

**No. PD-0881-20**

---

**COURT OF CRIMINAL APPEALS  
OF THE STATE OF TEXAS**

---

**CRYSTAL LA VON MASON-HOBBS,  
Appellant,  
v.  
THE STATE OF TEXAS,  
Appellee.**

---

On Appeal from the Court of Appeals  
of the Second Judicial District of Texas of Fort Worth, Texas

From the 432nd Judicial District Court of Tarrant County, Texas  
Cause No. 1485710D (Judge Ruben Gonzalez, Jr., Presiding)

---

**BRIEF OF *AMICI CURIAE* THE LEAGUE OF  
WOMEN VOTERS OF TEXAS AND THE TEXAS STATE CONFERENCE  
OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF  
COLORED PEOPLE IN SUPPORT OF APPELLANT**

Robert Reyes Landicho  
State Bar No. 24087881  
VINSON & ELKINS LLP  
1001 Fannin St.,  
Suite 2500  
Houston, TX 77002  
rlandicho@velaw.com

Thomas S. Leatherbury  
State Bar No. 12095275  
Paige Wright  
State Bar No. 24109833  
April Spencer  
State Bar No. 24121405  
VINSON & ELKINS LLP  
2001 Ross Ave.,  
Suite 3900  
Dallas, TX 75201  
tleatherbury@velaw.com  
pwright@velaw.com  
aspencer@velaw.com

James Dawson  
State Bar No. 24094618  
VINSON & ELKINS LLP  
2200 Pennsylvania Ave.  
NW Suite 500 West  
Washington, DC 20037  
jamesdawson@velaw.com

Attorneys for *Amici Curiae* The League of Women Voters of Texas and The Texas  
State Conference of The National Association for the Advancement of Colored  
People

## **IDENTITY OF PARTIES AND COUNSEL**

*Amici Curiae* adopt the designation of the identities of the parties and their counsel as set forth in Appellant's Brief on the Merits and State's Brief on the Merits.

**TABLE OF CONTENTS**

IDENTITY OF PARTIES AND COUNSEL ..... ii

STATEMENT OF INTEREST OF *AMICI CURIAE* ..... 1

STATEMENT OF THE CASE.....2

ISSUES PRESENTED.....2

STATEMENT OF FACTS .....2

SUMMARY OF ARGUMENT .....3

ARGUMENT .....6

    I.    The court of appeals erred in holding that it was “irrelevant” that Ms. Mason “did not know she was legally ineligible to vote,” ignoring the text of the Illegal Voting Statute and this Court’s decision in *DeLay*.....6

    II.   HAVA preempts the Opinion’s interpretation of Texas’s Illegal Voting Statute.....14

        A.    Congress expressly regulated federal elections by creating a right for individuals to cast provisional ballots through HAVA and requiring States to comply.....15

        B.    If the State’s interpretation of the Illegal Voting Statute is correct, that law is preempted because Congress, through HAVA, used its power under the Elections Clause to protect an individual’s right to cast a provisional ballot if she believes she is eligible to vote.....17

        C.    The legislative record confirms that HAVA was enacted pursuant to Congress’s power under the Elections Clause—not the Spending Clause (as the State now suggests for the first time).....23

    III.  The court of appeals incorrectly characterized rejected provisional ballots as “votes” within the meaning of the Illegal Voting Statute.....24

CONCLUSION AND PRAYER .....26

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Alessi v. Raybestos-Manhattan, Inc.</i> , 451 U.S. 504 (1981).....	17, 19, 20, 21
<i>Arizona v. Inter Tribal Council of Arizona, Inc.</i> , 570 U.S. 1 (2013).....	<i>passim</i>
<i>Colon-Marrero v. Velez</i> , 813 F.3d 1 (1st. Cir. 2016).....	23
<i>DeLay v. State</i> , 465 S.W.3d 232 (Tex. Crim. App. 2014) .....	<i>passim</i>
<i>Heath v. State</i> , No. 14-14-00532-CR, 2016 WL 2743192 (Tex. App.—Houston [14th Dist.] May 10, 2016, pet. ref'd).....	10, 11
<i>Jenkins v. State</i> , 468 S.W.3d 656 (Tex. App.—Houston [14th Dist.] 2015), <i>pet.</i> <i>dism'd improvidently granted</i> , 520 S.W.3d 616 (Tex. Crim. App. 2017) (per curiam) .....	10
<i>Llamas v. State</i> , 12 S.W.3d 469 (Tex. Crim. App. 2000) .....	13
<i>Martinez v. State</i> , 278 S.W.2d 156 (Tex. Crim. App. 1955) .....	24
<i>Mason v. State</i> , 598 S.W.3d 755 (Tex. App—Fort Worth 2020).....	<i>passim</i>
<i>McQueen v. State</i> , 781 S.W.2d 600 (Tex. Crim. App. 1989) .....	13
<i>Medrano v. State</i> , 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref'd) .....	10
<i>Mills v. Warner Lambert Co.</i> , 157 S.W.3d 424 (Tex. 2005) .....	22

<i>Ex parte Napper</i> , 322 S.W.3d 202 (Tex. Crim. App. 2010) .....	22
<i>Ross v. State</i> , 543 S.W.3d 227 (Tex. Crim. App. 2018) .....	7
<i>Sandusky Cnty. Democratic Party v. Blackwell</i> , 387 F.3d 565 (6th Cir. 2004) .....	15, 16
<i>Thompson v. State</i> , 9 S.W. 486 (Tex. Ct. App. 1888).....	11, 12
<i>Wagner v. State</i> , 539 S.W.3d 298 (Tex. Crim. App. 2018) .....	24

**Statutes**

18 U.S.C. § 1621 .....	22
52 U.S.C. § 21082 .....	<i>passim</i>
52 U.S.C. § 21082(a)(5)(B) .....	16
52 U.S.C. § 20901 <i>et seq.</i> .....	5
TEX. GOV'T CODE § 311.035(b)(1) .....	7, 13, 25
TEXAS ELECTION CODE § 64.002(a).....	15
TEXAS ELECTION CODE § 64.012 .....	3
TEXAS ELECTION CODE § 64.012(a).....	12
TEXAS ELECTION CODE § 253.003(a).....	7, 8, 10, 11
TEX. PENAL CODE § 15.01(a) .....	25
TEX. PENAL CODE § 37.02(a) .....	22

**Rules**

TEX. R. APP. P. 11.....1, 2  
TEX. R. APP. P. 44.2(b).....13  
U.S. CONST. art. I, § 4, cl. 1 .....17, 23

**Other Authorities**

H.R. Rep. No. 107–329, pt. 1 (2001).....21, 23  
U.S. Election Comm’n, *Quick Start Management Guide: Provisional  
Ballots* (Oct. 2008).....16

**STATEMENT OF INTEREST OF AMICI CURIAE**

Pursuant to Texas Rule of Appellate Procedure 11, *Amici* The League of Women Voters of Texas and The Texas State Conference of the National Association for the Advancement of Colored People (“TX NAACP”) submit this brief of *amici curiae* in support of Appellant.

The League of Women Voters of Texas is a non-partisan, volunteer organization committed to encouraging informed and active participation in government, working to increase understanding of major public policy issues, and influencing public policy through education and advocacy.

The NAACP is a non-profit organization founded on the goal of securing the political, educational, social, and economic equality of rights in order to eliminate race-based discrimination and ensure the health and well-being of all persons. The NAACP’s core mission is to protect the right to vote, and the organization has spent 111 years in pursuit of that mission. The TX NAACP serves as the Texas statewide branch of the NAACP. The TX NAACP is deeply invested in efforts to ensure that every United States citizen has meaningful access to the American democracy and that Texas voters are heard at the polls.

*Amici* are interested in the issues presented because this case involves important questions affecting participation in the voting process in Texas. The court of appeals’ Opinion interprets the Election Code in a way that conflicts with federal

law. This Court's decision will affect the state and national discourse on the fundamental right to vote and the use of provisional ballots under the Help America Vote Act.

No fee has been paid or will be paid by *Amici* or by any of the parties for the preparation of this brief. TEX. R. APP. P. 11. *Amici* counsel are providing their services pro bono.

### **STATEMENT OF THE CASE**

*Amici* adopt the Statement of the Case set forth in Appellant's Brief on the Merits, by reference.

