ARIZONA COURT OF APPEALS
DIVISION ONE

KARI LAKE, *Plaintiff/Appellant*, v. KATIE HOBBS, *et al.*, *Defendants/Appellees*.	Court of Appeals Division One No. 1 CA-CV 22-0779 No. 1 CA-SA 22-0237 (CONSOLIDATED) Maricopa County Superior Court No. CV2022-095403
KARI LAKE, *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 and in her official capacity as Secretary of State; STEPHEN RICHER, in his official capacity as Maricopa County Reporter, *et al.*, *Real Parties in Interest*.	

REPLY BRIEF OF APPELLANT-PETITIONER KARI LAKE

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INTRODUCTION

This is a straightforward case. Appellees-respondents Maricopa County and Katie Hobbs (collectively, "Defendants") make this case seem more complicated than it is because the central issues in this appeal cannot be credibly disputed. To distract the Court from this fact, Defendants ignore the trial court's holdings, misstate the law, misstate material facts, and—unable to get their stories straight—contradict each other.

Contrary to Defendants' argument, the trial court wrongly required appellant-petitioner Kari Lake ("Plaintiff") to prove by clear and convincing evidence that Defendants "***intended to affect the result of the 2022 General Election***" and actually succeeded in that effort. Lake.Appx:691. No Arizona case law supports that standard. Instead, binding Arizona Supreme Court case law holds otherwise—"a showing of fraud is not a necessary condition" in an election contest. *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994). In their briefs, Defendants ignore this aspect of the trial court's holding.

With respect to Maricopa's failure to conduct mandatory logic and accuracy testing ("L&A testing") on "***all of the county's deployable voting equipment***" prior to Election Day, Defendants misleadingly conflate "stress testing" with Arizona's statutorily mandated L&A testing. Stress testing is not found in Arizona law and does not ensure that all ballot styles printed from all vote center ballot on demand

("BOD") printers can be scanned by all vote center tabulators. L&A does. As a consequence of Maricopa's violation of law, tens of thousands of misconfigured or faulty BOD printed ballots were generated in at least 132 of Maricopa County's 223 vote centers—causing tens of thousands of tabulator rejections and massive disruptions on Election Day. Thousands of Republican voters were disenfranchised by Maricopa's failure to follow the law, thereby rendering the election's outcome, at least, uncertain.

Indeed, just yesterday, the Arizona Senate Committee on Elections was presented evidence from Maricopa's tabulator system log files showing that on Election Day, Maricopa's vote center tabulators rejected over 7,000 ballots ***every thirty minutes*** beginning almost immediately after the vote centers opened at 6:00 am and continuing past 8:00 pm—totaling over 217,000 rejected ballot insertions on a day when approximately 248,000 votes were cast. Contrary to Defendants' claims of "hiccups," the tabulator ballot rejections were massive, widespread and lasted all day. Lake requests that the Court take judicial notice of this committee meeting and the information therein because it shows the importance of these developing issues that relate directly to the claims in this case.[1]

[1] *See* https://www.azleg.gov/videoplayer/?eventID=2023011091 at 2:00:30, 2:13:20-2:14:37 (last visited Jan. 24, 2023). Publicly available records on the Legislature's website are judicially noticeable. Ariz.R.Evid.R. 201; *Pedersen v. Bennett*, 230 Ariz. 556, 559, ¶15 (2012).

With respect to Maricopa's violations of Arizona chain-of-custody laws, Maricopa *admits* that on Election Day it did not count the ballots at MCTEC as Arizona law mandates "due to the large volume of early ballots." Maricopa Br. 20. Instead, Maricopa simply unpacked the ballots and estimated their number before sending them to Runbeck. No such exception exists in Arizona law. The unexplained increase of over 25,000 ballots in the reported totals between November 9 and 10, far exceeding the 17,117 margin of votes between Hobbs and Lake, is a direct manifestation of Maricopa's violation.

Lastly, for the claims dismissed on the pleadings, Defendants ignore the specific allegations of those claims. For Count III (signature verification), Defendants theorize that Lake intended to challenge signature-verification policies, Hobbs Br. 35, but the complaint plainly alleges that Maricopa did not follow the policies, which is actionable. *Reyes v. Cuming*, 191 Ariz. 91, 94 (App. 1998). Similarly, on Counts V (equal protection) and VI (due process), Defendants fail to acknowledge that Lake alleges both that the election chaos targeted Republicans not only because they favor Election-Day voting but also—***among the cohort of Election-Day voters***—affected Republicans to a statistically anomalous degree. Hobbs Br. 40-43. By ignoring this targeted effect—not explainable by chance, and Defendant's burden to explain—Defendants offer no justification for the Court's sidestepping the constitutional issues as either merely cumulative or wholly outside

the election-contest statute.

STANDARD OF REVIEW

"Failure to respond in an answering brief to a debatable issue constitutes confession of error." *Chalpin v. Snyder*, 220 Ariz. 413, 423 n.7, ¶40 (App. 2008); *Caretto v. Ariz. DOT*, 192 Ariz. 297, 303 (App. 1998). Citing *Miller v. Indus. Comm'n of Ariz.*, 240 Ariz. 257, 259, ¶ 9 (App. 2016), Hobbs argues that "contrary to Lake's suggestion, this Court must defer to the trial court's determination of disputed facts." Hobbs Br. 15. That is not what *Miller* held:

> The applicability of preclusion … is a mixed question of fact and law; accordingly, we apply a deferential standard of review to the determination of disputed facts supported by reasonable evidence, and apply an independent standard of review to the ultimate determination of whether these facts trigger preclusion.

Miller, 240 Ariz. at 259, ¶9. This Court's *Miller* decision did not—and could not—overrule the Arizona Supreme Court's holding that the deferential "unless clearly erroneous doctrine" "does not apply … to findings of fact that are induced by an erroneous view of the law nor to findings that combine both fact and law when there is an error as to law." Opening Br. at 22 (quoting *Ariz. Bd. of Regents v. Phx. Newspapers*, 167 Ariz. 254, 257 (1991)).

I. THE TRIAL COURT APPLIED THE WRONG STANDARDS UNDER §16-672.

By requiring clear-and-convincing evidence of election officials' intent to affect election results, the trial court used the wrong standard for "misconduct." At

a minimum, if this Court cannot reach the merits to reverse, that error requires vacating the trial court and remanding for further review under the correct legal standard.

A. Defendants conflate clear-and-convincing evidence with the rebuttable presumptions supporting elections.

Hobbs argues that Lake's proposed standard for evaluating misconduct "bears *no resemblance* to the election contest standard Arizona courts use" and "runs counter to Arizona's longstanding presumption in favor of the validity of elections." Hobbs Br. 17 (emphasis in original). This argument conflates applicable evidentiary standards and presumptions, as shown below.

