2020

KELLY LAWS, an individual, Petitioner below and Appellant and Cross Appellee on appeal, vs. WILLIE GRAYEYES, an individual. : OPENING BRIEF OF APPELLEE/CROSS-APPELLANT

Utah Supreme Court

IN THE UTAH SUPREME COURT

KELLY LAWS, an individual, Petitioner below and Appellant and Cross-Appellee on appeal, vs. WILLIE GRAYEYES, an individual, Respondent below and Appellee and Cross-Appellant on appeal.	Case No. 20190088-SC

OPENING BRIEF OF APPELLEE/CROSS-APPELLANT, WILLIE GRAYEYES

On appeal from the Seventh Judicial District Court
The Honorable Don M. Torgerson
No. 180700016

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District Court Parties and Counsel

The parties and counsel in the district court are identical and unchanged on this appeal.

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GLOSSARY

In this brief, appellant and cross-appellee, Kelly Laws, will be called "Laws," appellee and cross-appellant, Willie Grayeyes, will be called "Grayeyes," and the Seventh Judicial District Court, State of Utah, will be called "Judge Torgerson" or the "lower court." All statutory references, except where otherwise indicated, are to the Utah Code, 2018 version. All constitutional references, except where otherwise indicated, are to the Utah Constitution. The Record on Appeal is abbreviated as ROA.

STATEMENT OF ISSUES

The issues on this appeal and cross-appeal are whether Laws has standing, whether Laws is barred by untimeliness and laches, whether Judge Torgerson's ruling that Grayeyes, for electoral purposes, resides in San Juan County should be sustained on appeal, and whether Judge Torgerson's denial of Grayeyes's request for attorney fees and court costs should be reversed and remanded. The standard of review for these issues is set forth below.

STATEMENT OF THE CASE

This appeal arises from an election contest. Laws ran against, and lost to, Grayeyes in the 2018 race for San Juan County Commissioner, District 2. After losing, Laws sued Grayeyes, claiming he was not qualified as a candidate or eligible to serve as a commissioner for want of residency, invoking §§20A-4-402(1)(b) and 20A-4-402(1)(g). ROA at 001-0080 and 001392-001473.

The complaint was filed December 28, 2018. As directed by statute, §20A-4-404(1)(b)(ii), Judge Torgerson conducted a trial within 30 days on January 22, 2019.

ROA at 001636-001642 and 001882-002247. He received all evidence which each side proffered with one exception: portions, but not all, of a report prepared by a San Juan County Deputy Sheriff, Colby Turk. ROA at 001916 and 001922-001927.

After trial, on January 29, 2019, Judge Torgerson refused to annul the election, §20A-4-404(4)(c)(i), having determined that Grayeyes was a legal resident of San Juan County at all applicable times. The Ruling and Order is attached as Appendix A.

After winning at trial, Grayeyes filed an application for attorney fees and court costs. He argued entitlement to such an award on the basis of equitable principles, the so-called bad faith and private attorney general doctrines. He also contended that legislative enactments that modified or eclipsed these doctrines violated the separation of powers and are unconstitutional. He further requested an opportunity to take discovery on the question of bad faith and for an evidentiary hearing to prove his case. ROA at 001704-001831, 001867-001872, 002275-002276, and 002282-002286.

On June 20, 2019, ignoring Grayeyes's requests for discovery and a hearing, Judge Torgerson denied the application for fees and costs, ruling that §§78B-5-825 and 78B-5-825.5 debarred the relief which Grayeyes sought. The Order Denying Application for Attorney Fees and Costs is attached as Appendix B.

Laws filed a notice of appeal from the January 29, 2019, Ruling and Order that affirmed the election of Grayeyes. ROA at 001698-001701. Grayeyes filed a notice of cross-appeal from the June 20, 2019, Order Denying Application for Attorney Fees and Costs. Because Grayeyes's notice was not included in the ROA, a copy is attached as Appendix C.

SUMMARY OF ARGUMENT

In connection with Laws's appeal, Grayeyes contends that it should be dismissed because Laws lacks standing and, in the alternative, on the basis of untimeliness and laches. If the merits of the appeal are reached, Judge Torgerson's ruling on residency should be sustained. Laws failed in his duty to marshal all evidentiary submissions for purposes of this appeal. He also had insufficient evidence to prove his case in the lower court. The evidence showed that Grayeyes was a qualified candidate for the office of county commissioner and this outcome was not affected by any evidentiary rulings by Judge Torgerson.

In connection with Grayeyes's cross-appeal, he argues that Judge Torgerson applied an unconstitutional and incorrect legal standard in refusing to award attorney fees and costs. Sections 78B-5-825 and 78B-5-825.5, as applied by Judge Torgerson, offend Art. V and Art. VIII by interfering with the judicial branch's inherent power to regulate attorneys and award fees. Judge Torgerson's decision respecting attorney fees and court costs accordingly should be reversed and remanded so that he might apply legal standards which are not cabined by the language in these statutes.

ARGUMENT

LAWS LACKS STANDING[1]

Laws claims standing under §20A-4-403(1)(a) which provides that a "registered voter" may file a verified complaint under the election contest statute. In Utah, however, such statutory standing is only a threshold requirement that must be pleaded and satisfied with proof. It is not the end of the matter, because the legislature, by statute (and in light of the constitutional principles which mandate a separation of powers, *e.g., of Water Rights,* 2010 UT 14, ¶12), may not expand the judicial branch's subject-matter jurisdiction. Therefore, in addition to statutory standing, Laws also must show that he satisfies Utah's tests respecting constitutional standing.[2]

In the proceedings before Judge Torgerson, Laws's pleadings did not allege that he had suffered a constitutionally cognizable injury which is redressable through judicial

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[1] Grayeyes broached the issues of subject-matter-jurisdiction and standing in the lower court, ROA at 0098ff, 001275ff, 001570ff, although these questions can be raised at any time, even on appeal, *e.g., Brown v. Division of Water Rights,* 2010 UT 14, ¶13. Motions to dismiss on the basis of standing present questions of law which this Court reviews for correctness. *E.g., Haik v. Jones,* 2018 UT 39, ¶9.

[2] *E.g., Brown v. Cox, 2017 UT 3, ¶¶12-14* (legislature, by statute, may not expand Utah Supreme Court's appellate jurisdiction); *Haik v. Jones, 2018 UT 39, ¶¶17-22* ("person aggrieved" statutory standing analyzed pursuant to constitutional standing tests); id. at ¶41 & nn. 10, 11, and 12, citing, among other cases, *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)* (Associate C. J. Lee, concurring opinion); *In re Questar Gas Co., 2007 UT 79, ¶¶58-62 & n. 65* (statute expressly grants utility's "stockholders" right of review of PSC order in Utah Supreme Court, but these stockholders still must prove standing under traditional constitutional tests set forth in *Utah Chapter of the Sierra Club v. Utah Air Quality Board, 2006 UT 74, ¶19,* and cases such as *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990)*, respecting a distinct, palpable injury, causation, and redressability); *Jenkins v. Swan, 675 P.2d 1145, 1148 (Utah 1983)* (legislature cannot create standing through enactment of Utah Declaratory Judgment Statute).

action. ROA at 001ff and 00139ff. Nor did he offer any proof along these lines. ROA at 002043 and 002041-002042. His appeal, therefore, must be dismissed for these reasons alone. But could Laws make (and prove) such allegations under the circumstances of this case?

He might blame his electoral loss on Grayeyes's want of residency. But any causal nexus between Grayeyes's home and Laws's defeat is attenuated at best. Such a loss, moreover, is not redressable, since §20A-4-404(4)(c)(i), under the circumstances of this case, authorizes judges only to nullify an election and not to award victory to candidates who come in second place. Laws admits as much when, through his testimony and pleadings in the lower court, he disclaimed any right to the office which he failed to win. ROA at 002041-002042 and "Petitioner's Amended Memorandum Opposing Respondent's Motion for Summary Judgment on Laches," at page 9, ROA at 001527-001528.

Laws also might argue that his vote doesn't matter if an unqualified candidate is allowed to take office. This appears, after all, to be the explanation for §20A-4-403(1)(a) and "registered voter" statutory standing. Ignoring the point that this argument is something of a *non sequitur*, it is clear that Laws's concern about his ability to vote for legal candidates is not the kind of "distinct" and "palpable" or "particularized" injury which creates standing in Utah. *E.g., Council of Holladay City v. Larkin,* 2004 UT 24, ¶27 (mayor of city lacked standing to challenge certain aspects of proposed change to form of government in connection with election contest because "[i]t is generally insufficient for a plaintiff to assert only a general interest he shares in common with

members of the public at large[ ]") (internal quotation marks and citation omitted); *York v. Unqualified Washington County Elected Officials,* 714 P.2d 679, 680 (Utah 1986) (citizen challenged election of county officials on grounds they were unqualified to hold office; dismissal of challenge for want of standing upheld on appeal; plaintiff "does not distinguish himself from any other resident, property owner, or taxpayer of Washington County . . . His amended petition alleges that other persons in similar circumstances will suffer the same unidentified jeopardy to their legal rights and status . . .").[3]

[3] In *Gregory v. Shurtleff,* 2013 UT 18, ¶94, Justice Lee cited *York* for the proposition that, "The holdings in most of our cases (if not always the dicta) have effectively maintained traditional limitations on standing. In *Jenkins v. Swan,* for example, we foreclosed standing in cases where 'other potential plaintiffs with a more direct interest in [the] particular question' exist. 675 P.2d 1145, 1151 (Utah 1983). This holding appropriately prefers parties that meet traditional standing requirements. *See id.* at 1150 ('[T]his Court will not readily relieve a plaintiff of the . . . requirement of showing a real and personal interest in the dispute[ ]')."

See also, Haik v. Jones, 2018 UT 39, ¶18 (citations omitted); *Jenkins v. Swan,* 675 P.2d 1145, 1152 (Utah 1983) (plaintiff had no standing to be private enforcer of conflict-of-interest requirements for state legislators); *Schlesinger v. Reservists Comm. To Stop the War,* 418 U.S. 208, 217 (1974) (plaintiffs lacked standing in suit to enforce Art. I, §6, cl. 2 of United States Constitution; "[t]he only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract . . . [The] claimed nonobservance [of the clause], standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance[ ]"); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573-577 (1992) ("[w]e have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy[ ]"), cited approvingly in *In re Questar Gas Co.,* 2007 UT 79, ¶61 & n. 65 (holding that, although "stockholders" and "aggrieved persons" literally are identified in statutes conferring individual standing and vouchsafing judicial review, as appellants in Supreme Court, they failed constitutional tests, such as those found in *Lujan,* and, thus, had no standing to appeal).

The desire for "legal" candidates isn't an interest peculiar to voters in general or Laws in particular, since those who abstain from the polls, as well as felons or aliens who cannot cast a ballot, care just as much about the qualifications of officials who preside in a commonwealth. Indeed, it isn't even an interest which affected Laws in the 2018 election, since presumably he voted for himself rather than that "other fellow" whom he believed to be "unlawful."

Moreover, this result is compelled by analogy to Utah R. Civ. Pro. 65B(c)(1) which governs the issuance of extraordinary writs, including writs of *quo warranto,* which are used – as in this case -- to challenge entitlements to public office. Case law from Utah and other jurisdictions holds that registered voters or local taxpayers, without more, cannot invoke a court's jurisdiction through *quo warranto* because they do not have an interest in these controversies which is "distinct from the general public." *State ex rel. Murdock v. Ryan,* 125 P. 666, 668-669 (Utah 1912). *See also, Newman v. United States of America ex rel. Frizzell,* 238 U.S. 537, 545-550 (1915). Indeed, without a limitation on standing such as this, elected candidates could be hounded out of office through a multitude of suits by registered voters, *id.* at 546, and the election contest statute, which essentially is a surrogate for Rule 65B(c)(1) and writs of *quo warranto,* might be unconstitutional under Art. VIII, §§3, 5, and 4, pursuant to the rationale of precedents such as *Barnes v. Lehi City,* 279 P. 878, 881, and 882-883 (Utah 1929).

Laws's own testimony at trial, in large measure, reflected these realities. He insisted that the Lieutenant Governor should have taken the Grayeyes case in vindication of the rights of the public at large: "You know, it seems kind of interesting that this is set

up this way, that it becomes my financial burden to prove somebody's residency in the state of Utah instead of the lieutenant governor's office stepping in and honoring their duly sworn obligation to protect the sovereignty of our elections. So the answer to your question is yes, you're damn rights I'm concerned about the costs of it because it is very costly to prove something that the State of Utah should have done for me." ROA at 002051.

In short, Laws's defeat in the election was not caused by any lack of residency on Grayeyes's part, nor could it have been redressed by any means available to Judge Torgerson under the election code. Laws has disclaimed any right to occupy the office of commissioner in all events. He has, moreover, only a "generalized" interest, shared with the San Juan County community at large, in questioning the residency of Grayeyes as a qualified candidate. At trial, Laws produced no evidence, other than his registration as a voter, to prove standing on any other basis. Accordingly, Laws lacks standing and the appeal should be dismissed.

LAWS WAS UNTIMELY AND BARRED BY LACHES[4]

Judge Torgerson ruled that Laws's complaint was untimely and barred on account of laches. This ruling should be affirmed on appeal.

[4] Grayeyes raised the issue of timeliness and laches in the lower court. ROA at 00162ff. Insofar as this presents a question of timeliness under §20A-9-202(5), it concerns interpretation of Utah law and is reviewed for correctness. *E.g., Adams v. Swensen,* 2005 UT 8, ¶7. And to the extent it presents a question of fact, Judge Torgerson's findings on this point may not be overturned absent a showing that they were clearly erroneous. *E.g., Harding v. Bell,* 57 P.3d 1093, 1097 (Utah 2002).

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 this case, Grayeyes's 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(7)(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. Before receiving Grayeyes's declaration of candidacy, the filing officer, in this case, a deputy at the San Juan County Clerk's 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 this 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. It is undisputed in our case that Laws did not timely file an objection to Grayeyes's declaration of candidacy under §20A-9-202(5).

However, where objections are made on a timely basis, the election official "immediately" must communicate any such 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 alternate remedy where objections are sustained, candidates may amend the declaration or file a new one, so long as this is done within three days of the election official's decision. §20A-9-202(5)(c).

Timing is critical when treating these objections. After filing his declaration, a candidate must invest days of effort and lots of money in pre-convention campaigning. Grayeyes thus filed his declaration on March 9, so that he could garner sufficient delegates to achieve nomination at the Democratic Party Convention held on March 23. Convention dates in fact are fixed in relation to the §20A-9-202(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. For example, if an objection to Grayeyes's declaration of candidacy had been timely filed by 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 on March 23. And a 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 – that 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 Utah 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).

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 with their affirmations of residency 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 three 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). This 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, 891-893 (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, 981-982 (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 shilly-shallying when candidates' rights are in the dock.[6]

Accordingly, March 9, 2018, was the earliest opportunity for Laws to object to the candidacy of Grayeyes on grounds of non-residency in light of §20A-9-202(5). Laws admitted at trial that he was aware of residency concerns respecting Grayeyes at that time. ROA at 002041-002042 and 002045-002046. At any time, from March 9, 2018,

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[5] This Court abjured enforcement of the filing deadline for declarations of candidacy in *Clegg v. Bennion,* 247 P.2d 614, 614-616 (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, 548-549 (Utah 2005) (campaign disclosure deadline not met by one day and city recorder's decision to remove candidate from ballot upheld).

through election day, November 6, 2018, Laws could have objected to Grayeyes's candidacy on residency grounds, using other vehicles in the election code, such as the procedures given in §§20A-1-801, *et seq.,* §20A-1-404, and §§20A-4-402, *et seq.* At trial he testified that he remained aware of residency concerns surrounding his opponent's campaign for all of these eight months -- because of an ongoing controversy between John David Nielson, the San Juan County Clerk and Grayeyes, wherein Nielson was endeavoring to kick Grayeyes off the ballot -- an awareness so keen and concerning that it prompted Laws to investigate the residency issue for himself during this period. ROA at 002042 and 002047-002048.

In June 2018, the controversy between Nielson and Grayeyes landed in the United States District Court for the District of Utah, Judge David Nuffer presiding. In early August 2018, Judge Nuffer ruled that Nielson's efforts against Grayeyes constituted a denial of due process and enjoined Nielson to put Grayeyes on the November ballot. Laws testified at trial that he was aware of Judge Nuffer's injunction on or about the date it was issued. ROA at 002047-002048. And he admitted further that, on September 5, 2018, while canvassing for votes at Navajo Mountain, his suspicions respecting Grayeyes's qualifications as commission candidate further were aroused when he went to Grayeyes's home and was told by a stranger whom he met at the door that Grayeyes was not present. ROA at 002059-002063. Indeed, so much publicity was given to the Grayeyes campaign and these residency concerns, all but the most detached citizens of San Juan County (and especially a campaign opponent) must have been aware that his

qualifications as a candidate were being placed at issue – but without resolution in court or by other means. ROA at 00180-001263.

Notwithstanding this awareness and his professed concern respecting the residency issue, for almost eight months (March 9 to November 6), Laws did not act. Even when it became apparent that the misbegotten challenge through the clerk's office would terminate in a finding of constitutional violations and a preliminary injunction from Judge Nuffer in Grayeyes's favor, Laws did not act. Even after that injunction was entered on August 9, 2018, putting Grayeyes on the November ballot, Laws did not act. And even after visiting the Grayeyes residence, encountering a stranger there on September 5, 2018, Laws remained immobile.

