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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 REPLY IN SUPPORT OF SUMMARY JUDGMENT

TO THE HONORABLE JUDGE PEEPLES:

Contestee, Tamika Craft, files this Reply in Support of Summary Judgment, and respectfully shows the Court as follows:

I. CONTESTEE CRAFT OBJECTS TO CONTESTANT LUNCEFORD'S EVIDENCE

1. Contestee is filing with this Reply her Objections to the Summary Judgment Evidence, which Contestee incorporates herein. Most of the evidence submitted by Contestant is inadmissible in both form and substance and cannot be relied upon to defend against summary judgment. Contestee asks that the Court sustain her objections and strike all the objected-to evidence. Because Contestant's evidence is inadmissible as a threshold matter, Contestant has no evidence to support her single cause of action. Summary judgment should therefore be granted.

II. CIRCUMSTANTIAL EVIDENCE OF "ILLEGAL VOTES" IS INSUFFICIENT

2. Even if the objections are overruled, Contestant's summary judgment evidence cannot meet her burden of proof because circumstantial evidence of illegal votes is, without more, insufficient as a matter of law under the high bar of the clear and convincing standard. *See O'Caña v. Salina*, No. 13-18-00563-CV, 2019 WL 1414021 (Tex. App.—Corpus Christi-Edinburg, Mar. 29, 2019, pet. denied). In *O'Caña*, the Court of Appeals reversed the trial court's judgment that

had voided an election because circumstantial evidence was insufficient to demonstrate that the number of illegal votes were enough to change the outcome of the election. *Id*. The Court relied only on *direct* evidence of illegal votes—such as direct testimony from individual voters regarding their individual ballots. *Id*. But, the Court would not rely upon evidence that was based on mere *ipse dixit* opinion of experts or evidence that required layers of inferences and assumptions. *Id*. at *9-10. Such evidence was conclusory and speculative. *Id*. The Court noted the well-established Texas law that "conclusory testimony is not probative," and "findings based evidence that allows for no more than speculation—a guess—are based on legally insufficient evidence." *Id*. at 9, 11. So, even with deference to the trial court's credibility determinations, the Court of Appeals concluded that the evidence was legally insufficient to support its finding that the number of illegal votes was equal to or greater than the number of votes necessary to change the outcome. *Id*. at 11.

3. Similarly here, the Contestant relies heavily upon circumstantial evidence to reach the number of alleged illegal votes that would materially affect the election results. Because there is a substantial lack of direct evidence in this case, Contestant cannot legally meet the clear and convincing standard for her burden of proof. Accordingly, summary judgment should be granted.

III. REPLY AS TO EXAMPLE 4: "LATER CAST VOTES"

4. Additionally, Contestee Craft files this Reply to specifically address Contestant's arguments with respect to "Example Four" regarding the votes that occurred after 7 p.m. on election day because it is an issue that may be decided as a threshold matter of law. Regardless of any evidence offered by Contestant—whether admissible or not—the issue of whether votes cast after 7 p.m. should be counted is purely a matter of legal interpretation.

5. Contestant Lunceford asserts that certain provisional votes cast after 7 p.m. should not be counted. However, Contestant fails to identify any legal basis to support her argument that

such votes were "illegal" under the Election Code or that the Code was violated. Her complaints regarding the temporary restraining order issued on election day—and the related hearing—are groundless and irrelevant. Also, the mandamus order from the Texas Supreme Court did not deem the votes "illegal"; it only required that they be segregated. No legal basis exists to find that the votes cast in compliance with Texas law were "illegal" under the Election Code.

6. Contestee Craft therefore asks that the Court grant summary judgment and conclude that the provisional ballots cast after 7 p.m. are not "illegal" votes as a matter of law.

A. Relevant Background

7. On November 8, 2022—election day—a petition and application for a temporary restraining order was filed seeking to extend the voting hours in Harris County past 7 p.m. because certain polling locations did not open on time at 7 a.m. *See* Exhibit 25A to Contestant's Response. The defendants to the suit received notice of the petition and application. *See* Exhibit 25C to Contestant's Response ("Plaintiff has notified Defendants of Plaintiff's Petition and Application through their county attorney via phone call and email."). The Ancillary Judge considered the application during an oral hearing and considered the evidence in support. Based on that evidence, the judge granted a Temporary Restraining Order (the "TRO"). *See* Exhibit 25C to Contestant's Response. The TRO required the defendants to keep certain polling locations open until 8 p.m., and all other polling locations in Harris County open until 8 p.m., as well. *Id*. The TRO noted that voters who arrive after 7 p.m. would have to cast a provisional ballot. *Id*.

