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KELLY LAWS, Appellant/Cross-Appellee, v. WILLIE GRAYEYES, Appellee/Cross-Appellant. : REPLY BRIEF OF APPELLANT/CROSS-APPELLE KELLY LAWS

Utah Supreme Court

Peter Stirba, Valerie Wilde; Counsel for Appellant/Cross-Appellee.Steven C. Boos, David Irvine, Eric P. Swenson; Counsel for Appellee, Cross-Appellant.

IN THE UTAH SUPREME COURT

KELLY LAWS, Appellant/Cross-Appellee, v. WILLIE GRAYEYES, Appellee/Cross-Appellant.	Appellate Case No. 20190088-SC District Case No. SJ180700016

REPLY BRIEF OF APPELLANT/CROSS-APPELLEE KELLY LAWS

Appeal from a Final Judgment of the Honorable Don M. Torgerson, Seventh Judicial District Court, State of Utah

Peter Stirba
STIRBA, P.C.
215 South State Street, Suite 750
Salt Lake City, UT 84111
Telephone: (801) 362-8300
Fax: (801) 364-8355
Email: Peter@stirba.com

Valerie Wilde (Bar No. 7345)
STIRBA, P.C.
215 S. State Street, Suite 750
Salt Lake City, Utah 841101
Telephone: (801) 364–8300
Fax: (801) 364–8355
Email: vwilde@stirba.com

Counsel for Appellant/Cross-Appellee Kelly Laws

Steven C. Boos
MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP
835 East Second Avenue, Suite 123
Durango, CO 81301
Telephone: (970) 247-1755
Email: sboos@mbssllp.com

David Irvine
747 East South Temple
Salt Lake City, UT 84102
Telephone: (801) 579-0802
Email: dirvine@aol.com

Eric P. Swenson
1393 East Butler Avenue
Salt Lake City, UT 84102
Telephone: (801) 521-5674
Email: e.swenson@comcast.net

Alan L. Smith
1169 East 4020 South
Salt Lake City, UT
alankaed@aol.com

Counsel for Appellee/Cross-Appellant
Willie Grayeyes

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Appellant and Cross-appellee, Kelly Laws, by and through his undersigned counsel, STIRBA, P.C., hereby responds to Appellee and Cross-Appellant's Opening Brief as follows:

INTRODUCTION

In this brief, appellee and cross-appellant, Willie Grayeyes will be referred to as ("Grayeyes") and appellant and cross-appellee Kelly Laws will be referred to as ("Laws"). The Utah Seventh Judicial District Court will be referred to as ("lower court"). Citations to the Record on Appeal are delineated as ("[R. *page number*]").

In reply to Grayeyes principle brief, much of the focus of the arguments concerns the statutory construction for determining a residency and Grayeyes eligibility to be a candidate and elected as a San Juan County Commissioner. A person resides in Utah if "(i) a person's principle place of residence is within Utah; and the person has a present intention to maintain the principle place of residence permanently or indefinitely." § 20A-2-105(3)(a). A person's principle place of residence "is the single location where a persons' habitation is fixed and to which, whenever a person is absent the person has the intention of returning." §20A-2-105(1)(a). The controversy between the parties all revolves around the construction of the aforesaid statutory language. Laws argued extensively in his opening brief that the trial court misinterpreted and misconstrued the statutory language. Much

of the reply brief is argument about why the trial court erred in its interpretation, and why the interpretation by Grayeyes is not consistent with the statutory language.

Grayeyes has also filed a cross-appeal concerning the court's denial of his application for attorneys' fees and costs. The opposition addressed by Laws not only the fact that Grayeyes is not entitled to any attorneys' fees under any theory advanced in his opening brief, but also that his assertion of entitlement under the private attorney general doctrine either has been waived or has no application because he is not a party plaintiff and is not in a position to be awarded attorneys' fees functioning as a private attorney general.

I. REPLY ARGUMENT

A. LAWS HAS STATUTORY STANDING UNDER UTAH CODE ANN. § 20A-4-403(1)(a) AND MEETS REQUIREMENTS FOR TRADITIONAL STANDING

Laws has standing as a "registered voter" under §20A-4-403(1)(a), which expressly authorizes an individual who meets the statutory requirement to contest "the right of any person declared elected to any office by filing a verified written complaint with the district court of the county in which he resides…" §20A-4-403(1)(a). Grayeyes argues that Laws's demonstration of standing under §20A-4-403(1)(a) is insufficient because statutory standing is only a threshold requirement and additionally constitutional standing must also be shown. The statutory standing

granted to Laws through §20A-4-403(1)(a) should be sufficient for his claims to be properly adjudicated before this court, but Laws also meets the traditional standing requirements.

Determinations of whether an individual has statutory standing have been reviewed by this Court for correctness through the lens of statutory interpretation. *Wash. County Water Conservancy Dist. v. Morgan*, 2003 UT 58, ¶ 7 (Utah December 23, 2003). Notably, when interpreting statutes, this Court "gives effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Kearns-Tribune Corp. v. Salt Lake Cty. Comm'n*, 2001 UT 55, ¶ 14.

In addition to the plain reading of the statute, Judge Torgerson, in his June 2019 ruling, interpreted it to determine that Laws had statutory standing. [R. 2375].

> [Laws's] claim was based on a reasonable interpretation of the statute. Utah Code § 20 A-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 20 A-4-402(1)(g)—that Grayeyes was not a resident of San Juan County, a continuing requirement to be eligible for office. *Id* at [R. 2376].

