No. 21-1161

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiffs – Appellants,

v.

DOMINION VOTING SYSTEMS, INC., FACEBOOK, INC. n/k/a META PLATFORMS, INC.*, a Delaware corporation, CENTER FOR TECH AND CIVIC LIFE, an Illinois non-profit organization,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Colorado
The Honorable N. Reid Neureiter
Magistrate Judge
D.C. No. 20CV03747

DEFENDANTS-APPELLEES' JOINT ANSWER BRIEF

Oral Argument Is Not Requested

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* After the district court order dismissing this case, Facebook, Inc. changed its name to Meta Platforms, Inc.

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CORPORATE DISCLOSURE STATEMENT

US Dominion, Inc. has 100% ownership in Defendant-Appellee Dominion Voting Systems, Inc.

After the district court order dismissing this case, Defendant-Appellee Facebook, Inc. changed its name to Meta Platforms, Inc. ("Meta"). Meta is a publicly traded corporation with no parent corporation. No publicly held corporation owns more than 10% of Meta's stock.

Defendant-Appellee Center for Tech and Civic Life is an Illinois private, nonprofit corporation. It has no parent corporation and no publicly held corporation owns more than 10 percent of its stock.

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PRIOR OR RELATED APPEALS

Kevin O'Rourke, *et al.* v. Dominion Voting Systems, Inc., *et al.*, No. 21-1394.

INTRODUCTION

In this purported class action suit on behalf of 160 million people, Plaintiffs-Appellants seek $160 billion in so-called "nominal" damages from Defendants-Appellees Dominion Voting Systems, Inc., Facebook, Inc., and the Center for Tech and Civic Life. Plaintiffs allege that Defendants (all of which are private entities) violated the Constitution by engaging in a vast conspiracy to interfere with the 2020 presidential election—including by passing or changing election laws, providing voting machines, operating a social media platform, awarding grants available to all U.S. election departments, participating in an "illegitimate adjudication process," and donating to non-profits. Plaintiffs allege that this conduct "hurt[] every registered voter in the country, no matter whose side the voter is on." Aplt. App. A Vol. I at 82 ¶ 319. On that basis, they seek to represent every registered voter in the United States—regardless of whether they voted, or where they voted, or whom they voted for—in alleging that Defendants caused a nationwide dilution of votes in the 2020 presidential election.

Applying settled Supreme Court precedent, bolstered by a bevy of on-point election cases, the district court dismissed Plaintiffs' complaint

(and denied leave to file a proposed amended complaint) for lack of Article III standing. It reasoned that Plaintiffs had failed to establish injury-in-fact, and that their allegations presented a paradigmatic generalized grievance. Given the frivolity of Plaintiffs' arguments, as well as the many other abuses they perpetrated in this case, the district court also sanctioned Plaintiffs' counsel. Nonetheless, Plaintiffs' counsel appealed the dismissal of Plaintiffs' claims. Their brief on appeal reprises the same irrelevant, baseless, and frivolous contentions that the district court carefully considered and decisively rejected. This Court should affirm.

RESTATEMENT OF THE ISSUES

Whether the district court erred in concluding that Plaintiffs failed to satisfy the injury-in-fact requirement of Article III standing.

STATEMENT OF THE CASE

A. The Parties

Plaintiffs are eight registered voters from six different states. Aplt. App. A Vol. I at 20–21 ¶¶ 6–13. Defendant Dominion is a private company that provides local election officials with tools to run elections, such as voting machines that count paper ballots. *Id.* at 21 ¶ 14; *id.* at 24 ¶¶ 36–37. Dominion provided voting systems used across the country for the 2020 election. *Id.* at 39 ¶ 125. Defendant Facebook is a company that

operates several popular online social media platforms and mobile applications. *Id.* at 27 ¶¶ 46–47. Defendant CTCL is a non-profit organization that provides training and logistical support to election administrators "to make U.S. elections more inclusive and secure." *Id.* at 32 ¶ 70 n.18. In preparation for the 2020 election, CTCL made "COVID-19 Response Grants" available to election administrators throughout the country and encouraged "all U.S. local election jurisdictions" to apply. *Id.* at 36 ¶ 94. Many local governments participated—over 2,500 of them in total. *Id.* at 36, 115–16.

B. Plaintiffs' Original Complaint

In their original complaint, Plaintiffs alleged that Dominion, Facebook, and CTCL—along with two private individuals, up to 10,000 unnamed co-conspirators, and officials in Pennsylvania, Michigan, Georgia, and Wisconsin—undertook a vast conspiracy to subvert the results of the 2020 presidential election. Plaintiffs alleged that these actors "engaged in concerted action to interfere with the 2020 presidential election through a coordinated effort to, among other things, change voting laws without legislative approval, use unreliable voting machines, alter votes through an illegitimate adjudication process,

provide illegal methods of voting, count illegal votes, suppress the speech of opposing voices, disproportionately and privately fund only certain municipalities and counties, and other methods, all prohibited by the Constitution." Aplt. App. A Vol. I at 19 ¶ 4. Plaintiffs set forth these allegations in a sprawling complaint that was nearly one hundred pages, with several lengthy and irrelevant attachments.

Based upon these allegations, Plaintiffs brought an assortment of claims that Dominion, Facebook, and CTCL (all private parties) had violated the Electors Clause, Equal Protection Clause, and Due Process Clause. *Id.* at 79–89 ¶¶ 292–362. Plaintiffs also claimed that Facebook had violated the First Amendment by "censor[ing]" content with which it disagrees. *Id* at 89–95 ¶¶ 363–387.

