ARIZONA SUPREME COURT

KARI LAKE, *Plaintiff/Appellant*, v. KATIE HOBBS, *et al.*, *Defendants/Appellees*.	Court of Appeals Division One No. 1 CA-CV 22-0779 No. 1 CA-SA 22-0237 (CONSOLIDATED)
KARI LAKE, *Petitioner*, v. THE HONORABLE PETER THOMPSON, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge*, KATIE HOBBS, personally as Contestee; 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 No. CV2022-095403 **PETITIONER'S OPPOSITION TO MOTION FOR SANCTIONS AND CROSS-MOTION FOR A PROCEDURAL ORDER FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION OF THE DENIAL OF HER PETITION FOR REVIEW**

Kurt B. Olsen (admitted *pro hac vice*)
Olsen Law PC
1250 Connecticut Ave. NW, Ste. 700
Washington, DC 20036
Tel: 202-408-7025
Email: ko@olsenlawpc.com

Bryan James Blehm, Ariz. Bar #023891
Blehm Law PLLC
10869 N. Scottsdale Rd., Suite 103-256
Scottsdale, Arizona 85254
Tel: 602-753-6213
Email: bryan@blehmlegal.com

Counsel for Petitioner

INTRODUCTION

Petitioner Kari Lake respectfully opposes Respondents' request for sanctions for Lake's statement in her Petition that the Court of Appeals should have considered "the undisputed fact that 35,563 unaccounted for ballots were added to the total of ballots at a third party processing facility." The record indisputably reflects at least 35,563 Election Day early ballots, for which there is no record of delivery to Runbeck, were added at Runbeck, and that this issue was properly raised below prior to Lake filing her Petition for Review.

Not only should Respondents' request for sanctions be denied, but Lake respectfully requests leave of the Court to treat this response as a motion for reconsideration of the Court's denial of review on this chain-of-custody issue.

OPPOSITION TO MOTIONS FOR SANCTIONS

Although Maricopa did not move for sanctions, the other respondents seek sanctions and fees pursuant to A.R.S. §12-349 and ARCAP 25. As relevant here, both provisions condition sanctions and fees on appeals brought without substantial justification or primarily for delay or harassment. *See* A.R.S. §12-349(A)(1)-(2); ARCAP 25. To warrant sanctioning a party or their counsel for exercising First Amendment rights, a court must find either that they brought a claim for an improper motive or that they pressed issues that are not "supportable by any reasonable legal theory" and for which there is no "colorable legal argument … about which

reasonable attorneys could differ." *In re Levine*, 174 Ariz. 146, 153 (1993) (citing *Arizona Tax Research Ass'n v. Department of Revenue*, 163 Ariz. 255, 258-59 (1989)).

Here, the respondents seeking sanctions have not even attempted to show any evidence rebutting Lake's claims regarding the 35,379 ballots for which Runbeck has no record of receiving. Notably, private actors like Runbeck do not benefit from presumptions favoring government actors. *Garcia v. Sedillo*, 70 Ariz. 192, 200 (1950) ("the officials in this election were not public officials where we can say that there is a presumption that they acted in good faith"). Nor can anyone doubt that Lake honestly believes that electoral misconduct and illegal votes determined the outcome of the 2022 gubernatorial election. As such, sanctions are not appropriate.

I. Lake properly raised the issue of 35,563 unaccounted for early ballots injected at Runbeck in direct response to Hobbs' argument at the Court of Appeals.

Three types of ballots are delivered to Runbeck: drop-box ballots received by Maricopa; mail-in ballots received by the U.S. Postal Service ("USPS"); and provisional ballots. Lake.Appx:602-05 (Valenzuela Tr. 155:03-158:05). Runbeck then scans the ballot envelopes for signature verification before the ballots are sent back to MCTEC for tabulation. *Id*. As stated in Lake's reply brief in support of her Petition for Review, the issue of unaccounted for early ballots injected into the election at Runbeck in violation of Arizona's mandatory chain-of-custody

requirements has existed since the inception of this case. Lake Reply at 2 citing Lake.Appx:064 (Compl. ¶114, "[t]here is no way to know whether 50 ballots or 50,000 ballots were unlawfully added into the election" at Runbeck). Proper chain of custody would allow Maricopa to detect even one inserted ballot.

