No. 23-1021

IN THE
Supreme Court of the United States

KARI LAKE, *ET AL.*,
Petitioners,
v.
ADRIAN FONTES, ARIZONA SECRETARY OF STATE,
ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amici Curiae* of Maricopa County Republican Committee and 10 Other Republican County Committees, Nebraska Republican Party, Republican Party of New Mexico, and Conservative Legal Defense and Education Fund in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus Maricopa County Republican Committee ("Maricopa GOP") is the official Republican organization in Maricopa County, Arizona. It is on record demanding fair elections and supporting election transparency throughout Arizona. For example, Maricopa GOP voted to censure Maricopa County government officials who allowed the November 8, 2022 election to be "fraught with avoidable errors, leading to significant voter disenfranchisement" as shown by a State Senate Signature Audit report which "revealed at least 1,298 ballots cast by dead voters and 17,822 mismatched ballots." *See* MCRC Formally Censures Press Release (Jan. 20, 2023). In March 2023, Maricopa GOP called for a forensic investigation by the State Legislature and the Attorney General of allegations concerning government electoral corruption. *See* MCRC Calling for Investigation Press Release (Mar. 8, 2023). In addition, in December 2023, the Maricopa GOP adopted a resolution calling on the Arizona House of Representatives to impeach Arizona Attorney General Kris Mayes for abuse of office based on Arizona Senate Resolution 1037, "finding that computerized voting machines used in Arizona were not transparent and contained components manufactured, assembled, or tested in foreign nations like China and thus posed a

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

threat to the security of elections" as well as citing "actual breaches of voting systems and uncured vulnerabilities making voting systems such as those used in Arizona subject to a material risk of manipulation." *See* "MCRC EGC Unanimously Passes Resolution Calling on the Arizona House of Representatives to Impeach Arizona Attorney General Kris Mayes" (Dec. 6, 2023).

The following *amici* are the official Republican Party organizations in their respective counties:

Georgia:
- Cobb County Republican Committee
- Fulton County Republican Party Inc.

Nebraska:
- Arthur County Republican Party
- Cass County Republican Party
- Cedar County Republican Party
- Hamilton County Republican Party
- Perkins County Republican Party
- Seward County Republican Party

Oregon:
- Klamath County Republican Central Committee
- Marion County Republican Central Committee

Amici Nebraska Republican Party and Republican Party of New Mexico are the official state Republican Party organizations. All party organizations are committed to open and fair elections.

Amicus Conservative Legal Defense and Education Fund is a nonprofit organization founded in 1982, that

has been active in defending the liberties of Americans, having filed over 100 *amicus* briefs in this Court, including defending electoral rights and promoting reasonable standards for standing.

STATEMENT OF THE CASE

In April 2022, Petitioners Kari Lake and Mark Finchem, as candidates for state office and as voters, filed suit, challenging the manner in which the 2022 Arizona election was being conducted. In their Amended Complaint, and now in their Petition for Certiorari ("Pet."), they identify the specific ways that the election violated Arizona law and their right to have an honest count in their elections. Nevertheless, the district court dismissed the Amended Complaint for failure to meet an elevated and unreasonable standard for standing, preventing Petitioners from having the opportunity to conduct discovery and to prove their case on the merits, thereby ending their opportunity to obtain judicial relief for the 2022 election. Petitioners Lake and Finchem are both candidates for office again in 2024, and should the same unlawful procedures be used in this upcoming election as were used in 2020 and 2022, they will again be at risk of a reported vote count that would not accurately reflect the votes cast by the People of Arizona.

Responsibility for conducting a lawful election and accurate count in 2022 was vested in defendant (then-Secretary of State) Katie Hobbs, who Petitioners assert failed in that duty. Since that time, Hobbs has been replaced in this litigation by Respondent and

newly elected Secretary of State Adrian Fontes. The other Respondents include the five members of the Maricopa County Board of Supervisors and the five members of the Pima County Board of Supervisors, who were the county elected officials responsible for conducting the 2022 election in accordance with Arizona law.

