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Pro Se

IN THE SUPREME COURT FOR THE

STATE OF ARIZONA

Ryan L. Heath

Petitioner,

v.

Honorable Peter A. Thompson

Respondent,

Kari Lake, personally as Contestant/Plaintiff, Katie Hobbs, Contestee/Defendant personally and in her official capacity as Secretary of State; Stephen Richer, Defendant in his official capacity as Maricopa County Recorder; Bill Gates, Clint Hickman, Jack Sellers, Thomas Galvin, and Steve Gallardo, Defendants in their official capacities as members of the Maricopa County Board of Supervisors; Scott Jarrett, Defendant in his official capacity as Maricopa County Director of Elections; and the Maricopa County Board of Supervisors,

Real Parties in Interest.

Case No.: CV-23-0002
Maricopa County Superior Court
Case No. CV 2022-095403

PETITIONER'S MOTION FOR EXPEDITED HEARING RE: AMENDED WRIT OF VERIFIED SPECIAL ACTION PETITION FOR WRIT OF MANDAMUS

Petitioner, RYAN L. HEATH, respectfully moves this Honorable Court to grant an Expedited Hearing RE: Petitioner's Amended Verified Special Action for Writ of Mandamus.

1. On December 24, 2022, Honorable Peter A. Thompson issued his ruling denying Ms. Lake's election contest. Three days later, Ms. Lake filed notice of appeal.

2. On December 30, Ms. Lake filed a Petition for Special Action in the Arizona Court of Appeals, Division One, Case No. 1 CA-SA 22-0237. The next day, she filed a petition for transfer of her Petition for Special Action to this Honorable Court, *See* Pet., Case No. T-22-0010-CV (Ariz. Dec. 30, 2022).

3. This Court denied Ms. Lake's Petition on January 4, 2023. Order, Case No. T-22-0010-CV (Ariz. Jan. 4, 2022).

4. On January 9, 2022, the Arizona Court of Appeals, Division One, accepted jurisdiction over Ms. Lake's special action, consolidating the petition with her appeal, and setting forth a briefing schedule. Case No. 1 CA-CV 22-0779 (Jan. 9, 2022 Order).

5. Also on January 9, 2023, Petitioner initiated this Verified Special Action Petition for Writ of Mandamus. On January 12, 2023, Petitioner filed the Amended Verified Special Action Petition for Writ of Mandamus now before this Court. That same day, the undersigned notified Respondent along with the attorneys for all Real Parties in Interest by sending a copy of the Amended Verified Special Action (along with a flash drive containing each exhibit mentioned therein) via Certified Mail.

6. Petitioner has received no communications from this Court since January 12, 2023.

7. Pursuant to the briefing schedule set forth by the Arizona Court of Appeals, Case No. 1 CA-CV 22-0779 (Jan. 9, 2022 Order), Defendant Hobbs submitted her Answering Brief and Opposition to Special Action Petition on January 17, 2023.[1] The following attorneys appear on

[1] Attached hereto as Exhibit 9 and incorporated herein by this reference.

this filing: Alexis E. Danneman (Perkins Coie, LLP); and Abha Khanna, Lalitha D. Madduri, Christina Ford, and Elena Rodriguez Armenta (Elias Law Group, LLP).

8. Maricopa County Defendants (including Real Parties in Interest Stephen Richer, Bill Gates, Clint Hickman, Jack Sellers, Thomas Galvin, Steve Gallardo, Scott Jarrett and the Maricopa County Board of Supervisors) also submitted their Answering Brief on January 17, 2023.[2] Maricopa County's Attorneys as listed on their Brief are: Rachel H. Mitchell (Maricopa County Attorney); Thomas P. Liddy, Joseph J. Branco, Joseph E. La Rue, Karen J. Hartman-Tellez, Jack L. O'Connor, Sean M. Moore, Rosa Aguilar (Deputy Maricopa County Attorneys), and Emily Craiger (The Burgess Law Group).

9. The foregoing attorneys are hereby put on notice that, for the following reasons, bar complaints are forthcoming.

10. Importantly, the Maricopa County Answering Brief includes a Statement of Joinder, in which Maricopa County Defendants "join the Jurisdictional Statement, Statement of Facts, Statement of Issues, Legal Standard, and Argument sections in the brief filed by Governor [sic[3]] Katie Hobbs." *Id.* at 2. Thus, all Attorneys involved in Case No. 1 CA-CV 22-0779 are familiar with the cases cited within Defendant Hobbs's Answering Brief.

11. On the nineteenth page of her Answering Brief, Defendant Hobbs cites *Reyes v. Cuming*, 952 P.2d 329 (Ariz. Ct. App. 1997) and abjectly mischaracterizes the holding. Through counsel, Ms. Hobbs asserts that an election result is "'uncertain' where 'the absentee ballots counted in violation of [*state law*] indisputably changed the outcome of the election." (emphasis added,

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[2] Attached hereto as Exhibit 10 and incorporated herein by this reference.

[3] Petitioner refuses to address Ms. Hobbs using an honorific—to which she has no legitimate claim.

1 brackets original). This quotation is shocking for several reasons. Firstly, the language quoted
2 by Defendant Hobbs (and by the Maricopa County Defendants via their Statement of Joinder) is
3 obviously dicta. The holding in *Reyes* is plainly set forth in the preceding paragraph, which
4 explains that "[i]n the instant case, where a non-technical statute has been disregarded and
5 almost one-third of the ballots cast counted without compliance to A.R.S. section 16-550(A), the
6 trial court abuses its discretion by finding that the Recorder substantially complied with the
7 statute. To rule otherwise would 'affect the result *or at least render it uncertain*.'" *Id.* (quoting
8 *Miller v. Picacho Elementary School District No. 33*, 179 Ariz. 178, 180 (1994) (quoting
9 *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929))). Clearly, if "uncertainty" means "actual
10 impact," as asserted by Defendants, then the latter half of this sentence is superfluous.
11 Moreover, the same would be true for the introductory word from the sentence quoted by
12 Defendants, "furthermore" (clearly indicating that additional points supporting the court's
13 conclusion will follow, beyond those already addressed)—which Defendants conveniently
14 omitted from the quoted language. The plain import of *Reyes* is that a Ms. Lake may succeed by
15 showing Maricopa County tabulated votes in violation of a "non-technical" statute (which
16 Maricopa County cannot dispute), and that these votes (1) had an actual impact on the outcome
17 of the election, or (2) rendered the results uncertain. This makes sense, given that "*actual fraud*
18 *is not a necessary element*." *Id.* (*quoting Miller*, 197 Ariz. at 180). Indeed, the absence of
19 tangible evidence of fraud "is irrelevant." *Id.* Additionally, the bracketed changes to the original
20 quotation cannot be understood as anything but an obvious attempt by each of the
21 aforementioned attorneys to deceive the Court of Appeals—given that the original passage
22 explains that election results must be set aside for impermissible "uncertainty" or a measurable
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impact on the outcome where "the absentee ballots [are] counted in violation *of a non-technical statute* [(referring to A.R.S. § 16-550(A))]." *Reyes*, 952 P.2d at 332 (emphasis added). Here, Count III of Ms. Lake's original cause of action (the dismissal of which is also challenged by Ms. Lake on appeal) alleged that Maricopa County violated the "non-technical" requirements of A.R.S. § 16-550(A) and—during trial—Maricopa County officials admitted to doing so. In fact, the violation was pre-meditated. *See* Election Plan § 6.3.8. It is axiomatic that "election statutes are mandatory, not 'advisory,' *or else they would not be law at all*." *Id.* at 331 (quoting *Miller*, 179 Ariz. at 180). As explained by the Court in *Reyes*, if A.R.S. § 16-550(A) "unduly burdens election officials, the Recorder or other appropriate officials *may lobby the legislature to change it*; *until then it is the law*." *Id.* at 331-32 (emphasis added). Finally, rather than disclosing the indisputable adverse applicability of *Reyes* when addressing Count III—Defendants (and, more importantly, each of the abovementioned attorneys who are ethically bound to be candid toward the tribunal) wholly ignore this dispositive, binding authority. In short, Defendants (and their lawyers) wish to have their cake and eat it too.

12. To promote judicial efficiency, protect the People of Arizona from needless consequences stemming from the admitted, reckless disregard of clear "non-technical" statutory law by Maricopa County Defendants, to remove a tyrant from her illegitimate post, to fix Honorable Respondent's apparently honest mistake, and to prevent an obvious attempt to defraud the Judicial Branch of Arizona by Defendants (many of whom are also licensed attorneys in Arizona) and the attorneys mentioned above, Petitioner respectfully requests that this Honorable Court stay the proceedings in Case No. 1 CA-CV 22-0779 (Jan. 9, 2022 Order) and, instead, schedule an emergency hearing to decide this case on its merits as soon as possible.

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Better yet, Respondent is cordially invited to concede his mistake (although he was more likely deceived by the aforementioned attorneys), revoke his December 24, 2022, and act accordingly.

Dated: January 23, 2023

Respectfully Submitted,

By: /s/ RYAN L. HEATH

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VERIFICATION OF RYAN L. HEATH

Before me, the undersigned notary, on this day personally appeared Ryan L. Heath, the affiant, whose identity is known to me. After I administered the oath, affiant testified as follows:

1. My name is Ryan L. Heath. I am over eighteen (18) years of age, of sound mind, and capable of making this verification. I have read thoroughly the document to which this verification is attached, Motion for Expedited Hearing Re: Amended Verified Special Action Petition for Writ of Mandamus, as well as the exhibits attached to the document.
2. Unless stated upon information and belief, the facts stated and set forth in Petitioner's Motion for Expedited Hearing Re: Amended Verified Special Action Petition for Writ of Mandamus as well as all exhibits attached to the document are within my personal knowledge and are true and correct.

Further Affiant Sayeth Not.

Respectfully Submitted,

By: ______________________

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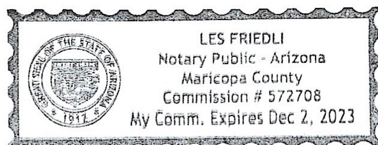
Subscribed to and sworn before me on this 23 day of January, 2023.



By: ______________________
Notary Public in and for the state of Arizona

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2023, I transmitted a true and accurate copies of the attached, Motion for Expedited Hearing Re: Amended Verified Special Action Petition for Writ of Mandamus, along with a copy of each Exhibit mentioned therein to the following individuals via certified, overnight mail:

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Exhibit 9

ARIZONA COURT OF APPEALS

DIVISION ONE

<table>
<tr><td>KARI LAKE,

Plaintiff/Appellant,

v.

KATIE HOBBS, et al.,

Defendants/Appellees.</td><td>Court of Appeals
Division One
No. 1 CA-CV 22-0779
No. 1 CA-SA 22-0237
(CONSOLIDATED)

Maricopa County
Superior Court
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<tr><td>KARI LAKE,

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v.

THE HONORABLE PETER THOMPSON, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

KATIE HOBBS, personally as Contestee and in her official capacity as Secretary of State; STEPHEN RICHER, in his official capacity as Maricopa County Recorder, et al.,

Real Parties in Interest.</td><td></td></tr>
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DEFENDANT-APPELLEE HOBBS'S ANSWERING BRIEF AND OPPOSITION TO SPECIAL ACTION PETITION

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January 17, 2023

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INTRODUCTION

Kari Lake lost the Governor's race to Katie Hobbs by 17,117 votes. In the face of this insurmountable margin, Lake brought a sprawling election contest, alleging an elaborate and nefarious scheme among (largely Republican) election officials to disenfranchise Republican voters, all to sow distrust in Arizona's election results. The trial court gave Lake the opportunity to prove her speculative allegations during a two-day trial. Despite seven witnesses, hundreds of declarants, and thousands of pages of exhibits, Lake failed to demonstrate *any* violations of Arizona law and offered *no* evidence that absent alleged violations the outcome of the election would have been different.

On appeal, Lake fares no better. The trial court applied the correct legal standard, rooted in more than 100 years of precedent, and rightly found that Lake failed to carry her heavy burden to overturn the election. The trial court also rightly found that Lake's other claims were barred by laches, fell outside Arizona's exclusive election contest statute, or otherwise failed to state a claim. Lake's arguments to the contrary depend on unsupported and untenable legal standards that would require elections to be thrown out upon mere speculation of election misconduct and conjecture regarding its supposed result. But Arizona law requires much more to disenfranchise millions of Arizonans. Given the "strong public policy favoring stability and finality of election results," *Donaghey v. Attorney General*,

120 Ariz. 93, 120 (1978), "nothing but the most credible, positive, and unequivocal evidence should be permitted to destroy the credit of official returns," *Hunt v. Campbell*, 19 Ariz. 254, 271 (1917). Lake fell far short of such a showing. Indeed, Lake's own witnesses admitted having no knowledge of any election misconduct or the number of votes that may have been affected by alleged misconduct.

The trial court thus correctly dismissed Lake's claims and confirmed the election of Governor Katie Hobbs. This Court should affirm.

