No. 23-1021

In the Supreme Court of the United States

KARI LAKE AND MARK FINCHEM,
Petitioners,

v.

ADRIAN FONTES, ARIZONA SECRETARY OF STATE, *ET. AL.*,
Respondents.

On Petition for Writ of *Certiorari*
to the U.S. Court of Appeals
for the Ninth Circuit

PETITIONERS' MOTION TO EXPEDITE

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INTRODUCTION

Pursuant to Supreme Court Rule 21, petitioners Kari Lake and Mark Finchem respectfully move to expedite consideration of their Petition for Writ of *Certiorari* from the United States Court of Appeals for the Ninth Circuit's order affirming the dismissal of their challenge to Arizona election procedures. Petitioners alleged that Arizona's use of electronic voting machines violated petitioners' constitutional rights under, *inter alia*, the Fourteenth Amendment's guarantee of due process. The well-pled allegations in the complaint, and the evidence introduced in connection with the preliminary injunction motion, showed: repeated instances of past vote manipulation; the machines' uncorrected vulnerabilities to future manipulation; and that private companies are responsible for ensuring the accuracy of the election. Indeed, election officials admitted they did not possess log-in credentials for the machines to independently verify whether the machines were properly configured to generate accurate results. As explained below, petitioners' amended allegations of jurisdiction argue that the situation is even more dire than their complaint alleged.

The Ninth Circuit affirmed dismissal of petitioners' claims based on a purported lack of standing stating that petitioners asserted only a "generalized interest in seeing that the law is obeyed," an interest that "is neither concrete nor particularized" relying on *Lance v. Coffman*, 549 U.S. 437, 441-42 (2007), and further agreeing with the district court that petitioners' claims were "speculative." Pet.App:7a. Expedited consideration of this matter is warranted by the seriousness of the issues and their effect on the upcoming 2024 election—not only in the battleground State of Arizona where petitioners reside (and are candidates for federal

and state office), but also nationwide. Petitioners introduced new allegations in their petition to support Article III standing in accordance with 28 U.S.C. §1653. The evidence supporting those allegations introduced here is extraordinary.

Specifically, the new evidence attached here shows, *inter alia*, that: (1) the equipment provided by Dominion Voting Systems, Inc. ("Dominion") violates basic cyber security standards by leaving master cryptographic encryption keys on the machines in plain text, thereby allowing any malicious actor to take control over the electronic voting machines and the election results—without likely detection; and (2) Maricopa County used illegally altered election software in the 2020 and 2022 elections and falsely represented that this software is certified by Election Assistance Commission ("EAC"). Even if this Court does not accept this evidence in support of petitioners' standing, the Court can and should accept the evidence in support of the urgency to resolve this matter expeditiously. Left uncorrected, these issues would render the true 2024 election results undeterminable.

Given the lower courts' clear error under this Court's precedents, summary reversal is appropriate here. *See* Section I.A, *infra*. Sending this case back to the district court now will ensure these issues are addressed in time to stop a clear violation of petitioners' (and indeed all voters') constitutional rights heading into the 2024 election. It also will help restore lost trust in the election process. Pew Research recently found that "[o]nly 4% of Americans now say the political system is working extremely or very well, with nearly three-quarters saying it isn't. A majority (63%)

say they have little or no confidence in the future of the U.S. political system."[1] Trust in the electoral process is urgently needed now more than at any other time in our Country's history.

STATEMENT OF THE CASE

In this Court, petitioners support their standing with the detailed allegations in their complaint, the district court declarations and hearing testimony in support of their motion for a preliminary injunction, and the amended allegations of jurisdiction made here pursuant to 28 U.S.C. §1653 based on discovery in other matters and public-record requests that were not known until after the Ninth Circuit order affirming dismissal of the amended complaint. To establish subject-matter jurisdiction at the pleading stage, courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation and alteration omitted); *accord Bennett v. Spear*, 520 U.S. 154, 168 (1997) ("general allegations embrace those specific facts that are necessary to support the claim"). Moreover, even on appeal, an appellant or petitioner may amend the allegations of jurisdiction, 28 U.S.C. §1653, if that jurisdiction existed when the suit was filed. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830-32 (1989).

