**ARIZONA SUPREME COURT**

KARI LAKE,

*Plaintiff/Appellant*,

v.

KATIE HOBBS, *et al.*,

*Defendants/Appellees*.

Court of Appeals
Division One

No. 1 CA-CV 22-0779
No. 1 CA-SA 22-0237
(CONSOLIDATED)

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, personally as Contestee; ADRIAN FONTES, in his official capacity as Secretary of State; STEPHEN RICHER, in his official capacity as Maricopa County Reporter, *et al.*,

*Real Parties in Interest*.

Maricopa County
Superior Court
No. CV2022-095403

**PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS**

ARCAP 23(a), ARPSA 8(b)

RETRIEVED FROM DEMOCRACYDOCKET.COM

Kurt B. Olsen (admitted *pro hac vice*)
Olsen Law PC
1250 Connecticut Ave. NW, Ste. 700
Washington, DC 20036
Tel: 202-408-7025
Email: ko@olsenlawpc.com

Bryan James Blehm, Ariz. Bar #023891
Blehm Law PLLC
10869 N. Scottsdale Rd., Suite 103-256
Scottsdale, Arizona 85254
Tel: 602-753-6213
Email: bryan@blehmlegal.com

*Counsel for Petitioner*

# TABLE OF CONTENTS

Table of Authorities .......... ii

Petition for Review .......... 1

Issues Presented for Review .......... 2

Material Facts .......... 4

Chain of Custody .......... 4

L&A Testing .......... 6

Signature Verification .......... 8

Equal Protection and Due Process .......... 8

Reasons Petition Should Be Granted .......... 8

I. The court of appeals erred by applying the wrong standards of review. .......... 8

A. The court of appeals' erred by applying the clear-and-convincing standard, which directly conflicts with Division Two and is inconsistent with this Court's decisions. .......... 9

1. Presumptions of good faith and honesty do not aid Maricopa. .......... 11

2. Presumptions *cannot* aid Runbeck. .......... 11

B. The Opinion contradicts this Court's holdings in *Hunt* and *Huggins* for electoral manipulation not susceptible to quantification. .......... 12

II. The court of appeals erred by ratifying Maricopa's disregard of Arizona's COC and L&A testing laws. .......... 13

A. Maricopa's COC violations are actionable. .......... 13

B. Maricopa's L&A testing violations are actionable. .......... 14

III. The court of appeals erred in dismissing Counts III, V, and VI on the pleadings. .......... 14

RETRIEVED FROM DEMOCRACYDOCKET.COM

A. The court of appeals erred in dismissing the signature-verification claim (Count III) by misconstruing the alleged violation. ..................15

B. The panel erred in dismissing the Equal Protection and Due Process claims (Counts V and VI) as duplicative, without considering how constitutional elements modify the other claims. ....16

Conclusion ..........................................................................................17

## TABLE OF AUTHORITIES

**Cases**

*Abbey v. Green*,
28 Ariz. 53 (1925)..........................................................................11

*Aileen H. Char Life Interest v. Maricopa Cty.*,
208 Ariz. 286 (2004) ......................................................................10

*Ariz. Bd. of Regents v. Phx. Newspapers*,
167 Ariz. 254 (1991) ..............................................................4, 9, 13

*Averyt v. Williams*,
8 Ariz. 355 (1904)..........................................................................10

*Bonas v. Town of N. Smithfield*,
265 F.3d 69 (1st Cir. 2001)..............................................................16

*Buzard v. Griffin*,
89 Ariz. 42 (1960)............................................................................9

*Castaneda v. Partida*,
430 U.S. 482 (1977).........................................................................16

*Coleman v. City of Mesa*,
230 Ariz. 352 (2012) ..................................................................14, 16

*Findley v. Sorenson*,
35 Ariz. 265 (1929)................................................................. 2-4, 12

*Garcia v. Sedillo*,
70 Ariz. 192 (1950)................................................................... 10-11

*Golonka v. GMC*,
204 Ariz. 575 (App. 2003)................................................................11

RETRIEVED FROM DEMOCRACYDOCKET.COM

*Griffin v. Buzard*,
86 Ariz. 166 (1959)....................................................................................14

*Huggins v. Superior* Court,
163 Ariz. 348 (1990) ...................................................................................12

*Hunt v. Campbell*,
19 Ariz. 254 (1917)....................................................................2, 9, 12