In Plaintiffs' telling, Defendants' conduct "hurt[] every registered voter in the country, no matter whose side the voter is on." *Id.* at 82 ¶ 319. Plaintiffs added that the alleged conspiracy injured "millions" of voters. *Id.* at 39 ¶ 126. Reflecting that extraordinarily generalized grievance, Plaintiffs structured their case as a purported class action on behalf of 160 million registered voters from across the United States. *Id.* at 19 ¶ 1.

In their Prayer for Relief, Plaintiffs sought $160 billion in supposed "nominal" damages. *See id.* at 99. They also asked the court to issue declaratory and injunctive relief providing that the "actions of the Defendants, as herein described, [be declared] unconstitutional and ultra vires, thereby making them legal nullities[.]" *Id.* at 100.

C. Defendants Move to Dismiss the Original Complaint

Plaintiffs filed the original complaint on December 22, 2021. Aplt. App. A Vol I at 101. Shortly after, they served Dominion and Facebook. Dominion and Facebook responded by asking Plaintiffs to withdraw their original complaint on the ground that it violated Federal Rule of Civil Procedure 11, including because it did not establish Plaintiffs' standing to bring their claims. Supp. App. Vol I at 64, 101–02. Yet Plaintiffs persisted in the suit, so Dominion and Facebook filed motions to dismiss in February 2021. Aplt. App. A Vol I at 241–286. Plaintiffs then served CTCL, at which point CTCL informed Plaintiffs of its intention to file a motion to dismiss. Plaintiffs responded by stating that they would file an amended complaint. When they failed to do so on the promised date, CTCL went ahead and filed its own motion to dismiss. *See* Aplt. App. C Vol. III at 744 n.3. Dominion, Facebook, and CTCL all argued (among

other things) that the complaint faced dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of Article III standing—including lack of injury-in-fact. *See* Aplt. App. A Vol. I at 254–58, 273–77; Aplt. App. C Vol. III at 745–49.

On March 11, 2021, Judge Neureiter held an initial status conference. There, Plaintiffs' counsel announced that they would defend the original complaint while also seeking leave to amend it. Supp. App. Vol I at 28–30, 43–44. Judge Neureiter approved that plan. But he warned the Plaintiffs that their amended pleading should address the many issues that had been identified with their Article III standing. *Id.* at 33–34.

D. Plaintiffs' Proposed Amended Complaint

Plaintiffs did not take Judge Neureiter's admonition to heart. Instead, four days later—on March 15, 2021—they filed their proposed amended complaint.[1] *See* Aplt. App. D Vol. IV at 860–975. There,

[1] Plaintiffs also filed oppositions to the motions to dismiss that maintained objectively frivolous positions on Article III standing. For example, their response to Dominion's motion to dismiss inexplicably asserts that "Plaintiffs have suffered a particularized injury-in-fact" because "[e]very constitutional right violation infers a damage." *See* Aplt. App. B Vol. II at 318.

Plaintiffs doubled down on their initial scattered strategy: adding 152 new plaintiffs, 473 new paragraphs, and six new causes of action, including a civil RICO claim against Facebook and CTCL. *See id*. This brought the complaint to 882 paragraphs and 113 pages in length. *Id.* Yet, while Plaintiffs increased the number of named plaintiffs nearly tenfold and almost doubled the length of the complaint, *none* of the additional plaintiffs claimed a personal stake in this litigation beyond being a registered voter somewhere in the United States. *See id.* at 868–885. This decision reflected Plaintiffs' theory that every registered voter in the country has Article III standing to file suit in Colorado (or anywhere else) against Dominion, CTCL, and Facebook based on the alleged conspiracy.[2]

E. Further District Court Proceedings

On March 29, 2021, Dominion, Facebook, and CTCL filed briefs opposing Plaintiffs' request for leave to file the proposed amended

[2] In their original complaint, Plaintiffs also sued government officials from Georgia, Pennsylvania, Michigan, and Wisconsin. But after the named officials from Georgia, Pennsylvania, and Michigan filed motions to dismiss—and subsequently filed briefs opposing leave to file an amended complaint—Plaintiffs voluntarily dismissed their claims against all government official defendants. *See* Aplt. App. F Vol. II at 1458–1465, 1478–1491.

complaint. Once again, all three defendants emphasized that Plaintiffs lacked Article III standing—supporting that argument with reference to substantial legal authority and devoting their principal contentions to the complete absence of any injury-in-fact. *See* Aplt. App. E Vol. V at 1235–1242, 1258–1262, 1277–79. Plaintiffs responded to these briefs (and to the pending motions to dismiss) without addressing most of the cited cases. *See* Aplt. App. B Vol. II at 316–321; Aplt. App. C Vol. III at 730–32; Aplt. App. D Vol. IV at 850–57; Aplt. App. E Vol. V at 1299–1302, 1336–1342, 1384–87, 1405–09. Indeed, their briefs cited virtually no caselaw interpreting or applying Article III's injury-in-fact requirement; instead, they cited a grab-bag of habeas rulings, criminal law cases, and merits opinions, plus one recent case holding that nominal damages can satisfy the redressability element of Article III standing. *See generally id.* As a result, CTCL asked Plaintiffs to withdraw their original complaint and proposed amended complaint on the ground that they violated Rule 11, including because Plaintiffs' standing arguments were objectively frivolous. *See* Fed. R. Civ. P. 11(b)(2) (requiring pleadings, motions, or other papers contain only contentions "warranted by existing law or by a

nonfrivolous argument for extending . . . existing law or for establishing new law").

Judge Neureiter scheduled oral argument on the pending dispositive motions for April 26, 2021. Several days before the argument, Plaintiffs' counsel emailed Facebook and CTCL, seeking their consent "to join approximately 350 new plaintiffs to the current list of plaintiffs." *See* Supp. App. Vol. I at 92, 105. Facebook and CTCL did not consent to that untimely, irregular request. *Id.* The night before the hearing, Plaintiffs' counsel filed a motion seeking judicial notice of several dozen sources—ranging across cases, books, articles, websites, and online videos pushing a conspiracy theory espoused by a pillow salesman. *See* Aplt. App. F Vol. IV at 1495–1500. Most of these materials had been publicly available at the time Plaintiffs drafted their pleadings (including the complaints).

