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COURT OF CRIMINAL APPEALS
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NO. PD-0881-20

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

CRYSTAL MASON,
Appellant,
V.

STATE OF TEXAS,
Appellee.

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

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ORAL ARGUMENT NOT GRANTED

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**pro hac vice application forthcoming

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Tarrant County, Texas
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STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument. In the event the Court determines oral argument is appropriate, Appellant requests the opportunity to present oral argument.

STATEMENT OF THE CASE

In the November 2016 general election, Appellant Crystal Mason submitted a provisional ballot pursuant to the federal Help America Vote Act (HAVA). RR3.Ex.9. At the time, Ms. Mason was on federal "supervised release" after having served her prison sentence for a federal tax offense. RR2.20:6-21:2. Because election officials subsequently determined she was not registered to vote at the time of the election, Ms. Mason's provisional ballot was rejected and never counted. RR3.Ex.6.

On March 28, 2018, the trial judge convicted Ms. Mason of illegal voting under Section 64.012(a)(1) of the Election Code, which makes it a second degree felony to "vote[] … in an election in which the person knows the person is not eligible to vote." CR.33. She was sentenced to five years in prison for this offense. *Id.*

On March 19, 2020, the Second Court of Appeals affirmed Ms. Mason's conviction. *Mason v. State*, 598 S.W.3d 755 (Tex. App—Fort Worth 2020) (hereinafter "Op."). On June 1, 2020, Ms. Mason sought reconsideration en banc. After requesting a response from the State, the court denied the motion on September

27, 2020. Justices Gabriel and Womack, however, wrote that they would have reviewed the panel's decision.

On March 31, 2021, this Court granted Ms. Mason's petition for discretionary review.

ISSUES PRESENTED

1. The Illegal Voting statute requires that "the person knows the person is not eligible to vote." Tex. Elec. Code § 64.012(a)(1). This Court's precedent, notably *Delay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014), confirms that the State must prove that the person knew her conduct violated the Election Code. Did the court of appeals err in holding that "the fact that [Ms. Mason] did not know she was legally ineligible to vote was irrelevant to her prosecution"? Op.770.

2. Did the court of appeals err by adopting an interpretation of the Illegal Voting statute that is preempted by the federal Help America Vote Act—specifically by interpreting the Illegal Voting statute to criminalize the good faith submission of provisional ballots where individuals turn out to be incorrect about their eligibility to vote? Op.775-76.

3. In an issue of first impression, did the court of appeals misinterpret the Illegal Voting statute by holding that submitting a provisional ballot that is rejected constitutes "vot[ing] in an election"? Op.774-75.

STATEMENT OF FACTS

In November of 2016, at the urging of her mother, Crystal Mason went to vote at her normal polling place. RR2.116:2-11. At the time, Ms. Mason was on federal supervised release for a previous federal tax conviction. "According to the lead supervisor in the probation office, no one in the office told Mason that she could not vote while on supervised release because '[t]hat's just not something [they] do.'"

Op.775 (citing RR2.20:9-17). The terms of Ms. Mason's federal supervised release included conditions detailing what she was and was not permitted to do, such as an instruction that she "shall not possess a firearm." RR3.Ex.1. None of the conditions addressed voting or submitting a provisional ballot. *See id*.

"The evidence does not show that she voted for any fraudulent purpose." Op.779. Ms. Mason had no personal or pecuniary interest in the elections, and nothing in general to be gained except exercising her civic duty at the urging of her mother. RR2.116:8-11.

A mother of three and a caretaker for her brother's four children, Ms. Mason was working and going to night school to become a licensed aesthetician. RR2.146:12-17. Ms. Mason testified that she would not have dared even go to the polls if she had known that it meant jeopardizing her ability to be with her kids again:

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

RR2.126:3-8; *see also* RR2.146:6-11 ("I would never do anything else to jeopardize to lose my kids again. I was happy enough to come home and see my baby graduate, my daughter. Now my son is graduating again. I wouldn't have dared went to the poll[s] to vote.").

The worker checking the voter-registration roll at Ms. Mason's regular polling place could not find her name after looking under both her maiden and married

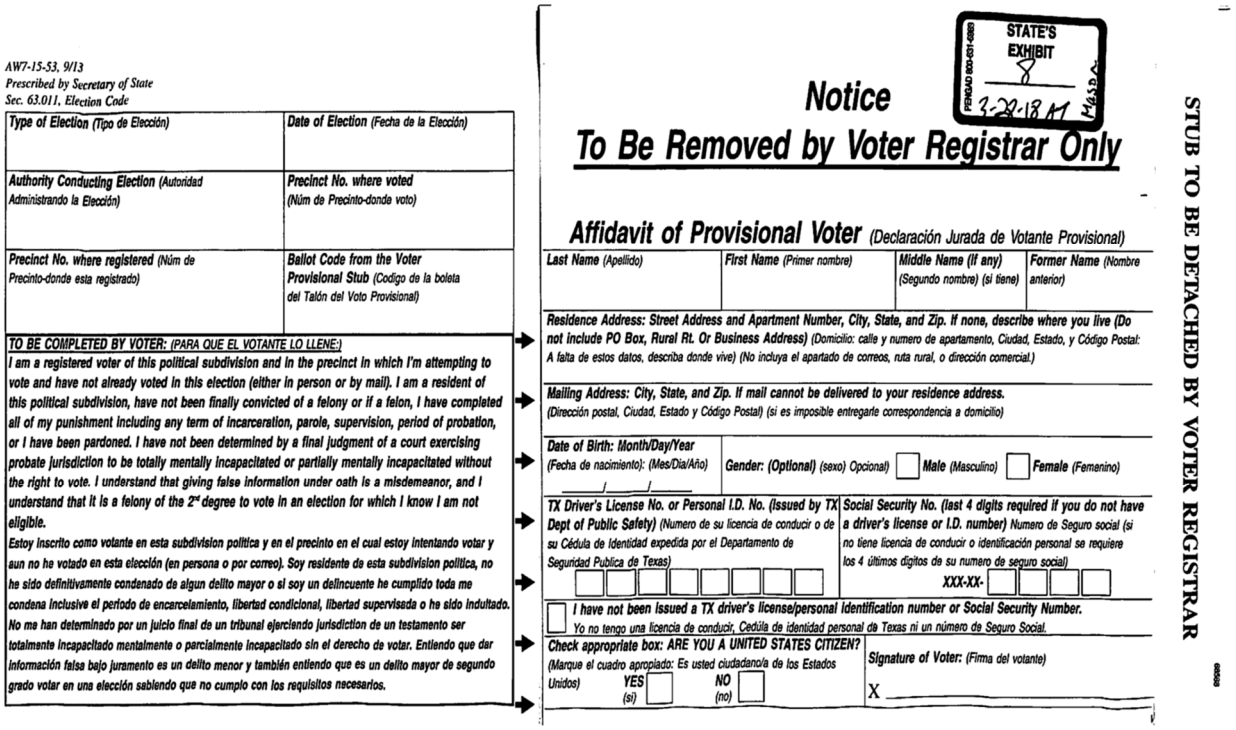
names. RR2:60:3-13. Because they could not find her name, "election workers offered to let her complete a provisional ballot" pursuant to the federal Help America Vote Act, "which [Ms. Mason] agreed to do." Op.766.

