ARIZONA COURT OF APPEALS
DIVISION TWO

KARI LAKE, *Plaintiff-Contestant/Appellant*, v. KATIE HOBBS, personally as Contestee, *Defendant-Contestee/Appellee*, and ADRIAN FONTES, in his official capacity as Secretary of State; STEPHEN RICHER, in his official capacity as Maricopa County Reporter; Bill Gates, Clint Hickman, Jack Sellers, Thomas Galvin, Steve Gallardo, in their official capacities as members of the Maricopa County Board of Supervisors; Scott Jarrett, in his official capacity as Maricopa County Director of Elections; and the Maricopa County Board of Supervisors, *Defendants/Appellees*.	No. 2CA-CV23-0144 Transferred from Court of Appeals Division One No. 1CA-CV23-0393 Maricopa County Superior Court No. CV2022-095403

REPLY BRIEF OF APPELLANT KARI LAKE

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INTRODUCTION

In its Answering Brief, Maricopa makes demonstrably false or misleading arguments to distract the Court from the evidence and admissions showing that Maricopa blatantly violated Arizona election laws, falsely certified it conducted L&A testing on October 11, 2022, and apparently rigged the November 2022 Election to fail on Election Day.

First, Maricopa concedes that Lake's Rule 60 Motion forced Maricopa to admit ***seven months after the fact*** that, three days ***after*** purportedly conducting and passing statutorily mandated public pre-election L&A testing on October 11, 2022, Maricopa spent three days: (1) cutting the seals on the 446 vote-center tabulators; (2) taking out all of the memory cards containing the election program; and (3) reformatting and reinstalling those 446 memory cards, purportedly with a copy of the previously certified election program. [Answering Brief ("AB") 40; ROA 280 ep 4-5 (Jarrett Dec. ¶¶ 14-15).]

Second, Maricopa concedes that during those three days Maricopa: (1) conducted unannounced testing on those 446 vote-center tabulators; (2) had 260 of the 446 tabulators reject ballots with the "same type of 'Ballot Misread' errors that also occurred on Election Day"; and (3) then resealed the 446 vote-center tabulators for use on Election Day. [AB 39-41, Opening Brief ("OB") 13.]

Third, Maricopa's brief is silent on the fact that Maricopa's system log ("SLOG") files show that Maricopa's vote-center tabulators rejected defective BOD-printed ballots more than 200,000 times at a rate of over 7,000 ***every 30 minutes*** from 6:30 am, shortly after the polls opened, through 8:00 pm, after the polls closed, causing massive lines and chaos on Election Day. [OB 10-11.]

Fourth, in explaining why it removed and installed reformatted memory cards in the 446 vote-center tabulators, Maricopa unwittingly reveals it did not conduct statutorily mandated L&A testing on October 11, 2022 on ***any*** of its Election Day vote-center tabulators, much less "all" of them as Arizona law requires. Specifically, Maricopa states "on October 14, 17, and 18, 2022, [it] installed new memory cards ***on its Election Day tabulators***—each memory card containing the certified Election Program that had undergone the logic and accuracy testing on October 11." [AB 40 (emphasis added).] However, any tabulators used during the October 11, 2022 L&A test were required to have the Election Program installed for that statutory L&A testing. It would be unnecessary later to install election software ***on Election Day tabulators*** if they were part of L&A testing on October 11, 2022.

Maricopa's "nothing-to-see-here" arguments continue its pattern of false statements to cover up clear violations of Arizona election law. It has been said that "democracy dies in darkness." Unless corrected by the Court, democracy in Maricopa and in Arizona will die in plain sight.

STANDARD OF REVIEW

"Failure to respond in an answering brief to a debatable issue constitutes confession of error." *Chalpin v. Snyder*, 220 Ariz. 413, 423 n.7, ¶40 (App. 2008); *Caretto v. Ariz. DOT*, 192 Ariz. 297, 303 (App. 1998).

Appellate courts review purely legal issues *de novo* and purely factual issues for abuse of discretion. [*Compare* Opening Br. ("OB") 31-32 *with* AB 19, 34.] Maricopa does not dispute two additional facets of appellate review:

- The fact-law distinction is not an either-or proposition. *De novo* review also applies to "findings of fact that are induced by an erroneous view of the law" and "findings that combine both fact and law when there is an error as to law" because the "unless clearly erroneous doctrine" "does not apply." [OB 31 (quoting *Ariz. Bd. of Regents v. Phoenix Newspapers*, 167 Ariz. 254, 257 (1991)).]
- When appellate issues hinge on "question[s] … of law or logic," [OB 32 (quoting *Birt v. Birt*, 208 Ariz. 546, 549 ¶9 (App. 2004) (quoting *State v. Chapple*, 135 Ariz. 281, 297 n.18 (1983))], rather than on trial judges' "more immediate grasp of all the facts of the case, … opportunity to see the parties, lawyers and witnesses, and … better assess[ment of] the impact of what occurs before [the court,]" *Chapple*, 135 Ariz. at 297 n.18, appellate courts have the "final responsibility to ... look over the shoulder of the trial judge

and, if appropriate, substitute our judgment for his or hers." [OB 31 (quoting *Birt*, 208 Ariz. at 549 ¶9 (quoting *Chapple*, 135 Ariz. at 297 n.18).]

By not disputing these interstitial aspects of the fact-law distinction, Maricopa concedes them.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DENYING LAKE'S MOTION FOR RELIEF FROM JUDGMENT ON COUNT II.

A. Maricopa's threshold arguments lack merit.

This Court should reject Maricopa's meritless threshold arguments against Lake's Rule 60 motion.