8. Contestant Lunceford contends in her summary judgment response that the TRO "was not properly granted," and asserts that illegal votes resulted from the supposedly improper order.

B. Notice of the TRO Hearing Is Not at Issue

9. Contestant Lunceford first complains that the TRO was improper because the local HCRP was not provided notice of the TRO hearing. The first problem with Contestant's argument is that HCRP was not an adverse party in the lawsuit. *Cf.* TEX. R. CIV. P. 680 (requiring that notice be provided "to the adverse party" unless certain factors are met). Second, the TRO expressly states that notice *was* provided to Defendants. *See* Exhibit 25C to Contestant's Response. Third, Contestant admits that even if there was a lack of notice, such complaint is immaterial because "HCRP discovered that a hearing was going to occur," made an appearance, asked to intervene, was permitted to intervene, and then objected to the request for an extra hour of voting. *See* Contestant's Response at 27. Contestant's complaint about lack of notice was therefore cured through its intervention, and her challenge to the TRO on that basis should fail.

C. The Evidentiary Basis for the TRO was Proper

10. Contestant Lunceford next complains about the Ancillary Judge's evidentiary basis for entering the TRO. Contestant complains that the TRO was not based on proper evidence because the judge allowed oral testimony at the hearing on the TRO application. But Contestant has cited *no law whatsoever* in support of her argument that oral testimony cannot be accepted at a TRO hearing. Rule 680 does not prohibit oral testimony.[1] In fact, there is no rule that prohibits accepting oral testimony at a TRO hearing.

11. Further, even if the oral testimony was improper, the Texas Supreme Court had an opportunity to cure that error during mandamus proceedings in the very same case. And yet, the Supreme Court made no such ruling. *See* Exhibits 26D & 27G to Contestant's Response. Accordingly, Contestant is precluded by collateral estoppel or res judicata from relitigating this

[1] Unlike, for example, Rule 166a governing summary judgment hearings, which expressly states, "No oral testimony shall be received at the hearing." TEX. R. CIV. P. 166a(c).

issue. *See Barr v. Resolution Tr. Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992) ("[r]es judicata, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit," and "[i]ssue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit.").

12. Contestant's complaint about the evidentiary basis for the TRO lacks merit.

D. The TRO Properly Applied to All Polling Locations in Harris County

13. Contestant cannot and does not argue that the Ancillary Judge lacked authority to keep the polls open for an extra hour. Indeed, the Election Code expressly anticipates such action. *See* TEX. ELEC. CODE § 43.007(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."); TEX. ELEC. CODE § 63.011(e) ("A person who is permitted under a state or federal court order to cast a ballot in an election for a federal office after the time allowed by Subchapter B, Chapter 41, must cast the ballot as a provisional vote in the manner required by this section."). Federal law also anticipates that such action may be necessary and simply requires that the ballot cast "be separated and held apart from other provisional ballots cast by those not affected by the order." Help America Vote Act, 42 USC § 15482(c). In other words, the law allows a court to order that all polls remain open as long as the later cast votes are separated.

14. Contestant instead argues that if the polls were to be left open past 7 p.m., then that must apply to 100% of the polling locations. But that is exactly what the TRO required. It ordered the defendants to keep specific polling locations open, and as to all other locations:

2. To operate the other polling locations in Harris County until 8 p.m. as required by Texas Election Code Section 43.007(p), which reads, "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."

See Exhibit 25C to Contestant's Response. The Ancillary Judge therefore required that the order apply to *all* countywide polling locations. So, Contestant's argument that the TRO was improper for failing to apply to all polling locations is groundless.

15. Nonetheless, Contestant still complains that the TRO requiring polls to stay open could not have applied everywhere, *in effect*, because some polls may have run out of ballot paper at that time. But that argument, if true, has no bearing on the validity of the TRO, itself. The TRO followed the law requiring all countywide polling locations to remain open during the extended hours. The Order even referenced the exact code provision that Contestant relies upon. *See* TEX. ELEC. CODE § 43.007(p). Whether some other circumstances created difficulties in casting ballots at a particular location has no effect on the language of the TRO, which complied with the law. Also, Section 43.007(d) does not say anything about all polling locations operating at the exact same level of functionality or efficiency; it only states that all polling places must remain "open" for the same extended period. Regardless of any technical difficulties at a particular location, the TRO correctly included language ordering that *all* countywide polling locations were to remain "open." Contestant's argument also lacks merit because even if some polling locations ran out of ballot paper, voters could still go to the alternative locations that also remained open because the TRO properly kept *all* locations open. Contestant therefore has no legal basis for her complaint about the TRO's scope.

