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1st COURT OF APPEALS
HOUSTON, TEXAS
12/12/2023 7:31:58 AM
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DATE 12/12/2023

NOTICE OF APPEALS
ASSIGNMENT OF COURT THE COURT OF APPEALS

TO: 1ST COURT OF APPEALS

From: Deputy Clerk: KATRINA SOLOMON
Marilyn Burgess, District Clerk
Harris County, T E X A S

CAUSE: 2022-79328 **COURT:** 164TH **RELATED APPEAL:** NONE

CASE STATUS: DISPOSED/FINAL **IMAGE #(S):** 111272448

TENTATIVE DUE 3/8/2024 **ATTORNEY** 19727600

NOTICE OF APPEAL HAS BEEN ASSIGNED TO THE 1ST COURT OF APPEALS

DATE JUDGMENT SIGNED: 11/9/2023

MOTION FOR NEW TRIAL DATE FILED NONE

FINDINGS OF FACT & CONCLUSIONS OF LAW FILED 11/29/2023

REQUEST TRANSCRIPT DATE FILED NONE

NOTICE OF APPEAL DATE FILED 12/11/2023

NUMBER OF DAYS: (CLERKS RECORD) 120 DAYS

FILE ORDERED: YES ☐ NO ☐ **IMAGED FILED:** YES ☐ NO ☐

CODES FOR NOTICE OF APPEAL: BC, C, OA

COURT REPORTER: CYNTHIA DAUGHERTY

MARILYNN BURGESS
Harris County, District Clerk

By: /s/ *Katrina Solomon*
KATRINA SOLOMON, Deputy

BC - NOTICE OF APPEAL FILED
BG - NOTICE OF APPEAL FILED – GOVERNMENT
C - JUDGMENT BEING APPEALED
D - ACCELERATED APPEAL
OA - NO CLERK'S RECORD REQUEST FILED
O - CLERK'S RECORD REQUEST FILED (W/ NOTICE OF APPEAL)
NA - AMENDED NOTICE OF APPEAL
CR – CROSS APPEAL
H - PAUPER'S OATH FILED

12/11/2023 4:07 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 82446030
By: Katrina Solomon
Filed: 12/11/2023 4:07 PM

CAUSE NO. 2022-79328

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

CONTESTANT/APPELLANT ERIN ELIZABETH LUNCEFORD'S NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF THIS COURT:

Contestant/Appellant Erin Elizabeth Lunceford hereby files this Notice of Appeal, and, as such, desire to appeal the following:

1. The Trial Court's Final Judgment dated November 9, 2023, attached hereto as Exhibit A, which denies Contestant's/Appellant's election contest;

2. The Trial Court's Findings of Fact and Conclusions of Law, dated December 9, 2023, attached hereto as Exhibit B; and

3. All rulings throughout the case, including all rulings, evidentiary or otherwise, related to the bench trial which was conducted in the summer of 2023.

4. This appeal is taken to either the First or Fourteenth Court of Appeals, Houston, Texas.

Respectfully Submitted,

ANDY TAYLOR & ASSOCIATES, P.C.

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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 December 11, 2023.

/s/ Andy Taylor
Andy Taylor

Automated Certificate of eService

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Filing Code Description: Notice of Appeal
Filing Description: Contestant's/Appellant's Notice of Appeal
Status as of 12/11/2023 4:25 PM CST

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CAUSE NO. 2022-79328

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

EXHIBIT A TO CONTESTANT/APPELLANT ERIN ELIZABETH LUNCEFORD'S NOTICE OF APPEAL

Cause No. 2022-79328

ERIN ELIZABETH LUNCEFORD, Contestant	*	IN THE DISTRICT COURT
vs	*	164th JUDICIAL DISTRICT
TAMIKA "TAMI" CRAFT, Contestee	*	HARRIS COUNTY, TEXAS

FINAL JUDGMENT DENYING ELECTION CONTEST

BACKGROUND AND CONTEXT.

The captioned election contest arose from one of sixty-eight countywide courthouse races on the November 8, 2022 Harris County ballot. The final results show that Tamika "Tami" Craft defeated Erin Elizabeth Lunceford for Judge of the 189th District Court by 533,710 to 530,967, a margin of 2743 votes. The percentage is 50.13 to 49.87. There were many close races: By the court's count, twenty-one candidates for courthouse offices (seventeen Democrats and four Republicans) won by a margin within 51 to 49 percent.

Twenty-one unsuccessful Republican courthouse candidates filed election contests by the statutory deadline. The court has had remote hearings roughly once a week from December through September, presiding over the gathering of election records and other evidence.[1]

An election contest in America's third most populous county is an intimidating prospect. The large numbers alone make these cases difficult and time-consuming. Craft's lawyers argued that this election, with its 2743-vote margin, was "not even close." The Court respectfully disagrees with that assessment because a 50.13 to 49.87 percent election is a close election. In a hypothetical 10,000-vote county, a 50.13 margin would be 26 votes, 5013 to 4987. Though the percentages in both cases would be 50.13–49.87, it is much harder to challenge a margin of 2743 in a large county than a margin of 26 in a small county.

Lunceford vs. Craft was tried to the court from August 2 to August 11. The court heard testimony from eleven live witnesses in court, four witnesses by oral deposition, and thirty-five others by written-question depositions. The court

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[1] No judge who lives in Harris County could hear these cases because the Texas Election Code mandates that judges (active or retired) who live in *County A* are not eligible to handle an election contest involving *County A*. For very good reason, election contests must be heard by someone from the outside. Pursuant section 231.004 of the Texas Election Code, in December and January the undersigned retired judge from San Antonio was appointed to hear the twenty-one election contests by the Honorable Susan Brown, Presiding Judge of the 11th Administrative Judicial Region of Texas.

admitted some 120 exhibits, which contain several thousand pages. The issues litigated can be seen at a glance on page one of this Judgment.

This court's authority. Two sections of the Texas Election Code delineate the court's authority in this matter:

§ 221.003. SCOPE OF INQUIRY.

(a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome *because*:

(1) illegal votes were counted; or

(2) an election officer or other person officially involved in the administration of the election:

(A) prevented eligible voters from voting;

(B) failed to count legal votes; or

(C) engaged in other fraud or *illegal conduct* or made a *mistake*. (emphasis added)

§ 221.012. TRIBUNAL'S ACTION ON CONTEST.

(a) If the tribunal hearing an election contest *can* ascertain the true outcome of the election, the tribunal shall declare the outcome.

(b) The tribunal shall declare the election void if it *cannot* ascertain the true outcome of the election. (emphasis added)

Section 221.003 describes the *conduct* of election officials that may be a basis for an election contest. Section 221.012 specifies that the *ultimate issue for decision* in an election contest is whether the court can or cannot "ascertain the true outcome of the election."

Summary of Decision. For the reasons stated below, the court has found many mistakes and violations of the Election Code by the Harris County Elections Administration Office ("EAO") and other election officials. But the court **holds** that not enough votes were put in doubt to justify voiding the election for the 189th District Court and ordering new one.

The main contentions and issues that were tried fall into the groups discussed in sections I through IX below.[2]

I. BALLOT PAPER

In-person Harris County voters voted on computer screens, which then printed their selections onto two legal-size pages of ballot paper, which the voter would review for accuracy and then scan into a secure system that would eventually count the votes countywide.

The Texas Election Code states in one section how much ballot paper *shall be supplied* to each voting location:

> **Sec. 51.005. Number of ballots.** (a) The authority responsible for procuring the election supplies for an election *shall provide* for each election precinct a number of ballots equal to *at least* the *percentage of voters who voted* in that precinct in the most recent corresponding election *plus 25 percent* of that number, except that the number of ballots provided may not exceed the total number of registered voters in the precinct. (emphasis added)

This is the law of Texas, and election administrators are duty-bound to try to follow it.

For the November 2022 election, the Harris County Elections Administration Office (the "EAO") *chose not to follow* section 51.005—indeed the EAO *totally ignored* it. The EAO did this because the statute speaks of providing paper to "each election precinct," and since 2019 Harris County has voted at countywide polling locations, not at "precincts."

Feeling unbound and unguided by section 51.005, the EAO decided to give 766 of the 782 polling locations *identical* amounts of paper—enough for 600 ballots each. Larger amounts were given to the other sixteen locations (PX-20; DX-11). The

---

[2] The following acronyms were used throughout the trial and are listed here for convenience: Ballot by Mail (BBM); Elections Administration Office (EAO); Early Vote Ballot Board (EVBB); Provisional Ballot Affidavit (PBA); Reasonable Impediment Declaration (RID); Statement of Residence (SOR); and Signature Verification Committee (SVC).

EAO planned to take phone calls on election day and deliver extra paper to the polling locations as they telephoned for more.

A. Section 51.005's intent.

In section 51.005 the Legislature's obvious intent was:

> First, estimate *future turnout* by looking at *past turnout*.
>
> Second, err on the side of *over*supply (instead of risking *under*supply) by adding 25% to the first number.
>
> In a nutshell:
>
> - *Look at past proven need by area, and provide "at least" that percentage,*
> - *estimate future need by area,*
> - *then oversupply by 25% just to be safe.*

Election officials are commanded ("shall") to *estimate a future unknown* (the coming election's need) by reference to *known historical facts* (the past election's known turnout, area by area). That is, calculate the 2022 need for ballot paper scientifically by looking at known numbers from 2018 in areas of town (precincts).

Ironically the EAO did the *opposite* of what the Legislature had mandated. The Legislature specified fact-based, individualized, fine-tuned allocation. The EAO supplied one-size-fits-all allocation of 600 ballots apiece for 766 of the 782 polling locations (98%).

B. The consequences of the 600-per-location decision.

The 600-per-location decision had tragic consequences:

- On election day several polling locations ran out of paper and were not able to get more paper in time for waiting voters.
- Voters stood in long lines for long periods of time.
- Many voters became frustrated and angry. One election worker testified, through tears, that a voter spit on her when she delivered the news that lined-up voters would have to wait, or go elsewhere to vote, because the polling location had run out of ballot paper. Another election worker testified that angry voters wanted her badge number.
- The news media reported the long lines and voter frustration.

- Election workers who made phone calls for more paper were often put on hold or told to leave a message. Promised paper was not always delivered.
- Damage was done to the public's confidence in government; pre-existing distrust was deepened. Partisan suspicions were inflamed.
- When voters eventually went elsewhere to try to vote, they sometimes encountered paper shortages and long lines at the other locations.

Had the EAO simply *tried* to obey the Legislature, twenty-one election contests might have been avoided because the shortages of ballot paper caused much of the Election Day chaos.

The consequences of the EAO's decision were foreseeable, avoidable, and costly.

C. The EAO's Rationale offered by Craft and the Harris County Attorney.

Craft and the EAO (through the Harris County Attorney's Office) argue that Section 51.005 simply *does not apply* to countywide voting. Their arguments are:

- Section 51.005's language refers to "each election precinct," not each countywide voting location.
- Precincts and polling locations are different things. A precinct is an *area* in the county with boundaries. A countywide polling place is a *location* for voting (a building) that serves the entire county.
- The last clause of section 51.005 ("except that . . . in the precinct") would be absurd if it applied to countywide locations; it would mean the paper for each polling location could not "exceed" 2.4 million ballots ("the total number of registered voters" in each of the 782 countywide "precincts").
- There is no legislative history, no Secretary of State guidance, and no case law saying section 51.005 applies to countywide voting.
- Some precincts have been redistricted since 2018. This not only worsens the 2022 "fit" with 2018. It means "there was not a 'recent corresponding election' upon which to base ballot calculations."[3]
- Craft's expert witness worked in the EAO for two years (June 2020 to August 2022) before the November election. Her opinion was that ballot supply "is an art not a science." She mentioned "multiple data points"

[3] The quoted language is from the Harris County Election Administrator's Amicus Brief in Support of Craft's No Evidence Motion for Summary Judgment, at 8.

such as [1] "how many polling locations will you have," and [2] "is it a presidential or gubernatorial election," and [3] "is there a particular contest in a section of the county that is likely to drive turnout for several locations in that area." Summing up, she said: "I think what the code requires is you do an analysis, provide the ballot paper you think will be necessary *at that poll*, and be prepared to provide supplemental ballot paper as needed." (emphasis added)

The expert witness made no effort to explain how *any* of her three factors, or her summary, or "art not a science" or "multiple data points" could justify *identical* supplies of 600 ballots for 98% of the polling locations. Her presentation as a neutral expert was tarnished a bit when she said later, in response to a question about a different issue, "that is not *our* burden of proof."

If any other thought was given to this disastrous decision, the expert witness had every opportunity to mention it; and the County Attorney's amicus brief could have mentioned too.[4] There was no evidence that anyone at the EAO thought about whether 600 per location might *over*supply some and *under*supply others. If there was undersupply, might additional paper get there late in a county the size of Harris (2.4 million registered voters, 1700 square miles)? Might phone callers get a busy signal, or a message saying please leave a message, or a voice message estimating the wait time?

The EAO made a conscious decision that voters and election officials at the polls would wait while phone calls were answered and paper delivered throughout the county. The 600-ballot approach put unmerited trust in the ability of EAO workers (and private contractors) to answer phone calls on election day and deliver ballots across Harris County's 1700 square miles.