In his principal brief, Laws belatedly argues that he relied on the Clerk's investigation (launched through the complaint of Wendy Black) to resolve the residency issue, but he did not give testimony along this line at trial and Judge Torgerson made no finding to this effect in his ruling. The argument is misleading, moreover, because, as shown from the docket report in the federal case,[7] (1) the Black complaint, with Nielson's connivance, was concealed from the public and Grayeyes until it was reframed and filed much later as a challenge to Grayeyes's status as a voter under §20A-3-202.3, rather than his qualifications as a candidate under §20A-9-202(5), (2) Nielson's adjudication of Black's complaint was first interrupted and then derailed by the litigation before Judge

[7] The case is styled as *Grayeyes, et al. v. Cox, et al.,* civ. no. 4:18-cv-00041-DN (United States District Court for the District of Utah). The Court may take judicial notice of the contents of this docket including Judge Nuffer's preliminary injunction. *E.g., Fitzgerald v. Critchfield,* 744 P.2d 301, 305 (Utah Ct. App. 1987).

Nuffer, litigation which did not treat the state law residency issue, instead examining federal constitutional claims, and (3), in all events, Laws knew that Judge Nuffer's injunction, in early August, had put Grayeyes on the ballot, keeping the residency question alive for those, like Laws, who believed it should be answered.

Perhaps Laws gambled that he would win the election. But, if so, that proved to be a bad bet. He lost by a vote of 973 to 814. But whatever his pre-election intentions may have been, it is undisputed that Laws waited until after the election to act – first by filing a petition challenging Grayeyes's residency with the Lieutenant Governor pursuant to §§20A-1-801, *et seq.*, on November 30, 2018, and then by serving a complaint in this lawsuit pursuant to §§20A-4-402, *et seq.,* on the day Grayeyes was sworn into office, January 7, 2019. By seeking a couple of mulligans, one in an administrative proceeding and another before Judge Torgerson, Laws apparently sought to hedge his election bets on multiple fronts for a second time.

Not everyone, however, sees the electoral process as a gaming opportunity. It should go without saying that elections are designed to give voters a choice among candidates, such as Laws and Grayeyes -- and in order to ensure that choice and facilitate the choosing process in the 2018 election for San Juan County Commissioner in District 2, state and local governments, government officials, political parties, non-profit entities, legal representatives, judicial personnel, and the candidates themselves invest enormous amounts of time, energy, resources, and money. Laws's claims for relief in this appeal, if granted, will put the ideals and efforts of all these parties in interest to naught. Indeed, but for Laws's dilatory challenge to Grayeyes's residency, the San Juan County

Democratic Party could have found a candidate replacing Grayeyes in the 2018 race. §§20A-1-501(1)(b) and 20A-5-409.

Under these circumstances, Judge Torgerson's determination that Laws was guilty of laches and that, for this reason, among others, his complaint should be dismissed cannot be surprising. Election contests under §20A-4-402 are equitable proceedings, *e.g., Ellis v. Swensen,* 2000 UT 101, ¶23, and, therefore, principles of equity, including laches, will block petitioners who fail "to exercise reasonable diligence" in asserting rights, regardless of any applicable statute of limitations. In *Swensen,* for example, a timely notice of appeal – a jurisdictional deadline – had been filed, but the Court nevertheless ruled that laches remained as a viable bar to the appellate process. *Id.* Thus, Laws cannot escape the perils wrought by his pre-election delays, even though he may have brought this action under a statute which expressly contemplates post-election litigation within 40 days of an official canvass. A petitioner seeking relief in an election controversy actually may be right on the merits, but still should have his claim dismissed under the doctrine of laches when he fails to assert that claim at the earliest possible opportunity. *See, In re Cook,* 882 P.2d 656, 659 (Utah 1994) (discussed below).

Laches is especially relevant in election contests because the voiding of an election is a "'drastic if not staggering' remedy" with an "extremely disruptive effect" that wreaks havoc on the body politic. *Soules v. Kauaians for Nukolii Campaign Committee,* 849 F.2d 1176, 1180 (9th Cir. 1988) (citations omitted). In addition, "the courts have been wary lest the granting of post-election relief encourage[s] sandbagging on the part of wily plaintiffs. As the Fourth Circuit put it, the 'failure to require pre-

election adjudication would permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.'" *Id.* (Citations omitted.) The application of laches, under these circumstances, incentivizes early resolution of election law controversies, especially where, as here, the question is a simple claim respecting a party's residency, and means, in effect, that "'[t]he law imposes a duty on parties having grievances . . . to bring their complaints forward for preelection adjudication.'" *Id.* (Citations omitted.) If parties having adequate opportunities to raise the question at issue do not come forward on a pre-election basis, "they will be barred from the equitable relief of overturning the results of the election." *Id.* (Citations omitted.)

This Court – echoing the rationales advanced in *Soules* – also applies the laches doctrine to election contests. In *Clegg v. Bennion,* 247 P.2d 614 (Utah 1952), Clegg asked for an extraordinary writ in order to disqualify Dalton who had won nomination as the Republican candidate in a Utah congressional race. Clegg argued that Dalton had made an untimely filing of his declaration of candidacy and, therefore, was ineligible for office. The Court's opinion acknowledges that the deadline for filing was mandatory, and, moreover, that the Court's own precedents on the subject had not allowed any equitable circumstance, no matter how extenuating, to relax this mandate. The Court nevertheless denied what may have been a meritorious application for a special writ and refused relief to Clegg on the basis of laches.

The Court said: "[W]e feel that Mr. Clegg comes to us too late. Matters of import as great as this require airing at the earliest opportunity and at a time when anticipated

error may be prevented of occurrence. In this case any question of ineligibility or disqualification existed, if at all, on July 12, 19 days before the convention to which the declarants' names were to be presented. During that period the matter could have been litigated. Seeking relief 13 days after the convention had met, accepted and nominated the declarants, impresses as not being within that reasonable time contemplated in equity in such cases. It would seem rather to provoke an unfair assurance that . . . losing candidates have two shafts to their bow, while disfranchising delegates to party conventions which traditionally have enjoyed an autonomy usually unreviewable by the courts." *Clegg v. Bennion,* 247 P.2d at 616 (elisions added).

The Court's opinion makes clear that Clegg's tardiness, a delay of 13 days in comparison to Laws's procrastination of eight months, was unreasonable, in large measure, because the convention delegates, party leaders, state election officials, and Dalton himself, in effect were relying upon Clegg's inaction by expending time, effort, and resources in conducting their campaign for election.

In *Peck v. Monson,* 652 P.2d 1325 (Utah 1982), this Court affirmed an injunction which the trial court entered against the Lieutenant Governor, ordering him to put petitioner Peck on the general election ballot for a state legislative race. Peck had sued the Lieutenant Governor, arguing that his denial of ballot placement was grounded upon an erroneous reading of a timing provision in the elections code. The Utah Supreme Court resolved the case by upholding Peck's views on statutory construction, but Justice Oaks filed a concurring opinion, *id.* at 1327-1328, which maintained that the trial judge might have dismissed Peck's petition on the basis of laches.

Justice Oaks noted that Peck had five months to obtain a ruling which applied the statute in question to the facts of his case but waited three months before bringing suit. Although the courts took approximately one month to adjudicate the issues, the passage of time, in Justice Oaks's view, was entirely too disruptive and impaired the integrity of the electoral process. He observed that, while the contest was pending, political parties and the legislative candidates were left in limbo. Uncertain of the ballot, voters did not know who their candidates would be and accordingly how to evaluate them. All involved, including the state itself, which spends millions of dollars in funding elections, were at risk of wasting their time, effort, and resources.

Justice Oaks cited the approach taken by *Clegg* as the antidote for these ills, arguing, with *Clegg,* that petitioners have a legal duty to "put the controversy before the courts 'at the earliest opportunity[,]'" and quoting in full the same language from the *Clegg* opinion which we have inserted above, emphasizing that disappointed candidates, like Laws, should not be given "two shafts to their bow." His opinion is significant because, although a concurrence in *Peck* and dictum in relation to the outcome of that case, it later was adopted as the view of this Court.

In *In re Cook,* 882 P.2d 656 (Utah 1994), this Court returned to the application of laches in election contests. Petitioners were sponsors of an initiative under Chapter 7 of Title 20A of the election code. They disagreed with determinations by the Lieutenant Governor respecting the language to be used in describing their initiative on the ballot and also in connection with the voter information pamphlet. A unanimous Court agreed with the petitioners' contentions, finding that the Lieutenant Governor was wrong and

that the ballot title and information pamphlet, insofar as they concerned petitioners' initiative, were in violation of the statute. Nevertheless, the Court overruled the petitioners' application for a special writ and denied any relief on the basis of laches.

Relying upon Justice Oaks's concurring opinion in *Peck v. Monson* and its supporting precedent of *Clegg v. Bennion,* the Court ruled that petitioners had slept on their rights, because they were aware of the offensive language in the ballot title and the information pamphlet on August 31, but waited nearly two months, until September 28, to lodge their petition with the Court. In the meantime, the ballots and pamphlets had been printed and partially distributed and some absentee ballots had been cast, possibly in reliance on those materials. These circumstances underscored the need to require petitioners to bring their election-related claims to the attention of the judiciary (citing the same language from *Clegg* which Justice Oaks had relied upon in *Peck*) "at the earliest possible opportunity."

Laws manifestly did not satisfy his "legal duty" to bring the question of Grayeyes's residency to court "at the earliest possible opportunity." Laws was not ignorant of the dispute surrounding Grayeyes's residency and his qualification as a candidate. News surrounding the controversy – and related judicial proceedings – was widespread. Even if he counted on Black and Nielson to carry water for his campaign in Judge Nuffer's court, that reliance was unreasonable, since it was apparent that these federal proceedings would not adjudicate the state-law residency issue. In all events, Laws knew, in early August, when Judge Nuffer ruled, that any such reliance was misplaced.

Laws's delay was more than "unreasonable," the typical yardstick by which the application of laches is measured. As Grayeyes's political opponent, Laws had more reason than most to monitor the progress of the election and the ongoing debate respecting Grayeyes's residency and had no reason to leave leadership in that debate to surrogates like Black or Nielson. He therefore should have led out, in March, with an objection to the Grayeyes candidacy under §20A-9-202(5), especially because the Grayeyes declaration of candidacy, with its affirmation of residency, by statutory edict, remained valid throughout the election cycle in the absence of a timely objection – within 5 days of the last date on which declarations of candidacy could be filed -- pursuant to §20A-9-202(5)(a).

At the very least, as a candidate who cared about winning, he should have taken steps to use the other available election remedies noted above when it became apparent that Grayeyes would pursue relief in federal court, posing the risk that the Black/Nielson effort would not bear fruit, and he had even more incentive to take independent action once it became apparent, in June and July 2018, that Nielson's manipulation of the re-framed voter registration dispute would backfire and lead to an injunction.

When Judge Nuffer struck a fatal blow to Laws's campaign, by entering an injunction on August 9, Laws had no further excuse for inaction. Even at that juncture, although undoubtedly aware of all the events described above, and notwithstanding two months remaining in the pre-election cycle -- ample time in light of the factual findings and language employed in *Clegg, Peck, Brown,* and *Cook* -- Laws continued to bide his time, lying in wait until he lost the election and darkness settled, believing that he still

could use that extra "shaft in his bow," so disparaged by the opinions cited above, in order to gain victory. This Court, in those opinions, has refused to countenance this kind of political gamesmanship and should now hold to that stance and dismiss Laws's appeal on the ground of untimeliness and laches.

JUDGE TORGERSON'S RULING THAT GRAYEYES HAS A PRINCIPAL PLACE OF RESIDENCE IN SAN JUAN COUNTY SHOULD BE UPHELD ON APPEAL

Laws's complaint alleged that the 2018 election should be annulled because Grayeyes, as the elected candidate, was not "eligible for the office [of commissioner] at the time of the election[,]" §20A-4-402(1)(b), and, as the candidate declared elected, was "ineligible to serve in the office to which [he had been] elected[,]" §20A-4-402(1)(g). To make his case at trial, Laws relied upon the criterion for eligibility found in §17-16-1(1)(b), which provides that, when filing a declaration of candidacy, a candidate shall have been "a resident for at least one year of the county . . . in which the person seeks office[.]" ROA at 001907. Grayeyes filed his declaration of candidacy on March 9, 2018 (Trial Exhibit 11). The one-year period noted in this statute therefore ran from March 9, 2017, through March 9, 2018.[8]

After considering the evidentiary submissions at trial, Judge Torgerson determined that Grayeyes "is a resident of San Juan County living at Navajo Mountain/Paiute Mesa."

[8] Every other statute respecting eligibility-requirements for county commissioners deals with voter registration, not legal residency. *See,* §§17-16-1(1)(c), 17-53-202(1) and 17-53-202(2). Grayeyes had been a registered voter in San Juan County for decades and, therefore, satisfied all requirements under these statutes.

Appendix A at 2. He also had no problem "concluding that Grayeyes maintains his principal place of residence in San Juan County." Appendix A at 8. But Judge Torgerson also indicated that, while Grayeyes "has always maintained his residence at Navajo Mountain/Paiute Mesa," he may not have a "primary house" in that location. Appendix A at 2. Judge Torgerson was "not persuaded [by Laws's] argument that a particular house is required for a person to have a principal place of residence. As long as the location where the person resides is entirely within a voting precinct, the Court believes the 'single location where a person's habitation is fixed' [as defined in §20A-2-105(1)(a)] could mean a larger geographical area and include various places, particularly for someone like Mr. Grayeyes who observes traditional cultural practices. He may stay on Paiute Mesa under a shade hut during the summer. Or at his daughter's cabin. Or at his sister's house in Navajo Mountain. As long as those all fall within a single voting precinct, that geographical area is sufficient to be a principal place of residence." Appendix A at 8.

Laws's principal brief, at pages 14-16, focuses on Judge Torgerson's dictum that the statutory definition for a "principal place of residence" in §20A-2-105(1)(a) may be read broadly to cover voters who reside in a single precinct with a degree of fluidity to their habitation. He argues that this reading of the statute was wrong as a matter of law, requiring reversal.

We believe that Judge Torgerson correctly applied §20A-2-105(1)(a) to the peculiar facts of our case, but this Court may sustain his Ruling and Order on appeal for alternate reasons. *E.g., Peak Alarm Company, Inc. v. Salt Lake City Corporation,* 2010

UT 22, ¶76 (appellate court may uphold decision of lower court on any legal basis); *Dipoma v. McPhie,* 2001 UT 61, ¶18 (same). These are as follows: Laws failed to marshal the evidence pursuant to appellate requirements. Grayeyes qualifies for residence in San Juan County under §17-16-1(1)(b), even if he may not satisfy the specific standards of §20A-2-105(1)(a). If §20A-2-105 applies, Laws did not satisfy his burden of proving an essential element of his case in chief under §§20A-2-105(7)(a), 20A-2-105(7)(b)(ii), and 20A-2-105(1)(a). Considering all factors under §20A-2-105(4), Grayeyes has a principal place of residence at a fixed habitation in a single location at Navajo Mountain/Paiute Mesa within the meaning of §20A-2-105(1)(a).

1. Laws's appeal should be dismissed for failing properly to marshal the evidence.

Laws attacks Judge Torgerson's findings of fact supporting the lower court's rulings that Grayeyes had legal residency in San Juan County. But Laws fails properly – as directed by precedents from Utah's appellate courts -- to marshal the evidence in favor of Grayeyes as the prevailing party.

To begin, Laws has a "heavy burden" in pursuing any challenge to the fact findings of the lower court. *Matter of Estate of Bartell,* 776 P.2d 885, 886 (Utah 1989). This is true, in large measure, because appellate courts do not weigh the evidence *de novo,* and "great deference is given to the trial court's findings, especially when they are based on an evaluation of conflicting live testimony." The appellate standard of review is whether the findings are clearly erroneous. *Id.*

Accordingly, when a challenge is attempted, *all* evidence – "every scrap" -- in support of the finding under review first must be assembled in an appellant's opening brief. That assemblage, moreover, must "correlate particular items of evidence with the challenged findings." Next the appellant – assuming the role of a "devil's advocate" -- must present that evidence in the light most favorable to the finding in question. Only then may the appellant endeavor to pinpoint the "fatal flaw" in that evidence, a defect which must be profound enough to convince the appellate court that the finding was "clearly erroneous." *Harding v. Bell*, 57 P.3d 1093, 1097 (Utah 2002); *Neely v. Bennett*, 51 P.3d 724, 727-728 (Utah Ct. App. 2002); *West Valley City v. Majestic Inv., Co*., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

Judge Torgerson made approximately 12 findings which supported his rulings on residency. Laws should have addressed each of these -– specifically and serially -- in the manner described above. *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints,* 164 P.3d 384, 390 (Utah 2007). Instead, he merely summarized the testimony and evidence which came through 13 witnesses. This testimony and evidence were not assembled in a comprehensive manner -- not presented in the light most favorable to the rulings in question -- and not related – with particularity and sequentially – to each of the lower court's various findings. This is plain to see, not only from a cursory look at Laws's principal brief, at pages 22-30, but also by comparison with the evidentiary review of the residency questions which may be found in our brief in the next succeeding sections. Laws's half-baked approach will not wash under Utah's precedents. Selective testimony and incomplete analysis violate the marshaling rule. *State v. Maese*,

236 P.3d 155, 160-161 (Utah Ct. App. 2010). Simply listing some of the evidence does not satisfy the marshaling requirement. *Kimball v. Kimball*, 217 P.3d 733, 743 (Utah 2009).

