No. 01-23-00921-CV

IN THE FIRST COURT OF APPEALS
FOR THE STATE OF TEXAS
AT HOUSTON, TEXAS

ERIN ELIZABETH LUNCEFORD

v.

TAMIKA CRAFT

Appealed from the 164th District Court
of Harris County, Texas
Cause No. 2022-79328

REPLY BRIEF OF TAMIKA CRAFT AS CROSS-APPELLANT

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GUIDE TO CITATIONS AND ABBREVIATIONS

1. "CR" means Clerk's Record, followed by page number.

2. "SCR" means Supplemental Clerk's Record, followed by page number.

3. "RR" means Reporter's Record, followed by volume number and page/line or Exhibit number.

4. "FF" means Finding of Fact, followed by the numbered finding.

5. "CL" means Conclusion of Law, followed by the numbered conclusion.

6. "Contested Race" means the November 2022 race for District Judge of the 189th Judicial District between Erin Lunceford and Tamika Craft.

7. "Lunceford's Opening Br." means Appellant Lunceford's Brief filed on July 9, 2024.

8. "Craft's Br." means Brief of Appellee/Cross-Appellant Tamika Craft filed on September 9, 2024.

9. "Lunceford's Response Br." or "Lunceford's Response" means Appellant Lunceford's Combined Reply Brief and Cross-Appellee Lunceford's Response Brief filed on January 4, 2025.

10. "SOR" means Statement of Residence.

11. "RID" means Reasonable Impediment Declaration.

12. "TRO" means the Temporary Restraining Order issued by the ancillary court on November 8, 2022. *See* RR55 at Ex. 25C.

SUMMARY OF ARGUMENT

This appeal presents a fundamental question: whether an election involving over one million voters should be voided based on mere speculation, inadmissible testimony, and legally insufficient evidence. The trial court ultimately reached the correct result that Tamika Craft won the race for the 189th District Court, so the election should not be voided. That result—the true outcome of the election—should be affirmed.

The trial court's findings and conclusions, however, rest on several legal errors that warrant correction, as they set a dangerous precedent for future election contests. Leaving the trial court's improper findings undisturbed might operate as a tacit approval of using legally insufficient evidence to disqualify legal votes. The judgment should therefore be modified in Craft's favor by reducing the number of "total affected votes" to only those that are supported by proper and sufficient evidence.

Lunceford's Response brief largely reproduces her opening brief verbatim, offering minimal engagement with the substantive challenges raised in Craft's cross-appeal. This pattern of recycled content—spanning approximately twenty-five pages—underscores the Response's failure to address the following legal and evidentiary deficiencies.

The trial court erred in admitting testimony from Lunceford's purported experts. Russell Long, Steve Carlin, and Christina Adkins lacked the requisite qualifications, reliability, and relevance to offer expert opinions. Lunceford's attempt to recast their testimony as lay opinion fails because these witnesses lacked personal knowledge of the underlying facts and offered no assistance to the trier of fact.

Section 51.005 of the Election Code, which mandates minimum ballot supplies for election precincts, does not apply to counties participating in the Countywide Polling Place Program. Even assuming its applicability, Lunceford failed to demonstrate the existence of a "recent corresponding election" that could satisfy the statute's formula requirements, relying instead on speculation and inadmissible "expert" testimony. The trial court therefore erred in making the legal conclusion that the Election Administrator violated Section 51.005, and that his conduct was both "illegal" and a "mistake" under the Election Code. Because Section 51.005 was not violated, the Election Administrator's decisions regarding initial ballot supply allocation are immaterial and cannot operate as a basis for finding that approximately 250-850 voters were prevented from voting.

The trial court's findings regarding 1,236 Statements of Residence and 380 Reasonable Impediment Declarations rest on legally insufficient evidence. The trial court improperly shifted the burden of proof and ignored the Election Code's clear

intent that hyper-technical deficiencies should not void otherwise legal votes. Further, Lunceford failed to overcome the presumption of voter eligibility or prove these documents were connected to votes actually cast in the Contested Race.

The court also erred in finding that the Election Administrator "agreeing to the TRO" constituted a "mistake" warranting the potential disenfranchisement of nearly 2,000 voters who cast legal ballots pursuant to a valid court order. This novel interpretation of the Election Code would severely undermine voter confidence and create a dangerous precedent allowing attorney argument in a collateral proceeding to override the expressed will of eligible voters. And even if such conduct could operate as a "mistake," Lunceford still failed to prove clearly and convincingly that the alleged mistake caused unlawful votes or prevented eligible voters from voting.

The stakes here extend beyond this single contest. Voiding an election with over one million votes based on speculation about voter eligibility or hyper-technical paperwork errors would set a devastating precedent for future elections. Such extreme relief requires clear and convincing evidence of irregularities that materially affected the outcome—evidence conspicuously absent from this record. The Court should affirm Craft's victory while correcting the trial court's erroneous findings that threaten to destabilize Texas election law.

