No. _____

In The
Supreme Court of the United States

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

Petitioners,

v.

DOMINION VOTING SYSTEMS, INC., FACEBOOK, INC.
K/N/A META, INC., CENTER FOR TECH AND CIVIC LIFE,
MARK ZUCKERBERG AND PRISCILLA CHAN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

ERNEST J. WALKER
Counsel of Record for Petitioners
3368 Riverside Rd.
Benton Harbor, MI 49022
(303) 995-4835
ernestjwalker@gmail.com

September 26, 2022

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED

1.) Whether citizens have standing to sue private persons engaged in state action for relief under § 1983 for deprivations of their right to vote for president of the United States, freedom of speech, equal protection, and due process;

2.) Whether citizens' claims for relief under § 1983, for themselves and others similarly situated against private persons engaged in state action, may properly be classified as a general grievance; and,

3.) Whether deprivation of a right constitutes an injury in fact to confer Article III standing.

PARTIES TO THE PROCEEDING

Kevin O'Rourke, Nathaniel L. Carter, Lori Cutunilli, Larry D. Cook, Alvin Criswell, Kesha Crenshaw, Neil Yarbrough, and Amie Trapp, and others similarly situated,

Petitioners,

v.

Dominion Voting Systems Inc., a Delaware corporation, Facebook, Inc. k/n/a Meta Inc., a Delaware corporation, Center for Tech and Civic Life, an Illinois non-profit organization, Mark E. Zuckerburg, individually, Priscilla Chan, individually,

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 (appeal of a sanctions order filed August 3, 2021, and final order determining the amount dated November 22, 2021, which is still pending determination by the Court of Appeals)

- *Kevin O'Rourke, et al., v. Dominion Voting Systems, Inc., et al.,* Tenth Circuit Court of Appeals Case No. 21-1394 (where the appeal of appeal was filed prematurely concerning the issue of sanctions, and voluntarily dismissed in December 23, 2021).

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).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Rules

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners 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 on Appendix 1. The district court's order of dismissal is reported is attached on Appendix 9. The order denying Petitioner's request for rehearing is attached on Appendix 45.

JURISDICTION

The Tenth Circuit entered judgment on May 27, 2022, and denied Petitioners' motion for rehearing on June 27, 2022. This Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS FEDERAL RULESAND INVOLVED

- The relevant provisions of the Civil Rights Act, 42 U.S.C. §§ 1981 through 1988, are reproduced at App. 46-47.

- Federal Rule of Civil Procedure 15(a) is reproduced at App. 48.

STATEMENT

1. The issue is whether citizens seeking retroactive relief under § 1983 have standing to sue private persons engaged in state action. The answer seems so obviously in the affirmative that review would be unnecessary. However, the United States Court of Appeals for the Tenth Circuit (10th Circuit) carved out an exception: If the damage is so great that a large group of citizens were deprived of their rights, the claim is a generalized grievance which a court has no jurisdiction to resolve. To do this, the lower courts engaged in a secondary abuse of misstating the Petitioners' claims as brought on behalf of others, or society, in general. Repeatedly, Petitioners' complaint references claims brought "for themselves, and others similarly situated."

Petitioners are eight citizens from five different states that participated in the 2020 presidential election. These citizens are vested with a national right to vote for the presidency. Only, living, registered voters may cast a ballot. The states administer their own elections. However, a federal district court has jurisdiction to provide remedy to a citizen of the United States against a deprivation of rights by persons acting under color of law.

Under the Eleventh Amendment, citizens may not sue a state. However, under the *Ex parte Young* doctrine, a citizen may seek injunctive relief against a state and other persons in their official capacity. None of that is relevant, here. Petitioners' claims concern persons acting under color of authority for retroactive relief, individually, and as a class.

The purpose of § 1983 is to provide jurisdiction to district courts to hear cases brought by citizens against person's acting under color of law. There, no immunity applies. A citizen's prudential standing is satisfied by a claim for relief against a "person," so described. The violation is the injury. At the pleading stage, under federal notice pleading standards, a personal claim for damage is enough. Here, the failure of the lower courts to distinguish a case brought against a state for injunctive relief from one for retroactive relief against private persons engaged in state action resulted, not only in dismissal, but in sanctions against the attorneys who respectfully sign this petition. The rights of citizens, individually and as a class, to file a complaint against giant private persons who violate the rights of millions has been stripped by the decision of the 10th Circuit. Thus, this case is of great national importance.

2. Congress enacted the Civil Rights Act of 1871, which provides relief to citizens against private persons acting under color of official authority, codified in 42 U.S.C. § 1983. The Petitioners filed their complaint pursuant to § 1983 for relief against the Respondents after the formers' constitutional rights had been deprived by the latter. The claims against Respondents are not against government. Therefore, the Petitioners claims for relief could not be a generalized grievance. However, the district court and 10th Circuit extended this jurisdictional doctrine to Respondents, who are private persons.[1]

---

[1] Respondents, Mark Zuckerberg and Priscila Chan, were not served with the complaint. The district court dismissed the case before the time for service expired. ROA 1505-1533.

