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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

KARI LAKE, Contestant/Plaintiff, v. KATIE HOBBS, personally as Contestee and in her official capacity as the Secretary of State; et al., Defendants.	No. CV2022-095403 **PLAINTIFF KARI LAKE'S NOTICE OF APPEAL** (Assigned to Hon. Peter Thompson)

Plaintiff Kari Lake ("Plaintiff") hereby provides her notice of appeal pursuant to Ariz. R. Civ. App. P. 8, 9 as follows:

I. Caption of Special Action and Case Number

The special action is captioned as Kari Lake, Contestant/Plaintiff, versus Katie Hobbs, personally as Contestee and in her official capacity as Secretary of State; Stephen Richer in his official capacity as Maricopa County Recorder; Bill Gates, Clint Hickman, Jack Sellers, Thomas

Galvin, and 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.

The case number is No. CV2022-095403 in the Arizona Superior Court for Maricopa County.

II. Parties Taking Appeal

Plaintiff Kari Lake takes this appeal.

III. Judgement or Portion of Judgment from Which the Parties are Appealing.

Plaintiff appeals the final judgment entered December 27, 2022 (Exhibit A), denying all Plaintiff's requested relief and dismissing the case. Incorporated into the judgment from which Plaintiff appeals are the Court's Under Advisement Ruling dated December 19, 2022 (Exhibit B), granting Defendants' motions to dismiss in part, the Court's Under Advisement Ruling dated December 24, 2022 (Exhibit C), denying relief on Counts II and IV, and all other orders and rulings in this matter.

IV. Court to Which the Party is Appealing

Plaintiff appeals to Division 1 of the Arizona Court of Appeals. Plaintiff will also seek direct review by the Arizona Supreme Court either by petition for emergency transfer or by special action.

DATED this 27th day of December 2022.

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ORIGINAL e-filed and served via electronic means this 27th day of December 2022, upon:

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EXHIBIT A

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-095403

12/27/2022

HONORABLE PETER A. THOMPSON

CLERK OF THE COURT
V. Felix
Deputy

KARI LAKE

BRYAN JAMES BLEHM

v.

KATIE HOBBS, et al.

DAVID ANDREW GAONA

THOMAS PURCELL LIDDY
COURT ADMIN-CIVIL-ARB DESK
DOCKET CV TX
JUDGE THOMPSON

MINUTE ENTRY

Pending before this Court are Maricopa County Defendants' Motion For Sanctions And Application For Attorney Fees, Arizona Secretary Of State Katie Hobbs' Application For Attorney Fees And Expenses, Governor-Elect Katie Hobbs' Partial Attorney Fee Application, Alexis Danneman's Declaration In Support Of Fee Application and Arizona Secretary Of State Katie Hobbs' Joinder In Maricopa County Defendants' Motion For Sanctions, Plaintiff Kari Lake's Response To Defendants' Motions For Sanctions And Applications For Attorney Fees and Plaintiff Kari Lake's Corrected Response To Defendants' Motions For Sanctions And Application For Attorney Fees. The Court has fully considered the arguments, affidavits and memoranda of law submitted by counsel.

Statutory Authority For Award Of Attorney Fees And Expenses

Defendants each seek an award of their attorney fees and expenses pursuant to Arizona Revised Statutes § 12-349(A)(1) which mandates this Court to make such an award if it finds that Plaintiff has brought this action "without substantial justification". Subpart F of the statute defines "without substantial justification" to mean that "the claim or defense is groundless and is not made in good faith".

The Court agrees with Defendants' statements that election contests are purely statutory and provide for limited form of relief. *Grounds v Lawe*, 67 Ariz. 176, 186 (1948). Further, that an election contest (1) presumes the good faith of election officials as a matter of law, *Hunt v Campbell*, 19 Ariz. 254, 268 (1917), and (2) draws "all reasonable presumptions [to] favor the validity of an election." *Moore v. City of Page*, 148 Ariz. 151, 155 (App. 1986). As stated in the Court's ruling, an election challenger must establish specific element of A.R.S. § 16-672 by clear and convincing evidence. *Cf McClung v Bennett*, 225 Ariz. 154, 156 (2010).

It is also true that Defendants asked each and every witness at Trial if they had either intentionally committed misconduct or knew anyone who had perpetrated intentional misconduct aimed to influence the outcome of the Election. No witness answered in the affirmative. Nevertheless, it is also true that Defendants alleged in their pleadings, attachments and exhibits and argued at the hearing that the evidence and testimony of the conduct of the Election itself together with statistical analysis would meet the requirements of A.R.S. § 16-672 by clear and convincing evidence. The Court does not doubt Plaintiff's belief in her perception of the evidence. However, the analysis of whether Plaintiff's claims were groundless or made in bad faith is not limited to subjective views.

Although eight of Plaintiff's claims were dismissed as a matter of law, two claims did survive and proceeded to Trial[1]. Granting a hearing on those claims was a question of law applied to facts and not a benevolent act. As a result of the hearing required under the law, Plaintiff's allegations that survived dismissal were subject to factual and legal scrutiny and ultimately found by this Court as failing to meet the clear and convincing evidence standard under Arizona Revised Statutes § 16-672.

At the hearing, Plaintiff was not successful in eliciting from any Defendant admissions of intentional malfeasance aimed at altering the Election outcome. However, she did produce testimony of an expert, which ultimately was not accepted by the Court, but who did ague that intentional malfeasance was the root cause of tabulator malfunctions on Election Day. Plaintiff also presented statistical analysis based on 220 Affidavits of voters who did vote but reported frustrations with tabulator malfunctions and the lines on Election Day. Plaintiff also presented expert evidence which attempted to establish a relationship between exit polling results on Election Day and projected Republican voters who did not actually vote. That statistical analysis of polling results also argued a connection between a range of anticipated Republican votes which never materialized and which the witness testified could have influenced the outcome of the Election. That testimony was also not accepted because of faulty underpinnings in fact, unsupported assumptions and foundation.

[1] The arguments that Defendants Richer and Jarret are non-essential parties and should have not been joined under Arizona law were not part of the Motion To Dismiss.

The case law regarding Election Challenges dates back to Territorial days when ballots were counted by hand. There are no cases which rule in or out a statistical analysis as a method for proving elements of an Election Challenge under A.R.S. § 16-672. But, the law makes clear that Plaintiff is required to show a specific number of votes affected which would impact the Election outcome. The Court was not persuaded that, among other failures of proof, statistical analysis with projected ranges of votes based on assumptions as to people who did not vote, met the burden of clear and convincing evidence of a specific number or votes to be subtracted or added to either Plaintiff or Defendant under A.R.S. § 16-672. This ruling is not an exhaustive recitation of the basis for the Court's ruling of December 24, 2022. The Court refers the parties to that ruling for a more detailed basis of the Court's findings of fact and conclusions of law.

There is no doubt that each side believes firmly in its position with great conviction. The fact that Plaintiff failed to meet the burden of clear and convincing evidence required for each element of A.R.S. § 16-672 does not equate to a finding that her claims were, or were not, groundless and presented in bad faith. Any legal decision must be based on the law and facts rather than subjective beliefs or partisan opinions, no matter how strongly held. The Court has heard all the evidence and arguments. The Court has carefully examined and thought through the facts and evidence before it in the motions and at the hearing.

