

LAURA PRESSLEY	§	IN THE DISTRICT COURT
Contestant	§	
	§	
v.	§	
	§	
GREGORIO “GREG” CASAR	§	
Contestee	§	OF TRAVIS COUNTY, TEXAS
	§	
	§	201 st JUDICIAL DISTRICT

**CONTESTANTS’ SIXTH AMENDED ORIGINAL CONTEST OF ELECTION,
FOR THE OFFICE OF THE AUSTIN CITY COUNCIL, DISTRICT 4**

TO THE HONORABLE JUDGE OF SAID COURT

NOW COMES, Laura Pressley, Contestant, and files this Sixth Amended Original Petition for Election Contest for the Office the Austin City Council, District 4 (Petition) against Gregorio “Greg” Casar, Contestee.¹ In support of this election contest, Dr. Pressley will respectfully show as follows:

I. DISCOVERY

1. The contestant intends that discovery be conducted under level three, a custom discovery plan for election contest devised with the approval of the court.

II. SUMMARY

2. This contest is based on the facts that election irregularities, mistakes, manual, mechanical and electronic errors occurred with the election activities and tabulation of the votes that were cast using the electronic voting machines during Early Voting and on Election Day for the December

¹ This 6th Amended Petition is filed in response to the Discovery production of Travis County and has more specific allegations pleaded. Also, this Sixth Amended Petition is filed in Response to Contestee Gregorio “Greg” Casar’s Answer and Special Exceptions to Contestant’s Original Contest of Election, and the Court’s order of April 13, 2015 regarding those Special Exceptions, and Casar’s Motion to Strike the Fifth Amended Petition.

16, 2014 Joint Special Runoff Election for the District 4 Austin City Council City of Austin election (referred to as the “Runoff”) and January 6, 2015 District 4 Austin City Council Recount (referred to as the “Recount”).

3. There are numerous election irregularities in the administration and results tabulation of the Runoff election. Specifically, the most material issues are related to:

- a. nine instances of corrupt Mobile Ballot Box errors during vote tabulation on election night at Central Counting,
- b. missing data log entries in the vote tabulation systems, the Tally Audit and Ballot Now audit logs,
- c. suspicious mathematical patterns observed in the Runoff Election results that show them to be erroneous and not credible,
- d. Travis County election officers instructing election officers to not print and retain crucial, mandated election records listing specific vote results for each candidate in a race (Zero Tapes, Tally/Results tapes),
- e. election equipment security seals that were improperly sealed, subsequently unsealed and replaced,
- f. not producing, counting and retaining statutorily required ballot images,
- g. obstructing Contestant’s official poll watchers at polling locations and Central Counting after the polls closed.

4. These violations materially affected the outcome of the election in that an inordinate number of election irregularities occurred and there was a lack of accountability of election officers with regard to no printing of Zero Tapes, no printing of Results Tapes, denying office poll watchers access to election activities, improperly sealed electronic devices, security breaches of

the Tally vote tabulation system, corrupt Mobile Ballot Box entries, and Tally Audit log deletions. Because of the erroneous reported election results, the egregious election irregularities, the missing election records, possible criminal and fraudulent violations, the outcome of the Runoff cannot be known.

5. Specifically, these violations caused illegal votes to be counted and election officers failed to count legal votes correctly. In addition, the pervasive and numerous election irregularities make it impossible to conclude that the reported results are the true outcome of the election. Finally, because no ballots, or images of ballots were preserved by the Office of the Travis County Clerk, Dana DeBeauvoir, there are no ballots to count and no ballots to use to verify the electronic “cast vote records” in the Recount except for the paper Absentee/Mail-In ballots .

6. Section 221.012 of the Texas Election Code provides in pertinent part:

Sec. 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.

7. “A contestant seeking to have an election declared void under this provision must allege and prove that the true results of the election are impossible to ascertain.” *See City of La Grulla v. Rodriguez*, 415 S.W.2d 701, 703 (Tex.Civ.App. San Antonio 1967, writ ref'd n. r. e.)” *Garcia v. Avila*, 597 S.W.2d 400, 403, 1980 Tex. App. LEXIS 3027, 6 (Tex. Civ. App. San Antonio 1980, writ dism'd w.o.j.)

8. As will be presented below, many crucial election records for the 3,937 electronically cast ballots in the Runoff² are missing or corrupted³ on the Travis County’s Hart Voting System: Ballot

²Exhibit A, Runoff Recount Results showing Ballot by Mail ballots of 480, and Cast Vote Records (electronically cast

images, vote tabulation Tally Audit logs⁴, Zero Tapes⁵, Tally/Results tapes^{6,7}, Mobile Ballot Box corruption^{8,9}, improperly sealed security seals for voting equipment¹⁰, etc.

9. The only legal ballots that have been retained, produced and recounted by Travis County, are the 480 votes cast on paper, Mail in Ballots (Exhibit 1). These ballots show an exact tie at 240 ballots cast as votes for Pressley and 240 ballots cast as votes for Casar (Exhibit 1). Therefore, the outcome of the election is a tie and neither Pressley nor Casar may be declared the victor.

10. Given the only retained ballots show an exact tie, along with the numerous mathematical anomalies observed with the Runoff election results, the statutory and mandated retention of important election records is needed to determine the true outcome of the election. In the absence of these crucial election records, the outcome cannot be known and this Honorable Court cannot ascertain the true outcome of the Runoff election between Pressley and Casar, and thus declare the Runoff election void and order a new election.

III. PARTIES

11. Contestant Laura Pressley is a resident of Austin City Council District 4, Travis County, Texas. She was a candidate in the Austin City Council District 4 Runoff Election on December 16, 2014.

12. Contestee Gregorio “Greg” Casar is a resident of Austin City Council District 4, Travis County, Texas. He was a candidate in the Austin City Council District 4 Runoff Election on

ballots) of 3,937.

³Exhibit B, Tally Audit logs showing missing entries and multiple “Invalid/Corrupt MBB[Mobile Ballot Box]” errors.

⁴ Exhibit B, Tally Audit logs,

⁵ Exhibit C, Judges’ Booth Controller (JBC) Judge’s Envelope, p. xxx, Zero Tapes missing

⁶ Exhibit C, Judges’ Booth Controller (JBC), Judge’s Envelope cover states, “DO NOT PRINT THE TALLY”

⁷ Exhibit D, Travis County Clerk, Dana DeBeauvoir’s Deposition regarding no Results tapes, p. 128, line 15.

⁸ Exhibit B, Tally Audit Logs, Mobile Ballot Box corruption on pgs. 5, 22, 23, 26, 27, 29 and 42.

⁹ Exhibit D, DeBeauvoir’s deposition regarding MBB corruption errors, p. 98, lines 18-20, and p. 99, lines 4-9

¹⁰ Exhibit E, Hart Voting System election equipment with improperly sealed security seals, election official signed affidavits.

December 16, 2014. The election results were canvassed on December 30, 2014 and Mr. Casar was declared the victor by 1,291 votes.¹¹ A “manual recount” of all early voting, election day, provisional, and mailed-in ballots was attempted on January 6, 2015.

13. The mail-in ballots were exactly tied between the candidates, at 240 each, for a total of 480 votes (Exhibit A). The attempted recount was a nullity and a full recount was made impossible in that the attempted recount violated state law and the manual recount of the 3,937 electronically cast ballots (Exhibit A) was incorrectly performed¹² using of the “cast vote records” in lieu of “images of ballots cast.” Based on the counting of “cast vote records” and mail in ballots, as could be predicted, the invalid recount did not change the reported results of the election and the original declaration of Mr. Casar as the victor for the runoff election did not change.

14. Casar was sworn into office on January 6, 2014. He has been notified of the filing of this action by a delivery of a copy of this Petition in accordance with TEX. ELEC. CODE § 21.003(b).

IV. JURISDICTION AND VENUE

15. Jurisdiction and venue in this case are proper and mandatory in Travis County because the office being sought is for a district entirely within the boundaries of Travis County under the Texas Elections Code, Section 232.006.

V. FACTS

Numerous Irregularities in Counting of Votes

16. Many election irregularities, errors, mistakes occurred with regard to the counting, tabulation, and reporting of votes for the District 4 Austin City Council Runoff Election and the

¹¹ Exhibit F, Official December 16, 2014 Runoff Cumulative Election Results.

¹²Though the County Clerk termed the action a “manual recount,” because the event as it occurred did not satisfy statutory criteria, Pressley does not concede that what occurred was actually a statutory manual recount as defined by the Texas Election Code 128.001(a)2, 213.016, 214.049(e), 213.016.

Official Recount. Many of these unexplained gaps in security and defect vote counts at a very minimum made fraud possible and make ruling out fraud an impossibility.

Unnatural Mathematical Patterns Raises an Inference That the Reported Runoff Results are Erroneous—November General Election and December Runoff Results Are the Same

17. The November 4, 2014 General Election for the District 4 Austin City Council City of Austin Election was comprised of 8 candidates and the December 2014 Runoff was comprised of 2 candidates (Pressley vs Casar). A statistical analysis of the results of the election showed mathematical anomalies with the General Election and the Runoff. See table below.

Top 9 Precincts with > 200 Votes, 80% of Voters								
November 4th					Dec 16th			
Pct	LP	Casar	LP + GC	LP%	LP	Casar	Total	LP%
156	188	517	705	27%	197	449	646	30%
222	275	354	629	44%	233	312	545	43%
135	128	498	626	20%	106	416	522	20%
139--HH	251	259	510	49%	198	229	427	46%
217	176	259	435	40%	151	219	370	41%
149--Ave G	80	306	386	21%	76	279	355	21%
140	240	181	421	57%	187	169	356	53%
164	82	157	239	34%	62	122	184	34%
133	69	223	292	24%	65	173	238	27%
Election Overall Results	1489	2754	4243	35.1%	1275	2368	3643	35.0%
Average of Top 9 Pcts (unweighted)				35.1%				35.1%

18. Voters in the top nine (9) precincts in the City of Austin District 4 election comprise roughly 80% of the total voters in the Runoff (as documented by Exhibit G).¹³ The ratio of precinct level votes that the Contestant received compared to Contestee is the same ratio in the November General Election (8 candidates) as it was in the December Runoff Election (2 candidates), 35% vs 35% respectively.¹⁴

¹³ Exhibit G, Comparison Results, p. 1.

¹⁴ Exhibit G, Comparison Results, p. 1.

19. In addition, the average of the percentages the Contestant received in the unweighted precincts compared to Contestee, in the November General Election and the December Runoff, are also equal at 35% and 35%, respectively. The fact that so many precincts showed exactly the same and unchanged results for the General Election and the Runoff is sufficient to raise an inference that the reported results are erroneous.

20. The summary analysis (Exhibit G, p. 1) of the precinct level voting results for the General Election¹⁵ and the precinct level results for the Runoff Election,¹⁶ show very unusual and unique mathematical patterns and anomalies. This analysis reveals the Runoff results are erroneous and are a result of counting and tabulation errors committed by Travis County and thus the outcome of the election cannot be determined.

21. Reviewing Travis County Voter election results for the General and Runoff Elections, there was an overall attrition of over 4,000 voters from the General and Runoff elections. The occurrence of duplicated relative results for Pressley and Casar for the General and Runoff Election shows the results are strictly isolated to the District 4 Pressley vs Casar race, are erroneous, and are indicative of errors committed by Travis County in the vote collection and/or tabulation and clearly raises an inference that the reported results are not accurate.

22. For voters in just the top 9 precincts, there was an attrition of at least 600 voters (who voted for either Pressley or Casar) between the General and the Runoff Elections²⁴. The unique occurrence that the results remain unchanged between Pressley's City Council General and Runoff is not correct.

