No. 21-1442

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Oral Argument is requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Rules of Civil Procedure

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

The premise of the Plaintiffs' lawsuit is that certain private persons, acting under color of official authority, violated the Plaintiffs' rights during the 2020 Presidential election.

"[M]ost rights secured by the Constitution are protected only against infringement by governments." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). However, a private person may cause the deprivation of a right, subject to liability under § 1983, "when he does so under color of law." *Id*. Under the public function test, a court determines whether a private entity has exercised "powers traditionally exclusively reserved to the State." *Tool Box v. Ogden City Corp.*, 316 F.3d 1167, 1176 (10th Cir. 2003) (*quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)). "Such powers have traditionally included the holding of elections…." *Id*.

Fed.R.Civ.P. 8 Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (*quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Although this Court has recently ruled that Appellants' claims are a generalized grievance, the Plaintiffs have filed their petition for rehearing and/or request for en banc determination concurrent with this reply. In it, the Plaintiffs/Appellants urged the Court to reexamine the issue concerning whether their claims are a generalized grievance. Ordinarily, a generalized grievance concerns the conduct of government, not private entities engaged in state action.

Instead of asserting standing based upon a registered voter's interest in the integrity of the election process, or in ensuring that the government "follow the law," the Plaintiffs outlined the specific conduct of the named Defendants, and submitted affidavits concerning their individual circumstances and damages. In doing so, Appellants (as counsel for the Plaintiffs) most certainly did not file the case with the intent to benefit society, generally, or to compel or stop any government from doing anything. The case is a damages case, based upon the damages suffered by the Plaintiffs as caused by conduct of the Defendants.

Not surprisingly, Appellees continue to engage in ridicule, defamatory accusations, and misinformation in defense of the case. Further, the respective attorney generals for the State of Michigan (*Michigan*) and Commonwealth of Pennsylvania (*Pennsylvania*) continue to pursue sanctions against Appellants,

despite the fact that no person was sued in his or her official capacity, and the individuals sued were dismissed without entering into the case.

In all instances, Appellants, as counsel for Plaintiffs, were never impolite or unprofessional, nor did Appellants multiply the proceedings. In fact, just the opposite. Ultimately, the three remaining Defendants, Dominion Voting Systems, Inc. (*Dominion*), Meta Platforms, Inc., f/k/a Facebook, Inc. (*Facebook*), and Center for Tech and Civic Life (*CTCL*), are not government. They are private persons engaged in state action.

Appellants, as officers of the Court, respect this Court's initial opinion that the Plaintiffs' claims are a generalized grievance, but respectfully disagree with the Court' determination and analysis. In the complaints, Appellants, on behalf of their clients, repeatedly assert that the conduct of the Defendants damaged every registered voter vested in a fair, equal and verifiable presidential election. However, that language laid the foundation for the class action element of the case. The standing of the Plaintiffs was based upon their individualized damage, as suffered by each Plaintiff and outlined in their separate and distinct affidavits. The issue of whether sufficient evidence exist to support a class action is not ripe, and pays no part in either appeal.

Further, the district court partially based its *Sanctions Order* upon the assertion that the evidence initially relied upon by Appellants in support of their clients' claims was frivolous. However, recent revelations have destroyed that premise, entirely.

Ultimately, Appellants outlined the specific conduct that violated the rights of their clients. The Plaintiffs claims may not be different or distinct from other registered voters, but each have their own, individuals rights, which were violated by the conduct of the named Defendants. Accordingly, the damages suffered by each Plaintiff is separate and distinct from the general public. As such, a violation of a plaintiff's substantial rights, as alleged here, *is* the damage. Other similarly situated voters across the country may also have been damaged, as the conduct of the named Defendants was broad in its scope and affect, but that equates to a mass tort—not a generalized grievance concerning the conduct of governments.

ARGUMENT

I. Appellants Believed in Good Faith that the Plaintiffs Had Article III Standing

Appellees allege that Appellants advanced an objectively frivolous theory of Article III standing. *See Def. Res. Br.*, pp. 46-49. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

"As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (*quoting Baker v. Carr*, 369 U.S. 186, 204 (1962).