At the April 26 hearing, Plaintiffs' counsel again announced their intention to join hundreds of additional plaintiffs to this lawsuit, each of whom would submit an affidavit stating that they "feel very passionate" that their "rights have been violated" by Defendants. *Id.* at 1656. Plaintiffs' counsel also opposed dismissal for lack of Article III standing—even after Judge Neureiter cited "clearly on point" precedent foreclosing

Plaintiffs' position and expressed "shock[] that . . . even today, given this opportunity, you're not responding to these cases." *Id.* at 1653–54. When asked to identify authorities that supported their standing, Plaintiffs' counsel cited two merits cases that did not address Article III standing at all—and then invoked *Brown v. Board of Education* as among their leading Article III standing precedents. *See id.* at 1670–72.[3]

F. The Decision Below

On April 27, Judge Neureiter dismissed the original complaint for lack of standing and denied as futile Plaintiffs' motion for leave to file the proposed amended complaint. Aplt. App. F Vol. VI at 1505–33. He first identified "the gravamen of Plaintiffs' Complaint" as a "general assertion that allegedly illegal conduct occurred in multiple states across the country during the recent Presidential election, resulting in Plaintiffs' votes (to the extent each Plaintiff actually voted—some admit they did not) being diluted or discounted in some way, to the point where their votes did not matter." *Id.* at 1513. He next reasoned that "the disputed conduct and the resulting claimed injury impacted 160 million voters in

[3] During this hearing, Judge Neureiter denied Plaintiffs' pending request for judicial notice, finding that it "sand bagged the Defendants," and "doesn't make any sense." Aplt. App. F Vol. VI at 1636–37, 1641–42.

the same way." *Id.* In this crucial respect, he concluded, Plaintiffs alleged only 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." *Id.* at 1513–14. Therefore, Judge Neureiter determined, "[this] is not the kind of controversy that is justiciable in a federal court." *Id.* at 1514.

Judge Neureiter emphasized that a "veritable tsunami of decisions [found] no Article III standing in near identical cases to the instant suit," adding that "Plaintiffs' arguments . . . are cursory and neither cite nor distinguish any of the cases that have found a lack of standing among voter plaintiffs making challenges to the 2020 election." *Id.* at 1521. Here, Judge Neureiter reasoned that Plaintiffs' claims were foreclosed by the Supreme Court's decision in *Lance v. Coffman*, 549 U.S. 437 (2007) (per curiam). *See id.* at 1514. He also invoked *Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020), and a host of other cases, *see id.* at 1514–1520. Finally, he observed that "Plaintiffs paradoxically make arguments that implicitly concede the generalized, rather than particularized, nature of the injuries about which they complain." *Id.* at 1521; *see also id.* ("[R]educing the number of allegedly harmed Plaintiffs from 300 million

total Americans to only 160 million registered voters does not make the harm complained of any less generalized nor any more particularized."); *id.* at 1523 ("This is almost the hornbook definition of a generalized grievance that broadly affects all of a state's voters in the same way.").

Turning to Plaintiffs' proposed amended complaint, Judge Neureiter concluded that it fared no better: amendment was futile because "[n]othing in the proposed Amended Complaint changes the standing analysis." *Id.* at 1532. He therefore granted Defendants' dispositive motions and dismissed Plaintiffs' claims for lack of standing.

Less than 24 hours later, Plaintiffs' counsel filed a notice of appeal. *Id.* at 1541.

G. The District Court Sanctions Plaintiffs' Counsel

In response to the abuse of legal process perpetrated by Plaintiffs' counsel, Dominion, Facebook, and CTCL sought sanctions under Rule 11, 28 U.S.C. § 1927, and the court's inherent authority. Judge Neureiter held a hearing and agreed that sanctions were warranted. Supp. App. Vol I at 273–277.[4]

[4] The government official defendants from Pennsylvania and Michigan also sought sanctions against Plaintiffs' counsel on largely the same

In reaching this conclusion, Judge Neureiter first noted that "this was not a normal case in any sense." *Id.* at 214. For starters, "[t]he Complaint is one enormous conspiracy theory." *Id.* By virtue of that theory, Plaintiffs "came seeking a determination from a federal court in Colorado that the actions of multiple state legislatures, municipalities, and state courts in the conduct of the 2020 election should be declared legal nullities." *Id.* This "would have included the certification of the votes of the states and the subsequent inauguration of President Biden." *Id.* At the same time, "the main focus of the suit, at least as emphasized by Plaintiffs' counsel in argument, was a demand for a massive amount of money, likely greater than any money damage award in American history." *Id.* at 215. Indeed, the requested "nominal amount" of "$160 billion" in damages was "greater than the annual GDP of Hungary." *Id.*

Against that background, Judge Neureiter identified three separate grounds warranting sanctions. *First*, Plaintiffs' counsel failed to engage in a pre-filing inquiry "reasonable under the circumstances[.]" Fed. R. Civ. P. 11(b). Here, Judge Neureiter reasoned that "[l]awyers who

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grounds as Dominion, Facebook, and CTCL. Their motions, too, were granted. Supp. App. Vol. I at 273–77; Supp. App. Vol. II at 330–32.