B. The preponderance-of-evidence standard applies both to resolve the merits and to rebut any presumptions.

Although Hobbs demands election decisions applying a preponderance-of-evidence standard, *id.*, the question is precisely the opposite: what election-contest decisions apply the clear-and-convincing standard absent fraud or statutes expressly adopting the clear-and-convincing standard? Three points bear emphasis:

First, election decisions apply the clear-and-convincing evidence only in specialized circumstances (*e.g.*, for fraud or where statutes set that standard). Opening Br. 23-25; *Hunt v. Campbell*, 19 Ariz. 254, 268 (1917) (fraud); *Buzard v. Griffin*, 89 Ariz. 42, 50 (1960) (same); *McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 3 (1997) (A.R.S. §16-121.01); *Jenkins v. Hale*, 218 Ariz. 561,

566 (2008) (same). Election contests do not require proof of fraud, *Miller*, 179 Ariz. at 180; *Griffin v. Buzard*, 86 Ariz. 166, 169-70 (1959) ("election contest is not a criminal action … and the high degree of proof required to convict is not essential"), so the first set of decisions is inapposite to non-fraud claims. The election-contest statute is silent on evidentiary standards, *see* A.R.S. §§16-671 to 16-678, so the second set of decisions is inapposite to the election-contest statute.

Second, Division Two of this Court recently reserved the question of which evidentiary standard applies to election cases, absent statutes setting a standard. *Parker v. City of Tucson*, 233 Ariz. 422, 436 n.14 (App. 2013). Contrary to Hobbs' claims, the issue is not settled.

Third, the standard rule in civil cases—made clear by statutes occasionally adopting clear-and-convincing standards for discrete election-law issues—is that a preponderance-of-evidence standard applies unless otherwise stated. *See* Opening Br. 23. Hobbs' clear-and-convincing exceptions prove the preponderance-of-evidence rule. If a clear-and-convincing standard applied to ***all*** election contexts, the Legislature would not have expressly enacted that standard for ***some*** election contexts:

> A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous.

Nicaise v. Sundaram, 245 Ariz. 566, 568, ¶11 (2019). Defendants' view of the law

would render the occasional targeted provisions wholly superfluous.

The same evidentiary principles apply to presumptions. When the Legislature wants to adopt clear-and-convincing thresholds for its presumptions, it does so: "Any presumption under this section shall be rebutted by clear and convincing evidence." A.R.S. §§25-814(C), 23-364(B). Absent a statute or rule, default principles apply to presumptions. Ariz.R.Evid.R. 301. In Arizona, nonstatutory presumptions are not themselves evidence. *Flores v. Tucson Gas, Elec. Light & Power Co.*, 54 Ariz. 460, 463-66 (1939). "Whenever evidence contradicting a legal presumption is introduced the presumption vanishes." *Silva v. Traver*, 63 Ariz. 364, 368 (1945); *Golonka v. GMC*, 204 Ariz. 575, 589-90, ¶48 (App. 2003) (discussing Arizona's "bursting bubble" treatment of presumptions).

Finally, the preponderance-of-evidence test applies to *quo warranto* actions to remove officeholders. *Abbey v. Green*, 28 Ariz. 53, 60 (1925). It would be strange to apply *less*-strict review to removing officers than to installing them. In short, default preponderance-of-evidence standards apply to election contests absent fraud or statutes that expressly adopt different standards.

C. <u>The presumptions supporting elections do not aid Defendants.</u>

Hobbs invokes the presumptions favoring elections. Those presumptions do not support Defendants here.

1. Presuming Defendants' good faith and honesty is both inapposite and rebutted.

Because misconduct does not require fraud, *Miller*, 179 Ariz. at 180, Defendants' honesty is irrelevant, but Lake has shown the sort of bias and dishonesty that rebuts this presumption. *Pavlik v. Chinle Unified Sch. Dist. No. 24*, 195 Ariz. 148, 154, ¶24 (App. 1999) (presumption of decisionmaker's "honesty and integrity" rebutted by actual bias). First, the trial revealed that Maricopa knew about defects in its equipment over three election cycles, Lake.Appx:618 (Tr. 217:06-13), and neither fixed nor reported the issue. *See also* Lake.Appx:54-55 (¶124 & n.22) (Maricopa withheld election evidence from a Senate subpoena); Appx:152-53 (Maricopa dissembling about stress testing versus L&A testing). These pieces of evidence rebut the presumption of Defendants' honesty and good faith, to the extent that the presumption is relevant.

2. Presuming that returns are *prima facie* correct is rebutted.

Although courts presume election returns are *prima facie* correct, *Hunt*, 19 Ariz. at 268, that presumption derives from the good-faith-and-honesty presumption. *Id.* The presumption is rebutted here by the rebuttal of that prior presumption. *Garcia v. Sedillo*, 70 Ariz. 192, 200 (1950) (no presumption of *prima facie* correctness with presumption of good faith and honesty); *cf. Reyes*, 191 Ariz. at 94 ("finding that there was no evidence that any ballots were cast by persons other than registered voters is irrelevant").

3. Applying all reasonable presumptions in the election's favor does not save the chaotic 2022 election.

Although courts must entertain "all reasonable presumptions" on an election's validity, *Moore v. Page*, 148 Ariz. 151, 159 (App. 1986), *overruled in part on other grounds*, *Huggins v. Superior* Court, 163 Ariz. 348, 350 n.1 (1990), they need not—indeed, *cannot*—entertain *unreasonable* presumptions. Finding substantial compliance in the face of large-scale noncompliance with election laws such as those at issue here *per se* abuses discretion. *Reyes*, 191 Ariz. at 94 ("conclusion not supported by the facts is considered an abuse of discretion") (interior quotations omitted). As with the second presumption, moreover, Lake's rebuttal of the good-faith presumption voids this catch-all presumption.

D. The trial court applied the wrong standard to analyze misconduct.

The trial court improperly defined "misconduct" under §16-672(A)(1) by requiring not only that covered election officials intended to affect the election results but also that their actions actually affected the election results. Lake.Appx:684.

1. The trial court erred in requiring intent to alter election results.

Other than equating Plaintiff's claims with fraud, Hobbs Br. 18, Defendants confess the trial court's error by failing to defend its equation of misconduct with intending to affect election results. *Chalpin*, 220 Ariz. at 423 n.7, ¶40.

a. Under *Hunt*, nonquantifiable election interference does not require fraud.

