No. 21-1442

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KEVIN O'ROURKE, *et al.*,
Plaintiffs-Appellants,
v.

DOMINION VOTING SYSTEMS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado, No. 20-cv-3747
Honorable N. Reid Neureiter, Magistrate Judge

ANSWER BRIEF ON BEHALF OF GOVERNOR GRETCHEN WHITMER, SECRETARY OF STATE JOCELYN BENSON, GOVERNOR TOM WOLF, AND FORMER SECRETARY OF THE COMMONWEALTH KATHY BOOCKVAR

Oral Argument is Not Requested

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PRIOR OR RELATED APPEALS

Plaintiffs-appellants previously appealed the district court's order dismissing their action for lack of jurisdiction. O'Rourke, *et al*. v. Dominion Voting Systems, Inc., *et al.*, No. 21-1161. That appeal is pending.

Plaintiffs-appellants also prematurely appealed the district court's order sanctioning plaintiffs' counsel. *See* O'Rourke, *et al*. v. Dominion Voting Systems, Inc., *et al.*, No. 21-1394. That appeal was voluntarily dismissed.

INTRODUCTION

This case alleged that four governors—one a member of the Republican Party—as well as Meta (formerly Facebook), Dominion Voting Services, the nonprofit Center for Tech and Civic Life, and up to 10,000 unknown individuals conspired to interfere with the 2020 presidential election by changing voting laws, allowing illegal votes to be counted, altering votes, suppressing speech, and funding election administration. App. Vol. 1 at 20. Even putting that outlandish allegation aside, this case demanded the imposition of sanctions.

First, this action was thoroughly frivolous. It was utterly devoid of any discernible basis for subjecting the Governor and Secretary of State of Michigan and Pennsylvania, respectively, to jurisdiction in Colorado. Moreover, it alleged that the supposed injuries giving rise to plaintiffs' Article III standing—their unease about the 2020 presidential election—were shared by every one of the United States' roughly 160 million registered voters. The self-evidently abstract and generalized injuries could not have been more obviously inadequate to establishing plaintiffs' standing, and controlling precedent foreclosed each effort counsel made to avoid foundational tenets of standing doctrine.

Second, the particular allegations against Michigan Governor Gretchen Whitmer, Michigan Secretary of State Jocelyn Benson, Pennsylvania Governor Tom Wolf, and former Pennsylvania Secretary of the Commonwealth Kathy Boockvar—that each violated or modified state law during the 2020 election—misrepresented the relevant state laws. Those fundamental misrepresentations displayed, at best, that counsel filed this action without bothering to investigate the truth of their allegations. But at worst, the pleadings communicate that plaintiffs' counsel likely knew they were making false allegations.

The record thus amply supports that plaintiffs' counsel brought this case in bad faith, and that every action taken after filing the complaint unreasonably extended the litigation. The district court therefore did not abuse its discretion ordering sanctions against plaintiffs' counsel. That order should be affirmed.

STATEMENT OF THE ISSUES

Whether the district court abused its discretion by sanctioning attorneys pursuant to its inherent authority and 28 U.S.C. § 1927 who:

1. Sued in Colorado the Governors and Secretaries of State of Michigan and Pennsylvania for conduct that took place in, and was directed at, Michigan or Pennsylvania;
2. Filed a putative class action on behalf of every single registered voter in the country without any plausible argument that any plaintiff had suffered a concrete or particularized injury sufficient for Article III standing; and
3. Made demonstrably false statements about government officials' administration of the 2020 presidential election.

STATEMENT OF THE CASE

I. Litigation Over the 2020 Election

Michigan and Pennsylvania securely and lawfully administered their respective 2020 presidential elections. Millions of each state's citizens voted, and in each state President Biden was legally certified as the winner.

Individuals dissatisfied with the election's lawful results, however, bombarded each state with meritless litigation. A range of parties—

from the former president's campaign, to federal and state representatives, to other states, to private individuals—challenged countless aspects of each state's election. Those parties' allegations run the gamut—from unfounded claims of widespread fraud to unsupported assertions that officials improperly modified state election law. Some sought relief as significant as enjoining certification of each state's presidential election.

With trivial exception, no party won any relief from any court.[1] Characteristic of the judicial response to the cascade of litigation, one

[1] The exception concerned how much time after Election Day first-time Pennsylvania voters who voted by mail had to supply missing identification. Order, *Donald J. Trump for President v. Boockvar*, 602 M.D. 2020 (Pa. Commw. Ct. Nov. 12, 2020).

Otherwise, for litigation from Michigan, see, *e.g.*, *Texas v. Pennsylvania*, 141 S.Ct. 1230 (Mem) (2020); *Wisconsin Voters Alliance v. Pence,* 514 F. Supp. 3d 117 (D.D.C. 2021); *King v. Whitmer*, 505 F. Supp. 3d 720 (E.D. Mich. 2020); *Johnson v. Benson*, 951 N.W.2d 310 (Mich. 2020); *Davis v. Sec'y of State*, 963 N.W.2d 653 (Mich. Ct. App. 2020).

