

**Achieving Electoral Equity After *Brnovich*: A Case Study of Native Activism  
in Nevada**

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## **Achieving Electoral Equity After *Brnovich*: A Case Study of Native Activism in Nevada**

**Abstract:** Over the past decade, cross-state differences in election laws and practices have increased dramatically with some states passing laws that reduced electoral barriers, while other states have tightened access, citing concerns about ballot security. Not surprisingly, voting rights activists have focused attention on the restrictive states, but that ignores the role of local election officials, who handle the actual administration of elections. In this paper, we present a case study, tracing the struggle of Shoshone and Paiute tribal leaders, Native activists and lawyers to force Elko County election officials to provide electoral access on the Duck Valley Reservation in northern Nevada, where voters had to travel 200 miles round trip to vote. After county officials refused the request for an early voting site and Election Day polling place, the Tribes asked a judge in state court to issue an emergency injunction. Tribal lawyers argued the county was violating state law and a newly adopted provision in the state constitution, which committed the state to providing “equal access to the elections system without discrimination.” This case study serves as an important reminder of the discretionary power wielded by local election officials. Also, it presents a potential roadmap for fighting voting abuses, using state laws and courts, which is particularly important, given the Supreme Court’s *Brnovich v. Democratic Central Committee* (2021) ruling.

## **Achieving Electoral Equity After *Brnovich*: A Case Study of Native Activism in Nevada**

### **Introduction**

Because the U.S. Constitution gives state legislatures the responsibility for determining, “...the times, places and manners for holding elections,” each state has been free to develop its own distinct rules and cultural norms around elections (Cain et. al. 2008). While some differences date back to the Founding era, the divergence, over the past decade, has become much greater. Some states have adopted reforms, aimed at increasing turnout by reducing barriers to voting. In other states, concerns about ballot security, triggered efforts to tighten registration and voting laws. The pace of change accelerated following Supreme Court rulings (*Shelby County v. Holder* 2013; *Brnovich v. Democratic National Committee* 2021), which radically limited the scope of claims permissible under the Voting Rights Act.<sup>1</sup> These rulings opened the floodgates for the passage of ever more restrictive election laws in Republican controlled states and the opposite in Democratic controlled states; all of which show no sign of slowing (Brennan Center 2023).

It is not surprising that voting rights activists have focused on states with new restrictive laws, but discriminatory practices are not limited to those states. It can be found in states with voter friendly laws, such as Nevada which has many laws aimed in facilitating electoral access. Registration can be done online via the Secretary of State’s website, by mail or in-person at government offices (department of motor vehicles, county election offices, and public assistance offices). Counties also can send field registrars to people’s homes if they are ill, disabled or “for

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<sup>1</sup> One law professor went so far as to state that *Brnovich* “all but eviscerated the remaining protections” of the Voting Rights Act and that it would “wipe out” future claims of voting rights discrimination” (Becker 2021).

other good cause” (NRS 293.5237). The state also provides many different ways to vote: by mail, at Election Day polling places, at county election offices, and early voting centers. Early voting at satellite centers and county clerk offices is available for the two weeks prior to Election Day. According to Schraufnagel et. al. (2022), Nevada has the seventh lowest cost of voting in the country.

But states delegate the actual running of elections to local election officials. In Nevada, election administration is handled by county clerks, who themselves are elected in partisan races (NRS 246.010; NRS 293.267). These local election officials have tremendous discretionary power. As Cha and Kennedy (2014) noted, local election officials largely “determine who can vote, where they can vote and how they can vote.” This is why it is possible, for even states with laws that emphasize electoral access, to have discriminatory electoral practices.

A survey of 1,388 local election officials in Wisconsin found that most had negative views of reforms to increase turnout (election day registration, mail in absentee voting, and in-person absentee voting.) They said the reforms imposed administrative burdens by causing security problems and that the costs substantially outweighed benefits.<sup>2</sup> These negative attitudes led to what Burden et. al. (2012: 748) describe as “status quo bias” which slowed their adoption of reforms.

Partisanship and racial animus also appear to affect how election officials carried out their jobs. In a different article, using the same Wisconsin data set, researchers found that having a Republican election official in a Democratic district was associated with a substantial drop in turnout (Burden et. al. 2013: 904). A national study found in highly partisan political jurisdictions that provisional ballots cast by voters, who were of the same party as the local

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<sup>2</sup> In follow-up interviews, the election officials reiterated they felt burdened by new forms of voting, going so far as to “portraying the burden as a zero-sum battle between citizens and administrator” (Burden et. al. 2012: 746).

election official, were more likely to be counted (Kimball et.al. 2006: 457). A New Mexico study (Atkeson et. al. 2010) uncovered systemic bias against voter with Hispanic surnames in that they were much more likely required to provide identification before voting than were voters with non-Hispanic last names.

### This Project

Our research focuses on the ongoing struggle of the Shoshone and Paiute Tribes on the Duck Valley Reservation in Nevada to force local election officials Elko County to provide them with equal access to voting on the reservation. This case study is part of the effort to combat the widespread “erasure” of Native Americans from political science.<sup>3</sup> Orren and Skowronek (2004:3) describe this type of research as a “close to the ground study, to delve into the intricacies of political conflict and government operations in a particular historical setting.” In this case study, we trace a series of small and seemingly unconnected events that reshaped the political context on the reservation and within the state, which made change possible.<sup>4</sup> A range of different data sources, including election results, legislative politics, observation research, survey responses, and legal case materials, are used in crafting our account.

While our findings will be of interest to scholars, whose primary research falls with the sub-fields of American Indian/Indigenous politics and race and ethnic politics, we believe it will be of interest to those more broadly interested in voting and elections, as well as those whose field is state and local politics. The case study is a powerful reminder that elections are administered by local officials and that abuses can occur even in states that have reformed their election laws to increase access. It also shines light on the use of state laws, rather than federal

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<sup>3</sup> For more on the erasure of Native Americans, see Orr et. al. (2018).

<sup>4</sup> The case study approach is particularly suitable when the research topic is new or there has been only limited exploration of the topic. See Yin (1989) and Johnson and Joslyn (1995) for more on case study research.

law, as a means of redress for voting rights abuses. The is of great importance in the current post-*Brnovich* era. The material is divided into the following five sections: 1. The cost of voting on reservations, 2. The Duck Valley electoral context, 3. The changing political context, and 4. The Duck Valley lawsuit, and 5. Aftermath.

