No. 21-1161

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KEVIN O'ROURKE, et al.,

Plaintiffs-Appellants,

v.

DOMINION VOTING SYSTEMS, INC., et al.,

Defendants-Appellees.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Oral Argument is requested

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INTRODUCTION AND SUMMARY OF ARGUMENT

At the Revolution, the sovereignty devolved upon the people. *Chisholm v. Georgia*, 2 U.S 419, 471-472 (1793). Thus, "the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty." *Id*. at 472. After experiencing the disappointments of the confederation of States, "the people, in their collective and national capacity, established the present Constitution." *Id*. 470-471.

The Constitution empowers Congress to enforce the prohibitions of the Constitution. *See ex parte Virginia*, 100 U.S. 339, 344-346 (1880). In enacting the Civil Rights Act of 1871, codified under 42 U.S.C. § 1983, Congress provided a remedy for deprivations of rights secured by the Constitution. *See Lugar v. Edmondson*, 457 U.S. 922, 924 (1982). As stated by the *Lugar* court:

> The history of the Act is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual. Perhaps the most direct statement of this was that of Senator Edmunds, the manager of the bill in the Senate: "[Section 1 is] so very simple and really reenact[s] the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (1871). Representative Bingham similarly stated that the bill's purpose was "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic. . . to the extent of the rights guaranteed to him by the Constitution." Id., App. 81.
>
> *Id*. at 934.

"[M]ost rights secured by the Constitution are protected only against infringement by governments." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978). However, a private person may cause the deprivation of a right, subject to liability under § 1983, "when he does so under color of law." *Id*. Generally, action by a private party pursuant to a state statute, "without something more, was not sufficient to justify a characterization of that party as a 'state actor.'" *Lugar*, 457 U.S. at 939 (discussing the evolution of the concept of subjecting a private party to § 1983).

Under the public function test, a court determines whether a private entity has exercised "powers traditionally exclusively reserved to the State." *Tool Box v. Ogden City Corp.*, 316 F. 3d 1167, 1176 (10th Cir. 2003)(*quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)). "Such powers have traditionally included the holding of elections…" *Id*.

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

ARGUMENT

I. Plaintiffs have Art. III Standing

"In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. *Id*. "As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" *Id*. at 498-499 (*quoting Baker v. Carr*, 369 U. S. 186, 204 (1962).

Here, Plaintiffs each have a fundamental right to vote for President and Vice-President.[1] That right was infringed by the Defendants during the 2020 Presidential election. Plaintiffs' Article III standing is based upon that injury, caused to them and others similarly situated, by the conduct of the Defendants, as outlined in Plaintiffs' respective complaints.

[1] Plaintiff, Neil Yarbrough, did not vote in the 2020 general election. This may affect his standing to request relief, herein. However, the remaining Plaintiffs all voted in the 2020 Presidential election, including the additional Plaintiffs added in the Amended Complaint.

As described in their Opening Brief, the Plaintiffs' right to vote for President and Vice-President is linked with each Plaintiff's right to freedom of speech and expression, accompanied by their individual rights to due process and equal protection. Each Plaintiff is vested with a national interest in participating in a fair and equal general election, independent of the state in which each resides.

The injury suffered is *not* based upon a concept "that any registered voter, anywhere in the country, can file in any federal court against anyone who they believe did anything improperly affecting a presidential election." *Def. Ans. Br.* 19. The Plaintiffs filed their suit in the district wherein the remaining Defendants were found, based upon facts as outlined with specificity in their complaints.

Their injury, while possibly similar to other voters that have an interest in a constitutionally sound electoral system, are nonetheless particular to each individual Plaintiff. The Plaintiffs' claims center around the 2020 Presidential election. Thus, the allegations and causes of actions are naturally narrowed to that factual circumstance.

As outlined *ad nauseum* in the Plaintiffs' complaints and pleadings, the Plaintiffs have suffered an injury in fact, i.e., an invasion of a legally protected interest that is actual, concrete and particularized.

As alleged, Defendants, Mark Zuckerberg and Priscilla Chan, infused over Three Hundred Million Dollars into voting precincts and counties across the country to influence the outcome of the 2020 Presidential election. This scheme is outlined with particularity in the Plaintiffs' Amended Complaint and establishes the use of this money by Defendant, Center for Tech and Civic Life (CTCL), to essentially privatize the 2020 Presidential election to the benefit of Zuckerberg and Chan's favored candidates for President and Vice-President, as described.

