No. _____

In the Arizona Court of Appeals
Division One

KARI LAKE,
Plaintiff-Contestant/Appellant,

v.

KATIE HOBBS, PERSONALLY AS CONTESTEE AND IN HER OFFICIAL CAPACITY AS THE SECRETARY OF STATE,
Defendant-Contestee /Appellee,

and

STEPHEN RICHER IN HIS OFFICIAL CAPACITY AS MARICOPA COUNTY RECORDER, *ET AL.*,
Defendants/Appellees.

ON APPEAL FROM ARIZONA SUPERIOR COURT,
MARICOPA COUNTY, ACTION NO. CV2022-095403,
HON. HON. PETER THOMPSON

PETITION FOR SPECIAL ACTION

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INTRODUCTION

The margin between Kari Lake and Secretary of State Katie Hobbs in the Arizona gubernatorial race is approximately 0.67% (17,117 votes out of about 2,559,485 votes cast). The number of votes affected by the clear and massive violations of law and maladministration by Maricopa County officials described below, at a minimum, render the outcome of the Arizona gubernatorial contest uncertain. The election in Maricopa County must be set aside. A.R.S. §16-676(B).

The 2022 general election in Maricopa County ("Maricopa") was a debacle. But the evidence shows something far worse: The chaos on November 8, 2022 ("Election Day"), a day when Republican turnout was widely predicted to be historic, was no accident. On Election Day, thousands of Republican voters were disenfranchised as a result of Maricopa election officials' misconduct in connection with the widespread tabulator rejections of defective ballots printed by ballot on demand ("BOD") printers. These failures occurred at 132 of the 223 vote centers in Maricopa—over 59 percent of all vote centers in the County.

The sheer breadth of these failures, which Maricopa officials continue to downplay as routine "hiccups", is as astounding as it is improbable. These widespread failures were not unforeseen mechanical failures—the printer and tabulator failures arose out of deliberate acts. Maricopa's only response to the widespread chaos has been to gaslight the public—and the trial court—by claiming

nothing unusual happened. Maricopa's disingenuous response is a slap in the face to the thousands of voters who were compelled to endure the chaos caused by Maricopa officials or disenfranchised of their right to vote as a direct consequence of the chaos that day.

The evidence put forward in this case, including the changing and conflicting testimony of Maricopa officials, and sworn testimony by whistleblowers employed by Maricopa and Runbeck Election Services proved that Maricopa officials: (1) caused the chaos arising at nearly two thirds of Maricopa's 223 vote centers where BOD printer failures occurred and where illegally misconfigured ballots were injected into the election, causing tabulators to reject tens of thousands of ballots; (2) violated A.R.S. §16-621(E)'s chain-of-custody ("CoC") requirements with respect nearly 300,000 Election Day drop box ("EDDB") ballots, including the inexplicable injection of over 25,000 ballots between November 9 and November 10; and (3) counted tens of thousands of ballots with voters' signatures which clearly did not match the record signature and were not properly cured in the 2022 general election in violation of A.R.S. §16-550.

Notwithstanding the damning evidence presented by Plaintiff, the trial court ruled that Plaintiff needed to prove by clear and convincing evidence that Secretary of State Hobbs and Maricopa officials intentionally acted to, and did in fact, change the outcome of the 2022 general election. That is not the correct standard. Rather,

Findley v. Sorenson, 35 Ariz. 265 (1929), and its progeny require election challengers to show by a preponderance of the evidence that misconduct or illegal votes render the outcome of the election at least "uncertain." Plaintiff easily met that standard. This Court should reverse the trial court and grant the injunctive relief of *vacatur* of the election certification and order a new election, as requested in Plaintiff's Verified Complaint. Appx:68.

STATEMENT OF JURISDICTION

Plaintiff's petition for special action relief is warranted because she has "no equally plain, speedy and adequate remedy by appeal." *See* Rule 8(a), Ariz. Spec. Act. R.P. An election contest is a classic example of a case that is ripe for Special Action Review. The rival candidates—and all Arizonans—deserve election finality as quickly as possible. This matter is ill-suited to a regular appeal.

The election-contest statute sets strict timelines for the institution and resolution of these types of cases at the trial level. The initial cause of action must be—and was—filed within five days of the canvass, then the trial court needed to—and did—render a decision within tight statutory deadlines. A.R.S. §§16-672(A); 16-676(A)-(B). For some election challenges, accelerated statutory appellate timelines apply, but not here. Respondent Hobbs would assume the governorship early next week, notwithstanding the significant and important legal errors underpinning the trial court's decision dismissing all but two claims as a matter of law and deciding

the remaining two claims under a legally defective standard of review.

This case is further appropriate for review by special action because the denial of relief on all counts that Plaintiff seeks to review was premised on pure questions of law. *See Sierra Tucson, Inc. v. Lee ex rel. County of Pima*, 230 Ariz. 255 (App. 2012) (motion to dismiss); *Mendez v. Robertson*, 202 Ariz. 128, 129, ¶¶1-3 (App. 2002) (standard of review). Further, the case turns on applying state statutory and constitutional provisions on voting. *See, e.g., Nordstrom v. Cruikshank*, 213 Ariz. 434, 438 (App. 2006) (interpretation and application of statutes raise questions of law, well-suited for special-action review); *Dobson v. State ex rel., Comm'n on App. Ct. Appointments*, 233 Ariz. 119, 121 ¶7 (2013) (special action jurisdiction appropriate to address constitutional interpretation); *Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, 249 Ariz. 396, 404-05 (2020) (electoral calendar's exigencies contribute to need for special review). Finally, because this special action involves a state statutory scheme, it is a matter of statewide—not merely local—importance that favors special action review. *Yuma Cnty. v. Keddie*, 132 Ariz. 552, 553 (1982).[1]

[1] Alternatively, for the reasons set forth in this section, Lake requests that this Court treat this petition as her appellant's opening brief in No. 1 CA-CV 22-0779 and expedite that appeal pursuant to RPSA 8(a) ("the court in which the appeal is pending may waive or order an acceleration of any or all appeal procedures."). In this event, Lake requests that an accelerated briefing schedule be set, that the Court

STATEMENT OF THE CASE

Plaintiff filed a timely Complaint in Special Action and Verified Statement of Election Contest Pursuant to A.R.S. §16-672 (the "Complaint") on December 9, 2022 in Maricopa's superior court. The Complaint pled violations of A.R.S. §16-672(A)(1), (4)-(5) and several related state and federal constitutional claims.

Defendants filed motions to dismiss, and the court issued an Under Advisement Ruling on December 19, 2022, granting Defendants' motions to dismiss all but Counts II (Illegal Tabulator Configuration) and IV (Invalid Chain of Custody). On December 21-22, the court held a bench trial at which evidence and fact and expert testimony was taken on Counts II and IV. On December 24, the court issued its Under Advisement Ruling and dismissed Plaintiff's claims in Counts II and IV. Appx:682. The court described its findings relating to the testimony of Plaintiff's witnesses finding that none had satisfied the court as to show Defendants' "intentional misconduct" by "clear and convincing evidence." Appx:684-90.

On December 27, 2022, the court entered final judgment in accordance with Rule 54(c). Appx:692. The December 27, 2022 Ruling is a final appealable order that disposes of all of the issues presented in the case. A.R.S. §12-2101(A)(1).

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dispense with the requirement that the record on appeal have been transmitted prior to the filing of this Opening Brief and decide the case as expeditiously as possible.

STATEMENT OF FACTS

Because the court granted a motion to dismiss Counts III, V, and VI, this Court must accept all well pled factual allegations made by the Plaintiff as true when evaluating those counts. *Petolicchio v. Santa Cruz County Fair and Rodeo Ass'n, Inc.*, 177 Ariz. 256, 258 (1994). For the bench trial on Counts II and IV, this Court reviews factual determinations based on the trial-court record.

