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**IN THE SUPREME COURT FOR THE
STATE OF ARIZONA**

KARI LAKE

Petitioner,

v.

KATIE HOBBS, *et al.*,

Respondents.

No. CV-23-0046-PR

Court of Appeals
Division One

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

Maricopa
Superior Court

No. CV2022-095403

**AMICUS CURIAE BRIEF OF DAVID MAST IN SUPPORT OF KARI LAKE'S
PETITION FOR SPECIAL ACTION**

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1 **BRIEF AMICUS CURIAE OF DAVID MAST IN SUPPORT**
2 **OF PETITIONER KARI LAKE**

3 **INTRODUCTION**

4
5 “No right is more precious in a free country than that of having a voice in the
6 election of those who make the laws under which, as good citizens, we must live. Other
7 rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v.*
8 *Sanders*, 376 U.S. 1, 17 (1964).
9

10 The issues presented in this case are of critical importance to the State of Arizona
11 and to the Nation as they concern the integrity of the electoral process and public’s
12 confidence in the fundamental fairness and honesty of our system of government.
13 Maricopa’s failure to comply with Arizona’s laws in its conduct of the 2022 general
14 election, especially its unlawful counting of mail-in ballots that were not verified in
15 accordance with Arizona law, puts this guarantee at great risk.
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17

18 Additionally, by requiring that Lake prove by clear and convincing evidence that
19 electoral misconduct actually “affected the result” of the election, the appellate court flew
20 in the face of this Court’s precedent and imposed an insurmountable bar, effectively
21 shielding election officials from recourse. This perpetuates and even reinforces the risk of
22 abuse and malfeasance by election officials. It is now incumbent upon this Court to ensure
23 that the electoral process is conducted in accordance with the law and that the will of the
24 voters is upheld. Therefore, it is critical that this Court grants review of this. Mr. Mast, as
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1 a non-partisan voter of the State of Arizona, implores this Court to steadfastly maintain the
2 rule of law and grant Ms. Lake’s Petition for Review.

3 4 **LEGAL ARGUMENT**

5 **I. *Sherman’s* Holding that “Procedural Challenges” Must Be Brought Prior to an** 6 **Election Has Never Been Extended to Matters That Were Not Known and Could Not** 7 **Have Been Known Prior to the Election.**

8
9 The court of appeals misconstrued Lake’s signature verification claim as “a
10 challenge to Maricopa’s existing election procedures,” which could only properly be
11 brought before the election. *See Sherman v. City of Tempe*, 202 Ariz. 339, 342, 45 P.3d
12 336, 339 (2002). However, this rule is implicitly grounded in the rationale that, because
13 election challenges request a radical remedy, post-election requests to alter an election’s
14 outcome should not be based on grounds that existed prior to the election. *Id.* The
15 prohibition does not apply in this case because, (A) while the Maricopa Elections
16 Department’s 2022 Elections Plan (the “Election Plan”) did contain some provisions that
17 violate A.R.S. §16-550(A), Lake’s challenge was not procedural as a matter of law, and
18 (B) Lake had no way of knowing about many other violations of that statute that were not
19 specified in the Election Plan.
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23 **A. Lake’s Complaint makes plain that she is not challenging a procedure in the Election** 24 **Plan but challenging the inclusion of illegal votes.**

25
26 Lake’s Complaint in Special Action (the “Complaint”) is explicit; her objections
27 regarding verification were never objections to Maricopa’s existing election procedures
28

1 but, rather, objections to the fact that votes were illegally counted. *See* Lake.Appx:017-034
2 (Compl. ¶¶2-58). The mere fact that facially illegal procedures were *a* cause of the unlawful
3 count is irrelevant to her claim, *because of when the alleged act of misconduct occurred*.
4 Arizona case law clearly delineates between challenges to alleged acts of misconduct that
5 occurred prior to an election, which are subject to *laches*,² from acts of alleged misconduct
6 that occurred during the “voting process,” which are not. *See Reyes v. Cuming*, 952 P.2d
7 329 (Ariz. Ct. App. 1997); *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178
8 (1994).