Maricopa County dominates Arizona state-wide elections. The reason is obvious. Maricopa County, whose county seat is Phoenix, has a population of over 4.4 million, making it the fourth largest County in the United States, behind only Los Angeles County, California; Cook County, Illinois; and Harris County, Texas. Approximately 62 percent of Arizona's residents reside in Maricopa County, and an even higher percentage of its voters reside there. By contrast, Pima County, whose county seat is Tucson, Arizona, is the state's second most populous county with a population of over 1 million. This *amicus* brief addresses some of the election irregularities which occurred in Maricopa County.

The district court opinion was issued on August 26, 2022. *See Lake v. Hobbs*, 623 F. Supp. 3d 1015 (D. Ariz. 2022) ("*Lake I*"). The Ninth Circuit opinion was issued on October 16, 2023. *See Lake v. Fontes*, 83 F.4th 1199 (9th Cir. 2023) ("*Lake II*").

STATEMENT

The challenge below was not a contest to the reported results of an election after the fact. Rather, it was an effort to ensure that an upcoming election

was conducted in accordance with state law, particularly when those state laws were written to ensure that machine voting and tabulation are not manipulated or compromised. From an examination of the manner in which modern elections are conducted with heavy reliance on computers and technology, and how the courts below responded to election irregularities, three observations can be made.

First, judicial oversight of elections results in better and more honest elections. When courts apply elevated standards for standing and dismiss challenges to the conduct of elections at their outset, it makes it nearly impossible to ensure fair elections. In many locations, if election officials believe that they can conduct elections without transparency, and then avoid judicial scrutiny into how they conduct elections, they will be emboldened to conduct elections in, at best, a casual and inaccurate manner and, at worst, a manner designed to ensure the outcome they desire.

Second, the more aggressively that election officials seek to derail election challenges based on standing and other avoidance doctrines, the more suspicious the American People become that they are hiding unlawful activities. Election officials who have conducted the election in accordance with law, and to the best of their ability, will have no problem in providing transparency and responding to a merits review of their actions. In fact, when litigation challenges the manner in which an election will be held, and the courts reach the merits of the allegations, it gives voters confidence in the legitimacy of the election process. When election officials

ferociously resist review of the merits — which has occurred in Arizona — voter confidence in elections is undermined.

Third, the justification offered by some courts for declining to hear election challenges — that election problems are best resolved by the political branches — is an unrealistic expectation. It should be remembered that those who occupy the political branches are themselves politicians — just politicians who have been elected to office. The political branches have a vested interest that could make them more interested in electing and reelecting their colleagues than conducting elections in accordance with law.

Thus, where a court dismisses a well-pled challenge to the conduct of an election, it not only fails to do its constitutional duty to resolve legitimate "cases" and "controversies," but it also undermines the legitimacy of elections and makes it impossible to know if the government is operating with the consent of the governed, on which our constitutional republic is grounded.

SUMMARY OF ARGUMENT

Petitioners were two candidates for statewide office in Arizona who brought a pre-election challenge to the manner in which the 2022 election was being conducted by Respondents. Petitioners alleged specific violations of state laws that were designed to ensure that electronic machine voting was protected from error and manipulation. Although the district court purported to apply *Lujan* standards, it largely

disregarded the specific allegations of laws being violated, applied the wrong standards, and dismissed the case based on standing. The district court deemed the claims speculative because Petitioners could not prove that the election had "security failures," that the results were manipulated, that the manipulation was not detected, and that the manipulation would have changed the outcome of the election. However, none of these elements apply in a pre-election challenge. The Ninth Circuit affirmed the dismissal based on standing.

Maricopa County, with about five-eighths of the Arizona electorate, dominates statewide races in Arizona, and Petitioners made a host of specific allegations as to how that County was conducting the election in violation of law. Moreover, the district court ignored allegations that the County had a track record of discrepancies in the 2020 election, with a vote mismatch of over 11,000 votes and refusal to provide transparency. Moreover, since the election, Petitioners have asserted that after-discovered information demonstrates that violations of voting machine integrity laws were not just likely, but actually occurred.