Under *Hunt*—and decisions based on the same authority—election interference "where it is found impossible to compute the wrong" requires striking the flawed results. *Hunt*, 19 Ariz. at 266; *King v. Cty. Bd. of Educ.*, 174 Ga. 685, 689 (1932) ("'when the proceedings are so tarnished by fraudulent, negligent, or improper conduct on the part of the officer that the result of the election is rendered unreliable, the entire returns will be rejected'") (quoting Paine on Elections, 500, §596). Maricopa's chaotic 2022 election fits that bill.

Implicitly invoking the "series-qualifier canon," Hobbs claims "fraudulent combinations, coercion, and intimidation" necessarily means "fraud." Hobbs Br. 18. But that canon must give way to common sense, *S. Tucson v. Bd. of Supervisors*, 52 Ariz. 575, 584 (1938) ("clear intent … takes precedence as a canon of construction of all grammatical rules"), so the adjective "fraudulent" modifies only the noun "combinations."

No decision limits election interference—such as coercion and intimidation—to fraudulent election interference. *See*, *e.g.*, *Patton v. Coates*, 41 Ark. 111, 124-26 (1883) (interpreting phrase to include fraud *and* actual violence). Hobbs is simply wrong that nonquantifiable election interference requires fraud.

b. Misconduct can occur without intent to affect results.

Actionable misconduct does not require fraud. *Miller*, 179 Ariz. at 180. It is

enough "that an express non-technical statute was violated, and ballots cast in violation of the statute affected the election." *Id.* Defendants confess error by not defending the trial court's setting felonious misconduct, A.R.S. §16-1010, as the minimum bar. *Chalpin*, 220 Ariz. at 423 n.7, ¶40. Instead, disregarding election laws can *per se* constitute misconduct. *Reyes*, 191 Ariz. at 94.

Indeed, misconduct's dictionary definition includes forms of negligence. Opening Br. 26. While Hobbs correctly notes that mere mistakes are not misconduct, *see* Hobbs Br. 20 & n.6 (citing *State v. Lapan*, 249 Ariz. 540, 549, ¶25 (App. 2020)), *Lapan* does not—and cannot—overrule the Arizona Supreme Court's finding that *aggravated* negligence constitutes misconduct. *See Newman v. Sun Valley Crushing Co.*, 173 Ariz. 456, 460-61 (App. 1992). Under Arizona law, "reckless" or "wanton" misconduct (*i.e.*, "aggravated negligence") means "simple negligence" coupled with "wantonness" (*i.e.*, "a high degree of probability that substantial harm will result"). *DeElena v. Southern Pacific Co.*, 121 Ariz. 563, 566 (1979). Given the admittedly recurring nature of Maricopa's election issues, a court should find wantonness.

2. <u>The trial court erred in requiring that misconduct actually affected the election results.</u>

Where—as here—the contestant's claims involve enough votes to affect the election, courts abuse their discretion by upholding elections: "To rule otherwise would 'affect the result or at least render it uncertain'" under *Miller*. *Reyes*, 191 Ariz. at 94. While Hobbs quibbles that the affected votes are not "massive" here, citing

Marks v. Stinson, 19 F.3d 873, 888 (3d Cir. 1994), Hobbs Br. 43, *Marks* involved "approximately 1,000 absentee ballots." *Marks*, 19 F.3d at 877. The misconduct here affected enough votes to render the outcome uncertain under *Miller* and *Reyes*.

II. DEFENDANTS' ARGUMENT THAT THE TRIAL COURT DID NOT ERR ON THE MERITS WITH RESPECT TO COUNT II LACKS MERIT.

Counts II (Illegal BOD Printer/Tabulator Configurations) is governed by A.R.S. §16-449 (Required test of equipment and programs; notice; procedures manual). The EPM implementing this statute has the force of law. A.R.S. §16-452(C). Defendants' arguments that Maricopa complied with this statute and the EPM are false.

A. Contrary to Defendants' misleading arguments, Maricopa did not conduct mandatory L&A testing.

As Plaintiff stated in her opening brief, Maricopa did not perform L&A testing in accordance with the EPM's express requirement that "all of the county's deployable voting equipment" be tested. Pl. Br. 29-30. As a consequence, Election Day chaos ensued, disenfranchising thousands of predominantly Republican voters. Hobbs and Maricopa both argue falsely that the record shows Maricopa performed L&A testing in accordance with A.R.S. §16-449(A) and the L&A testing procedures set forth in the EPM.

L&A testing is test expressly identified in A.R.S. §16-449(A) with the purpose being "to ascertain that the equipment and programs will correctly count the

votes cast for all offices and on all measures" prior to each election, which includes scanning all ballot styles. The EPM sets forth detailed instructions for conducting L&A testing. Supp.Appx:18-24 (EPM Sections D-F). The EPM distinguishes L&A test procedures for the Secretary of State versus for Arizona counties. The Secretary of State is responsible only for L&A testing "selected voting equipment…[from] 10-20 precincts for a large county" such as Maricopa.[2] In addition, "[i]f a county will use preprinted ballots and ballots through a ballot-on-demand printer, the officer in charge of elections must provide ballots generated though both printing methods." Appx:701.

In contrast, counties, including Maricopa, "must substantially follow the L&A testing procedures applicable to the Secretary of State, ***except that all of the county's deployable voting equipment must be tested***."[3] In other words, ***all*** BOD printers and ***all*** tabulators used at each of Maricopa's 223 vote centers using BOD printed ballots were required to be L&A tested—and to pass L&A testing—before the election.

Hobbs nonsensically argues "all of Maricopa's voting equipment was lawfully tested and certified years ago." Hobbs Br. 23. Hobbs' argument is irrelevant. The

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[2] Appx:701 (EPM, section D.2, "Selection of Precincts and Test Ballots"); Supp.Appx:18 (EPM at 86).

[3] Appx:702-03 (EPM, section F, "County L&A Testing") (emphasis added); Plaintiff's Opening Brief at 29-30. *See also* Supp.Appx:23-24 (EPM Section F).

fact that voting equipment was "tested and certified years ago" is meaningless with respect to L&A testing performed before each election. Hobbs also argues that that "Director Jarrett also confirmed that the printers and tabulators used at voting centers were successfully tested in the weeks leading up to election day" citing Jarrett's testimony at Lake.Appx:149-50 (Tr: 52:17-53:04). *Id*. Significantly, Hobbs does not use the phrase "L&A testing," just the vague word "tested."

Maricopa quotes the same portion of Jarrett's testimony in its answering brief, but goes further and expressly states "Maricopa County performed logic and accuracy testing exactly as the Elections Procedures Manual requires." Maricopa Br. 5. Defendants are misleading the Court by conflating "logic and accuracy testing"—required by A.R.S. §16-449 and the EPM—with Jarrett's carefully parsed testimony about "stress testing"—which appears nowhere in the EPM The two tests are completely different, and Defendants know they are different.

