No. 21-1161

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KEVIN O'ROURKE, et al.,

Plaintiffs-Appellants,

v.

DOMINION VOTING SYSTEMS, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
Civil Action No. 1:20-cv-3747
U.S. Magistrate Judge N. Reid Neureiter

APPELLANTS' PETITION FOR PANEL REHEARING AND/OR REQUEST FOR EN BANC DETERMINATION

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INTRODUCTION

In accordance with Rules 35 and 40 of the Federal Rules of Appellate Procedure and Tenth Circuit Rules 35.1 and 40.1, Petitioners/Appellants respectfully request Panel rehearing and/or rehearing en banc of the Opinion entered by this Court on May 10th, 2022 (Opinion of the Court), attached hereto as Attachment 1. The members of the Court were Chief Judge Tymkovich, and Circuit Judges Holmes, and Rossman. Chief Judge Tymkovich authored the Opinion of the Court.

RULE 35(b) STATEMENT

Based upon the professional judgment of undersigned counsel, the Opinion of the Court should be reheard by either the Panel or the En Banc Court. In accordance with Fed. R. App. 35(b)(1)(B), this case involves "one or more questions of exceptional importance." The Opinion of the Court extends protection to private entities that is reserved to government. Further, the Opinion of the Court failed to recognize the individualized injury of Appellants as described with particularity in their respective affidavits. Appellants brought the case as a potential class action, but rely on their own claims for damages to establish the requisite Article III standing. The Opinion misinterprets Appellants' claims as an

attempt to ensure that government administer elections fairly, when in fact their claims are based upon damages caused by the specific conduct of Appellees.

SUMMARY OF GROUNDS FOR REHEARING

Appellants brought suit under 42 U.S.C. §1983 against Appellees for the latter's conduct in violating the former's constitutional rights during the 2020 Presidential election. As a part of their complaints, Appellants averred that every registered voter, vested in a fair, equal and verifiable presidential election, would have been similarly damaged by the state action of these otherwise private entities. Despite this, Appellees argued that Appellants' claims were generalized grievances. The district court agreed and dismissed the case for lack of subject matter jurisdiction. This Court agreed and affirmed the district court's dismissal based upon the perceived lack of a concrete and particularized injury suffered by Appellants.

The Opinion of the Court protects Appellees with a doctrine developed to protect government from suit by citizens who have not been damaged, but seek to either enjoin government from engaging in a particular action, or require that government act in accordance with the law. Here, Appellants have not sued any governmental entity, or person acting in their official capacity. Appellants claims

are non-partisan and do not involve a political question. Neither have Appellants sought injunctive relief to either require, or enjoin a governmental body from conducting its own affairs in a particular way.

With respect, the Opinion of the Court overlooked key facts and law related to the individualized injury of Appellants, and the state action by private parties involved in this matter. Simply put, Appellees are not government, and are accordingly not immune from Appellants claims for retrospective, monetary damages—such as a State would have under the Eleventh Amendment.

Rehearing is required because the Opinion failed to recognize the individualized nature of Appellants injuries as outlined in their respective affidavits attached to the original complaint. Each Appellant individually had a right to vote for the President and Vice-President of the United States in the 2020 general election. As is particularized in their respective affidavits, Appellants were each harmed in a different and disguised way. Although their claims were similar to other similarly situated, each Appellant's damages are different in substance from one another, and as registered voters certainly from the general citizenship, as a whole.

Many citizens are not registered to vote, at all, and thus have no standing to claim a violation of a right in that regard. Nonetheless, Appellants did not bring

this action to benefit the public at large, but to vindicate their own, individual rights, and the rights of those of similarly situated individual registered voters. Thus, in light of the status of the parties herein involved, Appellants have identified injuries to themselves that are distinct from the alleged injury to other registered voters. *See* Attachment 1, p. 5.

ARGUMENT

I. Standards Governing Rehearing

Panel rehearing is appropriate where an issue of law or fact has been overlooked or misapprehended by the Court. Fed. R. App. 40(a)(2). Rehearing en banc is appropriate where "the proceeding involves a question of exceptional importance." Fed. R. App. 40(a)(2). Rehearing *en banc* is appropriate where "the proceeding involves a question of exceptional importance." Fed. R. App. 35(a)(2).

