SUPREME COURT OF LOUISIANA

DOCKET NUMBER ____________

NEIL S. KAVANAGH

Plaintiff/Respondent

VERSUS

ROY EUGENE HEBRON

Defendant/Applicant

APPLICATION FOR SUPERVISORY WRIT
ON BEHALF OF ROY EUGENE HEBRON

COURT OF APPEAL
THIRD CIRCUIT
STATE OF LOUISIANA
CIVIL DOCKET NO. CA 19-28

RELATIVE TO A JUDGMENT
SIGNED ON DECEMBER 21, 2018
BY THE 9TH JUDICIAL DISTRICT COURT
PARISH OF RAPIDES
CIVIL SUIT NO. 263,744, DIV. "A"
HONORABLE MONIQUE RAULS, PRESIDING

CIVIL PROCEEDING

CHARLES ELLIOTT & ASSOCIATES, LLC
Charles D. Elliott (#22355)
720 Murray Street
Alexandria, LA 71301
Telephone: (318) 704-6511
Fax: (318) 704-6523

ATTORNEYS FOR APPLICANT
ROY EUGENE HEBRON

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO.________________________

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

NEIL S. KAVANAGH

VS.

ROY EUGENE HEBRON

Applicant: Roy Eugene Hebron
Have there been any other filings in this Court in this matter? ☐ Yes ☑ No

Are you seeking a Stay Order? NO
Priority Treatment? NO
If so you MUST complete & attach a Priority Form

LEAD COUNSEL/PRO SE LITIGANT INFORMATION

APPLICANT:	RESPONDENT:
Name: Charles D. Elliott	Name: B. Gene Taylor, III
Address: 720 Murray Street, Alexandria, LA 71301	Address: P.O. Box 6118, Alexandria, LA 71307-6118
PhoneNo. 318-704-6511 Bar Roll No. 22355	PhoneNo. 318-445-6471 Bar Roll No. 33407

Pleading being filed: ☐ In proper person, ☐ In Forma Pauperis

Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

☑ Civil, ☐ Criminal, ☐ R.S. 46:1844 protection, ☐ Bar, ☐ Civil Juvenile, ☐ Criminal Juvenile, ☐ Other

☐ CINC, ☐ Termination, ☐ Surrender, ☐ Adoption, ☐ Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court:________________ Docket No.________________

Judge/Commissioner/Hearing Officer:________________ Ruling Date:________________

DISTRICT COURT INFORMATION

Parish and Judicial District Court: 9th Judicial District Court, Parish of Rapides Docket Number: 263,744

Judge and Section: Hon. Monique Rauls -- Division A Date of Ruling/Judgment: December 21, 2018

APPELLATE COURT INFORMATION

Circuit: THIRD Docket No. CA 19-028 Action: AFFIRMED

Applicant in Appellate Court: Roy Eugene Hebron Filing Date: 01/03/19

Ruling Date: 01/24/19 Panel of Judges: Ulysses Gene Thibodeaux, Elizabeth Pickett and Phyllis M. Keaty En Banc: ☐

REHEARING INFORMATION

Applicant:________________ Date Filed:__________ Action on Rehearing:__________

Ruling Date:__________ Panel of Judges:________________ En Banc: ☐

PRESENT STATUS

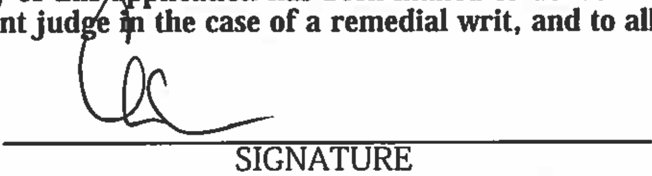
☐ Pre-Trial, Hearing/Trial Scheduled date:________________, ☐ Trial in Progress, ☐ Post Trial

Is there a stay now in effect?______ Has this pleading been filed simultaneously in any other court?______

If so, explain briefly____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate court of appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.



02/06/19
DATE

SIGNATURE

O:\lasc\rules\filings0.wpd

Revised 12-9-98

TABLE OF CONTENTS

I. WRIT GRANT CONSIDERATIONS 1

II. ASSIGNMENTS OF ERROR 9

III. ISSUES PRESENTED FOR REVIEW 9

IV. SUMMARY OF THE ARGUMENT 10

V. STATEMENT OF THE FACTS AND THE CASE 11

A. Factual Background. 11

B. Procedural Background 12

VI. ARGUMENT 13

VII. CONCLUSION 23

VIII. CERTIFICATE OF SERVICE 25

IX. APPENDIX 26

A. Third Circuit Court of Appeal Opinion, dated January 24, 2019 26

B. Minute Entry, dated December 21, 2018 44

C. Order signed in Open Court, December 21, 2018 45

D. Transcript excerpts of December 21, 2018 hearing 46

E. Exhibit A - Plea Agreement 60

F. Defendant's Exceptions - filed December 21, 2018 70

G. Petition for Declaratory Judgment and for Preliminary and Permanent Injunctive Relief, and Alternative Writ of Quo Warranto Docket No. 263,744-A - filed December 17, 2018 82

TABLE OF AUTHORITIES

JURISPRUDENCE:

Calogero v. State ex rel. Treen,
445 So.2d 736 (La. 1984). 4, 17, 18

Chrishon v. Marshall,
2008-923 (La. App. 3d Cir. 7/28/08), 994 So.2d 585 . . . . . . 7, 21, 22

Cunningham v. Marullo,
2014-0931 (La. App. 4th Cir. 9/3/14), 150 So.3d 21 . . . . . . 5, 17

Malone v. Tubbs,
36,816 (La. App. 2d Cir. 9/6/02), 825 So.2d 585 . . . . . . 5, 17

Shepherd v. Schedler,
2015-1750 (La. 1/27/16), 209 So. 3d 752, 773, on reh'g (May 2, 2016) 1

State v. Gibson,
2012-1145 (La. 1/29/13), 107 So.3d 574, 575 . . . . . . 2, 13

State v. Hinton,
08–1849 (La.App. 1 Cir. 2/13/09), 6 So.3d 242, 244,
writ denied, 09–0821 (La.3/4/11), 58 So.3d 466 21

State v. Merrill,
2014-530 (La. App. 3d Cir. 6/11/14), 140 So.3d 1237, 1239 23

State v. Odom,
07–0516 (La.App. 1 Cir. 7/31/08), 993 So.2d 663, 671 21

State v. Toups,
2013-1371 (La. App. 1 Cir. 4/3/14), 144 So. 3d 1052, 1056 21

STATUTES:

18 U.S.C. § 922(a)(2) 8, 21

La. Const. Art I, § 10.1 . . . . 4, 5, 8, 14, 16-19, 21-23

La. Const. art. I, § 10 . . . . 2, 7, 13, 15, 21

La. Const. art. I, § 10(B) 15

La. R.S. 18:1405. 14

La. R.S. 40:1784 . . . . 8, 22

La. R.S. 42:1412(A) 15

I. WRIT GRANT CONSIDERATIONS

This writ application arises out an erroneous interpretation of a newly-enacted Louisiana Constitutional Amendment. The suit below, and the appellate court decision, purport to determine that a validly-elected mayoral candidate cannot take office. These issues are fundamental to our democracy, and touch on a number of the writ application considerations.