Specifically, Defendants rely on the following testimony by Jarrett:

> Q: Prior to performing logic and accuracy testing prior to the 2022 General Election, did you perform, or did your office perform logic and accuracy testing with test ballots from ballot on-demand printers in the precinct-based tabulators?
>
> A: We printed ballots from our ballot on-demand printers, and those were included in the tests ***that the Secretary of State did***. ***We also performed stress testing before the logic and accuracy tests*** with ballots printed from our ballot on-demand printers that went through both central count tabulation equipment as well as our precinct-based tabulators for the voting locations.

Lake.Appx:149-50 (Tr: 52:17-53:04) (emphasis added).

As the italicized and bolded text in the quote above shows, Hobbs and Maricopa conflate Jarrett's testimony about the "stress tests" performed by Maricopa with the Secretary of State's "logic and accuracy tests"—which are performed only on a small sample of voting equipment. Jarret was also asked during that examination:

> Q: "What evidence exists that shows the results of the logic and accuracy testing that you say was performed in connection with the 2022 General Election?"
>
> A: "***So the stress testing***, we have a report that summarizes that stress testing that we performed of -- so I'm aware of that. That would be documentation."

Appx:152-53 (*id.* 55:21-56:1) (emphasis added).

Jarrett again expressly avoids using the phrase "logic and accuracy test." Instead, he again responded with the phrase "stress testing." However, "stress testing" has a specific meaning: "to ensure that all components [of the voting system] will properly process the volume of materials and data similar to volumes the County expects during an election" as Maricopa knows.[4] It has nothing to with L&A testing

[4] Excerpt of Maricopa County, Notice of Solicitation, Request for Proposal for: Elections Tabulation System, at ¶ 2.1.1 (System Support Services) (04/04/2019) (available at https://www.maricopa.gov/DocumentCenter/View/64680/190265-Solicitation-Addendum-2-04-09-19); *See also* Election Assistance Commission, "2005 Voluntary Voting System Guidelines," 71 Fed. Reg. 18,824 (Apr. 12, 2006) ("Stress tests: These tests investigate the system's response to transient overload conditions.").

which A.R.S. §16-449 states is to ensure that ***all*** voting "equipment and programs will correctly count the votes cast for all offices and on all measures."

Maricopa also states in its written response to the Arizona AG's inquiry into the Election Day debacle that Maricopa performed only "stress testing"—not L&A testing—on the BOD printers. Appx:708, (stating "Despite stress testing the printers before Election Day…."). Maricopa's failure to perform L&A testing is a per se violation of A.R.S. §16-449 and the EPM, constitutes misconduct under A.R.S. §16-672(A)(1), and was a direct cause of the massive disruptions on Election Day.

B. Defendants' arguments as to the severity of the tabulator ballot rejections are demonstrably false or irrelevant.

Defendants downplay the severity of the widespread debacle on Election Day as a "hiccup." Lake.Appx.618 (Tr. 217:14-19). However, the only evidence Defendants cite is only their self-serving testimony and descriptions of wait time data which Defendants did not introduce into evidence.

Maricopa and Hobbs do not dispute the sworn testimony of over 200 election workers, election observers, and voters, admitted into evidence by the trial court, describing the debacle on Election Day. Lake.Appx:410-11 (Tr. 9:25-10:08, admitting Exs. 53-54, 76). Those sworn declarations identify 132 of Maricopa's 223 vote centers—nearly two-thirds of Maricopa's vote centers—as experiencing widespread BOD printer and tabulator failures causing chaos, hours long lines, and voters giving up and not voting. Lake.Appx:79-84. Supp.Appx:43-44 (chart showing

massive lines and hours long wait times at least 32 of the vote centers based on those declarations).

Hobbs falsely maintains that "Lake's witnesses could not identify a single voter who was unable to vote because of tabulator issues." Hobbs Br. at 4. The following is sampling of just a few of over 200 unrebutted sworn declarations:

- A-189 (Steven Steele) ("approximately 170 to 175 people simply gave up after standing in line for many hours"). Supp.Appx:41-42.
- A-11 (Kathryn Baillie) ¶ 20 ("while the printers were down, there were long lines and 'some people just left'"). Supp.Appx:27-32.
- A-182 (Erin Smith) at Page 4 ("I also saw several voters leave the lines and cite work or other reasons why they could not wait 2-3 hours it seemed it would take"). Supp.Appx:34-40.
- A-95 (James Knox) ¶5 ("Throughout the day, I witnessed lots of people leave due to the length of the lines. I would estimate at a minimum of 300 people. All were disgusted."). Supp.Appx:33.
- A-1 (Jamie Alford) ¶ 15 ("I estimate that 10-20% of voters left without voting."). Supp.Appx:25-26.

Contemporaneous text messages from a group chat of fifteen "T-Techs " hired by Maricopa for the 2022 general election to assist with vote center problems also tell the true story of Election Day. Lake.Appx:345-46 (Tr.: 248:06 – 249:09). These T-Techs covered a "bare minimum" of 20 to 30 vote centers on Election Day. Lake.Appx:346-47 *(id*. 249:07 – 250:17). Those texts were admitted into evidence and examples describe the chaos that day:

- "im having a 911…tabulators aren't…reading." Lake.Appx:715.

- "Is anyone else's tabulators not working whatsoever?" Lake.Appx:720.

- "Yeah, tabulators are kicking out approximately 80% (according to poll workers manning tabulators) So we have people milling around on their 3rd and 4th ballot. Cleaning printers continually-yes, we are cleaning Corona wire." Lake.Appx:717

- "Cleaned wires and checked toner at deer valley. Ballots look good tabulators running 60%ish acceptance." Lake.Appx:717

- "Northern. Tabulators misreading at high rate still. Cleaned and replaced carts. Ballots look good coming out. Inspector said he cleaned tabulators earlier. Variety of pens but plenty of time to dry. Inspector hasn't gotten much response from hotline." Lake.Appx:718

- "Cave Creek tabulators are once again rejecting ballots that look absolutely pristine to me…we are running about 50% acceptance." Lake.Appx:716.

- "What is the current record for T Tech mileage on election day because I'm at 166." Lake.Appx:722.

- "Worship and word church still has at least 50. They had line around building all day. I'd help break equipment down when they close unless told otherwise…Heh. I was wrong. 50 inside and about 100 outside still waiting. Coffee pls" Lake.Appx:723.