### **ISSUES PRESENTED**

*Amici* adopt the Issues Presented set forth in Appellant's Brief on the Merits, by reference.

### **STATEMENT OF FACTS**

*Amici* adopt the Statement of Facts set forth in Appellant's Brief on the Merits, by reference. In addition, *Amici* supplement its Statement of Facts as follows:

In November of 2016, Crystal Mason's life was on an upward trajectory. After spending time in prison for a federal tax conviction, she was committed to building a new life for herself and her family. She was grateful to be out on supervised release, the terms of which never mentioned any prohibitions on voting or casting a provisional ballot. RR3.Ex.1. Intent on leaving the past behind her, Ms. Mason worked and attended night school to earn her aesthetician's license, all while



caring for her brother’s four children and three children of her own. RR2.146:6-11. She never would have risked going to the polls had she known that she was ineligible. RR2.126:3-8. In her own words, she had far too much to lose:

“[W]hy would I dare jeopardize losing a good job, saving my house, and leaving my kids again and missing my son from graduating from high school this year as well as going to college on a football scholarship? I wouldn't dare do that, not to vote.”

RR2.146:12-17.

In fact, the court of appeals conceded that the State presented no evidence tending to show that Ms. Mason “voted for any fraudulent purpose.” *Mason v. State*, 598 S.W.3d 755, 779 (Tex. App—Fort Worth 2020) (hereinafter “Op.”). Rather, she merely hoped to make her mother proud by exercising her civic duty.

RR2.116:2-11.

The *Texas Tribune* news articles attached as Ex. A and B elaborate on Ms. Mason’s remarkable personal history, and the impact the case has had on her life.

### **SUMMARY OF ARGUMENT**

Leaving Ms. Mason’s conviction for Illegal Voting and the court of appeals’ Opinion undisturbed will threaten the integrity of future elections by deterring voting among citizens who fear criminal prosecution for honest errors in assessing their eligibility to vote. Section 64.012 of the Texas Election Code (the “Illegal Voting Statute”) provides that “[a] person commits an offense if the person . . . votes . . . in

an election in which the person *knows* the person is not eligible to vote” (emphasis added). But the court of appeals held that it was “irrelevant to her prosecution” that Ms. Mason “did not know she was legally ineligible to vote.” Op. 770. That holding criminalized Ms. Mason’s act of casting a provisional ballot that was not counted, ignored the text of the Illegal Voting Statute, and is impossible to reconcile with federal law.

*First*, the Texas Legislature specified a *mens rea* in the statute, which is an essential element of the offense that the Opinion incorrectly read out of the statute. Under the plain text of the Illegal Voting Statute, conduct is a criminal offense only if a person votes in an election while *knowing* that she is not eligible to vote. But the court of appeals has rewritten this statutory requirement, holding that the State need only prove that a defendant was aware of the facts that rendered her ineligible to vote, *regardless of whether she knew she was, in fact, ineligible*. This was error, and it was not harmless. Moreover, if there is any ambiguity in construing the *mens rea* requirement in the Illegal Voting Statute, the rule of lenity requires this Court to resolve ambiguity in favor of non-prosecution, which the Opinion failed to do. In committing these errors, the court of appeals failed to adequately confront this Court’s precedent in *DeLay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014), and wrongly distinguished *DeLay* on superficial and incorrect grounds. It is contrary to

the text of the Illegal Voting Statute, to the purpose of the statute, and to this Court’s jurisprudence, to maintain Ms. Mason’s conviction. *See infra* § I.

*Second*, it is also impossible to reconcile the court of appeals’ construction of Texas’s Illegal Voting Statute with the federal Help America Vote Act of 2002, 52 U.S.C. § 20901 *et seq.* (“HAVA”). Through HAVA, Congress regulates federal elections by creating a right for individuals to cast provisional ballots if they believe they are eligible to vote but are not on the voter rolls. HAVA is not, as the State argues, a federal spending program that states may “opt into” (or out of); rather, Congress enacted HAVA pursuant to its authority under the Elections Clause of the U.S. Constitution. As Justice Scalia wrote in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8, 14 (2013), the Elections Clause confers upon Congress the express power to alter or supplant State regulations prescribing the time, place, and manner of federal elections—and “the power the Elections Clause confers is none other than the power to pre-empt.” HAVA preempts the court of appeals’ construction of Texas’s Illegal Voting Statute because the court interprets this state election law to criminalize the exercise of a federally regulated right (*i.e.*, the right to cast provisional ballots in accordance with HAVA’s procedures). A state statute (or its application) becomes invalid when it criminalizes conduct that federal law expressly permits. *See infra* § II.

*Third*, the court of appeals made a critical error in holding that Ms. Mason “vote[d]” at all. One does not “vote” by marking a provisional ballot that is not ultimately counted by elections officials. The court of appeals improperly dismissed the other uses of the term “vote” in the Texas Election Code, and again ignored the rule of lenity, which mandates that any ambiguities in the phrase “to vote in an election” be resolved in favor of the defendant. This interpretation also renders superfluous the separate statutory language in the Illegal Voting Statute distinguishing a “vote” from an “attempt[] to vote.” *See infra* § III.

If left undisturbed, the court of appeals’ holding will have far-reaching negative consequences by undermining public trust in the voting process and the criminal justice system, and chilling voter participation across Texas. Accordingly, this Court should reverse the decision of the court of appeals, reverse Ms. Mason’s conviction, and order a judgment of acquittal.

## **ARGUMENT**

**I. The court of appeals erred in holding that it was “irrelevant” that Ms. Mason “did not know she was legally ineligible to vote,” ignoring the text of the Illegal Voting Statute and this Court’s decision in *DeLay*.**

This Court in *DeLay* held that a statutory requirement that an individual must “knowingly” undertake an action in order to be found guilty of a criminal offense under the Election Code requires the State to prove that the actor “be aware, not just of the particular circumstances that render his otherwise-innocuous conduct

unlawful, but also of the fact that undertaking the conduct under those circumstances in fact constitutes” the statutorily specified circumstance rendering the conduct unlawful. *DeLay*, 465 S.W.3d at 249-50. The State bears the burden of proving the culpable mental state required by a criminal statute as an essential element of the offense, and reversal is warranted if the “evidence was insufficient to prove beyond a reasonable doubt that [the defendant] knew that her conduct was unlawful.” *Ross v. State*, 543 S.W.3d 227, 234 (Tex. Crim. App. 2018). If there is any ambiguity in the interpretation of the Illegal Voting Statute or any element of the offense (including the applicable *mens rea*), the rule of lenity requires this Court to construe any ambiguity in favor of the defendant. *See* TEX. GOV’T CODE § 311.035(b)(1).

In *DeLay*, this Court interpreted the “knowing” *mens rea* requirement in Section 253.003(a) of the Election Code, which provides that “[a] person may not knowingly make a political contribution in violation of this chapter.” TEX. ELEC. CODE § 253.003(a); *DeLay*, 465 S.W.3d at 239 n.17. The defendant (former U.S. Congressman Tom DeLay) had appealed his conviction for money laundering and conspiracy, which was based on his alleged act of “facilitat[ing] and conspir[ing] to facilitate the making of campaign contributions” with tainted funds arising from a violation of Section 253.003(a). *DeLay*, 465 S.W.3d at 234-35. After observing that it was “not at all clear [in Section 253.003(a)] how far down the sentence the word ‘knowingly’ is intended to travel,” this Court held that “conviction should depend

upon proof of *more than* just the bare conduct (“mak[ing] a political contribution”), which . . . *is not intrinsically condemnable.*” *DeLay*, 465 S.W.3d at 250 (emphases added). This Court then concluded that, “as written, Section 253.003(a) requires that the actor be aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, but also of the fact that undertaking the conduct under those circumstances *in fact* constitutes a ‘violation of’ the Election Code.” *Id.* (emphasis added). *DeLay* further explained that “the rule of lenity” applies to “penal provisions that appear outside the Penal Code,” and that “neither recklessness nor negligence” are sufficient to show actual knowledge of illegality. *DeLay*, 465 S.W.3d at 251-52.