Pleadings and Record Evidence

The complaint pled detailed particularized facts casting substantial doubt on

[1] https://www.pewresearch.org/politics/2023/09/19/americans-dismal-views-of-the-nations-politics/ (last visited Mar. 20, 2024).

whether the existing state of Arizona's electronic voting machines likely could produce accurate election results including that:

- Despite certifications by the Election Assistance Commission ("EAC"), voting machines like those used in Arizona have been hacked, manipulated, or failed to record votes accurately on multiple occasions. Pet.App:65a-82a, 65a-82a, 88a-91a (¶¶30, 72-107, 125-134).
- All Arizona-certified optical scanners and ballot marking devices, as well as the software on which they rely, have been wrongly certified for use in Arizona because they do not comply with the statutory requirements set forth at A.R.S. §16-442(B), making these systems easily vulnerable to manipulation. Pet.App:54a, 91a-94a (¶¶23, 135-143).
- Maricopa election officials did not have the credentials necessary to validate tabulator configurations and independently validate the voting system prior to an election. The vendor, Dominion, had those credentials. Pet.App:62a, 95a (¶¶63, 148-49).
- Recognized experts have shown that all safety measures intended to secure electronic voting machines against manipulation of votes, such as risk limiting audits and logic and accuracy tests, can be defeated. Pet.App:56a. 94a-95a (¶¶31, 144-146).

In connection with their motion for a preliminary injunction against using Arizona's electronic voting machines, petitioners introduced declarations and testimony from six credentialed cyber and national security experts testifying about

evidence of actual breaches in Maricopa County's election system, the ease at which voting systems like those used in Arizona, can be penetrated by malicious actors, and evidence of actual vote manipulation in Maricopa and Pima Counties.

For example, at the preliminary-injunction hearing, cyber expert Clay Parikh testified that he had performed "a hundred or more security tests" on electronic voting machines, like those used in Arizona, while performing EAC certification tests. Pet.App:155a. Parikh testified it took him "[o]n average, five to ten minutes" to hack these voting machines, including the voting machines like those used in Arizona. *Id*. Another cyber expert, Ben Cotton, previously retained by the Arizona Senate to examine Maricopa's electronic voting machines, testified that Maricopa's "air gapped" system "could be bypassed in about 30 seconds." Pet.App:147a-148a. He also found "actual evidence of remote log-ins into [Maricopa's] EMS server." *Id*.

This expert testimony—unrefuted by respondents and ignored by the Ninth Circuit, App:3a—showed additional concrete evidence of actual past ballot manipulation and/or remote log-in intrusion in Maricopa and Pima Counties through the electronic voting machines i.e., uncorrected systemic vulnerabilities going into the November 2022 election.

New Evidence and Amended Allegations of Standing

The new allegations, and the supporting evidence attached here that underlies those allegations, show three things: (1) Maricopa County used election software in the 2020 and 2022 elections that was altered after required testing and certification, and falsely represented to the district court that this software was certified by the EAC and approved for use in Arizona; (2) Maricopa County falsely represented to the

district court that it conducted statutorily mandated pre-election logic and accuracy ("L&A") testing on all of its 400+ vote center tabulators used in the 2020 and 2022 elections—when in fact it only tested five spare tabulators; and (3) alarmingly, since at least 2020, Dominion apparently configured all its machines in use across the Country with the master cryptographic encryption keys stored 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 the electronic voting system without likely detection.

Attached to this motion are three sworn expert declarations, which include an analysis of Maricopa County's 2020 and 2022 election system log files and databases. The three cyber experts are:

- **Clay Parikh**, a cyber expert with more than seventeen years of experience in the field supporting both civil and Department of Defense agencies within the U.S. government, and NATO, including the position of Information Security Manager for enterprise operations at Marshall Space Flight Center. From 2008 to 2017, Mr. Parikh also conducted security tests on vendor voting systems for the certification of those systems by either the EAC, or to a state's specific Secretary of State's requirements. *See* Declaration of Clay Parikh ("Parikh Decl.") (App:1a).
- **Ben Cotton**, a cyber security expert with over twenty-seven years of experience performing computer forensics and other digital systems analysis. He has testified as an expert witness in state courts, federal courts and before

the United States Congress. He was the lead cyber expert in the Arizona State Senate Maricopa County audit of the 2020 general election. *See* Declaration of Ben Cotton ("Cotton Decl.") (App:44a).