*Jenkins v. Hale*,
218 Ariz. 561 (2008) .....................................................................................9

*Jennings v. Woods*,
194 Ariz. 314 (1999) ...................................................................................13

*McDowell Mountain Ranch Land Coal. v. Vizcaino*,
190 Ariz. 1 (1997).........................................................................................9

*Miller v. Picacho Elementary Sch. Dist. No. 33*,
179 Ariz. 178 (1994) ............................................................... 2, 9, 12-14

*Nicaise v. Sundaram*,
245 Ariz. 566 (2019) ...................................................................................10

*Parker v. City of Tucson*,
233 Ariz. 422 (App. 2013)........................................................... 2-3, 9

*Pedersen v. Bennett*,
230 Ariz. 556 (2012) .....................................................................................7

*Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62 (2d Cir. 2002)...................................................15

*Reyes v. Cuming*,
191 Ariz. 91 (App. 1998).............................................................................15

*Service v. Dulles*,
354 U.S. 363 (1957).....................................................................................16

*Silva v. Traver*,
63 Ariz. 364 (1945).......................................................................................11

*Young v. Bishop*,
88 Ariz. 140 (1960).........................................................................................4

**Statutes**

U.S. CONST. amend. XIV, §1, cl. 3 .........................................................16

U.S. CONST. amend. XIV, §1, cl. 4 .........................................................16

RETRIEVED FROM DEMOCRACYDOCKET.COM

Ariz. Const. art. 2, §21 .......... 2
A.R.S. §16-121.01 .......... 9
A.R.S. §16-449 .......... 1, 3
A.R.S. §16-449(A) .......... 6, 14
A.R.S. §16-452(C) .......... 1
A.R.S. §16-550(A) .......... 8
A.R.S. §16-621(E) .......... 1
A.R.S. §23-364(B) .......... 11
A.R.S. §25-814(C) .......... 11

**Rules, Regulations and Orders**

Ariz.R.Evid. 201 .......... 7
Ariz.R.Evid. 301 .......... 11
Ariz. Sec'y of State, 2019 Elections Procedures Manual .......... 1, 3, 5-6, 13-14

**Other Authorities**

Maricopa County, Notice of Solicitation, Request for Proposal for: Elections Tabulation System ¶ 2.1.1 (System Support Services) (04/04/2019) .......... 6-7

RETRIEVED FROM DEMOCRACYDOCKET.COM

## PETITION FOR REVIEW

The court of appeals' Opinion denying petitioner Kari Lake's appeal ruled that Arizona election laws don't matter. The panel ignored this Court's precedents for reviewing election contests and ratified Maricopa officials' decision to ignore Arizona's ballot chain-of-custody ("COC") and logic and accuracy testing ("L&A testing") requirements set forth in Arizona's Election Procedures Manual ("EPM"), and A.R.S. §§16-621(E), 16-449, 16-452(C). Further, the Opinion effectively immunizes election officials' noncompliance with Arizona's election laws by incorrectly holding that the clear-and-convincing standard of proof applies to all election contests.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The consequences of Maricopa's violations are stark:

- Maricopa's COC violations include the injection of 35,563 unaccounted-for ballots by Maricopa's third-party ballot processor, Runbeck Election Services, before Runbeck returned ballots to the Maricopa County Tabulation and Election Center ("MCTEC") for tabulation.
- Maricopa's failure to perform mandated L&A testing led to tabulators rejecting ballots at nearly two-thirds of Maricopa's 223 vote centers over 7,000 times every thirty minutes, beginning at 6:00 am and continuing past 8:00 pm—causing massive disruptions, hours-long lines and disenfranchising thousands of predominantly Republican voters on Election Day.

The Opinion directly contradicts this Court's admonition that "election statutes are mandatory, not 'advisory,' or else they would not be law at all." *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994). Further, by requiring clear-and-convincing evidence of outcome-determinative vote swings, the Opinion conflicts with the longstanding requirement that violations "affect the result, or at least render it uncertain" under *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929), and *Hunt v. Campbell*, 19 Ariz. 254, 265-66 (1917).

