No. 01-23-00921-CV

IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT OF TEXAS
IN HOUSTON

ERIN ELIZABETH LUNCEFORD

Appellant,

v.

TAMIKA CRAFT,

Appellee.

On Appeal from the 164th Judicial District Court
Harris County, Texas
Cause No. 2022-79328
Honorable David Peeples, Sitting by Special Assignment

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Nature of Underlying Proceeding: Election contest filed by a Republican candidate for Harris County Civil District Court Judge who purportedly lost the November 8, 2022, General Election by 2,743 votes, which equates to 0.0026 percent of the total votes cast in her specific race. After conducting a bench trial, the Trial Court, Judge David Peeples, who was sitting by special assignment for the 164th Civil District Court of Harris County, denied Appellant's election contest and her request for a new election, ruling that the purported outcome, as shown by the final canvass, was the true outcome.

Action from which relief requested: Appellant seeks to reverse the Trial Court's entry of final judgment denying her election contest (see Appendix, Tab A), based upon several legal and factual sufficiency challenges to several of the Trial Court's Findings of Fact and Conclusions of Law (see Appendix, Tab B). Prior to the Court's entry of Final Judgment, Appellant submitted proposed Findings of Fact and Conclusions of Law (see Appendix, Tab C and D, respectively). After entry of Judgment, Appellant requested additional Findings of Fact and Conclusions of Law (see Appendix, Tab E). Appellant asks this Court to reverse and render judgment that the purported outcome cannot be determined, order a new election, and remand this cause to the Trial Court to

set a date for the new election in accordance with the Texas Election Code.

ISSUES PRESENTED

APPELLANT'S ISSUE NUMBER ONE

DESPITE THE TRIAL COURT'S PROPER FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE OF 2600 VOTERS WHO WERE UNABLE TO VOTE AT SPECIFIC POLLING LOCATIONS ON ELECTION DAY DUE TO A LACK OF BALLOT PAPER, THE TRIAL COURT SUBSEQUENTLY ERRED IN ITS "ESTIMATE" THAT ONLY 250 TO 850 OF THOSE 2600 VOTERS ULTIMATELY FAILED TO CAST A BALLOT ELSEWHERE. THE TRIAL COURT'S MANUFACTURED "ESTIMATE" IS NEITHER LEGALLY NOR FACTUALLY SUPPORTED BY THE EVIDENCE.

APPELLANT'S ISSUE NUMBER TWO

DESPITE THE PRESENCE OF CLEAR AND CONVINCING EVIDENCE THAT 411 VOTERS WERE TURNED AWAY FROM SPECIFIC POLLING LOCATIONS FOR REASONS UNRELATED TO BALLOT PAPER, THE TRIAL COURT TOTALLY IGNORED SUCH EVIDENCE BEFORE REACHING ITS ERRONEOUS CONCLUSION THAT THE PURPORTED OUTCOME OF THIS CONTESTED ELECTION IS THE TRUE OUTCOME.

APPELLANT'S ISSUE NUMBER THREE

III. DESPITE THE PRESENCE OF CLEAR AND CONVINCING EVIDENCE THAT 1,995 SUSPENSE VOTERS CAST ILLEGAL BALLOTS WHICH WERE COUNTED WITHOUT PROVIDING A STATUTORILY REQUIRED STATEMENT OF RESIDENCE, THE TRIAL COURT TOTALLY IGNORED SUCH EVIDENCE BEFORE REACHING ITS ERRONEOUS CONCLUSION THAT THE PURPORTED OUTCOME OF THIS CONTESTED ELECTION IS THE TRUE OUTCOME.

APPELLANT'S ISSUE NUMBER FOUR

BECAUSE THE CLEAR AND CONVINCING EVIDENCE PREVENTED THE TRIAL COURT FROM DECLARING THAT THE PURPORTED OUTCOME OF THIS ELECTION IS THE TRUE OUTCOME, THE TRIAL COURT HAD NO DISCRETION TO DENY APPELLANT'S ELECTION CONTEST BUT WAS INSTEAD REQUIRED TO ORDER A NEW ELECTION.

STATEMENT REGARDING ORAL ARGUMENT

Appellant believes oral argument will be helpful to the Court in determining whether the Trial Court erred in denying her election contest, particularly because the record is lengthy, and the election law issues are both factually and legally complex.

STANDARD OF REVIEW

(i) The Trial Court's Findings of Fact in a Bench Trial are Subject to the Same Standards of Review as a Jury Trial.

In an appeal of a judgment rendered after a bench trial, the trial court's findings of fact have the same weight as a jury's verdict, and this Court must review the legal and factual sufficiency of the evidence to support them in the same manner as the Court would review a jury's findings. Nat'l Fire Ins. Co. of Hartford v. State & Cnty. Mut. Fire Ins. Co., No. 01-07-00845-CV, 2009 Tex. App. LEXIS 7928, 2009 WL 3248224, at *3-4 (Tex. App.—Houston [1st Dist.] Oct. 8, 2009, no pet.) (mem. op.).

(ii) *The Standard of Review for a Factual Sufficiency Challenge to a Finding of Fact.*

In a factual sufficiency review, a court of appeals must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. The inquiry must be "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." A court of appeals should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. If, considering the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. A court of appeals should detail in its opinion why it has concluded that a reasonable factfinder could not have credited disputed evidence in favor of the finding. In the Interest of J.F.C, 96 S.W.3d 256, 266-267 (Tex. 2003).

(iii) *The Standard of Review for a Legal Sufficiency Challenge to a Finding of Fact.*

In a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that

the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard *all* evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.

If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient. Rendition of judgment in favor of the parent would generally be required if there is legally insufficient evidence. In the Interest of J.F.C, 96 S.W.3d 256, 266 (Tex. 2003).

(iv) *The Standard of Review for a Challenge to a Conclusion of Law.*

This Court's review of a trial court's conclusions of law is de novo. BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002); In re Moers, 104 S.W.3d 609, 611 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

SUMMARY OF THE ARGUMENT

According to the official canvass, Appellant Erin Elizabeth Lunceford purportedly lost her race for the 189th Civil District Court of Harris County by a mere 2,743 votes. This reported deficit was razor thin, as it constituted approximately one-quarter of one percent (0.0026 percent) of the 1,064,677 total votes cast in her race. To sustain her request for a new election, Appellant's burden was to show that the purported outcome, as report in the canvass, was not the true outcome. In support of her request, Appellant Lunceford introduced clear and convincing evidence of five (5) specific categories of voting: (i) 325 illegal net votes were cast and counted in favor of Appellee Craft after 7pm on Election Day (called ascertained votes) and must therefore be subtracted from Appellee's vote total (the Trial Court agreed with this category and so found, but erred when it included these votes in its undervote calculations); (ii) 1,716 additional illegal votes were cast and counted for a variety of reasons but were not tied to either candidate (called unascertained votes) (the Trial Court agreed and so found); (iii) 2600 unidentified (and unidentifiable) potential voters attempted to vote on Election Day but were turned away from specific polling locations due to a shortage of ballot paper (the Trial Court agreed and so found but

then erred when it invented an "estimate" of how many of these specific voters were able to vote elsewhere); (iv) an additional 411 potential voters were turned away from specific polling locations due to equipment failures or other reasons (the Trial Court made no mention of this category in its Final Judgment denying Appellant's election contest, nor did it address this category in its subsequent Findings of Fact and Conclusions of Law); and (v) 1,995 additional voters who were on a suspense list and failed to submit the statutorily required statement of residence form cast illegal votes which were counted but were not tied to either candidate (unascertained votes) (the Trial Court made no mention of this category in its Final Judgment denying Appellant's election contest).

The Trial Court fully embraced and accepted category (i) by finding that a net sum of 325 illegal votes had been cast and counted for Appellee Craft (although the Trial Court misapplied a subsequent undervote calculation by including, rather than excluding, the net 325 votes in that calculation). The Trial Court also fully embraced and accepted category (ii) by finding that 1,716 illegal votes were cast and counted but not ascertained as to which candidate those illegal votes were cast.

But the Trial Court committed reversible error with respect to category (iii). More specifically, although the Trial Court found by clear and convincing evidence that 2,600 voters tried to vote but were turned away due to ballot paper shortages, the Trial Court subsequently erred by speculating, without any evidence whatsoever to support its speculation, that most of those 2,600 rejected voters were, in fact, able to find another place to vote, and then went there and voted.

There is no legal or factual basis for this speculation. As was proven by Contestant at trial, the identities of these potential voters were not only unknown, but unknowable, and thus, it was neither feasible nor possible to contact them and find out whether they did or did not vote elsewhere on Election Day. With the sole exception of one voter who testified that he finally voted after traveling to four (4) separate polling places, there is absolutely zero evidence to support the idea that any of these other specific potential voters voted, much less that somewhere between 1,750 and 2,350 of the 2,600 potential voters ended up voting. Accordingly, the Trial Court erred when it manufactured an invented finding of fact that an estimated "range" of 250 to 850 voters from the original 2,600 voters who were turned away gave up and did not actually vote elsewhere.

Although the Trial Court's error regarding category (iii) is sufficient by itself to require a reversal and rendition, the Trial Court also committed reversible error in other respects. First, by completely ignoring clear and convincing evidence of 411 potential voters turned away for reasons unrelated to ballot paper shortages as described in category (iv), the Trial Court erred in taking these voters into account when it determined whether the reported outcome was the true outcome in its Final Judgment. Although Appellant Lunceford requested findings of fact on category (iv) before the Trial Court entered its Final Judgment, the Trial Court ignored the subject altogether in its decision. Moreover, even though Appellant Lunceford requested the Court to make findings of fact after its decision was announced, the Trial Court nevertheless failed to enter any findings of fact on this specific category of voters.

The Trial Court also committed reversible error by completely ignoring category (v), where clear and convincing evidence of 1,995 illegal votes by suspense voters who failed to submit statutorily required statements of residence was admitted at trial. Appellant Lunceford requested findings of fact before the Court issued its Final Judgment with respect to category (v). Once the Final Judgment was announced, Contestant thereafter specifically asked the Trial Court to explain why it

failed to address this category of challenged voters. In response, the Trial Court avoided any explanation or evaluation of this category of evidence and failed to make any findings of fact on this topic. Instead, the Trial Court merely rejected category (v) with no evaluation whatsoever, other than saying this category was not satisfactorily proved. The Trial Court's silence on this point is deafening; Appellant proved by clear and convincing evidence that there were 1,995 instances of unascertained illegal votes being cast and counted by showing the specific names of the suspense voters as displayed by Harris County's voting roster, coupled with proof that no statement of residence existed for any of these suspense voters.

As will be demonstrated herein, Contestant's factual presentation, which was proven by clear and convincing evidence, prevented the Trial Court from declaring the outcome, as report by the final canvass, was the true outcome. To the contrary, the trial of this case demonstrated that the Trial Court could not ascertain the true outcome, and therefore had no discretion but to declare this contested election void and order a new election, as is required by the Texas Election Code (the Trial Court "*shall* declare the election void" and order a new election). *Tex. Elec. Code*

§221.009(b)(emphasis added)*;Green v. Reyes*, 836 S.W.2d 203, 212 (Tex. App.-Houston [14th Dist.] 1992, no writ).

STATEMENT OF FACTS[1]

Contestant Erin Elizabeth Lunceford is the Republican nominee who ran for election to the 189th Civil Judicial District Court of Harris County during the November 8, 2022, General Election cycle. 11 RR 36 (Contestant's Exhibit 2, which is the official canvass by Harris County). Contestee Tamika "Tami" Craft is the Democratic nominee who ran for election to the 189th Civil Judicial District Court of Harris County during the November 8, 2022, General Election cycle. Id. This countywide contested judicial election was conducted in Harris County and encompassed the entire county. Id.

On November 19, 2022, the Harris County Commissioner's Court (the canvassing authority) issued its final canvass on behalf of Harris County, Texas. Id. (Contestant's Exhibit 2). According to the final canvass, Contestant received 530,967 votes (49.87%) and Contestee received 533,710

[1] These background facts are supported by 81 separate volumes of the Reporter's Record, which includes sworn testimony in the form of live witnesses, sworn testimony in the form of oral depositions, sworn testimony in the form of depositions upon written questions, and documentary evidence admitted during the bench trial.

votes (50.13%). Id. Thus, the margin of reported defeat is 2,743 votes, which equates to a mere 0.26 of one percent of the total votes cast in that specific race. This purported outcome was timely contested by the Contestant. Id.

The ballot for the November 8, 2022, General Election was two pages in length, both of which were 8.5 by 14 inches in width and length, respectively. 3 RR 134. The candidates for the 189th Civil Judicial District Court race appeared on page one of the two-page ballot. Id.

The November 8, 2022, General Election was overseen and conducted by Clifford Tatum, who is the Elections Administrator ("EA" or "HCEA") for Harris County. Id.; 4 RR 208, et seq. (video deposition of Clifford Tatum).

How In Person Voting Is Conducted In Harris County.

The established procedure for voting in person for this election in Harris County at a polling location began by directing a potential voter who arrived to cast a vote to what is referred to as the Qualifying Table. 3 RR 140-145 (live testimony of Victoria Williams); 51 RR 93-299 (Contestant Exhibit 16, Harris County Training Manual).

At the Qualifying Table, an election official will attempt to determine if the voter is listed as a registered voter on the Harris County Voter Roll, which is the list of every registered voter in Harris County, and an election

official will also ask the voter to present one of the statutorily required forms of photo identification, which is referred to as the "List A" forms of identification. Id.

If the voter's name is on the Harris County Voter Roll, and if the voter presents one of the List A forms of photo identification, then that voter will be checked into the E-Poll Book system, which is an iPad connected to the internal voting data information of Harris County. Id. The list of every voter who voted in the November 8, 2022, General Election is maintained in a database called the Harris County Voter Roster. Id; 4 RR 208, et seq. (video deposition of Clifford Tatum).

Upon check-in, a ballot access code is printed out from a device called a Controller. 3 RR 140-145 (live testimony of Victoria Williams); 51 RR 93-299 (Contestant Exhibit 16, Harris County Training Manual). Using that specific access code, the voter will then proceed to a machine called a Duo, which has an electronic touchscreen upon which a voter may select amongst the various candidates for whom they wish to vote. Id. The specific access code given to the voter is tied to the specific registration address where the voter is registered to vote, so that the voter's ballot choices are limited to only those political offices which have geographical political boundaries which encompass the area where the voter resides. Id.

For those voters who arrive at the Qualifying Table that were not listed on the Harris County Voter Roll, an election official will attempt to determine whether that voter was indeed a registered voter. Id. If that voter's registration status is confirmed, then an election official will add that voter to a list of registered voters who are not presently on the list of registered voters, which is called a Registration Omissions List, and that voter will proceed in the same manner as a voter who was already on the Harris County Voter Roll. Id.

If the voter is not on the Harris County Voter Roll, and if the election official is not able to verify that this voter was indeed a registered voter, then that voter is not permitted to cast a regular ballot. Id. If that voter wishes to vote anyway, then an election official will permit that voter to cast what is called a Provisional Ballot, but not a regular ballot. Id.

If the voter whose name is on the Harris County Voter Roll (or who has now been added to the Registration Omissions List) does not present one of the List A forms of photo identification, then that voter will be provided an opportunity to nevertheless qualify to cast a regular ballot as explained above. Id.

Once a voter is determined to be listed as a registered voter on the Harris County Voter Roll, or if the voter is found to be a registered voter

despite not being listed on the Harris County Voter Roll (and thus added to the Registration Omissions List), but that voter fails to present one of the List A forms of photo identification, then the election official will require the voter to present one of the substitute forms of identification, which is referred to as the List B forms of permitted identification. Id. In addition, the election official will require the voter to completely fill out a form called a Reasonable Impediment Declaration ("RID"). Id. The RID form requires the voter to identify what reasonable impediment prevents them from having one of the List A forms of photo identification, and it also requires the voter to sign that document. Id. The election official may not question the reasonableness of the impediment claimed by the voter, but the voter is required to indicate on the RID form what reasonable impediment they claim to have. Id. The RID form also requires the election official to identify what type of List B identification was presented by the voter, and it also requires the election official to sign that document. Id.

If the voter does not present a List A form of photo identification, and if the voter also does not present both a List B form of identification and a reasonable impediment for not having a List A form of photo identification, then that voter may not be permitted to cast a regular ballot. Id. If that voter still wants to vote, then that voter is permitted to cast a provisional ballot. Id.

In addition to determining whether the voter who has appeared at the Qualifying Table is listed on the Harris County Voter Roll and has satisfied all identification requirements, the election official is also required to ask the voter, as required by the election code, if they still reside at the address shown on the Harris County Voter Roll. 3 RR 145-148 (live testimony of Victoria Williams). If the answer to that question was yes, then the voter was asked to sign the iPad and ultimately was given an access code, and then that voter proceeds to vote at a machine called a Duo. Id. Once finished, the Duo can print out the electronically selected choices onto the two-page ballot. Id.

After the voter completed their selections on the Duo and printed out their ballot, then they proceeded to the final step of the in-person voting process, which was for the voter to go to a Scanner, which is the device by which both pages of the voter's ballot would be scanned in. 3 RR 171-176 (live testimony of Victoria Williams). Once scanned, that ballot was electronically recorded on a special flash drive, which is called a V-drive, and on a hard drive of the Scanner. Id. The paper ballot was collected in the ballot box underneath the Scanner. Id. Eventually, that voter's recorded vote will be reflected as a cast vote record and will be included in the vote totals reflected in the Official Final Canvass. Id.

Failure to Supply Sufficient Ballot Paper in Advance to Polling Places on Election Day.

From the evidence provided by the Harris County Election Administrator's Office, including, but not limited to, Attachment 2 to their post-election assessment issued last November of 2022, see 55 RR 5-59 (Contestant's Exhibit 20), most of the Election Day polling locations received the same amount of ballot paper, which was purportedly enough for 600 voters (e.g., 1200 pages)[2].

During his video deposition, which was played at trial, Clifford Tatum explained the HCEA's rationale for its intentional decision to supply ballot paper in the way it did. 4 RR 208, et. seq. His rationale started with the projection that turnout would be 65% of the registered voters. Actual turnout was 43% of the registered voters. When asked why polling locations ran out of ballot paper when turnout was 22% less than projected, Mr. Tatum had no answer, but simply stated that the plan which was implemented started with an initial allocation, coupled with the plan that additional paper would be supplied during the day where and when needed. Id.

Evidence was submitted that this plan failed. HCEA admitted in Contestant's Exhibit 20 (55 RR 5-59) that 68 polling locations ran out of their initial ballot paper allocation. Several Presiding Judges at various

[2] 1200 pages would not likely service the needs of 600 voters, for multiple reasons, including the fact that EA Tatum's instructions on how to handle scanning problems would require more than two (2) pages per voter.

Election Day polling locations testified that it was difficult, if not impossible, to get thru on the phone to HCEA on to request additional ballot paper, as hold times exceeded thirty (30) minutes in some cases, while in other cases election officials were not able to reach an actual person who answered the phone. See, e.g., 3 RR 132, et. seq. (live testimony of Victoria Williams); 3 RR 233, et. seq. (deposition testimony of Elizabeth Kocurek); 3 RR 259 (deposition testimony of Kelly Hubanek Flannery). Other testimony demonstrated that, even when someone with HCEA was contacted, additional ballot paper was not delivered in time for voters to vote. See, e.g., 8 RR 10, et. seq. (depositions upon written questions of thirty-eight (38) different election workers).

HCEA Tatum made no effort to compare 2018 turnout for a particular polling location and then multiply that known turnout by 125% to calculate what amount of ballot paper should be allocated to the same polling location in 2022. 4 RR 208, et. seq. (deposition testimony of Clifford Tatum), He also did not consider areas where there were hotly contested races that might increase participation in a particular district, nor did he increase in an amount to account for spoiled ballots. Id.

Although redistricting and other factors caused Harris County to change precinct boundaries and to assign different numbers to precincts that

were in existence during the 2018 election from those precincts that were utilized in the 2022 election, it is nevertheless possible to determine actual turnout of a specific polling location in 2018 and then it is also possible to project anticipated turnout at the same polling location in 2022. 6 RR 178, et seq. (live testimony of Russ Long). And, to the extent one 2018 polling location was configured within a particular 2018 precinct, but for purposes of the 2022 election was combined with one or more other precincts for the 2022 election, whereby all combined precincts utilized the same physical polling location, it was nevertheless still possible to analyze 2018 turnout for each polling location within each combined precinct, add them together, and then make a projection for turnout at that specific polling location in 2022 for all of the combined precincts. Id. EA Tatum did not attempt to perform these calculations, nor did Beth Stevens, the retained expert for Contestee. 4 RR 208, et. seq. (deposition of Clifford Tatum); 8 RR 295, et. seq. (live cross-examination of Beth Stevens). In many cases, the polling location that was used in 2018 was the same polling location used in 2022. Id. Voters in 2022 would likely be turning out to the same location where they voted in 2018. Id.

HCEA Tatum also made no effort to project turnout on a specific polling location by polling location basis. Id. Instead, with only a few

exceptions, turnout was predicted to be the same, e.g., 600 voters, at virtually every single polling location. 55 RR 5-59 (Contestant's Exhibit 20, Attachment 2). Contestant's Exhibits 14C, 14D, and 14E, see 4 RR 16, as well as the Harris County November 8, 2022, Voter Roster, see 51 RR 62-63, demonstrates that the same number of people did not turnout at every polling location. In fact, 380 out of 782 polling locations had more than 600 voters. Id.

Contestant's Exhibit 75 demonstrated 2018 turnout on a precinct-by-precinct basis. 8 RR 8. Contestant's Exhibit 76 demonstrated 2018 canvass totals on a precinct-by-precinct basis. 8 RR 8. By comparing these two exhibits, it is possible to determine actual turnout for a specific polling location for 2018, and then by multiplying 125% for the actual 2018 turnout for each specific polling location, it is possible to calculate the total projected turnout for the same polling location in 2022. Id. Once that number is compared to the specific polling locations listed in Attachment 2 to Contestant's Exhibit 20, HCEA's initial allocation for 600 voters was less than the 125% calculation for well more than 100 specific polling locations. Id.

Regardless of whether a specific polling location in 2022 received an initial ballot paper allocation of less than 125% of actual turnout for 2018,

evidence was also introduced that compared the initial ballot paper allotment for 2022 as shown in Attachment 2 to Contestant's Exhibit 20, on the one hand, with the actual canvassed turnout for a specific polling location on Election Day, on the other hand. See 55 RR 5-59 (Contestant's Exhibit 2), as well as Contestant's Exhibits 14C, 14D, and 14E. 4 RR 16.

That comparison shows that HCEA initially undersupplied 121 Harris County polling locations with paper ballots. 6 RR 178, et. seq. (live testimony of Russ Long). Of that total number, 111 polling locations were in neighborhoods where voters have previously voted in at least two (2) Republican primaries out of a total of seven (7) primaries spanning twelve (12) years, from 2010 to 2022. Id. In addition, 109 polling locations were in neighborhoods where voters voted in at least six (6) Republican primaries out of a total of seven (7) primaries spanning twelve (12) years, from 2010 to 2022. Id. The evidence demonstrated that there was an extremely high correlation of ballot shortages with Republican voting patterns. To answer the question "what is the probability this pattern occurred by chance?" a mathematical formula called a binomial function was used by Russ Long, one of Contestant's non-retained experts. 14 RR 14 (Contestant's Exhibit 78); see also 6 RR 178, et. seq. (live testimony of Russ Long). The answer: the probability of getting 111 (using 2 R) or 109 (using 6 R) undersupplied

polling locations inside Republican areas, out of the identified total of 121 "in/out" possibilities, in a fair distribution, is very low, about 0.00021% (using 2 R) and 0.0224 (using 6 R). Id. Thus, the clear and convincing evidence showed that the HCEA's decision on how to initially allocate ballot paper at a particular polling location disproportionately affected neighborhoods with likely Republican voters.

(i) Polling Locations Ultimately Ran Out of Paper and Turned Voters Away.

The evidence during the trial demonstrated that at least twenty-four (24) polling places ran out of ballot paper on election day. 8 RR 10, et. seq. According to the collective testimony of 27 witnesses (one live witness, two witnesses by video deposition, and twenty-one (21) witnesses by deposition upon written questions), approximately 2,535 voters were estimated to have been turned away from these polling locations as a result. The Trial Court so found in its Finding of Fact number 17, although it used a slightly higher number of 2,600 instead of 2,535. Contestant has tried to discern why the Trial Court did so but cannot find a basis to explain the Trial Court's math. Contestant does not challenge the Trial Court's finding.

Of that total number of twenty-four (24) locations, twenty (20) polling locations were in neighborhoods where a majority of the turnout in 2018 supported Greg Abbott for Governor in 2018. 6 RR 178, et. seq. (live

testimony of Russ Long). Thus, approximately 83.3% of the polling locations that ran out of ballot paper were in Republican precincts. Id. The clear and convincing evidence demonstrates that the loss of ballot paper disproportionately affected neighborhoods with likely Republican voters. Id.

During the trial, Contestee argued that Contestant's proof in this regard was deficient. Among the reasons asserted by Contestee were the following: (i) no evidence of the names of the turned away voters; (ii) no evidence of the voter registration status of the turned away voters; (iii) no evidence of whether any of the turned away voters actually voted elsewhere; (iv) no evidence of whether any turned away voters intended to vote in the 189th Civil Judicial District race; and (v) no evidence of which candidate turned away voters intended to support. The clear and convincing evidence admitted during the bench trial debunked these assertions. More specifically, the clear and convincing evidence showed that it was both impossible and impractical to obtain this information from turned away voters. See, e.g., 3 RR 132, 138-139 (live testimony of Victoria Williams), who served as a Presiding Judge, and who testified that, as an election official, it would have been "inappropriate, unethical, and illegal" to ask a turned away voter to disclose their identify or to reveal how they intended to vote. Id. Indeed, the Election Code only empowers this Court with the authority to force a voter

to disclose for whom they voted if and only if the Court first finds that the voter cast a ballot that was ineligible to have been counted. Where, as here, we are talking about voters who were turned away, that statutory authority does not apply, and, by logic, would not authorize an election official at a polling location to conduct a mini trial and investigation in the middle of a busy election day of voting. Further, the witnesses who testified about turning away voters from their polling locations were election officials, and they were duty bound to continue their work as election officials, which included working inside of the polling location, rather than standing around outside where the voters were turned away. See, e.g., 8 RR 10 (depositions upon written questions of thirty-eight (38) election officials). Moreover, testimony was provided by several witnesses that turned away voters were upset over the fact that ballot paper was not available, creating a hostile and toxic environment (e.g., one such voter spit on a Presiding Judge, see 3 RR 259 (deposition of Kelly Hubanek Flannery), while others engaged in conduct that required calling the police to come out and calm things down. See 3 RR 233, deposition testimony of Elizabeth Kocurek). Accordingly, the clear and convincing evidence adduced at trial was that it was impractical, if not impossible, to obtain any information about the voters who were turned away. Even if it were possible to track down turned away voters, Contestant

introduced evidence that it would be financially and logistically impossible and/or impractical to subpoena these individuals and to pay the costs associated with a deposition upon written questions, an oral deposition, or to secure in-person trial appearances.

Polling Locations Turned Away Voters for Other Reasons.

In addition to voters being turned away for lack of ballot paper, fifteen (15) witnesses testified there were also other issues beyond ballot paper shortages that caused voters to leave specific polling sites without casting their ballots at those locations. 8 RR 10, et. seq. For example, there was evidence of machine malfunctions, the inability to reach the HCEA on the phone or by other means, a lack of equipment or supplies and other problems, which occurred on Election Day. Id. Based upon that evidence, the Court should have found that a total of fifteen (15) polling locations were affected, with 411 voters that were turned away. Thus, adding the number of voters turned away for ballot paper shortages (2535 by Contestant's calculations, although shown as 2,600 by the Trial Court in Finding of Fact number 17), with the number of voters turned away for other reasons (411) the Trial Court should have found clear and convincing evidence of 2,946 potential voters who were turned away in all. This category alone exceeds the reported margin of defeat in this contested race and the undervote

percentage of 3.86%. But for reasons not expressed by the Trial Court anywhere in the record, it did not include these 411 turned away voters in the analysis. The Trial Court's rationale for doing so is simply invisible.

The chart below summarizes and quantifies the thirty-eight (38) depositions upon written questions, see 8 RR 10, et. seq., as follows:

Polling Location	Poll Number	Number of Voters Turned Away	Election Worker	Posit
Seabrook Intermediate School	52045	207	Kelley Hubenak-Flannery	P
T H Rogers School	82032	187	Frances Rauer	P
Brill Elementary School	22036	28	Neal Richard	P
City of El Lago City Hall	52047	100	Chris Russo	P
Linkwood Park Community Center	92087	75	Betty Edwards	A
Saint Marys Episcopal Church	12115	60	Cody McCubbin	P
Oak Forest Elementary School	12140	40	Patricia Phillips	P
Salyards Middle School	12131	500	Terry Wheeler	P
Spring First Church	22042	190	Victoria Williams	P
Northpointe Intermediate School	12027	120	James Schoppe	P
Zwink Elementary	22016	30	Richard Self	P
Katherine Tyra Branch Library	12007	120	Linda Zachary	P
North Hampton Mud Community Center	22019	40	MARTIN RENTERIA	P
Twin Creeks Middle School	22122	250	Elizabeth Kocurek	P
Laura Welch Bush Elementary	62009	100	Lydia Cantu	A
Ginger McNabb Elementary	22118	10	Cindy Adamek	P
Unity of Houston	82031	100	Dorothy Nall	A
*Ashford United Methodist Church	82018	42	Lamar Strickland	P
HCC Alief Hayes Campus Building C	82013	80	Erin Eitel	A
Lake Houston Church of Christ	32007	0	SAN BRANHAM	P
IPSP	92045	40	Richard Hawley	A
Poe Elementary School	92096	20	Matthew Goitia	A
Northgate Crossing Elementary School	22120	75	Mike Guillory	A
**Heritage Park Baptist Church	62004	19	Jeff Larson	P
French Elementary	22017	40	DeAnna Snyder	P
St. Lukes Missionary Baptist Church	92050	97	Margaret King	P
Viola Cobb Elementary School	42035	43	Pearline Burton	P
Parkview Intermediate School	52006	40	Robert Kenney	P
Element Houston Katy	82070	3	Lisa Musick	P
Deer Park Junior HIgh School	52053	25	Connie Dellafave	P
Hardy Street Citizens Center	SRD 140 [EV]	N/A	Paul Stalnaker	A
Jensen Elementary School	52012	150	Erik Munoz	P
University Baptist Church	52034	3	Phyllis Tacquard	P
Red Elementary School	72029	N/A	Erich Wolz	A
Rummel Creek Elementary School	82027	N/A	Charles Grindon	P
Paul Revere Middle School	82010	29	Robert Dorris	Vot
James E Taylor High School	82044	N/A	Susan Clasen	P
Birkes Elementary School	12024	10	Thomas Nobis	P
Shadowbriary Elementary School	82023	15	Damian Derby	P
Rice Univeristy Welcome Center	92077	30	Ana Flor Lopez Millan	A
	TOTAL	2946	Total Declarants =40	

Nowhere in the documentary or testimonial evidence is there any proof whatsoever about whether, and to what extent, any of the 2,600 turned away voters ended up voting somewhere else. All that is known is the number of voters turned away. Their identities, their gender, their race, their partisanship, or even their voter registration status, is not known. Nor could it be found out, as these potential voters did not give out their names, addresses, phone numbers, voter registration status, or any other types of information. It is both not feasible and indeed impossible to know what happened after these potential voters left the polling sites that had no ballot paper. And to "estimate" how many voted after being turned away is not evidence. It is simply manufactured out of whole cloth.

Agreeing To A Court Order To Permit Voting For An Extra Hour On Election Day.

An emergency court hearing late in the day on Election Day resulted in HCEA Tatum agreeing to keep all 782 of the polls open for one additional hour. Under the terms of that order, all such voters who arrived at a polling location to vote after 7:00 p.m. were supposed to cast Provisional Ballots rather than voting regularly. See 55 RR 60 thru 56 RR 216, which comprises Contestant's Exhibits 25A thru 25L, 26A thru 26H, and 27A thru 27L.

No notice of this emergency hearing was given to Contestant Lunceford, even though she was a candidate on the ballot and even though

her candidacy would be affected by the relief being sought by the plaintiffs. Id. No notice of the initial emergency hearing was given to the State of Texas, the Secretary of State, or the Office of Attorney General. Id.

Evidence was admitted during the trial that the State of Texas, Secretary of State, and the Office of Attorney General, jointly filed a motion to dissolve the temporary restraining order that the Trial Court, sitting as the Ancillary Court on Election Day, had granted. Despite this new development, the Trial Court did not do so. Id.

Parallel emergency mandamus proceedings were also filed by the same parties who had filed the joint motion to dissolve before the Harris County Ancillary Judge. The Texas Supreme Court thereafter issued a stay of the Trial Court's temporary restraining order, but an hour of voting had already occurred by the time the stay has issued. Id.

Despite EA Tatum's assurances to the Trial Court earlier in the evening that sufficient supplies would be available to accommodate voting for an extra hour, EA Tatum ultimately admitted in a subsequent hearing that same evening before the Trial Court that not all polling locations had access to ballot paper during the extra hour of allotted time to vote. Id. This caused the Trial Court to express concern for what EA Tatum had promised and what EA Tatum had delivered. Id.

