ARIZONA COURT OF APPEALS
DIVISION TWO

KARI LAKE, *Plaintiff-Contestant/Appellant*, v. KATIE HOBBS, personally as Contestee; *Defendant-Contestee/Appellees*. and ADRIAN FONTES, in his official capacity as Secretary of State; STEPHEN RICHER, in his official capacity as Maricopa County Reporter; Bill Gates, Clint Hickman, Jack Sellers, Thomas Galvin, Steve Gallardo, in their official capacities as members of the Maricopa County Board of Supervisors; Scott Jarrett, in his official capacity as Maricopa County Director of Elections; and the Maricopa County Board of Supervisors, *Defendants/Appellees*.	No. 2CA-CV23-0144 Transferred from Court of Appeals Division One No. 1CA-CV23-0393 Maricopa County Superior Court No. CV2022-095403

OPENING BRIEF OF APPELLANT KARI LAKE

Kurt B. Olsen (admitted *pro hac vice*)
Olsen Law PC
D.C. Bar No. 445279
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 Appellant

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INTRODUCTION

Arizona elections are now in uncharted territory. New evidence produced by Maricopa County ("Maricopa") strongly suggests that Maricopa officials intentionally sabotaged the 2022 General Election, then gave false testimony attempting to cover up their misconduct. Even viewed in the light most favorable to Maricopa, the evidence shows Maricopa intentionally failed to conduct logic and accuracy ("L&A") testing required by A.R.S. § 16-449(A) and altered the election equipment thereby rendering the election irredeemably flawed.

On November 8, 2022 ("Election Day"), when Republican turnout was widely predicted to be historic, vote-center tabulators at over 59% of Maricopa's vote centers rejected defective ballots printed by ballot-on-demand ("BOD") printers more than 200,000 times. The ensuing chaos led to massive lines and wait times, thereby impairing or depriving the right to vote of tens of thousands of predominately Republican voters.

After discovering this new evidence, Lake filed a motion (the "Rule 60 Motion") for relief from judgment under Rule 60(b) of the Arizona Rules of Civil Procedure ("ARCP") [ROA 271] showing that:

- Maricopa falsely certified that it conducted L&A testing in accordance with A.R.S. § 16-449(A) on October 11, 2022, complete with the required public notice and observers, which in reality was simply kabuki theatre;

- After Maricopa conducted its falsely "certified" L&A testing on October 11, 2022, Maricopa conducted unannounced and unlawful testing on all 446 vote-center tabulators on October 14, 17, and 18. The tabulator system log files show that 260 of the vote-center tabulators rejected ballots with the same tabulator error codes that occurred on Election Day. In other words, this evidence supports a conclusion that Maricopa's unannounced and unlawful testing was a dry run for the Election Day debacle;
- Maricopa's Co-Director of Elections, Scott Jarrett, gave false testimony about the causes and the extent of the Election Day tabulator ballot rejections caused by misconfigured, speckled, or faded BOD-printed ballots. In reality, vote-center tabulators rejected BOD-printed ballots at a rate of over 7,000 ***every 30 minutes*** from 6:30 am, shortly after the polls opened, through 8:00 pm, after the polls closed; and
- The cause of the misconfigured "fit-to-page" 19-inch BOD-printed ballot images to be printed on 20-inch paper occurred at 127 of Maricopa's 223 vote centers on Election Day and was caused either by malware on the BOD printers or remote administration changes.

Incredibly, in response to the Rule 60 Motion, Maricopa officials admitted, ***seven months after the fact***, that between October 14-18, 2022, they swapped out the memory cards and the election software installed on Maricopa's 446 vote-center

tabulators with "reformatted memory cards" that purportedly contained election software supposedly previously tested on other equipment. Maricopa did not perform L&A testing on these 446 tabulators after swapping out the elections software and memory cards as required under A.R.S. § 16-449.

Aside from potential criminal misconduct, Maricopa's unlawful actions also invalidate the tabulators from use in the November 2022 General Election. As detailed below, the election should be set aside on these facts alone. Although finding Lake's motion timely, the trial court denied Lake's motion—ruling, *inter alia*, that Lake had improperly amended her prior claim with this new evidence. This was clear error. The claim Lake presented in this motion is plainly within the complaint and the same claim presented at trial in December 2022—but Maricopa's wrongdoing is now plain to see.

The second claim here concerns signature verification that A.R.S. § 16-550(A) requires for mail-in ballots. Signature verification is one of the most important security requirements for ensuring that every mail-in ballot is cast by the actual voter who requested and is legally qualified to vote it. The evidence presented at trial revealed that Maricopa created the façade of a transparent, scientific rigor to mislead the public about the integrity of the signature-verification process.

First, Maricopa published signature-review training materials and set up two rooms at the Maricopa County Tabulation and Election Center ("MCTEC") under

live video for the public to watch the signature-review process. These training materials and the live-feed transparency were for show. In reality, Maricopa does not require signature-review workers to "compare" signatures in accordance with its training materials, and the vast majority of Maricopa's 155 first-level signature-verification workers worked remotely, out of sight, *even at home*. Deviating from its own express training for signature verification while leading the public to believe it was able to observe the entire process strongly supports an inference that Maricopa intended to violate Arizona's law requiring signature verification.

Second, Maricopa's computer logs show that Maricopa's signature-verification workers "compared" and approved over 275,000 voter signatures at humanly impossible speeds—meaning the signature comparisons required by A.R.S. § 16-550(A) and Maricopa's own training materials cannot have been literally, much less lawfully, performed. Over 275,000 voter signatures on ballot affidavits were purportedly "compared" for consistency with the same voters' signatures on registration records—as required by A.R.S. § 16-550(A) and in accordance with Maricopa's signature-verification procedures—in less than ***three seconds*** per signature comparison, with 70,000 in less than ***two seconds*** per signature comparison.

Lake's signature expert testified, and common sense agrees, that it is not physically possible to "compare" a voter's ballot signature to his or her registration

signature at such speeds. The trial court ruled that the A.R.S. § 16-550(A) requirement to "compare" signatures imposes no standard capable of judicial review. The court's ruling misconstrued the statute's plain meaning, as well as the Secretary of State's and Maricopa's own interpretations of this requirement.

Counts V and VI of the Complaint assert equal protection and due process claims, respectively, under the Arizona and U.S. Constitutions, including the allegation that Election Day problems disproportionately burdened Republican voters and the failure to follow Arizona election law as a due process violation. Counts V and VI thus incorporate the constitutional basis for Counts II and III.

The situation in Maricopa is unprecedented. Maricopa's intentional disregard of critical election security requirements of Arizona election law cannot stand.

STATEMENT OF THE CASE AND JURISDICTION

On March 22, 2023, the Arizona Supreme Court reversed the Superior Court's laches-based dismissal of Count III of Plaintiff-Contestant Kari Lake's complaint regarding Maricopa's alleged violation of A.R.S. § 16-550(A) concerning signature verification of mail-in and drop-box ballots. The Supreme Court ordered a new trial on Count III [ROA 150 ep 78; ROA 262 ep 3], issuing its mandate on May 4, 2023. [ROA 261.]

After a status conference on May 8, 2023, the Superior Court ordered that all motions be filed no later than May 9, 2023, and set oral argument for May 12, 2023.

[ROA 264.] Defendants filed motions to dismiss Lake's claim under Count III, Lake responded, and Defendants replied. [ROA 265, 266, 267, 268, 281, 285, 287, 288.]

Lake also filed her Rule 60 Motion under ARCP 60(b)(2)-(3) and (6) for relief from the trial court's December 19, 2022, and December 24, 2022, under advisement rulings ("UAR") dismissing her claims concerning the illegal BOD printer and tabulator configurations alleged in Counts II, V, and VI related to the cause of the massive disruptions at nearly two-thirds of Maricopa's 223 vote centers on Election Day. [ROA 271.][1] In support of the Rule 60 Motion, Lake attached new evidence and the Declaration of Lake's cyber security and electronic voting machine expert, Clay Parikh, explicating that new evidence. [ROA 271 ep 26-70.] Defendants opposed the Rule 60 Motion, and Lake replied. [ROA 276, 277, 279, 280, 290.]

After oral argument on May 12, 2023, the Superior Court issued a UAR on May 15, 2023, denying Defendants' motions to dismiss and Lake's Rule 60 Motion. [ROA 295.] In denying the Rule 60 Motion, the trial court held that the motion was timely but denied relief because the motion constituted an improper amendment to Count II, and the new evidence did not support relief from judgement. [*Id.* ep 5-8.]

On May 17-19, the Superior Court held a bench trial, taking evidence and hearing fact and expert testimony as to whether Maricopa violated the signature-

[1] [ROA 150 ep 4-7 (12/19/22 UAR), ROA 172 ep 6-8 (12/24/22 UAR).]

verification requirements mandated by A.R.S. § 16-550(A) for a sufficient number of ballots to alter the gubernatorial election outcome, as the Arizona Supreme Court mandated in its March 22, 2023, Order. [ROA 262 ep 3-4.] On May 22, the Superior Court issued its UAR and dismissed Lake's claim under Count III [ROA 311], directing Defendants to submit a proposed form of judgment and a statement of costs. [*Id.* ep 6.] Rather than proceed as directed, Maricopa moved for sanctions, joined by the other Defendants, in connection with Lake's claims under Count III and the Rule 60 Motion. [ROA 312, 313, 315.] Lake responded to Defendants' motions for sanctions, addressing in particular the court's holding with respect to the Rule 60 Motion in its May 15, 2023, UAR, and attaching the supplemental Parikh declaration as additional support. [ROA 321.]

On May 26, 2022, the Superior Court denied Defendants' motions for sanctions, awarded no costs, and entered a signed final judgment in accordance with ARCP 54(c) on May 30, 2023. [ROA 323.] On May 31, 2023, Lake timely filed her notice of appeal. [ROA 325.]

The Rulings from which Lake appeals are final appealable orders that dispose of all the issues presented in the case. A.R.S. § 12-2101(A)(1). This Court has jurisdiction pursuant to A.R.S. § 12-120.21(A)(1), and venue was proper in Division One pursuant to A.R.S. § 12-120.21(B) for an appeal from the Maricopa County

Superior Court. By Order dated July 7, 2023, Division One transferred the appeal to this Division. [ROA 329.]

STATEMENT OF FACTS

A. Count II expressly alleges—and the supporting evidence at the December 2022 trial shows—that misconfigured and defective BOD-printed ballots caused Maricopa's vote-center tabulators to reject tens of thousands of ballots, which would have been prevented by proper L&A testing.

