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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
CENTRAL DIVISION, STATE OF UTAH

FILED  
U.S. DISTRICT COURT

2012 AUG 22 P 4:26

DISTRICT OF UTAH

BY: \_\_\_\_\_  
DEPUTY CLERK

Carmen Snow, an individual,	)	
Carol Murphy, an individual,	)	
and Stacey McGinnis, an individual,	)	
	)	
Plaintiffs,	)	<b>COMPLAINT</b>
	)	
vs.	)	Case: 2:12cv00817
	)	Assigned To : Benson, Dee
	)	Assign. Date : 8/22/2012
The Committee for the	)	Description: Snow et al v. Committee
Recruitment and Nomination	)	for the Recruitment and Nomination
Of Members of the Utah State	)	of Members of the Utah State Board
Board of Education, and Mark	)	
Shurtleff, in his official capacity as	)	
Attorney General for the state	)	
of Utah,	)	
	)	
Defendants.	)	
	)	

Plaintiffs, Carmen Snow, Carol Murphy, and Stacey McGinnis ("Snow,"  
"Murphy," "McGinnis," or collectively "plaintiffs"), complain of defendants, The

Committee for the Recruitment and Nomination of Members of the Utah State Board of Education (the "Committee"), and Mark Shurtleff in his official capacity as Attorney General for the state of Utah ("Shurtleff") (or collectively "defendants"), and, for causes of action, aver as follows.

### **THE PARTIES, JURISDICTION, AND VENUE**

1. Snow is an individual residing in Washington County, state of Utah. In 2012, acting pursuant to Utah Code, §§ 20A-14-104, 20A-9-201, and 20A-9-202, Snow timely filed a declaration of candidacy to become the member of the Utah State Board of Education ("USBE" or "Board" or "state Board") from her State School Board District. Pursuant to Utah Code, § 20A-14-104(b), Snow's name, as a potential candidate, therefore, was forwarded to the Committee, an agency of Utah state government which, pursuant to Utah Code, §§ 20A-14-104, *et seq.*, is given a controlling role in the selection of persons to become, after designation by the governor of the state of Utah (sometimes simply "governor") and election by the people, a Board member. There is no question that Snow was eligible to be a candidate for consideration by the Committee. Although, as detailed below, Snow was not selected as a nominee by the Committee for purposes of the election in November, 2012, Snow intends to seek election to the state Board in the next available election cycle.

2. McGinnis is a citizen of the state of Utah who is registered to vote in the State School Board District from which Snow seeks election to the Board. McGinnis is a Snow supporter and, but for the Committee's action in refusing to nominate Snow, McGinnis would have cast her vote this coming November for Snow. When Snow seeks

to become a candidate for the Board in the next available election cycle, McGinnis intends to vote for Snow.

3. Murphy is an individual residing in Park City, Utah. For the past 4 years, she has been a member of the Board, serving her State School Board District. In 2012, acting pursuant to Utah Code, §§ 20A-14-104, 20A-9-201, and 20A-9-202, Murphy timely filed a declaration of candidacy for re-election to the Board. Pursuant to Utah Code, § 20A-14-104(b), Murphy's name, as a potential candidate, therefore, was forwarded to the Committee, an agency of Utah state government which, pursuant to Utah Code, §§ 20A-14-104, *et seq.*, is given a controlling role in the selection of persons to become, after designation by the governor and election by the people, a Board member. There is no question that Murphy was eligible to be a candidate for re-election and, accordingly, for consideration by the Committee. And there is no question that Murphy was qualified to serve on the Board. She already -- in a previous election cycle -- had been selected as a nominee by a previous Committee and designated by the governor to run for a seat on the Board. And she already had been elected by a preponderance of her constituents in her School Board District to serve and was serving as an incumbent on the Board. Although, as detailed below, Murphy was not selected as a nominee by the Committee for purposes of the election in November, 2012, Murphy intends to seek election to the state Board in the next available election cycle.

4. Pursuant to Utah Code, §§ 20A-14-104, *et seq.*, the Committee, as noted above, is an agency of Utah state government which plays a key role in the recruiting, vetting, and nomination of candidates for the state Board. The Board (as distinct from the Committee) has fifteen elected members. Each member is elected from a different Senate

district. Members serve four year terms. The terms are staggered so that different seats come open at each regular general election cycle. The Committee, among other tasks, supposedly reviews the “qualifications” of all candidates for membership on the Board (according to a statutorily prescribed yardstick) and selects no fewer than three names for each district subject to election that year. No later than July 1 of the relevant year, these names are forwarded to the governor.