If allowed to stand, the Opinion will make commonplace the type of official arrogance exemplified by Maricopa's blaming of Republicans for voting on Election Day: "***you reap what you sow***." Appx:720-21 (Tr. 273:23-274:16). Public trust in elections is at an all-time low. Decisions such as the Opinion only serve to further erode that trust. The Legislature did not intend election officials to have this degree of insulation: "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Ariz. Const. art. 2, §21. The undisputed facts, and the violations of law, show that Maricopa's 2022 election must be set aside. Trust must be restored. This Court should grant review to correct this manifest error.

RETRIEVED FROM DEMOCRACYDOCKET.COM

## ISSUES PRESENTED FOR REVIEW

1. Did the panel err in deciding that a century of precedent applies the clear-and-convincing standard to all aspects of election contests, contrary to *Parker v.*

*City of Tucson*, 233 Ariz. 422, 436 n.14 (App. 2013), in which Division Two recognized that the evidentiary standard remains an open question in cases—like this— where there is neither express statutory standard nor an allegation of fraud?

2. Given the EPM's requirement that "the number of ballots inside the container shall be counted and noted on the retrieval form" "[w]hen the secure ballot container is opened," EPM, Chapter 2, §I.7.h.1, did the panel err in holding that the EPM does not "impos[e] any express time requirement" for "when" to count ballots and that "an initial estimate" of ballots is all that the law requires?

3. Did the panel err when it ignored the undisputed fact that 35,563 unaccounted for ballots were added to the total number of ballots at a third party processing facility—an amount far exceeding the vote margin between Hobbs and Lake—holding that fact was insufficient to show the election's outcome was at least "uncertain" under *Findley*, 35 Ariz. at 269?

4. Did the panel err when it ignored the fact that Maricopa did not perform L&A testing as required by EPM and A.R.S. §16-449?

5. Did the panel err when it ignored the evidence that Maricopa's failure to perform L&A testing caused massive disruptions to voting on Election Day disenfranchising thousands of Republican voters, and rejecting evidence that

RETRIEVED FROM DEMOCRACYDOCKET.COM

the chaos made the election outcome at least "uncertain" under *Findley*, 35 Ariz. at 269?

6. Did the panel err in dismissing the signature-verification claim on laches mischaracterizing Lake's claim as a challenge to existing signature verification policies, when Lake in fact alleged that Maricopa failed to follow these polices during the 2022 general election?

7. Did the panel err in dismissing the Equal Protection and Due Process claims on the pleadings as "duplicative" of Count II, without considering the additional issues that equal-protection and due-process review add to Maricopa's misconduct, such as the targeting of Republican voters and the "patent and fundamental unfairness" of targeted election disruptions?

RETRIEVED FROM DEMOCRACYDOCKET.COM

## MATERIAL FACTS

For the dismissed claims, "all well-pleaded material allegations of the [complaint] are to be taken as true." *Young v. Bishop*, 88 Ariz. 140, 143 (1960). For the tried claims, *de novo* review applies to "findings of fact that are induced by an erroneous view of the law [and] findings that combine both fact and law when there is an error as to law." *Ariz. Bd. of Regents v. Phx. Newspapers*, 167 Ariz. 254, 257 (1991) (internal quotations omitted).

### Chain of Custody

Arizona law unambiguously requires election officials to count "the number

of ballots" and "note[]" the number on the retrieval form" "[w]hen the secure container is opened….", EPM Chapter 2, §I(I)(7)(h) (Appx:112), *see also* A.R.S. §16-621(E).[1] However, Maricopa admitted in its appellate brief, that "[a]fter the close of polls on election day, due to the large volume of early ballot packets dropped at polling places that day," it did not follow these mandatory COC procedures regarding drop-box ballots retrieved on Election Day ("EDDB ballots"). Appx:150. Instead of "counting" the EDDB ballots when the secure containers were opened at MCTEC as required by the EPM, Maricopa admitted that the EDDB ballots were simply "sorted and placed in mail trays." *Id*. Maricopa then estimated it sent "275,000+" ballots to Runbeck, its third-party vendor for signature scanning. Opinion ¶23.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Unlike Maricopa, Runbeck recorded the exact number of EDDB ballots received from Maricopa on "MC Inbound—Receipt of Delivery" forms (263,379 EDDB ballots), Appx:732-740, and the number of EDDB ballots that it scanned and sent back to MCTEC on "MC Incoming Scan Receipts" (298,942 EDDB ballots). Appx:742-70. In other words 35,563 more ballots were inserted at Runbeck and sent back to MCTEC for tabulation, an unlawful discrepancy far exceeding the margin

[1] *Accord id.* Chapter 9, §VIII(B)(2)(g) ("Election Day…close-out duties" include mandate to determine the "number of ballots cast" including counting of drop-box ballots retrieved on Election Day when secure containers arrive at "the central counting place to be counted there.") (Appx:124-25).

between Hobbs and Lake. A Runbeck whistleblower testified that Runbeck allowed employees to insert ballots into the system, which is illegal and further establishes COC violations. Appx:356 (Honey Tr., 199:9-13), 728-30 (Marie Declaration).