ARGUMENT AND AUTHORITIES

I. Lunceford's Response Consists Primarily of Verbatim Content from Her Opening Brief, Failing to Address Craft's Arguments

Lunceford's response brief as Cross-Appellee largely duplicates the factual recitations from her opening brief as Appellant, offering minimal substantive rebuttal to the arguments and evidence raised by Craft as the cross-appellant. Despite having four months to file her combined response and reply brief, Lunceford copied-and-pasted approximately twenty-five pages (6-18 and 21-34) from her opening brief, leaving merely two or three pages of new content. Rather than meeting Craft's arguments head-on, Lunceford circles the periphery, offering volume without substance. Like ships passing in the night, the Response fails to meaningfully intersect with the core issues raised by Craft. This failure to address Craft's substantive arguments highlights the extent of the trial court's legal errors as described in the cross-appeal.

II. The Opinions of "Experts" Carlin, Long, and Adkins Were Inadmissible

In her Reply Point Number Four, Lunceford attempts to salvage the testimony of witnesses Russell Long, Steve Carlin, and Christina Adkins by recasting "much" of it as lay opinion rather than expert testimony, asserting that these witnesses merely "compar[ed] and contrast[ed]" public records rather than analyzing them. *See* Lunceford's Response Br. at 20. This recharacterization does not cure the testimony's fundamental inadmissibility.

A. Lay Opinion Testimony Remains Inadmissible When Made Without Personal Knowledge

The rules of evidence permit lay opinion testimony only when it is (1) "rationally based on the witness's perception" and (2) "helpful to clearly understanding the witness's testimony or to determining a fact in issue." TEX. R. EVID. 701. This first requirement demands both personal knowledge of the underlying events and opinions rationally derived from that knowledge. *See Mittelsted v. Meriwether*, 661 S.W.3d 867, 894 (Tex. App.—Houston [14th Dist.] 2023, pet. denied).

The testimony of Long and Carlin fails both prongs of Rule 701. First, neither possessed the requisite personal knowledge of the public records they discussed—they neither created nor maintained these records as custodians. Steve Carlin, an unpaid volunteer, testified that he led a team of 60 unidentified partisan volunteers who took the Statements of Residence ("SORs"), Provisional Ballot Affidavits ("PBAs"), and Reasonable Impediment Declarations ("RIDs") produced by Harris County and just inserted them into basic Microsoft software for review and categorization. RR5 at 87:1- 88:11; RR6 at 11:15-21. They then excerpted the SORs, PBAs, and RIDs that they sought to challenge and compiled them together in what became Contestant's Exhibit 9A, 10A, & 13A. *See* RR5 at 97:24-98:5; RR12-27; RR28-38; RR41-51. Neither Carlin nor the volunteers created those Harris County records nor had any unique personal knowledge related to those records. The only

"analysis" performed by Carlin was comparison to the TrueNCOA data, which was properly excluded from evidence at trial. RR5 at 167:19-21, 173:16-174:23; RR6 at 81:17 (excluding Contestant's Exhibits 9B and 9C). Likewise, Russell Long testified that he downloaded the voter roster data from Harris County for his analysis. RR6 at 183:7, 186:14-16. So, according to Lunceford, Carlin and Long offered *non*-expert opinions about documents of which they had no firsthand knowledge, and yet Lunceford presented them as "experts" at trial. The Court should reject this attempt to cloak lay opinions in the guise of expertise.

Second, their testimony provided no assistance in determining any fact issue. The Harris County voter records spoke for themselves, and the trial court was equally capable of "comparing and contrasting" their contents, if it was as simple as Lunceford now claims. These witnesses possessed no unique knowledge about the records that would aid the factfinder's understanding.

Christina Adkins also offered no lay opinions based on personal knowledge, as she admitted she had no knowledge of any case-specific fact. RR7 at 183:13-185:15. She only testified as an expert and only opined on pure questions of law. *See* Craft's Br. at 39-42. Her testimony therefore cannot be recast as lay witness opinion.

Therefore, even if characterized as lay testimony, the trial court abused its discretion in admitting the testimony of Long, Carlin, and Adkins. Their complete

lack of personal knowledge and inability to assist the trier of fact render their lay opinions inadmissible.

B. Lunceford Fails to Defend the Admissibility of These Witnesses' Testimony as Experts

Lunceford cannot recategorize all of the testimony as that of lay witnesses because certain portions undoubtedly constituted expert opinions. Yet, her Response fails to address the fundamental challenges to their admissibility under Texas's well-established standards for expert opinion testimony.

Russell Long's testimony describing his mathematical formulas purporting to show disproportionate effects of ballot paper shortages on Harris County Republicans plainly required expertise. *See* Lunceford's Response Br. at 25. As detailed in Craft's Brief at 34-37, Long lacked the requisite qualifications, and his opinions failed to meet the basic requirements of reliability and relevance. Lunceford's Response remains silent on these critical deficiencies. She offers no explanation for how Long's background as an oil exploration project manager qualified him to analyze data from an election and apply it to determining how ballot supplies might affect particular polling locations. She does not address his failure to account for crucial variables such as Democratic voting margins compared to Republican margins or total voting populations in the affected areas. Most significantly, she provides no defense for Long's speculation and conclusory

opinions, nor his failure to calculate any error rate in his analysis until the night before his trial testimony.