In a similar case in Georgia, the district court readily determined that plaintiffs had standing to challenge procedures used for machine voting. Moreover, many well-publicized pre-election challenges have been brought to the manner in which elections were being conducted, and standing has routinely been found in challenges unrelated to electronic machine voting. This case insulates state

election officials from challenges to electronic machine voting systems.

The person responsible for conducting the 2022 election was then-Secretary of State Katie Hobbs. She declared herself the winner in the race for Governor over Petitioner Lake by a margin of only 17,117 votes. Hobbs also declared current Secretary of State Adrian Fontes the winner in a close election, who is now responsible for conducting the 2024 election in which both Petitioners are again seeking office. To ensure that this year's election is conducted lawfully, it is essential that this Court return the case forthwith to the Ninth Circuit to apply the correct standards for standing, consider the allegations, and be in a position for the courts below to grant relief before another election is conducted.

ARGUMENT

I. THE NINTH CIRCUIT UPHELD THE DISMISSAL OF PETITIONERS' EFFORT TO PREVENT AN UPCOMING ELECTION FROM BEING CONDUCTED IN VIOLATION OF STATE LAW.

The case below was a pre-election challenge brought by Petitioners, two candidates for state office, against Respondent state and county officials responsible for conducting Arizona elections. Petitioners asserted that the manner in which the election was being conducted violated state law. Petitioners' 50-page Amended Complaint detailed the reasons for their belief that the use of electronic voting

machines, particularly without complying with the protections written into state law, make the results unreliable. *See* Amended Complaint ¶¶ 135-143. Petitioners specifically detailed many of the reasons why the hardware and software being used was unreliable. *See* Amended Complaint ¶¶ 71-134; Pet. at 7-13. Information discovered after the case was dismissed by the district court has confirmed that Petitioners' concerns were real, and that even Respondents could not independently verify the results provided to them by Dominion Voting Systems. *See* Pet. at 8. In essence, Respondents contracted out the counting of the votes to a private party, and that private party will not even allow Respondents to examine its work. *Id*. at 1.

Respondents aggressively challenged Petitioners' standing, arguing that their allegations were speculative, and asserting that in order to challenge Respondents' use of voting machines, they should be required to prove four discrete elements. These elements all go to the merits of a post-election challenge — not standing in a pre-election suit:

> (1) the specific voting equipment used in Arizona must have "security failures" that allow a malicious actor to manipulate vote totals; (2) such an actor must actually manipulate an election; (3) Arizona's specific procedural safeguards must fail to detect the manipulation; and (4) the manipulation must change the outcome of the election. [*Lake II* at 1204, quoting verbatim from *Lake I* at 1028.]

Under this Court's standing jurisprudence, Petitioners should not have been required to make any of these showings to avoid dismissal of their pre-election suit based on standing.

II. MARICOPA COUNTY PROMINENTLY FIGURED IN THE ELECTION LAW VIOLATIONS THAT OCCURRED IN 2020 AND WHICH CONTINUED IN 2022.

Petitioners' Amended Complaint alleged numerous statewide problems with Arizona's election system, and also included specific allegations about the election in Maricopa County. Petitioners alleged that Maricopa County was using "election systems and equipment ... that are rife with potentially glaring cybersecurity vulnerabilities," including:

- Operating systems lacking necessary updates;
- Antivirus software lacking necessary updates;
- Open ports on the election management server, allowing for possible remote access;
- Shared user accounts and common passwords;
- Anomalous, anonymous logins to the election management server;
- Unexplained creation, modification, and deletion of election files;
- Lost security log data;
- The presence of stored data from outside of Maricopa County;
- Unmonitored network communications;
- Unauthorized user internet or cellular access through election servers and devices;

- Secret content not subject to objective and public analysis. [Amended Complaint ¶ 12.]

Each of these allegations demonstrates a shocking disregard for the need to have a iron-clad electronic computerized voter system highly resistant to hacking or other methods by which error may be introduced into the results. Most of these allegations appear to violate the statutory requirements for the manner in which the election is conducted. *See, e.g.*, Pet. at 17; Motion to Expedite at 20.

