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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION, SOUTHERN REGION

WILLIE GRAYEYES and TERRY WHITEHAT, Plaintiffs, v. SPENCER COX, JOHN DAVID NIELSON, KENDALL G. LAWS, COLBY TURK, and WENDY BLACK, Defendants.	**SAN JUAN COUNTY DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Civil No. 4:18-cv-00041-DN Judge David Nuffer

Defendants San Juan County Clerk John David Nielson ("Mr. Nielson"), San Juan County Attorney Kendall G. Laws ("Mr. Laws"), and San Juan County Deputy Colby Turk ("Deputy Turk") (collectively "San Juan County Defendants"), by and through their undersigned

counsel, hereby submit this Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.[1] For the reasons sets forth below, this Court should deny Plaintiffs' Motion.

INTRODUCTION

Plaintiffs seek the extraordinary relief of a preliminary injunction based upon their conclusory claims that Mr. Nielson's alleged "maladministration" of the Utah voter challenge could only have been the result of discriminatory intent to deprive him of due process and other constitutional rights. Despite Plaintiffs' attempts to craft a narrative of deception and conspiracy, the facts already known to the parties show that the voter challenge decision reflected a good faith application of the applicable statutes to the evidence. Plaintiffs have failed to make a clear showing of their alleged constitutional violations, and therefore have failed to meet their burden of showing that they will likely prevail on the merits. The Motion should therefore be denied.

STATEMENT OF FACTS

Wendy Black Challenge

1. On March 20, 2018, San Juan County Clerk John David Nielson received a letter from Wendy Black challenging the residency of Willie Grayeyes. Exh. B to Plaintiff's Motion.

2. Nielson had never received a challenge to residency as the County Clerk before. He therefore sought advice from others in the County about how to handle the challenge.

[1] Doc. No. 13. Defendants object to Plaintiffs' Motion on the ground that it exceeds the permitted page limit for preliminary injunction motions by nearly 40 pages, yet Plaintiffs failed to file a motion to for leave to file an overlength motion. *See* DUCivR 7-1(a)(3)(A) ("Motions field pursuant to Fed. R. Civ. P. 12(b), 12(c), and 65 must not exceed . . . twenty-five (25) pages.")

3. This included speaking with the former County Clerk, who told him that in the past the County had used Sheriff's Deputies to investigate a residency challenge.

4. This also included speaking with the Deputy County Attorney, Matt Brooks, who informed Neilson about what the statutes required regarding voter challenges.

5. County Attorney Kendall Laws, a Democrat whose father is a candidate running against Grayeyes, made efforts to remove himself from involvement with the challenge by seeking independent counsel to assist the County in the matter.

6. Nielson contacted the County Sheriff and indicated that it might be worth having a Deputy go out to Grayeyes' address to investigate.

7. Nielson also determined that the County did not have a voter challenge form available for citizens to make voter challenges. Nielson obtained a form and provided that form to Black. *See id.*

8. Deputy Colby Turk was assigned to conduct an investigation into the residency of Grayeyes, which included investigating the offense of False Information or Report.

Deputy Turk's Investigation

9. Much of Deputy Turk's investigation was captured on his body-worn camera. That footage was provided to the Court as Exhibit A to San Juan County Defendants' Motion for Expedited Discovery, Doc. 49 (hereinafter "Body Cam Footage"). Deputy Turk also completed a detailed police report regarding his investigation. Exh. C to Plaintiffs' Motion.

10. Deputy Turk went out to confirm Grayeyes' address on March 27, 2018. *Id.* The address Grayeyes had on file with the County was 17 miles from the Navajo Mountain Chapter House on Paiute Mesa. Exh. A to Plaintiffs' Motion.

11. Deputy Turk stopped at the Navajo Tribal Utility Authority Office in Kayenta to attempt to confirm Grayeyes' address. They informed him that they could not give him information without a warrant but suggested that he contact the chapter house in the area. Exh. C to Plaintiffs' Motion, at 3; *see also* Body Cam Footage.

12. Deputy Turk went to the Inscription House Arizona Chapter House and asked about the address for Grayeyes. They informed him that he was a member of the Navajo Mountain Chapter House and they would have more information there. *Id*.; *see also* Body Cam Footage.

13. Deputy Turk then went to the Navajo Mountain Chapter House and inquired regarding Grayeyes' address. They informed him that Grayeyes does not live in Navajo Mountain but lives in Tuba City, Arizona. *Id*.; *see also* Body Cam Footage.

14. Deputy Turk then drove to the home of Grayeyes' sister, Rose Johnson. Johnson was not at home so Deputy Turk contacted several of her neighbors. None could confirm that Johnson's home was Grayeyes' residence. *Id*. at 4; *see also* Body Cam Footage.

15. Deputy Turk then drove to the point 17 miles from the Navajo Mountain Chapter House and filmed the area. There were no homes in the area. *Id*.; *see also* Body Cam Footage.

16. Deputy Turk continued driving and found a home 19 miles from the Chapter House, which appeared to have been abandoned for some time. *Id*.; *see also* Body Cam Footage.

