IN THE SUPREME COURT

STATE OF ARIZONA

KARI LAKE, Plaintiff/Appellant, v. KATIE HOBBS, et al., Defendants/Appellees.	Arizona Supreme Court No. CV-23-0046-PR Court of Appeals, Division One Case No. 1 CA-CV 22-0779 Case No. 1 CA-SA 22-0237 (Consolidated)
KARI LAKE, Petitioner, 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.	Maricopa County Superior Court Case No. CV2022-095403

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

This case involves Kari Lake's attempt to malign and undermine our election processes and those who administer them, sow deep-rooted distrust for our democracy, and unseat Katie Hobbs, who is our duly elected Governor. Ms. Lake continues to attest that the 2022 election was stolen, which is ironic, since it is she who seeks to steal the election and usurp the People's will through judicial fiat.

At trial, Ms. Lake failed to present any evidence supporting her two claims that survived dismissal. The court of appeals agreed, and affirmed the superior court. Now, Ms. Lake seeks review from this Court for several reasons unworthy of this Court's energy.

First, she claims there is a conflict among divisions one and two of the court of appeals concerning the proper burden of proof for sustaining an election challenge under A.R.S. § 16-672.[1] No such conflict exists. The burden of proof for sustaining an election challenge under A.R.S. § 16-672 has been and remains more than a preponderance of the evidence. Ms. Lake's attempt to manufacture a conflict of law where none exists only highlights the flimsy foundation upon which her cries of a stolen election teeter.

Second, she argues that the superior court, which considered and weighed

[1] There is only one court of appeals. It is more proper to state that there are conflicting decisions *by the court of appeals*.

the evidence, somehow ignored the evidence and misapplied the law. In essence, Ms. Lake asks this Court to second guess the superior court's weighing of the evidence and witness credibility. This is no basis upon which to grant review.

Third, in support of her debunked cries of a stolen election, Ms. Lake misrepresents the record in an effort to construct and pursue a reconfigured argument for the first time on appeal: due to chain of custody deficiencies evidenced by documents Ms. Lake contended at trial did not exist, over 30,000 votes were injected into the fray and cost her the election. This Court should not accept review of an argument made for the first time here, especially when the argument is based on a misrepresentation of the record and lacks any evidentiary basis.

Accordingly, for the following reasons, this Court should deny the Petition, decline review, and sanction Ms. Lake and her counsel pursuant to A.R.S. § 12-349 and ARCAP 25 upon Secretary Fontes' compliance with ARCAP 21.

II. BACKGROUND

Ms. Lake asserted several claims in the superior court, but just two made it to trial:

> (1) an official interfered with ballot-on-demand printers, leading to tabulators rejecting misprinted ballots and costing [Ms.] Lake votes, and (2) the Maricopa County Defendants violated chain-of-custody requirements when handling early ballots submitted on election day, permitting some number of ballots to be unlawfully added to the official results.

Lake v. Hobbs, 1 CA-CV 22-0779, 2023 WL 2052341, ___ Ariz. ___, at *1, ¶3

(App. 2023). After hearing two days of testimony and argument, "the superior court found that [Ms.] Lake had failed to prove any element of either claim – including alleged misconduct or an effect on the election results – and confirmed [Ms.] Hobbs' election as governor." *Id*.

The court of appeals affirmed the superior court. *See generally, id*.

III. ISSUES FOR REVIEW

Secretary Fontes has no additional issues for this Court's review should it grant the Petition.

IV. THIS COURT SHOULD DECLINE REVIEW

A. The Burden Of Proof In An Election Contest Is Not In Conflict

Invoking *Parker v. City of Tucson*, 233 Ariz. 422 (App. 2013), Ms. Lake argues that review is necessary because "the evidentiary standard is an open question for election cases – like this – with no express statutory standard or allegations of fraud." Petition ("Pet.") at 9; *see also id*. at 2, ¶1. She claims there is a "dispute" between divisions one and two of the court of appeals that this Court must "referee." Pet. at 9. She is wrong.

