IN THE

United States House of Representatives

RITA HART,

Contestant,

v.

MARIANNETTE MILLER-MEEKS,

Contestee.

CONTESTANT'S RESPONSE TO CONTESTEE'S MOTION TO DISMISS NOTICE OF CONTEST REGARDING THE ELECTION FOR REPRESENTATIVE IN THE ONE HUNDRED SEVENTEENTH CONGRESS FROM IOWA'S SECOND CONGRESSIONAL DISTRICT

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TABLE OF CONTENTS

INTRODUCTION

Contestant Rita Hart's notice of contest identified—and provided comprehensive evidence to verify—22 lawful ballots cast by voters in Iowa's Second Congressional District that were not counted in the November 2020 election. In her motion to dismiss, Contestee Mariannette Miller-Meeks *does not contest* the validity of these ballots. Instead, she shrugs at the undisputed disenfranchisement of 22 Iowa voters as the product of the "ordinary course of election administration," and urges the Committee to do the same based on a fabricated procedural requirement with no basis in the law. But there is nothing ordinary about the improper exclusion of lawful votes. And any requirement that contestants exhaust state judicial remedies would not only be inconsistent with House precedent, but also intrude upon Congress's constitutional prerogative to judge the elections and qualifications of its members.

Ultimately, Contestee Miller-Meeks's focus on process over people fails, both as a matter of principle and as a matter of law, and she raises no substantive objection to the counting of the 22 votes identified by Contestant Hart. Contestee Miller-Meeks's purported concern that this contest will diminish public confidence in elections rings hollow as she seeks to wrongfully disenfranchise lawful Iowa voters whose ballots should be counted. Her motion should be denied, those ballots should be counted, and Contestant Hart should properly be seated in the House.

BACKGROUND

On December 22, 2020, Contestant Hart timely filed and served her notice of contest upon Contestee Miller-Meeks to contest the election for Iowa's Second Congressional District (the "District")—a race that currently stands with a *six-vote margin* out of nearly 400,000 ballots cast. This election is among the closest House races in nearly a century, but Contestant Hart has not filed this contest merely because of the infinitesimal margin. She has done so because, as

meticulously detailed in her notice, 22 ballots were wrongfully excluded from the state's certified returns, meaning that 22 voters were wrongfully disenfranchised. *See* Notice of Contest Regarding the Election for Representative in the One Hundred Seventeenth Congress from Iowa's Second Congressional District ("Notice") ¶ 5.

Contestant Hart's notice describes each of these 22 votes in detail, explaining—ballot by ballot—why each was erroneously rejected and should be included in the final count. These wrongfully excluded ballots include:

- Two curbside ballots cast in Scott County, both of which are indisputably valid but went mistakenly uncounted in the initial canvass and subsequent recount, *see id.* ¶¶ 31-37;

- Nine absentee ballots in Marion County, all of which are indisputably valid but went mistakenly uncounted in the initial canvass and subsequent recount, *see id.* ¶¶ 38-47;

- One provisional ballot in Johnson County that was timely cured by an eligible Iowa voter but was not counted because election workers misplaced the voter's ballot and proof of identity, *see id.* ¶¶ 48-57;

- One absentee ballot in Johnson County that was timely submitted and signed by an eligible Iowa voter but was not counted because election officials decided (contrary to Iowa law) that the voter had signed his ballot envelope in the wrong location, *see id.* ¶¶ 58-68;

- Two absentee ballots in Johnson County that were timely signed and submitted by eligible Iowa voters who received their absentee ballot envelopes already sealed—thus requiring them to break the seal on the ballot envelopes and then reseal them—and rejected because they were not "properly sealed," a standard that is not found in Iowa law, *see id.* ¶¶ 69-87;

- Five absentee ballots in Johnson and Scott Counties that were timely signed, sealed, and submitted by eligible Iowa voters but rejected because they were not "properly sealed" when they arrived (again, even though this is not a standard found under Iowa law), *see id.* ¶¶ 88-99; and

- Two absentee ballots in Des Moines and Wapello Counties that were signed, sealed, and timely returned to a commissioner's office in compliance with Iowa law but erroneously deemed untimely, *see id.* ¶¶ 100-08.

Of these wrongfully excluded ballots, the evidence establishes that 18 were cast for Contestant Hart, three were cast for Contestee Miller-Meeks, and one did not record a vote for either candidate—resulting in a net gain of 15 votes for Contestant Hart. *See id.* ¶¶ 6, 109-10. Once those ballots are properly included in the final tally, Contestant Hart has 196,976 votes and Contestee Miller-Meeks has 196,967 votes, giving Contestant Hart a lead of nine votes. *Id.* ¶ 6. As Contestant Hart pleads in her notice, these votes alone are therefore sufficient to change the outcome of the election and establish her entitlement to the District's seat. *Id.* ¶ 110.