### **The Cost of Voting on Reservations**

Within political science, most research on voting builds off the basic rational choice voting model developed by Anthony Downs (1957), where individuals calculate the cost of voting (time and effort) against the perceived benefits derived from voting for one party as opposed to the other party. Early researchers posited that the act of voting was “relatively costless” because polling places are close to home (Niemi 1976: 115-119), but it soon was shown that individuals differ in their ability to bear the costs of voting. This led to the development of the resource-based theory that recognizes differential access to the needed “money, time, skill, knowledge, and self-confidence” to vote (Rosenstone and Hansen 1993: 12-14) and that these resources are more prevalent among the white electorate (Williams 2004: 683-689).

While the ability to bear differential costs definitely is a function of whether populations are “resource rich” or “resource poor” (Berinsky et. al. 2001), there also are contextual factors that influence the level of costs assigned to designated populations. There is academic research, from as far back as 2006, showing that local election officials, facing financial challenges, are more likely to cut back access to voting sites within minority communities than in white areas (Fullmer 2015). This results in “resource poor” populations also having to face disproportionate burdens (e.g., greater objective costs) in accessing the ballot.

Not only are reservation voters generally “resource poor,” they also often must overcome geographic distance, physical impedance and low levels of political trust, in order to vote (Schroedel et. al. 2020). Poverty levels on reservations are roughly twice as high as among the general population and education levels are substantially lower (Native American Rights Fund 2020: 37 and 38). A 2016 survey of 2,804 Native Americans, most of whom lived on reservations, found extremely low levels of political trust in non-tribal governments (Native American Voting Rights Coalition 2018). Subsequent research, using the survey data from South Dakota and Nevada, found that political trust was a strong predictor of voting in non-tribal elections, controlling for all other factors (Schroedel et. al. 2022).

Most tribal lands are geographically remote, but many also are further isolated due to topographical features, such as mountains and canyons. For example, on the Yakima Nation it can take up to an hour to drive seven miles. Poor roads and the lack of access to reliable vehicles and no public transit exacerbate the problem, as does inclement weather in November (Native American Rights Fund 2020: 28-30).<sup>5</sup> Geographer Gerald Webster, lumped these factors together, calling them “the tyranny of distance” that makes it extremely difficult for voters on reservations to reach off-reservation election offices and polling locations (Native American Rights Fund 2020: 32).

In considering how hard or difficult it is to travel from one location to another, transportation planners consider two factors: distance and impedance. Distance is a relatively straightforward concept---distance by road to travel from point A to point B. Impedance is

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<sup>5</sup> In 2017 and 2018, the Native American Voting Rights Coalition (NAVRC) held field hearings in different parts of the country. The 125 witnesses gave testimony about their experiences with barriers to voting. The findings from the hearings were written up and published by the Native American Rights Fund (NARF) in 2020. Since 2015, NARF has functioned as the convener of NAVRC, which is a coalition of groups, activists, and lawyers, working to enhance voting rights among Native American populations.

anything that slows down that travel between the two locations, e.g. factors, such as speed limits, density, traffic congestion, poor road quality, number of intersections, topographical barriers and so on (Gimpel and Schuknecht 2003).

Although not an impedance factor discussed by transportation planners and geographers, many Native Americans experience racism when they go to vote in border towns and among poll workers. The Native American Rights Fund (2020: 44-45) documented many instances of Native voters being discriminated against, including in one county being expected to vote in-person in a chicken coop. At one of the hearings, a witness described “being too intimidated” to try and vote in a hostile border town.<sup>6</sup>

Although voting by mail is an increasingly common way for people to vote, it is not a viable option for many reservation voters. Most people on reservations have what the USPS classifies as non-standard mail service, which means they do not have residential mail delivery and must travel often long distances to post offices, which typically have limited hours of operation and to access mail services (Schroedel et. al. 2021; Native American Rights Fund 2020: 40). Getting mail-in ballots, as one man testified at the 2018 hearings, is a “big problem” (Native American Rights Fund 2020: 40). But a corollary to the lack of access to mail service is the severe lack of trust in voting by mail. In the 2016 survey of Native voters, less than 30% indicated they had complete trust that their vote would count if it was sent in via the post and most respondents, who had tried voting by mail, had experienced problems in trying to vote by mail. The most common problem was the ballot failing to arrive (Native American Voting Rights Coalition 2018).

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<sup>6</sup> Native respondents, to a 2014 South Dakota survey about the impact of travel distance on people’s lives, expressed similar feelings about traveling to do shopping and other activities in the off-reservation county seat. The northern half of Jackson County is the eastern portion of the Pine Ridge Reservation, while the southern part, including the county seat of Kadoka, is off-reservation (Schroedel 2020: 80-81).



## **The Duck Valley Electoral Context**

The southern half of the 450.6 square mile Duck Valley Reservation is in Nevada, while the part north of the 42<sup>nd</sup> parallel is in Idaho. The Western Shoshone and Northern Paiutes, who live on the reservation, are descendants of the Indigenous inhabitants of Idaho, Oregon and northern Nevada. For more than 140 years, the two Tribes amicably lived together on the reservation (Sho-Pai Tribes 2018). The terrain is mostly high desert, with much of the land devoted to grazing of cattle (Nevada State Historic Preservation Office, no date). According to the American Community Survey's 2021 five-year data (Census Reporter, 2021), the reservation has a population of 1,125 or 2.5 people per square mile.<sup>7</sup> Tribal data sources indicate the on-reservation population is higher (1,700) with roughly 80% living in the Nevada part (Healy 2022). Residents have all of the socio-demographic and economic factors, associated with low levels of political engagement and voting. The average per capita income is roughly half of the US average (\$19,049) and the poverty level is more than twice the US average (36.9%), while the education level is much lower (Census Reporter, 2021).

In 2016, tribal members told NAVRC survey takers that in the distant past there had been a polling place in Owyhee, the main reservation town, but that the county had shut it down to save money. They said that county election officials ignored their requests for there to be in-person voting in Owyhee (Native American Voting Rights Coalition 2018: 9). There also was no evidence of election officials sending field registrars to Duck Valley or any of the other Nevada reservations (Native American Voting Rights Coalition 2018: 10).

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<sup>7</sup> There often is significant under-counting of reservation populations, due to Native Americans' deep and well-founded distrust of government officials, including census takers.

