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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

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CRYSTAL MASON,
Appellant,

V.

STATE OF TEXAS,
Appellee.

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COURT OF CRIMINAL APPEALS
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From the Second Court of Appeals,
Cause No. 02-18-00138-CR

Trial Court Cause No. 148710D
From the 432nd District Court of Tarrant County, Texas
The Honorable Ruben Gonzalez, Jr. Presiding

APPELLANT'S REPLY BRIEF

Thomas Buser-Clancy (Lead Counsel)
Texas Bar No. 24078344
Andre Ivan Segura
Texas Bar No. 24107112
Savannah Kumar
Texas Bar No. 24120098
ACLU Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, TX 77007
Telephone: (713) 942-8146
Facsimile: (915) 642-6752
tbuser-clancy@aclutx.org
asegura@aclutx.org
skumar@aclutx.org

Alison Grinter
Texas Bar No. 24043476
6738 Old Settlers Way
Dallas, TX 75236
Telephone: (214) 704-6400
alisongrinter@gmail.com

Additional counsel on following page

ORAL ARGUMENT NOT GRANTED

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ADDITIONAL COUNSEL FOR APPELLANT

Emma Hilbert
Texas Bar No. 24107808
Hani Mirza
Texas Bar No. 24083512
Texas Civil Rights Project
1405 Montopolis Drive
Austin, TX 78741-3438
Telephone: (512) 474-5073 ext. 105
Fax: (512) 474-0726
emma@texascivilrightsproject.org
hani@texascivilrightsproject.org

Sophia Lin Lakin*
New York Bar No. 5182076
Dale E. Ho*
New York Bar No. 4445326
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 519-7836
Fax: (212) 549-2654
slakin@aclu.org
dho@aclu.org

Kim T. Cole
Texas Bar No. 24071024
2770 Main Street, Suite 186
Frisco, Texas 75033
Telephone: (214) 702-2551
Fax: (972) 947-3834
kcole@kcolelaw.com

*pro hac vice application forthcoming

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I. Introduction

The court of appeals held that "the fact that [Ms. Mason] did not know she was legally ineligible to vote was irrelevant to her prosecution" for submitting a provisional ballot that was rejected. *Mason v. State*, 598 S.W.3d 755, 770 (Tex. App—Fort Worth 2020) (hereinafter "Op."). This is legally untenable and carries extreme implications, threatening prosecution for tens of thousands of Texas voters who submit provisional ballots believing in good faith that they are eligible to vote but who turn out to be incorrect in their belief. The State has no reasoned defense for the court of appeals' opinion.

First, the State fails to defend the court of appeals' disregard for Section 64.012(a)(1)'s clear *mens rea* requirement that "the person knows the person is not eligible to vote." The statute's knowledge requirement is straightforward, applying only to a person's eligibility to vote—not to any other underlying fact, such as being on a condition of release. The State cannot explain how the court of appeals' interpretation can be squared with this Court's holding in *Delay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014) that a knowing violation of the Election Code 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.* at 250.

Second, the State tries to avoid the clear conflict between the court of appeals' opinion and the federal Help America Vote Act (HAVA) by asserting that HAVA is a non-substantive administrative law passed pursuant to Congress's spending powers. This is simply incorrect. The authority is clear that HAVA substantively confers a right to cast a provisional ballot pursuant to Congress's power under the Elections Clause. The court of appeals' opinion, which criminalizes good faith but mistaken submissions of provisional ballots, cannot coexist with HAVA and is preempted by it.

Third, in response to the argument that submitting a provisional ballot that is rejected does not constitute voting in an election under Section 64.012(a)(1), the State argues that nothing forced the court of appeals to adopt Ms. Mason's interpretation. But the State ignores the requirements under the Rule of Lenity for those accused of violations of Texas law that arise outside of the Penal Code—here, the Texas Election Code. The Rule of Lenity demands that any ambiguities be resolved in favor of the defendant. The host of contrary uses set forth by Ms. Mason demonstrate that a reasonably well-informed person could (and likely would) conclude that submitting a provisional ballot that is rejected does not constitute voting in an election. As such, there is at least substantial ambiguity regarding the meaning of the phrase "to vote in an election," and such ambiguity must be resolved in favor of Ms. Mason.

II. The court of appeals erred in holding that "the fact that [Ms. Mason] did not know she was legally ineligible to vote was irrelevant to her prosecution."

The plain language of Section 64.012(a)(1) requires the State to prove that the person voted in an election "in which the person **knows** the person is not eligible to vote." (emphasis added). Indeed, the State concedes that the statute means what it says: "In order to uphold a conviction for illegal voting, the evidence must show that the actor knew she was not eligible to vote." State's Brief on the Merits at 15 (hereinafter "State's Brief").