The court of appeals improperly departed from this Court’s ruling in *DeLay*. It failed to apply *DeLay*’s application of a “knowing” *mens rea* requirement, dismissing this Court’s analysis in a single cursory footnote. In that footnote, the court tried to distinguish *DeLay*’s requirement that knowledge of illegality was required by declaring, without explanation or analysis, that the illegal contribution statute’s use of “knowingly” was ambiguous, whereas the Illegal Voting Statute’s use of “knows” is not ambiguous as to which phrase the mental culpability requirement modified. *See* Op. 769 n.12. But the court never explained why the ambiguity in the illegal contribution statute in *DeLay* empowered the court of appeals here to ignore *DeLay*’s separate determination of how to interpret what it

means to “knowingly . . . violat[e] the Election Code.” *DeLay*, 465 S.W.3d at 250. In failing to confront this key holding in *DeLay*, the court of appeals sidestepped the required analysis of how the mental culpability requirement (“knows”) in the Illegal Voting Statute should be interpreted to modify “the particular circumstance that renders” (here, *constitutionally protected*) conduct (voting) criminal (*i.e.*, “not eligible to vote”) consistent with *DeLay*.” *See id.*; *see* Op. 769 n.12.

It is *this* holding in *DeLay* that controls Ms. Mason’s case, which cannot be discarded by the court of appeals’ truncated analysis. *DeLay* held that the “knowing” *mens rea* requirement requires the State to prove both:

(1) knowledge of underlying facts giving rise to a circumstance (in *DeLay*, that the “contributing corporations” made political contributions that were to be used as described in fund-raising literature; here, that Ms. Mason knew she was on federal supervised release);

**and**

(2) an “actual realiz[ation]” that those underlying facts “in fact constitute[]” the specified circumstance rendering the conduct unlawful (in *DeLay*, that the contributing corporations had made contributions “with the awareness that to do so under the circumstance constituted a violation of Chapter 253.003(a)”; here that Ms. Mason actually, subjectively realized that she was “not eligible to vote”).

*See id.*; *DeLay*, 465 S.W.3d at 252. Because the State failed to prove that Ms. Mason “actually realized” that she was “in fact” “not eligible to vote,” the State failed to prove an essential element of the offense. This warrants reversal.

Two further points support this interpretation of the required *mens rea*. First, like the “illegal contribution” criminal statute in *DeLay* (Section 253.003(a)), the Illegal Voting Statute deals with underlying conduct that is not inherently criminal in nature. Like corporate contributions to political action committees (which this Court observed “is not intrinsically condemnable,” *see DeLay*, 465 S.W.3d at 250), voting is not considered “criminal conduct” – it is *constitutionally protected* conduct. Rather, it is the *circumstances of the conduct*, as specified by statute, that renders the conduct unlawful. In Section 253.003(a), *DeLay* held that it is the act of making a corporate contribution while “actually realiz[ing]” it would be used for a purpose that violates the Election Code that is condemnable—not the mere act of making a corporate contribution to a political action committee. *See DeLay*, 465 S.W.3d at 250. Likewise, in the case of the Illegal Voting Statute, it is the act of “voting” when a person “actually realize[s]” that he or she is ineligible to vote that is condemnable—not the act of filling out a provisional ballot with a genuine (but mistaken) belief that he or she is eligible to vote.<sup>1</sup>

---

<sup>1</sup> The cases relied on by the court of appeals further demonstrate its error in construing the *mens rea* requirement in the Illegal Voting Statute. The *Medrano*, *Jenkins*, and *Heath* cases all involved defendants whose actions were intended to undermine the integrity of the election or advance a personal political agenda. *See Medrano v. State*, 421 S.W.3d 869 (Tex. App.—Dallas 2014, pet. ref’d) (candidate asked niece to lie about her address on her voter registration card and at the polling place, so she could vote for him); *Jenkins v. State*, 468 S.W.3d 656 (Tex. App.—Houston [14th Dist.] 2015) (defendant changed address on voter registration to a hotel, and then rented room in hotel at eve of the election and then voted), *pet. dismiss’d*



Second, in both *DeLay* and this case, the State argues that ignorance of the law is no defense. *See DeLay*, State’s Post-Submission Supplemental Letter Brief; *see* State’s Brief §§ I.C and I.D. This is a sideshow argument that misses the forest for the trees. In *DeLay*, this Court held that it had a “duty to ascribe a culpable mental state to the particular ‘statutory elements that criminalize otherwise innocent conduct.’” *DeLay*, 465 S.W.3d at 251. In Sections 253.003(a) and the Illegal Voting Statute, it is an essential element of both criminal statutes that the State prove (beyond a reasonable doubt) that the requisite *mens rea* has been established. As with the contributing corporations in *DeLay*, there is no evidence (circumstantial or otherwise) that establishes that Ms. Mason “actually realized” that she was in fact ineligible to vote. *See DeLay*, 465 S.W.3d at 252.

Instead of adhering to this Court’s precedent in *DeLay*, the court of appeals favored a stale nineteenth-century, single-paragraph Texas Court of Appeals opinion, *Thompson v. State*, 9 S.W. 486, 486-67 (Tex. Ct. App. 1888), and inapposite decisions of other courts of appeals.<sup>2</sup> *Thompson* is out of step with this Court’s

---

*improvidently granted*, 520 S.W.3d 616 (Tex. Crim. App. 2017) (per curiam); *Heath v. State*, No. 14-14-00532-CR, 2016 WL 2743192 (Tex. App.—Houston [14th Dist.] May 10, 2016, pet. ref’d) (mem. op., not designated for publication)) (same). There is no evidence (and the State does not suggest) that Ms. Mason intended to undermine the integrity of the election or advance a political agenda when she cast a provisional ballot – she voted at her mother’s urging and did not know that she was, in fact, ineligible to vote. *See* 2RR116, 143.

<sup>2</sup> As explained in the Brief of Former Prosecutors as *Amici Curiae* in Support of Appellant Crystal Mason (“Prosecutors’ Amicus Brief”), the Chair of the Texas

recent precedents—including *DeLay*. Moreover, even if this Court finds that *DeLay* did not abrogate *Thompson* and that *Thompson* is still good law (which it is not), the court of appeals’ reliance on *Thompson* is misplaced, and fails to account for the express text of the Illegal Voting Statute, where the required *mens rea* is “knowledge” of ineligibility to vote.

As noted above, *DeLay*’s treatment of the “knowing” *mens rea* requirement controls, and should leave no ambiguity as to the interpretation of the Illegal Voting Statute. But, to the extent this Court finds that Section 64.012(a) is ambiguous as to how the *mens rea* requirement should be construed, *DeLay* also held that the rule of lenity applies in construing penal provisions that appear outside the Penal Code,

---

House Elections Committee, Representative Briscoe Cain, confirmed and clarified the legislature’s intent while advocating for the passage of Senate Bill 7 (“SB7”) on May 30, 2021. Representative Cain stated that one provision of the new bill would “clarify what some courts and local prosecutors have gotten wrong” about the Illegal Voting Statute, testifying that “[t]he crime of illegal voting is intended to target those individuals who intentionally try to commit fraud in our elections by voting when they know they are not eligible to vote. It is not intended to target people who make innocent mistakes about their eligibility, that are facilitated solely by being provided a provisional ballot by a judge.” See Prosecutors’ Amicus Brief, pp. 7-8; see Decl. of Julie Veroff, Ex. A to Prosecutor’s Amicus Brief at 2. Representative Cain further clarified that the new bill did “not change existing law, but [] rather makes crystal clear that under current law, when an individual fills out a provisional ballot, like tens of thousands of Texans do every year, the mere fact that they filled out and signed a provisional ballot affidavit is not enough to show that an ineligible voter knew they were ineligible to vote.” *Id.* Representative Cain emphasized that prosecution of “people who in good faith cast [a] provisional ballot, but turn out to be mistaken, cannot and should not be prosecuted,” and that such prosecution “would . . . be a grave error.” *Id.*

including criminal offenses found in the Election Code. *DeLay*, 465 S.W.3d at 251. Specifically, with regard to “ambiguities with respect to the scope of the applicable *mens rea*,” *DeLay* held that it was critical to “mak[e] sure that mental culpability extends to the *particular circumstance that renders otherwise innocuous conduct criminal*.” *Id.* (emphasis added); accord *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989). Here, as in *DeLay*, it is critically important that the statute be properly construed to apply the “knowing” *mens rea* to the “particular circumstance” of “eligibil[ity] to vote”; to the extent that there is any ambiguity, Texas’s Statutory Rule of Lenity applies to construe any ambiguity in favor of Ms. Mason. See TEX. GOV’T CODE § 311.035(b)(1); see *DeLay*, 465 S.W.3d at 251.