In *Washington County Water Conservancy District*, this Court stated that "…a plaintiff who has not been granted standing to sue by statute must either show that he has or would suffer a 'distinct and palpable injury that gives rise to a

personal stake in the outcome' of the case or meet one of the two exceptions…" *Wash. County Water*, 2003 UT 58, ¶ 17. In this case statutory standing was denied due to a lack of an express grant of authority contained within the statute. *Id* at ¶ 9.

The factual circumstances of Laws's case are distinguishable from *Washington County Water Conservancy District* because §20A-4-403(1)(a) contains an express grant of authority resulting in statutory standing. Grayeyes alleges that both statutory standing and traditional standing must be satisfied in order to meet Utah's legal requirements for standing. (Grayeyes Opening Brief, pg. 22). Grayeyes's conclusion is not entirely consistent with this Court's opinion in *Washington County Water Conservancy District*, the language of that opinion seems to indicate that in the absence of statutory standing, traditional standing or one of its exceptions must be met, not both.[1] Under this reading, the express grant of standing in § 20A-4-403(1)(a) is sufficiently provides Laws with standing to have his claim adjudicated.

[1] The notion that a statutory grant of authority alone is enough to satisfy traditional standing requirements is supported by various courts. *E.g.*, *Press-Enter., Inc. v. Benton Area Sch. Dist.*, 604 A.2d 1221, 1223 (Pa. Commw. Ct., 1992) (stating "traditional standing requirements are applicable only where a specific statutory provision for standing is lacking."). *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 850 (Tex. App. 2005) (stating "[t]he common law standing rules apply except where standing is statutorily conferred."). *Tanner v. Town Council*, 880 A.2d 784, 792 (R.I. 2005) (stating, "[a] party acquires standing either by suffering an injury in fact or as the beneficiary of express statutory authority granting standing.").

Additionally, Grayeyes misconstrues the holdings of several cases in support of the notion that both statutory standing and traditional standing are required under Utah law. Grayeyes argues that the "legislature, by statute, may not expand Utah Supreme Court's appellate jurisdiction." (Grayeyes Opening Brief, footnote 2, pg. 22). Grayeyes cites *Brown v. Cox*, 2017 UT 3 ¶¶ 12-14 in support of this claim.[2] The court in *Brown*, held that the legislature lacks authority to expand the Utah Supreme Court's ***original jurisdiction*** by statute, but indicates that "[t]he Utah Constitution provides that the court possesses 'appellate jurisdiction over…matters to be exercised as provided by statute.'" *Id* at ¶ 13 (citing Utah Const. art. VIII, § 3).

Regardless of whether statutory standing is sufficient for this court to adjudicate Laws's claim alone, Laws also meets traditional standing requirements. To meet standing requirements a plaintiff is required "to show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute." *Nat'l Parks & conservation Ass'n, v. Bd. of State Lands*, 869 P.2d 909 (Utah 1993). Demonstration of a "particularized injury" is regarded as the "traditional"

[2] In addition to *Brown v. Cox*, 2017 UT 3, ¶¶ 12-14, Grayeyes cites *Haik v. Jones*, 2018 UT 39, ¶¶ 17-22 as support for analyzing statutory standing under constitutional standing requirements when the statutory language notes that a cause of action may be brought by a "person aggrieved". The statutory language of §20A-4-403(1)(a) does not include a requirement that the claimant be "aggrieved," but rather requires only registered voter status to meet the requirement for standing and is thus distinguishable from the case at hand.

standing test. *Society of Prof'l Journalists v. Bullock*, 743 P.2d 1166, 1170 (Utah 1987).

In *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, the court held that two individual members of the Sierra Club ("members") had standing because they "identified personal adverse effects, sufficient causation, and redressability." *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶ 21 (Utah Nov. 21, 2006). Plaintiffs aimed to stop the construction of a power plant near their community. *Id* at ¶ 2. Despite "potential injuries to other persons" who live in the area and are similarly situated, the court held that the members had standing because they identified a "personal stake in the outcome of the dispute." *Id* at ¶ 23.

Alternatively, in *Haik v. Jones*, the court denied standing on grounds that the plaintiff being "…a landowner in the valley from which the water is to be appropriated…" was not a particularized injury. *Haik v. Jones*, 2018 UT 39, ¶ 20 (Utah August 7, 2018). "…Haik argues that because he receives (or wants to receive) water from the City, he has an interest in how the City manages that water and standing to challenge the City's decision. Haik's injury could hardly be 'particularized' if any person who receives water from the City could assert it." *Id*.

The United States Supreme Court discusses "…the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" noting that

this right ranks "among our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). Additionally, the court discusses state enacted election codes, explaining that the provisions contained therein may govern "registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote." *Id* at 788.

Similarly, the United States Supreme Court stated in *Gill v. Whitford*, "a person's right to vote is individual and personal in nature. Thus, voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1929 (2018).

The factual reality of Laws's case is more analogous to the individual members in *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.* compared to the landowner in *Haik v. Jones*. The effect of being represented by an unqualified candidate serving in a political office unlawfully, creates a concrete and particularized injury to Laws as a registered voter in San Juan County. Despite the potential injury to all voters in San Juan County, given this Court's ruling in *Utah Chapter of the Sierra Club v. Utah Air Quality Bd*., the injury Laws faces is being represented by an unqualified, and, therefore, unlawful County Commissioner despite his constitutional right to participate effectively in lawful elections.

