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Filed Electronically
The Honorable Ruben Gonzalez Jr.
Tarrant County Criminal Court Clerk,
401 W Belknap St,
Fort Worth, TX 76102

Re: State of Texas v. Crystal Mason, 432nd District Court, Tarrant County, Case No. D432-1485710-00

To the Honorable Ruben Gonzalez Jr.:

Amici, the American Civil Liberties Union Foundation of Texas and the Texas Civil Rights Project, respectfully submit this short letter brief in support of Defendant's amended motion for a new trial. The United States Supreme Court has long held that the right to vote is "a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Accordingly, this right must be safeguarded from actions that would threaten to chill citizens' participation in the franchise. *Thomas v. Groebl*, 147 Tex. 70, 78 (1948). Here, the State seeks to criminalize what appears to be an innocent mistake made in casting a *provisional ballot*. The State's prosecution sends a message that, rather than freely engaging in the fundamental democratic process of voting, citizens may vote only if they are certain that they have interpreted

the complex Election Code correctly to determine their eligibility. Any mistake—no matter how innocent—will be penalized with the full force of the criminal law. Such a message, if not rejected by this Court, will inevitably chill participation in elections and undermine the strength of our democracy.

Amici write to clarify two issues of law. First, the State's reading of the Texas Election Code to criminalize casting a provisional ballot is inconsistent with Federal election law set forth in the Help America Vote Act, raising serious constitutional questions, and must be rejected. Second, evidence that an individual cast a provisional ballot based on an apparent mistake about her eligibility is insufficient as a matter of law to demonstrate the requisite criminal intent.

Interests of *Amici Curiae*

The American Civil Liberties Union Foundation of Texas ("ACLU of Texas") is a nonpartisan organization with thousands of members across the State and is dedicated to protecting the fundamental liberties and basic civil rights of all Texans as guaranteed by the U.S. Constitution and our nation's civil rights laws.

In its twenty-six year history, the Texas Civil Rights Project ("TCRP") has brought thousands of strategic lawsuits to protect and expand voting rights, challenge the injustices in our broken criminal justice system, and advance racial and economic justice. The right to vote is fundamental. Still, however, Texas voters continue to face obstacle after obstacle just to participate in the democratic process. Millions of eligible voters remain shut-out of the democratic process, a disparate number of whom are young, poor, and people of color. The Texas Civil Rights Project focuses its work on tackling the systemic issues that suppress voting rights in Texas – from voter registration to the moment an individual casts their ballot. Today – with dozens of high-caliber attorneys and professionals in Austin, Dallas, El Paso, Houston and the Rio Grande Valley and an

extensive network of pro bono counsel and community allies – TCRP is among the most influential civil rights organizations in the Lone Star State.

Amici both have a vested interest in protecting the right to vote.

Argument

A. The State's interpretation of the Election Code is inconsistent with rights established under federal law.

Ms. Mason's conviction is premised on an interpretation of the Election Code that conflicts with the federal Help America Vote Act ("HAVA"), which permits people who believe they are eligible to vote to cast a provisional ballot even where it is uncertain whether that person is, in fact, eligible. The State's interpretation of the Election Code that criminalizes casting a provisional ballot where the person believes he or she is eligible but is ultimately incorrect raises serious constitutional questions of federal preemption, which the Court need not address if it interprets the Election Code as written to require the requisite mens rea discussed further below. Therefore, to avoid raising these constitutional issues, the Court should order a new trial and interpret the Election Code as written to permit Ms. Mason's casting of a provisional ballot as explicitly sanctioned by HAVA.

1. HAVA provides a right for individuals who believe they are eligible to vote to cast a provisional ballot.

Ms. Mason cast a provisional ballot in accordance with her federally protected right under HAVA. HAVA resulted from legislative efforts to review and reform the administration of federal elections "[i]n the wake of the November 2000 presidential election and its attendant controversies." *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1155 (11th Cir. 2008). Congress passed HAVA in 2002 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 Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004) (citing H.R. Rep. 107–329 at 38 (2001)). HAVA prevents these "on-the-spot denials . . . by poll workers" by allowing individuals who believe they are eligible to vote, like Ms. Mason, to cast a provisional ballot. *Id*. at 574; 52 U.S.C. § 21082(a).