Parker involved a signature challenge to an initiative, not an election challenge under A.R.S. § 16-672. *Parker*, 233 Ariz. at 427, ¶5. Even so, Ms. Lake asserts footnote 14 of the *Parker* decision recognizes "the evidentiary standard" in an election challenge "is an open question for elections cases – like this …." Pet. at 9. Ms. Lake's position is either intentionally misleading or willfully ignorant,

because no reading of footnote 14 supports her position.

Footnote 14 states:

> The Employees assert they were only required to demonstrate the circulators' non-residence by a preponderance of the evidence. *Because we determine there was clear and convincing evidence of nonresidence, we do not address this argument*.

Parker, 233 Ariz. at 436, ¶39 n.14 (emphasis added). This footnote does not conceivably signal the conflict or open issue Ms. Lake claims exists. At most, *Parker* noted the *parties in that case* had conflicting positions on the appropriate burden of proof in a *petition* challenge (preponderance of the evidence versus clear and convincing). But the *Parker* court *never* recognized the legitimacy of the parties' differing positions in the initiative context, let alone in the *election challenge* context. Instead, the *Parker* court expressly declined to decide the issue in a petition challenge. *Parker*, 233 Ariz. at 431–32, ¶24 (expressly stating it need not address or decide the appropriate burden of proof in a petition challenge).

There is no split, conflict, or dispute in Arizona case law concerning the hefty burden of proof one asserting an election challenge under A.R.S. § 16-672 must meet. The court of appeals' summary of the law in this regard is worth repeating here:

> [O]ur courts have long noted the general principle that only proof of "the most clear and conclusive character" will overturn an election. *See Oakes*, 5 Ariz. at 398, 53 P. 173; *see also Hunt*), 19 Ariz. at 268, 271, 169 P. 596 (holding that "nothing but the most credible, positive, and unequivocal evidence should be permitted to destroy the credit of official returns," and requiring "clear and satisfactory proof" of the alleged fraud "to overcome the prima facie case made by the returns of an election"); *Buzard v. Griffin*, 89 Ariz. 42, 50, 358 P.2d 155

> (1960) (requiring clear and convincing evidence in a contest alleging fraud); *cf. Griffin*, 86 Ariz. at 173, 342 P.2d 201 (noting that an election contest does not require proof beyond a reasonable doubt as necessary to convict in a criminal action).
>
> A higher burden of proof is consistent with the holdings in those cases. And it is further supported by Arizona's "strong public policy favoring stability and finality of election results," *Donaghey*, 120 Ariz. at 95, 584 P.2d at 559, and by the presumption of "good faith and honesty" of elections officials. *Hunt*, 19 Ariz. at 268, 169 P. 596. We thus agree with the superior court that Lake was required to prove her case by clear and convincing evidence.

Lake, 1 CA-CV 22-0779, 2023 WL 2052341, ___ Ariz. ___, at *2, ¶¶9-10.

There is no legitimate basis upon which to represent to this Court that any part of *Parker* renders the burden of proof in an election challenge under A.R.S. § 16-672 in conflict or questionable. *Parker* declined to address this issue, and existing authority supports a clear and convincing evidence standard. Worse, Ms. Lake fails to confront the case law contradicting her position. Instead, she ignores the actual law and misstates the one case to which she clings. Her attempt to manufacture a conflict worthy of this Court's review lacks justification and serves only to unreasonably expand these proceedings. *See* A.R.S. § 12-349(A)(1), (3) and (F); *see also* ARCAP 25.

B. THIS COURT SHOULD NOT REWEIGH THE EVIDENCE ON APPEAL

In an election case, "this court is not permitted to look behind the finding of the trial court when it is a matter of weighing the evidence or pertaining to the credibility of the witnesses." *Hunt v. Campbell*, 19 Ariz. 254, 266 (1917) (noting, when considering evidence on appeal in an election challenge,"[t]he evidence they

produce, however, when competent and material, is legitimate evidence, and an appellate court will attach to it that weight and that credibility given by the trial court; no more, no less."). But this is precisely what Ms. Lake asks this Court to do.