JURISDICTIONAL STATEMENT

On January 9, 2023, this Court accepted special action jurisdiction.[1]

STATEMENT OF FACTS

I. Voters in Maricopa County had ample opportunity to cast ballots.

Voters in Maricopa County had numerous opportunities to vote in the November 2022 election. Early ballots were mailed to voters almost four weeks before the election, A.R.S. § 16-542(C), and many vote centers provided in-person

[1] For preservation, Governor Hobbs maintains that special action jurisdiction is inappropriate in this case, as Lake has an "equally plain, speedy, and adequate remedy" available through the normal appellate process. *Harris Tr. Bank of Ariz. v. Super. Ct. in & for Cnty. Of Maricopa*, 188 Ariz. 159, 162 (App. 1996); Rule 1(a), Arizona Rules of Procedure for Special Actions. By waiting until the eve of Governor Hobbs's swearing in to pursue appellate relief, *see infra* Statement of Facts § V, Lake failed to establish the "extraordinary circumstances" necessary to overcome the "strong Arizona policy against using [special actions] as substitutes for appeals," *Harris*, 188 Ariz. at 162; *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 76 (1990).

early vote options beginning at the same time, Lake Appendix to Special Action Petition:706 ("Lake.App."). Over 1.3 million voters cast their ballots early using these options. Lake.App.:478 (2 Tr. 77:13-15 (Baris)). On election day, voters could vote from 6 a.m. to 7 p.m. at any of Maricopa's 223 vote centers, which were an average distance of less than 1.8 miles apart. A.R.S. § 16-565; Lake.App.:706, 573-74 (2 Tr. 172:21-173:4 (Jarrett)). About 248,000 voters chose this option, approximately matching Maricopa County's projection for election day voters. Lake.App.:158 (1 Tr. 61:1-21 (Jarrett)). Throughout election day, Maricopa County tracked wait times at each vote center and published them on the County's website, allowing voters to see current times and opt for nearby vote centers with short wait times. Lake.App.:163-65 (1 Tr. 66:7-68:23 (Jarrett); Lake.App.:578 (2 Tr. 177:11-25 (Jarrett)).

II. Election day printer and tabulator issues in Maricopa County were resolved throughout the day and did not prevent any voter from casting their ballot.

Arizona law does not require on-site tabulation of ballots cast in-person on election day. But about half of Arizona counties, including Maricopa, tabulate election day ballots at the voting center itself where possible. Lake.App.:585-87 (2 Tr. 184:9-186:23 (Jarrett)). Other counties, including some of Arizona's largest counties like Pima and Pinal, tabulate all election day ballots at a central county location. *Id.*

On election day in Maricopa County, voters at some vote centers at certain times were unable to have their ballots tabulated on site. Lake.App.:579-80 (2 Tr. 178:23-179:1 (Jarrett)). When this occurred, voters had multiple options, including placing their ballots into a secure drop box "Door 3," where ballots were collected and later counted at the Maricopa County Tabulation and Election Center (MCTEC). Lake.App.:585-87 (2 Tr. 184:9-186:23 (Jarrett)). Voters could also spoil their ballot and vote a new ballot at the same voting location or any of Maricopa's other voting centers. *Id.* If on-site tabulators could not read a ballot, the ballot was later duplicated by bipartisan boards and tabulated at MCTEC. Lake.App.:582-83 (2 Tr. 181:18-182:7 (Jarrett)). Thus, every ballot that was initially unable to be tabulated was ultimately counted. *Id.* Lake offered no evidence to the contrary. *See* Lake.App.:223 (1 Tr. 126:2-8, 126:15-22 (Parikh)) (agreeing that any ballots that could not be read on-site would be duplicated and tabulated). Indeed, Lake's witnesses could not identify a single voter who was unable to vote because of tabulator issues. *See, e.g.*, Lake.App.:354-55 (1 Tr. 257:24-258:11 (Bettencourt)) (no knowledge of anyone deciding not to vote because of tabulator issue); Lake.App.:373-74 (1 Tr. 276:12-19, 276:20-22, 277:5-14 (Sonnenklar)) (no personal knowledge of any voter leaving a line because of tabulator issues).

When tabulator issues arose on election day, Maricopa County immediately deployed multiple resources to resolve them: (1) 90 temporary technicians hired to

troubleshoot technical issues; (2) employees from the tabulator company; and (3) employees from the ballot-on-demand printer companies. Lake.App.:585-87 (2 Tr. 184:9-186:23 (Jarrett)). These teams and the County identified a variety of solutions—none of which demonstrated misconduct on the part of Maricopa election officials or anyone else. One of the most successful interventions on election day was to shake printer cartridges. Lake.App.:350-51 (1 Tr. 253:18-254:8 (Bettencourt)). Another was to change printer settings. *Id.*; Lake.App.:580 (2 Tr. 179:2-13 (Jarrett)) (describing printer heat setting issue). Another was to clean printer wires. Lake.App.:352 (1 Tr. 255:10-17 (Bettencourt)). Yet another solution was allowing printers to warm up and changing ink settings. Lake.App.:719-20. At three voting centers, technicians apparently altered printer settings to "shrink-to-fit" while attempting to resolve printer issues, resulting in slightly smaller images for 1,300 ballots, which tabulators could not read on-site. Lake.App.:581, 618 (2 Tr. 180:1-23, 217:20-25 (Jarrett)). In other cases, nothing was wrong with printers or tabulators at all; instead, a voter's markings were too light or misshapen, rendering ballots unreadable by tabulators. Lake.App.:356 (1 Tr. 259:13-21 (Bettencourt)); Lake.App.:582-83 (2 Tr. 181:18-182:7 (Jarrett)) (10% of Door 3 ballots were the result of the voter's markings). The County's diligent efforts to resolve issues and

the varied, successful solutions contradict any speculation that Maricopa engaged in coordinated misconduct to undermine election day voting.[2]

Unsurprisingly, no witness offered any evidence of any intentional misconduct. *See, e.g.,* Lake.App.:689 ("Every single witness before the Court disclaimed personal knowledge of such misconduct."); Lake.App.:355-56, 358 (1 Tr. 258:22-259:4, 261:1-5 (Bettencourt)) (no knowledge of any technician who caused printer or tabulator issues or of intentional scheme to undermine election); Lake.App.:487 (2 Tr. 86:5-9 (Baris)) (no knowledge of anyone intentionally tampering with printers or tabulators); Lake.App.:171-72 (1 Tr. 74:18-75:10 (Jarrett)) (no knowledge of any tampering with printers or tabulators); *see also* Lake.App.:213 (1 Tr. 116:5-9 (Parikh)) (no evidence of hacking); Lake.App.:375, 377-78 (1 Tr. 278:5-17, 280:6-281:9 (Sonnenklar)) (relying on "common sense" as proof of misconduct while admitting he did not "know exactly what caused the problem"). As one elections expert testified, tabulator issues are among the most common unforeseen equipment malfunctions in elections. Lake.App.:520 (2 Tr. 119:3-9 (Mayer)).

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[2] Although Lake repeatedly argues ballots were "illegally misconfigured" systemwide, *see, e.g.,* Br. at 9, there was no evidence at trial that ballot definitions were improperly programmed in Maricopa's Election Management System (EMS). As the trial court rightly observed, "if the ballot definitions were changed, it stands to reason that *every* ballot for that particular definition printed on every machine so affected would be printed incorrectly," Lake.App.:687, which did not occur.

As in every election, some voters experienced long lines on election day. Lines arose for multiple reasons, including but not limited to tabulator issues. Lake.App.:353 (1 Tr. 256:19-25 (Bettencourt)) (describing lines prior to tabulator issues). Multiple witnesses testified regarding line lengths, but even Lake's evidence showed that only 64 of Maricopa's 223 vote centers experienced long lines, and that after 3pm on election day, only 24 of 223 had long lines. Lake.App.:371-73 (1 Tr. 274:24-275:7, 276:4-8 (Sonnenklar)). Maricopa's own systematic cataloging of lines aligns with Lake's evidence of scattered long lines. According to Maricopa's data, only 7% of vote centers had maximum wait times over an hour and 72% had maximum wait times of 30 minutes or less. Lake.App.:520 (2 Tr. 119:3-9 (Mayer)). And of course, voters could check live wait times online and choose to visit any of Maricopa's 223 vote centers.

No witness offered evidence that a specific number of voters were prevented from voting because of tabulator issues. All Lake offered was her purported expert, Mr. Baris, who speculated that had voter turnout been higher, Governor Hobbs *could have won* by 2,000 votes or lost by 4,000 votes. Lake.App.:438-39 (2 Tr. 37:20-38:3 (Baris)). Mr. Baris himself admitted that his analysis offered no evidence of whether anyone was unable to vote or even deterred from voting because of tabulator issues or long lines, Lake.App.:453, 456 (2 Tr. 52:3-9, 55:13-15, 59:5-10 (Baris)). Thus, the trial record provides no evidence that tabulator issues on election day resulted in

the disenfranchisement of *any* voters, let alone an outcome-determinative number of voters.

III. Maricopa County lawfully maintained chain of custody.

Maricopa adhered to all applicable chain of custody laws for 2022 general election ballots—including for early ballots received on election day, the only ballots for which Lake claims on appeal that Maricopa failed to maintain chain of custody. *See* Br. at 33.

Arizona Chain of Custody Laws. A.R.S. § 16-621(E) provides that the "officer in charge of elections" must "maintain records that record the chain of custody for all … ballots during early voting through the completion of provisional voting tabulation." The EPM in turn provides more detailed guidance regarding the procedures that must be followed for early ballots, including those received on election day. *See* Hobbs.App.:80-81, 86-87 (Ariz. Sec'y of State, 2019 Elections Procedures Manual ("EPM") (rev. Dec. 2019), at 61-62, 192-93).[3] The only specific chain of custody paperwork for early ballots required by Arizona law is a generic "retrieval form," which must be "attached to the outside of the secure ballot container or otherwise maintained in a manner prescribed by elections officials that ensures the form is traceable to its respective secure ballot container." *See*

[3] The EPM is available at https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

Hobbs.App.:81 (EPM at 62). Early ballots do not need to be counted at any specific time if they "are transported in a secure and sealed transport container to the central counting place to be counted there." Hobbs.App.:86-87 (EPM at 192-93). Arizona law does not require election officials to provide counts of early ballots to the public at any specific time. *See generally* EPM.

Maricopa Chain of Custody Process. Early ballots received on election day follow a regimented, documented procedure from submission to counting. These ballots are tracked using precinct ballot reports and receipt of delivery forms. *See* Lake.App.:593-95 (2 Tr. 192:10-194:2 (Jarrett)); Hobbs.App.:89-131, 132-61 . After the close of polls, early ballots received on election day are placed in securely sealed "blue boxes" at voting locations, and poll workers prepare precinct ballot reports documenting tamper-evident seal information for each box. Lake.App.:594-95 (2 Tr. 193:19-24, 194:9-25) (Jarrett)). Consistent with the EPM, Maricopa does not document the specific number of early ballots at this time because the "ballots are transported in a secure and sealed transport container to [MCTEC]." Lake.App.:597 (2 Tr. 196:10-20) (Jarrett)); Hobbs.App.:87 (EPM at 193).

Once the containers are delivered to MCTEC, bipartisan teams receive them, complete further chain-of-custody documents, scan the containers' barcodes, open the containers, and sort contents by ballot type. Lake.App.:597-98 (2 Tr. 196:24-197:20, 198:9-25 (Jarrett)). Sorted ballots are loaded into trays in secure cages, and

an estimate of ballots is derived based on the number of trays, Lake.App.:599-600 (2 Tr. 198:22-199:4 (Jarrett)), consistent with the EPM's requirements to count ballots upon their arrival at MCTEC, Hobbs.App.:81, 87 (EPM at 62, 193). These estimates are recorded on "Inbound Receipt of Delivery" forms. Hobbs.App.:89-131.[4]

The secure ballot cages are then transported by a bipartisan team to Runbeck Election Services—Maricopa's "best-in-class" vendor—and received by a bipartisan team of county employees, who remain with the ballots at Runbeck, where ballot envelopes are scanned and counted before being returned to MCTEC for verification and tabulation. Lake.App.:601 (2 Tr. 200:12-13) (Jarrett)). Upon arrival at Runbeck, one member of the bipartisan team—a permanent county employee—photographs and documents chain of custody forms, and emails copies to Directors Jarrett and Valenzuela, and other election officials. Lake.App.:600, 601 (2 Tr. 199:5-13, 200:12-13 (Jarrett)); Hobbs.App.:89-131. The other team member signs Inbound Receipt of Delivery forms, documenting receipt of the secure cages at Runbeck. Lake.App.:605 (2 Tr. 204:4-20 (Jarrett)); Hobbs.App.:89-131. Then, "[u]nder the direct supervision and observation of Maricopa County employees," the ballot

[4] Contrary to Lake's contention on appeal, Br. at 17-18, Lake's own lay witness Heather Honey admitted knowing that the required chain of custody documentation exists, claiming only that she did not receive these forms in response to her public records requests. Lake.App.:277, 310-11 (1 Tr. 180:15-16, 213:15-214:7 (Honey)).

envelopes are scanned and counted, and this information is recorded by Maricopa employees on Incoming Scan Receipts. Lake.App.:601 (2 Tr. 200:12-16 (Jarrett)); Hobbs.App.:132-61. Through this process, Maricopa "maintain[s] chain of custody for every one of those early ballots all the way through the process[,]" such that the County would be aware of any ballot "inserted or rejected or lost" in any part of the process. Lake.App.:601 (2 Tr. 200:18-24 (Jarrett)).[5]

Estimated Final Count of Early Ballots. The day after election day, Maricopa officials publicly estimated that "over 275,000" early ballots had been received on election day. Hobbs.App.:234-35; Lake.App.:126 (1 Tr. 29:19-22 (Richer)). After the county completed its counting process, the final number was about 290,000. Lake.App.607 (2 Tr. 206:7-13 (Jarrett)).

