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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KARI LAKE, Contestant/Petitioner, vs. KATIE HOBBS, et al., Defendants.	No. CV2022-095403 **MARICOPA COUNTY DEFENDANTS' RESPONSE OPPOSING LAKE'S MOTION FOR RELIEF FROM JUDGMENT** (Expedited Election Matter) (Honorable Peter Thompson)

Pursuant to Rule 7.1, Ariz. R. Civ. P., and this Court's May 8, 2023 Minute Entry Order, the Maricopa County Defendants file this Response Opposing Lake's Motion for Relief From Judgment and urge this Court to deny Lake's Motion.

INTRODUCTION

It is important to remember why we are here, and the two "first principles" that guide this proceeding. The first is that *this is an election contest, governed by the election contest statutes*. Arizona held an election for governor on November 8, 2022. At the canvass of the election, Governor Katie Hobbs was shown to have earned 17,117 more votes than candidate Kari Lake. [*Lake v. Hobbs*, No. CV2022-095403, Under Advisement Ruling (December 24, 2022) ("Ruling"), at 3.] Lake then filed the instant election contest, which is a creation of statute and is governed by the election contest statute. *Fish v. Redeker*, 2 Ariz. App. 602, 605 (1966); *Griffin v. Buzard,* 86 Ariz. 166, 168 (1959). Consequently, *everything* that happens in this election contest must fit within the parameters allowed by statute for election contests. That is the first "first principle."

The second "first principle" is this: *in an election contest, it is not enough to prove that misconduct occurred; the contestant must prove that the misconduct was outcome determinative*. The Court of Appeals recently stated that rule when it decided the appeal of this matter, and it is the law of the case moving forward. *Lake v. Hobbs*, 525 P.3d 664, 668 ¶ 11 (Ariz. Ct. App. 2023); *review of decision on counts I-II, IV-X denied*, No. CV-23-0046-PR, Order, at 2 (Sup. Ct., Mar. 22, 2023); *see also Miller v. Picacho Elementary Sch. Dist. No. 33*, 179 Ariz. 178 (1994) (sustaining election contest where misconduct affecting outcome of election was shown). As explained below, Lake has not shown misconduct and *cannot* show misconduct because none occurred. But even if she could show misconduct, that would not be enough: Lake would have to show that the alleged misconduct actually changed the outcome of the gubernatorial election. And she has not done that.

Those are the two first principles that govern the consideration of Lake's Motion for Relief from Judgment (the "Motion"). And when those first principles are kept in focus, it is clear that this Court should deny the Motion.

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ARGUMENT

I. Lake Has Not Alleged Misconduct That Could Affect the Outcome of the Election.

A. Lake's Allegations About Tabulators are False and also Insufficient for Rule 60 Relief.

Lake's first basis for requesting relief from judgment is her assertion that the County failed to perform required testing on its tabulators; instead, performed "secret" testing that its tabulators failed; and did not tabulate (*i.e.*, count) all the ballots cast in the 2022 general election. Each of these spurious allegations is false.

1. The County Performed the Required Logic and Accuracy Testing.

Lake's first asserts that Maricopa County "did not perform L&A testing on *any* vote center tabulators used on Election Day." [Motion at 2, 14.] This assertion is based on Clay Parikh's Declaration, in which he baldly asserts that his review of Maricopa County's tabulator logs establish that none of the tabulators underwent logic and accuracy testing. [*Id.* at 14 (*citing* Ex. A to the Motion, Parikh Decl., ¶¶ 8(a), 11-13.] But the evidence directly contradicts him.

First, the Secretary of State's representatives attested on the State's official Logic & Accuracy Certificate that the required logic and accuracy testing occurred on October 11, 2022. [Ex. 1 to Parikh's Decl., Secretary of State's Logic & Accuracy Equipment Certificate.] One of those representatives was Kori Lorick, the State Elections Director. [*Id.*] Second, Maricopa County Elections Department employees and political party observers signed the County's official Certificate attesting that the logic and accuracy testing occurred on October 11, 2022. [*Id.*, Maricopa County Elections Department Certificate of Accuracy.] This included Kevin Gallagher, a Republican Party Precinct Committeeman for LD14, as well as Janice Bryant, another Republican Party Observer. And Scott Jarrett, Maricopa County's Co-Director of Elections, submits his contemporaneously-filed Declaration, which is Exhibit A to this Response, in which he testifies that the logic and accuracy testing occurred on October 11, 2022 and that it included tabulators use in vote

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centers. [Ex. A, Jarrett Decl., ¶¶ 5-8, 12-13.]