This dark money carried influence and conditions, and was not spread out equally among the jurisdictions in the participating States. Those Defendants may claim that the money was to "fortify" the election, or help keep voters and election officials safe while casting their votes, but that's not what the Plaintiffs allege.

Their factual allegations and causes of actions surrounding this unprecedented infusion of private money are not frivolous, nor is their standing foreclosed by any other case. These Defendants were in association with another, and in concert with Defendant, Facebook, Inc., n/k/a Meta Platforms, Inc. (Facebook)—the latter of which is the most powerful social media company in the world whose Chief Executive Officer (CEO) is Defendant Zuckerberg. The evidence of Facebook's interference with the 2020 Presidential election is overwhelming.

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

The Plaintiffs' averments concerning these Defendants are true, and require de novo review before affirmation of the district court's dismissal. Illegal votes and unconstitutional procedures *did* dilute the votes of every legal voter in the 2020 Presidential election. However, that is only a small portion of the Plaintiffs' case.

Plaintiffs' claims against Defendant, Dominion Voting Systems, Inc. (Dominion), are separate and distinct from those against the above-referenced Defendants. Those claims, although still centered around the 2020 Presidential election, are based around Dominion's status as a state actor involved in the administration of elections in jurisdictions across the United States. Their systems, software and voting machines are unreliable and lack transparency. In fact, expert opinions, law review articles and other reports referred to in the Plaintiffs'

complaints and pleadings indicate that Dominion's products and systems are defective, hackable, untrustworthy and, thus, unconstitutional in their use and implementation in the 2020 Presidential election. Voters rely upon their respective States to properly conduct their general elections. Here, Dominion is responsible for the contractual relationships, into which it entered with all, or a portion of the jurisdictions within the six swing states referred in the Plaintiffs' complaints.

In their Amended Complaint: two Plaintiffs are voters from Georgia; ten are voters from Michigan; eight are voters from Pennsylvania; two are voters from Wisconsin; and, ten are voters from Arizona. These Plaintiffs have each suffered from the unreliable results of Dominion's voting systems in their respective States. Additionally, based upon the use of Dominion's for-profit systems in 1300 jurisdictions in 28 states across the country, Plaintiffs residing in states that do not use Dominion were nonetheless injured, regarding the 2020 Presidential election, as well. Ap. 854.

With that, all of the Plaintiffs have suffered an injury-in-fact. Each has sustained a concrete and particularized injury, due directly to the conduct of all the Defendants, here. Additionally, the case is in the pleading stage. Plaintiffs' Amended Complaint has not been accepted by the district court and, as such, is not the subject of the Defendant's respective motions to dismiss.

At the pleading stage, general factual allegations of injury resulting from a defendant's conduct may suffice, for on a motion to dismiss courts "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 US 555, 561 (1992) (*quoting Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)).

A. The Plaintiffs Claims Are Not a Generalized Grievance

It is the burden of the party who seeks the exercise of jurisdiction in his favor to clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 561 (1992)(*quoting McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 189 (1936), and *Warth v. Seldin*, 422 U. S. 490, 518 (1975).)

To establish standing, a plaintiff must have suffered an invasion of a legally protected interest which is concrete and particularized, actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U. S. at 560. There must also be a causal connection between the injury and the conduct complained of that is likely to be redressed by a favorable decision. *Id*. at 560-561 (1992).

In light of these principles, the Supreme Court has "consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the

Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Id*. at 573-574.

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

As is outlined in *Warth*:

> First, the Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm *alone normally* does not warrant exercise of jurisdiction. [Citations]. Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. [Citations]. Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights. [Emphasis added].

Id. at 499-500.

In *Warth*, organizations and individual residents of a metropolitan area brought suit against a municipality adjacent to the metro area and others, claiming "the town's zoning ordinance, by its terms and as enforced by the defendant board

members…effectively excluded persons of low and moderate income from living in the town…" *Id*. at 493. With four justices dissenting, the Supreme Court agreed with the judgment of the Court of Appeals in affirming the district court's dismissal of the action.

