

No. 23-719

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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 EXPERTS IN DEMOCRACY AS  
*AMICI CURIAE* IN SUPPORT OF  
RESPONDENTS

JOHN VAIL  
*Counsel of Record*  
John Vail Law PLLC  
1025 Thomas Jefferson  
St., NW  
Suite 810  
Washington DC 20007  
(202) 589-1300  
john@johnvaillaw.com

Counsel for *Amici Curiae*

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**BRIEF OF EXPERTS IN DEMOCRACY AS  
*AMICI CURIAE* IN SUPPORT OF  
RESPONDENTS**

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**INTEREST OF THE *AMICI CURIAE*<sup>1</sup>**

*Amici curiae* are among the world's leading experts on democracy, political violence, and the rule of law. They have studied and written extensively about the fragility of democracy and the role of political violence in contributing to democratic decline. *Amici* are uniquely positioned to provide a perspective to this Court on the ways that the experience of American democracy leading up to, during, and after January 6, 2021 echoes patterns from around the world of the corrosion of democratic government by political violence.

*Amici* are:

- Dr. Ruth Ben-Ghiat, Professor of History and Italian Studies at New York University;
- Dr. Sheri Berman, Professor of Political Science, Barnard College, Columbia University;
- Dr. Larry Diamond, William L. Clayton Senior Fellow, Hoover Institution; Mosbacher Senior Fellow in Global Democracy, Freeman Spogli Institute for International Studies, Stanford University;

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<sup>1</sup> Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *amici* and their counsel contributed money to fund this brief.

- Dr. Rachel Kleinfeld, senior fellow, Carnegie Endowment for International Peace;
- Dr. Steven Levitsky, Professor of Government and Director of the David Rockefeller Center for Latin American Studies at Harvard, Harvard University; and
- Dr. Timothy Snyder, Richard C. Levin Professor of History and Public Affairs, Faculty Advisory of Fortunoff Archive for Video Holocaust Testimonies, Yale University.

*Amici's* titles and affiliations are listed for identification only; *amici* submit this brief in their personal capacities.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

This brief seeks to provide the Court with an understanding of how the events surrounding the 2020 election and the violence on January 6, 2021, appear in relation to events that have caused democratic erosion and collapse in other countries.

Democracy is historically rare. For the vast majority of human history, people have been the subjects of despots, monarchs, and empires. Some of these societies were ruled well, and some poorly – but in none of them were citizens able to choose their leaders, peacefully express the policies by which they wished to be governed, and thereby alter their country's course when needed. Democracy has proven to be a uniquely self-correcting system that has created the wealthiest, freest societies that have ever existed.

But democracy is fragile. In the 1930s and 1940s, as democracies fell to authoritarians on the left and

right, America became one of just 12 surviving democracies by 1942.<sup>2</sup> The years since saw democracy gain ground globally. But over the last 17 years, democracies have once again been culled.<sup>3</sup>

While the Cold War was marked by democracies collapsing via coups and wars, the majority of decline and failure today occurs under democratically elected politicians who use their popularity to undermine constitutions, laws, and norms from within. Most democracies die now at the hands “not of generals but of elected leaders — presidents or prime ministers who subvert the very process that brought them to power.”<sup>4</sup> The decline and loss of democracy can be extremely rapid. Severe polarization that enables leaders to erode democracy with voter support unfolds intensely, often in a handful of years.<sup>5</sup>

Since our founding, Americans have understood our system of government to be precious. That commitment has allowed us to build what is now the oldest and longest-standing democracy on our planet.

But the longstanding vigor of our democracy also creates a unique vulnerability: most of our nation

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<sup>2</sup> Samuel P. Huntington, *Democracy's Third Wave*, 2 J. Democracy, no. 2, 12, 12, (1991), <http://tinyurl.com/4cynurxa>.

<sup>3</sup> Freedom House, *New Report: Global Freedom Declines for 17th Consecutive Year, but May Be Approaching a Turning Point* (Mar. 9, 2023), <http://tinyurl.com/bd47uyms>.

<sup>4</sup> Steven Levitsky & Daniel Ziblatt, *How Democracies Die* 3 (2019).

<sup>5</sup> Thomas Carothers & Andrew O'Donohue, *Comparative Experiences and Insights*, in *Democracies Divided: The Global Challenge of Political Polarization* 257, 265 (Thomas Carothers & Andrew O'Donohue, eds., 2019).

takes our strong institutions for granted. While the experience of government collapse was very much within the living memory of the drafters of the Fourteenth Amendment when they sought to create checks against the overthrow of America's constitutional order in 1868, Americans today have no reference point for an experience that could end our form of government.

This brief steps outside the limits of our firsthand experience to consider historical and comparative experiences of how democracies are attacked from within, weakened, and at times, destroyed.

### ARGUMENT

France was Europe's oldest democracy in 1934, when it was beset by polarization between its left and right. On February 6, a series of far-right and veterans' groups rallied in protest of what they believed was a conspiracy that presaged a far-left government takeover.<sup>6</sup> The 10,000 or so protestors were composed of a mix of committed members of violent ideological groups, and hangers-on.<sup>7</sup> As night came on and the incoming left-wing Prime Minister, Édouard Daladier tried to invest his new cabinet, the crowd marched towards the Parliament building.<sup>8</sup> The police tried to hold them back, but the mob threw metal grates and

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<sup>6</sup> Brian Jenkins & Chris Millington, *France and Fascism: February 1934 and the Dynamics of Political Crisis* 1-2, 48-50, (2015); William L. Shirer, *The Collapse of the Third Republic: An Inquiry Into the Fall of France in 1940* 193-200 (1969).

<sup>7</sup> Jenkins & Millington, *supra* n. 6, at 1.

<sup>8</sup> Shirer, *supra* n. 6, at 193-200.

rocks.<sup>9</sup> Wielding long poles with razor blades at the ends, they slashed the legs of police horses.<sup>10</sup> Fourteen people were killed.<sup>11</sup> Though the violent groups failed to breach the Parliament building, they had support from Members inside.<sup>12</sup> Right and left-leaning members fought, and as the violence continued outside Parliament's walls, they held a series of no-confidence votes that undermined the new Prime Minister.<sup>13</sup> Unable to lead a government, Daladier resigned the next day and made way for a new leader who satisfied the far-right.<sup>14</sup> An attempt to hold a balanced investigation of the incident fell victim to partisan polarization. Members of Parliament excused violent extremists as martyrs and refused to participate.<sup>15</sup> The politician accused of masterminding the violence refused to be shamed, claiming, "there are moments when insurrection is the most sacred of duties."<sup>16</sup>

The French Republic endured the night of February 6, but the events left it fatally injured. The next center-left premier was nearly beaten to death by a

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<sup>9</sup> *Id.* at 194.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 200.

<sup>12</sup> William D. Irvine, *French Conservatism in Crisis: The Republican Federation of France in the 1930s* 100, 107–9 (1979).

<sup>13</sup> Shirer, *supra* n. 6, at 196.

<sup>14</sup> *Id.* at 202.

<sup>15</sup> Irvine, *supra* n. 12, at 118.

