The Honorable John Roberts
Chief Justice
United States Supreme Court
One First Street, NE
Washington, DC 20543

June 8, 2022

Dear Chief Justice Roberts:

The Supreme Court today faces a crisis from the loss of public confidence.

We write to urge the Supreme Court to address this grave problem by adopting a Code of Ethics to guide the behavior of the Justices. We also urge the Court to strengthen its internal procedures to apply the existing statutory requirement for a Justice to recuse himself or herself from participating in any case that presents a conflict of interest, or the appearance of a conflict.

A Gallup poll last September public approval of the Court at its lowest point since the poll was started. Fifty-three percent expressed disapproval of the Court and only 40 percent approved. A Monmouth University poll last month found a similar majority disapproved of the Court with only 38 percent expressing approval.

Compounding this serious public credibility problem for the Court, the recent unauthorized release of a draft opinion in the *Dobbs v. Jackson Women's Health Organization* case has further damaged the institutional integrity of the Court.

Repeatedly over the past year, Justices of the Court, including Justice Clarence Thomas, have felt compelled to reassure Americans that the work of the Court is non-political, and that Justices are not "a bunch of partisan hacks."

Unfortunately, however, Justice Thomas himself has done serious damage to the Court and to its credibility by his refusal to separate his official duties from the active participation of his spouse, Ginni Thomas, in former President Donald Trump's baseless attempt to overturn the 2020 presidential election. This damage will grow even worse if Justice Thomas continues to participate in cases that may come before the Court relating to Trump's attempted presidential coup and to the January 6, 2021 attack on the Capitol.

As you know, the House January 6th Select Committee is investigating former President Trump's attempted presidential coup – the first by a sitting U.S. President against our own government in the nation's history – and the insurrectionist attack on the Capitol – the first since the War of 1812. A federal district court judge, David Carter, has already concluded that these activities likely involved criminal conduct on the part of former President Trump and others associated with these efforts. The U.S. Department of Justice is also investigating.

Documents produced to the House Committee show that Ginni Thomas was deeply involved in efforts to overturn the results of the 2020 presidential election. As described by *The New York Times*: "Ms. Thomas actively supported and participated at the highest levels in schemes to overturn the election."

In the days following the election, Ginni Thomas was in frequent contact with White House Chief of Staff Mark Meadows, urging him via text to "stand firm" to stop "the greatest Heist of our History."

In a text message to Meadows on November 5, 2020, Ginni Thomas repeated some of the more extreme and outlandish post-election conspiracy theories, telling Meadows that "[w]atermarked ballots in over 12 states have been part of a huge Trump & military white hat sting operation in 12 key battleground states." Ginni Thomas also told Meadows that "Biden crime family & ballot fraud co-conspirators […] are being arrested & detained for ballot fraud right now & over coming days & will be living in barges off GITMO to face military tribunals for sedition."

Other documents show that Ginni Thomas directly lobbied two Arizona state legislators, including the speaker of the state House, to urge them to overturn the results of the popular vote in the state and then award the state's electoral votes to former President Trump. At a time when lawyers for Trump were invoking the so-called "independent state legislature theory" – a legal argument that would permit state legislatures to choose presidential electors notwithstanding the popular vote in a state – Ginni Thomas sent an email to the speaker of the Arizona House and another state legislator urging them to "do your constitutional duty."

Ginni Thomas also participated in efforts to undermine the House investigation into the January 6 insurrection at the Capitol by co-signing a letter calling for Representatives Liz Cheney (R-WY) and Adam Kinzinger (R-IL) to be expelled from the House Republican caucus because they had agreed to participate in the House inquiry.

In these circumstances Justice Thomas never should have participated in a case before the Supreme Court related to these events. Yet, in *Trump v. Thompson*, 595 U.S. ___ (2022), Justice Thomas cast the sole vote to block the January 6 Committee's access to certain presidential records possessed by the National Archives concerning the post-election attempt to overturn the presidential election.

It belies reality to think that Justice Thomas was entirely unaware of his wife's active involvement in efforts to overturn the 2020 presidential election. He also knew that the documents at issue in the *Trump* case related to the investigation of the attempted presidential coup – and therefore potentially to his wife's activities. Under these circumstances, Justice Thomas had a serious conflict of interest and even more so, the appearance of a conflict, and he should have recused himself from the case.

New York University Law Professor Stephen Gillers, a recognized expert on legal ethics, has said, "I think Ginni Thomas is behaving horribly, and she's hurt the Supreme Court and the administration of justice. It's reprehensible."

