

ARIZONA COURT OF APPEALS
DIVISION 1

KARI LAKE,

Plaintiff/Appellant,

v.

KATIE HOBBS, et al.,

Defendants/Appellees.

No. 1 CA-CV 22-0779

Maricopa Co. Case No.
CV2022-095403

BRIEF OF AMICUS CURIAE DAVID MAST

Veronica Lucero (030292)

Arno Naeckel (026158)

Davillier Law Group, LLC

4105 N. 20th St., Ste. 110

Phoenix, AZ 85016

T: (602) 730-2985 F: (602) 801-2539

vlucero@davillierlawgroup.com

anaeckel@davillierlawgroup.com

phxadmin@davillierlawgroup.com (file copies)

Attorneys for Amicus Curiae

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INTRODUCTION

Although the American political system remains partisan, in Arizona, the number of Independents exceeds the number of registered Democrats and ranks a close second to the number of registered Republicans.¹ In Maricopa County, however, Independents make up the largest bloc of voters.² Thus, the failures of election administration that occurred in Maricopa County during the 2022 General Election impacted not only Republicans but also a significant number of Independents. Indeed, the impact on Independents was *greater* than on partisan voters. “Only about 5% of independents statewide voted in either the Republican or Democratic primary in 2018, the last election for which the Secretary of State’s Office separated such data.”³ This is because “primary elections are designed as

¹ Ariz. Sec’y of State, *Voter Registration Statistics – November 2022 (General Election)*, <https://azsos.gov/elections/results-data/voter-registration-statistics> (last accessed Dec. 30, 2022).

² Kevin Stone, *Independents make up largest bloc of Maricopa County voters registered for primary*, KTAR NEWS (Jul. 11, 2022, 2:00 PM), <https://ktar.com/story/5150005/independents-make-up-largest-bloc-of-maricopa-county-voters-registered-for-primary/>.

³ Abe Kwok, *Independent voters have a lot of power in Arizona’s primary election – if they show up*, ARIZ. REPUBLIC (June 5, 2022, 7:00 AM), <https://www.azcentral.com/story/opinion/op-ed/abekwok/2022/06/05/independent-voters-could-change-primary->

partisan affairs – an intraparty process by which Democrats compete against fellow Democrats, and Republicans against Republicans, for the nod to be their party’s nominee(s) on the general election ballot.”⁴

For most Independents, the general election is the one and only time they express their preferences at the ballot box. And, though Maricopa County has repeatedly blamed the Republican Party’s promotion of election-day voting for the County’s failures of administration,⁵ historically, election-day voting has been regarded as the most secure way of casting a vote by all

[election-if-they-show-up/7488913001/](https://www.youtube.com/watch?v=493fAoBjn4U) (further noting that the number was a slightly higher 12% in Maricopa County in 2020).

⁴ *Id.*

⁵ See, e.g., AZFamily | 3TV and CBS 5 News, *Part 1: First day of hearings in Kari Lake Election Lawsuit*, YOUTUBE (Dec. 21, 2022) at 1:30:11-1:30:44, <https://www.youtube.com/watch?v=493fAoBjn4U>:

“Q: [Deputy County Attorney Joe LaRue]: Are you aware that one of the political parties urged their voters to forgo early voting and vote in person on election day?

A: [Maricopa County Election Day Director Scott Jarrett]: Yes I’m aware of that.

...

Q: Were you aware of that when you prepared your analysis for the election day plan?

A: No, I was not.

Q: So I’m assuming...this urging by a political party was not factored into your election day plan, is that correct?

A: That’s correct.”

voters regardless of partisan affiliation.⁶ Indeed, almost twice as many Independents as Democrats chose to vote in person on election day in Maricopa County in the 2022 General Election.

Many others, however, confused by reports of the County's closure of certain polling places or deterred by long lines at others,⁷ were unable to vote in this election. Whether this result stemmed from Defendants' *intentional* acts or simply from their *mistakes or carelessness* may be gravely concerning to partisans. But it is irrelevant under the law because a showing of intent is not required to prevail in a challenge under A.R.S. § 16-672(A)(1).

