No. _______

In the

Supreme Court of the United States

JENNIFER L. COOPER, *et al.*,
Petitioners,

v.

U.S. DOMINION, INC., *et al.*,
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

Petitioners executed affidavits about election worker partisanship in the 2020 general election. Thereafter, they received cease-and-desist letters from counsel for Dominion, a voting systems company. The letters falsely accused petitioners of defamation, threatened litigation, and made demands. Dominion's P.R. firm gave letter copies, with petitioners' names and addresses, to the Washington Post. The letters produced confusion and distress in the petitioners and caused them to stop speaking about the election.

Petitioners sued. The district court found injury-in-fact for one claim but dismissed the case. A divided Tenth Circuit panel affirmed the dismissal but reversed the finding of injury. The concurring judge expressed "less confidence than the majority" that petitioners lacked standing. The panel designated its opinion non-precedential and refused to publish it.

Two questions are presented:

1. Whether the recipients of a cease-and-desist letter—which falsely accuses them of defamation, threatens imminent litigation, demands retractions, requires they preserve texts and emails, and insists they respond, and which is copied to a national newspaper as well as to the recipients—have an injury-in-fact for purposes of Article III standing.

2. Whether the petitioners' equal protection rights under the Fifth Amendment's Due Process Clause requires the Tenth Circuit to publish its opinion on injury-in-fact as binding precedent for all circuit litigants, not just the petitioners.

PARTIES TO THE PROCEEDING

Petitioners are Jennifer L. Cooper, Eugene Dixon, Francis J. Cizmar, Anna Pennala, Kathleen Daavettila, Cynthia Brunell, Karyn Chopjian, and Abbie Helminen. All petitioners were plaintiffs in the district court and appellants in the Court of Appeals. As plaintiffs in the district court, petitioners brought their claims both individually and on behalf of all others similarly situated, but class certification was never reached by the district court.

Respondents are US Dominion, Inc.; Dominion Voting Systems, Inc.; Dominion Voting Systems Corporation (collectively, "Dominion"); and Hamilton Place Strategies, LLC ("HPS"). All respondents were defendants in the district court and appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioners are natural persons with no parent companies and no outstanding stock.

LIST OF RELATED PROCEEDINGS

- *Cooper, et al., v. US Dominion, Inc., et al.*, No. 1:21-cv-02672-PAB-STV, U.S. District Court for the District of Colorado. Judgment entered Sep. 22, 2022.

- *Cooper, et al., v. US Dominion, Inc., et al.*, No. 22-1361, U.S. Court of Appeals for the Tenth Circuit. Judgment entered Dec. 13, 2023. Rehearing and publication denied Jan. 16, 2024.

- *Cooper, et al., v. US Dominion, Inc., et al.*, Application No. 23A887, U.S. Supreme Court. Order extending time to file a petition for a writ of *certiorari* entered Apr. 8, 2024.

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PETITION FOR WRIT OF CERTIORARI

Jennifer L. Cooper, Eugene Dixon, Francis J. Cizmar, Anna Pennala, Kathleen Daavettila, Cynthia Brunell, Karyn Chopjian, and Abbie Helminen respectfully petition this Court for a writ of *certiorari* to the United States Court of Appeals for the Tenth Circuit to review its determination that petitioners suffered no injury-in-fact, and thus had no Article III standing to pursue a federal lawsuit, when they received individually-addressed letters threatening each of them with imminent defamation litigation—unless they silenced themselves, retracted past speech, preserved all potentially relevant personal and business documents (such as texts and emails), and responded promptly to the letter's sender. In finding that the petitioners had alleged no injury-in-fact and lacked standing under these circumstances, the Tenth Circuit panel departed from its own (and this Court's) standing cases. Petitioners thus ask this Court to grant the writ and to review and reverse the Tenth Circuit's failure to credit petitioners' allegations of injury-in-fact.

Alternately, even if the decision below denying injury-in-fact is allowed to stand, this Court should still grant the writ for at least the narrower purpose of reversing the Tenth Circuit's order denying publication of its opinion. The panel's decision was not a routine application of case law. For one thing, the panel reversed a ruling by the Chief Judge of the District of Colorado, who had cited a Tenth Circuit case as authority for finding that the petitioners *did* allege an injury-in-fact that gave them standing on their equal-protection claim. For another thing, even the concurring panel member expressed "less confidence than the majority that Plaintiffs lack standing on all theories raised on appeal." App. 22. Faced with such disagreements among jurists, the panel majority produced nineteen pages of reasoning and substantive legal analysis to justify its conclusion that the petitioners lacked any injury-in-fact. Under our American system of law, such a decision is significant and would ordinarily establish binding precedent applicable to all litigants in future cases. The panel, however, inexplicably made its opinion nonprecedential, App. 2 n.*—and subsequently even denied an affirmative request by the petitioners for publication. App. 57.

The panel's determination not to make its decision authoritative, even though the decision resolved conflicts among judges, in part by correcting the district court's own articulated understanding of established circuit precedent, inevitably invites the inference that petitioners in this case were subjected to a legal standard that the panel did not wish to apply to litigants in other cases. This disparate treatment of petitioners at the hands of the federal courts deprives petitioners of their Fifth Amendment due process right to equal protection of the law, which fundamentally requires impartiality and principled consistency in how the law is applied. Moreover, any perception that some litigants and causes are not treated equally by courts is profoundly damaging to our judicial system. Perceptions of partiality in the administration of justice are antithetical to the rule of law and undermine the legitimacy and authority of our courts. Thus, regardless of whether the panel's substantive ruling is reviewed or not, petitioners ask this Court to grant the writ at least to reverse the panel's decision not to publish its own opinion as binding Tenth Circuit precedent.

OPINIONS AND ORDERS BELOW

The Tenth Circuit's unpublished Order and Judgment affirming in part and reversing in part the district court is reported at 2023 U.S. App. LEXIS 32883, 2023 WL 8613526 (10th Cir. Dec. 13, 2023). The panel's majority and concurring opinions are reprinted in Appendix A, at App. 1–21 (majority), 22–23 (concurrence).

The district court's Order dismissing petitioners' complaint is reported at 2022 U.S. Dist. LEXIS 171824, 2022 WL 4386002 (D. Colo., Sept. 22, 2022). It is reprinted in Appendix B, at App. 24–53.

