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FFCLX

Cause No. 2023-00841

TAMI C. PIERCE, Plaintiff/Contestant	*	IN THE DISTRICT COURT
vs	*	165th JUDICIAL DISTRICT
DASEAN A. JONES, Defendant/Contestee	*	HARRIS COUNTY, TEXAS

FINDINGS OF FACT and CONCLUSIONS OF LAW

INTRODUCTION: CONTEXT AND PROCEDURE.

There were sixty-eight countywide courthouse races on the November 8, 2022 Harris County ballot. Twenty-one unsuccessful Republican courthouse candidates filed election contests by the statutory deadline.

The above-styled election contest for the 180th District Court arose from the closest of those twenty-one elections. The final vote count for the 180th shows that Dasean Jones defeated Tami Pierce by 534,460 to 534,011, a margin of 449 votes and a percentage difference of 50.02 to 49.98.

This case was tried to the court on April 1 and April 2, 2024. The court heard testimony from three witnesses and admitted 63 exhibits.

TEXAS ELECTION CODE PRINCIPLES.

Most of the court's authority in this matter is stated in two sections of the Texas Election Code:

Section 221.003. SCOPE OF INQUIRY.

(a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is *not the true outcome* because:

(1) *illegal votes were counted;* or

(2) an election officer or other person officially involved in the administration of the election:

(A) prevented eligible voters from voting;

(B) failed to count legal votes; or

(C) engaged in other fraud or illegal conduct or made a mistake.

(b) In this title, "illegal vote" means a vote that is not legally countable. (emphasis added)

Section 221.012. TRIBUNAL'S ACTION ON CONTEST.

(a) If the tribunal hearing an election contest *can* ascertain the true outcome of the election, the tribunal *shall* declare the outcome.

(b) The tribunal *shall* declare the election void if it *cannot* ascertain the true outcome of the election. (emphasis added)

Section 221.003 describes the *conduct* of election officials that may be the basis for an election contest. Section 221.012 makes clear that the *ultimate issue for decision* in an election contest is whether the court can or cannot "ascertain the true outcome of the election."

Why this case involving the closest election was tried <u>after</u> the other 20 cases. In this case Defendant Jones filed a motion to dismiss the lawsuit, citing the Texas Citizens Participation Act (TCPA). No such motion was filed in the other twenty cases. The TCPA enacted a procedure for dismissal of lawsuits that seek to chill a person's exercise of First Amendment rights.[1] The effect of Jones's TCPA motion was to postpone any judicial action on this case for eleven months, from March 2023 until February 2024. This court held a hearing on Jones's TCPA motion to dismiss, denied the motion, and sanctioned Jones and his attorney because the motion was frivolous and calculated to delay the election contest.

[1] Section 27.002 of the Act says: "The purpose of [the TCPA] is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury." TEX. CIV. PRAC. & REM. CODE § 27.002. The Texas Supreme Court summarized the TCPA's purpose in *In re Lipsky*, 460 S.W.3d 579, 598 (Tex. 2015): "The TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dispose of meritorious lawsuits."

Jones appealed that ruling to the First Court of Appeals, which ultimately affirmed this court's dismissal and its sanctions ruling, although the appellate court set aside this court's ruling that the TCPA motion was filed solely for delay.[2] The chronology of this case is:

2023

January 5	Plaintiff Pierce filed the election contest case.
January 20	Defendant Jones filed an answer and a TCPA motion to dismiss.
February 23	The court heard and denied the TCPA motion.
March 9	Jones filed a notice of appeal. *This stayed all trial court action until the appeal was concluded.*[3]
April 5	Court of Appeals ordered mediation and set May 8 deadline.

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[2] The appellate court's opinion (Dasean Jones v. Tami Pierce, First Court of Appeals of Texas, No. 01-23-00187-CV, Nov. 16, 2023) said Jones's motion to dismiss was "frivolous":

> [The] record supports the trial court's determination that Jones failed to demonstrate that Pierce's suit was "based on" or "in response to" Jones's exercise of the right to free speech or the right of association, and accordingly the trial court did not err in denying his TCPA motion. . . . **We agree with Pierce and the trial court that Jones's motion was frivolous.** Jones has failed to articulate any basis supporting his position that Pierce's election contest is "based on or is in response to" any exercise by *Jones* of a protected constitutional right. . . . We affirm the trial court's order denying Jones's TCPA motion to dismiss and affirm the trial court's finding that Pierce is entitled to attorney fees and costs. (opinion at pages 14, 17-18, & 20) (italics by the Court of Appeals; bold font added).

[3] *See In re Geomet Recycling LLC*, 578 S.W.3d 82 (Tex. 2019) (When a trial court denies a TCPA motion to dismiss, a notice of appeal automatically stays all trial court proceedings until the TCPA appeal is resolved).

April 14	Jones asked for extension of time to bile brief.
May 2 to June 12	Briefs filed.
September 8	Oral argument set.
October 19	Oral Argument before the First Court of Appeals.
November 16	Court of Appeals affirmed this court's denial of the TCPA motion to dismiss but set aside the ruling that the motion was filed solely for delay.
2024	
February 2	Mandate issued by Court of Appeals. (This meant the trial court could resume work on the case.)

Mixed questions of law and fact. Many of these fact findings and legal conclusions involve mixed questions of law and fact and do not fit neatly into either the FF or CL category.

Formatting. It is customary to format Findings of Fact and Conclusions of Law separately, with the fact findings at the beginning of the document and the legal conclusions toward the end. But in this case the court thinks the findings and conclusions might be easier to assess when grouped together issue by issue.

Clear and convincing evidence. All affirmative findings rest on evidence the court considered to be clear and convincing, the legal standard for election contests.

Evidence different from August 2023 *Lunceford v. Craft* trial. In August 2023 this court presided over an 8-day trial involving the same election and essentially the same voting records. But the two trials were different in several ways. There were three witnesses in the *Pierce* case. In *Lunceford* the court heard testimony from eleven live witnesses in court, four witnesses by oral deposition, and thirty-five others by written-question depositions. And though many of the exhibits and records in *Lunceford* and *Pierce* were the same, several exhibits in *Pierce* were new. Much of the evidence in the two cases was organized, presented, and argued differently.

* * *

The court now makes Findings of Fact 1-39 and Conclusions of Law 1-50s on pages 5-21 below.[4]

I. VOTING IN HARRIS COUNTY BY OUT-OF-COUNTY RESIDENTS.

CL 1. To lawfully vote in a county, a voter *must reside* in that county.[5] The voter *must* also be *registered* to vote.

