No. _______

In The Supreme Court of the United States

IN RE: O'ROURKE, ET AL. V. DOMINION VOTING SYSTEMS, ET AL.
BY
ERNEST WALKER, ESQ., AND GARY FIELDER, ESQ.,
Petitioners,
v.

DOMINION VOTING SYSTEMS INC., A DELAWARE CORPORATION, FACEBOOK, INC. K/N/A META PLATFORMS, INC., A DELAWARE CORPORATION, CENTER FOR TECH AND CIVIC LIFE, AN ILLINOIS NON-PROFIT ORGANIZATION, STATE OF MICHIGAN, AND COMMONWEALTH OF PENNSYLVANIA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioners were properly sanctioned under a district court's inherent authority for asserting standing on behalf of voters for damages against private persons engaged in state action pursuant to § 1983.

2. Whether Petitioners were properly sanctioned for multiplying the proceeding in violation of § 1927 by naming certain out-of-state defendants when they were voluntarily dismissed without inconvenience to them in their individual capacity.

3. Whether Petitioners were denied due process by the Tenth Circuit's affirmation of the district court's refusal to set an evidentiary hearing before sanctioning them.

4. Whether a sanction requiring Petitioners to pay over $186,000 for the attorney fees of the requesting defendants was reasonable.

PARTIES TO THE PROCEEDING

Ernest J. Walker, Esq., and Gary D. Fielder, Esq.,

Petitioners,

vs.

Dominion Voting Systems Inc., a Delaware corporation, Facebook, Inc. k/n/a Meta Platforms Inc., a Delaware corporation, Center for Tech and Civic Life, an Illinois non-profit organization, State of Michigan and Commonwealth of Pennsylvania,

Respondents.

CORPORATE DISCLOSURE STATEMENT

Petitioners are natural persons.

STATEMENT OF RELATED PROCEEDINGS

- *Kevin O'Rourke, et al., v. Dominion Voting Systems, Inc., et al.,* United States District Court, District of Colorado, Case No. 1:20-cv-03747.

- *Kevin O'Rourke v. Dominion Voting* Systems, Inc., Tenth Circuit Court of Appeals Case No. 21-1161 (opinion dated May 27, 2022; Petition for Rehearing denied June 27, 2022).

- *Kevin O'Rourke, et al., v. Dominion Voting Systems, Inc., et al.,* Tenth Circuit Court of Appeals Case No. 21-1442 (opinion dated December 13, 2022; Petition for Rehearing denied February 2, 2023).

- *Kevin O'Rourke, et al., v. Dominion Voting Systems, Inc., et al.,* Supreme Court of the United States No. 22-305 (cert. denied December 5, 2022).

There are no other proceedings in the state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Ernest J. Walker, Esq., and Gary D. Fielder, Esq., counsel for the plaintiffs regarding *O'Rourke, et al.*, v. *Dominion Voting Systems, Inc.*, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is unpublished and attached at App. 1. The district court's order granting sanctions is published and attached at App. 45. The district court's order specifying the sanctions amount is published and attached at App. 21. The order on Rehearing of the United States Court of Appeals for the Tenth Circuit is unpublished and attached at App. 126.

JURISDICTION

The Tenth Circuit entered judgment on December 13, 2022, and denied Petitioners' motion for rehearing on February 2, 2023. This Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS FEDERAL RULES AND INVOLVED

- 28 U.S.C. § 1927 is reproduced at App. 128.

STATEMENT OF THE CASE

A. Introduction

Petitioners, Ernest J. Walker, Esq., and Gary D. Fielder, Esq., seek to set aside sanctions imposed against them as counsel for plaintiffs regarding *O'Rourke, et al.*, v. *Dominion Voting Systems, Inc.*, *et al*. The plaintiffs' case was dismissed pursuant to F.R.C.P. 12(b)(1) for lack of subject matter jurisdiction, after which the Petitioners, on behalf of plaintiffs, filed a notice of appeal. Certain defendants then filed motions with the district court for sanctions, which were granted. The dismissal of the case was affirmed on appeal and this Court denied review. Thereafter, the Tenth Circuit affirmed the sanctions pursuant to the district court's inherent authority and § 1927. This petition followed. As a result of these proceedings, the purpose of the Civil Rights Act has been subverted and a chilling effect against attorneys willing to help vindicate the rights of citizens has been created. Petitioners behaved with decorum and timeliness. Every pleading was filed within the rules of professional conduct. However, because the subject matter was the 2020 presidential election, the district court seemed to disfavor the plaintiffs, dismissed their case, refused to allow amendment, and sanctioned their counsel to pay the attorney fees of the requesting defendants—some of whom were States that had no standing in the case, whatsoever. Ultimately, the decisions of the lower courts were based upon a misunderstanding of constitutional law and § 1983, which, if not corrected, will have a long and devasting effect on American jurisprudence.