- "Just found out that there were continued misreadings throughout the day, more than I thought, I just wasn't told about them until just now. I though the problem was fixed in the morning." Lake.Appx:724.

Notably, contrary to Defendants' arguments, the T-Techs' comments show that tabulator rejections continued despite their varied attempts to fix the printers (*e.g.*, cleaning them, shaking the toner). Hobbs Br. 24.

Mark Sonnenklar, a Republican attorney observer, testified that he was part of a group of Republican attorneys covering 115 of 223 vote centers on Election

Day. Lake.Appx:362-63 (Tr. 265:02-266:25). He personally visited 10 vote centers and described Election Day as "pandemonium out there everywhere" with "lines out the door, which did not -- you did not see during the Primary…. [and] angry and frustrated voters." *Id*. Sonnenklar testified that "most of the [other] roving attorneys [covering the other 105 vote centers] had a similar experience" to him. Lake.Appx:365 (*id*. 268:01-10).

Unable to rebut this damning evidence describing what really happened on Election Day, Hobbs argues that "[a]s one elections expert testified, tabulator issues are among the most common unforeseen equipment malfunctions in elections." Hobbs 6. This so-called expert is a political science professor. He is not an expert on voting equipment, was not in Arizona on Election Day, simply relied on the County's data and did nothing to verify the accuracy of the data he received from Maricopa. Lake.Appx:513, (Tr. 112:14-17) (Mayer), Appx:543-44 (*id*. 142:04-143:06). Moreover, "tabulator issues" are not routine. Election Assistance Guidelines establish that "[t]he voting system misfeed rate must not exceed 0.002 (1/500)." Voluntary Voting System Guidelines VVSG 2.0 Voluntary Voting System Guidelines VVSG 2.0, at 59 (2021);[5] *see* note 1, *supra*. (judicial notice).

[5] https://www.eac.gov/sites/default/files/TestingCertification/Voluntary_Voting_System_Guidelines_Version_2_0.pdf (last visited Jan. 24, 2023).

Lastly, as described in the Introduction, the evidence and testimony at the January 23, 2023 at the Arizona Senate Committee on Elections meeting shows more than 7,000 ballots being rejected by vote center tabulators every 30 minutes from 7:00am to 8:00pm—totaling over 217,000 rejected ballot insertions on a day when approximately 248,000 votes were cast. Defendants' attempt to downplay the chaos on Election Day is disingenuous at best.

C. Defendants' arguments downplaying Jarrett's changing testimony regarding 19 inch misconfigured ballots injected into the election on Election Day are sophistry.

To deflect from Jarrett's changing and conflicting testimony, Maricopa argues that Lake's questions of Jarrett were limited to the 12,000 programmed "ballot definition" settings that Maricopa claims did not relate to the so-called "fit-to-paper" excuse Maricopa concocted after Lake's cyber expert revealed his explosive findings the day before. Maricopa concludes their three page filibuster arguing:

> At no time on the first day of the trial did any attorney ask Jarrett about the fit-to-paper problem. He was never asked whether the printers at three of the vote centers had their settings changed to fit-to-paper, nor was he ever asked whether some ballots at those three vote centers had shrunken, 20-inch ballot images printed. ***Accordingly, there was no reason for Jarrett to discuss the fit-to-paper problem***.

Id. at 13.

Maricopa misstates the record. Lake's counsel asked, and Jarrett acknowledged the question which asked if he "had any idea how [a 19 inch ballot image projected on 20 inch paper] could occur" separate and apart from "ballot

definitions." Lake.Appx:174 (Tr. 77:14-24) (Jarrett). Maricopa's argument is meritless.

Second, Defendants argue that if the issue arose from the ballot definition, "every ballot" would have printed out as a 19 inch image. Maricopa Br. 11-12, Hobbs 24 (also citing trial court's order). Not so. As Defendants themselves recognize, Maricopa used 12,000 different ballot styles, any number of which could be programmed with a different image size.

Third, Defendants argue all votes were supposedly counted. Maricopa 13-14, Hobbs 25. Defendants ignore the fact that Parikh testified that Jarrett admitted to him during his inspection that Maricopa did not maintain the duplicate ballots together with the originals he inspected as is required by law. There is no way to tell if these ballots were counted. Opening Br. 12.

Lastly, Defendants have no excuse for Jarrett's admission that Maricopa supposedly knew about the "fit-to-paper" issue shortly after the November election, that it had occurred in ***three prior elections***, and that Maricopa was still performing a "root cause analysis"—but never disclosed this issue to the public or in Maricopa's November 26, 2022 written response to the Arizona Attorney General's inquiry into the Election-Day chaos. Opening Br. 14. Notably, Hobbs' argument that Parikh did not find misconfigured 19-inch ballots images printed on 20 inch paper is wrong. Hobbs Br. 24 n.9. Parikh answered that his findings applied to all six vote centers

that he inspected. Lake.Appx:203-04,207 (Tr. 106:24-107:03, 110:07-24). Parikh's findings further rebut Defendants' new fit-to-paper excuse, which Maricopa claims occurred only at three vote centers. Lake.App.610 (Tr. 209:07-10).

D. Baris' testimony is credible and demonstrates voter disenfranchisement sufficient to void the results in Maricopa County.

Defendants: (1) attack Baris' qualifications as an expert, (2) insist that, because Baris does not give a specific number of disenfranchised voters, his testimony must be discounted; and (3) dispute Baris' range of possible outcomes as "speculative." Maricopa Br. 7-9; Hobbs Br. 7, 26-9. All three arguments fail.

Hobbs criticizes Baris' background noting that he has not studied polling in an academic context or published his results in an academic journal. Hobbs Br. 26-25. However, Hobbs does not explain why academic contexts should have greater weight than professional contexts and concedes that Baris has worked as a respected professional pollster for many years.

The sole criticism of Baris' professional work is the fact that he is not listed among the pollsters ranked by an online blog, FiveThirtyEight. Hobbs Br. 27. Hobbs does not explain why FiveThirtyEight is more credible than Baris, and, indeed, a brief inquiry reveals a similar absence of academic experience and publishing from

that outlet.[6] Baris is ranked by RealClearPolitics and Election Recon, the latter ranking his organization, Big Data Poll, number 2 in the nation out of over 200 other polling organizations based on accuracy and lack of bias. Lake.Appx:507 (Tr. 106:2-24 (Baris)).