Roy Hebron, applicant herein, was overwhelmingly elected to the position of Mayor of the Town of Ball Louisiana on November 6, 2018. His qualifications as candidate were not challenged, as he was qualified to run for mayor. His election was not challenged, as he received more than 53 percent of the popular vote, which was twice the votes of the Respondent, Neil Kavanagh.

The November 6, 2018 ballot also asked citizens to vote on Constitutional Amendment Art. I, § 10.1.[1] The effective date of that Amendment was December 12, 2018. Prior to that date, Roy Hebron was certified by the Secretary of State as the winner of the election. After certification by the Secretary of State, the only remaining issues were ministerial. The Secretary of State was to send the commission to Governor Edwards for his signature. Since both State agencies were aware of this pending litigation, Mayor Hebron's commission has not been sent.

Erroneous Interpretation or Application of Constitution or Laws

A. The Third Circuit erroneously held that a citizen can sue to unseat an elected official. The Third Circuit Court of Appeal erred when it ruled that Neil Kavanagh could bring suit to enforce the Constitution against a successful opponent. Kavanagh's standing to prosecute this suit was challenged in the trial court and at the Third Circuit.

The election code provides limited remedies for individual citizens. No citizen (or opponent) filed a challenge to Hebron's candidacy during the time period allowed for citizens to contest a

[1] The text of the proposed amendment that was on the ballot and the actual language of the Amendment are not the same. This discrepancy is the subject of a challenge in the trial court. "The procedure described therein and the requirements thereof, are not technicalities, but rather are safeguards to ensure that our state's basic, fundamental legal document is altered only in accordance with the procedure prescribed." Shepherd v. Schedler, 2015-1750 (La. 1/27/16), 209 So. 3d 752, 773, on reh'g (May 2, 2016).

candidate's qualifications. At the time of the qualifying period, it is undisputed that Hebron was qualified to be a candidate to run for the office of Mayor under the law in effect at that time. After the election, no petition was filed by a citizen (or opponent) within the time period allowed for challenges. Those are the only two challenges allowed for individual citizens.

Once Mr. Hebron was elected to office, he (and his electorate) had vested rights. After the November 6, 2018 election, the issuance of Hebron's commission and his taking office were only ministerial duties, and there was no further discretion. This Court has previously addressed this issue. The Court has held that the parish district attorney is the proper party to file suit to challenge the ability of a candidate to take office after the time period allowed for individual citizens. See State v. Gibson, 2012-1145 (La. 1/29/13), 107 So.3d 574, 575.[2] The Court "granted th[e] writ application to determine whether the **State** can directly enforce Article I, § 10 of the Louisiana Constitution to prevent a candidate from taking public office without regard to the Election Code's time limitations on challenges to candidacy."

In the Gibson case, the defendant was a convicted felon, yet he marked on his qualifying forms that he met the requirements for the position. After Gibson was elected, the fact that he was a convicted felon and was not a qualified candidate at the time of the election became known. This Court acknowledged that the rights of individual citizens to prevent Mr. Gibson from holding office had perempted. Recognizing that someone must have the power to challenge an elected official from taking office must exist, and this Court held that the district attorney had that power. Citizens do not.

The Election Code provides detailed procedures for qualifications and for contesting elections. There is no provision in the Election Code that would allow for an individual citizen to obtain an injunction against a successful candidate to prevent him from taking office, nor does Kavanagh allege any such law. This issue was raised at the Third Circuit, and Kavanagh's counsel

---

[2] With all due respect, the transcript shows that opposing counsel referenced the Gibson case (not in his brief) in open court and led the court to believe that the case supported his position. Tr. p. 21-22. The rule of candor to the court, should have required that he disclose that the district attorney was the proper party. Counsel for Hebron raised that point, but it was not addressed by the court. Tr. p. 23.

could not point to any law or jurisprudence to support such a right. The trial court and the Third Circuit merely assumed, with no legal basis, that Kavanagh could bring this action. In the trial court:

> The court wants to note that Neil S. Kavanagh, as Mayor and resident of the Town of Ball and a registered voter, does have standing to bring the suit before this Court.

Tr. p. 80.

The Third Circuit also jumped to the conclusion that an individual citizen could file suit to challenge the qualifications of an elected official. This, without any statutory or jurisprudential support:

> Thus, the ruling in *Gibson* was that the State was not bound by the Election Code in enforcing a constitutional amendment. Similarly, Paragraph (D) of La. R.S. 18:495 gives standing to registered voters to bring suit under the same constitutional amendment, again couching it in terms of candidacy. Similar to *Gibson*, there must be a remedy outside the Election Code for citizens to protect their interests in the face of constitutional violations. While Hebron characterizes the holding in *Gibson* as applying only to the State's plenary power, *Gibson* does not make that power exclusive to the State, nor does it foreclose a right of action by a voter to seek injunctive relief in the face of a violation of La. Const. art. 1, § 10.1 in this case.

Kavanagh v. Hebron, 2019-28 (La. App. 3 Cir. 1/24/19). With all due respect, this is not the holding of the Gibson case, and La. R.S. 18:495 has no application in this post-election challenge.

Private citizens do not have the "plenary power" that is granted to the State to enforce provisions of the Constitution.[3] The Third Circuit erred when it created a right under La. R.S. 18:495 for individual citizens to bring suit outside of the Election Code. La. R.S. 18:495 only deals with the right of the district attorney to attack the qualifications of someone attempting to run for office, and the statute provides that citizens still have such a right, even if the district attorney is pursuing such a claim. In this case, there is no dispute that Hebron was qualified to run for the office of mayor in the November 6, 2018 election. There was no prohibition in effect at the time of his qualification nor at the time of the election.

---

[3] In this context, "plenary power" is inherent power in the State, even though not defined by statute. "A plenary power or plenary authority is a complete and absolute power to take action on a particular issue, with no limitations. It is derived from the Latin term plenus ('full')." https://en.wikipedia.org/wiki/Plenary_power..

B. The Third Circuit's ruling was contrary to the law and the Constitution where it ignored Hebron's claim that the new Constitutional Amendment could not be applied retroactively. The Third Circuit Court of Appeal erred when it ignored Hebron's argument and implicitly held that the Section 10.1 could be applied retroactively. This was an issue raised at the trial court, in the appeal, and was argued at oral argument. It was an issue that was ignored by Kavanagh in brief and was not addressed by the Third Circuit in its opinion.[4]

The newly-enacted Section 10.1 does not apply to candidates who were elected in the November 6, 2018 election. The ballot on November 6, 2018 contained three (3) candidates running for Mayor of the Town of Ball – Roy Hebron, Neil Kavanagh and Gene Decker. Hebron properly qualified to run in the election, and it was not disputed that his name was properly on the November 6, 2018 ballot. Hebron overwhelmingly won that election, more than doubling the votes for Kavanagh. On that same November 6 ballot was a chance for citizens to approve the enactment of a new constitutional amendment – Art. I § 10.1. At trial, and at the Third Circuit, there was a dispute about whether Section 10.1 applied to Hebron's election, described by the parties as an attempt to retroactively apply the new law. It was undisputed that Section 10.1 became effective on December 12, 2018, more than one month after the election. Tr. p. 84.

