ARIZONA SUPREME COURT

KARI LAKE, *Plaintiff/Appellant,* v. KATIE HOBBS, *et al.*, *Defendants/Appellees.*	No. CV-23-0046-PR 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 **MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF AMERICA'S FUTURE, U.S. CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND, PUBLIC ADVOCATE OF THE UNITED STATES, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, IN SUPPORT OF PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS** ARCAP 23(a), ARPSA 8(b)

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March 16, 2023

America's Future, U.S. Constitutional Rights Legal Defense Fund, Public Advocate of the United States, and the Conservative Legal Defense and Education Fund, through Counsel and pursuant to this Court's order of March 2, 2023, hereby move this Court for leave to file a Brief as Amici Curiae and state the following in support of their motion.

The *amicus* brief submitted with this motion for leave is submitted by four nonprofit organizations with a strong interest in the preservation of constitutional rights and election security. America's Future is one of the nation's oldest nonprofit organizations, organized in 1947, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). U.S. Constitutional Rights Legal Defense Fund is a nonprofit educational and legal organization, exempt from federal income tax under IRC section 501(c)(3). Public Advocate of the United States is a nonprofit social welfare organization, exempt from federal income tax under IRC section 501(c)(4). Conservative Legal Defense and Education Fund is a nonprofit educational and legal organization formed in 1982, and exempt from federal income tax under IRC section 501(c)(3).

In the aggregate, these four nonprofit *amici* have filed literally hundreds of *amicus* briefs in state and federal court over several decades, addressing

important matters of constitutional and statutory law and matters involving election and campaign law.

This Court has allowed *amicus curiae* briefs to be filed in the past. *See Burkons v. Ticor Title Ins. Co.*, 168 Ariz. 345 (1991). Furthermore, this Court's March 3, 2022, order specifically referenced *amicus* briefs, setting a deadline for the filing of any such briefs as March 16, 2023.

Pursuant to Rule 16, representatives of each of these *amici* organizations and counsel have read the relevant briefs, petitions, and other filings. Rule 16(b)(2).

Furthermore, *amici* believe that this Court's acceptance of this *amici curiae* brief would be desirable because it explains how there is a compelling need to assure the voting public that elections in every state are indeed administered fairly and in accordance with the applicable laws. *See Dem. Exec. Comm. of Florida v. Lee*, 915 F.3d 1312, 1327 (11th Cir. 2019). Just last year, the Wisconsin Supreme Court reiterated that elections that do not follow established law are presumptively invalid and undermine the public's confidence in the voting system, which in turn discourages voter participation. *Teigen v. Wisconsin Elections Comm'n*, 403 Wis. 2d 607, 626, 976 N.W.2d 519 (2022).

Counsel for Amici sought the consent of the parties to filing this amicus brief. Counsel for Petitioner consented. Counsel for respondents did not consent.

A Rasmussen poll taken after the November 2022 Arizona election found that 71 percent of likely voters believe "that problems with the election in Maricopa County affected the outcome of the Senate election in Arizona."[1] It is not just voters in Arizona, but voters across the United States, who are interested in having a final judicial resolution of election law claims. These *amici* believe that their brief will bring to bear research from other jurisdictions and a fresh view of the facts of this case, which will benefit the Court in its decision to hear this case. These *amici* believe that this type of open process is necessary to help restore the public's confidence in this state's processes.

CONCLUSION

Wherefore, America's Future, U.S. Constitutional Rights Legal Defense Fund, Public Advocate of the United States, and Conservative Legal Defense and Education Fund, respectfully request that this Court enter an order granting this

[1] Rasmussen, "Most Voters Share GOP Concerns About 'Botched' Arizona Election" (Nov. 30, 2022).

Motion for Leave to File Brief *Amici Curiae* which is being lodged with the Court together with this Motion.

Respectfully submitted,

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March 16, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CONSTITUTION

STATE CONSTITUTIONS

STATUTES

CASES

MISCELLANEOUS

INTEREST OF THE *AMICI*[1]

This *amicus* brief is submitted by four organizations with a deep interest in the preservation of constitutional rights and election security.

America's Future is one of the nation's oldest nonprofit organizations, organized in 1947 and exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3).

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Conservative Legal Defense and Education Fund is a nonprofit educational and legal organization formed in 1982, exempt from federal income tax under IRC section 501(c)(3).

The interest of these *amici* in this case is set out in the accompanying Motion for Leave to file this *Amici Curiae* Brief.

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[1] No persons other than *amici* or their members provided financial resources for the preparation of this brief.

STATEMENT OF THE CASE

This matter is an election contest filed by Kari Lake, the Republican nominee for governor of the State of Arizona in the 2022 election. The defendants are Katie Hobbs, who was sued in her capacity as Secretary of State, responsible for administration of Arizona elections in 2022, and the candidate certified as the winner of the gubernatorial election, and Maricopa County defendants: Maricopa County Recorder Stephen Richer; Maricopa County Director of Elections Scott Jarrett; the Maricopa County Board of Supervisors; and Supervisors Bill Gates, Clint Hickman, Jack Sellers, Thomas Galvin, and Steve Gallardo.

Plaintiff Lake filed a Verified Complaint in Maricopa County Superior Court on December 9, 2022, challenging the conduct and results of the election in Maricopa County. *See* Lake Petition for Special Action at 5 ("Pet. for Action"). Lake alleges that a number of election irregularities occurred in Maricopa County in that election, including failure by election officials to properly pre-test voting machines, which resulted in voting machine failure across more than half the precincts in the county, causing widespread delays and leading many voters to leave before voting on Election Day, 2022. *See* Lake Petition for Review at 1 ("Pet."). The evidence demonstrates that Maricopa

County ballots were transferred by the county to a third party processor, Runbeck, illegally violating Arizona's ballot chain-of-custody law, and that over 35,000 additional ballots were inserted into the total of ballots cast in the county by Runbeck between November 9 and November 10, 2022. *Id*. Additionally, she alleges that the county illegally accepted thousands of ballots where the signature of the alleged voter casting the ballot did not match that voter's signature on file with the State of Arizona, without following the required signature curing process. *See id.* at 8.

On December 19, 2022, the court granted the defendants' motion to dismiss on all but Counts II (Illegal Tabulator Configuration) and IV (Invalid Chain of Custody). *See* Pet. for Action at 5.