D. No consultation with the Texas Secretary of State.

During the planning phase, no one at the EAO made even a perfunctory phone call to the Texas Secretary of State's office. The SOS was not consulted about anything, such as:

[4] From the beginning of this case, the court has allowed the Harris County Attorney's office, though not a party, to participate and speak in hearings and to file the amicus brief.

- What are other counties doing? (Ninety Texas counties use countywide voting.)
- What options do we have? What has experience shown?
- We think we are totally freed from section 51.005's commands. Do you agree?
- Our tentative plan is to ignore section 51.005, give identical amounts to 98% of the locations, and take phone calls and send deliveries during the day—what do you think?

E. How many voters went elsewhere to vote?

The court heard from live witnesses and read the testimony of witnesses who testified through depositions by written questions [DWQs] that a total of 2900 voters had left their polling locations without voting because of paper shortages. The court finds the testimony of these witnesses generally credible. Some were cross-examined about why they didn't ask voters whether they planned to go vote elsewhere. There was credible testimony that election workers had no time to take notes or get contact information from voters who left. Some workers expressed concern that voters would have resented the privacy intrusion if such questions had been asked.

One DWQ witness testified that in his effort to vote he eventually went to *four locations* before he finally found one with functioning machines and reasonable lines. At one polling location the officials estimated the wait time would be ninety minutes.

One witness testified in response to Craft's cross-question ("explain in detail how you know" that voters who left did not vote elsewhere): "There were at least two nearby locations that also ran out of ballot paper, according to voters who arrived at my polling location, and my polling location was the second or third stop for some trying to vote. Based on this information, I believe some [voters] likely did not cast a vote [elsewhere]. Additionally, several voters who were in line by 7:00 p.m. left the line before ballot paper was provided (~ 9:05 p.m.) and after polls had closed [so] these people were not able to cast a ballot." Another witness testified: "They left. Several women stated they needed to go care for children, prepare dinner. Others got tired of waiting and did not want to go elsewhere."

From the evidence, the court **finds** that because of *paper shortages* 2600 voters who tried to vote at their polling place of choice left without voting. These numbers do not include voters discouraged by long lines who voted elsewhere due to *machine malfunctions* or *paper jams*, which were not caused by EAO decisions.

A more difficult question is how many of these civic-minded people voted somewhere else that day. The Official Results show that 43.54% of Harris County's 2,543,162 registered voters voted in the November 8 election (early by mail, early in person, and in person on Election Day). All of these frustrated, waiting voters were part of that 43.54%—they were the *civic-minded* who had shown up in person to vote, and we might expect them to be persistent and go to another polling location. At each polling place signs were posted showing the four nearest polling locations (DX-12).[5] From common experience we can infer that *some of these voters* undoubtedly gave up when they saw long lines at the next location(s) they went to. Some had budgeted time for voting, but not enough time for going to a second or third location. Some had excess discretionary time for voting, and for waiting; others had places to go, tasks to do, appointments or jobs where they were expected. Some undoubtedly thought, *My vote won't make a difference in this huge city. But I tried. I'm leaving*. Others planned to come back and vote later but never followed through.

Given the state of the evidence, the court *estimates* that between 250 and 850 voters who left the first polling place did not vote elsewhere because of the EAO's ballot paper decision, which was both illegal (a failure to follow the law) and a mistake.

DECISIONS.

The court *finds* that the EAO did not make a good faith effort to comply with section 51.005(a).

The court *holds* that section 51.005 required the EAO to ***try*** to do two things in apportioning ballot paper. First, estimate 2022 need for *areas* of the county (the 782 countywide polling locations) based on past proven need at the last comparable election (2018), which would show 2018 turnout in *areas* of the

[5] **Section 43.007(o)**: "Each countywide polling place must post a notice of the four nearest countywide polling place locations by driving distance."

county where people live (precincts). Second, oversupply rather than undersupply, by 25%. These two statutory requirements are *clear,* and they were consciously disobeyed. The EAO's ballot paper decision to ignore section 51.005 was both "illegal conduct" and a mistake.

The court *estimates* that between 250 and 850 voters left and did not vote elsewhere on Election Day. Pursuant to section 221.012(b) (quoted above on page 3), these numbers will be taken into account in sections XI and XII below as part of the court's decision whether it can or cannot "ascertain the true outcome of the election."

II. VOTING IN HARRIS COUNTY BY OUT-OF-COUNTY RESIDENTS.

A. THE LAW.

A voter *must* reside in a county to vote in that county. The voter *must* also be registered to vote. Election judges are required to ask each in-person voter if the address shown on the official voter roll is still the voter's *current* address. Voters who answer "no" are required to sign a Statement of Residence ("SOR").[6]

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[6] **Election Code § 63.0011** ("Statement of Residence"):

(a) *Before* a voter may be accepted for voting, an *election officer shall ask* the voter if the voter's residence address on the precinct list of registered voters is *current* and whether the voter has changed residence within [Harris] county. . . .

(b) If the voter's residence address is not current because the voter has changed residence *within* [Harris] county, the voter may vote, if otherwise eligible, in [his old precinct] if the voter resides in [Harris] county *and*, if applicable:

(c) Before being accepted for voting, the voter *must* execute and submit to an election officer a statement [SOR] including:

(1) a statement that the voter satisfies the applicable *residence* requirements prescribed by Subsection (b) [i.e. still resides in Harris County];

(2) all of the *information* that a person must include in an *application to register* to vote under Section 13.002; and

(3) the *date* the statement is submitted to the election officer.

(c-1) The statement [the SOR] described by Subsection (c) must include a field *for the voter to enter the voter's current county of residence.* (emphasis added).

Lunceford points out that votes were cast by persons who did not reside in Harris County. She focuses on: (i) votes by *out-of-county* residents whose SORs show on their face a residence other than Harris County; and (ii) votes supported by *incomplete* SORs, which failed to give *any* information about *residence*, and for the vast majority of these the voters themselves omitted every bit of information except their names.

At polling locations, the election officials are supposed to make sure that SORs are correct and complete. SORs are filled out when the voter signs in and the Election Judge has asked, *Do you still live at this address*, and voter has said *No*. (Later the EAO registrar uses SORs to update the voter registration records.[7]) Voters who say they live in a different county are not eligible to vote a regular Harris County ballot (which has countywide and district-based elections, in addition to the statewide ones).

B. PROOF OF RESIDENCE AT POLLING PLACE (FROM VOTERS) AND AT TRIAL (EXTRINSIC EVIDENCE).

There is a distinction between receiving additional evidence of residence at the *polling location* and additional evidence *at trial*.

Residence information from voters at the polling location. *At the polling location* the information is *handwritten* on the SOR *by the voter*; the election official is not expected to inquire beyond the SOR, although an official who has the time and the inclination *could* certainly choose to discuss residence briefly with the voter. An SOR is filled out only because the voter has just replied, in response to the election judge's inquiry, "I don't live there anymore." At the polling place, election judges are to assess the residence information *shown on the SOR*. If the SOR shows that the voter resides outside Harris County, the voter can vote only a *provisional* ballot.

Extrinsic evidence of residence at trial. *In an election contest trial,* the parties *may* litigate a voter's true residence with evidence. When this happens, the trial judge

[7] Election Code § 15.022 (a) states: "The registrar shall make the appropriate corrections in the registration records . . . (4) after receipt of a voter's statement of residence executed under Section 63.0011."

will decide whether an SOR did or did not speak the truth about a voter's residence.[8]

C. DECISIONS.

Out-of-County Voters. The SORs signed by 966 voters show on their face, *in the voter's handwriting*, that the voters resided outside Harris County. SORs are supposed to be checked at the polls by election judges; they are not vetted by the Early Vote Ballot Board.[9]

For countywide elections, these 966 were illegal votes within the meaning of section 221.003 and should not have been counted.

SORs incomplete. The court also finds that 270 SORs were filled out by the voter so incompletely—with the boxes for former residence and current residence *totally blank*—that it was not lawful to approve them and they should not have been counted. *A Statement of Residence must* ***state*** *the* ***residence****.*

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[8] In *Alvarez v. Espinoza*, 844 S.W.2d 238 (Tex. App.—San Antonio 1992, no pet.) (en banc), for example, the parties presented evidence *at trial* concerning the true residence of nine voters. The trial court found that all nine resided in Commissioners Court Precinct 3, the area covered in the Frio County election contest. The appellate court examined the evidence and held that six of these voters, as a matter of law, did not live within Precinct 3. *Id.* at 247-48.

Craft's lawyers cited *State v. Wilson*, 490 S.W.3d 610 (Tex. App.— Houston [14th Dist.] 2016, no pet.), an appeal from a jury trial about whether Wilson's residence was within the boundaries covered by a school trustee election. The captioned election contest is not about whether one *candidate* resided in Harris County, and Lunceford was not required to present extrinsic evidence of voter residences in court, instead relying on the SORs.

[9] **The EVBB.** The Early Vote Ballot Board in Harris County consists of twelve Democrats and twelve Republicans. Each member is recommended to Commissioners Court by the persons who chair the two major political parties. The EVBB's duties are to review Applications for Provisional Ballots (PBAs), Ballots by Mail (BBMs), and Statements of Residence (SORs) for completeness and registration information. They work in teams of two, one Democrat and one Republican. The evidence showed that these members of different parties worked together amicably and professionally during the November 8 election's two-week early voting period, on Election Day, and afterward.

III. PROVISIONAL BALLOTS.

Lunceford contends that several Provisional Ballot Affidavits ("PBAs") were improperly approved for voting. The Secretary of State's PBA form summarizes several statutory "Reasons for Voting Provisionally."[10]

1. Voter failed to present acceptable photo identification or an alternate form of identification with an executed Reasonable Impediment Declaration;
2. Voter is not on list of registered voters;
3. Voter not on list, votes in another precinct. [This would not apply because Harris County votes at countywide polling locations, not at individual precincts.]
4. Voter is on list of persons who received mail ballots and has not surrendered the mail ballot or presented a notice of improper delivery; and
5. Voter voted after 7:00 p.m. due to court order. [Provisional ballots from 7:00 to 8:00 p.m. on election day pursuant to court order are discussed in section VIII below on page 22.]

Already voted by mail? Most of the challenged PBAs in this case list reason 4 above for voting provisionally (that the voter appears to have already voted by mail). These are voters who showed up to vote *in person* and were advised that a mail ballot was earlier sent to them. In-person voters who say they *did not receive* the mail ballot, or received it but *didn't vote it and mail it in*, must sign a PBA and

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[10] **Section 65.054 (Accepting Provisional Ballot)** provides:

> (a) The early voting ballot board [EVBB] shall examine each [provisional ballot affidavit] and determine whether to accept the provisional ballot of the voter . . . .
>
> (b) A provisional ballot *shall* be accepted *if* the board determines that: (1) from the information in the affidavit or contained in public records, the person is eligible to vote in the election and has not previously voted in that election; [and] (2) the person . . . meets the identification requirements of Section 63.001 (b) [photo identification, or an approved substitute plus a Reasonable Impediment Declaration form] . . . . (emphasis added)

vote a provisional ballot. The EVBB will later check the records and verify whether the in-person voter did or did not vote by mail earlier. In Harris County the EVBB's work continues for several days after Election Day.

For each of these forms singled out for scrutiny, the Mail Supervisor (an employee of the EAO) has signed and checked a box that the mail-in ballot was "not returned." This means the EAO has checked the records and confirmed that the voter *did not mark and return the mail ballot*. This is a valid reason for the EVBB to accept the voter's provisional in-person ballot.

Signatures on these PBAs by the Mail Supervisor and the EVBB show that they concluded that these voters had *not* voted earlier by mail. Concerning these PBAs, the court is *not* persuaded that these officials *erred* in reaching those conclusions. To state it differently, the court accepts the decisions of the Mail Supervisor and the EVBB that approved these PBAs.

It is significant that on these PBAs there is no issue of whether the voters lacked photo identification—the election judges did *not* check a box concerning lack of proper photo identification.

Other boxes not checked. Other boxes on some PBA forms were not checked or not filled out properly.

- Some Election Judges signed the PBA but did not date it.
- Some voters wrote their address in the wrong box.
- Some of these voters did not sign the yes-or-no citizenship box.

The court has assessed these for genuineness. On these PBAs the boxes for the voter registration number and precinct number are filled in. At the polling location the election judges saw these registered voters face-to-face. The EVBB accepted them, and the court has decided not to overrule the board and disallow these votes. The court concludes that these omissions do not justify nullifying these provisional ballots as illegal.

Unsigned PBAs. The court does *not* approve the PBAs that the *voter* did not sign (6), or the *Election Judge* did not sign (22), or the *EVBB* did not sign (15). These 43 PBAs were not lawfully approved, and the votes supported by them should not have been counted.

IV. MAIL BALLOTS.

Lunceford contends that several mailed ballots were counted, in violation of the election code, even though they lacked code-required *signatures* or were not *timely mailed or timely received.*

The code specifies several steps for voting by mail. The voter: (i) must ask for a mail ballot in a signed writing, (ii) must have a statutory reason (age, disability, will be out of county, in jail), and (iii) must return the marked ballot *in time* and with proper *signatures* (on both the *application* and the *envelope*). (There are also explicit limits on who may assist the voter in marking the ballot and mailing it.)

