# SUPREME COURT OF LOUISIANA

**No. 2023-C-01645**

**JOHN NICKELSON**

**VS.**

**HENRY WHITEHORN AND R. KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS LOUISIANA SECRETARY OF STATE**

*On Writ of Certiorari to the Court of Appeal, Second Circuit, Parish of Caddo*

**WEIMER, C.J.**, dissents from the writ denial, would grant and docket, and assigns reasons.

I vote to grant and docket this significant case for oral argument before a final decision is rendered. A determination of who will serve as the chief law enforcement officer in Caddo parish following an election with a one vote margin of victory (which was re-affirmed after a recount), and a court of appeal decision with a one vote margin, which includes a concurrence, deserves this court's full attention with the litigants appearing before this court to publicly plead their positions in person.[1] This case raises numerous legal questions that this court has not answered, but should. Publicly sorting through legal and factual questions is one of the most valuable attributes of oral argument, which should occur before a final decision is made. The best and last chance to answer any questions raised by the justices is oral argument.[2] Intense study and thorough review are no substitute for the discussion in oral argument.

[1] To provide public access and transparency, this court has live-streamed oral arguments since January 2007, giving citizens easier access to observe Louisiana Supreme Court proceedings. The Louisiana Supreme Court was among the first supreme courts to make this opportunity, which benefits citizens and students, available to the public.

[2] There is no rehearing from a decision in an election case. See La. R.S. 18:1409. There is no rehearing following a writ denial in this court. See La. Supreme Court Rule IX, § 6.

Voting to elect public servants is fundamental and indispensable to our representative form of government.[3] Only under extreme circumstances, timely and adequately proven, should the vote of the people be overturned by a judicial decree. The legal process is best served by a public airing of the issues, not a closed-door determination.

Public consideration has the salutary effect of building trust and confidence in the citizens that all arguments and each side has been heard, particularly in a case which resonates among the public for many different reasons. The Louisiana Constitution recognizes that court proceedings should be open. La. Const. art. 1, § 22. This recognition serves as a check and balance on the judiciary itself by affording citizens the opportunity to observe judicial proceedings.

In election cases, there are strict time limits on when the district court and court of appeal must issue their rulings; thus, the parties are afforded little time to research and prepare their arguments. However, this court does not have a time limitation statutorily imposed, thus, benefitting from time for deliberative decision making, which should include oral argument.

Oral argument is beneficial to clarify matters and helps judges focus on important issues. Oral argument provides an opportunity for judges to communicate with lawyers and ask direct questions that may have arisen after reading the briefs. See SL Wasby, Functions and Importance of Appellate Oral Argument - some views of Lawyers and Federal Judges, Judicature, Vol. 65, Issue 7, pp. 340-353 (February 1982). A report from the American Academy of Appellate Lawyers' Oral Argument Task Force of the American Bar Association found significant benefits from oral argument. Among other benefits, oral

[3] Even judges are elected in Louisiana.

argument: (i) improves the accuracy and quality of appellate decisions and the decision making process itself; (ii) provides the parties with a public manifestation that they have had their day in court; (iii) performs a critical civics function showing appellate courts' role in upholding the rule of law; and (iv) teaches lawyers how appellate judges decide cases. See James C. Martin & Susan M. Freeman, Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!, 19 J. App. Prac. & Proc. 89 (Spring 2018). Judges have reported their initial impression of a case has changed following oral argument in a significant number of cases. See Hon. Joseph W. Hatchett and Robert J. Telfer, III, The Importance of Appellate Oral Argument, 33 Stetson L. Rev. 139 (2003). The late Justice Ruth Bader Ginsburg noted "I have seen few victories snatched at oral argument from a total defeat the judges had anticipated on the basis of the briefs. But I have seen several potential winners become losers in whole or in part because of clarification elicited at argument." The Honorable Ruth Bader Ginsburg, Remarks on Appellate Advocacy, 50 S.C. L. Rev. 567, 570 (1999). The late Chief Justice William H. Rehnquist wrote that, "[i]n a significant minority of the cases in which I have heard oral argument, I have left the bench feeling different about a case than I did when I came on the bench." See David C. Frederick, Supreme Court & Appellate Advocacy, 3d § 1:2 (March 2019). I wholeheartedly agree with these sentiments.