This Court, and other courts, have determined that the law in effect on the date of an election is the law that controls that election and the candidates. The most important case is Calogero v. State ex rel. Treen, 445 So.2d 736 (La. 1984). That case involved previous Chief Justice Calogero and his challenge to a change in the Louisiana Constitution after his election.

In that case, Supreme Court Justice Calogero filed suit because he was elected just before the 1974 Constitution came into effect, and his term of office started on the same date as the new Constitution with a different term limit. This Court held that the law in effect on the date of the election controls:

> When the election establishing the term is held, the constitution in effect at that time controls the length of the term. The election must be for a specific office with a specific term and specific powers; otherwise the people would be electing a candidate

---

[4] The Third Circuit opinion indicates that there were only two issues when, in fact, there were many more issues raised on appeal.

> to an unknown office, with an unknown term and unknown powers. This certainty on the date of the expression of the popular will is an essential element in the maintaining of the legitimacy of popular elections in a democratic society.

Id., 445 So.2d at 738 (citations omitted). See also Justice Lemmon, concurring (term at the time of election was not affected by a yet-to-become-effective 1974 constitution); Cunningham v. Marullo, 2014-0931 (La. App. 4th Cir. 9/3/14), 150 So.3d 21 (qualifications at the time of the election are the only ones that matter; constitutional amendments on the same ballot cannot change that); Malone v. Tubbs, 36,816 (La. App. 2d Cir. 9/6/02), 825 So.2d 585 (citizens of Louisiana have the right to establish the qualifications of an elective office and have those qualifications apply to everyone who seeks office after the new qualifications go into effect). The trial court and the Third Circuit erred when those courts applied Section 10.1 to an election that took place prior to the effective date of that Amendment. The Calogero opinion could not be clearer: "Having decided that the 1921 Constitution in effect at the time of the election was the only law in effect, and therefore controlled the outcome of the election, it is unnecessary for this court to pass on the correctness of the trial court's rulings on the exceptions of no cause or right of action raised by some of the defendants." Calogero, 445 So.2d at 740. Similarly, this Court should find that the Constitutional provisions in effect on the date of the election (which contained no prohibitions related to felons in office) applies in this case and makes Mr. Hebron eligible to hold office for this term.

C. The Court of Appeal read out important words of the Section 10.1, in violation of the Constitution and in contravention to the rules of statutory construction. While Hebron contests the application of 10.1 to his election, even if that Amendment did apply, the words must be given their due.[5] The Amendment does not prohibit "felons" in general from holding office. Instead, the law requires that certain conditions be met before a duly-elected official can be disqualified. That provision only excludes "...A person who has been convicted ... under the laws

---

[5] The case before this Court is a ruling on a preliminary injunction. Of course, the ruling on this case will affect the ultimate ruling on the motion for a permanent injunction. Nevertheless, Hebron has challenged the application of the new Amendment to his case. The words of the amendment, as presented to the voters, was not the same as the language of the amendment.

of ... the United States ... of a crime which, if committed in this state, would be a felony." La. Const. Ann. art. I, § 10. Mr. Hebron did not plead guilty to defrauding the State of Louisiana, and Mr. Hebron did not commit a crime that could be prosecuted as a felony in Louisiana. As applied in this case, Mayor Hebron is not excluded from being eligible for office.

Mayor Hebron's guilty plea is in the record. The elements of the crime are in the record. Roy Hebron pleaded guilty to, and served his sentence, for a federal crime related to the use of FEMA (federal) money by the Town of Ball. In particular, Hebron pleaded guilty to conspiracy to commit major disaster or emergency benefits fraud, which would be an offense against the United States government. See Exhibit 2. Hebron testified at the hearing that he had never pleaded guilty to defrauding the State of Louisiana.

Kavanagh did not state a cause of action. Kavanagh filed suit against his political opponent, Hebron, following Kavanagh's loss in the election. He made the simplistic argument that Hebron was a felon.

In fact, the provision that ostensibly applies to Hebron only excludes him if the federal crime for which he was convicted would have been a state crime, which could be prosecuted as a felony in Louisiana. Kavanagh's attorney and the trial court agreed that Hebron's guilty plea centered on facts and crimes that could not be prosecuted in Louisiana.

> BY MR. ELLIOTT:
> Could I ask you to clarify – the first one, the No Cause of Action related to the fact that there is no allegation of a particular Louisiana statute...
>
> BY THE COURT:
> Well yo---
>
> BY MR. ELLIOTT
> ... which is supposed to be the same – contain the same elements?
>
> BY THE COURT:
> I – the way I read the law, it's not that it have to contain the same elements, but if – I agree that if this offense – like you say, the offense was committed was a felony under the laws of the United States.
>
> ....
>
> If the same ... element, same thing happened, and there's a statute in the state court. Of course, the State – no state ever prosecutes a federal crime. That's the federal courts jurisdiction. No state has jurisdiction. No state court has jurisdiction to hear a violation of a federal law.

Tr. pp. 26-27. The trial court and Kavanagh's counsel both admitted that the factual basis for Hebron's plea agreement could not/would not be prosecuted as a felony under Louisiana law. It seemed enough for the district court and for the Third Circuit that there was a "similar" crime that **could** have been a felony **if** it had been committed against the State of Louisiana.

> BY THE COURT:
> According to [counsel for Kavanagh], you said there isn't a state statute with the exact identical elements. However, if this – if you take these same facts and allege that these facts were committed against the state, it would be a felony.

Tr. p. 27.[6] The trial court accused Hebron for trying to make a "distinction without a difference," and again admitted that the facts in this case would support a federal prosecution but not a state prosecution ("as if the state is going to prosecute a federal crime"). Tr. p. 28. Counsel for Kavanagh admitted this as well ("[I can't find] that the standard is that the state – there would have to be a state statute that prohibits a – a crime that is federal in nature, which of course is not the issue. It just doesn't happen."). Tr. p. 28.

There is no Louisiana criminal statute (nor was one cited in plaintiff's Petition) that makes it a crime to conspire with another person to defraud the United States relative to major disaster or disaster benefits. Kavanagh cited two criminal statutes in brief: La. R.S. 14:26 (conspiracy) and La. R.S. 14:70.9 (Louisiana Government Benefits Fraud). The conspiracy statute requires a corresponding Louisiana crime, which Kavanagh determined was the Louisiana Benefits Fraud. A simple review of the elements of that crime makes it clear that Hebron did not plead guilty to that crime. In fact, Hebron testified that he did not plead guilty to conspiring to defraud the State of Louisiana. Tr. p. 66.[7]

With all due respect, the trial court and the Third Circuit failed to interpret Section 10.1 in a manner that gave effect to **all of the words** of the Amendment. The Third Circuit previously

---

[6] To quote counsel for Kavanagh, "**had** he perpetrated his crime against the state and **had** been prosecuted by the state, then the penalty would constitute a felony **if** it was brought under Criminal Conspiracy." Tr. p. 8. This is a clear admission that the state felony was purely hypothetical. The trial court also acknowledged that the State would never prosecute the federal offense of which Hebron's guilty plea centered. Tr. p. 28. If there is no Louisiana law that was violated, which would have been a felony, then Hebron is not disqualified.