Steve Carlin's testimony similarly ventured beyond mere factual observations into expert opinion territory, requiring specialized expertise to draw conclusions from reviewed records. Yet Lunceford's Response ignores the considerable challenges raised in Craft's Brief at 36-39. She offers no justification for the trial court's admission of testimony that Carlin himself characterized as "wrong" and "sloppy." RR5 at 230:1-6, 260:21-261:25. She fails to address his omission of alternative explanations that could render the challenged votes legal, and she does not contest his demonstrated bias.

Well-established Texas law holds that no witness may offer an opinion on a pure question of law. *See Birchfield v. Texarkana Memorial Hosp.*, 747 S.W.2d 361, 365 (Tex. 1987). For the testimony to be admissible, the expert witness must tie the law to the facts. *Id*. Christina Adkins conceded that her testimony consisted entirely of purely legal opinions. She testified as to statutory interpretation without reviewing a single relevant fact in the case. Lunceford's Response makes no attempt to justify the trial court's admission of this purely legal expert testimony devoid of factual foundation. *See* Craft's Br. at 39-42. Adkins's testimony is therefore plainly inadmissible and the court abused its discretion by permitting her to offer such opinions.

Given Lunceford's complete failure to address these fundamental deficiencies, the trial court's admission of expert testimony from these witnesses constitutes an abuse of discretion. The Court should sustain Craft's cross-appellate point on this issue.

III. Section 51.005 Did Not Apply to the 2022 Harris County General Election

For the reasons explained in Craft's Brief, the trial court erred in finding that 250-850 voters were prevented from voting because of ballot paper issues. *See* Craft's Br. at 15-25. Should the Court disagree, then the Court must next consider whether such finding is material to the election contest. It is only material if section 51.005 of the Texas Election Code applied to this election contest, as that section mandates the minimum amount of election supplies that shall be allocated to each election day precinct. *See* TEX. ELEC. CODE § 51.005.

A. Section 51.005 Does Not Apply to Counties Participating in the Countywide Polling Place Program

Lunceford's Response fails to raise any new argument with respect to her contention that Harris County violated Texas Election Code Section 51.005.[1] She fixates on Clifford Tatum's initial ballot paper allocation decisions, but that bears no relation to the threshold question of whether section 51.005 applies to the Countywide Polling Place Program. *See* TEX. ELEC. CODE § 43.007. Lunceford

[1] Lunceford's Response Brief at Reply Point Five (at 21-25) reproduces verbatim her opening brief's content, except for the final paragraph. *Compare to* Lunceford's Opening Br. at 23-29.

premises her entire argument upon the assumption that it applies, but she makes no effort to explain the legal grounds supporting this assumption, other than a cursory reference to Christina Adkins's purely legal opinions. *See* Lunceford's Response Br. at 21.

Lunceford wholly fails to address the fundamental legal challenges raised in Craft's Brief on this issue. She provides no explanation for:

- How Section 51.005, which applies to precincts, could be practically implemented in countywide voting systems, where precinct-based voting is not used on election day.
- Why statutory ambiguities should be resolved in her favor absent specific Secretary of State guidance.
- How the trial court's requirement for county officials to "try" to "estimate" supply procurement aligns with the statute's precise minimum-allocation formula.
- How to reconcile the inherent contradiction in the trial court's interpretation of the statute as simultaneously being both directory and mandatory.
- Why "election precinct" should be construed to mean "election day polling place" when the Election Code consistently treats "polling place" and "precinct" as distinct terms.

Lunceford's failure to address these points demonstrates that the trial court's legal conclusion regarding Section 51.005 constituted error. *See* CR287 at CL5. Although the relief sought here is for this Court to affirm the trial court's judgment that the true outcome of the election is a victory for Craft, the Court should still clarify that Section 51.005 does not apply to countywide voting as a matter of law.

B. Assuming Section 51.005 Could Be Applied, Lunceford Still Presented No Evidence of a "Recent Corresponding Election"

Even assuming Section 51.005's applicability to countywide elections, Lunceford fails to demonstrate the existence of a "recent corresponding election" that could satisfy the statute's strict formula requirements. Despite Harris County's redistricting and re-precincting between 2018 and 2022, Lunceford insists the 2018 election data could determine 2022 polling place allocations. This position fails for three crucial reasons:

First, Lunceford relies on Russell Long's inadmissible "expert" testimony. *See* Lunceford's Response Br. at 23-25.[2] Long lacks qualifications to opine on election law, voter turnout patterns in countywide versus precinct-based systems, or the impact of boundary changes on polling location turnout. His methodology lacks both reliability and relevance.