1. Baris' statistical evidence of suppressed voter turnout in Maricopa is based on concrete data.

Hobbs and Maricopa argue that Baris' calculation of the number of voters in Maricopa who would have voted for Lake but for the Election-Day chaos is based on "absurd speculation…rather than evidence" or "plucked…out of thin air." Maricopa Br. 6, Hobbs Br. 28. Hobbs and Maricopa both ignore the detailed methodology underpinning Baris' analysis of, and personal interaction with, approximately 1,300 Arizona high propensity voters participating in the November 2022 general election, including 813 voters from Maricopa. Lake.Appx:428 (Tr. 27:12-15), Lake.Appx:429-30 (*id*. 28:21-29:06). Baris' exit poll had a statistical confidence level of accuracy of 3.5%. Lake.Appx:490 (*id*. 89:19-21). Baris' findings here are based on sound exit poll methodology, which is more reliable than the simple turnout modeling, such as that relied on by Maricopa to prepare for its

[6] FiveThirtyEight is run by Nate Silver, whose sole academic background consists of a bachelor's degree in economics, whose professional background is in baseball statistics, and whose sole work in election polling consists of a self-published internet blog the main purpose appears to be publishing baseball statistics.

elections. Lake.Appx:424-25 (*id* 23:15-25:5).

An exit poll is a detailed analysis of voter preference in elections. Baris selects voters from a randomly generated pool, screened through their voter histories to establish a high propensity to vote, and who agree to fill out detailed pre-election questionnaires in advance of the election, and to participate in the exit poll after voting. Lake.Appx:426-32 (*id* 25:07-32:57). In Baris' experience the drop-off rate of these exit poll voters who do not fill out the post-vote questionnaire is between 5 and 8 percent. Lake.Appx:511 (*id*. 110:2-3).

During Election Day, Baris heard from an unusually large number of the exit poll voters—***who were only from Maricopa***—whose "main concern....[was] [l]ong wait times and ballots not reading properly" including some of whom said they "couldn't wait [in] line." Lake.Appx:432-33 (*id* 31:12-32:15), 458 (*id*. 57:6-24), 510 (*id*. 109:04-08). These unusual issues caused Baris to add an additional polling question about whether the exit poll participants were having problems casting their vote. *Id*.

After the November 2022 election, Baris compared the number of Arizona participants who had agreed to take the poll but did not do so and noticed a never before seen disparity between those Maricopa exit poll voters who had cast a vote-by-mail ballot and those who had tried to vote in person on Election Day, with a response rate about 20 percent lower for the Election Day voters. App.:434-35 (*id*

33:04-34:18). This disparity vastly exceeded the disparity in hundreds of past elections for which he had done exit polling. *Id*.; Lake.Appx:511 (*id*. 110:01-23).

These facts, considered in conjunction with the Arizona exit poll's methodology, led Baris to conclude in his expert opinion, that the 20-point disparity in responses was primarily attributable to people who had planned to vote on Election Day but did not do so as a result of the problems at Maricopa vote centers. Lake.Appx:434-35 (*id*. 33:04-34:18) . Indeed, even if only *half* of that disparity were attributable to election-day problems, the result would be 25,000 disenfranchised voters, still far higher than the 17,117-vote margin between Lake and Hobbs.Appx:435-36 (*id*. 34:19-35:07). It hardly requires expert opinion to show that people do not like waiting in line, or that long lines discourage voters from even coming out to vote.

2. <u>Baris' range of possible outcomes meets Lake's burden under established Arizona law to show that the election outcome was affected or rendered uncertain.</u>

Contrary to Defendants' arguments, courts have never required a specific number of disenfranchised voters to void elections. Maricopa Br. 7; Hobbs Br. 7. Rather, courts consistently accept—even *prefer*—statistical evidence of disenfranchisement. *See Ward v. Jackson*, No. CV-20-0343-AP/EL, 2020 WL 8617817, at *2 (Ariz. Dec. 8, 2020) (relying on the statistical rate of error for its finding); *Gallardo v. State,* 236 Ariz. 84, 89 (2014) (finding against

underrepresentation of certain districts based on statistical evidence).

The fact that Baris' "estimates resulted in many scenarios where Governor Hobbs still would have won," Hobbs Br. 28-9, is irrelevant. Because Lake's burden is to show that the outcome was at least rendered uncertain, Lake need only provide evidence that a sufficient number of voters were disenfranchised to change the election's outcome, *not* that a sufficient number of those voters would have voted for a particular candidate. *See Miller*, 179 Ariz. at 180 (stating "'affect the result, or at least render it uncertain,'… at means ***ballots procured*** in violation of a non-technical statute in sufficient numbers to alter the election's outcome.) (citation omitted, emphasis added). In other words, an election is uncertain when the number of voters disenfranchised exceeds the margin of victory (here, a number greater than 17,117). *See Huggins*, 163 Ariz. at 350 ("it hardly seems fair that as the amount of illegal voting escalates, the likelihood of redressing the wrong diminishes"); *Hunt*, 19 Ariz. at 265-66 (rejecting a need for *any* "arithmetically computed" vote figure in a case dealing with voter intimidation).

Baris' range of possible outcomes absent voter disenfranchisement (from a 2,000-vote margin for Hobbs to a 4,000 vote margin for Lake) demonstrates that Lake would more likely would have won, given that the higher end of the range far exceeds the low end. The trial court's holding that Baris' findings do not "approach the degree of precision that would provide clear and convincing evidence that the

result did change as a result of BOD printer failures" is clear error. Lake.Appx:688-89.

III. MARICOPA'S ADMISSION THAT IT DID NOT COUNT THE BALLOTS ON ELECTION DAY "DUE TO THE LARGE VOLUME OF EARLY BALLOTS" IS FATAL ON COUNT IV.

Maricopa spends twelve pages in its brief obfuscating straightforward chain-of-custody requirements set forth in the EPM. Maricopa 15-27. Arizona laws concerning drop-box ballots are clear and unambiguous. Ballots ***must be counted*** when they are removed from a secure container and the number retrieved from the specific drop-box location must recorded on the chain-of-custody form. Opening Br. 15-16 (citing EPM Chapter 2: Early Voting, Section I(I)(7) governing "Ballot Drop-Off Locations and Drop-Boxes" Section I(I)(7) and EPM Chapter 9: Conduct of Elections/Election Day Operations, Section VIII(B)(2)(g), Lake.Appx:699, 705). Thus, the counting of Election Day drop-box ("EDDB") ballots can be deferred only until containers arrive at the central counting place, MCTEC. No exceptions. This simple chain of custody step helps prevent the fraudulent insertion, removal, or substitution of ballots.