**L&A Testing**

Arizona law mandates that counties conduct L&A testing on "all of the county's deployable voting equipment," including using ballots printed on the ballot-on-demand ("BOD") printers used at Maricopa's 223 vote centers, "to ascertain that the equipment and programs will correctly count the votes cast for all offices and on all measures" A.R.S. §16-449(A); EPM, Chapter 4, II, Appx:117, 122-23.

The undisputed evidence shows that Maricopa did not perform the mandatory L&A testing. Instead, Maricopa performed "stress testing"—Appx:209-10 (Tr: 52:17-53:04), 212-13 (*id.* 55:21-56:1), 771 (stating "Despite stress testing the printers before Election Day"). However, "stress testing" is not L&A testing and does not test to ensure that tabulators will read all ballots and correctly count the votes cast. A.R.S. §16-449(A). Instead "stress testing" only "ensure[s] that all components [of the voting system] will properly process the volume of materials and data similar to volumes the County expects during an election."[2]

RETRIEVED FROM DEMOCRACYDOCKET.COM

---

[2] Excerpt of Maricopa County, Notice of Solicitation, Request for Proposal for: Elections Tabulation System, at ¶2.1.1 (System Support Services) (04/04/2019)

On Election Day, BOD printers at nearly two-thirds of Maricopa's 223 vote centers printed misconfigured and defective ballots, causing tabulators to reject those ballots. As more than 200 witnesses testified, chaos ensued with hours-long wait lines causing voters to give up waiting or to simply not vote at nearly two-thirds of Maricopa's 223 vote centers. Appx:772-77, 778-79. A Republican attorney observer—part of a group of Republican attorneys covering 115 of 223 vote centers on Election Day—testified there was "pandemonium out there everywhere" with "lines out the door, which did not—you did not see during the Primary…. [and] angry and frustrated voters." Appx:422-23, 425 (Tr. 265:02-266:25, 268:01-10).

RETRIEVED FROM DEMOCRACYDOCKET.COM

The evidence and testimony presented at the Arizona Senate Committee on Elections meeting on January 23, 2023, showed more than 7,000 ballots being rejected by vote center tabulators every 30 minutes from 6:00 am to 8:00 pm—totaling over 217,000 rejected ballot insertions on a day with approximately 248,000 votes cast.[3] Had Maricopa performed L&A testing, the BOD printer and tabulator issues would have been discovered prior to Election Day and fixed. Appx:208 (Tr.

---

(available at https://www.maricopa.gov/DocumentCenter/View/64680/190265-Solicitation-Addendum-2-04-09-19).

[3] *See* https://www.azleg.gov/videoplayer/?eventID=2023011091 at 2:13:20-2:14:37. As in the court of appeals, Lake requests judicial notice of these facts as publicly available records on the Legislature's website. Ariz.R.Evid. 201; *Pedersen v. Bennett*, 230 Ariz. 556, 559, ¶15 (2012).

51:5-12).

**Signature Verification**

Count III alleges that "a material number of early ballots … were transmitted in envelopes containing an affidavit signature that the Maricopa County Recorder or his designee determined did not match the signature in the putative voter's 'registration record,'" and that Maricopa did not cure those ballots and "accepted a material number of these early ballots for processing and tabulation" in violation of A.R.S. §16-550(A). Compl. ¶¶150-151 (Appx:75-76).

RETRIEVED FROM DEMOCRACYDOCKET.COM

**Equal Protection and Due Process**

Counts V and VI assert Equal Protection and Due Process claims related to the Election Day chaos, based on the fact that Republicans disproportionately favor voting on Election Day, Compl. ¶89 (Republican-versus-Democrat disparity of 58.6% to 15.5%) (Appx:54-55) and that—***even among the Republican-heavy cohort of Election-Day voters***—the chaos targeted Republican voters. Compl. ¶165 (tabulator problems burdened Republican Election-Day voters more than 15 standard deviations more than they burdened non-Republican Election-Day voters) (Appx:78).

