

No. 21-1389 / 21M_____

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

Motion To Disqualify Justice Thomas and Justice Kavanaugh

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

June 16, 2022

Petitioner *pro Se* Jeremy Bates, proceeding derivatively, moves pursuant to 28 U.S.C. § 455 and under the Court's inherent power to disqualify The Honorable Clarence Thomas, A.J.U.S., and The Honorable Brett Kavanaugh, A.J.U.S., from this proceeding (*Bates v. Trump*, No. 21-1389, *petition distributed* (June 7, 2022)).

As to Justice Thomas, this motion is largely based on facts that were first publicly reported last night by *The Washington Post* and *The New York Times*.

Justice Kavanaugh is included in this motion for the sake of completeness and to avoid any disparate result. Bates should already be on Justice Kavanaugh's recusal list, due to a judicial-misconduct complaint that Bates filed in 2018.

Justice Thomas and Justice Kavanaugh may have recused already. As is customary in this Court, however, any recusal is not now on the public docket.

This is one Motion, rather than two applications. If either Justice were not to recuse himself, then the full Court retains inherent, indefeasible power to protect its proceedings. *See* Pet. at 24. The full Court may enter an appropriate Order.

Background

The petition seeks review of the dismissal of a 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.

If this Court were to grant the petition and to reverse the Court of Appeals, then this case would return to the Southern District of New York. There, a likely next step would be the filing of an amended complaint that reflects information developed over the 17 months since this action was filed. In Bates's view, any amendment should include further claims, primary or secondary, against other defendants. And as relevant here, those further claims against others may include valuable claims for aiding and abetting the primary breaches of duty.

Ms. Virginia Thomas

The press has been reporting that Ms. Virginia Thomas had texted the White House, and had e-mailed Arizona legislators, about the election. Even those reports caused the New York City Bar to “urge Justice Thomas to promptly recuse himself from any participation in proceedings... relating to the events of January 6... or any other efforts to overturn the results of the 2020 Presidential election.”¹

Yesterday, however, new and potentially disturbing information emerged.

The *Post* reported that Ms. Thomas e-mailed John Eastman, then-counsel to Respondent Trump. According to sources, those emails show that “[Ms.] Thomas’s efforts to overturn the election were more extensive than previously known.”²

The *Times* reported that Mr. Eastman “claimed in an email... to have insight into a ‘heated fight’ among the Supreme Court justices over whether to hear arguments about the president’s efforts to overturn his defeat at the polls.” As the *Times* put it, “Mr. Eastman’s email, if taken at face value, raised the question of how he would have known about internal tension among the justices.”³

¹ Statement by the New York City Bar Association, *The Need for Supreme Court Recusals: Justice Thomas and Supreme Court Proceedings Related to Jan. 6* (May 20, 2022), at https://s3.amazonaws.com/documents.nycbar.org/files/Need_for_Recusal_by_SCOTUS_Justices_CityBarStatement.pdf (visited June 16, 2022).

² Jacqueline Alemany, Josh Dawsey, & Emma Brown, *Ginni Thomas corresponded with John Eastman, sources in Jan. 6 House investigation say*, Wash. Post (June 15, 2022, at 7:19pm EDT), at <https://www.washingtonpost.com/national-security/2022/06/15/ginni-thomas-john-eastman-emails/> (visited June 16, 2022).

³ Luke Broadwater and Maggie Haberman, *Trump Lawyer Cited ‘Heated Fight’ Among Justices Over Election Suits*, N.Y. Times (June 15, 2022, updated June 16, 2022, 1:59 a.m. ET), at <https://www.nytimes.com/2022/06/15/us/trump-emails-eastman-chesebro-jan-6.html> (visited June 16, 2022).

Bates has not seen the e-mails reported by the *Post* or the *Times* and does not know what they show about Ms. Thomas's efforts or about any possible source of Mr. Eastman's knowledge. Both reports suggest, however, that these e-mails have raised new and serious questions for the House Select Committee.

Bates v. Kavanaugh, Nos. DC-18-90069 (D.C. Cir.) & 10-18-90050 (10th Cir.)

This Motion must also reflect the fact that Bates filed a judicial-misconduct complaint against then-Judge Kavanaugh in 2018.

Reasons for Granting This Motion

“Any justice... of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). The test under § 455(a) “is not the reality of bias or prejudice but its appearance.”

Liteky v. United States, 510 U.S. 540, 548 (1994). “This inquiry is an objective one, made from the perspective of a reasonable observer” who is informed of all the facts.

Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000) (statement of Rehnquist, C.J.). This test does not depend on a justice's intention or actual bias.

Liljeberg v. Health Servs. Acq. Corp., 486 U.S. 847, 859 (1988) (finding appearance of impropriety to be grounds for recusal, even if judge is unaware of conflict).

A justice must also disqualify himself if his spouse has an “interest that could be substantially affected by the outcome of the proceeding.” 28 U.S.C. § 455(b)(4), (5)(iii). At present, Bates cannot assess Ms. Thomas's potential liability in this case. But Justice Thomas, who after all is a public fiduciary, has a statutory duty to “make a reasonable effort to inform himself” on this point. 28 U.S.C. § 455(c).

From Petitioner’s perspective, it now appears that documents at least connect Ms. Thomas to election-destabilization efforts by people who “more likely than not” committed two federal crimes. *Eastman v. Thompson*, 2022 WL 894256, *22 (C.D. Cal. Mar. 28, 2022). Such presidential crimes were also breaches of fiduciary duty.

A private derivative plaintiff alleging more than \$2.1 billion in damages would zealously protect that case against any potential judicial impropriety. Here, Bates is likewise trying to protect the interests of the United States.

Attempts To Elicit DOJ’s Position

At 7:46am today, Bates e-mailed the Solicitor General’s office, stated that he would file this motion this evening, and requested DOJ’s position by 5:30pm, given the logistics of filing. At 12:37pm today, Bates e-mailed the Solicitor General’s office a near-final draft of this motion. As of 5:30pm today, DOJ had not responded.

Respondent Trump was not served successfully in the district court. So he was not a party, and he did not appear, below. Nor has he appeared in this Court.

Conclusion

This Motion should be granted under § 455 or the Court’s inherent powers.

Dated: New York, New York
June 16, 2022

Respectfully submitted,

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