2020

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. : REPLY BRIEF OF APPELLEE/CROSS-APPELLANT, WILLIE GRAYEYES

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

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT, WILLIE GRAYEYES

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

Peter Stirba (Utah Bar No. 3118)
Valerie Wilde (Utah Bar No. 7345)
Stirba, P.C.
215 South State Street, Suite 750
Salt Lake City, Utah 84110
Telephone: (801) 364-8300
E-Mail: vwilde@stirba.com

Counsel for appellant, cross-appellee, Laws

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

Counsel for appellee, cross-appellant, Grayeyes

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

David R. Irvine (Utah Bar No. 1621)
Attorney and Counselor at Law
747 East South Temple Street
Salt Lake City, Utah 84103
Telephone: (801) 579-0802
E-Mail: drirvine@aol.com

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

Counsel for appellee,
cross-appellant, Grayeyes

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions, Statutes, and Rules **Page**

Utah Constitution

Utah Code

Utah Rules of Civil Procedure

Case Law

Other Authorities

ARGUMENT

Grayeyes rebuts Laws's contentions respecting standing, laches, residency, and fees.

Standing

Laws argues that his status as a registered voter, without more, gives him standing – with a constitutional footing under this Court's so-called traditional test -- and a statutory basis in light of §20A-4-403(1)(a). Laws is incorrect.

The Traditional Test. "Judicial power," pursuant to Art. VIII, §1, is "vested" in our state judiciary which – as a core function -- "[d]etermine[s] controversies . . . and questions in litigation[.]" *Timpanogos Planning and Water Management Agency v. Central Utah Water Conservancy District,* 690 P.2d 562, 569 (Utah 1984). The "procedural integrity of judicial adjudications," in turn, depends upon the presence of parties with "sufficient interest" and "sufficient adverseness" to ensure that all "legal and factual issues which must be resolved will be thoroughly explored." *Terracor v. Utah Bd. of State Lands,* 716 P.2d 796, 798 (Utah 1986). Hence, a plaintiff does not have standing under the traditional test absent a personal stake and particularized injury which is redressable in court. *See, e.g., Alpine Homes, Inc. v. City of West Jordan,* 2017 UT 45, ¶34. Indeed, "[s]tanding is a question of subject matter jurisdiction that 'raise[s] fundamental questions regarding a court's basic authority over the dispute.'" *Id.* at ¶2 (citation omitted).

Voters *qua* voters who question the constitutionality of statutes or the eligibility of candidates do not have the kind of personal stake or particularized injury which gives

them standing under this traditional test. *See, Gregory v. Shurtleff,* 2013 UT 18, ¶21 (no standing under traditional test for voters who challenged constitutionality of statute; they do not have "'a personal stake in [a] controversy'") (citation omitted); *Council of Holladay City v. Larkin,* 2004 UT 24, ¶27 (mayor has no standing to question electoral notice); *York v. Unqualified Washington County Elected Officials,* 714 P.2d 679, 680 (Utah 1986) (resident, taxpayer, and property owner has no standing to challenge the qualifications of persons elected as county commissioners; mere allegation of adverse impact, without more, insufficient); *Jenkins v. Swan,* 675 P.2d 1145, 1151 (Utah 1983) (registered voter cannot sue to determine whether educators are eligible to serve as legislators under Art. VI); *Jenkins v. Finlinson,* 607 P.2d 289, 290 (Utah 1980) (plaintiff lacks standing to question eligibility of lawyers to serve as legislators under Art. V and Art. VI).

Laws neither cited, discussed, nor distinguished any of these precedents in his briefing to this Court. He instead relies upon *Anderson v. Celebrezze,* 460 U. S. 780 (1983) and *Gill v. Whitford,* 138 S. Ct. 1916 (2018) to support his argument for standing. But the plaintiffs in these cases, unlike Laws here, asserted a particularized injury to their right to vote and did not rely solely on their status as holders of the franchise. In *Anderson,* the Supreme Court found that a ballot access law for independent political parties placed an actual burden on plaintiffs' rights. Plaintiffs in *Gill* alleged that a state legislative districting plan systematically diluted the voting strength of Democratic voters in violation of the Equal Protection Clause and First Amendment. In contrast, Grayeyes showed in his opening brief that Laws, *qua* voter, neither alleged nor proved a distinct,

palpable harm in connection with Grayeyes's election. Laws attempts belatedly to do this on appeal by claiming that he is injured when Grayeyes, an allegedly ineligible candidate, serves unlawfully in the office of commissioner. But this concern is common to the electorate at large, an abstract injury respecting lawful governance, and nothing more. Identical concerns were raised in *York, Swan*, and *Finlinson,* cited above, and *Ryan,* referenced below. Indeed, *York,* as here, dealt directly with the conditions for election and service of county commissioners. This was not enough, under all of these precedents, to achieve standing under the traditional test.