Before the Eleventh amendment, a citizen had the power to sue a state. *See Chisholm v. Georgia*, 2 U.S 419 (1793). Now, district courts do not have jurisdiction to hear such claims. Comparably, a district court lacks jurisdiction to hear a citizen's claim to "require government to be administered according to law [or] that the public moneys be not wasted." *See Lance v. Coffman*, 549 U.S. 437, 439 (2007)(*quoting Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)). It is not sufficient that a plaintiff merely have a general interest common to all members of the public. *United States v. Richardson*, 418 US 166, 176-177 (1974). *See also, Schlesinger v. Reservists Comm. to Stop the War*, 418 US 208 (1974).

In *Richardson*, a federal taxpayer sued Congress, and alleged that certain provisions concerning public reporting of expenditures under the Central Intelligence Agency Act of 1949 were unconstitutional. *Richardson*, 418 U.S. at 167. In reversing the Court of Appeals, this Court found the claim was a generalized grievance—the impact of which was undifferentiated and common to all members of the public. *Id.* at 176-177.

In *Schlesinger*, this Court reversed the Court of Appeal's affirmation of a district court's declaration that Members of Congress were ineligible to hold a commission in the military Reserves. *Schlesinger*, 418 U.S. at 209. The Court found taxpayers lack standing to bring claims that are "undifferentiated' from that of all other citizens. *Id.* at 218. There, the only interest shared in the claim advanced was one that presented injury in the abstract. *Id.*

To establish Article III standing a plaintiff must "'allege such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422, U.S. 490, 498-499 (1975) (*quoting Baker v. Carr*, 369 U.S. 186, 204 (1962). "To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: 'What's it to you?'" *Transunion v. Ramirez*, 594 U.S. ___, 141 S.Ct. 2109, 2203 (2021) (*citing Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983)). To answer that question, a plaintiff must demonstrate a concrete and particularized injury caused by the defendant and redressable by judicial relief. *Id*. at 2203. This assures that federal courts decide "the rights of individuals." *Id*. (*quoting Marbury v. Madison*, 1 Cranch 137, 170, 5 U.S. 137, 2 L.Ed. 60 (1803)). Concrete adverseness "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker*, 369 U.S. at 204.

"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 v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (*quoting National Wildlife Federation*, 497 U.S. 871, 889 (1990). Hence, under § 1983, a court is not obliged to challenge a citizen's redressable claim of deprivation of rights caused by a private person engaged in state action.

Ultimately, the jury determines the issue of state action and damages. Additionally, attorneys for plaintiffs seeking remedy under § 1983 conduct themselves under their constitutional oaths as private attorneys general.

If a state deprives the rights of a citizen, injunctive relief may be available under the *Ex parte Young* doctrine. There, too, a citizen must have standing and, in order to obtain a preliminary injunction, demonstrate a "likelihood of success on the merits." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006). Claims are often brought for prospective relief under § 1983 to "enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury." *Quern v. Jordan*, 440 U.S. 332, 337 (1979). However, this type of litigation is entirely different than the scope of civil rights cases for retroactive relief against private persons engaged in state action. In such cases, a preliminary injunction is often unnecessary. Thus, under federal notice pleading standards, a complaint pursuant to § 1983 should not be dismissed for lack of standing when a plaintiff has articulated a plausible set of facts against private persons engaged in state action—the results of which caused the plaintiff damage, no matter how general.

3. In the 2020 presidential election, the incumbent president was a populist figure that many despised and accused of spreading misinformation throughout his campaign. To "fortify" the election, Respondent, Facebook, Inc., k/n/a, Meta Platforms,

Inc. (Facebook) regulated information that a cadre of progressives thought was misleading to the public.[2] Additionally, Center for Tech and Civic Life (CTCL) sought to control the process of local elections across the county under the cover of COVID-19 relief through conditioned grants totaling hundreds of millions of dollars provided by the Chief Executive Officer (CEO) of Facebook, Respondent, Mark Zuckerberg (Zuckerberg), and his wife, Respondent, Priscila Chan (Chan). Extraordinary lengths were taken to ensure the incumbent's defeat. Petitioners' amended complaint describes these instituted plans in detail. ROA 860-975.[3] As alleged, the Respondents brought to bear a highly coordinated effort to defeat the incumbent and elect the candidate of their choice. Such is the case in every presidential election—but this involved the Respondents engaging in state action, which resulted in the deprivation of Petitioners' rights.

Before the election, lawsuits were filed to stop the referenced funding from being used by the accepting municipalities, counties and other jurisdictions. These cases were against government for injunctive relief. Courts often found them too general and speculative, at the time, and regularly denied these many requests for prospective relief.[4]

---

[2] *See* Molly Ball, *The Secret History of the Shadow Campaign That Saved the 2020 Election*, TIME, February 4, 2021.

[3] "ROA" references the Appendix from the Court of Appeals.