The calculation of 35,563 early ballots for which there is no record of delivery to Runbeck was raised by Lake as a direct response to an argument advanced by Hobbs in her answering brief on appeal. Specifically, Hobbs cited two unique types of Maricopa chain-of-custody forms in her answering brief, Defense Trial Exhibits 33 and 82, as support for her argument that "Through this process, Maricopa maintain[s] chain of custody for every one of those early ballots ... such that the County would be aware of any ballot inserted or rejected or lost in any part of the process." Second.Supp.Appx:050 (interior quotation marks omitted) (Excerpt of Hobbs Answering Brief).[1]

Defense Trial Exhibit 33 is a compilation of forms entitled "MC Incoming Scan Receipt[s]" ("Runbeck Scan Receipts"). The Runbeck Scan Receipts recorded the number of early ballots packages that Runbeck scanned for signature verification processing and counted on its high-speed equipment between Election Day,

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[1] *See* generally Second.Supp.Appx:048-050 (Excerpt of Hobbs' Answering Br. pp. 9-11, repeatedly citing Hobbs.App.:89-131, 132-61, which are Defense Trial Exhibits 82 and 33, respectively).

November 8, and November 9, 2022. Lake.Appx:741-70. These forms recorded a total of 298,942 early ballot packages (including 6,978 provisional ballot packages) scanned by Runbeck on those two days.

Defense Trial Exhibit 82 is a compilation of forms entitled "MC Inbound—Receipt of Delivery" ("Runbeck Receipt of Delivery"). The Runbeck Receipt of Delivery forms are records created at Runbeck documenting *all* Maricopa County early ballots delivered to Runbeck *prior to* Runbeck scanning the ballots. Second.Supp.Appx:004-046. Four witnesses, in addition to a County employee, signed each of these forms for Election Day deliveries after 7:00 am November 8, 2022 verifying the estimated number of ballots delivered to Runbeck. *Id*. at 039-046.

In response to Hobbs' answering brief claiming that Defense Trial Exhibits 33 and 82 prove that chain-of-custody laws were not only complied with, but the County would be aware of any ballot "inserted or rejected or lost in any part of the process[,]" Lake stated in her reply brief that she calculated the number of early ballots recorded on the Runbeck Receipt of Delivery forms taken from Defense Trial Ex. 82 dated from November 8, 2022 (Election Day) through November 9, 2022. This is the same date range of all Runbeck Scan Receipts in Trial Ex. 33. Second.Supp.Appx:056-057 (Lake Court of Appeals Reply Br. 29-30); Lake.Appx:732-40. Notably, each of these Runbeck Receipt of Delivery forms are hand marked as "Election Day" or "Election Night." *Id*.

Based on that calculation, the number of early ballots recorded on the Runbeck Receipt of Delivery forms dated November 8-9, 2022, totaled 263,379 ballots. Significantly, that figure includes *all* early ballots Maricopa received on Election Day and delivered to Runbeck and excludes 184 "late ballots." Compared to the 298,942 Election Day early ballots recorded on the Runbeck Scan Receipts, that is a discrepancy of 35,563 more ballots scanned than ballots received.

For the Court's convenience, attached are two tables collating the data from these two trial exhibits. Table 1 collates the information on all Runbeck Receipt of Delivery forms in Defense Trial Exhibit 82, including Hobbs' appendix citations used in her answering brief. Table 2 breaks out the Runbeck Receipt of Delivery forms dated November 8-9, 2022 showing the total 263,379 ballots Runbeck received (not including 184 late ballots recorded on one Runbeck Receipt of Delivery form) compared to all Runbeck Scan Receipts in Defense Trial Ex. 33 cited by Hobbs in her answering brief. Second.Supp.Appx:058-059 (Tables 1 and 2).

For Hobbs to be correct in arguing that the County would be aware of any ballot "inserted or rejected or lost in any part of the process," Maricopa would necessarily have to know the exact number of ballots at every step in the chain-of-custody process. As Lake stated in her Petition for Review, under Arizona law, Maricopa was required to count the number of ballots when the ballot containers were opened at MTEC on Election Day—but Maricopa admittedly disregarded that

mandatory requirement on Election Day "due to the large volume of early ballot packets dropped at polling places that day." Lake Petition for Review at 4-5; Lake.Appx:150 (Maricopa Answering Brief). Regardless, the number of Election Day ballots scanned by Runbeck on November 8-9, 2022 should at least closely match the number of early ballots delivered to Runbeck on those same dates. However, the number of early ballots recorded as delivered to Runbeck on November 8-9, 2022, compared to the number that it recorded as being scanned on those dates is not even close.

