

No. 02-18-00138-CR

**IN THE
COURT OF APPEALS
SECOND APPELLATE DISTRICT OF TEXAS
AT FORT WORTH**

CRYSTAL MASON,

Appellant,

v.

STATE OF TEXAS,

Respondent.

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

**BRIEF OF FORMER PROSECUTORS AS *AMICI CURIAE*
IN SUPPORT OF APPELLANT CRYSTAL MASON**

COOLEY LLP

Kathleen R. Hartnett*
CA Bar No. 314267
Darina Shtrakhman*
CA Bar No. 324109
3 Embarcadero Center, 20th Floor
San Francisco, California 94111-4004
Telephone: (415) 693-2000
Facsimile: (415) 693-2222
khartnett@cooley.com
dshtrakhman@cooley.com

SUSMAN GODFREY LLP

Justin A. Nelson
Texas Bar No. 24034766
Neal S. Manne
Texas Bar No. 12937980
Robert Rivera, Jr.
Texas Bar No. 16958030
Ace M. Factor
Texas Bar No. 24118923
1000 Louisiana, Suite 5100
Houston, TX 77002-5096
Telephone: (713) 651-9366
Facsimile: (713) 654-6666
jnelson@susmangodfrey.com
nmanne@susmangodfrey.com
rrivera@susmangodfrey.com
afactor@susmangodfrey.com

STATES UNITED DEMOCRACY
CENTER

Katherine Reisner*
NY Bar No. 5287917
Jonathan L. Williams*
NC Bar No. 40173
Gregory T. Nolan*
CA Bar No. 291162
1101 17th St NW, Suite 250
Washington, D.C., 20036
Telephone: (202) 999-9305
katie@statesuniteddemocracy.org
jonathan@statesuniteddemocracy.org
greg@statesuniteddemocracy.org

Counsel for Amici Curiae

**Pro Hac Vice Admission Pending*

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STATEMENT OF INTEREST OF *AMICI*

Amici curiae are former prosecutors and officials who are committed to the integrity of the justice and elections systems. *Amici* take seriously the vision of a prosecutor articulated by Justice Robert Jackson in an address he delivered while serving as the Attorney General of the United States: that prosecutors should be “diligent, strict, and vigorous in law enforcement,” but above all, should “be just,” approach their “task with humility,” and recognize that even when “the government technically loses its case, it has really won if justice has been done.” Robert H. Jackson, *The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys at 3 and 7 (Apr. 1, 1940)*.

Dedicated to this principle—that a prosecutor’s highest service to this country is not to win, but to deliver justice—*Amici* have an interest in ensuring that the outcome of this case will not discourage eligible voters from exercising their fundamental right to vote or undermine the public’s trust in the criminal justice system.¹ If Crystal Mason’s conviction for casting a provisional ballot is allowed to stand, this case will do both.

Donald B. Ayer served as Deputy Attorney General at the U.S. Department of Justice from 1989 to 1990; Principal Deputy Solicitor General of the United States

¹ No fees have been or will be paid for the preparation and filing of this amicus brief. *See* Tex. R. App. P. 11.

from 1986 to 1989; and U.S. Attorney for the Eastern District of California from 1981 to 1986. He has argued nineteen cases in the U.S. Supreme Court.

Gregory A. Brower served as Assistant Director and Deputy General Counsel of the Federal Bureau of Investigation from 2016 to 2018; U.S. Attorney for the District of Nevada from 2008 to 2009; and Inspector General of the U.S. Government Publishing Office from 2004 to 2006.

Stephen C. Bullock served as Attorney General of Montana and two terms as Montana's Governor. Previously, he also served as an assistant Attorney General and chief deputy Attorney General of Montana.

Paul Coggins served as the U.S. Attorney for the Northern District of Texas from 1993 to 2001, and was twice appointed as Special Assistant Attorney General for Texas.

E. Thomas Coleman served eight terms as a member of Congress from Missouri. Prior to his congressional service he was an Assistant Attorney General of Missouri and twice elected to the Missouri House of Representatives.

John William (Jack) Conway served for two terms as Attorney General of Kentucky.