First, Ms. Lake challenges the court of appeals' "ratif[ication of] Maricopa's disregard of Arizona's COC and L&A testing laws." Pet. at 13. This challenge is necessarily to the superior court's weighing of the evidence at trial, informing the finding that Ms. Lake failed to prove her case. Put differently, Ms. Lake argues that the evidence supports her position and the superior court's assessment of that evidence was wrong.

Second, Ms. Lake asserts that she should have prevailed because the "electoral manipulation" of which she complains is "not susceptible to quantification," she established at trial the results of the election were "uncertain," which she asserts was good enough, and so the election should be overturned. Pet. at 12. But even assuming uncertainty is all that must be proven to undo an election, whether it has been "proven" is a factual inquiry. And as the trier of fact, the superior court weighed the evidence and found that Ms. Lake came nowhere close to showing uncertainty in the outcome of the 2022 general election. *See* Index of Record ("IR") at 178 (Under Advisement Ruling). To conclude otherwise requires this Court to supplant the superior court's role and reweigh the evidence.

Third, Ms. Lake asks this Court to second guess the superior court's weighing of "the sworn testimony of over 200 witnesses and disregarded expert testimony," and conclude, on appeal, that Maricopa County failed to perform mandated logic and accuracy testing. Pet. at 14. Again, this would require the Court to supplant the superior court's role as fact finder, reweigh the evidence, and reassess witness credibility.

C. MS. LAKE'S REWORKED "CHAIN OF CUSTODY" ARGUMENT IS NEW AND MISSTATES THE RECORD

Ms. Lake argues that chain of custody issues in Maricopa County warrant both this Court's review and its scrapping the 2022 general election (at least as to Ms. Lake and the gubernatorial race she lost). Pet. at 13-14. She argues that Maricopa County and its contractor, Runbeck Election Services ("Runbeck"), permitted the "unaccounted-for injection of 35,563 ballots" that, if allowed to stand, "will nullify [chain of custody] requirements and ratify the insertion of illegal votes into elections." Pet. at 14; *see also id*. at 1 (first bullet point), 3 (at #3), 4-6 (section entitled "Chain of Custody").

Ms. Lake states that certain documents she calls "MC Inbound—Receipt of Delivery" reflect "the exact number of [Election Day drop box] ballots received from Maricopa," while other documents she calls the "MC Incoming Scan Receipts" reflect "the number of [Election Day drop box] ballots that it scanned and sent back to MCTEC." Pet. at 5. She asserts that the Receipt of Delivery

forms show 263,379 ballots delivered to Runbeck, and that the Incoming Scan Receipts show 298,942 ballots returned to Maricopa County from Runbeck, for a difference of 35,563 ballots. *Id.* The problems with this argument are manifold.

First, this argument was never developed in the superior court or the court of appeals. For example, in her Complaint, Ms. Lake alleged that chain of custody records for early ballot packets dropped off on Election Day *do not exist*. *See* Lake Appendix at 062, ¶(a); IR 1 (Complaint at ¶112(a)). Now, having lost at trial, Ms. Lake recasts her allegation and asserts that those non-existent records show that over 30 thousand ballots were somehow wrongfully inserted into the results. But the record does not support her conclusion. Her effort to manufacture a record she believes could possibly hand her the Governor's Office and nullify over 1.2 million votes cannot be entertained beyond the time it takes to reject it.

More critically, Ms. Lake fails to identify where in the record this argument has been preserved or developed, or what specific evidence (apart from mischaracterized evidence, as discussed *infra*) truly supports her position. For these reasons, review is unwarranted. *See Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 88 (1990) ("As a general rule, we will not review an issue on appeal that was not argued or factually established in the trial court."); ARCAP 23(d)(2).