For mail ballots to be lawfully counted, the election code specifies two requirements that are at issue in this case—timeliness and matching signatures.

Timeliness. The code requires that mail ballots be timely *mailed* and timely *received.* The carrier envelope *must* be postmarked by 7:00 p.m. on election day *and* the envelope with the ballot *must* be received by 5:00 p.m. on the next day (November 9 for this election).[11]

Matching signatures. The code requires the voter's signature (1) on the *application* for a mail ballot and (2) on the carrier *envelope* in which the ballot marked by the voter is mailed back to the EAO. As the court said in *Alvarez v. Espinoza*, 844 S.W.2d at 245, "The law places the burden on those who vote early by mail to sign both the application and the [carrier] envelope with signatures that match."

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[11] **Section 86.007** (Deadline for Returning Marked Ballot):

(a) [Except for ballots mailed from outside the US,] a marked ballot voted by mail *must arrive* at the address on the carrier envelope:

(1) before the time the polls are required to close on election day; or

(2) not later than 5 p.m. on the day after election day if the carrier envelope was [mailed and postmarked] not later than 7 p.m. at the location of the election on election day. . . .

(c) A marked ballot that is not timely returned *may not be counted.* . . . (emphasis added)

The early vote clerk, after checking the carrier envelope for timeliness, puts it in a *jacket envelope* along with the voter's application for the mail ballot, and sends the jacket envelope to the EVBB for its review.[12] The EVBB reviews mail ballots for two signatures—the signature on the application and the signature on the carrier envelope. In addition, the EVBB "may" compare either or both signatures with a *third* signature—the *voter's signature on file with the registrar*.[13]

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[12] **Section 87.041. ACCEPTING VOTER.**

(a) The early voting ballot board shall open each jacket envelope for an early voting ballot voted by mail and determine whether to accept the voter's ballot.

(b) A ballot may be accepted *only if*:

(1) the carrier envelope certificate is properly executed; [and]

(2) neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness; . . .

(d) A ballot *shall* be rejected if any requirement prescribed by Subsection (b) is not satisfied. In that case, the board shall indicate the rejection by entering "rejected" on the carrier envelope and on the corresponding jacket envelope.

(d-1) . . . The board *shall* compare signatures in making a determination under Subsection (b)(2) . . . .

(e) In making the determination under Subsection (b)(2), to determine whether the signatures are those of the voter, the board *may* also compare the signatures with any known signature of the voter on file with the county clerk or voter registrar. . . . (emphasis added)

[13] **Voter mistakes on mail ballots *may* be cured.** If the early voting clerk receives a mailed ballot that lacks a required signature or is otherwise defective, the clerk *may*: (i) mail the BBM back to the voter for correction; (ii) telephone and inform the voter of the right to *cancel* the mail ballot and vote *in person*; or (iii) telephone and suggest that the voter may come to the registrar's office and correct the omission. **Section 86.011** ("Action by Clerk on Return of Ballot") says:

. . . (d) Notwithstanding any other provisions of this code, if the clerk receives a *timely* carrier envelope that does not fully comply with the applicable requirements . . . [i] the clerk *may* deliver the carrier envelope in person or by mail to the voter and *may* receive, before the deadline, the *corrected carrier envelope* from

As stated earlier (footnote 9) the EVBB is a bipartisan board with equal numbers of Democrats and Republicans whose names were suggested to Commissioners' Court by each party's chair. The EVBB works in teams of two (always one Democrat and one Republican per team). The EVBB is given considerable discretion.[14]

The court finds that thirty-six mailed ballots lacked a required signature, and an additional nine ballots were not timely mailed. PX-11 & PX-12. These forty-five mailed ballots do not satisfy the code's mandatory provisions, and therefore it was not lawful to count them.

V. PHOTO IDENTIFICATION.

The election code says election judges shall make two inquiries of *every* in-person voter. Election Judges are to ask: (i) whether the address shown on the voter list is still the voter's current address[15] and (ii) whether the voter has photo identification.[16]

Acceptable photo identification. The code specifies that each in-person voter must show:

> the voter, *or* [ii] the clerk *may* notify the voter of the defect by telephone and advise the voter that the voter may come to the clerk's office in person to *correct* the defect or *cancel* the voter's application to vote by mail and vote on election day. If the procedures authorized by this subsection are used, they must be applied uniformly to all carrier envelopes covered by this subsection. . . . (emphasis added)

[14] "The law presumes that the board [EVBB] acted properly in rejecting and accepting ballots; to overcome this presumption, a challenger must show by clear and satisfactory evidence that the board erred." *Alvarez v. Espinoza*, 844 S.W.2d at 844.

[15] Section 63.0011(a) ("Before a voter may be accepted for voting, an election officer *shall* ask the voter if the voter's residence address [on the list] is current and whether the voter has changed residence within the county") (emphasis added).

[16] Section 63.001(b) (". . . on offering to vote, a voter *must* present to an election officer at the polling place: (1) one form of photo identification listed in Section 63.0101(a) or (2) [an acceptable substitute *plus* a reasonable impediment declaration]." (emphasis added)

(1) an approved *photo ID*[17] ***or***

(2) an approved *substitute* ***and*** an approved *reason* for not having a photo ID.

The approved *substitute* may be a utility bill, bank statement, government check, paycheck, birth certificate, or a voter registration card or other government document.[18] The approved *reason* may be lack of transportation, disability or illness, work schedule, family responsibilities, ID is lost or stolen, or application for photo ID is pending.[19]

RIDs. A voter who does not have a listed type of photo identification is asked to sign a Reasonable Impediment Declaration. RID forms have been designed and approved by the Texas Secretary of State.

The *election official* at the polling location may check a box for one of six *alternate kinds of identification without a photo.*

RID forms let the *voter* check one of several boxes listing the *reason(s) why the voter has not gotten an approved form of photo identification.*

Flexibility on name and address matches. The voter's name must be on the official roll of registered voters. But the *name* on the substitute document need not "match exactly with the name on the voter list" if they are "substantially similar." The election official cannot reject the substitute document solely because its *address* "does not match the address on the list of registered voters."[20]

Incomplete RIDs. Lunceford challenges 532 votes because the RIDs supporting them were not completely filled out. The challenged RIDs lack *one or more* of the following: a reason for not having a photo ID, a lawful ID substitute (e.g., paycheck, utility bill, voter registration card), voter signature, election judge

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[17] Section 63.001(b)(1) (requiring photo ID); § 63.0101(a) (listing acceptable photo IDs). An *expired* photo ID-card is acceptable for voters *70 and older* and is acceptable for voters *69 and younger* if the ID-card has been expired for only four years or less.

[18] Section 63.001(b)(2) (allowing substitutes for photo ID); § 63.0101(b) (listing acceptable photo ID substitutes).

[19] Section 63.001(i) (listing acceptable reasons for not having photo ID).

[20] Section 63.001 (c) & (c-1).

signature (the judge is supposed to place the voter under oath), or Voter ID number.

The evidence shows that over 347,000 voters voted in person on Election Day, and that 532 of them did not satisfy one or more of the election code's requirements, summarized above: bring a photo ID *or* bring a substitute document *and* check a box showing why they have not gotten a photo ID. The reasons for not having an ID include family responsibilities, disability or illness, work schedule, application pending, lack of transportation, or ID lost or stolen.

It is worth noting that persons who have no photo ID may satisfy this statute by simply bringing their voter registration card,[21] which suffices as substitute proof for the photo ID if there is an approved reason for not having a photo ID.

A RID is the voter's chance to comply with the code's effort to make sure that voters can demonstrate *who they are* with documents. The court concludes that 380 of the 532 challenged RIDs are so lacking in the statutory information that they are improper, and votes cast by these 350 voters should not have been counted.

VI. ERRONEOUS INSTRUCTIONS TO THE SIGNATURE VERIFICATION COMMITTEE.

A member of the Signature Verification Committee (SVC) testified that when early voting began, an EAO staffer told the SVC not to compare Ballot by Mail (BBM) *application* signatures or *envelope* signatures with the voter's signature *on file* with the elections office. (This advice was flatly wrong; the SVC *may* but is not *required* to compare the voter's application signature and envelope signature with the voter's signature officially on file. *See* footnote 12 on page 16 above quoting section 87.041(e). Two other SVC members testified they *did not hear* the EAO staffer make this remark.

The court finds that the remark was made, the erroneous advice was indeed given, and it was obeyed for two hours before the EAO corrected it.

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[21] Section 63.0101: "(b) The following documentation is acceptable as proof of identification under this chapter: (1) a government document that shows the name and address of the voter, including *the voter's voter registration certificate*." (emphasis added)

This incident shows either carelessness or ignorance by the EAO about the SVC's authority to exercise its statutory discretion concerning an important safeguard for BBMs. But the erroneous instruction affected only a few votes; the witness estimated that the SVC found that approximately 1% of the application or envelope signatures did not match the signature on file. She also estimated that 700 BBMs were approved during the first two hours while the SVC operated under the incorrect instructions. The court concludes that seven improper BBMs slipped by unexamined and should not have been counted.

VII. LAST-MINUTE EAO INSTRUCTIONS FOR BALLOTS THAT WOULDN'T SCAN.

The printed ballot was two legal-size pages for each voter. During both early voting and election-day voting, there were times when the scanning machines would not accept page two of a voter's ballot.

HCEA Manual. For this situation the 2022-2023 Harris County instruction manual advised [PX-16, page 115] that the second ballot page should be rescanned four different ways.[22] If the re-scanning was still unsuccessful, the second page would be put into the Emergency Slot [aka the "Emergency Chute"]. Such unscanned pages would later be processed and counted by Central Count, a bipartisan body (two Republicans and two Democrats) with a higher-quality scanner that might be able to scan and count the troublesome second pages. If Central Count could not successfully re-scan a page two, it would manually input the votes shown on that unscanned page into the official vote count.

EAO's last-minute change for the page-two problem. A short time before November 8, after election workers had been trained, the EAO emailed new instructions: If any page two was *illegible* as opposed to *legible but unscannable*, the voter should vote again, but scan only the new page two and spoil the new page one (because the original page one had already been scanned and recorded).

[22] The manual said to scan each difficult page 2 by inserting it *top first* with print down and then with print up, and then by inserting it *bottom first* with print down and then with print up.

New page two would be put into the Emergency Chute for processing later by Central Count.

Lunceford contends this new procedure was too complex for such a last-minute change, and that a sizeable number of *new* first ballot pages were mistakenly scanned a second time after the original first pages had been scanned and recorded. The *Lunceford vs Craft* race was on page one of the printed ballots and therefore may have received double-votes *if page one was indeed counted twice* because of the scanning problem and the last-minute instructions.

The court has concluded that even if the last-minute instructions were a "mistake" within section 221.003, the evidence does not convincingly show extra counting of page one races.

The official election results (PX-2) show a steady drop-off from votes at the top of the ballot to votes toward the bottom, a drop-off that would look normal to one who has been observing Texas elections for several decades. As voters wade through a long urban ballot—starting with federal races, moving then to the statewide races, Board of Education, members of the State Senate and House, appellate courts, District Courts, County Courts-at-Law, and Probate Courts—it is common to see a steady drop-off (i.e. reduced voting) in down-ballot *judicial* races. This was true for the November 2022 down-ballot judicial races in Harris County.

In this election, one down-ballot race stood out: the high-profile page-two contest for County Judge (Alexandra Mealer vs Lina Hidalgo) showed slightly more turnout than even some page-one races like the Texas Supreme Court. This suggests there was no large double-voting of page one.

The court concludes that the EAO's perhaps unwise last-minute decision about handling scanning problems was certainly not illegal and does not qualify as a "mistake" within the meaning of § 221.003. The court also concludes the last-minute scanning change did not cause a significant difference in page-one votes compared to page-two votes because the drop-off was typical for down-ballot judicial races.

The court has assessed the testimony about the Cast Vote Records and compared it to the evidence of the canvassed final results. The evidence of a page two drop-off in votes, possibly caused by scanning confusion, is not persuasive

enough to be clear and convincing. The argument that there were more page one votes than page two votes, causing double votes in the 189th, is respectfully **denied**.

VIII. COURT-ORDERED EXTENSION OF COUNTYWIDE VOTING UNTIL 8:00 P.M.

Lunceford contends that Administrator Tatum made a "mistake" within the meaning of section 221.003 when he agreed on Election Day to a Temporary Restraining Order [TRO] that extended the voting period countywide from 7:00 p.m. to 8:00 p.m.

This court holds that agreeing to the extension was not *illegal*. But the court *sustains* Lunceford's contention that agreeing to the TRO was a *mistake* within the meaning of section 221.003. The court also expresses its deep concern about the way the TRO was sought and obtained.

Section 221.003 says:

> (a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown in the final canvass, is not the true outcome because: . . .
>
> (2) an election officer or other person officially involved in the administration of the election: . . .
>
> (C) engaged in . . . illegal conduct or made a mistake.

A. Background.

On November 8 several polling locations opened late, some of them several hours late. Others experienced machine malfunctions. Voters waited helplessly in line, sometimes for two hours.