Statutory Standing. Laws's claim to statutory standing as a registered voter (under §20A-4-403(1)(a)) also is unpersuasive. Standing rules are derived from Utah's jurisprudence respecting the separation of powers. *E.g., Brown v. Division of Water Rights,* 2010 UT 14, ¶12. As such, they are designed to ensure "the procedural integrity of judicial adjudications[,]" *Terracor v. Utah Bd. of State Lands,* 716 P.2d at 798, when courts perform their core function of resolving controversies, *Timpanogos Planning and Water Management Agency v. Central Utah Water Conservancy District,* 690 P.2d 562 at 569. Courts may not delegate their core functions to legislative agencies and, therefore, presumably, to legislatures themselves. *E.g., Vega v. Jordan Valley Medical Center, L. P.,* 2019 UT 35, ¶15. To the same effect, the legislature may not enlarge the jurisdiction of courts beyond constitutional bounds, *Brown v. Cox,* 2017 UT 3, ¶¶12-14 -- and this principle logically applies to standing rules which set constitutional limits to the jurisdiction or power of courts in processing disputes, *Terracor v. Utah Bd. of State Lands,* 716 P.2d at 799 ("doctrine of standing limits judicial power" in order to keep the

judicial branch from becoming an "open forum for the resolution of political and ideological disputes about the performance of government[ ]"). (Citations omitted).

These principles respecting the separation of powers have informed this Court's approach to statutory standing. Although there may be outlier cases appearing to take statutes creating standing at face value,[1] for the most part, and more recently, this Court has glossed such statutes with the constitutional criteria of the traditional test. Thus, for example, in the seminal case of *Jenkins v. Swan,* 675 P.2d 1145 (Utah 1983), this Court expressly held that the Utah Declaratory Judgment Statute, by itself, did not confer standing, *id.* at 1148, and, accordingly, applied the traditional test to deny standing to a "citizen, taxpayer, registered voter and parent" -- indistinguishable from the general public – who attacked the eligibility of educators to serve as legislators under Utah's Constitution, *id.* at 1148-1152. *Accord, Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State of Utah,* 2004 UT 32, ¶19; *Lyon v. Bateman,* 228 P.2d 818, 446-447 (Utah 1951).; *D.A.R. v. State of Utah,* 2006 UT App. 114, ¶6.

Other cases – most of which are neither cited nor discussed in Laws's briefing – likewise illustrate this point. *E.g., Haik v. Jones,* 2018 UT 39, ¶¶17-22 ("person aggrieved" standing under §73-3-14 glossed to require compliance with traditional test); *Morra v. Grand County,* 2010 UT 21, ¶¶14-22 ("adversely affected" standing under prior

[1] *See, DOIT, Inc. v. Touche, Ross & Co.,* 926 P.2d 835, 848-849 (Utah 1996). But *DOIT* relied upon *Pike Countryside Annexation v. Vernal City,* 711 P.2d 240, 242 (Utah 1985), and *Pike* dealt with a Local Boundary Commissions Act which conferred standing upon affected entities that were defined to include any entity "whose territory, service delivery or revenue will be directly and significantly affected by a proposed boundary change[.]" This language is or could be construed to be consistent with the traditional test.

version of County Land Use and Development Management Act construed in a manner consistent with traditional test); *Cedar Mountain Envtl., Inc. v. Tooele County,* 2009 UT 48, ¶8 (same); *In re Questar Gas Co.,* 2007 UT 79, ¶¶58-62 & n. 65 (statute expressly grants utility "stockholders" right to challenge PSC order, but stockholders still must prove standing under 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); *Washington County Water Conservancy Dist. v. Morgan,* 2003 UT 58, ¶¶5-10 (special statutory standing provisions respecting water right forfeiture proceedings must be read in light of traditional test: "[m]any statutes are intended to benefit the public generally, yet we do not construe them as conferring enforcement standing on the general public[ ]"); *id.* at ¶¶11-28 ("interested person" and "person aggrieved" standing under §§73-3-7(1) and 73-3-14 glossed to require showing under traditional test); *Salt Lake City v. Property Tax Div.,* 1999 UT 41, ¶¶15-16 (statutes authorizing governmental entities to "sue and be sued" construed to confer standing so long as traditional test was satisfied). *See also, State ex rel. Murdock v. Ryan,* 125 P. 666, 668-669 (Utah 1912) (statutory predecessor to Rule 65B(c)(1) construed to deny standing to citizens and taxpayers who challenged election of school district officers; plaintiffs had no "special interest," meaning "no interest in the subject-matter of the controversy distinct from the general public[ ]").[2]

[2] Laws also argues that he has standing because Art. VIII, §3, gives the legislature power to authorize appeals. This argument is ill-conceived, not only because §20A-4-403(1)(a)

Section 20A-4-403(1)(a) must be given a similar construction. Absent this gloss, the statute might be unconstitutional. *See, e.g., Brown v. Cox,* 2017 UT 3, ¶¶12-14. *Brown* struck down an earlier version of §20A-4-403 which unconstitutionally enlarged the original jurisdiction of this Court. As noted above, similar logic should apply to statutes which confer standing because standing also is integral to this Court's jurisdictional reach. Likewise, as already noted, the traditional test was forged from Art. V and Utah's jurisprudence respecting the separation of powers. The cases cited above insist that, but for a standing rule like the traditional test, the "procedural integrity" of "judicial adjudications," a core function of Utah's courts, may be compromised. They also suggest that standing rules prevent courts from untoward supervision of the executive and legislature – branches of government which ordinarily deal with "political and ideological disputes about the performance of government." *Baird v. State,* 574 P.2d 713, 717 (Utah 1978).