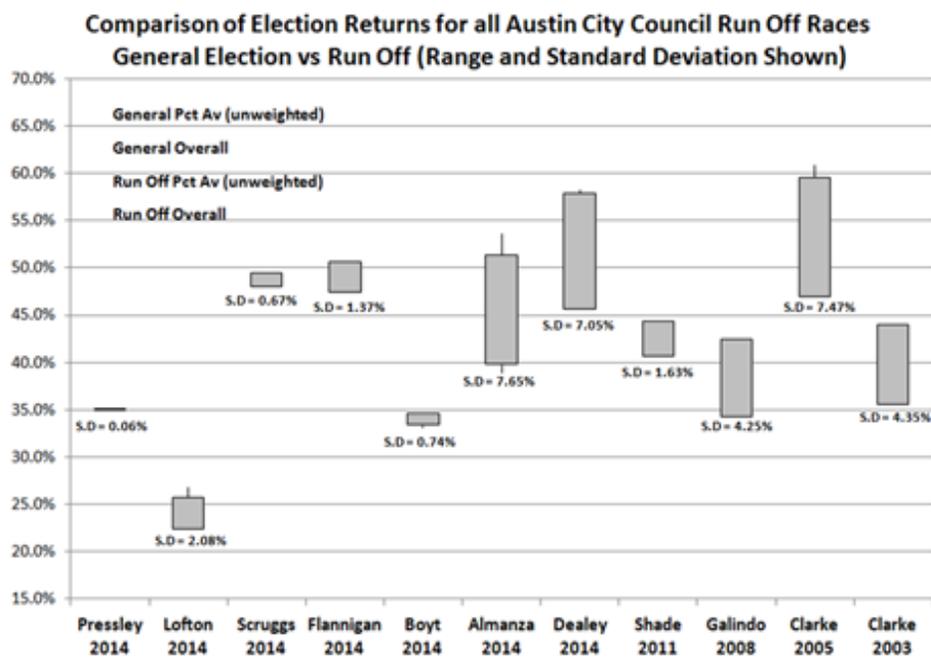
23. From 2003 – 2014, a total of eleven races have resulted in a City of Austin City Council

¹⁵Exhibit H, Official 2014 General Election Results by precinct, self-authenticating public record, website for the Travis County Clerks' Election Results: <http://www.traviscountyclerk.org/eclerk/Content.do?code=E.1>

¹⁶ Exhibit I, Official Runoff Election Results cumulative, and by precinct, self-authenticating public record, website for the Travis County Clerks' Election Results: <http://www.traviscountyclerk.org/eclerk/Content.do?code=E.1>

Runoff.¹⁷ The graph below shows the ranges and standard deviations of the four, weighted and unweighted precinct results, values for those 11 races (similarly calculated as the Pressley race).

24. Furthermore, compared to the Pressley vs Casar race, no race in 11 years shows such a tight distribution with a standard deviation of 0.06%. Ten races have greater than 10x the standard deviation (0.67% or higher) and three races show greater than 100x the standard deviation (7.05% or higher).



No other Council race in the history of electronic voting in the City of Austin for Council races from 2003 – 2014 has shown such a tight distribution between a General and a Runoff Elections and this fact strengthens the inference that the results are erroneous. These vote tabulation mistakes by Travis County are likely related to violations of, but not limited to

- a. mishandling and tabulation of the electronic ballots cast on the Hart InterCivic hardware and software,

¹⁷ Self-authenticating Travis County Website of precinct level results for Austin City Council races for the General and the Runoff elections for 2003, 2005, 2008, and 2011 <http://www.traviscountyclerk.org/eclerk/Content.do?code=E.1>.

b. not adhering to the specific laws and procedures as defined by the Texas Constitution¹⁸, Texas Election Code¹⁹, Texas Secretary of State²⁰, US Federal Elections Commission^{21,22}, and

25. Hart InterCivic operation and training manuals.²³ Errors committed by Travis County caused these 3,937 electronically cast votes²⁴ to be counted and tabulated incorrectly. Thus, election officers failed to count legal votes correctly.

26. Because so many high volume District 4 precincts showed exactly the same percentage results for Pressley and Casar, it is possible mistakes were made with the saving, loading and/or counting the votes on the memory cards (Mobile Ballot Boxes). In addition, errors, mistakes, or possible fraudulent activity may have occurred with the hardware or software used for counting and tabulating voting results (Mobile Ballot Boxes, Tally, Rally, BOSS, JBC, eSlates, etc.) used for the Runoff.

A. Early Voting—More Ballots than Voters

27. Anomalies occurred with counting and reporting of the Early Voting results. The December 30, 2014 canvassed results for Early Voting were inconsistent with the December 1-10, 2014 Travis County Early Voting voter reports received from Travis County.

28. During Early Voting from December 1 – December 10, Travis County published 24 hour reports that reported 2,651 total voters voted in Early Voting in District 4. Reviewing the voter

¹⁸ Texas Constitution, Article 6, Section 4

¹⁹ Texas Election Codes 52.062, 52.063, 52.064, 52.070, 124.063

²⁰ Exhibit J, Texas Secretary of State 2014 Electronic Voting Procedures: (<http://www.sos.state.tx.us/elections/laws/electronic-voting-system-procedures.shtml>), and the 2012-03 Advisory (<http://www.sos.state.tx.us/elections/laws/advisory2012-03.shtml>)

²¹ Exhibit K, 1990 Federal Election Commission Performance and Testing Standard for Punchcard, Marksense, and Direct Recording Electronic Voting Systems.

²² Exhibit L, 2002 Federal Election Commission Voting System's Standards, Volume 1, Performance Standards.

²³ Exhibit M, Hart Voting System Support Procedures Training Manual, self-authenticating Idaho Secretary of State Website: http://www.sos.idaho.gov/elect/clerk/Hart/ac6300-006_62D_SupportProcedures_%23390-cp.pdf

²⁴ Exhibit A

ID's, 437 entries existed for those submitting Ballot by Mail (BBM).

29. There were at least 28 duplicate entries for BBM.²⁵ At least 28 Ballot by Mail, mail-in ballots, appear to have been counted and/or referenced twice or three times. See Exhibit N for duplicate Ballot by Mail Entries.

30. Once duplicate BBM's were removed from the voter rolls, 2,622 unique voter names remained that voted in Early Voting according to the Early Voting lists from Travis County that were distributed prior to Election Day, December 16, 2014.

31. Based on Travis County's Canvassed and Recount results for those that voted for Greg Casar, or Laura Pressley or Under Voted, the total number of ballots cast for Early Voting is 2,701. The unknown extra 80 ballots are distributed among 15 of the 18 precincts of the District 4 Race (One precinct, with one eligible voter, showed no votes.).²⁶ See table below.

32. The pervasiveness of the Early Voting discrepancies in 15 precincts are evidence of systemic errors occurring in the counting. Thus the Early Voting tabulation accuracy cannot be relied on to determine the outcome of the election.

33. The issue of the mismatch between the number of individuals who voted and the number of ballots cast, is indicative of several known and documented scenarios of errors and security breaches that can occur with the Hart Electronic Voting Systems²⁷.

²⁵Exhibit N, Duplicate Ballot by Mail entries reported in Travis County's 24hr Early Voting Rolls

²⁶ Exhibit O, Early Voting Discrepancies, more ballots than voters.

²⁷ Exhibit P, California Secretary of State Source Code Review of the Hart Expert and Exhibit S, affidavit declaration by Dr. Jefferey Jacobson, Ph.D. regarding the InterCivic Voting System:
<http://pubs.cs.rice.edu/sites/pubs.cs.rice.edu/files/Source%20Code%20Review%20of%20the%20Hart%20InterCivic%20Voting%20System.pdf>

Early Voting Discrepancies			
Pct	Total Ballots Cast per Canvass and Recount	Voters Names per Early Voting Rolls from County	Ballot Discrepancy (Over votes)
156	431	422	9
222	319	307	12
135	271	264	7
139--	270	265	5
140	233	228	5
217	216	205	11
149--	195	191	4
133--	149	145	4
164--	116	113	3
260--	108	103	5
142--	86	83	3
209--	81	77	4
223--	68	66	2
258--	59	55	4
268--	59	57	2
211--	24	25	-1
224--	16	16	0

34. These tabulation irregularities also show the reported Runoff results for the Pressley/Casar race are in question and are erroneous.

35. According to expert, Dr. Jefferey Jacobson, Ph.D.²⁸,

The patterns Dr. Pressley found in the vote data are suspicious enough to warrant further analysis and testing, especially in light of the numerous election irregularities and given the security weaknesses in the Hart InterCivic voting system.

36. The previously noted, highly unlikely mathematical patterns associated with the 3,643 votes cast in the top 9 precincts, along with the Early Voting discrepancies, strongly suggests that the electronically cast and counted votes in the Runoff cannot be relied in determining the true outcome of the election because there are no true ballot images to verify the voters' intent. Contestant alleges the counting errors—in tabulating the top 9 precincts (3,643 votes) and the counting errors in tabulating the Early Votes (2,701 votes)—committed by Travis County caused

²⁸ Exhibit S, Expert affidavit and declaration by Dr. Jeffrey Jacobson, Ph.D.

these votes to be counted incorrectly and prevents knowing or ascertaining the true outcome of the election.

B. Election Irregularities, Mistakes and Possibility of Fraud Makes Results Invalid

37. Travis County election officers committed numerous mistakes and election law violations related to all of the 3,937 electronically cast votes in the District 4 Runoff that materially affected the outcome of the election. For these specific electronically cast votes, Travis County failed to adhere to critical election rules, counting procedures, and security protocols as outlined in the Texas Constitution, the Texas Election Code, the Texas Secretary of States Procedure/Advisories, and the Federal Election Commission’s Voting System’s Standards, and the Hart Voting System requirements. Violations that materially affected the outcome of the election are outlined in chronological order as they occurred on Election Day and during the Recount in the following respects:

1. Not printing Zero Tape Reports

38. The Texas Secretary of State²⁹ and Hart InterCivic Manuals³⁰ require the printing of Zero Tape Reports during Early Voting and on Election Day at each precinct/polling location. Zero Tape Reports are defined by the Texas Secretary of State as “A Zero Tape is the tape that is printed when the voting machine is first set up at the polls. It is called a Zero Tape since all contests or propositions should have zero votes next to each name or question.” Exhibit J, p. 13 and 35.

39. According to the Texas Secretary of State’s Election Advisory No. 2012-03(6)(g)(vi), for

“Opening the Polls:

vi. 1. At a minimum print one zero tape from each applicable device, as follows: The

²⁹ Exhibit J, Texas Secretary of State 2012-03 and June 2014 Electronic Voting Procedures Advisories.

³⁰ Exhibit M, Hart Training Manual

presiding judge, an election clerk, and not more than two watchers, if one or more watchers are present, *shall* sign the zero tape. 2. Maintain zero tapes in a secure location to be returned with election materials (i.e. Ballot Box #4 or other secure means designated by the general custodian of election records).” (*emphasis added*)

40. According to Hart’s Voting System Support Procedures Training Manual Exhibit J, p. 108, “The “Zero Tape” report displays the contests and options [candidates] available on the ballot(s) for this polling place. It is *proof* that the JBC has no votes cast on it the first day of Early Voting and/or the start of Election Day.” *emphasis added*.

41. Travis County received a waiver from the Secretary of State granting permission to not print Zero Tapes for the November 4th General Election because of the extensive number of races and candidates for the General Election. The Secretary of State did not provide a waiver granting permission to not print Zero Tapes for the December 16, 2014 Runoff and Special Election which had a very small number of races and candidates (Austin Mayor, Council Members, AISD and ACC Trustees).

42. Michael Winn, Travis County Elections Division Director, in a phone call, relayed to Contestant on December 15, 2014, they were instructing election judges to not print Zero Tapes at the beginning of Early Voting and to not print Zero Tapes on Election Day for the Runoff. Review of Discovery documents provided by Travis County, no Zero Tapes (showing the number of votes present on the Hart Voting equipment for each candidate when the polls open) were printed during Early Voting and no Zero Tapes were printed on Election Day of the Runoff. This is evidenced by the JBC Report Envelope produced by Travis County, Exhibit C.³¹

43. Travis County disregarded the printing Zero Tape Reports and the Hart InterCivic operational procedures and the retention of crucial election records mandated by the Texas

³¹ Exhibit C, JBC Envelope contents produced by Travis County showing the District 4 polling locations election materials— no Zero Tapes were printed or signed by election judges at those locations.

Secretary of State. As a result, as the Hart Training Manual (Exhibit M) states, there is no “*proof* that the JBC has no votes cast on it the first day of Early Voting and/or the start of Election Day” (*emphasis added*) at the Countywide Polling locations the Runoff.

44. A critical election security protocol for retaining key election records was ignored. This undermines the claimed DRE results, (3,937) electronically cast ballots, for the District 4 race because there is no “*proof* that the JBC has no votes cast on it the first day of Early Voting and/or the start of Election Day.” The Travis County officers violations affected the outcome of the election because votes may have remained on the voting equipment (Mobile Ballot Boxes (MBB’s), eSlates and JBC) and as a result the court cannot ascertain the true outcome of the election.

