

Nos. 19-1257, 19-1258

IN THE
Supreme Court of the United States

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY AS ARIZONA ATTORNEY GENERAL, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

ARIZONA REPUBLICAN PARTY, ET AL.,
Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, ET AL.,
Respondents.

**On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit**

**UNOPPOSED JOINT MOTION OF PETITIONERS
FOR DIVIDED ARGUMENT**

Pursuant to this Court's Rules 21 and 28.4, Petitioners in No. 19-1257, Mark Brnovich, in his official capacity as Arizona Attorney General, and the State of Arizona (collectively, "State Petitioners"), and Petitioners in No. 19-1258, Arizona Republican Party, Bill Gates, Suzanne Klapp, Debbie Lesko, and Tony Rivero

(collectively, “Private Petitioners”), respectfully and jointly move for divided argument in these consolidated cases. More specifically, State Petitioners and Private Petitioners request to divide their argument time evenly. This division of argument time will ensure that all Petitioners have their interests fully represented and that the Court secures a full understanding of the unique perspectives and arguments of all Petitioners. Respondents have informed Petitioners’ counsel that they do not object to this motion.

1. This case presents two questions regarding § 2 of the Voting Rights Act, which prohibits laws that “deny” or “abridge” the right to vote on account of race, *see* 52 U.S.C. § 10301. The first question presented is whether § 2 prohibits Arizona’s race-neutral voting rules—which prohibit “ballot harvesting” and require in-person voters to vote within their assigned electoral precinct—merely because minority citizens ostensibly were more likely to use ballot harvesters or vote out of precinct. The second question presented is whether Arizona’s enactment of its anti-ballot-harvesting law was tainted by discriminatory intent, even though the district court found following a full trial that the State Legislature was motivated by sincere concerns regarding voter fraud, not racial animus.

2. The two sets of Petitioners have been represented by separate counsel throughout this litigation and continue to be separately represented. Respondents sued Mark Brnovich in his official capacity as State Attorney General, and the State of Arizona intervened on appeal in the Ninth Circuit. Private Petitioners—the Arizona Republican Party along with several of its elected officials and candidates—

intervened as defendants in the district court and participated in both the district court and Ninth Circuit. Counsel for both sets of Petitioner participated in oral argument at the Court of Appeals, at both the panel and en banc stages.

3. Petitioners have distinct interests and perspectives concerning the question presented. State Petitioners seek to preserve reasonable, valid electoral regulations duly enacted and signed into law by Arizona's state government. Private Petitioners seek to preserve fair, predictable electoral rules for candidates and voters in Arizona, in addition to undoing the Ninth Circuit's extreme, outlier decision, which would wreak havoc on election regulation not only in Arizona but across the country.

4. Petitioners have also pressed different arguments in this Court with respect to both standing and the merits. Though there should be no question that all Petitioners have standing, State Petitioners and Private Petitioners assert different bases to support their standing to sue. State Petitioners rely on Arizona's right to defend its own laws, as well as the Attorney General's legal right both to speak for the State and to defend the laws at issue as a state official charged with enforcing them. *See* State Petitioners' Reply Br. in Support of Cert. at 10–11. Reflecting their private status, Private Petitioners instead rely on the injury that invalidation of Arizona's electoral rules would cause to their interests as voters, candidates, and a political party; these are the mirror images of the injuries that Respondents invoked to challenge Arizona's electoral rules in the first place. *See* Private Petitioners' Reply Br. in Support of Cert. at 3–4.

Likewise, while all Petitioners agree that the Ninth Circuit erred, they assert differing merits arguments and urge this Court to adopt different standards for § 2 claims. State Petitioners advocate a two-part test to assess whether an electoral regulation violates § 2. In their view, to make out a vote-denial claim, plaintiffs must both (1) identify a substantial disparate impact on minority voters' ability to participate in the electoral process and to elect representatives of their choice and (2) establish that the substantial disparate impact was caused by the challenged regulation. *See* State Petitioners' Br. at 19–24. Private Petitioners, by contrast, do not rely on such a two-part test and instead argue that as long as electoral regulations are race-neutral and impose no more than the ordinary burdens traditionally associated with voting, there is no “denial” or “abridgement,” and § 2 is not implicated. *See* Private Petitioners' Br. at 19–21.

In short, while both State and Private Petitioners agree that all Petitioners have standing and that Arizona's challenged electoral rules are valid, they have offered different approaches for resolving the questions presented, and will provide different perspectives on the issues at stake in the case.

5. This Court has regularly granted motions for divided argument when both a state government party and a private party appeared on the same side of the case. *See, e.g., Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 951 (2019) (mem.); *Tenn. Wine & Spirits Ass'n v. Blair*, 2019 WL 98538 (2019) (mem.); *Sturgeon v. Frost*, 139 S. Ct. 357 (2018) (mem.); *Janus v. Am. Fed. of State, Cty., & Municipal Employees, Council 31*, 138 S. Ct. 974 (2018) (mem.); *Masterpiece Cakeshop, Ltd. v.*

Colorado Civil Rights Comm'n, 138 S. Ct. 466 (2017) (mem.); *Util. Air Reg. Grp. v. EPA*, 135 S. Ct. 1541 (2015) (mem.); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 884 (2014) (mem.). Divided argument is similarly appropriate here.

6. For the foregoing reasons, the two sets of Petitioners jointly request that the Court divide oral argument time equally between them.

Respectfully submitted,

JANUARY 6, 2021

/s/ Michael A. Carvin

Mark Brnovich
Attorney General
Joseph A. Kanefield
Chief Deputy and
Chief of Staff
Counsel of Record
Brunn W. Roysden III
Solicitor General
Drew C. Ensign
Deputy Solicitor General
Kate B. Sawyer
Assistant Solicitor
General
Office of the Arizona Attorney
General
2005 N. Central Ave.
Phoenix, AZ 85004
(602) 542-5025
joe.kanefield@azag.gov

William S. Consovoy
Tyler R. Green
Consovoy McCarthy PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423

Counsel for State Petitioners

Michael A. Carvin
Counsel of Record
Yaakov M. Roth
Anthony J. Dick
E. Stewart Crosland
Stephen J. Kenny
Stephen J. Petrany
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
macarvin@jonesday.com

Brett W. Johnson
Colin P. Ahler
Tracy A. Olson
Snell & Wilmer LLP
400 E. Van Buren St.
Suite 1900
Phoenix, AZ 85004

Counsel for Private Petitioners