

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 30, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-5254

DONALD J. TRUMP
Plaintiff-Appellant,

v.

BENNIE G. THOMPSON, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
(No. 21-cv-2769-TSC)

**BRIEF FOR AMICI STATES UNITED DEMOCRACY CENTER AND
FORMER FEDERAL, STATE, AND LOCAL OFFICIALS
IN SUPPORT OF DEFENDANTS-APPELLEES**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

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B. Rulings

References to the rulings at issue appear in Appellant's Opening Brief.

C. Related Cases

This case was not previously before this Court or any other court, and amici are not aware of any related cases in this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae States United Democracy Center states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Date: November 22, 2021

Respectfully Submitted,

/s/ Norman L. Eisen

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CERTIFICATE REGARDING SEPARATE BRIEFING

Pursuant to Circuit Rule 29(d), counsel for amici curiae certifies that this separate brief is necessary to provide amici's unique perspective, which is not found in either the parties' briefs or any other amicus brief.

Amici include former federal, state, and local officials who had direct responsibility for administering elections and for protecting public safety surrounding elections. Their experience and expertise position them to explain, *inter alia*, why the forces that gave rise to the January 6 insurrection represent an ongoing threat to free and fair elections nationwide. They can attest that Congress' obtaining the documents at issue in this case is important to the public interest, because state and local officials need Congress to impose accountability and craft legislative solutions to armor our democracy against an existential threat.

Date: November 22, 2021

Respectfully Submitted,

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STATEMENT OF INTEREST¹

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. Elections are run by the states, and the state and local officials who oversee them have unique power and responsibility to defend strong voting laws, 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 brief biographies are listed in the addendum 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.

¹ Pursuant to Federal Rule of Appellate Procedure Rule 29(c), amici certify that no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. Defendants-Appellees consent, and Plaintiff-Appellant does not object, to the filing of this brief.

This case goes to the heart of amici's interests. It is former President Donald Trump's attempt to frustrate accountability by invoking a privilege that belongs not to him but 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.² The January 6 assault on our democracy disrupted the culmination of extraordinary work by state and local officials. Amici want to see Congress impose accountability and legislate protections so that nothing like January 6 ever happens again.

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>.

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 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. Pl.’s Mot. Prelim. Inj. 13, ECF No. 5-1. Exactly one week later, the Associated Press reported that 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.³ 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.⁴ On November 12—with Trump’s appeal already lodged in this Court—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.⁵

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, 6:19 PM), <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, 10:35 PM), <https://tinyurl.com/5n57hh9f>.

January 6 is not over. The officials who administer our elections are still under threat. Our future elections, including a national midterm election less than 12 months away, are vulnerable.

The House of Representatives' Select Committee to Investigate the January 6th 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 attack on our democracy that manifested on January 6 and recommend legislation to protect and improve our elections systems and our other mechanisms for the peaceful transfer of power. President Joseph Biden has waived executive privilege, clearing the path for disclosing the records, in the interest of transparency and accountability.

Now, seeking to overturn the will of both the legislative and executive branches, Trump is trying to unilaterally prevent the Archives from releasing those records. He arrogates to himself the executive privilege of the presidency—as though there were no space between the man and the office that he used to occupy. The District Court properly denied Trump's request for a preliminary injunction. This Court should affirm as expeditiously as possible. Any undue delay in disclosure is an impediment to the Select Committee's urgent work of defending our democracy.

Amici, who support and endorse in full the arguments advanced by the Defendants-Appellees, speak in particular to aspects of Trump’s appeal that implicate the interests of state and local election and law enforcement officials. Amici urge 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 federal, state, and local officials—know that former officeholders in our democratic system have no authority to invoke their old powers 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. Lifetime authority is a badge of royalty that is inimical to the American idea. In keeping with that critically important democratic norm, our fundamentally antimonarchical Constitution withheld any powers from former presidents. Trump asks this Court to embrace a principle abhorrent to our Constitution and our democracy. That is why he can neither prevail on the merits nor demonstrate irreparable harm.⁶

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

⁶ 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).

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.

ARGUMENT

I. AN EX-PRESIDENT CANNOT EXERCISE EXECUTIVE POWERS IN DEFIANCE OF THE INCUMBENT AND CONGRESS

A. Trump Cannot Show a Likelihood of Success on the Merits Because His Attempt to Assert Executive Privilege Is Contrary to Our Antimonarchical Constitutional Order

In arguing that he is likely to succeed on the merits, Trump relies on the proposition that he can assert executive privilege “in perpetuity,” J.A. at 189, even over the waiver of the incumbent president. But—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.” J.A. at 194.