Under HAVA, an individual must be permitted to cast a provisional ballot if the individual believes he or she is eligible to vote, is not on the voter rolls, and affirms that he or she is registered and eligible to vote in that jurisdiction in an election for federal office. *Sandusky Cty. Democratic Party*, 387 F.3d at 574; § 21082(a). This right to cast a provisional ballot under HAVA is "couched in mandatory terms" and "unambiguous." *Id*. at 572-573.

HAVA's right to cast a provisional ballot assures that nobody is "turned away" from the polls. *Id*. at 570, 575. Congress's intent was to permit individuals in Ms. Mason's situation to cast a provisional ballot, and shift the onus to the State to determine 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*.

Indeed, HAVA specifically contemplates that, despite the requirement that an individual affirm he or she is eligible, some individuals will turn out not to be eligible. HAVA requires State and local election officials to set up a hotline whereby individuals can find out whether their vote was counted, and if "the vote was not counted, the reason that the vote was not counted." 52 U.S.C.A. § 21082(a)(5)(B). The State's attempt to impose felony penalties in circumstances in which an individual who believes herself to be eligible, signs a provisional ballot, and is found

ineligible to vote is clearly inconsistent with HAVA's specific guidance with respect to such circumstances.

Crystal Mason appears to have exercised her statutory right under HAVA to cast a provisional ballot during the 2016 presidential election because she believed that she was a registered voter in her precinct, and that she was eligible to vote in an election for federal office. Under such circumstances, the only repercussion Ms. Mason should have faced for her incorrect belief was being found ineligible to vote under state law, being told why she was found ineligible, and having her vote not count. *Sandusky Cty. Democratic Party*, 387 F.3d at 576.

Contrary to this outcome, however, the State chose instead to prosecute Ms. Mason for taking the very steps HAVA allowed her to take: casting a provisional ballot based upon her belief that she was eligible to vote. In prosecuting Ms. Mason under the Texas Election Code's illegal voting statute and creating a scheme in which prospective voters must be infallible with respect to their eligibility or else risk criminal prosecution, the State is creating a regime that would drastically discourage individuals from casting even a provisional ballot, which undermines HAVA's purpose in mandating provisional ballots in the first instance.

2. The State's interpretation raises serious constitutional concerns.

The State's interpretation of the Election Code may well have significant constitutional preemption implications that this Court should avoid. Principles of statutory construction and constitutional avoidance require a state statute to be read in a way that does not conflict with federal law. As the Supreme Court noted in *National Federation of Independent Business v. Sebelius*, "it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so." 567 U.S. 519, 562 (2012)

(finding the individual mandate to be a "tax" within Congress' constitutional power to tax, rather than a required purchase outside the scope of Congress' constitutional powers, to avoid potential constitutional violation); *see also Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998) (interpreting statute's use of the words "unreasonable" and "arbitrary" to require a deferential, rather than de novo, standard of review to avoid possible constitutional violation); *Federal Sav. and Loan Ins. Corp. v. Glen Ridge I Condominiums, Ltd.* 750 S.W.2d 757, 759 (Tex. 1988) (construing liquidation proceeding statutes so as to avoid constitutional question regarding Article III: "it is our duty as a court to construe statutes in a manner which avoids serious doubt of their constitutionality").