In her reply brief on appeal, Lake pointed out that 35,563 early ballots (including provisional ballots) were scanned by Runbeck but remain unaccounted for in the Runbeck Receipt of Delivery forms. This discrepancy is a straightforward arithmetic calculation based on Hobbs' own exhibits, which directly rebutted Hobbs' statement that "Maricopa 'maintain[s] chain of custody for every one of those early ballots' ... such ***that "the County would be aware of any ballot inserted or rejected or lost in any part of the process***." Second.Supp.Appx:050 (emphasis added, interior quotation marks omitted).

As stated in Lake's reply brief in support of her Petition for Review, no Respondent disputed this issue of 35,563 unaccounted for ballots injected at Runbeck by either requesting oral argument after Lake filed her reply, as was their right under ARCAP 18(a), or by seeking leave to file a sur-reply. Lake Reply Br. 4.

Hobbs' statement that "Lake's petition for review is the first time Lake presents this fictitious number of 35,563 ballots introduced at Runbeck" is flatly false. *Compare* Hobbs Response Br. 8 *with* Second.Supp.Appx:056-057 (Lake Court of Appeals Reply Br. 29-30).

II. Hobbs' argument that the County would be aware of any ballot "inserted or rejected or lost in any part of the process" is rebutted by the two defense trial exhibits she cited as support.

The difference of 35,563 total ballots recorded on the two distinct chain-of-custody forms cited by Hobbs in her answering brief on appeal cannot be reconciled. First, the Runbeck Receipt of Delivery forms document the total number of *all* Maricopa ballots (including provisional ballots) transferred to Runbeck for scanning and signature verification processing. Lake.Appx:606 (Valenzuela Tr. 159:8-12) ("this is our Maricopa County inbound receipt of delivery document that when we show up at Runbeck that we are, basically, transferring that custody"); Second.Supp.Appx:004-46 (Defense Trial Exhibit 82). There are no other chain-of-custody forms that record *additional* sources of ballots delivered to Runbeck that could account for the 35,563-ballot discrepancy. Nor did Hobbs cite to any other chain-of-custody forms in her answering brief that would explain the discrepancy to support her argument that Maricopa would know of any ballot "inserted or rejected or lost in any part of the process."

In addition, as noted in Lake's reply brief on appeal (and in her Petition for

Review), Maricopa admitted in its answering brief on appeal that instead of counting each ballot when the secure ballot transport containers were opened at MCTEC as required by the EPM, on Election Day, Maricopa simply sorted the early ballots, placed them in mail trays, and delivered t0hem to Runbeck to be scanned and counted. Second.Supp.Appx:054-55 (Excerpts Lake Reply Br. 27-28); *see also* Lake.Appx.150 (Maricopa Answering Br. 20). Thus, Maricopa readily admits not knowing precisely how many ballots were transferred to Runbeck on Election Day, November 8, 2022 through November 9, 2022.

Second, the 263,379 ballots recorded on the Runbeck Receipt of Delivery forms dated November 8-9, 2022 (excluding the 184 late ballots) represents the sum of all ballots received by Runbeck beginning on Election Day. This includes the ballots delivered at 6:47 am, before the vote centers were even open on Election Day. Lake.Appx:732. Lake included the ballots on the 6:47 am Receipt of Delivery form to capture the largest possible number of ballots delivered to Runbeck on Election Day.

The difference between the 263,379 ballots Runbeck recorded receiving on November 8-9, 2022 and the 298,942 ballots Runbeck recorded scanning on those dates *cannot be explained* by including Runbeck Receipt of Delivery forms dated *before* November 8, 2022 to theoretically account for this shortfall. The record shows that Maricopa concluded on November 9, 2022 that the final number of early

drop-box ballots Maricopa received *on Election Day, November 8, 2022*, totaled approximately 292,000 early ballots (not including the 6,978 provisional ballots). Lake.Appx:193, 648, 653 (Richer Tr. 36:11-14, Jarrett Tr. 201:1-5, 206:4-10); Second.Supp.Appx.068 (Plaintiff Trial Ex. 69 Richer email reflecting 291,000 Election Day "drop off" ballots and 8,000 provisional ballots); Second.Supp.Appx.059 (Table 2 comparing Defense Trial Exs. 33 and 82).