A second mandamus proceeding was filed by the same parties as had jointly filed the motion to dissolve the previously entered temporary restraining order. The Supreme Court thereafter issued a subsequent order which required Harris County to announce separate canvass totals, one counting the after 7pm provisional ballots and one not including those totals. Those separately canvassed results are contained in Contestant's Exhibit 27H, see 56 RR 105 thru 195 (page 128 relates to this race).

Ordinarily, there is no technological basis to determine which candidate in a specific race received a vote from a Provisional Ballot ("PB") voter whose vote was cast and counted. The reason for this is that, once the Early Voting Ballot Board ("EVBB") has accepted a PB, all such accepted provisional ballot affidavits ("PBAs") are then transferred to the Harris County EA's office for actual counting. EA Staff then open the accepted PBA envelopes, remove the PB, and then scan those ballots so that they are electronically recorded onto the V-Drive. Once scanned, the PB votes become part of the vote totals, but there is no tracking system to be able to connect which candidate received a vote from which specific PB voter. Thus, it is ordinarily impossible for the Court to declare the outcome of these PB votes.

In this election, however, there is one notable exception to what is described above. The Texas Supreme Court issued a stay on November 8, 2022, and ordered that Harris County segregate all PBs cast and counted after 7pm by court order from the rest of the PBs. Id. A subsequent order from the Texas Supreme Court resulted in Harris County reporting in the final canvass results the actual breakdown, by candidate, of how this discrete group of PB voters cumulatively voted, if such voters cast PBs after 7pm by court order. Id. Thus, although ordinarily it would not be possible to do so, in this election, Harris County reports in the final canvass totals that Contestant Lunceford received 822 PBs cast after 7pm by court order, while Contestee Craft received 1,147. 56 RR 128. This means that Contestee received a net number of 325 more PBs than did Contestant.

In Conclusion of Law number 34, the Trial Court correctly concluded that 325 votes for Appellee Craft were illegal votes. However, the subsequent statement by the Trial Court in that same finding only reflects that it would take that "into account." More than that is legally required. Section 221.011 of the Texas Election Code required the Trial Court to subtract all 325 votes from the canvass totals, leaving Contestee with 325

fewer votes than before, which means the purported margin of defeat goes from 2,743 to 2,418 votes[3].

Mail-in Ballots Were Not Initially Handled Properly.

The evidence at trial demonstrated that approximately 700 mail-in ballots ("BBMs") were counted without conducting the required review and analysis by the Signature Verification Committee ("SVC") before agreeing to accept a BBM for counting by the Early Voting Ballot Board ("EVBB"). 4 RR 19, et. seq. The HCEA's office instructed the Signature Verification Committee ("SVC") to deviate from established procedure on the first day that they processed BBMs. Id.

Kay Tyner, the Vice Chair of the Signature Verification Committee, testified that when the Signature Verification Committee began its process in the November 8, 2022, Election, one of the Election Administrator's staff members instructed the Signature Verification Committee that they were only supposed to compare the identification information provided on the mail ballot carrier envelope to the information that was included on the mail ballot application. Id. Additionally, the EA staff member declared that it was not necessary to review the signatures. Members of the Signature

[3] As will be explained in the Argument and Authorities section of this Brief, the Trial Court should not have multiplied the undervote percentage of 0.0386 times 2,743 (which reflects an additional 106 votes needed for Contestant to account for the undervote in her race). Instead, the correct calculation is 0.0386 times 2,418 (which reflects an additional 93 votes instead of 106).

Verification Committee protested and requested that the process be reviewed. Id.

In addition, Kay Tyner testified that after this improper process was brought to the attention of the EA staff member, the process was fixed by a retraction from the EA staff member of the earlier instructions, but approximately 700 BBMs that were processed during that time were not re-reviewed. Id. These mail ballots should have been reviewed properly to determine if they were acceptable. Id. Not knowing which mail ballot envelopes were incorrectly reviewed, and not knowing how many of these 700 mail ballots were accepted and how many were rejected, it is not possible to ascertain the impact of these improperly processed mail in ballots on either Contestant or Contestee. The Trial Court found that seven (7) illegal ballots resulted from this situation in Finding of Fact number 49. Although this number is significantly smaller than the evidence presented at trial, Contestant does not challenge this finding.

Mail-In Ballots.

Contestant introduced evidence challenging certain mail-in ballots that were cast and counted. Those challenges fall into three (3) categories, as follows: (i) BBMs post-marked after November 8; (ii) BBMs post-marked on November 8 for a non-military and non-overseas voter who postmarked

their ballot on Election Day in a city like San Antonio or Fredericksburg; and BBMs (iii) not signed by the voter.

Contestant's Exhibit 12 represented the twelve (12) BBMs which were accepted by the EVBB and counted, even though each one was postmarked on or after November 8. Contestant's Exhibit 11 represent the forty-four (44) BBMs which were accepted by the EEVB and counted, even though the BBM return carrier envelopes had no signatures. 39 RR 20-52, 40 RR 4-55, and 41 RR 5-10. Based upon all this evidence, the Trial Court in Finding of Fact number 37 a total of forty-five (45) illegal ballots that were cast and counted. Although this number is less than the evidence which was submitted, Contestant does not challenge this finding.

Provisional Ballots During Early Voting and Election Day During non-Extended Hours.

Contestant also contended that certain provisional ballots that were cast and counted should not have been counted. Those challenges fall into multiple categories. Contestant's Exhibits 10A, 10C, 10D, and 10E (4 RR 16) show the specific challenges and why those challenges were made. In Finding of Fact number 34, the Trial Court found a total of forty-three (43) provisional ballots that should not have been counted. Although this number is significantly less than the number challenged, Contestant does not challenge this finding.

Votes by voters who have cancelled voter registrations.

Harris County's official Voter Roster (which lists all the voters who cast a ballot in the election and for whom their vote was counted and included in the official canvass) lists 2,970 voters in the November 8, 2022, General Election whose status is cancelled. 51 RR 62-63. HCEA reviewed those fact patterns and informed the parties that five (5) of the 2,970 voters voted in the November 8, 2022, election with an expired voter registration. The Trial Court so found in Finding of Fact number 64. Contestant does not challenge this finding.

Votes by voters who were on the Suspense list.

The Harris County Voter Roster lists 2,039 voters who voted and have a SUSPENSE notation next to their name. 51 RR 62-62; 4 RR 16. Evidence was admitted during the trial that 1,995 of these voters did not submit a filled-out Statement of Residence ("SOR"). 6 RR 87-88, 111-113 (live testimony of Steve Carlin). The evidence at trial was that eighty-two (82) of those voters did submit a SOR, but 38 of those SORs were challenged on other grounds by the Contestant, and the Court sustained those challenges. Id. Thus, there are forty-four (44) SORs which remain unchallenged, leaving 1,995 as the remaining total of Suspense list voters who failed to submit a SOR. Id. None of this evidence was disputed, and the Court's rejection of

this evidence constitutes harmful error. The evidence conclusively demonstrated that these 1,995 voters who cast a ballot without a SOR cast a vote that was illegal.

The Trial Court did not analyze or even mention this category of challenged voters when it issued its Final Judgment, even though Contestant Lunceford had submitted proposed findings of fact and conclusions of law on this category. After the decision, Contestant Lunceford requested a specific finding on this specific topic. The Trial Court failed to analyze this category, but simply said it was not sufficiently proved.

Votes Were Cast And Counted By Out of County Voters Or By Voters Who Failed To Adequately Fill Out An SOR.

Contestant's Exhibit 9A is a compilation of 2,351 SORs challenged by the Contestant on various grounds. 12 RR 5 thru 27 RR 206. Contestant's Exhibit 9B is a detailed spreadsheet of those challenges. 27 RR 207-208. Of the various categories, the Court sustained Contestee's objections to certain categories tied to a database called the National Change of Address ("NCOA") database, which is compiled and maintained by the United States Postal Service ("USPS"), and, for this lawsuit, was reported by a third party, called True NCOA. Contestant does not challenge these rulings.

The SOR categories which do not relate to NCOA, USPS, or True NCOA, are: (i) out of county voters and (ii) incomplete SORS lacking

sufficient information to determine whether a voter was entitled to vote in the November 8, 2022, General Election in Harris County. As to the first category, the clear and convincing evidence demonstrated that 1,113 SORs represent voters who voted in the November 8, 2022, election but who did not reside in Harris County on the date that they voted. Of that 1,113 total, 1,000 of those SORs demonstrated the out of county status of the voter without the need to resort to extrinsic evidence. The remaining 113 of those SORs required some additional research, such as typing in the residence address on google maps to determine what county that address was in or inputting the address into the Harris County Appraisal District website or checking other verifiable and public databases. Because the list of these out of county SORs is so lengthy, a tally by bates number for each SOR was submitted by the Contestant in her proposed Findings of Fact as Exhibit B. Ultimately, the Trial Court found in Finding of Fact number 23 that 966 illegal votes were cast by voters who did not live in Harris County at the time they voted. Although this number is less than what was proven at trial, Contestant does not challenge this finding.

The other SOR category that Contestant challenged were those voters who cast a ballot but who failed to supply sufficient information on their SOR to meet the minimum residency requirements necessary to confirm

their right to cast a ballot in Harris County. Contestant's initial category of challenged SOR voters was 467. After the cross-examination of Steve Carlin, which, in part, focused on this category of challenged SORs, Contestant withdrew 185 challenges in this specific category, such that only 284 challenges remain. Because the list of these incomplete SORs is so lengthy, a tally by bates number for each SOR was submitted by Contestant in her proposed Findings of Fact and was attached thereto as Exhibit C. Ultimately, the Trial Court found in Finding of Fact number 24 that 270 of the challenged SORs fail to satisfy the information requirements set forth in Section 63.0011 of the Texas Election Code. Although this number is smaller than the evidence presented at trial, Contestant does not challenge this finding.

Votes Were Cast And Counted Without An Appropriate Reasonable Impediment Declaration.

Contestant presented testimony about how to qualify and accept a voter to vote, the need for photo identification and/or the need for a reasonable impediment declaration ("RID"), and what to do if information is missing on a RID. 3 RR 132, et. seq. (live testimony of Victoria Williams). According to her testimony, all 532 challenged RIDs were not sufficient on their face to permit this Court to confirm that those specific voters—who cast a vote and that vote was counted—were, in fact, eligible to cast a

regular ballot. Contestant's Exhibit 13A is a copy of all the challenged RIDs, see 41 RR 11 thru 51 RR 4, while Contestant's Exhibit 13C is a spreadsheet demonstrating what is lacking on a particular RID. 51 RR 5-61. The Trial Court ultimately sustained 380 of the challenged RIDs in Finding of Fact number 44. Although this number is significantly less than the evidence presented by the Contestant, she nevertheless does not challenge the finding.

The Undervote

The final canvass, see 11 RR 36, shows that the undervote in Contestant's specific race, when expressed as a percentage, is 3.86%. This means that for every 1000 voters who voted in the November 8, 2022, General Election, 38 voters did not cast a ballot in the Contested Election, while 962 did so. The reported margin of defeat in the Contested Election was 2,743. After subtracting 325 net votes as described earlier, that purported margin declines to 2,418. Taking the undervote percentage into account (2,418 multiplied by 0.0386), approximately 93 voters out of 2,418 voters did not vote in the Contested Election. Thus, to ensure that the undervote is considered, 93 undervotes must be added to 2,418, for a grand total of 2,511 votes. The Trial Court correctly analyzed the undervote percentage in Finding of Fact 70, and Contestant does not challenge that portion of the finding. However, the Trial Court erred by applying the

undervote calculation to the 325 net votes referenced previously. Because the Texas Supreme Court required election officials to segregate the after 7pm provisional ballots, the evidence is certain that each of the 325 voters voted for Appellee Craft and therefore no undervote could exist for that specific category of challenged votes. That being the case, the Trial Court erred in determining that the margin necessary to demonstrate a material impact on the Contested Election is 2,849. In actuality, the margin is 2,511, and Contestant challenges this portion of the Trial Court's finding.

ARGUMENT AND AUTHORITIES

APPELLANT'S ISSUE NUMBER ONE

DESPITE THE TRIAL COURT'S PROPER FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE OF 2600 VOTERS WHO WERE UNABLE TO VOTE AT SPECIFIC POLLING LOCATIONS ON ELECTION DAY DUE TO A LACK OF BALLOT PAPER, THE TRIAL COURT SUBSEQUENTLY ERRED IN ITS "ESTIMATE" THAT ONLY 250 TO 850 OF THOSE 2600 VOTERS ULTIMATELY FAILED TO CAST A BALLOT ELSEWHERE. THE TRIAL COURT'S MANUFACTURED "ESTIMATE" IS NEITHER LEGALLY NOR FACTUALLY SUPPORTED BY THE EVIDENCE.

APPELLANT'S ISSUE NUMBER TWO

DESPITE THE PRESENCE OF CLEAR AND CONVINCING EVIDENCE THAT 411 VOTERS WERE TURNED AWAY FROM SPECIFIC POLLING LOCATIONS FOR REASONS UNRELATED TO BALLOT PAPER, THE TRIAL COURT TOTALLY IGNORED SUCH EVIDENCE BEFORE REACHING ITS ERRONEOUS CONCLUSION THAT THE PURPORTED OUTCOME OF THIS CONTESTED ELECTION IS THE TRUE OUTCOME.

APPELLANT'S ISSUE NUMBER THREE

III. DESPITE THE PRESENCE OF CLEAR AND CONVINCING EVIDENCE THAT 1,995 SUSPENSE VOTERS CAST ILLEGAL BALLOTS WHICH WERE COUNTED WITHOUT PROVIDING A STATUTORILY REQUIRED STATEMENT OF RESIDENCE, THE TRIAL COURT TOTALLY IGNORED SUCH EVIDENCE BEFORE REACHING ITS ERRONEOUS CONCLUSION THAT THE PURPORTED OUTCOME OF THIS CONTESTED ELECTION IS THE TRUE OUTCOME.

A. THERE IS NO LEGALLY OR FACTUALLY SUFFICIENT BASIS TO SUPPORT THE TRIAL COURTS FINDING OF FACT NUMBERS 17, 18, 19, 21, 44, 67, 70, 71, 72, 73 AND 74.

Appellant Lunceford brings several legal and factual sufficiency challenges to the Trial Court Findings, specifically Findings number 17, 18, 19, 21, 44, 67, 70-74. Before explaining why these findings are without legal or factual support, the following standards of review must be explained.

(i) The Trial Court's Findings of Fact in a Bench Trial are Subject to the Same Standards of Review as a Jury Trial.

In an appeal of a judgment rendered after a bench trial, the trial court's findings of fact have the same weight as a jury's verdict, and this Court must review the legal and factual sufficiency of the evidence to support them in the same manner as the Court would review a jury's findings. Nat'l Fire Ins. Co. of Hartford v. State & Cnty. Mut. Fire Ins. Co., No. 01-07-00845-CV, 2009 Tex. App. LEXIS 7928, 2009 WL 3248224, at *3-4 (Tex. App.—Houston [1st Dist.] Oct. 8, 2009, no pet.) (mem. op.).

(ii) *The Standard of Review for a Factual Sufficiency Challenge to a Finding of Fact.*

In a factual sufficiency review, a court of appeals must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing. The inquiry must be "whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the State's allegations." A court of appeals should consider whether disputed evidence is such that a reasonable factfinder could not have resolved that disputed evidence in favor of its finding. If, considering the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. A court of appeals should detail in its opinion why it has concluded that a reasonable factfinder could not have credited disputed evidence in favor of the finding. In the Interest of J.F.C, 96 S.W.3d 256, 266-267 (Tex. 2003).

(iii) *The Standard of Review for a Legal Sufficiency Challenge to a Finding of Fact.*

In a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light

most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard *all* evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.

If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient. Rendition of judgment in favor of the parent would generally be required if there is legally insufficient evidence. In the Interest of J.F.C, 96 S.W.3d 256, 266 (Tex. 2003).

(iv) *The Standard of Review for a Challenge to a Conclusion of Law.*

This Court's review of a trial court's conclusions of law is de novo. BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002); In re Moers, 104 S.W.3d 609, 611 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

With all these above-referenced legal standards in mind, Contestant will now demonstrate why specific Findings of Fact by the Trial Court are both legally and factually insufficient.

FINDING OF FACT NUMBERS 17, 18, 19 AND 21 LACK FACTUAL AND FACTUAL SUFFICIENCY (REGARDING VOTERS TURNED AWAY).

Finding of Fact number 17 recites the following:

FF 17. From the evidence, the court finds that because of paper shortages 2600 voters who tried to vote at their polling place of choice left without voting. These numbers do not include voters discouraged by long lines who voted elsewhere due to machine malfunctions or paper jams, which were not caused by EAO decisions.

The evidence in support of the Trial Court's Finding of Fact number 17 (2,600 voters turned away) is well-documented, clear, convincing, and unrebutted. Thirty-eight (38) different witnesses testified under oath by depositions upon written questions, along with several other live and deposition witnesses. The summary chart on page 33 of this Brief sets forth that evidence, and the Trial Court embraced it in the first sentence of Finding of Fact number 17.

The first sentence quoted above makes clear that the 2,600 voters who were turned away relate solely to ballot paper shortages, not equipment malfunctions. That much is clear, and Contestant does not challenge that portion of the finding.

But Contestant Lunceford does contend that there is no factual or legal support for the second sentence of that Finding. One the one hand, it seems to recognize that some potential voters were turned away from their polling place due to other reasons unrelated to ballot paper, such as machine malfunctions and paper jams. Indeed, Contestant's clear and convincing proof on this point was that 411 potential voters fell into that separate category. But the reference to "who voted elsewhere" is confusing. Why would the Trial Court be talking about voters "who voted elsewhere" that had nothing to do with ballot paper shortages? And how would the Trial Court know that any of the 411 voters turned away for other reasons beyond ballot paper shortages voted somewhere else? And what about those potential voters who were unable to find another location and vote there? The binary reference in the second sentence fails to recognize that a turned away voter for reasons unrelated to ballot paper shortages may have not been subsequently able to vote. Instead, it seems to say that the only turned away voters are 2,600 in number, and that is belied by the evidence of 411 voters turned away for other reasons.

It may be that the Trial Court intended to separate, as did the Contestant in her proof at trial, those voters who were turned away for ballot paper shortages from those voters who were turned away for other reasons,

such as equipment failures. But if that is true, then it seems like the Trial Court forgot to cover the latter category in its Findings. None of the Trial Court's findings ultimately mention--much less analyze--that latter category. Simply put, there is no evidence at all that proved some of the voters who were turned away for equipment or non-ballot-paper issues went elsewhere to vote. That evidence simply does not exist.

Finding of Fact number 18 also lacks factual or legal support. Finding number 18 talks about the 43.54% of the registered voters who turned out to vote, and the Trial Court seems to truncate the category of 2,600 turned away voters with that turnout percentage. That is clearly wrong. If a voter did not vote, then that voter cannot be part of the percentage of the electorate who voted. The opposite is true; they are part of the percentage of voters who did not vote.

Findings of Fact numbers 18 and 19 are even more concerning because there the Trial Court departs from the evidence and begins to muse about voter motivations without any evidentiary basis to do so. With one notable exception (one deponent testified he went to four (4) different polling locations in his effort to vote, see Appendix, Tab B, Finding of Fact 15), none of the witnesses in this case provided any evidence whatsoever about successfully voting after being initially turned away from their polling

location. And yet the Trial Court devotes an entire paragraph in Finding of Fact number 18 to the thought processes of these specific 2,600 voters, none of which was introduced as evidence on the topic of why specific voters voted or gave up and did not vote. These findings by the Trial Court were literally made up. None of those statements were made at trial by anyone. All the evidence conclusively demonstrated how many voters tried to vote but were turned away. What happened after those voters left is utter speculation and is not a burden of proof that is required in an Election Contest.

After properly finding in Finding of Fact 17 that 2,600 voters were turned away due to paper shortages, the Trial Court also erred when it subjectively injected its "estimate" of voters that ultimately found a place to vote and did in fact vote in Finding of Fact number 19. That Finding recites:

FF 19. Given the state of the evidence, the court estimates that between 250 and 850 voters who left the first polling place did not vote elsewhere because of the EAO's ballot paper decision.

There is no factual or legal support for this finding. There is not one shred of evidence to suggest that 250 to 850 turned away voters gave up, while the rest found a place to vote and voted. Finding of Fact number 19

simply cannot withstand scrutiny. None of the witnesses said this at trial, and none of the admitted exhibits prove this Finding.

Finding of Fact number 21, in part, states:

FF 21. The court estimates that between 250 and 850 voters left and did not vote elsewhere on Election Day.

For all the reasons previously mentioned regarding Finding of Fact 19, there is no factual or legal support for Finding of Fact 21. The Trial Court does not specify whether the 250 to 850 voters mentioned in Finding of Fact number 21 are the same voters referenced in Finding of Fact number 19. It is unclear why the Trial Court needed to make two separate findings—19 and 21—on the same topic. Could it be that the Trial Court was aware that Contestant had raised an additional challenge of 411 potential voters being turned away for reasons beyond ballot paper shortages, like equipment failures? And if so, why would those voters be ignored when the Trial Court quantified the voters turned away at 2,600? Why wouldn't the number be increased from 2,600 to 3,011 (2,600 plus 411)? Or did the Trial Court simply want to cap the potential voters turned away category to something between 250 and 850, although Contestant's proof had two categories of voters turned away, not just one? The simple answer is that the two findings

cannot be squared with one another. But regardless, there is no factual or legal support for either finding.

FINDING OF FACT NUMBER 44 LACKS FACTUAL AND FACTUAL SUFFICIENCY (REGARDING RIDS).

The Trial Court's Finding of Fact number 44 is probably the result of a mistake. That Finding recites:

FF 44. *The court concludes that 380 of the 532 challenged RIDs are so lacking in the statutory information that they are improper, and votes cast by these 350 voters should not have been counted.*

In the beginning of the finding, the Trial Court finds 380 illegal votes were counted, but at the end of the same finding, the Trial Court says 350, not 380. Which is it? Contestant assumes the Trial Court made a mistake and intended to say 380 instead of 350. This view makes sense when viewed in concert with Finding of Fact number 73, which adds up all the votes accepted by the Trial Court as illegal. For the numbers to add up correctly, 380 is required, not 350. There is no factual or legal support for the number of 350. Contestant does not challenge the number of 380.

FINDING OF FACT NUMBER 67 LACKS FACTUAL AND FACTUAL SUFFICIENCY (REGARDING SUSPENSE VOTERS).

The Trial Court's Finding of Fact number 67 relates to its refusal to accept the evidence of 1,995 suspense voters voting illegally. This Finding states:

FF 67. *Lunceford contended that 1995 voters whose names were on the suspense list were permitted to vote without showing that they still resided in the county. This contention was not proved to the court's satisfaction and it is respectfully denied.*

There is no factual or legal support for this Finding. The Harris County Voter Roster lists 2,039 voters who voted and have a SUSPENSE notation next to their name. 51 RR 62-63. Evidence was admitted during the trial that 1,995 of these voters did not submit a filled-out Statement of Residence ("SOR"). 6 RR 87-88, 111-113 (live testimony of Steve Carlin).

Registered voters whose address has come into question through a variety of processes, may be placed on a suspense list ("Suspense"). Section 63.0011 of the Texas Election Code requires voters whose name is on Suspense must fill out a Statement of Residence prior to be accepted for voting. If those voters fail to properly fill out a SOR, then are not allowed to vote, and, if they are nonetheless permitted to vote a regular ballot, then that vote is an illegal vote that is not eligible to be counted.

The undisputed clear and convincing evidence submitted at trial demonstrates that the Harris County Voter Roster, Contestant's Exhibit 14C, 14D, and 14E, shows 2,039 voters were on the Suspense list. 4 RR 16; 6 RR 87-88, 111-113 (live testimony of Steve Carlin). The evidence at trial was that eighty-two (82) of those voters did submit a SOR, but 38 of those SORs were challenged on other grounds by the Contestant, and the Court sustained those challenges. Id. Thus, there are forty-four (44) SORs which remain unchallenged, leaving 1,995 as the remaining total of Suspense list voters who failed to submit a SOR. Id. None of this evidence was disputed, and the Court's rejection of this evidence constitutes harmful error. The evidence conclusively demonstrated that these 1,995 voters who cast a ballot without a SOR cast a vote that was illegal.

The Trial Court did not analyze or even mention this category of challenged voters when it issued its Final Judgment, even though Contestant Lunceford had submitted proposed findings of fact and conclusions of law on this category. After the decision, Contestant Lunceford requested a specific finding on this specific topic. The Trial Court failed to analyze this category, but simply said it was not sufficiently proved.

FINDING OF FACT NUMBERS 70 AND 71 LACK FACTUAL AND FACTUAL SUFFICIENCY (REGARDING THE UNDERVOTE).

The undervote findings in Findings of Fact number 70 and 72 also lack factual and legal support. In those Findings, the Trial Court misapplied the undervote calculation by including, rather than excluding, the net 325 votes in the calculation due to the after 7pm Election Day voting category is addressed[4]. To demonstrate the error in the Trial Court's math, the reported margin of defeat in the Contested Election was 2,743. After subtracting 325 net votes as described earlier in this Brief regarding after 7pm Election Day illegal voting, that purported margin declines to 2,418. Taking the undervote percentage into account (2,418 multiplied by 0.0386), approximately 93 voters out of 2,418 voters did not vote in the Contested Election. Thus, to ensure that the undervote is considered, 93 undervotes must be added to 2,418, for a grand total of 2,511 votes. The Trial Court correctly analyzed the undervote percentage in Finding of Fact 70, and Contestant does not challenge that portion of the finding. However, the Trial Court erred by applying the undervote calculation to the 325 net votes referenced previously. Because the Texas Supreme Court required election officials to segregate the after 7pm provisional ballots, the evidence

[4]Because the Texas Supreme Court ordered that all PBs cast after 7pm be segregated and reported separately, the Trial Court was required to find that all 822 votes cast for Contestant and all 1,147 votes cast for Contestee must be subtracted from the respective candidates' vote totals, as these votes are illegal. Doing so leaves a net 325 votes to be subtracted from the purported margin of defeat.

is certain that each of the 325 voters voted for Appellee Craft and therefore no undervote could exist for that specific category of challenged votes. That being the case, the Trial Court erred in determining that the margin necessary to demonstrate a material impact on the Contested Election is 2,849. In actuality, the margin is 2,511, and Contestant challenges this portion of the Trial Court's finding.

Contestant's view of how to deal with the undervote is supported by a similar conclusion of law by a trial court in Cameron County which was entered on January 27, 2022. In the case of *Leal v. Pena*, No. 2020-DCL-06433, the trial court found the following:

> "41. The Court is mindful that overturning an election is not to be taken lightly. To this end the Court has considered using an approximate "under vote ratio" of 6,000/40,000. The evidence shows 15% of voters in this election "under voted" in the school board election. By using this ratio an 8-vote margin of victory requires approximately ten (10) illegally cast votes to equate to in order to invalidate the election results. The Court has found 24 illegally cast votes. This number is more than twice the calculated "over vote" cushion favoring the Contestee."

The trial court's judgment, including the above-quoted conclusion of law, was affirmed by the Corpus Christi Court of Appeals. *Pena v. Leal*, 13-22-00204-CV (PFR denied in 23-0538).

FINDING OF FACT NUMBERS 70-75 LACK FACTUAL AND FACTUAL SUFFICIENCY (REGARDING VOTERS TURNED AWAY).

The findings in Findings of Fact 70-75 are also without legal or factual support for the reasons previously asserted regarding the false estimated range of 250 to 850 voters and the failure to account for the 411 turned away voters and the 1,995 suspense voters.

APPELLANT'S ISSUE NUMBER FOUR

BECAUSE THE CLEAR AND CONVINCING EVIDENCE PREVENTED THE TRIAL COURT FROM DECLARING THAT THE PURPORTED OUTCOME OF THIS ELECTION IS THE TRUE OUTCOME, THE TRIAL COURT HAD NO DISCRETION TO DENY APPELLANT'S ELECTION CONTEST BUT WAS INSTEAD REQUIRED TO ORDER A NEW ELECTION.

The remainder of the legal arguments are focused on why Contestant's Election Contest should have been granted.

The Right To Vote Is A Fundamental Constitutional Right Which Must Be Protected.

"The right to vote is fundamental, as it preserves all other rights." *Andrade*, 345 S.W.3d at 12 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)); see also Tex. Const. art. I, § 3 (providing equal rights). Courts have zealously protected the right to vote. See *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct.

526, 11 L. Ed. 2d 481 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); *Stewart v. Blackwell*, 444 F.3d 843, 862 (6th Cir. 2006) ("Few rights have been so extensively and vigorously protected as the right to vote. Its fundamental nature and the vigilance of its defense, both from the courts, Congress, and through the constitutional amendment process, stem from the recognition that our democratic structure and the preservation of our rights depends to a great extent on the franchise."); see also *United States v. Mosley*, 238 U.S. 383, 386, 35 S. Ct. 904, 59 L. Ed. 1355 (1915) ("We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."); *Avery v. Midland County*, 406 S.W.2d 422, 425 (Tex. 1966) ("Petitioner as a voter in the county has a justiciable interest in matters affecting the equality of his voting and political rights."); *Thomas Paine*, Dissertation on the Principles of Government, 1795 ("The right of voting . . . is the primary right by which all other rights are protected.").

The Constitutional Right To Vote Is Denied When A Reported Outcome Is Not The True Outcome Of An Election.

"No one who has imbibed anything of the spirit and genius of our free government will ever question the peerless value and sacred inviolability of the elective franchise. It will be guarded with sleepless vigilance by all who appreciate the blessings of free institutions." *Arberry v. Beavers*, 6 Tex. 457, 470 (1851). Because the sacred right to vote is fundamental to a democratic society, this Court has a solemn obligation to ensure that the purported outcome of the 189th Civil Judicial District Court election, as reported by Harris County in its final canvass, is the true outcome. This duty does not and cannot derive from a political perspective. Indeed, the political victor will almost always support the status quo, while the reportedly defeated candidate very well may not, especially when the reported margin of victory is narrow and close. But the Court's job here is to render a judgment that is based purely on the facts and the law, and must be made *despite, not because of*, the political ramifications it may generate. Thus, for the parties and the public to have confidence in its system of democratic elections, and after hearing all the evidence in this case, it is the Court's considered judgment that that the reported outcome of the 189th Civil Judicial District Court of Harris County is void, and that a new election must be ordered for this specific contested race. To ignore the clear and convincing evidence in this case that illegal votes were counted, legal votes were discarded, eligible

voters were prevented from voting, and election officials engaged in fraud or illegality or made mistakes, would be tantamount to accepting the adage of "it's good enough for government work." The Texas Election Code mandates this result, and it is not within the sound discretion of this Court to turn a blind eye to these transgressions, as to do so would not protect, but would denigrate, the constitutional right to vote.

After weighing all the evidence, and after applying the law to the evidence, the Trial Court had no choice but to hold that it cannot ascertain that the outcome, as reported in the final canvass, is the true outcome for the 189th Civil District Court of Harris County (the "Contested Election"). Accordingly, the Trial Court should have declared the Contested Election void, and a new election is ordered pursuant to TEX.ELEC. CODE ANN. § 221.009(b) (Vernon 1986).

<u>The Trial Court's Duty in an Election Contest.</u>

The Texas Election Code mandates that an election tribunal "<u>*shall*</u> declare the election outcome if it can ascertain the true outcome of the election." *Tex. Elec. Code §221.009(a)* (emphasis added). Conversely, if a court cannot ascertain the true outcome of the election, it "<u>*shall*</u> declare the election void" and order a new election. *Tex. Elec. Code §221.009(b)* (emphasis added)*; Green v. Reyes*, 836 S.W.2d 203, 212 (Tex. App.-Houston

[14th Dist.] 1992, no writ). Because the Trial Court could not possibly ascertain that the reported outcome, as shown by the official canvass, see Contestant's Exhibit 2, is the true outcome, that Court has no discretion but to declare this election void and to order a new election, as is required under the above-quoted section of the Texas Election Code.

A contestant must prove by clear and convincing evidence that, with respect to each voter whose vote is challenged, one or more violations of the Texas Election Code occurred and that these violations materially affected the outcome of the election. *Woods v. Legg, 363 S.W3d 710 (Tex. App.-Houston [1st Dist.] 2011, no pet.).*

The Texas Civil Practices and Remedies Code defines "clear and convincing" as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Tex. Civ. Prac. & Rem. Code, Section 41.001(2).*

The focus of this Court's inquiry then, as dictated by the election code, is to first attempt to determine the true outcome of the election, if possible. If the true outcome can be ascertained, then this Court has no discretion but to declare that the reported outcome is, indeed, the true outcome. Conversely, Texas Election Code § 221.012(b) mandates that an

election tribunal "shall declare the election void if it cannot ascertain the true outcome of the election."

Section 221.003 of the Texas Election Code sets forth the general parameters of an election contest:

> Sec. 221.003. SCOPE OF INQUIRY.
>
> (a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because:
>
> (1) illegal votes were counted; or
>
> (2) an election officer or other person officially involved in the administration of the election:
>
> (A) prevented eligible voters from voting;
>
> (B) failed to count legal votes; or
>
> (C) engaged in other fraud or illegal conduct or made a mistake.

