Real Parties in Interest.

REPLY BRIEF OF APPELLANT-PETITIONER KARI LAKE

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Tracy Beanz, [1/25/2023 11:54 AM]

🚨THREAD: Last night, Kari Lake filed a reply brief in her appeal. This is in response to the brief filed by Maricopa et al. You'll want to follow this thread closely.

INTRODUCTION

This is a straightforward case. Appellees-respondents Maricopa County and Katie Hobbs (collectively, "Defendants") make this case seem more complicated than it is because the central issues in this appeal cannot be credibly disputed. To distract the Court from this fact, Defendants ignore the trial court's holdings, misstate the law, misstate material facts, and—unable to get their stories straight—contradict each other.

Contrary to Defendants' argument, the trial court wrongly required appellant-petitioner Kari Lake ("Plaintiff") to prove by clear and convincing evidence that Defendants "***intended to affect the result of the 2022 General Election***" and actually succeeded in that effort. Lake.Appx:691. No Arizona case law supports that standard. Instead, binding Arizona Supreme Court case law holds otherwise—"a showing of fraud is not a necessary condition" in an election contest. *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994). In their briefs, Defendants ignore this aspect of the trial court's holding.

The intro gets right to the point. Defendants are trying to hold that the trial courts standard was proper- that they needed to prove that def. INTENDED to affect the outcome. That is nowhere in case law. Case law demonstrates otherwise- a key tenet of the appeal.

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With respect to Maricopa's failure to conduct mandatory logic and accuracy testing ("L&A testing") on "***all of the county's deployable voting equipment***" prior to Election Day, Defendants misleadingly conflate "stress testing" with Arizona's statutorily mandated L&A testing. Stress testing is not found in Arizona law and does not ensure that all ballot styles printed from all vote center ballot on demand

("BOD") printers can be scanned by all vote center tabulators. L&A does. As a consequence of Maricopa's violation of law, tens of thousands of misconfigured or faulty BOD printed ballots were generated in at least 132 of Maricopa County's 223 vote centers—causing tens of thousands of tabulator rejections and massive disruptions on Election Day. Thousands of Republican voters were disenfranchised by Maricopa's failure to follow the law, thereby rendering the election's outcome, at least, uncertain.

Defendants purposefully conflate "Stress Testing" (which isn't found in AZ law) and "Logic and Accuracy Testing" which IS found in AZ law. Maricopa didn't perform LA testing, resulting in tens of thousands of tabulator rejections and massive disruptions on election day.

Indeed, just yesterday, the Arizona Senate Committee on Elections was presented evidence from Maricopa's tabulator system log files showing that on Election Day, Maricopa's vote center tabulators rejected over 7,000 ballots ***every thirty minutes*** beginning almost immediately after the vote centers opened at 6:00 am and continuing past 8:00 pm—totaling over 217,000 rejected ballot insertions on a day when approximately 248,000 votes were cast. Contrary to Defendants' claims of "hiccups," the tabulator ballot rejections were massive, widespread and lasted all day. Lake requests that the Court take judicial notice of this committee meeting and the information therein because it shows the importance of these developing issues that relate directly to the claims in this case.[1]

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[1] *See* https://www.azleg.gov/videoplayer/?eventID=2023011091 at 2:00:30, 2:13:20-2:14:37 (last visited Jan. 24, 2023). Publicly available records on the Legislature's website are judicially noticeable. Ariz.R.Evid.R. 201; *Pedersen v. Bennett*, 230 Ariz. 556, 559, ¶15 (2012).

The hearing in the AZ Senate can be included; Lake is requesting the court take judicial notice (huge); the log files showed that tabulators in Maricopa rejected over 7k ballots every 30 minutes, totaling over 217k rejected ballot insertions. There were appx 248k votes cast.

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With respect to Maricopa's violations of Arizona chain-of-custody laws, Maricopa *admits* that on Election Day it did not count the ballots at MCTEC as Arizona law mandates "due to the large volume of early ballots." Maricopa Br. 20. Instead, Maricopa simply unpacked the ballots and estimated their number before sending them to Runbeck. No such exception exists in Arizona law. The unexplained increase of over 25,000 ballots in the reported totals between November 9 and 10, far exceeding the 17,117 margin of votes between Hobbs and Lake, is a direct manifestation of Maricopa's violation.

Maricopa county admits in its pleadings that they didn't count ballots at MCTEC as required by law because there were so many, but there is no exception in AZ law to thwart procedure because there were too many votes.