Duck Valley residents had to travel to the county clerk's office in Elko if they wanted to vote in-person, either as an early voter or an Election Day voter. The one-way travel distance from Owyhee to Elko is 100 miles. The time to make that trip can vary enormously, due to different types of impedance. Poor road conditions, cattle crossing, highway construction, and inclement weather were cited by tribal leaders as causing the trip to take from 2.75 to 3.5 hours. One of the authors of this report traveled to Owyhee 2016 and was stopped for more than an hour due to fire fighters battling a fast spreading brush fire. What this means is that voting in Elko can easily mean nearly a full day spent traveling to the county clerk's office and back, as well as paying for gas---and this assumes that a voter has access to a running vehicle because there is no bus service. There were only a small number of Duck Valley respondents to the Native American Voting Rights Coalition survey, but their responses mirrored those of the large Nevada sample in that they evinced low levels of political trust and that travel distance made registering and voting difficult.

### **The Changing Political Context**

According to Pierson (2004), there is a "stickiness of history" that makes social and political change difficult, but there are times "small events" can alter an established path and open up new possibilities (Pierson 2000: 75). Starting in 2016, there were a series of events that significantly reshaped the Nevada political context. While the Democratic party, regaining control of the state legislature, might not be considered "small," there were many events that certainly would be characterized as "small." It is our contention that those "small" events, in conjunction with Democrats gaining substantial majorities in the state assembly and state senate, has fundamentally changed the Nevada political context for Native Americans.

As well as being resource poor, Native Americans also are among the least politically powerful populations---not only because of their relatively small size, but also due to the long history of vote denial, dilution and suppression (McCool et. al. 2007; McDonald 2010; Schroedel and Hart 20015). One of the most troubling results of this history is that discriminatory treatment can become so normalized, such that it often goes unrecognized. Native voting rights attorney Natalie Landreth discovered that many Alaska Natives, who only spoke Yu'pik, failed to realize that getting English language ballots was discriminatory (Schroedel 2020: 137).

#### Growing Awareness of Voting Inequality

In spring 2016, the Kellogg Foundation provided funding to the Native American Voting Rights Coalition (NAVRC) to conduct a large-scale survey of Native Americans, living on reservations and other rural areas, with the aim of identifying barriers that impede electoral participation. The Nevada survey takers included members of Four Directions, a grass roots voting rights organization, and a team from Claremont Graduate University, including authors of this study. As Natalie Landreth found in Alaska Native villages, we discovered that inequalities in terms of access to registration and voting had become normalized. But the mere asking of survey questions that included lists of possible types of unequal treatment triggered many discussions about how to get county officials to address what was often egregious violations of the Voting Rights Act. Tribal leaders on the Yerington, Duck Valley, Pyramid Lake and Walker River Reservations expressed interest in getting early voting sites established on tribal lands, but only those from Walker River Reservation in Mineral County and the Pyramid Lake Reservation in Washoe County followed up by formally requesting that county election officials and the secretary of state open early voting satellites on their reservations.

#### The *Sanchez v. Cegavske* Case

After their requests were turned down, the Pyramid Lake and Walker River Tribes went to federal court for a preliminary injunction to force election officials to open early voting sites, comparable to what was available in most of the state. Since the main argument was that travel distance impeded electoral participation, resulting in “abridgement” contrary to Section 2 of the Voting Rights Act, the Yerington Tribe withdrew because their travel distance (8.7 miles one way) to vote was much shorter than on other reservations (one way 48.3 miles for Pyramid Lake and 33.8 miles for Walker River). The leaders at Duck Valley chose to step aside out of concern that having tribal lands in two states might cause problems (Schroedel et. al. 2022: 87). Judge Miranda Du in *Sanchez v. Cegavske* (2016) ruled that the travel distance disparities faced by Native voters on the two reservations did constitute “abridgement” when combined with “historical, social and political conditions to produce a discriminatory result.”

The impact of *Sanchez v. Cegavske* went well beyond just the establishment of early voting sites of the Pyramid Lake and Walker River Reservations. The case broke new legal ground. Although travel distance disparities had been a factor in previous voting rights cases, this is the first time there was an actual judicial ruling instead of the parties being pushed to reach a settlement.<sup>8</sup> It also led to cross-tribal efforts to expand voting access throughout the state.

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<sup>8</sup> The main reason why there are so many settlements in Native voting rights cases is due to the type of municipal insurance coverage provided to political jurisdictions in those states. Large states have separate funds for insuring general municipal coverage and those for physical possessions (e.g. police cars, buildings etc.) and workers compensations. In small states, there typically is a single fund that combines all risks into a single pool that pays all claims. What this means is that claims for voting rights abuses are paid out of the same state insurance pool as those for damages related to a police car hitting another vehicle. Since it is a state insurance pool, funded by taxpayers from across the state, individual political jurisdictions do not have to cover the expenses, nor face backlash from taxpayers for the costs of litigation. This means that political jurisdictions, being sued for voting rights abuses in these states, have little incentive to rein in the costs of litigation and often seek to run up the costs for defense attorneys. Then if defendants look like they are going to lose, they can offer a settlement, which judges typically like, and the plaintiffs notch a “win” but are stuck with high legal costs, which in turn discourage them from filing subsequent charges. This is a particular problem in Indian Country because nearly all of those states have the mixed model of insurance fund (Dietrich et. al. 2021).

The Inter-Tribal Council of Nevada asked the state to provide early voting satellites on the other reservations, but the request was refused (Schroedel et. al. 2022: 88). This refusal, along with the entrenched opposition by many county clerks to increased opportunities for registration and voting on Tribal lands, sparked greater awareness of the need for Tribes to mobilize their citizens and for greater inter-Tribal efforts. The Nevada Indian Commission (NIC), under the leadership of Executive Director Stacey Montooth (Walker River Tribe) sponsored meetings on ways to increase voting access. The meetings included the Secretary of State's Tribal Liaison and representatives from many groups involved in getting out the vote efforts and voting rights struggles (Solis 2022a).

#### The 79<sup>th</sup> and 80<sup>th</sup> Legislative Sessions

As noted earlier, the 2016 election gave Democrats control of the state legislature for the 79<sup>th</sup> legislative session, although not the governorship because Governor Brian Sandoval still had another two years left on his term. The Senate went from Republicans, having an 11-10 majority, to Democrats having an 11-9-1 advantage. In the Assembly, a 25-17 Republican advantage flipped to a 27-15 majority for Democrats. Even though observers predicted that the partisan split between a Democratic legislature and Republican governor would result in a “stalemate,” the parties reached agreements on legislation reforming education, health and criminal justice (Benavides 2018: 40 and 65).