For litigation from Pennsylvania, see, *e.g., Texas v. Pennsylvania*, 141 S.Ct. 1230 (Mem) (2020); *Bognet v. Sec'y Commonwealth of Pennsylvania,* 980 F.3d 336 (3d Cir. 2020); *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020); *Metcalfe v. Wolf*, 636 M.D. 2020, 2020 WL 7241120 (Pa. Commw. Ct. Dec. 9, 2020) (unpublished); *Kelly v. Commonwealth*, 240 A.3d 1255 (Pa. 2020); *In re Canvass of Absentee & Mail-in Ballots of*

circuit court, while affirming an order dismissing a case that hoped to enjoin certification of Pennsylvania's presidential election results, wrote, "Free, 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." *Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377, 381 (3d Cir. 2020).

Most notably, Texas presented the Supreme Court with a bill of complaint replete with false allegations, and asked the Supreme Court to stop certification of Michigan's and Pennsylvania's election results (and those of two other states) based on those misrepresentations. *See* Bill of Complaint at 39-40, *Texas v. Pennsylvania*, No. 22O155 (U.S. Dec. 7, 2020). The Supreme Court swiftly denied Texas' motion for leave to file the complaint because Texas had no "judicially cognizable interest in the manner in which another State conducts its elections." *Texas v. Pennsylvania*, 141 S.Ct. 1230 (Mem) (2020).

November 3, 2020 General Election, 241 A.3d 1058 (Pa. 2020); *In re Canvassing Observation*, 241 A.3d 339 (Pa. 2020); *In re November 3, 2020 General Election*, 240 A.3d 591 (Pa. 2020).

II. The Original Complaint

After most of this litigation concluded, plaintiffs' counsel filed their original complaint, alleging, without any supporting facts, that the 2020 presidential election was overtaken by a vast conspiracy to favor President Biden, hatched by the governors of four states, Facebook, Dominion Voting Services, the Center for Tech and Civic Life, and thousands of unknown co-conspirators. App. Vol. 1 at 20, 40, 66, 82-83, 86, 90. Michigan Governor Gretchen Whitmer, Michigan Secretary of State Jocelyn Benson, Pennsylvania Governor Tom Wolf, and former Pennsylvania Secretary of the Commonwealth Kathy Boockvar were all named as defendants. App. Vol. 1 at 23.[2]

The defendants allegedly executed their conspiracy to influence the election through "a coordinated effort to, among other things, change voting laws without legislative approval, use unreliable voting machines, alter votes through an illegitimate adjudication process, provide illegal methods of voting, count illegal votes, suppress the

[2] Georgia Governor Brian Kemp, Georgia Secretary of State Brad Raffensperger, Wisconsin Governor Tony Evers, and members of the Wisconsin Election Commission also were named as defendants. The Georgia defendants did not seek sanctions after being voluntarily dismissed. The Wisconsin defendants were never served.

speech of opposing voices, disproportionally and privately fund only certain municipalities and counties, and other methods, all prohibited by the Constitution." App. Vol. 1 at 20.

The supposed conspiracy, the complaint alleged, equally injured "every registered voter in the country." App. Vol. 1 at 83; *accord* App. Vol. 1 at 34, 40, 82, 86. Accordingly, the complaint was styled as a putative class action on behalf of roughly 160 million registered voters. App. Vol. 1 at 20, 99. Nothing in the complaint even attempted to establish activity on the part of the Michigan Governor or Secretary, or the Pennsylvania Governor or Secretary, directed at Colorado.

Indeed, the allegations about the four government defendants were copied extensively from earlier cases—specifically Texas' complaint in its failed Supreme Court action—to describe various ways each Governor and Secretary supposedly had violated or modified state law while administering the 2020 presidential election. App. Vol. 1 at 41-46, 61-66.

The complaint sought, among other things, a "nominal" damage award of $160 billion, an injunction that restrained the defendants "from any further unconstitutional behavior" and remedied "the ongoing

effects of Defendants' unconstitutional conduct," and a declaration that the defendants' actions were "unconstitutional and ultra vires, thereby making them legal nullities." App. Vol. 1 at 100-01.

III. Motions to Dismiss and Proposed Amended Complaint

Plaintiffs' counsel staggered service of the various defendants, serving Dominion and Facebook not long after filing the complaint. Those entities promptly sought dismissal for, among other reasons, plaintiffs' clear lack of injury sufficient for Article III standing. App. Vol. 2 at 255-58, 274-76.

The Michigan and Pennsylvania defendants were not served until after the initial motions to dismiss had been filed. Those government defendants then filed their own motions to dismiss, arguing, among other things, that none was subject to jurisdiction in Colorado, App. Vol. 4 at 798-800; App. Vol. 6 at 1175-77, that no plaintiff had pleaded a constitutionally cognizable injury, App. Vol. 4 at 800-03; App. Vol. 6 at 1178-80, and that core allegations about ways in which the government defendants had modified state election law misrepresented the relevant state law, App. Vol. 4 at 796-97; App. Vol. 6 at 1172-74.