Petitioners alleged that one of the reasons the election procedures were likely flawed was that an audit after the 2020 election in Maricopa County showed problems that have carried over to 2022:

- "The official result **totals [in 2020] do not match** the equivalent totals from the Final Voted File (VM55). These discrepancies are significant with a total ballot delta of **11,592** between the official canvass and the VM55 file when considering both the counted and uncounted ballots." [Amended Complaint ¶ 70 (emphasis added).]

In addition, Petitioners alleged that it was impossible to establish that the 2020 election had been fair, since key evidence concerning the 2020 election had been deleted and other information withheld:

- "[A] **large number of files** on the Election Management System (EMS) Server and HiPro Scanner machines were **deleted** including

> ballot images, election related databases, result files, and log files. These files would have aided in our review and analysis of the election systems as part of the audit. The deletion of these files significantly slowed down much of the analysis of these machines. Neither of the 'auditors' retained by Maricopa County identified this finding in their reports"; and
>
> - "Despite the presence of at least one poll worker laptop at each voting center, the **auditors did not receive laptops** or forensic copies of their hard drives. It is unknown, due to the lack of this production, whether there was unauthorized access, malware present or internet access to these systems." [*Id.* ¶ 70 (emphasis added).]

These allegations that files were deleted and evidence was withheld from those examining the 2020 election are not just suspicious activities; they are *prima facie* indications of an effort to conceal illegal conduct. Yet, the district court dismissed Petitioners' Amended Complaint for lack of standing before discovery could be undertaken, the truth could be uncovered, and the merits of the case resolved by the court.

When the courts failed their duty, the Arizona State Senate, having fewer powers than a federal court, did what it could to examine the election:

> The **Arizona Senate** hired a team of forensic auditors to review Maricopa County's election process. The auditors issued a partial audit

> report on September 24, 2021, which found: (1) "**None** of the various systems related to elections had numbers that would **balance** and agree with each other. In some cases, these differences were significant"; (2) "**Files** were **missing** from the Election Management System (EMS) Server"; (3) "**Logs** appeared to be intentionally rolled over, and all the data in the database related to the 2020 General Election had been fully **cleared**"; (4) "Software and patch protocols were not followed"; and (5) basic cyber security best practices and guidelines from the CISA were not followed. [Amended Complaint ¶ 132 (emphasis added).]

The Complaint also alleges that these findings led Arizona Senate leaders to issue subpoenas to Dominion Voting Systems on July 26, 2021 seeking information that would provide "administrative access" to the "ballot tabulation machines [that] Maricopa County rents from Dominion," but "Dominion flatly refused to comply with this validly-issued legislative subpoena." *Id.* ¶¶ 148-49.[2] It appears that Respondents "contracted out" the conduct of Arizona elections to Dominion Voting Systems, and then failed to prove that Dominion had conducted the election in accordance with law. The conduct of elections and tabulation of votes are core government functions and if they are to be "contracted out" at all, this must be

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[2] In addition, Petitioners alleged that Maricopa County officials failed to conduct elections in accordance with A.R.S. § 16-452. *See* Amended Complaint ¶¶ 163-64. *See also* Amended Complaint ¶¶ 200-06.

done with the greatest of care, supervision, transparency, and accountability, none of which were present in Arizona.

The natural result of dismissing the Amended Complaint, based on a novel and overly restrictive concept of standing, was to prevent any discovery from being conducted, thereby avoiding the need for a judicial evaluation of, and determination concerning, the merits of Petitioners' well-pled allegations.

III. IN A HIGHLY SIMILAR CASE, A DISTRICT COURT IN GEORGIA HANDLED THE ISSUE OF STANDING VERY DIFFERENTLY FROM THE DISTRICT COURT IN ARIZONA.

Lake v. Fontes is not the first time that a challenge to an election using equipment similar to that used in Arizona was brought. A remarkably similar challenge was filed in 2017 — a pre-election challenge to an election using machine votings where the results could not be verified — *Curling v. Raffensperger*.[3] The *Curling* plaintiffs challenged the constitutionality of "Direct Recording Electronic" ("DRE") voting machines and related software. *Curling* raises many of the same issues as *Lake v. Fontes* raises with respect to the vulnerabilities of the electronic voting machines.

