**No. 01-23-00921-CV**

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



ERIN ELIZABETH LUNCEFORD

Appellant,

v.

TAMIKA CRAFT,

Appellee.





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

# APPELLANT LUNCEFORD'S COMBINED REPLY BRIEF AND CROSS-APPELLEE LUNCEFORD'S RESPONSE BRIEF

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**II. Both the Appellant and the Appellee agree that 411 voters were turned away from the polls for reasons other than a lack of ballot paper. But the consequence of this finding is not immaterial. Rather, the Trial Court was obligated to consider the entirety of all 411 voters who were turned away from the polls in determining whether the reported outcome was the true outcome.**

**III. The law is clear that suspense voters may not cast a regular ballot without also submitting a statement of residence. The undisputed evidence is clear and convincing that 1,995 voters did not do so. The Trial Court was obligated to consider the entirety of all 1,995 illegal votes in determining whether the reported outcome was the true outcome.**

**IV. The Trial Court properly considered the testimony of Russell Long, Steve Carlin and Christina Adkins.**

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**those voters who filled out a statement of residence and specifically indicated their current residence at the time of their vote.**

**Appellant's Reply Point Number Seven:**

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**Appellant's Reply Point Number Eight:**

**VIII. The Trial Court properly exercised its authority to determine the impact of the illegal voting which took place after 7pm on Election Day and subtract those illegal votes from the vote totals of each candidate for whom such illegal vote was cast and counted.**

**Appellant's Reply Point Number Nine:**

**IX. Although the Trial Court erred in including Appellant's net gain of 325 votes due to illegal voting after 7pm on Election Day in its undervote calculation, the methodology and percentage calculations for the undervote analysis were otherwise calculated correctly.**



## SUMMARY OF THE ARGUMENT

According to the official canvass, Appellant Erin Elizabeth Lunceford purportedly lost her race for the 189th Civil District Court of Harris County by a mere 2,743 votes. Appellant Lunceford introduced clear and convincing evidence of five (5) specific categories of voting:

(i) 325 illegal net votes were cast and counted in favor of Appellee Craft after 7pm on Election Day (called ascertained votes) and must therefore be subtracted from Appellee's vote total (the Trial Court agreed with this category and so found, but erred when it included these votes in its undervote calculations);

(ii) 1,716 additional illegal votes were cast and counted for a variety of reasons but were not tied to either candidate (called unascertained votes) (the Trial Court agreed and so found);

(iii) 2600 unidentified (and unidentifiable) potential voters attempted to vote on Election Day but were turned away from specific polling locations due to a shortage of ballot paper (the Trial Court agreed and so found but then erred when it invented an "estimate" of how many of these specific voters were able to vote elsewhere);

(iv) an additional 411 potential voters were turned away from specific polling locations due to equipment failures or other reasons (the Trial Court made no mention of this category in its Final Judgment denying Appellant's election contest, nor did it address this category in its subsequent Findings of Fact and Conclusions of Law); and

(v) 1,995 additional voters who were on a suspense list and failed to submit the statutorily required statement of residence form cast illegal votes which were counted but were not tied to either candidate (unascertained votes) (the Trial Court made no mention of this category in its Final Judgment denying Appellant's election contest).

The Trial Court fully embraced and accepted category (i) by finding that a net sum of 325 illegal votes had been cast and counted for Appellee Craft

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

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

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

decision. Moreover, even though Appellant Lunceford requested the Court to make findings of fact after its decision was announced, the Trial Court nevertheless failed to enter any findings of fact on this specific category of voters.

The Trial Court also committed reversible error by completely ignoring category (v), where clear and convincing evidence of 1,995 illegal votes by suspense voters who failed to submit statutorily required statements of residence was admitted at trial. Appellant Lunceford requested findings of fact before the Court issued its Final Judgment with respect to category (v). Once the Final Judgment was announced, Contestant thereafter specifically asked the Trial Court to explain why it failed to address this category of challenged voters. In response, the Trial Court avoided any explanation or evaluation of this category of evidence and failed to make any findings of fact on this topic. Instead, the Trial Court merely rejected category (v) with no evaluation whatsoever, other than saying this category was not satisfactorily proved. The Trial Court's silence on this point is deafening; Appellant proved by clear and convincing evidence that there were 1,995 instances of unascertained illegal votes being cast and counted by showing the specific names of the suspense voters as displayed by Harris County's voting roster, coupled with proof that no statement of residence existed for any of these suspense voters.

