



A Brief Guide to Brnovich v. Democratic National Committee

Background:

- In 2016, a group of Arizona voters and the Democratic party filed suit to challenge two Arizona policies as discriminatory under Section 2 of the Voting Rights Act (VRA). Earlier that year, the Arizona legislature limited who could provide ballot-collection assistance to mail voters. Arizona also had a policy of entirely disregarding ballots cast in the wrong precinct — including votes for president or statewide office.
- Section 2 of the VRA prohibits voting restrictions that result in a denial of the right of any citizen of the United States to vote on account of race. The Ninth Circuit used a two-part test to evaluate whether the challenged voting restrictions violated Section 2:
 - 1) First, the court determined if the challenged standard, practice, or procedure results in a **disparate burden** on members of the protected class.
 - 2) Second, if there is a disparate burden, the court determined if under the **totality of the circumstances**, there is a relationship between the disparate burden, on one hand, and “social and historical conditions,” such as a history of official discrimination in the state, on the other.

Restrictions at issue in Brnovich are:

- **Out-of-precinct (OOP) policy:** Arizona’s policy of rejecting the *entire* ballot of a voter who voted out of precinct even if the voter was legally permitted to vote for some of the candidates or propositions included on the ballot; and
- **Ballot collection:** A state statute that criminalized ballot collection, including absentee ballots, by any person other than an election official, those who are permitted to transmit U.S. mail, or a family member, household member, or caregiver of the voter.

9th Circuit Findings:

- The 9th Circuit, *en banc*, found that both restrictions violated Section 2. Critical to the Court’s ruling were, among other factual findings, that:
 - A substantial number of minority voters are disparately affected by the OOP policy given the “unusually frequent” changes in polling places by state election

officials and disproportionately higher rates of residential mobility among minority voters.

- That minority voters, especially Native American voters, are generally more likely to rely on third party ballot collection because of factors like lack of transportation and lack of outgoing mail services in their apartment buildings.
 - That the state of Arizona had a long history of race-based discrimination in voting, including the use of literacy tests to disenfranchise minority populations.
- The Ninth Circuit also specifically rejected the notion that public distrust of third-party ballot collection caused by false statements could justify the restrictions:

“It would be perverse if those proponents, who used false statements and race-based innuendo to create distrust, could now use that very distrust to further their aims in this litigation.”

What’s At Stake:

- This case provides an opportunity for the Supreme Court to not only bless the challenged restrictions but also to undercut or significantly narrow Section 2 of the VRA. Undermining Section 2 would be another blow to voting rights given the Court’s 2013 decision in *Shelby County* that essentially nullified Section 5 of the VRA, which required states with a history of Jim Crow laws and poor minority voter participation to “preclear” new voting restrictions through the federal Department of Justice.

Timing:

- We expect the opinion to be announced on July 1, 2021. The Court generally waits until the very end of the term to release blockbuster decisions.

Examples of Amicus Briefs filed by State and Local Leaders:

- State and local elections administrators including Maine Secretary of State Shenna Bellows, Michigan Secretary of State Jocelyn Benson, and Minnesota Secretary of State Steve Simon [filed a brief](#) in support of the plaintiffs.
- District of Columbia Karl Racine led 18 Attorneys General in support of plaintiffs in filing a [brief](#) in support of the plaintiffs.
- Secretary of States from Kentucky, Louisiana, and Missouri [filed a brief](#) in support of defendants.
- The Wisconsin state assembly speaker and the state senate leader [filed a brief](#) in support of the defendants.

Scenarios:

The possible scenarios fall into four broad categories:

- 1) Plaintiffs win all claims, and the Court upholds remaining protections in section 2 of the VRA
- 2) Plaintiffs lose all claims, but the Court limits to facts of the case. Does not further restrict section 2 of VRA
- 3) Plaintiffs lose all claims, and the Court narrows application of section 2, but leaves opportunity open to bring future claim

- 4) Plaintiffs lose all claims, and the Court makes it nearly impossible to bring a case under section 2 of VRA.

Additional Context

- This case is taking place against the backdrop of significant efforts to erect barriers to the ballot box and interfere with election administration in states across the country. As of the end of May, 48 states have introduced more than 389 bills to restrict the freedom to vote.
- The Voting Rights Act has been the core defense against racially discriminatory voting policies and efforts to suppress the vote.
- A strong Voting Rights Act supports a strong democracy. Section 2 of the Voting Rights Act works to protect the freedom to vote for people of color. There's no place for racism in our elections, and our leaders at every level of government must be committed to that.
- Voting should be safe and accessible. Voting helps ensure confidence and transparency in the election system. We must strengthen state and federal laws that protect access to the ballot.