On January 21, 2021, Contestee Miller-Meeks filed her motion to dismiss, raising various objections to Contestant Hart's decision to file this contest. Significantly, her motion does not deny that these 22 ballots were wrongfully excluded from the final count. Instead, it contends only that the House should not hear this contest because Contestant Hart did not seek judicial review of the erroneously certified results in Iowa state court. For the reasons that follow, that argument should be rejected.

LEGAL STANDARD

Under the U.S. Constitution, each House of Congress is "the Judge of the Elections, Returns and Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1. As the U.S. Supreme Court has recognized, this provision gives each chamber the authority "to make an independent final judgment" in evaluating a member's election and entitlement to a seat. *Roudebush v. Hartke*, 405 U.S. 15, 25-26 (1972).

To aid its resolution of election contests, Congress enacted the Federal Contested Elections Act (FCEA), codified at 2 U.S.C. §§ 381-396, which provides a procedural framework for candidates for the House to contest the outcomes of their elections. Under the FCEA, a contestant's initial burden in a notice of contest is to "state with particularity the grounds upon which [the]

contestant contests the election." 2 U.S.C. § 382(b). The contestant must "claim a right to the office" with "specific credible allegations of irregularity or fraud that, if proven true, would entitle the Contestant to the office." *Project Hurt v. Waters*, H.R. Rep. No. 113-133, at 3 (2013); *see also Pierce v. Pursell*, H.R. Rep. No. 95-245, at 4 (1977) (Republican minority stating that Contestant must "allege [] specific irregularities justifying the conclusion that the result of the election was in error").

Once a contestant has filed and served a notice of contest, the contestee has three options under the FCEA: file an answer, file a motion to dismiss, or file a motion for a more definite statement. *See* 2 U.S.C. § 383. If the contestee chooses to file a motion to dismiss, as Contestee Miller-Meeks has done, "the following defenses may be made":

> (1) Insufficiency of service of notice of contest.
>
> (2) Lack of standing of contestant.
>
> (3) Failure of notice of contest to state grounds sufficient to change result of election.
>
> (4) Failure of contestant to claim right to contestee's seat.

Id. § 383(b).

Because Congress modeled the provision in the FCEA allowing motions to dismiss on the Federal Rules of Civil Procedure, *see Dornan v. Sanchez*, H.R. Rep. No. 105-416, at 8 (1998), the Committee reviewing a motion to dismiss evaluates the sufficiency of a notice of contest under a "blend of Rules 12(b)(6) and 56." *Anderson v. Rose*, H.R. Rep. No. 104-852, at 10 (1996). Accordingly, a notice must allege sufficient facts "to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (interpreting Rule 12(b)(6)). Under the heightened standard of Rule 56, a notice that presents sufficient evidence "on which the [factfinder] could reasonably find" in the

contestant's favor will survive a motion to dismiss under the FCEA. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (quoting *Schuylkill & Dauphin Improvement Co. v. Munson*, 81 U.S. 442, 448 (1871)) (interpreting Rule 56).

Stated differently, a contestant survives a motion to dismiss if her notice sets forth "credible allegations" that, "if subsequently proven true, would likely change the outcome of the election." *Dornan*, H.R. Rep. No. 105-416, at 7. "The credibility element of the test," in turn, "allows for consideration of evidence confirming or refuting allegations of election errors or fraud." *Anderson*, H.R. Rep. No. 104-852, at 6-7 ("In judging whether a particular allegation is credible, [the House] should consider not only the contestant's view and any supporting evidence, but any countervailing arguments and evidence available from the contestee or other sources.").

ARGUMENT

Contestant Hart's notice easily satisfies any articulated standard for assessing a motion to dismiss. By identifying *22 specific ballots* that were wrongly excluded from the election results, she has supplied specific, credible allegations—supported by evidence—demonstrating that she is the rightful winner in the District.

The arguments advanced in Contestee Miller-Meeks's motion miss the mark. What Contestee Miller-Meeks disingenuously refers to as "routine election administration decisions that disfavored" Contestant Hart, *see* Motion to Dismiss Notice of Contest ("Mot.") at 28, are actually lawful ballots cast by voters who will be disenfranchised if the House does not act. Contestant Hart has not only pleaded the existence of 22 ballots, she has proved their validity through unrebutted evidence. As a result, Contestant Hart has more than met her burden under the FCEA and House precedent to present credible allegations that errors were made that would change the result of the election. Contestee Miller-Meeks's attempt to impose an even higher evidentiary burden at this

stage—requiring Contestant Hart to put forward evidence of every ballot cast in the District—reads into the FCEA a requirement that does not exist and that the House has never before endorsed. Because Contestant Hart has offered more than sufficient allegations and evidence to meet her pleading burden, the motion to dismiss should be denied.