As will be demonstrated herein, Contestant's factual and legal presentation, which was proven by clear and convincing evidence, prevented the Trial Court from declaring the outcome, as report by the final canvass, was the true outcome. To the contrary, the trial of this case demonstrated that the Trial Court could not ascertain the true outcome and therefore **had no discretion but to declare this contested election void and order a new election**, as is required by the Texas Election Code (the Trial Court "*shall* declare the election void" and order a new election). *Tex. Elec. Code §221.009(b)*(emphasis added)*;Green v. Reyes*, 836 S.W.2d 203, 212 (Tex. App.-Houston [14th Dist.] 1992, no writ).



## ARGUMENT AND AUTHORITIES

Before responding to Appellee's arguments, it is important to first set forth the legal parameters for an election contest.

The Trial Court's Duty in an Election Contest.

The Texas Election Code mandates that an election tribunal "*shall* declare the election outcome if it can ascertain the true outcome of the election." *Tex. Elec. Code §221.009(a)* (emphasis added). Conversely, if a court cannot ascertain the true outcome of the election, it "*shall* declare the election void" and order a new election. *Tex. Elec. Code §221.009(b)* (emphasis added)*; Green v. Reyes*, 836 S.W.2d 203, 212 (Tex. App.-Houston [14th Dist.] 1992, no writ). Because the Trial Court could not possibly ascertain that the reported outcome, as shown by the official canvass, is the true outcome, Judge Peeples had no discretion but to declare this

election void and to order a new election, as is required under the above-quoted section of the Texas Election Code.

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

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

TEX. ELEC. CODE ANN. § 221.003(a) (Vernon 2003). With these standards in mind, Appellant responds to the Appellee's arguments as follows:



**Appellant's Reply Point Number One:**

**I. Both the Appellant and the Appellee agree that the Trial Court erred when it estimated that only 350 to 850 voters of the 2600 voters who were turned away due to a lack of ballot paper ultimately failed to cast a ballot on Election Day. But the appellate remedy for the Trial Court's undisputed error is not to ignore this evidence. To the contrary, because there was no basis for determining whether any of these 2,600 turned away voters voted, and because this group of voters exceeded the purported margin of defeat, the Trial Court was obligated to order a new election.**

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

The evidence during the trial demonstrated that at least twenty-four (24) polling places ran out of ballot paper on election day. 8 RR 10, et. seq. According to

the collective testimony of 27 witnesses (one live witness, two witnesses by video deposition, and twenty-one (21) witnesses by deposition upon written questions[1]), approximately 2,535 voters were estimated to have been turned away from these polling locations as a result. The Trial Court so found in its Finding of Fact number 17, although it used a slightly higher number of 2,600 instead of 2,535.

Of that total number of twenty-four (24) locations, twenty (20) polling locations were in neighborhoods where a majority of the turnout in 2018 supported Greg Abbott for Governor in 2018. 6 RR 178, et. seq. (live testimony of Russ Long[2]). Thus, approximately 83.3% of the polling locations that ran out of ballot paper were in Republican precincts. Id. The clear and convincing evidence demonstrates that the loss of ballot paper disproportionately affected neighborhoods with likely Republican voters. Id.

During the trial, Appellee argued that Appellant's proof in this regard was deficient. Among the reasons asserted by Contestee were the following: (i) no evidence of the names of the turned away voters; (ii) no evidence of the voter



[1] Appellee asserts that the depositions upon written questions were never entered into evidence. That is false. There were multiple discussions, both pre-trial and during the trial, about how best to handle the presentation of this testimony. Given that no jury was involved, there was no need to read the deposition questions and answers out loud into evidence. Instead, the Court took all the depositions and read them over the weekend and made his factual determinations after reviewing the testimony and ruling on all the Appellee's specious objections to that testimony. 8 RR 10/13 to 12/4.

