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UNITED STATE DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

Willie Grayeyes, an individual, and **Terry Whitehat**, an individual, Plaintiffs, vs. **Spencer Cox**, as Lieutenant Governor of the state of Utah, **John David Nielson**, as Clerk/ Auditor of San Juan County, a political subdivision of the state of Utah, **Kendall G. Laws**, as Attorney of San Juan County a political subdivision of the state of Utah, **Colby Turk**, as Deputy Sheriff in the Sheriff's Office of San Juan County, a political sub-division of the state of Utah, and **Wendy Black**, an individual, Defendants.	PLAINTIFF GRAYEYES' MOTION AND BRIEF IN SUPPORT OF PRELIMINARY INJUNCTION AND RELATED RELIEF Civil No. 4:18-cv-00041-DN Judge: David Nuffer

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65, and DUCivR 7-1, plaintiff Willie Grayeyes ("Grayeyes") asks the Court to enter a preliminary injunction against defendant Spencer Cox, in his official capacity as Lieutenant Governor of the state of Utah, and defendant John David Nielson, in his official capacity as Clerk/Auditor of San Juan County, state of Utah. In March, 2018, the Democratic Party of San Juan County nominated Grayeyes to be their candidate for County Commissioner in a newly created District 2. In order to qualify as a candidate for Commissioner, Grayeyes must be a registered voter in San Juan County. In May, 2018, however, as the election officer with initial responsibility in this regard, the County Clerk, John David Nielson, determined that Grayeyes was not eligible to register to vote because he did not have a so-called "principal place of residence" within the County. Nielson then ruled that Grayeyes would be denied a place on the ballot for the November, 2018, election. In taking these actions, Nielson (in collaboration with the other defendants in this civil proceeding) unconstitutionally discriminated against Grayeyes, violating his rights of Free Speech, Due Process, and Equal Protection under the First and Fourteenth Amendments to the United States Constitution. The Court should enjoin Spencer Cox and John David Nielson to restore the voting franchise and ballot access to Grayeyes so that he can stand for election as a candidate for San Juan County Commissioner in District 2 in November 2018.

MEMORANDUM OF LAW IN SUPPORT OF MOTION

FOR PRELIMINARY INJUNCTION

As demonstrated in the statement of facts below, Grayeyes is an enrolled member of the Navajo Nation and has lived at Navajo Mountain in San Juan County since birth in 1946. His ancestral home is at Paiute Mesa, Utah. He owns cattle at that location. And he holds no fewer

than three positions of trust, Chapter Representative, Secretary/Treasurer, and School Board Member, in connection with the local Navajo community. Moreover, in the last decade, and acting through a Utah based non-profit corporation, Utah Bine Bikeyah, Grayeyes has been the public face and moving force behind the establishment and defense of the Bears Ears National Monument, a public lands issue with sacred significance to the Navajos and other Indians in the southeastern part of this state. He has been a registered voter in San Juan County since 1984, and available records show that he has voted continually in San Juan County elections since the early 1990s. In 2012, he ran for County Commissioner from then District 1, losing to his Republican opponent, but not before the County Clerk at that time, Norm Johnson, had confirmed that Grayeyes was eligible, as a resident, to run for office, overruling an objection on this score.

In 2015 and 2016, this Court ruled that San Juan County Commission and School Board voting districts did not comply with the one-person one-vote mandate (School Board) or had been drawn using racial classifications (County Commission, in violation of the Equal Protection Clause). *See Navajo Nation v. San Juan Cty.*, 150 F. Supp. 3d 1253 (D. Utah 2015); *Navajo Nation v. San Juan Cty.*, 162 F. Supp. 3d 1162 (D. Utah 2016). Districts accordingly were reconfigured, and many have predicted that, with equal protection for all voters, a Navajo Democrat might win the race for Commissioner in a newly created District 2. *See* Courtney Tanner, *'We've been disenfranchised': Republicans in San Juan County say redrawn voter districts unfairly favor Navajos*, The Salt Lake Tribune, April 10, 2018. Grayeyes accordingly threw his hat into the ring and was nominated as the Democratic candidate for District 2.

But defendant Wendy Black ("Black") objected to Grayeyes' eligibility to register to vote on grounds of residency (and hence to be a candidate). The County Attorney, defendant Kendall

Laws ("Kendall Laws") (whose father, Kelly, is the Republican nominee for the District 2 seat in opposition to Grayeyes), enlisted the Sheriff's Department, through a deputy, defendant Colby Turk ("Turk"), and the County Clerk, defendant John David Nielson ("Nielson"), to investigate and prosecute Black's voter registration complaint. This collaboration of public officials resulted in two letter decisions, issued through Nielson, who was acting as election judge in this case, and determining that Grayeyes did not have a principal place of residence within the County and therefore had to be stricken from the voter registration rolls and ousted as a candidate from the November 2018 ballot.

STATEMENT OF FACTS

The essential background to this ballot controversy may be found in the description of facts detailed below.

1. Grayeyes' Principal Place of Residence at Navajo Mountain

Grayeyes was born March 15, 1946, the son of Tulley Grayeyes and Bertha Clarke. At the time of birth, both parents were residents of Navajo Mountain, San Juan County, Utah. Please see Grayeyes' birth certificate which is attached as Exhibit J.

Consistent with Navajo tradition, Tulley and Bertha buried Grayeyes' umbilical cord near their family's residences at Navajo Mountain, Utah. This ceremonial burial is a sacred rite, signifying that Navajo Mountain is the permanent abode of the cord's owner, in this case Grayeyes. Please see the Supplemental Declaration of Willie Grayeyes, dated April 24, 2018, ¶¶ 2 and 3, which is attached as Exhibit L (hereinafter "First Supplemental Grayeyes Declaration"). Please also see *United States v. Tsosie*, 849 F. Supp. 768, 774-75 (D. N. M. 1994).

Grayeyes grew up with his family in Navajo Mountain and attended high school at Navajo Mountain High School. Please see Declaration of Willie Grayeyes dated April 19, 2018, ¶¶ 6 and 7, which is attached as Exhibit K (hereinafter "Grayeyes Declaration").

For the last 20 years, Grayeyes has had a residence, a fixed habitation in a single location, which is at Navajo Mountain in a rural area near Paiute Mesa, Utah. Please see the Grayeyes Declaration, Exhibit K, ¶¶ 5, 8, 9, and 10. He runs cattle at this location, pursuant to a permit granted under authority of the Navajo Nation Grazing District 2-3. Please see the Declaration of Russell Smallcanyon, dated May 2, 2018, which is attached as Exhibit M (hereinafter "Smallcanyon Declaration"). Russell Smallcanyon is the Grazing Officer for Navajo Nation Grazing District 2-3, and, based upon his official and hence personal inspection of Grayeyes' home and cattle in June of 2017, Smallcanyon attests that Grayeyes has a home and cattle business in San Juan County, Utah. Smallcanyon Declaration, Exhibit M, ¶¶ 5, 7, and 8.

Grayeyes is an enrolled member of the Navajo Nation, portions of which are in Utah and Arizona. He resides in the Navajo Mountain Chapter of the Navajo Nation and serves as a Chapter Official for Navajo Mountain, Utah, the Secretary/Treasurer for the Navajo Mountain Chapter, and as Chairman of the School Board for the Naatsis'ann [Navajo Mountain] Community School. Grayeyes Declaration, Exhibit K, ¶¶ 2, 14, 15, and 16, and Exhibit O.

Vital services, such as mail delivery, are obtained with difficulty at Navajo Mountain, given its remote, rural character. Hence, residents of Navajo Mountain typically use a post office box at Tonalea, Arizona, as a mailing address, from which mail is collected and then delivered by truck to Navajo Mountain. Grayeyes uses this service so that he can collect mail near his home in Navajo Mountain. Please see the Declaration of Lena Fowler, dated April 25, 2018, ¶ 11, which is attached as Exhibit N (hereinafter "Fowler Declaration"). See also Grayeyes

Declaration, Exhibit K, ¶¶ 11 and 12. San Juan County officials, including the County Clerk's office, are aware that Navajos like Grayeyes are forced to use a Tonalea, Arizona, post office box address so that they can obtain mail delivery, pursuant to the arrangement described above, in proximity to their homes in or near Navajo Mountain. Please see the Deposition of Norman Johnson, at page 42, found in the record for *Navajo Nation v. San Juan Cty.*, civ. no. 1:12-cv-00039-RS (D. Utah, June 23, 2015).

Grayeyes always has been active politically in San Juan County, serving as chairperson of the Board of Directors for Utah Dine Bikeyah, the Utah based, non-profit entity which has advocated vigorously for establishment of the Bears Ears National Monument. He also has been a registered voter in San Juan County and has voted in San Juan County elections for at least the last 18 years. Grayeyes Declaration, Exhibit K, ¶¶ 13, 17, 18, and 20, and Utah Dine Bikeyah corporate records attached as Exhibit P. He never has never been a legal resident of – or voted in –Arizona. Grayeyes Declaration, Exhibit K, ¶¶ 32 and 20, and Fowler Declaration, Exhibit N, ¶¶ 12 and 13.

Although Grayeyes' work sometimes forced him to travel to Arizona, and although his responsibilities as an official in the Navajo Nation had him frequently commuting back and forth, from Utah to Arizona to Utah, he always regarded his home at Navajo Mountain as the principal place of residence to which he intended forever to return. Grayeyes Declaration, Exhibit K, ¶ 10.

2. Grayeyes' Voter Registration History,

Including the County Clerk's Decision

That He Was Qualified to Be A Candidate for

County Commissioner in 2012

In 1984, Greyeyes registered to vote as a resident in San Juan County, state of Utah. Grayeyes Declaration, Exhibit K, ¶ 17. Please also see the official voting record of San Juan County Clerk's Office, Column J, which is attached as Exhibit Q.

Although voting records are available only back to 1999, those records indicate that Grayeyes has voted consistently since that time to the present as a resident of San Juan County. Grayeyes Declaration, Exhibit K, ¶¶ 18 and 19. Please also see the official voting record of the San Juan County Clerk's Office, Row 1263, Columns AH-DM, which is attached as Exhibit Q.

In 2012, Grayeyes was the nominee of the Democratic Party for a seat on the San Juan County Commission. At that time, for the first time, his residency (and hence his eligibility as a voter and candidate) in San Juan County was challenged. The County Clerk at that time, Norman Johnson, overruled this challenge, and Grayeyes was certified as a *bona fide* resident to run in 2012 for a seat on the San Juan County Commission. Grayeyes Declaration, Exhibit K, ¶ 21. Please also see Grayeyes' 2012 candidacy related records which are attached as Exhibit R.

In 2016, Grayeyes applied to renew his voter registration as a resident in San Juan County, state of Utah. Exhibit Q, Column I.[1] In Utah, applicants who currently do not reside in the voting precinct from which they are attempting to register are not eligible for voter registration. Utah Code, §20A-2-101(1)(d). Likewise in Utah, county clerks "shall" register applicants who meet the requirements (including the residency requirement noted above) for

[1] Grayeyes was forced to re-register because, after taking office in 2014, Nielson systematically "purged" Navajos, including Grayeyes, from the voter registration rolls of San Juan County. This is one of many means by which members of the governing class, like Nielson, over the years, have erected barriers which make it difficult for Navajos to vote in San Juan County. In Utah, County Clerks have a duty to update voter registration, Utah Code, §20A-2-304.5, and, under limited circumstances, may remove voters from the rolls, Utah Code, §§20A-2-305, 20A-2-306, but none of these conditions applied to Grayeyes at any time after 2014, and, so far as we can tell, Nielson did not perform any of the statutorily mandated pre-removal compliance before he conducted the "purge."

registration or reject applications where those requirements (including the residency requirement noted above) are not satisfied. Utah Code, §20A-3-204. Under § 20A-3-204(2)(b), in the event of rejection, the county clerk is to notify the applicant respecting the fact of rejection as well as "the reason for the rejection[.]" Nielson was the county clerk of San Juan County in 2016; he approved and did not reject Grayeyes' application to register to vote at that time.

3. Grayeyes' 2018 Declaration of Candidacy for County Commissioner

In 2018, Grayeyes decided again to run for a seat on the San Juan County Commission, this time in District 2, newly established under Judge Shelby's redistricting order. On March 9, 2018, as required by Utah Code, §20A-9-201(1), Grayeyes submitted his Declaration of Candidacy in this regard to the San Juan County Clerk. Please see the Declaration of Candidacy attached as Exhibit A. Grayeyes' 2018 Declaration of Candidacy gives his residential address as 17 miles north of the Navajo Mountain Chapter House on Paiute Mesa. This is the same residential address given to Norman Johnson, the County Clerk, when Grayeyes declared his candidacy for County Commissioner in 2012. Exhibit R. It is the same address he used on his application to register to vote in 1984 and when he renewed that registration in 2016. Exhibit Q.