conceive of a lawsuit seeking $160 billion dollars, making allegations questioning the validity of a Presidential election, and the fairness of the basic mechanisms of American democracy, must conduct extensive independent research and investigation into the validity of the claims before filing suit." Supp. App. Vol. I at 241. But "this lawsuit was filed with a woeful lack of investigation into the law and (under the circumstances) the facts." *Id.* at 258. Plaintiffs' counsel copied whole sections of the Complaint from other failed lawsuits; they undertook virtually no independent fact research; and they submitted client affidavits that were "notable only in demonstrating no firsthand knowledge by any Plaintiff of any election fraud, misconduct, or malfeasance." *Id.* at 216. This was sanctionable: "The lawsuit put into or repeated into the public record highly inflammatory and damaging allegations that could have put individuals' safety in danger. Doing so without a valid legal basis or serious independent personal investigation into the facts was the height of recklessness." *Id.* at 258.[5]

[5] At the hearing, it emerged that Plaintiffs' counsel had engaged in substantial online solicitation to fund this lawsuit of their own devising, receiving approximately $95,000 from approximately 2,100 people. *See* Supp. App. Vol. I at 126–27.

Second, Judge Neureiter imposed sanctions based on the objective frivolity of Plaintiffs' standing contentions: "[T]here was no good faith basis for believing or asserting that Plaintiffs had standing to bring the claims they did." *Id* at 259. Judge Neureiter found that "Plaintiffs' effort to distinguish this case from what I referred to as a 'veritable tsunami' of adverse precedent was not just unpersuasive but crossed the border into the frivolous." *Id.* at 225 (citation omitted). He concluded that "[n]o reasonable attorney would have believed Plaintiffs, as registered voters and nothing more, had standing to bring this suit." *Id.* at 260.

Finally, Judge Neureiter found that "Plaintiffs' counsel acted with objective bad faith in filing this lawsuit and dumping into a public federal court pleading allegations of a RICO conspiracy that were utterly unmerited by any evidence." *Id.* at 270. With respect to this basis for sanctions, Judge Neureiter determined that Plaintiffs' counsel had engaged in affirmative misrepresentations to the Court. *See id.* at 273 ("No reasonable lawyer acting in good faith, as an officer of the court, would have . . . made representations to the Court saying the allegations of a conspiracy to rig the election could be supported with citations to an article [that] says the exact opposite." (citations omitted)).

Following Judge Neureiter's decision imposing sanctions, Plaintiffs' counsel filed a motion for reconsideration. Supp. App. Vol. II at 313–28. That motion has since been denied in relevant part. *Id.* at 329–32. The parties have also submitted briefing concerning the amount of an appropriate sanctions award; that issue remains *sub judice*. See Supp. App. Vol. I at 278–296; Supp. App. Vol. II at 297–305. Although Judge Neureiter has not yet entered a final order on the sanctions award, Plaintiffs' counsel have filed a notice of appeal. Supp. App. Vol. II at 333–34.

STANDARD OF REVIEW

This Court engages in de novo review of the district court's decision dismissing this case for lack of subject matter jurisdiction. *See Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017). To survive a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Plaintiffs must allege non-conclusory facts that, if true, establish subject matter jurisdiction and state a plausible claim for relief. *See id.*[6]

[6] Plaintiffs suggest that the case was improperly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). Aplt. Op. Br. at 37–39. That is mistaken: Rule 12(b)(1) is unquestionably the proper vehicle for

SUMMARY OF THE ARGUMENT

Plaintiffs' purported injury is a generalized grievance that is insufficient to establish Article III standing under settled Supreme Court caselaw. Plaintiffs allege that Defendants injured 160 million registered voters—no matter who they voted for, and even if they did not vote—by orchestrating a vast conspiracy to prevent the law from being followed in the 2020 presidential election. Defendants supposedly caused this injury by (among other means) passing election laws, providing voting machines, operating a social media platform, awarding local government grants available to all U.S. election departments, influencing votes through an "illegitimate adjudication process," and/or donating to non-profits. The district court applied well-settled precedent—including Supreme Court authority and many recent election cases—to hold that this purported injury constitutes a paradigmatic generalized grievance insufficient to confer standing. In fact, as the district court concluded,

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determining whether to dismiss a case for lack of Article III standing. *See Stein v. New Mexico*, 684 F. App'x 720, 721 (10th Cir. 2017) (unpub.) (affirming dismissal for lack of injury-in-fact under 12(b)(1)); *Hernandez v. Grisham*, 499 F. Supp. 3d 1013, 1047 (D.N.M. 2020) ("Motions to dismiss for lack of standing are 'properly brought pursuant to rule 12(b)(1), because standing is a jurisdictional matter.'" (citation omitted)).

Plaintiffs' lack of standing was so undeniable—and so obvious—that no reasonable attorney would have filed this case in the first place.

Plaintiffs' attempts to distinguish the binding precedents that foreclose their standing arguments are specious. The contention that their alleged injury is concrete and particularized because it impacts only "registered voters" is not a serious legal argument—courts nationwide have consistently rejected the notion that an alleged injury impacting any and all registered voters is sufficiently particularized to support Article III standing. And Plaintiffs' attempt to distinguish dozens of on-point cases on the ground that they involved requests for injunctive relief (or government defendants) is both factually baseless and simply irrelevant to their failure to establish injury-in-fact. Nor can Plaintiffs establish standing by conflating Article III's specific requirements with the state action doctrine, the substantive elements of various constitutional claims, or inapplicable one-person, one-vote cases. Finally, Plaintiffs' invocation of irrelevant redressability jurisprudence is not responsive to the district court's holding that they failed to allege a sufficient injury-in-fact.

Because Plaintiffs utterly failed to satisfy Article III—and because their proposed amended complaint doubled down on the same frivolous theory of standing—the district court properly denied leave to amend.

The district court's decision should be affirmed.