[2] This portion of Russ Long's testimony is not expert testimony. Rather, Mr. Long was simply reporting publicly available data, which showed which precincts supported Governor Abbott and which precincts ran out of ballot paper. 6 RR 83/1-6, 111/4 to 113/21, 204/17, 7 RR 36/14-23; 9 RR 9-10, 11/11-12. The portion of Mr. Long's testimony that does constitute expert opinion, e.g., his map and mathematical partisan strength calculations, will be addressed later in this Reply Brief.

registration status of the turned away voters; (iii) no evidence of whether any of the turned away voters actually voted elsewhere; (iv) no evidence of whether any turned away voters intended to vote in the 189th Civil Judicial District race; and (v) no evidence of which candidate turned away voters intended to support. The clear and convincing evidence admitted during the bench trial debunked these assertions. More specifically, the clear and convincing evidence showed that it was both impossible and impractical to obtain this information from turned away voters. See, e.g., 3 RR 132, 138-139 (live testimony of Victoria Williams), who served as a Presiding Judge, and who testified that, as an election official, it would have been "inappropriate, unethical, and illegal" to ask a turned away voter to disclose their identify or to reveal how they intended to vote. Id. Indeed, the Election Code only empowers this Court with the authority to force a voter to disclose for whom they voted if and only if the Court first finds that the voter cast a ballot that was ineligible to have been counted. Where, as here, we are talking about voters who were turned away, that statutory authority does not apply, and, by logic, would not authorize an election official at a polling location to conduct a mini trial and investigation in the middle of a busy election day of voting. Further, the witnesses who testified about turning away voters from their polling locations were election officials, and they were duty bound to continue their work as election officials, which included working inside of the polling location, rather than standing around outside where the voters were turned away. See, e.g., 8 RR 10 (depositions upon written questions of thirty-

eight (38) election officials). Moreover, testimony was provided by several witnesses that turned away voters were upset over the fact that ballot paper was not available, creating a hostile and toxic environment (e.g., one such voter spit on a Presiding Judge, see 3 RR 259 (deposition of Kelly Hubanek Flannery), while others engaged in conduct that required calling the police to come out and calm things down. See 3 RR 233, deposition testimony of Elizabeth Kocurek). Accordingly, the clear and convincing evidence adduced at trial was that it was impractical, if not impossible, to obtain any information about the voters who were turned away. Even if it were possible to track down turned away voters, Contestant introduced evidence that it would be financially and logistically impossible and/or impractical to subpoena these individuals and to pay the costs associated with a deposition upon written questions, an oral deposition, or to secure in-person trial appearances.



The only finding by the Trial Court that is suspect is the manufactured finding that only 250 to 850 of the 2,600 turned away voters did not vote, while the rest of that group did vote. As explained in Appellant's Brief, that finding has absolutely no legal or factual evidence to support it whatsoever. It was literally made up by Judge Peeples.

Seizing upon that reality, Appellee's Reply Brief tries to argue that none of the 2,600 turned away voters can be counted as voters who did not vote. But that makes absolutely no sense. As explained above, it is literally impossible to know the identity of any of 2,600 voters, so it is likewise impossible to know if any of those

voters voted elsewhere or not. But the failure to know the answer is not the fault of Appellant; it is due to the fact that the HCEA performed miserably and mismanaged ballot supplies in key Republican neighborhoods, making it impossible for Appellant to be able to track these unidentified voters down so they could be deposed. Period. Thus, Appellee's logic is flawed and the entirety of all 2,600 turned away voters must be considered as to whether the reported outcome is the true outcome in this specific judicial race. Moreover, because the purported margin of defeat, which is 2,743, was properly reduced by a net gain of 325 votes in favor of Appellant due to the illegal after 7pm voting, the adjusted purported margin of defeat is 2,418 votes[3]. Thus, because 2,600 turned away voters is greater than 2,418 (and, after adjusting for the undervote, greater than the adjusted total of 2,511), the Trial Court had no discretion but was required to order a new election.



**Appellant's Reply Point Number Two:**

**II. Both the Appellant and the Appellee agree that 411 voters were turned away from the polls for reasons other than a lack of ballot paper. But the consequence of this finding is not immaterial. Rather, the Trial Court was obligated to consider the entirety of all 411 voters who were turned away from the polls in determining whether the reported outcome was the true outcome.**

Polling Locations Turned Away Voters for Other Reasons.

In addition to voters being turned away for lack of ballot paper, fifteen (15) witnesses testified there were also other issues beyond ballot paper shortages that

[3] The Trial Court should not have multiplied the undervote percentage of 0.0386 times 2,743 (which reflects an additional 106 votes needed for Contestant to account for the undervote in her race). Instead, the correct calculation is 0.0386 times 2,418 (which reflects an additional 93 votes instead of 106).

caused voters to leave specific polling sites without casting their ballots at those locations. 8 RR 10, et. seq. For example, there was evidence of machine malfunctions, the inability to reach the HCEA on the phone or by other means, a lack of equipment or supplies and other problems, which occurred on Election Day. Id. Based upon that evidence, the Court should have found that a total of fifteen (15) polling locations were affected, with 411 voters that were turned away.

