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ATTORNEYS FOR PLAINTIFFS

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

**WILLIE GRAYEYES, and TERRY
WHITEHAT,**

Plaintiffs,

v.

JOHN DAVID NIELSON,

Defendant.

**MOTION TO DISMISS AND
MEMORANDUM OF LAW IN
SUPPORT**

Civil No. 4:18-cv-00041-DN

Judge: David Nuffer

I. Motion

Plaintiffs move the Court for an order dismissing this case on the grounds that, due to intervening factual events, the Court is no longer able to grant any effective relief in this matter,

rendering the case moot and depriving the Court of subject matter jurisdiction over the merits of this case.¹

II. Background

The Complaint in this matter was filed on June 20, 2018.² The relief requested in the Complaint was limited to declaratory and injunctive relief reinstating Plaintiff Grayeyes as a candidate for District Two of the San Juan County Commission on the November 2018 ballot.³ No money damages were requested.⁴

On August 9, 2018, this Court granted Plaintiffs' Motion for a Preliminary Injunction and re-instated Plaintiff Grayeyes as a candidate for the San Juan County Commission in District 2.⁵ The preliminary injunction afforded Plaintiffs "all the relief they would potentially receive following trial on the merits."⁶ In compliance with the preliminary injunction, San Juan County re-instated Plaintiff Grayeyes on the ballot for the election held on November 6, 2018.⁷ The election was held on November 6th using that ballot.

III. Discussion

¹ See *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) ("[T]he existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction.").

² *Complaint*, Dkt. 2, filed June 20, 2018.

³ *Id.* at 56.

⁴ *Id.* The only other relief requested was an award of attorneys' fees and costs.

⁵ *Memorandum and Decision Order Granting [13] Plaintiff Grayeyes's Motion for Preliminary Injunction*, Dkt. 94, filed August 9, 2018.

⁶ *Id.* at 9.

⁷ Exhibit One, *Sample Official Ballot, San Juan County, Utah, Tuesday, November 6, 2018*.

A. The mootness doctrine divests the Court of jurisdiction to take further action when a plaintiff has received all the relief that it sought.

The mootness doctrine has been summarized as follows:

Under the mootness doctrine, the legal issues sought to be litigated must remain alive or extant throughout the entire course of the action. Thus, a case will be considered moot when a court is no longer in a position to grant effective relief because the dispute has been resolved through other means, or the passage of time has made the claim stale and it is unlikely that the precise conditions of the case will ever recur.⁸

Similarly, “if the plaintiff has received all that it sought, the court can offer no further relief and the case is moot.”⁹

Because mootness goes to the court’s subject matter jurisdiction, it may be raised by any party, or on the court’s own motion, at any time.¹⁰ The party raising mootness has the burden of proof.¹¹

The application of the mootness doctrine in the context of election disputes is illustrated by the decision in *Fleming v. Gutierrez*.¹² In that case, the district court entered a preliminary injunction that “required [Sandoval] County to adhere to new regulations increasing the number of voting centers and voting machines” in an upcoming election.¹³ The County filed an interlocutory appeal of the preliminary injunction, but while that appeal was pending, the

⁸ Moore’s Federal Practice 3d, § 101.93[1], at 101-358 (2018).

⁹ Moore’s Federal Practice 3d, § 101.95, at 101-393 (2018).

¹⁰ *Leser v. Berridge*, 668 F.3d 1202, 1206-07 (10th Cir. 2011).

¹¹ *In re Paige*, 584 F.3d 1327, 1336-37 (10th Cir. 2009).

¹² 785 F.3d 442 (10th Cir. 2015).

¹³ *Id.* at 443.

election to which the preliminary injunction applied took place under the force of the injunction, and the injunction expired.¹⁴ The Court of Appeals held the issues concerning the preliminary injunction to be moot, stating as follows:

We cannot turn back the clock and create a world in which the County does not have to administer the 2014 election under the strictures of the injunction. Accordingly, because the election has passed and we cannot grant any effective relief, the appeal is moot.¹⁵

B. This Court cannot turn back the clock on the 2018 election and the merits of this case are moot.

This Court entered a preliminary injunction requiring that Plaintiff Grayeyes be reinstated on the November 6, 2018 ballot. Grayeyes was reinstated on the ballot and the election has passed using that ballot. As the Court has recognized, this is all the relief the plaintiffs requested in this case.¹⁶ As with the *Fleming* case, it is now impossible to turn back the clock and create a world in which Plaintiff Grayeyes does not appear on the ballot of the November 2018 election. This case is therefore moot.