Moreover, contrary to Contestee Miller-Meeks's argument, there is no requirement that a House contestant exhaust all post-election state judicial remedies. The FCEA contains no exhaustion requirement, and House precedent falls far short of requiring a contestant to exhaust all state judicial remedies. Indeed, requiring a contestant to exhaust post-election judicial relief in the states before seeking relief in the House would impermissibly infringe upon and jeopardize the House's constitutional duty to be the judge of the elections and returns of its members.

I. Contestant Hart's notice, which identifies 22 specific ballots that were erroneously excluded from the election returns, is more than sufficient to survive a motion to dismiss.

Contestant Hart's notice, which thoroughly details 22 specific ballots that were erroneously excluded from the District's returns—and that would, if counted, give her a *nine-vote victory* over Contestee Miller-Meeks—readily satisfies the FCEA's requirement to allege with particularity grounds sufficient to change the result of the election. *See* 2 U.S.C. §§ 382(b), 383(b). In contrast to cases where contestants vaguely alleged undefined instances of misconduct or uncertain numbers of compromised votes, Contestant Hart's notice accomplishes precisely what the FCEA requires: it states credible allegations, supported by evidence, that serve to change the results of the election and demonstrate that she has a rightful claim to the District's seat. The notice therefore survives a motion to dismiss under any standard the Committee might bring to bear on this contest.

Significantly, Contestee Miller-Meeks has not even attempted to dispute the evidence submitted by Contestant Hart, nor has she countered Contestant Hart's characterizations of Iowa law or otherwise challenged Contestant Hart's claim that these 22 votes should be counted. In

short, she has provided *nothing*—neither argument nor evidence—to suggest that these 22 ballots should not be counted. There is thus not only a genuine issue of material fact in this case, but an undisputed one. These 22 ballots should be counted, and Contestant Hart should be seated.

A. Contestant Hart's notice alleges grounds sufficient to change the result of the election and claim a right to the District's seat and thus satisfies Rule 12(b)(6).

Under the standard of Rule 12(b)(6), a Contestant "is not required to provide convincing evidence in the form of documents and/or affidavits"; instead, "every factual allegation and inference[] contended by the" Contestant is presumed true. *Dornan*, H.R. Rep. No. 105-416, at 8. While these "[f]actual allegations must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, they need not be "detailed" so long as they are not "devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557).

Contestant Hart has met and surpassed this requirement. In fact, while the standard does not *require* "detail," Contestant Hart has nonetheless provided it, clearly alleging the existence of 22 specific ballots that were erroneously excluded from the District's final tally. She does not merely hypothesize that a sufficient number of ballots exists; instead, she *specifically identifies* these votes and provides factual enhancement for each:

- For the two wrongfully excluded Scott County curbside ballots, Contestant Hart identifies when these ballots were cast, at which precinct they were cast, for which candidate they were cast, why they were not counted, and why they should have been counted, *see* Notice ¶¶ 31-37;
- For the nine wrongfully excluded Marion County absentee ballots, Contestant Hart identifies for which candidate they were cast, why they were not counted, and why they should have been counted, *see id.* ¶¶ 38-47;
- For the wrongfully excluded Johnson County provisional ballot, Contestant Hart identifies who cast the ballot, how and when she cured her ballot, for which candidate she cast the ballot, why the ballot was not counted, and why it should have been counted, *see id.* ¶¶ 48-57;

- For the wrongfully excluded Johnson County absentee ballot, Contestant Hart identifies who cast the ballot, for which candidate he cast the ballot, why the ballot was not counted, and why it should have been counted, *see id.* ¶¶ 58-68;

- For the two wrongfully excluded Johnson County absentee ballots with pre-sealed envelopes, Contestant Hart identifies who cast the ballots, for which candidate they cast the ballots, why the ballots were not counted, and why they should have been counted, *see id.* ¶¶ 69-87;

- For the five wrongfully excluded Johnson County and Scott County ballots that an election worker determined were not properly sealed, Contestant Hart identifies who cast the ballots, for which candidate they cast the ballots, why the ballots were not counted, and why they should have been counted, *see id.* ¶¶ 88-99; and

- For the two wrongfully excluded Linn County absentee ballots that were timely returned, Contestant Hart identifies who cast the ballots, for which candidate they cast the ballots, why the ballots were not counted, and why they should have been counted, *see id.* ¶¶ 100-08.