A. Voting in Maricopa

Maricopa is the fourth largest county in the United States. Approximately 60% of the 2,592,313 votes cast in the 2022 Arizona general election came from Maricopa. Of that figure, Maricopa reported that approximately 248,000 votes were cast on Election Day, by in-person votes at one of Maricopa's 223 vote centers. Maricopa reported that more than 1.3 million early ballots were returned via drop box or U.S. Mail. ¶36

According to Maricopa's published figures, Lake received 752,714 votes in Maricopa, while Hobbs received 790,352 votes there. That 37,638-vote margin is larger than the 17,177-vote margin dividing the candidates statewide. ¶37.

B. Election Day Chaos Caused by Tabulators at Nearly Two Thirds of Maricopa's Vote Centers Rejecting Ballots From BOD Printers

Mark Sonnenklar and Bradley Bettencourt testified at trial regarding their observations of the Election Day chaos caused by malfunctioning BOD printers resulting tabulator rejections of ballots at 132 of 223 vote centers. These issues began

almost immediately on Election Day with the County receiving complaints starting at 6:20 am. Appx:585 (Day 2 Tr: 184:09-25) (Jarrett).

Mark Sonnenklar was a roving attorney in the Republican National Committee's Election Integrity Program for the 2022 Primary and the General Election in Maricopa. Appx:359-60 (Day 1 Tr. 262:24-263:01) (Sonnenklar). The roving attorneys' function was to visit Maricopa's vote centers and observe the voting process on Election Day and ensure local officials were complying with election law. Appx:360-61 (*id.*, 263:02-264:19).

Sonnenklar personally visited ten vote centers on Election Day. He testified about his observations on Election Day as follows:

> Q. And what was your experience what you personally saw at those ten vote centers?
>
> A. Well, it was really pandemonium out there everywhere. … I started out in Fountain Hills and immediately, I mean, there was a line-- there was a line of 150 people at Fountain Hills. The tabulators were not working, and that was what I saw at, you know, I saw the same thing happening at six of my ten vote centers. There were different things happening at some of the other ones too, but six of them in particular were really bad.

Appx:362-63 (*id*., 265:13-266:04).

Sonnenklar also testified that what he observed "was a completely different animal" than what he had seen in any other election with "lines out the door" and "angry and frustrated voters who did not want to put their ballots in the Box 3 [where

ballots rejected by tabulators were placed to be counted later]. … Everyone was just freaked out". Appx:363 (*id*., 266:08-25). Sonnenklar created a written report based on interviews of eleven other roving attorneys who in total visited 115 out of the 223 Maricopa vote centers on Election Day. Appx:361-64 (*id*., 264:20-267:25). These roving attorneys had similar observations of chaos on Election Day as he did. Appx:365 (*id.*, 268:01-10). Sonnenklar also oversaw the creation of a chart admitted into evidence at trial as Exhibit 53 (based on 219 sworn declarations from Inspectors, judges, clerks, poll workers, and voters also admitted into evidence), showing that the ballot tabulators and ballot printers experienced rampant breakdowns at no less than 132 out of the total 223 Maricopa vote centers (59.2%). Appx:105 (Day 1 Tr., 8:09-23).

When asked "if somebody were to characterize the events of that day as minor technical difficulties that should be expected in any election, what would you say to that?" Sonnenklar replied:

> I would say that's nonsense. When you have 132 -- we've been able to document that there were at least 132 vote centers with tabulator problems out of 227, which comes out to about 59 percent. I don't see how that could be characterized as a small matter.

Appx:365 (*id*., 268:11-18).

Brad Bettencourt a "T-Tech" hired by Maricopa for the 2022 general election to set up vote centers and assist with problems during Election Day testified

similarly. Appx:345-46 (Day 1 Tr., 248:06-249:09) (Bettencourt). Bettencourt was one of a group of 15 T-Techs in group text chat set up by his supervisor, a full time Maricopa employee, who covered a "bare minimum" of 20 to 30 vote centers on Election Day. Appx:346-47 (*id*., 249:07-250:17). Bettencourt's contemporaneous group text chats also T-Techs describing tabulator rejections of ballots as causing massive lines and chaos on Election Day. Appx:715-24.

In contrast to the Election Day chaos described above, Maricopa officials downplayed the events that day at trial. Jarrett characterized the events on Election Day as simply "some printers that were not printing some tiny marks on our ballots dark enough to be read in by our tabulation equipment" and that was not a "disruption." Jarrett's testimony cannot be reconciled with of the testimony of over 200 witnesses with first-hand knowledge directly to the contrary. Appx:161 (Day 1 Tr., 64:12-21) (Jarrett).

1. Maricopa Co-Director of Elections' Conflicting Testimony Regarding Deliberately Misconfigured BOD Ballots Injected Into The Election on Election Day

In the 2022 general election, illegally misconfigured 19 inch ballot images were printed on 20 inch ballot paper by ballot on demand printers installed at Maricopa vote centers. Thousands of these misconfigured ballots could not be read by the tabulators at the vote centers because the tabulators are programed to read a precisely pre-configured ballot to allow the tabulator to know exactly which filled

in oval corresponds to a particular vote. These tabulator rejections of ballots were a direct cause the Election Day chaos described above.

Specifically, on the first day at trial, Plaintiff called Jarrett testify. Jarrett testified that Maricopa's tabulators were configured to only read a 20 inch ballot image in the 2022 general election. Appx:148-51 (*id*., 51:13- 54:1-8). Any other sized ballot image could not be read by a tabulator and would be rejected. Appx:152 (*id*., 55:2-10). Jarrett testified ***at least four times*** that he did not know of, nor did he hear of, a 19 inch ballot image projected onto 20 inch paper in the 2022 general election. Jarrett testified as follows:

> Q. Sir, I want to go back to the earlier question about the 19-inch ballot image being placed on a 20-inch paper. Did you hear of any reports of that occurring in the 2022 General Election?
>
> A. I did not.
>
> Q. Okay. If that occurred, would that be a failure of Maricopa County's election process?
>
> A. ***I'm not aware of it occurring, and I'd be surprised if there was a ballot on a printer that had a 19-inch ballot on it.***
>
> * * *
>
> Q. And so I'll go back to my question again. If a 19-inch ballot image was put on a 20-inch paper in the 2022 General Election, would that be a failure of your election process?

> A. It would -- if something like that happened, which I don't know how it would, yes, it would have been a mistake.
>
> Q. Could that have also been a deliberate act?
>
> A. Again, you're asking me to speculate about things that ***I have no knowledge of occurring, so I don't know if it could have been a deliberate act or not***. I don't believe that that occurred.

Appx:165-67 (Day 1 Tr., 68:24-69:09, 70:02-13) (emphasis added).[2] Jarrett also admitted that extensive logic and accuracy testing is performed to ensure the tabulators can properly read all ballots, including BOD printed ballots, on Election Day. Appx:152 (*id.*, 50:22-53:10).

Immediately following Jarrett's testimony above, Plaintiff's cyber expert, Clay Parikh, took the witness stand. Parikh is a qualified cyber expert, including with respect to electronic voting machine equipment. The same voting systems testing lab that certified Maricopa's voting systems had retained Parikh for nine years to certify voting systems. Parikh has worked on and analyzed cyber related system failures at the highest levels of the U.S. Government, including classified matters. Appx:178-86 (Tr. 81:19-89:10).

Parikh testified that the day before trial, he had inspected a sampling of ballots

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[2] Appx:152 (*id*., 55:09-10) ("there was no 19-inch ballot images installed on ballot on-demand printers."), 174 (*id*., 77:14-24) ("Your first question [how a 19 inch ballot could be printed on 20 inch paper] asks if I have any idea how it could occur ***and I said I do not***.").

from six Maricopa vote centers pursuant to A.R.S. §16-677. Appx:187 (Tr., 90:15-20). In direct contradiction to Jarrett's sworn testimony above, Parikh testified how he found 19 inch ballot images printed on 20 inch paper ***at all six vote centers*** from which he inspected ballots; and that the 19 inch ballot issue affected 48 of 113 of the combined spoiled[3] and duplicated original ballots[4] he had inspected (42% of spoiled and duplicated original ballots), and 14 of 15 of the duplicated original ballots he inspected (93% of duplicated original ballots). Appx:188-95 (Tr., 91:08-98:06) (Parikh). According to Maricopa, nearly 17,000 ballots were rejected by tabulators but left by voters to be counted later. Appx:709. This figure does not include spoiled ballots. Moreover, Parikh testified that Maricopa did not maintain the duplicates of the original ballots he inspected as is required by law. Thus, he could not confirm the duplicate ballot matched the original ballot he inspected. Appx:189-90 (Tr., 92:14-93:21).