Recognizing the court of appeals’ deficient holding on the *mens rea* element of the offense, the State now argues in the alternative that the court of appeals’ error was “harmless” because “any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt.” See State’s Brief on the Merits at 27-30. But the State ignores that the error “had a substantial and injurious effect or influence” on the court of appeals’ conclusion, holding, and judgment, which affects the defendant’s substantial rights and is therefore not harmless error. See TEX. R. APP. P. 44.2(b); *Llamas v. State*, 12 S.W.3d 469, 470, 471 n.2 (Tex. Crim. App. 2000) (when this Court is asked to determine whether an error is harmless, it considers “whether or not the error affected a substantial right of the defendant”).

The Opinion’s erroneous conclusion that “it was irrelevant to [Ms. Mason’s] prosecution” that she “did not know she was legally ineligible to vote” (Op. 17) is directly and causally related to the court of appeals’ determination that the State had met its burden of proof beyond a reasonable doubt with respect to the required *mens rea*. Op. 770.

On any reasonable reading of the record, there is insufficient evidence for the State to demonstrate beyond a reasonable doubt that Ms. Mason was aware that she was legally ineligible to vote. *See, e.g.*, Appellant’s Reply Brief at 14-19. The State relies entirely on the contradicted and explicitly uncertain evidence that Ms. Mason “read the Affidavit of Provisional Voter” to prove that it met the “know[ing]” *mens rea* element of the offense. But the court of appeals rejected this and expressly recognized that Ms. Mason “voted . . . despite the fact that **she was not certain and may not have read the warnings on the affidavit form.**” Op. 779-80. But for the court of appeals’ error, the evidence was legally insufficient to prove beyond a reasonable doubt that Ms. Mason was aware that she was legally ineligible to vote.

## **II. HAVA preempts the Opinion’s interpretation of Texas’s Illegal Voting Statute.**

The court of appeals’ interpretation of the Illegal Voting Statute also criminalizes conduct that is a federally protected right under HAVA. Congress exercised its power under the Elections Clause when enacting HAVA to establish minimum election standards for States in administering federal elections, including

instituting a provisional balloting regime with which States must comply. Ms. Mason’s conviction – under the court of appeals’ incorrect reading of Section 64.002(a) – is entirely incompatible with the text and purpose of HAVA. This Court must correct the court of appeals’ errant reading of the Illegal Voting Statute and interpret it not to criminalize the submission of a provisional ballot by someone who incorrectly believes she is eligible to vote in order to harmonize state law with HAVA.

**A. Congress expressly regulated federal elections by creating a right for individuals to cast provisional ballots through HAVA and requiring States to comply.**

Congress passed HAVA to establish minimum election standards for States when administering Federal elections. *See* 52 U.S.C. § 21082. HAVA provides that an individual “*shall* be permitted to cast a provisional ballot,” by state election officials if the individual’s name “does not appear on the official list of eligible voters for the polling place” but yet the individual “declares that [they are] a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office.” *Id.* at § 21082(a) (emphasis added); *see, e.g., Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 670 (6th Cir. 2004) (noting that the duty of election officials to allow a citizen to mark a provisional ballot upon a claim of eligibility is “mandatory”). The voter’s declaration must take the form “of a written affirmation . . . stating that the

individual” is both “a registered voter in the jurisdiction in which the individual desires to vote” and is “eligible to vote in that election.” *Id.*

The election official must then send the provisional ballot or voter information to the proper state or local election official for verification. 52 U.S.C. § 21082. If the election official determines that the individual is eligible to vote under state law, then the ballot will be counted. But, if the ballot is not counted, the individual must be provided with information about why her ballot did not count, like ineligibility, improper precinct, or lack of proper identification. 52 U.S.C. § 21082(a)(5)(B).

The marking of a provisional ballot has been used as a “fail-safe” for those who are not on the eligibility list as it “allows election officials an opportunity to review each provisional voter’s information and determine eligibility following extensive research at the central election office.” U.S. Election Comm’n, *Quick Start Management Guide: Provisional Ballots* (Oct. 2008)<sup>3</sup>; *see also* U.S. Election Assistance Comm’n, *Best Practices On Provisional Voting Report*.<sup>4</sup> The fail-safe aspect of provisional ballots protects both the individual trying to vote and the integrity of the election by counting a provisional ballot only when and if the election officials verify the eligibility of the individual. Because of this check on election poll workers and their ability to ensure eligible voters can vote, the provisional ballot

---

<sup>3</sup> Available at <https://bit.ly/3781z97>.

<sup>4</sup> Available at [https://www.eac.gov/sites/default/files/document\\_library/files/EAC-Best-Practices-on-Provisional-Voting.pdf](https://www.eac.gov/sites/default/files/document_library/files/EAC-Best-Practices-on-Provisional-Voting.pdf).

aspect of HAVA has become a “crucial safety net” for many voters. *See* Election Data Servs., *Election Day Survey*, conducted for the U.S. Election Assistance Comm’n, at 6-5 (Sept. 27, 2005).

HAVA does not include any criminal penalties for those who cast a provisional ballot believing they were eligible but later were found to be ineligible to vote.

**B. If the State’s interpretation of the Illegal Voting Statute is correct, that law is preempted because Congress, through HAVA, used its power under the Elections Clause to protect an individual’s right to cast a provisional ballot if she believes she is eligible to vote.**

Under the Elections Clause, Congress has the ability to “at any time by Law make or alter such Regulations” created by states, except as to the place of choosing senators. U.S. CONST. art. I, § 4, cl. 1. “The power the Elections Clause confers [to Congress] is none other than the power to pre-empt.” *Inter Tribal*, 570 U.S. at 2. Moreover, a state statute is invalid when it purports to criminalize conduct that federal law expressly permits. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981).<sup>5</sup>

---

<sup>5</sup> The Illegal Voting Statute as construed in the Opinion is preempted by operation of the Elections Clause. U.S. CONST. art. I, § 4, cl. 1. The preemptive force of the Elections Clause is much greater than the preemptive force of the Supremacy Clause; indeed, given that “the power the Elections Clause confers is none other than the power to pre-empt” and that federalism concerns are “weaker” in the Elections Clause context, the U.S. Supreme Court has held that there is no presumption against preemption in Elections Clause cases. *Inter Tribal*, 570 U.S. at 14. *Amici* also refers to cases decided under the Supremacy Clause merely because Elections Clause cases

Conflicts between state and federal election law require federal preemption if the state law would negate one of the main functions or purposes of the election law that Congress has enacted. *See Inter Tribal*, 570 U.S. at 15. In *Inter Tribal*, the U.S. Supreme Court grappled with the federal requirement that States “accept and use” the federal form, as required in the National Voter Registration Act (“NVRA”), and whether Arizona’s practice of rejecting any voter registration form that did not include documentation of citizenship was preempted under the Elections Clause. *Id.* at 4, 6-7. Arizona argued that there was no ‘conflict’ mandating preemption because (in its view) the NVRA’s requirement that States “accept and use” the federal registration form did not bar States from instituting an additional proof of citizenship requirement. *Inter Tribal*, 570 U.S. at 6-7. But the Court held that Arizona’s law was preempted by the NVRA, as it would make the language of “accept and use” “cease[] to perform any meaningful function.” *Id.* at 13. *Inter Tribal* held further that, while States have the power to set qualifications to vote, Congress has the express power to preempt State election laws outside of voter qualifications. *Id.*, at 16-17. Because Arizona’s interpretation would conflict with the NVRA’s goal of uniform acceptance and use of the federal form, and undercut Congress’s requirement that States “accept and use” the federal form, the Court found Arizona

---

are relatively scarce. The preemption jurisprudence developed in the Supremacy Clause context applies even more forcefully in the Elections Clause context. *See id.*



law inconsistent with the NVRA and preempted under the Elections Clause. *Id.* at 15.