ARGUMENT

I. Plaintiffs' Article III Standing Arguments Are Frivolous and Squarely Foreclosed.

Plaintiffs have never offered a serious theory of Article III injury. Nor have they responded to either Defendants' arguments or the district court's analysis. Instead, they have advanced arguments foreclosed by precedent and have attempted to distinguish their position from this caselaw (and election suits already rejected by many other courts) on immaterial grounds. At bottom, they rely on an objectively frivolous theory of injury-in-fact: namely, that any registered voter, anywhere in the country, can file suit in any federal court against anyone who they believe did anything improperly affecting a presidential election.

Nothing has changed on appeal. The district court was right to reject each of Plaintiffs' frivolous standing arguments, and the district court's decision dismissing their complaint should now be affirmed.

A. Plaintiffs Have Not Alleged a Cognizable Injury-in-Fact Under Well-Settled Precedent.

Article III "limits the category of litigants empowered to maintain a lawsuit in federal court" to those with "actual cases or controversies." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks omitted). The "'irreducible constitutional minimum' of standing" requires: (1) a concrete and particularized injury-in-fact, (2) a causal connection between that injury and the challenged conduct, and (3) redressability. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Here, Plaintiffs failed to establish *any* of these Article III elements—including, as the district court determined, injury-in-fact. Plaintiffs' allegation that "illegal votes and unconstitutional procedures dilute[d] the votes of [every] legally registered voter" in the 2020 presidential election, Aplt. App. A Vol. 1 at 83 ¶ 320, is "precisely the kind of undifferentiated, generalized grievance about the conduct of government that [the Supreme Court has] refused to countenance[.]" *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam).[7]

[7] *See* Aplt. App. A Vol. 1 at 257–58, 273–77, Aplt. App. C Vol. 3 at 745–48; Aplt. App. E Vol. 5 at 1235–41, 1258–62, 1277–79. The deficiencies in Plaintiffs' pleadings are legion. They failed to plead any cognizable claim, establish subject matter, establish personal jurisdiction over

This follows from hornbook law. To establish standing, a plaintiff's injuries must be "concrete and particularized." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Lujan*, 504 U.S. at 560). To be "particularized," an injury-in-fact must "affect the plaintiff in a personal and individual way." *Spokeo*, 136 S. Ct. at 1547 (internal quotation marks omitted). The very opposite of a particularized injury is a "generalized grievance"—that is, an asserted injury "shared in substantially equal measure by all or a large class of citizens[.]" *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Such an undifferentiated grievance—"undifferentiated and common to all members of the public," *Lujan*, 504 U.S. at 575 (internal quotation marks omitted)—can never support standing, "no matter how sincere." *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013); *see also Lance*, 549 U.S. at 440–41. And as the Supreme Court has emphasized, "a grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper

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numerous defendants, allege facts to show Defendants are state actors, or even serve many of the parties they purportedly sought to sue for the sprawling election conspiracy that their counsel copied and pasted from other failed election suits. Aplt. App. A Vol. 1 at 259–66. Nevertheless, this Court need not address those many deficiencies because the district court correctly held that Plaintiffs' suit failed for lack of injury-in-fact.

application of the law does not count as an 'injury in fact.'" *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). This longstanding and familiar limit "serves vital interests going to the role of the Judiciary in our system of separated powers." *Hollingsworth*, 570 U.S. at 715.

The Supreme Court has applied these requirements with full force in the election context. In *Lance v. Coffman*, a group of Colorado voters sought to upend a Colorado redistricting plan for failing to comply with the Elections Clause. *See* 549 U.S. at 438. But the Supreme Court held that these voters lacked Article III standing because they "assert[ed] no particularized stake in the litigation." *Id.* at 442. "The only injury" the plaintiffs had asserted was "that the law—specifically the Elections Clause—[had] not been followed." *Id.* The Supreme Court held that this was "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance[.]" *Id.* The Supreme Court added that the allegations were "quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Id.* For these principles, the Supreme Court invoked a "lengthy pedigree" of cases establishing its "refusal to serve as a forum for generalized grievances." *Id.* at 439–40 (discussing *Fairchild*

v. Hughes, 258 U.S. 126 (1922), *Ex parte Levitt*, 302 U.S. 633 (1937) (per curiam), and *United States v. Richardson*, 418 U.S. 166 (1974)).

Lance thus clearly established that a plaintiff may not bring an election suit asserting merely "'a general interest common to all members of the public'" or arising from an undifferentiated belief that votes in general may be miscounted or diluted. *Id.* at 440 (citation omitted). In other words, *Lance* makes clear that a plaintiff may not bring an election-related suit that premises their injury on the right "to require that the government be administered according to the law[.]" *Chiles v. Thornburgh*, 865 F.2d 1197, 1206 (11th Cir. 1989) (internal quotation marks omitted) (explaining that such an injury is a generalized grievance).

Lance—and the "lengthy pedigree" of Supreme Court cases that it invoked—directly precludes Plaintiffs' theory of Article III standing in this case. Plaintiffs have never alleged that they were personally denied the vote; that their individual votes were not counted; or any other individualized and particular grievance. Rather, they have asserted that "illegal votes and unconstitutional procedures dilute[d] the votes of the legally registered voter" in the 2020 election. *See* Aplt. App. A Vol. 1 at

83 ¶ 320. Indeed, from their very first pleading in this suit, Plaintiffs have been adamant that the purported injury they seek to vindicate "hurt[] *every registered voter in the country*." Aplt. App. A Vol. 1 at 33 ¶ 76; *see also id.* at 85 ¶ 334, 88 ¶ 357 (emphasis added). And they have sought to represent a class of "any" and all registered American voters in this suit on the purported ground that *all* of their votes were generally "dilute[d]" or miscounted. *E.g.*, *id.* at 83 ¶ 320. It is difficult to imagine a more obvious "generalized grievance" than a claim on behalf of 160 million people that everybody registered to vote in a presidential election—whether or not they actually voted, and regardless of who they voted for—was injured by a secret nationwide conspiracy to not follow the law. *See, e.g.*, *Lance*, 549 U.S. at 442; *Warth*, 442 U.S. at 499.