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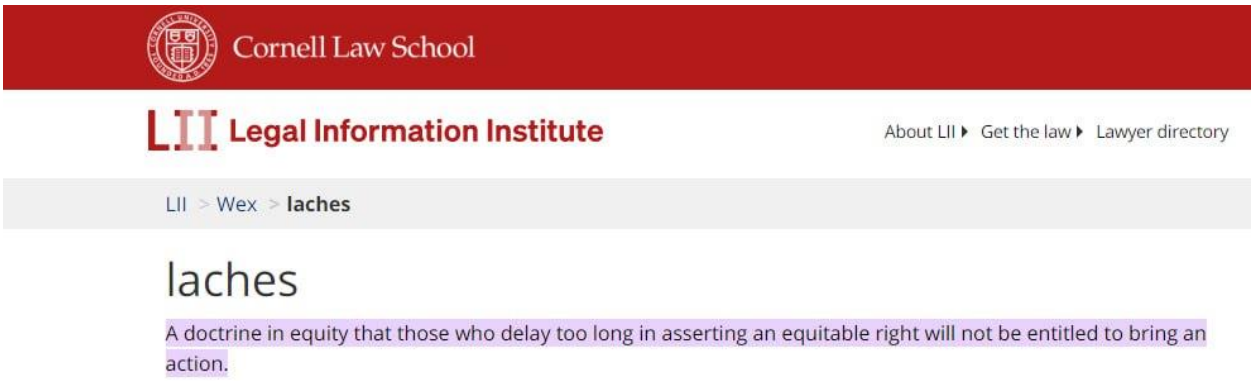

This next part is complicated and needs some backstory. Initially, Lake brought a signature-matching claim. The judge struck it down because the defendants misled the court about what was being challenged and Defendants used laches to be able to get that dismissed.

What is laches? See below. The defendants argued that Lake was challenging the POLICY used for matching, not the physical verification ITSELF, and the judge found it easy to dismiss on those grounds. But Lake wasn't challenging policy

https://www.law.cornell.edu/wex/laches#:~:text=A%20doctrine%20in%20equity%20that,entitled%20to%20bring%20an%20action.

The Defense argument was "if they had a problem with this, they should've raised it BEFORE the election. They waited too long." Lake is saying, "this has nothing to do with your policy, its that you didn't follow it and approved signatures that weren't correct"

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Lastly, for the claims dismissed on the pleadings, Defendants ignore the specific allegations of those claims. For Count III (signature verification), Defendants theorize that Lake intended to challenge signature-verification policies, Hobbs Br. 35, but the complaint plainly alleges that Maricopa did not follow the policies, which is actionable. *Reyes v. Cuming*, 191 Ariz. 91, 94 (App. 1998). Similarly, on Counts V (equal protection) and VI (due process), Defendants fail to acknowledge that Lake alleges both that the election chaos targeted Republicans not only because they favor Election-Day voting but also—***among the cohort of Election-Day voters***—affected Republicans to a statistically anomalous degree. Hobbs Br. 40-43. By ignoring this targeted effect—not explainable by chance, and Defendant's burden to explain—Defendants offer no justification for the Court's sidestepping the constitutional issues as either merely cumulative or wholly outside

In her appeal, @KariLake is challenging the decision to deny her claim on signature matching.

STANDARD OF REVIEW

"Failure to respond in an answering brief to a debatable issue constitutes confession of error." *Chalpin v. Snyder*, 220 Ariz. 413, 423 n.7, ¶40 (App. 2008); *Caretto v. Ariz. DOT*, 192 Ariz. 297, 303 (App. 1998). Citing *Miller v. Indus. Comm'n of Ariz.*, 240 Ariz. 257, 259, ¶ 9 (App. 2016), Hobbs argues that "contrary to Lake's suggestion, this Court must defer to the trial court's determination of disputed facts." Hobbs Br. 15. That is not what *Miller* held:

> The applicability of preclusion … is a mixed question of fact and law; accordingly, we apply a deferential standard of review to the determination of disputed facts supported by reasonable evidence, and apply an independent standard of review to the ultimate determination of whether these facts trigger preclusion.

Miller, 240 Ariz. at 259, ¶9. This Court's *Miller* decision did not—and could not—overrule the Arizona Supreme Court's holding that the deferential "unless clearly erroneous doctrine" "does not apply … to findings of fact that are induced by an erroneous view of the law nor to findings that combine both fact and law when there is an error as to law." Opening Br. at 22 (quoting *Ariz. Bd. of Regents v. Phx. Newspapers*, 167 Ariz. 254, 257 (1991)).

Hobbs is arguing that the appeals court MUST use the same determination of disputed facts as the trial court. That just simply isn't the case.

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I. THE TRIAL COURT APPLIED THE WRONG STANDARDS UNDER §16-672.

By requiring clear-and-convincing evidence of election officials' intent to affect election results, the trial court used the wrong standard for "misconduct." At