The district court's entry of final judgment is not separately reported but is docketed in *Cooper, et al., v. US Dominion, Inc., et al.*, No. 1:21-cv-02672-PAB-STV (Dkt. #50). It is reprinted Appendix C, at App. 54–44.

The Tenth Circuit's post-judgment Order denying rehearing and denying publication is not reported. It is docketed in *Cooper, et al., v. US Dominion, Inc., et al.*, No. 22-1361 (10th Cir. Jan. 16, 2024), and reprinted in Appendix D, at App. 56–57.

STATEMENT OF JURISDICTION

On December 13, 2023, the Tenth Circuit affirmed the district court's dismissal of the case. App. 1–23. The Tenth Circuit denied a timely petition for rehearing and petitioners' request for publication on January 16, 2024. App. 56–57. By order dated April 8, 2024, the Circuit Justice extended petitioners' time within which to petition this Court for writ of *certiorari* until May 15, 2024, under Application No. 23A887. This Court has jurisdiction to review the Tenth Circuit's judgment, and its order denying publication, on a writ of *certiorari* under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III of the U.S. Constitution provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States…." U.S. Const. art. III, § 2.

The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides in pertinent part: "No person shall … be deprived of life, liberty, or property, without due process of law …." U.S. Const. amend. V.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

This case arose in the wake of the 2020 presidential election—but it is emphatically *not* a case about whether the election results themselves were right or wrong. Instead, this case asks only whether the judiciary offers recourse to ordinary Americans who were threatened, intimidated, and retaliated against for speaking publicly about election irregularities they personally witnessed. Every election cycle, the Dominion entities gladly step into the shoes of government in jurisdictions across the country by performing critical aspects of the exclusively public function of running elections. Immediately after the 2020 presidential election, however, Dominion abruptly invoked the prerogative to police its *private* reputation as a pretext to do on government's behalf what government could not lawfully do for itself—broadly and actively suppress speech criticizing how the public function of conducting elections had just been performed. Each of the petitioners was targeted—and injured—by Dominion's resulting "Lawfare" campaign. That campaign sought to silence the petitioners' criticisms of the 2020 election, not to protect Dominion's reputation from anything the petitioners had said. None of the petitioners had ever mentioned Dominion in their statements about witnessing election irregularities. Some did not even know who or what Dominion was. Dominion targeted them anyway, and its conduct caused the petitioners real harm.

Petitioners, as plaintiffs in the district court, alleged the following facts, which were required to be taken as true and construed in the light most favorable to the plaintiffs at the motion-to-dismiss stage:

In the 2020 general election, each of the petitioners volunteered to serve as a poll watcher or challenger in the key battleground State of Michigan. All were present at Detroit's TCF Center as ballots were processed on Wednesday, November 4, 2020, the day after the election. Each directly witnessed the tallying of votes in a State that was critical to deciding the outcome of the presidential election. App. 72–81, ¶ 16 (Cooper); ¶ 19 (Dixon); ¶ 21 (Cizmar); ¶ 22

(Pennala) ¶ 24 (Daavettila); ¶ 26 (Brunell); ¶ 27 (Chopjian); ¶ 28 (Helminen).

At the TCF Center, petitioners saw troubling irregularities bearing on the integrity of the counting process. App. 67–81, ¶ 7, ¶ 16 (Cooper); ¶ 19 (Dixon); ¶ 21 (Cizmar); ¶ 22 (Pennala) ¶ 24 (Daavettila); ¶ 26 (Brunell); ¶ 27 (Chopjian); ¶ 28 (Helminen). As the validity of the election results in Michigan became a focus of national attention, local government officials publicly asked anyone who had witnessed election issues to sign an affidavit describing what they had seen. App. 77–78, ¶ 22, ¶ 24. The petitioners came forward, completing and executing their affidavits within six days after election day.

The irregularities petitioners described in their affidavits, which were attached to the operative complaint, Appendix E, at App. 59–158, were numerous: Jennifer Cooper observed mishandling of military ballots and breaches of chain-of-custody procedures. Eugene Dixon witnessed improper ballot duplication. Francis Cizmar and Anna Pennala saw improper handling of provisional ballots, among other irregularities. Kathleen Daavettila and Cynthia Brunell observed a lack of signature verification, saw unsigned absentee ballots being counted, and witnessed ballots being counted despite mismatches between ballot numbers and computer records. Karyn Chopjian saw thousands of unattended ballots, as well as witnessing attempts by TCF Center workers to frustrate observation efforts and impose secrecy on the counting process. Abbie Helminen witnessed a lack of signature matching, saw confused handling of military ballots, and observed what she took to be duplicate ballots being deliberately counted. All the petitioners suffered or witnessed harassment, intimidation, or obstruction by TCF Center workers and by the opposing party's watchers. Windows and doors were covered with cardboard and paper, while individual watchers (from one side) were episodically ejected to cheers and clapping by workers and partisans. Petitioners reported being hollered or screamed at and generally intimidated while trying to observe the counting. Several petitioners described the entire scene as chaotic and the atmosphere at the TCF Center as very intimidating.

What *none* of the petitioners described—in *any* of their affidavits—was any sort of irregularity that had anything to do with Dominion or its voting system. None of petitioners' affidavits contained the word "Dominion." None complained in general terms about the electronic pollbooks, scanning tabulators, or the election management system, which are Dominion's products. None identified any technical irregularities that might be attributed to Dominion indirectly. Indeed, at least two petitioners did not even know who or what Dominion was when they prepared their affidavits. App. 80–81, ¶¶ 27–28 (Chopjian, Helminen). Far from making disparaging or defamatory statements about Dominion or its voting-system products, petitioners' affidavits focused only on problems with how (human) election workers had performed the count at the TCF Center.