CL 2. At polling locations, Election Judges are required to ask each in-person voter if the address shown on the official voter roll is still the voter's *current* address. Voters who answer "no" must sign a Statement of Residence (SOR).[6]

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[4] The following acronyms, used throughout the pretrial phase of the 21 lawsuits, are listed here for convenience and reference: Ballot by Mail (BBM); Early Vote Ballot Board (EVBB); Elections Administration Office (EAO); Provisional Ballot Affidavit (PBA); Reasonable Impediment Declaration (RID); Signature Verification Committee (SVC); Statement of Residence (SOR); and Temporary Restraining Order (TRO).

[5] **Section 11.001 (2):** "[T]o be eligible to vote in an election in this state, a person must . . . be a resident of the territory covered by the election for the office . . . ."

[6] **Section 63.0011** ("Statement of Residence"):

(a) *Before* a voter may be accepted for voting, an *election officer shall ask* the voter if the voter's residence address on the precinct list of registered voters is *current* and whether the voter has changed residence within [Harris] county. . . .

(b) If the voter's residence address is not current because the voter has changed residence *within* [Harris] county, the voter may vote, if otherwise eligible, in [his old precinct] if the voter resides in [Harris] county *and*, if applicable:

(c) Before being accepted for voting, the voter *must* execute and submit to an election officer a statement [SOR] including:

(1) a statement that the voter satisfies the applicable *residence* requirements prescribed by Subsection (b) [i.e. still resides in Harris County];

(2) all of the *information* that a person must include in an *application to register* to vote under Section 13.002; and

(3) the *date* the statement is submitted to the election officer.

(c-1) The statement [the SOR] described by Subsection (c) must include a field *for the voter to enter the voter's current county of residence.* (emphasis added)

CL 3. Section 1.015(a) of the Election Code defines residence as: "domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence." The definition is not stated on the SOR form.

CL 4. SORs are filled out when an in-person voter signs in to vote and the Election Judge has asked, *Do you still live at this address,* and voter has answered *No.* (Later the registrar of the Elections Administration Office [EAO] will update the voter registration records by inputting the new data from the SORs.[7])

CL 5. At the polling location, the officials are expected to read the completed SOR and let the voter vote only if the SOR shows a Harris County residence.

CL 6. Officials are not supposed to approve for voting a voter whose SOR shows residence in a different county or does not show *any* residence.

CL 7. A Statement of Residence must **state** the **residence**.

Pierce's Contentions.

Pierce contends that 1198 votes were cast by persons who didn't reside in Harris County. She alleges that:

(i) Votes were cast by 953 o*ut-of-county* residents whose SORs show on their face a residence other than Harris County and

(ii) Votes were cast by 245 persons who submitted *incomplete* SORs, which gave *no* information about their *residence.*

The court sustains both contentions, but finds fewer unlawful votes than were alleged.

Evidence of residence at the polling location vs. evidence at trial.

CL 8. There is a distinction between *officials* receiving additional evidence of residence at the *polling location* and *courts* receiving additional evidence *at trial.*

CL 9. Residence information given by voters at the polling location. *At the polling location* the information is *handwritten* on the SOR *by the voter.* An SOR is

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[7] **Section 15.022 (a)**: "The registrar shall make the appropriate corrections in the registration records . . . (4) after receipt of a voter's statement of residence executed under Section 63.0011."

being filled out only because the voter has just replied (in response to the Election Judge's mandatory inquiry about current residence): "I don't live there anymore" or "My address has changed." At the polling place, Election Judges are to assess the residence information *shown on the SOR*. If the SOR shows that the voter resides outside Harris County, the voter cannot vote for Harris County offices.

CL 10. Extrinsic evidence of residence at trial. *In an election contest trial,* the parties *may* litigate a voter's true residence with evidence, including an examination of the SORs themselves. When this happens, the trial judge will decide from the evidence whether the voter does or does not reside in Harris County.[8]

Out-of-county voters.

A. SORs expressly stating residence in:

- **a *county* other than Harris County,**
- **a *city* clearly outside Harris County, or**
- **a town or city in the metropolitan Houston area *without stating a Harris County residence.***

FF 1. Pursuant to Texas Rule of Evidence 201, the Court has taken judicial notice that the following Texas cities are *totally outside Harris County*: Arlington, Austin, Beaumont, Brookshire, Bryan, Cleveland (Liberty County), Conroe, Dallas, El Paso, Fort Worth, Galveston, Hempstead, Huntsville, Lampasas, Livingston, Midland, Navasota, New Braunfels, Richmond, Rosenberg, Rosharon, Round Rock, San Antonio, San Marcos, Schulenberg, Sealy, Texas City, Waco, Waxahachie, Weatherford, and Wharton.

FF 2. Many SORs expressly state, in the voter's handwriting, residence in a nearby *county* (most often Brazoria, Chambers, Fort Bend, Galveston, and

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[8] For example, in *Alvarez v. Espinoza*, 844 S.W.2d 238 (Tex. App.—San Antonio 1992, no pet.) (en banc), the parties presented evidence *at trial* concerning the true residence of nine voters. The trial court found that all nine resided in Commissioners Court Precinct 3, the area covered in the Frio County election contest. The appellate court examined the evidence and held that six of these voters, as a matter of law, didn't reside in Precinct 3. *Id.* at 247-48.

Montgomery) or residence in a *city* clearly outside Harris County (those listed in FF 1.)

CL 11. A voter whose SOR expressly says he resides in a county other than Harris, or in a city listed in FF 1, is not a Harris County resident and was not qualified to cast a vote for any Harris County office.

FF 3. The SORs in evidence frequently state as residences the following towns and communities surrounding the Metropolitan Houston area:

> Baytown, Friendswood, Humble, Katy, Kemah, Kingwood, League City, Magnolia, Manvel, Missouri City, New Caney, Pearland, Porter, Spring, Sugarland, and The Woodlands.

FF 4. The court finds that **606** SORs expressly stated a county of residence other than Harris or a city clearly outside Harris County; and **146** stated residence in a nearby town or city *without stating any county of residence.*

CL 12. The **752** votes resting on these SORs were not lawful and should not be counted.

FF 5. The court does not disturb the election officials' implicit decision to approve SORs stating residence in a nearby town or city *and expressly stating residence in Harris County*. The evidence at trial was not sufficient to establish that these voters resided *outside* Harris County.

FF 6. The court finds that where the voter stated a nearby "metro Houston" city (FF 3 above) as her residence and *also* stated residence in Harris County, the election official's decision at the polling location to let the person vote should not be set aside in this case.

CL 13. To disqualify these votes at trial, Contestant Pierce had the burden to show that the statement of residence in Harris County was not true—that is, Pierce had the burden to overcome the voter's "Harris County" statement in the SOR. That burden was not carried in this case. For these SORs, there was not clear and convincing proof at trial of residence *outside* Harris County.

B. SORs that gave <u>no</u> residence information.

FF 7. The court finds that **231** SORs were filled out by the voter so incompletely—with the spaces for former residence and current residence *totally blank*—that it was not lawful to approve them and they should not be counted. Most of these

SORs were blank without one word in the available spaces for past and current county of residence. A few listed a Post Office Box but not a *residence* address. A few listed a street address but *no city*. None of these 231 SORs stated a county of residence or a residence address.