TEX. ELEC. CODE ANN. § 221.003(a) (Vernon 2003).

The appellate standard of review applicable to this Court's judgment is whether the record shows that the trial court abused its discretion. Guerra v. Garza, 865 S.W.2d 573, 576 (Tex. App. — Corpus Christi 1993, writ dism'd w.o.j.); Reese v. Duncan, 80 S.W.3d 650, 655 (Tex. App.-Dallas 2002, pet. denied).

§ 221.003(a)(1)'s Reference to Illegal Voting

An "illegal vote" is one that "is not legally countable." TEX. ELEC. CODE ANN. § 221.003(b) (Vernon 2003). For example, a vote cast in a precinct by a person who does not reside in the county of the election is an

illegal vote that cannot be counted. Alvarez v. Espinoza, 844 S.W.2d 238, 247 (Tex. App.-San Antonio 1992, writ dism'd w.o.j.).

For the reasons which follow, the Trial Court was required to find that Contestant was not and is not required to demonstrate whether an illegal vote was cast and counted in the Contested Election to be afforded a new election.

In *Green v. Reyes*, 836 S.W.2d 203 (Tex. App.-Houston [14th Dist.] 1992, no writ), the 14th Court of Appeals in Houston affirmed a trial court's decision to grant a new election. One of the conclusions of law by the trier of fact in that case, which was affirmed by the 14th Court, stated the following:

> "[t]he Court may reach this result 'without attempting to determine how individual voters voted' so long as 'the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election.' Texas Election Code § 221.009(b)."

Id. at 207. That same appellate court also upheld the following conclusions of law:

> "Section 221.009(b) must be interpreted and applied in a manner that makes sense. It clearly must mean that an election tribunal in its discretion may order a new election when, as here, the number of illegal votes exceeded the official margin of victory without either requiring testimony from each illegal voter, or proof by the Contestant that collecting such testimony represented a physical impossibility. The statute must envision the circumstance in which the magnitude of the illegal voting

along with some evidence of the tendencies of the illegal voting warrant the relief of a new election without the laborious, lengthy, and expensive process of a single trial judge trying to call a close election weeks or months afterwards by the testimony of hundreds of voters with uncertain memories."

"Plainly worded statutes must be read in their common sense. Section 221.009(b) must mean that in some reasonable circumstances the presumption of correctness of the official outcome no longer prevents relief in the form of a new election."

"Section 221.011 requires the court to deduct illegal votes from the candidates receiving them, but when it "cannot ascertain how the [illegal] voters voted, the tribunal shall consider those votes in making its judgment." The law assumes that in some cases, as here, some illegal votes will remain in doubt after all the evidence is concluded in an election contest, and further mandates that the court take those illegal but unknown votes into account."

"When the court, with some degree of certainty, can determine the outcome of the election based upon the evidence presented by the parties, section 212.012(a) requires it to do so. Failing this, the court's only alternative is defined by § 221.012(b), which requires the voiding of the election. Whatever may be the case when Contestant fails to sustain its burden of proof concerning the number of illegal voters, or proves a number of illegal voters less than the margin in the official returns for the election, once a Contestant has satisfied its burden of proving the number of illegal voters necessary to trigger the powers of the court under § 221.009(b), § 221.012(b) cannot be read to require a Contestant to prove the unavailability or lack of memory on the part of each and every voter whose vote might make a difference in order for the court to declare a new election. Such a burden would make some election contests logistically impossible."

"An application of sections 221.009 and 221.012 in this fashion carefully balances two competing public policies which clash

> when illegal voting exceeds the margin of "victory" by some magnitude: the policy of promptly determining election results versus the policy of maintaining public confidence in the integrity of an election process that is free from taint."

Green v. Reyes, 836 S.W.2d 203, 207 (Tex. App.-Houston [14th Dist.] 1992, no writ).

Indeed, a trial court in Hidalgo County on January 27, 2022, expressly extended this reasoning to relieve a contestant from having to establish that an illegal voter cast a ballot in the contest election. *Leal v. Pena*, No. 2020-DCL-06433, which was affirmed by the Corpus Christi Court of Appeals on April 27, 2023. *Pena v. Leal*, 13-22-00204-CV (PFR denied in 23-0538) ("it was not necessary to engage into the inquiry as to whether those illegal ballots were actually cast in the subject election"). Accordingly, for all these reasons, the Trial Court should have found, and erred by not finding, that it is neither possible nor practical for Contestant to prove that any illegal ballots which were cast in the November 8, 2022, General Election were, in fact, cast in this specific contested race.

Unascertainable Illegal Votes.

In addition, Contestant also proved that a certain number of illegal votes occurred where it was impossible to even identify the specific voter. Section 221.012(b) of the Texas Election Code comes into play where there were illegal votes cast which upon reasonable inquiry at an election contest

cannot be attributed to either the Contestant or Contestee. See TEX.ELEC. CODE ANN. § 221.012(a) (b) (Vernon 1986); see also Medrano v. Gleinser, 769 S.W.2d 687, 688 (Tex. App. — Corpus Christi 1989, no writ). The trial court may void the election results and order that a new election be held where there are enough illegal votes which cannot be attributed to either candidate, namely, where the number of illegal unascertainable votes is greater than or equal to the margin of victory. TEX.ELEC. CODE ANN. § 221.012(b) (Vernon 1986); see also Medrano, 769 S.W.2d at 688.

§ 221.003(a)(2)(B)'s Reference to Eligible Voters Prevented From Voting

Although Section 221.003(a)(1) of the Texas Election Code refers to illegal voting, the other parts of that statute refer to things besides illegal voting. For example, (a)(2)(B) refers to an election official preventing an eligible voter from casting a vote.

When understood in this context, the case law which discusses whether proof of how a voter voted is solely limited to illegal voting. In the case at bar, Contestant made many other challenges, the crux of which did not contend that certain votes which had been cast were illegal. For example, with respect to the entire subject matter of voters turned away because of certain polling locations running out of ballot paper, no allegation was made that these turned away voters ultimately cast a ballot that was illegal. To the

contrary, the complaint is centered around the fact that these voters did not cast a ballot at all, at least with respect to a certain specified number of identified polling locations. Thus, the Trial Court was obligated to find that it was not necessary for Contestant to prove whether these turned away voters cast a ballot in the Contested Election, as that information does not even exist.

The Court also was obligated to find that it was impossible and impractical for Contestant to prove who these turned away voters were, and whether they ultimately voted elsewhere. These facts are not knowable. Contestant is not required to prove these unprovable facts.

§ 221.003(a)(2)(C)'s Reference to Fraud, Illegality, Mistake By Election Officials

The election code does not require a trial court to rely solely on "illegal votes" in attempting to ascertain the true outcome of an election. As is evident from section 221.003, the outcome of an election can be muddled not just by the counting of illegal votes or the failure to count legal votes, but also by mistakes made by election officers. TEX. ELEC. CODE ANN. § 221.003(a) (2)(C) (Vernon 2003); see Alvarez, 844 S.W.2d at 242. A contestant may allege and prove that "irregularities rendered impossible a determination of the majority of the voters' true will." Guerra v. Garza, 865 S.W.2d 573, 576 (Tex. App. — Corpus Christi 1993, writ dism'd w.o.j.).

"The election code does not provide any guidance as to how a trial court should weigh a "mistake" by an election clerk. But given the importance of recording the true will of the voters, we believe that if enough voters are rendered potentially ineligible by mistakes made during the recording process to account for the entire margin of victory, the trial court is within its discretion to declare the election void because it is impossible to determine the true outcome of the election." *Gonzalez v. Villarreal*, 251 S.W.3d 763, 782 (Tex. App. –Corpus Christi-Edinburg 2008), pet. dism'd w.o.j.

There are many provisions contained in the election code that demonstrate the code's purpose to preserve evidence of the qualified voters' true will. Violations of certain recording provisions by election clerks can certainly undermine the purpose of the election code and obscure the true will of the qualified voters. By necessity, election officials are required to obtain and record certain information from individuals who present themselves at a polling place to vote. Election officials, under the code, are provided with certain tools with which they can verify information provided by a voter. *Gonzalez v. Villarreal*, 251 S.W.3d 763, 782 (Tex. App. –Corpus Christi-Edinburg 2008, pet. dism'd w.o.j).

For the above-referenced categories of complaint, the Trial Court was obligated to find that Contestant need not prove that these voters voted in the

Contested Election. To the contrary, all that is required is to show that these things occurred, so that the Court may take them into account when determining whether the true outcome of the election may be ascertained.

Support for Contestant's position can be found in *Gonzalez v. Villarreal*, 251 S.W.3d 763, 782 (Tex. App. –Corpus Christi-Edinburg 2008, pet. dism'd w.o.j.), as follows:

"In reality, election contests are not so cut and dry. The election code, however, recognizes that it may be impracticable or even impossible to determine for whom an illegal vote was cast. The election code does not require such an inquiry. Rather, the code provides that "if the tribunal finds that illegal votes were cast but cannot ascertain how the voters voted, the tribunal shall consider those votes in making its judgment." Id. § 221.011(b) (Vernon 2003). Although section 221.011 does not dictate exactly how those illegal votes should be considered, section 221.009 provides the answer: " [i]f the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, the tribunal may declare the election void without attempting to determine how individual voters voted." Id. § 221.009(b) (Vernon 2003). In other words, if a trial court determines that illegal votes were cast and that the number of illegal votes equals or is greater than the margin of victory, the trial court can then declare the election void without ever inquiring as to the candidate for whom those illegal votes were cast. See, e.g., Slusher, 896 S.W.2d at 240; Alvarez, 844 S.W.2d at 242 (holding that the election code permits a trial court to determine whether the number of illegal votes cast exceeded contestee's margin of victory without determining for which candidate illegal votes were cast); Kelley v. Scott, 733 S.W.2d 312, 314 (Tex. App.-El Paso 1987, writ dism'd) (judgment declared void because one illegal vote was cast, which equaled the number of votes to change the outcome of the election, regardless of the candidate for whom the illegal voter casts her vote)."

Accordingly, Appellant's Election Contest should have been accepted, and a new election ordered. The Trial Court erred in failing to do so.

PRAYER

Appellant asks this Court to: (i) reverse the Trial Court's denial of her Election Contest; (ii) sustain Appellant's Election Contest; (iii) render judgment that a new election must be ordered; and (iv) remand this cause to the Trial Court with instructions to schedule the new election in accordance with the Texas Election Code.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

By affixing my signature above, I hereby certify that a true and correct copy of Appellant's Brief has been delivered via the electronic filing system to the parties below on the 9th day of July 2024.

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CERTIFICATE OF COMPLIANCE

In accordance with TEX. R. APP. P. 9.4(i)(3), I certify that this Brief complies with the type-volume restrictions of TEX. R. APP. P. 9.4(e), (i)(2)(B). Inclusive of the portions exempted by Rule 9.4(i)(1), this Brief contains 14,846 words and is in Times New Roman, 14-point type.

/s/ Andy Taylor
Andy Taylor

No. 01-23-00921-CV

IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT OF TEXAS
IN HOUSTON

ERIN ELIZABETH LUNCEFORD

Appellant,

v.

TAMIKA CRAFT,

Appellee.

On Appeal from the 164th Judicial District Court
Harris County, Texas No. 2022-79328
Honorable David Peeples, sitting by assignment

APPENDIX IS SUPPORT OF APPELLANT'S BRIEF

No. 01-23-00921-CV

IN THE COURT OF APPEALS
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ERIN ELIZABETH LUNCEFORD

Appellant,

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Honorable David Peeples, sitting by assignment

TAB A

Cause No. 2022-79328

ERIN ELIZABETH LUNCEFORD,	*	**IN THE DISTRICT COURT**
Contestant	*	
	*	
vs	*	**164th JUDICIAL DISTRICT**
	*	
	*	
TAMIKA "TAMI" CRAFT,	*	**HARRIS COUNTY, TEXAS**
Contestee	*	

FINAL JUDGMENT DENYING ELECTION CONTEST

BACKGROUND AND CONTEXT.

The captioned election contest arose from one of sixty-eight countywide courthouse races on the November 8, 2022 Harris County ballot. The final results show that Tamika "Tami" Craft defeated Erin Elizabeth Lunceford for Judge of the 189th District Court by 533,710 to 530,967, a margin of 2743 votes. The percentage is 50.13 to 49.87. There were many close races: By the court's count, twenty-one candidates for courthouse offices (seventeen Democrats and four Republicans) won by a margin within 51 to 49 percent.

Twenty-one unsuccessful Republican courthouse candidates filed election contests by the statutory deadline. The court has had remote hearings roughly once a week from December through September, presiding over the gathering of election records and other evidence.[1]

An election contest in America's third most populous county is an intimidating prospect. The large numbers alone make these cases difficult and time-consuming. Craft's lawyers argued that this election, with its 2743-vote margin, was "not even close." The Court respectfully disagrees with that assessment because a 50.13 to 49.87 percent election is a close election. In a hypothetical 10,000-vote county, a 50.13 margin would be 26 votes, 5013 to 4987. Though the percentages in both cases would be 50.13–49.87, it is much harder to challenge a margin of 2743 in a large county than a margin of 26 in a small county.

Lunceford vs. Craft was tried to the court from August 2 to August 11. The court heard testimony from eleven live witnesses in court, four witnesses by oral deposition, and thirty-five others by written-question depositions. The court

[1] No judge who lives in Harris County could hear these cases because the Texas Election Code mandates that judges (active or retired) who live in *County A* are not eligible to handle an election contest involving *County A.* For very good reason, election contests must be heard by someone from the outside. Pursuant section 231.004 of the Texas Election Code, in December and January the undersigned retired judge from San Antonio was appointed to hear the twenty-one election contests by the Honorable Susan Brown, Presiding Judge of the 11th Administrative Judicial Region of Texas.

admitted some 120 exhibits, which contain several thousand pages. The issues litigated can be seen at a glance on page one of this Judgment.

This court's authority. Two sections of the Texas Election Code delineate the court's authority in this matter:

§ 221.003. SCOPE OF INQUIRY.

(a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome *because*:

(1) illegal votes were counted; or

(2) an election officer or other person officially involved in the administration of the election:

(A) prevented eligible voters from voting;

(B) failed to count legal votes; or

(C) engaged in other fraud or *illegal conduct* or made a *mistake.* (emphasis added)

§ 221.012. TRIBUNAL'S ACTION ON CONTEST.

(a) If the tribunal hearing an election contest *can* ascertain the true outcome of the election, the tribunal shall declare the outcome.

(b) The tribunal shall declare the election void if it *cannot* ascertain the true outcome of the election. (emphasis added)

Section 221.003 describes the *conduct* of election officials that may be a basis for an election contest. Section 221.012 specifies that the *ultimate issue for decision* in an election contest is whether the court can or cannot "ascertain the true outcome of the election."

Summary of Decision. For the reasons stated below, the court has found many mistakes and violations of the Election Code by the Harris County Elections Administration Office ("EAO") and other election officials. But the court **holds** that not enough votes were put in doubt to justify voiding the election for the 189th District Court and ordering new one.

The main contentions and issues that were tried fall into the groups discussed in sections I through IX below.[2]

I. BALLOT PAPER

In-person Harris County voters voted on computer screens, which then printed their selections onto two legal-size pages of ballot paper, which the voter would review for accuracy and then scan into a secure system that would eventually count the votes countywide.

The Texas Election Code states in one section how much ballot paper *shall be supplied* to each voting location:

> **Sec. 51.005. Number of ballots.** (a) The authority responsible for procuring the election supplies for an election *shall provide* for each election precinct a number of ballots equal to *at least* the *percentage of voters who voted* in that precinct in the most recent corresponding election *plus 25 percent* of that number, except that the number of ballots provided may not exceed the total number of registered voters in the precinct. (emphasis added)

This is the law of Texas, and election administrators are duty-bound to try to follow it.

For the November 2022 election, the Harris County Elections Administration Office (the "EAO") *chose not to follow* section 51.005—indeed the EAO *totally ignored* it. The EAO did this because the statute speaks of providing paper to "each election precinct," and since 2019 Harris County has voted at countywide polling locations, not at "precincts."

Feeling unbound and unguided by section 51.005, the EAO decided to give 766 of the 782 polling locations *identical* amounts of paper—enough for 600 ballots each. Larger amounts were given to the other sixteen locations (PX-20; DX-11). The

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[2] The following acronyms were used throughout the trial and are listed here for convenience: Ballot by Mail (BBM); Elections Administration Office (EAO); Early Vote Ballot Board (EVBB); Provisional Ballot Affidavit (PBA); Reasonable Impediment Declaration (RID); Statement of Residence (SOR); and Signature Verification Committee (SVC).

EAO planned to take phone calls on election day and deliver extra paper to the polling locations as they telephoned for more.

A. Section 51.005's intent.

In section 51.005 the Legislature's obvious intent was:

> First, estimate *future turnout* by looking at *past turnout*.
>
> Second, err on the side of *over*supply (instead of risking *under*supply) by adding 25% to the first number.
>
> In a nutshell:
>
> - *Look at past proven need by area, and provide "at least" that percentage,*
> - *estimate future need by area,*
> - *then oversupply by 25% just to be safe.*

Election officials are commanded ("shall") to *estimate a future unknown* (the coming election's need) by reference to *known historical facts* (the past election's known turnout, area by area). That is, calculate the 2022 need for ballot paper scientifically by looking at known numbers from 2018 in areas of town (precincts).

Ironically the EAO did the *opposite* of what the Legislature had mandated. The Legislature specified fact-based, individualized, fine-tuned allocation. The EAO supplied one-size-fits-all allocation of 600 ballots apiece for 766 of the 782 polling locations (98%).

B. The consequences of the 600-per-location decision.

The 600-per-location decision had tragic consequences:

- On election day several polling locations ran out of paper and were not able to get more paper in time for waiting voters.
- Voters stood in long lines for long periods of time.
- Many voters became frustrated and angry. One election worker testified, through tears, that a voter spit on her when she delivered the news that lined-up voters would have to wait, or go elsewhere to vote, because the polling location had run out of ballot paper. Another election worker testified that angry voters wanted her badge number.
- The news media reported the long lines and voter frustration.

- Election workers who made phone calls for more paper were often put on hold or told to leave a message. Promised paper was not always delivered.
- Damage was done to the public's confidence in government; pre-existing distrust was deepened. Partisan suspicions were inflamed.
- When voters eventually went elsewhere to try to vote, they sometimes encountered paper shortages and long lines at the other locations.

Had the EAO simply *tried* to obey the Legislature, twenty-one election contests might have been avoided because the shortages of ballot paper caused much of the Election Day chaos.

The consequences of the EAO's decision were foreseeable, avoidable, and costly.

C. The EAO's Rationale offered by Craft and the Harris County Attorney.

Craft and the EAO (through the Harris County Attorney's Office) argue that Section 51.005 simply *does not apply* to countywide voting. Their arguments are:

- Section 51.005's language refers to "each election precinct," not each countywide voting location.
- Precincts and polling locations are different things. A precinct is an *area* in the county with boundaries. A countywide polling place is a *location* for voting (a building) that serves the entire county.
- The last clause of section 51.005 ("except that . . . in the precinct") would be absurd if it applied to countywide locations; it would mean the paper for each polling location could not "exceed" 2.4 million ballots ("the total number of registered voters" in each of the 782 countywide "precincts").
- There is no legislative history, no Secretary of State guidance, and no case law saying section 51.005 applies to countywide voting.
- Some precincts have been redistricted since 2018. This not only worsens the 2022 "fit" with 2018. It means "there was not a 'recent corresponding election' upon which to base ballot calculations."[3]
- Craft's expert witness worked in the EAO for two years (June 2020 to August 2022) before the November election. Her opinion was that ballot supply "is an art not a science." She mentioned "multiple data points"

[3] The quoted language is from the Harris County Election Administrator's Amicus Brief in Support of Craft's No Evidence Motion for Summary Judgment, at 8.

such as [1] "how many polling locations will you have," and [2] "is it a presidential or gubernatorial election," and [3] "is there a particular contest in a section of the county that is likely to drive turnout for several locations in that area." Summing up, she said: "I think what the code requires is you do an analysis, provide the ballot paper you think will be necessary *at that poll*, and be prepared to provide supplemental ballot paper as needed." (emphasis added)

The expert witness made no effort to explain how *any* of her three factors, or her summary, or "art not a science" or "multiple data points" could justify *identical* supplies of 600 ballots for 98% of the polling locations. Her presentation as a neutral expert was tarnished a bit when she said later, in response to a question about a different issue, "that is not *our* burden of proof."

If any other thought was given to this disastrous decision, the expert witness had every opportunity to mention it; and the County Attorney's amicus brief could have mentioned too.[4] There was no evidence that anyone at the EAO thought about whether 600 per location might *over*supply some and *under*supply others. If there was undersupply, might additional paper get there late in a county the size of Harris (2.4 million registered voters, 1700 square miles)? Might phone callers get a busy signal, or a message saying please leave a message, or a voice message estimating the wait time?

The EAO made a conscious decision that voters and election officials at the polls would wait while phone calls were answered and paper delivered throughout the county. The 600-ballot approach put unmerited trust in the ability of EAO workers (and private contractors) to answer phone calls on election day and deliver ballots across Harris County's 1700 square miles.

D. No consultation with the Texas Secretary of State.

During the planning phase, no one at the EAO made even a perfunctory phone call to the Texas Secretary of State's office. The SOS was not consulted about anything, such as:

[4] From the beginning of this case, the court has allowed the Harris County Attorney's office, though not a party, to participate and speak in hearings and to file the amicus brief.

- What are other counties doing? (Ninety Texas counties use countywide voting.)
- What options do we have? What has experience shown?
- We think we are totally freed from section 51.005's commands. Do you agree?
- Our tentative plan is to ignore section 51.005, give identical amounts to 98% of the locations, and take phone calls and send deliveries during the day—what do you think?

E. How many voters went elsewhere to vote?

The court heard from live witnesses and read the testimony of witnesses who testified through depositions by written questions [DWQs] that a total of 2900 voters had left their polling locations without voting because of paper shortages. The court finds the testimony of these witnesses generally credible. Some were cross-examined about why they didn't ask voters whether they planned to go vote elsewhere. There was credible testimony that election workers had no time to take notes or get contact information from voters who left. Some workers expressed concern that voters would have resented the privacy intrusion if such questions had been asked.

One DWQ witness testified that in his effort to vote he eventually went to *four locations* before he finally found one with functioning machines and reasonable lines. At one polling location the officials estimated the wait time would be ninety minutes.

One witness testified in response to Craft's cross-question ("explain in detail how you know" that voters who left did not vote elsewhere): "There were at least two nearby locations that also ran out of ballot paper, according to voters who arrived at my polling location, and my polling location was the second or third stop for some trying to vote. Based on this information, I believe some [voters] likely did not cast a vote [elsewhere]. Additionally, several voters who were in line by 7:00 p.m. left the line before ballot paper was provided (~ 9:05 p.m.) and after polls had closed [so] these people were not able to cast a ballot." Another witness testified: "They left. Several women stated they needed to go care for children, prepare dinner. Others got tired of waiting and did not want to go elsewhere."

From the evidence, the court **finds** that because of *paper shortages* 2600 voters who tried to vote at their polling place of choice left without voting. These numbers do not include voters discouraged by long lines who voted elsewhere due to *machine malfunctions* or *paper jams*, which were not caused by EAO decisions.

A more difficult question is how many of these civic-minded people voted somewhere else that day. The Official Results show that 43.54% of Harris County's 2,543,162 registered voters voted in the November 8 election (early by mail, early in person, and in person on Election Day). All of these frustrated, waiting voters were part of that 43.54%—they were the *civic-minded* who had shown up in person to vote, and we might expect them to be persistent and go to another polling location. At each polling place signs were posted showing the four nearest polling locations (DX-12).[5] From common experience we can infer that *some of these voters* undoubtedly gave up when they saw long lines at the next location(s) they went to. Some had budgeted time for voting, but not enough time for going to a second or third location. Some had excess discretionary time for voting, and for waiting; others had places to go, tasks to do, appointments or jobs where they were expected. Some undoubtedly thought, *My vote won't make a difference in this huge city. But I tried. I'm leaving.* Others planned to come back and vote later but never followed through.

Given the state of the evidence, the court *estimates* that between 250 and 850 voters who left the first polling place did not vote elsewhere because of the EAO's ballot paper decision, which was both illegal (a failure to follow the law) and a mistake.

DECISIONS.

The court *finds* that the EAO did not make a good faith effort to comply with section 51.005(a).

The court *holds* that section 51.005 required the EAO to ***try*** to do two things in apportioning ballot paper. First, estimate 2022 need for *areas* of the county (the 782 countywide polling locations) based on past proven need at the last comparable election (2018), which would show 2018 turnout in *areas* of the

[5] **Section 43.007(o)**: "Each countywide polling place must post a notice of the four nearest countywide polling place locations by driving distance."

county where people live (precincts). Second, oversupply rather than undersupply, by 25%. These two statutory requirements are *clear*, and they were consciously disobeyed. The EAO's ballot paper decision to ignore section 51.005 was both "illegal conduct" and a mistake.

The court *estimates* that between 250 and 850 voters left and did not vote elsewhere on Election Day. Pursuant to section 221.012(b) (quoted above on page 3), these numbers will be taken into account in sections XI and XII below as part of the court's decision whether it can or cannot "ascertain the true outcome of the election."

II. VOTING IN HARRIS COUNTY BY OUT-OF-COUNTY RESIDENTS.

A. THE LAW.

A voter *must* reside in a county to vote in that county. The voter *must* also be registered to vote. Election judges are required to ask each in-person voter if the address shown on the official voter roll is still the voter's *current* address. Voters who answer "no" are required to sign a Statement of Residence ("SOR").[6]

[6] **Election Code § 63.0011** ("Statement of Residence"):

(a) *Before* a voter may be accepted for voting, an *election officer shall ask* the voter if the voter's residence address on the precinct list of registered voters is *current* and whether the voter has changed residence within [Harris] county. . . .

(b) If the voter's residence address is not current because the voter has changed residence *within* [Harris] county, the voter may vote, if otherwise eligible, in [his old precinct] if the voter resides in [Harris] county *and*, if applicable:

(c) Before being accepted for voting, the voter *must* execute and submit to an election officer a statement [SOR] including:

(1) a statement that the voter satisfies the applicable *residence* requirements prescribed by Subsection (b) [i.e. still resides in Harris County];

(2) all of the *information* that a person must include in an *application to register* to vote under Section 13.002; and

(3) the *date* the statement is submitted to the election officer.

(c-1) The statement [the SOR] described by Subsection (c) must include a field *for the voter to enter the voter's current county of residence.* (emphasis added).

Lunceford points out that votes were cast by persons who did not reside in Harris County. She focuses on: (i) votes by *out-of-county* residents whose SORs show on their face a residence other than Harris County; and (ii) votes supported by *incomplete* SORs, which failed to give *any* information about *residence*, and for the vast majority of these the voters themselves omitted every bit of information except their names.

At polling locations, the election officials are supposed to make sure that SORs are correct and complete. SORs are filled out when the voter signs in and the Election Judge has asked, *Do you still live at this address*, and voter has said *No*. (Later the EAO registrar uses SORs to update the voter registration records.[7]) Voters who say they live in a different county are not eligible to vote a regular Harris County ballot (which has countywide and district-based elections, in addition to the statewide ones).

B. PROOF OF RESIDENCE AT POLLING PLACE (FROM VOTERS) AND AT TRIAL (EXTRINSIC EVIDENCE).

There is a distinction between receiving additional evidence of residence at the *polling location* and additional evidence *at trial*.

Residence information from voters at the polling location. *At the polling location* the information is *handwritten* on the SOR *by the voter*; the election official is not expected to inquire beyond the SOR, although an official who has the time and the inclination *could* certainly choose to discuss residence briefly with the voter. An SOR is filled out only because the voter has just replied, in response to the election judge's inquiry, "I don't live there anymore." At the polling place, election judges are to assess the residence information *shown on the SOR*. If the SOR shows that the voter resides outside Harris County, the voter can vote only a *provisional* ballot.

Extrinsic evidence of residence at trial. *In an election contest trial,* the parties *may* litigate a voter's true residence with evidence. When this happens, the trial judge

[7] Election Code § 15.022 (a) states: "The registrar shall make the appropriate corrections in the registration records . . . (4) after receipt of a voter's statement of residence executed under Section 63.0011."

will decide whether an SOR did or did not speak the truth about a voter's residence.[8]

C. DECISIONS.

Out-of-County Voters. The SORs signed by 966 voters show on their face, *in the voter's handwriting*, that the voters resided outside Harris County. SORs are supposed to be checked at the polls by election judges; they are not vetted by the Early Vote Ballot Board.[9]

For countywide elections, these 966 were illegal votes within the meaning of section 221.003 and should not have been counted.

SORs incomplete. The court also finds that 270 SORs were filled out by the voter so incompletely—with the boxes for former residence and current residence *totally blank*—that it was not lawful to approve them and they should not have been counted. *A Statement of Residence must* ***state*** *the* ***residence****.*

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[8] In *Alvarez v. Espinoza*, 844 S.W.2d 238 (Tex. App.—San Antonio 1992, no pet.) (en banc), for example, the parties presented evidence *at trial* concerning the true residence of nine voters. The trial court found that all nine resided in Commissioners Court Precinct 3, the area covered in the Frio County election contest. The appellate court examined the evidence and held that six of these voters, as a matter of law, did not live within Precinct 3. *Id.* at 247-48.

Craft's lawyers cited *State v. Wilson*, 490 S.W.3d 610 (Tex. App.— Houston [14th Dist.] 2016, no pet.), an appeal from a jury trial about whether Wilson's residence was within the boundaries covered by a school trustee election. The captioned election contest is not about whether one *candidate* resided in Harris County, and Lunceford was not required to present extrinsic evidence of voter residences in court, instead relying on the SORs.

[9] **The EVBB.** The Early Vote Ballot Board in Harris County consists of twelve Democrats and twelve Republicans. Each member is recommended to Commissioners Court by the persons who chair the two major political parties. The EVBB's duties are to review Applications for Provisional Ballots (PBAs), Ballots by Mail (BBMs), and Statements of Residence (SORs) for completeness and registration information. They work in teams of two, one Democrat and one Republican. The evidence showed that these members of different parties worked together amicably and professionally during the November 8 election's two-week early voting period, on Election Day, and afterward.

III. PROVISIONAL BALLOTS.

Lunceford contends that several Provisional Ballot Affidavits ("PBAs") were improperly approved for voting. The Secretary of State's PBA form summarizes several statutory "Reasons for Voting Provisionally."[10]

1. Voter failed to present acceptable photo identification or an alternate form of identification with an executed Reasonable Impediment Declaration;
2. Voter is not on list of registered voters;
3. Voter not on list, votes in another precinct. [This would not apply because Harris County votes at countywide polling locations, not at individual precincts.]
4. Voter is on list of persons who received mail ballots and has not surrendered the mail ballot or presented a notice of improper delivery; and
5. Voter voted after 7:00 p.m. due to court order. [Provisional ballots from 7:00 to 8:00 p.m. on election day pursuant to court order are discussed in section VIII below on page 22.]

Already voted by mail? Most of the challenged PBAs in this case list reason 4 above for voting provisionally (that the voter appears to have already voted by mail). These are voters who showed up to vote *in person* and were advised that a mail ballot was earlier sent to them. In-person voters who say they *did not receive* the mail ballot, or received it but *didn't vote it and mail it in*, must sign a PBA and

[10] **Section 65.054 (Accepting Provisional Ballot)** provides:

> (a) The early voting ballot board [EVBB] shall examine each [provisional ballot affidavit] and determine whether to accept the provisional ballot of the voter . . . .
>
> (b) A provisional ballot *shall* be accepted *if* the board determines that: (1) from the information in the affidavit or contained in public records, the person is eligible to vote in the election and has not previously voted in that election; [and] (2) the person . . . meets the identification requirements of Section 63.001 (b) [photo identification, or an approved substitute plus a Reasonable Impediment Declaration form] . . . . (emphasis added)

vote a provisional ballot. The EVBB will later check the records and verify whether the in-person voter did or did not vote by mail earlier. In Harris County the EVBB's work continues for several days after Election Day.

For each of these forms singled out for scrutiny, the Mail Supervisor (an employee of the EAO) has signed and checked a box that the mail-in ballot was "not returned." This means the EAO has checked the records and confirmed that the voter *did not mark and return the mail ballot*. This is a valid reason for the EVBB to accept the voter's provisional in-person ballot.

Signatures on these PBAs by the Mail Supervisor and the EVBB show that they concluded that these voters had *not* voted earlier by mail. Concerning these PBAs, the court is *not* persuaded that these officials *erred* in reaching those conclusions. To state it differently, the court accepts the decisions of the Mail Supervisor and the EVBB that approved these PBAs.

It is significant that on these PBAs there is no issue of whether the voters lacked photo identification—the election judges did *not* check a box concerning lack of proper photo identification.

Other boxes not checked. Other boxes on some PBA forms were not checked or not filled out properly.

- Some Election Judges signed the PBA but did not date it.
- Some voters wrote their address in the wrong box.
- Some of these voters did not sign the yes-or-no citizenship box.

The court has assessed these for genuineness. On these PBAs the boxes for the voter registration number and precinct number are filled in. At the polling location the election judges saw these registered voters face-to-face. The EVBB accepted them, and the court has decided not to overrule the board and disallow these votes. The court concludes that these omissions do not justify nullifying these provisional ballots as illegal.