But Dominion saw things differently. Over the Christmas and New Year's period, each petitioner individually received a FedEx letter from Dominion's "defamation counsel," Clare Locke LLP. App. 73–81,

¶¶ 17–18 (Cooper), ¶ 20 (Dixon), ¶ 21 (Cizmar); ¶ 23 (Pennala), ¶ 25 (Daavettila), ¶ 26 (Brunell), ¶ 27 (Chopjian), ¶ 28 (Helminen). Dominion's letters were personally addressed to each individual petitioner yet were otherwise boilerplate. App. 62–65. Each letter said the same thing—Dominion's "defamation counsel" decried "ongoing misinformation campaigns" that accused Dominion of "rigging or otherwise improperly influencing the outcome" of the presidential election; Dominion had recently sent letters to lawyer Sidney Powell and various media entities "demanding retraction of their myriad defamatory and conspiratorial claims about Dominion"; "Litigation regarding these issues is imminent"; and—most ominously—"This letter is your formal notice to cease and desist taking part in defaming Dominion." App. 62–63. In case this heavy-handed accusation of wrongdoing was not clear enough, the letters explained, "For the avoidance of doubt, this is a retraction demand pursuant to relevant state statutes and applicable rules of court." App. 63 n.2. Though these letters accused petitioners of "taking part" in defamation and demanded retraction, none of the letters identified any statement that any petitioner had made about Dominion at all, much less anything defamatory.

The letters next burdened petitioners with the obligation to preserve "all" documents and communications that related "in any way" to Dominion's concerns, including "all" text messages, emails, and voicemails, App. 63, under the threat of violating "laws and rules prohibiting destruction of evidence." App. 65. The letters detailed onerous steps each petitioner would have to take to comply with the letters' instructions to preserve all materials "relevant to Dominion's pending legal claims"—which, apart from general references to defamation, were not described. App. 63. The letters warned that the "laws and rules prohibiting destruction of evidence" required petitioners to "discontinue all data destruction and data backup recycling"; that these obligations would continue "until this matter is resolved," *i.e.*, indefinitely; and that this duty to preserve extended "both to you individually, and to any entities that you control," *i.e.*, to any small businesses the petitioners might own. App. 65.

The letters closed by requiring each of the petitioners individually to confirm in a "prompt response" that they had received the letter and intended to comply with its "request" to retain documents. App. 65. Despite issuing this instruction, and despite appearing to be written on law-firm letterhead, the letters provided no contact information at all, instead containing only empty space in places where letterhead customarily shows physical, telephone, and email contact details. App. 62–65.

Reading their own personally addressed letter's startling accusation of wrongdoing ("taking part in defaming Dominion"), App. 63, its intimidating promise of "imminent" litigation, App. 62, its threatening retraction demand, App. 63 n.2, and its onerous preservation instructions, App. 63–65, each petitioner was impacted in an immediate and personal way. All were alarmed, intimidated, and confused.

Perceiving that her letter "threatened ruinous litigation" she could not afford, Jennifer Cooper "immediately had a visceral reaction, one of dread and fear." App. 73–74, ¶ 17. Confused and distressed by the letter's accusation and implications, she struggled to answer the questions that sprang to mind: "What had she said that was defamatory toward Dominion? How did they know where she lived? Why would they want to sue? Could her small business survive? … Was she going to lose everything she had worked so hard for during her life?"

Eugene Dixon read his letter and was "consumed with a sense of fear" and "confused" for identical reasons. App. 75, ¶ 20. Francis Cizmar was similarly "overwhelmed, concerned, and afraid." He tried to comply with his letter's instruction to respond. Finding no contact details on the letter, he tried a number for Clare Locke LLP that he found on the Internet but was put into voicemail. His message was never returned. App. 75–76, ¶ 21.

Cynthia Brunell read her letter and felt "bullied and afraid" for her family's financial security. App. 79–80, ¶ 26. Karyn Chopjian took from her letter that "she was being threatened with litigation that could potentially destroy her life as well as her business." App. 80–81, ¶ 27.

All the petitioners subsequently censored their own speech about what they witnessed during the 2020 election for fear of a meritless billion–dollar, process-as-punishment lawsuit. App. 82, ¶ 29; App. 137–38, ¶¶ 86–87.

Because of Dominion's letters, each of the petitioners was personally burdened by unexpected and onerous document-preservation obligations, by fear and apprehension at the sudden prospect of being wrongfully sued for defamation, by concerns about how Dominion had discovered where they lived, by the sudden realization that uninvited and unwelcome people might now come to their homes (perhaps to serve process or harass them), and—above all—by utter confusion and distress over what they could possibly have said to draw such a menacing letter from self-described "defamation counsel" for a belligerent corporation that was plainly intent on suing people. *E.g.*, App. 77–81, ¶¶ 23, 25, 28. Each of the petitioners was forced to search their memories for anything they might have communicated, read, or written that was "relevant to Dominion's pending legal claims," whatever those were. Each was forced now to digest, and to assess whether and how to start complying with, Dominion's burdensome preservation instructions—or else risk breaking the "laws and rules prohibiting destruction of evidence" that the letters had referenced. Each was forced to choose whether even to comply with the command to respond to the sender, as the letters demanded.

Confusion, fear, apprehension, and burden were precisely the impacts that Dominion intended the letters to have because, shortly after the election, Dominion, Clare Locke, and HPS had conspired to pursue a scorched-earth campaign to litigate, shame, and threaten into silence—and to retaliate against—critics of the 2020 election. App. 29–139, ¶¶ 29, 35, 78, 81–90.

The eight petitioners were targeted for intimidation by this conspiracy, even though their affidavits never mentioned Dominion or its products. As part of the Lawfare campaign, HPS publicly bragged that it had given a list of letter recipients to the Washington Post, along with actual copies of the letters, which contained petitioners' names and addresses as well as the false and misleading accusation that the petitioners were taking part in defaming Dominion. App. 66–67, ¶ 6 n.3.

Having individually received personally addressed letters and being aware of the acrimonious post-election climate, and with HPS trumpeting Dominion's Lawfare campaign in the national press, several petitioners prudently purchased home security systems to protect themselves from the foreseeable dangers inherent in the unwanted infamy that the Lawfare campaign threatened to foist upon them. App. 74–81, ¶¶ 18, 20, 23, 26–27.