[4] E.g., *Pennsylvania Voters Alliance, v. Centre County*, 4:20-cv-01761 (M.D. Penn.); *Wisconsin Voters Alliance v. City of Racine*, 1:20-cv-01487 (E.D. Wis.); *Texas Voters Alliance v. Dallas County*, 495 F. Supp.3d 441, 449 (E.D. Tex.); and, *Iowa Voter Alliance v. Black Hawk County*, C20-2078-LTS. 2021 WL 276700 (N.D. Iowa).

After the election, other plaintiffs filed ill-fated cases, many of which requested federal district courts to enjoin sovereign states from certifying their general election, or sending certain Electors to Washington, D.C., for the electoral college. Those cases involved plaintiffs suing persons in their official capacity for prospective relief, and where often dismissed as generalized grievances.[5]

3. On December 22, 2020, Petitioners filed a class action, civil rights case for retroactive relief against Respondents under § 1983. The complaint describes Respondent, Dominion Voting Systems, Inc. (Dominion), as a corporation, doing business in Colorado, that provides electronic voting systems to jurisdiction across the United States. ROA 18-101, at ¶¶ 14, 37. The complaint alleges that, in 2018, the Canadian parent company that owns Dominion was acquired by the former's senior management team and a private equity firm. The complaint references the role that "Dominion has played in the creation and perpetuation of concerns regarding 'vulnerabilities and a lack of transparency in the election technology industry.'" *Id*. at ¶ 40. The complaint references law review articles, a state sponsored report, and expert opinions regarding the risks, unsuitability and vulnerabilities of Dominion's voting systems—including an allegation that the "hundreds of thousands of votes" were switched in the 2020 presidential election "as a result of the

[5] E.g., *Pearson, et al., v. Kemp.*, Case 1:20-cv-04809 (N.D. Ga.); *Bowyer v. Ducey*, 20-cv-2321, 2020 WL 7238261 (D. Ariz.); *King v. Whitmer*, 20-cv-13134, 2020 WL 7134198 (E.D. Mich.); *Feehan v. Wisconsin Elections Commissions*, 506 F.Supp.3d 596 (E.D. Wis.); *Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020).

systemic and widespread exploitable vulnerabilities" in the software utilized by Dominion's voting systems. *Id*. at ¶¶ 42-44. Petitioners alleged by reference to an expert report, that Dominion's voting systems are "intentionally and purposefully designed with inherent errors to create systemic fraud and influence election results." *Id*. at ¶ 174. Petitioners amended complaint further details their factual allegations against Dominion, which included averments concerning the unconstitutional adjudication process integral to Dominion's voting systems.

Petitioners described CTCL as a progressive, Illinois based, non-profit organization. *Id*. at ¶¶ 18, 83, 91. Before the 2020 presidential election, CTCL received over $250 million dollars from Zuckerberg and his wife, Chan, for election grants to local election offices across the country as COVID 19 response relief—which included substantial amounts of money granted to municipalities in the swing states of Michigan, Wisconsin, Pennsylvania and Georgia *Id*. at ¶¶ 91-98.

The money paid by Zuckerberg and Chan, through CTCL, was used to, among other things: pay ballot harvesters, fund mobile ballot pick-up units, deputize and pay political activists to manage ballots, pay poll workers and election judges, establish drop-boxes to bypass and intercept the United States Mail, and consolidate counting centers to facilitate the movement of hundreds of thousands of questionable ballots without legally required observation. *Id*. at ¶¶ 165, 205, 244, and 272.

Petitioners alleged that Respondent, Facebook, "is the largest social media platform for real-time interaction and dissemination of information across the internet." *Id*. at ¶ 7. Petitioners alleged that Facebook "burdened the Plaintiffs' rights to free speech, free press, and online assembly, based upon the favored political and health related preferences of Defendants, Mr. Zuckerberg and Ms. Chan," and "have used their alter-ego, Facebook, to dominate the competition in business, and now in politics, by funding their political ideology through alleged philanthropic charities, and other civic minded entities, such as CTCL." *Id*. at ¶¶ 51 & 56.

Zuckerberg is the CEO of Facebook, and Chan is also employed by the media giant. Petitioners alleged that "Facebook, Dominion, CTCL, Zuckerberg and Chan, having so inextricably woven their interests into the presidential election process and said state actors, they are thus defined as persons subject to 42 U.S.C. § 1983, 1985, and 1988." *Id*. at ¶ 310.

In their complaint, the Petitioners alleged:

> Because illegal votes and unconstitutional procedures dilute the votes of the legally registered voter, persons that create policies and procedures that authorize, encourage, and cover-up unconstitutional behavior are liable for the damages they cause to Plaintiffs with proper standing.

Id. at ¶ 320.

Respondents asserted several claims pursuant to 42 U.S.C. § 1983, 1985, 1986 & 1988, including Count I, that alleged that the defendants unconstitutionally burdened the Petitioners' fundamental right to vote for the president and vice-president of the United States. *Id*. at ¶¶ 292-325.

Count II alleges that the "Plaintiffs and others similarly situated have suffered concrete and particularized damages, injuries and losses, as a direct and proximate cause of the Defendants' unconstitutional conduct, in violation of the Equal Protection Clause of the Fourteenth Amendment." *Id*. at 350.