At 4:01 p.m. the Texas Organizing Project filed suit against Harris County Commissioners Court and its EAO, seeking an order extending poll closures beyond 7:00 p.m. to compensate for the time lost by voters due to twelve late-opening polls that morning. Plaintiff Texas Organizing Project was represented by three lawyers from the Texas Civil Rights project and three additional lawyers

from the ACLU of Texas. Defendants EAO and Harris County Commissioners Court were represented by two lawyers from the County Attorney's office.

Significantly, no one else had been given even telephone notice that the plaintiffs would be asking the court to extend voting countywide for all 782 voting locations. The ancillary judge for the Harris County District Courts began a TRO hearing at 5:06 p.m.

Two things about the hearing are troubling.

(1) **Friendly hearing**. The plaintiffs sought—*and fought for*—a friendly hearing (a hearing without anyone to oppose its requests). They tried to exclude any other interested persons who might oppose their TRO request or provide a different point of view.

(2) **Ballot paper.** When the discussion turned to ballot paper, the EAO was not candid with the trial judge when she tried to learn whether there would be adequate ballot paper for *all* the polling locations.

B. The attempt to structure a friendly, uncontested TRO hearing, and the lack of candor about ballot paper.

The ancillary court convened a Zoom hearing and heard announcements from the lawyers for the plaintiff and the two defendants. Andy Taylor, the attorney for the Harris County Republican Party [HCRP] and its chair, Cindy Siegel, had learned about the hearing. He asked permission to *speak* and to *intervene*:[23]

THE COURT: Any objection . . .?

MR. MIRZA (Texas Civil Rights Project attorney representing the Texas Organizing Project): *Yes, we object to the intervention*. . . . We believe they *are not a party to the case.* They don't — this is an issue with regard to voters. . . .

THE COURT: Mr. Taylor, talk to me more about why you believe Ms. Siegel and the Republican Party needs to intervene in this lawsuit *at this time.*

[23] In the dialog summarized on pages 23-28 below, all emphasis has been added.

MR. TAYLOR: [You are going to be asked] to extend the voting time past 7:00 p.m.

THE COURT: Correct.

MR. TAYLOR: . . . [T]he Harris County Republican Party [HCRP] has *multiple candidates on the ballot*. . . . we have a very significant interest . . . because what you're going to decide can impact the races that are on the ballot . . . .

THE COURT: . . . I'm still trying to figure out why this would in any way *affect your clients* certainly at this juncture. If in fact granted, it would be applicable to all the polls no matter what location they're in.

MR. TAYLOR: . . . [T]his number is growing - - but I'm aware of 19 polling locations *that have no ballots*. They're out of ballot paper. [Taylor offered to email the Court a list.] Those happen to be in what are politically referred to as Republican strongholds.

Moments later, Nickolas Spencer, attorney for the Harris County Democratic Party [HCDP], appeared and said, "I'll be making similar arguments to Mr. Taylor." He then expressed concern that poll workers and poll watchers might need to make personal arrangements for an extended workday.

The court asked again if there was objection to participation by the two local political parties.

MS. BEELER (Texas Civil Rights Project attorney representing TOP): *Yes, we object to both. . . . The parties don't have standing to intervene here.* This dispute is between the County and the voters, . . . not between the voters and the parties. If Mr. Taylor has concerns about their voters, *he should file his own lawsuits and request his own relief.* That has nothing to do with our suit. It has no bearing on our suit. . . . This dispute is between the voters and Harris County and the named defendants here. It is not between the voters and the parties.

THE COURT: . . . Since we have both parties [the Rs and the Ds] present and *both parties are in agreement for the most part* about *whatever interests they may have in this suit*, I am going to grant the intervention for [both parties.]

[The court gave plaintiff Texas Organizing Project time to arrange for live witnesses to testify. The discussion then turned to whether to keep to the polls open longer and whether all polls would have ballot paper. This is significant because the election code mandates that if a court orders *any* countywide polling place to remain open past the 7:00 p.m. closing time, it must keep *all* polling places open for the same length of time.[24] But if a polling location has no ballot paper, it can hardly be said to be "open."]

> **ATTORNEY FOR PLAINTIFF Texas Organizing Project:** . . . [M]ultiple polling locations in Harris County did not open on time this morning. . . . [One] didn't open for three hours this morning. Defendant's failure to open these polling locations on time will injure plaintiff's members and other voters by burdening their fundamental right to vote. . . . If the polling location hours are not extended, they will be disenfranchised. . . .
>
> . . .
>
> **COUNTY ATTORNEY (REPRESENTING THE EAO):** . . . [W]e wouldn't have any opposition to the relief sought if it's limited to one hour and my client, especially the Elections Administrator, who is really the proper target of this lawsuit, is *able to comply* with that and to ensure that the polls remain open for one extra hour.
>
> **THE COURT:** You're referring to Mr. Tatum. He is able?
>
> **COUNTY ATTORNEY:** *He is able.*
>
> **MR. SPENCER (HCDP):** *We would agree* with extending it to one extra hour . . . . *We would prefer . . . two hours* . . . .
>
> **MR. TAYLOR (HCRP):** We are opposed. *We've been monitoring* the situation all day long with our people that are on the ground [and] there are *at least 19 polling locations that have no paper*. If you extend the time to vote, how are those 19 locations going to effectuate a citizen's right to vote without any paper? . . . It would be . . . a disenfranchisement to allow some of the polling places to vote and others not, and that's what the

[24] Section 43.007(p) says: "If a court orders any countywide polling place to remain open after 7 p.m., all countywide polling places located in that county shall remain open for the length of time required in the court order."

Election Code says. If you're going to extend polling, you can't do it piecemeal. You've got to do it countywide. . . .

THE COURT: [A]ll I need to do is perhaps include an order to Harris County to deliver the additional sufficient ballots and supplies that are needed . . . .

County Attorney: With respect to the locations that are missing paper, the EA's office is *currently replenishing* all those locations. . . . It's not true that there are currently 19 locations without paper. It is 10. As we get updates on the *locations that don't have paper*, we're sending people out there to replenish. *The EA's office is making sure that every polling location is able to operate.*

[The court heard testimony about the late poll openings that morning.]

THE COURT: Based on the testimony that I've heard, I am going to *grant* the TRO and extend the polls specifically for those 12 locations which, of course, means for all the Harris County polls, *until 8:00 o'clock. . . . I want to know logistically how this is going to work.*

COUNTY ATTORNEY: The office has been responding to any report of paper ballots running out. The latest update I have is that there are two locations—and this was about 20 minutes ago—there were *only two* locations that were out of paper and they were in the process of being restocked. . . .

THE COURT: . . . *I want to make sure that it's actually possible to get the supplies to these polls.* It's going on 6:00 o'clock. *You're telling me that is possible?*

COUNTY ATTORNEY: *My understanding is, yes.*

MR. TAYLOR: Our information is that *there are at least 19 locations that don't have paper as I'm speaking. . . .*

THE COURT: . . . . I do want to make sure that we are clear about the supplies and . . . deliver the materials . . . .

COUNTY ATTORNEY: *So the folks are out delivering the paper to*—I'm just talking about the paper ballots . . . *to all the locations that currently need*

them. I'm still trying to get a final tally on this. It's not 19 . . . . And what I would ask is if we're in a situation where we're going to run out of ballots and we can't comply with the order, we're able to come back before this Court . . . obviously I don't want to be in a position where my client can't comply with the terms of the order. Hopefully that's not going to be an issue. We don't anticipate it will be, but you never know.

THE COURT: Okay. All right. I'm signing off on the order.

The TRO was signed and the hearing ended **at 6:03.** The EAO had promised to get paper to polling locations *during rush hour*.

At 7:49 the court reconvened and announced that the Attorney General's office had filed a motion to dissolve the TRO. The lawyer for the Attorney General argued there was no reason to extend voting hours because voters could go to the other 770 voting locations. She then observed that the TRO was sought "without providing any notice to the State so that we would have the opportunity to be heard before this Court issued a TRO that requires not just 12 but all 782 polling locations in Harris County to stay open past the statutory deadline."

MS. BEELER for Texas Organizing Project: *We are unaware of any authority that requires us to let the State know and to give the State notice*. . . . It's going to be *moot* in one minute . . . . We would argue that the order is *already moot*.

. . .

COUNTY ATTORNEY: . . . we agree that at this point . . . the requested relief in the State's motion is *moot* . . . . *I did want to . . . come back to clarify some of the issues related to ballots missing from polls that we discussed earlier*.

[MR. TAYLOR [HCRP] listed by name several polling locations where voters were turned away because there were no ballots.]

COUNTY ATTORNEY: I asked that we come back if we were *not able to comply* with that provision [ballot supply]. *As Mr. Taylor notes, there have been polls where paper ballots were not able to be delivered,* so that's obviously information we didn't have at the time. . . . (emphasis added)

> **THE COURT:** . . . I asked explicitly, is this something that logistically could be done; and I remember your response being something along the lines of "as best we can, Judge."

The ancillary judge was then told that the Texas Supreme Court had stayed the TRO, and she promptly recessed the hearing.

C. Notice and opportunity to be heard.

It is hard to think of any principle of civil procedure more fundamental to fairness and due process of law than the right of interested persons to be given *notice* and an *opportunity to be heard* when a lawsuit might affect their legal interests.[25] Yet Texas Organizing Project's lawyers consciously chose *not to give notice* to either political party or to the Texas Secretary of State or the Texas Attorney General. And the plaintiffs *fought* their effort to *speak and be heard.*

There were twelve *statewide* races on the ballot in Harris County (as in every Texas county). (See the table on page 35 at the end of this Judgment.) The lawsuit sought a TRO affecting *countywide* and *statewide* voting in the state's most populous county. Plaintiff's attorneys, *speaking for a few voters*, opposed letting the

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[25] *See Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950): "The fundamental requisite of due process is the *opportunity to be heard*. . . . An elementary and fundamental requirement of due process in any proceeding which is to be *accorded finality* is notice reasonably calculated, under all the circumstances, to apprise *interested parties* of the pendency of the action and afford them an *opportunity to present their objections*." (emphasis added)

Of course, the TRO would not be "accorded finality." But everyone knew this TRO proceeding would be *moot* three hours later. At 7:59 p.m. that evening, Plaintiffs and the County Attorney opposed the Attorney General's efforts to dissolve the TRO by arguing the issues were *moot*; the voting time had already been extended. ***Attorney for Texas Organizing Project***: "So we are unaware of any authority that requires us to let the State know and to give the State notice. . . . It's going to be *moot* in one minute." And the ***County Attorney***, opposing the Attorney General: "We agree that at this point . . . the requested relief in the State's motion is *moot*, because it is now 8:02 p.m. . . ." Court Reporter's Record of TRO hearing at pages 60 & 62 (emphasis added).

Harris County Republican Party's lawyer even *speak for 114 candidates on the ballot,* who were *also voters.*

Certainly, the plaintiff couldn't be expected to give *official* notice to *all* 228 candidates for partisan offices on the ballot. But the local parties and their chairs and lawyers were a small number (two party chairs, two lawyers), easily identified and contacted. In these days of instant communication, it was inexcusable not to give them a courtesy call, and even more inexcusable to *object* and *resist* when Mr. Taylor simply asked to be heard. The plaintiff and the court should have *welcomed* these additional voices.

There are times when notice cannot be given quickly to interested persons. But this was not one of those times. None of the usual reasons for not giving notice were present at this TRO hearing:

- **Identity.** The identity of these interested persons was *known*. These were not *unknown* persons or interests.
- **Out of pocket?** They were easy to *locate.*
- **Burden? Expense?** It would not have been *burdensome* or *expensive* to email or telephone them with notice of the hearing.
- **Delay?** An email or a telephone call would not have *delayed* the hearing. One of the six lawyers for the Texas Organizing Project or a staff member could easily have made a phone call or sent a text message or email while the petition was being prepared. This was a Zoom hearing in which lawyers were in their offices; it was not an in-person hearing in a courtroom. There would be no waiting while lawyers drove to downtown Houston. The trial court was willing to wait while the six Texas Organizing Project lawyers rounded up live witnesses.
- **Trivial interest?** Their interest in the TRO issue was not *minimal* or *insignificant*. (When the votes from the extra hour were counted it became obvious that one side was better prepared than the other to continue campaigning during the extra hour and get its voters to the polls—from 7:00 a.m. to 7:00 p.m. most down-ballot races broke 51-49 and 52-48, while from 7:00 to 8:00 p.m. the votes broke 58-42) As stated above, twenty-one countywide races finished within a 51-49 margin.

- Finally, it cannot be said that anyone else at the hearing would have voiced the concerns raised by Mr. Taylor. (Sometimes there are parties present who will speak up for those absent; but that cannot be said of this TRO hearing.)

The court rejects the notion that such a hearing can properly be made a private matter between an advocacy group and the EAO and Commissioners Court. It was not proper to try to exclude clearly interested persons and entities from *simply being heard*.

This court understands that the ancillary judge faced a fast-developing situation and might have been criticized whether she granted or denied the TRO. She was not helped by the lawyers who insisted the lawsuit was a private matter between voters and the Harris County officials—even toward the end of the hearing, their advocacy was still shaping the judge's thoughts when she said (page 62), "I want to hear from *the actual parties*."