C. The Court retains jurisdiction to decide the collateral issue of attorneys' fees.

This Court retains subject matter jurisdiction over the collateral issue of attorneys' fees, which is separate from merits issues, even if the motion to dismiss for mootness is granted.¹⁷

¹⁴ *Id.*

¹⁵ *Id.* at 445 (citations omitted).

¹⁶ See *Memorandum and Decision Order Granting [13] Plaintiff Grayeyes's Motion for Preliminary Injunction*, Dkt. 94 at 9, filed August 9, 2018 ("Here, the injunctive relief sought by Plaintiff Grayeyes is mandatory rather than prohibitory in nature. In other words, it alters rather than maintains the status quo, or otherwise affords Plaintiffs all the relief they would potentially receive following trial on the merits.").

¹⁷ *Anderson v. United States Dep't of Health and Human Servs.*, 3 F.3d 1383, 1385 (10th Cir. 1993) (Freedom of Information Act claim properly dismissed on mootness grounds, but district court retained jurisdiction to award attorney's fees); *Dahlem v. Bd. of Educ. of Denver Pub.*

Plaintiffs have already filed a motion for attorneys' fees and costs (Dkt. 99, filed August 17, 2018) and the Court will retain jurisdiction to award fees even if this case is otherwise dismissed as moot on its merits.

IV. Conclusion

With the conclusion of the November 6, 2018 election, the preliminary injunction entered on August 9, 2018 expired, the Court can offer no further relief on the merits of this case and the Court has lost subject matter jurisdiction. This matter must be dismissed as moot. However, the Court retains jurisdiction to decide the collateral issue of attorneys' fees.

DATED this 7th day of November, 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

/s/ Eric P Swenson
Eric P. Swenson

Attorneys for Plaintiffs

(electronic signatures added with permission)

Schs., 901 F.2d 1508, 1510-11 (10th Cir. 1990) (mootness of underlying claim did not moot controversy over attorney's fees already incurred).

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2018 I electronically filed the foregoing **MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT** 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:

R. Blake Hamilton
Ashley M. Gregson
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/s/ Lataj Gamble
Lataj Gamble

EXHIBIT ONE

SAMPLE

OFFICIAL BALLOT
SAN JUAN COUNTY, UTAH
TUESDAY, NOVEMBER 6, 2018

SAN JUAN COUNTY CLERK

INSTRUCTIONS TO VOTERS: To vote for the candidate of your choice, completely darken the OVAL next to the candidate's name. To vote for a person whose name is not on the ballot, darken the OVAL next to "Write-In" and write in the candidate's name on the Write-In line. To vote on a measure, fill in the oval next to your choice. Use ballpoint pen with dark ink (not red). All distinguishing marks or erasures are forbidden and make the ballot void. If you tear, deface, or wrongly mark this ballot, contact the County Clerk's office or Poll Worker. VOTE LIKE THIS: 