Lake's complaint, and a supporting expert sworn declaration, directly raised the issue of misconfigured and defective BOD-printed ballots as the cause of a massive number of tabulator ballot rejections at nearly two-thirds of Maricopa's 223 vote centers. [*See, e.g.*, ROA 1 ep 22-23 ¶¶ 68-69 (describing the "Printer/Tabulator Breakdown" and stating "the percentage of ballots that these tabulators were unable to read [witnessed by roving attorneys] ranged from 5% to 100% at any given time on election day, with the average having a failure rate between 25% and 40%."); ROA 2 ep 169-171 ¶¶ 19-20 (cyber expert Parikh discussing both "spotty" BOD-printed ballots and "shrunken" 19-inch ballot images printed on 20-inch ballot paper as causing tabulator rejections).][2]

In addition, sworn expert testimony included in the Complaint and at Lake's December 2022 trial expressly opined that Maricopa failed to properly perform L&A

[2] [*See generally* ROA 1 ep 4-5, 21-40, 43-45, 58-59 (Comp. ¶¶ 8-11, 63-90, 100-05, 141-44, 147).] Count II expressly incorporated and realleged the preceding paragraphs of the Complaint. [*See id.* ep 57 ¶ 136.]

testing prior to the November 2022 General Election and that, had proper L&A testing been performed, the misconfigured and defective ballots would have been detected and remedied prior to Election Day. [ROA 2 ep 177-79 ¶¶ 32-33; ROA 271 ep 125-28 (Parikh RT, 9/12/23, 100:17-103:06).] Notably, the Complaint alleged that, in direct violation of Arizona law, Maricopa did not use any BOD-printed ballots in its L&A testing. [ROA 2 ep 177 ¶ 32.]

B. New evidence demonstrates that Maricopa falsely certified its 446 vote-center tabulators passed mandatory L&A certification testing prior to Election Day and strongly suggests Maricopa planned the Election Day debacle.

Lake's Rule 60 Motion presented new evidence including:

- The tabulator system log files Maricopa produced for 445 of the 446 voting center tabulators used on Election Day and an analysis of the over thirty million lines (~30,192,847) of system log entries[3];
- The "Maricopa County 2022 General Election Ballot-on-Demand Printer Investigation" Report issued on April 10, 2023, by former Chief Justice of the Arizona Supreme Court Ruth V. McGregor (the "McGregor Report")

[3] Maricopa did not produce system log files for one of the 446 vote-center tabulators. [ROA 271 ep 27 (Parikh Decl. ¶ 6).]

describing her investigation of the BOD printer failures that gave rise to the massive number of tabulator ballot rejections on Election Day[4]; and

- Other documents produced by Maricopa in response to multiple Public Records Requests and in response to an Arizona State Senate subpoena issued by Senator Townsend.[5]

The explosive revelations from this new evidence showed that: (1) Maricopa County falsely certified that, on October 11, 2022, the 446 tabulators used at Maricopa's 223 vote centers passed L&A testing in accordance with A.R.S. § 16-449; (2) Maricopa conducted unannounced testing (not L&A testing) of all 446 vote-center tabulators on October 14, 17, and 18 and learned that 260 of the vote-center tabulators rejected ballots yet did not fix those issues before Election Day and therefore knew that these tabulators would reject ballots, causing massive disruptions on Election Day; (3) Maricopa vote-center tabulators rejected misconfigured and defectively printed BOD-printed ballots on Election Day at a rate of over 7,000 rejections every 30 minutes from 6:30 am through 8:00 pm; (4) Maricopa's Co-Director of Elections Jarrett falsely testified at the December 2022 trial as to the causes and extent of the tabulator ballot rejections; (5) Maricopa's

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4 [*Id.* ep 3, 28 (Parikh Decl. ¶ 7), 225-63 (McGregor Report).]

5 [*Id.* ep 27-28, 38-40, 46 (Parikh Decl. ¶¶ 5-7, 31-32, 44).]

election hotline call logs, video evidence, and Goldenrod reports identify misconfigured fit-to-page BOD-printed ballots occurring at 127 out of Maricopa's 223 vote centers; and (6) malware on the BOD printers or configuration changes made through remote administration caused at least 8,000 misconfigured fit-to-page ballots to be printed by BOD printers on Election Day, which were rejected by all tabulators—the vast majority of which were never counted.[6]

1. The evidence shows that Maricopa did not test any of the 446 vote-center tabulators used on Election Day for L&A in violation of A.R.S. § 16-449(A)-(B)—a criminal violation under Arizona law.

Arizona requires L&A testing "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) (emphasis added). In addition, the statute requires that the public be notified of the date and time for the L&A testing, which must be observed by at least two election inspectors not of the same political party, and that the testing be open to representatives of the political parties, candidates, the press, and the public. A.R.S. § 16-449(A) expressly references A.R.S. § 16-452, which provides, *inter alia*, that

[6] [ROA 271 ep 28-50 (Parikh Decl. ¶¶ 8-49).]

violations of the Elections Procedures Manual ("EPM") are misdemeanors. *See* A.R.S. § 16-452(C).[7]

The EPM states further that with respect to L&A testing "all of the county's deployable voting equipment must be tested." [ROA 271 ep 15; ROA 290 ep 3-4.] In addition, the EPM states that "[i]f a county will use preprinted ballots and ballots through a ballot-on-demand printer, the officer in charge of elections must provide ballots generated though both printing methods." [ROA 290 ep 4.]

On October 7, 2022, Maricopa published notice that the upcoming L&A test for voting equipment to be used in the November 2022 Election would be held on October 11, 2022. [ROA 271 ep 16 n.12.] After conducting the L&A testing on October 11, 2022, Maricopa falsely certified that it conducted L&A testing in accordance with the mandatory procedures of A.R.S. § 16-449(A) and the EPM on all vote-center tabulators. [ROA 271 ep 15, 28, 30 (Parikh Decl. ¶¶ 8(a), 11-13).] As Parikh testified, the tabulator system log files for the Maricopa vote-center tabulators (and other internal documents produced by Maricopa) show that Maricopa did not perform L&A testing on a single one of the 446 vote-center tabulators on October 11, 2022 (or any other date), and thus violated A.R.S. § 16-449. [*Id.*]

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[7] The 2019 EPM, the operative version here, has the same force of law as statute. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 (2020). The EPM was admitted as Plaintiff's Exhibit 60 at the December 2022 trial. [ROA 201.]

Co-Director of Elections Jarrett confirmed in his declaration submitted in response to Lake's Rule 60 Motion that Maricopa did not perform any L&A testing of the vote-center tabulators in accordance with A.R.S. § 16-449. [ROA 280 ep 4 (Jarrett Decl. ¶ 7 referring to unspecified and unobserved "testing" supposedly performed October 4-10, 2022, i.e., ***not*** October 11, 2022, and ***not*** using the phrase "logic and accuracy testing").]

2. Maricopa conducted unannounced testing of all 446 vote-center tabulators beginning on October 14 and knew that 260 of those tabulators rejected ballots.

The same tabulator system log files, and other internal documents showing that Maricopa falsely certified it conducted L&A testing on October 11, 2022, also show that Maricopa conducted unannounced testing of the 446 vote-center tabulators on October 14, 17, and 18 in violation of, *inter alia*, the requirements for public notice and observers set forth in A.R.S. § 16-449(A). [ROA 271 ep 30, 33-34 (Parikh Decl. ¶¶ 14, 20-25).] These unannounced tests consisted of running an average of nine ballots through each tabulator. [*Id.* ep 33 ¶ 20.] The tabulator system log files show that 260 of the 446 vote-center tabulators *failed* this unlawful "test" generally with the same "Ballot Misread" and paperless "Paper-Jam" errors that plagued voters on Election Day. [*Id.* ep 28, 33 ¶¶ 8(c), 20.]

3. The observations in the McGregor Report of random "fit-to-page" ballots printed during their testing could only have been caused by malware or remote administration changes, i.e., not by technicians changing printer settings on Election Day.

The McGregor Report stated that "four printers [of the ten BOD printers tested] randomly printed one or a few 'fit to page' ballots in the middle of printing a batch of ballots." [ROA 271 ep 238.] The McGregor Report stated further that "[n]one of the technical people with whom we spoke ***could explain how or why that error occurred***." [*Id.* (emphasis added).] The McGregor Report concluded that "***[w]e could not determine*** whether this change resulted from a technician attempting to correct the printing issues, the most probable source of change, ***or a problem internal to the printers***." [*Id.* (emphasis added).]

As Lake's cyber expert testified and no defendant rebutted, the astonishing event of "randomly printed…'fit to page' ballots" occurring during Chief Justice McGregor's team's testing means that the 19-inch ballot "fit-to-page" configuration on Election Day could only be due to malware or remote configuration changes. [*Id.* ep 29, 40-42, 46, 49 (Parikh Decl. ¶¶ 8(e)-(f), 33-36; 44, 49).]

4. The findings in the McGregor Report and other newly produced evidence show that Co-Director of Elections Jarrett gave false testimony at the December 2022 trial regarding the massive ballot rejections at Maricopa's vote centers.

Lake called Jarrett to testify on the first day of the December 2022 trial. Jarrett testified ***at least four times*** that he neither knew of nor had heard of a 19-inch ballot image projected onto 20-inch paper in the 2022 General Election. [ROA 271 ep 6-7.] Jarrett also refused to agree there was a "disruption" on Election Day, characterizing the events that day as simply "some printers that were not printing some tiny marks on our ballots dark enough to be read in by our tabulation equipment." [*Id.* ep 89 (RT, 9/12/23, 64:09-21).]

Immediately following Jarrett's testimony, Lake called cyber expert Parikh, who testified that the day before the December 2022 trial began, he had inspected a sampling of ballots from six Maricopa vote centers pursuant to A.R.S. § 16-677. [ROA 271 ep 4-5.] Directly contradicting Jarrett's sworn testimony above, Parikh testified how he found 19-inch ballot images printed on 20-inch paper ***at all six vote centers*** from which he inspected ballots. [*Id.*]

The next day, Maricopa called Jarrett back to the stand. Despite denying the day before that 19-inch ballots could be printed on 20-inch ballot paper, on direct examination by Maricopa counsel, Jarrett testified that: in fact, just after Election Day, Maricopa discovered that 19-inch ballots were found ***at three vote center***s and

were purportedly caused by temporary technicians changing BOD printer settings to a "shrink to fit" setting (also called "fit to print") and that Maricopa was performing a root cause analysis of this issue. [ROA 271 ep 7.] Jarrett also testified that the fit-to-page issue only affected approximately 1,300 ballots, and all of those ballots were duplicated and tabulated. [*Id.* ep 175-77 (RT, 9/12/23, 180:01-23, 181:18-182:07).] Lastly, Jarrett downplayed the debacle on Election Day, agreeing with Maricopa's counsel's characterization of the chaos that day as simply an "Election Day hiccup." [*Id.* ep 212 (Tr: 217:14-19).]

