No. 23-719

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

—v.—

NORMA ANDERSON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF OF *AMICUS CURIAE* JEREMY BATES IN SUPPORT OF THE ANDERSON RESPONDENTS

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Amicus Curiae in support of the Anderson Respondents

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Interests of *Amicus Curiae*[1]

Amicus Curiae Jeremy Bates has four interests.

Like most Americans, Bates has an interest in ensuring that officers of the United States faithfully support and protect the Constitution.

Like 81 million Americans in the 2020 election, Bates voted for Joseph Biden. So Bates is one among the many indirect victims of the insurrection in which, the Colorado courts held, Petitioner engaged.

Bates is a lawyer and has litigated alleged breaches of fiduciary duty in trusts, estates, and businesses.

And on January 19, 2021, Bates sued Petitioner derivatively for breaching his fiduciary duties to the United States, in part in the January 6 insurrection. *See Bates on behalf of United States* v. *Trump*, No. 21-1533, 2022 WL 453397 (2d Cir. Feb. 15, 2022), *cert. denied sub nom. Bates* v. *Trump*, No. 21-1389, 2022 WL 2295592 (U.S. June 27, 2022), *motion for lv. to file pet. for reh'g distrib.* (Jan. 17, 2024).

Summary of Argument

Under four clauses of the original Constitution, the presidency is an Office of Trust. These 1787 texts plainly envision high federal office as a public trust, with powers to be exercised in the interests of those who created the office and who confer the trust: the American People. This Court has framed this vision in fiduciary language, reasoning last year that "[a]n

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1 No counsel for a party authored this brief in whole or in part. No counsel, no party, and no entity or person other than *amicus* made any monetary contribution intended to fund the preparation or submission of this brief.

'agent owes a fiduciary obligation to the principal,'" 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, 329–30 (2023) (quoting 1 Restatement (Third) of Agency § 1.01, Comment *e*, p. 23 (2005)) (state government).

Fiduciary offices are not open to any person, no matter how disloyal or destructive. Private fiduciary offices—including trustee, executor, and officer—may only be filled by persons who are fit to hold them. The law is replete with rules that disqualify unfit nominees from serving as private fiduciaries.

By this analogy, § 3 of the Fourteenth Amendment is a fiduciary-disqualification provision, akin to rules that courts across the country commonly enforce.

Argument

Our 1787 Constitution describes the presidency as an Office of Trust. So the 1787 text and Section Three are best read together as creating a fiduciary office and then as barring unfit persons from holding it.

I. The President of the United States is a public fiduciary.

The word "Trust"—always capitalized—appears four times in the 1787 Constitution. Every time, it is used to describe "Office[s]" under the United States.[2]

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2 U.S. Const. art. I, § 3, ¶ 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States"); U.S. Const. art. I, § 9, ¶ 8 ("[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress,

These four references to Offices of Trust must include the office of president. Otherwise these four significant clauses—the Impeachment-Judgment, the Foreign-Emoluments, the Electors-Appointment, and the Religious-Test Clauses—would all be subject, incongruously, to presidential exceptions.

That the Framers created the presidency as an Office of Trust has powerful implications here. These implications, however, are familiar from case law.

Two lines of cases generally establish that public officials are fiduciaries—and that they may be liable, civilly or criminally, if they violate their duties to the entities that employ them or to the public they serve.

The first line of cases is about protecting secrets. When a CIA agent violated his duty to keep the Nation's confidences, this Court held civilly that the agent had "breached a fiduciary obligation." *Snepp* v. *United States*, 444 U.S. 507, 510 (1980) (per curiam). In 1987 this Court repeated *Snepp*'s "traditional" rule that "'an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment.'" *Carpenter* v. *United States*, 484 U.S. 19, 27 (1987) (quoting *Snepp*, 444 U.S. at 515 n.11).[3]

The second line of cases is about prosecuting fraud.

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accept of any [ ] Emolument . . . from any foreign State."); U.S. Const. art. II, § 1, ¶ 2 ("[N]o Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."); U.S. Const. art. VI, ¶ 3 ("[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.").

3 The Second Circuit has accepted Petitioner's argument that when he was the President, he was a government employee. *Carroll* v. *Trump*, 2022 WL 4475079, *11 (2d Cir. Sept. 27, 2022) (construing Westfall Act).

When the United States prosecuted a former governor of Maryland, the Fourth Circuit held that "[T]he Governor . . . 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." *United States* v. *Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979); *see also id*. at 1362 (describing governor's "fiduciary duties" of "honest, faithful and disinterested service").

