Steven C. Boos (Utah Bar No. 4198)
Maya Kane, *Pro Hac Vice*
Maynes, Bradford, Shipps & Sheftel, LLP
835 East Second Avenue, Suite 123
Durango, Colorado 81301
Telephone: (970) 247-1755
Telecopier: (970) 247-8827
E-Mail: sboos@mbssllp.com
E-Mail: mkane@mbssllp.com

David R. Irvine (Utah Bar No. 1621)
Attorney and Counselor at Law
747 East South Temple Street
Salt Lake City, Utah 84102
Telephone: (801) 579-0802
E-Mail: Drirvine@aol.com

Eric P. Swenson (Utah Bar No. 3171)
Attorney and Counselor at Law
1393 East Butler Avenue
Salt Lake City, Utah 84102
Telephone: (801) 521-5674
E-Mail: e.swenson4@comcast.net

Alan L. Smith (Utah Bar No. 2988)
Attorney and Counselor at Law
1169 East 4020 South
Salt Lake City, Utah 84124
Telephone: (801) 262-0555
E-Mail: Alanakaed@aol.com

Attorneys for plaintiffs, Willie Grayeyes and Terry Whitehat

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' REPLY TO DEFENDANTS' OPPOSITION RESPONSES TO MOTION FOR PRELIMINARY INJUNCTION Civil No. 4:18-cv-00041-DN Judge: David Nuffer

INTRODUCTION

On June 26, 2018, plaintiff Willie Grayeyes ("Grayeyes") asked this Court preliminarily to enjoin defendant John David Nielson ("Nielson") to put Grayeyes as a candidate for San Juan County Commission, District 2, on the November ballot. On July 11, 2018, defendants in the case filed briefs (3 altogether), responding to this request. Put simply, Grayeyes' motion argued that the San Juan County defendants had used their official positions, in collaboration with defendant Wendy Black ("Black"), to oust Grayeyes' from the ballot, and that the manner in which this was accomplished, through maladministration of Utah's election code, constituted a violation of his First Amendment rights. In reply, the San Juan County defendants maintain that they did not abuse their prerogatives as public servants by administering the voter registration requirements in Utah's laws to the best of their ability and in good faith – and that, accordingly, their conduct did not rise to the level of that unconstitutional dishonesty which was condemned in the *Yanito* case,[1] a precedent which both sides invoke.

Yanito, however, requires the sorting and weighing of every circumstance which is relevant to this case. Grayeyes contends that the San Juan County defendants' course of conduct in treating Black's objection to Grayeyes' status as a registered voter in order, as they now in essence admit, to defeat his candidacy for a county commission seat should be considered in its entirety -- from the standpoint of recent history and in relation to the cumulative actions of all concerned -- and that, if this perspective is taken, those circumstances are a convincing witness of constitutional wrong.

In replying to defendants here, Grayeyes first outlines his position in response to the Court's "Order Requesting Special Briefing." And, although Grayeyes has answered most of defendants' arguments in the factual analysis and legal authorities found in his opening brief, he

[1] *Yanito v. Barber*, 348 F. Supp. 587 (D. Utah 1972).

next sets forth his rebuttals to the balance of defendants' arguments – largely, but not entirely, in the sequence used by defendants in their arguments to the Court.

What Procedure Should Have Been Followed

In Treating Black's Objection to Grayeyes' Candidacy?

Nielson now acknowledges that his true purpose in looking at Grayeyes as a voter was in order to review his qualifications as a candidate. In order to accomplish that purpose, Nielson used a statute designed to resolve voter registration disputes found at Utah Code, § 20A-3-202.3.[2] Nielson chose this path, he insists, because both questions, qualification as candidate and status as voter, entailed an issue respecting residency. The "seriousness" of the situation, in his view, required more time in order to conduct an investigation.

Challenges to Candidate Qualifications

But challenges to a candidate's qualifications are governed, in the first instance, by § 20A-9-202(5). Before filing a declaration of candidacy, each candidate must meet the "legal requirements" of that office, § 20A-9-201(1)(b), which, for county commissioners, include durational residency of one year prior to the election in question, § 17-16-1(1)(b). In light of § 20A-9-407(3)(a) and the facts of our case, Grayeyes' deadline for filing a declaration of candidacy was March 15, 2018, a deadline which he met by filing on March 9, 2018. The statutorily prescribed form of declaration, § 20A-9-201(4)(a), and the one used by Grayeyes, require a candidate to "solemnly swear," under oath, that he meets the legal requirements for the office being sought and to affirm his residency. What's more, before receiving Grayeyes' declaration of candidacy, the filing officer, in this case, a deputy at the San Juan County Clerk's

[2] All statutory citations hereafter are to the Utah Code unless otherwise indicated.

office, read "the constitutional and statutory requirements for the office" to Grayeyes who, in turn, affirmed that, as a candidate, he met those requirements. § 20A-9-201(3)(a)(i).

Once submitted, a declaration of candidacy, including its affirmation of residency, is "*valid unless* a written objection is filed" with the filing officer. § 20A-9-202(5)(a) (emphasis supplied). Any such objection must be made no later than 5 days after the last day on which declarations of candidacy may be filed. *Id.* In our case, that deadline, computed pursuant to § 20A-1-401, at the latest, was March 20, 2018. Since a declaration of candidacy in effect requires an affirmation respecting residency, a lack of residency obviously is a ground for objection.

If an objection is timely made, the election official "immediately" must communicate the objection to the affected candidate and furthermore must resolve that objection within 48 hours after receiving it. § 20A-9-202(5)(b). An election official's decision respecting matters of form is final, § 20A-9-202(5)(d)(i), but determinations of substance are reviewable, if prompt application for review is made, before a district judge, § 20A-9-202(5)(d)(ii). As an alternative remedy where objections are sustained, candidates may amend the declaration or file a new one, so long as this is done within 3 days of the election official's decision. § 20A-9-202(5)(c).

Timing is critical, for obvious reasons, when treating these objections. After filing his declaration, a candidate must invest days of effort and lots of money in pre-convention campaigning.[3] Convention dates are fixed in relation to the § 20A9-202(5) procedures, so that parties and delegates, in the exercise of their First Amendment associational rights, may know beforehand that their choice of candidate won't easily be derailed after the fact.[4] And a

[3] Grayeyes filed his declaration on March 9, so that he could garner sufficient delegates to achieve nomination at the Democratic Party Convention held March 23.

[4] Had an objection to Grayeyes' declaration of candidacy been timely filed March 20, it would have been resolved not later than March 22, in time for consideration by delegates to the Democratic Party Convention which nominated Grayeyes March 23.

candidate who succeeds at convention will want the same certainty before investing even more heavily in the time and money – and in the exercise of equally vital First Amendment rights to solicit votes – which are required to mount a campaign for a June primary or a November election.

Moreover, § 20A-9-202(5) maximizes the *prompt* resolution of candidate qualifications, *early in the election season*, because otherwise states might face constitutional challenges over delayed access to campaign fora, delays which prejudice the rights of candidates, under First Amendment principles, to have a full and fair opportunity to win at the ballot box, *cf. Anderson v. Celebrezze*, 460 U. S. 780, 790-793 (1983) (discussing importance of temporal considerations for voters and candidates in election contests), or, worse, complaints that different timelines for processing issues – such as those existing, as we will see, between challenges to candidates as opposed to objections to voters -- constitute discriminatory treatment which violates the Equal Protection Clause, *e.g., Anderson,* 460 U. S. at 799-801 (even same deadlines in election contest may create unequal burdens and "'sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike[ ]") (citation omitted).