The most natural reading of the illegal voting statute limits enforcement of the statute only to a person who unmistakably "votes or attempts to vote" through a non-provisional ballot, while "*know[ing]* [he or she] is not eligible to vote." Tex. Elec. Code § 64.012 (a)(1), (a)(2) (emphasis added). Even if this were not the most natural reading of the statute, it would not matter, as a reading that does not violate the Constitution need only be a "fairly possible" one. *Sebelius*, 567 U.S. at 563 (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). If, however, a state statute cannot be read in a way that does not conflict with federal law, the Supremacy Clause requires that the state statute yield to federal law: "thus, when a state law conflicts with federal law, it is preempted and has no effect." *BIC Pen Corp. v. Carter*, 251 S.W.3d 500, 504 (Tex. 2008) (citing *Maryland v. Louisiana*, 451 U.S. 725, 747 and *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 426 (Tex. 2005)). Reading the Texas Election Code to criminalize Ms. Mason's provisional ballot and actually *prohibit* an individual like Ms. Mason from taking the very action that HAVA mandates the State permit is inconsistent and may very well "actually conflict" with and be preempted by HAVA.

The Court need not resolve these constitutional issues. Rather, it can simply interpret Section 64.012 of the Texas Election Code consistently with HAVA and its plain language, and allow potential voters like Ms. Mason to cast a provisional ballot without fear of prosecution. The most natural reading—and certainly a "fairly possible" reading—of the Texas Election Code limits enforcement of the statute to only a person who unmistakably "knows [he or she] is not eligible to vote," yet nonetheless casts a non-provisional ballot. Tex. Elec. Code § 64.012 (emphasis added); *Sebelius* 567 U.S. 519 at 563. This reading would allow a potential voter like Ms. Mason whose name is not on the voter rolls to both cast a provisional ballot in accordance with her rights under HAVA, as well as avoid improper prosecution under the illegal voting statute. For these reasons Ms. Mason's conviction cannot stand.

B. The State cannot as a matter of law demonstrate that defendant violated Section 64.012(a)(1) of the Election Code.

1. The State had the burden to show beyond a reasonable doubt that Ms. Mason acted with the required criminal intent.

In a criminal prosecution, the State bears the burden of proving all elements of the crime beyond a reasonable doubt, including that the defendant acted with the necessary mens rea. *Humason v. State*, 728 S.W.2d 363, 366 (Tex. Crim. App. 1987) ("As with all elements of an offense, the State must prove the mens rea element of an offense beyond a reasonable doubt."), *abrogated on other grounds by Brown v. State*, 911 S.W.2d 744 (Tex. Crim. App. 1995); *Fisher v. State*, 851 S.W.2d 298, 302 (Tex. Crim. App. 1993) ("The due process clause of the Fourteenth Amendment requires that every state criminal conviction be supported by evidence that a rational factfinder could accept as sufficient to prove all the elements of the offense beyond a reasonable doubt."). As a matter of law, the State cannot meet its burden here, where it appears that Ms. Mason thought she was eligible to vote and cast a provisional ballot.

Section 64.012(a)(1) of the Election Code provides that "a person commits an offense if the person: (1) votes or attempts to vote in an election in which the person *knows* the person is not eligible to vote." Election Code, Section 64.012(a)(1) (emphasis added). Under this statute, which includes a "knowing" mens rea element, the State had the burden to prove beyond a reasonable doubt that Ms. Mason voted intentionally, was aware of the circumstances that rendered her ineligible to vote, and was aware that she was *in fact* ineligible to vote. *See also McDonald v. Gonzales*, 400 F.3d 684, 689 (9th Cir. 2005) (interpreting Hawaii election law to require subjective awareness that voter was ineligible to vote). In other words, the State must prove not just that Ms. Mason intentionally voted while knowing that her non-intrusive post-release requirements qualified as "supervision," as that term is used in the Election Code, but that Ms. Mason also knew that being under such "supervision" rendered her ineligible to vote—a burden the State has not and seemingly cannot meet, given the facts of this case.

