

ARIZONA SUPREME COURT

KARILAKE,

Plaintiff/Appellant,

v.

KATIE HOBBS, *et al.*,

Defendants/Appellees.

ARIZONA SUPREME COURT
No. T-23-0005

Court of Appeals Division Two
No. 2CA-CV23-0144

KARILAKE,

Petitioner,

v.

THE HONORABLE PETER
THOMPSON, Judge of the SUPERIOR
COURT OF THE STATE OF
ARIZONA, in and for the County of
MARICOPA,

Respondent Judge,

KATIE HOBBS, personally as
Contestee; ADRIAN FONTES, in his
official capacity as Secretary of State;
STEPHEN RICHER, in his official
capacity as Maricopa County Reporter,
et al.,

Real Parties in Interest.

Transferred from
Court of Appeals Division One
No. 1CA-CV23-0393

Maricopa County Superior Court
No. CV2022-095403

**REPLY IN SUPPORT OF
PETITION FOR TRANSFER**

ARCAP 19(a)

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INTRODUCTION

Petitioner Kari Lake respectfully submits this reply to correct misstatements Maricopa County made in its response to Lake’s Petition For Transfer. Maricopa ignores or misstates the central issues in the Petition to Transfer and misleads this Court on tangential issues and non sequiturs. At bottom, Maricopa misleadingly cites Arizona law mandating the Secretary of State (“SoS”) to conduct L&A testing and ignores Arizona law mandating the county to conduct its own L&A testing. There are certificates for each. Appx:0094. The two L&A tests are different under Arizona law. By its own implicit and affirmative admissions in its Answering Brief and in its Response, Maricopa did not conduct statutory L&A testing on “its Election Day [vote-center] tabulators” in accordance with A.R.S. §16-449 and the EPM.

ARGUMENT

I. MARICOPA IGNORES LAKE’S EXPRESS BASIS FOR TRANSFER.

Maricopa argues “[a]bsolutely nothing has happened since the prior denial which would change the result of this Petition,” Maricopa Resp. 4, and claims there is no basis for transfer. *Id.* at 5. In so doing, Maricopa ignores that Lake based her petition for transfer on Maricopa’s admissions in its Answering Brief filed on October 25, 2023.

Specifically, Maricopa implicitly or affirmatively admitted it did not conduct its *county* L&A testing on its 446 vote-center tabulators on October 11, 2022 (the only announced day for statutory L&A testing) or after it replaced the memory cards

on its 446 vote-center tabulators, which violated A.R.S. §16-449(A) and the EPM. *See* Pet. 3-7; *see also* A.R.S. §16-449(B) (“[e]lectronic ballot tabulating systems shall be tested for logic and accuracy ... pursuant to the [EPM]...as prescribed by section 16-452.”).

II. THE DEFECTS IN MARICOPA’S ELECTION ARE MATERIAL.

Maricopa next argues that Lake’s arguments are not material: “this ‘new evidence’ cannot alter the outcome of Lake’s election contest.” Maricopa Resp. 6. Far from concerning a mere 8,000 votes,¹ Lake’s new evidence of Maricopa’s admission is material in two respects.

First, Arizona law requires 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.” A.R.S. § 16-449(A) (emphasis added); *see also* Appx:0808 (EPM at 86) (L&A test “is intended to confirm” the accuracy of the vote “in the election management system (EMS)”). The volume of ballots counted by Maricopa’s 446 vote-center tabulators which did not go through mandatory L&A testing—namely, the entire fleet—was a material number of votes.

¹ Lake mentioned the 8,000 fit-to-page ballots only to argue Jarrett gave false testimony that only 1,300 fit-to-page ballots existed leaving at least 6,700 ballots not duplicated. Pet. at 2-3 citing Appx:0086 (Parikh Decl. ¶¶ 38-39).

Second, Maricopa’s failure to conduct L&A testing in accordance with A.R.S. § 16-449 and the EPM is also a criminal violation. A.R.S. § 16-452(C). Indeed, Maricopa falsely certified it conducted statutory L&A testing. Given the purpose of pre-election L&A testing is to ensure “*that votes are attributed to the correct candidates and ballot measures*...that each candidate and ballot measure receives the *accurate number of votes*” (Appx:0808, EPM at 86), Maricopa’s failure to L&A test all 446 vote-center tabulators used on Election Day means there is no way to know if the November 2022 general election results are accurate, and invalidates the election under *Hunt v. Campbell*, 19 Ariz. 254, 265-66 (1917). *See also Miller v. Picacho Elementary School District No. 33*, 179 Ariz. 178, 180 (1994).

III. MARICOPA FAILED TO PERFORM L&A TESTING

A. Maricopa misleadingly conflates the EPM’s requirements for Secretary of State’s L&A testing with the EPM’s requirements for County L&A testing.

Maricopa claims that “Lake’s attorneys also falsely assert that Maricopa County did not conduct the logic and accuracy testing required by A.R.S. § 16-449 on all of its tabulators, citing Parikh’s Declaration, which claims that *no* tabulator was tested.” Maricopa Resp. 8 (emphasis in original). Maricopa then claims that A.R.S. § 16-449 “concerns the Secretary of State’s logic and accuracy testing, doesn’t specify that ‘all’ tabulators must be tested, and the [EPM], which has the force of law under A.R.S. § 16-452, specifies that the Secretary’s logic and accuracy

testing must be conducted on ‘selected equipment,’ not all of it.” Maricopa Resp. at 8. Maricopa is misleading the Court.