1. Rule 60 applies to election contests.

Arguing that Rule 60 does not apply to election contests, Maricopa attempts to distinguish *Moreno v. Jones*, 213 Ariz. 94, 97 ¶16 (2006), based on how quickly the plaintiffs there sought relief from judgment. [AB 49-50.] This argument conflates timing and applicability. Moreover, the trial court ruled for Lake on this issue, [ROA 295 ep 5], and no appellee cross-appealed. The time to cross-appeal ended 20 days after Lake appealed, ARCAP 8(b), 9(b), so this Court lacks jurisdiction to address this issue: "The time to appeal is jurisdictional[.]" *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 413, ¶29 (2006).

2. The mandate rule does not preclude new evidence from changing old results.

Maricopa argues that Rule 60 relief would violate the mandate from the prior appeal. [AB 47-48.] Citing *Standard Oil Co. v. United States*, 429 U.S. 17, 18-19 (1976), the Arizona Supreme Court expressly rejected that limitation on relief under Rule 60: "the mandate was based on the record and issues before the appellate court during the appeal and did not deal with later occurring events ***or discoveries***." *US W. Communs. v. Ariz. Dept of Revenue*, 199 Ariz. 101, 103 (2000) (emphasis added).

3. The law-of-the-case doctrine does not bar review.

Maricopa asserts the law-of-the-case doctrine and attempts to elevate the Arizona Supreme Court's denial of review into a merits holding. [AB 51-53.] Both arguments lack merit.

First, "[t]he 'law of the case' doctrine is a rule of policy, not law." *Martinez v. Indus. Comm'n*, 192 Ariz. 176, 179 (1998). The doctrine is discretionary, *State v. Wilson*, 207 Ariz. 12, 15, ¶9 (App. 2004), but invoking the doctrine *vis-à-vis* the Rule 60 Motion's facts and evidence would abuse that discretion. *See Id.* (doctrine applies "***unless*** an error in the first decision renders it manifestly erroneous or unjust or ***when a substantial change occurs in essential facts or issues, in evidence***, or in the applicable law") (emphasis added). Second, the apt resolution of ***prior appeals***, based on ***prior records***, does not preclude different resolutions based on new records. [*See* Section I.A.2, *supra*.] Moreover, denials of review are not merits holdings. *State*

v. Youngblood, 173 Ariz. 502, 504-05 (1993). When the Supreme Court wants to affirm appellate decisions summarily, the Court knows how. *State v. Mendiola*, 112 Ariz. 165, 165 (1975) (Court of Appeals decision "approved and adopted as the opinion of this court"). Even if the prior appellate decisions "aptly resolved ***those issues***," [ROA 262 ep 2 (emphasis added)], the resolved issues were expressly limited to issues five and seven (*i.e.*, not the entire case outside Count III). [*See id.*]

4. The Rule 60 motion does not implicitly amend the complaint.

Maricopa argues that tabulator-based arguments constitute an impermissible amendment of a printer-based Count II, [AB 53-54], but Maricopa does not dispute that "the Complaint makes claims for both BOD printers and the tabulators," [OB 34], and readily admits that other aspects of Count II existed but were dismissed. [AB 53.] Maricopa thus concedes that Count II ***as filed*** included tabulator issues, which is clear—in any event—from the complaint's plain language.

5. One or more of Rules 60(b)(2)-(b)(3) and (b)(6) applies.

Maricopa quibbles about what "new" means under Rule 60(b)(2) and Lake's not having proved fraud under Rule 60(b)(3), [AB 35-38, 45-46], but cannot credibly dispute Lake's overall argument that one or more of Rules 60(b)(2)-(b)(3) and (b)(6) applies. [OB 35-41.] Although the three Rules have slightly different tests, all of them require showing material or outcome-altering impacts, [OB 36-40], although Rule 60(b)(3) shifts the burden ***to nonmovants*** for ***intentional*** misconduct. [OB 37-

38.] Because Maricopa does not defend the outcome-altering nature of Lake's Rule 60(b) evidence, [*see* Sections I.B, *infra*], this Court need not decide whether Maricopa intentionally misled the trial court. Either Maricopa did not meet ***its burden***, [*id.*], or the burden remained with Lake but Maricopa conceded the issue. Either way, Lake's motion fits within Rule 60(b). The following three subsections show that Maricopa concedes at least one basis under Rules 60(b)(2)-(b)(3) and 60(b)(6) for considering Lake's evidence, whether "new" or not.

a. "New" evidence exists under Rule 60(b)(2).

Maricopa argues that "new" evidence needed to exist when the court entered judgment, but that is not the test. [*Compare* OB 36 *with* AB 35-38.] While "newly discovered" evidence cannot include ***post-judgment*** evidence, Bennett Evan Cooper *et al.*, ARIZONA TRIAL HANDBOOK § 33:31; *Birt*, 208 Ariz. at 549, ¶11 (post-judgment bankruptcy); *OPI Corp. v. Pima Cnty.*, 176 Ariz. 625, 626-27 (Tax 1993) (failure to make post-judgment tax payment), "new" can apply to ***post-judgment discussions*** of ***pre-judgment facts***. *See, e.g.*, *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*, 31 F.4th 1124, 1128-29 (9th Cir. 2022) (post-judgment indictment illuminating pre-judgment conduct is "new"); *Chilson v. Metropolitan Transit Authority*, 796 F.2d 69, 72 (5th Cir. 1986) (post-judgment audit of pre-judgment activity is "new"); *Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1075 n.3 (D.C. Cir. 1983) (government reports about

past actions are "new"); MOORE'S FEDERAL PRACTICE—CIVIL § 60.42. Even assuming *arguendo* that evidence is not "new" for failing to exist when judgment was entered, the evidence can nevertheless be considered under Rules 60(b)(3) and Rule 60(b)(6). [OB 37 n.16, 40-41; *see* Sections I.A.5.b-I.A.5.c, *infra*.] But all Lake's evidence is "new."