Voting this Straight Party Race is optional. It is permissible to vote for candidates of various political parties in this election.		ASSESSOR Vote for One (1)	MEASURES SUBMITTED TO VOTERS
STRAIGHT PARTY		GREG ADAMS REP	Constitutional Amendment A Shall the Utah Constitution be amended to modify the period of time that a person in the military needs to serve out of state under an order to federal active duty in order to qualify for a property tax exemption for the military person's residence, allowing the military person to qualify if the period of service is at least 200 days in a continuous 365-day period? FOR AGAINST
CONSTITUTION CON	ATTORNEY Vote for One (1)	KENDALL G LAWS DEM	
UNITED UTAH UUP	CLERK/AUDITOR Vote for One (1)	JOHN DAVID NELSON REP	
LIBERTARIAN UB	SHERIFF Vote for One (1)	JASON F TORGERSON REP	
REPUBLICAN REP	NON PARTISAN		
DEMOCRATIC DEM	STATE SCHOOL BOARD		
INDEPENDENT AMERICAN IAD	STATE SCHOOL BOARD OF EDUCATION DISTRICT 14 Vote for One (1)	MARK A. HUNTSMAN	Constitutional Amendment B Shall the Utah Constitution be amended to authorize the creation of a property tax exemption for real property, such as land or buildings, that the state or a local government entity leases from a private owner? FOR AGAINST
FEDERAL OFFICES		LOCAL SCHOOL BOARD	
UNITED STATES SENATE Vote for One (1)		SCHOOL BOARD DISTRICT 1 Vote for One (1)	Constitutional Amendment C Shall the Utah Constitution be amended to: <ul style="list-style-type: none"> authorize the Legislature to convene into a limited session if two-thirds of the Utah Senate and House members agree that convening is necessary because of a fiscal crisis, war, natural disaster, or emergency in the affairs of the state; require the Governor to reduce state expenditures or convene the Legislature into session if state expenses will exceed revenue for a fiscal year; and require a session of the Legislature, other than the 45-day annual general session, to be held at the state capitol, unless it is not feasible due to a specified condition? FOR AGAINST
TIM AALDERS CON	SCHOOL BOARD DISTRICT 2 Vote for One (1)	LORI MAUGHAN	
CRAIG R. BOWDEN LIB	MERRI B SHUMWAY		
REED C. MCCANDLESS IAD	SCHOOL BOARD DISTRICT 3 Vote for One (1)	HELEN BENALLY LAKE	
JENNY WILSON DEM	STEVEN C BLACK		
MITT ROMNEY REP	SUZETTE R MORRIS		
Write-In	SCHOOL BOARD DISTRICT 4 Vote for One (1)	LUCILLE CODY	
U.S. HOUSE OF REPRESENTATIVES CONGRESSIONAL DISTRICT 3 Vote for One (1)		MELVIN CAPITAN JR	
JOHN CURTIS REP	SCHOOL BOARD DISTRICT 5 Vote for One (1)	NELSON A YELLOWMAN	
JAMES COURAGE SINGER DEM	GRAND COUNTY SCHOOL BOARD DISTRICT 1 Vote for One (1)	MELINDA BLACKHORSE	
TIMOTHY L. ZEIDNER UUP	BRITNIE ELLIS		
GREGORY C. DUERDEN IAD	JUDICIAL RETENTION		
STATE OFFICES		Shall CONSTANDINOS (DENO) HIMONAS be retained in the office of Justice of the Utah Supreme Court? YES NO	
UTAH HOUSE OF REPRESENTATIVES DISTRICT 73 Vote for One (1)		Shall MARY KATE A. TOOMEY be retained in the office of Judge of the Utah Court of Appeals? YES NO	
PHIL LYMAN REP			
MARSHA M HOLLAND *Unaffiliated			
* These candidates are not affiliated with, or do not qualify to be listed on the ballot as affiliated with, a political party.			
COUNTY OFFICES			
COUNTY COMMISSION DISTRICT 1 Vote for One (1)			
BRUCE ADAMS REP			
COUNTY COMMISSION DISTRICT 2 Vote for One (1)			
KELLY G LAWS REP			
WILLIE GRAYEYES DEM			
Write-In			
COUNTY COMMISSION DISTRICT 3 Vote for One (1)			
HENRY THOMASBOY DEM			
Write-In			

Nonbinding Opinion Question #1

Potential Gas Tax Increase for Public Education and Local Roads

To provide additional funding for public education and local roads, should the state increase the state motor and special fuel tax rates by an equivalent of 10 cents per gallon?

☐ FOR

☐ AGAINST

Proposition Number 2

Shall a law be enacted to:

- establish a state-controlled process that allows persons with certain illnesses to acquire and use medical cannabis and, in certain limited circumstances, to grow up to six cannabis plants for personal medical use;
- authorize the establishment of facilities that grow, process, test, or sell medical cannabis and require those facilities to be licensed by the state; and
- establish state controls on those licensed facilities, including:
 - electronic systems that track cannabis inventory and purchases; and
 - requirements and limitations on the packaging and advertising of cannabis and on the types of products allowed?