B. Proceedings Leading up to the District Court's Order Sanctioning the Petitioners

On April 28, 2021, the district court dismissed the plaintiffs' complaint, without prejudice, for lack of subject matter jurisdiction, and denied plaintiffs' motion to amend. The plaintiffs filed their notice of appeal the next day. ROA 1572-1573.

The complaint was brought by eight voters from five states. Plaintiffs sued Respondents, Dominion Voting Systems, Inc. (*Dominion*), Meta Platforms, Inc., f/k/a Facebook, Inc. (*Facebook*), and Center for Tech and Civic Life (*CTCL*), pursuant to, among other things, § 1983, for engaging in state action that burdened the plaintiffs' rights in the 2020 presidential election.[1] ROA 19. Plaintiffs also sued Gretchen Whitmer and Jocelyn Benson from Michigan (*Michigan Defendants*), Tom Wolf and Kathy Boockvar from Pennsylvania (*Pennsylvania Defendants*), Brian Kemp and Brad Raffensperger from Georgia, and others, in their respective, individual capacities for conduct performed under color of law in contravention of the Constitution of the United States, to which all of these latter defendants took an oath. Plaintiffs attached personal affidavits to the complaint. Each were citizens of the United States and of their respective state, registered to vote with a stake in the 2020

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[1] Plaintiffs also sued Mark Zuckerberg and Priscila Chan. The district court dismissed the case before the time for serving those defendants had expired. ROA 1505-1533.

presidential election, claiming damages caused by the conduct of the defendants.

Later, the plaintiffs filed a motion to amend (with their proposed amended complaint), which included one hundred and sixty plaintiffs from thirty-eight states. At all material times, plaintiffs were represented by the Petitioners, who are experienced lawyers from Michigan and Colorado, with sixty years of experience between them.

After service, *Dominion*, *Facebook*, and *CTCL* filed motions to dismiss. ROA 242-287 & 737-757. On behalf of the plaintiffs, Petitioners then filed timely responses, to which the defendants replied. ROA 301-736, 1321-1336, 1377-1392, 1444-1471, 11-87-1221, 1472-1488.

In the interim, attorney generals from the State of Michigan (*Michigan*), Commonwealth of Pennsylvania (*Pennsylvania*) and State of Georgia (*Georgia*) entered their appearances on behalf of their respective governors and secretaries of state, none of whom had been named in their official capacity. ROA 290-300. Subsequently, *Michigan*, *Pennsylvania* and *Georgia* all filed motions to dismiss and separate objections to the plaintiffs' motion to amend. ROA 790-875, 1167-1186, 1225-1320. In the plaintiffs' responses to the States' motions to dismiss, Petitioners argued that those defendants were not only being sued in their individual capacity, but that the attorney generals had only entered their appearances for persons holding public office in their official capacity.

In dismissing the case, the district court found the plaintiffs did not suffer a "particularized, concrete individual injury." App. 66. In sanctioning counsel, the district court concluded the plaintiffs' case was barred by "binding Supreme Court precedent." App. 104 (*citing Lance v. Coffman*, 549 U.S. 437 (2007)).

The district court further stated:

> Plaintiffs' effort to distinguish this case from what I referred to as a "veritable tsunami" of adverse precedent [citation] was not just unpersuasive but crossed the border into the frivolous.[2]

App. 64.

In *Lance*, four Colorado citizens sued the Colorado Secretary of State, in his official capacity, challenging the state's supreme court interpretation of a section of the Colorado Constitution as a violation of their rights under the Elections Clause. There, this Court identified a generalized grievance as an attempt to assert "only the right, possessed by every citizen, to require that the Government be

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[2] The "veritable tsunami" of cases included: *King v. Whitmer*, Civ. No. 20-cv-13134, 2020 WL 7134198 (E.D. Mich. December 7, 2020); *Bowyer v. Ducey*, Civ. No. 20-cv-2321, 2020 WL 7238261 (D. Ariz. December 9, 2020); *Feehan v. Wisconsin Elections Commissions*, 506 F.Supp.3d 596 (E.D. Wis. December 9, 2020); *Texas Voters Alliance v. Dallas County,* 95 F. Supp.3d 441 (E.D. Tex. Oct 10, 2020); *Iowa Voter Alliance v. Black Hawk County*, C20-2078-LTS. 2021 WL 276700 (N.D. Iowa January 27, 2021); and, *Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020).