The Texas Court of Criminal Appeals has reached similar conclusions regarding the mens rea requirements of other sections of the Election Code. In analyzing another offense under the Election Code that likewise includes a "knowing" mens rea element, the Texas Court of Criminal Appeals held that:

> [T]he State must also show that the actor was actually aware of the existence of the particular circumstance surrounding that conduct that renders it unlawful. Moreover, as written, Section 253.003(a) requires that the actor be aware, not just of the particular circumstances that render his otherwise-innocuous conduct unlawful, but also of the fact that undertaking the conduct under those circumstances in fact constitutes a "violation of" the Election Code.

Delay, 465 S.W.3d at 250. The Court proceeded to analyze the conduct at issue and held that the conduct could not be criminalized because "nothing in the record shows that anyone associated with the contributing corporations *actually realized* that to make a political contribution under

these circumstances *would in fact* violate Section 253.003(a) (or any other provision) of the Texas Election Code." *Id.* at 252 (emphasis added).[1]

Texas courts have also required a subjective awareness of wrongdoing when interpreting other statutes with similar mens rea requirements. For example, Texas's Abuse of Official Capacity statute makes it illegal for a public servant to intentionally or knowingly " (1) violate[] a law relating to the public servant's office or employment." Tex. Penal Code Ann. § 39.02. Texas courts have interpreted this language to require subjective knowledge that the defendant's act violated the law—not just that the defendant knew she was a public servant and committed said act. *State v. Edmond*, 933 S.W.2d 120, 127 (Tex. Crim. App. 1996) ("In order to commit an offense under § 39.02(a)(1), a defendant must 'know' that his conduct which constitutes 'mistreatment' is unlawful."); *Prevo v. State*, 778 S.W.2d 520, 525 (Tex. App. 1989) ("The State was also required to prove under section 39.02 that appellant intentionally acted in the manner alleged with knowledge that his conduct was unlawful."); *see also Ross v. State*, No. PD-0001-17, 2018 WL 1516737, at *6 (Tex. Crim. App. Mar. 28, 2018) (interpreting Texas's Official Oppression statute and reversing conviction after finding that "evidence was insufficient to prove beyond a reasonable doubt that Ross knew that her conduct was unlawful").

[1] Amici are aware that at least one Court of Appeal has reached a different conclusion with respect to Section 64.012(a)(1). In *Medrano v. State*, the Dallas Court of Appeal held that to be convicted under Section 64.012(a) the State need show only that the defendant was aware of the circumstances that rendered her ineligible to vote. 421 S.W.3d 869, 885 (Tex. App. 2014). However, *Medrano*, which is not binding on this Court, was decided before *Delay* clarified the appropriate standing for "knowing" in the Election Code. Indeed, in *Delay*, the Court rejected the central premise of *Medrano*. To reach its conclusion that the State did not have to show that defendant subjectively knew she was ineligible to vote, the *Medrano* court relied on the premise that individuals are presumed to be aware of the law. *Id.* (citing *Thompson v. State*, 26 Tex. App. 94, 9 S.W. 486, 486 (1888)). However, the *Delay* court rejected that reasoning where, as here, the language of the statute specifically imposes a "knowing" mens rea requirement. *Delay*, 465 S.W.3d at 247 n.55.

The mens rea requirements of Section 64.012(a)(1) are clear; however, any ambiguities would need to be resolved according to the rule of lenity. Where a criminal charge concerns the fundamental right to vote, ambiguities in the law must be interpreted to avoid criminalizing citizens' participation in the electoral process. As the Texas Supreme Court has held "[t]he right to vote is so fundamental in our form of government that it should be as zealously safeguarded as are our natural rights," and election statutes must be interpreted "in favor of that right." *Thomas v. Groebl*, 147 Tex. 70, 78 (1948). Further, the Texas Court of Criminal Appeals has specifically held that the penal sections of the Election Code must be interpreted leniently. *Delay*, 465 S.W.3d at 251 ("[I]n 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.") (citation omitted).

2. In casting a provisional ballot based on a confusion concerning her eligibility, Ms. Mason lacked the requisite criminal mens rea as a matter of law.