However, the State then asserts that it needs to show only that Ms. Mason knew she had been finally convicted of a felony and was on federal supervised release at the time she voted. State's Brief at 21. But Section 64.012(a)(1) does not state that a person commits an offense if they vote in an election in which they know the underlying fact that would render them ineligible to vote. In plain and unequivocal terms, Section 64.012(a)(1) requires that the person actually "knows they are not eligible to vote in the election." Demonstrating that a person is aware that they are on federal supervised release does not show that they also actually realize the State law implications of that federal condition with respect to their voter eligibility.

When the *mens rea* is written into the text of a statute, it applies to the circumstances as stated in the statute itself, not to a different formulation that the

State might prefer. The State offers this Court no justification for why the express *mens rea* element should be read out of the statute. It should not be, and the court of appeals erred when it held that "[t]he fact that [Ms. Mason] did not know she was legally ineligible to vote was irrelevant to her prosecution." Op.770.

A. The court of appeals' decision conflicts with this Court's precedent.

The State overlooks the precedential significance of *Delay*, brushing it aside simply because it involves a different statute. State's Brief at 22-23.[1]

But, as previously explained, the logic and holding of *Delay* is incompatible with the ruling from the court of appeals. *Delay* analyzes the *mens rea* requirement of a criminal statute arising out of the Election Code that requires a knowing violation of the Election Code. Appellant's Brief on the Merits at 20 (hereinafter "Appellant's Brief"). Here, Section 64.012(a)(1) is also a criminal statute arising out of the Election Code that requires a knowing violation of the Election Code (voting while knowingly ineligible, where ineligibility is defined by the Election Code). Appellant's Brief at 46. *Delay* held that "knowingly" taking an action "in violation of the Election Code" requires "that the actor be aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, **but also of the**

[1] The State also attempts to distinguish *Rehaif v. United States*, 139 S. Ct. 2191 (2019) and *Liparota v. United States*, 471 U.S. 419 (1985), State's Brief at 25-27, on the basis that they are federal cases involving different statutes, but does not explain why these cases are not persuasive authority.

fact that undertaking the conduct under those circumstances in fact constitutes a 'violation of' the Election Code." *Delay*, 465 S.W.3d at 250 (emphasis added). The State offers no explanation for how this Court's analysis in *Delay* can be construed consistently with the court of appeals' interpretation of Section 64.012(a)(1).

The State's only other attempt to distinguish *Delay* from this case is a reference to grammatical ambiguity at issue in the statute in *Delay.* State's Brief at 23. But that only strengthens Ms. Mason's position. Appellant's Brief at 27. In *Delay*, the Court imposed a strict *mens rea* requirement under a grammatically ambiguous statute; the statute at issue here, Section 64.012(a)(1), is **unambiguous** in requiring knowledge of ineligibility under the Election Code. There is no reason why this Court should read one Election Code statute with an ambiguously placed knowledge requirement to require that the defendant actually realize they are violating the Election Code, but read the *mens rea* requirement out of the statute here, where all parties agree that it is unambiguous.

The State fares no better with respect to this Court's other precedent, which establishes that where "an offense criminalizes otherwise innocuous conduct based on particular circumstances, "the culpable mental state of 'knowingly' must apply to those surrounding circumstances." *McQueen v. State*, 781 S.W.2d 600, 603 (Tex.

Crim. App. 1989).[2] Appellant's Brief at 24. The State attempts to distinguish this precedent by mischaracterizing Ms. Mason's position. Ms. Mason's position is not that the State was required to show that Ms. Mason knew her actions were a criminal offense. State's Brief at 15, 24. Rather, Ms. Mason's position is that the State must show that Ms. Mason knew she was ineligible to vote.

Section 64.012(a)(1) explicitly states what distinguishes the innocuous conduct of voting from illegal conduct: being "not eligible to vote in the election." Accordingly, this Court's precedent requires the State to show that the individual actually knows they are ineligible to vote, not simply the underlying facts that would render them ineligible.

B. The court of appeals' decision is unpersuasive.

The State makes the same error as the court of appeals by arguing that Ms. Mason does not have a valid mistake of fact or mistake of law defense. State's Brief at 16-17. This case does not hinge on whether the evidence raises affirmative defenses. Appellant's Brief at 27-28. The *mens rea* requirement and affirmative

[2] *See also Dennis v. State,* 647 S.W.2d 275, 280 (Tex. Crim. App. 1983) (the *mens rea* of Tex. Penal Code § 31.03(b)(2) applies to the statutorily specified circumstance of "stolen by another"); *State v. Ross,* 573 S.W.3d 817, 826 (Tex. Crim. App. 2019*)* (the *mens rea* of Tex. Penal Code § 42.01(a)(8) applies to the statutorily specified circumstance of "calculated to alarm")*; Jackson v. State,* 718 S.W.2d 724, 726 (Tex. Crim. App. 1986) (the *mens rea* of Tex. Penal Code § 38.04(a) applies to the statutorily specified circumstance of "attempting lawfully to arrest or detain him").

