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Election Litigation Update - Gohmert.

Reply brief is in. Let's have a look. They are, mercifully, underlength. They had 50 pages available, the PDF is 43 and some of that is cover page, signatures,

Interesting table of contents. Looks like they're packing a lot in, until you realize that much of the material that's important - like their response to the "you sued the wrong person" material and "injury in fact" take up very little space.

Looks like they decided to skip the table of authorities. Presumably GoogleDocWord ate it too bad for them to fix. This will certainly further endear them to the judge.

This is going to be interesting - leading off a reply brief with a "here's what our cause is about" is certainly a strategy. It's even a bold strategy.

Shall we dig deeper, Cotton?

"We live in a democratic republic in which the Vice President, who will more often than not be a candidate in the election, has the sole and unchallengeable power to decide who wins the election" is a hellofa take.

These people do not appear to understand what either "democratic" or "republic" actually mean. And, given that the plaintiffs are the unduly unqualified cosplayers from Arizona, they also don't seem to understand what "duly qualified" means.

"We didn't care before but we do now because we're dissatisfied with both the will of the electorate and the verdict of the courts" is also a hell of a take.

"We ask you, judge, is it fair to make poor put upon and victimized Mike Pence follow the rules that have governed for more than a century when he can use his feels as an alternate set of rules"?

*cough*BULLSHIT*cough*

I do, however, entirely agree with the highlighted characterization of the role of the Vice President at the joint session.

They're setting forth a "brief study" of the background, which is going to be interesting (to say the least).

Creating mistrust and then using the existence of that mistrust to argue that you should be accorded special privileges is the very definition of chutzpah.

The highlighted fact is irrelevant.

"The founders wrote procedural rules so the Vice President gets to declare himself to be the winner if he wants" is another great argument. Really. It must be. Team Kraken is making it.

"We don't want tumult and disorder. We do want the Vice President to invalidate enough electors, despite the results of the election, state lawsuits, and federal lawsuits, to make the loser a winner in what will certainly be a calm and peaceful process."

"Every practicable obstacle should be raised to corruption. Also, please let the Vice President say he's going to be the Vice President for another four years no matter what the certified election results say."

By the way, that's two and a half pages of their reply that are nothing but a description of how the President is elected. That's always a thing you want to inflict on a judge you're forcing to work over a holiday weekend.

Still going through early American history, I see. We're now on Page 10, and there's been nothing even approaching something that addresses the arguments they're putatively replying to.

This is literally the entire section on "The Election of 1800" and I have no idea if it was supposed to be the whole section, if the dog ate the rest, or why it's here.

OFFS - DO NOT WRITE SOMETHING LIKE THIS.

This is a mistake that I've encountered in student work. Do not simply say that "commentators argue" something. You need to make those arguments yourself. You can - and must - cite the commentators you are relying on, but you must argue.

In this case, they're compounding their amateurish error further because THEY DON'T SAY WHAT THE "HIDDEN POWERS" ACTUALLY ARE.

Oh, and also this is the first time we've seen this citation but they don't provide the full cite. Well done.

The issue here is that Congress can - and has in plenty of other contexts - taken whatever actions it can short of an amendment when an amendment is not likely to pass. This isn't the same as saying that 3 USC §5 is unconstitutional.

I don't have the time to go digging through my old con law notes, but there's not a shortage of case law to the effect that Congress can use carrot-and-stick approaches to incentivize states to do things that Congress can't simply require.

This really doesn't support their argument - which they tossed into that final sentence. If anything, it reinforces the opposing argument by showing that even pre-ECA Congress and not the VP decided what votes to accept.

I'll be back in a minute or two with more - I want to pull a reference they're citing in the next section so I can review some stuff.

Didn't find what I was looking for, which was just additional detail. Sorry for the delay.

This section goes a long way toward dismantling the idea that the pseudoelectors from Arizona have any claim to reality - you'll notice that with the possible exception of SC, where the Tilden slate's authority is unspecified, all these slates had some state certification.

The certification might have been questionable in many cases, particularly Louisiana where there was apparently a disputed election for governor on top of the disputed presidential election, but there was something purporting to be authority for them to vote.

Y'know, maybe it's just me, but it feels like a bad idea to quote something that suggests that the ECA might involve questions not subject to judicial review - especially when opposing counsel haven't raised that issue.