“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.”⁷ It is a non sequitur for Trump to assert that “it is always equitable and in the public interest to enforce the Constitution.” Appellant’s Br. 52. Defendants-Appellees have ably shown that there is no authority—including in the Presidential Records Act, 44 U.S.C. §§ 2201–2209, and *Nixon v. GSA*, 433 U.S. 425 (1977)—allowing Trump to assert the privilege over President Biden’s waiver. And there is certainly no such authority in our Constitution.

⁷ Laurent Sacharoff, *Former Presidents and Executive Privilege*, 88 TEX. L. REV. 301, 302 (2009).

To the contrary: As former officials who themselves swore an oath to uphold the Constitution, amici are acutely aware that the Framers rejected 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*, 2 Black 635, 668, 17 L.Ed. 459 (1863), 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.”⁸ 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.⁹ 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.¹⁰

⁸ Sacharoff, *supra* note 7, at 322.

⁹ *Id.*

¹⁰ Louise Burnham Dunbar, A STUDY OF “MONARCHICAL” TENDENCIES IN THE UNITED STATES, FROM 1776 TO 1801 40-49 (1922).

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.”¹¹ Beyond those explicit requirements, the job of the presidency inherently requires the president to communicate regularly, both formally and informally, with Congress. Trump proposes that a former president can block the incumbent from fulfilling those solemn constitutional duties. Trump 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 “in his capacity as the 45th President of the United States.” J.A. at 6. 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—as the District Court correctly noted, J.A. at 213—he is not the right person to assert the presidency’s interests. 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

¹¹ Sacharoff, *supra* note 7, at 329.

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. But on appeal, Trump forgets that this suit is supposed to be about protecting the presidency. Instead, he foregrounds his personal interest. “The limited interest the Committee may have in immediately obtaining the requested records,” Trump’s opening brief wrongly contends, “pales in comparison to President Trump’s interest in securing judicial review before *he* suffers irreparable harm.” Appellant’s Br. 53 (emphasis added).

This is either about Trump or it is about the presidency. Either way, though, he cannot win: Executive privilege does not exist to 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 any 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 dispositively in favor of prompt disclosure. A ruling in Trump’s favor would substantially harm the public, both by frustrating expeditious accountability for the attempt to overthrow our government and by preventing Congress from developing legislative fixes to protect our democracy.

In his opening brief to this Court, Trump downplays the urgency of the moment: “Defendants would suffer no harm by delaying production while the parties litigate the request’s validity. There will not be another Presidential transition for more than three years.” Appellant’s Br. 52-53. 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 12 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 and threats of violence; the baseless insistence that the election would be tainted by fraud; and an effort to turn the federal

government into a partisan tool for retaining power. 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.¹² 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 his rallies.¹³ When violence—predictably—ensued, he crowed: “That's what we need more of.”¹⁴ 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.”¹⁵ When a pickup truck caravan of armed Trump

¹² See, e.g., Rebecca Beitsch & Maggie Miller, *Trump's Call for Poll Watchers Sparks Fears of Voter Intimidation*, THE HILL (Sept. 30, 2020, 5:36 PM), <https://tinyurl.com/br9rv8rd> (describing Trump camp's call for an “army” of poll watchers).

¹³ Daniel White, *Donald Trump Tells Crowd to 'Knock the Crap Out Of' Hecklers*, TIME (Feb. 1, 2016, 3:51 PM), <https://tinyurl.com/845tysnc>.

¹⁴ 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>.

¹⁵ Justin Wise, *Trump Suggests That It Could Get 'Very Bad' If Military, Police, Biker Supporters Play 'Tough'*, THE HILL (Mar. 14, 2019, 3:18 PM), <https://tinyurl.com/xtmx9h4c>.

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.¹⁶

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.”¹⁷ This was a theme. Trump wanted 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.¹⁸ Trump would lead in the original returns, the

¹⁶ Katie Shepherd, *Trump Cheers Supporters Who Swamped a Biden Bus in Texas*, WASH. POST (Nov. 2, 2020), <https://wapo.st/3kbgp5j>.

¹⁷ 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, 7:11 PM), <https://tinyurl.com/yeff49tr>.