THE COURT FINDS that Plaintiff's claims presented in this litigation were not groundless and brought in bad faith under Arizona Revised Statutes § 12-349(A)(1). Therefore,

IT IS ORDERED denying Defendants' Motions For Attorney Fees And Sanctions.

Assessment of Taxable Costs

A prevailing party in Superior Court is entitled to an award of taxable costs pursuant to Arizona Revised Statutes § 12-332. Those costs include the fees of witnesses. A.R.S. § 12-332(A)(1). Defendant, Secretary of State Katie Hobbs, has presented her request for $5,900.00 in expert witness fees for Mr. Ryan Macias who was retained as an expert and testified at the hearing. A separate request for expert witness fees in the amount of $22,451.00 was submitted by Defendant, Katie Hobbs sued in capacity as Governor-Elect. Defendants have not submitted any other itemized costs pursuant to A.R.S. § 12-332(A).

THE COURT FINDS the submitted expert witness fees are appropriate under A.R.S. § 12-332(A)(1).

Defendant Katie Hobbs sued in her capacity as Governor-Elect has also submitted a signed declaration of attorney Abha Khanna in support of an award in the amount of $4,689.50 for the cost of compensation of Maxwell Schechter, the person designated by them to be present at the inspection of the ballots. Mr. Schechter's compensation is represented by counsel in his signed pleading as $565.00 per hour for the 8.3 hours involved in the inspection. Although he did not testify at Trial, the choice of Defendants to employ Mr. Schechter was based upon his qualifications and credentials to perform this duty much as Plaintiff's expert Mr. Clay Parikh served as her chosen representative for inspection of the ballots.

THE COURT FINDS the submitted compensation of Defendants' designee for inspection of the ballots pursuant to A.R.S. § 16-677(C) is appropriate. Therefore,

IT IS ORDERED awarding Defendant, Secretary of State Katie Hobbs, $5,900.00 as taxable costs pursuant to A.R.S. § 12-332(A)(1).

IT IS FURTHER ORDERED awarding Defendant, Governor-Elect Katie Hobbs, $22,451.00 as taxable costs pursuant to A.R.S. § 12-332(A)(1).

IT IS ALSO ORDERED awarding Defendant, Governor-Elect State Katie Hobbs, $4,689.50 as compensation of her appointed representative for inspection of ballots pursuant to A.R.S. § 16-677(C).

IT IS ORDERED that the amounts entered with this judgment shall run with an annual interest rate of seven and one half percent (7.5%) per annum until paid in full.

The Court having entered its findings of fact, conclusions of law and orders on December 24, 2022 and all matters concerning this litigation before the Court having been resolved with nothing else pending,

IT IS HEREBY ORDERED confirming the election of Katie Hobbs as Arizona Governor-Elect pursuant to A.R.S. § 16-676(B) and entering final judgment in this matter pursuant to Rule 54(c), Arizona Rules of Civil Procedure.

DATED this 27th day of December 2022.

Peter A. Thompson

HONORABLE PETER A. THOMPSON
JUDICIAL OFFICER OF THE SUPERIOR COURT

EXHIBIT B

Clerk of the Superior Court
*** Filed ***
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-095403 12/19/2022

HONORABLE PETER A. THOMPSON

CLERK OF THE COURT
V. Felix
Deputy

KARI LAKE

BRYAN JAMES BLEHM

v.

KATIE HOBBS, et al.

DAVID ANDREW GAONA

THOMAS PURCELL LIDDY
COURT ADMIN-CIVIL-ARB DESK
DOCKET CV TX
JUDGE THOMPSON

UNDER ADVISEMENT RULING

After considering the filings and arguments of the Parties and considering all alleged facts and drawing reasonable inferences therefrom in the light most favorable to the non-movant Contestant, the court finds as follows.

BACKGROUND

Contestant Kari Lake initiated this election contest with the filing of her Complaint in Special Action and Verified Statement of Election Contest, naming as Defendants Katie Hobbs, personally as Contestee and in her official capacity as Secretary of State and the following, identified as the "Maricopa County Defendants": Stephen Richer in his official capacity as Maricopa County Recorder; Bill Gates, Clint Hickman, Jack Sellers, Thomas Galvin, and 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. On December 5, 2022, Secretary of State Katie Hobbs published the official canvass for the general election, identifying 1,270,774 votes cast for Plaintiff and 1,287,891 for Contestee Katie Hobbs.

Pending before the Court are the three Motions to Dismiss Plaintiff's Complaint and Verified Statement of Election Contest filed individually by the Maricopa County Defendants, Katie Hobbs in her capacity as Secretary of State, and Katie Hobbs in her personal capacity as Contestee. Plaintiff filed a combined Response to the motions, and those who had moved to dismiss individually filed replies. The court heard oral argument on the pending motions to dismiss on December 19, 2022.

DISCUSSION

A motion to dismiss ought to be granted if there is no interpretation of the facts alleged in the verified statement, susceptible to proof, that entitles the plaintiff to relief. Ariz. R. Civ. P. 12(b)(6); *see also Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8 (2012). The court assumes the truth of "well-plead factual allegations and will indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008). "[A]llegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts," are not presumed true. *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389, ¶ 4 (App. 2005).

A court must apply "all reasonable presumptions" in "favor [of] the validity of an election." *Moore v. City of Page*, 148 Ariz. 151, 155 (App. 1986). "[H]onest mistakes or mere omissions on the part of election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not void an election, unless they affect the result, or at least render it uncertain." *Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). An election challenger is required to structure her verified statement in conformity with the applicable election challenge statute, and this court accordingly cannot grant relief in an election contest that falls outside the statute. *See Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978); *see also Burk v. Ducey*, No. CV-20-0349-AP/EL, 2021 WL 1380620, at *2 (Ariz. Jan. 6, 2021), *cert. denied*, 209 L. Ed. 2d 735, 141 S. Ct. 2600 (2021) (applying *Donaghey* to dismiss election contest).

I. Count I – Violation of Freedom of Speech

Plaintiff's first count alleges that Defendants Hobbs and Richer's actions constitute "per se violation[s]"of the First Amendment (and its Arizona Constitution cognate) that merit invalidation of the election results. Not only does the verified statement fail to set forth an unconstitutional infringement on Plaintiff's (or anyone else's) speech, even if it did, it would not set forth misconduct under A.R.S. § 16-672(A)(1).

Plaintiff complains of two acts: 1) the Secretary and Recorder's "censorship" of certain social media posts by reporting them to the Department of Homeland Security and Center for Internet Security's ("CISA's") Election Misinformation Reporting Portal and 2) the Recorder's presentation to CISA on "the needs of election officials" concerning purported election misinformation.

It is unclear after briefing what legal argument Plaintiff is attempting to make by use of the word "censorship." In their response to Defendants' motions to dismiss, Plaintiff argued that she need not set forth a First Amendment claim to prevail – but then argues that the challenged acts were illegal. On what basis illegality of these acts could be argued apart from an alleged infringement of the freedom of speech, the verified statement does not say. Though the quintessential censorship—prior restraint—makes no appearance in the verified statement, given that the verified statement frames this as a First Amendment challenge, the court will proceed on that basis.

It is certainly true that a government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Indeed, "[c]ontent-based laws—those that target speech based on its communicative content are presumptively unconstitutional" and must pass muster under strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). But this analysis is premised on state action—the First Amendment does not restrain private parties from opposing speech, or choosing what to publish. *See Manhattan Comm. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928 (2019) ("The threshold problem [of state action] is a fundamental one" in the context of a First Amendment claim).

