No. 02-18-00138-CR

COURT OF APPEALS
SECOND JUDICIAL DISTRICT OF TEXAS
FORT WORTH, TEXAS

CRYSTAL LA VON MASON-HOBBS,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

On appeal from the 432nd Judicial District Court of
Tarrant County, Texas
Cause No. 1485710D
Judge Ruben Gonzalez, Jr., Presiding

BRIEF OF AMICUS CURIAE THE LEAGUE OF WOMEN VOTERS OF TEXAS IN SUPPORT OF APPELLANT

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Amicus Curiae adopts the list of parties and counsel in Appellant's Brief, as supplemented by additional counsel in Appellant's Reply Brief. Tex. R. App. P. 9.7. Amicus further supplements as follows:

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STATEMENT OF INTEREST OF AMICUS 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 League of Women Voters of Texas is interested in the questions presented because this case involves important issues affecting participation in the voting process in Texas. The outcome of this case will also affect the state and national discourse on the fundamental right to vote and the use of provisional ballots under the federal Help America Vote Act. *See* Appendix (sample news coverage about case).

No fee has been paid or will be paid by the League of Women Voters of Texas or by any of the parties for the preparation of this brief. Tex. R. App. P. 11. Amicus counsel are providing their services pro bono.

STATEMENT OF THE CASE

Amicus adopts Appellant's Statement of the Case by reference. Tex. R. App. P. 9.7.

ISSUES PRESENTED

Amicus adopts Appellant's Issues Presented by reference. Tex. R. App. P. 9.7.

STATEMENT OF FACTS

Amicus adopts Appellant's Statement of Facts by reference. Tex. R. App. P. 9.7.

SUMMARY OF THE ARGUMENT

Ms. Mason-Hobbs's conviction for illegal voting cannot be sustained because the State failed to show that the term "vote" found in Texas's Illegal Voting Statute stretches to encompass rejected provisional ballots. Under Texas's Illegal Voting Statute, it is a second degree felony to "vote[] . . . in an election in which the person knows the person is not eligible to vote." Tex. Elec. Code § 64.012(a). Neither the Texas Election Code nor the Texas Penal Code defines "vote," and the State seeks to fill this silence with an overbroad definition that would include a rejected provisional ballot. However, a narrower definition that does not include rejected provisional ballots effectuates the presumption of statutory consistency, which requires that statutory terms "be interpreted consistently in every part of an act." *Ex parte Keller*, 173 S.W.3d 492, 498 n.18 (Tex. Crim. App. 2005). Here, the Texas Election Code consistently distinguishes between counted and uncounted ballots, and only a counted ballot constitutes a "vote." *See, e.g.*, Tex. Elec. Code § 65.010 (uncounted ballots are not called "votes," but are instead called "ballots not counted"); Tex. Elec. Code § 65.054(c)-(d) ("If a *provisional ballot is accepted*, the board shall enter the *voter's* name on a list of *voters* whose provisional ballots are

accepted . . . If a provisional ballot is rejected, the board shall indicate the rejection by marking 'rejected' on the envelope containing the provisional ballot.") (emphasis added); Tex. Elec. Code § 65.056 (which, in describing the disposition of rejected provisional ballots, never provides that such ballots are "votes").

Furthermore, the State's expansive interpretation would create constitutional issues by conflicting with the federal Help America Vote Act (HAVA) — Congress's express legislation mandating how states administer provisional ballots. HAVA requires that all States allow any individual who believes he or she is eligible to vote to cast a provisional ballot, even if the individual is not on the official list of eligible voters or if an election official asserts that the individual is ineligible. 52 U.S.C. § 21082(a). The only consequence that exists under HAVA for an individual who casts a provisional ballot but turns out to be ineligible is that her provisional ballot will not be counted. *Id.*; *see also Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004). HAVA thus pre-empts the harsh criminal penalties the State would impose under Texas's Illegal Voting Statute on an individual in Ms. Mason-Hobbs's situation.

As a result, the State's interpretation would violate the constitutional mandate under the Elections Clause that empowers Congress to alter or pre-empt state regulations concerning federal elections. The Elections Clause of the U.S. Constitution provides that "Congress may at any time by Law make or alter" a state's

federal election regulations. U.S. Const. art. I, § 4, cl. 1. This congressional power over election regulations "is paramount and may be exercised at any time" and, unlike the Supremacy Clause, operates without a presumption against pre-emption. *Arizona v. Inter Tribal Council of Arizona, Inc*., 570 U.S. 1, 8-9, 13-15 (2013) (citation omitted). With HAVA, Congress demonstrated its intent to ensure that no one is turned away from the polls if the individual believes he or she is eligible to vote, regardless of his or her appearance on the voter rolls. *See* H.R. Rep. No. 107-329, at 38 (2001). The State's expansive interpretation of "voting" criminalizes the population HAVA intended to empower and undercuts Congress's constitutional mandate regulating federal elections.

In order to avoid that unconstitutional outcome, this Court should reject the State's proffered definition of "vote" in accordance with the fundamental canon of constitutional avoidance. When faced with an ambiguous statute that is susceptible to more than one interpretation, a court is obliged to construe the statute so that it is constitutional. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). Even if this Court deems the State's proffered definition of "vote" to be reasonable, it should adopt the narrower construction of "vote" to avoid setting the statute on a collision course with the Elections Clause and HAVA.

Moreover, Texas's Statutory Rule of Lenity requires that the Court resolve statutory ambiguity in favor of Ms. Mason-Hobbs. When a criminal statute outside

the Penal Code is ambiguous, that doubt should be resolved in favor of the defendant. Tex. Gov't Code § 311.035; *Cuellar v. State*, 70 S.W.3d 815, 822 (Tex. Crim. App. 2002). The ambiguity of the terms "vote" and "supervision," as used in the Texas Election Code, as well as the interpretation of the *mens rea* requirement under Texas's Illegal Voting Statute, require that they be construed in favor of Ms. Mason-Hobbs. Rather than accept interpretations of these arguably ambiguous statutes which criminalize her actions, this Court should adhere to the Rule of Lenity and reverse Ms. Mason-Hobbs's conviction.

Finally, criminalization of Ms. Mason-Hobbs's conduct will depress voter participation and chill the exercise of the fundamental right to vote. Under HAVA, the right to vote is not conditioned on infallibility. In fact, the provisional ballot scheme mandates flexibility, not rigidity. It allows an individual who believes she is an eligible voter, under a reasonable interpretation of Texas law, to exercise that right. If an individual who believes she has, and in fact does have, a right to vote learns she could be sent to prison for casting even a provisional ballot, that individual may then be scared away from the ballot box entirely. The State's successful prosecution of Ms. Mason-Hobbs shuts the door on the right of honest, but uncertain, citizens to participate in our democratic process.

For all of these reasons and those in Appellant's Brief and Reply Brief, this Court should reverse the judgment of conviction and order a judgment of acquittal.

ARGUMENT

I. The Evidence Is Legally Insufficient to Sustain Ms. Mason-Hobbs's Conviction for Illegal Voting.[1]

Due process requires that no person suffer the onus of a criminal conviction except upon sufficient proof, beyond a reasonable doubt, of every element of the criminal offense necessary to constitute the crime with which he or she is charged. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). The finder of fact is not permitted to reach conclusions based on mere speculation or factually unsupported inferences or presumptions. *Hooper v. State*, 214 S.W.3d 9, 15-16 (Tex. Crim. App. 2007). If, given all the evidence, a rational fact finder would necessarily entertain a reasonable doubt as to the defendant's guilt, the due process guarantee requires a reviewing court to reverse and order a judgment of acquittal. *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003). Under the Due Process Clause of the U.S. Constitution, U.S. Const. amend. XIV(1), a reviewing court must reverse a state conviction if the state statute, properly interpreted, does not prohibit the conduct at issue. *Fiore v. White*, 531 U.S. 225, 228-29 (2001).