The importance of timing expressly is written or implicitly understood, not simply from the real-world election context and constitutional constraints described above, but also in light of § 20A-9-202(5)'s language. Declarations of candidacy are valid *unless* an objection is filed *within a 5 day deadline*. If objections are timely filed, the election official *"shall"* resolve them within 48 hours. If sustained, candidates are given 3 days to cure or re-file, or, in the event judicial review is desired, it is available on condition that a petition to the district court "promptly" is lodged.

Utah's case law reinforces the timing imperatives of § 20A-9-202(5). Declarations of candidacy themselves must be timely filed – and candidates who miss their filing deadline are shown no mercy and left out in the cold. *See, Anderson v. Cook,* 130 P.2d 278, 282-283 (Utah 1942). The Utah Supreme Court has adhered to this view even where the interested parties have acted in good faith or substantial equities otherwise would excuse tardiness. *See, Utah State Democratic Committee v. Monson,* 652 P.2d 890 (Utah 1982). Indeed, in *Monson,* calling the statute regulating declarations of candidacy "the most important step mandated by the legislature" in the electoral process, the Court stressed that its timing provisions were compulsory and could not be construed away on equitable or other grounds. *Id.* at 893. *See also, Wood v. Cowan,* 250 P. 979 (Utah 1926) (nomination certificate was late by one day because of confusion over interpretation of election code provision respecting computation of time; statutory deadline is mandatory and late filing properly refused by elections official).[5] These precedents, although not dealing directly with objections to declarations of candidacy, nevertheless show that the Utah election code, and case law construing it, will not countenance any shillyshallying when candidates' rights are in the dock.[6]

Section 20A-9-202(5)'s provisions respecting judicial review are important as well. Relief from an election official's decision may be obtained, if promptly sought, with plenary

[5] The Utah Supreme Court abjured enforcement of the filing deadline for declarations of candidacy in *Clegg v. Bennion,* 247 P.2d 614 (Utah 1952), distinguishing *Anderson,* because the election official in *Clegg* gave candidates a filing deadline which was different from the statutory deadline. In *Monson,* however, the Court declined to follow *Clegg* and adhered to its earlier holding in *Anderson.*

[6] *Anderson, Monson,* and *Wood* are consistent with other Utah cases which hold that pre-election timing statutes – because they may impact the electorate at large – are mandatory measures to be strictly enforced. *See, e.g., Pugh v. Draper City,* 114 P.3d 546 (Utah 2005) (campaign disclosure deadline not met by one day and city recorder's decision to remove candidate from ballot upheld), citing *Sjostrom v. Bishop,* 393 P.2d 472, 474 (Utah 1964) (distinguishing between pre-election and post-election deadlines).

review – based on competent evidence -- from an independent judge. The parties themselves, using discovery, will investigate the merits of whatever objection has been raised. At a hearing on the case, they are given a full and fair opportunity to advocate their position and rebut the argument of an opponent. The trial court, as impartial arbiter, then renders judgment. As we will see below, the scope of judicial review where voter registration decisions are involved is substantially more limited.[7]

Challenges to Voter Registration

Pre-election challenges to voter registration are treated under § 20A-3-202.1. This statute also has timing features and processing deadlines, but they are keyed in relation to a person's right to vote in upcoming elections, §§ 20A-3-202.3(1)(a) and 20A-3-202.3(4)(a) – not in relation to the temporal guideposts (declarations of candidacy, objections to that declaration, nominating conventions, certification of nominees, primary elections, general elections) which matter to a candidate running the gauntlet of a state's electoral system. Residency in voter registration disputes is determined according to the precinct where a person wants to vote, § 20A-2-101(d) – not in relation to the geographic unit (here, San Juan County, § 17-16-1(1)(b)) which a candidate seeks to represent. The consequences for a registrant who fails to establish residency are not earth-ending, since he "may register to vote or change the location of the voter's voter registration if otherwise legally entitled to do so[,]" § 20A-3-202.2(7), and his right

[7] Candidate qualifications also may be challenged under §§ 20A-1-801, *et seq.* This statute, then codified as §§ 20A-1-703, *et seq.*, was analyzed in the *Maxfield v. Herbert* opinion discussed below. It authorizes registered voters to petition the Lieutenant Governor to bar a candidate before an election or to remove a winning candidate post-election in circumstances where violations of the elections code have occurred. On receipt of a petition, the Lieutenant Governor is empowered to "gather information" in order to determine whether a "special investigation" is needed. If the Lieutenant Governor concludes that it is, he refers the matter to the Attorney General who conducts such investigation and then, if warranted, arranges for prosecution of the offense in state court.

in this regard will not expire until 30 days immediately before the next election, §§ 20A-2-102.5(b) and 20A-2-101(1)(b). But residency challenges to political candidates, if sustained, will be devastating. Residency requirements for office-seekers usually are of significant duration, so a successful objection to a candidate's residency, even if he re-establishes voting status, as noted above, effectively eliminates him from the race – or, even if he overturns the election official's ruling, through court action or otherwise, he may suffer, in the meantime, irreparable losses in public relations, campaign momentum, or time on the hustings

Section 20A-3-202.1's voter registration challenge procedures are tailored with this narrower focus, limited purpose, and less consequential impact in mind. Because judicial review is strictly confined to the record established before the elections official, § 20A-3-202.3(6), the statute hedges the manner in which that record is assembled, what it may contain, and the level of persuasion it must achieve. Unlike the lieutenant governor who expressly is empowered to "gather evidence" and to ask the attorney general to conduct "special investigations," when candidate qualification contests are initiated under § 20A-1-801, the county clerk must rely on evidence supplied by the objector and the voter and what otherwise may be "available" such as voting records. There is no plenary review where an independent judiciary may overrule submissions of incompetent or unreliable evidence, but the county clerk is enjoined not to base a decision on unsworn testimony or hearsay accounts, especially from unnamed sources, and all the evidence must be clear and convincing in order to disenfranchise a voter.

Challenge Procedures Must Match Code Violations

The Utah Supreme Court, in *Maxfield v. Herbert,* 2012 UT 44, recently emphasized the importance of matching the correct procedure to an alleged offense under title 20A of our election code. In *Maxfield,* Stephen Maxfield contested Gary Herbert's gubernatorial win in

2010. Maxfield argued that Herbert had been disqualified as a candidate on account of campaign finance violations, and that this offense could be adjudicated and Herbert removed from office under § 20A-4-402. The Court disagreed, however, holding that Maxfield should have brought his complaint under the statute now denominated as §§ 20A-1-801, *et seq.* In parsing the differences in statutory language as between these measures, the Court held that questions respecting "eligibility for office," such as the county commissioner eligibility statute found in chapter 53 of title 17, should be tested under § 20A-4-402, but that candidate qualification issues, such as the county commissioner qualification statute found in chapter 16 of title 17, should be resolved under §§ 20A-1-801, *et seq*.

This determination, according to the Court, "importantly" was informed by the "broad structure of the election code[.]" *Maxfield*, 2012 UT 44, at ¶ 33. And, in this regard, the Court placed special stress upon the "statutorily prescribed procedural limitations" which are found in §§ 20A-1-801, *et seq.*, including the "key difference" that, when facing candidate qualification challenges, the lieutenant governor plays a "gatekeeper" role and is empowered expressly to "gather information" in furtherance of any "special investigation" into the code violations which have been raised. The opinion, at several points, also stressed that those who object to candidate qualifications should not be allowed to circumvent these controls – "including, most importantly, the provisions establishing the lieutenant governor's gatekeeping role in such proceedings[,]" -- by using alternative procedures in the elections code. *Id.* at ¶¶ 33 through 37.[8]

[8] The survey of the differences between voter registration residency and candidate qualification residency, given above on pages 7 and 8 of this brief, not only reveals another error in Nielson's decision to disqualify Grayeyes as a candidate, but also proves the wisdom of the Court's analysis in *Maxfield v. Herbert*.