Page 2 of the Form of Declaration used by Grayeyes lists the qualifications – including residency requirements -- which candidates for the office of County Commissioner must have, tracking statutory language which is found at Utah Code, §§17-53-202, 17-16-1. The Form notes that, before accepting a Declaration of Candidacy, the County Clerk must read these qualifications to the candidate and have the candidate affirm that he meets them. Whether or not Nielson followed this instruction in Grayeyes' case, it is undisputed that Nielson accepted and filed the Declaration of Candidacy for Grayeyes without further ado.

Utah Code, §20A-9-202(5), provides that Declarations of Candidacy are valid unless written objections thereto are made within 5 days of the last day for filing declarations of candidacy. If an objection is made, notice promptly must be given to the candidate and the objection then must be resolved within 48 hours after the objection is filed. The election official's decision respecting form is final. The election official's decision respecting substance – for example, a determination based upon residency requirements -- is subject to judicial review on condition that prompt application for such review is made to a court. Pursuant to Utah Code, §20A-9-407(3)(a), declarations of candidacy in Grayeyes' case had to be filed on or before March 15, 2018, and, as calculated under Utah Code, §20A-1-401(3)(a), the 5 day bar date for objection to that declaration under Utah Code, §20A-9-202(5) would have expired March 20, 2018. No objection to Grayeyes' candidacy, pursuant to Utah Code, §20A-9-202(5), ever was lodged with the relevant election official (in this instance, Nielson as County Clerk) against the Grayeyes Declaration of Candidacy.

4. The San Juan County Defendants Collaborate in

Mounting a Challenge to Grayeyes'

Eligibility to Register to Vote,

With a View to Derailing His Candidacy

Instead of attacking Grayeyes' qualifications as a candidate under either Utah Code, §20A-9-202(5) or the two additional procedural avenues which specifically are tailored for such challenges in Utah's election code – namely, Utah Code, §§20A-1-801, *et seq.*, or Utah Code, §§20A-4-402, *et seq.* – the San Juan County defendants enlisted Black to question Grayeyes' eligibility to register to vote pursuant to Utah Code, §20A-3-202.3. This voter registration challenge was memorialized in two documents. The first was a typed, one paragraph, unverified

petition and the second was a form apparently made available to Black by Nielsen as the San Juan County Clerk. Please see both documents which are attached as Exhibit B. Both documents are dated March 20, 2018, but, in light of circumstances detailed below, Grayeyes believes that they probably have been backdated.[2]

No later than March 23, 2018, Turk, a deputy in the San Juan County Sheriff's Office, launched an investigation into the matter of Grayeyes' residency. Authorization for this use of Turk's services, however, is questionable. Law enforcement officials, like Sheriff's deputies, do not get involved in the investigation of civil disputes, such as voter registration challenges. Fraudulent voter registration is criminalized in Utah Code, §20A-2-401(1)(a), but that statute requires a showing of willfully applying to register with knowledge that the applicant is not eligible to vote; a *mens rea* impossible of proof in Grayeyes' case in light of his status as a registered voter since the 1980s and especially after county clerk Norman Johnson blessed Grayeyes' status as a registered voter in the 2012 election.

Nevertheless, it is undisputed that (with whatever end in view) Turk conducted an investigation into Grayeyes', residence. To disguise what probably was improper interference in a civil matter, he noted on the facing sheet of the incident report that he was investigating "False Info" or "FIPO," which is not an offense, so far as Grayeyes can discover, under any ordinance in San Juan County. Please see Turk's report which is attached as Exhibit C.

Not only Turk but also Nielson and Kendall Laws were eager to hide their involvement in a questionable inquiry using unlawful means. As detailed below, while Grayeyes' attorneys were asking Nielson for information (including information about a reported investigation)

[2] The first "complaint" also was concealed from Grayeyes and his counsel until they were able to discover a copy through alternate means. The significance of this concealment is discussed below.

respecting the voter information challenge, through counsel, he denied knowledge about any investigation or evidence being gathered in that connection, claiming that any such matters would be handled at the state rather than county level. Kendall Laws attempted to give the appearance that he had recused himself from the investigation – because his father, Kelly Laws, is running against Grayeyes for the District 2 seat. But the involvement of both men was exposed when Turk's report and related materials were obtained through a government records request. Those documents suggest that Nielson and Kendall Laws had instigated and were directing Turk's investigative efforts, conduct which, in addition to the impropriety of dissembling noted above, may have violated Utah Code, §17-16a-4(b), Utah Code, §20A-11-1203(1), and Utah Constitution, Art. XXII, §5. These all prohibit misuse of official position for personal or political advantage.

On March 27, 2018, near the beginning of his investigation, Turk interviewed Black who told Turk that, on March 23, she had driven to Navajo Mountain in search of Grayeyes' residence, but could not find it (although she was told by an unidentified couple that Grayeyes "lives in" the "Deshonto" area). Turk report, Exhibit C, page 3.

The facing page of Turk's report indicates that he disposed of the case and closed the file on March 28, 2018 (although there are entries in the report, perhaps added later, for the dates of March 30 and April 4.) His report form includes signature points on the end pages for review by and approval of line officers in the sheriff's department, but these are unsigned, suggesting that Turk submitted the report, not to his superiors in the department, but to Nielson and Kendall Laws as protagonists in the campaign to defeat Grayeyes. This result also is suggested by the facing and first pages of the report, showing that Black and Nielson jointly coordinated the use of Turk in furtherance of their private dispute with Grayeyes, and by the e-mails between

Nielson and Turk, showing that the clerk was directing the deputy in conducting the investigation. Turk report, Exhibit C, pages 1 and 3 and Exhibit I.

On March 28, 2018, after seeing what must have been the March 27th entry in Turk's report, Nielson sent a letter to Grayeyes, stating that Grayeyes was the subject of a voter registration challenge for want of residency pursuant to Utah Code, §20A-3-202.3(3)(c). Nielson's letter did not include a copy of Black's charging documents. Nielson's March 28th letter is attached as Exhibit D.

On April 19, 2018, Natalie Callahan, the Communications Coordinator for San Juan County, issued a press release, announcing that the candidacy of Grayeyes was under investigation by county authorities and indicating that the investigation might result in the filing of criminal charges. The press release was calculated to derail Grayeyes' candidacy, since it named him as the target of the investigation and insinuated strongly (and irresponsibly) that the investigation might be criminal in character. This cloud would hang over Grayeyes' candidacy, not only because he could not qualify or go on the ballot without meeting the residency requirements, but also because, in Utah, any criminal violation of the elections code, absent compliance with reinstatement procedures, permanently will disenfranchise a citizen from voting and hence for service in office. *See* Utah Code, §20A-2-101(2)(b). A copy of the press release is attached as Exhibit E.

5. The San Juan County Defendants Collaborate,

Through Obstruction and Prevarication,

In an Effort to Prevent Grayeyes from

Effectively Responding to the Voter Registration Challenge

After receiving Nielson's letter, Grayeyes contacted counsel, Steven Boos and Maya Kane, at the law firm of Maynes, Bradford, Shipps, & Sheftel LLP ("MBSS"), asking for their help in responding. On no fewer than four occasions, April 19, April 25, April 27, and May 3, 2018, MBSS wrote Nielson, demanding a copy of the charging documents so that they could be informed respecting the nature of the charge and any evidence supporting it and in order to prepare adequately to defend against it. Even though Nielson, at this point, was in possession of Turk's report which ultimately would form the basis for his decision in this case, Nielson did not return this correspondence. These letters, with accompanying materials, are attached as Exhibit F.

On April 27 through May 1, 2018, MBSS conducted an e-mail exchange with outside counsel for the San Juan County Clerk's Office, Mr. Jesse Trentadue of the Suitter Axland law firm in Salt Lake City, seeking information respecting whatever investigation Nielson was undertaking in connection with the Black complaint. This effort likewise bore no fruit. These e-mail exchanges are attached as Exhibit G. Nielson referred the MBSS inquiries to Trentadue, instead of handling them through the normal channels of county government, in order to mislead Grayeyes and his counsel into believing that Kendall Laws, the county attorney and son of Grayeyes' opponent, Kelly Laws, had recused himself in relation to the voter registration challenge, when, in fact, Kendall Laws actively was involved in the investigation and prosecution of the challenge to Grayeyes.

The depth of Nielson's nondisclosures and the confusion they wrought is illustrated by these e-mail exchanges. MBSS was pressing Trentadue to clarify whether San Juan County indeed was conducting an investigation into Grayeyes' residency and what evidence, such as utility bills, was deemed relevant in connection with such investigation. The April 27 letter

from MBSS to Nielson specifically notes that an Associated Press reporter, Lindsey Whitehurst, had reported to MBSS that Nielson had said that he needed a copy of utility bills or receipts in order to establish residency for Grayeyes in San Juan County. In response to these MBSS concerns, Trentadue, perhaps relying on representations from his client, Nielson, denied that San Juan County was conducting an investigation, insisted that this was a matter for the state of Utah, and represented that, in light of such state control, Nielson knew nothing about the investigatory materials in play. It is clear, however, from an examination of the documents in Exhibits C and I, that an investigation was being conducted by Nielsen, and that he deemed the existence of utility bills to be highly material to the question of residency and had tasked Turk specifically to explore that evidentiary issue. This e-mail exchange also shows that the San Juan County defendants attempted to conceal the role of Kendall Laws in directing Turk – by suggesting that the state was in charge or that Laws was recused in deference to prosecutors from another jurisdiction.[3] As a matter of fundamental fairness, Grayeyes and his counsel had a right to know the charges and evidence against them so that they adequately could prepare a response. But this also was imperative in light of Utah Code, §20A-3-202.3(6)(c) which limits the scope of any judicial review of the county clerk's decision on voter registration eligibility to those matters actually submitted by the parties or used by the clerk in processing the dispute.

On May 3, 2018, after sending the last letter found in Exhibit F, MBSS submitted a records request under Utah's Government Records Access and Management Act ("GRAMA"), seeking to obtain whatever evidentiary materials had been made available to Nielson in

[3] The press release which the San Juan County defendants issued April 19 (Exhibit E) also appears to be part of the effort to conceal the nature and extent of Nielson's investigation from Grayeyes and his counsel – by implying that the Clerk's office is handicapped from doing so in light of logistical problems, especially the "lack of an addressing system in a large part of the county [which] makes it extremely difficult for the clerk's office to verify residency."

connection with the voter registration dispute and which, therefore, might form the basis for any decision which he might make in the matter. Please see the GRAMA request which is attached as Exhibit T.

However, on May 9, 2018, before he responded to the GRAMA request, Nielson issued his decision, declaring that Grayeyes was not a resident of San Juan County and therefore ineligible to register to vote. On May 10, 2018, Nielson made another decision, announcing that, in light of his voter registration decision of May 9, Grayeyes could not be a candidate for the office of County Commissioner and therefore would be denied a place on the November, 2018, ballot. Both of Nielson's decisions are attached as Exhibit H.

On May 24, 2018, over two weeks after making these decisions, Nielson finally sent a partial response to the GRAMA request of Grayeyes and MBSS. The documents included in this response revealed that, contrary to the representations of Nielson through Trentadue, Nielson in fact had been gathering evidence relative to the residency of Grayeyes all along, that Kendall Laws was involved in that effort, and that both were using Turk, a deputy sheriff (under the guise of a criminal investigation) in their campaign, on behalf of Kendall's father, Kelly, to discredit and disqualify Grayeyes as a candidate. A copy of the GRAMA response is attached as Exhibit I.[4]

6. Nielson's Handling of Black's Voter Registration Complaint

[4] Nielson's cover letter which was sent with the documentary response to the GRAMA request (Exhibit I) states that, "No responsive records are being withheld from this response." But this was untrue. The GRAMA response failed to include Black's first complaint described in the text above. Grayeyes and his counsel later obtained a copy of this document from another source. Nielson withheld this document from Grayeyes and MBSS because it more clearly revealed that, but for Nielson's proactive intervention and investigative assistance, Black had no foundation for bringing her complaint and that, without more, as the statute required, it should have been dismissed summarily.

Shows the Discriminatory Bias of the San Juan County Defendants Against Grayeyes

Nielson's decision to disenfranchise Grayeyes as voter was contrived for the purpose of silencing his speech as a candidate, and the extreme irregularities in the decision-making process demonstrate this fact. Those irregularities include the following.

