Twitter Thread by Akiva Cohen

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So, quick rundown of the latest #Squidigation decision: It's very thorough; 36 pages of Judge Parker explaining that Powell and her merry band of fuckups lose for every conceivable reason

> Hi, #Squidigation fans. New developments in the Michigan tentacle. Driving little man to school this morning, but we can talk about it when I get back https://t.co/m6GxK7g5T1
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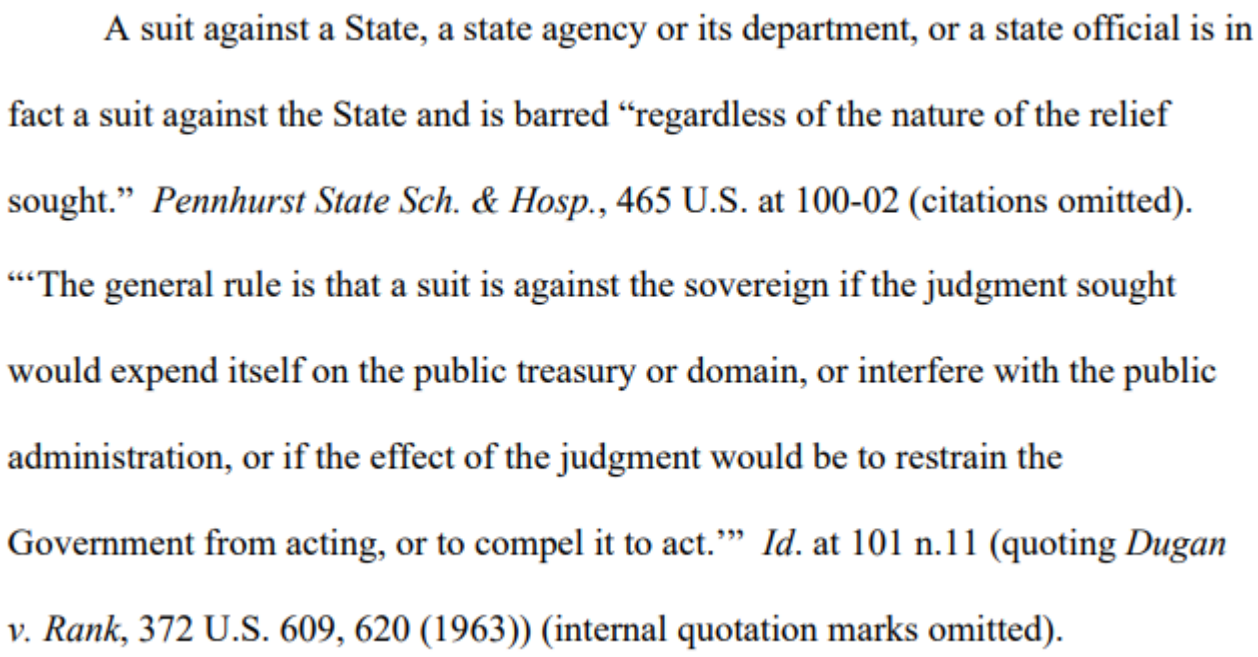
> — Akiva Cohen (@AkivaMCohen) December 7, 2020

First: 11th Amendment Immunity. Basically, states (and their officials) have sovereign immunity; you can't sue them in Federal Court except to the extent that they agree to be sued there. Quick thumbnail of the doctrine here



A suit against a State, a state agency or its department, or a state official is in fact a suit against the State and is barred "regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp.*, 465 U.S. at 100-02 (citations omitted). "'The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.'" *Id.* at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963)) (internal quotation marks omitted).