This is the key deficiency with the claim against the Recorder and Secretary's respective reports to the Election Misinformation Reporting Portal—after the report is made, there is no further conceivable state action. Twitter (to take one example) takes down posts that offend its terms of service after a report is made, and neither the Recorder nor the Secretary are alleged to have control over that process or are alleged to have the authority to *compel* such a take-down. *See Amer. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) ("Action taken by private entities with the mere approval or acquiescence of the State is not state action."). Twitter, or any other social media company, is a private actor, and Plaintiff has alleged no fact – taken in the light most favorable to her – that leads to the reasonable inference of government coercion or control by the Recorder or Secretary.

Nor does the First Amendment restrain the government from engaging in speech contrary to the views of some constituents—a proposition which defeats the claim against the Recorder for his presentation to CISA. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009) ("A government entity has the right to speak for itself. It is entitled to say what it wishes and to select the views that it wants to express.") (cleaned up). As the United States Supreme Court held in

Matel v. Tam: "When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture." 137 S.Ct. 1744, 1757 (2017). Put another way, nothing in the First Amendment keeps a government official from presenting his views on election misinformation to another government body or a private entity. Both of which, in this case, were free to adopt or reject the Recorder's position. Nothing about this allegation raises a First Amendment claim.

To the extent that the verified statement raises the Arizona Constitution's independent, and broader, guarantee of free speech, they do not defend this argument in the briefing. *See generally* Ariz. Const. art. 2 § 6; *see also Brush & Nib Studio, LC v. City of Phoenix*, 247 Ariz. 269, 281-82, ¶ 45 (2019) (state constitutional protection of speech is broader than under federal constitution). In any event, the Court finds no support for the proposition that Arizona's Constitution somehow restrains the government from articulating a viewpoint to a public or private party.

Moreover, even if Plaintiff successfully pled a First Amendment challenge, she cannot argue that these alleged First Amendment violations constitute election misconduct. The statute requires misconduct "on the part of election boards or any members thereof in any of the counties of the state, *or* on the part of any officer making or participating in a canvass for a state election." A.R.S. § 16-672(A)(1). (emphasis added). Two types of misconduct are therefore implicated: 1) by election boards or members, and 2) any officer making or participating in a canvass. The Secretary and Recorder are not automatically members of election boards, *see* A.R.S. § 16-531(A), so if Defendants committed misconduct, it must be done while "making or participating in a canvass" to come within the ambit of (A)(1). Both actions alleged to be misconduct took place months prior to canvassing, and consequently cannot be considered misconduct under the statute. Even viewing the allegations in the light most favorable to Plaintiff, she has not stated a claim.

Count I must be dismissed.

Count II – Illegal Tabulator Configurations

Plaintiff alleges that the ballot-on-demand ("BOD") printers that malfunctioned on election day were not certified and "have vulnerabilities that render them susceptible to hacking" according to a declaration attached to the statement. Plaintiff alleges separately that the BOD printers malfunctioned because of an "intentional action." Plaintiff alleges that these combined to provide grounds for setting aside election results based on both (A)(1) for misconduct and (A)(4) for illegal votes.

The Court takes Plaintiff to mean two things by this count: 1) the use of BOD printers lacking certification was misconduct by some responsible official and 2) that someone did something to the printers to cause them to misprint ballots.

The former is not enough to state a claim. Plaintiff cites 52 U.S.C. § 21081(b) and A.R.S. § 16-442 for the proposition that devices such as tabulators and election software must be certified under the Help America Vote Act ("HAVA"). But Plaintiff goes further, arguing that the BOD printers, because they fall under the definition of "voting system" under HAVA, must also be certified. Defendants argue, making reference to the title of A.R.S. § 16-442, under Arizona law only the "vote *tabulating* system" is required to be certified pursuant to HAVA. However, this Court will only result to using the title of the statute to help discern legislative intent when the statute is ambiguous. *See* A.R.S. § 1-212; *Secure Ventures, LLC v. Gerlach in and for Cnty. of Maricopa*, 249 Ariz. 97, 100, ¶ 7, n.1 (App. 2020).

Recourse to such methods is unnecessary where context is fruitful. *State v. Martinez*, 202 Ariz. 507, 510, ¶ 15 (App. 2002) (courts "give the words of a statute their commonly accepted meaning unless . . . a special meaning is apparent from the context.") From context alone, the Court agrees with Defendants that the "machines and devices" in subsection (B) are the same as those in (A). And thus, only machines and devices that record or tabulate votes must be certified in compliance with HAVA to comply with Arizona law. A.R.S. § 16-442(A)-(B). Moving from there to A.R.S. § 16-444, the Court finds the definition of "vote tabulating equipment" must apply to: any "apparatus necessary to automatically examine and count votes as designated on ballots and tabulate the results." A.R.S. § 16-444(A)(7).

Consequently, a ballot printer, which neither examines nor counts, nor tabulates, is not a component of the vote tabulating system and need not be laboratory certified. *See also* A.R.S. § 16-449(B)-(C) (requiring logic and accuracy testing of "electronic ballot *tabulating* systems"). While the federal definition of "voting system" certainly is more expansive, and could conceivably include ballot printers, the federal "voting system" definition does not limit the devices that Arizona can employ for printing ballots, and in fact prescribes neither a certification requirement for printers nor a federal remedy (i.e. reconducting an election) for failure to certify equipment. *See* 52 U.S.C. § 21081(b). Nor does that statute even reference laboratory certification. *Id.* Indeed, since state use of federally accredited laboratories for certification is discretionary, a federal penalty would make no sense. *See* 52 U.S.C. § 20971(a)(2). Thus, the lack of certification of any BOD printer cannot give rise to a claim under A.R.S. § 16-672(A)(4).

The twin allegation that the BOD printer failures render the vote illegal also fails. An illegal vote is one that is either cast by a voter who is ineligible to vote, *see Moore v. City of Page*, 148 Ariz. 151, 156-7 (App. 1986), or one cast in a manner that – by statute – *invalidates* the vote. *See Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178, 180 (1994). What Plaintiff is essentially arguing is essentially a fruit of the poisonous tree argument – that contamination in one part of an election process renders the result illegal. However, that is not the framework given in either the election statutes (which, again, this Court must construe in favor of an election result) or the over a century of Arizona caselaw interpreting these statutes. Plaintiff cannot point to a single case where an illegal vote was a *missing* vote. To the extent such a claim is cognizable, it is under (A)(5) and is not raised here. Because Plaintiff does not allege that the BOD printer failure either 1) caused a vote to be cast by an ineligible voter, or 2) caused a vote to be cast *and counted* when the vote *should not have been*, she has not stated a claim under subsection (A)(4).

While the Court finds that Plaintiff does not state a claim under A.R.S. § 16-672(A)(4), the Court finds that Plaintiff does state a claim under (A)(1). Viewing the Complaint in the light most favorable to the non-movant, Plaintiff specifically alleges that a person employed by Maricopa County interfered with BOD printers in violation of Arizona law, resulting in some number of lost votes for Plaintiff. Plaintiff is entitled to attempt to prove at trial that 1) the malfeasant person was a covered person under (A)(1); 2) the printer malfunctions caused by this individual directly resulted in identifiable lost votes for Plaintiff; and 3) that these votes would have affected the outcome of the election.