[1] Amicus adopts Appellant's arguments concerning the applicable standards of review and preservation of error. Tex. R. App. P. 9.7. The legal sufficiency standard necessarily involves issues of statutory construction that present questions of law reviewable *de novo*. *Tex. DOT v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002); *State v. Haltom Med. Inv'rs, L.L.C.*, 153 S.W.3d 664, 668 (Tex. App.—Fort Worth 2004, no pet.).

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

> (a) A person commits an offense if the person: (1) *votes* or attempts to vote[2] 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.

See Tex. Elec. Code § 64.012 (emphasis and footnote added). Here, Ms. Mason-Hobbs's conviction must be reversed because the State failed to demonstrate that Ms. Mason-Hobbs's act of filling out and submitting a rejected provisional ballot while on federal supervised release met the essential elements of Texas's Illegal Voting Statute beyond a reasonable doubt. *See Jackson*, 443 U.S. at 318-19; *Byrd*, 336 S.W.3d at 246. The Illegal Voting Statute cannot be read to criminalize Ms. Mason-Hobbs's filling out of a rejected provisional ballot, where the State offered insufficient proof that (1) rejected provisional ballots are "votes" within the meaning of Texas's Illegal Voting Statute; (2) that Ms. Mason-Hobbs was under "supervision" as that term is defined in Texas Election Code Section 11.002; and (3) that Ms. Mason-Hobbs had "voted" intentionally and actually knew that her choice to fill out a provisional ballot would in fact violate Section 64.012. Convicting Ms. Mason-Hobbs for conduct that is not punishable under Section 64.012, properly

[2] Ms. Mason-Hobbs was not convicted of the offense of an "attempt to vote" within the meaning of Section 64.012(1) of the Texas Election Code.

interpreted, runs afoul of the Due Process Clause and requires reversal and acquittal. *See Fiore*, 531 U.S. at 228-29; *Swearingen*, 101 S.W.3d at 95.

A. The State Has Not Shown that Rejected Provisional Ballots Are "Votes" Within the Meaning of Texas Election Code Section 64.012(a).

Texas's Illegal Voting Statute provides that it is a second degree felony to "*vote*[] . . . in an election in which the person knows the person is not eligible to vote." *See* Tex. Elec. Code § 64.012(a) (emphasis added).

The State has failed to show that Ms. Mason-Hobbs "voted" within the meaning of Section 64.012(a) by filling out and submitting a rejected provisional ballot.[3] The term "vote" is not defined in either the Texas Election Code (or the Texas Penal Code), and the record is bare of proof that rejected provisional ballots meet the essential element of "voting" within the meaning of the offense defined in Section 64.012(a).

The State asserts that it meets this element based on an overbroad dictionary definition of the word "vote" – *in essence*, that any action that "express[es] one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication" when ineligible, is a second degree felony. *See* Appellee's Brief at 22 (citing *Prichard v. State*, 533 S.W.3d 315, 319-20 (Tex. Crim. App. 2017);

[3] The State does not dispute that Ms. Mason-Hobbs filled out only a provisional ballot and that this provisional ballot was not counted. RR 2:38; RR 3: S-X 6 (Notice Documents).

Black's Law Dictionary (10th ed. 2014)). But, the State fails to "consider the term's usage in other statutes, court decisions, and similar authorities" in confirming whether its proposed definition of "vote" is consistent with the Texas Election Code's other provisions. *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 35 (Tex. 2017). The State also relies on inapposite fact witness testimony for its interpretation of Texas's Illegal Voting Statute, which is not relevant to this Court's review. *See Tha Dang Nguyen v. State*, 359 S.W.3d 636, 641 (Tex. Crim. App. 2012) (statutory interpretation is a question of law, reviewed de novo).

The State's definition would indiscriminately criminalize a wide range of conduct if adopted, and should be rejected for three main reasons:

(1) the State's interpretation of the ambiguous term "vote" is inconsistent with other provisions of the Texas Election Code that distinguish "votes" from rejected provisional ballots;

(2) the State's interpretation gives rise to a constitutional violation because it conflicts with HAVA in violation of the Elections Clause of the U.S. Constitution, and principles of constitutional avoidance dictate that this Court must interpret Texas's Illegal Voting Statute to avoid this State-created constitutional violation;

(3) in accordance with Texas Government Code Section 311.035 ("**Texas's Statutory Rule of Lenity**"), any ambiguity in the definition of "voting" in Texas's Illegal Voting Statute must be construed in favor of Ms. Mason-Hobbs.

Accordingly, Ms. Mason-Hobbs's conviction cannot be sustained because her conduct did not meet an essential element of the offense – that Ms. Mason-Hobbs "voted" within the meaning of Texas's Illegal Voting Statute. Moreover, the State's interpretation of Texas's Illegal Voting Statute would criminalize conduct protected by federal law. Properly interpreted, Ms. Mason-Hobbs's act of casting a rejected provisional ballot is not conduct punishable under Section 64.012.

1. The State's Broad Construction of the Term "Vote" in Texas's Illegal Voting Statute to Include Rejected Provisional Ballots Is Inconsistent With Other Texas Election Code Provisions.

"Under the normal rules of statutory construction, there is a presumption of statutory consistency," and a court should presume that "identical words used in different parts of the same act are intended to have the same meaning." *Keller*, 173 S.W.3d at 498. In ascertaining a term's meaning, courts should not give an undefined statutory term different meanings in different provisions of a code or an act, as "[s]tatutory terms should be interpreted consistently in every part of an act." *Id.* at 498 n.18. Rather, "[w]ords that can have more than one meaning are given content…by their surroundings." *Inter Tribal*, 570 U.S. at 10-13; *accord Tex. State*

Bd. of Exam'rs, 511 S.W.3d at 35 (instructing courts to look to a term's usage in "similar authorities").

In *Keller*, the Court of Criminal Appeals applied the principle of statutory consistency. The Court faced the question of whether inmate Keller was eligible for mandatory supervision (after taking into account "street-time credit") or if he was ineligible because he was "*previously convicted of*" one of several listed offenses. *Keller*, 173 S.W.3d at 493-94. The Court reasoned that "not all inmates are eligible for street-time credit" under Texas Government Code Section 508.283(c), which provides that "an inmate is ineligible for mandatory supervision if he . . . 'has been *previously convicted of*'" an offense listed under Section 508.149(a). *Id.* at 494 (emphasis added). In construing the phrase "previously convicted of" in Section 508.283(c), the Court confronted two competing interpretations: the State argued that the term "previously convicted" meant "convicted before the date of parole revocation" (thus disqualifying Mr. Keller), but in Section 508.149(a) (the statute listing ineligible offenses) the phrase "previously convicted of" was defined as having "been convicted […] *before committing the holding offense*." *Id.* at 497 (emphasis added). The Court of Criminal Appeals applied the "presumption of statutory consistency," and reasoned that a "phrase that is used within a single statute generally bears the same meaning throughout that statute." *Id*. at 498. Accordingly, the Court concluded that the phrase "previously convicted of" in Section 508.149(a)

used to describe those who are ineligible for release on mandatory supervision, must be interpreted consistently with the same phrase in Section 508.283(c) in which it is used to describe those who are ineligible for "street time." *Id*. at 497-98.