CL 14. The **231** votes based on SORs that did not state Harris County (or any county) *and did not state a residence address* were not lawful and should not be counted.

Summary—out-of-county residents.

CL 15. The SORs signed by **752** voters were not lawful because **606** stated a *county* other than Harris and **146** stated a *town or city* outside Harris County, showing on their face *in the voter's handwriting* that the voters resided outside Harris County.

CL 16. The 231 votes based on *incomplete* SORs were not lawful and should not have been counted.

FF 8. For the **752** and **231** SORs discussed above, the evidence from the voter roster (PX-14, showing the voters who actually voted in the November 2022 election) proved that these persons voted.

CL 17. For the Harris County office of the 180th District Court, these **983** votes by nonresidents were illegal votes within the meaning of section 221.003 (quoted on pages 1-2 above) and should not be counted.

II. Provisional Ballots.

FF 9. The Secretary of State's Provisional Ballot Affidavit form (PBA) summarizes the main statutory reasons for voting provisionally in these words:[9]

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[9] **Section 65.054 (Accepting Provisional Ballot)** provides:

> (a) The early voting ballot board [EVBB] shall examine each [provisional ballot affidavit] and determine whether to accept the provisional ballot of the voter . . . .
>
> (b) A provisional ballot *shall* be accepted *if* the board determines that: (1) from the information in the affidavit or contained in public records, the person is eligible to vote in the election and has not previously voted in that

1. Voter failed to present [i] acceptable photo identification or [ii] an alternate form of identification with an executed Reasonable Impediment Declaration (RID);
2. Voter is not on list of registered voters;
3. Voter not on list, votes in another precinct;[10]
4. Voter is on list of persons who received mail ballots and has not surrendered the mail ballot or presented a notice of improper delivery; and
5. Voter voted after 7:00 p.m. due to court order.[11]

FF 10. Most of the challenged PBAs in this case list reasons 2 and 4 above for voting provisionally—that is, the voter appears to be *not registered to vote* or to have *voted already by mail*.

FF 11. For PBAs mentioning **item 2,** the registration records are checked later; and if the voters were indeed registered, their provisional votes are counted.

FF 12. Item 4 concerns voters who showed up to vote *in person* and were advised that a mail ballot was sent to them earlier—for these voters, the Mail Supervisor (an employee of the EAO) has signed and checked a box that the mail-in ballot was "not returned." This means the EAO has checked the records and confirmed that the voter *did not mark and return the mail ballot*.

CL 18. In-person voters who say they *didn't receive* the mail ballot or received it but *didn't mark it and mail it in,* must sign a PBA and vote a provisional ballot. The Early Vote Ballot Board (EVBB) later checks the records and verifies whether the in-person voter did or did not vote by mail earlier.

Pierce contends that *thirty-nine* PBAs were unlawfully approved. These contentions fall into the following two groups.

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election; [and] (2) the person . . . meets the identification requirements of Section 63.001 (b) [photo identification, or an approved substitute plus a Reasonable Impediment Declaration form] . . . . (emphasis added)

[10] Reason 3 does not apply in this case because Harris County votes at countywide polling locations, not at individual precincts.

[11] The provisional ballots cast from 7:00 to 8:00 p.m. on election day pursuant to court order are discussed in section V below on pages 17-19.

FF 13. Signatures missing (21). Pierce exhibits B, B-1, B-2, and B-3 show five PBAs not signed by the voter, thirteen not signed by the Election Judge, and three not signed by the Ballot Board Judge. A PBA form has spaces for five potential signatures—for the voter, the Election Judge, the Ballot Board Judge, the Ballot by Mail Supervisor, and the Voter Registrar. Sixteen of the challenged forms are signed by most of the officials with responsibility for confirming legality. The court has reviewed these twenty-one PBAs that have only one signature missing and has concluded that the information on sixteen of them is substantially complete and reliable, and that for these sixteen the evidence does not justify a judicial decision disallowing the votes.

FF 14. Photo ID and RIDs missing (18). Pierce Exhibits B and B-4 show eighteen PBAs that focus on a question asking whether "Voter presented acceptable form of identification or a supporting form of identification and executed a reasonable impediment declaration." On all eighteen challenged PBAs the box is checked "No." Yet immediately below that statement is an *unchecked box* asking this: "Failed to present acceptable form of photo identification, a supporting form of identification with an executed a Reasonable Impediment Declaration, or voter registration certificate with exemption."

FF 15. Seventeen of these PBAs show that the only reason for the PBA was that the in-person voter had earlier received a mail ballot; and these seventeen PBAs show that in fact the mail ballot had *not* been voted earlier.[12]

FF 16. Only one of the eighteen indicates that the reason for the PBA was the voter's inability to show a photo ID or substitute.

FF 17. The court has assessed these forms for substantial completeness and reliability and concludes that the challenge to seventeen of them should be denied and the challenge to one granted.

FF 18. Concerning these seventeen PBAs, the court accepts the decisions of the Mail Supervisor and the EVBB that approved them and is unwilling to hold that these officials erred in reaching their conclusions.

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[12] Whether such a voter has voted by mail is not necessarily known at the polling location on election day. In the days after the election, the Ballot by Mail Supervisor checks the records, and for these PBAs she concluded the voters had *not* voted by mail.

CL 19. Six votes based on PBAs ballots are invalid—five due to lack of signature, and one for lack of ID.

III. MAIL BALLOTS.

Pierce contends that several mailed ballots were counted, in violation of the Election Code, even though they lacked code-required *signatures* or were not *timely mailed or timely received.*

CL 20. The code specifies several steps for voting by mail. The voter must:

- ask for a mail ballot in a writing that is signed,
- have a statutory reason (age, disability, will be out of county, in jail), and
- return the marked ballot *in time* and with proper *signatures* (on both the *application* and the *envelope*).

(There are also explicit limits on who may assist the voter in marking the ballot and mailing it.)[13]

CL 21. For mail ballots to be lawfully counted, the Election Code specifies two requirements that are at issue in this case—timeliness and matching signatures.

CL 22. Timeliness. The code requires that mail ballots be timely *mailed* and timely *received*. The carrier envelope *must* be *postmarked* by 7:00 p.m. on election day *and* the envelope with the ballot *must* be *received* by 5:00 p.m. on the next day (November 9 for this election).[14]

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[13] *See Garza v. Alcala*, 2006 WL 1080241 (Tex. App.—San Antonio 2006, no pet.) (Affirming trial court's decision that 75 mail ballots for Alcala and 6 for Garza "should not have been counted because [the 81 voters] received unlawful assistance from persons who helped them mark their ballots and/or took possession of the ballots for the purpose of mailing them, without signing the oath and information mandated by §§ 64.034, 86.010 & 86.0051." The 81 illegal mail ballots were 2.45% of the total vote (81 of 3306) for the top two mayoral candidates in Del Rio.