As the various motions to dismiss were being filed, the district court held a status conference during which plaintiffs' counsel announced an intention to amend the complaint. App. Vol. 4 at 768-69. After learning of that plan, the district court asked plaintiffs' counsel how the amended complaint would address the absence of Article III standing raised in the motions to dismiss that already had been filed. App. Vol. 4 at 772-74. Plaintiffs' counsel responded that the amended complaint would bring new claims, App. Vol. 4 at 774, but still would be on behalf of "a class of similarly situated people who all were registered voters across the country" and would again allege that the election somehow violated the rights of "every voter," App. Vol. 4 at 773.

Soon after the status conference, plaintiffs' counsel sought leave to file an amended complaint.

The proposed amended complaint again would have alleged "[t]he 2020 Presidential election was unconstitutionally influenced by a well-funded cabal of powerful people . . . who worked together behind the scenes to influence perceptions, change rules and laws, steer media coverage and control the flow of information." App. Vol. 5 at 895.

Plaintiffs' putative class remained "all registered voters who were eligible to cast a ballot in the 2020 election for President and Vice President." App. Vol. 5 at 920. Consistent with that sprawling class, the proposed amended complaint still alleged that defendants' allegedly illegal conduct equally injured every voter in the country. App. Vol. 5 at 938, 974-75, 977. There remained nothing in the proposed amended complaint that connected Michigan's or Pennsylvania's officials to Colorado.

Factually, the proposed amended complaint repeated allegations that the government defendants violated or modified state law while administering the 2020 election. App. Vol. 5 at 945-53, 958-65.

The proposed amended complaint once more sought damages for the putative class, as well as various forms of injunctive relief including an injunction remedying "the ongoing effects of Defendants' unconstitutional conduct." App. Vol. 5 at 1005.

The Michigan and Pennsylvania defendants opposed plaintiffs' motion for leave to amend because amendment would have been futile. App. Vol. 6 at 1235-40, 1253-61.

IV. Plaintiffs' Responses

Plaintiffs' counsel answered the government defendants' motions to dismiss and oppositions to the motion for leave to amend with a series of confused, unresponsive, and irrelevant arguments.

First, counsel argued, without explaining its relevance, that government officials may be—and had been in this case—sued in their personal capacity. App. Vol. 6 at 1379-80; App. Vol. 7 at 1462.

Second, counsel argued that the Michigan and Pennsylvania defendants were subject to jurisdiction in Colorado because each had certified their own state's presidential election results. App. Vol. 6 at 1382-83, 1406-07.

Third, counsel argued that there was jurisdiction in Colorado over the government defendants because the private defendants have business in Colorado. App. Vol. 6 at 1383, 1407-08, 1427-28; App. Vol. 7 at 1466.

Fourth, counsel argued that plaintiffs had standing because a violation of constitutional rights is an injury that may be remedied by nominal damages, and the rights at issue here related to the presidential election, but said nothing about the complete absence of

any particularized injury and the dispositive case law cited in every opposing brief. App. Vol. 5 at 881-83; App. Vol. 6 at 1384-86, 1408-10, 1429-30; App. Vol. 7 at 1466-68.

Fifth, counsel argued that, with respect to Pennsylvania, it did not matter whether the original complaint misrepresented Pennsylvania law because the proposed amended complaint would challenge the constitutionality of the relevant Pennsylvania election laws. App. Vol. 6 at 1388-89.

V. The Case Is Dismissed

A few days after plaintiffs' counsel had sought leave to amend the complaint, the Pennsylvania defendants served counsel with a motion for sanctions under Federal Rule of Civil Procedure 11. App. Vol. 8 at 1735. The day before the Pennsylvania defendants could have moved for sanctions under Rule 11(c)(2), plaintiffs' counsel announced their intention to dismiss the government defendants. App. Vol. 7 at 1507-08. Counsel later did so. App. Vol. 7 at 1491-92, 1495-1522.

The remaining parties appeared before the district court for a hearing on the pending motions to dismiss and the motion for leave to amend the complaint. At the hearing, the district court pressed

plaintiffs' counsel to respond to the dozens of decisions holding that general concerns about election administration do not amount to a cognizable injury for Article III standing, and asked why plaintiffs' briefs had not done so. App. Vol. 7 at 1675, 1684-85. Plaintiffs' counsel did not meaningfully respond, but instead gave a nonsensical answer about the importance of suing government officials in their personal capacity, stated that the complaint sought monetary relief instead of equitable relief, and insisted that plaintiffs' claims were different because they were about voting irregularities that "affected everybody's rights" and that have made people "very, very upset." App. Vol. 7 at 1675-82, 1685-86, 1702.

Not long after the hearing, the district court granted the motions to dismiss and denied plaintiffs' motion for leave to amend. As the district court appreciated, plaintiffs' case was no more than a "general assertion that allegedly illegal conduct occurred in multiple states across the country during the recent Presidential election," which, even if true, "impacted 160 million voters in the same way." App. Vol. 7 at 1544. The complaint was therefore just a "generalized grievance about the operation of government." App. Vol. 7 at 1544.