In the absence of oral argument, my current thoughts on the issues involved in this case follow. Our election laws are designed by the legislature to promptly determine which candidate will be elected to serve. While La. R.S. 18:1432(A) does allow a court to set aside an election and order a new election in limited circumstances, the legislature made that process onerous by design so that

elections, once the votes are counted, are not easily or readily overturned. The lower courts, finding inappropriate votes were cast, overturned the results of the election on the basis it was impossible to determine the outcome given the one vote margin of victory. Yet the sole fact that votes were cast inappropriately does not permit a court to set aside the election results. Our legislature, which enacts the laws governing elections and sets forth the public policy related to elections, has enacted specific requirements for challenging votes, including deadlines and necessary proof. The Election Code requires challenges to voter qualifications or to irregularities in the conduct of an election be made either before or during an election. This policy, chosen by the legislature, is designed to prevent a candidate, disappointed in the outcome ***after the votes are tallied***, to complain and then file suit challenging the results. "A candidate is not allowed to await the outcome of an election and, if unsuccessful, then object to voter qualifications." **Lipsey v. Dardenne**, 07-1487, p. 6 (La.App. 3 Cir. 11/29/07), 970 So.2d 1237, 1242. One must affirmatively address issues before the votes are tallied; otherwise, the measured and peaceful transition of authority, which is a hallmark of our system of democracy, can be unduly delayed and interrupted. In this case, the lower courts erred in giving short shrift to these statutory requirements and simply excused Mr. Nickelson from performing the tasks required by law and presenting the necessary proof.[4] The evidence presented demonstrates that Mr. Nickelson failed to comply with these statutory requirements; thus, his challenges to certain votes were waived. Mr. Nickelson merely complains the irregularities "could have" affected the outcome of the election without proof that the

[4] Because legal errors occurred, the factual determinations by the trial court are afforded no deference and the manifest error rule is not applicable. **Latour v. Steamboats, LLC**, 23-0027, p. 6 (La. 10/20/23), 371 So.3d 1026, 1034.

irregularities actually did so. Such a showing is insufficient under the law. Evidence and proof must be of "sterner stuff" to overturn a vote of the people with a judicial decree.

The court of appeal affirmed the district's court's judgment voiding the results of this election based on its finding that six illegal votes should be invalidated, thereby making it impossible to determine the result of the election (given the one vote margin of victory). Four of these votes were cast by persons who were interdicted (three of whom voted in-person by early vote and the fourth who voted by absentee vote). These four interdicted persons clearly should not have been allowed to vote.[5] However, Mr. Nickelson was required to challenge these four votes no later than four days prior to the election. La. R.S. 18:1315(A)(1); La. R.S. 18:565(A)(1).[6] The lower courts did not apply this deadline. The court of appeal found it "too onerous a burden to require a candidate to canvass the public records prior to the election for orders of interdiction," and that due diligence does not require a candidate to do so. **Nickelson v. Whitehorn**, 55,730, p. 16 (La.App 2 Cir. 12/12/23), ___ So.3d ___. Based on the evidence, I must disagree. Mr. Nickelson had access to the names of all early/absentee voters.[7] Likewise, interdiction records were readily available

[5] La. R.S. 18:102(A)(2) provides that "[n]o person shall be permitted to register or vote who is: Interdicted after being judicially declared to be mentally incompetent as a result of a full interdiction proceeding."

[6] La. R.S. 18:1315(A)(1) provides that "[a] candidate ... may challenge an absentee by mail or early voting ballot for the grounds specified in R.S. 18:565(A), by personally filing his written challenge with the registrar no later than the fourth day before the election for which the ballot is challenged. ..." La. R.S. 18:565(A)(1) specifically provides a person not qualified to vote in the election can be challenged.

[7] La. R.S. 18:1311(A)(1) requires the registrar of voters to keep a "list containing the names of all persons who vote by early voting ballot during early voting and of those whose absentee ballots by mail he has received. He shall ensure that the list is available for inspection by members of the public at the principal office of the registrar when the office is open."

and undisputed testimony established that "it does not take long at all" to gather such records. A comparison of interdicted persons against the list of eligible voters, or the list of those who had early voted, would have revealed the incapacity of those persons to vote. Had Mr. Nickelson exercised due diligence to access the resources available to him, the qualifications of these interdicted voters could have been challenged within the statutory time frame mandated by La. R.S. 18:1315(A)(1).[8] The law provides no excuse for failing to follow its clear directives.