Similarly, in *Inter Tribal*, the United States Supreme Court had to choose between two reasonable interpretations of the National Voter Registration Act (NVRA)'s mandate that States "accept and use" the federal voter registration form, in determining whether Arizona's additional requirement that a registrant submit documentary proof of citizenship was pre-empted by federal law. 570 U.S. at 10. The Court observed that the mandate "might mean that a State must accept the Federal Form as a complete and sufficient registration application; or it might mean [as Arizona argued] that the State is merely required to receive the form willingly and use it *somehow* in its voter registration process." *Id*. at 9-10. But the Court wrote that Arizona's proposed interpretation "seem[ed] out of place," and "was difficult to reconcile with neighboring provisions of the NVRA," including the provision mandating that States ensure that an eligible applicant is registered to vote "if the *valid voter registration form* of the applicant is postmarked" by the specified date. *Id*. at 11. Thus, the Court struck down the Arizona election law, rejecting Arizona's argument that it could refuse to accept a completed Federal Form if the applicant additionally fails to submit documentary proof of citizenship as required

by State law, because "it is improbable that the statute envisions a completed copy of the form . . . as being any less than valid." *Id*. at 12.

Here, the Texas Election Code consistently confirms that only *counted* ballots constitute "votes" within the meaning of the code. *See*, *e.g.*, Tex. Elec. Code § 2.001 ("[T]o be elected to a public office, a candidate must *receive more votes* than any other candidate for the office."); Tex. Elec. Code § 2.002(a) ("[I]f two or more candidates for the same office tie for the number of *votes required to be elected*, a second election to fill the office shall be held."); Tex. Elec. Code § 2.021 ("If no candidate for a particular office receives the *votes necessary to be elected* in an election requiring a majority vote, a runoff election for that office is required") (emphasis added). Just as the Texas Court of Criminal Appeals held in *Keller* that it must interpret the phrase "previously convicted of" consistently within the Texas Government Code's related provisions, so, too, must this Court interpret "vote" in Texas's Illegal Voting Statute to mean counted votes, and not rejected provisional ballots that are not counted. *See Keller*, 173 S.W.3d at 497-98; Tex. Elec. Code § 64.012(a).

And, like the neighboring provisions of the NVRA which gave context to the phrase "accept and use" in *Inter Tribal*, the neighboring provisions of the Texas Election Code pertaining to "Ballots Not Counted" distinguish rejected provisional ballots from accepted provisional ballots submitted by "voters." *See* Tex. Elec. Code

§ 65.010 (uncounted ballots are not called "votes," but are instead called "ballots not counted"); *see also* Tex. Elec. Code § 65.054(c)-(d) ("If a *provisional ballot is accepted*, the board shall enter the *voter's* name on a list of *voters* whose provisional ballots are accepted . . . If a provisional ballot is rejected, the board shall indicate the rejection by marking 'rejected' on the envelope containing the provisional ballot.") (emphasis added). In fact, the Texas Election Code never equates rejected provisional ballots with "votes" at all. *See, e.g.*, Tex. Elec. Code § 65.056 (which, in describing the disposition of rejected provisional ballots, never provides that such ballots are "votes").

The State's proposed overbroad definition of "voting" that includes rejected provisional ballots is thus contrary to the use of the term in the Texas Election Code. The principle of statutory consistency confirms that an uncounted provisional ballot falls outside the meaning of "vote" under Texas's Illegal Voting Statute.[4]

[4] The Texas Election Code's distinction between "votes" and "Ballots Not Counted" draws parallels to some other states' election codes, including Georgia and Maryland. The Georgia Election Code distinguishes "voting [a] provisional ballot" and "casting [a] provisional ballot." *See* Ga. Code Ann. §§ 21-2-419(c)(2)–(3). Specifically, the code provides instructions to voting registrars if the "registrars determine . . . that the person **voting** the provisional ballot timely registered and was eligible and entitled to vote in the primary or election. . ." *See id.* at § 21-2-419(c)(2). The code then provides separate instructions to registrars in the case that "the registrars determine that the person **casting** the provisional ballot did not timely register to vote or was not eligible or entitled to vote in such primary or election. . ." *Id.* at §§ 21-2-419(c)(3). Maryland likewise distinguishes "voting" from casting a rejected provisional ballot. *See* Md. Code Ann. Elec. Law § 1-101(uu). Under the Maryland code, "'[v]ote' means to cast a ballot that is **counted**." *Id*. Moreover, Maryland defines "provisional ballot" as "a ballot that is cast by an individual but not counted until the individual's qualifications to vote have been confirmed by the local board." *Id.* at § 1-101(ll). This definition makes clear that an individual does not "vote" with a provisional ballot until the local board confirms her eligibility. *See id.*

2. Texas's Illegal Voting Statute Must Be Construed to Avoid a Constitutional Violation.

By including rejected provisional ballots within the definition of "vote" for purposes of Texas's Illegal Voting Statute, the State criminalizes individuals who follow the procedures of HAVA, 52 U.S.C. § 21082, which Congress enacted to ensure that anyone who believes he or she is eligible to vote is given a provisional ballot and not turned away at the polls (even if the belief is incorrect). *See* H.R. Rep. No. 107-329, at 38 (2001); *see Sandusky*, 387 F.3d at 574. If adopted, the State's definition would conflict with federal law as set forth in HAVA, in violation of the Elections Clause of the U.S. Constitution. *See* U.S. Const. art. I, § 4, cl. 1; *Inter Tribal*, 570 U.S. at 13-15 (a state's role in regulating congressional elections "has always existed subject to the express qualification that it terminates according to federal law"). Thus, to avoid a constitutional conflict, this Court should construe Section 64.012's definition of an illegal "vote" in a manner consistent with HAVA, to exclude provisional ballots cast by individuals believing they are eligible to vote that are rejected. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562 (2012), *quoting Parsons v. Bedford*, 3 Pet. 433, 448-49 (1830) ("No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.").

(i) The State's Interpretation of Texas's Illegal Voting Statute Conflicts With HAVA in Violation of the Elections Clause of the U.S. Constitution.

(a) By Enacting HAVA, Congress Expressly Legislated How States Should Administer Provisional Ballots and Determine Whether Those Ballots Are Accepted or Rejected.

Congress enacted HAVA in response to the serious problems that occurred during the 2000 presidential election. Congress intended HAVA, *inter alia*, to "establish minimum election administration standards for States and units of local government with responsibilities for Federal Elections." Pub. L. No. 107–252, Oct. 29, 2002, 116 Stat 1666 (codified at 52 U.S.C. § 20901 *et seq*.).

Among other things, HAVA mandates that all States permit any individual who believes he or she is eligible to vote to cast a provisional ballot, if the individual is not on the official list of eligible voters for the polling place or if an election official asserts that the individual is not eligible to vote. 52 U.S.C. § 21082(a). In order to cast a provisional ballot, HAVA requires an affirmation from the individual that he or she "is a registered voter in the jurisdiction in which the individual desires to vote," and that the individual "is eligible to vote in that election." *Id.* The right to cast a provisional ballot under HAVA is "unambiguous" and "couched in mandatory" terms. *Sandusky*, 387 F.3d at 569. Thereafter, the election official transmits the provisional ballot to an appropriate State or local election official, who will ultimately determine whether the individual is eligible to vote under State law.

See 52 U.S.C. § 21082(a)(3).[5] The individual who issued the provisional ballot can then later verify whether the provisional ballot was counted, and if the ballot was "*not counted*," the reasons why the ballot was not counted. *See* 52 U.S.C. § 21082(a)(4)-(5) (emphasis added).