Here, there are several factors that show as a matter of law that Ms. Mason appears to have lacked the required mens rea. As an initial matter, the State must show beyond a reasonable doubt that Ms. Mason was aware of the circumstances rendering her ineligible to vote. *Delay*, 465 S.W.3d at 250. As relevant here, Texans are not eligible to vote if they have been convicted of a felony and have not "fully discharged [their] sentence, including any term of . . . parole, or supervision, or completed a period of probation ordered by any court." Election Code 11.002(a)(4)(A). Ms. Mason was not on probation or parole. Her alleged ineligibility to vote rests on whether she was under "supervision." However, as expressed in Ms. Mason's amended motion for a new trial, the term "supervision" is excessively vague. The term supervision is not defined in the Election Code, and Texas courts have historically equated supervision with other terms that

were inapplicable to Ms. Mason such as "probation." *See, e.g., 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."). Here, Ms. Mason was not required to meet regularly with any sort of supervisor; she simply had to log into an online system to confirm she had not moved, changed her phone number, or been arrested. Given the vagueness of what it means to be supervised and Ms. Mason's nonintrusive post-release requirements, the State cannot show beyond a reasonable doubt that Ms. Mason knew she was under "supervision" as that term is meant in the Election Code.

Courts routinely strike down laws that include provisions that are so vague that the average citizen cannot determine what conduct is prohibited. A law is void for vagueness where it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008); *see also Women's Med. Ctr. v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001). Where, as here, the law contains both an impermissibly vague term and a requirement that the defendant *actually know* she was ineligible to vote, the Court must, as a matter of law, find that the defendant does not meet the required mens rea standard.

Further, the State also needs to show that Ms. Mason was *actually aware* that she was ineligible to vote. *Delay*, 465 S.W.3d at 250. Ms. Mason's new counsel has now introduced numerous affidavits concerning Ms. Mason's innocent belief that she was eligible to vote, and there is no explanation for why Ms. Mason would risk up to twenty years in prison to cast a ballot in an election. The State has not, for example, shown that Ms. Mason had a familial relationship to a candidate, a pecuniary interest in the outcome of a particular issue, or any other motive that would explain why Ms. Mason would risk giving up her life and freedom again to vote in this

particular election. The much more plausible explanation is that Ms. Mason made an innocent mistake regarding her eligibility. Neither the text of the Election Code nor the decisions of Texas high courts countenance criminalizing such a mistake.

Finally, given that Ms. Mason's ballot was provisional, the State has not shown that she intended to vote at all. As explained, *supra*, the purpose of the provisional ballot is to account for ambiguities about whether a person is eligible to vote such as those present here. Thus, Ms. Mason's submission of a provisional ballot shows only that Ms. Mason believed that she was eligible to vote and that she intended to allow the State to determine whether she was in fact eligible to do so.

Conclusion

Free and open participation in the democratic process is critical to a well-functioning republic. To ensure that citizens continue to engage in the democratic process, even in circumstances where there is confusion surrounding their eligibility to vote, congress passed the Help America Vote Act. Here, the provisional ballot system worked. There was confusion about Ms. Mason's eligibility to vote; she cast a provisional ballot and it ultimately was not counted. Criminalizing Ms. Mason's innocent actions contradicts both the requirements of Federal law under HAVA and the heightened mens rea requirements set forth by the Election Code. *Amici*, therefore, respectfully request that the Court grant Ms. Mason's motion for a new trial and ultimately vacate her conviction.

Date: May 23, 2018

Respectfully submitted:

ACLU FOUNDATION OF TEXAS:

/s/ Thomas Buser-Clancy
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Andre Segura
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TEXAS CIVIL RIGHTS PROJECT

/s/ Mimi M.D. Marziani
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Certificate of Service

I hereby certify that a true and correct copy of the following document, ***Letter Brief of Amici Curiae,*** has been delivered to defendant's counsel and the District Attorney's Office in Tarrant County via efile on this 23rd day of May, 2018.

__/s/ Thomas Buser-Clancy__

Thomas Buser-Clancy