9
10
11 Because Ms. Lake’s signature verification claim challenges the illegal tabulation of
12 unverified votes, which necessarily occurred during the “voting process,” it *is not* a
13 procedural challenge as a matter of law. Thus, this claim is not subject to the limitations
14 specified in *Sherman* and can be brought after the election has taken place.
15
16

17 B. While the Election Plan does contain instructions clearly violating A.R.S. §16-
18 550(A), there were many other violations that were impossible for Lake to contest
19 prior to the election.

20
21 The violations of A.R.S. §16-550(A) in the Election Plan relate to Maricopa’s
22 instruction that employees could verify mail-in ballot signatures against a variety of
23

24 ² *See Williams v. Fink*, No. 2 CA-CV 2018-0200, 2019 WL 3297254 (Ariz. Ct. App. July
25 22, 2019) (“[t]he statutory violation in that case occurred during the voting process, not
26 before[,] . . . by contrast, Williams’s argument is based on purported misconduct with how
27 the ballots were printed—something that necessarily occurred before the ballots could have
28 been voted, and certainly well before post-election canvassing”); *see also Sherman*, 202
Ariz. at 342; *Grounds v. Lawe*, 67 Ariz. 176 (1948).

1 historical documents, rather than against each “voter registration record,” as the text of the
2 law plainly requires (discussed in greater detail hereinbelow). However, there were a huge
3 number of other violations of A.R.S. §16-550(A) of which the public, and Lake in
4 particular, had no warning prior to the election. There is already ample briefing from Lake
5 regarding the eyewitness testimony of extremely low rejection rates, split-second
6 verification, discrepancies between reviewers at different stages of review, and defects in
7 the review process to such a gross extent that we hardly need repeat that evidence here.
8
9 *See, e.g.*, Lake.Appx:017-036 (Compl. ¶¶54-62).

10
11 Of particular note, however, is the trial and appellate courts’ acceptance that
12 Maricopa utilized Early Voting Ballot Transfer Receipts (“EVBTRs”) for mail-in ballot
13 packets on Election Day—as they had every day prior (during the early voting period).
14 Lake.Appx:102-3 (Rul. 4-5); Lake.Appx:012 (Op. ¶22).

15
16 It is worth noting that the numerous other violations noted in Ms. Lake’s Complaint
17 were similarly absent from Maricopa’s Election Plan. The public did not become aware of
18 these issues, especially with respect to their scale, until after Election Day, as alleged in
19 Lake’s Complaint. Lake.Appx:013-036 (Compl. ¶¶44-62). Therefore, even if *some* of
20 Maricopa’s violations of A.R.S. §16-550(A) were challengeable prior to the election, many
21 others were not, and the lawsuit before this Court concerning those issues that arose on or
22 after Election Day could not have been brought prior to the election. Therefore, the holding
23 in *Sherman* does not apply and review should be granted.
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1 **II. If this Court Were to Allow the Ruling of the Lower Court to Stand, it Would**
2 **Render Electoral Misconduct Effectively Unreviewable**

3 **A. The lower court’s understanding of “uncertainty” contradicts the precedent**
4 **of this Court.**

5 Misconduct rising to a level “affect[ing] the result [of an election], or at least
6 render[ing] it uncertain” is sufficient to invalidate the results of an election. *Findley v.*
7 *Sorenson*, 35 Ariz. 265, 269 (1929). Applied, this standard is met when the “violation of a
8 non-technical statute” occurs in “sufficient numbers to alter the outcome of the election.”
9 *Miller*, 179 Ariz. at 180. Put simply, Lake need only show that the number of affected votes
10 exceeds the margin of victory. *See Reyes*, 191 Ariz. at 93 (holding that “even without a
11 showing of actual fraud, the election had to be set aside because (1) absentee ballots were
12 procured in violation of a non-technical statute and (2) those ballots were in sufficient
13 numbers to alter the outcome of the election”); *Fink*, at ¶16 (omissions and irregularities
14 void the result of an election when they rise to such a level that they “*may have*” affected
15 the result of the election) (emphasis added); *see also Moore v. City of Page*, 148 Ariz. 151,
16 159, 713 P.2d 813, 821 (Ct. App. 1986) (“Moore is obliged to show that the alleged
17 disenfranchisement *may have* affected the result of the election”) (emphasis added).
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19 Indeed, the only contrary example to this plain pattern, referenced by the Arizona
20 court of appeals in its ruling, was in the case of *Huggins v. Superior Court*, Ariz. 348, 352-
21 53 (1990). However, the court of appeals ignored the fact that the only reason that the mere
22 margin for victory was insufficient to invalidate the election results in that case was that,
23 24 25 26 27 28

1 once a pro-rata deduction of illegal votes had been made, the new total *no longer exceeded*
2 *the margin for victory*. *Id.* The direct implication of this is that, had the affected votes
3 exceeded the margin of victory, then the challenge would have been sufficient to invalidate
4 the results, as has been recognized, consistently, in every other Arizona case on this subject.