The sufficiency of Contestant Hart's notice becomes even more apparent when contrasted with other contests that the House dismissed. The notice does not, for example, rely on baseless claims that votes *could* have been changed because voting machines in a district were "vulnerab[le]" to "hacking or fraudulent manipulation," *Gonzalez v. Diaz-Balart*, H.R. Rep. No. 110-175, at 4 (2007) (dismissing contest), or theorize that a candidate's failure to disclose certain information *might* have changed the final results, *see Saunders v. Kelly*, H.R. Rep. No. 95-242, at 2 (1977) (dismissing contest). Similarly, Contestant Hart's notice does not merely speculate about the existence of thousands of *potentially* unlawful ballots that *possibly* should be excluded from the election results, as is the case with another contest currently pending before the House. *See* Notice of Contest Regarding the Election for Representative in the One Hundred Seventeenth Congress from Illinois' Fourteenth Congressional District, *Oberweis v. Underwood* (Jan. 3, 2021). In stark contrast with these other examples, Contestant Hart not only identifies 22 specific ballots that should have been counted, but also pleads *where* these ballots were cast, for *whom* they were cast, and *why* they were improperly excluded. Given this copious factual support, her allegations

plausibly demonstrate that she, and not Contestee Miller-Meeks, has the proper claim to the District's congressional seat. Her notice therefore easily passes muster under Rule 12(b)(6).

Rather than challenge the plausibility of Contestant Hart's factual allegations or the evidence that supports them, Contestee Miller-Meeks suggests that a House contest cannot be premised on "routine election administration decisions that disfavor[]" a contestant. Mot. 28-30. This argument is not only constitutionally problematic, *see infra* at 18-19, but also disregards precedent clearly establishing that "the House has the authority to arrive at its own conclusions on any particular issue affecting the validity of a ballot or return." *Anderson*, H.R. Rep. No. 104-852, at 17 n.37; *see also McCloskey v. McIntyre*, H.R. Rep. No. 99-58, at 24 (1985) (collecting precedent and noting that, as "between the execution of voter intent and the technicalities of state law," House "resolved each question in favor of obvious voter intent" (quoting *Kyros v. Emery*, H.R. Rep. No. 94-760, at 5 (1975))); Jack Maskell & L. Paige Whitaker, Cong. Rsch. Serv., RL33780, *Procedures for Contested Election Cases in the House of Representatives* 15-16 (2010) ("[T]he Committee on House Administration has noted that 'in addition to the fact that the House is not legally bound to follow state law, there are instances where it is in fact bound by justice and equity to deviate from it,' such as to ensure that 'the will of the voters should not be invalidated' by mere technicalities of state law or regulation in instances where voters' 'obvious intent' may be discerned." (quoting *McCloskey*, H.R. Rep. No. 99-58, at 23-24)). Accordingly, the House can *and should* remedy election administration decisions that resulted in the disenfranchisement of lawful voters.[1]

[1] The precedent on which Contestee Miller-Meeks relies does not support a contrary conclusion. In *Fox v. Higgins*, the House declined to count rejected ballots not out of blind deference to state officials, but because the true intent of the voters could not be discerned from the ballots (and due

B. Contestant Hart provides sufficient evidence to create a genuine dispute of material fact and thus satisfies Rule 56.

Contestant Hart's notice also readily satisfies the heightened standard inspired by Rule 56, under which "the Committee [] incorporates the component of credibility into the review of a contestant's allegations similar to the standard a judge would utilize in viewing the evidence at issue in a . . . motion for summary judgment." *Dornan*, H.R. Rep. No. 105-416, at 9. To prevail under Rule 56, a contestant must demonstrate a genuine issue of material fact by identifying "evidence [] such that a reasonable jury could return a verdict for the [contestant]." *Anderson*, 477 U.S. at 248. Here, the evidence submitted by Contestant Hart provides ample grounds for an ultimate determination in her favor. This evidence includes:

- Affidavits from eligible voters, who clearly attest that they lawfully cast ballots that should have been counted in the election, *see* Susan Johnson Aff.; Klawonn Aff.; Kurth Aff.; Lackland Aff.; Lietsch Aff.; Loetz Aff.; Nasr Aff.; Overholt Aff.; Reyes-Torres Aff.; Rhomberg Aff.; Schaefer Aff.; Charles Tucker Aff.; Linda Tucker Aff.; and

- Affidavits of recount board members, who demonstrate that lawful ballots were not counted, *see* Biderman Aff.; Nahra Aff.; Russell Aff.

