Legal Sidebar

Voting Rights Act: Supreme Court Provides "Guideposts" for Determining Violations of Section 2 in *Brnovich v. DNC*

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For the first time, the Supreme Court has issued a decision interpreting Section 2 of the Voting Rights Act (VRA) in the context of state voting rules. On July 1, 2021, the Court in *Brnovich v. Democratic National Committee (DNC)* held that two Arizona voting rules—restrictions on out-of-precinct voting and third-party ballot collection—do not violate Section 2. In interpreting the statutory language, the Court determined that Section 2 requires that voting be "'equally open' to minority and non-minority groups alike" and that courts should apply a broad totality of the circumstances test to determine whether state voting rules violate Section 2. While not establishing a standard to govern all Section 2 challenges, the Court identified "certain guideposts," including five specific circumstances for courts to consider. Looking ahead, the Court's ruling will guide lower courts in determining if recently enacted state election and voting rules comply with the VRA. This Legal Sidebar provides an overview of the VRA and lower court rulings in this case, followed by a discussion of the Court's ruling in *Brnovich* and considerations 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. 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 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 the totality of the circumstances test includes several factors that originated in the legislative history accompanying enactment of Section 2.

Historically, Section 2 has been invoked primarily to challenge redistricting maps, also known as "vote dilution" cases. In certain circumstances, the Supreme Court has interpreted Section 2 to require the creation of one or more "majority-minority" districts, which can ensure that a racial or language minority group is not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of their choice. More recently, plaintiffs have invoked Section 2 to challenge other types of state voting and election administration laws, also known as "vote denial" cases. The 2013 Supreme Court ruling in *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, thereby rendering the preclearance requirements in Section 5 inoperable. Since then, plaintiffs have increasingly turned to Section 2 to challenge state voting laws. As a result of this relatively new application of Section 2 to vote denial claims, *Brnovich* is the first time that the Supreme Court has addressed this issue.

Lower Court Rulings in *Brnovich*

As discussed further in an earlier CRS Legal Sidebar, in 2016, the DNC, the Democratic Senatorial Campaign Committee, and the Arizona Democratic Party brought suit in federal district court seeking to enjoin (1) an Arizona policy whereby ballots that a voter casts outside their designated precinct are discarded instead of being fully or partially counted, otherwise 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, also known as H.B. 2023. Among other things, the challengers argued that the Arizona voting rules (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." The district court held that the challengers did not prove that the Arizona voting rules violate the VRA or the Constitution, and a Ninth Circuit three-judge panel agreed. The Ninth Circuit, sitting *en banc*, reversed and enjoined both Arizona voting rules as violations of Section 2.

Supreme Court Decision in *Brnovich*

In a 6-3 decision written by Justice Alito, the Supreme Court in *Brnovich v. DNC* reversed the Ninth Circuit and held that the two Arizona voting rules do not violate Section 2 of the VRA. The Court began its analysis by focusing on the text of the statute, which is codified at 52 U.S.C. §10301:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
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> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

After observing that most of the Court's Section 2 case law relies on *Gingles*—a redistricting case involving vote dilution—the Court explained that *Brnovich* marks the first time that the Court has considered how Section 2 applies to "generally applicable time, place or manner voting rules." Therefore, the Court reasoned that "a fresh look" at the statute was needed.

While the operative phrase in Section 2(a) prohibits state voting rules operating "in a manner which results in a denial or abridgement of the right…to vote on account of race or color," the Court explained that Section 2(b) sets forth what must be proved to establish a violation. Under Section 2(b), the Court determined that a violation exists where "'the political processes leading to nomination or election' are not '*equally open* to participation' by members of the relevant protected group '*in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice.'" According to the Court, the inclusion of the phrase "in that" in Section 2(b) means that the standards of "equal openness and equal opportunity are not separate requirements," and that "equal opportunity helps to explain the meaning of equal openness." The Court further explained that the term "opportunity" means "a combination of circumstances, time, and place suitable or favorable for a particular activity or action." The Court determined that, in "putting [all of] these terms together . . . the core of §2(b) is the requirement that voting be 'equally open'" and that "[t]he statute's reference to equal 'opportunity' may stretch that concept to some degree to include consideration of a person's ability to *use* the means that are equally open. But equal openness remains the touchstone."

The Court also interpreted Section 2(b)'s command that courts evaluate "the totality of the circumstances" in ascertaining a violation. While cautioning that the list is not exhaustive, the Court outlined five circumstances for courts to consider:

1. The "size of the burden" placed by the challenged voting rule is "highly relevant" and needs to indicate an "absence of obstacles and burdens that block or seriously hinder voting." "Mere inconvenience" is insufficient to prove a violation, and "the 'usual burdens of voting'" that accompany an equally open process must be permitted.
2. The "degree to which a voting rule departs" from voting practices that were in effect in 1982—when Section 2 was last amended—should be considered because it is "doubt[ful]" that Congress meant to displace "facially neutral time, place, and manner regulations" with "a long pedigree" or "in widespread use."
3. The "size of any disparities" in a voting rule's effect on "members of different racial or ethnic groups" should be taken into account because small disparities have less probability than large disparities to signify that an election system is not "equally open." To the degree that minorities and non-minorities differ regarding "employment, wealth, and education," even neutral laws may render "some predictable disparities," although "the mere fact there is some disparity in impact does not necessarily" constitute a violation.
4. The opportunities afforded by "a State's entire system of voting" should be considered when evaluating the burden imposed by a challenged voting rule. Where a state offers several methods of voting, the burden on voters who opt for one method "cannot be evaluated without also taking into account the other available means."
5. The "strength of the state interests" served by the challenged voting rule is to be considered because voting rules that are justified by robust state interests "are less likely" to contravene Section 2. The prevention of electoral fraud is a "strong and entirely legitimate state interest" because fraud can affect the results of close elections; fraudulent votes can dilute the value of legal votes; and election fraud can compromise public confidence in elections. In addition, ensuring that votes are cast "without intimidation or undue influence" constitutes "a valid and important state interest."