- **Dr. Walter C. Daugherity,** a computer consultant and Senior Lecturer Emeritus in the Department of Computer Science and Engineering at Texas A&M University where he taught for the last thirty-two years. He has master's and doctor's degrees from Harvard University. *See* Declaration of Walter Daugherity ("Daugherity Decl.") (App:130a).

First, contrary to Maricopa County's representations to the district court, these expert declarations show that in place of the EAC-certified and Arizona Secretary of State-approved election software that Maricopa claimed to use in the 2020 and 2022 elections, Maricopa's election software has been surreptitiously altered with respect to components controlling how ballots are read and tabulated. App:3a-4a, 7a-10a, 46a-51a (Parikh Dec. ¶¶11.a-b, 20-28; Cotton Decl. ¶¶20(a)-(b), 21-22). The election results put through this uncertified software are unreliable. App:4a, 9a-10a, 16a, 57a (Parikh Dec. ¶¶11.b, 26-28, 53; Cotton Decl. ¶29). Further, the voting system testing labs, Pro V&V and SLI Compliance, retained by Maricopa to verify that the software used in the 2020 election was the EAC-certified version of Dominion's Democracy Suite 5.5B, both failed to detect this altered software and falsely certified it was the EAC-certified version. App:4a, 13a-14a, 55a-56a (Parikh Dec. ¶¶11.c, 42-47; Cotton Decl. ¶¶20(e), 28).

Second, contrary to Maricopa County's representations to the district court,

Maricopa County did not conduct statutorily mandated pre-election L&A testing on any of its vote center tabulators prior to the November 2020 election. App:10a-13a (Parikh Decl. ¶¶30-41). Specifically, Maricopa County uses a vote center model to conduct elections consisting of over two hundred vote centers each with two ImageCast Precinct-2 (ICP2) tabulators to scan and process ballots. App:10a (Parikh Dec. ¶10). Arizona law which requires "all deployable voting equipment" to pass the statutorily mandated L&A testing prior to an election. App.10a-11a (*Id.* ¶¶29-32). Instead, Maricopa L&A tested only five spare tabulators in connection with the 2020 election. App.11a (*Id.* ¶34). Maricopa County also L&A tested only five spare tabulators in connection with the November 2022 election. *Id.*

Third, Dominion promises in its contract with Maricopa County—and apparently in its contracts with other counties nationwide—that it "protect[s]" election data with high-level Federal Information Processing Standard ("FIPS") level encryption. App:135a (Daugherity Decl. ¶16). The new evidence, however, shows that Dominion leaves the master cryptographic encryption keys unprotected on the election databases in plain text available to ***any*** insider—or any non-insider who only needs to bypass the basic Windows log-in, which can be easily done in less than five minutes with instructions available on the internet.[2] Every Dominion system that petitioners' cyber experts inspected leaves these master cryptographic encryption keys in this unprotected and plain text state including in Arizona, Colorado,

[2] App:5a, 14a-16a, 45a-47a, 51a-53a, 57a, 136a-137a (Parikh Decl. ¶¶ 12, 48-53; Cotton Decl. ¶¶10, 20(c), 23-25, 29; Daugherity Decl. ¶¶ 20-23;).

Michigan, Colorado, and Georgia. *Id*. It is safe to assume that the Dominion electronic voting machines are equally susceptible to attack in all states in which they operate.

As cyber expert Clay Parikh testified, leaving these master cryptographic encryption keys in this unprotected state and in plain text, especially on a voting system, "is an **egregious**, **inexcusable** violation of long-standing, **basic** security practices" and FIPS—with which Dominion purports its encryption complies.[3] A screenshot taken from Maricopa County's 2020 election database (redacted) depicting the plain text storage of these master cryptographic encryption keys is shown below:[4]

Figure 7—Rijndael Key for Maricopa 2020 Election

With these master cryptographic encryption keys, "an intruder (including an insider) could, for example, decode official ballots … alter or replace them, encode the new 'official' ballots, and pass them on as legitimate [and] since the correct keys are used, the substitution is undetectable."[5] "Simply put, this is like a bank having the most secure vault in the world, touting how secure it is to the public and then taping

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[3] App:15a-16a, 57a, 135a-137a (Parikh Decl. ¶¶ 51-52 (emphasis in original); Daugherity Decl. ¶¶ 16, 21-23; Cotton Decl. ¶29).