## REASONS PETITION SHOULD BE GRANTED

### I. THE COURT OF APPEALS ERRED BY APPLYING THE WRONG STANDARDS OF REVIEW.

The court of appeals required proving outcome-determinative numbers of

votes by clear-and-convincing evidence. Opinion ¶¶9-11. Both facets require this Court's review to avoid immunizing electoral misconduct. Because legal error infects the lower courts' factual determinations, this Court reviews the facts *de novo*. *Phx. Newspapers*, 167 Ariz. at 257.

### A. **The court of appeals' erred by applying the clear-and-convincing standard, which directly conflicts with Division Two and is inconsistent with this Court's decisions.**

The court of appeals relied on a series of decisions beginning with *Oakes v. Finlay*, 5 Ariz. 390, 398 (1898), to find the clear-and-convincing standard generally applicable to election contests. Opinion ¶¶9-10. However, those cases all involve either statutes expressly adopting the clear-and-convincing standard or fraud.[4] In 2013, Division Two correctly recognized that the evidentiary standard is an open question for election cases—like this—with no express statutory standard or allegation of fraud. *Parker*, 233 Ariz. at 436 n.14. Combined with the presumptions that election officers act in good faith, elevated evidentiary standards would effectively immunize election officials from suit, even if their intentional misconduct or gross negligence impairs elections. Only this Court can referee the dispute between Division One and Division Two as to whether a clear-and-

RETRIEVED FROM DEMOCRACYDOCKET.COM

[4] *Hunt*, 19 Ariz. at 268 (fraud); *Buzard v. Griffin*, 89 Ariz. 42, 50 (1960) (same); *McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 3 (1997) (A.R.S. §16-121.01); *Jenkins v. Hale*, 218 Ariz. 561, 566 (2008) (same).

convincing standard applies to all election contests.

***First***, election contests do not require proof of fraud, *Miller*, 179 Ariz. at 180, and the election-contest statute is silent on evidentiary standards, *see* A.R.S. §§16-671-16-678, so the Opinion's supporting authorities are inapposite.

***Second***, without statutory revision, a preponderance-of-evidence standard applies in civil ligation. *Aileen H. Char Life Interest v. Maricopa Cty.*, 208 Ariz. 286, 291 (2004). Indeed, under the canon against surplusage,[5] the occasional clear-and-convincing exceptions prove that default rule. If a clear-and-convincing standard applied to ***all*** election contexts, the Legislature would not have expressly enacted that standard for ***some*** election contexts. While plaintiffs bear the initial burden of proof, *Garcia v. Sedillo*, 70 Ariz. 192, 198 (1950), showing illegality can shift the burden ***to defendants***:

> [N]oncompliance does not necessarily make the ballots inadmissible in evidence, but the burden of proof in such case is cast upon the party offering to introduce them in evidence to show that the ballots offered are the identical ballots cast at the election, and that there is no reasonable probability that the ballots have been disturbed or tampered with[.]

*Averyt v. Williams*, 8 Ariz. 355, 359 (1904). Here, Lake has clearly shown

RETRIEVED FROM DEMOCRACYDOCKET.COM

5 *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶11 (2019) (statutes should be read to give meaning to every provision and to avoid rendering any provision superfluous).

noncompliance with Arizona law. Thus, rather than a clear-and-convincing standard ***against Lake***, this Court's Williams decision should shift the evidentiary burden ***to defendants***.

***Third***, the preponderance-of-evidence test applies to *quo warranto* actions to remove officeholders. *Abbey v. Green*, 28 Ariz. 53, 60 (1925). It would be strange to apply ***less***-strict review to removing officers than to installing them.

### 1. Presumptions of good faith and honesty do not aid Maricopa.

The same principles above apply to presumptions favoring election officials. Opinion ¶6. When the Legislature wants to adopt clear-and-convincing thresholds for its presumptions, it knows how. A.R.S. §§25-814(C), 23-364(B). Absent a statute or rule, default principles apply to presumptions. Ariz.R.Evid. 301. "Whenever evidence contradicting a legal presumption is introduced the presumption vanishes." *Silva v. Traver*, 63 Ariz. 364, 368 (1945); *Golonka v. GMC*, 204 Ariz. 575, 589-90, ¶48 (App. 2003) (discussing "bursting bubble" treatment of presumptions). Evidence of Maricopa's bad faith eliminated Maricopa's presumptions.

