No. 01-23-00921-CV

IN THE FIRST COURT OF APPEALS
FOR THE STATE OF TEXAS
AT HOUSTON, TEXAS

ERIN ELIZABETH LUNCEFORD

v.

TAMIKA CRAFT

Appealed from the 164th District Court
of Harris County, Texas
Cause No. 2022-79328

BRIEF OF APPELLEE/CROSS-APPELLANT TAMIKA CRAFT

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Oral Argument Requested

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GUIDE TO CITATIONS

1. "CR" means Clerk's Record, followed by page number.
2. "SCR" means Supplemental Clerk's Record, followed by page number.
3. "RR" means Reporter's Record, followed by volume number and page/line or Exhibit number.
4. "FF" means Finding of Fact, followed by the numbered finding.
5. "CL" means Conclusion of Law, followed by the numbered conclusion.

STATEMENT OF THE CASE

Nature of the case:	This is an appeal from the trial court's final judgment in an election contest filed by Erin Lunceford challenging the results of the November 8, 2022 election for the 189th Judicial District Court of Harris County, Texas, in which Tamika Craft won by a margin of 2,743 votes.
Trial Court:	Hon. David Peeples (sitting by special assignment per TEX. ELEC. CODE § 231.004) 164th Judicial District Court Harris County, Texas
Trial Court's Judgment:	After eight days of trial, the court issued a Final Judgment Denying the Election Contest. The court also issued Findings of Fact and Conclusions of Law. The trial court found that there were 2,041 "illegal" votes and 250-850 votes that were not counted as a product of "mistake" and "illegal conduct" by an election official. CR302 at FF73. The court therefore found a total of 2,891 "affected votes." CR302 at FF73. The court considered the undervote, but found that it is "reasonable to infer" that those who cast illegal votes in the Contested Race did so at roughly the same rate (96.14%) as in the General Election. CR 301 at FF 70. The court applied that undervote percentage to reduce the total affected votes from 2,891 to 2,779. CR302 at FF72-73. Although this number slightly exceeded Craft's margin of victory, the trial court found that it was too small to put the true outcome of the election into doubt. CR303 at CL40-41. The trial court concluded Craft's victory was the true outcome. CR279, 303.

REPLY TO APPELLANT'S ISSUES PRESENTED

Reply to Issue No. 1:

Craft agrees that the trial court erred in estimating that 250 to 850 unknown potential voters ultimately failed to cast a ballot after leaving a polling location. Craft agrees with Lunceford that "the trial court's manufactured 'estimate' is neither legally nor factually supported by the evidence." Consequently, none of those potential votes by unknown persons should have been considered by the trial court in determining the outcome of the election.

Reply to Issue No. 2:

The trial court considered the 411 unknown potential voters who were supposedly turned away for reasons unrelated to ballot paper and properly found that number was immaterial to the judgment.

Reply to Issue No. 3:

The trial court considered the evidence of 1,995 alleged suspense list voters and properly found that it was insufficient to support Lunceford's claim.

Reply to Issue No. 4

Based on the evidence at trial, the court had discretion to determine that Craft's victory was the true outcome of the election. The judgment in Craft's favor should be affirmed.

CROSS-APPELLANT'S ISSUES PRESENTED

1. Did the trial court abuse its discretion in permitting Russell Long, Steve Carlin, and Christina Adkins to offer their expert opinions at trial?

2. Are election officials required to follow the strict procedures of TEX. ELEC. CODE § 51.005 when allocating ballot paper supplies in a county participating in the Countywide Polling Place Program under TEX. ELEC. CODE § 43.007?

3. Did the trial court abuse its discretion in finding—based solely on the face of the document—that 1,236 Statements of Residence constituted illegal votes that were cast and counted in the Contested Race?

4. Did the trial court abuse its discretion in finding—based solely on the face of the document—that 380 Reasonable Impediment Declarations constituted illegal votes that were cast and counted in the Contested Race?

5. Did the trial court have jurisdiction to consider the propriety of the Temporary Restraining Order keeping polls open for an additional hour?

    a. If so, was it a mistake for the Election Administrator's Office to agree to the application for the TRO to keep polls open for an additional hour?

    b. If so, did that mistake cause the TRO to be granted over the intervenors' objections?

6. Did the trial court err in failing to consider the entire undervote and instead applying an arbitrary percentage to determine the amount of undervotes considered even though Lunceford presented no expert testimony or other competent evidence in support of that percentage?

STATEMENT REGARDING ORAL ARGUMENT

Tamika Craft respectfully requests oral argument. While the Court could affirm the judgment and confirm Craft's victory without oral argument, Craft believes that the Court would benefit from a discussion about the state of the evidence contained in the extensive record. Craft would also welcome the opportunity to guide the Court through the complex legal and factual issues arising from the interpretation and application of the Election Code to the November 2022 general election in Harris County. Oral argument would further allow Craft to address the unique aspects of this case, as large-scale election contests are rare and warrant thorough examination.

STATEMENT OF PROCEDURAL HISTORY

I. The Contested Election

On November 8, 2022, Harris County held a general election which included dozens of individual races (the "General Election"). One race was for District Judge of the 189th Judicial District between Erin Lunceford and Tamika "Tami" Craft (the "Contested Race").

The Harris County Official Canvass Report (the "Canvass") shows that there were 1,107,390 total votes cast in the General Election and 1,064,677 votes cast in the Contested Race. RR11 at Ex. 2. There were 42,697 undervotes[1] and 16 overvotes in the Contested Race. RR11 at Ex. 2. Contestee Craft prevailed in the Contested Race by 2,743 votes. RR11 at Ex. 2.

Lunceford filed an election contest on December 7, 2022, seeking to overturn the results of the Contested Race and to obtain a new election. CR3. The trial took place from August 2nd through 11th. The trial court issued its Final Judgment Denying Election Contest on November 9. CR240. The Court issued its Findings of Fact and Conclusions of Law on December 9, 2023. CR279.

[1] The "undervote" is the number of votes from people who voted in the General Election but not in the Contested Race. RR11 at Ex. 2.

II. Contestant Lunceford's Limited Points on Appeal

Lunceford filed her Notice of Appeal, and Craft timely filed her Notice of Cross-Appeal.[2] CR308, CR 374. On appeal, Lunceford challenged just three categories of allegedly improper votes:

(1) the trial court's estimated 250-850 potential voters who supposedly left polling places because of ballot paper supply issues without voting elsewhere;

(2) the 411 potential voters who supposedly left polling places for reasons *unrelated* to ballot paper issues without voting elsewhere; and

(3) the 1,995 votes challenged for being on the suspense list that lacked sufficient evidence of being illegal votes.

Lunceford did not challenge any other category of votes and therefore has waived on appeal all other complaints regarding the election and the trial court's findings. *See Rischon Development Corp. v. City of Keller,* 242 S.W.3d 161, 166 (Tex. App.—Fort Worth 2007, pet. denied).

[2] Craft also filed a Motion to Dismiss, contending that Lunceford's appeal was untimely, which has been carried with the case.

STATEMENT OF FACTS

I. The Ballot Paper Supply on Election Day

Lunceford contested the election in part by arguing that the Elections Administration Office (the "EAO"), led by Clifford Tatum, failed to supply a sufficient amount of ballot paper to polling locations. Most of the polling locations on election day were initially supplied with ballot paper for 600 voters and the EAO planned to supply additional paper throughout the day as needed. RR72 at Ex. 11.

For the General Election, Harris County implemented countywide polling, rather than precinct-based polling. *See* TEX. ELEC. CODE § 43.007. This meant Harris County voters could vote at any polling location in the county on election day. *See id.*; RR8 at 173:20-174:4. And every polling place in the county posted signs identifying the four nearest alternative locations by driving distance. *See* TEX. ELEC. CODE § 43.007(o); RR73 at Ex. 12; RR3 at 137:7-8, 180:4-23.

The trial court concluded that the EAO failed to follow TEX. ELEC. CODE § 51.005—setting minimum ballot paper allocation requirements for each precinct—and that failure was both "illegal conduct" and a "mistake." CR287 at CL5. Craft challenges this conclusion in her cross-appeal.

II. Lunceford Agrees There is No Evidence as to Whether the 2,600 Voters Who Left Polling Locations Voted Elsewhere

Lunceford alleged at trial that 2,535 unknown people were in line to vote at various polling places and were observed by poll workers as having left before

voting. *See* Appellant's Brief at 29. The trial court found that "because of paper shortages 2600 voters who tried to vote at their polling place of choice left without voting." CR286 at FF17.

None of those 2,600 potential voters were presented as witnesses at trial. Rather, this finding was based upon sworn declarations from 37 poll workers who observed unknown people arrive at a polling place and leave without casting a vote at that place. The trial court "admitted" these declarations over Craft's objections. *See* SCR510-12. However, the declarations were never formally introduced into evidence as an exhibit, the declarations were never read into the record,[3] and the DWQ answers to direct and cross-questions were never filed with the trial court. So, they were not properly introduced into the evidentiary record at trial. This oversight should have barred the trial court as the factfinder from relying on the declarations in making its findings.

Regardless, even if the evidence could have been considered, the Parties agree that the declarants had no personal knowledge as to whether the 2,600 observed leaving voted elsewhere. *See* Appellant's Brief at 34, 52-53. The trial court noted that the declarants did not know whether they planned to vote elsewhere. *See* CR285 at FF14. The trial court also noted the guesses of some declarants as to why the

[3] Only the *names* of the declarants were read into the record; not the testimony, itself. *See* RR8 at 10:13-11:7.

"turned away" voters might not have voted elsewhere. *See* CR286 at FF16. The trial court even offered its own speculation as to why people might leave a polling location and not vote elsewhere. *See* CR286 at FF18. But the Parties agree those findings were not based on the declarations or any other evidence. *See* Appellant's Brief at 52.

Still, the trial court found that up to 850 of the 2,600 potential "lawful voters" left specifically because of ballot paper issues *and* did not vote at any other polling location. *See* CR286 at FF17-21; CR302 at FF73. The trial court considered these 850 potential voters as part of the "total affected votes" in its determination of the true outcome. *See* CR302 at FF73.

III. The Trial Court Properly Found Insufficient Evidence that 1,995 Voters on Suspense List Illegally Voted

The registrar maintains a "suspense list" of voters who fail to send a timely response to a request for confirmation of current residence. *See* TEX. ELEC. CODE § 15.081. Lunceford's expert witness, Steve Carlin, identified the Harris County voter roster (the "Roster") as showing 2,039 individuals on the "suspense list." RR6 at 87:7-88:2. The Roster indicates the number of people who checked in at a polling location, but that does not necessarily reflect votes because it does not include those who left after checking in without voting ("fleeing voters"). RR8 at 226:1-13, 230:17-25, RR9 at 102:17-20.

Carlin testified that for 1,995 of those listed, he could not locate a completed Statement of Residence ("SOR"), which he said was required. RR6 at 88:3-11, 109:1-3. Accordingly, Lunceford alleged these constituted 1,995 illegal votes. The trial court found that this was not proved with sufficient evidence. CR300 at FF67.

IV. The Evidence is Factually and Legally Insufficient to Prove that 1,236 SORs Constituted Illegal Votes

The Election Code requires election officers to ask voters if their registered address is current. *See* TEX. ELEC. CODE § 63.0011(a). If the address is not current because they have changed residence within the county, they may still vote. *Id*. at 63.0011(b). Before voting, however, they must execute an SOR swearing that they reside in the county and identifying the address. *Id*. at 63.0011(c).

At trial, Carlin testified that 966 SORs listed addresses outside of Harris County and correlated to individuals on the Roster. RR5 at 150:7-12; RR6 at 87:1-6. Based on this, the trial court found 966 illegal votes. CR289 at FF23. The trial court also found 270 illegal votes based on incomplete SORs. CR289 at FF24.

Craft challenges these findings.

V. The Evidence is Factually and Legally Insufficient to Prove that 380 RIDs Constituted Illegal Votes

When a registered voter arrives at a polling location without an approved photo ID, an election official must ask them to sign a Reasonable Impediment Declaration ("RID"). RR51 at 195; RR7 at 180:7-24; *see* TEX. ELEC. CODE § 63.001.

The RID allows a registered voter to verify their identity using a substitute form of identification. *See* RR7 at 180:7-182:3. If the voter's name is on the list of registered voters and the election official can identify them based on the documentation provided, "the voters shall be accepted for voting." TEX. ELEC. CODE § 63.001. If the ID requirements cannot be met, the voter may still vote provisionally. *Id*.

Lunceford challenged 532 votes by registered voters on the basis that the RIDs were incomplete or improperly completed. CR129-30. Lunceford did not argue that these were "illegal" votes; on the contrary, Lunceford only complained that the faulty RIDs constituted "mistakes." RR8 at 51:15-20. Nonetheless, the trial court found 380 *illegal* votes based on the challenged RIDs. CR296 at FF44; *see also* CR301 at n. 22 (finding that these 380 were among the total number of "illegal votes"). Craft challenges these findings.