John Farmer has been an Assistant U.S. Attorney, New Jersey Attorney General, Senior Counsel to the 9/11 Commission, Dean of Rutgers Law School, and now serves as Director of the Eagleton Institute of Politics. He has also served on

New Jersey's Executive Commission on Ethical Standards, Advisory Committee on Judicial Conduct, and the State Commission of Investigations.

Jonathan S. Feld served as an Associate Deputy Attorney General at the U.S. Department of Justice; Assistant U.S. Attorney for the District of New Jersey; Assistant Special Counsel to the Select Commission established by the State of Rhode Island to investigate the collapse of its privately insured financial institution system; and Associate Independent Counsel for the investigation of the U.S. Department of Housing and Urban Development.

Patricia A. Madrid served two terms as Attorney General of New Mexico.

Janet A. Napolitano served as Attorney General of Arizona and as U.S. Attorney for the District of Arizona. She served two terms as Arizona's Governor, and from 2009 to 2013, she was the United States Secretary of Homeland Security.

Matthew D. Orwig served as the U.S. Attorney for the Eastern District of Texas from 2001 to 2007.

Sarah R. Saldaña served as the U.S. Attorney for the Northern District of Texas (Dallas) from 2011 to 2014 and was appointed to the Attorney General's Advisory Committee during her tenure. Since 2004, she had served as an Assistant U.S. Attorney in the same office, both as a line prosecutor, including service as the District's Election Officer, and as Deputy Criminal Chief of the Major Fraud and

Public Corruption unit. Most recently, she served as Director of U.S. Immigration and Customs Enforcement from 2014 to 2017.

Richard H. Stephens served as Interim U.S. Attorney (twice), First Assistant U.S. Attorney and Chief of the Criminal Division of the U.S. Attorney's Office for the Northern District of Texas. In addition, he served as Assistant District Attorney for Dallas County, Texas.

William F. Weld served as the U.S. Attorney for Massachusetts from 1981 to 1986; as the Assistant U.S. Attorney General in charge of the Criminal Division from 1986 to 1988; and as Governor of Massachusetts from 1991 until 1997.

ARGUMENT

Prosecutors wield tremendous power. The impact of their decisions on whether and how to prosecute can reverberate well beyond the specifics of any given case, in ways both positive and destructive. Appropriately, our system imposes important checks on prosecutorial power to ensure it is used only to further the aims of justice. This Court’s review of Appellant Crystal Mason’s conviction for illegal voting is one such check.

Ms. Mason’s prosecution was far outside the bounds of any reasonable exercise of the prosecutorial power. To violate Texas’s illegal voting statute, a voter must have “actual knowledge that it was a crime for her to vote” *Mason v. State*, No. PD-0881-20, 2022 WL 1499513, at *1 (Tex. Crim. App. May 11, 2022). Yet, as this Court has already recognized, “[t]he evidence does not show that [Ms. Mason] voted for any fraudulent purpose.” *Mason v. State*, 598 S.W.3d 755, 779 (Tex. App.—Fort Worth 2020). Simply put, Ms. Mason never should have been charged, much less convicted.

Now that the Court of Criminal Appeals has clarified the legal standard, this Court on remand must rigorously enforce the knowledge requirement to ensure that Ms. Mason’s mistake about her eligibility does not result in a felony conviction. Texas law provides ample safeguards to ensure that only eligible voters’ ballots are counted. If Ms. Mason’s conviction stands, Texas’s elections will not be more

secure. All that such an outcome would achieve is to make Texas voters fearful that a mistake about their eligibility could result in harsh criminal consequences, harming our democratic processes and undermining the legitimacy of our justice system.

A. Absent rigorous enforcement of the knowledge requirement, the threat of prosecution will discourage eligible voters from voting.

The right to vote is fundamental in our democracy, as it “preserves all other rights.” *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 12 (Tex. 2011). To ensure that government rests upon the consent of the governed, voters must remain free to “exercise the franchise in a free and unimpaired manner.” *See Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

The power of “baseless arrests and prosecutions” to chill potential voters has long been clear. *See United States v. McLeod*, 385 F.2d 734, 740–41 (5th Cir. 1967) (observing that, “short of physical violence,” it is “difficult to imagine anything” that could be more discouraging). For this reason, Department of Justice guidelines urge prosecutors not to bring election-related charges unless the defendant sought to “corrupt the process.” *See* U.S. Dep’t of Justice, *Federal Prosecution of Election Offenses* 10–11 (8th ed. 2017), <http://bit.ly/3Vlv8Ki>. This restraint is critical. If eligible voters believe that a mistake about their eligibility could lead to prosecution and conviction, they will understandably think twice before voting. To avoid this chilling effect, the Court must rigorously enforce the illegal voting statute’s knowledge requirement.