Petitioners further alleged that, despite historically being attacked by left-leaning and government critics and never apparently reacting, App. 94–121, ¶¶ 47–77, Dominion chose to wage its Lawfare against the petitioners and others only because of their speech about irregularities in the 2020 election and their perceived political views. This unequal and retaliatory treatment implicated petitioners' constitutional rights because petitioners also alleged Dominion sent the letters in its role as a state actor. Dominion plays an active, central part in the conduct of elections across the United States, including in the 2020 presidential election, that makes Dominion virtually indistinguishable from government. App. 84–93, ¶¶ 36–44. Petitioners alleged Dominion's status as a state actor included its sending of letters to the petitioners and others. *E.g.*, App. 69–70, ¶¶ 10–11; App. 152–53, ¶¶ 118; App. 154, ¶ 122(b).[1]

In its appellate answer brief, Dominion added an important concession to the foregoing facts alleged in the petitioners' district court complaint. Specifically, Dominion told the court of appeals that it had sent its letters to the petitioners *because* the petitioners signed affidavits that were used in two post-election lawsuits against the State of Michigan. *See* Answer Br. at PACER pp. 18, 24, *Cooper v. US Dominion, Inc.*, No. 22-1361 (10th Cir. Dec. 13, 2023). This concession strengthened the inference that Dominion was a state actor when it sent the letters because it meant Dominion was serving no legitimate interest of its own by sending them. Dominion was not a party to either of the lawsuits against the State of Michigan, it could ground no valid defamation claim in any filings in those lawsuits because of the litigation privilege, and it never served any discovery on any of the petitioners in support of its own post-election cases against Mike Lindell, Sidney Powell, Fox News, and others. Thus, the only plausible interest animating Dominion's attempt to silence the petitioners "because" they gave affidavits in the Michigan cases was the interest of Dominion's governmental patron, the State of Michigan, which

[1] The state-action allegations are provided to give a full picture of petitioners' unequal-treatment and First Amendment claims. But the question whether the state-action allegations were sufficiently plausible to allow petitioners to invoke Section 1983 against Dominion (something both courts below rejected) should not be conflated with the distinct question of whether Dominion's cease-and-desist letters caused injury-in-fact to petitioners.

had a direct interest in suppressing petitioners and other witnesses from providing evidence in the post-election lawsuits that the State was defending.[2]

II. PROCEDURAL BACKGROUND

A. District Court Proceedings

Petitioners commenced their lawsuit as plaintiffs below on September 30, 2021. Petitioners sued personally and as putative class representatives to challenge violations of civil RICO, violations of the Equal Protection Clause and the First Amendment (invoking the state-action doctrine), and violation of Colorado's common-law prohibition on civil conspiracy. These claims are set out in Counts I through IV of the operative First Amended Class Action Complaint, which is reprinted in Appendix E, at App. 58–158.

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[2] The two cases in which petitioners' affidavits were used were ultimately dismissed for want of evidence, and the lawyers who brought them were sanctioned by the trial court. But, on appeal, the Sixth Circuit specifically reversed that part of the trial court's sanctions order that penalized certain "allegations about election-related events at TCF Center." *King v. Whitmer*, 74 F.4th 511, 527 (6th Cir. 2023). Citing "some three dozen detailed affidavits" containing "credible allegations" that election workers "mistreated, intimidated, and discriminated against Republican election challengers," the Sixth Circuit noted this "intimidation and harassment … was potentially criminal" and concluded the District Court "should not have dismissed these affiants' allegations out of hand." *Id.* The Sixth Circuit specifically quoted the allegations made by two of the petitioners from this case by name—Helminen and Pennala—when describing allegations that were credible, not sanctionable. *Id.*

In Count I, petitioners invoked 18 U.S.C. § 1964(c) to claim damages caused by Dominion and HPS's violations of 18 U.S.C. § 1962(c) (RICO) and 18 U.S.C. § 1962(d) (RICO conspiracy). App. 143–48. Jurisdiction existed under 28 U.S.C. § 1331.

In Counts II and III, petitioners invoked 42 U.S.C. § 1983 and the state-action doctrine to claim damages caused by Dominion's violations of the Fourteenth Amendment's Equal Protection Clause (Count II) and the First Amendment (Count III). App. 149–53. Jurisdiction existed under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3).

In Count IV, petitioners invoked Colorado's common-law tort of civil conspiracy to make Dominion and HPS jointly and severally liable for the constitutional violations claimed in Counts II and III. App. 153–55. Supplemental jurisdiction existed under 28 U.S.C. § 1367(a). Although a class was not certified before dismissal, the class allegations invoked jurisdiction under 28 U.S.C. § 1332(d)(2).

The operative complaint sought retrospective relief in the form of damages against the three Dominion entities—US Dominion, Inc.; Dominion Voting Systems, Inc.; Dominion Voting Systems Corporation; and against Dominion's public relations firm, Hamilton Place Strategies, LLC. Dominion and HPS separately moved to dismiss the First Amended Class Action Complaint, focusing their motions almost entirely on Rule 12(b)(6) arguments and advancing only sweeping and highly general objections to justiciability, standing, and ripeness. Neither motion to dismiss challenged any specific allegations of harm to the petitioners as insufficient to show injury-in-fact.

Addressing the motions to dismiss, the District of Colorado's Chief Judge Philip A. Brimmer focused his analysis not on any specific paragraphs in the operative complaint but instead on "four main injuries" that he "discerned" the complaint to allege—chilled speech, the fear of threatened litigation, costs of obtaining home security, and unequal treatment at the hands of a state actor. App. 34. The district court concluded that the first three injuries were insufficient to support standing. As for the unequal treatment injury, the district court noted that, "the Tenth Circuit has held that the 'injury in fact' in the equal protection context 'is the denial of equal treatment' itself." App. 48–49 (citing *Am. C. L. Union of N.M. v. Santillanes*, 546 F.3d 1313, 1319 (10th Cir. 2008)). Applying *Santillanes*, the district court concluded that the complaint's allegation of unequal treatment by a state actor alleged a valid injury-in-fact. App. 49.

Though the district court found that unequal treatment conferred standing, it confined the operation of this unequal-treatment injury-in-fact to its standing analysis of the equal-protection claim only, even though all of petitioners' legal claims arose from the same challenged conduct of the defendants, namely, the sending of the letters. The district court thus dismissed the civil RICO, First Amendment, and conspiracy claims for lack of standing under Rule 12(b)(1). It then proceeded to consider the pleading sufficiency of the equal-protection claim. Finding that the state-action allegations that the petitioners asserted to bring their 42 U.S.C. § 1983 equal-protection claim against private entities were not connected to the sending of the letters, the district court dismissed the equal-protection claim under Rule 12(b)(6). App. 49–52.