Given this evidence, Contestant Hart has not only *pleaded* the existence of 22 outcome-dispositive votes that were wrongfully excluded from the District's final tally, but *proved* it. The provenance, lawfulness, and improper exclusion of each ballot is supported by affidavits signed under oath; none is pleaded on "information and belief" or in anything resembling a conclusory,

to various other evidentiary shortcomings). *See* H.R. Rep. No. 894, at 4 (1934). *Gormley v. Goss* was similarly dismissed due to the contestant's evidentiary failure "to establish any fraud, deceit, or conspiracy," H.R. Rep. No. 893, at 4 (1934), not because a state's administrative decisions are outside the House's ambit of review in an election contest. And *Oliver v. Hale* involved the House's refusal to *invalidate* ballots based on state law, *see* H.R. Rep. No. 2482, at 7-8 (1958)—not, as would be relevant to Contestee Miller-Meeks's argument, a refusal to *count* ballots based on state law.

speculative, or unsubstantiated manner. Contestant Hart has thus more than satisfied both the plausibility standard of Rule 12(b)(6) *and* the evidentiary standard of Rule 56.

Indeed, the most remarkable feature of the parties' submissions in this contest is that they show *no* genuine issue of material fact. The state's certification wrongfully excluded 22 lawful votes that would have changed the outcome of the election—period. Because Contestant Hart's notice more than satisfies the applicable standards, the Committee should deny Contestee Miller-Meeks's motion to dismiss and proceed to the merits.

C. Contestee Miller-Meeks improperly attempts to elevate Contestant Hart's burden.

To keep the Committee from considering these 22 lawful ballots, Contestee Miller-Meeks invents a new, heightened standard that she claims Contestant Hart must first satisfy, one that requires the presentation of affirmative evidence—*before discovery has taken place*—proving that Contestant Hart has analyzed the full universe of ballots cast in the District. Specifically, Contestee Miller-Meeks suggests that Contestant Hart has not met her initial burden of demonstrating grounds sufficient to change the election because she has not affirmatively shown that there "were not other ballots cast for Miller-Meeks that were disallowed for the same reasons as the 22 identified by Hart." Mot. 29. But this heightened burden is neither tenable nor supported by precedent.

First, assuming that the 22 ballots described in Contestant Hart's notice *are* the only such ballots in existence, it would be impossible for her to prove this point. It is, by definition, "hard to prove a negative," *United States v. Blandina*, 895 F.2d 293, 300 (7th Cir. 1989)—here, for Contestant Hart to prove the nonexistence of ballots that do not in fact exist—which is likely why Contestee Miller-Meeks seeks to impose such an unfeasible burden on this contest, one for which she identifies no authority, precedential or otherwise.

Second, even if it were possible to produce every ballot cast in the District, Contestant Hart would not be required to do so to be entitled to the seat. To ultimately prevail in the election contest, a contestant must only prove that "the election results entitle [her] to [the] contestee's seat," 2 U.S.C. § 385, by "*a fair preponderance of the evidence*." 2 *Deschler's Precedents* ch. 9, § 35.2, H.R. Doc. No. 94-661, at 1057 (1994) (emphasis added). By suggesting that Contestant Hart's notice must account for every single ballot cast in the District, Contestee Miller-Meeks improperly elevates a contestant's *final burden* to show *by a preponderance of the evidence* that she is entitled to the seat to an *initial burden* to show *beyond a reasonable doubt* that she is entitled to the seat. No precedent from prior House contests remotely supports such a standard, and for good reason; as the House has repeatedly recognized, it would be impractical to expect contestants to have access to every piece of evidence before discovery has begun. *See, e.g.*, *Anderson*, H.R. Rep. No. 104-852, at 9 n.19; *Dornan*, H.R. Rep. No. 105-146, at 6.

If Contestee Miller-Meeks had evidence to suggest that these 22 ballots should *not* be counted or that Contestant Hart neglects other ballots that *should* be counted, she could have and should have presented that evidence to this Committee with her motion to dismiss. As the Republican majority in *Dornan* noted, "in judging whether a particular allegation is credible," the Committee can consider "not only the Contestant's view and any supporting evidence, but any countervailing arguments and evidence available from the Contestee." *Dornan*, H.R. Rep. No. 105-146, at 6; *see also id*. at 7 (noting that Committee can consider "evidence confirming or refuting allegations of election errors" at motion to dismiss stage). Contestee Miller-Meeks had the opportunity to present evidence to refute Contestant Hart's allegations and did not do so; it was not Contestant Hart's burden to do that for her.

In the face of credible and now unrebutted allegations that 22 ballots were erroneously excluded from the final count, the Committee must deny Contestee Miller-Meeks's motion to dismiss and proceed to the merits. Anything less would be a disservice to the District's voters, all of whom deserve to have their votes counted.

II. Neither the FCEA nor House precedent required Contestant Hart to exhaust all possible remedies under state law before filing this contest.