Appellee attempts to argue that the Trial Court properly ignored this evidence because there was no tie to the conduct of the Elections Administrator. But the statute in question is much broader than that. Indeed, evidence that an election official prevented voters from voting is a statutorily mandated basis for an election contest. Where, as here, election equipment did not work and voters were unable to vote, such clear and convincing evidence cannot be ignored, but must be considered in whether the purported outcome is the true outcome.



## Appellant's Reply Point Number Three:

**III. The law is clear that suspense voters may not cast a regular ballot without also submitting a statement of residence. The undisputed evidence is clear and convincing that 1,995 voters did not do so. The Trial Court was obligated to consider the entirety of all 1,995 illegal votes in determining whether the reported outcome was the true outcome.**

**Votes by voters who were on the Suspense list.**

The Harris County Voter Roster lists 2,039 voters who voted and have a SUSPENSE notation next to their name. 51 RR 62-32; 4 RR 16. Evidence was admitted during the trial that 1,995 of these voters did not submit a filled-out

Statement of Residence ("SOR"). 6 RR 87-88, 111-113 (live testimony of Steve Carlin). The evidence at trial was that eighty-two (82) of those voters did submit a SOR, but 38 of those SORs were challenged on other grounds by the Contestant, and the Court sustained those challenges. Id. Thus, there are forty-four (44) SORs which remain unchallenged, leaving 1,995 as the remaining total of Suspense list voters who failed to submit a SOR. Id. None of this evidence was disputed, and the Court's rejection of this evidence constitutes harmful error. The evidence conclusively demonstrated that these 1,995 voters who cast a ballot without a SOR cast a vote that was illegal.

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



The Harris County Voter Roster lists 2,039 voters who voted and have a SUSPENSE notation next to their name. 51 RR 62-63. Evidence was admitted during the trial that 1,995 of these voters did not submit a filled-out Statement of Residence ("SOR"). 6 RR 87-88, 111-113 (live testimony of Steve Carlin).

Registered voters whose address has come into question through a variety of processes, may be placed on a suspense list ("Suspense"). Section 63.0011 of the

Texas Election Code requires voters whose name is on Suspense must fill out a Statement of Residence prior to be accepted for voting. If those voters fail to properly fill out a SOR, then are not allowed to vote, and, if they are nonetheless permitted to vote a regular ballot, then that vote is an illegal vote that is not eligible to be counted.

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



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

Appellant failed to disprove multiple possibilities, such as the timing of when a suspense notation was first entered for a particular voter, whether such a notation was accurate or the product of a mistake, whether such status had been subsequently cured by the voter, whether that specific voter showed up as a provisional ballot voter, and whether that targeted voter actually voted in the specific judicial race at issue. Of course, none of these issues were presented during the evidence of the trial by Appellee, and it was not necessary to disprove a negative. Moreover, the suspense notations are derived from the Harris County Voter Roster, not the Voter Roll. As was explained at trial, the Voter Roster is a snapshot of what occurred on the day the voter voted, not some time thereafter. 4 RR 211/14-21. Thus, by definition, each of these voters were on the suspense list at the time they presented themselves to the Qualifying Table for voting. Also, 100% of all the provisional ballot affidavits were produced and entered into evidence in the trial of this case, and none of those ballots came from any of the 1,995 suspense voters flagged by Appellant for her contest. In addition, the entire universe of statements of residence were also produced and entered into evidence, making it an absolute certainty as to whether a suspense voter voted with or without a corresponding statement of residence. As explained by Steve Carlin, none of the 1,995 voters did so. 5 RR 170/19 to 171/9 and 175/7 to 176/8. Finally, these illegal votes are the byproduct of a mistake on the part of election officials, who failed to follow the law by permitting suspense voters to vote a regular ballot without providing a statement of residence. Accordingly, Appellee's attempts

to undermine Appellant's evidence should be categorically denied by this Court.