Underpinning the Rule 60 Motion's claims, the SLOG files show that Maricopa:

- Did not conduct statutory L&A testing on October 11, 2022 in violation of A.R.S. § 16-449;
- Conducted unannounced testing on October 14, 17-18 2022, with 260 of the 446 tabulators rejecting ballots with the same error codes as occurred on Election Day; and
- Had advance notice that vote-center tabulators would reject ballots on Election Day on an unimaginable scale at nearly two-thirds of Maricopa's 223 vote centers.

[OB 9; ROA 271 ep 27-30, 31-34, 37-38, 47-49 (Parikh Decl. ¶¶ 6, 8, 11-14, 17-24, 29-30, 46-48).]

i. The SLOG files are "new."

The SLOG files predate the judgment, [ROA 271 ep 27 (Parikh Decl. ¶ 6)], and thus are temporally eligible under Rule 60(b)(2), which Maricopa ignores.

Moreover, contrary to Maricopa's argument about Lake's delay, her cyber and legal team diligently analyzed over thirty million lines (~30,192,847) of SLOG entries over the course of several months, *see Trendsettah*, 31 F.4th at 1137, involving several thousand man-hours in data analysis, research, and testing before timely bringing the Rule 60 Motion. [AB 37; ROA 271 ep 27-28 (Parikh Decl. ¶ 6).]

ii. Jarrett's admissions and the McGregor Report are "new."

Although the Jarrett declaration and McGregor Report post-dated the judgment, they concern pre-judgment facts leading up to Election Day. As explained in Section I.A.5.a, *supra*, backward-looking revelations about pre-judgment facts can qualify as "new" under Rule 60(b)(2). For the same reasons, Maricopa's election hotline call logs, video evidence, and Goldenrod reports identifying misconfigured fit-to-page BOD-printed ballots occurring at 127 out of Maricopa's 223 vote centers are "new." [OB 9-11, 13.]

b. "Misconduct" exists under Rule 60(b)(3).

Maricopa does not dispute that "[m]isconduct within [Rule 60(b)(3)] need not amount to fraud or misrepresentation but may include even accidental omissions." [OB 37 (quoting *Estate of Page v. Litzenburg*, 177 Ariz. 84, 93 (App. 1993)).] Maricopa thus concedes Rule 60(b)(3)'s application to accidental omissions (*i.e.*, the rule does not require proving fraud).

Lake's Rule 60 evidence shows, *inter alia*, that Maricopa (1) failed to conduct statutory L&A testing on "all of [Maricopa's] deployable voting equipment" either on October 11, 2022, or after it broke the seals on the 446 vote-center tabulators and removed, reformatted, and reinstalled the memory cards on October 14, 17, 18, [ROA 201 ep 109-10]; (2) failed to disclose the latter events; (3) knew that 260 of 446 tabulators rejected ballots in the unannounced testing on October 14, 17-18; and (4) gave false testimony on the causes and extent of tabulator BOD-printed ballot rejections. [OB 9-18, 38-39].

These shortcomings—failing to L&A test all vote-center tabulators on October 11 and altering all vote-center tabulators on October 14, 17, and 18— are material because failing to undergo statutorily mandated L&A testing makes those tabulators unreliable to use in elections, requiring the election to be set aside. *Miller v. Pichaco Elementary School District No. 33*, 179 Ariz. 178, 180 (1994); *Reyes v. Cuming*, 191 Ariz. 91, 94 (App. 1998). Moreover, Maricopa testified falsely and argued misleadingly about these shortcomings throughout this litigation.

c. Without Rules 60(b)(2)-(b)(3), Rule 60(b)(6)'s catchall applies.

Maricopa argues that Rule 60(b)(6) is mutually exclusive from Rules 60(b)(1)-(b)(5), and that Rule 60(b)(6) does not apply because "Lake's 'new evidence' is not actually new evidence [and] essentially forecloses its use as a ground for obtaining Rule 60(b)(6) relief." [AB 46-47.] If Rules 60(b)(2)-(b)(3) do not

apply, then Rule 60(b)(6) can apply. Further, Jarrett's deceitful responses, post-judgment government reports like the McGregor Report and admissions like the Jarrett declaration, as well as engineered Election Day chaos and the evidence of malware all meet the alternate exceptional-circumstance Rule 60(b)(6). *See Amanti Elec., Inc. v. Engineered Structures, Inc.*, 229 Ariz. 430, 433, ¶10 (App. 2012).

6. Parikh is a qualified expert for cyber issues.

Maricopa hyperbolically disparages Lake's cyber expert, [AB 38-40 (Parikh's "baseless," "outrageous" "conclusory" claims)], but Parikh's findings sufficed to prompt Maricopa's belated admissions in the Jarrett Declaration that after L&A testing on October 11, 2022, Maricopa swapped reformatted memory cards on all 446 vote-center tabulators and conducted unannounced testing in which 260 tabulators experienced the same error codes as on Election Day. [*See* Section I.B.2, *infra*.]

Moreover, Maricopa does not challenge Parikh's *qualifications* to analyze Maricopa's documents. [ROA 2 ep 157-58 ¶¶ 2-4; ROA 271 ep 26-27 (¶¶ 2-4).] Among Parikh's many cyber qualifications, between 2008-2017, he was retained by voting systems testing labs like Pro V&V, which certifies Maricopa's voting machines, to perform security tests on voting systems for certification by the Election Assistance Commission or various Secretaries of State. [ROA 271 ep 106-08 (RT, 9/12/23, 81:25-83:21).] Parikh is thus plainly qualified to analyze

Maricopa's technical data, such as the SLOG files and tabulator poll tapes, and to analyze the McGregor Report's findings and observations.

B. Maricopa's attacks on the new evidence and denials of wrongdoing fail.

Maricopa makes demonstrably false, misleading, and contradictory arguments against granting Rule 60 relief. [AB 35-44]. None of Maricopa's arguments withstands scrutiny.