2. Not printing Results/Tally Tape Reports

45. The Texas Secretary of State also mandates the printing of Results/Tally Tape Reports on Election Day at each precinct/polling location.³² Tally/Results Tape Reports are defined by the Texas Secretary of State as “A Results Tape is the tape that is printed when the polls close. It is called a Results tape since all contests and propositions are listed and have the resulting votes next to each name or question.” Exhibit J, p. 12 and 35.

46. According to the Texas Secretary of State’s Election Advisory No. 2012-03(6)(k)(iii) Exhibit J, for

“Closing the Polls:”

iii. After the polls have been closed on Election Day, the precinct election officials *shall* print out, at a minimum, two copies of the results tape from each applicable device and secure the voting device against further use. (Warning do not print the results tape during Early Voting; this includes the last day of Early Voting). 1. The presiding election judge, an election clerk, and not more than two watchers, if one or more watchers are present, *shall* sign the results tape(s). 2. The copies of the results tape(s) shall be distributed as

³²Exhibit J, Texas Secretary of State 2012-03 and June 2014 Electronic Voting Procedures Advisories.

follows: a. Envelope #3 this is delivered to the presiding election judge; and b. Ballot Box #4 (or other secure means designated) that is delivered to the general custodian of election records, along with other election media and materials.” *Emphasis added.*

47. Similarly as noted above, Travis County received a waiver from the Secretary of State granting permission to not print Results/Tally Tape Reports for the November 4th General Election because of the extensive number of races and candidates for the General Election.³³ The Secretary of State did not provide a waiver granting permission to not print Results Tapes for the December 16, 2014 Runoff and Special Election which had a very small number of races and candidates (Austin Mayor, Council Members, AISD and ACC Trustees).

48. Michael Winn, Travis County Director of Elections also relayed to Contestant on December 15, 2014, that election officers were instructed to not print Tally/Results Tapes at the close of the polls on Election Day. A review of Discovery documents provided by Travis County, shows no Results Tapes were printed or signed by election officers on Election Day of the Runoff.

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49. Travis County produced actual envelopes the election officers used to store official election records.³⁵ On the front of each of the election judges’ JBC Report Envelopes (where polling location election records are stored and returned), were the instructions, “DO NOT PRINT THE TALLY.”³⁶

50. In addition, in Travis County Clerk, Dana DeBeauvoir’s deposition (Exhibit D, p. 128, 13-15), she confirms election judges were instructed to not print the Tally/Results tapes that the Texas

³³ Exhibit T, Texas Secretary of State Waiver for General Election, Nov. 4th 2015.

³⁴ Exhibit C, JBC Envelope contents produced by Travis County showing the District 4 polling locations election materials— no Results/Tally Tapes were printed or signed by election judges at those locations.

³⁵ Exhibit C, JBC Envelope contents produced by Travis County showing the District 4 polling locations election materials— no Results/Tally Tapes were printed or signed by election judges at those locations.

³⁶ Exhibit C, JBC Report Envelope contents produced by Travis County showing the District 4 polling locations election materials— no Results/Tally Tapes were printed or signed by election judges at those locations. On the cover of the JBC Report Envelope, instructions to election officers clearly state, “DO NOT PRINT THE TALLY.”

Secretary of State requires.

51. Without Results/Tally Tape Reports, there is no proof of the vote totals each candidate received during the election, prior to the election materials (eSlates, JBC's and MBB's) being transferred to Central Counting for electronic tabulation.

52. The Results/Tally Tapes are an essential backup election record of the vote and they help ensure the electronically cast 3,937 votes results are consistent with subsequent Central Counting computer tabulation results. A critical election security protocol for retaining key election records was ignored by Travis County and thus invalidates the results for the (3,937) electronically cast ballots for the District 4 race because there is no *proof* that the JBC had no votes cast on it erroneously for the Runoff or that there were computer corruption issues at Central Counting that skewed the true will of the voters in the Runoff.

53. The lack of retention of the Results/Tally tape further highlight the fact the Runoff results are erroneous, cannot be trusted due to corruption errors, and cannot be validated with retained election records, and so many security protocols were violated. These irregularities have caused the true outcome, of the 3,937 electronically cast votes in the Runoff, to not be known.

4. Contestant's Official Poll Watchers Were Denied Access on Election Night— Four Counts of Criminal Violations Committed by Travis County Election Officer

54. Two of Contestant's Official Poll Watchers were denied access to and were prevented from signing Results/Tally Tapes. Rae Nadler-Olenick and Paul Williams were official poll watchers for the Pressley Campaign and they were denied access to Results/Tally Tapes on December 16, 2014 at polling location Randalls at Braker/Research Hwy 183 and Gus Garcia Recreation Center, respectively.

55. Both Mrs. Nadler-Olenick and Mr. Williams were present and observed that official Poll/Tally tapes were not printed when the polls were closed at their respective polling locations. They were both present and observed that Results/Tally tapes were not printed before the election materials and equipment was removed from their respective polling locations. They were both prevented from signing the official Results/Tally tapes because the election officials at Randalls were instructed to not print the Results/Tally tapes³⁷ and they, in turn, did not print them.³⁸ See affidavit of official poll watcher, Paul Williams, Exhibit U.³⁹

56. The Travis County officers violations materially affected the outcome of the election because there is no way to verify the voting equipment and vote results (MBB, eSlate, and JBC) were not corrupted or modified after leaving the polling location. We know for a fact from multiple Travis County election officer affidavits that many security seals on the election equipment were improperly sealed, seals were removed, and resealed because of security issues.⁴⁰ Two additional Pressley Official Poll Watchers were denied access to view election activities at the Dobie Middle School election substation and the Travis County Central Counting facility on Election Day after the polls closed.

57. Sergio Martinez and Claire Martinez were also Official Campaign Poll Watchers for Contestant. Sergio and Claire Martinez were initially denied access to Dobie Middle School, Substation on December 16, 2014 and were not able to monitor and track the first set of election materials being transferred from the countywide polling location at Gus Garcia Recreation Center

³⁷ Exhibit C, JBC Report Envelope contents produced by Travis County showing the District 4 polling locations election materials— no Results/Tally Tapes were printed or signed by election judges at those locations. On the cover of the JBC Report Envelope, instructions to election officers clearly state, “DO NOT PRINT THE TALLY.”

³⁸ Exhibit C, JBC Envelope contents produced by Travis County showing the District 4 polling locations election materials— no Results/Tally Tapes were printed or signed by election judges at those locations.

³⁹ Exhibit U, Affidavit of Official Poll Watcher, Paul Williams.

⁴⁰ Exhibit E, Affidavits from Runoff election officers documenting security seals are improperly sealed, removed and resealed.

to the Dobie Substation. This was one of the strongest Pressley precincts and voting locations in District 4 and they intended to track the MBB chain of custody and transfer procedures.

58. Election materials entered and left the Dobie Substation and Mr. and Mrs. Martinez were not able to monitor the chain of custody and transfer status of election materials (MBB's, etc.) from the various polling locations. This affected the outcome of the Runoff election in that errors in tabulating votes and maintaining security protocols occurred at Central Counting.

59. Also, Sergio and Claire Martinez were subsequently denied access in monitoring the transfer of election materials (including but not limited to Mobile Ballot Boxes, sealed JBC and eSlate computers, official envelopes with materials, and the like) and were prevented from monitoring the tabulation activities occurring at Central Counting on Election night on December 16, 2014.

60. On Election night, Contestant made numerous personal phone calls to the Travis County Director of Elections, Michael Winn, informing him of that Mr. and Mrs. Martinez were repeatedly being denied direct access to election and tabulation activities at Central Counting and Mr. Winn did not correct the situation after multiple conversations.

61. Obstructing an official poll watcher is a Class A misdemeanor in the Texas Election Code 33.061:

Sec. 33.061. UNLAWFULLY OBSTRUCTING WATCHER. (a) A person commits an offense if the person serves in an official capacity at a location at which the presence of watchers is authorized and knowingly prevents a watcher from observing an activity the watcher is entitled to observe. (b) An offense under this section is a Class A misdemeanor. Acts 1985, 69th Leg., ch. 211, Sec. 1, eff. Jan. 1, 1986.

62. Multiple "activities the watcher is entitled to observe" were violated by Travis County election officers as it relates to Pressley's official watchers:

a. Pressley poll watchers Paul Williams and Rae Nadler-Olenick were prevented from

observing the printing and signing of Result tapes at the respective polling locations they were serving on Election Day, and

- b. Pressley poll watchers Sergio and Claire Martinez were prevented from accessing and observing election materials transfer at Dobie Middle School and election material transfer/election tabulation activities at Central Counting, respectively, on Election Day.

63. Multiple election irregularities occurred at Central Counting on Election Day and Pressley's poll watchers were denied access to monitor and report the issues. These election irregularities are the most concerning and egregious out of all the irregularities which occurred during the Runoff election. These are very serious Class A misdemeanors, criminal violations, of the Texas Election Code 33.061 and Contestant has documented violations of four separate counts.

64. These violations materially affected the outcome of the election in that an inordinate number of election irregularities occurred and there was a lack of accountability of election officers with regard to no printing of Zero Tapes, no printing of Results Tapes, denying office poll watchers access to election activities, improperly sealed electronic devices, security breaches of the Tally vote tabulation system, corrupt Mobile Ballot Box entries, and Tally Audit log deletions. The intent of the poll watchers is to ensure accountability, transparency, and secure practices are adhered to. Because of the erroneous reported election results, the egregious election irregularities, and the missing election records, the outcome of the Runoff cannot be known.

5.Audit Logs at Central Counting Show Missing Logs, Security Issues and Corrupt Files Loaded

65. Hart Voting System Audit Logs show multiple problems

- a. Tally Audit log and Ballot Now entries missing (Exhibit B, V,⁴¹ W⁴²)
- b. Security issues (Exhibit B, E)
- c. MBB processing errors during vote tabulations at Central Counting on Election Day, December 16,2014, and (Exhibit B)
- d. questionable entries into the Tally and security systems after Contestant filed her Election Contest, etc. (Exhibit B).

66. Numerous software/hardware errors occurred when Travis County electronically transferred and tabulated the electronic Cast Vote Records. There are nine “Invalid/Corrupt MBB” errors recorded in the Tally Audit logs during Election Day tabulations of votes. These are errors associated with tabulating the electronic votes from the Mobile Ballot Boxes (Exhibit B pages 5, 22, 23, 26, 27, 29 and 42). According to the Travis County Clerk, Dana DeBeauvoir, the Tally Audit logs are legally required and she describes the information the logs contain:

“In general, they're going to track every single step, everything that's happening at the counting station on election night..So every time something's turned on, every time something's turned off, every time an entry happens.” (Exhibit D, DeBeauvoir’s Deposition, p. 72 ,19-23)

67. The audit logs in the Tally (Exhibit B) and Ballot Now subsystems (Exhibit V and W) show long periods of apparent inactivity between an administrator's last recorded action and a session logout. They range from two hours to days long (see summary table, below).

⁴¹ Exhibit V, Security audit logs for BN PC5system

⁴² Exhibit V, Security audit logs for BN PC3 system

Date of LogOut	Travis County audit logs	Time System Was Open	Time Frame System Was Open and Vulnerable
12/1/2014	Ballot Now (BNPC3)	10 days	Early Voting
12/2/2014	Ballot Now (BNPC5)	7 days	Early Voting
12/10/2014	Ballot Now (BNPC3)	9 days	Early Voting
12/11/2014	Ballot Now (BNPC3)	1 day	Early Voting
12/12/2014	Ballot Now (BNPC3)	1day	Early Voting
12/15/2014	Ballot Now (BNPC3)	3 days	Early Voting
12/16/2014	Tally	2 hrs, 44 min	Election Day Tabulations
12/16/2014	Ballot Now (BNPC3)	1 day	Election Day Tabulations
12/18/2014	Ballot Now (BNPC5)	8 days	Election Day Tabulations
1/6/2015	Tally	4 hours	Recount

68. During these extended logon times, anyone with physical access to the computer could use the administrator account to arbitrarily change vote information in the database then directly edit the log files to hide the fact (Exhibit S, Dr. Jacobson’s affidavit). This would require no more skill than reading the Tally manual and using legal administrator commands. There are unusually long periods of apparent inactivity during a crucially important logged-in Tally administration session during Election Day when vote tabulations were underway from 12:30pm thru 3:24pm (Exhibit B).