The fact that Maricopa determined on November 9, 2022 that it received approximately 292,000 early ballots on Election Day (not including provisional ballots) precludes the theoretical possibility that the total count of 298,942 ballots recorded on the Runbeck Scan Receipts included ballots delivered to Runbeck prior to November 8, 2022 that would be recorded on Runbeck Receipt of Delivery forms. Thus there is no record for the 35,563-ballot discrepancy between the number of ballots recorded as received by Runbeck on November 8-9, 2022 and the number of ballots Runbeck scanned on November 8-9, 22. Indeed, as shown below, that number is conservative.

III. Respondents' arguments that the 35,563 discrepancy between early ballots Runbeck recorded as received between November 8-9 compared to the number of early ballots it scanned on those dates are not supported by the record are false.

In its response brief to Lake's Petition for Review, Maricopa argues that Lake misrepresents the record by comparing an *excerpt* of Defense Trial Exhibit 82 (*i.e.*, the Runbeck Receipt of Delivery forms dated November 8-9, 2022) with Defense

Trial Exhibit 33 (*i.e.*, the Runbeck Scan Receipts for the same date range) to produce the 35,563-ballot discrepancy. Not so.

Specifically, Maricopa first falsely states that:

> Those pages do not reflect all early ballot packets deposited by voters at vote centers on Election Day. Indeed, some of the pages that Lake appended to her Petition record ballots delivered from USPS to Runbeck on Election Day or those retrieved from USPS after Election Day, which are considered late and are not tabulated. (See Lake App. at 732 (early ballot packets delivered from USPS before 7:00 am on Election Day), 739 (late-received packets).) In short, the Receipt of Delivery forms are not for ballots received at vote centers on Election Day.

Maricopa Response Br. 5.

Maricopa's argument that "the Receipt of Delivery forms are not for ballots received at vote centers on Election Day" is nonsensical. The issue is not what ballot packets are received at "vote centers." As Maricopa well knows, ballot packets deposited at "vote centers" (not ballots cast in person) are transferred to MCTEC before being delivered to Runbeck for scanning. The Runbeck Receipt of Delivery forms reflect the ballots Runbeck records as receiving from Maricopa, including drop-box ballots, provisional ballots, and USPS ballots. Lake.Appx:148-51 (Maricopa Answering Br. 18-21 describing Maricopa's chain-of-custody process); *id*. 605-06 (Valenzuela Tr. 158:25-159:11 Runbeck Receipt of Delivery forms "document that when we show up at Runbeck that we are, basically, transferring that

custody").

As demonstrated above, the Runbeck Receipt of Delivery forms dated November 8-9, 2022, cited by Lake include *all* early vote ballots (including provisional ballots) "deposited … at vote centers" or other drop-box locations that Maricopa received on Election Day and other early ballots delivered to Runbeck on Election Day but which were deposited prior to Election Day (*e.g.*, from the USPS). Notably, Maricopa has no record cite that would resolve the 35,563-ballot discrepancy.

In fact, Maricopa's objection that Lake included early ballots delivered to Runbeck by USPS (and other ballots reflected on Lake.Appx.732) does not advance their argument. It *undermines* their argument. Specifically, Lake included a single Runbeck Receipt of Delivery form (Lake.Appx:732) that included ballots retrieved from USPS and other early ballots delivered to Runbeck prior to 7:00 am on Election Day because that form stated on it "Election Day," even though delivered before vote centers opened. As noted above in Section II, Lake's inclusion of these ballots from that form (Lake.Appx:732) *increased* the number of early ballots Runbeck recorded receiving between November 8-9, 2022 by 48,479 ballots—thereby reducing the ballot discrepancy. Second.Supp.Appx:059 (Table 2, comparison of Defense Trial Exs. 33 and 82). Lake calculated the discrepancy conservatively by

including these early ballots on that one form (Lake.Appx:732).[2]

Second, Maricopa incorrectly argues that the "Incoming Scan Receipts" (Trial Ex. 33) do not reflect "ballots that [Runbeck] scanned and sent back to MCTEC." Maricopa Br. 5. The record reflects that all 298,942 early ballots scanned at Runbeck were sent back to MCTEC (*i.e.*, Runbeck does not keep any ballots). Lake.Appx:652 (Jarrett Tr. 205:7-14, discussing Ex. 33 and stating "then once they are completed with the signature verification process, then they won't be transferred back to the County until that's completed").[3]

MOTION FOR LEAVE TO FILE MOTION TO RECONSIDER

The same facts that warrant the denial of sanctions also warrant this Court's reconsidering the dismissal of Count IV on the chain-of-custody issue. Because motions to reconsider are disfavored, *Sw. Paint & Varnish Co. v. Ariz. Dep't of Envtl. Quality*, 194 Ariz. 22, 25 ¶17 (1999), the appellate rules require demonstrating that an appellate "decision contain[s] erroneous determinations of fact or law."