Where an appellant, like Laws, fails properly to marshal the evidence, the appellate court may do one of two things. It has discretion to ignore the challenger's arguments which are based upon factual findings. This is because the Court is "strictly bound to affirm the accuracy of the…factual findings in the absence of marshaling." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 164 P.3d at 390. Or where – as here -- it appears that an appellee has a compelling case, well-grounded in evidentiary submissions to the lower court, the appeal may be dismissed. *Neely v. Bennett*, 51 P.3d at 728 (summary affirmance of the trial court decision when appellant fails to marshal the evidence). Accordingly, Grayeyes respectfully submits that the Court summarily should affirm Judge Torgerson's rulings on residency in light of Laws's failure properly to marshal the evidence on this appeal.

2.Grayeyes qualifies for residence under §17-16-1(1)(b), even if he may not satisfy the specific standards of §20A-2-105(1)(a).

Judge Torgerson found, at a minimum, that Grayeyes had general residency in San Juan County. This satisfies the residency requirement of §17-16-1(1)(b), the eligibility statute upon which Laws relies in this case. This is the statute, again, which provides that, when filing a declaration of candidacy, a candidate shall have been "a resident for at least one year of the county . . . in which the person seeks office."

Section 17-16-1(1)(b) does not define residency in terms of a specific location or fixed habitation for purposes of eligibility to be a county commissioner. Language about specific locations and fixed habitations *is* found at §20A-2-105, but that statute cannot be used to define residency under §17-16-1(1)(b), because §20A-2-105(2) says that §20A-2-105 applies, as relevant here, only "when determining whether a person is a resident for purposes of interpreting this title [20A]," not title 17 of the Utah Code. Indeed, Utah case law holds that statutes like §20A-2-105, in our election code, especially in view of provisions like subpart (2), quoted above, cannot be given cross-application in 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 in election code does not apply to campaign disclosure requirement found in Title 10 for cities).

Section 17-16-1(1)(b)'s failure to define residency in terms of a specific location or fixed habitation for pre-election purposes is underscored by §17-16-1(2), which uses §20A-2-105 as the litmus test by which post-election changes in residency are determined. *See, Sjostrom v. Bishop,* 393 P.2d 472, 474 (Utah 1964) (discussing importance of differences between pre-election and post-election circumstances).

Hence, under §17-16-1(1)(b), only a general residency must be present when filing a pre-election declaration of candidacy. Under §17-16-1(2), however, once a candidate is elected, a post-election test to demarcate residential change during tenure in office comes into play. At that point in time, a test is needed to indicate the circumstances under which a change in residency has occurred, and §20A-2-105, in subpart (5)(a), satisfies that need:

the failure to "maintain residence" during a commissioner's term only can occur when that commissioner both "acts affirmatively to move from the state" and "has the intent to remain in another state[.]" §20A-2-105(5)(a).

This distinction between tests to determine residency on a pre- or post-election basis, not only makes sense because of obvious differences between candidates who run for office and elected candidates who become officeholders, but also coordinates perfectly with the remaining standards which establish eligibility for county commissioners. All of these are based on voter registration, §§17-16-1(1)(c), 17-53-202(1), and 17-53-202(2), which creates a presumption of residency within the precinct where registration occurs, §20A-2-105(7)(a). That presumption may be rebutted only by showing, as with elected commissioners under §17-16-1(2), that the voter, after registration, has moved and established a new principal place of residence out of state, §§20A-2-105(5)(a) and 20A-2-105(7)(b)(i).

In short, the Utah legislature apparently knew what it was doing when distinguishing between pre- and post-election residency requirements for county commissioners and carefully crafted the relevant statutes to achieve its policy goals. Hence, in light of §17-16-1(1)(b)'s general residency standard, Judge Torgerson's dictum that Grayeyes lived in San Juan County – albeit with some fluidity to his stopping places -- during the pre-election period is sufficient, without more, to defeat Laws's complaint.

3. If §20A-2-105 applies, Laws failed to prove a basic element of his case-in-chief as required under §§20A-2-105(7)(a), 20A-2-105(7)(b)(ii), and 20A-2-105(1)(a).

Judge Torgerson ruled that Laws did not prove that Grayeyes had a principal place of residence, within the meaning of §20A-2-105(1)(a), at a mobile home in Page, Arizona. Ruling and Order at 7. This finding alone also is sufficient to defeat Laws's complaint.

Laws had to prove that Grayeyes did not reside in San Juan County from March 9, 2017, through March 9, 2018. §17-16-1(1)(b). Laws insists that §20A-2-105 governs determinations of residency in this case, *while admitting that Grayeyes was a registered voter in San Juan County during that same period.* What does this combination of circumstances mean under our election code?

Registered voters are presumed to have a principal place of residence in their registration precinct. §20A-2-105(7)(a). This presumption may be rebutted only through a showing, by clear and convincing evidence, that the voter has a "principal place of residence" *outside of Utah*. §20A-2-105(7)(b)(ii).

Laws attempted to rebut this presumption and make this showing by offering into evidence the title records for a mobile home in Page, Arizona, which Grayeyes had purchased in 1984. However, Laws offered no evidence whatsoever that this was a property at which Grayeyes had ever lived on a sustained basis or to which he had any "intention to return" within the meaning of §§20A-2-105(7)(b)(ii) and 20A-2-105(1)(a). A short field trip to the Arizona mobile home would have shown Laws that the structure was uninhabitable, an abandoned ruin. Evidence just as easily accessed would have

revealed that this property had been in a state of dereliction for some time. Moreover, far from harboring any intention of "returning," Grayeyes had not set foot on this property for over 30 years. ROA at 002202ff and 002234ff.

More than this, it is indisputable that Grayeyes has been a registered voter – and has voted -- in San Juan County for decades. The Lieutenant Governor, as chief elections officer for the state of Utah, certified Grayeyes as a lawful candidate for county commissioner in 2012. The San Juan County Clerk, as local elections officer, had renewed Grayeyes's registration to vote in 2016. Trial Exhibit 13.

Before Judge Torgerson and, to some extent, in his principal brief in this Court, Laws endeavors to talk around these facts by insisting that Grayeyes did not live in San Juan County. But this is a red herring. Because he is a registered voter in San Juan County, Grayeyes is presumed to live there. To rebut this presumption, under the clear language of the controlling statutes, Laws has to show that Grayeyes has a principal place of residence *in another state*. Laws tried to show that the trailer in Page met that mark, but the evidence – especially evidence concerning the relevant period from March 2017 to March 2018 -- overwhelmingly was against him and Judge Torgerson so ruled. That ruling was based upon uncontroverted facts and conclusively establishes, on this alternate theory of the case, that Laws's complaint properly was dismissed.

4. Considering all factors under §20A-2-105(4), Grayeyes has a principal place of residence at a fixed habitation in a single location on Navajo Mountain/Paiute Mesa.

In his principal brief, Laws argues, at pages 14-16, that Judge Torgerson erred by finding that Grayeyes resided generally in San Juan County as opposed to a fixed habitation in single location at Navajo Mountain. As demonstrated above, this argument is a blind, because, as a registered voter, Grayeyes was presumed to have a principal place of residence, a fixed habitation in a single location, at Navajo Mountain, and Laws could rebut this presumption only by showing that this legal residency at Navajo Mountain had been replaced by a principal place of residence in a state other than Utah – something he failed to do. Nevertheless, the evidence at trial overwhelmingly supports a conclusion that Grayeyes had a principal place of residence at Navajo Mountain within the meaning of §§20A-2-105(1)(a) and 20A-2-105(4).

Residency under §20A-2-105(a)(1) is largely about a person's "intention to return" to a certain location. Section 20A-2-105(4) asks judges to consider nine factors, listed, (a) through (i), "to the extent that . . . [he] determines the factors to be relevant" in evaluating this question of "intent." An evaluation of these key factors supports the finding of Grayeyes's residence at Navajo Mountain.

a. Voter registration and voting.

Section 20A-2-105(4) does not specifically name voter registration and actual voting as factors to be considered in determining residency. But subpart (i) of that statute is a catch-all provision that requires a judge to look at all other relevant, residency-related

circumstances. Registering to vote and voting are relevant, arguably even determinative, in this case for important reasons.

The statutory provisions for determining eligibility to run for and serve in the office of commissioner -- found in §§17-16-1(1) and 17-53-202 – stipulate voter registration as a requirement three times and actual residency only once. And residency is presumed from registration and voting, as a matter of statutory direction, §20A-2-105(7)(a), and long-standing judicial precedent, *e.g., Beauregaard v. Gunnison City,* 160 P. 815, 818-819 (Utah 1916) (voter is presumed to reside in place where he last voted).

How did proof at trial speak to these points of law? Through counsel, Laws himself introduced Trial Exhibit 13 which was received into evidence. ROA at 001976 and 001978. This exhibit shows, among other facts, that Grayeyes has been a registered voter in San Juan County since the age of 18, that he has voted in almost all San Juan County elections since 2000, that he was certified by the Lieutenant Governor for the State of Utah to stand as a candidate for the office of commissioner in San Juan County in the 2012 general election, and that he never has voted in any state other than Utah. Confirming this testimony, the Court received into evidence – without objection from Laws – Trial Exhibit 25, ROA at 002242-002243, the voter registration and voting records for Grayeyes in San Juan County.

Trial Exhibit 13 and testimony from Lena Fowler, a government official in Coconino County, further demonstrated that Grayeyes never had registered to vote or actually voted in Arizona where Laws alleged that Grayeyes lived. ROA at 002126-002127. This circumstance has relevance under §20A-2-105(4)(i) because registration

and voting in another state may be a determinant of residency in light of §20A-2-105(3)(e)(ii).

But the absence of registration and voting in Arizona has significance beyond the negative inference to be drawn from §20A-2-105(3)(e)(ii). It also suggests that, because Grayeyes did not register to vote in Arizona, he had no intent to stay permanently in that state. *See,* Op. Az. Atty. Gen., No. 72-37-L (act of registration shows independent intent to remain permanently for residency purposes in Arizona). It likewise indicates that Grayeyes may not have qualified to become a resident there for any electoral purpose on account of insufficient contacts. *See, Parker v. City of Tucson,* 314 P.3d 100, 108-109 (Ariz. 2013) (physical presence in Arizona isn't enough to qualify for residency). Indeed, since he was registered to vote in Utah, Grayeyes could not obtain residency, for voting purposes, in the state of Arizona. *See,* A.R.S. §16-101.

b. Family residences and sleeping arrangements.

The proximity of family is another criterion for determining residency. Thus, §20A-2-105(4), at subparts (a) and (d), invites consideration of where a "person's family resides" and "where a person usually sleeps." Trial testimony showed that Grayeyes has a traditional homestead on Paiute Mesa, Navajo Mountain, San Juan County. Two sons live there, and it is the place his family gathers for celebratory occasions. ROA at 002222. Grayeyes has a daughter and a sister who live at Navajo Mountain and he stays as much as 80 percent of each year at their homes. ROA at 002212- 002213, 002240-002241, and 002226-002232. Laws's own witness, Alex Bitsinnie, affirmed that "most

everyone" who lives at Navajo Mountain, was a Grayeyes relative, and that it would take "the rest of the day, tomorrow," to name them all. ROA at 002090 and 002089.

c. Occupational/business pursuits.

Section 20A-2-105(4), at subpart (f), identifies "employment, income sources, or business pursuits" as factors to be considered in determining residency. Laws put Trial Exhibit 13 into evidence, paragraphs 14, 15, and 16 of which show that Grayeyes was a Chapter Official and Secretary/Treasurer of the Navajo Mountain Chapter of the Navajo Nation and the chairperson of the local school board. Five other witnesses, Alex Bitsinnie, Herman Daniels, Lena Fowler, April Wilkerson, and Naverina Grayeyes, supplied testimony which proved that, in performing this work, Grayeyes has been physically present and actively engaged with the Navajo Mountain community for many years. ROA at 002071, 002073, 002084-002087, 002155-002158, 002125, 002212-002213, 002240, 002236, 002129-002130, and 002133. In fact, according to Fowler, Grayeyes was known in her community as "Mr. Utah," because his work was so central to San Juan County in general and Navajo Mountain in particular. ROA at 002136.

Grayeyes also runs cattle at his homestead on Navajo Mountain. A permit from the grazing committee at the Navajo Nation is necessary to conduct this business. The agent for that committee, Russell Smallcanyon, testified that Grayeyes had such a permit, ROA at 002194, and that his cattle operation was inspected and in compliance with the Nation's regulations, ROA at 002198-002199. Registration of Grayeyes's cattle brand with the State of Utah apparently is a necessary aspect of these compliance audits. ROA at 002200. Mr. Bitsinnie, Laws's witness, testified that, over the past three to four years,

he had seen Grayeyes in attendance at grazing committee meetings at Navajo Mountain. ROA at 002083. In addition, Grayeyes's daughter, April, testified that her father's stops with his sister, Rose, in Navajo Mountain, were for the purpose of looking in on the cattle, ROA at 002212, and that the family gathered on occasion at the Grayeyes homestead to brand the cows and help with operation of the livestock, ROA at 002222.

Other witnesses testified about the significant relationship between the ownership of cattle and the location of a home in the Navajo tradition. ROA at 002149-002151, 002138, 002179-002180, and 002160. Judge Torgerson was authorized, pursuant to §20A-2-105(4)(i), to take this evidence into account so long as he deemed it to be relevant. And the evidence has relevance because it speaks to the residence-related intentions of Grayeyes, who, as a Navajo, is a product of these bedrock Navajo cultural beliefs.

But this point may be mooted because the trial evidence, taken as a whole, showed that the connection at Navajo Mountain between animal husbandry and living space is not merely a sociological metaphor. In addition to the evidence noted above, Lena Fowler testified that the grazing committee, along with Chapter officials, manages affairs at Navajo Mountain. ROA at 002125. And another witness, Russell Smallcanyon, affirmed that ownership of a grazing permit is critical to the acquisition of a homesite lease at Navajo Mountain. ROA at 002198. This, in turn, was corroborated by Laws's witness, Mr. Bitsinnie, who said that the grazing committee is responsible for homesite leasing. ROA at 002082. The fact that Grayeyes held a grazing permit, in other words, showed entitlement to his actual home and his family's homestead at Navajo Mountain.

d. Real property.

Laws's case focused primarily upon §20A-2-105(4)(g), which asks courts to consider the location of real property owned by a person whose residency is under review. Laws showed, through official records, that in the early 1980s Grayeyes and his wife purchased a mobile home in Page, Arizona. Those records also suggested that, approximately 18 years ago, a refinancing in relation to that property had occurred, and that property tax notices – with the words "principal residence" – had been addressed to Grayeyes and mailed to a post office box.

But the ownership of realty, standing alone, does not tell us much of anything in relation to a person's residency. Many folks, politicians and voters alike, have multiple homes in as many locations. And the statute itself, for example, §§20A-2-105(1)(a), 3(c), and 3(e), is peppered with language which contemplates this very contingency. This also is why subpart (4) of §20A-2-105 identifies 9 indicators – one of which is a catch-all provision for all other relevant factors – additional to realty ownership – as signposts on the road to determine residency. Accordingly, in these instances, there must be a showing, some sort of narrative context, that "ownership" of one property, rather than another, signifies residency, and the prefatory language in §20A-2-105(4), calling our attention to the "relevancy" of a property's location, is a reminder of this need.

But Laws's sole evidence respecting the mobile home consisted of official records; he called no witness who could explain the *relevant* circumstances – circumstances, if any, which might bear upon the question of residency -- behind Grayeyes's naked title to that property. As real property lawyers know, title may be the

least important twig in the bundle of sticks which comprise "ownership" of land. And, more to the point in this case, naked title deals only with nominal – or apparent -- ownership -- whereas residency is concerned with a person's more "enduring ties"[9] -- including homestead traditions, closeness of kin, or actual occupancy of a particular place -- by the individual in question.

Laws's evidence not only suffered from this lack of explanatory context, but also could not be given much weight in our case -- because the dates on which the mobile home was purchased (nearly four decades ago) and refinanced (almost two decades past) are exceedingly remote in relation to the 2018 election cycle, the *relevant* time-line for determining residency in this election contest.