Rather than offering argument or evidence as to why the 22 ballots should not be counted, Contestee Miller-Meeks attempts to hide behind process, arguing that this contest is improper because Contestant Hart did not seek judicial relief in state court—a position that has no statutory or precedential support. The FCEA *does not require* a contestant to exhaust state remedies before filing a notice of contest, and House precedent requiring exhaustion—to the extent such precedent is even applicable here—is cabined to pre-election remedies and post-election administrative remedies, not judicial remedies. If accepted, Contestee Miller-Meeks's argument would jeopardize the House's ability to fully exercise its constitutional duty to judge the elections, returns, and qualifications of its own members.

A. The FCEA does not require exhaustion.

The plain language of the FCEA does not require a contestant to exhaust all state remedies before filing a notice of contest. It is black letter law that "[t]he preeminent canon of statutory interpretation requires [an adjudicator] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion) (third alteration in original) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). Here, that means that the House should presume that Congress said what it meant when it enacted the FCEA in 1969—and Congress did *not* say that the FCEA required exhaustion of state remedies.

If Congress wanted to require contestants to exhaust all state remedies before filing a notice of contest under the FCEA, it could have crafted such a requirement. In contrast to the FCEA, several statutes include express exhaustion requirements, including the Federal Tort Claims Act, which was last revised in 1966—a mere three years before Congress enacted the FCEA. *See* 28 U.S.C. § 2675(a); *see also, e.g.*, 5 U.S.C. § 552a(g)(1) (requiring exhaustion before bringing action under Privacy Act of 1974). Had Congress intended to include an exhaustion requirement in the FCEA, it knew how to do so. But it chose not to.

Finding no express requirement in the FCEA to exhaust remedies, Contestee Miller-Meeks turns to 2 U.S.C. § 383(b)(3) and (4), which she suggests *implicitly* require exhaustion. *See* Mot. 17. But these provisions address the FCEA's *pleading* standards; they do not impose any procedural requirements on the initiation of a contest, let alone specify that contestants must exhaust state remedies before seeking relief under the statute. *See* 2 U.S.C. § 383(b)(3)-(4) (permitting contestee to seek dismissal of contest for "[f]ailure of notice of contest to state grounds sufficient to change result of election" and "[f]ailure of contestant to claim right to contestee's seat"). In fact, just two years after Congress enacted the FCEA, the House explained that this section was included to require the contestant "at the outset *to make proper allegations with sufficient supportive evidence*" to avoid "unnecessary and unwarranted" hearings and investigations—with no mention of exhaustion of state remedies. *Tunno v. Veysey*, H.R. Rep. No. 92-626, at 3 (1971) (emphasis added).

As discussed above, Contestant Hart has (1) alleged and provided evidence demonstrating that 22 ballots sufficient to change the results of the election were wrongfully excluded from the District's results, and (2) claimed the right to the District's seat. She has thus satisfied the pleading requirements articulated by subsections 383(b)(3) and (b)(4), which do not contemplate any sort

of exhaustion requirement. To conclude otherwise, as Contestee Miller-Meeks's motion urges, would misread both the statutory language *and* House precedent explaining the rationale for its inclusion in the FCEA.[2]

In short, because Contestant Hart has satisfied the pleading requirements and the FCEA does not contain an exhaustion requirement, the motion to dismiss should be denied.

B. House precedent does not require a contestant to seek post-election state court judicial relief.

Contestee Miller-Meeks grossly overstates the scope of House precedent when she asserts that it "uniformly require[s] a contestant to exhaust state procedures before filing a contest with the House." Mot. 18. To the contrary, there is no uniform requirement found in House precedent that a contestant must exhaust every possible state remedy before filing a notice of contest. Indeed, requiring a contestant to seek state judicial relief (as opposed to state *administrative* relief) in every circumstance would intrude upon the House's constitutional prerogative of judging the elections of its members.

Post-FCEA precedent, which is most relevant here and which Contestee Miller-Meeks studiously avoids, emphasizes that the key question in analyzing a motion to dismiss is whether

[2] Congress should not read an implied exhaustion requirement into the FCEA because the agency-deference rationale that typically justifies such requirements does not exist here. *See McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) ("[T]he exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer."). Unlike traditional agency exhaustion requirements, an exhaustion requirement with respect to House contests would necessarily be applied unevenly to contestants. Not all 50 states contain contest procedures for House races, and those states that do permit House contests vary widely in terms of how those contests are adjudicated. By enacting the FCEA, Congress sought to create a uniform process for the review and correction of erroneous, state-certified results, in fulfillment of the House's duties to judge the elections, returns, and qualifications of its members under Article I, Section 5.

the contestant satisfies the FCEA's pleading standards, even where the contestant has not availed herself of all potential state remedies. In *Dornan*, for example, a Republican contestant filed a notice of contest without first exhausting his state remedies. *See generally Dornan*, H.R. Rep. No. 105-416. Although the Democratic contestee argued that exhaustion was required and sought dismissal on this basis, *see id.* at 4, the Republican-controlled House properly disregarded that argument and focused solely on whether the contestant met the FCEA's hybrid Rule 12(b)(6)/Rule 56 pleading standard. *See id.* at 8. Once the House determined that the contestant satisfied the pleading standards, it set a hearing on the merits and discovery commenced. *See id.* at 11-12.