A great many federal courts have held that similar (and even arguably better specified) allegations of nationwide vote dilution present a general grievance insufficient to establish standing. In *Wood v. Raffensperger,* for example, the Eleventh Circuit dismissed for lack of standing a voter's suit claiming his vote had been diluted when Georgia unlawfully processed absentee ballots in violation of the Equal Protection Clause and the Electors and Elections Clause. *See* 981 F.3d 1307, 1311–

12 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1379 (2021). As the Eleventh Circuit explained, such allegations are a "'paradigmatic generalized grievance" because "'no single voter is specifically disadvantaged' if a vote is counted improperly, even if the error might have a "'mathematical impact on the final tally and thus on the proportional effect of every vote.'" *Id.* (quoting *Bognet v. Sec'y of Commonwealth of Pa.*, 980 F.3d 336, 356 (3d Cir. 2020), *vacated as moot*, 141 S. Ct. 2508 (2021)); *Wood v. Raffensperger*, 2021 WL 3440690, at *2 (11th Cir. Aug. 6, 2021) (per curiam) (same). Similar cases abound.[8]

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[8] *See, e.g., Texas v. Pennsylvania*, 2020 WL 7296814, at *1 (Dec. 11, 2020) ("Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections."); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711 (D. Ariz. 2020) (voter dilution "allegations are nothing more than generalized grievances that any[one] . . . who voted could make if they were so allowed" and collecting cases); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Penn. 2020) (dismissing plaintiffs' claims for lack of Article III standing); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 609 (E.D. Wis. 2020) ("The plaintiff has not alleged that, as a voter, he has suffered a particularized, concrete injury sufficient to confer standing."); *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020) ("Even if accepted as true, plaintiffs' pleadings allude to vote dilution that is impermissibly generalized."); *King v. Whitmer*, 505 F. Supp. 3d 720, 734–37 (E.D. Mich. 2020) (similar); *Bognet*, 980 F.3d at 346 (similar); *Moore v. Circosta*, 494 F. Supp. 3d 289, 312 (M.D.N.C. 2020); *Martel v. Condos*, 487 F. Supp. 3d 247, 253 (D. Vt. 2020) (similar). Numerous judges reached the same fundamental conclusion in the context of addressing constitutional challenges to CTCL's grant program.

Such a formidable list of cases (and the Supreme Court precedent they follow) should have warned reasonable counsel away from pursuing this suit. "Federal courts are not 'constituted as free-wheeling enforcers of the Constitution and laws.'" Aplt. App. F Vol. 6 at 1512 (quoting *Initiative Referendum Inst. v. Walker*, 450 F.3d, 1082, 1087 (10th Cir. 2006) (en banc)); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction."). Thus, Plaintiffs cannot invoke a federal court's "power to declare the law" without a justiciable controversy. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96 (1998) (internal quotation marks omitted). The district court correctly held that Plaintiffs' purported injury is a generalized

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See, e.g., *Iowa Voter All. v. Black Hawk Cnty.*, 515 F. Supp. 3d 980, 986 n.1, 989–94 (N.D. Iowa 2021); *Tex. Voters All. v. Dallas Cnty.*, 495 F. Supp. 3d 441, 452 (E.D. Tex. 2020) ("The Supreme Court has held that an interest 'in influencing the legislature's overall composition and policymaking' is not the 'individual and personal injury of the kind required for Article III standing.' Here, Plaintiffs allege an injury that is 'the kind of undifferentiated, generalized grievance about the conduct of government that [the Supreme Court] has refused to countenance in the past.'" (citations omitted)); *see also Pa. Voters All. v. Centre Cty.*, 459 F. Supp. 3d 861 (M.D. Pa. 2020), *appeal dismissed*, ECF 28, No. 20-3175 (3d Cir. Nov. 23, 2020) ("The foregoing appeal is summarily dismissed for lack of standing, as there is no injury-in-fact.").

grievance insufficient to confer such Article III standing, and properly dismissed their complaint.

B. None of Plaintiffs' Arguments Salvage Their Frivolous Theory of Article III Standing.

Plaintiffs' arguments on appeal range from irrelevant to immaterial, and serve only to prove how untethered from basic standing doctrine Plaintiffs' pursuit of this suit has been from the outset.

First, Plaintiffs contend—without authority—that the interests of "registered voters" are not generalized grievances because they differ from the general interest of the members of the public. *See* Aplt. Op. Br. at 1 n.1, 23–24. But longstanding Supreme Court precedent squarely forecloses this contention: an "asserted harm is a 'generalized grievance'" when it is "shared in substantially equal measure by all *or a large class of citizens*[.]" *Warth*, 422 U.S. at 499 (emphasis added); *see also* Aplt. App. F Vol. 6 at 1521 ("[R]educing the number of allegedly harmed Plaintiffs from 300 million total Americans to only 160 million registered voters does not make the harm complained of any less generalized[.]").

Adhering to this rule, federal courts have repeatedly explained that cases alleging "vote dilution" injuries to every registered voter based on broad-based theories of electoral impropriety present a "paradigmatic

generalized grievance that cannot support standing." *Wood*, 981 F.3d at 1314–15 (citation omitted); *see also, e.g.*, *Martel*, 487 F. Supp. 3d at 253 ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Cegavske*, 488 F. Supp. 3d at 1000; *accord Lance*, 549 U.S. at 439–41 (recounting "lengthy pedigree" of taxpayer standing cases and their "progeny" rejecting Plaintiffs' position). The generalized nature of Plaintiffs' grievance is especially apparent here, where they claim the same injury on behalf of *all* registered voters in the United States, regardless of whether they actually voted in the presidential election, regardless of what State they voted in, and regardless of which candidate they supported. *See, e.g.*, Aplt. App. A Vol. I at 136 ¶ 9 (named plaintiff admits he did not vote); *id.* at 105 ¶ 11 (same).