[8] Although the court of appeal pretermitted consideration of the challenged absentee votes, Mr. Nickelson's challenge to these votes must fail for the same reasons. With respect to irregularities (lack of signatures and/or witnesses) in the absentee/mail-in ballots, La. R.S. 18:1313(E) provides, in pertinent part, that "[c]andidates ... may be present during the preparation, verification, counting, and tabulation of absentee by mail and early voting ballots." The time period for asserting a challenge to absentee/mail-in votes is set forth in La. R.S. 18:1315(B), which states: "During the preparation and verification process for the counting of absentee by mail and early voting ballots before the election, as applicable, or the counting of absentee by mail and early voting ballots on election day, any candidate ... may challenge an absentee by mail or early voting ballot for cause, other than those grounds specified in R.S. 18:565(A)." Under this statute, challenges to absentee/mail-in votes may be made at two times: (1) during the preparation and verification process for counting the votes or (2) the counting of the votes on election days. Mr. Nickelson did not avail himself of the opportunity to be present at the verification, preparation, or counting process for absentee-by-mail and early voting ballots despite the fact that the date and time of the process was posted.

The lower courts also invalidated votes of two persons who voted twice (one having voted early and the other having voted by mail, but both having voted on the day of the election). Those votes cast on election day were in violation of La. R.S. 18:1305 ("A person who has voted either by absentee by mail ballot or during early voting shall not vote in person at the polls on election day."); however, the objection to those votes should have been made at the polls. Louisiana R.S. 18:1434 provides "[a]n objection to the qualifications of a voter ... or to an irregularity in the conduct of the election, 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." Candidates have access to the names of all persons who vote absentee or by mail, or by early voting. These lists are updated, supplemented and posted, and readily available for inspection. See La. R.S. 18:1311. Notably, La. R.S. 18:1311(E) expressly states: "The commissioners at the polling place shall use the supplemental list ... to ensure that persons who have voted absentee by mail do not vote in person at the polls on election day." Mr. Nickelson was entitled to have poll watchers present at each precinct on election day, who could have called attention to these votes to the commissioners, thereby allowing a challenge at the poll. See La. R.S. 18:435;[9] La. R.S. 18:427(B).[10] The court of appeal found it would have been too burdensome to require Mr. Nickelson to object to these votes on the day of the election because it would have "necessitated his omnipresence at each of the 166 precincts involved." **Nickelson**, 55,730 at 16, ___ So.3d at ___. The court of appeal concluded that to require Mr.

[9] La. R.S. 18:435(A)(1)(a) provides, in part: "Each candidate is entitled to have one watcher at every precinct on election day where the office he seeks is voted on in a primary or general election."

[10] La. R.S. 18:427(B) provides, in part: "A watcher shall be admitted within all parts of the polling place during the election day and the printing of results from the voting machines, and

Nickelson to challenge these illegal votes on the day of the election "would produce an absurd and over burdensome requirement under the law, that would effectively deny him his right to challenge these clearly illegal votes." **Nickelson**, 55,730 at 17, ___ So.3d at ___. Here, too, the court of appeal provided an excuse for Mr. Nickelson's inaction and ignored the statutory requirement that a challenge be made at the polls. Whether the legal requirements surrounding a challenge are burdensome is not the issue. The statute itself was not challenged and must be followed as written unless it produces an absurd result. No evidence was submitted to demonstrate absurdity or to establish the law was overly burdensome. Difficulty in following a clear statutory directive is not an excuse for failing to follow a law, particularly when there was no evidence or proof offered that the law was too burdensome to follow. Mr. Nickelson's failure to follow the mandated procedure of the Election Code to raise concerns regarding double voting during the election results in a waiver of his challenge.

Moreover, even if Mr. Nickelson's challenge to these votes is deemed timely, he did not meet the burden of proof required by the Election Code to nullify an election. La. R.S. 18:1432(A)(1) provides, in relevant part:

> 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 a combination of these factors would have been sufficient to change the result had they not occurred, the judge may render a final judgment declaring the election void ....

shall call any infraction of the law to the attention of the commissioners."