Without explaining why, the district court dismissed the civil RICO, First Amendment and common-law conspiracy claims *without* prejudice but dismissed the equal-protection claim *with* prejudice. App. 52, 55. The court awarded costs and closed the case. App. 54–55.

B. Tenth Circuit Proceedings

1. Appellate Order and Judgment

Appellate jurisdiction existed under 28 U.S.C. § 1291. On appeal, petitioners as appellants argued that the district court had disregarded multiple injuries that the complaint alleged they suffered when they received and read Dominion's letters. They also argued that the one alleged harm the district court did accept as an injury-in-fact—unequal treatment—should have conferred standing to bring all their claims for relief arising from the sending of the letters, not just their equal-protection claim.[3] In reply to Dominion's argument that its cease-and-desist letters were ordinary pre-litigation activity that should

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[3] Petitioners argued other points below that are not pertinent to this Petition and thus are not discussed here, including the pleading sufficiency of their Section 1983 state-action and RICO allegations. The Tenth Circuit decided the case based on standing, so pleading sufficiency issues are outside the scope of this Petition. But the other issues argued to the Tenth Circuit on appeal may properly be included in the merits briefing before this Court to the extent Dominion may raise them as alternate grounds for affirming.

properly be immune from liability, petitioners identified an *en banc* decision of the Tenth Circuit, *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 965–66 (10th Cir. 1996), that stood for the proposition that receipt of a cease-and-desist letter from a private party establishes a "case or controversy" between the sender and the recipient that confers jurisdiction for a declaratory judgment claim under Article III. Finally, petitioners argued that, in any event, if a dismissal was affirmed, their equal-protection claim should be dismissed *without* prejudice, like the First Amendment claim, since both constitutional claims invoked Section 1983 and relied upon the same state-action allegations.

A divided panel of the Tenth Circuit affirmed the district court's dismissal of the case on standing grounds alone. The panel majority, consisting of Judges Moritz and Rossman, wrote a nearly twenty-page opinion that rejected all of petitioners' arguments for reversal and instead reversed the district court's singular finding that petitioners had an injury-in-fact for their equal-protection claim under *Santillanes*, 546 F.3d at 1319. The majority explained that the statement Judge Brimmer had relied upon in *Santillanes* applied more narrowly than the district court had understood, thus the petitioners lacked an injury-in-fact for their equal-protection claim, as well as for their other claims. App. 18–21 & n.9.

Addressing petitioners' reliance on the *Cardtoons* litigation, the panel majority referenced the wrong *Cardtoons* case and distinguished that decision in a footnote as providing no guidance because it "did not address standing." App. at 18 n.8.

Having determined that the operative complaint alleged no valid injury-in-fact, the panel concluded by vacating the portion of the district court's order that dismissed the equal-protection claim with prejudice, requiring instead that the claim should be dismissed without prejudice. App. 21.

In his separate concurrence, Judge Hartz took a more reserved view of petitioners' standing arguments. He opined that, "Plaintiffs may have been able to show standing in this case," and noted, "I have less confidence than the majority that Plaintiffs lack standing on all theories raised on appeal." App. 22. But Judge Hartz ultimately concurred in affirming the dismissal because he did not believe petitioners' standing theories had been adequately preserved in the district court briefing. App. 22–23.[4]

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[4] In the cursory, high-level treatment they gave to standing in their motions to dismiss, (10th Cir. App. Vol. III, at 113–155; Vol. VI, at 239–40), Dominion and HPS made no real attempt to challenge the complaint's very specific allegations of injury. In their own trial court and appellate briefing, by contrast, petitioners cited specific paragraphs of their complaint that contained the very injury allegations argued on appeal. Whether or not petitioners' district court briefing was sufficient to preserve their appellate theories of injury, the panel majority obviated the preservation issue by expressly exercising its discretion to address the injuries-in-fact argued by petitioners on appeal even while labelling them "newly asserted." The panel majority noted that even Dominion failed to argue on appeal that there was any preservation problem. App. 7–8 n.4.

2. Order Denying Rehearing and Publication

Petitioners timely moved for rehearing *en banc* and requested publication of the panel's decision as binding circuit precedent. The petition for rehearing and request for publication is reprinted in Appendix F, at App. 159–76.

In urging publication of the decision, petitioners cited Tenth Circuit Rule 36.1,[5] noting that,

> Regardless of whether rehearing is granted, the Order and Judgment should be a published disposition. The Majority's Opinion presented nineteen pages of analysis focused entirely on applying Tenth Circuit caselaw about injury-in-fact.
>
> The Majority applied "new points of law that would make the decision a valuable precedent." 10th Cir. R. 36.1. First, the Majority reversed District Court Chief Judge Brimmer's application of *Santillanes*. Second, the Majority apparently differed with Judge Hartz, who expressed "less confidence than the majority that Plaintiffs lack standing on all theories raised on appeal." …. Such

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[5] "The court does not write opinions in every case. The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent." 10th Cir. R. 36.1

> disagreement among jurists strongly suggests the Majority's decision involved more than a routine application of established points of law.
>
> Plaintiffs disagree with the Majority's reasoning and outcome. But if this decision stands, then it is a consequential interpretation of Tenth Circuit standing cases. Such a decision should be binding precedent for all litigants in the Tenth Circuit, not private law for these Plaintiffs alone.

App. 175–76 (citation to the court of appeals record omitted).

The panel denied the petition for rehearing and simultaneously rejected the request for publication without explanation. App. 56–57. Petitioners now petition this Court for review.

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition for three reasons. First, the Tenth Circuit's denial of petitioners' standing conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). Second, the Tenth Circuit's decision also conflicts with the decisions of other courts of appeals on the same important matter. Sup. Ct. R. 10(a). Third, the Tenth Circuit has significantly departed in two ways from the accepted and usual course of judicial proceedings by its disregard for the doctrine of *stare decisis*. For one thing, the Tenth Circuit ignored several of its own binding precedents on standing, without overruling them, when it affirmed the dismissal below. More gravely, the Tenth Circuit violated petitioners' Fifth Amendment due process right to equal protection by deliberately excluding its new decision against them from being treated as precedent binding on other litigants and cases. Both derogations of *stare decisis* call for an exercise of this Court's supervisory power.