¹⁸ 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, 11:51 PM), <https://tinyurl.com/39k94v65>.

narrative went, but Democrats would somehow “steal” the election as ballots were counted.¹⁹ 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.²⁰

It was not just Trump and the likes of his truck caravan either. As the election grew near, it began to seem that federal government resources were being twisted to partisan ends. The Department of Justice, in particular, weighed in on the election in frightening and precedent-breaking ways. For nearly forty years prior to 2020, DOJ policy had been to refrain from conducting “overt investigations . . . until after the outcome of the election allegedly affected by the fraud is certified.”²¹ But in 2020, Trump’s DOJ broke with that policy, loudly announcing new investigations that looked to be aimed at intimidating voters.²² At the same time, U.S. Attorney General

¹⁹ Adam Kelsey, *Trump Adviser Predicts Sunbelt Sweep, Misleads on Post-election Counting*, ABC NEWS (Nov. 1, 2020, 4:15 PM), <https://tinyurl.com/32b2sx48>.

²⁰ DFR LAB, JUST SECURITY, #STOPTHESTEAL: TIMELINE OF SOCIAL MEDIA AND EXTREMIST ACTIVITIES LEADING TO 1/6 INSURRECTION (Feb. 10, 2021), <https://tinyurl.com/2x4834f4>.

²¹ U.S. DEP’T OF JUST., FEDERAL PROSECUTION OF ELECTIONS OFFENSES 9 (Dec. 2017).

²² *See* VOTER PROTECTION PROGRAM, MEMORANDUM: FEDERAL INTERFERENCE IN THE 2020 ELECTION (Oct. 14, 2020).

William Barr initially endorsed Trump’s fictional fraud narrative, echoing Trump’s false claims that mail-in voting was susceptible to tampering and counterfeit.²³

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’d promised, Trump immediately and baselessly began to complain of a “rigged” election.²⁴ His false allegations 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.²⁵ 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

²³ Jane C. Timm, *Fact Check: Echoing Trump, Barr Misleads on Voter Fraud to Attack Expanded Vote-by-Mail*, NBC NEWS (Sept. 19, 2020, 5:09 AM), <https://tinyurl.com/zvbk2eca>.

²⁴ See William Cummings et al., *By the numbers: President Donald Trump’s Failed Efforts to Overturn the Election*, USA TODAY, (Jan. 6, 2021) <https://bit.ly/3rxbYDH> (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, 8:47 PM), <https://tinyurl.com/y7yddwum>.

²⁵ See, e.g., Juana Summers, *Trump Push to Invalidate Votes in Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020, 6:26 AM), <https://tinyurl.com/y2a4ryw7>; *Pearson v. Kemp*, No. 1:20-cv-4809-TCB, 2020 U.S. Dist. LEXIS 226348 (N.D. Ga. Nov. 29, 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).

suspension of the public vote. Again and again Trump and his allies alleged, without ever proving, that somehow the election was stolen from Trump.²⁶

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.²⁷ In one of the most frightening episodes, Michigan Secretary of State Jocelyn Benson's house was besieged by armed "Election Truthers" while she tried to decorate for the holidays.²⁸

Meanwhile, Trump and his closest advisors whipped up the mob, and secretly and even openly 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

²⁶ Cummings, *supra* note 24 (tallying 62 lawsuits). *And see, e.g., Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 381 (3d Cir. 2020) (affirming dismissal of election challenge with the reminder that "[f]ree, fair elections are the lifeblood of our democracy. Charges of unfairness are serious. But calling an election unfair does not make it so. Charges require specific allegations and then proof. We have neither here.").

²⁷ *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> ("Secretary of State Brad Raffensperger said he backs aide Gabriel Sterling's push for President Donald Trump to back off on his rhetoric on Georgia and his general election loss.").

²⁸ Katie Shepherd, *Armed Protesters Alleging Voter Fraud Surrounded the Home of Michigan's Secretary of State*, WASH. POST (Dec. 7, 2020, 4:54 AM), <https://wapo.st/3yXBRip>.

White House to urge them to legislatively override the popular vote.²⁹ 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.³⁰

As former state and local officials, or federal ones who have worked closely with the states, amici understand the 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 from coast to coast. It is devastating. 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 just one year away.

²⁹ 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, 9:00 PM), <https://tinyurl.com/j59nb6zu>.