69. When not in use, the Tally system should be logged off to protect the security of the vote tabulation database. Having the system open is a critical security breach. The Tally system vote tabulation database was left open and security was compromised or there are activity files missing. Either way, the integrity of the electronic vote tabulation cannot be trusted. Thus, the outcome cannot be known to be true. Every vote counted electronically cast and counted (3,937) cannot be known and exceed the margin of victory. The Court cannot determine the will of the votes and a new election is required.

70. When asked about other extended time periods where the Tally administrator was logged on and no activity was documented for roughly 7 days (Exhibit B) DeBeauvoir (Exhibit D,

deposition) stated, “I don’t know what this means...I don’t believe that’s true...I doubt it’s true...I doubt it’s true...[the log is wrong?] yeah...I don’t think that’s true...I don’t know...” (Exhibit M, Dana’s Deposition p. 114, line 16 thru p. 117, p. 3).

71. In effect, the Travis County Clerk under oath when asked about the Tally Audit logs and the issues, she stated, “I don’t think that’s [Audit logs] true.” Because the voting tabulation system was left open and security was compromised or there are log files missing, the integrity of the vote tabulation cannot be trusted. Thus, the outcome of the electronically tabulated votes cannot be known to be true.

72. Tally Audit Logs show multiple error codes being registered during the loading of MBB’s during vote tabulations at Central Counting⁴³. With no Results/Tally Tape Reports from the polling locations (Exhibit C), there is no data to validate the results of the tabulation of the electronically cast ballots and, thus, the results for the (3,937) electronically cast ballots for the District 4 race and the outcome cannot be known.

73. In this election, the Tally Audit log produced by Travis County shows no less than nine (9) instances of a corrupted Mobile Ballot Box being introduced into the Travis County election Tally system (Exhibit B). These documented, admitted nine (9) separate instances of corrupted data being introduced into the election count system make it impossible to determine the true outcome of the election.⁴⁴

74. This is an extraordinary level of corrupt mobile ballot boxes (MBBs), showing something was wrong with the system that tallied the votes, according to the Travis County Clerk. From her deposition (Exhibit D, page 98, lines 18-20; page 99 lines 4 -9):

⁴³ Exhibit B, Tally Audit Logs

⁴⁴ See Exhibit S, Declaration of expert witness Jeffrey Jacobson, Ph.D; See also Attachment B thereto, Audit Log produced by Travis County; See also Exhibit D, Deposition of Dana DeBeauvoir, p. 87, 94, 96, 97, and 98, and Tally Audit Log, Exhibit 12 to Exhibit M (authenticated at page 55-56.)

Q. [I]t's a little unusual to have so many invalid MBBs in an election tally, isn't it?

A. ·I've never heard of so many –

A. I suspect there's something wrong with the reader, not the MBBs.

Q. (BY MR. COHEN) Okay. So you think -- your suspicion is that there was something wrong with the reader that night?

A. Correct.

75. There were more invalid/corrupt ballot boxes in a single election than Dana DeBeauvoir had ever heard of. DeBeauvoir is a person of extraordinary experience and knowledge in elections. She has been Travis County Clerk for 28 years, overseeing elections in all that time, including every election since 2002 using the Hart eSlate system. And she has NEVER HEARD OF as many invalid MBBs in an election tally as there were in this election. The Travis County Clerk herself conceded that something was very wrong with the system tallying the votes -- that there was a degree of error in that election beyond anything she had ever heard of happening before.

76. And, according to her deposition testimony (Exhibit D), she has no idea why. From her deposition, page 95, lines 6-10:

Q. ·I haven't seen anywhere in this audit log what -- where it tells you what it did when it found a corrupt MBB.·Do you -- is that...

A. ·Yeah.·There would be other documentation that will tell you what happened.·I can't tell you.

77. From her deposition, page 96, lines 22-25:

·Q.· (BY MR. COHEN)·Again, on page 23, if you go down by 8:42, there's another "Invalid/Corrupt MBB," and we still don't know what happened to that MBB.

A. ·Same thing.

78. From her deposition, page 97, lines 1-8:

Q. ·Okay.·And then there's another one a little further down, again.·And then there -- it says "MBB already read by Tally."·Do you see that?·There's three of those in a row.

A. ·Uh-huh.·Uh-huh.

Q. ·Do you have any idea what that -- what happened as a result of that?

A. · I'm sorry...I don't.

According to expert, Dr. Jefferey Jacobson, Ph.D.(Exhibit S p. 1-2), “Properly created MBB(s) may have contained legitimate votes, but some event made it/them unreadable or corrupted...

Alternatively, a third party may ‘Introduce corrupt MBBs into the legitimate flow of MBBs from the precincts back to Election Central’ (California report, page 48, paragraph 1).⁴⁵ This could damage the credibility of the vote counting process.”

79. Corrupt MBBs, whether deliberately tampered with or accidentally introduced into the system, will either result in a failure to count actual votes, or in the counting of invalid votes, or in other corruption of the system.

80. In any event, nine (9) separate introductions of corrupted mobile ballot boxes into a system designed to tally votes is sufficient to undermine the reliability of the purported outcome.

81. The numerous irregularities (mathematical anomalies, failure to keep ballot images, failure to print and keep Tally/Results tapes, numerous Invalid/Corrupt Mobile Ballot Box errors, Mobile Ballot Box reader malfunction, deleted Tally Audit log data, and security breaches of the Tally system, shutting down polling locations) all render impossible a determination of the true outcome of the 3,937 electronically cast votes in the Runoff election.

6.Travis County Conducted Critical Recount Activities from January 4, 2015 through January 6, 2015 at 10:59am, before the Official Recount on January 6, 2015 at 11:00am.

82. The discussion of the problems and illegalities arising in the “recount” are relevant to the

⁴⁵ Exhibit A, Attachment 5, **California Report:** Inguva, S., Rescorla, E., Shacham, H., & Wallach, D. S. (2007). Source code review of the Hart InterCivic voting system. *University of California, Berkeley under contract to the California Secretary of State.* <https://www.sos.ca.gov/voting-systems/oversight/ttbr/Hart-source-public.pdf> **California2007.pdf, Attachment 5 to Jacobson Declaration.** This report is an official California government record, obtained through an official California government website, and is admissible as an exception to the hearsay rule under Texas Rule of Evidence 803(8) (c) (new number 803 (8)(A)(iii), effective April 1, 2015.), and TRE 902 (5).

election contest because the issues that appeared for the first time in the recount pointed to errors in the conduct of the election. Specifically, the inability of Travis County to produce “images of ballots cast” at the recount, in violation Texas Election Code § 213.016 led to the discovery that the machines, as configured by Travis County for the December run-off election, violated Texas Election Code § 128.001(a)(2). The discovery that Travis County, in operating the December run-off election, did not “provide for the **use** of a computerized voting system with . . . (2) a main computer to coordinate ballot presentation, vote selection, **ballot image storage**, and result tabulation” is conclusive evidence of illegality in the election.

83. One of the items the tribunal in an election contest is charges with determining is if “the outcome of the contested election, as shown by the final canvass, is not the true outcome because: . . . an election officer or other person officially involved in the administration of the election: . . . engaged in other fraud or illegal conduct or made a mistake.” TEX. ELEC. CODE § 221.003.

84. Failing to print the legally required “images of ballots cast” for the election recount is a violation of Texas Election Code § 213.016 by itself. But it also led proximately to the discovery of additional illegality.

85. Moreover, the discovery of those two illegalities undermine both the possibility of an accurate count or an accurate recount, as “images of ballots cast” are a prerequisite to a recount, and the counting of actual ballots is the nature of a count.

86. The errors and illegalities at the “recount” also led to the discovery in the audit logs of multiple corrupt mobile ballot boxes and other errors in the conduct of the election, some of which were testified to by the County Clerk.

87. Unofficial recount activities were completed on January 4 – 6. This was prior to the official Recount Start Notice (January 6, 2015 at 11:0am) and as a result, Pressley and her official

watchers were not aware of and not allowed to monitor the unofficial recount activities that occurred prior.

88. On January 4 – January 5, 2015, prior to the start of the Official Recount on January 6, 2015, Travis County Clerk and the Election Division officers conducted unofficial recount activities in which they:

- a. gained access to the sealed and archived voting records for the District 4 Austin City Council Runoff Election on December 16, 2014, (Exhibit B)
- b. Electronically extracted the District 4 voting records in the form of Cast Vote Records, (Exhibit B),
- c. copied and compiled the official District 4, Cast Vote Records into a single pdf report, (Exhibit X)⁴⁶
- d. printed roughly 4,000 Cast Vote Records for the District 4 race,
- e. convened members of the Recount Committee whose roles were to recount votes (Exhibit Y)⁴⁷
- f. conducted unofficial Recount activities that lasted 4-6 hours⁴⁸.

89. A Travis County employee, a member of the recount committee, who was present at the Official Recount on January 6th, relayed to one Pressley’s recount watchers, on January 6, 2015, “They started all this on Sunday [January 4, 2015].”

90. Direct evidence of unofficial recount activities are shown in the Audit logs of Travis County’s Hart Tally and SERVO systems (Exhibit B). These various audit logs document access, extraction, compilation, and printing of reports of the official District 4 Cast Vote Records and

⁴⁶ Exhibit X, Early Vote CVR in one file, used to print CVR, produced by Travis County

⁴⁷ Exhibit Y, Recount Invoice from Travis County

⁴⁸ Exhibit Y, Recount Invoice from Travis County

data on January 4th (2:18pm), January 5th (2:18pm), and January 6th (8:24am)—all prior to the start time of the Official Recount on January 6, 2015 at 11:00am.

91. Contestant and her Official Watchers attended the Official Recount which started at 11:00 am and individuals tasked with counting votes were dismissed around 4:30pm (roughly after 5.5 hours). Additional evidence for unofficial recount activities are shown in the invoice (Exhibit Y) of the Recount charges which was provided to Contestant by Travis County after the Official Recount. The invoice documents Recount Committee members such as individuals who were temporary employees and who counted votes. In many cases, individuals counting votes were documented as working over 9 hours performing vote recounting activities.

92. This Travis County Recount invoice documents Recount Committee members counting votes, spent roughly twice the hours (Exhibit Y) required to complete the Official Recount and Contestant's Official Watchers were not allowed to monitor those prior recount activities.

93. In addition, at the Official Recount, Contestant requested to view the source and properties of the CVR files, such as dates of the CVR files and origination, and was denied by the Recount Committee Member, the Travis County Director of Elections, Michael Winn.

94. Obstructing an Official Watcher is a criminal offense and materially affected the outcome of the Recount. Contestant and her Official Poll Watchers were denied access and were not allowed to monitor the critical recount activities such as vote retrieval and counting (Exhibit Y).

95. Most importantly, Contestant and her official Recount Watchers were not allowed to monitor the integrity of where the Cast Vote Records were retrieved (Exhibit B), the source where the retrieval occurred, or the copying of the Cast Vote Record files to an aggregated pdf file. The Recount pdf file obtained from Travis County during Production, is an electronic file and was created on January 6 approximately at 10:00 am was used to print, and was used to count votes in

the Recount.

96. Denying Contestant her rightful access to monitor Recount activities and determine that illegal votes (in the form of duplicate copies of CVR's) were printed and counted, materially affected the outcome of the Recount. Counting copies of 3,937 CVR's do not meet the statutory requirements for counting legal votes. The only legal votes produced at the Recount were the Mail in Ballots which were counted and tabulated to result in an exact tie of 240 votes for Pressley and 240 votes for Casar (Exhibit A).

7. Illegal Votes Counted—Statutory Ballots, Ballot Images and Images of Ballots Cast Were not Retained, Produced or Counted at Official Recount

97. On Tuesday, January 6, 2015, at 11:00 a.m. when the recount was to begin, the Travis County Clerk and the Recount Committee relayed to Contestant and her official recount watcher, Karen Renick that images of ballots cast on the Hart Electronic Voting System (eSlate) were not available, would not be printed, and would not be recounted.⁴⁹

98. At that meeting, Dr. Pressley expressly stated, in her "Petition Requesting a Recount," and "Amended Petition Requesting a Recount" that "[w]e are requesting a manual recount of the results using the actual, stored, ballot images." (See Appendix 11.) Pressley also expressly requested "a manual (by-hand) count." "[T]he election code expressly provides for the 'printing of images of ballots cast using direct recording electronic voting machines for the purpose of a manual recount.' See *id.* § 213.016." *Andrade v. NAACP of Austin*, 287 S.W.3d 240, 258 (Tex. App. Austin 2009), *rev'd on other grounds by Andrade v. NAACP of Austin*, 345 S.W.3d 1 (Tex. 2011).