HAVA expressly contemplates, therefore, that some individuals who fill out and submit provisional ballots will turn out to be ineligible, despite the requirement that individuals affirm that they believe that they are eligible. *See id.* This is consistent with Congress's object and purpose in enacting HAVA's system of provisional balloting: to address the "significant problem voters experience" when "arriv[ing] at the polling place believing that they are eligible to vote, and then [being] turned away because the election workers cannot find their names on the list of qualified voters." *See* H.R. Rep. No. 107-329, at 38 (2001). Indeed, Congress specifically contemplated that provisional voting as provided by HAVA was intended to limit the States' ability to restrict individuals who believe they are eligible from casting a provisional ballot – the exact situation that Ms. Mason-Hobbs faced:

[5] "According to the 2016 Election Administration and Voting Survey compiled by the U.S. Election Assistance Commission, at least 2.5 million provisional ballots were issued in the 2016 federal election; 1.7 million were counted, at least in part, and 600,000 were rejected. (About 100,000 were statistically unaccounted for.) These 1.7 million provisional ballots accounted for 1.2% of all votes counted in the 2016 election. Conversely, the 600,000 rejected provisional ballots amounted to 0.4% of ballots cast." Massachusetts Institute of Technology Election Data + Science Lab, *Provisional Ballots*, https://electionlab.mit.edu/research/provisional-ballots.

> In-precinct provisional voting limits the ability of states to impose extra hurdles that may have the effect of deterring the use of provisional voting [and] […] [v]oter participation is easier and more efficient, as poll workers can provide an option to voters who may be angry or frustrated by their absence from the registration list. These often ill-trained and low-paid temporary workers do not have to research or resolve cases on the spot, while other voters impatiently wait in line. Nor are more senior election officials tied down in resolving such questions during Election Day.

See H.R. Rep. No. 107-329, at 38-39. Thus, HAVA "is quintessentially about being able to *cast* a provisional ballot" because "[n]o one should be 'turned away' from the polls." *Sandusky*, 387 F.3d at 576. Likewise, under HAVA, the only repercussion for an individual who casts a provisional ballot incorrectly believing that she is eligible is that her provisional ballot "*will then not be counted*." *Id.* (emphasis added); *see* 52 U.S.C. § 21082(a)(4). HAVA does not contemplate additional consequences or punishment for individuals who submit provisional ballots incorrectly believing they are eligible. Thus, the State's interpretation of Texas's Illegal Voting Statute would impose draconian felony penalties on individuals who believe they are eligible and cast provisional ballots, but are found ineligible to vote – an outcome that, as discussed below, would be pre-empted by federal law and would run afoul of the Elections Clause of the U.S. Constitution.

(b) Under the Elections Clause, Texas Cannot Punish Individuals Who Believe Incorrectly They Are Eligible to Vote and Follow HAVA's Procedures for Provisional Ballots.

The Elections Clause of the U.S. Constitution provides that "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations*, except as to the Places of chusing [sic] Senators." U.S. Const. art. I, § 4, cl. 1 (emphasis added). The Elections Clause empowers Congress to alter or altogether supplant state regulations regarding federal elections. *Inter Tribal*, 570 U.S. at 8. The Elections Clause, unlike the Supremacy Clause, has no rule of construction prescribing a "presumption against pre-emption" because the Elections Clause confers on Congress the express power to alter or supplant state laws prescribing the time, place, and manner of conducting federal elections. *Inter Tribal*, 570 U.S. at 13-15. Furthermore, unlike a state's historic "police powers" at play in the Supremacy Clause context, a state's role in regulating congressional elections "has always existed subject to the express qualification that it terminates according to federal law." *Id.* at 14-15 (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001)).

In *Inter Tribal*, the Court held that the NVRA's requirement that states "accept and use" the federal voter registration form pre-empted Arizona's state law requirement that election officials "reject" the application of a prospective voter who

submits a completed federal form unaccompanied by additional documentary evidence of citizenship. 570 U.S. at 15. Justice Scalia emphasized that the Elections Clause's "grant of congressional power" was expressly contemplated by the founders in ensuring "against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *Id*. at 8-9. Thus, "the power of Congress over the 'Times, Places, and Manner' of congressional elections 'is paramount and may be exercised at any time.'" *Id.* The Court further rejected Arizona's argument that, like the Supremacy Clause, the Elections Clause requires "a presumption against pre-emption,"[6] concluding that the presumption of the validity of a state statute finds no place in Elections Clause jurisprudence, because Congress is acting with the express power to "make or alter" or "displace" state election regulations. 570 U.S. at 13-15.

Here, HAVA provides unambiguous and mandatory procedures that states are obligated to follow in allowing an individual to cast a provisional ballot when she believes she is eligible to vote, even if she is ultimately incorrect about her eligibility. *See* 52 U.S.C. § 21082; *see also Sandusky*, 387 F.3d at 569. This effectuates Congress's intent that no one should be "turned away" from the polls if she believes

[6] The Court observed that the presumption against pre-emption is a rule of construction that "the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Inter Tribal*, 570 U.S. at 13-14; *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

she is eligible to vote, but is not found on the voter rolls. *See* H.R. Rep. No. 107-329, at 38 (2001). Here, as *Inter Tribal*, in which the Court held that the NVRA's requirement that states "accept and use" the federal voter registration form pre-empted Arizona's documentary proof-of-citizenship registration requirement (which Arizona demanded, as extra verification in addition to the information provided on the federal voter registration form), the State's criminalization (under its broad interpretation of Texas's Illegal Voting Statute) of the very conduct that HAVA prescribes (casting a provisional ballot where Ms. Mason-Hobbs believed she was eligible to vote, but was ultimately incorrect)[7] risks pre-emption under the Elections Clause. *See Inter Tribal*, 570 U.S. at 15; *see* Tex. Elec. Code § 64.012(a); *see* 52 U.S.C. § 21082(a).

Likewise, under HAVA, the only negative consequence for an individual who believes she is eligible to vote and casts a provisional ballot but who (after verification) turns out to be ineligible, is that her provisional ballot will not be counted. 52 U.S.C. § 21082(a)(4). HAVA does not provide for additional consequences for or punishment of individuals who submit provisional ballots incorrectly believing they are eligible. *See id.* Just as the NVRA's requirement that

[7] Ms. Mason-Hobbs testified that she would not have cast a provisional ballot if she had known she was ineligible to vote. RR 2 126: 4-8 ("Why would I dare jeopardize losing a good job, saving my house, and leaving my kids again and missing my son from graduating high school this year as well as going to college on a football scholarship? I wouldn't dare do that, not to vote.").

states "accept and use" the federal registration form precluded Arizona from imposing additional proof-of-citizenship requirements in *Inter Tribal*, HAVA's provisions on the *manner* in which states shall administer provisional ballots in federal elections pre-empt the State's broad construction of the Illegal Voting Statute, which would impose felony convictions on individuals who, believing they are eligible to vote, follow HAVA's procedures and cast provisional ballots, but are found ineligible to vote. *See Inter Tribal*, 570 U.S. at 12; *see* 52 U.S.C. § 21082(a)(4); *see* Tex. Elec. Code § 64.012(a).

(ii) Principles of Constitutional Avoidance Dictate that This Court Reject the State's Proffered Definition of "Vote."

To avoid a constitutional conflict, this Court must therefore construe the definition of an illegal "vote" in Texas's Illegal Voting Statute in a manner consistent with HAVA – defining illegal "voting" to exclude casting a provisional ballot which is not counted, where that individual mistakenly believes he or she is eligible to vote.

No court ought, unless the terms of an act render it unavoidable, to give a construction to an act which should involve a violation, however unintentional, of the constitution. *Sebelius*, 567 U.S. at 562, *quoting Parsons*, 3 Pet. at 448-449. When a statute is ambiguous and there are multiple possible interpretations of it, a state or federal court's "plain duty" is to adopt the interpretation which will save the statute from unconstitutionality. *Blodgett*, 275 U.S. at 148; *see also Skilling v.*

United States, 561 U.S. 358, 405 (2010) ("It has long been our practice . . . before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction."); *accord Ex parte Thompson*, 442 S.W.3d 325, 339-40 (Tex. Crim. App. 2014) ("The federal constitution affords the states broad authority to narrowly construe a statute to avoid a constitutional violation. We have held that Texas courts have a duty to employ a reasonable narrowing construction for that purpose.") (internal citations omitted).

