

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

**PETITIONER'S REPLY IN
SUPPORT OF CROSS-MOTION
FOR A PROCEDURAL ORDER
FOR LEAVE TO FILE A MOTION
FOR RECONSIDERATION OF
THE DENIAL OF HER PETITION
FOR REVIEW**

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INTRODUCTION AND BACKGROUND

Petitioner Kari Lake respectfully replies to the oppositions filed by Secretary of State Fontes and contestee Governor Hobbs to Lake's procedural cross-motion for leave to file a motion for reconsideration ("Cross-Mot."). Contrary to the oppositions filed by Hobbs and Fontes (collectively, "Respondents"), Lake seeks to leave to correct "erroneous determinations of fact or law" in the Court's denial of review for the chain-of-custody issues. ARCAP 22(a).

With respect to determinations of fact, Lake seeks review of the ballots injected at Runbeck based on and caused by Maricopa's failure to follow required chain-of-custody procedures. As Lake showed, Hobbs' answering brief in the Court of Appeals argued that Defense Trial Exhibits 33 and 82 proved that Maricopa "would be aware of any ballot inserted or rejected or lost in any part of the process." Cross-Mot. at 3. Fontes joined Hobbs' brief in the Court of Appeals. Thus, in Hobbs' and Fontes' own words, whether Defense Trial Exhibit 82 reflects a precise count or an estimate, the minimum 35,563 discrepancy between those two exhibits proves the "insert[ion]" of these ballots at Runbeck.

With respect to determinations of law, with the remand of Count III on the signature-verification issue, any number of ballots unlawfully injected at Runbeck under Count IV would cumulate with any ballots rejected on signature-verification rationales, with the combined sum determining the election's outcome. Thus, the

Court should reinstate this claim consistent with its Order remanding the signature-verification issue to the trial court.

ARGUMENT

I. Respondents cannot reverse course in this Court to call their trial exhibits meaningless estimates when they argued to the Court of Appeals that those same exhibits would make Maricopa “aware of any ballot inserted or rejected or lost in any part of the process.”

In the Court of Appeals, Hobbs cited Trial Exhibits 33 and 82 for the proposition that “Maricopa maintain[s] chain of custody for every one of those early ballots ... such that the County would be aware of any ballot inserted or rejected or lost in any part of the process.” Second.Supp.Appx:50 (interior quotation marks omitted) (excerpt of Hobbs Answering Brief). Secretary Fontes did not file a brief, but instead filed a document captioned “Arizona Secretary of State Adrian Fontes’ Joinder,” which provided that the Secretary “hereby joins in Defendant/Appellee Hobbs’ Answering Brief and Opposition to Special Action Petition and the Answering Brief of the Maricopa County Defendants.” Fontes Joinder, at 1 (Jan. 17, 2023). In her reply in the Court of Appeals, Lake took Hobbs and Fontes at their respective words that these exhibits were meaningful as to inserted ballots and counted ballots on each to determine that 35,563 more early ballots scanned at Runbeck than were reported as delivered to Runbeck. Second.Supp.Appx:56-57 (Lake Court of Appeals Reply Br. 29-30); Lake.Appx:732-40.

Now questioning Lake’s reliance on Trial Exhibits 33 and 82 for the very issue

on which Hobbs and thus Fontes relied on those exhibits in the Court of Appeals, Hobbs and Fontes argue that Trial Exhibit 82 is merely an “estimate” that cannot provide an accurate counterpoint to the “precise count” reported in Trial Exhibit 33. Fontes Opp’n at 2-3; Hobbs Opp’n at 2-4. Petitioner Lake respectively submits that Respondents cannot have it both ways. Either Maricopa has no idea whether ballots were injected because its numbers in Trial Exhibits 33 and 82 cannot be compared for chain-of-custody purposes, or the numbers can be compared and show that Runbeck recorded scanning 35,563 more ballots than Runbeck recorded receiving. Either way, reconsideration is justified.

This is especially true where the Court of Appeals accepted Respondents’ arguments over Lake’s arguments. *See* Lake.Appx:12 (Opinion ¶23);¹ *cf. Freightways, Inc. v. Ariz. Corp. Comm’n*, 129 Ariz. 245, 245-48 (1981) (estoppel available against government). Although Respondent makes grand statements about the integrity of our electoral democracy, Fontes Opp’n at 3-4; Hobbs Opp’n at 1, it is Respondents—not Lake—that defend unlawful election conduct by switching arguments when it suits them. Under the circumstances, “the government’s wrongful conduct threatens to work a serious injustice and ... the public interest would not be

¹ The Court of Appeals appears to have disregarded the 35,563-ballot disparity from comparing Trial Exhibits 33 and 82 in Lake’s reply and focused instead on the disparity of 25,000+ ballots that results from Maricopa’s tweet of 275,000+ ballots. *See id.*

unduly damaged by the imposition of estoppel” to hold respondents to their prior argument. *Freightways*, 129 Ariz. at 248. Like elected officials, elections should be transparent.