Parikh testified that the printing of a 19 inch ballot image on 20 inch paper could only happen two ways: either the printer settings were set to override the ballot

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[3] "Spoiled" ballots are ballots that a voter returns back to an election judge in return for a new ballot and are not counted. A.R.S. § 16-585.

[4] "Duplicated" ballots are original ballots that are damaged or cannot be processed by the tabulator thereby requiring a separate duplicate ballot be created to be counted by the tabulator. The original ballot must be duplicated with witnesses present and both the original and duplicate must be labeled with the same serial number. A.R.S. § 16-621(A).

definition programmed into the voting system, or two different ballot images were illegally programmed into the voting system Appx: 196-99 (Parikh 99:13-102:06). Either way, a 19 inch ballot image projected on 20 inch ballot paper would be rejected by any tabulator. Appx:199-200 (Tr., 102:11-103:20) (Parikh). Parikh also testified that this misconfiguration could only be done by a deliberate act. Appx:197-98 (Tr., 100:17-101:05).

Defendants called Jarrett back to the stand the next day. Jarrett directly contradicted his testimony from the previous day. Specifically, Jarrett changed his prior testimony and testified that: just after Election Day, Maricopa discovered that 19 inch ballots were found in three vote centers purportedly caused by certain onsite technicians changing BOD printer settings to a "shrink to fit" setting; and that Maricopa was performing a root cause analysis of this issue, and that "temporary technicians" had caused this issue. Appx:579-82 (Day 2 Tr., 178:23-181:17).

On cross-examination, Plaintiff's counsel asked Jarrett was asked why he had not disclosed the new "shrink to fit" setting excuse when he testified the day before that 19 inch misconfigured ballot images on 20 inch ballot paper never happened. Jarrett became evasive claiming he did not "know the exact measurements of a fit to -- fit-to-paper printing", that "he wasn't asked" about "a slightly smaller image of a 20-inch image on a 20-inch paper ballot—despite the fact that 19 inches is clearly "smaller" than 20 inches. Appx:607-10 (*id.*, 206:20-207:25, 208:08-209:07).

Jarrett also admitted that Maricopa had not disclosed this issue to the public, nor is this issue discussed in Maricopa's November 26, 2022 written response to the Arizona Attorney General's inquiry into the Election-Day chaos. Appx:614 (*id*., 213:06-16); Appx:696-705. Incredibly, despite denying four times the prior day that a smaller ballot image such as a 19 inch ballot could ever be imposed on larger ballot paper such as a 20 inch ballot, Jarrett also testified that the "fit-to-print" issue also "happened in August 2020 Primary Election, the November 2020 General Election, and the August 2022 Primary Election" in an apparent attempt to show that such ballot misconfigurations are nothing more than a "Election day hiccup" (Appx:618 (*id*., 217:06-19)).

Nonetheless, Jarrett still could not explain the existence of 19 inch ballot images on 20 inch paper found by Parikh ***at all six vote centers*** he inspected as opposed to the three vote centers identified by Maricopa's purported root cause analysis.

2. Plaintiff's Survey Expert Concluded Voter Turnout Was Materially Suppressed By The Election Day Chaos Changing the Outcome of the Election In Hobbs' Favor

Richard D. Baris is an expert in conducting, analyzing, and interpreting surveys and polls for political campaigns, election officials, and news organizations. Appx:422-24, 487, 511 (Tr., 21:21-22:02; 22:19-25; 23:3-12; 86:20-22; 110:12-16) (Baris). The bipartisan Election Recon evaluated his work number two out of more

than 200 pollsters in terms of its accuracy rate and bias. Appx:507 (*id.*, 106:2-24). In the six years since his firm began releasing public election polling on a steady basis, it has never failed to accurately predict the winner, within the sampling error rate. Appx:431 (*id.*, 30:19-20).

Baris performed an exit poll in Arizona on Election Day using a statistically significant sample of likely voters, which he adjusted on Election Day to reflect the chaos. Appx:432-33 (*id.*, 31:12-32:19; 57:18-24). Based on his analysis, Baris testified that—but for the chaos—sufficient numbers of additional voters would have voted—disproportionately supporting Lake over Hobbs—such that the election's margin would have conservatively changed from the 17,117-vote margin for Hobbs to a result within the range of a 2,000-vote margin for Hobbs and a 4,000-vote margin for Lake. Appx:688; Appx:440-43, 481-8 2 (*id.*, 39:12-24, 40:20-42:07, 80:2-10, 81:21-82:13).

C. Maricopa Violated Chain of Custody

Arizona law requires the County Recorder to implement secure drop box ballot-retrieval and CoC procedures. Arizona's Election Procedures Manual ("EPM") requires that when a ballot-transport container is opened, the "number of ballots inside the container shall be counted and noted on the retrieval form." Appx:699 (subsection I.7.h). This is a requirement for all retrievals including Election Day drop box ("EDDB") ballots. The EPM requires EDDB ballots to be

counted and recorded at the time of retrieval on Election Day "unless ballots are transported in a secure and sealed transport container to the central counting place to be counted there." Appx:704 (subsection B.2.g). Thus, the counting of EDDB ballots can be deferred only until containers arrive at the central counting place, MCTEC.

Absent valid, legally required CoC that there are multiple opportunities for insertion, removal, or substitution of ballots. Appx:272 (Tr., 175:7-14) (Honey). Unrebutted evidence showed that Runbeck allowed employees to insert ballots into the system. Appx:296 (Tr., 199:9-13) (Honey); Appx:75-78 (Marie Declaration). Richer's failure to maintain CoC makes it impossible to know how many ballots were injected into the system. Appx:331-32 (*id*., 234:22-235:1).

Specifically, all ballots must be received by 7:00PM on Election Day. A.R.S. §16-547. According to CoC requirements, Maricopa should have an exact count of ballots immediately afterwards before transferring ballots to Runbeck. However, Recorder Richer testified that on Election Day, EDDB ballots are not counted at MCTEC, and instead are counted at Runbeck because there are too many ballots. Appx:116 (Tr., 19:14-21) (Richer); Appx:569 (Tr., 168:2-11) (Valenzuela) (testifying EDDB ballots are counted at Runbeck, not MCTEC). Richer's testimony is also consistent with the observations of a Republican observer at MCTEC who testified that on Election Day bins of ballots were delivered to MCTEC, ballots were

separated from the bins and were not counted. Appx:72-73 (White Declaration, ¶¶12-21).

However, Runbeck, an external vendor, is not central counting, a designation reserved for MCTEC where central tabulation occurs. Co-Director of Elections Valenzuela also testified that no County employees operate Runbeck's equipment. Appx:563-64 (Tr., 162:25-163:02). The moment uncounted ballots were transferred from Maricopa to Runbeck, the ballots leave Maricopa's possession, breaking CoC in violation of A.R.S. §16-621(E).

Richer also contradicted his prior testimony above to state that EDDB ballots were counted at MCTEC prior to transferring them to Runbeck. Appx:118 (Day 1, Tr., 21:17-20). Richer testified that CoC forms were created at MCTEC prior to the transfer and that his office produced those forms in response to Public Records Requests. Appx:125 (Day 1, Tr. 28:7-24). Richer's statement was false. No documents for EDDB ballot retrieval counts exist. Appx:138 (Tr., 41:06-10) (Richer).