[14] **Section 86.007** (Deadline for Returning Marked Ballot).

(a) [Except for ballots mailed from outside the US,] a marked ballot voted by mail *must arrive* at the address on the carrier envelope:

(1) before the time the polls are required to close on election day; or

CL 23. Matching signatures. The code requires the voter's signature (1) on the *application* for a mail ballot and (2) on the carrier *envelope* in which the voter's filled-out ballot is mailed back to the EAO. As the court said in *Alvarez v. Espinoza*, 844 S.W.2d 238, 245 (Tex. App.—San Antonio 1992, no pet.) (en banc), "The law places the burden on those who vote early by mail to sign both the application and the [carrier] envelope with signatures that match."

CL 24. The early vote clerk, after checking the carrier envelope for timeliness, puts it in a *jacket envelope* along with the voter's application for the mail ballot, and sends the jacket envelope to the EVBB for its review.[15] The EVBB reviews mail ballots for two signatures—the signature on the application and the signa-

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(2) not later than 5 p.m. on the day after election day if the carrier envelope was [mailed and postmarked] not later than 7 p.m. at the location of the election on election day. . . .

(c) A marked ballot that is not timely returned *may not be counted*. . . . (emphasis added)

[15] **Section 87.041** (Accepting Voter).

(a) The early voting ballot board shall open each jacket envelope for an early voting ballot voted by mail and determine whether to accept the voter's ballot.

(b) A ballot may be accepted *only if*:

(1) the carrier envelope certificate is properly executed; [and]

(2) neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness; . . .

(d) A ballot *shall* be rejected if any requirement prescribed by Subsection (b) is not satisfied. In that case, the board shall indicate the rejection by entering "rejected" on the carrier envelope and on the corresponding jacket envelope.

(d-1) . . . The board *shall* compare signatures in making a determination under Subsection (b)(2) . . . .

(e) In making the determination under Subsection (b)(2), to determine whether the signatures are those of the voter, the board *may* also compare the signatures with any known signature of the voter on file with the county clerk or voter registrar. . . . (emphasis added)

ture on the carrier envelope. In addition, the EVBB "may" compare either or both signatures with a *third* signature—the *voter's signature on file with the registrar*.[16]

FF 19. The EVBB is a bipartisan board with equal numbers of Democrats and Republicans whose names were suggested to Commissioners Court by each party's chair. The EVBB works in teams of two (always one Democrat and one Republican per team).

CL 25. The EVBB is given considerable discretion.[17]

FF 20. The court finds that forty mailed ballots lacked a required signature, and an additional eight ballots were not timely mailed. PX-11 & PX-12.

FF 21. These forty-eight mailed ballots do not satisfy the Election Code's mandatory provisions, and therefore it was not lawful to count them.

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[16] **Voter mistakes on mail ballots *may* be cured.** If the early voting clerk receives a mailed ballot that lacks a required signature or is otherwise defective, the clerk *may*: (i) mail the mail ballot back to the voter for correction; (ii) telephone and inform the voter of the right to *cancel* the mail ballot and vote *in person*; or (iii) telephone and suggest that the voter may come to the registrar's office and correct the omission. These rules are contained in **section 86.011** ("Action by Clerk on Return of Ballot"), which says:

> . . . (d) Notwithstanding any other provisions of this code, if the clerk receives a *timely* carrier envelope that does not fully comply with the applicable requirements . . . [i] the clerk *may* deliver the carrier envelope in person or by mail to the voter and *may* receive, before the deadline, the *corrected carrier envelope* from the voter, *or* [ii] the clerk *may* notify the voter of the defect by telephone and advise the voter that the voter may come to the clerk's office in person to *correct* the defect or *cancel* the voter's application to vote by mail and vote on election day. If the procedures authorized by this subsection are used, they must be applied uniformly to all carrier envelopes covered by this subsection. . . . (emphasis added)

[17] "The law presumes that the board [EVBB] acted properly in rejecting and accepting ballots; to overcome this presumption, a challenger must show by clear and satisfactory evidence that the board erred." *Alvarez v. Espinoza*, 844 S.W.2d at 844.

IV. PHOTO IDENTIFICATION.

CL 26. The Election Code says election judges shall make two inquiries of *every* in-person voter: (i) whether the address shown on the voter list is still the voter's current address[18] and (ii) whether the voter has photo identification.[19]

CL 27. Acceptable photo identification. The code specifies that each in-person voter must show:

(1) an approved *photo ID*[20] **or**

(2) an approved *reason* for not having a photo ID **plus** an approved *substitute* ID.

CL 28. The approved *reason* for not having a photo ID may be:

- lack of transportation,
- disability or illness,
- work schedule,
- family responsibilities,
- ID lost or stolen, or
- application for photo ID pending.[21]

CL 29. The approved *substitute* may be:

- a utility bill,
- a bank statement,
- a government check,

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[18] **Section 63.0011(a)** ("Before a voter may be accepted for voting, an election officer *shall* ask the voter if the voter's residence address [on the list of voters] is current and whether the voter has changed residence within the county") (emphasis added).

[19] **Section 63.001(b)** ("... on offering to vote, a voter *must* present to an election officer at the polling place: (1) one form of photo identification listed in Section 63.0101(a) or (2) [an acceptable substitute *plus* a reasonable impediment declaration])." (emphasis added)

[20] **Section 63.001(b)(1)** (requiring photo ID); **§ 63.0101(a)** (listing acceptable photo IDs). An *expired* photo ID is acceptable for voters *70 and older* and is acceptable for voters *69 and younger* if the ID has been expired for only four years or less.

[21] **Section 63.001(i)** (listing acceptable reasons for not having a photo ID).

- a paycheck,
- a birth certificate, or
- a voter registration card or other government document.[22]

CL 30. RIDs. A voter who does not have a listed type of photo identification must be asked to sign a Reasonable Impediment Declaration. RID forms have been designed and approved by the Texas Secretary of State.

FF 22. Reasons. RID forms let the *voter* check one of several boxes listing the *reason(s) why the voter has not gotten an approved form of photo identification.*

FF 23. Substitutes for photo ID. The *election official* at the polling location may check a box for one of six *alternate kinds of identification without a photo.*

CL 31. Flexibility on name and address matches. The voter's name must be on the official roll of registered voters. But the *name* on the substitute document need not "match exactly with the name on the voter list" if they are "substantially similar." The election official cannot reject the substitute document solely because its *address* "does not match the address on the list of registered voters."[23]

Pierce challenges 499 votes because the RIDs supporting them were not filled out completely.