Rather, what matters is whether Plaintiff produced sufficient evidence below to demonstrate that it is "at least...uncertain" whether the results of such a close election would have been different had Maricopa County's failures of administration not occurred. *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). If the answer to that question is yes, then the fair, just, and legally

⁶ See, e.g., Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46 (Sept. 2005) ("Absentee ballots remain the largest source of potential voter fraud.").

⁷ See *Tracking potential issues at voting centers, ballot drop-off locations*, ABC15 (Nov. 8, 2022),

<https://www.abc15.com/news/political/elections/tracking-potential-issues-at-voting-centers-ballot-drop-off-locations>.

supported remedy is simply to hold a properly administered re-vote in Maricopa County. In this way, the Court can ensure that voters have chosen the next governor of Arizona under a properly administered election rather than establishing a precedent whereby the largest county in Arizona (and one of the largest counties in the nation) is permitted to thwart voters who choose to cast their ballots on election day so long as the County's failures are merely accidental or negligent and not *intentional*. Such a precedent would mean that election-day voters (and their political preferences) would be disadvantaged compared to those who vote by different means.

INTERESTS OF AMICUS CURIAE

David Mast is an individual who resides in Maricopa County. As a registered "Independent" voter, he has a strong interest in ensuring the perspective of non-partisan or "unaffiliated" voters is considered in this appeal, which presents a dispute between two major partisan figures – the Republican and Democratic candidates for Arizona Governor. The Maricopa County Board of Supervisors and Recorder, meanwhile, are elected officials with a political interest in minimizing the problems that occurred on their watch. In such disputes, the perspectives and interests of

ordinary voters and non-partisans necessarily get short shrift absent the participation of amici.⁸

ARGUMENT

I. **A.R.S. § 16-672(A)(1) does not require a showing of *intentional* misconduct for the court to set aside the election.**

In Count VI of her Complaint, Plaintiff Kari Lake alleged that intentional misconduct was not required for an award of relief under either A.R.S. § 16-672 or the Fourteenth Amendment. Compl. ¶ 171. In its ruling on Defendants' motions to dismiss, the trial court dismissed this claim and held that Plaintiffs were required to prove at trial that the "printer malfunctions were intentional, and directed to affect the results of the election, and that such actions did actually affect the outcome" of the election to obtain relief under A.R.S. § 16-672(A)(1). Under Advisement Ruling (Dec. 19, 2022) at 6-7.

However, (A)(1) states that any "elector of the state may contest the election of any person declared elected to a state office" for "misconduct," period. The plain meaning of "misconduct" is "1: mismanagement especially of governmental or military responsibilities." *Misconduct*, Merriam-Webster Dictionary (2022), <https://www.merriam-webster.com/dictionary/miscon>

⁸ See Ariz. R. Civ. App. P. 16(b)(1)(C)(iii).

duct. Accordingly, “honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters” are still sufficient to “void an election” so long as they “affect the result, or at least render it uncertain.” *Findley*, 35 Ariz. at 269. This rule continues to govern election contests in Arizona. See *Williams v. Fink*, 2019 Ariz. App. Unpub. LEXIS 827, at *8-9 (Ct. App. July 22, 2019).⁹ Thus, a showing of negligent maladministration or substantive election irregularities can void an election that, as here, has been rendered at least *uncertain* by their effects.

For example, in *Miller v. Picacho*, the Arizona Supreme Court explained that even “a showing of fraud [was] not necessary to invalidate absentee balloting” when substantive irregularities caused voters to cast ballots that may have never been cast at all if school district employees had not delivered ballots to electors whom they knew, encouraging them to vote for a budget override. 179 Ariz. 178, 180 (1994). The court thus held that the election must be set aside. *Id.* *Miller* is instructive here because it underscores the proposition that even “substantive irregularities” can affect the outcome of

⁹ Cited pursuant to Supreme Court Rule 111. Copy available free of charge at <https://law.justia.com/cases/arizona/court-of-appeals-division-two-unpublished/2019/2-ca-cv-2018-0200.html>.

an election.

The court noted that, “[a]lthough these electors did not ask for ballots” and “[e]ven if the elector voted his or her conscience, the ballots still would never have been cast but for the procedures adopted by the district.” *Id.* This was enough to affect the outcome of the election due to the introduction of votes that otherwise would not been counted. Here, the outcome of the election has been affected due to the *absence* of votes that otherwise *would* have been counted. As set forth below, an indeterminate but substantial number of eligible election-day voters were deterred from voting because of entirely avoidable issues with election administration.