Grayeyes's evidence nevertheless filled the holes left in Laws's case -- with information which proved that the mobile home had no relation to the question of residency under §20A-2-105(4). Grayeyes's daughters explained that Grayeyes did not live in the mobile home for most of the 1980s, as well as all of the 1990s and the 21st century. Grayeyes and his wife acquired the mobile home so that the wife could supervise the children while they attended school during their early years in that location (because there were no schools at that time on the Utah side of the Navajo Reservation at Navajo Mountain). ROA at 002235. Grayeyes could not stay at the mobile home because he worked elsewhere. ROA at 002236 and 002206-002207. His wife and children paid

[9] This phrase is drawn from *Dodge v. Evans,* 716 P.2d 270, 275 (Utah 1985), an important decision by this Court on the question of residency for political purposes.

him visits in their home at Navajo Mountain – on account of Grayeyes's work obligations in that community -- during break-times or vacation intervals. ROA at 002237 and 002206-002207. Grayeyes, for a short period after his wife died, in 1987 and 1988, looked after his children in Page while they continued their education, but even this short-lived parental supervision often was interrupted when Grayeyes returned to his primary residence at Navajo Mountain, ROA at 002237-002238, and ended when the oldest daughter, upon turning 18, could give full-time attention to the remaining youngsters, ROA at 002207-002208. Grayeyes's children have been the sole occupants of the mobile home since 1988 because Grayeyes himself continued working as a Chapter official at Navajo Mountain. ROA at 002238-002239 and 002226-002232. The last child to occupy the mobile home, a son, left in the middle of the 2010s, after which the structure became uninhabitable and accordingly was boarded up and abandoned. ROA at 002210-002211. The tax notices for the property, although bearing Grayeyes's name, were mailed to post office boxes which were registered to his children, and his children, not Grayeyes, paid those taxes. ROA at 002210-002211.[10] Insofar as the mobile home is concerned, Grayeyes has been nothing more than a title holder, certainly not an

[10] Laws argued that the tax notices, which carried the designation "principal residence" in lower case type, proved that this was Grayeyes's "principal place of residence" under Utah's election code. But Laws did not lay any foundation for this assertion. He did not call a witness with personal knowledge of what this hearsay designation means on an Arizona tax notice. And A.R.S. §§42-12052, 12053, and 12010, suggest, as one might expect, that this label is part of a classification system which facilitates the use of variable rates on different properties under Arizona law for tax purposes. Accordingly, it has little or no "relevance" to the question of residency under Utah law for election purposes.

actual occupant, ROA at 002221, and, indeed, has not set foot on the Page property since 1989, almost 30 years ago. ROA at 002210, 002202ff, and 002234ff.

Grayeyes's principal place of residence, the place which he intended permanently to call home and the place to which, even when absent temporarily for work, he always intends to return, is at Navajo Mountain. The testimony to this effect – especially from his daughters -- was compelling and conclusive. ROA at 002202ff and 002234ff.

This place is a birthright, where his umbilical cord was buried in a sacred ceremony. Trial Exhibit 14. The importance of this circumstance, as a signifier of "residency," cannot be overstated. The umbilical cord ritual, as a symbol of homestead ownership, has been recognized specifically in Tenth Circuit case law, *see, United States v. Tsosie,* 849 F. Supp. 768, 774-775 (D. N. M. 1994). At least four witnesses, including Mr. Bitsinnie who Laws called to the stand, testified to this effect. ROA at 002081-002082 and 002090 and 002091, 002145-002149, 002174-002178, and 002121-002122. Johnson Dennison, an expert witness, said that this ceremony tells us where a Navajo "lives;" it says that, no matter where I go, "I always come back to the place where my umbilical cord is buried." In a similar vein, as noted above, Grayeyes ran cattle at this location, another index to homestead location in Navajo tradition.

Grayeyes presented evidence respecting the importance of these circumstances as determinants of "home" – and Judge Torgerson took them into account -- not as Laws contends in his principal brief because Navajo custom somehow takes precedence over the Utah statute which defines residency under the election code -- but because these circumstances prove an "intention" within the meaning of that statute and code -- to

maintain Navajo Mountain as a principal place of residence and always to return there, even when absent on an interim basis. Intention, in this regard, is the very touchstone of residency under Utah election law. §§20A-2-105(3)(a)(ii), (1)(a).

Even if we eliminate all evidence respecting Navajo traditions and Grayeyes's beliefs, Navajo Mountain, in every secular sense, was Grayeyes's principal place of residence. As shown above, he registered to vote and in fact voted there for over 30 years. Likewise, as shown above, his income was derived from occupations at that location throughout this same extended period. Similarly, as shown above, most of his immediate family and numerous kin from an extended clan shared space with him at Navajo Mountain. A majority of witnesses who had acquaintance with Grayeyes -- his daughters, workmates, and friends -- all testified that they either knew Grayeyes in fact resided at Navajo Mountain or had visited his homestead there or both. ROA at 002202ff, 002234ff, 002129-002130 and 002133, 002180-002184 and 002158. One of these witnesses knew that Grayeyes had a residence at Navajo Mountain, not only because he personally had visited the place, but also because, in official work for the Navajo Nation, he saw that the Grayeyes home was scheduled for infrastructure improvements, including installation of water lines and a septic tank. ROA at 002163-002167.

In short, Laws may have thought that he could write a "tale of two houses," but, at the end of trial, there was little sound, no fury, and his story signified nothing. He produced certified copies of official records showing that Grayeyes had purchased a Page-based mobile home in the early 1980s – and nothing more. The truly relevant

evidence showed that this mobile home was a temporary expedient where his wife could tend to the education of their children. Grayeyes was the title holder, and even early on, only rarely, the occupant of that home. ROA at 002221. It has been beneficially owned by his children – who have paid taxes on the land -- for decades. Grayeyes has not spent time in the trailer for nearly 30 years. ROA at 002210. It is far removed from the 2018 election cycle with which this case is concerned.

In contrast, Grayeyes's homestead at Navajo Mountain is a principal place of residence. All of his "enduring ties," religious, familial, political, social, and economic, are there. Family members, nuclear and extended, live nearby. The local community looks to him for leadership, as Chapter official, school board chair, and advocate for environmental needs, educational facilities, and social services. He has been a registered voter – voting in elections – for over 30 years. He ran for the office of commissioner in the 2012 election. This is where he has earned a living and runs his cattle. And, as the evidence at trial repeatedly showed, this is the place to which Grayeyes always has returned and continues to return.

In summary, §20A-2-105(4) lists nine factors which, to the extent relevant in a given case, might be indicative of residency. A fair-minded and even-handed application of five of the nine factors, realty ownership, family residences, sleeping arrangements, work-related pursuits, and voter registration and voting (as otherwise relevant under subpart (i)), to the facts of this case demonstrates that Grayeyes has a principal place of residence in Navajo Mountain, San Juan County. Many of these factors, the Navajo Mountain homestead, cattle ownership, family ties, and work connections, have been

identified as major indices to a finding of residency by this Court. *See, Dodge v. Evans,* 716 P.2d 270, 274 (Utah 1985). Three of the nine, marital status, age, and where minor children are going to school, have no bearing on Grayeyes's residency for purposes of the 2018 election cycle.

5. Portions of the Turk Report properly were excluded and that exclusion was harmless.

Judge Torgerson excluded portions of a report prepared by San Juan County Deputy Sheriff Colby Turk which purported to be the product of an investigation into Grayeyes's residency on Navajo Mountain.[11] Laws argues that Judge Torgerson abused his discretion in excluding portions of the report (the disallowed portions of which hereafter will be called "the Report") – because the Report was admissible under Utah R. Evid. 803(8), the public records exception to the rule against hearsay.

Judge Torgerson, however, did not abuse his discretion for the following reasons: The Report properly was excluded for insufficient foundation. The Report, if made pursuant to a criminal case was inadmissible under the plain terms of Rule 803(8)(A)(ii), and, if part of a civil proceeding, was not the product of a "legally authorized investigation" within the meaning of Rule 803(8)(A)(iii). In addition, the Report did not contain "factual findings" and therefore did not qualify for admissibility under Rule

[11] It is important to note that Judge Torgerson did not exclude the entire report. He disallowed Turk's narration respecting encounters with witnesses, videos taken of those interviews, and transcriptions of those interrogations. He allowed Turk's testimony of what he saw, along with documents, such as photographs, which Turk himself took on his journey to Navajo Mountain. He also allowed a videotape (but not the transcription) of Turk's interview with Grayeyes and Grayeyes's sister, Rose.

803(8)(A)(iii). Finally, the Report lacked "trustworthiness" in light of its "sources of information" and "other circumstances" and, therefore, in all events, was excludable under Rule 803(8)(B).

a. Insufficient foundation.

Rule 803(8) provides that a "record or statement of a public office" may be admitted, notwithstanding the rule against hearsay, if "it sets out: (8)(A)(i) the office's activities; (8)(A)(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (8)(A)(iii) in a civil case . . . factual findings from a legally authorized investigation; and (8)(B) neither the source of information nor other circumstances indicate a lack of trustworthiness."

Laws didn't call a witness who had the personal knowledge necessary to lay foundation for admission of the Report under Rule 803(8). *E.g., State v. Bertul,* 664 P.2d 1181, 1184 (Utah 1983) ("a proper foundation must be laid to establish the necessary indicia of reliability"). He called Deputy Turk who, insofar as "legal authorization" for the Grayeyes investigation was concerned, gave only hearsay accounts about a complaint from Wendy Black (concerning Grayeyes's status as a candidate or voter under Utah election law) to the County Clerk who called the County Sheriff, but no accounting whatsoever for the legal basis which justified the Sheriff's department or Turk personally to conduct an investigation involving two citizens in a civil proceeding. ROA at 001924-001926 and 001933-001935.

Following up on the Black complaint, Turk did footwork in the field, and, therefore, could report on geography covered and witnesses interviewed, but he lacked any personal knowledge whether these "sources of information" -- some of whom were unnamed in the Report -- and the opinions which they expressed had validity in fact. *E.g., State v. Bertul,* 664 P.2d at 1184 (under prior version of Rule 803(8), foundation for admissibility must show that "the sources of information" used in report and "circumstances of the preparation of the document" were indicative of "trustworthiness[ ]"); *Kehl v. Schwendiman,* 735 P.2d 413, 416-417 (Utah Ct. App. 1987) (breathalyzer test result properly excluded in civil administrative proceeding for want of foundation testimony from qualified operator; police affidavit properly excluded for want of foundational testimony showing reliability). *Cf. Clayton v. Metropolitan Life Ins. Co.,* 85 P.2d 819, 823 (Utah 1938) (under common law rule, physician's report respecting nurse involvement in appendix removal properly excluded where no foundation laid concerning reasons why nurse was unavailable to testify).

Indeed, since Turk did not claim to be the custodian of records in the sheriff's office, he gave no testimony respecting the safekeeping of the Report and whether, from March, 2018, when it was prepared, until January 22, 2019, the date on which it was offered into evidence at trial, anyone had tampered with the videos or mishandled the documentation. And no foundation, from either Turk or a court reporter, was laid to explain the process for preparing the video transcriptions, critical testimony since these recordings, at points, are inaudible and, on occasion, show witnesses speaking in Navajo.

E.g., State v. Bertul, 665 P.2d at 1184 ("foundation must show that report, after being prepared and filed, was kept "under circumstances that would preserve its integrity[ ]").

b. If part of a criminal case, the Report had to be excluded; if part of a civil proceeding, it properly was excluded because Turk's investigation wasn't legally authorized.

To qualify for admissibility under Rule 803(8)(A)(ii), if the proffered report is part of a criminal case, matters observed by law-enforcement personnel – notwithstanding a legal duty to report -- may not come into evidence. In the alternative, under Rule 803(8)(A)(iii), if the proffered report is part of a civil case, its "factual findings" may be admitted so long as the report is the end-result of a "legally authorized investigation."

Notwithstanding some ambivalence on the part of Laws's counsel, ROA at 001919-001920, it is clear that the Report was prepared in conjunction with a criminal case. The Report, on its face, contemplates a criminal investigation. It gives an offense code, "FIPO," and states the nature of the offense as "False Info," and as "FIPO False Information or Report," presumably an allegedly false oath which Grayeyes had made about his residency when filing the declaration of candidacy. Turk also lacked authority to conduct an investigation (as he did) on the Navajo Reservation, unless that endeavor was part of a criminal case. Trial Exhibit 19.

In that event, however, Turk's observations as a law-enforcement officer were obviously inadmissible in view of the plain language of Rule 803(8)(A)(ii) and the persuasive reasoning of this Court in *State v. Bertul,* 664 P.2d at 1184-1185. Rule 803(8)(A)(ii)'s blanket exclusion of law-enforcement reports appears to be a codification

of this reasoning in *Bertul,* and has been applied in later Utah cases. *E.g., State v. Morrell,* 803 P.2d 292, 298 (Utah Ct. App. 1990) (police report not eligible for admission under Rule); *Layton City v. Peronek,* 803 P.2d 1294, 1298 (Utah Ct. App. 1990) (police reports are not reliable enough to obtain admission under exception to rule against hearsay). The Report, then, rightly was excluded pursuant to Rule 803(8)(A)(ii).[12]

In the alternative, Laws may have believed that the Report was admissible as part of a "legally authorized investigation" in a civil matter under Rule 803(8)(A)(iii). But Judge Torgerson also had sufficient reason to exclude the Report under this subpart of the Rule. As already noted, Laws laid no foundation that the Report was the product of a "legally authorized investigation." And Judge Nuffer of the United States District Court for the District of Utah previously had found that the Report, far from being lawful, in fact was used to violate Grayeyes's rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *See, Grayeyes, et al. v. Cox, et al.,* Memorandum Decision and Order Granting [13] Plaintiff Grayeyes's Motion for Preliminary Injunction, civ. no. 4:18-cv-0004, Dkt. no. 94 (United States District Court

[12] Laws's principal brief on appeal, at pages 36-37, relies *entirely* on Rule 803(8)(A)(ii), and not the alternative in Rule 803(8)(A)(iii). But his brief, at the top of page 37, quotes the Rule misleadingly, by cutting off the critical part which supplies the exception to the exception – "but not including, in a criminal case, a matter observed by law-enforcement personnel[.]" As noted in our argument above, this part of the Rule, codifying *Bertul,* when applicable, interdicts the use of law enforcement reports altogether as exceptions to the hearsay rule. However, to remove all doubt on this subject, we discuss both alternatives, criminal and civil, under Rule 803(8), showing that the Report was not admissible under either.

for the District of Utah, August 9, 2018). The Memorandum Decision found expressly that the Turk investigation was "not permitted or authorized by statute." *Id.* at 15-16.

c. No factual findings.

The Report failed to qualify for admissibility under Rule 803(8)(A)(iii), not only because it was *ultra vires*, but also because, in any case, it contained no "factual findings." These findings give official reports the credibility and reliability needed to become exceptions to the rule against hearsay. They are formalized when "data gathered through the investigation is subjected to sifting and evaluation. Training, experience, and intuition are applied to the compilation of raw data, and a report emerges. Facts are found." *State v. Ison,* 2006 UT 26, ¶20. The Report here is like the "raw data" noted in *Ison.* The Report itself doesn't purport to make factual findings; it merely contains an "Investigation Narrative" in which Turk discusses where he went, with whom he spoke, and what they said. These aren't the factual findings contemplated by Rule 803(8)(A)(iii). *See generally, State v. Ison,* 2006 UT 26, ¶¶19-23.

d. Lacking trustworthiness.

Public reports are exceptions to the rule against hearsay because the officials who prepare them generally are well-acquainted with the requirements of their work and proficient in the performance of it. *E.g., State v. Ison,* 2006 UT 26, ¶20 ("[t]raining, experience, and intuition"). But no foundation was laid showing that Turk had any familiarity with civil disputes in general or voting rights in particular. His questioning of witnesses in fact demonstrated a lack of understanding in this regard. Rather than exploring the full range of relevant factors which serve to define residency under the

election code, he merely asked whether Grayeyes "lives" – without giving a relevant time frame, such as the March 2017-March 2018 election cycle -- at Navajo Mountain. *E.g., State v. Bertul,* 664 P.2d at 1185 (reports may be prejudicial through "manner of language usage[ ]").

Worse than this, there was no science to the serendipity by which Turk selected his witnesses or whether the few in his sample were representative of the general population at that location. The Report shows that he did not ask questions to determine whether his witnesses had first-hand knowledge which backed the assertions they gave on tape. In addition to the double-hearsay implicit in such assertions, the Report contains actual instances of several witnesses who claimed knowledge through statements from others. Many witnesses were unnamed, entirely anonymous. Utah opinions emphasize that such circumstances almost always will render a report inadmissible on the ground of untrustworthiness. *E.g., State v. Bertul,* 664 P.2d at 1184 and 1186 (witness statements "are not made in the regular course of the witness' business and do not have the indicia of reliability" deemed necessary for admission as evidence; "investigatory reports of government officials containing opinions not based on first-hand knowledge are not admissible under [exception to rule against hearsay]"); *State in Interest of W.S.,* 939 P.2d 196, 201 (Utah Ct. App. 1997) (double hearsay "inherently unreliable" and has "a high probability for inaccuracy"); *Layton City v. Peronek,* 803 P.2d at 1298 (officer twice-removed in the organizational chain from jailer who witnessed violation cannot lay foundation for admission of jailer's report).

e. Fundamental rights and harmless error.

Two final reasons support Judge Torgerson's decision to exclude the Report. First, voting is a fundamental right and the evidence presented to defeat this franchise should be compelling, not questionable. Utah's cases, treating evidentiary issues under Rule 803(8) and its predecessor, have underscored this concern. *See, State v. Bertul,* 664 P.2d at 1185 (must apply exceptions to rule against hearsay so as to protect "substantial rights" such as right to cross-examine under the Confrontation Clause in criminal cases); *Kehl v. Schwendiman,* 735 P.2d at 416 (same respecting right to travel, privilege of driving, due process of law). Second, the presumption of residency tied to voter registration may be rebutted – and the right to vote may be defeated – only by clear and convincing evidence. *See* §§20A-3-202.3 and 20A-2-105(7)(b)(i). Hearsay, especially the double hearsay and anonymous sources found in the Report, never can be clear and convincing.