VI. The Election Day TRO Did Not Result from Mistake

On Election Day, the Texas Organizing Project filed suit against the Harris County Commissioners Court and its EAO seeking an emergency order extending poll closures beyond 7:00 p.m. because several polling locations opened late and some polling locations suffered from machine malfunctions. *See* RR55 at Ex. 25A. The court held an emergency hearing in which the parties appeared. *See* RR55 at Ex. 25L. The State of Texas and the Harris County Republican Party (represented by Andy Taylor) intervened. *See* RR55 at Ex. 25D, 25L.

Over Mr. Taylor's and the State of Texas's objections, the ancillary judge granted a temporary restraining order (the "TRO") keeping all poll locations open for one additional hour. *See* RR55 at Ex. 25C. The State of Texas filed a petition for mandamus arguing that the ancillary court abused its discretion in extending voting by one hour. *See* RR55 at Ex. 25G. In a brief order, the Texas Supreme Court stayed the TRO and ordered the post-7:00 p.m. votes to be segregated. *See* RR55 at Ex. 25H.

Lunceford contended in her petition that the Election Day TRO "was not properly granted." CR105 at ¶ 32. At trial, Lunceford additionally claimed that the EAO made a "mistake" under section 221.003 of the Election Code when it agreed to the TRO granting an extra hour for voting. RR10 at 14:10; CR223-26.

The trial court concluded that "[a]greeing to the extension was not *illegal*" but that it was "a *mistake* within the meaning of section 221.003." CR299 at FF63, CL32. The trial court found that polling locations that did not have ballot paper were not really "open," which violated section 43.007. CR300 at FF63; *see* TEX. ELEC. CODE § 43.007(p). The trial court concluded that the 325 net votes for Craft resulted from mistake and took them into account in its ultimate decision. CR300 at CL34.

Craft challenges these findings and conclusions.

SUMMARY OF ARGUMENT

The trial court correctly declared Tamika Craft's victory in the Contested Race as the true outcome. Erin Lunceford failed to meet her burden to prove by clear and convincing evidence all necessary elements of her claims.

Lunceford failed to present a single voter to testify that they were prevented from voting because of ballot paper shortages. Both Lunceford and Craft agree that the trial court was unable, based on the evidence presented, to estimate the number of potential voters who might have been unable to vote because of ballot paper shortages. Such an estimate would be speculation. Consequently, the Parties agree that the trial court should not have taken 850 unknown potential voters into account when ascertaining the true outcome. And without those 850 being counted, the trial court only found 2,041 illegal votes, which is far short of Craft's 2,743-vote margin of victory.

The trial court properly found insufficient evidence of any voters who were on the suspense list prior to casting a vote in the Contested Race. Lunceford failed to present evidence of when they were placed on the suspense list, failed to rule out provisional votes, failed to determine if their suspension was cured, failed to account for those mistakenly placed on the suspense list, and failed to prove how many challenged voters cast a ballot in the Contested Race, specifically.

Craft's victory should be affirmed.

If the Court reverses any of Lunceford's requested issues, Craft cross-appeals, asking the Court to consider reversing portions of the judgment found in Lunceford's favor.

The trial court erred in allowing Lunceford's witnesses to provide expert opinions because they were not qualified or their opinions lacked reliability. The trial court also erred in applying section 51.005 of the Election Code to this election because Harris County implemented countywide voting, making the statute inapplicable. The trial court's specious interpretation of the statute should be rejected. The trial court further erred in counting illegal votes based solely on the face of Statements of Residence and Reasonable Impediment Declarations. Lunceford failed to prove that those documents correlated to votes cast and counted in the Contested Race, failed to sufficiently prove the illegality of those votes, and failed to overcome the presumption in favor of the election officials' decisions. Once again, Lunceford presented no testimony from those challenged voters. The trial court also improperly threw out all post-7:00 p.m. votes based on an overly expansive interpretation of "mistake." Finally, the trial court improperly limited its consideration of the undervote to a small percentage, even though no witness testified in support of that statistical calculation. As a result of this litany of errors, the trial court counted far more illegal votes than it should have.

And yet, despite all these improper findings in Lunceford's favor, she still could not amass sufficient evidence to void the election. Even with the trial court giving Lunceford every benefit of the doubt, she could not prevail.

Craft defeated Lunceford by 2,743 votes. Lunceford claims this margin of victory was "razor thin," but she did not cite a single case where a contestant overturned an election lost by such a large margin. No election contest in Texas history has even come close to being challenged on the scale that Lunceford is contesting here. In other words, Lunceford is asking the Court to set historic precedent and is doing so based on scant evidence of illegal votes that were actually cast in the Contested Race, zero testimony from disaffected voters, and tortured interpretations of the Election Code. Texas courts "recognize that elections are seldom perfect," but "do not order new elections because of errors that did not affect the outcome." *Alvarez v. Espinoza*, 844 S.W.2d 238, 249 (Tex. App.—San Antonio 1992, writ dism'd w.o.j.).

The Court should affirm the judgment, protecting Craft's unequivocal victory, and reverse the erroneous findings regarding votes improperly found to be illegal or a result of mistake.

STANDARD OF REVIEW

The standard of review for an appeal from a judgment in an election contest is whether the trial court abused its discretion. *See Tiller v. Martinez,* 974 S.W.2d 769, 772 (Tex. App.—San Antonio 1998, pet. dism'd w.o.j.). Lunceford only challenged findings of fact, not conclusions of law. So, the Court should review her points of error under the abuse of discretion standard. To the extent Craft challenges conclusions of law by cross-appeal, those should be reviewed *de novo*. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002).

Legal Sufficiency. As the contestant, Lunceford bears the burden to prove by clear and convincing evidence that voting irregularities materially affected the outcome of the election. *Harrison v. Stanley*, 193 S.W.3d 581, 583 (Tex. App.—Houston [1st dist.] 2006, pet. denied). This elevated standard of proof necessitates an elevated standard of review. *See Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004). "Evidence that does not produce a firm belief or conviction does not support an issue that must be proved by clear and convincing evidence." *Id*. Accordingly, "evidence that does more than raise surmise and suspicion will not suffice." *Id*. at 621. "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." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002).

In conducting a legal sufficiency review under a clear and convincing standard, 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." *Id*. at 265–66. And it should disregard "all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id.* at 266. But, courts cannot disregard contrary evidence that the trier of fact could not ignore. *City of Keller v. Wilson,* 168 S.W.3d 802, 817, 830 (Tex.2005).

Factual Sufficiency. In a factual sufficiency review, the court "must give due consideration to evidence that the factfinder could reasonably have found to be clear and convincing." *In re J.F.C.*, 96 S.W.3d at 266. "If, in light of 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." *Id*.

APPELLEE'S ARGUMENT IN RESPONSE

I. Lunceford Failed to Meet Her Burden of Proof.

To prevail in a multi-race election contest, Lunceford is required to first show that either (1) illegal votes were counted or (2) an election official prevented eligible

voters from voting, failed to count legal votes, or engaged in other fraud, illegal conduct or mistake. *See* TEX. ELEC. CODE § 221.003; *Miller v. Hill*, 698 S.W.2d 372, 375 (Tex. App.—Houston [14th Dist.] 1985), *writ dism'd w.o.j.,* 714 S.W.2d 313 (Tex. 1986) (per curiam). She must next show the illegal votes were cast *in the particular race* being contested. *Id*. Finally, she must show either a different result would have been reached by counting or not counting certain specified votes, or irregularities were such as to render it impossible to determine the will of the majority of the voters participating. *Reese v. Duncan*, 80 S.W.3d 650, 656 (Tex. App.—Dallas 2002, pet. denied); *see also* RR8 at 162:3-163:20.

Lunceford must also overcome the presumption that the election officials acted properly in rejecting or accepting ballots. *Reese*, 80 S.W.3d at 661; *see also Guerra v. Pena*, 406 S.W.2d 769, 773 (Tex. App.—San Antonio 1966, no writ). "The contestant must show that the board erred." *Reese*, 80 S.W.3d at 661.

After the evidence is submitted, if the trial court can ascertain the true outcome, it must declare the outcome. TEX. ELEC. CODE § 221.012(a). To determine the true outcome, the trial court may compel the voter to reveal for whom he or she voted. TEX. ELEC. CODE § 221.009(a); *Medrano v. Gleinser*, 769 S.W.2d 687, 688 (Tex. App.—Corpus Christi–Edinburg 1989, no writ). Then, the trial court shall subtract the vote from the official total for the candidate for whom the voter cast his or her vote. TEX. ELEC. CODE § 221.001(a); *Medrano,* 769 S.W.2d at 688. If the

number of illegal votes is equal to or exceeds the number of votes necessary to change the outcome the trial court *may* void the election without attempting to determine for which candidate the voters voted. TEX. ELEC. CODE § 221.009(b); *Medrano,* 769 S.W.2d at 688. Here, Lunceford did not present a single voter to testify at trial who voted illegally or who was unable to vote, so there was no one the trial court could compel to reveal their vote.

Then, only after all of that analysis is complete, if the trial court *cannot* ascertain the true outcome of the election, it must declare the election void. TEX. ELEC. CODE § 221.012(b); *Tiller,* 974 S.W.2d at 772; *Medrano,* 769 S.W.2d at 688.

Lunceford failed to meet her burden of proof. The trial court's judgment that Craft's victory was the true outcome of the election should be affirmed.

II. The Parties *Agree* There is No Evidence to Support the Trial Court's Finding that 250-850 Voters Were Unable to Vote Because of Ballot Paper Shortages.

A. The 37 Witness Declarations Were Not Properly Introduced into Evidence.

Lunceford failed to formally introduce the 37 witness declarations obtained by DWQ into evidence as an exhibit, failed to read them into the record, and failed to file them with the trial court, making it improper for the trial court to have

considered them.[4] The declarants' answers to direct and cross-questions also cannot be found anywhere in the record from trial. So, it was not proper for the trial court to consider the witness declarations.

Nonetheless, the trial did consider the declarations in making its findings. *See* CR285-87 at FF14-19.

B. No Evidence Supports the Trial Court's Findings 14-19 & 73.

The trial court found that 2,600 lawful voters left a polling place because of ballot paper shortages and estimated that 250-850 did not vote elsewhere. *See* CR285-87 at FF14-19; CR302 at FF73. Lunceford argues on appeal that this estimate is not supported by any legally or factually sufficient evidence and the trial court abused its discretion in making such findings. *See* Appellant's Brief at 34, 52-53. Craft agrees.

The trial court's findings are improper because they are based on layered assumptions that completely lack evidence:

(1) There is no evidence that any of the 2,600 potential voters were "lawful voters." Their eligibility, registration status, residence, citizenship, age, *etc*., are completely unknown.

(2) There is no evidence—or certainly not clear and convincing evidence—that the potential voters left because of ballot paper issues as opposed to any other reasons.

[4] Lunceford's brief inserts a chart with the declarants' names and number of voters they observed as "turned away," but it was never offered or admitted into evidence. *See* Appellant's Brief at 33; CR85 (Ex. 30).

(3) There is no evidence that any of those potential voters would (or would not) have voted in the Contested Race.

(4) There is no evidence that any of those potential voters were unable to vote elsewhere or did not vote at a different polling location after leaving.

Lunceford did not present a single witness to testify that they were prevented from voting because of ballot paper or other issues. Thus, there is no sufficient evidence of eligible voters being prevented from voting. *See Honts v. Shaw*, 975 S.W.2d 816, 823 (Tex. App.—Austin 1998, no pet.) (finding insufficient evidence tending to show that eligible voters were prevented from voting where no witness testified that they were prevented from voting); *cf.*, *McCurry v. Lewis*, 259 S.W.3d 369, 373-74 (Tex. App.—Amarillo 2008, no pet.) (where seven "voter-witnesses" testified that they were eligible but prevented from voting in the contested race).

This Court has previously held that observations of "turned away voters," without more, is legally insufficient evidence that those individuals were prevented from voting. *See Price v. Lewis*, 45 S.W.3d 215, 220 (Tex. App.—Houston [1st Dist.] 2001, no pet.). There, several witnesses working at polling places testified that 41 voters were turned away on election day, but none of the unknown potential voters testified and it was unknown whether they were ultimately prevented from voting. *Id*. at 219-20. The Court held the contestant therefore failed to meet her burden because there was no clear and convincing evidence showing that the unknown voters were turned away or left without voting. *Id*. at 220-21.

Here, there is no competent evidence showing that the 2,600 unknown persons were unable to vote elsewhere. The Parties agree that "[n]owhere 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." *See* Appellant's Brief at 34. "What happened after those voters left is utter speculation . . . ." *Id*. at 53. "That evidence simply does not exist." *Id*. at 52. Lunceford's own witness, Russell Long, admitted that it is "speculation" as to whether those voters cast their ballot elsewhere. RR7 at 81:7-13. Thus, the number of potential voters who left polling locations is immaterial.

Although the declarations were not formally introduced into evidence for the factfinder's consideration, there is no dispute as to what they stated. The Parties agree that it was not reasonable for the trial court to infer from the declarations that the unknown individuals who were observed leaving polling stations did or did not go elsewhere to vote. *See* Appellant's Brief at 34, 52-53. It is undisputed that the declarations did not include any personal knowledge by the declarants as to whether individuals observed leaving went elsewhere to vote. *Id*. at 34, 52-53. So, the Court may accept as true that the declarations did not include any such personal knowledge.