Nielson's choice of procedure was an abuse of process. Utah's election code contains three methods for disqualifying candidates, §§20A-9-202(5), 20A-1-801, *et seq.*, and 20A-4-402, *et seq.* That code contains one method for questioning a person's eligibility to vote, §20A-3-202.3. Each set of procedures is carefully tailored to the circumstances and importance of the challenge in question. Section 20A-9-202(5) provides for summary treatment by election officials of objections to declarations of candidacy, with unlimited review by district courts of those decisions. This section of the code, which requires objections to be made immediately after the deadline for filing declarations of candidacy, is a pre-convention clearance device so that, where a candidate is not qualified to run for office, his resources and those of his chosen political party won't be wasted in an unnecessary convention fight. Sections 20A-1-801, *et seq.*, and 20A-4-402, *et seq.*, may be used in post-convention or even post-election contests, but they have more elaborate procedural frameworks, overseen by disinterested – and ultimately judicial -- officers, which ensure due process to protect candidates who, at these stages of campaigning, have invested substantial resources. These safeguards also protect the body politic which may have expressed its choice by nominating or electing one candidate instead of another. Section 20A-3-202.3 on the other hand is a streamlined procedure for testing a person's eligibility to register to vote with limitations on judicial review. The Utah courts have taken these distinctions – making sure that specific violations of the election code are remediated properly with appropriate procedures – very seriously. *E.g., Maxfield v. Herbert*, 284 P.3d 647, ¶¶ 33-37 (Utah

2012) (complaints respecting campaign finance violations must be brought through procedures set forth in Utah Code, §20A-1-703 [now amended and renumbered as Utah Code, §20A-1-801], rather than Utah Code, §20A-4-402). The San Juan County defendants knew that their goal was to disqualify Grayeyes as a Commission candidate, but they ignored the requirements, procedures, and protections vouchsafed Grayeyes as a candidate under §§20A-9-202(5), 20A-1-801, *et seq.*, and 20A-4-402, *et seq.* They instead used §20A-3-202.3 to challenge Grayeyes' status as a voter and then bootstrapped from there in order to disqualify Grayeyes as a candidate in the Commission race. They did this because it afforded greater opportunity for these defendants, and especially Nielson, to manipulate procedures and control outcomes while at the same time cutting off effective access to the district courts for judicial review of Nielson's decision – all with the unconstitutional purpose to oust Grayeyes from the November ballot.[5]

[5] In a May 30, 2018, *post hoc* rationalization, Nielson attempted to justify what he did to Grayeyes by reference to §20A-9-202(5) (although he mis-cites the statute), arguing that he had a *duty* to ensure that Grayeyes' declaration of candidacy was valid. A copy of Nielson's correspondence containing this *mea culpa* is attached as Exhibit S. But this attempted justification is further demonstration of the *ultra vires* nature of his conduct. First, Black challenged Grayeyes' voter registration eligibility expressly under §20A-3-202.3, not his declaration of candidacy under §20A-9-202(5). These statutes use radically different procedures and serve entirely different purposes. Nielson's May 30th letter therefore is an admission that he decoyed Grayeyes by pretending to proceed under one set of rules while intending all along to invoke another. Second, Neilson had no *duty* independently to review Grayeyes declaration of candidacy when it was filed March 9, 2018. Nielson was required, pursuant to §20A-9-201(3)(a)(i), merely to read the qualifying requirements to Commission candidates and then to hear Commission candidates affirm that, in their case, those requirements were met. This is in contrast to his role with other, separately designated candidacies with licensure qualifications, such as those for county attorney or district attorney or county sheriff, where §§20A-9-201(3)(a)(ii), (iii), and (iv), obligate the clerks to "ensure" that these special qualifications are met before accepting the candidate's filing. Third, §20A-9-202(5) requires objections to candidacy to be filed within 5 days of the last date for submitting a declaration of candidacy and further demands that the clerk then must decide any such objection within 48 hours from the date it is filed. If the clerk makes a substantive ruling, immediate, unlimited review of that ruling may be obtained from a neutral judge. Grayeyes believes and the evidence suggests that Nielson and Black may have backdated their complaint against Grayeyes in order to disguise their failure to meet §20A-9-202(5)'s 5 day bar date. But in any event it is undisputed that Nielson did not act

Nielson overstepped his authority as an election official by the manner in which he administered and decided the voter registration dispute. Section 20A-2-303.2, at subparts (2) and (4), empowered Nielson to resolve Black's complaint on either a summary or a regular basis. Grayeyes discusses Nielson's failure summarily to dispose of Black's complaint below. In the event summary disposition was inappropriate, however, subpart (4) of the statute authorized Nielson merely to determine whether a person is eligible to register to vote on the basis of a statutorily controlled record. Nielson went far beyond these parameters by initiating, organizing, and conducting the prosecution of Grayeyes and then deciding the case on the basis of a type of evidence that expressly is prohibited by the terms of the statute. These statutory excesses had due process implications. An impartial decision-maker is essential to due process, but Nielson forsook this role when he became complainant, prosecutor, judge, and jury in the same docket. Nielson's eagerness to prosecute and his blindness to the inherent conflict of both prosecuting and deciding a case demonstrate that his overarching goal was not to administer the voter registration statute as a neutral elections officer but to stifle Grayeyes' candidacy.

Nielson went beyond the pale in recruiting Deputy Turk to assist in the investigation of a civil dispute, by collaborating with Kendall Laws, the County Attorney and son of Grayeyes' election opponent, in conducting that investigation, in attempting to conceal these improprieties by pretending that the investigation was criminal in nature, and in dissembling about his role in all these respects to MBSS. Utah Code, §20A-3-202.3 does not authorize county clerks to

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within the statute's further 48 hour limitations period. This failure sabotaged the primary purpose of this measure, namely, to ensure that political parties have a pre-convention, threshold certainty respecting the legitimacy of the candidates who will contend for nomination in those arenas. The San Juan Democratic Party, which nominated Grayeyes at a convention held March 24th, was denied this opportunity. As a public official, charged with neutral administration of election laws, Nielson never would have rigged procedures or played so loosely with these statutes without a partisan purpose to block Grayeyes' from the November ballot.

conduct investigations into voter registration disputes, to enlist law enforcement personnel in the resolution of civil matters, to collaborate with conflicted county attorneys, to disguise these usurpations of power by improperly characterizing such a proceeding as criminal rather than civil in nature, or to lie about their role in order to obstruct a proper response from the attorneys for the citizen whose voting status is under challenge. Nielson drew outside all of these lines, covering his abuses with a false mantle of statutory legitimacy, with a partisan desire to keep Grayeyes off the November ballot.

Nielson flagrantly disregarded the voter protection procedures set forth in §20A-3-202.3. A citizen's right to vote is sacrosanct and therefore statutes which authorize a challenge to that right should be carefully administered. Nielson, however, failed properly to administer the statute for testing voter registration eligibility, and this failure was so profoundly egregious that no explanation other than a wrongful use of public office for partisan ends – to keep Grayeyes off the November ballot – is possible. Here is a catalogue of Nielson's maladministration of Utah Code, §20A-3-202.3.

Section 20A-3-202.3(1) sets forth the requirements respecting those who may file a complaint as well as the form and content of any particular challenge. Black's complaint failed to satisfy the most important of these requirements.

(i) Subpart (1)(a) allows any "person" to file a written complaint with the "election officer," in this case, the county clerk. The disjunction between the person filing and the official receiving the complaint shows that clerks, as neutral officials, are not meant independently to launch voter registration challenges. Nielson actively participated in the filing and prosecution of the complaint against Grayeyes.

(ii) Subpart (1)(a)(ii)(C) requires the complainant to identify the basis for the challenge "as provided under Section 20A-3-202[,]" which sets forth bases to challenge an individual's eligibility to vote. Black's initial complaint, however, could be read as a challenge to Grayeyes' candidacy, rather than his voter registration; it merely avers that, "It has been brought to my attention that [Grayeyes] may live outside of the county and state of Utah." Some time after this initial complaint was submitted, however, Nielsen helped Black fill out an official form in which Black avers that Grayeyes' principal residence is not within the appropriate geographical areas and therefore he is ineligible to register to vote in San Juan County. Black and Nielson changed the form of the complaint because a voter registration challenge would give Nielson more control over the proceeding, allowing him to manipulate the desired outcome of blocking Grayeyes from the November ballot. In addition, Black and Nielson feared that their backdating of the complaints might be discovered, leaving them without recourse to pretend that they were challenging Grayeyes' declaration of candidacy under §20A-9-202(5), and therefore determined to circumvent that problem and defeat Grayeyes' candidacy by using a backdoor respecting voter registration under §20A-3-202.3. Copies of the complaints are attached as Exhibit B.

(iii) Subparts (1)(a)(ii)(D), (1)(a)(iii)(B), and (1)(c) require the complainant to "provide[ ] facts and circumstances supporting the basis provided[,]" and these "facts and circumstances," moreover, must be grounded upon personal knowledge and belief, as opposed to unsupported allegations or unidentified witnesses. Neither of Black's complaints meet these standards. Her first complaint says that "[i]t has been brought to my attention" that Grayeyes may not be a resident of the county, a statement which clearly isn't based on personal knowledge, directly alludes instead to the hearsay quality of the testimony, and just as clearly fails to name the anonymous party which brought this information to her attention. Black's second complaint,

even though completed with Nielson's assistance, also fails the statutory tests of personal knowledge, non-hearsay reports, and identification of sources. She writes: "The place Willie Greyeyes [sic] claims to live is his sisters [sic] home [sic]. He occassionally [sic] stays there but he does not have a permanent residence in Utah. He also claims to live in his mothers [sic] home on Piute [sic] Mesa. It is not livable, windows boarded up, roof delapidated [sic]. No tracks going into home for years." The first three sentences are based upon Grayeyes' claims not Black's personal knowledge. The last sentence, about Grayeyes' mother's home, has the feel of an observation which was made in person, but we know that Black did not visit Grayeyes' mother's home on or before March 20 when she swore out this affidavit under oath, because she told Turk that she did not search for Grayeyes' home until March 23 and, moreover, that she failed to locate (and hence could not have viewed) any Grayeyes residence at that time. Exhibit C, page 3.[6] According to the facing page of the Turk report (Exhibit C, page 1), Turk initiated his investigation as a result of a telephone complaint from Black on March 23, and, moreover, all of Black's statements in her March 20 complaint appear to be derived from Turk's report which was not "completed" until March 28. These combined circumstances strongly suggest that, not only was the Black complaint based on hearsay rather than personal knowledge, but also that Black and Nielson backdated the complaint to March 20 after they first enlisted Turk to investigate on March 23 and then reviewed Turk's report on March 28. Finally, Black's argument that "he [Grayeyes] does not have a permanent residence in Utah[,]" is not a fact or circumstance as required under subpart (1)(a)(ii)(D), but a *non sequitur* which Black derives

[6] What's more, Black's foundation for the unproven premise that Grayeyes in fact claimed to reside in his mother's home -- or that the home she observed in fact belonged to Grayeyes' mother -- is not given. Nor does she explain the temporal omniscience which allows her to conclude that there were "no tracks" going into that home -- on a sandy, wind-blown mesa – for a period of "years."

from her unsupported allegation that Grayeyes only "occassionally" [sic] stays at his sister's home, her equally unsupported allegation that his mother's home on "Piute [sic] Mesa" is unlivable by her standards, and her unarticulated assumption that there is no other place within the vastness of San Juan County where Grayeyes could be residing. This is nothing more than a conclusory proposition (constructed, moreover, upon an illogical premise) and hardly the personal intelligence or hard facts which should be required as evidence to disenfranchise a voter.

(iv) Subparts (1)(a)(iii) and (1)(c) require the complainant to swear, under penalty of perjury, that he or she has exercised due diligence personally to verify the facts and circumstances which are set forth in the complaint and that those facts and circumstances are not based upon unsupported assumptions or anonymous tips. Black swore under penalty of perjury that she exercised due diligence before filing her complaint, but this cannot be true, since she swore to the complaint March 20, but did not drive out towards Navajo Mountain in search of evidence until March 23 and, even then, did not find any evidence of moment. As already noted, moreover, the "facts" averred in her complaint apparently were derived, not as a result of her due diligence, but taken instead from Turk's report which wasn't "completed" until March 28. That report is hearsay insofar as Black (and Nielson) are concerned and cannot be a matter of either her due diligence or her personal knowledge. It bears repeating that Turk's report is entirely hearsay and that, moreover, with the exception of Turk's observations respecting certain houses, the information from the report is double and sometimes even triple hearsay, most of which comes from unidentified, and, hence, anonymous sources. The report likewise, contrary to the requirements of the statute, is unsworn and hence unverified.

Subpart (2) provides that, if the complaint is not in proper form or if it is incomplete or if it fails to satisfy the requirements of subpart (1), the clerk "shall" dismiss the complaint. Even laypersons realize that "shall" is obligatory, not merely advisory, but Utah Code, §68-3-12(1)(j), confirms this construction, providing that, when used in any Utah statute, the word "[s]hall means that an action is required or mandatory." Black's complaint was horribly deficient in both form and substance, and yet Nielson did not obey this statutory command to dismiss the proceeding. He instead undertook to cure those deficiencies, by collaborating with Kendall Laws, commandeering Turk, directing an investigation, and issuing press releases.

