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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
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE PEEPLES:

Contestee, Tamika Craft, files the attached Proposed Findings of Fact and Conclusions of Law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Texas Rule of Civil Procedure 21a, a true and correct copy of the foregoing instrument was forwarded to all counsel of record and/or parties on August 31, 2023.

/s/ Eric A. Hawley
Eric A. Hawley

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Contestee.	§	164TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 1, 2023, came Erin Lunceford, Contestant, by and through her attorneys of record, and also came Tamika Craft, Contestee, by and through her attorneys of record, and all parties having announced ready for trial, all matters of fact and law were tried and submitted to the Court pursuant to Texas Election Code Section 231.005.

The Court, having heard the evidence and argument submitted by the parties during the eight days of trial, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

BACKGROUND FINDINGS

1. On November 8, 2022, Harris County held a general election which included dozens of individual races for various positions (the "General Election"). One such race was for District Judge of the 189th Judicial District between Erin Lunceford and Tamika "Tami" Craft (the "Contested Race"). Early in-person voting for the General Election began on Monday, October 24, 2022 and ended on November 4, 2022.

2. It is undisputed that for the General Election, Harris County implemented countywide polling, rather than precinct-based polling. It is undisputed that this meant Harris

County voters could vote at any polling location in the county, and were not restricted to a single precinct.

3. The Harris County Official Canvass Report (the "Canvass"), admitted into evidence as Contestant's Exhibit 2, shows that there were 1,107,390 total votes cast in the November 8, 2022 General Election in Harris County. The Canvass shows that 1,064,677 total votes were cast for one of the two candidates in the 189th Judicial District race. The Canvass shows Contestant with 530,967 votes and Contestee with 533,710 votes. The Canvass shows that Contestee Craft prevailed in the Contested Race by 2,743 votes.

4. The "undervote" at issue in this case is the number of voters who voted in the General Election but did not vote for either candidate in the Contested Race. The Canvass shows that there were 42,697 undervotes and 16 overvotes in the Contested Race.

5. Clifford Tatum was the Election Administrator for Harris County during the General Election.

6. The Early Voting Ballot Board ("EVBB") is a bipartisan board made up of twelve Republicans and twelve Democrats. The leaders of the EVBB are the Presiding Judge and Alternate Judge. The Presiding Judge for the November 8, 2022 General Election was Sarah Syed, who testified as witness for Contestee Craft during trial. The Alternate Judge was Kay Tyner, who testified as a witness for Contestant Lunceford during trial.

7. The Signature Verification Committee ("SVC") is a bipartisan board made up of twelve Republicans and twelve Democrats. The leaders of the SVC are the Chair and Vice-Chair. The Chair and Vice-Chair of the board are selected from among the approved members. For the November 8, 2022 General Election, the Vice-Chair was Kay Tyner.

8. Contestant Lunceford filed this election contest on December 7, 2022, seeking to overturn the results of the Contested Race and to obtain a new election.

FINDINGS REGARDING "EXAMPLE ONE," "EXAMPLE TWO," AND "EXAMPLE FIFTEEN"

9. Contestant Lunceford alleged as "Example One" of her Fifth Amended Petition that Harris County instructed poll workers to use an improper procedure for scanning ballot pages that failed to scan properly, which led to double-counting of votes.

10. Contestant Lunceford alleged as "Example Two" of her Fifth Amended Petition that the same procedure was improperly used for ballots that had legibility problems, such as smudges, and resulted in double-counting of votes.

11. Contestant Lunceford alleged as "Example Fifteen" of her Fifth Amended Petition that the Canvass reflected a discrepancy between the total cast votes for all countywide races and the cast votes for certain down-ballot contests.

12. Contestant contends that the scanning issues described in "Example One" and "Example Two" led to the cast vote record ("CVR") discrepancy described in "Example Fifteen." As a result, Contestant claims that 1,151 votes—the amount of the CVR discrepancy—were double-counted due to improper scanning.

13. Contestant relied on the testimony of Cindy Seigel to support the existence of the scanning issues. Contestant also relied on Paul Stalnaker's answers to a deposition by written questions ("DWQ") in support of the scanning issues. Contestant relied on the testimony of Colleen Vera to support the amount of the CVR discrepancy and to support allegations of improper scanning procedures.

14. Colleen Vera admitted that the cast vote records in the Contested Race matched up with the cast vote records for the gubernatorial race. There was neither credible nor clear and

convincing evidence to the contrary. Therefore, the Court finds that no CVR discrepancy existed with respect to the Contested Race.

15. Vera admitted she did not know why the discrepancy existed for any other race and she admitted she could offer no expert opinion in that regard.

16. Vera acknowledged she offered no expert testimony during trial.

17. Cindy Siegel is the Chair of the Harris County Republican Party. Siegel did not testify as to any specific illegal vote that was cast in the General Election. Siegel did not testify as to any specific illegal vote that was cast in the Contested Race. Siegel did not testify as to any mistake that resulted in any specific improper vote in the Contested Race. Siegel did not testify as an expert in the trial. There was neither credible nor clear and convincing evidence to the contrary.

18. Paul Stalnaker testified as to problems he personally experienced with the scanners during early voting, but could only attest as to "20+" first page ballots being scanned in a second time. He admitted in his DWQ answers that he could not specify the number of voters who had problems scanning their ballot. His testimony is therefore comprised of speculation. Also, he admitted in his DWQ at answer number 13 that the spoiled ballots were handled properly on election day at the polling place where he was the Presiding Judge.

19. Rebecca "Beth" Stevens testified at trial as Contestee Craft's expert on election administration matters. The Court found Stevens to be an expert in election law, election administration, and election procedures. In light of her knowledge, education, experience, and training, the Court found Stevens to be a highly credible witness as to the subject matter of her testimony.

20. Stevens credibly testified based on her expertise that the scanning procedures were proper and did not result in double-votes. Stevens credibly testified that Hart, the manufacturer of

the voting machines used by Harris County in the General Election, provided guidance for the exact scanning situations described by Contestant in her Examples One and Two, whereby one page of a two-page ballot successfully scanned but the second page did not scan. Stevens testified as to the substance of Hart's instructions under those circumstances. Stevens credibly testified that the process used by Harris County in the General Election complied with the instructions from Hart. Stevens credibly opined, based on her expertise, that this was the proper way to handle the process. There was neither credible nor clear and convincing evidence to the contrary.

21. Stevens credibly testified based on her expertise that the process Harris County instructed poll workers to use was the proper way to handle situations where one page was scanned but one page was not. There was neither credible nor clear and convincing evidence to the contrary.

22. Stevens credibly testified that under the Election Code, voters in the General Election were entitled to receive up to three ballots if they had to spoil a ballot for any reason. There was neither credible nor clear and convincing evidence to the contrary.

23. Stevens agreed with Vera that the cast vote records for the Contested Race matched up with the cast vote records for the gubernatorial race. There was neither credible nor clear and convincing evidence to the contrary.

24. Unlike Vera, Stevens credibly explained—based on her knowledge and expertise—why the CVR discrepancy might exist for other races further down the ballot. Stevens credibly testified as to "fleeing voters," which could explain why there would be larger number of checked-in voters than the total number of votes in the election for down-ballot races. There was neither credible nor clear and convincing evidence to the contrary.

25. Contestant Lunceford claimed that too many first pages of the ballot were scanned in and thus too many CVRs in the gubernatorial race and the Contested Race. If Contestant's

claims were correct, then there would be more votes/CVRs than checked-in voters. However, the evidence at trial established that the number of voters who checked in exceeded the number of CVRs with respect to both the gubernatorial race and the Contested Race. The evidence established at trial therefore does not support Contestant's claim.

26. Contestant Lunceford failed to present any contradicting expert witness testimony regarding the proper procedures for scanning ballots, spoiling ballots, illegible ballots, or the CVR discrepancies. Contestant's election law expert, Christina Adkins, did not testify as to whether the procedures for scanning or spoiling ballots were proper or improper. Neither Cindy Siegel nor Colleen Vera provided expert testimony on the matter.

27. Based on the evidence at trial, the Court finds that neither Cindy Siegel nor Colleen Vera were neutral or unbiased witnesses, which calls into question the credibility and persuasiveness of their testimony.

28. Based on the evidence a trial, even if Siegel's or Vera's testimony was credible, they relied on speculation to support their claims as to the number of improperly scanned or spoiled ballots. Speculation is not evidence under Texas law and cannot be used to support a finding.

29. The Court finds that Contestant Lunceford failed to prove by clear and convincing evidence that the scanning issues described in Examples One and Two resulted in any illegal votes.

30. The Court finds that Contestant Lunceford failed to prove by clear and convincing evidence that the scanning issues described in Examples One and Two resulted in any illegal votes in the Contested Race.

31. The Court finds that Contestant Lunceford failed to prove by clear and convincing evidence that the scanning issues described in Examples One and Two constituted a mistake that resulted in irregularities in the Contested Race.

32. The Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any of the 1,151 votes challenged by "Example One," "Example Two," and "Example Fifteen" resulted in illegal votes being counted in the Contested Race.

33. The Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any of the 1,151 votes challenged by "Example One," "Example Two," and "Example Fifteen" resulted in irregularities in connection with the Contested Race.

34. The Court finds that even if any double votes resulted from improper scanning, there was no evidence that any were specifically cast in the Contested Race.

35. The Court finds that the Canvass shows there was no evidence of any discrepancy in the cast vote records for the Contested Race when compared with the gubernatorial race.

36. The Court finds that the number of voters who checked in exceeded the number of CVRs for the Contested Race.

37. The Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any of the 1,151 votes challenged by "Example One," "Example Two," and "Example Fifteen" materially impacted the outcome of the Contested Race.

38. The Court finds that Contestant Lunceford failed to prove by clear and convincing evidence that any violation of Texas election laws occurred with respect to any of the 1,151 votes challenged by Examples One, Two, and Fifteen.

FINDINGS REGARDING "EXAMPLE THREE"

39. Contestant Lunceford alleged as "Example Three" of her Fifth Amended Petition that the Harris County Election Administrator ("HCEA") failed to supply sufficient election supplies to certain polling places.

40. Contestant Lunceford claims that the initial allocation of ballot paper was insufficient under Section 51.005 of the Texas Election Code. For the reasons explained in Conclusion of Law Nos. 50 through 61, that section did not apply to the Nov. 8, 2022 General Election. The Court finds that the HCEA did not violate the Election Code in determining its initial allotment of ballot paper. There was neither credible nor clear and convincing evidence to the contrary.

41. Contestant Lunceford relied upon the testimony of Russ Long in support of its allegation that Harris County intentionally undersupplied certain historically Republican polling locations.

42. Contestant Lunceford designated Russ Long as an expert on mass data analysis from large server databases.

43. The Court heard and denied Contestee's motion to exclude Long.

44. The evidence at trial established that Long's professional background was in construction, project management, and risk management.