administered according to law and that the public moneys be not wasted." *Id*. at 439 (*quoting Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

In its order sanctioning Petitioners, the district court spent pages referencing news articles that disputed "Trump's allegations of election rigging and widespread fraud," and included a detailed description of the events at the Capitol on January 6, 2021. App. 96. The plaintiffs, here, however, were relying on more than a candidate's allegation of voter fraud, and had nothing to do with the events of January 6, 2021, at the Capitol in Washington, D.C. Despite that, the district court stated:

> Given the volatile political atmosphere and highly disputed contentions surrounding the election both before and after January 6, 2021, circumstances mandated that Plaintiffs' counsel perform *heightened* due diligence, research, and investigation before repeating in publicly filed documents the inflammatory, indisputably damaging, and potentially violence-provoking assertions about the election having been rigged or stolen. [Emphasis added].

App. 101.

After the dismissal, *Dominion*, *Facebook* and *CTCL* filed separate motions for sanctions against Plaintiffs' counsel, pursuant to Rule 11, § 1927, and the court's inherent authority. ROA 1716-1731, 1748-1924. *Michigan* and *Pennsylvania* also filed motions to sanction the Petitioners under the court's

inherent authority and § 1927, as well. ROA 1732-1748, 1927-1946. Petitioners filed responses in objection to all of those motions, which included their continued challenge to the standing of *Michigan* and *Pennsylvania*. ROA 1947-2006, 2088-2100.

The district court held oral arguments on the motions for sanctions. ROA 2455-2557. After that, Petitioners requested an evidentiary hearing. ROA 2558. The district court denied the request. ROA 2563. Thereafter, the district court granted the motions, and ordered the parties to meet and confer with regard to an appropriate sanction. ROA 2567-2635.

Without conceding the righteousness of the district court's sanctions, Petitioners agreed that *Pennsylvania* and *Michigan's* request for $6,162.50 and $4,900, respectively, were reasonable. The parties did not agree regarding the requests for attorney fees made by *Dominion*, *Facebook* and *CTCL*. Because of that, those Respondents submitted separate billing statements, wherein *Dominion* requested $78,944; *Facebook* requested $50,000, and *CTCL* requested $64,012.24. ROA 2684-2809.

Ultimately, the district court granted the Respondents' requests for attorney fees, and further scolded Petitioners for, among other things, slandering the Respondents. ROA 2959. Petitioners appealed. ROA 2938.

C. Proceedings in the Tenth Circuit

The Tenth Circuit affirmed the district court's dismissal, also finding that the plaintiffs' claims were a generalized grievance.

With regard to the sanctions, the Tenth Circuit overturned the district court's orders regarding sanctions related to Rule 11. However, the Tenth Circuit affirmed "the sanctions awards under the court's inherent powers and authority §1927." App. 6. The Tenth Circuit adopted the district court's finding that "'there was no good faith basis for believing or asserting that the plaintiffs had standing to bring the claims that they did' because '[t]here was no individual particularized harm alleged,' [citation], and '[n]o reasonable attorney would have believed Plaintiffs, as registered voters and nothing more, had standing to bring this suit.'" App. 105.

The Tenth Circuit further stated:

> As the district court stated in its merits decision, there was 'a veritable tsunami of decisions finding no Article III standing in near identical cases to the instant suit.' Aplt. App. Vol. 7 at 1552. Yet the Attorneys' 'efforts to distinguish between this case and the other dismissed lawsuits were either self-contradictory (claiming that this suit is brought against private entities and not government entities) or nonsensical and precluded by Supreme Court caselaw (suggestion that seeking money damages

> rather than an injunction as a remedy makes Plaintiffs' claimed injury sufficiently particularized to form a basis for standing).' *Id.* Vol. 11 at 2616.

App. 9.

The record, however, does not support those findings. The plaintiffs' complaint repeatedly states that they suffered damages as a proximate cause of the conduct of the defendants. Additionally, each plaintiff described their damages in their respective affidavits. Thus, their standing *was* found in their citizenship and right to vote.

In affirming the sanctions, the Tenth Circuit stated:

> At the hearing on the motions to dismiss and the motions to amend, the district court explicitly gave Mr. Fielder the opportunity to distinguish the many adverse cases cited by the defendants, but he was not able to meaningfully do so.

App. 9.

At said hearing, however, the following colloque transpired between the district court and counsel:

> District Court: Let's talk about standing. Why didn't you cite a single case of the dozens that have been issued by Federal District Courts across the country dismissing the claims exactly like yours on the basis of standing.

