

No. 21-932

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IN THE  
**Supreme Court of the United States**

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DONALD J. TRUMP,

*Petitioner,*

*v.*

BENNIE G. THOMPSON, *et al.*,

*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

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**MOTION FOR LEAVE TO FILE AND BRIEF OF  
AMICI CURIAE STATES UNITED DEMOCRACY  
CENTER AND FORMER FEDERAL, STATE, AND  
LOCAL OFFICIALS IN SUPPORT OF RESPONDENTS**

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## **MOTION FOR LEAVE TO FILE**

Pursuant to Supreme Court Rule 37.2(b), amici curiae respectfully move for leave to file the attached brief in support of Respondents. On December 10, 2021, counsel gave written notice to all parties of intent to file this amicus brief. Respondents consented in writing, and petitioner notified counsel in writing that he did not object.

Amici include former state and local officials who have an important stake in ensuring that the events of January 6 never recur. In our coordinate federal system, states and their subdivisions commit resources, time, and energy to collecting, counting, and certifying votes for presidential electors. The January 6 assault on our democracy disrupted the culmination of extraordinary work by state and local officials. Amici want to see Congress take steps to ensure that nothing like January 6 ever happens again. And Congress needs the documents that it seeks here in order to do its job of fact finding and developing legislative solutions.

Amici have a distinct perspective on the merits, the harms, and the public interest at stake here, and their brief includes relevant material not brought to the attention of the Court by the parties that may be of considerable assistance.

First: Amici, as former officials, explain the integral importance in our constitutional order of smooth transitions of power in which former officeholders defer, and fully cede their erstwhile powers and prerogatives, to their duly-elected successors.

Second: Amici explain that January 6 was not an isolated incident. It was, instead, a graphic instantiation of an ongoing crisis that threatens public safety and the free and fair elections upon which democracy depends. That is why the public interest and the balance of the equities weigh heavily in favor of prompt disclosure. The relief that former President Trump seeks would deeply injure the public by preventing Congress from swiftly developing legislation to protect our democracy in advance of the upcoming federal election cycle.

For the foregoing reasons, amici respectfully request that they be allowed to file the attached brief.

Dated: January 4, 2022

Respectfully submitted,

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## INTERESTS OF AMICI<sup>1</sup>

States United Democracy Center (“States United”) is a national, nonpartisan organization that works with state and local officials to protect free, fair, and secure elections and to hold those who attack our democracy accountable through litigation, advocacy, and investigations. States run elections, and the state and local officials who oversee elections have unique power and responsibility to defend voting laws that ensure access to the ballot box and protect our election results. States United supports those state and local officials, who are front-line guardians of our democracy.

The individual amici are former state, local, and federal officials who are members of States United’s Advisory Board. Their names and titles are listed in the Appendix that follows this brief. As former elected or appointed officials from both parties, they are committed to engaging and empowering pro-democracy leadership. Among the individual amici are former officials with responsibility for law enforcement and elections administration at the state and local levels. That includes former federal officials who worked closely with state leaders doing elections work.

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1. No party’s counsel authored this brief in whole or in part, and no person other than amici or their counsel funded its preparation or submission. Counsel of record for all parties received notice, at least ten days prior to the filing date, of amici’s intention to file this brief. In writing, Respondents consented, and Petitioner expressed that he does not object, to the filing of this brief. A motion for leave to file accompanies this brief.

This case goes to the heart of amici's interests. Former President Donald Trump is trying to invoke a privilege that belongs to the office he lost in a free and fair election. At bottom, the case is about whether Congress will secure the information it needs to armor our democracy against the ongoing assault that manifested in the insurrection of January 6, 2021.

State and local officials have an important stake in ensuring that the events of January 6 never recur. In our coordinate federal system, states and their subdivisions commit vast resources, time, and energy to collecting, counting, and certifying votes for presidential electors.<sup>2</sup> The January 6 assault on our democracy disrupted the culmination of extraordinary work by state and local officials. Amici want to see Congress swiftly legislate protections so that nothing like January 6 ever happens again.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Donald Trump filed his preliminary injunction motion in this case on October 19, 2021, telling the District Court—just as he told the appellate court, and as he now tells this Court—that there can be no harm in delaying disclosure of information relating to the planning and implementation of the January 6 insurrection. Exactly one week later, the Associated Press reported that

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2. See generally Joshua Matz et al., States United Democracy Ctr., *Guide to Counting Electoral College Votes and the January 6, 2021 Meeting of Congress*, (Jan. 4, 2021), <https://tinyurl.com/3kdamh2y>.