Count III contends that the "conduct of the Defendants violated the rights of the Plaintiffs and all registered voters in the United States," who were "deprived of their right to substantive due process of law, in violation of the Fifth and Fourteenth Amendments of the Constitution." *Id*. at ¶¶ 357-358. Petitioners also claimed damages under § 1983 against Facebook and Zuckerberg for damages to the Plaintiffs' rights to freedom of speech, association and press.

Petitioners alleged that "Facebook, under the direction and control of Mr. Zuckerberg, intentionally censored non-offensive, politically relevant, journalistic articles and opinion, posted by users for other users, with the intention to limit the exposure thereof." *Id*. at 369. As averred by the Petitioners, "Facebook, under the control and direction of Mr. Zuckerberg, unconstitutionally relied upon Section 230 to suppress the 1st Amendment

rights of others having a different political and cultural ideology than Mr. Zuckerberg, and monoculture of the left-leaning agents and employees of Facebook."

Petitioners further alleged that "[a]s a direct and proximate result of Defendants' collusive, concerted, unlawful and unconstitutional conduct, Plaintiffs were and are being deprived of their rights, in violation of the First and Fourteenth Amendments of the Constitution, and have and continue to suffer damages, mental distress, anguish, humiliation, loss of liberty and legal expenses." *Id*. at ¶ 387.

Petitioners also filed a constitutional to challenge to 47 U.S.C. § 230(c)(Section 230), as applied by Facebook and Zuckerberg to, among other things: label and censor content that opposed their preferred cultural and political ideology as offensive, harassing, and violent; block and restrict access and availability of material in a politically motivated and biased manner; and publish their own content to support their political ideology and preserve their investment in the 2020 presidential election. *Id*. at 388-403.

Petitioners' amended complaint, which was not accepted by the district court, alleged that Zuckerberg, Chan, CTCL and Facebook were involved in a pattern of racketeering activity and conspiracy, prohibited by 18 U.S.C. § 1962. ROA 954-960, ¶¶ 747-783. Further, the respective affidavits of the Petitioners, describing the particularized damages, were attached to both complaints. ROA. 104-142 & 1127-1135.

4. On April 27, 2021, the district court dismissed Petitioners' complaint for lack of subject matter jurisdiction, and denied their motion to amend. App. 9. In the order, the district court stated:

> The decisive argument is that the Plaintiffs have not demonstrated a judicially cognizable interest or injury sufficient to grant them standing to sue. With Plaintiffs not having standing to sue, there is no case or controversy, a necessary predicate for federal court jurisdiction under Article III...
>
> ***
>
> The [Petitioners'] Complaint, viewed as whole, is a generalized grievance about the operation of government, or about the actions of the Defendants on the operation of government, resulting in abstract harm to all registered voting Americans.

App. 17, 19.

5. On May 27, 2022, the 10th Circuit affirmed the district court's dismissal. App. 1. In the opinion, the 10th Circuit repeated the district court's mischaracterization of the Petitioners' claims:

> [Petitioners] aver that Defendants' conduct with regard to the 2020 Presidential election violated the constitutional rights of every registered voter in the United States. That is a generalized grievance.

App. 5.

However, as established above, that was not the gravamen of Petitioners' complaint. A class was never certified. Accordingly, the standing of Petitioners was dependent upon their individual injury. Others were similarly situated, but each Petitioner claimed damage and requested relief.

In essence, the 10th Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction pursuant to F.R.C.P. 12(b)(1). The 10th Circuit correctly found that district courts lack jurisdiction to entertain a generalized grievance. However, that general principle of prudential standing does not apply to private companies that deprive citizens of their rights. When relief is sought for an injury caused to a citizen by a private person engaged in state action, there is no immunity from liability, or lack of jurisdiction for a court to rule. The sovereign is always superior to the corporation.

As a result, the 10th Circuit's affirmation erases the distinction between claims under § 1983 for prospective relief against government and retro-active relief against private persons acting under color of official authority. A claim upon which relief may be granted under § 1983 must establish that the plaintiff was deprived of a right secured by the Constitution and laws of the United States, and that the defendant was acting under color of law. *See Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 150 (1970). Here, the lower courts didn't get that far. Instead, the lower courts determined the Petitioners had no cognizable right and suffered no injury.

In error, the 10th Circuit affirmed the district court's dismissal for lack of standing at the pleading stage. As addressed herein, the several deprivations of the Petitioners' fundamental rights are the injuries in fact necessary to establish the "irreducible constitutional minimum of standing." *Lujan*, 504, U.S. at 560. Further, Petitioners asserted their own legal rights and interests, and did rest their claims for relief on the legal rights or interests of third parties. *See Warth v. Seldin*, 422 US 490, 499 (1975).

The 10th Circuit's decision raises legal issues of national importance for citizens seeking to vindicate their rights against private persons engaged in state action. Thus, the questions presented in this petition are critical to the fair and uniform enforcement of § 1983, in that regard. The lower courts failed to discuss the rights of the individual plaintiffs, nor determine the status of the Respondents as state actors. No analysis of prudential, or Article III standing can be conducted without the answers to those constitutional questions. Do the Petitioners have a national right to vote for the presidency, and the attendant rights of freedom of speech, equal protection and due process? Where the Respondents engaged in state action during the 2020 presidential election? The answers to those questions are: yes. This case squarely presents those important constitutional question that the 10th Circuit got so horribly wrong. This case merits the Court's review.