Even if a case could be made that Judge Torgerson had abused his discretion in excluding the Report, that exclusion did no harm to Laws's case. *E.g.,* Utah R. Civ. Pro. 61; *Joseph v. W. H. Groves Latter Day Saints Hospital,* 318 P.2d at 333 (errors which do not have a substantial effect upon the outcome of a trial are deemed harmless and do not warrant reversal); *Ha v. Trang,* 380 P.3d 337, 340 (Utah Ct. App. 2016) (appellant has burden of showing not only that an error occurred, but also that it was substantial and prejudicial). As shown above, Laws had to prove, as an essential element of his case-in-chief, that Grayeyes had a principal place of residence outside Utah. To prove this point, Laws argued that Grayeyes's principal place of residence was a mobile home in Page,

Arizona. But the Report shows that Turk did not go to Page in furtherance of his investigation, and, indeed, Page is mentioned, in passing, only once in that document. Moreover, to make his case for the trailer in Page, Laws had to show that this was *the* residence, a fixed habitation in a single location to which Grayeyes always intended to return. The Report focuses on Tuba City, where Grayeyes has a girlfriend, but also references other places inside Arizona – in other words, multiple stopping points and not a single location – where Grayeyes, for a variety of reasons, stayed from time to time. Hence, the Report doesn't help with Laws's case-in-chief and hurts that case by deflecting attention from Page to multiple, rather than single, locations. In short, Laws has not shown – and cannot show – that exclusion of the Report was a substantial error and prejudicial to his case. The error, if any, therefore, was harmless.

JUDGE TORGERSON ERRED IN HIS DENIAL OF FEES AND COSTS[13]

When he denied Grayeyes's application for attorney fees and court costs, Judge Torgerson overlooked the judicial branch's inherent, exclusive power in relation to fee awards, power which does not brook legislative interference. He, therefore, incorrectly applied §78B-5-825, rather than equitable principles, to determine whether fees should be awarded on the basis of bad faith. And he also incorrectly followed §78B-5-825.5, instead of focusing on the equitable circumstances supporting application of the private

[13] Grayeyes raised the question of fees and the constitutionality of legislative enactments which impose upon judicial power to award them in the ROA at 001704ff and 002282ff. Proper application of constitutional standards to the statutes in question presents a legal question which is reviewed for correctness. *E.g., Injured Workers Association of Utah v. State,* 2016 UT 21, ¶12.

attorney general doctrine. Judge Torgerson's ruling should be reversed and remanded so that, after discovery, an evidentiary hearing, and application of the correct legal standards, a determination respecting the propriety of fees and costs may be had.

1. The judicial power to regulate fees is inherent and exclusive; it overrides any conflicting legislation.

Utah's courts have inherent and exclusive authority to regulate the allowance and allocation of attorney fees. *See, Injured Workers Association of Utah v. State,* 2016 UT 21. In *Injured Workers*, this Court struck down, as unconstitutional, legislation empowering the Utah Labor Commission to determine fee allowances in workers' compensation cases, as well as the agency rule implementing that statute. The Court justified this ruling with three primary, logically sequential reasons. First, the judicial branch has inherent power to regulate attorney fees under Art. VIII, §1. Second, since attorney fees are an integral part of the practice of law, this historical, inherent power over fee regulation was made exclusive and non-delegable by virtue of the 1985 revisions to Art. VIII, §4. Third, in view of the exclusivity aspect of these 1985 revisions, legislative enactments and administrative rules which interfere with judicial supremacy in the subject area of fees are no longer legally enforceable because of Art. V. *See, Injured Workers Association of Utah v. State,* 2016 UT 21, ¶¶3, 14-15.

The Court explained that prior precedents, such as *Thatcher v. Industrial Commission,* 207 P.2d 178 (Utah 1949), and *Ruckenbrod v. Mullins,* 133 P.2d 325 (Utah 1943), insofar as they may have created space for legislative edicts in relation to attorney fees, had been overtaken by history and especially the 1985 revisions to Art. VIII. This

process began in 1981, when the Court exercised its inherent power to integrate the Utah State Bar and the practice of law, and was consummated through the 1985 ratification of amendments to Art. VIII, which made judicial control over the legal profession and dispensation of fees "explicit and exclusive." *Injured Workers Association of Utah v. State,* 2016 UT 21, ¶¶3, 13-14, and 17-34, esp. ¶21 ("[t]his sharing of our power [with the legislature] to regulate the practice of law [and hence the allowance of fees] ended in 1985 when the constitution was amended to explicitly grant the Utah Supreme Court exclusive power to govern the practice of law[ ]"), and ¶28 ("[t]hus, any pre-1985 case law discussing our shared power to regulate the practice of law [including fee allowances] with the legislature is no longer valid[ ]"), and ¶34 (Art. VIII, §4, invalidates prior holdings that legislature has role to play in regulation of attorney fees; "[e]ven if [those rulings] correctly allowed the legislature to regulate fees at the time [they] were decided, th[ese] decision[s] [have] been preempted by this court's now exclusive constitutional authority to regulate attorney fees[ ]"). Moreover, in a footnote discussing and distinguishing certain language about pre-1985 power-sharing by the judiciary and legislature in relation to attorneys and the practice of law found in the opinion of *In re Discipline of McCune,* 717 P.2d 701 (Utah 1986), the Court implicitly holds that even its "inherent" powers over attorney fees, flowing from Art. VIII, §1, cannot be touched by legislative action. *Injured Workers Association of Utah v. State,* 2016 UT 21, ¶28 & n.6.

The facts and holding of the *Injured Workers* case underscore this language respecting judicial exclusivity and the corresponding displacement of any role for the legislative branch in the oversight of fees. *Injured Workers* struck down an agency rule

which established a fee schedule in workers' compensation proceedings because the judicial power to regulate fees is "exclusive" and "non-delegable," *Injured Workers Association of Utah v. State,* 2016 UT 21, ¶3, in contradistinction to other cases respecting Art. VIII where the Court has endorsed limited delegations of fact-finding, administrative roles by agency panels. *See, e.g., Vega v. Jordan Valley Medical Center, L.P.,* 2019 UT 35, ¶15, (core judicial function of entering final judgment not delegable, but fact-finding, scheduling proceedings, recommending solutions are tasks which can be delegated to agencies in other departments of state government), citing *State v. Thomas,* 961 P.2d 299, 302 (Utah 1998). Consistent with this allocation of the power to regulate fees, the Court declined to create its own fee schedule (such as one modeled after the Utah Labor Commission rule), and, instead, chose to stand on existing guidelines for attorney fees in the Utah Rules of Professional Conduct, Rules which, under Art. VIII, §4, the Court has the exclusive power to adopt and promulgate. *See, Injured Workers Association of Utah v. State,* 2016 UT 21, ¶¶35-42.

The *Injured Workers* opinion matters in this case because Judge Torgerson relied upon legislative enactments when denying Grayeyes's fee application – an application which was predicated upon equitable principles fashioned from the judicial branch's inherent power to award fees. Grayeyes asked for fees under an equity-based bad faith rule, but Judge Torgerson refused that request on statutory grounds, invoking §78B-5-825. Grayeyes also asked for fees under the equity-based private attorney general doctrine, but Judge Torgerson denied that request in light of §78B-5-825.5. Judge Torgerson erred in both instances. He applied incorrect standards – legislative yardsticks

rather than judicially formed, equitable measures -- in reviewing Grayeyes's application for fees.

2. In deciding whether fees should be awarded on account of "bad faith," Judge Torgerson should have applied the judicial branch's equity test, rather than deferring to the legislative directive found at §78B-5-825.

In *Stewart v. Utah Public Service Comm'n,* 885 P.2d 759, 782 (Utah 1994), this Court held that the judicial branch has inherent authority to award attorney fees "when it deems it appropriate in the interest of justice and equity." (Citation omitted.) "Justice and equity," according to *Stewart*, require such awards "when a party acts in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* (Internal quotation marks and citation omitted.) While *Stewart* adopted this test from *Hall v. Cole,* 412 U.S. 1, 4 (1973), a federal case, it could just as easily have been derived from earlier Utah jurisprudence. *E.g., Western Cas. and Sur. Co. v. Marchant,* 615 P.2d 423, 427 (Utah 1980) (fees can be awarded where party lacks "good faith" in bringing suit, or was "spiteful, contentious, or obstructive[ ]"); *American States Ins. Co. v. Walker,* 486 P.2d 1042, 1044 (Utah 1971) (court was within prerogative to award fees against party which acted in "bad faith" or was "stubbornly litigious"). *See also, Campbell v. State Farm Mut. Auto. Ins. Co.,* 2001 UT 89, ¶127, *rev'd on other grounds,* 538 U. S. 408 (2003) (litigation expenses awarded against insurer in light of "labored, vexatious . . . burdensome . . . [and] oppressive defense") (internal quotation marks omitted).

No single formula may capture the meaning of "equity and justice," because judicial pathways to equitable solutions must be left ungated, open, flexible, and

adaptable to the nuanced circumstances of particular cases. *Hughes v. Cafferty,* 2004 UT 22, ¶¶26-27. Hence, in describing "bad faith," *Stewart, Marchant,* and *Walker,* merely name the usual suspects in the lineup of inequity, "wantonness," "vexation," "spitefulness," and "contention," and even these are catalogued disjunctively because no single factor, such as "lacking in merit," is necessarily dispositive. Any one of them, such as "oppression," on occasion and standing alone, may suffice to trigger a court's discretion in assessing the propriety of fees. In *Walker,* cited above, for example, this Court upheld an award of fees – on the basis of stubborn litigiousness – where an insurer raised a coverage question offensively in one suit when it could have resolved identical issues by acting defensively in another. The relative "merits" of the insurer's position in either suit was not a factor to be considered. Similarly, Laws also launched two proceedings – with identical claims – against Grayeyes. These came in the wake of three others – initiated by Laws's surrogates – in 2018.[14]

Despite this, Judge Torgerson's ruling cites and follows §78B-5-825, which required Grayeyes to show "both" a lack of "merit" and "bad faith" in order to establish his right to collect fees from Laws. Appendix B at 2. Judge Torgerson in fact held that,

[14] Laws filed a petition against Grayeyes with the Lieutenant Governor under §§20A-1-801, *et seq.,* in addition to the instant case. Grayeyes moved to dismiss the 20A-1-801 proceeding after Judge Torgerson's ruling in this case. Laws filed an opposition to that motion to dismiss. As noted above, Laws's surrogates also commenced proceedings against Grayeyes in 2018. Laws's son, Kendall, who is the San Juan County Attorney, requested a criminal investigation of Grayeyes with the Davis County Attorney under §20A-2-401(1)(a). Kendall Laws also participated in the effort to disenfranchise Grayeyes – with the true objective of disqualifying him as a candidate – in the proceedings started by Black and conducted by Nielson under §20A-3-202.3.

because Laws's residency claims had some merit,[15] it was unnecessary to explore his subjective intent in seeking to remove Grayeyes from office – and, by implication, any of the other factors, such as oppression, which might have been considered on equitable grounds. Appendix B at 2-3. This analysis is puzzling, since the original version of §78B-5-825 became law in 1981, long before *Stewart* was decided in 1994, yet *Stewart* not only fails to make note of this statute but also formulated an equitable test for bad faith – pursuant to this Court's inherent power – which is radically different from the one set forth in that legislation.

Judge Torgerson then reinforced these statutory limitations (with their corresponding interdiction of wider-ranging equitable circumstances) by refusing to allow discovery and to hold an evidentiary hearing, measures which would have unhitched the fee question from its legislative mooring and enabled the court to row more freely in equitable waters. Judge Torgerson thus allowed a legislative decree, §78B-5-825, unconstitutionally to constrain the equitable test for bad faith which had been fashioned pursuant to the judiciary's inherent judicial power.

This surely was incorrect – and not merely because, under the *Injured Workers* rationale, it is a violation of the separation of powers. If applied, like Judge Torgerson did here, as the exclusive measure for awarding fees when litigation-related conduct is drawn into question, §78B-5-825 would unduly hamstring the judicial branch in the

[15] Nevertheless, Laws had no meritorious argument in opposition to the laches defense, and that basis for dismissal, as the case law cited above makes clear, applies here regardless of any merit in his case-in-chief.

performance of its core judicial function of "determin[ing] controversies between adverse parties and questions in litigation[.]" *Timpanogos Planning and Water Management Agency v. Central Utah Water Conservancy District,* 690 P.2d 562, 569 (Utah 1984). Here's why.

The administration of justice depends largely on the power of judges adequately to supervise and control the parties appearing before them – as well as the officers of court who are in service to those parties. Judicial rules for awarding or withholding fees play an essential role in this regard. *See, e.g., In re State in Interest of Woodward,* 384 P.2d 110 (Utah 1963) (power to use remedial tools such as fines, forfeitures, and penalties belongs exclusively to judicial branch and legislative enactment which gave Public Welfare Commission general supervisory authority over juvenile courts' exercise of this power constituted violation of Arts. VIII and V). Hence, it is well-established that courts, at trial or on appeal, have power, inherently or by rule, to sanction parties or control their counsel with the hammer and claw of fees and costs. *E.g., Barnard v. Wassermann,* 853 P.2d 243, 248-249 (Utah 1993) (trial courts have inherent power, independent of statutes, to manage cases, disincentivize delay, and forestall inconvenience, by imposing sanctions); *Lundahl v. Quinn,* 2003 UT 11, ¶13 (attorney fees and double costs awarded pursuant to Utah R. App. Pro 33(c)(1) against party who brought frivolous petition).

Judicial authority in the dispensation of fees not only serves these important purposes in case management but also is essential to the integrity of courts and the appearance of justice. This inherent equitable power enables our courts at once "to compensate the wronged party, punish the wrongdoer, and protect the integrity of the

court." 10 MOORE'S FEDERAL PRACTICE, §54.171[2][c][i], at 54-283 (3d ed. 2019). Consistent with its equitable origins, the power can be exercised and fees assessed against either a party or his counsel. *Id.* at 54-283--54-284, citing *Lockary v. Kayfetz,* 974 F.2d 1166, 1169 (9th Cir. 1992). And because this power is integral to the court's own integrity, as well as cost-effective management of the cases in its docket, it is "beyond any democratic controls." 10 MOORE'S FEDERAL PRACTICE, §54.171[2][c][iii], at 54-288.

In short, Judge Torgerson applied an incorrect legal standard in reviewing Grayeyes's application for fees insofar as that application was based upon the rubric of "bad faith." Judge Torgerson used a legislative bridle when he should have given judicial rein to his equitable instincts, and considered "oppression," "vexation," and "stubborn litigiousness," rather than "merit" to the exclusion of all other factors, in determining whether fees should be allowed. The ruling on bad faith attorney fees therefore should be reversed and remanded so that he may be given an opportunity, through discovery and an evidentiary hearing, to evaluate the appropriateness of fees in light of the full-range of equitable circumstances in this case.

3. Judge Torgerson erred in concluding that the legislative proscription in §78B-5-825.5 barred him from considering an allowance of fees under the judicially created private attorney general doctrine.

The *Stewart* opinion also held that, pursuant to the judiciary's "inherent equitable" power, fee allowances could be made under the private attorney general doctrine. *Stewart v. Utah Public Serv. Comm'n,* 885 P.2d at 783. In 2009, however, the Utah

legislature passed §78B-5-825.5 which states that, "A court may not award fees under the private attorney general doctrine in any action filed after May 12, 2009." Judge Torgerson ruled that *Injured Workers* did not overrule §78B-5-825.5, because *Injured Workers* applied only to private contracts between attorneys and clients and had no application to fee awards against non-prevailing parties in ordinary litigation. Appendix B at 5. Judge Torgerson, therefore, concluded that "this statute [§78B-5-825.5] is binding upon the Court," Appendix B at 4, and accordingly refused to allow fees under the private attorney general doctrine. For reasons given below, we submit this conclusion is mistaken.

a. Judge Torgerson misread the Injured Workers rationale.

The rationale of *Injured Workers* cannot be limited to fee relationships between an attorney and his client, as suggested by Judge Torgerson. As noted above, the Court's reasoning is largely based upon the "inherent power" of Utah's courts, and thus draws a direct line to the *Stewart* decision and other authorities, discussed below, where that power has been exercised to order parties to pay the fees of opposing, rather than personal, counsel.

Injured Workers also reasons analogically from the Utah Rules of Professional Conduct, which regulate fee arrangements respecting parties outside the conventional attorney-client relationship. These include, for example, Rule 1.5(e) which governs fee-splitting between attorneys. *See also, Christensen & Jensen, P.C. v. Barrett & Daines,* 2008 UT 64, ¶¶40-48 (fee allocation dispute between law firms properly adjusted through exercise of judicial branch's equity powers). Fee-splitting between attorneys and third-

party non-attorneys likewise is regulated as a matter of professional ethics. *See generally,* C. W. Wolfram, MODERN LEGAL ETHICS, §9.2.4, at 509-513, and §16.3.1, at 895 (1986). Even when the sharing of fees has been disguised through an assignment of claims, the evils associated with fee-splitting, which may include the unauthorized practice of law, have been enjoined by this Court. *See, Nelson v. Smith,* 154 P.2d 634, 639 & 641-642 (Utah 1944). These ethical concerns are related to regulatory constraints respecting non-lawyer investment in legal enterprises, *see, e.g.,* Wolfram, §16.2.1, at 878-879, a subject-area recently addressed in the Report and Recommendations of the Utah Work Group on Regulatory Reform, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION (August, 2019).