5
6 Regardless of the credibility one attributes to Lake’s expert witnesses, the
7 undisputed factual record demonstrates that a sum of votes far greater than the margin of
8 victory was affected by electoral misconduct in Maricopa. Lake.Appx:200 (Tr. 43:4-14),
9 481-2 (Tr. 257:15-258:7), 704-5 (Tr. 34:21-35:18). In fact, even examining each of the
10 major areas of misconduct *individually* (*i.e.*, logic and accuracy testing, Lake.Appx:772;
11 chain-of-custody defects impacting nearly 300,000 mail-in-ballot-packets (based on
12 undisputed witness testimony, Lake.Appx:156 (Cnty. Ans. 26); and signature verification),
13 each of them yields a sum of votes affected that exceeds the margin for victory, providing
14 a mathematical basis for uncertainty. The fact that an analysis of exit polling and
15 demographic data swings the uncertain votes substantially in Lake’s favor only further
16 corroborates this, especially when the data demonstrates that tens of thousands of voters
17 were likely disenfranchised. Lake.Appx:484 (Tr. 37:18-19). Because the electoral results
18 are uncertain as a matter of law, this Court should grant review.
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24 **B. There is good reason for the “uncertainty” standard and, if a different**
25 **standard were permitted to go unreviewed, electoral integrity and public**
26 **trust would be seriously compromised.**
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1 When a material number of voters are simply unable to cast their ballots, as occurred
2 here, determining precisely how the election would have gone with the inclusion of such
3 votes is impossible. With the secret ballot, the same difficulty arises even when the votes
4 have been cast but are counted in error, as occurred during the signature verification
5 process. *Montana Republican Party v. Jacobsen*, 230 F.3d 920, 926 (9th Cir. 2000) (“we
6 do not, and cannot, ascertain how [the impacted voters] would have voted if provided with
7 the opportunity”).
8

9
10 Requiring Lake to demonstrate that the affected votes would have been cast for a
11 particular candidate imposes an insurmountable burden that, in effect, nullifies the
12 “uncertainty” standard, rendering the vast majority of electoral conduct unreviewable,
13 because it necessitates Lake to establish how every voter would have voted absent the
14 misconduct or irregularity. The “uncertainty” standard has never been held to mandate such
15 proof and imposing such a requirement constitutes a gross deviation from established legal
16 precedent. *Reyes*, 191 Ariz. at 93.
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19 Given the inherent significance of fair elections to our system of government, putting
20 misconduct beyond review would be a grave mistake. This Court should uphold the law as
21 it has been consistently recognized in Arizona and acknowledge that, because a huge
22 number of votes—far exceeding the margin of victory—were tainted by the misconduct of
23 Maricopa elections officials, the results cannot stand.
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1 **III. The Lower Court Ignored the Precedent of *Reyes* Which, Based on the**
2 **Undisputed Evidence Presented at Trial, Requires the Election to be Set**
3 **Aside as a Matter of Law.**
4

5 The binding precedent in the *Reyes* case bears directly upon this case. There, the
6 Arizona court of appeals unanimously set aside the results of an election in which Yuma
7 County had failed to comply with the A.R.S. §16-550(A) signature verification
8 requirements, finding explicitly that the statute was “non-technical” and that
9 “impracticability” was no excuse for noncompliance, because such requirements “set[]
10 forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and
11 intimidation.” *Reyes*, 191 Ariz. at 331 (quoting Ariz. Const. Art. VII §1). In other words,
12 the requirements of A.R.S. §16-550(A) are precisely the sort that, if ignored (as here), justly
13 undermine public faith in the integrity of the electoral process and run substantial risk of
14 destabilizing civil society.
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18 Maricopa's signature verification process for mail-in ballots unquestionably allowed
19 for the inclusion of illegal votes in the 2022 general election for Arizona Governor.
20 Contrary to A.R.S. §16-550(A), testimony before the superior court showed that Maricopa
21 did not compare ballot signatures against each elector’s “registration record” alone.
22 Instead, Maricopa used an ambiguous standard that allowed for the comparison of ballot
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1 affidavit signatures with legally prohibited documents.³ This resulted in the acceptance of
2 mail-in ballot packets containing statutorily unverified signatures.