In fact, Richer had to estimate the count of EDDB ballots on November 9, which he estimated to be 270,000. Appx:126 (Tr., 29: 6-16). If counts of EDDB ballots been done the previous day, no estimates would be necessary on November 9 as the precise count would have been known. Richer testified that all EDDB ballots had been transferred to Runbeck by 5AM on November 9 but during an afternoon

press conference on November 9, Richer reported 275,000 EDDB ballots were received. Appx:138-39 (Tr., 41:12-42:21).

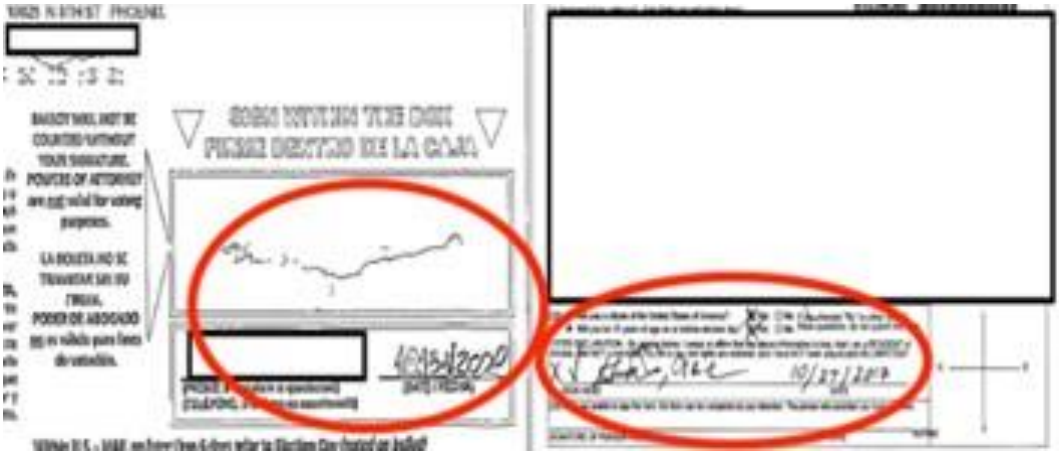
County officials did not count EDDB ballots and did not create any documents to record the number of ballots transferred to Runbeck. Appx:75-78 (Marie Declaration) (testifying that no CoC forms were received from MCTEC for EDDB ballots). On November 9, at 5:30PM, Maricopa officials called to ask for a count of EDDB ballots scanned at Runbeck. Ex. 46. The Runbeck whistleblower reported back with 298,942, an increase of nearly 25,000 EDDB ballots that Maricopa cannot account for. Appx:318-19 (Tr., 221:24-222:20) (Honey). Further, after this call to Runbeck, the number of total ballots reported by Maricopa to the Secretary of State increased from 1,544,513 to 1,569,603, an increase of 25,090 ballots. Compl. ¶119 (Appx:51).

In addition, Richer stated in an email to the County Board of Supervisors on November 10, 2022, at 2:13p.m. that he is "unable to currently reconcile SOS listing with our estimates from yesterday…. So there's a 15,000 difference somewhere." Appx:306-07 (Tr., 209:19-210:05) (Honey). Additional evidence demonstrating that Maricopa failed to maintain CoC is the fact Maricopa has not been able to produce Delivery Receipts documenting the transfer of EDDB ballots to Runbeck on Election Day. Appx:276-77, 280 (Tr., 179:01-180:16, 183:1-5) (Honey).

D. Maricopa Violated Signature-Verification Requirements and Accepted Illegal Ballots with Signature Mismatches

Absentee ballots are "the largest source of potential voter fraud." BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005). Compl. ¶12 (Appx:5). In a report dated April 6, 2022, on "election failures and potential misconduct that occurred in 2020," Arizona's Attorney General Brnovich found that "the early ballot affidavit signature verification system in Arizona, and particularly when applied to Maricopa, may be insufficient to guard against abuse," stating that "[r]equiring a match between the signature on the ballot affidavit and the signature on file with the State is currently ***the most important election integrity measure when it comes to early ballots.***" *Id.* ¶46 (Appx:15). Indeed, "Maricopa County's elections suffered from outcome-determinative number of illegal votes from mail-in ballots in 2020 and 2022." *Id.* ¶152 (citing Busch and Parikh declarations) (Appx:61).

In a 2022 signature review of absentee ballots from the 2020 general election in conjunction with the Arizona Senate's review, approximately 16.3% of absentee ballots had disqualifying signature mismatches, with 7.82% (18,022/230,339) "egregious mismatches" and another 8.52% (19,631/230,339) likely mismatches. *Id.* ¶51 (Appx:16). The complaint included an exhibit of a sampling of over 5000 egregious mismatches such as the example below:



Id., 5 (Appx:6). Notwithstanding the 37,653 mismatched signatures in 230,339 sample ballots (12.12% of total ballots), Maricopa rejected only 587 total ballots in 2020. *Id.* ¶52 (citing Attorney General's report) (Appx:16).

In the 2022 general election, over 1.3 million ballots were cast through the mail-in vote or placed in drop boxes in Maricopa. Plaintiff submitted sworn declarations of three signature verification workers employed in Maricopa's signature verification and signature curing process during the 2022 general election. Those three whistleblowers testified that 15-40 percent of the 2022 ballots had disqualifying signature mismatches. *Id.* ¶54 (Appx:17-18). Further, "Maricopa County Recorder … accepted a material number" of "early ballots for processing and tabulation" notwithstanding that the "affidavit signature … did not match the signature in the putative voter's 'registration record.'" *Id.* ¶151 (Appx:61). Specifically, Maricopa pushed through ballots previously rejected for signature mismatches (*e.g.*, by cycling the same ballots back through the signature-verification

process) without contacting the voters, as the EPM requires. Compl. ¶59 (Appx:19).

STATEMENT OF ISSUES

1. Whether the trial court erred in requiring plaintiff to show by clear and convincing evidence that defendants intended their conduct to alter the election result and that, factually, the conduct did alter the result.
2. Did the trial court err in concluding that Plaintiff's expert opining as to the number of voters disenfranchised by the chaos on Election Day had to show Plaintiff would have won the election but for the misconduct as opposed the outcome of the election being "uncertain" in accordance with *Findley v. Sorenson*, 35 Ariz. 265 (1929).
3. Whether the trial court erred in failing to consider claims of "illegal votes" under A.R.S. §16-672(A)(4) pled in the Complaint at Counts II and IV.
4. Whether the trial court erred in dismissing Count III—which challenged conduct on Election Day and beyond—on laches.
5. Whether the trial court erred in finding Counts V and VI either merely cumulative or, alternatively, outside the election-contest statute.

STANDARD OF REVIEW

"Dismissal of a complaint under Rule 12(b)(6) is reviewed de novo," *Coleman v. City of Mesa*, 230 Ariz. 352, 355, ¶7 (2012), with "all well-pleaded material allegations of the [complaint] … taken as true." *Young v. Bishop*, 88 Ariz. 140, 143

(1960). "Dismissal is appropriate under Rule 12(b)(6) only if as a matter of law plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof." *City of Mesa*, 230 Ariz. at 356, ¶8. This standard applies to election contests, *Griffin v. Buzard*, 86 Ariz. 166, 169-70 (1959), so that dismissal "should never be granted unless the relief sought could not be sustained under any possible theory." *Id.*

Appellate courts review all legal questions *de novo*. *Fitzgerald v. Myers*, 243 Ariz. 84, 88 ¶8 (2017). Following a bench trial, appellate courts defer to the trial court's factual findings unless clearly erroneous, *Ariz. Bd. of Regents v. Phx. Newspapers*, 167 Ariz. 254, 257 (1991), but that "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." *Id.* (internal quotation marks omitted).

ARGUMENT

I. THE TRIAL COURT ERRED ON THE MERITS WITH RESPECT TO TABULATOR CONFIGURATIONS (COUNT II) AND THE CHAIN OF CUSTODY (COUNT IV).

The trial court found Counts II and IV to state a claim, Appx:96, but withheld relief on the merits. Appx:695.