Plaintiff initially cited to *Hunt* for the proposition that, instead, if this count survives it must result in a revote of the entire election because of "fraudulent combinations coercion and intimidation." *See Hunt v. Campbell*, 19 Ariz. 254, 265-66 (1917); *see also Findley v. Sorenson*, 35 Ariz. 265, 269 (1929). But Plaintiff has not alleged fraud, nor plead it with particularity. *See* Ariz. R. Civ. P. 9(b) (fraud must be plead with particularity); *see also Hunt*, 19 Ariz. at 264 ("[Fraud] ought never to be inferred from slight irregularities, unconnected with incriminating circumstances; nor should it be held as established by mere suspicions, often having no higher origin than partisan bias and political prejudices.") (citation omitted). Indeed, on pages 6 and 7 of Plaintiff's response to the instant motions and at oral argument, she disclaimed her previous theory of fraud. The Court therefore dismisses any claim under Count II alleging fraud.

Plaintiff has, nonetheless, also alleged intentional misconduct sufficient to affect the outcome of the election and thus has stated an issue of fact that requires going beyond the pleadings. The Court takes no position as to the evidentiary weight it will give Plaintiff's proffered experts at trial and notes that, at trial, it must indulge all reasonable assumptions in favor of the election when weighing the evidence before it. However, evidence is not before the Court at the motion to dismiss stage—pleadings, made under the auspices of Rule 11 are. Accordingly, Plaintiff

must show at trial that the BOD printer malfunctions were intentional, and directed to affect the results of the election, and that such actions did actually affect the outcome.

Defendants' motions are denied as to Count II as narrowed above.

Count III – Invalid Signatures on Mail-In Ballots

Plaintiff next argues that the signature validation methodology utilized by Maricopa County did not comply with the statute. Specifically, Plaintiff argues that the review of mail-in ballot signatures, conducted pursuant to the Maricopa County Election Manual was inadequate. She makes reference to Maricopa County signature reviewer declarations that are critical of the process used to cure ballots that, at first glance, did not match the signature on file for that voter. But the Defendants argue that this claim is subject to laches.

Laches is an equitable doctrine that precludes claims that are brought 1) after an unreasonable delay where 2) that unreasonable delay prejudices the other parties, the administration of justice, or the public. *League of Ariz. Cities and Towns v. Martin*, 219 Ariz. 556, 558, ¶ 6 (2009); *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435, ¶ 13 (App. 2013). This doctrine bars procedural challenges by election contestants after an election has already taken place. *See e.g., Allen v. State*, 14 Ariz. 458, 462 (1913); *Tilson v. Mofford*, 153 Ariz. 468, 470 (1987) ("[P]rocedures leading up to an election cannot be questioned after the people have voted, but instead the procedures *must* be challenged before the election is held.") (citing *Kerby v. Griffin*, 48 Ariz. 434, 444-46 (1936)). A challenger may not "ambush an adversary or subvert the election process by intentionally delaying a request for remedial action to see first whether they will be successful at the polls." *McComb v. Super. Ct. in and for Cnty. of Maricopa*, 189 Ariz. 518, 526 (App. 1997) (quoting *United States v. City of Cambridge, Md.*, 799 F.2d 137, 141 (4th Cir. 1986)).

"Election procedures generally involve 'the manner in which an election is held.'" *Sherman v. City of Tempe*, 202 Ariz. 339, 342, ¶ 10 (2002) (quoting *Tilson*, 153 Ariz. at 470). The reconciliation of ballot envelope signatures with voter file signatures is an election procedure, as this process takes place in the course of the election itself – the casting and counting of ballots. Thus, absent a reason for the delay or a lack of prejudice, the challenge may not proceed after the election has taken place.

Considering first Plaintiff's delay, Plaintiff makes much of a report by Arizona Attorney General Mark Brnovich – issued on April 6, 2022 – that reported that the "early ballot affidavit signature verification system in Arizona, and particularly when applied to Maricopa County, may be insufficient to guard against abuse." Whatever the merits of that position, applied to these facts, Plaintiff was on notice by April (at the latest) of the procedural defects she now raises in her challenge and offers no explanation for the delay. *See Mathieu v. Mahoney*, 174 Ariz. 456, 459

(1993) (applying laches to election challenge based on publicly available documents). To the extent she relies on a ballot review conducted of 2020 ballot signatures, the report Plaintiff relies on was presented in June 2022, again months before the instant election. To bring a belated action under these circumstances is not justifiable.

As for prejudice, as another department of this Court indicated in dismissing another election claim, any procedural challenge post-election "ask[s] us to overturn the will of the people as expressed in the election." *Finchem v. Fontes*, CV2022053927, at 5 (Maricopa Cnty. Super. Ct. Dec. 16, 2022) (quoting *Sherman*, 202 Ariz. at 342, ¶ 11). This is an exceedingly high degree of prejudice against both the parties and the public, which this Court is loath to excuse. Therefore, because Plaintiff was on notice (at a minimum) months before the election as to the nature of the ballot signature reconciliation process and chose not to challenge it then, her claim is barred by laches.

Count III must be dismissed.

Count IV – Ballot Chain of Custody

Plaintiff next claims that violations of the County Election Manual pertaining to chain of custody constitute misconduct pursuant to A.R.S. § 16-672(A)(1). Specifically, Plaintiff argues that: 1) the ability of employees of the county's ballot contractor to add ballots of family members and 2) the lack of an Inbound Receipt of Delivery form both constitute misconduct. This is in addition to complaints about the handling of ballots in the 2020 election. The allegations concerning 2020 have no bearing on this contest, and the Court does not consider them.

Plaintiff alleges that ballots, of some number, were added by Runbeck employees to the total in violation of A.R.S. § 16-1016. Further, Plaintiffs allege that the lack of Receipt of Delivery forms were violations of state law that permitted an indeterminate number of votes to be added to the official results, constituting misconduct. The Court, drawing inferences in the light most favorable to Plaintiff as it must at this stage, finds that Plaintiff has stated a claim of misconduct by a person under control of Maricopa County that affected the canvass under A.R.S. § 16-672(A)(1). Defendants argue that laches applies. However, laches do not apply to contests arising from *violation* of election day procedures as opposed to challenges to the procedures themselves. *See McComb*, 189 Ariz. at 525-26 (laches inapplicable where "little time" existed before election to file suit). Delay, to the extent there was any, was reasonable here.

Defendants dispute the lack of compliance with chain of custody laws and claim that Plaintiff has misunderstood the forms required. As presented, whether the county complied with its own manual and applicable statutes is a dispute of fact rather than one of law. This is true as to whether such lack of compliance was both intentional and did in fact result in a changed outcome.

Consequently, Plaintiff has stated a claim under A.R.S. § 16-672(A)(1).

Defendants' motions are denied as to Count IV.

Count V: Equal Protection and Count VI: Due Process

In her Counts V and VI, Plaintiff asserts that various facts she alleges warrant findings of, respectively, "intentional discrimination" and "a due process violation," under the United States or Arizona Constitution. The nearest Plaintiff comes to suggesting the relevance of these allegations to her contest is her citation to A.R.S. Section 16-672(A)(1), which permits election contest on the ground of official misconduct, and (A)(4), which permits election contest on the ground of illegal votes.