IV. Maricopa County lawfully verified signatures of early ballots.

Maricopa's specific procedures for signature verification were published six months before the 2022 general election, Hobbs.App.:49 (2022 Maricopa Elections Plan at 45), and comply with all relevant statutory requirements and the EPM.

[5] A non-witness declarant claimed that she observed Runbeck employees adding at most about 50 ballot envelopes from family members into the pool of early ballots at Runbeck. Lake.App.:75-78, 318, 331-32 (1 Tr. 221:17-22, 234:1-235:8 (Honey)). This alleged introduction of ballots was not authorized by Maricopa County, and no Maricopa election official testified that they knew of such conduct. Lake.App.:563 (2 Tr. 162:10-16 (Valenzuela)).

In Arizona, early ballot voters must return their ballots with a signed affidavit. *See* A.R.S. §§ 16-545, 16-547. Once received, the county recorder or other designated election official "shall compare the signatures" on early ballots "with the signature of the elector on the elector's registration record" to verify that the ballot returned was cast by the voter associated with that ballot. *See id.* § 16-550(A). Pursuant to the EPM, election officials should consult the voter's registration form and "additional known signatures from other official election documents in the voter's registration record." Hobbs.App.:83 (EPM at 68). If the signature does not match a voter's known signatures, election officials must allow "the voter to correct or the county to confirm the inconsistent signature" within five business days after a general election. *Id; see also* A.R.S. § 16-550(A).

Maricopa has a multi-level signature verification process to review all mail-in ballot signatures. First-level reviewers, who have access to only a limited number of signatures in a voter's registration record, are tasked with flagging potential signature mismatches for manager-level review and decision-making. Hobbs.App.:49 (2022 Maricopa Elections Plan at 45). Lake offered the declarations of three first-level signature verification workers, all of whom admitted being the "most inexperienced" signature reviewers. *See* Hobbs.App.:163. These declarants collectively claimed that they had flagged for further review 15-40% of the signatures they reviewed, and that ultimately many of those initially flagged ballot

envelopes were accepted, Hobbs.App.:165-66, 173, 181—precisely as contemplated by Maricopa's Election Plan's multiphase signature verification process.

V. The trial court confirmed Governor Hobbs's election, and Lake delayed prosecuting her appeal.

On December 5, 2022, state officials certified the Governor's election for Katie Hobbs. Lake filed her complaint on December 9, Lake.App.:1, the last date for filing an election contest, see A.R.S. § 16-673(A). Defendants filed motions to dismiss the contest on December 15, which were then fully briefed. The trial court heard oral argument on the motions on December 19, after which it dismissed all claims other than Counts II (tabulator issues) and IV (chain of custody). Lake.App.:85-97. A trial was held on those claims on December 21 and 22. Lake.App.:682.

On December 24, 2022, the trial court issued its ruling denying Lake's election contest. Lake.App.:682-691. Lake filed her appeal three days later, on December 27, after the trial court entered final judgment. Index of Record (I.R.), Case No. CV2022-095403, Index of Record (Ariz. Super. Ct. Dec. 27, 2022), No. 196. Lake took no action to accelerate her appeal. *See* Ariz. R. App. P. 29. Instead, she waited until 9 p.m. on Friday, December 30 (when the Court was closed for the holiday weekend) before filing, separately, her petition for special action in this Court, Case No. 1 CA-SA 22-0237, and, the next day, a petition for transfer of her special action in the Arizona Supreme Court, *see* Pet., Case No. T-22-0010-CV

(Ariz. Dec. 30, 2022), despite the fact that she could have filed her special action directly in the state's highest court. Ariz. R.P. Spec. Act. 4(a).

On January 2, 2023, Katie Hobbs was sworn in as Governor of Arizona.

The Arizona Supreme Court denied Lake's petition on January 4, 2023. Order, Case No. T-22-0010-CV (Ariz. Jan. 4, 2022). On January 9, this Court issued an order exercising jurisdiction over Lake's special action, consolidating Lake's special action with her appeal, and setting forth a briefing schedule. Case No. 1 CA-CV 22-0779 (Jan. 9, 2022 Order).

STATEMENT OF THE ISSUES

I. Did the trial court err in declining to vacate the election results and require a new election where Lake failed to show an outcome-determinative number of votes were affected by misconduct or illegal votes?

II. Did the trial court err in declining to consider claims that Lake could have brought before the election?

III. Did the trial court err in declining to consider claims brought outside the election contest statute?

LEGAL STANDARD

This Court reviews legal questions, including the interpretation of rules and statutes, *de novo*. *Pima Cnty. v. Pima Cnty. L. Enf't Merit Sys. Council*, 211 Ariz. 224, 227, ¶ 13 (2005). The Court must defer to the trial court's findings of fact unless

clearly erroneous. *Shooter v. Farmer*, 235 Ariz. 199, 201, ¶ 4 (2014). Trial courts are tasked with "weigh[ing] the evidence and resolv[ing] any conflicting facts, expert opinions, *and inferences therefrom*." *Id*. (internal citation omitted). Such determinations should not be reversed absent clear error.

For mixed questions of law and fact, this Court may "draw [its] own conclusions of law from the facts found by the trial court," *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc*., 167 Ariz. 254, 257 (1991), but contrary to Lake's suggestion, this Court must defer to the trial court's determination of disputed facts. *Miller v. Indus. Comm'n of Ariz.*, 240 Ariz. 257, 259, ¶ 9 (App. 2016).

Given the "strong public policy favoring stability and finality of election results," *Donaghey*, 120 Ariz. at 95, this Court, like the trial court, is bound by three important presumptions in evaluating election contests: First, Arizona courts apply "all reasonable presumptions" in "favor [of] the validity of an election." *Moore v. City of Page*, 148 Ariz. 151, 159 (App. 1986). Second, there is a presumption "in favor of the good faith and honesty of the members of the election board." *Hunt*, 19 Ariz. at 268. Third, courts must presume the "returns of the election officers are prima facie correct." *Id.* As the Arizona Supreme Court has explained, vacating an election and requiring a new one imposes significant burdens on the electorate. *See Huggins*, 163 Ariz. at 351-52. And because "a second election" "may prove no better than the first," *see id.* at 351, the burden to establish entitlement to a new election is

extraordinarily high. For the reasons explained below, the trial court correctly concluded that Lake did not meet that burden.

ARGUMENT

The trial court did not err in finding that Lake's contest fails at every level. *First*, the trial court applied the correct legal standard, requiring Lake to show by clear and convincing evidence that absent intentional misconduct by Maricopa election officials, Lake would have won. *Second*, Lake failed to show—by any legal standard—that Maricopa election officials committed any misconduct related to tabulators (Count II) or chain of custody (Count IV) or that any alleged misconduct would have altered the outcome of the election. *Third*, the trial court did not abuse its discretion in finding that laches bars Lake's signature matching claim (Count III), which otherwise fails as a matter of law. *Fourth*, the trial court did not err in dismissing claims brought outside Arizona's election contest statute (Counts V and VI), which also fail as a matter of law. None of Lake's arguments are sufficient to warrant the extraordinary relief of overturning Arizona's gubernatorial election and disenfranchising millions of Arizona voters.

I. The trial court did not err in declining to vacate the election.

A. The trial court applied the correct legal standard in rejecting Counts II and IV of Lake's complaint.

Lake asks this Court to declare that a contestant is entitled to vacate election results as long as she can show, by a preponderance of the evidence, that an honest

mistake of an election official caused some "nonquantifiable" impact on the election. *See* Br. at 22-29. That standard bears *no resemblance* to the election contest standard Arizona courts use, and for good reason. Under Lake's preferred standard, elections would be routinely nullified where unforeseen and unintentional technical issues occurred in some places affecting some number of voters. This approach not only has no basis in practice or precedent, it runs counter to Arizona's longstanding presumption in favor of the validity of elections. As explained below, the trial court properly required Lake to prove by clear and convincing evidence that, but for alleged misconduct or illegal votes, the election result would have been different. Because Lake failed to do this, *see infra* Argument §§ I(B)-(C), the trial court appropriately dismissed Lake's contest.

1. The trial court properly required Lake to show that misconduct or illegal votes affected an outcome-determinative number of votes.

Election contests in Arizona are subject to a straightforward standard: To set aside the election, the contestant must show either (1) fraud or (2) that but for actual misconduct or illegal votes, "the result would have been different." *Moore*, 148 Ariz. at 159. While cases involving fraud do not require definitively proving the outcome would be different, Lake expressly disclaimed any claim of fraud here. Hobbs.App.:190-91.

Lake inexplicably relies on Arizona's quintessential election fraud case—*Hunt v. Campbell*, 19 Ariz. 254 (1917)—to argue she need not quantify the impact of misconduct or show the result of the election was affected. *See* Br. at 28-29. But *Hunt* provides that where "*fraudulent combinations, coercion, and intimidation*" are at play, the effect often "cannot be arithmetically computed" and thus need not be proven in such cases (although the fraud itself must be established by "clear and satisfactory proof"). *Hunt*, 19 Ariz. at 265, 268 (emphasis added). Where Lake has not only failed to satisfy the heightened pleading standard for fraud, Lake.App.:90, but also specifically *disclaimed* fraud, Hobbs.App.:190-91, she cannot capitalize off the legal standard for election fraud claims.

Nor does *Huggins v. Superior Ct. In & For Cnty. of Navajo*, 163 Ariz. 348 (1990), relieve Lake of the obligation to show a quantifiable impact on election results. *See* Br. at 28. *Huggins* merely relieved contestants of the burden to prove *for which candidate* the alleged illegal ballots were cast. *Id.* at 350. *Huggins* still required contestants to show that an outcome-determinative number of illegal votes changed the election result via a "a proportionate, precinct-by-precinct extraction of the illegal votes." *Id.* at 352. Indeed, in *Huggins*, the election result stood even though the contestant proved 16 illegal votes in an 8-vote margin race. *Id.* at 353-54. In that case, the contestant's proof of illegal votes was insufficient for relief

where he could not also establish that they affected the outcome of the election. *Id.* at 353.

Lake latches onto the language of *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929), that an election contest may succeed if the contestant can prove that the result is "uncertain" in light of proven misconduct. But the Court has since explained that "uncertainty" in the elections contest context means that the errors were of such magnitude that they would have changed the outcome of the election. *See Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994) (en banc) (holding election result rendered "uncertain" where illegal ballots were procured "in sufficient numbers to alter the outcome of the election"); *see also Reyes v. Cuming*, 191 Ariz. 91, 94 (App. 1997) (holding election result rendered "uncertain" where "the absentee ballots counted in violation of [state law] indisputably changed the outcome of the election"). The result is not rendered "uncertain" anytime a contestant speculates what might have happened in flawless election. Such a standard would catapult nearly all elections into an election contest, violating Arizona's presumption in favor of the validity of elections.

For all the reasons discussed *infra* Argument §§ I(B)(2), I(C)(2), Lake failed to show that the alleged misconduct she claims actually affected the election result.

2. The trial court properly required Lake to show intentional misconduct.

The trial court did not err in requiring Lake to show that the errors she claims occurred were the result of intentional action by election officials. The "good faith and honesty" of election officials must be presumed. *Hunt*, 19 Ariz. at 268. And as the Arizona Supreme Court has explained, "unless the [claimed] error or irregularity goes to the honesty of the election itself, it will be generally disregarded." *Findley*, 35 Ariz. at 270. Consistent with *Findley*, more recent case law demonstrates what actionable misconduct looks like. In *Miller*, for example, governmental officials went to the homes of electors and personally distributed absentee ballots in violation of statute, and "stood beside them as they voted." 179 Ariz. at 180. Such patently improper behavior, which was proven to affect the election results, *see id.*, was sufficient to establish misconduct. Mere mistakes alone, by contrast, do not state a claim for misconduct. *Cf. State v. Lapan*, 249 Ariz. 540, 549, ¶ 25 (App. 2020) (describing misconduct as "'intentional conduct [that] the [person] knows to be improper and prejudicial'" (citation omitted)).[6] In any event, as explained *infra* Argument §§ I(B)(1), I(C)(1), Lake failed to establish any misconduct—intentional, negligent, or otherwise.

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[6] That Arizona may recognize the concept of "negligent misconduct" in the context of attorney professional responsibility, *see* Br. at 26 (citing *In re Alexander*, 232 Ariz. 1, 13-14, ¶ 52 (2013)), is not probative in the elections contest context and does not change this analysis.

3. The trial court properly required Lake to prove her claims by clear and convincing evidence.

Lake's argument that she need only prove her claims by a preponderance of the evidence, *see* Br. at 23-26, ignores not only the well-established presumptions in favor of the validity of the election, but also a wealth of caselaw imposing a higher burden on contestants.

