No. 23-1021

IN THE
Supreme Court of the United States

KARI LAKE, *ET AL.*,
Petitioners,
v.
ADRIAN FONTES, ARIZONA SECRETARY OF STATE,
ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief *Amicus Curiae* of Georgia Republican Party, Inc. in Support of Petitioners

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae Georgia Republican Party, Inc. is the official Georgia state affiliate of the national Republican Party, and is registered as a party committee with the Federal Election Commission ("FEC"). This *amicus* has a strong interest in fair and open elections. Accordingly, it is concerned that the lower courts employ the correct test for standing to reach the merits of creditable election challenges such as those brought by Petitioners here.

STATEMENT OF THE CASE

The Parties. In 2022, Petitioner Kari Lake, the Republican candidate for Governor of Arizona, ran against Democrat candidate Katie Hobbs, who was then serving as Arizona's Secretary of State with statutory responsibility to ensure elections are conducted lawfully. There were numerous problems in the conduct of the November 8, 2022 election, but Hobbs certified herself as the victor, with 1,287,891 votes (50.3 percent) against Lake's 1,270,774 votes (49.6 percent) — making Hobbs' margin over Lake a mere 17,117 votes. Petitioner Mark Finchem. the Republican candidate for Secretary of State, ran against Respondent Adrian Fontes, a Democrat who

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than this *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

was declared the winner of the general election by a margin of 120,208 votes.

Lower Court Proceedings. After learning that Arizona's elections were being conducted in violation of state law, on April 22, 2022, Lake and Finchem filed a Complaint against then-Secretary of State Hobbs and the Boards of Supervisors for Maricopa and Pima Counties, in U.S. District Court for the District of Arizona. Lake and Finchem followed with a motion for preliminary injunction on June 15, 2022, on which a hearing was held on July 21, 2022 — 12 days before the primary election and three and one-half months before the general election.

On August 26, 2022, three weeks after the August 2 primary, the district court granted defendants' motion to dismiss, asserting that petitioners lacked standing because "speculative allegations that voting machines may be hackable are insufficient to establish an injury in fact under Article III." Petition Appendix at 31a. The district court did not address Petitioners' other specific allegations of violation of election law in their Amended Complaint (herein "Complaint"), Petition Appendix at 48a.

On October 16, 2023, the Ninth Circuit, in a *per curiam* opinion, affirmed the district court's dismissal based on standing. *See* Petition Appendix at 3a.

Petition and Motion to Expedite. Shortly after timely filing their Petition for Certiorari, Petitioners filed a motion to expedite, as the serious election problems that occurred in 2022 are being repeated,

with the 2024 general election now only seven months away. Additionally, Petitioner Lake is again a candidate in the 2024 election, now seeking to represent Arizona in the U.S. Senate. Also, Petitioner Finchem is again a candidate in the 2024 election, now seeking election to the Arizona State Senate, District 1 seat. The proper conduct of the 2024 elections is now in the hands of Respondent Secretary of State Fontes, who could be expected to have little motivation to make necessary changes to election procedures, as his own election was achieved under the 2022 procedures. Unless the motion to expedite is granted, and the petition acted on quickly, this Court's decision could come too late to affect the 2024 election, which will suffer from the same irregularities as the 2022 election.

STATEMENT

In the short time since the 2020 election cycle, many of this nation's federal and state courts have implemented a major modification in this Court's standing jurisprudence which severely limits the election challenges they are willing to consider on the merits. These recent decisions, requiring plaintiffs in election challenges to meet unreasonable standards to demonstrate standing, violate a basic duty of the federal courts, as explained by Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. 264, 404 (1821): "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *See also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817

(1976), describing this court's duty to hear and decide cases within its jurisdiction as "virtually unflagging."

It is possible that the triggering event for this sea change in election challenge standing can be found in this Court's one-sentence order of December 11, 2020 refusing to entertain the Texas bill of complaint invoking this Court's original jurisdiction in *Texas v. Pennsylvania*, 2020 U.S. LEXIS 5994 (2020) ("Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections.").[2]

Especially if it was this Court that inadvertently created this problem of lower courts refusing to decide legitimate election challenge cases and controversies brought to them, a course correction is now desperately needed to ensure elections are conducted in accordance with law. A survey of how the law of standing is being applied now in election challenges was conducted by law Professor Steven J. Mulroy, who concluded:

> [I]n many [cases], courts took an **unjustifiably strict view of standing** as applied to both voters and candidates.... And they further exemplified the unique **overlap**

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[2] Just last month, this Court had another opportunity to address the merits of an election challenge, and there adopted a very different position, now agreeing that: "in a Presidential election 'the impact of the votes cast in each State is affected by the votes cast' ... 'for the various candidates in other States.'" *Trump v. Anderson*, 218 L. Ed. 2d 1, 11 (2024) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983)).