Even if the Court assumes officials' alleged violations of equal protection and due process in the conduct of an election would constitute "misconduct" contemplated by Section 16-672(A)(1), allegations of such violations are merely cumulative and unnecessary to successfully plead an election contest. An instance of misconduct by either an election board or a person making or participating in a canvass need not result in a harm against a protected class in order to be successful. A bootstrapped constitutional argument takes the verified statement beyond the remedies provided by the election contest statute, which is impermissible. *See Donaghey*, 120 Ariz. at 95.

Nor is it apparent from the Complaint that Plaintiff has successfully pled a successful due process or equal protection challenge at all. *Cf. Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 570 (App. 2003) (government acts in violation of law, in bad faith, or beyond jurisdiction do not necessarily equate to a due process or equal protection challenge); *Vong v. Aune*, 235 Ariz. 116, 123, ¶ 31 (App. 2014) (equal protection protects against discriminatory classifications). Plaintiff does not clearly allege that an actor actually discriminated against a class (i.e. Republicans) or that this discrimination could actually alter the outcome given ticket splitters even among election day voters. Plaintiff has trouble even at this stage drawing a through-line from purported discrimination to well-pled impact.

In any event, a finding of either violation is not necessary ultimately to succeed in an election contest under either Section 16-672(A)(1) or (A)(4). The addition of this constitutional argument is unnecessary. Even assuming equal protection or due process claims lie in the circumstances surrounding the 2022 election, they are outside of the scope of Plaintiff's Section 16-672 election contest.

Count V and Count VI must be dismissed.

Count VII – Secrecy Clause

Plaintiff argues that the mail-in ballot procedure is unconstitutional under the Arizona Constitution's Secrecy Clause. *See* Ariz. Const., art. VII, § 1. Whatever merit this challenge has, it is squarely barred by laches for the same reasons as Count III. The current absentee ballot statute was adopted in 1991. 1991 Ariz. Sess. Laws, ch. 51, § 1. Lake could have brought this challenge at any time in the last 30 years. To do so now is to invite confusion and prejudice when absolutely no explanation has been given for the unreasonable delay. Laches conclusively bars this challenge as to the instant election.

Count VII must be dismissed.

Count VIII: Incorrect Certification

As noted in Ms. Hobbs's motions in her capacity as Secretary of State and Contestee, Plaintiff's Count VIII contains no new factual allegations. The Count only asserts that "the cumulative impact of [Counts I through VII] invalidates significantly more Hobbs votes than the certified margin of victory for Hobbs" and that the court will have to declare Hobbs' certification of election invalid and declare that Plaintiff is elected governor. *See* A.R.S. § 16-676(C). The court reads Count VIII as Plaintiff's request for the specific relief available under A.R.S. Section 16-676(C) if any of Counts I through VII are sufficiently proven but dismisses it as an independent cause of action because it is not a cause of action in itself.

Count VIII must be dismissed.

Count IX: Inadequate Remedy

In her Count IX, Plaintiff asserts that, "[t]o the extent that the special nature of these proceedings precludes bringing concurrent federal claims against Maricopa County's 2022 general election, this Court has jurisdiction under Arizona's Uniform Declaratory Judgment Act to declare that the remed[ies] provided by A.R.S. § 16-672 [are] inadequate to protect those federal rights and requirements."

First, insofar as the "federal claims" to which Plaintiff here refers are those included in her complaint, the "special nature of these proceedings" does *not* preclude concurrently bringing those claims against appropriate parties, so Plaintiff's Count IX invocation of the Court's jurisdiction to provide declaratory relief is unnecessary and outside the scope of an election challenge.

Second, in any case, the Court may not provide the suggested relief. A court may provide declaratory judgment only over a "justiciable controversy between plaintiff and defendant that is ripe for adjudication." *Moore v. Bolin*, 70 Ariz. 354, 355 (1950). The specific question of whether A.R.S. § 16-672 is adequate to protect Plaintiff's "federal rights and requirements" was not in controversy between Plaintiff and the Defendants before declaratory action was brought. "No proceeding lies under the declaratory judgments acts to obtain a judgment which is merely advisory or which merely answers a moot or abstract question," *Id.* at 357 (quoting 16 Am. Jur., Declaratory Judgments, § 9, p. 282), such as the adequacy of Section 16-672 to remedy federal claims. Beyond all this, the request for the court to concoct a new remedy is a straightforward invitation for judicial legislation which must be denied. *See McNamara v. Citizens Protecting Tax Payers*, 236 Ariz. 192, 195-96, ¶¶ 10-11 (App. 2014) (declining in campaign finance context to "infer a statutory remedy . . . that the legislature eschewed") (quoting *Pacion v. Thomas*, 225 Ariz. 168, 169, ¶ 9 (2010)). Count IX must be dismissed because it is unnecessary by its own terms and requests an unavailable remedy.

Plaintiff in her reply argues that "the Court has a justiciable controversy as to whether it may consider at trial claims in an election-contest action," Resp. at 30, but this misunderstands the nature of a declaratory action. The "justiciable controversy" requirement is provided by a plaintiff's assertion of "a legal relationship, status or right" in which the party has a definite interest and 'the denial of it by the other party." *Original Apartment Movers, Inc. v. Waddell*, 179 Ariz. 419, 420 (App. 1993) (quoting *Morris v. Fleming*, 128 Ariz. 271, 273 (App. 1980)). The relationship of the Plaintiff and the Defendants exists prior to the bringing of the declaratory action and does not arise, as claimed here, by the Defendants defending against a claimed right in the midst of litigation.

Count IX must be dismissed.

Count X: Constitutional Rights

In her Count X, Plaintiff alleges that certain actions of Maricopa County may have violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Plaintiff states that such violations may be remedied by this court under 42 U.S.C. § 1983 independently of A.R.S. § 16-672 and then claims that, "[a]ccordingly, [Plaintiff] is entitled to an order setting aside the election in its entirety and ordering a new election." The statement is correct insofar as "this

Court"—the superior court as Arizona's "single unified trial court of general jurisdiction," *see Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 102 (1995)—may hear such claims under Section 1983. However, when, as here, the gravamen of her complaint is the improper conduct of an election, her challenge must conform with the provisions of Section 16-672. *See Donaghey*, 120 Ariz. at 95. This Court may hear Plaintiff's civil rights claims in a separate action, but they must be dismissed from this election contest as out of the scope of Section 16-672.

Count X must be dismissed.

CONCLUSION

IT IS ORDERED dismissing all counts of Plaintiff's Verified Statement of Election contest except for Count II and Count IV.

IT IS FURTHER ORDERED affirming this Court's prior order concerning ballot inspection to take place at 8:00 a.m. on Tuesday, December 20, 2022.

IT IS FURTHER ORDERED accepting and adopting Maricopa County's recommendation, appointing Lynn Constable as the Court's inspector pursuant to A.R.S. § 16-677(B).

****FURTHER ORDERS AND TRIAL INSTRUCTIONS****

The Court originally allocated two days for the trial of this election challenge. That allocation of time was based on the original nine counts of the Petition being heard. The ruling on the Motions To Dismiss has reduced the number of remaining counts substantially. Therefore, the original time estimate should be more than adequate to accommodate a full hearing on the merits.

The compressed time for presentation is based not only on the time constraints imposed by A.R.S. § 16-676 and the short time frame before January 2, 2023, but the parties' expressed desire to leave at least some time to file an appeal of this Court's rulings before January 2, 2023.

The time allocated means each side will have five and a half hours available for opening statement, direct examination of witnesses, cross examination of opposing witnesses, re-direct examination of witnesses and closing argument. Thirty minutes is deducted from each side's allocated six hours to allow for a 15-minute break each morning and afternoon.

