SUPREME COURT OF ARIZONA

KARI LAKE, Appellant/Petitioner, v. KATIE HOBBS, et al. Appellees/Respondents	No. CV-23-0046-PR Court of Appeals Division One (Consolidated) No. 1 CA-CV 22-0779 No. 1 CA-SA 22-0237 Maricopa County Superior Court No. CV2022-095403 **GOVERNOR KATIE HOBBS'S RESPONSE TO PETITION FOR REVIEW**

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INTRODUCTION

On January 2, 2023, Katie Hobbs was sworn in as Governor of Arizona after winning a majority of votes cast in the 2022 gubernatorial election. For the past five months, Kari Lake has attempted unsuccessfully to use Arizona's judiciary to undermine the results of that election. Enough is enough.

Lake's latest petition does not present a meritorious ground for review. Lake simply recycles the same arguments that have already been rejected by two Arizona courts. The only things that are new are a handful of misrepresentations and distortions of the trial court record. Neither the Court nor Respondents should be required to continue parsing through Lake's convoluted and unsubstantiated arguments. This Court should deny Lake's petition, sanction Lake and her counsel pursuant to ARCAP 25 and A.R.S. § 12-349, and award fees upon Governor Hobbs's compliance with ARCAP 21.

ISSUES FOR REVIEW

Governor Hobbs has no additional issues for this Court's review should it grant the petition.

MATERIAL FACTS AND PROCEDURAL HISTORY

On December 5, 2022, state officials certified the Governor's election for Katie Hobbs. Days later, Lake filed a 10-count election contest, alleging everything from partisan discrimination on behalf of election officials to cyber hacking of

voting machines to Twitter misinformation. Lake Pet. App. ("App.") 56, 81-82. The trial court dismissed eight of Lake's ten claims, and conducted a trial on the remaining two, during which Lake had the opportunity to present witness testimony and documentary evidence and question Maricopa officials directly. On December 24, the trial court issued its ruling denying Lake's election contest, finding that Lake had failed to demonstrate any basis to question the election results and that Maricopa County elections officials had performed their work in a way "more than sufficient to comply with the law and conduct a valid election." App. 107.

Lake filed a flurry of paper on appeal. On December 27, she filed a notice of appeal in the Court of Appeals. Three days later, she filed a petition for special action in that court. She subsequently filed a petition to transfer her special action to this Court. This Court denied Lake's petition for transfer on January 4. Order, Case No. T-22-0010-CV (Ariz. Jan. 4, 2023). Undeterred, Lake filed a second petition to transfer on January 25, which this Court again denied later the same day. Order, Case No. T-23-0001-CV (Ariz. Jan. 25, 2023). The Court of Appeals, meanwhile, faced with two separate appeals filed by Lake, decided to exercise jurisdiction over Lake's appeal and special action concurrently and established a briefing schedule. Order, Case No. 1 CA-CV 22-0779 (Ariz. Ct. App. Jan. 9, 2023).

On February 16, the Court of Appeals affirmed the decision of the superior court and confirmed the election of Governor Hobbs. App. 4-15. On March 1, Lake

filed a petition for review ("Pet.") in this Court—her third attempt to have this Court undo the 2022 gubernatorial election and the rulings below.

REASONS PETITION SHOULD BE DENIED

This Court should deny Lake's petition, which only rehashes the same arguments she made below, but this time with new, fabricated facts and legal issues. Lake's spurious arguments have already been carefully considered by the superior court and the Court of Appeals, and Lake has failed to show a meritorious basis for this Court's review.

I. The Court of Appeals correctly affirmed the legal standards applied by the superior court.

The Court of Appeals was correct to require clear and convincing evidence to overturn election results, and relatedly, to refuse to find that the outcome of the 2022 gubernatorial election was "uncertain" where Kari Lake could not even identify—let alone prove—an outcome determinative number of votes that were affected. Neither issue provides a basis for this Court's review.

First, Lake's insistence on a more lenient standard to overturn the will of Arizona voters cannot be reconciled with longstanding precedent, App. 9 ¶ 10; *see also Oakes v. Finlay*, 5 Ariz. 390, 398 (1898) (refusing to disturb election results without "proof [] of the most clear and conclusive character"); *Hunt v. Campbell*, 19 Ariz. 254, 271 (1917) (holding "nothing but the most credible, positive, and unequivocal evidence should be permitted to destroy the credit of official returns"),

and Arizona's strong presumption in favor of the finality of election results and the good faith of election officials, *see*, *e.g.*, *Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978) (noting Arizona's "strong public policy favoring stability and finality of election results"); *Hunt*, 19 Ariz. at 268 (noting the presumption of "good faith and honesty" of elections officials).