defenses are two distinct concepts.[3] The State has the burden to prove beyond a reasonable doubt the *mens rea* element of an offense. An illegal voting conviction cannot be sustained unless it is shown that the person has the culpable mental state of "knowledge" that the statute requires. *King v. State,* 895 S.W.2d 701, 703 (Tex. Crim. App. 1995); *see also* Appellant's Brief at 28 (citing *Wayne R. LaFave*, 1 SUBST.CRIM. L., § 5.6(a) (3d ed.) (2020); *Liparota*, 471 U.S. at 425 n.9).

The State also argues that the court of appeals rightly relied on *Thompson v. State,* 9 S.W. 486 (Tex. Ct. App. 1888) and the lower court opinions that followed it because *Delay* did not expressly mention *Thompson* and therefore could not have abrogated it. State's Brief at 22-23. But, as previously discussed, *Thompson*'s holding that the State does not need to show the specified *mens rea* element of the statute simply cannot be squared with this Court's other precedents, especially *Delay*, and the State offers no explanation for how it could be. Appellant's Brief at 29-30. This Court should clarify that the 133-year-old, one-paragraph opinion that was considered unsound in legal academia by 1937 is no longer good law and cannot be used as a basis to ignore the clear statutory text of Section 64.012(a)(1). *Id.*

[3] Nor can the State avoid its burden to demonstrate the required *mens rea* element by arguing that ignorance is not a defense. *See* Appellant's Brief at 27.

C. Ms. Mason's conviction must be overturned.

The State argues that even if the court of appeals erred with respect to applying the correct *mens rea* standard, that error was harmless because the record "support[s] an inference" that Ms. Mason knew she was ineligible to vote. State's Brief at 28. The State's argument is incorrect for at least four reasons.

First, the court of appeals' erroneous determination that "[t]he fact that [Ms. Mason] did not know she was legally ineligible to vote was irrelevant to her prosecution," Op.775, clearly dictated its determination that the State had met its burden with respect to the *mens rea* statute and was therefore harmful. The State ignores that the court of appeals expressly noted that Ms. Mason "voted . . . despite the fact that she was not certain and may not have read the warnings on the affidavit form," Op.779-80; *see also* Op.770 (holding "[t]he fact that [Ms. Mason] did not know she was legally ineligible to vote" to be "irrelevant"); Op.779 ("The evidence does not show that she voted for any fraudulent purpose."); *id*. ("Mason may not have known with certainty that being on supervised release as part of her federal conviction made her ineligible to vote under Texas law….").

Second, the court of appeals' error with respect to Section 64.012(a)(1)'s *mens rea* requirement infected other areas of the court's opinion that would require reconsideration on remand if this Court does not order an acquittal. For instance, as noted in Appellant's Brief, the court of appeals relied solely on its erroneous *mens*

rea analysis to dismiss Ms. Mason's ineffectiveness of counsel claim concerning her trial counsel's failure to call numerous available witnesses who would have supported her claim that she did not know she was ineligible to vote. Appellant's Brief at 19 n.2. The error also spilled over into its analysis of the whether submitting a provisional ballot that is rejected constitutes voting in an election. Op.778. Thus, the implications of the court of appeals' error would need to be considered on remand if this Court does not order an acquittal.

Third, the State's response confirms that its sole theory that Ms. Mason knew she was ineligible to vote relies on speculation that she read the long and confusing affirmations on the left hand side of the provisional ballot; that she understood from those affirmations that she was ineligible to vote; and that she submitted her provisional ballot anyways, despite having no personal or pecuniary interest in the election. Even if the evidence established that she read the affirmations—which, as explained below, it does not—such a theory would not be sufficient to show that Ms. Mason actually realized she was ineligible to vote.

The affirmations on the left hand side of the ballot: (a) do not explicitly establish that being on federal supervised release renders an individual ineligible to vote—and indeed, federal supervised release is **not** the equivalent of any term listed

in the affirmations, *see* Appellant's Brief at 13 n.1, 32 n.3;[4] (b) do not appear under the heading of "Affidavit of Provision Voter"; and (c) do not contain a signature line as appears under the left hand side of the ballot where the person fills out their personal information. *Id.* at 14.

