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COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

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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'S PETITION FOR DISCRETIONARY REVIEW

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STATEMENT OF INTEREST OF *AMICI CURIAE*

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 Texas State Conference of The National Association for the Advancement of Colored People ("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.

The *Amici* are interested in this Court granting review of this case because it involves important issues 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 the *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.

SUMMARY OF THE ARGUMENT

If left uncorrected, the Court of Appeals' Opinion 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. The Court of Appeals criminalized the act of submitting a provisional ballot when the citizen incorrectly believes that he or she is eligible to vote. The opinion undermines the purpose of provisional voting, wherein a citizen may cast a provisional ballot without being turned away, and the ballot is only counted as a vote after the individual's eligibility to vote is confirmed. The Opinion made a critical error by holding that Ms. Mason "vote[d]" at all. One does not "vote" by marking a provisional ballot that is not counted by elections officials. Furthermore, despite precedential case law from this Court to the contrary, the Opinion held that it was "irrelevant" whether Ms. Mason subjectively knew that she was ineligible to vote. A statutory requirement that an individual must "knowingly" undertake an action in order to be found guilty of an offense under the Election Code requires the State to prove that the actor "actually realize[]" that "undertaking the conduct under those circumstances in fact constitutes" the specified circumstance rendering the conduct unlawful *See infra* § I.

Moreover, the construction of the Illegal Voting Statute adopted in the Opinion is preempted by the Help America Vote Act ("HAVA"). Ms. Mason's actions were expressly permitted by HAVA, which requires that an individual be permitted to mark a provisional ballot upon attesting to her eligibility. This Court should grant review of this case in order to correct the Court of Appeals' holding that brings Texas law into conflict with federal law. *See infra* § II.

ARGUMENT

I. The Court of Appeals Improperly Criminalized the Act of Casting a Provisional Ballot When a Citizen Subjectively (But Incorrectly) Believes That He or She Is Eligible to Vote.

Section 64.012 of the Texas Election Code (the "Illegal Voting Statute" or "Section 64.012") provides:

> (a) A person commits an offense if the person: (1) votes or attempts to vote in an election in which the person knows the person is not eligible to vote […].
>
> (b) An offense under this section is a felony of the second degree unless the person is convicted of an attempt. In that case, the offense is a state jail felony.

Tex. Elec. Code §§ 64.012(a)-(b) .

The Court of Appeals adopted an untenable interpretation of this statute, reasoning that any individual who subjectively—but incorrectly—believes that he or she is eligible to vote can be convicted of a second-degree felony when that individual marks a provisional ballot. *See Mason v. State,* 598 S.W.3d 755, 770 (Tex. App.—Fort Worth 2020, pet. filed) (the "Opinion" or "Op."). For individuals

with questions regarding their eligibility to vote, submitting a provisional ballot in Texas is hardly worth the risk based on the Court of Appeals' Opinion. If this Court leaves the Opinion below undisturbed, Texas will continue to criminalize the use of provisional ballots by citizens who incorrectly believe that they are eligible to vote—an action that will have a chilling effect on voter participation across Texas.

A. The Court of Appeals incorrectly characterized rejected provisional ballots as "votes" within the meaning of Texas Election Code Section 64.012.

The Court of Appeals erred by construing Ms. Mason's submission of an uncounted provisional ballot as a "vote" under Texas law. The Opinion states 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 the fact that Section 64.012 of the Texas Election Code 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 highly relevant in determining what it means to "vote." But the Court of Appeals nonetheless skipped past the difference between these separate crimes. Phrased another way, the Court of Appeals failed to appreciate 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.[1] The Court of Appeals' contrary interpretation improperly read the "attempt" crime 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.

From a policy perspective, it is unconscionable to charge someone with a second-degree felony for submitting a ballot that would only be counted if she were eligible to vote, when she mistakenly believed that she was eligible to vote. The criminalization of that act undercuts the entire purpose of provisional voting, and it effectively discourages anyone with any uncertainty about his or her voting status from going to the polls at all.