Contrary to Lake's assertions, there is no disagreement among lower courts about the standard of review applicable to election contests. While Lake attempts to manufacture disagreement between Division One in this case and Division Two in *Parker v. City of Tucson*, 233 Ariz. 422 (App. 2013), even a cursory reading of *Parker* belies her claim. As an initial matter, *Parker* did not involve an election contest, but instead involved a signature challenge to an initiative. Moreover, *Parker* found that because there "was clear and convincing evidence" of petition circulators' ineligibility, the court did not have to "address [the] argument" on appeal that only a preponderance of the evidence was required. *Id.*, 233 Ariz. 436, n.14. The absence of a holding on the applicable standard in a case having nothing to do with an election contest does not create a disagreement meriting this Court's resolution.

Perhaps most bizarrely, Lake argues that "[i]f a clear-and-convincing standard applied to *all* election contexts, the Legislature would not have expressly enacted that standard for *some* election contests." Pet. 10 (emphasis in original). It is

anyone's guess which election contest standards Lake is referring to.[1] After Lake's nearly ten briefs in pursuit of her election contest and its subsequent appeals, Lake still has not cited to a *single* election contest case applying a preponderance of the evidence standard—perhaps because, to Governor Hobbs's knowledge, none exists.

Second, the Court of Appeals did not contradict this Court's prior caselaw when it required Lake to show the alleged misconduct she complains about "did in fact affect the result" of the election. Pet. 12 (citing App. 9 (Ct. App. Op. ¶ 1 (citing *Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994); *Findley v. Sorenson*, 35 Ariz. 265, 271–72 (1929)). The Court of Appeals reached the unremarkable conclusion that "a competent mathematical basis" is required "to conclude that the outcome would plausibly have been different," and that elections cannot be overturned based on an "untethered assertion of uncertainty." App. 9 ¶ 11. This principle is well supported in Arizona's election contest precedent. *See Miller*, 179 Ariz. at 180 (election results are not rendered "uncertain" unless a challenger can show "ballots procured in violation of a non-technical statute in sufficient numbers to alter the outcome of the election"); *Reyes v. Cuming*, 191 Ariz. 91, 94 (App. 1997) (finding uncertainty in election result because illegal votes

[1] The only Arizona statutes applying a clear and convincing evidentiary standard that Lake refers to in her petition do not apply to election contests, or to elections in general. *See* Pet. 11 (citing A.R.S. § 25-814(C) (presumption of paternity) and A.R.S. § 23-364(B) (minimum wage and employee benefits enforcement)).

"indisputably changed the outcome of the election"); *Huggins v. Super. Ct.*, 163 Ariz. 348, 352–53 (1990) (holding that though the aggregate number of illegal votes exceeded the margin of victory, the number was not "of sufficient magnitude to change the result" (quotation omitted)). Lake relies heavily on *Hunt*, which, unlike this case, is an election fraud case. *Hunt*, 19 Ariz. at 268, 271; *see also* App. 9 ¶ 9 (noting that *Hunt* required "clear and satisfactory proof" of the alleged fraud "to overcome the prima facie case made by the returns of an election"). Because the effect of fraud "cannot be arithmetically computed," it need not be proven. *Hunt*, 19 Ariz. at 268. Here, Lake has expressly *disclaimed* any allegation of fraud, *see* Pet. 9-10, and thus she may not benefit from the legal standard for election fraud.

II. The Court of Appeals correctly upheld the trial court's findings.

The remaining issues Lake raises in her petition for review involve, in whole or part, the Court of Appeals' consideration and affirmance of the trial court's factual findings. Pet. 2-4. But the trial court's findings were not clearly erroneous, App. 9-14, and all questions of law were reviewed de novo, including the ultimate legal conclusions drawn from the superior court's factual findings. *Id*. at 9-10. None of the courts' well-reasoned findings and conclusions merits this Court's review.

As to Lake's ***printer/tabulator claim***, which—as the Court of Appeals correctly framed—"boils down to a suggestion that election-day issues … allegedly resulted in a substantial number of predominately Lake voters not voting[,]" App.