As discussed in *Anderson*, the provisions relevant to this case contained within Utah's election code aim to regulate the eligibility of candidates. These regulations affect the individual right to vote of each citizen of San Juan County. Additionally, Laws can show a concrete particularized injury to his right to vote effectively in an election within his county because his right to choose between eligible and qualified candidates has been impaired. Grayeyes was an unqualified candidate who is now an unqualified County Commissioner, and the only evidence provided was by Laws indicating that the place of residence Grayeyes declared to be his is in fact the place of residence of Harrison Ross. The right to vote and the exercise of that right is personal to Laws, uniquely and solely. Having a candidate that is ineligible to serve in that office elected impairs and dilutes Laws's constitutional right to participate in a regular and properly constituted election.

B. THE TRIAL COURT ERRED IN APPLYING LACHES TO AN ELECTION CONTEST, CHALLENGING GREYEYES' QUALIFICATION TO HOLD OFFICE.

The equitable doctrine of laches is founded upon considerations of time and injury. Laches in legal significance is not mere delay, but delay that works a disadvantage to another. Laches is designed to shelter a prejudiced defendant from the difficulties of litigating meritorious claims after an unexplained delay. *F.M.A. Financial Corp. v. Build, Inc., 17 Utah 2d 80, 404 P.2d 670, 672 (Utah 1965),* referring to "the practically invariable rule that laches cannot be a defense before

the statutory limitation has expired," and *Insight Assets, Inc. v. Farias, 2013 UT 47, ¶ 18, 321 P.3d 1021,* holding that "that rule is not absolute."

It is undisputed that Laws' petition contesting the election was filed within the forty-day statutory period for contesting an election[3]. The timeliness of Laws' petition was also acknowledged by the trial court. [R.1680] However, in finding Laws' petition contesting the election was "unreasonably" delayed, the trial court relied upon Laws' ability to challenge Greyeyes' qualification to hold office when he declared his candidacy. Notably, the trial court never found prejudice or disadvantage to Greyeyes, but instead couched the basis for an "unreasonable delay" on the delays impact to voters and the election process. This is because Greyeyes cannot be prejudiced by a challenge to his qualification to hold office. Utah's legislature found the right to challenge a candidate's qualifications to hold office significant enough to permit such challenges to occur pre-election[4], post-election[5], and after the candidate takes office[6]. A qualification provision to hold office is distinctly different from procedural rules to hold office.

When the Utah Election Code speaks to a person's eligibility for office, it is best understood to address general prerequisites to serve in an office. *Maxwell v.*

[3] Utah Code §20A-4-404
[4] Utah Code §20A-9-202
[5] Utah Code §20A-4-404
[6] Utah Code §17-16-1(b)

Corroon, 2012 UT 44. In this case, the qualification at issue is Greyeyes residency. A residency challenge under Utah Code Ann. § 20A-4-402(1)(b) goes to constitutional eligibility to be elected and to hold office. *Id.* The terminology of eligibility for office is used extensively in state constitutions. Whenever the constitutional term appears, it prescribes objective, ex ante prerequisites to running for office—not individualized, ex post grounds for disqualifying someone from appearing on a ballot. The Utah Constitution employs this specialized term in the same way. *Id.*

Residency requirements are universally understood to be vital to the town system of government as practiced in this commonwealth continuously from a time long before the declaration of independence until the present. [1918] This form of local government was the fiber of our institutions when the Constitution was adopted. *Opinion of the Justices, Mass.1918, 229 Mass. 601, 607, 119 N.E. 778, 781.* It is believed that candidates must have the special capacities that will enable them to perform the office he seeks, and his possession or lack of possession of those capacities need to be exposed to those who will make the choice. The State has a compelling interest in preventing frivolous and fraudulent candidacy by persons who have had no previous exposure to the problems and desires of the electorate of a representative district.

Laws challenged Greyeyes' ability to meet the County residency requirements to run for office. In Utah, the State Legislature has provided two statutory mechanisms for a voter to challenge the qualification of a candidate. The first type of challenge can be made within 5 days of a declaration of candidacy. Utah Code Ann. §20A-9-202. The second type of challenge can be made post-election, during the canvas. Utah Code §20A-4-403. We can presume that the legislature intended either procedure to be used to challenge a candidate[7].

Admittedly, Laws did not submit a pre-election challenge to Greyeyes' candidacy. During the trial court hearing, Laws identifies several reasons for not doing so. Greyeyes attempts to speculate about how the delay benefited Laws. However, such wild speculation is unnecessary because we have the benefit of Laws' testimony which indicates he was aware of Black's challenge to Greyeyes lack of residency. [R.2046] A second challenge would serve no public purpose. By the time Black's challenge was resolved, Laws was time barred from challenging Greyeyes declaration of candidacy pursuant to Utah Code §20A-9-202.

Greyeyes brief acknowledges the importance of an orderly election process. In acknowledgement of the disruption that ensues with altering ballots[8], the

[7] Utah Code 17-16-1(b) contains a residency requirement for an elected County official once he holds office.
[8] Ellis v. Swensen, 2000 UT 101

wording of initiatives[9] or procedural aspects of voting[10], the Utah Legislature provided for only two distinct periods of time in which to challenge the election process as it relates to a candidate's qualifications. A challenge based upon the candidate's declaration is tied to a swift procedural process which allows for resolution before the primary. The next available time period to challenge a candidate's qualification is after the election, during the period of canvas, and before the candidate takes office. A contest to the election, under Utah Code §20A-4-403, also provides for tight procedural timelines to ensure an overall orderly election process, minimizing disruption during the election process.