The State ignores the fact that affirming Ms. Mason's conviction on such a theory would again be inconsistent with this Court's analysis in *Delay*. Appellant's Brief at 19-20. There, corporate executive defendants had ample financial, political, and legal resources to inform them of a "substantial and unjustifiable *risk* that their corporate political contributions would violate the Texas Election Code." *Delay*, 465 S.W.3d at 252. But even under those circumstances, the Court held that such facts were not sufficient to demonstrate that the *Delay* defendants actually knew that their actions violated the code, and that "neither recklessness nor negligence" are sufficient *mens rea* for an offense under the Election Code. *Id.* Here, even if the State had proven—which it did not—that Ms. Mason took a negligent risk in casting her ballot or did so "despite the fact that she was not certain" of her eligibility, Op.779, that showing would not be sufficient to establish that she actually knew she was

[4] Ms. Mason's hindsight statement, after already having been charged with illegal voting, that she would have understood the affidavit's language, can't be divorced from her testimony that she did not actually read the affidavit. It cannot establish that she actually read the affidavit and, in that moment, understood from it that she was ineligible to vote but went ahead and submitted her provisional ballot anyway.

ineligible to vote. *See also Ross,* 573 S.W.3d at 826 (rejecting objective standard for knowledge requirement and instead requiring actual knowledge).

Further, the State also ignores the fact that convicting an individual for illegal voting based solely on the fact that they read and signed the provisional ballot affidavit—an act required for any person to submit a provisional ballot—would subject every person who turns out to be wrong about their eligibility to criminal prosecution, conflicting with and subject to preemption by HAVA. Appellant's Brief at 33 n.4.

Fourth, the evidence is not sufficient to show that Ms. Mason read the affirmations on the left hand side of the provisional ballot affidavit. The State relies heavily on the testimony of the Election Judge. However, much of that testimony is irrelevant to the question of whether Ms. Mason read and understood the left hand side affirmations. For instance, the State notes that "Dietrich gave Appellant the envelope and told her to read and fill out the section entitled 'To be completed by the voter.'" State's Brief at 28. But the section entitled "To be completed by voter" is on the right hand side of the affidavit and does not contain the affirmations at issue. Appellant's Brief at 14. Similarly, the State notes that "Dietrich held up his right hand and asked if Appellant affirmed that all the information she provided was accurate, and she responded "in the affirmative." RR 2:71-72. But, as Ms. Mason testified, the information she provided and that she was careful to ensure was

accurate was the personal information on the right hand side of the affidavit. Appellant's Brief at 14-15.

And when it comes to whether Ms. Mason did read the left hand side affirmations, the State has repeatedly conceded, as it must, that its main witness, the Election Judge, was not certain whether Ms. Mason in fact read them. State's Brief at 28 ("Dietrich could not say with certainty that Appellant actually read it . . . ."); State's Brief on the Merits to the Court of Appeals at 25 (similar); *see also* RR2.86:24-87:2. The State's only other witness on this issue testified about what he saw from several feet away while doing other work, and his testimony is silent as to whether Ms. Mason read the left-hand side of the affidavit, which is the critical detail for the State's insufficient theory. RR2.102:7-23; *see* Appellant Reply Brief to Court of Appeals at 13.

No one disputes that knowledge may be inferred from circumstantial evidence; however, the state cannot pile uncertain testimony upon inferences, and then claim that it has met its burden of proving an element of a crime beyond a reasonable doubt. *Hacker v. State*, 389 S.W.3d 860, 873-74 (rejecting sufficiency of the evidence where it was merely "suspicion linked to other suspicion"). Here, the State argues that explicitly uncertain testimony about whether Ms. Mason read confusing small print affirmations—that themselves do not expressly address Ms. Mason's situation nor explicitly inform her that she would be ineligible to vote—is

sufficient to demonstrate an actual realization of ineligibility. Such an argument should be rejected.

That Ms. Mason submitted a provisional ballot "despite the fact that she was not certain [of her eligibility] and may not have read the warnings on the affidavit form," Op.779-80, demonstrates that the State failed to meet its burden of proof under the correct *mens rea* standard, and this Court should order an acquittal of Ms. Mason.

III. Ms. Mason's Conviction Conflicts with the Help America Vote Act.

As explained in Ms. Mason's principal brief, the court of appeals' interpretation of Section 64.012(a)(1) conflicts with the Help America Vote Act ("HAVA"), 52 U.S.C. § 20101, *et. seq*.; Appellant's Brief at 35–43. HAVA grants individuals who declare and affirm they are eligible to vote the right to cast a provisional ballot even if those individuals turn out to be incorrect about their eligibility. *Fla. Democratic Party v. Hood*, 342 F. Supp. 2d. 1073, 1081 (N.D. Fla. 2004) ("[A] person who meets the statutory prerequisites to casting a provisional ballot, by making the required declaration and executing the required affirmation, must be allowed to cast a provisional ballot."). The court of appeals' interpretation of Section 64.012(a)(1) conflicts with this right because, for individuals who believe they are eligible to vote but turn out to be mistaken, it criminalizes the exact actions that HAVA creates a federal right to perform. Appellant's Brief at 35–43.