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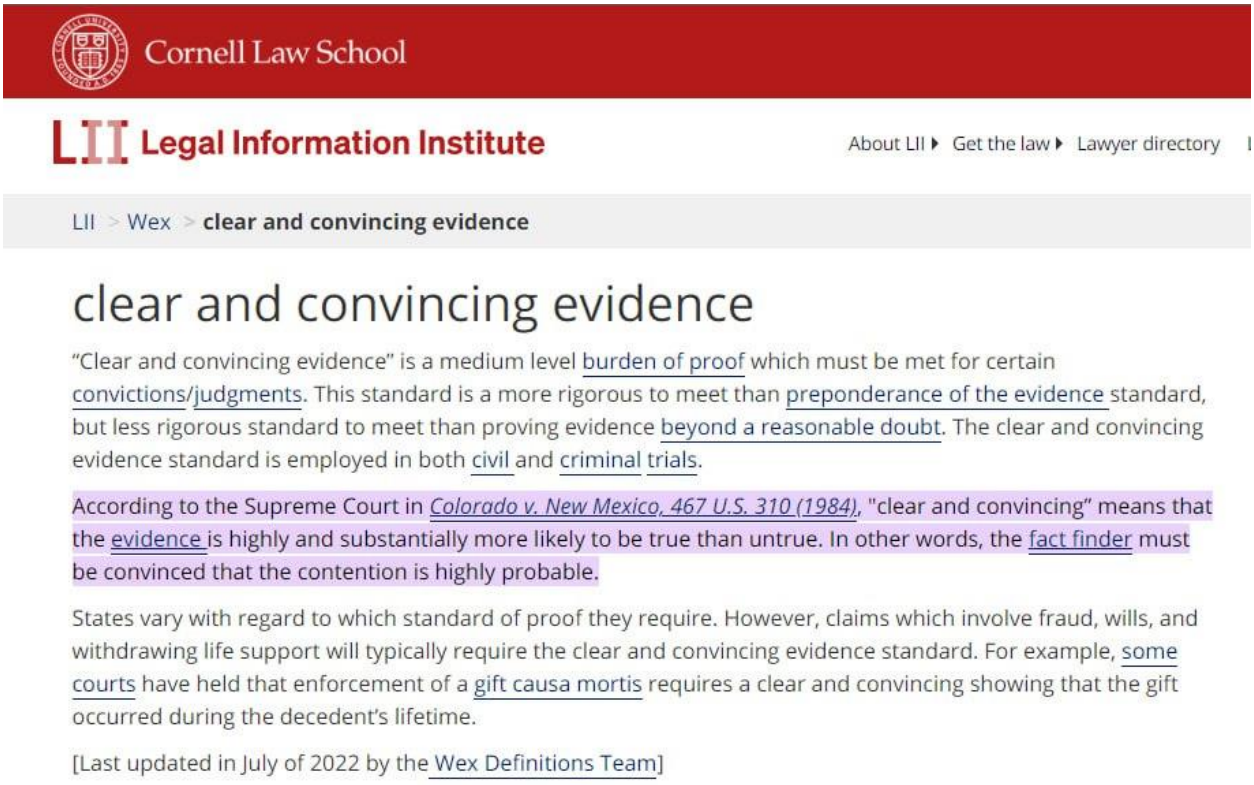
a minimum, if this Court cannot reach the merits to reverse, that error requires vacating the trial court and remanding for further review under the correct legal standard.

The Trial Court applied the wrong standard under the law by requiring clear-and-convincing evidence of INTENT. If the appeals court can't reverse, the error requires vacating the trial court's decision and remanding for further review using proper standards (AKA a retrial)

The defense case relies on the trial judge using the incorrect standard to conduct the trial, so they go to lengths to try to argue that the trial judge used the proper standard. This next section is Lake's legal argument as to why that is improper. It's important to understand.



There are two standards: clear and convincing and preponderance of the evidence. Let's unpack those quickly. Clear and convincing: (These vary between states but this is generally. Also sometimes different for elections. but here is an idea)

https://www.law.cornell.edu/wex/clear_and_convincing_evidence#:~:text=According%20to%20the%20Supreme%20Court,the%20contention%20is%20highly%20probable.

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Tracy Beanz, [1/25/2023 12:38 PM]

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Tracy Beanz, [1/25/2023 12:47 PM]

Preponderance of the evidence: As you can see, it is much different, and is the default standard always used unless indicated otherwise. As you will see in the next few posts, it wasn't. Preponderance of the

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https://www.law.cornell.edu/wex/preponderance_of_the_evidence#:~:text=Under%20the%20preponderance%20standard%2C%20the,proof%20in%20a%20civil%20trial.

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A. Defendants conflate clear-and-convincing evidence with the rebuttable presumptions supporting elections.

Hobbs argues that Lake's proposed standard for evaluating misconduct "bears *no resemblance* to the election contest standard Arizona courts use" and "runs counter to Arizona's longstanding presumption in favor of the validity of elections." Hobbs Br. 17 (emphasis in original). This argument conflates applicable evidentiary standards and presumptions, as shown below.

Hobbs argues that Lake's proposed standard "bears no resemblance" to the election contest standard AZ courts use. This is just an absurd argument. Hobbs wants to rewrite the law and precedent with her appeal brief. It's ludicrous, and Lake explains why next.

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First, election decisions apply the clear-and-convincing evidence only in specialized circumstances (*e.g.*, for fraud or where statutes set that standard). Opening Br. 23-25; *Hunt v. Campbell*, 19 Ariz. 254, 268 (1917) (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,

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566 (2008) (same). Election contests do not require proof of fraud, *Miller*, 179 Ariz. at 180; *Griffin v. Buzard*, 86 Ariz. 166, 169-70 (1959) ("election contest is not a criminal action … and the high degree of proof required to convict is not essential"), so the first set of decisions is inapposite to non-fraud claims. The election-contest statute is silent on evidentiary standards, *see* A.R.S. §§16-671 to 16-678, so the second set of decisions is inapposite to the election-contest statute.