In *Skilling*, for example, the Court narrowly interpreted the "honest-services" fraud statute so that it did not violate the due process requirements of fair notice and protection against arbitrary and discriminatory prosecutions. 561 U.S. at 412. In doing so, the Court noted that previous decisions interpreting the federal statute "were not models of clarity or consistency." *Id*. at 405. Rather than find that the statute was meant to protect against an impermissibly vague array of crimes outside the core category of bribery and kickback schemes, the Court held that the statute was meant only to address that core category of crimes. *Id.* By limiting the construction of the statute, the Court was therefore able to avoid a due process violation. *Id*.

Likewise, in *Sebelius*, although the Court held that the Affordable Care Act's "individual mandate" could not be upheld under the U.S. Constitution's Commerce Clause, the Court instead upheld the individual mandate under the Tax Clause.

Sebelius, 567 U.S. at 561-63. In *Sebelius*, the Government set forth an alternative interpretation of the individual mandate for purposes of the Tax Clause, different from its proposed interpretation under the Commerce Clause. *Id*. at 561-62. Under this alternative definition, the Government argued that "[u]nder the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes." *Id*. at 562-63. The Court observed that "it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so," and reasoned that the mandate can be construed as "not a legal command to buy insurance," but "just another thing the Government taxes." *Id.* Since the doctrine of constitutional avoidance requires that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," the Court upheld the individual mandate as a "tax," rather than as an unconstitutional "regulation requiring individuals to purchase health insurance." *Id.* (citation omitted).

Here, like *Skilling*'s limiting interpretation of the "honest-services" fraud statute, and the Court's alternative interpretation of the "individual mandate" in *Sebelius*, this Court must interpret the ambiguous term "vote" in Texas's Illegal Voting Statute narrowly to exclude casting rejected provisional ballots, in order to save it from unconstitutionality. *See Skilling*, 561 U.S. at 405; *see Sebelius*, 567 U.S.

at 562-63. Just as *Sebelius* did not construe the individual mandate "as a legal command to buy insurance" in violation of the Commerce Clause, this Court should not construe the Illegal Voting Statute to impose felony convictions on individuals who, believing they are eligible to vote, follow HAVA's procedures and cast provisional ballots, but are found to be ineligible to vote. *See Sebelius*, 567 U.S. at 562-63; *see* 52 U.S.C. § 21082(a)(4).

3. Texas's Statutory Rule of Lenity Requires Any Ambiguity in Texas's Illegal Voting Statute to Be Resolved in Favor of Ms. Mason-Hobbs.

Ms. Mason-Hobbs is also entitled to a reversal of her conviction because any ambiguity in Section 64.012 must be construed in favor of Ms. Mason-Hobbs under Texas's Statutory Rule of Lenity. Tex. Gov't Code § 311.035.

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." *In re M.S.*, No. 02-11-00041-CV, 2012 WL 335864, at *3 (Tex. App. – Fort Worth Feb. 2, 2012, no pet.) (citations omitted); *Cuellar v. State*, 70 S.W.3d at 822 (Tex. Crim. App. 2002).

Criminal statutes outside the Penal Code must be construed strictly, with any doubt resolved in favor of the accused. *Johnson*, 219 S.W.3d at 388; *State v. Rhine*, 297 S.W.3d 301, 309 (Tex. Crim. App. 2009). This canon of statutory construction for criminal offenses applies with particular force to criminal statutes in the Texas Election Code, as these criminal statutes affect the fundamental right to vote. *See, e.g.*, *Delay v. State*, 465 S.W.3d 232, 249 (Tex. Crim. App. 2014).

In *State v. Cortez*, the Texas Court of Criminal Appeals found that a provision of the Texas Transportation Code penalizing driving on the shoulder was subject to two reasonable interpretations. *State v. Cortez*, 543 S.W.3d 198, 210 (Tex. Crim. App. 2018) . Mr. Cortez was pulled over when the wheel of his vehicle touched the "fog line," the line separating the road from the shoulder. *Id.* The Transportation Code defined "shoulder," but this definition made no mention of the "fog line." *Id.* The State argued that the fog line is part of the shoulder, but the Court found that interpretation too broad, and ruled in favor of the defendant. *Id.* In concurrence, Justice Newell further reasoned that, while the Transportation Code could be interpreted to encompass the fog line as part of the shoulder, it just as easily could be interpreted to include only the area beyond the fog line. *Id.* The concurrence explained that, where there is more than one reasonable interpretation of a statute, under Texas's Rule of Lenity, "the tie must go to the defendant." *Id.* (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008)).

As applied to Ms. Mason-Hobbs's conviction, Section 64.012 says nothing of filling out and casting a provisional ballot that is not counted. Just as the Texas Court of Criminal Appeals rejected the State's overbroad definition of "shoulder" within the meaning of the Transportation Code to encompass the "fog line," so, too, must this Court reject the State's overbroad definition of "vote" to encompass rejected provisional ballots that are not counted. *See Cortez*, 543 S.W.3d at 210; *see* Appellee's Brief at 22. Even assuming the State's definition is a reasonable one, it is equally reasonable to find that uncounted provisional ballots are not illegal "votes," which the legislature intended to criminalize. *See* Tex. Elec. Code § 64.012(a). Here, "the tie must go to" Ms. Mason-Hobbs, and conviction should be reversed. *See Cortez*, 543 S.W.3d at 210 (Newell, J., concurring).

II. The Term "Supervision" in Texas Election Code Section 11.002(4) Is Also Ambiguous and Must Be Construed in Favor of Ms. Mason-Hobbs Under Texas's Statutory Rule of Lenity.

Similarly, Texas Election Code Section 11.002(4) is ambiguous on its face because the term "supervision" has no definite meaning in the Texas Election Code. Because this statute falls outside the Penal Code, Texas's Statutory Rule of Lenity applies and requires that this ambiguity also be resolved in favor of Ms. Mason-Hobbs. *See Rhine*, 297 S.W.3d at 309. In relevant part, a person is qualified to vote under Section 11.002(4) if she "has not been finally convicted of a felony or, if so convicted, has: (A) fully discharged the person's sentence, including any term of

incarceration, parole, or *supervision*, or completed a period of probation ordered by any court; or (B) been pardoned or otherwise released from the resulting disability to vote." Tex. Elec. Code § 11.002(4) (emphasis added).

Although the term "supervision" appears in this provision, it is not defined anywhere in either the Texas Election Code or the Texas Penal Code. The term "supervision" appears in nine chapters of the Texas Penal Code and is used six different ways:

1. **Community supervision**. Tex. Penal Code § 38.01(2) ("'Escape' means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period or leave that is part of an intermittent sentence, but does not include a violation of conditions of *community supervision* or parole other than conditions that impose a period of confinement in a secure correctional facility.") (emphasis added); *see also* Tex. Penal Code § 1.07(14)(D); Tex. Penal Code § 12.42(g)(1); Tex. Penal Code § 22.01(b-2)(f)(1); Tex. Penal Code § 30.04(d-1); Tex. Penal Code § 30.05(d-1); Tex. Penal Code § 38.10(b); Tex. Penal Code § 38.113(a); Tex. Penal Code § 38.14; Tex. Penal Code § 43.02(e); Tex. Penal Code § 46.04(a)(1); Tex. Penal Code § 46.04(b)(2); Tex. Penal Code § 46.06(a)(4)(B); Tex. Penal Code § 46.15(a)(3).

2. **Supervision with respect to special relationships** (*i.e.*, educator-student relationships or guardian relationships with incompetent persons). Tex.

Penal Code § 9.62 ("EDUCATOR-STUDENT. The use of force, but not deadly force, against a person is justified: (1) if the actor is entrusted with the care, *supervision*, or administration of the person for a special purpose …") (emphasis added); Tex. Penal Code § 9.63 ("GUARDIAN-INCOMPETENT. The use of force, but not deadly force, against a mental incompetent is justified: (1) if the actor is the incompetent's guardian or someone similarly responsible for the general care and *supervision* of the incompetent …") (emphasis added).