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[2] Contrary to Maricopa's suggestion, Lake did not include the 184 "late-received packets" recorded on another Runbeck Receipt of Delivery form (Lake.Appx:739) in calculating the 263,379 early ballots (including provisional ballots). Second.Supp.Appx.059 (Table 2, comparison of Defense Trial Exs. 33 and 82, excluding that Runbeck Receipt of Delivery Form from the 263,379 calculation).

[3] Secretary Fontes made similar arguments in his brief. Fontes Br. 9-10. As with Maricopa, Fontes provides no explanation from the record to rebut the 35,563 discrepancy in early ballots that Runbeck recorded receiving between November 8-9 compared to the number of ballots it scanned.

ARCAP 22(a). As explained above, the facts here show an unaccounted for injection of *at least* 35,563 ballots. That injection went undetected because Maricopa violated mandatory chain-of-custody requirements.[4]

Significantly, the appeal of this special action consolidated a special-action appeal with a regular appeal, so the rules for seeking reconsideration may differ. *Compare* ARPSA 9(1) (allowing motions to reconsider) *with* ARCAP 22(f) (requiring Court order for leave to move for reconsideration of this Court's denying a petition for review). Accordingly, petitioner Lake respectfully moves this Court to allow her to move this Court to reconsider the denial of her Petition for Review with respect to the dismissal of Count IV, based on the same facts that warrant the denial of sanctions. If the Court grants her motion to reconsider, this Court should deem this motion for leave and the accompanying opposition as a motion to reconsider.[5]

The unlawful injection of at least 35,563 ballots in a race decided by 17,177 votes requires setting aside the election. *See* A.R.S. §16-672(A)(4), 16-676(B). This

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[4] Although Respondents are wrong that the issue of votes injected at Runbeck was a new issue in the Petition for Review as demonstrated in Lake's reply brief filed March 16, 2023, this Court need not resolve the merits of counting how many ballots were illegal. Whatever that number, the illegal ballots under Count IV would cumulate with any votes invalidated under Count III on signature-verification issues, which this Court remanded to the trial court.

[5] Alternatively, petitioner Lake respectfully request leave to file a separate motion to reconsider pursuant to an order of this Court.

Court should not countenance the lower court's rewriting the clear requirement mandated in the Election Procedure Manual to count and record the number ballots retrieved from each drop box *when opening* the secure containers in which the ballots arrive at MTEC,to allow, instead, counting ballots *elsewhere*, *long after* opening the secure containers. Lake.Appx:112, EPM Chapter 2, §I(I)(7)(h), *see also* A.R.S. §16-621(E).[6]

Finally, although Arizona's gubernatorial election concerns state office, the 2022 election was also a federal election, and this appeal raises federal due-process issues. A state court's revision of—or refusal to enforce—a clear legislative election mandate would violate the Elections Clause: "A significant departure from the legislative scheme … presents a federal constitutional question." *Bush v. Gore*, 531 U.S. 98, 113 (2000) (discussing the Electors Clause) (Rehnquist, C.J., concurring).[7]

While the Elections Clause does not apply by its terms to Arizona's gubernatorial election, federal law—including the Due Process Clause—require interpreting Arizona law to avoid violating the federal Constitution. Specifically, the

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[6] *Accord id.* Chapter 9, §VIII(B)(2)(g) ("Election Day … close-out duties" include mandate to determine the "number of ballots cast" including counting of drop-box ballots retrieved on Election Day when secure containers arrive at "the central counting place to be counted there.") (Lake.Appx:124-25).

[7] The federal Constitution's two election-related clauses impose the same requirement that courts defer to the legislative election criteria. *Compare* U.S. CONST. art. II, §1, cl. 2 (Electors Clause) *with id.* art. I, §4 (Elections Clause).

U.S. Supreme "Court will 'ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 18 (2013) (quoting *Crowell v. Benson*, 285 U. S. 22, 62 (1932)) (emphasis and alteration in *Arizona*).

Although petitioner Lake has not previously raised the Elections Clause and the constitutional doubt canon, the U.S. Supreme Court would consider those *arguments* in support of the chain-of-custody and due-process issues that she has raised. *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (distinguishing issues from arguments in support of issues). If the U.S. Supreme Court would consider whether the Elections Clause and constitutional doubt require rejecting the lower courts' rewrite of Arizona's elections procedures, this Court should consider it first.