The new evidence shows Jarrett's testimony in December 2022 was false or misleading. First, the newly produced Maricopa election hotline call logs and Goldenrod reports identify fit-to-page BOD-printed ballots occurring at 127 of Maricopa's 223 vote centers—not three vote centers as Jarrett testified. [*Id.* ep 46 (Parikh Decl. ¶ 44]). Second, far from an Election Day "hiccup" as characterized by Jarrett, the system log files show that on Election Day vote-center tabulators were rejecting misconfigured fit-to-page ballots and defectively printed ballots more than 7,000 times every 30 minutes beginning at 6:30 am and continuing until the vote centers closed. [*Id.* ep 47-49 (Parikh Decl. ¶¶ 46-48).]

Third, Jarrett never disclosed until responding to Lake's Rule 60 Motion that Maricopa: (i) swapped out the memory cards with the election program on all 446 vote-center tabulators on October 14, 17, and 18—after the publicly announced and

certified L&A test on October 11, 2022, because Maricopa "made a program change on October 10, 2022" and (ii) conducted unannounced testing (not L&A testing) on all 446 vote-center tabulators on October 14, 17, and 18, during which 260 of the 446 vote-center tabulators rejected ballots, an error that was not remedied prior to Election Day. [ROA 271 ep 28-34 (Parikh Decl. ¶¶ (8(a)-(d), 11-25); ROA 280 ep 5-6 (Jarrett Decl. ¶¶ 14-15).] Notably, in his declaration responding to Lake's Rule 60 Motion, Jarrett falsely stated that Lake had not requested system log files "predating October 14." [ROA 280 ep 5 (Jarrett Decl. ¶ 14).] Lake requested all system log files and did not limit them by date as Jarrett falsely testified. [ROA 290 ep 4 n. 2.]

Lastly, the McGregor Report's observations and findings contradict Jarrett's testimony that printer settings changed by technicians trying to fix Election Day printer problems caused the fit-to-page issue. First, after three months of investigation the McGregor Report stated "[w]e could not determine whether this change resulted from a technician attempting to correct the printing issues, the most probable source of change, or a problem internal to the printers." [ROA 271 ep 238 (McGregor Report).] In other words, after approximately three months of investigation, the McGregor Report "could not determine" that Jarrett's testimony was true.

Second, the McGregor Report's observation of the sudden "random" printing of "fit-to-page" ballots in the middle of testing—an event that no "technical people…could explain"—is a jaw-dropping event explaining the basis for the McGregor Report's statement that the cause of the fit-to-page issue could be explained by "a problem internal to the printers." [*Id.*] The McGregor Report does not note any further investigation of this inexplicable "random" event.

As Parikh testified in discussing this event, "[t]here are no settings a tech or anyone could make on the printer to make randomized size changes to a printer," nor did the McGregor Report identify any such settings. [ROA 271 ep 41 (Parikh Decl. ¶ 35).] Jarrett's testimony is "inconsistent with all available evidence," and the cause of the misconfigured fit-to-page BOD-printed ballots was "either malware or remote administration changes." [*Id.* ep 42 (Parikh Decl. ¶ 36); *id.* ep 49 ¶ 49).]

C. New evidence shows Maricopa did not "compare" over 275,000 voter signatures according to the plain meaning of A.R.S. § 16-550(A), the Secretary of State, and Maricopa's own rules.

The evidence presented at trial on Count III regarding signature verification revealed two things.

First, Maricopa created a façade of transparent, scientific rigor for its signature-verification process. The evidence showed that, in reality, the vast majority of signature-review workers worked behind closed doors, beyond the live-stream public video feed at MCTEC. Moreover, Maricopa did not require the

comparison of voter signatures to comply with the professional signature-review standards and procedures in Maricopa's training materials.

Second, a material number of voter signatures on the ballot envelopes were "compared" with voter record signatures as required by A.R.S. § 16-550(A) at humanly impossible speeds—nearly 276,000 signatures were compared at less than three seconds, each with a nearly 100% matching pass rate, and over 70,000 signatures were compared at a rate of less than two seconds per signature. As Lake's expert testified, it is humanly impossible for Maricopa's signature-review workers to "compare" signatures at that speed in accordance with A.R.S. § 16-550(A).

1. Maricopa created the façade of signature verification.

Maricopa created a façade of transparency and science to mislead the public about the integrity and scientific rigor of its signature-verification process. Maricopa's 2022 Election Plan provided for

> a multi-level signature verification process to review ***100% of the signatures on mail-in ballots***. Using a binary digital image, ***100% of the signature records are compared to a reference signature*** with a disposition made by a human…. During the first level review, trained staff ***first look at the broad and local characteristics of the signature*** and compare it to up to three signatures on file.

[ROA 192 ep 46 (emphasis added).] Maricopa purported to train its signature-verification workers to conduct a "robust process" of evaluating "100% of signatures" for any combination of dissimilarities in six different "broad

characteristics," at a minimum, and also in five "local characteristics," if necessary, before approving any signature as consistent with a voter's reference signature. [Exhibit 23 at 9].[8] Maricopa also set up two MCTEC rooms for signature-verification work under a "24/7 live video" feed allowing public observation. [ROA 192 ep 9; RT, May 17, 2023–pm ep 118-120 at 117:21-119:17; *id.* ep 15-19 at 14:13-16:17; Trial Exhibit 19 (video capture); RT, May 17, 2023–am ep 49-51 at 48:10-50:8.] But these signature-verification standards, training materials, and the live-feed transparency were apparently all for show.

In reality, Maricopa's signature-verification workers could approve signatures without "need[ing] to look at any" of the broad or local characteristics described in the training materials unless they had first decided, relying wholly on their own discretion, that a signature was somehow "in question." [RT, May 17, 2023–pm ep 88-89 at 87:4-14, 87:20-88:1.] The evidence also showed that the vast majority of Maricopa's 155 first-level signature-verification workers exercised this discretion remotely, outside of MCTEC's live video feed, [RT, May 17, 2023–pm ep 114-121

[8] Exhibit 23 is a PowerPoint entitled "Maricopa County Election Department, Signature Verification, General Election 2022" (hereinafter "Maricopa SV PPT"). *See* Exhibit Worksheet. [ROA 320].

at 113:6-12, 115:16-25, 117:21-119:17, 119:22-120:10], possibly even at home[9]—removed in any event from the public observation and oversight attending work done at MCTEC.[10]

2. The statutory mandate to "compare" signatures entails discernible actions.

A.R.S. § 16-550(A) and the EPM's mandate to "compare" signatures entails a minimum analysis of certain signature characteristics that are described in the Secretary's Signature Verification Guide ("SVG"), Maricopa's Election Plan, and the County's own training materials such as the Maricopa SV PPT. Evidence at trial showed that Maricopa's verification workers completely disregarded this standard in comparing and verifying over 275,000 voter signatures.

Ray Valenzuela, Maricopa's Director of Elections, testified that since he started in Maricopa's Elections Department in 1990, signature verification has "always" been performed by "referencing for consistency against the signature on the early voting affidavit to the signatures on the registration file." [RT, May 17, 2023–pm ep 80-81 at 79:21-80:2.] The standard Maricopa applies when comparatively referencing two signatures for consistency is derived from A.R.S. §

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9 [RT, May 17, 2023–pm ep 120 at 119:2-17 (employees had remote access); RT, May 18, 2023–am ep 34-35 at 33:18-34:19 (employees could login and perform signature verification from home).]

10 [RT, May 17, 2023–am ep 65 at 64:11-20.]

16-550 and the EPM. This standard requires reviewing "broad and local characteristics" of signatures per the SVG, which Maricopa's 2022 Election Plan and training materials for signature reviewers implement and reference. [Exhibit 1, §§ B-D (SVG); ROA 192 ep 46 (Election Plan); Exhibit 23 at 4 ("Laws and Guidelines"); RT, May 17, 2023–pm ep 83-86 at 82:3-22; 84:16-85:12.]

The statute itself first requires that an act of comparison must be conducted, providing that "the county recorder or other officer in charge of elections ***shall compare*** the signatures thereon with the signature of the elector on the elector's registration record." A.R.S. § 16-550(A) (emphasis added). After this act of comparison has been conducted, the statute provides for different next steps depending on whether, after a comparison, "the signature is inconsistent with the elector's signature on the elector's registration record," "the signature is missing," or the verification worker is "satisfied that the signatures correspond." *Id.* The EPM echoes the statutory mandate, providing counties "***shall compare*** the signature on the affidavit with the voter's signature in the voter's registration record." [ROA 201 ep 83 (§ VI.A.1 (emphasis added).] Despite requiring counties to "compare" signatures, neither the statute nor the EPM defines the specific steps that must be completed to perform the mandatory act of comparison.

"[T]he words of a statute are to be given their ordinary meaning unless it appears from the context or otherwise that a different meaning is intended." *State v.*

Miller, 100 Ariz. 288, 296 (1966). The unambiguous, plain-language, dictionary meaning of "compare" is "to examine the character or qualities of especially in order to discover resemblances or differences." *See Merriam Webster Dictionary*, https://www.merriam-webster.com/dictionary/compare (last visited Sept. 15, 2023); [*see also* RT, May 18, 2023–am ep 95 at 94:12–17 (Plaintiff's expert, E. Speckin).] Thus, the statute's plain language requires verification workers to conduct an actual examination of "the character or qualities" of reviewed signatures.

The SVG establishes what such an examination entails, identifying specific features of signatures that must be examined to determine their consistency. The SVG divides those features into "broad characteristics" and "local characteristics." [RT, May 17, 2023–pm ep 87, 126 at 86:19-23, 125:1-18; Exhibit 1 p. 2-10 (SVG).] Broad characteristics are examined initially. They include the type of writing (e.g., cursive versus print), speed of writing (e.g., harmonious versus slow and deliberate), overall spacing, overall size and proportions, position of the signature (e.g., slanted versus straight), and spelling and punctuation. [Exhibit 1, p.3, 5-7 (SVG)]. Local characteristics are evaluated only when initial examination finds a combination of dissimilarities between the broad characteristics of two signatures.[11] [Exhibit 1 at 3].