A civil election challenge isn't a criminal case. This is something I have spoken about a lot. The standard the trial judge set was wrong. There wasn't even fulsome discovery, let alone enough to meet the same standard for evidence you'd need in a criminal case.

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Second, Division Two of this Court recently reserved the question of which evidentiary standard applies to election cases, absent statutes setting a standard. *Parker v. City of Tucson*, 233 Ariz. 422, 436 n.14 (App. 2013). Contrary to Hobbs' claims, the issue is not settled.

Division Two of the AZ appeals court recently reserved the question of which standard applies in cases, absent a statute declaring it, and Hobbs had claimed it was settled in her brief. It isn't, and they deferred.

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Third, the standard rule in civil cases—made clear by statutes occasionally adopting clear-and-convincing standards for discrete election-law issues—is that a preponderance-of-evidence standard applies unless otherwise stated. *See* Opening Br. 23. Hobbs' clear-and-convincing exceptions prove the preponderance-of-evidence 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:

> A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.

Nicaise v. Sundaram, 245 Ariz. 566, 568, ¶11 (2019). Defendants' view of the law

would render the occasional targeted provisions wholly superfluous.

The same evidentiary principles apply to presumptions. When the Legislature wants to adopt clear-and-convincing thresholds for its presumptions, it does so:

And, if the legislature wants to adopt "clear and convincing" thresholds for presumptions, it does so.

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Finally, 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. In short, default preponderance-of-evidence standards apply to election contests absent fraud or statutes that expressly adopt different standards.

And this is an EXCELLENT point-- preponderance of evidence standard applies to actions to remove officeholders. It would be strange to apply less strict review to removing officers than installing them. GREAT point.

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1. Presuming Defendants' good faith and honesty is both inapposite and rebutted.

Because misconduct does not require fraud, *Miller*, 179 Ariz. at 180, Defendants' honesty is irrelevant, but Lake has shown the sort of bias and dishonesty that rebuts this presumption. *Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, 154, ¶24 (App. 1999) (presumption of decisionmaker's "honesty and integrity" rebutted by actual bias). First, the trial revealed that Maricopa knew about defects in its equipment over three election cycles, Lake.Appx:618 (Tr. 217:06-13), and neither fixed nor reported the issue. *See also* Lake.Appx:54-55 (¶124 & n.22) (Maricopa withheld election evidence from a Senate subpoena); Appx:152-53 (Maricopa dissembling about stress testing versus L&A testing). These pieces of evidence rebut the presumption of Defendants' honesty and good faith, to the extent that the presumption is relevant.

The defendant's brief used a standard by which they claim "good faith and honesty." Lake now goes about ripping that claim apart. Maricopa knew about the defects in its equipment over 3 elections and didn't fix or report the issues. (They are being kind)

D. The trial court applied the wrong standard to analyze misconduct.

The trial court improperly defined "misconduct" under §16-672(A)(1) by requiring not only that covered election officials intended to affect the election results but also that their actions actually affected the election results. Lake.Appx:684.

1. The trial court erred in requiring intent to alter election results.

Other than equating Plaintiff's claims with fraud, Hobbs Br. 18, Defendants confess the trial court's error by failing to defend its equation of misconduct with intending to affect election results. *Chalpin*, 220 Ariz. at 423 n.7, ¶40.

The trial court incorrectly required BOTH that officials intended to affect the election outcome AND ALSO that their actions actually did affect the results. The defendants confess that error by not defending its equation of the two.

a. Under *Hunt*, nonquantifiable election interference does not require fraud.

Under *Hunt*—and decisions based on the same authority—election interference "where it is found impossible to compute the wrong" requires striking the flawed results. *Hunt*, 19 Ariz. at 266; *King v. Cty. Bd. of Educ.*, 174 Ga. 685, 689 (1932) ("'when the proceedings are so tarnished by fraudulent, negligent, or improper conduct on the part of the officer that the result of the election is rendered unreliable, the entire returns will be rejected'") (quoting Paine on Elections, 500, §596). Maricopa's chaotic 2022 election fits that bill.

Implicitly invoking the "series-qualifier canon," Hobbs claims "fraudulent combinations, coercion, and intimidation" necessarily means "fraud." Hobbs Br. 18. But that canon must give way to common sense, *S. Tucson v. Bd. of Supervisors*, 52 Ariz. 575, 584 (1938) ("clear intent … takes precedence as a canon of construction of all grammatical rules"), so the adjective "fraudulent" modifies only the noun "combinations."

No decision limits election interference—such as coercion and intimidation—to fraudulent election interference. *See, e.g.*, *Patton v. Coates*, 41 Ark. 111, 124-26 (1883) (interpreting phrase to include fraud *and* actual violence). Hobbs is simply wrong that nonquantifiable election interference requires fraud.