However, in its answering brief, Maricopa admits that "[a]fter the close of polls on election day, due to the large volume of early ballot packets dropped at polling places that day", it deviated from the EPM. Maricopa Br. 20. Instead of "counting" the ballots at MCTEC as required by the EPM, Maricopa admits that the

EDDB ballots are "sorted and placed in mail trays" and sent to third party vendor Runbeck to be counted. *Id*. Maricopa's admission is a fatal deviation from a non-technical statute. The evidence and Maricopa's admission prove Maricopa failed to follow mandatory chain-of-custody procedures on Election Day with respect to nearly 300,000 drop box ballots delivered to MCTEC on Election Day. Notably, Hobbs apparently recognizes this requirements and contradicts Maricopa arguing falsely that EDDB "ballots were counted upon arrival ***at MCTEC*** and Runbeck." Hobbs Br. 31 (emphasis added).

Maricopa misleadingly attempts to inject ambiguity in the EPM's strict requirements arguing that the EPM "further provides" for "processing" drop-box ballots "in the same manner" as ballots received via the U.S. Postal Service. Maricopa Br. 18, citing "p. 62" of the EPM. Maricopa then spends the next three pages trying to convince the Court that counting EDDB ballots at third-party Runbeck is the same as counting the ballots at MCTEC. Maricopa Br. 19-21. Maricopa is again misleading the Court.

First, "counted" ***"[w]hen the secure ballot container is opened***" means just that—not "processing." "In the absence of a statutory definition, a dictionary may be consulted to determine the ordinary meaning of words used in a statute." *Fogliano v. Brain*, 229 Ariz. 12, 19 (App. 2011). There is no need for a dictionary here. Second, Maricopa cites the EPM, at 62, as support for its "processing" argument but

misleadingly leaves off the citation in the EPM at the end of passage it quotes, "see Chapter 2, Section VI." Supp.Appx:4. Section VI refers to "processing" functions such as "signature verification" and how to handle rejected and incorrect ballots. Supp.Appx:10-14. That section in no way moots the EPM's requirement to count the ballots when the secured ballot containers are opened at MCTEC which occurs well before "processing" the ballots.

Hobbs' also misleadingly argues that the "'delivery receipt' forms for the 'nearly 300,000' election day early ballots….are part of the record before this Court" is false. Hobbs. Br. 29. First, the "delivery receipt" form Hobbs refers to are forms created by Runbeck (Lake.Appx.602 (Tr. 201:20-22))—these forms are not the "Maricopa County Delivery Receipt" created by Maricopa "that has on it the precise count of the ballots that they are then loading on a truck and transferring to Runbeck." Appx.276-77 (Tr. 179:01-180:10), Supp.Appx:45-48 (comparison of chain-of-custody forms). The Maricopa County Delivery Receipt forms have not been produced and are not part of the record as Hobbs argues at page 10 of her brief. *Id*.

Second, Hobbs' reliance on two Runbeck created forms, "MC Inbound—Receipt of Delivery" (Hobbs.Appx:89-131) and "MC Incoming Scan Receipt" (Hobbs.Appx:132-61) proves the impact of Maricopa's chain-of-custody violations. Hobbs. Br. 29. Counting the number of ballots recorded on the Runbeck created

"MC Inbound—Receipt of Delivery" forms for early ballots delivered to Runbeck on and after Election Day documents only 263,379 early ballots received by Runbeck. Hobbs.Appx:123-131. In comparison, the "MC Incoming Scan Receipts" Hobbs (Hobbs.App:132-61) cites in her brief, documents the total number of early ballots scanned for signature verification at Runbeck as 298,942, the same figure reported by the Runbeck whistleblower noted in Lake's opening brief at 18.[7] In other words, the very "MC Inbound Receipt of Delivery" forms that Hobbs points to as chain of custody, fail to document any record of delivery or receipt of the other 35,563 ballots scanned at Runbeck , an inexplicable discrepancy that far exceeds the margin between Hobbs and Lake.

In sum, the unexplained increase of over 25,000 ballots in the total reported to the Secretary of State between November 9 and 10, far exceeding the 17,117 margin of votes between Hobbs and Lake, is a direct manifestation of Maricopa's violating the EPM's chain-of-custody requirements. Maricopa and Hobbs still have no explanation for this discrepancy, a discrepancy that would not exist had Maricopa followed mandated chain-of-custody procedures.

[7] Hobbs' argument that Lake's claim is barred by laches is without merit. Hobbs Br. 32, n.13. Maricopa did not adhere to their plan, or Arizona law, and Plaintiff could not have known that Maricopa would break the law prior to Election Day when the violations occurred.

IV. THE TRIAL COURT ERRED BY DISMISSING COUNT III ON LACHES.

The trial court dismissed Count III (signature verification) on the pleadings based on laches. Lake.Appx:91-92. Because laches do not apply, and Count III states a claim, this Court should reverse the dismissal of Count III "unless the relief sought could not be sustained under any possible theory." *Griffin v. Buzard*, 86 Ariz. at 169-70.

A. Laches does not apply to Count III for the 2022 election.

Hobbs' laches argument theorizes that Lake really intended to challenge Maricopa's signature-verification policies and that Lake's tier-one whistleblowers do not establish Maricopa's higher-tier reviewers failed to follow signature-verification procedures. Hobbs Br. 35. Not so.

Count III alleges in pertinent part that "a material number of early ballots … were transmitted in envelopes containing an affidavit signature that the Maricopa County Recorder or his designee determined did not match the signature in the putative voter's 'registration record,'" but that Maricopa "nevertheless accepted a material number of these early ballots for processing and tabulation" in violation of A.R.S. §16-550(A). Lake.Appx:60-61 (¶¶150-151); Opening Br. 36. Such violations are actionable: "Without the proper signature of a registered voter on the outside, an absentee ballot is void and may not be counted." *Reyes*, 191 Ariz. at 94. Dismissing Count III on laches was error because Maricopa's failure to follow verification

procedures did not occur until after the election.

B. Count III states a claim for illegal votes and misconduct.

In the alternative, Hobbs argues three merits bases for dismissing Count III, Hobbs Br. 37-38, none of which warrant dismissal.

First, Hobbs cites Lake.Appx:14-21 for not alleging failure to comply with the signature matching statute or the relevant provision of the EPM. Hobbs Br. 37. Lake makes that allegation at Lake.Appx:60-61 (¶¶150-151).

Second, Hobbs argues that A.R.S. §16-552 requires making signature-verification challenges before opening the ballot envelope. Hobbs Br. 38. That statute provides for challenging early ballots only for "grounds set forth in section 16-591," A.R.S. §16-552(D), which in turn applies only to unqualified voters and those voting multiple times. *See* A.R.S. §16-591. Failure to comply with signature-verification is actionable, *Reyes*, 191 Ariz. at 94, so Hobbs' second argument is inapposite here.