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[1] Ms. Mason was never charged with attempting to vote illegally because she could not have been convicted of the 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 below, 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 requirement of attempt crimes and the statutory knowledge requirement discussed below.

B. The Court of Appeals disregarded the "knowing" *mens rea* requirement in Texas Election Code § 64.012(a), and failed to interpret the "knowing" *mens rea* requirement strictly, consistent with *DeLay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014).

This Court should also grant Ms. Mason's Petition for Discretionary Review because the Court of Appeals "appears to have misconstrued" Section 64.012(a) of the Texas Election Code in a way that "conflicts with the applicable decisions of the Court of Criminal Appeals"—specifically, with *DeLay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014). Tex. R. App. P. 66.3(c), (d). Thus, this Court's review is necessary to clarify the precedential effect of the Court's decision in *DeLay*, in particular, with respect to the interpretation and application of the "knowing" *mens rea* requirement.

A statutory requirement that an individual must "knowingly" undertake an action in order to be found guilty of an offense under the Election Code likewise 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 specified circumstance rendering the conduct unlawful. *DeLay v. State*, 465 S.W.3d 232, 249-250 (Tex. Crim. App. 2014). The State bears the burden of proving the culpable mental state required by a criminal statute, 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).

In *DeLay*, this Court interpreted the "knowing" *mens rea* requirement in an Election Code offense (Section 253.003(a)) that made it a third-degree felony to "knowingly make a political contribution in violation of [the Election Code]." *DeLay*, 465 S.W.3d at 242. 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 to certain Texas candidates with tainted funds arising from a violation of Section 253.003(a) of the Election Code." *DeLay*, 465 S.W.3d at 234-235. Mr. DeLay had "steadfastly insisted, both at trial and on appeal, that the funds were not tainted" because "the circumstances under which the funds were generated did not violate any felony provision of the Election Code." *DeLay*, 465 S.W.3d at 235.

In analyzing the "knowing" *mens rea* requirement in Section 253.003(a), this Court in *DeLay* first held that "the Legislature intended [in enacting Section 253.003(a)] that conviction should depend upon proof of ***more than*** just the bare conduct ("make a political contribution"), which (while it may be subject to state regulation, within First Amendment boundaries) ***is not intrinsically condemnable***." *DeLay*, 465 S.W.3d at 250 (emphases added). The Court then reasoned that 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). Because this Court concluded that "nothing in the record shows that anyone associated with the contributing corporations ***actually realized*** that to make a political contribution under these circumstances would ***in fact*** violate Section 253.003(a) (or any other provision) of the Texas Election Code," the State had failed to prove sufficient facts to support Mr. DeLay's conviction. *DeLay*, 465 S.W.3d at 252 (emphases added).

The Court of Appeals departed from this Court's precedent in *DeLay*, and specifically departed from *DeLay*'s interpretation and application of a "knowing" *mens rea* requirement found in the Election Code's criminal statutes. *See* Op. 768. The Court of Appeals included a cursory discussion of *DeLay* (in a single footnote), attempting to distinguish *DeLay* on the basis that *DeLay* found that there was statutory ambiguity in Section 253.003(a) as to "whether the word 'knowingly' . . . modified merely the making of a campaign contribution, or whether it also modified the statutory circumstance that the contribution was made 'in violation of' the Election Code." *DeLay*, 465 S.W.3d at 250; Op. 769 n.12. Because *DeLay* dealt with a statute that had latent ambiguity with respect to which phrase the word "knowingly" modified, and in contrast the Court of Appeals determined here that

Section 64.012(a)'s mental culpability requirement ("knows") was not ambiguous as to which phrase the word "knows" modified (*i.e.*, "not eligible to vote"), it failed to apply *DeLay* on that basis alone.