An election worker gave Ms. Mason a provisional ballot affidavit and told her that if she was in the right location, the provisional ballot would count, and if she was not, it would not count. RR2:119:11-23.

The provisional ballot affidavit contains two parts. The left hand side of the provisional ballot affidavit contains information that the election worker fills out (such as the precinct number), followed by small print in English and Spanish, which contain a series of affirmations, including the statement that "I am a registered voter of this political subdivision and in the precinct in which I'm attempting to vote and ... have not been finally convicted of a felony, or if a felon, I have completed all of my punishment including any period of incarceration, parole, supervision, period of probation or I have been pardoned." [1] RR3.Ex.8. Although these affirmations track

[1] In Texas, a person convicted of a felony may become eligible to vote once that person has "fully discharged the person's sentence, including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court." Tex. Elec. Code § 11.002. Ms. Mason was not on "parole," and federal supervised release is not equivalent to "probation" under state law. *United States v. Ferguson*, 369 F.3d 847, 849 n.5 (5th Cir. 2004) ("Supervised release is different than probation: 'probation is imposed instead of imprisonment, while supervised release is imposed after imprisonment.'"). Nor is it the same as "supervision" in Texas, which is understood to be equivalent to probation. *Speth v. State*, 6 S.W.3d 530, 532 n.3 (Tex. Crim. App. 1999) ("We use the terms probation and community supervision interchangeably in this opinion.").

eligibility requirements to vote under Texas law, the form does not specify that these affirmations determine whether a person is in fact eligible to vote. There is no signature line on the left hand side of the form. *Id.* On the right hand side of the form, under a large font header "Affidavit of Provisional Ballot," there are numerous blank fields for individuals to fill out their personal information (including name, address, date of birth, driver license number, and social security number). *Id.* At the bottom of the right hand side of the form, there is a space for the individual to sign. *Id.*



AW7-15-53, 9/13
Prescribed by Secretary of State
Sec. 63.011, Election Code

Type of Election (Tipo de Elección)	Date of Election (Fecha de la Elección)
Authority Conducting Election (Autoridad Administrando la Elección)	Precinct No. where voted (Núm de Precinto-donde voto)
Precinct No. where registered (Núm de Precinto-donde esta registrado)	Ballot Code from the Voter Provisional Stub (Codigo de la boleta del Talón del Voto Provisional)

TO BE COMPLETED BY VOTER: (PARA QUE EL VOTANTE LO LLENE:)
I am a registered voter of this political subdivision and in the precinct in which I'm attempting to vote and have not already voted in this election (either in person or by mail). I am a resident of this political subdivision, have not been finally convicted of a felony or if a felon, I have completed all of my punishment including any term of incarceration, parole, supervision, period of probation, or I have been pardoned. I have not been determined by a final judgment of a court exercising probate jurisdiction to be totally mentally incapacitated or partially mentally incapacitated without the right to vote. I understand that giving false information under oath is a misdemeanor, and I understand that it is a felony of the 2nd degree to vote in an election for which I know I am not eligible.
Estoy inscrito como votante en esta subdivision politica y en el precinto en el cual estoy intentando votar y aun no he votado en esta elección (en persona o por correo). Soy residente de esta subdivision politica, no he sido definitivamente condenado de algun delito mayor o si soy un delincuente he cumplido toda me condena inclusive el periodo de encarcelamiento, libertad condicional, libertad supervisada o he sido indultado. No me han determinado por un juicio final de un tribunal ejerciendo jurisdiction de un testamento ser totalmente incapacitado mentalmente o parcialmente incapacitado sin el derecho de votar. Entiendo que dar información falsa bajo juramento es un delito menor y también entiendo que es un delito mayor de segundo grado votar en una elección sabiendo que no cumplo con los requisitos necesarios.

STATE'S EXHIBIT 8 3-29-18 MAS D.

Notice
To Be Removed by Voter Registrar Only

Affidavit of Provisional Voter (Declaración Jurada de Votante Provisional)

Last Name (Apellido)	First Name (Primer nombre)	Middle Name (If any) (Segundo nombre) (si tiene)	Former Name (Nombre anterior)

Residence Address: Street Address and Apartment Number, City, State, and Zip. If none, describe where you live (Do not include PO Box, Rural Rt. Or Business Address) (Domicilio: calle y numero de apartamento, Ciudad, Estado, y Código Postal: A falta de estos datos, describa donde vive) (No incluya el apartado de correos, ruta rural, o dirección comercial.)

Mailing Address: City, State, and Zip. If mail cannot be delivered to your residence address. (Dirección postal, Ciudad, Estado y Código Postal) (si es imposible entregarle correspondencia a domicilio)

Date of Birth: Month/Day/Year (Fecha de nacimiento): (Mes/Dia/Año) ____/____/____ Gender: (Optional) (sexo) Opcional) ☐ Male (Masculino) ☐ Female (Femenino)

TX Driver's License No. or Personal I.D. No. (Issued by TX Dept of Public Safety) (Numero de su licencia de conducir o de su Cédula de Identidad expedida por el Departamento de Seguridad Publica de Texas) ☐☐☐☐☐☐☐☐

Social Security No. (last 4 digits required if you do not have a driver's license or I.D. number) Numero de Seguro social (si no tiene licencia de conducir o identificación personal se requiere los 4 últimos dígitos de su numero de seguro social) XXX-XX-☐☐☐☐

☐ I have not been issued a TX driver's license/personal identification number or Social Security Number. Yo no tengo una licencia de conducir, Cedúla de identidad personal de Texas ni un número de Seguro Social.

Check appropriate box: ARE YOU A UNITED STATES CITIZEN? (Marque el cuadro apropiado: Es usted ciudadano/a de los Estados Unidos) YES (si) ☐ NO (no) ☐

Signature of Voter: (Firma del votante) X _____

STUB TO BE DETACHED BY VOTER REGISTRAR

Id.

Ms. Mason took pains to ensure that the information she entered on the right side of the provisional ballot affidavit was correct. RR2:125:12-20; 159:23-25. She then signed the right hand side below the information she filled out. RR3.Ex.9. Ms.

Mason testified that she did not read the left hand side of the provisional ballot affidavit. RR2.122:13-22; 125:12-20. The State's primary witness testified that he could not be sure if she read the left hand side of the provisional ballot affidavit. State's Brief on the Merits to the Court of Appeals at 25; *see also* RR2.86:24-87:2. Another witness testified that from several feet away he saw her reviewing the affidavit, but his testimony was not specific as to which side she was reviewing. RR2.102:7-23.

After completing her provisional ballot affidavit, Ms. Mason filled out her provisional ballot on an electronic screen. RR2.123:6-24:15. Ms. Mason's provisional ballot affidavit and the electronic receipt of her ballot were stored separately from the votes that were cast. RR2.64:11-21; Tex. Elec. Code § 64.008(b).

After Ms. Mason submitted her provisional ballot, election officers determined she was not eligible to vote, resulting in the rejection of her provisional ballot. RR3.Ex.6; Tex. Elec. Code § 64.008(b). Ms. Mason's ballot was never counted. *Id.*

SUMMARY OF ARGUMENT

(1) 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" under Section 64.012(a)(1). That holding cannot be reconciled with the plain language of the statute, which criminalizes "vot[ing] ... in an election in which the person **knows**

the person is not eligible to vote." Tex. Elec. Code § 64.012(a)(1) (emphasis added). As if that were not clear enough, this Court provided controlling guidance seven years ago in *Delay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014). That case analyzed a similar statutory requirement that individuals know that their actions violated the Election Code in order for their actions to be criminal. This Court held that this required that the individual **"actually realize[]"** the conduct **"in fact"** violated the Election Code. *Id.* at 252 (emphasis added). The court of appeals' opinion cannot be squared with *Delay*.