In order for Parikh's analysis to be true—which, it is not—several Secretary of State officials, several Maricopa County officials, several members of the Democratic Party, and several members of the Republican Party would have to be in cohoots together, and would have to have agreed to lie on official documents, falsely claiming that the logic and accuracy testing occurred. This makes no sense, and it did not happen.

But, even if—contrary to all logic, and contrary to fact—the State Elections Director, Maricopa County personnel, and members of the Democratic *and* Republican parties had taken a blood oath and agreed to falsely sign official documents, come what may—*even if that had really happened*—that "misconduct" would not have affected the outcome of the 2022 gubernatorial election. This Court has already determined that all ballots cast in that election were tabulated. [Ruling at 6, 7.] So Lake's contrary-to-fact assertion, that the logic and accuracy testing did not occur, would not be grounds to set aside the election even if it were true—which, as explained, it is not.

2. No "Secret" Testing Occurred.

Next, Lake falsely alleges that the County conducted "secret" testing of the vote center tabulators used on Election Day on October 14, 17 and 18, and that 260 of the 446 tabulators failed this secret testing. [Motion at 2, 14-15; *see also id*. at 10 (stating that "[i]ntent can be inferred from Maricopa's surreptitious means").] Besides being laughable, this allegation is flat-out wrong. As Scott Jarrett explains in his Declaration, on October 14, 17, and 18, the County installed new memory cards, containing the certified Election Program that had undergone the logic and accuracy testing, on each of its tabulators. [Ex. A to this Response, Jarrett Decl., ¶ 14.] This process was conducted under the live stream video cameras in the County's Ballot Tabulation Center (the "BTC") in the Maricopa County Tabulation and Election Center ("MCTEC"). [*Id*.] When installing the memory cards, the County tabulated a small number of ballots on each tabulator to be certain that the memory cards had been properly inserted. [*Id*., ¶ 15.] This, too, was done under the live stream video cameras. [*Id*.] This was not done in secret; it was not "testing;" and it was not misconduct.

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Lake notes that the County provided no public notice for this "testing" (which, of course, wasn't really testing no matter Lake's claim), and then claims that the lack of public notice violated A.R.S. § 16-449(A). [Motion at 14-15.] Wrong again. That statute refers to the required logic and accuracy testing, and commands that public notice be made prior to that required test. The loading of memory cards is not logic and accuracy testing, and no public notice was required.

Nor did any tabulator "fail" this "testing," as Lake alleges. [Motion at 15.] Lake makes this assumption because the tabulator logs that Parikh examined contained "Ballot Misread" and "Paper-Jam" errors. [*Id*.] But as Scott Jarrett explains, "a tabulator misreading a ballot does not necessarily indicate a tabulator is malfunctioning, accordingly a review of the tabulator logs for misread ballots is not an appropriate method for identifying if a tabulator failed a logic and accuracy test." [Ex. A to this Response, Jarrett Decl., ¶ 17.] Rather, many situations can lead to those log entries. For example, a ballot inserted slightly askew can produce them. Similarly, a ballot inserted immediately after cleaning the tabulator, if a small piece of the cleaning linen was left on the tabulator, can produce them. These entries do not indicate failure; rather, they are a normal part of both testing tabulators and voting on them. [*Id*.]

None of what Lake alleged about this supposedly "secret" "test" is correct. And because nothing "surreptitious" occurred, no "intent" of misconduct should be inferred, despite Lake's hope that it will be. [Motion at 10.] But even if, contrary to fact, Lake's allegation here were true—even if the County had conducted a "secret" "test," without public notice, and tabulators failed it—that would not have changed the outcome of the election because every ballot cast in the election was tabulated. [Ruling at 6, 7.] So Lake's contrary-to-fact assertion, that "secret" "testing" occurred, would not be grounds to set aside the election even if it were true—which, as explained, it is not.