<sup>16</sup> *Id.* at 116–17.

far-right extremist.<sup>17</sup> Workers launched crippling strikes.<sup>18</sup> Governing became impossible, and leaders grew used to ruling through executive decree.<sup>19</sup> In 1940, when presented with the choice of how to govern the third of the country it controlled following Germany's invasion, parliament voted to kill France's remaining democracy without even a discussion.<sup>20</sup> They erected an authoritarian state in its stead.<sup>21</sup>

**I. International experiences of democratic corrosion through violence are instructive.**

**A. The refusal to cede power is particularly dangerous to democracies.**

There are many risk factors that make democracies more likely to falter or fail. But no single element is as important as an elected leader conceding power peacefully based on the will of the voters. Countries whose leaders take that action are democratic – however illiberal or flawed they may be. The peaceful transition of power is so important that one of the 20th century's foremost political scientists, Samuel Huntington, established the benchmark that no democracy could be considered safely consolidated until one

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<sup>17</sup> Sheri Berman, *Democracy and Dictatorship in Europe: From the Ancien Regime to the Present Day* 181 (2019).

<sup>18</sup> *Id.*

<sup>19</sup> Giorgio Agamben, *State of Exception* (Kevin Attell, trans.) (2004), available at <http://tinyurl.com/4cbnv586>.

<sup>20</sup> *End of the Third Republic in France*, Guardian (July 11, 1940), available at <http://tinyurl.com/57brkk6k>.

<sup>21</sup> *Id.*



party had peacefully transferred power to another, and the same had occurred in the other direction.<sup>22</sup>

The United States is not the first democracy to have an incumbent leader refuse to concede after legal challenges were exhausted. But there are no parallels among strong, consolidated democracies. The events of January 6 unfortunately bear closer resemblance to what happens in some of the world's weakest democracies.

Globally, incumbents who wish to hold power reach first for bureaucratic means to alter election results. They pressure the organizations and individuals who have power over the vote count to find in their favor. In Cote d'Ivoire's 2010 election, for instance, the independent electoral commission released provisional results showing that incumbent president Laurent Gbagbo had lost.<sup>23</sup> The President refused to concede.<sup>24</sup> He instead pressured his loyalists on the Constitutional Council to act.<sup>25</sup> Claiming that widespread fraud had occurred in northern districts that supported the challenger, the Constitutional Council annulled the results of those geographies.<sup>26</sup> The next

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<sup>22</sup> Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* 266-67 (1993).

<sup>23</sup> Freedom House, *Freedom in the World 2011* 177 (Arch Puddington, et al., eds., 2011), <http://tinyurl.com/4p92a2rs>.

<sup>24</sup> Jennifer G. Cooke, *The Election Crisis in Côte d'Ivoire*, Ctr. for Strategic & Int'l Stud., (Dec. 7, 2010), <http://tinyurl.com/mr4xx2xa>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

day, the Constitutional Council named Gbagbo the winner with 51% of the vote.<sup>27</sup>

In more authoritarian countries, politicians are more direct in their election manipulation. In Equatorial Guinea, an election official was forced to sign off on the official results as a gun was held to his head.<sup>28</sup> In Belarus' recent elections, President Lukashenko simply ordered election officials to decide the election by a specific percentage of votes.<sup>29</sup>

### **B. Some leaders use state violence to remain in power.**

Bureaucratic efforts to retain power against the will of voters are generally carried out long before election day. Those that occur after an incumbent has lost tend to require force.

In weak democracies with strong security sectors, parties that want to maintain their power after losing elections often rely on government forces. After Armenia's 2008 election, the central Election Commission announced that Prime Minister Serzh Sargsyan had won.<sup>30</sup> Suspicious of fraud, protestors took to the streets.<sup>31</sup> Early days of the protest were peaceful, until

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<sup>27</sup> Freedom House, *supra* n. 23.

<sup>28</sup> Nicholas Cheeseman & Brian Klaas, *How to Rig an Election* 24 (2018).

<sup>29</sup> *Id.* at 160, 199; *see also* Kostya Manenkov & Daria Litvinova, *Belarus Poll Workers Describe Fraud in Aug. 9 Election*, AP (Sept. 1, 2020), <http://tinyurl.com/2awmuy6b>.

<sup>30</sup> Org. for Sec. & Coop. Eur., Off. for Democratic Insts. & Hum. Rts., *Post-Election Interim Report: 20 February – 3 March 2008* 1 (2008), <http://tinyurl.com/4k9v7xs2>.

<sup>31</sup> *Id.*

the president deployed the police and armed forces to take “determined and sharp” actions to preserve “stability.”<sup>32</sup> The ensuing violence killed ten people.<sup>33</sup> The unrest provided an excuse for the President to introduce a 20-day state of emergency during which he and the Prime Minister consolidated control.<sup>34</sup>

### C. Other leaders turn to mob violence to retain power.

In less authoritarian contexts, however, leaders often wish to use force to retain power, but seek to maintain plausible deniability. These politicians cultivate violent groups willing to deploy force to achieve the politician’s goals without explicit direction from the politician.<sup>35</sup> These groups may be highly organized paramilitary forces, or euphemistically named “youth wings” of the ruling political party.<sup>36</sup> In Jamaica, politicians have engaged criminal gangs.<sup>37</sup> Vladimir

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<sup>32</sup> *Id.* at 4.

<sup>33</sup> Freedom House, *Freedom in the World 2009*, 43, (Arch Puddington, et al., eds., 2009), <http://tinyurl.com/4djbpdkk>.

<sup>34</sup> *Id.* at 45.

<sup>35</sup> Rachel Kleinfeld & Elena Barham, *Complicit States and the Governing Strategy of Privilege Violence: When Weakness Is Not the Problem* 215, 221-23, 225-26, 21 *Ann. Rev. Pol. Sci.* (2018), <http://tinyurl.com/bdfpmude>.

<sup>36</sup> Sebastian Angzoorokuu Paalo, *Political Party Youth Wings and Political Violence in Sub-Saharan Africa: A Case of Ghana*, 8 *Int’l J. Peace & Dev. Stud.*, no. 1 (2017), <http://tinyurl.com/3rmdesu3>.

<sup>37</sup> Glaister Leslie, *Confronting the Don: The Political Economy of Gang Violence in Jamaica*, *Small Arms Survey*, 12-13 (Sept. 2010), <http://tinyurl.com/rkvkbc6u>.

Putin uses the Night Wolves motorcyclists, whose leader carried the torch in the Sochi Olympics and whose rank and file were among the groups sent to invade Crimea.<sup>38</sup>

In Cote d'Ivoire's 2010 election, after the alteration of election results, the challenger, Alassane Ouattara, held an inauguration ceremony that conflicted with the ceremony of President Gbagbo.<sup>39</sup> The president rallied violent supporters to attack opposition supporters.<sup>40</sup> The latter fought back, and the ensuing unrest killed at least 3,000 Ivorians and forced a million more to flee their homes.<sup>41</sup> While unrest eventually ended, Cote d'Ivoire's democratic experiment did not recover. Future elections were so tilted towards the incumbent party that opposition forces had little chance of winning, and political violence has become an entrenched means of political contestation.<sup>42</sup>

In Venezuela, after winning free and fair elections in 1998 and 2000, Hugo Chavez began organizing

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<sup>38</sup> Joseph V. Micallef, *The Night Wolves: Russian Motorcycle Club or Kremlin Militia?*, Military.com (Sept. 4, 2018), <http://tinyurl.com/2htn3t2x>.