Finally, even if the 35,563 figure results in part from an estimate, two important points surface. First, the only reason that there is an estimate is that Maricopa failed to count the ballots when Arizona election law required Maricopa to count them when the ballot containers were opened at MCTEC *before* transferring the ballots to Runbeck. *See* Lake Cross-Mot. at 14 & n.6 (collecting authorities); Petition for Review 4-6. Second, under any circumstances, a 35,563 difference is far too high *vis-à-vis* the 17,117-vote margin between Hobbs and Lake, especially given that this discrepancy is a direct result of Maricopa’s violation of Arizona law.

II. Lake’s cross-motion for a procedural order neither was improper nor expanded these proceedings.

Respondents argue that Lake’s procedural cross-motion for leave to move the Court to reconsider the denial of review for the chain-of-custody issues flouts this Court’s order, seeks review of the entire case, was procedurally improper, and expands the proceedings. Hobbs Opp’n at 2, 5-6; Fontes Opp’n at 5-6. They are wrong on each point:

- The inclusion of a procedural cross-motion in no way flouts the Court’s order to brief the sanction issues on which the Court requested briefing. A separate procedural motion for leave to file would have complied with Appellate Rule

22(f), but that would have expanded the proceedings more than Lake’s cross-motion did, given the overlap between the issues covered by the two motions.

- The inclusion of a cross-motion directly related to the very issue on which the Court requested briefing does not unnecessarily expand the proceedings. If Lake is correct on the sanctions issue (*i.e.*, that the injected voters were properly before the Court), the Court may well want to or need to reconsider.
- Lake did not request reconsideration of the “entire election contest,” Hobbs Opp’n at 5, but rather requested reconsideration of only the chain-of-custody issues already being briefed pursuant to the Court’s order.
- While it is unclear whether Special Action Rule 9(1) applies here directly to allow motions for reconsideration, it is clear that Appellate Rule 22(f) allows a party to seek the Court’s leave to seek reconsideration, which is all that Lake has done. *See* ARPSA 9(1); ARCAP 22(f).

Respondents’ hyperbolic opposition provides no reason to deny Lake’s procedural motion. Finally, as explained in Section III, *infra*, Secretary Fontes is wrong that Lake does not point the Court to legal and factual errors. Fontes Opp’n at 5-6. He is wrong, moreover, that reconsideration requires “new evidence or intervening change in the law.” *Compare id with* ARCAP 22(a) (“erroneous determinations of fact or law”).

III. Respondents concede the issues in Lake’s motion that Respondents fail to address.

“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); *cf. State v. Styers*, 177 Ariz. 104, 113, 865 P.2d 765, 774 (1993) (citing Ariz. R. Crim. P. 31.13(c)), and the two oppositions fail to rebut two important issues Lake raised.

First, the Court of Appeals recognized that 50 ballots might have been unlawfully injected at Runbeck, but found that number immaterial *vis-à-vis* the vote margin, given that all other counts were dismissed. Lake.Appx:12-13 (Opinion ¶24). Now that this Court has remanded Count III, it is possible that unlawful votes from the chain-of-custody violation could cumulate with unlawful votes from Count III’s signature-verification issue to make a material difference. *See* Lake Cross-Mot. at 13 n.4. Significantly, that is true wherever the actual number lies between the continuum between 50 and 35,563 ballots.

Second, the chain-of-custody issue has been present from the outset of this litigation. The specific numbers of ballots—which rely on trial exhibits submitted by Respondents as evidence of Maricopa’s compliance with Arizona law—that Lake raised on appeal as *arguments* in support of that *issue* can be raised here and in the U.S. Supreme Court. *See* Lake Cross-Mot. at 15 (citing *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992)); *cf. Arizonans for Second Chances, Rehab., & Pub.*

Safety v. Hobbs, 249 Ariz. 396, 407 ¶36 (2020) (considering “issue of statewide importance” that petitioner failed to preserve in opening brief).

The issues here are of statewide importance. Indeed, the first issue presented above—the remand of Count III regarding signature verification—readily distinguishes the authority on which Respondents rely for this Court’s not considering Lake’s allegations about the 35,563-ballot discrepancy. *See* Hobbs Opp’n at 5 (citing *McDowell Mt. Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5 (1997)). In *Vizcaino*, this Court noted that it could consider issues of statewide importance, but declined to do so where the case was not a suitable candidate. *Vizcaino*, 190 Ariz. at 5 (citing *Dombey v. Phoenix Newspapers Inc.*, 150 Ariz. 476, 482 (1986)). By contrast, this is a case of statewide importance that this Court already has remanded in part to the trial court.

CONCLUSION

WHEREFORE, petitioner Kari Lake respectfully requests that the Court grant her leave to seek this Court’s reconsideration of the denial of the Petition for Review with respect to the chain-of-custody issues.

Dated: April 13, 2023

Respectfully submitted,

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-CERTIFICATE OF SERVICE

I certify that, on April 13, 2023, I electronically filed with the Arizona Supreme Court, using the AZ Turbo Court e-filing system, Petitioner's Opposition to Motion for Sanctions and Cross-Motion for a Procedural Order for Leave to File a Motion for Reconsideration of the Denial of her Petition for Review attaching as an exhibit the Supplemental Appendix. On that date, I also caused a copy of the same to be emailed to:

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