> **between standing analysis and the merits** of election cases, while in some cases also exemplifying the dangers involved in confusing the two.[3]

This case now before this Court illustrates the trend identified by Professor Mulroy and would be an excellent vehicle to address a serious problem which has caused the American people to lose confidence in the integrity of our elections. Election challenges are not a type of case in which the courts should step back and allow the political branches free reign: "[T]he very fact that [election challenges] involve claimed flaws in the electoral process means that **the political process may not be adequate** to address the flaws, thus justifying the **need for judicial intervention** and ameliorating concerns about judicial overreach."[4]

SUMMARY OF ARGUMENT

For decades, federal courts have entertained challenges to elections allegedly conducted in violation of applicable law. Lower courts have applied rules of standing established by this Court. For reasons that are not known, beginning in the 2020 election cycle, many lower courts began to apply elevated rules of standing which, as a recent Law Review survey confirms, often conflate standing with the merits of the case.

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[3] S. Mulroy, "Baby & Bathwater: Standing in Election Cases After 2020," 126 DICKINSON L. REV. 9, 67 (Fall 2021) (emphasis added).

[4] *Id.* (emphasis added).

Petitioners, candidates for state office, brought a challenge to Arizona's 2022 elections based on well-pled allegations that specific Arizona statutes were being violated by state and county election officials. Applying new tests not grounded in this Court's standing jurisprudence, the circuit court deemed those allegations speculative, affirming the district court's dismissal based on standing. The circuit court set an unattainable and unreasonable standard for standing, and Petitioners' Complaint was dismissed before any discovery could be conducted to collect evidence necessary to prove the allegations.

After their challenge was dismissed, Petitioners have reported that the election was conducted in violation of the laws as they had pled, as well as having other flaws not previously known. Petitioners assert that the requirement that all voting machines undergo "logic and accuracy" testing was violated, as was the requirement that only state-certified software be used. Perhaps most shocking was that the machines included their own decryption keys in plain text in a table that could be readily accessed, giving third parties control over the results.

Although candidates long have been considered to meet the elements of standing allowing them to challenge unlawfully conducted elections, the circuit court disregarded all of this Court's relevant precedents, including *Storer v. Brown*, to assert that a candidate's standing ends on election day. Similarly, the circuit court ignored well-established rules of voter standing that have been applied from *Baker v. Carr* to *FEC v. Akins*.

ARGUMENT

I. THE NINTH CIRCUIT EMPLOYED A FLAWED LEGAL STANDARD IN AFFIRMING DISMISSAL OF PETITIONERS' COMPLAINT BASED ON STANDING.

Beginning in 2020, multiple circuit courts have affirmed district court dismissals of well-pled election challenges based on elevated tests for standing that conflict with this Court's standing jurisprudence, including *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). The decision of the district court of Arizona to dismiss Petitioners' challenge to the conduct of the 2022 Arizona election is one of the clearest illustrations of this abusive line of cases which have required much more than well-pled allegations, brought by candidates, that elections were being conducted in violation of law.

Petitioners Kari Lake and Mark Finchem were Republican candidates for Governor and Secretary of State of Arizona, respectively, in the 2022 election cycle. On April 22, 2022, more than six months before the general election, Petitioners brought this challenge to the manner in which the 2022 election was being conducted by both Arizona State and Maricopa County election officials. Petitioners asserted that the state and county officials were administering the election in violation of Arizona election law, the Arizona Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the fundamental right to vote as protected by the U.S. Constitution.

On August 26, 2022, the district court dismissed the complaint, *inter alia*, based on standing because Petitioners "have articulated only conjectural allegations of potential injuries...." *Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1027-29, 1032 (D. Ariz. 2022) ("*Lake I*"). The circuit court addressed only the standing issue, affirming all of the district court's conclusions, as well as its analytical approach. *See Lake v. Fontes*, 83 F.4th 1199, 1201-04 (9th Cir. 2023) ("*Lake II*").