FF 24. Incomplete RIDs. The court finds that 497 of the challenged RIDs lack *one or more* of the following:

- a lawful *reason* for not having a photo ID (reasons listed in CL 28 above),
- a lawful ID *substitute* (substitutes listed in CL 29 above), and
- the Election Judge's *signature.*

CL 32. Persons who have no photo ID may satisfy this statute by simply bringing their voter registration card—if they also have a reason for not having a photo ID.[24] To state it differently, the VR card suffices as substitute proof for the

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[22] **Section 63.001(b)(2)** (allowing substitutes for photo ID); **§ 63.0101(b)** (listing acceptable photo ID substitutes).

[23] **Section 63.001 (c) & (c-1).**

[24] **Section 63.0101:** "(b) The following documentation is acceptable as proof of identification under this chapter: (1) a government document that shows the name and address of the voter, including *the voter's voter registration certificate.*" (emphasis added)

photo ID if the voter simply has an approved reason for not having a photo ID (lawful reasons listed in CL 28).

CL 33. The RID provisions are the voter's opportunity to comply with the code's effort to make sure that voters can demonstrate—with documents—*who they are.*

FF 25. The court finds that 445 RIDs signed by voters do not satisfy one or more of the Election Code's requirements: (i) bring a photo ID *or* (ii) bring a substitute document (CL 29 above) *and* check a box on the RID showing why they have not gotten a photo ID (CL 28 above).

FF 26. For fifty-two RIDs the only problem is that the Election Judge did not sign them. The court concludes the votes based on these fifty-two RIDs should not be disregarded because the voters did all that the code requires of them.

CL 34. The court holds that 445 of the votes based upon incomplete RIDS were not lawful and should not be counted.

V. COURT-ORDERED EXTENSION OF COUNTYWIDE VOTING UNTIL 8:00 P.M.

FF 27. Pierce contends that Elections Administrator Tatum made a "mistake" within the meaning of section 221.003 (quoted at pages 1-2 above) when he agreed on Election Day to a Temporary Restraining Order (TRO) that extended the voting period countywide from 7:00 p.m. to 8:00 p.m.

FF 28. In Exhibit A at the end of these FF/CL (pages 23-32), the court has summarized the 66-page TRO hearing (PX-25L), which provides the context for this section V.

FF 29. The Harris County Elections Administration Office (EAO) and Administrator Tatum, speaking through the Harris County Attorney's office, gave the Harris County ancillary court information that proved to be inaccurate about ballot paper adequacy at the polling locations. Inaccurate assurances were given that all 782 polling locations would have enough ballot paper if the court extended the poll-closing deadline.

CL 35. A court is entitled to candid and truthful information from lawyers and their clients.

FF 30. The assurances of adequate paper were not accurate, and the court relied on them in issuing the TRO.

FF 31. The court finds that the EAO and Mr. Tatum made a *mistake* within the meaning of section 221.003(a)(2)(C) when they agreed to the TRO, an agreement based on confident and optimistic, but ultimately inaccurate, assurances that *all* 782 polling places would have paper for ballots.

CL 36. The EAO's agreement to the TRO was a *mistake* within the meaning of section 221.003 of the Election Code, which says the trial court in an election contest shall try to determine whether the canvassed outcome "is not the true outcome because . . . an election officer or other person officially involved in the administration of the election . . . made a mistake."

CL 37. The polling locations that did not have ballot paper were not really "open," and section 43.007(p) of the Election Code was violated.[25] This violation was a direct result of the mistake discussed above.

FF 32. During the extended voting from 7:00 p.m. to 8:00 p.m. Jones received 1146 votes and Pierce received 825, a difference of 321 and a percentage margin of 58.1 to 41.9.[26]

FF 33. The votes for Pierce and Jones during the extended voting period are known because the Texas Supreme Court ordered the Harris County election officials (PX-27F):

> . . . to separately identify in the vote tabulations the number of "later cast votes" for each candidate in each race . . . so that candidates, the parties, and this Court may ascertain whether the "later cast votes" would be

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[25] **Section 43.007(p)** says: "If a court orders any countywide polling place to remain open after 7 p.m., all countywide polling places located in that county shall remain open for the length of time required in the court order."

[26] The final canvassed count for the 180th shows that Jones defeated Pierce by 534,460 to 534,011, a margin of 449 votes. The "extended voting period" votes for each candidate must be subtracted: 534,460 – 1146 equals 533,314 for Jones, and 534,011 – 825 equals 533,186 for Pierce, an adjusted margin of victory for Jones of 128 votes. This is the same adjusted margin achieved by simply subtracting Jones's margin during extended voting (321) from his canvassed margin (449) yielding a new margin of 128 (449 – 321 equals 128).

outcome-determinative and so that the parties can assess the extent to which further litigation is warranted.

CL 38. Agreeing to the extension was not *illegal*. But the court *sustains* Pierce's contention that agreeing to the TRO was a *mistake* within the meaning of section 221.003.

CL 39. The court respectfully rejects Pierce's request that the 321 votes be *subtracted* from the margin between Jones and Pierce, which would make the net difference between them 128 votes (449 minus 321), because agreeing to the TRO was not *illegal* but a *mistake*. Section 221.011 permits subtraction of votes only when they were *illegal*.[27] Illegal votes are different from votes cast due to an official's *mistake*.

CL 40. The 321 net votes for Jones resulted from the EAO's mistaken approval of the extra hour and should be considered in the court's decision.

VI. THE UNDERVOTE.

FF 34. In this election 38,908 voters (3.51%) voted in other races but chose not to vote in the 180th. Over the years, non-votes in a given race have become known colloquially as "undervotes."[28]

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[27] **Section 221.011. ILLEGAL VOTES SUBTRACTED.**

(a) If the tribunal hearing an election contest can ascertain the candidate or side of a measure for which an illegal vote was cast, the tribunal shall subtract the vote from the official total for the candidate or side of the measure, as applicable.

[28] The official canvassed total (PX-1) shows Jones defeated Pierce by 534,460 to 534,011, the total vote for both candidates being 1,068,471. A total of 1,107,390 voters voted in the election. 1,107,390 minus 1,068,471 equals an undervote of 38,919, but the official report shows the undervote in the 180th (the number of voters who did not vote for either candidate) was 38,908. The discrepancy results from the 11 "overvotes" apparently due to 11 ballot-by-mail voters who marked their paper ballots for *both* Jones and Pierce. *See* PX-1, page 21. The official undervote (38,908) is 3.51%, a percentage obtained by dividing the undervotes by the total votes cast in the election (38,908 divided by 1,107,390 equals .0351).

CL 41. Jones argues that Pierce must "show that sufficient illegal or mistaken votes were cast *in this specific contest.*" (emphasis in original, trial brief generally and at 10). This argument is essentially an "undervote" argument.