5. Pursuant to Utah Code, §§ 20A-14-104, *et seq.*, and no later than August 1 of the relevant year, of those names forwarded to him by the Committee, the governor selects 2 to stand for election in each applicable School Board district. If the governor fails in this duty by August 31, the Committee performs this office.

6. Shurtleff is the Attorney General for the state of Utah. He is sued in his official capacity because, in this lawsuit, plaintiffs seek a declaration that the statutes regulating the nomination and designation of candidates for the Board are unconstitutional.

7. In this civil action, plaintiffs seek declaratory and injunctive relief for violations of their civil rights under 42 U.S.C. § 1983. This Court, accordingly, has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331.

8. Plaintiffs also seek declaratory and injunctive relief in connection with violations of Utah state constitutional provisions. These violations of state constitutional provisions arise from the same circumstances which created the civil rights violations under 42 U.S.C. § 1983. This Court, accordingly, has supplemental subject-matter jurisdiction pursuant to the relevant provisions of Title 28 of the United States Code.

9. This Court has *in personam* jurisdiction over the defendants pursuant to Rule 4 of the Federal Rules of Civil Procedure.

10. Venue properly is laid in this Court pursuant to Title 28 of the United States Code because all of the defendants are situated or perform their offices in this district and because all of the events from which liability arises occurred in this district.

### **BACKGROUND AVERMENTS**

11. Snow and Murphy, as noted above, both filed declarations of candidacy for membership on the USBE. These declarations were timely filed.

12. The Lieutenant Governor of the state of Utah, pursuant to statute, forwarded the names of Snow and Murphy for consideration by the Committee.

13. Between February 15 and April 17, 2012, the Committee met on 4 or 5 occasions in order to discharge its statutory duties in connection with the selection of nominees for Board membership.

14. In these meetings, the Committee established ground rules for the vetting of and voting on candidates. As noted below, however, these rulemakings did not comply with the requirements of the Utah Administrative Rulemaking Act.

15. These ground rules included a determination that candidates would be asked to answer, in writing, a series of questions about educational policy preferences.

16. The Committee, accordingly, created a list of questions which required candidates to state their educational policy preferences. For example, the questionnaire required candidates to state their support or opposition to Utah Core Curriculum Standards and the teaching of sex education in public schools, two highly contentious issues, both of which have been driven by ultra-conservative factions of Utah's Republican Party. Likewise, the questionnaire called upon the candidates to declare support for or opposition to merit-based pay for teachers, as well as so-called backpack

funding as a means of financing public education in the state of Utah, two more equally controversial issues. These measures also have been pushed by partisan, Republican state legislators.

17. Snow and Murphy, along with other candidates, answered the questions on these questionnaires and returned them to the Committee. The Committee used these answers, and their expressions of opinion on points of educational policy, in selecting the names of nominees to forward to the governor.

18. Candidates, including Snow and Murphy, likewise were interviewed by the Committee. At these interviews, candidates, including Snow and Murphy, were asked to elaborate on their answers to questions on the questionnaire. The Committee also asked candidates, including Snow and Murphy, other policy related questions. The Committee used these interviews and the candidates' opinions -- including those expressed by Snow and Murphy -- on points of educational policy in selecting the names of nominees to forward to the governor.

19. When Snow was interviewed, one of the Committee members, Chris Bleak, angrily denounced her before the entire Committee. Criticizing Snow, Bleak pointed out that Snow was serving as executive director of a group known as Utahns for Public Schools ("UTPS"), an advocacy group which had spearheaded a referendum which had defeated a voucher bill which the Utah State Legislature enacted in 2007. Bleak averred that the Utah State Legislature hated UTPS, indicating plainly that, if anyone affiliated with UTPS, such as Snow, were to serve on the Board, it would create tension between the Legislature and the Board. Bleak's comments in opposition to Snow had weight because, during the voucher fight, he served as chief of staff to then Speaker Greg Curtis,

and, since then, Bleak has served as the chief spokesperson for the charter school industry in the state of Utah, one of several special interest groups which was sympathetic to and supportive of school vouchers.

