

No. PD-0300-24

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS**

CRYSTAL MASON,

Appellant,

v.

STATE OF TEXAS,

Appellee.

On Discretionary Review from the
Second Court of Appeals, Cause No. 02-18-00138-CR

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

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

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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.¹ *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, 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. Continuing attempts to prosecute Crystal Mason for casting a provisional ballot will do both.

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

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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. The Second Court of Appeals exercised one such check when, on remand from this Court, it overturned Crystal Mason’s illegal-voting conviction for lack of evidence. *Mason v. State*, 687 S.W.3d 772, 785 (Tex. App. Ft. Worth 2024) (*Mason III*).

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*, 663 S.W.3d 621, 624 (Tex. Crim. App. 2022) (*Mason II*). Yet, as the Second Court of Appeals previously 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. Ft. Worth 2020) (*Mason I*). Simply put, Ms. Mason never should have been charged, much less convicted.

On remand from this Court, the Second Court of Appeals overturned Ms. Mason’s conviction and rendered a judgment of acquittal, holding that the evidence at trial failed to show that Ms. Mason’s mistake about her eligibility met the

knowledge requirement. *Mason III*, 687 S.W.3d at 785 (“We conclude that the quantum of the evidence presented in this case is insufficient to support the conclusion that Mason actually realized that she voted knowing that she was ineligible to do so and, therefore, insufficient to support her conviction for illegal voting under Election Code Section 64.012(a)(1).”). This result bolsters public trust in the justice system without damaging the integrity of our elections. Texas law provides ample safeguards to ensure that only eligible voters’ ballots are counted. Ms. Mason’s now-overturned conviction would not have made Texas’s elections more secure. Instead, all that such an outcome would have achieved is to make Texas voters fearful that a mistake about their eligibility could result in harsh criminal consequences. This Court should affirm the judgment of acquittal.

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 courts must rigorously enforce the illegal voting statute’s knowledge requirement. The Second Court of Appeals did so on remand, concluding that the evidence the State offered was “insufficient to support the conclusion that Mason actually realized that she voted knowing that she was ineligible to do so.” *Mason III*, 687 S.W.3d at 785.

Allowing Ms. Mason’s conviction to stand would likely have deterred eligible Texans from voting because the case involves a provisional ballot—a type of ballot specifically designed to allow individuals to cast a ballot if their eligibility is in question. 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. No. 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. No. 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. *See, e.g., Tex. Att’y Gen., Edinburg Mayor, Wife Arrested in Organized Illegal Voting Scheme* (Apr. 25, 2019),

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>.

<https://bit.ly/4hDKGFn> (acquitted 2022); Tex. Att’y Gen., *AG Paxton’s Election Fraud Unit Arrests Starr County Woman for Illegal Voting Using a Dead Person’s Identity* (Jan. 31, 2019), <https://bit.ly/3AmHFso> (dismissed 2019); Tex. Att’y Gen., *Work of AG Paxton’s Election Fraud Unit Results in Arrests of 4 Members of Organized Voter Fraud Ring in North Fort Worth* (Oct. 12, 2018), <https://bit.ly/3YX124E> (dismissed 2023). 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 ballot³ 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

Ms. Mason’s prosecution is especially troubling because “citizens rendered ineligible by criminal conviction,” such as Ms. Mason, confront a confusing legal

³ See <https://www.heritage.org/voterfraud-print/search> (full compilation); <https://www.heritage.org/voterfraud/search?state=TX> (Texas prosecutions, including 20 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.”).

landscape. Justin Levitt, *The Truth About Voter Fraud* 11, Brennan Center for Justice (2007), <http://bit.ly/3GYLbtS>; *Mason III*, 687 S.W.3d at 778 (noting that the ballot Ms. Mason submitted “does not expressly inform the provisional voter” that, if she is on supervised release, she “is ineligible by law to cast the provisional ballot”). Laws “vary from state to state,” and “different voters are disenfranchised for different convictions for different lengths of time.” Levitt, *supra*, at 11. “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 now-vacated 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*, TwinCities.com (June 4, 2014), <http://bit.ly/3XCMHI3>. Mason's sentence of five years in prison for submitting a provisional ballot (that was never counted) because she incorrectly believed she was eligible to vote 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 only those with "*knowledge* that [they are] ineligible to vote, not simple negligence," can be convicted; otherwise, cases like Ms. Mason's will discourage Texans from casting provisional ballots in good faith. *See Mason II*, 663 S.W.3d at 624. And while knowledge of ineligibility to vote may be based on both direct and

circumstantial evidence, “[t]he statute does not allow a court to presume knowledge of ineligibility based solely on a provisional ballot affidavit.” *Id.*

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.* §§ 16.031, 18.068. 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(a)(3).

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-.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).

In this case, Ms. Mason did not cast a regular ballot, but a provisional ballot. 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 local 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; Reporter’s Record Vol. 3 (“RR3”) State’s Ex. 6; *Mason I*, 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, 60:3–23; RR3 State’s Ex. 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; RR3 State’s Ex. 6.

Texas’s election-safety system worked in Ms. Mason’s case by preventing her provisional ballot from being counted. The Second Court of Appeals applied the correct legal standards to conclude that the evidence in the record was insufficient

to show that Ms. Mason knowingly cast an illegal vote—a critical requirement for a conviction under § 64.012 of the Election Code. Continuing attempts to prosecute Ms. Mason would serve neither election integrity nor criminal justice.

CONCLUSION

Amici respectfully urge the Court to affirm the judgment of the court of appeals.

Dated: November 14, 2024

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Pursuant to Rule 9.4(i)(3), the undersigned counsel certifies that the total number of words in the Brief of *Amici Curiae* Former Prosecutors in Support of Appellant, exclusive of the matters designated for omission, is 5,255 words as counted by Microsoft Word Software.

/s/ Ace M. Factor _____
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CERTIFICATE OF SERVICE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of this Brief will be served on counsel of record via e-service on November 14, 2024.

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