Here, Plaintiffs each had a fundamental right to vote for President and Vice-President. That right was infringed by the Defendants' conduct during the 2020 Presidential election. The Plaintiffs' right to vote is linked with each Plaintiff's right to freedom of speech and expression, accompanied by their individual rights to due process and equal protection. Plaintiffs' Article III standing is based upon the injury caused by the conduct of the Defendants, as outlined in Plaintiffs' respective complaints. Throughout, Appellants have continually expressed a view that while the claims of similarly situated registered voters may be similar, the Plaintiffs individual damages are distinct and individualized from one another.

The question for this appeal is whether Appellants were so lacking in facts and research as to not only be frivolous, but to have also acted in bad faith by attempting to amend the Plaintiffs' complaint with the addition of claims associated with the Racketeering Influence and Corrupt Organizations Act (RICO).

As outlined *ad nauseum* in the Plaintiffs' complaints and pleadings, the Plaintiffs have suffered an injury in fact, i.e., an invasion of a legally protected interest that is actual, concrete and particularized. As alleged, Defendants, Mark Zuckerberg and Priscilla Chan, infused over Three Hundred Million Dollars into voting precincts and counties across the country to influence the outcome of the 2020 Presidential election. This scheme is outlined with particularity in the Plaintiffs' Amended Complaint, and establishes the use of this money by *CTCL* to influence the outcome of the 2020 Presidential election to the benefit of Zuckerberg and Chan's favored candidates for President and Vice-President, as described.

This dark money carried influence and conditions, and was not spread out equally among the jurisdictions in the participating States. Those Defendants may claim that the money was to "fortify" the election, or help keep voters and election officials safe while casting their votes, but that's not what the Plaintiffs alleged. Thus, the factual allegations and causes of actions surrounding this unprecedented infusion of private money are not frivolous, nor is their standing foreclosed by any other case.

As alleged, *CTCL* was in concert with Zuckerberg, the Chief Executive Officer (CEO) of *Facebook*, the latter of which is the most powerful social media

company in the world. In that regard, the evidence of *Facebook's* interference with the 2020 Presidential election is overwhelming. Normally, *Facebook's* consistent censorship of conservative ideals, coupled within its support of its CEO's choice for President and Vice-President, *may* have been constitutionally sound based upon its status as a private company with immunity, pursuant to Section 230 of the Communications Decency Act of 1996 (Section 230). However, based upon the Plaintiffs' allegations, Section 230 is unconstitutional as applied to *Facebook*, particularly concerning its conduct surrounding the 2020 Presidential election, and as the alter-egos of Defendants, Zuckerberg and Chan.

All of the Plaintiffs' averments concerning these Defendants are true, and the district court abused its discretion by finding facts based upon its own assessment of what the district court believed to be true. Illegal votes and unconstitutional procedures *did* dilute the votes of every legal voter in the 2020 Presidential election. As such, although broad in scope, the unconstitutional conduct of the named Defendants damaged the country *and* the Plaintiffs, individually. Nonetheless, that is still only a small portion of the Plaintiffs' case.

Despite arguments to the contrary, Appellants were careful in their approach to the lawsuit and, at all times relevant, have simply been asserted the rights of their clients—with a firm belief that their individual injuries entitled them to relief.

Plaintiffs' claims against *Dominion* are separate and distinct from those against *CTCL* and *Facebook*. Those claims, although still centered around the 2020 Presidential election, are based around *Dominion's* status as a state actor, substantially involved in the administration of the 2020 President election in jurisdictions across the United States. Their systems, software and voting machines are unreliable and lack transparency. In fact, expert opinions, law review articles and other reports referred to in the Plaintiffs' complaints and pleadings indicate that *Dominion's* products and systems are defective, hackable, untrustworthy and, thus, unconstitutional in their use and implementation in the 2020 Presidential election. Accordingly, based upon the use of Dominion's for-profit systems in 1300 jurisdictions in 28 states across the country, the Plaintiffs were damaged by the far reaching and unconstitutional conduct of *Dominion*, regarding the 2020 Presidential election, as well.