3. **Supervision of an animal**. Tex. Penal Code § 38.15(a)(4) ("an animal under the *supervision* of a peace officer, corrections officer, or jailer, if the person knows the animal is being used for law enforcement, corrections, prison or jail security, or investigative purposes …") (emphasis added).

4. **Supervision of the Texas Department of Criminal Justice, Texas Juvenile Justice Department, probation department, or community supervision and corrections department**. Tex. Penal Code § 39.04(5)(f) ("An employee of the Texas Department of Criminal Justice, the Texas Juvenile Justice Department, a juvenile facility, a local juvenile probation department, or a community supervision and corrections department established under Chapter 76, Government Code … commits an offense if the actor engages in sexual contact, sexual intercourse, or deviate sexual intercourse with an individual who the actor knows is *under the supervision of* the Texas Department of Criminal Justice, Texas Juvenile Justice

Department, probation department, or community supervision and corrections department but not in the custody of the Texas Department of Criminal Justice, Texas Juvenile Justice Department, probation department, or community supervision and corrections department.") (emphasis added); Tex. Penal Code § 39.04.

5. **Direct supervision of a parent or legal guardian over a minor**. Tex. Penal Code § 46.02(a-4)(3)(c) ("under the *direct supervision* of a parent or legal guardian of the person…") (emphasis added).

6. **Mandatory supervision**. Tex. Penal Code § 46.06(a)(4)(B) ("the person's release from supervision under community supervision, parole, or *mandatory supervision* following conviction of the felony…") (emphasis added); Tex. Penal Code § 46.04(a)(1).

Supervision has no definition, but multiple meanings in the Penal Code. It cannot be true, therefore, that the term "supervision" as used in the Texas Election Code Section 11.002(4), has one clear meaning under Texas law. Further, the circumstances of Ms. Mason-Hobbs's federal supervised release do not equate to any of the meanings detailed above. Clearly, federal supervised release is not the equivalent of supervision with respect to special relationships, supervision of an animal, or direct supervision of a parent or legal guardian over a minor. The remaining meanings are also inapplicable. The phrase "supervision of the Texas

Department of Criminal Justice, Texas Juvenile Justice Department, probation department, or community supervision and corrections department," indicates that the State of Texas oversees the supervision, making the phrase inapplicable to Ms. Mason-Hobbs's federal supervised release. "[C]ommunity supervision" and "mandatory supervision" refer to situations in which an individual's prison sentence is shortened or suspended entirely in favor of a period of supervision. *See, e.g.*, Tex. Code Crim. Proc. Art. 42A.551(a) (specifying when a judge must or may "suspend the imposition of the sentence and place the defendant on community supervision"); Tex. Gov't Code § 508.001(5) ("'Mandatory supervision' means the release of an eligible inmate sentenced to the institutional division so that the inmate may serve the remainder of the inmate's sentence not on parole but under the supervision of the pardons and paroles division."). In contrast, federal supervised release is imposed only after an individual has completed his or her prison sentence. *United States v. Ferguson*, 369 F.3d 847, 850 n.5 (5th Cir. 2004). Furthermore, no use of the term "supervision" in the Texas Penal Code refers to Ms. Mason-Hobbs's federal supervised release.

Notwithstanding the fact that the State has not proven the specific terms of Ms. Mason-Hobbs's federal supervised release at the time she cast a provisional ballot, *see* RR 2, 15, 20-21, no use of the term "supervision" in the Texas Penal Code or the Texas Election Code unequivocally suggests that any form of federal

supervised release was contemplated by the Legislature in the Texas Election Code. A layperson could not be certain that the word "supervision" in Texas Election Code Section 11.002(4) includes federal supervised release, where a review of the Texas Election Code does not define the term "supervision." A layperson's review of the Texas Penal Code makes it even more difficult to understand the term because the term remains undefined in that code and is used in several different ways, none of which would apply to federal supervised release. The lack of clarity in the meaning of "supervision" in the Election Code requires that the issue be settled in favor of Ms. Mason-Hobbs under Texas's Statutory Rule of Lenity. *See* Tex. Gov't Code § 311.035; *see Rhine*, 297 S.W.3d at 309 ("Although the common-law rule that a penal statute is to be strictly enforced does not apply to the Penal Code, 'criminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused.'") (citation omitted). Based on the ambiguity of the term, the Texas Election Code should not be used to criminalize Ms. Mason-Hobbs's casting of a provisional ballot that was not counted.

III. Texas's Statutory Rule of Lenity Mandates that the *Mens Rea* Requirement of Texas's Illegal Voting Statute Also Be Construed Strictly.

As noted above, Texas's Illegal Voting Statute provides that it is a second degree felony to "vote[] . . . in an election in which *the person knows the person is not eligible to vote*." *See* Tex. Elec. Code § 64.012(a) (emphasis added). The statute

thus has an express *mens rea* requirement, that the accused "knows" that she is not eligible to vote, which must be construed strictly. *See Rhine*, 297 S.W.3d at 309. Thus, it is not enough that the accused knows that she is on federal supervised release – rather, the statute requires actual knowledge that being on federal supervised release rendered her ineligible to vote. *See Delay*, 465 S.W.3d at 247-49.

Section 6.03 of the Texas Penal Code defines the knowing mental state as follows:

> (b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist.

Said another way, under the Illegal Voting Statute, a person commits an offense when she has specific, actual knowledge that she was *in fact* ineligible to vote, and votes anyway.[8] Considering the ambiguities in the Texas Election Code, including the Illegal Voting and Voter Eligibility statutes at issue, the *mens rea* element of this offense is critical – otherwise, the State can arbitrarily enforce the Illegal Voting Statute against citizens who are confused about the voting process.

[8] *Medrano v. State*, 421 S.W.3d 869 (Tex. App.–Dallas 2014, pet. ref'd), is inapposite. There, the Dallas Court of Appeals held (in a decision not binding on this Court) that Texas's Illegal Voting Statute only requires that the State show that the accused is aware of the circumstances that rendered her ineligible to vote, and presumes that the accused is aware of the law. *Id*. at 885. The Texas Court of Criminal Appeals later abrogated *Medrano*'s reasoning in *Delay v. State*, and held that a criminal statute's "knowing" *mens rea* requirement required the actor to be aware of the criminality of his conduct. 465 S.W.3d at 246-47 ("How much of the ensuing statutory language is the adverb 'knowingly' intended to modify? . . . We think the Legislature must surely have intended that, to commit or conspire to commit money laundering, the actor must be aware of the fact that the transaction involves the proceeds of criminal activity.").

As applied to Ms. Mason-Hobbs, an honest mistake regarding eligibility is neither legally nor factually sufficient to convict Ms. Mason-Hobbs under the Illegal Voting Statute, where she expressly testified that she did not know that she was ineligible to vote. The State's witnesses could not definitively testify that Ms. Mason-Hobbs read the provisional ballot affidavit. Opp'n at 25; *see also* RR 2 86:24-87:2 ("You cannot tell District Judge Gonzalez that she, in fact, read the left-hand side of this ballot. You can't say that, can you? A. No."). And, Ms. Mason-Hobbs's own testimony shows that she did not realize that she was ineligible. RR 2 126: 4-8.

Construing the statute strictly, the State must prove beyond a reasonable doubt that she *actually knew* she was ineligible, and voted anyway. The State did not. *See Jackson*, 443 U.S. at 318-19; *see also Byrd*, 336 S.W.3d at 246. It is not enough for the State to argue that Ms. Mason-Hobbs *should have known* she was ineligible, because the finder of fact is not permitted to reach conclusions based on mere speculation or unsupported inferences or presumptions. *Hooper*, 214 S.W.3d at 15-16.