Petitioners respectfully submit, first, that each of the foregoing reasons independently justifies granting a writ of *certiorari* and, second, that if the writ is granted, both questions presented by this Petition may appropriately be decided in summary fashion in petitioners' favor based on the record submitted herewith.

I. The Tenth Circuit's Decision Conflicts with Relevant Decisions of this Court

The Tenth Circuit's holding that petitioners failed to allege a concrete injury-in-fact for purposes of their standing conflicts with this Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

Article III standing is established by showing (1) an injury in fact that is (2) fairly traceable to the challenged action of the defendant and is (3) likely to 'be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). The first element requires "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (cleaned up). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).[6]

In *TransUnion*, this Court considered whether individuals suffered a concrete injury (1) when writings containing erroneous information about them were provided to a third party and (2) when the individuals themselves were sent defectively formatted letters containing the same erroneous information. In the case of named plaintiff Sergio Ramirez, the defendant credit agency provided a third-party car dealership with a credit report that erroneously described Ramirez as being listed on a terrorist watch list. When Ramirez requested a copy of his credit report, he received two defectively formatted reports that also contained the same wrong information. Testimony in the record showed that Ramirez was confused by the errors in the mailings he personally received. *TransUnion*, 141 S. Ct. at 2213 (citing *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1018, 1019 (9th Cir. 2020)). The record showed Ramirez was "embarrassed, shocked, and scared when he learned his name was on a terrorist watch list." 951 F.3d at 1018.

This Court held that Ramirez suffered concrete injury-in-fact for purposes of standing because of *both* the misleading report disseminated to a third party

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[6] The district court characterized Dominion's challenge to standing as a facial attack on the legal sufficiency of the complaint's allegations, rather than a factual attack on the allegations' veracity. App. 25 n.2, 29. The court of appeals did not dispute this characterization.

and the erroneous reports he personally received. For Ramirez and the 1,853 putative class members whose misleading credit reports were disseminated to third parties, the transmission of erroneous information was a "concrete reputational harm," thus, an injury-in-fact. *TransUnion*, 141 S. Ct. at 2200, 2209 ("We have no trouble concluding that the 1,853 class members suffered a concrete harm that qualifies as an injury in fact."). For the 6, 332 putative class members who were provided defectively formatted reports containing misleading information but whose reports were *not* sent to a third party, however, this Court held that *only* Ramirez was concretely injured because only Ramirez presented evidence showing he had actually opened his mailing and been "confused, distressed, or relied on the information" in it. *TransUnion*, 141 S. Ct. at 2213 & n.8.

Applying *TransUnion* here, the petitioners in this case suffered injury-in-fact for the very same reasons as Ramirez. Petitioners' allegations correspond closely to the evidence that conferred standing on Ramirez for both types of claims.

For example, petitioners expressly alleged that Dominion's letters contained erroneous and misleading information about them. Like Ramirez and the class of 1,853 members who had standing for the dissemination claim in *TransUnion*, petitioners here alleged that erroneous information about them was provided to a third party when Dominion's letters were given by HPS to the Washington Post.

Also like Ramirez (but unlike the 6,332 putative class members whose misleading reports were not provided to a third party), petitioners here alleged that they had opened Dominion's letters and had been confused and distressed by the false accusations contained therein. Following this Court's reasoning in *TransUnion*, the petitioners here plainly alleged two distinct injuries-in-fact that independently conferred standing to sue Dominion and HPS for sending the letters and for providing them to the Washington Post.

The panel majority ignored altogether *TransUnion*'s holding on the dissemination claim and waved away the holding affirming Ramirez's injury from opening his own inaccurate report as "not meaningfully contested" and thus a question that this Court "passed on … , having no reason to consider it." App. 10–11.

But the panel plainly misapplied *TransUnion*. The close similarity between the injuries that petitioners alleged and those that this Court found to be sufficient for Ramirez in *TransUnion* should have been dispositive. *See Allen v. Wright*, 468 U.S. 737, 751–52 (1984) ("In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases.") The Tenth Circuit's decision denying that petitioners were injured by the sending of Dominion's letters conflicts directly with *TransUnion*. It should be reviewed under Sup. Ct. R. 10(c) and reversed.

II. The Tenth Circuit's Decision Conflicts with Relevant Decisions of Other United States Courts of Appeals

The Tenth Circuit's decision also conflicts with decisions of other United States courts of appeals, several of which have held that being subjected to a demand from a private party requiring action, analogous to the demands made in Dominion's cease-and-desist letters, establishes injury-in-fact sufficient to confer Article III standing. For example:

- In *Rainey v. Samuels*, 130 F. App'x 808, 810 (7th Cir. 2005), the Seventh Circuit held that a licensed private child-welfare agency's one-time demand for a non-custodial parent to attend church as part of a parenting skills program had caused an injury-in-fact that gave the parent to standing to sue the private agency as a state-actor because "the demand affects [the parent's] own conduct."
- In *Young Am. Corp. v. Affiliated Comput. Servs.*, 424 F.3d 840, 844 (8th Cir. 2005), the Eighth Circuit suggested that the plaintiff could have stated a valid injury-in-fact had it simply alleged that the defendant's letters demanding an audit had themselves injured the plaintiff.
- In *Green Edge Enters., LLC v. Rubber Mulch etc., LLC*, 620 F.3d 1287, 1301 (Fed. Cir. 2010), the Federal Circuit held in the trademark context that "a threat of suit in the form of a cease and desist letter," coupled with suing others, was "sufficient to confer declaratory judgment jurisdiction." *Id.; see also Dalton v. Honda Motor Co.*, 425 F. App'x 886, 891 (Fed. Cir. 2011) (receiving a private trademark cease-and-desist letter conferred standing).

Similar cases involving cease-and-desist letters from governments exist. For example:

- In *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1154 (9th Cir. 2017), the Ninth Circuit held that a tribe's allegation about receiving a county sheriff's cease-and-desist letter, which threatened prosecution if the tribe conducted certain law enforcement activities on its reservation, gave a tribe "alleges an injury in fact that meets the requirements of constitutional ripeness."
- In *Dana's R.R. Supply v. AG*, 807 F.3d 1235, 1241 (11th Cir. 2015), the Eleventh Circuit held that a business served with a demand by the Attorney General of Florida to cease and desist from adding surcharges to credit card purchases (as opposed to calling the same practice a discount for purchasing in cash) suffered an injury-in-fact that gave it standing to bring a First Amendment challenge.