First, Lake cites Maricopa’s implicit and affirmative admissions in its Answering Brief i.e., not Parikh’s testimony as the basis for her Petition. *See* Pet. at 3, 6-7. Second, Maricopa omits the fact that the EPM, mandated under A.R.S. § 16-449(B), requires pre-election county L&A testing for “*all of the county’s deployed voting equipment*”—as opposed to “*selected voting equipment*” for the SoS’s L&A test that Maricopa misleadingly cites. Appx:0814, 816-17 (EPM at 92, 94-95) (emphasis added). “[E]ach L&A test” must be noticed and “open to observation by representatives of the political parties, candidates, the press, and the public.” Appx:0808, 0810 (EPM at 86, 88).

B. Maricopa attempts to mislead the Court by arguing its testing on October 4-10, 2022 satisfied its statutory L&A testing requirements.

Maricopa argues “Lake’s attorneys also [falsely] assert that Maricopa never tested all of its tabulators that would be used on election day” citing Jarrett’s testimony that “the County tested all of its tabulators on October 4 through 10, 2022.” Maricopa Resp. at 8. Maricopa’s argument is misleading for at least three reasons.

First, Maricopa’s argument ignores that Maricopa certified it conducted L&A testing *on October 11, 2022* in accordance with “AZ statute 16-449” (which includes

the EPM as mandated by A.R.S. §§ 16-449(B), 16-452). *See* Appx:0094. By implicitly claiming its testing on October 4-10, 2022 satisfies its legal obligations, Maricopa unwittingly admits that its “Certificate of Accuracy” certifying that Maricopa’s L&A testing conducted on October 11, 2022 was in accordance with “AZ Statute 16-449” is false. *See* Section I, *supra*; Pet. at 3, 5-7.

Second, Lake did not assert that Maricopa “never tested” its tabulators. Lake asserted Maricopa “did not conduct *statutorily* required L&A testing on its 446 vote-center tabulators used on Election Day” i.e., in accordance with the specific requirements of A.R.S. §16-449(A) “*and the EPM*” (mandated by A.R.S. §§16-449(B), 16-452).

Third, Jarrett admitted that the 446 tabulators Maricopa tested on October 4-10, 2022 did *not* use the same election program as on Election Day. Appx:0329 (Jarrett Decl. ¶¶ 9-10 describing “reprogramming” on October 10). For that reason alone, “testing” on October 4-10, 2022 is meaningless and could not constitute the statutorily mandated L&A testing.

C. Maricopa misleadingly conflates its test on October 4-10, 2022 with the “Ballot Misread” error codes appearing during its unannounced testing on October 14, 17-18, 2022 and Election Day.

Lastly, Maricopa argues that its unannounced testing on its 446 vote-center tabulators on October 14, 17-18, 2022—after installing reformatted memory cards containing the revised election program—involved “test ballots [that] included

overvotes, blank ballots, and accessible voting ballots that ‘produce[d] the same type of ‘Ballot Misread’ errors that also occurred on Election Day in connection with the BOD printer issue.’” Maricopa Resp. at 7-8. Thus, Maricopa claims these errors were part of an intentional test. Maricopa is misleading the Court.

The testing Maricopa references occurred on October 4-10, 2022. It is *not* the unannounced testing Maricopa performed on October 14, 17-18, 2022 that resulted in the same error codes that arose on Election Day. Appx:0329 (Jarrett Decl. ¶ 7).

IV. MARICOPA’S REMAINING ARGUMENTS CONSIST OF MISDIRECTION AND FALSEHOODS.

Maricopa gratuitously cites the trial court’s statement that Lake’s conclusions as to the McGregor Report were 180 degrees from its conclusions. Maricopa Resp. 6. Maricopa moved for sanctions on this issue, which, after reviewing Lake’s explanations why the court’s statement was in error, the trial court denied. *Compare* Lake’s response to Maricopa’s motion for sanctions (Appx:0364-8) *with* trial court’s UAR denying sanctions (Appx:0020).

Maricopa also argues that the trial court’s reliance on lay witness Bettencourt in December rebuts Lake’s expert witness Parikh. Maricopa Resp. 7. Putting aside that Maricopa’s argument is false for a host of reasons, including that Bettencourt is

not an expert like Parikh², Maricopa's argument is irrelevant. Lake's Petition relies on Maricopa's implicit and affirmative admissions in its Answering Brief.

CONCLUSION

This Court should transfer and expeditiously hear this case. In addition, given Maricopa's repeated and deliberate mischaracterizations of the record and Arizona law, Lake respectfully moves that the Court sanction Maricopa and award Lake her costs associated with this brief.

Dated: November 20, 2023

Respectfully submitted,

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² See Appx:0368.

CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure Rule 14(a)(5), the undersigned counsel certifies that the Reply in Support of Petition for Transfer is double spaced and uses a proportionately spaced typeface (*i.e.*, 14-point Times New Roman) and contains 1,388 words according to the word-count function of Microsoft Word.

Dated: November 20, 2023

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