Arizona Secretary of State Katie Hobbs has at times required round-the-clock security because her life is being threatened for the offense of fairly counting the votes cast on Election Day.<sup>3</sup> On November 1—while briefing on Trump’s requested injunction was underway in the District Court—Philadelphia election officials were still getting vicious death threats relating to the 2020 election.<sup>4</sup> On November 12—with Trump’s appeal already lodged in the U.S. Court of Appeals for the D.C. Circuit—Wisconsin election officials turned to the media to beg the FBI to do more about the persistent threats to their safety that began during the 2020 election season.<sup>5</sup> On December 1, a day after this case was argued before the D.C. Circuit, Reuters reported on the campaign of fear that drove a Georgia poll worker into hiding.<sup>6</sup>

January 6 is not over. The state and local officials who administer our elections are still under threat. Our future elections, including a national midterm election less than 11 months away, are vulnerable.

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3. Jonathan Cooper, *Officials Describe Threats Following 2020 Election*, Associated Press (Oct. 26, 2021), <https://tinyurl.com/j8sp6mtj>.

4. Matt Petrillo, “We’re Coming after You”: *Philadelphia Elections Officials Still Receiving Death Threats Following 2020 Presidential Election*, CBS Phila. (Nov. 1, 2021), <https://tinyurl.com/f2heafxv>.

5. Matt Smith, *Election Officials Still Face Violent Threats in Wake of 2020 Election, Ask FBI to Do More*, WISN (Nov. 12, 2021), <https://tinyurl.com/5n57hh9f>.

6. Jason Szep & Linda So, *Trump Campaign Demonized Two Georgia Election Workers – and Death Threats Followed*, Reuters (Dec. 1, 2021), <https://tinyurl.com/k8wxy3zs>.

The House of Representatives' Select Committee to Investigate the January 6<sup>th</sup> Attack on the United States Capitol (the "Select Committee") seeks records from the National Archives and Records Administration (the "Archives") so it can understand the ongoing attack on our democracy that manifested on January 6 and recommend legislation to protect and improve our elections systems and our mechanisms for the peaceful transfer of power. President Joseph Biden has decided not to invoke the executive privilege, clearing the path for disclosing the records.

Now, seeking to overturn the will of the sitting legislative and executive branches, former President Trump is trying to unilaterally prevent the Archives from releasing those records. The District Court properly denied Trump's request for a preliminary injunction. A panel of the Circuit Court unanimously affirmed. And this Court should deny certiorari as expeditiously as possible. Any undue delay in disclosure unnecessarily impedes the Select Committee's urgent work of defending our democracy.

Amici speak in particular to aspects of Trump's petition that implicate the interests of state and local election and law enforcement officials, urging this Court to reaffirm principles that are central to the integrity of our democracy and that inform amici's own approaches to their current and former work.

First: Amici—who include former federal, state, and local officials—know that former officeholders in our democratic system have no authority to invoke their old powers by fiat and in defiance of the incumbent. The

peaceful transfer of power imbues a newly elected official with all the powers of the office—and sends former officials home as nothing more nor less than private citizens. In keeping with that critically important democratic norm, our fundamentally antimonarchical Constitution withheld any powers from former presidents. Without proffering any evidence of particularized harm from the disclosure of any document, Trump asks this Court to simply accept as a blanket proposition that he knows the interests of the executive and the republic better than our elected officials. That is a principle abhorrent to our Constitution and our democracy, and it is why Trump cannot prevail on the merits.<sup>7</sup>

Second: State and local election and law enforcement officials know that January 6 was not an isolated incident. It was, instead, a graphic instantiation of an ongoing crisis that threatens public safety and the free and fair elections upon which democracy depends. That is why the public interest and the balance of the equities weigh heavily in favor of prompt disclosure. The relief that Trump seeks would deeply injure the public, both by frustrating accountability for the attempt to overthrow our government and by preventing Congress from developing legislation to protect our democracy.

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7. To prevail on a motion for a preliminary injunction, the movant bears the burden of showing that: (1) “he is likely to succeed on the merits”; (2) “he is likely to suffer irreparable harm in the absence of preliminary relief”; (3) “the balance of equities tips in his favor”; and (4) “an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

**ARGUMENT****I. PETITIONER CANNOT PREVAIL ON THE MERITS OR SHOW IRREPARABLE HARM****A. Petitioner Cannot Show a Likelihood of Success on the Merits Because His Attempt to Assert Executive Privilege Is Contrary to Our Antimonarchical Constitutional Order**

Ex-presidents have the prerogative to object to the release of documents from their term in office. *Nixon v. GSA*, 433 U.S. 425 (1977). But Donald Trump seeks to prevent the release of Congressionally requested documents without proffering any evidence or even advancing any specific argument about any individual record. *See Trump v. Thompson*, No. 21-5254, 2021 WL 5832713, at \*21 (D.C. Cir. Dec. 9, 2021) (noting that Trump “has not pointed to a single record in the existing tranches” that implicates a sensitive question, and concluding that “Mr. Trump’s disagreement with President Biden’s judgment, by itself, provides the court no basis to override the sitting President’s judgment”). Because he does not engage on the merits, Trump’s position amounts to the assertion not just that his powers persist unabated but that they are even greater than the powers of the person elected to do the job of the presidency. As the District Court properly observed, this is an idea suited to a monarchy, not to our constitutional republic: “Presidents are not kings, and Plaintiff is not President.” *Trump v. Thompson*, No. 21-2769, 2021 WL 5218398, at \*8 (D.D.C. Nov. 9, 2021).

