No. 21-1389

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 REHEARING

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Jeremy Bates, derivatively on behalf of the United States, petitions for rehearing.

Reasons for Granting Rehearing

A rehearing petition must be based on inter-vening circumstances of controlling effect or on "substantial grounds" not presented before. Sup. Ct. R. 44.2.

I. This action may proceed derivatively.

Cases decided after June 2022, when certiorari was denied, support derivative standing here.

A. Claim-processing rules are waivable and may have equitable exceptions.

The Second Circuit reasoned, "Bates points to no statutory exception to section 516's requirements." *Id*. If that holding was jurisdictional, it was wrong.

Half an hour after denying certiorari, the Court held that a statute with similar language was not jurisdictional. *Xiulu Ruan* v. *United States*, 597 U.S. 450, 460 (2022) (except-as-authorized clause).

Ever since, the Court has continued to distinguish jurisdictional provisions from claim-processing rules.

A Federal-Circuit statute is claim-processing. *Harrow* v. *Dep't of Defense*, 601 U.S. 489, 483 (2024). In *Harrow*, the parties disputed whether the words "pursuant to" could change "procedural rules" into "absolute bars to judicial action." *Id*. at 488.

Federal-Circuit jurisdiction was not ousted by "little phrases that can mean a raft of things." *Id*. at 486. Procedural rules "cannot turn on and off the Federal Circuit's power." *Id*. at 488. Among them: a provision enabling agency heads to refer cases to the Federal Circuit *if* the Attorney General approves. *Id*. (citing 41 USC § 7107(a)(1)(B)). The Court did not say that the Attorney General's refusal to approve cannot

turn judicial power off—but this was implicit. After *Harrow*, § 516 lacks jurisdictional effect.

Harrow highlights two other points.

First, nonjurisdictional statutes are waivable. If a rule is claim-processing, "a court will not enforce it against a non-complying party" where the adversary has "forfeited or waived" it. 601 U.S. at 483–84.

Here, § 516 has been forfeited by Respondents. President Trump has yet to appear in this case at all. In this Court, DOJ waived § 516 and similar rules.[1]

Second, *Harrow* suggests that nonjurisdictional statutes may have equitable exceptions. "[W]e do not understand Congress to alter' age-old procedural doctrines lightly." 601 U.S. at 489 (quoting *Boechler* v. *Commissioner*, 596 U.S. 199, 209 (2022)).

In 2025 the Court restated reluctance "to label a rule 'jurisdictional' unless Congress has clearly signaled that the rule is meant to have that status." *Riley* v. *Bondi*, 606 U.S. __, __ (2025), slip op. at 13. A provision is not jurisdictional unless the signal is "exceedingly strong." *Id.*

The *Riley* statute did not convey any exceedingly strong signal due to its text and placement. Its text gave no directive to courts. *Id.* Its placement—in a section that has nothing to do with jurisdiction—also prevented it from constraining judicial power. *Id.*

Like the *Riley* statute, § 516 does not direct courts. Section 516 reserves the conduct of litigation to the Attorney General—telling the Executive, not the Judiciary, what to do. Section 516 is placed nonjurisdictionally, in part of Title 28 that establishes DOJ as

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[1] Even if DOJ argued that § 516 bars derivative standing for the United States, that position would be due no deference. *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 413 (2024).

an "executive department," 28 USC § 50; and in a chapter that sets up the Attorney General's office.[2]

So § 516 is a claim-processing rule. It may be waived—here, it was. It may also have equitable exceptions, including derivative standing.

B. Article III is no bar to suing derivatively on behalf of the United States.

Article III poses no barrier to derivative standing.

The Court revived a suit by ERISA participants, apparently suing derivatively for their plan, without mentioning standing. *Cunningham* v. *Cornell Univ.*, 604 U.S. __, __ (2025), slip op. *passim*.

Third-party standing "allow[s] a plaintiff to assert the rights of another person when the plaintiff has a close relationship with the person who possesses the right and there is a hindrance to the possessor's ability to protect his own interests." *FDA* v. *All. for Hippocratic Med.*, 602 U.S. 367, 397 (2024) (Thomas, J., concurring) (cleaned up).

If the relationship-and-hindrance applies here, citizen-taxpayers have the requisite relationship. Like ERISA participants, taxpayers pay money and receive benefits. Like shareholders, citizens own the Republic and elect its officers.[3]

What hindrances justify derivative standing?