## Appellant's Reply Point Number Four:

**IV. The Trial Court properly considered the testimony of Russell Long, Steve Carlin and Christina Adkins.**

Much of what these challenged witnesses testified to was not actually expert testimony. To the contrary, a significant portion of their testimony had to do with public records and comparing and contrasting, as opposed to analyzing, date on those public records. However, to the extent that some of the testimony elicited was in the form of an expert opinion, the record in the trial of this case makes clear that Mr. Long, Mr. Carlin, and Ms. Adkins each possessed the necessary education, work experience, skill and expertise to opine on the matters covered during their trial testimony. See, e.g., 6 RR 178/16 to 182/10 (Long); 5 RR 73/13 to 81/17 (Carlin); and 7 RR 120/7 to 124/11 (Atkins).



## Appellant's Reply Point Number Five:

**V. Section 51.005 of the Texas Election Code applies to Harris County, regardless of the fact that countywide voting is available.**

> § 51.005 Safe Harbor for Initial Paper Ballot Allotments
>
> Sec. 51.005. NUMBER OF BALLOTS. (a) The authority responsible for procuring the election supplies for an election shall provide for each election precinct a number of ballots equal to at least the percentage of voters who voted in that precinct in the most recent corresponding election plus 25 percent of that number, except that the number of ballots provided may not exceed the total number of registered voters in the precinct.

Despite Appellee's protestations to the contrary, there is no textual basis for concluding that Harris County is exempt from this statute. And the chief elections attorney for the Texas Secretary of State, Christina Adkins, agrees. 7 RR 133/7-19.

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

From the evidence provided by the Harris County Election Administrator's Office, including, but not limited to, Attachment 2 to their post-election assessment issued last November of 2022, see 55 RR 5-59 (Contestant's Exhibit 20), most of the Election Day polling locations received the same amount of ballot paper, which was purportedly enough for 600 voters (e.g., 1200 pages)[4].

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

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

[4] 1200 pages would not likely service the needs of 600 voters, for multiple reasons, including the fact that EA Tatum's instructions on how to handle scanning problems would require more than two (2) pages per voter.

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

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

Although redistricting and other factors caused Harris County to change precinct boundaries and to assign different numbers to precincts that were in existence during the 2018 election from those precincts that were utilized in the 2022 election, it is nevertheless possible to determine actual turnout of a specific polling location in 2018 and then it is also possible to project anticipated turnout at the same

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



HCEA Tatum also made no effort to project turnout on a specific polling location by polling location basis. Id. Instead, with only a few exceptions, turnout was predicted to be the same, e.g., 600 voters, at virtually every single polling location. 55 RR 5-59 (Contestant's Exhibit 20, Attachment 2). Contestant's Exhibits 14C, 14D, and 14E, see 4 RR 16, as well as the Harris County November 8, 2022, Voter Roster, see 51 RR 62-63, demonstrates that the same number of people did not turnout at every polling location. In fact, 380 out of 782 polling locations had more than 600 voters. Id.

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

Regardless of whether a specific polling location in 2022 received an initial ballot paper allocation of less than 125% of actual turnout for 2018, evidence was also introduced that compared the initial ballot paper allotment for 2022 as shown in Attachment 2 to Contestant's Exhibit 20, on the one hand, with the actual canvassed turnout for a specific polling location on Election Day, on the other hand. See 55 RR 5-59 (Contestant's Exhibit 2), as well as Contestant's Exhibits 14C, 14D, and 14E. 4 RR 16.

That comparison shows that HCEA initially undersupplied 121 Harris County polling locations with paper ballots. 6 RR 178, et. seq. (live testimony of Russ Long). Of that total number, 111 polling locations were in neighborhoods where voters have previously voted in at least two (2) Republican primaries out of a total

of seven (7) primaries spanning twelve (12) years, from 2010 to 2022. Id. In addition, 109 polling locations were in neighborhoods where voters voted in at least six (6) Republican primaries out of a total of seven (7) primaries spanning twelve (12) years, from 2010 to 2022. Id. The evidence demonstrated that there was an extremely high correlation of ballot shortages with Republican voting patterns. To answer the question "what is the probability this pattern occurred by chance?" a mathematical formula called a binomial function was used by Russ Long, one of Contestant's non-retained experts. 14 RR 14 (Contestant's Exhibit 78); see also 6 RR 178, et. seq. (live testimony of Russ Long). The answer: the probability of getting 111 (using 2 R) or 109 (using 6 R) undersupplied polling locations inside Republican areas, out of the identified total of 121 "in/out" possibilities, in a fair distribution, is very low, about 0.00021% (using 2 R) and 0.0224 (using 6 R). Id. Thus, the clear and convincing evidence showed that the HCEA's decision on how to initially allocate ballot paper at a particular polling location disproportionately affected neighborhoods with likely Republican voters.