Second, Lunceford ignores the critical distinction between precinct consolidation and boundary modification. While she suggests combining 2018 voting totals for consolidated precincts to predict turnout, this approach provides no solution for polling locations serving single precincts with new boundaries. She offers no basis for treating a prior election with different precinct boundaries as a "recent corresponding election" under Section 51.005.

[2] It's unclear, however, which portion of Long's testimony Lunceford specifically relies upon, as she cites to the entirety of Long's direct examination.

Third, Lunceford's argument rests entirely on unsupported assumptions. Her vague contention that "in many cases" voters would "likely" use the same polling locations as in 2018 ignores the fundamental difference between precinct-based and countywide voting systems. *See* Lunceford's Response Br. at 23. No competent evidence supports this speculation about voter behavior when voters are given countywide voting options, rendering the 2018 precinct-based election inappropriate as a "corresponding" election under the statute.

Based on the foregoing, Section 51.005 either did not apply or was not violated. Accordingly, there could be no election code violation, illegal conduct, or mistake in the Election Administrator's decision not to follow the minimum-allocation formula set forth in that section. The trial court's speculative finding that 250-850 voters supposedly left polling locations because of inadequate ballot paper supplies is therefore immaterial and should not have counted toward the total number of "affected" votes. *See* CR302 at FF71.

IV. The Trial Court Erred in Concluding that 1,236 SORs Constituted Illegal Votes

The trial court found 966 illegal votes based on Statements of Residence ("SORs") because those supposedly related to ballots cast by individuals residing outside of Harris County, and 270 SORs that were too incomplete to have been legally counted. *See* CR289 at FF23-24 . The trial court committed error in making these findings regarding 1,236 "illegal" votes. *See* Craft's Br. at 51-57.

Lunceford failed to raise any new argument defending the trial court's ruling on SORs.[3]

A. The SOR Data and Testimony Lacked Foundation

One basis for this error is the lack of evidentiary foundation because the trial court sustained Craft's objections to data obtained from a third-party vendor, TrueNCOA, and the court excluded that data from evidence. *See* RR5 at 167:19-21, 173:16-174:23; RR6 at 81:17. In her Response, Lunceford wrongly claims that the trial court's exclusion of the TrueNCOA data has "nothing whatsoever to do with the evidence concerning statements of residence" allegedly showing illegal votes. Lunceford Response Br. at 26. But Lunceford's expert, Steve Carlin, admitted he relied on the excluded data to create his list of challenged SORs. RR5 at 214:21-216:3, 229:18-20, 236:7-19. Because Carlin based his expert opinions on excluded data, those opinions should have been excluded at trial. *See Merrell Dow Pharms. v. Havner*, 953 S.W.2d 706, 714 (Tex. 1997) ("If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable.").

[3] Lunceford's Response at Reply Point Six (at 26-28) copies her opening brief's content for everything following the initial sentence of that section. *See* Lunceford Opening Br. at 42-44.

B. Statements of Residence, Alone, are Legally Insufficient to Support a Finding of Voter Ineligibility

Even if the SOR data was admissible, the trial court still erred with respect to the 966 SORs where the voter provided an out-of-county residence because each SOR contained affirmative evidence of eligibility in at least three ways.

First, each challenged voter swore under penalty of perjury they were a Harris County resident upon signing their SOR. *See* Craft's Br. at 52 (citing RR79 at Ex. 40). Second, each voter completing an SOR signed the roster, which certifies residency. *See Carson v. Johnston*, 57 S.W.3d 657, 659 (Tex. App.—Eastland 2001, no pet.) ("When a voter signs the voter roster prior to voting, the voter is certifying that he or she meets the residency requirements for the election."). Third, the election judge's act of accepting that voter provides a legal presumption of eligibility. *Tiller v. Martinez*, 974 S.W.2d 769, 774 (Tex. App.—San Antonio 1998, pet. dism'd w.o.j.); *see also, e.g.*, *Harrison v. Stanley*, 193 S.W.3d 581, 583-84 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("The law presumes that the Ballot Board acted properly[;] . . . a challenger must show by clear and convincing evidence that the board erred.").

Lunceford failed to come forward with any other evidence of nonresidence or ineligibility beyond the four corners of these 966 SORs. Lunceford could have, as is normal in election contests, made at least some effort to call voters, election judges, or individuals with personal knowledge of polling place events or facts that might

prove non-residency. *See Speights v. Willis*, 88 S.W.3d 817, 821 (Tex. App.—Beaumont 2002, no pet.) (affirming plaintiff failed to meet burden of proving non-resident voting materially affected the outcome when "[o]ther than the eight who testified at trial, [] the trial court was presented with no evidence of the individual circumstances, volition, intention and actions of the more than 5000 voters attacked by contestant."). Lunceford, however, presented no testimony or other extrinsic evidence as to the residence of any one of these 966 individuals. She did not bring these voters—whose addresses were known—to trial to testify, she did not seek their depositions, and she did not obtain any affidavits from them. *Cf. Green v. Reyes,* 836 S.W.2d 203, 208 (Tex. App—Houston [14th Dist.] 1992, no writ) (where contestant presented testimony of 313 voters through live testimony, depositions, and affidavits). She failed to present any extrinsic data that would cast more light on their residency status. She therefore failed to overcome the presumption that the election judges properly accepted the votes tied to those SORs.