With that, Appellants believed in good faith that all of the Plaintiffs suffered an injury-in-fact. Each has sustained a concrete and particularized injury, due directly to the conduct of all the Defendants, as described herein, as averred in the complaints filed in district court. Appellants did not "scour the internet for filings in other cases, ransacking those filings for factual allegations, and repacking the results to a federal court without speaking to any of the lawyers, fact witnesses, or

experts whose claims [Appellants] appropriated." *Def. Res. Br.*, p. 52. Practically ever factual allegation contained in the original complaint is cited by an identifiable source, such as an under an under oath affidavit, expert report, law review article, verifiable letters, and other information from reliable sources. Accordingly, it is unfair and untrue to assert that Appellants were simply "parroting" other complaints. *Id*.

There is not one citation to an "internet article." *Id*. at 53. Nor did Appellants rely on any information contained in another complaints, without first researching and verifying every allegation cited. Waiting for time to elapse was also not necessary under the circumstances. Despite Appellee's argument that the Plaintiffs' claims were "far-reaching and fantastical," all of the Plaintiffs' averments concerning *Dominion*, *Facebook* and *CTCL* are true. *Id*. at 54.

Without repeating the overwhelming evidence against Appellees, it is worth noting that additional evidence has recently surfaced, which further supports the Plaintiffs' factual averments. On June 3, 2022, the Cybersecurity and Infrastructure Security Agency (CISA) released a security advisory detailing nine vulnerabilities to *Dominion's* voting machines. *See* ICS Advisory ICSA-22-154-01. These vulnerabilities essentially left *Dominion's* voting machines naked to attack. As such, anyone who gained access, permissive or otherwise, could easily

compromise the entire system. The advisory made effort to state that "CISA has no evidence that these vulnerabilities have been exploited in any elections." However, CISA conveniently omits any reference to the Antrim County, Michigan, report included in the original Complaint, or any other subsequent computer forensic analysis—such as the recent report generated from the information recently revealed from Mesa County, Colorado.[1]

The CISA advisory also fails to mention *Curling v Raffensperger*, currently being litigated in the Northern District of Georgia, and referenced under Case No. 1:17-cv-2989-AT. As noted in Appellants' *Opening Brief*, Dr. J. Alex Halderman first detailed these same vulnerabilities in his filed report dated August 2, 2020. *Aplt Opening Br*., p. 31.

[1] See Dr. Walter C. Daugherity and Jeffery O'Donnell, *Report #3, Election Database and Data Process Analysis*, March 19, 2022. ("The findings provide evidence of unauthorized and illegal manipulation of tabulated vote data during the 2020 General Election and 2021 Grand Junction Municipal Election. Because of this evidence, which led to the vote totals for those elections being impossible to verify, the results and integrity of Mesa County's 2020 General Election and the 2021 Grand Junction Municipal Election are in question. This analysis was performed using the forensic image of [Dominion's] EMS server, which was backed up before Colorado Secretary of State and DVS overwrote the hard drive with D-Suite version 5.13.) https://useipdotus.files.wordpress.com/2022/03/mesa-3-report.pdf

Thus, the premise of the districts court's findings that the 2020 Presidential election was the most secure election in history is now a myth. The district court erroneously accepted this myth as truth when offered by *Dominion*, and failed, as required, to accept the Plaintiffs' well-plead allegations as true. Further, the district court denied Appellants' request for an evidentiary hearing to justify their allegations. Instead, Appellants were ridiculed, defamed, and sanctioned.

The now infamous statement declaring the 2020 Presidential election as the most secure in election history was broadly attributed to CISA, but actually was issued as a "Joint Statement from Elections Infrastructures Government Coordinating Council (*EISCC*) and the Election Infrastructure Sector Coordinating Committees (*EISGCC*)." Therefore, it was *EISCC* and *EISGCC* that declared the November 3, 2020, presidential election as the most secure in American history. Notably, *Dominion* is a member of the *EISCC*, along with every other voting machine manufacturer.[2]

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[2] The members of the *EISCC* include: Amazon Web Services (AWS), Arrikan, Inc./Chaves Consulting, Inc., Associated Press (AP) Elections, Ballottrax (i3logix, Inc.), BlueCrest, The Canton Group, Civix, Clear Ballot Group, CyberDefenses, Inc., Democracy Live, Democracy Works, DemTech Voting Solutions, DFM Associates, Dominion Voting Systems, EasyVote, ElectionIQ, Election Systems & Software (ES&S), Electronic Registration Information Center (ERIC), ElectSure Learning, Enhanced Voting, Freeman, Craft, McGregor Group, Hart InterCivic, KNOWInk, K&H Election Services, Microsoft, Microvote General Corp., NTS