10 ¶ 16, the Court of Appeals correctly found that "Lake's only purported evidence that these issues had any potential effect on election results was, quite simply, sheer speculation." *Id*. That conclusion was well supported. *See* App. 499, 502, 506 (2 Tr. 52:3-9, 55:13-15, 59:5-10 (Baris) (Lake's expert admitting that his analysis offered no evidence of whether anyone was unable to vote or even deterred from voting because of printer and tabulator issues); *see also* App. 574 (2 Tr. 127:8-24 (Mayer)). Lake offers nothing for this Court to conclude otherwise.

As to Lake's ***chain of custody claim***, Lake raises two issues for this Court's consideration, both of which the court below also squarely addressed. First, Lake questions whether the panel erred by holding that the EPM does not "impos[e] any express time requirement" for "when" to count election-day early ballot packets and that "an initial estimate" of ballots upon receipt from vote centers is all that the law requires. Pet. 3. As the Court of Appeals noted, Lake does not cite any authority requiring these express time requirements and fails to explain "how an initial estimate followed by precise count … does not qualify as 'counted.'" App. 12 ¶ 22. Lake still fails to point to any such authority in her petition for review.

Lake's next chain of custody argument—whether the panel erred "when it ignored the undisputed fact that 35,563 unaccounted for ballots were added to the total number of ballots" by Maricopa's third-party ballot processing facility, Runbeck Election Services, *see* Pet. 3—blatantly misrepresents key facts from the

record.[2] In her complaint, Lake originally alleged that the chain of custody documentation for early ballot packets collected from drop boxes on Election Day did not exist. App. 62, Compl. ¶ 112(a). Now, Lake argues that not only did those records exist, but that they show that "35,563 more ballots were inserted at Runbeck and sent back to MCTEC for tabulation." Pet. 13-14. This figure is a complete fabrication. While Lake asserts that "Exhibit 33" reflects the number of "ballots that [Runbeck] scanned and sent back to MCTEC[,]" *id.* at 5, the "Incoming Scan Receipts" at Exhibit 33 in fact reflect the total early and provisional ballot packets received by Maricopa on Election Day and sent to Runbeck for scanning. App. 646-647 (2 Tr. at 199:5-200:24; *see also* App. 741-770 (Ex. 33). Notably, Lake's petition for review is the first time Lake presents this fictitious number of 35, 563 ballots introduced at Runbeck. The only evidence Lake previously offered of unauthorized ballots inserted into the count was from a non-witness declarant, who claimed that she observed Runbeck employees adding about 50 ballot envelopes from family members into the pool of early ballots at Runbeck. App. 378, 391-392 (1 Tr. 221:17-22, 234:1-235:8 (Honey)). This Court should reject Lake's request to grant review of her election contest based on new and baseless facts.

[2] In response to this argument, Governor Hobbs also incorporates by reference Maricopa's description of the mischaracterization of trial evidence at trial exhibits 33 and 82 in the County's March 13, 2023 response to Lake's petition for review at 4-6, and Secretary of State Fontes's discussion of the matter in his March 13, 2023 response to Lake's petition for review at 7-10.

As to Lake's ***signature verification claim***, both courts below properly determined Lake's claim was to the signature matching procedures themselves, a claim which could have been brought before the election. App. 4-15, 99-108. This Court should similarly reject Lake's attempt to "subvert the election process by intentionally delaying a request for remedial action to see first whether [she would] be successful at the polls." *McComb v. Super. Ct. In & For Cnty. of Maricopa*, 189 Ariz. 518, 526 (App. 1997) (cleaned up).

Finally, because Lake's ***constitutional claims*** were wholly duplicative of Lake's failed printer/tabulator claim, App. 15 ¶ 31, the Court of Appeals did not err in affirming their dismissal for this and other reasons.

III. Respondents are entitled to attorneys' fees and sanctions.

Governor Hobbs respectfully requests attorneys' fees for the cost of responding to this petition under ARCAP 21, and to pursue the imposition of sanctions pursuant to A.R.S. § 12-349 and ARCAP 25.[3] Lake's continued, baseless appeals of her failed election contest warrant sanctions as they are "frivolous" within the meaning of ARCAP 25, and merit an award of attorneys' fees as they have been brought without substantial justification and unreasonably expanded and delayed the proceedings at issue. A.R.S. § 12-349(A)(1), (3).