Tellingly, Lake does not cite a single election contest case applying a preponderance of the evidence standard. To Governor Hobbs's knowledge, no such case exists. Instead, courts regularly require contestants to establish their claims with a higher degree of proof. *See, e.g.*, *Oakes v. Finlay*, 5 Ariz. 390, 398 (1898) (deeming it "unwise to lay down any rule by which the certainty and accuracy of an election may be jeopardized by the reliance upon any proof affecting such results that is not of the most clear and conclusive character"); *Hunt*, 19 Ariz. at 271 (holding "nothing but the most credible, positive, and unequivocal evidence should be permitted to destroy the credit of official returns"); *see also Law v. Whitmer*, 477 P.3d 1124 (Nev. 2020) (holding that district court did not err by requiring "clear and convincing evidence" in election contest and collecting cases from other jurisdictions which have held similarly).[7]

[7] Contrary to Lake's contention, Br. at 25, *Miller* does not change the burden of proof in misconduct cases; it simply elaborates the *substance of the allegations* that must

Lake is also wrong to suggest that Defendants have any burden of proof in this case. Where she alleges misconduct, the burden remains on Lake to prove her claims. *See, e.g., Moore*, 148 Ariz. at 165-66 (refusing to shift burden of proof to city "to uphold the results of the election"). This makes sense: "The burden of proof in an election contest falls on the [contestant,]" as "all reasonable presumptions must favor the validity of an election." *Id.* at 159 (citation omitted).

Lake's attempt to lessen the burden to upend an election is hardly surprising given the lack of evidence offered in support of her claims. In any event, it does not move the needle; as explained below, Lake's evidentiary showing falls short under any legal standard, and thus the trial court properly dismissed Lake's contest.

B. The trial court did not err in holding Lake failed to prove Count II.

The trial court did not clearly err in finding that Lake failed to show any misconduct, however defined, in relation to printers and tabulators on election day or that any purported misconduct affected the outcome of the election.

1. Lake did not prove any misconduct occurred in relation to printers and tabulators on election day.

On appeal, Lake identifies just two purported instances of "misconduct" with regard to printers and tabulators: (1) that Maricopa failed to test voting equipment,

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be proven in such a case, which, notably, includes that the misconduct "affected [the result of] the election." *Id.* (quoting *Miller*, 179 Ariz. at 180).

and (2) that Director Jarrett allowed "misconfigured ballots to be injected into the 2022 general election." Br. at 29-30. Neither claim finds any support in the record.

First, contrary to Lake's assertion, all of Maricopa's voting equipment was lawfully tested and certified years ago.[8] Director Jarrett also confirmed that the printers and tabulators used at voting centers were successfully tested in the weeks leading up to election day and did not reveal any of the issues that arose on election day. Lake.App.:149-50 (1 Tr. 52:17-53:4 (Jarrett)) (Maricopa printers were successfully tested, including through tabulation by vote center tabulators); Lake.App.:580 (2 Tr. 179:2-25 (Jarrett)) (the printer heat settings used on election day were used in testing without issue); Lake.App.:611-12 (2 Tr. 210:20-211:16 (Jarrett)) (printer testing did not show any ballot size issue). Lake offers no contrary evidence. Instead, her argument boils down to the untenable proposition that whenever a machine fails, testing must not have been conducted. *See* Br. at 30 ("Had such logic and accuracy testing been done such widespread failures could not have occurred."). Under any standard, Lake's unsupported inference of misconduct does not amount to actual proof of misconduct.

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[8] *See* SOS's official list of voting equipment certifications: https://azsos.gov/sites/default/files/2020.07.22_Official_List.pdf (last accessed January 15, 2023). Had there been any failure to test voting equipment, such a claim is barred by the doctrine of laches. All testing occurred months, if not years, before the 2022 general election, and any "alleged procedural violations" of those processes must have been challenged "prior to the actual election." *Sherman v. City of Tempe*, 202 Ariz. 339, 342, ¶ 9 (2002).

Second, Lake can point to no evidence that Maricopa County officials "misconfigured" ballots. Director Jarrett's trial testimony was consistent: He testified that no 19-inch configuration was programmed into Maricopa's Election Management System (EMS), Lake.App.:171 (1 Tr. 74:4-16 (Jarrett)), and separately, that three vote centers appear to have had their individual printer settings changed on election day to "shrink-to-fit," most likely as a result of troubleshooting tactics that technicians used at 1% of all vote centers, Lake.App.:581 (2 Tr. 180:1-23 (Jarrett)). As the trial court rightly observed, had ballot definitions been changed systemwide, every ballot should have been printed on the wrong size, which Lake's own expert did not find. Lake.App.:687, 188-89, 191-93 (1 Tr. 91:24-92:1; 94:5-8; 94:12-95:4; 96:9-22 (Parikh)). Indeed, Mr. Parikh admitted that a shrink-to-fit setting could have accounted for the ballots he believed to be 19 inches in size. Lake.App.:222 (1 Tr. 125:6-9 (Parikh)).[9] Additionally, the fact that numerous and varied strategies resolved issues on election day demonstrates that there was no singular cause for the issues that arose. *See supra* Statement of Facts § II; Lake.App.:687-88. In fact, every one of Lake's own witnesses disclaimed any

[9] While Lake repeatedly claims that her expert, Mr. Parikh, found incorrectly sized ballots from each of the six voting centers' ballots he reviewed, *see, e.g.,* Br. at 31, Mr. Parikh stated only that he *requested* ballots from six centers and that 48 of 113 spoiled ballots and original ballots appeared to have been smaller than 20 inches, as were 14 of 15 duplicated ballots. Lake.App.:188-89, 191-193 (1 Tr. 91:24-92:1, 94:5-8, 94:12-95:4, 96:9-22 (Parikh)).

knowledge of intentional misconduct, and one of Lake's technical witnesses testified the issues were the result of unforeseen mechanical failures. Lake.App.:687-88; *see supra* Statement of Facts § II.

Ultimately, Lake identifies no factual basis to disturb the presumption of "good faith and honesty" of election officials, *Hunt*, 19 Ariz. at 268. To the contrary, all the evidence, including from Lake's own witnesses, shows that Maricopa worked in good faith to prevent and resolve technical issues on election day. *See supra* Statement of Facts § II. Because Lake's cries of foul play ring hollow, the trial court did not err in finding no misconduct.

2. Lake failed to show that an outcome determinative number of voters were disenfranchised.

Even if Lake had established misconduct, she must also show that but for that misconduct, "the result would have been different." *Moore*, 148 Ariz. at 159. Lake failed to do so. As an initial matter, Lake makes no claim that printer or tabulator issues caused any illegal votes to be cast. There is also no dispute that any voter who encountered a tabulator issue ultimately had their vote counted—Lake's own expert confirmed this. *See, e.g.,* Lake.App.:226-27 (1 Tr. 129:24-130:2 (Parikh)). Indeed, not one of Lake's witnesses identified a single voter who was unable to vote because of tabulator issues or long lines. *Supra* Statement of Facts § II. And of the hundreds of voter declarations Lake submitted, only one voter said they *chose* not to vote because of long lines. *See, e.g.,* Lake.App.:26-27. Thus, the trial court did not clearly

err in finding that "the actual impact element. . *.could not be proven.*" Lake.App.:687.

To close the 17,000-plus vote gap, Lake speculates that some unknown number of voters *might* have voted on election day absent long lines and that they *might* have voted at high rates for Lake. Lake identifies no case where an Arizona court set aside an election based on conjecture of what the vote count might have looked like in a flawless election. Long lines, whatever the cause, are an unfortunate reality in many elections, and by Lake's untenable standard, nearly every election would have to be redone. That is precisely why Lake must show "the result *would* have been different" to prevail. *Moore*, 148 Ariz. at 159 (emphasis added).

The only "evidence" Lake offered to suggest an outcome-determinative number of votes was the purported expert testimony of Richard Baris. Mr. Baris conducted a poll asking respondents whether they faced "any issues or complications" while voting and concluded that anyone who did not respond to his survey must have been unable to vote due to tabulator issues. Lake.App.:435-36, 453-454, 460 (2 Tr. 34:3-35:18, 52:3-9, 53:13-17, 59:5-10 (Baris)). Mr. Baris's analysis is flawed at every level.

First, there are ample reasons to question Mr. Baris's credibility. Despite the scope of his testimony, Mr. Baris has no academic or publishing background in polling, long lines, voter turnout, or what factors can affect voter turnout,

Lake.App.:443-45 (2 Tr. 42:25-44:17 (Baris)). Moreover, his polling company has been thoroughly discredited: It is excluded from national poll aggregators and received an "F" grade by the New York Times' 538 polling project. Lake.App.:443-45, 449 (2 Tr. 42:25-44:17, 48:16-19 (Baris)); Lake.App.:535-36 (2 Tr. 134:20-135:5 (Mayer)).[10]

Second, Mr. Baris's poll only surveyed individuals who actually voted yet draws conclusions about people who did *not* vote. Lake.App.:456 (2 Tr. 55:13-15 (Baris)). Indeed, the sole basis for Mr. Baris's conclusions (which Lake neither explains nor defends, *see, e.g.,* Br. at 29-32) was the unremarkable fact that a handful of people *declined* to complete Mr. Baris's poll. Specifically, Mr. Baris assumed that anyone who did not complete his survey attempted to vote but could not because of a printer or tabulator issue on election day. Lake.App.:435-36, 454, 460 (2 Tr. 34:3-35:18, 53:13-17, 59:5-10 (Baris)). As Governor Hobbs's highly qualified expert explained, *see* Lake.App.:513-15 (2 Tr. 112:9-114:21 (Mayer)), "there are about five logical leaps that you have to go through to get from that premise to the conclusion, and there's just no evidence to support that contention. It's just a series of

[10] Governor Hobbs moved to exclude Mr. Baris's testimony pursuant to Arizona Rule of Evidence 702, and, although the trial court denied her motion, Governor Hobbs maintains that Mr. Baris's expert testimony was inadmissible for the reasons cited therein. *See* Hobbs.App.:236-63.

assumptions and speculation." Lake.App.:528 (2 Tr. 127:8-24 (Mayer)) (cleaned up).

Third, Mr. Baris's "calculation" of potential election outcomes is based on fanciful assumptions and faulty math. Mr. Baris's speculation about what *might have happened* if turnout had been 2.5 percentage points higher was not derived from his poll. Instead, he plucked this number out of thin air because such an increase in turnout was, in his view, "what it would have needed to [be] in order for it to change the outcome." Lake.App.:474 (2 Tr. 73:1-13 (Baris)). Mr. Baris admitted that his analysis about a potentially different election outcome actually assumed—without any factual basis—that *16%* more voters would have voted on election day. Lake.App.:483 (2 Tr. 82:22-83:1 (Baris)); Lake.App.:532-33 (2 Tr. 131:10-132:2 (Mayer)). In other words, Mr. Baris conceded that the outcome of the election could only be different assuming that one out of every six voters who would have voted on election day were prevented from doing so by printer and tabulator issues. Lake.App.:485 (2 Tr. 84:3-12 (Baris)).

Ultimately, Mr. Baris himself agreed that his analysis offered no evidence about whether anyone was deterred from voting as result of printer or tabulator issues or long lines, admitting that "nobody can give a specific number" of "disenfranchised" voters. Lake.App.:476 (2 Tr. 75:7 (Baris)). And even if Mr. Baris's analysis carried any weight, his own estimates resulted in many scenarios

where *Governor Hobbs still would have won*. Lake.App.:438-39 (2 Tr. 37:20-38:3 (Baris)).

In short, under any standard, Lake does not come close to meeting her burden to establish that the printer and tabulation issues affected an outcome-determinative number of votes.

C. The trial court did not err in holding Lake failed to prove Count IV.

Lake claims that election officials failed to comply with legally required chain of custody procedures, but failed at trial to show, by clear and convincing evidence or any other standard, that *any* legal requirement went unmet or that any of her alleged violations altered the outcome of the election. The Court did not clearly err in holding otherwise.

1. Lake did not prove any chain of custody misconduct in relation to early ballots received on election day.

First, Lake argues that Maricopa violated chain of custody requirements because it allegedly failed to maintain "delivery receipt" forms for the "nearly 300,000" election day early ballots. Br. at 33. Not so. Director Jarrett testified that these forms were maintained for all early ballots received on election day, which are part of the record before this Court. *See* Lake.App.:596, 600, 602-03 (2 Tr. 195:6-12, 199:14-24, 201:15-202:3 (Jarrett)); Hobbs.App.:132-61; Hobbs.App.:89-131.

Lake presented just one witness in support of her argument—Pennsylvania resident Heather Honey.[11] While Ms. Honey testified that she did not receive them in response to public records requests, Lake.App.:276-77, 280 (1 Tr., 179:01-180:16, 183:1-5 (Honey)), she admitted knowing that the forms at issue exist and were utilized by Maricopa, even if they were not in her possession. *See* Lake.App.:310 (1 Tr. 213:15-25 (Honey)) (Q. "[B]ecause you didn't receive those forms, you're assuming that they do not exist?" A. "No, quite the contrary. I know they exist."). Ms. Honey also admitted that she had no evidence that anyone intentionally interfered with early ballots received on election day in Maricopa County. *See* Lake.App.:328 (1 Tr. 231:19-25 (Honey)).

In passing, Lake notes the hearsay testimony of two non-witnesses who claim to have observed ballots delivered to Runbeck unaccompanied by chain of custody forms. Br. at 33.[12] Neither demonstrates any breach of chain of custody requirements. As an initial matter, Arizona law does not require chain of custody

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[11] Ms. Honey testified about her personal understanding of Arizona election law and her secondhand understanding of the events of election day. Ms. Honey is not an expert, and by her own admission, has never trained or worked as an election official, poll worker, or poll observer, has never been a credentialed observer in Maricopa County, has never been inside the MCTEC facility, and has no personal knowledge about what happened at Runbeck or MCTEC on election day. Lake.App.:309-12 (1 Tr. 212:19-213:14, 214:15-215:2 (Honey)).