The trial court's finding of 966 "illegal" votes was based on legally insufficient evidence.

C. A Voter's Mere Failure to Fully Complete a SOR Does Not Void that Vote

The court also committed pure legal error regarding the 270 "incomplete" SORs by holding that missing information was sufficient to prove ineligibility absent any affirmative evidence of nonresidence. *See* CR289 at FF24. The "complete

absence" of information is not itself evidence. *Danet v. Bhan*, 436 S.W.3d 793, 797 (Tex. 2014). The trial court again inverted the burden of proof.

The trial court looked at the SORs and found that 270 "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." CR289 at FF24 (emphasis in original). The trial court found no *affirmative* evidence, however, proving that these voters were ineligible to vote in Harris County.

The absence of an identified residence on the SOR does not make the vote illegal. If a Harris County resident recently moved to a new residence (also within Harris County) and then failed to fully complete the SOR, that person is still an eligible voter, and their vote should still be counted as to countywide races. There is no basis in the Election Code or case law supporting the premise that the legislature intended such votes to be voided. There is no evidence in the record that can create an inference as to whether or not those voters with incomplete SORs resided in Harris County. The inability of the court to make any inference based on these SORs means that there is no legally sufficient evidence to demonstrate with firm belief or conviction that they constitute illegal votes. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) ("Evidence that is so slight as to make any inference a guess is in legal effect no evidence."). Once again, Lunceford failed to offer any

evidence overcoming the presumption that those votes were properly accepted by the election judges.

The Election Code explicitly specifies when failure to adhere to a provision results in a vote that is not legally countable. On at least *twenty-five* separate occasions, the Election Code *explicitly* specifies that a deviation results in a vote that "may not be counted" or is "void."[4] But section 63.0011, which Lunceford claims was violated here, does not state that a failure to comply results in voided votes. *See* TEX. ELEC. CODE § 63.0011. When the Legislature includes express language in one section but not another, courts assume it intended a different meaning. *See, e.g.*, *Bexar Appraisal Dist. v. Johnson*, 691 S.W.3d 844, 855 (Tex. 2024) ("[T]he Legislature knows how to limit a particular exemption . . . . The fact that it did so in Section 11.13(a) but not Section 11.131(b) means that Section 11.131(b) bears no such limitation."); *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 563 (Tex. 2016) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the [C]ourt assumes different meanings were intended." (internal quotation marks omitted)). Nothing in the Election Code governing SORs indicates that a vote is "void" or "not legally countable" due to an incomplete SOR without clear and convincing evidence of the voter's ineligibility.

[4] TEX. ELEC. CODE §§ 52.006, 64.034, 64.037, 65.008, 65.010(a)(1)-(5), 86.003, 86.006, 86.007, 86.010, 102.004, 102.006, 105.001, 111.005, 146.022, 146.051, 146.081, 162.013, 171.0231, 192.063, 213.006, 232.043.

This situation is analogous to *Ramsay v. Wilhelm*, 52 S.W.2d 757, 760 (Tex. App.—Austin 1932, writ ref'd), *Deffebach v. Chapel Hill Indep. Sch. Dist.*, 650 S.W.2d 510, 513 (Tex. App.—Tyler 1983, no writ), and *Walker v. Thetford*, 418 S.W.2d 276, 292 (Tex. App.—Austin 1967, writ ref'd n.r.e.). In those cases, voters were required by statute to fill out either lost-poll-tax affidavits or lost-registration affidavits and failed to do so. That failure did not render their ballots voidable absent express language to that effect in the Election Code.

To deem a vote illegal, Lunceford bore the burden to "negative every theory upon which the challenged votes . . . could have been legal." *Royalty v. Nicholson*, 411 S.W.2d 565, 575 (Tex. App.—Houston 1967, writ ref'd n.r.e); *accord Rivera v. Lopez*, No. 13-14-00581- CV, 2014 WL 8843788, at *3, n.2 (Tex. App.—Corpus Christi 2014, no pet.) (mem. op.) (confirming contestant "has the burden of proving a negative proposition—that a challenged vote is not legal"); *Solis v. Martinez*, 264 S.W.2d 956, 957-58 (Tex. App.—San Antonio 1954, writ dism'd) (same); *Willow Hole Indep. Sch. Dist. v. Smith*, 123 S.W.2d 708, 710 (Tex. App.—Waco 1938, writ ref'd) (holding that proving ineligibility required affirmatively proving no poll tax exemptions applied). In other words, a contestant cannot merely raise doubt about legality, they must affirmatively prove there were *no* circumstances under which the vote was legal. The court failed to apply this burden of proof. Applying an incorrect burden of proof, or inverting the burden of proof, constitutes legal error. *See Abbott*

v. Perez, 585 U.S. 579, 607 (2018) ("whether the court applied the correct burden of proof is a question of law subject to plenary review").