[3] Governor Hobbs incorporates by reference in its entirety Secretary of State Fontes's request for sanctions in his March 13, 2023 response to Lake's petition for review. *See* Sec'y of State Fontes Resp. to Pet. at 10-14.

ARCAP 25 provides in relevant part that a court "may impose sanctions on an attorney or a party if it determines that an appeal or a motion is frivolous[.]" "Sanctions may include … withholding or imposing costs or attorneys' fees[,]" and are appropriate to discourage "similar conduct in the future." *Id*. Lake's appeal is "objectively frivolous." *Matter of Levine*, 174 Ariz. 146, 153 (1993), *reinstatement granted,* 176 Ariz. 535 (1993). Even if an appeal was not brought for an improper purpose—as it was here—an appeal can still be "frivolous for its failure to raise any reasonable issue regarding a meritorious claim." *Johnson v. Brimlow*, 164 Ariz. 218, 222 (App. 1990). As explained *supra*, two Arizona courts have found Lake's claims to be unsubstantiated by actual evidence, and Lake has failed to raise any legitimate issue warranting this Court's review. This appeal is frivolous and warrants the imposition of sanctions.

A.R.S. § 12-349(A) makes an award of attorneys' fees and costs mandatory where an "attorney or party . . . [b]rings . . . a claim without substantial justification" or "[u]nreasonably expands or delays the proceeding." Lake and her counsel have done both. First, Lake and her counsel have far exceeded any "substantial justification" in their obstinate pursuit of unwarranted relief. *See* A.R.S. § 12-349(A)(1). The phrase "'without substantial justification' means that the claim … is groundless and is not made in good faith." A.R.S. § 12-349(F). "While groundlessness is determined objectively, bad faith is a subjective determination."

Takieh v. O'Meara, 252 Ariz. 51, 61, ¶ 37 (App. 2021), *review denied* (Apr. 7, 2022). Every single witness Lake called before the superior court "disclaimed any personal knowledge of such misconduct." App. 106. While Lake continues to boast of evidence in the form of "expert" witnesses and whistleblowers, Lake's "expert" offered only "speculation or conjecture," *id.*, and Lake never even called the alleged "whistleblower" to testify as a witness, submitting only a written declaration in which she stated that she was aware of "about 50" ballots submitted by Runbeck employees and admitted that she left the Runbeck facility before the relevant election day ballots even arrived on election night. *Id*. Now, before the highest court in Arizona, Lake misrepresents trial evidence and case law alike, *see supra* at §§ I-II, supporting a subjective finding by this Court of bad faith. *Takieh,* 252 Ariz. at 61, ¶ 37.

Lake has also brought multiple appeals, indiscriminately and unreasonably expanding and delaying the instant proceedings, A.R.S. § 12-349(A)(3), based solely on her fixation to litigate to the end, and not on any actual basis to appeal other than her own disagreement and disappointment with the results of the election and the lower courts' rulings. *See, e.g.*, Pet. at 2 (asserting, without any evidentiary support, that "[p]ublic trust in elections is at an all-time low" and that her petition for review is the vehicle through which "[t]rust must be restored").

When assessing an award of attorneys' fees under A.R.S. § 12-349, the Court may include any of the factors listed in A.R.S. § 12-350. As described immediately *supra*, the misconduct on the part of Lake and her counsel implicates provisions of A.R.S. § 12-350, including (1) Lake's apparent failure to "determine the validity of [her] claim[s] before [they were] asserted"; (2) Lake's lack of effort "after the commencement of [this] action" to reduce the number of claims asserted or dismiss claims found not to be valid; (3) the complete availability of facts from the trial record to assist Lake in "determining the validity" of her claims; (5) Lake's prosecution of this action "in whole or in part, in bad faith;" and (7) the extent to which Respondents have repeatedly prevailed "with respect to the amount and number of claims in controversy." A.R.S. § 12-350 (1)-(3), (5), (7). Attorneys' fees and sanctions under A.R.S. § 12-349 and ARCAP 25 are warranted here.

CONCLUSION

For all the foregoing reasons, Lake's petition should be denied. Governor Hobbs respectfully requests the opportunity for supplemental briefing on the appropriate amount of sanctions, if awarded.

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