CONCLUSION

WHEREFORE, petitioner Kari Lake respectfully requests that the Court deny the motions for sanctions and grant her leave to seek this Court's reconsideration of the denial of the Petition for Review with respect to the chain-of-custody issues.

Dated: April 5, 2023

Respectfully submitted,

/s/ Bryan James Blehm

Kurt B. Olsen (admitted *pro hac vice*)
Olsen Law PC
1250 Connecticut Ave. NW, Ste. 700
Washington, DC 20036
Tel: 202-408-7025
Email: ko@olsenlawpc.com

Bryan James Blehm, Ariz. Bar #023891
Blehm Law PLLC
10869 N. Scottsdale Rd., Suite 103-256
Scottsdale, Arizona 85254
Tel: 602-753-6213
Email: bryan@blehmlegal.com

Counsel for Petitioner

-CERTIFICATE OF SERVICE

I certify that, on April 5, 2023, I electronically filed with the Arizona Supreme Court, using the AZ Turbo Court e-filing system, Petitioner's Opposition to Motion for Sanctions and Cross-Motion for a Procedural Order for Leave to File a Motion for Reconsideration of the Denial of her Petition for Review attaching as an exhibit the Supplemental Appendix. On that date, I also caused a copy of the same to be emailed to:

Honorable Peter Thompson
Maricopa County Superior Court
c/o Sarah Umphress
sarah.umphress@jbazmc.maricopa.gov

Amy M. Wood, Clerk
Court of Appeals, Division One
inform@appeals.az.gov

Alexis E. Danneman
Austin Yost
Samantha J. Burke
Perkins Coie LLP
2901 North Central Avenue
Suite 2000
Phoenix, AZ 85012
adanneman@perkinscoie.com
ayost@perkinscoie.com
sburke@perkinscoie.com
Attorneys for Defendant Katie Hobbs

and

Abha Khanna*
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
akhanna@elias.law
Telephone: (206) 656-0177

and

Lalitha D. Madduri*
Christina Ford*
Elena A. Rodriguez Armenta*
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW, Suite 400
Washington, D.C. 20001
lmadduri@elias.law
cford@elias.law
erodriguezarmenta@elias.law
Attorneys for Defendant Katie Hobbs

and

Craig A. Morgan
SHERMAN & HOWARD, LLC
201 East Washington Street, Suite 800
Phoenix, Arizona 85004
cmorgan@shermanhoward.com
Attorney for Defendant Secretary of State Adrian Fontes

and

Sambo Dul
STATES UNITED DEMOCRACY CENTER
8205 South Priest Drive, #10312
Tempe, Arizona 85284
bo@statesuniteddemocracycenter.org
Attorney for Defendant Secretary of State Adrian Fontes

and

Thomas P. Liddy
Joseph La Rue
Joseph Branco
Karen Hartman-Tellez
Jack L. O'Connor
Sean M. Moore
Rosa Aguilar
Maricopa County Attorney's Office
225 West Madison St.
Phoenix, AZ 85003
liddyt@mcao.maricopa.gov
laruej@mcao.maricopa.gov
brancoj@mcao.maricopa.gov
hartmank@mcao.maricopa.gov
oconnorj@mcao.maricopa.gov
moores@mcao.maricopa.gov
aguilarr@mcao.maricopa.gov
Attorneys for Maricopa County Defendants

and

Emily Craiger
The Burgess Law Group
3131 East Camelback Road, Suite 224
Phoenix, Arizona 85016
emily@theburgesslawgroup.com
Attorneys for Maricopa County Defendants

James E. Barton II
BARTON MENDEZ SOTO PLLC
401 West Baseline Road Suite 205
Tempe, Arizona 85283
James@bartonmendezsoto.com

and

E. Danya Perry (pro hac vice forthcoming)
Rachel Fleder (pro hac vice forthcoming)
Joshua Stanton (pro hac vice forthcoming)
Lilian Timmermann (pro hac vice forthcoming)
PERRY GUHA LLP
1740 Broadway, 15th Floor
New York, NY 10019
dperry@perryguha.com
Attorneys for Amici Curiae Helen Purcell and Tammy Patrick

/s/ Bryan James Blehm

Bryan James Blehm
Counsel for Appellant-Petitioner Kari Lake