The burden is high in an election contest because "the will of the legal voters as expressed at the polls is the matter of paramount concern." *Barrera v. Garcia*, No. 04-12-00469-CV, 2012 WL 4096021, at *2 (Tex. App.—San Antonio Sept. 19, 2012, no pet.) (mem. op.). Voiding an election with over 1,000,000 votes based on speculation of ineligibility of a few due to missing information is untenable. But that is the result Lunceford seeks here.

D. Lunceford Failed to Prove the Nexus Between the SORs and Votes Cast in the Contested Race

Decades of precedent confirm that a contestant must prove by clear and convincing evidence that "the illegal votes were cast *in the race being contested*" and materially affected the results of that specific election. *Reese v. Duncan*, 80 S.W.3d 650, 656 (Tex. App.—Dallas 2002, no pet.) (emphasis added) (citing *Miller v. Hill,* 698 S.W.2d 372, 375 (Tex. App.—Houston [14th Dist.] 1985, *writ dism'd w.o.j.*)); *Green,* 836 S.W.2d at 208 ("The burden of proving illegality in an election contest is on the contestant who must prove that illegal votes were cast in the election being contested . . . .") (collecting cases). Lunceford's Response fails to address this significant issue.

Lunceford offers no proof that the 1,236 challenged SORs reflect votes cast and counted in the Contested Race. A Statement of Residence may be completed

regardless of whether that person casts a ballot. Evidence tying the SORs to votes cast in the Contested Race, specifically, is wholly absent from the record. Steve Carlin—whose testimony Lunceford relies upon to prove the number of illegal votes supposedly tied to SORs—admitted he could not testify that all those being challenged had voted in the General Election, much less the Contested Race. RR5 at 226:16-21; RR6 at 92:14-23. No legally sufficient evidence exists to support the trial court's finding that 1,236 illegal votes were cast in the Contested Race.

V. The Trial Court Erred in Finding 380 RIDs Constituted Illegal Votes

The trial court found 380 Reasonable Impediment Declarations ("RIDs") were "so lacking in statutory information that they are improper, and votes cast by these 350 [sic] voters should not have been counted." CR296 at FF44. The trial court counted these among the total number of 2,041 "illegal votes." *See* CR301 at n. 22. This finding suffers from at least four problems, *none* of which have been addressed by Lunceford:[5]

First, Lunceford never pleaded that incomplete RIDs constituted "illegal" votes, characterizing them instead as "based upon mistakes by election officials." RR8 at 51:15-20; Lunceford's Response Br. at 29. The trial court lacked authority to make findings beyond the pleadings. *See* Craft's Brief at 57-58 (*citing* TEX. R.

[5] Lunceford's Response at Reply Point Seven (at 28-29) duplicates the opening brief's content except for a single concluding paragraph. *Compare to* Lunceford Opening Br. at 44-45.

CIV. P. 301); *Oil Field Haulers Ass'n v. R.R. Comm'n*, 381 S.W.2d 183, 191 (Tex. 1964); *RE/MAX of Tex., Inc. v. Katar Corp.*, 961 S.W.2d 324, 328 (Tex. App.—Houston [1st Dist.] 1997, no writ)). While Lunceford now argues that "mistake" can void votes, she fails to rationalize a finding of illegality absent proper pleadings.

Second, Lunceford's own expert witness, Christina Adkins, conceded that failure to fill out some information on a RID did not inform whether the voter failed to provide sufficient information. See RR7 at 229:5-230:5, 230:17-20, 231:18-20. Lunceford's Response is tellingly silent on Adkins's concession. So, it is undisputed that an incomplete RID, alone, cannot serve as the basis to void the vote attached to that RID.

Third, the Election Code contains no provision declaring that incomplete RID forms will result in votes that "may not be counted"—unlike twenty-five other instances where the legislature explicitly prohibits counting votes. *See* n. 4, *supra*. While the statute requires the Secretary of State's form to include space for indicating impediments, TEX. ELEC. CODE § 63.001(i)(3), it neither mandates that voters swear to specific impediments nor invalidates votes for failure to check one of the boxes on the form. Indeed, Lunceford admits that the votes tied to the RIDs are not "illegal" votes. But qualifying the RID paperwork error as a "mistake" still does not turn a legal vote into one that is voidable. *See* TEX. ELEC. CODE § 1.0015 ("It is the intent of the legislature that the application of this code and the conduct of

elections . . . promote voter access, and ensure that all legally cast ballots are counted."); *see also Honts v. Shaw*, 975 S.W.2d 816, 821 (Tex. App.—Austin 1998, no pet.) ("the Code . . . may not be used as an instrument of disenfranchisement for irregularities of procedure.").

Fourth, like with the SORs, the trial court's finding lacks any support in extrinsic evidence connecting these RIDs to votes actually cast and counted in the 189th District Court race. A voter can sign a RID without having cast a ballot. Lunceford failed to prove how many of the 380 RIDs at issue correlated to votes cast in the general election or in the 189th District Race.