There are only 3 exceptions to this: 1) Congress says "you can sue your state for this"; 2) the state agrees to be sued; 3) Younger, a case that said "you can sue your state if you are just seeking an order saying 'stop violating my rights'"

In other words, if the state passes a law that says "no talking politics in public" you can sue for an order saying "that's unconstitutional and can't be enforced" but not for damages from having your 1A rights violated in the past

I'm sure you can see where this is going: Exceptions 1 and 2 don't apply; Congress didn't say "no sovereign immunity" when it passed 42 USC 1983 (the civil rights statute the plaintiffs sued under) and Michigan hasn't waived it. That leave Younger as the only remaining option

Shit, not Younger. Ex parte Young. (Younger is a different issue). Apologies

Anyway, Young doesn't apply, for two reasons: 1) it NEVER applies to state law claims (so the Plaintiffs' claims that Michigan violated its own election code are barred); 2) The Plaintiffs are asking for backwards looking relief ("decertify, etc") not an injunction against future

violations of their rights. So that exception isn't available, either.

Bottom line: The Plaintiffs have no ability to sue any of these defendants at all, so they lose.

Next, Judge Parker moves on to mootness: Even if they *could* sue these defendants, the court couldn't give the plaintiffs any relief, so the case is moot

B. Mootness

This case represents well the phrase: "this ship has sailed." The time has passed to provide most of the relief Plaintiffs request in their Amended Complaint; the remaining relief is beyond the power of any court. For those reasons, this matter is moot.

"'Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies.'" *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 595 (6th Cir. 2014) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). A case may become moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 410 (1980) (internal quotation marks and citation omitted). Stated differently, a case is moot where the court lacks "the ability to give meaningful relief[.]" *Sullivan v. Benningfield*, 920 F.3d 401, 410 (6th Cir. 2019). This lawsuit was moot well before it was filed on November 25.

Here's what the Plaintiffs asked for

In their prayer for relief, Plaintiffs ask the Court to: (a) order Defendants to decertify the results of the election; (b) enjoin Secretary Benson and Governor

Whitmer from transmitting the certified election results to the Electoral College; (c) order Defendants "to transmit certified election results that state that President Donald Trump is the winner of the election"; (d) impound all voting machines and software in Michigan for expert inspection; (e) order that no votes received or tabulated by machines not certified as required by federal and state law be counted; and, (f) enter a declaratory judgment that mail-in and absentee ballot fraud must be remedied with a manual recount or statistically valid sampling.[3] (ECF No. 6 at Pg ID 955-56, ¶ 233.) What relief the Court could grant Plaintiffs is no longer available.

The problem with all that? Before they bothered to sue, the results had already been certified, the certification passed to the Archivists, and the time set in Michigan law for requesting special elections (based on voting machine errors) or recounts had expired

Before this lawsuit was filed, all 83 counties in Michigan had finished canvassing their results for all elections and reported their results for state office races to the Secretary of State and the Michigan Board of State Canvassers in accordance with Michigan law. *See* Mich. Comp. Laws § 168.843. The State Board had certified the results of the 2020 General Election and Governor Whitmer had submitted the slate of Presidential Electors to the Archivists. (ECF

[3] Plaintiffs also seek an order requiring the impoundment of all voting machines and software in Michigan for expert inspection and the production of security camera footage from the TCF Center for November 3 and 4. (ECF No. 6 at Pg ID 956, ¶ 233.) This requested relief is not meaningful, however, where the remaining requests are no longer available. In other words, the evidence Plaintiffs seek to gather by inspecting voting machines and software and security camera footage only would be useful if an avenue remained open for them to challenge the election results.

No. 31-4 at Pg ID 2257-58; ECF No. 31-5 at Pg ID 2260-63.) The time for requesting a special election based on mechanical errors or malfunctions in voting machines had expired. *See* Mich. Comp. Laws §§ 168.831, 168.832 (petitions for special election based on a defect or mechanical malfunction must be filed "no later than 10 days after the date of the election"). And so had the time for requesting a recount for the office of President. *See* Mich. Comp. Laws § 168.879.

For all of you nervous folks out there - and I know there are a lot of you - pay special attention to the footnote: There is no longer any legal avenue left for challenging Michigan's election results.