Craft and Lunceford agree that the trial court's estimate of 250-850 voters being unable to vote was "manufactured out of whole cloth" and "not one shred of

evidence" supports that finding. *See* Appellant's Brief at 34, 53. The trial court stated in its finding that the witnesses answering the DWQs did not know whether the people observed leaving went to vote elsewhere. *See* CR285 at FF14. The trial court further declared that its estimate was only based on an "inference" derived from "common experience." CR286 at FF18. The trial court's inference was unreasonable, arbitrary, and based on speculation, meaning its findings are not based on legally sufficient evidence. *See Serv. Corp. Int'l v. Guerra*, 348 S.W.3d 221, 229 (Tex. 2011) ("[F]indings based on evidence that allows for no more than speculation—a guess—are based on legally insufficient evidence.").

The trial court found, based on written statements alone, that the poll workers who observed voters leaving were "credible." *See* FF14. But the trial court cannot rely on credibility to circumvent admissibility requirements. Even if a witness speculates credibly, it is still speculation and therefore inadmissible.

The trial court's findings point to witness testimony estimating the number of voters who left and guessing that some voters "likely did not cast a vote" elsewhere. *See, e.g.*, CR286 at FF16. Texas courts have held that this kind of circumstantial evidence cannot meet the clear and convincing standard.

For example, in *O'Caña*, the contestant argued that ballot harvesting was proven in part by a witness who testified they saw an election campaign worker carrying a "big" bag of ballots, estimated at 200 ballots. *See O'Caña v. Salinas*, No.

13-18-00563-CV, 2019 WL 1414021, at *2 (Tex. App.—Corpus Christi–Edinburg Mar. 29, 2019, pet. denied). The court held that this estimate constituted a "guess," and even when combined with the other witness's testimony and other circumstantial evidence, the guess did not reach the level of clear and convincing evidence. *Id*. at *11. The court also ignored the testimony of an expert witness that 48 voters were "likely" bribed because they cast ballots around the same time as five voters who were bribed. *Id*. at *9. Such "testimony regarding the 'very likely' quantity of additional bribed votes does not meet the exacting standard of 'clear and convincing.' " *Id*. The testimony was "an opinion based on an 'assumption.' " *Id*. Accordingly, his opinion was "unsupported by any factual basis or underlying reasoning" and such "conclusory testimony is not probative." *Id*. When that same witness offered opinions based on circumstantial evidence and "several layered inferences and assumptions," the court held it was not probative. *Id*. at *10.

Likewise, here, the trial court's findings are based on conclusory testimony, layered inferences and assumptions, and speculation. No reasonable factfinder could have formed a firm belief or conviction that 850 people were prevented from voting.

The Parties agree that the trial court erred by considering 250-850 votes among the "total affected votes." *See* CR302 at FF73. So, those 850 votes should not be counted. By subtracting out 850 votes from the trial court's finding of "total

votes affected," the number of remaining "illegal" votes is 2,041, which is far below the margin of victory.

The Court should hold that the trial court erred in finding that 850 voters were prevented from voting due to illegal conduct and mistake. The Court should therefore affirm the trial court's ultimate finding that the true outcome of the election was a victory for Craft.

C. The Court Cannot Assume All 2,600 Potential Voters Were Prevented from Voting

Although Lunceford agrees that what happened after those 2,600 potential voters left polling locations is "utter speculation," she still asks the Court to assume that all 2,600 were unable to vote elsewhere because proving otherwise would supposedly be "both impossible and impractical." *See* Appellant's Brief at 30. In other words, Lunceford agrees that there is no evidence to support an alleged fact, but because it would be difficult to prove by clear and convincing evidence, the fact must be taken as true. *See id*. at 70. This fallacious argument must fail.

The court cannot assume evidence to overturn an election because doing so would reverse the burden of proof. The Court cannot assume that all 2,600 potential voters who left were unable to vote. And the Court cannot assume the opposite—that all 2,600 voted elsewhere. Rather, the number of people who were seen arriving at a polling location and then were observed leaving that polling location, without more, is simply immaterial. It is not probative of whether or not they were prevented

from voting. *See Service Corp. Intern.*, 348 S.W.3d at 230 (applying the "equal inference rule," circumstantial evidence is legally insufficient if two equivalently consistent facts can be inferred from the evidence).

Lunceford relies on section 221.012(b) of the Election Code to argue "it was not necessary for Contestant to prove whether these turned away voters cast a ballot in the Contested Election" because "it was impossible and impractical" to prove who they were and "whether they ultimately voted elsewhere." Appellant's Brief at 68-70. Nonsense.

The Election Code does not allow a contestant to forego evidence merely by alleging that it's impossible to gather such evidence. To void an election, contestants "must allege and prove [1] particularized material irregularities in the conduct of an election" and, separately, "[2] that the irregularities rendered impossible a determination of the majority of the voters' true will." *Guerra v. Garza*, 865 S.W.2d 573 (Tex. App.—Corpus Christi–Edinburg 1993, writ dism'd w.o.j.). Lunceford's argument dispenses with the first requirement for her to prove by clear and convincing evidence the existence of particularized material irregularities. Instead, she conflates the term "impossibility" when applied to the determination of voter's true will with "impossibility" in proving the alleged irregularities. But the alleged material irregularities must be *based on the admissible evidence*. The "impossibility" determination has nothing to do with Lunceford's burden of proof; it has to do with

whether the outcome of the election is *determinable* based on proper evidence of illegal votes. *See* TEX. ELEC. CODE § 221.012(b).

Furthermore, the Court in *Green* rejected Lunceford's argument by holding that section 221.012(b) "is not a tool to be utilized to void the election results of a close election." *Green v. Reyes*, 836 S.W.2d 203, 210 (Tex. App.—Houston [14th Dist.] 1992, no writ). Rather, it "only 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." *Id*. Thus, the consideration of unascertainable votes under section 221.012(b) only applies to votes already proven to be illegal, not to speculative potential votes that may or may not have been cast.

Lunceford also relies on Texas case law holding that it may be "impracticable or even impossible to determine *for whom* an illegal vote was cast" and the "election code does not require such an inquiry" *See Gonzalez v. Villarreal*, 251 S.W.3d 763 (Tex. App.—Corpus Christi–Edinburg 2008, pet. dism'd) (emphasis added). But that holding relates only to the determination of which candidate an illegal vote was cast for; it does not relieve Lunceford from meeting her burden to adduce clear and convincing evidence of the illegal vote.

Finally, even if Lunceford could argue impossibility or impracticality, her argument still fails because she did not attempt to present a single potential voter to testify that they were unable to vote because of ballot paper issues, even though it

would have been possible. *See* RR9 at 38:23-39:10 (Craft's expert, Rebecca "Beth" Stevens, explaining how it was possible to obtain affidavits from people at polling locations). Instead, Lunceford produced evidence of the opposite. One of the witnesses who testified by DWQ declared that he was one of the "turned away" potential voters. *See* CR247 (the Final Judgment described his declaration). He went to three different polling locations to vote and left each of them due to long lines. *Id*. But, then he went to a fourth location where he successfully voted. *Id*. So, Lunceford's own evidence provided a specific example of (1) a voter who got in line at multiple polling locations, left each of them, and still successfully voted; and (2) someone who may have been counted three separate times by observing poll workers as a "turned away" potential voter, even though his vote was ultimately counted. This testimony shows exactly why the declarations are unreliable. It also shows that it was not impossible for her to obtain testimony from any of the "turned away" voters.

For these reasons, Lunceford failed to meet her heavy burden to present clear and convincing evidence that any number of voters were eligible to vote, intended to vote in the Contested Race, and were unable to vote because of ballot paper shortages.

The Court should hold the evidence is not legally or factually sufficient to support the trial court's Findings of Fact 14-21 and 73. The effect is that the court

cannot consider, when determining the true outcome of the election, any of the 2,600 voters who were supposedly observed leaving a polling place on election day.

III. The 411 Voters Who Left Polling Places for *Non*-Ballot Paper Reasons are Immaterial.

Lunceford contends 411 voters were turned away for reasons unrelated to ballot paper shortages (*e.g.*, machine malfunctions, inability to reach the EAO, and lack of equipment). *See* Appellant's Brief at 16. Lunceford wrongly complains on appeal that the trial court "ignored this subject altogether in its decision." *Id*. The trial court addressed the subject matter when it stated, "[t]hese 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." CR286 at FF17.

The trial court correctly dismissed this claim because there was no nexus between the cause of long lines and the conduct or decisions of an election official. *See* TEX. ELEC. CODE § 221.003. Unlike with the ballot paper issues—which the trial court (erroneously) concluded were a result of the EAO's "mistake" and "illegal conduct" (CR287 at CL4-5)—the court found no mistake or illegal conduct related to non-ballot paper delays at polling locations. Thus, there could be no Election Code violation and those 411 potential votes cannot be counted in contesting the election.

Additionally, the evidence of those 411 potential voters suffers from all of the same flaws as the 2,600 potential voters that supposedly left for ballot paper reasons.

There is no evidence that those 411 potential voters (1) were eligible voters, (2) that they intended to vote in the Contested Race, or (3) that they were unable to vote at a different polling location.

The trial court correctly rejected this claim and its finding should be affirmed.

IV. The Trial Court Properly Found Insufficient Evidence to Prove that 1,995 Voters Were on The Suspense List Prior to Voting in the General Election.

The trial court properly found that Lunceford's contention regarding 1,995 voters on the "suspense list" was not proved with clear and convincing evidence. CR300 at FF67. The trial court's finding should be affirmed for several reasons.

A. Lunceford Presented No Evidence That These Voters Were Placed on the Suspense List *Prior* to Voting on Election Day.

Lunceford failed to present any evidence as to when the voters at issue were placed on the suspense list. Lunceford's expert, Steve Carlin, did not consider the timing. RR6 at 48:16-17, 49:19-21. But a voter who was added to the suspense list *after* Election Day did not cast an illegal vote. RR8 at 234:9-235:2. And it was possible that all 1,995 voters on the suspense list were placed on the suspense list at some point after Election Day.

While this may seem improbable, that is exactly what happened with Lunceford's challenge to the voters on the cancelled registration list. Carlin admitted that he did not verify his data regarding 2,970 voters listed as having cancelled registrations before he swore that all of those votes were illegal. RR5 at 284:1-22.

Lunceford later withdrew 2,965 of those from the contest because Carlin was wrong; those voters were placed on the cancelled registration list after Election Day. *See* Appellant's Brief at 41.

Likewise, Carlin swore that 1,995 people voted in the election with a suspense status, but he admitted that he did nothing to verify the date that voters were suspended at the time they voted. RR5 286:3-18, 288:16-25.

Carlin based his expert opinion on the assumption that the registration status had been suspended prior to the General Election. RR5 at 289:9-16, 290:10-17. But he did nothing to verify the truth of that assumption. *See* RR5 286:3-18, 288:16-25. Lunceford presented no other evidence as to when the challenged voters were placed on the suspense list. *See* RR8 at 234:2-8. Like in *Woods*, there is no evidence from any of the registered voters, no evidence that they remained suspended on the date of the election, and no evidence they actually voted. *See Woods v. Legg*, 363 S.W.3d 710, 716 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

For these reasons, the trial court properly found a lack of sufficient evidence for this claim.

B. Carlin Failed to Properly Verify That the Voters on the Suspense List Lacked SORs.

Additionally, Carlin's methodology was fundamentally flawed because he failed to use the Voter Unique Identifier number ("VUID")[5] to match the SORs with all challenged names on the suspense list. RR6 at 103:1-104:9, 106:4-9. But Carlin admitted that the *only* way to reliably find if any of those on the suspense list completed an SOR would be to match the VUID. RR6 at 105:8-14; *cf.*, *Green*, 836 S.W.2d at 204 (where list of challenged votes was compiled by an accounting firm using detailed comparison of names, registration numbers and precinct numbers). Lunceford presented no evidence that the challenged voters were cross-checked for SORs using VUIDs.

Also, Carlin admitted that his data regarding the suspense list came from TrueNCOA. RR6 at 48:8-10, 49:4-7 ("I am not the authoritative person. . . . The NCOA is telling us this data."). That data was excluded from evidence, so any conclusions drawn from it should also be excluded as lacking foundation. *See Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997).

The trial court properly ruled that the evidence submitted by Lunceford could not meet the exacting standard of the clear and convincing burden of proof.

[5] *See* RR 5 at 149:11-12 (defining VUID).

C. Carlin Failed to Rule Out That the Suspense List Voters Voted with Provisional Ballots Instead of SORs.

Carlin testified he was 100% certain that a person on the suspense list must have completed an SOR to legally vote. RR6 at 114:12-19. Carlin was wrong. Carlin was not aware that a person on the suspense list could still vote legally using a provisional ballot. RR6 at 115:3-6. "[A] voter on the suspense list might cast a provisional ballot for the reason other than the fact they are on the suspense list and that would not give us an SOR. It would give us a provisional ballot." RR8 at 237:4-7. So, the election contestant must cross-check whether the suspense list voters with no SOR voted provisionally before counting their vote as illegal. RR8 at 238:1-11. Carlin's methodology was critically flawed because he never considered provisional ballots.