“The Constitution,” as one scholar observes, “makes no provision for former Presidents. It vests them with no powers, titles, or role whatsoever; it does not even provide them a pension.”<sup>8</sup> As former officials who themselves swore an oath to uphold the Constitution, amici are acutely aware that the Framers never encoded the proposition that a president could exercise perpetual power, or indeed any power at all, after the end of their elected term. U.S. Const. art. II, § 1 (providing that the president “shall hold his office during the term of four years”). Every power given to the president was qualified and capped as to both scope and duration. For instance: Even as Commander in Chief, where presidential powers may be at their broadest, *see Prize Cases*, 67 U.S. 635 (1862), the president cannot declare war. U.S. Const. art. I, § 8, cl. 11. And the prohibition against a foreign-born president was not simple nativism—it was a deliberately “antimonarchical provision designed to prevent a foreign prince from being installed as a monarchical President.”<sup>9</sup> Similarly, the prohibition against a president younger than 35 was not just age discrimination. Instead, it was designed to stop a son from replacing his father as in royal systems.<sup>10</sup> It is impossible to imagine George Washington, who famously refused a throne, exercising the executive privilege like a king in exile from Mount Vernon, over the waiver of John Adams.<sup>11</sup>

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8. Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 Tex. L. Rev. 301, 302 (2009).

9. *Id.* at 322.

10. *Id.*

11. *See* Louise Burnham Dunbar, *A Study of “Monarchical” Tendencies in the United States, from 1776 to 1801*, at 40-49 (1922) (describing Washington’s retirement).

While the Constitution gives no role to former presidents, it affirmatively grants incumbents the power and responsibility to share information with Congress. It requires the president, among other things, to “‘give to the Congress Information of the State of the Union,’ recommend measures to Congress, and state his objections to a bill he has vetoed.”<sup>12</sup> Beyond those explicit requirements, the job of the presidency inherently requires the president to communicate regularly, both formally and informally, with Congress. In particular, as the D.C. Circuit noted, the sitting president is perpetually involved in a “give-and-take” with Congress over providing records and testimony. *Trump v. Thompson*, No. 21-5254, 2021 WL 5832713, at \*10 (D.C. Cir. Dec. 9, 2021). Trump proposes that a former president can block the incumbent from fulfilling those solemn constitutional duties by fiat. He cannot prevail on the merits, because endorsing his argument would mean rejecting our Constitution’s text and structure.

### **B. The Incumbent President Is Empowered to Decide What Will Harm the Executive Office**

Trump sues here, as he must, “in his capacity as the 45<sup>th</sup> President of the United States.” And so, to show irreparable harm, he must show that releasing the records would somehow harm not Trump, the defeated ex-president, but the office of the presidency. He cannot, because he is not the right person to assert the presidency’s interests.

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12. Sacharoff, *supra* note 8, at 329.

Mr. Trump disagrees with President Biden’s policy determinations. That is his right as a citizen, but he has no corresponding power. So again, Trump’s claim fails in the face of a fundamental democratic principle: Just as the incumbent is the only person entitled to wield the powers of the presidency, he also is the only person entitled to make policy determinations about what is helpful or harmful to the Executive Office.

Amici, as former officials, would never have imagined the possibility that they could continue to exercise the powers of their offices to overrule their successors. Nor would they have imagined that their own personal interests could control decisions about their official papers. But Mr. Trump apparently forgets that this suit is supposed to be about protecting the presidency. Instead, he foregrounds his own personal interest. “The limited interest the Committee may have in immediately obtaining the requested records,” Trump’s petition wrongly contends, “pales in comparison to President Trump’s interest in securing judicial review before *he* suffers irreparable harm.” Pet. 32 (emphasis added).

This is either about Trump or it is about the presidency. Either way, though, he cannot win: Executive privilege does protect Trump as a private person from suffering irreparable harm, and the presidency is in new hands. In the end, this Court is asked to decide who gets to wield the powers of the presidency and safeguard the Executive Office—the person who won the election, or the person who did not. That is not a hard call. The people already have resolved this case.

## II. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST FAVOR RAPID DISCLOSURE

Trump can show neither that he is likely to succeed on the merits nor that the denial of the injunction would do irreparable harm. His case is even weaker on the remaining injunction factors. The balance of the equities and the public interest—which merge here, where the federal government is the defendant, *Nken v. Holder*, 556 U.S. 418, 435 (2009)—weigh heavily in favor of prompt disclosure. Even a temporary injunction in Trump’s favor would substantially harm the public, both by frustrating expeditious accountability for the attempt to overthrow the government and by preventing Congress from developing legislative fixes to protect our democracy.