3. All Ballots Cast in the 2022 General Election Were Tabulated.

Next, Lake asserts that "a malicious and intentional act" caused the "fit-to-page" errors. [Motion at 15-16.] She bases this assertion on Justice McGregor's BOD Report, in

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which the former Justice notes that during her testing four printers randomly printed fit-to-page ballots. [*Id*. at 15.] The McGregor BOD Report explained, however, that the cause of this occurrence was unknown. [*Id*.] An *unknown* cause does ***not*** mean that it must be a "malicious" or "intentional" one. But nonetheless, Lake asserts that this "could only be due to malicious code, malware, or remote configuration changes." [*Id*. at 16.] This claim is plainly wrong: the cause is, at the moment, *unknown*. But regardless, as with Lake's prior allegations, so here: even if it were true, the outcome of the election would not be changed because all ballots cast in the election (including the "fit-to-page" ballots) were tabulated. [Ruling at 6-7.]

Next, Lake alleges that the County's tabulators rejected more than 7,000 ballots every half hour. [Motion at 16.] Lake must not mean that 7,000 different voters inserted 7,000 different ballots into the tabulators and had them rejected every half hour, which would be an impossible statistic, but rather that several voters attempted to insert their same ballot multiple times, totaling 7,000 rejections. Undersigned counsel is unsure whether even *that* is correct. And undersigned counsel is confident that the vast majority of the County's tabulators did not experience that rejection rate. But again, even if that were true, it would not have affected the outcome of the election—every ballot cast in the election was counted.

Finally, Lake claims that "over 8,000 ballots" were rejected by tabulators and not counted. But as explained below, that claim is simply false. [*See infra* at 9-11.] Every ballot cast in the election was counted, as this Court found. [Ruling at 6-7.] The Court of Appeals affirmed this Court, and the Supreme Court denied review of everything except whether the Recorder failed to follow his signature verification procedures, as challenged in Count III. As just demonstrated, Lake's claim of misconduct by unidentified Maricopa County personnel is false: no misconduct occurred. And because all the ballots cast in the election were counted, her alleged misconduct, even if it *had* happened, would not affect the outcome of the election. Lake therefore cannot prevail on Counts II, V, and VI, and this Court should deny the Motion.

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B. Lake's Allegations About Scott Jarrett's Trial Testimony are False and also Insufficient for Rule 60 Relief.

Lake's second basis for requesting relief from judgment is an assertion that "new evidence" shows that Scott Jarrett gave what Lake incorrectly calls "false testimony" concerning the issue of 19-inch ballot images being printed on 20-inch ballot paper. [Motion at 2-3.] As explained below, Jarrett's testimony was truthful. It is Lake's accusations about Jarrett that are false.

Lake's claimed "new evidence" is the following quote from former Chief Justice Ruth McGregor's Ballot on Demand ("BOD") report:

> Another printing anomaly occurred at several vote centers, where ballots were re-sized as "fit to page," a process that entirely changed the location of the timing marks on the ballots and assured that neither the on-site tabulators nor the central count tabulators could read the ballots. ***We could not determine whether this change resulted from a technician attempting to correct the printing issues, the most probable source of change, or a problem internal to the printers***. During our testing, ***four printers randomly printed one or a few "fit to page" ballots in the middle of printing a batch of ballots.*** None of the technical people with whom we spoke could ***explain how or why that error occurred***.

[Motion at 15-16 (*citing* Maricopa BOD Report at 12 (Lake's Ex. E).] Lake outrageously asserts, with no logical or evidentiary basis, that this statement "proves" Parikh's theory that this "fit to page" problem must have been caused by an "intentional act." [Motion at 16.[1]] This is nonsense: Plaintiff's claim is absurd on its face.

Parikh's theory concerning the genesis of the "fit to page" issue, as correctly articulated by this Court in its December 24, 2022 Ruling, is that the printing of the "fit to page" ballots "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." [Ruling at

[1] The Motion also includes what it frames as if it were a quote—but without an ending quotation mark and with no citation to the record, the following: "'Moreover, the tabulator system log files internal records show that the so-called "fit-to-page" issue—first disclosed by Jarrett on the second day of trial—occurred at 110 vote centers, not three voter (sic) centers as Jarrett testified." [Motion at 16.] This purported quotation has no support anywhere in the record, so far as the County has been able to determine, and the County is unaware of any basis for this claim that 110 vote centers were impacted.