As these various cases suggest, the Tenth Circuit's holding that petitioners suffered no injury-in-fact when they received Dominion's letters conflicts with decisions in other circuits. Dominion's letters falsely accused petitioners of defamation, threatened "imminent" litigation, and demanded that petitioners cease speaking, retract past statements, preserve documents, and respond. Other United States courts of appeals have recognized that analogous demands for a subject to act (or refrain from acting) necessarily give the recipients of such demands an injury-in-fact that confers standing. This Court should resolve the conflict between the decision below and the approaches taken in other circuits regarding the standing of those who receive cease-and-desist letters.

III. The Tenth Circuit's Decision to Exclude the Opinion Below from the Operation of Horizontal *Stare Decisis* Calls for the Exercise of this Court's Supervisory Power

Finally, the Tenth Circuit's decision violates the judicial doctrine of *stare decisis* in two ways that call for the exercise of the supervisory powers of this Court. First, the Tenth Circuit disregarded several of its own controlling cases to reach the decision that petitioners lack an injury-in-fact that gives them standing. Second, by rejecting petitioners' request for the decision below to be published as binding Tenth Circuit precedent, the panel has cast aside a fundamental aspect of how our judicial system works—through the case-by-case accumulation of generally applicable judicial reasoning that establishes evolving rules of law for litigants and judges alike to rely upon in future cases.

"Horizontal" *stare decisis* is the respect that a court "owes to its own precedents." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1416 n.84 (2020) (Kavanaugh, J., concurring). The Tenth Circuit panel acted in derogation of horizontal *stare decisis* when it disregarded the Tenth Circuit's own case law that dictated a ruling in petitioners' favor. Even more concerning, the Tenth Circuit's decision not to treat its opinion below as binding precedent appears to be a conscious decision to pre-empt the opinion below from becoming *stare decisis* in the first place.

Petitioners of course contend that the decision below was erroneous. But even if they are wrong, the decision below is a substantive and consequential interpretation of case law. As such, it should properly be binding precedent for all litigants and cases within the Tenth Circuit, going forward. If it is allowed by the panel below to be treated otherwise, then a corrosive impression is created that the panel is purposely exempting its decision from becoming embedded into circuit case law. The inevitable inference is that the petitioners received a one-off legal interpretation that the panel does not want to see applied in other cases.

Perhaps especially because of the proverbial warning that "hard cases make bad law," *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 899 (2009) (Roberts, Scalia, Thomas, Alito, JJ., dissenting), this Court should not permit the lower courts to become accustomed to exempting their less defensible decisions from being treated as binding precedent. Courts that are allowed to engage in end-runs around the doctrine of horizontal *stare decisis* by making their "hard cases" non-precedential will inevitably end up getting used to applying the law to disfavored parties and causes in selective ways, rather than applying the law consistently to all litigants. Unequal treatment of certain litigants and cases deprives those disfavored federal litigants of their constitutional right to equal protection under the Due Process Clause of the Fifth Amendment. Even a mistaken perception of unequal treatment adversely impacts litigants, who are entitled to expect even-handedness from courts. Eventually such perceptions, if they are allowed to form, will inevitably erode public confidence in the judicial system and diminish the legitimacy of the judiciary itself.

A. The Tenth Circuit Disregarded Its Own Precedential Decisions in *Cardtoons* and Other Cases, Without Overruling Them

The panel majority failed either to follow or to overrule several of its own precedents when it held the petitioners lacked standing. The panel completely disregarded a binding decision called *Cardtoons*, even as it misapplied, and thus deviated from, the clear requirements of other Tenth Circuit standing cases.

1. *Cardtoons I*

The panel majority's ruling that petitioners had no injury-in-fact for purposes of standing conflicts directly with the Tenth Circuit's own precedential decision in *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 965–66 (10th Cir. 1996) ("*Cardtoons I*"). *Cardtoons I* is a binding Tenth Circuit precedent that held the receipt of a cease-and-desist letter established a "case or controversy" between the sender and the recipient that confers jurisdiction for a declaratory judgment claim under Article III. 95 F.3d at 966.

Under Tenth Circuit case law, Article III's case-or-controversy requirement is "no less strict in an action for declaratory judgment than in any other type of suit." *Id.* (emphasis added). Moreover, "a declaratory judgment 'controversy' … requires no greater showing than is required for Article III." *Surefoot LC v. Sure Foot Corp.*, 531 F.3d 1236, 1241 (10th Cir. 2008) (emphasis added) (Gorsuch, J.). In other words, an injury that establishes a "controversy" in a declaratory relief action also necessarily establishes a controversy under Article III generally. *See also MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (holding that a "'case of actual controversy' in the [Declaratory Judgment] Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III") (Scalia, J.).

Instead of applying *Cardtoons I* as controlling precedent, the panel majority dispensed with petitioners' invocation of the *Cardtoons* litigation in a footnote that said, "*Cardtoons* did not address standing, so it provides no guidance here." App 18 n.8. Unfortunately, the panel's footnote cited the wrong *Cardtoons* case, suggesting that the panel majority may not even have considered the actual controlling decision. The Tenth Circuit issued three separate opinions during its *Cardtoons* litigation. *Cardtoons I*, which expressly decided the question of jurisdiction, 95 F.3d at 965–66, plainly provides dispositive support for the petitioners' standing and should have been followed under the doctrine of horizontal *stare decisis*.[7] If the panel intended not to follow *Cardtoons I*, then that decision should have been discussed and either distinguished or overruled. Instead, *Cardtoons I* was simply ignored, which is a serious departure

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[7] The other two *Cardtoons* decisions considered different issues without revisiting the earlier-decided question of Article III jurisdiction. *See Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 182 F.3d 1132 (10th Cir. 1999) ("*Cardtoons II*"), *rev'd by*, *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885 (10th Cir. 2000) (en banc) ("*Cardtoons III*").

from the way judicial precedents are meant to be utilized in federal courts.

The panel's failure to apply and follow the binding Tenth Circuit precedent set out in *Cardtoons I* represents a significant departure from the "accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a). This Court should exercise its supervisory power to correct the panel's disregard for the doctrine of horizontal *stare decisis*.