FF 35. From the evidence, it is reasonable to infer, and the court finds, that some of the 1482 illegal votes (discussed above in sections I through IV) were cast in the 180th and some were not. It is also reasonable to infer, and the court finds, that those who cast the 1482 illegal votes would have voted (and not voted) in the 180th at roughly the same rate (96.49%) as one million other voters did.

FF 36. Not all of the 1482 illegal votes would have been cast in the *Pierce v. Jones* contest because overall there was a 3.51% undervote in the race for the 180th District Court. The court finds that roughly the same undervote percentage in the contest for the 180th District Court would have occurred with the illegal votes—that is, 96.49% of the 1482 illegal votes. This means that 1430 votes in the 180th (96.49% of 1482) were illegal.[29]

CL 42. Undervote adjustment. The total of illegal votes (1482) must be adjusted for the undercount percentage, yielding a total of 1430 illegal votes.

VII. Summary of Findings.

FF 37. The court's rulings show a total of 1482 illegal votes:

Section I (FF/CL pages 5-9): **983** votes were cast by persons whose residence is outside Harris County.

Section II (FF/CL pages 9-12): **6** votes cast as provisional ballots should not have been counted.

Section III (FF/CL pages 12-14): **48** mail ballots lacked required signatures or were not timely mailed and received.

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[29] The percentage approach to the undervote was used and approved in *Green v. Reyes*, 836 S.W.2d 203 (Tex. App. —Houston [14th Dist.] 1992, no pet.), on the issue of whether the contestant proved "that illegal votes were cast in the election being contested." *Id.* at 208. Although an expert witness explained the percentage approach in *Green* and the court of appeals approved it, *id.* at 211, the court in *Green* did not suggest that the issue *requires* expert testimony in an election contest. This court holds that expert testimony is not required.

Section IV (FF/CL pages 14-17): **445** votes were cast by voters who did not show a photo ID, did not state a reason for failing to apply for a Photo ID, and did not show a substitute ID document (a *voter registration card* would have sufficed as a substitute ID document).

CL 43. Because of the "undervote" percentage, there were 1430 illegal votes (96.49% of 1482) in the contest for the 180th district court.

CL 44. Jones's 321-vote margin in the 7:00 to 8:00 p.m. extended-voting period, resulting from the EAO's mistake in agreeing to the TRO, should also be taken into account.

CL 45. Taking into account the undervote, there were **1430** unlawful votes (Sections I through IV) and **321** additional net votes for Jones resulting from official mistake (Section V), for a total of **1751** votes that cast doubt on the true outcome in the 180th District Court race.

VIII. Attorney Fees.

FF 38. Plaintiff Tami Pierce incurred attorney fees of $65,265 and $572 for costs. These amounts are reasonable and necessary for defending the TCPA motion to dismiss, and the court finds they are appropriate sanctions. The amounts do not include time spent presenting the case itself.

CL 46. The TCPA motion to dismiss was without merit and frivolous, justifying sanctions in the amount of $65,265 for attorney fees and $572 for costs.

IX. Judgment

FF 39. The 1751 votes (1430 + 321) greatly exceed Jones's margin of victory, 449. The court holds that this number is large enough to put the true outcome in doubt.

CL 47. Election Code section 221.012 specifies that the *ultimate issue for decision in an election contest* is whether the court can or cannot "ascertain the true outcome of the election."

CL 48. The court holds that the margin of 1751 affected votes is more than enough to make the true outcome unknowable in this election with a 449-vote margin in the canvassed final result.

CL 49. The proper decision is that the election contest be **granted**.

CL 50. The **true outcome** in the contest for Judge of the 180th District Court cannot be determined, and a new election is therefore **ordered**.

The court will discuss timing with the attorneys and parties before setting a date.

Signed: May 15, 2024

/s/ David Peeples

DAVID PEEPLES, Judge Presiding

EXHIBIT A

SUMMARY OF EMERGENCY TRO HEARING ON EXTENDING COUNTYWIDE VOTING FROM 7:00 P.M. TO 8:00 P.M.

This summary is based on Pierce Exhibit 25L, the 66-page reporter's record of the emergency TRO hearing on November 8, 2022.

The broader context, including the proceedings before the Texas Supreme Court, are found in Pierce Exhibits 25A through 27L.

A. Background.

On November 8 several polling locations opened late, some of them several hours late. Others experienced machine malfunctions. Voters waited helplessly in line, sometimes for two hours.

At 4:01 p.m. the Texas Organizing Project (TOP) filed suit against Harris County Commissioners Court and its Elections Administration Office (EAO), seeking an order extending poll closures beyond 7:00 p.m. to compensate for the time lost by voters due to twelve late-opening polls that morning. Plaintiff TOP was represented by three lawyers from the Texas Civil Rights Project and three additional lawyers from the ACLU of Texas. Defendant EAO and Harris County Commissioners Court were represented by two lawyers from the Harris County Attorney's office. No one from TOP or the court contacted either political party between the filing of the lawsuit (4:01 p.m.) and the time the hearing began (5:06 p.m.).

Significantly, no one else had been given even a telephone "heads-up" that the plaintiffs would be asking the court to extend voting countywide for all 782 voting locations in the state's most populous county. The ancillary judge for the Harris County District Courts began a TRO hearing at 5:06 p.m.

B. The attempt to structure a friendly, uncontested TRO hearing, and the lack of candor about ballot paper.

Two things about the TRO hearing are troubling.

(1) TOP sought—*and fought for*—a friendly, non-adversary hearing. TOP and its lawyers tried to exclude any other interested persons who might oppose the TRO request or provide a different point of view.

(2) When the discussion turned to ballot paper, the EAO was not candid with the trial judge when she tried to learn whether there would be adequate ballot paper for *all* 782 polling locations, which the election code requires.[30]

The ancillary court convened a Zoom hearing at 5:06 p.m. and heard announcements from the lawyers for the plaintiff and the two defendants. Andy Taylor, the attorney for the Harris County Republican Party [HCRP] and its chair, Cindy Siegel, had learned about the hearing. He asked permission to *speak* and to *intervene*:[31]

> THE COURT: Any objection . . .?
>
> MR. MIRZA (Texas Civil Rights Project attorney representing the Texas Organizing Project): Yes, we object to the intervention. . . . We believe they are not a party to the case. They don't — this is an issue with regard to voters. . . .
>
> THE COURT: Mr. Taylor, talk to me more about why you believe Ms. Siegel and the Republican Party needs to intervene in this lawsuit *at this time.*
>
> MR. TAYLOR: [You are going to be asked] to extend the voting time past 7:00 p.m.
>
> THE COURT: Correct.

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[30] Section 43.007(p) of the election code says: "If a court orders any countywide polling place to remain open after 7 p.m., all countywide polling places located in that county shall remain open for the length of time required in the court order."

[31] All emphasis in the summary below has been added.