The Court applied these circumstances to the two Arizona voting rules. With regard to the OOP policy, the Court held that in light of the "modest burdens allegedly imposed" by the restriction, the "small size" of its disparate impact, and the justifications proffered by the State of Arizona, the policy does not violate Section 2. Requiring voters to identify and travel to their correct polling places to vote "does not exceed the 'usual burdens of voting,'" the Court found. The Court also announced that Section 2 does not mandate that states demonstrate that their chosen voting rules are essential or that less restrictive rules would not sufficiently serve their governmental interests. With regard to the ballot collection restrictions, the Court held that in view of "the modest evidence" of a racially disparate burden, taken into consideration with the state's justifications, the restrictions likewise do not violate Section 2. According to the Court, the challengers failed to provide "concrete," "statistical evidence" demonstrating that the law affected minority voters in a disparate manner. Furthermore, in evaluating the state's justifications for the restrictions, the Court remarked that "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." Section 2 "surely does not demand that 'a State's political system sustain some level of damage before the legislature [can] take corrective action,'" the Court announced.

In addition, the Court held that the restrictions on ballot collection were not enacted with a discriminatory intent. Observing that the district court properly applied *Village of Arlington Heights v. Metropolitan Housing Development Corp*., the Court explained that it had considered the events leading to the enactment of the law; searched for any divergence from "the normal legislative process"; examined relevant legislative history; and assessed the impact of the restrictions on various racial groups. Although the Court acknowledged that the record reflected that some opponents of the law had alleged that the proponents had "racially discriminatory motives," the Court underscored that this "view was not uniform." The Court further reasoned that while a "racially-tinged" video prompted the legislature's debate about ballot collection restrictions, the district court did not find evidence supporting the conclusion "that the legislature as a whole was imbued with racial motives." While the impetus for the legislative debate may have been provided by one legislator's "enflamed partisanship," the Court emphasized that "partisan motives are not the same as racial motives."

The Court also expressly rejected the adoption of certain tests for establishing a Section 2 violation, observing that the parties, amici, and lower courts had proposed at least 10 different standards. For example, referencing how the *Gingles* factors were designed to be used in vote dilution cases, the Court said that their relevance "is much less direct" in cases regarding "neutral time, place, and manner rules," but cautioned that they should not be disregarded. The Court also refused to adopt the disparate impact test that is used under Title VII of the Civil Rights Act and the Fair Housing Act, as was proposed in an amicus brief. Under that test, the Court criticized the "tight fit" that would be required by imposing a "necessity requirement," thereby forcing states to show that their governmental interests can only be effected by the challenged voting rules. Further, the Court disapproved of the "transfer" of state regulation of elections to the federal courts that would result from adopting that test. In response to the disparate impact test proffered by the dissent, the Court characterized it as "radical," focused "almost entirely" on one circumstance instead of considering the totality of the circumstances, as required by the statute. In the view of the Court, such a "freewheeling" test would restrict any voting rule with "'discriminatory effects,' loosely defined." Further, imposing such a test would require states to prove that a challenged voting rule is the only way that a governmental interest can be achieved, an interpretation of Section 2 that has "no footing" in the statutory text or Court precedent, the Court determined. The Court also warned that adoption of the dissent's test would potentially "invalidate just about any voting rule a State adopts."

Justice Gorsuch wrote a concurrence, joined by Justice Thomas, and Justice Kagan wrote a dissent, joined by Justices Breyer and Sotomayor. While joining the ruling in full, the concurrence posited that the Court's case law has assumed, but not decided, that Section 2 provides "an implied cause of action," and underscored that the Court did not address this issue in *Brnovich*. The dissent argued that despite the "broad," "expansive" text of the statute, the *Brnovich* Court has "lessen[ed]" Section 2, cutting it down to

the Court's "preferred size." Characterizing the Court's ruling as establishing "a set of extra-textual exceptions and considerations to sap the Act's strength," the dissent pointed out that Congress, instead of the Court, "gets to make that call."

Considerations for Congress

The Court's ruling in *Brnovich* will likely have consequences for state election and voting rules across the nation. Lower courts will likely apply the circumstances articulated by the Court in adjudicating challenges to such rules under Section 2 of the VRA, but it remains to be seen precisely how the Supreme Court's ruling in *Brnovich* will play out in such court cases. Many legal commentators predict that the ruling will restrict successful claims. For instance, in applying circumstance two—requiring an assessment of the "degree to which a voting rule departs" from voting practices that were in effect in 1982—courts could determine that limits on early and absentee voting comport with that principle because, as the Court explains, in 1982 most states required almost all voting to occur on Election Day.

As the Supreme Court decision in *Brnovich* resolved a question of statutory interpretation, Congress might wish to examine amending the VRA in response to the decision. By way of historical example, following the Court's 1980 decision in *City of Mobile v. Bolden*, Congress amended Section 2 in 1982 to overturn the effects of that ruling. Any such legislation would have to be consistent with the Constitution, as interpreted by the Court.

Legislation introduced in Congress would address the VRA. For example, H.R. 1 (117th Congress), as passed by the House of Representatives, and S. 1 (117th Congress) include findings of a "commitment of Congress to restore the Voting Rights Act." In addition, in the last Congress, H.R. 4 (116th Congress). S. 561 (116th Congress), S. 1799 (116th Congress), and S. 4263 (116th Congress) would have amended the VRA to establish a new coverage formula for Section 5 preclearance.

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