[4] App:52a (Cotton Dec. ¶23).

[5] App:136a (Daugherity Decl. ¶ 21); *See also* App:15a, 52a-53a (Parikh Decl. ¶50, with these keys a malicious actor can "create or duplicate election data and make it look authentic"; Cotton Decl. ¶25).

the combination in large font type on the wall next to the vault door." App:52a (Cotton Decl. ¶25).

STANDARD OF REVIEW

A "summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999); *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 840 (2009) (summary reversal for "clear error" applying the Court's prior decisions); *Allen v. Siebert*, 552 U.S. 3, 7 (2007) (summary reversal where the Court's prior decision "precludes [the lower court's] approach"); *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (summary reversal where for error "obvious" from binding precedent). Indeed, the Court occasionally uses follow-on summary decisions to flesh out issues in recently decided cases. *See*, *e.g.*, *Lambrix v. Singletary*, 520 U.S. 518, 538-39 (1997); Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 694 (2020).[6] Exigency can also justify summary proceedings. *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006). Significantly, "the Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 577 U.S. 385, 394-95 (2016) (collecting cases). Finally, if the Court denies expedited hearing or summary reversal, the Court can instead require merits briefing and argument. *Rosario v. Rockefeller*,

[6] The recently decided decision here is *Moore v. Harper*, 143 S.Ct. 2065 (2023), which held for claims under the Elections Clause that "federal courts must not abandon their own duty to exercise judicial review," *Moore*, 143 S.Ct. at 2089-90, thereby elevating the three-justice concurrence in *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring), to a holding.

410 U.S. 752, 756-58 (1973).

REASON TO EXPEDITE THIS MATTER

Even before any respondent files a brief in opposition ("BIO"), the pleadings, record evidence, and petitioners' amended allegations of jurisdiction pursuant to 28 U.S.C. §1653 make clear that this Court can and should reverse the dismissal for lack of Article III standing, which makes summary disposition an appropriate option. Expediting this matter would serve the two crucial goals of ensuring election integrity and avoiding the unnecessary delay of merits briefing when petitioners' standing is clear and the lower courts clearly erred in their contrary ruling.

I. PETITIONERS HAVE STANDING, AND NO OTHER THRESHOLD ISSUE BARS THIS ACTION.

As "a lower court's demonstrably erroneous application[s] of federal law," the threshold bases for dismissal that the lower courts erected against petitioners' suit warrant summary reversal. *Dyson*, 527 U.S. at 467 n.1; *accord CSX Transp.*, 556 U.S. at 840 (summary reversal for "clear error"); *Gonzales*, 547 U.S. at 185 ("obvious" error). While the complaint's well-pled allegations and record evidence support reversal, petitioners' new allegations of injury under 28 U.S.C. §1653 make the error all the more "clear" and "obvious." If those amended allegations would be hard for this Court to accept on counsel's making them as mere allegations in a petition, petitioners supply the new evidence in support of this motion to expedite, *See* Section II, *infra*.

A. Petitioners plainly have Article III standing.

Standing poses a three-part test requiring (a) judicially cognizable injury to

plaintiffs, (b) defendants' causation by the challenged conduct, and (c) redressability by courts. *Lujan*, 504 U.S. at 561-62. Of these, the questions of speculative or generalized injury concern only the first prong. Pet.App.9a. Causation and redressability pose "little question" when the government acts directly to injure a plaintiff. *Lujan*, 504 U.S. at 561-62. The next three sections show that petitioners' injury was judicially cognizable, imminent, and particularized, and not in any way speculative or generalized.

1. Petitioners' injury goes to the heart of our representative democracy: the right to vote and to run for office in fair and lawful elections.