Subpart (3) provides that, if a challenge to a voter's registration "meets the requirements for filing under this section," the clerk shall attempt to give notice of the challenge to the voter, informing him or her that evidence proving the entitlement to vote may be submitted up to "(A) 21 days before the date of the election[.]" As already noted, Black's complaint should have been dismissed pursuant to subpart (2) and Nielson never should have proceeded with notice to Grayeyes since that complaint surely did not meet the requirements of the statute within the meaning of subpart (3). But Nielson nevertheless sent a letter to Grayeyes on March 28 (Exhibit D), alerting him to the voter registration challenge. Three things are noteworthy about this letter. First, Nielson was required to notify Grayeyes, pursuant to subpart (3)(B)(v)(A), that he could submit evidence up to 21 days prior to the election which, in the pre-convention context of this dispute, would have meant the primary election scheduled for June 26th, or, in other words, a submission deadline of June 5th. Nielson's letter did not alert Grayeyes to this deadline, but, instead, asked for his rebuttal information "as soon as possible." Second, in light of the language of subpart (3)(B)(v)(A), Grayeyes had a statutory right to submit materials in order to rebut the complaint until day's end June 5th, but Nielson eclipsed that right by issuing his decision on the

complaint May 9. Nielson deliberately accelerated his date for decision because MBSS had sent a GRAMA request May 3, returnable May 13 (Exhibit T), demanding access to all materials being used in the investigation of the complaint, a request which would have obligated Nielson to turn over the Turk report, which in turn would have revealed the extent of Nielson's procedural abuses as well as the illicit collusion with Kendall Laws, revelations to which Grayeyes could have responded before the June 5 deadline. Grayeyes and MBSS unfairly were denied this opportunity by the manner in which Nielson disobeyed the statute and manipulated timetables within the proceeding. Third, the March 28 letter is a further indication that Nielson and Black may have backdated their voter registration complaints to March 20. Subpart (3)(a) requires the clerk to send notice "upon receipt" of a complaint. Had Nielson received the Black complaint March 20, he would have sent notice on the 20th or 21st, not the 28th. But, as noted above, Nielson and Black waited until they heard from Turk on the 28th, then prepared the complaints on the 28th, backdating them to the 20th, before issuing the notice to Grayeyes on the 28th.

Subpart (4)(b)(i) provides that the complainant has the burden of proving a registrant's ineligibility to vote "by clear and convincing evidence[.]" And subpart (4)(b)(ii) further provides that the "election officer shall resolve the challenge based on the available facts and information submitted, which may include voter registration records and other documents or information available to the election officer." The thrust of this statute is plain: The complainant must prove her case; the case should not be made by the election official who has a duty to remain impartial in order to render an unbiased decision. But Black, as we have seen, did not prove her case; she failed to submit evidence (clear, convincing, or otherwise) in accordance with the statutory standards – evidence based on personal knowledge (subpart (1)(a)(iii)), that is neither hearsay

nor attributed to an unidentified source (subpart (1)(c)). Nielson's decision, since it went against Grayeyes, therefore, had to rest on Turk's report, but this was unlawful for two reasons. First, this evidence was not submitted, as the statute requires, *by* Black *and* under oath (subpart (1)(a)(iii)). Second, the Turk report itself was hearsay (with those parts of the report material to Nielson's May 9th decision entailing double, triple, and in some instances even quadruple hearsay), rather than personal knowledge, and the preponderance of witnesses were unidentified (subpart (1)(c)). Nielson believed that his reliance on the Turk report was justified in light of the wording of subpart (4)(b)(ii) which he interprets as a license to look at any other documents or information he desires. This reading ignores the text which limits "other documents and information" to those "submitted" by the parties or, at most, already "available" to the clerk, such as voter registration records. It does not authorize Nielson to ignore the burden of persuasion which is placed on the complainant, to doff the cap of impartiality in order to become a prosecutor in the case, or to enlist a deputy sheriff to create "evidence" which otherwise would be decidedly unavailable to him. What's more, since the statute requires the complainant to verify all submissions with an oath, and to make sure that evidence is based on personal knowledge, it would be anomalous for Nielson, as he did here with the Turk report, to rely on unverified hearsay and unidentified sources. In addition, although Nielson stretched the meaning and purpose of the statute beyond all recognition, on the pretext that a sheriff's department investigation or deputy sheriff's report constitute "available" information which he is entitled to use, he completely ignored the most relevant and readily "available" information in his voter registration files, namely, the 2012 decision by his predecessor, Norman Johnson, holding that Grayeyes was a *bona fide* resident and validly registered voter of San Juan County and a fully qualified candidate in that year's election to the office of County Commissioner.

7. Nielson's May 9th Decision to Disenfranchise Grayeyes

Shows the Discriminatory Bias of the San Juan County Defendants Against Him

These extreme departures from proper administration of §20A-3-202.3, as already noted, demonstrate the discriminatory bias of the San Juan County defendants against Grayeyes, and a purpose unlawfully to prevent Grayeyes' access to the November ballot. But Nielson's May 9th decision which disenfranchised Grayeyes, depriving him of the right to vote in San Juan County, is an even clearer revelation of that unconstitutional intent. Grayeyes details below the flaws in that decision-making process and in that decision.

The May 9th decision was not the product of impartial decision-making. To begin, Nielson's decision was not the result of disinterested decision-making by a neutral county clerk; it was the product of a partisan effort to disqualify Grayeyes as a candidate and to block his access to the ballot. To this end, Nielson assisted Black in preparing and possibly backdating a complaint under Utah Code, §20A-3-202.3. Nielson improperly enlisted a law enforcement official, Turk, to conduct discovery outside the scope of the statute in question and for use in the resolution of a civil dispute. Neilson then dissembled, attempting to disguise his improper use of Turk as a proper investigation of criminal misconduct. Neilson dissembled further, through his lawyer, Trentadue, by feigning ignorance about his role in connection with the investigation in order to defeat the efforts of Grayeyes' counsel properly to respond to Black's complaint. He also dissembled in order to conceal the fact that Kendall Laws, who should have played no role in this matter – in light of his relationship as son of Grayeyes' Republican opponent and in light of the statutes which regulate ethical conduct for county officials – actively was engaged in the investigative process, as clearly revealed in the body of Turk's report. Exhibit C, page 6. Indeed, Nielson's referral of the MBSS correspondence to Trentadue for a response was itself a

device which Nielson deployed falsely to imply that Kendall Laws was not working on the case against Grayeyes. Kendall Laws also attempted to throw plaintiffs off this scent by "referring" the "investigation" of Grayeyes to the Davis County Attorney in order to give the false appearance that he indeed was recused. Grayeyes believes that Kendall Laws also improperly may have assisted Nielson in preparing and issuing the April 19th press release and in writing the decisions on May 9th and May 10th which disenfranchised and disqualified Grayeyes.

Nielson's crabbed reading of the residency requirement for voting registration was contrary to the standards of liberality which are set forth in Utah case law and codified in its elections code. Utah's election code and the case law which construes it require election officials like Nielson to interpret and apply the relevant statutes liberally with an eye to enfranchising voters and increasing participation by all citizens in the electoral process. *See* Utah Code, §20A-1-401(1); *Rothfels v. Southworth,* 356 P.2d 612, 617 (Utah 1960) (voter registration challenge; statute should be read liberally to effectuate voting which is "among the most precious of the privileges for which our democratic form of government was established[ ] "). This result also is strongly implied by the procedural and evidentiary restrictions found in Utah Code, §20A-3-202.3, which must be met before disenfranchisement of a voter may occur. Nielson's decision ignores these principles. He violated the statutes, twisted the rules, and manipulated the processes which the San Juan County defendants deployed against Grayeyes, all with a purpose of extinguishing his voice as a candidate and voter.

Nielson's partisan bias caused him grossly to misread and unlawfully to apply the statutory requirements for voter residency in Grayeyes' case. In Utah, citizens have a right to vote but are not eligible to exercise that right absent registration. Registration is conducted by county clerks and in order to register, among other proofs, the applicant must show that he or she

"currently resides within the voting district or precinct in which the person applies to register to vote." Utah Code, §20A-2-101(d).

Residency for voter registration purposes is defined in Utah Code, §20A-2-105(3)(b): "A person resides within a particular voting precinct if, as of the date of registering to vote, the person's principal place of residence is in that voting precinct." "Principal place of residence," is a term of art which is defined in Utah Code, §20A-2-105, to mean "the single location where a person's habitation is fixed and to which, whenever the person is absent, the person has the intention of returning."

When a person registers and names a principal place of residence under oath, there is a rebuttable presumption that he resides in Utah as well as the applicable precinct -- which presumption may be overcome only when, after objection, it is shown as a matter of law or by clear and convincing evidence that the individual's principal place of residence is not in Utah. Utah Code, §20A-2-105(7).

Grayeyes registered to vote with the San Juan County Clerk in 1984 and then renewed that registration in 2016. On both occasions, he affirmed under oath that his principal place of residence was at a stated location in the vicinity of Navajo Mountain. What is more, in 2012, under challenge, the County Clerk, Norman Johnson, found that this indeed was Grayeyes' principal place of residence -- for the purpose of both voter registration and candidate qualification. Hence, as of Black's March, 2018, challenge, Grayeyes' Navajo Mountain address, not only enjoyed a presumption of veracity, rebuttable only by clear and convincing evidence, as his principal place of residence for voter registration purposes, but also had been found expressly to be such in a 2012 decision by Norman Johnson as an election official. Moreover, Black's challenge (and Turk's report) did not question the fact that, on these landmark

dates of 1984, 2012, and 2016, Grayeyes' principal place of residence was at the address indicated in Navajo Mountain, but merely asserted and purported to show that, as of March 2018, Grayeyes no longer resided at that location.

This background is important because, pursuant to Utah Code, §20A-2-105(5)(b), a person may not have more than one principal place of residence at the same time, and §20A-2-105(5)(c) says that a person does not lose one principal place of residence *until* he establishes another principal place of residence. Hence, when these statutes are read in tandem with §20A-2-105(7) and the circumstances described above, it means that, in order to prove – by clear and convincing evidence -- that Grayeyes no longer had a principal place of residence in Utah, Black had to show and Nielson had to find that Grayeyes had established a new principal place of residence in Arizona or somewhere else. Remember, too, that principal place of residence, old or new, is defined to mean a "single location" with a "fixed habitation" to which the voter always intends to return.

The relevant inquiry in March 2018, accordingly, was not whether Grayeyes' Navajo Mountain property theretofore had been his principal place of residence, a fact already established in the 2012 decision, if not by the presumption advanced in §20A-2-105(7)(a). The relevant inquiry was whether Grayeyes had lost residency at Navajo Mountain by behavior, within the meaning of the statute, which signified that he had established a new principal place of residence in Arizona. Black and Nielson therefore had to show by clear and convincing evidence that Grayeyes – again adverting to the statutory definition – had established *in Arizona* a "single location where a person's habitation is fixed and to which, whenever the person is absent, the person has the intention of returning." Utah Code, §20A-2-105(1)(a). Nielson's decision, however, focused exclusively on whether Grayeyes lived at Navajo Mountain, and

nowhere demonstrated, or even analyzed – using the factors set forth in §20A-2-105(4) -- whether or where Grayeyes might have a "single location" with a "fixed habitation" to which he always had the intention of "returning" in Arizona.

The only "evidence" to which Nielson could have resorted (had he chosen to make this inquiry) was Turk's report. That document, however, actually disproves that Grayeyes had a principal place of residence in Arizona, that is, a "single location" with "fixed habitation" to which he always intended to return. Turk's witnesses, most of whom remained unidentified, variously stated that Grayeyes lived in Tuba City, Kayenta, Page, and Cameron (in addition to Navajo Mountain). Within one location, Tuba City, witnesses said Grayeyes lived in a number of different places, behind a car wash, in a red brick cinder house, and in a trailer by a church. At one point in his 9 pages of single-spaced analysis, Turk reports that Black told him that a young couple (who remain nameless) told her that Grayeyes lives in "Deshonto," a place which, according to Google maps, simply does not exist.

Witnesses from Arizona, according to Turk's reportage, either could not identify or had difficulty pinpointing whether or where Grayeyes might have a fixed habitation at a single location in that state. "Ladies" in the main office of the Navajo Chapter House in Tuba City knew Grayeyes by name, but didn't know where he lived. People "behind the car wash" in Tuba City didn't even know who Grayeyes was. Carlene Yellowhair and Candelora Lehi, both of whom knew Grayeyes from shared tribal responsibilities, didn't know where he might live in Arizona and in fact assumed he had residency in Navajo Mountain in light of his role as a chapter official in representing that area. The Navajo Police Department in Tuba City didn't have an address for Grayeyes in Tuba City. So they loaned Albert Nez, one of their investigators, to assist Turk in a search for Grayeyes. They also recommended a call to the Navajo Police

Department in Kayenta district because "they knew Grayeyes lived in their area." But the folks in Kayenta district "had an address for him at the same spot where [Turk] had checked the Grayeyes family property [on Navajo Mountain]." Then Turk called Kendall Laws for an update on the investigation and Kendall Laws reported that Kelly Pehrson, the San Juan County Manager, had reported that he had received an "anonymous tip" that Grayeyes lived with a girlfriend, Victoria Bygone, in Tuba City. Following this lead, Turk contacted Lucida Johnson, the mother of Victoria Bygone, who informed Turk that Grayeyes "live[d] there with Victoria and added that Willie lives in Navajo Mountain," adding again that "he is everywhere on the rez because he is a councilman." This echoed another unnamed witness at Navajo Mountain who informed Turk that Grayeyes was "from" Navajo Mountain but lived "all over." Grayeyes himself told Turk that, although he stopped with his girlfriend when working in Arizona, he didn't have a place of his own in Tuba City, a statement never contradicted in Turk's report.