The district court recited the familiar tests for standing, as follows:

> (1) an injury in fact that is (a) **concrete and particularized** and (b) **actual or imminent**; (2) the injury is fairly **traceable** to the challenged action of the defendant; (3) it is likely, **not merely speculative**, that the injury will be **redressed** by decision in the plaintiff's favor. [*Lake I* at 1026 (citation omitted) (emphasis added).]

However, the district court then invented its own test which allowed it to dismiss the complaint, and which would make it nearly impossible for anyone to challenge the manner in which any future election was conducted. Election challengers had not previously been required to prove their case in their complaint — but that is what the courts below required of Petitioners. While the district court stated that a "complaint that fails to **allege** facts sufficient to establish standing requires dismissal..." (*Lake I* at 1026 (emphasis added)), it conflated standing with merits, twisting the standing rules to require much

more — that the complaint **prove** facts sufficient to grant **relief**.

Factor (1.a.) Injury in fact — concrete and particularized. As to "injury in fact," the complaint was filed before the 2022 general election by both Petitioners Lake and Finchem both as (i) **candidates** and as (ii) **voters**. The district court indicated that Respondents did not dispute that these candidates had standing, stating: "Plaintiffs allege, and the Secretary does not consider, whether Plaintiffs' status as candidates may confer standing." *Lake I* at 1028. Nevertheless, the court examined the issue and actually found they had a "cognizable interest" and suffered a "concrete and particularized injury," asserting:

> [i]t is true that, **as candidates**, Plaintiffs "have a **cognizable interest** in ensuring that the final vote tally accurately reflects the legally valid votes cast. An inaccurate vote tally is a **concrete and particularized injury** to candidates..." [and although that] does make the argument that their alleged injuries are particularized **more compelling**, it is **not sufficient** to establish standing. [*Id*. at 1028-29 (emphasis added).]

However, the district court's analysis conflated the various tests for standing. The court believed Petitioners' status as candidates was **not sufficient** to establish standing because they had not alleged facts to show the election was being "'tilted.'" *Id*. at

1028. However, this criticism focuses on what the complaint alleged, discussed under factor (3), *infra*.

Factor (1.b.) Injury in fact — actual or imminent. As to the "**actual or imminent**" requirement, the district court cited just one authority — *Clapper v. Amnesty Int'l USA,* 568 U.S. 398 (2013) — for the proposition that "'[a]llegations of *possible* future injury' are not sufficient." *Id*. at 409. Here, the district court had to go outside the law of election challenges to find authority on which to rely. To challenge the constitutionality of electronic eavesdropping for foreign intelligence purposes, the *Clapper* Court required plaintiffs to show an actual or imminent intrusion into their telephone conversations and emails, which they could not do. Here, Petitioners' allegations that an upcoming, scheduled election is being conducted in a manner that violates Arizona law presents a challenge that was both actual and imminent. When an election is being conducted in an unlawful manner, there is nothing speculative about the result being unreliable. Even the district court concluded that Petitioners had a "'**cognizable interest** in ensuring that the final vote tally accurately reflects the legally valid votes cast.'" *Lake I* at 1028 (emphasis added). Unlike foreign surveillance cases, in election challenges, an allegation of feared future harm has routinely been sufficient as long as there is "a substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (quoting *Clapper* at 414 n.5).

Factor (2) — Traceability. The district court did not mention one word about traceability. In an

election context, traceability should not be a problem. Petitioners alleged that election officials were not following the requirements of Arizona law which were designed to ensure an accurate vote. As the district court stated, Petitioners as candidates have an interest "'that the final vote tally accurately reflects the legally valid votes cast.'" *Lake I* at 1028.

Factor (3.a.) — Redressability. Again, there was no discussion by the district or circuit courts about redressability, but again, there really was no issue. If Respondents were compelled to conduct the election in the manner required by state law, the count would have more fairly reflected the will of the voters. Had the courts allowed the case to proceed beyond motions practice to discovery, and if Lake and Finchem proved their allegations to be true, injunctive and declaratory relief would have resulted in a fair and honest election.

At this point, the only standing issue remaining that the courts could question was that the claims not be "'conjectural or hypothetical.'" *Lake I* at 1027.