<sup>39</sup> Cooke, *supra* n. 24.

<sup>40</sup> Wairagala Wakabi, *Prosecution Lays Out Evidence in Support of Continuation of Gbagbo's Trial*, Int'l Just. Monitor (Nov. 5, 2018), <http://tinyurl.com/yeyumzx5>.

<sup>41</sup> Hum. Rts. Watch, *Côte d'Ivoire: No Amnesty for Serious Crimes of 2010-11 Crisis* (Aug. 7, 2018), <http://tinyurl.com/zejjmrbu>; Stephany Nebehay, *Nearly One Million Ivorians Uprooted by Conflict: UNHCR*, Reuters (Mar. 25, 2011), <http://tinyurl.com/bd5s2d9c>; Freedom House, *supra* n. 23.

<sup>42</sup> Freedom House, *Freedom in the World 2023: Côte d'Ivoire* (last accessed Jan. 25, 2024), <http://tinyurl.com/26jt9hm5>.

grassroots supporters into “Bolivarian Circles” that were loyal to Chavez himself.<sup>43</sup> In April of 2002, vast numbers of Venezuelans turned out to protest his placing loyalists in charge of a crucial government body.<sup>44</sup> Members of the military refused to fire on the protestors.<sup>45</sup> The Bolivarian Circles came to Chavez’s support and violently routed the protestors, after which the military high command attempted to replace Chavez.<sup>46</sup> However, Chavez sidestepped the attempted coup and regained control.<sup>47</sup> He later renamed the Bolivarian Circles “*colectivos*” and institutionalized them after his landslide election in 2006, providing them with arms.<sup>48</sup> The *colectivos* attacked Chavez’s opponents as Chavez systematically destroyed what remained of Venezuelan democracy.<sup>49</sup>

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<sup>43</sup> Scott Wilson, *Venezuela’s ‘Bolivarian Circles’ Get a Direct Line to President*, Wash. Post, (Dec. 4, 2001), <http://tinyurl.com/4tnbdn3j>; Venezuela Investigative Unit, *The Devolution of State Power: The ‘Colectivos,’* InSight Crime (May 18, 2018), <http://tinyurl.com/56zjwvyk>.

<sup>44</sup> Alex Bellos, *Chavez Rises from Very Peculiar Coup*, Guardian (Apr. 15, 2002), <http://tinyurl.com/4tsmjm4c>.

<sup>45</sup> Press Briefing, Ari Fleischer, White House Press Secretary, *Press Briefing by Ari Fleischer* (Apr. 12, 2002), <http://tinyurl.com/y7crtrm2>.

<sup>46</sup> Scott Wilson, *Venezuelan Military Says Chavez Is Ousted*, Wash. Post (Apr. 12, 2002), <http://tinyurl.com/55y2s3v7>; Venezuela Investigative Unit, *supra* n. 43.

<sup>47</sup> Venezuela Investigative Unit, *supra* n. 43.

<sup>48</sup> *Id.*

<sup>49</sup> *Chávez prepara grupos paramilitares por si pierde las elecciones*, Libertad Digital (Sept. 22, 2012), <http://tinyurl.com/493znr8v>.

In South Africa, former President Jacob Zuma had cultivated a personal militia of military veterans,<sup>50</sup> and his “Radical Economic transformation” (RET) faction of the African National Congress was connected to a variety of organized criminal groups.<sup>51</sup> Zuma was facing a judicial inquiry into corruption that had occurred during his presidency – and having avoided the court for months, had been sentenced by the Constitutional Court to 15 months in prison for his “ongoing assaults on the integrity of the judicial process.”<sup>52</sup> Just after his arrest, the country exploded into eight days of anarchy. Mass looting, arson and unrest killed 300 people.<sup>53</sup> At first, the violence appeared to be a spontaneous outburst of anger from Zuma supporters. But many people knew of the plans ahead of time.<sup>54</sup> The Expert Panel into the July 2021 Civil Unrest coined the term “organized spontaneity” to describe violence that was catalyzed by a pre-planned effort and supplemented by opportunists. They described a political

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<sup>50</sup> Qaanitah Hunter et al., *Eight Days in July: Inside the Zuma Unrest That Set South Africa Alight*, 23-25 (2021).

<sup>51</sup> *How Organised Crime is Blighting South Africa’s Economy*, Economist (Oct. 20, 2022), <http://tinyurl.com/yf2wayvm>.

<sup>52</sup> *Sec’y of Jud. Comm’n of Inquiry into Allegations of State Capture, Corruption & Fraud in the Pub. Sector including Organs of State v. Zuma* [2021] ZACC 18 at 17 para. 30.

<sup>53</sup> Andrew Harding, *South Africa Riots: The Inside Story of Durban’s Week of Anarchy*, BBC (July 28, 2021), <http://tinyurl.com/3hpy9cpf>.

<sup>54</sup> *Report of the Expert Panel into the July 2021 Civil Unrest* 38-39 (Nov. 29, 2021), available at <http://tinyurl.com/22wxzzzw>; see also Pauline Bax, *Riots Reveal South Africa’s Enduring Rifts*, Int’l Crisis Grp. (July 23, 2021), <http://tinyurl.com/3ted3avu>.

faction willing to destroy the country in order to make it ungovernable and force President Ramaphosa to free Zuma, then step down.<sup>55</sup> President Ramaphosa maintained South Africa's democracy, but only through the largest deployment of troops since apartheid.<sup>56</sup> He explained: "the events of the past week were nothing less than a deliberate, coordinated and well-planned attack on our democracy. . . . Using the pretext of a political grievance, those behind these acts have sought to provoke a popular insurrection."<sup>57</sup>

## **II. Trump's actions in the wake of the November 2020 election are alarmingly similar to activities that have destroyed democracies in other countries.**

During and since the 2020 election, Trump's actions have echoed these overseas experiences in alarming ways.

**Refusal to concede power:** On September 23, 2020 a reporter asked President Trump if he would accept a peaceful transfer of power. He replied, "We're going to have to see what happens," and spoke of his concerns regarding ballot fraud.<sup>58</sup> The grave danger to

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<sup>55</sup> *Report of the Expert Panel*, *supra* n. 54, at 38-39.

<sup>56</sup> *South Africa Looting: Government to Deploy 25,000 Troops After Unrest*, BBC (July 15, 2021), <http://tinyurl.com/yxj5dmn3>.

<sup>57</sup> President Cyril Ramaphosa, Update on Security Situation in the Country, South Africa Gov't (July 16, 2021), <http://tinyurl.com/5n8txenj>.