Although it was completely improper for Nielson to solicit and use Turk's report in deciding this voter registration issue, it would have been impossible for Nielson (had he analyzed the real issue in this case) to translate the comments from Johnson and others that Grayeyes is "everywhere on the rez" and Black's quadruple hearsay that he was in "Deshonto," a place from nowhere, and the suggestions that he was by turns in Page, Kayenta, Cameron, and four different sites in Tuba City into a conclusion that his principal place of residence was a "single location" with a "fixed habitation" in Arizona.

In summary, Utah Code, §20A-2-105(5)(c) says that Grayeyes could not have lost the principal place of residence which, in 2012, 1984, and 2016, by official resolution and statutory presumption already had been established at Navajo Mountain unless and until, pursuant to the March, 2018, complaint and May, 2018, decision, in light of changed circumstances, it was

found that he had established another principal place of residence in Arizona. Hence, Black had the burden of persuading Nielson, by clear and convincing evidence, that Grayeyes had lost his principal place of residence at Navajo Mountain by establishing another principal place of residence outside Utah and inside Arizona. To arrive at this conclusion, Nielson necessarily would have to rely upon Turk's report, but that document does not show that Grayeyes established another principal place of residence, a fixed habitation in a single location to which he always intended to return, anywhere in Arizona – Tuba City behind the car wash, Tuba City in a red brick cinder house, Tuba City in a trailer park, Kayenta, Page, Cameron, or "Deshonto." And Neilson's May 9th decision neither analyzed this issue by using the factors set forth in §20A-2-105(4), nor rendered any findings or conclusions that one of these locations was Grayeyes' new principal place of residence in Arizona as required under §20A-2-105(5)(c). Instead, Nielson peremptorily struck Grayeyes from the ballot.

Even Nielson's improper focus on whether Grayeyes had a principal place of residence on Navajo Mountain was misguided through bias. Instead of following the language and the logic of Utah Code, §20A-2-105, Nielson held that Black's complaint itself was clear and convincing evidence, sufficient to rebut a prior finding and the statutory presumption that Grayeyes had his principal place of residence on Navajo Mountain, and then proceeded to analyze, not whether Grayeyes had lost that residence by establishing a new, fixed habitation at a single location in Arizona, but whether Navajo Mountain, as an original question, could be Grayeyes' principal place of residence. To this end, Nielson analyzed and applied the factors found at §20A-2-105(4) to determine whether Navajo Mountain – rather than an alternate fixed habitation at a single location in the state of Arizona -- in fact was Grayeyes' principal place of residence.

But even here, in this backwards analysis of §20A-2-105, Nielson missed the mark. Section 20A-2-105(4) requires county clerks to evaluate and weigh the impact of nine factors on the question of residency. Nielson believed only four of these were relevant in Grayeyes' case, although he then invoked the statute's catch-all clause, "other relevant factors" to examine two more: Grayeyes' prolonged absences from his home in Navajo Mountain and the public's perception that he did not live there. But Nielson's treatment of these factors – relying upon the hearsay from Turk – was slanted towards his partisan objective – kicking Grayeyes off the ballot.

For example, Nielson treated factor one, "where a person's family resides," as unimportant, because Grayeyes has a sister in Utah and an uncle in Arizona. But the weight of comment in Turk's report shows that Nielson's arithmetical cancellation in this regard is oversimple and indeed a misapplication of this factor. Turk's report says that the sister, Grayeyes' closest living relative, is a blood sister who teaches at the community school in Navajo Mountain with whom Grayeyes spends 60 to 70 percent of his time. Grayeyes also has a nephew who lives in Navajo Mountain, a fact which Nielson passes over in his eagerness to call this relationship factor a one to one wash. Grayeyes' mother and aunt left him property near Navajo Mountain, property which Grayeyes, without contradiction, calls a "birthright," another familial connection which Nielson suppresses.

Nielson similarly gave insufficient weight to "the location of the person's employment, income sources, or business pursuits." It is undisputed that Grayeyes runs cattle at Navajo Mountain. And but for Nielson's racial astigmatism, he would understand that, in Navajo tradition, the location of cattle is an important signifier of one's homestead. It also is undisputed that Grayeyes works as a tribal official in the Navajo Nation, and that this work puts him front and center as a representative for the people of Navajo Mountain – the same citizens, it should be

added, whom Grayeyes would represent were he elected to the District 2 seat on the San Juan County Commission. This work responsibility, in fact, is the context for which he is known by the very few named witnesses in the Turk report. More than this, Grayeyes is the chair of the board of trustees of a non-profit corporation, Utah Dine Bikeya, which is organized under the laws of the state of Utah, headquartered in Salt Lake City, and dedicated to the promotion of the Bears Ears National Monument in San Juan County. Even a cursory search on Google, unaided by Turk's investigative prowess, shows that Grayeyes is the face of this movement which has been a *cause celebre* in southeastern Utah for at least the last 6 years. The Blacks, Nielsons, Laws, and Lymans of San Juan County did not care where Grayeyes lived or voted from 1984 when he first registered until the second decade of the 21st Century. But when Grayeyes became active in San Juan County issues, making the kinds of connections which durational residency requirements are purposed to advance, they pulled on the levers of power in local government in order to suppress his vote and silence his voice.

Nielson likewise gives short shrift to the "location of real property owned by the person[.]" The Turk report notes that Grayeyes owns real property and runs cattle and has employment, as a tribal representative and community activist at Navajo Mountain, the three most important factors in determining voter registration residency according to Utah case law. *See Dodge v. Evans*, 716 P. 2d 270, 274 (Utah 1985) (prison inmate deemed not resident in Salt Lake County for voter registration purposes because of want of ownership of real property or personal property and absence of "any other contacts" in that community). Lorena Atene in Utah showed Turk a map in her possession respecting Grayeyes' real property at Navajo Mountain, and the Navajo Police Department at Kayenta, Arizona, gave Turk, through his dispatcher, the address to this same real property. And the real property, in Grayeyes' case, is much more than

mere land. It is his inheritance, a birthright from his local clan, and the place where, at birth, that family buried his umbilical cord, a sacred ceremonial space which signifies home and fixed habitation. Grayeyes explained and stressed this circumstance in his counsel's correspondence and sworn statements to Nielson. But Nielson, for reasons which are all too apparent on the face of this record, chose to ignore what may have been the most significant indicator of principal place of residence in this case, an indicator so significant that it has figured in Tenth Circuit opinions which bear upon this subject.

In *United States v. Tsosie*, 849 F. Supp. 768 (D.N.M. 1994), Judge Hansen entered an order of abstention so that Navajo courts in the first instance could apply tribal custom, part of the common law of an Indian tribe, to determine a real property ownership issue between two members of the Navajo Nation. Tsosie's claim was based on the fact that her maternal ancestors had buried her umbilical cord on the land in question. In deciding to allow Navajo Tribal Courts to decide this question in the first instance, Judge Hansen adverted to affidavit testimony from Tom Tso, a former Chief Justice of the Navajo Nation Supreme Court, who opined that Navajo cultural traditions are "sacred" because they are "rooted in religious songs, prayers and chants[,]" and for this reason are embodied as part of the Navajo common law. Land inherited from maternal ancestors, according to Mr. Tso, has the status of *res judicata* as a principle. And burial of the umbilical cord has "'profound significance,'" suggesting a fundamental tie to Mother Earth. Tso opined that "'Relocating traditional Navajos from the land where their umbilical cords are buried and where they have always lived is uprooting them from their religion, and from a central part of their own identities. There are no precise analogies in the non-Navajo society of which I am aware to describe the harm that such relocation causes. It would be like yanking an infant away from its mother when the infant is still screaming and the mother is

reaching for it, and the mother is killed of loneliness and the child is killed for lack of tenderness and sustenance. It is tantamount to separating the Navajo from her spirit.'"

In contrast to these familial, cultural, and religious ties to Grayeyes' land and cattle at Navajo Mountain, Nielson points to "other relevant factors" which he felt entitled to consider in deciding that Grayeyes did not have a principal place of residence in Utah. These were, first, Grayeyes' long absences from Navajo Mountain, including what Nielson believed to be the most recent of these absences, a six month hiatus between the present and last fall when Grayeyes tended to his cattle operation. This application of the Turk report to the statutory language is skewed in at least two respects.

First, as a matter of law, reading the statute as a whole, its overall emphasis is on the intent to return, notwithstanding absences of whatever length, to the residence and whether, when leaving, one has established a new principal place of residence, a fixed habitation, in a single location. Under Utah's statute, the "intent to remain" or an "intent to return" are refrains which signify the *sine qua non* of a principal (the statute does not say "permanently or even frequently occupied") place of residence.

Second, as a matter of fact, Turk's report showed that Grayeyes returned often and always to Navajo Mountain, staying with his sister sixty or seventy percent of the time, commuting between Tuba City and Navajo Mountain on tribal business and in order to collect his mail, going everywhere on the reservation in his capacity as a representative of the Navajo Mountain Chapter of the Navajo Nation, and (had Nielson dared to mention the circumstance which may have most unsettled San Juan County Republicans about Grayeyes' candidacy) in order to maintain a regular presence as local agitator for and ardent proponent of the Bears Ears National Monument. Grayeyes even demonstrated his "subjection to local laws," a factor

deemed important in *Dodge v. Evans*, 716 P.2d at 274, by borrowing his girlfriend's vehicle and driving to meet Turk in answer to the Black complaint -- and by registering to vote at the county seat in 1984 and 2016. Moreover, according to records which *were* available to Nielson – within the meaning of §20A-3-202.3(4)(b)(ii) – Grayeyes has voted in San Juan County in nearly every election for the past 20 years and last voted there in 2016. Under Utah law, in addition to the presumption derived from statements made on a voter registration application, Utah Code, §20A-2-105(7)(a), the last jurisdiction in which a person votes is presumed to be the location of his residence. *See Beauregaard v. Gunnison City*, 160 P. 815, 818-19 (Utah 1916). Grayeyes' voting patterns, political campaigning, and local community activism show at least as much "presence" in San Juan County as what can be observed in other Utah politicians like Senator Hatch who had a 50 year sojourn in Washington, D.C., or Mormon mission presidents who leave Utah, traveling abroad for 2 to 3 years, in fulfillment of religious callings.

Finally, there is no factual basis in the Turk report to measure the length of any of Grayeyes' "absences." Putting aside the fundamental point that the entire report is unvarnished hearsay and hence inadmissible under the statutory requirements of §20A-3-202.3, that document, based upon interviews with a handful of people over a 3-day period, could not and does not purport to observe the times on a continuous – or even continual – basis when Grayeyes either was inside or outside the state of Utah. At bottom, therefore, Nielson's "finding" that Grayeyes had overlong, out-of-state absences, not only violated the statutory tests which bear on durational issues, but also is nothing more than an unsupported assumption grounded in anecdotal, inconsistent, hearsay references.

It is clear that Grayeyes has a peripatetic lifestyle, but this follows from the fact that the boundaries of the Navajo Nation straddle the Utah-Arizona border and tribal business -- to which

Grayeyes as an officer of the Nation must attend -- is conducted on both sides of that line. Likewise, as Grayeyes alluded and Fowler testified in the sworn evidence given to Nielson, work opportunities for members of the Navajo Nation are not easy to find in Utah and therefore Grayeyes and others often move back and forth between states in an effort to earn a living. Moving back and forth across state lines, however frequently or for whatever duration, does not signify, particularly under these circumstances, that Grayeyes lacks sufficient contact for residency on Navajo Mountain. Instead the statute mandates that a person with a principal place of residence in Utah does not lose that principal place of residence until he establishes a new principal place of residence in another state. Utah Code, §20A-2-105(5)(c). There was no showing that Grayeyes did this, namely, moved to a "single location" with a "fixed habitation" in the state of Arizona to which he always intended to return.