RETRIEVED FROM DEMOCRACYDOCKET.COM

### 2. Presumptions *cannot* aid Runbeck.

Even if Maricopa preserved its entitlement to presumptions of good faith, its private third-party contractor Runbeck lacks such presumptions. *Sedillo*, 70 Ariz. at 200 ("the officials in this election were not public officials where we can say that there is a presumption that they acted in good faith").

### B. **The Opinion contradicts this Court's holdings in *Hunt* and *Huggins* for electoral manipulation not susceptible to quantification.**

The panel relied on language from *Miller* defining the *Findley* "uncertainty" test to mean "in sufficient numbers to alter the outcome of the election." Opinion ¶11 (quoting *Miller*, 179 Ariz. at 180). The *Miller* gloss on "uncertainty" was expressly "[i]n the context of this case." *Miller*, 179 Ariz. at 180. This Court has not insulated unquantifiable electoral manipulations, such as the Election Day debacle with massive tabulator ballot rejections at nearly two-thirds of Maricopa's vote centers, from review:

> Their effect cannot be arithmetically computed. It would be to encourage such things as part of the ordinary machinery of political contests to hold that they shall avoid only to the extent that their influence may be computed. So wherever such practices or influences are shown to have prevailed, not slightly and in individual cases, but generally, so as to render the result uncertain, ***the entire vote so affected must be rejected***.

*Hunt*, 19 Ariz. at 265-66 (interior quotation marks omitted, emphasis added); *cf. Huggins v. Superior Court*, 163 Ariz. 348, 350 (1990) ("it hardly seems fair that as the amount of illegal voting escalates, the likelihood of redressing the wrong diminishes") (interior quotation marks omitted). If nonquantifiable impacts "affect the result, or at least render it uncertain," *Findley*, 35 Ariz. at 269, that suffices to overturn an election. This error requires this Court's review.

RETRIEVED FROM DEMOCRACYDOCKET.COM

## II. THE COURT OF APPEALS ERRED BY RATIFYING MARICOPA'S DISREGARD OF ARIZONA'S COC AND L&A TESTING LAWS.

The panel reviewed the trial court's rejection of Lake's COC and L&A testing claims under the clearly-erroneous standard, without recognizing that the trial court's erroneous legal standard undermined its factual determinations. *See* Opinion ¶¶13-24; *Phx. Newspapers*, 167 Ariz. at 257. The panel also erred by requiring outcome-changing results, *see* Section I.B, *supra* (unquantifiable electoral manipulation is reviewable) and by ignoring this Court's holding in *Miller* that "election statutes are mandatory, not 'advisory,' or else they would not be law at all." *Miller*, 179 Ariz. at 180. These errors require the Court's review.

### A. Maricopa's COC violations are actionable.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Under EPM §I.7.h, "[w]hen the secure ballot container is opened … the number of ballots inside the container shall be counted and noted on the retrieval form." The panel incomprehensibly held these unambiguous mandates do not "impos[e] any express time requirement" to count the ballots, and further that the requirement to count "the number of ballots" is satisfied by "an initial estimate." Opinion ¶¶22-23.

Absent a statutory definition, dictionary definitions suffice. *Jennings v. Woods*, 194 Ariz. 314, 322, ¶33 (1999). There is no need for a dictionary here because the EPM's requirements to begin counting "when the secure ballot container is opened" and "the number of ballots shall be counted" (*i.e.*, not estimated) are

unambiguous. If allowed to stand, the panel's rewrite would gut the EPM's clear-cut mandates. Allowing Maricopa to mask Runbeck's unaccounted-for injection of 35,563 ballots underscores how the Opinion, if not vacated, will nullify COC requirements and ratify the insertion of illegal votes into elections.

**B. Maricopa's L&A testing violations are actionable.**

The panel ignored Maricopa's failure to perform L&A testing as mandated by A.R.S. §16-449(A) and the EPM, in direct contravention of the Court's holding in *Miller*. Instead, the panel focused on whether the Election Day debacle at nearly two-thirds Maricopa's vote centers "had any potential effect on election results." ¶16. Putting aside the fact that the panel ignored the sworn testimony of over 200 witnesses and disregarded expert testimony, the Opinion contradicts this Court's long-standing precedent that nonquantifiable election interference is reviewable. *See* Section I.B, *supra*.