D. Lunceford Failed to Determine How Many Voters Cured Their Suspense Status.

Even if a voter is on the suspense list, that voter is given an opportunity to cure their status. RR6 at 53:20-54:6. Lunceford presented no evidence as to whether the challenged voters cured their suspense status.

E. Lunceford Failed to Account for Mistake.

Lunceford failed to rule out that the voters were mistakenly placed on the suspense list. *See* RR8 at 236:9-237:3. The Election Code contemplates such a scenario. *See* TEX. ELEC. CODE § 14.002 & § 63.0051. When that happens, a voter

may be taken off the suspense list or the voter might cast a provisional ballot. Thus, the fact that a suspense list voter did not complete an SOR is not, on its own, reason to count the vote illegal. Lunceford presented no evidence ruling out the possibility that any of the 1,995 challenged voters were mistakenly placed on the suspense list.

F. Lunceford Failed to Prove Any Suspense List Voters Cast a Ballot in the Contested Race

Finally, Lunceford presented no legally or factually sufficient evidence that 1,995 suspense votes were illegally cast and counted in the General Election or in the Contested Race. The record lacks any evidence of whether the suspense list voters cast a ballot or whether they voted for either Lunceford or Craft. Thus, no evidence exists that their votes materially affected the Contested Race.

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For each of the foregoing reasons, the trial court correctly found Lunceford's contention regarding the 1,995 suspense list voters was not proved with clear and convincing evidence. CR300 at FF 67. The trial court's finding should be affirmed.

V. Lunceford Waived Her Complaints Regarding the Undervote Calculation and, Regardless, They Have No Material Effect.

In an effort to increase the total number of "affected votes" by just 13 votes, Lunceford has complained on appeal about the trial court's method for calculating an undervote percentage. *See* Appellant's Brief at 58. Lunceford argues, "the Trial Court erred in determining that the margin necessary to demonstrate a material

impact on the Contested Election is 2,849." *Id*. at 46 & 59. Lunceford argument fails for three reasons.

First, Lunceford waived this complaint because this is the exact calculation she requested at trial. She repeatedly asked the Court to find that "the margin necessary to demonstrate a material impact on the Contested Election is 2,849." *See* Appx. C to Appellant's Brief at 40-41; *see also* RR8 at 33:18-24 ("If you gross up 2,743 by 106 then the mountain we have to climb to get a new election is 2,849"); RR10 at 31:9-20 (making the same argument in closing statement).

Second, the trial court could not subtract the 325 votes because the court found they were a result of *mistake*, not *illegal* votes. *See* CR299 at FF63. The Election Code permits subtraction of votes only when they were illegal. *See* TEX. ELEC. CODE § 221.011(a).

Third, even if the newly suggested calculation were applied, there is no material effect because it results in just a 13-vote difference. The trial court found 1,716 illegal votes (not including the 325 ascertained net votes for Craft) and up to 850 votes not counted because of mistake and illegal conduct. That totals in 2,566 unascertained "affected votes." Applying the trial court's undervote percentage, the result is 2,467 (96.14% of 2,566). But then adding 325 net votes for Craft is 2,792 "total affected votes," which is only 13 votes greater than the trial court's finding of 2,779 affected votes. CR302 at FF72. So, the trial court's finding that the total

affected votes only "*slightly*" exceeded Craft's margin of victory remains true even under Lunceford's new calculation.CR303 at FF74. Lunceford's complaint therefore has no material effect.

VI. The Trial Court Did Not Abuse Discretion in Declaring Craft's Victory as the True Outcome

If the Court affirms all of the trial court's findings, the result should remain the same. Even if there were 2,779 "total affected votes," which is 36 votes more than the margin of victory, the trial court had discretion to ascertain that the victory by Craft was the true outcome. *See Woods*, 363 S.W.3d at 716 ("The statute, however, expressly leaves the discretion to make such a declaration to the trial court.").

Lunceford argues that 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." *See* Appellant's Brief at 63. The court could only void the election if it could not ascertain the true outcome of the election. *See* TEX. ELEC. CODE § 221.012(b). The trial court correctly concluded that, even with 2,779 votes being considered as having potentially affected the election, this was not sufficient to place the election into doubt. *See* CR303. The trial court complied with the Election Code's requirement that if it can ascertain the true outcome, it shall declare the outcome. *See* TEX. ELEC. CODE § 221.012(a). The trial court's ultimate decision should not be disturbed on appeal. Craft's victory should be affirmed.

ARGUMENTS FOR CROSS-APPEAL

Craft is appealing, in part, a favorable judgment because the trial court erred with respect to certain findings, conclusions, and evidentiary rulings in Lunceford's favor. Though Craft prays that the trial court judgment be affirmed, and her election victory preserved, Craft cross-appeals to ensure, out of an abundance of caution, there is no basis for reversal or remand, even if Lunceford were to prevail on any of her appellate points.

Further, the Court should reverse the erroneous portions of the judgment because the improper findings and conclusions may have statewide impacts on elections. The trial court's errors, if not corrected by this Court, might be used improperly by contestants in the future to challenge fair elections. Indeed, Lunceford has already demonstrated a willingness to prop up trial court findings and conclusions as though they are precedent. *See* Appellant's Brief at 68 (relying on a trial court's case-specific findings).

Craft therefore asks the Court to affirm the judgment finding the election outcome in Craft's favor, but to reverse the erroneous findings and conclusions and modify the judgment to reduce the number of "total affected votes."

I. The Trial Court Erred in Permitting Lunceford's Witnesses to Provide Expert Testimony.

Lunceford presented Russell Long, Steve Carlin, William Ely, and Christina Adkins as expert witnesses. Prior to trial, Craft filed motions to exclude the proposed

expert testimony. SCR25-431. The trial court ruled that it would "deal with objections to the testimony of each witness as it is offered at trial." SCR445. The trial court permitted them to testify as experts. The trial court should have excluded the expert opinions.

A. Legal Requirements for Expert Testimony.

Before a witness may testify as an expert, the offering party must prove the witness is qualified. *United Blood Services v. Longoria*, 938 S.W.2d 29, 31 (Tex. 1997); TEX. R. EVID. 702.

Expert testimony must also be based on a reliable factual foundation. *Houston Unltd., Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 832–33 (Tex. 2014). If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. *Havner*, 953 S.W.2d at 714.

Finally, the expert's opinion must be relevant. *See* TEX. R. EVID. 702. To be relevant, the proposed testimony must be sufficiently tied to the facts that it will aid the factfinder in resolving a factual dispute. *See E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).

B. Russell Long Was Not Qualified.

Lunceford relied on the testimony of Russell Long to support her arguments that it was possible to anticipate turnout at specific polling locations in allocating

ballot paper supplies. *See* Appellant's Brief at 26; RR7 at 47:10-17. Long was not qualified to provide expert opinions on this subject.

Long's professional background was in construction and project management. RR6 at 178:19-179:11. Long admitted he is not a political scientist, had no professional experience in administrating elections, and he was not an expert in election-related matters, election law, or allocation of election supplies. RR6 at 218:19-219:8; RR7 at 51:4-6, 53:14-55:5, 113:23-114:4. Prior to the trial in this case, Long had never before been designated as an expert of any kind, never testified as an expert, and never accepted by a court as an expert. RR7 at 114:9-23.

Long admitted during trial that he was not qualified enough to opine whether there was precinct-based polling in 2018 unlike the countywide polling in 2022. RR7 at 89:22-24. He further admitted that he was "not qualified" to opine as an "expert in elections, how elections are conducted, how districting is done, what effect redistricting has on voter outturn and things of that nature." RR7 at 90:1-6. But Lunceford relies on Long for opinions on those exact topics. *See* Appellant's Brief at 26.

Long was not qualified to provide any relevant expert opinions in this case and the trial court erred in allowing him to cloak his opinions with the authority of an expert witness.

C. Russell Long's Opinions Were Neither Reliable nor Relevant.

Lunceford relied on Long to support her argument that there were ballot paper shortages disproportionately affecting neighborhoods with likely Republican voters. *See* Appellant's Brief at 28-29. This testimony lacked foundation because it was based entirely on data that was excluded from evidence by the trial court. RR7 at 46:3-5 (excluding the "Heat Map"); *see Havner*, 953 S.W.2d at 714.

What's more, Long applied incoherent and unreliable methodology in determining the alleged disproportionate effect because he failed to account for the margin of Democrats in the areas at issue, failed to account for the total population in those areas, the underlying data was based on speculation and hearsay, the opinion was purely subjective, and he failed to calculate a rate of error until the night before his testimony at trial. *See* RR6 at 223:6-224:1; RR7 at 29:21-30:8, 31:6-19, 43:3-6, 57:23-58:25, 59:10-17, 62:17-63:17, 64:1-65:5; 65:22-66:23, 67:7-20, 68:11-17; 72:13-16, 81:14-25, 115: 19-21, 116:7-117:6.

The trial court should have excluded Long's expert testimony, and Lunceford certainly cannot rely on it as a basis for reversing judgment.

D. Steve Carlin Was Not Qualified.

Lunceford presented Steve Carlin as an expert witness to support the data related to suspense voters, SORs, and RIDs.

Carlin is not qualified as an election law expert or any other type of expert relevant to this case. Carlin's professional background is as a consultant on business strategies, systems implementation, and information technology. RR5 at 73:24-74:9. Lunceford presented no evidence of Carlin possessing qualifications relevant to political science, election law, or the administration of elections. There was no evidence that Carlin had previously been accepted by any court as an expert or that his opinions, methodology, or theories had been peer-reviewed or relied on outside of this litigation.

The trial court erred in overruling Craft's repeated objections to Carlin's testimony and denied Craft's motion to exclude his expert testimony. *See* SCR304-431; RR5 at 72:16-73:7, 81:3-9, 127:9-128:3, 140:1-6, 155:11-156:23, 267:4-270:3.

E. Carlin's Opinions Were Not Reliable or Relevant.

Carlin testified at trial that there were 1,116 SORs that he found signed by voters who supposedly resided out-of-county. Carlin testified that 966 of these were the SORs that related to individuals on the Roster. RR5 at 150:7-12; RR6 at 87:1-6. The trial court issued Findings of Fact number 23-24 based on Carlin's testimony. CR289.

The trial court properly sustained Craft's objections to the TrueNCOA data (Exhibits 9B and 9C) that Carlin relied upon, and the court excluded that evidence

on relevance and hearsay grounds. RR5 at 167:19-21, 173:16-174:23; RR6 at 81:17. Lunceford did not challenge that ruling. *See* Appellant's Brief at 42.

Cross-examination of Carlin at trial revealed several problems with his methodology and conclusions. *See* Section III.(B-C), below. Carlin admitted his data was sometimes "wrong," it was "sloppy," and he agreed it was unreliable. RR5 at 230:1-6, 260:21-261:5. Carlin based numerous opinions on data he obtained from TrueNCOA, which was excluded from evidence. Carlin also failed to account for other possible explanations that would make the challenged votes legal. *See* RR5 at 48:18-49:6, 278:9-12; RR6 at 39:14-41:9, 41:15-44:15.

Additionally, Carlin's opinions regarding Lunceford's challenge to 1,995 suspense list voters were not reliable the reasons explained in Section IV, above.

Why were Carlin's expert opinions so flawed? Carlin perhaps provided an answer when he admitted his bias. He agreed he did not want Craft to win the election and that the purpose of his testimony was to "advocate through [his] partisan lens on behalf of Erin Lunceford to remove Tami Craft at least through a new election." RR5 at 48:3-6. Carlin agreed his methodology was to "throw big numbers and have somebody come prove [him] wrong." RR5 at 290:2-7. That methodology is unsound, reverses the burden of proof, and is an improper way to form expert opinions.

Based on the foregoing, Carlin's data is not reliable, not helpful, and not relevant, so it cannot form the basis of the trial court's findings. The trial court erred in failing to exclude his opinion testimony.

F. Adkins' Opinions Were Purely Legal and Not Based on Any Review of the Facts.

No witness, not even an expert, is authorized to offer an opinion on a pure question of law. *Mega Child Care, Inc. v. Tex. Dep't of Protective & Regulatory Services*, 29 S.W.3d 303, 309 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Birchfield v. Texarkana Memorial Hosp.,* 747 S.W.2d 361, 365 (Tex. 1987). An expert witness may offer an opinion on a mixed question of law and fact. *Id*.

Christina Adkins, Lunceford's election law expert, admitted that *none* of her opinions at trial were based on a review of the facts in this case. RR7 at 183:13-185:15. Adkins admitted she did not review any contest-specific materials, pleadings, depositions, or discovery, she did not attend or watch the trial, she did not have any knowledge of specific facts in the case, and she was not offering any case-specific opinions. RR7 at 183:13-185:15. Her opinions were offered on pure questions of law and hypotheticals unrelated to the facts of the case. Adkins did not relate any of her opinions to the specific facts of the case. She couldn't because she didn't know any of the facts.[6]

[6] In contrast, Stevens reviewed the discovery, pleadings, and attended trial. *See* RR8 at 160:22-161:24.