20. Snow also was criticized by the Committee because she has been acting as a plaintiff in a lawsuit in Utah state court which lawsuit seeks a declaration that an omnibus educational bill known as SB 2 which had been passed in the 2008 general session of the Utah State Legislature is unconstitutional in light of the anti-log-rolling provisions found in Article VI, § 22 of the Utah State Constitution.

21. The interview questionnaires and comments such as those made by Bleak in reference to Snow were overt illustrations of what blatantly occurs when the Committee nominates candidates: The Committee members discriminate against candidates based upon the candidates' viewpoints, opinions, and educational policy preferences. By focusing on candidates' opinion and policy viewpoints, as opposed to their professional and experience qualifications, the Committee pre-selects what it considers to be "acceptable" candidacies, and substitutes its judgments in a manner that restricts the educational policy choices that are presented to the voters in a general election contest between Tweedle-Dee and Tweedle-Dum.

22. The privatization of education, through voucher bills or otherwise, has been a recurring theme in the nomination of candidates by the Committee. Speaking illustratively, not exhaustively, in 2006, the Committee divided candidates into 2 groups, pro-voucher and anti-voucher, for purposes of determining names that would be submitted to the governor.

23. Indeed, in every year in which the Committee has performed its role, the members of the Committee as a matter of course have adverted to the policy viewpoints of Board candidates in determining which names would be sent to the governor for selection in a runoff election.

24. Perceived opposition to the will of the state legislature or at least to the desires of certain Republican legislators also has been a recurring theme in the nomination of candidates by the Committee. Again, speaking illustratively, not exhaustively, in 2010, a member of the Committee, Stan Lockhart, husband to Becky Lockhart, then and now Speaker of the Utah State House of Representatives, opposed the nomination of Kim Burningham, long time member and former Chairperson of the USBE, to the Board, because Burningham was seen as “contentious” and “divisive” by the legislature or, rather, certain Republican legislators in light of his political activism in opposition to the voucher bill and in pressing for ethics reform at the Utah state capitol.

25. The manner of selection of Committee members and the occupations and credentials of those members further contributes to this viewpoint discrimination against Board candidates. Under the relevant statute, members of the Committee are appointed by the governor who is a member of a partisan political party. The governor, in turn, by statute, is required to select Committee members from different industry groups, some if not all of which are economic or ideological stakeholders in various aspects of Utah's public education system. Speaking historically, most members of the Committee who have represented private sector groups are registered lobbyists or trade representatives for those groups. The 2012 Committee followed this pattern.



26. The Committee rejected Snow and Murphy as nominees; their names were not forwarded to the governor. This is because plaintiffs' viewpoints, opinions, and educational policy preferences were not acceptable to the Committee and/or the viewpoints, opinions, and educational policy preferences of other candidates were more acceptable to the Committee.

26a. As a result of this rejection of Snow and Murphy, McGinnis was denied an opportunity to exercise her franchise, the right to vote, in favor of her preferred candidate, namely, Snow.

**COUNT ONE: THE COMMITTEE'S EXERCISE OF  
UNBRIDLED DISCRETION IN DETERMINING  
WHICH CANDIDATES WILL BE NOMINATED  
VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS**

27. Plaintiffs incorporate by reference all the foregoing averments in this complaint into this count one of the complaint.

28. Utah Code, § 20A-14-104(6) sets forth the criteria which the Committee should apply in selecting the names of candidates to forward to the governor.

29. At first blush, these criteria appear to deal with professional qualifications rather than policy preferences. This appearance, on one view, may be reinforced by the so-called *ejusdem generis* rule of statutory construction.

30. The Committee, however, has read § 20A-14-104(6) and especially subpart (k) of that statute to mean that the Committee may consider any circumstance about a candidate, including policy preferences, as a selection criterion.

31. The Committee, in practice, consistently has applied this open-ended reading of § 20A-14-104(6) in the selection of nominees.

32. In litigation, in a case styled *Morrill v. The Committee for the Recruitment and Nomination of Members of the Utah State Board of Education*, civil no. 100913632 (Third Judicial District Court, State of Utah) (the “Morrill Lawsuit”), the Committee, speaking through the Attorney General of the state of Utah, has defended its right to consider any circumstance about a candidate, including policy preferences, as a selection criterion.