The district court added that its ruling should come as "no surprise" given the "veritable tsunami" of indistinguishable cases challenging some aspect of the 2020 election that all met the same fate. App. Vol. 7 at 1546-52. And the district court criticized plaintiffs' counsel for never actually confronting the overwhelming precedent compelling dismissal for lack of standing, App. Vol. 7 at 1552, and for making arguments in favor of standing that were legally irrelevant and inconsistent with their own pleadings, App. Vol. 7 at 1544-55.

Finally, the district court denied leave to amend the complaint because the proposed amended complaint made no changes relevant to plaintiffs' unavoidable lack of standing. App. Vol. 7 at 1559-63.

VI. Sanctions Proceedings

Once the case was dismissed, the Michigan and Pennsylvania defendants moved for sanctions under both the district court's inherent authority and 28 U.S.C. § 1927. App. Vol. 8 at 1732-47, 1927-43.

On June 1, 2021, the district court set a hearing on the motions for sanctions. App. Vol. 8 at 1925-26. In advance of the hearing, the district court provided parties with a list of topics it intended to cover. App. Vol. 9 at 2103-06. That hearing happened as scheduled. App. Vol.

11 at 2452-54. Five days after the hearing, and nearly seven weeks after the district court had scheduled it, plaintiffs' counsel requested another hearing for them to present evidence. App. Vol. 11 at 2558-62. The district court denied that request. App. Vol. 11 at 2563-66.

Ultimately, the district court granted each motion for sanctions. Explaining that decision, the district court summarized the original complaint as one in which "Plaintiffs purported to represent 160 million American registered voters and came seeking a determination from a federal court in Colorado that the actions of multiple state legislatures, municipalities, and state courts in the conduct of the 2020 election should be declared legal nullities." App. Vol. 11 at 2571. Despite having been affirmatively put on notice of the obvious jurisdictional problems those allegations posed, plaintiffs' counsel tried to amend the complaint without doing anything to address "the critical [jurisdictional] deficiency" and without making "any effort to address the conspicuous personal jurisdictional problems." App. Vol. 11 at 2578.

The district court concluded that plaintiffs' arguments for Article III standing were thoroughly at odds with basic standing doctrine and contradicted by their own pleadings. App. Vol. 11 at 2579-85, 2616-17.

Indeed, the arguments for standing, the district court found, were so frivolous that they could be explained only by bad faith. App. Vol. 11 at 2617, 2630-31.

Similarly, the district court observed that even a "first-year civil procedure student" would have appreciated there was absolutely no basis for subjecting the Governor or Secretary of State of Michigan or of Pennsylvania to jurisdiction in Colorado for a suit purely about activity in each official's home state. App. Vol. 11 at 2585. Plaintiffs' counsel had made no serious argument otherwise. App. Vol. 11 at 2588. The district court concluded that only bad faith could explain bringing a case in which personal jurisdiction was so clearly lacking. App. Vol. 11 at 2617-18, 2631.

Moreover, seeking leave to amend the complaint without addressing these evident jurisdictional problems, the district court ruled, was an unreasonable effort to prolong the litigation. App. Vol. 11 at 2632.

Next, the district court found that plaintiffs' counsel did not perform a reasonable inquiry before filing the complaint. App. Vol. 11 at 2618-27, 2631. As one example, the district court noted that counsel

should have realized their various allegations about the Pennsylvania defendants modifying Pennsylvania law were all contradicted by the Pennsylvania Supreme Court's conclusive interpretations of Pennsylvania law. App. Vol. 11 at 2601.

After the district court entered its order sanctioning plaintiffs' counsel, each set of government officials reached an agreement with plaintiffs' counsel on a reasonable award. For the Michigan defendants, the parties agreed $4,900 was a reasonable sanction amount. App. Vol. 12 at 2667-68, 2681-82. For the Pennsylvania defendants, the parties agreed $6,162.50 was a reasonable sanction amount. App. Vol. 11 at 2651-52; App. Vol. 12 at 2681-82.

For the two sets of government defendants, the district court eventually entered an order sanctioning plaintiffs' counsel in the agreed amounts. App. Vol. 13 at 2957-58.

STANDARD OF REVIEW

The imposition of sanctions is reviewed only for abuse of discretion. *Farmer v. Banco Popular of North America*, 791 F.3d 1246, 1256 (10th Cir. 2015). A district court abuses its discretion if it acts

arbitrarily, commits a legal error, or relies on "clearly erroneous factual findings." *Id.*

SUMMARY OF ARGUMENT

Attorneys that file lawsuits with absolutely no basis for doing so may be sanctioned pursuant to a court's inherent authority for that bad faith conduct. *Mountain W. Mines, Inc. v. Cleveland-Cliffs Iron Co.*, 470 F.3d 947, 954 (10th Cir. 2006). So, too, may attorneys who make false assertions in court. *Hamilton v. Boise Cascade Exp.*, 519 F.3d 1197, 1200 (10th Cir. 2008). Separately, 28 U.S.C. § 1927 empowers district courts to sanction attorneys who unreasonably multiply litigation, such as, for example, by prolonging doomed litigation. *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1278 (10th Cir. 2005).