Mandel arguably turned on an express provision in Maryland's post–Civil War constitution. *See* Md. Const. Decl. of Rights art. 6 (1867) ("[A]ll persons invested with the Legislative or Executive powers of Government are the Trustees of the Public.").

But last year, this Court suggested that the rule that public officers are fiduciaries may find its source also in the common law of agency. "An '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, 329–30 (2023) (quoting 1 Restatement (Third) of Agency § 1.01, Comment *e*, p. 23 (2005)) (state government).

And indeed, the principle that federal officers are fiduciaries is traditional. A century ago, prefiguring *Percoco*, this Court viewed public officials as agents:

> The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent. If he takes any gift, gratuity, or benefit in violation of his duty, or acquires any interest adverse to his principal without full disclosure, *it is a betrayal of his trust and a breach of confidence* . . . .

United States v. *Carter*, 217 U.S. 286, 306 (1910) (italics added). This agency reasoning follows "from the fiduciary character" of the public office. *Id*. The *Carter* defendant was an agent, and thus a fiduciary, because at the time of his misconduct, he was "a captain in the Army of the United States." *Id*. at 297.

If these kinds of public servants—Army captains, State governors, CIA agents—are all fiduciaries, then the President of the United States is too. The office is unique and national, but this means only that the confidence placed by the People is weightier, the public trust administered is greater, and any breach of fiduciary duty may cause wider damage.[4]

To be sure, the question whether the President is a fiduciary is not now before the Court. This brief argues mostly by analogy.[5]

But from the settled law that government agents are fiduciaries, it follows that fiduciary powers ought not be entrusted to persons who are unfit to serve. And however new this principle might be as applied to the presidency, it is commonly applied to private offices.

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4 Fiduciary language has also been used to describe this Court and its employees. *See Trump* v. *Mazars USA, LLP*, 591 U.S. __, 140 S.Ct. 2019, slip op. at 11 (2020) (stating that longstanding practice "imposes on us a duty of care"); *Statement of the Court Concerning Leak Investigation* 1 (Jan. 19, 2023) (terming leak "one of the worst breaches of trust" in Court's history and an "extraordinary betrayal of trust"); *Marshal's Report & Recommendations* 5 (Jan. 19, 2023) (quoting Law Clerk Code of Conduct) ("The law clerk, like the Justices, holds a position of public trust.").

5 For scholarly debate on whether the President is a fiduciary, *compare* Samuel Bray & Paul Miller, *Against Fiduciary Constitutionalism*, 106 Va. L. Rev. 1479 (2020), *with* Andrew Kent, Ethan Leib, & Jed Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019).

II. Unfit persons are commonly disqualified from serving as private fiduciaries.

This case may seem novel because it involves a court disqualifying someone whom the People might otherwise choose to be a high public fiduciary. But in private contexts, courts disqualify unfit fiduciaries, even though such persons are nominated by the people who otherwise hold fiduciary-selection power.

What follows *infra* are several examples of how other courts and other provisions do very much what the Colorado Supreme Court and § 3 did in this case. These examples are mostly from New York, where *amicus* practices; but on belief, the rule that courts may disqualify unfit fiduciaries exists in every State.

A. Unfit persons are disqualified from serving as trustees or executors.

As trusts-and-estates litigators know, settlors and testators are sometimes induced—whether by fraud, duress, undue influence, misplaced allegiance, sentiment, or other causes—to select as fiduciaries persons who are, or who turn out to be, unfit to serve.

The law, however, makes provision for such cases. So, for example, the ordinary fiduciary offices of trustee or executor may not be held by just anyone.

The Uniform Trust Code counsels that a court may remove a trustee on the court's own initiative if the trustee "has committed a serious breach of trust" or if, "because of unfitness," the court finds that removal "best serves the interests of the beneficiaries." Uniform Trust Code § 706(b) (2018 updated 2023).

The Uniform Probate Code provides that even after a nominated personal representative qualifies, by posting a bond and filing a "statement of acceptance of the duties of the office," cause for removal exists if removal would be "in the best interests of the estate," or if the representative "mismanaged the estate or failed to perform any duty pertaining to the office." Uniform Probate Code §§ 3-601, 3-611(b) (rev. 2019).

These uniform principles find specific expression in (mostly) state statutes and cases.

In New York, the Estates, Powers, and Trusts Law empowers the Supreme Court to remove trustees who have "violated or threatened to violate" their trust or who "for any reason" are "unsuitable to execute the trust." N.Y. EPTL § 7-2.6(a)(2). This provision applies even if the trustee was appointed by a competent settlor in a valid trust instrument.