The plaintiffs in *Curling* are several individuals and a nonprofit organization concerned about issues of

[3] U.S. District Court, Northern District of Georgia, No. 17-cv-2989.

election integrity, security, and transparency. None of the plaintiffs were candidates, and thus the Georgia plaintiffs presented a less compelling case for standing than Petitioners here. Nevertheless, the Georgia district court found they had standing. Plaintiffs in that case raised:

> three substantive claims challenging [the voting] system: a violation of the fundamental right to vote under the Due Process Clause of the Fourteenth Amendment ..., an Equal Protection Clause claim alleging that in-person voters using the [Ballot Marking Devices ("BMD")] system are deprived of equal protection as compared to voters using absentee paper ballots ..., and a request for a declaratory judgment that the ... system fails to comply with [Georgia's] statutory requirement for an elector-verifiable paper ballot. [*Curling v. Raffensperger*, 2023 U.S. Dist. LEXIS 202368, *49-50 (N.D. Ga. 2023).]

In rejecting the defendants' arguments that plaintiffs lacked standing, the district court found that:

> Plaintiffs' allegations are not premised on a theoretical notion or "unfounded fear" of the hypothetical "possibility" that Georgia's voting system might be hacked or improperly accessed and used. Plaintiffs allege that harm has in fact occurred, specifically to their **fundamental right to participate in an election process that accurately and reliably records their votes** and protects

> the privacy of their votes and personal information.... Plaintiffs also allege the **threat of future harm**.... Furthermore, Plaintiffs plausibly allege a threat of a future hacking event that would jeopardize their votes and the voting system at large. [*Curling v. Kemp*, 334 F. Supp. 3d 1303, 1314-16 (N.D. Ga. 2018) (emphasis added).]

With respect to a causal connection between the injury and the conduct complained of, the court found that the "allegations plausibly show causal connection, even if indirectly, between Defendants' continued use of unsecure DREs and the injury to Plaintiffs' constitutional rights." *Id*. at 1317. Furthermore, the coalition plaintiffs in *Curling* also sought an injunction against the state from enforcing the Georgia statute and implementing regulations, which taken together, require the use of the DRE machines. Over defendants' arguments, the court held that coalition plaintiffs "have alleged enough of a causal link between the State Defendants' conduct and their injury for standing purposes." *Id*. at 1318.

Finally, with respect to redressability, the district court found that the plaintiffs "have sufficiently alleged that the State Defendants play a significant role in the continued use and security of DREs, and therefore the requested injunction would help redress some" of plaintiffs' injuries. *Id*. Furthermore, the "State Defendants ... are ... in a position to redress the Plaintiffs' alleged injury." *Id*.

The district court concluded that "both sets of Plaintiffs have sufficiently alleged standing to bring their claims at this juncture." *Id*. at 1320. The court then denied the defendants' motions to dismiss for lack of standing.

Because the district court recognized plaintiffs' standing, they have been able to conduct discovery and present evidence of how the voting machines could be modified with malicious software and change the results of voting on those machines completely without detection, including by modifying "'all of the vote records, audit logs, and protective counters stored by the machine, so that even careful forensic examination of the files would find nothing amiss.'" *Id*. at 1308.

In a recent, November 10, 2023 decision, the district court reaffirmed its position that the plaintiffs had standing — this time at the summary judgment stage of the case. In addition to meeting the traceability and redressability standards, the court concluded the challengers had suffered a nonspeculative, cognizable injury based on Georgia's machine voting system:

> the Court concludes that — for purposes of summary judgement — Plaintiffs have presented enough concrete evidence to support CGG's concern and fear that there is a substantial risk of injury to its members' **right to have their votes counted as cast** if they are required to vote on Georgia's BMD system. [*Curling v. Raffensperger* at *125-26 (emphasis added).]