After a December 21-22, 2022 bench trial, the trial court dismissed all remaining claims on December 24, 2022, ruling that Petitioner had failed to prove Respondents' "intentional misconduct" by "clear and convincing evidence." *See id*. at 5.

On December 30, 2022, Lake filed a Petition for Special Action with the Arizona Court of Appeals. *Id.* at 46. On February 16, 2023, the Court of Appeals upheld the lower court and dismissed Lake's appeal. *Lake v. Hobbs*, 2023 Ariz. App. LEXIS 74 (Ariz. Ct. App. 2023).

Petitioner then filed a Petition for Review in this Court. The Petition presented seven questions for review. On March 2, 2023, this Court entered a scheduling order under which *amicus* briefs were to be filed no later than March 16, 2023.

STATEMENT OF FACTS

The disputed issues in this case revolve around election irregularities in an election conducted under the auspices of Secretary of State Katie Hobbs, simultaneously the 2022 Democratic candidate for governor and the state official charged with enforcing election law during the 2022 election. The issues involve ballots retrieved from ballot drop boxes on Election Day 2022 (election day drop ballots, or "EDDBs") and transferred by Maricopa County to Runbeck, its third-party vendor tasked with matching the signatures on ballots to the purportedly corresponding voters' signatures on file with the Secretary of State. *See* Pet. at 5.

Maricopa County, in violation of Arizona law requiring all ballots to be counted upon retrieval from drop boxes,[2] failed to actually count the EDDBs transferred to a private third-party ballot counting firm, Runbeck, instead simply

[2] Election Procedures Manual ("EPM"), Chapter 2, §I(I)(7)(h) (App'x at 112) and Chapter 9; *see also* A.R.S. §16-621(E).

"estimating" that it transferred some 275,000 EDDBs to Runbeck. *See id.* Runbeck did in fact count the EDDBs received from the County, a total of 263,379. *See id.* After receipt of the ballots from Maricopa County, Runbeck's logs reflect its processing of 298,942 ballots, **fully 35,563 more than Runbeck actually received from the County**, which ballots it then sent back to Maricopa County. *Id.* The number of additional ballots inserted by Runbeck is far more than the **17,117-vote certified margin** of Hobbs over Lake. Pet. for Action at 1. Respondents have been utterly unable to account for the inserted ballots.

According to the declarations of whistleblowers "employed in Maricopa's signature verification and signature curing process during the 2022 general election," 15-40 percent of the 2022 ballots did not match the voter's signature on file. Compl. ¶54-56; App'x at 32-33. The "'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.'" Complaint at ¶151 (App'x at 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 [to verify signature], as the EPM requires. Compl. ¶59 (App'x at 34).

Additionally, the County failed to conduct required "L&A testing" of ballot tabulator machines. Pet. at 6. This resulted in unprecedented and massive tabulator failure on Election Day, and mass disenfranchisement of Republican voters — both because Election Day turnout favors Republicans in Arizona over early voting, and because the great majority of the machine failures occurred in Republican precincts, depressing the Republican vote. Pet. at 8.

Despite these irregularities, the trial court held that Petitioner had failed to prove with "clear and convincing" evidence that the election outcome would necessarily have been different but for the irregularities, and the Court of Appeals affirmed. *See* Pet. at 1-2.

SUMMARY OF ARGUMENT

These *amici* address only some the issues raised by Petitioners, where the Arizona Court of Appeals erroneously affirmed important errors committed by the trial court.

First, it was error to hold that "clear and convincing evidence" is the standard of proof in an election contest case under A.R.S. § 16-672. Where there is no statute requiring a different standard of proof, the ordinary "preponderance of the evidence" standard in civil actions is the applicable

standard for election contest cases generally. That is the rule in other jurisdictions.

Second, it was error to hold that Petitioner was required to demonstrate that "but for" the challenged irregularities, she would have won the election. In fact, the law requires only that the irregularities "rendered the election in question." A recent decision of the Wisconsin Supreme Court explains that historically "tyrants have claimed electoral victory via elections conducted in violation of governing law." *Teigen v. Wis. Elections Comm'n*, 976 N.W.2d 519, 529 (Wis. 2022). The Court added: "The right to vote presupposes the rule of law governs elections." The people must have confidence in their elections for the nation to remain cohesive.

Third, it was error to dismiss Petitioner's Equal Protection claim. The Supreme Court has been clear that federal constitutional claims are independent of state claims, and federal constitutional claims have their own elements and burden of proof, which is preponderance of the evidence.

Fourth, it was error to overlook Respondents Hobbs and Maricopa County's repeated and material violations of election law and their impact on the election result. This error is a mixed question of law and fact, requiring *de novo* review in this Court.

Fifth, these *amici* argue that the Brief in Response to Petition for Review filed by Respondent Fontes misstates important matters of both law and fact.[3] The standard of proof by which Petitioners were required to prove their case is most definitely in dispute, and Respondent's reliance on narrow rules applicable in specific circumstances does not establish a general rule to be applied here.

For these reasons, and those offered by Petitioner, the errors by the trial court, which were affirmed by the Court of Appeals, require review by this Court.

ARGUMENT

I. THE COURTS BELOW ERRONEOUSLY DETERMINED THAT PETITIONER'S ELECTION CHALLENGES REQUIRED CLEAR AND CONVINCING EVIDENCE OF A CHANGED OUTCOME.

The trial court required Petitioner to prove her case on all points by "clear and convincing evidence." Pet. at 1. The trial court determined that she failed to meet this standard on the two issues it permitted to be litigated, Counts II (Illegal Tabulator Configuration) and IV (Invalid Chain of Custody). *See* Petition for Action at 5. *See also Lake v. Hobbs*, 2023 Ariz. App. LEXIS 74, at *3 (Ariz. Ct. App. 2023). In addition, the trial court required Petitioner to prove

[3] The Responses filed by both Respondent Hobbs and Respondent Maricopa County contain the same misstatements, to which *amici*'s rebuttal applies.

"the misconduct did, in fact, change the result of that election." App'x at 684. These rulings were in error.

First, it is black letter law that in civil cases, a plaintiff/petitioner generally need only prove his or her case to a "preponderance of the evidence" standard. There is no statute which requires use of a "clear and convincing evidence" standard for either point Petitioner has to prove — that 35,563 unaccounted-for EDDBs were inserted under Runbeck's custody, or that a material number of ballots were improperly accepted despite mismatched, unverified, and legally uncured signatures. The preponderance rule applies generally in election contests.

