Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Supreme Court Considers Standard for Voting Rights Act Claims

March 18, 2021

In a potentially significant case, the Supreme Court is considering the proper standard for evaluating claims of discriminatory voting laws under Section 2 of the Voting Rights Act of 1965 (VRA). On March 2, 2021, the Court heard oral argument in *Brnovich v. Democratic National Committee* (which has been consolidated with a related case, *Arizona Republican Party v. Democratic National Committee*.) In *Brnovich*, the Court is evaluating whether Arizona voting procedures that prohibit counting out-of-precinct provisional ballots and restrict who can collect another person's completed ballot violate Section 2, and whether the ballot collection restriction violates the 15th Amendment. More broadly, the standard adopted by the Court in this case for Section 2 claims will likely determine to what degree new state voting laws enacted throughout the country are permissible under the VRA.

This Legal Sidebar begins with an overview of Section 2 of the VRA, the procedural history, and the appellate court ruling in this dispute. Next, it summarizes the arguments being considered by the Supreme Court, including some highlights from oral argument, and concludes by noting possible outcomes and implications of a ruling for Congress.

Section 2 of the VRA

Section 2 of the VRA provides a right of action for private citizens or the federal government to challenge state discriminatory voting practices or procedures, including those alleged to diminish or weaken minority voting power. Under Section 2, challengers can prove violations under an "intent test" or under a "results test." Coextensive with the Fifteenth Amendment, the "intent test" requires a challenger to prove that a voting procedure was enacted with an intent to discriminate. Specifically, the challengers must prove, under the test established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, that the voting procedure was enacted to harm minority voting strength. As a consequence of the 1982 amendments to the VRA, Section 2 also provides for a "results test." Specifically, Section 2 prohibits any voting qualification or practice applied or imposed by any state or political subdivision that results in the "denial or abridgement" of the right to vote based on race, color, or membership in a language minority. The statute further provides that a violation is established if, "based on the totality of circumstances," electoral processes "are not equally open to participation by members of" a racial or

Congressional Research Service
https://crsreports.congress.gov
LSB10583

language minority group "in that its members have less opportunity than other members of the electorate to elect representatives of their choice."

In the landmark decision *Thornburg v. Gingles*, the Supreme Court held that a violation of Section 2 is established if, based on the "totality of the circumstances" and "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." To facilitate determination of the totality of the circumstances, the Court listed the following factors, which originated in the legislative history accompanying the enactment of Section 2:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivisions is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Historically, Section 2 has been invoked primarily to challenge redistricting maps, also known as "vote dilution" cases. That is, in certain circumstances, the Supreme Court has interpreted Section 2 to require the creation of one or more "majority-minority" districts, in which a racial or language minority group comprises a voting majority. In those cases, the creation of such districts can avoid minority vote dilution by helping ensure that the racial or language minority group is not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of choice.

More recently, plaintiffs have invoked Section 2 to challenge other types of state voting and election administration laws, which are often called "vote denial" cases. A 2013 Supreme Court ruling, *Shelby County v. Holder*, has likely contributed to the expanded reliance by plaintiffs on Section 2. In *Shelby County*, the Court invalidated the coverage formula in Section 4(b) of the VRA. Therefore, certain states and jurisdictions that were "covered" under Section 4(b) are no longer required under Section 5 to obtain prior approval or "preclearance" of proposed changes to their voting laws from either the Department of Justice (DOJ) or the U.S. District Court for the District of Columbia. Since *Shelby County*, plaintiffs have increasingly turned to Section 2 to challenge state voting laws. However, as a result of this relatively new application of Section 2 to vote denial claims, the attendant case law has not yet had the benefit of evaluation by the Supreme Court.

Procedural History and Appellate Court Ruling

In 2016, the Democratic National Committee (DNC), the Democratic Senatorial Campaign Committee (DSCC), and the Arizona Democratic Party (ADP) brought suit in federal district court seeking to enjoin (1) an Arizona policy whereby ballots cast out-of-precinct are discarded, instead of being fully or partially counted, known as the out-of-precinct (OOP) policy; and (2) an Arizona statute that criminalizes the collection of another person's early ballot, with some exceptions such as collection by a family member,

which is known as H.B. 2023. Among other things, the challengers argued that the Arizona voting procedures (OOP and H.B. 2023) violate Section 2 of the VRA "by adversely and disparately impacting the electoral opportunities of Hispanic, African American, and Native American" citizens, and that H.B. 2023 violates Section 2 and the Fifteenth Amendment because the Arizona legislature enacted the law "with the intent to suppress voting by Hispanic and Native American voters." In sum, the district court held that the challengers did not prove that the Arizona voting procedures violate the VRA or the Constitution. The challengers appealed to the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit).