IV. STANDING HAS BEEN READILY ACKNOWLEDGED TO EXIST IN NUMEROUS RECENT PRE-ELECTION CHALLENGES WHERE ELECTIONS WERE BEING CONDUCTED UNLAWFULLY.

The Ninth Circuit approved the district court's dismissal of Petitioners' challenge to the unlawful manner in which the 2022 election was to be conducted. The challenge had been filed by Petitioners in their capacity as candidates for office (as well as voters), alleging numerous violations of state law, and the constitutionally protected right to vote. That dismissal below stands in stark contrast to a long string of cases where courts had no problem finding standing when plaintiffs alleged that upcoming elections were being held in violation of law, or in a manner which violated their constitutional liberties. A flood of these cases began to be filed leading up to the 2016 elections, and accelerated dramatically in the lead-up to, and aftermath of, the 2020 election.

To be sure, each of these federal cases discussed *infra* was predicated on a variety of different violations of law and constitutional liberties but, in each case, the standing inquiry applied to the plaintiffs was significantly different from the elevated requirements for standing applied in both *Lake I* and *Lake II*. Standing was found to exist for candidates, voters, political parties, political committees, and others.

Northern District of Florida (Oct. 16, 2016). The Florida Democratic Party and the Democratic National Committee challenged a Florida law which allowed

voters who failed to sign their mail-in ballots to "cure" the missing signature, but which did not allow opportunity to "cure" when the voter's signature on the ballot envelope did not match the voter's signature on file with the state.[4] Before even addressing standing, the district judge took time to express his personal disdain for the Florida law, describing it as part of another effort by which "the State of Florida has consistently **chipped away at the right to vote**." *Fla. Democratic Party v. Detzner*, 2016 U.S. Dist. LEXIS 143620 at *2 (N.D. Fla. 2016) (emphasis added). The court never conducted the *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), three-part standing analysis, focusing only on the standing of political parties to bring challenges on behalf of unidentified persons who may vote in a particular manner. The court cited an earlier decision to the effect that "political parties have standing to assert, at least, the rights of its members who will vote in an upcoming election ... even though the political party could not identify *specific* voters that would be affected...." *Fla. Democratic Party* at *11. Applying that rule, the district court found standing to exist based on what could be termed a judicial assumption of "inevitability," stating: "**Plaintiffs need not**

[4] One possible reason that the Florida legislature may have made the distinction in this statute is offered here. When different signatures appear on the ballot and the signature card, that could reasonably be viewed presumptively as an act of fraud. When there is no signature, it could reasonably be viewed presumptively as a mistake. Yet, the district court judge, in response to his own question as to whether there could be any reasonable basis for this distinction, stated: "a resounding 'no.'" *Id.* at *3.

identify *specific* voters that are registered as Democrats that will have their vote-by-mail ballot rejected due to apparent mismatched signatures; it is sufficient that **some inevitably will**." *Id*. at *12 (bold added). That concluded this court's *Lujan* analysis.

District of Minnesota (June 15, 2020). Two individual plaintiffs, the Democrat Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee challenged a ballot order statute that required the minority party to get first placement on the ballot. The court denied a motion to dismiss filed by the Minnesota Secretary of State, concluding that the Democratic campaign committees had standing to challenge the statute because "first-listed candidates on Minnesota ballots [have] a 'clear and discernable' advantage." Plaintiffs were not required to allege that the flaw would be outcome-determinative. *Pavek v. Simon*, 467 F. Supp. 3d 718, 740 (D. Minn. 2020).

Northern District of Florida (June 30, 2020). A group of individual plaintiffs and a large coalition of progressive advocacy groups challenged multiple provisions of Florida election security laws, including the requirement that voters in some counties were required to apply their own postage on a mail-in ballot, while other counties provided the postage. The district court granted Florida's motion to dismiss the claim against the postage requirement, ruling that "[r]equiring a voter to pay for postage to mail a registration form or ballot ... is not unconstitutional." *Nielsen v. DeSantis*, 469 F. Supp. 3d 1261, 1268 (N.D. Fla. 2020). However, the district court took pains to

explain that the dismissal was not based on standing. Rather, the court explained that the individual plaintiffs, presumably voters, who were the "plaintiffs who wish to vote by mail and reside in counties that do not provide postage **have standing** to challenge the postage requirement." *Id.* at 1266 (emphasis added).