> You didn't mention any of them in either your motion to amend or your opposition to the motions to dismiss. Why not? Please distinguish this case from the cases in Iowa, the cases in Wisconsin, the cases in Pennsylvania, that were all dismissed on the basis of standing.
>
> Mr. Fielder: Because the individuals there were coming to the court and suing government individuals and persons in their official capacities. Therefore, they were essentially suing the states or sub-divisions of a state. They were asking for extraordinary relief. All of those cases, all of them, were with regard to a request for a TRO or a preliminary injunction. In those cases, the standard of proof is that the plaintiff must show a likelihood of success on the merits. The standard here is different. This is a completed Constitutional right violation. This is multiple parties committing multiple violations. However, . . . [a]fter the election, in the middle of the process before the Electoral College met, many voters expressing their dissatisfaction, hired lawyers that went to court and asked for extraordinary relief. We did not do that. On December 10th of 2020, the United States Supreme Court in the [*Tanzin v. Tanvir*] case, indicated that it has long since recognized a plaintiff's ability to sue individuals in their individual capacity.

ROA 1674-1676.

The Tenth Circuit additionally stated:

> Plaintiffs' arguments regarding standing were so inadequate that it was not an abuse of discretion for the district court to conclude that the claims were made in bad faith, vexatiously, wantonly, or for oppressive reasons, such as to support inherent-powers sanctions. *Cf. Collins v. Daniels*, 916 F.3d 1302, 1321 (10th Cir. 2019) (upholding Rule 11 sanctions where 'Plaintiffs' standing arguments ignored controlling precedent' and 'Plaintiffs unreasonably attempted to distinguish' binding authorities regarding standing).

The Tenth Circuit further found the record "amply supported" the district court's finding "that there was no good-faith basis for asserting personal jurisdiction over the Michigan and Pennsylvania defendants in the District of Colorado." App. 10.

The Tenth Circuit relied upon *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 852, 858 (10th Cir. 2018), wherein it followed this Court's guidance in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991). In *Chambers*, this Court articulated a district court's inherent power to assess attorney fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Id*. at 45.

Regarding § 1927, the Tenth Circuit concluded:

> Given the plaintiffs' inability to establish personal jurisdiction over the Michigan and

> Pennsylvania defendants, it was not an abuse of discretion for the district court to conclude that the Attorneys unreasonably and vexatiously multiplied the proceedings by failing to dismiss the claims against them before filing the motion to amend and by naming them in the proposed amended complaint.

App. 15.

Lastly, the Tenth Circuit determined that Petitioners' right to due process was not violated by the district court's denial of an evidentiary hearing, and that the sanctions award was not excessive or unreasonable. App. 17.

REASONS FOR GRANTING THE PETITION

A. The Tenth Circuit Improperly Affirmed the Sanctions Under the District Court's Inherent Power

In *Chambers*, the sanctioned party engaged in a lengthy and continued abuse of the judicial process, including defiance of a preliminary injunction, the filing of a series of meritless motions and delaying actions. *Id*. at 38. These actions "triggered further warnings" from the trial court which continued until the eve of trial. *Id*. Even after the trial, Chambers transferred property, removed equipment, and engaged in behavior that resulted in NASCO seeking sanctions for contempt. *Id*. at 38-39. The court of appeals also found his appeal frivolous and imposed attorney fees, as well. *Id*. at 40.

Here, Petitioners filed a complaint on behalf of clients that claimed damage by the acts of the several defendants. Motions to dismiss those claims were filed, and timely and well-reasoned responses were filed without request for extension. Petitioners appeared at both oral arguments and, at all times, conducted themselves in a professional manner. No motions for sanctions were filed by the defendants, nor did the district court sanction the Petitioners before, or at the time of the dismissal without prejudice. Only after the filing of a notice of appeal did *Dominion*, *Facebook*, *CTCL*, *Michigan Defendants* and *Pennsylvania Defendants* file their respective motions for sanctions. ROA 1716-1924, 1927-1943.

As such, the Petitioners' conduct did not rise to the level of bad faith. Petitioners complied with their duties and followed the rules of civil procedure. Further, Petitioners did not willfully disobey orders, nor, despite the moving defendants' protestations, was the lawsuit filed for an improper purpose.

"Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980). "Like all applications of inherent power, the authority to sanction bad-faith litigation practices can be exercised only when necessary to preserve the authority of the court." *Chambers*, 501 U.S. at 64. The "necessity predicate limits the exercise of inherent powers to those exceptional instances in which congressionally authorized powers fail to protect the processes of the court." *Id*.

With regard to standing, as this Court stated in *Gomez v. Toledo*, 446 U.S. 635, 640 (1980):

> By the plain terms of § 1983, two–and only two–allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.