Adkins formed her opinion solely for the purposes of litigation, lending further to its unreliability. *See Robinson*, 923 S.W.2d at 559. She did not form this opinion as part of her duties at the Secretary of State, she did not confer with any counties regarding their interpretations prior to offering her opinion,[7] and she did not present any evidence that she had formed this opinion prior to the litigation.

Adkins's opinions consisted of pure legal opinions, such as the meaning of certain terms in TEX. ELEC. CODE § 51.005 and her personal interpretation of the statute. Matters of statutory construction, however, are questions of law for the court to decide rather than issues of fact. *Johnson v. City of Fort Worth,* 774 S.W.2d 653, 655–56 (Tex.1989). Texas courts have held that testimony on statutory construction, like Adkins' here, is inadmissible. *See Fleming Foods of Tex., Inc. v. Sharp*, 951 S.W.2d 278, 280 (Tex. App.—Austin 1997), reh'g granted, order withdrawn (Sept. 10, 1998), rev'd sub nom. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278 (Tex. 1999).

Further, Adkins admitted that she had no support for her interpretation of section 51.005. She did no legislative history research and she could not point to any Secretary of State written guidance underpinning her analysis. RR7 at 197:25-198:24. She agreed that the court just has to take her word for its truth. RR7 at 217:2-

[7] Unlike Stevens, who conferred with election administrators at Tarrant and Williamson counties, which also participate in the Countywide Polling Place Program and do not interpret section 51.005 as applying. RR8 at 208:10-209:11.

9. Her opinion is therefore the very definition of *ipse dixit*. *See Havner*, 953 S.W.2d at 712. The trial court erred in overruling Craft's repeated objections to Adkins' legal opinion testimony. *See, e.g.*, RR7 at 129:14-17, 139:14-16, 142:15-144:18, 146:2-149:23, 154:21-24, 156:2-159:22.

Additionally, if an expert testifies as to the ultimate issues before court, then the opinion must be helpful; thus, the offering party must meet the threshold burden of showing that the expert possessed greater knowledge, skill, experience, and education than the trial court. *See* TEX. R. EVID. 702; TEX. R. EVID. 704. This is an "extremely difficult burden to meet" when the expertise at issue is legal expertise because "the trial judge is presumed to have specialized competency in all aspects of the law." *Holden v. Weidenfeller*, 929 S.W.2d 124, 134 (Tex. App.—San Antonio 1996, writ denied).

Adkins offered pure legal opinions on ultimate issues, such as whether section 51.005 of the Election Code applies to counties with countywide polling. Lunceford failed to meet her burden to prove that Adkins had a greater knowledge, skill, experience, and education than the trial court. Adkins' opinions on the ultimate issues did not involve "scientific or technical" subjects. *Id*. Rather, "the trial court, a legal expert itself, was perfectly capable of applying the law to the facts and reaching a conclusion without benefit of expert testimony from another attorney."

Id. The trial court erred in failing to exclude Adkins' purely legal testimony on ultimate issues in the case.

Alternatively, if the Court permits Adkins' opinions on ultimate issues to be considered, then it should consider her concession on the ultimate issue at hand. Adkins conceded that she had no evidence or opinion that any voting irregularities occurred in the Contested Race and no opinion or evidence that any voting irregularities materially affected the Contested Race. RR7 at 186:9-17. Thus, Lunceford's only election law expert admitted that Lunceford's election contest should fail.

II. TEX. ELEC. CODE § 51.005 Does Not Apply to Countywide Elections, so the Amount of Ballot Paper Supplied in the General Election was Immaterial.

The trial court's findings that 250-850 people were unable to vote because of ballot paper shortages is not relevant unless it is directly related to a mistake or illegal conduct by an election official in preventing eligible voters from voting. *See* TEX. ELEC. CODE § 221.003. The trial court therefore tied the ballot paper shortages to a violation of section 51.005 of the Election Code. CR287 at CL4-5.

For the following reasons, section 51.005 did not apply to this election and, therefore, was not violated.

A. The Plain Language of Section 51.005 Does Not Apply it to Countywide Polling.

Questions of statutory construction are reviewed *de novo*. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). When construing a statute, the plain meaning of the words used must first be considered. *Id*. And where statutory text is clear, it is determinative of legislative intent, unless it would lead to absurd results. *Id*. A court should use any definitions provided by the statute and assign undefined terms their ordinary meaning, unless a different, more precise definition is apparent the context of the statute. *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). Courts presume the legislature intends the "entire statute to be effective," "a just and reasonable result is intended," and "a result feasible of execution is intended." TEX. GOV'T CODE § 311.021(2)-(4); *Helena Chemical Co. v. Wilkins,* 47 S.W.3d 486, 493 (Tex. 2001); *see also* TEX. ELEC. CODE § 1.003(a) (applying the Code Construction Act). Courts should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone. *Helena,* 47 S.W.3d at 493.

Nothing in the text of section 51.005 indicates that counties opting into the Countywide Polling Place Program must follow its terms, and section 51.005 does not explain *how* it would apply to countywide polling places. *See* TEX. ELEC. CODE

§ 43.007. It only references precincts, which are not used in countywide polling. The text of the section 51.005 states:

> 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***.

TEX. ELEC. CODE § 51.005 (emphasis added). This section also is not referenced in the later-enacted section 43.007, which sets forth requirements for the Countywide Polling Place Program.

B. The SOS Offers No Official Guidance to Clear Up Any Ambiguity.

If the plain language of a statute is ambiguous, courts then defer to the interpretation of the statute made by the administrative agency charged with its enforcement. *Combs*, 340 S.W.3d at 438. Here, that would be the Texas Secretary of State. The SOS has not issued any official guidance as to whether section 51.005 applies to countywide polling, or how it would be applied.

However, evidence at trial established that the Secretary of State defines "election day precinct" as the "*area* served on election day by a single polling place." RR81 at 78 (emphasis added). For countywide polling, the "area served" by each polling location is the entire county. *See* RR7 at 210:4-6. Applying that definition would mean each and every countywide polling location would have to procure a number of ballots equal to 125% of the voters in that "area served"—*i.e.*, the *entire*

county. That reading of the statute is not reasonable and cannot feasibly be executed. The statute therefore should not be construed as applying to countywide voting.

C. The Trial Court Wrongly Interpreted Legislative Intent.

The trial court engaged in a textual analysis of the statute and (1) found that the statute applies to counties in the Countywide Polling Place Program, and (2) described the method by which such counties must substantially comply with the statute. *See* CR287 at CL5.

> **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.

The trial court's conclusion should be rejected.

1. *The statute requires following a precise formula for procuring supplies, not a rough estimate based on imprecise data.*

The trial court's conclusion misconstrues the statute as requiring election officials to "try" to make an "estimate" for procuring election supplies. The text of the statute does not call for endeavor to guess; rather, it sets out a precise formula for objectively determining the exact minimum amount of supplies that must be procured for each election precinct.

The statute mandates election officials to rely on objective data from a "recent corresponding election" in determining supply amounts. TEX. ELEC. CODE § 51.005(a). To apply the statutory formula, the election officials must be able to identify the precise number of voters who voted in a specific precinct in the prior election, the precise number of voters who were registered to vote in that precinct in the prior election, and the total number of current registered voters in that same precinct, which cannot be exceeded. *See id*. Then, if the minimum is not procured based on application of the formula, the statute has been violated.

But here, in applying the statute to countywide polling, the trial court construes the statute as requiring some subjective level of effort to estimate the amount of supplies that must be procured to meet an undefined minimum standard. That interpretation cannot be correct. This would require election officials to comply with a precise formula despite only possessing inherently imprecise data. The trial court would require officials to estimate supply needs for particular countywide polling places—which have no defined precinct boundaries and no maximum set number of registered voters—based on a percentage of past turnout at different precinct polling places with limited data particular to a restricted geographic area. The court's interpretation would not result in feasible execution of the statute.

Moreover, the trial court's interpretation is problematic because it rests on the rationale that the legislature intended the statute to be mandatory in some cases but

directory in others. The plain language of the statute is mandatory for precinct-based counties (the "authority . . . *shall* provide for each election precinct" supplies complying with the formula). *See* TEX. ELEC. CODE § 51.005(a). But for counties with countywide polling, the trial court says the EAO must only "try" to comply with the statute. CR287 at CL5. In other words, substantial compliance is acceptable. By interpreting the statute as allowing substantial compliance, the court is interpreting it as a directory statute. *See Reese*, 80 S.W.2d at 657 ("provisions deemed mandatory in nature permit no application of the substantial compliance rule"). It's unclear what rationale would allow the court to conclude that the legislature intended that the single sentence of 51.005(a) should be both mandatory and directory at the same time. The trial court's interpretation cannot be correct. The statute is either mandatory for counties with precinct-based voting and otherwise not applicable, or the statute was directory and failure to comply with it does not justify setting aside the election. *See Alvarez*, 844 S.W.2d at 243; *Honts*, 975 S.W.2d at 821-22.

No other provision in the Election Code states how much ballot paper to supply. *See* CR282 at CL3. There is no provision in the Election Code setting forth a ballot paper requirement in countywide elections. Election officials therefore have latitude in making determinations as to how to handle ballot paper in counties with

countywide polling, and mistakes in making those determinations are not Code violations.

The trial court takes issue with the fact that the EAO chose not to analyze how much ballot paper to supply at each particular polling place, and instead opted for a nearly uniform distribution. But the trial court's qualms do not make for a Code violation. Regardless of the effectiveness of the decision, neither section 51.005 nor any other provision was violated.

2. *The trial court conflates "precinct" with "area".*

The trial court's textual analysis relies on a false premise because it interprets "precinct" to mean "areas," more broadly. *See* CR282 at CL2, CR287 at CL5. This is not based on any SOS guidance, any case law, or any legislative history.

The trial court defines "areas" in two different ways. At first, the trial court says "areas of the county" are the "782 countywide polling locations." CR287 at CL5. Adkins offered a similar interpretation of the statute, arguing that "election precinct" in this statute means "election day polling place." RR7 at 140:6-8, 208:4-7, 208:17-20. But the polling places, themselves, cannot be an "area" or an "election precinct" because they are just the buildings where voting occurs. *See* TEX. ELEC. CODE § 41.031; RR8 at 202:3-5. Throughout the Election Code, the terms "polling place" and "election precinct" are used separately with distinct definitions. *See, e.g.*, TEX. ELEC. CODE § 51.008 (using the term "polling place," rather than "election

precinct"). In fact, the Code specifically differentiates the term "election precinct" from "election day polling place." *See* TEX. ELEC. CODE § 43.001 ("Each *election precinct* established for an election shall be served by *a single polling place* located within the boundary of the precinct."). So, if the legislature intended to say "polling place" instead of "election precinct" it would have done so.

In the next part of its interpretation, the trial court defines "areas of the county where people lived" as the "precincts." CR287 at CL5. This makes more sense than "polling locations" because a "precinct" is an area on a map with boundaries that includes a certain number of registered voters. *See* TEX. ELEC. CODE § 42.003; RR8 at 201:25-202:15. Even when precincts are consolidated or combined, the total number of registered voters for the new "election precinct" is still a known number. *See* TEX. ELEC. CODE § 42.0051. And the Code sets limits on the number of voters that may reside in "election precincts." *See* TEX. ELEC. CODE § 42.006 ("election precinct must contain at least 100 but not more than 5,000 registered voters"). So, in precinct-based voting, the total number of registered voters that could possibly go to the polling location is a known quantity, it is a limited quantity, and supplies can be allocated accordingly. But this still does not explain how to define the borders of "areas" for countywide polling locations, which are not tied to any precincts and are therefore undefined.

The number of voters that will show up at a single polling place in countywide elections is unknown because any voter in the county can vote at any countywide polling place. The trial court's interpretation does not solve the problem of defining the subject "area" for consideration of election supplies for each countywide polling location where there are no precincts. Without that clarity, the statute becomes vague and cannot be enforced uniformly in Texas, as different election officials may define the "area" related to countywide polling locations differently.

3. The election in 2018 was not a "recent corresponding election."

The trial court also erred because there is no evidentiary basis for its finding that 2018 was the "last comparable election." *See* CR287 at CL5. Prior to the General Election, Harris County underwent redistricting and re-precincting, which went into effect in early 2022. RR8 at 167:20-168:7, 217:2-21. There was no countywide polling in 2018. RR8 at 216:25. There was no general election with the new districts or new precincts prior to November 8, 2022. *See* RR8 at 218:6-14 Also, the use of hybrid machine and paper ballot voting was not instituted until 2021. RR8 at 214:2-17, 218:16-20. So, there was not a "recent corresponding election" that used ballot paper as used in the General Election. *See* TEX. ELEC. CODE § 51.005. It was therefore not possible to violate section 51.005.

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If section 51.005 did not apply, then there could be no Election Code violation, illegal conduct, or mistake in the EAO's decision not to follow section 51.005. *See* TEX. ELEC. CODE § 221.003. Thus, the number of potential voters (whether 250-850 or 2,600) who supposedly left the polling location without voting is immaterial.