17. Deputy Turk contacted other individuals driving in the area, none of whom could confirm Grayeyes' residence was in Paiute Mesa. *Id*. at 4-5; *see also* Body Cam Footage.

18. Deputy Turk continued to visit other homes in the area, including homes he was told were on the Grayeyes family property, but all appeared to be abandoned, and none of the residents he met could confirm Grayeyes' residence. *Id.*; *see also* Body Cam Footage.

19. Deputy Turk then contacted Johnson at the Community School. She told him that Grayeyes did not live with him and that he instead lived in Tuba City. *Id*. at 5; *see also* Body Cam Footage.

20. Deputy Turk asked dispatch to contact the Navajo Nation Police Department in Tuba City to get a current address for Grayeyes. They told dispatch to contact the Kayenta district, who told them that no one had been to the Grayeyes family property for years and they had also sent an office to Navajo Mountain, who had also been told by neighbors that Grayeyes lives behind a car wash in Tuba City. *Id*. at 5-6.

21. Deputy Turk went to Tuba City, Arizona on March 30, 2018. *Id*. at 6.

22. He first visited the Navajo Chapter House for information, then solicited help from the Navajo PD investigator Albert Nez. The two officers then went to the Paiute Tribe Office, where they spoke with tribal leaders about their knowledge regarding Grayeyes' residence. *Id*.; *see also* Body Cam Footage.

23. Deputy Turk was eventually able to locate the residence where Grayeyes was purported to live in Tuba City based upon information received from a witness there. Deputy Turk went to the home but no one was home. Deputy Turk left his card with the witness and asked her to tell Grayeyes to contact him. *Id*.; *see also* Body Cam Footage.

24. Grayeyes called Deputy Turk and the two met in Bluff, Utah on April 4, 2018. Deputy Turk asked Grayeyes questions about his residence. During the conversation, Grayeyes

could not identify a fixed residence in Utah. He admitted that he did not live on Paiute Mesa, the address he used on his declaration of candidacy, and claimed to stay with his sister 60-70% of the time, along with a number of other residences where he sometimes stays. *Id.* at 7; *see also* Body Cam Footage.

Evidence from Grayeyes

25. On March 28, 2018, Nielson sent a letter to Grayeyes informing him that there had been a voter challenge against him. Exh. D to Plaintiffs' Motion.

26. Grayeyes' attorneys responded to the voter challenge in a series of letters dated April 19th, April 25th, April 27th, and May 3rd. The letters accompanied evidence submitted by Grayeyes in the form of declarations, a grazing permit, a birth certificate, and Google maps photos. Exh. F to Plaintiffs' Motion.

27. This included a Declaration of Willie Grayeyes dated April 19, 2018, in which Grayeyes swore under oath that his "full-time," "principal place of residence" was in Navajo Mountain, in a home "near Piute Mesa in Utah." The Declaration was accompanied by satellite images of a residence along with coordinates for the home. The referenced home was not the home of Grayeyes' sister. *Id*. at 5, ¶¶ 4-5.

Supplemental Investigation by Deputy Turk

28. Deputy Turk went to the GPS coordinates provided by Grayeyes in his declaration, which were about 250 feet away from a house. There were no recent tire tracks to the house and no one was home. This supplemental investigation was again documented by body-worn camera footage. *See* Supplemental Report, attached hereto as Exhibit A; *see also* Body Cam Footage.

Nielson's Voter Challenge Decision

29. On May 9, 2018, Nielson sent a letter issuing his decision that Grayeyes was not a resident of Utah for purposes of voting. Nielson provided a summary of the evidence that had been submitted to him, which included the statement from Black, the evidence from Grayeyes, and the evidence gathered by Deputy Turk. Exh. H to Plaintiffs' Motion.

30. Nielson also provided his detailed analysis to support his decision, including the statutory definitions and factors he applied to the evidence, and the facts he found to be important in the decision, including the location of family, relationships, and employment, the length of absences from the residence, and the perception of the community regarding his residence. Nielson also considered the fact that Grayeyes himself gave conflicting statements regarding his residence. *Id*.

31. Nielson informed Grayeyes that he may appeal the decision to the district court pursuant to Utah Code § 20A-3-202.3(6)(a). *Id*.

Nielson's Letter Regarding Candidacy

32. Given the fact that Grayeyes was not only a voter but also a candidate, Nielson did not know how he should proceed with the election if Grayeyes was found not to be a resident and therefore could not vote.

33. Nielson contacted the Lt. Governor's office to seek information on what would happen if Grayeyes was found not to be a resident. They were unable to give him a definitive answer given that the statutes were silent on this matter.

34. Nielson could not ignore his voter challenge decision when it came to his duties as the County Clerk when it came to the election ballots. He now knew that Grayeyes did not

meet the requirements to be a candidate, and therefore sent Grayeyes another letter informing him that he could no longer accept Grayeyes' declaration of candidacy under the statute. *Id*.

GRAMA Request

35. On May 3, 2018, counsel for Grayeyes made a formal GRAMA request for records from San Juan County. Exh. T to Plaintiffs' Motion. San Juan County responded to the GRAMA request by mailing responsive disks and records on May 25, 2018. Exh. I to Plaintiffs' Motion.

