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 Recorder, *et al.,* *Real Parties in Interest.*	Maricopa County Superior Court No. CV2022-095403 **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)

David T. Hardy (Ariz. Bar No. 4288)
8987 E. Tanque Verde, No. 265
Tucson, AZ 85749
T: (520) 749-0241
dthardy@mindspring.com
Counsel for Amici Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CONSTITUTION

STATE CONSTITUTIONS

STATUTES

CASES

MISCELLANEOUS

INTEREST OF THE AMICI

The interest of the four nonprofit organizations filing this *amicus* brief is set out in their Motion for Leave to File Brief *Amici Curiae*, which is incorporated by reference.[1]

STATEMENT

Despite a continuing barrage of news stories describing claims of 2022 election irregularities as "false" and "debunked," Arizona voters — by a 55 to 40 percent margin — overwhelmingly continue to believe such irregularities in Maricopa County compromised the election.[2] And now, a "late exit" poll demonstrates that 8 percent more voters report that they voted for Kari Lake than report they voted for Katie Hobbs.[3]

The trial court and court of appeals made numerous, serious legal errors in rejecting Petitioner's challenge to the election. The use of an inapplicable "clear and convincing" standard of proof together with the requirement that petitioner

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

[2] Rasmussen Reports, "Most Arizona Voters Believe Election 'Irregularities' Affected Outcome" (Mar. 17, 2023).

[3] *See* R. Alexander, "New 'Late Exit" Poll Finds Eight Percent More Arizona Voters Said They Voted for Lake over Hobbs," *Arizona Sun Times* (Mar. 17, 2023).

Lake demonstrate that the results of the election would have been different if it had been conducted properly have essentially immunized the election from meaningful review. The courts below sanctioned numerous violations of the statutes and procedures by which the November 2022 election was required to have been conducted. Petitioner's showing that an additional 35,000 votes — twice the supposed margin of victory — were introduced into the count has never been explained by Respondents. The fact that the election was conducted under the control of the candidate who declared herself the victor has reassured no one. Allowing such an election to stand unreviewed would destroy the public's confidence in this election and give license to those conducting future elections to manipulate the rules at will.

In such a circumstance, this Court has a duty to review the matter. Just months ago, in a case where the Wisconsin Supreme Court found illegal election interference by employees of the Wisconsin Elections Commission, the Court expressed what is at stake in election context cases by quoting John Adams:

> "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." [*Teigen v. Wis. Elections Comm'n*, 976 N.W.2d

519, 530 (Wis. 2022) (quoting John Adams, Inaugural Address (Mar. 4, 1797) (emphasis added).]

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 by "clear and convincing evidence." Pet. at 1. It determined she failed to meet this standard on the two issues tried: 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). It also required Petitioner to prove "the misconduct did, in fact, change the result of that election." App'x at 101. These rulings were in error.

It is black letter law that in civil cases, a plaintiff/petitioner generally need only reach a "preponderance of the evidence." No statute requires a "clear and convincing evidence" standard for either point tried — that 35,563 unaccounted-for Election Day Drop-Box ballots ("EDDBs") were inserted under third-party Runbeck's custody, or that a material number of ballots were improperly accepted despite mismatched, unverified, and legally uncured signatures.

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). Moreover, in the election code, one narrow provision 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 legislature specified that standard in one narrow type of election-related case, its failure to require that standard for other types of cases indicates it should not be used here.

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 … by preponderance of the evidence."[4]

Numerous other jurisdictions have employed the preponderance standard:

- Minnesota: 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).

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[4] 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).

- New Jersey: "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).
- West Virginia: "The burden was upon contestant to prove by a preponderance of the evidence that the election … 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).
- Connecticut: "[T]he usual civil standard of a preponderance … is the appropriate burden of persuasion…." *In re Election of the United States Representative for the Second Congressional Dist.*, 653 A.2d 79, 94, n.25 (Conn. 1994).

Although this Court has not expressly described the standard for election contests as a "preponderance," 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 … 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…." *Id*.

Lastly, in Section III, *infra*, it is shown that if the trial court had not erroneously dismissed Petitioner's Equal Protection Claim, a preponderance standard would have applied, and the court could not have required Petitioner to prove that a vote without irregularities would have necessarily been outcome-determinative.

II. THE COURTS BELOW ERRONEOUSLY RULED THAT PETITIONER MUST PROVE THAT ILLEGAL BALLOTS WOULD NECESSARILY HAVE CHANGED THE RESULT.