99. Travis County's failure to print and count 3,937 images of ballots cast, for the District 4

⁴⁹ Exhibit Z, Affidavit of Karen Renick.

Austin City Council Election on December 16, 2014 on the Hart eSlate Electronic Voting System, violates this provision of the election code and materially affected the outcome of the election because 3,937 illegal cast votes were counted.

100. Printing the CVR data files was in essence reprinting the previous electronically counted results obtained on Election night. A CVR is a printing of a data file to a template. A template that does not meet the statutory requirements for a “ballot” or an image of a “ballot” and as such it is not a meaningful check on the original count.⁵⁰

101. The recount failed to *only* count legal votes because “images of ballots cast” were not

⁵⁰ Secretary of State is somewhat unclear on this issue. Travis County’s production of a “cast vote record” is a subset of the information on an Official Ballot. Therefore, an “image of ballots cast,” if a true image, is an exact replica of a ballot cast. The 2014 Electronic Voting System Procedures bulletin, posted online at <http://www.sos.state.tx.us/elections/laws/electronic-voting-system-procedures.shtml>, the SOS appears to not clearly differentiate cast vote records from ballot images. See, e.g., Section 8:

Section 8 – Requested Recounts (if necessary)

Requested Recount on DRE Voting Systems (Pursuant to TEC § 214.071):

1. The candidate requesting a recount may request that the recount be done electronically or manually.
2. For an electronic recount, the persons specifically permitted by law to be present at the recount are also authorized to be present as the election media are reloaded into the central accumulator system.
3. For a manual recount of a DRE election, the Recount Coordinator shall organize the printing of cast vote records (ballot images) for the affected race or issue.
 - a. The Recount Coordinator shall notify the parties in the recount of the date, place, and time the printing of cast vote records (ballot images) will take place.
 - b. The full recount committee is not required to be present at the printing of cast vote records (ballot images) and the Recount Chair shall determine how many members should be present. The persons specifically permitted by law to be present at the recount are entitled to be present as the cast vote records (ballot images) are printed and to have the same number of representatives as allowed for the recount.
 - c. If the manual recount does not take place immediately after the printing of the cast vote records (ballot images), the printed cast vote records (ballot images) shall be locked and secured until the recount takes place.
 - d. A manual count of the printed cast vote records (ballot images) shall be conducted in the same manner as a recount of hand-counted paper ballots.

After the recount is complete, the printed cast vote records (ballot images) shall be secured and preserved for the appropriate preservation period for maintaining election records.

provided and counted. Using the 3,937 CVR's instead of ballot image violates Texas Election Code 214.049 (e): "If electronic voting system ballots are to be recounted manually, the original ballot, rather than the duplicate of the original ballot, shall be counted." Ballots are defined in Texas Election Code Chapter 52, Subchapter C.⁵¹

Cast Vote Records are not legal Ballots, Ballot Images or Images of Ballots Cast

102. The most material fact in this lawsuit and is at a minimum hotly contested. Contestee relies on *post-hoc* letters and instructions from agencies with a bureaucratic bias to argue that a cast vote record satisfies the statutory and constitutional requirements that an image of a ballot cast be kept to verify the computers tabulation of what the actual ballot the voter sees when the selecting a candidate. Contestant relies on the factual difference between the ballot used and the cast vote record, expert testimony relying on reports and government statements and the statutes and laws of the State of Texas to contend that a cast vote record does not comply with the law's requirement to maintain images of the ballots cast. The resolution of this issue is very material to the decision in this case because if a cast vote record is not a ballot or an image of a ballot there were no votes in the election that can be counted other than the Absentee/Mail in Ballots.

1. Definitions of "Ballot Image"

⁵¹ For the purposes of this suit, the most salient portions of that subchapter are Sec. 52.003 and Sec. 52.070.

Sec. 52.003. PLACING CANDIDATE'S NAME ON BALLOT. (a) Except as otherwise provided by law, the authority responsible for having the official ballot prepared shall have placed on the ballot *the name of each candidate*:...

Sec. 52.070. VOTING SQUARE AND INSTRUCTION FOR CANDIDATES. (a) A square for voting shall be printed to the left of *each candidate's name* on a ballot.

(b) Immediately below "OFFICIAL BALLOT," the following instruction shall be printed: "Vote for the candidate of your choice in each race by placing an 'X' in the square beside the candidate's name."

...

(e) A square shall be printed to the left of each line provided for write-in voting under Section 52.066(c), but failure to place a mark in the square does not affect the counting of a write-in vote. (*emphasis* added.)

103. The Texas Secretary of State defines “Ballot image” without reference to a notion of “Cast Vote Records.”⁵² Per the Secretary of State’s Glossary of Election Terminology (Exhibit AA, p. 2): “Ballot Image: The ballot as it appears on a direct recording electronic (DRE) voting system. A ballot image is self-evidently therefore not a Cast Vote Record.

104. The phrase “Cast Vote Record” does not appear in the Exhibit O, Texas Secretary of State’s Glossary of Election Terminology. *Id.*

105. The Federal government also defines “Ballot image” without reference to the notion of “Cast Vote Record.” In 1990, the Federal Election Commission’s Performance and Testing Standard for Punchcard, Marksense, and Direct Recording Electronic Voting Systems (DRE)⁵³ (Exhibit K, p. 48, paragraph 1) reported:

To attain a measure of integrity over the process, DRE systems must also maintain images of each ballot that is cast, such that records of individual ballots are maintained by a subsystem independent and distinct from the main vote detection, diagnostic, processing and reporting path.

106. Therefore, a Cast Vote Record (CVR) is not an image of “each ballot that is cast.”

107. To the extent the 1990 FEC report discusses what would later be known by others as “Cast Vote Records,” the FEC distinguishes these data files from ballot images, saying there should be two pathways for vote records in DRE’s: a) images of ballots cast capability, and b) vote detection, processing and reporting path for vote data. The CVR is a reporting path/subsystem for reporting voete results to the Tally system and a ballot image is an image file that is independent from a data reporting path (*See* Exhibit K). Therefore a Cast Vote Record is not an image file of a ballot.

108. In 2002, The Federal Elections Commission’s 2002 Voting System’s Standards, Volume 1,

⁵² *See* Attached Exhibit AA, Texas Secretary of State’s Glossary of Election Terminology, <http://www.sos.state.tx.us/elections/laws/glossary.shtml>.

⁵³ *See* Exhibit K the Federal Election Commission’s 1990 Performance and Testing Standard for Punchcard, Marksense, and Direct Recording Electronic Voting Systems.

Performance Standards⁵⁴ (Exhibit L) reinforced and upheld these 1990 requirements for DRE's to maintain two pathways independent from each other so that vote data is stored and ballot images are preserved (p. 31-Section 2.2.4.2, p. 60-Section 3.2.1b(2), and page 135—Section 9.5.1.2.a). Therefore, a Cast Vote Record is not an image of a ballot.

109. In addition, Contestee never proves that the Cast Vote Record electronic file or paper copy produced by Travis County is an image file, is a replica of anything a voter sees when they are voting, or that it meets the legal standards of an Official ballot. The Cast Vote Record that Travis County has produced is not produced from an official ballot, is not produced from an image of an official ballot, or produced from anything a voter saw or experienced when casting their electronic vote. Therefore, a Cast Vote Record is not a ballot image.

110. Perhaps most decisively, the Hart Intercivic manuals themselves concede that a CVR is not a ballot image. Hart's own Ballot Now Operations Manual documentation⁵⁵ provided to Travis County states that the eScan subsystem scans each paper ballot to create an exact digital image of the ballot cast. The eScan creates and stores a ballot image (a bitmap, .bmp file) and then reads the data to make a Cast Vote Record (Ballot Now manual, Exhibit AB, page 24 and 259-260). In this way, the Travis County's Hart manual clearly refers to the CVR (a data structure used to transfer data for tabulation in Tally) and the ballot image (bitmap, .bmp file) as two technically different things. Therefore, a Cast Vote Record is not an image of a ballot.

1. A Cast Vote Record is not the same as a Ballot Image

111. Paragraph 22-29, above, decisively establish that the Texas Secretary of State, the Federal Election Commission and Hart InterCivic all define “ballot image” and “Cast Vote Record” as

⁵⁴ See Exhibit L Elections Commission's 2002 Voting System's Standards, Volume 1, Performance Standards.

⁵⁵ Exhibit AB, Ballot Now Manual produced by Travis County.

distinctly different.⁵⁶ This, at a minimum, creates a fact issue as to whether a Cast Vote Record is an image of ballot cast that is required by law to preserved and counted in recount and contest.

112. Additionally, the following Texas statutes show that the Legislature intended the word “ballot image” to have a specific meaning that is different from the meaning asserted for “Cast Vote Record.”

113. The Texas Election Code, Sec. 128.001(a)(2), requires that “The secretary of state shall prescribe procedures to allow for the use of a computerized voting system. The procedures **must** provide for the **use** of a computerized voting system with . . . (2) a main computer to coordinate ballot presentation, vote selection, **ballot image storage**, and result tabulation.” The language of the statute is mandatory.⁵⁷

114. Thus, the statute requires any Travis County electronic voting system have all of those four components: a main computer to coordinate a) ballot presentation, b) vote selection, c) **ballot image storage**, and 4) result tabulation.

115. Importantly, this section of the Code was enacted in 1997, before the word “Cast Vote Record” appears in any Federal Election Commission and Texas Secretary of State records, and before such a term could have acquired any “technical or particular meaning.” The words must therefore be construed as required under the Code Construction Act “Sec. 311.011. COMMON

⁵⁶ Exhibit AC, additionally, Casar misrepresents the definitions of Cast Vote Record and ballot image in the 2007 Election Assistance Commission Spanish-English Glossary of Key Election Terminology by omitting relevant pages in Exhibit AC. Those relevant pages are attached, however in Exhibit 6 to Exhibit 24 of the Amended MSJ, and provide the false notion that the EAC defines “ballot image” and “Cast Vote Record” as synonymous. The relevant pages are found in Exhibit AC, p. 15, 16, and 19.

⁵⁷ Texas Government Code (Code Construction Act) governs the use of the word.

Sec. 311.016. "MAY," "SHALL," "MUST," ETC. The following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute:

- (1) "May" creates discretionary authority or grants permission or a power.
- (2) "Shall" imposes a duty.
- (3) "Must" creates or recognizes a condition precedent.

AND TECHNICAL USAGE OF WORDS. (a) Words and phrases shall be read in context and construed according to the rules of grammar and *common usage*.” (emphasis added.)

See Acts 1997, 75th Leg., ch. 1349, Sec. 50, eff. Sept. 1, 1997.

116. While Contestee mocks Pressley’s use of the common usage of the word “image” as a “picture,” that is plainly the meaning contemplated by the Legislature in enacting the statute in 1997. A “Cast Vote Record” is nothing more than “result tabulation” referenced by the 1990 Federal Election Commission and contemplated by the 1997 statute.⁵⁸

117. This interpretation is subsequently supported by the 2002 Federal Election Commission report (Exhibit L) and the Texas Secretary of State Glossary of Election Terms (Exhibit AA, <http://www.sos.state.tx.us/elections/laws/glossary.shtml>, last visited March 15, 2015, 11:36 a.m.) defines as follows: “Ballot Image: The ballot as it appears on a direct recording electronic (DRE) voting system.” No definition of “Cast Vote Record” appears in the Secretary of State’s Glossary of Election Terms.

118. A genuine issue of material fact exists as to the central issue in this case: whether all four components were provided in the conduct of the Runoff election in order to determine the victor in the runoff. Plaintiffs assert the “Cast Vote Record” used in the Travis County Runoff election is not an “image of a ballot cast.” A side-by-side comparison of a Hart “ballot image” and “cast vote record” shows that the two are not the same.

119. The Cast Vote Record shown below (Exhibit AD) is authenticated in Exhibit D, Deposition of Dana DeBeauvoir, Exhibit 10, p. 42 lines 18-21.