Under the Hunt case and other cases that used that as precedent, election interference where it is impossible to "compute" the wrong, requires that results are stricken. Hobbs argues that non-quantifiable interference requires fraud. Precedent proves otherwise.

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b. Misconduct can occur without intent to affect results.

Actionable misconduct does not require fraud. *Miller*, 179 Ariz. at 180. It is

enough "that an express non-technical statute was violated, and ballots cast in violation of the statute affected the election." *Id.* Defendants confess error by not defending the trial court's setting felonious misconduct, A.R.S. §16-1010, as the minimum bar. *Chalpin*, 220 Ariz. at 423 n.7, ¶40. Instead, disregarding election laws can *per se* constitute misconduct. *Reyes*, 191 Ariz. at 94.

Indeed, misconduct's dictionary definition includes forms of negligence. Opening Br. 26. While Hobbs correctly notes that mere mistakes are not misconduct, *see* Hobbs Br. 20 & n.6 (citing *State v. Lapan*, 249 Ariz. 540, 549, ¶25 (App. 2020)), *Lapan* does not—and cannot—overrule the Arizona Supreme Court's finding that *aggravated* negligence constitutes misconduct. *See Newman v. Sun Valley Crushing Co.*, 173 Ariz. 456, 460-61 (App. 1992). Under Arizona law, "reckless" or "wanton" misconduct (*i.e.*, "aggravated negligence") means "simple negligence" coupled with "wantonness" (*i.e.*, "a high degree of probability that substantial harm will result"). *DeElena v. Southern Pacific Co.*, 121 Ariz. 563, 566 (1979). Given the admittedly recurring nature of Maricopa's election issues, a court should find wantonness.

Misconduct can occur without intent to affect results: It's enough just to violate a statute, which they did. Hobbs argues mere mistakes are not misconduct, but that doesn't mean those "mistakes" didn't break the law. Why have laws?

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In contrast, counties, including Maricopa, "must substantially follow the L&A testing procedures applicable to the Secretary of State, ***except that all of the county's deployable voting equipment must be tested***."[3] In other words, ***all*** BOD printers and ***all*** tabulators used at each of Maricopa's 223 vote centers using BOD printed ballots were required to be L&A tested—and to pass L&A testing—before the election.

Hobbs nonsensically argues "all of Maricopa's voting equipment was lawfully tested and certified years ago." Hobbs Br. 23. Hobbs' argument is irrelevant. The

[2] Appx:701 (EPM, section D.2, "Selection of Precincts and Test Ballots"); Supp.Appx:18 (EPM at 86).

[3] Appx:702-03 (EPM, section F, "County L&A Testing") (emphasis added); Plaintiff's Opening Brief at 29-30. *See also* Supp.Appx:23-24 (EPM Section F).

fact that voting equipment was "tested and certified years ago" is meaningless with respect to L&A testing performed before each election. Hobbs also argues that that "Director Jarrett also confirmed that the printers and tabulators used at voting centers were successfully tested in the weeks leading up to election day" citing Jarrett's testimony at Lake.Appx:149-50 (Tr: 52:17-53:04). *Id*. Significantly, Hobbs does not use the phrase "L&A testing," just the vague word "tested."

Maricopa didn't perform L&A testing prior to the election, and in their brief, Hobbs conflates this testing with the testing required at a statewide level hoping the appellate court won't notice.

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Maricopa quotes the same portion of Jarrett's testimony in its answering brief, but goes further and expressly states "Maricopa County performed logic and accuracy testing exactly as the Elections Procedures Manual requires." Maricopa Br. 5. Defendants are misleading the Court by conflating "logic and accuracy testing"—required by A.R.S. §16-449 and the EPM—with Jarrett's carefully parsed testimony about "stress testing"—which appears nowhere in the EPM The two tests are completely different, and Defendants know they are different.

Specifically, Defendants rely on the following testimony by Jarrett:

> Q: Prior to performing logic and accuracy testing prior to the 2022 General Election, did you perform, or did your office perform logic and accuracy testing with test ballots from ballot on-demand printers in the precinct-based tabulators?
>
> A: 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.

Lake Answer 140-50 (Tr. 52:17-53:04) (emphasis added)

Defendants attempt to conflate "stress testing" with L&A testing, again, hoping the distinction won't be noted. Here you see that Jarett references the SOS L&A testing, which differs from the statute for testing required in the law. Crafty, but caught.

which A.R.S. §16-449 states is to ensure that ***all*** voting "equipment and programs will correctly count the votes cast for all offices and on all measures."

Maricopa also states in its written response to the Arizona AG's inquiry into the Election Day debacle that Maricopa performed only "stress testing"—not L&A testing—on the BOD printers. Appx:708, (stating "Despite stress testing the printers before Election Day…."). Maricopa's failure to perform L&A testing is a per se violation of A.R.S. §16-449 and the EPM, constitutes misconduct under A.R.S. §16-672(A)(1), and was a direct cause of the massive disruptions on Election Day.

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More on this

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B. Defendants' arguments as to the severity of the tabulator ballot rejections are demonstrably false or irrelevant.