45. The evidence at trial established that Long had no prior education or experience with respect to Texas election laws or the administration or operation of Texas elections. The evidence at trial established that Long had no experience serving as an elections administrator and had never personally administered an election. The evidence at trial established that Long had never been hired by a government entity to perform a post-election audit of election results.

46. Long is not an expert in election-related matters.

47. The evidence at trial established that prior to this case, Long had never before been designated as an expert and had never testified as an expert. The evidence at trial established that

prior to this case, no court had ever found Long to be an expert. There was neither credible nor clear and convincing evidence to the contrary.

48. The evidence at trial established that Long had never published any peer-reviewed publications. The evidence at trial established that none of the theories or opinions regarding the "Heat Map" that Long presented in this case, had ever been subjected to peer review. The evidence at trial established that none of Long's theories or opinions in this case have been used or relied on outside of this litigation. There was neither credible nor clear and convincing evidence to the contrary.

49. Based on the evidence at trial, the Court finds Long is not a neutral or unbiased witness, which calls into question the credibility and persuasiveness of his testimony.

50. The Court finds that the HCEA did not intentionally undersupply certain Harris County polling locations. There was neither credible nor clear and convincing evidence to the contrary.

51. The Court finds that the HCEA did not target "historically Republican" polling locations to undersupply them with ballot paper. There was neither credible nor clear and convincing evidence to the contrary.

52. There was no credible nor clear and convincing evidence that any of the polling locations where ballot paper allegedly ran out were "historically Republican."

53. The Court does not find Long's opinions to be credible or persuasive because he failed to undertake any analysis of the number of Democrats at those polling locations, failed to consider the total population of those areas, and relied upon hearsay and speculation to support his opinion. Russ Long also admitted that his analysis was purely subjective.

54. The "Heat Map" introduced as Contestant's Exhibit 29 was excluded. The Court therefore finds that the expert testimony of Russ Long that relied upon the "Heat Map" is not reliable, as it is based on inadmissible evidence.

55. The Court finds that Russ Long's methodology was unreliable because it failed to account for the number of Democrats in those areas, it failed to account for the total population in those areas, it was based on speculation, it was purely subjective, and he failed to calculate a rate of error until the night before his testimony at trial.

56. Contestant Lunceford asserts that 2,914 voters were "turned away" from polling locations due to insufficient ballot paper or other problems with the supplies provided to the polls. In support of this allegation, Contestant offered the live trial testimony of Victoria Williams and Cindy Siegel, video deposition testimony of Elizabeth Kocurek and Kelly Hubenak-Flannery, and the testimony of approximately 38 individuals who submitted answers to depositions by written questions. Each of these witnesses presented an estimated guess as to the number people who were "turned away" from each polling location. Many admitted that they did not specifically count the number of voters turned away. Many admitted that they could not state precisely how many voters were turned away. Most admitted that they did not know if any of the voters that left their polling places eventually voted at another countywide polling place.

57. Based on the evidence at trial, the Court finds these witnesses were not neutral or unbiased witnesses, which calls into question the credibility and persuasiveness of their testimony.

58. Although Contestant Lunceford claims that the voters were turned away because of a lack of election supplies, Contestant failed to obtain testimony from any "turned away" voter.

59. Cindy Siegel admitted in her testimony that "nothing prevented" Contestant from reaching out to the voters allegedly turned away to obtain their testimony in this case.

60. Contestant's claim as to the reason for the voter's decision to leave the polling place is based on speculation or hearsay. Such evidence cannot be considered by the Court and is not legally sufficient to support a finding.

61. There was no credible nor clear and convincing evidence presented that a single one of the 2,914 "turned away" voters were unable to vote or prevented from voting in the General Election or in the Contested Race.

62. There was no credible nor clear and convincing evidence presented that any of the "turned away" voters were unable to vote or prevented from voting at a different polling location. The Court finds that because the November 8, 2022 General Election in Harris County implemented countywide polling, any "turned away" voter could go vote at any of the other 781 polling locations in the county.

63. Contestant's witnesses credibly testified that there were signs posted at each polling location instructing voters where the four nearest polls were located. The credible evidence from multiple witnesses shows that poll workers instructed voters to visit a different polling location if they were being turned away for lack of election supplies. There was no credible nor clear and convincing evidence to the contrary.

64. Contestant's DWQ from Robert Dorris demonstrates precisely why the number of "turned away" voters is not equivalent to the number of people who were prevented from voting. Dorris stated in his declaration that he went to three different polling locations to vote but left each due to long lines. Dorris then went to a fourth location where he successfully voted. So, Contestant's own evidence provides a specific example of (1) a voter who left one or more polling locations and was able to vote at another location, and (2) at least one person who may have been counted as a "turned away" voter on three separate occasions, but his vote was ultimately counted.

This DWQ demonstrates the fatal flaw in Contestant's argument regarding the alleged 2,914 turned away voters and shows that the 2,914 number lacks any credible foundation.

65. Contestant Lunceford failed to present the testimony of a single voter to say that they were turned away and were unable to vote or were prevented from voting.

66. Contestant failed to present the testimony of a single voter to say that the lack of election supplies prevented them from voting in the General Election or in the Contested Race.

67. Contestant Lunceford presented no evidence as to whether the "turned away" voters were eligible to vote or would have been able to cast legal votes.

68. The Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any of the "turned away" voters were eligible voters that were prevented from voting.

69. The Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any of the "turned away" voters resulted in legal votes not being counted.

70. The Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any "mistake" with respect to the allocation of supplies resulted in irregularities that had any material effect on the outcome of the Contested Race.

FINDINGS REGARDING "EXAMPLE FOUR"

71. Contestant Lunceford alleged as "Example Four" of her Fifth Amended Petition that the Court made a mistake by agreeing to an extra hour of voting on election day. For the reasons explained in Conclusions of Law Nos. 37 through 49, the Court finds no credible nor clear and convincing evidence that there was a mistake by the HCEA.

72. The credible evidence showed that there were 1,969 votes cast after 7 p.m. on election day during the General Election in the Contested Race. Because the Texas Supreme Court required that those votes be segregated, the Court can determine candidate-specific votes with

respect to the post-7 p.m. ballots. The Court finds that 1,147 votes were cast for Contestee Craft and 822 were cast for Contestant Lunceford after 7 p.m. Thus, there were 325 more votes for Contestee Craft than Contestant Lunceford that were cast after 7 p.m.

73. The Court finds that even if there had been a mistake in allowing the extra hour of voting, the 325-vote margin of difference in favor of Contestee Craft does not materially affect the outcome of the Contested Race.

FINDINGS REGARDING "EXAMPLE FIVE"

74. Contestant Lunceford alleged as "Example Five" of her Fifth Amended Petition that approximately 700 mail-in ballots ("BBMs") were not handled properly because the HCEA instructed the Signature Verification Committee to deviate from established procedures during the first two hours of the first day they processed BBMs.

75. Contestee's expert witness, Beth Stevens, credibly testified as to the duties of the SVC. Stevens testified that their responsibilities were—with respect to BBMs—to review both the identification number that is provided on the carrier envelope—the envelopes the ballot was returned in—as well as the signature on that envelope. The SVC's duty was to compare the identification number to the number provided on the person's voter registration documentation, and to compare the carrier envelope signature with the application for ballot-by-mail signature. She testified that they could also compare the signature to any other signature provided by that voter in the past. There was neither credible nor clear and convincing evidence to the contrary.

76. Stevens credibly testified that if the identifications or signatures did not match, then the voter had an opportunity to take corrective action and cure the error before the final voting day. Thus, just because a BBM includes a questionable signature, that does not automatically make the

vote invalid or illegal. There was neither credible nor clear and convincing evidence to the contrary.

77. Stevens credibly testified that if the identification number on the carrier envelope matched the identification number on the voter registration documentation, then there was a rebuttable presumption that the signature on the carrier envelope matched the signature on the BBM application. There was neither credible nor clear and convincing evidence to the contrary.

78. Contestant Lunceford relied on the testimony of Kay Tyner to support her claim that 700 BBMs were processed by the SVC using improper procedures. Kay Tyner testified that she heard Jennifer Colvin give improper instructions to the SVC, and then heard the HCEA change the instructions two hours later.

79. Kay Tyner admitted she did not know the exact number of BBMs that were processed during those two hours. Tyner estimated at least 700 BBMs were reviewed during those first two hours, but it may have been as many as 800.

80. Tyner admitted that she did not personally review any of the challenged 700 BBMs during those two hours. Tyner admitted that she did not know what process was actually used by the SVC members reviewing the BBMs during those first two hours.

81. Tyner admitted that she was unable to say whether the BBMs reviewed during those first two hours were acceptable votes or unacceptable votes. Tyner admitted that she did not know of anyone on behalf of Contestant Lunceford that has gone back to review the 700 BBMs to see if any should have been marked as questionable.

82. Tyner admitted that usually only 1% of the BBMs reviewed by the SVC would be questionable. In other words, she could only challenge 7 of the 700 votes as perhaps being questionable.

83. Tyner admitted that she was not an expert as to election law, election administration, or election procedures. Tyner admitted that she could not offer expert testimony. Tyner admitted that she could not identify any violation of Texas election law or the Texas Election Code.

84. Contestee Craft presented the testimony of two other witnesses who were present during the two hours where Contestant Lunceford alleges that 700 BBMs were processed under improper instructions. Those two witnesses were Melissa McDonough and Sarah Syed.

85. The Court finds the testimony of McDonough and Syed to be credible and persuasive.

86. Melissa McDonough credibly testified that she worked on the SVC with Tyner during the first two hours that the SVC convened to review the BBMs.

87. McDonough credibly testified that she did not hear Jennifer Colvin give improper instructions to the SVC. McDonough said she never heard Colvin instruct the SVC not to compare signatures from the carrier envelope to the application. McDonough credibly testified that at no point were they told not to compare signatures. McDonough credibly testified that she and her team properly compared signatures.

88. McDonough credibly testified that she had access to the voter registrar records. McDonough credibly testified that she was provided with the correct password to access the registrar records. McDonough credibly testified that she assisted other people with setting up the split screen on their monitors to compare signatures more easily.

89. Sarah Syed credibly testified that she has been a member of the SVC and EVBB for three years. Syed credibly testified that she has served as an election worker for six years. Syed

credibly testified that she was present during the entire day—including the first two hours—on the first day that the SVC convened for the General Election.

90. Like McDonough, Syed credibly testified that she did not ever hear Jennifer Colvin instruct her or anyone else not to compare signatures on the envelopes to the signatures on the applications. Syed credibly testified that she did not ever hear Colvin instruct her or others not to compare identification numbers on the envelope with the registrar records. Syed credibly testified that at no point did she ever hear Colvin instruct anyone, including Tyner, that they were not supposed to compare identifications on the carrier envelope with the registrar records or the application.

91. Syed credibly testified that it would not make sense to not compare signatures. Syed credibly testified that if she had received such instruction, she would have stopped and discussed it with others.