The same is true is for *CTCL*, which, as outlined in the Plaintiffs' complaint, is inextricably connected to Zuckerberg, Chan, and *Facebook*. As outlined in Appellants' *Opening Brief*, the Wisconsin Assembly recently appointed a special counsel to investigate the integrity of its 2020 election.[3] The *Special Counsel Report* opined that *CTCL* facially violated Wisconsin law prohibiting election bribery. *Special Counsel Report*, pp. 17-40. The report also states, among other things, that the *CTCL's* grants were impermissible and partisan. *Id*. at 41-43. None of these allegations were addressed in Appellees' Response Brief.

Further, it cannot be said that Appellants made personal attacks on the Appellees, herein. *See Def. Res. Br.*, p. 58. In fact, every allegation made by Appellants, on behalf of their clients, were supported by citation to a reliable source.

Data Services, Pro V&V, Runbeck Election Services, Ryder Election Services, SCYTL, SeaChange Print Innovations, SLI Compliance, Smartmatic, Tenex Software Solutions, Unisyn Voting Solutions, Victor Envelope Company, Voatz, VOTEC, Votem, VoteShield, Voting Works, and VR Systems. (https://www.cisa.gov/government-facilities-election-infrastructure-charters-and-membership)

[3] Office of the Special Counsel, *Second Interim Investigative Report On the Apparatus & Procedure of the Wisconsin Elections System* (*Special Counsel Report*), March 1, 2022. (https://legis.wisconsin.gov/assembly/22/brandtjen/media/1552/osc-second-interim-report.pdf)

It's not enough for Appellees to state that Appellants leveled "outrageous accusations" against them for an improper motive. *Id*. at 58-59. The motivation of Appellants was to represent their clients. Even in that regard, earning a fee for ethical legal work is not an improper motive. However, to suggest that Appellants' motivation was to embarrass or defame Appellees is unsupported by the evidence, and simply untrue.

II. Appellants Believed in Good Faith That the Plaintiffs' Claims were Not a Generalized Grievance

The Supreme Court has "consistently held that 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." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992).

"A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . " *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973)).

Here, all of the original eight Plaintiffs submitted affidavits concerning their own, individual injury associated with the infringement of their rights. Thus,

coupled with the allegations made in the complaints, Appellants believed that the Plaintiffs had demonstrated a case and controversy between themselves, personally, as against the named Defendants,. The fact that their claims may be comparable to others similarly situated, in the measured judgment of Appellants, did not vitiate their claims.

A generalized grievance is an "asserted injury 'shared in substantially equal measure by all or a large class of citizens[.]'" *Def. Res. Br.* 21 (*quoting Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Such an undifferential grievance, as claimed by Appellees, can never support standing, '"no matter how sincere.'" *Def. Res. Br.* 21 (*quoting Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013)). However, there is a distinction between a claim "undifferentiated and common to all members of the public" and "a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560.

Here, each original Plaintiff (and those who attempted to join in the Amended Complaint) outlined their own, personal interest and injury in their respective affidavits. The Plaintiffs did not file their claims for the benefit of society. 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, generally. Their injuries were personal and individualized to themselves, respectively. By the very nature of the claims, although many other voters are similarly situated, the potential injury a voter suffered from the conduct of the Defendants would naturally vary from voter to voter.

With that said, however, the injuries to others at this stage is irrelevant. Although similar in nature to those similarly situated, Appellants, in good faith, averred the damages of their clients, all of whom suffered their own concreate and particularized injury, as outlined in their affidavits. Any issue concerning a class of injured voters is premature, at this juncture.

Lastly, the circumstances of this case are unprecedented. Never before in American history have such a series of facts played out over the course of a Presidential election. As is outlined with greater particularity in the Plaintiffs' Amended Complaint, it is a fact that a cabal of progressives from around the World made it their business to exert their influence upon the 2020 Presidential election. The candidates and their respective parties are irrelevant. In fact, if a conservative cabal had, through a person similar to Defendant Zuckerberg, funneled Hundreds of Millions of Dollars in private money to only a portion of precincts in certain states to the overwhelming advantage of a *Republican* candidate, that case would be similarly self-evident.