Unsigned PBAs. The court does *not* approve the PBAs that the *voter* did not sign (6), or the *Election Judge* did not sign (22), or the *EVBB* did not sign (15). These 43 PBAs were not lawfully approved, and the votes supported by them should not have been counted.

IV. MAIL BALLOTS.

Lunceford contends that several mailed ballots were counted, in violation of the election code, even though they lacked code-required *signatures* or were not *timely mailed or timely received.*

The code specifies several steps for voting by mail. The voter: (i) must ask for a mail ballot in a signed writing, (ii) must have a statutory reason (age, disability, will be out of county, in jail), and (iii) must return the marked ballot *in time* and with proper *signatures* (on both the *application* and the *envelope*). (There are also explicit limits on who may assist the voter in marking the ballot and mailing it.)

For mail ballots to be lawfully counted, the election code specifies two requirements that are at issue in this case—timeliness and matching signatures.

Timeliness. The code requires that mail ballots be timely *mailed* and timely *received*. The carrier envelope *must* be postmarked by 7:00 p.m. on election day *and* the envelope with the ballot *must* be received by 5:00 p.m. on the next day (November 9 for this election).[11]

Matching signatures. The code requires the voter's signature (1) on the *application* for a mail ballot and (2) on the carrier *envelope* in which the ballot marked by the voter is mailed back to the EAO. As the court said in *Alvarez v. Espinoza*, 844 S.W.2d at 245, "The law places the burden on those who vote early by mail to sign both the application and the [carrier] envelope with signatures that match."

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[11] **Section 86.007** (Deadline for Returning Marked Ballot):

(a) [Except for ballots mailed from outside the US,] a marked ballot voted by mail *must arrive* at the address on the carrier envelope:

(1) before the time the polls are required to close on election day; or

(2) not later than 5 p.m. on the day after election day if the carrier envelope was [mailed and postmarked] not later than 7 p.m. at the location of the election on election day. . . .

(c) A marked ballot that is not timely returned *may not be counted*. . . . (emphasis added)

The early vote clerk, after checking the carrier envelope for timeliness, puts it in a *jacket envelope* along with the voter's application for the mail ballot, and sends the jacket envelope to the EVBB for its review.[12] The EVBB reviews mail ballots for two signatures—the signature on the application and the signature on the carrier envelope. In addition, the EVBB "may" compare either or both signatures with a *third* signature—the *voter's signature on file with the registrar*.[13]

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[12] **Section 87.041. ACCEPTING VOTER.**

(a) The early voting ballot board shall open each jacket envelope for an early voting ballot voted by mail and determine whether to accept the voter's ballot.

(b) A ballot may be accepted *only if*:

(1) the carrier envelope certificate is properly executed; [and]

(2) neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness; . . .

(d) A ballot *shall* be rejected if any requirement prescribed by Subsection (b) is not satisfied. In that case, the board shall indicate the rejection by entering "rejected" on the carrier envelope and on the corresponding jacket envelope.

(d-1) . . . The board *shall* compare signatures in making a determination under Subsection (b)(2) . . . .

(e) In making the determination under Subsection (b)(2), to determine whether the signatures are those of the voter, the board *may* also compare the signatures with any known signature of the voter on file with the county clerk or voter registrar. . . . (emphasis added)

[13] **Voter mistakes on mail ballots *may* be cured.** If the early voting clerk receives a mailed ballot that lacks a required signature or is otherwise defective, the clerk *may*: (i) mail the BBM back to the voter for correction; (ii) telephone and inform the voter of the right to *cancel* the mail ballot and vote *in person*; or (iii) telephone and suggest that the voter may come to the registrar's office and correct the omission. **Section 86.011** ("Action by Clerk on Return of Ballot") says:

. . . (d) Notwithstanding any other provisions of this code, if the clerk receives a *timely* carrier envelope that does not fully comply with the applicable requirements . . . [i] the clerk *may* deliver the carrier envelope in person or by mail to the voter and *may* receive, before the deadline, the *corrected carrier envelope* from

As stated earlier (footnote 9) the EVBB is a bipartisan board with equal numbers of Democrats and Republicans whose names were suggested to Commissioners' Court by each party's chair. The EVBB works in teams of two (always one Democrat and one Republican per team). The EVBB is given considerable discretion.[14]

The court finds that thirty-six mailed ballots lacked a required signature, and an additional nine ballots were not timely mailed. PX-11 & PX-12. These forty-five mailed ballots do not satisfy the code's mandatory provisions, and therefore it was not lawful to count them.

V. PHOTO IDENTIFICATION.

The election code says election judges shall make two inquiries of *every* in-person voter. Election Judges are to ask: (i) whether the address shown on the voter list is still the voter's current address[15] and (ii) whether the voter has photo identification.[16]

Acceptable photo identification. The code specifies that each in-person voter must show:

> the voter, *or* [ii] the clerk *may* notify the voter of the defect by telephone and advise the voter that the voter may come to the clerk's office in person to *correct* the defect or *cancel* the voter's application to vote by mail and vote on election day. If the procedures authorized by this subsection are used, they must be applied uniformly to all carrier envelopes covered by this subsection. . . . (emphasis added)

[14] "The law presumes that the board [EVBB] acted properly in rejecting and accepting ballots; to overcome this presumption, a challenger must show by clear and satisfactory evidence that the board erred." *Alvarez v. Espinoza*, 844 S.W.2d at 844.

[15] Section 63.0011(a) ("Before a voter may be accepted for voting, an election officer *shall* ask the voter if the voter's residence address [on the list] is current and whether the voter has changed residence within the county") (emphasis added).

[16] Section 63.001(b) (". . . on offering to vote, a voter *must* present to an election officer at the polling place: (1) one form of photo identification listed in Section 63.0101(a) or (2) [an acceptable substitute *plus* a reasonable impediment declaration]." (emphasis added)

(1) an approved *photo ID*[17] ***or***

(2) an approved *substitute* ***and*** an approved *reason* for not having a photo ID.

The approved *substitute* may be a utility bill, bank statement, government check, paycheck, birth certificate, or a voter registration card or other government document.[18] The approved *reason* may be lack of transportation, disability or illness, work schedule, family responsibilities, ID is lost or stolen, or application for photo ID is pending.[19]

RIDs. A voter who does not have a listed type of photo identification is asked to sign a Reasonable Impediment Declaration. RID forms have been designed and approved by the Texas Secretary of State.

The *election official* at the polling location may check a box for one of six *alternate kinds of identification without a photo*.

RID forms let the *voter* check one of several boxes listing the *reason(s) why the voter has not gotten an approved form of photo identification*.

Flexibility on name and address matches. The voter's name must be on the official roll of registered voters. But the *name* on the substitute document need not "match exactly with the name on the voter list" if they are "substantially similar." The election official cannot reject the substitute document solely because its *address* "does not match the address on the list of registered voters."[20]

Incomplete RIDs. Lunceford challenges 532 votes because the RIDs supporting them were not completely filled out. The challenged RIDs lack *one or more* of the following: a reason for not having a photo ID, a lawful ID substitute (e.g., paycheck, utility bill, voter registration card), voter signature, election judge

[17] Section 63.001(b)(1) (requiring photo ID); § 63.0101(a) (listing acceptable photo IDs). An *expired* photo ID-card is acceptable for voters *70 and older* and is acceptable for voters *69 and younger* if the ID-card has been expired for only four years or less.

[18] Section 63.001(b)(2) (allowing substitutes for photo ID); § 63.0101(b) (listing acceptable photo ID substitutes).

[19] Section 63.001(i) (listing acceptable reasons for not having photo ID).

[20] Section 63.001 (c) & (c-1).

signature (the judge is supposed to place the voter under oath), or Voter ID number.

The evidence shows that over 347,000 voters voted in person on Election Day, and that 532 of them did not satisfy one or more of the election code's requirements, summarized above: bring a photo ID *or* bring a substitute document *and* check a box showing why they have not gotten a photo ID. The reasons for not having an ID include family responsibilities, disability or illness, work schedule, application pending, lack of transportation, or ID lost or stolen.

It is worth noting that persons who have no photo ID may satisfy this statute by simply bringing their voter registration card,[21] which suffices as substitute proof for the photo ID if there is an approved reason for not having a photo ID.

A RID is the voter's chance to comply with the code's effort to make sure that voters can demonstrate *who they are* with documents. The court concludes that 380 of the 532 challenged RIDs are so lacking in the statutory information that they are improper, and votes cast by these 350 voters should not have been counted.

VI. ERRONEOUS INSTRUCTIONS TO THE SIGNATURE VERIFICATION COMMITTEE.

A member of the Signature Verification Committee (SVC) testified that when early voting began, an EAO staffer told the SVC not to compare Ballot by Mail (BBM) *application* signatures or *envelope* signatures with the voter's signature *on file* with the elections office. (This advice was flatly wrong; the SVC *may* but is not *required* to compare the voter's application signature and envelope signature with the voter's signature officially on file. *See* footnote 12 on page 16 above quoting section 87.041(e). Two other SVC members testified they *did not hear* the EAO staffer make this remark.

The court finds that the remark was made, the erroneous advice was indeed given, and it was obeyed for two hours before the EAO corrected it.

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[21] Section 63.0101: "(b) The following documentation is acceptable as proof of identification under this chapter: (1) a government document that shows the name and address of the voter, including *the voter's voter registration certificate*." (emphasis added)

This incident shows either carelessness or ignorance by the EAO about the SVC's authority to exercise its statutory discretion concerning an important safeguard for BBMs. But the erroneous instruction affected only a few votes; the witness estimated that the SVC found that approximately 1% of the application or envelope signatures did not match the signature on file. She also estimated that 700 BBMs were approved during the first two hours while the SVC operated under the incorrect instructions. The court concludes that seven improper BBMs slipped by unexamined and should not have been counted.

VII. LAST-MINUTE EAO INSTRUCTIONS FOR BALLOTS THAT WOULDN'T SCAN.

The printed ballot was two legal-size pages for each voter. During both early voting and election-day voting, there were times when the scanning machines would not accept page two of a voter's ballot.

HCEA Manual. For this situation the 2022-2023 Harris County instruction manual advised [PX-16, page 115] that the second ballot page should be rescanned four different ways.[22] If the re-scanning was still unsuccessful, the second page would be put into the Emergency Slot [aka the "Emergency Chute"]. Such unscanned pages would later be processed and counted by Central Count, a bipartisan body (two Republicans and two Democrats) with a higher-quality scanner that might be able to scan and count the troublesome second pages. If Central Count could not successfully re-scan a page two, it would manually input the votes shown on that unscanned page into the official vote count.

EAO's last-minute change for the page-two problem. A short time before November 8, after election workers had been trained, the EAO emailed new instructions: If any page two was *illegible* as opposed to *legible but unscannable*, the voter should vote again, but scan only the new page two and spoil the new page one (because the original page one had already been scanned and recorded).

[22] The manual said to scan each difficult page 2 by inserting it *top first* with print down and then with print up, and then by inserting it *bottom first* with print down and then with print up.

New page two would be put into the Emergency Chute for processing later by Central Count.

Lunceford contends this new procedure was too complex for such a last-minute change, and that a sizeable number of *new* first ballot pages were mistakenly scanned a second time after the original first pages had been scanned and recorded. The *Lunceford vs Craft* race was on page one of the printed ballots and therefore may have received double-votes *if page one was indeed counted twice* because of the scanning problem and the last-minute instructions.

The court has concluded that even if the last-minute instructions were a "mistake" within section 221.003, the evidence does not convincingly show extra counting of page one races.

The official election results (PX-2) show a steady drop-off from votes at the top of the ballot to votes toward the bottom, a drop-off that would look normal to one who has been observing Texas elections for several decades. As voters wade through a long urban ballot—starting with federal races, moving then to the statewide races, Board of Education, members of the State Senate and House, appellate courts, District Courts, County Courts-at-Law, and Probate Courts—it is common to see a steady drop-off (i.e. reduced voting) in down-ballot *judicial* races. This was true for the November 2022 down-ballot judicial races in Harris County.

In this election, one down-ballot race stood out: the high-profile page-two contest for County Judge (Alexandra Mealer vs Lina Hidalgo) showed slightly more turnout than even some page-one races like the Texas Supreme Court. This suggests there was no large double-voting of page one.

The court concludes that the EAO's perhaps unwise last-minute decision about handling scanning problems was certainly not illegal and does not qualify as a "mistake" within the meaning of § 221.003. The court also concludes the last-minute scanning change did not cause a significant difference in page-one votes compared to page-two votes because the drop-off was typical for down-ballot judicial races.

The court has assessed the testimony about the Cast Vote Records and compared it to the evidence of the canvassed final results. The evidence of a page two drop-off in votes, possibly caused by scanning confusion, is not persuasive

enough to be clear and convincing. The argument that there were more page one votes than page two votes, causing double votes in the 189th, is respectfully **denied**.

VIII. COURT-ORDERED EXTENSION OF COUNTYWIDE VOTING UNTIL 8:00 P.M.

Lunceford contends that Administrator Tatum made a "mistake" within the meaning of section 221.003 when he agreed on Election Day to a Temporary Restraining Order [TRO] that extended the voting period countywide from 7:00 p.m. to 8:00 p.m.

This court holds that agreeing to the extension was not *illegal*. But the court *sustains* Lunceford's contention that agreeing to the TRO was a *mistake* within the meaning of section 221.003. The court also expresses its deep concern about the way the TRO was sought and obtained.

Section 221.003 says:

> (a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown in the final canvass, is not the true outcome because: . . .
>
> > (2) an election officer or other person officially involved in the administration of the election: . . .
> >
> > > (C) engaged in . . . illegal conduct or made a mistake.

A. Background.

On November 8 several polling locations opened late, some of them several hours late. Others experienced machine malfunctions. Voters waited helplessly in line, sometimes for two hours.

At 4:01 p.m. the Texas Organizing Project filed suit against Harris County Commissioners Court and its EAO, seeking an order extending poll closures beyond 7:00 p.m. to compensate for the time lost by voters due to twelve late-opening polls that morning. Plaintiff Texas Organizing Project was represented by three lawyers from the Texas Civil Rights project and three additional lawyers

from the ACLU of Texas. Defendants EAO and Harris County Commissioners Court were represented by two lawyers from the County Attorney's office.

Significantly, no one else had been given even telephone notice that the plaintiffs would be asking the court to extend voting countywide for all 782 voting locations. The ancillary judge for the Harris County District Courts began a TRO hearing at 5:06 p.m.

Two things about the hearing are troubling.

(1) **Friendly hearing**. The plaintiffs sought—*and fought for*—a friendly hearing (a hearing without anyone to oppose its requests). They tried to exclude any other interested persons who might oppose their TRO request or provide a different point of view.

(2) **Ballot paper.** When the discussion turned to ballot paper, the EAO was not candid with the trial judge when she tried to learn whether there would be adequate ballot paper for *all* the polling locations.

B. The attempt to structure a friendly, uncontested TRO hearing, and the lack of candor about ballot paper.

The ancillary court convened a Zoom hearing and heard announcements from the lawyers for the plaintiff and the two defendants. Andy Taylor, the attorney for the Harris County Republican Party [HCRP] and its chair, Cindy Siegel, had learned about the hearing. He asked permission to *speak* and to *intervene*:[23]

THE COURT: Any objection . . .?

MR. MIRZA (Texas Civil Rights Project attorney representing the Texas Organizing Project): *Yes, we object to the intervention*. . . . We believe they *are not a party to the case.* They don't — this is an issue with regard to voters. . . .

THE COURT: Mr. Taylor, talk to me more about why you believe Ms. Siegel and the Republican Party needs to intervene in this lawsuit *at this time*.

[23] In the dialog summarized on pages 23-28 below, all emphasis has been added.

MR. TAYLOR: [You are going to be asked] to extend the voting time past 7:00 p.m.

THE COURT: Correct.

MR. TAYLOR: . . . [T]he Harris County Republican Party [HCRP] has *multiple candidates on the ballot*. . . . we have a very significant interest . . . because what you're going to decide can impact the races that are on the ballot . . . .

THE COURT: . . . I'm still trying to figure out why this would in any way *affect your clients* certainly at this juncture. If in fact granted, it would be applicable to all the polls no matter what location they're in.

MR. TAYLOR: . . . [T]his number is growing - - but I'm aware of 19 polling locations *that have no ballots*. They're out of ballot paper. [Taylor offered to email the Court a list.] Those happen to be in what are politically referred to as Republican strongholds.

Moments later, Nickolas Spencer, attorney for the Harris County Democratic Party [HCDP], appeared and said, "I'll be making similar arguments to Mr. Taylor." He then expressed concern that poll workers and poll watchers might need to make personal arrangements for an extended workday.

The court asked again if there was objection to participation by the two local political parties.

MS. BEELER (Texas Civil Rights Project attorney representing TOP): *Yes, we object to both. . . . The parties don't have standing to intervene here.* This dispute is between the County and the voters, . . . not between the voters and the parties. If Mr. Taylor has concerns about their voters, *he should file his own lawsuits and request his own relief.* That has nothing to do with our suit. It has no bearing on our suit. . . . This dispute is between the voters and Harris County and the named defendants here. It is not between the voters and the parties.

THE COURT: . . . Since we have both parties [the Rs and the Ds] present and *both parties are in agreement for the most part* about *whatever interests they may have in this suit*, I am going to grant the intervention for [both parties.]

[The court gave plaintiff Texas Organizing Project time to arrange for live witnesses to testify. The discussion then turned to whether to keep to the polls open longer and whether all polls would have ballot paper. This is significant because the election code mandates that if a court orders *any* countywide polling place to remain open past the 7:00 p.m. closing time, it must keep *all* polling places open for the same length of time.[24] But if a polling location has no ballot paper, it can hardly be said to be "open."]

> **ATTORNEY FOR PLAINTIFF Texas Organizing Project:** . . . [M]ultiple polling locations in Harris County did not open on time this morning. . . . [One] didn't open for three hours this morning. Defendant's failure to open these polling locations on time will injure plaintiff's members and other voters by burdening their fundamental right to vote. . . . If the polling location hours are not extended, they will be disenfranchised. . . .
>
> . . .
>
> **COUNTY ATTORNEY (REPRESENTING THE EAO):** . . . [W]e wouldn't have any opposition to the relief sought if it's limited to one hour and my client, especially the Elections Administrator, who is really the proper target of this lawsuit, is *able to comply* with that and to ensure that the polls remain open for one extra hour.
>
> **THE COURT:** You're referring to Mr. Tatum. He is able?
>
> **COUNTY ATTORNEY:** *He is able*.
>
> **MR. SPENCER (HCDP):** *We would agree* with extending it to one extra hour . . . . *We would prefer . . . two hours* . . . .
>
> **MR. TAYLOR (HCRP):** We are opposed. *We've been monitoring* the situation all day long with our people that are on the ground [and] there are *at least 19 polling locations that have no paper.* If you extend the time to vote, how are those 19 locations going to effectuate a citizen's right to vote without any paper? . . . It would be . . . a disenfranchisement to allow some of the polling places to vote and others not, and that's what the

[24] Section 43.007(p) says: "If a court orders any countywide polling place to remain open after 7 p.m., all countywide polling places located in that county shall remain open for the length of time required in the court order."

Election Code says. If you're going to extend polling, you can't do it piecemeal. You've got to do it countywide. . . .

THE COURT: [A]ll I need to do is perhaps include an order to Harris County to deliver the additional sufficient ballots and supplies that are needed . . . .

County Attorney: With respect to the locations that are missing paper, the EA's office is *currently replenishing* all those locations. . . . It's not true that there are currently 19 locations without paper. It is 10. As we get updates on the *locations that don't have paper*, we're sending people out there to replenish. *The EA's office is making sure that every polling location is able to operate*.

[The court heard testimony about the late poll openings that morning.]

THE COURT: Based on the testimony that I've heard, I am going to *grant* the TRO and extend the polls specifically for those 12 locations which, of course, means for all the Harris County polls, *until 8:00 o'clock*. . . . *I want to know logistically how this is going to work.*

COUNTY ATTORNEY: The office has been responding to any report of paper ballots running out. The latest update I have is that there are two locations—and this was about 20 minutes ago—there were *only two* locations that were out of paper and they were in the process of being restocked. . . .

THE COURT: . . . *I want to make sure that it's actually possible to get the supplies to these polls.* It's going on 6:00 o'clock. *You're telling me that is possible?*

COUNTY ATTORNEY: *My understanding is, yes.*

MR. TAYLOR: Our information is that *there are at least 19 locations that don't have paper as I'm speaking. . . .*

THE COURT: . . . . I do want to make sure that we are clear about the supplies and . . . deliver the materials . . . .

COUNTY ATTORNEY: *So the folks are out delivering the paper to*—I'm just talking about the paper ballots . . . *to all the locations that currently need*

them. I'm still trying to get a final tally on this. It's not 19 . . . . And what I would ask is if we're in a situation where we're going to run out of ballots and we can't comply with the order, we're able to come back before this Court . . . obviously I don't want to be in a position where my client can't comply with the terms of the order. Hopefully that's not going to be an issue. We don't anticipate it will be, but you never know.

THE COURT: Okay. All right. I'm signing off on the order.

The TRO was signed and the hearing ended **at 6:03.** The EAO had promised to get paper to polling locations *during rush hour*.

At 7:49 the court reconvened and announced that the Attorney General's office had filed a motion to dissolve the TRO. The lawyer for the Attorney General argued there was no reason to extend voting hours because voters could go to the other 770 voting locations. She then observed that the TRO was sought "without providing any notice to the State so that we would have the opportunity to be heard before this Court issued a TRO that requires not just 12 but all 782 polling locations in Harris County to stay open past the statutory deadline."

MS. BEELER for Texas Organizing Project: *We are unaware of any authority that requires us to let the State know and to give the State notice*. . . . It's going to be *moot* in one minute. . . . We would argue that the order is *already moot*.

. . .

COUNTY ATTORNEY: . . . we agree that at this point . . . the requested relief in the State's motion is *moot . . . . I did want to . . . come back to clarify some of the issues related to ballots missing from polls that we discussed earlier.*

[MR. TAYLOR [HCRP] listed by name several polling locations where voters were turned away because there were no ballots.]

COUNTY ATTORNEY: I asked that we come back if we were *not able to comply* with that provision [ballot supply]. *As Mr. Taylor notes, there have been polls where paper ballots were not able to be delivered,* so that's obviously information we didn't have at the time. . . . (emphasis added)

> **THE COURT:** . . . I asked explicitly, is this something that logistically could be done; and I remember your response being something along the lines of "as best we can, Judge."

The ancillary judge was then told that the Texas Supreme Court had stayed the TRO, and she promptly recessed the hearing.

C. Notice and opportunity to be heard.

It is hard to think of any principle of civil procedure more fundamental to fairness and due process of law than the right of interested persons to be given *notice* and an *opportunity to be heard* when a lawsuit might affect their legal interests.[25] Yet Texas Organizing Project's lawyers consciously chose *not to give notice* to either political party or to the Texas Secretary of State or the Texas Attorney General. And the plaintiffs *fought* their effort to *speak and be heard*.

There were twelve *statewide* races on the ballot in Harris County (as in every Texas county). (See the table on page 35 at the end of this Judgment.) The lawsuit sought a TRO affecting *countywide* and *statewide* voting in the state's most populous county. Plaintiff's attorneys, *speaking for a few voters*, opposed letting the

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[25] *See Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950): "The fundamental requisite of due process is the *opportunity to be heard*. . . . An elementary and fundamental requirement of due process in any proceeding which is to be *accorded finality* is notice reasonably calculated, under all the circumstances, to apprise *interested parties* of the pendency of the action and afford them an *opportunity to present their objections*." (emphasis added)

Of course, the TRO would not be "accorded finality." But everyone knew this TRO proceeding would be *moot* three hours later. At 7:59 p.m. that evening, Plaintiffs and the County Attorney opposed the Attorney General's efforts to dissolve the TRO by arguing the issues were *moot*; the voting time had already been extended. ***Attorney for Texas Organizing Project***: "So we are unaware of any authority that requires us to let the State know and to give the State notice. . . . It's going to be *moot* in one minute." And the ***County Attorney***, opposing the Attorney General: "We agree that at this point . . . the requested relief in the State's motion is *moot*, because it is now 8:02 p.m. . . ." Court Reporter's Record of TRO hearing at pages 60 & 62 (emphasis added).

Harris County Republican Party's lawyer even *speak for 114 candidates on the ballot,* who were *also voters*.

Certainly, the plaintiff couldn't be expected to give *official* notice to *all* 228 candidates for partisan offices on the ballot. But the local parties and their chairs and lawyers were a small number (two party chairs, two lawyers), easily identified and contacted. In these days of instant communication, it was inexcusable not to give them a courtesy call, and even more inexcusable to *object* and *resist* when Mr. Taylor simply asked to be heard. The plaintiff and the court should have *welcomed* these additional voices.

There are times when notice cannot be given quickly to interested persons. But this was not one of those times. None of the usual reasons for not giving notice were present at this TRO hearing:

- **Identity.** The identity of these interested persons was *known*. These were not *unknown* persons or interests.
- **Out of pocket?** They were easy to *locate*.
- **Burden? Expense?** It would not have been *burdensome* or *expensive* to email or telephone them with notice of the hearing.
- **Delay?** An email or a telephone call would not have *delayed* the hearing. One of the six lawyers for the Texas Organizing Project or a staff member could easily have made a phone call or sent a text message or email while the petition was being prepared. This was a Zoom hearing in which lawyers were in their offices; it was not an in-person hearing in a courtroom. There would be no waiting while lawyers drove to downtown Houston. The trial court was willing to wait while the six Texas Organizing Project lawyers rounded up live witnesses.
- **Trivial interest?** Their interest in the TRO issue was not *minimal* or *insignificant*. (When the votes from the extra hour were counted it became obvious that one side was better prepared than the other to continue campaigning during the extra hour and get its voters to the polls—from 7:00 a.m. to 7:00 p.m. most down-ballot races broke 51-49 and 52-48, while from 7:00 to 8:00 p.m. the votes broke 58-42) As stated above, twenty-one countywide races finished within a 51-49 margin.

- Finally, it cannot be said that anyone else at the hearing would have voiced the concerns raised by Mr. Taylor. (Sometimes there are parties present who will speak up for those absent; but that cannot be said of this TRO hearing.)

The court rejects the notion that such a hearing can properly be made a private matter between an advocacy group and the EAO and Commissioners Court. It was not proper to try to exclude clearly interested persons and entities from *simply being heard.*

This court understands that the ancillary judge faced a fast-developing situation and might have been criticized whether she granted or denied the TRO. She was not helped by the lawyers who insisted the lawsuit was a private matter between voters and the Harris County officials—even toward the end of the hearing, their advocacy was still shaping the judge's thoughts when she said (page 62), "I want to hear from *the actual parties*."

The case was pleaded as a private matter involving only voters and election administrators. Notice was not given and there was strenuous objection to the uninvited Republican Party lawyer. The court finds that the plaintiffs wanted a friendly hearing and not a contested one.

The court observes that in contrast to the Texas Organizing Project's attitude toward the "nonparties" in the TRO proceeding, *this court* expressly welcomed the *non-party* Harris County Attorney's office and let its First Assistant *attend* and *speak* and *be heard* without limitation at *every pre-trial hearing* in this and twenty other election cases. Mr. Taylor did not object even though the County Attorney's office was obviously aligned with Defendant Craft.

D. "Mistake" under section 221.003.

Untrue information about ballot paper was given to the trial judge. The court does not fault the lawyers from the County Attorney's office—they relied on what they were told by their client, the EAO.

A candid and truthful response from the EAO to the court would have been: "We have had difficulty all day getting paper to polling locations. Harris County covers 1700 square miles. We can't assure the court that all polling locations will

have enough ballot paper, especially at 6:00 o'clock during the rush-hour traffic we all know about."

Instead, confident statements were made promising there was (or would be) adequate paper even though throughout the day election judges who called the EAO had long phone call waits, and contractors working for the EAO had been trying to deliver paper throughout the county.

A court is entitled to candid and truthful information from lawyers and their clients. The assurances of adequate paper were not accurate, and the court relied on them.

Later that day, after 8:00 o'clock, the Texas Supreme Court issued a stay of the TRO and ordered that the provisional ballots cast between 7:00 and 8:00 p.m. be preserved for later examination. That examination showed that Craft received 1147 of the provisional votes and Lunceford received 842, a margin of 325 and a percentage of 58.25% to 41.75%.

One cannot help noticing the difference when the twelve-hour regular voting period is compared with the extra hour from 7:00 to 8:00 p.m. From 7:00 a.m. to 7:00 p.m. on Election Day, the margins in local countywide races generally went Democratic within 52-48, many of them within 51-49. From 7:00 to 8:00 p.m. the range was closer to 59-41.

The evidence does not show whether the stronger Democratic voting from 7:00 to 8:00 p.m. happened because strong Republican polling locations were disproportionately without paper, or because the side that sought the extra hour of voting was more ready to get its voters to the polls after the 6:00 o'clock ruling, or for other reasons.

E. Decisions.

The court **finds** that EAO and Mr. Tatum made a *mistake* within the meaning of section 221.003(a)(2)(C) when they agreed to the TRO, an agreement based on false assurances that *all* polling places would have paper for ballots. The polling locations that did not have ballot paper were not really "open" and section 43.007(p) of the election code [quoted above at page 25, footnote 24] was violated.

The court **holds** that 325 net votes for Craft resulted from the EAO's mistaken approval of the extra hour and should be taken into account in the court's ultimate decision.

IX. MISCELLANEOUS.

Voters with cancelled registrations. Initially, during discovery, the evidence appeared to show over 2000 votes by voters whose registrations had been canceled. Ultimately, it was learned that the vast majority of those cancellations happened *after* the election. When the dust had settled, the evidence showed that five voters were improperly allowed to vote even though their registrations had been canceled *before* the election. The five votes were illegal.

Inconsistencies in reconciliation reports. Some of the numbers in the post-election reports did not sum up with complete accuracy. But the court is not persuaded that this justifies a judicial conclusion, in connection with other evidence and findings, that the true outcome cannot be ascertained.

X. THE UNDERVOTE.

In this election exactly 42,697 voters (3.86%) voted in various other races but didn't vote in the 189th. Collectively these non-votes in a contest have come to be called the undervote.

Craft argues that before the court can take illegal votes into account and make its "true outcome" decision, Lunceford must: (i) show that the illegal votes were cast *in this specific race* and must also (ii) prove "the disputed votes did not fall into the category of undervotes." (Trial Brief at 10) These arguments are two ways of approaching the same issue—if the illegal votes *were cast* in the race for the 189th, then by definition they *were not* undervotes; and if the votes *were not* cast in the 289th, then by definition they *were* undervotes.[26]

[26] The question *Were the illegal votes cast in this specific race?* arises only when there was an undervote in the specific race. To illustrate, consider an election contest in a 50-vote election for *Seat A* on the school board in a small county, where all 50 voters cast votes in each of the races for *Seats A, B,* and *C*. In the election contest for *Seat A,* there would be

From the evidence, it is reasonable to infer that some of the illegal votes (discussed above in sections II through IX) were cast in the 189th and some were not. It is also reasonable to infer that those who cast illegal votes would have voted in the 189th at roughly the same rate (96.14%) as one million other voters did.[27]

The court's rulings in sections II through IX yield a total of 2041 illegal votes.[28] The court *estimated* in section I (at pages 9-10) that 250 to 850 votes were *not cast* due to the EAO's ballot paper decision, which was illegal conduct and also an official mistake. Using the largest estimated number (850), these 2891 votes (2041 + 850) might be called the *affected votes*.

Not all of the 2891 would have been cast in the Lunceford vs. Craft contest because overall there was a 3.86% undervote in the race for the 189th District Court. The court holds that roughly the same undervote percentage in the contest for the 189th District Court would have occurred with the affected votes—96.14% of the 2041 illegal votes (plus the estimated 850 that were deterred from voting by the ballot paper decision) would have been cast in the 189th. This means that 2779 votes in the 189th (96.14% of 2891) were *affected*.

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no undervote issue *and* there could be no argument that the losing candidate must show that illegal voters voted *in the contested race*.

[27] The official canvassed total (PX-2) shows Craft defeated Lunceford by 533,710 to 530,967, the total vote for both candidates being 1,064,677. A total of 1,107,390 voters voted in the election. 1,107,390 minus 1,064,677 equals 42,713, but the official report shows the "undervote" in the 189th (the number of voters who did not vote for either candidate) was 42,697. The discrepancy results from the 16 "overvotes" apparently due to 16 ballot-by-mail voters who marked their paper ballots for *both* Craft and Lunceford. The official undervote (42,697) is 3.86% (a rounded number) of the total votes cast in the election (42,697 divided by 1,107,390 equals 3.8556).

[28] Voting by out-of-county residents (1236), provisional ballots (43), mail ballots (45), photo identification (380), erroneous instructions to the SVC (7), instructions for unscannable ballots (zero), mistake regarding TRO (325), and voting after registration was canceled (5). These findings from sections II to IX equal 2041 illegal votes.

The court respectfully rejects Craft's argument that this court, as trier of fact, cannot make these calculations because there was no expert testimony to support them.[29]

XI. SUMMARY OF FINDINGS.

Mistake and illegal-vote findings. The court has estimated that 250 to 850 lawful voters did not cast votes because of the EAO's ballot-paper decision, which was "illegal conduct" and also a mistake under section 221.003. There were 2041 *illegal* votes as discussed above. Using the largest estimated number (850), this yields a total of 2891 affected votes.