---

does not speak to appellate jurisdiction, but also because it wrongly conflates two branches – adjudicative authority and justiciability concerns -- of subject-matter jurisdiction. What's more and in all events, standing is determined "'as of the time the action is brought,'" *CME v. Tooele County,* 2009 UT 48, ¶10 (citation omitted), and, in addition, may be raised for the first time or at any time (even *sua sponte* by this Court) in conjunction with an appeal, *Gregory v. Shurtleff,* 2013 UT 18, ¶¶11 and 20. Hence, "[a]n appellant whose standing is challenged must show not only that 'he or she had standing under the traditional test in the original proceeding before the district court,' but also 'generally must show both that he or she was a party or privy to the action below and that he or she is aggrieved by that court's judgment.'" *Brand v. Paul,* 2017 UT App 196, ¶7, citing *Chen v. Stewart,* 2005 UT 68, ¶50. *See also, Society of Prof. Journalists v. Bullock,* 743 P.2d 1166, 1171 (Utah 1987) (same). Indeed, these holdings may illustrate the principle that statutory grants of appellate jurisdiction may not "run afoul of any specific constitutional limitation.'" *Brown v. Cox,* 2017 UT 3, ¶13, citing *State v. Taylor,* 664 P.2d 439, 442 (Utah 1983).

This observation seems particularly apt in our case where the legislature, in §§20A-1-801, *et seq.,* has charged the executive with supervision of the eligibility and qualifications of candidates seeking election -- and where the judiciary, exercising its rulemaking authority under Art. VIII, §4, in Rule 65B(c)(1), largely has concurred in that judgment and otherwise has confined standing in such challenges to persons "aggrieved" who can satisfy the traditional test. Section 20A-4-403(1)(a) must be interpreted in a manner not inconsistent with these principles. If that is done, because Laws does not satisfy the traditional test, he lacks standing and his appeal, regardless of merit, must be dismissed.[3]

Laches

Grayeyes's eligibility for county commissioner on the basis of residency was widely discussed and thoroughly aired during the 2018 election cycle – through campaign rhetoric, judicial proceedings, and media coverage. Hence, when voters, many of whom

[3] Utah does not adhere exactly to standing requirements fashioned from Art. III of the United States Constitution, but the traditional test largely follows these federal rules. And under those rules, Congress may not create standing by statute which transgresses the bounds of judicial authority. *See generally,* Roberts, "Article III Limits on Statutory Standing," 42 DUKE L. J. 1219, 1226-1229 (1993). *See also, Schlesinger v. Reservists Comm. To Stop the War,* 418 U.S. 208, 217-218 (1974) (plaintiffs lacked standing in suit to enforce Art. I. §6, cl. 2, of United States Constitution treating eligibility of legislators to serve; "[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[ ]"); *Wagner v. Cruz,* 2016 WL 1089245 (D. Utah, March 18, 2016) (Judge Parrish), *aff'd,* 662 Fed. Appx. 554 (10th Cir. 2016) (registered voter, without more, lacks standing to challenge eligibility of Ted Cruz as presidential candidate).

were Grayeyes's neighbors at Navajo Mountain, went to the polls on November 5, 2018, it fairly may be said that they not only decided who should be commissioner but also expressed their opinion that Grayeyes is one of them, a resident of San Juan County. This *de facto* referendum on Grayeyes's eligibility to serve as county commissioner – by electors who "traditionally have enjoyed an autonomy usually unreviewable by the courts[,]" *Clegg v. Bennion,* 247 P.2d 614, 616 (Utah 1952) -- should not be overturned for slight reasons – especially where, as here, the petitioner seeking this result has been guilty of laches. Nevertheless, Laws resists Judge Torgerson's laches determination with both factual assertions and legal arguments. All of his assertions and arguments are unavailing.

Factual assertions. Laws responds on the factual front by averring (1) that he only had two options for challenging Grayeyes's residency, one under §20A-9-202(5), and another pursuant to §§20A-4-402, *et seq.* (2) He claims "excuse" for failure to deploy a remedy under §20A-9-202(5) *because the deadline ran out on him*. (3) He further maintains that he was counting on surrogates, his son, the county attorney, Kendall Laws, the county clerk, John David Nielson, and a colleague, Wendy Black, to carry the ball on residency for him until he had to resort in this proceeding to the use of §§20A-4-402, *et seq.* (4) Laws finally maintains that Grayeyes suffered no prejudice from the delay in bringing this proceeding.

These factual assertions are intended to defeat findings in the lower court of undue delay or failure to exercise reasonable diligence under the circumstances of this case. But those findings, unless "clearly erroneous," cannot be overturned, *e.g., In re Adoption of*

Baby B., 2012 UT 35, ¶40, and Laws's mere assertions, noted above, are insufficient to accomplish that task. Indeed, each of his assertions is either flatly wrong or entirely inconsistent with the evidence at trial.

(1) The number of statutory paths which Laws could have taken in order to challenge Grayeyes's residency is largely irrelevant.[4] The important fact is that, whatever the number, he failed to walk down any of them on a timely basis.