The Governor's Office of Management and Budget estimates the law proposed by this initiative would result in total fiscal expenses of \$2,900,000 (\$1,800,000 ongoing and \$1,100,000 one-time).

Fee collections would cover about \$1,400,000 of ongoing costs. General state revenues would be required for remaining ongoing costs (\$400,000) and all onetime costs (\$1,100,000).

Under the proposed sales tax exemption, the state and local governments may initially forego \$1,600,000 in sales tax revenue. Foregone revenue could increase over time if consumption and taxable sales increase in the later years following implementation.

Consumer and firm behavior different than assumed would alter these estimates.

In addition, the cost of posting information regarding the initiative in Utah's statewide newspapers and for printing the additional pages in the voter information packet is estimated at \$30,000 in one-time funds.

☐ FOR

☐ AGAINST

Proposition Number 3

Shall a law be enacted to:

- expand the state Medicaid health coverage program to include coverage, based on income, for previously ineligible low-income adults;
- maintain the following as they existed on January 1, 2017:
 - eligibility standards, benefits, and patient costs for Medicaid and the Children's Health Insurance Program (CHIP); and
 - the payment rate for healthcare providers under Medicaid and CHIP; and
- use the tax increase described below to pay for Medicaid and CHIP?

This initiative seeks to increase the current state sales tax rate by 0.15%, resulting in a 3.191% increase in the current tax rate.

The Governor's Office of Management and Budget estimates that this proposed initiative would, in fiscal year 2021 (upon full phase-in of the federal Affordable Care Act):

- Result in new state fiscal expenses of about \$77,000,000 for Medicaid services
- Increase state sales taxes by about \$80,000,000 by increasing the state sales tax rate by 0.15%, from 4.70% to 4.85% (a 3.2% increase from the current tax rate).

Beyond FY 2021, costs could outpace new revenue depending on actual cost and revenue trajectories. Estimates could vary with changes in federal law, federal funding, taxpayer behavior and Medicaid recipient behavior, among other factors.

In addition, the cost of posting information regarding the proposed initiative in Utah's statewide newspapers and for printing additional pages in the voter information pamphlet is estimated at \$30,000 in one-time funds.

☐ FOR

☐ AGAINST

Proposition Number 4

Shall a law be enacted to:

- create a seven-member commission to recommend redistricting plans to the Legislature that divide the state into Congressional, legislative, and state school board districts;
- provide for appointments to that commission: one by the Governor, three by legislative majority party leaders, and three by legislative minority party leaders;
- provide qualifications for commission members, including limitations on their political activity;
- require the Legislature to enact or reject a commission-recommended plan; and
- establish requirements for redistricting plans and authorize lawsuits to block implementation of a redistricting plan enacted by the Legislature that fails to conform to those requirements?

The Governor's Office of Management and Budget estimates that the law proposed by this initiative would result in a total fiscal expense of approximately \$1 million.

In addition, the cost of posting information regarding the initiative in Utah's statewide newspapers and for printing the additional pages in the voter information packet is estimated at \$30,000 in one-time funds.

☐ FOR

☐ AGAINST

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

WILLIE GRAYEYES, an individual,
and **TERRY WHITEHAT**, an individual,

Plaintiffs,

v.

JOHN DAVID NIELSON, as Clerk/Auditor
of San Juan County, a political
subdivision of the state of Utah, ,

Defendant.

**ORDER GRANTING PLAINTIFF'S
MOTION TO DISMISS**

Civil No. 4:18-cv-00041-DN

Judge: David Nuffer

Based on Plaintiffs' Motion to Dismiss and Memorandum of Law in Support, and for good cause appearing,

The Court finds that with the conclusion of the November 6, 2018 election, the preliminary injunction entered on August 9, 2018 expired, the Court can offer no further relief on the merits of this case and the Court has lost subject matter jurisdiction. This matter must be dismissed as moot. However, the Court retains jurisdiction to decide the collateral issue of attorneys' fees.

Signed this _____ day of November, 2018.

BY THE COURT:

David Nuffer
United States District Judge