In order to register to vote, a registrant need only establish residency – as defined in § 20A-2-105 – within the precinct or district where he intends to vote, § 20A-2-101(d). The statute isn't clear on the distinction between "precincts" or "districts," but the disjunctive "or" is used so, in all events, it may be one or the

other. *In order to file a declaration of candidacy* for county commissioner, a candidate, among other qualifications, must "*have been* a resident for at least one year of the county . . . in which the person seeks office," and "be a registered voter in the county . . . in which the person seeks office[,] §§ 17-16-1(1)(b) and 17-16-1(1)(c) (emphasis supplied). On March 9, 2018, Grayeyes met these qualifications, since, when he filed his declaration of candidacy, he had been a resident in the county for at least one year and was a registered voter at that time. Nielson's May 9 decision, determining that Grayeyes was not a resident of his voting precinct, did not contradict Grayeyes' declaration of candidacy or the candidacy qualifications found in §§ 17-16-1(1)(b) and 17-16-1(1)(c), because Nielson's ruling is keyed to a precinct rather than the county and applies as of the date of decision, May 9, whereas the qualifications for candidacy found in chapter 16 of title 17 are operative only in relation to the date on which the declaration was filed or, in this case, March 9.

These qualifications which must be met in declarations of candidacy are in contrast to the balance of § 17-16-1 which deals with maintaining residency during an elected candidate's term of office, § 17-16-1(2)(a), and creating vacancies in that office if and when an officer changes his principal place of residence by moving outside the county, § 17-16-1(2)(b). In this later instance, the statute requires the application of § 20A-2-105, but only in relation to a post-election move away from the county which would require a showing that the official had established a principal place of residence at a fixed habitation in a single location outside the county. This is important because § 20A-2-105, by its terms, only applies to chapter 2 of title 20A and Utah case law follows the language of this statute in making clear that, absent an explicit legislative expression to the contrary, the provisions of title 20A do not apply to other titles of the Utah Code. *See, Pugh v. Draper City*, 114 P.3d 546, 548-549 (Utah 2005) (provision of title 20A endorsing "substantial compliance" standard for certain purposes does not apply to campaign disclosure requirement found in title 10). The logical extension of this rule, especially in light of what appears to be careful draftsmanship in parsing pre- and post-election qualification standards as between §§ 17-16-1(1) and 17-16-1(2), is that the meaning of residency, in relation to declarations of candidacy for county commissioner under § 17-16-1(1)(b), well may be different from the definition respecting residency for voter registration purposes in § 20A-2-105.

All of this is complicated further by the presence of § 17-53-202 which requires that each member of a county legislative body shall be a registered voter of the county he represents and, according to subpart (2), "have been a registered voter for at least one year immediately preceding the member's election." This statute also fails explicitly to incorporate the residency definitions of § 20A-2-105, and may or may not reference them implicitly by its requirement of voter registration.

However these statutes best may be harmonized, it appears that the declaration of candidacy requirements in chapter 16 of title 17 are "qualifications" for candidacy whereas the residency requirements in chapter 53 of title 17 are "eligibility" standards for holding office, as those terms are elaborated by Justice Lee in *Maxfield v. Herbert,* discussed in this section of our brief, and that opinion holds that, at the end of the day, candidate qualifications must be tested (once outside the vetting process for declarations of candidacy set forth in § 20A-9-202(5)) under the procedures found in §§ 20A-1-703, *et seq.* (now found at §§ 20A-1-801, *et seq.*), and eligibility standards for holding office are most appropriately resolved through § 20A-4-402. In either event, however, Nielson used the wrong procedure when he channeled this dispute through § 20A-3-202.3.

Nielson's Deliberate Mismatching of Challenge Procedures and Substantive Violations

The record before the Court, as it has been developed thus far, shows that Nielson was aware of the differences between a candidate qualification challenge and a voter registration dispute, as well as the procedural significance of those differences to the case at hand. Defendants' brief indicates as much, implying, moreover, that this is the reason Nielson sought advice from a deputy county attorney and the lieutenant governor's office. However, the initial letter/complaint which he received from Black,[9] fairly read, clearly challenges the candidacy of Grayeyes. But notwithstanding this challenge, Nielson arranged for Black to fill out another form, one that disputed Grayeyes' registration as a voter -- and then he backdated that form to March 20.[10] Why would he do this?

The answer is apparent from the circumstances of this case. Black's letter/complaint is dated March 20, but defendants' brief says that it was mailed to Nielson, in which case, it had to arrive and could only have been filed after the March 20 deadline for the filing of objections to declarations of candidates. Realizing that Black had missed the March 20 deadline for objecting, Nielson must have concluded that, in order to derail Grayeyes' candidacy, he would have to explore a different route to the same end. This realization, not perplexity over how to proceed, explains his inquiries to a deputy county attorney and the lieutenant governor's office. In other words, the Black letter/complaint was time-barred insofar as objections to declarations of

[9] Most of the documentary references in this reply brief hearken back to the exhibits used by Grayeyes in his original brief. For simplicity's sake, the argument here assumes that the reader is conversant with those facts and documents. However, at certain points in this reply brief, Grayeyes references the relevant pages of deposition testimony from Nielson and defendant Colby Turk ("Turk"). Those depositions are attached as exhibits to this reply brief.

[10] At his deposition, Nielson admitted that he backdated the complaint which he helped Black prepare. His testimony on that occasion was that he had the complaint April 16 and backdated it to March 20. Please see the Nielson Deposition at pages 61 through 63.

candidacy were concerned. *This was clear as day*. And Nielson was bending his oars to circumvent that bar, a bar surrounding "the most important step mandated by the legislature" in the electoral process, Utah State Democratic Committee v. Monson, 652 P.2d at 893. In doing so, Nielson abandoned his neutrality as an elections official and took Black's part as objector -- to the extent of helping her with legal assistance at county expense.[11]

When he seized upon a solution (treating the objection to Grayeyes' candidacy as a voter registration dispute) which would undermine the deadline found in § 20A-9-202(5), he arranged for Black to submit a second complaint, had her backdate that document to March 20, and then, acting in his official capacity as county clerk, personally attested to her lie respecting the date of subscription and, just for good measure, added his own lie that he also had signed on March 20.

All of this was accomplished to create an appearance that the second complaint had been filed timely and to preserve an argument that Black's challenge to Grayeyes' voter status *and* candidacy was legitimate. Nielson in fact raised this argument, as a *post hoc* rationalization (albeit mis-citing § 20A-9-202(5), in correspondence with Grayeyes' counsel on May 30 after he disqualified Grayeyes as a candidate on May 10. Please see Grayeyes' opening brief, at page 17 fn. 5. Nielson then proceeded to cover his tracks by omitting to send Black's initial letter/complaint on May 23 in response to Grayeyes' GRAMA request of May 3, compounding

[11] As discussed below in subsequent sections of this brief, Nielson's extraordinary help to Black may be contrasted with his response to Grayeyes' counsel who importuned Nielson over and over for a look at the evidence upon which he would rely in resolving the voter registration dispute. Nielson first stonewalled these requests. Then he had his attorney, Mr. Trentadue, dissemble about Turk's investigation. And, finally, in this proceeding, the San Juan County defendants' brief says that this evidence wasn't supplied to Grayeyes' counsel because Nielson had no duty to do so – pursuant to the statutory process which Nielson had selected for handling that dispute.

this omission with an untruth in the cover letter – namely, that he had not withheld any documents.[12]

In pursuing this course, Nielson not only compromised his neutrality as an elections official and his integrity as a public servant, but also subverted the fundamental differences in how our election code treats objections to candidate qualification as opposed to voter registration. He acknowledges that, in channeling Black's complaint into § 20A-3-202.3, he was considering the legitimacy of the Grayeyes candidacy,[13] but felt that the matter was so serious it warranted an investigation which would require additional time to conduct.

