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JOHN NICKELSON	*	NO. 647419 DIV. B
	*	
VERSUS	*	FIRST JUDICIAL DISTRICT COURT
	*	
HENRY WHITEHORN AND R. KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS LOUISIANA SECRETARY OF STATE	*	CADDO PARISH
	*	STATE OF LOUISIANA
	*	

POST-TRIAL BRIEF OF HENRY WHITEHORN, SR.

NOW INTO COURT, through undersigned counsel, comes Sheriff-Elect Henry L. Whitehorn, Sr., who hereby submits this brief in accordance with the Court's order at the conclusion of the November 30, 2023 trial.

I. PRELIMINARY STATEMENT

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In this contentious and parish-wide election that has drawn national attention, Sheriff-Elect Henry L. Whitehorn, Sr. ("Col. Whitehorn")[1] was carefully determined as having won the vote, and the corresponding office, as Sheriff for the Parish of Caddo, Louisiana. One of the two candidates, John Nickelson ("Mr. Nickelson"), requested a recount. A second count was thereby conducted under the careful and watchful observance by attorneys and agents for Mr. Nickelson (and the successful candidate Col. Whitehorn). Col. Whitehorn won the vote a second time.

Elections should not be decided by the judiciary. Louisiana courts have made it clear that the results of an election are to be disturbed only under extraordinary circumstances where a plaintiff introduces compelling evidence that is "sufficient to change the result in the election…" *See* La. Rev. Stat.. § 18:1432(A)(1) (emphasis added).

II. STATEMENT OF FACTS

Col. Whitehorn won the runoff election by a majority vote. He then won the recount, and the Board of Election Supervisors certified the results of the election. Mr. Nickelson, the plaintiff, did not produce any evidence that the votes cast for Sheriff were inaccurately recorded, nor did he produce evidence that, by the fourth day prior to the election, he had lodged a challenge to any absentee votes or voter qualifications. No one—not the Caddo Parish Clerk of Court, Louisiana Secretary of State Commissioner of Elections, or members of the Caddo Parish Board of Election

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[1] Henry L. Whitehorn, Sr. served as Deputy Secretary for Public Safety Services and the Louisiana State Police Superintendent from 2004 through 2007, when he retired after twenty-nine years of service with the agency.

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Supervisors—could provide any evidence suggesting that Mr. Nickelson <u>even attempted to challenge</u> an absentee ballot prior to or during the election. Rather, Mr. Nickelson chose to wait and see if he won the election. Only after he lost the vote—twice—has he challenged the process.

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Mr. Nickelson's persistent reliance on the thesis that two electors (identified as "M.F.G." and "E.M.K.") each voted twice proves nothing: Mr. Nickelson intentionally declined to call either of these two electors to even establish that they voted in the election for Sheriff. Mr. Nickelson's <u>failure to call either of these two voters to even testify to confirm that they voted in the Sheriff's election</u> warrants an adverse presumption.[2] It was readily apparent to those in the courtroom who observed the November 30, 2023 trial that Mr. Nickelson did not call these two voters to testify because it is unlikely that they voted for Col. Whitehorn. Each is registered as a Republican—and given the dynamics of this runoff election, the likely recipient of their votes is manifest.[3] Restated, and setting aside the consideration that Mr. Nickelson failed to produce testimony of which candidate these electors voted for, he patently <u>failed to produce any evidence that they **even voted in the contest for Sheriff**</u>. Notably, the November 27, 2023 recount involved 120 (of 500) adjudicated ballots omitting a vote for either candidate for Sheriff. At least some electors voting in the runoff did <u>not</u> vote for <u>either</u> candidate for Sheriff.

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Mr. Nickelson's evidence with respect to at least one of these two events is, at best, conflicted: Mr. Nickelson attached to his Petition the Notation of Irregularities for Precinct 109. This document, introduced into evidence at trial as Exhibit "Whitehorn 1,"[4] confirms that "ROV ... will pull [M.F.G.'s] absentee mail-in ballot." Mr. Nickelson's rebuttal testimony was, at best, speculative and argumentative. The best evidence of what happened with respect to the ballot of M.F.G. is reflected in the Notation of Irregularities.[5]