[11] Local characteristics, which are examined once a combination of inconsistent broad characteristics is found, include internal spacing; size or proportions of a letter or letter combination; curves, loops, and cross-points; presence or absence of pen lifts; and beginning and ending strokes. [Exhibit 1 at 3].

Examining two signatures for multiple dissimilarities in the broad characteristics is thus the ***minimum*** evaluation that the SVG provides for verification workers to do during signature verification to gain confidence that two signatures are consistent. [*Id.*]. Only after the required examination of (at least) the broad characteristics is complete will the signature-verification worker be able to exercise judgment and discretion to determine, based on the presence or absence of a combination of dissimilarities in the examined characteristics, whether a voter's purported signature on the ballot affidavit is consistent with the same voter's corresponding reference signature.

Maricopa's official procedures implement A.R.S. § 16-550(A) and the EPM's comparison mandate by adopting the SVG's analytical framework for conducting signature comparisons. [*See generally* Exhibits 23, 25, 26, 27, identified on Exhibit Worksheet, ROA 320.] To this end, Maricopa retained an expert document analyst and prepared the Maricopa SV PPT to train first-level verification workers how to use the SVG's eleven broad and local characteristics when conducting signature review. [RT, May 17, 2023–pm ep 126-127 at 125:19-126:12; RT, May 18, 2023–am ep 99-100 at 98:17-99:9; Exhibit 23.] The Maricopa SV PPT does not say that the SVG's broad characteristics are either optional or reserved for use only after verification workers, in their own subjective judgment, first find signatures questionable; on the contrary, the Maricopa SV PPT lists the broad and local

characteristics on page 9 next to a statement that Maricopa uses a "robust multiple tiered system to review ***100% of the signatures*** on early voting packets."

The Maricopa SV PPT states on page 18, "***If the broad characteristics are clearly consistent***, you may accept the signature (marked as good). If not, move on to review the local characteristics." [Exhibit 23, at 4, 9-18 (emphasis added).] Maricopa also provided other training materials to its workers that instructed them to perform handwriting analysis using the SVG's characteristics. [RT, May 17, 2023–am ep 37-42 at 36:8-41:9; Exhibit 46 at 59-75.] In sum, all of Maricopa's official procedures provide for signature-verification workers to begin by evaluating the broad characteristics of the two signatures being compared.

In stark contrast to Maricopa's training materials, Elections Director Valenzuela testified that verification workers actually "don't need to look at any" of these SVG characteristics—unless "you have a signature in front of you that you're questioning." [RT, May 17, 2023–pm ep 88-89 at 87:4-14, 87:20-88:1.] In other words, verification workers decide whether to apply the SVG standard. When challenged on this statement, Valenzuela reiterated that "broad and local" characteristics are not required to be referenced for ***all*** signatures, but only for

signatures first found to be "in question" by a verification worker ***without*** referencing the characteristics. [RT, May 17, 2023–pm ep 88-89 at 87:20-88:1][12]

Lake's signature expert, Erich Speckin, testified after Valenzuela that all signature comparisons entail looking for "the broad and local characteristics that were discussed yesterday, those don't change. That's how a comparison is done. You're looking for similarities and differences. That's what it means to compare." [RT, May 18, 2023–am ep 95 at 94:3-17.] Speckin also testified that he was professionally aware of the expert document analyst who provided Maricopa's training, that he had reviewed Maricopa's training materials, and that, "my own knowledge of how comparisons are done [is] consistent with what their training was." [RT, May 18, 2023–am ep 96-98 at 95:6-97:14.]

This evidence showed that an objective, substantive standard for comparing signatures existed. Maricopa knew what this standard was and purported to follow it in all training materials. But Maricopa's verification workers did not actually follow the standard in reality. Instead, they chose whether and when to apply the

[12] In addition, Maricopa's signature-verification workers were only obligated to compare ballot affidavit signatures against one exemplar out of all those available. [RT, May 17, 2023–pm ep 134 at 130:4-14.] Valenzuela did not say whether the one exemplar must be from the voter's original "registration record," per A.R.S. § 16-550(A). But Maricopa's training materials indicate signatures on prior early ballot return envelopes are acceptable identification. [Exhibit 23 at 5]; *contra Ariz. Free Enterprise Club v. Fontes*, No. S1300CV202300202, at 4 (Sup. Ct. Yavapai Cnty. Sep. 1, 2023).

standard. The result, as the evidence in the next section shows, is that the standard was completely ignored for over 275,000 ballot affidavit signatures.

3. Maricopa failed to "compare" over 275,000 signatures.

Lake's signature expert summarized and evaluated computer-log evidence of verification workers' keystrokes to show that Maricopa's verification workers processed over 275,000 early ballot affidavits more quickly than is ***physically possible*** for verification workers actually to have performed even the minimum steps of analysis that were necessary to "compare" those signatures for consistency.

Speckin oversaw the creation of Exhibit 47 to summarize the data contained in the timestamped computer logs of keystrokes made by Maricopa's 155 first-level verification workers.[13] [RT, May 18, 2023–am ep 114-116 at 113:20-115:12.] Exhibit 47 strikingly shows that Maricopa's human verification workers processed huge, outcome-determinative numbers of ballot affidavit signatures at humanly

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[13] The complete data set that is summarized by Exhibit 47 was admitted, without qualification, as substantive evidence in Exhibit 20. [RT, May 17, 2023–am ep 113-116 at 112:02-115:13 (Exhibit 20 was a CD-ROM of data produced by Maricopa in response to a public records request for signature-verification data).]

The summary in Exhibit 47 was admitted into evidence for the limited purpose of establishing what Mr. Speckin had reviewed in forming his expert opinions [RT, May 18, 2023–am ep 124 at 123:03-21; ROA 311 ep. 5], but this limitation has no practical significance because the underlying data in Exhibit 20 (which Exhibit 47 summarized) was already fully admitted as substantive evidence. Thus, Exhibit 47 simply provides a convenient articulation of conclusions drawn by Speckin that can be (and were) drawn directly from the admitted evidence in Exhibit 20.

impossible speeds[14] and that many verification workers approved the signatures they reviewed at these speeds at rates of 99 to 100%. Between them, just eight Users (31, 43, 67, 79, 81, 112, 134, 135) "compared" a total of 143,483 ballot signatures to reference signatures in under ***three seconds*** per comparison. These eight Users approved their portions of the 143,483 "reviewed" signatures at rates all higher than 99%. [Exhibit. 47].

Mr. Speckin testified that roughly 70,000 voter signatures on ballot affidavits were "compared" for consistency with voters' signatures from registration records in less than ***two seconds*** per comparison. [RT, May 18, 2023–pm ep 12 at 11:13-22.] Another 205,000+ signatures were compared in 2-3 seconds per comparison. [RT, May 18, 2023–pm ep 11-12 at 10:16-11:12.] Comparing ballot signature characteristics against reference signatures at such speeds is physically "impossible" at such scales. [RT, May 17, 2023–pm ep 62-63 at 61:11-62:10 (verification worker Meyers); RT, May 18, 2023–pm ep 13-14, 64-68 at 12:7-13:16, 63:14-67:12 (expert Speckin).] Exacerbating the impossibility of Maricopa's verification workers achieving these speeds, in practical terms, were the time-consuming mechanics of Maricopa's review process, which required verification workers to load signature

[14] Speckin drew conclusions without counting totals from Users 9 and 26, who "had some activity that appears to be inputted though a computer by some algorithm or a script." [RT, May 18, 2023–pm ep11-12 at 10:16-11:12.]

images on a screen, then scroll up and down to view both the reviewed and the reference signatures, and finally clicking the appropriate decision button on screen. [RT, May 17, 2023–pm ep 42-44 at 41:18–43:8 (verification worker Onigkeit).]

When asked, Maricopa's Co-Elections Director Valenzuela insisted it was "possible" to review 33,624 ballots (as User 134 did) at an average rate of 2.4 seconds. [RT, May 17, 2023–pm ep 111 at 110:6–9.] But Valenzuela's own performance highlights the impossibility of the speeds and approval rates that Maricopa's verification workers achieved. Valenzuela approved approximately only 80.6% of the 1,600 first-level signatures that he personally reviewed. [RT, May 19, 2023–am ep 50 at 49:3–16 (rejecting 311 of the 1,600 first-level signatures).] User 134 alone approved 99.98% of 33,624 ballot signatures. [Exhibit 47 at 4]. For the 275,000+ signatures that Lake objected to, the evidence shows Maricopa's verification workers cannot have performed the obligation to "compare" them as A.R.S. § 16-550(A) requires.

STATEMENT OF ISSUES

1. Did the Superior Court err by holding that Lake's Rule 60 Motion constituted an amendment to Count II pleaded in her complaint?

2. Did the Superior Court err by holding that Rule 60(b)(3) requires a showing of scienter?

3. Did the Superior Court err by holding that Rule 60(b)(6) did not

otherwise apply in light of the exceptional circumstances presented here?

4. Did the Superior Court err by misconstruing A.R.S. § 16-550(A)'s mandate for reviewers to "compare" signatures as only requiring (a) a wholly subjective, judicially unreviewable exercise of absolute discretion by the reviewer rather than (b) an initial act of comparing standard signature characteristics and a subsequent discretionary conclusion based on dissimilarities in the examined characteristics?

5. Did the Superior Court clearly err and abuse its discretion by concluding that Maricopa's signature-verification process was adequate, based on testimony by Maricopa's Elections Director, when computer logs and other testimony showed that Maricopa's 155 first-level reviewers together processed 275,000+ signatures at physically impossible speeds (under 3 seconds apiece)?

6. Did the Superior Court err when it read *Reyes v. Cuming*, 191 Ariz. 91, 94 (App. 1998) to provide a remedy for signature-verification non-compliance only when non-compliance is universal for all early ballots instead of also applying it to situations when (like here) non-compliance affects a known, material subset of ballots?

7. Did the double impact borne by Republican voters—first because they outnumbered Democrat voters almost 3.78:1 on Election Day and second because, ***even among Election Day voters***, the printer-tabulator problems disproportionately

affected Republicans more than 15 standard deviations beyond a random distribution of the Election Day problems—caused by Maricopa's intentional violations of Arizona election law violate the federal Equal Protection Clause and Arizona's Equal Privileges and Immunities Clause?

8. Did Maricopa's intentional failure to follow Arizona election law violate the federal and Arizona Due Process Clauses?

9. Did Maricopa's violations of Arizona election law requiring election equipment to pass L&A testing before use in an election and requiring comparison of voter signatures with the registration record shift the burden to Maricopa to demonstrate the lawfulness of the votes Maricopa tallied?