Without question, a "clear and convincing" standard has been required in a narrow class of cases. Historically, "clear and convincing" has been the standard in fraud cases. *See Buzard v. Griffin*, 89 Ariz. 42, 50 (1960) ("Fraud must be established by clear and convincing evidence."). Moreover, in the election code, there is one narrow provision which expressly requires "clear and convincing evidence." *See, e.g.*, *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). Insofar as the Arizona legislature specified that standard in

one narrow type of election-related case, its failure to require that standard for other types of cases (such as that involved here) indicates it should not be used here.

In one outlier case, *Renck v. Superior Court*, 66 Ariz. 320, 327 (1947), this Court applied the "clear and convincing" standard as to a discrete issue as to signature verification relating to whether to order the removal of an initiative from the ballot on the basis of insufficient petition signatures. This Court determined that a "clear and convincing" showing of insufficiency would have to be made to keep the initiative off the ballot. However, initiatives are different from elections, as a rule that applies to initiatives should not be imported into a case involving an election contest.[4] Further, this Court's rationale in *Renck* was

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[4] In *Renck*, the Court explained that "**the purpose of initiative petitions is partly administrative in nature**, *i.e.,* to make certain that the subject matter of the petition is of interest to a sufficiently large segment of the electorate such as would entitle the measure to a place on the ballot and justify the expense of printing and publicity required for submission of it to a vote of the people. The court must be aware always that **in case of doubt** as to the strength of such preliminary showing, there is less danger to the rights of the people in incurring this expense to the state than in delaying the electorate from promptly deciding whether they do or do not want the measure") (emphasis added). Thus, this Court imposed a higher burden of proof to keep the initiative off the ballot, **to protect the people's right to determine the issue for themselves** at the polls. Where it is alleged that the people's **right to choose their own Governor** was thwarted by the election process, the reason for using the higher standard of proof in *Renck* would not apply. Indeed, a preponderance standard better protects the people's authority to decide these matters.

that keeping an issue off the ballot and out of the hands of the voters for ultimate decision, required the higher standard of proof. The end goal was to allow "the electorate" to make the final determination in a free and open vote, and **keeping the issue from the voters** required a higher standard. Here, the court used the higher standard to prevent a judicial assessment as to whether "the electorate" had been given a free and open opportunity for decision. This is the polar opposite of the teaching of *Renck*.

A treatise that covers this issue states unequivocally: "[i]n a civil case, which is what a **lawsuit challenging an election** is, the plaintiff must prove the truth of the facts that he or she alleges by **preponderance** of the evidence."[5] The author of that treatise, Barry Weinberg, had extensive elections experience, in that he served as acting chief of the Voting Section of the U.S. Justice Department's Civil Rights Division.

Although not involving a state election context, in federal voting rights cases, "the plaintiff bears the burden of proof at trial and must show a violation by a **preponderance** of the evidence." *Feldman v. Reagan*, 843 F.3d 366, 403 (9th Cir. 2016) (emphasis added).

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[5] B. Weinberg, The Resolution of Election Disputes: Legal Principles That Control Election Challenges, 2d ed. at 14 (International Foundation for Electoral Systems: 2008) (emphasis added).

Numerous other jurisdictions that have addressed the issue have employed the preponderance standard:

- The Minnesota Supreme Court refused to overturn a result because "[c]ontestants did not prove by a **preponderance** of the evidence that any double counting of votes occurred." *Sheehan v. Franken (In re Contest of Gen. Election)*, 767 N.W.2d 453, 470, n. 21 (Minn. 2009) (emphasis added).

- The New Jersey Supreme Court determined: "the burden is on the contestant to show by a **preponderance** of the evidence that there [are] statutory grounds to contest the election." *In re Contest of the November 8, 2005 General Election for Office of Mayor of Tp. of Parsippany-Troy Hills*, 192 N.J. 546, 577 (2007) (emphasis added).

- The West Virginia Court of Appeals explained: "The burden was upon contestant to prove by a **preponderance** of the evidence that the election in Precinct No. 4 was so fraudulently conducted that the entire vote cast there should not be considered." *Maynard v. Hammond*, 79 S.E.2d 295, 299 (W. Va. 1953) (emphasis added).

- The Connecticut Supreme Court ruled: "[T]he usual civil standard of a **preponderance** of the evidence is the appropriate burden of persuasion applicable to this case." *In re Election of the United States Representative for the Second Congressional Dist.*, 653 A.2d 79, 94, n. 25 (Conn. 1994) (emphasis added).

Although this Court has not expressly described the standard it employed by using the word "preponderance" in election contests, it appears to have applied that standard. *See Findley v. Sorenson*, 35 Ariz. 265 (1929), where this Court determined that "mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not

void an election, unless they **affect the result**, or at least **render it uncertain.**" *Id*. at 269 (emphasis added). This Court called the holding a "cardinal rule[] which, in the absence of specific statutory provisions to the contrary, always ha[s] governed election contests, not only in Arizona, but elsewhere." *Id*.

Lastly, in Section III, *infra*, it is shown that if the trial court had not erroneously dismissed Petitioner's Equal Protection Claim, it would have been required to use a preponderance of the evidence standard, and would not have been able to require Petitioner to prove that a vote without irregularities would have necessarily resulted in a different outcome.

II. THE COURTS BELOW ERRONEOUSLY RULED THAT PETITIONER MUST PROVE THAT ILLEGAL BALLOTS WOULD NECESSARILY HAVE CHANGED THE RESULT RATHER THAN MAKING THE RESULT "UNCERTAIN."

The trial court required Petitioner to prove "the misconduct did, in fact, change the result of that election." App'x at 101. As demonstrated in Section I, *supra*, in *Findley v. Sorenson*, this Court has not required ironclad proof that election irregularities would necessarily have changed the outcome, before ordering a new election. The test is whether the omissions or irregularities could be seen to "affect the result, or at least render it uncertain…." *Findley* at 260.

The Arizona Constitution places the highest value on the integrity of the election process. It demands that "[a]ll elections shall be free and equal, and no

power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Ariz. Constitution, art. 2, §21. This Court's prior decisions uphold this constitutional imperative. Where actions are taken to wrongfully impact the electoral process:

> [t]heir 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, 266 (1917) (emphasis added).]