Utah's Code of Professional Conduct, in Rule 1.8(f) & comments 11 and 12, also governs a third-party's payment of fees to an attorney on behalf of his client, as well as a variation on that theme, in Rule 1.8(i) & comment 16, when champertous litigation is maintained by the attorney himself or a litigation investor. These concerns are traditional to the practice of law, not only because they may divide an attorney's loyalty from his client's interest, but also because they may have a corrupting influence on the judicial branch and the administration of justice. *See, In re Evans,* 62 P. 913, 919 (Utah 1900) (attorney accused of champerty subject to summary jurisdiction of trial court "not for the purpose of punishment but for the protection of the court, the proper administration of justice, the dignity and purity of the profession, the public good, and the protection of clients[ ]") (internal quotation marks and citations omitted). The rules respecting champerty and maintenance were carried forward, in 1981, when this Court used its

inherent power to integrate the Bar by rule. *See, In re Integration and Governance of Utah State Bar,* 632 P.2d 845, 846-847 (Utah 1981) and *In re Disciplinary Action of McCune,* 717 P.2d 701, 704-705 (Utah 1986).[16] And the Court's analysis in *Injured Workers Association of Utah v. State,* 2016 UT 21, ¶20, clearly relies, in the broadest sense, on this circumstance in support of its decision.

Finally, in the course of illustrating the extended scope of the judiciary's inherent, exclusive power to regulate the practice of law and the allowance of fees, and contrary to Judge Torgerson's narrower interpretation, *Injured Workers* relied directly on precedents where the Court had assumed jurisdiction in relation to parties outside the ordinary attorney-client relationship. Thus, the Court cited approvingly *Utah State Bar v. Summerhayes & Hayden,* 905 P.2d 867 (Utah 1995) which upheld restraints upon so-called third-party adjusters who were engaged in the unauthorized practice of law and *In re Disciplinary Action of McCune,* 717 P.2d 701 (Utah 1986) which enjoined an attorney to remit settlement funds to a third-party vendor and other professionals. *Injured Workers* makes clear that this order affecting third parties was justified by the judiciary's then-existing "inherent power," and implicitly confirms that this power, by virtue of the 1985 revisions to Art. VIII, now has become "exclusive." *Injured Workers Association of Utah v. State,* 2016 UT 21, ¶¶29, 28 & n. 6.

[16] As a result of integration, the Court adopted virtually all prior statutory regulation of lawyers, fees, and litigation finance, re-promulgating them in "Rules for Integration and Management of the Utah State Bar." Rule (C) 26. f. provided that it is the duty of attorneys, "Not to encourage either the commencement or continuance of an action or proceeding from any corrupt motive or passion or interest."

b. Section 78B-5-825.5 violates Art. VIII, §1, by usurping the inherent power of courts to fashion equitable remedies, and Art VIII, §4, by interfering with the exclusive power of courts to regulate the practice of law including attorney fees.

Nor can we accept, as Judge Torgerson did below, the proposition that certain questions respecting fee regulation may be placed, by legislative fiat, outside the reach of judicial disposition – in other words, that fee allocations don't always strike at the very center of the practice of law and the operation of courts.

Respecting the practice of law, the language in *Injured Workers* on this point could not be clearer: "Regulating attorney fees goes to the very heart of the practice of law, inasmuch as it involves assessment of the quality, amount, and value of legal services related to a legal problem." *Injured Workers Association of Utah v. State,* 2016 UT 21, ¶33.

Insofar as the operation of courts is involved, access to justice has always been a central concern of the judicial branch and the legal profession. This concern is reflected, for example, in Rules 6 and 7 of the Utah Code of Professional Conduct which have been promulgated by this Court. And this Court, through invocation of its "inherent" power, historically has addressed that concern through negative means and positive inducements. On the negative side, it has conscripted (without pay) counsel to serve indigent defendants, *Ruckenbrod v. Mullins,* 133 P.2d 325 (Utah 1943),[17] and appointed (with

[17] *Injured Workers Association of Utah v. State,* 2016 UT 21, ¶28, overruled *Ruckenbrod v. Mullins,* 133 P.2d 325 (Utah 1943), insofar as *Ruckenbrod* permitted the legislature a role in the allocation of fees. But *Ruckenbrod's* other holdings, those in support of the inherent power of the judicial branch to govern attorneys and regulate fees, remain intact.

uncertain prospect of financial remuneration) attorneys to represent non-indigent, absent parties, *Burke v. Lewis,* 2005 UT 44. On the positive front, it has used its "inherent" power to fashion an equitable award of attorney fees for the appointed counsel in *Burke, Doctors' Co. v. Drezga,* 2009 UT 60, ¶36, and, using that same "inherent" equitable power, it has authorized fee awards to counsel who otherwise might not have received pay in cases where a public interest or collective good or the interests of justice would be served, *Stewart v. Utah Public Serv. Comm'n,* 885 P.2d 759, 782-783 (Utah 1994).

As these cases show – where the Court has flexed its inherent, equitable muscle to afford representation in difficult situations -- the key to judicial access chiefly is turned through the legal profession and, as a practical matter, often depends on how and by whom that litigation can be financed. In other words, ordinary folk usually cannot gain access to judicial proceedings absent the retention of counsel, and "[i]t is the attorney who first sits as judge of the merits of every case, who decides whether or not suit should be commenced. The court and the public are interested in having that decision rendered by those qualified so to do to avoid, as much as possible, needless litigation and to have those cases upon which suits are deemed advisable properly prepared so that they will move through the process of trial with as few snarls as possible." *Nelson v. Smith,* 154

Ruckenbrod reasoned that attorneys who were pressed into unpaid service for indigent clients got a fair exchange in light of their fellowship in a bar organization governed through the inherent power of the judicial branch and thus free from legislative restraint. *Id.* at 330. This circumstance further was justified, according to *Ruckenbrod,* because "[i]t seems to be the universal rule that a court has the inherent power and authority to incur and order paid all such expenses as are necessary for the holding of court and the administration of its duties[.]" (Internal quotation marks and citations omitted.)

P.2d 634, 637 (Utah 1944). This ordinarily costs money since the practice of law, by judicial definition, for the most part, is done for profit or "gain." *Id.* at 638. And these are "established principles" concerning the "practice of law" which are subject to change only through the judicial department. *Id.* at 637 (internal quotation marks and citation omitted).

Put differently, fee arrangements and all forms of litigation financing are the driving force in getting to court, staying there, and successful prosecution of a case, either offensively or defensively. This is a central reality of legal practice and judicial administration. It is the very reality which prompted the recently issued Report and Recommendations of the Utah Work Group on Regulatory Reform, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION (August 2019). And we see this reality played out on a regular basis in actual proceedings – when someone is denied a day in court because he can't afford the legal expense of processing a claim or – if the case gets filed, when progress is stalled because he fails to pay or is slow in paying his bill or -- when the well-heeled client, with top grade counsel, has the advantage over an impecunious opponent. Regardless of the merits of a cause, the expense of counsel often will dictate the outcome in that case -- when, for instance, it simply makes no economic sense to resist a twenty thousand dollar claim where the gamble of trial will take a bet – in the form of fees and costs -- which equals or exceeds the amount in controversy.

In fact, Utah's primary regulation – the *court-made* American Rule[18] -- for the allocation of fees in civil litigation is a reflection of these realities and itself represents a deliberate choice in relation to the economics of litigation – that is, underwriting for a case and the affordability of counsel – and how these factors should be balanced either to encourage or impede a litigant's progress to court or defense against claims. For example, the first Utah case we can find on this subject endorses the American Rule because it opens courts for the vindication of rights and the redress of wrongs: "The courts of this state are always open to all for the redress of grievances and the protection of legal rights, and in our judgment they should refrain from allowing the imposition of

[18] Because the judicial power to regulate fees has such a long and sometimes ambiguous history, it is easy to forget that Utah's adoption of the so-called American Rule is itself an expression of that very power. Even in the days, prior to Bar integration and Art. VIII's amendment, when the legislature, by statute, had a sometime role in attorney regulation, this Court believed itself at perfect liberty to announce a doctrine which governed the allocation of counsel fees in contested litigation and, then, as discussed at greater length below, to create exceptions, at its independent will, to that doctrine, including those where, in equity, special circumstances justify a departure from the primary rule that each side must engage in litigation at its own expense.

Judicial independence from the legislative branch in fashioning the American Rule also might be shown by reference to a legislative directive which has existed in Utah since statehood and now is found at §68-3-1. This legislation always has required Utah's courts to give priority, as a rule of decision in the absence of statute, to the English common law. The English common law, however, followed the English Rule which required losers to pay the winners' fees in litigation and was so called in order to avoid confusion with the American Rule which dictated the opposite result. In other words, it appears that this Court, in *St. Joseph Stock Yards Co v. Love* and other cases, may have adopted the American Rule in direct contravention of a statutory edict to give priority to the English Rule. This suggests, even more forcibly, that the American Rule itself is an expression of the independent, exclusive power of Utah courts to fashion, modify, and extend rules concerning attorney fees, a power which, like other essential judicial powers, cannot be curtailed by legislative enactments.

costs and expenses upon the losing party . . . " *St. Joseph Stock Yards Co. v. Love,* 195 P. 305, 311 (Utah 1921).

Federal precedents showcase the same issue, wondering "[o]n what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill?" but worrying whether "the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *F. D. Rich Co., Inc. v. United States,* 417 U. S. 116, 128-129 (1974) (internal quotation marks and citations omitted).[19] *Injured Workers* also confirms the centrality of fees to the accessibility of justice by examining how fee awards and rates for payment affect the availability and quality of counsel who are willing to perform services in workers' compensation cases. *Injured Workers Association of Utah v. State,* 2016 UT 21, ¶¶35-39.[20]

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[19] The court in *Rich* also noted that the American Rule has been supported on the ground that it spares judges from the extra burden of trying cases over the allowance of fees and on the further basis that a contrary approach, where fees are assessed against a losing party, may have a negative impact on independent advocacy "by having the earnings of the attorney flow from the pen of the judge before whom he argues." *F. D. Rich Co., Inc. v. United States,* 417 U.S. 116, 129 (1974). Ethical complications brought about through fee-shifting departures from the American Rule – whether those departures occur as a result of statutory reform or judge-made rules – also are flagged and discussed in C. W. Wolfram, MODERN LEGAL ETHICS, §16.6.4, at 931-932 (1986). All of these issues, like the economics of litigation, go to the heart of attorney conduct and judicial administration and, thus, argue that they should be addressed exclusively in the judicial department of state government.

[20] The legal literature on the American Rule, which is extensive, invariably notes that the Rule has been adopted as an economic prod in furtherance of certain policies of judicial administration, such as freer access to court systems, reduced work-loads, and more disinterested counsel. *See, e.g.,* Bartholomew and Yamen, "The American Rule: The Genesis and Policy of the Enduring Legacy on Attorney Fee Awards, UTAH BAR

Utah's exceptions to the American Rule exemplify these same points. All exceptions have been created or endorsed by the courts, and, therefore, reaffirm the primacy of judicial power in regulating fees.[21] All of them likewise reflect concern about

JOURNAL, September/October 2017, at 16-18; Carney, "'Loser Pays' – Justice for the Poorest and the Richest, Others Need Not Apply," UTAH BAR JOURNAL, May, 1995, at 18-20; Judge J. Thomas Greene, "The Need for Cautious and Deliberate Reforms in the Civil Justice System," UTAH BAR JOURNAL, August/September, 1995, at 46-47.

[21] When deciding whether fees should be awarded in a given case, Utah courts generally begin by announcing our state's policy, under the American Rule, that fees are not assessed unless a contract or statute provides otherwise. This formula, through repetition, may give the impression that the legislature, by statute, has a shared or supervening authority insofar as fee regulation is concerned. But, as *Injured Workers* was careful to note, this impression is a by-product of a foregone age when fee regulation was an interdepartmental function, and, moreover, ignores the point that the American Rule – *including the exceptions for contract and statute* – from the beginning was the offspring of judicial power, a fact which has been repeatedly confirmed over the years *by the judicial branch's ongoing creation of additional exceptions.*

Judicial primacy over the creation of exceptions to the American Rule further is demonstrated by the case law which subjects even those exceptions to judicial control. For example, Utah courts have created a contract exception to application of the American Rule, but they still have primary supervisory power in interpreting and applying that exception for contracts as well as construing and applying the contracts themselves which come within the purview of the exception.

Injured Workers illustrates both points. Recall that the Labor Commission rule at issue disregarded and refused to enforce whatever fee agreements existed between injured workers and retained attorneys. This substitution of agency rates for private contracts in one sense violated the judicially created American Rule which permitted the contractual allocation of fees between parties to litigation and, by inference, between one of those parties and his personal attorney. In addition, the *Injured Workers* opinion makes it clear that any abrogation or award of fees in a litigation contest may occur only with the judiciary's blessing. Since this power cannot be delegated to the legislature or its designated agency, *Injured Workers* disapproved the Labor Commission rule which nixed the worker-counsel contracts. And as witness to the judicial power exclusively to extinguish any right to fees, contractual or otherwise, *Injured Workers* approvingly cites the *Dahl* case which denied enforcement to an attorney fee contract which violated the

core issues affecting the judicial branch, such as case management, and access to justice so that important rights do not suffer for want of vindication. This certainly is true for the equity-based bad faith exception discussed above. And it similarly follows for private attorneys general as well as other litigants, favored with additional, but different, exceptions, creatures of the judiciary's inherent, equitable power, which have been formulated and expanded over the years.[22]

All of these fee allocations, exceptions all to the American Rule, are based upon the judicial branch's "inherent, equity" power or "inherent" general authority. This

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Code of Professional Conduct. *See, Injured Workers Association of Utah v. State,* 2016 UT 21, ¶41.

Utah courts likewise have created an exception for statutes in connection with the American rule, but they may use their inherent, exclusive power to strike down such statutes when they unduly invade judicial prerogatives, *see, e.g., Injured Workers Association of Utah v. State,* 2016 UT 21, ¶3, or otherwise to construe them in a manner that is consistent with judicially created equitable guidelines. *See, e.g., Bilanzich v. Lonetti,* 2007 UT 26 (imposing equitable controls on Utah's reciprocal attorney fees statute).

[22] These include, without limitation, *Stewart v. Utah Public Service Comm'n,* 885 P.2d at 782 (legal service which creates a common fund for benefit of others); *Hughes v. Cafferty,* 2004 UT 22, ¶22 (recoveries from trustees for maladministration of trust); *Campbell v. State Farm Mut. Auto. Ins. Co.,* 2001 UT 89, ¶122, *rev'd on other grounds,* 538 U. S. 408 (2003) (recoveries for breach of fiduciary duties), *Capson v. Brisbois,* 592 P.2d 583, 585 (Utah 1979) (fee allocations to plaintiffs with clean hands who interplead funds), citing *Gresham v. O and K Construction Company,* 370 P.2d 726, 736-737 (Ore. 1962), *on rehearing*, 372 P.2d 187, 188 (Ore. 1962) (court had power in equity to "adjust the liability of all of the parties before it," even though it only was in the nature of an interpleader action); *Doctors' Co. v. Drezga,* 2009 UT 60, ¶¶31-38 (fees for counsel who was judicially conscripted to represent non-indigent, but absent, party in dispute respecting insurance coverage); *LeVanger v. Highland Estates Properties Owners Ass'n, Inc.,* 2003 UT App 377, ¶20 (fees allowed were a litigant confers substantial benefit on an identifiable class).

accordingly – assuming synonymous usage of the word "inherent" -- should put them on a par with those functions which *Taylor v. Lee,* 226 P.2d 531, 537 (Utah 1951) deemed "primary," "core," "essential," and "so inherently . . . judicial that they must be exercised exclusively by [the judicial] department[ ]." The exercise of this inherent equitable power in creating bad faith and private attorneys general exceptions to the American Rule accordingly should be immune from interference by the legislative branch.

c. Section 78B-5-825.5 violates Art. VIII, §4, by usurping this Court's rulemaking power.

Under Art. VIII, §4, this Court has rulemaking power which is shared, to some extent, with the legislative department. *Brown v. Cox,* 2017 UT 3, ¶¶15-24, however, held that this Court has first dibs on promulgating rules; *only after* it acts may the legislature come forward – with the requisite supermajorities -- to counter or modify that enactment. In other words, the Supreme Court "adopts rules" and the Legislature only may "amend" what the Supreme Court in the first instance has adopted. *Id.* at ¶¶17 and 21-24. Section 78B-5-825.5 impermissibly may intrude upon this Court's rulemaking power – especially its power to decide, in the first place, whether there should be a particular rule respecting attorney fees.[23]

This Court has exercised this supervening power to adopt rules, insofar as attorney fees are concerned, with great care. It has promulgated rules which bear upon the

[23] Grayeyes obviously makes this argument in the alternative. He believes, as contended above, that the judicial branch has the exclusive power to regulate fees under *Injured Workers Association of Utah v. State,* 2016 UT 21, ¶¶26-28.

regulation of fee awards in several instances. *See, e.g,* Utah R. Civ. Pro. 11, 16, 54, 37, and 65,[24] and Utah R. App. Pro. 33. But, in other contexts – because equity awards must remain adaptable to a variety of circumstances -- it has eschewed rulemaking as a means to process the allocation of fees. *E.g., Hughes v. Cafferty,* 2004 UT 22, ¶¶26-27.