[12] Governor Hobbs objected at trial to all hearsay evidence, *see, e.g.,* Lake.App.:289-90 (1 Tr. 192:22-193:5), and maintains that this and other evidence admitted over hearsay objections remains inadmissible.

forms to be physically attached to ballot containers. *See* Hobbs.App.:81 (EPM at 62) (forms "shall be attached to the outside of the secure ballot container *or otherwise maintained in a matter prescribed by the County Recorder or officer in charge of elections*") (emphasis added). Moreover, one of the declarants, whom the trial court found not credible compared to county witnesses, *see* Lake.App.:686, left before the delivery of any election day early ballots to Runbeck, Lake.App.:75-78, while the second declarant admitted that because she did not have a "clear view of the activities on the truck or on the dock" where containers were delivered, she could not have seen chain of custody documentation processed in those areas. Lake.App.:71.

Second, Lake argues that "Maricopa violated clear [chain of custody] rules" by not having "an exact count of ballots" on election night. Br. at 16, 33. But there is no legal requirement that counties have a precise count of early ballots received on election day "immediately" after polls close on election night. Br. at 16. As Director Jarrett explained, if "the ballots are transported in a secure sealed transport container to the central counting place," the EPM does not require documenting the number of early ballots at voting centers. Lake.App.:597 (2 Tr. 196:10-20 (Jarrett)); Hobbs.App.:87 (EPM at 193). In accordance with EPM requirements, these ballots were counted upon arrival at MCTEC and Runbeck. *See supra* Statement of Facts § III.

Third, Lake argues that because Maricopa's initial estimate of election day early ballots was not precisely correct, there was an "inexplicable injection of over 25,000 ballots" after election day. Br. at 2. But there is no legal requirement that counties publicly report exact counts of early ballots. *See generally* EPM. The truth is much more mundane: The initially reported "at least 275,000" figure was only an estimate provided "early in the day following Election Day," before the County had even completed its scanning-in process. Lake.App.:126 (1 Tr. 29:19-22 (Richer)); Lake.App.:606-07 (2 Tr. 205:24-206:7 (Jarrett)). Far from evidencing misconduct, the final figure was simply the "full accounting for all [] early ballots." Lake.App.:607 (2 Tr. 206:7-13 (Jarrett)).[13]

In sum, Lake failed to identify any legal chain of custody requirement that went unmet.

2. Lake did not prove that the alleged chain of custody violations changed the outcome of the election.

Beyond identifying no discernable misconduct, Lake also failed to prove that any votes were wrongly counted because of purported chain of custody violations, and certainly not enough to change the election outcome. Lake's only witness on

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[13] To the extent Lake claims Maricopa's chain of custody procedures violate Arizona law, that claim is barred by laches, *see infra* Argument § II, as those procedures have been in place since at least early 2022. Lake App:121-22 (1 Tr. 24:21-25:6 (Richer)); *see also* Hobbs.App.:4-73 (2022 Maricopa Elections Plan published in May 2022) (describing generally Maricopa chain of custody processes and forms for 2022 elections).

this point, Ms. Honey, admitted that any estimate of how many ballots were improperly counted "would be nothing but pure speculation," Lake.App.:337-38 (1 Tr. 240:17-21, 241:5-13 (Honey)), and on appeal, Lake concedes that "it [is] impossible to know how many ballots were injected into the system," Br. at 16. Both admissions are fatal to Lake's appeal.

At most, Lake offered the declaration of one non-witness who claimed that approximately 50 ballots of family members were added to the pool of ballots at the Runbeck facility rather than dropped off at a designated voting center. Lake.App.:318, 331-32 (1 Tr. 221:17-22, 234:1-235:8 (Honey)). Even if the Court were to credit this testimony, 50 ballots is far short of an outcome determinative number of votes—or, as the trial court correctly found, "would not come close to clear and convincing evidence that the election outcome was affected." Lake.App.:689. And as Director Jarrett explained, Maricopa "maintained chain of custody for every one of those early ballots all the way through the process" and there was "a one-for-one" tracking system, such that the County would be aware of any ballot "inserted or rejected or lost" in any part of the process. Lake.App.:601 (2 Tr. 200:18-24 (Jarrett)). Lake fails to demonstrate that but for any alleged chain of custody violations "the result [of the election] would have been different." *Moore*, 148 Ariz. at 159.

II. The trial court did not err in dismissing Count III.

A. The trial court did not abuse its discretion in dismissing Lake's signature verification claim (Count III) on laches grounds.

The equitable doctrine of laches bars claims when a plaintiff's delay in filing suit is unreasonable and prejudicial. *Sotomayor v. Burns*, 199 Ariz. 81, 82-83, ¶ 6 (2000). This Court "review[s] the dismissal of a complaint based on laches for an abuse of discretion." *See Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435, ¶ 12 (App. 2013), as amended (Feb. 26, 2013) (internal citation omitted). "[A]bsent erroneous interpretation of the law or clearly erroneous factual underpinnings," the lower court's finding will be "overturned only if its decision represents an unreasonable judgment in weighing relevant factors." *Id*. (internal quotation marks omitted). The trial court did not abuse its discretion in dismissing Lake's signature verification claim (Count III), which was available to Lake well before election day.

In considering whether laches bars a late lawsuit, courts consider (1) "the justification for delay"; (2) "whether [the] delay … was unreasonable"; and (3) whether "the delay resulted in actual prejudice to the adverse parties." *Harris v. Purcell*, 193 Ariz. 409, 412, ¶ 16 (1998) (citing *Mathieu v. Mahoney*, 174 Ariz. 456, 459 (1993)). In evaluating prejudice, Arizona courts consider fairness to litigants, election officials, the voters, and the Court. *See id.*; *Sotomayor*, 199 Ariz. at 83, ¶ 9. The trial court here exercised "reasonable judgment in weighing" all "relevant

factors" in finding that Count III was barred by laches. *See Prutch*, 231 Ariz. at 435, ¶ 12 (internal quotation marks omitted).

There is no justification for Lake's unreasonable delay. By definition, "[t]he reconciliation of ballot envelope signatures with voter file signatures is an election procedure," Lake.App.:91, citing *Sherman*, 202 Ariz. at 342, ¶ 10, which was set out in Arizona's 2019 EPM and Maricopa's 2022 Elections Plan published six months before the election. Hobbs.App.:49-50. While Lake contends that her signature verification claim is based on Maricopa's alleged failure to follow its procedures rather than the procedures themselves, the substance of her allegations indicates otherwise. Lake's only contention is that first-level reviewers flagged more potential mismatches than were ultimately rejected after higher level review and cure procedures. *See* Lake.App.:17-18. But that is the precise process contemplated by Maricopa's 2022 Elections Plan. Hobbs.App.:49-50 (describing multi-level signature verification process). As a result, Lake's challenge to the process by which signatures initially flagged are ultimately verified is a challenge to the election procedure itself, and thus one that Lake was required to bring "prior to the actual election." *Sherman*, 202 Ariz. at 342, ¶ 9. The trial court did not abuse its discretion in finding that Lake "offers no explanation for the delay," and her belated action is "unjustifiable." Lake.App.:91-92.

Lake's unjustifiable delay also presents "an exceedingly high degree of prejudice against both the parties and the public[.]" Lake.App.:92. Lake's cavalier request that the Court order the rejection of ballots deemed valid by election officials belies the fundamental harm to Arizona voters: "[A]ny procedural challenge post-election 'ask[s] us to overturn the will of the people as expressed in the election.'" Lake.App.:92 (citing *Finchem v. Fontes*, CV2022053927, at 5 (Maricopa Cnty. Super. Ct. Dec. 16, 2022) (quoting *Sherman*, 202 Ariz. at 342, ¶ 11)). Lake's prejudicial delay also compromised both Governor Hobbs's entitlement "to a meaningful response" and the public's entitlement to fair administration of justice. *Ariz. Pub. Integrity All. Inc. v. Bennett*, No. CV-14-01044-PHX-NVW, 2014 WL 3715130, at *3 (D. Ariz. June 23, 2014); *see also McClung v. Bennett*, 225 Ariz. 154, 157, ¶ 15 (2010) (applying laches in election appeal filed within the statutory deadline given prejudice to opponent and public). The impact of Lake's delay also extends to the judiciary: "The real prejudice caused by delay in election cases is to the quality of decision making in matters of great public importance." *Sotomayor*, 199 Ariz. at 83, ¶ 9.

Because Lake "allow[ed] an election to proceed in violation of the law which prescribes the manner in which it shall be held," Lake cannot be permitted "after the people have voted," to "then question the procedure." *Kerby v. Griffin*, 48 Ariz. 434, 444 (1936), *abrogated on other grounds by Fann v. State*, 251 Ariz. 425 (2021). As

below, this Court should reject Lake's attempt to "subvert the election process by intentionally delaying a request for remedial action to see first whether [she would] be successful at the polls." *McComb v. Super. Ct. In & For Cnty. of Maricopa*, 189 Ariz. 518, 526 (App. 1997) (cleaned up).

B. Count III otherwise fails as a matter of law.

Even if it were not barred by laches, Lake's Count III "misconduct" claim also fails as a matter of law. ***First***, Lake fails to allege that any signature verification worker failed to comply with the signature matching statute, A.R.S. § 16-550(A), or the relevant provision of the EPM, Hobbs.App.:83 (EPM at 68), much less engaged in misconduct or counted illegal votes. *See* Lake.App.:14-21. While Lake's declarants—who describe themselves as "the most inexperienced" of signature reviewers, *see* Hobbs.App.:163, 169, 178—may have anticipated higher numbers of rejected signatures, Lake.App.:17-19, their misapprehension does not amount to misconduct on the part of county officials, *Hunt*, 19 Ariz. at 264, particularly where unsupported by any allegations of a statutory violation. *See* Hobbs.App.:227 ("An illegal vote is one that is cast in violation of a statute providing that non-compliance invalidates the vote, or cast by one who is not eligible to vote.").[14]

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[14] In fact, Maricopa County's 2022 signature rejection rate of .137% is consistent with 2020 rejection rates of 0.0646% statewide and 0.47% nationally across all jurisdictions that use signature matching. *See* Maricopa Cnty. Elections Dep't,

Second, Lake's claim for the "rejection of ballots with invalid signatures" (Br. at 37) fails to comply with the exclusive statutory procedures for challenging ballots on those grounds. A.R.S. § 16-552 requires that such challenges be made before the opening of the ballot envelope, and that voters be provided with notice and opportunity to be heard before their ballots can be invalidated. Lake should not be permitted to disenfranchise some untold number of Arizonans by using an election contest to evade the procedures required by statute to challenge early ballots.

Finally, Lake speculates that "nothing prevented" election workers from curing ballots improperly. Lake.App.:19-20. But allegations of *opportunities* for misconduct are not allegations of *actual* misconduct, *see Cullen v. Auto-Owners Ins. Co*, 218 Ariz. 417, 418-19, ¶ 4 (courts may not "speculate about hypothetical facts that might entitle the plaintiff to relief"), and cannot overcome the presumption of "good faith and honesty" of election officials, *Hunt*, 19 Ariz. at 268.

For any and all of these reasons, Count III fails as a matter of law.

November General Election Canvass (Nov. 8, 2022), https://elections.maricopa.gov/asset/jcr:7bd36c75-477c-43d0-83db-80b2761ca698/11-08-2022-0%20Canvass%20BOS%20SUMMARY%20CANVASS.pdf; U.S. Election Assistance Comm'n, https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf (accessed Jan. 15, 2023); *see also Mesquite Power, LLC v. Ariz. Dep't of Revenue*, 252 Ariz. 74, 78 n.3 (App. 2021) (noting that court may take judicial notice of agency website). In short, these declarants' "expectations" of a rejection rate as high as 40%, *see* Lake.App.:18-19, bear no relation to reality.

III. The trial court did not err in dismissing claims brought outside the election contest statute.

Lake's complaint raised seven constitutional claims wholly outside the election contest statute, ranging from allegations that officials violated Lake's First Amendment rights (Count I) to a claim that mail-in ballots violate ballot secrecy requirements under "U.S. Const. amend. XVI" (Count VII). Lake.App.:57-67. On appeal, Lake argues that the trial court erred in dismissing just two of these: her equal protection claim (Count V) and her due process claim (Count VI). But the trial court correctly dismissed these claims falling outside the scope of the election contest statute. Lake.App.:9-10. Even if a court could consider separate constitutional claims in an election contest, Lake's allegations in Count V and VI fail to state a claim as a matter of law. This Court should therefore affirm the dismissal of these claims on either ground.

A. Election contests are limited in scope and are not vehicles for free-wheeling constitutional claims.

A.R.S. § 16-672 circumscribes five exclusive statutory grounds for an election contest: (1) official misconduct on the part of the election boards, (2) ineligibility of the contestee to hold office, (3) bribery or other offenses against the franchise committed by the contestee, (4) illegal votes, or (5) when "by reason of erroneous count of votes the person declared elected … did not in fact receive the highest number of votes." Election contests "may not be extended to include cases not within

the language or intent of the legislative act," and the burden falls on the contestant to show that her claims fall strictly within the statute. *Henderson v. Carter*, 34 Ariz. 528, 534-35 (1928).