The complaint raised the claim that respondents' election processes nullify the fundamental right to vote—and have a vote counted accurately—under the Due Process Clase. Pet.App:103a-108a.[7] As used in Arizona, the electronic voting machines cause several injuries to petitioners, both as voters and as candidates:

- For voters, Maricopa's elections are so unreliable and open to abuse as to nullify the fundamental, due process right to vote and to have votes accurately counted. *United States v. Classic*, 313 U.S. 299, 315 (1941) ("included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted"); *accord Stewart v. Blackwell*, 444 F.3d 843, 868-69 (6th Cir. 2006) (collecting cases).

[7] Parties are not confined to the precise arguments they made below and can raise new *arguments* here to support a preserved *claim*. *Citizens United v. FEC*, 558 U.S. 310, 330-31 (2010); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

- For candidates, Maricopa's elections inflict not only unequal-footing injuries that deny the right to run for public office under lawful and reliable competitive process, *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) (unequal-footing injuries apply outside equal-protection context); *accord Mecinas v. Hobbs*, 30 F.4th 890, 897-900 (9th Cir. 2022); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020); *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020), but also—by increasing public distrust in elections, *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government")—make it more difficult and more expensive to get voters to vote, forcing candidates to spend more time fundraising and less time campaigning, thereby inflicting First Amendment associational injuries.

These injuries easily meet the criteria of Article III under this Court's precedents.

2. Petitioners' injuries are imminent, not speculative.

Article III does not require a plaintiff to wait to be injured, *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2210 (2021), because waiting often would be unworkable (as with elections). Instead, imminence under Article III requires only a "risk of harm [that] is sufficiently imminent and substantial." *Id.* Petitioners meet that standard for several reasons:

- First, under petitioners' complaint, the record evidence, and the new allegations of jurisdiction, 28 U.S.C. §1653, the injury in past elections supports the heightened risk of injury in future elections that the lower courts

failed to consider. *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) ("past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury"); *cf. Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 164 (2014) ("history of past enforcement" is obvious evidence of "substantial" threat of future enforcement).

- Second, procedural injury lowers the Article III threshold for immediacy. *Lujan*, 504 U.S. at 571-72 & n.7 (a proper procedural-injury plaintiff "can assert that right without meeting all the normal standards for redressability and immediacy").
- Third, and relatedly, unequal-footing injuries occur upon denying lawful competition, not in denying the ultimate benefit. *See City of Jacksonville*, 508 U.S. at 666 (1993); *Clinton*, 524 U.S. at 433 n.22, and the injury is not the denial of the ultimate prize (e.g., admission to school, winning a contract or election)—which "is merely one of relief," not one of injury. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 280 n.14 (1978)—but the denial of a lawful process.
- Fourth, when multiple actors can cause injury, the threat of injury is increased. *Compare Driehaus*, 573 U.S. at 164 (2014) *with Curling v. Raffensperger*, __ F.Supp.3d __, 2023 U.S. Dist. LEXIS 202368, at *120 (N.D. Ga. Nov. 10, 2023) ("Mueller Report's findings leave no doubt that Russia and other adversaries will strike again") (alterations and internal quotation omitted) (No. 1:17-cv-2989-AT).

- Fifth, and relatedly, for cybersecurity injuries outside of elections (*e.g.*, regarding fiduciary obligations to protect money or personal information), courts easily find imminence *vis-à-vis* improper actions that injure plaintiffs. *See*, *e.g.*, *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 967-68 (7th Cir. 2016) (victims need not wait for identity theft to happen); *Webb v. Injured Workers Pharmacy, LLC*, 72 F.4th 365, 375 (1st Cir. 2023) (risk of mis-use is higher when criminal conduct involved in breach) (citing *McMorris v. Carlos Lopez & Assocs.*, LLC, 995 F. 3d 295, 302 (2d Cir. 2021) and *Clemens v. ExecuPharm Inc.*, 48 F.4th 146, 153-54, 157 (3d Cir. 2022)). Given their misconduct, the government actors here enjoy no presumption of regularity under Arizona law, *Silva v. Traver*, 63 Ariz. 364, 368 (1945); *Golonka v. GMC*, 204 Ariz. 575, 589-90 ¶48 (App. 2003) (discussing Arizona's "bursting bubble" treatment of nonstatutory presumptions), and the private actors never had a presumption of regularity under Arizona law. *Garcia v. Sedillo*, 70 Ariz. 192, 200 (1950). Courts should treat the fundamental right to vote at least as well as personal privacy.