Unsurprisingly, the State does not even attempt to explain how the court of appeals' interpretation can be harmonized with the right to cast a provisional ballot under HAVA. Nor could it: placing the onus on would-be voters to gamble with their liberty and correctly determine their eligibility to vote at the risk of felony prosecution would render the right to cast a provisional ballot meaningless. Instead, the State attempts to limit the scope of HAVA's guarantees by claiming, without authority, that HAVA is a spending program passed pursuant to Congress's spending power that requires only that, as a condition of receiving federal funds, the State perform certain prescribed tasks. State's Brief at 33–35.

The State is wrong. HAVA was explicitly enacted pursuant to Congress's authority under the Elections Clause and is not simply a spending program requiring the State to perform a delineated set of tasks as a condition of funding. *See* H.R. Rep. 107–329, pt. 1, at 57 (2001) (noting that the constitutional authority for HAVA arises from "Article 1, Section 4 of the U.S. Constitution" which "grants Congress the authority to make laws governing the time, place and manner of holding Federal elections"); *see also Colon-Marrero v. Velez*, 813 F.3d 1, 19 (1st Cir. 2016) ("HAVA . . . was enacted pursuant to Congress's authority under the Elections Clause of the Constitution"); *id.* at 20 (HAVA is "authorized by constitutional authority more specific than the spending power[,]" namely, the Elections Clause).

Through HAVA, Congress, using its Elections Clause authority, mandated new federal requirements for administering elections, including the right to submit provisional ballots so long as an individual declares and affirms their eligibility. Appellant's Brief at 35-43; 52 U.S.C. § 21082(a); *Colon-Marrero*, 813 F.3d at 19–20 (HAVA contains "rights-creating language" that is "couched in mandatory terms" and "unambiguous."); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 572–73 (6th Cir. 2004); *Hood*, 342 F. Supp. 2d at 1079.

While the State correctly points out that HAVA *also* provides funding to help states meet its mandates, *see* 52 U.S.C. § 20901, that does not transform the right to HAVA's broadly accessible system of provisional voting into a circumscribed set of technical steps a state needs to check off to obtain federal funding. Nor does anything in the statute (and the State points to no other authority) suggest that the availability of funds somehow limits the scope of the rights guaranteed by HAVA. Indeed, States cannot choose to opt-out of implementing HAVA's mandates by refusing funding. "States that do not receive HAVA funds must either certify that they have a comparable administrative scheme or submit a detailed compliance plan showing 'the steps the State will take to ensure that it meets the [statute's] requirements.'" *Colon-Marrero*, 813 F.3d at 15 (quoting 52 U.S.C. § 21112(b)(1)(B)).

The State's incorrect framing of HAVA's guarantees as narrow spending program conditions is fatal to its other arguments. The State claims, for example,

that criminalizing the submission of a provisional ballot by an individual who turns out to be incorrect about their eligibility cannot conflict with HAVA because HAVA does not explicitly proscribe that criminalization. But when Congress legislates under the Elections Clause, as it did with HAVA, "it necessarily displaces some element of a pre-existing legal regime erected by the States," and need not expressly state every state law or action with which it necessarily conflicts. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14 (2013); *see id.* at 8, 14 (observing that the Election Clause confers on Congress broad power to alter state regulations or "supplant them altogether," such that there is no "presumption against pre-emption" that would require a clear statement of pre-emption); *id.* at 9-15 (finding that documentary proof of citizenship requirement in registering to vote for federal elections was preempted by NVRA despite no explicit ban on such a requirement).

As discussed above and in Ms. Mason's principal brief, the plain language of HAVA establishes a clear right to submit a provisional ballot so long as the individual declares and affirms their eligibility, and HAVA also makes clear that this right, and the right to know whether the ballot was counted, extends not only to individuals who are correct about their eligibility but also to individuals who turn out to be incorrect. Appellant's Brief at 35-43. This is why the court in *Hood* ruled both that an individual in a federal election has a right under federal law to cast a provisional ballot at a polling place even if local officials assert that the individual

is at the wrong polling place, and that the individual's "ballot will count only if the person [is] indeed 'eligible under State law to vote' in th[at] election at th[at] polling place." *Hood*, 342 F. Supp. 2d at 1074–75, 1081. And this is also why the "remedy" under HAVA where an individual in good faith submits a provisional ballot but the State cannot confirm the individual's eligibility is simply to not count that individual's provisional ballot, even if HAVA does not explicitly bar other penalties.