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6.] *That* is Parikh's claim. And Justice McGregor's report makes no such finding, nor does it even remotely address either of these erroneous theories repeatedly asserted by Parikh. Moreover, Parikh's voluminous declaration, attached to the Motion, is completely devoid of any testimony that he has any personal knowledge whatsoever of any intent behind this alleged error. [Ex. A to the Motion.] So, nothing has changed: as was the case when the Court issued its December 24, 2022 Ruling, all Lake has presented this Court is speculation. And "[t]he Court cannot accept speculation or conjecture in place of clear and convincing evidence." [Ruling at 8.]

Further, there is nothing—and, never has been anything—inconsistent or inaccurate about Jarrett's testimony concerning the ballot images. This issue has been addressed *ad nauseam*, including at trial and in the appellate briefing on this issue. It is disappointing—but also, *telling*—that Lake continues to misrepresent Jarrett's testimony and wrongly assert that he "falsely" testified. [Motion at 2-3.] It is likewise disappointing and telling that Lake continues to wrongly assert—despite this issue being repeatedly explained—that the "fit to page" issue caused a 19-inch ballot image to be printed, instead of a 20-inch ballot image. [*Id*.] These accusations are false, and compel the Maricopa County Defendants to explain matters one more time.

Words have meaning, and in election administration parlance a "ballot image" refers to the ballot PDFs generated by a voting system's programming, establishing the ballot definition, for a given election. For the 2022 General Election, the Maricopa County Elections Department used the Election Management System to generate a 20-inch ballot definition with over 12,000 different "styles"—elections-administration nomenclature for ballots designed with contests for each different jurisdiction in Maricopa County, allowing each voter to receive a ballot appropriate for where they live. [See Dec. 21, 2022 Tr. at 51:19–23, 69:10–21; Dec. 22, 2022 Tr. at 230:15–17.] "Ballot definitions are used to program the voting systems" and generate ballot PDFs—i.e., ballot images, which are utilized to print the ballots. [Dec. 22, 2022 at 230:224–231:5.] Because Maricopa County had a 20-inch ballot definition, the ballot PDF was a 20-inch image, which remained true

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even when the image was printed by printers set to "fit to page." What those printers printed was a slightly shrunk version of the 20-inch ballot image. It was, however, *still* a 20-inch ballot image, but shrunk smaller on the page.

Turning to Jarrett's testimony, Lake's incorrect belief that 19-inch ballot *images* had been printed apparently led Lake's counsel to consistently ask Jarrett about "19-inch ballot images," and Jarrett just as consistently denied that there had been any such PDF ballot images created for the 2022 general election. Jarrett also consistently testified that some 20-inch ballot images had been printed by printers set to "fit to page", which caused the 20-inch images to print slightly smaller than they should have.

On the first day of trial, when Lake's counsel asked Jarrett whether "for the 2022 General Election, Maricopa was operating with a 20-inch ballot image, correct?" Jarrett replied, "That's correct." (Dec. 21, 2022 Tr. at 53:17–19.) When asked whether he had heard any reports about a "19-inch ballot image being placed on 20-inch paper[,]" Jarrett answered, "I did not." (Dec. 21, 2022 Tr. at 68:24–69:4.) And in response to further questioning about whether there had been a 19-inch ballot image printed by any printer for the 2022 general election, Jarrett stated that "the reason why" he was confident that there was not "a printer that had a 19-inch ballot on it" was because "we did not design a 2022 General Election on a 19-inch ballot. That ballot does not exist. The only ballot that exists is a 20-inch ballot." (Dec. 21, 2022 Tr. at 69:7–14.)

At no time on the first day of the trial did any attorney ask Jarrett about the "fit to page" problem. He was never asked whether the printers at three of the vote centers had their settings changed to "fit to page", nor was he ever asked whether some ballots at those three vote centers had shrunken, 20-inch ballot images printed. Accordingly, there was no reason for Jarrett to discuss the "fit to page" problem.

Parikh testified after Jarrett. Parikh focused on his incorrect assumptions about there being "only two ways" for a ballot to be printed smaller than it was supposed to be.