In *DNC v. Hobbs*, in January 2020, the Ninth Circuit, sitting *en banc*, reversed the federal district court and a three-judge Ninth Circuit panel, and enjoined both Arizona voting procedures in violation of Section 2 of the VRA. First, the Ninth Circuit held that Arizona's OOP policy and the ballot collection prohibition in H.B. 2023 violate the results test in Section 2 of the VRA. According to the court, the challengers demonstrated that the restrictions impose a disparate burden on Native American, Hispanic, and African American voters in violation of Section 2's prohibition on the "denial or abridgement of the right" of citizens to vote "on account of race or color." Further, in evaluating the "totality of the circumstances" under *Thornburg v. Gingles*, the court determined that the challengers proved that the discriminatory burden imposed by the restrictions is partially "caused by or linked to 'social and historical conditions' that have or currently produce 'an inequality in the opportunities enjoyed by the [minority] and white voters to elect their preferred representatives' and to participate in the political process."

In addition, the court held that the Arizona ballot collection restriction in H.B. 2023 violates the "intent test" in Section 2 of the VRA, and therefore, the Fifteenth Amendment. As a threshold matter, the court observed that although Supreme Court precedent places the burden on challengers to establish proof of a legislature's discriminatory intent or purpose, it does not require proof that the discriminatory intent or purpose was the "'sole[]' or even a 'primary' motive for the legislation," but only that it was "*a* motivating factor." Applying that standard, the court first determined that the "totality of the circumstances" led it to conclude that "racial discrimination was a motivating factor in enacting H.B. 2023," and identified the following factors in support:

> Arizona's long history of race-based voting discrimination; the Arizona legislature's unsuccessful efforts to enact less restrictive versions of the same law when preclearance was a threat; the false, race-based claims of ballot collection fraud used to convince Arizona legislators to pass H.B. 2023; the substantial increase in American Indian and Hispanic voting attributable to ballot collection that was targeted by H.B. 2023; and the degree of racially polarized voting in Arizona.

Further, the Ninth Circuit concluded that the State of Arizona failed to meet its burden of demonstrating that absent the motivating factor of racial discrimination, H.B. 2023 would have been enacted. Quoting the district court in this case, the Ninth Circuit acknowledged that "[t]he legislature was motivated by a misinformed belief that ballot collection fraud was occurring, but a sincere belief that mail-in ballots lacked adequate prophylactic safeguards as compared to in-person voting." Accepting the district court's finding, however, the Ninth Circuit observed that the legislature's "misinformed belief" stemmed from "unfounded and often farfetched allegations of ballot collection fraud" made by a former legislator and a "racially-tinged" video created by a county party official. Therefore, the Ninth Circuit concluded that, persuaded by "false and race-based" assertions of election fraud, "well meaning legislators were unknowingly used as 'cat's paws,'" to further the discriminatory intent of specific legislators and their allies.

The Arizona Attorney General and the Arizona Republican Party (ARP) appealed the ruling to the U.S. Supreme Court. Pending the appeal, the Ninth Circuit stayed its ruling. Therefore, the challenged Arizona voting procedures were in effect during the November 2020 congressional and presidential elections.

Arguments Before the Supreme Court

On appeal to the Supreme Court, Arizona Attorney General Mark Brnovich (AG Brnovich) argues that the Section 2 results test standard that the Ninth Circuit adopted is too "relaxed." Most significantly, he criticizes the standard for departing from the textual requirements of Section 2 by failing to require proof that a voting procedure "*caused* a significant disparate impact" on opportunities for a racial or language minority group to participate in the political process and elect candidates of choice. Instead, AG Brnovich states that the Ninth Circuit invalidated the Arizona voting procedures after determining that they merely affected "more than a de minimis number of minority voters." For vote denial claims under Section 2, AG Brnovich recommends that challengers be required to prove first, that a voting procedure has created "a substantial disparity in minority voters' opportunity to vote and to elect their preferred candidates," and second, that the voting procedure "caused" the disparity. By not applying this narrowed standard, AG Brnovich cautions that Section 2 may invite "serious constitutional concerns."