[7] While this Louisiana criminal statute does not apply, Hebron's sentence under that law would have been only 2.5 years, and he would now be beyond the 5-year prohibition.

wrestled with the same issue in the same context – an election qualification dispute. In the case of Chrishon v. Marshall, 2008-923 (La. App. 3d Cir. 7/28/08), 994 So.2d 585,[8] there was a pre-election challenge to Marshall's candidacy to run for Alexandria City Council under the previous version of Louisiana Const. Art. I § 10.[9] Marshall had a prior federal conviction for illegally transporting firearms (a pistol) in interstate commerce in violation of 18 U.S.C. § 922(a)(2). The closest criminal law the challenger could find was La. R.S. 40:1784, which restricted the transfer of certain weapons, but specifically excluded pistols. The court found that this was not " a felony offense for which he could have been charged in Louisiana." While the federal and the state statutes were similar, the state statute could not be stretched to make that offense illegal under Louisiana law. The trial court acknowledged that the Louisiana statute and the federal statute are not identical," and wrote it off as a "distinction without a difference." Tr. p. 83.

Hebron pleaded guilty to **conspiracy** to commit major fraud under a FEMA contract against the United States. See Plea Agreement, Exhibit "2." The Third Circuit failed to follow (or even cite) its prior jurisprudence holding that the crimes must have the same elements in order to disqualify a candidate for office. The Third Circuit, in that same case, held that there is no shifting sand regarding the crime alleged – it must be the same at the trial court and on appeal. Uniform Rule 1-3 states that issues not submitted to, or decided by the trial court, are not reviewable on appeal. There was no Louisiana felony alleged in Kavanagh's Petition in the instant case, nor was a Louisiana crime proven at trial, which met the factual and legal elements of the federal crime for which Roy Hebron plead guilty. Therefore, Mr. Hebron is not disqualified under Section 10.1. "Kind of similar" is not enough, any more than it is in horseshoes or hand grenades.

D. The Court of Appeal's refusal to require that Kavanagh post a bond was contrary to law. In light of the short time allowed for appeals of injunctions, Hebron promptly filed his appeal. At the same time, and before the delays for new trial ran, Hebron sought to have the trial

---

[8] The Third Circuit ignored its own jurisprudence, and its opinion did not even refer to this case.

[9] This Amendment was eventually declared unconstitutional, because the published version of the proposed law did not include an amendment that had been made in the Legislature.

court mandate that Kavanagh post the bond required by La. Code Civ. Proc. arts. 3610 and 3608. The trial court did not require Neil Kavanagh to post security to cover the costs, damages and attorneys' fees incurred by Appellant, as provided for in those articles. Hebron also raised the issue with the Third Circuit in a supplemental brief. The Third Circuit never ruled on the motion to supplement the brief, nor did it rule on the issue of the mandatory bond.

II. ASSIGNMENTS OF ERROR

1. The Third Circuit Court of Appeal committed legal error when it ruled that an individual citizen has standing to have a public official removed from office.

2. The Third Circuit Court of Appeal committed legal error when it retroactively applied a newly-enacted Constitutional Amendment to someone who previously qualified and had already been elected to office.

3. The Third Circuit Court of Appeal committed legal error when it applied the newly-enacted Constitutional Amendment to Hebron's election, where Kavanagh did not allege or prove that the elements of Hebron's plea would be a felony under Louisiana law.

4. The Third Circuit Court of Appeal erred when it refused to allow Hebron to supplement his brief to raise the issue that Kavanagh has not posted the mandatory bond, and in refusing to consider that issue.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Third Circuit Court of Appeal committed legal error when it ruled that a citizen has standing to have a public official removed from office, in light of prior jurisprudence from this Court which gave that exclusive power to the State or the District Attorney.

2. Whether the Third Circuit Court of Appeal committed legal error when it retroactively applied a newly-enacted Constitutional Amendment to someone who had already been elected to office, thereby opening up the door to challenges by citizens to currently-elected officials.

3. Whether Third Circuit Court of Appeal committed legal error when it applied the newly-enacted Constitutional Amendment to Hebron's election, where Kavanagh did not allege or prove that the elements of Hebron's plea would be a felony under Louisiana law, reading out part of Section 10.1, as enacted.

4. Whether the Third Circuit Court of Appeal erred when it refused to allow Hebron to supplement his brief to raise the issue that Kavanagh has not posted the mandatory bond, and in refusing to consider that issue.

IV. SUMMARY OF THE ARGUMENT

This case is outside of the usual Election Code suit. Roy Hebron properly qualified for the position of Mayor of Ball according to the qualification in effect for the November 2018 election, and his qualifications were not challenged. Roy Hebron was overwhelmingly elected Mayor of Ball, and that election was not challenged.[10] It was after the newly-enacted La. Const. Art. I, § 10.1 came into effect, that Hebron's political opponent, Neil Kavanagh, filed for a preliminary and permanent injunction to prohibit Hebron, an elected official, from taking office.

In the past, this Court has found a "plenary" power in the State to challenge the seating of an elected official prior to the time the candidate assumes office. Neither this Court, nor any of the inferior courts, have held that an individual citizen holds such constitutional power. Therefore, Kavanagh has no standing to bring this suit. It was error for the Third Circuit to find or imply such authority from the Election Code, which clearly does not apply in this case.

As the Court is aware, it is difficult to apply statutes retroactively in a manner consistent with the Louisiana and Federal Constitutions. This Court has previously held that the law in effect on the date of an election is the law that controls the term or conditions of that election. This issue was raised at the trial court, and in the Third Circuit. Despite the time spent in briefing and in oral argument, the Third Circuit simply ignored this elephant in the room.

The Third Circuit opinion also spent an inordinate amount of time and effort on the issue of whether Hebron's crime, if committed in Louisiana, would be a crime in Louisiana. The Court went to extraordinary lengths, even though the crime raised at trial by Kavanagh was a completely different crime. Hebron did not conspire to commit a fraud against the State of Louisiana regarding disaster benefits.

Finally, the law required that Kavanagh post a bond to cover the damages, attorneys' fees, and costs, should he be unsuccessful. This issue was raised in the trial court, contemporaneously with the filing of this appeal. Hebron attempted to raise the issue with the Court of Appeal, but was rebuffed without explanation.

---

[10] When these time periods ran, without challenge, the rights of citizens under the Election Code terminated.

V. STATEMENT OF THE FACTS AND THE CASE

A. Factual Background.

The Town of Ball elected a new Mayor on November 6, 2018. Roy Hebron received more than twice the votes of his nearest competitor, Neil Kavanagh, out of a field of three. On the same ballot was a new constitutional amendment. Hebron was elected, without the necessity of a runoff. Art. I, § 10.1 was approved by the voters on the same ballot, but the amendment did not take effect until December 12, 2018.

Neil Kavanagh, individually, filed suit against Roy Hebron, seeking to prevent Hebron from taking office. The new amendment, effective after the election, reads:

> Section 10.1. (A) Disqualification. The following persons shall not be permitted to qualify as a candidate for elective public office or hold elective public office or appointment of honor, trust, or profit in this state:
>
> > (1) A person actually under an order of imprisonment for conviction of a felony.
> >
> > (2) A person who has been convicted within this state of a felony and who has exhausted all legal remedies, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be a felony and who has exhausted all legal remedies and has not afterwards been pardoned either by the governor of this state or by the officer of the state, nation, government, or country having such authority to pardon in the place where the person was convicted and sentenced.
>
> (B) Exception. The provisions of Paragraph (A) of this Section shall not prohibit a person convicted of a felony from qualifying as a candidate for elective public office or holding such elective public office or appointment of honor, trust, or profit if more than five years have elapsed since the completion of his original sentence for the conviction.
>
> (C) The provisions of Paragraph (A) of this Section shall not prohibit a person from being employed by the state or a political subdivision.