Second, Plaintiffs observe that the U.S. Constitution prohibits "abridging or burdening the rights or immunities of citizens," "the use of differential standards in the treatment and tabulation of ballots within a State," and "the denial or abridgement of the right to vote on account of race or ethnicity." *Id.* at 84 ¶¶ 330–331; *id.* at 85 ¶ 336. But Plaintiffs

allege no facts showing that they (or all 160 million of the registered voters they purport to represent) personally suffered any such concrete or individualized injury. For instance, no plaintiff alleges that they were actually denied the right to cast a vote. Quite the opposite—as noted, some plaintiffs chose not to vote. Aplt. App. A Vol. 1 at 105, 136.

The mere fact that substantive rights 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. That is why the Constitution requires plaintiffs to have Article III standing. *See Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 822 (10th Cir. 1999) (plaintiffs failed to allege personal injury suffered as a result of alleged unconstitutional action and lacked standing), *cert. denied*, 529 U.S. 1037 (2000); *Valley Forge Coll. v. Ams. United*, 454 U.S. 464, 485–86 (1982) (drawing a clear distinction between unlawful conduct and resulting injury-in-fact).

Third, referencing 42 U.S.C. § 1983, Plaintiffs argue they have established standing by alleging that Defendants are state actors who violated their rights. *See* Aplt. Op. Br. at 3–6. Indeed, much of the Opening Brief is premised on the argument that a plaintiff who pleads

state action necessarily has standing to assert a claim under 42 U.S.C. § 1983. *See id.* at 3 (arguing that "[42 U.S.C. § 1983] grants district courts the jurisdiction to hear cases and controversies between citizens and other persons, the latter of whom is alleged to have violated any of the complaining citizen's rights—including the right to vote"), 6 ("[I]f a citizen files a claim under [42 U.S.C. § 1983], and sufficiently claims a violation of rights, traceable to the conduct of a defendant, the district court *must accept subject matter jurisdiction* over the case." (emphasis added)).[9] But the mere existence of a statutory cause of action to vindicate constitutional rights does not vest everyone in the United States with Article III standing to allege claims under that statute. *See, e.g., Spokeo,* 136 S. Ct. at 1545; *see also id.* at 1547–48 (reasoning that "[i]njury in fact is a constitutional requirement, and '[i]t is settled that *Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have*

[9] As further illustration, Plaintiffs fault the district court for "refus[ing] to assess Plaintiffs' claims under the recognition that the Defendants are state actors," and then argue that the court erred in its standing analysis because, "the status of Plaintiffs as citizens of the United States that claim damage under [42 U.S.C. § 1983], as averred by their well pleaded facts, establish their standing." *Id.* at 39–40.

standing" (emphasis added) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3)); *Heath v. Bd. of Cty. Comr's of Boulder Cty.*, 92 F. App'x 667, 672 (10th Cir. 2004) (unpub.) ("To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of standing, therefore, it is not enough to sufficiently allege constitutional error (the challenged acts)[.]").[10]

Moreover, the Supreme Court has squarely rejected the notion that the governmental status of a defendant alters the requirements of Article

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[10] While conflating Section 1983's cause of action with Article III standing, Plaintiffs continue to miscite *Anderson v. Celebrezze,* 460 U.S. 780 (1983). In their telling, *Anderson* supports the universal right of "a registered voter in one state" "to sue persons for acts concerning a Presidential election committed in another State." Aplt. Op. Br. at 5. That is an egregious misreading of precedent. In *Anderson*, the plaintiffs were a Presidential candidate (John Anderson) and several individuals who supported his campaign. *Anderson*, 460 U.S. at 782–83. They sued a specific government official (Ohio's Secretary of State) seeking declaratory and injunctive relief to prevent him from enforcing an allegedly unconstitutional state law (an early ballot-access deadline for independent presidential candidates). *Id.*; *see Anderson v. Celebrezze*, 499 F. Supp. 121, 123 (S.D. Ohio 1980). That deadline operated to the detriment of each of the plaintiffs in a variety of concrete and particular ways. *See* 460 U.S. at 786 (noting that the ballot-access deadline obviously had a "direct impact" on the excluded candidate himself); *id.* at 795 n.19 (discussing additional burdens the deadline imposed on Anderson supporters outside Ohio). That is why there was never any doubt in *Anderson* that at least one plaintiff satisfied the prerequisites for Article III standing. 460 U.S. 780; *see also Horne v. Flores*, 557 U.S. 433, 446 (2009) (if "at least one" plaintiff has standing, a court "need not consider" whether others do). So *Anderson* has no relevance here.

III. *See Steel Co.*, 523 U.S. at 104 n.5 (explaining that whether a plaintiff has alleged a cognizable injury-in-fact "does not depend on the defendant's status as a governmental entity" and "[t]here is no conceivable reason why it should"). Waiving or weakening the Article III standing requirement for claims against government actors would re-write Article III's "Case" or "Controversy" mandate, would defy precedent, and would risk grave litigation burdens on local and state governments. Plaintiffs' reliance on "state action" allegations to attempt to distinguish the cases foreclosing their position is thus frivolous. *See* Aplt. Op. Br. at 23, 36.[11]

Fourth, Plaintiffs contend that the district court erred in applying the Rule 12(b)(1) standard, which requires—as all parties and the district court agreed—accepting Plaintiffs' well-pleaded factual allegations as true. Aplt. Op. Br. at 39. But Plaintiffs do not identify a single well-pleaded factual allegation that the district court failed to credit as true.