Allowing Ms. Mason’s conviction to stand would likely deter eligible Texans from voting because the case involves a provisional ballot—a type of ballot specifically designed to allow individuals whose eligibility is in question to cast a ballot. Through the Help America Vote Act of 2002 (“HAVA”), 52 U.S.C. § 20901 *et seq.*, Congress required the States to allow provisional voting to address “a significant problem”: voters were “arriv[ing] at the polling place believing that they [were] eligible to vote, and then [were] turned away because the election workers [could not] find their names on the list of qualified voters.” H.R. Rep. 107-329 at 38 (2001). To alleviate that problem, HAVA “creat[ed] a system for provisional balloting . . . under which a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote.” *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004). In so doing, Congress recognized 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. 107-329 at 37.

The very design of the provisional ballot system contemplates that people will sometimes be wrong about their eligibility to vote and provides that the remedy in such situations is not counting the ballot. *See Sandusky*, 387 F.3d at 570; 52 U.S.C. § 21082(a)(4). That Ms. Mason’s provisional ballot was ultimately excluded was

thus certainly not unique. Some 54,000 provisional ballots were rejected in Texas in 2016.² That she was prosecuted for casting the ballot is.

To date, illegal voting prosecutions nationally and in Texas have almost uniformly targeted only intentional voter fraud—not the casting of a ballot, let alone the submission of a provisional ballot, by an individual who turns out to be incorrect about their eligibility to vote. The Heritage Foundation tracks and compiles news coverage of election fraud prosecutions across the United States. Its compilation is full of coverage suggesting intentional misdeeds, but no prosecutions for the ultimately incorrect submission of a provisional ballot, except for this one.³ Ms. Mason’s prosecution sends the troubling message that casting a provisional ballot carries a serious risk, with a consequent chilling effect on the use of provisional ballots. This chill would likely disproportionately impact minority voters, who tend to cast more provisional ballots.⁴

² This figure is derived from the U.S. Election Assistance Commission 2016 Dataset, <https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys>.

³ See <https://www.heritage.org/voterfraud-print/search> (full compilation); <https://www.heritage.org/voterfraud/search?state=TX> (Texas prosecutions, including 22 instances of “ineligible voting” since 2009).

⁴ Christopher McGinn & Keith G. Debbage, *The Electoral Geography of Provisional Ballots by County*, 55 SE. GEOGRAPHER 293, 304 (2015), <https://www.jstor.org/stable/26233742> (“Counties with disproportionately large white populations tended to cast fewer provisional ballots per 1,000 relative to more racially diverse counties. Such a finding supports much of the existing literature that suggested a connection existed between provisional ballots and racial composition.”).

Ms. Mason’s prosecution is especially troubling because “citizens rendered ineligible by criminal conviction,” such as Ms. Mason, confront a confusing legal landscape. Justin Levitt, *The Truth About Voter Fraud*, Brennan Center for Justice at 11 (2007), <http://bit.ly/3GYLbtS>. Laws “vary from state to state,” and “different voters are disenfranchised for different convictions for different lengths of time.” *Id.* “Moreover, the process of restoring a citizen’s right to vote varies” *Id.* Prospective voters are not the only ones who find these rules difficult to navigate. Even “election officials with special training in the rules and regulations governing eligibility routinely get the law wrong.” *Id.* As one Texas legislator conceded in response to Ms. Mason’s case, “I would not have known whether a person on federal supervised release was eligible to vote, and I’m a lawyer and a member of the legislature.” H.J. of Tex., 87th Leg., 2nd C.S. 317 (Aug. 31, 2021).