3
4 Therefore, as a matter of law, the court in *Reyes* ruled that the violation of A.R.S.
5 §16-550(A) is, *per se*, “misconduct” within the meaning of the law and thus, when
6 violations of that statute are found, it necessitates the invalidation of votes affected. 191
7 Ariz. at 331. “To rule otherwise,” explained the court of appeals, would ““affect the result
8 or at least render it uncertain.”” *Id.* (quoting *Miller*, 197 Ariz. at 180).

10 Here, because the number of tabulated votes affected exceeds the margin of victory,
11 setting aside those votes necessarily requires setting aside the results of the 2022 election
12 for Governor. Respondents have rightly observed that “strong public policy favor[s]
13 stability and finality of election results,” *Donaghey v. Att’y Gen.*, 120 Ariz. 93, 95 (1978),
14 and the remedy of setting aside an election is usually a radical one, however, the
15 circumstances here make this remedy no more radical here than in *Reyes*. Firstly, *Reyes* set
16 aside the results of an election over a year after that election had taken place. *Reyes*, 191
17 Ariz. at 331. Comparatively, this election took place less than six months ago. Secondly,
18 the margin for victory originally returned in *Reyes* was almost identical to the margin in
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23 ³ The Election Plan allowed "historical reference signature[s] that was previously verified
24 and determined to be a good signature for the voter. These historical documents may
25 include voter registration forms, in-person roster signatures and early voting affidavits
26 from previous elections." See Election Plan §6.3.8. However, Arizona law only allows
27 comparison of the signature on the affidavit accompanying a mail-in ballot to the signature
28 on the elector's "registration record." A.R.S. §16-550(A). The use of historical reference
signatures other than the voter's registration record is contrary to the plain language and
intent of A.R.S. §16-550(A).

1 this case – a mere fraction of a percent.⁴ The primary difference in the two cases is that the
2 race for Governor is a more powerful and significant position, which only further stresses
3 the importance of an accurate count. Because the unusual remedy of setting aside an
4 election’s results was appropriate in *Reyes*, it is also appropriate here. In short, “because
5 A.R.S. section 16-550(A) is a non-technical statute and because absentee ballots counted
6 in violation of that statute have rendered the outcome of this election uncertain,” the only
7 appropriate remedy—as a matter of law—is for the results from the Maricopa election for
8 Arizona Governor to be “set aside.” *Reyes*, 191 Ariz. at 331 (quoting *Miller*, 179 Ariz. at
9 180).

13 **IV. The Constitutional Standards Mandate that the Results of the Election be** 14 **Set Aside**

15 The Equal Protection Clause of the Fourteenth Amendment of the United States
16 Constitution provides that no State shall “deny to any person within its jurisdiction the
17 equal protection of the laws.” U.S. Const. Amend. XIV, §1. Generally, the Equal Protection
18 Clause is “a direction that all persons similarly situated should be treated alike.” *Green v.*
19 *City of Tucson*, 340 F. 3d 891, 896 (9th Cir. 2003) (internal quotations omitted). Similarly,
20 the Equal Protection and Privileges or Immunities Clauses of Arizona’s Constitution
21 provide similar protections. *See Chavez v. Brewer*, 222 Ariz. 309, 320 (Ct. App.
22 2009). These fundamental Constitutional rights bear directly upon this election.

26
27 ⁴ In *Reyes*, the margin for victory was 0.62179% (23 votes); here, the margin for victory
28 is 0.668982% (17,117).