REASONS FOR GRANTING THE PETITION

A. District Courts Have Jurisdiction Over Claims Filed by Citizens Under § 1983

The 10th Circuit's opinion limits a citizen's access to federal district courts for vindication of rights under § 1983. The Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U. S. C. § 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). There is no distinction. *Lugar*, 457 U.S. at 929.

Article III limits judicial power to resolving cases and controversies, not theoretical questions. U.S. Const. art. III, § 2. However, the 10th Circuit's opinion protects private persons involved in state action who would otherwise be liable for their conduct under § 1983. Understandably, a district court lacks jurisdiction to rule upon a citizen's "abstract questions." *Schlesinger*, 418 U.S. at 223. However, there is a distinction between a claim "undifferentiated and common to all members of the public" and "a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations." *Lujan*, 504 U. S. at 560. Respondents are not government, nor are any remaining claims for injunctive relief against a state or its officials under the *Ex parte Young* doctrine. Thus, Petitioners have not only raised "a generally available grievance *about government*." *Lujan*, 504 U. S. at 573-574. [Emphasis added.]

The purpose of § 1983 is to hold persons engaged in state action responsible for their conduct. In fact, Justice Thomas recently confirmed that the Court "has long interpreted [§ 1983] to permit suits against officials in their individual capacities." *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020). The Respondents are not government. None of the Petitioners remaining claims are against government officials—and when they were, before voluntary dismissal, those defendants were named in their individual capacity. The Respondents were acting under color of official authority, and the Petitioners claims were clearly made on on behalf of themselves and others similarly situated. Moreover, the Petitioners each submitted an affidavit concerning their own, individual injury associated with the infringement of their rights—in addition to their general allegations contained in their complaint and amended complaint. ROA, App. 102-142.

Even a failure to set out an actionable federal or constitutional claim is not always "conclusive against the party bringing the suit." *Bell v. Hood*, 327 US 678, 681 (1946). As this Court found in *Bell*:

> Jurisdiction, therefore, is not defeated…by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.

Id.

In that regard, the party who brings the suit is master to decide what law will be rely upon, and to determine whether the suit arose under the Constitution or laws of the United States. *Id*. As this Court stated in *Gomez v. Toledo*:

> 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.
>
> 446 U.S. 635, 640 (1980).

As a matter of public policy, "the discrete factual context within which [a] concrete injury occurred…ensures the framing of relief no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger*, 418 U.S. at 222. To maintain a proper separation of powers, this "is especially important when the relief sought produces a confrontation with one of the coordinate branches of the Government." *Id*. "To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Id*.

Here, no conflict is created. Petitioners remaining claims are against private persons, and they have plausibly alleged Respondents were engaged in state action concerning the 2020 presidential election. That's not a generalized grievance.

Moreover, assessing concreteness includes "whether the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts…'" *Transunion v. Ramirez*, 141 S.Ct. 2109, 2204 (2021) (*quoting Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-341 (2016)).

Petitioners claim infringement of their right to vote for the presidency, a national right. That right is connected to their 1st Amendment right to freedom of expression and speech, right to substantive due process and equal protection. The relief requested is for retroactive injury, which can be redressed in nominal damage. *See Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 798-799 (2021).

District courts are often requested to determine constitutional issues which result in orders against a state. This case is against persons. The Respondents have no official authority. They operated under color of law through contract, custom, actions, words and deeds, or, were in concert with others who did. Knowledge of their status is unnecessary. In fact, no state of mind is required. Thus, a critical part of any analysis of standing must include a determination as to whether Petitioners properly alleged that the Respondents were engaged in state action.

B. Respondents Are State Actors Subject to Liability Under § 1983

Generally, § 1983 does not apply to acts of private persons or entities." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838-839 (1982). However, this Court has "of course, found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Jackson v. Metropolitan Edison*, 419 U.S. 345, 352 (1974). "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978). "One such area has been elections." *Id.* "While the Constitution protects private rights of association and advocacy with regard to the election of public officials, our cases make it clear that the conduct of the elections themselves is an exclusively public function." *Id.*

Generally, federal courts have ruled that Facebook is not a state actor and cannot be sued under § 1983.[6] In the District of Colorado, "a plaintiff must allege specific facts showing an agreement and concerted action amongst the defendants to state a valid Section 1983 claim." *Tonkovich v. Kan. Bd. Of Regents*, 159 F.3d 504, 533 (10th Cir. 1998).

---

[6] See. e. g., *Zimmerman v. Facebook, Inc.*, 2020 WL 5877863, at *2 (N.D. Cal. Oct. 2, 2020) ("To the extent that the constitutional claims are free speech claims premised on the blocking of the plaintiffs' accounts, they fail because Facebook is not a state actor"). *See also Forbes v. Facebook, Inc.*, 2016 WL 676396, at *2 (E.D.N.Y. Feb. 18, 2016) (dismissing Section 1983 claims because Facebook was not a state actor).