³⁰ Aruna Viswanatha et al., *White House Forced Georgia U.S. Attorney to Resign*, WALL ST. J. (Jan. 9, 2021, 9:07 PM), <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>.

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—its violence, its false allegations of fraud and theft, its meritless legal machinations, and its attempts to co-opt ostensibly nonpartisan mechanisms of governance—did not emerge *ex nihilo*. And its aftermath has been characterized by the same destructive strategies. For instance: The frivolous legal challenges of the immediate post-election period have devolved into endless, meritless election “audits,” each vainly seeking a scrap of evidence that the election was somehow tainted.³¹

Perhaps most troublingly, the attacks on amici’s former colleagues—state and local election officials—have not stopped.³² To the contrary: They are sickeningly prevalent and deeply corrosive to worker morale and effectiveness.³³

Since the storming of the Capitol, partisans have continued to aim death threats at officials all around the country—Republican and Democratic, municipal and state—who dare to administer and count a fair vote. On January 7, the day after

³¹ See JONATHAN BYDLAK, ET AL., BRENNAN CTR. FOR JUST., PARTISAN ELECTION REVIEW EFFORTS IN FIVE STATES (July 8, 2021), <https://tinyurl.com/3vcb3v94>.

³² Linda So, *Trump-Inspired Death Threats Are Terrorizing Election Workers*, REUTERS, (June 11, 2021), <https://reut.rs/36D3CRa>.

³³ Fredreka Schouten & Kelly Mena, *Falsehoods and Death Threats Haunt Local Election Workers Weeks After Capitol Siege*, CNN (13 Feb. 2021, 9:01 AM), <https://tinyurl.com/3zb7wm9a>.

the insurrection failed to derail the will of the people, workers at the Republican Nevada Secretary of State's office were subjected to vicious 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."³⁴ 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."³⁵ In Philadelphia, Republican Commissioner Al Schmidt absorbed anti-Semitic threats that drove his family into hiding.³⁶ 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."³⁷ As of August this year, Milwaukee's election director Clare Woodall-Vogg had received 150 violent threats.³⁸

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

³⁴ 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>.

³⁵ So, *supra* note 32.

³⁶ BRENNAN CTR. FOR JUST. & BIPARTISAN POLICY CTR., ELECTION OFFICIALS UNDER ATTACK 4 (June 16, 2021), <https://tinyurl.com/yy93pubv>.

³⁷ 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>.

³⁸ Drew Griffin, *'We're coming for you': Election Director Shares Threatening Voicemail*, CNN (Aug. 27, 2021), <https://tinyurl.com/5839du7w>.

and his family. Election workers—from local volunteers to senior administrators—continue enduring regular harassing phone calls and emails.” Earlier this year, a poll found that “one 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.”³⁹

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 country’s worst abuse after President Biden’s upset win in her state, fears that the threats are contributing to high employee turnover⁴⁰—and that the results could damage election administration: “An exodus of experienced election workers would have ripple effects that undermine the ability to efficiently run trustworthy elections...that could mean longer wait times, closure of polling places, a rise of voter intimidation and harassment at the polls and widespread loss of confidence in elections.”⁴¹ 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

³⁹ BRENNAN CTR., *supra* note 36, at 4.

⁴⁰ Andrew Oxford, *Secretary of State Warns of Threats to Election Workers*, ARIZ. PUB. MEDIA NEWS (Oct. 6, 2021), <https://tinyurl.com/ukwp5z2r>.

⁴¹ Cooper, *supra* note 3.

of time because the stress, after a while, it's hard to ignore it all the time.”⁴² He should know: Mr. Barron himself announced on November 3 of this year that he will resign, “as the county continues to face attacks, conspiracy theories and a state-run performance review following the 2020 election.”⁴³

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

On November 1 of this year—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.”⁴⁴ 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.⁴⁵ The Big Lie is a part of our public discourse now. Fully 30% of

⁴² Sam Levine, *‘It’s Been a Barrage Every Day’: US Election Workers Face Threats and Harassment*, THE GUARDIAN (Nov. 1, 2021), <https://tinyurl.com/jpjsxv9u3>.

⁴³ Stephen Fowler, *Fulton Elections Director Rick Barron to Resign*, GPB NEWS (November 4, 2021 4:34 PM), <https://tinyurl.com/4rmzr83z>.