The only other mechanism a voter can use to raise a qualification clause challenge is an extraordinary writ, which is an equitable claim conditioned on no other adequate remedy at law. *Cox v. Laycock, 2015 UT 20*. If Laws filed for an extraordinary writ contesting Greyeyes' residency status, the court would have denied the writ because Laws had an adequate remedy to contest the election under Utah Code §20A-4-403.

It was error for the trial court to find Laws was required to challenge Greyeyes' declaration of candidacy because the Utah Election code has no

[9] In re Cook, 882 P.2d 656 (Utah 1994) alleging an improper definition of the citizen initiative.
[10] Clegg v. Bennion, 247 P.2d 614 (Utah 1952)

requirement or condition, that Laws was limited to the pre-election challenge. Laws challenge under Utah Code §20A-4-403 did not prejudice Greyeyes, a requirement to invoke laches. Furthermore, the only prejudice found by the trial court was "the important public interest concerns and the integrity of the election process". [R.1679-81] The trial court's finding regarding prejudice to invoke laches was focused on a negative impact to the voters and the election process to the point of ignoring Greyeyes' unclean hands[11]. The court also failed to consider the fundamental right of a voter to elect a qualified candidate to hold office. Under the facts of this case, the principle of laches is misapplied. In this case there is no harm to the election process by preventing a candidate from taking office when he fails to meet the residency requirements for office. *Draper v. Phelps*, 351 F. Supp. 677 (1972).

Here, the trial court erred when it decided that Laws' election contest to a qualification clause requirement impacted the integrity of the election process. Utah allows voters to challenge the qualification of its elected representatives, pre-

[11]It is uncontroverted that Greyeyes' Declaration of Candidacy listed his residence as Navajo Mountain with a photo of a home later found to belong to Harrison Ross and the court ultimately found Greyeyes had no physical house at Navajo Mountain. [R.2377]. The United States Supreme Court has found that "unclean hands has traditionally been a defense to equitable claims, but not to legal claims." See *Merck & Co. v. Gilead Scis., Inc., 2019 U.S. LEXIS 98, *1, 139 S. Ct. 797, 202 L. Ed. 2d 572, 2019 WL 113117, 202 L. Ed. 2d 572*.

election, post-election and once the candidate takes office. The importance of being able to challenge those candidates who fail the qualification clause requirements is inherent in our electoral system to ensure proper representation by candidates who are familiar with the issues and strive to resolve those issues through the legislative process. Greyeyes from the outset was a candidate who failed the qualification clause requirements and his candidacy, as well as, his right to hold office could be challenged at any time.

Greyeyes argues in support of the trial court's application of laches and asserts that "[E]lection contests under §20A-4-402 are equitable proceedings." Brief at 34. Greyeyes relies on *Ellis v. Swensen, 2000 UT 101,* to support the notion that an election challenge is an equitable proceeding. However, this is not the case. In *Ellis v. Swensen, Supra*, Ellis challenged Swensen's use of her official seal on each page of the ballot to certify each candidate when she herself was a candidate for office. Ellis sought to correct the manner and look of the ballot, by filing a request for an injunction and declaratory relief, both equitable claims. Likewise, *Clegg v. Bennion, 247 P.2d 614 (Utah 1952),* was an extraordinary writ attempting to disqualify a candidacy based upon a late filing of candidacy, a procedural aspect of voting. Both of these cases represent litigants requesting the court invoke its equitable powers, neither of these cases have facts similar to this

case, where an election contest is based upon the qualification clause or candidate's eligibility to hold office.

A challenge under §20A-4-402 is not an equitable proceeding but a legal action under the statute[12]. When a statute is invoked, the court applies the statute to determine the rights of the parties. The cases[13] relied upon by Greyeyes are challenges to election procedures or the right of candidate to be presented on the ballot. Each of those cases were brought under the court's equitable powers and analyzed with equity in mind. The only statutory interpretation case cited by Greyeyes is Peck v. Monson, 652 P.2d 1325 (Utah 1982) wherein a candidate for office was found not to be eligible due to residency requirements before the filing deadline and the political party certified a replacement candidate after the deadline, the court was asked to determine if the political party could certify a replacement candidate. The Utah Supreme Court resolved the question by interpreting the statutory provision for replacement candidates, finding no time limitation within the wording of the statute for disqualifications. It is the concurring opinion relied

[12] It is the settled law of the state that equity has no jurisdiction over contest for office, even if the election is claimed to be void. Parties aggrieved are required to assert their rights in proceedings provided by statute or in actions at law. *Harries v. McCrea, 62 Utah 348, 355, 219 P. 533 (1923).*

[13] Greyeyes also relies upon *In re Cook, 882 P.2d 656 (Utah 1994)* which is a Rule 65a writ challenging the voter pamphlet, and *Soules v. Kauaians for Nukolii Campaign Committee, 849 F. 2d 1176 (9th Cir. 1988)* a developer's intervention attempting to stop a special election through an injunction.

upon by Greyeyes that mischaracterizes the case as an equitable claim and indicates they would have denied the replacement candidate using the principle of laches. In the same way the majority in *Peck v. Monson, Supra*, saw Peck's challenge as one of statutory interpretation, Laws' petition under the Election Code challenging Greyeyes' qualification to hold and accept office is one of statutory interpretation.[14]