II. Rehearing Should Be Granted On the Issue of Whether the Plaintiffs' Claims are a Generalized Grievance

The Court's finding that Appellants claims are a generalized grievance expands the doctrine too far, and, with due respect, fails to properly analyze the issue within the context of these unique claims. In *Lance v. Coleman*, the Supreme Court affirmed a dismissal of claims wherein the injury alleged was "precisely the

kind of undifferentiated, generalized grievance about the conduct of *government* that we that we have refused to countenance in the past." 127 S.Ct. 1194, 1198 (2007) (emphasis added).

The Supreme Court observed, however, "the sorts of injuries alleged by plaintiffs in voting rights cases where [the Court has] found standing." *Id*. (*citing Baker v. Carr*, 369 U.S. 186 (1962)).

In *Baker*, the Supreme Court stated:

> A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, cf. *United States v. Classic*, 313 U.S. 299; or by a refusal to count votes from arbitrarily selected precincts, cf. *United States v. Mosley*, 238 U.S. 383, or by a stuffing of the ballot box, cf. *Ex parte Siebold*, 100 U.S. 371; *United States v. Saylor*, 322 U. S. 385.

Baker v. Carr, 369 U.S. at 207-208.

As noted in *Lance*, the Supreme Court adopted the oft-cited case of *Lujan v. Defenders of Wildlife*, wherein the Court held:

> [T]hat a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy.

504 U.S. 555, 560-561 (1992).

Additionally, in *DaimlerChrysler Corp. v. Cuno*, the Supreme Court refused to create an exception to the general prohibition on taxpayer standing for challenges to state tax or spending decisions, and observed that taxpayer standing has been rejected "because the alleged injury is not 'concrete and particularized,' but instead a grievance the taxpayer 'suffers in some indefinite way in common with people generally.'" 547 U.S. 332, 344 (2006) (citation omitted)). There, the plaintiffs were taxpayers from the local area who "filed suit against various state and local officials and DaimlerChrysler in state court, alleging that [certain] tax benefits violated the Commerce Clause." *Id*. at 339. The tax benefits were to the automobile manufacturer and "the alleged injury [was] based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes" and "a grievance the taxpayer 'suffers in some indefinite way in common with people generally.'" *Id*. at 344 (*quoting Frothingham v. Mellon*, 262 U.S. 448, 488 (1923).

Here, Appellants claims are not against government, nor do their claims involve a "political question." *See Baker v. Carr*, 369 U.S. at 209-234. In *Baker*, the plaintiffs sought "a declaration that [a] 1901 statute [was] unconstitutional and an injunction restraining the appellees from acting to conduct any further elections under it." *Id*. at 195. The *Baker* Court held that redistricting qualifies as a

justiciable question under the Fourteenth Amendment. *Id*. at 206-209. Previously, the Supreme Court had held that districting claims over racial discrimination could be brought under the Fifteenth Amendment. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Against the backdrop of these important and landmark cases, Appellants assert that their claims are not dependent upon distinguishing themselves from every other voter in the United States. In some contexts, that may be required, but not here.

First, the policy considerations of not extending jurisdiction to claims asserting a generalized grievance are sound. Standing requires more than "a general interest common to all members of the public." *Ex Parte Levitt*, 302 U.S. 633, 634 (1937). *See also Tyler v. Judges of Court of Registration*, 179 U.S. 405, 406 (1900) ("Even in a proceeding which he prosecutes for the benefit of the public…[plaintiffs] must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.").

Secondly, the doctrine of separation of powers requires that "there is a real need to exercise the power of judicial review," with remedies "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-222 (1974).