A district court lacks jurisdiction to rule upon a citizen's "abstract questions." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 (1974). Nonetheless, 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. 555, 560 (1992).

With regard to the Tenth Circuit's affirmation of the district court's finding that there was no good-faith basis for asserting personal jurisdiction over the *Michigan Defendants* and *Pennsylvania Defendants*, those defendants could have consented to the jurisdiction of the District of Colorado to avoid being sued in their home state.

Additionally, just prior to the filing of the complaint, Justice Thomas confirmed that this Court "has long interpreted [§ 1983] to permit suits against officials in their individual capacities." *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020).

B. The District Court Sanctioned Counsel Pursuant to Motions Filed After Dismissal Without Prejudice

The Tenth Circuit followed its own precedent and found that "'that the motions for [Rule 11] sanctions should have been denied because they were not filed until after the district court had dismissed the complaint.'" *Opinion*, p. 6 (*citing Roth v. Green*, 466 F.3d 1179, 1193 (10th Cir. 2006).

The Tenth Circuit, however, failed to set aside the sanctions under the district court's inherent power, despite the fact that those motions were also filed after the district court's final order of dismissal.

Like the Tenth, the Third Circuit requires "parties to file all motions for Rule 11 sanctions before entry of the court's final order." *Prosser v. Prosser*, 186 F.3d 403, 405 (3d Cir. 1999). In *Prosser*, the Third Circuit specifically found that "the interests of judicial efficiency, timeliness, and notice are no different when imposing sanctions under the court's inherent power." As quoted by the Petitioners in their opening brief regarding sanctions, the *Prosser* court stated:

> At the time that the court decided the motions for summary judgment and dismissal, it had before it the identical information that it relied upon three months later in imposing the sanctions. Nothing was to be gained by delay. If sanctions had truly been appropriate, the court should have

> imposed them at that time. Their imposition three months later was an abuse of discretion.

Id. at 405-06 (*citing Simmerman v. Corino,* 27 F.3d 58, 63-64 (3d Cir. 1994)).

The Tenth Circuit seemed to recognize *Prosser* in *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1223 (10th Cir. 2006), except in the context of § 1927. In light of this authority, noting the Tenth Circuit's recognition of the untimeliness of the Rule 11 motions, the same ruling should have applied to the motions filed for sanctions after dismissal under the district court's inherent authority. *See also Peer v. Lewis*, 606 F.3d 1306, fn. 10 (11th Cir. 2010) (*also citing Prosser* and 2 James Wm. Moore et al., *Moore's Federal Practice* § 11.41[6] (3d ed. 2010)).

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-396 (1990), this Court found that district courts retain jurisdiction to decide collateral issues after dismissal, which include the imposition of sanctions. Nonetheless, in *Cooter*, the party seeking sanctions filed the sanctions motion well before the voluntary dismissal in that matter. *Id*. at 389.

C. The Tenth Circuit's Affirmation Expanded § 1927 Beyond Its Recognizable Limits and to Parties That Were Not Part of the Lawsuit

In the Tenth Circuit, § 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).

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)). The conduct must, when "viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *Id.* (*citing Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987)).

Here, the Tenth Circuit noted that the "district court based its award of § 1927 sanctions on the 'filing of a motion for leave to amend, without addressing the obvious fatal problems with standing and lack of personal jurisdiction, while attempting to add RICO claims based on a TIME magazine article that provided no support for such claims.'" App. 14.

Regarding the *Pennsylvania Defendants* and *Michigan Defendants*, the Tenth Circuit found that "by the time the Attorneys filed the motion to amend, they were aware that these defendants were not going to consent to personal jurisdiction." However, the plaintiffs filed their motion to amend on the same day that the Pennsylvania and Michigan attorneys general filed their motions to dismiss the original complaint (and then, only on behalf of these defendants in their official capacities) on March 15, 2021. ROA 790-875, 1167-1186.

Moreover, the attorney generals had only ever filed entries of appearance on behalf of their respective governors and secretaries of state in their official capacity (and never appeared on behalf of

them in their individual capacities).[3] As such, these defendants never appeared or filed any responsive pleadings before the district court before being voluntarily dismissed by plaintiffs. Because they had not individually appeared, Petitioners filed notices of voluntary dismissal on April 19, 2021, and April 25, 2021, respectively.[4]

The *Sanctions Orders* states that it "should have been as obvious to Plaintiffs' counsel as it would be to a first-year civil procedure student that 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. 67. The district court found that it was "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

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[3] For example, since Defendant, Kathy Boockvar, had resigned as Pennsylvania's Secretary of State before the Pennsylvania Attorney General entered his appearance, the party listed on the entry was Boockvar's replacement, Veronica Degraffenreid, in her official capacity as Secretary of State for the Commonwealth of Pennsylvania and ignored Boockvar entirely. ROA 298.