Defendants downplay the severity of the widespread debacle on Election Day as a "hiccup." Lake.Appx.618 (Tr. 217:14-19). However, the only evidence Defendants cite is only their self-serving testimony and descriptions of wait time data which Defendants did not introduce into evidence.

Maricopa and Hobbs do not dispute the sworn testimony of over 200 election workers, election observers, and voters, admitted into evidence by the trial court, describing the debacle on Election Day. Lake.Appx:410-11 (Tr. 9:25-10:08, admitting Exs. 53-54, 76). Those sworn declarations identify 132 of Maricopa's 223 vote centers—nearly two-thirds of Maricopa's vote centers—as experiencing widespread BOD printer and tabulator failures causing chaos, hours long lines, and voters giving up and not voting. Lake.Appx:79-84. Supp.Appx:43-44 (chart showing

massive lines and hours long wait times at least 32 of the vote centers based on those declarations).

Hobbs falsely maintains that "Lake's witnesses could not identify a single voter who was unable to vote because of tabulator issues." Hobbs Br. at 4. The following is sampling of just a few of over 200 unrebutted sworn declarations:

- A-189 (Steven Steele) ("approximately 170 to 175 people simply gave up after standing in line for many hours"). Supp.Appx:41-42.
- A-11 (Kathryn Baillie) ¶ 20 ("while the printers were down, there were long lines and 'some people just left'"). Supp.Appx:27-32.
- A-182 (Erin Smith) at Page 4 ("I also saw several voters leave the lines and cite work or other reasons why they could not wait 2-3 hours it seemed it would take"). Supp.Appx:34-40.
- A-95 (James Knox) ¶5 ("Throughout the day, I witnessed lots of people leave due to the length of the lines. I would estimate at a minimum of 300 people. All were disgusted."). Supp.Appx:33.
- A-1 (Jamie Alford) ¶ 15 ("I estimate that 10-20% of voters left without voting."). Supp.Appx:25-26.

Contemporaneous text messages from a group chat of fifteen "T-Techs " hired by Maricopa for the 2022 general election to assist with vote center problems also tell the true story of Election Day. Lake.Appx:345-46 (Tr.: 248:06 – 249:09). These T-Techs covered a "bare minimum" of 20 to 30 vote centers on Election Day. Lake.Appx:346-47 *(id.* 249:07 – 250:17). Those texts were admitted into evidence and examples describe the chaos that day:

- "im having a 911 tabulators aren't reading." Lake.Appx:715

Day. Lake.Appx:362-63 (Tr. 265:02-266:25). He personally visited 10 vote centers and described Election Day as "pandemonium out there everywhere" with "lines out the door, which did not -- you did not see during the Primary…. [and] angry and frustrated voters." *Id*. Sonnenklar testified that "most of the [other] roving attorneys [covering the other 105 vote centers] had a similar experience" to him. Lake.Appx:365 (*id*. 268:01-10).

They also downplay the severity of election day as "hiccups." They use their own self serving testimony to "prove" this and do not dispute, but just ignore, hundreds of affidavits and other evidence.

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Unable to rebut this damning evidence describing what really happened on Election Day, Hobbs argues that "[a]s one elections expert testified, tabulator issues are among the most common unforeseen equipment malfunctions in elections." Hobbs 6. This so-called expert is a political science professor. He is not an expert on voting equipment, was not in Arizona on Election Day, simply relied on the County's data and did nothing to verify the accuracy of the data he received from Maricopa. Lake.Appx:513, (Tr. 112:14-17) (Mayer), Appx:543-44 (*id*. 142:04-143:06). Moreover, "tabulator issues" are not routine. Election Assistance Guidelines establish that "[t]he voting system misfeed rate must not exceed 0.002 (1/500)." Voluntary Voting System Guidelines VVSG 2.0 Voluntary Voting System Guidelines VVSG 2.0, at 59 (2021);[5] *see* note 1, *supra*. (judicial notice).

Unable to rebut the evidence describing what really happened on Election Day, Hobbs invokes her "expert." But the expert relied on data provided to him and did nothing to verify its accuracy.

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> Lastly, as described in the Introduction, the evidence and testimony at the January 23, 2023 at the Arizona Senate Committee on Elections meeting shows more than 7,000 ballots being rejected by vote center tabulators every 30 minutes from 7:00am to 8:00pm—totaling over 217,000 rejected ballot insertions on a day when approximately 248,000 votes were cast. Defendants' attempt to downplay the chaos on Election Day is disingenuous at best.

They again introduce evidence from the Senate Hearing, as is allowed, that shows that 7k ballots were rejected every 30 minutes.

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Maricopa misstates the record. Lake's counsel asked, and Jarrett acknowledged the question which asked if he "had any idea how [a 19 inch ballot image projected on 20 inch paper] could occur" separate and apart from "ballot

definitions." Lake.Appx:174 (Tr. 77:14-24) (Jarrett). Maricopa's argument is meritless.