(2) HAVA preempts the court of appeals' interpretation of Section 64.012(a)(1), which criminalizes the submission of provisional ballots by citizens who have a good faith but mistaken belief that they are eligible to vote. The court of appeals' opinion is contrary to the text and purpose of the provisional ballot requirement of HAVA, which exists to permit individuals who are uncertain about their eligibility to submit a provisional ballot that will be subsequently subject to review and counted only if that person is eligible to vote, rather than forgo their possible right to vote altogether. Upholding the opinion could subject tens of thousands of Texans who submit provisional ballots in good faith to potential prosecution.

(3) Submitting a provisional ballot that is ultimately rejected does not constitute "vot[ing] in an election" under Section 64.012(a)(1). The court of appeals failed to properly credit numerous contrary uses in the Election Code and dictionaries,

including the Election Code's use of the verb "casts" instead of "votes" when discussing provisional ballots. At a minimum, these contrary usages demonstrate ambiguity with respect to the term "votes." Pursuant to the Rule of Lenity, such ambiguity must be resolved in favor of the criminal defendant. Further, the court of appeals' overly broad interpretation that "to vote" means any expression of choice regardless of whether that choice is counted violates several principles of statutory construction, including rendering the separate statutory crime of an "attempt to vote" superfluous and leading to illogical results.

ARGUMENT

I. 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 court of appeals misinterpreted Section 64.012(a)(1) 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. This erroneous interpretation contradicts the statute's express *mens rea* requirement—that "the person knows the person is not eligible to vote"—and this Court's precedent, including *Delay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014).

A. The court of appeals' opinion conflicts with the statute's plain language.

Under Section 64.012(a)(1), "a person commits an offense if the person ... votes or attempts to vote in an election in which the person **knows** the person is not

eligible to vote." (emphasis added).

On appeal, Ms. Mason challenged the sufficiency of the evidence that she knew she was ineligible to vote as a result of being on federal supervised release. The court of appeals did not find that the evidence was legally sufficient to demonstrate that Ms. Mason had knowledge of her ineligibility to vote, observing that "she voted ... despite the fact that she was **not certain** [about her eligibility] and may not have read the warnings on the affidavit form." Op.779 (emphasis added). Under Section 64.012(a)(1)'s plain text, the court's determination that Ms. Mason lacked subjective awareness of her ineligibility should have resulted in a reversal of her conviction, as the evidence failed to demonstrate that she "kn[ew] [she was] not eligible to vote."

Nevertheless, the court affirmed Ms. Mason's conviction, holding that "[t]he fact that [Ms. Mason] did not know she was legally ineligible to vote was irrelevant to her prosecution." Op.770. The court held that Ms. Mason's knowledge that she was on federal supervised release was, by itself, sufficient to meet Section 64.012(a)(1)'s *mens rea* element. Op.768–70. It reasoned that the law presumes her knowledge of the legal consequences of that underlying fact—per the State, that being on federal supervised release rendered her ineligible to vote. *Id.*

The court's holding impermissibly nullifies the express *mens rea* element of Section 64.012(a)(1), which requires that the individuals "know[]" they are "not

eligible to vote" under the Election Code. Where a criminal statute specifies a culpable mental state, the State bears the burden of proving that mental state beyond a reasonable doubt. *King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App. 1995) ("As with all elements of a criminal offense, the State must prove the *mens rea* element beyond a reasonable doubt."). In other words, the state had to demonstrate that Ms. Mason not only knew that she was on federal supervised release (which is undisputed), but that she *also knew* that being on federal supervised release rendered her ineligible to vote—*i.e.*, that she voted despite being subjectively aware she was ineligible to do so.

The court of appeals erred by reading the *mens rea* requirement out of the statute.[2] "[T]he fact that Ms. Mason did not know she was legally ineligible to vote," Op.770, is in fact directly relevant to her prosecution, because it negates the required *mens rea* element.

B. The opinion conflicts with *Delay v. State*.

In *Delay*, former Congressman Tom Delay was convicted of money

[2] The court of appeals' error with respect to the *mens rea* requirement under Section 64.012(a)(1) infected other areas of its opinion that would require reconsideration on remand if this Court does not order an acquittal. For instance, Ms. Mason argued that she received ineffective assistance of counsel because her trial counsel failed to call numerous available witnesses who would have supported her claim that she did not know she was ineligible to vote. Appellant Reply Br. to Court of Appeals at 27-29. The court of appeals rejected this argument solely on the basis that it was irrelevant to whether Ms. Mason knew she was ineligible to vote. Op.785.

laundering and conspiracy to launder money based on a series of corporate political contributions that were alleged to violate Section 253.003(a) of the Election Code. 465 S.W.3d 232. Section 253.003(a) criminalizes "knowingly mak[ing] … a political contribution in violation of [the Election Code]."

This Court reversed the conviction, holding that "knowingly" taking an action "in violation of the Election Code" means "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**." *Delay*, 465 S.W.3d at 250 (emphasis added). Thus, *Delay* held that, in order to be guilty of an unlawful political contribution, the actor must know not only that they are making a contribution that will be steered to a specific candidate, **but also** that such a contribution violates the Election Code. *Delay*, 465 S.W.3d at 250.

Section 64.012(a)(1) imposes the same knowledge requirement: not just of a predicate action or conditions, but also that the actions taken were in violation of the Election Code. Just as Section 253.003(a) makes it a crime for a person to knowingly make a campaign contribution **which that person knows is in violation of the Election Code**. *Delay*, 465 S.W.3d at 250-51, Section 64.012(a) makes it an offense to "vote[]… in an election **in which the person knows the person is not eligible to vote**," *i.e.*, in violation of the eligibility requirements established by Sections 11.001

and 11.002 of the Election Code. (emphasis added).

Thus, the State was required to prove:

- (1) knowledge of the "particular circumstances that render ... otherwise-innocuous conduct unlawful"—here, that Ms. Mason knew she was on federal supervised release; **and**
- (2) **an "actual[] realiz[ation]"** that those underlying facts **"in fact constitute[] a 'violation of' the Election Code**"—here, that Ms. Mason "actually realized" being on federal supervised release meant, per the State, she was not eligible to vote, *i.e.*, the "violation" of the Election Code at issue here.

Id. at 250, 252.

Despite the precedential importance of *Delay*, the court of appeals only briefly discussed the case in a footnote. Op.769 n.12. The court of appeals observed that *Delay* found statutory ambiguity with respect to determining "whether the word 'knowingly' ... modified merely the making of a campaign contribution," or whether it also modified the phrase "'in violation of' the Election Code." *Delay*, 465 S.W.3d at 250; Op.769 n.12. The court then asserted that *Delay* was distinguishable because there is no similar ambiguity in the statute at issue in this case. Op.769 n.12.