⁵⁸ Alternatively, a CVR could also be described using the language of the FEC report, as a vote data storage pathway – essentially synonymous with “results tabulation.”

“Ballot Image” from Hart InterCivic Ballot Now Manual
Produced by Travis County

Vote Both Sides

**DEMONSTRATION BALLOT PRINTED BY
Hart Intercivic BALLOT NOW**

Democratic Party
Primary Election
Sample County
August 06, 2006
Precinct: f003

Instruction:
With a black pen, fill in the box next to your choice.

United States Senator Vote for One <input type="checkbox"/> Paul J. Fenster Democrat <input type="checkbox"/> Peery Bebeson Democrat <input type="checkbox"/> Marvin Stone Democrat <input type="checkbox"/> Martha DeLo Democrat <input type="checkbox"/> Everett Jones Democrat <input checked="" type="checkbox"/> Rupert M. Michaels Democrat <input type="checkbox"/> Danny Crane Democrat	State Treasurer Vote for One <input type="checkbox"/> Candice Hunter Democrat <input type="checkbox"/> Alfonso Numero Democrat <input checked="" type="checkbox"/> Ray Fenton Democrat
Governor Vote for One <input type="checkbox"/> Christopher Petersen Democrat <input type="checkbox"/> Laura Frasier Democrat <input type="checkbox"/> Janice Mitchell Democrat <input checked="" type="checkbox"/> Darrel Scott Democrat	State Board of Education Vote for Two <input type="checkbox"/> Angelina Stone Democrat <input checked="" type="checkbox"/> Kim Struthers Democrat <input checked="" type="checkbox"/> Consuelita Martinez Democrat <input type="checkbox"/> Richard Pohl Democrat <input type="checkbox"/> Julianne Pirle Democrat
Lieutenant Governor Vote for One <input type="checkbox"/> Chester Anderson Democrat <input type="checkbox"/> Arin Strandberg Democrat <input checked="" type="checkbox"/> Genevieve Worthington Democrat	City Council Vote for Two <input checked="" type="checkbox"/> Penny Garcia Democrat <input type="checkbox"/> Bob Leigh Democrat <input type="checkbox"/> Thomas Edwards Democrat <input type="checkbox"/> Paula Snow Democrat <input checked="" type="checkbox"/> Wendy Bates Democrat
State Attorney General Vote for One <input type="checkbox"/> Myers Hart Democrat <input checked="" type="checkbox"/> Ted Vanecek Democrat	

Vote Both Sides

“Cast Vote Record”
Produced by Travis County

Votes by Precinct
JBCs Election Day GR14

Precinct: 133-C
Party: NP
Device: JBC - C05A76
Polling Place: ED (111) Randalls Brode -
Election Day

Contest Title	Candidate/Option
PLACE 2, ACC TRUSTEE, AUSTIN COMMUNITY COLLEGE DISTRICT	No Selection
MAYOR, CITY OF AUSTIN	David Adler
DISTRICT 4, AUSTIN CITY COUNCIL, CITY OF AUSTIN	Laura Pressley
DISTRICT 1, SINGLE MEMBER TRUSTEE, AISD	No Selection
AT LARGE POSITION 9, AISD	No Selection

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120.

121. The “ballot image” shown above from the Hart Intercivic Ballot Now Manual is from Exhibit AB.

122. Further, a comparison of an example of an “image of ballot cast” (from the Hart Manual) and a Travis County Runoff Absentee/Mail-in-Ballot (Exhibit AE) shows that the two are as nearly identical to each other. They are clearly very different from the Travis County Runoff Cast Vote Record.

"Ballot Image" from Hart InterCivic Ballot Now Manual
Produced by Travis County

Vote Both Sides

DEMOCRATIC PARTY Primary Election Sample County August 08, 2006 Precinct: 1002	
Instruction: Fill in a black pen, X in the box next to your choice.	
United States Senator Vote for One <input type="checkbox"/> Paul J. Fenster Democrat <input type="checkbox"/> Penny Bellison Cony Ferryson <input type="checkbox"/> Marvin Stone Democrat Martha Deeds Everett Jones <input checked="" type="checkbox"/> Rupert M. Michaels Democrat <input type="checkbox"/> Denny Crane Democrat	State Treasurer Vote for One <input type="checkbox"/> Candice Hunter Democrat <input type="checkbox"/> Alfonso Numero Democrat <input checked="" type="checkbox"/> Ray Fenton Democrat
Governor Vote for One <input type="checkbox"/> Christopher Petersen Democrat <input type="checkbox"/> Laura Friesler Democrat <input type="checkbox"/> Janice Mitchell Democrat <input checked="" type="checkbox"/> Darrel Scott Democrat	State Board of Education Vote for Two <input type="checkbox"/> Angelina Stone Democrat <input checked="" type="checkbox"/> Kim Struthers Democrat <input checked="" type="checkbox"/> Consuelita Martinez Democrat <input type="checkbox"/> Richard Pohl Democrat <input type="checkbox"/> Julianne Pirle Democrat
Lieutenant Governor Vote for One <input type="checkbox"/> Chester Anderson Democrat <input type="checkbox"/> Ivan Strandsberg Democrat <input checked="" type="checkbox"/> Genevieve Worthington Democrat	City Council Vote for Two <input checked="" type="checkbox"/> Perry Garcia Democrat <input type="checkbox"/> Bob Leigh Democrat <input type="checkbox"/> Thomas Edwards Democrat <input type="checkbox"/> Paula Snow Democrat <input checked="" type="checkbox"/> Wendy Bates Democrat
State Attorney General Vote for One <input type="checkbox"/> Myers Hart Democrat <input checked="" type="checkbox"/> Ted Vanecek Democrat	

Vote Both Sides

Actual Ballot by Mail
Produced by Travis County

Vote Both Sides Vote en Ambos Lados de la Página

December 16, 2014 Joint Special Runoff Election 16 de diciembre, 2014 Elecciones Especiales Secundarias Conjuntas Travis County Condado de Travis December 16, 2014 - 16 de diciembre, 2014 Precinct: Precinto 156-B	
CITY OF AUSTIN RUNOFF ELECTION ELECCIÓN SECUNDARIA CIUDAD DE AUSTIN MAYOR, CITY OF AUSTIN ALCALDE, CIUDAD DE AUSTIN <input checked="" type="checkbox"/> Mike Martinez <input type="checkbox"/> Steve Adler	AUSTIN INDEPENDENT SCHOOL DISTRICT SCHOOL BOARD TRUSTEE RUNOFF ELECTION ELECCIÓN SECUNDARIA PARA JUNTA DE REGENTES DISTRITO ESCOLAR INDEPENDIENTE DE AUSTIN AT LARGE POSITION 9, AISD PUESTO EN GENERAL 9, AISD <input checked="" type="checkbox"/> Kendall Pace <input type="checkbox"/> Hillary Procknow
DISTRICT 4, AUSTIN CITY COUNCIL, CITY OF AUSTIN DISTRITO 4, CIUDAD DE AUSTIN CONSEJO, CIUDAD DE AUSTIN <input checked="" type="checkbox"/> Laura Pressley <input type="checkbox"/> Gregorio "Greg" Casar	To continue voting press the NEXT button. Para continuar votando, presione el botón Siguiente (NEXT).
To continue voting press the NEXT button. Para continuar votando, presione el botón Siguiente (NEXT).	

Vote Both Sides Vote en Ambos Lados de la Página

123. The Absentee/Mail-in Ballot results are attached as Exhibit A, and are authenticated in the Deposition of Dana DeBeauvoir (Exhibit D), p. 44-46 p 58, line 10 – p 59, line 9.

124. The Absentee/Mail-in Ballot is attached as Exhibit AE, and is authenticated in the Deposition of Dana DeBeauvoir (Exhibit D), p. 45, lines 13-21.

125. The Cast Vote Record is attached as Exhibit AD, and is authenticated in the Deposition of Dana DeBeauvoir (Exhibit D), p. 42, lines 20-21.

A CVR is not a "Ballot Image" as a matter of information technology

126. A CVR is not a Ballot "Image" as a matter of information technology and computer science. As reported by expert, Dr. Jeffrey Jacobson, Ph.D., in Exhibit S, p. 2, “[According to] the

California Report⁵⁹, a Cast Vote Record is typically not more than 100 bytes of digital information.

Image files are far larger than a Cast Vote Record. Image files contain digital information that is not present in a Cast Vote Record. A CVR is nothing more than a simple data record.”

CVR is not a "Ballot Image" as a matter of law.

127. A ballot image, as a matter of plain language, requires a "Ballot" and an "image."

128. A Cast Vote Record is not an electronic system Ballot as defined under Tex. Elec. Code §

124.063:

Sec. 124.063. INSTRUCTIONS REQUIRED ON BALLOT. (a) An electronic system ballot on which a voter indicates a vote by making a mark on the ballot must contain the following instruction if candidates are to be voted on: "Vote for the candidate of your choice in each race by making a mark in the space provided adjacent to the name of that candidate." If a proposition appears on the ballot, the ballot must contain the following instruction: "Make a mark in the space provided beside the statement indicating the way you desire to vote."

129. The Cast Vote Record, Exhibit S, does not include the mandated instructions.

130. A CVR is not a Ballot as defined under Exhibit A, Attachment 7, the Federal Election Commission Performance and Test Standards, 1990, which was the most current federal guidelines in 1997, when the first Texas statute using the term, Texas Election Code § 128.001(a), was enacted.

131. A Cast Vote Record is not a Ballot as defined under Tex. Elec. Code Chapter 52.

132. A Cast Vote Record is not a Ballot as defined under Tex. Constitution, Art. 6, Sec. 4.

133. The tribunal cannot ascertain the true outcome because the only actual ballots – the Absentee/Mail-in Ballots – are exactly tied,⁶⁰ and no other ballots were legally cast, or recorded and

⁵⁹ Exhibit P, **California Report:** Inguva, S., Rescorla, E., Shacham, H., & Wallach, D. S. (2007). Source code review of the Hart InterCivic voting system. *University of California, Berkeley under contract to the California Secretary of State*. <https://www.sos.ca.gov/voting-systems/oversight/ttbr/Hart-source-public.pdf> **California2007.pdf, Attachment 5 to Jacobson Declaration.** This report is an official California government record, obtained through an official California government website, and is admissible as an exception to the hearsay rule under Texas Rule of Evidence 803(8) (c) (new number 803 (8)(A)(iii), effective April 1, 2015.), and TRE 902 (5).

⁶⁰ See Attached Exhibit A, (authenticated by Deposition of Dana DeBeauvoir, Exhibit D, p. 58, Line 10 - p. 59, Line 9, and attached Exhibit 13.)

counted.

134. Travis County admits that its system can only produce the easily-falsifiable Cast Vote Records, not the more secure images of ballot cast required under the Texas Election Code (128.001a(2), 213.016).

135. During the recount, for the first time, it became apparent that Travis County had this illegal defect in its procedures when Travis County only produced Cast Vote Records, and the election recount supervisor stated that Travis County was incapable of printing images of ballots cast.⁶¹

136. Because no ballot images were ever preserved, it is impossible for Travis County to produce and count the ballots, as required under the Tex. Constitution, Art. 6, Sec. 4, and Texas Election Code (213.016, 214.049(e)).

137. Because no ballot images were ever preserved, it is impossible for Travis County to conduct a lawful recount the ballots, as required under the Texas Election Code (213.016, 214.049(e))

138. The ballot images must be preserved under the Texas Election Code. Failure to preserve ballot images means that essential election records are missing. Such missing records make it impossible for the tribunal to determine the outcome. In the event of such missing records,⁶² an order to void the result and order a new election is appropriate. *Garcia v. Avila*, 597 S.W.2d 400, 405 (Tex. Civ. App.-San Antonio 1980, writ dismiss'd).

139. Additionally, the evidence produced by Travis County shows that mistakes were made that make it impossible for the tribunal to know the true outcome of the election.

Arguments and Authorities

⁶¹ Attached Exhibit Z, Affidavit of Karen Renick, p.2

⁶² DeBeauvoir confirmed that the election Tally system audit log is also missing data during Early Voting (Exhibit D, Deposition of Dana DeBeauvoir, p.76, line 7-15). In addition, DeBeauvoir confirmed that Travis County is also missing the Results/Tally Tapes required by the Secretary of State. The SOS requires Results/Tally Tapes be printed when closing the polls. When DeBeauvoir was asked if the Runoff poll judges were told to not print Results/Tally tapes directly after the closing of the polls, her response was "correct." (Exhibit M, Deposition of Dana DeBeauvoir, p. 128, line 15).