IV. Criminalizing Ms. Mason-Hobbs's Actions Will Impermissibly Chill Participation in the Voting Process.

"The right to vote is fundamental, as it preserves all other rights." *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 12 (Tex. 2011) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) ("When the

state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.").

The State urges this Court to adopt an interpretation of the Texas Election Code that will criminalize casting an uncounted provisional ballot where a person mistakenly believes that he or she is eligible to vote based on a reasonable interpretation of Texas law. In addition to the statutory and constitutional considerations discussed above, there are powerful policy considerations as to why the State's interpretation is untenable and incompatible with the fundamental right to vote.

The ability of individuals to cast a provisional ballot is critical to ensuring that the fundamental right to vote is not abridged. According to the U.S. Election Commission, "[t]he 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 Commission, *Quick Start Management Guide: Provisional Ballots* (Oct. 2008), https://www.eac.gov/assets/1/6/Quick%20Start-Provisional%20Ballots.pdf. By convicting Ms. Mason-

Hobbs under Texas's Illegal Voting Statute and advocating for a broad definition of illegal "voting," the State seeks to create a process in which prospective voters must either be infallible with respect to their eligibility to vote or risk criminal prosecution (and conviction). This makes little sense, because a provisional ballot is subject to strict procedures under HAVA that ensure that the ballot does not "count" as a vote unless an authorized state election official verifies the individual's eligibility. In other words, the purpose of Texas's Illegal Voting Statute (to prevent voter fraud) is not furthered by the State's broad interpretation here. *See In re Bell*, 91 S.W.3d 784, 787 (Tex. 2002) (finding that the prevention of election fraud is "one of the principal purposes behind the Election Code").

Moreover, the byzantine and ambiguous voting laws that apply here and in other states contain traps for the unwary, which carry potential harsh penalties for honest errors. Even prominent citizens have reportedly cast ballots that have not counted in recent elections, due to confusion regarding applicable voting procedures.[9]

The consequences of attaching felony penalties to a prospective voter's honest mistake regarding eligibility are far reaching. At bottom, given the amount of reasonable confusion surrounding voting laws in Texas and the lack of uniformity

[9] *See* Rebecca Savranscy, *Melania, Ivanka Trump's 2017 votes won't count due to issues with absentee applications*, The Hill (Dec. 17, 2017), https://thehill.com/homenews/campaign/364440-melania-ivanka-trumps-2017-votes-wont-count-due-to-issues-with-absentee.

of voting laws throughout the country, imposing criminal penalties on Texans who cast provisional ballots but who ultimately are ineligible invites arbitrary enforcement (or at best, represents a poor use of the State's limited resources for enforcement).

Furthermore, criminalizing the use of provisional ballots for citizens who incorrectly believe that their right to vote has been restored will effectively discourage those citizens from exercising their right to vote. Resolving the ambiguities in the Texas Election Code in favor of criminalizing the use of provisional ballots will have a chilling effect on voter participation across Texas, especially for those who have been accused or convicted of crimes in the past.

The implications of the State's interpretation and application of the Texas Election Code are clear: prospective voters who believe they are eligible to vote but are uncertain regarding the process should stay home, or otherwise face felony penalties for honest mistakes. Not even casting a provisional ballot is worth that risk.

CONCLUSION AND PRAYER

The League of Women Voters of Texas prays that this Court reverse the judgment of the trial court and order a judgment of acquittal as to the conviction for illegal voting. In the alternative, this Court should reverse the conviction and remand to the trial court for a new trial.

Dated: July 19, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on July 19, 2019, 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 Amicus 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 Amicus Curiae complies with the applicable word count limitation because it contains 9,159 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 Word 2016, which was used to prepare the Brief of Amicus Curiae.

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The New York Times

Texas Woman Sentenced to 5 Years in Prison for Voter Fraud Loses Bid for New Trial

Crystal Mason, center, with her legal team. Ms. Mason has argued that she did not know a felony conviction barred her from voting in the 2016 presidential election.

By Sandra E. Garcia

June 13, 2018

A judge who sentenced a Texas woman to five years in prison for voting illegally because she was a felon on probation turned down on Monday the woman's bid for a new trial.

"Prison is a lot closer for her today," Alison Grinter, a lawyer for the woman, Crystal Mason, 43, said on Tuesday, noting that her client would appeal the decision to a higher court.

Sharen Wilson, the Tarrant County district attorney, declined to comment.

Ms. Mason was convicted of illegal voting in a one-day trial held March 28 before Judge Ruben Gonzalez, a state district court judge who sentenced her that day to five years in prison. She has been free on bond pending appeal.

[Where do states stand on voting rights for felons? Here's a breakdown.]

Ms. Mason, who was sentenced to 60 months in jail for tax fraud and was released in early 2016, has said that she didn't know that she wasn't allowed to vote in that year's presidential election. She cast a provisional ballot at her local church after being told that her name could not be found on the rolls. The ballot was never counted.

"Crystal's name was purged from the rolls when she went to prison, but Crystal did not know that," Ms. Grinter said in an interview on Tuesday.

Whether felons can vote varies state by state, and has become a contentious issue. More than six million Americans have been stripped of their voting rights because of felony disenfranchisement laws, according to the Sentencing Project, a nonprofit organization that works on criminal justice reform.

Two months ago, a petition was started online to have all charges against Ms. Mason, who is black, thrown out. In the petition her photo is placed next to a photo of Terri Lynn Rote, a white woman who was convicted of voter fraud in Iowa for trying to vote for President Trump twice. Ms. Rote was sentenced to two years' probation and a $750 fine. The petition has over 38,000 signatures.

As she prepared to appeal the rejection of her motion for a new trial, Ms. Mason said she had high hopes.

"I showed my kids that no matter what you can get out and get your life in order," said Ms. Mason. "But sometimes, regardless of whatever your past is, you are still going to be beat up for it."

Follow Sandra E. Garcia on Twitter: @S_Evangelina.