The next day, Jarrett was called by the Defendants. Asked to identify the printer problems the County experienced, Jarrett addressed the faint-ink problem and then testified:

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"we did identify three different locations that had a fit-to-paper setting that was adjusted on Election Day[,]" which affected "just shy of 1,300 ballots[.]" [Dec. 22, 2022 Tr. at 180:3–15.] Jarrett also testified that ballots from one of those vote centers had been included in the ballots inspected by Parikh. [Dec. 22, 2022 Tr. at 180:21–23.] And he further testified: "that was a -- not a 19-inch ballot," but "a 20-inch ballot, a definition of a 20-inch ballot that's loaded on the laptop from -- that is connected to the ballot on-demand printer that gets printed onto then a 20-inch piece of paper; but because of the fit-to-paper setting, that actually shrinks the size of that ballot." [Dec. 22, 2022 Tr. at 181:8–14.] And Jarrett testified that all of the affected ballots were ultimately duplicated and tabulated at the central count facility. [Dec. 22, 2022 Tr. at 181:21–182:7.]

On cross, Lake's counsel asked Jarrett whether he remembered previously testifying that "a 19-inch ballot image being imprinted on a 20-inch ballot did not happen in the 2022 General Election[,]" and Jarrett answered, "Yes, I recall that there was not a 19-inch ballot definition in the 2022 General Election." [Dec. 22, 2022 Tr. at 206:23–207:3.] Lake's counsel then stated, "But that wasn't my question, sir." [Dec. 22, 2022 Tr. at 207:4.]

But that *was* his question. Lake's counsel had repeatedly asked about 19-inch ballot images, and Jarrett had consistently testified that there was no such thing created for the 2022 general election. The next exchange typifies this disconnect. Lake's counsel asked: "I asked you specifically about a 19-inch ballot image being imprinted on a 20-inch piece of paper. So are you changing your testimony now with respect to that?"—to which Jarrett replied, "No, I'm not[,]" and then explained, "I don't know the exact measurements of a fit to -- fit-to-paper printing. I know that it just creates a slightly smaller image of a 20-inch image on a 20-inch paper ballot." [Dec. 22, 2022 Tr. at 207:4–12 (emphasis added).]

This is the testimony that Lake claims was "false."[2] But Jarrett's testimony was accurate, truthful and consistent. Jarrett testified that no 19-inch ballot images were used in

[2] Notably, Lake made this exact assertion on appeal, asserting Jarrett gave "conflicting" testimony. [Lake's Pet. for Sp. Act., December 30, 2022, at 9-13 and 31-32.] Lake's assertion of the exact same argument, post unsuccessful appeal, is improper and a further waste of judicial resources.

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the 2022 general election in Maricopa County—because they weren't. He also testified that a few printers were incorrectly set to "fit to page" causing 20-inch ballot images to be slightly shrunk when they printed—because that is what happened. Lake's arguments to the contrary are false.

Finally, Parikh appears to imply that the impacted ballots were either not properly duplicated or not tabulated at all. Specifically, Lake asserts that "Parikh testified that Maricopa did not keep duplicate ballot combined with the original ballot and thus there was no way to tell how the duplicate ballot was actually voted." [Motion at 4.] And Lake ascribes to Parikh a claim that "the evidence shows that over 8,000 ballots, maliciously misconfigured to cause a tabulator rejection, were not counted." [*Id*. at 16 (*citing* Parikh Decl., ¶¶ 36, 38-39).] But this, too, is false: not only were the ballots placed in Door 3 tabulated, but Parikh never said that they were not tabulated. Lake here has not only misrepresented the actual facts, she has misrepresented the testimony of her own witness.

Here is the truth about what happened. As set forth in Parikh's Declaration, during the 8-hour court ordered ballot inspection preceding the trial, Parikh requested the duplicated ballots so that he could, presumably, compare the original and the duplicated ballots. [Ex. A to the Motion, Parikh Decl., ¶ 38.] This was the first time that Parikh or the Lake team had made this request, despite Jarrett having offered Lake's team the opportunity to pre-select the batches of ballots that they wanted to examine. [Ex. A to this Response, Jarrett Decl., ¶ 19.] When Parikh made his request, Jarrett explained to Parikh that, at this late time, there was insufficient time to locate those duplicated ballots. [*Id*., ¶ 21.] Parikh acknowledges this in his Declaration. [Ex. A to the Motion, Parikh Decl., ¶ 38.] However, because Parikh did not see the duplicated ballots (because he had not requested them in sufficient time), he testified in his Declaration that he "had no way of knowing if the original ballots were duplicated at all, let alone duplicated accurately, let alone tabulated and counted." [*Id*.]

