Twitter Thread by Akiva Cohen

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OK, #Squidigation fans, I think we need to talk about the new Wisconsin suit Donald Trump filed - personally - in Federal Court last night. The suit is (as usual) meritless. But it's meritless in new and disturbing ways. This thread will be

> \U0001f6a8BREAKING: Trump files new federal court lawsuit in Wisconsin challenging the results of the election.https://t.co/LfKb2PUIkq
>
> — Marc E. Elias (@marceelias) December 3, 2020

Not, I hope, Seth Abramson long. But will see.

I apologize in advance to my wife, who would very much prefer I be billing time (today's a light day, though) and to my assistant, to whom I owe some administrative stuff this will likely keep me from ■

First, some background. Trump's suit essentially tries to Federalize the Wisconsin Supreme Court complaint his campaign filed, which we discussed here. https://t.co/a11AKAR92A

> OK, #squidigation fans. This is a new Wisconsin case not filed by the Krake[n/d] team of Powell and Wood and NOT focusing on wild conspiracy theories. It's a competent and professional filing that raises things that would be real issues ... if you don't understand why they aren't https://t.co/ETvUiWV5du
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> — Akiva Cohen (@AkivaMCohen) December 1, 2020

If you haven't already, go read that thread. I'm not going to be re-doing the same analysis, and I'm not going to be cross-linking to that discussion as we go. (Sorry, I like you guys, and I see this as public service, but there are limits)

Also, @5DollarFeminist has a good stand-alone thread analyzing the new Federal complaint - it's worth reading as well, though some of the analysis will overlap. https://t.co/W6J0Qd9MRq

> Every one of these Trump election suits is the same gobbledygook garbage barge:
>
> FRAUD!
>
> It coulda happened.

> Well, no, we can't prove it.
>
> But just to be safe, best let the gerrymandered legislature give us all the electoral votes!https://t.co/Z926668H05 pic.twitter.com/xGZsJKIO7Y
>
> — Liz Dye (@5DollarFeminist) December 3, 2020

Last bit of preliminaries - we'll also be talking about the DNC's motion to intervene in that Wisconsin Supreme Court action, which you can find here.

https://t.co/2uHpWCtHXe

OK. Let's get to it.

First of all, note the plaintiff in the new Federal suit, and compare it to the plaintiffS in the Wisconsin suit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

Donald J. Trump, Candidate for President of the United States of America,	)	
Plaintiff,	)	
vs.	)	Case No. _____
The Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Scott	)	

This is, to say the least, unusual. Working from memory, I assumed that Trump had not personally been a plaintiff in the Wisconsin suit and that he (rather than the campaign) was the Plaintiff in the federal suit to try to avoid an argument that he couldn't file 2 cases on the

same basic issue. But Trump was a plaintiff in Wisconsin, too. So that can't be it. And if so, why aren't the Campaign - and Pence - named plaintiffs here, too?

There have been reports that Pence wants out of this whole debacle. That may be particularly true for this case, which - at face value & as we'll talk about - would call into question every federal election in Wisconsin for years, including Ron Johnson's

https://t.co/8OGzc3wzWm

I'm not sure how the campaign is structured, but I would bet that there was strong pushback to this suit by Pence and that Pence basically said "you do what you want but don't put my name anywhere near this"

OK. Substance. The first clue we get as to the claims is in the "Jurisdiction" section, where you tell the Federal Court, which can only hear certain types of cases, why your case is one that it can consider.

JURISDICTION AND VENUE

23. This action arises under 42 U.S.C. § 1983 and Art. I, § 4, cl. 2, Art. II, § 1, cl. 4 and the First and Fourteenth Amendments of the United States Constitution.

Section 1983 is the civil rights act - he's alleging that the "violations" the complaint will identify infringed on Wisconites' right to vote.

Article 1, §4 is the Elections Clause: State legislatures get to set the "time, place, and manner" for Congressional elections

Article 2, § 1, Clause 4 is the Electors Clause: For *Presidential* elections, State legislatures get to set the "Manner" of choosing electors. (Congress gets to set the "Time").

The 14th Amendment will be a due process claim. Not sure how the 1st plays in - probably a right of association claim.