STANDARD OF REVIEW

Appellate courts review legal questions *de novo*. *Fitzgerald v. Myers*, 243 Ariz. 84, 88 ¶8 (2017). Following a bench trial, appellate courts defer to trial courts' factual findings unless clearly erroneous, *Ariz. Bd. of Regents v. Phx. Newspapers*, 167 Ariz. 254, 257 (1991), but the "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." *Id.* (internal quotation marks omitted).

Appellate courts review denials of Rule 60(b) motions under an abuse-of-discretion standard. *Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz. 181,

185 (App. 2000). It is consider[ed]...an abuse of discretion for a trial court to act arbitrarily or make decisions unsupported by fact or law." *Id*. (citing *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29 (1985) (also stating "[o]ur question here, then, is whether the trial court's denial of relief was grounded upon a determination of disputed questions of fact or credibility, a balancing of competing interests, pursuit of recognized judicial policy, or any other basis to which we should give deference")).

> While we will not substitute our judgment for that of the trial court with respect to its discretionary decisions, where the "facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to ... look over the shoulder of the trial judge and, if appropriate, substitute our judgment for his or hers."

Birt v. Birt, 208 Ariz. 546, 549 ¶9 (App. 2004) (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983) (interior quotation marks omitted)).

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING LAKE'S MOTION FOR RELIEF FROM JUDGMENT ON COUNT II.

Lake moved for relief from judgment under ARCP 60(b) based on newly discovered evidence from Maricopa showing Maricopa's misconduct, ARCP 60(b)(2)-(3), as well as the catch-all for "any other reason justifying relief." *Id.* 60(b)(6). The trial court found Lake's motion timely but denied relief ruling that:

- Lake effectively amended her claim from a "printer-based claim" to a "tabulator-based claim" because "[t]his is not newly discovered evidence that goes to the claim as presented to the Court in December and reviewed on appeal, it is a wholly new claim, and therefore Count II remains unrevived."
- With respect to the evidence showing that Jarrett gave false testimony at trial, evidence showing a "contradiction is not enough to prevail on grounds of fraud or misrepresentation," instead requiring scienter to establish fraud.
- The testimony of a temporary technician at the December 2022 trial as to his observations at the vote centers on Election Day undermined Plaintiff's expert's conclusions and testimony.

As shown below, Lake did not change her claim from a "printer-based claim" to a "tabulator-based claim," and scienter is not required to prove misconduct under Rule 60(b)(3). Any inference from the temporary technician's testimony is plainly dispelled by the subsequent factual evidence produced by Maricopa and related expert opinions.

A. Lake's new evidence of Maricopa's misconduct did not amend Count II.

In its May 15, 2023, UAR denying Lake's Rule 60 Motion, the trial court held that Lake's motion changed her claim from a "printer-based claim" to a "tabulator based claim." [ROA 295 ep 5-6.] This was error.

As indicated in the *See* Statement of Facts Section A, *supra*, Count II included tabulator-based claims in the initial Complaint and the declarations submitted with the initial Complaint. Simply put, the Complaint makes claims for both BOD printers and the tabulators reading and counting those BOD-printed ballots under Arizona's notice-pleading standards. [*See, e.g.*, ROA 1 ep 43-45 ¶¶ 100-05 (discussing intentional misconduct giving rise to BOD printer and tabulator failures); *id.* ep 58 ¶ 142 ("tabulator problems that certain Maricopa County vote centers experienced on election day were the result of intentional action").]

Lake's Rule 60(b) Motion brought new evidence regarding the BOD printer failures and the attendant tabulator rejections of BOD-printed ballots on Election Day, showing Maricopa's advance knowledge of that event. Lake's reply brief also highlighted the fact that Maricopa's belated and shocking admission ***in its response to the Rule 60 Motion*** dug Maricopa's hole deeper by admitting to swapping out the memory cards and election software on Maricopa's 446 vote-center tabulators after the October 11, 2022, L&A certification, which constitutes another violation of A.R.S. § 16-449. [ROA 290 ep 2-5.]

The claim that tabulator-based claims amended the complaint rests on only one question: do the Rule 60(b) Motion's tabulator-based arguments fit within the initial Complaint? Because they do, the Superior Court erred in rejecting "tabulator-based claims" as an improper amendment.

B. The Superior Court's reliance on Bettencourt's December 2022 testimony to reject Parikh's May 2023 testimony was error.

This Court should reject the Superior Court's reliance on the December Bettencourt testimony as "undermin[ing] completely" the Parikh testimony supporting the Rule 60 Motion. [ROA 295 ep 6]. Unlike Parikh, Bettencourt is not a cyber expert and lacked access to the system log files for all vote-center tabulators, information on the source of the errors, and other post-Election Day developments such as the McGregor Report, on which Parikh based his opinions. [ROA 321 ep 8-9]. Bettencourt's testimony on T-Techs' earnest attempts to solve the problem neither undermines Parikh's testimony on the BOD printer issues and tabulator rejections, nor disputes that problems continued at over 7,000 rejections every 30 minutes throughout Election Day at the vast majority of vote centers for which Bettencourt had no information. Because Bettencourt's competence to rebut evidence he never reviewed combines factual and legal issues, this Court's review is *de novo*. *Phoenix Newspapers*, 167 Ariz. at 257; *cf. Birt*, 208 Ariz. at 549 ¶9.

C. Lake properly invoked Rule 60(b) for relief from judgment.

Each of Lake's Rule 60(b) bases warranted relief from judgment on Count II. Significantly, election contests' short timelines do not preclude resort to relief from judgment under Rule 60. *Moreno v. Jones*, 213 Ariz. 94, 97 ¶16 (2006). The following three subsections demonstrate Lake's entitlement to relief from judgment under Rule 60(b)(2)-(3) and 60(b)(6).

1. Lake presented new evidence under Rule 60(b)(2) warranting relief from judgment.

Motions for relief from judgment based on newly discovered evidence must meet three criteria:

> (1) the newly discovered evidence could not have been discovered before the granting of judgment despite the exercise of due diligence, (2) the evidence would probably change the result of the litigation, and (3) the newly discovered evidence was in existence at the time of the judgment.

Boatman v. Samaritan Health Servs., Inc., 168 Ariz. 207, 212 (App. 1990); *In re Cruz*, 516 B.R. 594, 605 (B.A.P. 9th Cir. 2014) (citing *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990)) (same); *Fantasyland Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1005 (9th Cir. 2007).[15]

Here, much of the evidence that existed at the time of judgment did not become available to Lake until Maricopa responded to public record requests ("PRR"), and even the system log files that were available to Lake at the time of judgment required extensive analysis and benefited from additional evidence that Lake's team acquired by PRR after the judgment. [ROA 271 ep 27-28 ¶¶ 6-7 (discussing, *inter alia*, analysis of over 30 million log entries from the system log

[15] Arizona courts follow federal procedural rulings on the federal rules on which the Arizona rules are based. "Arizona courts give great weight to federal court interpretations of the rules of procedure." *Estate of Page v. Litzenburg*, 177 Ariz. 84, 93 (App. 1993) (citing *Edwards v. Young*, 107 Ariz. 283 (1971)).

files of 446 tabulators).] Moreover, some of the evidence became available only quite recently, including the McGregor Report (issued April 10, 2023) and Maricopa's PRR responses (delivered through March 2023). [*Id.* ep 28, 226.]

2. Lake presented evidence of misconduct under Rule 60(b)(3) warranting relief from judgment.

Contrary to the trial court's ruling, for relief from judgment under Rule 60(b)(3), "[m]isconduct within the rule need not amount to fraud or misrepresentation, but may include even accidental omissions." *Estate of Page*, 177 Ariz. at 93 (internal quotation marks and citations omitted); *Norwest Bank*, 197 Ariz. at 186 ("misconduct…include[s] discovery violations, even when such violations stem from accidental or inadvertent failures to disclose material evidence"); *cf. Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 179 (1994) (election contests do not require proof of fraud).[16] Even if a misrepresentation was "inadvertent" and "not motivated by bad faith," the "failure is enough to warrant a finding of misconduct by clear and convincing evidence" for purposes of "misconduct" under Rule 60(b)(3). *Norwest Bank*, 197 Ariz. at 186.

Movants bear the burden of establishing substantial interference with the "ability fully and fairly to prepare for, and proceed at, trial," which movants can

[16] If "new evidence" also shows the opposing party's misconduct, courts evaluate the evidence under both (b)(2) and (b)(3). *Moreno*, 213 Ariz. at 97-98 ¶ 17.

meet "by establishing the material's likely worth as trial evidence" or by "demonstrat[ing] that the misconduct was knowing or deliberate," thereby shifting to the nonmovant to make "a clear and convincing demonstration that the consequences of the misconduct were [trivial]." *Estate of Page*, 177 Ariz. at 93 (interior quotation marks omitted); *accord Breitbart-Napp v. Napp*, 216 Ariz. 74, 80 (App. 2007). Intent can be inferred from Maricopa's surreptitious means. *See, e.g.*, *State v. Rood*, 11 Ariz. App. 102, 104 (App. 1969) ("surreptitious means might support such an inference" of intent); *Mezey v. Fioramonti*, 204 Ariz. 599, 609 (App. 2003) (intent inferable of facts showing concealment), *overruled in part on other grounds*, *Bilke v. State*, 206 Ariz. 462 468 ¶28 (2003).[17]

Here, Maricopa's misrepresentations are widespread and significant. [ROA 271 ep 11.] *See* Statement of Facts Sections B.1, B.4, *supra* (failure to conduct L&A testing, false testimony about L&A testing, advance knowledge of failures of ballot tabulators, false testimony as to the causes and extent of tabulator BOD-printed

[17] *See also In re Glimcher*, 458 B.R. 544, 548 (Bankr. D. Ariz. 2011) ("bad faith can be inferred from intentional concealment"); *United States v. Harris*, 185 F.3d 999, 1006 (9th Cir. 1999) ([i]ntent could be inferred from the tricks and deceptions [defendant] used to cover up what he did"); *State v. Quatsling*, 24 Ariz. App. 105, 108 (App. 1975) (discussing "circumstantial evidence to sustain a finding of intent based upon…surreptitious means"); *Jackson v. Am. Credit Bureau*, 23 Ariz. App. 199, 202 (App. 1975) ("[t]here must be some positive act of concealment done to prevent detection"); *State v. Belyeu*, 164 Ariz. 586, 591 (App. 1990) (intent can be inferred from circumstances).

ballot rejections, failure to disclose swapping out of tabulator memory cards and election software). These misrepresentations clearly interfered with Lake's ability to present her case for two reasons.