[4] As noted by the Tenth Circuit, the proposed amended complaint also named as additional defendants the attorneys general of Michigan and Pennsylvania, in their official capacities. App. 14-15. However, those parties were named in conjunction with the plaintiffs' constitutional challenges to statutes in those states, which were also voluntarily dismissed on April 25, 2021. ROA 1523.

Michigan elections." App. 11. In fact, the district court further stated that the "[f]iling a lawsuit against an out-of-state defendant with no plausible good faith justification for the assertion of personal jurisdiction or venue is sanctionable conduct." *Id.*

Similarly, in affirming the sanctions pursuant to § 1927, the Tenth Circuit ruled:

> Given the plaintiffs' inability to establish personal jurisdiction over the Michigan and Pennsylvania defendants, it was not an abuse of discretion for the district court to conclude that the Attorneys unreasonably and vexatiously multiplied the proceedings by failing to dismiss the claims against them before filing the motion to amend and by naming them in the proposed amended complaint.

App. 15.

Petitioners contend that this Court has long held that a party may consent to personal jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714, 725 (1877). Moreover, there are many reasons to agree to consent, including judicial economy. In light of that, § 1927 cannot be read to include the naming of parties in a complaint—much less their inclusion in an amended complaint that was never allowed to be filed. Before this matter, historically in the Tenth Circuit, § 1927 covered only the multiplication of the proceedings in a case. *Steinert*, 440 F.3d at 1224-1225 ("This unambiguous statutory language necessarily excludes the complaint that gives birth to the

proceedings, as it is not possible to multiply proceedings until after those proceedings have begun.")

As for *Dominion*, *Facebook*, and *CTCL*, the Tenth Circuit found that "it was not an abuse of discretion for the district court to conclude that the Attorneys unreasonably and vexatiously multiplied the proceedings by moving to amend their complaint, including adding RICO claims, without showing that the plaintiffs had standing to bring their claims." App. 15.

Plaintiffs' proposed amended complaint outlines an alleged scheme, some of which is described in the referenced TIME article. However, this was only a part of a broad foundation constructed by many pieces of evidence that create a clear picture of abuse. More importantly, throughout their complaints, the plaintiffs consistently referenced suffering injury as it related to their constitutional rights. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [this Court] 'presum[es] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan,* 504 U.S. at 561 (*quoting National Wildlife Federation*, 497 U.S. 871, 889 (1990).

The deprivation of a federal protected interest creates an injury in fact. Thus, the standing of the plaintiff is found by the factual allegations of damage, as alleged. Although the injury in fact must be concrete and particularized, "intangible injuries can nevertheless be concrete." *Spokeo, Inc. v. Robins*,

136 S. Ct. 1540, 1549 (2016). In *Spokeo*, this Court cited cases that vindicate First Amendment values as examples in support. *Id.* (*citing Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (free exercise); *see also* Rachel Bayefsky*, Psychological Harm and Constitutional Standing*, 81 Brook. L. Rev. 1555, 1557 (2016) ("The idea that certain intangible interests can count for Article III standing is by no means novel.").

D. The Petitioners Had a Right to an Evidentiary Hearing

Both the district court's *Sanctions Order* and *Final Order* are peppered with disdainful comments toward the Petitioners. At the end of the *Final Order*, the district court states:

> [Petitioners] are experienced lawyers who should have known better. They need to take responsibility for their misconduct. Defendants have been significantly prejudiced, not just because they have had to incur legal fees to defend this pointless and unjustified lawsuit, but because they have been defamed, without justification, in public court filings.

App. 43.

The district court seems to equate the Petitioners with criminal defendants that need to take responsibility before receiving a lighter sentence. The district court's language also seems to suggest that

the Petitioners should stop arguing the case and drop their appeals. Space does not permit a full deconstruction of the district court's one-sided criticisms of the Petitioner and plaintiffs. Suffice it say, the district court gave its personal opinions the full weight of punitive sanctions. The district court's discussions are one-sided—citing only those who agree with its preferences, and wholly ignoring huge parts of the record that contradict its conclusions. All this, while accusing the Petitioners of engaging in unprofessional behavior. The district court's analysis confuses standards and relies on inapplicable authorities. Thus, the *Sanctions Order* and *Final Order* employ a censorious, accusatory tone, contriving improper conduct where there is none.

After oral arguments on the motions for sanctions, Petitioners moved for an evidentiary hearing. ROA 2558. However, the district court denied this request, finding that "train [has] left the station." ROA 2563.

