

ARIZONA SUPREME COURT

KARILAKE,

Plaintiff/Appellant,

v.

KATIE HOBBS, *et al.*,

Defendants/Appellees.

KARILAKE,

Petitioner,

v.

THE HONORABLE PETER
THOMPSON, Judge of the SUPERIOR
COURT OF THE STATE OF
ARIZONA, in and for the County of
MARICOPA,

Respondent Judge,

KATIE HOBBS, personally as
Contestee; ADRIAN FONTES, in his
official capacity as Secretary of State;
STEPHEN RICHER, in his official
capacity as Maricopa County Reporter,
et al.,

Real Parties in Interest.

No.

Court of Appeals Division Two
No. 2CA-CV23-0144

Transferred from
Court of Appeals Division One
No. 1CA-CV23-0393

Maricopa County
Superior Court
No. CV2022-095403

PETITION FOR TRANSFER

ARCAP 19(a)

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INTRODUCTION

Pursuant to Rule 19(a), Ariz.R.Civ.App.P., petitioner Kari Lake asks this Court to transfer her appeal from the Court of Appeals based on the extraordinary new evidence presented in Lake's motion for relief from judgment under ARCP 60(b)(2),(3),(6) (the "Rule 60(b) Motion"), Maricopa's admissions in its answering brief filed in Division Two on October 25, 2023 (the "Answering Brief"), this case's statewide importance, and the urgency of remedying election maladministration affecting the 2022 election and the upcoming 2024 election.

BACKGROUND

I. The Rule 60(b) Motion

The dispositive new evidence supporting Lake's Rule 60(b) Motion shows that:

- Maricopa falsely certified that it successfully completed logic and accuracy ("L&A") testing on October 11, 2022, including all 446 tabulators used at Maricopa's 223 vote centers, complete with advance public notice and required observers, in accordance with A.R.S. §16-449. Appx:0071-76, 81-82 (¶¶8(a), 11-19, 30-31).
- Maricopa conducted unannounced testing of all 446 vote center tabulators on October 14, 17, and 18. Maricopa's tabulator system log files show that 260 tabulators (i.e., 58%) rejected ballots with the same

error codes that recurred on Election Day. Appx:0071, 76-77 (*id.* ¶¶8(b)-(d), 19-22). At worst, this suggests Maricopa’s unannounced and unlawful testing may have been a dry run for the Election Day debacle. At best for Maricopa, Maricopa had advance notice of the coming chaos and did nothing to stop it.

- The ballot-on-demand printer investigation report by former Chief Justice McGregor (“the McGregor Report”) found that “*four printers randomly printed one or a few ‘fit to page’ ballots in the middle of printing a batch of ballots...* [n]one of the technical people with whom we spoke could *explain how or why that error occurred.*” Appx:0281 (emphasis added). Lake’s expert testified this “error” could only result from malware or remote access. Appx:0085-86, 92 (¶¶36-39, 49).
- At the December 2022 trial, Maricopa Co-Director of Elections, Scott Jarrett, falsely testified that the Election Day chaos was a “hiccup”, in which approximately 1,300 misconfigured fit-to-page ballots occurred at only three vote centers, innocently caused by onsite technicians changing printer settings which were all duplicated. Appx:0218, 0255 (Tr. 180:3-8. 217:14-19).
- In fact, the new evidence, which Maricopa did not dispute in its Answering Brief, shows that on Election Day: (i) at least 8,000

misconfigured “fit-to-page” ballots occurred at 127 vote centers on Election Day, the vast majority of which were not duplicated; and (ii) vote center tabulators logged over 7,000 rejections *every 30 minutes* from 6:30 am through 8:00 pm. Appx:0089-92 (Parikh Decl. ¶¶44-49).

Responding to Lake’s motion, Maricopa admitted, *seven months after the fact*, that after L&A testing, they swapped out the memory cards and the election software on Maricopa’s 446 vote center tabulators and installed “reformatted” cards purportedly containing the previously certified election program. Appx:0330-31 (Jarrett Decl. ¶¶14-15). Maricopa never disclosed these facts before responding to Lake’s motion.

II. Maricopa’s Answering Brief on Appeal

In its Answering Brief, Maricopa implicitly admits that it did not conduct statutorily required L&A testing on its 446 vote center tabulators used on Election Day. Specifically, Maricopa states “on October 14, 17, and 18, 2022, Maricopa County installed new memory cards *on its Election Day tabulators*—each memory card containing the certified Election Program that had undergone the logic and accuracy testing on October 11.” Appx:769 (emphasis added).

However, any tabulators used during the statutory October 11, 2022 L&A test were required to have the Election Program installed for that statutory L&A testing. Appx:0330 (Jarrett Decl. ¶ 12). There would be no need to install the Election

Program *on its Election Day tabulators* if those tabulators were L&A tested on October 11, 2022.