A. The trial court applied an incorrect standard of review.

As discussed in the following three sections, the trial court's standard of review erred in three respects requiring: clear-and-convincing evidence; defendants'

intent that their misconduct alter the election result; and lastly that the violations did, in fact, alter the result. Appx:684. These compounded errors infected the court's rulings. For example, the trial court improperly rejected expert testimony that the Election-Day chaos depressed turnout that would have swung the result from a 17,117-vote Hobbs victory to somewhere between a 2,000-vote Hobbs victory and a 4,000-vote Lake victory as not *clearly and convincingly* showing an *outcome-changing* effect. Appx:688-89.

Plaintiff showed by a *preponderance of the evidence* that the misconduct rendering the outcome *uncertain* under *Findley*, 35 Ariz. at 269. The trial court's discomfort with ranges is unsustainable, given that courts dealing with statistics necessary consider intervals, *see, e.g.*, *State v. Escalante-Orozco*, 241 Ariz. 254, 290-91, ¶¶151-152 (2017); *State v. Johnson*, 186 Ariz. 329, 333-34 (1996), including in election cases. *Moore v. City of Page*, 148 Ariz. 151, 159 (App. Ct. 1986) (discussing registration estimates based on census data and population projections).

1. The trial court's "clear and convincing" standard does not apply to all election-contest issues.

Although "the usual rule [is] that a plaintiff must establish each element of a civil action by a preponderance of the evidence," *Aileen H. Char Life Interest v. Maricopa Cty.*, 208 Ariz. 286, 291 (2004), the trial court cited *Oakes v. Finlay*, 5 Ariz. 390, 398 (1898), and *McClung v. Bennett*, 225 Ariz. 154, 156, ¶7 (2010), for the proposition that the clear-and-convincing standard applies to all aspects of an

election contest. Appx:684. While this Court has indeed applied that standard to *some* aspects of election litigation, *see, e.g.*, *Buzard v. Griffin*, 89 Ariz. 42, 50 (1960) ("Fraud must be established by clear and convincing evidence."); *Jenkins v. Hale*, 218 Ariz. 561, 563 (2008) (requiring clear and convincing evidence to strike signatures from nomination petitions as not being qualified electors), this Court has never held that the clear-and-convincing standard applies to *all* election-contest issues.

At the outset, having that standard automatically apply to all election-contest issues would undermine the holdings that the standard applies in specific contexts. Certainly, *Oakes* cannot control because that common-law decision from Arizona's territorial days is simply inapposite: "[E]lection contests are purely statutory, unknown to the common law, and are neither actions at law nor suits in equity, but are special proceedings." *Griffin v. Buzard*, 86 Ariz. 166, 168 (1959). Similarly, the cited portion of *McClung v. Bennett* is dicta: "Apart from the due process concerns, we would deny McClung's appeal for two additional reasons," 225 Ariz. at 157, based on the inapposite decision in *Jenkins*, *supra*. Arizona courts generally impose a "clear and convincing" standard when specifically required by statute. *Compare McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 3 (1997) ("voter's registration is presumed to be proper, but the presumption may be rebutted by clear and convincing evidence") (citing A.R.S. §16-121.01) *with* A.R.S. §16-121.01

(presumption "may be rebutted only by clear and convincing evidence"). No statute or decision of this Court[5] imposes the clear-and-convincing standard here.

The trial court's clear-and-convincing standard for election fraud under *Buzard v. Griffin* is simply not the test for misconduct under the election-contest statute: "a showing of fraud is not a necessary condition to invalidate absentee balloting." *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994) All that the election-contest statute requires for misconduct is "that an express non-technical statute was violated, and ballots cast in violation of the statute affected the election." *Id.* The question is a factual question that courts resolve without resort to elevated standards of review. *See id.* (resolving questions of misconduct's impact on election in context of absentee voting).

To be sure, "the burden of proof is on contestant to show illegality," *Garcia v. Sedillo*, 70 Ariz. 192, 198 (1950), but a contestant's showing of illegality can shift the burden *to Defendants*:

> [N]oncompliance does not necessarily make the ballots inadmissible in evidence, but the burden of proof in such case is cast upon the party offering to introduce them in evidence to show that the ballots offered are the identical ballots cast at the election, and that there is no reasonable

[5] This Court discussed clear and convincing evidence in *Renck v. Superior Court*, 66 Ariz. 320, 327 (1947), which was not an election contest case. *Moore*, 148 Ariz. at 155, *abrogated in part on other grounds*, *Huggins v. Superior Court*, 163 Ariz. 348, 350 n.1 (1990); *cf. Kromko v. Superior Court*, 168 Ariz. 51, 55 (1991) ("*Renck* … was decided solely upon mootness grounds").

> probability that the ballots have been disturbed or tampered with[.]

Averyt v. Williams, 8 Ariz. 355, 359 (1904). Plaintiff alleged noncompliance with Arizona law in great detail with substantial expert and fact affidavit support, but the "clear and convincing" standard is not the standard that the election-contest statute requires for misconduct.

2. The trial court applied an incorrect definition of "misconduct" under §16-672(A)(1).

The trial court also erred by conflating mere "misconduct" by an election official under §16-672(A)(1) with the election official's intent to affect an election's outcome. Appx:684. The trial court's standard for "misconduct" is a felony, Ariz. Rev. Stat. §16-1010, and thus certainly misconduct. But this Court has set the bar far lower for the type of misconduct that is actionable in election contests.

Absent legislative intent for a "special or technical meaning," the dictionary definition applies. *State ex rel. Frohmiller v. Hendrix*, 59 Ariz. 184, 189 (1942). "Misconduct" includes negligent maladministration as well as intentional acts. *See, e.g.*, *In re Alexander*, 232 Ariz. 1, 13-14 (2013) (distinguishing "intentional or knowing misconduct [from] negligent misconduct"). In the election context, statuary requirements are not merely advisory if the violation of a statutory protection "affect[s] the result, or at least render it uncertain." *Findley*, 35 Ariz. at 269. Indeed, this Court subsequently narrowed *Findley*:

> Contrary to *Findley*, election statutes are mandatory, not "advisory," or else they would not be law at all. If a statute expressly provides that non-compliance invalidates the vote, then the vote is invalid. If the statute does not have such a provision, *non-compliance may or may not invalidate the vote* depending on its effect. In the context of this case, affect the result, or at least render it uncertain means ballots procured in violation of a non-technical statute in sufficient numbers to alter the outcome of the election.

Miller, 179 Ariz. at 180 (interior quotation marks and citations omitted, emphasis added). Although the statute in question here does not expressly state that non-compliance would invalidate the votes, Plaintiff showed that the number of non-compliant ballots (whether resulting from the chain of custody violations or the signature verification violations) vastly surpasses the 17,177 votes that separates Plaintiff from Katie Hobbs. Under its own precedent in *Miller*, this Court should invalidate those illegal votes.

The question is whether the provisions advance constitutional goals "by setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation." *Id.* As in *Miller*, Maricopa violated the types of election laws intended "to secure the purity of elections and guard against abuses of the elective franchise." Ariz. Const. art. VII, §12. The violations are therefore material *in context*: "we will not set aside an election unless the effect of the noncompliance altered the outcome or clouded the reliability of the results." *Wenc v. Dist. No. 68*, 210 Ariz. 183, 186 (App. 2005); *Miller*, 179 Ariz. at 180 (considering

violations in context). By requiring felonious conduct instead of mere outcome-altering or outcome-clouding impacts, the trial court applied the wrong standard of review.

Plaintiff does not allege "mere technical violations." She alleges "substantive irregularities" and systematic violations of procedural safeguards for fair and legal elections where the "tactics … turned the election around." *Miller*, 179 Ariz. at 180.

3. The trial court's required showing of an outcome-changing impact misstates Arizona law.

The trial court also required that "the misconduct did, in fact, change the result of that election," Appx:684, which is simply wrong. This Court has long reasoned that unquantifiable electoral manipulations are not immune from review, merely because their impact cannot be quantified:

> Their effect cannot be arithmetically computed. It would be to encourage such things as part of the ordinary machinery of political contests to hold that they shall avoid 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 be rejected*.