III. The Evidence is Factually and Legally Insufficient to Support a Finding of 1,236 Illegal Votes from Out-of-County Residents.

The trial court found 966 illegal votes because they were supposedly cast by individuals residing outside of Harris County, and the court found 270 SORs were too incomplete to have been legally counted. *See* CR289 at FF23-24. These findings of 1,236 "illegal" votes were in error.

A. SORs, Alone, Are Insufficient to Prove Actual Residency Outside of Harris County.

The law requires Lunceford to prove that the SORs were completed by people whose *actual residence* was outside of Harris County. The face of the SOR, itself, cannot be relied upon as the sole evidence of residency. *See* RR9 at 102:1-9. The law requires Lunceford to conduct a deeper investigation to prove residence. And Lunceford's evidence at trial must overcome the *presumption* that election officials acted properly in accepting or rejecting the ballots of these registered voters. *See Reese*, 80 S.W.3d at 661.

The Election Code defines "residence" as "one's home and fixed place of habitation to which one intends to return after any temporary absence." TEX. ELEC.

CODE § 1.015(a). A person does not lose their residence by leaving their home to go to another place for temporary purposes only. *Id*. at 1.015(b). Whether a person is a resident depends on their surrounding circumstances and their present intention. *Woods,* 363 S.W.3d at 714. When a person's statements regarding residence are inconsistent with other evidence showing actual residence, "such statements are of *slight weight* and cannot establish residence in fact." *Id*. at 715 (emphasis added).

Lunceford failed to present any evidence of any challenged voter's actual residence outside of the SORs. *See* RR5 at 280:5-9. Lunceford failed to rule out temporary residences, failed to determine the intent of the voters, and failed to establish their surrounding circumstances. This is insufficient to overcome the presumption that the election officials acted properly.

The 966 SORs listed by Lunceford were challenged because the registered voter supposedly identified a separate residence address or mailing address located outside of Harris County. But every SOR also included a statement by the voter swearing under penalty of perjury that they *are* a resident of Harris County.

I understand that giving false information to procure a voter registration is perjury, and a crime under state and federal law. Conviction of this crime may result in imprisonment up to one year in jail, a fine up to $4,000, or both. Please read all three state-ments to affirm before signing. Entiendo que el dar información falsa para obtener una tarjeta de registro electoral constituye un delito de perjurio bajo las leyes estatales y federales. La condena por este delito puede resultar en encarcelamiento de hasta un año de cárcel, una multa de hasta $4,000, o ambas cosas. Por favor lea cada una de las tres declaraciones antes de firmar.

- I am a resident of this county and a U.S. citizen; and
- I have not been finally convicted of a felony, or if a felon, I have completed all of my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned; and
- I have not been determined by a final judgment of a court exercising probate jurisdiction to be totally mentally incapacitated or partially mentally incapacitated without the right to vote.

Defendants' Exhibit 40

RR79 at Ex. 40. The challenged SORs therefore contained conflicting statements. That means the SOR, by itself, is of "slight weight" in establishing proof of residency. *Woods,* 363 S.W.3d at 714; *see also* RR8 at 231:18-232:13 (Stevens' testimony).

The law required Lunceford to present clear and convincing evidence beyond the four corners of the SOR to prove residency for each challenged vote. Lunceford's own expert, Steve Carlin, agreed. *See* RR5 at 248:4-249:4 ("Q: Judge Peeples should go beyond this document [the SOR], shouldn't he? A: Yes."). Lunceford failed to meet this essential element of her claim because she failed to present evidence that would form a firm belief or conviction that these people actually resided outside Harris County. She failed to call a single voter to testify that they resided outside of Harris County. *Cf.*, *Green*, 836 S.W.2d at 204 (where the margin of victory in the contested election was 180 votes, 313 of the illegal voters testified at trial); *Alvarez*, 844 S.W.2d at 247-48 (where nine voters testified as to their residence); *Medrano*, 769 S.W.2d at 689 (where five voters testified at trial that they voted in the race at issue and that they resided outside the precinct boundaries). Lunceford's sole evidence of "illegal" out-of-county votes was the information contained in the four corners of the SORs. That evidence is legally and factually insufficient to support the trial court's finding of 966 illegal votes.

B. Evidentiary Problems with the 1,236 Challenged SORs.

Even if the Court were to accept the face of the SORs, alone, as evidence of actual residency, there were still significant problems with Lunceford's evidence.

Lunceford relied on Steve Carlin's testimony to challenge the SORs. By the end of trial, Carlin conceded that many of the challenged SORs were not out-of-county or could not be verified as out-of-county. RR5 at 216:18-24. Indeed, Carlin was shown over a dozen challenged addresses that were actually in Harris County. *See, e.g.,* RR5 at 218:21-220:19, 221:21-226:10, 228:19-229:17. And after being confronted with these numerous examples of inaccuracies, Carlin admitted that he was "wrong" on those because he failed to verify the data. *See* RR5 at 230:1-6, 231:1-15.

Nonetheless, the trial court found that *all* 966 challenged SORs showed that the voters resided outside of Harris County. *See* CR289 at FF23. This finding directly contradicts the evidence, as Carlin admitted the 966 number was inaccurate and he withdrew numerous SORs from Lunceford's challenge. No reasonable factfinder could form a firm belief or conviction that the 966 SORs correlated to 966 illegal votes.

Further, Lunceford's evidence lacked foundation. The trial court sustained Craft's objections to data obtained from third-party vendor, TrueNCOA, and it was excluded from evidence. RR5 at 167, 173:16-175:2; RR6 at 81. But Carlin admitted

that he relied on the excluded data to come up with the list of challenged SORs. RR5 at 214:21-216:3, 229:18-20, 236:7-19. The court erred in overruling Craft's objections to Carlin's testimony as being based on excluded evidence. *See* RR5 at 216:4-7; *Havner*, 953 S.W.2d at 714.

The trial court also found that 270 SORs were incomplete and should not have been counted. CR 289 at FF 24. Again, Carlin admitted that he could not tell the court that those were ineligible voters. RR5 at 246:7-10. He admitted substantial errors in his data, which resulted in him retracting *dozens* of challenged SORs. RR5 at 250:23-266:4, 271:12-273:22. Carlin eventually admitted that his work with respect to the incomplete SORs was "sloppy" and agreed that the court should not rely on his sloppy work. RR5 at 260:21-261:5.

C. There's No Evidence that the Challenged SORs Related to Votes Cast in the General Election.

Assuming *arguendo*, that Lunceford met the foregoing essential element and proved that all 966 registered voters completing these SORs were out-of-county residents, Lunceford still must prove that those SORs correlate to illegal votes cast and counted in the election. *See* RR9 at 102:1-9. Again, the four corners of the SORs, alone, do not prove that a person voted. An SOR ≠ a vote. Thus, using some other evidence aside from the SOR, Lunceford must prove that the person filling out the SOR then voted in the General Election.

To do so, Lunceford argued that the 966 challenged SORs were identified as people listed on the Roster. But that is insufficient. The Roster is not the list of voters; it is the list of people who checked in at a voting location. It does not account for fleeing voters. *See* RR9 at 102:10-20, 131:21-132:5. Lunceford was therefore required to obtain testimony from individual voters to confirm that they voted. *See* RR9 at 102:10-20.

Steve Carlin admitted he could not testify that the 966 people being challenged had voted in the General Election. RR5 at 226:16-21; RR6 at 92:14-23. Carlin admitted they did not contact a single voter to ask if they had voted in the election. RR6 at 92:19-93:11. He admitted they "could have asked" the voters—whose information is apparent from the face of the SOR—about their residence and obtained their testimony. *See* RR6 at 96:9-20. But Lunceford failed to present testimony from a single out-of-county voter, even though such task was "not impossible." RR6 at 98:22-99:3 (Carlin's testimony).

The trial court abused its discretion in assuming that all 1,236 SORs being challenged related to votes cast in the election.

D. There's No Evidence that the Challenged SORs Related to Votes Cast in the Contested Race.

Even if the trial court believed that Lunceford proved all the foregoing, Lunceford must further prove that the challenged votes were cast in the Contested Race. She failed to present any such evidence.

The evidence is therefore legally and factually deficient to prove that there were 1,236 illegal votes that had a material effect on the Contested Race.

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For all these reasons, the court's Findings of Fact 23-24 are not supported by legally or factually sufficient evidence. *See* CR 289. The Court should therefore reverse the trial court's findings related to these categories and exclude the 1,236 votes from consideration.

IV. The Evidence is Factually and Legally Insufficient to Support a Finding of 380 RIDs as Illegal Votes.

The trial court found that 380 of the votes tied to RIDs were illegal. CR296 at FF44; *see also* CR 301 at n. 22 (counting them among the total number of "illegal votes"). The evidence is legally and factually insufficient to support the trial court's finding.

A. Lunceford Never Pleaded that the RIDs Constituted Illegal Votes.

Lunceford never contended that the votes tied to improper RIDs were "illegal." On the contrary, Lunceford expressly argued that 532 RIDs constituted "mistakes." RR8 at 51:15-20 ("***We are not arguing the RIDs were illegal votes, Judge***. . . . What we're saying is it's a mistake."). Lunceford therefore waived any argument that these votes were illegal votes and she cannot sustain a favorable judgment based on those votes being found "illegal." *See Oil Field Haulers Ass'n v. R.R. Comm'n*, 381 S.W.2d 183, 191 (Tex. 1964) ("[t]hat a plaintiff may not sustain

a favorable judgment on an unpleaded cause of action, in the absence of trial by consent, is the general rule"). The trial court did not have the authority to include a finding of illegality in its judgment as to the RIDs, and the finding was not supported by any legally or factually sufficient evidence. *See* TEX. R. CIV. P. 301 (judgment shall conform to the pleadings); *RE/MAX of Tex., Inc. v. Katar Corp.*, 961 S.W.2d 324, 328 (Tex. App.—Houston [1st Dist.] 1997, no writ) (holding "the trial court did not have authority to include such a finding in its judgment" where the finding related to an affirmative defense that was never properly pleaded).

B. It is Undisputed that Incomplete RIDs Are Not Illegal Votes.

Even setting aside waiver, the evidence still was not legally or factually sufficient to support the trial court's finding. It was *undisputed* at trial that an incomplete RID, in and of itself, could not serve as the basis to disqualify the vote attached to that RID. Christina Adkins admitted that failure to fill out some information on a RID did not inform whether the voter failed to provide sufficient information. See RR7 at 229:5-230:5, 230:17-20, 231:18-20. Beth Stevens agreed. RR8 at 261:8-17, 264:17-265:22. Like with the SORs, Lunceford was required to present evidence from beyond the four corners of the RIDs. She didn't.

Furthermore, the trial court's finding ignores the presumption in place that the election judge working with the voter acted properly. *See Reese*, 80 S.W.3d at 661. Lunceford failed to overcome this presumption.

Lunceford also presented no evidence that the voters who completed the RIDs at issue voted in the General Election or in the Contested Race. Lunceford again failed to produce a single voter to testify that they were improperly permitted to vote, that they voted, and that they voted in the Contested Race.

Because no reasonable factfinder could form a firm belief or conviction that 380 RIDs constituted illegal votes, the trial court erred in finding that they should not have been counted. *See* CR296 at FF44.

V. The Election Day TRO was Proper and the Trial Court Erred in Concluding that Any "Mistake" Impacted the Election.

Lunceford claimed that the Election Day TRO "was not properly granted" because certain polling places ran out of paper, so not all polling locations were "open." CR105 at ¶ 32.

A. Collateral Estoppel Prevents the Trial Court from Questioning the TRO's Validity.

The trial court did not have jurisdiction to decide whether the TRO, itself, was proper, as the matter had been decided and collateral estoppel precludes re-litigation of a particular issue resolved in a prior suit. *See Barr v. Resolution Tr. Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992). The TRO was issued by a trial court judge in a different case brought by non-parties to the present case. The trial court in Lunceford's election contest did not have jurisdiction to decide the issue of whether the TRO from that other case was proper.

B. The TRO Kept All Polling Locations Open.

Even if the trial court had jurisdiction to consider the issue, its conclusions contravene the Election Code.

The Election Code requires that if any countywide polling place remains open after 7:00 p.m., all countywide polling places shall remain open. *See* TEX. ELEC. CODE § 43.007(p). The trial court found that "[t]he polling locations that did not have ballot paper were not really 'open' and section 43.007(p) of the election code was violated." CR300 at FF63.

Lunceford's own argument on appeal contradicts this finding. Lunceford conceded the TRO kept "all 782 of the polls open for one additional hour." *See* Appellant's Brief at 34. This is confirmed by the TRO's plain language. And when Christina Adkins was shown the TRO, she agreed that it complied with the Election Code. RR7 at 228:10-18. Beth Stevens agreed. RR8 at 266:20-267:10. There is no evidence that the TRO was improper.

There is also no requirement in the Election Code that polling locations must be kept "really open" or must operate without any technical problems to qualify as "open." Accordingly, the TRO did not violate the Election Code. *See* TEX. ELEC. CODE § 43.007(p).

C. There was No "Mistake" that Prevented Eligible Voters from Voting.

The trial court made an improper conclusion of law that the EAO agreeing to the extension was a "mistake" within the meaning of section 221.003. *See* CR299 at CL32.