<sup>58</sup> Aamer Madhani & Kevin Freking, *Trump Won't Commit to Peaceful Transfer of Power if He Loses*, Associated Press (Sept. 23, 2020), <http://tinyurl.com/ybavz2uc>.

democracy of an incumbent refusing to concede was clear to other political leaders. Multiple members of Congress felt the need to publicly state that the tradition of peaceful presidential transitions would continue. Senate Majority Leader Mitch McConnell, for instance, wrote, “The winner of the November 3rd election will be inaugurated on January 20<sup>th</sup>. There will be an orderly transition just as there has been every four years since 1792.”<sup>59</sup>

**Pressure to alter the election through bureaucratic means:** Incumbent leaders who wish to retain power after losing an election first try to apply bureaucratic pressure to alter the vote. President Trump’s calls to Wayne County officials in Michigan pressuring them not to certify the results of votes in a geography likely to support his opposing candidate<sup>60</sup> resemble President Gbagbo’s strategy in Cote d’Ivoire. The effort to create multiple slates of electors in the hopes that the confusion would enable loyal Members of Congress to decide the election in his favor is a similar bureaucratic tactic.<sup>61</sup> Trump’s call to the Republican Secretary of State of Georgia explaining, “So look.

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<sup>59</sup> Lisa Mascaro, et al., *Despite Trump Attacks, Both Parties Vow Orderly Election*, Associated Press (Sept. 24, 2020), <http://tinyurl.com/4cj6x4hw>. In fact, the first transfer of power between parties occurred in 1801, when John Adams stepped down and Thomas Jefferson assumed the Presidency.

<sup>60</sup> Craig Mauger, *Trump Recorded Pressuring Wayne County Canvassers Not to Certify 2020 Vote*, Detroit News (Dec. 22, 2023), <http://tinyurl.com/dhhrc2nr>.

<sup>61</sup> H.R. Rep. No. 117-663, Final Report: Select Committee to Investigate the January 6th Attack on the United States Capitol, at 41 (2022) (hereinafter “J6 Report”).



All I want to do is this. I just want to find 11,780 votes, which is one more than we have,”<sup>62</sup> echoes President Lukashenko’s direction to finalize specific percentages of votes in Belarus.

**Exploring the use of state violence:** According to multiple senior security officials, Trump explored using state violence to retain power.<sup>63</sup> The then-Chairman of the Joint Chiefs of Staff, Mark Milley told historians he was concerned that Trump ““was stoking unrest, possibly in hopes of an excuse to invoke the Insurrection Act” to remain in office, the strategy employed in Armenia in 2008.<sup>64</sup> Concerns were heightened when Trump fired senior Pentagon officials days after Biden had been declared the winner, and replaced them with loyalists.<sup>65</sup>

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<sup>62</sup> *Id.* at 263.

<sup>63</sup> Ryan Goodman & Justin Hendrix, *Crisis of Command: The Pentagon, The President, and January 6*, Just Sec. (Dec. 21, 2021), <http://tinyurl.com/57axep3s>. Discussion of the president’s potential use of the Insurrection Act was so widespread that the National Task Force on Election Crises (on which Dr. Kleinfeld serves) drafted a report on the authorities governing troop deployment during the election and post-election season: National Task Force on Election Crises, *Authorities Governing the Deployment of Troops during the Election and Post-Election Season* (Sept. 2020), <http://tinyurl.com/3uus2pms>.

<sup>64</sup> Carol D. Leonnig & Philip Rucker, *I Alone Can Fix It: Donald Trump’s Catastrophic Final Year* 437 (2021).

<sup>65</sup> Robert Burns & Lolita C. Baldor, *Trump Fires Esper As Pentagon Chief After Election Defeat*, Associated Press (Nov. 9, 2020), <http://tinyurl.com/44rhv8wd>; Jack Detsch & Robbie Gramer, *More Top Pentagon Officials Out After Trump Sacks Esper*, Foreign Pol’y (Nov. 10, 2020), <http://tinyurl.com/463ehjad>.

However, the highly professional U.S. military was unwilling to be misused in this manner. On January 3, 2021, all ten living former Secretaries of Defense published an unprecedented joint op-ed in support of a peaceful transfer of power.<sup>66</sup> After January 6, the institution appears to have felt the need to erect further guardrails. On January 13, every member of the serving Joint Chiefs of Staff signed a memo to the entire active-duty force reaffirming that Biden was the rightful president and reminding members of the military that “Any act to disrupt the Constitutional process is not only against our traditions, values, and oath, it is against the law.”<sup>67</sup>

**Cultivating ties to private groups willing to use violence:** President Trump began cultivating relationships with potentially violent groups of loyalists for years prior to the 2020 election. He allowed the Oath Keepers to serve as security for multiple election rallies in 2016 and 2020.<sup>68</sup> The vigilante group Bikers for Trump, provided volunteer security to multiple Trump rallies, and Trump’s head of security

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<sup>66</sup> Ashton Carter et al., *All 10 Living Former Defense Secretaries: Involving the Military in Election Disputes Would Cross Into Dangerous Territory*, Wash. Post (Jan. 3, 2021), <http://ti.nyurl.com/zb592fx5>.

<sup>67</sup> Jim Garamone, *Joint Chiefs Stress Service Members’ Commitment to Constitution*, DOD News (Jan. 13, 2021), <http://ti.nyurl.com/5347wmcj>.

<sup>68</sup> *The Rise in Political Violence in the United States and Damage to Our Democracy: Testimony Before the Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol*, 117th Cong. 12 (2022) (testimony of Rachel Kleinfeld, Senior Fellow, Carnegie Endowment for International Peace), available at <http://ti.nyurl.com/yvnmumxu>.

reportedly embraced Chris Cox, its leader, and conferred with him during a 2016 rally when a reporter was present.<sup>69</sup> As with the Bolivarian Circles in Venezuela, these groups are willing to engage in acts of lawless violence out of personal loyalty to Trump. Cox, the leader of Bikers for Trump, explained at the 2016 Republican National Convention in Cleveland, “I’m anticipating we’ll be doing a victory dance,” but, “if the Republican Party tries to pull off any backroom deals [to prevent Trump’s nomination] . . . our role will change.”<sup>70</sup>

In 2019, a New Mexico County Commissioner named Couy Griffin came to Trump’s attention after starting a group called Cowboys for Trump. Trump called Griffin personally and met with him in the oval office in September 2019.<sup>71</sup> When Griffin posted a video of himself speaking at a New Mexico rally claiming that “I’ve come to a place where I’ve come to the conclusion that the only good Democrat is a dead Democrat,” Trump retweeted this clip, but cut the portion when Griffin backtracked, claiming that he “[doesn’t] say that in a physical sense.”<sup>72</sup>

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<sup>69</sup> Ben Schreckinger, *Meet the Vigilantes Who Patrol Trump’s Rallies*, Politico (Apr. 25 2016), <http://tinyurl.com/2bfpmtxb>.

<sup>70</sup> Nick Carey, *From Bikers to Truckers, Pro-Trump Groups Plan Forceful Presence in Cleveland*, Reuters (Apr. 29, 2016), <http://tinyurl.com/mr269asw>.

<sup>71</sup> Rob Kuznia & Scott Bronstein, *The Cowboy*, CNN (last accessed Jan. 26, 2024), <http://tinyurl.com/2tjwsaue>.