There, the individual plaintiffs asserted "standing as [persons] of low or moderate income and, coincidentally, as a member of a minority racial or ethnic group." *Id*. at 502. Importantly, the *Warth* court found:

> [T]he fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' asserted illegal actions have violated their rights. Petitioners 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.

Id. at 502.

Here, all of the original eight Plaintiffs submitted affidavits concerning their own, individual, injury associated with the infringement of their rights. Thus, coupled with the allegations made in the complaints, the Plaintiffs have demonstrated a case and controversy between themselves, personally, against the Defendants, herein. The fact that their claims may be comparable to others similarly situated, does not vitiate their claims.

As a citizen of the United States, each Plaintiff is a joint tenant in the sovereignty of the Nation. Each equal to the other. However, while every voter is a citizen of the United States, not every citizen can vote. Noting the magnitude of the conduct of these Defendants in the 2020 Presidential election, the fact that their actions *may* have affected every voter in the country is irrelevant for the purpose of this appeal. The issue is whether these Plaintiffs have standing.

A generalized grievance is an "asserted injury 'shared in substantially equal measure by all or a large class of citizens[.]'" *Def. Res. Br.* 21 (*quoting Warth v. Seldin*, 422 U. S. 490, 499 (1975)). Such an undifferential grievance, claim the Defendants, can never support standing, '"no matter how sincere.'" *Def. Res. Br.* 21 (*quoting Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013).

However, there is a distinction between a claim "undifferentiated and common to all members of the public" and "a case where concrete injury has been suffered by many persons, as in mass fraud or mass tort situations." *Lujan v. Defenders of Wildlife*, 504 U. S. at 560.

Lastly, if the Plaintiffs' claims are truly generalized grievances against government, the Defendants tacitly admitted to state action. Even then, however, the Plaintiffs' claims are not *against* government. They are against private actors engaged in state action, under color of law. The difference is subtle, but distinct.

B. Plaintiffs Claimed Individual Damages

As stated in the Defendants' response brief, "no plaintiff alleges that they were actually denied the right to cast a vote." *Def. Res. Br.* 29. However, the Plaintiffs, here, allege injury unassociated with their ability to cast a ballot. First, the circumstances of this case are unprecedented. Never before in American history have such a series of facts played out over the course of a Presidential election. As is outlined with greater particularity in the Amended Complaint, a cabal of progressives from around the World made it their business to exert their influence upon the 2020 Presidential election. That is a fact.

This case is not about the Republican incumbent, former President Donald Trump. Nor is it about the Democratic challenger, President Joseph Biden. The candidates and their respective parties are irrelevant. In fact, if a conservative cabal had, through a person similar to Defendant Zuckerberg, funneled Hundreds of Millions of Dollars in private money to only a portion of precincts in certain states to the overwhelming advantage of the *Republican* candidate, that case would be similarly self-evident. If that conduct was substantial enough to make a difference in the outcome of a Presidential election, it would also be safely assumed that the conduct of those persons involved infringed the rights of not only the voters whose candidate lost, but of any voter with a vested interest in voter integrity.

The 2020 Presidential election is over. The electors from all the States casts their votes in the Electoral College on January 6, 2021. President Biden has been sworn in and there is nothing the Plaintiffs can do about that, nor have they requested anything in that regard.

However, during that process, the rights of the Plaintiffs were infringed by the conduct of the Defendants. The fact that they were able to casted a ballot is irrelevant. The majority of each ballot would have been for local and state candidates, and other matters. None of that is at issue, here. If, on the other hand, the 2020 Presidential election was unconstitutionally interfered with by the conduct of the Defendants, nationwide, the Plaintiffs' rights in that regard would be violated. The fact that other voters interested in a fundamentally fair Presidential election were similarly violated does not reduce the injury to the Plaintiffs.

In *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), this Court of Appeals ruled that a group of climbers had not alleged individual damage to themselves associated with their challenge of the Secretary of the Interior's approval of the National Park Service's development of a plan that asks climbers to voluntarily refrain from climbing Devil's Tower "during the month of June when American Indians engage in [their] Sun Dance and other ceremonies."

This Court found that the climbers, who apparently climbed the monument in the month of June, anyways, "'claim that the Constitution [was] violated [but] they claim nothing else."' *Id*. at 822 (*quoting Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). "'They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error.'" *Id*.