ARGUMENT

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion."[2] "Any motion for injunctive relief that seeks to alter the status quo, such as the motion in this case, 'must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.'"[3] "To obtain a preliminary injunction the moving party must demonstrate: (1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable harm if the injunction is not granted; (3) the balance of equities is in the moving party's favor; and (4) the preliminary injunction is in the public interest."[4] This case "centers on the first prong, the plaintiffs' likelihood of success on the

[2] *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006) (quotations omitted).
[3] *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005) (quoting *O Centro*, 389 F.3d at 975).
[4] *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1092 (10th Cir. 2013).

merits."[5] San Juan County Defendants do not dispute that "[v]indication of constitutional freedoms and protection of First Amendment rights is in the public interest" and that "irreparable injury . . . is presumed to exist whenever First Amendment constitutional rights are infringed."[6] However, as explained below, Plaintiffs have failed to demonstrate a constitutional violation "by a clear or decidedly strong showing which would tip the balance of hardships in their favor."[7]

I. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THEIR CLAIMS BASED ON THE UTAH ELECTION CODE.

A. Mr. Nielson properly construed Ms. Black's complaint as a voter challenge.

The Court requested specific briefing on the propriety of the use of a voter challenge in connection with a candidacy challenge and the effect of Mr. Nielson's failure to resolve the candidacy challenge within 48 hours.[8] Voter challenges are governed by section 20A-3-202.3 of the Utah Election Code.[9] Substantial amendments to this section went into effect on May 8, 2018. Although Plaintiffs appear to rely on the 2018 version of the statute, the version applicable to this case, and the version Mr. Nielson followed, is the 2015 version in effect when Ms. Black filed her voter challenge on March 20, 2018.[10] That version provides that "[a] person may challenge the right to vote of a person whose name appears on the official register by filing with the election officer, during regular business hours and not later than 21 says before the date that

[5] *See id.*
[6] *Albright v. Bd. of Educ. of Granite Sch. Dist.*, 765 F. Supp. 682, 686–87 (D. Utah 1991) (emphasis omitted).
[7] *See id.* at 687.
[8] *See* Doc. No. 43, at 2.
[9] Utah Code Ann. § 20A-3-202.3 (2015).
[10] Unless otherwise indicated, any reference to section 20A-3-202.3 herein is therefore to the 2015 version, which is attached hereto as Exhibit B.

early voting commences, a written statement" that includes information about the person filing the challenge, information about the challenged voter, and a signed affidavit.[11] This section references a list of specific grounds for a voter challenge, including that the challenged voter is "not a resident of Utah."[12]

Candidacy challenges are governed by section 20A-9-202 of the Utah Election Code.[13] "A declaration of candidacy . . . is valid unless a written objection is filed with the clerk or lieutenant governor within five days after the last day for filing."[14] "If an objection is made, the clerk . . . shall: (i) mail or personally deliver notice of objection to the affected candidate immediately; and (ii) decide any objection within 48 hours after it is filed."[15] Although section 20A-9-202 does not list specific grounds for an objection, the general requirements for candidacy include that the individual "be a registered voter in the county, district, precinct, or prosecution district in which the person seeks office."[16]

Here, Ms. Black's complaint against Mr. Grayeyes could be construed as either a voter challenge or a candidacy challenge. Her initial complaint stated that she was seeking to challenge Mr. Grayeyes' candidacy on the ground that he may not be a resident of Utah.[17] Due to the nature of Ms. Black's allegations, a decision on her complaint was not simply a matter of Mr. Grayeyes's eligibility to be a candidate, but more fundamentally, his eligibility to vote. Mr.

[11] Utah Code Ann. § 20A-3-202.3(1)(a).
[12] *Id.* § 20A-3-202(1)(b).
[13] *Id.* § 20A-9-202.
[14] *Id.* § 20A-9-202(5)(a).
[15] *Id.* § 20A-9-202(5)(b).
[16] *Id.* § 17-16-1(1)(c).
[17] Doc. No. 13-2, at 1 (Exh. B).

Nielson did not make a decision on her complaint within 48 hours as required by section 20A-9-202 because he did not construe the complaint as a candidacy challenge. Because residency in Utah is a requirement both for candidacy and for voting, he determined that it was appropriate to construe her complaint as a voter challenge under section 20A-3-202.3. The seriousness of the allegation necessitated the additional time for investigation permitted under section 20A-3-202.3.

Further, although Ms. Black's initial complaint did not include all of the required information for a voter challenge, "[t]he election officer may provide a form that meets the requirements of this section for challenges filed under this section."[18] Contrary to Plaintiffs' assertions, Mr. Nielson was not required to dismiss her initial complaint: "If the challenge is not in the proper form or if the basis for the challenge does not meet the requirements of this part, the election officer *may* dismiss the challenge and notify the filer in writing of the reasons for the dismissal."[19] As permitted by statute, Mr. Nielson provided Ms. Black with a voter challenge form that she completed with all of the required information.[20] Thus, Mr. Nielson properly exercised his discretion in construing Ms. Black's initial complaint as a voter challenge and providing her with a form that met the requirements of section 20A-3-202.3.

