

CAUSE NO. 2022-79328

**ERIN ELIZABETH
LUNCEFORD,**
Contestant,

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IN THE DISTRICT COURT

v.

HARRIS COUNTY, TEXAS

**TAMIKA “TAMI”
CRAFT,**
Contestee.

164TH JUDICIAL DISTRICT

**AMICUS CURIAE BRIEF OF THE TEXAS ORGANIZING PROJECT,
IN SUPPORT OF CONTESTEE**

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I. INTEREST OF AMICUS CURIAE

The Texas Organizing Project (“TOP”) is a Texas non-profit corporation, with its principal place of business in San Antonio, Texas. TOP is a membership-based organization that empowers low- and moderate-income neighborhoods to build political power and stronger communities through issue advocacy, lobbying efforts, and electoral organizing. Founded in 2009, TOP has dozens of employees and hundreds of regular volunteers working in three offices across the state, including an office in Harris County. TOP’s membership comprises thousands of low- to moderate-income people, with a particular focus on serving the needs of Black and Latino communities.

Amicus (TOP) has a specific interest in this lawsuit because TOP sought and obtained the injunctive relief to hold Harris County polling locations open one hour later on Election Day. That order is improperly under collateral attack here, and TOP has an interest in ensuring that the voters who lawfully cast their ballots under the order are not disenfranchised by Contestant Lunceford’s election contest.

II. ARGUMENT

On November 8, 2022, at least twelve polling places in Harris County opened after the statutorily mandated time of 7 a.m.¹ TOP petitioned the Court to grant

¹ See Ex. A Pl’s. Original Verified Pet. App. for TRO, Temporary Inj., and Permanent Inj. 5–8; see also Tex. Elec. Code § 43.031.

injunctive relief against Harris County for the appropriate remedy for this injury—extending the time the polls were open by one hour.² Harris County was properly notified of the suit and the Court held an emergency hearing.³ Both the Harris County Republican Party (HCRP) and Harris County Democratic Party (HCDP) attended the hearing, requested to intervene, and were allowed to intervene.⁴ After considering the evidence, the Court granted a temporary restraining order (TRO) allowing voters in Harris County to vote a provisional ballot if they joined the line to vote after 7 p.m. but by 8 p.m. on Election Day.⁵ Intervenor HCRP—represented by Counsel for Contestant here—actively worked with the Court to craft the eventual order.⁶ While the State petitioned for mandamus and the late-cast ballots were ordered to be separately tallied, the ballots were included in the final canvass.⁷

The order to extend polling hours was proper. The Texas Election Code broadly authorizes and specifically contemplates the exact relief obtained in that suit. Indeed, that same Election Day, the Secretary of State advised Bell County to seek

² See *id.* Ex. A. Pl’s. Original Verified Pet. App. for TRO, Temporary Inj., and Permanent Inj. 5–8.

³ Ex. B Order App. TRO, No. 2022-73765, at 1 (295th District Court Harris County, Nov. 8, 2022).

⁴ Ex. C Ancillary Hr’g Tr. 8:15–14:12.

⁵ Ex. B Order App. TRO, No. 2022-73765, at 2–4 (295th District Court Harris County, Nov. 8, 2022).

⁶ Ex. C Ancillary Hr’g Tr 20:16–25, 46:2–47:13.

⁷ Ex. D Order On Pet. for Writ of Mandamus, *In re State*, No. 22-044, (Nov. 22, 2022).

the exact same sort of court order, which it did.⁸ Contestant's other quibbles with the order, including its evidentiary basis, are similarly wrong on the law. Further, the Court should reject the extraordinary remedy sought here which would disenfranchise over 2,000 voters who lawfully cast ballots under a valid court order.

A. The TRO was Properly Noticed.

Contestant suggests that proper notice was not given prior to the TRO hearing. However, the defendant, Harris County, was properly notified of the lawsuit. The other entities and persons that Contestant names as interested parties (including the Office of the Secretary of State, Office of the Attorney General, HCRP, and candidates on the ballot) were not proper parties to sue for injunctive relief. Contestant's 5th Am. Original Pet. 18–19. Only Harris County could remedy its Election Code violation and keep its polling locations open for an extended hour of voting. Further, this was not a suit challenging the constitutionality of a statute which would have required notice to the Attorney General. There was no legal reason or obligation for TOP to notify any of the other entities and persons the Contestant names.