That is what Parikh testified at paragraph 38 of his Declaration: he had no way of knowing if the ballots under discussion were duplicated, tabulated, and counted. But Lake

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falsely claims that Parikh testified far more than that. She claims that Parikh's testimony at paragraph 36, 38, and 39 of his Declaration was that these ballots "were not counted." [Motion at 16.] But paragraphs 36 and 39 do not discuss this matter, and as just shown, paragraph 38 does not say what Lake claims. Rather, Parikh stated that he did not know whether the ballots had been tabulated. Lake's conjecture about this—*i.e.*, because Parikh does not know whether tabulation occurred, it must not have occurred—is not evidence, may not be considered by the Court, and is insufficient to grant Rule 60 relief. And to top it off, Lake's conjecture is *wrong*. As Jarrett testified in his Declaration, Maricopa County retains the original ballot as well as the duplicated ballot, separated and segregated from other ballots, and the Elections Department could have provided Parikh the duplicated ballots if it had been provided the time to do so. [Ex. A, Jarrett Decl., ¶¶ 18, 22.]

Moreover, the actual evidence presented in this case shows that ballots that could not be read by the tabulators in the vote centers were taken to the central count facilities, where they were (a) tabulated by the tabulators there or (b) duplicated by bi-partisan teams onto a new ballot, which were then tabulated. [Dec. 22, 2022 Tr. at 119:10–23 (testimony of Dr. Kenneth Mayer); *id.* at 181:18–182:7 (testimony of Scott Jarrett).]

Finally, even if it were true, which it is not, that the election ballots impacted by the "fit to page" setting were never duplicated or duplicated incorrectly or never tabulated—all of which is demonstrably false—the total number of election day ballots that were duplicated, for any reason, was 2,656 ballots. Of these, 1,282 ballots were impacted by the "fit to page" problem; unquestionably, an insufficient number to change the outcome of the election. These ballots *were* duplicated and tabulated, as the evidence in this matter conclusively shows. But even if the County had not duplicated and tabulated them, the outcome of the election would remain the same.

Lake's assertions about new evidence regarding the "fit to page" setting are either false or based on pure speculation. They are therefore insufficient to grant Lake's requested Rule 60 relief. And even if, contrary to fact, Lake's allegations were true—which, they are not—the number of ballots at issue are too few to affect the outcome of the election, so

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another trial on these claims would be futile and a waste of judicial resources. For all these reasons, the Motion must be denied.

II. Lake Has Not Made a Proper Rule 60 Motion for Relief From Judgment.

A trial court has limited jurisdiction and discretion when handling a matter on remand following a mandate from the Court of Appeals. Following the issuance of the mandate, the trial court's jurisdiction is limited to that which is consistent with the mandate and the decision of the Court of Appeals and/or the Supreme Court. *Harbel Oil Co. v. Superior Ct. of Maricopa Cnty.*, 86 Ariz. 303, 306 (1959) ("the trial court's jurisdiction on remand is delimited by the terms of the mandate"). On remand, the trial court loses much of its discretion, and it cannot act contrary to the word or the spirit of the appellate court's decision and mandate. *See State v. Boykin*, 112 Ariz. 109, 113 (1975) ("the trial court is restricted in its discretion when faced with a mandate containing specific directions."). The determinations made on appeal are final and cannot be revisited by the trial court. *Tucson Gas & Elec. Co. v. Superior Ct. In & For Pima Cnty.*, 9 Ariz. App. 210, 213 (1969) ("The Supreme Court has adopted the view that its decisions are the law of the particular case."); *Tovrea v. Superior Ct. In & For Maricopa Cnty.*, 101 Ariz. 295, 297 (1966) ("the trial court is absolutely bound by the decision and mandate of an appellate court and that it is not within the jurisdiction of the trial court to review the appellate court's determination"). A trial court which attempts to exercise jurisdiction beyond that granted to it in the mandate is subject to immediate reversal via special action. *Cabanas v. Pineda in & for Cnty. of Maricopa*, 246 Ariz. 12, 17, 433 P.3d 560, 565 (App. 2018) ("Special action jurisdiction is appropriate when the superior court has acted contrary to this court's mandate.").

