

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-02992-PAB-KLM

JUDICIAL WATCH, INC., et al.,
Plaintiffs,
v.

JENA GRISWOLD, Colorado Secretary of State in her official capacities,
Defendant.

DEFENDANT’S NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant, Jena Griswold, in her official capacities, submits the following notice of supplemental authority.

In her Reply in Support of Motion for Reconsideration, Defendant cited the district court opinion in *O’Rourke v. Dominion Voting Sys., Inc.* for its holding that a “lack of faith in the existing form of government” resulting from alleged election irregularities was insufficient to confer standing. Def.’s Reply in Support of Mot. to Reconsider (Doc. No. 74) at 5–6 (quoting *O’Rourke v. Dominion Voting Sys., Inc.*, No 20-cv-03747-NRN, 2021WL1662742 at *1 (D. Colo. April 28, 2021)).

On appeal, the Tenth Circuit affirmed that decision without oral argument in an Order and Judgment authored by Chief Judge Tymkovich. *O’Rourke v. Dominion Voting Sys., Inc.*, Order & Judgment, No. 21-1161 (10th Cir., May 27, 2022) (“Slip Op.”).¹ The Court of Appeals held that plaintiffs had failed “to identify any injury to any named plaintiff that is in any way different than the alleged injuries to every registered voter in the United States.” Slip Op. at 6. As

¹ A copy of the Order and Judgment of the Court of Appeals is attached as Exhibit 1.

a result, the plaintiffs’ alleged injuries were the type of “generalized grievance” insufficient to confer standing. *Id.* at 4.

Although not binding, Defendant alerts the Court to this supplemental authority “for its persuasive value.” Slip Op. at 1 n.*.

Dated: May 31, 2022

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Exhibit 1

to Defendant's Notice of Supplemental Authority

Slip Opinion in *O'Rourke v. Dominion Voting Sys., Inc.*, No. 21-1161
(May 27, 2022)

May 31, 2022

RETRIEVED FROM DEMOCRACYDOCKET.COM

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

May 27, 2022

FOR THE TENTH CIRCUIT

**Christopher M. Wolpert
Clerk of Court**

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

Plaintiffs - Appellants,

v.

DOMINION VOTING SYSTEMS, INC., a
Delaware corporation; FACEBOOK, INC.,
a Delaware corporation; CENTER FOR
TECH AND CIVIC LIFE; MARK E.
ZUCKERBERG, individually;
PRISCILLA CHAN, individually,

Defendants - Appellees.

No. 21-1161
(D.C. No. 1:20-CV-03747-NRN)
(D. Colo.)

ORDER AND JUDGMENT*

Before **TYMKOVICH**, Chief Judge, **HOLMES** and **ROSSMAN**, Circuit Judges.

Plaintiffs appeal from the district court’s dismissal of their 42 U.S.C. § 1983 suit for lack of standing. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

BACKGROUND

After the November 3, 2020, election for President of the United States, eight registered voters from several states filed a class action complaint in the District of Colorado alleging that Defendants (all private entities and individuals) had influenced or interfered with the election in violation of various constitutional provisions. Relying on their status as registered voters for standing, *Aplt. App. A* at 98, Plaintiffs alleged that Defendants' conduct "hurt[] every registered voter in the country, no matter whose side the voter is on," *id.* at 82; "damaged the Plaintiffs, but more broadly, every registered voter in America, all of whom have an interest in free and fair elections to determine the President of the United States of America," *id.* at 85; and "violated the rights of Plaintiffs and all registered voters in the United States," *id.* at 88. As recompense, they requested a declaratory judgment, a permanent injunction enjoining Defendants "from continuing to burden the rights of the Plaintiffs and all similarly situated registered voters," *id.* at 96, and "nominal" damages of \$1,000 per registered voter, totaling approximately \$160 billion, *id.* at 99.

Defendants Dominion Voting Systems, Inc., Facebook, Inc. (now known as Meta Platforms, Inc.), and Center for Tech and Civic Life moved to dismiss. Plaintiffs then moved for leave to file an amended complaint. After hearing oral arguments on the motions, the district court dismissed the suit for lack of Article III standing. The 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.

DISCUSSION

I. Lack of Standing

“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). We review de novo a decision regarding a plaintiff’s Article III standing. *See Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1272 (10th Cir. 2018). “When evaluating a plaintiff’s standing at the motion to dismiss stage, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *United States v. Sup. Ct. of N.M.*, 839 F.3d 888, 899 (10th Cir. 2016) (brackets and internal quotation marks omitted).