Former President Donald Trump, “[t]he most influential figure on the American right,” has spent the last several years vociferously urging conservatives to vote in person on election day rather than by mail.¹⁰ Accordingly, the attitudes of both Republicans and conservative-leaning independent voters towards early voting have steadily worsened over the

¹⁰ Eric Cortellessa, *After Midterm Losses, GOP Leaders Move to Embrace Mail Voting. Trump May Not Let Them*, TIME (Dec. 9, 2022, 8:42 AM), <https://time.com/6240015/republican-mail-in-voting-rethink-trump/>.

past several years.¹¹ This manifested in election-day voters skewing heavily towards Republican *and* Independent voters.¹²

It was therefore eminently foreseeable that any problems with election-day administration would disproportionately prejudice Ms. Lake. Indeed, the County forthrightly acknowledged this in closing arguments, saying:

*In this particular election there were a significant number of printer errors...and those did cause real inconvenience for a lot of people.... But those errors or those mishaps by machines if you will...the effect that had on election day voters was compounded...by months and months and months of communication from the current leadership of the Republican Party of Arizona and the communications specialist of the Kari Lake for Governor Campaign that said do not vote early!*¹³

¹¹ *Republicans and Democrats Move Further Apart in Views of Voting Access*, PEW RESEARCH CENTER (Apr. 22, 2021), <https://www.pewresearch.org/politics/2021/04/22/republicans-and-democrats-move-further-apart-in-views-of-voting-access/>.

¹² Garrett Archer, *2022 Maricopa voters by party and ballot type*, TWITTER (Dec. 7, 2022), https://twitter.com/Garrett_Archer/status/1600558683586723840.

Accordingly, though Mr. Mast was able to cast a ballot, these failures disproportionately diluted the voices of Independents like him. As the *Bell* Court recognized, it is “the body politic as a whole” that suffers from election misconduct, regardless of whether any particular voter was able to cast a ballot. *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967).

¹³ Fox 10 Phoenix, *Kari Lake election lawsuit trial underway | Day 2, Pt. 2*, YOUTUBE (Dec. 22, 2022) at 3:18:00-3:19:10, <https://www.youtube.com/watch?v=Inw7VyREtLQ>.

The County then went on to make fun of voters and politicians who had expressed a preference for election-day voting. It mocked them, in open court, for (supposedly) watching the film *Two-Thousand Mules* and for being “terrified” that the County’s failures of administration precluded on-site tabulation.¹⁴

What the County fails to grasp is that voters have a *right* to vote in-person on election day. And political figures have a *right* to both ask their supporters to vote in this secure and ancient manner and to expect that when they do so, the system will work as well for them as it does for those to choose to vote by other means.

In addition, the problems that occurred at the polls on election day were *also* entirely foreseeable and avoidable. Indeed, Maricopa County’s director of election-day operations acknowledged that printing issues impacting the readability of the timing marks on election-day ballots frustrated the ability of tabulators at polling sites to read ballots in the 2020 general election. *See* App. 000049, 000088-89.¹⁵ In other words, Maricopa

¹⁴ *Id.* at 3:19:10-3:20-24.

¹⁵ Q. So let’s talk about Drawer Number 3. If I’m understanding correctly, those are for ballots that that the tabulator for some reason can’t read, correct?

County has known about the issue for at least *two years*.¹⁶ The County also

A. Yes. A damaged or defective ballot.

Q. So give me some examples of when that occurs.

A. So that could occur if the voter makes a mark in those tiny marks, those hash marks that go down the sides of the ballots. That wouldn't allow it. If our printers were running potentially low on ink and some of those timing marks weren't dark enough for the tabulators to read, that would also create a time when that ballot couldn't be read by the tabulator...

...

Q. And what do those visual inspectors look for?

A. They look for if there may be a ballot that was printed slightly misaligned. So that would -- if it is misaligned, that would need to go through duplication, but if they can't visually determine why the ballot would have needed to go to duplication or was not read by the tabulator, it would then attempt to run it through our central count tabulator.

Q. ... Approximately, how many ballots would you say are printed misaligned in any given cycle?

...