2. Other Tenth Circuit Precedents

Though the panel's other departures from Tenth Circuit case law were less egregious than its omission of *Cardtoons I*, the panel also meaningfully departed from at least two other circuit precedents, each of which should have been controlling under the doctrine of *stare decisis*.

First, the panel's opinion denying petitioners' assertion of an injury-in-fact to their First Amendment rights conflicts with *In re Special Grand Jury 89-2*, 450 F.3d 1159 (10th Cir. 2006). This Tenth Circuit case stands for the proposition that people who are silenced are injured—even in the absence of a free-speech claim. *Id.* at 1173 ("[A]n infringement on Appellants' interest in speaking can constitute the requisite injury in fact for Article III standing even though they are raising no First Amendment claim."). The injury exists even if the person silences themselves voluntarily to avoid an adverse consequence. *Id.* at 1174 ("Appellants have expressed a definite intent and desire to speak out.... It is the threat of punishment ... that keeps them silent.").

Importantly, *In re Special Grand Jury 89-2* does not involve the injury of a "subjective chill," which is insufficient for standing. Rather, *In re Special Grand Jury 89-2* involves silencing oneself in response to an overt (*i.e.*, objective, not imagined) demand to cease speaking, under threat of consequence. Despite the obvious applicability of *In re Special Grand Jury 89-2*, and the fact that petitioners cited the case in their opening and reply briefs, the Tenth Circuit panel inexplicably omitted any mention of this dispositive precedent in its decision.

Second, the panel majority cited *Shields v. Prof'l Bureau of Collections of Md., Inc.*, 55 F.4th 823 (10th Cir. 2022), to justify concluding (notwithstanding *TransUnion*) that petitioners' confusion and distress at receiving Dominion's letters were not injuries-in-fact. In *Shields*, the plaintiff had received a letter from a debt collector that "caused her to be confused and believe her debt was not accruing interest. But she never alleged the letters caused her to *do* anything." *Id.* at 830 (original emphasis). The panel's opinion cited *Shields*'s holding that "confusion and misunderstanding are insufficient to confer standing." *Id.* But the panel simultaneously noted, incongruously, that Dominion's letters *did*, in fact, cause one petitioner to do something. App. 12. Specifically, Francis Cizmar "tried to call Dominion's defamation counsel"—responding to the sender just as the letter demanded. App. 12; App. 75–77, ¶ 21. Cizmar's action satisfied *Shields*. His efforts to find Dominion's lawyers' contact details, then to physically call and record a voicemail, were at least "an identifiable trifle," which is all the injury-in-fact that standing doctrine requires. *United States v. Students*

Challenging Regulatory Agency Procedures, 412 U.S. 669, 689 n.14 (1973).[8] Moreover, Cizmar's resulting standing sufficed for *all* petitioners' standing. *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) ("If at least one plaintiff has standing, the suit may proceed.") Though petitioners consistently argued that *Shields* supported their standing, the panel adopted a different view that was in conflict with *Shields*.

The Tenth Circuit panel's failure to apply correctly or overrule any of *Cardtoons I*, *In re Special Grand Jury 89-2*, and *Shields* in the course of denying petitioners' standing shows the degree to which the panel disregarded the doctrine of horizontal *stare decisis*. That disregard "so far departed from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), that this Court should exercise its supervisory power to review and reverse the decision below.

B. The Tenth Circuit's Decision to Exclude the Opinion Below from the Operation of Horizontal *Stare Decisis* Deprives Petitioners of Their Right to Equal Protection of the Law

Litigants in the federal courts should be treated consistently, which means they should be subjected to uniform interpretations of case law that are applied equally to all litigants alike. The Due Process Clause of the Fifth Amendment requires such equal

[8] The panel apparently relied on Cizmar's lack of success at reaching Dominion's lawyers when he called them as grounds to conclude that no plaintiff "actually responded" to the letters—a conclusion that is simply untenable. App. 12.

treatment. *See Sessions v. Morales-Santana*, 582 U.S. 47, 52 n.1 (2017) ("[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process. This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.") (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975)).

Courts obviously have discretion to characterize routine applications of law as non-precedential, and good judicial administration of course may favor designating many routine cases as non-authoritative. But such exercises of discretion can quickly become improper if they are extended to non-routine decisions. An important check on the potential for judicial arbitrariness is the expectation among litigants and judges alike that significant decisions will establish precedential authority that is binding in other cases before other panels.

The Tenth Circuit's decision below was not a routine application of existing law, which might properly be designated as non-precedential. The Chief Judge of the District of Colorado, after all, was overruled in his application of a Tenth Circuit precedent. One of the three judges on the panel expressly stated his reduced confidence in the majority's conclusions about standing—the central issue on appeal. The majority's legal analysis of injury-in-fact required nearly twenty pages of reasoning and discussion of case law.

Under these circumstances, there can be little dispute that the only proper approach to judicial administration—and to protecting the petitioners' Fifth Amendment due process right to equal treatment under the law—is for the opinion of the panel to be designated as binding precedent so that it will apply to all Tenth Circuit litigants equally. Private legal interpretations by the federal courts are simply not consistent with how American courts have historically operated. Significant decisions must be published and treated as authority, so they can guide the outcomes of other cases and shape the ongoing development of the law. If a decision in a "hard case" ultimately proves to be indefensible, then it should be subjected to criticism and eventually to being overruled. What should not happen is for potentially bad decisions in hard cases to be quarantined as non-precedential; hiving off such cases is inherently unfair because it makes them harder to appeal in a system of discretionary review and is corrosive to the administration of justice because it is contrary to the fundamental rule-of-law principle that all litigants should be equally subject to the same laws and legal interpretations.

Petitioners believe the Tenth Circuit panel decided the case below wrongly and that the decision should be reversed. However, Petitioners can be satisfied with even an adverse decision, so long as they can trust that the same standing rules that were applied to them will uniformly apply to litigants in other cases as well. To the extent the decision below remains purposely designated as non-precedential and expressly binds only the petitioners, such trust cannot be justified. Accordingly, the petitioners respectfully request that, even if the decision below is allowed to stand, this Court should at least require the panel below to publish its decision as binding precedent for all litigants in the federal courts of the Tenth Circuit.

CONCLUSION

The Court should grant this Petition for a writ of *certiorari*.

Respectfully submitted,

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