Indeed, the State does not dispute that, in every general election in Texas, there are tens of thousands of people who cast provision ballots, but turn out to be ineligible to vote due to lack of proper registration alone. Appellant's Brief at 42-43. The State's interpretation of HAVA would potentially subject these individuals to felony prosecution, rendering HAVA's guarantee of a right to cast a provisional ballot a dead letter. This is, of course, irreconcilable with HAVA's text and purpose.

The State additionally claims that Ms. Mason's pre-emption argument is faulty because it rests on a voter's state of mind and HAVA "does not contemplate a voter's state of mind," State's Brief at 33. This misunderstands the conflict at issue. HAVA's provisional ballot guarantee necessarily and explicitly encompasses individuals who declare and affirm that they are eligible to vote but who turn out to be incorrect. The court of appeals' opinion subjects those same individuals to criminal charges. There can be no clearer conflict than interpreting Section 64.012(a)(1) to criminalize the very right HAVA guarantees.

Additionally, the State incorrectly relies on a statement from *Sandusky* that the "legality of the vote cast provisionally is generally a matter of state law." State's Brief at 34 (citing *Sandusky*, 387 F.3d at 576). But the discussion in *Sandusky* on the "legality of the vote cast provisionally" pertains to the determination of whether a provisional ballot is accepted or rejected, not whether a court can convict an individual found ultimately ineligible to vote after that individual casts a provisional ballot in good faith. 387 F.3d at 576 ("the voter casts a provisional ballot at the peril of not being eligible to vote under state law; if the voter is not eligible, the vote will then not be counted.").

Finally, the State's assertion that "nothing in HAVA's provisional voting section exempts from criminal liability persons, like Appellant, who falsely affirm their eligibility to vote" mischaracterizes the facts in this case and sidesteps the core issue. It may be correct that HAVA does not preempt criminalizing the act of fraudulently submitting a provisional ballot. But that is not what is at issue here. Op.779 ("The evidence does not show that she voted for any fraudulent purpose."). HAVA does preempt the court of appeals' interpretation that imposes criminal liability for people who declare and affirm their eligibility in good faith but turn out to be mistaken. Any other interpretation would ignore HAVA's text and gut its purpose.

Thus, the Court should reverse Ms. Mason's conviction because it conflicts with HAVA.

IV. Submitting a provisional ballot that is rejected does not constitute "vot[ing] in an election" under Section 64.012(a)(1).

A. The court of appeals failed to resolve ambiguities in favor of Ms. Mason.

In an effort to shore up the court of appeals' definition of "vot[ing] in an election," the State argues that since nothing *forced* the court of appeals to adopt Ms. Mason's definition of "to vote," the court was free to simply choose a definition and disregard all contrary usages. This is incorrect and turns the process of statutory interpretation—and particularly the Rule of Lenity—on its head.

A statute is ambiguous where the "statutory language may be understood by reasonably well-informed persons in two or more different senses." *Price v. State*, 434 S.W.3d 601, 605 (Tex. Crim. App. 2014). An ambiguous statute that arises outside of the Penal Code, such as Section 64.012(a)(1), must be resolved in favor of the defendant. Appellant's Brief at 46 (citing *Delay*, 465 S.W.3d at 251; *State v. Rhine*, 297 S.W.3d 301, 309 (Tex. Crim. App. 2009)). The State does not dispute this. Nor does it dispute that there are contrary usages of the term "vote," or offer any explanation as to why, based on these contrary usages, a reasonably well-informed person would not interpret the phrase "votes in an election" to not include submitting a provisional ballot that is rejected.

Indeed, the only thing the State has to say about the Rule of Lenity is to assert that Ms. Mason's Rule of Lenity argument concerns her belief that she was eligible to vote. State's Brief at 36 n.6. But that is incorrect. Ms. Mason's argument that the Rule of Lenity demands resolving any ambiguity concerning the phrase "votes in an election" in favor of Ms. Mason and therefore that submitting a provisional ballot that is not counted does not constitute voting in an election, is distinct from the previous *mens rea* arguments about Ms. Mason's belief that she was eligible to vote

Instead of addressing applicability of the Rule of Lenity, the State argues that unless it is *required* to do otherwise, a court can read ambiguities out of a statute by ignoring contrary usages that demonstrate ambiguity. For example:

- The State asserts that the Election Code's use of the verb "cast" and not "vote" with respect to submitting provisional ballots, Appellant's Brief at 44-45, does not "**requir[e]** the verb 'vote' in section 64.012(a)(1) to include only tallied ballots," [5] State's Brief at 38 (emphasis added).

- It asserts that the Election Code's numerous uses of the noun "vote" to mean tallied ballots in sections 2.001 and 2.002(a) "**does not prevent** interpreting the verb 'vote' in section 64.012(a)(1) to cover timeframes preceding the counting of votes." State's Brief at 40 (emphasis added).