In his petition for certiorari, Trump downplays the urgency of the moment: “Respondents would suffer virtually no harm by delaying production while the parties litigate the request’s validity. And while Congress is certainly free to set its own timeframe to conduct its business, the Electoral Counts Act [sic] will not be triggered for three years.” Pet. 32. But the crisis facing our nation is both urgent and ongoing. It threatens to compromise every election in this country—including the national election less than 11 months away.



**A. The Equities and Public Interest Strongly Favor Swift Disclosure, Accountability, and a Congressional Response to the Ongoing Attack on Democracy**

**1. The Violent Insurrection of January 6 Was the Manifestation of a Long-Running Campaign Against Free, Fair, and Secure Elections**

The campaign to overturn the will of the people began long before November 3, 2020. Its strategies have included intimidation, threats of violence, and the baseless insistence that the election was tainted by fraud. These strategies matter here because they were redeployed repeatedly through January 6, and they have become all too common in American political life in the aftermath of the Capitol invasion. Their pervasiveness speaks to the urgency of Congress’s quest for information.

In the run-up to Election Day, the Trump campaign and some of its allies called, in increasingly audible dog-whistles, for an intimidating “army” of poll-watchers.<sup>13</sup> These calls for voter intimidation carried such force because of Trump’s long history of soliciting and encouraging violence against his opponents. During the 2016 campaign, Trump promised to provide legal defense for thugs willing to “knock the crap” out of protestors at

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13. See, e.g., Rebecca Beitsch & Maggie Miller, *Trump’s Call for Poll Watchers Sparks Fears of Voter Intimidation*, The Hill (Sept. 30, 2020), <https://tinyurl.com/br9rv8rd> (describing Trump camp’s call for an “army” of poll watchers).

his rallies.<sup>14</sup> When violence—predictably—ensued, he crowed: “That’s what we need more of.”<sup>15</sup> His supporters, he bragged, were “tough people” who “don’t play it tough—until they go to a certain point, and then it would be very bad, very bad.”<sup>16</sup> When a pickup truck caravan of armed Trump supporters besieged a Biden campaign bus on a Texas highway in October 2020, Trump expressed delight, tweeting “I LOVE TEXAS” along with the video of the frightening highway confrontation.<sup>17</sup>

This valorization of violence extended to dark threats about what would happen if Trump lost. In September of 2020, Trump refused to commit to a peaceful transition of power: “There won’t be a transfer,” he said. “[W]e’re going to have to see about what happens. You know that I’ve been complaining very strongly about the ballots, and the ballots are a disaster.”<sup>18</sup> This was a theme. Trump wanted

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14. Daniel White, *Donald Trump Tells Crowd to “Knock the Crap Out Of” Hecklers*, TIME (Feb. 1, 2016), <https://tinyurl.com/845tysnc>.

15. Eric Levitz, *Trump on His Supporters Attacking Protesters: “That’s What We Need More of”*, N.Y. Mag. (Mar. 11, 2016), <https://nym.ag/2VTiJ78>.

16. Justin Wise, *Trump Suggests That It Could Get “Very Bad” If Military, Police, Biker Supporters Play “Tough”*, The Hill (Mar. 14, 2019), <https://tinyurl.com/xtmx9h4c>.

17. Katie Shepherd, *Trump Cheers Supporters Who Swamped a Biden Bus in Texas*, Wash. Post (Nov. 2, 2020), <https://wapo.st/3kbgp5j>.

18. Allan Smith, *Trump on Peaceful Transition if He Loses: “Get Rid of The Ballots” and “There Won’t Be a Transfer”*, NBC News (Sept. 23, 2020), <https://tinyurl.com/yeff49tr>.

to keep his opponents from voting. But if they voted him out of office, Trump was ready with an explanation: Any election that did not result in his victory was, necessarily, fraudulent and stolen.

The false cries of fraud grew louder as the election drew closer. According to partisans trying to discredit our election system, mail-in voting—a tried-and-true method in red states and blue—would open the door to “foreign countries” counterfeiting millions of ballots.<sup>19</sup> Trump would lead in the original returns, the narrative went, but Democrats would somehow “steal” the election as ballots were counted.<sup>20</sup> That drumbeat, warning of a stolen election, sounded throughout: “Stop the steal” echoed over and over on Trump’s Twitter feed and those of his biggest supporters.<sup>21</sup>

The anti-democratic strategies first deployed prior to Election Day became a constant over the days and months after President Biden’s 7 million vote victory. Just as he had promised, Trump immediately and baselessly began to complain of a “rigged” election.<sup>22</sup> His false allegations

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19. Joey Garrison, “Nonsense”: *Election Experts Reject Trump’s Claim that Foreign Countries Could Counterfeit Millions of Mail-in Ballots*, U.S.A. Today (June 22, 2020), <https://tinyurl.com/39k94v65>.