In addition, Maricopa did not dispute in its Answering Brief that, on October 14, 17-18, 2022, it conducted unannounced testing on the 446 vote center tabulators, after it removed all of 446 the tabulator memory cards and installed reformatted memory cards. Nor did Maricopa dispute that 260 of these vote center tabulators rejected ballots with “the same type of ‘Ballot Misread’ errors that also occurred on Election Day in connection with the BOD printer issue.” Appx:0769. Maricopa also did not dispute that the tabulator system log files show ballot rejections occurring at a rate vote center tabulators logged over 7,000 rejections *every 30 minutes* from 6:30 am through 8:00 pm. Appx:0089-92 (¶¶44-49).

ARGUMENT

L&A testing is expressly identified in A.R.S. §16-449(A) requiring that the “automatic tabulating equipment and programs [be] tested to ascertain that the *equipment and programs* will correctly count the votes cast for all offices and on all measures.” *Id.* (emphasis added). The Secretary of State’s Elections Procedures Manual (“EPM”) requires “all of the county’s deployable voting equipment must be tested.”¹ Appx:0816-17.

¹ The EPM has the force of law. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 (2020).

The extraordinary circumstances at issue warrant transfer under Rule 19(a)(3). First, Maricopa did not conduct statutory L&A testing of “all” of its 446 vote-center tabulators on October 11, 2022 as required under Arizona law. As described above, Maricopa blatantly violated the fundamental statutory requirement to conduct pre-election L&A testing on all of its 446 vote-center tabulators on a date (here, October 11, 2022) that Maricopa told the public the statutory L&A test would take place and be “open to: Designated political party representatives; Candidates or candidate representatives; Government officials; and Members of the public and the media.” Appx:0808, 0810. Maricopa thus falsely certified its conducted statutory L&A testing in accordance with A.R.S. §16-449(A).

Afterwards, without any public announcement, Maricopa altered the 446 vote-center tabulators on October 14, 17, and 18, and ran test ballots through them with 260 of the 446 tabulators rejecting ballots with the same error codes that arose on Election Day—when vote center tabulators logged over 7,000 rejections *every 30 minutes* from 6:30 am through 8:00 pm. Under the plain terms of A.R.S. §16-449(A), Maricopa was also required to conduct statutory L&A testing on its 446 vote centers with the newly installed reformatted memory cards on the 446 vote center tabulators on October 14-18, 2022. A.R.S. §16-449(A) (stating “automatic tabulating equipment and programs [are to be] tested.”), Maricopa admitted in its answering brief “no logic and accuracy testing occurred on those days.” Appx:0769.

Maricopa’s violations of Arizona law made its 446 vote center tabulators unreliable for use in the November 2022 general election, the results of which cannot be trusted because there is no way to know if the tabulators “correctly count[ed] the votes cast for all offices and on all measures.” A.R.S. §16-449(A). Combined with the manifestation of those violations into Election Day chaos, the results of the November 2022 general election must be set aside. *Miller v. Picacho Elementary School District No. 33*, 179 Ariz. 178, 180 (1994); *Reyes v. Cuming*, 191 Ariz. 91, 94 (App. 1998). Moreover, Jarrett has testified falsely about these issues throughout this litigation—leading to a reasonable belief that this or similar misconduct will occur in 2024. Indeed, the Presidential Preference Election is scheduled for March 19, 2024.

There is scarcely a matter of greater statewide importance than protecting the electoral process: “the political franchise of voting [is] a fundamental political right, because preservative of all rights.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Left unchecked, Maricopa’s willful disregard of Arizona election law also present a clear and present danger to rapidly approaching 2024 elections, further disenfranchising all Arizonan’s right to vote.

CONCLUSION

This Court should transfer and expeditiously hear this case and address the legal issue presented: whether or not Maricopa’s failure to conduct L&A testing on

all “equipment and programs” on October 11, 2022 (implicitly admitted in Maricopa’s Answering Brief), and after materially altering all 446 tabulators used on Election Day (admitted in Maricopa’s Answering Brief), violates A.R.S. § 16-449 and the EPM. In light of Maricopa’s admissions, there is no longer a factual question over whether Maricopa conducted L&A testing on “all deployable voting equipment,” including its 446 Election Day vote center tabulators. Maricopa did not. Maricopa must be held accountable for these clear violations of law.

Dated: November 14, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 14(a)(5), the undersigned counsel certifies that the Petition for Transfer is double spaced and uses a proportionately spaced typeface (*i.e.*, 14-point Times New Roman) and contains 1,330 words according to the word-count function of Microsoft Word.

Dated: November 14, 2023

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Pursuant to Rule 4, Rules of Civil Appellate Practice, the undersigned certifies that the foregoing Petition for Transfer was e-filed via AZTURBO COURT on this 14th day of November, 2023, and served as follows:

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