Second, Ms. Lake mischaracterizes the "evidence" to bolster her position, which should also preclude review. She cites her Appendix at 732-740 in support

of her argument. Pet. at 5. She claims this is "Trial Ex. 82." Lake Appendix at 002 (#10). But this is not Trial Exhibit 82. This is just a 9 page cherry-picked excerpt of the full 43 pages comprising Trial Exhibit 82. *Compare* Lake Appendix at 732-740 with IR 213 (Trial Exhibit 82). Worse, Ms. Lake mischaracterizes the portion of Trial Exhibit 82 she did provide.

Those pages do not reflect all early ballot packets dropped off at voter centers on Election Day, then delivered to Runbeck after the close of polls. Some of the pages Ms. Lake appended to her petition reflect ballots delivered from the United States Postal Service ("USPS") to Runbeck on Election Day, or retrieved from the USPS *after* Election Day (which are considered late and are not tabulated). *See* Lake Appendix at 732 (early ballot packets the USPS delivered before 7:00 am on Election Day), 739 (packets received late). This discrepancy exists because Receipt of Delivery forms are *not* for ballots received at vote centers on Election Day.

Relatedly, the "Incoming Scan Receipts" do not reflect "ballots that [Runbeck] scanned and sent back to MCTEC." Pet. at 5. Trial testimony establishes that Runbeck and Maricopa County, working after the polls closed, recorded the precise count of early ballot packets and provisional ballots dropped at polling places on Election Day that were sorted at MCTEC and delivered to Runbeck for scanning. *See* Lake Appendix at 645-647 (Dec. 22, 2022 Trial

Transcript ("Tr.") at 198:9-200:24). The ballot packets recorded on those forms reflect early and provisional ballot packets received on Election Day and sent to Runbeck. *Id.*; *see also* Lake Appendix at 741-770 (Trial Exhibit 33). They are not a record of ballots "sent back" to MCTEC. Thus, Ms. Lake's difference calculation between her portion of Trial Exhibit 82 and Trial Exhibit 33 is unsupported by the record.

D. THIS COURT SHOULD SANCTION MS. LAKE AND HER COUNSEL FOR MISREPRESENTING THE RECORD, ATTEMPTING TO MAKE A NEW ARGUMENT ON APPEAL BASED ON THAT MISREPRESENTATION, AND ALLEGING A "DISPUTE" EXISTS AMONG COURT OF APPEALS' DECISIONS WHEN NONE ACTUALLY DOES

Those who invoke our Courts must do so in good faith. We cannot allow a disgruntled vocal minority to weaponize our Courts, sow unfounded distrust in our election processes, malign our public servants, and undermine our democracy – all for the purpose of trying to overturn the People's will and topple an election. Our democracy thrives because, among other things, it demands accountability. And principles of accountability dictate that those who misuse our judicial system to bring claims without substantial justification or for an improper purpose, or to cause delay or harass others, must be held accountable. *See* A.R.S. § 12-349; *see also* ARCAP 25.

Ms. Lake and her counsel continue to push false claims of election fraud, now on appeal going so far as to misrepresent the record and the law. This justifies

the imposition of sanctions, or some kind of admonishment, so others will not follow suit. Indeed, this Court is the last opportunity for our judiciary to remind those who seek its recourse that they must do so with integrity. If this Court sits silent in the face of what has occurred, then those who would due our union harm will continue to malign and erode the foundations upon which our great state stands. And if the People's faith in those foundations crumble, so goes all we have worked so hard to build and maintain. We cannot let this happen.