La. Const. art. I, § 10.1. Kavanagh was under the mistaken impression that he could, as an individual citizen, have Hebron prevented from taking office.

Neil Kavanagh was the previous Mayor of Ball, Louisiana. His term ended on **December 31, 2018**, and the newly-elected mayor, Roy Hebron, was to take office on **January 1, 2019.**[11] Kavanagh has obtained an injunction that prohibits Hebron from taking office.

---

[11] The time for taking office is found in La. R.S. 33:383(A)(2)(d).

B. Procedural Background.

Less than two days after Hebron was served with the Petition, the trial court held a trial on a request for a preliminary injunction and eventually, a permanent injunction, a declaratory judgment, and a quo warranto claim. These claims sought to have Hebron declared to be unable to hold office (even though he had not yet taken office) and sought to have Kavanagh declared the mayor until there could be a special election. A copy of the Petition is attached at Tr. p. 02.

In response, Hebron filed a number of exceptions including: no cause of action, prematurity, improper cumulation of actions and no right of action. See Tr. p. 22, Hebron had less than two (2) days to prepare for and file pleadings so he filed his exceptions on December 21, 2018, the date of the hearing on the preliminary injunction.

The court considered exhibits introduced at the hearing, and brief testimony from Hebron and Kavanagh. After hearing the arguments of counsel, the court denied all of the exceptions, and entered a preliminary injunction which "enjoined, restrained, and prohibited [Hebron] from taking, occupying, or holding the office of the Mayor of the Town of Ball, or exercising any duty, obligation, responsibility, or function of office in any manner, directly or indirectly, pending further order of the Court." See Tr. p. 16.

The trial court also went further, and granted the request for a declaratory judgment, ordering that Kavanagh "shall continue to maintain and lawfully discharge the duties of public office pursuant to Louisiana Revised Statutes 42:2, and pending further order of the Court and/or other proceedings conducted in accordance with law." The citizens of Ball were well aware of Hebron's history, yet only 26% of the citizens of Ball voted for Kavanagh. The trial court issued a judgment that has the potential to affect the Town of Ball, which was not a party to the suit.[12]

Hebron appealed, raising a number of issues. The Third Circuit only ruled on two of them, and ignored the rest. This was an error of law and procedure. It found that "if" Hebron had deprived the State of Louisiana of disaster funds, that "would have" been a felony. Hebron pleaded guilty to a particular crime, which had nothing to do with the State of Louisiana. His crime was conspiracy

---

[12] The Town of Ball is still in limbo. It has a Mayor *Pro Tempore*, but Kavanagh has refused to give up his position as Mayor.

in relation to federal disaster benefits. The Third Circuit also found that Kavanagh, an individual citizen, had standing to prevent Hebron from taking office, citing a portion of the Election Code that clearly does not apply. This writ application followed.

VI. ARGUMENT

A. The Third Circuit erroneously held that an individual citizen can sue and unseat an elected official. The Third Circuit Court of Appeal erred when it ruled that Neil Kavanagh could bring suit to enforce the Constitution against a successful opponent. That power belongs exclusively to the State. Kavanagh's standing to prosecute this suit was challenged in the trial court and at the Third Circuit.

The Election Code provides limited remedies to individual citizens. No citizen (or opponent) filed a challenge to Hebron's candidacy during the time allowed for citizens to file suit to contest a candidate's qualifications. At the time of the qualifying period, it is undisputed that Hebron was qualified to be a candidate to run for the office of Mayor under the law in effect at that time. After the election, no petition was filed within the time period allowed for challenges. Those are the only two challenges allowed by citizens. All other power belongs to the State.

Once Hebron was elected to office, he (and his electorate) had vested rights. After the November 6 election, the issuance of Hebron's commission and the taking of office were ministerial duties, and there was no further discretion. The Secretary of State confirmed the election results, and the Governor was to issue Hebron's commission.[13] This Court has previously addressed the issue raised in this Writ Application. The Court has held that the parish district attorney is the proper party to file suit to challenge the ability of a successful candidate to take office after the time period allowed for individual citizens. See State v. Gibson, 2012-1145 (La. 1/29/13), 107 So.3d 574, 575.[14] This Court "granted th[e] writ application to determine whether the **State** can directly enforce Article

---

[13] While not in the record, the Governor's office is waiting on the outcome of this litigation.

[14] With all due respect, the transcript shows that opposing counsel referenced the Gibson case (not in his brief) in open court and led the court to believe that the case supported his position. Tr. p. 21-22. The rule of candor to the court, should have required that he disclose that the district attorney was the proper party. Counsel for Hebron raised that point, but it was not addressed by the court. Tr. p. 23.

I, § 10 of the Louisiana Constitution to prevent a candidate from taking public office without regard to the Election Code's time limitations on challenges to candidacy."[15]

In the Gibson case, the defendant was a convicted felon, yet he marked on his qualifying forms that he met the requirements to run for that position. The district attorney was not aware of those facts, and missed the deadlines in the Election Code to challenge Gibson's candidacy and election, and no voter brought a challenge under the Election Code. As explained in the Gibson case, Kavanagh waived his right to contest the election, and therefore has no cause of action. "An action contesting any election involving the election to office shall be instituted no later than 4:30 p.m. on the ninth day after the date of the election, and no such contest shall be declared moot because of the performance or nonperformance of a ministerial function including but not limited to matters relating to the printing of ballots for the general election." La. R.S. 18:1405. This period is peremptive and therefore Kavanagh no longer has a cause of action.

The Election Code provides detailed procedures for qualifications and contesting elections by individual citizens. There is no provision in the Election Code that would allow a citizen to obtain an injunction against a successful candidate to prevent that candidate from taking or holding office, nor does Kavanagh allege any such law. This issue was raised at the Third Circuit, and Kavanagh's counsel could not point to any law or jurisprudence to support such a right. The trial court and the Third Circuit merely assumed, with no legal basis, that Kavanagh, an individual citizen, could bring this action. In the trial court:

> The court wants to note that Neil S. Kavanagh, as Mayor and Resident of the Town of Ball and a registered voter, does have standing to bring the suit before this Court.

Tr. p. 80.

The Third Circuit also jumped to the conclusion that a citizen could file suit to challenge the qualifications of an elected official. This, without any statutory or jurisprudential support:

> Thus, the ruling in *Gibson* was that the State was not bound by the Election Code in enforcing a constitutional amendment. Similarly, Paragraph (D) of La. R.S. 18:495 gives standing to registered voters to bring suit under the same constitutional amendment, again couching it in terms of candidacy. Similar to *Gibson*, there must

---

[15] While this was a similar and previous version of the Amendment at issue, the same logic should apply. The previous version was declared unconstitutional by this Court.

> be a remedy outside the Election Code for citizens to protect their interests in the face of constitutional violations. While Hebron characterizes the holding in *Gibson* as applying only to the State's plenary power, *Gibson* does not make that power exclusive to the State, nor does it foreclose a right of action by a voter to seek injunctive relief in the face of a violation of La. Const. art. 1, § 10.1 in this case.