16. And again, the Texas Supreme Court did not find otherwise when the TRO was scrutinized in the mandamus proceedings.

17. This is a threshold issue that should be decided as a matter of law, and the Court should grant summary judgment on this issue.

E. This Court Should Not Relitigate the Ancillary Proceedings or Supreme Court Mandamus

18. Regardless, assuming *arguendo* that her complaints are not baseless, Contestant cannot complain to *this court* that the Ancillary Judge in a *separate case* made an incorrect ruling. This Court's job is not to review the decisions of other courts. The remedy for such complaint would be an appeal to a *higher* court. Indeed, that's exactly what occurred. When emergency mandamus proceedings were filed by the State of Texas, the Texas Supreme Court reviewed the TRO proceedings. The Supreme Court of Texas issued an Order late on election staying the TRO. But the Court did not stay the TRO because the evidence was improper or because the votes were illegal. Rather, the Order only stated that votes cast after 7 p.m. were to be segregated. The entirety of that Order is set forth below:

> **THE SUPREME COURT OF TEXAS**
>
> Orders Pronounced November 8, 2022
>
> **MISCELLANEOUS**
>
> 22-0997 IN RE STATE OF TEXAS; from Harris County
>
> The district court's temporary restraining order issued today in Cause No. 2022-73765, Texas Organizing Project v. Harris County, et al., is stayed. Voting should occur only as permitted by Texas Election Code Section 41.032. Later cast votes should be segregated.

See In re State, No.22-0997 (Nov. 8, 2022 order) (Exhibit 26D to Contestant's Response). Notably, the Supreme Court chose *not* to comment upon the evidentiary basis for the TRO, *not* to state that

any section of the Election Code was violated, and *not* to comment on the legality of "later cast votes."

19. On November 22, after further mandamus briefing, the Supreme Court ordered Harris County to count the segregated provisional ballots and include them in the canvass of the November 2022 election. *See* Exhibit 27G to Contestant's Response. Again, the Supreme Court chose not to rule that the "later cast votes" were illegal or that any code provision was violated. *Id*. The provisional ballots cast after 7 p.m. were correctly included in the count as directed by the Texas Supreme Court and continued to be segregated from votes cast before 7 p.m., as directed by the Texas Supreme Court. Contestant Lunceford has provided no evidence that the Early Voting Ballot Board improperly accepted the ballots. Further, Contestant has presented no evidence that the segregated ballots would be outcome-determinative. *See id*; *Willet v. Cole*, 249 S.W.3d 585, 589 (Tex. App.—Waco 2008, no pet.) ("[t]he outcome of an election is 'materially affected' when a different and correct result would have been reached in the absence of the irregularities.").

20. By arguing that the "later cast votes" are "illegal," Contestant is asking the Court to re-litigate the TRO hearing and to *add* language to the Texas Supreme Court's Order. There is no legal basis for the Court here to make that conclusion. The Court should grant summary judgment in favor of Contestee and rule as a matter of law that the later cast votes are not illegal.

F. Public Policy Favors Empowering Voters, Not Disenfranchising Them

21. The "later cast votes" cannot be taken out of the count unless the votes are found to be "illegal" votes under the Election Code. For the votes to be illegal, there must have been voter error. *See Honts v. Shaw*, 975 S.W.2d 816, 822 (Tex. App.—Austin 1998, no pet.) ("Courts have held that illegal votes are not to be counted when violations of certain provisions of the Election Code result from *voter* action"). There is no basis on which to find that the votes were

illegal because they were not a result of violations of the Election Code by voters. The Ancillary Judge ordered the polls to remain open—in compliance with the Election Code—and voters were told that they could cast provision ballots after 7 p.m. The Supreme Court did not order that the provisional votes were considered illegal votes, only that they were to be segregated from regular votes. There is no legal basis for finding that the "later cast votes" cannot be legally counted.

22. If the Court finds that the "later cast votes" are illegal, the result would be to disenfranchise voters who were acting within their rights under Texas law, which violates public policy in favor of granting voters access to the ballot. *See In re Francis*, 186 S.W.3d 534, 542 (Tex. 2006) ("access to the ballot lies at the very heart of a constitutional republic"); *Honts*, 975 S.W.2d at 822 ("courts should not disfranchise the ... voters because an official failed to follow the strict letter of the code."); *In re Watkins*, 465 S.W.3d 657, 660 (Tex. App.—Austin 2014, no pet.) ("we are to construe deadlines in the Election Code broadly in favor of eligibility and access to the ballot so that decisions are made by voters, not technicalities.").