92. Syed credibly testified that every time she met with Colvin, there were at least two bipartisan people present.

93. Syed credibly testified that her team properly compared signatures during the first two hours on the first day they convened.

94. Syed credibly testified that she had the password to access the registrar records.

95. Beth Stevens credibly opined that it was possible for Contestant Lunceford to go back and review the 700 BBMs challenged by Tyner to determine whether any were questionable. Stevens explained that the Election Management System allows for running a report on the first 700 BBMs processed, and pulling the carrier envelopes, the voter registration, and application for all 700 of those BBMs. A comparison could then be performed to determine the precise number

of questionable votes. There was neither credible nor clear and convincing evidence to the contrary.

96. Christina Adkins, Contestant Lunceford's election law expert, agreed that this process was possible.

97. Contestant Lunceford did not present any evidence that she engaged in this process or asked the County to engage in this process.

98. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that it was impossible to determine the true outcome with respect to the 700 challenged BBMs.

99. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any of the 700 BBMs challenged in "Example Five" constituted illegal votes.

100. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any election official made a mistake that caused improper BBMs to be counted during the first two hours that the SVC convened for the General Election.

101. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any mistake made during the first two hours the SVC convened had any material effect on the outcome of the Contested Race.

102. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any violation of Texas election laws occurred during the first two hours the SVC convened for the General Election.

FINDINGS REGARDING "EXAMPLE SEVEN,"[1] "EXAMPLE SIXTEEN," AND "EXAMPLE SEVENTEEN"

103. Contestant Lunceford alleged as "Example Seven" of her Fifth Amended Petition that a Harris County reconciliation report demonstrated more ballots were cast in the General Election than there were voters.

104. Contestant Lunceford similarly alleged as "Example Sixteen" of her Fifth Amended Petition that there were more votes in the Canvass than the number of voters who voted.

105. Contestant Lunceford similarly alleged as "Example Seventeen" of her Fifth Amended Petition that more mail-in ballots were counted than turned in by voters.

106. Contestant Lunceford relied upon the testimony of Colleen Vera to support "Example Seven," "Example Sixteen," and "Example Seventeen."

107. Colleen Vera admitted that none of her testimony constituted expert testimony. Vera admitted that she is not an expert on the Election Code, not an expert on the Administrative Code, and not an expert on how elections are run in Texas. Vera admitted that she had no expert opinions on whether votes were illegal under the Texas Election Code or whether any votes must or must not be counted under the law.

108. Beth Stevens, Contestee's election law expert, credibly testified that Contestant's Exhibit 63 is a "Preliminary Election Reconciliation—Unofficial Totals" form that was prepared immediately after the General Election. Stevens' testimony is supported by page 23 of Contestant's Exhibit 20, which explains when and why the form found in Contestant's Exhibit 63 was prepared. That paragraph states, "the Preliminary Election Reconciliation—Unofficial Totals . . . is an early unofficial report of the number of voters and the number of ballots tallied for the November 8,

[1] Prior to trial, Contestant Lunceford withdrew allegations related to "Example Six" and withdrew allegations of "double voting" alleged in "Example Seven."

election. However, this report is not an accurate reflection of voter turnout and ballots counted . . . .” That paragraph goes on to explain that the preliminary report in Contestant’s Exhibit 63 does not include ballots still being processed, does not include timely post-marked mail ballots, and does not take into account Limited Ballot Voters. There was neither credible nor clear and convincing evidence to the contrary.

109. Stevens credibly testified that Contestant’s Exhibit 20, on the other hand, is the HCEA’s *final* post-election report, which has the corrected number of votes cast. Stevens credibly testified that the relevant information contained in Exhibit 20 was supplied to the Texas Secretary of State pursuant to post-election processes. There was neither credible nor clear and convincing evidence to the contrary.

110. Contestant Lunceford’s witness, Colleen Vera, relied upon Contestant’s Exhibit 63—the *preliminary* report—and not Contestant’s Exhibit 20—the *final* report. Vera admitted that she relied upon the preliminary report and not the corrected, final report.

111. Beth Stevens credibly testified that the numbers from Exhibit 63 should not be relied upon, as those were preliminary numbers, not the final voting numbers. There was neither credible nor clear and convincing evidence to the contrary.

112. Stevens credibly testified—and the evidence shows—that there is no discrepancy in the HCEA’s final post-election report in Exhibit 20. Vera also admitted that the math in the final report adds up correctly and there are no errors.

113. Stevens credibly testified that because Vera’s allegations were based on a *preliminary* report and did not factor in the corrected number, they do not amount to anything and “do not demonstrate there is an issue at all even remotely close to materially affecting this election or this race at all, period.”

114. Vera admitted that she did not factor in limited ballot voters or voters on the omissions list in her calculations. She admitted that including these voters could make up for the difference in her claimed discrepancy.

115. The Court finds Stevens' testimony based on her expertise to be credible and reliable.

116. The Court finds Vera's lay testimony in support of "Example Seven," "Example Sixteen," and "Example Seventeen" to be unreliable and not credible.

117. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that it was impossible to determine the true outcome because of the reconciliation discrepancy alleged in "Example Seven," "Example Sixteen," and "Example Seventeen."

118. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any claimed irregularities in the preliminary reconciliation report actually impacted any specific vote cast in the Contested Race.

119. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any mistake made with respect to the preliminary reconciliation report had any material effect on the outcome of the Contested Race.

120. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any violation of Texas election laws occurred with respect to the allegations in "Example Seven," "Example Sixteen," or "Example Seventeen"

FINDINGS REGARDING "EXAMPLE EIGHT"

121. Contestant Lunceford alleged as "Example Eight" of her Fifth Amended Petition that certain mail-in ballots that were cast and counted should not have been counted because they were postmarked after November 8, postmarked on November 8 for non-military and non-overseas voters in a city like San Antonio or Fredericksburg, or the carrier envelope lacked a signature by the voter. Contestant Lunceford alleged in her Fifth Amended Petition that she was challenging 72 total votes under "Example Eight," but she pared that down to 56 during Colleen Vera's live testimony at trial.

122. Contestant relied on the testimony of Colleen Vera to support the allegations in "Example Eight."

123. Vera admitted that none of her testimony constituted expert testimony. Vera admitted that she is not an expert on the Election Code, not an expert on the Administrative Code, and not an expert on how elections are run in Texas. Vera admitted that she had no expert opinions on whether votes were illegal under the Texas Election Code or whether any votes must or must not be counted under the law.

124. Vera testified that 44 of the BBMs were not signed. She admitted that she could not testify that these were "illegal" votes. She could only offer her opinion that if she had been on the Ballot Board and seen these issues, she would have "questioned" the ballots.

125. Vera could not dispute the fact that the bipartisan Ballot Board accepted the 56 challenged votes based on the information available, which was more information than Vera had to rely on for her non-expert opinion.

126. Vera admitted that 4 or 5 of those 44 challenged BBMs included witness signatures. The evidence at trial established that a signature by the voter was not necessary where a witness

signature was present. The Court finds that Contestant failed to prove with credible or clear and convincing evidence that those 5 BBMs were illegal votes.

127. Christina Adkins, Contestant Lunceford's election law expert, testified in her deposition that if the County receives a carrier envelope containing a mail-in ballot and that envelope is not signed, then she would advise the County that the unsigned carrier envelope is eligible for the corrective action process and that they should pass it on to the Ballot Board. The Ballot Board can then notify the voter to give the voter an opportunity to cure the error. Beth Stevens, Contestee's election law expert, agreed with Adkins on this point. There was neither credible nor clear and convincing evidence to the contrary.

128. Contestee's Exhibits 47 and 48 are the "Notice of Carrier Defect" forms that would be sent to the voter if there was a signature lacking.

129. Vera admitted that she had no knowledge as to whether the 44 BBMs that she challenged as lacking signature were later cured. Contestant Lunceford presented no evidence as to whether the 44 challenged BBMs were cured or not.

130. Stevens credibly testified that if the unsigned BBM was later cured, it would not necessarily be reflected in the same document. There would be additional documents in the Election Management System reflecting the correction. There is no credible evidence that Contestant Lunceford attempted to obtain those additional documents that would show the corrected ballots.

131. Colleen Vera testified that 12 of the BBMs were postmarked late.

132. Beth Stevens credibly testified based on her expertise that she saw no evidence of a postmark not complying with the Texas Election Code that materially affected the outcome of the Contested Race.

133. Contestant Lunceford presented no evidence that the 56 votes challenged under "Example Eight" included votes in the Contested Race.

134. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that it was impossible to determine whether the 56 challenged BBMs under "Example Eight" were illegal votes.

135. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that it was impossible to determine the true outcome of the Contested Race due to alleged issues with 56 BBMs under "Example Eight."

136. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any of the 56 BBMs challenged in "Example Eight" constituted illegal votes.

137. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any election official made a mistake that caused improper BBMs to be counted.

138. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any mistake with respect to the 56 challenged BBMs had any material effect on the outcome of the Contested Race.

139. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any violation of Texas election laws occurred with respect to the 56 challenged BBMs under "Example Eight."

FINDINGS REGARDING "EXAMPLE NINE"

140. Contestant Lunceford alleged as "Example Nine" of her Fifth Amended Petition that certain provisional ballots were cast and counted that should not have been counted.

141. The Court admitted into evidence the Provisional Ballot Affidavit exemplar form as Contestant's Exhibit No. 5.

142. Christina Adkins, Contestant's expert witness, testified that Provisional Ballot Affidavits ("PBAs") are used when a voter appears at a voting location and their name does not appear on the list of registered voters. The PBA offers the voter a chance to vote provisionally and gives the voter registrar an opportunity to investigate the circumstances. She testified that PBAs may also be used when there is a lack of identification.

143. Beth Stevens, Contestee's expert witness, credibly testified that PBAs are also signed often for mail ballots where the voter was notified they need to cure and the voter shows up to cure in person because they did not receive the mail ballot or chose not to vote by mail. Stevens credibly testified that PBAs are used for many reasons, not just for voter registration issues.

144. Stevens credibly testified that the Early Voting Ballot Board is the only body that has discretion in determining whether to accept or reject a provisional ballot. There was neither credible nor clear and convincing evidence to the contrary.

145. The EVBB is a bipartisan group and every decision as to whether to accept or reject is made by a bipartisan team. There was neither credible nor clear and convincing evidence to the contrary.

146. As stated in Conclusion of Law No. 6, below, the EVBB is presumed by law to have acted properly in accepting or rejecting a provisional ballot.

147. Stevens credibly testified that the EVBB is entitled to review the entire PBA as well as publicly available documentation—including voter registration data—to determine whether to accept or reject a PBA. There was neither credible nor clear and convincing evidence to the contrary.

148. The Court finds that the starting point for the PBA analysis is that the EVBB is presumed to have acted properly in accepting the challenged PBAs, and Contestant Lunceford must overcome that presumption with clear and convincing evidence.