Accordingly, Harris County violated Section 51.005 of the Texas Election Code because HCEA Tatum failed to provide ballot paper in sufficient quantifies and did not even attempt to calculate how much ballot paper would constitute 125% of the voters from the last-like election who voted in that precinct or in the case of combined or county-wide polls, the polling location. This statute serves as a safe

harbor to counties, so that they need not worry about ensuring ballot paper shortages which may result from higher-than-expected turnout at certain polling locations.

The Trial Court properly took this illegal activity on the part of Election Officials into account when considering whether it can ascertain that the reported outcome of the Contested Election is the true outcome[5].

## Appellant's Reply Point Number Six:

## VI. Appellant was not required to produce extrinsic evidence of residence for those voters who filled out a statement of residence and specifically indicated their current residence at the time of their vote.

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

Appellee focuses on NCOA objections that were sustained during the trial, but those rulings have nothing whatsoever to do with the evidence concerning statements of residence showing out of county voters voted illegally in the contested election. More specifically, Contestant's Exhibit 9A is a compilation of 2,351 SORs challenged by the Contestant on various grounds. 12 RR 5 thru 27 RR 206. Contestant's Exhibit 9B is a detailed spreadsheet of those challenges. 27 RR 207-208. Of the various categories, the Court sustained Contestee's objections to certain categories tied to a database called the National Change of Address ("NCOA") database, which is compiled and maintained by the United States Postal Service



[5] Alternatively, the way HCEA determined its initial ballot paper allocation, even if Section 51.005 of the Texas Election Code does not apply to Harris County, constituted a mistake for which the Trial Court was required to consider when determining whether it can ascertain that the reported outcome is the true outcome.

("USPS"), and, for this lawsuit, was reported by a third party, called True NCOA. Contestant does not challenge these rulings.

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

The other SOR category that Contestant challenged were those voters who cast a ballot but who failed to supply sufficient information on their SOR to meet

the minimum residency requirements necessary to confirm their right to cast a ballot in Harris County. Contestant's initial category of challenged SOR voters was 467. After the cross-examination of Steve Carlin, which, in part, focused on this category of challenged SORs, Contestant withdrew 185 challenges in this specific category, such that only 284 challenges remain. Ultimately, the Trial Court found in Finding of Fact number 24 that 270 of the challenged SORs fail to satisfy the information requirements set forth in Section 63.0011 of the Texas Election Code. Although this number is smaller than the evidence presented at trial, Contestant does not challenge this finding.



**Appellant's Reply Point Number Seven:**

**VII. The votes of 380 voters who submitted defective reasonable impediment declarations and were mistakenly accepted as valid were properly deducted from the purported margin of defeat.**

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

Contestant presented testimony about how to qualify and accept a voter to vote, the need for photo identification and/or the need for a reasonable impediment declaration ("RID"), and what to do if information is missing on a RID. 3 RR 132, et. seq. (live testimony of Victoria Williams). According to her testimony, all 532 challenged RIDs were not sufficient on their face to permit this Court to confirm that those specific voters—who cast a vote, and that vote was counted—were, in fact, not eligible to cast a regular ballot. Contestant's Exhibit 13A is a copy of all the challenged RIDs, see 41 RR 11 thru 51 RR 4, while Contestant's Exhibit 13C is a

spreadsheet demonstrating what is lacking on a particular RID. 51 RR 5-61. The Trial Court ultimately sustained 380 of the challenged RIDs in Finding of Fact number 44. Although this number is significantly less than the evidence presented by the Contestant, she nevertheless does not challenge the finding.

Although Appellee makes much about Appellant's statements to the Trial Court that she did not consider these votes to be illegal votes, that does not change the fact that an election contest can also be based upon mistakes by election officials, which these 380 votes represent.

## Appellant's Reply Point Number Eight:

**VIII. The Trial Court properly exercised its authority to determine the impact of the illegal voting which took place after 7pm on Election Day and subtract those illegal votes from the vote totals of each candidate for whom such illegal vote was cast and counted.**

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



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

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

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

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

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



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

A second mandamus proceeding was filed by the same parties as had jointly filed the motion to dissolve the previously entered temporary restraining order. The

Supreme Court thereafter issued a subsequent order which required Harris County to announce separate canvass totals, one counting the after 7pm provisional ballots and one not including those totals. Those separately canvassed results are contained in Contestant's Exhibit 27H, see 56 RR 105 thru 195 (page 128 relates to this race).