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[2] "An adverse presumption exists when a party having control of a favorable witness fails to call him or her to testify, even though the presumption is rebuttable and is tempered by the fact that a party need only put on enough evidence to prove the case." *Driscoll v. Stucker*, 04-0589 (La. 1/19/05); 893 So.2d 32 (citing *Safety Ass'n of Timbermen Self Insurers Fund v. Malone Lumber, Inc.*, 34,646 (La. App. 2 Cir. 6/20/01), 793 So.2d 218, *writ den.*, 01-2557 (La.12/07/01), 803 So.2d 973). "This adverse presumption is referred to as the 'uncalled witness' rule and applies 'when "a party has the power to produce witnesses whose testimony would elucidate the transaction or occurrence" and fails to call such witnesses.'" *Id.* (quoting 19 FRANK L. MARAIST, LOUISIANA CIVIL LAW TREATISE: EVIDENCE AND PROOF, § 4.3 (1999)). ". . .[T]his rule remains vital, especially in cases, such as this one, in which a witness with peculiar knowledge of the material facts is not called to testify at trial." *Id.*

[3] *See* Exh. "A-2" hereto.

[4] *See* Exh. "A-1" hereto.

[5] *See id.* Notably, there were numerous <u>other</u> runoff races on the November 18, 2023 ballot, and not all electors voted in <u>all</u> contests.

Mr. Nickelson purports to indict the quality of the work provided by the Board of Election Supervisors during the course of the November 18, 2023 election. Yet, again, throughout his effort at cataloging these "improprieties," he does not establish, nor did he allege in his 80-page Petition, that any of these events were "sufficient to change the result had they not occurred."[6]

III. LAW AND ARGUMENT

The laws controlling the integrity of elections and the narrow standard for overturing the election results are clear, lucid, and unambiguous. These controlling statutes are not aspirational. These laws are not guides to encourage fair play. The statutory law is controlling and not subject to more than one reasonable interpretation.

A. Mr. Nickelson did not challenge absentee ballots or voter qualifications by the fourth day prior to the election or election day, as required under La. Rev. Stat. § 18:1315.

La. Rev. Stat. § 18:1315 governs the "[c]hallenge of absentee by mail or early voting ballot[s]" and unequivocally requires any such challenge to be made either by the "fourth day before the election for which the ballot is challenged" or, for certain limited challenges, "on election day." This statute provides, in pertinent part, as follows:

> A. (1) A candidate or his representative...**may challenge an absentee by mail or early voting ballot**...by personally filing his written challenge with the registrar **no later than the fourth day before the election for which the ballot is challenged**....
>
> . . . .
>
> B. During the preparation and verification process for the counting of absentee by mail and early voting ballots **before the election**,... or the counting of absentee by mail and early voting ballots **on election day**, any candidate or his representative ... may challenge **an absentee by mail or early voting ballot for cause**[7] ...

It is of paramount importance that no testimony was offered suggesting that Mr. Nickelson complied with this requirement; to the contrary, substantial evidence was presented by the Commissioner of Elections, Board of Election Supervisors, and other governmental officials that such a timely written challenge did not, to their knowledge, occur in this election. The significance of this cannot be overlooked. Had Mr. Nickelson complied with this inviolate requirement at an unsuspicious time, a written challenge would have been offered to the Board of Election Supervisors, allowing the issues raised by Mr. Nickelson in this lawsuit to be resolved before the

[6] *See* La. Rev. Stat. § 18:1432(A)(1).
[7] *See* La. Rev. Stat. § 18:1432(A)(1) (emphasis added).

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election results were announced. Indeed, the stated purpose of La. Rev. Stat. § 18:1313.1(E), according to the uncontradicted trial testimony, is to provide to candidates, <u>at a time when the issue could have been resolved</u>, an opportunity to address challenges <u>before the election</u>, rather than as a subsequent judicial challenge.

La. Rev. Stat. § 18:1313.1(E) provides as follows:

> <u>Candidates, their representatives, and qualified electors may be present during the preparation and verification process for the counting and tabulation of absentee by mail and early voting ballots **before the election and** the counting and tabulation of absentee by mail and early voting ballots **on election day**</u>. . . .[8]

As confirmed by the compelling and uncontroverted trial testimony of Mr. R.J. Johnson, a four-year member of the Caddo Parish Board of Election Supervisors, Mr. Nickelson chose not to avail himself of this opportunity, either personally or through a representative, to be present "during the preparation and verification process for the counting and tabulation of absentee by mail and early voting ballots before the election" or "on election day." Mr. Johnson's <u>unchallenged</u> testimony also confirmed that the dates and times of "the preparation and verification process for the counting and tabulation of absentee by mail and early voting ballots before the election" were publicly posted and that other candidates have recently taken such an opportunity.