The district court did not abuse its discretion in finding that the facts of this case warranted imposing sanctions against plaintiffs' counsel under these standards. For one, jurisdictional arguments plaintiffs' counsel made in this case were impermissibly frivolous. Indeed, counsel sued in Colorado the Governor and Secretary of State of Michigan and of Pennsylvania because those officials had some role in

administering an election in their own state, for their own state's citizens, and under their own state's laws. Arguments plaintiffs' counsel made for the district court to exercise personal jurisdiction under those circumstances flouted foundational principles of federal jurisdiction.

Similarly, counsel filed this action believing that plaintiffs had Article III standing because the defendants' allegedly unlawful conduct had left plaintiffs—and *every other registered voter in the country*—with a "shared, foreboding feeling of impending doom." App. Vol. 1 at 100. Precedent unequivocally foreclosed that assertion of standing, as plaintiffs' counsel was repeatedly reminded. Every argument that plaintiffs' counsel made to distinguish well-established precedent also squarely conflicted with controlling precedent.

On top of that, allegations that the Michigan and Pennsylvania defendants had modified or violated state law during the 2020 election were demonstrably wrong, as counsel would have easily ascertained with a modicum of pre-filing investigation. In fact, plaintiffs' counsel likely knew their allegations about the government defendants were false. Sanctioning counsel for the bad faith displayed by their total

ambivalence to the truth of their allegations was not an abuse of discretion.

ARGUMENT

This case demands sanctions. Plaintiffs' counsel made obviously false allegations against government officials. They did so to bring a thoroughly frivolous case that advanced theories of jurisdiction which, accepted at face value, would permit anyone anywhere to sue a state official from any state for any conduct with any connection to a presidential election.

The district court did not abuse its discretion in finding that the allegations and arguments in this case warranted sanctions under the court's inherent authority.[3] That authority allows sanctions against an attorney who takes actions, including initiating a lawsuit, "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *see also Steinert v. Winn Grp., Inc.*, 440 F.3d 1214, 1224 (10th Cir. 2006).

[3] Courts may impose sanctions under their inherent authority even if sanctions are also available by rule or statute. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46, 50 (1991); *contra* Aplt. Br. at 47.

Nor did the district court abuse its discretion awarding sanctions under 28 U.S.C. § 1927, which authorizes sanctions against an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously." That statute permits sanctions "when an attorney acts recklessly or with indifference to the law." *Dominion Video Satellite*, 430 F.3d at 1278. Bad faith is not required for sanctions under § 1927—conduct that "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court is sanctionable." *Hamilton*, 519 F.3d at 1202 (internal citations omitted).

Both sources of authority authorize the sanctions order.

I. Sanctioning Counsel for Impermissibly Frivolous Jurisdictional Arguments Was Not an Abuse of Discretion

Plaintiffs' counsel filed a complaint deeply at odds with foundational principles of federal jurisdiction. After repeatedly being made aware of deficiencies that must have been apparent to counsel from the start, counsel sought to file a materially unchanged amended complaint. Filing, and then trying to re-file, such an obviously frivolous suit demonstrated that plaintiffs' counsel initiated this case in bad faith, just as it displayed their reckless indifference to the law. The district court certainly did not abuse its discretion in finding as much.

A. Arguments for Exercising Personal Jurisdiction Over the Government Defendants Were Impermissibly Frivolous

Courts may sanction attorneys as an exercise of their inherent authority for making arguments that are "so frivolous as to reflect impermissible conduct." *Mountain W. Mines, Inc. v. Cleveland-Cliffs Iron Co.*, 470 F.3d 947, 954 (10th Cir. 2006); *see also Martin for estate of Martin v. Greisman*, 754 F. App. 708, 713 (10th Cir. 2018). Section 1927 likewise allows sanctions for multiplying proceedings with arguments that are "completely meritless." *Dominion Video Satellite*, 430 F.3d at 1278.

Consistent with these rules, this Court has affirmed sanctions awards when a party's "standing argument ignored controlling precedent" and the party made only unreasonable arguments to distinguish that precedent. *Collins v. Daniels*, 916 F.3d 1302, 1321 (10th Cir. 2019); *see also Roth v. Green*, 466 F.3d 1179, 1188–89 (10th Cir. 2006) (affirming sanctions because case was filed with "a host of legal impediments to . . . prevailing"). Other judges in this circuit have imposed sanctions against attorneys for initiating actions "without a good-faith basis for personal jurisdiction." *Jamieson v. Hoven Vision*

LLC, No. 20-CV-1122, 2021 WL 1564788, at *3 (D. Colo. Apr. 21, 2021) (unpublished).