Also, without fanfare, Democratic leaders in the state legislature in the 79<sup>th</sup> legislative session started the process to incorporate a Voters' Bill of Rights into the state constitution. Amendments to the Nevada constitution must be passed by the state legislature in two successive sessions and then be approved by the voters as a ballot measure. The Voters' Bill of Rights, which would enshrine a range of protections, including the right to get assistance in

understanding a ballot, the right to not face intimidation in voting and that all citizens have an equal opportunity to vote. Introduced as Senate Joint Resolution No. 3, the lead sponsor was Senator Pat Spearman (Clark County/ North Las Vegas District 1), who during the 79<sup>th</sup> session served as the chair of the Senate Committee on Health and Human Services. Eight of the eleven Democrats in the Senate, including Majority Leader Aaron Ford and Assistant Majority Leader Julie Ratti, signed on as co-sponsors. In the Assembly, the lead sponsor was Speaker Jason Frierson (District 26, Clark County/west Las Vegas). All of the co-sponsors represented urban areas in either Clark County or Washoe County (File Number 29.SJR 1 of the 79<sup>th</sup> Session).

Despite not having a single Republican co-sponsor, Senate Joint Resolution 3 passed on a 21-0 vote in the Senate on April 25, 2017. It was brought up for an Assembly vote on May 26 on a 38-3 vote (File Number 29.SJR 1 of the 79<sup>th</sup> Session). The three negative votes came from Republicans (Lisa Krasner from Washoe County, Jim Marchant from northeast Las Vegas and Richard McArthur from northwest Las Vegas). When the resolution came up in the 80<sup>th</sup> Session, it again passed the Senate on a unanimous 21-0 vote on February 20, 2019 and on May 24, 2019 in the Assembly by a 31-0 vote with two members excused. The Nevada Electronic Legislative Information System (NELIS) reports that the Resolution was never discussed or debated on the floor in either session. It was simply read and voted on.

#### Nevada Ballot Question 4

The measure was brought to the voters, as Ballot Question 4, the State Constitutional Rights of Voters Amendment, in the 2020 general election. Again, the proposed amendment got almost no attention. According to Ballotpedia, there was no organized opposition and no reported campaign spending. In one media story (Solis 2020b), there was a brief mention that some people thought the amendment was unnecessary because the rights of voters already were

sufficiently protected by federal law and the Nevada constitution, before noting proponents believed “enshrining an explicit right to vote in the state constitution” would provide additional protection of this fundamental right.

Nearly two-thirds of voters (64.12%) voted “yes” on Question 4, which meant the constitution would include additional guarantees of voting rights henceforth would be in the Nevada constitution.<sup>9</sup> Voters in only five of the seventeen Nevada counties voted “yes” on Question 4. Not surprisingly, the highest favorable vote (68.43%) was in largely urban and Democratic Clark County, followed by Washoe County with 59.4%. The greatest opposition was in heavily rural counties, most notably Esmeralda (65.43%), Eureka (63.06%) and Lincoln (62.9%) Counties. But the total number of “no” votes on Question 4 in those three counties was only 2,363. In contrast, Clark County alone had 605,243 “yes” votes. See Table 1 for the county vote totals in favor and opposed to Question 4, as well as the percentages for each county.

**Table 1: County Votes on Question 4 to Change Nevada Constitution<sup>10</sup>**

<b>County</b>	<b>Yes Vote</b>	<b>No Vote</b>
<i>Carson City</i>	15,316 (53.72%)	13,519 (47.27%)
Churchill	5,658 (46.27%)	6,570 (53.73%)
<i>Clark</i>	605,243 (68.43%)	279,232 (31.57%)
Douglas	15,804 (47.24%)	16,848 (52.76%)
Elko	9,884 (47.23%)	11,045 (52.77%)
Esmeralda	158	299

<sup>9</sup> These provisions in state constitutions are either described as “fairness” or “free and equal” provisions. According to the National Council of State Legislatures (2019), two-thirds of states have some type of this language in their state constitutions. See also Douglas (2014).

<sup>10</sup> Data is from the Nevada Secretary of State website.  
[Nvsos.gov/soselectionpages/results/StateWideGeneral/ElectionsIndex.aspx](https://nvsos.gov/soselectionpages/results/StateWideGeneral/ElectionsIndex.aspx).

	(34.57%)	(65.43%)
Eureka	348 (36.94%)	594 (63.06%)
Humboldt	3,314 (44.39%)	4,151 (55.81%)
Lander	1,139 (42.92%)	1,515 (57.08%)
Lincoln	867 (37.10%)	1,470 (62.90%)
Lyon	13,587 (47.51%)	15,009 (52.49%)
<i>Mineral</i>	1,217 (55.32%)	983 (44.68%)
<i>Nye</i>	12,161 (50.63%)	11,857 (49.37%)
Pershing	891 (40.48%)	1,310 (59.52%)
Storey	1,239 (45.20%)	1,502 (54.80%)
<i>Washoe</i>	138,652 (59.40%)	94,757 (40.60%)
White Pine	1,961 (47.05%)	2,207 (52.95%)

Note: The five counties that voted in favor of the measure are italicized.

Although a majority of voters in Elko County voted against the passage of Question 4 (the State Constitutional Rights of Voters Amendment), the vote was closer (47.23% to 52.77%) than in many rural counties. Elko is a heavily Republican County that gave more than three-quarter of its presidential vote to Donald Trump. The fact that not a single Democrat hold elected office in the entire county is further evidence of the Republican Party's dominance of county politics. Probably the low visibility of Question 4 and willingness of Republicans legislators, including those from Elko County, to vote for the bill when it came up for votes in 2017 and 2019, made the proposed amendment much less partisan than one might have expected, given that all of the sponsors were Democrats. Even so, a majority of county voted against



Question 4. An outlier was Precinct 29 (Duck Valley Reservation), where 70.49% voted in favor of the amendment.