Factor (3.b.) — Not Speculative. The district court believed "their claimed injuries are indeed too speculative to establish an injury in fact, and therefore standing." *Id*. at 1028. Petitioners' complaint was anything but speculative. It included numerous allegations of violation of Arizona state election law, both general and specific. These allegations of illegality began with an allegation of breach of the Respondents' duty to ensure elections are conducted with a "maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early

voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. § 16-452(A). Complaint ¶ 3. "This responsibility includes a statutory duty to ensure that 'satisfactorily tested' voting systems are used to administer public elections, A.R.S. § 16-441." Complaint ¶ 43; *see also id.* ¶ 44.

The Complaint then specifically alleged that the software which former Secretary of State Hobbs certified for use on the Dominion voting system "does not meet 2002 VSS standards or Arizona's statutory requirements." The 2002 VSS standards were established by the Federal Election Commission and required by Arizona law. The Complaint explains those standards require that "all electronic voting systems," *inter alia,* must "[m]aintain a permanent record of all original audit data that cannot be modified or overridden [and] [d]etect and record every event...." Complaint ¶¶ 135-36.

In violation of the VSS standards, the Complaint explained that the Dominion machines being used are:

> normally configured with cellular wireless connections, Wi-Fi access and multiple wired LAN connections, each of which provides an access point for unauthorized remote connection and thereby makes it impossible to know whether improper data entry or retrieval has occurred or whether the equipment has preserved election records unmodified or not,

> in violation of the standards. [Complaint ¶ 138.[5]]

The courts below virtually ignored these specific allegations of the violation of Arizona election law, preferring to address only those portions of the Complaint explaining the vulnerabilities of the use of machines generally. To be sure, the Complaint described numerous instances where machines of the sort being used in Arizona had been hacked in other elections, but the operative allegations were that the election officials were using those machines without complying with the protections provided in Arizona election law.

Focusing only on the issue of the general reliability of machines, both courts adopted verbatim the defense strategy advanced by the Secretary of State that four "hypothetical contingencies" must take place for Petitioners to have standing to challenge election fraud in Arizona:

> (1) the specific voting equipment used in Arizona must have 'security failures' that allow a malicious actor to manipulate vote totals; (2) such an actor must actually manipulate an election; (3) Arizona's specific procedural safeguards must fail to detect the manipulation; and (4) the manipulation must

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[5] The Complaint also identifies numerous other violations of Arizona state law. *See* Complaint ¶¶ 156-59; ¶¶ 162-64; ¶¶ 201-04.

> change the outcome of the election. [*Lake II* at 1204, quoting verbatim from *Lake I* at 1028.]

Adopting the Secretary of State's argument, the courts ruled that, since Petitioners' complaint had not demonstrated that these four factors had been met, the claims were speculative, and Petitioners lacked standing. Again, the courts conflated the merits of the case with standing. One can understand why the courts below would consider these types of factors in order to determine if Petitioners would prevail and obtain declaratory and injunctive **relief**. However, it is wholly unreasonable for the district and circuit courts to require that these four factors must be established to demonstrate **standing** to avoid a motion to dismiss.

Demonstrating how unreasonable this test was, **none** of the four elements the courts below required could be alleged or proven when the Complaint here was filed **before** an election. As to element (1), no plaintiff could demonstrate there were "security failures" in the machines being used in a forthcoming election. It should have been sufficient that there were well-pled allegations that Arizona laws designed to prevent "security failures" were being violated. Additionally, to demonstrate security failures, plaintiffs would ordinarily need access to the machines for their experts to study during discovery, which is foreclosed when cases are dismissed based on standing. Element (2), which requires that Petitioners demonstrate that an election be "actually manipulate[d]" would be impossible to allege in a challenge brought before the election. As to element

(3), it should be obvious that efforts to surreptitiously change the outcome of an election would be designed in a way to ensure that they are undetectable. Again, detection would occur during discovery, when experts would have access to the machines, and not at the complaint stage. Element (4) is wholly unreasonable for many reasons. First, it has no application in a pre-election challenge. In post-election challenges, some courts have required that the number of disputed votes be equal or greater than the margin separating the candidates. However, until now challengers have not been required to establish what the outcome would have been if the election had been conducted lawfully. Particular ballots are not traceable to specific voters in a secret election. The courts below held the Petitioners to an unachievable standard for standing. It therefore is an unreasonable standard.[6]