Lake cannot meet this burden. Indeed, in response to Defendants' motions to dismiss below, rather than argue that her constitutional claims fall within the terms of the election contest statute, Lake relied on general joinder provisions under the rules of civil procedure to justify her constitutional claims. Hobbs.App.:213-14. But suits alleging unconstitutional action are regularly "subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Care Ctr., Inc.,* 575 U.S. 320, 327 (2015); *see also* Ariz. Const. art. IV, pt. 2, § 18 (legislature may set restrictions on suit). Where, as here, the relevant statute circumscribes the grounds for relief, general joinder rules must give way to specific statutory limitations.

On appeal, Lake changes course, attempting to smuggle in her free-wheeling equal protection and due process claims by slapping a "misconduct" label on them. Notably, Lake cites no election contest in Arizona's history recognizing a constitutional claim as a valid basis for an election contest and offers no way around binding precedent prohibiting judicial reach beyond "the language or intent of the legislative act," *Henderson*, 34 Ariz. at 534-35. Lake argues only that it "beggars the imagination that the Legislature would exempt" constitutional claims in election contests. Br. at 45. But it is Lake who is operating in the realm of imagination. Had

the Legislature wished to include constitutional violations within the statute's scope, it could have done so. Because it did not, and "it is not the function of the courts to rewrite statutes," *Orca Commc'ns Unlimited, LLC v. Noder*, 236 Ariz. 180, 182, ¶ 11 (2014), this Court may not read in a "constitutional claim" component to the election contest statute where none exists.

B. Lake's constitutional claims otherwise fail as a matter of law.

Even if they could be considered in an election contest, the trial court did not err in dismissing Counts V and VI because neither states a viable claim for relief.

Lake's equal protection claim of intentional discrimination, as alleged in the complaint, hinges solely on insufficient allegations of disparate impact. Lake alleges that, "[a]ssuming *arguendo* that a state actor caused the tabulator problems … the disproportionate burden on a class of voters—Republicans—warrants a finding of intentional discrimination." Lake.App.:63. But a basic tenet of equal protection doctrine is that disparate impact alone is rarely sufficient to state a claim of intentional discrimination. *See Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also Valley Nat'l Bank of Phoenix v. Glover*, 62 Ariz. 538, 554 (1945) (state equal protection law follows federal counterpart).

On appeal, Lake argues that "impact alone" is sufficient to state a claim for intentional discrimination when the impact is "wildly out of proportion." Br. at 43. But Lake has not alleged the type of results that would permit any court to infer

intentional discrimination. Courts infer intentional discrimination from disparate impact alone only when the result is *extraordinary* and *unexplainable* on any other basis. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding intentional discrimination where 100% of those adversely impacted by ordinance were of minority group); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (finding intentional discrimination where city removed all but four Black voters and no white voters). As the U.S. Supreme Court has explained, "[a]bsent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). There is no such pattern here; all that is alleged is that Republicans were more likely to vote on election day than Democrats. That is simply not enough to state a claim of intentional discrimination.

Lake's substantive due process claim must also fail because she did not allege the required patent and fundamental unfairness necessary to state such a claim. Lake claims the printer and tabulator issues rises to a substantive due process violation. Lake.App.:64, 66. But the only burden Lake alleges relates to longer lines at some voting centers at some times on election day, which is the kind of "garden variety election irregularit[y]" which cannot give rise to a substantive due process violation. *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978); *see Hennings v. Grafton*, 523 F.2d 861, 862 (7th Cir. 1975) (rejecting substantive due process claim after voting machines malfunctioned). Courts have found substantive due process violations

following elections only in extraordinary circumstances, such as failure to call an election entirely, *see Duncan v. Poythress*, 657 F.2d 691 (5th Cir. Unit B 1981), or the retroactive invalidation of ten percent of all absentee ballots, *see Griffin*, 570 F.2d at 1078-88. Such fundamental deprivation of rights is not alleged here. Finally, *Marks v. Stinson*, 19 F.3d 873, 888 (3d Cir. 1994), does not support Lake's substantive due process claim. As Lake concedes, *Marks* involved "massive absentee ballot fraud," Br. at 44, and Lake has disclaimed any allegation of fraud here.

Lake's procedural due process claim—which she raised in a single sentence in her complaint for "intentional failure to follow election law" and "random and unauthorized acts," *see* Lake.App.:64-65, and makes no mention of here—is also meritless. Lake's complaint did not allege voters were disenfranchised, only that some voters may have chosen to leave the line. But where a voter is not deprived of the right to vote, a procedural due process claim must fail. *Cf. Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1357 (D. Ariz. 1990) (acknowledging procedural due process violation where voters are actually disenfranchised and ballots disqualified without proper protections).

Finally, while Lake argues *Coleman v. City of Mesa*, 230 Ariz. 352 (2012), provides a roadmap for her claims, *see* Br. at 40, *Coleman* only emphasizes that an individual must be intentionally targeted for discrimination or deprived of something

(here, the right to vote) to state viable claims. Lake has not adequately alleged either, and this Court should affirm the trial court's dismissal of these claims.

CONCLUSION

For any and all of these reasons, the Court should affirm the trial court's orders and deny Lake's attempt to overturn the will of Arizona's voters. Governor Hobbs also reserves her right to pursue attorneys' fees pursuant to Ariz. R. Civ. App. P. 21 and Ariz. R.P. Spec. Act. 4(g).

RESPECTFULLY SUBMITTED this 17th day of January, 2023.

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Exhibit 10

ARIZONA COURT OF APPEALS

DIVISION ONE

KARI LAKE, Plaintiff/Appellant, v. KATIE HOBBS, et al., Defendants/Appellees.	No. 1 CA-CV 22-0779 No. 1 CA-SA 22-0237 Maricopa County Superior Court No. CV2022-095403
KARI LAKE, Petitioner, v. THE HONORABLE PETER THOMPSON, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, Respondent Judge, KATIE HOBBS, et al., Real Parties in Interest.	

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Introduction

"That's all we can do, isn't it, Ms. Honey, is speculate, isn't it?" (Dec. 21, 2022 Tr. at 241:5–6.) The Maricopa County Defendants/Appellees/Real-Parties-In-Interest[1] agree—Plaintiff-Petitioner-Appellant Kari Lake's election contest *is* based on speculation: speculation from a public opinion pollster who based his conclusion that voters were disenfranchised by their lack of response to his exit poll; speculation from a corporate supply chain investigator from Pennsylvania with no experience in election administration; speculation from a "cyber expert" who discarded evidence that failed to fit his narrative. The trial court properly rejected Lake's speculation and her election contest.

On appeal, Lake's Opening Brief repeatedly mischaracterizes the record below, misrepresents events in Maricopa County, and misconstrues the relevant law. While joining Appellee Governor Katie Hobbs' discussion of the relevant law, this Brief focuses on setting the record straight and defending the County's lawful practices concerning ballot-on-demand printing and chain of custody.

This Court should affirm the trial court's dismissal of Lake's election contest.

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[1] This unwieldy moniker—necessitated by Lake's curious post-judgment procedural choices—will be shorted to "Maricopa County Defendants" in this Brief.

Statement of Joinder

Consistent with ARCAP 13(h), the Maricopa County Defendants join the Jurisdictional Statement, Statement of Facts, Statement of the Issues, Legal Standard, and Argument sections in the brief filed by Governor Katie Hobbs.

Argument

I. Lake's arguments about in-person election day voting are premised on blatant falsehoods about the record.

A. The record is clear: even ballots that experienced printing problems were ultimately counted.

Before turning to Lake's specific arguments about the election day printer problems, this Court should have an accurate understanding of the scope of those problems. It should also rest assured that these ballots were ultimately counted because Arizona's elections administration—like that of jurisdictions around the country—contains numerous redundancies to ensure that lawfully cast votes are counted. (*See* Dec. 22, 2022 Tr. at 237:17–19 (testimony of Ryan Macias that "elections are resilient, we have processes in place to be able to [] ensure that every voter's ballot is counted and cast as intended").)

On election day, Maricopa County experienced two types of problems with its ballot-on-demand (sometimes called "BOD") printers. First, printers at some of Maricopa County's vote centers printed ballots that—although they looked normal to the human eye—used an amount of ink too faint to be read by the vote center tabulators (the "faint-ink problem"). (Dec. 21, 2022 Tr. at 64:12-13; Dec. 22, 2022 Tr. at 179:3-13.) Initially, it was not known that this was a printer problem; officials first thought that some of the tabulators might be malfunctioning. (Dec. 22, 2022 Tr. at 184:13–186:23 (testimony of Scott Jarrett describing efforts Maricopa County

made to identify what caused some ballots to be unable to be read by tabulators in the vote centers); *id.* at 185:23–25 (stating that it "took us a couple hours to rule out that it was not a tabulator issue").) But personnel troubleshooting the problem were quickly able to determine that the tabulators were working properly, and the printers—for reasons unknown at the time—were printing some ballots with ink that was too faint for the tabulators to read the timing marks on the ballots. (*See id.* at 179:5–13.)

Second, well-intentioned technicians who were troubleshooting the faint-ink problem—*before* it was understood that faint ink was the cause—changed the printer settings on a few printers to "fit-to-paper" in an attempt to get the printers to print ballots that could be read by the tabulators (the "fit-to-paper problem"). (*See* Dec. 22, 2022 Tr. at 180:1–182:7; *see also id.* at 180:18–19 ("now this was not direction that we provided from the Maricopa County Elections Department").) This change caused the printers to "shrink[]" the 20-inch ballot image, printing it slightly smaller than it was supposed to be. (*Id.* at 180:1–182:7) These ballots also looked fine to the human eye; but because they were slightly shrunk, these ballots could not be read by the vote center or central count tabulators. (Dec. 22, 2022 Tr. at 181:18–182:4).)

Importantly, all of these ballots were ultimately tabulated. Ballots that could not be read by the tabulators in the vote centers were taken to the central count facilities, where they were (a) tabulated by the tabulators there or (b) duplicated by

bi-partisan teams onto a new ballot, which were then tabulated. (Dec. 22, 2022 Tr. at 119:10–23 (testimony of Dr. Kenneth Mayer); *id.* at 181:18–182:7 (testimony of Scott Jarrett).) Even Lake's witness, Clay Parikh, testified that ballots that "cannot be ran through the tabulation system" are "duplicated and then that duplication is run through the system." (Dec. 21, 2022 Tr. at 92:17–21); *see also id.* at 92:22–24 (agreeing that a duplicated ballot is "actually tabulated and counted"); 129:9–130:2 (agreeing that "[i]f they are duplicated correctly and they are configured correctly, yes, they should be" tabulated).)

B. Lake's arguments are at odds with the record.

On appeal, as below, Lake seeks to overturn the election results by relying on speculation rather than established fact. (*See* O.B. at 29–32.) Each of Lake's arguments fail.

1. Maricopa County performed all necessary logic and accuracy tests.

Lake argues that Maricopa County failed to perform necessary logic and accuracy testing that would have prevented the printer problems. (O.B. at 29–30.) The undisputed record contradicts this argument: Maricopa County performed logic and accuracy testing exactly as the Elections Procedures Manual requires; no issues were detected. (Dec. 21, 2022 Tr. at 50:14–52:25, 54:1–8).) Further, as Jarrett explained, *inter alia*:

We printed ballots from our ballot on-demand printers, and those were

> included in the tests that the Secretary of State did. We also performed stress testing before the logic and accuracy tests with ballots printed from our ballot on-demand printers that went through both central count tabulation equipment as well as our precinct-based tabulators for the voting locations.

(*Id*. at 52:17–53:4.) No witness contradicted this testimony; Lake offered no evidence suggesting it was incorrect. Lake's logic and accuracy argument on appeal is baffling. This Court should reject it.

2. The fit-to-paper printer problem did not result in illegal votes.

Lake also argues that the fit-to-paper problem violated Arizona's Elections Procedures Manual. (O.B. at 31.) Tellingly, Lake offers no citation to any statute or provision in the Elections Procedures Manual—because no statute, provision of the Elections Procedures Manual, or any other legal authority prohibits inadvertent printer errors that produce misconfigured ballots. Lake cannot establish an "illegal vote" claim on this record.

3. Lake's argument about alleged disenfranchisement is based on absurd speculation from a pollster rather than evidence.

Lake, nonetheless, argues that the fit-to-paper printer issue "contributed to the Election Day chaos and disenfranchisement of thousands of predominately Republican voters who voted on Election Day." (O.B. at 32.) This argument lacks support in the record.

To begin with, one would have expected Lake to prove this claim with

testimony (or at least affidavits) from voters who wanted to vote for Lake but were unable to do so because of printer problems. She did not. No witness testified that she was unable to vote because of printer problems. And, among the more than 200 affidavits Lake submitted with her Complaint, only one *may have* contained testimony claiming that the affiant was unable to vote, and that affidavit is unclear as to whether the voter was actually dissuaded from voting because of problems in vote centers. (I.R. 1–7.) The remaining affidavits from those who went to vote centers on election day indicate that the affiants cast their ballots—that is, they were *not* disenfranchised. (*Id.*) Nothing in the record shows that voters were unable to vote because of printer problems.