Put differently, Utah courts, as a rule, don't award attorney fees. That, after all, is the judge-made American Rule. Departures from this Rule, the equitable exceptions for bad faith litigation or private attorneys general, are exactly that, fee awards, in exceptional circumstances, which depend upon discretionary exercises of judicial power. Unlike "codifications" found in, say, Rule 37(d), the Court here has decided that these types of awards, because they are exceptional and equitable in character, are not amenable to rulemaking and, accordingly, should not be promulgated as rules.

Section 78B-5-825.5, on the other hand, declares that there shall be a rule respecting the allocation of attorney fees in a particular equitable circumstance -- when

[24] Rule 65B(c), in particular, is very close to the heart of this case, since *quo warranto* is the extraordinary writ which traditionally must be used to determine whether an officeholder such as Grayeyes truly is qualified or eligible to hold an office on grounds of residency or otherwise. *See, e.g., State v. Christensen,* 35 P.2d 775, 782 (Utah 1934) ("[q]uo warranto, or a proceeding in the nature thereof, is a proper and appropriate remedy to test the right or title to an office[ ]") (citation and elisions omitted). Petitioners seeking a writ of *quo warranto* must post "an undertaking with sufficient sureties to pay any judgment for costs and damages that may be recovered against [them]." Although few cases address this issue, it appears that the "damages" contemplated in these proceedings include attorney fees. *See, e.g., Colorado Development Co. v. Creer,* 80 P.2d 914, 920-921 (Utah 1938) ("damages" as used in former statute which memorialized entitlement to writ of mandamus means attorney fees). *See also, Timpanogos Planning and Water Management Agency v. Central Utah Water Conservancy District,* 690 P.2d 562, 569 (Utah 1984) (bonding power is judicial power)

this Court has opined that rules respecting fee allocations, where equity is in play, are entirely inappropriate. This offends Art. VIII, §4, as interpreted in *Brown,* by preempting this Court's power to decide, in the first instance, what shall be a rule and, in the event, when and pursuant to what terms and conditions, it shall be promulgated.

In conclusion, Judge Torgerson's denial of fees should be reversed and that aspect of the case remanded so that Grayeyes may be allowed to prove, in the first instance and unimpeded by §78B-5-525.5, that he is an appropriate private attorney general and worthy of a fee award.

CONCLUSION AND REQUEST FOR DISPOSITION

Laws's appeal should be dismissed or denied. He lacks standing. He was untimely and tardy in bringing suit. He also failed to prove that the election of Grayeyes to the office of San Juan County Commissioner should be undone.

Judge Torgerson's ruling on attorney fees and court costs should be reversed. Sections 78B-5-825 and 78B-5-825.5 were unconstitutionally applied in this case to the Grayeyes fee application. This aspect of the proceeding should be returned to Judge Torgerson so that, after brief discovery and an evidentiary hearing, he can apply correct legal standards to determine whether, in the first instance, fees and costs should be allowed under the full range of equitable circumstances which inform the bad faith and private attorney general doctrines.

Dated this 11th day of March, 2020.

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CERTIFICATE OF COMPLIANCE

In accordance with Utah Rule of Appellate Procedure 24(a)(11), the undersigned certifies that the foregoing Opening Brief of Appellee/Cross-Appellant, Willie Grayeyes complies with Utah Rule of Appellate Procedure 24(g), in that the word count of the Brief (exclusive of those parts exempted pursuant to Utah Rule of Appellate Procedure 24(g)(2)) is exactly 20,519 words, and in that no non-public information as defined in Utah Rule of Appellate Procedure 21 is contained in the Brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of March, 2020, after submitting the foregoing Opening Brief of Appellee/Cross-Appellant, Willie Grayeyes to the clerk of court for the Utah Supreme Court, the undersigned served copies of the same by mail, both electronic and regular, addressed to Peter Stirba and Matthew Strout at Stirba, P.C., 215 South State Street, Suite 750, Salt Lake City, Utah 84110-0810, peter@stirba.com and mstrout@stirba.com, as counsel for Kelly Laws, as appellant and cross-appellee, and, as required by Utah R. App. P. 25A(a)(4), to the Office of the Attorney General for the State of Utah, Attention: Utah Solicitor General, 320 Utah State Capitol, Salt Lake City, Utah 84114-2320, notices@agutah.gove.

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IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

KELLY LAWS, Petitioner, vs. WILLIE GRAYEYES, Respondent.	RULING and ORDER Case No. 180700016 Judge Don M. Torgerson

Willie Grayeyes was elected to be a San Juan County Commissioner in the 2018 general election. His defeated opponent in the election, Kelly Laws, has contested the election result by alleging that Grayeyes is ineligible to serve in the office because he is not a resident of San Juan County. The Court conducted a trial on January 22, 2019 to determine the election contest. The Court has also reviewed the parties' written arguments and pretrial motions. Based on the evidence presented, the Court confirms the election result and rules in favor of Grayeyes, as set forth below.

BACKGROUND

The Navajo Mountain/Paiute Mesa community is located in a very remote part of San Juan County and is bisected by the Utah/Arizona border. The area is entirely within the Navajo Nation reservation.

From Monticello, Utah it takes approximately 4 ½ hours to drive to Navajo Mountain, and a substantial portion of the route is in Arizona. Paiute Mesa is beyond Navajo Mountain and is accessed by crossing a steep canyon on unpaved roads. Although part of San Juan County, Navajo Mountain is much closer to services in Arizona, with travel times of approximately 2 hours from Tuba City, AZ and just under 3 hours from Page, AZ.

With the exception of a school, small senior center, and small health clinic, there are no services in the area. There are no gas stations, laundromats, libraries, or grocery stores. The closest groceries are 40 miles away at Inscription House, AZ. And all mail for the residents of Navajo Mountain/Paiute Mesa is routed through the post office in Tonalea, AZ, 66 miles away. Because the closest Department of Motor Vehicles is located in Arizona, most residents of Navajo Mountain/Paiute Mesa possess Arizona driver's licenses.

On August 9, 2018, Judge David Nuffer of the United States District Court for the District of Utah entered a preliminary injunction in Case No. 4:18-cv-00041 requiring San Juan County to place Grayeyes on the ballot. His residency had been challenged but Judge Nuffer never entered a final opinion about Grayeyes's residency.

FINDINGS OF FACT

1. Grayeyes is a resident of San Juan County living at Navajo Mountain/Paiute Mesa.

2. Grayeyes is a member of the Navajo Nation, has been active in tribal politics throughout his life, and travels often for that work.

3. Grayeyes has been a registered voter continuously in San Juan County since 1984. His voter registration has never been properly challenged.

4. Grayeyes has never been registered to vote in Arizona.

5. As a matter of convenience, Grayeyes has an Arizona driver's license and gets his mail from the post office located at Tonalea, AZ

6. Grayeyes owns an uninhabitable trailer in Page, AZ but has never lived there as his permanent residence. Although he does not have a primary house, he has always maintained his residence at Navajo Mountain/Paiute Mesa.

7. Grayeyes stays the night at Navajo Mountain/Paiute Mesa approximately 60%-80% of the time. He stays with his sister, under a shade hut, or at his daughter's cabin. Other times he is traveling and often stays with a girlfriend in Tuba City, AZ or with an uncle in Arizona.

8. Kelly Laws is a registered voter in San Juan County and was the opposing candidate in the election.

9. Laws knew about residency concerns for Grayeyes sometime in March 2018, as early as the neighborhood caucuses.

10. Laws was also aware of the preliminary injunction issued by Judge Nuffer near the time it was entered on August 9 or 10, 2018.

11. The Complaint filed in this case on December 28, 2018 which was the last business day for the Court within the 40-day statutory period.

12. Laws has never challenged Grayeyes's eligibility to vote or his declaration of candidacy for office.

RULING

I. Petitioner's challenge is untimely.

To file a declaration of candidacy for an election to office, an individual must (1) be a United States Citizen, (2) meet the legal requirements of the office, and (3) state their party affiliation.[1] And under Utah Code § 17-53-202, the legal requirements for the office of county commission are that the candidate be a registered voter of the county which the member represents, and have been a registered voter for at least one year immediately preceding the member's election.

Accordingly, the Court must consider whether Laws ever challenged Grayeyes's voter eligibility or declaration of candidacy in a way that would nullify his voter registration, thereby disqualifying him from candidacy and rendering him "not eligible for the office at the time of the election."[2]

Under Utah Code §20A-3-202.3, a person may challenge a voter's eligibility by following the strict requirements set forth in that statute.[3] Most notably, the challenge must be made in writing and under oath, be delivered to the election official at least 45 days before the date of the election, and the challenge must be determined by the election officer before the day when early voting begins.

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[1] Utah Code § 20A-9-201(1).
[2] Utah Code § 20A-4-402 (1)(b).
[3] A voter challenge may also occur at the time of voting under Utah Code § 20A-9-202.5, but the facts of this case do not implicate that process.

Similarly, under Utah Code §20A-9-202(5), a declaration of candidacy is valid unless challenged in writing within five days after the last day for filing. If challenged, the objection must be determined within 48 hours.

Laws never challenged Grayeyes's voter eligibility nor his voter registration according to the required statutory process. Instead, he waited until after the election to challenge Grayeyes's "eligibility to serve in the office to which [he] was elected" under Utah Code § 20A-4-402 (1)(g). It is undisputed that Grayeyes was a registered voter of San Juan County for at least one year before the election, and that he is currently a registered voter of San Juan County. At the time of the election, he met all of the statutory requirements of the office. And he currently meets the statutory requirements of the office. Under Utah Code § 20A-4-402 (1)(b), Grayeyes was eligible for the office at the time of the election.

II. Petitioner's challenge is barred by laches.

Election controversies are equitable proceedings and a party who has failed to exercise reasonable diligence in asserting his rights might be denied relief.[4] As noted by the Utah Supreme Court, "...equity aids the vigilant, not one who sleeps on his rights."[5]

Where a party wants to challenge the election process, they are required to act at the earliest possible opportunity to avoid disrupting the election process by interfering with the rights of absentee and other voters, candidates, political parties, and others who participate in the election process and spend money and effort toward conducting the election.[6]

In this case, Laws had actual knowledge about the issue of Grayeyes's residency as early as March 2018, when neighborhood caucuses were conducted. He was also aware of the litigation in Federal Court surrounding Grayeyes's residency, and knew that Judge Nuffer had issued a preliminary injunction on August 9, 2018 to compel San Juan County to put Grayeyes back on the ballot.

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[4] See *Ellis v. Swenson*, 16 P.3d 1233, 1239 (Utah 2000).
[5] *Peck v. Monson*, 652 P.2d 1325, 1328 (Utah 1982) (Oaks, J., concurring).
[6] See *In re Cook*, 882 P.2d 656, 659 (Utah 1994); *Clegg v. Bennion*, 247 P.2d 614 (Utah 1952); and Williams v. Rhodes, 393 U.S. 23 (1968).

Prior to the election, Laws could have challenged Grayeyes's declaration of candidacy under Utah Code § 20A-9-202(5) or his qualification to vote under §20A-3-202.3. And as Grayeyes's direct political opponent, he was one of the individuals most invested in the outcome of the election and had the most reason to conclusively determine the issue of Greyeyes's residency. Had Laws challenged Grayeyes's declaration of candidacy or qualification to vote, the issue would have been decided sometime before the first day of early voting.

But despite knowing about the issue of Greyeyes's residency for at least 7 months before the election, Laws delayed bringing his challenge until after the election was concluded. And, notably, his challenge wasn't actually filed until the last business day of the 40-day period when he could have brought the challenge. Instead of acting at his earliest possible opportunity, Laws acted at his very last possible opportunity. His reasons make sense — he did not want to spend money unnecessarily and he probably expected to win the election. But sensible reasons do not excuse his failure to act at the earliest possible opportunity where the public interest is concerned.

And his delay is prejudicial to important public interest concerns and the integrity of the election process. In supporting Grayeyes, the San Juan County Democratic Party spent at least $20,000 and hundreds of hours of volunteer time. The Democratic Party was also unable to substitute and support a replacement candidate before the election. Ballots were printed. And some 1,787 votes were cast in the election that would be nullified if the election was not confirmed.

Laws could have challenged Grayeyes's declaration of candidacy and qualification to vote, thereby resolving the issue before public interest concerns became a problem. But considering the entirety of the election process, the Court concludes that Laws waited too long to bring his election challenge even though it was filed within the 40-day limit of Utah Code § 20A-4-403(1)(a).

III. Grayeyes is a resident of San Juan County and is eligible to serve.

As a "county officer", a county commissioner must maintain "residency" within the county in which he was elected during the officer's term of office.[7] A person resides

[7] Utah Code § 17-16-1(2)(a) and § 17-53-101(1)(a)(i).

in Utah if (1) the person's principal place of residence is within Utah; and (2) the person has a present intention to maintain the person's principal place of residence in Utah permanently or indefinitely.[8] Finally, a "principal place of residence" means the single location where a person's habitation is fixed and to which, whenever the person is absent, the person has the intention of returning.[9]

In determining a person's principal place of residence, the Court must consider the factors set forth in Utah Code § 20A-2-105(4).[10] Not all of the factors are particularly helpful, but all are addressed below:

a. Where the person's family resides:

Grayeyes has family throughout Utah and Arizona. Importantly, he has a sister in Navajo Mountain with whom he often stays the night. His daughter, April, has a cabin and he stays there too. He is also from Paiute Mesa in the traditional sense — he was raised there, his umbilical cord is buried there, and his family counts the area as their place of origin. And testimony introduced at trial by Petitioner, through Mr. Bitsinnie, indicated that Grayeyes is related to most residents at Paiute Mesa.

b. Whether the person is single, married, separated, or divorced:

Grayeyes is a widower. He has a girlfriend who lives in Tuba City where he sometimes spends the night, often once or twice per week.

c. The age of the person:

Grayeyes is an elderly gentleman of retirement age. And he maintains traditional Navajo cultural practices.

d. Where the person usually sleeps:

The Court considers this factor to be significant. The evidence produced at trial was not credibly refuted by Petitioner. According to the testimony, Grayeyes spends approximately 60% - 80% of his time on Navajo Mountain. He often stays with his sister, Rose, and at his daughter April's cabin. He also spends time with a girlfriend in

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[8] Utah Code § 20A-2-105(3)(a).
[9] Utah Code § 20A-2-105(1)(a).
[10] Candidly, the Court is not entirely sure how to interpret § 20A-2-105(3)(c)(iv) as it might apply to the unique facts of this case. As it is unnecessary to a resolution of the issues, that question is best left alone for now.

Tuba City, AZ and he spends a lot of his time traveling. It is apparent that Grayeyes spends more time at Navajo Mountain than he does anywhere else.

e. Where the person's minor children attend school:

This factor is also significant. Grayeyes does not currently have minor children. When he did, they went to school primarily in Page, AZ. But the testimony showed that he did not generally reside in Page with them and they returned home on the weekends to work with him and visit him at Navajo Mountain. Grayeyes lived there to keep his livestock and maintain his employment in tribal politics.

f. The location of the person's employment, income sources, or business pursuits:

Grayeyes has spent much of his life involved with tribal politics, as a representative of Navajo Mountain. He traveled (and still travels) extensively in that role and is employed by the Navajo Mountain Chapter of the Navajo Nation. Additionally, he has historically maintained his livestock allotment on Paiute Mesa.

g. The location of real property owned by the person:

Grayeyes owns an uninhabitable trailer in Page, AZ. Petitioner believes this to be a clear indicator that Grayeyes lives in Arizona. But the testimony about the trailer was unrefuted at trial. It was purchased by Grayeyes and his wife to send their children to public school. His wife lived there with the children until her passing in 1987. At that time, Grayeyes moved to the trailer for the term of one school year ('87-'88) to help care for the children. Afterward, he returned to Navajo Mountain to live while the children raised themselves and each other. It was clear at trial that Grayeyes does not live at that trailer and has never lived there as a permanent residence.

It is unclear if Grayeyes is entitled to occupy other lands within the Navajo reservation. He has a grazing permit for Paiute Mesa that allots 15 grazing units. And there was testimony at trial that he may have a legitimate, but disputed, claim to a homesite on Paiute Mesa that is currently in the probate process in Navajo tribal court. But Petitioner did not provide evidence at trial explaining the complexities of Grayeyes's interest in Navajo trust land.

h. The person's residence for purposes of taxation or tax exemption:

This factor is largely irrelevant given Grayeyes's residency within the Navajo Nation reservation.

i. Other relevant factors.

Grayeyes has an Arizona driver's license, gets his mail from a post office in Arizona, buys groceries and gas in Arizona, and accesses critical services in Arizona. But so do all of the other Utah residents at Navajo Mountain/Paiute Mesa. His interactions with Arizona as a matter of convenience are not dispositive of his residency.

More importantly, Grayeyes has been a registered voter in San Juan County since 1984 and has consistently voted in every election since then without his voter registration ever being effectively challenged.

Considering the testimony at trial, in light of the statutory factors, the Court has no problem concluding that Grayeyes maintains his principal place of residence in San Juan County. First, it is apparent that Grayeyes spends more time in Navajo Mountain/Paiute Mesa than he does anywhere else. As much as 80% according to some testimony. He has consistently lived there throughout his life and continues to do so.