Together, these reasons conclusively establish a non-speculative risk of future injury under this Court's precedents.

Significantly, the new allegations of jurisdiction (like the supporting evidence) of the Dominion machines' vulnerability marries with and reinforces petitioners' prior pleadings of past harm. For example, Dr. Daugherty's record declaration suggesting electronic tampering with the 2020 election becomes more credible when

one considers that the master cryptographic encryption keys to commandeer an election surreptitiously are available to anyone with physical or remote access. App:137a-139a (Daugherity Decl. ¶¶24-32). Thus, while the lower courts may not have found that petitioners' claims to "[]cross the line from conceivable to plausible," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), the new allegations—including that Maricopa misled the lower courts—clearly crosses the line.

3. Petitioners' injuries are concrete, not generalized.

The Ninth Circuit also found petitioners' injuries were generalized—as opposed to particularized—because the entire population suffered the same injury. Pet.App:7a (citing *Lance*, 549 U.S. at 441-42). Nullifying the fundamental right to vote injures everyone, and an injury's being widely shared does not foreclose finding it to be particularized:

> Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found "injury in fact."

FEC v. Akins, 524 U.S. 11, 24 (1998); *Gill v. Whitford*, 138 S.Ct. 1916, 1929 (2018) (right to vote is personal and individual). Indeed, *Akins* hypothesized an example "where large numbers of voters suffer interference with voting rights conferred by law." *Akins*, 524 U.S. at 24. What *Akin* hypothesized happened here.

Significantly, *Lance* is not to the contrary:

> The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. *It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing.* Because plaintiffs assert no

> particularized stake in the litigation, we hold that they lack standing to bring their Elections Clause claim.

Lance, 549 U.S. at 442 (emphasis added). *Lance* simply has no application where—as here—the plaintiff alleges violations of a personal right.[8]

B. No other threshold issue bars' petitioners' action.

Although the Ninth Circuit affirmed dismissal only on standing, Pet.App:9a, the district court also dismissed on sovereign immunity and under *Purcell*. Pet.App:34a (immunity), 35a-37a (*Purcell*). This Court can review any issue pressed in or passed on by the lower court. *United States v. Williams*, 504 U.S. 36, 42 (1992), and Secretary Fontes pressed the sovereign-immunity and *Purcell* issues in the Ninth Circuit. *See* Fontes Br. 38-46, *Lake v. Fontes*, No. 22-16413 (9th Cir.). Moreover, "there is no unyielding jurisdictional hierarchy" to threshold bases for dismissal. *Ruhrgas Ag v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999). To avoid the pyrrhic victory of petitioners' reversing the dismissal on standing only to be re-dismissed on sovereign immunity or *Purcell*, this Court can and should resolve those two easy issues. *Cf. Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (appellate courts have discretion to reach issues not decided below). Neither sovereign immunity nor *Purcell* provide a basis for dismissal.

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[8] Moreover, once the plaintiff has standing to challenge a particular government action, the plaintiff may challenge it on any basis that violates federal law. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006); *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 78-79 (1978) (outside of taxpayer standing, Article III has no "nexus" requirement).

1. *Purcell* does not apply to all future elections, including the 2024 election.

Purcell concerns the denial of equitable relief too close to an election because "voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. While *Purcell* may—or may not—argue against injunctive relief *vis-à-vis* a particular election, it never authorizes outright dismissal of a complaint applied to future elections. If 2022 was too close to petitioners' suit, 2024 was not. So too, 2026, 2028, and so on.

2. Sovereign immunity does not bar this action.

Counties lack sovereign immunity, *Alden v. Maine*, 527 U.S. 706, 756-57 (1999), and even state officers can be sued under *Ex parte Young*, 209 U.S. 123, 159-61 (1908), and its progeny to enjoin ongoing violations of federal law. Significantly, "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,* 535 U.S. 635, 638 (2002). At that threshold level, negating Arizona voters' and candidates' rights under the Due Process Clause surmounts any sovereign immunity that respondents have.