Federal law also must prevail when state law seeks to prohibit or criminalize what federal law expressly permits. *Alessi*, 451 U.S. at 524. In *Alessi*, a New Jersey law prohibited the practice of offsetting workers' compensation benefits against pension benefits, a practice allowed under the federal Employee Retirement Income Security Act ("ERISA"). *Id.* at 507-08. The U.S. Supreme Court held that the New Jersey law was preempted. *Id.* at 509. Although New Jersey argued that ERISA did not include an express provision permitting offsetting, and thus argued that states were free to prohibit it, the Court disagreed. *Id.* at 514, 519. Because the New Jersey law created a prohibition on an employee benefit practice that is permitted by federal law, the Court held that the New Jersey law was an impermissible intrusion on the federal regulatory scheme. *Id.* at 522-25. Here, Ms. Mason subjectively believed that she was eligible to vote (RR2.126:3-8; RR2.146:6-11) and marked a provisional ballot in accordance with the procedures set out by Congress in HAVA, as facilitated solely by being provided a provisional ballot by a state election official (RR2:119:11-23). Ms. Mason's actions are expressly permitted by HAVA, which requires that an individual be permitted to mark a provisional ballot upon attesting to her eligibility. *See* 52 U.S.C. § 21082. Moreover, and in further accordance with HAVA, Ms. Mason's provisional ballot was not counted as a vote after she was

subsequently found not to have been eligible by election officials. RR3.Ex.6. But, according to the court of appeals, Ms. Mason's act of casting a provisional ballot, with a good faith (but ultimately mistaken) belief that she was eligible to vote, constitutes a felony in Texas.

This cannot be the law, as *Inter Tribal* and *Alessi* have shown. Just like *Inter Tribal*, where Arizona's practice of disallowing federal registration forms lacking proof of citizenship documentation ran afoul of the NVRA and Elections Clause because it rendered Congress' instruction to "accept and use" the federal form meaningless, so, too, here does the Illegal Voting Statute – as interpreted by the court of appeals – render useless HAVA's requirement that States allow individuals to complete a provisional ballot form if they believe they are eligible to vote but are not on the voter rolls. Under HAVA, the State cannot prosecute someone who casts a ballot with the mistaken belief she is eligible to vote. *See Inter Tribal*, 570 U.S. at 13.

Moreover, the State employs the same losing argument that New Jersey made, and the U.S. Supreme Court rejected, in *Alessi*, claiming that "section 21082 has no provisions preventing the states from criminalizing the casting of a provisional ballot by an ineligible voter." State's Brief on the Merits, p. 34. Even so, HAVA expressly contemplates and provides a right to cast a provisional ballot in the inevitable event that someone, whether an election official or an individual casting a ballot, will be

mistaken about voter eligibility at some point during any given federal election. 52 U.S.C. § 21082. Just as the U.S. Supreme Court in *Alessi* held that a New Jersey state statute is invalid when it purports to prohibit conduct that federal law expressly permits, any construction of the Illegal Voting Statute that criminalizes the good faith casting of a provisional ballot by a voter who believes she is eligible but is mistaken is preempted by HAVA, which expressly permits individuals to cast a provisional ballot under the circumstances set forth in HAVA. *See Alessi*, 451 U.S. at 524. Contrary to the State’s position, if New Jersey may not prohibit conduct expressly permitted by ERISA, Texas may not criminalize conduct expressly permitted by HAVA, especially given the heightened presumption of preemption afforded by the Elections Clause. *Inter Tribal*, 570 U.S. at 15.

The court of appeals attempted to escape the specter of preemption by claiming that Congress did not “inten[d] in HAVA’s mandated provisional-ballot procedure to preempt state laws that allow illegal-voting prosecutions.” Op. 783. But that is mistaken and ignores the conflict created by the Opinion’s errant interpretation of the Illegal Voting Statute. By choosing to guarantee the availability of a provisional ballot to “people whose eligibility is in doubt,” Congress intended that citizens would engage in provisional balloting, and criminalizing the act of casting a provisional ballot where an individual believes she is eligible, but is mistaken, would stand as an obstacle to Congress’s objective. H.R. Rep. No. 107-

329, pt. 1, at 37-38 (2001); *see Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 426-27 (Tex. 2005).

It is no answer to suggest, as did the court of appeals, that HAVA does not preempt prosecutions of citizens who mark provisional ballots because it “expressly requires a provisional voter to affirm that the voter is both registered and eligible under state law—thus placing that person at risk of federal and state criminal liability if the information is false.” Op. 783. This portion of the Opinion appears to conclude that HAVA could not preempt the prosecution at issue here because HAVA itself contemplates that a citizen may be subject to criminal liability for providing false information in an affirmation. But the court of appeals failed to appreciate that, in both the Texas and federal systems, a criminal conviction for providing false information requires that the declarant must have *subjectively* known that the information provided was false. *See* TEX. PENAL CODE § 37.02(a); 18 U.S.C. § 1621; *see also Ex parte Napper*, 322 S.W.3d 202, 243 (Tex. Crim. App. 2010) (“In Texas, the crime of perjury is committed if ‘*with intent to deceive* and with knowledge of the statement’s meaning’ a person makes a false statement under oath or unsworn declaration” (emphasis added)). Despite this, the Opinion holds that a conviction for illegal voting in Texas can be sustained upon proof that the citizen had knowledge of facts that rendered her ineligible to vote, even if she did not

subjectively realize she was ineligible. The court of appeals' holding is illogical, and cannot be upheld.

**C. The legislative record confirms that HAVA was enacted pursuant to Congress's power under the Elections Clause—not the Spending Clause (as the State now suggests for the first time).**

Finally, the State now argues, without any authority to support, that HAVA is a spending program enacted pursuant to Congress's spending power, and that HAVA requires only that, as a condition of receiving federal funds, the State perform certain prescribed tasks. *See* State's Brief on the Merits at 32-35. This analysis is completely incorrect. As explained above, Congress, using its Elections Clause authority, mandated new federal requirements for administering elections through HAVA, including the right to submit provisional ballots so long as an individual declares and affirms her eligibility. *See, e.g., Colon-Marrero v. Velez*, 813 F.3d 1, 19-20 (1st. Cir. 2016) ("HAVA . . . was enacted pursuant to . . . the Elections Clause of the Constitution" and contains "mandatory, rather than precatory" terms). The legislative record confirms that HAVA was enacted pursuant to Congress's power stemming from the Elections Clause. H.R. Rep. 107-329, pt. 1, at 57, 2001 WL 1579545, at \*57 (providing that the "constitutional authority" for HAVA is "Article 1, Section 4 of the U.S. Constitution," which "grants Congress the authority to make laws governing the time, place and manner of holding Federal Elections."). The State's arguments fail.

### **III. The court of appeals incorrectly characterized rejected provisional ballots as “votes” within the meaning of the Illegal Voting Statute.**

The court of appeals erred by construing Ms. Mason’s submission of an uncounted provisional ballot as a “vote” under Texas law. The court wrote that “to cast or deposit a ballot—to vote—can be broadly defined as expressing one’s choice, regardless of whether the vote actually is counted.” Op. 775. But that interpretation ignores that the Illegal Voting Statute distinguishes between a vote and an “attempt[] to vote.” The key distinction between the crimes of (1) voting illegally and (2) *attempting* to vote illegally is whether the ineligible voter succeeds in having the ballot counted. *See Martinez v. State*, 278 S.W.2d 156, 157 (Tex. Crim. App. 1955) (sustaining attempt conviction where defendant took affirmative steps to achieve his ends “but did not accomplish his desires”).

Under the interpretive canon of *noscitur a sociis*, “a word is known by the company it keeps.” *Wagner v. State*, 539 S.W.3d 298, 318 (Tex. Crim. App. 2018). The fact that the Texas Election Code separately acknowledges “vot[ing]” and “attempting to vote” is therefore *extremely* relevant in determining what it means to “vote,” because including ballots that did not count would render the “attempt[]” language in the statute superfluous. But the court of appeals ignored the difference between these separate crimes, and failed to consider that even if Ms. Mason may have “attempt[ed] to vote” when she submitted a provisional ballot, she never

actually voted because her ballot was never counted.<sup>6</sup> The court of appeals improperly read the separate crime of an “attempt[] to vote” out of the statute by concluding that marking a provisional ballot while objectively ineligible to vote is a second-degree felony, regardless of whether that ballot is ultimately counted.<sup>7</sup>

Furthermore, the court of appeals erred by failing to apply Texas’s Statutory Rule of Lenity to construe any ambiguity in the term “vote” in favor of Ms. Mason. *See* TEX. GOV’T CODE § 311.035(b)(1). Ms. Mason has established that the contrary uses of the words “vote” in the Texas Election Code demonstrate that it is at least plausible that the act of marking a rejected provisional ballot does not constitute “voting” under the Texas Election Code. *See* Appellant’s Reply Brief at 25-28. Thus, the court of appeals erred in not applying the Rule of Lenity and in not vacating

---

<sup>6</sup> Ms. Mason was never charged with attempting to vote illegally because she could not have been convicted of an attempt. TEX. PENAL CODE § 15.01(a) provides that all attempt crimes require specific intent. Ms. Mason did not have specific intent to vote illegally because, as discussed above, she did not subjectively believe that she was ineligible to vote. Thus, Ms. Mason’s lack of subjective knowledge of her ineligibility negates both the specific intent required of attempt crimes and the statutory knowledge requirement discussed above.