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Regardless of whether Mr. Johnson has observed <u>a candidate</u> attend the opening of absentee ballots in a Caddo Parish election, Mr. Johnson unequivocally testified that he observed <u>a representative</u> of an October, 2023 Caddo Parish election candidate, John Milkovich, present during the preparation and verification process for the counting and tabulation of absentee by mail and early voting ballots <u>before</u> the election and on election day. As testified by Mr. Johnson, Mr. Milkovich's <u>wife</u> served as his representative and was present for this process.

Mr. Johnson further testified that <u>no challenges</u> were submitted by or on behalf of Mr. Nickelson before the November 18, 2023 election results were certified. In this scenario, La. Rev. Stat. § 18:1434 controls: "<u>**An objection to the qualifications of a voter...which with the exercise of due diligence could have been raised by a challenge of the voter or objections at the polls to the procedure, is deemed waived**</u>."[9]

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[8] La. Rev. Stat. § 18:1313.1(E) (emphasis added).
[9] La. Rev. Stat. § 18:1434 (emphasis added).

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Mr. Nickelson purports to rely on evidence that some electors may have died before the election. Yet, Mr. Nickelson fails to provide any proof, nor is there even an allegation, that these voters predeceased the submission dates of their ballots. Nor is there any evidence that these voters even participated in the contest for Sheriff and certainly no evidence that rejection of these votes would "change the results" of the election.[10] Mr. Nickelson also interjects the argument that four "voters" were previously interdicted. Yet, the Clerk of Court testified that the listing of residents subject to interdiction orders was readily available in the conveyance records and that it would have taken but a few minutes to research these records. As was the situation with the "deceased voters," Mr. Nickelson provided absolutely no evidence that these interdicts voted in the contest and certainly no evidence that the election "results" would have been different. The purpose and reason for La. Rev. Stat. § 18:1565(A) is to require this sort of challenge to votes before the election, when these matters can be addressed and resolved, and not after the election.[11]

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B. Mr. Nickelson's challenge to absentee ballots and voter qualifications is untimely under the Louisiana Election Code and interpretative jurisprudence.

As Louisiana courts of appeal have uniformly recognized, "[a] candidate is **not allowed to await the outcome** of an election **and, if unsuccessful, then object** to voter qualifications."[12]

> . . . [T]**he Election Code requires that challenges** to voter qualifications or to irregularities in the conduct of an election **be made either before or during an election**. *See* La. R.S. 18:1434.4 **The only exception** to this is for objections to voters who should have been removed from the voter registration rolls due to death. *Id.*; La. R.S. 18:173. **The burden is on the candidate to challenge possibly unqualified voters prior to votes being cast** if due diligence would have allowed for the discovery of this information. *See Dawsey v. Boone*, 94–2388 (La. App. 1 Cir. 12/1/94), 647 So.2d 1188, *writ granted*, 94–2938 (La. 12/9/94, 648 So.2d 906); *Davis v. McGlothin*, 524 So.2d 1320 (La. App. 3 Cir.), *writ denied*, 525 So.2d 1046 (La.1988).[13]

Although Col. Whitehorn has more than forty years of qualifying law enforcement experience, he is not an attorney. The challenger, however, is an experienced and, by reputation, skilled and capable attorney. Further, he has successfully sought election to other elected offices

[10] *See* La. Rev. Stat. § 18:1432(A)(1).

[11] *See Lipsey v. Dardenne*, 07-1487 (La. App. 3 Cir. 11/29/07, 5–6); 970 So.2d 1237, 1241–42 (emphasis added) (rejecting as untimely challenges to voter qualifications, including a post-election challenge to the vote of an interdicted voter because the challenger "he failed to file his challenge prior to or on the date of the election" and noting that, with due diligence, the qualifications of the interdicted voter to vote in the election could have been challenged prior to the election), *writ den.*, 2007-2305 (La. 12/14/07); 970 So.2d 539.

[12] *Id.* at 1241–42 (emphasis added) (citing *Dawsey v. Boone*, 94–2388 (La. App. 1 Cir. 12/1/94), 647 So.2d 1188, *writ granted*, 94–2938 (La. 12/9/94, 648 So.2d 906).

[13] *Lipsey*, 970 So.2d at 1241–42 (emphasis added).

and thus has experience with the application of the Title 18 Election Code. Yet, much like the challenger in *Lipsey*, Mr. Nickelson chose to wait and see if he won the vote, and indeed the recount, before complaining about the process. *See Lipsey*, 970 So. 2d at 1242 (rejecting Lipsey's challenge as untimely and finding "prior experience of running for office" as a factor that "should have put Lipsey on notice that voter qualifications should be investigated prior to the election.").