Here, however, each original Plaintiff/Appellant (and those who attempted to join in the Amended Complaint) outlined their own, personal interest and injury in their respective affidavits. The Appellants did not file their claims for the benefit of society, nor were there causes of action against government, in general. In fact, the claims were specific to conduct concerning an actual election that took place in time and space—not an abstract or hypothetical injury shared by citizens and voters. Their injuries were personal, individualized to themselves, respectively. By the nature of the claims, although many citizens were and are similarly situated, the potential injury a voter suffered from the conduct of the Appellees would naturally vary from voter to voter—but, every voter vested in a fair, equal and verifiable 2020 Presidential election potentially suffered an injury. With that said, however, the injuries of others at this stage is irrelevant. Appellants suffered their own concreate and particularized injury, as outlined in their affidavits. Any issue concerning a class of injured voters is premature.

Further, the unique facts of this case are worth reexamination. Essentially, this case should never possibly exist. Elections are a public function. To that, there is no question. Accordingly, in would be impossible under the Eleventh Amendment for citizens to sue a State for money damages concerning its conduct in a presidential election. *See Hans v. Louisiana*, 134 U.S. 1 (1890). Each State is a

sovereign entity in a federal system, and it is "'inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,'" *Id*., at 13, *quoting The Federalist No. 81*, p. 487 (C. Rossiter ed. 1961) (A. Hamilton).

That constitutional immunity does not reach Appellees, here. As alleged, Appellees engaged in state action by their substantial involvement with a majority of States across the Union concerning the administration of the 2020 Presidential election, but that was their voluntary choice.

As such, their conduct injured the Appellants, particularly and individually. Allowing Appellees to hide behind a federal court's inability to determine generalized grievances against government eviscerates a citizen's ability to hold private companies engaged in state action responsible for the violation of her rights. For example, the several lawsuits filed against government to enjoin their use of funds provided by Center For Tech And Civic Life (CTCL) is instructive on the point. *E.g.*, *Texas Voters Alliance v. Dallas County*, 495 F. Supp.3d 441 (E.D. Tex. Oct. 10, 2020); and, *Iowa Voter Alliance, et al., v. Black Hawk County*, et al., 515 F. Supp.3d 980 (N.D. Iowa 2021). In those cases, the suits were filed against government. Thus, the holdings in those cases that the plaintiffs' claims were generalized grievances objectively required those federal courts to dismiss the

actions for want of subject matter jurisdiction, and support the policy considerations noted above.

No such limitations exist in the Appellants' complaints. No governments were named. Neither did Appellants file their claims to enjoin the conduct of Appellees, outside of want may have been ultimately necessary to ensure compliance with any of the district court's orders. Thus, no State has had to avoid "the indignity of subjecting [itself] to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Authority*, 506 U.S. 139, 146 (1993) (internal quotation marks omitted).

Hence, this Court's finding that Appellants claims against Appellees are a generalized grievance goes too far to protect private persons and corporations, who otherwise engage in the important and public function of administrating a presidential election. Dependent upon the election itself, an injured voter might be limited. For example, if a private person or other entity engaged in unconstitutional conduct under color of law in a local election, the impact or injury could only be felt by those having standing to vote in that particular election. Also noting that each of the fifty States conduct their own presidential election, it would only be possible to affect such an election by a broad influence in multiple states. Ordinarily, that would be impossible—but it happened, here, in the 2020

Presidential election. With that said, outside of maybe a failed presidential candidate, or unless exercised within the prosecutorial powers of the federal government, the only other persons that would have standing to sue private entities engaged in such broad and nationwide state action would be the voters, themselves. Without the protection afforded by the Court in finding that Appellants' claims are a generalized grievance, Appellants possess a right without a remedy.

CONCLUSION

For the reasons detailed in this Petition, Appellants respectfully request that the Panel or the Court En Banc grant rehearing in this matter, and find: (i) Appellants have articulated a concrete and particularized injury in their respective affidavits, and in their general allegations as contained in their complaints; (ii) conclude that Appellees are not government as that term has been used to describe the prohibition against claims concerning the conduct of government, generally; (iii) find that Appellants have standing to pursue their claims against Appellees, who are otherwise private entities engaged in state action; and, (iv) remand the matter to the district court with instructions to reinstate the case and allow Appellants to amend their complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with Fed. R. App. P. 35(b)(3) and Fed. R. App. P. 40(b) because it contains 2,333 words, thus not exceeding 3,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) and 10th Cir. R. 32(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: June 13, 2022.