Next the complaint transitions to what it says is a summary of the wrongful acts in Wisconsin. "Ultra vires", btw, is latin for "beyond your authority" - essentially, that the person in question had no legal power to do what they did

BRIEF SUMMARY OF *ULTRA VIRES* ACTS BY WISCONSIN OFFICIALS THAT UNDERMINED THE PRESIDENTIAL ELECTION IN WISCONSIN

26. A striking characteristic of the November 3, 2020, election in Wisconsin is that it involved a number of *ultra vires* acts by Wisconsin public officials charged with administering the election that were inconsistent with state law and the directions of the Wisconsin Legislature as set forth in the Wisconsin Election Code.

Here's the complaint's general summary of the issues they allege:

1) Changing absentee/mail in ballot rules

2) Using drop-boxes
3) Counting ballots without poll watchers able to see
4) Messing with the certifications on mail-in ballots
5) "Permitting ballot tampering"

The complaint asks for an expedited schedule sufficient to let Trump get up to SCOTUS by 12/11. This is insane. He's asking for a schedule built to accommodate 3 levels of appeal in 10 days - after waiting A MONTH after the election to file the case

32. The Electoral College is scheduled to meet on December 14, 2020.[2]

33. The matters addressed in this Complaint must be considered expeditiously and Plaintiff is contemporaneously with the filing of this Complaint filing a separate motion requesting that this matter be set for a hearing within forty-eight (48) hours on Plaintiff's motion for expedited declaratory, preliminary and permanent injunctive relief or within such other shortened time period which the Court determines reasonable under the circumstances and which will permit all parties an opportunity for appeals at all levels of the federal judicial system to be completed by December 11, 2020.[3]

Page 9 of the complaint - paragraphs 37-41 basically set out the argument that courts cannot constrain state legislatures' exercise of its Constitutional right to set the "manner" of appointing electors.

But it goes further:

BACKGROUND

The Electors Clause of the U.S. Constitution

37. Article II of the United States Constitution requires that each State "shall appoint" its Presidential electors "in such Manner as the *Legislature thereof* may direct." U.S. CONST. art. II, § 1, cl. 4 (emphasis added).[4]

38. Thus, "in the case of a law enacted by a state legislature applicable not only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution." *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 76 (2000).

39. "[T]he state legislature's power to select the manner for appointing electors is plenary." *Bush v. Gore*, 531 U.S. 98, 104 (2000).

40. Therefore, a state supreme court cannot invoke a state constitution to circumscribe that legislative power. *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 77.

41. For the same reasons, neither can an executive branch official, such as a Governor of a State, a mayor of a municipality or an election officer in the State, a municipal clerk, or any administrative body or member of such a body, lawfully circumscribe, alter, limit, amend or fail to enforce or refuse to enforce a law enacted by the State Legislature which is, or was intended by the Legislature to be, applicable to the Presidential election in the State.

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[4] *See also* id. art. I, § 4, cl. 2 (providing that, in each State, the "Legislature thereof" shall establish "[t]he Times, Places and Manner of holding Elections for Senators and Representatives").

That last paragraph is critical to their claim: they will be arguing that *interpreting* state statutes governing presidential elections is a violation of the Elections and Electors clauses. That is very very wrong.

BTW, a side note: Donald J. Trump is not - unless I missed something that would have been very obvious - a candidate for the US House of Representatives or US Senate.

Nope, he was not

There are going to be standing issues with all his claims. But there isn't even the ghost of a shadow of the as-yet-unborn grandchild of a chance that Trump has standing to allege a violation of the *Elections* clause governing election of Senators and Representatives.

Any reference to claims under the Elections clause in this complaint is completely and utterly frivolous.

The next several pages of the Complaint (which is doubling as the President's brief in support of his motion for injunctive relief) are charitably described as A Trumpy Salute to Federalism, in support of the "Leave it to the Legislatures" argument

I'm not kidding.

The Election Clauses and Separation of Powers Provisions of the U.S. Constitution Safeguard Liberty and Fair and Free Elections

42. Whether the State of Wisconsin and its public officials respected the limits of the United States Constitution's Electors Clause is a matter of fundamental national importance not limited to the interests of Wisconsin voters or merely those individuals who voted in the 2020 Presidential Election in Wisconsin.

Next, Trump pauses to explain to the Court that yeah, the Wisconsin state legislature probably knows about all the terrible stuff he's about to complain about, but it should let him bring these claims on its behalf anyway

Whether Election Administrators Adhered to the Direction of the Wisconsin Legislature in the Conduct of the Presidential Election Presents a Justiciable Issue

64. It is, of course, imminently likely that the Wisconsin Legislature is aware of some, if not all, of the issues and concerns pertaining to administration of the 2020 Presidential election in the State of Wisconsin.