A. So there were just around 2,000 ballots that came back to us in misread envelopes, but those could have been based off of when tabulators were inoperable. And just when we went through them, we had to manually duplicate about 1,000 ballots. The other 1,000 went through our central count tabulators.

Q. But fair to say that at least a few ballots this election cycle were printed misaligned, correct?

A. Yes, that's correct.

Q. And the machines wouldn't have been able to read those, correct?

A. That's correct.

¹⁶ It should also be noted that, in 2018, over one hundred polling locations were impacted and at least four had to be closed when the County encountered problems with the machines then in use for which it had failed to secure adequate trouble-shooting technicians. Lorraine Longhi et al., *Arizona election: At least 4 polling locations closed due to machine malfunctions*, AZCENTRAL.COM (Aug. 28, 2018, 12:09 PM),

knew that if the issue reoccurred, candidates preferred by Republicans and conservative-leaning Independents would be disproportionately prejudiced. Yet for two years, County election officials failed to fix the problem. Perhaps they were hoping it would get better. Or perhaps, viewing election-day voters as worthy of ridicule, the County simply did not care if they experienced problems in exercising their franchise at the polls on election day. Whatever the reason, the problem, unsurprisingly, did not resolve itself; it festered and got worse.

Procedural errors in administering an election, even in the absence of outright vote denial or fraud, can support an election challenge. In such an instance, the test is not whether the contestant can prove that enough voters were deterred to have changed the result but whether there was a widespread coercive impact on voters. *Hunt v. Campbell*, 19 Ariz. 254, 265-66, (1917). As the *Hunt* Court explained:

It would be to encourage such things as part of the ordinary machinery of political contests to hold that they shall avoid [*sic*] only to the extent that their influence may be computed. So wherever such practices or influences are shown to have prevailed, not slightly and in individual cases, but generally, so as to render the result uncertain, the entire vote so affected must

<https://www.azcentral.com/story/news/politics/elections/2018/08/28/arizona-election-primary-polling-places-closed/1123879002/>.

be rejected.

Id.

In the context of a 14th Amendment challenge to the results of the election, the Fifth Circuit has engaged in similar analysis, recognizing that the trial court made a “fundamental mistake” in holding that Plaintiffs’ 14th Amendment claim was subject to the ordinary rules for election contests “in which the winner is challenged because of ineligibility, fraud or irregularities in the conduct of the election, the receipt or counting of illegal ballots which would change the result and the like.” *Bell*, 376 at 664. Rather, where Plaintiff “did not seek to be selected over” her opponents but sought, as a remedy, a lawfully administered election “it was not the usual simple case of counting votes and denying relief for want of affirmative proof of a different result.” *Id.* at 664-65.¹⁷

In this case, as even the County acknowledged, its misconduct

¹⁷ Irrespective of whether political affiliation is a “suspect classification,” it is a perfectly adequate ground to support a 14th Amendment challenge to election practices. The question, even in the stricter federal court litigation context, is whether the benefit conferred by the unlawful election procedures is of sufficient magnitude to confer an “unfair political advantage on certain candidates solely because of their partisan affiliation.” *Mecinas v. Hobbs*, 30 F.4th 890, 904-05 (9th Cir. 2022).

(intentional or not) deterred a large number of voters from casting a ballot. As the County further acknowledged, these putative votes disproportionately favored Ms. Lake. This is enough to entitle Plaintiff to relief.

The trial court's error here was similar to that of the trial court in *Bell*. After first finding that an element of entitlement to relief was "[t]hat the misconduct did, in fact, change the result of [the] election," Under Advisement Ruling (Dec 24., 2022) at 3, the trial court found dispositive as to this element that Plaintiff's expert statistician could not definitively say that but for the maladministration, the results of the election would have been different, *id.* at 7-8 ("Taking Mr. Baris's claims at face value, this does not nearly approach the degree of precision that would provide clear and convincing evidence that the result did change as a result of BOD printer failures."). Under *Hunt* and *Bell*, however, such certainty of computation is not required. But for the County's maladministration, turnout would have been 25,000-40,000 votes higher, meaning that "the outcome could be between a 2,000-vote margin for Hobbs to a 4,000-vote margin for Plaintiff." *Id.* at 7. Thus, it was eminently possible that but for these failures, the result would have been different. This is sufficient to entitle Plaintiffs to relief on

Count VI. And, while the trial court was correct that it would be unjust to declare Lake the winner given this uncertainty, it is an eminently just and appropriate remedy to require the election to be re-run in Maricopa County as further set forth below.