Our Constitutional Republic is not well served by setting the bar for election challenges so high that it simply cannot be met — yet this is what happened below. In one state court which got standing right, the Wisconsin Supreme Court explained: "The right to vote presupposes the rule of law governs elections. If elections are conducted outside of the law, the people have not conferred their consent on the government. Such elections are unlawful and their results are illegitimate." *Teigen v. Wis. Elections Comm'n,* 2022 WI 64, at 23. There, the court ruled that "thousands

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[6] In the aftermath of the Arizona 2022 election, Petitioners contend that ballot counts were proven inaccurate, showing "a total ballot delta of 11,592 between the official canvass and the [Final Voter] file." Complaint ¶ 70.

of votes have been cast via ... unlawful method, thereby directly harming the ... voters.... [A]ll lawful voters ... are injured when the institution charged with administering ... elections does not follow the law, leaving the results in question." *Id.* at 24. In this case too, Petitioners alleged that voters cast votes "via an unlawful method," and that "leav[es] the results in question."

II. PETITIONERS' STANDING ALLEGATIONS HAVE BEEN VALIDATED BY AFTER-DISCOVERED EVIDENCE.

The courts below were required to accept as true the Petitioners' well-pled allegations, including allegations supporting standing. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 557 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity...."). The courts below had before them Petitioners' specific allegations that elections were being conducted in a manner that flouted Arizona election laws designed to protect the integrity of its elections, yet deemed those allegations "speculative." By any historic standard for election challenges, the allegations in Petitioners' Complaint demonstrated standing, as explained in Section I, *supra.* Nevertheless, in intervening months, additional information has come to light as to how Respondents actually conducted the 2022 election, and are now conducting the 2024 election, that shows that Petitioners' allegations were not at all speculative.

A. After-Discovered Evidence Supporting Allegations in Petitioners' Complaint.

Petitioners' Complaint was dismissed by the district court before discovery could be undertaken. Nonetheless, while this case was on appeal, Petitioners report that they have identified multiple critical failures in the administration of Arizona's 2022 election that rendered the results untrustworthy, compromising the voting rights of all Arizonans. Petition for Certiorari ("Pet.") at 17-18. Making the matter all the more urgent, Petitioners report that these same failures have gone unaddressed, and if uncorrected, will again render the results of the upcoming 2024 election untrustworthy. Pet. at 35. Petitioners report three of these failures to be as follows:

Logic and Accuracy Testing. Arizona law requires that all electronic voting machines undergo logic and accuracy ("L&A") testing before voting begins. "Electronic ballot tabulating systems shall be tested for logic and accuracy within seven days before their use for early balloting...." A.R.S. § 16-449(B). Maricopa County advised the courts below that it had tested all ballot tabulators as the law required. Pet. at 12. This representation appears to have been disproven. *Id.* Petitioners have discovered that Maricopa County never conducted the required L&A testing on any machines actually used in voting in the 2022 election, instead testing only five spare machines that were not actually used in voting. *Id.*

State-Certified Election Software. Arizona law requires that polling locations use election software that is certified by the state. Although Maricopa County advised the courts below that it had used only certified software, this representation has also apparently been disproven, as Petitioners have discovered that Maricopa County used uncertified software in the 2020 and 2022 elections. *Id*.

Vulnerability of Dominion Machines. Petitioners discovered that "since at least 2020, Dominion [the provider of Arizona's election software] configured its machines with the decryption keys in an election database table in plain text — protected by nothing other than Windows log-in credentials that are easily bypassed — enabling any malicious actor total control over its electronic voting systems." Pet. at 13.

Each of these systemic failures compromised the 2022 election results, and now threatens to compromise the integrity of the 2024 elections in Arizona.

B. 28 U.S.C. § 1653 Allows Supplemental Allegations and Support to Be Presented to Establish Standing.

Should this Court find any of the allegations in Petitioners' Complaint deficient in any respect, federal law allows them to be supplemented. Under 28 U.S.C. § 1653, "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." This Court has made clear that "[t]he question [of] whether ... the original plaintiffs lacked standing to

sue" is a "jurisdictional question." *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612 (1989).

This Court has further stated that where jurisdiction "in fact existed at the time the suit was brought or removed, though defectively alleged," 28 U.S.C. § 1653 permits a plaintiff to amend the pleadings to allege jurisdiction. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 831 (1989). This includes situations where later-discovered evidence allows a plaintiff to sufficiently allege what is required to demonstrate the court's jurisdiction, including standing: "[a] defendant may use evidence discovered after removal to show the existence of jurisdiction, as long as the evidence reflects the parties' jurisdictional posture at the time of removal." *Tate v. Werner Co.*, 2002 U.S. Dist. LEXIS 11953, at *7 (S.D. In. 2002).