<sup>72</sup> *Id.*

Griffin organized a series of armed Stop the Steal rallies in New Mexico in the fall of 2020.<sup>73</sup> Griffin later took part in a cross-country bus tour where he rallied supporters to the January 6 rally with apocalyptic language, and he took part in the January 6 rally itself.<sup>74</sup> He was later disqualified from holding office under the Fourteenth Amendment.<sup>75</sup>

**Deploying private violence to pressure officials who could alter election results:** The violence that emerged from these vigilante groups follows the pattern of violence used to pressure opponents in weak democracies.

In the 11 weeks between the election and Inauguration Day, organized paramilitary groups at protests grew by 96% compared to the 11 weeks prior.<sup>76</sup> As President Trump made hundreds of claims of election fraud, a fifth of all Stop the Steal rallies nationally came to feature armed or paramilitary actors.<sup>77</sup>

Trump used his supporters' intimations of force to pressure election officials into altering the vote.

Trump spoke to Russell Bowers, Speaker of the Arizona House of Representatives, multiple times in November and December asking him to deliver

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<sup>73</sup> *New Mexico v. Griffin*, No. D-101-CV-202200473, 2022 WL 4295619, at \*5 (N.M. 1st Jud. Dist., Sept. 6, 2022).

<sup>74</sup> Citizens for Resp. & Ethics in Wash., *The Evidence in Support of Couy Griffin's Removal from Office* (Sept. 6 2022), <http://ti.nyurl.com/32khshds>.

<sup>75</sup> *Griffin*, 2022 WL 4295619, at \*25 .

<sup>76</sup> Bridging Divides Initiative, *Report: Election 2020 Political Violence Data and Trends* 10 (last accessed Jan. 25, 2024), <http://ti.nyurl.com/2s3v3hh8>.

<sup>77</sup> *Id.*

Arizona's electors to Trump.<sup>78</sup> After Bowers' home address and personal cell phone were posted online on December 8, demonstrators, some of them armed, protested with bullhorns outside of his family home where his adult daughter lay dying.<sup>79</sup>

In Georgia in November, as two recounts failed to alter Georgia's election results in Trump's favor, Oath Keepers arrived on the street where Secretary of State Brad Raffensperger lived. Earlier that day, their widowed daughter-in-law's home had been broken into.<sup>80</sup> The family went temporarily into hiding.<sup>81</sup> After Raffensperger refused Trump's request to "find" votes, the President tweeted that Raffensperger was unable or unwilling to do anything.<sup>82</sup> A deluge of death threats against Raffensperger and his family followed.<sup>83</sup>

On December 5, Trump spoke to a rally of his supporters and showed them a video of Fulton County's elections director, Richard Barron. He accused Barron and his office of tampering with ballots, after which

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<sup>78</sup> J6 Report, *supra* n. 61, at 286-89.

<sup>79</sup> H.R. Select Comm. To Investigate the Jan. 6<sup>th</sup> Attack on the U.S. Capitol, Interview of Russell Bowers, at 52-55 (June 19, 2022), <http://tinyurl.com/2p8y46a7>.

<sup>80</sup> Steve Fennessy & Jess Mador, *Georgia Today: Behind Relentless Death Threats Against Raffenspergers*, *Georgia Election Officials*, GPB News (June 18, 2021), <http://tinyurl.com/yes2euxm>

<sup>81</sup> *Id.*

<sup>82</sup> Donald J. Trump (@realDonaldTrump), X (Jan. 3, 2021, 8:57 AM), <http://tinyurl.com/2uhjvamt>.

<sup>83</sup> Linda So, *Special Report: Trump-Inspired Death Threats Are Terrorizing Election Workers*, Reuters (June 11, 2021), <http://tinyurl.com/3yhjt47h>.

Barron was inundated with threats, one detailed enough to warrant a police detail outside his home.<sup>84</sup>

On January 6, Oath Keepers and the Proud Boys (with whom they appear to have coordinated), formed two of the core groups of armed instigators who would jumpstart the violence that day. The Proud Boys did not attend Trump's speech at the Ellipse but gathered separately and marched to the Capitol hours earlier, and one of their members would be the first to breach the building.<sup>85</sup> Oath Keepers pre-stocked munitions, money, and armaments in a hotel just across state lines and created a stack formation to enter the capitol with purpose and preparation.<sup>86</sup>

Like the “organised spontaneity” of Jacob Zuma’s insurrection in South Africa, such pre-organized groups are provocateurs who can precipitate more spontaneous violence from others in a crowd who may not have begun with that intent. But the planning was clear to violence researchers who monitor online discussions within far-right communities. On December 21, violence researcher Arie Kovler predicted: “On January 6, armed Trumpist militias will be rallying in DC, at Trump's orders. It's highly likely that they'll try to storm the Capitol after it certifies Joe Biden's win.”<sup>87</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> J6 Report, *supra* n. 61, at 644-45, 653.

<sup>86</sup> Ryan Lucas, *Where the Jan. 6 Insurrection Investigation Stands, One Year Later*, NPR (Jan. 6, 2022), <http://tinyurl.com/2e8wtwbs>.

<sup>87</sup> Aaron Blake, *Who Could Have Predicted the Capitol Riot? Plenty of People – Including Trump Allies*, Wash. Post (Jan. 28, 2021), <http://tinyurl.com/yc87vwew>.

Like other politicians with ties to violent followers, Trump does not directly order violence – but his audience nonetheless receives what they believe to be a clear understanding of his intent. On December 19 when Trump tweeted: “Big protest in D.C. on January 6th. Be there, will be wild!”<sup>88</sup> the online community, TheDonald “immediately reacted with posts like: ‘Well, shit. We’ve got marching orders, bois’ and ‘We have been waiting for Trump to say the word.’” To that, another replied, “Then bring the guns we shall,” and they went on to describe plans for attacking the Capitol and arresting or even killing legislators.<sup>89</sup> As one of Trump’s supporters explained, “He can’t exactly openly tell you to revolt. This is the closest he’ll ever get.”<sup>90</sup>

### **III. Trump continues to undermine the rule of law and threaten our governing institutions.**

The violence of January 6 did not shock President Trump into altering his behavior to avoid rousing his followers to violence. Instead, his continuing messages to supporters evoke a technique researchers call

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<sup>88</sup> Donald J. Trump (@realDonaldTrump), X (Dec. 19, 2020, 1:42 AM), <http://tinyurl.com/5dvpnj84>.

<sup>89</sup> Susan Benesch, *The Insidious Creep of Violent Rhetoric*, Noema (Mar. 4, 2021), <http://tinyurl.com/yvy54ecs>.

<sup>90</sup> *Id.*

stochastic terrorism.<sup>91</sup> Stochastic violence occurs when a figure with a large following publicly demonizes a target, knowing that it is impossible to predict who among the followers will act violently, but almost a certain probability that someone will aim for the desired mark.

Trump has repeatedly targeted individuals who uphold the rule of law against his wishes, particularly fellow Republicans. Al Schmidt, the only Republican on Philadelphia’s election commission, described to the January 6 Select Committee, that “Prior to [Trump’s tweet] the threats were pretty general in nature . . . . after the president tweeted at me by name . . . the threats became much more specific, much more graphic, and included not just me by name, but included members of my family, by name, ages, our address, pictures of our home – just every bit of detail you can imagine.”<sup>92</sup> These threats led Schmidt’s

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<sup>91</sup> King Henry II’s exhortation, “Will no one rid me of this meddlesome priest?” which led to Archbishop Thomas Beckett’s murder, may be the first use of this technique. Molly Amman & J. Reid Meloy, *Stochastic Terrorism: A Linguistic and Psychological Analysis*, 15 *Perspectives on Terrorism*, no. 5, 2, 2 (Oct. 2021), <http://tinyurl.com/5e5xn73w>.