B. Mr. Nielson's decision that Mr. Grayeyes is not a Utah resident was not arbitrary, capricious, or unlawful.

Plaintiffs claim that Mr. Nielson relied on improper factors in making his decision that Mr. Grayeyes is not a Utah resident. Utah's voter challenge statute provides the applicable standard of review for the decision of an election officer regarding a person's eligibility to vote:

[18] Utah Code Ann. § 20A-3-202.3(1)(c).
[19] *Id.* § 20A-3-202.3(2)(a) (emphasis added).
[20] *See* Doc. No. 13-2, at 2–3.

"The district court shall uphold the decision of the election officer unless the district court determines that the decision was arbitrary, capricious, or unlawful."[21] "A person resides in Utah if: (i) the person's principal place of residence is within Utah; and (ii) the person has a present intention to maintain the person's principle place of residence in Utah permanently or indefinitely."[22] A "principal place of residence" is "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."[23]

"There is a rebuttable presumption that a person's principal place of residence is in Utah and in the voting precinct claimed by the person if the person makes an oath or affirmation upon a registration application form" to that effect.[24] The election officers shall allow such a person to register and vote "unless, upon a challenge by a registrar or some other person, it is shown by law or by clear and convincing evidence that: (i) the person's principle place of residence is not in Utah."[25] While the statute enumerates relevant factors that the election officer may consider in determining the principal place of residence of the challenged voter, it also permits consideration of "other relevant factors."[26]

Here, Plaintiffs argue that Mr. Nielson improperly considered Mr. Grayeyes' absences from Utah, the public perception of his residence, and the habitability of his residence. There is

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[21] Utah Code Ann. § 20A-3-202.3(6)(b). As San Juan County Defendants have argued elsewhere, if Mr. Grayeyes wanted to directly challenge Mr. Nielson's decision, that recourse was available to him in the form of an appeal to the District Court.
[22] Utah Code Ann. § 20A-2-105(3)(a).
[23] *Id.* § 20A-2-105(1)(a).
[24] *Id.* § 20A-2-105(7)(a).
[25] *Id.* § 20A-2-105(7)(b).
[26] *See id.* § 20A-2-105(4)(i).

no indication from Mr. Nielson's decision that he considered habitability as a factor in making his decision. The factors he did consider were relevant to determining Mr. Grayeyes principal place of residence because they indicated that he had changed his residence to Arizona despite his insistence that his intent was to return to Utah. Under Utah law, "[i]f a person moves to another state or precinct with the intent of remaining there for an indefinite time as the person's principal place of residence, the person loses the person's residence in Utah, or in the precinct, even though the person intends to return at some future time."[27] In *Beauregaard*, the Utah Supreme Court interpreted residency requirements applicable to voters who change their residence: "The voter . . . may not, after he has lost his residence in a certain voting district, return thereto and cast his ballot therein merely because he was qualified to do so at the last preceding city election . . . If a voter has removed from the district, . . . he may not return thereto to vote at such an election any more than he could do so at any other election."[28] Public perception of a voter's presence or absence in the community is relevant because "[w]hen a voter is absent from the community, an intent to return alone will not suffice to create residency . . . The intent must be coupled with other evidence that such intent is 'bona fide.'"[29] Here, Deputy Turk's body cam footage shows that there was no visible evidence that anyone resided at Mr. Grayeyes' claimed address.[30] The footage also shows that multiple witnesses stated that they

[27] *Id.* § 20A-2-105(1)(h).
[28] *See Beauregaard v. Gunnison City*, 48 Utah 515, 160 P. 815, 818 (1916).
[29] *See Casarez v. Val Verde Cty.*, 957 F. Supp. 847, 857 (W.D. Tex. 1997) (citing *Carrington v. Rash*, 380 U.S. 89, 96 (1965)); *see also Dodge v. Evans*, 716 P.2d 270, 274 (Utah 1985) ("The law requires something more than a mere assertion by an inmate that he intends to change his voting residence to a new place from his prior residence.").
[30] *See* Doc. No. 49.

believed that Mr. Grayeyes lived in Arizona and that Mr. Grayeyes himself admitted that he stayed with his girlfriend in Arizona.[31] Thus, Mr. Grayeyes' intention of returning to Utah was insufficient to show that he was a resident of Utah where there was substantial evidence that he had changed his residence to Arizona.

