

ARIZONA SUPREME COURT

KARI LAKE,

Plaintiff/Appellant,

v.

KATIE HOBBS, et al.,

Defendants/Appellees.

Arizona Supreme Court
No. CV-23-0046-PR

Court of Appeals, Division One
No. 1 CA-CV 22-0779
No. 1 CA-SA 22-0237
(CONSOLIDATED)

Maricopa County Superior Court
No. CV2022-095403

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, et al.,

Real Parties in Interest.

RESPONSE TO PETITION FOR REVIEW

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Introduction

Petitioner Kari Lake's Petition for Review entirely fails to present reasons to grant review and further fails to conform with the Rules governing the purpose of a petition for review. More alarmingly, it also presents—for the first time—a misleading factual theory about chain-of-custody documents.

Broadly, the purpose of a petition for review is to identify issues decided at the court of appeals that the petitioner believes warrant further review and to state the reasons why this Court should grant review on those issues. *See* ARCAP 23(d)(3). As orders from this Court regularly remind litigants, parties are discouraged from simply restating their arguments presented to the court of appeals because this Court already possesses that briefing. *See* ARCAP 23(i).

Here, Lake's Petition utterly fails at fulfilling its limited task. It does not present any argument illustrating a need for this Court to review the court of appeals' Opinion. It does not identify a single novel legal issue that this Court needs to clarify. And it does not identify any legal precedent that should be overturned or abrogated. Instead, the Petition is almost entirely a regurgitation of Petitioner Kari Lake's failed arguments before the trial court and the court of appeals.

The only aspect of the Petition that differs from Lake's briefing below is the inclusion of a newly-fabricated characterization of chain-of-custody documents presented for the first time in the Petition. But a petition for review is not the place

for Lake to argue that the trial court's findings of fact were incorrect, nor that the court of appeals improperly accepted the facts that the trial court found. Moreover, it is not the place to assert an entirely new factual theory that was never raised below. And it is most decidedly not the place to misrepresent the record and the testimony of trial witnesses.

This Court should deny the Petition.

Reasons the Petition Should Be Denied

I. Lake's misleading new factual theory does not support this Court's review.

A. A litigant's disagreement with the trial court's findings of fact is not a proper basis for this Court's review.

As a preliminary matter, even if Lake's factual argument did not misrepresent the record—it does—this argument runs headlong into the well-established principle that appellate courts are not finders of fact. *See Hoffman v. Brophy*, 61 Ariz. 307, 312 (1944) (“We, of course, are not the triers of the fact, and we adhere to our oft repeated rule that if there is any competent evidence in the record to [affirm], it is conclusive and binding on this Court.”); *see also Dolliver v. United States*, 379 F.2d 307, 308 (9th Cir. 1967) (“An appellate court may not usurp the function of the duly constituted fact finder.”); *People v. DeLuna*, 515 P.2d 459, 460 (Colo. 1973) (“The oft-stated rule that on disputed evidence the fact finder will not be overruled by an appellate court when the record supports the findings is dispositive of this appeal.”);

Southern v. Mississippi State Hosp., 853 So. 2d 1212, 1214 (Miss. 2003) (“The role of an appellate court is not to be a fact finder but rather determine and apply the law to the facts determined by the trier of fact.”); *Dunn v. Nat’l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (“We have said that appellate courts may not sit as factfinders, and are not empowered to make or modify findings of fact.”) (cleaned up). For this reason, mere disagreement with the trial court’s findings of fact is not a basis for this Court’s review. *Cf.* ARCAP 23(d)(3).

B. Lake’s misleading new factual theory about chain-of-custody documents lacks support in the record.

Setting aside Lake’s confusion about the role of an appellate court, the Petition’s newly-created claim about chain of custody documents lacks merit.¹ Because this new argument runs the risk of misleading this Court, the County Defendants address it, even though Lake’s argument is waived. *See McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5 (1997).