20. Adam Kelsey, *Trump Adviser Predicts Sunbelt Sweep, Misleads on Post-Election Counting*, ABC News (Nov. 1, 2020), <https://tinyurl.com/32b2sx48>.

21. DFR Lab, Just Security, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection* (Feb. 10, 2021), <https://tinyurl.com/2x4834f4>.

22. See William Cummings et al., *By the Numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA

were backed by a propaganda machine spinning up conspiracy theories of fraud allegedly perpetrated by everyone from Detroit voters to deceased Venezuelan dictator Hugo Chavez.<sup>23</sup> Throughout it all was endless, and often abusive, litigation—at least 62 lawsuits, filed in states across the country, seeking relief ranging from recounts to audits to the wholesale suspension of the public vote. Again and again Trump and his allies alleged, without ever proving, that somehow the election was stolen from Trump.<sup>24</sup>

The pre-Election Day intimations of violence, too, grew uglier in the aftermath of Trump’s loss. Online and flesh-and-blood mobs began stalking and intimidating election officials, urging them to tilt the count in Trump’s favor or seeking to punish them for their refusal.<sup>25</sup> In one of the most frightening episodes, Michigan Secretary of

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Today (Jan. 6, 2021) <https://tinyurl.com/2p88w56n> (tallying 75 times that Trump claimed the election was “rigged” on Twitter, between May of 2020 and January 6, 2021); Kevin Liptak, *Trump Seeks to Delegitimize Vote Even as His Campaign Says Math Will Turn His Way*, CNN (Nov. 4, 2020), <https://tinyurl.com/y7yddwum>.

23. See, e.g., Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020), <https://tinyurl.com/y2a4ryw7>; *Pearson v. Kemp*, No. 20-4809, 2020 WL 7040582 (N.D. Ga. Nov. 29, 2020), *appeal dismissed*, 831 F. App’x 467 (11th Cir. 2020) (federal case brought by conspiracy theorists who alleged, without proof, that a Hugo Chavez-designed software system, manipulated by Iran and China, somehow corrupted votes in U.S. swing states against President Trump).

24. Cummings, *supra* note 22 (tallying 62 lawsuits).

25. See, e.g., Tim Kephart, *Secy. of State Raffensperger Backs Aide as Trump Refuses to Back Down*, WGCL-TV (Dec. 2, 2020), <https://tinyurl.com/2mttdvry>.

State Jocelyn Benson’s house was besieged by armed “Election Truthers” while she tried to decorate for the holidays.<sup>26</sup>

Meanwhile, Trump and his closest advisors whipped up the mob and sought to convince election administrators and other officials to cheat. Trump himself stooped to tactics that ranged from pressuring the Georgia Secretary of State to “find 11,780 votes” to summoning Michigan lawmakers to the White House to urge them to legislatively override the popular vote.<sup>27</sup> Trump’s team leaned on officials in the federal government too, summarily removing a U.S. Attorney who refused to investigate nonexistent election offenses in Georgia and demanding that the DOJ assert unsubstantiated claims of fraud.<sup>28</sup>

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26. Katie Shepherd, *Armed Protesters Alleging Voter Fraud Surrounded the Home of Michigan’s Secretary of State*, Wash. Post (Dec. 7, 2020), <https://wapo.st/3yXBRip>.

27. See, e.g., Amy Gardner, “I Just Want to Find 11,780 Votes”: In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor, Wash. Post (Jan. 3, 2021), <https://wapo.st/3wYfyI4>; Brian Naylor, *Michigan Lawmakers Meet Trump Amid Efforts To Overturn Election Results*, NPR (Nov. 20, 2020, 12:49 PM), <https://tinyurl.com/uh2htbck>; Tim Alberta, *The Michigan Republican Who Stopped Trump*, Politico (Nov. 24, 2020), <https://tinyurl.com/j59nb6zu>.

28. Aruna Viswanatha et al., *White House Forced Georgia U.S. Attorney to Resign*, Wall St. J. (Jan. 9, 2021), <https://tinyurl.com/ndw5bkpt>; Katie Benner, *Trump Pressed Justice Dept. to Declare Election Results Corrupt, Notes Show*, N.Y. Times (July 30, 2021), <https://tinyurl.com/k2unwe8>.

As former state and local officials, or federal ones who have worked closely with the states, amici understand the devastating impact of this unprecedented campaign on those like Secretary Benson and the thousands of others who are on the front lines of administering our elections. The public interest and equities strongly favor Congress obtaining the information it needs in order to prevent the recurrence of such conduct, including in the midterm election in November of this year.