First, as discussed in Section IV.A, *infra*, Division One and the Superior Court relied on the presumptions favoring election officials. Evidence of Maricopa's misconduct eliminates the presumptions on which the superior court and the appellate courts relied to uphold the 2022 General Election in Maricopa, requiring relief from judgment under Rule 60(b)(3). *See* Section IV.A, *infra* (discussing Arizona's "bursting-bubble" rule for presumptions). [18]

Second, Maricopa's intentional misconduct puts the burden on it to demonstrate that its engineered trainwreck of an Election Day did not have the effect of depressing Election Day voter turnout in material numbers. *Estate of Page*, 177 Ariz. at 93.

[18] Lake addressed the court's belief that: (i) the McGregor Report did not support relief from judgment, and (ii) the testimony of a technician who testified at the December 2022 trial undermined Parikh's testimony in Lake's response brief to Defendants Motion for sanctions—which the Superior Court denied. [ROA 295 ep 6-7; ROA 321 ep 5-9 (detailing why the court was incorrect)]; *see also* Section I.B, *supra*.

3. Lake presented equitable reasons for relief under Rule 60(b)(6).

Generally, the catch-all provision in Rule 60(b)(6) applies only when one of the other five provisions of Rule 60(b) do not apply. *Panzino v. City of Phoenix*, 196 Ariz. 442, 444-45 (2000). But Arizona's "jurisprudence [under Rule 60(b)(6)] is not a model of clarity or consistency," *Gonzalez v. Nguyen*, 243 Ariz. 531, 534 (2018), and courts have found Rule 60(b)(6) to apply even in addition to the other provisions in Rule 60(b): "even when relief might have been available under one of the first five clauses…this does not necessarily preclude relief under clause (6) if the motion also raises exceptional additional circumstances" warranting "relief in the interest of justice." *Amanti Elec., Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430, 433 (App. 2012). Because all three Rule 60(b) tests apply and overlap, this Court can focus on the "extraordinary circumstances" that Lake raises. *Francine C. v. Dep't of Child Safety*, 249 Ariz. 289, 298 ¶23 (App. 2020).

Lake provided significant new evidence, including unannounced post-October 11, 2022 L&A certification tabulator testing where 260 of 446 tabulators rejected ballots with the same error codes that arose on Election Day, the secret swapping of tabulator memory cards and election software, the knowledge that the election system would fail on Election Day, and the existence of malware or remote administration changes as the cause of thousands of misconfigured fit-to-page ballots. Together—or ***even separately***—the new evidence certainly qualifies as

exceptional. *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("'the political franchise of voting' [is] "a fundamental political right, because preservative of all rights'") (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Election officials obviously cannot set out to thwart the electorate.

II. THE SUPERIOR COURT ERRED IN DENYING RELIEF ON COUNT III.

Invoking *Miller v. Pichaco Elementary School District No. 33*, 179 Ariz. 178, 180 (1994), and *Reyes v. Cuming*, 191 Ariz. 91, 94 (App. 1998), Lake argued that Maricopa violated A.R.S. § 16-550(A) by effectively conducting no signature verification on enough ballots to change the outcome of the gubernatorial election. Under *Miller*, no showing of fraud is necessary to invalidate absentee balloting if "an express non-technical statute was violated, and ballots cast in violation of the statute affected the election." 179 Ariz. At 180. Under *Reyes*, A.R.S. § 16-550(A) is a non-technical statute. *Reyes* also holds a court abuses its discretion by finding substantial compliance with A.R.S. § 16-550(A) where a material number of ballots are counted without signature verification. 191 Ariz. at 94.

For two reasons, the Superior Court erred as a matter of law and abused its discretion when it ruled against Lake following the trial of Count III. First, the Superior Court misconstrued A.R.S. § 16-550(A) as entailing no substantive, judicially reviewable standard for what it means to "compare" signatures beyond the subjective impression of the verification worker. [ROA 311 ep 4.] The evidence

showed that an objective standard for performing signature comparisons does exist, and Maricopa's verification workers ignored that standard for a dispositive number of signatures. Because intent can be inferred from surreptitious conduct, *see* note 17, *supra*, and accompanying text, Maricopa's Potemkin-village approach to training and transparency shows that ignoring the statutory standard was intentional and thus malfeasance.

Second, the Superior Court erred in concluding that Lake's claim was "outside the scope of *Reyes*" because Maricopa went through the motions of conducting signature verification "in some fashion." [ROA 311 ep 2, 4.] Nothing in *Reyes* limits its application to situations where non-compliance with signature-verification requirements is total and universally affects ***all*** absentee ballots.

A. The Superior Court misapplied A.R.S. § 16-550(A)'s requirement to "compare" signatures.

A.R.S. § 16-550(A) mandates that the signature on every early ballot affidavit must be "compared" to the same voter's reference signature in registration records, and then provides for options a verification worker can choose based on whether the verification worker is "satisfied" the two signatures are consistent. Importantly, the act of comparison—which involves substantive evaluation of broad signature characteristics by a verification worker, according to the SVG and Maricopa's own training materials—entails actions that must be physically performed ***before*** a verification worker can exercise judgment. The Superior Court collapsed these steps

and allowed the verification worker's formation of a subjective conclusion to subsume the predicate obligation to evaluate specific signature characteristics. In the Superior Court's own (erroneous) words, "whether the signatures are consistent to the satisfaction of the recorder, or his designee…is the determinative quality for whether signature verification occurred." [ROA 311 ep 4.] This holding is wrong as a matter of law since the plain statutory language mandates the performance of a physical act of comparison.

Nor is deciding what substantive steps constitute the act of comparison left to the verification worker's individual discretion. Both the SVG and Maricopa's own official training materials explain that the mandate to "compare" signatures requires, at a minimum, evaluating both signatures for consistency across six broad characteristics. Evaluating these six characteristics for each early ballot is a substantive obligation that takes time to accomplish—more time than Maricopa's verification workers took for 275,000+ ballots, according to the evidence.[19] Whether a specific process has been followed can objectively be reviewed, but the validity of a verification worker's subjective impression cannot. The subjective satisfaction of the verification worker that their job is done, by itself, is no lawful substitute for

[19] The Superior Court's contrary finding, that "looking at signatures that, by and large, have consistent characteristics will require only a cursory examination and thus take very little time" [ROA 311 ep 4], ignored the testimony of Mr. Speckin and others.

actual performance of the required act. Rapidly clicking "accept" as ballot signatures flash across a screen does not establish that a comparison of those signatures has occurred.

The Superior Court's interpretation of A.R.S. § 16-550(A) was error because it deferred completely to the wholly subjective standard of each individual signature-verification worker and construed the word "compare" to mean whatever each verification worker might want it to mean. Such a standardless interpretation of the statute's requirement completely insulates the performance of the statutory mandate from judicial review, disregards well-established canons of statutory construction based on the plain meaning of words (and the SVG and Maricopa's training materials), and—worst of all—judicially neuters the process of signature comparison as an effective statutory safeguard against election fraud. The Superior Court's interpretation of A.R.S. § 16-550(A) reduces the process of signature verification to a meaningless formality in derogation of the Arizona Supreme Court's recognition that a statutory mandate must have some objective, substantive content, or else it "would not be law at all." *Miller*, 179 Ariz. at 180.

The Superior Court also erred by finding in the alternative that, were it to consider whether Maricopa's signature-verification process was adequate, the testimony of Maricopa's Co-Elections Director Valenzuela sufficed to show "a comparison between voter records and signatures was conducted in every instance

Plaintiff asked the Court to evaluate." [ROA 311 ep 4.] Mr. Valenzuela's testimony simply cannot support this conclusion. Valenzuela personally reviewed only 1,600 signatures [ROA 311 ep 4; RT, May 17, 2023–pm ep 127 at 126:13-19; RT, May 19, 2023–am ep 50 at 49:7-16], and he "exceptioned" (i.e., disapproved) 311 of them—making for an approximately 80.6% approval rate.[20] [RT, May 19, 2023–am ep 50 at 49:3-16.] Valenzuela's personal performance is incapable on its face of refuting Lake's evidence—drawn from Maricopa's own data—showing verification workers processed 275,000+ signatures in less than 3 seconds apiece, with 8 users' approval rates (covering at least 143,483 of these in the range of 99-100%). Far from providing "ample evidence" that Maricopa's signature-review process was "adequate" [ROA 311 ep 4.] Valenzuela's testimony instead established that reviewers violated Maricopa's own policies to compare "100% of the signature records" using "the broad and local characteristics of the signature" and to apply "the same standard for accuracy at all election sites." [ROA 192 ep 46, 56.] The Superior Court abused its discretion when it disregarded Lake's evidence based on Valenzuela's testimony.

[20] Valenzuela initially testified that he only rejected 131 out of 1,600 signatures during his personal Level I review work [RT, May 17, 2023–pm ep 128 at 127:5-8], but he later changed his rejection number to 311 when questioned by Maricopa's counsel.

B. The Superior Court misapplied *Reyes*.

The Superior Court wrongly determined that Lake's claim was "outside the scope of *Reyes*" because, in *Reyes*, "the county recorder had done *no signature verification whatsoever*," while in Maricopa "signature review did take place in some fashion." [ROA 311 ep 2, 4 (emphasis in original).] Drawing this distinction was an error of law because, although it did involve a complete failure to conduct any signature verification of absentee ballots, nothing in *Reyes* limits its rule ***only*** to situations where non-compliance with signature-verification requirements is total, universally affecting all absentee ballots.[21] It would be absurd to apply *Reyes* that way since there is no valid reason why verifying only a fraction of early ballot affidavit signatures should somehow excuse potentially pervasive non-compliance with verification requirements as to the remainder.

Instead, what matters is whether the number of ballots counted without proper signature verification (whether that number be all ballots or just some of them) is large enough to affect the election result. Here, 275,000+ ballot affidavit signatures were counted at humanly impossible speeds, meaning they literally could not have

[21] The trial court apparently understood "plaintiffs' position is that it's not physically possible to perform even the rudimentary analysis" of signature verification [RT, May 18, 2023–am ep 80-81 at 79:24-:25; 80:8-11] but apparently treated this impossibility as being an all-or-nothing proposition under *Reyes*, rather than recognizing *Reyes* still applied to the subset of ballots that computer logs showed were identifiably and demonstrably not subjected to signature verification.

been compared with registration records. Many tens of thousands of these signatures were processed by verification workers who approved 99-100% of the signatures they "compared," an unrealistically high approval rate that only reinforces the conclusion that no true signature comparison took place for the signatures reviewed by these verification workers.