By:

s/ Gary D. Fielder
Gary D. Fielder, #19757

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANTS' PETITION FOR PANEL REHEARING AND/OR REQUEST FOR EN BANC DETERMINATION**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Malware bytes Antimalware, 1.50.1.1100, and according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By:

s/ Gary D. Fielder
Gary D. Fielder, #19757

CERTIFICATE OF SERVICE

I hereby certify that I have on this 13th day of June, 2022, I electronically filed the foregoing **APPELLANTS' PETITION FOR PANEL REHEARING AND/OR REQUEST FOR EN BANC DETERMINATION** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the e-mail addresses of counsel for Appellees.

By:

s/ Gary D. Fielder
Gary D. Fielder, #19757

FILED
United States Court of Appeals
Tenth Circuit

May 27, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KEVIN O'ROURKE; NATHANIEL L. CARTER; LORI CUTUNILLI; LARRY D. COOK; ALVIN CRISWELL; KESHA CRENSHAW; NEIL YARBROUGH; AMIE TRAPP,

Plaintiffs - Appellants,

v.

DOMINION VOTING SYSTEMS, INC., a Delaware corporation; FACEBOOK, INC., a Delaware corporation; CENTER FOR TECH AND CIVIC LIFE; MARK E. ZUCKERBERG, individually; PRISCILLA CHAN, individually,

Defendants - Appellees.

No. 21-1161
(D.C. No. 1:20-CV-03747-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **ROSSMAN**, Circuit Judges.

Plaintiffs appeal from the district court's dismissal of their 42 U.S.C. § 1983 suit for lack of standing. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

After the November 3, 2020, election for President of the United States, eight registered voters from several states filed a class action complaint in the District of Colorado alleging that Defendants (all private entities and individuals) had influenced or interfered with the election in violation of various constitutional provisions. Relying on their status as registered voters for standing, Aplt. App. A at 98, Plaintiffs alleged that Defendants' conduct "hurt[] every registered voter in the country, no matter whose side the voter is on," *id.* at 82; "damaged the Plaintiffs, but more broadly, every registered voter in America, all of whom have an interest in free and fair elections to determine the President of the United States of America," *id.* at 85; and "violated the rights of Plaintiffs and all registered voters in the United States," *id.* at 88. As recompense, they requested a declaratory judgment, a permanent injunction enjoining Defendants "from continuing to burden the rights of the Plaintiffs and all similarly situated registered voters," *id.* at 96, and "nominal" damages of $1,000 per registered voter, totaling approximately $160 billion, *id.* at 99.

Defendants Dominion Voting Systems, Inc., Facebook, Inc. (now known as Meta Platforms, Inc.), and Center for Tech and Civic Life moved to dismiss. Plaintiffs then moved for leave to file an amended complaint. After hearing oral arguments on the motions, the district court dismissed the suit for lack of Article III standing. The court held that Plaintiffs asserted a non-justiciable generalized grievance, because "by their own admission, Plaintiffs' claimed injuries are no different than the supposed injuries experienced by all registered voters." Aplt. App.

F at 1528. "Plaintiffs allege no particularized injury traceable to the conduct of Defendants, other than their general interest in seeing elections conducted fairly and their votes fairly counted." *Id.* at 1530. The court also denied Plaintiffs' motion to amend, holding that their proposed amended complaint failed to remedy the lack of standing.

DISCUSSION

I. Lack of Standing

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). We review de novo a decision regarding a plaintiff's Article III standing. *See Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1272 (10th Cir. 2018). "When evaluating a plaintiff's standing at the motion to dismiss stage, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 899 (10th Cir. 2016) (brackets and internal quotation marks omitted).

It is Plaintiffs' burden to establish their standing. *Lujan*, 504 U.S. at 561. To do so, they must show three elements: (1) an injury in fact, that (2) has a causal connection to Defendants' action(s), and that (3) is likely to be redressed by a favorable decision. *See id.* at 560-61.

This appeal involves the first requirement of injury in fact. To establish injury in fact, Plaintiffs must show they suffered "an invasion of a legally protected

interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks omitted). "Particularized" "mean[s] that the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1.