1. Maricopa falsely argues it conducted L&A testing on October 11, 2022, in accordance with Arizona law.

Maricopa argues that "Lake cites only to the Parikh declaration—not any documentary evidence" to assert Maricopa conducted no statutory L&A testing on October 11, 2022 "on any of the [446 vote-center] tabulators" used on Election Day." [AB 38.] Maricopa knows that Parikh's conclusions are based on his detailed analysis of the SLOG files but attempts to mislead the Court by cherry picking ¶¶ 11-13 of Parikh's declaration while simultaneously mischaracterizing the SLOG files as "bits of irrelevant material upon which Lake choses to rely." [AB 36, 38.]

a. SLOG files are not mere "bits of irrelevant material."

Maricopa does not dispute that the SLOG files "document[] all tabulator activity for the election project, including all testing through the close of polls on Election Day" [ROA 271 ep 31 (Parikh Decl. ¶ 17).]. The SLOG files are the most significant "new evidence" underpinning the Rule 60 Motion and the Parikh Declaration. This Court should reject Maricopa's feigned ignorance of what its own

SLOG files show and misleading disparagement of this evidence as "bits of irrelevant material." [AB 36.]

Further, Parikh's declaration clearly refers to the SLOG files beyond ¶¶ 11-13 cited by Maricopa as the basis for concluding that Maricopa did not subject any, much less "all deployable" vote-center tabulators used on Election Day to statutorily required L&A testing on October 11, 2022. [ROA 271 ep 27-28, 30-33 (¶¶ 6, 8(a), 11-14, 17-19 (discussing SLOG files including screenshots).] Maricopa's argument that Lake does not cite "documentary evidence" is false.

Lastly, as Lake' Opening Brief showed, Jarrett falsely testified that Lake had not requested system log files "predating October 14." [OB 17; ROA 280 ep 5 (Jarrett Decl. ¶ 14).] Lake requested all system log files and did not limit them by date. [OB 17; ROA 290 ep 27 Ex. A (letter requesting "All tabulator logs" and all "S-logs").] Maricopa does not dispute this point and thus concedes Jarrett again gave false testimony.

b. Maricopa attempts to mislead the Court about which tabulators were L&A tested on October 11, 2022.

Maricopa argues "[t]he evidence is conclusive: the tabulators were put through the ***required logic and accuracy testing and passed.***" [Maricopa Br. 38-39 (emphasis added]. Maricopa knows ***exactly*** what equipment it L&A tested on October 11, 2022. And Maricopa knows the issue here is not whether ***some*** unspecified "tabulators" underwent statutory L&A testing that day. The issue is

whether "all vote-center tabulators used on Election Day" underwent the statutorily required L&A testing on October 11, 2022. [OB 12.]

Maricopa's reliance on the Secretary of State and Maricopa L&A certificates attached as Ex. A to Parikh's Declaration is misplaced. [AB 38-39.] Those certificates simply state that some unspecified "voting and tabulation equipment" and "equipment and programs" were tested that day—not that all 446 vote-center tabulators used on Election Day underwent L&A testing on October 11, 2022.

Maricopa's reliance on Jarrett's declaration submitted in response to the Rule 60 Motion fares no better. [AB 39.] Jarrett simply testified that Maricopa tested an unspecified "combination of the Central Count and Vote Center tabulators" on October 11, 2022. [ROA 280 ep 5 (¶ 13).]

Lastly, Maricopa implicitly concedes that no vote-center tabulators used on Election Day underwent L&A testing on October 11, 2022. Specifically, Maricopa states "on October 14, 17, and 18, 2022, Maricopa County installed new memory cards ***on its Election Day tabulators***—each memory card containing the certified Election Program that had undergone the logic and accuracy testing on October 11." [AB 40 (emphasis added).] However, any tabulators used during the October 11, 2022, L&A test were required to have the Election Program installed for that statutory L&A testing. [ROA 280 ep 5 (¶ 12).] There would be no need to install the

Election Program ***on its Election Day tabulators*** if they underwent statutory L&A testing on October 11, 2022.

In sum, Maricopa failed to conduct statutorily mandated L&A testing on October 11, 2022, and falsely certified it complied with A.R.S. § 16-449 and the EPM requirement to conduct statutory L&A testing on "all" of the 446 vote-center tabulators used on Election Day. [OB 11-12.]

2. Maricopa's "nothing-to-see-here" argument does not rebut Lake's Rule 60(b) evidence that the Election Day chaos was neither accidental nor mundane.

Maricopa falsely states that "Lake also asserts that Maricopa County engaged in an unlawful 'unannounced' logic and accuracy testing of the tabulators starting on October 14, 2022, which she alleges the tabulators failed. Once again, Lake does not cite to any documentary evidence." [AB 39.]

First, Lake never asserted that Maricopa's surreptitious testing qualifies as "logic and accuracy" testing. As Parikh explained, Maricopa conducted unlawful unannounced "testing" beginning three days after Maricopa purportedly completed its L&A testing on October 11, 2022. [ROA 271 ep 27-28, 30-34, 38 (¶¶ 6, 8(b), 14, 17-25, 30).] Indeed, Arizona law required ***new L&A testing***—and ***new notice***—for the vote-center tabulators with reformatted memory cards and new software. A.R.S. § 16-449(A) (requiring that "automatic tabulating ***equipment and programs*** [be]

tested to ascertain that the equipment and programs will correctly count the votes cast for all offices and on all measures") (emphasis added).