**2. After January 6, Opponents of Democracy Have Continued their Push to Undermine Free and Fair Elections—Including Through Reprehensible Attacks on State and Local Election Officials**

January 6 did not emerge *ex nihilo*, and its aftermath has been characterized by the same destructive strategies. Perhaps most troublingly, the attacks on amici's former colleagues—state and local election officials—have not stopped.<sup>29</sup> To the contrary: They are sickeningly prevalent and deeply corrosive to worker morale and effectiveness.<sup>30</sup>

Since the storming of the Capitol, partisans have continued to aim death threats at officials all around the country who dare to administer and count a fair vote. On January 7, the day after the insurrection failed to derail the will of the people, workers at the Republican Nevada Secretary of State's office were subjected to vicious

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29. Linda So, *Trump-Inspired Death Threats Are Terrorizing Election Workers*, Reuters (June 11, 2021), <https://reut.rs/36D3CRa>.

30. Fredreka Schouten & Kelly Mena, *Falsehoods and Death Threats Haunt Local Election Workers Weeks After Capitol Siege*, CNN (Feb. 13, 2021), <https://tinyurl.com/3zb7wm9a>.

death threats: “I hope you all go to jail for treason,” said the caller. “I hope your children get molested. You’re all going to f----- die.”<sup>31</sup> Tricia Raffensperger, the wife of Georgia’s Republican Secretary of State, got a late-night text message: “You and your family will be killed very slowly.”<sup>32</sup> In Philadelphia, Republican Commissioner Al Schmidt absorbed anti-Semitic threats that drove his family into hiding.<sup>33</sup> The chair of the Maricopa County, Arizona board of supervisors, a Republican, affirmed that Biden won fair and square, only to face “furious protests and violent threats” that “have turned his life upside down.”<sup>34</sup> As of August 2021, Milwaukee election director Clare Woodall-Vogg had received 150 violent threats.<sup>35</sup>

The threats have become a terrifying part of the job even for line staff. “The intimidation in Georgia,” Reuters reported, “has gone well beyond Raffensperger and his family. Election workers—from local volunteers to senior administrators—continue enduring regular harassing phone calls and emails.” In 2021, a poll found that “one

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31. Linda So & Jason Szep, *U.S. Election Workers Get Little Help from Law Enforcement as Terror Threats Mount*, Reuters (Sept. 8, 2021), <https://tinyurl.com/auwk8jnw>.

32. So, *supra* note 29.

33. Brennan Ctr. for Just. & Bipartisan Policy Ctr., *Election Officials Under Attack* 4 (June 16, 2021), <https://tinyurl.com/yy93pubv>.

34. Erin Patrick O’Connor & Whitney Shefte, *Clint Hickman Faced Death Threats for Telling the Truth*, Wash. Post (Oct. 31, 2021, 8:00 AM), <https://tinyurl.com/m6ntss8v>.

35. Drew Griffin, “We’re Coming for You”: Election Director Shares Threatening Voicemail, CNN (Aug. 27, 2021), <https://tinyurl.com/5839du7w>.

in three election officials feel unsafe because of their job, and nearly one in five listed threats to their lives as a job-related concern.”<sup>36</sup>

The ongoing threats are driving effective and principled people, like those with whom amici served, away from administering elections. Arizona Secretary of State Hobbs, who absorbed some of the worst abuse after President Biden’s win in her state, fears that the threats are contributing to high employee turnover<sup>37</sup>—and that the results could damage election administration.<sup>38</sup> Rick Barron, the lead election official in Georgia’s Fulton County, who faces regular abuse and threats, warns that good people are being chased out of the job: “There are a lot of people leaving the profession. So I think you’re gonna end up with more inexperienced people running these offices. You’re going to see people in these types of jobs for a shorter period of time because the stress, after a while, it’s hard to ignore it all the time.”<sup>39</sup> He should know: Mr. Barron himself announced on November 3, 2021 that he will resign, “as the county continues to face attacks, conspiracy theories and a state-run performance review following the 2020 election.”<sup>40</sup>

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36. Brennan Ctr., *supra* note 33, at 4.

37. Andrew Oxford, *Secretary of State Warns of Threats to Election Workers*, Ariz. Pub. Media News (Oct. 6, 2021), <https://tinyurl.com/ukwp5z2r>.

38. Cooper, *supra* note 3.

39. Sam Levine, “*It’s Been a Barrage Every Day*”: *US Election Workers Face Threats and Harassment*, The Guardian (Nov. 1, 2021), <https://tinyurl.com/jpjxv9u3>.

40. Stephen Fowler, *Fulton Elections Director Rick Barron to Resign*, GPB News (Nov. 4, 2021), <https://tinyurl.com/4rmzr83z>.