II. PLAINTIFFS ARE UNLIKELY TO PREVAIL ON THEIR CLAIMS BASED ON THE FEDERAL CONSTITUTION.

A. Plaintiffs are unlikely to establish an Equal Protection violation based on the right to vote.

Plaintiffs claim that Mr. Nielson discriminated against Mr. Grayeyes by denying him the right to vote. "[C]itizens enjoy 'a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.'"[32] Because each county is its own jurisdiction, "the Equal Protection Clause requires only that each county treat similarly situated voters the same."[33]

"The right to vote is an important attribute of citizenship, but it derives from the state and may be exercised only upon meeting requirements set up by the legislature."[34] The United States Supreme Court has "noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivisions."[35] "An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional

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[31] *See id.*
[32] *Citizen Ctr. v. Gessler*, 770 F.3d 900, 918 (10th Cir. 2014) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).
[33] *Id.*
[34] *Rothfels v. Southworth*, 11 Utah 2d 169, 356 P.2d 612, 613 (1960).
[35] *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

scrutiny."[36] The Court has "uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."[37] The Utah Supreme Court has also recognized that "[t]he State's interest in establishing voting residency requirements that are based on a place with which the voter has his closest and most enduring ties is a compelling interest."[38]

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intention or purposely [sic] discrimination. This may appear on the face of the action taken with respect to a particular class or person, . . . or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself."[39] In *Yanito*, the court found that the county clerk's failure to inform Native Americans candidates about a specific filing requirement was "a crucial misstatement . . . knowingly and purposely carried out."[40] The Court made these inferences based on "the dependent status of the plaintiffs—their inferior knowledge and defendant's superior knowledge, and in view of her awareness that they were accepting her advice."[41] The Court reasoned that "[t]here is no other permissible inference to be drawn from the communication of half truths or silence where there is an obligation to

[36] *Id.* at 343–44.
[37] *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–69 (1978).
[38] *Dodge v. Evans*, 716 P.2d 270, 271 (Utah 1985).
[39] *Yanito v. Barber*, 348 F. Supp. 587, 592 n.7 (D. Utah 1972) (citations omitted).
[40] *See id.* at 593.
[41] *See id.*

speak out."[42] On this basis, the Court held that "there was a deprivation of not only substantial due process, but that there was an unlawful discrimination against the plaintiffs and the group which they represented."[43]

Here, relying on *Yanito*, Plaintiffs argue that discriminatory intent against Mr. Grayeyes can be inferred from Mr. Nielson's actions in light of the alleged history of discrimination against Native Americans in San Juan County. Plaintiffs' general allegations that San Juan County has historically discriminated against Native Americans are insufficient to show that Mr. Nielson individually had discriminatory intent in his decision that Mr. Grayeyes was not a resident of Utah.[44] Further, despite Plaintiffs' unfounded assertions, there is no evidence that Mr. Nielson made misstatements, withheld evidence, or used his official position for personal or political advantage in order to deny Mr. Grayeyes the right to vote. The evidence shows that Mr. Nielson's actions consisted of construing Ms. Black's complaint as a voter challenge, providing her with a form, investigating the challenge, notifying Mr. Grayeyes of the challenge, and making a decision on the challenge based on the evidence. Any missteps in the administration of his duties were due to inadvertence or inexperience. No discriminatory intent can be inferred from Mr. Nielson's attempts to carry out his duties as an election officer to the best of his ability.

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[42] *Id.*
[43] *Id.*
[44] *See Johnson v. Randolph Cty.*, 687 S.E.2d 223, 227–28 (Ga. Ct. App. 2009) (finding that "general allegations that the community had a history of racial strife and that a group of citizens had an agenda to prevent minorities from holding office do not demonstrate an intentional and deliberate policy or custom of the County that led [election officials] to challenge [the plaintiff's] nomination petition or treat his petition differently from other petitions").

Therefore, Plaintiffs are unlikely to prevail on their claim that Mr. Nielson discriminated against Mr. Grayeyes by denying him the right to vote in violation of the Equal Protection Clause.

B. Plaintiffs are unlikely to establish a procedural due process violation.

Plaintiffs claim that Mr. Grayeyes was deprived of due process because Mr. Nielson withheld evidence and relied on hearsay and secret evidence in making his decision on the voter challenge. For a claim involving procedural due process, the plaintiff must satisfy two elements: "(1) a constitutionally protected liberty or property interest, and (2) a governmental failure to provide an appropriate level of process."[45] "The right to vote . . . implicates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment."[46] The Due Process Clause requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[47] The "standard of culpability to establish a Fourteenth Amendment violation . . . is whether Defendants' conduct 'shocks the conscience.'"[48] "Actions 'intended to injure in some unjustifiable way' are 'most likely to rise to the conscience shocking level.'"[49] "[C]ourts have uniformly held that negligently inflicted harm is 'categorically beneath the threshold of constitutional due process.'"[50]

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[45] *Citizen Ctr. v. Gessler*, 770 F.3d 900, 916 (10th Cir. 2014).
[46] *Miller v. Blackwell*, 348 F. Supp. 2d 916, 921 (S.D. Ohio 2004).
[47] *Dusenbery v. United States*, 534 U.S. 161, 168 (2002) (quotations omitted).
[48] *Moore v. Nelson*, 394 F. Supp. 2d 1365, 1368 (M.D. Ga. 2005) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998)).
[49] *Id.* (quoting *Nix v. Franklin County School Dist.*, 311 F.3d 1373, 1375–76 (11th Cir. 2002) (quoting *County of Sacramento*, 523 U.S. at 849))).
[50] *Id.* (quoting *Nix*, 311 F.3d at 1375).