Nielson's admission here illustrates his open rebellion against the legislative mandates respecting procedural limitations on candidate challenges. If the objection properly had been handled under § 20A-9-202(5), swift resolution would have been the order of the day -- because that door already had been closed in light of Black's untimely filing. But Nielson unilaterally re-opened that door by initiating his own proceeding, one in which he personally – instead of the parties themselves through an open-ended and transparent discovery process as contemplated in the judicial review provisions of § 20A-9-202(5) -- would conduct an investigation.

Indeed, if the objection – on equally proper terms – had been handled under §§ 20A-1-801, *et seq*., the Lieutenant Governor would have been the gatekeeper with clear and specific

[12] The initial Black letter/complaint does not bear a time-stamp, showing the date of receipt, as typically is used in government offices, especially when filing deadlines, such as those under review here, are at issue. This omission, like the others noted above, was calculated to conceal the fact that Black's filing was untimely and is an additional badge of fraud which reflects adversely on Nielson's conduct in this case.

[13] Turk's report also suggests that the impetus for his investigation, as directed by other San Juan County authorities, was a challenge to Grayeyes' candidacy rather than his status as a voter. The facing page of the report indicates that he was investigating a crime which involved the giving of false information to a government official, which would seem to implicate Grayeyes' oath-bound declaration of candidacy. If he had been investigating voter registration fraud, Turk would have cited to the specific statute which covers that offense, namely § 20A-2-401.

powers to gather information to determine whether further investigation was needed on the facts of the case – but Nielson, giving a strained reading to "available" information, in § 20A-3-202.3(4)(b)(ii), and a hostile interpretation to the disallowance of hearsay evidence from anonymous sources in § 20A-3-202.3(1), chose to go outside the boundaries of his office and admit evidence in contravention of the statute.

And Nielson's determinations in this regard entailed more than statutory violations. His use of § 20A-3-202.3 to contest Grayeyes' qualifications as a candidate, drew a discriminatory line between Grayeyes and other office-seekers insofar as the timing and manner of processing these challenges is concerned and, as noted above, this line runs afoul of the *Anderson* Court's First Amendment and Equal Protection rationales. *See, Anderson v. Celebreeze,* 460 U. S. at 799-801.

Nielson's departures from the prescribed procedures of the election code, as we have seen from the case law cited above, cannot be excused on the basis of inadvertence, slight negligence, or good faith. These events haven't excused candidates who slip and fall on the law, and they even more surely won't justify public officials who take an oath to uphold that rule of law. But none of these pleas are available to Nielson on the facts of this case in any event. Nielson's actions reveal a guilty conscience, not good faith.

Nielson treated Black's complaint as a challenge to Grayeyes' candidacy because – at the end of the day -- Nielson was focused on disqualifying Grayeyes as a candidate. He didn't really care about Grayeyes' ability to vote except as a means to that end. No county clerk, after all, had objected to Grayeyes' status as voter for 30 years, except when he ran for office in 2012, at which time his voter status and candidate qualifications were upheld by Norman Johnson, the "predecessor" county clerk, with whom, as the San Juan County defendants' have

acknowledged, Nielson consulted in relation to the Grayeyes' case (although Nielson, in his deposition, implausibly denies that Johnson's 2012 decision on Grayeyes was discussed in that conversation). Nielson thus used § 20A-3-202.3 to thwart the protections of § 20A-9-202(5) in order to avoid the consequences of Black's late filing and to mask his more fundamental intention of crushing Grayeyes as a commission candidate.

In that regard, he now admits to backdating Black's complaint – and the circumstances here compel the conclusion that this was done to undermine what the Utah Supreme Court has called the "most important" step" in Utah's electoral process.[14] The backdating, however, was just the beginning of fraud in connection with Black's complaint. Nielson accepted Black's complaint, even though he should have known that she was lying under oath – not only about the date on which it was signed, but also concerning the contents of the complaint itself, namely, that Black had exercised due diligence, as required by the statute, in investigating her charge, and, also, as statutorily required, that she had prepared her complaint from personal knowledge rather than hearsay evidence from anonymous sources. And Nielson knew that these were misstatements of fact to a moral certainty because the Turk report which he himself had commissioned exposed those lies. Unable to deny what the documents so clearly reveal, Nielson in fact admitted to this guilty knowledge in his deposition testimony at pages 58-59.

In addition, although Nielson knew that Turk was investigating Grayeyes and preparing a report, Nielson had his attorney, Mr. Trentadue, falsely inform Grayeyes' counsel that no such investigation was being undertaken by the county. And even when he had Turk's report in hand -

[14] Nielson's conduct in this regard, along with his other misdeeds which are detailed in Grayeyes' submissions to the Court, presents a strong ground for impugning his credibility as a witness and, in turn, for disregarding all of his testimony in this case, including the elaborate but ultimately unpersuasive *mea culpa* in the San Juan County defendants' brief. *See, e.g., United States v. Gilkeson*, 431 F. Supp. 2d 270, 277 (N. D. N. Y. 2006) (where witness testifies falsely to material fact, his entire testimony may be disregarded for want of credibility).

- ostensibly basing his findings and conclusions upon it, perpetuating the deception he already had organized through Trentadue -- Nielson failed to give a copy of that report to those attorneys, waiting until after his decision was rendered – and, then, sending the report only when compelled by a GRAMA request. Even then he dissembled, since his cover letter for the GRAMA request states that he is not withholding any documents about the Grayeyes investigation, when, in fact, for the very troubling reasons described above, he continued to conceal Black's initial letter/complaint. His recent deposition testimony – at page 55 -- shows that the cover-up on this front ran deeper still, since, just to be sure that Grayeyes wouldn't know about Black's initial letter/complaint, Nielson omitted to include in the GRAMA response his April e-mail exchange with Black wherein they organized and backdated the second complaint.[15]

Black's challenge to Grayeyes' candidacy, as Nielson seems to acknowledge through his argument in this Court, was a matter of consequence, not only to Grayeyes himself, but also to the San Juan County electorate and Utah's electoral process. Nielson should have treated Grayeyes' candidacy with a gravity and care which every right under the First Amendment and Equal Protection Clause deserves. He should have remained neutral in the contest, instead of helping Black do an end-run around legislative mandates. He should not have applied a voting statute in order to test a candidate's qualifications for elective office and then practiced deception – to a gross and inexcusable extent – in the administration of that wrong procedure. He should

[15] Always claiming "oversight," Nielson withheld many more documents when responding to this GRAMA request. Nielson deposition at pages 26, 27, 37, 38, 44, 56, 57, and 77. Plaintiffs have asked for copies of these documents on discovery in this proceeding, but have yet to receive them from opposing counsel. Before filing his action in this Court, Grayeyes made a GRAMA request to have Nielson produce all records respecting Norman Johnson's ruling that Grayeyes was a resident of San Juan County when he ran for commissioner in 2012. Nielson also failed timely to transmit documents pursuant to this request. Nielson deposition at page 129. These documents also are due to be produced in this proceeding.

not have dishonored his oath of office, by making false statements in relation to Black's complaint.

Was Grayeyes Required to Seek Judicial Review Under § 20A-9-202(5)(d)(ii)?