Given these unaddressed deficiencies, no reasonable factfinder could form a firm belief or conviction that 380 partially completed RIDs resulted in any illegal votes in the Contested Race. The trial court erred in voiding 380 votes on this basis.

VI. Lunceford's TRO Narrative Fails to Address Any of Craft's Legal and Factual Challenges

Lunceford's Response describes in detail the events surrounding the Temporary Restraining Order issued by the ancillary court on Election Day which kept all polling locations open for an extra hour (the "TRO"). *See* Lunceford Br. at 29-32. The Response, however, conspicuously avoids addressing any of Craft's appellate points regarding (1) collateral estoppel, (2) the fact that the TRO properly kept all polling locations open, (3) the lack of "mistake" by an election official, (4) the lack of any causal connection between the alleged mistake and the granting of

the TRO, and (5) the lack of any causal connection between the TRO and voters being prevented from voting. *See* Craft's Br. at 59-62. Lunceford offers no rebuttal whatsoever.[6]

The trial court committed legal error by concluding that "agreeing to the TRO was a *mistake* within the meaning of Section 221.003." CR299 at CL32 (emphasis in original). The court's "deep concern about the way the TRO was sought and obtained" (CR299 at FF60) is not a proper basis for potentially voiding 1,969 total votes[7] that were legally cast by voters in the Contested Race. These votes were not "illegal," and it would not be proper to void them based on a finding of "mistake."

"Mistake" must be read in its statutory context. Section 221.003(a)(2) of the Election Code applies when "an election officer . . . prevented eligible voters from voting; failed to count legal votes; or engaged in other fraud or illegal conduct or made a mistake." TEX. ELEC. CODE § 221.003. It is a "familiar principle of statutory construction that words grouped in a list should be given related meaning." *Ritchie v. Rupe*, 443 S.W.3d 856, 869 (Tex. 2014) (internal citations omitted). This cannon of *noscitur a sociis*, and the related *ejusdem generis*, counsels that the meaning of

[6] Lunceford's Response at Reply Point Eight (at 29-32) entirely reproduces identical content from the opening brief. *See* Lunceford Opening Br. at 34-38.

[7] Lunceford received 822 of the extended-hour votes. Craft received 1,147 of these votes. The total is 1,969. The net total in Craft's favor was 325 votes. The trial court considered these 325 net votes for Craft in its count of "total affected votes."

"mistake" in 221.003 is ascertained by reference to the associated phrases "prevented eligible voters from voting," "failed to count legal votes," "fraud," and "illegal conduct."

Accordingly, "mistake" in this context refers to conduct more serious than commonplace poor judgment or immaterial error. A "mistake" in this context "must be one of such magnitude as to affect the true outcome of the election." *Honts*, 975 S.W.2d at 823-24 (refusing to overturn election results when election officials improperly joined precincts). An example of a cognizable mistake is when an "error was discovered in which vote figures were transposed on the tally sheets," *Reyes v. Zuniga*, 794 S.W.2d 842, 843 (Tex. App.—San Antonio 1990, no writ).

The County Attorney, speaking on behalf of the Election Administrator in a court proceeding, does not commit a legally cognizable "mistake" under the Election Code by merely making a statement in good faith based on the best information available at the time. *See* Craft's Br. at 61. And even if the County Attorney's conduct could operate as a "mistake," Lunceford failed to come forward with any evidence that "agreeing to the TRO" *caused* the polls to stay open. It is undisputed the polls were ordered to stay open by a district court judge following briefing and a hearing with the parties, the State, and the Harris County Republican Party—represented by Lunceford's counsel—attending the TRO. *See* RR55 at 137. The State and the HCRP *opposed* the order and presented their arguments to the court.

See, e.g., RR55 at 143, 148, 178. Ultimately, the TRO states that "Plaintiff has a substantial likelihood of succeeding on the merits of their claims. If the relief requested by Plaintiff is not granted, Plaintiff and its members will suffer imminent and irreparable harm." RR55 at 137. The TRO is therefore based on the trial court's legal and factual determinations, not in any way predicated on some purported agreement.

Finally, even if "agreeing to the TRO" did somehow cause the TRO, there's no record evidence that such actions caused any polling place in Harris County to be "not really open"—a term not found in law, which the court seemingly manufactured.[8] *See* CR300 at FF63. As the Election Code requires, the TRO explicitly ordered *all* polling places in Harris to remain open and, thereafter, voters cast ballots across the county. Lunceford did not prove with clear and convincing evidence that a single voter was unable to vote at one of the 782 locations in Harris County during the extended hour of voting. Accordingly, "[i]t was not shown by the evidence that such irregularity deprived any person of the privilege to vote or who did, in fact, not vote because the polls in [Harris County closed at 8pm instead of 7pm]," and there is utterly no basis to rely on the extended hours order as a potential basis to void *all* the votes cast during those hours. *Setliff v. Gorrell*, 466 S.W.2d 74,

[8] The relevant statute simply provides, "If a court orders any countywide polling place to remain open after 7 p.m., all countywide polling places located in that county shall remain open for the length of time required in the court order." TEX. ELEC. CODE § 43.007.