Undervote adjustment. The total of *affected* votes (2891) must be adjusted for the undercount percentage, yielding a total of 2779 affected votes (96.14% of 2891 equals 2779).

XII. JUDGMENT

The 2779 affected votes *slightly* exceed Craft's margin of victory, 2743. The court holds that this number is not large enough to put the true outcome in doubt. *That is the ultimate question in this case.* As was said above on page three, section 221.012 specifies that the *ultimate issue for decision in an election contest* is whether the court can or cannot "ascertain the true outcome of the election."

The court holds that 2779 illegal votes is not enough to make the true outcome unknowable in an election with a 2743-vote margin in the canvassed final result. Even if the 2779 affected votes had benefitted Craft by 90% to 10% (2501 to 278),

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[29] The percentage approach to the undervote was used and approved in *Green v. Reyes*, 836 S.W.2d 203 (Tex. App. —Houston [14th Dist.] 1992, no pet.), on the issue of whether the contestant proved "that illegal votes were cast in the election being contested." *Id.* at 208. Although an expert witness explained the percentage approach in *Green* and the court of appeals approved it, *id.* at 211, the court did not suggest that the issue *requires* expert testimony in an election contest. This court holds that expert testimony is not required.

an assumption no one would make, that would not be enough to affect the result.[30]

Green v. Reyes (discussed in footnote 29) is instructive. The trial judge in *Green* did not order a new election simply because the number of illegal votes *exceeded* the margin. He in *Green* found that he could not ascertain the true outcome because the number of illegal votes was roughly *three times as large* as the margin of victory. The number of affected votes found by this court is *too small* to justify a decision that the true outcome cannot be ascertained.

The election contest is respectfully **denied**, and Craft's victory in the contest for Judge of the 189th District Court is **declared** to be the **true outcome**.

Signed: November 9, 2023

/s/ David Peeples

DAVID PEEPLES, Judge Presiding

[30] Craft's 533,710 minus 2501 would equal 531,209. Lunceford's 530,967 minus 278 would equal 530,689. Craft would still win by 520 votes (531,209 exceeds 530,689 by 520).

Exhibit A

Partisan Offices on Harris County Ballot	**Number**
Congress	9
Governor, Lt. Governor, Attorney General, Comptroller Public Accts, Comm'r Gen. Land Office, Comm'r Agriculture, RR Comm'r	7
Supreme Court and Court of Criminal Appeals	5
State Board of Education	3
State Senator	4
State Representative	13
Court of Appeals	4
District Court	37
County Civil and Criminal Court	19
Probate Court	4
County Judge, District Clerk, County Clerk, County Treasurer	4
County Commissioner	2
Justice of the Peace	3
Total	114

No. 01-23-00921-CV

IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT OF TEXAS
IN HOUSTON

ERIN ELIZABETH LUNCEFORD

Appellant,

v.

TAMIKA CRAFT,

Appellee.

On Appeal from the 164th Judicial District Court
Harris County, Texas No. 2022-79328
Honorable David Peeples, sitting by assignment

TAB B

Cause No. 2022-79328

ERIN ELIZABETH LUNCEFORD,	*	**IN THE DISTRICT COURT**
Contestant	*	
	*	
vs	*	**164th JUDICIAL DISTRICT**
	*	
	*	
TAMIKA "TAMI" CRAFT,	*	**HARRIS COUNTY, TEXAS**
Contestee	*	

FINDINGS OF FACT and CONCLUSIONS OF LAW

BACKGROUND AND CONTEXT.

There were sixty-eight countywide courthouse races on the November 8, 2022 Harris County ballot. Twenty-one unsuccessful Republican courthouse candidates filed election contests by the statutory deadline. The captioned election contest arose from one of those twenty-one elections.

The final results show that Tamika "Tami" Craft defeated Erin Elizabeth Lunceford for Judge of the 189th District Court by 533,710 to 530,967, a margin of 2743 votes and a percentage difference of 50.13 to 49.87.

Lunceford vs. Craft was tried to the court from August 2 to August 11. The court heard testimony from eleven live witnesses in court, four witnesses by oral deposition, and thirty-five others by written-question depositions. The court admitted some 120 exhibits, which contain several thousand pages.

This court's authority. Two sections of the Texas Election Code delineate the court's authority in this matter:

Section 221.003. SCOPE OF INQUIRY.

(a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome *because*:

(1) illegal votes were counted; or

(2) an election officer or other person officially involved in the administration of the election:

(A) prevented eligible voters from voting;

(B) failed to count legal votes; or

(C) engaged in other fraud or *illegal conduct* or made a *mistake.* (emphasis added)

Section 221.012. TRIBUNAL'S ACTION ON CONTEST.

(a) If the tribunal hearing an election contest *can* ascertain the true outcome of the election, the tribunal shall declare the outcome.

(b) The tribunal shall declare the election void if it *cannot* ascertain the true outcome of the election. (emphasis added)

Section 221.003 describes the *conduct* of election officials that may be the basis for an election contest. Section 221.012 specifies that the *ultimate issue for decision* in an election contest is whether the court can or cannot "ascertain the true outcome of the election."

FINDINGS OF FACT and CONCLUSIONS OF LAW

The court now makes the Findings of Fact (FF 1-75) and Conclusions of Law (CL 1-42) on pages 3-25 below. Decisions on *mixed* questions of law and fact are designated Findings of Fact with the same "FF" abbreviation given to *pure* fact findings.

All affirmative findings rest on evidence the court considered to be clear and convincing, the legal standard for election contests.

It is of course customary to format Findings of Fact and Conclusions of Law separately, with the fact findings at the beginning of the document and the legal

conclusions toward the end. But the court believes that in this case the findings and conclusions will make more sense and be easier to follow when grouped together issue by issue.[1]

I. BALLOT PAPER

FF 1. In-person Harris County voters voted on computer screens, which then printed their selections onto two legal-size pages of ballot paper, which each voter reviewed for accuracy and then scanned into a secure system that would eventually count the votes countywide.

CL 1. The Texas Election Code states in one section how much ballot paper *shall be supplied* to each voting location. This is the law of Texas, and election administrators are duty-bound to try to follow it. The code says:

> **Section 51.005. Number of ballots.** (a) The authority responsible for procuring the election supplies for an election *shall provide* for each election precinct a number of ballots equal to *at least* the *percentage of voters who voted* in that precinct in the most recent corresponding election *plus 25 percent* of that number, except that the number of ballots provided may not exceed the total number of registered voters in the precinct. (emphasis added)

FF 2. For the November 2022 election, the Harris County Elections Administration Office (the "EAO") *chose not to follow* section 51.005—indeed the EAO *totally ignored* it. The EAO did this because the statute speaks of providing paper to "each election precinct," and since 2019 Harris County has voted at countywide polling locations, not at "precincts."

FF 3. Feeling unbound and unguided by section 51.005, the EAO decided to give 766 of the 782 polling locations *identical* amounts of paper—enough for 600 ballots each. Larger amounts were given to the other sixteen locations (PX-20;

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[1] The following acronyms were used throughout the trial and are listed here for convenience: Ballot by Mail (BBM); Elections Administration Office (EAO); Early Vote Ballot Board (EVBB); Provisional Ballot Affidavit (PBA); Reasonable Impediment Declaration (RID); Signature Verification Committee (SVC); and Statement of Residence (SOR).

DX-11). The EAO planned to take phone calls on election day and deliver extra paper to the polling locations as they telephoned for more.

A. Section 51.005's intent.

CL 2. In section 51.005 the Legislature's obvious intent was:

First, estimate *future turnout* by looking at *past turnout*.

Second, err on the side of *over*supply (instead of risking *under*supply) by adding 25% to the first number.

In a nutshell:

- *Look at past proven need by area, and provide "at least" that percentage,*
- *estimate future need by area,*
- *then oversupply by 25% just to be safe.*

CL 3. Election officials are commanded ("shall") to *estimate a future unknown* (the coming election's need) by reference to *known historical facts* (the past election's known turnout, area by area). That is, calculate the 2022 need for ballot paper scientifically by looking at known numbers from 2018 in areas of town (precincts). Without section 51.005, the Texas Election Code says *nothing* about how much ballot paper to supply.

FF 4. The EAO did the *opposite* of what the Legislature had mandated. The Legislature specified fact-based, individualized, fine-tuned allocation. Instead the EAO supplied one-size-fits-all allocation of 600 ballots apiece for 766 of the 782 polling locations (98%).

B. The consequences of the 600-per-location decision.

FF 5. The 600-per-location decision had tragic consequences:

(a) On election day several polling locations ran out of paper and were not able to get more paper in time for waiting voters.

(b) Voters stood in long lines for long periods of time.

(c) Many voters became frustrated and angry. One election worker testified, through tears, that a voter spit on her when she delivered the news that lined-up voters would have to wait, or go elsewhere to vote, because the polling location had run out of ballot paper. Another election worker testified that angry voters wanted her badge number.

(d) The news media reported the long lines and voter frustration.
(e) Election workers who made phone calls for more paper were often put on hold or told to leave a message. Promised paper was not always delivered.
(f) Damage was done to the public's confidence in government; pre-existing distrust was deepened. Partisan suspicions were inflamed.
(g) When voters eventually went elsewhere to try to vote, they sometimes encountered paper shortages and long lines at the other locations.

FF 6. Had the EAO simply *tried* to obey the Legislature, twenty-one election contests might have been avoided, because the shortages of ballot paper caused much of the Election Day chaos.

FF 7. The consequences of the EAO's decision were foreseeable, avoidable, and costly.

C. The EAO's Rationale offered by Craft and the Harris County Attorney.

FF 8. Craft and the EAO (through the Harris County Attorney's Office) argued that Section 51.005 simply *does not apply* to countywide voting. Their arguments were:

(a) Section 51.005's language refers to "each election precinct," not each countywide voting location.
(b) Precincts and polling locations are different things. A precinct is an *area* in the county with boundaries. A countywide polling place is a *location* for voting (a building) that serves the entire county.
(c) The last clause of section 51.005 (a) ("except that . . . in the precinct") would be absurd if it applied to countywide locations; it would mean the paper for each polling location could not "exceed" 2.4 million ballots ("the total number of registered voters" in each of the 782 countywide "precincts").
(d) There is no legislative history, no Secretary of State guidance, and no case law saying section 51.005 applies to countywide voting.

(e) Some precincts have been redistricted since 2018. This not only worsens the 2022 "fit" with 2018. It means "there was not a 'recent corresponding election' upon which to base ballot calculations."[2]

(f) Craft's expert witness worked in the EAO for two years (June 2020 to August 2022) before the November election. Her opinion was that ballot supply "is an art not a science." She mentioned "multiple data points" such as [1] "how many polling locations will you have," and [2] "is it a presidential or gubernatorial election," and [3] "is there a particular contest in a section of the county that is likely to drive turnout for several locations in that area." Summing up, she said: "I think what the code requires is you do an analysis, provide the ballot paper you think will be necessary *at that poll*, and be prepared to provide supplemental ballot paper as needed." (emphasis added)

FF 9. The expert witness made no effort to explain how *any* of her three factors, or her summary, or "art not a science" or "multiple data points" could justify *identical* supplies of 600 ballots for 98% of the polling locations. Her presentation as a neutral expert was tarnished a bit when she said later, in response to a question about a different issue, "that is not *our* burden of proof."

FF 10. If any other thought was given to this disastrous decision, the expert witness had every opportunity to mention it; and the County Attorney's amicus brief could have mentioned too.[3] There was no evidence that anyone at the EAO thought about whether 600 per location might *over*supply some and *under*supply others. If there was undersupply, might additional paper get there late in a county the size of Harris (2.4 million registered voters, 1700 square miles)? Might phone callers get a busy signal, or a message saying please leave a message, or a voice message estimating the wait time?

[2] The quoted language is from the Harris County Attorney's amicus brief, filed on behalf of the Election Administrator's Office. *See* Amicus Brief in Support of Craft's No Evidence Motion for Summary Judgment, at 8.

[3] From the beginning of this case, the court has allowed the Harris County Attorney's office, though not a party, to participate and speak in hearings and to file the amicus brief.

FF 11. The EAO made a conscious decision that voters and election officials at the polls would wait while phone calls were answered and paper delivered throughout the county.

FF 12. The 600-ballot approach put unmerited trust in the ability of EAO workers (and private contractors) to answer phone calls on election day and deliver ballots across Harris County's 1700 square miles.

D. No consultation with the Texas Secretary of State.

FF 13. During the planning phase, no one at the EAO made even a perfunctory phone call to the Texas Secretary of State's office. The SOS was not consulted about anything, such as:

(a) What are other counties doing? (Ninety Texas counties use countywide voting.)
(b) What options do we have? What has experience shown?
(c) We think we are totally freed from section 51.005's commands. Do you agree?
(d) Our tentative plan is to ignore section 51.005, give identical amounts to 98% of the locations, and take phone calls and send deliveries during the day—what do you think?

E. How many voters went elsewhere to vote?

FF 14. The court heard from live witnesses and read the testimony of witnesses who testified through depositions by written questions [DWQs] that a total of 2900 voters had left their polling locations without voting because of paper shortages. The court finds the testimony of these witnesses generally credible. Some were cross-examined about why they didn't ask voters whether they planned to go vote elsewhere. There was credible testimony that election workers had no time to take notes or get contact information from voters who left. Some workers expressed concern that voters might have resented the privacy intrusion if such questions had been asked.

FF 15. One DWQ witness testified that in his effort to vote he eventually went to *four locations* before he finally found one with functioning machines and reasonable lines. At one polling location the officials estimated the wait time would be ninety minutes.

FF 16. One witness testified in response to Craft's cross-question ("explain in detail how you know" that voters who left did not vote elsewhere): "There were at least two nearby locations that also ran out of ballot paper, according to voters who arrived at my polling location, and my polling location was the second or third stop for some trying to vote. Based on this information, I believe some [voters] likely did not cast a vote [elsewhere]. Additionally, several voters who were in line by 7:00 p.m. left the line before ballot paper was provided (~ 9:05 p.m.) and after polls had closed [so] these people were not able to cast a ballot." Another witness testified: "They left. Several women stated they needed to go care for children, prepare dinner. Others got tired of waiting and did not want to go elsewhere."

FF 17. From the evidence, the court finds that because of *paper shortages* 2600 voters who tried to vote at their polling place of choice left without voting. These numbers do not include voters discouraged by long lines who voted elsewhere due to *machine malfunctions* or *paper jams*, which were not caused by EAO decisions.

FF 18. A more difficult question is how many of these civic-minded people voted somewhere else that day and how many didn't. The Official Results show that 43.54% of Harris County's 2,543,162 registered voters voted in the November 8 election (early by mail, early in person, and in person on Election Day). All of these frustrated, waiting voters were part of that 43.54%—they were the *civic-minded* who had shown up in person to vote, and we might expect them to be persistent and go to another polling location. At each polling place signs were posted showing the four nearest polling locations (DX-12).[4] From common experience we can infer that *some of these voters* undoubtedly gave up when they saw long lines at the next location(s) they went to. Some had budgeted time for voting, but not enough time for going to a second or third location. Some had excess discretionary time for voting, and for waiting; others had places to go, tasks to do, appointments or jobs where they were expected. Some undoubtedly thought, *My vote won't make a difference in this huge city. But I tried. I'm leaving.* Others planned to come back and vote later but never followed through.

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[4] **Section 43.007(o)**: "Each countywide polling place must post a notice of the four nearest countywide polling place locations by driving distance."

FF 19. Given the state of the evidence, the court *estimates* that between 250 and 850 voters who left the first polling place did not vote elsewhere because of the EAO's ballot paper decision.

CL 4. That decision was both illegal (a failure to follow the law) and a mistake.

FF 20. The court *finds* that the EAO did not make a good faith effort to comply with section 51.005.

CL 5. The court *holds* that section 51.005 required the EAO to ***try*** to do two things in apportioning ballot paper. First, estimate 2022 need for *areas* of the county (the 782 countywide polling locations) based on past proven need at the last comparable election (2018), which would show 2018 turnout in *areas* of the county where people live (precincts). Second, oversupply rather than under-supply, by 25%. These two statutory requirements are *clear*, and they were consciously disobeyed. The EAO's ballot paper decision to ignore section 51.005 was both "illegal conduct" and a mistake.

FF 21. The court *estimates* that between 250 and 850 voters left and did not vote elsewhere on Election Day. Pursuant to section 221.012(b) (quoted above on page 2), these numbers will be taken into account as part of the court's decision whether it can or cannot "ascertain the true outcome of the election."

II. VOTING IN HARRIS COUNTY BY OUT-OF-COUNTY RESIDENTS.

CL 6. A voter *must* reside in a county to vote in that county. The voter *must* also be registered to vote. Election judges are required to ask each in-person voter if the address shown on the official voter roll is still the voter's *current* address. Voters who answer "no" are required to sign a Statement of Residence ("SOR").[5]

[5] **Section 63.0011** ("Statement of Residence"):

(a) *Before* a voter may be accepted for voting, an *election officer shall ask* the voter if the voter's residence address on the precinct list of registered voters is *current* and whether the voter has changed residence within [Harris] county. . . .

(b) If the voter's residence address is not current because the voter has changed residence *within* [Harris] county, the voter may vote, if otherwise eligible, in [his old precinct] if the voter resides in [Harris] county *and*, if applicable:

FF 22. Lunceford pointed out that votes were cast by persons who did not reside in Harris County. She focused on: (i) votes by *out-of-county* residents whose SORs show on their face a residence other than Harris County; and (ii) votes supported by *incomplete* SORs, which failed to give *any* information about *residence*, and for the vast majority of these the voters themselves omitted every bit of information except their names.

CL 7. At polling locations, the election officials are supposed to make sure that SORs are correct and complete. SORs are filled out when the voter signs in and the Election Judge has asked, *Do you still live at this address*, and voter has said *No*. (Later the EAO registrar uses SORs to update the voter registration records.[6]) Voters who say they live in a different county are not eligible to vote a regular Harris County ballot (which has countywide and district-based elections, in addition to the statewide ones).

CL 8. There is a distinction between receiving additional evidence of residence at the *polling location* and additional evidence *at trial*.

CL 9. Residence information from voters at the polling location. *At the polling location* the information is *handwritten* on the SOR *by the voter*; the election official is not expected to inquire beyond the SOR, although an official who has the time and the inclination *could* certainly choose to discuss residence briefly with the voter. An SOR is filled out only because the voter has just replied, in response to the election judge's inquiry, "I don't live there anymore." At the polling place,

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(c) Before being accepted for voting, the voter *must* execute and submit to an election officer a statement [SOR] including:

(1) a statement that the voter satisfies the applicable *residence* requirements prescribed by Subsection (b) [i.e. still resides in Harris County];

(2) all of the *information* that a person must include in an *application to register* to vote under Section 13.002; and

(3) the *date* the statement is submitted to the election officer.

(c-1) The statement [the SOR] described by Subsection (c) must include a field *for the voter to enter the voter's current county of residence.* (emphasis added).

[6] **Section 15.022 (a)** states: "The registrar shall make the appropriate corrections in the registration records . . . (4) after receipt of a voter's statement of residence executed under Section 63.0011."

election judges are to assess the residence information *shown on the SOR*. If the SOR shows that the voter resides outside Harris County, the voter can vote only a *provisional* ballot.

CL 10. Extrinsic evidence of residence at trial. *In an election contest trial,* the parties *may* litigate a voter's true residence with evidence. When this happens, the trial judge will decide whether an SOR did or did not speak the truth about a voter's residence.

FF 23. Out-of-County Voters. The SORs signed by 966 voters show on their face, *in the voter's handwriting,* that the voters resided outside Harris County.

CL 11. SORs are supposed to be checked at the polls by election judges; they are not vetted later by the Early Vote Ballot Board.

CL 12. For countywide elections, these 966 were illegal votes within the meaning of section 221.003 and should not have been counted.

FF 24. SORs incomplete. The court also holds that 270 SORs were filled out by the voter so incompletely—with the boxes for former residence and current residence *totally blank*—that it was not lawful to approve them and they should not have been counted.

CL 13. A Statement of Residence must **state** the **residence**.

III. PROVISIONAL BALLOTS.

FF 25. Lunceford contended that several Provisional Ballot Affidavits ("PBAs") were improperly approved for voting. The Secretary of State's PBA form summarizes several statutory "Reasons for Voting Provisionally."[7]

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[7] **Section 65.054 (Accepting Provisional Ballot)** provides:

> (a) The early voting ballot board [EVBB] shall examine each [provisional ballot affidavit] and determine whether to accept the provisional ballot of the voter . . . .
>
> (b) A provisional ballot *shall* be accepted *if* the board determines that: (1) from the information in the affidavit or contained in public records, the person is eligible to vote in the election and has not previously voted in that

1. Voter failed to present acceptable photo identification or an alternate form of identification with an executed Reasonable Impediment Declaration;
2. Voter is not on list of registered voters;
3. Voter not on list, votes in another precinct. [This would not apply because Harris County votes at countywide polling locations, not at individual precincts.]
4. Voter is on list of persons who received mail ballots and has not surrendered the mail ballot or presented a notice of improper delivery; and
5. Voter voted after 7:00 p.m. due to court order. [Provisional ballots from 7:00 to 8:00 p.m. on election day pursuant to court order are discussed in section VIII below on page 22.]

FF 26. Already voted by mail? Most of the challenged PBAs in this case list reason 4 above for voting provisionally (that the voter appears to have already voted by mail). These are voters who showed up to vote *in person* and were advised that a mail ballot was earlier sent to them.

CL 14. In-person voters who say they *did not receive* the mail ballot, or received it but *didn't vote it and mail it in*, must sign a PBA and vote a provisional ballot. The EVBB should later check the records and verify whether the in-person voter did or did not vote by mail earlier.

FF 27. For each of these forms singled out for scrutiny, the Mail Supervisor (an employee of the EAO) has signed and checked a box that the mail-in ballot was "not returned." This means the EAO has checked the records and confirmed that the voter *did not mark and return the mail ballot*.

CL 15. This is a valid reason for the EVBB to accept the voter's provisional in-person ballot.

FF 28. Signatures on these PBAs by the Mail Supervisor and the EVBB show that they concluded these voters had *not* voted earlier by mail.

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election; [and] (2) the person . . . meets the identification requirements of Section 63.001 (b) [photo identification, or an approved substitute plus a Reasonable Impediment Declaration form] . . . . (emphasis added)

FF 29. Concerning these PBAs, the court is *not* persuaded that these officials *erred* in reaching those conclusions. To state it differently, the court accepts the decisions of the Mail Supervisor and the EVBB that approved these PBAs.

FF 30. It is significant that on these PBAs there is no issue of whether the voters lacked photo identification—the election judges did *not* check a box concerning lack of proper photo identification.

FF 31. Other boxes not checked. Other boxes on some PBA forms were not checked or not filled out properly.

(a) Some Election Judges signed the PBA but did not date it.
(b) Some voters wrote their address in the wrong box.
(c) Some of these voters did not sign the yes-or-no citizenship box.

FF 32. The court has assessed these for genuineness. On these PBAs the boxes for the voter registration number and precinct number are filled in. At the polling location the election judges saw these registered voters face-to-face. The EVBB accepted them, and the court has decided not to overrule the board and disallow these votes.

FF 33. The court concludes that these omissions do not justify nullifying these provisional ballots as illegal.

FF 34. Unsigned PBAs. The court does *not* approve the PBAs that the *voter* did not sign (6), or the *Election Judge* did not sign (22), or the *EVBB* did not sign (15). These 43 PBAs were not lawfully approved, and the votes supported by them should not have been counted.

IV. MAIL BALLOTS.

FF 35. Lunceford contended that several mailed ballots were counted, in violation of the election code, even though they lacked code-required *signatures* or were not *timely mailed or timely received.*

CL 16. The code specifies several steps for voting by mail. The voter: (i) must ask for a mail ballot in a signed writing, (ii) must have a statutory reason (age, disability, will be out of county, in jail), and (iii) must return the marked ballot *in time* and with proper *signatures* (on both the *application* and the *envelope*). (There

are also explicit limits on who may assist the voter in marking the ballot and mailing it.)

CL 17. For mail ballots to be lawfully counted, the election code specifies two requirements that are at issue in this case—timeliness and matching signatures.

CL 18. Timeliness. The code requires that mail ballots be timely *mailed* and timely *received*. The carrier envelope *must* be postmarked by 7:00 p.m. on election day *and* the envelope with the ballot *must* be received by 5:00 p.m. on the next day (November 9 for this election).[8]

CL 19. Matching signatures. The code requires the voter's signature (1) on the *application* for a mail ballot and (2) on the carrier *envelope* in which the ballot marked by the voter is mailed back to the EAO. As the court said in *Alvarez v. Espinoza*, 844 S.W.2d 238, 245 (Tex. App.—San Antonio 1992, no pet.) (en banc), "The law places the burden on those who vote early by mail to sign both the application and the [carrier] envelope with signatures that match."

CL 20. The early vote clerk, after checking the carrier envelope for timeliness, puts it in a *jacket envelope* along with the voter's application for the mail ballot, and sends the jacket envelope to the EVBB for its review.[9] The EVBB reviews

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[8] **Section 86.007** (Deadline for Returning Marked Ballot).

(a) [Except for ballots mailed from outside the US,] a marked ballot voted by mail *must arrive* at the address on the carrier envelope:

(1) before the time the polls are required to close on election day; or

(2) not later than 5 p.m. on the day after election day if the carrier envelope was [mailed and postmarked] not later than 7 p.m. at the location of the election on election day. . . .

(c) A marked ballot that is not timely returned *may not be counted*. . . . (emphasis added)

[9] **Section 87.041** (Accepting Voter).

(a) The early voting ballot board shall open each jacket envelope for an early voting ballot voted by mail and determine whether to accept the voter's ballot.

(b) A ballot may be accepted *only if*:

(1) the carrier envelope certificate is properly executed; [and]

mail ballots for two signatures—the signature on the application and the signature on the carrier envelope. In addition, the EVBB "may" compare either or both signatures with a *third* signature—the *voter's signature on file with the registrar*.[10]

FF 36. The EVBB is a bipartisan board with equal numbers of Democrats and Republicans whose names were suggested to Commissioners' Court by each

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(2) neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness; . . .

(d) A ballot *shall* be rejected if any requirement prescribed by Subsection (b) is not satisfied. In that case, the board shall indicate the rejection by entering "rejected" on the carrier envelope and on the corresponding jacket envelope.

(d-1) . . . The board *shall* compare signatures in making a determination under Subsection (b)(2) . . . .

(e) In making the determination under Subsection (b)(2), to determine whether the signatures are those of the voter, the board *may* also compare the signatures with any known signature of the voter on file with the county clerk or voter registrar. . . . (emphasis added)

[10] **Voter mistakes on mail ballots *may* be cured.** If the early voting clerk receives a mailed ballot that lacks a required signature or is otherwise defective, the clerk *may*: (i) mail the BBM back to the voter for correction; (ii) telephone and inform the voter of the right to *cancel* the mail ballot and vote *in person*; or (iii) telephone and suggest that the voter may come to the registrar's office and correct the omission. **Section 86.011** ("Action by Clerk on Return of Ballot") says:

. . . (d) Notwithstanding any other provisions of this code, if the clerk receives a *timely* carrier envelope that does not fully comply with the applicable requirements . . . [i] the clerk *may* deliver the carrier envelope in person or by mail to the voter and *may* receive, before the deadline, the *corrected carrier envelope* from the voter, *or* [ii] the clerk *may* notify the voter of the defect by telephone and advise the voter that the voter may come to the clerk's office in person to *correct* the defect or *cancel* the voter's application to vote by mail and vote on election day. If the procedures authorized by this subsection are used, they must be applied uniformly to all carrier envelopes covered by this subsection. . . . (emphasis added)

party's chair. The EVBB works in teams of two (always one Democrat and one Republican per team).

CL 21. The EVBB is given considerable discretion.[11]

FF 37. The court finds that thirty-six mailed ballots lacked a required signature, and an additional nine ballots were not timely mailed. PX-11 & PX-12.

FF 38. These forty-five mailed ballots do not satisfy the code's mandatory provisions, and therefore it was not lawful to count them.

V. PHOTO IDENTIFICATION.

CL 22. The election code says election judges shall make two inquiries of *every* in-person voter. Election Judges are to ask: (i) whether the address shown on the voter list is still the voter's current address[12] and (ii) whether the voter has photo identification.[13]

CL 23. Acceptable photo identification. The code specifies that each in-person voter must show:

(1) an approved *photo ID*[14] ***or***

(2) an approved *substitute* ***and*** an approved *reason* for not having a photo ID.

[11] "The law presumes that the board [EVBB] acted properly in rejecting and accepting ballots; to overcome this presumption, a challenger must show by clear and satisfactory evidence that the board erred." *Alvarez v. Espinoza*, 844 S.W.2d at 844.

[12] **Section 63.0011(a)** ("Before a voter may be accepted for voting, an election officer *shall* ask the voter if the voter's residence address [on the list] is current and whether the voter has changed residence within the county") (emphasis added).

[13] **Section 63.001(b)** (". . . on offering to vote, a voter *must* present to an election officer at the polling place: (1) one form of photo identification listed in Section 63.0101(a) or (2) [an acceptable substitute *plus* a reasonable impediment declaration]." (emphasis added)

[14] **Section 63.001(b)(1)** (requiring photo ID); **§ 63.0101(a)** (listing acceptable photo IDs). An *expired* photo ID-card is acceptable for voters *70 and older* and is acceptable for voters *69 and younger* if the ID-card has been expired for only four years or less.

CL 24. The approved *substitute* may be a utility bill, bank statement, government check, paycheck, birth certificate, or a voter registration card or other government document.[15] The approved *reason* may be lack of transportation, disability or illness, work schedule, family responsibilities, ID is lost or stolen, or application for photo ID is pending.[16]

CL 25. RIDs. A voter who does not have a listed type of photo identification must be asked to sign a Reasonable Impediment Declaration.

FF 39. RID forms have been designed and approved by the Texas Secretary of State.

FF 40. The *election official* at the polling location may check a box for one of six *alternate kinds of identification without a photo*.

FF 41. RID forms let the *voter* check one of several boxes listing the *reason(s) why the voter has not gotten an approved form of photo identification*.

CL 26. Flexibility on name and address matches. The voter's name must be on the official roll of registered voters. But the *name* on the substitute document need not "match exactly with the name on the voter list" if they are "substantially similar." The election official cannot reject the substitute document solely because its *address* "does not match the address on the list of registered voters."[17]

FF 42. Incomplete RIDs. Lunceford challenges 532 votes because the RIDs supporting them were not completely filled out. The challenged RIDs lack *one or more* of the following: a reason for not having a photo ID, a lawful ID substitute (e.g., paycheck, utility bill, voter registration card), voter signature, election judge signature (the judge is supposed to place the voter under oath), or Voter ID number.

FF 43. The evidence shows that over 347,000 voters voted in person on Election Day, and that 532 of them did not satisfy one or more of the election code's

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[15] **Section 63.001(b)(2)** (allowing substitutes for photo ID); **§ 63.0101(b)** (listing acceptable photo ID substitutes).

[16] **Section 63.001(i)** (listing acceptable reasons for not having photo ID).

[17] **Section 63.001 (c) & (c-1)**.

requirements, summarized above: bring a photo ID *or* bring a substitute document *and* check a box showing why they have not gotten a photo ID.

CL 27. The reasons for not having an ID include family responsibilities, disability or illness, work schedule, application pending, lack of transportation, or ID lost or stolen.

CL 28. Persons who have no photo ID may satisfy this statute by simply bringing their voter registration card,[18] which suffices as substitute proof for the photo ID if there is an approved reason for not having a photo ID.

CL 29. A RID is the voter's chance to comply with the code's effort to make sure that voters can demonstrate *who they are* with documents.

FF 44. The court concludes that 380 of the 532 challenged RIDs are so lacking in the statutory information that they are improper, and votes cast by these 350 voters should not have been counted.

VI. ERRONEOUS INSTRUCTIONS TO THE SIGNATURE VERIFICATION COMMITTEE.

FF 45. A member of the Signature Verification Committee (SVC) testified that when early voting began, an EAO staffer told the SVC not to compare Ballot by Mail (BBM) *application* signatures or *envelope* signatures with the voter's signature *on file* with the elections office.

CL 30. This advice was flatly wrong; the SVC *may* but is not *required* to compare the voter's application signature and envelope signature with the voter's signature officially on file. *See* footnote 11 above quoting section 87.041(e).

FF 46. Two other SVC members testified they *did not hear* the EAO staffer make this remark.

FF 47. The court finds that the remark was made, the erroneous advice was indeed given, and it was obeyed for two hours before the EAO corrected it.

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[18] **Section 63.0101:** "(b) The following documentation is acceptable as proof of identification under this chapter: (1) a government document that shows the name and address of the voter, including *the voter's voter registration certificate*." (emphasis added)

FF 48. This incident shows either carelessness or ignorance by the EAO about the SVC's authority to exercise its statutory discretion concerning an important safeguard for BBMs. But the erroneous instruction affected only a few votes; the witness estimated that the SVC found that approximately 1% of the application or envelope signatures did not match the signature on file. She also estimated that 700 BBMs were approved during the first two hours while the SVC operated under the incorrect instructions.