The potential chilling effect here is greater because Ms. Mason’s five-year prison sentence for a mistake exceeds the punishments imposed in cases involving flagrant violations of Texas’s election laws. In the same county where Ms. Mason was convicted, a Justice of the Peace who admitted to submitting fake signatures to get on the primary ballot was sentenced to only probation. Gillian Edevane, *Judge Gets Probation for Voter Fraud in Same County Where Woman Got Five-year Prison Term for Voting Illegally*, Newsweek (Apr. 24, 2018), <http://bit.ly/3XqQQi8>. Another Tarrant County woman who arranged for her son to vote in his father’s

name was sentenced to only probation. Mitch Mitchell, *Fort Worth woman admits guilt in voter fraud case as national debate continues*, Fort Worth Star-Telegram (June 7, 2015), <http://bit.ly/3I7hbvT>. Two Harris County women who cast a ballot on behalf of one's daughter each received just one day in prison. Mihir Zaveri, *Two poll workers plead guilty to illegal voting*, Houston Chronicle (May 23, 2017), <http://bit.ly/3ACDbuk>. And a man who bragged on Facebook about voting in both Galveston and Minnesota received only a fine. Pioneer Press, *He voted in Anoka County and Texas, then bragged on Facebook*, Twin Cities.com (June 4, 2014), <http://bit.ly/3XCMHI3>. Mason's sentence of five years in prison for submitting a provisional ballot because she incorrectly believed she was eligible to vote (a ballot that was never counted) stands in sharp contrast to the sentences imposed in these other cases of intentional voter fraud.

Amici do not suggest that people who actually realize they are ineligible but vote anyway should be immune from the consequences that Texas law prescribes. But unless the Court makes clear to prosecutors and voters alike that only those with “*knowledge* that [they are] ineligible to vote, not simple negligence,” can be convicted, this case will discourage Texans from casting provisional ballots in good faith. *See Mason*, 2022 WL 1499513, at *6.

B. Texas law has ample safeguards to screen out ineligible voters.

Criminal prosecutions for illegal voting are not the only—much less the primary—tool for ensuring that only eligible voters vote in Texas. Texas law establishes a comprehensive system to prevent ineligible voters from voting. These safeguards work, as this case shows: Ms. Mason’s vote was not counted.

Election security begins at registration. Local registrars review each registration application to ensure that the person is eligible to register. Tex. Elec. Code § 13.071. The Texas Secretary of State maintains a computer database containing the name and other registration information for each registered Texas voter, available to all election officials in the state. *Id.* § 18.061(b). County registrars must provide the Secretary with information needed to maintain this list on an “expedited basis.” *Id.* § 18.061(c).

To maintain the integrity of the state’s voter registration records, state law requires both the Secretary of State and the local voter registrar to regularly review the voter registration lists and compare them with information received from other government agencies to ensure that the list of eligible voters is accurate. *Id.* §§ 18.068, 16.031. The Secretary and local registrars work together to update the voter rolls when they learn a voter has moved to a different county, died, been adjudged incompetent to vote, or is not a U.S. citizen. *See id.* When a local registrar

learns that a voter has a disqualifying felony conviction, the registrar must “immediately” cancel the voter’s registration. *Id.* § 16.031.

Other government entities assist with list maintenance by providing the Secretary and local registrars relevant information. For instance, local registrars of deaths must identify residents who have passed away to the Secretary and local voter registrars every month. *Id.* § 16.001. Every month, the clerk of the court must compile a list of individuals who are excused from jury service because they are non-citizens or non-residents and send that information to the voter registrar and Secretary of State. Tex. Gov’t Code §§ 62.113–62.114. Every business day, the Department of Public Safety provides the Secretary with abstracts of final judgments for each adult felony conviction. Tex. Elec. Code § 16.003. The U.S. Attorney similarly must provide the Secretary notice of any federal conviction of a resident. *See* 52 U.S.C. § 20507(g).

Provisional voting has its own lengthy set of safeguards. An election worker investigates whether each person desiring to vote is eligible to cast a traditional ballot or must vote provisionally. Tex. Elec. Code § 63.001. For provisional voting, an election judge at a polling place must perform a preliminary investigation into the reason that a voter must cast a provisional ballot, after which the local registrar of voters must investigate whether the voter was eligible to vote. *See* 1 Tex. Admin. Code §§ 81.173(b), 81.175(c). The registrar must review information from multiple

sources, including the registrar’s own county voter registration files and records, the Department of Public Safety, and volunteer deputy registrars. *Id.* Then, the early voting ballot board reviews multiple sources of information to determine whether to count the ballot. *Id.* § 81.176; Tex. Elec. Code § 65.054(a)–(b). Officials have up to two weeks to complete this process. Tex. Elec. Code § 65.051(a-1).