Likewise, on appeal, the ARP criticizes the standard adopted by the Ninth Circuit, but would go further than AG Brnovich's recommendation and would limit the scope of Section 2's applicability. According to the ARP, "[r]ace-neutral time, place, or manner regulations that are *equally applied* and impose only the *ordinary burdens of voting* do not implicate § 2—period." The ARP also argues that so long as all citizens are treated the same, such voting procedures neither deny nor abridge the right to vote and therefore, do not afford minority voters "less opportunity" to participate in the electoral process.

In response, the DNC argues that the standard adopted by the Ninth Circuit (and a majority of federal appellate courts) adheres to the text and purpose of Section 2. That is, the DNC asserts that the proper standard requires challengers to prove first, that a voting procedure has a disparate impact on minority voters. But unlike the standard supported by AG Brnovich, the DNC maintains that it does not require proof of a "substantial" disparate impact or that a minimum percentage of minority voters be affected. Next, if a challenger meets the first part of the standard, according to the DNC, an evaluating court should apply the totality of the circumstances test contained within Section 2, including consideration of the factors listed by the Court in *Thornburg v. Gingles*, to ascertain whether a voting procedure "interacts with social and historical conditions" to produce less opportunity for minorities to elect representatives of choice. While conceding that Section 2 requires proof of causation, the DNC argues that the "proximate cause" standard recommended by AG Brnovich is overly narrow. Furthermore, the DNC contends that the Equal Protection Clause of the Fourteenth Amendment to the Constitution does not require the Court to narrow the Section 2 standard employed by the Ninth Circuit because the standard does not require state voting procedures to "become overwhelmingly race conscious." In response to the ARP's argument that Section 2 does not apply to race-neutral time, place, and manner laws that are applied equally and impose only "ordinary" burdens, the DNC asserts that the text of Section 2 applies to *all* voting procedures, without exception, and that such an interpretation would effectively nullify the law.

Also in response, while arguing that the Ninth Circuit applied the proper standard, Arizona Secretary of State Hobbs (Secretary Hobbs) further asserts that AG Brnovich and the ARP lack standing to appeal the Ninth Circuit ruling regarding the OOP policy. According to Secretary Hobbs, Arizona law confers standing only to the Secretary of State to defend an elections policy—as opposed to a legislatively enacted statute—and the AG is not permitted to do so without her permission. Further, she maintains that the ARP lacks standing because they lack any particular stake in the outcome of this litigation.

In an amicus brief filed in December 2020 on behalf of the United States, the DOJ advocated for a narrower standard than the Ninth Circuit applied in this case. DOJ argued that a successful challenge under the results test of Section 2 must show that a protected group has "less ability to vote than other voters in light of the burdens imposed by the challenged" voting procedure; that the challenged procedure is "responsible for that lesser ability," instead of other factors; and that courts should take into consideration the "totality of the circumstances, including the justifications for the practice." However, shortly before oral argument and following a change in the administration, the DOJ wrote to the Court stating that, after reexamining the issues, it no longer agrees with the standard earlier recommended. On the other hand, regarding the two specific Arizona voting procedures, the DOJ stated that it "does not disagree" with the conclusion it reached in December that neither procedure violates the results test of Section 2.

During the nearly two-hour oral argument, several Justices explored concerns with the standards for Section 2 vote denial claims proffered by the parties. For example, in questioning counsel for the ARP, Justice Kavanaugh observed that if the Supreme Court adopts the position that "ordinary" race-neutral time, place, and manner voting restrictions do not violate Section 2, it will be incumbent upon courts to distinguish between "ordinary" and "extraordinary" voting procedures. Also challenging counsel for the ARP, Justice Kagan inquired as to whether, under the standard they recommend, a series of hypothetical voting laws would be subject to a Section 2 claim. In response, ARP counsel agreed that implementing a voting procedure that resulted in longer lines at polls located in minority counties and establishing polls at country clubs where minority voters would have to drive 10 times as long to vote—"places which … are traditionally hostile to them"—would deny equal opportunities to minority voters. However, ARP counsel disagreed that eliminating Sunday voting during a two-week period of early voting, even though minority voters are 10 times more likely to vote on a Sunday, according to Justice Kagan's hypothetical, would deny equal opportunities to minority voters. Shortly thereafter, Justice Barrett characterized the position of the ARP as having "some contradictions." Similarly, the Justices also questioned AG Brnovich regarding the Section 2 standard that he recommended. For example, Chief Justice Roberts pressed AG Brnovich to identify where in the text of Section 2 there is a requirement that a disparate impact needs to rise to the level of "substantial."