### The 81<sup>st</sup> Legislative Session

Despite substantial turnover in the makeup of the Nevada legislature, following the 2020 election (two new senators and ten new assembly members), control of the two chambers remained firmly with Democrats. In the Senate, Democrats continued to have the same 12-9 advantage, but Republicans gained two Assembly seats, which still left the Democrats with a 26-16 advantage. Unlike in the two previous sessions, where the joint resolution to strengthen voter rights was supported by nearly all Republicans, a bill to increase electoral access (AB321) did not get support from a single Republican. Instead AB321 was passed on straight party line votes: 26-16 in the Assembly on May 26, 2021 and 12-9 on May 31, 2021 (NELIS). This bill made it easier for Tribes to get early voting, drop boxes and Election Day polling places. If Tribes requested any of these options by March 1 for primary elections and August 1 for general elections, local officials would be required to honor the requests. The legislative analysis of the bill warned that meeting the requirements outlined in AB321 would impose financial costs on the county governments. In contrast, the Voters' Bill of Rights was not identified as imposing costs of any parties.

### **The Duck Valley Lawsuit**

Despite the state's adopting laws to increase electoral access, Elko County election officials did not make any changes for the June 2022 primary election. Two weeks later on July 1, 2022, leaders of the Shoshone-Paiute Tribes of the Duck Valley Reservation formally requested that Elko County establish a registration and early voting site in Owyhee, along with

an in-person Election Day polling location. The request was timely, given that AB321 established the August 1 deadline for tribes to make such requests. Also, Nevada law allows counties to offer registration and early voting satellites for the two weeks prior to Election Day. In the county seat of Elko, registration and early voting is available for 108 hours, along with Election Day polling places. The Tribes asked that the same level of access. County election officials were slow to respond, but eventually offered limited early voting and registration, but no Election Day voting on the reservation (Four Directions 2022).<sup>11</sup>

#### Motion for a Preliminary Injunction and Supporting Evidence

On October 5, attorneys representing the Duck Valley Tribes asked the Fourth Judicial District Court of Nevada to grant a preliminary injunction requiring the county to provide an early voting and registration site in Owyhee for the two weeks prior to Election Day (8 hours per day) and an Election Day polling place (12 hours). The legal team included Steven Sandven, whose practice is in Hill City, South Dakota, and in-state counsel Rendal Miller, who practices in Winnemucca Nevada. Over the past eight years, Sandven had partnered up with Four Directions in two earlier voting rights cases, involving travel distance disparities and that were settled in ways that provided partial redress.<sup>12</sup> Then in 2016, Sandven and Miller, broke new legal ground by winning *Sanchez v. Cegavske*, the first ever voting rights case where a judge ruled that travel distance disparities between electoral access provided to white and Native communities was discriminatory and a violation of the Voting Rights Act. But Sandven and

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<sup>11</sup> There is a disagreement over how much early voting access was offered at any point by the county. County Clerk Kristine Jakeman, in her deposition stated that the county initially had offered eight hours on October 28, four hours on October 29 and five hours on November 4. The defense attorney Rendal Miller goes even further stating the county and tribe had an actual agreement, but there is no evidence that tribal leaders ever hear or agreed to such an offer. Instead the plaintiffs state in the emergency motion for an injunction that the county only offered a total of eight hours of early voting spread over two days. At no point, had the county agreed to include registration along with early voting. Most importantly, only the Shoshone-Paiute Tribal Council has the authority to enter into an agreement with Elko County and they did not do so.

<sup>12</sup> These included *Wandering Medicine v. McCulloch* (2014) and *Poor Bear v. County of Jackson* (2015).

Miller knew that their argument was not going to succeed in federal court, given the Supreme Court's ruling in *Brnovich v. Democratic National Committee* (2021). Hence the decision to go to state court.

Plaintiffs' attorneys based their argument on the amended language in the state constitution, put in place after voters ratified Question 4.

Each voter who is a qualified elector under the Constitution and is registered to vote in Accordance with section 6 of this Article and the laws enacted the Legislature pursuant thereto has the right: To equal access to the elections system without discrimination, including without limitation, discrimination on the basis of race, age, disability, military service, employment or overseas residence (Nevada Constitution, Section 1A cited in Emergency Motion page 4).

Miller and Sandven further argued in their Emergency Motion (2022: 1) that the clear intent of the state legislature in passing Assembly Bill 321 was the remedy “the injustices inherent in the state’s electoral process” that limited electoral access for tribal members. According to the plaintiffs, there are a number of established electoral practices in Elko County that discriminate against Native Americans, living on the Duck Valley Reservation. Unlike *Sanchez v. Cegavske*, where the main argument was about travel distance disparities, in this case, the attorneys also emphasized how impedance, due to a “poorly maintained and winding road” turned the 100-mile one-way distance into a nearly four-hour journey (Emergency Motion 2022: 8).

Moreover, Bret Healy in Exhibit 5 (2022) his October 15<sup>th</sup> declaration provided copies of material posted online by the Elko County Department of Planning and Zoning, which warned motorists to be careful because “In extreme weather, even county-maintained roads can become impassable. You may need a four-wheel drive vehicle with chains for all four wheels to travel during those episodes, which could last for several days.” Still in Exhibit 5, Healy (2022) provided another warning from the Department of Planning and Zoning, “Extreme weather changes may strand the motorist in rural areas on roads that are infrequently traveled upon. It is

important to carry clothing and provisions while in rural Nevada.” He also included additional county warnings about wet weather causing large rocks rolling down and hitting people before closing with the Department of Planning and Zoning’s statement that “Emergency response times (Sheriff, fire suppression, medical care, etc.) cannot be guaranteed. Under some extreme conditions, you may find that emergency response is extremely slow and expensive.”

In the *Sanchez v. Cegavske* ruling, Judge Miranda Du stated voting abridgement required that travel distance disparities work “in tandem with historical, social and political conditions to produce a discriminatory result.” With this in mind, the plaintiffs provided evidence showing that tribal members had lower incomes, much higher poverty rates, less education and limited vehicle ownership; all of which made overcoming the travel distance and impedance much more difficult than was true for non-reservation populations in Elko County. In the Emergency Motion (2022:7-8) they pointed out that the Lamoille (population 134) has an Election Day polling place, despite only being 20 miles from Elko.

#### Defendant’s Response and Counter from Plaintiffs

Defense attorney Rand Greenburg did not agree that the Nevada law and the changes to the state constitution meant the county needed to alter in any way their existing practices. But much of his legal argument revolved around the issue of whether the Tribes had legal standing and the inability of Tribes to show “personal injury” (Greenburg 2022: 4). He further brought in tribal sovereignty and the fact that Tribes hold their own elections as evidence of a lack of legal standing (Greenburg 2022:5). This argument is patently false, given that the vast majority of Native American voting rights cases, have been brought by Tribes rather than individuals. This legal stance was prevalent in the pre-World War II period, when many states had subsequently discredited laws that excluded Native Americans from voting on the basis of their also belonging

to Tribal nations (Schroedel 2020: 21-26). While the argument might appeal to some sectors of the population in Elko County,<sup>13</sup> it was unlikely to be accepted by a judge.