[5] The State notes that the similar federal HAVA provision uses the verb "to vote" when discussing provisional ballots. State's Brief at 38 n.8. But this cuts against the State's argument. The fact that Texas legislators chose a different verb, "to cast," with respect to provisional ballots indicates that in the Texas Election Code—the code at issue here—"voting" means having one's ballot actually counted. At most, these different uses would only further underscore the ambiguity present, which must be resolved in favor of Ms. Mason.

- The State also argues it was permissible for the court of appeals to disregard contrary dictionary definitions because there was no "specific number" of definitions that the court of appeals was obliged to consult. State's Brief at 37.

For support, the State takes language out of context from *Clinton v. State*, 354 S.W.3d 795 (Tex. Crim. App. 2011) and argues "a finder of fact may 'freely read statutory language to have any meaning which is acceptable in common parlance.'" *Id.* at 800. However, the State fails to acknowledge the broader rule recognized in *Clinton*: "we construe a statute according to its plain meaning without considering extratextual factors **unless** the statutory language is ambiguous or imposing the plain meaning would cause an absurd result." *id*. (citing *Boykin v. State*, 818 S.W.2d 782, 785–86) (emphasis added).

In short, the State attempts to flip the Rule of Lenity on its head by arguing that nothing *forces* a court to adopt Ms. Mason's definition of the term vote. But the question is not whether Ms. Mason can point to a definition that the court of appeals was obliged to accept. The question is whether the contrary uses noted by Ms. Mason demonstrate that the phrase "votes in an election" may be understood by "reasonably well-informed persons in two or more different senses." *Price*, 434 S.W.3d at 605. The answer is undoubtedly yes, and the State provides no argument for why Ms. Mason's interpretation would not be reasonable.

The Rule of Lenity requires resolving this ambiguity in favor of Ms. Mason and therefore means that submitting a provisional ballot that is not counted does not constitute "vot[ing] in an election" under Section 64.012(a)(1). Ms. Mason's conviction cannot be sustained.

B. The court of appeals' opinion renders the "attempt to vote" language of section 64.012(a)(1) superfluous.

The State argues that Ms. Mason "went beyond an attempt [to vote] and actually voted when she completed every step necessary on her part to cast her provisional ballot." State's Brief at 42. The State's distinction between the offenses of "vote" and "attempt to vote," however, is directly at odds with the definition of the term "vote" it asks this Court to accept. In its brief, the State agrees with the court of appeals' decision that the term "vote" "can be broadly defined as expressing one's choice, regardless of whether the vote is actually counted." State's Brief at 36 (citing Op.775).

Under the State's definition, Ms. Mason would have "voted" well before "complet[ing] every necessary step … to cast a provisional ballot." State's Brief at 42. Indeed, according to this definition, she would have "voted" as early as the very first step the State outlines in its brief, when she had done no more than merely filled out the provisional ballot. *Id*. The State's definition of the term "vote" therefore

leaves no room for a person to "attempt" to vote, and consequently renders this separate offense superfluous.

This violates the fundamental principle of statutory interpretation that requires that each term in a statute be given meaning. *Heckert v. State*, 612 S.W.2d 549, 552 (Tex. Crim. App. 1981) (rejecting interpretation that would render distinct statutory provisions a nullity). Under the Penal Code, a criminal "attempt" occurs when a person has "specific intent to commit an offense," and "does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." Tex. Penal Code § 15.01. This would mean that a person who tries but fails to have their ballot counted may have "attempted" to vote, which differs clearly from a person who actually succeeds in having their ballot counted, and therefore "voted." Because the State's definition of the term "vote" does not allow for a distinction between the offenses of "voting" and "attempting to vote," it must be rejected.

C. The court of appeals' construction of the term "vote" leads to illogical results.

The State has no defense to the fact that its overly broad definition of "to vote" as "expressing one's choice, regardless of whether the vote actually is counted," Op.775, would clearly lead to absurd results. Such a definition would criminalize a host of acts that would not be considered "voting," such as handing a provisional ballot to an election judge, who deposited it in a box marked "rejected ballots"—similar to what Ms. Mason did. Appellant's Brief at 48-49 (citing RR2.64:11-21; Tex. Elec. Code § 64.008(b); *id*. § 65.056 (b)).

Instead of defending its position, the State counters that Ms. Mason's construction of the term "vote" would also lead to illogical results because it would prevent criminalization of fraudulently cast provisional ballots that are rejected. State's Brief at 40. However, that is not true. While Section 64.012(a)(1) does not encompass rejected provisional ballots, other criminal provisions could be employed to prosecute bad faith and fraudulent submissions of provisional ballots. *See generally*, Tex. Penal Code, Ch. 32, 37.