33. The presiding judge in the Morrill Lawsuit, Judge Anthony Quinn, agreed with the Attorney General’s interpretation and the Committee’s application of § 20A-7-104(6), opining that, in selecting candidates, the Committee could consider any matter it pleased in making its selections. Thus, a spelling-challenged school custodian was selected to replace Mr. Morrill, an attorney and a multi-termed member of the USBE.

34. The Committee periodically, by open use of policy-related questionnaires, and open criticism, such as the comments of Lockhart about Burningham and Bleak about Snow, tells the public some of the circumstances it considers germane to the selection of candidates.

35. But the Committee otherwise does not have to reveal the basis for its deliberations and decision-making in this regard. In the Morrill Lawsuit, the plaintiff, Denis Morrill, sought discovery, through document production and deposition testimony, which might have uncovered these bases, but the Committee, speaking through the Attorney General, objected on the ground of executive privilege. This objection was sustained by Judge Quinn.

36. The Committee never has promulgated rules under the Utah Administrative Rulemaking Act in order to delineate the nomination factors to be considered, the weight to be assigned to any particular factor, or whether factors should be ranked.

37. In the last two election cycles the Committee has conducted *ad hoc* votes to decide that the names of incumbent Board members need not be forwarded to the governor. In other words, the fact that a prior Committee has pre-qualified a candidate for service on the Board does not matter for purposes of the application of § 20A-14-104(6). In this manner, the Committee overrides the electoral judgment of the voters at large by striking popular, fully-qualified incumbents from the ballot.

38. In sum, there are no bounds to what the Committee may consider in determining whether to select the name of a candidate for submission to the governor. Underscoring this fact, even pre-qualified incumbents may be deemed unqualified -- in a subsequent election cycle -- for selection. Further underscoring this fact, the Committee has no rules for formalizing or regularizing the selection process. The bases for selection may be undisclosed and protected by executive privilege. And, finally, the bases for selection may include the Committee's hostility to the policy viewpoints of particular candidates.

39. The foregoing also sums up the manner in which the Committee applied the statute in rejecting the candidacies of Snow and Murphy. In particular, the Committee expressed open opposition to the candidacy of Snow since she is affiliated with a group, UTPS, which advocates for public education rather than the privatization of education through vouchers. In addition, the Committee punished Snow because, in the Committee's view, she had ruffled feathers at the state legislature. Finally, the

Committee retaliated against Snow because she had exercised her First Amendment rights in acting as a plaintiff in the SB 2 lawsuit. Likewise, the Committee refused to nominate Murphy because she is an incumbent on the Board who has been supportive of public education and opposed to school vouchers and the privatization of and private boondoggles in relation to educational efforts in the state of Utah.

40. The manner in which the Committee has applied § 20A-14-104(6) to candidates – the manner endorsed by the Attorney General and validated by Judge Quinn – is an invalid prior restraint on the First Amendment right to become a candidate for membership on the Board, and on the First Amendment right of voters such as McGinnis to vote for such candidates. This application renders the statute overbroad in the sense that it interdicts activities, political speech and viewpoint expression, which are protected by the First Amendment. And it gives the Committee, in effect, unbridled discretion to apply any criterion in nominating or refusing to nominate candidates (for whom voters such as McGinnis may wish to vote), a discretion which is inimical to the exercise of First Amendment rights.

41. The Committee applied § 20A-14-104(6) in this same manner to plaintiffs. In so doing, the Committee engaged in state action and action under the color of state law. And in so doing, the Committee violated the First Amendment rights of plaintiffs.

42. The Committee's selection process under the relevant statutes in general and its rejection of the candidacies of Snow and Murphy and the concomitant defeat of the voting right of McGinnis in particular are unconstitutional. The statutes, as interpreted and applied by the Committee, should be declared unconstitutional and the Committee should be enjoined from so interpreting and applying the statutes in the future when

Snow and Murphy become candidates in the next available election cycle and when McGinnis seeks to vote for Snow in that election cycle. The Committee's facial construction of the statutes, as endorsed by Shurtleff and the Utah courts, likewise should be declared unconstitutional and the Committee should be enjoined from so construing the statute in the future when Snow and Murphy become candidates -- and McGinnis seeks to vote for Snow as a candidate -- in the next available election cycle.