Contestee Miller-Meeks's motion to dismiss ignores *Dornan* entirely and turns instead to several contests that predate the FCEA, arguing that they require that a contestant first exhaust all state remedies. *See* Mot. 18-21 (citing *McLean v. Bowman* (1910), *Swanson v. Harrington* (1940), *Huber v. Ayers* (1951), and *Carter v. LeCompte* (1956)). These precedents are unavailing; not only was the House not bound by the FCEA when these contests took place, but none of these contests suggests that contestants must exhaust post-election judicial remedies before seeking relief in the House.

Even a cursory read of the four pre-FCEA "exhaustion" cases cited in Contestee Miller-Meeks's motion highlights that exhaustion might be required in only two situations, neither of which applies here. *First*, if a contestant could have addressed a *pre*-election issue through state procedures, then the House might dismiss the contest. *See generally McLean v. Bowman*, H.R. Rep. No. 62-1182 (1910) (dismissing contest where contestant claimed that *nomination* violated law and party rules); *Huber v. Ayers*, H.R. Rep. No. 82-906 (1951) (dismissing contest where contestant failed to address alleged violation of ballot order law before election). *Second*, dismissal might be warranted where a contestant fails to take advantage of her state's post-election

administrative remedies, as opposed to judicial remedies. *Compare Swanson v. Harrington*, H.R. Rep. No. 1722 (1940) (dismissing contest where contestant had not taken advantage of state recount procedure before seeking recount in House), *with Carter v. LeCompte*, H.R. Rep. No. 85-1626 (1956) (considering recount request where state law did not provide for recount and contestant produced attorney general opinion to that effect); *see also* Maskell & Whitaker, *supra*, at 1 n.3 (noting that "House committees hearing election contests have recommended dismissal, *on occasion*, for failure of contestant to 'exhaust his state remedies first,'" but only "in the case of certain pre-election procedural irregularities and in the case of recounts of ballots" (emphasis added) (citation omitted)).

None of the allegations raised in Contestant Hart's notice of contest involves pre-election issues that could have been litigated before votes were cast, and Contestant Hart took advantage of all post-election *administrative* remedies before initiating this contest. She requested and received a recount, but issues regarding the erroneous exclusion of lawful ballots and the adequacy of state recount procedures—in other words, the only issues implicated in her notice—require *judicial* remedies, not the administrative remedies that she has already exhausted. There is no precedent holding that a contestant must exhaust all state judicial remedies, as Contestee Miller-Meeks argues in her motion to dismiss. Such a requirement would threaten to conflict with the U.S. Constitution's delegation of authority regarding congressional elections.[3]

[3] Even if House precedent *did* contain such a limitless exhaustion requirement, it would not preclude this contest. As the Congressional Research Service has explained, "although various legislative precedent is extremely important in an ordered, democratic institution, such precedent followed by, for example, committees in the past, are not necessarily binding in a legal sense upon a later committee of the House, as long as the committee is acting within the scope of its authority." Maskell & Whitaker, *supra*, at 19. Accordingly, the House would not be bound in any event to apply a previously recognized exhaustion requirement—especially where such a requirement would be in tension with the Constitution.

Under the Constitution, while the states are responsible for administering elections for members of the U.S. House of Representatives, *see* U.S. Const., art. I, § 4, the House itself is "*the* Judge" of the elections and returns of its members, U.S. Const., art. I, § 5, cl. 1 (emphasis added). These two responsibilities—administering elections on one hand, judging returns on the other—are related but distinct; the U.S. Supreme Court has held that states may engage in election *administration* like recounts to verify "the accuracy of election results," but they *cannot* "frustrate[] the [House's] ability to make an independent final judgment." *Roudebush*, 405 U.S. at 25. Indeed, in *Hansen v. Stallings*, the House itself acknowledged that a contestant need not avail herself of a state remedy if that remedy "intrude[s] upon the constitutional prerogatives of the House in judging the election of its members." H.R. Rep. No. 99-290, at 6 (1985).