During the TRO hearing, the EAO attorney informed the court on the current status of replenishing supplies, and when asked if it was "*possible* to get the supplies to these polls," he answered, "My understanding is yes." RR55 at 222. (emphasis added). He further stated, "*Hopefully* that's not going to be an issue. We *don't anticipate* it will be, but *you never know*." RR55 at 232 (emphasis added). This was not a promise, but an accurate representation of the uncertain current state of affairs and reasonable expectations.

This "mistake"—revealed only in hindsight—is not the type of mistake that the legislature envisioned serving as the basis to disqualify votes. *See* TEX. ELEC. CODE § 1.0015 ("It is the intent of the legislature that the application of this code and the conduct of elections . . . promote voter access, and ensure that all legally cast ballots are counted."); *see also Honts*, 975 S.W.2d at 821 ("the Code . . . may not be used as an instrument of disenfranchisement for irregularities of procedure."). Lunceford seeks to disenfranchise thousands of legal votes based on counsel's judgment call during an argument at oral hearing. There is no precedent for interpreting "mistake" so expansively.

D. There is No Evidence the EAO's Agreement Caused the TRO to be Granted.

Regardless, even if the EAO's decision was a "mistake," there is still no evidence of causation—that *but for* the EAO's agreement, the TRO would not have been granted. The Texas Organizing Project advocated for the TRO and provided good reason for granting it. The EAO was not alone in agreeing to the extra hour; the Harris County Democratic Party agreed. RR55 at 197. But these agreements did not make it unopposed. Lunceford's counsel—on behalf of the Republican Party—and the State of Texas opposed the TRO. RR55 at 198, 234. The ancillary court granted the TRO over those objections.

For these reasons, the trial court erred in including the 325 net votes in Craft's favor as part of the "total affected votes."

VI. The Trial Court Failed to Consider Entire Undervote.

A. Texas Law Requires Consideration of the Undervote.

The law requires the contestant to prove that the Election Code violation(s) had a material effect on the outcome. *See Goodman v. Wise*, 620 S.W.2d 857, 859 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.). Because the General Election was a multi-race election, Lunceford was required to either (1) demonstrate that the votes being challenged were cast in the Contested Race, or (2) amass evidence of more illegal votes than the total number of undervotes plus the margin of victory.

Forty years of Texas case law supports this conclusion. *See Goodman*, 620 S.W.2d at 859 ("[n]ot only must the contestant prove that voting irregularities were present but also that they did in fact materially affect the results of the election"); *Miller*, 698 S.W.2d at 375 ("[a] contestant must prove . . . illegal votes were cast in the election being contested"); *Medrano*, 769 S.W.2d at 689 (where the margin of victory was one vote, five voters testified that they voted in the general election and in the specific race at issue); *Chumney v. Craig*, 805 S.W.2d 864, 870 (Tex. App.—Waco 1991, writ denied) (holding that even after the change in the law in 1985, the contestant must still prove the unqualified voters cast ballots in the election at issue); *Green*, 836 S.W.2d at 208 ("the contestant . . . must prove that illegal votes were cast in the election being contested"); *Tiller*, 974 S.W.2d at 779 (holding that the contestant "was required to prove that illegal votes were cast in the election being contested and that a different result would have been reached by not counting the illegal votes"); *Reese*, 80 S.W.3d at 656 ("[t]he contestant must next show the illegal votes were cast in the race being contested"); *McCurry*, 259 S.W.3d at 374 ("the question is not whether they voted in other races in the 2006 general election; rather, the inquiry is whether election officials prevented eligible voters from voting in the election for commissioner, precinct two.").

Adkins agreed. She testified that Lunceford would "have to show problems that occurred in the course of the election that impacted *their race* or impacted the

outcome *of that race*." RR7 at 189:2-16 (emphasis added); RR7 at 192:3-7 (agreeing that *Reese* is the "law of the land.").

Lunceford is therefore wrong in claiming that she "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." Appellant's Brief at 66 (Issue Four). Lunceford's reliance on *Green* and *Gonzalez* is misplaced because the language quoted from those cases relates to compelling testimony regarding *candidate*-specific votes, not *contest*-specific votes. *See id*. at 66-68, 72.

Lunceford also relies heavily on a trial court order. *See* "Findings of Fact and Conclusions of Law," in *Leal v. Peña*, No. 2020-DCL-06433 in the 107th District Court of Cameron County, Texas. That order carries no weight here. Although the trial court's judgment was affirmed, the appellate court did not address the undervote in its opinion. *See Peña v. Leal*, No. 13-22-00204-CV, 2023 WL 3116752 (Tex. App.—Corpus Christi–Edinburg Apr. 27, 2023, pet. denied) (mem. op.). Instead, it only discussed the necessity of proving candidate-specific votes. *Id*. at *2-3.

B. The Trial Court Erred in Applying a 3.86% Rate to the Undervote.

The trial court considered the undervote but determined that only 3.86% of the challenged votes would have been undervotes. *See* CR302 at FF72.

Lunceford failed to present any expert testimony in support of the application of an undervote percentage, but the trial court found that expert testimony was not

required. *See* CR302 at n.23. The trial court erred. This type of statistical extrapolation requires expert testimony because it is not in the realm of common knowledge. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 583 (Tex. 2006) ("Expert testimony is required when an issue involves matters beyond jurors' common understanding"). No expert testified as to whether the 3.86% undervote rate could be applied uniformly, or whether the rate would vary depending on the type of vote, or what rate of error would apply. Lunceford presented no methodology that Craft could rebut. *See Robinson*, 923 S.W.2d at 557.

The trial court relied on language from *Green* to support its use of an undervote percentage calculation. *See* CR302 at n.23. The undervote percentage in that case, however, was proven through a political scientist. *Green*, 836 S.W.2d at 211. Lunceford presented no such expert testimony here. The trial court erred in relying on *Green* to support its finding, while simultaneously ignoring *Green*'s dependence on fact-specific expert testimony. *See* CR302 at n.23.

Lunceford's goal here is to void an election where over 1.1 million people voted in the third-largest county in the United States. Lunceford complains that it is difficult to prove that illegal votes were cast in the Contested Race, but that is by design. It *should* be difficult to overturn an election, otherwise the public's confidence in the integrity of the election process will be eroded. Lunceford must prove her case by clear and convincing evidence. The court should not make

assumptions in a contestant's favor to make it easier to void an election, particularly in today's political climate.

PRAYER

Craft prays that the Court affirm the trial court's judgment and preserve her election victory. Craft further prays that the Court modify the judgment to reverse the trial court's erroneous findings and affirm the trial court's ultimate finding that Craft was the true winner of the election.

Respectfully submitted,

KHERKHER GARCIA, LLP

By: */s/ Eric A. Hawley*

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ATTORNEYS FOR TAMIKA CRAFT

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of TEX. R. APP. 9.4(i)(2)(B) because this brief contains 15,000 words, excluding the parts of the brief exempted by TEX. R. APP. 9.4(i)(1).

2. This brief complies with the typeface requirements of TEX. R. APP. 9.4(e) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

/s/ *Eric A. Hawley*
Eric A. Hawley
Dated: September 9, 2024

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing was properly forwarded to all counsel of record in accordance with Texas Rules of Appellate Procedure 9.5 by the Electronic Filing Service Provider, addressed as follows:

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Attorneys for Erin Lunceford

/s/ Eric A. Hawley
Eric A. Hawley
Dated: September 9, 2024

Appx 1

Contestee Tamika Craft's Notice of Cross Appeal, filed February 7, 2024

2/7/2024 4:34 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 84267545
By: Marcella Hill
Filed: 2/7/2024 4:34 PM

CAUSE NO. 2022-79328

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

CONTESTEE TAMIKA CRAFT'S NOTICE OF CROSS-APPEAL

Desiring to appeal the Final Judgment signed by the Court on November 9, 2023, Contestee Tamika Craft files this Notice of Cross-Appeal and states as follows:

1. This is a cross-appeal from Cause No. 2022-79328, *Erin Elizabeth Lunceford v. Tamika "Tami" Craft*, in the 164th District Court of Harris County, Texas.

2. On November 9, 2023, the district court signed the Final Judgment Denying Election Contest.

3. On December 11, 2023, Contestant Erin Lunceford filed her Notice of Appeal. The appeal has been assigned to the First Court of Appeals and is styled Appellate Cause No. 01-23-00921-CV, *Erin Elizabeth Lunceford v. Tamika "Tami" Craft*, in the First Court of Appeals in Houston, Texas.

4. Appellee Craft filed a Motion to Dismiss in the appellate court on February 7, 2024 because she failed to comply with the clerk's required deadline to file the appellate filing fee, and because Lunceford's notice was untimely for an accelerated appeal. The Court has not ruled upon that motion yet. Appellee Craft does not waive her motion with this filing and still wishes that Lunceford's appeal be dismissed. Should Lunceford's appeal

be dismissed, Craft's Cross-Appeal should also be dismissed. Out of an abundance of caution, if Lunceford's appeal is not dismissed, Contestee Craft files this Notice of Cross-Appeal.

5. Cross-Appellant Craft, should Lunceford's appeal not be dismissed, desires to appeal the Final Judgment Denying Election Contest and any other adverse rulings from the trial court.

Respectfully submitted,

KHERKHER GARCIA, LLP

By: */s/ Eric A. Hawley*

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-AND-

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ATTORNEYS FOR TAMIKA CRAFT

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 February 7, 2024.

/s/ Eric A. Hawley
Eric A. Hawley

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Envelope ID: 84267545
Filing Code Description: Notice
Filing Description: Contestee Tamika Craft's Notice of Cross-Appeal
Status as of 2/7/2024 4:45 PM CST

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Appx 2

Judge Peeple's Order Regarding MSJ and Objections, filed August 2, 2023

From: David Peeples
To: Kevin Haynes
Cc: Nick Ware; ataylor@andytaylorlaw.com; sonya@sonyaaston.com; santonmattei@pulaskilawfirm.com; Rosie Trejo; Eric Hawley; Marc Carter
Subject: Re: Lunceford v. Craft
Date: Saturday, July 29, 2023 2:59:49 PM

All overruled. I'll deal with objections to those witnesses and their testimony when they are testifying in the courtroom.

On Jul 29, 2023, at 1:30 PM, Kevin Haynes <khaynes@kherkhergarcia.com> wrote:

Judge Peeples,

Thank you for communicating your rulings below.

With that being said, when might we expect rulings on Craft's objections to Lunceford's summary-judgment evidence?

Respectfully,

<image008.png>

From: dpeeples99@gmail.com <dpeeples99@gmail.com>
Sent: Saturday, July 29, 2023 1:27 PM
To: Nick Ware <NWare@kherkhergarcia.com>; ataylor@andytaylorlaw.com; sonya@sonyaaston.com
Cc: Kevin Haynes <khaynes@kherkhergarcia.com>; santonmattei@pulaskilawfirm.com; Rosie Trejo <rtrejo@kherkhergarcia.com>; Eric Hawley <ehawley@kherkhergarcia.com>; Marc Carter <mcarter@KherkherGarcia.com>
Subject: RE: Lunceford v. Craft

is safe.

Counsel:

After some reading and thinking, here are a few rulings.

1. MSJ. The motion for summary judgment is respectfully **denied**. I hasten to say that my understanding of the issues is better and deeper now than it was two days ago. I look forward to assessing the evidence at trial and discussing the law further in the days ahead. Even if some arguments may be stronger than others, I think it is best not to grant a partial SJ on some issues while leaving others for trial.

2. Objections and motions to exclude. We will deal with objections to the testimony of each witness as it is offered at trial.

3. Deposition testimony. I will consider and rule on objections to deposition testimony (video or written) at trial when each Q and A is offered. So Mr. Taylor, go ahead and prepare your video offers (or regular depo evidence) as you desire. Play each video (or read the Q and A), and I will deal with objections as they come—at trial and not before. For the depositions on written questions to the 30-plus declarants, let's talk about that again.

4. Tatum deposition. Mr. Taylor, offer what you choose from Mr. Tatum's depo, and then I will allow Mr. Haynes to offer optional completeness and cross-examination contained in the deposition itself on the issues covered in Taylor's offer. In other words Mr. Haynes, no other Tatum testimony, either live or from deposition, until your case in chief. Of course if Mr. Taylor wants to call Mr. Tatum live in his case in chief, as he suggested in an earlier email, he may do so, and there would be wide-open cross.

5. Notice of next day's witnesses. Concerning Lunceford's Tuesday witnesses, Mr. Taylor will tell Mr. Haynes by tomorrow evening which witnesses he will call on Tuesday. For witnesses on Wednesday, we'll deal with that when we finish on Tuesday. Ditto for each day until the end of the trial. In other words, notice of next day's witnesses at the end of each day, not 24 hours before.