Lake instead offered the speculative theory from a pollster, Richard Baris, who testified concerning his belief that potential voters were discouraged from voting by long lines at some of the County's many vote centers. (Dec. 22, 2022 Tr. at 21–110; *see also* O.B. at 14–15.) This speculation failed to satisfy Lake's burden.

First, Baris acknowledged that he could not determine the number of voters who might have been discouraged by printer problems and decided to forego voting. (Dec. 22, 2022 Tr. at 75:7.) Instead, Baris' testimony revealed that he was providing an "estimate" of the number of voters who might have chosen to forego voting because some of Maricopa County's many vote centers experienced lines. Baris stated that he "gave a range" of voters that might have been affected, and was

"offering the opinion that that range is enough to put the outcome in doubt." (*Id*. at 75:6–14).) But when pressed, Baris admitted that he "estimated" that the number of affected voters who chose to forego voting "could be a quarter of the [election day] vote." (*Id*. at 76:17–20).) And the trial court correctly recognized that "no election in Arizona has ever been set aside, no result modified, because of a statistical *estimate*" and declined to be the first court to do so. (I.R. 157 at 7.)

To reiterate: even if taken at face value, Lake's reliance on Baris's estimate fails because no evidence shows that any particular voter declined to vote because of lines at some of Maricopa County's vote centers. One would expect that, if a full quarter of those who *would have* voted on election day had chosen not to do so—a number Baris estimated to have been as much as 50,000 voters, (Dec. 22, 2022 Tr. at 76:21–22)—Lake would have been able to produce someone at trial. That she produced *none* demonstrates the unreliability of Baris's estimate.

Second, Baris' "estimate" is no estimate at all—it is just a wild guess. Baris relied on voters who did not participate in his exit poll to conclude that the only reason they did not participate was because they did not vote on Election Day. (*See, e.g.*, Dec. 22, 2022 Tr. at 52:10–21 (Baris' testimony acknowledging that "the conclusion is not derived from the answers to [the poll] question" but instead "the absence of their completion" of the poll); *see also id.* at 127:10–129:11 (Mayer's testimony that Baris' theory requires "about five logical leaps").) The trial court

properly refused to overturn the election on the guesswork of a pollster who offered an opinion that was not based on the results of a poll.

Third, most of Maricopa County's vote centers did *not* experience long lines.[2] Jarrett testified that the County had "at about 16 locations wait times approaching about two hours or between 90 minutes and two hours, and that was not for the entire day, that was intermittent; some of those were towards the end of the day." (Dec. 22, 2022 Tr., 177:7–11). But "in every one of those instances, we have locations that were close by where a voter could be able to choose a different option to be able to drive to, and some of those cases it was less than one minute wait times." (*Id*. at 177:11–15). Jarrett further testified that "over 160 locations[] never had a wait time over 30 minutes[,]" and information concerning how long the wait was at each vote center was communicated to the public, with updates every fifteen minutes. (*Id*. at 174:2–14; *id*. at 177:16–25). The math simply does not add up for Baris: his estimate of how many voters may have decided to forego voting on election day because of lines cannot be correct.

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[2] Maricopa County had 223 vote centers on election day. All eligible, registered voters in Maricopa County could vote at any vote center they chose. (Dec. 22, 2022 Tr. at 172:21–173:13).) The average distance between vote centers was fewer than 2 miles. (*Id*. at 173:16–24).

4. Lake's argument about so-called "conflicting testimony" results from her failure to understand the ballot design and printing process.

Finally, in an attempt to create a dispute of fact where none exists, Lake falsely argues that Jarrett offered "conflicting testimony" about the fit-to-paper problem. (O.B. at 31; *see also id.* at 9–14.) This argument is meritless: Jarrett testified consistently, from start to finish, about the printer issues experienced on election day.

1. As a preliminary matter, before turning to Jarrett's testimony, it is important to understand the basis for Lake's misrepresentations about that testimony: her unfounded assumption that the fit-to-paper problem caused a 19-inch ballot image to be printed, instead of a 20-inch ballot. (*See* O.B. at 9, 31.)

For the 2022 General Election, the Maricopa County Elections Department used the Election Management System to generate a 20-inch ballot definition with over 12,000 different "styles"—elections-administration nomenclature for ballots designed with contests for each different jurisdiction in Maricopa County, allowing each voter to receive a ballot appropriate for where they live. (*See* Dec. 21, 2022 Tr. at 51:19–23), 69:10–21; Dec. 22, 2022 Tr. at 230:15–17.) "Ballot definitions are used to program the voting systems" and generate ballot PDFs—i.e., ballot *images*, which are utilized to print the ballots. (Dec. 22, 2022 at 230:224–231:5.) Because Maricopa County had a 20-inch ballot definition, the ballot PDF was a 20-inch

image, which remained true even when the image was printed by printers set to fit-to-paper. What those printers printed was a slightly shrunk, 20-inch ballot image.

Lake fails to address this evidence, instead arguing that what was printed was a 19-inch ballot image. (*See, e.g.*, O.B. at 31.) Lake's meritless argument appears to flow from her reliance on a witness, Clay Parikh, whom she offered as an expert. Parikh testified that there were "only two ways" for a ballot to be printed smaller than it was supposed to be. (Dec. 21, 2022 Tr. at 99:18–19.)

Parikh claimed the first way was changing the printer settings, (*id*. at 99:22–24)—which, as explained more fully above, is what happened here at a few vote centers. Parikh claimed the second way would occur if someone created a 19-inch ballot image for the ballot definition, such that there were *two* possible ballot images that could be printed. (*See* Dec. 21, 2022 Tr. at 99:24–100:16.) There is no evidence that occurred here—and indeed, it did not happen—but Parikh settled on this explanation anyway, concluding that the slightly-smaller prints of ballots were 19-inch ballot images, rather than shrunken prints of 20-inch ballot images. (*See, e.g.*, *id*. at 96:25–97:13.)

In contrast, Ryan Macias, an expert in election technology and related fields, testified that the evidence did not support Parikh's assumption that the Election Management System contained a 19-inch ballot definition. (Dec. 22, 2022 Tr. at 235:4–237:1.) As Macias cogently explained: "if that were the case, we would have

seen or Maricopa County would have seen every ballot of that ballot style or styles printed on a 19-inch ballot, because again, the ballot PDF file would have contained that image with a 19-inch ballot on it." (*Id*. at 235:13–17.)

2. Turning to Jarrett's testimony, Lake's incorrect assumption about a 19-inch ballot *image* apparently led Lake's counsel to consistently ask Jarrett about "19-inch ballot images" and Jarrett just as consistently denying that there had been any such ballot images for the 2022 general election. Jarrett also consistently testified that some 20-inch ballot images had been printed by printers set to fit-to-paper, which caused the 20-inch images to print slightly smaller than they should have.

On the first day of trial, when Lake's counsel asked Jarrett whether "for the 2022 General Election, Maricopa was operating with a 20-inch ballot image, correct?" Jarrett replied, "That's correct." (Dec. 21, 2022 Tr. at 53:17–19.) When asked whether he had heard any reports about a "19-inch ballot image being placed on 20-inch paper[,]" Jarrett answered, "I did not." (Dec. 21, 2022 Tr. at 68:24–69:4.) And in response to further questioning about whether there had been a 19-inch ballot image printed by any printer for the 2022 general election, Jarrett stated that "the reason why" he was confident that there was not "a printer that had a 19-inch ballot on it" was because "we did not design a 2022 General Election on a 19-inch ballot. That ballot does not exist. The only ballot that exists is a 20-inch ballot." (Dec. 21, 2022 Tr. at 69:7–14.)

At no time on the first day of the trial did any attorney ask Jarrett about the fit-to-paper problem. He was never asked whether the printers at three of the vote centers had their settings changed to fit-to-paper, nor was he ever asked whether some ballots at those three vote centers had shrunken, 20-inch ballot images printed. Accordingly, there was no reason for Jarrett to discuss the fit-to-paper problem.

Parikh testified after Jarrett. As discussed above, Parikh focused on his assumptions about the "only two ways" for a ballot to be printed smaller than it was supposed to be.

The next day, Jarrett was called by the Defendants. Asked to identify the printer problems the County experienced, Jarrett addressed the faint-ink problem and then testified: "we did identify three different locations that had a fit-to-paper setting that was adjusted on Election Day[,]" which affected "just shy of 1,300 ballots[.]" (Dec. 22, 2022 Tr. at 180:3–15.) Jarrett also testified that ballots from one of those vote centers had been included in the ballots inspected by Parikh. (Dec. 22, 2022 Tr. at 180:21–23.) And he further testified: "that was a -- not a 19-inch ballot," but "a 20-inch ballot, a definition of a 20-inch ballot that's loaded on the laptop from -- that is connected to the ballot on-demand printer that gets printed onto then a 20-inch piece of paper; but because of the fit-to-paper setting, that actually shrinks the size of that ballot." (Dec. 22, 2022 Tr. at 181:8–14.) And Jarrett testified that all of the affected ballots were ultimately duplicated and tabulated at the central count

facility. (Dec. 22, 2022 Tr. at 181:21–182:7.)

On cross, Lake's counsel asked Jarrett whether he remembered previously testifying that "a 19-inch ballot image being imprinted on a 20-inch ballot did not happen in the 2022 General Election[,]" and Jarrett answered, "Yes, I recall that there was not a 19-ballot definition in the 2022 General Election." (Dec. 22, 2022 Tr. at 206:23–207:3.) Lake's counsel then stated, "But that wasn't my question, sir." (Dec. 22, 2022 Tr. at 207:4.)

But that *was* his question; up until now, that had always been his question. Lake's counsel had repeatedly asked about 19-inch ballot *images*, and Jarrett had consistently testified that there was no such thing created for the 2022 general election. The next exchange typifies this disconnect: "I asked you specifically about a 19-inch ballot *image* being imprinted on a 20-inch piece of paper. So are you changing your testimony now with respect to that?"—to which Jarrett replied, "No, I'm not[,]" and then explained, "I don't know the exact measurements of a fit to -- fit-to-paper printing. I know that it just creates a slightly smaller image of a 20-inch image on a 20-inch paper ballot." (Dec. 22, 2022 Tr. at 207:4–12 (emphasis added).)

This is the testimony that Lake now claims was "conflicting." But Jarrett's testimony isn't in conflict. Rather, he testified that no 19-inch ballot images were used in the 2022 general election in Maricopa County—because *they weren't*. He also testified that a few printers were incorrectly set to fit-to-paper, causing 20-inch

ballot images to be slightly shrunk when they printed—because *that's what happened*. Lake's arguments to the contrary are false.

II. Lake provides no basis for this Court to disturb the trial court's factual findings regarding chain of custody.

The trial court correctly concluded that Lake's chain of custody claim failed. Lake argues at length about the appropriate standard of proof and the elements of her claim under A.R.S. § 16-672(A)(1). (O.B. at 22–29.) The trial court, however, applied the correct standard for an election contest and did not err in its formulation of what constitutes misconduct sufficient to overturn an election.[3]

Regardless, Lake's argument is essentially an academic one because the record demonstrates that even under a less stringent standard, Lake did not establish that the Maricopa County Defendants engaged in any misconduct regarding chain of custody documentation, let alone misconduct that would alter the results of the 2022 gubernatorial election. *See Forsztc v. Rodriguez*, 212 Ariz. 263, 265, ¶ 9 (App. 2006) (stating that this court "may affirm the trial court's ruling if it is correct for any reason apparent in the record").

A. The record fully supports the trial court's findings of fact and

[3] As noted above, the Maricopa County Defendants-Appellees join the arguments of Defendant-Appellee Katie Hobbs regarding the proper legal standard in election contests.

conclusions of law rejecting Lake's chain-of-custody claim.

1. The trial court's determinations regarding the weight and credibility of the evidence cannot be disturbed on this appeal.

As an initial matter, to the extent that the testimony of Lake's chain of custody witness conflicted with that of the County Recorder and the Maricopa County Co-Directors of Elections, the trial court properly afforded the County's witnesses greater weight. (I.R. 178 at 8–9.) Indeed, the three County witnesses combine for approximately 40 years of experience administering elections in Arizona. (Dec. 21, 2022 Tr. at 14:6–9; Dec. 22, 2022 Tr. at 149:12–150:12, 170:23–171:4.)

In contrast, Lake's chain of custody witness is not an elections professional: she is a corporate supply chain investigator from Pennsylvania whose only experience with elections is as an *ad hoc* "election integrity" activist for two and a half years. (Dec. 21, 2022 Tr. at 153:24–154:2.) She is not a certified election administrator, she has never been employed as an election official, and she has never served as a poll worker or credentialed party observer in Arizona. (*Id.* at 212:19–213:9.)

Thus, the trial court weighed the credibility and knowledge of these witnesses, after which it determined that the County witnesses credibly testified that chain of custody procedures were followed and that Lake "brought forward no evidence sufficient to contradict this testimony." (I.R. 178 at 8–9.) This Court, of course, is not in a position to reweigh the evidence or question the trial court's determinations

on the credibility of witnesses. *See Williams v. King*, 248 Ariz. 311, 317, ¶ 26 (App. 2020) (noting this Court does not "reweigh the evidence or reassess credibility issues on appeal"); *see also Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 597, ¶ 27 (App. 2007) ("To the extent the parties presented facts from which conflicting inferences could be drawn . . . it was for the trial court, not this court, to weigh those facts.").