The trial court required proof that "the misconduct did, in fact, change the result of that election." App'x at 101. But in *Findley,* this Court did not require ironclad proof that irregularities would have changed the outcome, before ordering a new election. The test is whether the omissions or irregularities "affect[ed] the result, or at least render[ed] it uncertain…." *Findley* at 260.

Arizona's Constitution demands "[a]ll elections shall be free and equal, and no power, civil or military, shall … interfere to prevent the free … right of

suffrage." Ariz. Constitution, art. 2, §21. This Court's prior decisions uphold this constitutional imperative. Where irregularities wrongfully interpose:

> [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 … 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).]

The *Teigen* court made clear: "If the right to vote is to have any meaning at all, elections must be conducted according to law." *Teigen* at 529. Unlike this case, *Teigen* involved a prospective injunction against election violations, not a retrospective request for a contest. Nonetheless, the Court's language appears to apply both to prospective and retrospective challenges:

> Unlawful votes do not dilute lawful votes so much as they pollute them …. **When the level of pollution is high enough, the … institution of voting loses its credibility as a method of ensuring the people's continued consent**…. *See State ex rel. Bell v. Conness*, 106 Wis. 425, 428 … (1900) ("He failed to show that he received a majority of the votes … but [proved] a condition of affairs that taints the whole proceeding…."). [*Id.* at 530, 531 (emphasis added).]

The 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 … virtually helpless.' *See* 106 Cong. Rec. 5082, 5117 (1960) (statement of Sen. Lyndon B. Johnson)." *Id.* at 531. Under the rulings below, Arizona's

voters may as well be "men without votes," "virtually helpless" in the face of serious election irregularities by those charged with conducting it. This Court should stand in the gap to prevent such abuse.

As Weinberg's treatise notes, 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...."[5] The challenger need not prove that the outcome would have been different.

By requiring Petitioner to prove she would have won but for the disputed ballots, the courts below have set up a standard higher than "clear and convincing." They have required the impossible — that Petitioner demonstrate which 35,563 ballots, out of 298,942 ballots, were the ones improperly inserted, and then prove which candidate received the votes cast on those 35,563 ballots. This would produce open season for election interference by the party controlling the Secretary of State's office in any given election. It would reward election malfeasance, since the greater the malfeasance and the difficulty of unwinding it, the less chance of effective judicial review. Thus 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

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

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 illegally contain uncured and un-matching signatures, this election, a process controlled by the prevailing candidate, is irretrievably tainted. Review is required to uphold the constitutional imperative of Article 2, §21.

Numerous jurisdictions agree. 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*, … "[T]he rule that has been followed by this court for more than a century and a half … [protects] 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).]

Hawaii also requires invalidation when the number of invalid ballots exceeds the final margin. *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 … 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 concurs: "in order … to overturn the results of an election … the court must be persuaded that: (1) there were substantial violations of … the statute…; and (2) as a result … the election is seriously in doubt." *Bauer v. Souto*, 896 A.2d 90, 97 (Conn. 2006).

Arkansas agrees. "[W]here the wrongs … render the election results **uncertain or doubtful**, there is no way for the trial court to determine who won…." *Whitley v. Cranford*, 119 S.W.3d 28, 35 (Ark. 2003) (emphasis added). "[W]hether an election is to be voided is based on whether the result … 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…" the court will "decree the nullity of the entire election." *Valence v. Rosiere*, 675 So. 2d 1138, 1139 (La. Ct. App. 1996). This "**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).

In New Jersey, when "the court cannot with **reasonable certainty** determine who received the majority of the legal vote," or "[i]f the irregularities … 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).

This Court's rule dates from 1917. When illegal or contested votes "render the result uncertain, the entire vote so affected must be rejected." *Hunt,* 19 Ariz. at 266. The vast numbers of questionable and contested votes "render the election uncertain," and the election should be reviewed by this Court.

III. THE COURT OF APPEALS ERRED BY AFFIRMING THE DISMISSAL OF THE EQUAL PROTECTION CLAIM.

It was error for the Court of Appeals to affirm the dismissal of Count V, which asserts a violation of the Equal Protection Clause, on the grounds that it was duplicative of Petitioner's state law claims. A federal equal protection claim is independent of a state law claim. *Cf. Bush v. Gore*, 531 U.S. 98, 105 (2000) ("The recount mechanisms implemented in response to the decision of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right [to equal protection].").

The Court of Appeals also erred by not applying the preponderance of the evidence burden of proof to the federal equal protection claim, as opposed to the clear and convincing burden of proof it had applied to the state law claims. *Harris v. Arizona Indep. Redistricting Comm'n*, 578 U.S. 253, 259 (2004) (Challengers in equal protection cases "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.'"); *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 rights cases).