Nielson's second stab at an extra-statutory factor is the "public perception" at Navajo Mountain that Grayeyes does not "live" in that area. The basis for this conclusion is again Turk's report which shows that, out of 2,290 active voters in Grayeyes' voting precinct, the deputy questioned, directly or indirectly, 13 people on or near Navajo Mountain. The witnesses identifiable by name indicated that Grayeyes had more than a passing connection with Navajo Mountain. Lorena Atene said that, although Grayeyes "lives" in Tuba City, he "is a registered Chapter member and official in Navajo Mountain," that he "commutes back and forth," traveling up from Tuba City to Navajo Mountain to discharge his official duties on the Utah side of the border. She also indicates that, because of limited postal service in the Navajo Nation, mail to Navajo Mountain has to be routed through post office box addresses which chapter members maintain in Tonalea, but that Grayeyes, through this arrangement, collects his mail at Navajo Mountain, a fact confirmed in the Fowler Declaration. Atene also showed Turk a map by which

Grayeyes' family property at Navajo Mountain could be located and again emphasized that he commutes from Navajo Mountain to Tuba City and back to Navajo Mountain. Turk asked Grayeyes' sister, Rose Johnson, where Grayeyes "lives," and, although this aspect of the report may be unreliable in light of Turk's reference to confusion over a language barrier (compare Turk report, page 5, and Grayeyes Declaration, Exhibit K, ¶ 24), Rose indicated that Grayeyes comes to Navajo Mountain and stays with her, a circumstance confirmed by other Turk interviewees.

Two of Turk's sources gave strong indications respecting Grayeyes' presence at and involvement with the Navajo Mountain community. Turk asked the Navajo Tribal Utility Authority (NTUA) for copies of Grayeyes' bills. The NTUA did not deny that these existed, but, rather, implied that they did by insisting that Turk obtain a warrant before they could be released. During a stop at the "Inscription House Arizona Chapter House," Turk was told that Grayeyes was a "member of the Navajo Mountain Chapter House," and that he should seek information about Grayeyes there.

Another unnamed man stated that Grayeyes was "from" Navajo Mountain, but that he didn't currently "live" at Navajo Mountain, adding, perhaps in reference to his chapter duties, that "he is from all over[,]" and adding further, perhaps to underscore Grayeyes' ties to the local community, that his nephew, Darrell Grayeyes, and his sister, Rose Johnson, both worked at the local school. (Grayeyes himself is chair of the local school board. Grayeyes Declaration, Exhibit K, ¶16.) An unnamed "lady," joining this conversation and responding to Turk's questioning, stated that "[Grayeyes] comes around every once and a great while and that she didn't know where he lived."

In sum, even if we overlook the inadmissible nature of the Turk report, six of the thirteen persons whom he interviewed, including his only named "witnesses," gave strong indications, official work, homestead maps, mail collection, visiting, staying, commuting, officiating, that Grayeyes had a substantial, recurring presence in the Navajo Mountain community. In light of this evidence, it is unclear how Nielson could find a "public" or even limited perception that Grayeyes was not connected in significant ways with Navajo Mountain.

But Nielson's "public perception" finding was faulty, not only because he gave a slanted application of public perception in light of the actual information in Turk's report, but also because the basis of that report, Turk's form of question, asking his interlocutors where Grayeyes "lives," did not address the statutory definition of principal place of residence which by its terms contemplates that a person may "live" elsewhere with an intent to return and invokes a number of touchstones, such as ownership of property, personal and real, employment, and blood relatives, which may have nothing whatsoever to do with "living" at a particular street address. Indeed, a man on the street, when asked Turk's question, probably would answer by reference to observations about a person's whereabouts when he comes home from work and goes to sleep at night, a reference point which, in statutory terms, under §20A-2-105(4)(d), is only one of many factors which should be considered in determining residency for voting purposes. If Turk had asked his unnamed sources at Navajo Mountain who represented tribal members and hence had an important presence in that geographical district, the answers probably would have echoed those given by Lorena Atene, Carlene Yellowhair, and Candelora Lehi, namely, Willie Grayeyes as "registered chapter member and official in Navajo Mountain." In short, Nielson's "finding" based on Turk's form of question, not only was a mis-reading of the collected witness

statements, but also was seriously under inclusive in relation to the statutory criteria which must be used in defining residence for purposes of voting registration.

Finally, if public perception, itself one of the grossest forms of hearsay evidence, does have a place in the decision-making process for voter registration disputes, the "perception," properly applied in Grayeyes' case, would show that he had no principal place of residence in Arizona, and, thus, given the mandate in §20A-2-105(5)(c), could not be deemed to have lost his principal place of residence at Navajo Mountain. Grayeyes has summarized this "evidence" from Turk's report above, and need not repeat it here.

Had Nielson followed §20A-2-105, rather than his own partisan prejudices and an unconstitutional desire to oust Grayeyes from the November ballot, he would have found that Grayeyes never lost his principal place of residence in Navajo Mountain by establishing a new and different principal place of residence in Arizona.

8. The San Juan County Defendants' Actions,

As Violations of Grayeyes' Right to Vote and Run for Office

Are Consistent with the County's Historical Pattern of Disenfranchising Navajo Voters

Congress extended citizenship to Indians through its approval of the Indian Citizenship Act of 1924 (ch. 233, 43 Stat. 253 (1924); 8 U.S.C. §1401(b)).

Despite the extension of citizenship to Indians, many states, including Utah, continued systematically to disenfranchise Indians by denying them the right to vote.

Prior to 1957, a Utah statute, Section 20-2-14(11), U.C.A 1953 (repealed), denied Indians the right to vote, which San Juan County implemented by not registering Indians to vote and by denying them access to the ballot box, but when the constitutionality of that statute was challenged in the United States Supreme Court, the Utah legislature repealed it and Utah became

the last state to legally allow Indian voting. (The *Rothfels* case, cited above, interprets the same statute, as amended in the afterclap of the challenge in the United States Supreme Court.)

The repeal of U.C.A. § 20-2-14(11) did not end impediments to Indian enfranchisement in Utah in general or in San Juan County in particular. Despite the fact that, following repeal, many Indians in the County registered to vote, legal action was needed to protect Indian voting rights when, in 1972, the County, through the office of the Clerk/Auditor, impeded Navajos from becoming candidates for the County Commission. In an action in this Court, *Yanito v. Barber*, 348 F. Supp. 587 (D. Utah 1972), an injunction against San Juan County was required to remove those impediments by ordering the Clerk/Auditor to place the two Navajo candidates on the ballot.

In addition, San Juan County diluted Indian voting strength through at-large election of County commissioners, a practice that was challenged in 1983 through a lawsuit filed in this Court by the United States Justice Department and in which the County agreed "that the process leading to the selection of [its] County Commissioners fails to comply fully with . . . Section 2 of the Voting Rights Act." *See United States v. San Juan Cty.*, No. C-83-1286W (D. Utah, April 4, 1984).

As a result of the 1983 litigation, this Court entered a permanent injunction against San Juan County, required the County to adopt separate election districts for the election of commissioners, and a three-judge panel of this court certified the County for federal election examiners.

Race-based election discrimination by San Juan County did not end with the permanent injunction in *United States v. San Juan Cty.* Subsequent to the permanent injunction being entered in that case, the County adopted a three-member Commission election district plan where

race was the predominant and controlling consideration, which had the effect of diluting Indian voting strength by packing Indians into one of the three election districts.

In addition, San Juan County failed to comply with the constitutional requirement to redraw election district boundaries for either the County Commission or the School Board following the decennial censuses in 1990, 2000, and 2010, despite the growth of the Indian population in the County.

By late 2011, both the Commission districting plan and the School Board districting plan violated the one-person, one-vote, requirement of the Equal Protection Clause.

San Juan County corrected the one-person, one vote, violation regarding its County Commission in late 2011, but left one of the three districts packed with an Indian voting age population of 98 percent. The County took no action regarding the School Board, leaving in place a plan with a 38 percent deviation, in clear violation of the Equal Protection Clause.

In January 2012, the Navajo Nation and several individual plaintiffs filed a lawsuit in this Court challenging San Juan County's illegal districting plans. *See Navajo Nation v. San Juan Cty.*, No. 2:12-cv-00039-RJS.

In late 2015, the District Court determined that San Juan County's School Board election districts violated the one-person, one-vote, mandate of the Equal Protection clause. *See Navajo Nation v. San Juan Cty.*, 150 F. Supp. 3d 1253 (D. Utah 2015).

Following the Court's invalidation of the School Board election districts, San Juan County was allowed to draw and implement a remedial plan for the 2016 elections, subject to later challenge by the plaintiffs. Nielson, as Clerk/Auditor, failed to take any action to notify approximately 491 Indian voters that they were assigned to new precincts under the remedial plan, thereby creating an impediment to their right to vote.

In late 2016, this Court determined that San Juan County had engaged in intentional racial discrimination and that the County Commission election districts violated the Equal Protection Clause due to the County's use of racial classifications in drawing those districts. *See Navajo Nation v. San Juan Cty.*, 162 F. Supp. 3d 1162 (D. Utah 2016).

San Juan County was given an opportunity to draw a remedial plan for the County Commission election districts and submitted such a plan to the District Court.

In 2017, the plaintiffs challenged the remedial plans drawn by San Juan County for both the County Commission and the School Board. In July 2017, this Court determined that the County's proposed remedial redistricting plans for its County Commission and School Board violated the Equal Protection Clause of the United States Constitution due to the County's use of racial classifications in drawing those districts. *See Navajo Nation. v. San Juan Cty.*, 266 F. Supp. 3d 1341 (D. Utah 2017). The County had once again committed intentional racial discrimination.

The District Court then engaged the services of a Special Master, Dr. Bernard Grofman, to draw lawful districting plans for the County Commission and the School Board.

The plan proposed for the County Commission districts created Indian voting majorities in two out of three of those districts and an Indian voting age population in Commission District 2 of 65 percent. San Juan County has objected vigorously to this change, characterizing it as discrimination against "white Republicans" in the County.

San Juan County Commissioner Phil Lyman reportedly threatened that the County simply would not comply with the Special Master's plans if it were adopted by this Court, stating, "We're not going to pay any attention to them."

On December 21, 2017, the District Court adopted the Special Master's proposed plans,

which created an Indian majority of 65 percent in Commission District 2. *Navajo Nation v. San Juan Cty.*, No. 2:12-CV-00039, 2017 WL 6547635, at *1 (D. Utah Dec. 21, 2017).

This most recent decision by Judge Shelby has upset local Republicans as the ruling elite in San Juan County, leading to an increase in racial rhetoric and political hyperbole. One commentator stated that "the result [of Judge Shelby's decision] will be the creation of a welfare county of legalized plunder which will force us into involuntary servitude and slavery to the Navajo Nation." The same commentator went on to demand that current San Juan County officials, including the San Juan County defendants in this case, resist the Court's decision.

At this year's Republican Convention, Robert Turk, a relative of deputy Turk in this litigation, complained that "we've been disenfranchised." Others referred to Judge Shelby as "King Shelby," and Kelly Laws, father to Kendall Laws, and Grayeyes' opposing candidate in District 2, stated of Shelby that, "He's stabbed the citizens of San Juan County in the heart the best he could[.]" Others complained that, since members of the Navajo Nation don't pay property taxes, "nontaxpaying commissioners" would be in the driver's seat and, moreover, that Navajo candidates like Grayeyes, if elected, "wouldn't show up for meetings, wouldn't allocate funding to white towns, [and] wouldn't understand how to govern the county." *See* Courtney Tanner, *'We've been disenfranchised': Republicans in San Juan County say redrawn voter districts unfairly favor Navajos*, The Salt Lake Tribune, April 10, 2018. Likewise, at this year's Republican convention, Black was overheard to say about Grayeyes that "he's going to be a drain on the system – he's going to want money and a car."

These comments are echoes of the opposition to Grayeyes when he ran for a seat on the San Juan County Commission in 2012. Even then, his candidacy generated race-based fears and political rhetoric to the effect that, if elected, he would spend County funds for the benefit of the

Navajo community. Grayeyes' opponents ran advertisements which stated that, "Willie Grayeyes is campaigning on promises that if he is elected he will use San Juan County money for projects on the reservation which are clearly the responsibility of the Federal Government or the Navajo Nation to finance." The advertisement promised that the election of Grayeyes' opponent would ensure that County funds were not spent in the Navajo community. These and other details respecting the racial animus and political opposition of the San Juan County defendants in relation to Grayeyes are documented in the Expert Witness Report of Dr. Daniel McCool in the case of *Navajo Nation v. San Juan Cty.*, case no. 2:12-cv-0039-RS, Dkt. No. 181 (D. Utah, August 18, 2015).

STANDARDS OF REVIEW FOR PRELIMINARY INJUNCTIVE RELIEF

Based upon the facts detailed above, the Court should grant a preliminary injunction, blocking defendants from their unconstitutional application of Utah Code, §§20A-3-202.1, 20A-2-105, and 17-53-202 to Grayeyes and requiring Cox and Nielson to restore Grayeyes to the ballot in November 2018. Grayeyes is likely to prevail on the merits of his argument that the manner in which he was disenfranchised and kept off the November ballot violated the First and Fourteenth Amendments to the United States Constitution. *See, e.g., Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005). Absent redress of these constitutional violations, Grayeyes will suffer irreparable harm. *Id.* The balance of hurt weighs in favor of Grayeyes. *Id.* An injunction will further the public interest. *Id.*

LEGAL ARGUMENT

As the following legal argument will demonstrate, Grayeyes' case for ballot access and voting privileges in fact satisfies each of these standards of review.