Here, the Supreme Court's Order and Mandate very clearly limit the issues on remand to ***only*** Count Three of Lake's Complaint. Specifically, the Supreme Court's Order states that this Court may only consider: "whether the claim that Maricopa County failed to comply with A.R.S. § 16-550(A) fails to state a claim pursuant to Ariz. R. Civ. P. 12(b)(6) for reasons other than laches, or, whether Petitioner can prove her claim as alleged pursuant to A.R.S. § 16-672 and establish that "votes [were] affected 'in sufficient numbers to alter

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the outcome of the election'" based on a "competent mathematical basis to conclude that the outcome would plausibly have been different, not simply an untethered assertion of uncertainty." [Order, *Lake v. Hobbs*, No. CV-23-0046-PR (Ariz. S. Ct., March 22, 2023) at 3-4.] This limitation is further confirmed by the Mandate which states that the Supreme Court only reversed the Court of Appeals insofar as it dismissed Count Three on the basis of laches and further instructs this Court to only hold such proceedings "as shall be required to comply with [the Supreme Court's] decision. [Mandate (Ariz. S. Ct., May 4, 2023) at 2]. Therefore, this Court categorically lacks jurisdiction to consider any issue beyond that limited ground explicitly stated in the Supreme Court's Order. If this Court (1) takes any action relating to Lake's Motion for Relief from Judgment other than outright denial; (2) allows Lake to present any claim other than Count Three; or (3) admits any evidence not directly relevant to Count Three, then such action would exceed this Court's jurisdiction and it would be subject to immediate reversal via special action.

Moreover, this Court lacks jurisdiction to reconsider specific issues which were conclusively resolved at trial and on appeal and are now the law of the case as a result. *See Tucson Gas & Elec. Co.*, 9 Ariz. App. at 213. Specifically, this Court found that, regardless of the tabulator issues, every single legally cast ballot was tabulated, [Ruling at 6, 7], and the Court of Appeals explicitly affirmed this finding. *Lake*, 525 P.3d at 669 ¶ 15. The Court of Appeals similarly affirmed the finding that Lake conclusively could not prove that the alleged tabulator issue caused any issue which would have affected the results of the election. *Id*. at ¶¶ 16-18. The Supreme Court affirmed these findings, so they are now law of the case and cannot be collaterally attacked as Lake is attempting to do here. *Kadish v. Arizona State Land Dep't*, 177 Ariz. 322, 327 (App. 1993) ("'Law of the case' concerns the practice of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court."). Plaintiff cannot now challenge these dispositive findings and, as discussed, her "new evidence" would not alter these findings in any case. Therefore, it would be improper for the Court to revive these conclusively resolved issues now.

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III. The Election Contest Statutes Have Strict Timeframes and Do Not Allow the Relief the Motion Seeks.

A. Rule 60 Motions Cannot Fit Within the Parameters of the Election Contest Statutes.

When this Court harmonizes the Rules of Civil Procedure and the election contest statutes, as it must—and, as it has done previously—the result is that Rule 60 motions for relief from judgment are unavailable to election contest litigants.

Rule 60(c)(1), Ariz. R. Civ. P., requires a party to file a Rule 60(b) motion "within a reasonable time," while capping a motion brought under Rule 60(b)(1)-(3) at six months from the "judgment or order or date of proceeding, whichever is later." Lake contends that her Motion is timely because she filed it in a reasonable time and within the six months after the entry of the Court's judgment. [Motion at 12.] But the effect of granting Lake's Motion would necessitate this Court holding a trial, and issue a judgment, on Counts II, V and VI. And *that* cannot be squared with the election contest statutes, which require that election contests must be fully adjudicated in the trial court within twenty-five days of the canvass of the election. A.R.S. §§ 16-673(A) (requiring election contests to be filed within five days of the canvass of the election); -676(A) (requiring the trial court to conclude the evidentiary hearing no later than fifteen days after the date the election contest was filed); -676(B) (requiring the trial court to pronounce judgment no later than five days after the conclusion of the evidentiary hearing).