As Wendy Black learned, an earlier challenge to Greyeyes' residency, at the time of Greyeyes' declaration proved to be futile. The trial court's assertion that Laws could have raised the residency issue with success is unsupported. By the time Judge Nuffer issued an order placing Greyeyes on the ballot, Laws was left with one option under the Election Code. Laws allowed the election to proceed and filed an election contest at the next available opportunity. The legislative desire for orderly elections prevented an earlier challenge to Greyeyes' residency. As such, there is no prejudice to the integrity of the election when a challenge to a candidate's qualification is limited by the wording of the statute. Laws availed himself of the statutorily created scheme to challenge Greyeyes, at the next available opportunity. As in *Peck, supra*, there is no time limitation written into the statute and this Court should not imply one. Laches is not implicated in this case

[14] The trial judge acknowledged the legal nature of Laws' petition when he stated, "Laws claims were based upon a reasonable interpretation of the stature." [R. 2376].

because Laws is not seeking equity from the court. It was error for the trial court to apply the principle to a pure statutory challenge.

C. GRAYEYES DOES NOT MEET THE STATUTORILY PRESCRIBED RESIDENCY REQUIREMENTS

Grayeyes, in his opening brief, argues in support of the lower court's ruling regarding his residence. The lower court committed an error in misinterpreting and misapplying §20A-2-105, and Grayeyes misinterprets the statutory definition of the term resident as well as its applicability in both §20A-2-105 and §17-16-1(1)(b). Laws's did not fail to marshal the evidence and Grayeyes's arguments regarding marshaling are outdated and incorrect. Grayeyes's support of the lower court's decision to bar admittance of Deputy Turk's investigative findings based on an incorrect assumption of lack of authorization, is unfounded.

1. Failure to marshal the evidence no longer provides sufficient grounds under Utah law for dismissal of an appeal or procedural default.

In his opening brief Grayeyes furthers an argument that Laws's appeal should be dismissed based on a failure to marshal the evidence. The precedent relied on in Grayeyes's opening brief was repudiated by this Court's clarification on marshaling requirements set out in State v. Nielsen, each opinion cited in support of dismissal for failure to marshal the evidence was decided prior to this Court's decision in 2014. State v. Nielsen, 2014 UT 10.

In State v. Nielsen, this court set out to clarify marshaling requirements and ultimately "repudiate[d] the default notion of marshaling sometimes put forward in our cases and reaffirm[ed] the traditional principle of marshaling as a natural extension of an appellant's burden of persuasion." State v. Nielsen, 2014 UT 10 ¶ 41. An appellant is still required to establish "a basis for overcoming the healthy dose of deference owed to factual findings…" which the court will focus its analysis on, as opposed to determining "whether there is a technical deficiency in marshaling meriting a default." Id.

Accordingly, the Court should not summarily affirm Judge Torgerson's residency rulings because the court has repudiated prior precedent requiring "playing 'devil's advocate' and of presenting 'every scrap of competent evidence' in a 'comprehensive and fastidious order.'" Id at ¶ 43.

2. Grayeyes does not qualify for residence under §17-16-1(1)(b) independently nor does he satisfy the residency requirements of §20A-2-105(1)(a).

The legislature has clearly defined the meaning of the term "resident" as "a person whose principle place of residence is within a specific voting precinct in Utah." §20A-2-105(1)(b). The preceding section defines "principle place of residence" as a "single location where a person's habitation is fixed…" §20A-2-105(1)(a). The lower court ruling and factual findings on January 29, 2019 (R. 1678) that Grayeyes met the §20A-2-105(1) residency requirements, based on a

misinterpretation of the statutory language, indicates that Grayeyes does not have a single residence in a fixed location as required by the statutory definition.

The durational requirement within §17-16-1(1)(b) that residency is required for one year in order to be an eligible candidate uses the same language employed in §20A-2-105(1)(b). The determination of residency logically precedes a determination of duration of that residency. The lower court did not find that Grayeyes had a general residency as described, but rather operated under a misinterpretation of the definition of principle place of residence and therefore, the term resident. Under the unambiguous definition contained in the statute, Grayeyes is not a resident of San Juan County.

Based on unrefuted evidence at trial Laws proved that the house Grayeyes reported as his own in his declaration of candidacy belongs to Harrison Ross. Overall, Judge Torgerson's January 29, 2019 ruling confirms Grayeyes's lack of a singular fixed habitation within the voting precinct of San Juan County. Grayeyes reiterates and discusses the nine factors listed in §20A-2-105 to determine an individual's principle place of residency. The purpose of the factors are to determine a principle place of residence under the operational definition contained within the statute making Grayeyes's use of the factors logically inconsistent with their position of upholding the lower court's misapplication of the statute. Application of these factors is non-sensical if the statutory framework is not taken

in context. The critical language, "principle place of residence" is defined and factors are set out in a later subsection, the factors are given under the assumption that the appropriate definition is being applied to the critical language of the statute.

Grayeyes alleges that Laws is required to prove his residence in a state outside of Utah. The statute requires an elected officer to be a resident of the voting precinct in which they are elected, it is apparent both by the clear and convincing evidence presented at trial and Judge Torgerson's factual findings that Grayeyes does not meet that definition. It is not Laws's burden to prove Grayeyes's principle place of residence, but a showing by clear and convincing evidence that Grayeyes is not a resident under the statutory definition contained in §20A-2-105 is enough to prove that Grayeyes is not eligible for the office he holds.