1. Grayeyes Will Prevail on the Merits

Grayeyes feels passionately about public issues and current events which affect all citizens in San Juan County. He wants to run for office, have a say, and make a difference. And according to the United States Supreme Court, his participation in the democratic process, by seeking election, spending money on a campaign, or voting for a candidate, is a matter of fundamental right which is protected by the First Amendment. *See, e.g., McCutcheon v. Fed. Election Comm'n,* --- U.S. ---, 134 S. Ct. 1434 (2014).

The reasons why the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office," *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971), are well known. "[I]t is of particular importance," for example, "that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day[.]" *Brown v. Hartlage,* 456 U.S. 45, 53 (1982). What is more, "[the] observation that in our country 'public discussion is a political duty,' . . . applies with special force to candidates for public office." *Id.* (citations omitted); *see also Bond v. Floyd,* 385 U.S. 116 (1966) (state violated First Amendment when it refused to seat a legislator-elect because of his public opposition to Vietnam war). In short, political speech "is the lifeblood of democracy – it is the means by which citizens learn about candidates, hold their leaders accountable, and debate the issues of the day." *Republican Party of N.M. v. King,* 741 F.3d 1089, 1092 (10th Cir. 2013).

Hence, even before decisions like *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310 (2010) and *Arizona Free Enter. Club's Freedom Club PAC v. Bennett,* 564 U.S. 721 (2011) elevated the protection of campaign speech to new levels, government regulation of political discourse has been treated with suspicion and will not be tolerated absent the existence of special

circumstances. The so-called ballot access cases, *e.g.*, *Lubin v. Panish,* 415 U.S. 709, 715 (1974), allow states, in some instances – for example, to economize, avoid confusion, or preserve political stability -- to establish rules respecting candidates. But the reasons for such rules must be substantial if not compelling, and the rule in question must navigate carefully – or in the least restrictive fashion possible – between the state's objective, the regulatory means to that end, and the constitutional liberty which may be placed in jeopardy. *E.g., McCutcheon v. Fed. Election Comm'n,* --- U.S. ---, 134 S. Ct. 1434 (2014) (citing, *inter alia*, *Buckley v. Valeo,* 424 U.S. 1, 21 (1976), *Sable Commc'ns of Cal., Inc. v. FCC,* 492 U.S. 115, 126 (1989), *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.,* 470 U.S. 480, 496-501 (1985)). In short, whatever the state's objective, the means selected to achieve that end may not unnecessarily impose upon a constitutionally protected liberty. *E.g., Ill. State Bd. Of Elections v. Socialist Workers Party,* 440 U.S. 173, 183 (1979).[7]

This especially is true where a state law, however well-intentioned or facially legitimate, is implemented in a partisan manner by public officials. In this important respect, the First Amendment is "[p]remised on mistrust of government power," *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 340 (2010), and that mistrust, in turn, is bred by the fear that government bureaucrats who regulate campaigns will be self-serving or less than disinterested, Allison R. Hayward, "Revisiting the Fable of Reform," 45 Harv. J. on Legis. 421 (2008), a sentiment which draws force from the principle that "those who govern should be the *last* people to help decide

[7] Grayeyes' discussion in this section of his brief relies mainly upon the First Amendment case law which bears upon a candidate's right to campaign, but these principles are no less true in relation to the right to vote, as another form of political expression, which Nielson abridged en route to his ultimate objective which of course was to prevent Grayeyes from getting access to the November ballot. *See, e.g., Dunn v. Blumstein,* 405 U. S. 330, 336 (1972) (the right to vote is "'a fundamental political right . . . preservative of all rights[,]'") (citing *Reynolds v. Sims,* 377 U. S. 533, 562 (1964)).

who *should* govern." *McCutcheon v. Fed. Election Comm'n,* --- U.S. ---, 134 S. Ct. 1434, 1441-42 (2014) (emphasis in original).[8]

Such governmental maladministration, even of legitimate electoral regulations, interferes with the free utterance of public statements in a political campaign. And such interference "runs directly contrary to the fundamental premises underlying the First Amendment as the guardian of our democracy. That Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech. It is simply not the function of government to 'select which issues are worth discussing or debating' . . . in the course of a political campaign." *Brown v. Hartlage,* 456 U.S. 45, 59-60 (1982) (citation omitted).

These hornbook expressions of First Amendment law should be well-known to San Juan County officials who (as the history of litigation cited above in our statement of facts demonstrates) have battled over the years to have their own way in arbitrarily excluding members of the Navajo Nation from voting rolls and campaign opportunities. The San Juan County Clerk's office has been at the forefront of this fight, using official power for partisan ends for decades. In *Yanito v. Barber,* 348 F. Supp. 587 (D. Utah 1972), for example, a three judge panel from this Circuit enjoined the San Juan County Clerk to put two Navajos who were

[8] The First Amendment, in this regard, "reaches the very vitals of our system of government," because, as Justice Douglas wrote, "[u]nder our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important – vitally important – that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." *United States v. Int'l Union United Auto., Aircraft & Agric. Workers of Am.,* 352 U.S. 567, 593 (1957) (dissenting opinion).

running for seats on the County Commission on a regular election ballot because the Clerk had abused his position, misleading the candidates by withholding information about the need for nominating petitions which were vital to their qualification for this office. "[A] statute valid on its face may be administered in an unconstitutional manner[,]" said the Court, and the omission to advise respecting the nominating petitions (even where the clerk disclaimed any duty to give advice respecting legal requirements) was "a crucial misstatement[,]" a misstatement, moreover, which the court "inferred," from facts in the record, to be "knowingly and purposely carried out." *Yanito's* light hasn't dimmed with the passage of time. It remains a truism that ballot regulations, in order to pass constitutional muster, must be non-discriminatory in purpose *and effect*. *E.g., Burdick v. Takushi,* 504 U. S. 428, 434 (1992). And because a state actor may not attempt to achieve his regulatory ends through unconstitutional means, *e.g., Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U. S. 173, 183 (1979), only when a ballot regulation crosses this non-discriminatory threshold will a balancing standard come into play, *e.g., Burdick v. Takashi*, 504 U. S. at 434.

Nielson's maladministration of the voter registration rules which were used to disqualify Grayeyes from the ballot was more egregious by a hundred-fold than the inferences which the *Yanito* judges drew from the circumstances of that case.

The timing of Black's challenge to Grayeyes' residency stands out. Nobody objected to Grayeyes as a voter – for almost 30 years -- until he ran for office in 2012 – and his residency then was determined to be in San Juan County and his candidacy accordingly was approved by Norman Johnson as County Clerk. Nobody objected again until Judge Shelby entered, first, a redistricting order in 2016 and, then, ordered new elections with a newly configured District 2 – where a Navajo candidate for the first time since time immemorial has a decent shot at winning -

- in 2018. And this second objection ignores entirely the fact that the prior clerk, Norman Johnson, in 2012 actually found that Grayeyes had a principal place of residency in San Juan County, a principal place of residency at exactly the same address as that listed on his 2018 Declaration of Candidacy.

Nielson tainted his administration of Black's challenge by collaborating with Kendall Laws who, because his father Kelly was running in opposition to Grayeyes, had a conflict of interest and probably was acting in violation of the ethics statutes applicable to county employees, as well as the Rules of Professional Responsibility. Nielson then doubled down on the conflict wager by personally prosecuting the challenge, commandeering the Sheriff's department to conduct an *ultra vires* investigation, and abandoning any semblance of neutrality as an election judge.

Now, with every particle of impartiality thoroughly exploded, Nielson drew wildly outside the lines in his adoption of procedures to handle the challenge. He wrongfully channeled the contest into a dispute over voter registration rather than candidate qualification, knowing that he would have more license, as the election official in charge, to manipulate outcomes when taking this improper path. He then ignored the legislative mandate found in Utah Code, §20A-3-202.3(2), to dismiss a legally insufficient complaint, and assisted Black in drawing up a second, equally deficient pleading[9] – and, while doing so, aided and abetted her misrepresentations, under oath, that she had personal knowledge of the basis for the challenge and that she had exercised due diligence in gathering first hand intelligence, misrepresentations which are

[9] Nielson's decision to disenfranchise Grayeyes, found in Exhibit H, later found that "Ms Black provided sufficient clear and convincing evidence that she had a valid basis for her challenge." Nielson, as judge, thus validated the very pleading which Nielson, as prosecutor, had assisted Black in preparing.

transparent from even a cursory review of the first page of the very report which he had commissioned from Turk.[10]

But these fictions are like a Sunday School fable when compared to the ongoing campaign which Nielson conducted, from March 28 through May 24, when he stonewalled the repeated requests from Grayeyes' counsel to obtain information about the basis for the challenge and a rumored investigation being conducted by the clerk, attempted to mislead those attorneys by the information transmitted via Trentadue, and further attempted to hide Kendall Laws's role in this affair with a pretense of recusal -- an attempt he furthered by using Trentadue as a cover for Laws and by implying, in addition, that any investigation would be conducted under state auspices or through the Office of the Davis County Attorney. These deceptions were revealed when Turk's report was delivered in response to a GRAMA request on May 24. But by then it was too late, since Nielson had decided the case in letters sent May 9 and May 10.

Nielson thimble-rigged the proceedings against Grayeyes through other means as well. He violated the notice provision of §20A-3-202.3 in two respects. He waited too long to send notice (if we accept that he didn't backdate the Black complaints), and his notice did not supply the statutorily mandated end date (June 5 in this case) after which evidentiary submissions would be barred. Nielson then parleyed this lack of notice into an abuse of process, cutting short the time available for Grayeyes' responses in order prematurely to decide the case on May 9-10 before his deceptions in conducting an investigation with the collaboration of Laws could be discovered in the response to the GRAMA request May 24 – a circumstance which eclipsed any

[10] Not to be outdone by Black's prevarications, Nielson piled on one of his own: He concealed Black's first complaint from Grayeyes and MBSS, omitting it from the packet of documents sent in response to their May 3 GRAMA request, and, in his cover letter on that occasion, positively mispresented that, "No responsive records are being withheld from this response." Exhibit I.

occasion for a full and fair "hearing" through rebuttal of the Turk hearsay as well as other secret evidence and procedural irregularities by almost a full month before expiration of the deadline on June 5.

Perhaps worst of all, Nielson disregarded the statutory mandates that evidence to disenfranchise a voter must be clear and convincing and that this evidence cannot be second hand and from anonymous sources. The evidentiary standard found in Utah Code, §20A-3-202.3, is "clear and convincing," in contrast to the "substantial evidence" which ordinarily suffices in administrative adjudications under Utah law. *E.g.*, Utah Code, §63-46b-16(g). This distinction is not a legislative accident, but, rather, a matter of constitutional principle. Fundamental rights in civil proceedings, like a liberty interest in involuntary commitment hearings or the right to free speech which is implicated in actions for libel, cannot be abridged absent showings which are based upon clear and convincing evidence. *See, e.g., Addington v. Tex.*, 441 U.S. 418, 431-33 (1979) (involuntary commitment proceeding), and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (publisher's right to due process, which attaches to its constitutional entitlement to free speech, requires that the element of malice in a libel action must be proved by clear and convening evidence). And Section 20A-3-202.3's no hearsay rule is to the same effect. That measure's absolute prohibition against the use of hearsay may be contrasted with other administrative adjudications under Utah law. In these proceedings, hearsay is admitted, but may not supply the exclusive basis for any given fact finding. *See, e.g., Yacht Club v. Utah Liquor Control Comm'n,* 681 P.2d 1224, 1226 (Utah 1984). And even at the federal level, where hearsay is liberally allowed in administrative actions, it may be a violation of due process to make findings in reliance upon hearsay unless the respondent is permitted to see that evidence in advance of a hearing or where a respondent has not been given an

opportunity, through subpoenas, cross-examination, or otherwise, to test the out-of-court declarant. *See, e.g., Bennett v. Nat'l Transp. Safety Bd.,* 55 F.3d 495, 500-02 (10th Cir. 1995). But in contrast to these rulings in *Yacht Club* and *Bennett,* §20A-3-202.3 -- more protective of the rights to due process and free expression where fundamental voting rights are at stake -- is unequivocal in its proscription of any and all hearsay.

These principles, however, weren't important enough to give Nielson pause, so eager was he to block Grayeyes from the ballot. If hearsay evidence, standing alone, isn't even "substantial evidence" under Utah law, how can it be "clear and convincing" for purposes of the voter registration statutes? Yet hearsay evidence in the form of Turk's report was the *exclusive* means by which Nielson turned the wheel and tightened the screws against Grayeyes. What's more, Turk's hearsay (consisting mainly of misguided questions to and responses from unnamed sources) was withheld (one has to say deceptively withheld) from Grayeyes until after the proceedings were concluded in a decision which unlawfully denied any further opportunity for inspection, rebuttal, or other form of response -- in a violation of due process which could not be more appalling in dimension or magnitude.