Hunt v. Campbell, 19 Ariz. 254, 265-66 (1917) (interior quotation marks omitted, emphasis added); *cf. Huggins*, 163 Ariz. at 350 ("it hardly seems fair that as the amount of illegal voting escalates, the likelihood of redressing the wrong diminishes") (interior quotation marks omitted). If these nonquantifiable impacts

"affect the result, or at least render it uncertain," *Findley*, 35 Ariz. at 269, that suffices to overturn the election.

B. The widespread BOD printer and tabulator failures on Election Day resulted from Maricopa election officials' misconduct.

The trial court dismissed Plaintiff's cyber expert's explosive findings regarding misconfigured 19 inch ballot images printed on 20 inch paper stating: "Plaintiff's expert on this point admitted that the voters who suffered from tabulator rejections would nevertheless have their votes counted, [and thus] [t]he BOD printer failures did not actually affect the results of the election." Appx:687. The trial court also dismissed the widespread BOD printer and tabulator failures as merely "unforeseen mechanical failures." December 24, 2022 Ruling at 6-7. Both findings are clear error.

First, as discussed in Statement of Facts, Section B, the Election Day chaos caused by the printer/tabulator failures was real and widespread. Had proper logic and accuracy testing been performed on vote center BOD printed ballots and tabulators, as required by the EPM, these widespread printer/tabulator failures could not have occurred. These failures were not a few one off machine failures. These failures occurred on Election Day at ***nearly two thirds*** of Maricopa's 223 vote centers.

Prior to the 2022 general election, Jarrett as the officer in charge of elections, was required to test "all of the county's deployable voting equipment." *See* Ex. 60,

EPM at p. 94-95 ("The officer in charge of elections 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***"). In addition, Jarrett permitted misconfigured ballots to be injected into the 2022 general election even though these ballots were not subject to logic & accuracy testing as required by the Election Procedure Manual. Appx:701 ("If 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***").

Whether the BOD printed ballots failed because of issues with the printer or the misconfigured 19 inch ballot image, the fact is Maricopa officials were charged under the law to ensure this equipment and the BOD printed ballots properly functioned in tabulators in the 2022 general election. Had such logic and accuracy testing been done such widespread failures could not have occurred. *See also* Appx:__-__ (Tr., 101:07-103:06). The testimony of Sonnenklar, the more than 200 sworn declarations of voters and poll workers, and text messages by the T-Techs discussed in Statement of Facts, Section B, show that BOD printed ballots and tabulator rejections of those ballots were the ***sole cause*** of the chaos on Election Day. And, that chaos thereby disenfranchised Election-Day voters who would have overwhelmingly voted for Plaintiff. Appx:440-43, 481-82 (Tr., 39:12-24, 40:20-42:07, 81:21-82:13) (Baris).

Second, the trial court ignored Jarrett's conflicting testimony on the subject of 19 inch ballot images being projected onto 20 inch paper. The evidence of Maricopa's cover up of their failures is evidence of a guilty state of mind. *See, e.g., Henry v. Mayer*, 6 Ariz. 103, 116 (1898). Plaintiff proved that illegally configured 19 inch ballot images printed by BOD printers on 20 inch paper were injected into the election on Election Day—an issue that Jarrett, under oath, denied occurred—not once, but four times before Plaintiff's cyber expert, Clay Parikh, testified about his explosive findings. At a minimum, these misconfigured ballots violate the Election Procedure Manual and thereby also constitute misconduct A.R.S. §16-672(A)(1).

The fact that Jarrett changed his testimony *after* Parikh revealed his explosive findings and trotted out a new contradictory "shrink-to-fit" excuse, does not mean misconduct has not been shown in accordance with A.R.S. §16-672(A)(1). Jarrett and Maricopa admitted knowing about the shrink-to-fit issue occurring in three prior elections. That admission shows that they were on notice of this issue *before* the 2022 general election. Defendants cannot dispute that the violations of the EPM described above are now knowing violations because Maricopa officials and Jarrett clearly did not take adequate steps to prevent the so-called shrink-to-fit issue from happening in the 2022 general election. It also bears noting that the Parikh discovered the misconfigured ballots ***in all six vote centers*** he inspected—not the

three vote centers Jarrett now claims were discovered by the County through a purported root cause analysis.

Nor does the trial court's reliance on the assumption that misconfigured rejected ballots were purportedly later counted render Maricopa's violations moot. First, later counting does not change the fact that this issue contributed to the Election Day chaos and disenfranchisement of thousands of predominately Republican voters who voted on Election Day. Second, Parikh testified that Maricopa did not keep duplicate ballot combined with the original ballot. Thus, there was no way to tell how the duplicate ballot was voted.

Plaintiff's expert, Rich Baris, testified that Kari Lake would conservatively have gained votes providing a range of a 2,000-vote margin for Hobbs and a 4,000-vote margin for Lake in Maricopa's final election canvass but for the Election Day chaos. In an election where the difference between the two candidates is 17,177 votes, this is more than enough votes to render the outcome of the 2022 general election "at least uncertain." *Findley*, 35 Ariz. at 269.

C. The chain of custody constituted misconduct and the counting of illegal votes.

The trial court held that Plaintiff's witness, Heather Honey, who testified for Plaintiff regarding Maricopa's ballot CoC failures, "admit[ted] that Defendants did in fact generate the documents they were required to, and otherwise affirms the County's compliance with election processes." December 24, 2022 Ruling at 5-6.

Honey did no such thing. Further, the trial court ignored the admissions by Maricopa officials discussed in Statement of Facts, Section C, showing they clearly violated Arizona CoC laws set forth the EPM and A.R.S. §16-621(E).

Honey never admitted that Maricopa officials generated required CoC documents for EDDB ballots delivered on Election Day. In fact, she testified Maricopa did not produce these forms ("Delivery Receipts") for the nearly 300,000 EDDB ballots. Appx:276-77, 280 (Tr., 179:01-180:16, 183:1-5) (Honey). Second, the Runbeck whistleblower corroborated Honey's testimony in a sworn declaration testifying that "no paperwork accompanied the ballots from the MCTEC on Election Night." Appx:75-78 (Marie Declaration); *see also* Appx:72-73 (White Declaration, ¶¶12-21) (EDDB ballots were delivered to MCTEC, were separated from the bins, and were not counted).

As discussed in Statement of Facts, Section C, Maricopa violated clear CoC rules by not counting EDDB ballots. As a consequence, nearly 300,000 EDDB ballots lack proper CoC documentation. Had Maricopa followed Arizona's CoC rules, they would have had an exact count of EDDB ballots delivered to MCTEC on Election Day before they were unpacked MCTEC and later transported to Runbeck, a third party vendor. Maricopa officials did not ascertain the exact count of EDDB ballots as required. Now, there is a minimum 25,000 unexplained discrepancy between the officially reported figures on November 9 and the reported figures on

November 10.

Maricopa's violation of law constitutes misconduct under A.R.S. §16-672(a)(1). Further, these violations also render at least 25,000 votes illegal under A.R.S. §16-672 (a)(4)—which the trial court did not address—and which render the outcome of the 2022 general election "at least uncertain." *Findley*, 35 Ariz. at 269.

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

The trial court erred in dismissing Counts III (signature verification) based on laches. First, striking unlawful ballots would not disenfranchise voters under Plaintiff's request for a new election. Compl. at 61 (¶g) (Appx:68). Second, the public interest and Arizona would not be harmed by holding a lawful election because the incumbent would remain in office. Ariz. Const. art. XXII, §13. Third, and in any event, Plaintiff timely asserted Counts III, so the equitable doctrine of laches does not bar Count III.

