the United States, even though the clock is ticking.

It appears that no court has considered what the statute of limitations might be on a fiduciary-duty claim against the sitting President. The limitations

period in New York (where the United States was organized) and the District of Columbia (now the seat of government) can be as brief as three years. N.Y. CPLR § 214(4); D.C. Code § 12-301.

Bates does not know of any civil action pending or contemplated by DOJ or the Special Counsel against Trump for breach of fiduciary duty. If DOJ or the Special Counsel were to allow such a claim to expire, the United States might have a malpractice claim.²

This concern becomes urgent when one considers that Supreme Court, New York County, has ordered that the certificates of certain Trump Organization entities be canceled and the entities dissolved. That case may make certain assets available to satisfy any judgment against Trump personally and in favor of the United States. *See, e.g.*, Shayna Jacobs, Trump gets temporary reprieve from losing control of companies in N.Y., Wash. Post (Oct. 6, 2023), at <https://www.washingtonpost.com/national-security/2023/10/06/trump-fraud-trial-appeal/>.

² DOJ and the Special Counsel's Office have advanced client interests in other ways. But what could justify allowing a valuable civil claim to lapse, unless it be the (conflicted) instinct of current fiduciaries that they too should never be sued? Besides, on inspection, the premise is shaky. In criminal cases, Bates has moved to intervene to raise the unclean-hands doctrine as to Trump where DOJ had raised it, but weakly, and the Special Counsel had not raised it at all. *See* Doc. 2027864-2 in *United States v. Trump*, No. 23-3190, *lv. to file denied* (D.C. Cir. Nov. 27, 2023) (per curiam); ECF No. 63 in *Trump v. United States*, No. 22-13005 (11th Cir.) (filed Nov. 17, 2022).

III. Rehearing Would Serve the Public Interest and Protect the United States.

Lastly, rehearing is needed due to extraordinary circumstances that now require an equitable remedy.

A candidate for president not only was indicted on 91 counts but also embraces the role. He says that if he wins the 2024 election, he will rule as a “dictator.”

If these circumstances justify (i) *expediting* (ii) a petition *before* judgment that (iii) does not present *any* circuit split, then they also justify (iv) *rehearing* (v) *out of time* here. For now DOJ affirmatively alleges exactly what Bates argued 18 months ago: that an administration can be a criminal conspiracy that enlists DOJ attorneys. *See* Pet. at 8–12.

As Bates urged, this is the very reason for derivative remedies: to protect entities against faithless executives and against lawyers who fail to sue them when they should. *See* Pet. at 12–16.

Moreover, derivative liability for every president is a more sure and swift remedy for misconduct than any criminal prosecution years later. Why should accountability depend critically on whether the next administration is inimical to the previous one? Even assuming inimicality, why should accountability be delayed for up to four years?

The notion that the United States is protected from faithless chief executives by post-presidential, criminal prosecution alone is nearly suicidal as a constitutional design. Such a design would make the presidency deeply attractive to the corrupt, by affording them a position of power and impunity. Such a design would also work perverse incentives, by giving presidents who fear that they will be held criminally accountable, post-presidency, strong motives to try to cling to power in lawless ways.

Such a design would also ignore the wisdom of trust law, under which fiduciaries who commit any misconduct against beneficiaries are immediately subject to liability, usually civil, as appropriate; and under which civil accountability does not depend on any action by (oft conflicted) co-fiduciaries.

The history here—impeachment, no conviction, insurrection, impeachment, no conviction, new election—suggests that if presidential accountability must abide a transition, then executive abuses, legislative passions, and succession by co-partisans may defeat presidential accountability entirely.

No private entity would allow its fiduciaries to be so insulated. Nor does trust law permit it. *See, e.g.*, Restatement (3d) of Trusts § 96(1) (stating that trust instruments may not exculpate liability for breaches committed “in bad faith[,] or with indifference” to fiduciary duty, trust terms, or beneficiary interests).

The Court should now clarify that victory in the 2024 presidential election will not confer any ability to breach duties to the United States with impunity.

Conclusion

The Court should both grant rehearing and grant certiorari, so as to review the judgment.

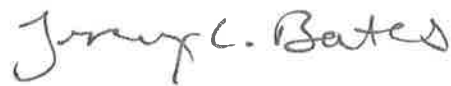
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Certificate of Compliance with Rule 44.2

I, Jeremy Bates, hereby certify that this Petition for Rehearing is restricted to the grounds that are specified in Rule 44.2 and that I have presented this Petition in good faith and not for delay.

Respectfully submitted,



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