Likewise, the Surrogate's Court Procedure Act creates qualifications for the issuance by courts of letters (e.g., to administer an estate). The following persons are categorically ineligible: an infant, an incompetent, a non-domiciliary non-citizen (with certain exceptions), and "one who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office." N.Y. SCPA § 707(1)(a)–(d).

Most relevantly here, the Surrogate's Court may remove fiduciaries who have acted in ways that "endanger the estate or seriously impede its administration." *Matter of Thomas*, 2015 NY Slip Op 51574(U) (Surr. Ct. Kings Co., Oct. 9, 2015), citing *Matter of Braloff*, 3 A.D.2d 912, 913 (2d Dep't 1957), *aff'd* 4 N.Y.2d 847 (1958).

B. Unfit persons may be disqualified from serving as corporate officers or directors.

Similar fiduciary-disqualification provisions also exist for other private entities, such as corporations.

Directors are normally elected by shareholders, and officers chosen by directors. Here again, however, stakeholder choices have safeguards.[6]

After the Enron scandal, Congress authorized the SEC to block unfit persons from serving as officers or directors of SEC-reporting companies. Under the Securities Act of 1933, a court may bar a person who has committed fraud from acting as an issuer's officer or director "*if the person's conduct demonstrates unfitness to serve*." 15 U.S.C. § 77t(e) (italics added). The Exchange Act of 1934 likewise authorizes a court to prohibit a person from acting in these capacities "*if the person's conduct demonstrates unfitness to serve*." 15 U.S.C. § 78u(d)(2) (italics added).

Supreme Court, New York County, is now deciding whether to bar Petitioner from serving as an officer or director of businesses in New York. *See* Jonah E. Bromwich, William K. Rashbaum, & Ben Protess, *N.Y. Attorney General Accuses Trump of "Staggering" Fraud in Lawsuit*, N.Y. Times (Sept. 21, 2022) (describing request to disqualify under N.Y. Executive Law 63(12)).

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6 Delaware courts reserve "enhanced judicial scrutiny" for fiduciaries' actions that "interfere[ ] with a corporate election or a stockholder's voting rights in contests for control." *Coster* v. *UIP Companies, Inc.*, __ A.3d __, 2023 WL 4239581, at *8 (Del. June 28, 2023).

Any such business bar would be in addition to the restrictions that Petitioner agreed to in 2019 on his ability to serve as a fiduciary of charities.[7]

Leaving aside the restrictions that courts have imposed, or may yet impose, on Petitioner's ability to act in private fiduciary capacities, the larger point is pellucid.

Settlors, testators, and shareholders have wide discretion in choosing fiduciaries. But that discretion has limits. The law sets these limits, and courts enforce these limits, in order to protect trusts, decedents' estates, and other private entities from persons who are unfit to serve.

In these private contexts, if someone takes on a fiduciary role, only to faithlessly betray that trust, then such a person is commonly disqualified from serving again in an office of trust.[8]

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7 *See* N.Y. Att'y Gen'l, *AG James Secures Court Order Against Donald J. Trump, Trump Children, and Trump Foundation* (Nov. 7, 2019) (describing "restrictions on future charitable service"), at https://ag.ny.gov/press-release/2019/ag-james-secures-court-order-against-donald-j-trump-trump-children-and-trump (visited Jan. 30, 2024).

8 Notably, Petitioner seeks to engage in the same election process of which he still refuses to accept the 2020 result. He says that his 2024 supporters are disenfranchised, but when it comes to disenfranchisement, his hands are unclean. And in this Court, Petitioner fails to acknowledge the chaos that could ensue if States must decide whether to count votes for him, even though he is disqualified. *See Bates* v. *D.C. Board of Elections & Ethics*, 625 A.2d 891, 895 (D.C. 1993) (describing "English rule," which disregards votes cast for disqualified candidates; and "American rule," under which such votes *are* given effect and—if cast in sufficient numbers—may render elections "nugatory").

III. Section Three is best interpreted as a fiduciary-disqualification provision and should be enforced accordingly.

The President is a fiduciary, and courts enforce fiduciary disqualifications. Section Three is best read as a provision that disqualifies, for unfitness to serve, persons who have engaged in insurrection.

Courts disqualify fiduciaries for cogent reasons. And as to the President *of* the United States, the reasons for disqualification cogently include engaging in an insurrection *against* the United States.

To enforce Section Three here—against a former president who brazenly tried, while in office, to reverse an election that he lost—is to serve the best interests of the Constitution's beneficiaries: the People.

This Court should now protect the United States in the same way that courts commonly protect trusts, estates, and private entities: by enforcing a provision that disqualifies persons who are unfit to serve.

Conclusion

The Court should affirm.

January 31, 2024

Respectfully submitted,

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