III. The District Court Abused Its Discretion In Imposing Sanctions on Appellants

Without waiving any arguments previously made, Appellants stand on the factual allegations and legal arguments made in the record, and in their previously filed *Opening Brief*. Without simply repeating the same arguments outlined in the *Opening Brief*, Appellants assert that the district court abused its discretion in imposing sanctions against Appellants.

As outlined in the previous pleadings, and in said *Opening Brief*, Appellees, *Dominion*, *CTCL* and *Facebook* failed to follow the strict requirements of Rule 11. Moreover, the allegations, generally, that Appellants failed to adequately research and perform reasonable inquiry are also not supported by the record. As such, Appellants continue to assert that their arguments related to the standing of their clients were made, in good faith.

With regard to Appellees, the Governor and Secretary of State from *Michigan*, and the Governor and Secretary of State of *Pennsylvania*, Appellants stands on their *Opening Brief*, and continue to assert the lack of standing for these parties to be a part of this appeal.

Defendants, Gretchen Whitmer and Jocelyn Benson, from *Michigan* (*Michigan Defendants*), and Tom Wolf and Kathy Boockvar, from *Pennsylvani*a (*Pennsylvania Defendants*), were sued in their respective, individual capacities,

for conduct performed under color of law in their respective states. Those persons never entered their appearance in their individual capacity, and were dismissed by the Plaintiffs.

Appellees, as represented by the attorney generals from *Michigan* and *Pennsylvania*, conversely entered their appearances on behalf of their respective governors and secretaries of state, in their official capacity, despite the fact that no individuals were not sued in their official capacity. As such, *Michigan* and *Pennsylvania* were not sued, and the attorney generals of those States have no standing to move for sanctions against Appellants.

Nevertheless, *Michigan* and *Pennsylvania* continue to assert that Appellants made demonstrably false allegations. *Def. Michigan* and *Pennsylvania Res. Br.*, p. 31-35. However, the factual allegations that *Michigan* and *Pennsylvania* claim to be false were never litigated in the case, nor did the district court base its sanctions on such allegations.

Moreover, there is no basis in fact to the claim that Appellants "knew their allegations were false." *Id*. at 35. The information as plead was based upon reliable sources, all of which were cited in the Plaintiff's complaint. The parties were dismissed relatively early in the proceedings, and no actions or conduct of

Appellants multiplied the proceedings with regard to the *Michigan Defendants*, or the *Pennsylvania Defendants* in any way.

Neither *Michigan* nor *Pennsylvania* have claims for sanctions pursuant to Rule 11. Further, § 1927 sanctions are discretionary and are appropriate only when an "extreme standard" of conduct is met. *White v. Am. Airlines, Inc.*, 915 F.2d 1414, 1427 (10th Cir. 1990). Thus, an award of attorneys' fees and costs under § 1927 is appropriate "only in instances evidencing a serious and standard disregard for the orderly process of justice." *Id*. (quoting *Dreiling v. Peugeot Motors of Am., Inc*., 768 F.2d 1159, 1165 (10th Cir. 1985)).

Appellants note that the none of the cases cited by *Michigan* were reviewed and affirmed by the United States Supreme Court. The cited case of *King v. Whitmer*, 556 F. Supp. 3d 680 (E.D. Mich. 2021) is still on appeal. Additionally, Appellants disagree with *Michigan* and *Pennsylvania's* assertions that the district court did not abuse its discretion by concluding that Appellants should be sanctioned for not reviewing, and apparently adopting as fact, the responses filed by *Pennsylvania* in *Texas v. Pennsylvania*, 141 S.Ct. 1230 (2020). *See Def. Michigan* and *Pennsylvania Res. Br.*, p. 34.

CONCLUSION

For the reasons stated herein, the Plaintiffs requests that this Court reverse the district court's orders granting Appellee's motions for sanctions, and set aside the district court's impositions of sanctions, as outlined in its *Final Order*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 3,842 words. I relied on my word processor and its Word software to obtain this count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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 **APPELLANT'S OPENING BRIEF**, 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 10th day of June, 2022, I electronically filed the foregoing **APPELLANT'S REPLY BRIEF** 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