Reyes held that "[t]he purpose of A.R.S. section 16-550(A) is to prevent the inclusion of invalid votes. Without the proper signature of a registered elector on the outside, an absentee ballot is void and may not be counted. A.R.S. § 16-552(B)." 191 Ariz. at 94. Applying *Reyes* and granting relief for 275,000+ unlawfully verified early ballot affidavit signatures will change the outcome of the gubernatorial race.

C. The number of votes at issue in Count III is material.

The remedy for misconduct resulting in illegal early ballots is either to set aside the election under *Miller*, 179 Ariz. at 180, and *Reyes*, 191 Ariz. at 94, or proportionately to reduce each candidate's share of mail-in ballots under *Grounds v. Lawe*, 67 Ariz. 176, 183-85 (1948). Either way, Count III alleges a mathematically adequate basis for setting aside the election.

Lake's expert analysis of Maricopa's own computer logs established that Maricopa's signature-verification workers processed approximately 275,000+ ballot affidavits—and often approved at 99-100% acceptance rates—at objectively physically impossible speeds, with roughly 70,000 signatures being processed in

under two seconds each and 205,000+ more in less than three seconds. [RT, May 18, 2023–pm ep 12-13, 64-68 at 11:13-12:19, 63:11-64:2, 64:7-67:12 (Speckin).] These ballots, which were not subjected to lawful signature review under A.R.S. § 16-550(A), are not allowed to be counted. *See Reyes*, 191 Ariz. at 94 ("[w]ithout the proper signature of a registered voter on the outside, an absentee ballot is void and may not be counted").

1. The Court could strike ballots proportionally under *Grounds*.

Maricopa recorded 1,311,734 total early ballots, all of which required signature verification. These ballots produced the following vote totals: Lake (578,653), Hobbs (715,492), other gubernatorial candidates (4,407) and no gubernatorial candidate (13,182).[22] These totals yield the following (rounded) early vote percentages: Lake (44.114%), Hobbs (54.546%), Other (0.336%), and None (1.005%).

These percentages imply that, if early vote counts for each candidate are reduced proportionally under *Grounds*, then for every 1,000 early ballots stricken Lake will lose approximately 441.14 early votes and Hobbs will lose approximately 545.46 early votes, reducing Hobbs's overall lead by approximately 104.32 votes. Because Hobbs's overall margin of victory over Lake was only 17,117 votes,

[22] [ROA 281 ep 14-15.]

striking 164,093 early ballots and reducing all candidates' vote totals in proportion to their performance among early voters will cause Hobbs's vote margin over Lake to be completely eliminated and results in Lake having the greatest number of total votes by one whole vote.[23] Thus, if at least 164,093 early ballots are deemed illegal to count because they were not lawfully signature-verified under A.R.S. § 16-550(A), then it is Lake, not Hobbs, who is the prevailing gubernatorial candidate. Given that Lake has shown through clear and convincing evidence that at least 275,000+ early ballots were not lawfully subjected to signature review, striking these ballots and applying the proportional reduction methodology of *Grounds* results in Lake being the duly elected Governor.

2. The Court could order a new election under *Miller* and *Reyes*.

Alternately, the Court could properly order a new election. The number of early ballots affected by Maricopa's failure to conduct signature verification exceeds Hobbs's purported margin of victory by an order of magnitude. *Reyes*, 191 Ariz. at 94 ("[w]ithout the proper signature of a registered voter on the outside, an absentee ballot is void and may not be counted"); *Miller*, 179 Ariz. at 180 (misconduct

[23] In other words, if the Court strikes 164,093 votes, Hobbs' loss of 54.546% of that total (*i.e.*, 89,505.36 lost votes) would exceed Lake's loss of 44.114% of that total (*i.e.*, 72,387.32 lost votes) by 17,118.05 votes. The 164,093rd vote would fall slightly under the median of the 205,000+ signatures approved in 2-3 seconds.

actionable if ballots in violation of a non-technical statute occur in sufficient numbers to alter the outcome of the election). Maricopa's non-compliance with A.R.S. § 16-550(A)'s signature-verification requirements occurred with respect to more than enough early ballots to "affect the result or at least render it uncertain" under *Miller*. *Reyes*, 191 Ariz. at 94.

The exact number of early ballots that were not lawfully reviewed does need to be established for relief to be appropriate. The Arizona Supreme Court has long reasoned that electoral manipulations with unquantifiable impacts on an election are not immune from review merely because their impact cannot be quantified. *Hunt v. Campbell*, 19 Ariz. 254, 265-66 (1917); *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" (quotation marks omitted)). The Legislature has never repudiated *Hunt*, which remains authority for the proposition that, when widespread malfeasance occurs, an election may be invalidated *in toto*, since contestants cannot be expected to shoulder the potentially impossible burden of proving up a potentially unquantifiable number of votes affected by the misconduct.

III. THE SUPERIOR COURT ERRED IN DENYING LAKE'S MOTION FOR RELIEF FROM JUDGMENT ON COUNTS V AND VI.

Counts V and VI assert equal protection and due process claims, respectively, under the Arizona and U.S. Constitutions, based not only on the allegations in the

prior counts [ROA 1 ep 63-64 ¶¶ 163, 168)] but also on the added allegation that Election Day problems disproportionately burdened Republican voters (*i.e.*, more than 15 standard deviations removed from the result that would obtain if the burden fell randomly on Election Day voters) as an equal protection violation [*id.* ep 63 ¶ 165] and the failure to follow Arizona election law as a due process violation. [*Id.* ep 64-65 ¶ 171.] Counts V and VI thus incorporate the constitutional basis for Counts II and III, as well as any other basis for the statistically anomalous result.

The same new evidence, misconduct, and "any other reason justifying relief," ARCP 60(b)(2)-(3), (b)(6), that warranted Rule 60(b) relief from judgment on Count II also justify relief from judgment on Lake's equal protection and due process claims in Counts V and VI. The Superior Court denied relief because "the motion does not grapple at all with the reason the Court dismissed those claims in its December 19, 2022, minute entry" for impermissibly bootstrapping constitutional claims into an election contest. [ROA 295 ep 8.] This was error.

A. Both Division One and the Arizona Supreme Court rejected the Superior Court's suggestion that unconstitutional elections fall outside of "misconduct" in election contests.

Although the Superior Court rejected Counts V and VI as *either* wholly outside the election-contest statute or merely cumulative of the substantive election-law allegations in its December 19, 2022, UAR [ROA 150 ep 9-10], both Division One and the Arizona Supreme Court rejected the either-or formulation and

determined that the case—as it then stood—did not make out a violation of the federal Constitution. *See Lake v. Hobbs*, 525 P.3d 664, 668 ¶31 (Ariz. App. 2023) ("these claims were expressly premised on an allegation of official misconduct in the form of interference with on-site tabulators"). [*See also* ROA 262 ep 2 ("Petitioner's challenges on these grounds are insufficient to warrant the requested relief under Arizona or *federal* law") (emphasis added).] The Superior Court's "bootstrapping" argument relied on *Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978) (denying mandamus because the petitioner had an adequate alternate remedy in an election contest). Citing *Donaghey* is a *non sequitur*. Denying a stand-alone mandamus action based on the adequate remedy of an election challenge does not mean that unconstitutional elections somehow do not constitute misconduct in an election contest. Quite the contrary, running unconstitutional elections is "misconduct" under the election-contest statute.

B. Lake is entitled to relief from judgment on Counts V and VI.

The Superior Court dismissed Counts V and VI on the pleadings, which 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). While the record may not establish whether Maricopa's intentional acts merely resulted in Election Day chaos or whether Maricopa affirmatively planned that chaos, the most likely inference is the latter.

The statistically improbable impact on Republican voters is an equal-protection violation, and Maricopa's violations of Arizona election law in Counts II and III establish a due-process violation. Due-process claims require "patent and fundamental unfairness," which "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). Maricopa's violations in Count II ***burdened*** the Republican-heavy Election Day cohort of voters, and its non-enforcement of signature verification in Count III ***favored*** the Democrat-heavy early-voting cohort. Indeed, making it harder for Republican voters while making it easier for Democrat voters is itself an equal-protection violation.

Maricopa has *admitted* to surreptitiously altering its election equipment, and it failed to address or disclose—much less ***cure***—the known defects that surfaced during unannounced "testing" on the unlawfully altered equipment. *See* Statement of Facts Section B.1, B.4, *supra*; Section I.C.2, *supra*. Here, intent can be inferred from Maricopa's means. *See* note 17, *supra* and accompanying text (intent can be inferred from surreptitious conduct). As indicated in Section IV.B, *infra*, Maricopa's violations of election law included criminal conduct (*i.e.*, "misconduct" for the purposes of the election-contest statute).

Significantly, under these unique circumstances and the statistically improbably biased effect on Republican voters, Maricopa will be unable to meet ***its***

burden of demonstrating that its 2022 election meets the requirements of the federal and Arizona constitutions. *See* Section IV.B, *infra*.

1. The new evidence supplies the intentionality that the prior appellate decisions found lacking.

At the outset, before wading into statistics, "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. Running an election on *intentionally* modified and noncompliant equipment is—***at best***—arbitrary and not reasonably related to the goal of running a fair and reliable election. Significantly, Maricopa's misconduct erases or "bursts" any presumptions in favor of election officials on which the prior decisions relied. *See* Section IV.A, *infra* (discussing Arizona's "bursting-bubble" rule for presumptions). But courts "are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2575 (2019) (internal quotation marks omitted). The improbably biased effect of Maricopa's admitted misconduct and Maricopa's advance knowledge and nondisclosure of the technical errors that surfaced on Election Day allow an inference that Maricopa ***engineered*** the Election Day chaos.

2. The statistically improbable impact on Republican voters shifts the burden to Maricopa to defends its misconduct.

Under Lake's new evidence, the intentionality inferred from the evidence strongly suggests Maricopa engineered the Election Day harm to that cohort of voters, which implicates the Equal Protection and Due Process Clauses. [ROA 1 ep 39-40 ¶ 89 (almost 3.78:1 Republican-versus-Democrat disparity in Election Day voters).] But even among the Republican-heavy cohort of Election Day voters, Republican Election Day voters were more than burdened than Democrat Election Day voters by more than 15 standard deviations beyond what a random distribution would expect. [ROA 1 ep 63 ¶ 165).] At that wide level of disparity, this Court must reject the claims of non-targeted randomness and shift the burden to explain the disparity to Defendants. *See* Section IV.B, *infra*. Levels of scrutiny aside, intentionally targeting voters—by race or by left-handedness—clearly is ***actionable***. *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Targeting Republicans is no different.