But the fact that *Delay* resolved grammatical ambiguity in Section 253.003(a) does not affect its controlling application here. The holding in *Delay* turned on this

Court's determination of what it substantively means to "knowingly ... violat[e] the Election Code." *Delay*, 465 S.W.3d at 250-51. Similarly, the issue here is what it means for a person to "know[] the person is not eligible to vote" under the Election Code. Op.768. In *Delay*, the Court found the evidence insufficient to sustain a conviction for violation of Section 253.003(a) because, although the contributing corporations may have known that their contributions would be steered to specific candidates, "nothing in the record shows that anyone associated with the contributing corporations **actually realized** that to make a political contribution under these circumstances **would in fact** violate … the Texas Election Code." *Delay*, 465 S.W.3d at 252 (emphasis added). In other words, even though the defendants in *Delay* were sophisticated individuals and corporations, this Court did not simply assume that they had knowledge of whether their conduct violated the Election Code. Nor did this Court hold, as the court of appeals did in this case, that such actual knowledge of a violation of the Election Code was "irrelevant." In fact, this Court reached the opposite conclusion: that a defendant cannot be found guilty of a criminal violation of the Election Code without actual knowledge that the conduct in question violated the Code.

It is this part of *Delay* that should have controlled the outcome here. In order to establish that Ms. Mason "kn[ew] [she was] not eligible to vote" under Section 64.012(a)(1) the State was required to prove not only that Ms. Mason knew she was

on federal supervised release, but also that she **"actually realized"** that being on federal supervised release "in fact" rendered her ineligible to vote, *Delay*, 465 S.W.3d at 252 (emphasis added).

That *Delay* involved a grammatical ambiguity and Section 64.012(a)(1) is unambiguous only underscores the error in the decision below, which read the knowledge requirement out of the *unambiguous* Section 64.012(a)(1). As the court of appeals observed, "Section 64.012(a)(1) places the word 'knows' after the actus-reas verb and immediately before the word describing the attendant circumstances––'ineligible.'" Op.769 n.12. Thus, in the statute's text, "knows" refers plainly and unambiguously to the fact that "the person is not eligible to vote." Despite the court of appeals' acknowledgment that "knows" unambiguously modifies "ineligible" in Section 64.012(a)(1), the court of appeals found that it was legally "irrelevant" whether Ms. Mason knew she was ineligible to vote, Op.770. But the clarity of this statute cannot be a basis for reading the *mens rea* requirement out of it. *Cf. United States v. Games-Perez,* 667 F.3d 1136, 1145 (Gorsuch, J., concurring) ("How can it be that ... when Congress expressly imposes just such a *mens rea* requirement ... we turn around and read it *out* of the statute?").

In sum, the court of appeals affirmed Ms. Mason's conviction based on nothing more than her knowledge that she was on supervised release. According to this Court's holding in *Delay*, the Election Code requires actual knowledge of her

ineligibility to vote. Because Ms. Mason did not know she was ineligible to vote, the Court should reverse Ms. Mason's conviction.

C. The opinion conflicts with other precedents from this Court.

Voting is not criminal conduct. Rather, it is the circumstances of the individual—eligible or ineligible—that may render the conduct unlawful under Section 64.012(a)(1). Accordingly, a defendant like Ms. Mason who does not know that she is ineligible to vote does not have the guilty state of mind the statute's language and purpose requires.

This Court has consistently affirmed 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) (analyzing Tex. Penal Code § 31.07 and holding that for a person to be guilty of the offense of unauthorized use of a motor vehicle, that person must have a culpable mental state of "knowing" they are operating a vehicle without the owner's consent, not merely that they are operating a vehicle).

For instance, this Court held that "[t]he word 'knowingly,' as used in the context that the defendant knowingly receives property that has been stolen" requires "actual subjective knowledge, rather than knowledge that would have indicated to a reasonably prudent man that the property was stolen," because such actual

knowledge is what makes unlawful the otherwise innocent conduct of receiving property. *Dennis v. State*, 647 S.W.2d 275, 280 (Tex. Crim. App. 1983) (analyzing Tex. Penal Code § 31.03(a), (b)(2)).

Similarly, with respect to a statute that prohibits "intentionally or knowingly ... display[ing] a firearm ... in a manner calculated to alarm," this Court held that "persuading a jury that the actor's display was objectively alarming would not, by itself, be enough for a conviction." *State v. Ross*, 573 S.W.3d 817, 826 (Tex. Crim. App. 2019) (analyzing Tex. Penal Code § 42.01(a)(8)). "The State would also ultimately have to prove ... that the actor knew that his display was objectively likely to alarm." *Id.*; *see also Jackson v. State*, 718 S.W.2d 724, 726 (Tex. Crim. App. 1986) (for the evading arrest offense, Tex. Penal Code § 38.04, "it is essential that a defendant know the peace officer is attempting to arrest him").

U.S. Supreme Court precedent is in accord. In *Liparota v. United States*, the Supreme Court held that a federal statute governing food stamp fraud required that defendants to know that their acquisition or possession of food stamps was unauthorized by the law. *Liparota v. United States*, 471 U.S. 419, 425 (1985). The statute in *Liparota* made it a crime to "knowingly use[], transfer[], acquire[], alter[], or possess[] coupons or authorization cards in any manner not authorized by [the statute] or the regulations." *Id.* at 420 (quoting 7 U.S.C. § 2024(b)(1)(1982)). The Supreme Court interpreted the *mens rea* of the offense ("knowingly") to apply to the

legal element of the offense ("not authorized by [the statute] or the regulations") and required that "the defendant knew his conduct to be unauthorized by statute or regulations." *Id.* at 425. The Court reasoned that to hold otherwise "would be to criminalize a broad range of apparently innocent conduct." *Id.* at 426. The Court further noted that its decision was supported by the Rule of Lenity, which "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Id.* at 427.

Similarly, in *Rehaif v. United States*, 139 S. Ct. 2191 (2019), a case involving federal prosecution for unlawful possession of a firearm on the basis of immigration status, the Court held that the statute required the government to prove that the defendant knew he was in the United States illegally. The Court found that such a knowledge requirement was essential where "the defendant's status is the 'crucial element' separating innocent from wrongful conduct." *Id.* at 2197. Otherwise, the statute would subject to criminal prosecution individuals who make innocent mistakes about their status. *Id.* at 2197-98.

The *Rehaif* Court specifically rejected arguments similar to those adopted by the court of appeals here, including that immigration status was a question of law and that ignorance of the law was not a defense. The Court explained:

> The defendant's status as an alien "illegally or unlawfully in the United States" refers to a legal matter, but this legal matter is what the

> commentators refer to as a "collateral" question of law. A defendant who does not know that he is an alien "illegally or unlawfully in the United States" does not have the guilty state of mind that the statute's language and purposes require.

Id. at 2198.

This Court should interpret Section 64.012(a)(1) consistently with this long line of precedent and reverse Ms. Mason's conviction because the statute's knowledge requirement cannot be read out of the statute.

D. The opinion's reasoning is unpersuasive.

The court of appeals attempted to justify negating Section 64.012(a)(1)'s *mens rea* element by relying on the general proposition that ignorance of the law is not a defense. Op.768-69 (citing Tex. Penal Code § 8.03(a)). But this case does not hinge on whether an affirmative defense of mistake of law exists in this context. The *mens rea* requirement and a defense of ignorance of law are two distinct concepts. Where a statute, as here, requires that the individual have a particular mental state, *mens rea* is a distinct element of the offense and it is the state's burden to establish it beyond a reasonable doubt. As this Court has made clear, a defendant cannot simply be presumed to have the requisite mental state. In fact, *mens rea* is the most important element when the underlying conduct is not itself criminal, like voting.