149. Contestant Lunceford relied upon William Ely to support the number of PBAs being challenged under "Example Nine."

150. Contestant Lunceford designated William Ely as an expert on Microsoft Excel.

151. The Court heard and denied Contestee's motion to exclude Ely.

152. Ely admitted that during his deposition, he crossed through all of, or substantial portions of, paragraphs 5, 6, 10, 11, 12, 13, and 14 of the disclosures designating him as an expert on various matters. He denied being an expert with respect to any of those struck-through matters.

153. The evidence at trial established that Ely's professional background is as an account executive for a software company. Although Ely claims to have experience in elections as an election judge, election clerk, precinct chair, and member of the HCRP Ballot Security Committee, Ely admitted that he was not designated as an election law expert and admitted he could not testify as to the meaning of any of the data he analyzed.

154. The evidence at trial established that Ely has no prior education or experience with respect to Texas election laws. The evidence at trial established that Ely had no experience serving as an elections administrator and has never personally administered an election. The evidence at

trial established that Ely had never been hired by a government entity to perform a post-election audit of election results.

155. Ely is not an expert in election-related matters. There was neither credible nor clear and convincing evidence to the contrary.

156. The evidence at trial established that prior to this case, Ely had never before been designated as an expert and had never testified as an expert. The evidence at trial established that no court had ever found Ely to be an expert. The evidence at trial established that Ely had never published any peer-reviewed publications. The evidence at trial established that none of the theories or opinions regarding the Provisional Ballot Affidavits that Ely presented in this case had ever been subjected to peer review. The evidence at trial established that none of Ely's theories or opinions in this case had been used or relied on outside of this litigation. There was neither credible nor clear and convincing evidence to the contrary.

157. Ely prepared Contestant's Exhibits 10C-E in support of his expert opinion regarding the number and type of PBAs being challenged.

158. Contestant Lunceford alleged that 3,406 of the 4,557 PBAs accepted by the EVBB should have been rejected. This is comprised of 2,206 PBAs cast after 7 p.m. on election day, and 1,200 PBAs that Contestant challenged for other reasons.

159. For reasons explained in Conclusions of Law 37 through 49, below, the 2,206 PBAs cast after 7 p.m. were not illegal votes and, therefore, the 325-vote margin for Contestee Craft could not have had a material effect on the outcome of the Contested Race.

160. Ely flagged the remaining 1,200 PBAs for various reasons, including:[2]

a. No voter ID or blank (1,075);

[2] The parenthetical numeration comes from Ely's chart on page 2 of Contestant's Exhibit 10C, in which he omits duplicate PBAs that fit within multiple of these categories.

b. Election Judge date invalid or blank (99)

c. Election Judge date after Nov. 8, and Election Judge date after Ballot Board Judge date (3);

d. No citizenship or left blank (14);

e. Blank residential address and blank or invalid mailing address (3);

f. No Election Judge signature (2);

g. No Ballot Board Judge signature (2); and

h. No voter signature (2).

161. Ely testified as to the number within each category, but he admitted that he could not testify as to their significance. Contestant Lunceford presented no witness who testified that each of the categories identified resulted in illegal votes.

162. Contestant's expert on election law, Christina Adkins, admitted that she could not offer any opinion as to any fact in this case. She was designated purely as an expert on the law and opined only as to hypothetical situations. Adkins did not offer any expert opinion as to whether *any* of the challenged PBAs constituted illegal votes.

163. Contestant Lunceford presented no credible evidence that the PBAs being challenged (other than the post-7 p.m. segregated votes) were cast and counted in the Contested Race.

164. Aside from the post-7 p.m. votes, the largest category of challenged PBAs is the "no voter ID or blank" category. The evidence at trial established that nearly all of these PBAs were blank—neither the "yes" nor the "no" box were marked. Only 37 PBAs were marked as "no."

165. Christina Adkins admitted that the "yes /no" box is not a reason—on its own—to reject a PBA. She admitted that the *reason* for voting provisionally, which is listed under the

"yes/no" box, *must* be considered. And unless the reason for voting provisionally is that the voter failed to present a proper photo ID, then the "yes/no" box is irrelevant.

166. Beth Stevens agreed with Adkins' testimony. Stevens credibly testified that if the "yes/no" box is blank and any reason for voting provisionally is selected other than lack of photo ID, then the "yes/no" box being blank is not a proper reason to reject the vote. There was neither credible nor clear and convincing evidence to the contrary.

167. Stevens further testified credibly that even if the "yes/no" box is blank *and* the reason for voting provisionally is that the voter failed to present acceptable form of photo identification, then the voter may still be allowed to cure within six days of election day. Thus, the lack of photo identification and a blank "yes/no" also did not equate to an illegal vote. There was neither credible nor clear and convincing evidence to the contrary.

168. Contestant presented no credible nor clear and convincing evidence that the voters with challenged PBAs failed to timely cure. Contestant failed to present evidence that she even attempted to discover whether the voters cured the allegedly defective PBAs.

169. The Court finds that Contestant Lunceford did not overcome the presumption that the EVBB acted properly in accepting PBAs with a blank in the "yes/no" field.

170. The Court finds that Contestant Lunceford did not prove with credible nor clear and convincing evidence that the PBAs with a blank "yes/no" box were illegal votes.

171. Stevens credibly testified that PBAs lacking a date next to the Election Judge signature are not invalid based solely on a blank date. Stevens credibly testified that a hyper-technical error by the election judge should not be visited upon the voter. There was neither credible nor clear and convincing evidence to the contrary.

172. Stevens credibly testified that the EVBB had discretion to consider the entire form, publicly available information, voter registration information, and ballot-by-mail information in making their decision to accept or reject a PBA. There was neither credible nor clear and convincing evidence to the contrary.

173. The Court finds that the lack of a date by the Election Judge does not overcome the presumption that the EVBB acted properly in accepting PBAs.

174. The Court finds that Contestant Lunceford did not prove with credible nor clear and convincing evidence that the PBAs with a blank Election Judge date were illegal votes.

175. Stevens credibly testified a PBA is not invalid because the Election Judge signed the PBA after November 8. Adkins admitted that judge may be called back in to sign the PBA at a later date. Stevens testified that the timing is of no consequence as to whether to accept or reject the PBA. There was neither credible nor clear and convincing evidence to the contrary.

176. Stevens credibly testified that a PBA is not invalid simply because the Election Judge signed after the Ballot Board Judge. There was neither credible nor clear and convincing evidence to the contrary.

177. The Court finds that Contestant Lunceford failed to overcome the presumption that the EVBB acted properly in accepting PBAs dated by the Election Judge after November 8 or after the Ballot Board Judge.

178. The Court finds that Contestant Lunceford did not prove with credible nor clear and convincing evidence that the PBAs dated by the Election Judge after November 8 or after the Ballot Board Judge were illegal votes.

179. Stevens credibly testified that all of the PBAs challenged for lack of citizenship were left blank—none were marked "no." There was neither credible nor clear and convincing evidence to the contrary.

180. Stevens credibly testified that a PBA is not invalid because the citizenship box was left blank. Stevens credibly testified that the EVBB had discretion to consider the entire form, publicly available information, and voter registration information, in making their decision to accept or reject a PBA. There was neither credible nor clear and convincing evidence to the contrary.

181. The Court finds that Contestant Lunceford failed to overcome the presumption that the EVBB acted properly in accepting PBAs with the citizenship box left blank.

182. The Court finds that Contestant Lunceford did not prove with credible nor clear and convincing evidence that the PBAs with the citizenship box left blank were illegal votes.

183. Stevens credibly testified that a PBA is not invalid because the residential address box was left blank. Stevens credibly testified that the EVBB had discretion to consider the entire form, publicly available information, and voter registration information, in making their decision to accept or reject a PBA. There was neither credible nor clear and convincing evidence to the contrary.

184. Stevens credibly testified that a PBA is not invalid because the voter wrote in their residential address in the mailing address portion of the PBA. Stevens credibly testified that the EVBB had discretion to consider the entire form, publicly available information, and voter registration information, in making their decision to accept or reject a PBA. There was neither credible nor clear and convincing evidence to the contrary.

185. The Court finds that Contestant Lunceford failed to overcome the presumption that the EVBB acted properly in accepting PBAs with the residential address left blank or the address written in the mailing address section.

186. The Court finds that Contestant Lunceford did not prove with credible nor clear and convincing evidence that the PBAs with the residential address box left blank or the address written in the mailing address section were illegal votes.

187. Stevens credibly testified that PBAs lacking a signature by the Election Judge or the Ballot Board Judge (Contestant challenged just 37 total PBAs on this basis) are not invalid on their face because these are hyper-technical errors by election officials which the law says should not be used to disenfranchise a voter. There was neither credible nor clear and convincing evidence to the contrary.

188. The Court finds that Contestant Lunceford did not prove with credible nor clear and convincing evidence that the PBAs with blank signatures by the Election Judge or Ballot Board Judge were illegal votes.

189. The Court finds that even if the PBAs with blank signatures by the Election Judge or Ballot Board Judge were illegal votes, there was no credible nor clear and convincing evidence that they had a material effect on the outcome of the Contested Race.

190. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not overcome the presumption in favor of the EVBB's acceptance of all PBAs challenged under "Example Nine."

191. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that it was impossible to determine whether the PBAs under "Example Nine" were illegal votes.

192. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that it was impossible to determine the true outcome of the Contested Race due to hyper-technical errors in the PBAs under "Example Nine."

193. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any of the PBAs challenged in "Example Nine" constituted illegal votes.

194. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any election official made a mistake that caused improper PBAs to be counted.

195. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any mistake with respect to the challenged PBAs had any material effect on the outcome of the Contested Race.

196. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that any violation of Texas election laws occurred with respect to the challenged PBAs under "Example Nine."

FINDINGS REGARDING "EXAMPLE TEN"

197. Contestant Lunceford alleged as "Example Ten" of her Fifth Amended Petition that voters with cancelled registrations illegally voted in the General Election.

198. Contestant initially alleged that 2,970 voters had illegally voted with cancelled registrations. Contestant relied on the expert opinion of Steve Carlin to support this claim. On the eve of trial, Contestant dismissed this claim as to all except for five (5) voters. Contestant admitted

that this claim only related to five voters, as all the other challenged voters had their registrations cancelled *after* the November 8 General Election.

199. Accordingly, only five votes are at issue with respect to "Example Ten."

200. Carlin admitted that he did not check the timing of the cancelled registration prior to providing his opinion.

201. Contestant failed to present credible or clear and convincing evidence that the five voters with cancelled registrations at the time of the General Election voted in the Contested Race.

202. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that five votes from voters with cancelled registrations had any material effect on the outcome of the Contested Race.

203. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that a different and correct result would have been reached even if the five votes were found to be illegal.

FINDINGS REGARDING "EXAMPLE ELEVEN"

204. Contestant Lunceford alleged as "Example Eleven" of her Fifth Amended Petition that 1,995 voters who were on the "suspense" list voted in the General Election without completing a Statement of Residence ("SOR"), making those votes illegal.

