

Cause No.16147

JEANNETTE HORMUTH, AND  
JERRY FARLEY

Contestants,

v.

LINDA LANGERHANS, IN HER  
OFFICIAL CAPACITY AS PRESIDING  
OFFICER, MAYOR OF THE CITY OF  
FREDERICKSBURG, TEXAS,

Contestee

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IN THE DISTRICT COURT OF

GILLESPIE COUNTY,  
TEXAS

216th JUDICIAL DISTRICT

**CONTESTANTS' FIRST AMENDED PETITION INITIATING ELECTION CONTEST  
FOR THE CITY OF FREDERICKSBURG CHARTER AMENDMENT ELECTION  
WITH REQUESTS FOR DISCOVERY AND PRODUCTION**

TO THE HONORABLE COURT:

NOW COME Contestants, JEANNETTE HORMUTH and JERRY FARLEY initiating an election contest under the Tex. Elec. Code and against LINDA LANGERHANS, in her official capacity as presiding officer of the final canvassing authority for the contested election, and would respectfully show:

**I. DISCOVERY**

1. Contestants intend 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 original petition initiating an election contest is filed pursuant to Chapter [233](#)

of the Texas Election Code. An election contest is a special statutory proceeding that provides a remedy for elections tainted by fraud, illegality or irregularity. *Blum v. Lanier*, 997 S.W.2d 259, 262 (Tex. 1999).

3. Contestants, Jeannette Hormuth (“Ms. Hormuth”) and Jerry Farley (Mr. Farley) are qualified and registered voters of the territory covered by the election, Fredericksburg, Texas in Gillespie County. Ms. Hormuth's unique Texas voter ID is 1029458471 and she resides at 206 East College Street, Fredericksburg, Texas 78624. *See* Tex. Elec. Code § 233.002. The last four numbers of her drivers’ license are 2322; the last four digits of her social security number are 8049. Mr. Farley’s unique voter ID is 1029553763; he resides at 508 South Milam, Fredericksburg, Texas 78624 and the last four digits of his drivers' license and social security number are 7230 and 0821, respectively.

4. Contestee, as required by Tex. Elec. Code § 233.003(a), is Linda Langerhans (“Mayor Langerhans”), presiding officer of the final canvassing authority for the contested election and Mayor of the City of Fredericksburg and may be served with process at her place of business at 126 W. Main Street, Fredericksburg, Texas, 78624.

5. As required by Tex. Elec. Code § 233.006(c), Contestants delivered a copy of this original petition to the Texas Secretary of State on or before the filing deadline.

6. This Court has jurisdiction of this measure contest, and venue is proper in Gillespie County. Tex. Elec. Code § 221.002; § 233.005(b).

7. On Tuesday, November 5, 2019, the City of Fredericksburg held an election using numbered paper ballots (Tex. Elec. Code § 52.062) that were subsequently optically scanned and tabulated using an ES&S Model 650.

8. The election that the City of Fredericksburg held was a Charter Amendment

election (the “Contested Election”), seeking approval of the voters of Fredericksburg in Precincts 1, 2 3, and 4 to add “Section 11.12 – Fluoridation of Public Water Supply Prohibited” to the City of Fredericksburg Charter.<sup>1</sup>

9. The unofficial election precinct level results for Gillespie County - for Absentee, Early Voting by Personal Appearance, and Election Day - as reported by the Gillespie County Elections Administrator, Ms. Anissa Herrera, on November 12, 2019 for Precincts 1, 2, 3, and 4 was 739 votes “Yes” (to stop adding fluoride) vs 1,258 votes “No.”<sup>2</sup>

10. A Recount Petition was submitted on November 15, 2019<sup>3</sup> and an official recount was ordered<sup>4</sup> for November 22, 2019. Final results of the recount were 742 votes “Yes” (to stop adding fluoride) vs 1,261 votes “No.”<sup>5</sup>

11. An official final canvass of the recount results of the contested election occurred on December 2, 2019 by the Fredericksburg City Council (Tex. Elec. Code [67.004](#)).<sup>6</sup>

12. Contestants assert that the outcome of the contested election, as shown by the official recount results and canvass, is not the true outcome. *See* Tex. Elec. Code [§ 221.003\(a\)](#). While the margin between the “Yes” and “No” vote results is more than 500 votes, when mistakes, errors or fraud occurs, the magnitude of the vote spread knows no bounds.