RETRIEVED FROM DEMOCRACYDOCKET.COM

## III. THE COURT OF APPEALS ERRED IN DISMISSING COUNTS III, V, AND VI ON THE PLEADINGS.

Affirming dismissal of Counts III, V, and VI on the pleadings was error "unless the relief sought could not be sustained under any possible theory." *Griffin v. Buzard*, 86 Ariz. 166, 169-70 (1959); *accord Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶7 (2012). Because courts can grant relief under Counts III, V, and VI, this Court should either grant that relief or vacate and remand for further proceedings.

## A. The court of appeals erred in dismissing the signature-verification claim (Count III) by misconstruing the alleged violation.

Although Lake alleged that Maricopa violated signature verification procedures and thereby accepted a material number of illegal ballots with signature mismatches, Compl. ¶¶150-151 (Appx:75-76), the panel incorrectly interpretated Lake's challenge to the election procedures themselves, and there by barred under laches for failing to file ***before the election***. Opinion ¶26.

However, Lake's claim is not that the signature verification procedures are unlawful. Rather, Lake challenges Maricopa's misconduct in failing to follow signature verification procedures in the 2022 election. Compl. ¶¶54-62, 151 (Appx:32-36, 76). "Without the proper signature of a registered voter on the outside, an absentee ballot is void and may not be counted." *Reyes v. Cuming*, 191 Ariz. 91, 94 (App. 1998). Lake could not have brought her claim earlier than when the whistleblowers conducting signature verification at MCTEC came forward with the evidence that Maricopa disregarded Arizona law and allowed tens of thousands of uncured ballots with nonmatching signatures to be counted. "One cannot be guilty of laches until his right ripens into one entitled to protection." *Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 70 (2d Cir. 2002) (internal quotation omitted).

The Court should reinstate Count III.

RETRIEVED FROM DEMOCRACYDOCKET.COM

B. **<u>The panel erred in dismissing the Equal Protection and Due Process claims (Counts V and VI) as duplicative, without considering how constitutional elements modify the other claims.</u>**

Although the panel affirmed the dismissal of the constitutional claims as merely "duplicative" of Lake's tabulator claims, Opinion ¶31, the claims add several actionable dimensions to Maricopa's misconduct.

***First***, Counts V and VI state claims against Maricopa's chaotic election: "the Equal Protection and Due Process Clauses protect against government action that is arbitrary, irrational, or not reasonably related to furthering a legitimate state purpose." *Coleman*, 230 Ariz. at 362. Government must follow its own rules. *Service v. Dulles*, 354 U.S. 363, 372 (1957). Maricopa's violations are actionable.

RETRIEVED FROM DEMOCRACYDOCKET.COM

***Second***, Maricopa's election chaos was not only ***intentional*** but also ***targeted***. *See* Compl. ¶¶89, 165 (almost 3.78:1 Republican-versus-Democrat disparity in Election-Day voters and—***among Election-Day voters***—Republican voters affected to a statistically improbable degree if disruption were random) (Appx:54-55, 78); *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). Levels of scrutiny aside, targeting voters—by race or by left-handedness—clearly is ***actionable***. Targeting Republicans is no different.

***Third***, due-process claims require "patent and fundamental unfairness," but that "lies in the eye of the beholder," so "each case must be evaluated on its own facts." *Bonas v. Town of North Smithfield*, 265 F.3d 69, 75 (1st Cir. 2001).

Erroneously finding constitutional claims unnecessarily cumulative, the lower courts never considered the facts.

## CONCLUSION

The Petition for Review should be granted.

Dated: March 1, 2023

Respectfully submitted,

/s/ Bryan James Blehm

Bryan James Blehm, Ariz. Bar #023891
Blehm Law PLLC
10869 N. Scottsdale Rd., Suite 103-256
Scottsdale, Arizona 85254
Tel: 602-753-6213
Email: bryan@blehmlegal.com

Kurt B. Olsen (admitted *pro hac vice*)
Olsen Law PC
1250 Connecticut Ave. NW, Ste. 700
Washington, DC 20036
Tel: 202-408-7025
Email: ko@olsenlawpc.com

*Counsel for Petitioner*

RETRIEVED FROM DEMOCRACYDOCKET.COM