Western District of Texas (Aug. 11, 2020). The district court found that the Texas Democratic Party, the Democrat Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee had standing to challenge statutory limitations on mobile voting locations, with claims that early voting locations might be unconstitutionally far from their homes, based on a "substantial risk" of that possibility, even though county officials had not yet determined where permanent early voting locations would be. *Gilby v. Hughs*, 2020 U.S. Dist. LEXIS 178465 (W.D. Tx. 2020).

District of Arizona (Sept. 10, 2020). The Arizona Democratic Party, the Democratic National Committee, and the Democratic Senatorial Campaign Committee filed a challenge to Arizona's law requiring that unsigned mail-in ballots must be cured by the end of Election Day. Two months before Election Day, the Arizona district court found plaintiffs had standing to challenge that requirement. The district court did not require any proof that the individuals which the Democratic Party was claiming to represent existed, or who they were. The court ruled that the plaintiffs "need not identify by name specific injured members if 'it is **relatively clear**, rather than merely speculative, that **one or more** members have been or will be

adversely affected' by the challenged law, and where Defendants 'need not know the identity of a particular member to understand and respond to' Plaintiffs' claims." *Ariz. Democratic Party v. Hobbs*, 485 F. Supp. 3d 1073, 1085 (D. Ariz. 2020) (emphasis added). The court then arbitrarily fashioned a five-day post-election grace period during which voters could cure the missing signature. *Id*. at 1096.

Northern District of Florida (Dec. 17, 2021). The League of Women Voters of Florida challenged a Florida law enacted after the 2020 election cycle, which required mail-in voters to request a ballot every election cycle. Previously, Florida law required a request be made in every other election cycle. Florida also banned unmanned ballot drop boxes, requiring that all drop boxes be manned. On summary judgment, the district court ruled that "the challenged provisions impose at least **some burdens** on Florida's electorate," **thus conferring standing**. *League of Women Voters of Fla., Inc. v. Lee*, 576 F. Supp. 3d 1004, 1012 (N.D. Fla. 2021) (emphasis added).

Ninth Circuit (Apr. 5, 2022). Two individual plaintiffs, joined by the Democratic National Committee, the Democratic Senatorial Campaign Committee, and Priorities USA, challenged Arizona's law that the party controlling the governorship would receive the top placement on the ballot. Although the district court originally found the plaintiffs did not have standing, the Ninth Circuit reversed, ruling that both candidates and political parties had "standing to sue 'to **prevent** their opponent from gaining an **unfair advantage** in the election process through

abuses of [processes] which **arguably promote** his electoral prospects.'" *Mecinas v. Hobbs*, 30 F.4th 890, 897 (9th Cir. 2022) (emphasis added). No level of "certainty" was required to obtain standing, and the allegation of "an unfair advantage" was sufficient, without a showing that any such advantage was outcome-determinative.

Southern District of New York (July 13, 2022). The district court concluded that the Democratic Congressional Campaign Committee was entitled to preliminary injunctive relief to the extent it challenged the rejection, without opportunity for cure, of absentee ballots missing postmarks that are received between two and seven days after Election Day in 2022. No allegation was made that the absence of the ability to cure changed the outcome of any election. *Democratic Cong. Campaign Comm. v. Kosinski,* 614 F. Supp. 3d 20 (S.D. N.Y. 2022). The district court explained the standing issue as follows:

> **Although it may indeed be speculative** to conclude that any specific individual will be impacted by one or more of the challenged practices, it is not speculative on the current record to conclude that **some** voters will be so impacted in the upcoming elections — and the relevant inquiry for purposes of assessing harm to DCCC is whether the challenged conduct will recur with respect to *any* Democratic voter.... Arguably, the more speculative conclusion under these circumstances would be that "[n]o injury may occur at all." [*Id*. at 42 (bold added).]