Grayeyes's voter registration is not being litigated in this case, both voter registration and residency for one year are individual eligibility requirements for holding office under §17-16-1. A rebuttable presumption exists in an action challenging voter registration, which is separate and distinct from an election challenge. The argument furthered by Grayeyes in his principle brief is irrelevant to this case because his voter registration status is not being challenged. that as a registered voter has residency within that voting precinct. Grayeyes takes §20A-2-105(7) out of context and attempts to impose a burden of proof related to showing

Grayeyes had a principle place of residence in Arizona. This is not only unnecessary but is also an improper application of a statute not applicable to this election challenge.

3. The trial court erred in barring Deputy Turk's investigative findings from being admitted into evidence.

Grayeyes argues that Deputy Turk's investigative report does not fall squarely within the exception to hearsay. Conversely, Deputy Turk's investigative report should have been admitted and can be admitted under both Utah Rule of Evidence 803(8) and 807. The lower court explained that the evidence was excluded because Deputy Turk's investigation was not legally authorized. [R. 2034]. Unrefuted evidence that Deputy Turk is cross-deputized and has authority to carry out his duties in San Juan County including on the Reservation was presented to the trial court. The investigation conducted by Deputy Turk was legally authorized, he testified at trial that he was asked by Sheriff Eldredge to investigate Grayeyes's residence. Utah Code § 17-22-2 indicates the broad authority a County Sheriff has to investigate a potential crime. Deputy Turk was asked by the Sheriff to investigate Grayeyes's residency, not by the County Clerk. The investigation was legally authorized, and the lower court erred in barring its admittance.

Under the Utah Rule of Evidence 803(8), public records or statements of a public office are admissible if it is either 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 (iii) in a civil case…factual findings from a legally authorized investigation…" Utah R. Evid. Rule 803(8).

Given that this is not a criminal case, rule 803(8)(A)(iii) applies and indicates that factual findings from a legally authorized investigation fall within the exception to hearsay. The lower court erred in ruling that the Deputy Turk's investigation was unauthorized, County Sheriffs have broad authority to investigate potential crimes, such as potential false statements in official proceedings.

The investigative report should have been allowed into evidence in its entirety, if not under Utah R. Evid. Rule 803(8), then under Utah R. Evid. Rule 807. The video recordings, photographs, and report provided by Deputy Turk have "equivalent circumstantial guarantees of trustworthiness" *Id*. Neither the source nor circumstances indicate a lack of trustworthiness. Deputy Turk's activities were recorded, and no evidence was presented questioning the trustworthiness of the report.

II. THE TRIAL COURT CORRECTLY DENEID RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES AND COSTS

The "American Rule" is that attorney's fees are generally not awarded to a prevailing party absent a contractual provision or statute that so provides. There are exceptions, however. As stated by this court in *Doctor's Co. v. Drezga*, 2009 UT 60, ¶ 32, 218 p.3 596, 607-608 "as a general rule Utah courts award attorney's fees only to the prevailing party, and only when such action is permitted by either statute or contract. The absence of such authority, however, does not bar the court from awarding attorney's fees when it deems it appropriate in the interest of justice and equity." The Court added there are several categories of cases which may qualify for equitable attorney's fee awards, including "suits which the non-prevailing party acted in 'bad faith, vexatiously, wantonly or for oppressive reasons.'" *Id* at ¶ 32.

The trial court found that Laws' case had merit in ruling that our bad faith attorneys fee statute, Utah Code §78B-5-825, had no application. The court found that his claims were based upon a "reasonable interpretation" of the relevant statute and had a "basis in fact". *See* [R. 2375].

Moreover, the lower court acknowledged that a major part of its ruling was a matter of **first** impression, which Laws could not have anticipated, even though the

interpretation argued by Laws was reasonable. As the court stated, "this was a straightforward election challenge authorized by statute." [R. 2380].

The court's express finding that this case had merit is fatal to the reach of any bad faith claim for attorney's fees because an **unfounded** claim, broadly defined, is a prerequisite to finding that the losing party acted in bad faith, vexatiously, wantonly or for oppressive reasons. "The accepted definition of bad faith in the context of groundless litigation has been provided by the Second Circuit in the often cited case *Browning Debenture Holding Committee v. DASA Corp*. 'an action is brought in bad faith when the claim is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for some other improper reasons.'" (in original) M. Brinkley Morse, *Attorneys' Fees - Nemeroff v. Abelson and the Bad Faith Exception to the American Rule*, 58 Tul. L. Rev. 1519, 1524–26 (1984).

In *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 765–66 (10th Cir. 1997) (internal quotations and citations omitted). Courts have the "inherent power to assess attorneys' fees when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons,' which exception is commonly referred to as 'bad faith' exception to the American Rule." *Id.* "Where are party institutes an **unfounded** action wantonly or for oppressive reasons or necessitates an action be filed or defends an action in the assertion of a colorless defense, that constitutes

bad faith which is grounds for an award of attorney's fees." *Id*. (emphasis added). *See Wardley Better Homes and Gardens v. Cannon*, 2002 UT 99, 61 p.3d 1009 (where the court referred to circumstances under which it is equitable to award fees which includes when a plaintiff acts in bad faith and pursued a **meritless** claim) (emphasis added). *See also EEOC v. US Steel Corp*., 877 F. Supp. 2d 278 (W.D.Pa. 2012).