Discrimination based on partisan factors has long been treated as an equal protection violation. *Andersen v. Celebrezze*, 460 U.S. 780, 788 (1983); *Williams v. Rhodes*, 393 U.S. 23, 30-32 (1968). The U.S. Supreme Court and lower federal courts have approved the use of statistical evidence to show such partisan discrimination. *Harris*, 578 U.S. at 259; *Brown v. Thomson*, 452 U.S. 835, 842 (1983); *Raleigh Wake*, 827 F.3d at 342; *City of Greensboro v. Guilford Cnty. Bd. of Elections*, 251 F.Supp. 3d 935, 943 (M.D.N.C. 2017); *Perez v. Abbott*, 250 F.Supp. 3d 123, 205-06 (W.D.Tex. 2017).

By affirming a dismissal of Count V as duplicative, the Court of Appeals never addressed the merits of Count V, which asserted that Petitioner's statistical evidence established a violation of equal protection. Petitioner's expert testified that Republican voters, who vote on Election Day rather than before at a significantly higher rate than do Democrat voters, suffered discrimination as a result of the County's undisputed failure to comply with the Logic and Accuracy Testing requirement of A.R.S. §16-449(A) and Arizona Election Procedure Manual ("EPM"), Chap. 4, II, App'x at 117, 122-23. The County's failure to comply with that requirement led to approximately two-thirds of the County's precincts printing defective ballots that were rejected.

Election Day voting by Republican voters exceeded voting by Democrat voters by a margin of 58%-15%. *See* Pet at 8. The voting machine failures burdened Republican-leaning precincts by 15 standard deviation points more than Democrat-leaning precincts. *See id*. If the rule adopted in *Harris*, *Brown*, and *Raleigh Wake* that allows statistical evidence to be used to establish an equal protection violation had been applied by the courts below, Petitioner would have established a *prima facie* case of discrimination that Respondents would be required to justify. *Brown*, 462 U.S. at 842-43. In error, that rule was not

applied by either court below, which warrants reversal of the decision of the Court of Appeals.

IV. THE COURTS BELOW DISREGARDED RESPONDENTS' REFUSAL TO PERFORM MANDATORY ELECTION LAW DUTIES.

A. Chain of Custody Procedures.

Arizona law requires: "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…." Ariz. Stat §16-621(E). *See also* EPM at 68-69 (emphasis added). *See* Compl. at ¶107, App'x at 060. Counting must be conducted at the counting center in the presence of observers representing the candidates and videotaped — not at a vendor's facility. A.R.S. §16-621(A); EPM at 193. 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).

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 with an extra, outcome-determinative, 35,000 ballots inserted. *Id*. at ¶119, App'x at 066. Having more votes than the certified margin of victory is what the requirement to count the votes was designed to prevent.

B. L&A Testing.

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. It appears undisputed that there was no "L&A Testing," only "stress testing" which "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 15.

This failure to do required testing led to tabulators at nearly two-thirds of Maricopa precincts printing 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 and voters giving up waiting. *Id*. at 7. Since Election Day voting favored Republicans by a large 58%-15% margin Petitioner disproportionately lost a substantial number of votes due to Respondents' violation of law. *Id*. at 8.

C. Signature Verification Requirements.

A.R.S. § 16-550 requires that for early-voting ballots, the voter must sign the ballot envelope, which signature is compared with the voter's signature on file. "If the signature is inconsistent … the county recorder or other officer in charge of elections shall make reasonable efforts to contact the voter … and allow the voter to correct or the county to confirm the inconsistent signature." If the signature is not cured, the ballot may not lawfully be counted. Compl. at ¶151; App'x at 75-76.

The Court below ignored its duty to accept as true Petitioner's well-pled allegations that a "material number" of ballot with un-matching signatures were nonetheless accepted in violation of the law. *Id.* at ¶151-152; App'x at 76. In addition, whistleblowers testified (i) signatures were not verified, and (ii) there were too many unverified signatures for curing to have occurred. Compl. ¶57, 61-62. App'x at 33, 35-36. As this Court has noted in *Miller*: "Section 16-542(B) [sets] 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* at 180.

CONCLUSION

This Court is again called upon to be the guardian of the rights of the voters of Arizona to a "free and unimpaired" election. Refusal to review the election contest would breed distrust in elections both in Arizona, and nationally.

Respectfully submitted,

/s/ David T. Hardy

David T. Hardy (Ariz. Bar No. 4288)
8987 E. Tanque Verde, No. 265
Tucson, AZ 85749
T: (520) 749-0241
dthardy@mindspring.com

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