1 Each United States citizen “has a constitutionally protected right to participate in
2 elections on an equal basis with other citizens in the jurisdiction.” *Dunn*, 405 U.S. at 366;
3 *See also Reynolds v. Sims*, 377 U.S. 533, 562 (1964)). Here, because the case at hand
4 involves a state-wide election, electors across Arizona must be treated equally with respect
5 to the way their votes are counted.
6

7 The “right to vote” also applies also to “the manner of its exercise.” *See Bush v.*
8 *Gore*, 531 U.S. 98, 104 (2000). This applies in the context of vote dilution. *See Id.* at 105
9 (*quoting Reynolds*, 377 U.S. at 555) (“the right of suffrage can be denied by a debasement
10 or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the
11 free exercise of the franchise”) (internal quotations omitted).
12
13

14 Here, for each of the tens of thousands of mail-in ballots illegitimately accepted by
15 Maricopa using its wholly ambiguous “historical record” for signature verification, all
16 qualified electors across the State of Arizona experienced disenfranchisement. Maricopa
17 is by far the most populous county in Arizona and counted approximately 1.6 million
18 ballots in this election—far more than any other county. Lake.Appx:698 (Tr. 251:8). Thus,
19 any error in Maricopa’s process resulting in the inclusion of illegitimate votes does more
20 relative harm as compared to an error elsewhere.
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23 Additionally, “it is well-established that once the legislature prescribes a particular
24 voting procedure, *the right to vote in that precise manner is a fundamental right*, and ‘one
25 source of its fundamental nature lies in the . . . equal dignity owed to each voter.’” *Id.* at
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1 953 (*quoting Gore*, 531 U.S. at 104) (emphasis added); *see also e.g. San Antonio Indep.*
2 *Sch. Dist. V. Rodriguez*, 411 U.S. 1, 36 n. 78 (1973); *Green*, 340 F. 3d at 897.

3 Here, A.R.S. §16-550(A) is a statute passed by the Arizona legislature that
4 prescribes a particular voting procedure with respect to *how every county across Arizona*
5 *must verify the signatures on mail-in ballot packets before a purported elector’s vote can*
6 *be counted*. Accordingly, the procedural safeguards conferred by A.R.S. §16-550(A) are
7 fundamental rights—and they must be strictly followed. *Gore*, 531 U.S. at 104;
8 *Charfauros*, 249 F.3d at 953. Because the State of Arizona guarantees to all similarly
9 situated electors, the right to have their mail-in ballot packets scrutinized for tabulation in
10 a particular way, Maricopa’s failure to conform with the clear requirements of A.R.S. §16-
11 550(A, (utilizing unenumerated sources for signature verification) must withstand strict
12 scrutiny. *Charfauros*, 249 F.3d at 950–51; *Dunn*, 405 U.S. at 343; *Green*, 340 F. 3d at 899.

13 State actions that burden fundamental rights “must be drawn with ‘precision’... and
14 must be ‘tailored’ to serve their legitimate objectives.” *Dunn*, 405 U.S. at 343 (internal
15 citations omitted). Because Maricopa unquestionably included tens of thousands of
16 unverified mail-in ballots in the state-wide election for Arizona Governor, Maricopa’s
17 actions must be measured by a strict equal protection test.

18 *Reyes* explicitly addressed A.R.S. §16-550(A) as a “very important,” “non-
19 technical” (*i.e.*, substantive) statute that advances the constitutional goal of “secur[ing] the
20 purity of elections and guard[ing] against abuses of the elective franchise” 952 P.2d at 331
21 (quoting Ariz. Const. Art. VII §1). Although decided before *Gore*, *Reyes* rests upon the
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1 same principle: uniform application of state election laws is necessary to guard against
2 arbitrary and disparate determinations for what constitutes a “legal vote.” The “purpose of
3 A.R.S. 16-550(A) is to prevent the inclusion of invalid votes.” *Id.* Far from requiring a
4 showing of strict scrutiny from Maricopa, the court of appeals rested on the ordinary
5 presumption that the returns of an election are valid and put the burden on Lake to show
6 that the results would have been different if Maricopa had followed the law. This is not
7 what strict scrutiny requires.
8

10 CONCLUSION

11 Based on the undisputed evidentiary record, Maricopa elections officials engaged in
12 misconduct affecting tens of thousands of votes, a number far greater than the margin of
13 victory. As a consequence of these defects, the election’s result is uncertain. Therefore, as
14 a matter of law, the results of the 2022 Arizona election for governor must be set aside.
15

17 Respectfully Submitted,

19 March 20, 2023

20 /s/ Ryan L. Heath
21 Ryan L. Heath, Esq.