In this regard, it is Nielson's hugger-muggery during the entire process which, when finally exposed to the light of day, stands out as the most gob smacking circumstance of all – serving as reminder that there is nothing more inimical to the principles of due process than decisions which are based upon secret evidence. The cases in support of this proposition are legion, but, for a sampling, *see, e.g., Rafeedie v. I.N.S.,* 880 F.2d 506, 516 (D. C. Cir. 1989) (. . . Rafeedie – like Joseph K. in Kafka's 'The Trial' – can prevail . . . only if he can rebut the undisclosed evidence against him, i.e. prove that he is not a terrorist regardless of what might be implied by the government's confidential information. It is difficult to imagine how even

someone innocent of all wrongdoing could meet such a burden[ ]"); *ADC v. Reno,* 70 F.3d 1045, 1069, 1070-71 (9th Cir. 1995) ("Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the . . . balancing [test adopted by the Supreme Court to determine whether INS conduct violates a non-citizen's due process rights] suggests that use of undisclosed information in adjudications should be presumptively unconstitutional[ ]"); *Kiareldeen v. Reno,* 71 F. Supp. 2d 402, 419 (D. N. J. 1999) ("Here, the court cannot justify the government's attempt to 'allow [persons] to be convicted on unsworn testimony of witnesses – a practice which runs counter to the notions of fairness on which our legal system is founded [ ]'"); *Haddam v. Reno,* 54 F. Supp. 2d 588, 598 (E.D. Va. 1999) ("The use of secret evidence against a party, evidence that is given to, and relied on, by the [immigration judge and the Board of Immigration Appeals] but kept entirely concealed from the party and the party's counsel, is an obnoxious practice, so unfair that in any ordinary litigation context, its unconstitutionality is manifest[ ]").

Nielson's actual decision, that Grayeyes did not have a principal place of residence within Utah and therefore was ineligible to register to vote, is the final insult to the idea of governmental integrity. We have given our analysis of the flaws in that decision in part 7 of the statement of facts and note, once again, that while differences of opinion in the interpretation of statutes and cases are not uncommon in the world of law, some readings and applications are so far beyond the pale that no motive other than partisan bias can be attributed to them, and this obviously occurred in Nielson's treatment of Grayeyes' case.

But three aspects of Nielson's decision deserve special mention, as part of this legal analysis concerning maladministration of what otherwise is a legitimate regulation for the registration of voters. First is Nielson's primary reliance upon Grayeyes' "absences" from his

homestead in Utah, since he had been found stopping with a girlfriend or other friends in Arizona while conducting tribal business. This reliance is misguided, of course, because the Navajo Nation exists as a geographic entity, not only in Utah, but also in Arizona, and anyone who works in that world perforce must cross state lines with considerable frequency. In addition, Grayeyes' Utah home is at the vortex of a multi-state area called Four Corners, part of a larger region known as the Colorado Plateau. It is a primarily, rural, arid, and rugged terrain with sparse population and limited economic opportunities. Four states and their local governments have jurisdictional boundaries in this region, as well as the federal government and federally recognized Indian Tribes including the Navajo Nation of which Grayeyes is an enrolled member. Because of these circumstances, the Four Corners region has become home to a class of travelers, including Grayeyes; indeed, it may be said that these residents have an imperative to travel back and forth, between or among, these states in order to obtain essential services as well as employment opportunities. These realities also reveal a deeper, constitutional flaw in Nielson's maladministration of the residency statute in Grayeyes' case, because his reliance on Grayeyes' "absences" from Utah in order to overrule the presumption of residency which is granted by statute constitutes an abridgement of the right to travel which Grayeyes has under the Due Process Clause of the Fourteenth Amendment, *e.g., Saenz v. Roe,* 526 U.S. 489, 499-502 (1999), a right, moreover, which has been described as a "constitutional liberty, closely related" to his right to free speech and association, *e.g., Aptheker v. Sec'y of State,* 378 U.S. 500, 517 (1964). *See also Dunn v. Blumstein,* 405 U. S. 330, 360 (1972).

Second is Nielson's treatment of the "public perception" that Grayeyes did not live at his address on Navajo Mountain. We have shown above in the factual analysis of Nielson's decision how his use of evidence is off the mark in this respect – and that his reading of the plain

language of the residency statute equally is wrong-headed. In addition, however, the invocation of "public perception" by Nielson exposes another area of constitutional vulnerability in this case. County clerks may use the "other relevant factors" test only where another factor is truly relevant to the inquiry about residency and, even then, only when there is evidence, within the procedural parameters of §20A-3-202.3 which supports a finding in that regard. Allowing clerks too much discretion in expanding the scope of relevance or shoehorning evidence into a "finding of fact" may lead to transgression of First Amendments proscriptions against viewpoint discrimination. Here's why.

It is clear from the circumstances of this case that Nielson was using the voter registration provisions of Utah's elections code to act as a gatekeeper in relation to Grayeyes' candidacy. But gatekeepers are suspect in First Amendment jurisprudence because, when given (or taking) too much license in the construction or application of even legitimate ballot restrictions, they can overreach their function and manipulate that discretion toward partisan ends, engaging in a forbidden discrimination as between viewpoints or candidates. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U S. 750 (1988); *see also United States v. Playboy Entm't Grp., Inc.*, 529 U. S. 803, 817 (2000), relying upon *R.A.V. v. St. Paul*, 505 U. S. 377, 382 (1992).

Many state actors, of course, are subtle folk and their discriminatory practices accordingly difficult of detection -- hidden behind seemingly legitimate administration of everyday regulatory requirements – becoming all the more dangerous in doing so. Hence, statutes which may be read to give excessive discretion to a government gatekeeper who thereby is empowered to restrict speech usually are prime suspects as the deadbolts by which an elections official may foreclose candidates from ballot access, thereby perpetrating the type of viewpoint discrimination which violates the First Amendment. We believe that, on a fair reading of the

entire record, this is the wrong which Nielson and the other San Juan County defendants perpetrated in this case. They used "public perception" as a "relevant" factor in determining where Grayeyes lived – when, at best, "public perception" is just another name for the anonymous hearsay which §20A-3-202.3 expressly interdicts – and, at worst, it is a license by which Nielson, as gatekeeper to voters and candidates, unconstitutionally prevented Grayeyes from getting on the ballot.

Third, Nielson dispatched Turk to conduct an investigation into where Grayeyes "lives," itself a misapplication of the residency statute's multi-pronged tests. To that end, Turk devotes a page or so in his report to the description of what he thinks is or might be Grayeyes' home near Navajo Mountain. It is unclear whether Turk ever really found (and therefore inspected) the "fixed habitation" which qualifies as home to Grayeyes in satisfaction of the residency requirement under Utah law,[11] but it is clear, judging from the language which Turk uses, that he doesn't deem these buildings to be "habitable" by his standards which, of course, are those held by a white, middle-class, Anglo-American.

[11] This section of Turk's report is confusing to say the least and he appears to have gotten lost in an area difficult to traverse with few roads. The problems encountered by Turk – locating homes on virtually non-existent streets which perforce have no street addresses – appear to be endemic to the area and a primary cause for much of the more comprehensive litigation which has occurred between members of the Navajo Nation and San Juan County over voter registration related issues. Nielson and the other San Juan County defendants are keenly aware of this problem as evidenced by their April 19th press release which is Exhibit E ("The lack of an addressing system in a large part of the county makes it extremely difficult for the clerk's office to verify residency[ ]"). Judicial notice of fact files in related lawsuits may show that Nielson and his colleagues have taken advantage of this circumstance to suppress voting among members of the Navajo Nation. In any event, Grayeyes, in his Declaration, Exhibit K, at ¶¶ 27 and 28, states that he met with Turk on April 4 (after Turk finished his search of the Mountain for Grayeyes' home) and that Turk told Grayeyes on that occasion that Turk could not find the location of Grayeyes' home at Navajo Mountain.

Nielson's May 9 letter which disenfranchised Grayeyes doesn't point openly to the perceived uninhabitability of the properties on Navajo Mountain as a ground for decision, but it is a fair conclusion that this formed a basis for his inferences respecting Grayeyes' "absences" or "public perception" that he did not live there. It bears repeating at this juncture that the language of Utah's statute doesn't require a habitable home, only a fixed habitation in a single location. So Nielson, once again, by giving vent to his partisan prejudices, has overreached the confines of the statute in question. This overreach, in addition, has constitutional implications, because a denial of the right to vote for want of a "habitable" residence has been held to violate the Due Process Clause and Equal Protection requirements of the Fourteenth Amendment. *See, e.g., Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984) (New York law which denied street people the right to register to vote held violative of Equal Protection Clause; people need only a specific location which they consider to be a "home base"); *Collier v. Menzel*, 221 Cal. Rptr. 110 (Ct. App. 1985) (refusal of clerk to register voters who lived in a public park was a violation of the Equal Protection Clause). If even the homeless with a fixed habitation on the street or in a park are constitutionally qualified to vote, we trust that Grayeyes, who has a fixed habitation on Paiute Mesa (sporting a brand new railing for handicapped guests), also can be counted among those eligible to enjoy the franchise.

If the Court is willing to take its cue from *Yanito*, or the principles announced in that decision, this is an easy case. As we have shown, Nielson's maladministration of the voter registration (and candidate qualification) statutes, deposing Grayeyes and in favoring his opponent, Kelly Laws, father of Nielson's co-worker and political ally, Kendall, are far worse than the circumstances which prompted the judges in that case to enter an injunction against the San Juan County Clerk requiring him to put Navajo candidates on the November ballot.

2. Grayeyes Will Suffer Irreparable Harm

Grayeyes' constitutional rights are at stake and, if those rights have been violated, he will suffer a harm which, by definition, under controlling case law, is irreparable. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury[ ]") (citation omitted); *Kikamura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) ("[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary [ ]") (citation omitted); *Community Commc'ns Co. v. City of Boulder*, 660 F.2d 1370, 1375 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982) (same); *Albright v. Bd. of Educ. Of Granite Sch. Dist.*, 756 F. Supp. 682, 687 (D. Utah 1991) ("[a]s to the requirement of *irreparable injury*, such is presumed to exist whenever First Amendment constitutional rights are infringed[ ]") (emphasis in original). Indeed, since "unconstitutional restrictions on speech are generally understood not to be in the public interest and to inflict irreparable harm that exceeds any harm an injunction would cause," Grayeyes' "main obstacle to obtaining a preliminary injunction," is "demonstrating a likelihood of success on the merits." *Smith v. Exec. Dir. of Ind. War Mem'l Comm'n,* 742 F.3d 282, 286 (7th Cir. 2014) (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012)).

3. The Balance of Equities Weighs in Favor of Grayeyes and

Public Policy Favors Injunctive Relief in This Case

Where, as here, a likelihood of success on the merits is established, the balance of harms factor under Rule 65 will weigh in favor of the party seeking injunctive relief. *E.g.*, *Alvarez*, 679 F.3d at 589. Moreover, the public interest, almost by definition, can suffer no harm when a court

enjoins the enforcement of an unconstitutional statute or an unconstitutional application of any law. *Id.* (citing *Joelner v. Vill. of Wash. Park, Ill.,* 378 F.3d 613, 620 (7th Cir. 2004)). Put differently, "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker,* 453 F.3d 853, 859 (7th Cir. 2006). The San Juan County defendants cannot articulate any reason – especially a compelling justification – for the type of maladministration of the voter registration statutes which Nielson has inflicted upon Grayeyes in this case.

The cost of adding Grayeyes' name, as an additional candidate, on the ballot for District 2 on the County Commission will be nothing extraordinary. On the other hand, the gains that will be achieved by allowing the public to choose between Grayeyes and Laws after hearing both candidates for that office exercise their right to speak, unfettered, uninterrupted, and unfiltered by maladministration of Nielson, are of immeasurable worth. "The First Amendment," after all, "embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad, and between candidates for political office. The fear of the San Juan County defendants that voters might make an ill-advised choice does not provide them with a compelling justification for limiting speech. It is simply not the function of government to 'select which issues are worth discussing or debating' . . . in the course of a political campaign." *Brown v. Hartlage*, 456 U.S. 45, 59-60 (1982) (citation omitted).

CONCLUSION

The defendants in this case have engaged in a deliberate assault on the constitutional rights of the defendants, which the Court must rectify immediately to prevent the permanent loss of those rights. For the reasons stated above, the Court should grant this motion for preliminary injunction and enjoin Spencer Cox and John David Nielson to restore the voting franchise and

ballot access to Grayeyes so that he can stand for election as a candidate for San Juan County Commissioner in District 2 in November 2018.

Dated this 26th day of June, 2018.

/ s / Alan L. Smith
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/s/ David R. Irvine
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CERTIFICATE OF DELIVERY

The undersigned hereby certifies that on the 26th day of June, 2018, a true and correct copy of the foregoing PLAINTIFF GRAYEYES' MOTION AND BRIEF IN SUPPORT OF PRELIMINARY INJUNCTION AND RELATED RELIEF was delivered via e-mail to following:

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