Grayeyes was not required to seek judicial review pursuant to the terms of section 20A-9-202(5)(d)(ii) because Nielson did not adjudicate Black's objection to Grayeyes' candidacy under this section of the elections code – and, indeed, through the course he pursued, Nielson positively mislead Grayeyes in this regard. Even if Grayeyes could have believed that Nielson's treatment of the case proceeded under § 20A-9-202(5), resulting in a decision which sustained Black's objection to the declaration of candidacy, Black's complaint was backdated and not timely filed under that statute – which clearly provides that, absent a timely objection, the declaration of candidacy remains valid. Finally, since in all events Nielson did not make his decision within 48 hours (this being the statute's second bar date), that decision was void. Grayeyes acknowledges that, since the statute itself does not dictate a remedy in the case of a late decision, this result may not automatically follow, but he maintains that whatever statutory lacunae may exist in this regard can be filled by applying the principles found in the cases cited above which hold that the election code's mandated deadlines must be enforced strictly and late filings, in all cases, are of no force or effect. Insofar as the Court's question about judicial review is intended to raise a concern respecting so-called exhaustion principles, Grayeyes addresses that point below in a subsequent section of this brief.

Nielson's Maladministration of § 20A-3-202.3

Although he chose the wrong procedure to disqualify Grayeyes as a commission candidate, Nielson nevertheless is guilty of maladministration under § 20A-3-202.3 – and within the scope of *Yanito* -- in handling that procedure.

The San Juan County defendants do not appear to gainsay Grayeyes' descriptions of the many ways in which Nielson abused his office when handling Black's objection to Grayeyes' candidacy. They simply state that Nielson was not required to dismiss Black's obviously deficient complaint under §20A-3-202.3(2) because, when Nielson processed Black's claim, the statute said "may" and the word "shall" was inserted later through a 2018 amendment. In all events, the argument continues, Nielson's procedural aberrations did not offend free speech, equal protection, or due process because they do not "shock the conscience" of ordinary observers. The defendants, however, are wrong on both counts.

First, the word "shall" was inserted in § 20A-3-202.3(2) by a 2018 amendment, but that amendment became effective prior to Nielson's decision to disenfranchise Grayeyes on May 9. Utah cases provide that new laws effecting change in procedure are applied retroactively to pending actions and given force at the time a court or agency decides a case. *See, e.g., Beaver County, et al. v. Utah State Tax Commission,* 2010 UT 50, at ¶¶ 10 through 15, and *Evans & Sutherland Comp. v. Utah State Tax Commission,* 953 P.2d 435, 437-438 (Utah 1997). Hence, there is no question that the Black petition should have been dismissed outright. Judging from the San Juan County defendants' description of events, and other references in the record before the Court, Nielson had a large pool of legal talent at his disposal -- which could have been (and apparently was) tapped to assist him in parsing what in hindsight appears to be a garden-variety question of statutory construction.

In truth, however, the retroactivity issue, as with the balance of Nielson's protestations of confusion or innocence, is a red herring. If he really cared about what Utah's election code did or did not require of him, he would not have backdated Black's complaint in the first instance in order to subvert the plain language of § 20A-9-202(5). Or even if he counted on that backdating

to evade Black's time bar in § 20A-9-202(5)(a), he can't possibly explain his outright violation of the requirement that he decide the objection within 48 hours, what in effect is a second limitations period found in § 20A-9-202(5)(b)(ii). Indeed, the San Juan County defendants' brief avers that Nielson wanted "more time" so that he could conduct an investigation which was commensurate with the "seriousness" of the charge, and this surely is a reference to the 48 hour time limitation found in § 20A-9-202(5)(b)(ii) -- and just as surely an expression of Nielson's willingness to flout the requirements of that statute. In other words, under the circumstances of this case, it is hard to believe that Nielson conscientiously was attending to the legislative mandates of the various statutes – however worded or construed -- before him.

Second, Nielson's conduct is shocking to the conscience of any fair-minded person as a matter of due process, but, just as important, his behavior as an elections official was so far beyond the pale that, under the circumstances, it must be taken as evidence of discriminatory intent against the First Amendment rights of Grayeyes and all those who wanted to see him on the ballot. The procedural wrongs inflicted by Nielson, as detailed in Grayeyes' opening brief and above in this brief, show that intent clearly.

Nielson minimizes this misconduct, arguing that it was all in a day's work, the inevitable oversights of a busy office handling a difficult case. But the evidence of Nielson's culpability can't be palliated with these excuses. Again, Grayeyes asks the Court to consider all of the circumstances, described in his briefings, which, taken cumulatively, show or suggest Nielson's maladministration. But let's respond here to defendants' attempts to justify two specific instances of those abuses.

The lack of impartiality. Defendants explain that Nielson was evenhanded and conscientious about his treatment of Black's complaint. Section 20A-3-202.3 indeed

contemplates that county clerks as election officials will be neutral decision-makers, but the canons of neutrality are offended when a judge takes on the role of advocate, as Nielson did for Black, or combines his office with the investigation and prosecution of a case as he did with Turk. *See, e.g., Anderson v. Industrial Comm'n of Utah*, 696 P.2d 1219, 1221 (Utah 1985), citing *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D. C. Cir. 1962) (violation of due process to combine prosecutorial and judicial functions). *See also, Taylor v. South Jordan City Recorder*, 972 P.2d 423, 424 (Utah 1998) (county official who has interest as advocate in election contest can't be trusted to discharge administrative duties).

This lack of neutrality appeared on many fronts in Nielson's handling of Black's complaint. For example, he went out of his way, as described above, to assist Black in preparing her objection to Grayeyes' candidacy, but stonewalled the attorneys for Grayeyes when they asked for documentation which would enable them to defend against that objection. Even in this proceeding, Nielson justifies this discrepancy in his treatment of the litigants before him by insisting, with no little irony, that he had no "duty" to respond to Grayeyes' counsel.[16] He argues that he has plenty of discretion – invoking the repealed "may" in the statute – to accept an obviously deficient complaint from Black, but can't find enough elbow room within the four corners of that statutory text to transmit the materials which would ensure adequate notice and a fair hearing to Grayeyes and his attorneys. Grayeyes observed the statutory mandate to make his declaration of candidacy under oath, *see, e.g., Utah State Democratic Committee v. Monson*, 652 P.2d at 893 (an "important" legislatively imposed requirement which "protects" the election process), but notwithstanding a corresponding mandate in § 20A-3-202.3, the only submission

[16] Nielson notified Grayeyes about the challenge (omitting any mention of Black) by letter dated March 28. Nielson might have sent a copy of Black's second complaint with this letter, but, since the second complaint wasn't prepared and backdated until at least April 16, it was not available for transmission at that time.

which Nielson took into account, namely, the Turk report, wasn't given under oath. And, more than this, Nielson backdated a critical document in the case and witnessed the false oath to Black's signature and told his own lie when attesting that signature, as of March 20, on the same document. The San Juan County defendants would have the Court believe that these violations of process don't matter as they could not have affected the outcome of this voter registration dispute. With respect, bias always matters and an impartial decision-maker is fundamental to due process.

The problems with adequate notice and a fair hearing. As another example, the San Juan County defendants argue that the failure to tell Grayeyes' counsel about the Turk investigation did not amount to much, since Nielson had a "duty" to investigate in all events and there is 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."

Section 20A-3-202.3 is silent about any "duty" which Nielson might have to investigate,[17] and thus it is remarkable that Nielson, especially as a supposedly neutral arbiter, would have undertaken this task. This undertaking was all the more remarkable since Nielson now claims that this same form of statutory silence absolved him from any "duty" to send Grayeyes' counsel the materials which they were requesting in order to protect their client's right to exercise his franchise.

