Twitter Thread by Mike Dunford

Mike Dunford
@questauthority

This is an excellent question, and it's something that I've thought about some over the last couple of months.

Honestly, I think the answer is that the rationales for these rulings are not likely to unreasonably harm meritorious progressive OR conservative challenges.

> Any merit to the notion that the rationales for some of these rulings will harm progressive challenges in future elections?
> One says laches, another moot, another standing, sometimes with almost the same type of plaintiff.
>
> — Andrew Broering (@AndrewBroering) January 3, 2021

The first thing to keep in mind is that, by design, challenges to the outcomes of elections are supposed to be heard by state courts, through the process set out in state law.

That happened this year, and the majority of those challenges were heard on the merits.

The couple of cases where laches determined the outcome of state election challenges were ones where it was pretty clear that the challenges were brought in bad faith - where ballots cast in good faith in reliance on laws that had been in force for some time were challenged.

The PA challenge to Act 77 is one example. The challengers, some of whom had voted for passage of the bill, didn't make use of the initial, direct-to-PA-SCt challenge built into the law or sue pre-election; they waited until post-election.

The WI case is another. That one had a challenge to ballots cast using a form that had been in use for a literal decade.

Those are cases where laches is clear - particularly the prejudice element.

The federal cases were the ones with standing issues. The federal courts are supposed to have a limited role in state elections. That role is primarily in protecting the right to vote, and as many judges noted this year, these post-election cases weren't about the right to vote.

They were, instead, challenges based on the premise that "my vote should count, that other person's shouldn't." Finding a lack of individual voter standing for a challenge to thousands of other voters is very much in line with existing law.

The Electors Clause cases made new standing law, but that's a relatively novel theory that's never been the basis for such aggressive litigation.

The theory Trump was advancing was that any deviation from state election law could be litigated in federal courts.

I can understand why having that as an option would be something welcomed by some on the left, but I'm conservative enough (at least when it comes to federal jurisprudence) to think that would be a bad thing.

I don't think the federal courts should be ruling de novo on whether (eg) it violates Pennsylvania law to make observers stand 10 feet from tables instead of 6 feet, or on whether it violates Georgia law to make an election clerk get a second opinion on a signature question.

Meanwhile, there was considerable pre-election litigation (on many of the same questions) where there weren't issues because the right parties brought cases in the right court at the right time.

So I'm pretty much OK with the way the courts - especially federal - handled the post-election litigation this cycle.