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



In this election, however, there is one notable exception to what is described above. The Texas Supreme Court issued a stay on November 8, 2022, and ordered that Harris County segregate all PBs cast and counted after 7pm by court order from the rest of the PBs. Id. A subsequent order from the Texas Supreme Court resulted in Harris County reporting in the final canvass results the actual breakdown, by candidate, of how this discrete group of PB voters cumulatively voted, if such voters cast PBs after 7pm by court order. Id. Thus, although ordinarily it would not be

possible to do so, in this election, Harris County reports in the final canvass totals that Contestant Lunceford received 822 PBs cast after 7pm by court order, while Contestee Craft received 1,147. 56 RR 128. This means that Contestee received a net number of 325 more PBs than did Contestant.

In Conclusion of Law number 34, the Trial Court correctly concluded that 325 votes for Appellee Craft were illegal votes. However, the subsequent statement by the Trial Court in that same finding only reflects that it would take that "into account." More than that is legally required. Section 221.011 of the Texas Election Code required the Trial Court to subtract all 325 votes from the canvass totals, leaving Contestee with 325 fewer votes than before, which means the purported margin of defeat goes from 2,743 to 2,418 votes[6].



**Appellant's Reply Point Number Nine:**

**IX. Although the Trial Court erred in including Appellant's net gain of 325 votes due to illegal voting after 7pm on Election Day in its undervote calculation, the methodology and percentage calculations for the undervote analysis were otherwise calculated correctly.**

The final canvass, see 11 RR 36, shows that the undervote in Contestant's specific race, when expressed as a percentage, is 3.86%. This means that for every 1000 voters who voted in the November 8, 2022, General Election, 38 voters did not cast a ballot in the Contested Election, while 962 did so. The reported margin of

[6] The Trial Court should not have multiplied the undervote percentage of 0.0386 times 2,743 (which reflects an additional 106 votes needed for Contestant to account for the undervote in her race). Instead, the correct calculation is 0.0386 times 2,418 (which reflects an additional 93 votes instead of 106).

defeat in the Contested Election was 2,743. After subtracting 325 net votes as described earlier, that purported margin declines to 2,418. Taking the undervote percentage into account (2,418 multiplied by 0.0386), approximately 93 voters out of 2,418 voters did not vote in the Contested Election. Thus, to ensure that the undervote is considered, 93 undervotes must be added to 2,418, for a grand total of 2,511 votes. The Trial Court correctly analyzed the undervote percentage in Finding of Fact 70, and Contestant does not challenge that portion of the finding. However, the Trial Court erred by applying the undervote calculation to the 325 net votes referenced previously. Because the Texas Supreme Court required election officials to segregate the after 7pm provisional ballots, the evidence is certain that each of the 325 voters voted for Appellee Craft and therefore no undervote could exist for that specific category of challenged votes. That being the case, the Trial Court erred in determining that the margin necessary to demonstrate a material impact on the Contested Election is 2,849. In actuality, the margin is 2,511, and Contestant challenges this portion of the Trial Court's finding.



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

> "41. The Court is mindful that overturning an election is not to be taken lightly. To this end the Court has considered using an approximate "under vote ratio" of 6,000/40,000. The evidence shows 15% of voters in this election "under voted" in the school board election. By using this

> ratio an 8-vote margin of victory requires approximately ten (10) illegally cast votes to equate to in order to invalidate the election results. The Court has found 24 illegally cast votes. This number is more than twice the calculated "over vote" cushion favoring the Contestee."

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

## PRAYER

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



Respectfully Submitted,

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## CERTIFICATE OF SERVICE

By affixing my signature above, I hereby certify that a true and correct copy of Appellant's Combined Reply and Cross-Appellee's Response Brief has been

delivered via the electronic filing system to the parties below on the 4th day of January 2025.

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## CERTIFICATE OF COMPLIANCE

In accordance with TEX. R. APP. P. 9.4(i)(3), I certify that this Brief complies with the type-volume restrictions of TEX. R. APP. P. 9.4(e), (i)(2)(B). Inclusive of the portions exempted by Rule 9.4(i)(1), this Brief contains 7,240 words and is in Times New Roman, 14-point type.

/s/ Andy Taylor

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