[11] Plaintiffs' position is also self-contradictory. They first argue: "Plaintiffs do not simply allege a generalized grievance against government conduct, as none of these Defendants are government." Aplt. Op. Br. at 23. Then, in the very next sentence of their brief, they argue: "At all times material, the Defendants were acting under color of law." *Id.*

Instead of pointing to allegations that were not credited or that would support a concrete, particularized injury-in-fact, Plaintiffs simply repeat their legally erroneous (and irrelevant) claim that the district court "refused to assess the Plaintiffs' claims under a recognition that the Defendants are state actors." Aplt. Op. Br. at 39.

Fifth, Plaintiffs block quote *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), a case that addresses the requirements for redressability—not injury-in-fact—under Article III. *Id.* at 796. *Uzuegbunam* held 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 802. But it added—in language controlling here—that this "holding concerns *only* redressability" and "[i]t remains for the plaintiff to establish the other elements of standing (*such as a particularized injury*)." *Id.* (emphasis added). Plaintiffs' deceptive omission of this key passage (which directly precludes their reliance on *Uzuegbunam*) is characteristic of their improper conduct throughout this litigation.[12]

[12] Plaintiffs' conflation of redressability and injury-in-fact is a consistent theme throughout their Opening Brief, as they interchangeably use the terms "injury" and "damages." *See, e.g.*, Aplt. Op. Br. at 31 ("Here, every

Relatedly, Plaintiffs assert that their case is somehow different from all of the ones that came before it because those cases sought preliminary injunctive relief, whereas they seek damages. Aplt. Op. Br. at 45–49. But as the district court reminded Plaintiffs during oral argument on Defendants' successful motion for sanctions, they *did* seek injunctive relief. *See* Supp. App. Vol. I at 203; *id.* at 273–78 (granting Defendants' motions for sanctions and ordering Plaintiffs to pay Defendants' reasonable attorneys' fees); *see also* Aplt. App. A Vol. I at 18, 79 ¶¶ 407–09, 100; Aplt. App. D Vol. IV at 862, 972–73 ¶¶ 880–82, 973–74. Regardless, in this setting, as in most, whether Plaintiffs suffered injury-in-fact does not depend on the separate question of what form of relief they seek to redress their alleged injury. *See Uzuegbunam*, 141 S. Ct. at 802. Accordingly, there is no merit to Plaintiffs' suggestion that their request for "nominal" damages offers an escape from the unbroken

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original Plaintiff expressed their personal injuries in their respective affidavits . . . regarding their damages associated with the violations of their rights by the Defendants."); *id.* at 8, 12, 23, 33. But they are two distinct concepts. While damages might speak to the redressability element of standing, the existence of alleged damages does not impute an injury-in-fact. *See Uzuegbunam*, 141 S. Ct. at 800.

line of precedents (to which they otherwise have no answer) squarely rejecting their theory of injury-in-fact.

Finally, Plaintiffs block-quote inapposite "one person, one vote" jurisprudence to claim that they have standing to sue based on their personal right to vote. Aplt. Op. Br. at 26–28. But "it does not follow from the labeling of the right to vote as 'personal' . . . that *any* alleged illegality affecting voting rights rises to the level of an injury in fact." *Bognet*, 980 F.3d at 358 (emphasis in original). Rather, the key inquiry for standing purposes is whether voters have alleged "facts showing disadvantage to themselves as individuals" and seek "to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)). Here, Plaintiffs' allegations show they have no claim that they were disadvantaged in any concrete or particularized way as individuals. To the contrary, they insist that *every* registered voter (including in proposed sub-classes of "Republicans, Democrats, Third-Parties, Independents" and "Disgruntled Voters") was injured from purported conduct that generally "had a direct impact on

the result of the 2020 Presidential election, which likely does not reflect the actual will of the American people." Aplt. Op. Br. at 30.[13]

II. The District Court Did Not Abuse Its Discretion in Denying Plaintiffs' Motion for Leave to Amend.

Plaintiffs have affirmed an unwavering commitment to a meritless theory of Article III standing at every stage in this suit. Despite the district court's admonition, Plaintiffs proposed amended complaint made no effort to fix the obvious deficiencies with their constitutional standing—nor could it have done so, given Plaintiffs' insistence on bringing claims on behalf of "any" or "all" registered voters arising from alleged nationwide "vote dilution." Even now, Plaintiffs do not contend otherwise. Instead, they maintain that there are no standing deficiencies with either of their complaints. *See* Aplt. Op. Br. at 52.

As a result, the district court properly recognized that allowing Plaintiffs to amend their complaint to add 152 new named plaintiffs,

[13] Plaintiffs' claim that they should have used the term "any registered voter" instead of "all registered voters" serves only to highlight their failure to meet the requirements of Article III standing. Aplt. Op. Br. at 1 n.1. The injury-in-fact inquiry is not about semantics, but substance. Stating that "any registered voter" is equally injured by the alleged conduct is just another way to say that "every" or "all" registered voters are so injured. This is a paradigmatic generalized grievance.

along with additional irrelevant allegations and spurious claims, would be futile in light of Plaintiffs' obvious failure to satisfy Article III standing. Aplt. App. F Vol. 6 at 1571. The district court acted well within its discretion in denying leave to amend the complaint, and its decision should be affirmed. *See Jefferson Cnty. Sch. Dist. v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999) ("Although Fed. R. Civ. P. 15(a) provides that leave to amend shall be given freely, the district court may deny leave to amend where amendment would be futile.").

CONCLUSION

For the reasons given above, Defendants respectfully submit that the decision below should be affirmed.

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Respectfully submitted,

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