In *Lake v. Fontes*, where Respondents conducted an election in which they violated the protections established by the state legislature for machine voting, it also is true that "the more speculative conclusion" is that the vote count in violation of law would be more accurate and fair than a vote count in accordance with law.

To be sure, none of the eight federal cases discussed *supra* is identical to the challenge brought by Petitioners. However, the right asserted in *Lake* to obtain an accurate vote count is at least as significant as the grounds for the other challenges. These cases indicate that even in speculative pre-election challenges to the legality of election procedures, courts often find standing and reach the merits, unlike the situation here, where the district court used an unreasonable standard for standing, and the Ninth Circuit approved.

V. THE NINTH CIRCUIT HAS APPLIED DIFFERENT STANDING STANDARDS IN SIMILAR CASES.

In *Lake II*, the Ninth Circuit affirmed the district court's impossible four-part standard to demonstrate that the claims were speculative. Both courts repeated the exact same four-part test. Petitioners' pre-election challenge was deemed speculative because Petitioners could not prove the following four factors relating to how the election would turn out using voting machines:

> (1) the specific voting equipment used in Arizona must have 'security failures' that allow a malicious actor to manipulate vote totals; (2) such an actor must actually manipulate an election; (3) Arizona's specific procedural safeguards must fail to detect the manipulation; and (4) the manipulation must change the outcome of the election. [*Lake II* at 1204.]

None of these requirements have any applications to a pre-election challenge of the sort brought by Petitioners. None of these requirements have been used in the Ninth Circuit to address other pre-election claims, such as *Mecinas v. Hobbs*, discussed *supra*.

Further, in *Lake I*, the district court required that the injury must be what it termed "'certainly impending'" for standing to exist. *Lake I* at 1027. That standard too was newly designed by the District of Arizona and the Ninth Circuit. The Arizona district court required Petitioners here to demonstrate proof in their complaint that malicious actors had in fact manipulated the 2022 election, that Arizona's system had failed to detect the manipulation, and that the result was outcome-determinative — not to win on the merits, but simply to achieve standing. Yet the same court required Arizona Democratic Party plaintiffs only to prove that it was "'**relatively clear**,'" rather than merely speculative, that "'**one or more** members **have been or will be** adversely **affected**.'" *Ariz. Democratic Party v. Hobbs* at 1085 (emphasis added), discussed *supra*. The "certainly impending" standard imposed on Petitioners here was never used.

Moreover, the same Ninth Circuit that affirmed dismissal of Petitioners' claims here treated plaintiffs' claims in *Mecinas* with a far more lenient standard. When plaintiffs challenged Arizona's partisan ballot placement statute, the Ninth Circuit required only a showing of "'an **unfair advantage in the election process**'" that "'**arguably promote[d]**'" the prospects of the plaintiffs' electoral opponents. *Mecinas* at 897 (emphasis added). Again, the "certainly impending" standard was discarded, and the court required no hint that the ballot placement was outcome-determinative, merely that it "arguably" created structural unfairness generally.

The District of Arizona and the Ninth Circuit did not exercise the "virtually unflagging" obligation to exercise jurisdiction where, as here, Petitioners have adequately pleaded facts to support their claims "with the manner and degree of evidence required" at the pleading "stage[] of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

This Court should not allow the courts below to impose a trial-stage standing requirement of positive proof, to replace a motion to dismiss standing requirement of a well-pled complaint with factual allegations sufficient to show a plausible claim for relief. According to this Court's standing jurisprudence, that is all standing requires. It was error for the Ninth Circuit to apply a new, elevated, unreachable, and unreasonable standard of standing to Petitioners.

CONCLUSION

These *amici* urge that both the petition and Petitioners' motion to expedite be granted. These *amici* also join in the request that the circuit court's decision be summarily reversed and remanded so that the district court has sufficient time to consider Petitioners' complaint on the merits in order to ensure that the election law violations alleged to have occurred in 2022 not be repeated, so that the 2024 election is conducted in accordance with Arizona law.

Respectfully submitted,

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