Here, it was not an abuse of discretion for the district court to impose sanctions because personal jurisdiction was obviously absent. App. Vol. 11 at 2631. Basic principles of personal jurisdiction require some connection between a defendant and the forum state. For an out-of-state defendant, there must be activity purposefully directed at the forum state and the alleged injuries must relate to that activity. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

No attorney acting in good faith could have believed that the complaint's or proposed amended complaint's allegations subjected out-of-state government officials to jurisdiction in Colorado. The complaint did not include *any* allegations—not even implausible ones—that the Governor or Secretary of State of Michigan or Pennsylvania took any action directed at Colorado. Nor could there have been any such allegations. Each official's supposedly unlawful conduct related to the administration of an out-of-state election, for out-of-state citizens, conducted under out-of-state law. As the district court noted, even a "first-year civil procedure student" would have known "there was no

legal or factual basis to assert personal jurisdiction *in Colorado* for actions taken by sister states' governors, secretaries of state, or other election officials, in those officials' home states." App. Vol. 11 at 2585 (emphasis in original).

Plaintiffs' counsel have never articulated a good-faith basis for suing out-of-state government officials in Colorado without alleging any connection to Colorado. Instead, below and before this court, counsel have primarily fixated on their claimed intention to sue the government defendants in each official's personal capacity rather than in their official capacity. App. Vol. 6 at 1379-80; App. Vol. 7 at 1462; Aplt. Br. at 41-44. But counsel supply no reason the distinction aids the exercise of personal jurisdiction. It does not: personal jurisdiction safeguards constitutional assurances of due process that protect all defendants. *Burger King*, 471 U.S. at 472; *see also Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008).[4] If anything,

[4] At different junctures, and for different purposes, plaintiffs' counsel have insisted the Michigan defendants and Pennsylvania defendants were sued in their personal capacities rather than official capacities. Counsel even tried to strike the Michigan defendants' motion to dismiss on this basis. App. Vol. 6 at 1346-53. But counsel have never identified any reason the distinction matters for any issue that has been adjudicated. And confusion about counsels' intentions is purely of their

counsels' intention to sue government officials personally makes the due process concerns even more pronounced.

At the sanctions hearing, and again in this Court, plaintiffs' counsel also suggested that the Governors and Secretaries of State of Michigan and of Pennsylvania all could have consented to defending this suit in Colorado. App. Vol. 11 at 2588; Aplt. Br. at 43. It was not clearly wrong for the district court to conclude that it is "inconceivable to have ever thought that state officials of Pennsylvania or Michigan would voluntarily waive personal jurisdiction and come to a *Colorado* federal court to answer charges about acts taken during the administration of Pennsylvania or Michigan elections." App. Vol. 11 at 2588 (emphasis in original).

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own making. First, the complaint explicitly invokes *Ex parte Young*'s exception to the Eleventh Amendment and alleges that the government defendants' unconstitutional acts "stripped" them of their official capacity. App. Vol. I at 66, 68. *Ex parte Young* and references to officials being stripped of their status explain why state officials can be sued in their official capacity notwithstanding the Eleventh Amendment. *See Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); *Ex parte Young*, 209 U.S. 123, 159 (1908). Second, although the complaint named former Secretary of the Commonwealth Kathy Boockvar as a defendant, counsel served the complaint at the office of the Secretary of the Commonwealth three weeks after Secretary Boockvar resigned. Doing so suggested that counsel meant to sue the officeholder rather than the individual.

The baseless assertions of personal jurisdiction were particularly egregious in this case. As the district court recounted, "this was not a normal case in any sense." App. Vol. 11 at 2571. Granting all plaintiffs' requested relief would have meant enjoining certification of Michigan's and Pennsylvania's 2020 election results. App. Vol. 11 at 2571. Counsels' theory of jurisdiction, then, is that any court anywhere can enjoin the results of any state's democratic elections based on claims against any state official. Democracy cannot function like that.

At bottom, plaintiffs' counsel never had a plausible basis to ask a Colorado court to exercise jurisdiction over Michigan's and Pennsylvania's Governor and Secretary of State for conduct in each official's state. All arguments for doing so were so frivolous as to reflect bad faith. The district court did not abuse its discretion reaching that conclusion.

B. Arguments for Plaintiffs' Article III Standing Were Impermissibly Frivolous

Likewise, no attorney acting in good faith could believe that the abstract, generalized grievances alleged in the complaint and proposed amended complaint gave rise to Article III standing. Article III standing requires a plaintiff to have suffered some concrete, particularized

injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Generalized grievances are insufficient. *Id.* at 573-74. This principle, which has a "lengthy pedigree," applies with equal force in the election context. *Lance v. Coffman*, 549 U.S. 437, 439 (2007). In fact, the Supreme Court wrote in *Lance* that voters' interest in election law being followed "is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Id.* at 441–42.