23. Based on the foregoing facts, Contestant's complaints are groundless and summary judgment is appropriate.

IV. REPLY AS TO EXAMPLE THREE: APPLICATION OF TEX. ELEC. CODE § 51.005

24. Contestee also files this Reply specifically with respect to "Example Three" of Contestant's Response because it relates to an issue that should be decided as a matter of law—namely whether or not section 51.005 of the Election Code applied to the November 8, 2022 General Election.

25. Contestant Lunceford contends with respect to "Example Three" that the Harris County Election Administrator's Office failed to provide sufficient ballot paper because it violated section 51.005 of the Election Code. That section 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(a) (emphasis added). Notably, this statute does *not* state that it applies to a county that holds *countywide* voting rather than *precinct*-based voting. There is no dispute that Harris County switched from precinct-based voting to countywide voting in 2019. Consequently, voters were not required to vote only at their registration precinct on election day; they could vote at any location countywide. And yet, Contestant Lunceford still "alleges that Section 51.005 of the Texas Election Code applied to the November 8, 2022 General Election conducted in Harris County, **notwithstanding the change in voting whereby *countywide voting* was available**." *See* Response at ¶ 17 (emphasis added). Contestant Lunceford's allegation directly contradicts the plain language of the statute. But Contestant failed to cite *any* authority to support her allegation that this provision of the Code applies to counties with countywide voting rather than counties with precinct-based voting.

26. In fact, legislative history strongly suggests that the statute does not apply countywide voting. During the last legislative session, Senate Bill 1911 was proposed, which would amend section 51.005 of the Election Code. *See* 2023 Texas Senate Bill No. 1911, Texas Eighty-Eighth Legislature, attached as Exhibit A, for reference. That bill amended the language so that going forward section 43.007 (the countywide voting statute) *would apply* to 51.005. This proposed amendment demonstrates that section 43.007 did not apply to 51.005, or, at least, the Senate thought it did not apply without the passage of an amendment to make it apply. S.B. 1911 passed the senate but did not pass the house. The law, therefore, remains as being applied solely to precinct-based voting and *not* countywide voting.

27. As further support for there being a difference in how the procedures relate to countywide voting versus precinct-based voting is Election Advisory No. 2023-06, which designates distinct procedures for appointing judges in places with countywide polling. *See* Election Advisory No. 2023-06, Texas Secretary of State (June 26, 2023), *available at* https://sos.state.tx.us/elections/laws/advisory2023-06.shtml. For places with countywide voting, the presiding judges and alternate judges do not need to be qualified voters of a particular election precinct. *Id*. They also do not need to have resided in the particular precinct where the countywide polling place is located. *Id*. And the rules *change the number* of presiding or alternate judges from the same election precinct that may be selected to serve on election day. *Id*. So, if the statutes governing which election judges may be appointed differ between countywide and precinct-based voting locations, then it follows that the statutes governing election supplies would also differ between countywide and precinct-based voting.

28. Nonetheless, even if section 51.005 somehow applied to countywide polling, it could not be relied upon here to show that the amount of ballot paper provided countywide constituted a code violation because there is no apples-to-apples comparison that could be made. It is an undisputed fact that Harris County switched from precinct-based polling to countywide voting in 2019. The county did not hold a general election on a countywide voting basis prior to the November 2022 general election. Further, after the 2020 census and redistricting, the precincts changed. *See* Election Advisory No. 2021-14, Texas Secretary of State (Nov. 1, 2021), a*vailable at* https://www.sos.state.tx.us/elections/laws/advisory2021-14.shtml. Thus, there is no "corresponding election" under section 51.005 to which the 125% rule could be applied. This means it was not possible, as a matter of law, for there to have been a violation of section 51.005 in Harris County in the November 2022 election.

29. There is no fact issue relevant to this question. The Court may conclude as a matter of law that this Election Code provision did not apply to the November 8, 2022 General Election because of the change to countywide voting, rather than voting by precinct.

30. Contestee Craft asks that the Court conclude that Section 51.005 does not apply. The plain language of the Election Code states that this applies to precincts. There is no legal basis for determining that Harris County violated this code provision when the section only applies to precincts, and no reasonable interpretation could apply it to counties with countywide voting.

V. CONCLUSION

For these reasons, Contestee respectfully requests this Court to set this motion for hearing and, after such hearing, to grant a summary judgment dismissing Contestant's election contest in its entirety, as a matter of law. Additionally or alternatively, this Court should dismiss all discrete legal claims, causes of action, and theories for which Contestant has adduced no evidence. Finally, Contestee requests all other relief to which she may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rule of Civil Procedure 21a, a true and correct copy of the foregoing instrument was forwarded to all counsel of record and/or parties on July 24, 2023.

/s/ Eric A. Hawley
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