While conveying apprehension with aspects of the standards recommended by the ARP and AG Brnovich, Justices also expressed support for the two Arizona voting procedures, suggesting that Section 2 does not preclude states from preserving election integrity. For example, several Justices referenced the 2005 Commission on Federal Election Reform Report, also known as the "Carter-Baker Commission Report," (Report) recommending restrictions on ballot collection by third parties to avoid voter fraud. Chief Justice Roberts noted that the Report determined that absentee ballots are the largest source of voter fraud and therefore, ballot collection by candidates or party volunteers should be prohibited. Further, Justice Kavanaugh remarked that when analyzing the totality of the circumstances under Section 2, the Report's recommendations would serve to justify restrictions on ballot collection, "as a matter of common sense." Similarly, with regard to the OOP policy, Justice Kavanaugh observed that it is commonly employed in other states, thereby bolstering its justification. In this vein, the Justices also questioned the breadth of the standard that was applied by the Ninth Circuit in this case. For instance, in one exchange with counsel for the DNC, Justice Alito cautioned that if the Court adopts the standard of the Ninth Circuit in this case, "every voting rule [will be] vulnerable to attack under Section 2."

In addition to questioning the standard applied by the Ninth Circuit, and those proffered by the ARP and AG Brnovich, the Justices inquired as to the appropriateness of other tests for adjudicating Section 2 vote denials claims. Specifically, Justice Breyer asked counsel about a standard recommended by Professor Nicholas Stephanopoulos that would incorporate the "disparate-impact framework" that has historically been used under, among other laws, Title VII of the Civil Rights Act and the Fair Housing Act. That standard, Justice Breyer observed, would require the challenger to show that a procedure "is at least a but-for cause" of a "significant disparity," and would then provide the defendant with an opportunity to

demonstrate that there is a "non-race-related reason" for the procedure that "can't be accomplished easily in other ways." While counsel for the ARP and AG Brnovich seemed less receptive to that standard, counsel for the DNC opined that it was close to the requirements of the statute, its legislative history, and Court precedent.

Possible Outcomes and Implications for Congress

Although litigation invoking Section 2 of the VRA in the context of vote denial claims has increased over the past several years, for the first time in *Brnovich,* the Supreme Court is evaluating the proper standard for adjudicating such claims. Beyond determining whether two Arizona voting procedures comport with Section 2, the standard adopted by the Court will likely have significant consequences for Section 2 claims in the future. Accordingly, the ruling will likely affect how states across the nation conduct their elections.

The Court could rule in a variety of ways. For instance, the Court could adopt a narrower standard than was applied by the Ninth Circuit, construing Section 2 to require challengers to prove a "substantial disparity" in the voting opportunities for minority voters and to meet a heightened causation standard. Going further, the Court could determine that equally applied, race-neutral time, place, or manner regulations, imposing only "ordinary" burdens on voting, fall outside the reach of Section 2. Such a ruling would thereby likely foreclose most vote denial claims under Section 2. In the alternative, the Court may adopt the standard applied by the Ninth Circuit in this case, but could conclude differently as to whether the two Arizona voting procedures meet that standard. As a procedural matter, with regard to Arizona's OOP policy, the Court could agree with Secretary Hobbs that AG Brnovich and the ARP lack standing to defend the voting procedure.

Depending on the contours of the Supreme Court's ruling in *Brnovich,* it may prompt Congress to consider legislation that would amend the VRA. That is, Congress might choose to amend Section 2 to adjust, endorse, or reject the standard adopted by the Court. By way of historical example, following the Court's 1980 decision in *City of Mobile v. Bolden*, as mentioned above, Congress amended Section 2 in 1982 to overturn the effects of that ruling.

A decision in this case is expected by the end of June 2021.

Author Information

L. Paige Whitaker
Legislative Attorney

Disclaimer