Despite this precedent, plaintiffs' counsel brought a case on behalf of plaintiffs whose alleged injuries—best summarized in the complaint as the "shared, foreboding feeling of impending doom," App. Vol. 1 at 100—were, as pleaded, shared by every other registered voter in the country. App. Vol. 1 at 34, 40, 82-83, 86; App. Vol. 5 at 938, 974-75, 977. Counsel never alleged that any plaintiff had been personally injured, such as, for example, by having their vote denied, let alone that any plaintiff had been uniquely injured.

Counsels' efforts to avoid precedent with such "lengthy pedigree" squarely contradicted case law and were factually inaccurate.

First, counsel argued their clients were differently situated because each was injured by alleged improprieties with the presidential election, which, they said, every citizen is uniquely invested in. App. Vol. 5 at 881-83; *see also* Aplt. Br. at 17. Remarkably, counsel took that position despite the Supreme Court's having rejected the very same argument two weeks before the complaint was filed here.

In Texas' failed Supreme Court original action, Texas had argued that it and its citizens suffer cognizable injuries when alleged irregularities in another state's election "affect the outcome of a presidential election." Brief in Support of Motion for Leave at 13, *Texas v. Pennsylvania*, No. 22O155 (U.S. Dec. 7, 2020). For Texas, the irregularities allegedly interfered with the interest in who holds federal office. *Id.* For Texas' electors, the irregularities allegedly debased their votes for candidates for those same offices. *Id.* at 14–15. The Supreme Court denied Texas' motion for leave "for lack of standing under Article III of the Constitution." *Texas v. Pennsylvania*, 141 S.Ct. 1230 (Mem) (2020).

The complaint here copied extensively from Texas' bill of complaint, App. Vol. 1 at 41-46, 61-66, so counsel surely was tracking

the Supreme Court litigation and knew of its resolution. But even before the Supreme Court's ruling in *Texas v. Pennsylvania*, lower courts, too, had resoundingly rejected plaintiffs' theory of standing. *See, e.g.*, *Wood v. Raffensperger*, 981 F.3d 1307, 1314–15 (11th Cir. 2020); *Bognet v. Sec'y Commonwealth of Pennsylvania,* 980 F.3d 336, 354 (3d Cir. 2020), *vacated for mootness*; *King v. Whitmer*, 505 F. Supp. 3d 720, 736 (E.D. Mich. 2020); *Pennsylvania Voters Alliance v. Center County.*, 496 F. Supp. 3d 861, 869-70 (M.D. Pa. 2020). In fact, in its opinion granting various motions to dismiss, the district court collected what it called a "veritable tsunami" of cases rejecting the theory of Article III standing advanced here. App. Vol. 11 at 2582. Counsel never responded to any of it.

Second, plaintiffs' counsel argued their case was unique because it sought damages rather than injunctive relief. App. Vol. 5 at 881; App. Vol. 6 at 1384-85, 1409-10. Yet clear precedent—including the very case counsel repeatedly cite—establishes the unmistakable futility of their continued insistence that certain remedial demands obviate the need to show concrete, particularized injury. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021). Although counsel maintain that *Uzuegbunam*

grants their clients entry to federal court based only on a request for nominal damages, the Supreme Court said precisely the opposite, explaining a request for nominal damages does not guarantee entry to court because plaintiffs still must "establish the other elements of standing (such as a particularized injury)." *Id.* at 802.

Third, counsel tried to distinguish standing in their suit from standing in any prior action because here they sued government officials in their personal capacity. App. Vol. 6 at 1380; Aplt. Br. at 21, 41-43. That distinction is unquestionably irrelevant for the injury-in-fact aspect of standing because no part of standing analysis depends on "the defendant's status as a governmental entity." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5 (1998).

The record thus fully supports the district court's finding that all arguments advanced for plaintiffs' Article III standing were so flawed that they exhibited bad faith. App. Vol. 11 at 2616-17. And, again, this court has affirmed that district courts may impose sanctions against attorneys who make completely baseless standing arguments that draw irrelevant distinctions with controlling precedent. *Collins*, 916 F.3d at 1321. That is precisely what happened here.

II. Sanctioning Counsel for Making Demonstrably False Allegations Was Not an Abuse of Discretion

Plaintiffs' counsel also made numerous demonstrably false allegations about how the Michigan and Pennsylvania defendants administered the 2020 election.[5] Alleging facts that plaintiffs' counsel knew—or at least should have known—were false demonstrates the bad faith and abusive nature of this action, further justifying the sanctions award.[6]

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[5] Counsel obliquely suggest sanctioning them for their allegations offends the First Amendment, Aplt. Br. at 50-52, but "in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed," *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991) (cleaned up); *Collins*, 916 F.3d at 1323 (noting the First Amendment does not permit frivolous lawsuits). While there are many forums in which "protestations, conjecture, and speculation may be advanced, such expressions are neither permitted nor welcomed in a court of law." *King v. Whitmer*, 556 F. Supp. 3d 680, 689 (E.D. Mich. 2021).