It is Plaintiffs’ burden to establish their standing. *Lujan*, 504 U.S. at 561. To do so, they must show three elements: (1) an injury in fact, that (2) has a causal connection to Defendants’ action(s), and that (3) is likely to be redressed by a favorable decision. *See id.* at 560-61.

This appeal involves the first requirement of injury in fact. To establish injury in fact, Plaintiffs must show they suffered “an invasion of a legally protected

interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Id.* at 560 (internal quotation marks omitted).

“Particularized” “mean[s] that the injury must affect the plaintiff in a personal and individual way.” *Id.* at 560 n.1.

In light of the requirement that injury be particularized, the Supreme Court has rejected standing based only on “a generalized grievance shared in substantially equal measure by all or a large class of citizens.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (internal quotation marks omitted). That means that a plaintiff who is “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.” *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (rejecting challenge to Colorado’s state redistricting procedures) (internal quotation marks omitted).

Plaintiffs 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. *See id.* at 442 (holding that the plaintiffs lacked standing because “[t]he 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.”); *see also Carney v. Adams*, 141 S. Ct. 493, 499 (2020) (generalized grievance that plaintiff, “like all citizens of Delaware,

must live and work within a State that (in his view) imposes unconstitutional requirements for eligibility on three of its courts”); *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (generalized grievance to complain about gerrymandering unless the plaintiff lives in a gerrymandered district); *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (generalized grievance where plaintiffs’ “only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law”); *Hotze v. Hudspeth*, 16 F.4th 1121, 1124 (5th Cir. 2021) (generalized grievance where “plaintiffs asserted . . . that drive-thru voting hurt the ‘integrity’ of the election process”); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (generalized grievance where registered voter based standing on interest in ensuring that only lawful ballots were counted), *cert. denied*, 141 S. Ct. 1379 (2021); *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 349 (3d Cir. 2020) (generalized grievance where “Plaintiffs . . . theorize their harm as the right to have government administered in compliance with the Elections Clause and Electors Clause”), *cert. granted and judgment vacated*, 141 S. Ct. 2508 (2021), *dismissed as moot*, 849 F. App’x 37, 38 (3d Cir. 2021).

Accordingly, no matter how strongly Plaintiffs believe that Defendants violated voters’ rights in the 2020 election, they lack standing to pursue this litigation unless they identify an injury to themselves that is distinct or different from the alleged injury to other registered voters. *See Carney*, 141 S. Ct. at 499 (“Lawyers, such as [the plaintiff], may feel sincerely and strongly that Delaware’s laws should comply with the Federal Constitution. But that kind of interest does not create

standing. Rather, the question is whether [the plaintiff] will suffer a personal and individual injury beyond this generalized grievance[.]” (citation and internal quotation marks omitted)); *Hollingsworth*, 570 U.S. at 706 (“[A] ‘generalized grievance,’ no matter how sincere, is insufficient to confer standing.”); *Diamond v. Charles*, 476 U.S. 54, 66-67 (1986) (“Article III requires more than a desire to vindicate value interests. It requires an injury in fact that distinguishes a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.” (citation and internal quotation marks omitted)). Plaintiffs state generally that they each suffered a “particularized injury,” Aplt. Opening Br. at 23, and they recognize that they “must demonstrate a personal stake in the outcome,” *id.* at 25 (internal quotation marks omitted). Yet their appellate briefs fail to identify any injury to any named plaintiff that is in any way different than the alleged injuries to every registered voter in the United States. Accordingly, Plaintiffs have not established that the district court erred in dismissing the action for lack of standing.

II. Denial of Leave to Amend

We generally review denial of leave to amend for abuse of discretion, “[b]ut when a district court denies leave to amend because amendment would be futile, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility.” *Castanon v. Cathey*, 976 F.3d 1136, 1144 (10th Cir. 2020) (internal quotation marks omitted).

The proposed amended complaint sought to add 152 additional plaintiffs, bringing the total number of plaintiffs to 160 from 38 states. It further sought to certify a class of all registered voters in the United States, alleging that the class “consist[s] of millions of registered voters that make up the people of the United States of America, and whose rights and interests have been directly burdened.” Aplt. App. D at 890. But Plaintiffs fail to show that any of the proposed additional plaintiffs had any injuries that were distinct or different from the injuries allegedly suffered by every registered voter in the United States. Therefore, for the reasons discussed above, the proposed amended complaint failed to establish any plaintiff had Article III standing, and the district court did not err in concluding that allowing amendment would be futile.

CONCLUSION

The district court’s judgment is affirmed.

Entered for the Court

Timothy M. Tymkovich
Chief Judge