The case was pleaded as a private matter involving only voters and election administrators. Notice was not given and there was strenuous objection to the uninvited Republican Party lawyer. The court finds that the plaintiffs wanted a friendly hearing and not a contested one.

The court observes that in contrast to the Texas Organizing Project's attitude toward the "nonparties" in the TRO proceeding, *this court* expressly welcomed the *non-party* Harris County Attorney's office and let its First Assistant *attend* and *speak* and *be heard* without limitation at *every pre-trial hearing* in this and twenty other election cases. Mr. Taylor did not object even though the County Attorney's office was obviously aligned with Defendant Craft.

D. "Mistake" under section 221.003.

Untrue information about ballot paper was given to the trial judge. The court does not fault the lawyers from the County Attorney's office—they relied on what they were told by their client, the EAO.

A candid and truthful response from the EAO to the court would have been: "We have had difficulty all day getting paper to polling locations. Harris County covers 1700 square miles. We can't assure the court that all polling locations will

have enough ballot paper, especially at 6:00 o'clock during the rush-hour traffic we all know about."

Instead, confident statements were made promising there was (or would be) adequate paper even though throughout the day election judges who called the EAO had long phone call waits, and contractors working for the EAO had been trying to deliver paper throughout the county.

A court is entitled to candid and truthful information from lawyers and their clients. The assurances of adequate paper were not accurate, and the court relied on them.

Later that day, after 8:00 o'clock, the Texas Supreme Court issued a stay of the TRO and ordered that the provisional ballots cast between 7:00 and 8:00 p.m. be preserved for later examination. That examination showed that Craft received 1147 of the provisional votes and Lunceford received 842, a margin of 325 and a percentage of 58.25% to 41.75%.

One cannot help noticing the difference when the twelve-hour regular voting period is compared with the extra hour from 7:00 to 8:00 p.m. From 7:00 a.m. to 7:00 p.m. on Election Day, the margins in local countywide races generally went Democratic within 52-48, many of them within 51-49. From 7:00 to 8:00 p.m. the range was closer to 59-41.

The evidence does not show whether the stronger Democratic voting from 7:00 to 8:00 p.m. happened because strong Republican polling locations were disproportionately without paper, or because the side that sought the extra hour of voting was more ready to get its voters to the polls after the 6:00 o'clock ruling, or for other reasons.

E. Decisions.

The court **finds** that EAO and Mr. Tatum made a *mistake* within the meaning of section 221.003(a)(2)(C) when they agreed to the TRO, an agreement based on false assurances that *all* polling places would have paper for ballots. The polling locations that did not have ballot paper were not really "open" and section 43.007(p) of the election code [quoted above at page 25, footnote 24] was violated.

The court **holds** that 325 net votes for Craft resulted from the EAO's mistaken approval of the extra hour and should be taken into account in the court's ultimate decision.

IX. MISCELLANEOUS.

Voters with cancelled registrations. Initially, during discovery, the evidence appeared to show over 2000 votes by voters whose registrations had been canceled. Ultimately, it was learned that the vast majority of those cancellations happened *after* the election. When the dust had settled, the evidence showed that five voters were improperly allowed to vote even though their registrations had been canceled *before* the election. The five votes were illegal.

Inconsistencies in reconciliation reports. Some of the numbers in the post-election reports did not sum up with complete accuracy. But the court is not persuaded that this justifies a judicial conclusion, in connection with other evidence and findings, that the true outcome cannot be ascertained.

X. THE UNDERVOTE.

In this election exactly 42,697 voters (3.86%) voted in various other races but didn't vote in the 189th. Collectively these non-votes in a contest have come to be called the undervote.

Craft argues that before the court can take illegal votes into account and make its "true outcome" decision, Lunceford must: (i) show that the illegal votes were cast *in this specific race* and must also (ii) prove "the disputed votes did not fall into the category of undervotes." (Trial Brief at 10) These arguments are two ways of approaching the same issue—if the illegal votes *were cast* in the race for the 189th, then by definition they *were not* undervotes; and if the votes *were not* cast in the 289th, then by definition they *were* undervotes.[26]

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[26] The question *Were the illegal votes cast in this specific race?* arises only when there was an undervote in the specific race. To illustrate, consider an election contest in a 50-vote election for *Seat A* on the school board in a small county, where all 50 voters cast votes in each of the races for *Seats A, B,* and *C*. In the election contest for *Seat A,* there would be

From the evidence, it is reasonable to infer that some of the illegal votes (discussed above in sections II through IX) were cast in the 189th and some were not. It is also reasonable to infer that those who cast illegal votes would have voted in the 189th at roughly the same rate (96.14%) as one million other voters did.[27]

The court's rulings in sections II through IX yield a total of 2041 illegal votes.[28] The court *estimated* in section I (at pages 9-10) that 250 to 850 votes were *not cast* due to the EAO's ballot paper decision, which was illegal conduct and also an official mistake. Using the largest estimated number (850), these 2891 votes (2041 + 850) might be called the *affected votes*.

Not all of the 2891 would have been cast in the Lunceford vs. Craft contest because overall there was a 3.86% undervote in the race for the 189th District Court. The court holds that roughly the same undervote percentage in the contest for the 189th District Court would have occurred with the affected votes—96.14% of the 2041 illegal votes (plus the estimated 850 that were deterred from voting by the ballot paper decision) would have been cast in the 189th. This means that 2779 votes in the 189th (96.14% of 2891) were *affected*.

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no undervote issue *and* there could be no argument that the losing candidate must show that illegal voters voted *in the contested race*.

[27] The official canvassed total (PX-2) shows Craft defeated Lunceford by 533,710 to 530,967, the total vote for both candidates being 1,064,677. A total of 1,107,390 voters voted in the election. 1,107,390 minus 1,064,677 equals 42,713, but the official report shows the "undervote" in the 189th (the number of voters who did not vote for either candidate) was 42,697. The discrepancy results from the 16 "overvotes" apparently due to 16 ballot-by-mail voters who marked their paper ballots for *both* Craft and Lunceford. The official undervote (42,697) is 3.86% (a rounded number) of the total votes cast in the election (42,697 divided by 1,107,390 equals 3.8556).

[28] Voting by out-of-county residents (1236), provisional ballots (43), mail ballots (45), photo identification (380), erroneous instructions to the SVC (7), instructions for unscannable ballots (zero), mistake regarding TRO (325), and voting after registration was canceled (5). These findings from sections II to IX equal 2041 illegal votes.

The court respectfully rejects Craft's argument that this court, as trier of fact, cannot make these calculations because there was no expert testimony to support them.[29]

XI. SUMMARY OF FINDINGS.

Mistake and illegal-vote findings. The court has estimated that 250 to 850 lawful voters did not cast votes because of the EAO's ballot-paper decision, which was "illegal conduct" and also a mistake under section 221.003. There were 2041 *illegal* votes as discussed above. Using the largest estimated number (850), this yields a total of 2891 affected votes.

Undervote adjustment. The total of *affected* votes (2891) must be adjusted for the undercount percentage, yielding a total of 2779 affected votes (96.14% of 2891 equals 2779).

XII. JUDGMENT

The 2779 affected votes *slightly* exceed Craft's margin of victory, 2743. The court holds that this number is not large enough to put the true outcome in doubt. *That is the ultimate question in this case.* As was said above on page three, section 221.012 specifies that the *ultimate issue for decision in an election contest* is whether the court can or cannot "ascertain the true outcome of the election."

The court holds that 2779 illegal votes is not enough to make the true outcome unknowable in an election with a 2743-vote margin in the canvassed final result. Even if the 2779 affected votes had benefitted Craft by 90% to 10% (2501 to 278),

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[29] The percentage approach to the undervote was used and approved in *Green v. Reyes*, 836 S.W.2d 203 (Tex. App. —Houston [14th Dist.] 1992, no pet.), on the issue of whether the contestant proved "that illegal votes were cast in the election being contested." *Id.* at 208. Although an expert witness explained the percentage approach in *Green* and the court of appeals approved it, *id.* at 211, the court did not suggest that the issue *requires* expert testimony in an election contest. This court holds that expert testimony is not required.

an assumption no one would make, that would not be enough to affect the result.[30]

Green v. Reyes (discussed in footnote 29) is instructive. The trial judge in *Green* did not order a new election simply because the number of illegal votes *exceeded* the margin. He in *Green* found that he could not ascertain the true outcome because the number of illegal votes was roughly *three times as large* as the margin of victory. The number of affected votes found by this court is *too small* to justify a decision that the true outcome cannot be ascertained.

The election contest is respectfully **denied**, and Craft's victory in the contest for Judge of the 189th District Court is **declared** to be the **true outcome**.

Signed: November 9, 2023

/s/ David Peeples

DAVID PEEPLES, Judge Presiding

[30] Craft's 533,710 minus 2501 would equal 531,209. Lunceford's 530,967 minus 278 would equal 530,689. Craft would still win by 520 votes (531,209 exceeds 530,689 by 520).

Exhibit A

Partisan Offices on Harris County Ballot	**Number**
Congress	9
Governor, Lt. Governor, Attorney General, Comptroller Public Accts, Comm'r Gen. Land Office, Comm'r Agriculture, RR Comm'r	7
Supreme Court and Court of Criminal Appeals	5
State Board of Education	3
State Senator	4
State Representative	13
Court of Appeals	4
District Court	37
County Civil and Criminal Court	19
Probate Court	4
County Judge, District Clerk, County Clerk, County Treasurer	4
County Commissioner	2
Justice of the Peace	3
Total	114

CAUSE NO. 2022-79328

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

EXHIBIT B TO CONTESTANT/APPELLANT ERIN ELIZABETH LUNCEFORD'S NOTICE OF APPEAL

Cause No. 2022-79328

ERIN ELIZABETH LUNCEFORD,	*	**IN THE DISTRICT COURT**
Contestant	*	
	*	
vs	*	**164th JUDICIAL DISTRICT**
	*	
	*	
TAMIKA "TAMI" CRAFT,	*	**HARRIS COUNTY, TEXAS**
Contestee	*	

FINDINGS OF FACT and CONCLUSIONS OF LAW

BACKGROUND AND CONTEXT.

There were sixty-eight countywide courthouse races on the November 8, 2022 Harris County ballot. Twenty-one unsuccessful Republican courthouse candidates filed election contests by the statutory deadline. The captioned election contest arose from one of those twenty-one elections.

The final results show that Tamika "Tami" Craft defeated Erin Elizabeth Lunceford for Judge of the 189th District Court by 533,710 to 530,967, a margin of 2743 votes and a percentage difference of 50.13 to 49.87.

Lunceford vs. Craft was tried to the court from August 2 to August 11. The court heard testimony from eleven live witnesses in court, four witnesses by oral deposition, and thirty-five others by written-question depositions. The court admitted some 120 exhibits, which contain several thousand pages.

This court's authority. Two sections of the Texas Election Code delineate the court's authority in this matter:

Section 221.003. SCOPE OF INQUIRY.

(a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome *because*:

(1) illegal votes were counted; or

(2) an election officer or other person officially involved in the administration of the election:

(A) prevented eligible voters from voting;

(B) failed to count legal votes; or

(C) engaged in other fraud or *illegal conduct* or made a *mistake*. (emphasis added)

Section 221.012. TRIBUNAL'S ACTION ON CONTEST.

(a) If the tribunal hearing an election contest *can* ascertain the true outcome of the election, the tribunal shall declare the outcome.

(b) The tribunal shall declare the election void if it *cannot* ascertain the true outcome of the election. (emphasis added)

Section 221.003 describes the *conduct* of election officials that may be the basis for an election contest. Section 221.012 specifies that the *ultimate issue for decision* in an election contest is whether the court can or cannot "ascertain the true outcome of the election."

FINDINGS OF FACT and CONCLUSIONS OF LAW

The court now makes the Findings of Fact (FF 1-75) and Conclusions of Law (CL 1-42) on pages 3-25 below. Decisions on *mixed* questions of law and fact are designated Findings of Fact with the same "FF" abbreviation given to *pure* fact findings.

All affirmative findings rest on evidence the court considered to be clear and convincing, the legal standard for election contests.

It is of course customary to format Findings of Fact and Conclusions of Law separately, with the fact findings at the beginning of the document and the legal

conclusions toward the end. But the court believes that in this case the findings and conclusions will make more sense and be easier to follow when grouped together issue by issue.[1]

I. BALLOT PAPER

FF 1. In-person Harris County voters voted on computer screens, which then printed their selections onto two legal-size pages of ballot paper, which each voter reviewed for accuracy and then scanned into a secure system that would eventually count the votes countywide.

CL 1. The Texas Election Code states in one section how much ballot paper *shall be supplied* to each voting location. This is the law of Texas, and election administrators are duty-bound to try to follow it. The code says:

> **Section 51.005. Number of ballots.** (a) The authority responsible for procuring the election supplies for an election *shall provide* for each election precinct a number of ballots equal to *at least* the *percentage of voters who voted* in that precinct in the most recent corresponding election *plus 25 percent* of that number, except that the number of ballots provided may not exceed the total number of registered voters in the precinct. (emphasis added)

FF 2. For the November 2022 election, the Harris County Elections Administration Office (the "EAO") *chose not to follow* section 51.005—indeed the EAO *totally ignored* it. The EAO did this because the statute speaks of providing paper to "each election precinct," and since 2019 Harris County has voted at countywide polling locations, not at "precincts."

