Twitter Thread by Akiva Cohen

Akiva Cohen
@AkivaMCohen

Dear Texas: When your argument is that election procedures were adopted in violation of the Electors clause, the only evidence you need to "marshal" is "what election procedures were adopted and how"

You don't need weeks, a magnifying glass, and Melissa Carone

Third, Defendant States' invocation of laches and standing evinces a cavalier unseriousness about the most cherished right in a democracy—the right to vote. Asserting that Texas does not raise serious issues is telling. Suggesting that Texas should have acted sooner misses the mark—the campaign to eviscerate state statutory ballot integrity provisions took months to plan and carry out yet Texas has had only weeks to detect wrongdoing, look for witnesses

willing to speak, and marshal admissible evidence. Advantage to those who, for whatever reason, sought to destroy ballot integrity protections in the selection of our President.

Also, why is there no other forum? You couldn't have sued in Federal court in Georgia or PA in advance of the election because ...?

Oh, right. No standing. That's still a problem

First, as a legal matter, neither Texas nor its citizens have an action in any other court for the relief

that Texas seeks here. Moreover, no other court could provide relief as a practical matter. The suggestion that Texas—or anyone else—has an adequate remedy is specious.

Also, Texas? I feel like you should take that up with ... Texas

Pennsylvania improperly conflates the Article I Elections Clause with the Article II Electors Clause. Penn. Br. 21. To state the obvious, these clauses are in separate Articles of the Constitution. The Elections Clause originally applied, by its terms, only to House (and later Senate) elections, whereas the Electors Clause applied to presidential elections. Although the Founders understandably feared the emergence of an all-powerful Executive based on their experience with

King George, they were not fearful of expanded legislative representation, which King George had denied them. As a result, the congressional proviso in Article I is broad—"Congress may at any time by Law make or alter" state determination of the times, places, and manner of federal elections. In Article II, however, congressional authority is limited to one modality—"Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." This binary is textually significant and reflective of distinctive policy choices made by the Founders in Article I versus Article II.

I kind of feel like "look, what you meant by Purcell was let's just wait until after the election and then invalidate ALL the votes" isn't necessarily the *strongest* argument

The parties argue against last-minute injunctions in election cases under *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006), but that "*Purcell* principle" concerns voter confusion in advance of an election. A variant of that principle is that unconstitutional elections cannot stand.

Also, you don't just get to make up a new principle of constitutional and election law and just call it "a variant of" Purcell (or anything else).

You can tell it's made up by the total absence of any citation to ANY case, ANYWHERE, saying that

> The parties argue against last-minute injunctions in election cases under *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006), but that "*Purcell* principle" concerns voter confusion in advance of an election. A variant of that principle is that unconstitutional elections cannot stand.

This is a very long-winded way of saying "no, our dumbass equal protection claims DON'T give you any basis to reverse the election, the Defendant States are right"

> **C. Defendant States' invocation of other litigation does not affect this action, either substantively or jurisdictionally.**
>
> Defendant States' arguments against the Fourteenth Amendment lack merit. Texas cited Defendant States' violations of the Fourteenth Amendment as a basis for granting leave to file, but Texas cited only the Electors Clause to justify interim

> relief. There are sufficient indicia of fraud or intentional irregularities to trigger review under substantive due process, but Texas relies on the *appearance* of fraud under intentionally relaxed ballot-integrity measures to press the seriousness of the Electors Clause issues that Texas presents.[1]

And saying in a footnote "yes, our case is worthless unless we've sufficiently alleged intentional fraud" is a bold strategy when your complaint doesn't actually allege intentional fraud at all, let alone meet the heightened pleading requirements for that claim

---

[1] Although Michigan argues that "Texas ... would constitutionalize any claimed violation of state election law—no matter how minor, fleeting, or inconsequential," Mich. Br. 29, that is not so. Garden-variety irregularities do not rise to the constitutional cognizance, but intentional ones do. *See, e.g.*, *Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1032 (8th Cir. 2013); *Bodine v. Elkhart Cty. Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986). Although Michigan claims that Wayne County's maladministration gave no group preference, Mich. Br. 33, that is not true. *See* Compl. ¶¶ 91-101. The Wayne County process (*e.g.*, running ballots through multiple times, harassing party workers and poll challengers) were not applied statewide. Compl. ¶¶ 94, 98 (citing declarations).

The argument that Texas' real interest here is in having Pence as the President of the Senate to break ties doesn't leave dumbfuckistan no matter how many times you use it, Ken

Nor does the possible litigation against Defendant States in other fora preclude or undermine the action here under original jurisdiction. This Court "carried over its exercise" of discretion to hear original-jurisdiction cases "to actions between two States, where our jurisdiction is exclusive." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Finding an adequate remedy to displace an original action typically requires that *the plaintiff* State have the alternate remedy, *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981), but the Court has extended its adequate-remedy inquiry to instances where a third party with the same interest as the State (*e.g.*, as customers charged a tax by a utility) because that third-party litigation could reach this Court on appeal from the lower courts. *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976). By contrast, no private party shares Texas's sovereign interest in the Senate, and no court anywhere would have jurisdiction—as a practical matter—over enough states to affect the outcome of the election. Simply put, there is no adequate remedy outside this Court.

As someone else noted, Texas has taken "saying the quiet part loud" and made it into an art form.

The argument here is that Texas' claim that other states' election procedures violated the constitution wasn't "ripe" until Texas was harmed by that violation, so Texas had to wait until after the election.

Texas's action is timely. Under Article III ripeness and standing requirements, Texas could not sue until after the election and, arguably, even after Defendant States certified their obviously flawed election results. Whereas Defendant States had months to plan, Texas had less than four weeks to detect violations, find witnesses willing to testify—notwithstanding threats—and develop evidence and build a case.

In other words, Texas is EXPRESSLY telling the Supreme Court that "the harm to us wasn't other states 'breaching the contract' by not following the Constitution. We were only harmed when they picked a candidate we don't like"