In any case, Nielson's omissions entailed much more than the Turk investigation. He also failed to disclose his true intent – to challenge Grayeyes' candidacy behind the mask of a

[17] This is in contrast, as noted above, to the language of §§ 20A-1-801, *et seq.*, which Nielson could and perhaps should have applied in this proceeding, and which expressly provides the lieutenant governor with information gathering powers.

statute which regulated voter registration. He failed to disclose his help for Black, especially in backdating her complaint in order to avoid the strictures of a limitations period. This latter omission is something of a double-blind, since the substitution of complaints while backdating the second was intended to maintain Nielson's cover that he was handling a challenge to voter registration rather than attempting to derail a candidacy. He failed to disclose – as revealed in the Turk report – that Kendall Laws, the San Juan County attorney and son of Grayeyes' election opponent, was involved in an investigation which ultimately would result in giving Grayeyes the boot off the ballot. Indeed, he failed to disclose that he had organized the Turk investigation, which commenced March 23, even before he had received an official complaint respecting Grayeyes' voter status from Black on April 16. And Nielson did not sin merely by omission about the Turk investigation as well as other material aspects of the Black complaint. Using Trentadue, Nielson fraudulently disclaimed the existence of any investigation into Grayeyes' voting registration. Moreover, Nielson's May 23 response to Grayeye's GRAMA request withheld Black's initial letter/complaint (and other documents) while positively – but falsely -- affirming that no documents were being withheld.

And of course there is "no evidence" respecting how Grayeyes otherwise would have handled this matter had he known, before the decision was issued, what he truly was up against in terms of the record being assembled by Nielson. That's what a lack of notice, keeping an opponent in the dark, accomplishes in a case; it handcuffs contestants and prevents them from mounting a *responsive* defense or pursuing other remedies. But if Grayeyes' counsel had known that Nielson's approach to the statutory procedures for challenges to voter registration was to conduct his own investigation, that he had marshalled the resources of the sheriff's department in doing so, that the product of that effort would be hours of videotape and a 20 page report, and

that, most important, the purpose behind and consequence of that effort would be not merely disenfranchisement under § 20A-3-202.3 but also disqualification as a candidate under § 20A-9-202(5), they would have moved heaven and earth to oppose the *ultra vires* nature of the investigation and then proceeded, as a cautionary matter, to get their own videotape and to develop their own record in relation to Nielson's extra-statutory criteria respecting residency, such as "public perception" and the like.

It bears repeating that there was no notice that Nielson was gunning for Grayeyes' candidacy. That notice is mandated under the candidacy disqualification procedures of Utah's election code. § 20A-9-202(5)(b)(i). But Nielson notified Grayeyes that his voter registration was being challenged, and not that his candidacy was under review. Any notice that Nielson was raising the stakes from voting to candidacy would have caused an escalation in the rights at issue, since the right to vote affects Grayeyes only, while the threat to candidacy impacted not only Grayeyes but also the associational rights of all voters in San Juan County and the Democratic Party which nominated him to run for office. This bait and switch approach does not comport with due process, which requires, at a minimum, that a respondent receive fair notice of actual charges against him so that he can prepare accordingly to defend. Had fair notice of the attack on his candidacy been given, Grayeyes could have enlisted allies in his fight, such as the Democratic Party itself, and brought a challenge in district court under the contest provisions of the election code, halting the voter registration proceedings, getting plenary review of all matters, both procedural and substantive, before an impartial judge. Nielson's "notice," omitting and even misleading Grayeyes in relation to the actual issues in this case, prevented all that.

Was Nielson as Bad or Worse than the Clerk in the *Yanito* Case?

Both sides to this controversy point to the *Yanito* decision and its holding that maladministration of election laws, under appropriate circumstances, can violate the free speech, equal protection, and due process rights of candidates. Hence, the facts of that case may be a helpful yardstick against which to measure the conduct of Nielson in this proceeding – in determining whether Nielson alone or in combination with the other San Juan County defendants abridged Grayeyes' constitutional rights.

The facts in *Yanito* were straightforward. Two members of the Navajo Nation were interested in running for open seats on the San Juan County Commission. Through an advisor, they asked the San Juan County Clerk what needed to be done in order to qualify as independent candidates in those races. The clerk informed the advisor that the prospective candidates must file declarations of candidacy and pay a fee. She omitted to tell the advisor that, in order to qualify as an independent candidate under the elections code, each prospective candidate also would have to submit nominating petitions signed by 50 electors. Relying on this partial advice, the prospective candidates filed declarations and paid the fee, but failed to submit the required nominating petitions. Upon receipt of the declarations and fee, the county clerk approached the county attorney, telling him that the filing was incomplete in the absence of the petitions. The county attorney conveyed this information to the prospective candidates who proceeded to gather signatures, but, lacking enough time, were five days late in turning them over to the clerk's office. In light of this deficiency, the clerk refused to put the prospective candidates on the upcoming ballot. The prospective candidates then filed suit under 42 U. S. C. § 1983, claiming that they had been misled by the county clerk – on account of her omission to tell them about the nominating petition requirement in a timely manner -- and their rights to the free exercise of

political rights, substantive due process, and equal protection therefore were violated. They sought injunctive relief to go on the ballot.

Beyond this general outline, the specific details of the Navajos' encounter with the county clerk in *Yanito* have disturbing echoes in relation to the facts of our case. For example, the prospective candidates' advisor there, like Grayeyes' counsel here, made numerous inquiries to the clerk's office in an effort to sort whatever difficulties might obtain in connection with their desire to get on the ballot, but the county clerk withheld facts respecting the nominating petition requirement. *Yanito v. Barber,* 348 F. Supp. at 592-593. Like Nielson here, the clerk in *Yanito* also attempted to excuse her failure to divulge this information on the ground that "she did not consider it her duty to advise [prospective candidates] of the legal requirements." *Id.* at 593. In *Yanito,* the clerk gave partial information to the prospective candidates, but this incomplete disclosure about declarations and fees made the omission to disclose about petitions all the more misleading. *Id.* And this circumstance is not unlike Nielson's March 28 notice that Grayeyes' voter registration was being challenged while omitting to state that, in reality, Black's initial letter/complaint was a frontal attack on his commission candidacy.

The *Yanito* court did not address the plaintiffs' facial challenge to the statutes at issue in that case, but, after reviewing the background of voting rights, social conflict, and racial tension in San Juan County -- and the political reality that discrimination may take many forms, "subtle," "simple," or "sophisticated," *Yanito v. Barber,* 348 F. Supp. at 591, quoting in part from *Lane v. Wilson*, 307 U. S. 268, 276 (1939) -- the three-judge panel determined that the clerk's nondisclosure about nominating petitions was "a crucial misstatement." Moreover, according to the Court, an *inference* that this misstatement was "knowingly and purposely carried out[,]" under the circumstances of that case, was unavoidable. *Yanito v. Barber,* 348 F. Supp. at 593.

Wrongful actions of this sort, in the Court's view, constituted a violation of the plaintiffs' constitutional rights to "substantial due process" and Equal Protection. *Id.* The Court said:

> [I]t is not necessary to consider the statute's validity on its face since there are not any palpable deficiencies, but this does not end the inquiry for a statute valid on its face may be administered in an unconstitutional manner. And so the conduct of the state acting through its officer must be appraised in the light of how the statute was used, and if it appears that it was operated in a discriminatory manner the resultant state action violates the Fourteenth Amendment regardless of the statute's being fair and rational.
>
> The threat to violation of constitutional rights is equally grave in the case of maladministration of the law as it is in the case of a statute which is unconstitutional on its face. The right which is infringed is not unimportant. It is the right to seek political office and to obtain majority support for his views – a substantial right of a citizen. Also, there is present the principle that the Constitution will not tolerate any preferred class of voters. *Yanito v. Barber*, 348 F. Supp. at 592.

The clerk's conduct in *Yanito* is a pale reflection of what we have seen from Nielson in the instant proceeding. Nielson's prevarications, for one thing, far outmatch those of the clerk in *Yanito*. He certainly withheld information, but, more than this, consciously misrepresented certain material facts. He backdated a document in order to subvert a statute of limitations and, in the process, thumbed his nose at what the Utah Supreme Court has called the most important step in our electoral process. He threw away any semblance of neutrality in order to take sides in the contest he was tasked with adjudicating. And the litany of offenses, described *ad nauseum* in Grayeyes' briefing to this Court, continues from there.