The core of the county's defense was about the degree of electoral access provided to people on the Duck Valley Reservation and how their burdens compared to other rural voters in the county. It relied heavily on evidence provided by County Clerk Kristine Jakeman, who is responsible for administering elections.<sup>14</sup> The defense argument has three main parts. First, voters on the reservation are not being treated differently than voters in other rural parts of the county. Second, turnout among registered Duck Valley voters was roughly comparable to that for the county as a whole, so there could not be discrimination. And third, the financial cost and additional labor to provide greater access on the reservation would impose a heavy burden on the county. The county had only a limited number of voting machines so it would be impossible to cover additional early sites or provide an Election Day polling place in Owyhee.

With respect to the first point, Greenburg (2022:8) cited other rural precincts that served more voters than Duck Valley and where those voters had to drive from 50 to 91 minutes one way to reach an in-person voting location. He stated that the Lamoille comparison was invalid because the precinct served a larger population base than those living in the town. Finally, the defense attorney said voters in two rural locations (Mountain City and Jarbridge) had travel distances and impediments comparable to those faced by Duck Valley voters. It is worth noting that no population figures were provided for these tiny, remote communities. Moreover, Greenburg (2022:11) pointed out that the plaintiffs, like other rural voters can choose to vote by

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<sup>13</sup> In 2021, the state legislature passed a law banning schools from using "racially discriminatory identifiers" as mascots. But the Elko County School District Board of Trustees voted unanimously to continue using an "Indian" mascot for its sports teams. It is the only remaining school in the state to keep such a mascot (Solis 2022c).

<sup>14</sup> County Clerk is a partisan and elected position in Nevada. In the 2022, Jakeman running as a Republican, got 100% of the vote, since the Democrats did not even bother to put up a candidate. The same was true for all county commissioner races.

mail. He (Greenburg 2022:12) closed the line of argumentation by stating, “Plaintiff argues distance and poverty are reasons for an in-person polling location. However, this is a product of where Plaintiffs reservation is located, not a product of discrimination.” This, of course, ignores the entire history of the Indian Wars and confinement of Native populations to reservations.

The defense also brought in registration and turnout data provided by the county clerk to argue that tribal voters did not experience discrimination in voting. Greenburg referred to County Clerk Jakeman’s precinct data, showing turnout rates in the 2020 general election. He noted that the turnout among registered Duck Valley voters was 88%, without any early voting nor Election Day in-person voting, which led him to conclude tribal members do not “experience irreparable harm” (Greenburg 2022: 14). Exhibit B (Jakeman 2022), which was attached to the County Clerk’s testimony, listed turnout figures, the number of registered voters and 2020 turnout for each precinct, as well as cumulative county data. It showed that Elko County as a whole has exceptionally high turnout rates---88.13%, with precinct rates ranging from a low of 68.40% in Precinct 21 to a high of 103.16% in Precinct 27.<sup>15</sup>

The 88% turnout rate for Precinct 29 (Duck Valley) was nearly exactly the same as the overall county rate. On the face of it, this suggests the reservation voters are not encountering obstacles in voting, which is the conclusion put forth by the defense. What Greenburg and Jakeman ignore is the low number of registered voters in Precinct 29, which according to the County Clerk’s 2020 data was only 150. This is an incredibly low number of registered voters given the size of the voting age population. But why register to vote, if you face enormous barriers in accessing in-person voting and you do not trust voting by mail?

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<sup>15</sup> The Precinct 27 data, which showed a turnout rate above 100%, also listed the number of registered voters as 412, but supposedly 425 people voted. There was no explanation for the disparity (Jakeman 2020).

Bret Healy, an expert hired by the defense, in Exhibit 3 (2022) provided the court with three different estimates of the voting age population in Precinct 29 and then used those figures to make comparisons between the Duck Valley registration rate and those within the county as a whole. He began with population figures, provided by alternative sources and then calculated what the likely voting age population (VAP) would be in each case. One source<sup>16</sup> was the 2019 and 2020 population figures for the town of Owyhee, which resulted in VAP estimates of 668 and 830. These numbers are likely lower than the actual population figures for the Nevada part of the reservation, given that not everyone lives in the town. The Shoshone and Paiute Tribes have number of reservation residents. If those numbers are used,<sup>17</sup> there is an estimated voting age population of 996. The county clerk's data showed there were only 150 registered voters in Precinct 29 in 2020, but that had increased to 172 by 2022. Healy then calculated the registration rates for the county as a whole and for each of the Duck Valley VAP estimates, using the 2022 registered voter numbers. For Elko County as a whole, the percentage of voting age population registered to vote is 69.60%, while for Precinct 29 it was 17.28%, 20.72% or 25.76%. Using those figures, the under-registration in Precinct 29 compared to the county as a whole is 52.32%, 48.88%, or 43.83%.

The third defense argument was very simple---that the county could not provide the voting equipment and trained election staff to handle the additional burden that providing two weeks of early voting in Owyhee and an Election Day polling place. To do so would result in the county suffering a great harm (Greenburg 2022: 17-20). The county has only a limited number of voting machines; all of which have to go through extensive checking and preparation

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<sup>16</sup> <https://datausa.io/profile/geo/owyhee-nv>. The 2019 base population for Qwyhee was 1,134, while the 2020 number was 912---a reduction of 222 or nearly 20% in a single year, which is unlikely.

<sup>17</sup> <https://www.shopaitribes.org/spculture>.

prior to being put into use. There also are not enough trained staff and poll workers to handle the additional work load that would be caused by meeting the plaintiffs' request. The County Clerk and two deputy clerks are already over-burdened. Throughout the entire early voting period they work overtime and on weekends. Also, state law requires that an early voting site be staffed, not only by poll workers, but also by a deputy clerk. There would not be enough time to train either deputy clerks, nor additional poll workers. In short, the defense argued that Elko County has neither the financial resources, sufficient equipment and staff, nor the time to remedy these issues prior to the start of early voting and the onus is on the plaintiffs for filing a late complaint on October 5.