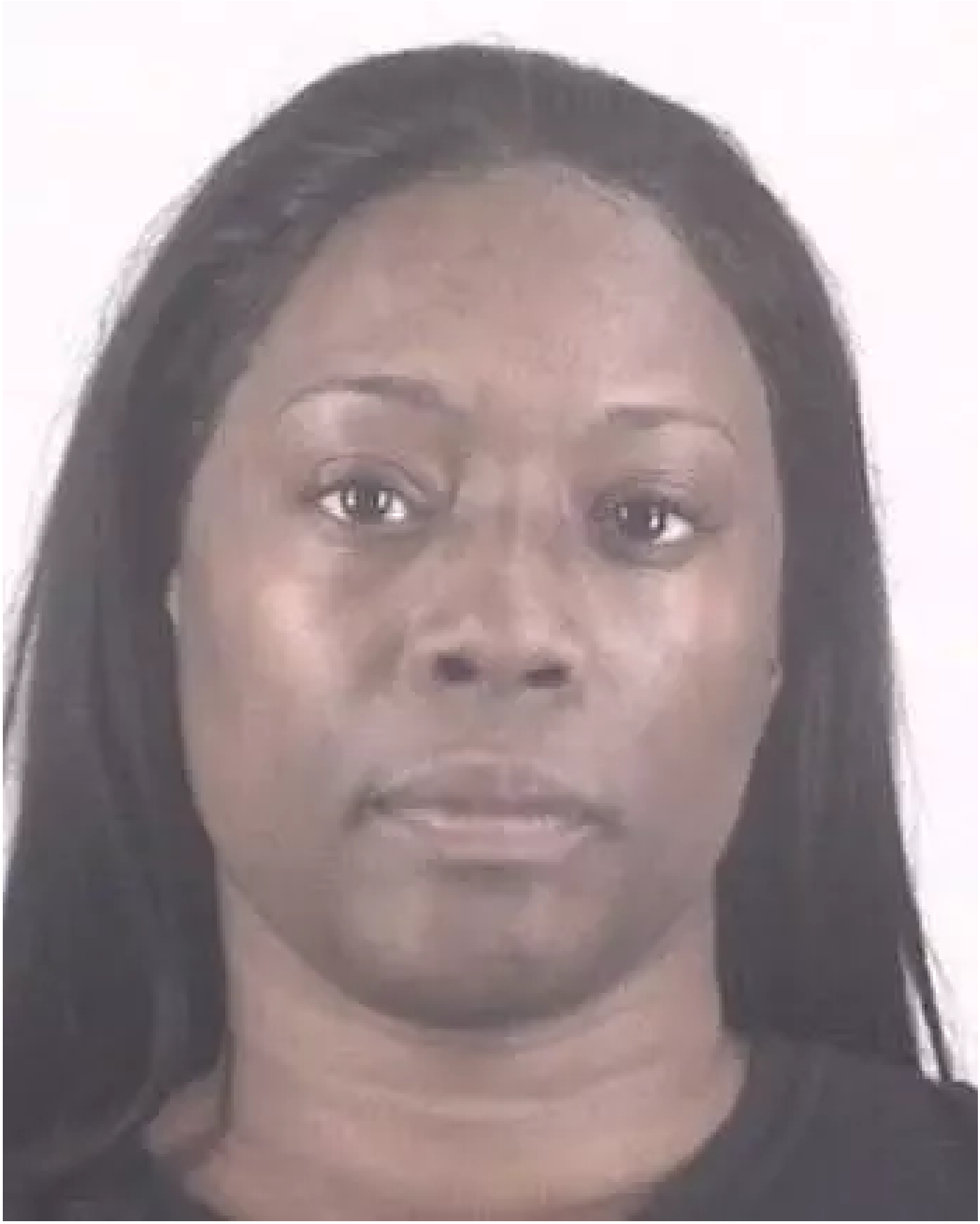
COURTS AUG 30

Tarrant County woman who voted illegally is ordered back to federal prison

Tom Steele, Breaking News Producer

Updated at 7 p.m.: *Revised throughout to include additional information.*

A Tarrant County woman who voted illegally in the 2016 presidential election while on supervise



Crystal Mason (Tarrant County Sheriff's Department)

A federal judge in Fort Worth ruled Thursday afternoon that Crystal Mason, 43, must spend 10 months behind bars followed by 26 months of supervised release.

Mason, who lives in Rendon in southeastern Tarrant County, was sentenced in March to five years in state prison for illegal voting.

She had been convicted of tax fraud in 2011 and was on supervised release — the federal court system's version of parole — in November 2016 when she voted for Hillary Clinton. Texas law requires that felons complete their entire sentence, including supervised release or parole, before they regain the right to vote.

Mason appealed the illegal-voting case and was free on bond, but federal authorities argued that the conviction violated the terms of her release and that she needed to return to prison on the tax-fraud charge.

Woman wearing restraints in viral doorbell video is safe, from Dallas area; boyfriend found dead

When Mason voted in 2016, poll workers did not find her name on a list of registered voters and told her she could fill out a provisional ballot.

She had to sign an affidavit with the ballot affirming that if she was a convicted felon, that she had "completed all of my punishment including any term of incarceration, parole, supervision, period of probation." Mason later said she was never told she wasn't legally allowed to vote and wouldn't have cast a ballot had she known.

Mason later received a letter telling her that her voted hadn't counted, but it didn't say why.

An election worker from her polling place filed a complaint with the Tarrant County district attorney's office, prompting authorities to investigate. Mason was arrested on an illegal-voting charge Feb. 16, 2017.

Lawyers for Mason have argued that attempting to cast a provisional ballot that was rejected does not count as actually voting.

The district attorney's office reiterated in a statement Thursday that it is illegal for someone on supervised release to vote in Texas.

"The DA's office has said that we will not apologize for enforcing the laws of the State of Texas," prosecutor Matt Smid said in a statement. "We believe it is not an 'accidental vote' when the voter drives herself to the polling place and votes after signing a warning against illegal voting and after being warned not to vote by her defense attorney."

But Mason's lawyers called the punishment "draconian."

"It is tantamount to someone being sent to prison because they didn't understand the fine print on some of their mortgage documents," attorney Alison Grinter said at a news conference.

"This is a message that's being sent and being heard loud and clear," said Grinter, who has previously called the case voter intimidation against minorities.

Arlington teen rapper Tay-K, facing 2 murder charges, poses for photo in jail cell

In 2017, a Hispanic Grand Prairie woman in the country legally — but not a U.S. citizen — was sentenced to eight years in prison on two counts of illegal voting. Rosa Ortega testified that she didn't understand the difference between her rights and those of citizens.

Earlier this year, a Tarrant County justice of the peace resigned and pleaded guilty to tampering with government records — forging signatures on a petiton — to get his name on a ballot. Russ Casey, who is white, was sentenced to five years of probation and ordered to pay a $1,000 fine.

Mason is due to report to prison in two weeks.

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Crystal Mason begins prison sentence in Texas for crime of voting

Mason, in a case seen as emblematic of voter suppression, faces over five years in prison for a mistaken vote that was not counted

Ed Pilkington *in Austin, Texas*

Fri 28 Sep 2018 09.30 EDT

Crystal Mason, the woman who became the poster child for voter suppression when she was sentenced to five years for casting a ballot in Texas, has gone into federal prison at the start of her ordeal.

Mason, 43, surrendered voluntarily on Thursday to authorities and was taken into federal prison in Fort Worth, Texas. She left her three children behind.

In her final Facebook post before she went inside, she wrote: “This fight is not over, I’m glad God choose me for this journey. I’m walking in there no tears and head hung high …”

Mason's crime was to cast a ballot in the 2016 presidential election. An African American woman, she had been encouraged by her mother to do her civic duty and vote, in her case on behalf of Hillary Clinton.

When she turned up to the polling station her name was not on the register, so she cast a provisional ballot that was never counted. She did not read the small print of the form that said that anyone who has been convicted of a felony - as she had, having previously been convicted of tax fraud - was prohibited from voting under Texas law.

The Guardian highlighted her plight last month.

For casting a vote that was not counted, she will now serve 10 months in the federal system. While locked up it is likely that her final appeals in state court will be exhausted, which means she could be passed at the end of the 10 months directly to state custody for a further five years.

Her lawyer, Alison Grinter, said she was dismayed to see Mason ripped from her family. "This is an act of voter intimidation, not the will of a free people."

Grinter added: "Make no mistake: this is a clarion call to our over-policed and over-prosecuted communities of color. You are not welcome in the voting booth, and any step out of line will be punished to the fullest extent of the law."

Mason's case is one of the more dramatic examples of voter suppression in Texas. The state has been at the forefront of Republican moves to place hurdles in the way of voting since 2013 when the US supreme court overturned a key element of the Voting Right Acts that had prevented largely southern states from discriminating against minority citizens.

The state has one of the most strict voter ID laws in the country, requiring individuals to show proof of identity, and to register to vote at least 30 days before any election. Fort Worth, under its Republican district attorney, has been particularly hardline, not only prosecuting Mason but also going after a Hispanic woman, Rosa Ortega, for mistakenly voting as a non-US citizen.

Ortega, 37, who had permanent resident status in the US having come to the country as an infant, was sentenced to eight years in prison to be followed by deportation to her native Mexico. Since her conviction she has disappeared and is presumed to have self-deported.

Fort Worth's harsh treatment of illegal voters is paradoxical in that it has among the worst turnout rates in America. In recent city council elections, the turnout was 6%.

Topics

- Texas
- US voter suppression
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