FF 3. Feeling unbound and unguided by section 51.005, the EAO decided to give 766 of the 782 polling locations *identical* amounts of paper—enough for 600 ballots each. Larger amounts were given to the other sixteen locations (PX-20;

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[1] The following acronyms were used throughout the trial and are listed here for convenience: Ballot by Mail (BBM); Elections Administration Office (EAO); Early Vote Ballot Board (EVBB); Provisional Ballot Affidavit (PBA); Reasonable Impediment Declaration (RID); Signature Verification Committee (SVC); and Statement of Residence (SOR).

DX-11). The EAO planned to take phone calls on election day and deliver extra paper to the polling locations as they telephoned for more.

A. Section 51.005's intent.

CL 2. In section 51.005 the Legislature's obvious intent was:

First, estimate *future turnout* by looking at *past turnout*.

Second, err on the side of *over*supply (instead of risking *under*supply) by adding 25% to the first number.

In a nutshell:

- *Look at past proven need by area, and provide "at least" that percentage,*
- *estimate future need by area,*
- *then oversupply by 25% just to be safe.*

CL 3. Election officials are commanded ("shall") to *estimate a future unknown* (the coming election's need) by reference to *known historical facts* (the past election's known turnout, area by area). That is, calculate the 2022 need for ballot paper scientifically by looking at known numbers from 2018 in areas of town (precincts). Without section 51.005, the Texas Election Code says *nothing* about how much ballot paper to supply.

FF 4. The EAO did the *opposite* of what the Legislature had mandated. The Legislature specified fact-based, individualized, fine-tuned allocation. Instead the EAO supplied one-size-fits-all allocation of 600 ballots apiece for 766 of the 782 polling locations (98%).

B. The consequences of the 600-per-location decision.

FF 5. The 600-per-location decision had tragic consequences:

(a) On election day several polling locations ran out of paper and were not able to get more paper in time for waiting voters.

(b) Voters stood in long lines for long periods of time.

(c) Many voters became frustrated and angry. One election worker testified, through tears, that a voter spit on her when she delivered the news that lined-up voters would have to wait, or go elsewhere to vote, because the polling location had run out of ballot paper. Another election worker testified that angry voters wanted her badge number.

(d) The news media reported the long lines and voter frustration.

(e) Election workers who made phone calls for more paper were often put on hold or told to leave a message. Promised paper was not always delivered.

(f) Damage was done to the public's confidence in government; pre-existing distrust was deepened. Partisan suspicions were inflamed.

(g) When voters eventually went elsewhere to try to vote, they sometimes encountered paper shortages and long lines at the other locations.

FF 6. Had the EAO simply *tried* to obey the Legislature, twenty-one election contests might have been avoided, because the shortages of ballot paper caused much of the Election Day chaos.

FF 7. The consequences of the EAO's decision were foreseeable, avoidable, and costly.

C. The EAO's Rationale offered by Craft and the Harris County Attorney.

FF 8. Craft and the EAO (through the Harris County Attorney's Office) argued that Section 51.005 simply *does not apply* to countywide voting. Their arguments were:

(a) Section 51.005's language refers to "each election precinct," not each countywide voting location.

(b) Precincts and polling locations are different things. A precinct is an *area* in the county with boundaries. A countywide polling place is a *location* for voting (a building) that serves the entire county.

(c) The last clause of section 51.005 (a) ("except that . . . in the precinct") would be absurd if it applied to countywide locations; it would mean the paper for each polling location could not "exceed" 2.4 million ballots ("the total number of registered voters" in each of the 782 countywide "precincts").

(d) There is no legislative history, no Secretary of State guidance, and no case law saying section 51.005 applies to countywide voting.

(e) Some precincts have been redistricted since 2018. This not only worsens the 2022 "fit" with 2018. It means "there was not a 'recent corresponding election' upon which to base ballot calculations."[2]

(f) Craft's expert witness worked in the EAO for two years (June 2020 to August 2022) before the November election. Her opinion was that ballot supply "is an art not a science." She mentioned "multiple data points" such as [1] "how many polling locations will you have," and [2] "is it a presidential or gubernatorial election," and [3] "is there a particular contest in a section of the county that is likely to drive turnout for several locations in that area." Summing up, she said: "I think what the code requires is you do an analysis, provide the ballot paper you think will be necessary *at that poll*, and be prepared to provide supplemental ballot paper as needed." (emphasis added)

FF 9. The expert witness made no effort to explain how *any* of her three factors, or her summary, or "art not a science" or "multiple data points" could justify *identical* supplies of 600 ballots for 98% of the polling locations. Her presentation as a neutral expert was tarnished a bit when she said later, in response to a question about a different issue, "that is not *our* burden of proof."

FF 10. If any other thought was given to this disastrous decision, the expert witness had every opportunity to mention it; and the County Attorney's amicus brief could have mentioned too.[3] There was no evidence that anyone at the EAO thought about whether 600 per location might *over*supply some and *under*supply others. If there was undersupply, might additional paper get there late in a county the size of Harris (2.4 million registered voters, 1700 square miles)? Might phone callers get a busy signal, or a message saying please leave a message, or a voice message estimating the wait time?

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[2] The quoted language is from the Harris County Attorney's amicus brief, filed on behalf of the Election Administrator's Office. *See* Amicus Brief in Support of Craft's No Evidence Motion for Summary Judgment, at 8.

[3] From the beginning of this case, the court has allowed the Harris County Attorney's office, though not a party, to participate and speak in hearings and to file the amicus brief.

FF 11. The EAO made a conscious decision that voters and election officials at the polls would wait while phone calls were answered and paper delivered throughout the county.

FF 12. The 600-ballot approach put unmerited trust in the ability of EAO workers (and private contractors) to answer phone calls on election day and deliver ballots across Harris County's 1700 square miles.

D. No consultation with the Texas Secretary of State.

FF 13. During the planning phase, no one at the EAO made even a perfunctory phone call to the Texas Secretary of State's office. The SOS was not consulted about anything, such as:

(a) What are other counties doing? (Ninety Texas counties use countywide voting.)
(b) What options do we have? What has experience shown?
(c) We think we are totally freed from section 51.005's commands. Do you agree?
(d) Our tentative plan is to ignore section 51.005, give identical amounts to 98% of the locations, and take phone calls and send deliveries during the day—what do you think?

E. How many voters went elsewhere to vote?

FF 14. The court heard from live witnesses and read the testimony of witnesses who testified through depositions by written questions [DWQs] that a total of 2900 voters had left their polling locations without voting because of paper shortages. The court finds the testimony of these witnesses generally credible. Some were cross-examined about why they didn't ask voters whether they planned to go vote elsewhere. There was credible testimony that election workers had no time to take notes or get contact information from voters who left. Some workers expressed concern that voters might have resented the privacy intrusion if such questions had been asked.

FF 15. One DWQ witness testified that in his effort to vote he eventually went to *four locations* before he finally found one with functioning machines and reasonable lines. At one polling location the officials estimated the wait time would be ninety minutes.

FF 16. One witness testified in response to Craft's cross-question ("explain in detail how you know" that voters who left did not vote elsewhere): "There were at least two nearby locations that also ran out of ballot paper, according to voters who arrived at my polling location, and my polling location was the second or third stop for some trying to vote. Based on this information, I believe some [voters] likely did not cast a vote [elsewhere]. Additionally, several voters who were in line by 7:00 p.m. left the line before ballot paper was provided (~ 9:05 p.m.) and after polls had closed [so] these people were not able to cast a ballot." Another witness testified: "They left. Several women stated they needed to go care for children, prepare dinner. Others got tired of waiting and did not want to go elsewhere."

FF 17. From the evidence, the court finds that because of *paper shortages* 2600 voters who tried to vote at their polling place of choice left without voting. These numbers do not include voters discouraged by long lines who voted elsewhere due to *machine malfunctions* or *paper jams*, which were not caused by EAO decisions.

FF 18. A more difficult question is how many of these civic-minded people voted somewhere else that day and how many didn't. The Official Results show that 43.54% of Harris County's 2,543,162 registered voters voted in the November 8 election (early by mail, early in person, and in person on Election Day). All of these frustrated, waiting voters were part of that 43.54%—they were the *civic-minded* who had shown up in person to vote, and we might expect them to be persistent and go to another polling location. At each polling place signs were posted showing the four nearest polling locations (DX-12).[4] From common experience we can infer that *some of these voters* undoubtedly gave up when they saw long lines at the next location(s) they went to. Some had budgeted time for voting, but not enough time for going to a second or third location. Some had excess discretionary time for voting, and for waiting; others had places to go, tasks to do, appointments or jobs where they were expected. Some undoubtedly thought, *My vote won't make a difference in this huge city. But I tried. I'm leaving.* Others planned to come back and vote later but never followed through.

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[4] **Section 43.007(o)**: "Each countywide polling place must post a notice of the four nearest countywide polling place locations by driving distance."

FF 19. Given the state of the evidence, the court *estimates* that between 250 and 850 voters who left the first polling place did not vote elsewhere because of the EAO's ballot paper decision.

CL 4. That decision was both illegal (a failure to follow the law) and a mistake.

FF 20. The court *finds* that the EAO did not make a good faith effort to comply with section 51.005.

CL 5. The court *holds* that section 51.005 required the EAO to ***try*** to do two things in apportioning ballot paper. First, estimate 2022 need for *areas* of the county (the 782 countywide polling locations) based on past proven need at the last comparable election (2018), which would show 2018 turnout in *areas* of the county where people live (precincts). Second, oversupply rather than under-supply, by 25%. These two statutory requirements are *clear*, and they were consciously disobeyed. The EAO's ballot paper decision to ignore section 51.005 was both "illegal conduct" and a mistake.

FF 21. The court *estimates* that between 250 and 850 voters left and did not vote elsewhere on Election Day. Pursuant to section 221.012(b) (quoted above on page 2), these numbers will be taken into account as part of the court's decision whether it can or cannot "ascertain the true outcome of the election."

II. VOTING IN HARRIS COUNTY BY OUT-OF-COUNTY RESIDENTS.

CL 6. A voter *must* reside in a county to vote in that county. The voter *must* also be registered to vote. Election judges are required to ask each in-person voter if the address shown on the official voter roll is still the voter's *current* address. Voters who answer "no" are required to sign a Statement of Residence ("SOR").[5]

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[5] **Section 63.0011** ("Statement of Residence"):

(a) *Before* a voter may be accepted for voting, an *election officer shall ask* the voter if the voter's residence address on the precinct list of registered voters is *current* and whether the voter has changed residence within [Harris] county. . . .

(b) If the voter's residence address is not current because the voter has changed residence *within* [Harris] county, the voter may vote, if otherwise eligible, in [his old precinct] if the voter resides in [Harris] county *and*, if applicable:

FF 22. Lunceford pointed out that votes were cast by persons who did not reside in Harris County. She focused on: (i) votes by *out-of-county* residents whose SORs show on their face a residence other than Harris County; and (ii) votes supported by *incomplete* SORs, which failed to give *any* information about *residence*, and for the vast majority of these the voters themselves omitted every bit of information except their names.

CL 7. At polling locations, the election officials are supposed to make sure that SORs are correct and complete. SORs are filled out when the voter signs in and the Election Judge has asked, *Do you still live at this address*, and voter has said *No*. (Later the EAO registrar uses SORs to update the voter registration records.[6]) Voters who say they live in a different county are not eligible to vote a regular Harris County ballot (which has countywide and district-based elections, in addition to the statewide ones).

CL 8. There is a distinction between receiving additional evidence of residence at the *polling location* and additional evidence *at trial*.

CL 9. Residence information from voters at the polling location. *At the polling location* the information is *handwritten* on the SOR *by the voter*; the election official is not expected to inquire beyond the SOR, although an official who has the time and the inclination *could* certainly choose to discuss residence briefly with the voter. An SOR is filled out only because the voter has just replied, in response to the election judge's inquiry, "I don't live there anymore." At the polling place,

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(c) Before being accepted for voting, the voter *must* execute and submit to an election officer a statement [SOR] including:

(1) a statement that the voter satisfies the applicable *residence* requirements prescribed by Subsection (b) [i.e. still resides in Harris County];

(2) all of the *information* that a person must include in an *application to register* to vote under Section 13.002; and

(3) the *date* the statement is submitted to the election officer.

(c-1) The statement [the SOR] described by Subsection (c) must include a field *for the voter to enter the voter's current county of residence.* (emphasis added).

[6] **Section 15.022 (a)** states: "The registrar shall make the appropriate corrections in the registration records . . . (4) after receipt of a voter's statement of residence executed under Section 63.0011."

election judges are to assess the residence information *shown on the SOR*. If the SOR shows that the voter resides outside Harris County, the voter can vote only a *provisional* ballot.

CL 10. Extrinsic evidence of residence at trial. *In an election contest trial,* the parties *may* litigate a voter's true residence with evidence. When this happens, the trial judge will decide whether an SOR did or did not speak the truth about a voter's residence.