Utah's voter challenge statute sets forth the applicable level of process. It requires the election officer to attempt to provide the voter with notice of the challenge "at least 14 days before the day on which early voting commences," and the challenged voter must submit the above information "no later than seven days before the day on which early voting commences."[51] The election officer must determine whether the challenged voter is eligible to vote "[b]efore the day on which early voting commences."[52] "The filer of the challenge has the burden to prove, by clear and convincing evidence, that the basis for challenging the voter's right to vote is valid."[53] "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."[54]

In a Georgia case involving a voter challenge, the plaintiff argued "that Defendants bungled the investigation into his felony status, handling the situation differently than he would have handled it."[55] The court found that "[t]hough a dispute arguably exists as to whether Defendants' investigation was handled as delicately and discreetly as it could have been, there is nothing about it that shocks the conscience."[56] The court noted that under state law the election officials "had a duty to investigate claims that an elector was not qualified," "determined that the claims regarding Plaintiff's felony status merited investigation," and "enlisted the help of [the

[51] Utah Code Ann. § 20A-3-202.3(3).
[52] *See id.* § 20A-3-202.3(4)(a).
[53] *Id.* § 20A-3-202.3(4)(b)(i).
[54] *Id.* § 20A-3-202.3(4)(b)(ii).
[55] *Moore v. Nelson*, 394 F. Supp. 2d 1365, 1368 (M.D. Ga. 2005).
[56] *Id.*

sheriff] to perform a background check."[57] The court therefore concluded that "no reasonable juror could find that Defendants' conduct violated Plaintiff's Fourteenth Amendment rights" and granted Defendants summary judgment on Plaintiff's § 1983 claim.[58]

Here, Mr. Nielson followed Utah voter challenge procedures to the best of his ability. Despite Plaintiffs' complaint that he issued his opinion too early, Plaintiffs have offered no evidence to show that the timing of the decision violated the statutory process to which Mr. Grayeyes was entitled, or hindered him from an opportunity to present evidence, which he did on multiple occasions. Neither does Mr. Nielson's reliance on Deputy Turk's investigation shock the conscience. Section 20A-3-202.3 permits him to consider the documents and information available to him, which in this case included evidence obtained through an investigation that his predecessor indicated was appropriate to resolve a voter challenge. Thus, Mr. Grayeyes has failed to show a procedural due process violation based on the process that was afforded to him under section 20A-3-202.3.

Much like the Plaintiffs in this case, the plaintiffs in a New York voter challenge case argued that the defendants "denied them of their procedural due process rights by cancelling their [voter] registrations on the basis of undisclosed hearsay allegations, without affording them an opportunity to respond thereto" because defendants "allegedly refused to supply [the plaintiffs] with copies of any of the reports that formed the basis of their decision."[59] The court rejected plaintiffs' arguments on the grounds that "[e]very document in the record supports defendants'

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[57] *See id.*
[58] *Id.* at 1369.
[59] *Cox v. Commissioners of Election of Delaware Cty. (New York)*, 899 F. Supp. 111, 112 (N.D.N.Y. 1995) (quotations omitted).

contention that they reached their determination—that [plaintiffs] were not residents of Delaware County—in accordance with New York law."[60] The court noted that "defendants based their determination of [the plaintiffs'] non-residency on substantially more evidence than a sheriff's report," but that "[n]othing in the election laws suggests that voters whose residency is challenged have the right to inspect copies of, or respond to, any of the materials election boards consider when determining whether to cancel a voter's registration."[61] The court therefore held that plaintiffs "failed to state a claim against defendants for denying them the right to vote in local elections without providing them due process of law."[62]

Here, although Plaintiffs claim that Mr. Nielson withheld documents and relied on hearsay and secret evidence, Mr. Nielson had no statutory obligation to provide Mr. Grayeyes with all of the documents available to him as the election officer. Because "[a]ll documents pertaining to a voter challenge are public records,"[63] Mr. Grayeyes was free to make a GRAMA request for the documents, but he failed to do so until May 3, 2018, which was after the May 1, 2018 deadline for Mr. Grayeyes to provide additional information. Therefore, Mr. Nielson's failure to provide Mr. Grayeyes with this evidence does not constitute a procedural due process violation.

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[60] *Id.* at 113.
[61] *See id.* at 113–14; *see also Camarata v. Kittitas Cty.*, 346 P.3d 822, 826–27 (Wash. Ct. App. 2015) (rejecting plaintiff's argument that County Auditor failed to provide adequate notice of the voter challenge "based on the incorrect assumption that the Auditor is required to send the challenge and all the supporting documentation when providing notice").
[62] *Id.* at 113.
[63] Utah Code Ann. § 20A-3-202.3(8).