1. ARIZONA RULE OF CIVIL APPELLATE PROCEDURE 25

"An appellate court may impose sanctions on an attorney or a party if it determines that an appeal … is frivolous, or was filed solely for the purpose of delay" or "for a violation of" the rules of civil appellate procedure. ARCAP 25. The sanctions imposed should be "appropriate in the circumstances of the case, and to discourage similar conduct in the future." *Id.* "Sanctions may include contempt … or withholding or imposing costs or attorneys' fees." *Id.*

This Court uses an objective test for determining whether an appeal is so frivolous as to violate ARCAP 25. *See Matter of Levine*, 174 Ariz. 146, 153 (1993), reinstatement granted, 176 Ariz. 535 (1993). "[I]f the issues raised are supportable by any reasonable legal theory, or if a colorable legal argument is presented about which reasonable attorneys could differ, the argument is not objectively frivolous." *Id.*

It is important to remember that "frivolous appeals waste the time and energy of the opposing parties and the resources of this court," and even if an appeal was not brought for an improper purpose, it can be "nonetheless frivolous for its failure to raise any reasonable issue regarding a meritorious claim." *Johnson v. Brimlow*, 164 Ariz. 218, 222 (App. 1990) (awarding sanctions and noting an "attorney has a specific duty to avoid claims for which there is no justification. E.R. 3.1, and comment, Rule 42, Supreme Court Rules.").

2. A.R.S. § 12-349

In Arizona, "in any civil action commenced … in a court of record in this state, the court *shall* assess reasonable attorney fees, expenses and, at the court's discretion, double damages of not to exceed five thousand dollars against an attorney or party … if the attorney or party," among other things, "[b]rings or defends a claim without substantial justification," "[b]rings or defends a claim solely or primarily for delay or harassment," or "[u]nreasonably expands or delays the proceeding." A.R.S. § 12-349(A)(1)-(3) (emphasis added). The phrase "'without substantial justification' means that the claim … is groundless and is not made in good faith." A.R.S. § 12-349(F). In this regard, "[w]hile groundlessness is determined objectively, bad faith is a subjective determination." *Takieh v. O'Meara*, 252 Ariz. 51, 61, ¶ 37 (App. 2021), review denied (Apr. 7, 2022).

An award under A.R.S. § 12-349 is mandatory where factually supported, and a violation need only be proven by a preponderance of the evidence. *See Democratic Party v. Ford*, 228 Ariz. 545, 548 ¶10 (App. 2012) (stating if party makes showing required by A.R.S. § 12-349, "the award of attorney fees becomes mandatory"); *City of Casa Grande v. Ariz. Water Co*., 199 Ariz. 547, 555 ¶27 (App. 2001) (noting A.R.S. § 12-349(A) "mandates an award of attorney's fees if a party" violates the statute by a preponderance of the evidence). And when awarding attorneys' fees under § 12-349, the Court must set forth the specific reasons for the award. *See* A.R.S. § 12-350. In doing so, the Court can consider any variety of factors, including those listed in A.R.S. § 12-350. *See id*.

3. SANCTIONS HERE ARE WARRANTED

The court of appeals does not have conflicting decisions concerning the burden of proof for sustaining an election challenge pursuant to A.R.S. § 16-672. At most, Arizona's appellate courts may not have expressly stated "clear and convincing" is the standard in all election cases, but that is nonetheless the correct standard in an election challenge pursuant to A.R.S. § 16-672 based on existing precedent. Ms. Lake and her counsel fail to meaningfully confront, let alone overcome, this precedent. And the lone case she invokes in support of her position comes nowhere near close to recognizing a conflict in authority, and no reasonable lawyer would have characterized that case as she and her counsel did here. This

position is not even debatable.

Likewise, Ms. Lake and her counsel advance an all new argument on appeal which hinges on a mischaracterization of the record. Either this was done intentionally or out of ignorance. Neither is excusable, and reasonable lawyers would not have advanced such an argument given the record and the well-settled law stating new arguments *cannot* be raised for the first time on appeal.

In both instances, Ms. Lake and her counsel had all the facts and law necessary to ascertain the validity of these positions. And both would have convinced any reasonable lawyer that the arguments advanced are unjustified, unreasonably expand this action, and delay its timely adjudication. Were this a close call, sanctions would not be warranted. But this is not a close call. It is not even debatable.

V. CONCLUSION

Secretary Fontes requests this Court deny the Petition, decline review, and sanction Ms. Lake and her counsel.

RESPECTFULLY SUBMITTED: March 13, 2023.

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