Perhaps it is old fashioned of us to insist, in Justice Cardozo's famous phrase, that all those in fiducial positions, including officials like Nielson, should observe the "punctilio of an honor" as they serve to administer our laws in furtherance of the public business. But surely it is not unreasonable to require men like Nielson to carry out the "intent and purpose" of our election code which is "to ensure fairness of elections[,]" and, in addition, "'to prevent fraud and to secure freedom of choice and not, by technical obstructions, to make the right of voting

insecure.'" *Ellis v. Swensen,* 16 P.3d 1233, 1241 (Utah 2000), quoting from *Earl v. Lewis,* 77 P. 235, 237 (Utah 1904). On the facts of this case, Nielson's behavior did not satisfy even this lower standard, let alone the conduct mandated by the *Yanito* court. Grayeyes respectfully submits that, in light of the controlling precedent of the *Yanito* case, Nielson should be enjoined and Grayeyes should go on the November ballot.

Nielson's Actual Decision on Grayeyes' Residency

The San Juan County defendants ask whether Nielson's decision on Grayeyes' residency was "arbitrary, capricious, or unlawful," echoing the standard of review found under state law in § 20A-3-202.3(6)(b). This of course is the wrong question. The real issue is whether Nielson's decision-making process and the decision itself – through accumulated circumstance – show that the San Juan County defendants in general or Nielson in particular trampled on Grayeyes' constitutional rights. This showing is made in Grayeyes' briefing to this Court.

But even if these defendants are posing the right question, and even if the state's standard, noted above, were to govern, the incontrovertible answer is "no." Nielson was *required* to dismiss Black's obviously deficient complaint(s) under § 20A-3-202.3(3)(a). Continued processing of the case thereafter was unlawful. And since his ruling was based entirely on Turk's report, or in other words, unsworn hearsay evidence which in turn relied upon unsworn hearsay evidence – which is interdicted by the statute – it was unlawful.[18] And since a record

[18] Nielson argues that he is entitled to rely upon Turk's report because it comes within the "other available information" language of subpart (4)(b)(ii) of the statute. The words of the statute, however, will not carry this freight. "Available" information is information which already exists, not evidence which is generated after the fact through investigation. And it would be anomalous to allow county clerks to rely upon "information" which, like Turk's report, is from an unsworn, hearsay source, when the mandates of the statute are elsewhere so insistent that this sort of evidentiary pitfall is to be avoided. In the event, Nielson's self-indulgent exception would swallow the statute's carefully crafted rules.

based entirely upon hearsay never can qualify as clear and convincing evidence – another standard mandated in the statute – it was unlawful.

Nielson's decision was unlawful on the merits because, as argued in Grayeyes' opening brief, in a proper review, the only issue should have been whether Grayeyes had established a primary place of residence, a fixed habitation in a single location, in Arizona, an issue which Nielson failed to address and which his only evidentiary source, Turk's report, emphatically resolves against him.[19] And, even if the controlling issue were whether Grayeyes had a primary place of residence, a fixed habitation in a single location (not where he presently "lives") in San Juan County,[20] Turk's report, when carefully read, as demonstrated in plaintiff's opening brief, shows that Grayeyes' home is at Paiute Mesa at Navajo Mountain.[21]

This is the conclusion reached by Nielson's predecessor, Norman Johnson, when Grayeyes ran for a county commission seat in 2012. And it can come as no surprise to the San Juan County defendants that this fact hasn't changed with the passage of a few years. Indeed, this fact does not surprise the San Juan County defendants, two of whom, Nielson and Turk, both admit in their deposition testimony that Grayeyes has a fixed habitation at a single location,

[19] Turk concedes this point in his deposition at page 105.

[20] In this regard, the San Juan County defendants argue that Turk's body cam footage, taken on a single day, showing "no visible evidence that anyone resided at Mr. Grayeyes' claimed address," is an adequate demonstration that Grayeyes does not live at Navajo Mountain. Defendants accordingly invite this Court to review an evidentiary submission which is inadmissible under § 20A-3-202.3, a submission, moreover, which proves nothing more than the fact that, on the single date upon which the footage was taken, nobody was home at Grayeyes' house, while at the same time showing that Grayeyes indeed had a "single habitation" in a "fixed location" to which he could return within the meaning of the Utah residency statute.

[21] Please remember, too, as elaborated above, in footnote 8 of this brief, that had the San Juan County defendants properly challenged Grayeyes' qualifications as a candidate by filing a petition under § 20A-1-801, or properly argued against his eligibility to serve on the county commission by commencing an election contest under § 20A-4-402, the test for residency under the provisions in title 17 might have been different from those which are applied in connection with voter registration disputes under § 20A-3-202.3.

Paiute Mesa at Navajo Mountain. Please see Nielson deposition at page 100 and Turk deposition at pages 91 and 92.

These admissions – obtained in the expedited discovery which was authorized by the Court -- have become two of the most telling indicators that Nielson and his colleagues had unconstitutional intentions in challenging Grayeyes' residency under the voter registration statutes. They knew all along that he had a home at Navajo Mountain, but used their official positions, in a rigged proceeding, to create the impression that it was otherwise – all with a purpose to keep him off the November ballot.

Should This Matter Be Handled in State Court?

The San Juan County defendants argue that Grayeyes should not be allowed to vindicate his rights to Free Speech, Equal Protection, and Due Process under 42 U. S. C. § 1983 in this Court until he first exhausts his administrative "remedy," specifically, the right to obtain review of Nielson's decision under § 20A-3-202.3(6)(a), in state court. These defendants also claim that abstention may be appropriate in order to give Utah courts a first bite at deciding issues which heretofore may have gone unresolved under our elections code.

Defendants' exhaustion argument must be overruled in light of *Patsy v. Board of Regents*, 457 U. S. 496 (1982) and related precedents. The rationale for these authorities is that "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Zinermon v. Burch*, 494 U. S. 113, 125 (1990). In addition, the remedy which the San Juan County defendants would have Grayeyes pursue, namely, an appeal with a narrow scope for review based upon a limited record, § 20A-3-202.3(6), is non-compulsory in nature and thus does not prevent Grayeyes from pursuing his claims in this Court, *e.g., Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.,* 477 U.S. 619, 627-628 n. 2 (1986),

especially because federal courts are the primary protectors of constitutional rights, *e.g.*, *Steffel v. Thompson,* 415 U. S. 452, 472-473 (1974). Finally, exhaustion is required only when a statute mandates this result in "sweeping and direct language" which expresses a legislative intent that there can be no federal jurisdiction prior to exhaustion – or where exhaustion is an element of the underlying claim. *Avocados Plus, Inc. v. Veneman,* 370 F.3d 1243, 1248 (D. C. Cir. 2004), citing *Weinberger v. Salfi,* 422 U. S. 749, 757 (1975). Neither of these requirements is met in this case.[22]

An application of *Patsy* and these precedents makes sense in light of the primary claim which Grayeyes asserts and the facts of this case. Grayeyes claims that the San Juan County defendants have abridged his rights to Free Speech, Equal Protection, and Due Process as a voter and candidate, since, like the clerk in *Yanito,* they excluded him from the November ballot through maladministration of the Utah elections code. A resolution of this claim entails more than determinations whether certain provisions of that code were authoritatively read or properly applied to ordinary facts. The real issue is whether these defendants misapplied (or even properly applied) the statutes in question with the unconstitutional intent of keeping Grayeyes off the November ballot. The manner in which these defendants read and applied the elections code may give evidentiary insights into that unconstitutional intent, but otherwise are not the subject-matter of the constitutional points to be resolved.