The Petitioners outlined with specificity the concerted efforts of Zuckerberg, Chan, CTCL and Facebook to affect the outcome of the 2020 presidential election. Funded by Zuckerberg and Chan, CTCL conditionally granted hundreds of millions of dollars to nearly 2,500 jurisdictions in 47 states. This had an enormous impact on the administration of the 2020 presidential election—and only some counties and municipalities applied for the money and agreed to the conditions. Books, articles and documentaries are part of the mainstream culture of America.[7]

Facebook was the alter-ego of Zuckerberg, Chan and a multitude of others whose purpose was one-sided: Beat Trump, by any means necessary. Accordingly, the conspiracy is self-evident. The only issue is state action. Certainly, at the pleadings stage, Petitioners have articulated a plausible case to establish that fact, which must ultimately be proven at different stages of the case, including jury trial.

Dominion is its own species. While Petitioners do not allege conspiracy, their claims against Dominion are, nonetheless, pursuant to § 1983. Dominion is more than a vender of products and services used by states and their subdivisions to tabulate votes. Dominion administers elections. This, the founders would have never imagined. Accordingly, though its

---

[7] Hemingway, *Rigged: How the Media, Big Tech, and the Democrats Seized Our Elections* (2021); Editorial Board, *Zuckerbucks Shouldn't Pay for Elections*, Wallstreet Journal, Jan. 3, 2022; Bossie, *Rigged: The Zuckerberg Funded Plot to Defeat Donald Trump* (2022).

employees are not under oath, Dominion is subject to the constitution—and is a person under § 1983. All of the conduct of Dominion and its agents are subject to liability under § 1983, by their own consent. Dominion voluntarily became a for-profit provider of election services. They must know their conduct is subject to constitutional scrutiny. Even if Dominion provided constitutionally sound voting systems that, here, were used to tabulate the votes of half the country, it would be a state actor: but it does not. In fact, the people's trust in elections is low, partially, but directly, because of Dominion. Its name is now part of the lexicon and cultural nomenclature of the country. The elephant is sitting in the corner, right there. Additionally, it's not just Dominion's vulnerabilities and seemingly inability to accurately tabulate votes, as it is the enormous, unchecked power it wields as a person *with private rights*. Dominion, however, is a surrogate of the state jurisdictions with whom it contracts. *That* is the concerted action necessary to establish under § 1983.

C. Petitioners Have a Federal Right to Vote for the President Along With All the Other Attendant Rights That Apply

Private persons cannot administer elections. Elections are the exclusive duty of the states—and are the fabric of the country and all her people. In that regard, registered voters have a federal right to vote for the president of the United States. A presidential election is the only national election that the people enjoy. A right, so precious, that if a private company comes along and starts burdening that right, those companies anticipate their liability.

The Plaintiffs are registered voters, and each has an individual right to vote for the President and Vice-President of the United States, the latter of whom "are the only elected officials who represent all the voters in the Nation." *Anderson v. Celebreeze*, 460 U.S. 780, 794-795 (1983). Currently, every state has chosen the means of a statewide election to appoint its respective members of the electoral college. As stated, by this Court:

> History now favors the voter, and in each of the several States the citizens themselves vote for Presidential electors. When the state legislatures vest the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity of each voter.

Bush v. Gore, 531 U.S. 98, 104 (2000).

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 10 (1963). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.* As such, "in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest." *Anderson*, 460 U.S. at 794-795. Additionally, a registered voter in one State has the right to sue persons for acts concerning a Presidential election committed in another State. *Id.*

To appreciate how the Article III "concrete harm" principle operates in practice, recently, the Court compared two different hypothetical plaintiffs:

> Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.

Transunion v. Ramirez, 141 S.Ct. at 2205.

This case involves the United States. Citizens of the United States pledge allegiance to the flag of one nation, indivisible. The right to vote for the presidency of that Union is the property of Petitioners, and others similarly situated. The right to cast a meaningful vote for the President of the United States is sacrosanct. As stated by Petitioners' counsel at the hearing on the motions to dismiss, "we fight wars over this." ROA. 1651, l. 14. Such is the sentiment in all the affidavits—essentially mocked by the district court in its recitation of facts.[8] Ap. 11-12. If the voters, in their individual capacity or as a class, do not have standing, who does?

---

[8] Although politically active during the 2020 presidential campaign, Petitioner, Neil Yarbrough, did not cast a ballot. He is a disgruntled voter. The issue of his standing, and others like him, i.e., voters that have a right but feel like their vote doesn't count, is a legal issue to be resolved.

D. Respondents' Infringement of Petitioners' Rights Constitutes an Injury

The case was brought as a class action, but this "adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 40, n. 20 (1976) (*quoting Warth v. Seldin*, 422 U. S. 490, 502 (1975)).

Thus, the standing of the Petitioners is found in their injuries, 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); *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.").