In the Tenth Circuit, the "basic requirements of due process with respect to the assessment of costs, expenses, or attorney's fees are notice that such sanctions are being considered by the court and a subsequent opportunity to respond." *Bradley,* 832 F. 2d at 1514. In determining whether due process has been afforded, no bright-line rule applies because "[d]ue process is a flexible concept, and the particular procedural protections vary, depending upon all the circumstances." *Id.*

Here, noting the attack on Petitioners' character and the allegations of deceit and impropriety,

Petitioners should have been afforded an opportunity to testify under oath and present evidence. The matter was set "to hear arguments" on the motions. ROA 2101. No orders were issued with regard to Petitioners' ability to call witnesses, or present evidence. That could only have been done at an evidentiary hearing. Instead, the district court effectively accepted as true all of the defendants allegations of fact at the pleadings stage, and rejected every allegation made by plaintiffs despite thorough factual support. Thus, the district court's denial of the Petitioners request for an evidentiary hearing violated the Petitioners' right to due process.

E. The Sanctions were Unreasonable

Although the *Sanctions Order* fails to distinguish the amounts associated with the different authorities exercised by the district court, the sanction imposed was unreasonable. The amounts stipulated by Petitioners and the attorneys general for Michigan and Pennsylvania were reasonable. But, the amounts the Petitioners were ordered to pay *Dominion*, *Facebook* and *CTCL* are not.

Petitioners accept opposing counsels' representations as to the hours expended, and the reasonableness of their hourly rate. However, requiring Petitioners to pay over $180,000 in attorney fees was excessive and unreasonable. Sanctions under Rule 11 are penal in nature, but those findings were overturned by the Tenth Circuit. Normally, § 1927 covers only the multiplication of the proceedings, which in this case were apparently associated with the filing of an amended complaint

that was never accepted, and against parties whom never appeared and were also voluntarily dismissed.

Of course, "if a plaintiff initiates a case in complete bad faith, so that every cost of defense is attributable only to sanctioned behavior, the court may…make a blanket award." *Goodyear Tire & Rubber Co. v. Haeger,* 137 S. Ct. 1178, 1188 (2017). In its *Final Order*, the district court stated:

> [The district court] conclude[s] that the repetition of defamatory and potentially dangerous unverified allegations is the kind of advocacy that needs to be chilled. Counsel should think long and hard, and do significant pre-filing research and verification, before ever filing a lawsuit like this again. As explained previously, this was a damages case with no need for urgency or immediate injunctive relief, and therefore there was no legitimate basis for filing suit without being certain about the claims. I do not believe that sanctioning these lawyers for this lawsuit threatens to chill appropriate legitimate legal advocacy in the future. I have also considered the degree of counsel's culpability, which is significant…I believe that rather than a legitimate use of the legal system to seek redress for redressable grievances, this lawsuit has been used to manipulate gullible members of the public and foment public unrest. To that extent, this lawsuit has been an abuse of the legal system and an interference with the machinery of government. For all these reasons, I feel that

> a significant sanctions award is merited. I also feel that the amounts awarded are to some degree consistent with the victim-centered . . . compensatory mechanism of sanctions anticipated under 28 U.S.C. § 1927.

App. 43.

However, those findings are not supported by the pleadings filed in the record. Plaintiffs were not "gullible members of the public," and the Petitioners motives were most certainly not to foment unrest. Accordingly, the higher standard applied by the district court and sanctions imposed were admittedly calculated not just to discourage improper conduct, but to deter future lawyers from bringing constitutional right cases involving the 2020 presidential election. No compelling interest is served by discouraging lawyers that seek to represent actual clients concerning the country's electoral process.

F. The Tenth Circuit's Affirmation of Sanctions Chills the Rights of Citizens to Vindicate Their Rights and of the Lawyers that Help Them

The Tenth Circuit's opinion chills a lawyer's willingness to help citizens access federal district courts for vindication of rights their rights under § 1983. Section 1983, "creates a species of tort liability" against persons acting under color of law or engaged in state action. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986).

Other circuit courts have also recognized that imposing attorney fees can often "create a disincentive to the enforcement of civil rights laws" and "have a chilling effect on a plaintiff who seeks to enforce his/her civil rights, especially against a government official." *Riddle v. Egensperger*, 266 F.3d 542, 551 (6th Cir. 2001). *See also Dean v. Riser*, 240 F.3d 505, 510 (5th Cir. 2001).