6. Streaming. I am still leaning against streaming. We'll revisit Tuesday morning.

Regards, dp

From: Nick Ware <NWare@kherkhergarcia.com>
Sent: Friday, July 28, 2023 10:59 PM
To: ataylor@andytaylorlaw.com
Cc: dpeeples99@gmail.com; Kevin Haynes <khaynes@kherkhergarcia.com>; santonmattei@pulaskilawfirm.com; Rosie Trejo <rtrejo@kherkhergarcia.com>; Eric Hawley <ehawley@kherkhergarcia.com>; Marc Carter <mcarter@KherkherGarcia.com>
Subject: Lunceford v. Craft

Andy,

Contestee's offers as to the deposition of Kelley Hubenak-Flannery and Elizabeth Kocurek are attached. Please not that these have already been E-filed with the Court; however, I have included Judge Peeples on this email to make sure he receives them.

Regards,

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Filing Code Description: No Fee Documents
Filing Description: Contestee Tamika Craft's Trial Brief Regarding Voir Dire Examination of Experts at Trial
Status as of 8/2/2023 11:57 AM CST

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Appx 3

Rulings on Craft's Objections to Lunceford's Depositions on Written Questions (DWQs), filed August 31, 2023

2022-79328

P.3

RULINGS ON CRAFT'S OBJECTIONS TO LUNCEFORD'S DEPOSITIONS ON WRITTEN QUESTIONS (DWQS)

Lunceford presented the testimony of 37 election workers, who testified by depositions on written questions (TRCP 200). The parties *agreed* (and the court *approved*) that Craft could make objections to these DWQs in writing and the court would read the depositions and rule on the objections *after the parties had rested and closed and after their final summations*. The court has done this and now makes the following rulings.

1. Objections to five questions in all 37 DWQs. Craft objects to direct questions 6, 7, 8, 11, & 12 for all 37 DWQs. The objections to Questions 6, 7, 8, 11, & 12 are **overruled**.

2. Objections to the entire DWQs of nine witnesses because some cross-questions were not answered—overruled.

Craft objects to nine DWQs in their entirety because *some* of her cross-questions were not answered. She cites *Hartford Fire Ins. Co. v. Galveston, H. & S.A. Ry,* 239 S.W. 919 (Tex. Comm'n App. 1922, judgment adopted), which held that "a failure to answer *material* cross-interrogatories requires the suppression of the whole of such deposition." *Id.* at 927-28 (emphasis added). She also cites *New York, T. & M. Ry v. Green*, 38 S.W. 31 (Tex. 1896), as did the *Hartford* court, for the same principle of law.

The court in *Green* said, citing cases, "A refusal to answer a *material* question propounded in a cross-interrogatory is fatal to the deposition, unless it should appear that the answer could have been of no benefit to the party propounding the question." *Id.* at 32 (emphasis added). *Green* stressed more than once whether the unanswered question was "material" or "important" or "unimportant." *Id.* at 32-33. The court summed up:

> It is not believed that the authorities require the exclusion of depositions in all cases where the witness has failed to answer every question. Much must be left to the discretion of the court. The rule should not be allowed to be presented to obstruct or retard trials, or to exclude depositions, because of a manifest casual failure to answer some unimportant question.

Id. at 33 (emphasis added).

The unanswered cross-questions to the DWQs are *not material enough* to require exclusion of the entire depositions under *Green* and *Hartford*.

Objections to entire depositions of nine witnesses because certain cross-questions were not answered		
Witness	**Ruling**: The objections based on *Hartford* and *Green* are overruled. The unanswered questions are not *material* within the holdings of *Green* and *Hartford*.	
Nall	Cross-questions 7 & 8	
Schoppe	Cross-questions 17 & 19	
Cantu	Cross-questions 5-10	The second page of the Cantu cross-questions appears to have been entirely skipped by mistake.
Guillory	Cross-question 1	
Phillips	Cross-questions 13-15	
Stalnaker	Cross-questions 34-38	
Kenney	Cross-questions 17, 39 & 40	
Branham	Cross-question 39	
McCubbin	Cross-question 1	

3. Specific objections to different DWQ answers.

The court makes the following rulings on Craft's specific objections to parts of the DWQs.

Objections that an answer was *nonresponsive* are *overruled* unless otherwise noted. In *nonjury trials,* this court generally lets a witness answer beyond yes or no if that seems fair and reasonable in the context.

Cross-question 35 asks each witness to "please explain in detail how you know" that any turned-away voters didn't go elsewhere to vote. All objections to the answers to that *open-ended question* (including hearsay) are *overruled*.

[Individual rulings on next page]

Rulings on objections to specific questions in 18 DWQs		
Witness	Objections	Ruling
1. Millan	Cross-Qs 22, 23, 31 Direct questions 13, 14, 15	Overruled Overruled
2. Russo	Cross-Q 35	Overruled
3. Derby	Cross-Qs 2-4,19, 23, 27-29	Overruled
4. Nall	Direct Qs 7, 8, 12 Cross-Q 20	Overruled Overruled
5. Wolz	Direct Q 12 Cross-Qs 23, 24	Overruled Overruled
6. Munoz	Cross Qs 20, 22, 24, 32, 33, 35	Overruled
7. Rauer	Direct Q 12 Cross Qs 1-5, 13, 17, 22, 24-26, 28, 30, 33-35	Overruled. I would allow the witness to give her estimate of voters turned away and then would let her explain how she arrived at that estimate.
8. Greene	Cross Qs 25, 35	Sustained as to "stealing." Otherwise overruled.
9. Larson	Cross Q 30	Overruled
10. Strickland	Cross Qs 29, 33	29 & 33: objection nonresponsive sustained
11. Zachary	Cross Qs 22, 28, 39	Overruled
12. Musick	Direct Q 12 Cross-Q 34	Overruled
13. Cantu	Cross Q 35	Overruled
14. Phillips	Direct Q 7 Cross-Qs 22, 23, 26, 28, 30, 34, 35	Overruled Overruled
15. Burton	Cross-Qs 1, 39	Overruled
16. McCubbin	Cross-Qs 32, 33	Not responsive - sustained
17. Wheeler	Direct Q 6 Cross-Qs 13, 22, 23, 30-33, 35	Not responsive – sustained 13, 22, 30-33 sustained, others overruled
18. Nobis	Cross-Q 23	overruled

Signed: August 30, 2023

/s/ *David Peeples*
Judge David Peeples

Appx 4

TEX. ELEC. CODE § 221.003

Vernon's Texas Statutes and Codes Annotated
Election Code (Refs & Annos)
Title 14. Election Contests (Refs & Annos)
Subtitle A. Introductory Provisions
Chapter 221. General Provisions (Refs & Annos)

V.T.C.A., Election Code § 221.003

§ 221.003. Scope of Inquiry

Currentness

(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.

(b) In this title, "illegal vote" means a vote that is not legally countable.

(c) This section does not limit a provision of this code or another statute expanding the scope of inquiry in an election contest.

Credits
Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

Notes of Decisions (167)

V. T. C. A., Election Code § 221.003, TX ELECTION § 221.003
Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

End of Document

Appx 5

TEX. ELEC. CODE § 221.012

V.T.C.A., Election Code § 221.012

§ 221.012. Tribunal's Action on Contest

Currentness

(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.

Credits
Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986.

Notes of Decisions (47)

V. T. C. A., Election Code § 221.012, TX ELECTION § 221.012
Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

End of Document

Appx 6

TEX. ELEC. CODE § 43.007

V.T.C.A., Election Code § 43.007

§ 43.007. Countywide Polling Place Program

Effective: December 2, 2021
Currentness

(a) The secretary of state shall implement a program to allow each commissioners court participating in the program to eliminate county election precinct polling places and establish countywide polling places for:

(1) any election required to be conducted by the county;

(2) any election held as part of a joint election agreement with a county under Chapter 271;

(3) any election held under contract for election services with a county under Subchapter D, Chapter 31;

(4) each primary election and runoff primary election if:

(A) the county chair or county executive committee of each political party participating in a joint primary election under Section 172.126 agrees to the use of countywide polling places; or

(B) the county chair or county executive committee of each political party required to nominate candidates by primary election agrees to use the same countywide polling places; and

(5) each election of a political subdivision located in the county that is held jointly with an election described by Subdivision (3) or (4).

(b) The commissioners court of a county that desires to participate in the program authorized by this section shall hold a public hearing on the county's participation in the program. The commissioners court shall submit a transcript or electronic recording of the public comments made at the hearing to the secretary of state. A county that has previously participated in a similar program and held a public hearing on the county's participation in that program is not required to hold a hearing under this subsection.

(c) In conducting the program, the secretary of state shall provide for an audit of the voting system equipment before and after the election, and during the election to the extent such an audit is practicable.

(d) The secretary of state shall select to participate in the program each county that:

(1) has held a public hearing under Subsection (b);

(2) has submitted documentation listing the steps taken to solicit input on participating in the program by organizations or persons who represent the interests of voters;

(3) has implemented a computerized voter registration list that allows an election officer at the polling place to verify that a voter has not previously voted in the election;

(4) uses direct recording electronic voting machines, ballot marking devices, or hand-marked scannable paper ballots that are printed and scanned at the polling place or any other type of voting system equipment that the secretary of state determines is capable of processing votes for each type of ballot to be voted in the county; and

(5) is determined by the secretary of state to have the appropriate technological capabilities.

(e) Each countywide polling place must allow a voter to vote in the same elections in which the voter would be entitled to vote in the county election precinct in which the voter resides.

(f) In selecting countywide polling places, a county must adopt a methodology for determining where each polling place will be located. The total number of countywide polling places may not be less than:

(1) except as provided by Subdivision (2), 50 percent of the number of precinct polling places that would otherwise be located in the county for that election; or

(2) for an election held in the first year in which the county participates in the program, 65 percent of the number of precinct polling places that would otherwise be located in the county for that election.

(g) A county participating in the program must establish a plan to provide notice informing voters of the changes made to the locations of polling places under the program. The plan must require that notice of the location of the nearest countywide polling place be posted on election day at each polling place used in the previous general election for state and county officers that is not used as a countywide polling place.

(h) In adopting a methodology under Subsection (f) or creating the plan under Subsection (g), the county shall solicit input from organizations or persons located within the county who represent minority voters.

(i) The secretary of state may only select to participate in the program six counties with a population of 100,000 or more and four counties with a population of less than 100,000.

(j) Not later than January 1 of each odd-numbered year, the secretary of state shall file a report with the legislature. The report must include any complaints or concerns regarding a specific election that have been filed with the office of the secretary of state before the preparation of the report and any available information about voter turnout and waiting times at the polling places. The report may include the secretary of state's recommendations on the future use of countywide polling places and suggestions for statutory amendment regarding the use of countywide polling places.

(k) Each county that previously participated in a program under this section is authorized to continue participation in the program for future elections described by Subsection (a) if:

(1) the commissioners court of the county approves participation in the program; and

(2) the secretary of state determines the county's participation in the program was successful.

(l) Subsections (b), (c), and (d) do not apply to a county participating in the program under Subsection (k).

(m) In adopting a methodology under Subsection (f), the county must ensure that:

(1) each county commissioners precinct contains at least one countywide polling place; and

(2) the total number of polling places open for voting in a county commissioners precinct does not exceed more than twice the number of polling places in another county commissioners precinct.

(n) To the greatest extent possible, countywide polling places shall be located in a precinct where the political party that received the greatest number of votes in the last gubernatorial election is the same political party with which the presiding judge is affiliated.

(o) Each countywide polling place must post a notice of the four nearest countywide polling place locations by driving distance.

(p) 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.

Credits

Added by Acts 2009, 81st Leg., ch. 606, § 1, eff. Sept. 1, 2009. Amended by Acts 2011, 82nd Leg., ch. 1002 (H.B. 2194), § 8, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 1169 (S.B. 578), § 2, eff. Sept. 1, 2013; Acts 2017, 85th Leg., ch. 828 (H.B. 1735), § 11, eff. Sept. 1, 2017; Acts 2019, 86th Leg., ch. 1188 (H.B. 3965), § 1, eff. Sept. 1, 2019; Acts 2021, 87th Leg., ch. 711 (H.B. 3107), § 38, eff. Sept. 1, 2021; Acts 2021, 87th Leg., 2nd C.S., ch. 1 (S.B. 1), § 3.03, eff. Dec. 2, 2021.

Notes of Decisions (6)

V. T. C. A., Election Code § 43.007, TX ELECTION § 43.007
Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

End of Document

Appx 7

TEX. ELEC. CODE § 51.005

V.T.C.A., Election Code § 51.005

§ 51.005. Number of Ballots

Effective: September 1, 2005
Currentness

(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.

(b) In computing a number of registered voters under this section, voters whose names appear on the list of registered voters with the notation "S", or a similar notation, shall be excluded.

(c) The secretary of state shall prescribe procedures for determining the number of provisional ballots to be provided.

Credits
Acts 1985, 69th Leg., ch. 211, § 1, eff. Jan. 1, 1986. Amended by Acts 1995, 74th Leg., ch. 797, § 37, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1078, § 1, eff. Sept. 1, 1997; Acts 2005, 79th Leg., ch. 1107, § 1.12, eff. Sept. 1, 2005.

V. T. C. A., Election Code § 51.005, TX ELECTION § 51.005
Current through the end of the 2023 Regular, Second, Third and Fourth Called Sessions of the 88th Legislature, and the Nov. 7, 2023 general election.

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