C. After-Discovered Evidence Identified Here Confirms Standing.

After-discovered evidence now demonstrates that the systemic failures of Arizona's 2022 election system were in place since at least 2020. Accordingly, at the time of the filing of Petitioners' Complaint, facts sufficient to support standing existed, though the details of the problems could not have been fully known by Petitioners at the time. Accordingly, 28 U.S.C. § 1653 allows Petitioners' after-discovered evidence to confirm standing in this matter.

Petitioners' after-discovered evidence even meets some of the erroneous standards for standing applied by the courts below. With respect to elements 1 and 3

(*see Lake II* at 1204), Petitioners report having discovered that "the Dominion Voting Systems, Inc., systems used in Maricopa ... have a built-in security breach enabling malicious actors to take control of elections...." Pet. at 2. "[S]ince at least 2020, Dominion configured its machines with the decryption keys in an election database table in plain text completely unsecured — protected by nothing other than Windows log-in credentials that are easily bypassed — enabling any malicious actor total control over its electronic voting systems." *Id.* at 13. Worse, this can happen "likely without detection." *Id.* at 2.

The deficiencies in certain machine tabulation now demonstrated in Arizona should not be a surprise. A federal district court recently observed that: "[N]ational cybersecurity experts [have] convincingly present[ed] evidence that this is not a question of 'might [hacking] actually ever happen?' — but 'when it will happen.'" *Curling v. Raffensperger*, 2023 U.S. Dist. LEXIS 202368, at *121 (N.D. Ga. 2023) (citing that court's 2020 decision).

III. PETITIONERS HAVE STANDING AS CANDIDATES WHOSE RIGHT TO AN ACCURATE ELECTION HAS BEEN UNDERMINED BY ELECTION LAW VIOLATIONS.

As both Petitioners were candidates for state-wide office in the 2022 Arizona election, they had standing to challenge Arizona and Maricopa County's violation of Arizona state election laws designed to ensure an honest and accurate election.

Candidates and political parties are uniquely positioned, for standing purposes, to challenge election laws or procedures. "An inaccurate vote tally is a concrete and particularized injury to candidates." *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020). "As a candidate for elected office, the President's alleged injury is one that 'affect[s] [him] in a personal and individual way.'" *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020). This Court has made the same determination, that candidates whose "names that go on the ... ballot for consideration of the voters ... have ample standing to challenge" state election laws. *Storer v. Brown,* 415 U.S. 724, 738 n.9 (1974).

This Court has long allowed candidates to bring cases in federal court challenging state election laws and processes. *See, e.g., McPherson v. Blacker*, 146 U.S. 1, 23-24 (1892); *Moore v. Ogilvie,* 394 U.S. 814 (1969); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000); and *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

By the time the circuit court's decision was issued in October 2023, more than 11 months after the general election, then-Secretary of State Hobbs had declared herself the winner over Lake and declared Respondent Fontes the winner over Finchem. The circuit court declared that since Petitioners "no longer seek relief related to the 2022 election, they **likely** now lack standing on that ground." *Lake II* at 1203 (emphasis added). The circuit court cited only one case

for its "likely" conclusion — *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Not only was that case not an election challenge, it involved a requirement to maintain standing to recover damages in a Fair Credit Reporting Act case. Cases involving election challenges are quite different.

If election challenge cases ended on election day, errors committed by district courts would never be corrected. Election law challenges involve issues which are "capable of repetition, yet evading review." *Roe v. Wade*, 410 U.S. 113, 125 (1973) rev'd on other grounds, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). In *Storer v. Brown*, this Court deemed the standing principle articulated in *Roe* fully applicable to election challenges:

> The [previous] election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects ... will persist as the [challenged] statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review." [*Id.* at 737 n.8.]

Further, the flawed electoral process which harmed Petitioners in 2022 is now being repeated, as Lake is a current candidate for the United States Senate from Arizona, and Finchem is a current candidate for the Arizona State Senate. As such, if the compromised election processes in 2022 are allowed to continue, Petitioners will be the victims a second time

of a badly flawed election process conducted in violation of state law.