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[2] No statute pursues any single purpose at all costs. *Medina* v. *Planned Parenthood S. Atlantic*, 606 U.S. __, __ (2025), slip op. at 7. Section 516 encourages the Executive to speak with one voice. Yet the premise of derivative actions is that the officers who should speak and sue for an entity may fall silent for the wrong reasons. That is a cost that equity refuses to pay.

[3] The relationship between the United States and its citizens is much closer, for no private entity can tax people or draft them. *Cf.* Pet. App. 14 ¶ 25 (alleging Selective-Service registration).

When States alleged that DOJ was underenforcing criminal laws, the States lacked standing; but that analysis "might change" if the Executive "abandoned its statutory responsibilities" to "bring prosecutions." *United States* v. *Texas*, 599 U.S. 670, 682 (2023). "[A]n extreme case of non-enforcement arguably could exceed the bounds of enforcement discretion and support Article III standing" for others. *Id*.

Still, standing requires injury-in-fact—including "a physical injury, a monetary injury, an injury to one's property, or an injury to one's constitutional rights." *FDA*, 602 U.S. at 381. Such injuries are alleged here on the fiduciary-duty claim. Pet. 2–3.

C. Public officials owe fiduciary duties.

In 2022, Bates called the rule that public officials are fiduciaries an antecedent point that was restated in *United States* v. *Percoco*, 13 F.4th 180, 188–89 (2d Cir. 2021). Pet. 5.

This Court then restated it—by reviewing *Percoco*.

There the Court noted that "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 Restatement (3d) Agency § 1.01, cmt. *e*, 25 (2005)).[4]

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[4] This Court describes government officials in trust terms. *Kennedy* v. *Braidwood Mgmt., Inc.*, 606 U.S. __, __ (2025), slip op. at 12 (describing "'discretion regularly entrusted'" to task-force members) (quoting *Myers* v. *United States*, 272 U.S. 52, 135 (1926) (Taft, C.J.)); *Dep't of State* v. *Muñoz*, 602 U.S. 899, 916 n.8 (2024) ("[T]he Constitution entrusts those tasks to the political branches."); *see Arizona* v. *Navajo Nation*, 599 U.S. 555, 589–90 (2023) (Gorsuch, J., dissenting) (stating that a plaintiff "may seek an accounting whenever the defendant is a fiduciary" who, though not named as a trustee, is "entrusted with property . . . belonging to the plaintiff").

Later the Court analogized presidents to trustees. The Court quoted the Constitution's "Office of honor, Trust or Profit" language, *Trump* v. *United States*, 603 U.S. 593, 632 (2024) (quoting Art. I § 3, cl. 7); quoted Chief Justice Chase's observation that "To the executive alone is intrusted the power of pardon," *id.* at 608 (quoting *United States* v. *Klein*, 80 U.S. 128, 147 (1872)); cautioned that presidents "make 'the most sensitive and far-reaching decisions entrusted to any official,'" *id.* at 611 (quoting *Nixon* v. *Fitzgerald*, 457 U.S. 731, 752 (1982)), and described the "'administration of public affairs as entrusted to the executive branch,'" *id.* at 618 (quoting *Fitzgerald*, 457 U.S. at 745).[5]

Percoco and *Trump* were energetic prosecutions. The Court had no need to consider the next question: If a high officer of the United States breaches duties, and yet DOJ fails to seek justice by suing the trustee, then what remedy does the United States have?

D. Equity tailors flexible remedies.

Equity "'secure[s] justice where it would not be secured by the ordinary... processes of law.'" *Trump* v. *CASA, Inc.*, 606 U.S. __ (2025), slip op. at 6 (quoting G. Adams, The Origin of English Equity, 16 Colum. L. Rev. 87, 91 (1916)).

"The essence of equity jurisdiction" is a power "to mould each decree to the necessities of the particular case." *Id.*, slip op. at 18–19 (quoting *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944)) (cleaned up).

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[5] *See also* Stmt. Concerning Leak Investigation 1 (Jan. 19, 2023) ("one of the worst breaches of trust"; "betrayal of trust"); Marshal's Report & Recs. 5 (2023) ("The law clerk, like the Justices, holds a position of public trust.").

"[E]quity is flexible" within the "broad boundaries of traditional equitable relief." *CASA*, slip op. at 10. So a "modern device" of equity "need not have an exact historical match," though it must have a "founding-era antecedent," a "historical pedigree," or a "sufficiently comparable predecessor." *Id*. at 11.