Kavanagh v. Hebron, 2019-28 (La. App. 3 Cir. 1/24/19). With all due respect, this is not the holding of the Gibson case, and La. R.S. 18:495 has no application in this post-election challenge.

In the Gibson case, the lawsuit was filed by a **district attorney** two days before Mr. Gibson was to take office.[16] The Court of Appeal held that this suit by the District Attorney was untimely under the Election Code (as would be Mr. Kavanagh's case). The State argued that it holds "plenary power" to enforce the Constitution, including Article I, § 10(B), which prevented a candidate from qualifying for office *and* from taking office.[17] The State distinguished this power from the rights given to individual citizens to challenge elections. The State also argued that it timely filed its action prior to the time Mr. Gibson was to take office.[18] Gibson, 107 So.3d at 577.

After reviewing the provisions of the Election Code, and finding that none of the provisions applied to this odd situation, this Court held that the "State of Louisiana has plenary power to directly enforce Article I, § 10 of the Louisiana Constitution and is not limited to bringing a challenge under the provisions of the Election Code." Id. The Gibson ruling by this Court makes it clear that private citizens **only** have the right to challenge elections under the provisions in the Election Code. The brief period after qualifying and after the election are the only remedies available for individual citizens.

Private citizens do not have the "plenary power" that is granted to the State to enforce provisions of the Constitution.[19] The Third Circuit erred when it created a right under La. R.S.

---

[16] Kavanagh's counsel was aware of the Gibson case at the trial court level, but did not disclose it in brief. When it was raised in oral argument, Hebron's counsel brought to the court's attention that the suit had been brought by the State, and not by a losing candidate.

[17] A district attorney has the authority to file suit to remove a convicted felon from office for a crime that is prosecuted during the tenure of that public official. See La. R.S. 42:1412(A).

[18] Unlike Mr. Hebron in the instant case, Mr. Gibson was not qualified based on his prior felony conviction.

[19] In this context, "plenary power" is inherent power in the State, even though not defined by statute. "A plenary power or plenary authority is a complete and absolute power to take action on a particular issue, with no limitations. It is derived from the Latin term plenus ('full')."

18:495 for individual citizens to bring suit outside of the Election Code. La. R.S. 18:495 only deals with the right of the district attorney to attack the qualifications of someone attempting to run for office, and the statute provides that citizens still have such a right, even if the district attorney is pursuing such a claim. However, in this case, there was no dispute that Hebron was qualified to run for office in the November 2018 election. There was no prohibition in effect at the time of Hebron's qualification or at the time of his election.

The Third Circuit has purported to create a right that does not exist. Citizens do not have the law enforcement power granted to the State. Kavanagh presented no evidence that he had contacted the District Attorney about his concerns. Kavanagh has no standing. The decision below was clearly contrary to law to the jurisprudence in this area.

B. The Third Circuit's ruling was contrary to the law and the Constitution where it ignored Hebron's claim that the new Constitutional Amendment could not be applied retroactively or that it did not apply to candidates in this election. The Third Circuit Court of Appeal erred when it ignored Hebron's argument and implicitly held that the Section 10.1 could be applied retroactively. This was an issue raised in the appeal, and was argued at oral argument. It was an issue that was ignored by Kavanagh in brief and was not addressed by the Third Circuit in its opinion.[20] This Court should find that its prior opinion on this issue requires that the law in effect on the date of Hebron's qualification and election be applied to the terms of his holding office.

The newly-enacted Section 10.1 does not apply to candidates who were elected in the November 6, 2018 election. The ballot on November 6, 2018 contained three (3) candidates for Mayor of the Town of Ball. Hebron properly qualified to run in the election, and it was not disputed that his name was properly on the November 6, 2018 ballot. Hebron overwhelmingly won that election, more than doubling the votes for Kavanagh. On that same November 6 ballot was a chance for the electors to approve the enactment of a new constitutional amendment–Art. I § 10.1. At trial,

---

https://en.wikipedia.org/wiki/Plenary_power..

[20] The Third Circuit opinion indicates that there were only two issues when, in fact, there were many more issues raised on appeal.

and at the Third Circuit, there was a dispute about whether Section 10.1 applied to Hebron's election, described by the parties as an attempt to retroactively apply the new law. It was undisputed that Section 10.1 became effective on December 12, 2018, more than a month after the election. Tr. p. 84.

This Court, and other courts, have determined that the law in effect on the date of an election is the law that controls that election and the candidates. The most important case is Calogero v. State ex rel. Treen, 445 So.2d 736 (La. 1984). This case involved previous Chief Justice Calogero and his challenge to a change in the Louisiana Constitution after his election.

In that case, Supreme Court Justice Calogero filed suit because he was elected just before the 1974 Constitution came into effect, and his term of office started on the same date as the new Constitution with a different term limit. It was argued that the electorate knew or expected that Justice Calogero was running for a 10-year term rather than the 14-year term which was in effect on the date of his election. Similarly, while some of the voters may have voted for Hebron, knowing of the possibility that the new amendment would be approved after the date of the election, no one actually knew. This Court rejected the argument in Calogero relative to the purported knowledge of the voters, and this Court held that the law in effect on the date of the election controls:

> When the election establishing the term is held, the constitution in effect at that time controls the length of the term. The election must be for a specific office with a specific term and specific powers; otherwise the people would be electing a candidate to an unknown office, with an unknown term and unknown powers. This certainty on the date of the expression of the popular will is an essential element in the maintaining of the legitimacy of popular elections in a democratic society.

Id., 445 So.2d at 738 (citations omitted). See also Justice Lemmon, concurring (term at the time of election was not affected by a yet-to-become-effective 1974 constitution); Cunningham v. Marullo, 2014-0931 (La. App. 4th Cir. 9/3/14), 150 So.3d 21 (qualifications at the time of the election are the only ones that matter; constitutional amendments on the same ballot cannot change that); Malone v. Tubbs, 36,816 (La. App. 2d Cir. 9/6/02), 825 So.2d 585 (citizens of Louisiana have the right to establish the qualifications of elective office and have those qualifications apply to everyone who seeks office after the new qualifications go into effect). The trial court and the Third Circuit erred when those courts applied Section 10.1 to an election that took place prior to the effective date of

that Amendment. The Calogero opinion could not be clearer: "Having decided that the 1921 Constitution in effect at the time of the election was the only law in effect, and therefore controlled the outcome of the election, it is unnecessary for this court to pass on the correctness of the trial court's rulings on the exceptions of no cause or right of action raised by some of the defendants." Calogero, 445 So.2d at 740. Similarly, this Court should find that the Constitutional provisions in effect on the date of the election (which contained no prohibitions related to felons in office) applies in this case and makes Mr. Hebron eligible to hold office for this term.

C. The Court of Appeal read out important words of the Section 10.1, in violation of the Constitution and in contravention to the rules of statutory construction. While Hebron contests the application of 10.1 to his election, even if that Amendment did apply, the words must be given their due.[21] The Amendment does not prohibit "felons" in general from holding office, yet the trial court and the Third Circuit seemed to buy into that argument. Instead, the law requires that certain conditions be met before a duly-elected official can be disqualified. That provision reads:

> Section 10.1. (A) Disqualification. The following persons shall not be permitted to qualify as a candidate for elective public office or hold elective public office or appointment of honor, trust, or profit in this state:
>
> (1) A person actually under an order of imprisonment for conviction of a felony.
>
> (2) A person who has been convicted within this state of a felony and who has exhausted all legal remedies, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which, if committed in this state, would be a felony and who has exhausted all legal remedies and has not afterwards been pardoned either by the governor of this state or by the officer of the state, nation, government, or country having such authority to pardon in the place where the person was convicted and sentenced.