<sup>7</sup> In its attempt to overcome the plain text of the Illegal Voting Statute, which enumerates a separate crime for an “attempt[] to vote,” the State argues that this Court should consider each component part involved in the casting of a provisional ballot at which Ms. Mason’s ineligibility could have been discovered, *e.g.*, “she accepted a PIN that allowed her to go into a voting booth,” or “she entered the PIN into the voting machine.” *See* State’s Brief on the Merits, p. 42. This unprecedented “dissecting” approach is far from a reasonable understanding of the (single) expressive activity of casting a provisional ballot.

Ms. Mason's conviction on the ground that casting an uncounted provisional ballot does not constitute "voting" in an election.

**CONCLUSION AND PRAYER**

For the foregoing reasons, this Court should grant Ms. Mason's request that the Court reverse the decision of the court of appeals, reverse her conviction, and order a judgment of acquittal.



## **CERTIFICATE OF COMPLIANCE**

Pursuant to Tex. R. App. P. 9.4(i)(3), the undersigned hereby certifies that this Brief of *Amici Curiae* complies with the applicable word count limitation because it contains 6,563 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1). In making this certification, the undersigned has relied on the word-count function in Microsoft Office 365, which was used to prepare the Brief of *Amici Curiae*.

/s/ Thomas S. Leatherbury  
Thomas S. Leatherbury

## CERTIFICATE OF SERVICE

I certify that, on August 2, 2021, I filed the attached document with the Clerk of the Court using the Court's ECF system. I hereby certify that a true and correct copy of this Brief of *Amici Curiae* has been served on all counsel of record via e-service:

Sharen Wilson  
Criminal District Attorney

Joseph W. Spence  
Assistant Criminal District Attorney  
Chief, Post-Conviction

Helena F. Faulkner  
Matt Smid  
John Newbern  
Assistant Criminal District Attorneys

John E. Meskunas  
Assistant Criminal District Attorney

401 W. Belknap  
Fort Worth, TX 76196  
coaappellatealerts@tarrantcountytexas.gov

*Counsel for Appellee*

Alison Grinter  
6738 Old Settlers Way  
Dallas, TX 75236  
alisongrinter@gmail.com

Kim T. Cole  
2770 Main Street, Suite 186  
Frisco, TX 75033  
kcole@kcolelaw.com

Thomas Buser-Clancy  
Andre Ivan Segura  
Savannah Kumar  
ACLU Foundation of Texas, Inc.  
5225 Katy Freeway, Suite 350  
Houston, TX 77007  
tbuser-clancy@aclutx.org  
asegura@aclutx.org  
skumar@aclutx.org

Emma Hilbert  
Hani Mirza  
Texas Civil Rights Project  
1405 Montopolis Drive  
Austin, TX 78741-3438  
emma@texascivilrightsproject.org  
hani@texascivilrightsproject.org

Sophia Lin Lakin  
Dale E. Ho  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004  
slakin@aclu.org  
dho@aclu.org  
\*\*admission *pro hac vice* pending

*Counsel for Appellant*

SUSMAN GODFREY  
Neal S. Manne  
State Bar No. 12937980  
Robert Rivera, Jr.  
State Bar No. 16958030  
1000 Louisiana, Suite 5100  
Houston, TX 77002-5096  
Telephone: (713) 651-9366  
Facsimile: (713) 654-6666  
*nmanne@susmangodfrey.com*  
*rrivera@susmangodfrey.com*

COOLEY LLP  
Kathleen R. Hartnett\*  
Julie Veroff\*  
Darina Shtrakhman\*  
3 Embarcadero Center, 20th Floor  
San Francisco, California 94111-4004  
Telephone: (415) 693-2000  
Facsimile: (415) 693-2222  
*khartnett@cooley.com*  
*jveroff@cooley.com*  
*dshtrakhman@cooley.com*

STATES UNITED DEMOCRACY CENTER

Christine P. Sun\*

3749 Buchanan St., No. 475165

San Francisco, CA 94147-3103

Telephone: (615) 574-9108

*christine@statesuniteddemocracy.org*

*Counsel for Amici Curiae Former Prosecutors*

*\*Pro Hac Vice Application Pending*

Jessica England

(Lead Counsel)

State Bar No. 24105841

*jengland@kslaw.com*

KING & SPALDING LLP

500 W. 2nd St., Suite 1800

Austin, TX 78701

Tel: (512) 457-2012

Fax: (512) 457-2100

Laura Harris

*lharris@kslaw.com*

KING & SPALDING LLP

1185 Avenue of the

Americas, 34th Floor

New York, NY 10036

Tel: (212) 709-5360

Fax: (212) 556-2222

*\*pro hac vice application  
forthcoming*

Paul Alessio Mezzina  
David Mattern  
pmezzina@kslaw.com  
dmattern@kslaw.com  
KING & SPALDING LLP  
1700 Pennsylvania Avenue,  
NW, 2nd Floor  
Washington, DC 20006  
Tel: (202) 626-2946  
Fax: (202) 626-3737  
*\*pro hac vice application  
forthcoming*

*Counsel for Amici Curiae*

/s/ Thomas S. Leatherbury  
Thomas S. Leatherbury

**EXHIBIT A**



# Crystal Mason's ballot was never counted. Will she still serve five years in prison for illegally voting?

Her lawyers say if her sentence stands, it could discourage low-information voters from going to the polls at all.

BY **EMMA PLATOFF** AND **ALEXA URA** SEPT. 17, 2019 12 AM CENTRAL



"I feel like God has a purpose for everyone," Crystal Mason says, and that hers might be educating others about voting rights. Leslie Boorhem-Stephenson for The Texas Tribune

[Voting Bills Battle](#) [Abbott's Border Initiatives](#) [COVID-19 Surge](#) [Coronavirus Tracker](#) [TribFest21](#)

out running.”

By Nov. 8, 2016, when she'd been out for months but was still on supervised release, she was working full-time at Santander Bank in downtown Dallas and enrolled in night classes at Ogle Beauty School, trying, she said, to show her children that a "bump in the road doesn't determine your future."

On Election Day, there was yet another thing to do: After work, she drove through the rain to her polling place in the southern end of Tarrant County, expecting to vote for the first female president.

When she got there, she was surprised to learn that her name wasn't on the roll. On the advice of a poll worker, she cast a provisional ballot instead. She didn't make it to her night class.

A month later, she learned that her ballot had been rejected, and a few months after that, she was arrested. Because she was on supervised release, prosecutors argued, she had knowingly violated a law preventing felons from voting before completing their sentences. Mason insisted she had no idea officials considered her ineligible — and would never have risked her freedom if she had.

For "illegally voting," she was sentenced to five years in prison. Now, as her lawyers attempt to persuade a Fort Worth appeals court to overturn that sentence, the question is whether she voted at all.

The Texas Tribune thanks its sponsors. [Become one.](#)

---

Created in 2002, provisional ballots were intended to serve as an electoral safe harbor, allowing a person to record her vote even amid questions about her eligibility. In 2016, more than 66,000 provisional ballots were cast in Texas, and the vast majority of those were rejected, most of them because they were cast by individuals who weren't registered to vote, according to data compiled by the U.S. Election Assistance Commission. In Tarrant County, where Mason lives, nearly 4,500 provisional ballots were cast that year, and 3,990 were rejected — but she was the only one who faced criminal prosecution.



In fact, Mason's lawyer told a three-judge panel in North Texas last Tuesday, hers is the first known instance of an individual facing criminal charges for casting a ballot that ultimately didn't count.