The Court of Appeals, however, focused on the wrong portion of this Court's holding in *DeLay*. After making the above findings discussed by the Court of Appeals, this Court in *DeLay* still had to interpret what it means to "knowingly . . . violat[e] the Election Code"—much like the Court of Appeals had to determine what it means for a person to "know[] the person is not eligible to vote." *DeLay*, 465 S.W.3d at 252; Op. 768. The Court of Appeals failed to interpret ***how*** Section 64.012(a)'s mental culpability requirement ("knows") modifies "the particular circumstance that renders otherwise innocuous conduct criminal" (*i.e.*, "not eligible to vote"), in accordance with this Court's precedent in *DeLay*.

In *DeLay*, this Court held that evidence that the contributing corporations "actually realized" that the conduct would "in fact" violate the Election Code was required to support a conviction under a criminal statute that required that the actor "knowingly . . . violat[e] [the Election Code]." *DeLay*, 465 S.W.3d at 250, 252. It is *this* holding that controls Ms. Mason's case: *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 when voting);

<u>and</u>

(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. In contrast, here, the Court of Appeals failed to apply the *mens rea* "knowingly" to the words "not eligible to vote"—a circumstance defined in Section 11.001 of the Election Code—in a manner consistent with the precedent in *DeLay*. *See id.* Applied here, as explained above, *DeLay* requires that Section 64.012(a) be interpreted to require the State to prove that a person "actually realize[]" that he or she is "in fact" "not eligible to vote." *See id.*

Two further points support this interpretation. First, like the criminal statute in *DeLay* (Section 253.003(a)), Section 64.012(a) 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." Rather, it is the ***circumstances of the conduct*** 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 Section 64.012(a), 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.

Second, in both *DeLay* and this case, the State argued that ignorance of the law is no defense. *See DeLay*, State's Post-Submission Supplemental Letter Brief; *see* Op. 768-69. This 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 both Sections 253.003(a) and 64.012(a), 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 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 decisions from other Courts of Appeals. Op. 768-70. To the extent there is any confusion

regarding the significance of this Court's precedent in *DeLay* in evaluating criminal statutes found in the Election Code, this Court should grant review.

C. Texas's Statutory Rule of Lenity requires that any ambiguity be construed in favor of Ms. Mason.

Under Texas's Statutory Rule of Lenity, "a statute or rule that creates or defines a criminal offense or penalty shall be construed in favor of the actor if any part of the statute or rule is ambiguous on its face or as applied to the case, including: (1) an element of offense; or (2) the penalty to be imposed." Tex. Gov't Code § 311.035; *State v. Johnson*, 219 S.W.3d 386, 388 (Tex. Crim. App. 2007). A criminal statute is ambiguous when it is subject to more than one reasonable interpretation and the intent of the legislature cannot be determined. *Cuellar v. State*, 70 S.W.3d at 822 (Tex. Crim. App. 2002). Criminal statutes outside the Penal Code, including those found in the Election Code, must be construed strictly, with any doubt resolved in favor of the accused. *Johnson*, 219 S.W.3d at 388; *DeLay*, 465 S.W.3d at 251.

As noted above, *DeLay*'s treatment of the "knowing" *mens rea* requirement controls, and should leave no ambiguity as to the interpretation of Section 64.012(a) of the Election Code. 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, 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 with *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 DeLay*, 465 S.W.3d at 251.

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. As discussed above, Ms. Mason has established that it is at least plausible that the act of marking a rejected provisional ballot does not constitute "voting" under the Texas Election Code. Thus, the Panel should have applied the Rule of Lenity and vacated Ms. Mason's conviction on the ground that casting an uncounted provisional ballot does not constitute "voting" in an election.