A well founded meritorious claim **cannot** form a predicate for the award of fees to the non-prevailing party in the "interest of justice and equity." Any suggestion to the contrary in the Grayeyes's brief is not the law, bad judicial policy, and unworkable. In the context of the foregoing caselaw, the court's determination that this case had merit, facts of which in support are summarized on page 3 of the lower court's June 20, 2019 order, an award of fees in the interest of justice and equity was not warranted. [R. 2380].

Of particular importance is the fact that the record evidence is that the beginnings of this case are found in a declaration of candidacy filed under oath by Grayeyes. He indicated by satellite coordinates and a photo, a house on Navajo Mountain, Exhibit 13 [R. 16-24], in which he claimed was his "principle residence". While that house is in Utah, it is **not** his house. The court found, "Grayeyes does not have a physical house at Navajo Mountain and stays at different locations." [R. 2377]. In other words, the declaration was **not** true. The

clear and convincing evidence at the trial was that the house referred to in the declaration as Grayeyes' "principle residence" was a house lived in by Harrison Ross that he had lived in it for at least one year prior to the election. Given these facts and the others identified by the lower court in its June decision, there was substantial justification for the court to determine that this case "had merit." [R. 2375].

SUMMARY OF THE ARGUMENT

It is unclear what is being advanced in Grayeyes cross-appeal as relevant error. Two arguments are apparently being made; first, Utah Code §75B-5-825 is unconstitutional and should not have been applied, and second, the lower court should not have applied Utah Code §78B-5-825.5 because it is also unconstitutional. This statute determines that a court may not award attorneys' fees under the private attorney general doctrine. Both arguments are incorrect.

Furthermore, the private attorney general doctrine argument has been waived and that doctrine also has no application to this case.

A. Application of Utah Code § 75B-5-825

In his application for fees, Grayeyes did not ask for fees under Utah Code §75B-5-825. However, the trial court ruled that the only basis for bad faith fees is under the statute, and accordingly denied the application because the court found,

as argued above, Laws' claim had substantive merit. Thus, an essential element of the statute to award fees had **not** been met. While Laws does not agree that the only way to recover bad faith fees is under this statute, the court did not commit error because this statute is not unconstitutional.

Respondent relies on *Injured Workers Ass'n of Utah v. State*, 2016 UT 21, ¶ 33, 374 P.3d 14, 22. He argues that the decision in that case renders Utah Code §75B-5-825 an unconstitutional encroachment on the power of this Court to regulate the "practice of law". However, the rationale of *Injured Workers* is **not** applicable to this case.

In footnote 7, not mentioned by Grayeyes, the Court stated, "we stress that this opinion is limited to legislative attempts to regulate the attorney-client relationship. We are **not** foreclosing the legislature's ability to designate statutory attorney fee awards." (emphasis added) *Id*. at 32 n. 7. The attorney-client relationship is not implicated by an award of fees to the prevailing party under our bad faith statute.

Moreover, the court's footnote referred, with approval, to a 2007 case *Bilanzich v. Lonetti*, 207 UT 26, 160 p.3d 1041. In *Bilanzich*, the court interpreted another legislative enactment broadening the right of a party to recover fees in which the parties' contract was one sided allowing only one party to recover. The

legislature changed that to allow either party to recover. Aside from limiting its holding to "attempts to regulate the attorney client relationship," the Court's reference to *Bilanzich* indicates that the decision does not impact any and all legislative enactments regarding awards of attorneys' fees. *Id.*

Grayeyes misreads the *Injured Workers* holding. It is limited to fee schedules or in instances where the legislature intrudes on the attorney-client relationship only. Awarding fees to the opposing prevailing party, no matter the context, simply does not impact this relationship. The fees are awarded for opposing counsel, not your own.

The footnote is dicta, but it is important to understanding the logic and breadth of the Court's decision. Certain kinds of legislative enactments address the award of attorneys' fees and the Code is replete with many provisions where the prevailing party may be awarded fees. Respectfully, this Court did not intend to hold the totality of those statutes unconstitutional. Such a major shift in that area would have been made manifestly clear. The reference to the *Bilanzich* case was illustrative that the court did not find that kind of legislation in the fee area an impermissible encroachment.

Similarly, §75B-5-825 does not implicate the attorney-client relationship and is not unconstitutional. The operation of this statute, rather than restrict judicial

powers, acknowledges judicial power to award fees in certain circumstances. The court is given discretion, unfettered by legislative directive to award fees where a case is meritless **and** prosecuted in bad faith. Those powers, however, are equitable powers that the court already has. *See Wardley Better Homes & Gardens, supra*. Thus, it would be non-sensical to interpret a statute providing the remedy that a court is already empowered to provide, to be an impermissible restriction on that very same judicial power, much less unconstitutional.

Clearly, Utah Code §75B-5-825 is tantamount to the legislative recognition of a power that the courts already have. As stated in *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 783 (Utah 1994) "courts have exercised that inherent power in several categories of cases." One is where a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id*. The fact is that Laws filed a lawsuit authorized by state, is in the category of persons who are so authorized, presented credible evidence in support, but was not successful because of a statutory interpretation of first impression. To award fees in this context, either by statute or in equity, would be an inexplicable incongruity.

B. The Private Attorney General Doctrine

Preliminarily, although Grayeyes mentions the doctrine, no meaningful arguments or authorities are presented in support of this section of his brief. As such this argument has been waived. Rule 24(a)(8); *State v. Johnson*, 2017 UT 76

(Utah 2017). Grayeyes cannot cure his waiver in a reply. *See Settlers Landing, LLC v. W. Haven Special Serv. Dist*., 2015 UT App 54, 346 P.3d 684, 689 n.8 ("It is well settled that issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court.") (citing *Allen v. Friel,* 2008 UT 56, ¶ 8, 194 P.3d 903).