205. Contestant Lunceford did not present credible nor clear and convincing evidence as to *when* the voters at issue went on the suspense list.

206. Contestant Lunceford relied on the testimony of her expert, Steve Carlin, to support "Example Eleven."

207. Carlin admitted that he did not use the Voter Unique Identifier ("VUID") in determining whether people on the suspense list completed an SOR. Carlin admitted that he was

able to match 44, but not the remaining 1,995. Carlin admitted that he was categorizing the 1,995 as illegal because he could not find the SOR, even though he failed to use the VUID in the search.

208. Carlin testified that, like with the cancelled registrations, he made no effort to determine when the voters at issue went on the suspense list.

209. As a result, there is no evidence as to how many of the "suspense" voters at issue were on the suspense list *prior to* or at *the time of* the General Election compared to *after* the election.

210. Beth Stevens credibly testified that it is irrelevant if the voters were placed on the suspense list after the election, just as it was irrelevant for voters who had their registrations cancelled after the election.

211. Contestant Lunceford contends that 1,995 voters on the suspense list did not complete an SOR.

212. However, Contestant Lunceford did not present credible nor clear and convincing evidence that the 1,995 voters on the suspense list were required to complete an SOR.

213. Beth Stevens credibly testified that a person may be accidentally or improperly placed on the suspense list. The Election Code contemplates this scenario. Sections 14.022 and 63.0051 discuss removing voters from the suspense list who were not supposed to be on the suspense list in the first place. In such case, Stevens credibly testified, a voter may be taken off the suspense list by the voter registrar, or the voter might cast a provisional ballot instead of an SOR. Thus, the fact that a suspense list voter did not complete an SOR is not, on its own, reason to count the vote illegal. There was neither credible nor clear and convincing evidence to the contrary.

214. Contestant's election law expert, Christina Adkins, was not properly or timely designated on the suspense list voter issue and the Court sustained Contestee's objection to her testifying on this issue.

215. Contestant Lunceford did not present credible nor clear and convincing evidence that the suspense list voters were properly placed on the suspense list in the first place.

216. Contestant Lunceford did not present credible nor clear and convincing evidence that the suspense list voters were not taken off the suspense list by the voter registrar.

217. Contestant Lunceford did not present credible nor clear and convincing evidence that the suspense list voters did not complete a PBA instead of an SOR, as permitted by the Texas Election Code.

218. Carlin admitted that he did not know a voter on the suspense list could vote through a provisional ballot.

219. There was no credible nor clear and convincing evidence that Contestant Lunceford made any attempt to cross-check the suspense list voters with voters who completed a PBA.

220. There was no credible nor clear and convincing evidence that Contestant Lunceford made any attempt to rule out other ways the suspense list voters could have legally voted.

221. Contestant failed to present credible or clear and convincing evidence that any of the voters on the suspense list voted in the Contested Race.

222. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that the challenged suspense list votes constituted illegal votes.

223. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that the challenged suspense list votes constituted illegal votes that were counted in the Contested Race.

224. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that suspense list voters had any material effect on the outcome of the Contested Race.

225. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that allowing the suspense list voters to vote constituted a violation of Texas election law.

226. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that an election officer or other person officially involved in the administration of the election made a mistake with respect to the suspense list voters that materially impacted the outcome of the Contested Race.

FINDINGS RELATED TO "EXAMPLE TWELVE" AND "EXAMPLE FOURTEEN"

227. Contestant Lunceford alleged as "Example Twelve" of her Fifth Amended Petition that 1,315 voters who cast ballots with an allegedly improper SOR constituted illegal votes.

228. Contestant Lunceford alleged as "Example Fourteen" of her Fifth Amended Petition that illegal votes were counted without an appropriate registration address.

229. Contestant changed the number of SORs being challenged during the time leading up to trial and during trial. Throughout the litigation, the number has steadily decreased, as Contestant's claims were further scrutinized. During trial, Steve Carlin testified that the number of SORs being challenged on their face for being out-of-county votes was 1,116 and that the

number of incomplete SORs being challenged was 467. By the close of evidence, Contestant claimed that 1,027 voters voted with an out-of-county SOR, 284 voters had an incomplete SOR, and four (4) voters had an SOR with a P.O. Box address. Contestant claimed those 1,315 votes constituted illegal votes. Carlin admitted, however, that of the 1,027 votes being challenged as out-of-county, only 966 were shown as being on the roster.

230. Contestant relied on the testimony of Steve Carlin to support her allegations under "Example Twelve" and "Example Fourteen."

231. Contestant designated Steve Carlin as an expert in Microsoft software products and analysis of large volume data.

232. The Court heard and denied Contestee's motion to exclude Carlin.

233. Carlin's professional background is as a consultant on business strategies, systems implementation, and information technology.

234. The evidence at trial established that Carlin managed a team of volunteers who analyzed the data on which he based his opinions.

235. The evidence at trial established that Carlin has no prior education or experience with respect to Texas election laws or the administration or operation of Texas elections. The evidence at trial established that Carlin had no experience serving as an elections administrator and had never personally administered an election. The evidence at trial established that Carlin had never been hired by a government entity to perform a post-election audit of election results. The evidence at trial established that prior to this case, Carlin had never before been designated as an expert and had never testified as an expert on election-related matters. The evidence at trial established that prior to this case, no court had ever found Carlin to be an expert on election matters. The evidence at trial established that Carlin had never published any peer-reviewed

publications regarding elections. There was neither credible nor clear and convincing evidence to the contrary.

236. Carlin is not an expert in election-related matters.

237. The evidence at trial established that none of the theories or opinions regarding elections that Carlin presented in this case, have ever been subjected to peer review. None of Carlin's theories or opinions in this case have been used or relied on outside of this litigation. There was neither credible nor clear and convincing evidence to the contrary.

238. The evidence at trial demonstrated that during trial, Carlin changed a number of his previously offered opinions as reflected in his pretrial reports and deposition testimony based on information he learned for the first time at trial.

239. Based on the evidence at trial, the Court finds Carlin is not a neutral or unbiased witness, which calls into question the credibility and persuasiveness of his testimony.

240. Carlin initially opined as to three "buckets" of data that Contestant was challenging. For two of the "buckets," Carlin relied heavily on data that came from TrueNCOA to show that election officials allegedly made a mistake. Carlin admitted that the TrueNCOA data, by itself, was not reliable. Carlin admitted that the TrueNCOA data did not come from a government entity, but it was a private contractor who prepared the data. Carlin admitted that his decision to use TrueNCOA was purely subjective.

241. The Court sustained Contestee's objections to the TrueNCOA data on relevance and hearsay grounds. The TrueNCOA data was excluded from evidence. The Court finds that Carlin's testimony based on such evidence is unreliable because it is based on inadmissible evidence.

242. Because the Court excluded the TrueNCOA data, Contestant narrowed her claim to challenge only SORs that were allegedly problematic based on "the four corners" of the SOR document.

243. The Court does not find Carlin's opinions regarding the 1,027 voters with alleged out-of-county addresses to be credible or persuasive for several reasons, including but not limited to:

a. Carlin admitted during cross-examination that for dozens of the challenged SORs, his data was incorrect and the addresses listed in the SORs were in-county, despite being counted as out-of-county in his data. Carlin repeatedly admitted those votes were "safe" and that he regretted counting them as improper.

b. Carlin admitted that he failed to consider whether the out-of-county voters were active service members in the military and stationed elsewhere. Carlin admitted that he had improperly counted active military votes as being invalid votes.

c. Carlin admitted that he failed to filter out for students who were voting from a temporary address or voting at a school address. Carlin admitted that he had improperly counted students with valid votes as being invalid.

d. Carlin admitted that every SOR being challenged as an out-of-county SOR included a sworn statement by the voter that they were a resident of Harris County.

e. Contestee's expert, Beth Stevens, credibly testified that this sworn statement triggers a presumption in favor of residency. There was neither credible nor clear and convincing evidence to the contrary.

f. Carlin admitted that the sworn statement of residency meant that Contestant would have to look beyond the four corners of the SOR to determine actual residency.

Contestant presented no credible nor clear and convincing evidence outside of the SOR that the voters were not in-county residents.

g. Carlin admitted that he could not say "clearly and convincingly" that the SORs being challenged were for voters who lived outside the county.

h. There is neither credible nor clear and convincing evidence that the challenged votes were cast in the Contested Race.

i. Carlin admitted that only 966 of the challenged SORs were on the roster. But that data does not show that those 966 individuals voted in the General Election or in the Contested Race.

244. The Court does not find Carlin's opinions regarding the 284 voters with incomplete SORs to be credible or persuasive for several reasons, including but not limited to:

a. Carlin admitted that he could not tell the Court whether those voters with incomplete SORs were ineligible voters.

b. Carlin admitted that some of the "incomplete" SORs were a result of transcription errors during processing by Contestant's volunteers—not errors by voters or by election officials.

c. Carlin admitted that he marked SORs as "incomplete" when the residence was redacted, even though there could be a legitimate reason for redacting the voter's address.

d. There is neither credible nor clear and convincing evidence that the 284 challenged votes were cast in the Contested Race.

245. The Court does not find Carlin's opinions regarding the four (4) P.O. Box voters to be credible or persuasive for several reasons, including but not limited to:

a. There is neither credible nor clear and convincing evidence that the four votes were illegal.

b. There is neither credible nor clear and convincing evidence that the four votes were cast in the Contested Race.

c. There is neither credible nor clear and convincing evidence that the four votes had a material effect on the outcome of the Contested Race.

246. Carlin admitted that just because a person filled out an SOR does not mean they voted in the General Election or in the Contested Race.

247. Carlin admitted that he could not say whether any of the out-of-county SORs being challenged were voters who voted in the General Election or in the Contested Race.

248. Carlin testified, at first, that it was "impossible" to tell if someone who completed an SOR voted in the General Election or in the Contested Race. However, he later admitted that it was, indeed, possible because Contestant could have contacted the voters. Carlin admitted that he made no effort to contact any of the voters whose votes were being challenged. The Court finds that there is no credible nor clear and convincing evidence that it was impossible to determine whether the challenged voters voted in the Contested Race.

249. The Court does not find Carlin's testimony to be credible or persuasive for several reasons, including but not limited to:

a. Carlin admitted that he could not find at least 61 allegedly out-of-county SORs on the roster and yet he chose to include those in his count of illegal votes. This glaring flaw in his analysis casts doubt on his methodology as a whole.

b. Carlin admitted that his job in this case was to throw out big numbers and have someone else prove him wrong.

c. Carlin admitted dozens of times that he regretted marking certain SORs as illegal when he was shown that they were not illegal.

d. Carlin admitted that his job was not to have 100% accuracy when counting votes as illegal. Carlin estimated that his opinions were 80% accurate. Carlin admitted that he did not calculate a rate of error for his work.

e. Carlin admitted that he did not cross-check his data to see if voters who completed an SOR also completed a PBA.

f. Carlin made no effort to determine if the challenged votes were cast and counted in the Contested Race.