⁸ Lauren Dodd & Jana Lynn Kilcrease, *Bell County polling locations extended to 8 p.m., officials say*, KILLEEN DAILY HERALD (Nov. 8, 2022), https://kdhnews.com/news/local/bell-county-polling-locations-extended-to-8-p-m-officials-say/article_b78f18dc-5f75-11ed-afd2-636e89875ecd.html (“Bell County Elections Administrator Dr. Desi Roberts contacted the Secretary of State’s office this morning to make the request,” the release said. “At that time, in accordance with Texas Election Code (43.007(p)), he was directed to ask the County Attorney, Jim Nichols, to petition a District Court judge to issue a Court Order instructing that polls remain open. . . .”).

Moreover, even if HCRP was a necessary party to the lawsuit (which it was not), the fact remains that they were not harmed by not being initially notified: as the Contestant openly admits, HCRP heard about the emergency hearing and was permitted to intervene. Contestant's 5th Am. Original Pet. 18–19. Upon intervening, HCRP actively participated in the hearing, including working to craft the specific order issued by the judge.⁹ Thus, the Contestant's notice objections should be rejected.

B. The Court's Order to Grant the TRO was Lawful.

i. The Texas Election Code authorizes the relief afforded.

Granting the TRO was consistent with the Legislature's intent as manifest in the Texas Election Code. When courts construe a statute, "words and phrases [must] be read in context and construed according to the rules of grammar and common usage." Tex. Gov't Code § 311.011(a); *see also Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 663 (Tex. 2010). Statutory construction requires "giving effect to all words so that none of the statute's language is treated as surplusage." Legislative intent is discerned from the statute as a whole, not from isolated portions. *Marks*, 319 S.W.3d at 663 (citing *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 402 (Tex. 2000)). The court's "ultimate goal is to understand the Legislature's intent and apply that intent according to the statute's purpose." Tex.

⁹ *See generally* Ex. C Ancillary Hr'g Tr. 46–53.

Gov't Code § 312.005; *see also Marks*, 319 S.W.3d at 663 (calling legislative intent the “polestar of statutory construction”) (citation omitted).

The Texas Election Code unambiguously contemplates extending polling place hours, the precise remedy TOP sought. First, the Texas Election Code gives courts broad authority to fashion remedies to prevent violations of the Election Code. Section 273.081 requires that “[a] person who is being harmed or is in danger of being harmed by a violation . . . of [the Election Code] is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring.” Tex. Elec. Code § 273.081. The Legislature did not limit the injunctive relief that injured parties are “entitled to” for Election Code violations to specific remedies. *Id.* Indeed, the Legislature gave courts the freedom to issue any “appropriate” relief, including extending polling hours, “to prevent the violation from continuing or occurring.” *Id.* This broad grant of authority clearly encompasses extending polling hours where, as here, that is the only appropriate relief.

Second, multiple provisions of the Texas Election Code expressly contemplate court orders to extend polling hours. Section 43.007(p), enacted in 2019, is premised on the possibility of a court ordering an extension of Election Day voting hours: “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 § 43.007(p). If the

Legislature had wanted to ban such court orders, it could have attempted to do so. Instead, the Legislature acknowledged the ability of courts to issue such a remedy and chose to tailor how the remedy operates in counties with countywide voting. Contestant's argument that the remedy of extending polling hours is not authorized by law would render this provision mere surplusage and contravene the Legislature's intent.

Similarly, Section 63.011 is premised on the possibility of a court ordering a ballot be accepted after the time for voting specified in the Code: "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." Tex. Elec. Code § 63.011(e).¹⁰

The Texas Election Code specifically contemplates and broadly authorizes granting injunctive relief to extend polling hours where appropriate. The district court properly granted Harris County voters that remedy.

¹⁰ That the Code specifies later-cast ballots must be provisional does not undermine the legitimacy of the ballots cast nor of the remedy of extending hours. The Code's requirements for vetting provisional ballots focus on voter eligibility and identification, not whether the person voted during extended hours. *See* Tex. Elec. Code §§ 65.054, 65.0541; *see also* § 65.057 (requiring the counting of accepted provisional ballots).

ii. *The Court's Decision to Grant the TRO was Consistent with Precedent Regarding Violations of § 41.031.*

The remedy of extending polling place hours is not only contemplated in statute, but recognized in precedent. Texas courts, including in Harris County, have historically remedied violations of Texas Election Code Section 41.031 by ordering counties to keep polling locations open after 7 p.m. to offset late openings which burden voters.¹¹ Indeed, the underlying case, *Tex. Organizing Project v. Harris Cnty.*, No. 2022-73765 (295th District Court Harris County, Nov. 8, 2022), is not even the sole example of a court ordering an extended hour of voting during the November 2022 general election. A court ordered Bell County that same day to keep polling places open until 8 p.m. after eight polling places opened late.¹² And, in fact, the Secretary of State expressly advised Bell County to seek that remedy.¹³