(I don't think it's just me.)

Also, all of this strongly suggests that Congress has always been the one to decide what electors are the right ones, not the Vice President.

So they're continuing to wreak havoc on their own arguments here.

And still more of that here. Because even if the ECA is unconstitutional, that's not the remedy they're seeking. They want a declaration that Mike Pence is the literal kingmaker. Whether one Congress can bind another is an unrelated question that they have no standing to raise.

Although, to be fair, they don't actually have standing to raise any of the claims they're raising, so what's one more amirite?

They then jump from history to fantasy and claim - despite everything they've just spent over a third of their brief discussing demonstrating that Congress and not the VP resolves disputes - that the Constitution "empowered the Vice-President to take control of the proceeding."

No legal authority argued for that proposition. And they've just spent OVER A THIRD of their entire reply brief beating their own arguments with a very big stick.

Me: *Looks at next page of brief*
Me:

We're moving on from the alleged historical background to the alleged merits of this case.

Also - no, nobody conceded anything. The responses are oppositions to your request for emergency relief.

And the cited case doesn't come within a parsec of supporting that claim.

Inflate your shoes; you'll fall on your face less.

And now we get to the great part - three sections of the brief that are one sentence long each.

Also, the one in #2 is actively misleading. Their claim is that the ECA is unconstitutional; amicus argued that the ECA complements the 12th Amendment.

Also, you really didn't want to spend 15+ pages discussing the history of how Congress and not the VP has always been the one to deal with objections and then quote that thing I highlighted.

Seriously.

1: Even if we grant the rest of this argument, the prejudice comes in large part from the delay in filing this case SINCE Election Day, not just the other 130 years of delay.
2: It's not the first election where the statute *could* affect the outcome. Just ask Al Gore.

I do not - AT ALL - understand what they're trying to do here, unless they're actively trying to machine-gun the legs out from under their own argument. The Constitution is every bit as silent on the VP's power as it is on Congressional Power.

Seriously. You wanted to remind the court that you're bringing this suit "a fortnite after" the electors met? Really?

Family stuff, back in a bit.

Will be back and forth with the family stuff a bit (New Year's phone calls) but I want to finish with this dreck so I'm going to keep going between calls.

Next up, we've got another "really, why did you spend New Year's Eve writing this" section. I'm particularly confused about why there's a discussion of the Administrative Procedures Act, which I don't remember being raised anywhere because WTF?

Also, these factors are pretty much irrelevant here. I don't think any of the replies raised anything that makes them relevant - the bulk of the challenge isn't specifically to declaratory judgment, it's to the case being clownshoes buffoonery.

But, hey, if the plaintiffs wanted to be the first to talk about Louie the Loopy's obvious forum shopping, why stand in their way?

Again, this is mostly a waste of space, which even the plaintiffs might have figured out since they trailed off in the middle of talking about discretion. That's in the section where they discuss the Anadarko Petroleum standard without quoting it or providing a full citation.

Also, I'm pretty sure that II.C is infra of II.B. Not supra.

1: You have no claims.
2: To the extent you have claims, they did not arise on Dec 14; they arose earlier.
3: To the extent they arose on Dec 14, you wasted more than half the time before Jan 6th.

They really need to confront the whole "so there were like 3 total weeks for our claim to be heard and we waited 2 weeks to bring the claim" thing.

But they don't. Instead, they handwave prejudice without mentioning that they blew through two weeks and now want an earth-shattering constitutional law decision to be made within a period of a few days.

Also. Al Gore really wants to have a word with these clowns, I'm thinking.

"A plaintiff that lacks standing can provide venue" is a very interesting argument. I would very much have liked to see A BLOODY CITATION for it.

1: The case cited deals with waiver on appeal.
2: The document they're calling an "amicus" is coming from someone who has moved to intervene.

That said, I'm not convinced the real Arizona electors are necessary parties.

And, honestly, they're probably right on this point, although I haven't looked at the Dowling argument.

This is also true, which is an independent reason that plaintiffs will lose.

This is a strange paragraph, not least because City of Boerne had - the parenthetical notwithstanding - absolutely fuckall to do with the 12th Amendment, Presidential elections, or Louie Gohmert.