As the Wisconsin Supreme Court pointed out last year in striking down illegal election interference by employees of the Wisconsin Elections Commission, "If the right to vote is to have any meaning at all, elections must be conducted according to law. Throughout history, tyrants have claimed electoral victory via elections conducted in violation of governing law." *Teigen v. Wis. Elections Comm'n*, 976 N.W.2d 519, 529 (Wis. 2022). The Court added:

> The right to vote presupposes the rule of law governs elections. **If elections are conducted outside of the law, the people have not conferred their consent on the government. Such elections are unlawful and their results are illegitimate**. If an election … can be procured by a party through artifice or corruption, the Government may be the choice of a party for its own ends, not of

> the nation for the national good. [*Id.* at 530 (quoting John Adams, Inaugural Address (Mar. 4, 1797) (emphasis added).[6]]

Unlike this case, the Wisconsin case involved a prospective injunction against election violations, not a retrospective request for an election contest. Nonetheless, the Wisconsin Court's language appears to apply both to prospective and retrospective challenges, determining that the challengers need not prove that the violations of election law would be outcome-determinative.

> Unlawful votes do not dilute lawful votes so much as they pollute them, which in turn pollutes the integrity of the results…. **When the level of pollution is high enough, the fog creates obscurity, and the institution of voting loses its credibility as a method of ensuring the people's continued consent to be governed**. *See State ex rel. Bell v. Conness*, 106 Wis. 425, 428, 82 N.W. 288 (1900) ("He failed to show that he received a majority of the votes cast at the election, but he succeeded in showing a condition of affairs that taints the whole proceeding and calls for careful consideration."). [*Id.* at 530, 531 (emphasis added).]

The Wisconsin Court concluded, "A man with an obscured vote may as well be 'a man without a vote,' and without the opportunity for judicial review, such a man 'is without protection; he is virtually helpless.' *See* 106 Cong. Rec. 5082, 5117 (1960) (statement of Sen. Lyndon B. Johnson)." *Id.* at 531. Under the ruling of the courts below, Arizona's voters may as well be "men without

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[6] Reprinted in Inaugural Addresses of the Presidents of the United States at 10. Washington, D.C.: U.S. Government Printing Office (1989).

votes," and they are "virtually helpless" in the face of serious irregularity in the conduct of an election where those charged with conducting the election according to law have personally benefitted from allowing those irregularities. This Court should stand in the gap to protect the people from such abuse.

As the Weinberg treatise points out, the general rule is: "To win an election challenge, the plaintiff usually must prove that the number of votes affected by irregularities was sufficient to change the result of the election."[7] The challenger need not prove that the outcome would have been different, as was required here.

By requiring Petitioner to prove that she would have won the election but for the disputed ballots, the courts below have set up a standard that, in effect, is higher than "clear and convincing," and in fact, is higher than a criminal "beyond reasonable doubt" standard. The lower courts have in fact required the impossible — that Petitioner Lake demonstrate which 35,563 ballots, out of 298,942 ballots returned by Runbeck to the County, were the ones improperly inserted, and then prove which candidate received the vote cast on each of those 35,563 ballots. Such a rule would produce open season for election interference by whichever party happens to be in control of the Secretary of State's office in a

[7] B. Weinberg, The Resolution of Election Disputes at 47.

given election. It would reward election malfeasance by enshrining the reality that the greater the volume of the malfeasance and the greater the difficulty of unwinding it, the less chance there could be of effective judicial review. That is why this Court stated so strongly in *Hunt*, "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." *Hunt*, 19 Ariz. at 266; *see also Findley*, 35 Ariz. at 269.

Since 35,563 EDDBs are unaccounted for, and an additional "material number" of ballots have uncured and unmatching signatures in violation of Arizona law, this election is beyond "uncertain." It is irretrievably tainted as the result of a process controlled by the prevailing candidate. Review is required to determine whether the constitutional imperative of Article 2, §21 has been upheld. Numerous other jurisdictions are in accord. New Mexico's Supreme Court cited:

> [t]he common law rule to be applied in such cases [] as stated [by the South Carolina Supreme Court] in *Creamer v. City of Anderson*, 240 S.C. 118, 124 S.E.2d 788, 791 (S.C. 1962): "But it seems to us, apart from the matter of precedent, that the rule that has been followed by this court for more than a century and a half in cases involving election to public office … is better calculated to safeguard the purity of elections by sending the matter back to the people **whenever so many illegal votes have been cast that their deduction from the winning side would affect the result**, so that upon a new election it may be determined with certainty which

> candidate . . . has received the greatest number of unquestionable votes." [*Gunaji v. Macias*, P.3d 1008, 1013 (N.M. 2001) (emphasis added).]

By statute, Hawaii also requires invalidation of elections when the number of invalid ballots exceeds the final margin between candidates. *Akaka v. Yoshina*, 461 P.2d 221, 224 (Haw. 1969) (citing HRS Section 12-103).

Tennessee also voids elections if "some ballots are found to be illegal, [and] the number of illegal votes cast is equal to, or exceeds the margin by which the certified candidate won." *Forbes v. Bell*, 816 S.W.2d 716, 720 (Tenn. 1991). Likewise, "mere omissions, or irregularity in directory matters" may void an election if they "affect the result or at least render it **uncertain**." *Id.* (emphasis added). The Tennessee Court's words mirror this Court in *Findley*. 35 Ariz. at 269. If the invalid ballots in an election "render it uncertain," the election should be invalidated.

Connecticut's courts concur:

> [I]n order for a court to overturn the results of an election and order a new election pursuant to § 9-328, the court must be persuaded that: (1) there were substantial violations of the requirements of the statute, [such as errors in the rulings of an election official or officials or mistakes in the counts of the votes]; and (2) as a result of those [errors or mistakes], the reliability of the result of the election is seriously in doubt. [*Bauer v. Souto*, 896 A.2d 90, 97 (Conn. 2006).]

Arkansas is in agreement. "[W]here the wrongs are so serious that they render the election results **uncertain or doubtful**, there is no way for the trial court to determine who won and who lost the election." *Whitley v. Cranford*, 119 S.W.3d 28, 35 (Ark. 2003) (emphasis added). "[T]he issue of whether an election is to be voided is based on whether the result of the election is **uncertain**." *Id.* at 34 (emphasis added).

Louisiana also holds that if a plaintiff can "show a sufficient number of contested votes to change the results of the election," the court will "decree the nullity of the entire election." *Valence v. Rosiere*, 675 So. 2d 1138, 1139 (La. Ct. App. 1996). This is true "**even though the contestant might not be able to prove that he would have been [elected] but for such fraud and irregularities**." *Id.* (emphasis added).