¹¹ See, e.g., Ex. E, Order, *Tex. Organizing Project v. Harris Cnty.*, No. 2018-80292 (295th District Court Harris County, Nov. 6, 2018) (finding that voters have the legal right to have twelve hours of voting on Election Day, and requiring polling locations in Harris County to stay open beyond 7 p.m. to guarantee that right); Ex. F, Order, *La Unión Del Pueblo Entero v. Hidalgo Cnty.*, No. 3842-20-F (370th District Court Hidalgo County, Nov. 3, 2020) (requiring polling locations in Hidalgo County to stay open until 8 p.m. after late openings); Ex. G, Order, *In the Interest of Upshur Cnty. Voters*, No. 514-20 (115th District Court Upshur County, Nov. 3, 2020) (same).

¹² Ex. H, No. 22-DCV-335320 (146th District Court Bell County, Nov. 8, 2022); see also 6 NEWS DIGITAL, *Bell County polling hours extended until 8 p.m.*, KCEN TV (Nov. 8, 2022), <https://www.kcentv.com/article/news/local/bell-county-polling-sites-experiencing-difficulties/500-6bbb8779-a6f6-4a34-be17-739041472bfb>.

¹³ See *supra* note 8, Lauren Dodd & Jana Lynn Kilcrease, *Bell County polling locations extended to 8 p.m., officials say*, KILLEEN DAILY HERALD (Nov. 8, 2022), https://kdhnews.com/news/local/bell-county-polling-locations-extended-to-8-p-m-officials-say/article_b78f18dc-5f75-11ed-afd2-636e89875ecd.html.

Texas courts have determined time after time that an extended hour of voting is the correct remedy when polling places open after the statutorily mandated time on Election Day. Thus, Contestant's arguments that the TRO was an improper remedy for Harris County's violation of Texas Election Code Section 41.031 are inconsistent with precedent and fail on their face.

C. Alleged Issues with Complying with the TRO Do Not Justify Disenfranchising Voters Who Lawfully Cast Ballots Pursuant to It.

The Texas Election Code requires that “[i]f 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 § 43.007(p). Contrary to the Contestant's assertions, *see* Contestant's 5th Am. Original Pet. 20, that is exactly what the district court ordered. The order required *all* of the named polling places in TOP's petition to remain open until 8 p.m. *and* “[t]o operate the other polling locations in Harris County until 8 p.m. as required by Texas Election Code Section 43.007(p)[.]”¹⁴ There was no deficiency in the court's order and any assertion to the contrary is misleading.

Even if, as Contestant argues, there was variance in polling place compliance with the order due to insufficient resources, Contestant's 5th Am. Original Pet. 19–

¹⁴ Ex. B Order App. TRO, No. 2022-73765, at 1 (295th District Court Harris County, Nov. 8, 2022).

21, those arguments do nothing to invalidate the TRO for the time it was in place, nor should they lead to extreme and extraordinary result that those voters who legally cast ballots would have them discarded. *See Honts v. Shaw*, 975 S.W.2d 816, 822 (Tex. App.—Austin 1998, no pet.) (“courts should not disfranchise the . . . voters because an official failed to follow the strict letter of the code.”). If, as Contestant claims, voters were harmed due to alleged insufficient resources at polling places during the extended time for voting, the appropriate remedy under the Texas Election Code would be for the harmed party to further extend the time polls are open or to seek some other remedial relief in the moment.¹⁵ Indeed, having successfully intervened, HCRP was positioned to raise the issue with the district court and seek such a remedy but chose not to.

D. The TRO was Properly Granted Because the Evidence the Court Considered to Support it was Sufficient.

Contestant claims that the evidence supporting the Election Day TRO was deficient and therefore all the voters who cast ballots pursuant to that order should be disenfranchised. Contestant’s argument fails as a matter of law. First, because the declarations Contestant challenges were valid under Texas law; and second, because there is no prohibition against using live witness testimony in a TRO hearing. *See*

¹⁵ *See* II.B.

Contestee’s Reply in Supp. of Summ. J. at 3–5 (emphasizing Contestant’s lack of evidence for her claims that live testimony is not permitted in a TRO hearing).

i. Texas Law Supported the Court Granting a TRO Because the Declarations TOP Submitted Included a Perjury Clause.