250. Contestant's expert, Beth Stevens, credibly testified that a determination of whether someone is an out-of-county voter cannot be made based on the face of the SOR, alone. She credibly testified that a deeper analysis that involves several steps is required.

251. The Court finds that the SORs categorized by Contestant as out-of-county contain contradictory statements regarding residency. Even if the address provided by the voter is an out-of-county address, the SOR contains an attestation that the voter is a resident of Harris County. Thus, there is a contradiction on the face of the SOR. As stated in Conclusion of Law No. 8, the non-resident address statement carries "slight weight" in determining whether that vote should be found illegal. The Court finds that the SORs are not illegal for the sole reason that they provide an out-of-county residential address.

252. Stevens credibly testified, based on her expertise, that a completed SOR does not mean the voter actually voted in the General Election. Stevens credibly testified that a completed SOR does not mean the voter actually voted in the Contested Race. There was neither credible nor clear and convincing evidence to the contrary.

253. Stevens credibly testified, based on her expertise, that a term of art exists for voters who cast a ballot but fail to complete the voting process: "fleeing voters." Stevens credibly testified that some SORs may have been completed by fleeing voters. Stevens credibly testified that some voters will check in and then leave before casting a ballot. There was neither credible nor clear and convincing evidence to the contrary.

254. Stevens credibly testified, based on her expertise, that it was possible for Contestant Lunceford to contact the voters to determine if they voted in the General Election or in the Contested Race. Stevens credibly testified that those voters could have been called in to testify as to whether they voted in the General Election or in the Contested Race. Such testimony would not require the voter to reveal which candidate they voted for, only the contest in which they voted. There was neither credible nor clear and convincing evidence to the contrary.

255. Stevens credibly testified, based on her expertise, that the challenged votes must have had a material effect on the outcome of the Contested Race. Stevens credibly testified that for the effect to be "material," it must have been greater than both the margin of defeat (2,743 votes) plus the undervote (42,697 votes).

256. The Court finds that even if the SORs were illegal, there was neither credible nor clear and convincing evidence that any of the 1,315 SORs challenged were cast and counted in the Contested Race, specifically.

257. The Court finds that it was possible for Contestant Lunceford to determine whether the challenged voters had voted in the Contested Race, but there is no credible nor clear and convincing evidence that Contestant made any effort to contact any of the voters who completed the challenged SORs.

258. The Court finds that the total number of challenged SORs (1,315) did not exceed the margin of defeat plus the undervote. There was neither credible nor clear and convincing evidence to the contrary.

259. The Court finds that there is no credible nor clear and convincing evidence that the challenged SORs had any material effect on the outcome of the Contested Race.

260. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that the challenged SORs constituted illegal votes.

261. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that the challenged SORs constituted illegal votes that were counted in the Contested Race.

262. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that the challenged SORs had any material effect on the outcome of the Contested Race.

263. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that counting the challenged SORs constituted a violation of Texas election laws.

264. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that an election officer of other person officially involved in the administration of the election made a mistake with respect to the challenged SORs that materially impacted the outcome of the Contested Race.

FINDINGS REGARDING "EXAMPLE THIRTEEN"

265. Contestant Lunceford alleged as "Example Thirteen" of her Fifth Amended Petition that 532 illegal votes were cast and counted without an appropriate Reasonable Impediment Declaration ("RID").

266. Contestant Lunceford challenged 532 RIDs because portions of the RID form were not completed.

267. Contestant's Exhibit 8 was admitted into evidence as an exemplar of a form RID.

268. The evidence established at trial that a RID was used for voters who appeared on the official list of registered voters but did not possess an acceptable form of identification. Those voters were presented a RID for completion and signature prior to voting.

269. Contestant Lunceford relied on the lay testimony of Victoria Williams to support the allegations regarding the 532 RIDs under "Example Thirteen."

270. Contestant Lunceford did not present Victoria Williams as an expert on election law, election procedures, or how to administer elections. The Court finds that Williams was not an expert. There was neither credible nor clear and convincing evidence to the contrary.

271. Victoria Williams admitted that she was not opining that the 532 challenged RIDs constituted "illegal votes," but that they were evidence of "mistakes" by election officials. Williams could not testify as to whether the votes were illegal.

272. Williams admitted that determining whether the RIDs were illegal votes would require further investigation. Williams admitted that she did not undertake any further investigation.

273. Williams admitted she could not testify as to any election code violation.

274. Contestant's election law expert, Christina Adkins, admitted that a voter who completed a RID was someone who was already on the list of registered voters. She credibly testified that the RID is about validating identity. As a result, she testified, an incomplete RID does not mean a voter failed to properly validate their identity. Adkins testified that determining whether a RID is valid is a very fact-specific inquiry. There was neither credible nor clear and convincing evidence to the contrary.

275. Adkins credibly testified that an improperly filled-out RID does not, on its face, mean that the voter is ineligible or should not have voted. Contestee's expert, Beth Stevens, testified that she agreed with Adkins on this point. There was neither credible nor clear and convincing evidence to the contrary.

276. Although Adkins could not testify as to any specific fact in the case, she admitted that if the Contestant is challenging RIDs by arguing that on the face of the RID there is some issue with some technicality, then that is not sufficient to warrant overturning that vote. There was neither credible nor clear and convincing evidence to the contrary.

277. Adkins admitted that if there were items on the form of the RID that were left blank or not properly filled out, that—on its face—is not an indication that the voter failed to validate their identity in the proper way. There was neither credible nor clear and convincing evidence to the contrary.

278. Contestant Lunceford failed to present credible nor clear and convincing evidence that any of the 532 challenged RIDs were votes cast and counted in the Contested Race, specifically.

279. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that the challenged RIDs under "Example Thirteen" constituted illegal votes.

280. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that the challenged RIDs under "Example Thirteen" constituted illegal votes that were counted in the Contested Race.

281. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that the challenged RIDs under "Example Thirteen" had any material effect on the outcome of the Contested Race.

282. Based on the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that counting the challenged RIDs under "Example Thirteen" constituted a violation of Texas election laws.

283. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds that Contestant Lunceford did not prove by clear and convincing evidence that an election officer of other person officially involved in the administration of the election made a mistake with respect to the challenged RIDs under "Example Thirteen" that materially impacted the outcome of the Contested Race.

CONCLUSIONS OF LAW

1. Contestant Lunceford filed this election contest pursuant to Chapter 233 of the Texas Election Code.

2. This Court has jurisdiction over this election contest pursuant to Texas Election Code Section 221.002, and venue was proper in Harris County pursuant to Texas Election Code Section 233.005.

3. This election contest was tried to the Court pursuant to Texas Election Code Section 231.005.

4. The scope of the Court's inquiry at trial of this election is set forth in Texas Election Code Section 221.003.

5. Texas courts abhor overturning election results because it disenfranchises the will of the voters. *See, e.g., Gonzales v. Villarreal*, 251 S.W.3d 763, 782-83 (Tex. App.—Corpus Christi 2008, pet. dism'd); *Speights v. Willis*, 88 S.W.3d 817, 821 (Tex. App.—Beaumont 2002, no pet.); *Olsen v. Cooper*, 24 S.W.3d 608, 610 (Tex. App —Houston [1st Dist.] 2000, no pet); *Simmons v. Jones*, 838 S.W.2d 298, 300 (Tex. App.—El Paso 1992, no writ); *Chumney v. Craig*, 805 S.W.2d 864, 865 (Tex. App.—Waco 1991, writ denied); *Concerned Citizens for Better Educ. v. Woodley*, 623 S.W.2d 488, 491 (Tex. App.—Texarkana 1981, writ dism'd); *Jordan v. Westbrook*, 443 S.W.2d 616, 618 (Tex, App.—San Antonio 1969, no writ); *Johnston v. Peters*, 260 S.W. 911, 916 (Tex. App.—San Antonio 1924,writ dism'd).

6. "There is a presumption that election officials have done their duty in conducting an election ...." *Chumney*, 805 S.W.2d at 865. "[W]hen the officers of an election have permitted a person to vote, the presumption at once arises that such action was proper and that such person is a legal voter." *Greaves v. Driggers*, 252 S.W.2d 782, 784 (Tex. App.—El Paso 1952, no writ). "[A]n election judge is *presumed* to have acted properly in receiving or rejecting a ballot," and the "contestant has the heavy burden of overcoming this presumption." *Tiller v. Martinez*, 974 S.W.2d 769 (Tex. App.—San Antonio 1998, pet. dism'd w.o.j.). Overcoming this presumption places a heavy burden on the contestant, "and the declared results of an election will be upheld in all cases except where there is clear and convincing evidence of an erroneous result." *Olsen*, 24 S.W.3d at

610; *Reyes v. City of Laredo*, 794 S.W.2d 846, 848 (Tex. App.—San Antonio 1990, no writ); *Harrison v. Stanley*, 193 S.W.3d 581, 583-84 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

7. The clear and convincing standard is the degree of proof that will produce in the mind of the trier of fact a "firm belief or conviction" as to the truth of the allegations sought to be proved. *Id*.

8. "When a person's statements regarding residence are inconsistent with the facts showing actual residence, 'such statements 'are of slight weight' and cannot establish residence in fact.'" *McDuffee v. Miller*, 327 S.W.3d 808, 820 (Tex. App.—Beaumont 2010, no pet.).

9. Circumstantial evidence of illegal votes, without more, is 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). Conclusory testimony is not probative, evidence that allows for no more than speculation is legally insufficient, and the Court cannot rely on the mere *ipse dixit* opinion of experts or opinions that require layers of inferences and assumptions. *Id*. at 9, 11.

10. "A court trying an election contest shall attempt to ascertain whether the outcome shown by the final canvass was not the true outcome because illegal votes were counted or because an election official or other person officially involved in the administration of the election (1) prevented eligible voters from voting, (2) failed to count legal votes, or (3) engaged in other fraud or illegal conduct or made a mistake." *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 98 (Tex. App.—Dallas 2010, pet. denied).

11. Contestant "has the burden of proving a negative proposition—that a challenged vote is not legal." *Royalty v. Nicholson*, 411 S.W.2d 565, 575 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.).

12. To set aside the outcome of the election, Contestant Lunceford bore the burden of proving by clear and convincing evidence that a violation of the election code occurred and it materially affected the outcome of the election. *Id.* at 98; *McCurry v. Lewis*, 259 S.W.3d 369, 372 (Tex. App.—Amarillo 2008, no pet.).

13. "The outcome of an election is materially affected when a different and correct result would have been reached in the absence of irregularities or irregularities in the conduct of the election render it impossible to determine the majority of the voters' true will." *Id*.