This is possibly the dumbest argument against Pence's opposition that they could possibly have raised. It's literally "we're clearly adverse because they want the case dismissed and we don't" which is, how should I put it, NOT HOW IT DAMN WELL WORKS AT ALL EVER.

Also, I've got no idea what "Whatever public statement one plaintiff made is not binding on the other plaintiffs, especially not a statement by one of the Arizona Electors on Rep. Gohmert" even means.

I'm looking forward to seeing where they're going with this because you can't invent standing by coming up with merits views that are untethered from the known multiverse.

Sigh

No. "The need to contest this election" does not create standing even if you really believe the election should be contested. At all.

And never mind all the state courts that ruled that the elections were legal.

Or the number of federal courts that have, in the last two months, said that the piddlyshit stuff you are complaining about doesn't approach a "significant departure" from anything.

Pro tip:
Don't repeat your initial argument in your reply. You have to, well, *reply* in your reply.

And this is apparently the rest of the "injury in fact" section - there's nothing on the Arizona electors, **DESPITE THE SECTION WHERE THEY SAID THE ARIZONA ELECTORS MIGHT HAVE STANDING IF LOUIE DOESN'T**

Also, the argument that general voting rights cases can somehow apply to legislative acts is a massively creative stretch and there better be some damn good attempts made to show that they're not just pulling that out of their collective asses. Or Louie's mouth.

But if "this section" doesn't mean something more than the subsection we just finished, they didn't. At all. Not even an attempt.

Fucking clownshoes.

And this argument assumes that *Pence* is the one who "invokes" anything. Which kind of defies reality. Especially since they've not made any kind of showing that Pence is the one who "implements the statute" that governs how Congresscritters make a decision.

They really didn't want to spend one sentence on each of those arguments. Especially since even the most Trump-friendly court is going to want some reassurance that it can order around Congress and the VP in the 12th Amendment context.

Yogi needs to climb out of the grave, shamble on down to Texas, and explain "over" to Gohmert.

And I think Inigo Montoya would like a word with them about the whole "undisputed" thing.

And it looks like we're done with standing. They made no serious attempt here. No discussion of Arizona at all, and nothing more than handwaving for Gohmert.

They're apparently going to spend a bunch of time on prudential limits instead of discussing those other case-determinative things that they've not mentioned.

Oh, finally a mention of the Arizona electors claims.
1: You have no merit, relative or otherwise.
2: You do not want to be treated fairly, because fair treatment would involve a boot.
3: Discussing zone of interests but not injury-in-fact is an interesting choice.

For the nonlawyers:
Injury in fact is mandatory. If you don't have an injury in fact, nobody cares about zone of interest. The clown car crew forgot to talk about injury in fact.

And I have no literal clue what this is about. At all. ZE-to-the-power-of-RO. First time this is getting mentioned as far as I know.

As far as I know, the bar against friendly suits is jurisdictional because it goes to the case or controversy requirement. I have looked at the cited page of the cited case and I don't see how it helps them at all.

The Defendant has literally only opposed the relief by saying he's the wrong defendant. And nothing was said about personal relationships.

Honestly, I don't think it even crossed their mind that Pence might call this out as a non-adversarial case. They seem to have been woefully unprepared for that.

Narrator Looks at footnote 1 of Pence's brief, starts to say something, stops, flips Gohmert the bird, and strolls out of the room.

They think they can name the PARLIMENTARIANS? I am deceased. Just totally deceased.

The parliamentarians are advisory, they have no power. They would be a new level in wrong defendant naming.

Literally Mike Pence: "I'm the wrong party. The right parties are the House and Senate."
These LITERAL Clowns: "Judge, if Pence is the wrong party, we want to sue the parliamentarians or the United States instead."

Dafuq??

They seriously must have pre-drafted something - but section headings only - covering everything that they expected and then decided to stick pointless and useless single-sentence things in there as filler because #reasons.

Page 22 of the House brief. You complete and utter, whitewash down your pants, stuck in the ladder, getting run over by the huge guy on the tiny bike, buffoons.

There were a few ways that they could have made their reply brief worse. But only a few.

I'll be interested to see what grounds are selected for the dismissal, particularly given the timeline.

It will also be interesting to see how much time the judge takes in dealing with this, given the limited amount of time on the clock.

Overall, though, I think I'm getting better at calibrating my Krakenexpectations. Because this was only a marginally worse brief than I thought it would be.

/fin