(2) Laws missed §20A-9-202(5)'s deadline, but appears to offer this lapse as an excuse rather than what it truly is, an admission against interest, especially in light of Utah's case law which insists that those who wish to raise election challenges must act at the "earliest possible opportunity." *In re Cook,* 882 P.2d 656, 659 (Utah 1994). Indeed, by missing this deadline, the "most important step" in the electoral timeline, *Utah State Democratic Committee v. Monson,* 652 P.2d 890, 893 (Utah 1982), Laws may have been barred from contesting residency altogether. *Cf. Cox v. Laycock,* 2015 UT 20, ¶¶21-24 and 60-66 (missing ten-day deadline for judicial review bars consideration of merits ruling in election contest under §§20A-4-402, *et seq.*).

(3) Contrary to the representations in his reply brief, Laws did not testify (or supply other evidence in support of the argument) that he looked to Nielson, Kendall, and Black to solve the residency problem. This is nothing more than a *post hoc* rationalization for inaction – and an unproven one at that. His testimony at trial suggests that it was an unwillingness to front the legal expense of an election contest, rather than

[4] In reality he had at least five such paths available, not two. These included §§20A-1-801, *et seq.,* 20A-4-402, *et seq.,* 20A-1-404, 20A-9-202(5), and Rule 65B(c)(1).

reliance on others, which more accurately explains his inertia in this matter. ROA at 002051.

What's more, the argument, even if it had been supported with actual evidence, is a *non sequitur*, because the Laws-Nielson-Black effort, which landed in federal court, did not purport to resolve the residency question under state law. In other words, Laws could not have placed any reasonable reliance that his surrogates' efforts would resolve the residency question. Delay in bringing the challenge in his own right, therefore, remained unreasonable. And, in all events, the federal lawsuit was concluded in August, 2018, giving Laws ample pre-election time to challenge Grayeyes's residency. ROA at 002047-002048 and Grayeyes's opening brief at 30-31.

(4) Finally, Judge Torgerson made an explicit finding that Laws's delay worked real prejudice on the electoral system and Democratic Party. This finding is consonant with the kind of prejudice which, according to Utah precedents, matters in laches-related litigation involving elections. *E.g., Peck v. Monson,* 652 P.2d 1325, 1327-1328 (Utah 1982) (Justice Oaks, concurring) (court of equity in election contest "may refuse to protect a private right if its exercise of jurisdiction *would be prejudicial to the public interest*[ ]") (emphasis supplied, citation omitted), adopted in *In re Cook,* 882 P.2d 656 (Utah 1994).

Moreover, Justice Oaks's opinion in *Peck* (which the entire Court followed in *Cook)* treated this prejudice as a self-evident truth (without adverting to any evidence below): Political parties -- and candidates like Grayeyes who are in privity with those parties -- spend dollars, time, and effort during the course of a campaign. These parties,

their candidates, the electorate at large, and the democratic process itself all suffer if these efforts come to naught on account of post-election litigation. The Utah cases also note as implicitly unfair – as a circumstance which is inherently prejudicial to winning candidates – the fact that, in election contests, those guilty of laches will receive an unfair advantage, "two shafts to their bow," as the *Clegg* opinion put it.

In our case, actual evidence was introduced before Judge Torgerson – for example, the legal expense ($324,819.85) which Grayeyes incurred during his fight over the summer of 2018 to get on the ballot and conduct a campaign – in support of the element of prejudice. ROA at 001245-001262. It is obvious that, if Laws had acted, at the earliest possible opportunity, and objected under §20A-9-202(5), forcing everyone concerned to sort the issue of residency at that juncture – giving Grayeyes an opportunity to resolve that issue, by amendment to his declaration of candidacy, as the statute permits, clarifying that, at a minimum, his stopping at the home of his daughter and sister for 80 percent of each year would satisfy whatever statute on residency might be deemed applicable – all of that expense and the ensuing hubbub over these protracted proceedings could have been avoided. If this doesn't deserve the name of prejudice, nothing ever will. On appeal, this evidence respecting prejudice may be referenced to sustain Judge Torgerson's decision. *E.g., Salt Lake City v. Carrera,* 2015 UT 73, ¶6.

Legal arguments. Having nowhere to go on the facts, Laws attempts to circumvent laches with a farrago of claims about (1) equity versus law, (2) statutes of limitation, (3) electoral challenges based on eligibility as opposed to qualifications, and (4) "unclean hands." All of these arguments fail.

(1) Laws says that laches only applies in equitable proceedings and that election contests are legal not equitable in character, citing *Harries v. McCrea,* 219 P. 533 (Utah 1923). But *Harries* was rendered obsolete by the judicial reformation which abolished distinctions between law and equity and permitted our courts, under the rules of procedure, to entertain issues pertaining to both in the same proceeding. *E.g., Borland v. Chandler,* 733 P.2d 144, 146 (Utah 1987). Since then, this Court has noted that election contests are proceedings in equity, *e.g., Ellis v. Swenson,* 2000 UT 101, ¶23, and equitable remedies may be applied in the context of such proceedings, *e.g., Cox v. Laycock,* 2015 UT 20, ¶¶23, 24, 60-66 (issuance of extraordinary writ in election contest under §§20A-4-402, *et seq.,* is exercise of equity power of Utah courts which power is subject to the doctrine of laches). Likewise, Justice Oaks made clear that Utah's judiciary, in election contests, sitting as "courts of equity," may overrule private concerns in deference to the public interest. *Peck v. Monson,* 652 P.2d 1325, 1328 (Utah 1982). Indeed, it could hardly be otherwise when our Declaration of Rights may be read to guarantee fair elections as a form of fundamental right, Art. I, §§27 and 17, and our case law has developed "to assure that elections are operated *equitably* and efficiently[ ]"). *Utah Safe to Learn-Safe to Worship Coalition, Inc. v. State,* 2004 UT 32, ¶34 (emphasis added, citation omitted).