IT IS ORDERED that the parties shall meet and confer to provide the Court with the list of witnesses to be called by each party together with anticipated time required for direct, cross, and re-direct examinations as well as opening statements and closing arguments by 12:00 noon on Tuesday, December 20, 2022.

IT IS FURTHER ORDERED that the parties shall either have physically marked and exchanged all hearing exhibits or uploaded all electronic exhibits to be used at the hearing to the Electronic Exhibits Portal of the Clerk of Maricopa County Superior Court not later than 12:00 noon on Tuesday, December 20, 2022.

EXHIBIT C

Clerk of the Superior Court
*** Filed ***
12/24/2022 10:45 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-095403 12/24/2022

HONORABLE PETER A. THOMPSON

CLERK OF THE COURT
V. Felix
Deputy

KARI LAKE

BRYAN JAMES BLEHM

v.

KATIE HOBBS, et al.

DAVID ANDREW GAONA

THOMAS PURCELL LIDDY
COURT ADMIN-CIVIL-ARB DESK
DOCKET CV TX
JUDGE THOMPSON

UNDER ADVISEMENT RULING

The Court has considered the evidence presented at the Evidentiary Hearing on December 21-22, 2022, including all exhibits admitted as well as the testimony of witnesses. The Court has read and considered all 220 Affidavits attached to the Verified Petition. The Court has also considered the arguments by counsel. The Court accordingly issues the following findings of fact and conclusions of law:

LEGAL STANDARDS AND BURDEN OF PROOF

Throughout the history of Arizona, the bar to overturn an election on the grounds of misconduct in this State – or Territory – has always been a high one. *See Territory ex rel. Sherman v. Bd. of Supervisors of Mohave Cnty.*, 2 Ariz. 248, 253 (1887) ("It is the object of elections to ascertain a free expression of the will of the voters, and no mere irregularity can be considered, unless it be shown that the result has been affected by such irregularity.") (citations omitted).

Our Territorial Supreme Court agreed in *Oakes v. Finlay*, 5 Ariz. 390, 398 (1898) that "it is . . . unwise to lay down any rule by which the certainty and accuracy of an election may be jeopardized by the reliance upon any proof affecting such results that is not of the *most clear and conclusive character*." (citing *Young v. Deming*, 33 P. 818, 820 (Utah 1893)) (emphasis added). The official election returns are prima facie evidence of the votes actually cast by the electorate. *See Hunt v. Campbell*, 19 Ariz. 254, 268 (1917). The burden of proof in an election contest is on the challenger. *Findley v. Sorenson*, 35 Ariz. 265, 271-72 (1929). "The duty of specifying and pointing out the alleged illegal irregularities and insufficiencies is a task that should be undertaken by litigants and their counsel." *Grounds v. Lawe*, 67 Ariz. 176, 189 (1948).

As for the actions of elections officials themselves, this Court *must* presume the good faith of their official conduct as a matter of law. *Hunt*, 19 Ariz. at 268. "[A]ll reasonable presumptions must favor the validity of an election." *Moore v. City of Page*, 148 Ariz. 151, 155 (App. 1986). Election challengers must prove the elements of their claim by clear and convincing evidence. *Cf. McClung v. Bennett*, 225 Ariz. 154, 156, ¶ 7 (2010).

The Order granting in part Defendants' Motions to Dismiss gave Plaintiff two independent claims for seeking their requested relief under A.R.S. § 16-672(A)(1). Plaintiff has only these options because election contests, "are purely statutory and dependent upon statutory provisions for their conduct." *Fish v. Redeker*, 2 Ariz.App. 602, 605 (1966). Put another way, Plaintiff has no free-standing right to challenge election results based upon what Plaintiff believes – rightly or wrongly – went awry on Election Day. She must, as a matter of law, prove a ground that the legislature has provided as a basis for challenging an election. *See Henderson v. Carter*, 34 Ariz. 528, 534-35 (1928) ("[O]ne who would contest an election assumes the burden of showing that his case falls within the terms of the statute providing for election contests. The remedy may not be extended to include cases not within the language or intent of the legislative act."); *see also Donaghey v. Att'y Gen.*, 120 Ariz. 93, 95 (1978) ("[F]ailure of a contestant to an election to strictly comply with the statutory requirements is fatal to h[er] right to have the election contested.").

Plaintiff's remaining claims are based on the following statutory ground:

"[M]isconduct on the part of election boards or any members thereof in any of the counties of the state, or on the part of any officer making or participating in a canvass for a state election."

A.R.S. § 16-672(A)(1). This trial was premised on Plaintiff's theories arising from the second clause, concerning an officer making or participating in a canvass.

The Order permitted two counts to proceed to Trial: 1) the claim that ballot-on-demand ("BOD") printer malfunctions experienced on Election Day were caused intentionally and that these malfunctions resulted in a changed outcome (Count II); and 2) the claim that Maricopa

County violated its own election procedures manual ("EPM") as to chain of custody procedures in such a way as to result in a changed election outcome (Count IV). As outlined in the Order partially granting the Motion to Dismiss, there are four elements to each claim. Plaintiff needed to prove by clear and convincing evidence, each element to be entitled to relief:

1) That the alleged misconduct – whether the BOD printer irregularities, or the ostensible failure to abide by county election procedures – was an intentional act. *See Findley*, 35 Ariz. at 269.

2) That the misconduct was an intentional act conducted by a person covered by A.R.S. § 16-672(A)(1), that is – an "officer making or participating in a canvass."

3) That the misconduct was intended to change the result of the November 2022 General Election. *See Findley*, 35 Ariz. at 269.

4) That the misconduct did, in fact, change the result of that election. *See Grounds*, 67 Ariz. at 189.

It bears mentioning that because of the requested remedy – setting aside the result of the election – the question that is before the Court is of monumental importance to every voter. The margin of victory as reported by the official canvass is 17,117 votes – beyond the scope of a statutorily required recount. A court setting such a margin aside, as far as the Court is able to determine, has never been done in the history of the United States. This challenge also comes after a hotly contested gubernatorial race and an ongoing tumult over election procedures and legitimacy – a far less uncommon occurrence in this country. *See e.g.*, *Hunt, supra*. This Court acknowledges the anger and frustration of voters who were subjected to inconvenience and confusion at voter centers as technical problems arose during the 2022 General Election.

But this Court's duty is not solely to incline an ear to public outcry. It is to subject Plaintiff's claims and Defendants' actions to the light of the courtroom and scrutiny of the law. *See Winsor v. Hunt*, 29 Ariz. 504, 512 (1926) ("It is the boast of American democracy that this is a government of laws, and not of men.") And so, the Court begins with a review of the evidence.

DISCUSSION

It was Plaintiff's burden to establish each element by clear and convincing evidence. If Plaintiff herself failed to sustain her burden of proof, the matter is decided. Thus, the Court begins with Plaintiff's case in chief.

a. Mark Sonnenklar

The Court first considers Mark Sonnenklar, a roving election attorney with the Republican National Committee. Mr. Sonnenklar testified that, on Election Day, he went from polling location to polling location speaking with partisan observers. Mr. Sonnenklar visited eight voter centers on Election Day. He testified of his personal knowledge of 1) the failure of tabulators at multiple locations to accept ballots, 2) his own personal estimate of the rate of failure, 3) the efforts – of varying degrees of efficacy – of Maricopa County T-Techs to fix the tabulators, and 4) the frustration and anger of voters who had to wait in longer lines due to these failures. He testified that the County-provided wait times were not accurate and that a much higher number of voter centers suffered from printer/tabulator failure than was admitted by Maricopa County.