C. Mr. Nickelson has not met the burden of proof required by the Louisiana Election Code to nullify an election.

La. Rev. Stat. § 18:1432(A)(1) provides:

> A. (1) If the trial judge in an action contesting an election determines that: it is impossible to determine the result of election . . . or the number of unqualified voters who were allowed to vote by the election officials was **sufficient to change the result of the election** if they had not been allowed to vote . . . **or would have been sufficient to change the result had they not occurred**, the judge may render a final judgment declaring the election void . . .[14]

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Not to belabor this cardinal requirement, but it is settled law that pre-election "irregularities" are of consequence only if "sufficient to change the result had they not occurred." Mr. Nickelson has introduced no evidence that the result (twice confirmed) would have changed "had they not occurred." The statutory standard for judicially overturning an election result is narrow. Because Mr. Nickelson has introduced no evidence suggesting that the issues of which he complains "would have been sufficient to change the result had they not occurred," he cannot establish that the November 18, 2023 election should be nullified.[15]

D. Mr. Nickelson's Brief conflates his burden of proof with his cause of action.

With respect, the fact that the cited statute creates a cause of action and allows for the filing of a suit certainly does not alter the fundamental principle that the plaintiff bears the burden of proving every material allegation in its petition.[16] Col. Whitehorn certainly does not bear any burden. Col. Whitehorn does not have to prove anything. He won. Twice. Mr. Nickelson has to prove the 43,000-vote election should be thrown out and a second election held next year. And,

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[14] La. Rev. Stat. § 18:1432(A)(1) (emphasis added).

[15] *See id.*

[16] "According to the Louisiana jurisprudence it is clear that in civil matters the plaintiff must carry the burden of proof imposed upon him, a burden that he may discharge by a preponderance of the evidence, which means that viewing the evidence as a whole the existence of a fact is more probable than its nonexistence." § 12.3. Burden of proof, 5 LA. CIV. L. TREATISE, LAW OF OBLIGATIONS § 12.3 (2d ed.) (citing *Bordlee v. Pat's Const. Co., Inc.*, 316 So.2d 16 (La. App. 4 Cir. 1975); *Cay v. State, Dept. of Transp. and Dev.*, 631 So.2d 393 (La. 1994); *Bond v. Allemand*, 632 So.2d 326 (La. App. 1 Cir. 1993), *writ denied*, 637 So.2d 468 (La. 1994)).

Mr. Nickelson has failed to prove that (1) he timely challenged the qualifications for mailed ballots that he had many opportunities to challenge; (2) either M.F.G. or E.M.K. even voted for Sheriff; or (3) that any aspect of his complaint and Petition would have changed the outcome.

E. *Adkins v. Huckabay* involved timely challenges to ballots.

Mr. Nickelson's reliance on *Adkins v. Huckabay* is entirely misplaced, as the decision fully supports Sheriff-Elect Whitehorn's argument that "irregularity" challenges must be timely preserved.[17] Mr. Nickelson contends that *Adkins* mandates the nullification of this election if the number of irregularly cast votes equals or exceeds the margin between the candidates. In so doing, he completely mischaracterizes the holding in *Adkins*. *Adkins* involved challenges to absentee ballots in a runoff election for Sheriff of Red River Parish that were raised by a candidate's representative "[w]hen the parish Board of Election Supervisors **met to begin** tabulating and counting the absentee ballots."[18] Unlike Mr. Nickelson, the unsuccessful Sheriff candidate and plaintiff in *Adkins* had a representative present for the counting of absentee ballots on election day.[19] During the election day tabulation of absentee ballots, Adkins' representative categorically challenged "all ballots not properly executed."[20]

Notably, *Adkins* also included challenges to four ballots that "do not qualify as either in-person or mail-in absentee ballots under the Election Code" because those absentee ballots were impermissibly hand-delivered by the Registrar of Voters to the electors. *See id.* Additionally, one of the members of the Board of Election Supervisors was the wife of defendant Sheriff Huckabay, the winner of the election at issue.[21] Further, during the tabulation of the ballots in *Adkins*, Mrs. Huckabay—the candidate's wife—denied the request of Mr. Adkins's representative to individually review the absentee ballots.[22]

Although the Supreme Court in *Adkins* ultimately concluded that a new election was warranted, that decision did not turn on the mere consideration that the number of "irregular" votes exceeded the margin.[23] Instead, the Court carefully analyzed the issues in light of the foregoing

[17] *See Adkins v. Huckabay*, 99-3605, (La. 2/25/00); 755 So.2d 206, 210-222.
[18] *Adkins*, 755 So.2d at 210-222 (emphasis added).
[19] *See id.* at 208.
[20] *See id.*
[21] *See id.*
[22] *See id.*
[23] *See id.* at 207-226.