In *Delay*, the State similarly argued that the defendants were presumed to know the law and therefore were presumed to have known that their actions violated

the Election Code. *See Delay*, State's Post-Submission Supplemental Letter Brief at 3. However, this Court held that the State bore the burden of showing that even the sophisticated actors in that case actually realized their conduct violated the Election Code because the statutory language so required. *Delay*, 465 S.W.3d at 250-52.

This Court was correct in *Delay* and should reject any similar argument by the State here. When a defendant's lack of subjective awareness regarding the legal consequences of their crime negates the required statutory *mens rea* element, such "ignorance" demonstrates that the State has failed to meet its burden to sustain a conviction.

As Professor LaFave explains in the treatise on Substantive Criminal Law:

> Instead of speaking of ignorance or mistake of fact or law as a defense, it would be just as easy to note simply that **the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense.** For example, to take the classic case of the man who takes another's umbrella out of a restaurant because he mistakenly believes that the umbrella is his, it is not really necessary to say that the man, if charged with larceny, has a valid defense of mistake of fact; it would be more direct and to the point to assert that the man is not guilty because he does not have the mental state (intent to steal the property of another) required for the crime of larceny.

Wayne R. LaFave, 1 SUBST. CRIM. L., § 5.6(a) (3d ed.) (2020) (emphasis added); *see also Liparota*, 471 U.S. at 425 n.9.

Moreover, instead of relying on the controlling analysis in *Delay*, the court of

appeals relied primarily on a case from the 1800s, *Thompson v. State*, 9 S.W. 486 (Tex. Ct. App. 1888)—an unpersuasive decision that is out of step with this Court's more recent precedent. It was an error for the court of appeals to rely on this century-old, single-paragraph decision, when it has clearly been abrogated by *Delay.*

In *Thompson*, the Court of Appeals of Texas held that a person's knowledge of their prior felony conviction for assault with intent to murder was sufficient to demonstrate knowledge of their ineligibility to vote, because individuals are charged with knowledge of the law. *Id.* at 486-87. This holding cannot be reconciled with *Delay*, which rejected the State's attempt to charge the sophisticated actors in that case with knowledge of the law. It also fails to account for the fact that knowledge of ineligibility is the specified *mens rea* for illegal voting under Section 64.012(a)(1), and therefore must be proven by the State and cannot be presumed.

Indeed, this flaw in *Thompson*'s reasoning has been noted since at least 1937, when a Texas Law Review article labeled the opinion "unsound." George Wilfred Stumberg, *Mistake of Law in Texas Criminal Cases*, 15 Tex. L. Rev. 287, 297, n.34 (1937). Professor Stumberg—who was a nationally recognized authority on criminal law—explained:

> The rule that ignorance of the law does not excuse, as contained by the Penal Code, could hardly have been intended by the framers of the Code to be applicable when the specific crime requires *knowledge* for guilt. ... When the legislature requires knowledge for guilt, it is only fair to assume that it meant what it said and did not mean *presumed* knowledge when there was no knowledge in fact.

Id.

The court of appeals' other cited cases fail for similar reasons. *Medrano v. State* relied entirely on the faulty reasoning of *Thompson* and involved facts materially different from the case at bar—namely, the court found in the alternative that the defendant *knew* she was ineligible to vote. 421 S.W.3d 869, 885 (Tex. App.—Dallas 2014, pet. ref'd). In *Medrano*, a candidate for office coached his niece to lie on her voter registration card and lie again at the voting place about her residence so that she could cast a ballot for him. *Id.* at 874. The Court therefore found that the niece did what the law makes criminal: knowingly misrepresented a characteristic about herself (her place of residence) to make herself eligible to cast a ballot. No such facts exist in this case. Ms. Mason was not involved in a scheme to lie to officials, had no personal interest in the election, and took care to accurately fill out the provisional ballot affidavit. *See supra* Statement of Facts.12-15.

The court of appeals' other cited cases fare no better. Neither *Heath v. State,* No. 14-14-00532-CR, 2016 WL 2743192 (Tex. App—Houston [14th Dist.] May 10, 2016, pet. ref'd) (mem. op., not designated for publication), nor *Jenkins v. State,* 468 S.W.3d 656, 677 (Tex. App.—Houston [14th Dist.] 2015), pet. dism'd, improvidently granted) discusses *Delay* at all despite its controlling analysis, and neither case analyzes Section 64.012(a)(1) as a circumstances of the offense type crime. In fact, in *Jenkins* the court didn't even analyze whether the State must show

the defendant was subjectively aware he was ineligible to vote. Instead, the court of appeals found error in the trial court's refusing to instruct the jury on a defendant's requested statutory mistake of law defense. Ms. Mason has not raised an affirmative defense regarding mistake of law; her verdict must be reversed because the State failed to demonstrate the required *mens rea* element.

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

Under the correct interpretation of Section 64.012(a)(1)'s knowledge requirement, the State bore the burden of demonstrating that Ms. Mason actually knew she was ineligible to vote, which required proving beyond a reasonable doubt:

(1) that Ms. Mason knew she was on federal supervised release (knowledge of "the particular circumstances that render [her] otherwise-innocuous conduct unlawful," *Delay*, 465 S.W.3d at 250); **and**

(2) that Ms. Mason "actually realized," that being on federal supervised release meant, per the State, that she was not eligible to vote (knowledge that "undertaking the conduct under those circumstances in fact constitutes a 'violation of' the Election Code,'" *id.* at 250, 252).

While it is undisputed that Ms. Mason knew she was on federal supervised release, the court of appeals correctly noted that Ms. Mason did not actually realize

that being on federal supervised release rendered her ineligible to vote.[3] As the court found, "she 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….").

The court of appeals' determination that the evidence failed to show that Ms. Mason was subjectively aware that she was ineligible to vote was correct. Ms. Mason unequivocally testified that she did not know she was considered ineligible to vote, and would not have jeopardized her newly rebuilt life to cast a ballot if she had known. RR2.126:4-8. There was no evidence that Ms. Mason had any personal interest in the election. Nor was there any evidence that she would have or should have become aware of the fact she was considered ineligible to vote. Indeed, the

[3] There is significant legal ambiguity about whether Ms. Mason's "federal supervised release" rendered her ineligible to vote. Federal supervised release is not the same as parole or probation; nor is it the equivalent of "supervision" as that term is used in Texas law. *See* Appellant Reply Br. to Court of Appeals at 8-10. While the court of appeals found against Ms. Mason on this issue, and Ms. Mason has not requested review on that aspect of the opinion, the ambiguity between the term federal supervised release and the terms under Texas law listed on the left hand side of the provisional ballot affidavit further supports Ms. Mason's lack of knowledge that she was ineligible to vote.

supervisor of her release program testified that Ms. Mason was not told that being on federal supervised release rendered her ineligible to vote. RR2.20:9-17.