Second, the Parikh Declaration clearly cites the SLOG files revealing: (1) the fact of Maricopa's unannounced and unlawful testing; and (2) the fact that 260 of the 446 tabulators showed error codes from this unannounced testing that were not corrected and were the same errors codes as arose on Election Day, when vote-center tabulators began rejecting BOD-printed ballots at a rate of over 7,000 ***every 30 minutes*** from 6:30 am, shortly after the polls opened, through 8:00 pm, after the polls closed, causing massive lines and chaos on Election Day. [ROA 271 ep 27-28, 30-34, 38, 47-49 (¶¶ 6, 8(b), 14, 17-25, 30, 46-48).] Contrary to Maricopa's argument, there is nothing "conclusory" or "baseless" about Parikh's SLOG-based findings. [AB 40.]

The veracity and credibility of Parikh's findings is illustrated by the fact that, after Lake filed her Rule 60 Motion, Maricopa was forced to admit or concede that:

- Without any public announcement, ***after*** the statutorily mandated October 11, 2022, L&A testing was certified to have occurred, Maricopa ***broke*** the "tamper evident seals" on the 446 vote-center tabulators and removed, reformatted, and replaced memory cards on October 14, 17-18, 2022, for all vote-center tabulators used on Election Day. [ROA 280 ep 5-6 ¶ ¶ 14-15.]

- Without any public announcement, Maricopa then ran a "test deck of ballots" through all 446 vote-center tabulators on October 14, 17-18, 2022. [ROA 280 ep 6 ¶ 15.]
- During that unannounced testing, 260 of the 446 vote-center tabulators ***rejected*** ballots with the same tabulator error codes that occurred on Election Day. [ROA 280 ep 6-7 ¶ 17; AB 39-41.]

Moreover, Maricopa does not dispute the astounding rate of rejections, 7,000 ballots every 30 minutes from 6:30am-8:00pm, with 51% percent of Maricopa's 223 vote centers experiencing an astounding 41%-100% ballot rejection rate. [ROA 271 ep 47-49 (¶¶ 46-48).] The sheer magnitude of these ballot rejections precludes any notion that this debacle was an unforeseen event. If the rejection or misfeed rate exceeds 0.002 (*i.e.*, 1 in 500), tabulators fail their certification requirement. [ROA 321 ep 29-30 (¶¶ 13-14).]

Such an event cannot happen with proper L&A testing. [OB 8-9.] Maricopa's characterization of the "Ballot Misread" errors as "mundane" and "not ***necessarily*** indicat[ing] the tabulator is malfunctioning" is disingenuous at best. [ROA 321 ep 27-30 (¶¶ 10-15).]

3. By replicating the "fit-to-page" issue, the McGregor Report supports Lake's argument that Jarrett gave false testimony.

Maricopa argues "[t]he McGregor Report, far from supporting Lake's position, concluded that the 'fit to page' issue appeared to be random and none of

the experts could identify the source of the problem." [AB 41.] Maricopa also argues that the "trial court described Lake's characterization of the McGregor Report as '180 degrees from the truth,' and it concluded that the McGregor Report actually supports Jarrett's testimony." [AB 42.] Maricopa's spin does not hold water.

First, Lake expressly addressed the trial court's "180 degrees from the truth" statement in responding to Maricopa's motion for sanctions, directly stating to the trial court that "it was mistaken" and showing why. [OB 39, n.6; ROA 321 ep 5-9 (explaining trial court's error); *see also* OB 14-18.] The trial court denied sanctions after considering Lake's detailed response. [ROA 323.]

Second, the McGregor Report did not conclude this event was just some "random" unexplainable event as Maricopa blithely suggests. Rather, the McGregor Report concluded, "***[w]e could not determine*** whether this change resulted from a technician attempting to correct the printing issues, the most probable source of change, ***or a problem internal to the printers***." [ROA 271 ep 238 (emphasis added).]

As Parikh explained, the McGregor Report identified this printing of fit-to-page ballots as occurring on ***both*** the OKI and Lexmark brands of Maricopa's BOD printers. As Parikh testified, "[i]t is impossible to have the same randomly occurring issue on two different types, models and manufactures of printers" without "malware

or remote administration changes" (*i.e.*, hacking).[1] [OB 18; ROA 271 ep 41-42, 49 (¶¶ 35-36, 49).] The McGregor Report thus further demonstrates the falsity of Jarrett's testimony that printer settings changed by technicians trying to fix Election Day printer problems caused the fit-to-page issue. [OB 17.]

4. Maricopa fails to rebut additional evidence showing Jarrett falsely testified about the cause and extent of the Election Day chaos.

Maricopa's attempt to spin Jarrett's demonstrably false testimony regarding the cause and extent of thousands of fit-to-page ballots that could not be tabulated on Election Day seeks to convince the Court not to look at the evidence—which is damning by any measure. [AB 43-44.]

First, Maricopa argues Lake's "assertion that the 'new evidence' shows that Jarrett gave false or misleading testimony … is wholly irrelevant to the resolution of this appeal—none of the claims have an element that requires Lake to show that Jarrett gave inaccurate testimony." [AB 42.] Maricopa's argument makes no sense. This evidence is directly relevant to Lake's claim under Rules 60(b)(3) and 60(b)(6). [OB 37-41.]

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[1] Maricopa also falsely argues "[t]he McGregor Report certainly *did not* find that the 'fit to page' issue was the result of intentional misconduct as Lake asserts." [AB 41-42.] But Lake never asserted the McGregor Report found intentional misconduct. Rather, Parikh's expert opinion was that malware or remote access could be the only cause, which can only be intentional.

Second, Maricopa implicitly argues that because Division One did not address the issue of Jarrett's false testimony that Lake raised in the December 2022 trial, this Court should ignore it too. Maricopa also critiques Lake's "willful ignorance given how many times this has been explained," improperly citing and incorporating its prior answering brief to an appeal with a different record. Maricopa needs to explain its conduct against this record. It does not.