(2) By the same token, Laws insists that laches should be given limited play where, as here, a statute of limitation applies. But case law makes clear that the application of laches turns on the circumstances of each case, *e.g., Estate of Price v. Hodkin,* 2019 UT App 137, ¶18, that the prejudice entailed by undue delay in election

contexts where democratic expectations of citizen voters otherwise might be overturned is especially acute, *e.g., Soules v. Kauaians for Nukolii Campaign Committee,* 849 F.2d 1176, 1180 (9th Cir. 1988), and therefore pre-election resolution of such disputes may be enforced notwithstanding any applicable limitations period, *e.g., Ellis v. Swenson,* 2000 UT 101, ¶23. *See also, Insight Assets, Inc. v. Farias,* 2013 UT 47, ¶18 (laches may apply notwithstanding existence and satisfaction of limitations period); *Veysey v. Nelson,* 2017 UT App 77, ¶7 (same); *Estate of Price v. Hodkin,* 2019 UT App 137, ¶15 (same).

(3) Laws makes the same argument in a different form when he says that the statutory basis for election contests allows for challenges to the eligibility of a candidate pre-election and the qualifications of that same candidate post-election, and that this distinction matters insofar as the timing of a challenge is concerned. Whether this may be an important distinction in some election contests, it makes no difference in ours. Laws focused entirely on what he considered to be the untruth respecting residency on the declaration of candidacy submitted by Grayeyes. All his evidence (the little there was) centered on what Grayeyes said – for durational residency purposes – i.e. pre-election purposes - on that document. Deputy Turk used the coordinates on the declaration to find Grayeyes's homestead. A social worker testified about visiting that home sometime before the election. Laws himself testified about his visit to that home during the campaign. There was not a scintilla of evidence presented concerning the applicable legal standard or related factual circumstances respecting Grayeyes's residence once he was installed in office.

What's more, the relevant statutes – whether addressing pre- or post-election residency requirements for county commissioners – as well as the controlling cases – show that this is a distinction without a difference, especially insofar as the logic of laches is concerned. Sections 17-16-1 and 17-53-202 all frame their residency requirements in terms of "eligibility" for office.[5] Section 17-16-1(1)(b), the only statute which Laws could invoke, treats residency in relation to the year prior to filing a declaration of candidacy. Section 17-53-202's provisions deal with a person's status when assuming office and the year prior, but only in terms of voter registration, not actual residency, and Grayeyes's status as a registered voter went uncontested at the trial before Judge Torgerson.

(4) Laws finally claims that Grayeyes has "unclean hands" and, therefore, cannot raise the defense of laches. Grayeyes's "unclean hands," according to Laws, consists of lying about his residence on his declaration of candidacy. Laws did not raise this argument in the lower court. Nor did he present any evidence that Grayeyes lacked an

[5] This language is in the title of the statutes, but such titles may be used by courts as interpretive tools in understanding legislative intent. *See, e.g., Jenkins v. Percival,* 962 P.2d 796, 800 (Utah 1998). *See also, Clegg v. Bennion,* 247 P.2d 614, 616 (Utah 1952) (candidate "disqualified" for want of residency in legislative district: "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 [ ]") (emphasis and elisions added).

honest belief that the GPS coordinates which he marked on his declaration of candidacy were in fact his legal residence. Judge Torgerson made no finding of fact on this point. Laws therefore has waived any "unclean hands" opposition to the doctrine of laches, and it cannot be raised for the first time on this appeal. *E.g., Meyer v. Deluke,* 457 P.2d 966, 969 (Utah 1969).

Residency

Grayeyes is 74 years old and has lived his entire life on Paiute Mesa, Navajo Mountain, San Juan County. The evidence establishing Grayeyes's residency at this place was overwhelming. He has a homestead on Paiute Mesa, Navajo Mountain. He runs cattle there, and, indeed, his permit to run cattle, under the regulatory requirements of the Navajo Nation, signifies his right to "ownership" of that very homestead. Acquaintances and family know that this is his homestead; they have paid him visits there, held family celebrations there, and branded the family cattle at that spot. His extended family, the Grayeyes clan, too numerous to count, lives in close proximity, spread over the same area. For upwards of 80 percent of each year, as an Elder and elderly gentleman, he stays with a daughter and a sister who have homes near that location. He works nearby as a chapter official and school board member in the Navajo Nation. For approximately 30 years, he has been a registered voter and has voted in that precinct, a fact which, under the statute relied upon by Laws in our case, creates a

presumption of residency which may be rebutted only through clear and convincing evidence.[6]

This evidence is sufficient to satisfy the durational residency requirement found at §17-16-1(1)(b), even if that statute's reference to "residency" must be understood in relation to the "fixed habitation" and "single location" language of §20A-2-105(1)(a). This was demonstrated with copious citations to the ROA, at pages 49 to 60 of our opening brief.[7]

---

[6] The factual statements in this paragraph are supported by citations to the ROA in our opening brief. Laws did not carry his burden of persuasion, under this Court's marshaling doctrine or otherwise, in contesting these facts. *See, State v. Nielsen,* 2014 UT 10, ¶¶41-42.