The State's only evidence regarding Ms. Mason's knowledge of her ineligibility was speculation that she had read the long and confusing affirmations set forth in small-print on the left-hand side of the provisional ballot affidavit. Notably, those affirmation were not accompanied by a signature line and did not appear under the header "Affidavit of Provisional Voter" located on the right side of the ballot.[4] Even this speculation, however, would not be sufficient to demonstrate that Ms. Mason "actually realized" that being on federal supervised release rendered her ineligible to vote. In *Delay*, the corporate executive defendants had ample financial resources, legal advisors, and fund-raising literature that should have informed them of a "substantial and unjustifiable *risk* that their corporate contributions would violate the Texas Election Code"—but this Court held that these facts were not sufficient to demonstrate **actual** knowledge that their actions violated the code. *Delay*, 465 S.W.3d at 252. This Court further noted that "neither

[4] Further, prosecuting someone for illegal voting solely on the basis that they read and signed the provisional ballot affidavit as contemplated by HAVA, and with no other evidence of knowledge of ineligibility, as the State has attempted to do here, would potentially subject to prosecution every individual who signed the provisional ballot affidavit and subsequently had their ballot rejected—each of those individuals affirmed that they were registered to vote in the relevant county despite being told they were not on the registration list. Therefore, it would conflict with HAVA and be preempted for similar reasons as those discussed further below.

recklessness nor negligence" are sufficient *mens rea* for an offense under Section 253.003(a) of 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, it would not show that she was "actually cognizant of any illegality," *Delay*, 465 S.W.3d at 252.[5]

Nevertheless, the court of appeals held that Ms. Mason's knowledge of being on supervised release was, by itself, "sufficient to prove that she committed the offense of illegal voting." Op.880. In other words, the court of appeals determined that Ms. Mason violated Section 64.012(a)(1) "despite that fact" that she did not have the required *mens rea* under the plain language of the law. *Id.* at 779. As the knowledge requirement cannot be simply disregarded where the evidence fails to support such a finding, this Court must reverse and vacate her conviction.

[5] Regardless, the evidence did not show that Ms. Mason read the left hand side of the provisional ballot affidavit. Ms. Mason testified that she did not read that portion of the affidavit, RR2.122:13-22, and the State conceded that their primary witness "could not say with certainty that Appellant actually read [the provisional ballot affidavit]." State's Brief on the Merits to the Court of Appeals at 25; *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 theory. RR2.102:7-23; *see* Appellant Reply Br. to Court of Appeals at 13.

II. The court of appeals erred by adopting an interpretation of the Illegal Voting Statute that is preempted by HAVA.

The court of appeals' interpretation of Section 64.012(a)(1) also must be reversed because the court adopted an interpretation of state law that directly conflicts with federal law and is thus pre-empted.

HAVA permits individuals who believe in good faith that they are eligible to vote to cast a provisional ballot, **even when their belief turns out to be incorrect**. As even the State has conceded here, HAVA "ensures that anyone who *believes they are eligible* to vote is given a provisional ballot if their name does not appear on the list of qualified voters." State's Response to Motion for En Banc Reconsideration at 17 (emphasis in the original). The court of appeals' interpretation of Section 64.012(a)(1) criminalizes such conduct—a result for which even the State did not advocate.

The court of appeals interpreted Section 64.012(a)(1) in a manner that directly conflicts with federal law and could subject potentially tens of thousands of Texans in every federal election to felony prosecution. This Court should correct the court of appeals' misinterpretation and clarify that Section 64.012(a)(1) does not criminalize submitting a provisional ballot based on a good faith but mistaken belief of voter eligibility. Because Ms. Mason submitted her provisional ballot in good faith, and in following the instructions of the election worker, she must be acquitted.

A. HAVA preempts state law when there is a conflict.

HAVA was enacted pursuant to Congress' Election Clause authority to make laws governing the time, place, and manner of holding Federal elections. U.S. Const. Art. 1, Sect. 4; H.R. Rep. No. 107-329 at 57. As such, HAVA preempts state or local laws that conflict with its text and purpose.

"The [Elections] Clause empowers Congress to pre-empt state regulations governing the 'Times, Places and Manner' of holding congressional elections." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8 (2013). Congress' power to regulate the "'Times, Places and Manner of congressional elections' is paramount" and where it is exercised, "'the regulations effected supersede those of the State which are inconsistent therewith.'" *Id*. at 9 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)). If state law conflicts with federal election law—here, by criminalizing a right guaranteed by HAVA—the state law must give way and "ceases to be operative." *Id.* at 9 (citation omitted).[6]

As a well-settled matter of statutory interpretation, the court of appeals should

[6] In contrast to other areas of federal law, there is no presumption against preemption for laws enacted under the Elections Clause because "the power the Elections Clause confers is none other than the power to pre-empt." *Arizona*, 570 U.S. at 14. Contrasting federal elections from other traditional prerogatives of the states, the U.S. Supreme Court observed that "the States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it 'terminates according to federal law.'" *Id*. (quoting *Buckman Co. v. Plaintiffs' Legal Comm*., 531 U.S. 341, 347 (2001)).

not have construed Section 64.012(a)(1) in a manner that is preempted by HAVA. *Alobaidi v. State*, 433 S.W.2d 440, 442 (Tex. Crim. App. 1968) ("A statute susceptible of more than one construction will be so interpreted . . . so that it will be constitutional.").

B. The court of appeals' interpretation conflicts with HAVA.

"HAVA was passed in order to alleviate 'a significant problem voters experience[,]'" which "'is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters.'" *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (quoting H.R. Rep. 107–329 at 38 (2001)).

The plain language of HAVA establishes a clear right to submit provisional ballots so long as an individual attests to their eligibility. HAVA provides that if an individual "declares" (1) "that such individual is a registered voter in the jurisdiction in which the individual desires to vote" and (2) "that the individual is eligible to vote in an election for Federal office," then the individual must be "permitted to cast a provisional ballot." 52 U.S.C. § 21082(a). The right to cast a provisional ballot under HAVA is "couched in mandatory terms" and "unambiguous." *Sandusky*, 387 F.3d at 572–73.

Congress established this broadly accessible system of provisional voting

under HAVA because it believed that "provisional voting is necessary to the administration of a fair, democratic, and effective election system, and represents the ultimate safeguard to ensuring a person's right to vote." H.R. Rep. No. 107-329 at 37. HAVA thus mandated that each covered state implement the provisional ballot requirements of the Act. 52 U.S.C. § 21082(a)(5). Under HAVA's provisional voting section,

> The person who claims eligibility to vote, but whose eligibility to vote at that time and place cannot be verified, is entitled under HAVA to cast a provisional ballot. On further review—when, one hopes, perfect or at least more perfect knowledge will be available—the vote will be counted or not, depending on whether the person was indeed entitled to vote at that time and place.

Fl. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1079 (N.D. Fla. 2004).

Critically, HAVA expressly contemplates that some individuals who submit a ballot in good faith will turn out to be incorrect regarding their eligibility to vote. The statute requires that states provide a mechanism for informing those individuals that their ballot was not counted and the reasons for that determination, without any suggestion that such individuals might be subject to criminal prosecution. 52 U.S.C. § 21082(a)(5)(B) (requiring state and local election officials to set up a hotline whereby individuals can find out whether their vote was counted, and if the ballot was not counted the reasons why); *see also* Tex. Elec. Code § 65.059 (implementing this requirement); *Hood*, 342 F. Supp. 2d at 1081. In other words, HAVA establishes a federal right to cast a provisional ballot—in order to deal with the problem of

elections officials turning away would-be voters who believe they are eligible—and provides that the remedy for situations where an ineligible voter mistakenly casts a provisional ballot in good faith is simply not to count the ballot, based on state elections officials' determination of eligibility made with the benefit of additional time.