Second, he is connected to San Juan County as deeply as any resident of the County. In practice, he has always participated in the voting process in San Juan County. And his rich cultural history adds to his connection -- he has always returned to the area and will always intend to return to the area when he has travelled away.

Finally, the Court is not persuaded by Petitioner's argument that a particular house is required for a person to have a principal place of residence. As long as the location where the person resides is entirely within a voting precinct, the Court believes the "single location where a person's habitation is fixed" could mean a larger geographical area and include various places, particularly for someone like Mr. Grayeyes who observes traditional cultural practices. He may stay on Paiute Mesa under a shade hut during the summer. Or at his daughter's cabin. Or at his sister's house in Navajo Mountain. As long as those all fall within a single voting precinct, that geographical area is sufficient to be a principal place of residence.

CONCLUSION and ORDER

Having considered the testimony at trial and the arguments of the parties, the Court confirms the election result. Respondent will be awarded reasonable costs under Utah Code §20A-4-405 upon submitting appropriate verification.

Dated: 1/29/19

By: _____
Don M. Torgerson
District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 180700016 by the method and on the date specified.

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01/30/2019 /s/ CONNIE ADAMS

Date: _____ _____

Deputy Court Clerk

IN THE SEVENTH JUDICIAL DISTRICT COURT
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

KELLY LAWS, Petitioner, vs. WILLIE GRAYEYES, Respondent.	ORDER DENYING APPLICATION FOR ATTORNEY FEES AND COSTS Case No. 180700016 Judge Don M. Torgerson

This matter is before the Court on *Respondent's Motion Respecting Scheduling Procedures for Resolution of Attorney Fee Dispute* and his request for attorney fees contained in *Respondent's Application for Costs and Fees*. Since Respondent has fully briefed his position, the Court rules without additional briefing or argument.

PROCEDURAL BACKGROUND

After Laws filed his notice of appeal of the Court's *Ruling and Order* dated 1/29/19, Grayeyes requested attorney fees for this case based on three equitable doctrines: bad faith, private attorney general, and substantial benefit. Laws has not yet responded to the original request for fees because litigation over attorney fees was stayed while the Utah Supreme Court considered Grayeyes's motion to dismiss or suspend the appeal.

Grayeyes has now asked to lift the stay and permit discovery so he can investigate his bad faith assertion and gather evidence of Laws's subjective intent in filing this case. Laws objects to the request for a discovery schedule, arguing primarily that the rules of procedure do not permit post-trial discovery for the attorney fee dispute.

The Court does not decide whether discovery is available after trial to investigate a bad faith claim for attorney fees. Instead, having considered Grayeyes's briefing, the Court concludes that there is no basis to award attorney fees in this case.

RULING

I. Attorney fees for Bad Faith are not awarded because Laws's case had merit.

Before awarding attorney fees for bad faith, the Court must find that the action was both "...without merit and not brought or asserted in good faith."[1] If a court determines that an action has merit, it is unnecessary to determine if it was brought in bad faith, since both requirements must be met before fees may be assessed.[2] And for an action to be without merit, the claims must be more than just unsuccessful — they must be so deficient that the party could not have reasonably believed the claims to have a basis in law and fact.[3]

In the Court's assessment, Grayeyes conflates his bad faith and merit arguments. He primarily focuses on Laws's intent, arguing that Laws knew or should have known (1) that his evidence was superficial and would be insufficient to prevail at trial, (2) the defense of laches was insurmountable, and (3) that his belief in his case was based on such thin analytical reasoning that a reasonable person with non-vindictive motives would be skeptical of its propriety. In fact, the 8 ½ pages of Grayeyes's overlength brief devoted to bad faith primarily argue Law's motives and purposes in filing suit. But Laws's purpose and motive is not relevant to determining whether his case had merit. And Laws's claims had merit.

First, his claim was based on a reasonable interpretation of the statute. Utah Code § 20A-4-403(1)(a) explicitly authorizes a "registered voter" to contest the result of an election by filing a complaint within 40 days after the canvass. As a registered voter, Laws had standing and his complaint was timely. He also alleged grounds under Section 20A-4-402(1)(g) —that Grayeyes was not a resident of San Juan County, a continuing requirement to be eligible for office.

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[1] Utah Code §78B-5-825.
[2] See *Utah Telecom. Open Infrastructure Agency v. Hogan*, 294 P.3d 645, 651 (Utah Ct.App. 2013).
[3] *Verdi Energy Group, Inc. v. Nelson*, 326 P.3d 104, 115 (Utah Ct.App. 2014).

Second, Laws's claims had a basis in fact. In support of his belief that Grayeyes was not a resident of San Juan County, Laws presented credible supporting evidence. For example, the only real property that Grayeyes owns is a house located in Arizona. Grayeyes dates a woman from Arizona and often stays overnight at her house. Grayeyes has an Arizona driver's license, gets his mail in Arizona, and registers his vehicles in Arizona. Grayeyes does not have a physical house at Navajo Mountain and stays at several different locations. Some people who live at Navajo Mountain do not believe Grayeyes lives there. And some people who visit Navajo Mountain regularly have not seen him during their visits.

The proof Laws presented at trial supported his belief that Grayeyes was not a resident of San Juan County. And although his proof was ultimately outweighed by other, more compelling evidence in the case, it does not diminish the overall merit of his claim. Moreover, the Court's central ruling — that Grayeyes was a resident even though his "residence" was located at multiple locations within the same voting district— appears to be a matter of first impression in Utah and Laws would have had no legal precedent to rely upon to anticipate that outcome before trial.

Grayeyes argues that there are two other, separate grounds for him to recover bad faith fees in this case: (1) he asserts that Utah Code §20A-1-805 permits fees when a bad faith complaint is filed with the Lieutenant Governor, and he argues for the extension of that statute to all election contests; and (2) he asserts that general equitable principles allow for fees when a litigant has acted in bad faith, under *Stewart v. Utah Pub. Serv. Comm'n.*[4]

Utah Code §20A-1-805 allows for attorney fees when a petition alleging an election code violation is filed with the Lieutenant Governor, if the petition was filed in bad faith. But importantly, the plain language of the statute specifically limits the recovery of fees to actions brought under Part 8 of Chapter 1, and even provides a unique definition of bad faith in § 802(1). The Court believes those provision are intentionally limiting. And there is no indication that the Legislature intended the provision to extend to non-governmental actors under Chapter 4, Part 4 of the Election

[4] *Stewart v. Utah Pub. Serv. Comm'n.*, 885 P.2d 759, 782 (Utah 1994).

Code. If the Legislature wanted to extend that same definition of bad faith to Chapter 4, it would have explicitly included that language in the statute.

Finally, Grayeyes asserts that a Court has a general equitable authority to award fees when a litigant acts "...in bad faith, vexatiously, wantonly, or for oppressive reasons."[5] Importantly, the quoted phrase is not the decision of the *Stewart* case. Instead, it is simply a restatement from Moore's Federal Practice (2d ed. 1972), cited by the *Stewart* court to support its decision to award attorney fees under the substantial benefit doctrine (discussed below). The Court does not find a general statement about inherent equitable power to be persuasive when considering bad faith. Instead, the Court concludes that the only basis for recovery of bad faith attorney fees in this case is under the bad faith statute. And since Grayeyes does not meet the requirements for recovery under the statute, his request for bad faith attorney fees must be denied.

II. The Private Attorney General Doctrine has been disavowed by the Legislature.

Grayeyes next argues that he should be awarded attorney fees under the private attorney general doctrine. He recognizes that the Legislature has explicitly disallowed that doctrine by statute but argues that the statute is unconstitutional. As explained below, the statute is binding upon the Court.

In 2009, the Legislature enacted Utah Code §78B-5-825.5: "A court may not award attorney fees under the private attorney general doctrine in any action filed after May 12, 2009."

Grayeyes argues that the statute is unconstitutional under the ruling in *Injured Worker's Asssociation of Utah v. State of Utah*, 2016 UT 21. In that case, the Utah Supreme Court determined that the Labor Commission's mandatory attorney-fee schedule, imposed in worker's compensation cases, was unconstitutional because the fee limits encroached on the Supreme Court's exclusive authority to govern and regulate the practice of law. In short, the amount of an attorney's fee is a matter of negotiation between an attorney and her client, constrained by the rules of professional conduct and

[5] See *Stewart* at 782; *Respondent's Application for Costs and Fees*, pg.14 ¶ 1.

measured by reasonableness. And only the Utah Supreme Court — not the Legislature — may regulate those fees.

Grayeyes argues that *Injured Workers Ass'n. of Utah* also prohibits the Legislature from restricting a court's inherent equitable power to award fees "in the interest of justice and equity."[6] He believes that is also an improper regulation of the practice of law. But the Court disagrees with his interpretation of the case. *Injured Workers Ass'n. of Utah* is about the Utah Supreme Court's exclusive authority to regulate attorney fees between attorneys and their clients. But this case is not about restricting fees between Grayeyes and HIS counsel. It concerns Grayeyes's ability to extract attorney fees from an opposing party.

Nevertheless, the issue is raised — may the Legislature, by statute, bar a "doctrine" for attorney fees that has existed under the court's inherent equitable power to award fees "in the interest of justice and equity?"[7] The private attorney general doctrine is one of those. It is a judge-made guideline to help courts exercise their inherent equitable powers. Under the doctrine, fees have been awarded when a case vindicated a strong or societally important public policy and the cost of doing so outweighed a party's own pecuniary interest.[8]

The Court does not believe that the Legislature has constrained the court's equitable authority simply by disallowing fees under the private attorney general doctrine. The umbrella considerations of "justice and equity" are not limited by removing the subset of private attorney general considerations.

And the Court finds that this case does not warrant attorney fees in the interest of justice and equity. It is apparent to the Court that Grayeyes believes his election is significant for Native Americans because there is now a Navajo majority on the San Juan County Commission. And history may confirm his view. But while the Court is certainly aware of the historical tension in San Juan County between Native American citizens and others in the County, those considerations were not part of the Court's analysis at trial and this is not a civil rights case.

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[6] See *Rehn v. Christensen*, 392 P.3d 872, 880 (Utah Ct.App. 2017).
[7] See *Rehn v. Christensen*, 392 P.3d 872, 880 (Utah Ct.App. 2017).
[8] See *Stewart* at 783.

Instead, this case is specific to one person and his qualification for office based on his residency. Evidence about his cultural background was marginally relevant to the question of residency. But the Court's analysis would have been the same if he had simply lived at the division of voting districts, rather than the division of Utah and Arizona. This was a straightforward election challenge authorized by statute. And if the Legislature intended for attorney fees to be awarded in this type of case, it would have explicitly said so.

III. The Substantial Benefit Doctrine does not apply in this case.

Grayeyes also contends that, by fighting for his seat on the County Commission in this litigation, he was acting in a representative capacity for three separate classes of voters: (1) all Native Americans in San Juan County; (2) the Navajo people within his voting district; and (3) all voters in San Juan County who participated in the election. Thus, by prevailing and retaining his elected position, the litigation conferred a substantial benefit upon the members of those groups, entitling him to attorney fees. Those benefits include preventing discrimination and voter suppression against Native Americans, giving every voter a voice, and vindicating the candidate chosen by a majority of voters.

The Court may award attorney fees under the substantial benefit doctrine if a litigant, proceeding in a representative capacity, obtains a decision that confers a substantial benefit upon members of an ascertainable class or group.[9] In *LeVanger*, for example, a member of a homeowner's association sued the association for improperly amending the covenants, restrictions, and conditions of the association. The litigation provided a substantial benefit because it enforced the same rights of all shareholders in the homeowner's association.[10] Similarly, in *Stewart*, certain telephone users challenged a Utah Public Service Commission order that affected the rates charged by a public

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[9] *LeVanger v. Highland Estates Properties Owners Ass'n, Inc.*, 80 P.3d 569, 575 (Utah Ct.App. 2003).
[10] Id at 577.

utility.[11] Plaintiffs' action benefitted all telephone users by enforcing better rates and they would not have received the benefit, but for the action of the representative users.

The commonality among substantial benefit fee cases is that a representative of a group participates in the litigation as if all other members of the group were parties to the same case. In other words, any member of the group could be substituted for the litigant and they would benefit the exact same way. By awarding fees to one, it limits the overall fees, because similarly-situated litigants could have filed the same lawsuit and obtained the same outcome.

In support of his argument for fees, Grayeyes includes many pages of footnotes and attachments that detail some of the history of Native American disenfranchisement in San Juan County. Given that history, he believes his confirmed membership on the County Commission provides a substantial benefit because, (1) he can give Native Americans a better voice; (2) it encourages Native Americans living in Utah, but traveling for work in other states, to run for political office; and (3) it ensured that the voters in his voting district are represented by their elected candidate.

In evaluating those claimed benefits, the Court must determine whether Grayeyes was a representative of a class and whether that class received a substantial benefit from the litigation. And the Court concludes that neither factor is met.

First, Grayeyes is not a representative of an ascertainable group because there are no similarly-situated defendants that would benefit from this litigation. This case turns on the fact-specific inquiry into whether Grayeyes is a resident of San Juan County. His home, his property ownership, his living habits, his out-of-state contacts, his travel practices, and his experiences are all unique to him and are the critical factors in determining his residency. There is no similarly-situated person. And the determination that he is a resident is not transferable to the next political candidate whose residency is challenged. Moreover, only Grayeyes was elected by a majority of voters in his voting district. And only he gets to be the Commissioner by having his election confirmed. This is not like a homeowner association, corporate proxy suit, or election irregularity that affected a group of people in the same way.

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[11] *Stewart v. Utah Pub. Serv. Comm'n.*, 885 P.2d 759, 782 (Utah 1994).

Second, it remains to be seen if Grayeyes's position on the County Commission will benefit the groups he identifies. Perhaps he'll be a remarkable commissioner who unites opposing factions in the community for the betterment of all. Or maybe he'll be a terrible commissioner who polarizes and disenfranchises his constituents. Presumably, every candidate for public office believes their tenure will benefit their voters.

But the benefits Grayeyes claims are not the type of benefit contemplated by the substantial benefit doctrine. The doctrine requires that the benefit be obviously quantifiable and that the group benefit the same way. And the Court cannot confirm all of Grayeyes's constituents as County Commissioners at the conclusion of this case.

IV. Grayeyes has not incurred recoverable costs.

Taxable costs are "...those fees which are required to be paid to the court and to witnesses, and for which the statutes authorize to be included in the judgment."[12] Other expenses of litigation, though necessary, are not taxable as costs.[13]

Grayeyes has requested $17,069.49 as costs in this case.[14] Consistent with *Frampton,* the Court has carefully reviewed the memorandum of costs and concludes that the majority of claimed expenses are litigation expenses and are not recoverable as costs. Lunches, hotels, vehicle rentals, online research, and transcription for trial preparation fall within that category. Similarly, the $8,500 claimed for paralegal and law clerk services are something between trial preparation expenses and attorney fees — necessary for trial but not recoverable.

Grayeyes's only expense entry that is potentially taxable as costs is the "Witness Fees and Travel" amount of $2,458.77. Grayeyes has not provided any itemization for those expeneses. Additionally, Grayeyes did not file any subpoenas in the case indicating that those fees were actually paid pursuant to subpoena.

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[12] *Frampton v. Wilson,* 605 P.2d 771, 774 (Utah 1980).
[13] *Id.*
[14] See pp. 5-6 of the billing records attached to the Declaration of Steven C. Boos, included with *Respondent's Application for Costs and Fees.*

Witness fees may be taxed as costs in the amount permitted by statute.[15] Under Rule 45(b)(2) U.R.C.P., a party serving a subpoena must tender the witness fee for one day's attendance and the mileage allowed by law. Currently, the daily fee for a witness is $18.50 plus $1 for each four miles in excess of 50 miles actually and necessarily traveled in going only.[16]

Because Grayeyes has failed to provide sufficient proof supporting his claim for witness fees and travel, and the amount demanded far exceeds the highest possible amount that might be awarded in this case, the Court denies those fees as taxable costs.

ORDER

Because there is no statutory or equitable basis to award attorney fees and there is insufficient proof of any taxable costs, Respondent's application for attorney fees and costs is denied.

Dated: 6/20/19

By: Don Torgerson
Don M. Torgerson
District Court Judge

STATE OF UTAH
SEVENTH DISTRICT COURT

[15] *Young v. State*, 16 P.3d 549, 554 (Utah 2000).
[16] Utah Code §78B-1-119(1).

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 180700016 by the method and on the date specified.

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IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

KELLY LAWS, Petitioner, v. WILLIE GRAYEYES, Respondent.	RESPONDENT'S NOTICE OF APPEAL Case No. SJ180700016 Judge: Don M. Torgerson

Respondent Willie Grayeyes, by and through undersigned counsel, hereby appeals the final order and judgment in the above-captioned case denying Respondent's application for fees and costs, entered on June 20, 2019, to the Utah Supreme Court, which has authority to hear this appeal pursuant to Rules 4 (b) (2) and 4 (d), Utah Rules of Appellate Procedure, Utah Code Ann., § 78A-3-102 and Utah Code Ann., § 20A-4-406. The appeal is taken from the entire Ruling and Order which was entered on June 20, 2019.

Dated June 25, 2019.

/ 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

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2019, I electronically filed the foregoing Notice of Appeal with the Seventh Judicial District Court in and for San Juan County, State of Utah. Notice will be electronically mailed to the following individuals representing Petitioner Kelly Laws:

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