140. “The tribunal shall declare the election void if it cannot ascertain the true outcome of the election.” TEX. ELEC. CODE § 221.012. The tribunal cannot ascertain the true outcome, because of evidence of mistakes and illegalities in the conduct of the election.⁶³

141. The largest and simplest illegality is plain. Travis County did not comply with the Texas Election Code requirement that, if it is to use a computerized voting system, it must use a system with ballot image storage.⁶⁴

A CVR is not a "Ballot Image."

142. **As a matter of computer science, a CVR is not an “image” at all.** Image files contain information not present in a CVR. The California report (Exhibit P, page 60, paragraph two) clearly states that the CVR is a data structure. A data structure is a table or list of information, in this case, a listing of the votes from one ballot. By contrast, an image file is a computer file which describes an image as a grid of pixels, with color and other information for each pixel stored individually. A data structure is not an image file, so the Cast Vote Record file is too small to be a ballot image file.⁶⁵

143. Image files are far larger than a Cast Vote Record.. “A CVR is not ever more than 100 bytes long (p 58, paragraph nine), which is more than enough room to hold a list of votes, at one byte per vote. But no image file format could do more than a dozen or so letters in 100 bytes; it certainly could not hold an entire ballot image.”⁶⁶ A CVR is nothing more than a simple data record. “Hart's own documentation provided to Travis County states that the eScan subsystem scans each paper ballot to create an exact digital image of the ballot cast. The eScan then reads the ballot image to

⁶³ Sec. 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.

⁶⁴ Texas Election Code §128.001

⁶⁵ See Declaration of expert witness Jeffrey Jacobson, Ph.D. Exhibit S, p. 2-3.

⁶⁶ See Declaration of expert witness Jeffrey Jacobson, Ph.D. Exhibit S, p. 2

make a CVR (Ballot Now manual, page 24, paragraph 5). In this way, the manuals clearly refer to the CVR and the ballot image as two different things.”⁶⁷ A CVR is not an image file.

144. **Under Texas Statutes and constitution, a CVR is not a “ballot image” or “image of ballot cast.”**

145. A ballot image, as a matter of plain language, requires a "Ballot" and an "image."

146. A ballot is defined through requirements set forth in the Texas Constitution and the Texas Election Code. It must possess:

- a. a unique serial/ticket number (Texas Constitution, Article 6, Section 4 and Texas Election Code 52.062)
- b. the election name (Texas Election Code 52.063), of Joint Special Runoff Election, Travis County
- c. the election date (Texas Election Code 52.063), of December 16, 2014,
- d. the designation of Official Ballot (Texas Election Code 52.064)
- e. a voting square to the left of each candidate’s name (Texas Election Code 52.070),
and
- f. voting instructions (Texas Election Code 52.070, and 124.062)

147. The Texas Code Construction Act⁶⁸ governs the interpretation of words in statutes. “Sec. 311.011. COMMON AND TECHNICAL USAGE OF WORDS. (a) Words and phrases shall be read in context and construed according to the rules of grammar and *common usage*.” (emphasis added.)

⁶⁷ See Exhibit S, Declaration of expert witness Jeffrey Jacobson, Ph.D. See also Hart Ballot Now manual, attached as Exhibit AB, p. 24, 149, 259, 260

⁶⁸ Texas Government Code, Chapter 311.

148. The word “image” is defined at <http://www.merriam-webster.com/dictionary/> as: Image *noun* im·age \ 'i-mij\

: a picture that is produced by a camera, artist, mirror, etc.

: a mental picture : the thought of how something looks or might look

: the idea that people have about someone or something

Full Definition of IMAGE

1: a reproduction or imitation of the form of a person or thing; *especially* : an imitation in solid form : statue

2 a : the optical counterpart of an object produced by an optical device (as a lens or mirror) or an electronic device

b : a visual representation of something: as (1) : a likeness of an object produced on a photographic material (2) : a picture produced on an electronic display (as a television or computer screen)

3 a : exact likeness : semblance <God created man in his own *image* — Genesis 1:27(Revised Standard Version)>

b : a person strikingly like another person <she is the *image* of her mother>

4 a : a tangible or visible representation : incarnation <the *image* of filial devotion>

b *archaic* : an illusory form : apparition

5 a (1) : a mental picture or impression of something <had a negative body *image* of herself> (2) : a mental conception held in common by members of a group and symbolic of a basic attitude and orientation <a disorderly courtroom can seriously tarnish a community's *image* of justice — Herbert Brownell>

b : idea, concept

6: a vivid or graphic representation or description

7: figure of speech

8: a popular conception (as of a person, institution, or nation) projected especially through the mass media <promoting a corporate *image* of brotherly love and concern — R. C. Buck>

9 : a set of values given by a mathematical function (as a homomorphism) that corresponds to a particular subset of the domain

149. Thus, an “image” of a ballot cast, as “construed according to the rules of grammar and *common usage*,” would require a “picture” or “reproduction” or “optical counterpart” or “visual representation” or “exact likeness” or “image” file, in something similar to a photograph, a bitmap, Jpeg, pdf, tif, etc. or similar computer format.

150. The Texas Election Code, Sec. 128.001(a)(2), requires that “The secretary of state shall prescribe procedures to allow for the use of a computerized voting system. The procedures **must** provide for the **use** of a computerized voting system with . . . (2) a main computer to coordinate ballot presentation, vote selection, **ballot image storage**, and result tabulation.”

151. A “Cast Vote Record” is nothing more than data storage file used for results tabulation. The Texas Government Code, Sec. 311.016(2) and (3) states:

"MAY," "SHALL," "MUST," ETC. The following constructions apply unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute:

(2) "Shall" imposes a duty.

(3) "Must" creates or recognizes a condition precedent.

152. Since Section 128.0001 of the Election Code states that the “secretary of state shall prescribe procedures [which] **must** provide for the **use** of a computerized voting system with . . . (2) a main computer to coordinate ... **ballot image storage**,” the ballot image storage is a condition precedent to the legal use of any computerized voting system.

153. Travis County has failed to comply with this condition precedent to the legal conduct of an election. While this would theoretically affect other races decided in December of 2014, the statute of limitations has passed for all election contests save this one.

154. The Hart Electronic Voting system can, according to its manuals, store ballot images and cast vote records.⁶⁹ The sky will not fall if this Court orders Travis County to conduct this election in conformance with Texas Election Code, using capabilities that are already part of the Hart Intercivic Ballot Now system (Exhibit A, Attachment 6). Contests of all other elections that have been held are barred by limitations. According to the Hart Manual it is a simple fix to have the system preserve images of the ballots the voters use in deciding which candidate to vote for and that conforms to the legal definition of a ballot.

155. Further, the Texas Government Code, Sec. 311.021, states in pertinent part:

Sec. 311.021. INTENTION IN ENACTMENT OF STATUTES. In enacting a statute, it is presumed that:

(1) compliance with the constitutions of this state and the United States is intended;

⁶⁹ Exhibit AB, Hart Ballot Now Operations Manual p. 24, 149, 259, 260

- (2) the entire statute is intended to be effective;
- (3) a just and reasonable result is intended;
- (4) a result feasible of execution is intended; and
- (5) public interest is favored over any private interest.

156. Because the “ballot image storage” is listed separately as a requirement in two different parts of the statute, it is a just and reasonable to construe the entire statute as operating under that feasible requirement that an actual “ballot image,” instead of a mere tally of the “Cast Vote Records,” be retained in the system in order to promote the public interest in transparent elections in which a human being can look at an image of a ballot and count by hand accordingly in a Recount, in a manner closely analogous to the way that ballots have been counted in America for centuries.

157. The private interest of saving money by using a system on the cheap that does not fulfill the public purpose of transparent elections is disfavored. The purpose of the Election Code is to provide an accurate and transparent method of electing representatives to government offices in a way that is both efficient and conducive to public faith in the process.⁷⁰

158. In *Alvarez v. Espinoza*, the court observed that “[t]he election code seeks to prevent error, fraud, mistake, and corruption, *and to give effect to the will of the voters.*” 844 S.W.2d 238, 242 (Tex. App.—San Antonio 1992, writ dism’d w.o.j.) (*emphasis added*). The court continued:

The public must have confidence that the election process is fair for all candidates....Those who have studied history and have observed the fragility of democratic institutions in our own time realize that one of our country's most precious possessions is the commitment of our public officials to the rule of law—fair and evenhanded application of rules known in advance—*and the widespread acceptance of election results.*

Id. at 249 (*emphasis added*).

⁷⁰ “The purpose of the election code is to ensure that the true will of the voters is ‘fairly expressed’ and that the evidence of that expression is ‘properly preserved.’ *Prado [v. Johnson]*, 625 S.W.2d 368 (Tex. Civ. App.—San Antonio 1981, writ dism’d w.o.j.), 625 S.W.2d at 369-70.” *Gonzalez v. Villarreal*, 251 S.W.3d 763, 778 (Tex. App.—Corpus Christi 2013). The failures and mistakes illustrated in this Contest show that the will of voters was thwarted, and the evidence of that expression was **not** properly preserved.

159. The United States Supreme Court has observed that:

[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Purcell v. Gonzalez, 549 U.S. 1, 7 (2006) (per curiam) (internal citations and quotations omitted).

160. By throwing out illegitimate votes of nonresidents, and enforcing the strict procedures for storage of ballot images, use of only non-corrupt mobile ballot boxes and non-defective mobile ballot box readers which protect against fraud and exploitation of voters, *see Guerrero v. State*, 820 S.W.2d 378, 383 (Tex. App.—Corpus Christi 1991, pet. ref'd), this court will protect the franchise of all those District 4 voters who voted legitimately. The court should not hesitate, therefore, in ordering a clean election.

161. Because “ballot image storage” was not used by Travis County, as the statute requires, the ballot images from the runoff election are missing election records and there are no ballots that can be counted other than the Absentee/Mail in Ballots which resulted in a tie. Therefore the only true outcome that can be ascertained is a tie which requires a new election.

"Election records" also include ballot boxes (containing voted ballots), tally sheets, absentee ballots, applications for absentee ballots in person and by mail, signature rosters for election day voting, and poll lists. *Garcia v. Avila*, 597 S.W.2d 400, 405 (Tex. Civ. App.-San Antonio 1980, writ dism'd). These items, and items like them, also constitute "precinct election records," as defined and used in chapter 66 of the code. In addition, section 273.003 lists election returns, voted ballots, and the signature roster as specific types of election records. TEX. ELEC. CODE ANN. § 273.003 (Vernon 1986). Based on the uses of the term "election records" and the examples listed within the code, we conclude "election records" are those which memorialize the actual election and the actual conduct of the election.

Dallas Indep. Sch. Dist. v. Finlan, 27 S.W.3d 220, 228-229, 2000 Tex. App. LEXIS 5773, 13-14 (Tex. App. Dallas 2000)

162. “Ballot images” are “election records” ... which memorialize the actual election and the

actual conduct of the election.”

163. Travis County has no ballot images.

164. Missing election records are, alone, sufficient grounds for this court to void the election. *Garcia v. Avila*, 597 S.W.2d 400, 403 (Tex. App.—San Antonio 1980) (“[B]ecause of the missing records it was impossible to ascertain the true results of the election. On that basis, the election was declared void and a special election was ordered.”)

165. Similarly, in this case, because the election records are missing, this honorable Court must void the election and order a runoff election between the Contestant and Contestee on voting machines that “use ballot image storage” as required by Texas Election Code 128.001 (a). Contestee’s amended motion for summary judgment must be denied.

The unserious “argument” that erroneous agency interpretation can retroactively affect statutory history.

166. Contestee alleges, in what can only be described as a preposterous parody of statutory construction, that an *ex post facto* application of agency construction of language that flies in the face of plain meaning rule and which undermines the relevant federal standards and produces a result that is both absurd and at odds with the statutory intent is to control.

167. It is uncontested that the relevant Texas statutes were enacted in 1997⁷¹ and 2003.⁷² Those statutes require “ballot image storage.” and “images of ballots cast.”