Here, Ms. Mason believed she was eligible to vote. *See supra* Statement of Facts.12-15. HAVA was designed precisely to permit people in situations like hers, who in good faith follow the instructions of the poll worker, to cast a ballot. *Sandusky*, 387 F.3d at 569; *Hood*, 342 F.Supp.2d at 1076-77 (describing the problem of determining whether individuals with felony convictions had their voting rights restored as "among the perceived irregularities" motivating passage of HAVA).

Under these circumstances, the only repercussions Ms. Mason should have faced were (1) being found ineligible to vote under state law, and (2) having her ballot not be counted as a vote. *Sandusky*, 387 F.3d at 576. Instead, the trial court convicted Ms. Mason, and the court of appeals upheld that conviction, under an interpretation of Section 64.012(a)(1) that conflicts with federal law by criminalizing actions that HAVA expressly requires states to make available to their prospective voters.

In so ruling, the court of appeals relied on a misreading of *Common Cause Georgia v. Kemp* to conclude that HAVA's provisional balloting requirement exists

to serve only those individuals who "appear at the proper polling place and are otherwise eligible to vote," while permitting the criminalization of those who turn out to be ineligible. Op.775-76 *see Common Cause Georgia v. Kemp*, 347 F. Supp. 3d 1270, 1292 (N.D. Ga. 2018). But, as explained above, HAVA establishes a right to submit a provisional ballot, and provides that the remedy for a provisional ballot cast by a person who is mistaken about their eligibility to vote in an election, which can include simply being at the wrong polling place, is not to count the ballot. Indeed, even the case relied on by the court of appeals acknowledged that HAVA grants "[t]he person who claims eligibility to vote, but whose eligibility to vote . . . cannot be verified," the right "to cast a provisional ballot," which will only be "counted if they are duly registered." 347 F.Supp.3d at 1293.

The court of appeals ignored the main issue animating the passage of HAVA: determining whether someone is "an otherwise qualified and eligible voter" is not always straightforward, even for elections officials—to say nothing of citizens such as Ms. Mason. Op.776. HAVA exists because in real time at the polling place there is often ambiguity about whether someone is actually eligible to vote. *Sandusky*, 387 F.3d at 569.

In light of such ambiguity, HAVA's right to cast a provisional ballot assures that nobody who believes they are eligible to vote is "turned away" from the polls. *Id.* at 570, 576. Congress' intent was to permit individuals in Ms. Mason's situation

to cast a provisional ballot, and then have the state determine, with the benefit of time, whether to count that ballot after the individual leaves the polling place: "Any error by the state authorities may be sorted out later, when the provisional ballot is examined.... [I]f the voter is not eligible, the vote will then not be counted." *Id*.; *Hood*, 342 F. Supp. 2d at 1081. HAVA's purpose is to prioritize letting voters cast provisional ballots, even if many such ballots are not ultimately counted, over determining eligibility conclusively at the time a ballot is submitted.

This is why the text of HAVA provides for the rejection of provisional ballots as the remedy where a voter is ineligible. 52 U.S.C. § 21082(a)(4) (noting that ballots are only counted upon determination of eligibility). Far from placing the burden on prospective voters to determine their own eligibility, HAVA obligates *the state* to provide written notice and set up a free access system to explain why a provisional ballot was not counted. § 21082(a)(5).

The court of appeals' interpretation, however, inverts this system and places tremendous risk on the prospective voter. Under the court of appeals' reasoning, where ambiguity exists about an individual's eligibility to vote, the individual is forced to gamble with their liberty—they have a theoretical right to cast a provisional ballot, but if they are wrong about their eligibility, they could be subject to prosecution. Putting the onus on would-be voters to be certain about their eligibility at the risk of criminal prosecution, as the court of appeals does, would eviscerate the

right to cast a provisional ballot under HAVA.

The impact of the court of appeals' view cannot be overstated, as it would expose tens of thousands of Texans to criminal prosecution in each election. For example, during the 2016 General Election, 67,273 provisional ballots were submitted in Texas and the vast majority—54,850 provisional ballots—were rejected. The majority of those rejected ballots—44,046 in all—were rejected because the individual was not registered in the relevant precinct or subdivision. Appellant's Post-Submission Letter to Court of Appeals at 1-2 (hereinafter "Letter").[7] The reasons for these specific rejections vary, but include individuals who moved but did not re-register, individuals who traveled to the wrong polling location, or individuals who had not timely registered.

Critically, registration is a voter "qualification" in Texas. *See* Tex. Elec. Code § 11.002(a)(6). Anyone casting a provisional ballot who turns out not to be properly registered is thus—like Ms. Mason—**ineligible** to vote under Texas law. *See* Tex. Elec. Code § 11.001(a)(1)-(2) (providing that an eligible voter must be qualified under Section 11.002, and must be a resident). Moreover, the provisional ballot affidavit contains an attestation that the provisional voter is "a registered voter of

[7] In Tarrant County, where Ms. Mason resides, during that election, 4,463 provisional ballots were submitted and 3,990 of those provisional ballots were rejected. 3,942 of those provisional ballots were rejected for not being registered in the relevant precinct or subdivision. Letter at 2.

this political subdivision and in the precinct in which I'm attempting to vote." Under the court of appeals' interpretation of the illegal voting statute, however, any provisional voter who is found to be ineligible based on lack of proper registration—and there are tens of thousands of them in each general election—could face a second-degree felony for voting while ineligible under Section 64.012(a)(1). For example, under the court of appeals' decision, the State could prosecute an individual who knew that they had moved to a new county but failed to update their registration information, and then filled out a provisional ballot affidavit, even if that individual had no idea that failing to re-register when they moved to a new county rendered them ineligible to vote.

Because the opinion criminalizes the casting of a provisional ballot by those who believe in good faith that they are eligible to vote but turn out to be mistaken about their eligibility, it conflicts with both the text and purpose of HAVA and should be overturned.

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

The court of appeals erred in holding that Ms. Mason's submission of a provisional ballot that was rejected met the requirement under Section 64.012(a)(1) for "vot[ing] in an Election." This holding (1) ignores the requirement under the Rule of Lenity that courts resolve statutory ambiguities in favor of Ms. Mason; (2) renders superfluous the separate statutory offense of "attempt to vote"; and (3)

leads to illogical results that would criminalize a host of innocent conduct.

A. The court of appeals failed to acknowledge ambiguity that must be resolved in favor of Ms. Mason.

The Rule of Lenity requires that courts resolve statutory ambiguity in a way that is most favorable for a defendant. In holding that submitting a provisional ballot that is rejected constitutes "vot[ing]" in an election, Op.778-79, however, the court of appeals failed to resolve such statutory ambiguity in favor of Ms. Mason.

Under the Texas Election Code, simply filling out a ballot—whether provisional or otherwise—does not, without more, constitute a vote. To the contrary, various sections of the Election Code repeatedly use the term "vote" to refer only to counted ballots, which makes clear that a ballot must be tallied to constitute a "vote." For example, Section 2.001 provides that "to be elected to a public office, a candidate must receive **more votes** than any other candidate for the office." (emphasis added); § 2.002(a) (discussing procedures where candidates "tie for the number of votes required to be elected"). No doubt, uncounted ballots are by definition not tallied as "votes" that determine who wins an election.