**COUNT TWO: THE COMMITTEE REJECTED SNOW AND MURPHY  
ON ACCOUNT OF THEIR POLICY VIEWPOINTS  
IN VIOLATION OF PLAINTIFFS' CONSTITUTIONAL RIGHTS**

43. Plaintiffs incorporate by reference all of the foregoing averments in this complaint in this count two of the complaint.

42. The Committee rejected Snow and Murphy as candidates and refused to forward their names to the governor because the Committee disagreed with the policy viewpoints of these plaintiffs. This is the necessary inference to be drawn from submission of a policy questionnaire to all candidates. Likewise, in Murphy's case, she had been pre-qualified as a candidate by a prior Committee and actually had served on the Board; hence, it had to be policy disagreements, rather than professional qualifications, which led to her rejection. In Snow's case, the outburst from Bleak showed that the Committee was hell-bent on punishing Snow for her opposition to vouchers in a 2007 election campaign and for her support of public education due to her present status as executive director of UTPS, among other viewpoint-related considerations

43. In rejecting the candidacies of Snow and Murphy, the Committee was acting for the state and under color of state law.

44. The Committee also was discriminating against one set of policy viewpoints in favor of others, discriminating against the speech rights of plaintiffs and preferring the speech rights of plaintiffs' opponents.

45. The Committee also, in effect, was saying that its members are empowered to make essential electoral choices for the body politic, displacing the public's right to vote -- and McGinnis's right to vote -- in this regard.

46. The Committee's treatment of plaintiffs in this regard deprived them of the right of Equal Protection under the Fourteenth Amendment to the United States Constitution. This treatment also deprived plaintiffs of their rights to free speech and access to the ballot and voting rights under the First Amendment.

47. The Committee's selection process under the relevant statutes in general and its rejection of the candidacies of Snow and Murphy and the concomitant defeat of the voting right of McGinnis in particular are unconstitutional. The statutes, as interpreted and applied by the Committee, should be declared unconstitutional and the Committee should be enjoined from so interpreting and applying the statutes in the future when Snow and Murphy become candidates in the next available election cycle and when McGinnis seeks to vote for Snow in that election cycle. The Committee's facial construction of the statutes, as endorsed by Shurtleff and the Utah courts, likewise should be declared unconstitutional and the Committee should be enjoined from so construing the statute in the future when Snow and Murphy become candidates -- and McGinnis seeks to vote for Snow as a candidate -- in the next available election cycle.

**COUNT THREE: UTAH CODE, § 20A-14-104'S CANDIDATE SELECTION**

**PROCESS VIOLATED PLAINTIFFS' RIGHTS TO DUE PROCESS**

48. Plaintiffs incorporate by reference all of the foregoing averments of this complaint in this count three of the complaint.

49. Section 20A-14-104 requires that the Committee which nominates candidates for the state Board be composed of various interest groups.

50. These interest groups are deemed, by the Utah State Legislature, to be stakeholders in the business of education in the state of Utah.

51. These interest groups are economic stakeholders in the business of education in the state of Utah.

52. Speaking historically, Committee membership has been comprised of lobbyists for these interest groups.

53. The Committee which rejected Snow and Murphy as candidates for membership on the Board was comprised, in large measure, of lobbyists for these interest groups. It also was comprised of trade representatives of these interest groups.

54. The Utah State Legislature, when enacting § 20A-14-104, intended that the members of the Committee, when selecting candidates, would vote according to their particular business, policy, and ideological interests.

55. The Committee members, when nominating candidates, do vote according to their particular business, policy, and ideological interests.

56. When the Committee members rejected Snow and Murphy as candidates, the Committee members voted according to their particular business, policy, and ideological interests.

57. The Committee's rejection of Snow and Murphy was state action and action under color of state law. As such, the Committee's decision-making process should have observed the plaintiffs' right to procedural due process, including the right to a decision by an impartial decision-maker and a fair hearing -- and pursuant to standards which are transparent and intelligible rather than vague and indecipherable.