The question for this Court is narrowly whether Section 64.012(a)(1)'s use of the phrase "votes in an election" is ambiguous with respect to whether it includes submitting a provisional ballot that is rejected. For the reasons expressed above, the

answer is clearly yes. The Rule of Lenity requires that such ambiguity must be resolved in favor of Ms. Mason, and Ms. Mason's conviction must be overturned.

V. Conclusion

For the foregoing reasons and those expressed in Appellant's Brief, Ms. Mason prays that the Court reverse the decision of the court of appeals, reverse her conviction, and order a judgment of acquittal.

Respectfully submitted,

Emma Hilbert
Texas Bar No. 24107808
Hani Mirza
Texas Bar No. 24083512
Texas Civil Rights Project
1405 Montopolis Drive
Austin, TX 78741-3438
Telephone: (512) 474-5073 ext. 105
Fax: (512) 474-0726
emma@texascivilrightsproject.org
hani@texascivilrightsproject.org

Sophia Lin Lakin*
New York Bar No. 5182076
Dale E. Ho*
New York Bar No. 4445326
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 519-7836
Fax: (212) 549-2654
slakin@aclu.org
dho@aclu.org

**pro hac vice application forthcoming*

/s/ Thomas Buser-Clancy
Thomas Buser-Clancy
Texas Bar No. 24078344
Andre Segura
Texas Bar No. 24107112
Savannah Kumar
Texas Bar No. 24120098
ACLU Foundation of Texas, Inc.
5225 Katy Freeway, Suite 350
Houston, TX 77007
Telephone: (713) 942-8146
Fax: (915) 642-6752
tbuser-clancy@aclutx.org
asegura@aclutx.org
skumar@aclutx.org

Alison Grinter
Texas Bar No. 24043476
6738 Old Settlers Way
Dallas, TX 75236
Telephone: (214) 704-6400
alisongrinter@gmail.com

Kim T. Cole
Texas Bar No. 24071024
2770 Main Street, Suite 186
Frisco, Texas 75033
Telephone: (214) 702-2551
Fax: (972) 947-3834
kcole@kcolelaw.com

Counsel for Appellant, Crystal Mason

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), the undersigned counsel certifies that the total number of words in Appellant's Reply Brief, exclusive of the matters designated for omission, is 5,996 words as counted by Microsoft Word Software.

/s/ Thomas Buser-Clancy
Thomas Buser-Clancy

CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this Reply Brief has been served on counsel of record and the State Prosecuting Attorney via e-service on July 19, 2021.

/s/ Thomas Buser-Clancy
Thomas Buser-Clancy

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Christopher Clay on behalf of Thomas Buser-Clancy
Bar No. 24078344
cclay@aclutx.org
Envelope ID: 55496995
Status as of 7/21/2021 8:44 AM CST

Associated Case Party: Crystal Mason

Name	BarNumber	Email	TimestampSubmitted	Status
Thomas Buser-Clancy	24078344	tbuser-clancy@aclutx.org	7/19/2021 7:46:25 PM	SENT
Sophia LinLakin		slakin@aclu.org	7/19/2021 7:46:25 PM	SENT
Dale E.Ho		dho@aclu.org	7/19/2021 7:46:25 PM	SENT
Emma Hilbert		emma@texascivilrightsproject.org	7/19/2021 7:46:25 PM	SENT
Hani Mirza		hani@texascivilrightsproject.org	7/19/2021 7:46:25 PM	SENT
Alison Grinter		alisongrinter@gmail.com	7/19/2021 7:46:25 PM	SENT
Kim T.Cole		kcole@kcolelaw.com	7/19/2021 7:46:25 PM	SENT
Andre Segura		asegura@aclutx.org	7/19/2021 7:46:25 PM	SENT
Savannah Kumar	24120098	skumar@aclutx.org	7/19/2021 7:46:25 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Tom Leatherbury		tleatherbury@velaw.com	7/19/2021 7:46:25 PM	SENT
Robert R.Landicho		rlandicho@velaw.com	7/19/2021 7:46:25 PM	SENT
Ashley Wiens		awiens@velaw.com	7/19/2021 7:46:25 PM	SENT
Joseph Wilson Spence	18913500	jwspence@tarrantcountytx.gov	7/19/2021 7:46:25 PM	SENT
Stacey Soule		information@spa.texas.gov	7/19/2021 7:46:25 PM	SENT
Rebecca HarrisonStevens		beth@texascivilrightsproject.org	7/19/2021 7:46:25 PM	SENT
Helena Faulkner		coaappellatealerts@tarrantcountytx.gov	7/19/2021 7:46:25 PM	SENT
Kevin Dubose		kdubose@adjtlaw.com	7/19/2021 7:46:25 PM	SENT