[7] Laws's rebuttal of this showing was thin to non-existent. It consisted of irrelevant or inconclusive testimony from four witnesses who, on approximately five different days, visited the home in question when Grayeyes was absent. But each of the visits occurred outside §17-16-1(1)(b)'s temporal orbit and signified nothing more than the possibility that Grayeyes, on those occasions, was avoiding a visit from home teachers or attending a meeting of the local grazing committee.

One witness, Mr. Bitsinnie, referenced a dispute between Grayeyes and his nephew, Harrison Ross, over ownership of the home, but no foundation was laid concerning the property laws which are peculiar to Native Americans on the Navajo Reservation, and, on cross-examination, Bitsinnie admitted that he had nothing more than hearsay information respecting whatever controversy actually may have existed. Grayeyes's daughters, on the other hand, testified affirmatively that Ross was a squatter who had no claim to the family home and that their father was giving him a wide berth in order to avoid any appearance that he was using his official position as a chapter representative for personal leverage in the resolution of that situation.

Indeed, by offering Bitsinnie as a witness, Laws reinforced the fact of Grayeyes's residency under §§17-1-16(1)(b) and 20A-2-105(1)(a). The very existence of this putative controversy with a close relative over a homestead location at Navajo Mountain is relevant to show Grayeyes's presence as a stakeholder in the county. And his daughters' testimony -- that Grayeyes did not press the issue to the point of litigation in order to avoid the appearance that he was taking advantage of an official position as

Laws's reply brief does not gainsay the fact that Grayeyes lived somewhere in San Juan County during the time necessary for durational residency.[8] But he appears to insist that this isn't good enough. Laws apparently argues that, in order to achieve durational residency under §17-16-1-(1)(b), Grayeyes, not only had to live in a fixed habitation in a single location within the meaning of §20A-2-105(1)(a), but also that this principal place of residence must be identical with the GPS coordinates which Grayeyes marked on his declaration of candidacy when it was filed pursuant to chapter 9 of title 20A. However, both of Laws's propositions in this regard are wrong.

Durational residency requirements under §17-16-1(1)(b) aren't tied to the voter residency language – a "principal place of residency" in a fixed habitation in a single location – of §20A-2-105(1)(a). Section 20A-2-105(2) makes this clear by providing that

---

chapter representative -- highlights Grayeyes's sensitivity to local opinion. A person without close contact and enduring ties at Navajo Mountain, somebody with living arrangements which are geographically remote to that region, would care less about his neighbor's sensibilities in this regard. In addition, Grayeyes's caution -- to ensure that a property dispute didn't become a breach of the peace and to guarantee that ethical governance under tribal law took precedence over personal interests -- show his subjection to legal rules in a local community, a factor which this Court has identified as significant in determinations of residency. *See, Dodge v. Evans,* 716 P.2d 270, 274 (Utah 1985).

Nevertheless, Laws's reply brief states repeatedly that Harrison Ross "owned" the Grayeyes homestead. There is no evidence supporting this assertion and Judge Torgerson did not make any finding to this effect. Ross's occasional, interloping occupancy of the Grayeyes homestead is not proof of ownership, and any dispute over either ownership or occupancy demonstrates Grayeyes's *bona fide* claim to that homestead and confirms his intention of keeping it.

[8] Laws apparently has abandoned the fiction that Grayeyes lived in a mobile home in Page, Arizona.

the single location/fixed habitation language of §20A-2-105(1)(a) applies only in title 20A and not in title 17, a result which is reinforced by this Court's reasoning in *Pugh v. Draper City,* 2005 UT 12, ¶9 (election law provisions of title 20A do not apply to election related statutes in title 10).[9]

In addition, candidates for the office of commissioner must meet four eligibility requirements. Three of the four, §§17-53-202(1), 17-53-202(2), and 17-16-1(1)(c), are based upon voter registration (which, in Grayeyes's case, was undisputed), while the fourth, §17-16-1(1)(b), speaks in terms of residency generally. Reading §17-16-1(1)(b) in terms of voter registration under §20A-2-105 would render §17-16-1(1)(b) superfluous, an interpretation which Utah's cases tell us to avoid wherever possible. *E.g., J. Pochynok Co., Inc. v. Smedsrud,* 2005 UT 39, ¶15 ("'statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and . . . interpretations are to be avoided which render some part of a provision nonsensical or absurd[ ]'"), quoting from *Millett v. Clark Clinic Corp.,* 609 P.2d 934, 936 (Utah 1980).