New Jersey holds that when "the court cannot with **reasonable certainty** determine who received the majority of the legal vote," or "[i]f the irregularities are found to have been so serious as to **prejudice the election result**," the court can void the election. *In re Gray-Sadler*, 753 A.2d 1101, 1109 (N.J. 2000) (emphasis added).

These jurisdictions comport with this Court's rule dating back to 1917. When illegal or contested votes "render the result uncertain, the entire vote so

affected must be rejected." *Hunt,* 19 Ariz. at 266. The Courts below got it wrong: the vast numbers of questionable and contested votes "render the election uncertain," and the election should be reviewed by this Court.

III. THE COURTS BELOW ERRED IN DISMISSING PETITIONER'S FEDERAL EQUAL PROTECTION CLAIM.

A. The Federal Equal Protection Clause Provides Separate Federal Protection Against Invidious Discrimination in Elections.

The Court of Appeals erroneously approved of the trial court's dismissal of Petitioner's Fourteenth Amendment Equal Protection claim as being "duplicative" of state law claims. This is not how such federal claims should be handled in state court. Federal constitutional claims exist independent of state law claims. *Cf. Bush v. Gore*, 531 U.S. 98, 105 (2000) ("The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirements for nonarbitrary treatment of voters necessary to secure the fundamental right [to equal protection]."); *Quinn v. Millsap,* 491 U.S. 95, 106 (1989) (Missouri Supreme Court decision upholding state requirement of ownership of real estate to serve on a government board reversed as violating the Equal Protection Clause). The Equal Protection Clause establishes its own elements of a claim and its own burden of proof. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 342

(4th Cir. 2016) (preponderance of the evidence burden of proof applies to equal protection claims in voting cases).

In *Reynolds v. Sims,* the U.S. Supreme Court established the core principle of "one person, one vote" based on the Equal Protection Clause. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the 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). "The right to vote can neither be denied outright, nor destroyed by alteration of ballots, **nor diluted by ballot-box stuffing**." *Id*. (internal citations omitted) (emphasis added).

Four years later, in *Williams v. Rhodes*, the Court applied the Equal Protection Clause to guard against discrimination in an election context. "The Equal Protection Clause of the Fourteenth Amendment … bans any 'invidious discrimination.' That command **protects voting rights and political groups** as well as economic units, racial communities, and other entities." *Williams v. Rhodes*, 393 U.S. 23, 39 (1968) (Douglas, J., concurring) (internal citations omitted) (emphasis added).

Thus, Petitioners' Equal Protection Claim was well pled, not redundant to any state claim, and should have been heard.

B. A "Preponderance" Standard Governs Equal Protection Claims.

Federal equal protection decisions have established standards for establishing claims of invidious discrimination with respect to the elections process. Thus far, these decisions primarily have arisen in the context of partisan redistricting, not partisan election malfeasance, but they are nonetheless persuasive. In the legislative reapportionment context, the Supreme Court has determined:

> minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. [*Brown v. Thomson*, 462 U.S. 835, 842 (1983).]

The Fourth Circuit has determined that for deviations below 10 percent, the "preponderance" burden of proof applies. "[P]laintiffs in one person, one vote cases with population deviations below 10% must show by a **preponderance of the evidence** that improper considerations predominate in explaining the deviations." *Raleigh Wake Citizens Ass'n* at 342 (emphasis added).

The Supreme Court agreed, in a case out of Arizona. "[T]hose attacking a state-approved plan must show that it is **more probable than not** that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the 'legitimate considerations.'" *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 259 (2004) (emphasis added).

By dismissing Petitioner's Equal Protection claim, the trial court was able to avoid evaluating the evidence presented based on a preponderance of the evidence standard, based on its erroneous view that "clear and convincing" was the standard for state claims.

C. In Redistricting Cases, "Deviations" Greater Than 10 Percent Shift the Burden of Proof to the State To Defeat Claims of Invidious Discrimination.

In redistricting cases, the U.S. Supreme Court has determined that population deviations over 10 percent shift the burden of proof to the government to justify the deviation for Equal Protection purposes. "A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." *Brown*, 462 U.S. at 842-843. That rule has not been applied to election contests, but it provides an interesting benchmark for comparison purposes here.

It was well known before this election and since that there is a remarkable political divide between Arizonans who vote before Election Day, and Arizonans who vote on Election Day. For that reason, any voting system which rendered Election Day voting more difficult would have a profoundly adverse discriminatory effect on Republicans, but relatively little effect on Democrats. Petitioners assert that the actual difference is almost a four to one "Republican-versus-Democrat disparity of 58.6% to 15.5% on Election Day." Pet. at 8.

Based on these numbers, Election Day voting machine tabulator problems burdened Republicans over Democrats by a margin of 43.1 percent. If a 10 percent differential were employed here, as used in redistricting cases, this differential would shift the burden to refute a *prima facie* Equal Protection violation to the State to prove the absence of intent to invidiously discriminate.

D. The Courts Below Improperly Rejected Credible and Probative Statistical Analysis and Expert Testimony That is Relevant in Equal Protection Voting Rights Cases.

The courts below were obligated to accept all well-pleaded allegations as true, but they improperly refused to consider Petitioner's expert witness evidence of the statistical unlikelihood of chance machine failures burdening Republican voters "more than 15 standard deviations more" than non-Republican voters.

Other jurisdictions have specifically recognized statistical evidence as being probative in Equal Protection voting rights cases.

- A North Carolina federal court described computer simulations showing a large deviation to be "very, very unlikely to happen by chance" as "credible evidence." *City of Greensboro v. Guilford County Bd. of Elections*, 251 F. Supp. 3d 935, 943 (M.D. N.C. 2017) ("Credible evidence based on computer simulations run by Dr. Chen again establishes that this was 'very, very unlikely' to happen by chance, and that this 'partisan skew' resulted from an intent 'to significantly favor' Republican voters. Plaintiffs' expert Anthony Fairfax also identified this pattern of overpopulation in Democratic-leaning districts and underpopulation in Republican-leaning districts").

- A Texas federal court likewise accepted expert testimony showing unexplainable redistricting deviation, and thus proving "intentional vote dilution claims" in an Equal Protection case. *Perez v. Abbott,* 250 F. Supp. 3d 123, 205-206, 218 (W.D. Tex. 2017) (Citing "the broad expert testimony that reveals flaws in Defendants' reliance on the County Line Rule to justify deviations [which] shows that it usually is not the cause of the challenged deviations and therefore cannot justify them").