La. Const. art. I, § 10. As applied in this case, and in order to be disqualified, Mayor Hebron would have to be a convicted felon under the laws of the United States, "**of a crime which, if committed in this state, would be a felony**."

---

[21] The case before this Court is a ruling on a preliminary injunction. Of course, the ruling on this case will affect the ultimate ruling on the motion for a permanent injunction. Nevertheless, Hebron has challenged the application of the new Amendment to his case. The words of the amendment, as presented to the voters, was not the same as the language of the amendment.

Mayor Hebron's guilty plea is in the record. The elements of the crime are in the record. Roy Hebron pleaded guilty to, and served his sentence,[22] for a federal crime related to the use of FEMA money by the Town of Ball. In particular, Hebron pleaded guilty to conspiracy to commit major disaster or emergency benefits fraud, which would be an offense against the United States government. See Exhibit 2. Hebron testified at the hearing that he had never pleaded guilty to defrauding the State of Louisiana.

Kavanagh did not state a cause of action. Kavanagh filed suit against his political opponent, Hebron, after receiving only 23% of the popular votes. Kavanagh made the simplistic argument that Hebron was a felon, and therefore not eligible to serve until after five (5) years from his release. His Petition did not name a Louisiana criminal statute that Hebron was alleged to have violated. While some may say that is "splitting hairs," or as the trial court described it, "a distinction without a difference," it is a big deal. If a duly elected candidate cannot take office under a provision in the Louisiana Constitution, that is not a trivial matter.

Section 10.1, which became effective on **December 12, 2018,** does not prohibit all felons from serving in public office. In fact, the provision that ostensibly applies to Hebron only excludes him if the federal crime for which he was convicted would have been a state crime, prosecutable as a felony in Louisiana. Kavanagh's attorney and the trial court agreed that Hebron's guilty plea centered on facts and crimes that could not be prosecuted in Louisiana.

BY MR. ELLIOTT:
Could I ask you to clarify – the first one, the No Cause of Action related to the fact that there is no allegation of a particular Louisiana statute...

BY THE COURT:
Well yo---

BY MR. ELLIOTT
... which is supposed to be the same – contain the same elements?

BY THE COURT:
I – the way I read the law, it's not that it have to contain the same elements, but if – I agree that if this offense – like you say, the offense was committed was a felony under the laws of the United States.

....

---

[22] While not dispositive, Louisiana's movement on prison reform and its attempts to remove itself from the world incarceration statistics cannot be ignored.

> If the same ... element, same thing happened, and there's a statute in the state court. Of course, the State – no state ever prosecutes a federal crime. That's the federal courts jurisdiction. No state has jurisdiction. No state court has jurisdiction to hear a violation of a federal law.

Tr. pp. 26-27. The trial court and Kavanagh's counsel both admitted that the factual basis for Hebron's plea agreement could not/would not be prosecuted as a felony under Louisiana law. It seemed enough for the district court and for the Third Circuit that there was a "similar" crime that **could** have been a felony **if** it had been committed against the State of Louisiana.

> BY THE COURT:
> According to [counsel for Kavanagh], you said there isn't a state statute with the exact identical elements. However, if this – if you take these same facts and allege that these facts were committed against the state, it would be a felony.

Tr. p. 27.[23] The trial court accused Hebron of trying to make a "distinction without a difference," and again admitted that the facts in this case would support a federal prosecution but not a state prosecution ("as if the state is going to prosecute a federal crime"). Tr. p. 28. Counsel for Kavanagh admitted this as well ("[I can't find] that the standard is that the state – there would have to be a state statute that prohibits a – a crime that is federal in nature, which of course is not the issue. It just doesn't happen."). Tr. p. 28.

The Elements of the Offenses that formed part of Hebron's plea agreement in United States v. Hebron, Criminal N. 1:09–cr-00234-01, U.S. District Court Alexandria Division establish the federal nature of the crime, and also fails to establish any Louisiana state crime. See Exhibit 2 (Document 111-2). According to the United States prosecutor, the elements of the offense against Hebron are as follows: "In order to establish that the Defendant, ROY EUGENE HEBRON, is guilty of the offense charged in the Indictment, conspiracy to commit major disaster or emergency benefits fraud, the Government must prove the following elements beyond a reasonable doubt...." The elements spelled out in that document require proof of a conspiracy with another person to commit an offense against the laws of the United States, and, in particular a conspiracy to commit major

[23] To quote counsel for Kavanagh, "**had** he perpetrated his crime against the state and **had** been prosecuted by the state, then the penalty would constitute a felony **if** it was brought under Criminal Conspiracy." Tr. p. 8. This is a clear admission that the state felony was purely hypothetical. The trial court also acknowledged that the State would never prosecute the federal offense of which Hebron's guilty plea centered. Tr. p. 28. If there is no Louisiana law that was violated, which would have been a felony, then Hebron is not disqualified.

disaster or emergency benefits fraud. There is no Louisiana criminal statute (nor has one been cited by Plaintiff) that makes it a crime in Louisiana to conspire with another person to defraud the United States relative to major disaster or disaster benefits. Criminal statutes are subject to strict construction under the rule of lenity. State v. Odom, 07–0516 (La.App. 1 Cir. 7/31/08), 993 So.2d 663, 671. All criminal statutes are construed strictly and the words of a statute must be given their everyday meaning. State v. Hinton, 08–1849 (La.App. 1 Cir. 2/13/09), 6 So.3d 242, 244, writ denied, 09–0821 (La.3/4/11), 58 So.3d 466; State v. Toups, 2013-1371 (La. App. 1 Cir. 4/3/14), 144 So. 3d 1052, 1056.

Kavanagh cited two criminal statutes in brief: La. R.S. 14:26 (conspiracy) and La. R.S. 14:70.9 (Louisiana Government Benefits Fraud). The conspiracy statute requires a corresponding Louisiana crime, which Kavanagh determined was the Louisiana Benefits Fraud. A simple review of the elements of that crime make it clear that Hebron did not plead guilty to that crime. In fact, Hebron testified that he did not plead guilty to conspiring to defraud the State of Louisiana. Tr. p. 66.[24]

With all due respect, the trial court and the Third Circuit failed to interpret Section 10.1 in a manner that gave effect to **all** of the words of the Amendment. The Third Circuit previously wrestled with the same issue in the same context – an election qualification dispute. In the case of Chrishon v. Marshall, 2008-923 (La. App. 3d Cir. 7/28/08), 994 So.2d 585,[25] there was a pre-election challenge to Marshall's candidacy to run for Alexandria City Council under the previous version of Louisiana Const. Art. I § 10.[26] Marshall had a prior federal conviction for illegally transporting firearms (a pistol) in interstate commerce in violation of 18 U.S.C. § 922(a)(2). The trial court dismissed the challenge, because there was no corresponding felony offense under Louisiana law, a decision that was affirmed on appeal by this Court. The trial court found that Louisiana Const. Art.