Her case, now pending before an all-Republican appeals panel, is about not just her freedom, but about the role and risks of the provisional ballot itself.

Prosecutors insist that they are not criminalizing individuals who merely vote by mistake. Despite those assurances, voting rights advocates fear the case could foster enough doubt among low-information voters that they'll be discouraged from heading to the polls — or even clear a path for prosecutors to criminally pursue other provisional ballot-casters.

"There are a lot of people who have questions about whether they can vote or where they can vote," said Andre Segura, legal director of the American Civil Liberties Union of Texas. "You want all of those people to feel comfortable going in and submitting a provisional ballot."

Mason, a highly private person who has been forced into the position of public example, has become a Rorschach test in the state's fight over voting rights.

To her advocates, Mason is a victim of voter suppression in a state where, federal judges have ruled, GOP officials have a long history of infringing on the voting rights of people of color. To hawks intent on preserving the integrity of the ballot, Mason is a criminal who was caught before her crime could have an impact. To Mason, her story is one of countless missed opportunities, of a system she feels could have educated her at several critical points but instead has opted to make an example out of her.

"I feel like God has a purpose for everyone. Right now, I'm walking my purpose," she said calmly in an interview the night before the hearing.

What is that purpose?

She smiled.

"I'm still trying to figure it out. Activist, I think — maybe educating on voting rights, your do's and your don'ts," she said.

### **"An untested application of the illegal voting statute"**

When Congress created provisional ballots through the Help America Vote Act of 2002, it envisioned that prospective voters facing questions about their eligibility — either because of mistakes by local election officials or confusion about whether they are registered to vote — would not be turned away from the polls.

Federal law laid out a simple safeguard through provisional voting: If you're not sure, cast a provisional ballot; if you're not eligible, it won't count in the election.

That was the procedure Mason followed in 2016, her lawyers argue, and that's where her story should've ended.

The Texas Tribune thanks its sponsors. [Become one.](#)

In a courthouse in downtown Fort Worth, Thomas Buser-Clancy, a Texas attorney for the American Civil Liberties Union, argued last week that Mason had made an honest mistake that ultimately had no impact on the election. How could it be, then, that she had “illegally voted”?

Arguing for the Tarrant County District Attorney's Office, prosecutor Helena Faulkner countered that “nothing in the Texas Election Code indicates that the verb ‘to vote’ has to include or only includes a vote that was tallied in the final election.”

The law, she argued, should not protect those who intentionally vote illegally. But prosecutors would not use it to penalize those who make honest mistakes.

“People can make mistakes,” said Sam Jordan, a communications officer for the district attorney's office. “The difference is in the intent.”

But who decides whether a ballot was an honest mistake?

Mason's conviction hinged on an affidavit she had signed before casting her provisional ballot. At her trial, the judge convicted her of voting illegally after he heard testimony from a poll worker who said he had watched Mason read and run her finger along each line of an affidavit that required individuals to swear that “if a felon, I have completed all my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned.” Mason said she did not read that side of the paper.

Mason was still under supervised release for a federal conviction. She was indicted in 2011 for helping clients at her tax preparation business falsify expenses and claim exemptions they were not entitled to in order to lower their tax bills.

The Texas Tribune thanks its sponsors. [Become one.](#)

Her lawyers argue that the law is murky. Texas law allows convicted felons to vote once they've completed their "sentence," including any "parole or supervision." But it's not clear that federal "supervised release" lines up with "supervision" under that law, Mason's lawyers say.

Since Mason's case arose, she and her lawyers say, parole officers in North Texas have begun distributing a form to their charges clarifying that they are ineligible to vote while on supervised release. (Questions about the form to the Northern District of Texas, which oversees that system, went unanswered.)

The irony is not lost on Mason, who received that form after she was released this year. If it's so unclear, she wondered, why wasn't that notice being issued three years ago, when it might have helped her? And if it's so ambiguous that clarification is required, why is she being prosecuted?

 Inline article image

Mason and her attorneys say officials in North Texas have begun distributing a form clarifying that felons on supervised release are not eligible to vote.

Mason likely could have secured a shorter sentence if she had pleaded guilty. But she didn't want to admit to a crime she did not commit, she said. Still, the consequences were steep: The illegal voting conviction landed her back in federal prison for months, and she was released into a halfway house in May of this year. Last week, in addition to her high-stakes hearing, she was navigating her first week at a new job.

Her appeal turns instead on narrow legal questions — did a person vote (illegally or otherwise) if her vote didn't count? — but the decision, expected in the coming months, will mark an important milestone in the state's battle over the ballot.

Most provisional ballots are rejected for ineligibility; even those that are accepted are not usually counted unless an election is particularly close. But Mason's advocates fear that her case could imperil the tens of thousands of other Texans who submit provisional ballots every election year.

"What we're faced with here is criminalizing that behavior," said Beth Stevens, voting rights program director at the Texas Civil Rights Project. "And the state's interpretation of the illegal voting statute would necessarily make all of those people — thousands of people across the state of Texas — vulnerable to prosecution."

As a mother and grandmother who raised her brother's children as well as her own, Mason said she wouldn't punish someone who did something wrong without intending to.

Instead, she'd educate: "You educate her on what to do, what not to do," she said.

It was Mason's mother who encouraged her to vote that day in 2016 — a message she has pushed since Mason was a little girl, and has spread, too, to Mason's children.

"Ancestors fought for this right, marched and died for this right — now that it's available for us, we should utilize it," Mason recalled. "You can't complain about anything if we don't try to exercise that right."

Before the hearing began, Mason's pastor led her attorneys and a group of her family members, too many of them to fit in one elevator, in prayer outside the courtroom.

The case is "not just for Crystal, but mostly for justice," said the Rev. Frederick Haynes of Friendship-West Baptist Church in Dallas as the others stood, eyes closed, holding hands, in a circle.

"This is a form of voter suppression," Haynes said.

### **"Safeguarding the integrity of our elections"**

To those fighting on Mason's behalf in court, the prosecution is "part and parcel" of a voter intimidation playbook that's guided the state for more than a decade.

Gone are the days of "white primaries," poll taxes and annual reregistration requirements enacted in the name of protecting the election process from voter fraud. The modern-day crackdown — fueled by unsubstantiated concerns over rampant illegal voting — led with a strict 2011 voter ID law that was softened after a federal judge expressed concerns that it disenfranchised voters of color.

Amid failed efforts to impose tighter voting restrictions and to scour the voter rolls for supposed noncitizens, attention has more recently turned to a handful of high-profile prosecutions of people of color.

Before Mason, who is black, there was Rosa Maria Ortega, a legal permanent resident also living in Tarrant County who was convicted of voter fraud after attempting to register to vote despite not being a citizen. Ortega — who did not realize her immigration status meant she was ineligible — cast ballots that counted in several elections.

When Ortega was sentenced to eight years in prison in 2017, Texas Attorney General [Ken Paxton](#) — whose office did not respond to questions for this story — hailed it as an outcome that “sends a message that violators of the state’s election law will be prosecuted to the fullest.”

“Safeguarding the integrity of our elections is essential to preserving our democracy,” Paxton said in a statement at the time.

Tarrant County prosecutors have brushed off concerns the Mason case could lead to voter suppression. “The fact that this case is so unique should emphasize why this case should in no way have a ‘chilling effect’ on anyone except people who knowingly vote illegally,” Jordan said.

But during the 2019 legislative session, some Republican lawmakers pushed to erase Mason’s legal defense for future defendants by making it easier to prosecute people who cast ballots without realizing they’re ineligible.

Currently, to commit a crime, voters must know they are ineligible; under the proposed law, they would commit a crime just by voting while knowing about the circumstances that made them ineligible. In other words, Mason would have been illegally voting because she was aware of her past felony conviction — even if she was not aware her “supervised release” status made her ineligible.

The Texas Tribune thanks its sponsors. [Become one.](#)

The fact that Mason’s provisional ballot wasn’t actually counted would have also been ruled out as a legal defense under the proposed changes to state law. That legislation ultimately failed in the House amid major opposition from Democrats.

Mason's appeal also comes in the wake of a bungled review of the voter rolls that did more harm than good to Republicans' voter fraud crusade.

Texas leaders set out to scour the state's massive voter registration database for supposed noncitizens, setting up nearly 100,000 registered voters to have to prove their citizenship to remain on the rolls. When the secretary of state's office announced the review, Paxton used the development to boast about the numerous prosecutions his office's Election Voter Fraud Unit was working on. (At the time, he was seeking additional dollars from state appropriators to expand the unit.)