Unlike the county, which did not provide a detailed accounting of the costs associated with setting up and staffing an early voting site and Election Day polling place, the plaintiffs provided cost estimate (Healy, Exhibit 1). For the two-week early voting site, the estimate was \$8,710.62 which included pay for temporary staff, their travel costs to Owyhee, lodging and travel costs for the deputy clerk, costs for transporting equipment, and overhead. Similar calculations for an Election Day polling site came out to \$2,136.24. The grand total in costs, leaving aside the possible purchase of an additional voting machine, came to \$10,846.86. While not an insignificant cost, the county had ample time to prepare for the possibility, given the passage of AB 321 in 2021 and that the initial request was made on July 1, 2022.

#### Resolution of the Case

On October 18, 2022, the case was heard in the Fourth Judicial District Court. Judge Alvin R. Kacin listened to five hours of testimony, arguments, and evidence.<sup>18</sup> On the following

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<sup>18</sup> Nevada District Court judges are elected and serve six-year terms. In 2012, Alvin Kacin was appointed to fill a vacancy in Department 2 of the District Court. He won a full term in 2014 and most recently was re-elected in 2020 when he ran as a non-partisan candidate and garnered 100% of the vote.



day, a senior judge out of Carson City--not Judge Kacin---called back the parties for a settlement conference. They met for hours before reaching agreement on a legally binding settlement. The settlement document, which was approved by Judge Kacin, was signed on October 26. Elko County agreed to provide, in the 2022 general election, 8 hours of early voting/registration on four days (October 27, October 28, November 3 and November 4) and four hours of early voting/registration on October 29 and an Election Day drop box available for 12 hours on Election Day. Then starting with the 2024 elections, the county agreed to provided 12 full days of early voting/registration and an Election Day polling place open for 12 hours. The plaintiffs, in turn, had to agree to provide a suitable location and “sufficient numbers of polling workers that have been trained to the satisfaction of the Elko County Clerk.” It was a huge win for Tribal leaders and the Shoshone and Paiute Tribes.

There are only two downsides to a settlement. First, a settlement does not provide a precedent for future cases, but that is less necessary, given *Sanchez v. Cegavske* (2016). Second, the settlement does not provide a way for the prevailing party (e.g., plaintiffs) to get their legal expenses reimbursed. Tribes either have to pay the incurred legal costs, have an outside party cover their bills or have attorneys willing to provide legal services on a pro bono basis. For this case, an outside party covered some of the legal costs, but most of the legal work was done on a pro bono basis.

## **Aftermath**

There has been some debate within the political science literature about whether having an early voting site increased electoral participation. Canon et. al, (2014) found that precincts with early voting sites actually decreased turnout. They hypothesized that it may be due to reduced efforts

by parties to mobilize voters in those precincts. Schroedel et. (2022), in their natural experiment, comparing Nevada reservations (Walker River and Pyramid Lake) that got early voting satellites following *Sanchez v. Cegavske* (2016) and the two that decided to not be part of the lawsuit (Yerington and Duck Valley), found a huge increase in the one with early voting. As the data in Figure 1 demonstrates, the figures from the Duck Valley Reservation in the 2022 general election provides further evidence that early voting sites result in very large increases in turnout among reservation populations (NV Sec of State n.d.). Despite being an off-year election, the turnout was far higher in 2020 when there was a hotly contested presidential race. In 2020, there were only 115 votes cast in Precinct 29 (88% of the 150 registered voters, according to data provided by the County Clerk. But in 2022, there were 226 votes or nearly twice as many, despite being an off-year election. A better comparison is the off-year election in 2018 when 87 votes were cast in Precinct 29 for a 260% increase.

As seen in Figure 1, the increase in turnout on the Duck Valley Reservation for general elections was much higher than was found on Walker River and Pyramid Lake following the establishment of early voting satellites. One of the most important differences is that early voting location in Owyhee also was able to register new voters, while those on Walker River and Pyramid Lake could not. Given that the total number of votes cast in Precinct 29 is substantially higher than the number of registered voters (172), when the case was being heard, it is plausible to attribute the presence of registration on the reservation contributed to the dramatic increase in turnout.