[6] Due process prohibits sanctions from being assessed without "notice that such sanctions are being considered by the court and a subsequent opportunity to respond." *United States v. Melot*, 768 F.3d 1082, 1085 (10th Cir. 2014). The district court complied with this requirement, *contra* Aplt. Br. at 52, having permitted full briefing on the various sanctions motions, having held a hearing with nearly seven weeks' notice, and having provided advance warning of what it intended to cover at the hearing. App. Vol. 8 at 1925-26 (setting hearing); App. Vol. 9 at 2103-06 (announcing topics). Due process did not require granting counsels' belated request for a second hearing.

This Court has said that even one false statement in a court filing may warrant sanctions. *Hamilton*, 519 F.3d at 1200; *see also Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 852, 859 (10th Cir. 2018) (finding district court did not abuse its discretion concluding that making false statement to opposing party constituted sanctionable bad faith). Elsewhere, attorneys who falsely accused the Michigan defendants of violating Michigan law during the 2020 election already have been sanctioned for doing so. *King v. Whitmer*, 556 F. Supp. 3d 680, 713-14 (E.D. Mich. 2021).

In this case, the thrust of plaintiffs' allegations against the Michigan and Pennsylvania defendants was that they improperly modified state election law, violating the U.S. Constitution. App. Vol. 1 at 80-84, 86, 90; App. Vol. 5 at 972-77, 981. To support that claim, the complaint and proposed amended complaint made a host of false claims about what Michigan and Pennsylvania law require.

For the Michigan defendants, plaintiffs' counsel alleged that Secretary Benson unlawfully mailed absent voter ballot applications to registered voters. App. Vol. 1 at 41-42; App. Vol. 5 at 945-46. But in September 2020, the Michigan Court of Appeals ruled that state law did

not stop the Secretary from mailing those applications. *Davis v. Secretary of State*, 963 N.W.2d 653, 605 (Mich. Ct. App. 2020).

For the Pennsylvania defendants, counsel first alleged that the Governor and Secretary authorized defiance of a statutory requirement that mail-in ballots undergo signature verification review. App. Vol. 1 at 60-62, 64; App. Vol. 5 at 959, 962. Yet as the Pennsylvania Supreme Court ruled two months before plaintiffs filed their complaint, Pennsylvania law does not permit signature verification of mail-in ballots. *In re November 3, 2020 Election*, 240 A.3d 591, 611 (Pa. 2020).

Second, plaintiffs' counsel alleged that the Pennsylvania defendants violated rules requiring the disqualification of mail-in ballots cast with technical errors. App. Vol. 1 at 61-62; App. Vol. 5 at 959-60. That, too, is false. The Pennsylvania Supreme Court ruled a month before plaintiffs filed the complaint that Pennsylvania does not require disqualifying mail-in ballots cast with technical errors, *In re Canvass of Absentee & Mail-in Ballots*, 241 A.3d 1058, 1078 (Pa. 2020), and Pennsylvania law does not prohibit counties from allowing voters to correct technical errors, *Donald J. Trump for President, Inc. v. Sec'y of Pennsylvania*, 830 F. App'x 377, 384 (3d Cir. 2020).

Third, plaintiffs' counsel alleged that certain Pennsylvania counties denied poll watchers access to pre-canvassing procedures to which watchers are entitled under Pennsylvania law. App. Vol. 1 at 64; App. Vol. 5 at 962. But the Pennsylvania Supreme Court ruled a month before plaintiffs' filed their complaint that Pennsylvania law guarantees poll watchers access only to the room in which mail-in ballots are pre-canvassed, which is precisely the access counties provided poll watchers during the 2020 election. *In re Canvassing Observation*, 241 A.3d 339, 349–51 (Pa. 2020).

All these allegations largely were copied from the complaint that Texas filed in the Supreme Court. App. Vol. 1 at 41-46, 61-66. The states' responses to that complaint—filed before this case began—identified the various decisions confirming that no government official had violated or modified state election law as alleged. Had plaintiffs' counsel been remotely concerned about whether their allegations were true, they would have consulted those responses and subsequently learned of the contradictory, conclusive state court decisions. The district court did not abuse its discretion concluding plaintiffs' should

have reviewed the responses to a complaint they so heavily copied. App. Vol. 11 at 2601.

Worse than that, the pleadings signal that plaintiffs' counsel knew their allegations were false. As the original complaint demonstrates, counsel were tracking the various litigation around the 2020 election. Indeed, the original complaint cites several decisions resolving challenges to various aspects of Michigan's and Pennsylvania's 2020 election. App. Vol. 1 at 46, 60-62, 65. It is inconceivable that the only cases to have evaded counsels' attention were those establishing their accusations were false. Even if counsel were unaware of just those decisions, such a poor investigation exhibits plaintiffs' counsels' complete ambivalence—or willful blindness—to the truth of their allegations. Either is bad faith.

Filing a complaint that was replete with false allegations is further evidence of counsels' bad faith and separately justifies the entry of sanctions.

CONCLUSION

For the foregoing reasons, the district court's imposition of sanctions under its inherent authority and 28 U.S.C. § 1927 should be affirmed.

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Respectfully submitted,

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