168. In his motion for traditional summary judgment, Contestee attempts to create ambiguity in the reading of the statutes by asserting that various administrative agencies, years after the enactment of the statutes at issue, have redefined the words of the statutes in ways that are inconsistent with plain language and inconsistent with the meaning of the statutes as understood at

⁷¹ Texas Election Code, Sec. 128.001(a)(2)

⁷² Texas Election Code, Sec. 213.016

the time of their enactment.

169. This is, to put it generously, a badly mistaken view of statutory construction.

170. Administrative redefinition of statutes is not allowed.

171. Under Texas case law, as set forth in *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011), the Texas Supreme Court reaffirmed its 20-year-old rule that limited the deference due to administrative determinations to those that are “reasonable and do[] not contradict the plain language of the statute.” *First Am. Title Ins. Co.*, 258 S.W.3d at 632 (quoting *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993)).”

172. The *Safe Future* Court added that “this deference is tempered by several considerations:”

It is true that courts give some deference to an agency regulation containing a reasonable interpretation of an ambiguous statute. But there are several qualifiers in that statement. First, it applies to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions [in a court brief]. Second, the language at issue must be ambiguous; an agency's opinion cannot change plain language. Third, the agency's construction must be reasonable; alternative *unreasonable* constructions do not make a policy ambiguous.

173. The plain language of the statutes require an “image” of a “ballot.” A “Cast Vote Record,” as a mere data record is neither “image” nor “ballot.”

174. In *Texas Dep't of Protective and Regulatory Services v. Mega Child Care*, 145 S.W.3d 170, 177 (Tex. 2004), the Texas Supreme Court, in overruling a 25-year-long pattern of erroneous interpretation of administrative law, made it clear that Texas embraces an unusually strong version of the plain meaning rule.

If the statutory text is unambiguous, a court must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results. *See Tune v. Tex. Dep't of Pub. Safety*, 23 S.W.3d 358, 363 (Tex.2000) (“We must enforce the plain meaning of an unambiguous statute.”); *Republic Bank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex.1985) (“Unless a statute is ambiguous, we must follow the clear language of the statute.”); *Brazos River Auth. v. City of Graham*, 163 Tex. 167, 354 S.W.2d 99, 109 n. 3 (1962) (“[O]perating as we are under a strict theoretical division of governmental powers, it would take a bit of

doing on the part of the judiciary to say, **in** the absence of ambiguous and uncertain statement or patent and manifest absurdity, that the Legislature intended something different from the clear import of the words chosen by it...."); *Gilmore v. Waples*, 108 Tex. 167, 188 S.W. 1037, 1039 (1916) (The literal meaning of a statute may be disregarded "only where it is perfectly plain that the literal sense works an absurdity or manifest injustice.").

See also AIC Mgmt. v. Crews, 246 S.W.3d 640 (Willet, J., concurring) (internal citations omitted) (citing to *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 n.4 (Tex. 2006) and 542 U.S. 241, 267, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004) (Scalia, J., concurring in the judgment)).

175. The language of 128.001(a)(2) and 213.016 is unambiguous. The application of the plain language does not lead to absurd results. The plain language does not work an absurdity or manifest injustice. Therefore, the Court must enforce the plain language requiring the storage and printing of images of ballots cast.

176. Contestee argues that the plain meaning rule does not apply, because subsequent statements by administrative agencies contradict the plain meaning. In support of this notion, Contestee cites Texas Government Code 311.011 (b): "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."

177. First of all, it is obvious that there is no unanimous or consistent re-definition of a "ballot image" as a "Cast Vote Record" at the federal level, or even within the Texas Secretary of State's Office, or within the manuals of Hart InterCivic governing this very voting system. *See supra*, paragraphs 22-29.

178. Moreover, every suggestion of such a re-definition put forth by Contestee is dated AFTER the statutes were enacted in 1997 and 2003.⁷³ It is impossible that documents published AFTER the statutes were enacted were considered by the legislature, and intended to have effect in defining

⁷³ The Texas Secretary of State references cited are in 2012, 2014 and 2015. A single Election Assistance Commission reference, which is mischaracterized as described *supra*, is dated 2007. There is no evidence that the "Words and phrases [] ha[d] acquired a technical or particular meaning" prior to statutory enactment.

statutes written years before they were published.⁷⁴ The suggestion, once clearly explained, is obviously ludicrous.

179. If that were not enough reason to disregard the notion put forward by Contestee, the *Safe Future* deference “applies [only] to formal opinions adopted after formal proceedings, not isolated comments during a hearing or opinions [in a court brief].” (second bracket set in original.)

180. Contestee has put forward no evidence of any “formal opinions adopted after formal proceedings,” and has explicitly attempted to rely on a 2008 “isolated comments during a hearing or opinions [in a court brief].” These random droppings are due no deference by this court..

181. Contestee also rests its notion that the SOS may willy-nilly redefine the words in statutes on Section 52.075 of the Election Code. That section allows the SOS to “prescribe the form and content of a ballot for a... electronic voting system .. to conform to the formatting requirements of the system.” The limiting language in the provision does not allow the SoS to redefine the statute. The limiting language allows the SoS to change the form and content merely to the extent required to conform with formatting requirements of a computer system. This is unsurprising, necessary, and nowhere near as broad a grant of power as Contestee imagines. This allows the SoS to choose, for instance, among various image file formats. But it does not allow the SoS to ignore the requirement of Texas Election Code, Sec. 128.001(a)(2) for “a main computer to coordinate ballot presentation, vote selection, **ballot image storage**, and result tabulation.” *How* the SoS mandates compliance with the 128.001(a)(2) elements is discretionary under 52.075. *If* they mandate compliance with the 128.001(a)(2) elements is *not* made discretionary by 52.075. Further, the more specific provisions of Election Code Chapter 124, SubChapter C Electronic Voting System Ballot, trump 52.075. (*e.g.*,

⁷⁴ Tex. Const., Art. 1, Sec. 16. states that “No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.” There is no reason to believe that retroactive administrative rulings are in some way exempt from this rule.

the electronic system ballot must be a different color than the sample ballot, §124.062; specific instructions are required, §124.062.)

182. A ballot is defined through requirements set forth in the Texas Constitution and the Texas Election Code. It must possess:

- a. a unique serial/ticket number (Texas Constitution, Article 6, Section 4 and Texas Election Code 52.062)
- b. the election name (Texas Election Code 52.063), of Joint Special Runoff Election, Travis County
- c. the election date (Texas Election Code 52.063), of December 16, 2014,
- d. the designation of Official Ballot (Texas Election Code 52.064)
- e. a voting square to the left of each candidate's name (Texas Election Code 52.070), and
- f. voting instructions (Texas Election Code 52.070)

183. The cast vote records do not fulfill these requirements.

184. Consequently, the Court must reject any "cast vote records" counted, produced and tallied on election night and the recount because they do not meet the statutory standards of an Official Ballot and cannot be verified as representing the voter's intent in the District 4 Runoff race. This is especially true when the election tally is pervasively tainted as described above.

185. In addition, the Texas Election Code is very clear that "ballots," "images of ballots cast," and "ballot images" are to be counted and used to verify voters' intent when the election results are challenged. It is well known, that an actual digital, electronic image file in the form of various types such as a bitmap, pdf, jpg, png, etc. is a different type of file compared to a CVR dataset file. The legislature's specific language of "ballot image" provides a secondary method for verifying

ballot counts. Simply printing out the same CVR data to a predefined CVR template, and counting those CVR's which is what was already electronically counted, is not a verification method.

8.Re-canvass Should have Occurred with Mail in Ballots

186. The District 4 Austin City Council Election made material errors and should have been re-canvassed using the results of the recount of the Mail in Ballots (240 for Pressley and 240 for Casar) and the election should have been declared a tie between Contestant Pressley and Contestee Casar.

187. Travis County failed to follow statutorily required recount procedures and recounted the 3,937 votes which were illegal on two counts. Primarily, the 3,937 votes were not counted from “images of ballots cast.” Secondly, the 3,937 votes were not original Cast Vote Records—they were copies of Cast Vote Records that were aggregated into a pdf file that was generated in January 2015. Travis County made material errors because the 3,937 votes cast on the eSlate are illegal on both counts and the final canvassed result, which was derived from these illegal votes, is not the true outcome of the election; the true outcome is a tie.

III. CAUSE OF ACTION

188. Contestant incorporates paragraphs 1 through 76 of this Petition herein

189. The runoff election for City Council of the City of Austin, Precinct 4 must be voided pursuant to Section 221.012 of the Texas Election Code and a new election held as described below because the true outcome cannot be ascertained or, in the alternative the only ballots cast in the election meeting legal requirements of a ballot resulted in a tie.

190. The result of these multiple irregularities, mistakes and possibility of fraud is that the result cannot be ascertained. The Court may request voters to disclose how they voted. Or, the

Court may declare the election void without attempting to determine how voters voted (Texas Election Code 221.009) and call for a new election. Dr. Pressley requests that such an election be timely set, and conducted in compliance with the Texas Constitution and the Texas Election Code.

191. In Texas Constitution, Article 6, Section 4, “In all elections by the people, the vote shall be by ballot...” The Texas Election Code 52.001, also stipulates, “the vote in an election is by official ballot...” Ballots are defined in Texas Election Code Chapter 52, Subchapter C.⁷⁵

192. In addition, the Texas Election Code (xxx) is very clear that “ballots,” “images of ballots cast,” and “ballot images” are to be counted and used to verify voters’ intent when the election results are challenged. It is well known, that an actual digital, electronic image file in the form of various types such as a bitmap, pdf, jpg, png, etc. is a different type of file compared to a CVR dataset file. The legislature’s specific language of “ballot image” provides a secondary method for verifying ballot counts. Simply printing out the same CVR data to a predefined CVR template, and counting those CVR’s which is what was already electronically counted, is not a verification method.

193. Several election safeguards and procedures defined by the Legislature and the Secretary of State that are intended to prevent human errors were mistakenly not followed by Travis County. The mistakes and failure to adhere to the Secretary of State’s procedures led to and caused errors, and illegal votes to be counted, legal votes to be not counted, and the election outcome cannot be

⁷⁵ For the purposes of this suit, the most salient portions of that subchapter are Sec. 52.003 and Sec. 52.070.
Sec. 52.003. PLACING CANDIDATE'S NAME ON BALLOT. (a) Except as otherwise provided by law, the authority responsible for having the official ballot prepared shall have placed on the ballot *the name of each candidate*:...
Sec. 52.070. VOTING SQUARE AND INSTRUCTION FOR CANDIDATES. (a) A square for voting shall be printed to the left of *each candidate's name* on a ballot.
(b) Immediately below "OFFICIAL BALLOT," the following instruction shall be printed: "Vote for the candidate of your choice in each race by placing an 'X' in the square beside the candidate's name."
...
(e) A square shall be printed to the left of each line provided for write-in voting under Section 52.066(c), but failure to place a mark in the square does not affect the counting of a write-in vote.
(*emphasis added.*)

known.

194. The sum total of all voting irregularities identified herein exceeds the number of votes by which the election was decided.

195. If no “images of ballots cast” can be retrieved, printed and counted, the true outcome of the election cannot be ascertained. The Court may order each of the more than 4,000 voters who voted in person to testify as to how they voted, pursuant to Texas Election Code Sec. 221.010. “SECONDARY EVIDENCE FOR UNAVAILABLE BALLOTS. If an examination of ballots is needed in an election contest and the ballots are lost, destroyed, or otherwise beyond the reach of the tribunal, the voters who cast the ballots may testify as to how they voted.”

196. In the alternative, if Travis County cannot produce “images of ballots cast” to be printed and counted, then Travis County cannot unequivocally determine the outcome of the election, and the election is void. If the court does not count cast vote records because they are not images of anything defined by law as a ballot then it can ascertain the election to be a tie by counting the Absentee/mail-In ballots either way as a matter of law, the Court must therefore order a new election. TEX. ELEC. CODE § 232.041.⁷⁶

VI. PETITION TIMELY FILED

197. This Election Contest is brought in accordance with the provisions of TEX. ELEC. CODE §232.008, which requires the Original Petition to be filed with the District Court not later than the 30th day after the date the official result of the contested election is determined.

⁷⁶ Sec. 232.041. NEW ELECTION ORDERED IF CONTESTED ELECTION VOID. In an election contest in which the contested election is declared void, the court shall include in its judgment an order directing the appropriate authority to order a new election.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served in accordance with the Texas Rules of Civil Procedure on May 19, 2015 on counsel of record as follows:

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