### 3. State and Local Officials Urgently Need Congress to Armor Our Democracy Against Ongoing Attack

On November 1 of 2021—with this lawsuit fully underway, and Mr. Trump seeking delay at every turn—PBS Newshour reported that 81% of U.S. adults fear that “the future of U.S. democracy is under threat.”<sup>41</sup> We are coming up on the one-year anniversary of the January 6 insurrection, but still election officials live and work in fear. The cries of election fraud reliably echo after Trump-identifying candidates lose.<sup>42</sup> The Big Lie is a part of our public discourse now. Fully 30% of Americans believe it, and the constantly repeated lies and conspiracy theories have bred deep mistrust in our ability to run free and fair elections.<sup>43</sup>

The ongoing threat matters urgently because we are less than a year away from the next round of national elections, and we still have not fully confronted what happened in the last one, much less passed necessary legislative reforms. As bipartisan former national security officials recently warned, the time to act is now. “We call on Congress to confront these threats and safeguard

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41. Laura Santhanam, *As Election Day Nears, Most U.S. Adults Say Future of Democracy Is Under Threat*, PBS News Hour (Nov. 1, 2021), <https://tinyurl.com/5mn6en5k>.

42. Nicholas Reimann, *Conspiracy Theories Swirl After Democrat Phil Murphy Re-elected New Jersey Governor—But There’s No Evidence of Widespread Fraud*, Forbes (Nov. 4, 2021), <https://tinyurl.com/er5dzt2v>.

43. PRRI, *Competing Visions of America: Findings from the 2021 American Values Survey* 35 (Oct. 2021).

our democratic process as we look ahead to the 2022 elections and beyond,” announced a group including former Homeland Security secretaries Michael Chertoff and Janet Napolitano.<sup>44</sup> That group urged Congress to pass legislation aimed at protecting election officials—the frontline democracy workers placed in danger by the past year’s attack on our democracy.<sup>45</sup>

As former officials, including state and local officials, amici know that their national security colleagues are right. Enjoining and further delaying release of the records would deeply harm the public interest, which demands that Congress take swift action. To do that, Congress urgently needs the information that it seeks from the Archives.

**B. The Equities and Public Interest Weigh Heavily Against an Injunction in Light of Petitioner’s History of Using Protracted Litigation to Run Out the Clock on Accountability**

Trump’s contention that delay will not harm the public or the parties is belied by the grave risk that he

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44. Maggie Miller, *Former Top Officials Warn Democracy in “Jeopardy” Without Congressional Action on Election Security*, The Hill (Nov. 10, 2021), <https://tinyurl.com/x93n4d8>.

45. See Christina A. Cassidy, *Election Officials Face Complex Challenges Looking to 2022*, Associated Press (Aug. 15, 2021), <https://tinyurl.com/8ea4bjdd> (“State election officials say they are confronting a myriad of challenges heading into the 2022 midterm elections, from threats of foreign interference and ransomware to changes of election laws and concerns of physical safety—all while still dealing with a wave of misinformation and disinformation surrounding last year’s presidential election.”).

will orchestrate a prolonged and—from our democracy’s perspective—painful delay in the Select Committee’s work. Trump has a history of protracted litigation of privilege claims to indefinitely put off accountability.

The District Court correctly found that “discovering and coming to terms with the causes underlying the January 6 attack is a matter of unsurpassed public importance because such information relates to our core democratic institutions and the public’s confidence in them.” *Trump v. Thompson*, No. 21-2769, 2021 WL 5218398, at \*17 (D.D.C. Nov. 9, 2021). Any delay can be fatal to Congress’s informing function. In the words of former President Woodrow Wilson:

Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.

*United States v. Rumely*, 345 U.S. 41, 43 (1953) (quoting Woodrow Wilson, *Congressional Government: A Study in American Politics* 303 (1913)). By the time this Court reviews this brief, the one-year anniversary of January 6 may have passed. With the 2022 and 2024 federal elections on the horizon, Americans need to learn facts that may influence their decisions, and Congress has an obligation to deliver that information and pass prescriptive legislation.

To delay until more ballots are cast or new leadership is convened is “to give the appellant the ultimate relief being sought.”<sup>46</sup>

Trump and his allies have repeatedly tried to delay requests for information until congressional inquiries are rendered essentially impotent. For example, in 2019, the House Judiciary Committee sought testimony from White House Counsel Donald McGahn relating to Trump’s alleged obstruction of the Mueller investigation. After the White House instructed McGahn not to testify, the Judiciary Committee sued to compel compliance. *Comm. on the Jud., U.S. House of Rep. v. Donald F. McGahn, Jr.*, 415 F. Supp. 3d 148 (D.D.C. 2019). The district court ruled against McGahn, who appealed. Over two years later, and one week before the D.C. Circuit was scheduled to hear the matter *en banc*, the parties reached an agreement regarding McGahn’s testimony. The timing was no accident—the Mueller investigation had long concluded, and Trump was out of office.