The lower courts found it was impossible to determine the result of the election because it is unknown how the illegal votes were cast. In so ruling, the courts relied on the constitutional guarantee of secretary of these ballots. La. Const. art. XI, § 2.[11] However, the courts failed to recognize that the sanctity and secrecy of one's vote is not protected when one votes when not qualified to do so. See La. C.E. art. 512 ("Every person has a privilege to refuse to disclose the tenor of his vote at a political election conducted by secret ballot ***unless the vote was cast illegally***." (Emphasis added.)). In this case, where some voters were not qualified to vote, and some illegally cast votes, the constitutional guarantee of secrecy protecting legal voters would not have prevented Mr. Nickelson from requiring these voters to divulge for whom they voted. This principle, statutorily enshrined in Article 512, was jurisprudentially recognized over a century ago by this court. See **Gaiennie v. Druilhet**, 143 La. 662, 664, 79 So. 212, 213 (1918). Thus, it was error for the lower courts to find it was impossible to determine the outcome of the election. Mr. Nickelson failed to call any of these voters to testify, nor did he present any other proof that not counting their votes would have changed the result of the election.[12]

Understandably, this case has garnered much public and media attention; however, such attention does not sway this court's ultimate decision. A court must always be mindful of its proper role, which "is not to declare a 'winner' or 'loser,' but to make reasoned, unbiased decisions based on the application of the

[11] La. Const. art. XI, § 2 provides: "In all elections by the people, voting shall be by secret ballot. The legislature shall provide a method for absentee voting. Proxy voting is prohibited. Ballots shall be counted publicly and preserved inviolate as provided by law until any election contests have been settled. In all elections by persons in a representative capacity, voting shall be viva-voce."

[12] There was no constitutional challenge to La. C.E. art. 512, and all laws are presumed constitutional until declared otherwise by a court.

law to the facts before the court. Cases do not arise and are not decided in a vacuum. Each case must be decided on the unique facts presented." **State v. Spell**, 21-00876, p. 1 (La. 5/13/22), 339 So. 3d 1125, 1140 (Weimer, C.J., dissenting).[13] Mr. Nickelson failed to exercise due diligence regarding the challenges lodged in this case. For the court to hold otherwise under these facts would unduly expand the law established by the legislature. Although the requirements for a timely challenge may be burdensome, if election results were easily overturned, election controversies would drag on, impairing finality and interrupting the measured and peaceful transition of authority in our democracy.

[13] The same was quoted in the dissent by Judge Hunter in this case.

The sheriff-elect is entitled to a four-year term, which he should not be required to earn again. Without timely challenges and proper proof by the challenger, Sheriff-elect Whitehorn received the majority of the votes of the citizens who saw fit to go to the polls to vote in this election and he is entitled to begin the transition to serve the citizens of Caddo Parish without delay. Ultimately, the citizens will have the opportunity to go back to the polls and be the judge of this officeholder in the next election, should he seek reelection at the end of his term. There is no evidence this election was marked by nefarious activity by either side. Mistakes were made by election officials,[14] but delay by the challenger and a lack of evidence that the result of the election would have been different absent the improperly cast votes, means the one-vote margin is the final result and must stand. There should be no concerns about the fairness or integrity of the election process on this record because objections by the challenger came too late and were unsupported by sufficient proof introduced by the challenger to establish any of the contested voters actually and factually impacted the outcome of the election.

Without the benefit or oral argument, my opinion is that the lower courts should be reversed. Obviously, my position could be altered if the case was granted and docketed with the parties being provided an opportunity to publically discuss the issues at oral argument.[15] Therefore, I respectfully dissent from the writ denial.

[14] While in no way suggesting this occurred, election officials could conspire to "bake in" errors to reverse the will of the electorate after the results are determined. This example represents another reason the legislature developed the policy enshrined in the Election Code that challenges must be made before the votes are counted. Any legal errors by election officials can be rectified in court by a timely filed objection by the challenger, which did not occur.

[15] Since 2002, the number of filings with the Supreme Court has fallen substantially, reflecting a nationwide trend, and there have been fewer cases orally argued. There was ample time to schedule this matter for oral argument between the time it was filed on December 14, 2023, and

the date this matter is rendered and becomes final.