II. The Court can and should grant Ms. Lake's proposed alternative form of relief by requiring Maricopa County to re-conduct the gubernatorial election in conformance with all applicable law.

"[A]s a last resort where it is found impossible to compute the wrong" and "imperative public necessity requires," a court will "will exercise the power to reject the votes of an entire precinct" even if doing so will "disfranchise a body of electors[.]" *Hunt*, 19 Ariz. at 266. Here, as the trial court correctly found, it is impossible to compute the wrong. Therefore, public necessity requires that the returns from Maricopa County be rejected. But public necessity does *not* require that the voters be disenfranchised. Rather, just as the court in *Bell* found, they can simply be given the opportunity to vote again in the context of a properly administered election:

This leaves only a tag end. There is a suggestion that the District Court enjoining Southwell from taking office pursuant to the election would be powerless to grant affirmative relief requiring that the Ordinary call a special election. In this vital area of vindication of precious constitutional rights, we are unfettered by the negative or affirmative character of the words used or the negative or affirmative form in which the coercive order is cast.

If affirmative relief is essential, the Court has the power and should employ it.

Bell, 376 F.2d at 665 (citing *Alabama v. United States*, 304 F.2d 583, 589 (5th Cir. 1962), *affirmed*, 371 U.S. 37; *Hamer v. Campbell*, 358 F.2d 215, 221 (5th Cir. 1966)).¹⁸

Just as the 5th Circuit did in *Bell*, this Court also has the “inherent power to do all things reasonably necessary for administration of justice.” *Schavey v. Royston*, 8 Ariz. App. 574, 575 (1968). Indeed, while the *Bell* court was constrained by the fact that it was a federal court wading into issues of state election law, this Court faces no such constraint in crafting relief. Thus, the Arizona Supreme Court has found that the Arizona Constitution gives courts broad latitude in crafting relief for successful litigants in election challenges. *Huggins v. Superior Court*, 163 Ariz. 348, 353 (1990) (“The problem we confront is practical; the solution we choose is ‘workable.’ The Arizona Constitution, in our view, permits us room to make this choice.”).¹⁹

¹⁸ Although a recount of the race at issue in this case has been completed, the result of the recount cannot establish whether substantive irregularities affected the outcome of the election for the simple reason that a recount will not capture how many voters were deterred from voting by the County’s misconduct. Thus, without a re-vote in Maricopa County, it will be impossible to determine the will of voters.

¹⁹ Citation omitted.

The primary form of relief that Ms. Lake sought below is “[a]n order setting aside the certified result of the 2022 Arizona gubernatorial election and declaring that Kari Lake is the winner of the 2022 Arizona gubernatorial election, pursuant to A.R.S. § 16-676.” Lake Compl. 67:1-4. In contrast, Ms. Hobbs sought complete dismissal and sanctions, arguing that to do anything else would frustrate the will of Arizona voters. *See* Contestee Katie Hobbs’s Mot. to Dismiss at 17:8-10. Obviously, both parties, in making these arguments, are seeking the relief that best serves their interests as candidates. However, this Court is empowered to adopt this sensible, middle-ground approach, which defers not to any particular candidate but to the voters of Arizona.

CONCLUSION

In politics, campaigns are often decided by chance: a favorable news cycle, a botched debate performance, an opponent’s scandal. But there is one element of randomness that must never be permitted to influence election results – failures of election administration. No election is perfect, but rarely has there been a case where the failures of election administration were so widespread and so disproportionately favored one candidate over another.

If the will of the voters is truly to have Katie Hobbs as their governor,

then a re-vote in Maricopa County will not change that result. If, however, the will of the voters was frustrated by Maricopa County's well-publicized failures, then that too will be clear.

RESPECTFULLY SUBMITTED December 31, 2022, by:

By /s/ Veronica Lucero
Veronica Lucero
Arno Naeckel
Davillier Law Group, LLC

Attorneys for Amicus Curiae

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APPENDIX

Trial Transcript

Laurie Aguilera, Donovan Drobina v. Adrian Fontes et al.

No. CV 2020-014562

Phoenix, Arizona

November 20, 2020

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