The long and winding path in *Trump v. Mazars USA, LLP*, 140 S.Ct. 2019 (2020), is another example of Trump’s strategic use of litigation to avoid meaningful disclosure. In February 2019, after hearing testimony that Trump had changed the estimated value of his assets and liabilities on financial statements prepared by his accounting firm, Mazars USA, LLP, the House Oversight Committee subpoenaed Mazars for documents related to Trump and his businesses. Trump sued, seeking a ruling that the subpoena was invalid and unenforceable. After the district court ordered Mazars to comply,

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46. 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2904 (3d ed. 2021).

Trump began a process of appeal and delay that did not conclude until July 2020—when, well over a year and a half after the subpoena had issued, the Supreme Court held that Congress’ “broad” and “indispensable” power to obtain information extends to the executive branch and the president himself. *Mazars*, 140 S. Ct. at 2031 (citing *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

However, the Court also remanded the case to the lower courts to apply a new standard to the subpoenas at issue. In August 2021—well after Trump was no longer president and after the subpoena had reissued—the district court again found that the congressional subpoenas are valid. *Trump v. Mazars USA, LLP*, No. 19-1136, 2021 WL 3602683 (D.D.C. Aug. 11, 2021). Trump has again appealed. Nearly three years after Congress issued a lawful subpoena to pursue records related to its investigation, the public is still waiting for a resolution.<sup>47</sup> Anything like that here would do irreparable harm to our republic.

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47. Mr. Trump is not the only president to use protracted litigation to forestall congressional inquiries. The Republican-controlled House’s effort to compel executive branch testimony as part of its investigation into Operation Fast and Furious during the Obama administration met a similar fate. In June 2012, after producing about 7,600 pages to the House, then-President Obama invoked executive privilege to withhold documents that “were not generated in the course of the conduct of Fast and Furious.” In 2016, the district court ruled that the records in question were not covered by privilege. *Comm. on Oversight and Gov’t Reform, U.S. House of Rep. v. Lynch*, 156 F. Supp. 3d 101 (D.D.C. 2016). The House lawsuit to try to recover the records was ultimately settled in April 2019, after control of the House had shifted to Democrats. *Comm. on Oversight and Gov’t Reform, U.S. House of Rep. v. Barr*, No. 16-5078, 2019 WL 2158212 (D.C. Cir. May 14, 2019).

## CONCLUSION

On October 13, 2021, only five days before Mr. Trump filed this case, he sent an email to NBC News: “If we don’t solve the Presidential Election Fraud of 2020, Republicans will not be voting in ’22 or ’24.”<sup>48</sup> Whatever else can be said about that statement, whose premise is false and whose conclusion is dubious, Trump is right that the 2020 election saw an existential threat unleashed on this country. He is right that the threat must be answered, if we want future elections to succeed. But he is wrong about the source of the threat. And he is terribly wrong, through this lawsuit, to stand in the way of a resolution.

For all the reasons set forth in this brief and in respondents’ briefs, this Court should refuse an injunction pending appeal and deny certiorari as soon as practicable. The Select Committee must be allowed speedily to continue with its urgent, important work of promoting accountability and protecting our democracy.

Date: January 4, 2022

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48. Jane C. Timm & Henry J. Gomez, *Trump’s Stolen Election Lie Is on the Ballot in 2022, Thanks to These Candidates*, NBC News (Oct. 16, 2021), <https://tinyurl.com/yw9dfw2>.

Respectfully submitted,

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## **APPENDIX**



**APPENDIX — NAMES AND TITLES OF  
INDIVIDUAL AMICI**

**Gregory A. Brower** (Assistant Director and Deputy General Counsel, FBI, 2016-2018)

**Steve Bullock** (Montana Governor, 2013-2021)

**Tom Coleman** (Missouri Congressman, 1976-1993)

**Jack Conway** (Kentucky Attorney General, 2008-2016)

**Frankie Sue Del Papa** (Nevada Attorney General, 1991-2003)

**John J. Farmer, Jr.** (New Jersey Attorney General, 1999-2002)

**Trey Grayson** (Kentucky Secretary of State, 2004 to 2011)

**Jim Hood** (Mississippi Attorney General, 2004-2020).

**Dr. Rachel Kleinfeld** (Senior Fellow, Carnegie Endowment for International Peace)

**Jahna Lindemuth** (Alaska Attorney General, 2016-2018)

**Patricia Madrid** (New Mexico Attorney General, 1999-2007)

**Tom Rath** (New Hampshire Attorney General, 1978-1980)

**Joyce Vance** (U.S. Attorney, Northern District of Alabama, 2009-2017)

*Appendix*

**Sarah R. Saldaña** (Director, U.S. Immigration and Customs Enforcement, 2014-2017)

**Michael Steele** (Maryland Lieutenant Governor, 2003-2007)

**Christine Todd Whitman** (New Jersey Governor, 1994 to 2001)

**William F. Weld** (Massachusetts Governor, 1991-1997)