Third, Maricopa misleadingly argues that Jarrett's testimony that the Election Day chaos was a "hiccup" applied only the fit-to-page issue, and that "even Lake's 'expert' Parikh admitted that the ballots subject to the BOD printer problem were duplicated." [AB 43.] Maricopa again attempts to mislead the Court. Jarrett's "hiccup" characterization described the total number of Election Day tabulator rejections, not simply the fit-to-page issue. And the SLOG files put a number on that chaos: over 7,000 ballot rejections every 30 minutes while polls were open, totaling over 200,000 rejections on a day when approximately 248,00 votes were cast. [OB 18; ROA 1 ep 12 ¶ 36.] Maricopa does not dispute this evidence, which squarely contradicts Jarrett's testimony that the Election Day chaos was a "hiccup."

Further, Parikh did ***not*** testify that the fit-to-page ballots were duplicated as he showed in his declaration. [ROA 271 ep 43 ¶ 38 citing trial transcript.] Lastly, the SLOG files, election hotline call logs, video evidence, and Goldenrod reports identify misconfigured fit-to-page BOD-printed ballots occurring at 127 out of

Maricopa's 223 vote centers at least 8,000 times—not three vote centers and 1,300 times as Jarrett falsely testified, which also means at least 6,700 ballots were not duplicated or counted. [OB 10-11; ROA 271 ep 7, 29, 43, 46 ¶¶ 8(g), 39, 44.] Maricopa ignores these facts which show Jarrett's testimony was false.

5. The Superior Court's reliance on Bettencourt's December 2022 testimony to reject Parikh's May 2023 testimony was error.

Maricopa does not dispute that the trial court erred in relying on lay testimony from December 2022 to reject later expert testimony—based on reviewing evidence not available to the lay witness—from May 2023. [*Compare* OB 35 *with* AB 1-63.] As such, Maricopa concedes the trial court erred. Assuming *arguendo* that the Court rejects Maricopa's frivolous threshold arguments against Rule 60 relief, [*see* Section I.A, *supra*], this concession alone warrants reversal.

II. THE SUPERIOR COURT ERRED IN DENYING RELIEF ON COUNT III.

To defend the denial of Count III, Maricopa argues: ***first***, that *Reyes* applies only to complete non-compliance with signature-verification requirements of A.R.S. § 16-550(A) and Lake failed to prove complete non-compliance; ***second***, Lake's argument for a contrary interpretation of *Reyes* is an impermissible "modification" of her signature-verification claim; ***third***, even if *Reyes* applies as Lake says, § 16-550(A) still imposes no objective, judicially reviewable standard for what it means to "compare" signatures; and ***fourth***, even if courts could adjudicate compliance

with § 16-550(A), Valenzuela's testimony showed Maricopa verified all early ballot signatures. All these arguments are either legally wrong or belied by the record.

A. Maricopa misstates the standard of review.

Although Maricopa urges clear-error review for Count III, [AB 18], both the legal issues under § 16-550(A) and *Reyes* and any related mixed fact-law questions are reviewed *de novo*. After resolving those issues, this Court next must decide whether Valenzuela's testimony established "a comparison … was conducted in every instance Plaintiff asked the Court to evaluate," [ROA 311 ep 4], the finding that underlay the trial court's alternative holding that Maricopa's signature comparisons were "adequate" for ***all*** ballots challenged, even under Lake's construction of § 16-550(A). [ROA 311 ep 4.] Extending Valenzuela's testimony to all challenged ballots is a quintessential error of "law or logic," which this Court reviews *de novo* under *Birt*, 208 Ariz. 546, 549 ¶9, and *Chapple*, 135 Ariz. at 297 n.18.

B. The trial court erred in interpreting *Reyes* as applying only to complete non-compliance with A.R.S. § 16-550(A).

Maricopa first argues *Reyes* applies only when officials completely fail to follow § 16-550(A). In *Reyes*, Division One set aside an election because verification was performed on no absentee ballots and they "changed the outcome of the election." *Reyes*, 191 Ariz. at 93. Here, although it is undisputed that ***some*** early

ballot signatures were compared,[2] the trial court erroneously held that incomplete "comparative process … put[s] us outside the scope of *Reyes*." [ROA 311 ep 2; AB 21-22.]

The trial court misunderstood and misapplied *Reyes*. While *Reyes* involved no signature comparison whatsoever, that fact was incidental. The court focused on ***why*** signature verification mattered—because "it guarantees that the absentee ballots are being cast by the registered voters and prevents fraud and ballot tampering." *Reyes*, 191 Ariz. at 93. *Reyes* held this statutory purpose—"to prevent the inclusion of invalid votes"—made § 16-550(A) a "non-technical statute" that required actual compliance, not substantial compliance. *Id.* at 94. The court described the comparison requirement as operating at the level of individual ballots (not at the level of all ballots in gross): "Without the proper signature of a registered elector on the outside, ***an*** absentee ballot is void and may not be counted." *Id.* (emphasis added). *Reyes* does not say what Maricopa wishes—that any unverified absentee ballots count unless signatures on ***all other*** absentee ballots are also unverified.

Reyes voided all the absentee ballots for the practical reason that the failure to compare signatures affected all the ballots, not because disregard of § 16-550(A) was universal versus partial. This rationale—"***absentee ballots counted in violation***

[2] [ROA 1 ep 16-20, ¶¶ 54-62 (alleging incomplete signature verification occurred); AB 20 (Lake's witnesses testified about signature verification).]

of [§ 16-550(A)] have rendered the outcome of the election uncertain"—would produce an identical ruling if only some absentee ballots were unverified, provided the unverified ballots were numerous enough to change the outcome. *Id.* (emphasis added). Non-compliance affecting a material number of ballots is what matters. Otherwise, according to Maricopa, *Reyes* permits anything less than 100% non-compliance with signature-comparison requirements before authorizing a remedy—an irrational rule that would produce absurd results. Properly understood, *Reyes* requires setting an election aside for material non-compliance with § 16-550(A).