II. PETITIONERS' NEW EVIDENCE FURTHER ESTABLISHES A NON-SPECULATIVE INJURY THAT WARRANTS IMMEDIATE RELIEF.

Pursuant to 28 U.S.C. §1653, petitioners seek to amend their allegations of jurisdiction in support of Article III standing at Sections I.C and II.C in their petition. Amending jurisdiction on appeal under §1653 applies where the jurisdiction already existed when the action was filed. *Newman-Green*, 490 U.S. at 830-32. Although appellate courts do not sit to accept new jurisdictional evidence on appeal, *Strain v.*

Harrelson Rubber Co., 742 F.2d 888, 889 n.2 (5th Cir. 1984), "the normal course consists in remanding the case rather than in allowing amendment here." *Nadler v. Am. Motors Sales Corp.*, 764 F.2d 409, 413 (5th Cir. 1985). If this matter proceeds beyond this motion, petitioners will move formally to amend their pleadings, which the Court could allow or could remand. *Compare*, *e.g.*, *Adams v. Reliance Standard Life Ins. Co.*, 225 F.3d 1179, 1183 & n.3 (10th Cir. 2000) (allowing formal amendment of pleadings on appeal) *with Van Buskirk v. United Grp. of Cos.*, 935 F.3d 49, 55-56 (2d Cir. 2019) (remanding to allow amendment of pleadings). Now, however, petitioners submit their evidence in support of the need for this Court to expedite this matter, not for the Court to decide the ultimate issue of petitioners' standing.

As shown in the Statement of the Case, *supra*, the new evidence petitioners put forward in support of this motion concerns evidence taken from election software used in the 2020 election. As such, the new evidence existed at the time petitioners filed their complaint in April 2022. That evidence—and thus petitioners' amended allegations of jurisdiction drawn from that evidence—demonstrates that petitioners' claims are not "speculative," based on both past injury and procedural violations that bear on Article III's requirement for imminent injury. *See O'Shea*, 414 U.S. at 496 (past injury); *Lujan*, 504 U.S. at 571-72 & n.7 (procedural injury). Indeed, as petitioners' suit warned, the 2022 election showed the same conduct as in 2020, which further validates the Article III standing that injury will continue in future elections without judicial relief.

A. Maricopa not only violated mandatory election-integrity measures under Arizona election law but also misled the district court to believe Maricopa complied with those measures.

As indicated in the Statement of the Case, Maricopa uses altered election software not certified for use in Arizona elections and failed to conduct L&A testing that Arizona law requires. *See* A.R.S. §§16-442, 16-449, 16-452. Worse still, Maricopa misled the lower courts to believe that Maricopa complied with these requirements, which purportedly minimized the risks that petitioners alleged would flow from using *lawful* election equipment and software systems. Pet.App:18a-20a (relying on certified software and L&A-tested equipment to find injury speculative). Knowing alteration of election software is a criminal act under Arizona law. *See* A.R.S. §§16-449(A), 16-452(C), 16-1009, 16-1004(B), 16-1010. Moreover, under Arizona's bursting-bubble theory of nonstatutory presumptions, Maricopa thereby loses any presumption of regularity. *Silva*, 63 Ariz. At 368; *Golonka*, 204 Ariz. At 589-90 ¶48. Absent court intervention, Maricopa will likely again use altered and uncertified election software in the upcoming 2024 election rendering those results unreliable and thus void. To avoid a "*Purcell* problem" *vis-à-vis* the 2024 election, urgent action is required.

B. Having master cryptographic encryption keys in plain text—unprotected except for Windows log-in passwords—presents a clear threat to election security.