<sup>92</sup> *Second Hearing on Investigation of January 6 Attack on the U.S. Capitol before the Select Comm. to Investigate the Jan. 6th Attack on the U.S. Capitol*, 117th Cong. 02:45 – 03:27 (2022) (testimony of Al Schmidt, Commissioner, Philadelphia City), YouTube (June 13, 2022), <http://tinyurl.com/5hyrtcf4>.



family to temporarily evacuate his home and receive a personal security detail.<sup>93</sup>

Representative Liz Cheney (R-WY), one of two Republicans who served on the House Select Committee to Investigate the January 6th Attack on the United States Capitol, faced villainizing Trump tweets on after she recommended that he face criminal charges in July 2022.<sup>94</sup> She was barely able to campaign for reelection in her own state that fall because of threats.<sup>95</sup>

Trump has used the same technique to threaten governing institutions. On August 8, 2023, he published a long statement and a post to Truth Social describing how his Mar-A-Lago home was “under siege, raided, and occupied by a large group of FBI agents”. A Trump follower named Ricky Shiffer replied to the message the following day, and later tried to breach

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<sup>93</sup> Linda So & Jason Szep, *U.S. Election Workers Get Little Help from Law Enforcement As Terror Threats Mount*, Reuters (Sept. 8, 2021), <http://tinyurl.com/43v842am>; Brennan Ctr. for Just. & Bipartisan Pol’y Ctr., *Election Officials Under Attack: How to Protect Administrators and Safeguard Democracy* 3 (June 16, 2021), <http://tinyurl.com/29av7hhr>.

<sup>94</sup> Donald J. Trump (@realDonaldTrump), Truth Social (July 4, 2022, 9:28 AM), <http://tinyurl.com/nh5m3hwy>; Mark Moore, *Trump rips ‘despicable’ Liz Cheney after she suggests Jan. 6 charges for ex-president*, NY Post (July 4, 2022), <http://tinyurl.com/4eakez23>.

<sup>95</sup> Leo Wolfson, *By Her Voting Record, Liz Cheney Is a Staunch Conservative but Her Rift With Trump May Be Too Much to Overcome*, Cowboy State Daily (Aug. 1, 2022), <http://tinyurl.com/4s5h4wyy>; Leo Wolfson, *Cheney Will Not Be Attending Wyo GOP Convention Because Eathorne Is “Oath Keeper”*, Cowboy State Daily (May 5, 2022), <http://tinyurl.com/ymc7u737>.

the FBI's Cincinnati office armed with an assault rifle and body armor, exchanging gunfire with police.<sup>96</sup>

On January 10, 2024, at 5:19 pm, Trump posted to Truth Social about the "Trump Hating Judge" in his New York civil case.<sup>97</sup> Twelve hours later, at 5:30 am on January 11, police responded to a hoax bomb threat called in at Judge Arthur Engoron's home in a swatting incident intended to bring a mass police response.<sup>98</sup>

Trump posted an angry message about Department of Justice Special Counsel Jack Smith to Truth Social at 5:32 pm on Christmas Eve, 2023.<sup>99</sup> On Christmas Day, Smith was swatted at his family's home.<sup>100</sup>

The day after Maine's Secretary of State, Shenna Bellows, issued a decision removing Trump from the state ballot, he posted on Truth Social with a link to

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<sup>96</sup> David Klepper, *Trump's Angry Words Spur Warnings of Real Violence*, Associated Press (Aug. 16, 2022), <http://tinyurl.com/4yac2vmz>.

<sup>97</sup> Donald J. Trump (@realDonaldTrump), Truth Social (Jan. 10, 2024, 5:19 PM), <http://tinyurl.com/bde3aw6r>.

<sup>98</sup> Erica Orden, *Trump Lashes Out at Judge in Closing Arguments of Civil Fraud Trial*, Politico (Jan. 11, 2024), <http://tinyurl.com/467p6rcr>.

<sup>99</sup> Donald J. Trump (@realDonaldTrump), Truth Social (Dec. 24, 2023, 5:32 PM), <http://tinyurl.com/5bptjwef>.

<sup>100</sup> Luke Barr, *Special Counsel Jack Smith Targeted with Swatting Call in Late December: Sources*, ABC News (Jan. 9, 2024), <http://tinyurl.com/mu4j9u9>.

her biographical page on the Maine Secretary of State website. Later that day, her home was swatted.<sup>101</sup>

Trump's willingness to continue stoking violence bodes ill for America's future. In countries such as Venezuela, Hungary, and Nicaragua, leaders willing to circumvent democracy who are forced from power and return were much more dangerous the second time. These events are made more troubling by statements from the former President indicating a willingness to undermine the rule of law directly if he regains power, such as his Veterans Day pledge to "root out the communists, Marxists, fascists, and the radical left thugs that live like vermin within the confines of our country that lie and steal and cheat on elections," and his intimations that former Chairman Milley deserves to be executed.<sup>102</sup>

#### **IV. U.S. democracy is being corroded by the normalization of political violence.**

The damage done to U.S. democracy from Trump's actions on and in the weeks prior to January 6 did not end that day. The Pandora's box he opened continues to damage institutions key to U.S. democracy due to Trump's choices to propagate the belief that American elections are intentionally being manipulated and to

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<sup>101</sup> Steffi Feldman, *Maine Secretary of State Says Home Was "Swatted" after Removing Trump from Presidential Ballot*, Tag24 (Dec. 31, 2023), <http://tinyurl.com/2kjb84ts>.

<sup>102</sup> Jonathan Lehrfeld, *Milley Says He'll Ensure Family Safety after Trump's Execution Remark*, MilitaryTimes (Sept. 28, 2023), <http://tinyurl.com/ytbvnadz>; Donald J. Trump, *Former President Trump Campaigns in Claremont, New Hampshire* 1:47:34 – 1:47:48, CSPAN (Nov. 11, 2023), <http://tinyurl.com/43csjkt2>.

convince his followers that threats and intimidation are a normal part of U.S. political discourse.

**A. Our electoral administration is buckling under threats.**

The officials who administrate our elections were almost unknown to the public prior to the 2020 election; threats against them were so uncommon that no one bothered to record them. But Trump’s claims that the election was being – or had been – stolen have made such threats so common that in 2021, the Department of Justice created a special unit to address them. To date, the unit has received over 1,000 reported threats, 11% of which they consider prosecutable “true threats.”<sup>103</sup> Threats peaked during the 2022 election, and sixty percent of the threats were made against election officials in the “battleground” states of Pennsylvania, Georgia, Michigan, Wisconsin, and Arizona.<sup>104</sup> A 2022 survey by the Brennan Center suggests this number is an undercount: one in six election officials claim to have been threatened, half of them in person rather than simply online or by phone, but the majority had not been reported to law enforcement.<sup>105</sup>

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<sup>103</sup> Peter Eisler et al., *Anatomy of a Death Threat*, Reuters (Dec. 30, 2021), <http://tinyurl.com/yeybed29>; Press Release, U.S. Dep’t of Justice, *Readout of Election Threats Task Force Briefing with Election Officials and Workers* (Aug. 1, 2022), <http://tinyurl.com/5n7hb8m4>.