Third, Hobbs argues that whistleblowers' speculation does not allege actual misconduct. Hobbs Br. 38 (citing Lake.Appx:19-20). As indicated, Lake alleges the misconduct at Lake.Appx:60-61 (¶¶150-151).

V. THE TRIAL COURT ERRED IN DISMISSING THE CONSTITUTIONAL CLAIMS.

Lake alleged that Maricopa's chaotic election violated both equal protection (Count V) and due process (Count VI) as misconduct and illegal votes under §16-

672(A)(1), (A)(4), and also asserted them under 42 U.S.C. §1983 (Count X), through joinder principles. Lake.Appx:63-65. The trial court dismissed Counts V and VI on the pleadings as either "merely cumulative" and thus "unnecessary" if within the election-contest statute or, alternatively, outside that statute. Lake.Appx:93. Those are the only constitutional counts that Lake appeals, Opening Br. 40-45, and their dismissal was error.

Significantly, Lake's equal-protection claim has two reinforcing components. The BOD errors caused havoc on Election Day, which is disproportionately favored by Republicans, ***and***—even among the Republican-heavy cohort of Election-Day voters—the havoc targeted Republican voters. *See* Lake.Appx:39-40 (¶89) (Republican-versus-Democrat disparity of 58.6% to 15.5%); (Lake.Appx:63) (¶165) (BOD printer problem burdened Republican Election-Day voters more than 15 standard deviations more than it burdened non-Republican Election-Day voters). Lake argued these issues under the election-contest statute in opposing dismissal, Hobbs.Appx:210-12, and in her opening brief (at 40-45). Before accusing Lake of "smuggling" claims on appeal, Hobbs Br. 40, Hobbs needed to check the manifest.

A. Counts V and VI are within the election-contest statute.

The parties agree that the election-contest statute represents the Legislature's decision on allowable misconduct and illegal-vote claims, but dispute the bounds of those terms. Significantly, the authority Hobbs cites for courts' not rewriting

statutory terms also acknowledges "reasonable doubt about the legislature's intent." *Orca Commc'ns Unlimited, LLC v. Noder*, 236 Ariz. 180, 182, ¶ 11 (2014). On this question, courts' "primary task … is to discern the legislature's intent," even in election disputes. *Jenkins*, 218 Ariz. at 562-63.

Although Hobbs deems it "operating in the realm of imagination," Hobbs Br. 40, Lake doubts the Legislature intended parallel federal challenges, armed with this Court's holding that Arizona's election-contest statute is inadequate to protect federal rights. Violating a law can, by itself, constitute misconduct. For example, in *Griffin v. Buzard*, 86 Ariz. at 168, the court found running a candidate with a similar name to result in illegal votes, based on violating the predecessor to A.R.S. §16-1006(A)(3). Similarly here, courts should look to the Equal Protection and Due Process Clauses to find misconduct or illegal votes. Levels of scrutiny aside, targeting voters based on race—or on left-handedness—clearly is *actionable*. Targeting Republicans is no different.

Quoting *Armstrong v. Exceptional Child Care Ctr., Inc.,* 575 U.S. 320, 327 (2015), Hobbs argues that "suits alleging unconstitutional action are regularly 'subject to express and implied statutory limitations.'" Hobbs Br. 40. But *Armstrong* concerned the availability of a private cause of action under *Medicaid*. That line of decisions asks whether violations of federal *law* also violate the plaintiff's federal *rights* sufficiently to imply a private right of action, absent a statutory cause of

action. *Armstrong*, 575 U.S. at 324-25; *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) ("plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*") (emphasis in original). Hobbs cannot seriously question whether the Equal Protection and Due Process Clauses create private rights.

Because the election-contest statute provides a private cause of action, *Armstrong* would be inapposite, even if it applied to constitutional issues. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 353 & n.5 (2006) ("once a litigant has standing to request invalidation of a particular [government] action, [she] may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate"). Constitutional claims are not merely "cumulative" to election contests because constitutional claims nullify presumptions. *R.A.V. v. St. Paul*, 505 U.S. 377, 384 n.4 (1992) (constitutional violation renders a "government interest … not a 'legitimate' one"); *Gallardo*, 236 Ariz. at 87-88, ¶9 (when government action burdens fundamental rights, "any presumption in its favor falls away"). The ultimate question is whether the Legislature intended to allow constitutional violations to constitute "misconduct" or "illegal votes" in expedited review under §16-672 or, instead, preferred to have constitutional claims brought outside election contests under 42 U.S.C. §1983.

B. <u>Count V states an equal-protection claim.</u>

By focusing only on the Election-Day component of the equal-protection

claim and dismissing it as a mere disparate-impact claim, Hobbs simply misses that Republicans were wildly and disproportionately targeted ***even among Election-Day voters***. Lake.Appx:63 (¶165) (citing *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977)); Opening Br. 41-43 & n.6; Hobbs.Appx:210-12. As Lake explains, such wide disparities constitute evidence of disparate treatment and, in any event, shift the burden to Defendants to explain the statistical anomaly. Opening Br. 41-43. Indeed, the *Castaneda* decision on which Lake relies expressly distinguishes the decisions on which Hobbs relies. *Castaneda*, 430 U.S. at 493-95 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976) and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-65 (1977)). Hobbs offers nothing to rebut that quantum of anomalous statistical evidence supporting equal-protection violations.

C. Count VI states a due-process claim.

As with Lake's equal-protection claim, Defendants' dispute with her due-process claim fails to address the targeted nature of the 2022 election attack. *Compare* Hobbs Br. 42-43 *with* Section V.B, *supra*. Defendants' waiver dooms their attempt to distinguish *Coleman v. City of Mesa*, 230 Ariz. 352 (2012), based on intentional targeting. Hobbs Br. 43-44. The parties agree that due-process claims require "patent and fundamental unfairness," but dispute its presence in Maricopa. "[P]atent and fundamental unfairness" "lies in the eye of the beholder." *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 75 (1st Cir. 2001). Erroneously finding these

counts either unnecessarily cumulative or impermissible, the trial court never "beheld" the issue. Lake respectfully submits that this Court should reverse the dismissal and remand for the trial court to consider the issue in the first instance. *State ex rel. Bullard v. Jones*, 15 Ariz. 215, 221 (1914) (appellate courts are "court[s] of last resort and not of first resort").

CONCLUSION

WHEREFORE, this Court should REVERSE the trial court's judgment and that grant Plaintiff the injunctive relief of *vacatur* of the election certification and a new election, as requested in her Verified Complaint. Appx:68. Alternatively, if the Court reverses dismissal without reaching the merits, this Court should remand to the trial court for further proceedings consistent with the Court's decision.

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Respectfully submitted,

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