3. An engineered assault on the electorate would require a new election under *Hunt*.

The Arizona Supreme Court has long reasoned that electoral manipulations with unquantifiable impacts on an election are not immune from review, merely because their impact cannot be quantified. *Hunt*, 19 Ariz. at 265-66; *cf. Huggins*, 163 Ariz. at 350 (quoted *supra*). Whether by design or as the direct consequence of

unlawful tampering with election equipment and the failure to follow Arizona law regarding L&A testing, Maricopa erected barriers to Election Day voting that prevented thousands of voters from voting.

IV. THIS COURT CAN AND SHOULD SET ASIDE THE ELECTION.

The prior appeal resolved in part based on the presumptions favoring election officials, but those presumptions evaporate in the face of misconduct such as the misconduct shown here. Moreover, the relief of remand to the Superior Court would be futile because Maricopa's misconduct shifts the burden of proof to Maricopa to show the legality of the vote totals, which would be literally impossible to do for Maricopa's flawed 2022 General Election.

A. The presumptions favoring Maricopa election officials have evaporated.

The Superior Court and Division One in the prior appeal relied on presumptions of election officials' good faith and the validity of the votes that they report. [ROA 172 ep 2]; *Lake*, 525 P.3d at 672 ¶10 (Ariz. App. 2023). But non-statutory presumptions evaporate in the face of rebuttal evidence: "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 Arizona's "bursting bubble" treatment of presumptions). Absent a statute or rule to the contrary, these default principles apply to presumptions. Ariz. R. Evid. 301. Indeed, "election contests are purely statutory,"

Griffin, 86 Ariz. at 168; *accord Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966), and nothing in the election-contest statute preserves the claimed presumptions in the face of rebuttal evidence.

As explained above, Maricopa's misconduct dissolves any presumptions on which a court could rely. *See* Sections I.C.2, II, III.B.1, *supra*. Moreover, constitutional claims are not merely "cumulative" in election contests because constitutional violations nullify presumptions. *R.A.V. v. St. Paul*, 505 U.S. 377, 384 n.4 (1992) (constitutional violation renders a "government interest … not a 'legitimate' one"); *Gallardo v. State*, 236 Ariz. 84, 87-88 ¶9 (2014) (when government action burdens fundamental rights, "any presumption in its favor falls away").

B. The burden of establishing the lawfulness of Maricopa's conduct of the election and vote counts shifts to Maricopa.

While plaintiffs or contestants in election contests bear the initial burden of proof, *Garcia v. Sedillo*, 70 Ariz. 192, 198 (1950), that burden shifts to Maricopa under two independent bases. First, when the violation of election statutes makes it uncertain whether a ballot is valid, election officials bear the burden of proof. Second, the targeted nature of Maricopa's Election Day chaos shifts the burden to Maricopa under equal protection analysis.

Violating a law can, by itself, constitute misconduct under A.R.S. § 16-672(A)(1). For example, in *Griffin v. Buzard*, the Arizona Supreme Court found that

running a candidate with a similar name resulted in illegal votes, based on violating the predecessor to A.R.S. § 16-1006(A)(3). 86 Ariz. at 168. Similarly, here, some of Maricopa's misconduct would be tried as misdemeanors, *see, e.g.*, A.R.S. §§ 16-449(A), 16-452(C) (EPM violations for pre-election L&A testing), 16-1009 (public officer's knowing failure to perform election-related duty in the manner prescribed by law), and some would be tried as felonies. *See, e.g.*, A.R.S. §§ 16-1004(B) (knowingly modifying election hardware or software without approval or certification pursuant to § 16-442), 16-1010 (knowing violation or refusal to perform duty by person charged with election-related duties). Showing that illegality shifts 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); *accord McLoughlin v. City of Prescott*, 39 Ariz. 286, 296-97 (1931); *cf. Hunt*, 19 Ariz. at 298 ("'Where the ballots are preserved in ***strict accordance with the statutory requirements***, they are admissible in evidence without further proof.'") (quoting *Averyt*, 8 Ariz. at 358) (emphasis added).

Here, Lake has clearly shown Maricopa's noncompliance with Arizona

election law in ways that preclude knowing the actual vote or intended vote. *See* Sections I.C.1-I.C.3, II.C.2, *supra*. That material noncompliance shifts the burden of proof to Maricopa to establish that the votes it counted for the 2022 election were lawful votes that Maricopa accurately tallied according to the will of a legal voter.

Moreover, under the Equal Protection Clause, statistically improbable results can shift the burden ***to defendants***, notwithstanding that plaintiffs bear the initial burden. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). Here, Maricopa's Election Day chaos skewed improbably against Republican voters by more than 15 standard deviations, even among the already heavily Republican cohort of Election Day voters.[24] *See* Section III.B.2, *supra*. The vanishingly small chance that such a skew occurred randomly shifts the burden of proof to Maricopa.

C. This Court should grant merits relief for Lake because remand would be futile.

If this Court holds that the burden of proof shifts to Maricopa, this Court should grant Lake merits relief. Where the party bearing the burden of proof on

[24] The standard deviation (σ) for a binomial distribution (e.g., heads or tails, Republican or Democrat) is the square root of the multiple of the expected probability and one minus the expected probability divided by the sample size (i.e., the square root of (p)(1-p)/n). *Castaneda*, 430 U.S. at 496 n.17. For example, with a coin toss, both (p) and (1-p) are 50% for a fair coin. The odds of getting 60% heads vary with the sample size: so that 6 heads in 10 tosses is within a standard deviation (σ=0.158 or 15.8%), but 600 heads out of 1,000 tosses falls 6.32 standard deviations (σ=0.016 or 1.6%) away from the expected 500 heads if the coin is fair.

remand cannot make its required showing, remand for further proceedings would be a futile gesture:

> To remand the case with direction to the trial court to sustain the demurrer when it is clear that another trial would disclose the situation now before us would be requiring a futile thing and courts do not take actions of this character.

Levandoski v. Ford, 52 Ariz. 454, 459 (1938); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S.Ct. 2183, 2208 (2020) ("remand for the lower Courts to consider those questions in the first instance is therefore the appropriate course—***unless such a remand would be futile***") (emphasis added); *Dowling v. Stapley*, 221 Ariz. 251, 270 n.23 (App. 2009); *Walls v. Arizona Dep't of Pub. Safety*, 170 Ariz. 591, 597 (App. 1991).[25]

Because Maricopa's 2022 election is irredeemably flawed, *see* Sections I.C.1-I.C.3, II.C.1-II.C.2, *supra*, a remand in which the burden of proof shifts to Maricopa is the same as a merits ruling for Lake. By failing to follow the election requirements in these "non-technical statute[s]," Maricopa's 2022 election must be set aside. *Miller*, 179 Ariz. at 180; *Reyes*, 191 Ariz. at 94. But there is no winding back the clock to base the 2022 General Election results on election equipment and software

[25] The rule is the same in criminal cases: "To remand in such cases would be inefficient if not futile. Judicial economy requires that we intervene when the record is … as clear as it is in the instant case." *State v. Emery*, 141 Ariz. 549, 553 (1984).

that was not tested or certified ***prior to the election***, as Arizona law requires. *See* A.R.S. §§ 16-442(B), 16-449(A). As such, like Humpty Dumpty, Arizona's 2022 election cannot be put back together on remand.

CONCLUSION

WHEREFORE, Plaintiff prays that the trial court be REVERSED and that Plaintiff be granted the injunctive relief of *vacatur* of the election certification and a new election, as requested in her Verified Complaint.

Dated: September 15, 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) 752-6213
Email: bryan@blehmlegal.com

Counsel for Plaintiff-Appellant

Kurt B. Olsen
Olsen Law PC
1250 Connecticut Ave. NW, Ste. 700
Washington, DC 20036
Tel: 202-408-7025
Email: ko@olsenlawpc.com

CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 4, the undersigned counsel certifies that the accompanying brief is double spaced and uses a proportionately spaced typeface (*i.e.*, 14-point Times New Roman) and contains 13,826 words according to the word-count function of Microsoft Word.

Dated: September 15, 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

Counsel for Plaintiff-Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the foregoing **OPENING BRIEF OF APPELLANT KARI LAKE** was e-filed with the Clerk of the Arizona Court of Appeals, Division Two via the Court's e-filing system on September 15, 2023, and that a copy was served via email on this same date to the following:

Honorable Peter Thompson
Maricopa County Superior Court
c/o Sarah Umphress
sarah.umphress@jbazmc.maricopa.gov

Alexis E. Danneman
Austin Yost
Samantha J. Burke
Perkins Coie LLP
2901 North Central Avenue
Suite 2000
Phoenix, AZ 85012
adanneman@perkinscoie.com
ayost@perkinscoie.com
sburke@perkinscoie.com
Attorneys for Defendant Katie Hobbs

and

Abha Khanna*****
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
akhanna@elias.law
Telephone: (206) 656-0177

and

Lalitha D. Madduri*
Christina Ford*
Elena A. Rodriguez Armenta*
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW, Suite 400
Washington, D.C. 20001
lmadduri@elias.law
cford@elias.law
erodriguezarmenta@elias.law
Attorneys for Defendant Katie Hobbs

and

Sambo Dul
STATES UNITED DEMOCRACY CENTER
8205 South Priest Drive, #10312
Tempe, Arizona 85284
bo@statesuniteddemocracycenter.org
Attorney for Defendant Secretary of State Adrian Fontes

and

Thomas P. Liddy
Joseph La Rue
Joseph Branco
Karen Hartman-Tellez
Jack L. O'Connor
Sean M. Moore
Rosa Aguilar
Maricopa County Attorney's Office
225 West Madison St.
Phoenix, AZ 85003
liddyt@mcao.maricopa.gov
laruej@mcao.maricopa.gov
brancoj@mcao.maricopa.gov
hartmank@mcao.maricopa.gov
oconnorj@mcao.maricopa.gov
moores@mcao.maricopa.gov
aguilarr@mcao.maricopa.gov
Attorneys for Maricopa County Defendants

and

Emily Craiger
The Burgess Law Group
3131 East Camelback Road, Suite 224
Phoenix, Arizona 85016
emily@theburgesslawgroup.com
Attorneys for Maricopa County Defendants

/s/Bryan James Blehm

Bryan James Blehm
Counsel for Appellant-Petitioner Kari Lake