The deprivation of a federal protected interest creates an injury in fact. Recently, this Court discussed the history of a completed constitutional violation as a legal injury, noting:

> Early courts required the plaintiff to prove actual monetary damages in every case. (Citation omitted). Later courts, however, reasoned that every legal injury necessarily causes damage, so they awarded nominal damages absent evidence of other damages (such as compensatory, statutory, or punitive damages), and they did so where there was no apparent continuing or threatened injury for nominal damages to redress. (Citations omitted). The latter approach was followed both before and after ratification of the Constitution. An early case about voting rights effectively illustrates this common-law understanding. Faced with a suit pleading denial of the right to vote, the court rejected the plaintiff's claim because, among other reasons, the plaintiff had not established actual damages. (Citation omitted) Dissenting, Lord Holt argued that the common law inferred damages whenever a legal right was violated. Observing that the law recognized "not merely pecuniary" injury but also "personal injury," Lord Holt stated that "every injury imports a damage" and that a plaintiff could always obtain damages even if he "does not lose a penny by reason of the (violation)."[*Ashby v. White*, 2 Raym. Ld. 938, 955, 92 Eng. Rep. 126, 137 (K. B. 1703)]. Although Lord Holt was in the minority, the House of Lords overturned the majority decision, thus validating Lord Holt's position 3 Salk. 17, 91 Eng. Rep. 665 (K. B. 1703)…

Uzuegbunam v. Preczewski, 141 S. Ct. at 798-799.

The holding in *Uzuegbunam* maintained that a "request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." *Id*. at 801-802. However, as clearly amplified in the case, a completed violation of a legal right was the intangible injury sought to which remedy was sought.

E. The Cases Relied Upon By the Lower Courts Are Not Relevant

In *Wood v. Raffensperger*, the 3rd Circuit affirmed the lower courts finding that plaintiff's request for emergency injunctive relief was not justifiable. 981 F.3d 1307, 1313 (11th Cir. 2020). There, the plaintiff based his standing on his interest in ensuring that "only lawful ballots are counted." *Id*. at 1314. As the *Wood* Court stated:

> Wood asserts only a generalized grievance. A particularized injury is one that effects the plaintiff in a personal and individual way… A generalized grievance is undifferentiated and common to all members of the public. (Citations and internal quotations omitted).

Id.

The *Wood* Court further noted:

> Wood moved for extraordinary relief. He asked that the district court take one of three steps: prohibit Georgia from certifying the results of the November election; prevent it

> from certifying results that include 'defective absentee ballots, regardless of whether said ballots were cured;' or declare the entire election defective and order the state to fix the problems caused by the settlement agreement.

Id. at 1312.

The 3rd Circuit also found that even "if Wood had standing, several of his requests for relief are barred by another jurisdictional defect: mootness." *Id*. at 1316. Georgia had "already certified its results." *Id*. at 1317. "Based upon the posture of this appeal," concluded the *Wood* Court, "the challenged action is the denial of an emergency injunction against the certification of election results." *Id*. at 1317.

Here, no such requests were made in the district court *against government* for extraordinary relief. Similarly, the lower courts' reliance on *Lance v. Coffman*, 549 U.S. 437 (2007), is also misplaced. In *Lance*, the plaintiffs sued the Colorado Secretary of State, in his official capacity, challenging the state supreme court's interpretation of a section of the Colorado Constitution. In finding plaintiffs failed to prove standing, this Court held:

> [T]he problem with this allegation should be obvious: The only injury plaintiffs allege is that the law — specifically the Elections Clause — has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to

> countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing.

Id. at 1198.

In that regard, 10th Circuit erroneously adopted the district court's misstatement of the Petitioners' claims. In its opinion, the 10th Circuit stated:

> The [district] court held that Plaintiffs asserted a non-justiciable generalized grievance, because 'by their own admission, Plaintiffs' claimed injuries are no different than the supposed injuries experienced by all registered voters.' Aplt. App. F at 1528. 'Plaintiffs allege no particularized injury traceable to the conduct of Defendants, other than their general interest in seeing elections conducted fairly and their votes fairly counted." *Id*. at 1530. The court also denied Plaintiffs' motion to amend, holding that their proposed amended complaint failed to remedy the lack of standing.

App. 3.

This so-called admission of the Petitioners is not in record. As outlined above, the Petitioners came to court to remedy their own, personal claims. The fact that a large class of people are similarly situated does not vitiate the Petitioners' causes of action.

What the district court referred to as a "tsunami of cases" consists of countless citations to cases that were all the same: plaintiffs suing states, or their political subdivisions, for prospective relief. App. 29.

A plaintiff may bring suit against individual state officers acting in their official capacity if the complaint alleges an ongoing violation of federal law and the plaintiff seeks prospective relief. *ex Parte Young*, 209 U.S. 123, 155-56 (1908). Courts treat those cases as suits against the States themselves. *See Hafer v. Melo*, 52 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity…should be treated as suits against the State."). *See also Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

No states, or any persons acting in their official capacity, are Respondents, here.