13. Contestants generally contend that an election officer(s) or other person(s) officially involved in the administration and tabulation of the election:

A) Counted illegal votes - Tex. Elec. Code [§ 221.003\(a\)1](#).

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<sup>1</sup> Exhibit A - Order of Special Election for City of Fredericksburg

<sup>2</sup> Exhibit B - Unofficial Gillespie County election results by precinct - for Absentee, Early Voting by Personal Appearance, and Election Day - as reported by Ms. Anissa Herrera, on November 12, 2019

<sup>3</sup> Exhibit C - Recount Petition

<sup>4</sup> Exhibit D - Order of Recount

<sup>5</sup> Exhibit E - Official Results for the City of Fredericksburg Recount on November 22, 2019 as signed by the Recount Committee Chair and Supervisor/Coordinator.

<sup>6</sup> Exhibit F - City of Fredericksburg Regular City Council Meeting Agenda and Attachments, Monday December 2, 2019. See Official Canvass Item 6c at [https://www.fbgtx.org/AgendaCenter/ViewFile/Agenda/\\_12022019-687](https://www.fbgtx.org/AgendaCenter/ViewFile/Agenda/_12022019-687)

- B) Failed to count legal votes - Tex. Elec. Code § [221.003\(a\)\(2\)\(b\)](#).
- C) Made mistakes and/or engaged in illegal conduct - Tex. Elec. Code § [221.003\(a\)\(2\)\(C\)](#).

14. Contestants will show that because of so many material mistakes, illegalities, irregularities, and potential fraud that occurred in the administration of the election and the tabulation of election results for Absentee Voting, Early Voting by personal appearance, and Election Day by personal appearance, for the City of Fredericksburg Charter Amendment election on November 5, 2019, that the true outcome of the election cannot be ascertained.

15. If the court finds that illegal votes were cast and cannot ascertain how the voters voted, the court shall consider those illegal votes and how they affect the overall results. Tex. Elec. Code § [221.011](#).

16. Section [221.012](#) of the Tex. Elec. Code provides in pertinent part:

**[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.

**A. 406 Recounted Ballots Are Legally Insufficient**

17. Since 1891, the Texas Constitution has mandated, “In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box.” Texas Constitution [Article VI Sec.4](#).

18. The Texas Legislature, following the Constitutional mandate, enacted multiple Texas Election Code provisions to prevent and detect election fraud. See, Tex. Elec. Code § [62.008](#):

**62.008. PRESIDING JUDGE TO SIGN BALLOTS.**

- (a) The presiding judge's signature shall be placed on the back of each ballot to be used at the polling place.
- (b) The judge shall sign each ballot or an election officer shall stamp a facsimile of the judge's signature on each ballot.
- (c) The signing of ballots need not be completed before the polls open, but an unsigned ballot may not be made available for selection by the voters.

19. While the Tex. Elec. Code § 62.008 specifies “an unsigned ballot may not be made available for selection by the voters,” during the Recount on November 22, 2019, official Recount Watchers, Ms. Hormuth, Mr. Jerry Farley and Mrs. Laura Pressley, witnessed that nearly all of the 408 Election Day ballots that were recounted for Precinct 4 did not contain the required stamp or signature of the election judge that presided over Precinct 4 on November 5, 2019. It is unclear why the Gillespie County Elections Office presented 406, unsigned/unstamped, legally insufficient ballots to the Fredericksburg Charter Amendment recount team on November 22, 2019.

20. See comparison table below that shows the signatures on the back of ballots for the various voting location categories of Mail In (Ballots cast Absentee), Early Voting (by personal appearance) and Election Day (by personal appearance). All of the ballots that were recounted for Mail In for Precincts 1, 2, 3, and 4<sup>7</sup> and Early Voting for Precincts 1, 2, 3, and 4<sup>8</sup> bore the statutorily required signatures. For ballots that were recounted that were cast on Election Day for Precincts 1,<sup>9</sup> 2,<sup>10</sup> and 3,<sup>11</sup> all also contained the required signatures of the Presiding Judge.