This is basically an argument that the court should find he has prudential standing to raise these claims. If you remember from old threads, "prudential standing" basically means "even if you got harmed by person A's violation of person B's rights, we're not going to let you sue"

"Because those are person *B's* rights, not yours. If person B wants to sue, fine. And you can tag along. But you, on your own, without person B? No."

Here, Trump is arguing the Court should let *him* sue for the alleged violation of the Legislature's rights, even though the Wisconsin Legislature isn't (and, as we'll see, hasn't for years)

OK, minor mental health break to keep me from saying Iä! Iä! Myopsida fhtagn! (as someone suggested I might). Back to it

Finally, at paragraph 73, the complaint starts to set out what it says the problems were. First, on photo ID - paragraphs 73-82 go into the background: Wisconsin really wants voters to give ID

81. The transparent purpose of these precisely written exceptions to Wisconsin's photo identification requirement for first time absentee voters is to confine those who need not provide photo identification when voting absentee to only military and overseas voters and those who are institutionalized or of significantly restricted mobility (i.e., "indefinitely confined" or "disabled for an indefinite period") due to one or more of four (4) limiting physical conditions: age, physical illness, infirmity or disability.

82. Wisconsin law also provides that once an absentee voter provides proof of identification with their initial absentee ballot(s), in subsequent elections in which that person votes absentee they no longer have to provide proof of identification if their name and/or address have not changed. Wis. Stat. § 6.87(4)(b)3.

And now, finally, we get to the issue they want to raise: the "indefinitely confined" issue from the Wisconsin case.

Wisconsin Public Officials Misapplied Wisconsin's "Indefinitely Confined" or Indefinite Period of Disability Exceptions, Undermining Wisconsin Election Law and Permitting Likely Tens of Thousands of Voters to Improperly Vote Absentee Without Complying with Wisconsin's Photo Identification Law

83. As explained below, in 2020 a number of public officials in Wisconsin's largest municipalities contended that the COVID-19 pandemic rendered voters "indefinitely confined because of age, physical illness or infirmity or . . . disabled for an

indefinite period"[14] and permitted tens of thousands of voters to vote absentee without a condition of age, illness or infirmity that rendered them indefinitely confined or indefinitely disabled.

I know I said I wasn't going to cross-link, but I'm realizing now that this will be hard to follow if I don't. So, if you need a refresher on what they alleged on this issue in the Wisconsin case (and why it's wrong), start here https://t.co/GDKg5SR66h

> Next category: Absentee ballots from people who self-identified as "Indefinitely Confined"
>
> This was the subject of prior litigation, Jefferson v. Dane County, when Dane County announced that voters counted as "Indefinitely Confined" under the governor's "Safe at Home" order
>
> — Akiva Cohen (@AkivaMCohen) December 1, 2020

Just realized I linked y'all to the DNC's motion to intervene, not their actual brief, in the Wisconsin case. Here's that brief, which we're about to quote.

https://t.co/x7E1trrHrS

The DNC's brief points out what my thread did: that the Wisconsin Election Commission issued - and the Wisconsin Supreme Court expressly approved - guidance on the meaning of "indefinitely confined" that torpedos Trump's case

- **Indefinitely Confined Voters.** In late March of this year, the WEC issued and this Court approved guidance on this issue, stating: "Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period." App. 56; *Jefferson v. Dane Cty.*, No 2020AP557-OA (Mar. 31, 2020). President Trump's demand that

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28,395 voters in Dane and Milwaukee Counties who self-designated as indefinitely confined be disenfranchised, based simply on a sampling of seven (7) non-authenticated Facebook posts, is as baseless as it is outrageous.

What is Trump to do? Obviously, he's about to lose in the Wisconsin Supreme Court, which already decided that issue. So he runs to Federal Court, and argues that the WEC and Wisconsin Supreme Court violated the constitution by putting out (and approving) this guidance

84. For instance, on March 29, 2020, the Wisconsin Elections Commission issued written guidance distributed to all election officials in the State and posted on the Commission website that "[d]uring the current public health crisis, *many voters* of a certain age or in at-risk populations *may meet that standard of indefinitely confined until the crisis abates*."[15]

85. This guidance contradicts Wis. Stat. § 6.86(2)(a) which requires an actual and verifiable physical or temporal condition being presently experienced by the voter (*i.e.*, age, physical illness or infirmity or disability) to justify an application for an absentee ballot based on indefinite confinement or indefinite disability and not a inchoate fear or apprehension experienced by the voter.