Plaintiff's claim goes to the legality of the vote and—thus—to whether a ballot can be counted: "In all elections held by the people in this state, the person, or persons, receiving the *highest number of legal votes* shall be declared elected." Ariz. Const. art. VII, §7 (emphasis added). Plaintiff plead for "striking any invalid ballots or types of ballots on an absolute or prorated basis," Compl. at 61 (¶e) (Appx:67), which would have provided a material change in the vote totals for Plaintiff to win the election. *Id.* ¶¶178-179 (Appx:65-66). When properly taken as true, *Griffin* 86

Ariz. at 169-70, Count III states a claim for relief.

Laches prevents a lawsuit from proceeding when unreasonable delay in bringing suit prejudices other parties. *Sotomayor v. Burns*, 199 Ariz. 81, 82-83 (2000). A court considering a laches defense must (1) "examine the justification for delay, including the extent of plaintiff's advance knowledge of the basis for challenge"; (2) analyze "whether [the] delay … was unreasonable"; and (3) consider whether "the delay resulted in actual prejudice to the adverse parties." *Harris v. Purcell*, 193 Ariz. 409, 412 (1998). In the election context, Arizona courts consider fairness to litigants, election officials, the voters, and the Court. *See id.*; *Sotomayor*, 199 Ariz. at 83.

"A laches defense, however, cannot stand on unreasonable conduct alone" because "[a] showing of prejudice is also required." *Sotomayor*, 199 Ariz. at 83, ¶8. Generally, "[w]hat is a reasonable time [to take action] is a question of fact for the trier of fact unless the facts are such that only one inference could be derived therefrom in which case it would become a question of law." *Jones v. CPR Div., Upjohn Co.*, 120 Ariz. 147, 151 (App. 1978); *cf. Walk v. Ring*, 202 Ariz. 310, 321, ¶43 (2002) (summary judgment inappropriate where question of fact existed about whether plaintiff knew or should have known of facts to put her on notice to investigate whether her injury was wrongfully inflicted); *Havasupai Tribe v. Ariz. Bd. of Regents*, 220 Ariz. 214, 230, ¶¶61-63 (App. 2008) (same).

A. The trial court erred by dismissing signature-verification (Count III) on laches

To be lawful and eligible for tabulation, the signature on the affidavit accompanying an early ballot must match the signature featured on the elector's "registration record." A.R.S. §16-550(A); Compl. ¶150 (Appx:60-61). When confronted with signature mismatches, the cure process requires contacting the voter to confirm the signature. EPM, at 68 (emphasis in original) (Appx:700); Compl. ¶150 (Appx:60-61). The trial court acknowledged that Plaintiff challenges "the process used to cure ballots that, at first glance, did not match the signature on file for that voter," but analyzes only the issue of laches. Appx:91-92.

Maricopa's authority is limited to those powers expressly or impliedly delegated to it. *Associated Dairy Prods. Co. v. Page*, 68 Ariz. 393, 395 (1949). Courts may enjoin the exercise of power beyond that delegation. *Berry v. Foster*, 180 Ariz. 233, 235-36 (App. 1994). Once adopted, the 2019 EPM had the same force of law as statute. *Ariz. Pub. Integrity All. v. Fontes*, 250 Ariz. 58, 63 (2020). In sum, Arizona law sets a mandatory process for curing signature mismatches. A.R.S. §16-550(A); EPM, at 68. Maricopa's use of its alternate, non-complying process to evade the ballot-curing process constitutes misconduct, so that ballots without matching or cured signatures are illegal votes. *See* A.R.S. §16-672(A)(1), (A)(4).

1. **The signature-verification count (Count III) is based on whistleblowers' testimony regarding *2022 general election misconduct*.**

Plaintiff's signature-verification claim is not based on whether Maricopa evaded required ballot-curing procedures to accept a material number of unlawful ballots where the signatures did not match in 2020. Compl. ¶¶ 51-54, 59, 151 (Appx:16-19, 61.). Plaintiff's claim is with respect to Maricopa's conduct *in the 2022 general election*.

Before Plaintiff—who was not a candidate in 2020—could sue, she first had to incur a *ripe* injury. *Mills v. Ariz. Bd. of Tech. Registration*, 514 P.3d 915, 923 (Ariz. 2022). Laches is "precisely the opposite argument" from ripeness. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 915 n.16 (1990) (Blackmun, J., dissenting). Before the election, Plaintiff had no ripe claim against Defendants' failure to verify or cure signatures in the 2022 general election:

> One cannot be guilty of laches until his right ripens into one entitled to protection. For only then can his torpor be deemed inexcusable.

What-A-Burger of Va., Inc. v. Whataburger, Inc., 357 F.3d 441, 449-50 (4th Cir. 2004) (internal quotation marks omitted); *Profitness Physical Therapy Ctr. v. Pro-Fit Orthopedic & Sports Physical Therapy P.C.*, 314 F.3d 62, 70 (2d Cir. 2002) (same). The suggestion that Count III is barred by laches as to improperly accepted ballots is unsustainable.

2. Neither defendants nor voters suffer cognizable prejudice from the rejection of ballots with invalid signatures.

The fact that Plaintiff introduced evidence of outcome-altering illegal votes in the 2020 election simply as corroboration for the outcome-altering illegal votes in the 2022 election cannot make a laches defense viable for *the 2022 election*. *McComb v. Superior Court*, 189 Ariz. 518, 525 (App. 1997) (discussing reasonableness of delay under RESTATEMENT (SECOND) OF TORTS). Defendants' laches defense requires "clear and convincing proof" that Plaintiff "deliberate[ly] bypass[ed] … a pre-election judicial remedy." *Id.* Given that her claim did not exist for 2022 until after the election, Defendants cannot make that showing.

Maricopa's egregious pandemic election in 2020 bolsters Plaintiff's signature-verification claims for the 2022 election. That history does not simultaneously absolve Maricopa from complying with the law. Simply put, Maricopa does not have a vested right to count illegal votes: "No vested right to violate an ordinance may be acquired by continued violations." *Acker v. Baldwin*, 18 Cal. 2d 341, 346 (1941); *cf. Rivera v. City of Phx.*, 186 Ariz. 600, 602 (App. 1996) (improperly issued building permit does not establish a vested right to build in violation of ordinance).

B. The trial court's errors on laches affected an outcome-determinative number of votes.

The remedy for illegal absentee ballots is either to set aside the election under

Miller, 179 Ariz. at 180, or proportionately to reduce each candidate's share of mail-in ballots under *Grounds*, 67 Ariz. at 183-85. Plaintiff requests a new election, but Plaintiff would prevail under Count III under pro rata reduction. Count III alleges that 15-40 percent of 1.3 million mail-in ballots should have failed signature verification, but for Maricopa's failure to follow the EPM. At the low end of invalidating 195,000 mail-in ballots—*i.e.*, 15% of 1.3 million ballots—Plaintiff would prevail.

Specifically, with Hobbs leading Lake 715,492 (55.10%) to 578,653 (44.56%) in early voting, Lake gains approximately 105 net votes from a 1,000-vote reduction. Applying the 15% error rate (195,000 votes) gains Lake approximately 20,548 net votes. Plaintiff credibly alleged "a material number of early ballots cast in the November 8, 2022 general election were transmitted in envelopes containing an affidavit signature that the Maricopa Recorder or his designee determined did not match the signature in the putative voter's 'registration record.'" Compl. ¶151 (Appx:61). As such, Count III states a claim for relief.

C. Vacating the certification of the 2022 general election and holding a new election would neither disenfranchise Arizonans nor deny Arizona a functioning government.

If a court granted Plaintiff her requested relief of a new and fair election, the striking of the election chaos to date would not disenfranchise any voter. Moreover, under the Arizona Constitution, the incumbent Governor's term would continue until

his successor was duly elected. Ariz. Const. art. XXII, §13; Ariz. Const. art. XXII, §13. Because this continues the incumbent's existing term, it does not violate constitutional term limits. *Jennings v. Woods*, 194 Ariz. 314, 331 (1999). As such, Arizona would not suffer from uncertainty in government affairs.