2. The record shows that Maricopa County has instituted chain of custody documentation procedures that are wholly consistent with Arizona law.

The law regarding ballot chain of custody gives counties broad discretion to create a system of documenting chain of custody for election equipment and ballots. The relevant statute states that "[t]he county recorder or other officer in charge of elections shall maintain records that record the chain of custody for all election equipment and ballots during early voting through the completion of provisional voting tabulation." A.R.S. § 16-621(E).

The Arizona Elections Procedures Manual sets forth further detail about how counties should document chain of custody for early ballot packets.[4] *See* 2019 Ariz.

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[4] As Maricopa County Co-Director of Elections for Early Voting and Election Services, Rey Valenzuela, testified, the County uses the term "early ballot packets" to describe sealed affidavit envelopes containing early ballots. (Dec. 22, 2022 Tr., at 150:17-151:4).) Those affidavit envelopes are opened and the ballots removed only after and if the signature verification process is successfully completed. (*Id.*; *see also id.* at 161:18–162:2.) It is these early ballot packets received at vote centers on Election Day that Lake calls "EDDB ballots." (*See* O.B. at 2.)

Elections Procedures Manual, at 62.[5] In relevant part, the Elections Procedures Manual provides that "[w]hen the secure ballot container [retrieved from a vote center] is opened by the County Recorder or officer in charge of elections (or designee), the number of ballots inside the container shall be counted and noted on the retrieval form." *Id.* And the instructions regarding early ballot packets dropped off at vote centers on election day are in accord—they may be "transported in a secure and sealed transport container to the central counting place to be counted there." *Id.* at 193. The Elections Procedures Manual further provides that "[b]allots retrieved from a ballot drop-off location or drop-box shall be processed in the same manner as ballots-by-mail personally delivered to the County Recorder or officer in charge of elections, dropped off at a voting location, or received via the United States Postal Service." *Id.* at 62.

In this case, the testimony at trial established how Maricopa County follows chain of custody procedures for early ballot packets, both during the early voting period (*i.e.*, the 27 days before election day) and on election day. The vast majority of early ballots are returned to Maricopa County by mail. During the early voting

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[5] The Arizona Elections Procedures Manual, created "to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots," A.R.S. § 16-452(A), is available at https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

period and on election day, two Maricopa County employees of differing political parties take possession of early ballot packets at the main United States Postal Service ("USPS") facility in Phoenix. (Dec. 22, 2022 Tr. at 156:18–157:5.) They then take the early ballot packets directly from USPS to Runbeck Election Services ("Runbeck"), the County's certified vendor. (*Id.* at 157:18–158:5.) When Maricopa County employees deliver the mailed early ballot packets to Runbeck, they complete a delivery receipt that indicates the number of trays of early ballot packets. (*Id.* at 159:7–17; *see also, e.g.*, I.R. 213 at 3.) The trays each hold approximately 350 early ballot packets and the tray count gives an estimate of the number of mail ballots, but not a precise count. (*Id.*) Runbeck then uses its high-speed counting equipment to obtain a precise count of the number of mailed early ballot packets received. (Dec. 22, 2022 Tr. at 158:6–21, 160:1–11.)

The remaining early ballot packets returned to Maricopa County during the early voting period are returned to drop boxes, most of which are located at government offices and early voting locations. (*Id.* at 152:21–18.) Like the USPS ballots, a team of two Maricopa County employees, one Democrat and one Republican, retrieves early ballot packets from drop boxes and transports them to the Maricopa County Tabulation and Election Center (also called "MCTEC"), the County's central counting facility, in secure transport containers. [*Id.* at 153:1–154:4] County employees record the seal numbers of the transport containers,

remove the early ballot packets from the secure transport containers, and note the number of early ballot packets in each container. (*Id.* at 155:3–156:8; I.R. 200.) Those early ballot packets are also then delivered to Runbeck, and recorded on the delivery receipt. (*See* I.R. 213.)

After the close of polls on election day, due to the large volume of early ballot packets dropped at polling places that day, the County's chain of custody procedures are similar to those followed for ballots received by mail. The secure transport containers for early ballot packets are returned to MCTEC. (Dec. 22, 2022 Tr. at 196:21–197:4.) At MCTEC, the early ballot packets are removed from the secure transport containers and the seal numbers of those containers noted, they are then sorted and placed in mail trays, then in secure cages for transport to Runbeck. (*Id.* at 198:9–199:4.) The County notes on its chain of custody forms the number of trays of early ballot packets transported to Runbeck. (*See* I.R. 213 at 37–42.) At Runbeck's facility, two County employees of differing parties oversee the processing of those early ballot packets using high-speed counting equipment and note the precise count of early ballot packets received on chain of custody forms. (Dec. 22, 2022 Tr. at 199:5–200:24; I.R. 201).

For the 2022 general election, it took until after 5:00 p.m. on the day following the election to complete the process of scanning and counting the number of early ballot packets dropped off on election day. (Dec. 22, 2022 at 199:17–24.) While

the counting of those early ballot packets was underway at Runbeck in the presence of two Maricopa County employees, Recorder Richer informed the public that the County had received "over 275,000" and "275,000+" early ballot packets at vote centers and the County's two standalone drop boxes on election day. (I.R. 208.) Estimates of "over 275,000" ballots and "275,000+" ballots accurately describe approximately 292,000 ballots (which is itself rounding the number of ballots received). (*See* Dec. 21, 2022 Tr., at 36:11–14.) Of course, on a more fundamental level, this comparison between an estimate and a final count is not evidence of illegal votes "injected" into anything.

3. On appeal, Lake misconstrues the record and the County's compliance with chain of custody requirements.

Despite the foregoing testimony and documentary evidence, Lake cherry-picks from the record to assert that Maricopa County did not follow the law regarding chain of custody. At times, she flat-out misrepresents the record. But, as the trial court properly concluded, even Appellant's own evidence does not support her chain of custody claim. (I.R. 178 at 5 (finding that "[b]ecause Plaintiff's expert agreed that the forms which are the basis for this claim were generated, Plaintiff cannot point to their absence writ large as a violation of the EPM").)

Lake relies on the testimony of Heather Honey, who asserted that she made public records requests to Maricopa County for chain of custody records. She also relied on hearsay from a declaration submitted by a purported Runbeck employee.

(*See, e.g.*, O.B. at 18; *see also* I.R. 178 at 5 (noting that the trial court "cannot afford [the declaration] much weight").) In her Opening Brief, Lake asserts that "County officials . . . did not create any documents to record the number of ballots transferred to Runbeck" and that "Maricopa has not been able to produce Delivery Receipts documenting the transfer of [early ballot packets] to Runbeck on Election Day." (*Id.*) But Honey actually testified that Maricopa County had "misplaced" the delivery receipt documents and she relied on the Runbeck employee's hearsay assertion that "no such documents existed for Election Day." (Dec. 21, 2022 Tr. at 182:20–183:16.) Elsewhere, Honey testified that "I know they exist. They exist in more than one copy. I know that they exist at Runbeck, because I've seen photographs of them." (*Id.* at 213:19–214:4.) Thus, Lake's argument on appeal that Recorder Richer "false[ly]" stated that chain of custody documents exist is at odds with Honey's testimony. (*See* O.B. at 17.)

Lake further argues that "[u]nrebutted evidence showed that Runbeck allowed employees to insert ballots into the system" and that Recorder Richer's "failure to maintain [chain of custody] makes it impossible to know how many ballots were injected into the system." (O.B. at 16.) The testimony, however, was that approximately 50 ballots of Runbeck employees and their family members might have been added to those early ballot packets handled at Runbeck. This sensational allegation is based solely on hearsay from the Runbeck employee, which the trial

court concluded it "cannot afford . . . much weight." (I.R. 178 at 5.) Moreover, the record is replete with testimony and documentary evidence showing that the chain of custody records were maintained, the County did not authorize Runbeck employees to insert their ballots outside of the chain of custody, and that every ballot tabulated by the County successfully completed the signature verification process. (Dec. 22, 2022 Tr., at 161:18–162:2, 162:10–16; I.R. 200; I.R. 201; I.R. 213.)

B. Lake cannot succeed on a claim that ballots dropped off at vote centers on election day are "illegal ballots."

Lake's argument that ballots for which the County lacks proper chain of custody records were illegal ballots that should not have been counted fails for a host of reasons. (*See* O.B. at 34.)

1. As explained above, the trial record contains substantial evidence of the County's compliance with chain of custody requirements. Even if it did not, however, Lake cannot succeed on this theory.

2. Lake's Complaint did not assert a claim that chain of custody issues led to "illegal" ballots being counted. Election contests are "purely statutory and dependent upon statutory provisions for their conduct." *Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966). The contestant must set forth in her statement of contest the reasons for the contest. A.R.S. § 16-673(A)(4). Due to the strict statutory deadlines for election contests, a contestant may not amend her contest after the deadline to file has passed. *Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978) (stating that "[t]he

failure of a contestant to an election to strictly comply with the statutory requirements is fatal to his right to have the election contested," and observing that "[t]he rationale for requiring strict compliance with the time provisions for initiating a contest is the strong public policy favoring stability and finality of election results"); *Kitt v. Holbert*, 30 Ariz. 397, 406 (1926) ("[W]e are constrained both by reason and authority to hold that a statement of contest in an election contest may not be amended, after the time prescribed by law for filing such contest has expired, by adding thereto averments of a jurisdictional nature.").

Here, the chain of custody count of the Complaint asserted a claim only under A.R.S. § 16-672(A)(1). (*See* I.R. 1 at 61–62 (citing A.R.S. §§ 16-621, 16-672(A)(1), and 16-1016[6]).) Lake did not include a claim under A.R.S. § 16-672(A)(4), which relates to the counting of "illegal votes." She cannot now add this statutory basis to this election contest. Accordingly, even if Lake could prove that Maricopa County's chain of custody processes caused the counting of illegal ballots—which she did not and could not—she waived her right to make such a claim by failing to include it in

[6] A.R.S. § 16-1016(7) and (8) set forth a criminal penalty for "[k]nowingly add[ing] a ballot to those legally cast at any election, by fraudulently introducing the ballot into the ballot box either before or after the ballots in the ballot box have been counted" and "[k]nowingly add[ing] to or mix[ing] with ballots lawfully cast, other ballots, while they are being canvassed or counted, with intent to affect the result of the election . . . ." Lake provided no competent evidence that any person engaged in such knowing and fraudulent conduct. And if she had, it would be a basis to prosecute that person for a class 5 felony, not to overturn the results of the election. *See* A.R.S. § 16-1016.

her Complaint.

3. More fundamentally, however, a failure to comply with Lake's ideas about chain of custody requirements does not render any ballot "illegal." The trial court's Dec. 19, 2022 order properly identified what constitutes an illegal vote under A.R.S. § 16-672(A)(4).

> An illegal vote is one that is either cast by a voter who is ineligible to vote, *see Moore v. City of Page*, 148 Ariz. 151, 156-7 (App. 1986), or one cast in a manner that – by statute – *invalidates* the vote. *See Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994).

(I.R. 156 at 6.) Nothing in A.R.S. § 16-621(E) or the Election Procedures Manual invalidates ballots for which chain of custody documentation is lacking.

Therefore, even if Lake had been able to establish that Maricopa County failed to maintain necessary chain of custody records for early ballot packets delivered on election day, she would have shown only "irregularities in directory matters," that "will not void an election." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). Because every early ballot eventually tabulated was verified through the signature verification process, there is simply no evidence that a lack of chain of custody records from election day could "affect the result, or at least render it uncertain." *See id. Findley* further provides that:

> The main object of the duties and restrictions imposed on election officers is to afford to every citizen having a constitutional right to vote an opportunity to exercise that right, to prevent those not so entitled from voting, and to insure the conduct of the election so that the true number of legal votes and their effect can be ascertained with certainty.

> If these things are accomplished, then to throw out the vote of an entire precinct, or a considerable portion thereof, because the inspectors failed to comply with the statutory regulations, would be a sacrifice of substance to form.

Id. at 269–70. Moreover, "the intent of the voter is the question of primary importance." *Id.* at 270. It would turn on its head a century of Arizona election law to hold that an error by election administrators (of which—to be certain—there is no evidence here) requires this court to cast aside the clearly expressed intent of the nearly 300,000 voters who dropped off their early ballot packets on Election Day.

C. As formulated on appeal, Lake's chain-of-custody claim is barred by laches.

As a final point, the procedures described in § II.A have been in place for many election cycles, and are the same procedures that the County used for the August 2022 primary election. Yet Lake waited until after the general election to challenge the procedures. "Challenges concerning alleged procedural violations of the election process must be brought prior to the actual election." *Sherman v. City of Tempe*, 202 Ariz. 339, 342, ¶ 9 (2002) (citation omitted).

Here, instead of seeking relief regarding the County's chain of custody procedures before the election, Appellant waited until after the election to sue. But "by filing [her] complaint after the completed election," Lake "essentially ask[s the Court] to overturn the will of the people, as expressed in the election." *Id*. at 342, ¶ 11. The Court must reject Lake's attempt to "subvert the election process by

intentionally delaying a request for remedial action to see first whether [she would] be successful at the polls." *McComb v. Superior Court*, 189 Ariz. 518, 526 (App. 1997) (quotation omitted).

Conclusion

This Court should affirm the trial court's judgment.

RESPECTFULLY SUBMITTED this 17th day of January 2023.

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