FF 23. Out-of-County Voters. The SORs signed by 966 voters show on their face, *in the voter's handwriting*, that the voters resided outside Harris County.

CL 11. SORs are supposed to be checked at the polls by election judges; they are not vetted later by the Early Vote Ballot Board.

CL 12. For countywide elections, these 966 were illegal votes within the meaning of section 221.003 and should not have been counted.

FF 24. SORs incomplete. The court also holds that 270 SORs were filled out by the voter so incompletely—with the boxes for former residence and current residence *totally blank*—that it was not lawful to approve them and they should not have been counted.

CL 13. A Statement of Residence must **state** the **residence**.

III. PROVISIONAL BALLOTS.

FF 25. Lunceford contended that several Provisional Ballot Affidavits ("PBAs") were improperly approved for voting. The Secretary of State's PBA form summarizes several statutory "Reasons for Voting Provisionally."[7]

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[7] **Section 65.054 (Accepting Provisional Ballot)** provides:

> (a) The early voting ballot board [EVBB] shall examine each [provisional ballot affidavit] and determine whether to accept the provisional ballot of the voter . . . .
>
> (b) A provisional ballot *shall* be accepted *if* the board determines that: (1) from the information in the affidavit or contained in public records, the person is eligible to vote in the election and has not previously voted in that

1. Voter failed to present acceptable photo identification or an alternate form of identification with an executed Reasonable Impediment Declaration;
2. Voter is not on list of registered voters;
3. Voter not on list, votes in another precinct. [This would not apply because Harris County votes at countywide polling locations, not at individual precincts.]
4. Voter is on list of persons who received mail ballots and has not surrendered the mail ballot or presented a notice of improper delivery; and
5. Voter voted after 7:00 p.m. due to court order. [Provisional ballots from 7:00 to 8:00 p.m. on election day pursuant to court order are discussed in section VIII below on page 22.]

FF 26. Already voted by mail? Most of the challenged PBAs in this case list reason 4 above for voting provisionally (that the voter appears to have already voted by mail). These are voters who showed up to vote *in person* and were advised that a mail ballot was earlier sent to them.

CL 14. In-person voters who say they *did not receive* the mail ballot, or received it but *didn't vote it and mail it in*, must sign a PBA and vote a provisional ballot. The EVBB should later check the records and verify whether the in-person voter did or did not vote by mail earlier.

FF 27. For each of these forms singled out for scrutiny, the Mail Supervisor (an employee of the EAO) has signed and checked a box that the mail-in ballot was "not returned." This means the EAO has checked the records and confirmed that the voter *did not mark and return the mail ballot*.

CL 15. This is a valid reason for the EVBB to accept the voter's provisional in-person ballot.

FF 28. Signatures on these PBAs by the Mail Supervisor and the EVBB show that they concluded these voters had *not* voted earlier by mail.

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election; [and] (2) the person . . . meets the identification requirements of Section 63.001 (b) [photo identification, or an approved substitute plus a Reasonable Impediment Declaration form] . . . . (emphasis added)

FF 29. Concerning these PBAs, the court is *not* persuaded that these officials *erred* in reaching those conclusions. To state it differently, the court accepts the decisions of the Mail Supervisor and the EVBB that approved these PBAs.

FF 30. It is significant that on these PBAs there is no issue of whether the voters lacked photo identification—the election judges did *not* check a box concerning lack of proper photo identification.

FF 31. Other boxes not checked. Other boxes on some PBA forms were not checked or not filled out properly.

(a) Some Election Judges signed the PBA but did not date it.
(b) Some voters wrote their address in the wrong box.
(c) Some of these voters did not sign the yes-or-no citizenship box.

FF 32. The court has assessed these for genuineness. On these PBAs the boxes for the voter registration number and precinct number are filled in. At the polling location the election judges saw these registered voters face-to-face. The EVBB accepted them, and the court has decided not to overrule the board and disallow these votes.

FF 33. The court concludes that these omissions do not justify nullifying these provisional ballots as illegal.

FF 34. Unsigned PBAs. The court does *not* approve the PBAs that the *voter* did not sign (6), or the *Election Judge* did not sign (22), or the *EVBB* did not sign (15). These 43 PBAs were not lawfully approved, and the votes supported by them should not have been counted.

IV. MAIL BALLOTS.

FF 35. Lunceford contended that several mailed ballots were counted, in violation of the election code, even though they lacked code-required *signatures* or were not *timely mailed or timely received.*

CL 16. The code specifies several steps for voting by mail. The voter: (i) must ask for a mail ballot in a signed writing, (ii) must have a statutory reason (age, disability, will be out of county, in jail), and (iii) must return the marked ballot *in time* and with proper *signatures* (on both the *application* and the *envelope*). (There

are also explicit limits on who may assist the voter in marking the ballot and mailing it.)

CL 17. For mail ballots to be lawfully counted, the election code specifies two requirements that are at issue in this case—timeliness and matching signatures.

CL 18. Timeliness. The code requires that mail ballots be timely *mailed* and timely *received*. The carrier envelope *must* be postmarked by 7:00 p.m. on election day *and* the envelope with the ballot *must* be received by 5:00 p.m. on the next day (November 9 for this election).[8]

CL 19. Matching signatures. The code requires the voter's signature (1) on the *application* for a mail ballot and (2) on the carrier *envelope* in which the ballot marked by the voter is mailed back to the EAO. As the court said in *Alvarez v. Espinoza*, 844 S.W.2d 238, 245 (Tex. App.—San Antonio 1992, no pet.) (en banc), "The law places the burden on those who vote early by mail to sign both the application and the [carrier] envelope with signatures that match."

CL 20. The early vote clerk, after checking the carrier envelope for timeliness, puts it in a *jacket envelope* along with the voter's application for the mail ballot, and sends the jacket envelope to the EVBB for its review.[9] The EVBB reviews

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[8] **Section 86.007** (Deadline for Returning Marked Ballot).

(a) [Except for ballots mailed from outside the US,] a marked ballot voted by mail *must arrive* at the address on the carrier envelope:

(1) before the time the polls are required to close on election day; or

(2) not later than 5 p.m. on the day after election day if the carrier envelope was [mailed and postmarked] not later than 7 p.m. at the location of the election on election day. . . .

(c) A marked ballot that is not timely returned *may not be counted*. . . . (emphasis added)

[9] **Section 87.041** (Accepting Voter).

(a) The early voting ballot board shall open each jacket envelope for an early voting ballot voted by mail and determine whether to accept the voter's ballot.

(b) A ballot may be accepted *only if*:

(1) the carrier envelope certificate is properly executed; [and]

mail ballots for two signatures—the signature on the application and the signature on the carrier envelope. In addition, the EVBB "may" compare either or both signatures with a *third* signature—the *voter's signature on file with the registrar.*[10]

FF 36. The EVBB is a bipartisan board with equal numbers of Democrats and Republicans whose names were suggested to Commissioners' Court by each

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(2) neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness; . . .

(d) A ballot *shall* be rejected if any requirement prescribed by Subsection (b) is not satisfied. In that case, the board shall indicate the rejection by entering "rejected" on the carrier envelope and on the corresponding jacket envelope.

(d-1) . . . The board *shall* compare signatures in making a determination under Subsection (b)(2) . . . .

(e) In making the determination under Subsection (b)(2), to determine whether the signatures are those of the voter, the board *may* also compare the signatures with any known signature of the voter on file with the county clerk or voter registrar. . . . (emphasis added)

[10] **Voter mistakes on mail ballots *may* be cured.** If the early voting clerk receives a mailed ballot that lacks a required signature or is otherwise defective, the clerk *may*: (i) mail the BBM back to the voter for correction; (ii) telephone and inform the voter of the right to *cancel* the mail ballot and vote *in person*; or (iii) telephone and suggest that the voter may come to the registrar's office and correct the omission. **Section 86.011** ("Action by Clerk on Return of Ballot") says:

. . . (d) Notwithstanding any other provisions of this code, if the clerk receives a *timely* carrier envelope that does not fully comply with the applicable requirements . . . [i] the clerk *may* deliver the carrier envelope in person or by mail to the voter and *may* receive, before the deadline, the *corrected carrier envelope* from the voter, *or* [ii] the clerk *may* notify the voter of the defect by telephone and advise the voter that the voter may come to the clerk's office in person to *correct* the defect or *cancel* the voter's application to vote by mail and vote on election day. If the procedures authorized by this subsection are used, they must be applied uniformly to all carrier envelopes covered by this subsection. . . . (emphasis added)

party's chair. The EVBB works in teams of two (always one Democrat and one Republican per team).

CL 21. The EVBB is given considerable discretion.[11]

FF 37. The court finds that thirty-six mailed ballots lacked a required signature, and an additional nine ballots were not timely mailed. PX-11 & PX-12.

FF 38. These forty-five mailed ballots do not satisfy the code's mandatory provisions, and therefore it was not lawful to count them.

V. PHOTO IDENTIFICATION.

CL 22. The election code says election judges shall make two inquiries of *every* in-person voter. Election Judges are to ask: (i) whether the address shown on the voter list is still the voter's current address[12] and (ii) whether the voter has photo identification.[13]

CL 23. Acceptable photo identification. The code specifies that each in-person voter must show:

(1) an approved *photo ID*[14] ***or***

(2) an approved *substitute* ***and*** an approved *reason* for not having a photo ID.

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[11] "The law presumes that the board [EVBB] acted properly in rejecting and accepting ballots; to overcome this presumption, a challenger must show by clear and satisfactory evidence that the board erred." *Alvarez v. Espinoza*, 844 S.W.2d at 844.

[12] **Section 63.0011(a)** ("Before a voter may be accepted for voting, an election officer *shall* ask the voter if the voter's residence address [on the list] is current and whether the voter has changed residence within the county") (emphasis added).

[13] **Section 63.001(b)** (". . . on offering to vote, a voter *must* present to an election officer at the polling place: (1) one form of photo identification listed in Section 63.0101(a) or (2) [an acceptable substitute *plus* a reasonable impediment declaration]." (emphasis added)

[14] **Section 63.001(b)(1)** (requiring photo ID); **§ 63.0101(a)** (listing acceptable photo IDs). An *expired* photo ID-card is acceptable for voters *70 and older* and is acceptable for voters *69 and younger* if the ID-card has been expired for only four years or less.

CL 24. The approved *substitute* may be a utility bill, bank statement, government check, paycheck, birth certificate, or a voter registration card or other government document.[15] The approved *reason* may be lack of transportation, disability or illness, work schedule, family responsibilities, ID is lost or stolen, or application for photo ID is pending.[16]

CL 25. RIDs. A voter who does not have a listed type of photo identification must be asked to sign a Reasonable Impediment Declaration.

FF 39. RID forms have been designed and approved by the Texas Secretary of State.

FF 40. The *election official* at the polling location may check a box for one of six *alternate kinds of identification without a photo.*

FF 41. RID forms let the *voter* check one of several boxes listing the *reason(s) why the voter has not gotten an approved form of photo identification*.

CL 26. Flexibility on name and address matches. The voter's name must be on the official roll of registered voters. But the *name* on the substitute document need not "match exactly with the name on the voter list" if they are "substantially similar." The election official cannot reject the substitute document solely because its *address* "does not match the address on the list of registered voters."[17]

FF 42. Incomplete RIDs. Lunceford challenges 532 votes because the RIDs supporting them were not completely filled out. The challenged RIDs lack *one or more* of the following: a reason for not having a photo ID, a lawful ID substitute (e.g., paycheck, utility bill, voter registration card), voter signature, election judge signature (the judge is supposed to place the voter under oath), or Voter ID number.

FF 43. The evidence shows that over 347,000 voters voted in person on Election Day, and that 532 of them did not satisfy one or more of the election code's

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[15] **Section 63.001(b)(2)** (allowing substitutes for photo ID); **§ 63.0101(b)** (listing acceptable photo ID substitutes).

[16] **Section 63.001(i)** (listing acceptable reasons for not having photo ID).

[17] **Section 63.001 (c) & (c-1)**.

requirements, summarized above: bring a photo ID *or* bring a substitute document *and* check a box showing why they have not gotten a photo ID.

CL 27. The reasons for not having an ID include family responsibilities, disability or illness, work schedule, application pending, lack of transportation, or ID lost or stolen.

CL 28. Persons who have no photo ID may satisfy this statute by simply bringing their voter registration card,[18] which suffices as substitute proof for the photo ID if there is an approved reason for not having a photo ID.

CL 29. A RID is the voter's chance to comply with the code's effort to make sure that voters can demonstrate *who they are* with documents.

FF 44. The court concludes that 380 of the 532 challenged RIDs are so lacking in the statutory information that they are improper, and votes cast by these 350 voters should not have been counted.

VI. Erroneous instructions to the Signature Verification Committee.

FF 45. A member of the Signature Verification Committee (SVC) testified that when early voting began, an EAO staffer told the SVC not to compare Ballot by Mail (BBM) *application* signatures or *envelope* signatures with the voter's signature *on file* with the elections office.

CL 30. This advice was flatly wrong; the SVC *may* but is not *required* to compare the voter's application signature and envelope signature with the voter's signature officially on file. *See* footnote 11 above quoting section 87.041(e).