In light of the requirement that injury be particularized, the Supreme Court has rejected standing based only on "a generalized grievance shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (internal quotation marks omitted). That means that a plaintiff who is "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large . . . does not state an Article III case or controversy." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (rejecting challenge to Colorado's state redistricting procedures) (internal quotation marks omitted).

Plaintiffs aver that Defendants' conduct with regard to the 2020 Presidential election violated the constitutional rights of every registered voter in the United States. That is a generalized grievance. *See id.* at 442 (holding that the plaintiffs lacked standing because "[t]he only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."); *see also Carney v. Adams*, 141 S. Ct. 493, 499 (2020) (generalized grievance that plaintiff, "like all citizens of Delaware,

must live and work within a State that (in his view) imposes unconstitutional requirements for eligibility on three of its courts"); *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (generalized grievance to complain about gerrymandering unless the plaintiff lives in a gerrymandered district); *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (generalized grievance where plaintiffs' "only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law"); *Hotze v. Hudspeth*, 16 F.4th 1121, 1124 (5th Cir. 2021) (generalized grievance where "plaintiffs asserted . . . that drive-thru voting hurt the 'integrity' of the election process"); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (generalized grievance where registered voter based standing on interest in ensuring that only lawful ballots were counted), *cert. denied*, 141 S. Ct. 1379 (2021); *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 349 (3d Cir. 2020) (generalized grievance where "Plaintiffs . . . theorize their harm as the right to have government administered in compliance with the Elections Clause and Electors Clause"), *cert. granted and judgment vacated*, 141 S. Ct. 2508 (2021), *dismissed as moot*, 849 F. App'x 37, 38 (3d Cir. 2021).

Accordingly, no matter how strongly Plaintiffs believe that Defendants violated voters' rights in the 2020 election, they lack standing to pursue this litigation unless they identify an injury to themselves that is distinct or different from the alleged injury to other registered voters. *See Carney*, 141 S. Ct. at 499 ("Lawyers, such as [the plaintiff], may feel sincerely and strongly that Delaware's laws should comply with the Federal Constitution. But that kind of interest does not create

standing. Rather, the question is whether [the plaintiff] will suffer a personal and individual injury beyond this generalized grievance[.]" (citation and internal quotation marks omitted)); *Hollingsworth*, 570 U.S. at 706 ("[A] 'generalized grievance,' no matter how sincere, is insufficient to confer standing."); *Diamond v. Charles*, 476 U.S. 54, 66-67 (1986) ("Article III requires more than a desire to vindicate value interests. It requires an injury in fact that distinguishes a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." (citation and internal quotation marks omitted)). Plaintiffs state generally that they each suffered a "particularized injury," Aplt. Opening Br. at 23, and they recognize that they "must demonstrate a personal stake in the outcome," *id.* at 25 (internal quotation marks omitted). Yet their appellate briefs fail to identify any injury to any named plaintiff that is in any way different than the alleged injuries to every registered voter in the United States. Accordingly, Plaintiffs have not established that the district court erred in dismissing the action for lack of standing.

II. Denial of Leave to Amend

We generally review denial of leave to amend for abuse of discretion, "[b]ut when a district court denies leave to amend because amendment would be futile, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Castanon v. Cathey*, 976 F.3d 1136, 1144 (10th Cir. 2020) (internal quotation marks omitted).

The proposed amended complaint sought to add 152 additional plaintiffs, bringing the total number of plaintiffs to 160 from 38 states. It further sought to certify a class of all registered voters in the United States, alleging that the class "consist[s] of millions of registered voters that make up the people of the United States of America, and whose rights and interests have been directly burdened." Aplt. App. D at 890. But Plaintiffs fail to show that any of the proposed additional plaintiffs had any injuries that were distinct or different from the injuries allegedly suffered by every registered voter in the United States. Therefore, for the reasons discussed above, the proposed amended complaint failed to establish any plaintiff had Article III standing, and the district court did not err in concluding that allowing amendment would be futile.

CONCLUSION

The district court's judgment is affirmed.

Entered for the Court

Timothy M. Tymkovich
Chief Judge