F. The Court of Appeal's Erred in Affirming the District Court's Abuse of Discretion in Not Allowing Petitioners to Amend

The Plaintiffs' amended complaint included the addition of over one hundred fifty plaintiffs from a total of thirty-eight states, all of whom signed affidavits concerning their damages and status as citizens and registered voters from their respective states. Additionally, the Respondents' conduct was more specifically described in the amended complaint, and an additional claim for racketeering was added, as well. ROA 954.

The 10th Circuit's affirmation of the district court's finding that any attempt by the Plaintiffs to amend their complaint would be futile was based upon the lower courts' misapplication of the law in determining that it did not have subject matter jurisdiction for lack of standing, in the first place.

On February 16, 2021, Dominion and Facebook filed their motions to dismiss, pursuant to Rule 12(b). ROA. 241-268 & 269-286. Thereafter, on March 9 and March 10, Petitioners filed their timely responses. ROA. 300-709 & 710-735. The next day, on March 10, 2021, the Plaintiffs filed their amended complaint on the same day that CTCL filed its motion to dismiss. This was 22 days after Dominion and Facebook had filed their motions to dismiss. Thus, while Petitioners responded to the motions to dismiss filed by Dominion and Facebook, before amendment, they otherwise had a right to amend the complaint concerning CTCL "as a matter of course." *See* Fed.R.Civ.P. 15(a).

Ultimately, the lower courts' failure to appreciate the distinction between the line of cases utilized to dismiss Petitioners' original complaint and the one at bar, lead them to determine that any amendment to Petitioners' complaint would be futile. As noted, Petitioners have standing and the district court has jurisdiction. Consequently, the case must be reinstated. F.R.C.P. 8(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the...claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

This simplified "notice pleading" standard "is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. *Id.* at 47-48.

With regard to whether Petitioners stated a claim upon which relief may be granted, it is well settled that a complaint need not contained detailed factual allegations. *Id.* at 47. However, a plaintiff's obligation to provide the grounds of his or her entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 US 544, 555 (2007).

Generally, in order to survive a motion to dismiss, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* The plaintiff must plead "enough facts to state a claim to relief that is plausible on its face" and to nudge his claim "across the line from conceivable to plausible." *Id.* at 570.

The problem is that we didn't get that far. With that, noting the lower courts' denial of Petitioners' ability to amend, any analysis in that regard, must not be undertaken until Petitioners are allowed to amend—again, if necessary. Petitioners' claims were dismissed "without prejudice." Over twenty months have transpired since the filing of Petitioners' complaint. Wherefore, Petitioners respectfully respect this Court reinstate with the right to amend.

G. The Court of Appeals Opinion is Wrong Must Be Immediately Reversed

The 10th Circuit created jurisdictional immunity for private persons under § 1983, where none previously existed. As such, the 10th Circuit's opinion is a gross departure from the accepted course of judicial proceedings, and is thus a matter of great importance. Therefore, this Court must clarify this most important issue concerning a citizen's right to national suffrage, and his or her standing to sue private persons for civil rights violations, as originally contemplated under § 1983.

Unquestionably, this is a case of first impression, which requires this Court's guidance regarding the scope of claims identified as generalized grievances under § 1983. If a citizen lacks the ability to hold private persons liable under § 1983 for injury caused to a large class of citizens, the purpose of the statute is defeated. Never before has a remedy sought against private persons engaged in state action under § 1983 been limited by the size of the tort.

Additionally, the policy considerations for prudentially denying 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. The Respondents are not government. Hence, Petitioners' claims against Respondents cannot be a generalized grievance against government—no matter how big the claim, or how many other citizens are similarly situated.

In less than forty-five days 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 facts concern a particular election that has already happened. The injury, herein claimed, is associated with *tha*t election. Therefore, the factual and legal issues, here, are not hypothetical or theoretical, but real and particularized to *that* election.

The current executive administration continues with use divisive rhetoric aimed at citizens that strive for election integrity, and to protect their own rights. These Americans are now classified as "election deniers," and literally labeled as "domestic terrorists." Such is 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, 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 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 rights under color of law, how does a citizen stop corporations the size of Facebook and Dominion, and persons as powerful and rich and Zuckerberg and Chan from violating his or her rights? They don't.

Normally, citizens take part in government through their respective legislative and executive representatives at the state and local level—but, 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.

Frankly, any material involvement of a private person in the administration of a state's general election is repugnant to the constitution. Private persons often do not take an oath. Freedom of information is not required. Suits for defamation are sustainable under the fiction of privacy. Courts lack jurisdiction to hear suits under § 1983 for conduct committed by private persons. Moreover, any for-profit, private company has a self-protective interest in maintaining that status. Thus, so long as these private persons continue to violate the rights of hundreds of millions of voters, any attempt to redress that conduct will fail as a generalized grievance, and this case will be the precedent.

This isn't a discrimination case. This is a civil right, class action case for damages under the 1st, 4th and 14th Amendments—none of which would mean anything without free and fair elections, particularly for the highest office in the land.

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.

CONCLUSION

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

Respectfully submitted,

/s/ Ernest J. Walker
ERNEST J. WALKER
Counsel of Record
Member, Supreme Court Bar
3368 Riverside Rd.
Benton Harbor, MI 49022
(303) 995-4835
ernestjwalker@gmail.com