The trial court hit the trifecta, hampering Petitioner's ability to prevail in three ways. First, the trial court's decision to elevate the level of proof required from Petitioner on state claims to "clear and convincing" made it exceedingly difficult for Petitioner to prove her case. Second, the trial court's decision to strike as duplicative Petitioner's federal Equal Protection Claim allowed it to avoid federal court rulings that the correct standard for such a claim is preponderance of the evidence. Third, if the trial court had allowed the Equal

Protection Claim to stand, and had applied principles gleaned from redistricting Equal Protection cases, it actually could have put the burden on Respondents to disprove alleged invidious discrimination when it conducted the election in such a way as to reduce the Republican votes tallied.

IV. THE COURT BELOW FAILED IN ITS STATUTORY RESPONSIBILITY TO REMEDY RESPONDENTS' REFUSAL TO PERFORM MANDATORY ARIZONA ELECTION LAW DUTIES.

A. Respondents Failed to Carry Out Statutorily Mandatory Chain of Custody Procedures, Resulting in Insertion of an Outcome-Determinative 35,000 Unaccounted-for Ballots.

Petitioner demonstrates that Respondents failed to carry out two mandatory functions under Arizona election law. "The county recorder or other officer in charge of elections **shall** maintain records that record the chain of custody for all election equipment and ballots during early voting through the completion of provisional voting tabulation." Ariz. Stat § 16-621(E) (emphasis added). *See also* Arizona Election Procedure Manual at 68-69 (emphasis added). *See* Compl. at ¶107, App'x at 060. That failure led directly to the unlawful insertion of tens of thousands of unaccounted-for ballots, in a number far exceeding the certified margin between Hobbs and Lake. *Id*. at ¶119, App'x at 066.

As this Court held in 1994, "election statutes are mandatory, not 'advisory,' or else they would not be law at all." *Miller v. Picacho Elementary*

Sch. Dist. No. 33, 179 Ariz. 178, 180 (1994). As in *Miller*, here "the dangers were the very ones the statute was designed to prevent," the commingling of illegal ballots with lawful ballots and the corruption of an election. As the Wisconsin Supreme Court likewise held last year, "illegality … weakens the people's faith that the election produced an outcome reflective of their will…. [A]ll lawful voters, are injured when the institution charged with administering … elections does not follow the law, leaving the results in question." *Teigen*, 976 N.W.2d at 530. "Unlawfully conducted elections threaten to diminish or even eliminate some voices, destabilizing the very foundation of free government." *Id*. at 532.

Yet the court below utterly failed to address these material violations of law. With regard to chain of custody, the court breezily stated, "Lake argues that this process does not satisfy the EPM's directive that '[w]hen the secure ballot container is opened … the number of ballots inside the container shall be counted.' EPM at 62. But she does not cite authority imposing any express time requirement…." *Lake v. Hobbs*, 2023 Ariz. App. LEXIS 74, at *13-14 (Ariz. Ct. App. 2023). The court ignores the authority Petitioner cited, the Election Procedure Manual itself, requiring that the ballots are to be counted "**when the**

secure ballot container is opened" — not a day or more later after the uncounted ballots have passed into third-party hands.

In effect, the court below converts a mandatory rule requiring ballots to be counted "**when the secure ballot container is opened**" (and thus before transfer to a third-party signature verification company such as Runbeck) into a permissive suggestion to count ballots "at some indefinite time after the ballots are opened" (including, as in this case, after a third party handled them and inserted an outcome-determinative number of unaccounted-for ballots). In defiance of this Court's command in *Miller*, the court below has allowed Ariz. Stat. § 16-621(E) to "not be law at all." The courts below also ignored the requirement that the counting must be conducted at the counting center, not at a vendor's facility, in the presence of observers representing the candidates and videotaped. A.R.S. §16-621(A); EPM at 193.

The Court of Appeals' "definition" waved both the facts and the law out of existence. It appears undisputed in the courts below that not only did the County Recorder not count the ballots "when the secure ballot container is opened," as the statute requires, but **apparently never counted them at all**. The only actual counts — not "estimates" — appear to be the counts from Runbeck of 263,379 ballots it counted as received from the Recorder, and the 298,942 ballots it

"counted" and sent back to the Recorder. The record appears devoid of evidence that the ballots were ever counted by the Recorder, let alone "when the secure ballot container was opened" and before chain of custody was violated and an outcome-determinative number of 30,000 unaccounted-for ballots were inserted. This nightmare scenario of more unaccounted-for votes than the certified margin of victory is precisely what the requirement for the Recorder to actually **count the votes** was intended to prevent.

B. Respondents Failed to Carry Out Required L&A Testing on All Ballot Tabulators Before Election Day, Resulting in Widespread Disenfranchisement of Voters.

Petitioner correctly alleged that Arizona law requires counties to perform "L&A Testing" on all ballot tabulator machines before Election Day, "to ascertain that the equipment and programs will correctly count the votes cast for all offices and on all measures." A.R.S. §16-449(A); EPM, Chapter 4, II; App'x at 117, 122-23. At trial, undisputed evidence demonstrated that Maricopa County refused to follow the law and perform required L&A testing. Pet. at 6. This failure by Maricopa County led to widespread machine outages, mass chaos, and widespread disenfranchisement of Election Day voters, disproportionately Republicans. *Id*. at 1, 7.

The court below merely observed that "the evidence regarding misconduct

was disputed" — which is what happens at trials — dismissing petitioner's expert testimony as "insufficient to call into question the election results." In fact, it appears that the central fact that Maricopa County refused to perform the required L&A testing was **not** "disputed" at trial; the County argued that it performed "stress testing" instead, as an excuse for its failure to follow the clear law. Pet. at 6. But stress testing is a different and lesser testing that fails to meet the mandate for L&A testing.

Because the evidence of the County's failure to conduct L & A testing was undisputed and satisfied either standard, the trial court again defied this Court's command in *Miller* and treated the statute's requirement for the protection of Arizona elections as a mere suggestion.

As noted in Petitioner's Petition for Review, "'stress testing' is not L&A testing and does not test to ensure that tabulators will read all ballots and correctly count the votes cast [as required by] A.R.S. § 16-449(A)." Pet. at 6.