58. The decision-makers in plaintiffs' case were not impartial; they were infected with the biases inherent in their special interests and the special interests which, as lobbyists and agents, they represented. This bias in fact is built into the statutory structure of Committee membership. This structural defect also is operational when the Committee sends names to the governor because, as a member of a partisan political party, his selection judgment also is infected with bias.

59. Plaintiffs likewise did not get a fair hearing. Members of the Committee, such as Bleak, obviously were discriminating on account of viewpoint. They also were considering extra-record, hearsay evidence in their determination to reject Snow and Murphy. Plaintiffs had no notice of this evidence and were not given any reasonable opportunity meet and rebut the same. Finally, the Committee's procedures were irregular in light of the requirements of the Utah Administrative Procedures Act, the Utah Administrative Rulemaking Act, and the Utah Open Meetings Act. These additional statutory violations compounded and exacerbated the other Due Process violations noted above and identified below.



60. The Committee's non-transparent, open-ended selection criteria, described above, also mean that the statutes involved must be deemed void for vagueness under the Due Process Clause. This problem is compounded when names are forwarded to the governor, since there are no statutory selection criteria which he must observe in making selections, his real thinking is veiled behind a claim of executive privilege, and, as a political actor, he presumably is motivated by extra-statutory, partisan considerations in any event.

61. The Committee's selection process under the relevant statutes in general and its rejection of the candidacies of Snow and Murphy and the concomitant defeat of the voting right of McGinnis in particular are unconstitutional. The statutes, as interpreted and applied by the Committee, should be declared unconstitutional and the Committee should be enjoined from so interpreting and applying the statutes in the future when Snow and Murphy become candidates in the next available election cycle and when McGinnis seeks to vote for Snow in that election cycle. The Committee's facial construction of the statutes, as endorsed by Shurtleff and the Utah courts, likewise should be declared unconstitutional and the Committee should be enjoined from so construing the statute in the future when Snow and Murphy become candidates -- and McGinnis seeks to vote for Snow as a candidate -- in the next available election cycle.

**COUNT FOUR: UTAH CODE, § 20A-14-104 VIOLATES**

**ARTICLE X OF THE UTAH CONSTITUTION**

62. Plaintiffs incorporate by reference all of the foregoing averments of this complaint in this count four of the complaint.

63. In 1896, when Utah became a state, the USBE was established as a constitutional entity in Utah state government. Its members, at that time, were appointed by the governor.

64. Over time, and in light of task forces and government studies, it was recommended that the public administration of education policy in the state of Utah should be professionalized and depoliticized. Accordingly, an amendment to the Utah State Constitution, making Board membership a matter of public election rather than gubernatorial appointment, was proposed and passed.

65. This constitutional amendment removed the governor's power to appoint Board members. The amendment provided that the members of the Board should be "elected" as provided by statute.

66. The Utah Constitution independently requires that employment in the state educational system cannot be based on any partisan consideration. Nevertheless, the Committee, in practice, functions in a highly partisan manner by basing its decisions on those political, economic, and ideological considerations favored by the lobbyists and trade representatives who are members of the Committee.

67. In 2004, the Utah state legislature enacted Utah Code, § 20A-14-104, the present statute which governs the "election" of Board members.

68. Board membership, as regulated by § 20A-14-104, is more appointive than electoral, however. On its face, the statute provides that the Committee which vets candidates is selected by the governor. The lists from which the governor selects Committee members are submitted by different interest groups and, in this sense, the selection process, in theory, may be self-determined by those interest groups. But, again,

on its face, the statute does not prevent the governor from demanding different lists if he disapproves of any submission from a particular group and, in practice, this is what the governor does until he gets the Committee which will make candidate selections of which he will approve.

69. After the Committee selects the names of candidates to forward to the governor, the governor selects two of those names to go on the ballot for the next regular general election. Hence, the governor selects the personnel who will determine the selection of candidates and then he selects the candidates themselves. The citizens of Utah get an electoral “choice” which is pre-determined by this selection process, a process which, as already noted, is controlled by the governor. In this way, the governor has the practical, effective power to determine Board membership. And the governor, as a political actor, may exercise that power for partisan ends.

70. Under these circumstances, Board members are not “elected” within the meaning of Article X of the Utah Constitution. Indeed, § 20A-14-104 is a throwback to the 1896 Constitution, reinstating the governor’s power to appoint Board members, denying effect to the constitutional amendment which required the election of Board members.