86. Contrary to the express terms of the Wisconsin Election Code, the Commission's guidance sought to alter the Election Code and plainly conveyed to election officials and the public that the COVID-19 pandemic *alone* could satisfy the requirement for the voter to request an absentee ballot.

Here's their argument that the guidance doesn't comply with the Election Code

88. The motives of the Commission in issuing this erroneous guidance are not at issue here, what matters is that the Commission lacked the authority to issue a guidance which *de facto* changed Wisconsin election law and circumvented the Legislature's absentee ballot and photo identification requirements for tens of thousands of voters. *See, e.g., Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020) ("However well-intentioned and appropriate from a policy perspective in the context of a pandemic during a presidential election, it is not the province of a state executive official to re-write the state's election code, at least as it pertains to selection of presidential electors.").

89. The Commission's March 29, 2020, guidance was inaccurate and misleading in other particulars. For instance, it conveyed: "Statutes do not establish the option to require proof or documentation from indefinitely confined voters. *Clerks* may tactfully verify with voters that the voter understood the indefinitely confined status designation when they submitted their request but they *may not request or require proof*."[16] This instruction doubly undermined the Election Code. First, it emphasized to voters that no election official would ever check or challenge their assertion of "indefinitely confined" status, thereby, affirming in writing there would be no ramifications for non-compliance with the law. Second, the instruction tied the hands of election officials throughout the State who were told they could not even "request" a voter confirm the basis for a claim the voter was entitled to receive an absentee ballot. Throughout the Election Code it is clear that the Wisconsin Legislature intends election

There are SEVERAL basic, fundamental problems with all of this.

First, Trump is *asking the Court to interpret the Wisconsin Election Code* in order to reach a conclusion that *nobody* can interpret the Wisconsin Election Code without violating the Constitution



Second, even if you get around that Mobius Strip of an argument, Trump is asking a Federal court to tell a State Supreme Court that the State Supreme Court is *wrong* in its interpretation of a STATE statute.

This ... is not a thing Federal courts can do.

No, I mean it's really really not. Not even SCOTUS.

Remember all that Federalism stuff Donny was waxing poetic about a few pages ago? This is part of it. State Supreme Courts are the ultimate arbiters of what State law *means*, in the same way that federal courts decide what federal law means

The Elections/Electors clause cases about things being exclusively committed to legislatures may mean that state constitutions can't constrain legislatures' choice of the "manner" of choosing electors (for example, if the state constitution said "every citizen can vote for prez"

And the state legislature decided to pass a law saying "the Legislature will directly appoint Presidential electors," the Supreme Court might find that law could not be defeated by the provision of the state constitution requiring a vote)

But what Trump is challenging here is NOT the State Supreme Court, or an executive branch official, saying "I know the Legislature wanted X, but we think NotX is better, let's do NotX"

This is the state supreme court exercising its core function of saying what the law passed by the Legislature *means*

Federal courts are prohibited from second-guessing that

Oh, and it gets better.

Because the Wisconsin Elections Commission? That's not an agency of Wisconsin's executive branch.

It was established *by statute* specifically to manage and administer *and interpret* Wisconsin elections and election law

5.05 Elections commission; powers and duties.

(1) GENERAL AUTHORITY. The elections commission shall have the responsibility for the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing. Pursuant to such responsibility, the commission may:

So the WEC and its guidance, and interpretation of the Wisconsin Election Law, is *expressly* part of the "manner" in which the Wisconsin Legislature determined that Wisconsin would select presidential electors

And btw? Even if federal courts could look at this issue at all (again, they can't), the Legislature delegated interpretation and implementation of the Election Code to the Election Commission. That has implications under the Chevron Doctrine

Chevron was a 1984 Supreme Court case that basically found that where an agency is charged with enforcing a statute, courts MUST defer to the agency's reasonable interpretation of that statute.

Even if it thinks a different interpretation would be reasonable or better, the court must go by the agency's interpretation unless that interpretation is, to use a technical term, absolutely crazypants