Maricopa next argues Lake has unfairly modified Count III on appeal—*i.e.*, she first asserted "no signature verification has occurred," but has changed her position. [AB 11, 22-23 & n.2.] When the trial court denied Maricopa's renewed motion to dismiss Count III after the Supreme Court remand, it apparently agreed, erroneously describing Lake's position as alleging Maricopa "entirely failed to perform signature matching required by statute." [ROA 295 ep 4.]

The record clearly shows Lake has ***never*** said ***no*** signature comparisons occurred. Instead, Lake's complaint expressly alleged failures to perform statutory signature comparisons for "a ***material number*** of early ballots," [ROA 1 ep 60, ¶ 151 (emphasis added)], meaning outcome-determinative numbers of early ballots, not all ballots. Lake presented evidence consistent with this position throughout the Count III trial, including ***her own witnesses'*** testimony about the signature-

comparison process. [*See* note 2, *supra*.] Lake's position has always been that *Reyes* applies to material non-compliance with § 16-550(A) and Maricopa's non-compliance affected a material number of—not all—early ballots.[3]

C. The trial court erred in construing A.R.S. § 16-550(A).

Maricopa next argues the trial court correctly interpreted § 16-550(A) because the statute does not define its command to "compare" signatures to include specific steps. Maricopa wrongly concludes that, if a reviewer approves a ballot affidavit signature, that approval by itself must establish the required comparison actually occurred. Not so. Maricopa and the trial court erroneously equated the act of ***approving*** signatures with the antecedent act of ***comparing*** them to exemplars.

Correctly understood, A.R.S. § 16-550(A) requires a two-step process. The first step requires a physical act of comparing. Although the statute does not say what "compare" means, the dictionary does. So too do Maricopa's own policies and training materials. These authorities require between six and eleven specific

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[3] Maricopa mistakenly perceives "admissions," [AB 22 & n.2], and the trial court a "concession," [ROA 295 ep 4], in Lake's characterizing Count III as a "*Reyes* claim, not a *McEwen* claim" and "*Reyes* on steroids." These statements are entirely consistent with Lake's (correct) interpretation of *Reyes*. First, *McEwen v. Sainz*, No. CV22-163 (Santa Cruz Super. Ct. Aug. 8, 2022), [ROA 267 ep 20-23], involved second guessing signature-matching conclusions made on individual ballots, not the systematic approval of signatures at humanly impossible speeds utterly incompatible with performing true comparisons. Second, because *Reyes* involved only 1,210 unverified ballots, *Reyes*, 191 Ariz. at 92, and Maricopa's non-compliance affected two orders of magnitude more, the "*Reyes* on steroids" rhetoric fits.

characteristics of two different signatures to be evaluated for consistency. Performing this evaluation takes time—not much time in some cases, but enough for a judicial determination whether the act of comparison could possibly have occurred in the time spent. From physically evaluating signature characteristics, reviewers form mental impressions about whether signatures are consistent. The statutory process's second discrete step is for reviewers to act on their mental impressions to approve or reject affidavit signatures.

Maricopa (and the trial court) erroneously regarded the act of approving signatures as conclusively establishing an antecedent comparison happened. To the contrary, approving signatures at impossible speeds cannot establish that the required comparisons occurred.

1. The command "shall compare" requires performing a physical act, and courts can objectively adjudicate whether that act was performed.

The command to "compare" signatures requires reviewers to do ***something***. Maricopa completely ignores that its own training materials explain what that "something" is by instructing reviewers to examine broad and local characteristics. [Exhibit 23 at 9.] The trial court's conclusion that the only test for compliance with § 16-550(A) is "the satisfaction of the recorder, or his designee," [AB 26], was wrong—at least here, where computer logs and testimony showed that near-100%

approvals of signatures (on hundreds of thousands of ballots) occurred faster than it was physically possible for humans to perform Maricopa's own processes.

The statutory command to "compare" has objective meaning beyond each individual reviewer's discretion. A simple analogy shows Maricopa's (and the trial court's) error: Courts expect lawyers to read cases before citing them. Under Maricopa's logic, lawyers satisfy this requirement simply by fanning an opinion's pages before their faces for a split second. This outcome is self-evidently absurd because, like the word "compare," the word "read" has substantive meaning.

2. The trial court improperly conflated the act of comparing with the act of approving.

The trial court described "satisfaction of the recorder" as "the determinative quality for whether signature verification occurred." [ROA 311 ep 4.] This erroneous conclusion conflates the act of comparing with the act of approving and creates an irrebuttable, unreviewable presumption that a reviewer's approval conclusively establishes a signature was "compared." Individual reviewers cannot insulate statutory noncompliance, arbitrary and capricious conduct, or neglect from judicial review in this manner. An erroneous construction of § 16-550(A) led the trial court to disregard evidence demonstrating the physical impossibility that comparisons occurred for 275,000+ ballots. This Court should reject that misinterpretation of § 16-550(A).

D. The trial court's finding that Valenzuela's testimony showed compliance with § 16-550(A) for *all* signatures was untenable.

The trial court alternatively held that, even under Lake's construction of § 16-550(A), Maricopa's signature comparisons were still "adequate" for ***all*** ballots because Valenzuela "provided ample evidence that—objectively speaking—a comparison between voter records and signatures was conducted in every instance Plaintiff asked the Court to evaluate." [ROA 311 ep 4.] But Valenzuela's testimony from his own limited experience was logically incapable of contradicting Maricopa's log-file evidence showing 275,000+ early ballots approved at near-100% rates in under 3 seconds apiece, speeds at which humans cannot evaluate broad and narrow signature characteristics as § 16-550(A) and Maricopa's own policies require. [OB 47-48.]