Here, the Plaintiffs have claimed personalized injuries and, as stated, had a stake in the 2020 Presidential election.

C. Plaintiffs' Standing is Tied to the Defendants' Status as State Actors

Plaintiffs concede that the "mere fact that a substantive right exist under the U.S. Constitution does not confer universal standing on every citizen to bring a constitutional claim related to every election whenever and wherever they want." *Def. Res. Br.* 29.

However, the status of the Defendants is important. To determine whether the rights of the Plaintiffs have been violated and, thus, actionable pursuant to § 1983, an analysis of the character of the Plaintiffs *and* the Defendants is required. "[I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this

conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 US 527, 535 (1981).

The first question concerns the status of a defendant, the second relates to plaintiff. In that regard, the deprivation of a person's rights, privileges, or immunities, if caused by a defendant under color of state law, is the injury-in-fact necessary to confer standing to the complaining party.

"Of course, pleadings must be something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP*, 412 U. S. 669, 688 (1973). Additionally, as the Supreme Court has stated:

> Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the *zone of interests protected by the law* invoked.

Allen v. Wright, 468 US 737, 750-751 (1984). [Emphasis added].

Here, the Plaintiffs claims squarely fall within zone of interest protected by § 1983. Similarly, the Plaintiffs have never argued that because the Defendants are persons acting under color of authority, pursuant to § 1983, that their burden of establishing standing is somehow abrogated. Suffice it to say, if a plaintiff's claim is sufficiently plead, and the court's subject matter jurisdiction is satisfied in

reference to the stage of the proceedings, the plaintiff's complaint should be accepted. As stated by the Supreme Court:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

D. The District Court Failed to Accept the Facts of the Plaintiffs' Complaints as True

In their response, the Defendants assert that the Plaintiffs did "not identify a single well-plead factual allegation that the district court failed to credit as true." *Def. Res. Br.* 32. However, as stated in the Plaintiffs' Opening Brief:

> [T]he district court applied an improper standard in evaluating the Plaintiffs' claims, in that, it did not actually accept as true all of Plaintiffs' plausible allegations and draw all reasonable inferences in their favor. For example, the district court described Dominion as "a private supplier of election and voting technology," Order of Dismissal, p. 2. Facebook as a "social media company," and CTCL as "a non-profit organization dedicated to making elections more secure and inclusive." Id. In that regard, the district court refused to assess the Plaintiffs' claims under a recognition that the Defendants are state actors. A §1983 claim is only applicable to conduct occurring under color of law.

Pl. Op. Br. 39.

Further, based upon the district court's orders after dismissal, it appears that the district court failed to take any of the Plaintiffs' allegations as true. In their Response Brief, Defendants discuss the district court's granting of the Defendants' motions for sanctions. *Def. Res. Bf.* 12-16. However, instead of establishing the frivolity of the Plaintiffs' claims and the legal work performed by their counsel, the district court's orders granting the Defendants' motions for sanctions displays the district court's contempt for the Plaintiffs' factual allegations. Supp. App. Vol. I (c) at 210-277.

At its core, the district court based its order granting sanctions on "binding Supreme Court precedent that such generalized grievances about the conduct of an election cannot be the basis for a federal lawsuit." Supp. App. Vol. I (c) at 223 (citing *Lance v. Coffman*, 549 U.S. 437 (2007). In their motions to dismiss, the Defendants all argued that the Plaintiffs' claims were a generalized grievance.

In that regard, at oral arguments on the Defendants' motions to dismiss, the district court and Plaintiffs' counsel engaged in the following colloquy:

> THE COURT: [Counsel], seriously, you're citing the My Pillow guy as your defense in this case? Come on. Let's talk about standing. Go to standing. I've denied your motion to take judicial notice. Let's talk about standing. Why didn't you cite a single case of the dozens that have been issued by Federal District Courts across the country dismissing the claims exactly like yours on the basis of standing. You didn't mention any of them in either your motion to amend or your opposition to the motions to dismiss. Why not? Please distinguish this case from the cases