21. Yet, for Precinct 4 for Election Day, only two of the 408 ballots were signed by the

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<sup>7</sup> Exhibit G1 – Samples of signed Precinct 1, 2, 3, 4 Mail In ballots





<sup>8</sup> Exhibit G2 – Samples of signed Precinct 1, 2, 3, 4 Early Voting ballots





<sup>9</sup> Exhibit G3 – Sample of signed Precinct 1 Election Day ballot





<sup>10</sup> Exhibit G4 – Sample of signed Precinct 2 Election Day ballot

<sup>11</sup> Exhibit G5 – Sample of signed Precinct 3 Election Day ballot

Presiding Judge. While ballot numbers 5235 and 5236 were signed,<sup>12</sup> the remaining ballots with numbers ranging from 1575 – 1800, and 5051 – 5237 were not signed.<sup>13</sup> See the table below for a summary of the signatures:

Voting Period	Precinct	Signature/Stamp on back of ballots	Ballots with Signatures
Mail In	1		33 of 33
	2		17 of 17
	3		8 of 8
	4		38 of 38

Voting Period	Precinct	Signature/Stamp on back of ballots	Ballots with Signatures
Early Vote	1		318 of 318
	2		180 of 180
	3		104 of 104
	4		314 of 314

Voting Period	Precinct	Signature/Stamp on back of ballots	Ballots with Signatures
Election Day	1		329 of 329
	2		144 of 144
	3		115 of 115
	4		2 of 408 Ballot numbers 5235 & 5236

22. Contestants contend that Tex. Elec. Code § 62.008 is a mandatory election provision. The purpose of mandatory provisions in election law is to aid in detecting fraud, irregularity, or illegality. *Christy v. Oliphint*, 291 S.W.2d 406, 408 (Tex.Civ.App.—Galveston 1956), *aff'd* 299 S.W.2d 933 (Tex. 1957). In deciding whether a statute is mandatory or directory, courts determine the legislative intent by considering the entire statute, its nature and object, and the consequences that follow from the construction of the statute. *Prado v. Johnson* 625 S.W.2d 368, 370 (Tex.Civ.App.—San Antonio 1981, writ dism'd). The general rule is that election officials' duties are directory, unless made mandatory by statute. *Id.* at 369. Statutes

<sup>12</sup> Exhibit G6 – Two Election Day Precinct 4 ballots that were signed by the Presiding Judge

<sup>13</sup> Exhibit G7 – 406 Election Day Precinct 4 ballots in which the signatures is missing.

regulating the manner of holding an election are generally directory. *Honts v Shaw*, 975 S.W.2d 2d 816, 821-22 (Tex.App.—Austin 1998, no pet.). Departing from directory requirements will not normally invalidate an election “unless such departure or such irregularities have affected or changed the results of the election.” *Prado* at 369.

23. Contestants contend that the purity and authenticity of these 406 ballots are in question and given the lack of a judge's signature, these ballots are legally insufficient and it cannot be known if these 406 ballots were modified and replaced after they were cast.

24. Contestants contend these 406 ballots, and the votes contained therein for the Fredericksburg Charter Amendment election, are unconstitutional, legally insufficient, are in direct violation of the Texas Constitution’s [Article VI Sec. 4](#) mandate and Tex. Elec. Code § [62.008](#) and should be voided from the recount.

#### **B. Absentee, Early Voting and Election Day Ballots are Appear to Be Missing**

25. Consistent with the Texas Constitution [Article VI Sec. 4](#) mandatory provisions, the Texas Legislature has enacted additional Texas Election Code sections that specify the numbering and tracking of ballots to ensure the purity and security of elections. *See* the following Tex. Elec. Code §§:

##### **[52.062](#) NUMBERING OF BALLOTS.**

“The ballots prepared by each authority responsible for having the official ballot prepared shall be numbered consecutively beginning with the number "1.”

##### **[62.009](#). DISARRANGING BALLOTS FOR VOTERS' SELECTION.**

(a) As needed for voting, an election officer shall disarrange a supply of the ballots so that they are in random numerical order.

(b) The disarranged ballots shall be placed face down on a table in a manner preventing an election officer or other person from ascertaining the number of a ballot selected by a voter.

