

State & Local Legal Center



## Supreme Court Elections Cases 2020-21

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*The State and Local Legal Center (SLLC) files Supreme Court amicus curiae briefs on behalf of the Big Seven national organizations representing state and local governments.*

In [\*Brnovich v. Democratic National Committee\*](#) the U.S. Supreme Court held 6-3 that Arizona's requirement that ballots cast in the wrong precinct and ballots collected by anyone other than a limited group of people not be counted didn't violate §2 of the Voting Rights Act. The Democratic National Committee (DNC) sued the Arizona Attorney General claiming that Arizona's refusal to count ballots cast in the wrong precinct and ballots collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver "adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens," in violation of §2. The DNC also alleged the ballot-collection restriction was enacted with discriminatory intent in violation of §2. Section 2(a) disallows voting practices that "results in a denial or abridgement of the right" to vote based on race or color. Section 2(b) states a violation occurs only 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 Justice Alito, writing for the majority, "it appears that the core of §2(b) is the requirement that voting be 'equally open.'" The Court offered five non-exhaustive factors to determine whether voting is "equally open." Those factors include: the size of the burden imposed by the rule, whether the rule departs from standard voting practice in 1982 when §2 was amended, the disparity of impact on different racial or ethnic groups, the openness of the state's entire voting system, and the strength of the state interests served by the rule. Applying the above five factors, the Court concluded neither Arizona's out-of-precinct rule nor its ballot-collection law violates §2. Regarding out-of-precinct ballots, the Court found "[h]aving to identify one's own polling place and then travel there to vote does not exceed the 'usual burdens of voting'" particularly when considering Arizona's "political processes" as a whole. While in 2016 over 1% of voters of color versus .5% of white voters voted out of precinct, according to the Court, "[a] policy that appears to work for 98% or

more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open.” Finally, not counting out-of-precinct votes “induces compliance” with the requirement that voters vote at their assigned polling place. Precinct-based voting furthers important state interests including distributing voters more evenly at polling places and reducing wait times. Regarding limits on ballot collection, the Court noted that Arizonans who receive early ballots have numerous options to cast their ballots, can rely on multiple proxies, and have 27 days to vote. The DNC was unable to provide statistical evidence that limits on ballot collection have had a disparate impact on minority voters. Finally, the Court pointed out that “third-party ballot collection can lead to pressure and intimidation.” The Supreme Court agreed the federal district court’s finding of a lack of discriminatory intent in enacting the ballot-collection restriction “had ample support in the record.” According to the Court, what happened after the airing of a former Arizona State Senator’s “unfounded and often far-fetched allegations of ballot collection fraud” and a “racially-tinged” video created by a private party “was a serious legislative debate on the wisdom of early mail-in voting.”

In [\*Americans for Prosperity Foundation v. Bonta\*](#) the U.S. Supreme Court held 6-3 that California violated the First Amendment by requiring charitable organizations to disclose their major donors to the state attorney general. To operate and raise funds in California, charities must register annually with the Attorney General. Regulations require them to submit a copy of their Internal Revenue Service Form 990, including Schedule B, which lists the names of donors who have contributed more than \$5,000 or, in some cases, more than 2 percent of an organization’s total contributions. A number of charities sued California’s Attorney General claiming requiring them to turn over this information violated the First Amendment. The Supreme Court, in an opinion written by Chief Justice Roberts, agreed that being compelled to disclose this information violated the charities’ First Amendment freedom of association rights. According to Roberts in the first “compelled disclosure” case the Court applied “exacting scrutiny.” Per this standard, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” While the parties argued that exacting scrutiny incorporates a “least restrictive means test” the Supreme Court disagreed. It concluded that the Court’s early compelled disclosure cases set forth that disclosure requirements must be “narrowly tailored to the government’s asserted interest.” Applying exacting scrutiny, the Court held that California’s “blanket demand” for Schedule Bs is facially unconstitutional. California argued it had an interest in preventing charitable fraud and self-dealing, and that “the up-front collection of Schedule B information improves the efficiency and efficacy of the Attorney General’s important regulatory efforts.” The Court didn’t doubt California had a substantial interest in preventing fraud. But, the Court opined, “[t]here is a dramatic mismatch . . . between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end.” “California does not rely on Schedule Bs to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain Schedule B information after initiating an investigation. “California’s interest is less in investigating fraud and more in ease of administration. This

interest, however, cannot justify the disclosure requirement.” In most facial challenge cases the challenger must “establish that no set of circumstances exists under which the [law] would be valid.” According to the Court, “a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” The Court had “no trouble” concluding that the Attorney General’s disclosure requirement in this case is overbroad. The Attorney General argued its disclosure requirement was unlikely to chill donors because the state keeps the Schedule Bs confidential. But the Court cited to precedent stating that disclosure requirements can chill association “[e]ven if there [is] no disclosure to the general public.”