14. To show a different and correct result would have been reached in the absence of irregularities, "[i]t must be shown that a different result would have been reached by counting or not counting certain specified results" affected by the complained of irregularities. *Goodman v. Wise*, 620 S.W.2d 857, 859 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.); *Price v. Lewis*, 45 S.W.3d 215 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Olsen v. Cooper*, 24 S.W.3d 608, 608 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

15. Texas courts uniformly hold that the mere assertion of election-related irregularities is insufficient to prevail in an election contest; rather, the Contestant must prove the identified issues specifically impacted a number of votes greater than the margin at issue in such a way that those votes should be disregarded and the election results declared void. *See Woods v. Legg*, 363 S.W.3d 710, 719 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (election contest plaintiff "did not bear his burden to prove by clear and convincing evidence that, but for election official misconduct, he would have won"); *O'Catia v. Salinas*, No. 13-18-00563-CV, 2019 WL 1414021 (Tex. App.—Corpus Christi-Edinburg Mar. 29, 2019, pet. denied); *Olsen*, 24 S.W.3d at 612-13.

16. While the aim of the Election Code is to "safeguard the purity of the ballot box … it may not be used as an instrument of disenfranchisement for irregularities of procedure." *Prado v. Johnson*, 625 S.W.2d 368, 369 (Tex. App.—San Antonio 1981, writ dism'd).

17. When any violation or irregularity is not of the voters, but of the election officials over which the voters had no control, then to vitiate the votes would wrongly result in a disenfranchisement of those voters who properly cast their ballots. *Id.* at 369-70.

18. While "statutory enactments concerning elections must be strictly enforced to prevent fraud," they should also be "liberally construed in order to ascertain and effectuate the will of the voters." *Id.* at 369.

19. Thus, when a technical violation of the Election Code occurs, "it would frustrate the democratic process to void th[e] entire … election for the sake of rigid conformity to the law." *Des Champ v. Featherston*, 886 S.W.2d 536, 541 (Tex. App.—Austin 1994, no writ).

20. "[C]ourts should not disenfranchise … voters because an official failed to follow the strict letter of the [E]ection [C]ode." *Alvarez v. Espinoza*, 844 S.W.2d 238, 243 (Tex. App.—San Antonio 1992, writ dism'd w.o.j.). "[A] sanction for the sins of the . . . official should not [be] visited upon the voter." *Honts v. Shaw*, 975 S.W.2d 816, 822 (Tex. App.—Austin 1998, no pet.).

21. "The general rule of interpretation is that the election laws are to be construed as directory in the absence of fraud or a mandatory provision which requires the voiding of a ballot for failure to comply with its provisions." *Reese*, 80 S.W.3d at 658.

22. Moreover, courts "recognize that elections are seldom perfect" and "do not order new elections because of errors that did not affect the outcome." *Id.* at 249.

THE CONTESTANT MUST PROVE CHALLENGED VOTES WERE CONTEST SPECIFIC

23. Contestant Lunceford contended that the Court does not need to consider whether the challenged votes were votes cast in the Contested Race; rather, Contestant claimed that showing the votes were cast in the General Election is sufficient. The Court disagrees.

24. The law requires the Contestant prove that the Election Code violation(s) had a material effect on the outcome. *See Goodman*, 620 S.W.2d at 859. Logically, because the General Election was a multi-race election, the illegal votes, or votes that were improperly counted as a product of mistake, must have been cast and counted in the Contested Race, otherwise they could not have had any effect on the outcome of the Contested Race. For example, if an illegal vote was cast in the gubernatorial race, but not in the Contested Race, then its illegality had no material effect on the Contested Race. The Court therefore concludes that the Contestant was required to show any illegal votes, or improper votes that were a product of alleged mistake, were cast in the Contested Race, unless the number of illegal or improper votes was so large as to overcome the margin of victory plus the entire undervote.

25. Texas case law supports this conclusion. *See Goodman*, 620 S.W.2d at 859 ("[n]ot only must the contestant prove that voting irregularities were present but also that they did in fact materially affect the results of the election"); *Miller v. Hill*, 698 S.W.2d 372 (Tex. App.—Houston [14th Dist.] 1985), writ dism'd, 714 S.W.2d 313 (Tex. 1986) ("[a] contestant must prove: (1) illegal votes, (2) illegal votes were cast in the election being contested, and (3) that a different and correct result would have been reached by not counting certain specified votes affected by the illegalities."); *Medrano v. Gleinser*, 769 S.W.2d 687 (Tex. App.—Corpus Christi 1989, no writ) (where the margin of victory was one vote, the contestant brought in five voters who testified that they voted in the general election and in the specific race at issue); *Chumney*, 805 S.W.2d at 864

(holding that even after the change in the law in 1985, the contestant must still prove the unqualified voters cast ballots in the election at issue); *Tiller v. Martinez*, 974 S.W.2d 769 (Tex. App.—San Antonio 1998, pet. dism'd w.o.j.) (holding that the contestant "was required to prove that illegal votes were cast in the election being contested and that a different result would have been reached by not counting the illegal votes"); *Reese v. Duncan*, 80 S.W.3d 650 (Tex. App.—Dallas 2002, pet. denied) ("[t]he contestant must next show the illegal votes were cast in the race being contested"); *McCurry v. Lewis*, 259 S.W.3d 369 (Tex. App.—Amarillo 2008, no pet.) (where the contestant alleged mistake by election officials, the court stated, "the question is *not* whether they voted in *other* races in the 2006 general election; rather, the inquiry is whether election officials prevented eligible voters from voting in the election for commissioner, precinct two.").

26. The Court concludes that Contestant failed to present credible or clear and convincing evidence of any contest-specific votes, other than the post-7 p.m. votes that were segregated.

27. The Court concludes that it was not impossible to determine whether the illegal or mistaken votes at issue in this case were cast in the Contested Race.

28. Contestant contends that it would have been *impractical* to determine whether there were over 2,743 (the margin of defeat) illegal or mistaken votes cast in the Contested Race. But there was no credible nor clear and convincing evidence that Contestant made any attempt to undergo such analysis. There was neither credible nor clear and convincing evidence that Contestant contacted any of the voters who allegedly voted illegally or as a product of mistake to determine whether they voted in the Contested Race. The Contestant failed to present the testimony of a single voter who voted illegally, voted improperly due to mistake, or that was prevented from or unable to vote in the General Election or in the Contested Race. The Court concludes that

Contestant has not proven impracticality because there was no attempt to ascertain whether the challenged votes were contest specific. *See, cf., Green v. Reyes*, 836 S.W.2d 203, 209 (Tex. App.—Houston [14th Dist.] 1992, no writ) (where the trial court heard testimony from 313 of 429 illegal voters).

29. The Court concludes that Contestant failed to present credible or clear and convincing evidence of there were sufficient illegal or improper contest-specific votes to void the Contested Race.

30. The Court concludes that Contestant was not required to prove *candidate*-specific votes, but was required to prove *contest*-specific votes, unless the number of illegal or improper votes outnumbered the margin of victory plus the total undervote.

THE COURT MUST ACCOUNT FOR THE UNDERVOTE

31. When a voter did not vote for either candidate at issue, that is an "undervote." *Reese*, 80 S.W. 3d at 653, n. 2; *Medrano* , 769 S.W. 2d at 688.

32. Courts in Texas have considered the number of undervotes when adjudicating election contests. *See*, *Rivera v. Lopez*, 13-14-00581-CV, 2014 WL 8843788, at *12 FN 12 (Tex. App.—Corpus Christi May 14, 2014); *Reese*, 80 S.W. 3d at 664.

33. Contestant Lunceford failed to prove that over 2,743 illegal votes, or improper votes as a product of mistakes by election officials, were cast and counted in the Contested Race. Contestant also failed to prove how many of the challenged votes were undervotes. Contestant must therefore account for the entire undervote. The Court concludes that to prevail in voiding the election without showing contest-specific votes, the Contestant must prove the existence of over 45,440 illegal votes or improper votes as a result of mistake (comprised of the 2,743 vote margin of defeat plus 42,697 undervotes in the General Election).

34. The Court concludes that Contestant failed to prove that the Contested Race should be voided because Contestant failed to overcome the undervote.

35. The Court rejects Contestant's suggested application of a 3.86% rate to the undervote for several reasons, including, but not limited to the following:

a. Contestant failed to present any witness who testified that this rate of undervote should be applied in the manner suggested by Contestant.

b. Contestant failed to present any expert testimony in support of the application of this (or any) percentage.

c. This type of statistical extrapolation requires expert testimony because it is not in the realm of common knowledge. *Unique Staff Leasing, Ltd. v. Cates*, 500 S.W.3d 587, 592 (Tex. App.—Eastland 2016, pet. denied) ("Generally, expert testimony is required when the testimony concerns information or knowledge outside that of an ordinary lay person") (citing *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex.1982)).

d. No expert testified as to whether that 3.86% rate could be properly applied uniformly to the entire vote, or whether the rate of undervote would vary depending on the type of challenged vote. Contestant failed to present expert testimony as to what the rate of error would be with respect to application of that percentage. Contestant presented no methodology that Contestee could rebut. *See E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) ("Scientific evidence that is not grounded in the methods and procedures of science is no more than subjective belief or unsupported speculation") (citing *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 590, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

e. Contestant failed to present any binding or persuasive case law applying a rate of undervote to determine a lower threshold. The Court concludes that Contestant's reliance on a single trial court order in a case that is still on appeal is not persuasive. *See, e.g.*, "Findings of Fact and Conclusions of Law," *Leal v. Peña*, No. 2020-DCL-06433, in the 107th Judicial District of Cameron County, Texas, Jan. 27, 2022), appealed at *Pena v. Leal*, No. 13-22-00204-CV, 2023 WL 3116752, at *1 (Tex. App.—Corpus Christi–Edinburg Apr. 27, 2023, ***pet. filed on*** Jul. 13, 2023).

f. There is no legal basis for the Court to *assume* the number of undervotes being challenged here is less than, greater than, or equal to 3.86%.

g. The Court concludes that the only proper way to account for the undervote is to account for the entire undervote, unless Contestant proves the challenged votes were contest-specific.

36. The Court concludes that Contestant must account for the entire undervote, or prove that each challenged vote was contest-specific. The Court concludes that Contestant failed to meet her burden on both counts.

THE "LATER CAST" VOTES WERE NOT ILLEGAL OR A RESULT OF MISTAKE

37. Contestant Lunceford alleged that votes cast after 7 p.m. on election day should not be counted.

38. On November 8, 2022 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. The defendants to the suit received notice of the petition and application. 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"). 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. The TRO noted that voters who arrive after 7 p.m. were required to cast a provisional ballot.

39. Contestant Lunceford contended that the TRO "was not properly granted."

40. The Court disagrees. The Court concludes that the votes cast after 7 p.m. pursuant to the TRO were not illegal, were not a product of an election official's mistake, and should not be voided.