71. Plaintiffs are entitled to the process, an elective, not an appointive, process, guaranteed under Article X of the Utah Constitution.

72. Snow and Murphy were denied the opportunity, guaranteed by Article X, to seek seats on the state Board through election rather than appointment. McGinnis was denied the right to a real electoral choice; that choice was pre-empted by the powers of appointment which dominate the current selection process.

73. The Committee's selection process under the relevant statutes in general and its rejection of the candidacies of Snow and Murphy and the concomitant defeat of the voting right of McGinnis in particular are unconstitutional. The statutes, as interpreted and applied by the Committee, should be declared unconstitutional and the Committee should be enjoined from so interpreting and applying the statutes in the future when Snow and Murphy become candidates in the next available election cycle and when McGinnis seeks to vote for Snow in that election cycle. The Committee's facial construction of the statutes, as endorsed by Shurtleff and the Utah courts, likewise should be declared unconstitutional and the Committee should be enjoined from so construing the statute in the future when Snow and Murphy become candidates -- and McGinnis seeks to vote for Snow as a candidate -- in the next available election cycle.

**COUNT FIVE: UTAH CODE, § 20A-14-104 VIOLATES**

**ARTICLE X OF THE UTAH CONSTITUTION**

74. Plaintiffs incorporate by reference all of the foregoing averments of this complaint in this count five of the complaint.

75. Utah Constitution, Article X, § 8, forbids the use of any partisan test in relation to the employment of any person in public education in the state of Utah. This prohibition applies to the selection or election of Board members.

76. Section 20A-14-104, as noted above, gives the governor virtual control over the selection of candidates for seats on the Board. As noted above, Utah's constitution was amended, removing the power of the governor to appoint Board members, because the citizens of Utah wanted to de-politicize education and gubernatorial appointments were deemed to be political or partisan acts. By restoring gubernatorial control over the

selection of Board members, Section 20A-14-104 has re-politicized education, contrary to the implicit intent of the constitutional amendment and contrary to the provisions of Article X, § 8. This same re-politicization likewise is effected by the governor's appointment of members for the Committee and the ideological tests which members of that body apply in the nomination of candidates and the forwarding of their names to the governor.

77. Section 20A-14-104, as noted above, gives the Committee substantial control over the selection of candidates for seats on the Board. As noted above, Committee membership is comprised of stakeholders in various interest groups, all of which have a partisan agenda in relation to public education.

78. The Committee composition, structurally speaking, leads to partisanship and partisan tests in the selection of Board members, in violation of the Utah state constitution.

79. The Committee's selection process under the relevant statutes in general and its rejection of the candidacies of Snow and Murphy and the concomitant defeat of the voting right of McGinnis in particular are unconstitutional. The statutes, as interpreted and applied by the Committee, should be declared unconstitutional and the Committee should be enjoined from so interpreting and applying the statutes in the future when Snow and Murphy become candidates in the next available election cycle and when McGinnis seeks to vote for Snow in that election cycle. The Committee's facial construction of the statutes, as endorsed by Shurtleff and the Utah courts, likewise should be declared unconstitutional and the Committee should be enjoined from so construing

the statute in the future when Snow and Murphy become candidates -- and McGinnis seeks to vote for Snow as a candidate -- in the next available election cycle.

**REQUEST FOR RELIEF**

Wherefore, having complained of defendants, plaintiffs request the following relief.

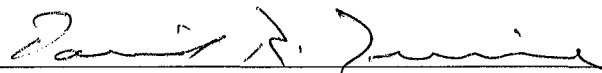
1. A declaratory judgment that the Utah statutes governing the selection of candidates for seats on the USBE are unconstitutional -- facially and as applied in this case -- on the bases asserted above;

2. A permanent injunction, restraining the Committee from acting to enforce those statutes or to interpret or apply them in derogation of the constitutional rights of plaintiffs when Snow and Murphy seek election again and when McGinnis seeks to vote for Snow in that race;

3. An award of attorney's fees and costs of court pursuant to 42 U.S.C. § 1988 and any other relevant statute and any applicable legal principle;

4. Such further relief as the Court may deem just or appropriate under the facts and circumstances of this case.

Dated this 20th day of August, 2012.



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