Texas law also expressly categorizes provisional ballots that are not accepted as "Ballots Not Counted," as opposed to "votes." Tex. Elec. Code § 65.010. Further, the Election Code uses the terminology of "casting" a provisional ballot that is not counted rather than "voting" such a ballot. § 65.059 (with respect to "a person who **casts a provisional ballot**," requiring a system to "allow the person to determine

whether the person's ballot was counted, and, if the person's **ballot was not accepted** ... the reason why) (emphasis added); § 63.011 (establishing requirements for when a person "may **cast** a provisional ballot") (emphasis added).

The court of appeals recognized that "the Election Code's provisional-ballot provisions speak in terms of 'casting' such a ballot," Op.775 n.20, but it erroneously assumed that the statute uses the verb "casts" interchangeably with the verb "votes." This assumption contradicts the principle that "when the legislature uses certain language in one part of the statute and different language in another, we presume different meanings were intended." *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 564 (Tex. 2016) (citation omitted).

Further, although the court of appeals considered selected dictionary definitions of the term "vote," it failed to consider contrary definitions, even ones from the same source. Op.774. For example, Webster's Dictionary defines the verb "to vote" as "to express one's views in response to a poll **especially: to exercise a political franchise**." (emphasis added).[8] Similarly, Black's Law Online Dictionary's first definition of the noun vote is "suffrage."[9] Ms. Mason certainly did not exercise her political franchise or suffrage when she submitted a provisional ballot that was rejected; indeed, the State claims that until she completes her federal

[8] Vote, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/vote.
[9] Vote, Black's Law Online Dictionary, https://thelawdictionary.org/vote/.

supervised release, she has no franchise.

At best, the court of appeals identified potential ambiguity with respect to whether casting a provisional ballot that is not counted constitutes "vot[ing] in an election" under Section 64.012(a)(1). Ambiguity exists 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).

In citing contrary examples of what could constitute "voting," the court of appeals raised at most the possibility that its interpretation could be correct; however, as established above, the better interpretation and certainly one that a reasonable person could adopt based on the Texas Election Code and dictionary definitions is that submitting a provisional ballot that is rejected and never counted does not constitute "voting in an election" under Section 64.012(a)(1).

Because Section 64.012(a)(1) is a criminal statute arising outside the Penal Code, any such ambiguity must be resolved in Ms. Mason's favor. *Delay*, 465 S.W.3d at 251 (analyzing terms found in Texas Election Code and holding that "in construing penal provisions that appear outside the Penal Code, we have recognized that the Rule of Lenity applies, requiring that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"); *State v. Rhine*, 297 S.W.3d 301, 309 (Tex. Crim. App. 2009) ("[C]riminal statutes outside the penal code must be construed strictly, with any doubt resolved in favor of the accused.") (citation

omitted).

Resolving any ambiguity in favor of Ms. Mason means that submitting a provisional ballot that is not counted does not constitute "vot[ing] in an election" under Section 64.012(a)(1). The court of appeals' failure to resolve this ambiguity in favor of Ms. Mason was error, and for this reason, Ms. Mason's conviction cannot be sustained.

B. The court of appeals' decision renders superfluous the separate "attempt to vote" offense.

The court of appeals held that submitting a provisional ballot that is not counted constitutes "vot[ing] in an election," based on its interpretation that "to vote … can be broadly defined as expressing one's choice, regardless of whether the vote is actually counted." Op.775. The court's overly broad interpretation, however, would render superfluous the separate statutory offense of an attempt to vote, contrary to principles of statutory construction.

Section 64.012(a)(1) provides that "a person commits an offense if the person: votes or attempts to vote." In short, the statute outlines two separate criminal offenses: when a person (1) "**votes** in an election," or (2) "**attempts to vote** in an election." (emphasis added). The statute's punishment provision draws the same distinction: illegal voting is a second degree felony—"unless the person is convicted of an attempt," which is "a state jail felony." Tex. Elec. Code § 64.012(b). While the State charged Ms. Mason with voting, it did not charge her with attempting to vote.

A fundamental principle of statutory interpretation requires that each term in a statute be given meaning. *Heckert v. State*, 612 S.W.2d 549, 552 (Tex. Crim. App. [Panel Op.] 1981) (rejecting interpretation that would render distinct statutory provisions a nullity).

Under the Penal Code, a criminal attempt is defined as: "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. In the context of the Illegal Voting statute, the clear distinction between the attempt offense and the completed offense is that an individual who votes in an election actually succeeds in having their ballot tallied.

The court of appeals' interpretation, however, would eliminate this distinction because it held that any "express[ion] of one's choice" constitutes a vote, regardless of whether the ballot is counted. Op.775. This definition of "to vote" would subsume all attempts to vote that are ultimately unsuccessful and therefore render superfluous that separate offense. The Court should correct the court of appeals' error and hold that submitting a provisional ballot that is not counted does not constitute "voting in an election."

C. The court of appeals' definition of "vote" leads to illogical results.

The Court should correct the court of appeals' interpretation for the additional reason that it has illogical consequences. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.

Crim. App. 1991) (courts should reject a plain language interpretation where it "lead[s] to absurd consequences"). The court of appeals' definition of voting as "expressing one's choice, regardless of whether the vote actually is counted," Op.775, would criminalize a host of acts that would clearly not be considered "voting." For example, if an individual walked into a polling place with a ballot filled out, but—because the election judge told her the ballot would not be accepted—she failed to submit it, no one would believe that she had "voted in an election."

The same would be true if that individual handed her ballot to the election judge, who deposited it in a box marked "rejected ballots." This is in fact the equivalent of what happened with Ms. Mason: her provisional ballot affidavit along with a receipt of her electronic ballot were placed in a separate envelope and ultimately rejected. RR2.64:11-21; Tex. Elec. Code §§ 64.008(b), 65.056 (b).

In short, the court of appeals' interpretation would lead to the absurd result that a "vote" need only be marked on a ballot, even if that ballot is never cast or tallied. Such an unsupported interpretation would undermine the very significance of the act of voting. Because the court of appeals' interpretation of Section 64.012(a)(1) illogically criminalizes otherwise lawful conduct and leads to absurd results, it is erroneous.

This Court should instead adopt an interpretation that an individual "votes in

an election" for the purposes of Section 64.012(a)(1) only when the individual submits a ballot that is tallied or counted in the election. Such an interpretation aligns with a plain language understanding of what it means to "vote in an election" and would not criminalize a host of non-harmful conduct. Even if the Court finds ambiguity with respect to this question, under the Rule of Lenity, such ambiguity must be resolved in favor of Ms. Mason. Therefore, under the correct interpretation of the statute and pursuant to the Rule of Lenity, Ms. Mason's submission of a provisional ballot that was not counted does not constitute "voting in an election." For this reason, Ms. Mason's conviction should be overturned.

PRAYER

Ms. Mason prays that the Court reverse the decision of the court of appeals, reverse her conviction, and order a judgment of acquittal.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), the undersigned counsel certifies that the total number of words in Appellant's Brief on the Merits, exclusive of the matters designated for omission, is 9,711 words as counted by Microsoft Word Software.

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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this brief has been served on counsel of record and the State Prosecuting Attorney via e-service on May 17, 2021.

/s/ Thomas Buser-Clancy
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