41. As an initial matter, the Court concludes that it does not have jurisdiction to determine whether the TRO was proper, as the matter has been decided through collateral estoppel. *See Barr v. Resolution Tr. Corp. ex rel. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992). The TRO was issued by an ancillary judge in a different case. That TRO went up on appeal to the Texas Supreme Court. The Texas Supreme Court issued an Order staying the TRO, but it did not opine on the legality of the TRO or remand for any determination as to the legality of the TRO. Contestant provided the Court with no authority supporting her position that this Court may rule that the TRO in that case was improper.

42. Even if the Court were to consider the legality of the TRO, Contestant's argument still fails.

43. Contestant Lunceford contended that the TRO was improper because the Harris County Republican Party ("HCRP"), including Lunceford, was not provided notice of the hearing.

44. The Court concludes that notice was not required to be provided to either the HCRP or Lunceford because neither were adverse parties in the suit at the time the TRO was filed, and the TRO did not apply to enjoin them from doing anything or requiring them to do anything. *Cf.*, TEX. R. CIV. P. 680 (requiring that notice be provided "to the adverse party" unless certain factors

are met). Rule 680 also does not require notice where there is evidence of imminent and irreparable harm. *Id*. The TRO stated that such requirements were met, making notice to any other parties unnecessary.

45. Regardless, HCRP received actual notice and counsel for Lunceford and HCRP appeared, intervened, and objected to the TRO.

46. Contestant further contends that the TRO was improper because live testimony was accepted by the court during the hearing. Contestant failed to present any binding or persuasive authority holding that live testimony is prohibited at a TRO hearing. The TRO was reviewed by the Texas Supreme Court, but it did not rule that the TRO improperly considered live testimony. Rule 680 does not prohibit live testimony at the hearing. The Court concludes that there is no basis for finding that the TRO was improper on the basis of accepting live testimony at the hearing.

47. Contestant also contends the TRO was improper because it did not apply to all polling locations. Contestant's argument is based on the fact that certain polling locations ran out of ballot paper at a certain time on election day. Nonetheless, the face of the TRO plainly states that it applies to all polling locations. When Contestant's election law expert, Chrsitina Adkins, was shown the TRO for the first time at trial, she admitted that it properly stated that all polling places shall remain open until 8 p.m. She agreed that the TRO, on its face, complied with the Election Code. The Court concludes that the TRO properly applied to all polling locations.

48. Contestant contended that the HCEA made a mistake in agreeing to the TRO. Contestant failed to present clear and convincing evidence that this constituted a mistake. And even if it was a mistake, Contestant failed to prove that such mistake should disenfranchise over two thousand voters who were permitted to vote by the courts.

49. As stated in Finding of Fact No. 72, the number of votes at issue with respect to "later cast" votes is 325 votes after accounting for candidate-specific voting. Even if the later cast votes were to be found illegal or improper, the Court concludes that they still did not materially affect the outcome of the Contested Race.

TEX. ELEC. CODE § 51.005 DOES NOT APPLY

50. Contestant Lunceford contended that the HCEA's Office failed to provide sufficient ballot paper in violation of section 51.005 of the Texas Election Code. Section 51.005 of the Texas Election Code 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.

Section 51.005 does not state that it applies to countywide polling. There is no reference to countywide polling in this subsection, and there is no other provision of the Election Code stating that this section applies to counties with countywide polling. Contestant failed to point to any case law or other authority holding that this subsection applies to counties with countywide polling.

51. Contestee's election law expert, Christina Adkins, opined that this section applies to counties with countywide polling because the term "election precinct" is broader than "precinct." Adkins testified that "election precinct" means election day polling place. She testified that this may differ from the voter registration precinct because more than one precinct may be consolidated or combined for an election day polling place. Adkins admitted that she could not point to any provision of the Election Code stating that "election precinct" means election day polling location.

52. Adkins' opinion, however, is problematic for numerous reasons, including but not limited to:

a. The Secretary of State's March 17, 2022 PowerPoint presentation—admitted as Contestee's Exhibit 60—defined "Election Day Precinct" as the "area served on election day by a single polling place." Adkins agreed with this definition.

b. But in countywide polling, the "area served on election day by a single polling place" is the *entire county*. Unlike in precinct-based polling counties—where two or three precincts may be consolidated or combined into a single polling location on election day, and the "area served" by that single polling place is just those consolidated or combined precincts—in countywide voting, the "area served" by each polling location is the entire county. If the statute is read so that Adkins' "election precinct" definition applies to the term "precinct," then it reads that the election official must procure a number of ballots "equal to at least the percentage of voters who voted in that [area served on election day by a single polling place] in the most recent corresponding election plus 25 percent of that number." Such reading would mean *each and every polling location* would have to procure a number of ballots equal to 125% of the voters in that "area served"—*i.e.*, the entire county. In other words, every polling location would have to procure ballots sufficient for all voters in the entire county, plus 25%. This application of the statute would lead to absurd results, as each polling location would have to procure millions of pages of ballot paper.

c. Further, the statute states, "except that the number of ballots provided may not exceed the total number of registered voters in the precinct." Again, under Adkins' definition of the term "precinct," this means the number of ballots cannot exceed the total number of voters in the "area served on election day by a single polling

place." Adkins admitted that the number of registered voters in counties with countywide polling would be unknown. So, Adkins testified that the definition of "precinct" changes for this portion of the subsection. She opined that the Court should interpret the definition of "precinct" differently within the same sentence. Adkins agreed that such reading of a statute is "not common." Adkins could not identify any other part of the Election Code that would be interpreted in a similar fashion.

d. Adkins also testified that she had no support for her interpretation of this subsection of the Election Code. She cited no legislative history, no Secretary of State guidance, and no case law. She admitted that the Court just has to take her word for it. The Court concludes that her opinion is therefore the very definition of *ipse dixit*. *See Nat'l Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012) ("If an expert 'br[ings] to court little more than his credentials and a subjective opinion,' his testimony will not support a judgment."); *Merrel Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 712 (Tex. 1997) ("it is not so simply because 'an expert says it is so.'"). She has asked the Court to accept her opinion just because she says so. The Court cannot do so under Texas law, which prohibits conclusory opinions.

53. Adkins admitted that she had never contacted any of the 89 other counties in Texas that use countywide polling to inquire as to how they handle distribution of supplies and whether they interpret Section 51.005 as applying.

54. Beth Stevens, on the other hand, credibly testified that election administrators at two other large Texas counties, Williamson and Tarrant Counties, which use countywide polling,

did not apply Section 51.005 to determine allocation of election supplies. Rather, they take into account multiple data points with respect to each polling location.

55. Stevens agreed with the Secretary of State's March 17, 2022 PowerPoint presentation, admitted as Contestee's Exhibit 60, regarding the definition of "election day precinct." She testified that "election precinct" in Section 51.005 means "election day precinct," not just "polling location." She credibly testified that "election precinct" could not mean the polling location on election day because the polling location is simply the building where voting takes place. A "precinct," on the other hand, is an area on a map with boundaries, and that includes a certain number of registered voters. On election day, precincts can be consolidated or combined and the total number of voters for that election precinct is still a known number because the number of registered voters in the consolidated or combined precincts can be added together. It therefore makes sense that Section 51.005 applies to precinct-based voting because the total number of registered voters that could possibly go to the polling location is a known quantity. This differs from countywide polling, where any voter in the county can vote at any polling location.

56. Stevens credibly testified that Adkins' reading of the statute is inconsistent with the Code Construction Act and inconsistent with logic.

57. Stevens credibly testified that the determination of how much ballot paper should be supplied at a location will depend on numerous factors, not a strict calculation under Section 51.005.

58. The Court concludes that Section 51.005 of the Texas Election Code did not apply to the allocation of ballot paper in the November 8, 2022 General Election in Harris County.

59. The Court concludes that, alternatively, even if Section 51.005 applied to countywide polling, the HCEA could not have violated it with respect to the November 8, 2022

election because there was no "recent corresponding election" on which to base the percentage allocation. The evidence at trial showed that Harris County underwent redistricting and re-precincting, which went into effect in early 2022. There was no general election with the new districts or new precincts prior to November 8, 2022. Also, the use of hybrid machine and paper ballot voting was not instituted until 2021. So, there was not a "recent corresponding election" that used ballot paper as used in the November 8, 2022 election.

60. The Court concludes that there was no violation of Section 51.005 of the Texas Election Code.

61. Finally, even if there had been a violation of Section 51.005, Contestant failed to prove any material effect on the outcome of the election. Contestant failed to present the testimony of a single voter who was unable to or prevented from voting in the election because of a lack of ballot paper. As stated in Findings of Fact Nos. 39 through 70, there is no evidence that the lack of election supplies had any material effect on the outcome of the Contested Race.

FINAL FINDINGS AND CONCLUSIONS

62. Based on its evaluation of the evidence and credibility of the witnesses at trial, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing evidence that the declared outcome of the Contested Race, as shown by the Canvass, was not the true outcome.

63. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing evidence that illegal votes were counted in connection with the Contested Race.

64. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing

evidence that an election officer or other person officially involved in the administration of the General Election prevented eligible voters from voting.

65. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing evidence that an election officer or other person officially involved in the administration of the General Election failed to count legal votes.

66. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing evidence that an election officer or other person officially involved in the administration of the General Election engaged in fraud.

67. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing evidence that an election officer of other person officially involved in the administration of the General Election engaged in illegal conduct or made a mistake that materially impacted the outcome of the Contested Race.

68. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing evidence that any claimed irregularities actually impacted any specific vote cast in the Contested Race.

69. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing evidence that a different and correct result would have been reached in the absence of any claimed irregularities.

70. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing evidence that a different result would have been reached by counting or not counting certain specified votes affected by any claimed irregularities.

71. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing evidence that any claimed irregularities in the conduct of the election render it impossible to determine the true will of the majority of voters in the Contested Race.

72. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing evidence that any claimed irregularities affected a sufficient number of specific voters greater than the margin of victory such that those votes should be disregarded, and the election results of the Contested Race declared void.

73. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove any violations of Texas election laws by voters who cast ballots in the Contested Race or violations of mandatory provisions of Texas elections laws requiring the voiding of a ballot.

74. And to the extent there were any technical violations of the Texas Election Code during the General Election, the Court finds and concludes that there was neither credible nor clear and convincing evidence that any such technical violations materially affected the outcome of the Contested Race.

75. Based on its evaluation of the evidence and the credibility of the witnesses, the Court finds and concludes that Contestant Lunceford did not prove by clear and convincing

evidence that any violation of laws or regulations governing elections in Texas occurred or, if so, that they materially affected the outcome of the Contested Race.

76. Any finding of fact that should be a conclusion of law is deemed and considered to be a conclusion of law. Any conclusion of law that should be a finding of fact is deemed and considered to be a finding of fact.

SIGNED this ____ day of _____, 2023

_____
HON. DAVID PEEPLES

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Filing Description: Contestee Tamika Craft's Proposed Findings of Fact and Conclusions of Law
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