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circumstances, including the timely categorical challenge to absentee ballots not meeting the statutory requirements, the participation of the successful candidate's wife as a member of the Board of Election Supervisors, and the hand-delivery of absentee ballots by the Registrar of Voters. *See id.* None of those issues are present in the matter at hand.

The opinion rendered by the Louisiana Court of Appeal, Second Circuit, in *Nugent v. Phelps* two years after the decision of *Adkins* negates the contention that an election must be nullified any time the allegedly irregular votes equal or exceed the margin of victory.[24] *Nugent* involved an election contest brought by "the incumbent Police Chief who lost the election by a margin of four votes," who "asserted numerous irregularities and unlawful activities by defendant, Benji Phelps, and his supporters."[25] In *Nugent*, evidence was presented demonstrating that at least four voters had accepted something of value in exchange for votes and that four vocal supporters of the unsuccessful candidate had been issued subpoenas "ordering them to appear before a grand jury during the week of the election, thus preventing them from campaigning."[26]

Citing *Adkins v. Huckabay* for the proposition that "a party contesting an election no longer must show that 'but for' the irregularity he would have won the election," the *Nugent* court opined:

> **it is the effect of the irregularity on determining the outcome, rather than the fact of an irregularity by itself, that guides us in these matters.** Accordingly, we **conclude that a vote should not be cast out simply because a voter was offered a bribe, or even because a voter accepted something of value for the vote, provided that voter still voted the way he originally intended.** Regardless of criminal implications, **our focus is on whether the alleged activities actually changed the result of the election by changing the vote totals, or at least made the election result impossible to determine.**[27]

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IV. CONCLUSION

The gravamen of Mr. Nickelson's argument is that two voters[28] allegedly voted twice. Not only is there no evidence of the candidates for whom these voters may have cast their votes, but there is also no evidence that they **even voted** for the office of Sheriff. In all events, public records confirm that they are registered Republicans. There is no evidence as to how the consideration of these two alleged irregularities was drawn to the attention of Mr. Nickelson. Yet, what is clear is

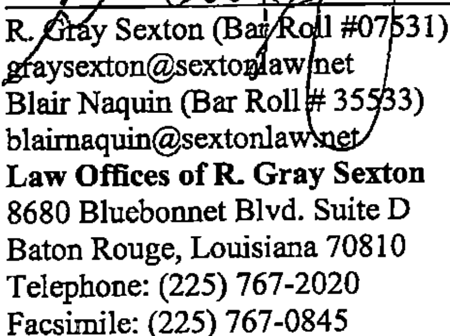
[24] *Nugent v. Phelps*, 36,366, p. 13 (La. App. 2 Cir. 4/23/02); 816 So.2d 349, 357, *writ denied*, 2002-1153 (La. 5/10/02); 815 So.2d 850)).
[25] 816 So. 2d at 351.
[26] *See id.* at 351-356.
[27] *See id.* at 357 (emphasis added)
[28] The evidence regarding M.F.G. is, at best, inconclusive.

that there is **not one scintilla of evidence that these voters even voted in the Sheriff's election**.

Secondly, Mr. Nickelson's criticism of the Board of Election Supervisors would be more palatable had he fulfilled his responsibility to challenge these considerations at an unsuspicious time, when it mattered most, and when something could have been done about these concerns. Yet, what is unassailable is the consideration that **not one** of these irregularities even suggests that the outcome of the election would have been different and certainly do not even purport to be evidence "sufficient to change the result had they not occurred."

In a broader sense, certainly no election for public office should be overturned in the absence of clear and compelling reasons. Yet, for better or worse, this is not a typical election. This is an election for the chief law enforcement officer in the state's third largest parish—a contest that has drawn national attention. The voting was influenced by political and cultural considerations. To overturn this election promises to create tension among the electorate likely leading to diminished confidence in the integrity of the election process. This confidence certainly will not be restored by a second election, next year, for the same office.

Respectfully Submitted:



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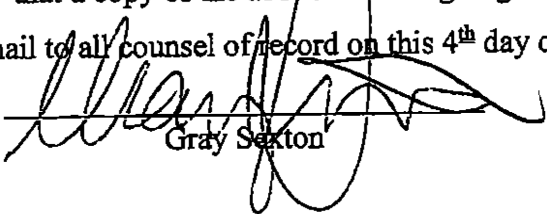
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Exceptions and Opposition has been sent via electronic mail to all counsel of record on this 4th day of December, 2023.



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