FF 49. The court concludes that seven improper BBMs slipped by unexamined and should not have been counted.

VII. LAST-MINUTE EAO INSTRUCTIONS FOR BALLOTS THAT WOULDN'T SCAN.

FF 50. The printed ballot was two legal-size pages for each voter. During both early voting and election-day voting, there were times when the scanning machines would not accept page two of a voter's ballot.

FF 51. HCEA Manual. For this situation the 2022-2023 Harris County instruction manual advised [PX-16, page 115] that the second ballot page should be rescanned four different ways.[19] If the re-scanning was still unsuccessful, the second page would be put into the Emergency Slot [aka the "Emergency Chute"]. Such unscanned pages would later be processed and counted by Central Count, a bipartisan body (two Republicans and two Democrats) with a higher-quality scanner that might be able to scan and count the troublesome second pages. If Central Count could not successfully re-scan a page two, it would manually input the votes shown on that unscanned page into the official vote count.

FF 52. EAO's last-minute change for the page-two problem. A short time before November 8, after election workers had been trained, the EAO emailed new instructions: If any page two was *illegible* as opposed to *legible but unscannable*, the voter should vote again, but scan only the new page two and spoil the new page one (because the original page one had already been scanned

[19] The manual said to scan each difficult page 2 by inserting it *top first* with print down and then with print up, and then by inserting it *bottom first* with print down and then with print up.

and recorded). New page two would be put into the Emergency Chute for processing later by Central Count.

FF 53. Lunceford contends this new procedure was too complex for such a last-minute change, and that a sizeable number of *new* first ballot pages were mistakenly scanned a second time after the original first pages had been scanned and recorded. The *Lunceford vs Craft* race was on page one of the printed ballots and therefore may have received double-votes *if page one was indeed counted twice* because of the scanning problem and the last-minute instructions.

FF 45. The court has concluded that even if the last-minute instructions were a "mistake" within section 221.003, the evidence does not convincingly show extra counting of page one races.

FF 55. The official election results (PX-2) show a steady drop-off from votes at the top of the ballot to votes toward the bottom, a drop-off that would look normal to one who has been observing Texas elections for several decades. As voters wade through a long urban ballot—starting with federal races, moving then to the statewide races, Board of Education, members of the State Senate and House, appellate courts, District Courts, County Courts-at-Law, and Probate Courts—it is common to see a steady drop-off (i.e. reduced voting) in down-ballot *judicial* races. This was true for the November 2022 down-ballot judicial races in Harris County.

FF 56. In this election, one down-ballot race stood out: the high-profile page-two contest for County Judge (Alexandra Mealer vs Lina Hidalgo) showed slightly more turnout than even some page-one races like the Texas Supreme Court. This suggests there was no large double-voting of page one.

CL 31. The court concludes that the EAO's perhaps unwise last-minute decision about handling scanning problems was certainly not illegal and does not qualify as a "mistake" within the meaning of § 221.003.

FF 57. The court also concludes the last-minute scanning change did not cause a significant difference in page-one votes compared to page-two votes because the drop-off was typical for down-ballot judicial races.

FF 58. The court has assessed the testimony about the Cast Vote Records and compared it to the evidence of the canvassed final results. The evidence of a

page two drop-off in votes, possibly caused by scanning confusion, is not persuasive enough to be clear and convincing. The argument that there were more page one votes than page two votes, causing double votes in the 189th, is respectfully **denied**.

VIII. COURT-ORDERED EXTENSION OF COUNTYWIDE VOTING UNTIL 8:00 P.M.

FF 59. Lunceford contended that Administrator Tatum made a "mistake" within the meaning of section 221.003 when he agreed on Election Day to a Temporary Restraining Order [TRO] that extended the voting period countywide from 7:00 p.m. to 8:00 p.m.

CL 32. Agreeing to the extension was not *illegal*. But the court *sustains* Lunceford's contention that agreeing to the TRO was a *mistake* within the meaning of section 221.003.

FF 60. For the reasons stated at pages 22-32 of the court's Final Judgment (signed on November 9), the court has expressed and explained its deep concern about the way the TRO was sought and obtained.

FF 61. The County Attorney's office, speaking for the EAO, gave the ancillary court untrue information about ballot paper at the polling locations and inaccurate assurances that all polling locations would have enough ballot paper it the court extended the poll-closing deadline.

CL 33. A court is entitled to candid and truthful information from lawyers and their clients.

FF 62. The assurances of adequate paper were not accurate, and the court relied on them.

FF 63. The court finds that the EAO and Mr. Tatum made a *mistake* within the meaning of section 221.003(a)(2)(C) when they agreed to the TRO, an agreement based on false assurances that *all* polling places would have paper for ballots.

The polling locations that did not have ballot paper were not really "open" and section 43.007(p) of the election code was violated.[20]

CL 34. The court holds that 325 net votes for Craft resulted from the EAO's mistaken approval of the extra hour and should be taken into account in the court's ultimate decision.

IX. MISCELLANEOUS.

FF 64. Voters with cancelled registrations. Initially, during discovery, the evidence appeared to show over 2000 votes by voters whose registrations had been canceled. Ultimately, it was learned that the vast majority of those cancellations happened *after* the election. When the dust had settled, the evidence showed that *five voters* were improperly allowed to vote even though their registrations had been canceled *before* the election.

CL 35. The five votes were illegal.

FF 65. Inconsistencies in reconciliation reports. Some of the numbers in the post-election reports did not sum up with complete accuracy.

FF 66. But the court is not persuaded that this justifies a judicial conclusion, in connection with other evidence and findings, that the true outcome cannot be ascertained.

X. VOTERS ON THE SUSPENSE LIST.

FF 67. Lunceford contended that 1995 voters whose names were on the suspense list were permitted to vote without showing that they still resided in the county. This contention was not proved to the court's satisfaction and it is respectfully denied.

[20] **Section 43.007(p)** says: "If a court orders any countywide polling place to remain open after 7 p.m., all countywide polling places located in that county shall remain open for the length of time required in the court order."

XI. THE UNDERVOTE.

FF 68. In this election exactly 42,697 voters (3.86%) voted in various other races but didn't vote in the 189th. Collectively these non-votes in a contest have come to be known as the "undervote."

FF 69. Craft argued that before the court can take illegal votes into account and make its "true outcome" decision, Lunceford must: (i) show that the illegal votes were cast *in this specific race* and must also (ii) prove "the disputed votes did not fall into the category of undervotes." (Trial Brief at 10)

CL 36. These arguments are two ways of approaching the same issue—if the illegal votes *were cast* in the race for the 189th, then by definition they *were not* undervotes; and if the votes *were not* cast in the 189th, then by definition they *were* undervotes.

FF 70. From the evidence, it is reasonable to infer that some of the illegal votes (discussed above in sections II through IX) were cast in the 189th and some were not. It is also reasonable to infer that those who cast illegal votes would have voted in the 189th at roughly the same rate (96.14%) as one million other voters did.[21]

FF 71. The court's rulings in sections II through IX yield a total of 2041 illegal votes.[22] The court *estimated* in section I (FF 21 at page 9 above) that 250 to 850 votes were *not cast* due to the EAO's ballot paper decision, which was illegal

[21] The official canvassed total (PX-2) shows Craft defeated Lunceford by 533,710 to 530,967, the total vote for both candidates being 1,064,677. A total of 1,107,390 voters voted in the election. 1,107,390 minus 1,064,677 equals 42,713, but the official report shows the "undervote" in the 189th (the number of voters who did not vote for either candidate) was 42,697. The discrepancy results from the 16 "overvotes" apparently due to 16 ballot-by-mail voters who marked their paper ballots for *both* Craft and Lunceford. The official undervote (42,697) is 3.86% (a rounded number) of the total votes cast in the election (42,697 divided by 1,107,390 equals 3.8556).

[22] Voting by out-of-county residents (1236), provisional ballots (43), mail ballots (45), photo identification (380), erroneous instructions to the SVC (7), instructions for unscannable ballots (zero), mistake regarding TRO (325), and voting after registration was canceled (5). These findings from sections II to IX equal 2041 illegal votes.

conduct and also an official mistake. Using the largest estimated number (850), these 2891 votes (2041 + 850) might be called the *affected votes*.

FF 72. Not all of the 2891 affected votes would have been cast in the *Lunceford vs. Craft* contest because overall there was a 3.86% undervote in the race for the 189th District Court. The court finds that roughly the same undervote percentage in the contest for the 189th District Court would have occurred with the affected votes—that is, 96.14% of the 2041 illegal votes, plus the estimated 850 (at most) that were deterred from voting by the ballot paper decision, would have been cast in the 189th. This means that 2779 votes in the 189th (96.14% of 2891) were *affected*.

CL 37. The court respectfully rejects Craft's argument that this court, as trier of fact, cannot make these calculations because there was no expert testimony to support them.[23]

XII. SUMMARY OF FINDINGS.

FF 73. Mistake and illegal-vote findings. The court has estimated that 250 to 850 lawful voters did not cast votes because of the EAO's ballot-paper decision, which was "illegal conduct" and also a mistake under section 221.003. There were 2041 *illegal* votes as discussed above. Assuming and using the largest estimated number (850), this yields a total of 2891 affected votes.

CL 38. Undervote adjustment. The total of *affected* votes (2891) must be adjusted for the undercount percentage, yielding a total of 2779 affected votes (96.14% of 2891 equals 2779).

[23] The percentage approach to the undervote was used and approved in *Green v. Reyes*, 836 S.W.2d 203 (Tex. App. —Houston [14th Dist.] 1992, no pet.), on the issue of whether the contestant proved "that illegal votes were cast in the election being contested." *Id.* at 208. Although an expert witness explained the percentage approach in *Green* and the court of appeals approved it, *id.* at 211, the court did not suggest that the issue *requires* expert testimony in an election contest. This court holds that expert testimony is not required.

XII. JUDGMENT

FF 74. The 2779 affected votes *slightly* exceed Craft's margin of victory, 2743. The court holds that this number is not large enough to put the true outcome in doubt. *That is the ultimate question in this case*.

CL 39. As was said above on page two, section 221.012 specifies that the *ultimate issue for decision in an election contest* is whether the court can or cannot "ascertain the true outcome of the election."

CL 40. The court holds that 2779 illegal votes is not enough to make the true outcome unknowable in an election with a 2743-vote margin in the canvassed final result. Even if the 2779 affected votes had benefitted Craft by 90% to 10% (2501 to 278), an assumption no one would make, that would not be enough to affect the result.[24]

CL 41. *Green v. Reyes* (discussed in footnote 23) is instructive. The trial judge in *Green* did not order a new election simply because the number of illegal votes *exceeded* the margin. He found that he could not ascertain the true outcome because the number of illegal votes was roughly *three times as large* as the margin of victory. The number of affected votes found by this court is *too small* to justify a decision that the true outcome cannot be ascertained.

FF 75. The proper decision is that the election contest be respectfully **denied**.

CL 42. Craft's victory in the contest for Judge of the 189th District Court is **declared** to be the **true outcome**.

Signed: December 9, 2023

/s/ David Peeples

DAVID PEEPLES, Judge Presiding

[24] Craft's 533,710 minus 2501 would equal 531,209. Lunceford's 530,967 minus 278 would equal 530,689. Craft would still win by 520 votes (531,209 exceeds 530,689 by 520).

No. 01-23-00921-CV

IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT OF TEXAS
IN HOUSTON

ERIN ELIZABETH LUNCEFORD

Appellant,

v.

TAMIKA CRAFT,

Appellee.

On Appeal from the 164th Judicial District Court
Harris County, Texas No. 2022-79328
Honorable David Peeples, sitting by assignment

TAB C

CAUSE NO. 2022-79328

ERIN ELIZABETH LUNCEFORD	§	IN THE DISTRICT COURT
Contestant,	§	164th JUDICIAL DISTRICT
v.	§	
TAMIKA "TAMI' CRAFT	§	HARRIS COUNTY, TEXAS
Contestee.	§	

CONTESTANT ERIN ELIZABETH LUNCEFORD'S PROPOSED FINDINGS OF FACT

TO THE HONORABLE JUDGE OF THIS COURT:

Contestant, Erin Elizabeth Lunceford, hereby files these Proposed Findings of Fact, and in support hereof, would show as follows:

I.
FINDINGS OF FACT

1. Contestant Erin Elizabeth Lunceford is the Republican nominee who ran for election to the 189th Civil Judicial District Court of Harris County during the November 8, 2022 General Election cycle.

2. Contestee Tamika "Tami" Craft is the Democratic nominee who ran for election to the 189th Civil Judicial District Court of Harris County during the November 8, 2022 General Election cycle.

3. This particular countywide contested judicial election was conducted in

Harris County and encompasses the entire county.

4. On November 19, 2022, the Harris County Commissioner's Court (the canvassing authority) issued its final canvass on behalf of Harris County, Texas. See Contestant's Exhibit 2. According to the final canvass, Contestant received 530,967 votes (49.87%) and Contestee received 533,710 votes (50.13%). Thus, the margin of reported defeat is 2,743 votes, which equates to 0.26 of one percent of the total votes cast in that specific race. This purported outcome was timely contested by the Contestant.

5. Early Voting in Harris County began on Monday, October 24, 2022 and ended on November 4, 2022.

6. There were ninety-nine (99) Early Voting polling locations throughout Harris County.

7. Election Day voting took place on Tuesday, November 8, 2022.

8. There were seven hundred eighty-two (782) Election Day polling locations throughout Harris County.

9. The ballot for the November 8, 2022 General Election was two pages in length, both of which were 8.5 by 14 inches in width and length, respectively. The candidates for the 189th Civil Judicial District Court race appeared on page one of the two-page ballot.

10. In March of 2019, Harris County opted to permit countywide voting.

This meant that any registered voter may vote in-person at any polling location. Thus, in this particular election, any Harris County registered voter may vote at any of the ninety-nine (99) Early Voting and seven hundred eighty-two (782) Election Day polling locations.

11. The only exception to FOF number 10 relates to those voters who had recently moved into Harris County before they voted but were not registered to vote in time to vote in that particular election. This class of voters may cast what is called a Limited Ballot, whereby a voter may cast a vote for candidates whose office is consistent with the district from which the voter came and where they are in Harris County, such as a statewide elected candidate for Governor, by way of an example.

12. According to Contestant's Exhibit 20, there were a total of 636 voters who cast a Limited Ballot in the November 8, 2022 General Election. For those Limited Ballot voters, the only location by which a Limited Ballot may be cast is at NRG Stadium, and those Limited Ballot voters may only vote during Early Voting, not during Election Day voting.

13. The November 8, 2022 General Election was overseen and conducted by Clifford Tatum, who is the Elections Administrator ("EA" or "HCEA") for Harris County.

How In Person Voting Is Conducted In Harris County.

14. The established procedure for voting in person for this election in Harris

County at a polling location began by directing a potential voter who arrived to cast a vote to what is referred to as the Qualifying Table.

15. At the Qualifying Table, an election official will attempt to determine if the voter is listed as a registered voter on the Harris County Voter Roll, which is the list of every registered voter in Harris County, and an election official will also ask the voter to present one of the statutorily required forms of photo identification, which is referred to as the "List A" forms of identification.

16. If the voter's name is on the Harris County Voter Roll, and if the voter presents one of the List A forms of photo identification, then that voter will be checked into the E-Poll Book system, which is an IPad connected to the internal voting data information of Harris County. The list of every voter who voted in the November 8, 2022 General Election is maintained in a database called the Harris County Voter Roster.

17. Upon check-in, a ballot access code is printed out from a device called a Controller. Using that specific access code, the voter will then proceed to a machine called a Duo, which has an electronic touchscreen upon which a voter may select amongst the various candidates for whom they wish to vote. The specific access code given to the voter is tied to the specific registration address where the voter is registered to vote, so that the voter's ballot choices are limited to only those political offices which have geographical political boundaries which encompass the

area where the voter resides.

18. For those voters who arrive at the Qualifying Table that were not listed on the Harris County Voter Roll, an election official will attempt to determine whether that voter was indeed a registered voter. If that voter's registration status is confirmed, then an election official will add that voter to a list of registered voters who are not presently on the list of registered voters, which is called a Registration Omissions List, and that voter will proceed in the same manner as a voter who was already on the Harris County Voter Roll.

19. If the voter is not on the Harris County Voter Roll, and if the election official is not able to verify that this voter was indeed a registered voter, then that voter is not permitted to cast a regular ballot. If that voter wishes to vote anyway, then an election official will permit that voter to cast what is called a Provisional Ballot, but not a regular ballot.

20. If the voter whose name is on the Harris County Voter Roll (or who has now been added to the Registration Omissions List) does not present one of the List A forms of photo identification, then that voter will be provided an opportunity to nevertheless qualify to cast a regular ballot as explained in FOF number 21.

21. Once a voter is determined to be listed as a registered voter on the Harris County Voter Roll, or if the voter is found to be a registered voter despite not being listed on the Harris County Voter Roll (and thus added to the Registration Omissions

List), but that voter fails to present one of the List A forms of photo identification, then the election official will require the voter to present one of the substitute forms of identification, which is referred to as the List B forms of permitted identification. In addition, the election official will require the voter to completely fill out a form called a Reasonable Impediment Declaration ("RID"). The RID form requires the voter to identify what reasonable impediment prevents them from having one of the List A forms of photo identification, and it also requires the voter to sign that document. The election official may not question the reasonableness of the impediment claimed by the voter, but the voter is required to indicate on the RID form what reasonable impediment they claim to have. The RID form also requires the election official to identify what type of List B identification was presented by the voter, and it also requires the election official to sign that document.

22. If the voter does not present a List A form of photo identification, and if the voter also does not present both a List B form of identification and a reasonable impediment for not having a List A form of photo identification, then that voter may not be permitted to cast a regular ballot. If that voter still wants to vote, then that voter is permitted to cast a provisional ballot.

23. In addition to determining whether the voter who has appeared at the Qualifying Table is listed on the Harris County Voter Roll and has satisfied all identification requirements, the election official is also required to ask the voter, as

required by the election code, if they still reside at the address shown on the Harris County Voter Roll. If the answer to that question was yes, then the voter was asked to sign the IPad and ultimately was given an access code, and then that voter proceeds to vote at a machine called a Duo. Once finished, the Duo has the ability to print out the electronically selected choices onto the two-page ballot.

24. After the voter completed their selections on the Duo and printed out their ballot, then they proceeded to the final step of the in-person voting process, which was for the voter to go to a Scanner, which is the device by which both pages of the voter's ballot would be scanned in. Once scanned, that ballot was electronically recorded on a special flash drive, which is called a V-drive, and also on a hard drive of the Scanner. The paper ballot was collected in the ballot box underneath the Scanner. Eventually, that voter's recorded vote will be reflected as a cast vote record, and will be included in the vote totals reflected in the Official Final Canvass.

25. The various polling locations are staffed and run largely by volunteers. These well-intentioned citizens receive some training, but the experience and expertise of these individuals is varied. The process by which Presiding Judges and Alternative Presiding Judges for the various polling locations are selected involved the local Republican and Democratic parties nominating certain individuals for service. The Harris County Commissioners' Court eventually accepts those

nominations, and the various nominees receive official credentials from the Harris County EA's Office in order to serve in a specific capacity. Whether a particular polling location's Presiding Judge is the Democratic or Republican nominee depends upon which Gubernatorial candidate carried a majority of the precinct in which this polling place was located in the 2018 election for Governor. Thus, if a particular polling location is located within a precinct for which a majority of the voters turned out to vote in 2018 supported Greg Abbott, then the Presiding Judge for that location in 2022 would be a Republican nominee, and the Alternative Presiding Judge would be a Democratic nominee, and vice-versa for those precincts that supported Lupe Valdez in 2018.

26. An issue which arose frequently during Early Voting and on Election Day voting was how to handle the situation where the Scanner would scan the first page of the ballot, but not the second page. When this occurred, the first page that was scanned successfully was recorded electronically onto a V-drive and entered into the cast vote record for the election. But the second page that was not scanned successfully was not recorded electronically on the V-drive and was not part of the cast vote record for the election.

27. During the trial of this matter, evidence was introduced on how to deal with this situation. According to Hart InterCivic, the manufacturer of the voting machines, the proper protocol was to: (i) spoil page two by placing that page in the

Spoiled Ballot Envelope, which is the receptacle for ballots that should be disregarded; (ii) give the voter a new ballot access code; (iii) allow the voter to return to the Duo and vote a second time; (iv) make sure that the first page of the second ballot was spoiled and placed in the Spoiled Ballot Envelope; and (v) make sure the second page of the second ballot was successfully scanned into the Scanner.

28. Evidence was also introduced as to what the HCEA instruction manual directed election officials to do in this situation. See Contestant's Exhibit 16, page 115. The protocol which was taught during training was different than what was recommended by the manufacturer of the voting machine. According to the HCEA training manual, instead of spoiling page two of the first ballot and revoting a second ballot, the proper protocol was simply to place page two of the ballot into the Emergency Chute, which is a receptacle for ballots which are supposed to be counted, but for whatever reason could not be scanned at one of the polling locations. By placing the problem page of the ballot in the Emergency Chute, this would permit Central Count at NRG Stadium to count that ballot page. The scanner at Central Count was of much higher quality than any of those scanners at a polling location, and a well-established procedure was already in place for both Republicans and Democrats to ensure that the members of Central Count would correctly scan ballots and, if not scannable, would correctly duplicate the problem ballot by hand. Thus, under the instructions given in the HCEA training manual, no new ballot access code

would be given, and the voter would not vote a second time. Thus, there would not be a second ballot to process, and there would be less risk that mistakes would be made by the election officials whereby duplicate scans of page one of the first ballot and page one of the second ballot occurred.

29. In addition, avoiding the practice of giving multiple ballot access codes to the same voter would avoid the problem of rendering a post-election audit by the Texas Secretary of State futile, because there would be no mechanism by which to tie the first ballot with the second ballot, as each ballot had a unique serial number, rendering it impossible to connect those two ballots to each other.

30. Harris County EA Clifford Tatum testified by video deposition that he instituted a third set of instructions. The protocol he instituted, which was disseminated by email to the election officials on the eve of the election and after training had already occurred, was to place page two of the first ballot in the Emergency Chute if it was legible, but to spoil page two of the first ballot if it was not legible, and then issue a new ballot access code, and permit the voter to cast a second ballot. To make matters even more complicated and susceptible to the commission of errors by the election officials, HCEA added another level of confusion: In order to conserve paper, Mr. Tatum testified that election officials were supposed to place the illegible second page of the first ballot, in lieu of a blank piece of ballot paper, into the Scanner. This was supposed to be accomplished by placing

the illegible second page of the first ballot backwards into the Scanner, coupled with placing the second page of the second ballot into the Scanner. Tatum also testified that the second page of the first ballot should be placed into the Spoiled Ballot envelope.

31. The Court finds that these three (3) sets of instructions are inconsistent with each other. Given that the election officials had been given three different sets of instructions, coupled with the fact that they are volunteers with various levels of expertise and experience, the evidence showed that not all polling locations handled the problem with scanning ballots the same way. The Court further finds that multiple and conflicting sets of instructions caused election officials to make mistakes, such that ballots that should have been spoiled were not spoiled, ballots that were supposed to be placed into the Emergency Chute were not so placed, ballots that were not supposed to be placed into the Emergency Chute were so placed, and pages of ballots that were supposed to have been scanned once were scanned more than once. Furthermore, evidence was introduced from Paul Stalnaker, who served as an Alternate Presiding Judge at Hardy Street Senior Citizens Center during early in-person voting, that hundreds of ballots that should have been spoiled during early in-person voting were not placed into the Spoiled Ballot Envelope. He further testified that more than twenty (20) ballots were placed into the Emergency Chute that should have been spoiled. This evidence demonstrates that ballot pages

were being scanned in more than once.

32. Additional evidence was introduced from Colleen Vera, who served as a member of Central Count, that ballots were placed in the Emergency Chute at one particular polling location (Hardy Street Senior Citizens Center) that should have been spoiled instead. She further testified that more ballots were cast at this location that the number of actual voters who voted.

33. Evidence was also introduced that the number of Cast Vote Records was different for the 189th Civil Judicial District Court race than other county races further down the ballot. Evidence was also introduced that the number of Cast Vote Records should always be the same for each countywide race, as that number is the sum total of all votes cast during early and election day voting, plus mail-in ballots, plus provisional ballots, plus undervotes and overvotes.

34. In total, there were 1,151 more Cast Vote Records in Contestant's specific race than were recorded for the countywide races at the bottom of the ballot. Evidence from the manufacturer of the voting machines demonstrated that a successful scan of page one of the ballot would cause an increment in the cast vote record, but that an unsuccessful scan of page two of the ballot would not. Thus, the explanation for the variance of 1,151 Cast Vote Records is explained by the fact that 1,151-page ones were scanned in more than once.

35. The race for the 189th Civil Judicial District Court was on page one of

the two-page ballot.

Failure to Supply Sufficient Ballot Paper in Advance to Polling Places on Election Day.

36. From the evidence provided by the Harris County Election Administrator's Office, including, but not limited to, Attachment 2 to their post-election assessment issued last November of 2022, see Contestant's Exhibit 20, the vast majority of the election day polling locations received the same amount of ballot paper, which was purportedly enough for 600 voters (e.g., 1200 pages)[1].

37. During his video deposition, Clifford Tatum explained the HCEA's rationale for its intentional decision to supply ballot paper in the manner in which it did. His rationale started with the projection that turnout would be 65% of the registered voters. Actual turnout was 43% of the registered voters. When asked why polling locations ran out of ballot paper when turnout was 22% less than projected, Mr. Tatum had no answer, but simply stated that the plan which was implemented started with an initial allocation, coupled with the plan that additional paper would be supplied during the day where and when needed.

38. Evidence was submitted that this plan failed. In particular, HCEA admitted in Contestant's Exhibit 20 that 68 polling locations ran out of their initial

[1] In reality, 1200 pages would not likely service the needs of 600 voters, for multiple reasons, including the fact that EA Tatum's instructions on how to handle scanning problems would require more than two (2) pages per voter.

ballot paper allocation. Several Presiding Judges at various Election Day polling locations testified that it was difficult, if not impossible, to get thru on the phone to HCEA on to request additional ballot paper, as hold times exceeded thirty (30) minutes in some cases, while in other cases election officials were not able to reach an actual person who answered the phone. Other testimony demonstrated that, even when someone with HCEA was contacted, additional ballot paper was not delivered in time for voters to actually vote.

39. HCEA Tatum made no effort to compare 2018 turnout for a particular polling location and then multiply that known turnout by 125% in order to calculate what amount of ballot paper should be allocated to the same polling location in 2022. He also did not consider areas where there were hotly contested races that might increase participation in a particular district, nor did he increase in an amount to account for spoiled ballots.

40. Although redistricting and other factors caused Harris County to change precinct boundaries and to assign different numbers to precincts that were in existence during the 2018 election from those precincts that were utilized in the 2022 election, it is nevertheless possible to determine actual turnout of a specific polling location in 2018 and then it is also possible to project anticipated turnout at the same polling location in 2022. And, to the extent one 2018 polling location was configured within a particular 2018 precinct, but for purposes of the 2022 election was

combined with one or more other precincts for the 2022 election, whereby all combined precincts utilized the same physical polling location, it was nevertheless still possible to analyze 2018 turnout for each polling location within each combined precinct, add them together, and then make a projection for turnout at that specific polling location in 2022 for all of the combined precincts. EA Tatum did not attempt to perform these calculations, nor did Beth Stevens, the retained expert for Contestee. In many cases, the polling location that was used in 2018 was the same polling location used in 2022. Voters in 2022 would likely be turning out to the same location where they voted in 2018.

41. HCEA Tatum also made no effort to project turnout on a specific polling location by polling location basis. Instead, with only a few exceptions, turnout was predicted to be exactly the same, e.g., 600 voters, at virtually every single polling location. See Contestant's Exhibit 20, Attachment 2. Contestant's Exhibits 14C, 14D, and 14E, the Harris County November 8, 2022 Voter Roster demonstrates that the same number of people did not turnout at every polling location. In fact, 380 out of 782 polling locations had more than 600 voters.

42. Contestant's Exhibit 75 demonstrated 2018 turnout on a precinct-by-precinct basis. Contestant's Exhibit 76 demonstrated 2018 canvass totals on a precinct-by-precinct basis. By comparing these two exhibits, it is possible to determine actual turnout for a specific polling location for 2018, and then by

multiplying 125% for the actual 2018 turnout for each specific polling location, it is possible to calculate the total projected turnout for the same polling location in 2022. Once that number is compared to the specific polling locations listed in Attachment 2 to Contestant's Exhibit 20, HCEA's initial allocation for 600 voters was less than the 125% calculation for well in excess of 100 specific polling locations.

43. Regardless of whether a specific polling location in 2022 received an initial ballot paper allocation of less than 125% of actual turnout for 2018, evidence was also introduced that compared the initial ballot paper allotment for 2022 as shown in Attachment 2 to Contestant's Exhibit 20, on the one hand, with the actual canvassed turnout for a specific polling location on Election Day, on the other hand. See Contestant's Exhibit 2, as well as Contestant's Exhibits 14C, 14D, and 14E.

44. That comparison shows that HCEA initially undersupplied 121 Harris County polling locations with paper ballots. Of that total number, 111 polling locations were located in neighborhoods where voters have previously voted in at least two (2) Republican primaries out of a total of seven (7) primaries spanning twelve (12) years, from 2010 to 2022. In addition, 109 polling locations were located in neighborhoods where voters voted in at least six (6) Republican primaries out of a total of seven (7) primaries spanning twelve (12) years, from 2010 to 2022. The evidence demonstrated that there was an extremely high correlation of ballot shortages with Republican voting patterns. In order to answer the question "what is

the probability this pattern occurred by chance?, " a mathematical formula called a binomial function was used by Russ Long, one of Contestant's non-retained experts. See Contestant's Exhibit 78. The answer: the probability of getting 111 (using 2 R) or 109 (using 6 R) undersupplied polling locations inside Republican areas, out of the identified total of 121 "in/out" possibilities, in a fair distribution, is very low, about 0.00021% (using 2 R) and 0.0224 (using 6 R). See id. The Court finds that HCEA's decision on how to initially allocate ballot paper at a particular polling location disproportionately affected neighborhoods with likely Republican voters.

(i) Polling Locations Ultimately Ran Out of Paper and Turned Voters Away.

45. The evidence during the trial demonstrated that at least twenty-four (24)[2] polling places ran out of ballot paper on election day. According to the collective testimony of 27 witnesses (one live witness, two witnesses by video deposition, and twenty-one (21) witnesses by deposition upon written questions), approximately 2,535 voters were estimated to have been turned away from these polling locations as a result.

[2] Contestant's last allegation in her Fifth Amended Original Petition was that twenty-nine polling locations ran out of paper, with 2,615 voters turned away as a result. Although this allegation was supported by twenty-nine different declarations, each of which was produced during the discovery phase of this lawsuit, five (5) of those declarants did not submit sworn answers to their respective deposition upon written questions served upon them. Thus, both the total number of locations and the total number of voters turned away declined accordingly.

46. Of that total number of twenty-four (24) locations, twenty (20) polling locations were located in neighborhoods where a majority of the turnout in 2018 supported Greg Abbott for Governor in 2018. Thus, approximately 83.3% of the polling locations that ran out of ballot paper were in Republican precincts. The Court finds that the loss of ballot paper disproportionately affected neighborhoods with likely Republican voters.

47. Contestee has pointed out that Contestant's proof in this regard was deficient. Among the reasons asserted by Contestee were the following: (i) no evidence of the names of the turned away voters; (ii) no evidence of the voter registration status of the turned away voters; (iii) no evidence of whether any of the turned away voters actually voted elsewhere; (iv) no evidence of whether any turned away voters intended to vote in the 189th Civil Judicial District race; and (v) no evidence of which candidate turned away voters intended to support. After hearing the evidence, the Court finds that it was both impossible and impractical to obtain this information from turned away voters. To begin with, the Court finds credible the live testimony of Victoria Williams, who served as a Presiding Judge, and who testified that, as an election official, it would have been "inappropriate, unethical, and illegal" to ask a turned away voter to disclose their identify or to reveal how they intended to vote. Indeed, the Election Code only empowers this Court with the authority to force a voter to disclose for whom they voted if and only if the Court

first finds that the voter cast a ballot that was ineligible to have been counted. Where, as here, we are talking about voters who were turned away, that statutory authority does not apply, and, by logic, would not authorize an election official at a polling location to conduct a mini trial and investigation in the middle of a busy election day of voting. Further, the witnesses who testified about turning away voters from their polling locations were election officials, and they were duty bound to continue their work as election officials, which included working inside of the polling location, rather than standing around outside where the voters were turned away. Moreover, testimony was provided by several witnesses that turned away voters were upset over the fact that ballot paper was not available, creating a hostile and toxic environment (e.g., one such voter actually spit on a Presiding Judge, while others engaged in conduct that required calling the police to come out and calm things down). Accordingly, the Court finds that it was impractical, if not impossible, to obtain any information about the voters who were turned away.

47. Even if it were possible to track down turned away voters, the Court finds that it would be financially and logistically impossible and/or impractical to subpoena these individuals and to pay the costs associated with a deposition upon written questions, an oral deposition, or to secure in-person trial appearances.

Polling Locations Turned Away Voters for Other Reasons.