Second, Defendants argue that if the issue arose from the ballot definition, "every ballot" would have printed out as a 19 inch image. Maricopa Br. 11-12, Hobbs 24 (also citing trial court's order). Not so. As Defendants themselves recognize, Maricopa used 12,000 different ballot styles, any number of which could be programmed with a different image size.

Lake argues the following: Jarrett WAS asked about the 19" ballot on 20" paper on the first day, though Hobbs argues that never happened. If the problem was with a ballot definition, every ballot would have the problem, and third, they argue all votes were counted (more)

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Third, Defendants argue all votes were supposedly counted. Maricopa 13-14, Hobbs 25. Defendants ignore the fact that Parikh testified that Jarrett admitted to him during his inspection that Maricopa did not maintain the duplicate ballots together with the originals he inspected as is required by law. There is no way to tell if these ballots were counted. Opening Br. 12.

They ignore that Parikh testified that Jarrett admitted to him during inspection that Maricopa didn't maintain dupe ballots together with originals as required by law. And we next get into the "fit to paper" shenanigans. Don't miss this next part.

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Lastly, Defendants have no excuse for Jarrett's admission that Maricopa supposedly knew about the "fit-to-paper" issue shortly after the November election, that it had occurred in ***three prior elections***, and that Maricopa was still performing a "root cause analysis"—but never disclosed this issue to the public or in Maricopa's November 26, 2022 written response to the Arizona Attorney General's inquiry into the Election-Day chaos. Opening Br. 14. Notably, Hobbs' argument that Parikh did not find misconfigured 19-inch ballots images printed on 20 inch paper is wrong. Hobbs Br. 24 n.9. Parikh answered that his findings applied to all six vote centers

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that he inspected. Lake.Appx:203-04,207 (Tr. 106:24-107:03, 110:07-24). Parikh's findings further rebut Defendants' new fit-to-paper excuse, which Maricopa claims occurred only at three vote centers. Lake.App.610 (Tr. 209:07-10).

They knew about to the "fit-to-paper" issue, it had occurred in THREE prior elections, and Maricopa is STILL performing a "root cause" analysis but never disclosed it to the public or to the AG.

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D. Baris' testimony is credible and demonstrates voter disenfranchisement sufficient to void the results in Maricopa County.

Defendants: (1) attack Baris' qualifications as an expert, (2) insist that, because Baris does not give a specific number of disenfranchised voters, his testimony must be discounted; and (3) dispute Baris' range of possible outcomes as "speculative." Maricopa Br. 7-9; Hobbs Br. 7, 26-9. All three arguments fail.

Hobbs criticizes Baris' background noting that he has not studied polling in an academic context or published his results in an academic journal. Hobbs Br. 26-25. However, Hobbs does not explain why academic contexts should have greater weight than professional contexts and concedes that Baris has worked as a respected professional pollster for many years.

The sole criticism of Baris' professional work is the fact that he is not listed among the pollsters ranked by an online blog, FiveThirtyEight. Hobbs Br. 27. Hobbs does not explain why FiveThirtyEight is more credible than Baris, and, indeed, a brief inquiry reveals a similar absence of academic experience and publishing from

They next break down the assault against @Peoples_Pundit . Unsurprisingly, they use FiveThirtyEight as their barometer for an "expert" but also concede that Baris has been a respected pollster for many years. I concur, bias aside. By this logic, their "experts" aren't either, BTW

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2. **Baris' range of possible outcomes meets Lake's burden under established Arizona law to show that the election outcome was affected or rendered uncertain.**

Contrary to Defendants' arguments, courts have never required a specific number of disenfranchised voters to void elections. Maricopa Br. 7; Hobbs Br. 7. Rather, courts consistently accept—even *prefer*—statistical evidence of disenfranchisement. *See Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020) (relying on the statistical rate of error for its finding); *Gallardo v. State*, 236 Ariz. 84, 89 (2014) (finding against

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underrepresentation of certain districts based on statistical evidence).

The fact that Baris' "estimates resulted in many scenarios where Governor Hobbs still would have won," Hobbs Br. 28-9, is irrelevant. Because Lake's burden is to show that the outcome was at least rendered uncertain, Lake need only provide evidence that a sufficient number of voters were disenfranchised to change the election's outcome, *not* that a sufficient number of those voters would have voted

Lake only had to provide that there were a sufficient number of voters disenfranchised to change the elections outcome, not that a sufficient number of voters would've voted for a particular candidate.

Almost done, folks- but it's imperative we understand the intricacies of this if we are to be able to debate and affect change moving forward. I like to think I make it a bit easier for you to do that.

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III. MARICOPA'S ADMISSION THAT IT DID NOT COUNT THE BALLOTS ON ELECTION DAY "DUE TO THE LARGE VOLUME OF EARLY BALLOTS" IS FATAL ON COUNT IV.