During the November 2022 election, Valenzuela personally reviewed only 1,600 signatures and approved only 80.6% of them. [OB 45.] Though Maricopa's policies require comparing "100% of the signature records" using "broad and local characteristics," [ROA 192 ep 46], Valenzuela testified first-level reviewers only needed to look at characteristics for signatures that were already "in question." [RT, May 17, 2023-pm ep 88-89 at 87:4-14, 87:20-88:1.] Valenzuela never testified about reviewing the 275,000+ ballots that Maricopa's keystroke logs showed were approved at humanly impossible speeds with approval rates vastly higher than Valenzuela's own rate. Valenzuela's testimony cannot logically be extrapolated to

justify ***all*** 275,000+ ballots that Lake identified as unverified using Maricopa's own log files and verification policies.

Maricopa says Lake is "cherry picking" Valenzuela's statements "out-of-context," [AB 31], but that is simply untrue, as reviewing the relevant transcript pages shows. Likewise, the trial court's deprecation of Lake's signature expert Erich Speckin flowed from the court's erroneous understanding that each reviewer's subjective satisfaction establishes compliance with § 16-550(A), rather than objective measures such as comparing the time required to evaluate broad and narrow signature characteristics against the time logged as spent. Maricopa's keystroke logs were admitted without qualification.[4] The trial court improperly disregarded this evidence and Speckin's testimony summarizing it. This Court should reject the trial court's illogical extrapolation from Valenzuela's testimony that 275,000+ early ballot affidavit signatures approved in under 3 seconds were all "compared" consistently with the requirements of A.R.S. § 16-550(A).

III. THE SUPERIOR COURT ERRED IN DENYING RULE 60 RELIEF ON LAKE'S CONSTITUTIONAL CLAIMS.

Against Lake's constitutional claims, Maricopa cites authorities for waiver of arguments raised in footnotes and for criminal law's distinction between harmless and fundamental error. [AB 56.] Even assuming *arguendo* that Lake's footnote

[4] [OB 27 n.13 (describing the contents and admission of Exhibits 20 and 47).]

waived the constitutional claims in Counts V and VI and that constitutional violations are not fundamental, Lake also alleges the same constitutional violations in Count II. [ROA 1 ep 59 ¶ 145.] As such, Maricopa cannot evade constitutional review by arguing waiver.

Maricopa argues mere ***evidence*** cannot remedy an *incognizable legal theory*, [AB 57], but Maricopa's admitted intentional and unannounced alteration of its election equipment provides the intentional state action required by Lake's constitutional claims. Maricopa laments the lack of analysis to support her allegation regarding standard deviations, [*id.*], but statistical analysis can be shown from judicially noticeable evidence (*e.g.*, the Republican-versus-non-Republican vote totals at the vote centers that experienced Election Day errors). Maricopa argues against using binomial distributions, [*id.* 58], but Republican-versus-non-Republican voters ***is binomial***. Maricopa cites a summary-judgment decision against reviving the constitutional claims, [*id.*], notwithstanding the trial court's dismissal ***on the pleadings***.

Maricopa misrepresents *Welch v. McClure*, 123 Ariz. 161, 165 (1979), as holding that Rule 60 motions are not "device[s] for weighing evidence or reviewing legal errors," [AB 56 (quoting *Welch*); *compare id.* (repeating Maricopa's law-of-the-case analysis) *with* Section I.A.3, *supra* (law-of-the-case doctrine no bar to reconsideration)], but *Welch* plainly refers to using Rule 60 to revisit previously

decided legal or factual issues ***without meeting Rule 60's criteria*** for relief from judgment. When Rule 60's criteria apply, Rule 60 motions obviously allow changed factual or legal findings.

IV. THIS COURT CAN AND SHOULD SET ASIDE THE ELECTION.

Lake raises numerous arguments about evaluating and remedying electoral misconduct—*e.g.*, unquantifiable election interference that invalidates the election under *Hunt v. Campbell*, 19 Ariz. 254, 265-66 (1917), Arizona's bursting-bubble theory of presumptions, burden-shifting for illegal ballots, and the futility of remand to recount Maricopa's unlawful election, [OB 54-61]—to which Maricopa's sole response is simply to deny wrongdoing. [AB 58-60.] On the futility of remanding for trial, Maricopa argues that only the trial court can set aside the election, [AB 60-61], but appellate courts can instruct a court to enter such relief. *See, e.g.*, *Lehnhardt v. City of Phoenix*, 105 Ariz. 142, 144 (1969). On burden shifting, Maricopa acknowledges that Lake's cited authorities go to the burden of proof for contested ballots, but Maricopa supposes that has little to do with election contests. [AB 59.] To the contrary, counting lawful ballots is precisely the point here.

Maricopa's responses work if the Court finds Maricopa's conduct lawful, but they concede Lake's arguments if the Court agrees with Lake about Maricopa's unlawful conduct for Counts II, III, V, or VI. As Lake set forth in her opening brief, *vacatur* is the appropriate remedy because remand for a new trial would be futile.

The appellees simply cannot prevail in defending the 2022 general election. [OB 56-61.]

CONCLUSION

WHEREFORE, the trial court's orders should be REVERSED. Because Maricopa's November 2022 general election cannot be corrected by reliably counting lawful votes on remand, the Court should order the Verified Complaint's requested relief of *vacatur* of the election certification and a new election.

Dated: November 14, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 4, the undersigned counsel certifies that the accompanying brief is double spaced and uses a proportionately spaced typeface (*i.e.*, 14-point Times New Roman) and contains 6,977 words according to the word-count function of Microsoft Word.

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The undersigned certifies that the original of the foregoing **REPLY BRIEF OF APPELLANT KARI LAKE** was e-filed with the Clerk of the Arizona Court of Appeals, Division Two via the Court's e-filing system on November 14, 2023, and that a copy was served via email on this same date to the following:

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