48. In addition to voters being turned away for lack of ballot paper, fifteen (15) witnesses testified there were also other issues beyond ballot paper shortages that caused voters to leave specific polling sites without casting their ballots at those locations. For example, there was evidence of machine malfunctions, the inability to reach the HCEA on the phone or by other means, a lack of equipment or supplies and other problems, which occurred on Election Day. Based upon that evidence, the Court finds that a total of fifteen (15) polling locations were affected, with 411 voters that were turned away. Thus, adding the number of voters turned away for ballot paper shortages with the number of voters turned away for other reasons, the Court finds that the grand total number of voters who were turned away is 2,946. This category alone exceeds the reported margin of defeat in this contested race and the undervote percentage of 3.86%.

49. The Court makes the same findings of impracticality and impossibility for these turned away voters as it did in FOF 46 and 47 above. The chart below summarizes the Court's factual findings for voters turned away, as follows:

Polling Location	Poll Number	Number of Voters Turned Away	Election Worker	Position
Seabrook Intermediate School	52045	207	Kelley Hubenak-Flannery	PJ
T H Rogers School	82032	187	Frances Rauer	PJ
Brill Elementary School	22036	28	Neal Richard	PJ
City of El Lago City Hall	52047	100	Chris Russo	PJ
Linkwood Park Community Center	92087	75	Betty Edwards	AJ
Saint Marys Episcopal Church	12115	60	Cody McCubbin	PJ
Oak Forest Elementary School	12140	40	Patricia Phillips	PJ
Salyards Middle School	12131	500	Terry Wheeler	PJ
Spring First Church	22042	190	Victoria Williams	PJ
Northpointe Intermediate School	12027	120	James Schoppe	PJ
Zwink Elementary	22016	30	Richard Self	PJ
Katherine Tyra Branch Library	12007	120	Linda Zachary	PJ
North Hampton Mud Community Center	22019	40	MARTIN RENTERIA	PJ
Twin Creeks Middle School	22122	250	Elizabeth Kocurek	PJ

Laura Welch Bush Elementary	62009	100	Lydia Cantu	AJ
Ginger McNabb Elementary	22118	10	Cindy Adamek	PJ
Unity of Houston	82031	100	Dorothy Nall	AJ
*Ashford United Methodist Church	82018	42	Lamar Strickland	PJ
HCC Alief Hayes Campus Building C	82013	80	Erin Eitel	AJ
Lake Houston Church of Christ	32007	0	SAN BRANHAM	PJ
IPSP	92045	40	Richard Hawley	AJ
Poe Elementary School	92096	20	Matthew Goitia	AJ
Northgate Crossing Elementary School	22120	75	Mike Guillory	AJ
**Heritage Park Baptist Church	62004	19	Jeff Larson	PJ
French Elementary	22017	40	DeAnna Snyder	PJ
St. Lukes Missionary Baptist Church	92050	97	Margaret King	PJ
Viola Cobb Elementary School	42035	43	Pearline Burton	PJ
Parkview Intermediate School	52006	40	Robert Kenney	PJ
Element Houston Katy	82070	3	Lisa Musick	PJ
Deer Park Junior HIgh School	52053	25	Connie Dellafave	PJ
Hardy Street Citizens Center	SRD 140 [EV]	N/A	Paul Stalnaker	AJ
Jensen Elementary School	52012	150	Erik Munoz	PJ
University Baptist Church	52034	3	Phyllis Tacquard	PJ
Red Elementary School	72029	N/A	Erich Wolz	AJ
Rummel Creek Elementary School	82027	N/A	Charles Grindon	PJ
Paul Revere Middle School	82010	29	Robert Dorris	Voter
James E Taylor High School	82044	N/A	Susan Clasen	PJ
Birkes Elementary School	12024	10	Thomas Nobis	PJ
Shadowbriary Elementary School	82023	15	Damian Derby	PJ
Rice Univeristy Welcome Center	92077	30	Ana Flor Lopez Millan	AJ
	TOTAL	2946	Total Declarants =40	

Agreeing To A Court Order To Permit Voting For An Extra Hour On Election Day.

50. An emergency court hearing late in the day on Election Day resulted in HCEA Tatum agreeing to keep all 782 of the polls open for one additional hour. Under the terms of that order, all such voters who arrived at a polling location to vote after 7:00 p.m. were supposed to cast Provisional Ballots rather than voting regularly.

51. The Court finds that it was a mistake for HCEA to have agreed to the entry of this order, as doing so only served to exacerbate, rather than ameliorate, the disproportionate impact upon the voters in the neighborhoods served by polling locations that ran out of paper.

52. The Court further finds that no notice of this emergency hearing was given to Contestant Lunceford, even though she was a candidate on the ballot and even though her candidacy would be affected by the relief being sought by the plaintiffs.

53. The Court also finds that no notice of the initial emergency hearing was given to the State of Texas, the Secretary of State, or the Office of Attorney General.

54. The Court finds that the parties described in FOF 52-53 were necessary parties that should have been provided notice.

55. Evidence was admitted during the trial that the State of Texas, Secretary of State, and the Office of Attorney General, jointly filed a motion to dissolve the temporary restraining order that the Trial Court had granted. Despite this new development, the Trial Court did not do so.

56. Parallel emergency mandamus proceedings were also filed by the same parties who had filed the joint motion to dissolve before the Harris County Ancillary Judge. The Texas Supreme Court thereafter issued a stay of the Trial Court's temporary restraining order, but an hour of voting had already occurred by the time the stay has issued.

57. Despite EA Tatum's assurances to the Trial Court earlier in the evening that sufficient supplies would be available to accommodate voting for an extra hour, EA Tatum ultimately admitted in a subsequent hearing that same evening before the

Trial Court that not all polling locations had access to ballot paper during the extra hour of allotted time to vote. This caused the Trial Court to express concern for what EA Tatum had promised and what EA Tatum had actually delivered. This Court shares the same concern.

58. A second mandamus proceeding was filed by the same parties as had jointly filed the motion to dissolve the previously entered temporary restraining order. The Supreme Court thereafter issued a subsequent order which required Harris County to announce separate canvass totals, one counting the after 7pm provisional ballots and one not including those totals. Those separately canvassed results are contained in Contestant's Exhibit 3.

59. Ordinarily, there is no technological basis to determine which candidate in a specific race received a vote from a Provisional Ballot ("PB") voter whose vote was cast and counted. The reason for this is that, once the Early Voting Ballot Board ("EVBB") has accepted a PB, all such accepted provisional ballot affidavits ("PBAs") are then transferred to the Harris County EA's office for actual counting. EA Staff then open the accepted PBA envelopes, remove the PB, and then scan those ballots so that they are electronically recorded onto the V-Drive. Once scanned, the PB votes become part of the vote totals, but there is no tracking system to be able to connect which candidate received a vote from which specific PB voter. Thus, it is ordinarily impossible for the Court to declare the outcome of these PB votes.

60. In this election, however, there is one notable exception to what is described above. The Texas Supreme Court issued a stay on November 8, 2022, and ordered that Harris County segregate all PBs cast and counted after 7pm by court order from the rest of the PBs. A subsequent order from the Texas Supreme Court resulted in Harris County reporting in the final canvass results the actual breakdown, by candidate, of how this discrete group of PB voters cumulatively voted, if such voters cast PBs after 7pm by court order. Thus, although ordinarily it would not be possible to do so, in this election, Harris County reports in the final canvass totals that Contestant Lunceford received 822 PBs cast after 7pm by court order, while Contestee Craft received 1,147. This means that Contestee received 325 more PBs than did Contestant. To the extent this Court finds that all PBs cast after 7pm on Election Day were illegal, then the result of that ruling would be to subtract 822 PBs from Contestant Lunceford and 1,147 PBs from Contestee Craft, which would then result in a net gain to Contestant Lunceford and a corresponding net loss of 325 votes from the canvass totals of votes received by Contestee Craft. To the extent this Court finds that, although not illegal, it was a mistake for the election officials to have agreed to extend voting for one hour, the Court will take the result of that mistake, which was to allow Contestee Craft to build her lead by 325 more votes than had no court order been entered.

Mail-in Ballots Were Not Initially Handled Properly.

61. The evidence at trial demonstrated that approximately 700 mail-in ballots ("BBMs") were counted without conducting the required review and analysis by the Signature Verification Committee ("SVC") before agreeing to accept a BBM for counting by the Early Voting Ballot Board ("EVBB"). In particular, the HCEA's office instructed the Signature Verification Committee ("SVC") to deviate from established procedure on the first day that they processed BBMs.

62. Kay Tyner, the Vice Chair of the Signature Verification Committee, testified that when the Signature Verification Committee began its process in the November 8, 2022 Election, one of the Election Administrator's staff members instructed the Signature Verification Committee that they were only supposed to compare the identification information provided on the mail ballot carrier envelope to the information that was included on the mail ballot application. Additionally, the EA staff member declared that it was not necessary to review the signatures. Members of the Signature Verification Committee protested and requested that the process be reviewed.

63. In addition, Kay Tyner testified that after this improper process was brought to the attention of the EA staff member, the process was fixed by a retraction from the EA staff member of the earlier instructions, but approximately 700 BBMs that were processed during that time were not re-reviewed. These mail ballots should have been reviewed properly in order to determine if they were acceptable. Not

knowing which mail ballot envelopes were incorrectly reviewed, and not knowing how many of these 700 mail ballots were accepted and how many were rejected, it is not possible to ascertain the impact of these improperly processed mail in ballots on either Contestant or Contestee. The Court finds Kay Tyner's testimony to be credible, especially in light of the fact that Contestee listed Jennifer Colvin as a testifying witness, but chose not to call her to rebut Kay Tyner's testimony. The Court will take this evidence of "illegality" and/or "mistake" into account when determining whether the true outcome of this contested election can be ascertained.

Mail-In Ballots.

64. Contestant introduced evidence challenging certain mail-in ballots that were cast and counted. Those challenges fall into three (3) categories, as follows: (i) BBMs post-marked after November 8; (ii) BBMs post-marked on November 8 for a non-military and non-overseas voter who postmarked their ballot on Election Day in a city like San Antonio or Fredericksburg; and BBMs (iii) not signed by the voter.

65. Contestant's Exhibit 12 represent the twelve (12) BBMs which were accepted by the EVBB and counted, even though each one was postmarked on or after November 8. Those specific documents are listed below:

Bates Numbers for Postmark on or after Nov. 8

0173314 & 0173315
0175803 & 0175804
0175821 & 0175822
0204880 & 0204881

0220036 & 0220037
0220084 & 0220085
0220954 & 0220955
0223064 & 0223065
0223928 & 0223929
0224028 & 0224029
0224550 & 0224551
0225050 & 0225051

66. Contestant's Exhibit 11 represent the forty-four (44) BBMs which were accepted by the EEVB and counted, even though the BBM return carrier envelopes had no signatures. Those specific documents are listed below:

Bates Numbers for Missing Signature

0111947 & 0111948
0112133 & 0112134
0114383 & 0114384
0118895 & 0118896
0124351 & 0124352
0127124 & 0127125
0127558 & 0127559
0128530 & 0128531
0132010 & 0132011
0132972 & 0132973
0133565 & 0133566
0135219 & 0135220
0138667 & 0138668
0142979 & 0142980
0146689 & 0146690
0154695 & 0154696
0155247 & 0155248
0158195 & 0158196
0162769 & 0162770
0178045 & 0178046
0179245 & 0179246
0181141 & 0181142
0182277 & 0182278
0184364 & 0184365
0186736 & 0186737
0192638 & 0192639

0193478 & 0193479
0193722 & 0193723
0196616 & 0196617
0198108 & 0198109
0199230 & 0199231
0200798 & 0200799
0204232 & 0204233
0210020 & 0210021
0216766 & 0216767
0217572 & 0217573
0218326 & 0218327
0230684 & 0230685
0231874 & 0231875
0236494 & 0236495
0236824 & 0236825
0239960 & 0239961
0237204 & 0237205
0252216 & 0252217

Provisional Ballots During Early Voting and Election Day During non-Extended Hours.

67. Contestant also contended that certain provisional ballots that were cast and counted should not have been counted. Those challenges fall into multiple categories. Contestant's Exhibits 10A, 10C, 10D, and 10E show the specific challenges and why those challenges were made. Because the list of challenged PBAs is so lengthy, the Court will attach a list hereto as Exhibit A. This exhibit identifies each specific bates-labeled PBA which falls into each of Contestant's specific category of challenge.

68. HCEA is the entity in possession of all of the election records. As such, HCEA produced to the parties in this lawsuit a copy of all PBAs that existed. Out of the grand total of 6,355 PBAs produced, multiple PBAs were either marked as

"void," or do not reflect any action being taken by the Early Voting Ballot Board, or both, meaning these specific PBAs were neither "accepted" nor "rejected," and, presumably, none of these provisional ballots ("PB") contained inside the PBA envelopes were included in the final canvass totals reported by Harris County. In addition, there are multiple duplicates of PBAs, both accepted and rejected, that were assigned different bates numbers. By deducting all duplicate PBAs, all PBAs marked void, and all PBAs which reflect no action by the EVBB, the total universe of PBAs which were either accepted or rejected does not equal 6,355, which is the total number of PBAs produced by Harris County. To the contrary, it appears that the actual count of PBAs (at least to the extent of what Harris County has produced to Contestant, and further assuming all PBAs in existence have been produced to Contestant) is 6,275.

69. There is some doubt as to whether 6,275 is an accurate count of the global universe of PBAs that were either accepted or rejected by the Early Voting Ballot Board in this election. Based upon the evidence presented at trial, this number of 6,275 does not tie to any of the numbers issued by Harris County. For example, according to the post-election report by the Harris County EA's Office, the total amount of PBs accepted and rejected is supposedly 6,302. But this count is not the same as the count from the actual PBA production sent by Harris County to the parties, even though these counts should be the same. Because one PB is supposed

to be inside of one PBA envelope, a one-to-one correlation should exist between PBAs and PBs either accepted or rejected.

70. To make the numbers even more confusing, Harris County reports the total number of PBAs accepted as 4,538 and the total number of PBAs rejected as 1,764. The summation of these two numbers is 6,302, which does not match the totals reflected by the PBAs produced by Harris County. Evidence in the form of Contestant's own analysis of the PBAs produced reflect 4,557 as the total number of PBAs accepted and 1,718 as the total number of PBAs rejected. The summation of these two numbers is 6,275.

71. Of the 4,538 PBAs which were supposedly accepted, Harris County reports that 205 of these PBAs did not have an actual PB inside the PBA envelope. This fact should not impact how many PBAs were accepted, but it does affect how many accepted PBs are actually in the canvassed totals for PBs. Thus, assuming that HCEA's numbers are accurate (which the Court finds that they are not), the revised count of PBs actually accepted and counted should be 4,538 minus 205, for a reduced total of 4,333 PBs, which is what Harris County has reported in its post-election report. Using Contestant's numbers, however, would require a deduction of 205 missing PBs from 4,557 PBAs accepted for counting, for a subtotal of 4,352 PBs actually counted. Regardless of which set of numbers is accurate, the 205 missing PBs raise a concern as to whether those PB votes are mistakenly included in the

canvassed totals as regular ballots or not. This could be explained in at least two ways. First, if an election official at a polling site on either Early Voting or Election Day Voting provided a provisional voter with a regular ballot by mistake, then that regular ballot is capable of being scanned at the specific polling location and, if scanned, is electronically captured, and recorded on a V-Drive. In that situation, a PB vote is not recorded as a PB vote, but is added to the total of the regular ballot count. Provisional Ballots are given a unique ballot code, which is distinct from the ballot code provided on a regular ballot. If the correct ballot code is given, then the scanner will not accept the PB, and it will not be electronically captured and recorded on a V-Drive. Conversely, if the incorrect ballot code is given, then the scanner will accept the PB as if it were a regular ballot, and that ballot will be electronically captured and recorded on a V-Drive. Second, the same is true for the Emergency Chute. If a PB is placed in the Emergency Chute with the correct ballot code, then any scanning attempt at Central Count would be rejected, but if a PB is placed in the Emergency Chute with the incorrect ballot code, then such PB would be interpreted as a regular ballot and is capable of being scanned and electronically captured and recorded on a V-drive.

72. The evidence in this trial demonstrated the following analysis of PBAs, which the Court finds to be credible. As shown below, the following table represents the summary findings from the analysis of the Provisional Ballot Affidavits (PBAs)[3].

ITEM	COUNT
Total PB Affidavits (PBA)	6,310
Total PBA EA Rejected	1,737
Total PBA EA Accepted	4,573
Of PBA Accepted:	
After 7PM	2,213
No ID or Blank	2,462
Invalid or Blank EJ Date	823
EJ Date after Nov 8 (subset of above)	90
No Citizenship or Blank	123
Blank Residential Address	45
No EJ Signature	25
No BB Signature	13
No Voter Signature	7
Invalid VR Date	6
No VR Signature	1

The following table represents the summary results from the HCEA:

From HCEA Official Results Summary:	Count
PB Total	6,302
PB Rejected	1,764
PB Accepted	4,538
PB Counted	4,333
HCEA Acceptance rate	72.01%
Analysis Acceptance Rate	18.23%

The following table shows the potential results, without counting PBAs having more than one error, by listing the highest categories first:

[3] **Note:** the record counts will not add to the total number of PBA's since many of the PBA's had more than one identified error.

ITEM	INVALID	BALANCE
Total PBA Received		6,310
Total PBA Rejected	1,737	4,573
After 7PM	2,213	2,360
No ID or Blank	1,080	1,280
Invalid or Blank EJ Date	105	1,175
No Citizenship or Blank	14	1,161
Blank Residential Address	4	1,157
No EJ Signature	2	1,155
No BB Signature	2	1,153
No Voter Signature	2	1,151
Invalid VR Date	1	1,150
Potentially Valid PBAs		1,150

Analysis Acceptance Rate	18.23%
Analysis: Accepted more than should have:	3,423

57. Beyond the problem of PBs cast after 7pm due to court order, Contestant's analysis demonstrates that a total of 1,200 PBs that were cast and counted but should have been rejected instead. Unlike the anomaly of being able to tie PBs to a specific candidate by virtue of the aforementioned Texas Supreme Court's issuance of a stay and their subsequent order regarding how the canvassing results should be reported, none of these PBs can be connected to either Contestant or Contestee. Thus, it is not possible to ascertain the impact of these 1,200 on the purported vote totals for the Contestant or Contestee. The number of PBAs in each distinct category is reflected in Exhibit A, attached hereto.

Votes by voters who have cancelled voter registrations.

58. Harris County's official Voter Roster (which lists all of the voters who cast a ballot in the election and for whom their vote was counted and included in the

official canvass) lists 2,970 voters in the November 8, 2022 General Election whose status is cancelled. HCEA reviewed those specific fact patterns and informed the parties that five (5) of the 2,970 voters voted in the November 8, 2022 election with an expired voter registration. The Court finds that these five (5) voters voted at a time when their voter registration status had already been cancelled.

Votes by voters who were on the Suspense list.

59. The Harris County Voter Roster lists 2,038 voters who voted and have a SUSPENSE notation next to their name. Evidence was admitted during the trial that 1,995 of these voters did not submit a filled-out Statement of Residence ("SOR").

Votes Were Cast And Counted Without An SOR.

60. Contestant's Exhibit 9A is a compilation of 2,351 SORs challenged by the Contestant on various grounds. Contestant's Exhibit 9B is a detailed spreadsheet of those challenges. Of the various categories, the Court sustained objections to certain categories tied to a database called the National Change of Address ("NCOA") database, which is compiled and maintained by the United States Postal Service ("USPS"), and, for this lawsuit, was reported by a third party, called True NCOA.

61. The SOR categories which do not relate to NCOA, USPS, or True NCOA, are: (i) out of county voters and (ii) incomplete SORS lacking sufficient

information to determine whether a voter was entitled to vote in the November 8, 2022 General Election in Harris County. As to the first category, the Court finds that 1,113 SORs represent voters who voted in the November 8, 2022 election but who did not reside in Harris County on the date that they voted. Of that 1,113 total, 1,000 of those SORs demonstrated the out of county status of the voter without the need to resort to extrinsic evidence. The remaining 113 of those SORs required some additional research, such as typing in the residence address on google maps to determine what county that address was in, or inputting the address into the Harris County Appraisal District website, or checking other verifiable and public databases. Because the list of these out of county SORs is so lengthy, a tally by bates number for each SOR is attached hereto as Exhibit B. The other SOR category that Contestant challenged were those voters who cast a ballot but who failed to supply sufficient information on their SOR to meet the minimum residency requirements necessary to confirm their right to cast a ballot in Harris County. Contestant's initial category of challenged SOR voters was 467. After the cross-examination of Steve Carlin, which, in part, focused on this category of challenged SORs, Contestant withdrew 185 challenges in this specific category, such that only 284 challenges remain. The Court finds that all 284 challenged SORs fail to satisfy the information requirements set forth in Section 63.0011 of the Texas Election Code. The Court also finds that all of the 284 incomplete SOR voters are listed on the Harris County

Roster, such that the Court finds that all 284 of the incomplete SOR challenges represent votes that were both cast and counted in the November 8, 2022 General Election. Because the list of these incomplete SORs is so lengthy, a tally by bates number for each SOR is attached hereto as Exhibit C.

Votes Were Cast And Counted Without An Appropriate Reasonable Impediment Declaration.

64. Contestant presented testimony about how to qualify and accept a voter to vote, the need for photo identification and/or the need for a reasonable impediment declaration ("RID"), and what to do if information is missing on a RID. Contestant also brought live testimony thru Victoria Williams, a Presiding Judge, that 532 RIDs were not sufficient on their face to permit this Court to confirm that those specific voters—who cast a vote and that vote was counted—were, in fact, eligible to cast a regular ballot. Contestant's Exhibit 13A is a copy of all of the challenged RIDs, while Contestant's Exhibit 13C is a spreadsheet demonstrating what is lacking on a particular RID. The Court finds this evidence and testimony to be credible and finds that it was a mistake on the part of the election officials not to have ensured that both the voter and the election official fully completed the RID and both of them signed that document. The Court has taken these mistakes into account when determining whether it can declare the true outcome of this contested election.

Votes Were Cast And Counted Without An Appropriate Registration Address.

65. William Ely and Steve Carlin both testified that approximately 5,000 voters were challenged in the summer of 2022 based upon the belief that these registered voters did not actually reside at the address listed in their voter registration records. Although they filed written challenges with the HCEA, approximately 4,600 of those same registered voters remain on the Harris County Voter Roll as of the date of Mr. Ely's trial testimony. The Court has taken the HCEA's failure to issue confirmation notices to these challenged individuals into account when trying to ascertain whether the reported outcome is the true outcome for this Contested Election.

Discrepancies in the Cast Vote Records.

66. The evidence at trial demonstrated that, according to the Harris County Election Administrator's official canvass, the Cast Vote Record for all county-wide races is not consistent amongst the various contests. See Contestant's Exhibit 2. If all of the ballots were counted correctly for all of the races, the Cast Votes Record would be the same for every county-wide contest. The numerical difference in the Cast Vote Record for the 189th Civil Judicial District Court race is 1,151 higher than the Cast Vote Record for the last countywide race on the ballot (e.g., 1,107,390 minus 1,106,239). The Court finds from the evidence that the reason for the numerical discrepancy is that more page ones of the two-page ballot were scanned into the Scanner and onto the V-drive for the same voter than were supposed to have

been scanned. These mistakes resulted in double votes, and it is impossible to determine which voters were involved. Nor is it possible to determine for whom these voters voted, or whether they voted in this specific contested race. Accordingly, the Court will take these mistaken double votes into account when determining whether the true outcome of this contested election can be ascertained.

There are more votes in the canvassed totals than the actual number of Voters who voted.

67. Colleen Vera testified that at a particular EV poll, SRD 140, which is known as the Hardy Street Senior Citizens Center, they had sixty (60) more ballots to scan than the number of voters who registered to vote at that poll. The Court finds this evidence to be credible and will take this mistake and discrepancy into account when determining whether it can ascertain the true outcome of this election.

68. Given that specific discrepancy, Ms. Vera testified that she then decided to compare the roster for that specific polling center to the final total for that poll on the Early Voting ("EV") Report. After comparing the totals for Early Voting in the Harris County Official Voter Roster (692,049) to the Official Canvass for the November 8, 2022 election (692,748), the evidence showed that the official canvass for early voting presents shows 699 more votes than voters.

Type	Roster	Canvass	Canvass - Roster
EV	692049	692748	699

The Court finds this evidence to be credible and will take this mistake and discrepancy into account when determining whether it can ascertain the true outcome of this contested election.

EA Tatum's Failure to Properly Reconcile Mail-in Ballots.

69. The Harris County EA's official reconciliation report has reported 9,307 more mail-in ballots were counted that were actually turned in by Harris County voters, as follows:

Mail Ballots Sent to Voters	80,995
Mail Ballots Not Returned by Voters	19,486
Mail Ballots Surrendered at Polling Places	6,557
Mail Ballots Returned this Election	54,952
Official Count of All Mail Ballot Voters	64,259
Discrepancy	9,307

70. Although Contestant Lunceford played deposition excerpts from Clifford Tatum's video deposition, this subject did not come up in those excerpts. HCEA Clifford Tatum was not called as a witness by Contestee Craft. He therefore did not explain this discrepancy, and the Court was not afforded the opportunity to ascertain why the official reconciliation total for BBMs is off. The sole explanation in the evidence comes from the post-election report by HCEA, which is Contestant's Exhibit 20, which suggests that the number of BBMs not returned was overstated by mistake. This explanation by HCEA comes from an interested and biased source, as

the HCEA is clearly on the side of upholding the outcome of this contested election. Indeed, the Court has had the opportunity to observe the attorneys representing HCEA throughout the life of this litigation, and HCEA has even filed an amicus brief on the side of Contestee's no-evidence motion for summary judgment. It is clear that an adversity of interest exists between HCEA and Contestant. It is equally clear that there is a common interest between HCEA and Contestee. Accordingly, the self-serving explanation for the discrepancy is not found to be persuasive, especially since there is no data or other documentation to actually permit the Court to audit the veracity of how the numbers changed from the date of the official reconciliation, on the one hand, to the explanation of a different calculation in the post-election report, on the other hand. The Court will therefore take this mistake and discrepancy into account when it determines whether it can ascertain the true outcome of this contested election.

Undervote

71. The Court finds that the undervote in the Contested Election, when expressed as a percentage, is 3.86%. This means that for every 1000 voters who voted in the November 8, 2022 General Election, 38 voters did not cast a ballot in the Contested Election, while 962 did so.

72. The reported margin of defeat in the Contested Election was 2,743. Taking the undervote percentage into account, approximately 106 voters out of 2,743

voters did not vote in the Contested Election. Thus, in order to ensure that the undervote is considered, the Court finds that the margin necessary to demonstrate a material impact on the Contested Election is 2,849.

73. Any Finding of Fact herein that is a Conclusion of Law shall be deemed a Conclusion of Law.

74. Any Conclusion of Law which is a Finding of Fact shall be deemed to be a Finding of Fact.

75. All Findings of Fact are supported by clear and convincing evidence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rule of Civil Procedure 21a, a true and correct copy of the foregoing instrument was forwarded to all counsel of record and/or parties on August 31, 2023.

/s/ Andy Taylor
Andy Taylor

No. 01-23-00921-CV

IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT OF TEXAS
IN HOUSTON

ERIN ELIZABETH LUNCEFORD

Appellant,

v.

TAMIKA CRAFT,

Appellee.

On Appeal from the 164th Judicial District Court
Harris County, Texas No. 2022-79328
Honorable David Peeples, sitting by assignment

TAB D

CAUSE NO. 2022-79328

ERIN ELIZABETH LUNCEFORD	§	IN THE DISTRICT COURT
Contestant,	§	164th JUDICIAL DISTRICT
v.	§	
TAMIKA "TAMI' CRAFT	§	
Contestee.	§	HARRIS COUNTY, TEXAS

CONTESTANT ERIN ELIZABETH LUNCEFORD'S PROPOSED CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF THIS COURT:

Contestant, Erin Elizabeth Lunceford, hereby files these Proposed Conclusions of Law, and in support hereof, would show as follows:

I.
CONCLUSIONS OF LAW

The Right To Vote Is A Fundamental Constitutional Right Which Must Be Protected.

1. "The right to vote is fundamental, as it preserves all other rights." *Andrade*, 345 S.W.3d at 12 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)); see also Tex. Const. art. I, § 3 (providing equal rights). Courts have zealously protected the right to vote. See *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("The right to vote freely for the

candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); *Stewart v. Blackwell*, 444 F.3d 843, 862 (6th Cir. 2006) ("Few rights have been so extensively and vigorously protected as the right to vote. Its fundamental nature and the vigilance of its defense, both from the courts, Congress, and through the constitutional amendment process, stem from the recognition that our democratic structure and the preservation of our rights depends to a great extent on the franchise."); see also *United States v. Mosley*, 238 U.S. 383, 386, 35 S. Ct. 904, 59 L. Ed. 1355 (1915) ("We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."); *Avery v. Midland County*, 406 S.W.2d 422, 425 (Tex. 1966) ("Petitioner as a voter in the county has a justiciable interest in matters affecting the equality of his voting and political rights."); *Thomas Paine*, Dissertation on the Principles of Government, 1795 ("The right of voting . . . is the primary right by which all other rights are protected.").

The Constitutional Right To Vote Is Denied When A Reported Outcome Is Not The True Outcome Of An Election.

2. "No one who has imbibed anything of the spirit and genius of our free government will ever question the peerless value and sacred inviolability of the elective franchise. It will be guarded with sleepless vigilance by all who appreciate the blessings of free institutions." *Arberry v. Beavers*, 6 Tex. 457, 470 (1851). Because the sacred right to vote is fundamental to a democratic society, this Court has a solemn obligation to ensure that the purported outcome of the 189th Civil Judicial District Court election, as reported by Harris County in its final canvass, is the true outcome. This duty does not and cannot derive from a political perspective. Indeed, the political victor will almost always support the status quo, while the reportedly defeated candidate very well may not, especially when the reported margin of victory is narrow and close. But the Court's job here is to render a judgment that is based purely on the facts and the law, and must be made *in spite of, not because of*, the political ramifications it may generate. Thus, in order for the parties and the public to have confidence in its system of democratic elections, and after hearing all of the evidence in this case, it is the Court's considered judgment that that the reported outcome of the 189th Civil Judicial District Court of Harris County is void, and that a new election must be ordered for this specific contested race. To ignore the clear and convincing evidence in this case that illegal votes were counted, legal votes were discarded, eligible voters were prevented from voting, and election officials engaged in fraud or illegality or made mistakes, would be

tantamount to accepting the old adage of "it's good enough for government work." The Texas Election Code mandates this result, and it is not within the sound discretion of this Court to turn a blind eye to these transgressions, as to do so would not protect, but would denigrate, the constitutional right to vote.

3. After weighing all of the evidence, and after applying the law to the evidence, this Court holds that it cannot ascertain that the outcome, as reported in the final canvass, is the true outcome for the 189th Civil District Court of Harris County (the "Contested Election"). Accordingly, the Court declares the Contested Election void and a new election is ordered pursuant to TEX.ELEC.CODE ANN. § 221.009(b) (Vernon 1986).

The Trial Court's Duty in an Election Contest.

4. The Texas Election Code mandates that an election tribunal "*shall* declare the election outcome if it can ascertain the true outcome of the election." *Tex. Elec. Code §221.009(a)*(emphasis added). Conversely, if a court cannot ascertain the true outcome of the election, it "*shall* declare the election void" and order a new election. *Tex. Elec. Code §221.009(b)*(emphasis added)*; Green v. Reyes*, 836 S.W.2d 203, 212 (Tex. App.-Houston [14th Dist.] 1992, no writ). Because this Court cannot ascertain that the reported outcome, as shown by the official canvass, see Contestant's Exhibit 2, is the true outcome, this Court has no discretion

but to declare this election void and to order a new election, as is required under the above-quoted section of the Texas Election Code.

5. A contestant must prove by clear and convincing evidence that, with respect to each voter whose vote is challenged, one or more violations of the Texas Election Code occurred and that these violations materially affected the outcome of the election. *Woods v. Legg, 363 S.W3d 710 (Tex. App.-Houston [1st Dist.] 2011, no pet.).*

6. The Texas Civil Practices and Remedies Code defines "clear and convincing" as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Tex. Civ. Prac. & Rem. Code, Section 41.001(2).*

7. The focus of this Court's inquiry then, as dictated by the election code, is to first attempt to determine the true outcome of the election, if possible. If the true outcome can be ascertained, then this Court has no discretion but to declare that the reported outcome is, indeed, the true outcome. Conversely, Texas Election Code § 221.012(b) mandates that an election tribunal "shall declare the election void if it cannot ascertain the true outcome of the election."

8. Section 221.003 of the Texas Election Code sets forth the general parameters of an election contest:

Sec. 221.003. SCOPE OF INQUIRY.

(a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because:
(1) illegal votes were counted; or
(2) an election officer or other person officially involved in the administration of the election:
(A) prevented eligible voters from voting;
(B) failed to count legal votes; or
(C) engaged in other fraud or illegal conduct or made a mistake.

TEX. ELEC. CODE ANN. § 221.003(a) (Vernon 2003).