Finally, because the residency requirements for county commissioners and the principal place of residence language in the voter registration statute serve entirely distinct purposes, they should not be conflated. *See,* e.*g., Utah Department of Transportation v. Ivers,* 2009 UT 56, ¶22 (goal of statutory interpretation is to give effect to legislative intent in light of the purpose the statute was meant to achieve). Durational

[9] Nor can this construction of §17-16-1(1)(b) be harmonized with §17-16-1(2), which invokes the voter registration residency statute *only* for purposes of determining when a commissioner, *after* election, *moves,* thereby creating a vacancy in that office.

residency requirements like §17-16-1(1)(b) are purposed to ensure that voters will have time to become acquainted with candidates for office and that candidates for office will have time to understand the minds of their constituents. *E.g.,* Note, "Durational Residence Requirements for Candidates," 40 U. CHI. L. REV. 357, 357 (1973). Residency provisions for purposes of voter registration enable county clerks to prepare official roles on a precinct by precinct basis, §§20A-2-101(1)(d), 20A-2-102, 20A-3a-102, 20A-5-401, 20A-5-204, 20A-5-205, 20A-5-206, thereby facilitating ballot preparation, as well as cross-checking and counting at polling locations, §§20A-5-405, 20A-3a-203, 20A-3a-205, 20A-5-605. A durational residency requirement does not care where a candidate may live in a county, so long as that candidate lives somewhere in that county. A voter on the other hand must live in his precinct in order properly to facilitate the mechanics of an election.[10]

But, as noted above, this commonsense construction of the statutory requirements does not appear to satisfy Laws. He is obsessed with the GPS coordinates *which Grayeyes listed on the declaration of candidacy* and maintains that, absent *proof* Grayeyes *owned* a physical habitat at this very location, *identical with the marks placed on this particular document,* he cannot be deemed a resident for purposes of §17-16-1(1)(b).[11] This view is misguided for at least three reasons.

[10] This same distinction has figured in constitutional analyses which have sustained longer durational residency requirements for candidates but shortened those for voters. *See generally,* Mazo, "Residency and Democracy: Durational Residency Requirements From the Framers to the Present," 43 FLA. STATE U. L. REV. 611 (2017).

[11] There are no street addresses at Navajo Mountain and the Navajo Reservation.

First, Grayeyes doesn't have to "prove" anything. Because Grayeyes is registered to vote at that location, *the statute which Laws invokes* creates a presumption that Grayeyes has his principal place of residence there. It is Laws's burden of persuasion to show otherwise by clear and convincing evidence, something he failed to do in the lower court. §20A-2-105(7).

Second, Grayeyes doesn't have to "own" that principal place of residence. By implying as much, Laws comes close to arguing for a violation of Art. IV, §7, which eliminates the ownership of property as a qualification to vote or otherwise participate in the electoral process. *The statute which Laws invokes* treats the ownership of realty as but one of many factors to be weighed in determining residency for *voting* purposes. §20A-2-105(4)(g). Residency for voting purposes, in states with statutes not unlike §20A-2-105, can be any fixed location: "Thus, a hotel, shelter for the homeless, or even a park bench will be sufficient." *Fischer v. Stout,* 741 P.2d 217, 221 (Alaska 1987), citing *Pitts v. Black,* 608 F.Supp. 696 (S.D.N.Y. 1984) and *Collier v. Menzel,* 221 Cal. Rptr. 110 (Cal. 1985).

Third, Utah's elections code doesn't say that residency for purposes of §17-16-1(1)(b) must be identical with the address given on a declaration of candidacy under chapter 9 of title 20A, and, indeed, any statement to that effect would collide with this Court's holding in *Pugh.* Likewise, a requirement that these addresses remain constant throughout an election cycle could not be squared with §20A-3-303.3(7) which allows Grayeyes *qua* voter to change precincts – within the same county – so long as he accomplishes this change within 30 days preceding a particular election, §§20A-2-

102.5(b) and 20A-2-101(1)(b). In short, in Laws's view, once a candidate filed his declaration, he could not change addresses within the same county until after the election – even though this restriction on movement nowhere is articulated in the elections code – runs counter to the statutes cited immediately above -- would actually defeat the purpose of durational residency requirements to give candidates wider acquaintance with voters county-wide -- and might offend the right to travel which has been tied to voting protection under the Due Process Clause of the Fourteenth Amendment. *E.g., Dunn v. Blumstein,* 405 U.S. 330, 338-342 (1972).

If we look beyond Laws's red herring, it is easy to see that Grayeyes had the requisite residency in San Juan County. At a minimum, Grayeyes lived with a daughter and a sister, in physical habitats with fixed coordinates in the same precinct at Navajo Mountain, for 80 percent of the time contemplated under the statute – and, to the extent necessary, he could amend his voter registration or candidacy declaration to reflect that circumstance[12] – or, as in other states, be deemed to have "elected" one of these locations (as among the several stopping places he used in San Juan County over the years) as a "principal place of residence."[13] Either scenario fits well with the facts established in the

[12] This possibility specifically is contemplated in §20A-9-202(5), and, had Laws objected to Grayeyes's declaration of candidacy on a timely basis, recourse to that statutory option might have saved everybody from this debacle of a contest.

[13] This procedure, which has been adopted in New York, is discussed in *Wit v. Berman,* 306 F.3d 1256 (2d Cir. 2002): "This pragmatic approach lessens the burdens on registrars, who in most cases need only verify an address, and on people like appellants, who otherwise might be turned down at both places and have to go to court in order to be able to vote anywhere." *Id.* at 1262. *See also, Wilkie v. Delaware County Bd. of Elections,* 865 N.Y.S.2d 739, 741 (N.Y. Sup. Ct., App. Div., 3d Dept., 2008) (voter may

lower court, and Judge Torgerson's ruling, fairly read, appears to adopt something like this application of the relevant statutes to the circumstances of our case.