This security breach violates *common sense*, to say nothing of FIPS-level encryption. While this breach has the game-changing *magnitude* of the Allies' deciphering Germany's ENIGMA machine in World War II, it is far worse. Dominion

leaves the decryption keys in plain text. As cyber expert, Ben Cotton stated "it is like a bank telling the public it has the most secure vault in the world, and then taping the combination on the wall next to the vault door." App:52a (Cotton Decl. ¶25). Even worse, key logging features that would record system activity showing such control can also be manipulated or disabled, thereby rendering any penetration of this system nearly undetectable. App:46a-47a, 52a-53a, 136a-137a (Cotton Decl. ¶20(c), 25; Daugherity Decl. ¶¶21-22).. Significantly, as private actors, the Dominion employees embedded within Maricopa never had a presumption of regularity under Arizona law. *Garcia*, 70 Ariz. at 200. Placing these master cryptographic encryption keys in such an egregiously unsecure state is a fatal compromise to the security of these voting systems being used in the 2024 election.[9]

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE ISSUES OF PROFOUND IMPORTANCE.

In addition to the certworthy issues presented here on Article III standing, this matter is urgently important for this Court to resolve in advance of the 2024 election and—notwithstanding the lengthy and technical declarations in the Appendix—the question presented is purely legal.

A. Only this Court can preserve the fundamental right to vote.

"[T]he political franchise of voting … is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). While this case concerns only Arizona, the issues raised here extend to the

[9] App:15a-16a, 57a, 136a-137a (Parikh Decl. ¶¶50-51, 53; Cotton Decl. ¶29; Daugherity Decl. ¶¶21-23).

approximately 30 States that use Dominion systems. This judiciary is the only branch of government that can resolve this matter. If the results of elections in approximately 30 States are unreliable, the political branches' *lawful* composition circa January 3, 2025, will be unknowable. This Court must ensure the 2024 election—and subsequent elections—can be trusted.

B. The question presented here is purely legal.

Notwithstanding the lengthy and technical declarations in the Appendix to this motion, the two-part question presented here is purely legal. First, if petitioners' existing pleadings and record evidence support standing, that is enough to reverse the lower courts' dismissal summarily. Second, if the existing pleadings and record evidence do not conclusively establish petitioners' standing to the level required for summary reversal, petitioners' amended allegations pursuant to 28 U.S.C. §1653 clearly do.

Arizona's legislature required certified software and L&A testing to ensure that Arizona's elections comply with Arizona's Constitution: "In all elections held by the people in this state, the person, or persons, receiving the *highest number of legal votes* shall be declared elected." ARIZ. CONST. art. VII, §7 (emphasis added); A.R.S. §§16-442, 16-449, 16-452. Moreover, whether intentional or not, including the master cryptographic encryption keys in plain text is simply dumbfounding. These new allegations—supported by the accompanying declarations—clearly "[]cross the line from conceivable to plausible," *Twombly*, 550 U.S. at 570, requiring this case to proceed to discovery and a renewed motion for a preliminary injunction in district court.

RELIEF REQUESTED

Based on the foregoing, petitioners respectfully request that the Court enter the following relief:

- Provide respondents a reasonable opportunity from 10 to 30 days from the date of the Court's order requesting a response to this motion, *compare* S.Ct. R. 21.4 *with* S.Ct. R. 15.3, which shall not be extended.
- Decide this matter summarily based on the parties' briefing of the petition and this motion.
- If the Court declines to decide this matter summarily, set the case for expeditious merits briefing and argument.

Petitioners respectfully request that the Court issue such other relief as is just.

CONCLUSION

The petition for a writ of *certiorari* should be granted, and the Ninth Circuit's decision should be summarily reversed. Alternatively, if the Court orders merits briefing and argument, the Court should set an expeditious briefing schedule with argument timed to enable a decision as far in advance of the 2024 election at possible.

Dated: March 20, 2024

Respectfully submitted,

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 21 and 33, I certify that the foregoing motion is proportionately spaced, have a typeface of Century Schoolbook, 12 points, and contains 23 pages (and 5,675 words) respectively, excluding this Certificate as to Form, the Table of Authorities, the Table of Contents, and the Certificate of Service.

Dated: March 20, 2024

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF SERVICE

I hereby certify that, on March 20, 2024, in addition to electronically filing the foregoing motion—together with its appendix—I caused one copy of those documents to be served by Federal Express, standard service, on the following counsel:

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In addition, I certify that on the same day, I electronically transmitted courtesy copies of the foregoing document to the email addresses identified above.

/s/ Lawrence J. Joseph
Lawrence J. Joseph