9. The appellate standard of review applicable to this Court's judgment is whether the record shows that the trial court abused its discretion. Guerra v. Garza, 865 S.W.2d 573, 576 (Tex. App. — Corpus Christi 1993, writ dism'd w.o.j.); Reese v. Duncan, 80 S.W.3d 650, 655 (Tex. App.-Dallas 2002, pet. denied).

Voter Eligibility.

10. To be eligible to vote in an election, a person "must be a qualified voter on the day the person offers to vote; be a resident of the territory covered by the election; and satisfy all other requirements for voting prescribed by law." Slusher v. Streater, 896 S.W.2d 239, 247 (Tex. App. — Houston [1st Dist.] 1995, no writ)(citing TEX. ELEC. CODE ANN. § 11.001 (Vernon 1986)).

11. The Texas Election Code defines a "qualified voter" as "one who is 18 years of age or older; is a United States citizen; has not been determined mentally incompetent; has not been finally convicted of a felony, except under certain

circumstances; is a resident of this state; and is a registered voter." Id. (citing TEX. ELEC. CODE ANN. § 11.002 (Vernon 1986)).

§ 221.003(a)(1)'s Reference to Illegal Voting

12. An "illegal vote" is one that "is not legally countable." TEX. ELEC. CODE ANN. § 221.003(b) (Vernon 2003). For example, a vote cast in a precinct by a person who does not reside in the county of the election is an illegal vote that cannot be counted. Alvarez v. Espinoza, 844 S.W.2d 238, 247 (Tex. App.-San Antonio 1992, writ dism'd w.o.j.).

Statements of Residence.

13. Contestant's Exhibit 9A is a compilation of 2,351 Statements of Residence ("SORs"). Of that total, Contestant's contended that some of these SORs represented voters who resided outside of Harris County at the time they cast their ballot, and, as a result, Contestant contended that each of these voters cast a ballot which was illegal and should not have been counted. In addition, Contestant contended that, because certain SORs lacked basic required information, such as the designation of where they resided at the time of their vote, these incomplete SORs did not satisfy the SOR requirement in the Texas Election Code and, therefore, each of these votes were illegal and should not have been counted.

Ballots Cast By Out Of County Voters Were Illegally Cast.

14. The Court finds that any voter who designated their county of residence in an SOR as somewhere outside of Harris County at the time they voted, did not have the legal right to vote in the November 8, 2022 General Election. As such, as such votes constitute an illegal vote within the meaning of § 221.003(a) of the Texas Election Code.

15. Applying this law to the facts of this contested election, the Court finds that 1,113 SOR voters did not reside in Harris County at the time their vote was cast. Of that number, 1,000 SORs demonstrated out of county status without the need to resort to any extrinsic evidence, while 113 SORs contained information supplied by the voter which, after resorting to various forms of extrinsic evidence, were proven by the Contestant to be out of county. Accordingly, the Court finds that all 1,113 of these out of county voters cast illegal ballots in the November 8, 2022 General Election. In the alternative, the Court also finds that the failure on the part of the election officials to prevent an out of county voter from casting a regular ballot is a mistake that the Court has taken into account when determining whether it is possible to ascertain the true outcome of this Contested Election.

16. The question arises, however, whether any of these 1,113 illegal ballots cast by out of county voters were actually counted and included in the canvassed totals disclosed in Contestant's Exhibit 2, which is the final canvass. In that respect, the Court finds that the Harris County Voter Roster, which is a publicly available

database, is the most reliable and accurate method of determining which out of county SOR voters' votes are actually in the canvassed totals. Based upon a comparison of that database with the 1,113 out of county voters, the Court finds that 966 are listed on the Harris County Voter Roster.

17. Evidence was also introduced that HCEA agreed to look at VMAX, which is its own internal system, and which is not available to the public, to see if any other voters with out of county SORs can be determined to have cast a ballot in the November 8, 2022 General Election, even though those voters are not listed on the Harris County Voter Roster. As a result of that work, ninety-three (93) additional voters were found to have cast a ballot. Accordingly, adding those voters listed on the Harris County Voter Roster and VMAX together, the Court finds that a grand total of 1,059 of the 1,113 illegal votes were cast and counted in the November 8, 2022 General Election.

18. The next question is whether any of those 1,059 illegal votes were cast in the specific Contested Election, which is the 189th Civil Judicial District Court race that occurred in Harris County. For the reasons which follow, the Court finds that Contestant was not and is not required to demonstrate whether an illegal vote was cast and counted in the Contested Election in order to be afforded a new election.

19. In *Green v. Reyes*, 836 S.W.2d 203 (Tex. App.-Houston [14th Dist.] 1992, no writ), the 14th Court of Appeals in Houston affirmed a trial court's decision

to grant a new election. One of the conclusions of law by the trier of fact in that case, which was affirmed by the 14th Court, stated the following:

> "[t]he Court may reach this result 'without attempting to determine how individual voters voted' so long as 'the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election.' Texas Election Code § 221.009(b)."

Id. at 207. That same appellate court also upheld the following conclusions of law:

> "Section 221.009(b) must be interpreted and applied in a manner that makes sense. It clearly must mean that an election tribunal in its discretion may order a new election when, as here, the number of illegal votes exceeded the official margin of victory without either requiring testimony from each illegal voter, or proof by the Contestant that collecting such testimony represented a physical impossibility. The statute must envision the circumstance in which the magnitude of the illegal voting along with some evidence of the tendencies of the illegal voting warrant the relief of a new election without the laborious, lengthy, and expensive process of a single trial judge trying to call a close election weeks or months afterwards by the testimony of hundreds of voters with uncertain memories."
>
> "Plainly worded statutes must be read in their common sense. Section 221.009(b) must mean that in some reasonable circumstances the presumption of correctness of the official outcome no longer prevents relief in the form of a new election."
>
> "Section 221.011 requires the court to deduct illegal votes from the candidates receiving them, but when it "cannot ascertain how the [illegal] voters voted, the tribunal shall consider those votes in making its judgment." The law assumes that in some cases, as here, some illegal votes will remain in doubt after all the evidence is concluded in an election contest, and further mandates that the court take those illegal but unknown votes into account."
>
> "When the court, with some degree of certainty, can determine the outcome of the election based upon the evidence presented by the parties, section 212.012(a) requires it to do so. Failing this, the court's

> only alternative is defined by § 221.012(b), which requires the voiding of the election. Whatever may be the case when Contestant fails to sustain its burden of proof concerning the number of illegal voters, or proves a number of illegal voters less than the margin in the official returns for the election, once a Contestant has satisfied its burden of proving the number of illegal voters necessary to trigger the powers of the court under § 221.009(b), § 221.012(b) cannot be read to require a Contestant to prove the unavailability or lack of memory on the part of each and every voter whose vote might make a difference in order for the court to declare a new election. Such a burden would make some election contests logistically impossible."
>
> "An application of sections 221.009 and 221.012 in this fashion carefully balances two competing public policies which clash when illegal voting exceeds the margin of "victory" by some magnitude: the policy of promptly determining election results versus the policy of maintaining public confidence in the integrity of an election process that is free from taint."

Green v. Reyes, 836 S.W.2d 203, 207 (Tex. App.-Houston [14th Dist.] 1992, no writ).

20. The Court further finds that it was both impossible and impractical to subpoena and obtain testimony from these out of county voters. First, the sheer number of voters creates significant logistical and financial burdens on the parties and on this Court to obtain this information in admissible form. Indeed, the Court has reviewed thirty-seven (37) depositions upon written questions, and takes note of how many questions were asked by Contestant and by Contestee, as well as the fact that Contestee served a request for the production of documents to every single one of these witnesses. Obtaining answers to these questions involved the assistance of a court reporter, required the presence of a notary, and as shown by the bill of costs in this case, resulted in approximately a $100 charge for each single witness

deposition, not to mention the time and cost for the lawyers for both the Contestant and Contestee to pursue this information. Moreover, the Court takes judicial notice of the fee structure in Harris County. In order to obtain the issuance of a single trial subpoena in Harris County from the Clerk's Office, the cost is $8.00. The cost to serve that one (1) subpoena through a deputy is $150.00. Second, the Court finds that there is no method or paper trail by which to test the memory or veracity of a voter's testimony, should it be procured. For example, because of the constitutional secrecy associated with a voter's vote, the governing authority in charge of this election, HCEA, has no ability to tie a particular vote with a particular voter, which is by design, and which exists for a valid and sound public policy reason, which is to protect a voter from being vilified or punished for their electoral choices. As a result, and assuming a voter's memory several months later is good enough to remember whether a vote was cast in the Contested Election specifically, the fact remains that a voter's testimony cannot be rebutted, as there is nothing in existence to prove what they are saying is or is not accurate. Third, even though the Election Code imbues this Court with the power to order, should it so desire, a voter who cast an illegal to disclose for whom they voted, the statute is silent as to whether this Court also has the power to order a voter who cast an illegal ballot to disclose whether they voted in a particular race, as opposed to ordering that vote to disclose for whom they voted. Fourth, Texas case law is replete with court decisions declaring

that a trial court may properly determine whether an election is or is not void, without ever resorting to any investigation whatsoever as to which candidate for whom a particular voter's illegal vote was cast. And, while it is true that an intellectual distinction may be made between whether a voter cast an illegal ballot in this contested election, as opposed to whether a voter cast an illegal ballot specifically for either Contestant Lunceford or Contestee Craft, the public policy rationale for not requiring the effort to gather this evidence is virtually the same in either scenario. Indeed, a trial court in Hidalgo County on January 27, 2022 expressly extended this reasoning to relieve a contestant from having to establish that an illegal voter cast a ballot in the contest election. *Leal v. Pena*, No. 2020-DCL-06433, which was affirmed by the Corpus Christi Court of Appeals on April 27, 2023. *Pena v. Leal*, 13-22-00204-CV (PFR pending)("it was not necessary to engage into the inquiry as to whether those illegal ballots were actually cast in the subject election"). Accordingly, for all of these reasons, the Court finds that it is neither possible nor practical for Contestant to prove that any illegal ballots which were cast in the November 8, 2022 General Election were, in fact, cast in this specific contested race.

Ballots Cast By Voters Who Turned In Incomplete SORs Were Illegally Cast Incomplete SORs.

21. Another SOR category that Contestant challenged were those voters who cast a ballot but who failed to supply sufficient information on their SOR to meet the minimum residency requirements necessary to confirm their right to cast a

ballot in Harris County. Contestant's initial category of challenged SOR voters was 467. After the cross-examination of Steve Carlin, which, in part, focused on this category of challenged SORs, Contestant withdrew 185 challenges in this specific category, such that only 284 challenges remain. The Court finds that all 284 challenged SORs fail to satisfy the information requirements set forth in Section 63.0011 of the Texas Election Code. Thus, because each SOR fails to contain the minimum information required for an election official to confirm whether a voter does or does not have the right to cast a regular ballot in the November 8, 2022 General Election, in violation of Section 63.0011, this Court finds each of these incomplete SORs represent an illegal vote. In the alternative, the Court also finds that the failure on the part of the election officials to ensure that a voter completely filled out a SOR is a mistake that the Court has taken into account when determining whether it is possible to ascertain the true outcome of this Contested Election.

22. The Court also finds that all of the 284 incomplete SOR voters are listed on the Harris County Roster, such that the Court finds that all 284 of the incomplete SOR challenges represent votes that were both cast and counted in the November 8, 2022 General Election.

23. For the reasons expressed previously, the Court finds that it was not and is not necessary for the Contestant to marshal evidence of how these specific SOR

voters voted. The fact that these voters voted in November 8, 2022 General Election is enough.

Suspense Voters Who Voted Without An SOR Are Illegal Voters.

24. Registered voters whose address has come into question through a variety of processes, may be placed on a suspense list ("Suspense"). The Court finds that Section 63.0011 of the Texas Election Code requires voters whose name is on Suspense must fill out a Statement of Residence ("SOR") prior to be accepted for voting. If those voters fail to properly fill out a SOR, then are not allowed to vote, and, if they are nonetheless permitted to vote a regular ballot, then that vote is an illegal vote that is not eligible to be counted.

25. The Court finds that the Harris County Voter Roster, Contestant's Exhibit 14C, 14D, and 14E, shows 2,039 voters were on the Suspense list. The evidence at trial was that eighty-two (82) of those voters did submit a SOR, but 38 of those SORs were challenged on other grounds by the Contestant, and the Court sustains those challenges. Thus, there are forty-four (44) SORs which remain unchallenged, leaving 1,995 as the remaining total of Suspense list voters who failed to submit a SOR. The Court finds that these 1,995 voters who cast a ballot without a SOR cast a vote that was illegal.

23. The conclusions of law which relieved Contestant of the burden of showing how these voters actually voted, as well as whether these voters voted in

the Contested Election, is equally applicable to this group of voters, and therefore Contestant was not obligated to make this showing.

Ballots Cast By Voters With Cancelled Voter Registrations Are Illegal Votes.

26. The Harris County Voter Roster, see Contestant's Exhibits 14C, 14D, and 14E, shows that a total of 2,970 voters cast ballots with a "registration cancelled" designation next to their respective names. Further research conducted by HCEA and shared with the parties demonstrated that only five (5) of these voters had cancelled voter registrations at the time they cast their ballots. Accordingly, the Court finds that all five (5) of these votes were cast illegally, and, for the reasons previously expressed, Contestant was not required to prove that these votes were actually cast in the Contested Election. Proof that these votes were cast and counted in the November 8, 2022 General Election is sufficient.

Certain BBMs that were Accepted and Counted Are Illegal Votes.

27. Based upon the testimony of Colleen Vera, coupled with Contestant's Exhibits 11 and 12, the Court finds that forty-four (44) BBMs were not signed and therefore should not have been accepted and counted, and the Court further finds that twelve (12) BBMs were postmarked on or after November 8, 2022 and therefore should not have been accepted and counted. All fifty-six (56) accepted BBMs represent illegal votes that must be subtracted from the reported margin of defeat.

28. Unlike SOR voters, the Court finds that it was not necessary for Contestant to prove that a specific voter was listed on the Harris County Voter Roster. For the entire universe of BBMs that were produced to the parties by HCEA, a written representation was made as to whether a specific BBM was accepted and counted by the Early Voting Ballot Board ("EVBB"). That listing is part of the Court's file, which is HCEA's Third Supplemental Objections and Responses to Contestant's Subpoena, and was filed on June 15, 2023. For the reasons previously expressed, Contestant was not required to prove that these votes were actually cast in the Contested Election. Proof that these votes were cast and counted in the November 8, 2022 General Election is sufficient.

Extra Hour of Provisional Ballot Voting Constituted Illegal Voting.

29. After reviewing Contestant's Exhibits 25A thru 25L, Contestant's Exhibits 26A through 26H, and Contestant's Exhibits 27A through 27L, the Court finds that the temporary restraining order entered by the Harris County Ancillary Judge on November 8, 2022 extending voting by one (1) hour was improvidently granted. Accordingly, all of the provisional ballots cast after 7pm on Election Day were illegally cast and must be subtracted from the totals in the Official Canvass, see Contestant's Exhibits 2 and 3. This results in 325 votes being subtracted from Contestee's total number of cast votes. In addition, the Court also finds that it was a mistake for HCEA to have agreed to that order.

30. The temporary restraining order, see Contestant's Exhibit 25C, was not properly granted for a number of reasons, not the least of which was the fact that the court found the written declarations in support of the application for emergency temporary restraining order relief to be invalid. For example, the declarations attached to the emergency lawsuit in support of a request for an emergency temporary restraining order lacked information required to be disclosed, such as dates of birth and addresses for the declarant, in order to satisfy the statutory requirements for a declaration to be valid under Section 132.001 of the Texas Civil Practice and Remedies Code. Without that statutorily required information, there was no evidence before the Ancillary Court which would have empowered the Trial Court to grant the relief requested.

31. In addition, notwithstanding the fact the Trial Judge recognized these fatal deficiencies, the Court nevertheless asked the plaintiffs if they could bring any witnesses to the emergency hearing to testify. Rule 680 of the Texas Rules of Civil Procedure does not permit the granting of an ex parte temporary restraining order based upon oral testimony. To the contrary, the rule requires the proof to come in the form of a verified petition with sworn affidavits. Otherwise, parties that were not afforded notice will not know the basis for the relief, and will not be able to competently move to dissolve the emergency order because the evidentiary basis was oral not written.

32. The Trial Court improperly heard and accepted oral testimony, which is not proper in a temporary restraining order situation such as this where relief was granted without notice to any affected parties, including, but not limited to, the State of Texas, the Texas Secretary of State, the Attorney General of Texas, the Office of Attorney General, or any of the candidates on the ballot. Simply put, the Trial Court's power to enter an ex parte temporary restraining order should have been confined to the actual sworn paperwork on file and before the Court.

33. Moreover, it was established at the emergency hearing that if the polls are to be kept open after 7:00 pm, the law requires that 100% of the polling locations are required to extend their hours, rather than just a subset of polling locations. And, given the fact that multiple polling locations had run out of paper, then, by definition, extending voting for an additional hour past 7pm would not apply to 100% of the polling locations, and would only serve to exacerbate, rather than mitigate, the problems associated with not having ballot paper on hand to permit voters to vote after 7pm. Although live testimony is not permitted under the rules governing temporary restraining orders under these unique circumstances, the Court nevertheless permitted such testimony and granted relief.

34. During the emergency hearing, the argument was made that an extra hour of voting was not necessary, given that countywide voting was available, such that any voter who could not vote at a particular polling location could simply travel

to another voting location. The Ancillary Judge did not find this argument to be persuasive, and granted an extra hour of voting. In this lawsuit, Contestee made the same argument, e.g., that voters who turned away at a particular polling location could simply vote at another polling location. The Court does not find this argument persuasive, and would note that most voters tend to vote at their neighborhood polling location.

35. Because the Texas Supreme Court ordered that all PBs cast after 7pm be segregated and reported separately, the Court finds that all 822 votes cast for Contestant and all 1,147 votes cast for Contestee must be subtracted from the respective candidates' vote totals, as these votes are illegal. Alternatively, the Court also finds that these votes constitute a mistake on the part of election officials, and should, for that reason, be subtracted from the vote totals for each candidate. The conclusions of law which relieved Contestant of the burden of showing how these voters actually voted, as well as whether these voters voted in the Contested Election, is equally applicable to this group of voters, and therefore Contestant was not obligated to make this showing.

Unascertainable Illegal Votes.

36. In addition, Contestant also proved that a certain number of illegal votes occurred where it was impossible to even identify the specific voter. Section 221.012(b) of the Texas Election Code comes into play where there were illegal

votes cast which upon reasonable inquiry at an election contest cannot be attributed to either the Contestant or Contestee. See TEX.ELEC.CODE ANN. § 221.012(a) (b) (Vernon 1986); see also Medrano v. Gleinser, 769 S.W.2d 687, 688 (Tex. App. — Corpus Christi 1989, no writ). The trial court may void the election results and order that a new election be held where there is a sufficient number of illegal votes which cannot be attributed to either candidate, namely, where the number of illegal unascertainable votes is greater than or equal to the margin of victory. TEX.ELEC.CODE ANN. § 221.012(b) (Vernon 1986); see also Medrano, 769 S.W.2d at 688.

37. For example, the Court finds that 1,151 voters who cast page one of two different ballots cannot be identified, as their ballots cannot be tied to a specific voter, and, because two different ballot access codes are involved, there is no way to tie the ballot for the first ballot with the voter for the second ballot. Thus, the Court finds that Contestant has proven that illegal votes were cast and counted in the November 8, 2022 General Election where it cannot be ascertained which voters did so, much less how those unidentified voters actually voted.

§ 221.003(a)(2)(B)'s Reference to Eligible Voters Prevented From Voting

38. Although Section 221.003(a)(1) of the Texas Election Code refers to illegal voting, the other parts of that statute refer to things besides illegal voting. For

example, (a)(2)(B) refers to an election official preventing an eligible voter from casting a vote.

39. When understood in this context, the case law which discusses whether proof of how a voter voted is solely limited to illegal voting. In the case at bar, Contestant made many other challenges, the crux of which did not contend that certain votes which had been cast were illegal. For example, with respect to the entire subject matter of voters turned away as a result of certain polling locations running out of ballot paper, no allegation was made that these turned away voters ultimately cast a ballot that was illegal. To the contrary, the complaint is centered around the fact that these voters did not cast a ballot at all, at least with respect to a certain specified number of identified polling locations. The Court therefore finds that it was not necessary for Contestant to prove whether these turned away voters cast a ballot in the Contested Election, as that information does not even exist.

40. The Court also finds that it was impossible and impractical for Contestant to prove who these turned away voters were, and whether they ultimately voted elsewhere. These facts are not knowable. Contestant is not required to prove these unprovable facts.

§ 221.003(a)(2)(C)'s Reference to Fraud, Illegality, Mistake By Election Officials

41. The election code does not require a trial court to rely solely on "illegal votes" in attempting to ascertain the true outcome of an election. As is evident from

section 221.003, the outcome of an election can be muddled not just by the counting of illegal votes or the failure to count legal votes, but also by mistakes made by election officers. TEX. ELEC. CODE ANN. § 221.003(a) (2)(C) (Vernon 2003); see Alvarez, 844 S.W.2d at 242. A contestant may allege and prove that "irregularities rendered impossible a determination of the majority of the voters' true will." Guerra v. Garza, 865 S.W.2d 573, 576 (Tex. App. — Corpus Christi 1993, writ dism'd w.o.j.). "The election code does not provide any guidance as to how a trial court should weigh a "mistake" by an election clerk. But given the importance of recording the true will of the voters, we believe that if a sufficient number of voters are rendered potentially ineligible by mistakes made during the recording process to account for the entire margin of victory, the trial court is within its discretion to declare the election void because it is impossible to determine the true outcome of the election." *Gonzalez v. Villarreal*, 251 S.W.3d 763, 782 (Tex. App. –Corpus Christi-Edinburg 2008), pet. dism'd w.o.j.

42. There are many provisions contained in the election code that demonstrate the code's purpose to preserve evidence of the qualified voters' true will. This Court finds that violations of certain recording provisions by election clerks can certainly undermine the purpose of the election code and obscure the true will of the qualified voters. By necessity, election officials are required to obtain and record certain information from individuals who present themselves at a polling place to

vote. Election officials, under the code, are provided with certain tools with which they can verify information provided by a voter. *Gonzalez v. Villarreal*, 251 S.W.3d 763, 782 (Tex. App. –Corpus Christi-Edinburg 2008, pet. dism'd w.o.j).

§ 51.005 Safe Harbor for Initial Paper Ballot Allotments

43. The Court holds that Section 51.005 of the Texas Election Code applies to Harris County.

44. The Court also finds that Harris County violated Section 51.005, which provides as follows:

> "The authority responsible for procuring the election supplies for an election shall provide for each election precinct a number of ballots equal to at least the percentage of voters who voted in that precinct in the most recent corresponding election plus 25 percent of that number, except that the number of ballots provided may not exceed the total number of registered voters in the precinct."

45. Harris County violated this statute because HCEA Tatum failed to provide ballot paper in sufficient quantifies and did not even attempt to calculate how much ballot paper would constitute 125% of the voters from the last-like election who voted in that precinct or in the case of combined or county-wide polls, the polling location. This statute serves as a safe harbor to counties, so that they need not worry about ensuring ballot paper shortages which may result from higher-than-expected turnout at certain polling locations.

46. The Court has taken this illegal activity on the part of Election Officials into account when considering whether it can ascertain that the reported outcome of

the Contested Election is the true outcome. Alternatively, the manner in which HCEA determined its initial ballot paper allocation, even if Section 51.005 of the Texas Election Code does not apply to Harris County, constituted a mistake for which this Court will consider when determining whether it can ascertain that the reported outcome is the true outcome.

BBMs Not Reviewed In Compliance With Section 87.041(b)(8).

47. The Court finds that Contestant proved approximately seven hundred (700) BBMs were processed by the Signature Verification Committee ("SVC") without confirming the identification information contained in that voter's registration record matched the identification information on the BBM application and/or BBM return carrier envelope, in violation of Section 87.041(b)(8) of the Texas Election Code.

Early Voting Results Were Illegally Reported Before Election Day Voting Had Ended.

48. Even though EA Tatum agreed to keep the polls open for an additional hour, his office posted the early voting results online at approximately 7:30 pm, which was approximately thirty (30) minutes prior to the time that he expected the polls to close in violation of Section 61.007 of the Texas Election Code. This illegal act informed those who had not yet voted the election results of those who had voted. This Court has taken this illegal act into account when trying to ascertain whether the reported outcome is the true outcome.

49. Thus, with respect to Contestant's evidence that: (i) initial ballot paper allocations were insufficient; (ii) the SVC's failure to confirm that a BBM voter's identification information matches the identification information contained within a voter's registration records; (iii) discrepancies in the number of early votes between the canvass and the roster such that there are more votes cast that the actual number of voters (699); (iv) mathematical discrepancies in the official reconciliation report by HCEA regarding 9,307 more BBMs being counted than were in existence and available to be counted; (v) 532 votes that were cast and counted without presentation of a photo identification, even though these voters' respective RIDs were not completed as required; (vi) 3,406 PBs were accepted and counted even though these PB voters' respective PBAs were not completed as required; and (vii) 284 SOR voters' votes were cast and counted even though those voters' respective SORs were not completed as required, etc., the Court finds that Contestant has established that election officials engaged in "fraud or illegal conduct or made a mistake" sufficient to satisfy Section 221.003(a)(2)(C) of the Texas Election Code.

50. For the above-referenced categories of complaint, the Court finds that Contestant need not prove that these voters voted in the Contested Election. To the contrary, all that is required is to show that these things occurred, so that the Court may take them into account when determining whether the true outcome of the election may be ascertained.

51. Support for this Court's Conclusions of Law can be found in *Gonzalez v. Villarreal*, 251 S.W.3d 763, 782 (Tex. App. –Corpus Christi-Edinburg 2008, pet. dism'd w.o.j.), as follows:

> "In reality, election contests are not so cut and dry. The election code, however, recognizes that it may be impracticable or even impossible to determine for whom an illegal vote was cast. The election code does not require such an inquiry. Rather, the code provides that "if the tribunal finds that illegal votes were cast but cannot ascertain how the voters voted, the tribunal shall consider those votes in making its judgment." Id. § 221.011(b) (Vernon 2003). Although section 221.011 does not dictate exactly how those illegal votes should be considered, section 221.009 provides the answer: " [i]f the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, the tribunal may declare the election void without attempting to determine how individual voters voted." Id. § 221.009(b) (Vernon 2003). In other words, if a trial court determines that illegal votes were cast and that the number of illegal votes equals or is greater than the margin of victory, the trial court can then declare the election void without ever inquiring as to the candidate for whom those illegal votes were cast. See, e.g., Slusher, 896 S.W.2d at 240; Alvarez, 844 S.W.2d at 242 (holding that the election code permits a trial court to determine whether the number of illegal votes cast exceeded contestee's margin of victory without determining for which candidate illegal votes were cast); Kelley v. Scott, 733 S.W.2d 312, 314 (Tex. App.-El Paso 1987, writ dism'd) (judgment declared void because one illegal vote was cast, which equaled the number of votes to change the outcome of the election, regardless of the candidate for whom the illegal voter casts her vote)."

PBA Analysis

52. Contestant introduced evidence challenging a total of 3,406 PBAs. The Court has already found that all of the PBAs cast after 7pm should be subtracted from the canvass totals of cast votes in support of both Contestant Lunceford and

Contestee Craft. With respect to each of the categories of challenge, which are set forth with specificity in Contestant's Exhibit 10C, the Court finds that all of these PBAs contain evidence of mistakes on the part of either the voter, the election official at the polling location, the voter registrar, or the EVBB. The Court has taken into account each of these mistakes in determining whether it can ascertain whether the reported outcome is the true outcome of the Contested Election.

53. Additional anomalies exist, however. According to the final canvass regarding PBs cast after 7pm, see Contestant's Exhibit 3, the grand total of such PBs in Contestant's specific race was 2,073. This number makes no sense, as it does not equal the totals calculated by Contestant (which was 2,206), nor does it equal the totals calculated by Harris County in their post-election report (which was 1,999, calculated by subtracting 205 missing PBs from 2,204, which is the total listed in that report), which means that the total number of PBs reported in the final canvass as having been cast and counted in Contestant Lunceford's race is less than the total number of PBs cast and counted in general. This discrepancy is a concern, as these two numbers should be the same, with the only difference being the number of undervotes in that specific race (which was 104). Thus, it is unclear whether 2,073 is a reliable number. In addition, the segregated final canvass report issued by Harris County specifically refers to Box number 5 on the provisional ballot affidavit ("PBA"), but there are many PBAs that the judge did not check Box number 5, but

checked Box 8 instead and identified the voter as a post 7:00 pm voter. It is unclear whether the 2,073 reported PB accepted ballots includes those Box 8 PBAs with the Box 5 PBAs. In any event, of 2,073 reportedly cast, 104 PB voters did not vote in Contestant Lunceford's specific race, meaning that the adjusted grand total of PBs accepted and counted is 1,969. According to that same canvass, of the 1,969 total, 822 PBs were cast and counted for Contestant Lunceford and 1,147 PBs were cast and counted for Contestee Craft.

54. In addition, there are other discrepancies where the EVBB did not act consistently, as shown by Contestant's Exhibit 10E. The Court finds that all of these PBAs contain evidence of mistakes on the part of the EVBB. The Court has taken into account each of these mistakes in determining whether it can ascertain whether the reported outcome is the true outcome of the Contested Election.

How to Deal With the Undervote.

55. The Court finds that the undervote in the Contested Election, when expressed as a percentage, is 3.86%. This means that for every 1000 voters who voted in the November 8, 2022 General Election, 38 voters did not cast a ballot in the Contested Election, while 962 did so.

56. The reported margin of defeat in the Contested Election was 2,743. Taking the undervote percentage into account, approximately 106 voters out of 2,743 voters did not vote in the Contested Election. Thus, in order to ensure that the

undervote is considered, the Court finds that the margin necessary to demonstrate a material impact on the Contested Election is 2,849.

57. The Court's view of how to deal with the undervote is supported by a similar conclusion of law by a trial court in Cameron County which was entered on January 27, 2022. In the case of *Leal v. Pena*, No. 2020-DCL-06433, the trial court found the following:

> "41. The Court is mindful that overturning an election is not to be taken lightly. To this end the Court has considered using an approximate "under vote ratio" of 6,000/40,000. The evidence shows 15% of voters in this election "under voted" in the school board election. By using this ratio an 8 vote margin of victory requires approximately ten (10) illegally cast votes to equate to in order to invalidate the election results. The Court has found 24 illegally cast votes. This number is more than twice the calculated "over vote" cushion favoring the Contestee."

The trial court's judgment, including the above-quoted conclusion of law, was affirmed by the Corpus Christi Court of Appeals. *Pena v. Leal*, 13-22-00204-CV (PFR pending).

<u>HCEA's Failure To Timely Issue Confirmation Notices To Voters.</u>

58. William Ely and Steve Carlin both testified that several thousand voters were challenged in the summer of 2022 based upon the belief that these registered voters did not actually reside at the address listed in their voter registration records. Although they filed written challenges with the HCEA, those same registered voters remain on the Harris County Voter Roll as of the date of Mr. Ely's trial testimony. The Court has taken the HCEA's failure to issue confirmation

notices to these challenged individuals into account when trying to ascertain whether the reported outcome is the true outcome for this Contested Election.

59. Any Conclusion of Law that is a Finding of Fact shall be deemed to be a Finding of Fact.

60. Any Finding of Fact that is a Conclusion of Law shall be deemed to be a Conclusion of Law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rule of Civil Procedure 21a, a true and correct copy of the foregoing instrument was forwarded to all counsel of record and/or parties on August 31, 2023.

/s/ Andy Taylor
Andy Taylor

No. 01-23-00921-CV

IN THE COURT OF APPEALS
FOR THE FIRST JUDICIAL DISTRICT OF TEXAS
IN HOUSTON

ERIN ELIZABETH LUNCEFORD

Appellant,

v.

TAMIKA CRAFT,

Appellee.

On Appeal from the 164th Judicial District Court
Harris County, Texas No. 2022-79328
Honorable David Peeples, sitting by assignment

TAB E

CAUSE NO. 2022-79328

ERIN ELIZABETH LUNCEFORD	§	IN THE DISTRICT COURT
Contestant,	§	164th JUDICIAL DISTRICT
v.	§	
TAMIKA "TAMI' CRAFT	§	
Contestee.	§	HARRIS COUNTY, TEXAS

CONTESTANT ERIN ELIZABETH LUNCEFORD'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF THIS COURT:

Contestant Erin Elizabeth Lunceford, pursuant to Rule 296 of the Texas Rules of Civil Procedure, hereby respectfully requests the Court to state in writing its Findings of Fact and Conclusions of Law. As the Court prepares its findings, Contestant Lunceford would point out that she cannot find anywhere in the Court's 36-page opinion any mention or evaluation of Contestant's claim that 1,995 Suspense voters on the Harris County Voter Roster voted illegally because they did not submit a filled-out Statement of Residence ("SOR"). See Contestant's Proposed Findings of Fact numbers 24 and 25 and Contestant's Proposed Conclusions of Law number 59, both of which were filed on August 31, 2023.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rule of Civil Procedure 21a, a true and correct copy of the foregoing instrument was forwarded to all counsel of record and/or parties on November 29, 2023.

/s/ Andy Taylor
Andy Taylor

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Status as of 7/10/2024 7:32 AM CST

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