Fees

Bad Faith Doctrine. Invoking §78B-5-825, Judge Torgerson held that a finding of some merit, standing alone, was dispositive on this point. But *Stewart v. Utah Public Service Commission,* 885 P.2d 759, 782 (Utah 1994) required Judge Torgerson to consider a wide range of equitable factors – oppression, vexatious stubbornness, spite, wantonness – itemized with the disjunctive "or" – in assessing whether Grayeyes should be allowed fees under the bad faith doctrine. The cases cited by Laws, including the dicta in *Injured Workers Association of Utah v. State,* 2016 UT 21, ¶34 n. 7, reflect rather than oppose this approach. The Court, in footnote 7, does not "foreclose" the legislature from designating "statutory attorney fee awards." But this is nothing more than what this Court, under the judge-made American Rule, always has allowed pursuant to its inherent power. Indeed, judicial supremacy over fee awards is implicit in the phrasing, "does not foreclose." Footnote 7 may permit statutory fee awards, through judicial grace, but it does not authorize the legislature, in §78B-5-825 or elsewhere, to overrule or curtail equitable fee doctrines arising from the inherent power of this Court. This case accordingly should be remanded so that all facts, including those bearing upon oppression, vexation, spite,

---

have two residences and choose one for election purposes so long as he has "legitimate, significant and continuing attachments" to that location) (internal quotation marks and citation omitted).

and wantonness, as well as merit, may be considered before determining whether an award of fees under the bad faith doctrine is appropriate.

Private Attorney General Doctrine (PAGD). Judge Torgerson deferred to §78B-5-825.5 and held that he could not award fees under the PAGD. Because he refused to cross this statutory threshold, anything said about the merits of Grayeyes's application for attorney fees was *obiter dicta* and, moreover, in all events, went unsupported in a record which, because of the pre-emptive effect of the constitutional bar, had not been developed. There was no point, after all, in rendering an advisory opinion on the merits of a claim that §78B-5-825.5 – which he upheld as constitutional – clearly extinguished. This reading of Judge Torgerson's ruling is confirmed by the fact that, had he truly and fully weighed the non-constitutional merits of the claim itself, he must have sustained it in view of compelling precedents where public interest fees are awarded in election contests involving the right to vote and the fundamental right of San Juan County's citizens to elect a candidate of their choice. *E.g., Utahns for Better Dental Health-Davis, Inc. v. Davis County Clerk,* 2007 UT 97, ¶¶9-10.[14] What's more, Laws's argument, raised for the first time on this appeal, that only petitioners and not respondents are entitled to fee awards under the PAGD, an argument unsupported by logic and contradicted by the

[14] The public interest aspects of candidate selection, election outcomes, and rights to vote in view of residency requirements are so obvious that some jurisdictions, such as Alaska, have codified variations of the PAGD in their rules of court. *See, e.g., Dansereau v. Ulmer,* 955 P.2d 916 (Alaska 1998) (gubernatorial contest), *Hunsicker v. Thompson,* 717 P.2d 358 (Alaska 1986) (school board election), *Lake & Peninsula Borough v. Oberlatz,* 329 P.3d 214 (Alaska 2014) (voter residency challenge).

facts of Utah's leading case, would have been addressed.[15] The upshot is that Grayeyes has shown that §78B-5-825.5 is unconstitutional, and has not waived argument about the application of the PAGD on this appeal because the merits of that claim were not addressed sufficiently in the lower court. The fee ruling, therefore, should be reversed and the case remanded so that Judge Torgerson, in the first instance, and free from constitutional uncertainty, may determine whether the PAGD properly may be applied to Grayeyes's application for attorney fees.

CONCLUSION

Grayeyes respectfully requests that Laws's appeal be denied and that Grayeyes's cross-appeal be granted with a remand to Judge Torgerson for further proceedings in connection with the application for attorney fees.

Dated this 11th day of July, 2020.

/ 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 Willie Grayeyes, as appellee and cross-appellant

[15] In *Stewart,* a utility petitioned for a rate increase. The ratepayers (who obtained the PAGD award) responded to that petition and ultimately prevailed.

CERTIFICATE OF COMPLIANCE

In accordance with Utah Rule of Appellate Procedure 24(a)(11), the undersigned certifies that the foregoing Reply Brief of Appellee/Cross-Appellant, Willie Grayeyes, complies with Utah Rule of Appellate Procedure 24(g)(1), 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 6,967 words, and in that no non-public information as defined in Utah Rule of Appellate Procedure 21 is contained in the Brief.

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

Attorney for appellee, cross-
Appellant, Grayeyes

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of March, 2020, after submitting the foregoing Reply 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 at Stirba, P.C., 215 South State Street, Suite 750, Salt Lake City, Utah 84110-0810, peter@stirba.com, as counsel for Kelly Laws, as appellant and cross-appellee.

/ s / Alan L. Smith

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

Attorney for appellee, cross-Appellant, Grayeyes