The Tenth Circuit opinion is a departure from the accepted course of judicial proceedings and is thus a matter of great importance. Therefore, this Court must clarify these most important issues concerning an attorney's obligation to zealously represent his or her citizen without fear of unreasonable sanctions being imposed for filing a case under § 1983. The *O'Rourke* case was unprecedented because the conduct of the defendants was unprecedented in the course of the history of the United States. Only recently have private, for-profit companies, such as *Dominion*, controlled such a large number of elections in multiple jurisdictions across the country. It is more than just a vendor of voting machines. Their business is to set-up, aid in the administration of, and tabulate the votes in thousands of local elections across the country. As experts have alleged, their voting systems are unreliable, hackable and, among other things, subject to miscalculation. Noting the size and power of this corporation, it is unthinkable that the people may feel that their right to vote in a presidential election is being subverted, but are otherwise powerless to object. This one company can apparently sue major media outlets for hundreds of millions of dollars for defamation and carry sway in

district courts to sanction attorneys that dare challenge its conduct. Courts absolutely have jurisdiction to hear the claims of voters that assert that their votes are not being properly tabulated. Without proper calculation, any election is a farce.

Regarding the interplay between Zuckerberg, *CTCL* and *Facebook*, their interference in the 2020 presidential election has become a cultural cliché in America. The only issue is the standing of the voters to object.

Unquestionably, this is a case of great importance, which requires this Court's guidance regarding the scope of a district court's authority to sanction attorneys for otherwise regular conduct pursuant to § 1983. If citizens lack the ability to hold private persons liable under § 1983 for damages caused to a large class of citizens, including themselves, the purpose of the statute is defeated. Moreover, by sanctioning counsel in this regard, citizens and lawyers will both hesitate to vindicate their rights, and the rights of others in similar situations.

Additionally, the policy considerations for prudential standing do not include the need to protect private persons engaged in state action. Generalized grievances are made against government. Private state actors operate under color of official authority and are liable for their unconstitutional conduct. *Dominion*, *Facebook* and *CTCL* are not government. Hence, the Plaintiffs' claims cannot be a generalized grievance against government—no matter how big the claim, or how

many other citizens are similarly situated. Simply put, the sanctions of the district court and affirmation by the Tenth Circuit are based upon this general misunderstanding.

In eighteen months from the submission of this Petition, these matters of great public importance will be tested, again, and will include ongoing court challenges to various aspects of the voting process, the use of electronic voting systems with propriety software, private funding of the certain states' election machinery, and the continued censorship of the normal political views of voters by powerful corporations and social media giants. To complain, generally, about these issues does not confer standing; but here, the Petitioners plead facts concerning a particular election for retroactive damages against certain private persons that the plaintiffs reasonably believed had violated their constitutional rights by unlawfully interfering with the 2020 presidential election. This conduct effected each plaintiff in a very deep and profound way.

The right to vote, particularly for the President, is priceless to every citizen with that right. The injury, therein claimed, was associated with the 2020 presidential election. The violation of this right was a concrete and completed injury. The factual and legal issues in the underlying case were not hypothetical or theoretical, but real and particularized to *that* election, involving *those* plaintiffs and *these* defendants.

All of this was the foreseeable result of allowing private persons to administer the general elections of

numerous states across the county, and, otherwise, bring their influence to bear. The founders never intended for that to happen. In fact, the creation of state government was necessary to, if for nothing else, administer the elections of their people.

If this Petition is not compelling enough to convince this Court to issue a writ of certiorari to review the sanctions brought against two attorneys for standing up for the rights of others, a case like this will likely never happen again. As it is, this case closes the door to citizens who have been injured by private persons in a fashion that burdens the constitutional rights of a large group of citizens.

Without clarity in the law concerning a citizen's standing to sue private persons who deprive *that* citizen of his or her rights under color of law, how does a citizen stop corporations the size of *Facebook* and *Dominion*, and persons as powerful and rich as *Zuckerberg* and *CTCL* from violating their rights—particularly when the latter are conducting a state function?

Normally, citizens take part in government through their respective legislative and executive representatives at the federal, state and local level. However, when the issue is the legitimacy of the elections, themselves, that participation often rings hollow. In this country, every registered voter has a right to cast a meaningful ballot. That right, once granted to the citizen by his or her respective state, becomes one of the fundamental rights of that citizen. Thus, any attempt to burden, infringe,

deprive, or diminish that right will foreseeably be belligerently defended.

The rule of law mandates that when the actions of private persons engaged in state action rises to an unconstitutional level, an injured citizen has a remedy through § 1983. As such, that right must be encouraged, empowered and expanded—not denied, suppressed and contracted.

The Petitioners request that this Honorable Court issue a writ of certiorari and briefing schedule so that these many important issues and legal concepts may be expanded upon, and that the sanctions against Petitioners be set aside.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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