Texas law requires that an unsworn declaration used in lieu of a written sworn declaration be in writing and subscribed as true under penalty of perjury. Tex. Civ. Prac. & Rem. Code § 132.001(a), (c); *Baylor Scott & White v. Project Rose MSO, LLC*, 633 S.W.3d 263, 291 (Tex. App.—Tyler, 2021, pet. denied). The unsworn declaration must be subscribed by the person making the declaration and contain a jurat in substantially the form shown in the statute. Tex. Civ. Prac. & Rem. Code § 132.001(c)(2), (d); *Gillis v. Harris Cnty.*, 554 S.W.3d 188, 192 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

Even if a declaration lacks certain elements set forth in Section 132.001’s jurat template, such as address and date of birth, the phrase “upon penalty of perjury” is the “key to an unsworn declaration” and is “consistently upheld as in substantial compliance with Section 132.001.” *Gillis*, 554 S.W.3d. at 192–93 (collecting Texas Courts of Appeals cases upholding such declarations as substantially compliant); *see also Tex. Dep’t of Pub. Safety v. Caruana*, 363 S.W.3d 558, 564 (Tex. 2012) (emphasizing that statements in an unsworn declaration are “subscribed . . . as true under penalty of perjury” and thus “[t]he verity of a declaration is . . . assured by the criminal penalties for perjury. . . .”). In *Baylor Scott & White*, the court considered

a declaration that was made under penalty of perjury but lacked the declarant's address and date of birth. *Baylor Scott & White*, 633 S.W.3d at 291. The court held that those insubstantial “shortcomings [were] not fatal” and admitted the declaration. *Id.* Similarly, in *Gillis*, the court considered a declaration lacking the declarant's address, date of birth, middle name, and date and county of execution—and found the declaration was sufficient because it contained the perjury clause. *Gillis*, 554 S.W.3d at 192–93.

Here, Amicus's declarations were subscribed by the declarant and contained the language “under penalty of perjury.”¹⁶ These declarations met the substantiality requirement to be considered sufficient evidence under *Gillis* and Section 132.001. The “defects” the court found were the omission of the declarants' dates of birth and addresses.¹⁷ Contrary to Contestant's assertion, the Court never found the declarations “invalid” or their deficiencies “fatal.” Contestant's 5th Am. Pet., at 18–19; Contestant's Resp. to Contestee's Mot. Summ. J., at 17–18.

Contestant's arguments to the contrary are irrelevant and meritless in light of Texas law. Whether TOP's declarations lacked “dates of birth and addresses for the

¹⁶ Ex. G Exs. A–S to Pl's Original Pet. & App. for TRO.

¹⁷ See Ex. C Ancillary Hr'g Tr. 14:23–15:3; see also *id.* at 27:6–29:2 (the court seeking caselaw from Plaintiffs about the “form” in which “these declarations must be made”).

declarant,” is immaterial. Contestant’s 5th Am. Pet., at 18; Contestant’s Resp. to Contestee’s Mot. Summ. J., at 17–18.

ii. Contestant Has No Authority for Her Objection to Live Testimony.

The Contestant’s contentions that introducing live testimony to support the TRO at the emergency hearing was improper hold no water.¹⁸ There is nothing in the Texas Rules of Civil Procedure, local rules, or Texas case law prohibiting the admissibility of witness testimony in a TRO hearing. Indeed, as Contestee points out, where the rules prohibit such testimony, the prohibition is plainly stated. Contestee’s Reply in Supp. of Summ. J. 4 n.1. The court specifically requested witness testimony to support the TRO, which Contestant acknowledged.¹⁹ *See* Contestant’s 5th Am. Pet., at 19; Contestant’s Resp. to Contestee’s Mot. Summ. J., at 18. There is nothing in state law to second-guess the court’s judgment on inviting witness testimony. Further, introducing live testimony served to decrease any prejudice to all parties. Every party had the opportunity to cross examine the witnesses offered (though they declined), and the judge was able to make credibility

¹⁸ This Court should reject Contestant’s invitation for the Court to micromanage and invalidate the decision made by a co-equal court. Contestant’s arguments, including second guessing how the district court evaluated the evidence before it, could have been raised as a direct attack or as a direct appeal but were not. Contestant’s challenges to the late-cast ballots here are improper collateral attacks on a coequal court and therefore should be rejected. *Armentor v. Kern*, 178 S.W.3d 147, 149 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (collateral attack permissible only where underlying judgment is void because of lack of jurisdiction, all other alleged errors must be raised on direct appeal).