This Court previously was asked by Plaintiff for expedited discovery—something that does not fit neatly (or rather, at all) within the parameters of the election contest statutes. [Lake v. Hobbs, No. CV2022-095403, Minute Entry (concerning Lake's Motion to Expedite Discovery), at 1 (Maricopa Cnty. Super. Ct. Dec. 19, 2022).] In considering that motion, the Court explained that, to decide Plaintiff's motion to expedite discovery, "it must harmonize conflicting rules and statutes[,] *State v. Fell*, 249 Ariz. 1, 3, ¶ 10 (App. 2020) (citation omitted)," [*id*. at 3], and "absent a conflict with the governing statute, this court must apply the civil rules to election contests." [*Id*. at 2.] But "in a case where a constitutionally enacted

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substantive statute conflicts with a procedural rule, the statute prevails. *Albano v. Shea Homes Ltd. P'ship*, 227 Ariz. 121, 127, ¶ 26 (2011)." [*Id*.]

Regarding the discovery request, this Court explained that "[i]n the case of an election contest, the timelines of which are compressed far beyond an ordinary civil contest, it is not merely difficult to comply with both the statute and civil rules—it is conceptually impossible to do so." [*Id*.] So "the tight timelines and absence of opportunity for discovery – without which a dispute of this type could not conclude on-time – prevail over the ordinary civil rule of procedure." [*Id*.] Accordingly, this Court denied Plaintiff's motion for expedited discovery. [*Id*. at 4.]

Here, if the Court were to grant the Motion, this Court would have to hold a trial and render judgment well beyond the timeframe expressly commanded by A.R.S. § 16-676. Unlike with Count III, where the Supreme Court issued a Mandate ordering this Court to make specific determinations, there would be no authority compelling this Court to hold a trial beyond the statutory deadline. This Court should not do so.

Just as the Civil Procedure Rules concerning discovery conflict with the requirements of the election contest statutes, so do Rule 60 motions for relief from judgment. The statute must prevail. Rule 60 relief is not available to Lake, and this Court must deny the Motion.

B. Newly Discovered Evidence Cannot Fit Within the Parameters of the Election Contest Statutes.

Additionally, allowing the parties to present "newly discovered evidence" that was gathered months after the time parameters established by the election contest statutes is not allowed, either. This is evident from the fact that the contestant must set forth in her statement of contest the reasons for the contest, A.R.S. § 16-673(A)(4), and may not assert additional grounds for her contest after the deadline to file has passed. *Donaghey*, 120 Ariz. at 95 (stating that "[t]he failure of a contestant to an election to strictly comply with the statutory requirements is fatal to his right to have the election contested," and observing that "[t]he rationale for requiring strict compliance with the time provisions for initiating a contest is the strong public policy favoring stability and finality of election results"); *Kitt v.*

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Holbert, 30 Ariz. 397, 406 (1926) ("[W]e are constrained both by reason and authority to hold that a statement of contest in an election contest may not be amended, after the time prescribed by law for filing such contest has expired, by adding thereto averments of a jurisdictional nature.").

The same fundamental principle, concerning stability and finality of election results, prevents parties from attempting to offer additional evidence that they gathered after the statutory time for hearing election contests has expired. Pursuant to their authorizing statutes, election contests must be filed within five days after the completion of the canvass of the election. A.R.S. § 16-673(A). The trial court must set the evidentiary hearing to commence within ten days after the date the contest was filed, and the hearing cannot generally go past the fifteenth day after the contest was filed. A.R.S. § 16-676(A). The Court of Appeals explained that the short time period for election contests is by deliberate design: "[t]he purpose of the time limitation is to ensure a resolution of the contest as soon as possible so that the winner can take the office to which he was rightfully elected." *Babnew v. Linneman*, 154 Ariz. 90, 92 (Ct. App. 1987). Thus, from start to finish, an election contest must be completed within twenty days of the canvass of the election, before the new terms of elected officials commence. And so, all evidence to be presented in an election contest must be gathered within that same period of time.

CONCLUSION

For the foregoing reasons, this Court should deny the Motion.

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RESPECTFULLY SUBMITTED this 10th day of May, 2023.

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