(c) The provisional ballots shall be placed separately from the regular ballots.

**62.007. EXAMINING BALLOTS.**

(a) An election officer shall unseal the ballot package, remove the ballots, and examine them to determine whether they are properly numbered and printed.

(b) An unnumbered or otherwise defectively printed ballot shall be placed in ballot box no. 4.

**51.007. RECORD OF BALLOT DISTRIBUTION.**

(a) As soon as practicable after the ballots are packaged for distribution, the authority responsible for distributing election supplies shall prepare a record of the number of ballots and the range of serial numbers on the ballots to be distributed to each presiding judge and the early voting clerk.

(b) The authority shall preserve the record for the period for preserving the precinct election records.

**51.008. SUPPLEMENTING DISTRIBUTED BALLOTS.**

(a) The authority responsible for distributing election supplies shall retain a reserve of ballots to supplement the distributed ballots and on election day may reallocate previously distributed ballots among the polling places.

(b) The authority shall enter on the record of ballot distribution the number of ballots reserved and the number of ballots distributed from the reserve to each polling place. The range of serial numbers on the ballots shall be included in the record.

(c) If distributed ballots are reallocated, the authority shall indicate the reallocation on the record of ballot distribution and shall issue a receipt to each presiding election judge showing the number of ballots and the range of serial numbers on the ballots taken from the judge's polling place for redistribution. Each presiding judge shall indicate on the ballot register any reallocation of ballots affecting that polling place.

(d) The authority shall retain the undistributed reserve for the period for preserving the precinct election records.

26. These mandatory provisions, detailing tracking and recording of ballot numbers and their respective locations in which they are distributed, are key enablers in performing a validation exercise to determine the purity, history and chain of custody for the manually



recounted ballots and at the present, some appear to be missing.

27. Contestant, Ms. Hormuth, was an official recount watcher, and per Texas Election Code § 213.013(i), she received copies of all the numbered ballots that were recounted on November 22, 2019 for Precincts 1, 2, 3, and 4. Upon sorting the ballots in numerical order, it was found that 79 - 200 numbered ballots of the four precincts for Absentee, Early Voting by personal appearance, and Election Day, appear to be missing.

28. Results of an initial ballot count analysis to verify the math between each of the Gillespie County Election Department voting data sets (tabulation audit logs<sup>14</sup>, recount results,<sup>15</sup> etc.) reveal additional discrepancies in ballot counts. Contestants seek production of all official sets of Gillespie County election records to thoroughly quantify potential ballot discrepancies.

### **C. Gillespie County Central Counting Station - Official Watchers Were Obstructed**

29. Multiple official Gillespie Central Counting Station Watchers appear to have been prevented from observing any and all Absentee, Early Voting in Person, and Election Day ballot handling and counting activities that occurred on November 5, 2019 at the Central Counting Station as provided by Texas Election Code § 33.056:

#### **33.056. OBSERVING ACTIVITY GENERALLY.**

(a) Except as provided by Section 33.057, a watcher is entitled to observe any activity conducted at the location at which the watcher is serving. A watcher is entitled to sit or stand conveniently near the election officers conducting the observed activity.

(b) A watcher is entitled to sit or stand near enough to the member of a counting team who is announcing the votes to verify that the ballots are read correctly or to a member who is tallying the votes to verify that they are tallied correctly.

(c) A watcher is entitled to inspect the returns and other records prepared by the election officers at the location at which the watcher is serving.

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<sup>14</sup> Exhibit H – ES&S M650 optical scanner audit logs

<sup>15</sup> Exhibit I – Recount precinct level results

30. See the affidavits of official Gillespie County Central Counting Station watchers on November 5, 2019, Ms. Jeannette Hormuth,<sup>16</sup> Ms. Angela Smith,<sup>17</sup> Ms. Robin Fleck<sup>18</sup> and Mr. Padraig O’Hara.<sup>19</sup> Specifically, violations of the watcher’s rights at central counting include

- Not being allowed to venture out of the taped off area in the central counting station room and were not allowed to observe the ballot sorting and tabulation activities at a close enough range to read materials.
- Not being permitted to observe the ballot scanning and tabulations that occurred in the “vault.”
- Not being permitted to view and verify the “calling out of votes” for the emergency ballots.
- Being told to leave the central counting station around midnight when central counting station activities were not complete. According to a Fredericksburg newspaper article,<sup>20</sup> tabulation activities continued until 3:30am and the watchers were prevented from observing what activities occurred from midnight to 3:30am.