FF 46. Two other SVC members testified they *did not hear* the EAO staffer make this remark.

FF 47. The court finds that the remark was made, the erroneous advice was indeed given, and it was obeyed for two hours before the EAO corrected it.

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[18] **Section 63.0101**: "(b) The following documentation is acceptable as proof of identification under this chapter: (1) a government document that shows the name and address of the voter, including *the voter's voter registration certificate*." (emphasis added)

FF 48. This incident shows either carelessness or ignorance by the EAO about the SVC's authority to exercise its statutory discretion concerning an important safeguard for BBMs. But the erroneous instruction affected only a few votes; the witness estimated that the SVC found that approximately 1% of the application or envelope signatures did not match the signature on file. She also estimated that 700 BBMs were approved during the first two hours while the SVC operated under the incorrect instructions.

FF 49. The court concludes that seven improper BBMs slipped by unexamined and should not have been counted.

VII. LAST-MINUTE EAO INSTRUCTIONS FOR BALLOTS THAT WOULDN'T SCAN.

FF 50. The printed ballot was two legal-size pages for each voter. During both early voting and election-day voting, there were times when the scanning machines would not accept page two of a voter's ballot.

FF 51. HCEA Manual. For this situation the 2022-2023 Harris County instruction manual advised [PX-16, page 115] that the second ballot page should be rescanned four different ways.[19] If the re-scanning was still unsuccessful, the second page would be put into the Emergency Slot [aka the "Emergency Chute"]. Such unscanned pages would later be processed and counted by Central Count, a bipartisan body (two Republicans and two Democrats) with a higher-quality scanner that might be able to scan and count the troublesome second pages. If Central Count could not successfully re-scan a page two, it would manually input the votes shown on that unscanned page into the official vote count.

FF 52. EAO's last-minute change for the page-two problem. A short time before November 8, after election workers had been trained, the EAO emailed new instructions: If any page two was *illegible* as opposed to *legible but unscannable*, the voter should vote again, but scan only the new page two and spoil the new page one (because the original page one had already been scanned

[19] The manual said to scan each difficult page 2 by inserting it *top first* with print down and then with print up, and then by inserting it *bottom first* with print down and then with print up.

and recorded). New page two would be put into the Emergency Chute for processing later by Central Count.

FF 53. Lunceford contends this new procedure was too complex for such a last-minute change, and that a sizeable number of *new* first ballot pages were mistakenly scanned a second time after the original first pages had been scanned and recorded. The *Lunceford vs Craft* race was on page one of the printed ballots and therefore may have received double-votes *if page one was indeed counted twice* because of the scanning problem and the last-minute instructions.

FF 45. The court has concluded that even if the last-minute instructions were a "mistake" within section 221.003, the evidence does not convincingly show extra counting of page one races.

FF 55. The official election results (PX-2) show a steady drop-off from votes at the top of the ballot to votes toward the bottom, a drop-off that would look normal to one who has been observing Texas elections for several decades. As voters wade through a long urban ballot—starting with federal races, moving then to the statewide races, Board of Education, members of the State Senate and House, appellate courts, District Courts, County Courts-at-Law, and Probate Courts—it is common to see a steady drop-off (i.e. reduced voting) in down-ballot *judicial* races. This was true for the November 2022 down-ballot judicial races in Harris County.

FF 56. In this election, one down-ballot race stood out: the high-profile page-two contest for County Judge (Alexandra Mealer vs Lina Hidalgo) showed slightly more turnout than even some page-one races like the Texas Supreme Court. This suggests there was no large double-voting of page one.

CL 31. The court concludes that the EAO's perhaps unwise last-minute decision about handling scanning problems was certainly not illegal and does not qualify as a "mistake" within the meaning of § 221.003.

FF 57. The court also concludes the last-minute scanning change did not cause a significant difference in page-one votes compared to page-two votes because the drop-off was typical for down-ballot judicial races.

FF 58. The court has assessed the testimony about the Cast Vote Records and compared it to the evidence of the canvassed final results. The evidence of a

page two drop-off in votes, possibly caused by scanning confusion, is not persuasive enough to be clear and convincing. The argument that there were more page one votes than page two votes, causing double votes in the 189th, is respectfully **denied**.

VIII. COURT-ORDERED EXTENSION OF COUNTYWIDE VOTING UNTIL 8:00 P.M.

FF 59. Lunceford contended that Administrator Tatum made a "mistake" within the meaning of section 221.003 when he agreed on Election Day to a Temporary Restraining Order [TRO] that extended the voting period countywide from 7:00 p.m. to 8:00 p.m.

CL 32. Agreeing to the extension was not *illegal*. But the court *sustains* Lunceford's contention that agreeing to the TRO was a *mistake* within the meaning of section 221.003.

FF 60. For the reasons stated at pages 22-32 of the court's Final Judgment (signed on November 9), the court has expressed and explained its deep concern about the way the TRO was sought and obtained.

FF 61. The County Attorney's office, speaking for the EAO, gave the ancillary court untrue information about ballot paper at the polling locations and inaccurate assurances that all polling locations would have enough ballot paper it the court extended the poll-closing deadline.

CL 33. A court is entitled to candid and truthful information from lawyers and their clients.

FF 62. The assurances of adequate paper were not accurate, and the court relied on them.

FF 63. The court finds that the EAO and Mr. Tatum made a *mistake* within the meaning of section 221.003(a)(2)(C) when they agreed to the TRO, an agreement based on false assurances that *all* polling places would have paper for ballots.

The polling locations that did not have ballot paper were not really "open" and section 43.007(p) of the election code was violated.[20]

CL 34. The court holds that 325 net votes for Craft resulted from the EAO's mistaken approval of the extra hour and should be taken into account in the court's ultimate decision.

IX. MISCELLANEOUS.

FF 64. Voters with cancelled registrations. Initially, during discovery, the evidence appeared to show over 2000 votes by voters whose registrations had been canceled. Ultimately, it was learned that the vast majority of those cancellations happened *after* the election. When the dust had settled, the evidence showed that *five voters* were improperly allowed to vote even though their registrations had been canceled *before* the election.

CL 35. The five votes were illegal.

FF 65. Inconsistencies in reconciliation reports. Some of the numbers in the post-election reports did not sum up with complete accuracy.

FF 66. But the court is not persuaded that this justifies a judicial conclusion, in connection with other evidence and findings, that the true outcome cannot be ascertained.

X. VOTERS ON THE SUSPENSE LIST.

FF 67. Lunceford contended that 1995 voters whose names were on the suspense list were permitted to vote without showing that they still resided in the county. This contention was not proved to the court's satisfaction and it is respectfully denied.

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[20] **Section 43.007(p)** says: "If a court orders any countywide polling place to remain open after 7 p.m., all countywide polling places located in that county shall remain open for the length of time required in the court order."

XI. THE UNDERVOTE.

FF 68. In this election exactly 42,697 voters (3.86%) voted in various other races but didn't vote in the 189th. Collectively these non-votes in a contest have come to be known as the "undervote."

FF 69. Craft argued that before the court can take illegal votes into account and make its "true outcome" decision, Lunceford must: (i) show that the illegal votes were cast *in this specific race* and must also (ii) prove "the disputed votes did not fall into the category of undervotes." (Trial Brief at 10)

CL 36. These arguments are two ways of approaching the same issue—if the illegal votes *were cast* in the race for the 189th, then by definition they *were not* undervotes; and if the votes *were not* cast in the 189th, then by definition they *were* undervotes.

FF 70. From the evidence, it is reasonable to infer that some of the illegal votes (discussed above in sections II through IX) were cast in the 189th and some were not. It is also reasonable to infer that those who cast illegal votes would have voted in the 189th at roughly the same rate (96.14%) as one million other voters did.[21]

FF 71. The court's rulings in sections II through IX yield a total of 2041 illegal votes.[22] The court *estimated* in section I (FF 21 at page 9 above) that 250 to 850 votes were *not cast* due to the EAO's ballot paper decision, which was illegal

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[21] The official canvassed total (PX-2) shows Craft defeated Lunceford by 533,710 to 530,967, the total vote for both candidates being 1,064,677. A total of 1,107,390 voters voted in the election. 1,107,390 minus 1,064,677 equals 42,713, but the official report shows the "undervote" in the 189th (the number of voters who did not vote for either candidate) was 42,697. The discrepancy results from the 16 "overvotes" apparently due to 16 ballot-by-mail voters who marked their paper ballots for *both* Craft and Lunceford. The official undervote (42,697) is 3.86% (a rounded number) of the total votes cast in the election (42,697 divided by 1,107,390 equals 3.8556).

[22] Voting by out-of-county residents (1236), provisional ballots (43), mail ballots (45), photo identification (380), erroneous instructions to the SVC (7), instructions for unscannable ballots (zero), mistake regarding TRO (325), and voting after registration was canceled (5). These findings from sections II to IX equal 2041 illegal votes.

conduct and also an official mistake. Using the largest estimated number (850), these 2891 votes (2041 + 850) might be called the *affected votes*.

FF 72. Not all of the 2891 affected votes would have been cast in the *Lunceford vs. Craft* contest because overall there was a 3.86% undervote in the race for the 189th District Court. The court finds that roughly the same undervote percentage in the contest for the 189th District Court would have occurred with the affected votes—that is, 96.14% of the 2041 illegal votes, plus the estimated 850 (at most) that were deterred from voting by the ballot paper decision, would have been cast in the 189th. This means that 2779 votes in the 189th (96.14% of 2891) were *affected*.

CL 37. The court respectfully rejects Craft's argument that this court, as trier of fact, cannot make these calculations because there was no expert testimony to support them.[23]

XII. SUMMARY OF FINDINGS.

FF 73. Mistake and illegal-vote findings. The court has estimated that 250 to 850 lawful voters did not cast votes because of the EAO's ballot-paper decision, which was "illegal conduct" and also a mistake under section 221.003. There were 2041 *illegal* votes as discussed above. Assuming and using the largest estimated number (850), this yields a total of 2891 affected votes.

CL 38. Undervote adjustment. The total of *affected* votes (2891) must be adjusted for the undercount percentage, yielding a total of 2779 affected votes (96.14% of 2891 equals 2779).

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[23] The percentage approach to the undervote was used and approved in *Green v. Reyes*, 836 S.W.2d 203 (Tex. App. —Houston [14th Dist.] 1992, no pet.), on the issue of whether the contestant proved "that illegal votes were cast in the election being contested." *Id.* at 208. Although an expert witness explained the percentage approach in *Green* and the court of appeals approved it, *id.* at 211, the court did not suggest that the issue *requires* expert testimony in an election contest. This court holds that expert testimony is not required.

XII. JUDGMENT

FF 74. The 2779 affected votes *slightly* exceed Craft's margin of victory, 2743. The court holds that this number is not large enough to put the true outcome in doubt. *That is the ultimate question in this case.*

CL 39. As was said above on page two, section 221.012 specifies that the *ultimate issue for decision in an election contest* is whether the court can or cannot "ascertain the true outcome of the election."

CL 40. The court holds that 2779 illegal votes is not enough to make the true outcome unknowable in an election with a 2743-vote margin in the canvassed final result. Even if the 2779 affected votes had benefitted Craft by 90% to 10% (2501 to 278), an assumption no one would make, that would not be enough to affect the result.[24]

CL 41. *Green v. Reyes* (discussed in footnote 23) is instructive. The trial judge in *Green* did not order a new election simply because the number of illegal votes *exceeded* the margin. He found that he could not ascertain the true outcome because the number of illegal votes was roughly *three times as large* as the margin of victory. The number of affected votes found by this court is *too small* to justify a decision that the true outcome cannot be ascertained.

FF 75. The proper decision is that the election contest be respectfully **denied**.

CL 42. Craft's victory in the contest for Judge of the 189th District Court is **declared** to be the **true outcome**.

Signed: December 9, 2023

/s/ David Peeples

DAVID PEEPLES, Judge Presiding

[24] Craft's 533,710 minus 2501 would equal 531,209. Lunceford's 530,967 minus 278 would equal 530,689. Craft would still win by 520 votes (531,209 exceeds 530,689 by 520).

(2) CONNECTION(S) FOUND.

CASE NUM: 202279328 PJN: TRANS NUM: CURRENT COURT: 164 PUB: Please Select

CASE TYPE: OTHER CIVIL CASE STATUS: DISPOSED (FINAL)

STYLE: LUNCEFORD, ERIN ELIZABETH VS CRAFT, TAMIKA (TAMI)

**** INACTIVE PARTIES ****

	PJN	PER/CONN	COC	BAR	PERSON NAME	PTY STAT	ASSOC ATTY
☐		00002 - 0001	DEF	24068346	CRAFT, TAMIKA (TAMI)		MACLEOD, RYAN S.
☐		00001 - 0001	PLT	19727600	LUNCEFORD, ERIN ELIZABETH		TAYLOR, WILLIAM A.

1 Total Pages 1 Records Per-Page 20

ATY INQ | ACT UPDT | SERV ISSU | DOCU INQ | CASE SUMM INQ | PTY ADDR | ATY SUB

MUL ATY SUB | ATY W/DRAWL | PTY W/DRAWL