79 (Tex. App.—Amarillo 1971, no writ) (refusing to overturn election based on evidence of late poll openings).

In *Stotler v. Fetzer,* 630 S.W.2d 782 (Tex. App.—Houston [1st Dist.] 1982, writ dism'd), this Court refused to penalize voters when an election official entered ballots after 7:00 p.m., finding that it would be unduly "harsh to disenfranchise twenty-nine voters for the act of an election official over whom they had no control" and at odds with the Election Code's purpose. *Id* at 784. Here too, the trial court's finding, which would nullify all 1,969 votes cast after 7:00 p.m., penalizes Texas voters who did nothing wrong. To effectively disregard the will of the voters who cast their ballots pursuant to a valid court order with no evidence any voters were prevented from voting would be "harsh," arbitrary, and at odds with the Election Code's purpose.

The trial court erred in concluding as a matter of law 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." *See* CR300 at CL34.

VII. The Trial Court Calculated the Undervote Improperly

Lunceford's Response sheds no new light on the undervote issue raised by Craft's Cross-Appeal.[9] She offers no rebuttal to the decades of case law establishing

[9] Lunceford's Response at Reply Point Nine (pages 32-34) copies her opening brief's content verbatim, aside from its header. *Compare to* Lunceford Opening Br. at 45-46, 59.

that she was required to either (1) prove that each of the votes being challenged were cast and counted in the Contested Race or (2) prove that the total number of illegal votes was greater than the margin of victory plus the undervote. *See* Craft's Br. at 62-64 (collecting cases). In fact, by arguing in support of the trial court's novel application of an undervote percentage, she concedes that the undervote must be considered in some way. The problem arises, however, with the manner in which the trial court considered the undervote. There is no appellate court precedent or statutory basis for applying a broad undervote percentage the way the trial court did here.

The trial court relied on *Green* to support its legal conclusion that an undervote percentage could be applied in a broad manner here despite the absence of any expert testimony regarding how to apply an undervote percentage. *See* CR302 at CL37 (citing *Green*, 836 S.W.2d at 203). But *Green* does not support the notion a challenger can use an undervote percentage estimate to wholly satisfy its burden of particularized, material proof. In *Green*, where the margin of victory was just 180 votes, the court heard testimony from 313 of the 431 challenged voters who cast ballots in both the Republican primary and Democratic run-off elections. *Green*, 836 S.W.2d at 204. The contestant presented voter testimony at trial, by deposition, or by affidavit. *Id*. at 204-05. Ultimately:

> The court determined that the number of illegal votes was truly 429 and that of those votes, 220 illegal votes were cast in favor of Green, 75

> illegal votes in favor of Reyes, 8 votes were not illegal at all, and 126 votes were unable to be attributed . . . . Thereafter, both appellant and appellee brought forth expert testimony to show that statistically the vast majority of the 126 undetermined illegal votes would have been cast for their opponent.

Id. at 205 (footnote omitted). *After* subtracting the ascertainable illegal votes, the candidates were separated by a mere 41 votes. From there, the court noted "the number of unascertained votes [126] is greater than three times the margin of victory established by the sample of voters whose voting conduct was determinable by the court [forty-one]." *Id.* at 206. Then, in using that spread to declare the true results unknowable, the court relied on expert testimony using the undervote percentages to estimate how many of those unascertained votes were cast in the Democratic run-off contest at issue. *Id*. at 212.

That expert—the Chairman of the Political Science Department at the University of Houston—testified that "approximately 97.5% (418) [illegal voters] probably voted" in the contest at hand based on his extensive knowledge of Texas voter behavior. *Id*. at 212 (alteration in original). Accordingly, *Green* belies the trial court's contention that applying the undervote calculation is appropriate for lay persons as a purely legal matter as opposed to a fact question supported by competent evidence.

Further, record evidence contradicts the notion that it is "reasonable to infer" that an overarching 3.86% undervote rate would apply uniformly across all

challenged ballots instead of accounting for (1) variation among ballot types and (2) a margin of error. The final canvass shows a varying undervote rate for different categories of ballots cast in the 189th District Court race—the undervote rate for ballots-by-mail, for instance, was 9.07%. RR72 at DEX 9, p. 21. This specialized, fact-specific inquiry cannot be answered by legal conclusions.

In sum, the broad undervote estimation cannot replace Lunceford's duty to provide particularized, material evidence, nor can it replace the trial court's duty to attempt to ascertain the true outcome.

PRAYER

Craft prays that the Court affirm the trial court's judgment and preserve her election victory. Craft further prays that the Court modify the judgment to reverse the trial court's erroneous findings and conclusions regarding various categories of "illegal" votes or votes that resulted from "mistake," reduce the number of "affected" votes, and affirm the trial court's ultimate finding that Craft was the true winner of the election.

Respectfully submitted,

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