As a result of the County's deliberate defiance of Arizona election law, tabulators at nearly two-thirds of Maricopa precincts printed defective ballots which could not be read by the machines, forcing hundreds of thousands of ballots to be rejected, and causing extreme delays in voting. *Id*. at 7. In the end, many voters gave up waiting and missed the opportunity to vote at all. *Id*.

These mechanical issues occurred only for ballots cast on Election Day, not for early ballots. *Id*. at 8. Election Day voting favored Republicans by a disproportionately large 58%-15% margin. *Id*. And the tabulator problems burdened Republican-leaning precincts by 15 standard deviations more than Democrat-leaning precincts. *Id*. As a result, Petitioner lost a substantial, though mathematically unprovable, number of votes.

C. Respondents Unlawfully Failed to Meet Statutory Signature Verification Requirements, Instead Allowing Illegal Counting of a Material Number of Ballots With Un-matching Signatures.

A.R.S. § 16-550 requires that for early-voting ballots, the purported voter must sign the ballot envelope. Then:

> the county recorder or other officer in charge of elections shall compare the signatures thereon with the signature of the elector on the elector's registration record. If the signature is inconsistent with the elector's signature on the elector's registration record, the county recorder or other officer in charge of elections shall make reasonable efforts to contact the voter, advise the voter of the inconsistent signature and allow the voter to correct **or the county to confirm the inconsistent signature**. [Emphasis added.]

If the signature is not cured, the ballot may not lawfully be counted. Compl. at ¶151; App'x at 75-76. The Court was obligated to accept as true Petitioner's well-pled allegations that a "material number" of ballot with un-matching signatures were nonetheless accepted by Maricopa County in violation of the law. *Id*. at ¶151-152; App'x at 76. In addition, whistleblowers testified

that signatures were not only not verified, but also that there were too many unverified signatures for curing to have occurred. Compl. ¶57, 61-62.

As this Court has noted in *Miller*:

> This is not a case of mere technical violation or one of dotting one's "i's" and crossing one's "t's." At first blush, mailing versus hand delivery may seem unimportant. But in the context of absentee voting, it is very important. Under the Arizona Constitution, voting is to be by secret ballot. Ariz. Const. art VII, § 1. Section 16-542(B) advances this constitutional goal by setting forth procedural safeguards to prevent undue influence, fraud, ballot tampering, and voter intimidation. Here, the dangers were the very ones the statute was designed to prevent. [*Miller*, 179 Ariz. at 180.]

Tellingly, while noting that the failure to verify signatures "turned the election around," this Court did not require outcome determination before voiding the election. Where the signature verification requirement is ignored, this Court held, "[t]hese were substantive irregularities. We therefore hold that a showing of fraud is not a necessary condition to invalidate absentee balloting. **It is sufficient that an express non-technical statute was violated**, and ballots cast in violation of the statute **affected the election**." *Id*. (emphasis added). The Court accordingly invalidated the election and ordered a new election. *Id*.

While in *Miller*, the ballots with unverified signatures were conclusively proven to be outcome-determinative, in *Miller* the only irregularity alleged was the unverified signatures. Here, multiple other irregularities intervene, including

the failure to perform L&A testing and, most importantly, unaccounted-for ballots in more than double the number separating the two candidates, as a result of Respondents' failure to follow chain of custody laws. The multiple violations create a perfect storm of malfeasance that irretrievably corrupts the election result. Under the rule of *Miller*, review should be granted.

V. RESPONDENTS CONFUSE THE ISSUES HEREIN.

A. Respondents Falsely Characterize the Applicable Burden of Proof.

In his Response, Respondent Fontes incorrectly assert first that "the burden of proof in an election contest is not in conflict." Fontes Response Br. at 3. The other Respondents make the same incorrect assertion in their response briefs. Indeed, this is one of the central issues in the case. Respondents misrepresent as being the general rule applicable here, some narrow exceptions for fraud and express statutory designations employed in a few situations. Respondents improperly urge this court to affirm the error of the courts below in transforming those limited exceptions into a general rule.

In fact, Petitioner argued that this Court should resolve an apparent split between Districts 1 and 2 as to the proper burden of proof in election contest cases, a "split" only caused by the error below. As discussed in Section I, *supra*, the default position in election cases, as in other civil cases, is a

preponderance. Petitioner argued that every case cited by Division 1 in the case below "all involve either statutes expressly adopting the clear-and-convincing standard or fraud." Pet. at 9. This is of course factually correct; two of the four cases cited involve fraud, and two involve express statutory designations.[8]

Petitioner also argued that Division 2 in its *Parker* case had "recognized that the evidentiary standard is an open question for election cases – like this – with no express statutory standard or allegation of fraud." Pet. at 9. Again, Petitioner's characterization of Division 2's holding was precisely correct. Although Petitioner cited only to a footnote, Division 2 was also clear in the text of the case that it was expressly not deciding to apply the "clear and convincing" standard, instead applying the time-tested approach of "assuming without deciding," since the court believed the plaintiffs had met the higher standard anyway. "We need not address this issue…. Even assuming, without deciding, the heightened standard of proof applies … they sustained that burden." *Parker v. City of Tucson*, 233 Ariz. 422, 431-432 (Ariz. Ct. App. 2013).

In fact, as noted in Section I, *supra*, it is black letter law that election challenges are civil cases, with a default burden of proof of a preponderance of

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[8] *Hunt*, 19 Ariz. at 268 (fraud); *Buzard v. Griffin*, 89 Ariz. 42, 50 (1960) (same); *McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 3 (1997) (A.R.S. §16-121.01); *Jenkins v. Hale*, 218 Ariz. 561, 566 (2008) (same).

the evidence. As Weinberg's treatise notes, "[i]n a civil case, which is what a **lawsuit challenging an election** is, the plaintiff must prove the truth of the facts that he or she alleges by **preponderance of the evidence**" (emphasis added).[9] If anything, Petitioner understated the strength of the presumption in favor of a preponderance, while still clearly exposing the error of the court below in wrongly turning statutory and fraud exceptions into a general "election law" civil rule.

B. Respondents Falsely Characterize Petitioner's Allegations Regarding Maricopa's Failure to Maintain Chain of Custody of Ballots.

Respondent Fontes falsely claims that, in her Complaint, Petitioner "alleged that chain of custody records for early ballot packets dropped off on Election Day do not exist. Now … Ms. Lake recasts her allegation and asserts that those non-existent records show that over 30 thousand ballots were somehow wrongfully inserted into the results." Fontes Response Br. at 8. He additionally falsely claims that Petitioner is only attempting to assert her "inserted ballots" argument on appeal. *Id*. The other Respondents echo the false claims.