<sup>104</sup> Joel Day et al., *Threats and Harassment Against Local Officials Dataset 20*, Bridging Divides Initiative & ADL (Oct 20, 2022), <http://tinyurl.com/4dhhbhtys>.

<sup>105</sup> Brennan Ctr. For J., *Local Election Officials Survey 6-7* (Mar. 2022), <http://tinyurl.com/2s46fz93>.

These threats have led to an exodus that may affect the future quality of US elections. One study found that in 11 Western states, nearly 40% of chief election officials have left their positions since 2020.<sup>106</sup> While some turnover occurs after every election, this level is astronomical. In Arizona, which faced particular accusations of fraud, 80% of counties have a new chief local election official since 2020, and 98% of residents will have their elections run by someone new to the job since 2020.<sup>107</sup> Nearly one in three election workers knows of a colleague who has left because of fears for their safety, intimidation, or increased threats.<sup>108</sup> The executive director of the National Association of State Election Directors testified to the Senate Judiciary Committee that “We are all braced for the worst. Until recently, this was not a field you went into thinking it could cost you your life.”<sup>109</sup>

America’s elections are extraordinarily decentralized and rely on workers to master local information across 13,000 jurisdictions.<sup>110</sup> The work involves cybersecurity and computer savvy to correctly handle computerized ballots and hacking threats. The

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<sup>106</sup> Michael Beckel et al., Issue One, *The High Cost of Turnover 2* (Sept. 2023), <http://tinyurl.com/4afu2y82>.

<sup>107</sup> *Id.* at 4.

<sup>108</sup> Brennan Ctr. For J., *Local Election Officials Survey*, *supra* n. 105, at 3.

<sup>109</sup> Alexa Corse, *Election Officials Plead for More Protection from Threats, Harassment*, Wall St. J. (Aug. 3, 2022), <http://tinyurl.com/yc634cz3>.

<sup>110</sup> Robert A. Pastor, *The United States Administration of Elections: Decentralized, Pre-modern, and Contented*, Ace Project (2014), <http://tinyurl.com/bdenw7p9>.

median election official has served in her role for 12 years – in the largest districts, most have served 15 to 20 years.<sup>111</sup> In the 161 counties in the West which lost chief election officials, the average experience dropped from 8 years to 1.<sup>112</sup> As Trump continues to spread fears of fraud, and as threats from his followers cause professionals to quit, new hires will be challenged to quickly master the role. Elections are likely to face more human errors in an environment of partisan re-primination, which will further erode trust in our system.

**B. Rising threats of violence are affecting defenders of democratic institutions regardless of political affiliation and may reduce the willingness of some Americans to engage in public service.**

Compared to other Republicans and Democrats, Trump supporters who believe the 2020 election was fraudulent are more likely to justify political violence.<sup>113</sup> They also admit to a greater willingness to threaten or intimidate a person to achieve a political

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<sup>111</sup> Paul Gronke et al., Democracy Fund, *Understanding the Career Journeys of Today's Local Election Officials and Anticipating Tomorrow's Potential Shortage* (Apr. 20, 2021), <http://ti.nyurl.com/56ah5y6z>.

<sup>112</sup> Beckel et al, *supra* n. 106.

<sup>113</sup> Garen J. Wintemute et al., *MAGA Republicans' views of American democracy and society and support for political violence in the United States: Findings from a nationwide population-representative survey*, PLoS One 15-19 (2024).

objective.<sup>114</sup> There are also signs that the left is growing more willing to engage in political violence, suggesting that the country could witness the kind of tit for tat political reprisal that can be devastating for democracies.<sup>115</sup>

In 2023, a non-election year when the American people tend to be less politically engaged, nearly 1 in 5 local elected politicians had experienced a threat in the previous 3 months,<sup>116</sup> with Republicans and Democrats reporting equal numbers of threats.<sup>117</sup> The problem is even more severe in large cities.<sup>118</sup> In San Diego, 75% of county officials reported being threatened or harassed.<sup>119</sup> Moderates received the greatest number of threats (which often come from more extreme co-partisans, particularly for Republicans). More than half of those who have been threatened have considered leaving public office as a result.<sup>120</sup>

Threats may disproportionately dissuade particular groups from public service. For instance, of the individuals Trump's followers harassed, parents of young children such as Al Schmidt of Philadelphia, as

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<sup>114</sup> *Id.*

<sup>115</sup> *See id.* at 21 (willingness to use violence against those who don't share political beliefs).

<sup>116</sup> CivicPulse, *Threats and Harassment in Local Government: Initial Benchmarking Report*, 4 (Sept. 25, 2023), available at <http://tinyurl.com/4dvw6zsh>.

<sup>117</sup> *Id.* at 9.

<sup>118</sup> *Id.* at 14.

<sup>119</sup> Rachel Locke, "How Scared Are You?", Univ. San Diego, at 11 (2023), <http://tinyurl.com/5cef5kz8>.

<sup>120</sup> *Id.* at 5.

well as Representatives Adam Kinzinger and Anthony Gonzalez (two of ten Republicans who voted to impeach Trump for his role in January 6), were particularly likely to decide not to run for reelection, citing the threats against their children as important to that decision.<sup>121</sup> Women and minorities consistently receive more threats than men and may also be more moved to act on them. Minority officials report double the concern about a future attack compared to other local officeholders.<sup>122</sup> And in San Diego County, nearly twice as many women as men were considering leaving their jobs due to threats.<sup>123</sup>

Yet nobody is immune. When Stephen Richer, Maricopa County's Recorder, tried to explain that Arizona's election had been carried out fairly, fellow Republicans screamed, grabbed him, and banged on his windshield as he tried to leave the parking lot.<sup>124</sup> While his office was provided with an armed police presence, multiple staff members quit immediately

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<sup>121</sup> ABC 7 Chi., *US Rep. Kinzinger Reveals Over a Dozen Threatening Messages Sent To Republican Amid Jan. 6 Hearings* (July 6, 2022), <http://tinyurl.com/bdpxbxre>; Henry J. Gomez, *Threats Linger Over Members of Congress As a Trump Adversary Calls It Quits*, NBC News (Sept. 23, 2021, 2:16 PM), <http://tinyurl.com/427xws2w>.

<sup>122</sup> CivicPulse & Bridging Divides Initiative, *Local Government Threats and Harassment Benchmarking Report* 13 (Nov. 30, 2023), <http://tinyurl.com/ybrtpwh3>.

<sup>123</sup> Locke, *supra* n. 119, at 5.