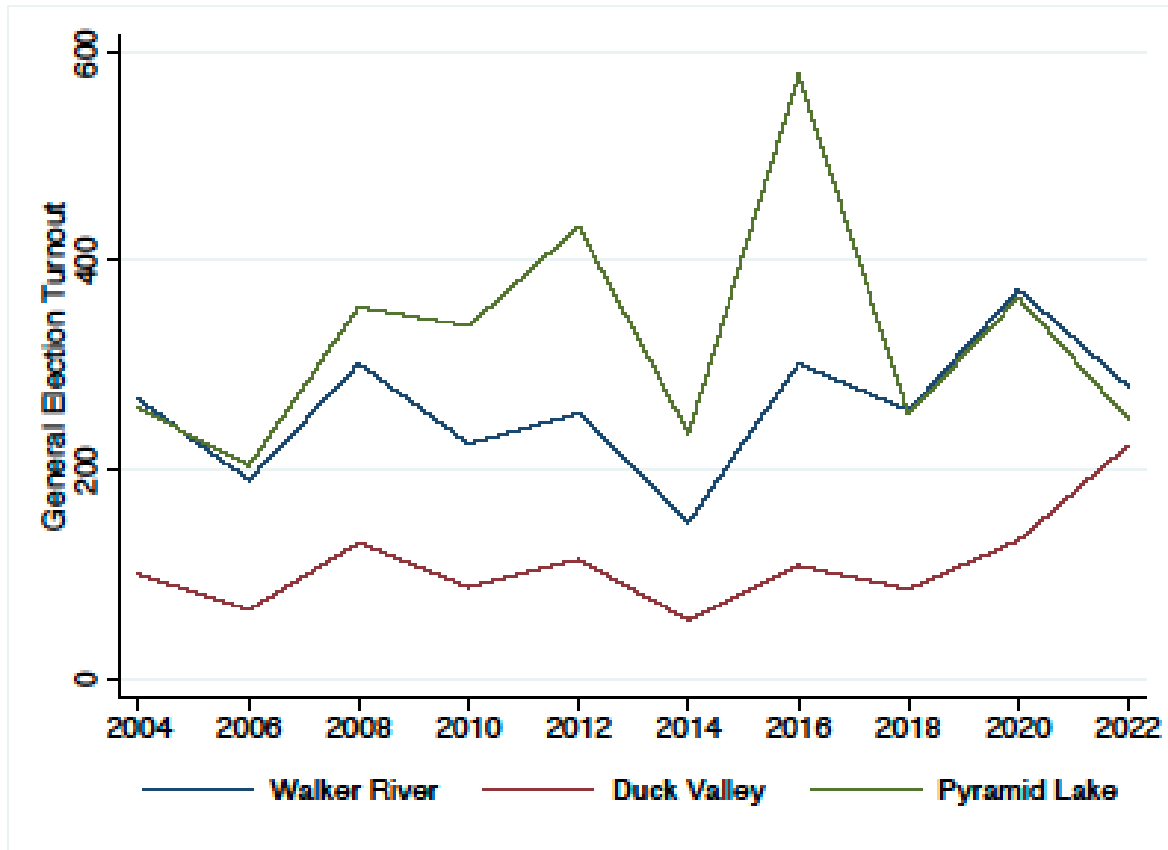


Figure 1. General Election Turnout on 3 Reservations in Nevada 2006-2022

But it is important to recognize that between 2016 and 2022, there has been growing awareness of the Native vote's significance in Nevada, with greater mobilization by Tribes and voting rights activists, as well as support from the Democratic controlled state legislation, most notably in the passage of AB 321. According to Solis (2022a), at least eleven Tribes had asked for permanent polling places to be established on there reservations before the March 1 deadline for their establishment for primary Election Day polling places.

But as the experience of one Nevada Tribe---the Yomba Shoshone---in Nye County serves as a further reminder of that local election officials do the actual administration of elections and not all are willing to follow the law. In August 2022, the long-time Nye County

Clerk resigned and an election denier Mark Kampf was given the position on an interim basis. The Yombe Shoshone Tribal Chair Wayne Dyer had requested an Election Day polling place in July (before the August 1 deadline established by AB321), but Mr. Kampf informed the Tribe on October 20<sup>th</sup>, that he knew nothing of the request and it would not be possible to establish the polling place for the November 8 Election. His lack of awareness of the request is unlikely, given there is an email trail of the Tribe reaching out to the interim County Clerk twice in mid-October. The Tribe contacted Four Directions for assistance and their consultant Bret Healy was able to convince the Nye County that it was in their interest to open a 12-hour Election Day polling place on the reservation (Solis 2022d).

## **Discussion**

Although primarily about the efforts of Shoshone and Paiutes, on the Duck Valley Reservation, to obtain an early voting satellite and Election Day polling place, the case study has much broader implications. The research highlights the role of local election officials in determining “who can vote, where they vote and how they can vote” and that is as true in states with laws aimed at increasing access as those acting to restrict voting conditions. There are over 4,500 local election officials (LEOS) across the country and nearly 60% of states choose these officials through partisan elections (Cha and Kennedy 2014). While there are strong professional norms, many of these officials currently under enormous pressure.<sup>19</sup> And if they choose to retire, as was the case in Nye County, there are risks of their being replaced, whether by appointment or election, by election deniers as happened in Nye County.

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<sup>19</sup> In one study, run after the 2020 election, a third of election officials reported feeling unsafe in their jobs and nearly 20% had gotten threats against their lives (Brennan Center 2021).

However, even the most professional of these officials face challenges in carrying out their tasks. They generally have limited resources, as attested by the Elko County Clerk, and must make decisions about where to utilize the funds, equipment and personnel; all of which contributes to a “status quo bias,” which works against increasing electoral access to “resource poor” and marginalized populations, such as the Shoshone-Paiute Tribes of the Duck Valley Reservation, and also almost certainly affects decisions about where to cut back access, when resources are tight. Hence, one of the most important take-aways from this project is the need for greater research into the administration of elections at the local level and add this element into cost of voting calculations and studies of electoral equity.

Equally significant, the plaintiffs in *Shoshone-Paiute Tribes of the Duck Valley Indian Reservations v. Elko County et. al.* (2022) prevailed in a voting rights case in state court. Nearly all previous voting rights cases have been heard in federal court, with plaintiffs arguing that actions of the defendant were impermissible according to the 1965 Voting Rights Act. These arguments are much harder sustain after *Shelby County v. Holder* (2013) and *Brnovich v. Democratic National Committee* (2021). Instead of trying to find a way around these Court rulings, Tribal leaders used the language in a newly adopted state law, designed to make voting easier for Nevada Tribes, and language in the state constitution, also newly adopted, that said citizens had a right to “equal access to the elections system without discrimination.” This is a version of what legal scholars call a “fairness” or “free and equal” constitutional provision. According to the National Council of State Legislatures (2019), thirty states had language in their constitutions requiring that elections be “free” and eighteen of those states also had language mandating that elections either be “open” or “equal.” Nevada did not have one of these provisions in their constitution at that time, but that changed with the passage of Question 4.

This is one of the first instances of state laws and a “free and equal” constitutional provision being used in a voting rights case in the aftermath of *Brnovich*. And the fact that plaintiffs prevailed in settlement is a strong indication that it provides a viable pathway for achieving electoral equity, despite the hostility of the Supreme Court’s conservative majority.

Finally, the case study sheds light on the importance of “close to ground” studies that allow one to untangle the many different threads that go into shaping political outcomes in specific contexts. As we have shown, there were a series of “small” events, starting in 2016, that came together to open up a window for changing the political context for Native voting in Nevada. But all of the “small” events, whether on the reservation, the state legislature, or among the state voters, were the result of decisions made by disparate groups of political actors, sometimes acting in concert, but often completely unaware of related actions. Over a six-year time span, “small” events, starting with NAVRC survey takers coming to Owyhee, altered the political calculus of Tribal leaders. They saw how outside entities, most notably Four Directions in partnership with lawyers, were able to win a legal victory for the Walker River and Pyramid Lake Tribes. At the same time, the return of the state legislature to Democratic control set in motion the amending the state constitution to include a “free and equal” provision, an effort that was spearheaded by African American legislators, but the party then passed AB321, which specifically aimed at aiding Tribes in gaining electoral equity. Leaders of the Shoshone-Paiute Tribes decided that it was an opportune time for them to request an early voting site and Election Day polling location. After being rebuffed, they sought assistance from Four Directions, which was able to bring in the experienced team of lawyers, who had won in *Sanchez v. Cegavske*. What this meant is that a very “resource poor” community was able to bring in external resources that made it possible for them to prevail---and then inspired the Yomba Shoshone Tribe that also

gained assistance from Four Directions. And finally, Tribal members turned out in exceptionally high numbers in the 2022 election.

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