Gillers noted that the existing recusal standard is "an appearance test," adding, "[i]t doesn't *require* an actual conflict. The reason we use an appearance test is because we say the appearance of justice is as important as the fact of justice itself." With regard to Ginni Thomas's post-election communications with Meadows, Gillers stated: "Ginni has now crossed a line. […] Clarence Thomas cannot sit on any matter involving the election, the invasion of the Capitol, or the work of the January 6 Committee."

Given the apparent resistance of Justice Thomas to take the necessary steps to protect the public credibility and institutional integrity of the Court, we call on you to take appropriate public steps to make clear that Supreme Court Justices must recuse themselves in cases where their participation would create an appearance of a conflict of interest.

The Judicial Conference has long promulgated a Code of Judicial Conduct to govern the behavior of federal judges. Canon 2 of the Code requires judges to "avoid impropriety and the appearance of impropriety" in all activities. Canon 3 requires a judge to disqualify himself or herself in a proceeding "in which the judge's impartiality might reasonably be questioned," including instances in which the judge's spouse has an "interest that could be substantially affected by the outcome of the proceeding."

Although the Code of Conduct does not formally apply to the Justices of the Supreme Court, you recognized, in your *2011 Year-End Report on the Federal Judiciary*, that the Justices are subject to the recusal requirements of Section 455 of Title 28.

Like the Code, it requires recusal where the spouse of a judge has an "interest that could be substantially affected by the outcome" of the proceeding. 28 U.S. Code § 455(b)(4). In your *2011 Year-End Report*, you wrote that "the limits of Congress's power to require recusal [for Justices] have never been tested," but that, as with statutory financial disclosure and gift reporting requirements which the Justices do follow, they also "follow the same general principles respecting recusal as other federal judges." Report at 7. You also wrote that the Justices each decide "whether recusal is warranted under Section 455." *Id.* at 8.

You noted that Section 455 imposes "a general principle, that a judge shall recuse in any case in which the judge's impartiality might reasonably be questioned." *Id.* (emphasis added). You further stated: "That objective standard focuses the recusal inquiry on the perspective of a reasonable person who is knowledgeable about the legal process and familiar with the relevant facts." *Id.* at 7.

Applying this "objective" and "reasonable person" standard, it is clear that Justice Thomas improperly failed to recuse himself from participating in the decision in *Trump v. Thompson*. The fact that the case potentially involved Ginni Thomas's own communications with White House officials relating to the 2020 election would cause any "reasonable person" to question whether Justice Thomas could be fair and impartial in deciding a case in which his wife's reputational interests and potentially improper activities were at stake.

The fact that Justice Thomas did not recuse himself in the *Thompson* case indicates that, unless persuaded otherwise, he will continue to participate in future cases that may come before the Court and that similarly involve the efforts to overturn the 2020 election results.

The public documents showing that Ginni Thomas was personally involved in these efforts, that she worked directly with both White House and state legislative officials to deny the presidency to Joe Biden, and that she then tried to impede the House investigation of the insurrection, make clear that any "reasonable person" would seriously question whether Justice Thomas could be publicly credible in participating in cases related to the 2020 coup attempt and the January 6 attack on the Capitol, or the investigation of that attack.

At a time when the Supreme Court has disapproval ratings similar to the two political branches of our government, Justice Thomas's participation in a case dealing with an attempted presidential coup in which his wife is a highly controversial political actor only reinforces the public's perception that the Court is a political, not a judicial, institution – the very result that you, Justice Thomas, and other Justices have sought to dispel.

Safeguards to provide public disclosure of a Justice's recusal-related considerations, and consultation with other Justices as a check on potential abuse of discretion, are necessary to help ensure that the recusal standards in Section 455 are correctly applied by the Justices and in a publicly credible way.

The Supreme Court should adopt internal procedures to manage recusal issues more rigorously than the current system of leaving the matter to the unfettered and unchecked discretion of each individual Justice. The Court's failure to address this problem is bound to lead to other instances that will have the effect of undermining the public credibility of the Court.

Accordingly, we respectfully request that the Court adopt a Code of Conduct and strengthen its internal procedures for applying the existing statutory conflict-of-interest standards for a Justice to recuse himself or herself from a case pending before the Court.

Thank you for your consideration of our views.

Sincerely,

Fred Wertheimer
President, Democracy 21

Former Amb. Norman Eisen

Karen Hobert Flynn
President, Common Cause