---

[24] While this Louisiana criminal statute does not apply, Hebron's sentence under that law would have been only 2.5 years, and he would now be beyond the 5-year prohibition.

[25] The Third Circuit ignored its own jurisprudence, and its opinion did not even refer to this case.

[26] This Amendment was eventually declared unconstitutional, because the published version of the proposed law did not include an amendment that had been made in the Legislature.

I § 10 provides that a person convicted of a federal felony cannot qualify for office if that crime, had it been committed in Louisiana, would be a Louisiana felony.

The closest criminal law the challenger could find was La. R.S. 40:1784, which restricted the transfer of certain weapons, but specifically excluded pistols. The court found that this was not " a felony offense for which he could have been charged in Louisiana." While the federal and the state statutes were similar, the state statute could not be stretched to make that offense illegal under Louisiana law. The trial court acknowledged that the Louisiana statute and the federal statute are not identical," and wrote it off as a "distinction without a difference." Tr. p. 83.

In the case before this Court, Hebron pleaded guilty to **conspiracy** to commit major fraud under a FEMA contract against the United States. See Plea Agreement, Exhibit "2." The trial court and opposing counsel both admitted that this was not a crime committed against the State of Louisiana, but argued, if it had been, it would have been a felony. That is simply not the standard, as the Third Circuit made it clear in the Chrishon case cited above.

Also, on appeal in Chrishon v. Marshall, the challenger attempted, for the first time, to argue a different state felony law which was not presented to the trial court. This was rejected by the Third Circuit based on Uniform Rule 1-3, which states that issues not submitted to, or decided by the trial court, are not reviewable on appeal. There was no Louisiana felony alleged in the Petition in the instant case, nor was a Louisiana crime proven at trial, which met the factual and legal elements of the federal crime for which Roy Hebron plead guilty. Therefore, Mr. Hebron is not disqualified under Section 10.1.

At the hearing in the trial court, undersigned counsel asked the court to give full effect to all of the words of Section 10.1. The plain meaning of the words is that the federal offense must also be triable as a Louisiana felony in order for the disqualification to apply. Section 10.1 does not say that a candidate is disqualified if there is a Louisiana felony that is "kind of similar" to the federal crime. The trial court was not convinced, and jumped through hoops to find that "if" Hebron had defrauded the State of Louisiana it would have been a felony:

> The Court finds that the argument was made that there -- it would not be a crime in the state of Louisiana. But this court think that's a distinction without a difference. The -- there are laws in the states, and on the state's books, and there are laws in the

> federal government books. They usually, a lot of times, address the same acts, same crime, but they might not be worded in identical form, might not be identical in nature. However, because we have different individuals writing these laws, different individuals enacting these laws, the court is of the opinion that Louisiana Government Benefits Fraud Statute would -- **if** the acts he committed had been committed, they **would be** applicable under this statute.

Tr. p. 82 (emphasis added).

The trial court effectively rewrote Section 10.1 to say that a federally-convicted felon is disqualified if there is a similar but different criminal statute that might apply if a different crime had been committed. Simply put, that is not the rule of statutory construction. State v. Merrill, 2014-530 (La. App. 3d Cir. 6/11/14), 140 So.3d 1237, 1239 (It is presumed that every word, sentence, or provision in a law was intended to serve some useful purpose, and in doing so, consider other laws *in pari materia*). The trial court erred in finding that Roy Hebron could have been convicted of a felony under Louisiana law. Kavanagh's counsel and the judge both admitted that there was no Louisiana felony law that fit the admissions in Roy Hebron's plea agreement.

D. The Court of Appeal's refusal to require that Kavanagh post a bond was contrary to law. In light of the short time allowed for appeals of injunctions, Hebron promptly filed his appeal. At the same time, and before the delays for new trial ran, Hebron sought to have the trial court mandate that Kavanagh post the bond required by La. Code Civ. Proc. arts. 3610 and 3608. The trial court did not require Neil Kavanagh to post security to cover the costs, damages and attorneys' fees incurred by Appellant, as provided for in those articles. Hebron also raised the issue with the Third Circuit in a supplemental brief. The Third Circuit never ruled on the motion to supplement the brief, nor did it rule on the issue of the mandatory bond.

VII. CONCLUSION

The Third Circuit Court of Appeal clearly erred. Kavanagh had no standing, as an individual citizen, to have Hebron removed from office. That power is exclusively given to the State or the District Attorney.

The Third Circuit Court of Appeal also committed legal error when it retroactively applied a newly-enacted Constitutional Amendment to someone who had already qualified and was elected

according to the law in effect on the date of the election. This error could possibly open doors to challenges by individual citizens to currently-elected officials. It is hard to comprehend how the Third Circuit could have ignored or missed this important legal issue. Prior jurisprudence makes it clear that the only law applicable to a candidate's qualifications is the law in effect on the date of the election.

The Third Circuit Court of Appeal committed legal error when it applied the newly-enacted Constitutional Amendment to Hebron's election, where Kavanagh did not allege or prove that the elements of Hebron's plea would be a felony under Louisiana law, reading out part of Section 10.1, as enacted. A petition that claims a candidate is non-compliant with the law should, at a minimum, point to the relevant statute. The Petition in this case failed in that regard. Even if the arguments of counsel in brief and at trial can be allowed, Hebron did not plead guilty to conspiring with others to cheat the State of Louisiana out of disaster benefits.

Finally, the Third Circuit Court of Appeal erred when it refused to allow Hebron to supplement his brief to raise the issue that Kavanagh has not posted the mandatory bond, and in refusing to consider that issue. The bond is required and should have been required by the trial court before the injunction was issued.

WHEREFORE, Applicant prays that this Court reverse the ruling below, which found that Kavanagh had standing to prevent Hebron's installation as Mayor of Ball, reversing the finding the Hebron could be prevented from taking office, from failing to require that Kavanagh be required to put up a bond, and for any other relief proper in the premises.

CHARLES D. ELLIOTT & ASSOCIATES, LLC

By:________________________

Charles D. Elliott (#22533)
720 Murray Street
Alexandria, LA 71301
Telephone: (318) 704-6511
Fax: (318) 704-6523
ATTORNEYS FOR APPLICANT ROY HEBRON

VIII. CERTIFICATE OF SERVICE

STATE OF LOUISIANA

PARISH OF RAPIDES

Charles D. Elliott, attorney for Roy Eugene Hebron, appeared before me, the undersigned Notary Public, and verified that all of the allegations appearing in Defendant's Application for Supervisory Writs are true and correct, and certified that he has mailed a paper copy of this application to the parties listed below by depositing same with the U.S. Postal Service, postage prepaid and properly addressed, this 6th day of February, 2019:

Hon. Monique Rauls
9th Judicial District Judge
P.O. Box 7357
Alexandria, LA 71306

Hon. Charles K. McNeely
Clerk of Court
Third Circuit Court of Appeal
P.O. Box 16577
Lake Charles, LA 70616-6577

B. Gene Taylor, III
Gold, Weems, Bruser, Sues & Rundell
P.O. Box 6118
Alexandria, LA 71307-6118
phone (318) 445-6471
Attorney for Plaintiffs

Charles D. Elliott

SWORN TO AND SUBSCRIBED before me, Notary, on this 6th day of February, 2019.

NOTARY PUBLIC