> **MR. TAYLOR:** . . . [T]he Harris County Republican Party [HCRP] has multiple candidates on the ballot. . . . we have a very significant interest . . . because what you're going to decide can impact the races that are on the ballot . . . .
>
> **THE COURT:** . . . I'm still trying to figure out why this would in any way *affect your clients* certainly at this juncture. If in fact granted, it would be applicable to all the polls no matter what location they're in.
>
> **MR. TAYLOR:** . . . [T]his number is growing - - but I'm aware of 19 polling locations that have no ballots. They're out of ballot paper. [Taylor offered to email the Court a list.] Those happen to be in what are politically referred to as Republican strongholds.

Moments later, Nickolas Spencer, attorney for the Harris County Democratic Party [HCDP], appeared and said, "I'll be making similar arguments to Mr. Taylor." He then expressed concern that poll workers and poll watchers might need to make personal arrangements for an extended workday.

The court asked again if there was objection to participation by the two local political parties.

> **MS. BEELER** (Texas Civil Rights Project attorney representing TOP): *Yes, we object to both. . . . The parties don't have standing to intervene here.* This dispute is between the County and *the* voters, . . . not between *the* voters and the parties. If Mr. Taylor has concerns about their voters, *he should file his own lawsuits and request his own relief.* That has nothing to do with our suit. It has no bearing on our suit. . . . This dispute is between the voters and Harris County and the named defendants here. It is not between the voters and the parties.
>
> **THE COURT:** . . . Since we have both parties [the Rs and the Ds] present and *both parties are in agreement for the most part* about *whatever interests they may have in this suit,* I am going to grant the intervention for [both parties.]

[The court gave plaintiff Texas Organizing Project time to arrange for live witnesses to testify. The discussion then turned to whether to keep the polls open longer and whether all polls would have ballot paper. This is significant because

the election code mandates that if a court orders *any* countywide polling place to remain open past the 7:00 p.m. closing time, it must keep *all* polling places open for the same length of time, as stated in footnote one above. If a polling location has no ballot paper, it can hardly be said to be "open."]

> **ATTORNEY FOR PLAINTIFF Texas Organizing Project:** . . . [M]ultiple polling locations in Harris County did not open on time this morning. . . . [One] didn't open for three hours this morning. Defendant's failure to open these polling locations on time will injure plaintiff's members and other voters by burdening their fundamental right to vote. . . . If the polling location hours are not extended, they will be disenfranchised. . . .
>
> . . .
>
> **COUNTY ATTORNEY (REPRESENTING THE EAO):** . . . [W]e wouldn't have any opposition to the relief sought if it's limited to one hour and my client, especially the Elections Administrator, who is really the proper target of this lawsuit, is *able to comply* with that and to ensure that the polls remain open for one extra hour.
>
> **THE COURT:** You're referring to Mr. Tatum. He is able?
>
> **COUNTY ATTORNEY:** *He is able.*
>
> **MR. SPENCER (HCDP):** *We would agree* with extending it to one extra hour . . . . *We would prefer . . . two hours* . . . .
>
> **MR. TAYLOR (HCRP):** We are opposed. We've been monitoring the situation all day long with our people that are on the ground [and] there are at least 19 polling locations that have no paper. If you extend the time to vote, how are those 19 locations going to effectuate a citizen's right to vote without any paper? . . . It would be . . . a disenfranchisement to allow some of the polling places to vote and others not, and that's what the Election Code says. If you're going to extend polling, you can't do it piecemeal. You've got to do it countywide. . . .
>
> **THE COURT:** [All] I need to do is perhaps include an order to Harris County to deliver the additional sufficient ballots and supplies that are needed . . . .

County Attorney: With respect to the locations that are missing paper, the EA's office is *currently replenishing* all those locations. . . . It's not true that there are currently 19 locations without paper. It is 10. As we get updates on the *locations that don't have paper*, we're sending people out there to replenish. *The EA's office is making sure that every polling location is able to operate.*

[The court heard testimony about the late poll openings that morning.]

THE COURT: Based on the testimony that I've heard, I am going to *grant* the TRO and extend the polls specifically for those 12 locations which, of course, means for all the Harris County polls, *until 8:00 o'clock. . . . I want to know logistically how this is going to work.*

COUNTY ATTORNEY: The office has been responding to any report of paper ballots running out. The latest update I have is that there are two locations—and this was about 20 minutes ago—there were *only two* locations that were out of paper and they were in the process of being restocked. . . .

THE COURT: . . . *I want to make sure that it's actually possible to get the supplies to these polls.* It's going on 6:00 o'clock. *You're telling me that is possible?*

COUNTY ATTORNEY: *My understanding is, yes.*

MR. TAYLOR: Our information is that *there are at least 19 locations that don't have paper as I'm speaking. . . .*

THE COURT: . . . I do want to make sure that we are clear about the supplies and . . . deliver the materials . . . .

COUNTY ATTORNEY: *So the folks are out delivering the paper to*—I'm just talking about the paper ballots . . . *to all the locations that currently need them.* I'm still trying to get a final tally on this. It's not 19 . . . . And what I would ask is if we're in a situation where we're going to run out of ballots and we can't comply with the order, we're able to come back before this Court . . . obviously I don't want to be in a position where my client can't comply with the terms of the order. Hopefully that's not going to be an issue. We don't anticipate it will be, but you never know.

THE COURT: Okay. All right. I'm signing off on the order.

The TRO was signed and the hearing ended **at 6:03.** The EAO had promised to get paper to polling locations during rush hour.

At 7:49 the court reconvened and announced that the Attorney General's office had filed a motion to dissolve the TRO. The lawyer for the Attorney General argued there was no reason to extend voting hours because voters could go to the other 770 voting locations. She then observed that the TRO was sought "without providing any notice to the State so that we would have the opportunity to be heard before this Court issued a TRO that requires not just 12 but all 782 polling locations in Harris County to stay open past the statutory deadline."

> **MS. BEELER** for Texas Organizing Project: *We are unaware of any authority that requires us to let the State know and to give the State notice.* . . . It's going to be *moot* in one minute . . . . We would argue that the order is *already moot.*
>
> . . .
>
> **COUNTY ATTORNEY:** . . . we agree that at this point . . . the requested relief in the State's motion is *moot* . . . . *I did want to . . . come back to clarify some of the issues related to ballots missing from polls that we discussed earlier.*
>
> **[MR. TAYLOR [HCRP]** listed by name several polls where voters were turned away because there were no ballots.]
>
> **COUNTY ATTORNEY:** I asked that we come back if we were *not able to comply* with that provision [ballot supply]. *As Mr. Taylor notes, there have been polls where paper ballots were not able to be delivered,* so that's obviously information we didn't have at the time. . . . (emphasis added)
>
> **THE COURT:** . . . I asked explicitly, is this something that logistically could be done; and I remember your response being something along the lines of "as best we can, Judge."