¹⁹ Ex. C Ancillary Hr’g Tr. 14:19–15:16, 27:3–6, 30:8–15, 31:17–32:2, 36:13–18, 41:2–9, 43:14–18.

determinations of the witnesses. Contestant's complaint appears to be that this TRO had more process than normal, but surely that is not a reason to invalidate it.

Contestant points to no authority in her briefs to support her contention that accepting live witness testimony at a TRO hearing is improper. Contestant's 5th Am. Pet., at 19; Contestant's Resp. to Contestee's Mot. Summ. J., at 18. Therefore, her arguments regarding the admission of such testimony should be disregarded.

III. CONCLUSION

For the reasons included herein, TOP asks the court to deny the relief the Contestant requests as to the late-cast ballots. To invalidate the late-cast ballots and call a new election would disenfranchise voters across Harris County and threaten public trust in the democratic process.

Dated: August 10, 2023

/s/ Veronikah Warm

Veronikah Warm

Texas Bar No 24132682

veronikah@texascivilrightsproject.org

Hani Mirza

Texas Bar No. 24083512

hani@texascivilrightsproject.org

Joaquin Gonzalez

Texas Bar No. 24109935

joaquin@texascivilrightsproject.org

Christina Beeler

Texas Bar No. 24096124

christinab@texascivilrightsproject.org

TEXAS CIVIL RIGHTS PROJECT

1405 Montopolis Drive

Austin, TX 78741

512-474-5073 (Telephone)

512-474-0726 (Facsimile)

-and-

Edgar Saldivar

Texas Bar No. 24038188

esaldivar@aclutx.org

Ashley Harris

Texas Bar No. 24123238

aharris@aclutx.org

Thomas Buser-Clancy

Texas Bar No. 24078344

tbuser-clancy@aclutx.org

ACLU FOUNDATION OF TEXAS, INC.

P.O. Box 8306

Houston, TX 77288

(713) 942-8146 (Telephone)

(915) 642-6752 (Facsimile)

CERTIFICATE OF SERVICE

I herby certify that on August 10, 2023, a true and correct copy of the foregoing *Amicus Curiae Brief of the Texas Organizing Project, In Support of Contestee*, was served upon all counsel of record via electronic filing, in accordance with TEX.,R.CIV.P.21(a).

*/s/ Veronikah Warm*_____

Veronikah Warm

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Chris Rainbolt on behalf of Veronikah Warm's

Bar No. 24132682

chris@texascivilrightsproject.org

Envelope ID: 78423381

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Case Contacts

| Name | BarNumber | Email | TimestampSubmitted | Status |
|-------------------------|-----------|--|----------------------|--------|
| William A. Taylor | 19727600 | ataylor@andytaylorlaw.com | 8/10/2023 5:36:29 PM | SENT |
| Steven Joseph Kherkher | 11375950 | SKherkher-Team@KherkherGarcia.com | 8/10/2023 5:36:29 PM | SENT |
| Sonya Aston | 787007 | sonya@sonyaaston.com | 8/10/2023 5:36:29 PM | SENT |
| Andy Drumheller | | adrumheller@dhmiaw.com | 8/10/2023 5:36:29 PM | SENT |
| Kristin Hagen | | khagen@dhmiaw.com | 8/10/2023 5:36:29 PM | SENT |
| Tiffany Bingham | | tiffany.bingham@harriscountytexas.gov | 8/10/2023 5:36:29 PM | SENT |
| Jonathan Fombonne | | jonathan.fombonne@harriscountytexas.gov | 8/10/2023 5:36:29 PM | SENT |
| Christopher Garza | | Christopher.Garza@harriscountytexas.gov | 8/10/2023 5:36:29 PM | SENT |
| Jacqueline Bauerband | | jacqueline.bauerband@harriscountytexas.gov | 8/10/2023 5:36:29 PM | SENT |
| Veronikah Warm's | | veronikah@texascivilrightsproject.org | 8/10/2023 5:36:29 PM | SENT |
| Hani Mirza | | hani@texascivilrightsproject.org | 8/10/2023 5:36:29 PM | SENT |
| Joaquin Gonzalez | | joaquin@texascivilrightsproject.org | 8/10/2023 5:36:29 PM | SENT |
| Christina Beeler | | christinab@texascivilrightsproject.org | 8/10/2023 5:36:29 PM | ERROR |
| Sadi Antonmattei-Goitia | | santonmattei@pulasakilawfirm.com | 8/10/2023 5:36:29 PM | SENT |