The most cursory review of Petitioner's Complaint reveals the falsity of

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[9] B. Weinberg, The Resolution of Election Disputes at 14 (emphasis added).

Respondents' shrill claims. In Paragraph 110 of her Complaint (App'x at 061), Petitioner states that Arizona law requires that when a drop box of ballots is retrieved for counting:

> The retrieval form must be attached to the outside of the transport container or maintained in a way that ensures the form is traceable to the respective ballot container. Significantly, when the secure transport container is opened by the county recorder, "the number of ballots inside the container shall be counted and noted on the retrieval form."

Petitioner then alleges in Paragraph 112(a), "The required chain of custody for these ballots does not exist." App'x at 062. She alleges in Paragraph 119, "On November 9, the County Recorder announced that '275,000+ ballots' have been sorted for scanning and signature verification after the Maricopa county vote center is closed. On November 10… Runbeck reported 298,000 ballots, an unexplained increase of 25,000 after the legal deadline for accepting ballots had closed." App'x at 066. In her Appendix to the Complaint, Petitioner offered as evidence the outgoing receipts sent from Runbeck back to Maricopa County, showing 298,000 ballots returned to the County. App'x at 742-770. Petitioner never alleged that **Runbeck** had a statutory obligation to maintain chain of custody ("COC"). She alleged that **the County** had that obligation. Instead, the County estimated "275,000+ ballots" sent to Runbeck (but without the required "retrieval form" with an actual count, as required by the State's Election

Procedure Manual (the county recorder provided only his rough "275,000+" estimate)). Petitioner's claims today are the exact claims she made in her Complaint. What's more, Respondents' claim to the contrary was already called out by Petitioner in her Reply Brief in the Court of Appeals:

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

Petitioner has indeed raised the issue of Maricopa's failure to maintain COC, and to do an actual count of the ballots before turning them over to Runbeck, at every stage of these proceedings.

C. Respondents Mischaracterize the Standard of Appellate Review.

Respondent Fontes incorrectly describes the appellate standard of review. Fontes Response Br. at pp. 5-7. The other Respondents do as well. Respondent Fontes categorically asserts that the appellate court must give factual findings "that weight and that credibility given by the trial court; no more, no less."

Hunt, 19 Ariz. at 263. But as Respondents are well aware, *Hunt's* general rule is far from the end of the matter. *Hunt* is not a categorical prohibition on appellate review of factual findings. As this Court held in a fraudulent election petition case in 2014, "[w]e defer to the trial court's findings of fact **unless they are clearly erroneous**." *Shooter v. Farmer*, 235 Ariz. 199, 200 (2014). The Court below even conceded the "clearly erroneous" exception for appellate factual review. *Lake v. Hobbs*, 2023 Ariz. App. LEXIS 74, at *8. (Ariz. Ct. App. 2023).

Additionally, when the question is "whether facts state a constitutional violation," the question "is, however a mixed question of law and fact [and t]his Court reviews de novo such mixed questions of law and fact." *State v. Moore*, 222 Ariz. 1, 7 (2009) (quoting *Sumner v. Mata*, 455 U.S. 591, 597 n.10 (1982) ("The ultimate conclusion as to whether the facts as found state a constitutional violation is a mixed question of law and fact.")).

Respondents seek to convince this Court that its own words do not apply. As, once again, Petitioner stated plainly in its Petition for Review,[10] this Court has made clear that the **"unless clearly erroneous doctrine" "does not apply to**

[10] *See* Petition for Review at 4, citing the same holding from *Arizona Bd. of Regents*.

the trial court's conclusions of law nor does it 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." *Arizona Bd. of Regents v. Phoenix Newspapers*, 167 Ariz. 254, 257 (1991) (emphasis added).

Here, Petitioner filed a "petition for special action," alleging that the courts below were in fact clearly erroneous in their factual findings, and that they had in addition applied an incorrect legal standard for burden of proof. As she noted in her Petition for Review, the Court of Appeals had "reviewed the trial court's rejection of Lake's COC and L&A testing claims under the clearly-erroneous standard, without recognizing that the trial court's erroneous legal standard undermined its factual determinations." Pet. at 13.

In addition, she alleged that, due to their improper application of the burden of proof, the lower courts had erred in dismissing her constitutional claims. Accordingly, there are outstanding "mixed questions of law and fact," which not only allow, but require, *de novo* review in this Court.

Providing a classic illustration of "projection," Respondents blame Petitioner for what they have done. Respondent Fontes asserts that Petitioner has "sow[ed] unfounded distrust in our election processes, malign[ed] our public servants, and undermine[d] our democracy," and that "if the People's faith in

those foundations crumble, so goes all we have worked so hard to build and maintain. We cannot let this happen." Fontes Response Br. at 10-11. The truth is that it was Respondents' blatant disregard for election laws — laws carefully crafted by Arizona's duly elected legislature to ensure the integrity of the process — that "sows distrust and undermines democracy." As Wisconsin's Supreme Court recognized, "allowing [those responsible] to administer the 2022 elections in a manner other than that required by law" is what "causes doubts about the fairness of the elections and erodes voter confidence in the electoral process." *Teigen*, 976 N.W.2d at 529. "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box." *Baker v. Carr*, 369 U.S. 186, 208 (1962) (internal citations omitted).

The lower courts' blithe dismissal of blatant election law violations defies the Supreme Court's admonition that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds*, 377 U.S. at 562. "Electoral outcomes

obtained by unlawful procedures corrupt the institution of voting, degrading the very foundation of free government." *Teigen*, 976 N.W.2d at 530. "The purity and integrity of elections is a matter of such prime importance, and affects so many important interests, that the courts ought never to hesitate, when the opportunity is offered, to test them by the strictest legal standards." *Id*. at 531.

CONCLUSION

This Court is again called upon to be the guardian of the rights of the voters of Arizona, as expressed through their elected legislators, to a "free and unimpaired" vote to determine their leaders. To refuse to review the election contest would breed distrust in elections in Arizona, and nationally. The Court should grant review, since Petitioner has proven to a preponderance of the evidence that the election has been "rendered uncertain" due to Respondents' illegal actions in violation of Arizona election law.

Respectfully submitted,

/s/ David T. Hardy

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