The Court credits the personal observations of Mr. Sonnenklar and does not doubt his knowledge or his veracity. But the Court cannot follow Mr. Sonneklar to ascribing intentional misconduct to any party. Mr. Sonnenklar said at Trial that it was "common sense" that such widespread failures must have been the result of intentional conduct. But this intuition does not square with Mr. Sonnenklar's own observations. For one thing, County T-Techs being sent to troubleshoot and fix the issues with tabulators are not consistent with a scheme by a person or persons to alter the result of an election. Mr. Sonnenklar testified to nothing that suggested those tech efforts were anything other than best-efforts intended to remedy the problem. Second, as Mr. Sonnenklar himself admitted, he did not personally observe anything that allowed him to support his intuition that someone had engaged in intentional misconduct. Third, Mr. Sonnenklar admitted that he had no technical knowledge which would allow him to infer that these ostensible technical failures were anything but malfunctions rather than malfeasance. Last, Mr. Sonnenklar admitted that he had no personal knowledge of any voter being turned away from the polls as a result of BOD printer failures.

As far as evidence of misconduct is concerned, the Court finds nothing to substantiate Plaintiff's claim of intentional misconduct as to either claim through Mr. Sonnenklar's testimony.

b. Heather Honey

The Court next considers Heather Honey, a supply chain auditor and consultant who testified primarily concerning the chain of custody claim. The Court, again, credits Ms. Honey's observations and personal knowledge of the system of early voting ballots. As relevant to misconduct, her testimony makes two main points: 1) that Maricopa County did not produce (pursuant to a Public Records Act request) Maricopa County Delivery Receipt forms for ballot packets dropped off by voters at drop boxes on Election Day; 2) that an employee of Runbeck Election Services (a county contractor) averred that Runbeck employees were permitted to submit about 50 ballot packets of family and friends into the ballot stream improperly.

Again, the Court does not doubt Ms. Honey's veracity, but her testimony is of limited use in making a finding that intentional misconduct occurred. For one thing, Ms. Honey agreed during cross examination that, while she has not received the Maricopa County Delivery Receipt forms – she knows that these forms do, in fact, exist. While she testified that the public records request has not yet been fulfilled, to the extent there is a claim to be made for insufficient production by Maricopa County in response to a public records request, that claim is not before the Court. Because Plaintiff's expert agreed that the forms which are the basis for this claim were generated, Plaintiff cannot point to their absence writ large as a violation of the EPM.

Next, as to the 50 ballot packets, Ms. Honey admitted that neither she nor her contacts with Runbeck had personal knowledge of any permission given by Maricopa County to Runbeck employees to bring the ballots of family for improper insertion into the ballot packet counting process.

The Court must also consider the Affidavits by Leslie White and Denise Marie on this point. The White Affidavit is less helpful on these points, as Ms. White testifies mainly to the limitations of what she was allowed to see as an observer at the Maricopa County Tabulation and Election Center ("MCTEC"). She expresses worry about the rapid pace of processes at MCTEC, objects to the limited field of her view as an observer but does not point to any violation of the EPM, nor does counsel draw the Court's attention to any EPM violation found in this Affidavit.

As for Ms. Marie's Affidavit, the Court must weigh her averment that family ballots were inserted into the ballot stream in violation of the EPM and chain of custody requirements against the sworn testimony of both Mr. Valenzuela and Mr. Jarrett who testified that Maricopa County employees – who follow the EPM – have eyes on the ballot process during their time at Runbeck. The Court finds the latter more credible given that Ms. Marie does not allege anything about Maricopa County employees' role in this alleged violation, the combined testimony of multiple Maricopa County officials concerning training of employees and lack of authorization for such a violation, and given that the purported authorization for such a practice is hearsay within the affidavit. The Court cannot afford this document much weight.

In his closing, counsel for Plaintiff argues that it "does not make sense" that Maricopa County did not know how many ballots Maricopa County had received on election night. But, at Trial, it was not Maricopa County's burden to establish that its process or procedure was reasonable, or that it had an accurate unofficial count on Election Night. Even if the County did bear that burden, failing to carry it would not be enough to set aside election returns. *See Moore v. City of Page*, 148 Ariz. 151, 165-66 (App. 1986). Particularly where Plaintiff's own witness on this point lacks personal knowledge of the intent of the alleged bad actor, admits that Defendants did in fact generate the documents they were required to, and otherwise affirms the County's

compliance with election processes, the Court cannot say that Plaintiff proved element one of Count IV by clear and convincing evidence.

c. Clay Parikh

Mr. Parikh has an impressive technical background as a cybersecurity expert for Northrup Grumman. The Court again credits his substantial experience and personal knowledge as far as it goes. His primary contention was that the printer errors he saw reflected in the A.R.S. § 16-677 ballot review he conducted – the printing of a 19-inch ballot on a 20-inch ballot paper – must have been done intentionally, either by overriding the image file that was sent from the laptop to the printer, or from the ballot image definition side. However, if the ballot definitions were changed, it stands to reason that *every* ballot for that particular definition printed on every machine so affected would be printed incorrectly. As Plaintiff's next witness indicates, that was not the case on Election Day. In either event, Mr. Parikh acknowledged that he had no personal knowledge of any intent behind what he believes to be the error.

The Court notes that Mr. Parikh also acknowledged a fact admitted by several of Plaintiff's witnesses: that any ballot that could not be read due to BOD printer or tabulator failure could be submitted for ballot duplication and adjudication through Door 3 on the tabulators. Plaintiff's own expert acknowledged that a ballot that was unable to be read at the vote center could be deposited by a voter, duplicated by a bipartisan board onto a readable ballot, and – in the final analysis – counted. Thus, Plaintiff's expert on this point admitted that the voters who suffered from tabulator rejections *would nevertheless have their votes counted*. This, at a minimum, means that the actual impact element of Count II *could not be proven.* The BOD printer failures did not actually affect the results of the election.

Further, as to the intent elements, the Court must pair its consideration of Mr. Parikh's testimony with that of another witness called by Plaintiff.

d. David Betencourt

Mr. Betencourt was a temporary employee of Maricopa County (a T-Tech) called by Plaintiff to testify as to the technical issues experienced on Election Day. T-Techs, in addition to setting up voter centers, provide technical support on Election Day.

As relevant here, Mr. Betencourt testified that there were, in fact, multiple technical issues experienced on Election Day. He testified that these were solved by means such as: 1) taking out toner and/or ink cartridges and shaking them, 2) cleaning the corona wire, 3) letting the printers warm up, 4) cleaning the tabulators, and 5) adjusting settings on the printer. It is of note that, apart from 5), none of these solutions implicates the ballot in a manner suggesting intent. Mr. Betencourt

testified that each of these on-site actions were successful to varying degrees, with shaking the toner cartridge being the most effective. It is worth repeating that ballots that could not be read by the tabulator immediately because of printer settings – or anything else – could be deposited in Door 3 of the tabulator and counted later after duplication by a bipartisan adjudication board.