31. To knowingly obstruct an official election watcher is a class A misdemeanor. Tex. Elec. Code § 33.061.

#### **D. City of Fredericksburg Recount – Official Watchers Were Obstructed**

32. Ms. Jeannette Hormuth, Mr. Jerry Farley and Dr. Laura Pressley were official watchers for the City of Fredericksburg Charter Amendment recount on November 22, 2019 each has provided a signed and notarized affidavit. See the affidavits of official watchers, Ms. Jeannette Hormuth,<sup>21</sup> Mr. Jerry Farley<sup>22</sup> and Dr. Laura Pressley.<sup>23</sup>

33. The Recount Petition was submitted on November 15 and the recount was ordered to start a week later on November 22, 2019 at 9am. Based on affidavits of official recount

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<sup>16</sup> Exhibit J – Central Counting Station Watcher Affidavit of Jeannette Hormuth

<sup>17</sup> Exhibit K – Central Counting Station Watcher Affidavit of Angela smith

<sup>18</sup> Exhibit L – Central Counting Station Watcher Affidavit of Robin Fleck

<sup>19</sup> Exhibit L2 – Central Counting Station Watcher Affidavit of Mr. Padraig O’Hara

<sup>20</sup> Exhibit L3 – Fredericksburg newspaper article reporting that central counting station tabulation activities occurred until 3:30am, November 6, 2019.

<sup>21</sup> Exhibit M – Recount Watcher Affidavit of Jeannette Hormuth

<sup>22</sup> Exhibit N – Recount Watcher Affidavit of Jerry Farley

<sup>23</sup> Exhibit O – Recount Watcher Affidavit of Dr. Laura Pressley

watchers, it appears that significant ballot handling activities occurred prior to the published start time and lacked transparency. When official watchers arrived at the Gillespie County elections office at 8:45am, the ballots were already prepared, grouped, sorted, and stacked in a sealed metal ballot box by numerically increasing precincts, with larger precincts grouped into even smaller batches. This suggests there were ballot handling activities associated with the recount that occurred prior to the official published recount start time of 9am. These ballot handling activities associated with the recount were not transparent to, or allowed to be monitored, by watchers as guaranteed by Tex. Elec. Code §§ [213.013\(h\)](#), [33.056\(b\)](#).

34. The election watcher provisions of Chapter 33 of the Texas Election Code ensure transparency of any election activities carried out by election officials and are mandatory election laws intended to prevent and detect fraud. There are criminal penalties for an official that knowingly prevents a watcher from observing the recount ballot handling activities, Tex. Elec. Code § [33.061](#) specifies, “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.

35. Ballot handling and tampering may have occurred illegally and outside the purview of watchers causing the recount results to not be entirely accurate.

36. Watchers report the recount was a hostile environment with additional obstructions such as the recount supervisor, Mayor Langerhans, not allowing watchers to sit or stand conveniently near the recount members while the recount commenced. These actions appear to be violations of Tex. Elec. Code §§ [213.013\(h\)](#) and [33.056\(b\)](#). These obstruction issues were resolved after intervention, via a phone call, by the Texas Secretary of State’s Election Division

Director, Ms. Christina Adkins.

### **E. Free Speech Was Violated by Unconstitutional City Ordinance and County Order**

37. The City of Fredericksburg's Sign Ordinance Chapter 29-5(11)<sup>24</sup> appears to unconstitutionally prevent the placement of political (content based) signs in the governmental public-right-of-way. This ordinance restricting free political speech had a dire impact on this Charter Amendment election and it was enforced by the City in violation of the Texas Constitution Article I Section 8 and First Amendment of the U.S. Constitution.