C. Plaintiffs are unlikely to establish a constitutional violation based on the right to campaign.

Plaintiffs claim that Mr. Grayeyes was deprived of his right to campaign.[64] Plaintiffs are not likely to prevail on their claim that Mr. Grayeyes was deprived of his right to campaign in violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs have failed to identify the class to which Mr. Grayeyes belonged and against which Mr. Nielson allegedly discriminated by denying him the right to campaign. To the extent that Plaintiffs claim that Mr. Nielson denied Mr. Grayeyes the right to campaign based on his status as a Native American, Plaintiffs have failed to provide sufficient evidence of discriminatory intent.[65] Further, Plaintiffs cannot claim that Mr. Nielson discriminated against Mr. Grayeyes based on his status as a nonresident. As explained above, Mr. Nielson had a compelling interest in ensuring that only residents vote, and it is this same interest that justifies allowing only residents to campaign.[66]

D. Plaintiffs are unlikely to establish a constitutional violation based on the right to travel.

Plaintiffs claim that Mr. Nielson's decision that Mr. Grayeyes does not reside in Utah denies him the right to travel. "The right of interstate travel has repeatedly been recognized as a basic constitutional freedom."[67] "Even a bona fide residence requirement would burden the right

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[64] Plaintiffs attempt to construe the primary constitutional violation at issue as the deprivation of Mr. Grayeyes right to campaign. *See* Doc. No. 13, at 47–48. However, Plaintiffs' arguments rely primarily on cases involving facial challenges to statutes that restrict campaign speech in which the plaintiffs allege viewpoint discrimination in violation of the First Amendment. *See id.* Because Plaintiffs' facial challenge to provisions of the Utah Code is against Defendant Lieutenant Cox, San Juan County Defendants do not address these arguments further.

[65] *See Johnson v. Randolph Cty.*, 687 S.E.2d 223, 227–28 (Ga. Ct. App. 2009).

[66] *See Dodge v. Evans*, 716 P.2d 270, 271 (Utah 1985).

[67] *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 254 (1974).

to travel, if travel meant merely movement."[68] However, cases involving residence requirements have been "concerned only with the right to migrate," or in other words, "to migrate, resettle, find a new job, and start a new life."[69] "States may show an overriding interest in imposing an appropriate bona fide residence requirement on would-be voters. One who travels out of the State may no longer be a bona fide resident, and may not be allowed to vote in the old State. Similarly, one who travels to a new State may, in some cases, not establish bona fide residence and may be ineligible to vote in the new State."[70] Although Mr. Grayeyes claims an infringement of his right to travel based on Mr. Nielson's application of Utah's residency requirement, Mr. Grayeyes appears to be asserting a right to movement, which is not constitutionally protected. Mr. Grayeyes is free to move to another state, but this does not exempt him from application of bona fide residence statutes. Mr. Grayeyes' right to travel, or in other words, right to migrate has not been infringed because Mr. Nielson's interest in imposing a residence requirement outweighs Mr. Grayeyes' right to travel.

III. PLAINTIFFS ARE UNLIKELY TO OVERCOME SAN JUAN COUNTY'S DEFENSES.

A. Plaintiffs' Claims Should be Heard in State Court.

The Court requested specific briefing on the effect of Mr. Grayeyes failure to apply for review in state district court.[71] The Utah voter challenge statute provides that "[a] decision of the election officer regarding a person's eligibility to vote may be appealed to the district court

[68] *Id.* at 255.
[69] *Id.* (quotations omitted).
[70] *Dunn v. Blumstein*, 405 U.S. 330, 342 n.13 (1972).
[71] *See* Doc. No. 43, at 2.

having jurisdiction over the location where the challenge was filed."[72] Plaintiffs argue that Mr. Grayeyes had no duty to exhaust non-compulsory state remedies before filing his § 1983 claims in federal court.[73] The Tenth Circuit has rejected this argument on the grounds that the plaintiff cannot claim a deprivation of due process where he has failed to avail himself of that process.[74] In *Lee*, the Court found that the plaintiff's "§ 1983 claim fails not because he refused to jump through the requisite hoops, but because he affirmatively pled that he was afforded notice and an opportunity to respond . . ." and "waived any challenge to the fairness of a post-termination hearing by failing to request such a hearing."[75] Similarly, in *Pitts*, the Court found that the plaintiff "was fully informed of his considerable procedural rights," that the state law procedures "clearly meet the requirements of the due process clause," and that "[b]y knowingly failing to take advantage of those procedures, [the plaintiff] waived his right to challenge them in federal court."[76] Plaintiffs rely heavily on the *Gale* case, which distinguished these cases on the ground that the plaintiff "took advantage of the administrative appeal levels available to him, unlike the plaintiffs in *Pitts* and *Lee*, who did not take advantage of any process" and "now challenges those administrative appeal procedures."[77]

Further, the presence of issues of interpretation of Utah election law indicate that this case may be appropriate for abstention. Cases involving the exhaustion of state administrative

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[72] Utah Code Ann. § 20A-3-202.3(6)(a).
[73] *See* Doc. No. 39, at 4.
[74] *See Lee v. Regents Of Univ. of Cal.*, 221 F. App'x 711 (10th Cir. 2007) (unpublished); *Pitts v. Bd. of Educ. of U.S.D. 305, Salina, Kansas*, 869 F.2d 555 (10th Cir. 1989).
[75] *See Lee*, 221 F. App'x at 714.
[76] *See Pitts*, 869 F.2d at 557.
[77] *See Gale v. Uintah Cty., No*. 2:13-CV-725-TC, 2015 WL 4645024, at *11–12 (D. Utah Aug. 4, 2015) (unpublished).