Mr. Betencourt testified that, not only did he lack knowledge of any T-Tech (or anyone else) engaging in intentional misconduct, but further testified that the T-Techs he worked with diligently and expeditiously trouble-shot each problem as they arose, and they did so in a frenetic Election Day environment. Plaintiff's own witness testified before this Court that the BOD printer failures were largely the result of unforeseen mechanical failure.

e. Richard Baris

Mr. Baris testified as the Director of Big Data Poll. He testified that, as a result of the BOD printer failures on Election Day, that a number of voters were disenfranchised, and opined that this change resulted in Plaintiff losing the election. He testified that he knew this because of the decreased response rates to his exit poll for the General Election in Arizona. The Court will, with respect, put aside the ongoing internecine fights among pollsters and political scientists as to methodology and reliability. Indeed, giving all weight and due credit to Mr. Baris, he does not prove element four of Count II – an actual effect on the election.

Further, Mr. Baris admitted at Trial that "nobody can give a specific number" of voters who were put off from voting on Election Day. Thus, even if Plaintiff proved elements 1-3 of Count II by clear and convincing evidence, the truth of this statement alone dooms element 4. No election in Arizona has ever been set aside, no result modified, because of a statistical *estimate*. In the Court's view, it is a quantum leap to go from analogizing cases where malfeasance was precisely quantified such that this Court could provide a remedy, to setting aside a result where the result of alleged malfeasance is itself unknown. In cases where, for instance, a proportionality method has been utilized, it has been to remedy a *known* number of illegal votes cast in *unknown* proportions for the candidates. *See Grounds*, 67 Ariz. at 183-85; *Clay v. Town of Gilbert*, 160 Ariz. 335, 339 (App. 1989). But election contests are decided by votes, not by polling responses, and the Court has found no authority suggesting that exit polling ought to be used in this manner. Given that exit polling is done after a vote has been cast – the weight of authority seems to be contrary to this proposition. *See Babnew v. Linneman*, 154 Ariz. 90, 93 (App. 1987) (citing *Young*, 33 P. at 820)).

Indeed, to the extent that a range of outcomes was suggested by Mr. Baris, he suggested that – with his expected turnout increase on Election Day of 25,000-40,000 votes the outcome could be between a 2,000-vote margin *for Hobbs* to a 4,000-vote margin for Plaintiff. Taking Mr. Baris's claims at face value, this does not nearly approach the degree of precision that would

provide clear and convincing evidence that the result did change as a result of BOD printer failures. While this Court (in the absence of controlling authority) is reticent to state that statistical evidence is always insufficient as a matter of law to demonstrate a direct effect on the outcome of an election, a statistical analysis that shows that the current winner *had a good chance of winning anyway* is decidedly insufficient. *Cf. Moore*, 148 Ariz. at 159 (suggesting that population data might in some cases be admissible to prove voter disenfranchisement).

Further, Mr. Baris cannot say—and further, there was no evidence at Trial—that these voters were turned away or refused a ballot. These were voters who elected not to vote, whether at a voter center due to long lines or due to media coverage of "chaos" on Election Day, or any number of unknown reasons. None of these constitutes a direct effect permitting the Court's intervention as outlined in prior cases. Mr. Baris's testimony does not show by clear and convincing evidence that alleged misconduct surrounding BOD printers influenced the election outcome.

f. Intentional Misconduct Standard

The Court makes the following observations about Plaintiff's case as a general matter. Every one of Plaintiff's witnesses – and for that matter, Defendants' witnesses as well – was asked about any personal knowledge of both intentional misconduct and intentional misconduct directed to impact the 2022 General Election. Every single witness before the Court disclaimed any personal knowledge of such misconduct. The Court cannot accept speculation or conjecture in place of clear and convincing evidence.

The closest Plaintiff came to making an argument for quantifiable changes resulting from misconduct, was Ms. Marie's Affidavit as discussed by Ms. Honey. Again, she states that Runbeck Election Services employees were permitted to introduce about 50 ballots of family members into the stream. But even this is not sufficient. Such a claim – if the Court accepted the Affidavit at face value – would constitute misconduct but would not come close to clear and convincing evidence that the election outcome was affected. Though again, weighing her Affidavit against other testimony, the Court does not give the Affidavit much weight.

Plaintiff failed to provide enough evidence with which this Court could find for her on either count by clear and convincing evidence. To the extent that certain claims are contradicted by Defendants' case in chief, it is unnecessary to go into extensive detail, but a few points are worth noting.

As Ray Valenzuela, Co-Director of Elections for the Maricopa County Recorder's Office testified, no direction or permission was given by Maricopa County to Runbeck to allow its employees to submit ballots in any manner other than authorized to the general public. He, Mr.

Scott Jarrett – also a co-director, and Mr. Stephen Richer – County Recorder, each testified that Maricopa County election workers are trained to follow the EPM and that – to their knowledge – this was done in 2022. As noted above, both Mr. Valenzuela and Mr. Jarrett testified that Maricopa County employees were observing the ballots at each stage in the process. Plaintiff brought forward no evidence sufficient to contradict this testimony.

It bears mentioning that election workers themselves were attested to by both Plaintiff's witnesses and the Defendants' witnesses as being dedicated to performing their role with integrity. Not perfectly, as no system on this earth is perfect, but more than sufficient to comply with the law and conduct a valid election.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Considering all evidence presented, the Court finds as follows:

<u>As to Count II – Illegal BOD Printer/Tabulator Configurations:</u>

a. The Court DOES NOT find clear and convincing evidence of misconduct in violation of A.R.S. § 16-672(A)(1).

b. The Court DOES NOT find clear and convincing evidence that such misconduct was committed by "an officer making or participating in a canvass" under A.R.S. § 16-672(A)(1).

c. The Court DOES NOT find clear and convincing evidence that such misconduct was intended to affect the result of the 2022 General Election.

d. The Court DOES NOT find clear and convincing evidence that such misconduct did in fact affect the result of the 2022 General Election.

<u>As to Count IV – Chain of Custody Violations:</u>

a. The Court DOES NOT find clear and convincing evidence of misconduct in violation of A.R.S. § 16-672(A)(1).

b. The Court DOES NOT find clear and convincing evidence that such misconduct was committed by "an officer making or participating in a canvass" under A.R.S. § 16-672(A)(1).

c. The Court DOES NOT find clear and convincing evidence that such misconduct was intended to affect the result of the 2022 General Election.

d. The Court DOES NOT find clear and convincing evidence that such misconduct did in fact affect the result of the 2022 General Election.

Therefore:

IT IS ORDERED: confirming the election of Katie Hobbs as Arizona Governor-Elect pursuant to A.R.S. § 16-676(B).

The Court notes the representations of the County Defendants that a motion for sanctions would be forthcoming and the Court also considers the need of this Court to enter an Order under Rule 54(c), Arizona Rules of Civil Procedure so that an appeal on all issues might be taken in a timely fashion.

Therefore:

IT IS FURTHER ORDERED: that a statement of costs including compensation of inspectors under A.R.S. § 16-677(C) must be filed by 8:00 a.m. Monday, December 26, 2022. Failure to do so by the deadline will be deemed a waiver of those costs.

IT IS FURTHER ORDERED: any motion for sanctions must be filed by 8:00 a.m. Monday, December 26, 2022, and any response by Plaintiff must be filed by 5:00 p.m. Monday, December 26, 2022. The Court will not consider a reply.

After consideration of any sanctions motion, or the failure to file such a motion, and the presentation of costs to be assessed, the Court will enter a signed judgment under Rule 54(c).