38. Additionally, the Gillespie County Commissioners' Court passed an order prohibiting all political signs on county property on February 12, 2018.<sup>25,26</sup> That county order was challenged as an unconstitutional violation of free speech<sup>27</sup> and a revision was adopted by the Gillespie County Commissioners on September 9, 2019.<sup>28</sup> The most recent Gillespie County Order prohibits the display of political signs at county polling locations, "signs may not be installed on or over county property by stakes in the ground, nails, tape, or any other method intended to temporarily affix the sign to county property."<sup>29</sup> The 2019 Order violates the First Amendment of the U.S. Constitution, the Texas Constitution [Article I Sec. 8](#), and the Tex. Elec. Code § [61.003](#) in which electioneering is permitted at county polling locations outside of 100 feet and "'Electioneering" includes the posting, use, or distribution of political signs or literature."

39. Limiting this type of election and political speech by the City and County prevents

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<sup>24</sup> Exhibit P – Code of Ordinances, City of Fredericksburg 29-5(11).

<sup>25</sup> Exhibit Q - Notice to Gillespie County candidates and Order prohibiting political signs on county property.

<sup>26</sup> Video of the Commissioner's Court meeting on February 12, 2018 regarding prohibiting posting political signs on county property: <https://www.youtube.com/watch?v=IDQQO4R2Avc&feature=youtu.be>

<sup>27</sup> Exhibit R – Letter from attorney, Tony McDonald, to Gillespie County Attorney requesting the county repeal their unconstitutional political sign prohibition order of February 12, 2018.

<sup>28</sup> Exhibit S - Order Regulating Temporary Signs on [Gillespie] County Property, September 9, 2019.

<sup>29</sup> *Id.*

voters from free expression, education, and exposure to election topics such as this Charter Amendment that challenge the City of Fredericksburg's and Gillespie County's status quo.

40. Prohibiting the display of election related material and signs for this Charter Amendment election were unconstitutional and violated the Texas. Election Code . The election was unconstitutionally and illegally negatively impacted to a degree that renders the official election results invalid. See U.S. Supreme Court *Reed, et. al v. Town of Gilbert Arizona, et.al.*

“Limiting speech based on its “topic” or “subject” favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth. See *Consolidated Edison Co. of N. Y. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 530, 537 (1980).”

“Whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual’s ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.”<sup>30</sup>

**F. Meeting the Standard of Tex. Elec. Code §§ 221.003, 221.001 and 221.012 - Declaring the True Outcome of the Election Cannot be Ascertained**

41. This Court may find that so many mistakes and illegalities occurred in the administration and tabulation of the Fredericksburg Charter Amendment election ballots that the true outcome of the election cannot be determined, and thus this Court may declare the Fredericksburg Charter Amendment election void. See Tex. Elec. Code §§ 221.011 and 221.012.

42. The table below summarizes the ballot counts and the impact the various issues detailed above have on the totals.

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<sup>30</sup> Exhibit T - *Reed, et. al v. Town of Gilbert Arizona, et.al*

	Initial Results	Recount Results	Subtracting all 401 unsigned Pct 4 ED ballots (-163 For's, -238 Against)
Total For	739	742	579
Total Against	1258	1261	1023
Delta Votes	519	519	444
<b>Ballot Issues:</b>			
1. 406 Pct 4 ED ballots - Legally insufficient because not signed by Presiding Judge (401 + 5 abstentions)			
2. 125 - 200 ballots appear to be missing from consecutive ballot analysis			
3. 16 - 20 ballots appear to be missing from recount (per audit logs)			
547 - 626 ballots legally insufficient, missing and/or in question			

43. After the recount, the Charter Amendment vote difference between the “For’s” and “No’s” is 519. Contestants contend that the 401 legally *insufficient* Election Day Precinct 4 ballots should be subtracted from the recount totals and thus the remaining legally *sufficient* recount ballot results are “For’s” at 579 and “No’s” at 1023. With the removal of the Precinct 4 Election Day votes, 444 is the remaining difference.

44. Unfortunately, there are 547 - 626 ballots in question that are legally insufficient and/or may be missing (see table above):

- 406 Precinct 4 Election Day ballots that are legally insufficient because they do not bear the signature or stamp of the Presiding Judge (401 + 5 abstentions),
- 125 – 200 ballots appear to be missing based on an analysis of consecutive ballot numbering, and
- 16 – 20 ballots appear to be missing from the recount (per the audit logs).