[22] The San Juan County defendants deploy a little bit of strawman argumentation in this section of their brief, acting as if the gravamen of Grayeyes' claim is due process, instead of ballot access under the First and Fourteenth Amendments. Hence, they cite a number of authorities to the effect that plaintiffs who do not exhaust their access to due process in state court are deemed to waive their right to press due process claims in federal court. These cases are inapt factually for the reasons noted in the text above. Moreoever, the review available to Grayeyes under the voter registration dispute process is too limited to accommodate the constitutional claims he is making in this Court. Finally, Grayeyes was denied the candidacy qualification challenge "process" which he was "due" under the elections code, and he cannot achieve a restoration of those rights by continuing in the voter registration dispute channel which the San Juan County defendants unconstitutionally foisted upon him by means of Black's complaint.

Thus, for example, whether a Utah court would determine that a county clerk, as a matter of law, should have used § 20A-9-202(5) instead of § 20A-3-202.3 to resolve Black's challenge to Grayeyes' candidacy isn't the crux of the matter. The nub of concern would be whether Nielson played an unconstitutional hand when he backdated Black's complaint to avoid a statutory bar or disguised an attack on Grayeyes' candidacy as a challenge to voter registration because that latter form of administrative proceeding, guided by his bias, more assuredly would guarantee an outcome in Black's favor, an outcome, moreover, which would be difficult to reverse given the limitations on judicial review found in § 20A-3-202.3(6), the very statute which, unsurprisingly, the San Juan County defendants, perhaps still in furtherance of their unconstitutional intent, now want to force Grayeyes to use for purposes of appeal in this case.[23]

For the same reasons, abstention isn't appropriate under the circumstances of this case. Given the Utah Supreme Court's ruling in *Maxfield v. Herbert*, the San Juan County defendants overstate their contention that there is insufficient precedent for use by a federal court wanting to decide which procedure – among those available in §§ 20A-9-202(5), 20A-1-801, *et seq.*, 20A-4-402, and 20A-3-202.3 -- Nielson should have deployed in attacking Grayeyes' candidacy for county commissioner. But in all events the need for a state court to tell this court how to apply certain provisions of the elections code is much mooted by any review of the San Juan County defendants' conduct in this case. That's because, in the final analysis, the rule of law didn't

[23] The court in § 20A-3-202.3(6) is empowered to review only Nielson's May 9 decision in relation to the voter registration issue and not to oversee his May 10 decision to disqualify Grayeyes as a candidate. Defendants may argue that, in light of the residency question which they believe to be common to both decisions, this is six of one and half dozen of another. This argument, however, may falter on the assumption that the residency issues in relation to candidate qualification and voter registration are indeed the same. The analysis above in footnote 8 of this brief suggests that there are grounds for doubt in that regard. And, in all events and as already noted, the Utah elections code gives Grayeyes' *qua* candidate plenary procedural protections – in contrast to the abbreviated, streamlined voter registration dispute process – and he will be deprived of those safeguards if forced to pursue the limited appellate remedy vouchsafed under § 20A-3-202.3(6).

matter to these defendants who, like outlaws, were determined to use or abuse the election code only as a means to their end of hijacking the Grayeyes' campaign.

Finally, practical considerations militate against any exhaustion of remedies, use of abstention, or certification[24] to state court. With a deadline for the preparation of ballots looming at August's end, and Grayeyes' candidacy under a cloud which is inimical to his campaign, the time to act is now. *See, Yanito v. Barber,* 348 F. Supp. at 590 ("time is of the essence in this matter). This is one reason Grayeyes sought a remedy in federal court, through use of Rule 65, where he would have priority on this Court's calendar, instead of seeking review under § 20A-3-202.3(6) with no guaranty that a timely decision would be made.

The San Juan County defendants may argue that Grayeyes has been the victim of his own delay, since it took him over a month after Nielson's decision to come to this Court. But Grayeyes' thoughtful, preparatory pause before seeking relief in any court is in no wise comparable to these defendants' time-related offenses. The authorities in San Juan County have had over 30 years in which to challenge Grayeyes' status as a voter and almost 6 years since he last ran for county commissioner). Yet they rested on their oars, until March of this year, before "filing" a challenge. Hoping to disrupt, if not defeat, Grayeyes' campaign, they ignored the timing protections for candidacy challenges which are found in § 20A-9-202(5), because Nielson wanted "more time" in which to conduct an *ultra vires* investigation. Then, waiting until late March, after Grayeyes was nominated at the Democratic Convention, an optimum time for wreaking havoc on anybody's candidacy, they launched their challenge. Even after launch, Nielson was double-tongued about notice and far from transparent in conducting the case. This

[24] The San Juan County defendants state in their brief that they will file a motion for certification with the Court. Grayeyes will respond to that motion, and the issues respecting certification, when that motion is filed.

led to much confusion and avoidable delays, as well as the eclipse of avenues which could have afforded relief to Grayeyes. Now they want to prolong the injuries which they already have inflicted on Grayeyes' campaign, by forcing exhaustion or seeking abstention. Given the exigencies of this case, the Court should refuse these overtures for delay.

Residual Issues of Qualified Immunity and Standing

The San Juan County defendants have raised issues respecting qualified immunity and standing. These issues are irrelevant to the pending motion for preliminary injunction. Qualified immunity comes into play only when damages are sought against public officials. Only equitable relief is requested in the matter before the Court. *See, e.g., Auvaa v. City of Taylorsvile,* 506 F.Supp.2d 903, 913 (D. Utah 2007) (qualified immunity does not shield government actors from injunctive relief), citing, among other opinions, *Eagon v. City of Elk City, Okla.*, 72 F.3d 1480 (10th Cir. 1996). Whitehat's standing is unimportant now, because he isn't a movant for preliminary injunction. Moreover, his standing may not gain importance, even in the near future, since no party will gainsay Grayeyes' right to reach the merits and seek redress under the circumstances of this case. The same is true in relation to Black who isn't in the dock insofar as injunctive relief may be concerned, but could be if, in future, the complaint is amended to seek damages against her. In short, the issues of qualified immunity and standing are outside the scope of what the Court must consider to decide the motion for preliminary injunction, and, therefore, consideration of the same should be deferred to a later time when they can be raised, in an appropriate procedural context, by the defendants involved.

CONCLUSION

For all of the foregoing reasons, Grayeyes respectfully requests this Honorable Court to grant his motion for a preliminary injunction.

DATED this 20th day of July, 2018.

/ s / Alan L. Smith
Alan L. Smith

/s/ David R. Irvine
David R. Irvine

MAYNES, BRADFORD, SHIPPS
& SHEFTEL, LLP

/s/ Steven C. Boos
Steven C. Boos
Maya L. Kane

/s/ Eric P Swenson
Eric P. Swenson

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2018 I electronically filed the foregoing PLAINTIFF GRAYEYES' REPLY TO DEFENDANTS' OPPOSITION RESPONSES TO MOTION FOR PRELIMINARY INJUNCTION with the U.S. District Court for the District of Utah. Notice will automatically be electronically mailed to the following individual(s) who are registered with the U.S. District Court CM/ECF System:

David N. Wolf
Andrew Dymek
Office of the Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
dnwolf@agutah.gov
adymek@agutah.gov

Jesse C. Trentadue
Britton R. Butterfield
Suitter Axland, PLLC
8 East Broadway, Suite 200
Salt Lake City, Utah 84111
Jesse32@sautah.com
bbutterfield@sautah.com

R. Blake Hamilton
Ashley M. Gregson
Jasmine A. Fierro-Maciel
Durham Jones & Pinegar, P.C.
1111 S. Main St., Suite 2400
P.O. Box 4050
Salt Lake City, Utah 84111
bhamilton@djplaw.com
agregson@djplaw.com
jfierro-maciel@djplaw.com

/s/ Suzanne P. Singley
Suzanne P. Singley