⁴⁴ Laura Santhanam, *As Election Day nears, Most U.S. Adults Say Future of Democracy Is Under Threat*, PBS NEWS HOUR (Nov. 1, 2021, 5:00 AM), <https://tinyurl.com/5mn6en5k>.

⁴⁵ Nicholas Reimann, *Conspiracy Theories Swirl After Democrat Phil Murphy Reelected New Jersey Governor—But There’s No Evidence of Widespread Fraud*, FORBES (Nov. 4, 2021, 12:15 PM EDT), <https://tinyurl.com/er5dzt2v> (“Following the narrow reelection victory of New Jersey Gov. Phil Murphy (D), conspiracy theories about voter fraud began to fly in many online right-wing circles...”).

Americans believe it, and the constantly repeated lies and conspiracy theories have bred deep mistrust in our ability to run free and fair elections.⁴⁶

The ongoing threat matters urgently because we are less than one 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 our democratic process as we look ahead to the 2022 elections and beyond,” announced a group including former Homeland Security Secretary Michael Chertoff, former DHS Secretary Janet Napolitano, former Defense Secretary William Cohen, and former Director of National Intelligence James Clapper.⁴⁷ 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.⁴⁸

⁴⁶ PRRI, *COMPETING VISIONS OF AMERICA: FINDINGS FROM THE 2021 AMERICAN VALUES SURVEY* 35 (Oct. 2021) (“Around three in ten Americans (31%) say that the 2020 presidential election was stolen from Donald Trump.”).

⁴⁷ Maggie Miller, *Former Top Officials Warn Democracy in ‘Jeopardy’ without Congressional Action on Election Security*, THE HILL (Nov. 10, 2021), <https://tinyurl.com/x93n4d8>.

⁴⁸ 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

As former officials, including state and local officials, amici know that their national security colleagues are right. Enjoining 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 Public Interest Weighs Heavily Against an Injunction in Light of Trump’s Demonstrated 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 Trump 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.” Op. at 38. In this respect, 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

a wave of misinformation and disinformation surrounding last year’s presidential election.”).

discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.

United States v. Rumely, 345 U.S. 41, 43 (1953) (quoting Woodrow Wilson, *Congressional Government: A Study in American Politics*, 303 (1913)). January 6 already is approaching its one-year anniversary. With the 2022 and 2024 federal elections on the horizon, the American people have a right 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.”⁴⁹

Trump and his allies repeatedly have sought 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 this Court was scheduled to hear the matter *en banc*, the parties reached an agreement

⁴⁹ 11 WRIGHT & MILLER, *FED. PRAC. & PROC. CIV.*, § 2904 (3d ed. 2021).

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 delay 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 ("Mazars"), 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, 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 has broad investigatory powers and can investigate the executive branch and the president himself. 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*, 2021 WL 360283 (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.⁵⁰ If that or anything like it happened here, it would do irreparable harm to our republic.

CONCLUSION

On October 13 of this year, only five days before 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.”⁵¹ 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 resolved, 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.

⁵⁰ 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, Obama had 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). Tens of thousands of additional pages were produced. The House lawsuit to try to recover the records was ultimately settled in April 2019, *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), after control of the House had shifted to Democrats.

⁵¹ 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>.

For all the reasons set forth in this brief and in the briefs of Defendants-Appellees, this Court should swiftly affirm the District Court's denial of a preliminary injunction. The Select Committee must be allowed speedily to continue with its urgent, important work of promoting accountability and protecting our democracy.

Date: November 22, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief of Amici Curiae in Support of Defendants–Appellees complies with the type-volume limitation, typeface requirements, and type style requirements of Fed. R. App. P. 32(a) because it contains 6,275 words excluding exempted parts and has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using the word-processing system Microsoft Word for Office 365.

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

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NAMES AND BIOGRAPHIES OF INDIVIDUAL AMICI**

Gregory A. Brower served as Assistant Director and Deputy General Counsel of the Federal Bureau of Investigation from 2016 to 2018; U.S. Attorney for the District of Nevada from 2008 to 2009; and Inspector General of the U.S. Government Publishing Office from 2004 to 2006.

Steve Bullock served as Attorney General of Montana from 2009 to 2013; as Governor of Montana from 2013 to 2021; and as chair of the National Governors Association from 2018 to 2019. He worked as an attorney in Montana's Secretary of State's office and Attorney General's office and in private practice before assuming either office.