45. Contestants contend that these questionable ballots translate to 542 – 621 voters that may not have had their legal votes counted accurately - because of possible mistakes, illegalities, and or fraud committed by election officials - and thus the results of the Charter Amendment cannot be ascertained. Tex. Elec. Code § [221.003](#).

46. It is Contestants’ burden to show by clear and convincing evidence that the outcome shown by the final canvass was not the true outcome because illegal votes were counted

or an election officer prevented eligible voters from voting, failed to count legal votes, or engaged in other fraud, illegal conduct, or mistake. *McCurry v. Lewis*, 259 S.W.3d 369, 373 (Tex.App.-Amarillo 2008, no pet.); Tex. Elec. Code § 221.003(a). The outcome of the election is materially affected when a different and correct result would have been reached in the absence of irregularities in the conduct of the election rendered it impossible to determine the majority of the voters' will. *McMurry* at 373.

47. Additionally, to prevail in an election contest Contestants must offer clear and convincing evidence showing some violation of the Elections Code materially affected the outcome of the election. *Woods v. Legg*, 363 S.W.3d 710, 713 (Tex. App. — Houston [1st Dist.] 2011, no pet.); *Price v. Lewis*, 45 S.W.3d 215, 218 (Tex. App. — Houston [1st Dist.] 2001, no pet.); *Alvarez v. Espinoza*, 844 S.W.2d 238, 242 (Tex. App. — San Antonio 1992, writ dis'd). An election has been “materially affected” when a different and correct result would have been reached in the absence of Election Code violations. *Woods*, 363 S.W.3d at 713; *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 98 (Tex. App. — Dallas 2010, pet. denied).

48. The real root causes and resolutions of the potential Precinct 4 Election Day ballot illegalities - whether due to administrative errors or violations of the Election Code - are crucial for this Court to determine so that the true outcome of the election is known. The issues before this Court are of great importance in ensuring that elections in Gillespie County and in Texas are legally conducted, trustworthy, and verifiable.

49. Contestants assert that because of the enormity of these aforementioned ballot counting mistakes, illegal conduct and/or fraud in the administration, conduct, and tabulation of the Fredericksburg Charter Amendment election results, the reported results of the election cannot be verified.

50. Moreover, Contestants contend that once the Court finds, through clear and convincing evidence, the magnitude of votes that were illegally cast, missing, illegally or mistakenly counted by members of the Gillespie County Recount Team, the Court will conclude the true election results cannot be ascertained and the election will be declared void (Tex. Elec. Code § [221.012](#)) and a new election is ordered.

51. Contestants reserve the right to timely amend this original petition if additional evidence concerning the counting of votes, fraud, illegal conduct, or mistakes related to the contested election is discovered.

### **III. DISCOVERY AND PRODUCTION REQUESTS**

52. Pursuant to Texas Rule of Civil Procedure 194, Contestant requests, within 30 days of service of this request, that Contestee disclose and serve the information and material described in Rule 194.2.

53. Pursuant to Texas Rule of Civil Procedure 196, Contestants request that Contestee and the authority administering the election, the Gillespie County Elections Department, produce for inspection and copying either electronically or hard copies of all audit logs from the ES&S M650 optical scanner, voter history rolls, all contents of Early Voting and Election Day Presiding Judge envelopes, ballot registers, combination forms, spoiled ballots, Mail in requests by voters, any and all carrier envelopes, and all remaining unused ballots.

### **IV. CONDITIONS PRECEDENT**

54. All conditions precedent have been performed or have occurred

### **V. PRAYER**

55. Based on the foregoing, Contestants request that the Court ascertain the true



outcome of the contested election and declare the outcome void, or in the alternative, declare the contested election results cannot be ascertained and thus declare the Fredericksburg Charter Amendment election void and order Gillespie County Elections Department to conduct and administer a new election adhering to all Texas election laws.

56. Contestants also seek all other relief, in law and in equity, to which they may be entitled.

Respectfully Submitted,

/s/Roger Borgelt

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*Attorneys for Contestants*

**Certificate of Service**

The undersigned hereby certifies that a true and correct copy of this First Amended Contest has been served on Contestee named herein via the State of Texas e-filing system on this, the 13th day of January, 2020.

/s/Roger B. Borgelt  
Roger B. Borgelt