Derivative standing has founding-era antecedents and a pedigree from the 1740s. Pet. 12–13.

Derivative standing also fulfills any requirement that remedies be party-specific. It gives relief only to nominal defendants that need protection and to derivative plaintiff-protectors. If Article III "requires that any remedy 'be tailored to redress the plaintiff 's particular injury,'" *CASA*, slip op. at 2 (Thomas, J., concurring) (quoting *Gill* v. *Whitford*, 585 U. S. 48, 73 (2018)), derivative remedies are precisely tailored. They redress injuries inflicted by defendants and by faithless entity officers—nothing more.

Derivative standing is a way to achieve complete relief between the United States and its President.[6]

II. This action should proceed derivatively.

Substantial grounds not previously presented also support rehearing.

A. DOJ prosecuted Trump, alleging crimes.

In April 2022, Bates argued that Trump's breaches were reckless, wanton, or criminal. Pet. 3.

In August 2022, after the time for as-of-right rehearing here expired, DOJ searched Mar-a-Lago and found evidence that Trump had absconded with classified materials. DOJ then appointed a Special

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[6] The Court often invites private lawyers to defend litigation positions abandoned by DOJ. *E.g.*, *NRSC* v. *FEC*, No. 24-621.

Counsel, thus conceding that DOJ lawyers are insufficiently independent to handle such cases.

In 2023, GAO reported that the Capitol attack cost "about $2.7 billion."[7] (The damages demanded here, including both reputational and punitive damages, totalled over $2.1 billion. Pet. 2–3.)

Then Trump was indicted on four counts. *Trump*, 603 U.S. at 602. According to that indictment, after losing the 2020 election, "Trump conspired to overturn it by spreading knowingly false claims of election fraud." *Id.*

The indictment alleged that "Trump and his co-conspirators attempted to use the Justice Department 'to conduct sham election crime investigations'" and to falsely claim that DOJ had significant election-integrity concerns. *Id.* at 602.

Trump was charged with four crimes: "conspiracy to defraud the United States in violation of 18 U.S.C. § 371"; "conspiracy to obstruct an official proceeding in violation of § 1512(k)"; "obstruction of and attempt to obstruct an offcial proceeding in violation of § 1512(c)(2), § 2 [sic]"; and "conspiracy against rights in violation of § 241." *Id.* at 603.

By January 2025, DOJ had charged over 1,500 individuals with Capitol-attack–related offenses.[8]

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[7] GAO, *Capitol Attack: Federal Agencies Identified Some Threats, but Did Not Fully Process and Share Information Prior to January 6, 2021*, at pg. 1 & n.2 (July 21, 2023), at www.gao.gov/assets/d23106625.pdf.

[8] Merrick B. Garland Statement on Fourth Anniversary of January 6 Attack on Capitol (Jan. 6, 2025), at https://www.justice.gov/archives/opa/pr/attorney-general-merrick-b-garland-statement-fourth-anniversary-january-6-attack-capitol

B. Trump's election led to failures of justice.

In November 2024, Trump was elected to the office of President. So under its policy, DOJ dismissed the indictments against the incoming Executive. (The Special Counsel's Office reported that despite the dismissal, it "assessed that the admissible evidence was sufficient to obtain and sustain a conviction."[9])

On Inauguration Day 2025, Trump commuted sentences of 14 convicts and granted a "full, complete and unconditional pardon to all other individuals convicted" of Capitol-attack–related offenses.[10]

This pardon absolved more than 1,500 people, of whom more than 1,000 had pled guilty.[11]

Now FBI employees who prosecuted Trump are being purged.[12] The FBI had characterized the

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[9] Perry Stein, Spencer S. Hsu, Jeremy Roebuck, & Yvonne Wingett Sanchez, "Justice Dept. releases Trump special counsel report on Jan. 6 case," Wash. Post (Jan. 14, 2025), at https://www.washingtonpost.com/national-security/2025/01/13/trump-jan-6-classified-documents-investigations-report-jack-smith/.

[10] Proclamation Granting Pardons and Commutation of Sentences for Certain Offenses (Jan. 20, 2025), at https://www.whitehouse.gov/presidential-actions/2025/01/granting-pardons-and-commutation-of-sentences-for-certain-offenses-relating-to-the-events-at-or-near-the-united-states-capitol-on-january-6-2021/.