Ms. Mason’s experience illustrates that these safeguards work. Following her federal conviction, the U.S. Attorney’s office notified the Secretary of State’s office of the conviction, which in turn notified the Tarrant County Election Administration. *See* Reporter’s Record Vol. 2 (“RR2”) at 30:24–34:4; State’s Exhibit 6; *Mason*, 598 S.W.3d at 764–65. As a result, Ms. Mason’s registration was canceled while she was incarcerated in 2013, and she was not on the list of eligible voters when she went to her polling place while on supervised release in 2016. RR2 at 32:8–34:4 and 60:3–23; State’s Exhibit 6. Ms. Mason was required to cast a provisional ballot, and that ballot was not counted because she was ineligible to vote. RR2 at 62:2–13; State’s Exhibit 6.

Texas already has an effective system to ensure that only eligible voters’ ballots are counted. That system works, and it worked in Ms. Mason’s case by preventing her provisional ballot from being counted.

CONCLUSION

Amici respectfully urge the Court to faithfully apply the illegal voting statute's knowledge requirement, reverse Ms. Mason's conviction, and order a judgment of acquittal.

Dated: February 14, 2023

Kathleen R. Hartnett*
CA Bar No. 314267
Darina Shtrakhman*
CA Bar No. 324109
COOLEY LLP
3 Embarcadero Center, 20th Floor
San Francisco, California 94111-4004
Telephone: (415) 693-2000
Facsimile: (415) 693-2222
khartnett@cooley.com
dshtrakhman@cooley.com

Respectfully submitted,

/s/ Justin A. Nelson
Justin A. Nelson
Texas Bar No. 24034766
Neal S. Manne
Texas Bar No. 12937980
Robert Rivera, Jr.
Texas Bar No. 16958030
Ace M. Factor
Texas Bar No. 24118923
SUSMAN GODFREY LLP
1000 Louisiana, Suite 5100
Houston, TX 77002-5096
Telephone: (713) 651-9366
Facsimile: (713) 654-6666
jnelson@susmangodfrey.com
nmanne@susmangodfrey.com
rrivera@susmangodfrey.com
afactor@susmangodfrey.com

Katherine Reisner*
NY Bar No. 5287917
Jonathan L. Williams*
NC Bar No. 40173
Gregory T. Nolan*
CA Bar No. 291162
STATES UNITED DEMOCRACY
CENTER
1101 17th St NW, Suite 250
Washington, D.C., 20036
Telephone: (202) 999-9305
katie@statesuniteddemocracy.org
jonathan@statesuniteddemocracy.org
greg@statesuniteddemocracy.org

Counsel for Amici Curiae

**Pro Hac Vice Admission Pending*

CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), I certify that this Brief of *Amici Curiae* complies with the applicable word count limitation because it contains 3042 words, excluding the parts exempted by Tex. R. App. P. 9.4(i)(1). In making this certification, the undersigned relied on the word-count function in Microsoft Word 2016, which was used to prepare the Brief of *Amici Curiae*.

/s/ Ace M. Factor _____
Ace M. Factor

CERTIFICATE OF SERVICE

I certify that on February 14, 2023, I filed the attached document with the Clerk of the Court using the Court's ECF system. I hereby certify that a true and correct copy of this Brief of *Amici Curiae* has been served on the following counsel of record via e-service.

Thomas Buser-Clancy
Savannah Kumar
ACLU Foundation of Texas, Inc.
tbuser-clancy@aclutx.org
skumar@aclutx.org

Steven W. Conder
Helena Foret Faulkner
John E. Meskunas
COAappellatealerts@tarrantcountytexas.gov

Counsel for the Appellee

Sophia Lin Lakin
American Civil Liberties Union
slakin@aclu.org

Hani Mirza
Christina Beeler
Texas Civil Rights Project
hani@texascivilrightsproject.org
christinab@texascivilrightsproject.org

Alison Grinter
alisongrinter@gmail.com

Kim T. Cole
kcole@kcolelaw.com

Counsel for Appellant Crystal Mason

/s/ Ace M. Factor
Ace M. Factor