> in Iowa, the cases in Wisconsin, the cases in Pennsylvania, that were all dismissed on the basis of standing.
>
> COUNSEL: Because the individuals there were coming to the court and suing government individuals and persons in their official capacities. Therefore, they were essentially suing the states or sub-divisions of a state. They were asking for extraordinary relief. All of those cases, all of them, were with regard to a request for a TRO or a preliminary injunction. In those cases, the standard of proof is that the plaintiff must show a likelihood of success on the merits. The standard here is different.
>
> This is a completed Constitutional right violation. This is multiple parties committing multiple violation… After the election, in the middle of the process before the Electoral College met, many voters expressing their dissatisfaction hired lawyers that went to court and asked for extraordinary relief. We didn't do that. On December 10th of 2020, the United States Supreme Court in [*Tanzin v. Tanvir*, 141 S. Ct. 486 (2020)], indicated that it has long since recognized a plaintiff's ability to sue individuals in their individual capacity.

Ap. at 1643-1645.

The issue as to whether the Plaintiffs claims *are* a generalized grievance must be decided on the facts and circumstances of this case, and the law. As such, the record speaks for itself. Plaintiffs' complaints are thoroughly footnoted, and the source of practically every factual allegation is referenced. Of course, some averments were based upon reasonable deductions from the basic facts, but those can have denied by the Defendants. When information was sourced from the pleadings of another case, reference is made to the case and the pleading or order,

wherein the information is contained. The parties to those referenced cases were always different from the parties, here.

Regarding the cases referenced by the district court in its *Order of Dismissal*, and elsewhere, the contentions, there, were exactly framed as generalized grievances. This was excruciatingly covered in the Plaintiffs' Opening Brief. *Pl. Op. Br.* 41-50. As stated, all of those cases involved plaintiffs suing their state and local governments.

In essence, the Plaintiffs never had a chance. The district court adapted the reasoning in the "tsunami" of other cases that *were* all generalized grievances. However, this case is not against government. The Plaintiffs have filed a class action/civil rights case for retroactive relief against private parties engaged in state action against citizens of the United States. There claims were specific, researched, outlined and focused on the general election in states that actually could have made a difference in the 2020 Presidential election.

In *Terry v. Adams*, 345 U.S. 461 (1953), the plaintiffs sued as a class. The Jaybird Democratic Association, which had excluded African Americans from their primaries, claimed to be a private entity. The Supreme Court found state action. That is hornbook law.

Had those plaintiffs sued the local or state governments for accepting the candidates ultimately chosen, those claims (although still colorable) may have also been considered a generalized grievance. Here, as in *Terry*, the Plaintiff have sued the source of the unconstitutional behavior.

E. The Plaintiffs Properly Plead Their Injury in Fact

The Defendants criticize the Plaintiffs' citation of *Uzuegbunam v. Preczewki*, 141 S. Ct. 792 (2021), to establish that a violation of a federal protected interest creates an injury in fact. *Def. Res. Br.* 33. However, the citation of the case was to support the proposition that "for the purpose of Article III standing, nominal damages provide the necessary redress for a completed violation of a legal right." *Id*. at 802. *See also Pl. Op. Br.* 34.

Here, as in *Uzuegbunam*, the Plaintiffs have requested, at least, nominal damages for the completed violation of their legal rights. In their Opening Brief, the Plaintiff's section on *Injury-in-Fact* is located in the proceeding section. *Pl. Op. Br.* 25-30. There, the Plaintiffs establish their judicially cognizable interest in their individual right to vote for the President and Vice-President of the United States. Their injury-in-fact is thus related to the completed infringement of that legal right, and their other rights appertaining, thereto.

Thus, the injury-in-fact to the Plaintiffs' legally protected rights, in this regard, became actionable upon the Defendants' completed violation of their rights. Plaintiffs may have been somewhat confusing in their use of the words "injury" and "damages," but their claims have been consistent, throughout.

Additionally, although the Plaintiffs filed a claim for injunctive relief, that was a request was made if the case necessary required an order from the district court to enjoin the Defendants after a finding of their unconstitutional conduct. No request for a preliminary injunction was made, and thus the case essentially is a damages case. "In some situations, a damage remedy can be as effective a redress for the infringement of a constitutional right as injunctive relief might be in another." *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974).