<sup>124</sup> Zach Beauchamp, *How Death Threats Get Republicans to Fall in Line Behind Trump*, Vox (Jan. 2, 2024, 7:00 AM), <http://tinyurl.com/mw9aavak>.



after such confrontations.<sup>125</sup> He has testified in three federal cases against people who threatened to kill him.<sup>126</sup> This may be why so many Republicans who have been outspoken in their support for the rule of law have left public service. As Republican Senator Mitt Romney explained, “it takes only one really disturbed person”.<sup>127</sup>

## V. Courts must be guardians of democracy.

### A. Courts internationally have played an essential role in restoring the guardrails of their democracies.

Democracies do not always die after violent insurrections. The attack on Brazil’s institutions of government on January 8, 2022 looked similar to the U.S. events of January 6, 2021. Jair Bolsonaro spent months claiming that the election would be marred by rigging.<sup>128</sup> When he lost his election, he refused to concede.<sup>129</sup> Tens of thousands of his supporters protested for weeks, culminating in their ransacking the

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Economist, *Might Jair Bolsonaro Try to Steal Brazil’s Election?* (July 14, 2022), <http://tinyurl.com/bdfzv4wt>; Diane Jeantet & Carla Bridi, *EXPLAINER: Bolsonaro Knocks Brazil’s Voting System*, AP News (Sept. 6, 2022, 1:45 PM), <http://tinyurl.com/mb7js8x5>.

<sup>129</sup> Ricardo Brito et al., *Brazil’s Bolsonaro Does Not Concede to Lula, But Authorizes Transition*, Reuters (Nov. 1, 2022, 9:33 PM), <http://tinyurl.com/3rym88dk>.

Congress, Supreme Court, and Presidential Palace.<sup>130</sup> But many Brazilians remembered and drew parallels with the 1964 coup that had snuffed their country's freedom, a freedom that was only restored in 1985.<sup>131</sup> The Supreme Court barred Jair Bolsonaro from running for future office for eight years, and democracy has steadied itself.<sup>132</sup>

As in Brazil, it has fallen to the courts to uphold the guardrails of democracy in other countries where leaders threatened the constitutional order. In June of 2023, Mexico's Supreme Court stopped President Andrés Manuel López Obrador from enacting an electoral overhaul that would have destroyed the country's independent election commission.<sup>133</sup> In Colombia, the Supreme Court prevented former President Álvaro Uribe from running for an unconstitutional third term in office.<sup>134</sup> In Israel, the Supreme Court

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<sup>130</sup> Adriano Machado, *Bolsonaro Backers Ransack Brazil Presidential Palace, Congress, Supreme Court*, Reuters (Jan. 8, 2023, 11:17 PM), <http://tinyurl.com/4vafnpe8>.

<sup>131</sup> Flavia Chacon, *On the Eve of Brazil's Military Coup Anniversary, Democracy Faces Historical Challenges* (Lucas Peresin trans., Mar. 31, 2023, 2:31 PM), <http://tinyurl.com/yyz8sx2v>.

<sup>132</sup> Economist, *Jair Bolsonaro Is Barred from Office For Eight Years* (June 30, 2023), <http://tinyurl.com/2ssyakay>; Oliver Stuenkel, *Brazil's political risk plummets amid January 8 reaction*, *The Brazilian Report* (Aug. 15, 2023, 9:33 AM), <http://tinyurl.com/bdf72swm>.

<sup>133</sup> Diego A. Zambrano et al., *How Latin America's Judges Are Defending Democracy*, 35 *J. Democracy*, no. 1, 118, 118 (2024) <http://tinyurl.com/yc2b6j83>.

<sup>134</sup> Tom Ginsburg, *Democratic Backsliding and the Rule of Law*, 44 *Ohio N. Univ. L. Rev.* 351, 359 (2018), <http://tinyurl.com/yd5jwrpn>.

rejected the first part of a judicial overhaul package that would have provided the Prime Minister with outsized powers, in a country with no constitution and no separately elected legislature to check executive overreach.<sup>135</sup> Courts have been similarly essential to returning slipping democracies onto steadier democratic ground in Italy, South Korea, Argentina, and other countries.<sup>136</sup>

This brief is not submitted lightly. There are grave issues to consider in removing a presidential candidate from deliberation by the voters. Taking a popular candidate out of consideration can breed distrust in the system. And yet, this concern is equally valid if the court fails to act: distrust in the system is precisely what has been fueled by the insurrection and claims of fraud perpetuated by the former President.

In countries where courts have avoided their role as an equal, independent branch with the power to override Executives on issues of constitutionality, democracy continues to slip away. So does the independence of the courts themselves.<sup>137</sup> In India, where a respected and independent court once presided, the judiciary's refusal to safeguard the constitution has allowed massive democratic erosion and has

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<sup>135</sup> Josef Federman & Melanie Lidman, *Israel's Supreme Court Overturns a Key Component of Netanyahu's Polarizing Judicial Overhaul*, AP News (Jan. 1, 2024, 2:54 PM), <http://tinyurl.com/yk6dwsth>.

<sup>136</sup> Rachel Kleinfeld & David Solimini, *What Comes Next? Lessons for the Recovery of Liberal Democracy*, Democracy Fund 4 (Oct. 2018), <http://tinyurl.com/2p8fbfdm>; Ginsburg, *supra* n. 134, at 353.

<sup>137</sup> Ginsburg, *supra* n. 134, at 367-368.

undermined judicial independence.<sup>138</sup> Previously the world’s largest democracy, India was downgraded by Freedom House in 2020 to only “partly free”.<sup>139</sup>

**B. Our Founders recognized the gravity of the threat to the Republic, and contemporary custodians of our Republic should as well.**

The ancient democratic tradition studied so closely by our Founding Fathers understood the demagogue to be the greatest threat to popular sovereignty. In the first Federalist paper, Alexander Hamilton recognized the threat “of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues and ending tyrants.”<sup>140</sup>

As Aristotle wrote: “The demagogues make the decrees of the people override the laws . . . . Such a democracy is fairly open to the objection that it is not a constitution at all; for where the laws have no authority, there is no constitution.”<sup>141</sup>

Following the bloodiest war our country has ever fought, our Constitution was amended so that no

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<sup>138</sup> Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14 L. & Ethics Hum. Rights, no. 1, <http://tinyurl.com/2p8hm6vu>.

<sup>139</sup> Sarah Repucci, *Freedom in the World 2020: A Leaderless Struggle for Democracy*, Freedom House (last accessed Jan. 25, 2024), <http://tinyurl.com/22dah2cn>.

<sup>140</sup> The Federalist No. 1 (Alexander Hamilton).

<sup>141</sup> Aristotle, *The Basic Works of Aristotle* 1213 (Richard McKeon ed., trans., Random House New York, 1941).

person shall hold any office if he had previously taken an oath as an officer of the United States to support the Constitution of the United States and subsequently engaged in insurrection against the same. In doing so, American leaders with firsthand experience of the fragility of democracy tried to give our country and our courts tools to avoid re-living their experience.

The American people rely on the United States Supreme Court to serve as the guardian of the Constitution. It is needed to uphold this role today.

Respectfully submitted.

JOHN VAIL  
*Counsel of Record*  
John Vail Law PLLC  
1025 Thomas Jefferson  
St., NW  
Suite 810  
Washington DC 20007  
(202) 589-1300  
john@johnvaillaw.com

*Counsel for Amici Curiae*

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