remedies also often involve abstention doctrines.[78] The Supreme Court explained abstention as follows: "Where strands of local law are woven into the case that is before the federal court, we have directed a District Court to refrain temporarily from exercising its jurisdiction until a suit could be brought in the state court."[79] Here, there are several issues of state law interwoven in this suit that have not yet been addressed by Utah courts. For instance, the Utah Supreme Court has not yet addressed the interplay between the voter challenge statute (section 20A-3-202.3) and the candidacy challenge statute (section 20A-9-202). Further, San Juan County Defendants note that Utah courts have not addressed whether transients can be residents under section 20A-3-202.3. Plaintiffs' claims primarily arise from Mr. Nielson's decision, under the procedures set forth in section 20A-3-202.3 rather than under section 20A-9-202, that Mr. Grayeyes was not a resident of Utah and was therefore not an eligible voter or candidate. The resolution of Plaintiffs claims thus depends on the interpretation of provisions of the Utah Election Code that Utah courts should have the opportunity to interpret in the first instance.[80]

Finally, the issues of Utah law involved in this case would be appropriate for certification to the Utah Supreme Court. "The Utah Supreme court may answer a question of Utah law certified to it by a court of the United States when requested to do so by such certifying court . . . if the state of the law of Utah applicable to a proceeding before the certifying court is uncertain."[81] The Utah District Court has noted that "courts determining the issue often find certification

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[78] *See, e.g.*, *Massengale v. Oklahoma Bd. of Examiners in Optometry*, 30 F.3d 1325 (10th Cir. 1994); *Spence v. Latting*, 512 F.2d 93 (10th Cir. 1975).
[79] *McNeese v. Bd. of Ed. for Cmty. Unit Sch. Dist. 187, Cahokia, Ill.*, 373 U.S. 668, 673 (1963).
[80] *See Ramey v. Rockefeller*, 348 F. Supp. 780, 791 (E.D.N.Y. 1972) (determining that abstention was appropriate for interpretation of residency requirements of state election law).
[81] Utah R. App. P. 41(a).

appropriate 'when the case concerns a matter of vital public concern, where the issue will likely recur in other cases, where resolution of the question to be certified is outcome determinative of the case, and where the state supreme court has yet to have an opportunity to illuminate a clear path on the issue.'"[82] Because the above issues involving interpretation of the Utah Election Code are a matter of vital public concern that the Utah Supreme Court has not yet addressed, San Juan County Defendants intend to file a Motion to Certify.

B. San Juan County Defendants are Entitled to Qualified Immunity.

"Qualified immunity protects officials performing discretionary functions from individual claims brought pursuant to 42 U.S.C. § 1983, if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[83] "The test for determining entitlement to qualified immunity is applied by considering the objective reasonableness of the official's actions (irrespective of his subjective beliefs) in light of legal rules which were clearly established at the time the action was taken. The unlawfulness of the action must be apparent to a reasonable official."[84] "As officials of the executive branch of government, election board members would appear entitled to qualified immunity as to their acts. Such immunity exists where there were reasonable grounds for the official's belief formed at the time and in light of the circumstances, coupled with a good-faith belief in the propriety of

[82] *See Utah ex rel. Div. of Forestry, Fire & State Lands v. United States*, 335 F. Supp. 2d 1319, 1321 (D. Utah 2004) (quoting *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001)).
[83] *Johnson v. Randolph Cty.*, 687 S.E.2d 223, 228 (Ga. Ct. App. 2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).
[84] *Id.* (quotations omitted).

the acts."[85] If the plaintiff establishes a constitutional violation, the court "would have to reach the next question of 'whether the right allegedly implicated was clearly established at the time of the events in question."[86]

Here, Deputy Turk is entitled to qualified immunity on Mr. Grayeyes' claims because it was reasonable for him to conduct an investigation of Mr. Grayeyes' residence when he became aware of Ms. Black's complaint alleging that he falsely claimed to reside in Utah. It was not apparent that actions typical to a routine investigation, such as visiting his residence and interviewing witnesses, were unlawful. Mr. Nielson is also entitled to qualified immunity on Mr. Grayeyes' claims because he was an election official who attempted to fulfill his duties to the best of his abilities. It was reasonable for him to believe that he could conduct an investigation of a voter challenge based on the advice of his predecessor. There were also reasonable grounds for his decision on the voter challenge because of the evidence that Mr. Grayeyes did not reside in Utah. Even if their conduct was not reasonable, given the limited precedent analyzing Utah's Election Code, it was not clearly established that the investigation or decision relating to the voter challenge would violate Mr. Grayeyes' rights.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be denied.

[85] *De La Cruz v. DuFresne*, 533 F. Supp. 145, 149 (D. Nev. 1982).
[86] *See Lee v. Regents Of Univ. of Cal.*, 221 F. App'x 711, 713 (10th Cir. 2007) (unpublished) (quotations omitted).

DATED this 11th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served this 11th day of July, 2018, via Utah District Court electronic filing system, upon the following:

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