Tom Coleman is a former eight-term member of Congress from Missouri. Prior to his congressional service he was an Assistant Attorney General of Missouri and twice elected to the Missouri House of Representatives. He has served as an adjunct professor at the Robert F. Wagner Graduate School of Public Service at New York University and as an adjunct professor at American University. He is past Chairman of the Board of Trustees of the U.S. Capitol Historical Society and is Trustee Emeritus of the Harry S. Truman Scholarship Foundation.

Jack Conway is the former two-term Attorney General of Kentucky from 2008 to 2016, who served on the Executive Committee of the National Association of Attorneys General, as co-chair of Consumer Protection for that same organization, and as chair of the Democratic Attorneys General Association. He is a trial attorney and current partner at Dolt Thompson Shepherd & Conway; a former board member of the Kentucky Center for African American Heritage; and spent six years as legal counsel to former Kentucky Governor Paul Patton.

Frankie Sue Del Papa served as Secretary of State of Nevada from 1987 to 1991 and as Attorney General of Nevada from 1991 to 2003. She also served as an elected member of the Board of Regents for the Nevada System of Higher Education.

John J. Farmer, Jr. has been an Assistant U.S. Attorney, New Jersey Attorney General, Senior Counsel to the 9/11 Commission, Dean of Rutgers Law School, and now serves as Director of the Eagleton Institute of Politics. He has also served on New Jersey's Executive Commission on Ethical Standards, Advisory Committee on Judicial Conduct, and the State Commission of Investigations.

Trey Grayson is an attorney with the law firm Frost Brown Todd and the former Kentucky Secretary of State from 2004 to 2011. During that time, he served as President of the National Association of Secretaries of State and Chair of the Republican Association of Secretaries of State. He also served as the Director of Harvard's Institute of Politics from 2011-2014.

Jim Hood served as the Third Judicial District Attorney of North Mississippi from 1991 to 1999; as President of the National Association of Attorneys General from 2014 to 2015; and as Attorney General of Mississippi from 2004 to 2020.

Dr. Rachel Kleinfeld is a senior fellow at the Carnegie Endowment for International Peace. She is a global expert on democracies facing violence, polarization, poor governance, and other forms of democratic decline. She advises the U.S. government and other allied nations, is a board member of Freedom House, and serves on the National Task Force on Election Crises.

Jahna Lindemuth served as Attorney General for the state of Alaska from 2016 to 2018, during which time she served on the National Association of Attorneys General executive board and the Conference of Western States Attorneys General executive board. Before serving as Attorney General, General Lindemuth was in private practice for 18 years at an international law firm, representing clients in complex commercial disputes and serving as the Anchorage office's managing partner for eight years. She has returned to private practice at Cashion Gilmore & Lindemuth, LLC.

Patricia Madrid served two terms as Attorney General of New Mexico, from 1999 to 2007. She has also served as chairperson of the Conference of Western Attorneys General and as Chair of the Board of the Mexican American Legal Defense and Education Fund.

Tom Rath served as Assistant Attorney General of New Hampshire from 1972 to 1976; as Deputy Attorney General of New Hampshire from 1976 to 1978; as Attorney General of New Hampshire from 1978 to 1980; as Director of the Legal Services Corporation under President George W. Bush; and as senior national advisor to the presidential campaigns of Howard Baker, Robert Dole, Lamar Alexander, Mitt Romney and George W. Bush. He has been a delegate to nine Republican National Conventions and was the Republican Party National Committeeman for New Hampshire for seven years.

Sarah R. Saldaña served as the U.S. Attorney for the Northern District of Texas (Dallas) from 2011 to 2014 and was appointed to the Attorney General's Advisory Committee during her tenure. Since 2004, she had served as an Assistant U.S. Attorney in the same office, both as a line prosecutor, including service as the District's Election Officer, and as Deputy Criminal Chief of the Major Fraud and Public Corruption unit. Most recently, she served as Director of U.S. Immigration and Customs Enforcement from 2014 to 2017.

Christine Todd Whitman is the co-chair of the States United Democracy Center and President of The Whitman Strategy Group. Previously, she served as the Governor of New Jersey from 1994 to 2001, and as the Administrator of the Environmental Protection Agency from 2001 to 2003.

William F. Weld served as the U.S. Attorney for Massachusetts from 1981 to 1986; as the Assistant U.S. Attorney General in charge of the Criminal Division from 1986 to 1988; and as Governor of Massachusetts from 1991 until 1997.