It's over.

The opinion then runs through why all of this means the case is moot; not gonna take you paragraph by paragraph but it quotes both the 11th Circuit's decision in Wood ("we cannot turn back the clock and create a world in which the 2020 election results are not certified") and

Wecht's concurrence in the PA Supreme Court case: "What are you idiots smoking, there's no legal mechanism for ignoring the vote, morons"

(I paraphrase)

So, our intrepid band of adventurers sued people who cannot be sued for relief that can't be granted. (Exactly the same as if they had sued Daenerys Targaryen and asked the Court for an order directing that they be awarded a dragon egg). But even if the court could ignore that...

They managed to file their lawsuits too late

> **C. Laches**
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> Defendants argue that Plaintiffs are unlikely to succeed on the merits because they waited too long to knock on the Court's door. (ECF No. 31 at Pg ID 2175-79; ECF No. 39 at Pg ID 2844.) The Court agrees.

By now, you're all familiar with the concept of laches, right? That if you sit on your hands and let the "bad thing" play out, when you could have stopped it earlier, and the delay harms people, the Court's not going to pay attention when you suddenly wake up and say "stop em!"

And oh boy did they ever file them late. Every aspect of their claim was late, especially its core; if you are going to sue about alleged software problems you claim have been discussed for a decade, do it *before* the fucking election

First, Plaintiffs showed no diligence in asserting the claims at bar. They filed the instant action on November 25—more than 21 days after the 2020 General Election—and served it on Defendants some five days later on December 1. (ECF Nos. 1, 21.) If Plaintiffs had legitimate claims regarding whether the treatment of election challengers complied with state law, they could have brought their claims well in advance of or on Election Day—but they did not. Michigan's 83 Boards of County Canvassers finished canvassing by no later than November 17 and, on November 23, both the Michigan Board of State Canvassers and Governor Whitmer certified the election results. Mich. Comp. Laws §§ 168.822, 168.842.0. If Plaintiffs had legitimate claims regarding the manner by which

ballots were processed and tabulated on or after Election Day, they could have brought the instant action on Election Day or during the weeks of canvassing that followed—yet they did not. Plaintiffs base the claims related to election machines and software on "expert and fact witness" reports discussing "glitches" and other alleged vulnerabilities that occurred as far back as 2010. (*See e.g.*, ECF No. 6 at Pg ID 927-933, ¶¶ 157(C)-(E), (G), 158, 160, 167.) If Plaintiffs had legitimate concerns about the election machines and software, they could have filed this lawsuit well before the 2020 General Election—yet they sat back and did nothing.

And, of COURSE the delay harmed the voters and defendants; we've now had an election and blown by Michigan's statutory deadlines for election challenges. Done.

But the Court isn't done yet. Even if they hadn't sued Santa for a real live baby Yoda, and even if they hadn't waited for after Christmas to file the suit, the Court *still* wouldn't hear it.

Why? Abstention

Abstention (I'll simplify) is a doctrine that basically says "look, Federal Courts, some things are better left to state courts. Where that's true, Federal Courts should dismiss the cases instead of hearing them.

There are a number of different situations where that comes into play, and the various abstention doctrines are known by the names of the cases that made them famous. Colorado River abstention - federal courts shouldn't take up issues already being litigated in a state court case

Burford abstention - federal courts can choose not to hear challenges to state administrative agency orders

Pullman abstention - don't assess the constitutionality of ambiguous state statutes until state courts have had an opportunity to interpret those statutes

Younger abstention (which is why Younger was on my mind earlier) - you can't hear a civil rights claim where the plaintiff is actively being prosecuted for the underlying conduct

Here, Colorado River applies, because there were state court cases challenging the election results. Detroit argued the Court should also abstain under Burford and Pullman, but Judge Parker was like "look, this is the fourth separate ground they lose on, one abstention is enough"