[11] NPR, The Jan. 6 attack: The cases behind the biggest criminal investigation in U.S. history (March 14, 2025), at https://www.npr.org/2021/02/09/965472049/the-capitol-siege-the-arrested-and-their-stories.

[12] Sarah Lynch & Andrew Goudsward, US Justice fires nine more employees from Jack Smith's team, sources say, Reuters (June 11, 2025) ("[A]t least 26 people who worked on Smith's team have been terminated since Trump took office."), at https://www.reuters.com/world/us/us-justice-fires-nine-more-employees-jack-smiths-team-sources-say-2025-07-12/.

Capitol attack as domestic terrorism. Combating terrorism is "an urgent objective of the highest order.'" *Fuld* v. *PLO*, 606 U.S. 1, 20 (2025).

C. Trump's breaches of duty have resumed.

This year, the Administration has "flout[ed] courts in a third of the more than 160 lawsuits against the administration in which a judge has issued a substantive ruling," which suggests "widespread noncompliance with America's legal system."[13]

If orders are defied, or are not being enforced by the Executive against itself, then citizens should be deputized to sue for the Republic, win judgments against faithless officers, and deter future abuses.

Nothing could be more equitable or American. In this country, citizen activism replaces aristocratic rank and governmental edict. Alexis de Tocqueville, *Democracy in America*, vol. 2 ch. 5 (1840).

III. Rehearing and remand are appropriate.

Two additional reasons for rehearing are salient.

A. Any intertwinement favors remand.

If this case had any fact-driven gating issue—it does not—the appropriate course would be a remand, so that any clarifying facts may be developed below.

If a dispositive gating issue is intertwined with merits issues, then trial should proceed. Thus in cases mixing legal and equitable claims, "the usual practice is that factual disputes regarding the merits of a legal claim go to the jury, even if that means a judge must

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[13] Justin Jouvenal, Trump officials accused of defying 1 in 3 judges who ruled against him, Wash. Post (July 21, 2025), at https://www.washingtonpost.com/politics/2025/07/21/trump-court-orders-defy-noncompliance-marshals-judges/.

let a jury decide questions he could ordinarily decide." *Perttu* v. *Richards*, 603 U.S. 460, 468 (2025) (citing *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 510–511 (1959)).

So too for jurisdictional facts. 603 U.S. at 472–74 (discussing *Smithers* v. *Smith*, 204 U.S. 632, 641–642 (1907) (amount in controversy); and *Land* v. *Dollar*, 330 U.S. 731, 735–39 (1947) (sovereign immunity)).

B. Any limitations issue favors remand.

The limitations period for fiduciary-duty claims against the President is unsettled. In New York (where the Republic was organized) and in D.C. (now the seat of government), it can be three years. N.Y. CPLR § 214(4); D.C. Code § 12-301.

Any tolling aside, DOJ may have allowed civil Capitol-attack claims to expire. So absent a remand, the Republic may have a legal-malpractice claim.

This is the very reason for derivative remedies: to protect entities against faithless officers and lawyers who fail to sue them. Pet. 12–16.

IV. Summary treatment may be appropriate.

This case raises only one appellate error.

The Court, however, just granted, reversed, and remanded to correct one error—a *Bivens* extension. *Goldey* v. *Fields*, 606 U.S. 942, 944 (June 30, 2025) (*per curiam*). Such extensions are disfavored, as the Court has "repeatedly emphasized." *Id.*

If summary disposition is used when repeated holdings have been disregarded, then it may be used here. This Court repeatedly distinguishes between jurisdictional bars and claim-processing rules. *See* Part I.A, *supra*. Below, those cases were overlooked.

Besides, an error about the Maine Legislature's rules was just corrected. *Libby* v. *Fecteau*, 605 U.S. __, __ (2025), slip op. at 2 (Jackson, J., dissenting) (describing "highly fact-specific error correction" as to "question of first impression"). If an error in *Libby* could be corrected, then the error here should be too.

Conclusion

The notion that the Republic is protected from faithless Executives by making them immune verges on a constitutionally suicidal design. That design makes the presidency a post of impunity, attracting the corrupt. That design creates perverse incentives, giving lawless presidents reasons to cling to power.

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).

Simply put: If presidential accountability is left to the Executive, then no President will be accountable.

The Court should grant rehearing, grant certiorari, and hold that the Executive may be sued derivatively on behalf of the United States.

August 31, 2025

Respectfully submitted,

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Certificate of Compliance—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.

Dated: New York, New York
August 29, 2025

Respectfully submitted,

_____

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