In the Petition, Lake describes one set of documents, the “MC Inbound—Receipt of Delivery” forms as recording “the exact number of [Election Day drop box] ballots received from Maricopa” and another set of documents, the “MC Incoming Scan Receipts” as recording “the number of [Election Day drop box]

¹ The Maricopa County Defendants will not substantively respond to the other legal and factual arguments raised in the Petition because these issues were already fully addressed in the briefing below.

ballots that it scanned and sent back to [the Maricopa County Tabulation and Election Center].” (Pet. at 5.) Lake further asserts that the Receipt of Delivery forms show 263,379 ballots delivered to Runbeck Election Services (“Runbeck”) and that the Incoming Scan Receipts show 298,942 ballots returned to Maricopa County from Runbeck, for a difference of 35,563 ballots. (*Id.*) This characterization of the facts is completely divorced from the testimony and exhibits at trial.

First, the “Receipt of Delivery” forms are those used throughout the early voting process to record early ballot packets delivered from both the Maricopa County Tabulation and Election Center (“MCTEC”) and the United States Postal Service (“USPS”) to Runbeck for scanning. The trial court admitted an exhibit at trial that contained all of the Receipt of Delivery forms for the 2022 General Election. (*See* Index of Record (“I.R.”) 213.) Those Receipt of Delivery forms recorded early ballot packets retrieved by County employees from (1) the main USPS facility in Phoenix, (2) drop boxes not at vote centers, (3) vote centers during the 27 days preceding Election Day, and (4) MCTEC after additional analysis by signature verification workers, then delivered to Runbeck. (*See* Dec. 22, 2022 Trial Tr., at 155:3–156:8, 158:25–160:11.)

With her Petition, Lake submitted an Appendix that included only the Receipt of Delivery forms dated November 8, 2022 or after. (Lake App. at 732–40.) She characterized this as “Exhibit 82,” when in fact it was *only nine pages* of the full 43-

page exhibit. (Lake App. at 2.) She also wholly mischaracterized the few pages that she did provide. Those pages do not reflect all early ballot packets deposited by voters at vote centers on Election Day. Indeed, some of the pages that Lake appended to her Petition record ballots delivered from USPS to Runbeck on Election Day or those retrieved from USPS after Election Day, which are considered late and are not tabulated. (See Lake App. at 732 (early ballot packets delivered from USPS before 7:00 am on Election Day), 739 (late-received packets).) In short, the Receipt of Delivery forms are not for ballots received at vote centers on Election Day.

Second, contrary to Lake’s new assertion in her Petition, the “Incoming Scan Receipts” do not reflect “ballots that [Runbeck] scanned and sent back to MCTEC.” (Pet. at 5.) The trial testimony clearly establishes that Runbeck and Maricopa County employees, working around the clock for more than 24 hours after the close of the polls, recorded the precise count of early ballot packets and provisional ballots dropped at polling places on Election Day. (Dec. 22, 2022 Trial Tr. at 199:5–200:24.) The ballot packets recorded on those forms are early ballot and provisional ballot packets received on Election Day and sent to Runbeck for scanning. (*Id.*; see also Lake App. at 741–770 (Ex. 33).) They are not a record of ballots “sent back” to MCTEC.

Accordingly, Lake’s baseless claim that a difference between her calculations of early ballot packets recorded in the excerpt of Exhibit 82 that she provided and in

Exhibit 33 is wholly unsupported by the record.

Moreover, she is asserting this new factual theory for the first time in her Petition for Review. Indeed, in her Complaint, Lake alleged that the chain of custody records for early ballot packets dropped off on Election Day did not exist. (Lake App. at 062, Compl. ¶ 112(a).) Now that Lake's allegation was definitively disproven and those records admitted at trial, she has changed the allegation and mischaracterized the record to make yet another fantastical claim. This Court should reject Lake's invitation to try this case anew on completely new and unsupported facts.

Conclusion

In short, the Petition does not present a viable argument for why review should be granted. Because the purpose of review is to clarify and provide guidance on questions of law, and not merely correct errors of the court of appeals, the Petition would not present a proper grounds to grant review even if its arguments were supported by evidence or law. Because all of the arguments raised in the Petition for Review were already thoroughly refuted in both the trial court and court of appeals, this Court should deny the petition.

RESPECTFULLY SUBMITTED this 13th day of March 2023.

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