II. The Interpretation of the Illegal Voting Statute Offered by the Court of Appeals Directly Conflicts with HAVA.

HAVA provides that an "individual shall be permitted to cast a provisional ballot" if his or her name "does not appear on the official list of eligible voters for the polling place" but yet the "individual declares that [he or she is] a registered

voter in the jurisdiction." 52 U.S.C. § 21082(a). 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.* § 21082(a)(2). The plain import of HAVA is that any "person who ***claims*** eligibility to vote"—regardless of whether that claim is objectively true or false—"is entitled . . . to cast a provisional ballot." *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 570 (6th Cir. 2004) (per curiam) (emphasis added). The duty of election officials to allow a citizen to mark a provisional ballot upon a claim of eligibility is "mandatory," *id.* at 572-73, and thus courts have not hesitated to find that state laws are preempted by HAVA when, as here, they purport to interfere with the exercise of that right. *See Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1269 (W.D. Wash. 2006); *Colorado Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at *12 (Colo. Dist. Ct. Oct. 18, 2004).

"The ability to cast a provisional ballot is often referred to as 'fail safe voting' in that it provides an opportunity for the voter to cast a provisional ballot without being turned away from voting, and 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), https://bit.ly/3781z97. A

provisional ballot only becomes a vote if an authorized state election official verifies the individual's eligibility to vote.

According to the Court of Appeals, marking a provisional ballot is sufficient to satisfy the "vote" element, and "the State does not have to prove that the defendant subjectively knew" that she was ineligible to vote in order to secure a conviction. Op. 768. In fact, according to the Court of Appeals, an individual's lack of knowledge that "she [is] ineligible to vote [is] irrelevant to her prosecution under 64.012(a)(1)." *Id.* at 770. With those principles in mind, consider an individual—like Ms. Mason—who completes a written affirmation and then marks a provisional ballot. Suppose further that the citizen took both actions with a subjective belief that she was eligible to vote but with knowledge of facts that—unbeknownst to her—rendered her ineligible to vote. This voter's actions were expressly permitted by HAVA, which requires that this individual be permitted to mark a provisional ballot upon attesting to her eligibility. But, according to the Court of Appeals, these same actions constitute a felony in Texas.

That cannot be the law. 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) (state law cannot bar activity "that is permitted by federal law"); *Lord v. Local Union No. 2088, Int'l Bhd. of Elec. Workers, AFL-CIO*, 646 F.2d 1057, 1061 (5th Cir. 1981)

(similar); *see also Sabine Consol., Inc. v. State*, 806 S.W.2d 553, 559 (Tex. Crim. App. 1991) (criminal laws preempted when "compliance with state and federal law is an impossibility").[2] If the Court of Appeals' interpretation of the Illegal Voting Statute is correct, then that law is preempted because it criminalizes conduct that HAVA protects—*i.e.*, the marking of a provisional ballot by an individual who has affirmed his or her belief that he or she is eligible to vote, when such belief is subjectively held but is objectively incorrect.

The Opinion below 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. By choosing to guarantee the availability of a provisional ballot to "people whose eligibility is in doubt," Congress intended that citizens would engage in such provisional balloting, and thus criminalizing such conduct would stand as an

[2] 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. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14 (2013). *Amici* refers to cases decided under the Supremacy Clause merely because Elections Clause cases are relatively scarce. For the reasons explained above, the preemption jurisprudence developed in the Supremacy Clause context applies even more forcefully in the Elections Clause context. *See id.*

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 either the Texas or in the federal system, 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."). 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 fact that HAVA leaves open the door to prosecution when an

individual signs an affidavit and marks a provisional ballot while subjectively knowing she is ineligible to vote has no bearing on this case, in which such scienter is purportedly irrelevant and was not proven.

CONCLUSION AND PRAYER

The League of Women Voters of Texas and The Texas State Conference of The National Association for the Advancement of Colored People pray that this Court grant discretionary review, vacate the Opinion, and order a judgment of acquittal.

Dated: December 16, 2020

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CERTIFICATE OF SERVICE

I certify that, on December 16, 2020, 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:

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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 **4,407** 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*.

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