F. The Plaintiff Are Not Required in this Case to Establish That They Were Disadvantaged

The Plaintiffs have a fundamental right to vote for President and Vice-President, as described. In their response, the Defendants quote the Court of Appeals, Third Circuit, for the proposition that labeling the right to vote as "personal" does raise "*any* alleged illegality affecting voting rights…to the level of an injury in fact." *Bognet v. Sec'y of Commonwealth of Pa.*, 980 F.3d 336, 358 (3rd Cir. 2020)(*judgement vacated with instructions to dismiss as moot*, 141 S.Ct. 2508 (2021)).

There, the 3rd Circuit's discussion was within the context of "harms underlying a racial gerrymandering claim under the Equal Protection Clause…" *Id*. As such, the 3rd Circuit stated:

> The key inquiry for standing is whether the alleged violation of the right to vote arises from an invidious classification—including those based on "race, sex, economic status, or place of residence within a State," Reynolds, 377 U.S. at 561, 84 S.Ct. 1362—to which the plaintiff is subject and in which "the favored group has full voting strength and the groups not in favor have their votes discounted," id. at 555 n.29, 84 S.Ct. 1362 (cleaned up). In other words, "voters who allege facts showing disadvantage to themselves" have standing to bring suit to remedy that disadvantage, Baker, 369 U.S. at 206, 82 S.Ct. 691 (emphasis added), but a disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group.

Id.

This holding, while vacated by the Supreme Court, does not stand for the proposition that *every* claim associated with the infringement a plaintiff's right to vote must be based upon an invidious classification. This has never been the only avenue of relief for voters whose rights have been otherwise infringed upon by the conduct of persons acting under color of law.

As such, this case is not simply a voting rights case. It's a civil rights case, based upon facts that establish the unconstitutional nature of the Defendants' conduct, and the resulting injury to the Plaintiffs.

II. The District Court Abused Its Discretion by Denying the Plaintiff's Motion to Amend

The district court's finding that any attempt by the Plaintiffs to amend their complaint would be futile was based upon the district court's misapplication of the law in determining that it did not have subject matter jurisdiction for lack of standing. *Order of Dismissal*, p. 28.

As explained in the Plaintiffs' Opening Brief, leave to amend "shall be freely given when justice so requires." *Pl. Op. Br.* 50. *See* Fed.R.Civ.P. 15(a)(2). After service, on February 16, 2021, Dominion and Facebook filed their motions to dismiss, pursuant to Rule 12(b). Ap. 241-268 & 269-286. Accordingly, the Plaintiffs filed their timely responses. Ap. 300-709 & 710-735.

Fed.R.Civ.P. 15(a), states:

> 1) **Amending as a Matter of Course**. A party may amend its pleading once as a matter of course within:
>
> (A) 21 days after serving it, or
>
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

On March 10, 2021, the Plaintiffs filed their amended complaint on the same day that CTCL filed their motion to dismiss. This was 23 days after Dominion and Facebook had filed their motion to dismiss.

The Plaintiffs responded to the motions to dismiss filed by Dominion and Facebook, but otherwise had a right to amend the complaint concerning CTCL "as a matter of course."

Ultimately, the district court's failure to appreciate the distinction between this case and the line of cases utilized by the district court to dismiss the Plaintiffs' original complaint, lead the district court to determine that any amendment to the Plaintiffs' complaint would be futile. That, along with the other errors noted above, must result in the reinstatement of the Plaintiffs' case, with the opportunity to amend their complaint as requested below.

CONCLUSION

For the reasons stated herein, the Plaintiffs requests that this Court reverse the district court's order granting dismissal of their case, and further requests that this Court reinstate the matter with instructions to the district court to allow the Plaintiffs to amend their complaint, pursuant to Rule 15, and, considering the dismissal of certain parties and claims since the filing of the Amended Complaint, to grant reasonable leave to allow the Plaintiff's amend their complaint, again, consistent with this Court's ruling.

PRIOR OR RELATED APPEALS

Kevin O'Rourke, et al. v. Dominion Voting Systems, Inc., et al., No. 21-1442.

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 5,094 words. I relied on my word processor and its Word software to obtain this count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By:

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

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Malware bytes Antimalware, 1.50.1.1100, and according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By:

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

CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of December, 2021, I electronically filed the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the e-mail addresses of counsel for Appellees:

By:

s/ Gary D. Fielder
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