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

The trial court dismissed Counts V (equal protection) and VI (due process) on the alternate grounds that either those constitutional claims were merely cumulative of the other election-contest counts or, alternatively, do not qualify as misconduct prohibited by §16-672(A)(1). Appx:93-94. The trial court also questioned whether Plaintiff adequately pleaded discrimination by governmental actors or an outcome-altering impact of any such governmental action. Appx:93. Because Plaintiff adequately pleaded her constitutional claims and unconstitutional acts qualify as misconduct, the trial court erred in dismissing Counts V and VI.

A. The constitutional counts are sustainable against arbitrary government action.

Before wading into statistics about Election-Day's impact on Republicans, this Court should reverse the dismissal of Counts V and VI because "the Equal Protection and Due Process Clauses protect against government action that is arbitrary, irrational, or not reasonably related to furthering a legitimate state purpose." *Coleman v. City of Mesa*, 230 Ariz. 352, 362 (2012). Maricopa's chaotic

2022 general election deviated from required procedures and plans in so many ways that clearly fail that test. *See, e.g.*, *Service v. Dulles*, 354 U.S. 363, 372 (1957) (government must follow its own rules). That—by itself—warrants reversal of the dismissal.

B. The trial court erred by dismissing equal protection (Count V) as outside the election-contest statute.

Maricopa's 2022 general election was worse than mere chaos because the failings were not only *intentional* but also *targeted*. Maricopa weakened ballot-integrity measures for mail-in votes, which benefits Democrats, and created a chaotic Election-Day scenario by administering a chaos on Election Day, which harms Republicans. *See* Compl. ¶89 (Republican-versus-Democrat disparity of 58.6% to 15.5%) (Appx:39-40); *id.* ¶165 (BOD printer problem burdened Republican Election-Day voters more than 15 standard deviations more than it burdened non-Republican Election-Day voters) (Appx:63). As Plaintiff's "heat map" (Appx:79) shows, the impact of Election-Day chaos targeted Republicans.

In trial court, Maricopa cited *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979), and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977), to evade responsibility for the impact on Republicans. Neither decision aids the County.

In *Feeney*, the passed-over female civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring constituted gender

discrimination. Although women then represented less than two percent of veterans, *Feeney*, 442 U.S. at 270 n.21, Massachusetts did not discriminate *because of sex* when it acted because of another, permissible criterion (veteran status). *Id.* at 272. Here, however, even among the Republican-heavy cohort of Election-Day voters, Republican Election-Day voters were more than burdened than Democrat Election-Day voters by more than 15 standard deviations beyond what a random distribution would expect. Complaint, ¶165.[6] At that wide level of disparity, this Court must reject the claims of non-targeted randomness and shift the burden to explain the disparity to Defendants. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). If a non-discriminatory factor—such as a lawful preference for veterans in *Feeney*—explains the wide disparity here, Defendants have the burden of explaining it.

Arlington Heights makes this clear. While holding there that "official action will not be held unconstitutional solely because it results in a … disproportionate impact," *Arlington Heights*, 429 U.S. at 264-65, the Court explained that that basic

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[6] The standard deviation for a binomial distribution is the square root of the multiple of the expected probability and one minus the expected probability divided by the sample size (*i.e.*, the square root of (p)(1-p)/n). *See Johnson*, 186 Ariz. at 334 n.55. For example, with a coin toss, both (p) and (1-p) are both 50% for a fair coin. The odds of getting 60% heads vary with the sample size. Six heads in 10 tosses is unsurprising because the standard deviation is 0.158 or 15.8%, so the difference between the expected 50% and experienced 60% is within one standard deviation. As n get larger, a 60% result gets less likely (*e.g.*, 600 heads out of 1,000 tosses has a standard deviation of 0.016 or 1.6%, putting the experienced 60% 6.32 standard deviations from the expected 50%).

holding does not apply when the results are wildly out of proportion, as they are here:

> Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. The evidentiary inquiry is then relatively easy.

Id. at 266 (footnotes and citations omitted). By deviating 15-plus standard deviations from a random or nonpartisan distribution of Election-Day chaos, Maricopa's election falls into the "rare" set of instances where the impact alone is evidence.

Courts "are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2575 (2019) (internal quotation marks omitted). Especially at the motion-to-dismiss stage, this Court must reject Defendants' "stuff happens" defense if the "stuff" happened to Republicans at starkly disproportionate rates.

C. The trial court erred by dismissing due process (Count VI) outside the election-contest statute.

An election violates due process when "the election process itself reaches the point of patent and fundamental unfairness." *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). Indeed, "there is precedent for federal relief where broad-gauged unfairness permeates an election, even if derived from apparently neutral action." *Id.*; *accord Marks v. Stinson*, 19 F.3d 873, 888 (3d Cir. 1994). "Like beauty, fundamental fairness frequently lies in the eye of the beholder," and "the

Constitution does not ensure a bright-line rule for every situation." *Bonas v. Town of N. Smithfield*, 265 F.3d 69, 75 (1st Cir. 2001). As such, "each case must be evaluated on its own facts" *Id.* Given the sufficiently alleged and extensive nature of Maricopa's deviations from Arizona law, the trial court erred in dismissing Count VI on the pleadings. Moreover, reinstating any of Plaintiff's other counts also requires reinstating Count VI.

In *Griffin*, the U.S. Court of Appeals for First Circuit required a new election where state election officials "changed the rules at the end of the game" with the result of an "outcome-determinative" change in the results. Bonas, 265 F.3d at 74 (citing *Griffin*, 570 F.2d at 1080). More recently, in *Marks*, the U.S. Court of Appeals for Third Circuit confronted the "massive" absentee-ballot fraud of approximately 1,000 ballots and decertified the election, with a new election unless the challenger could show that he would have won, but for the fraudulent ballots. *Marks*, 19 F.3d at 888-89. The tens of thousands of illegal votes here far exceeds the mere 1,000 votes that *Marks* found "massive." Counting illegal votes violates due process:

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds v. Sims, 377 U.S. 533, 555 (1964); *cf.* Ariz. Const. art. VII, §7 ("the person … receiving the highest number of legal votes shall be declared elected"). Moreover, the voting rights of the disproportionately Republican Election-Day cohort were

infringed: "all qualified voters have a constitutionally protected right to vote." *Reynolds*, 377 U.S. at 554. Indeed, even among that cohort, the Election-Day chaos disproportionately impacted Republicans so egregiously, Compl. ¶165 (Appx:63), that the impact itself qualifies as evidence of misconduct. *Arlington Heights*, 429 U.S. at 264-65 (quoted *supra*).

D. Holding unconstitutional elections qualifies as misconduct.

This Court should reject the trial court's suggestion that violations of the Fourteenth Amendment may not qualify as "misconduct" under §16-672(A)(1). In parsing that statute, the Court applies traditional tools of determining legislative intent. *Jenkins*, 218 Ariz. at 562-63 ("primary task in answering these questions is to discern the legislature's intent"). It beggars the imagination that the Legislature would exempt unconstitutional elections from review under the election-contest statute, leaving it to contestants to challenge the constitutionality of elections in separate lawsuits under 42 U.S.C. §1983. Given the "short time period" for such challenges, "[d]ue process requires that a party have an opportunity to be heard at a meaningful time and in a meaningful manner." *McClung*, 225 Ariz. at 156. The trial court's suggestion otherwise would throw Arizona into even more chaos.

CONCLUSION

WHEREFORE, Plaintiff prays that the trial court be REVERSED and that Plaintiff be granted the injunctive relief of *vacatur* of the election certification and a

new election, as requested in her Verified Complaint. Appx:68.

Dated: December 30, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 4, the undersigned counsel certifies that the Petition for Special Action is double spaced and uses a proportionately spaced typeface (i.e., 14-point Times New Roman) and contains 10,434 words according to the word-count function of Microsoft Word.

Dated: December 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

Pursuant to Rule 4, Rules of Civil Appellate Practice, the undersigned certifies that the foregoing Petition for Special Action was e-filed via AZTURBO COURT on this 30th day of December, 2022 and served as follows:

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