But the review efforts were marred by shoddy data. Within days, it was revealed that the state had mistakenly marked tens of thousands of naturalized citizens as suspect voters.

When the Legislature wrapped up in late May, it did so without passing any of the major legislation that Texas Republicans, backed by the attorney general, had put forth as part of their voter fraud crackdown.

That leaves criminal prosecution as one of the most powerful tools state officials have for targeting what they have characterized as an epidemic of voter fraud.

Still, one high-profile criminal prosecution may be enough, advocates said.

"Crystal is the face of, 'You should have been scared about going to vote, black people,'" said Jasmine Crockett, president of the Dallas Black Criminal Bar Association. "I don't think there are more people that are going to end up being prosecuted unless there are too many black and brown people voting. I really believe that."

The Texas Tribune thanks its sponsors. [Become one.](#)

**Quality journalism doesn't come free**

Perhaps it goes without saying — but producing quality journalism isn't cheap. At a time when newsroom resources and revenue across the country are declining, The Texas Tribune remains committed to sustaining our mission: creating a more engaged and informed Texas with every story we cover, every event we convene and every newsletter we send. As a nonprofit newsroom, we rely on members to help keep our stories free and our events open to the public. Do you value our journalism? Show us with your support.

**YES, I'LL DONATE TODAY**

The Texas Tribune thanks its sponsors.  
**Become one.**



[Donate](#)

[Contact Us](#)

[Advertise](#)

© 2021 The Texas Tribune

**SOCIAL MEDIA**

[Facebook](#)

[Twitter](#)

[YouTube](#)

**INFO**

[About Us](#)

[Our Staff](#)

[Jobs](#)

[Who Funds Us?](#)

[Strategic Plan](#)

[Republishing Guidelines](#)

[Code of Ethics](#)

[Terms of Service](#)

[Privacy Policy](#)

[Send us a confidential tip](#)

[Corrections](#)

[Feeds](#)

[Instagram](#)

[Newsletters](#)

[LinkedIn](#)

[Audio](#)

[Reddit](#)

[Video](#)

[Join our Facebook Group, This Is Your Texas.](#)



**EXHIBIT B**



# Crystal Mason, jailed for illegal voting after casting provisional ballot, seeks to have conviction overturned

The request for review by the state's highest criminal court was filed by Mason's attorneys as well as the American Civil Liberties Union of Texas, the national ACLU and the Texas Civil Rights Project.

BY **KAREN BROOKS HARPER** DEC. 1, 2020 1 PM CENTRAL



Crystal Mason has said she cast her ballot — which, like most provisional ballots, was ultimately not counted — on the advice of a poll worker. Leslie Boorhem-Stephenson for The Texas Tribune

*Editor's note: This coverage is made possible through [Votebeat](#), a nonpartisan reporting project covering local election integrity and voting access. The article is available for reprint under the terms of [Votebeat's republishing policy](#).*

A Fort Worth woman [jailed for casting a provisional ballot](#) in the 2016 presidential election while on supervised release for a federal conviction is asking the Texas Court of Criminal Appeals to overturn her conviction on illegal voting charges, according to legal documents filed Monday.

Crystal Mason said she cast her ballot — which, like most provisional ballots, was ultimately not counted — on the advice of a poll worker. Mason told the court during her trial and appeals that she did not realize she was ineligible to vote under Texas law, which required her to first complete her sentence on a federal tax fraud conviction.

The request for review by the state's highest criminal court was filed by Mason's attorneys as well as the American Civil Liberties Union of Texas, the national ACLU and the Texas Civil Rights Project.

The Texas Tribune thanks its sponsors. [Become one.](#)

---

“Crystal Mason never wanted to be a voting rights advocate,” said Alison Grinter, criminal defense attorney for Mason, in a statement released by ACLU Texas. “She never wanted to be on the news or have her name become a rallying point in a politically divisive battle. Hers is a textbook case for why provisional ballots were created and why they must not be criminalized. Crystal’s fight is a fight for every Texan.”

Her legal team argues that Mason did not intend to vote illegally and that the provisional ballot is specifically for voters with questions about ineligibility.

They also point out that her vote was never counted and that an appellate court [should not have upheld her conviction](#) earlier this year after acknowledging that

she was unclear on the law, a decision they say conflicts with the Federal Help America Vote Act.

“Like her, thousands of voters cast provisional ballots during every federal election,” said Emma Hilbert, attorney for the Texas Civil Rights Project. “Criminalizing those actions jeopardizes our democratic values and risks silencing the voices of voters across this state and nation.”

Provisional ballots, created in 2002, are cast at polling places when the voter’s eligibility is in question. Most are not counted, and tens of thousands are cast in major elections by voters who believe they are eligible and who sign an affidavit claiming eligibility — a requirement for a provisional vote.

The votes are then reviewed after the election and voters are notified within 30 days whether their votes counted. Most are rejected on the grounds that, like Mason, the voter was ineligible.

Mason was arrested a few months after learning that her ballot was not counted. Prosecutors argued that she knew she was violating the law prohibiting felons

---

[Voting Bills Battle](#)

[Abbott's Border Initiatives](#)

[COVID-19 Surge](#)

[Coronavirus Tracker](#)

[TribFest21](#)

---

For “illegally voting,” she was sentenced to five years in prison. The conviction landed her back in federal prison for months, and she was released into a halfway house in May of this year.

The Texas Tribune thanks its sponsors. [Become one.](#)

In Tarrant County, where Mason lives, nearly 4,500 provisional ballots were cast in 2016, and 3,990 were rejected — but only she faced criminal prosecution.

In March, [a state appellate court upheld her conviction and five-year prison sentence.](#)

Texas lawmakers are working on changing the law to protect voters like Mason, filing bills for the upcoming session that would allow felons to vote while they are still serving their sentences — as long as they are not still incarcerated.

If passed, the two bills, authored by [Rep. Senfronia Thompson, D-Houston](#), and [Rep. Carl Sherman Sr., D-DeSoto](#), would mark the first time since 1997 that Texas broadened voting rights of convicted felons, [according to Rice University's Kinder Institute of Urban Research](#).

The Texas Tribune thanks its sponsors. [Become one.](#)

---

A similar bill never made it out of committee during the 2019 legislative session. A 1997 law signed by then-Gov. George W. Bush [eliminated the two-year waiting period](#) for felons to be able to vote after completing their sentences.

“I'm more energized than ever before, and I refuse to be afraid,” Mason said in the ACLU statement. “I thought I was performing my civic duty and followed the election process by filling out a provisional ballot. By trying to criminalize my actions, Texas has shown me the power of my voice. I will use my voice to educate and empower others who are fighting for their right to vote.”

*Disclosure: Rice University has been a financial supporter of The Texas Tribune, a nonprofit, nonpartisan news organization that is funded in part by donations from members, foundations and corporate sponsors. Financial supporters play no role in the Tribune's journalism. Find a complete [list of them here](#).*

## Quality journalism doesn't come free

Perhaps it goes without saying — but producing quality journalism isn't cheap. At a time when newsroom resources and revenue across the country are declining, The Texas Tribune remains committed to sustaining our [mission](#): creating a more engaged and informed Texas with every story we cover, every event we convene and every newsletter we send. As a nonprofit

newsroom, we rely on members to help keep our stories free and our events open to the public. Do you value our journalism? Show us with your support.

**YES, I'LL DONATE TODAY**

The Texas Tribune thanks its sponsors.  
**Become one.**



[Donate](#)

[Contact Us](#)

[Advertise](#)

© 2021 The Texas Tribune

**SOCIAL MEDIA**

[Facebook](#)

[Twitter](#)

[YouTube](#)

[Instagram](#)

[LinkedIn](#)

[Reddit](#)

**INFO**

[About Us](#)

[Our Staff](#)

[Jobs](#)

[Who Funds Us?](#)

[Strategic Plan](#)

[Republishing Guidelines](#)

[Code of Ethics](#)

[Terms of Service](#)

[Privacy Policy](#)

[Send us a confidential tip](#)

[Corrections](#)

[Feeds](#)

[Newsletters](#)

[Audio](#)

[Video](#)

Join our Facebook Group, This Is Your Texas.