The County Attorney, after disagreeing with Mr. Taylor throughout the hearing, admitted (at 8:09 p.m.): "*As Mr. Taylor notes, there have been polls where paper ballots were not able to be delivered,* so that's obviously information we didn't have at the time. . . ." (emphasis added)

At this point the ancillary judge was told that the Texas Supreme Court had stayed the TRO, and she promptly recessed the hearing.

C. Notice and opportunity to be heard.

It is hard to think of any principle of civil procedure more fundamental to fairness and due process of law than the right of interested persons to be given *notice* and an *opportunity to be heard* when a lawsuit might affect their legal interests:

> The fundamental requisite of due process is the *opportunity to be heard.* This right to be heard has little reality or worth unless one is *informed that the matter is pending* and can choose for himself whether to appear or default, acquiesce or contest. . . . An elementary and fundamental requirement of due process in any proceeding which is to be *accorded finality* is notice reasonably calculated, under all the circumstances, to apprise *interested parties* of the pendency of the action and afford them an *opportunity to present their objections*. . . . [Within] the limits of practicability notice must be such as is reasonably calculated to reach *interested parties*.[32]

Yet the Texas Organizing Project's lawyers consciously chose *not to give notice* to either political party or to the Texas Secretary of State or the Texas Attorney General. And then the TOP lawyers *fought* their effort to *speak and be heard.*

There were twelve *statewide* races on the ballot in Harris County (as in every Texas county). The lawsuit sought a TRO affecting *countywide* and *statewide* voting in the state's most populous county.

Plaintiff's attorneys, *speaking for a few voters,* opposed letting the Harris County Republican Party's lawyer even *speak for 114 candidates on the ballot,* who were also voters.

Certainly, the plaintiff couldn't be expected to give *official* notice to *all* 228 candidates for partisan offices on the ballot. But the local parties and their chairs and

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[32] *Mullane v. Central Hanover Bank & Trust,* 339 U.S. 306, 314, 318 (1950) (emphasis added, citations omitted). *Mullane* has been cited 12,200 times by American courts. The case and its age-old principles are in every civil procedure book used in law schools; they are studied by every first-year law student in this country.

lawyers were a small number (two party chairs, two lawyers), easily identified and contacted. In these days of instant communication, it was inexcusable not to give them a courtesy call, and even more inexcusable to *object* and *resist* when Mr. Taylor simply asked to be heard. The plaintiff and the court should have *welcomed* these additional voices. The issue would be moot, the voting finished at 8:00 p.m.

There are times when notice cannot be given quickly to interested persons. But this was not one of those times. None of the usual reasons for not giving notice were present at this TRO hearing:

- **Identity.** The identity of these interested persons was *known*. These were not *unknown* persons or interests.
- **Out of pocket?** They were easy to *locate*.
- **Burden? Expense?** It would not have been *burdensome* or *expensive* to email or telephone them with notice of the hearing.
- **Delay?** An email or a telephone call would not have *delayed* the hearing. One of the six lawyers for the Texas Organizing Project or a staff member could easily have made a phone call or sent a text message or email while the petition was being prepared. This was a Zoom hearing in which lawyers were in their offices; it was not an in-person hearing in a courtroom. There would be no waiting while lawyers drove to downtown Houston. The trial court was willing to wait while the six Texas Organizing Project lawyers rounded up live witnesses.[33]
- **Trivial interest?** Their interest in the TRO issue was not *minimal* or *insignificant*. (When the votes from the extra hour were counted it became

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[33] Ten minutes into the hearing, the court gave TOP time to have its witnesses ready to participate:

> THE COURT (addressing the TOP lawyers): How quickly can you get someone to come in and testify? Because relying on these declarations [is] problematic. . . . So for that reason I am very willing to accept testimony. Do you have anyone? If you don't right now, the court will give you some time.

Eighteen minutes later, TOP's witnesses were ready and began to testify. (PX-27L, Reporter's Record at pages 14-15, & 30)

obvious that one side was better prepared than the other to continue campaigning during the extra hour and get its voters to the polls—from 7:00 a.m. to 7:00 p.m. most down-ballot races broke 51-49 and 52-48, while from 7:00 to 8:00 p.m. the votes broke 58-42) As stated above, twenty-one countywide races finished within a 51-49 margin.

- Finally, it cannot be said that someone else at the hearing would have voiced the concerns raised by Mr. Taylor and expressed his point of view. (Sometimes there are parties present who will speak up for those absent; but that cannot be said of this TRO hearing.)

The court rejects the notion that such a hearing can properly be made a private matter between an advocacy group and the EAO and Commissioners Court. It was not proper to try to exclude clearly interested persons and entities from *simply being heard.*

This court understands that the ancillary judge faced a fast-developing situation and might have been criticized whether she granted or denied the TRO. She was not helped by the lawyers who insisted the lawsuit was a private matter between voters and the Harris County officials—even toward the end of the hearing, their advocacy was still shaping her thoughts when she said (Reporter's Record, page 62), "I want to hear from *the actual parties* in this case." (emphasis added)

The case was pleaded as a private matter involving only voters and election administrators. Notice was not given and there was strenuous objection to the uninvited Republican Party lawyer. The court finds that TOP wanted a friendly hearing and not a contested one.

D. "Mistake" under section 221.003.

Untrue information about ballot paper was given to the trial judge. The court does not fault the lawyers from the County Attorney's office—they relied on what they were told by their client, the EAO.

A candid and truthful response from the EAO to the court would have been: "We have had difficulty all day getting paper to polling locations. Harris County covers 1700 square miles. We can't assure the court that all polling locations will have enough ballot paper, especially during the rush-hour traffic we all know about."

Instead, confident statements were made promising there was (or would be) adequate paper even though throughout the day election judges who called the EAO had experienced lengthy phone call waiting, and contractors working for the EAO had been trying to deliver paper throughout the county.

A court is entitled to candid and truthful information from lawyers and their clients. The assurances of adequate paper were inaccurate, and the court relied on them.

Later that day, after 8:00 o'clock, the Texas Supreme Court issued a stay of the TRO and ordered that the provisional ballots cast between 7:00 and 8:00 p.m. be preserved for later examination.

One cannot help noticing the difference in the turnout of the two parties during the twelve-hour regular voting period and the extra hour from 7:00 to 8:00 p.m. From 7:00 to 7:00 p.m. on Election Day, the margins in local countywide races ranged from 52-48 with few exceptions. From 7:00 to 8:00 p.m. the range was 59-41. The evidence does not show whether this happened because Republican polling locations were disproportionately without paper or whether one party was better poised to continue its turnout efforts, as is suggested by the HCDP attorney's statement to the Ancillary Judge quoted (quoted above at page 26): "*We would agree* with extending it to one extra hour . . . . *We would prefer . . . two hours* . . . ."

* * * * *