IV. PETITIONERS HAVE STANDING AS VOTERS WHOSE VOTES ARE DILUTED OR CAST INTO QUESTION.

Since Petitioners had standing as candidates to challenge the unlawful manner in which the 2022 election was being conducted, it was not necessary for Petitioners to show standing as voters, but they had voter standing as well. Refusal to recognize voter standing demonstrates how far afield from the established law governing election challenges that the courts below went to deny standing. This Court has considered election challenge cases brought by voters, repeatedly describing voting rights as fundamental — "the most basic of political rights." *FEC v. Akins*, 524 U.S. 11, 25 (1998). Voters are entitled to a lawful count of their votes under Article IV, Sect. 4.

Fully 60 years ago, this Court ruled that voters who were residents of counties under-represented by population in a state legislature had standing to challenge the state's disproportional reapportionment of legislative districts. It explained that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Baker v. Carr*, 369 U.S. 186, 206 (1962).

More recently, in *Akins*, "a group of voters" had standing to sue the Federal Elections Commission to require the FEC to compel a political action committee to disclose its membership and political contributions

as required by law. This Court stated that even "where a harm is concrete, though widely shared, the Court has found 'injury in fact.' ... This conclusion seems particularly obvious where ... large numbers of voters suffer interference with voting rights conferred by law." *Akins* at 24.

This Court has been painstakingly clear that the integrity of election results is a legally protectable interest belonging to voters:

> It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, ... and to have their votes counted.... [I]t is as equally unquestionable that the right to have one's vote counted is as open to protection ... as the right to put a ballot in a box. The right to vote can neither be denied outright ... nor destroyed by alteration of ballots ... nor diluted by ballot-box stuffing.... [*Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964).]

This Court continued:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any **restrictions on that right strike at the heart of representative government**. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. [*Id.* at 555 (emphasis added).]

In 1963, this Court stated, with crystal clarity, "any person whose right to vote is impaired ... has standing to sue." *Gray v. Sanders*, 372 U.S. 368, 375 (1963). Indeed, without voter standing, many of this Court's most critical cases preserving proportional representation and equal protection by race in reapportionment cases could never have been heard.

Petitioners, as voters, meet the second prong of *Lujan*. The injury to Petitioners' right to vote is fairly traceable to Respondents' actions. In Arizona it is illegal to "install[], use[] or permit[] the use of a voting system or device that is not certified for use" in Arizona. A.R.S. § 16-442. It is likewise a legal requirement that "[e]lectronic ballot tabulating systems shall be tested for logic and accuracy within seven days before their use for early balloting...." A.R.S. 16-449(B). Election officials in Arizona are well aware of these requirements. Yet, as Petitioners have now assedrted, these basic election law requirements were violated. Arizona used uncertified voting software, and instead of conducting L&A testing on all voting machines used in the election, they tested none, instead testing only five spare machines that were not actually used. Finally, they refused to use standard encryption protocols, leaving Arizona's vote tabulations "protected by nothing other than Windows log-in credentials that are easily bypassed — enabling any malicious actor total control over its electronic voting systems." Pet. at 13. Accordingly, Petitioners, as voters, just as in their capacity as candidates, should be found to meet the traceability prong.

Petitioners, as voters, also meet the third *Lujan* test, as a favorable decision would compel Arizona election officials to conduct its elections in accordance with Arizona election law. The courts below required an impossible standard this Court has never required — that unless Petitioners can conclusively prove that malign actors in fact compromised the 2022 vote tabulations, and changed enough votes to reverse the outcome, Petitioners lack standing. That is not and has never been the law of standing as applied to election challenges. For example, Petitioners point out that the failure to provide basic encryption "enabl[es] malicious actors to take control of elections, likely without detection." Pet. at 2. Without the basic security precautions required by Arizona law, the voting rights — which this Court deems "fundamental" and "the most basic of political rights" — are left unprotected. *Akins* at 25. The courts below twisted the standing requirements and thereby violated their duty under *Cohens v. Virginia* to entertain and resolve a well-pled election law challenge.

CONCLUSION

This *amicus* urges that both the petition and the motion to expedite be granted. And it also urges that the circuit court's decision be summarily reversed and remanded so that the district court has sufficient time to consider Petitioners' complaint on the merits to ensure that the election law violations of 2022 not be

repeated, so that the 2024 election is conducted in accordance with Arizona law.

Respectfully submitted,

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