In the event the court decides this issue on the merits, Laws presents the following in support of his argument that the doctrine has no application in this case.

While Grayeyes has argued that Utah Code §75B-5-825.5 is unconstitutional, Laws agrees with the Utah Attorney General's filing that the constitutional question is **not** determinative. It does not have to be reached because the doctrine simply does not apply.

Utah courts have recognized the doctrine and applied it where appropriate. However, the court in *Stewart* cautioned in footnote 19, "[i]n holding that the private attorney general doctrine applies here, we note the exceptional nature of this case. We further note that any future award of attorney fees under this doctrine will take an equally extraordinary case." *Stewart*, 885 P.2d 759 n. 19.

In *Cloud v. Washington City*, 212 UT App. 348 ¶ 16, 295 p.3d 181, 186-187, the court states, "under this doctrine, a plaintiff can petition to recover attorneys'

fees ‘as a private attorney general’ when the ‘vindication of a strong or societally important public policy’ takes place and the necessary cost in doing so ‘transcend the individual plaintiff’s pecuniary interest to an extent requiring subsidization.’” *Id*.

In addition to *Cloud*, other Utah cases have recognized the doctrine; *Highlands at Jordanelle, LLC v Wasatch County*, 2015 UT App 173, 355P. 3rd 1047, *Specht v. Town of Big Water*, 2015 WL 13386978, (Utah Dist. Ct. Aug. 14, 2015). The classic formulation of the doctrine is found in *Stewart*, where the Courts awarded fees because “…plaintiffs have successfully vindicated an important public policy benefiting all of the ratepayers in the state” by having certain rates set aside as unlawful, among other things. *Stewart*, 885 P.2d 759, 783.

These cited cases, and the many others involving the doctrine, articulate that its purpose is to encourage plaintiffs to file lawsuits that they would not otherwise have a monetary incentive to bring, provided that the lawsuit vindicates an important right affecting a strong public interest. As stated in *Cloud*, “A claim for fees under this doctrine requires, as a threshold matter, that **plaintiff** prevail on the merits of the underlying claim.” (emphasis added) *Cloud*, 2012 UT App. 348 ¶ 16, 295 p.3d 181, 186-187.

Since Grayeyes is **not** a plaintiff, the private attorney general doctrine does not apply. The above cited authorities make it clear that to be awarded fees as a private attorney general, you must be a plaintiff. As a result, his argument fails.

Furthermore, this case did not vindicate any important public right. As the trial court stated, "This is a straightforward election challenge authorized by statute." [R. 2380]. Although Grayeyes repeatedly argued that his defense had broader implications for voting rights and the battle against discrimination, the lower court rejected that analysis. The court reasoned in its June 20, 2019 decision, "this is not a civil rights case" and that "this case is specific to one person and his qualification for office for office based upon residency." [R.2379-80]. Grayeyes defended because he wanted to remain in office. He had a clear personal incentive to defend.

The doctrine potentially applies where, without fee shifting, a case involving important public rights may never be brought because it would not be is economically rational to do so. In this case, the cost of defending the lawsuit did not transcend his personal interest in it i.e., staying in office. In other words, Grayeyes has a strong personal incentive to litigate this case, and he did not need the prospect of an attorneys' fee award to incentivize him to defend himself. In short, Grayeyes defended this case to keep his job, not to advance any public right or interest. Thus, the core purpose of the doctrine is not met in this case.

CONCLUSION

For the foregoing reasons, and those contained in the opening brief, the trial court's finding of laches should be reversed. This court should use the rules of statutory construction to find Laws' petition was timely and Grayeyes failed to establish residency within San Juan County. Additionally, Grayeyes is not entitled to attorneys' fees or costs for the reasons articulated in Section II of this brief.

The Court should deny Grayeyes request for attorneys' fees and any additional relief.

RESPECTFULLY SUBMITTED, this 11th day of May, 2020.

STIRBA, P.C

/s/ Peter Stirba

Peter Stirba
Valerie Wilde

Attorneys for Appellant/Cross - Appellee Kelly Laws

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, the undersigned hereby certifies that according to the word count of the word processing system used to prepare this brief, this brief contains 7,615 words, excluding the title page, table of contents, table of authorities, addendum, and certificates hereto. Neither this brief nor its addendum contain non-public information.

STIRBA, P.C.

/s/ Peter Stirba
Peter Stirba

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of May 2020, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT/CROSS-APPELLEE KELLY LAWS** was electronically served on the following:

Steven C. Boos
MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP
835 East Second Avenue, Suite 123
Durango, CO 81301
Telephone: (970) 247-1755
Email: sboos@mbssllp.com

David Irvine
747 East South Temple
Salt Lake City, UT 84102
Telephone: (801) 579-0802
Email: dirvine@aol.com

Eric P. Swenson
1393 East Butler Avenue
Salt Lake City, UT 84102
Telephone: (801) 521-5674
Email: e.swenson@comcast.net

Alan L. Smith
1169 East 4020 South
Salt Lake City, UT
alankaed@aol.com

In care of:
Tyler R. Green (10660)
Utah Solicitor General
Stanford E. Purser (13440)
Deputy Solicitor General
P.O. Box 140856
Salt Lake City, UT 84114
Phone: (801) 366-0533
Email: notices@atutah.gov

/s/ Peter Stirba