Maricopa spends twelve pages in its brief obfuscating straightforward chain-of-custody requirements set forth in the EPM. Maricopa 15-27. Arizona laws concerning drop-box ballots are clear and unambiguous. Ballots ***must be counted*** when they are removed from a secure container and the number retrieved from the specific drop-box location must recorded on the chain-of-custody form. Opening Br. 15-16 (citing EPM Chapter 2: Early Voting, Section I(I)(7) governing "Ballot Drop-Off Locations and Drop-Boxes" Section I(I)(7) and EPM Chapter 9: Conduct of Elections/Election Day Operations, Section VIII(B)(2)(g), Lake.Appx:699, 705). Thus, the counting of Election Day drop-box ("EDDB") ballots can be deferred only until containers arrive at the central counting place, MCTEC. No exceptions. This simple chain of custody step helps prevent the fraudulent insertion, removal, or substitution of ballots.

Maricopa spent 12 full pages trying to get around the straighforward chain of custody requirements set forth in the law. Ballots MUST be counted when they are taken from the secure container and they MUST record this number on the form. NO EXCEPTIONS.

The law is CLEAR.

I have often said the more pages you need to defend yourself the less of a defense you actually have. This is *often* the case, as we see here. 12 pages on COC that they didn't follow. Pages/words in an appellate brief, or any brief, for that matter are valuable real estate.

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However, in its answering brief, Maricopa admits 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 deviated from the EPM. Maricopa Br. 20. Instead of "counting" the ballots at MCTEC as required by the EPM, Maricopa admits that the

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EDDB ballots are "sorted and placed in mail trays" and sent to third party vendor Runbeck to be counted. *Id*. Maricopa's admission is a fatal deviation from a non-technical statute. The evidence and Maricopa's admission prove Maricopa failed to follow mandatory chain-of-custody procedures on Election Day with respect to nearly 300,000 drop box ballots delivered to MCTEC on Election Day. Notably, Hobbs apparently recognizes this requirements and contradicts Maricopa arguing falsely that EDDB "ballots were counted upon arrival ***at MCTEC*** and Runbeck." Hobbs Br. 31 (emphasis added).

But, unfortunately for Maricopa, they are forced to admit they broke the law, and then try to argue that the law isn't really the law, and that there are loopholes.

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First, "counted" ***"[w]hen the secure ballot container is opened"*** means just that—not "processing." "In the absence of a statutory definition, a dictionary may be consulted to determine the ordinary meaning of words used in a statute." *Fogliano v. Brain*, 229 Ariz. 12, 19 (App. 2011). There is no need for a dictionary here. Second, Maricopa cites the EPM, at 62, as support for its "processing" argument but

misleadingly leaves off the citation in the EPM at the end of passage it quotes, "see Chapter 2, Section VI." Supp.Appx:4. Section VI refers to "processing" functions such as "signature verification" and how to handle rejected and incorrect ballots. Supp.Appx:10-14. That section in no way moots the EPM's requirement to count the ballots when the secured ballot containers are opened at MCTEC which occurs well before "processing" the ballots.

Wiggle words, obfuscation, leaving off the ends of citations hoping the judges don't notice-- they know they are screwed on this.

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Hobbs' also misleadingly argues that the "'delivery receipt' forms for the 'nearly 300,000' election day early ballots….are part of the record before this Court" is false. Hobbs. Br. 29. First, the "delivery receipt" form Hobbs refers to are forms created by Runbeck (Lake.Appx.602 (Tr. 201:20-22))—these forms are not the "Maricopa County Delivery Receipt" created by Maricopa "that has on it the precise count of the ballots that they are then loading on a truck and transferring to Runbeck." Appx.276-77 (Tr. 179:01-180:10), Supp.Appx:45-48 (comparison of chain-of-custody forms). The Maricopa County Delivery Receipt forms have not been produced and are not part of the record as Hobbs argues at page 10 of her brief. *Id*.

Hobbs tries to argue that the Runbeck forms are actually official Maricopa County forms. They've never been able to provide those official forms. They may not exist, because you'd think by now, they'd have come running with them.

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In sum, the unexplained increase of over 25,000 ballots in the total reported to the Secretary of State between November 9 and 10, far exceeding the 17,117 margin of votes between Hobbs and Lake, is a direct manifestation of Maricopa's violating the EPM's chain-of-custody requirements. Maricopa and Hobbs still have no explanation for this discrepancy, a discrepancy that would not exist had Maricopa followed mandated chain-of-custody procedures.

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[7] Hobbs' argument that Lake's claim is barred by laches is without merit. Hobbs Br. 32, n.13. Maricopa did not adhere to their plan, or Arizona law, and Plaintiff could not have known that Maricopa would break the law prior to Election Day when the violations occurred.

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But alas, they can't have it both ways. If they rely on Runbeck, they need to get past a serious issue. There is a 25k vote discrepancy that far exceeds the 17k that separate the candidate. So which is it, Hobbs? Runbeck COC forms, or Maricopa never created any?

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There is more here. They detail why the constitutional claims were dismissed incorrectly-- a SUPER important part of this, but mostly case law, etc. Those constitutional claims are FEDERAL in nature, so those paying attention will understand why that's important.

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There will be a hearing on 2/1. This case will almost certainly head to SCOTUS, but if you are an honest broker, it is IMPOSSIBLE to argue that there weren't horrible issues with this election that place the results completely in doubt. You just can't.

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