Requiring Contestant Hart (or any other contestant) to exhaust all potential post-election judicial relief before bringing a House contest would impermissibly upset the allocation of responsibility codified in Article I, Section 5. Instead of being "*the* Judge" of its members' elections, returns, and qualifications, the House would simply become *a* Judge whose jurisdiction is contingent upon a state court proceeding. And if the House were to adhere to an exhaustion requirement, it would deprive itself of its ability to judge an election, even in a situation where a contestant is clearly entitled to a seat. From a practical perspective, moreover, requiring contestants to exhaust all state judicial remedies before filing a notice of contest in the House would effectively deprive that district of proper representation in a meritorious contest for at least the time it takes a state court to resolve such a challenge—even though the House, not the state court, would have the final word.

Ultimately, there is no statutory exhaustion requirement in the FCEA, and House precedent under the FCEA confirms that exhaustion is not a proper basis for dismissal. Even if there were a

precedent-based requirement for exhaustion that survived the FCEA, it is necessarily cabined to pre-election remedies and post-election administrative remedies, since requiring exhaustion of post-election judicial remedies raises unavoidable constitutional concerns. Because Contestant Hart seeks a post-election judicial remedy in the House and judging the elections of its members is constitutionally delegated to Congress, the House should not require her to exhaust state judicial remedies.

III. The House has the authority to conduct a recount pursuant to its general investigatory power.

Although the House need not reach this issue in order to resolve the motion to dismiss, it is undisputed that the Committee tasked with reviewing an election contest has the authority to conduct a recount under its "general investigatory power." 2 *Deschler's Precedents* ch. 8, § 8.5, H.R. Doc. No. 94-661, at 887. To receive a recount, a contestant must put forward evidence sufficient to (1) raise "at least a presumption of irregularity" and (2) demonstrate that a recount would alter the outcome of the election. *Id.* ch. 9, § 40, at 1078. Contestant Hart has satisfied both requirements.

Significantly, Contestee Miller-Meeks does not dispute that irregularities occurred in the statewide recount. As Contestant Hart explains in her notice, Iowa law (1) requires voting machines to reject ballots that register as overvotes and (2) directs recount boards to physically examine rejected ballots for voter intent. *See* Notice ¶ 123. Contestant Hart identified 18 counties—three-fourths of all counties in the District—where overvotes were not physically examined. *Id.* ¶¶ 140-42.

These errors were consequential. Dr. Maxwell Palmer analyzed the data from the six counties that properly reviewed overvotes for voter intent and determined that 39.5 percent of votes that were initially classified as overvotes actually contained a vote for one of the two

candidates. *Id.* ¶ 143. Based on this analysis, Dr. Palmer concluded that approximately 38 ballots that were classified as overvotes from the remaining 18 counties likely contained a vote for one of the two candidates. *Id.* ¶ 144. Those 38 ballots represent 38 currently disenfranchised voters whose votes are more than sufficient to change the outcome of the election.

Contestee Miller-Meeks's argument that nothing requires recount boards to count each overvote by hand is simply incorrect. Although Iowa law permits recount boards to engage in hand or machine recounts in the first instance, if a machine identifies and rejects a ballot as an overvote, the recount board *must* physically examine it to determine whether it reflects the voter's intent. Because many boards that did machine recounts did *not* properly examine such overvotes for voter intent, *see id.* ¶¶ 123, 138, those recounts did not comply with Iowa law.[4]

Ultimately, even if the House were to find that a recount is unavailable here, that conclusion would not warrant dismissal of the notice of contest, as Contestant Hart has readily satisfied the relevant pleading standard for her primary ground for contest—tabulation of the 22 wrongfully excluded votes. *See supra* at 6-13. Indeed, although Contestant Hart has satisfied the requirements for a recount, the House might well determine that it need not even address this alternative ground for contesting the election because the 22 uncontested votes that Contestant Hart has already identified with certainty are sufficient to entitle her to the District's seat.

CONCLUSION

The adjudication of an election challenge must begin with a "commitment to a proposition indisputable in our democratic process: that the lawfully cast vote of every citizen must count."

[4] Contestee Miller-Meeks's argument that Contestant Hart "is the one who created the lack of uniformity" is both incorrect and disingenuous. Mot. 26. Because each of the 24 recount boards consisted of three representatives—one Hart designee, one Miller-Meeks designee, and one neutral designee—and made decisions by majority vote, neither Contestant Hart nor Contestee Miller-Meeks controlled how the recount boards conducted their recounts or counted particular ballots.

Bognet v. Sec'y of Commonwealth, 980 F.3d 336, 342 (3d Cir. 2020), *petition for cert. filed*, No. 20-740 (U.S. Nov. 27, 2020). In last November's election for U.S. Representative from Iowa's Second Congressional District, lawful Iowa voters were wrongly disenfranchised. No one—least of all Contestee Miller-Meeks—has argued that this disenfranchisement was proper or consistent with Iowa law. Accordingly, these ballots should *and must* be counted, to safeguard both the franchise and the public's faith in our democratic processes.

This contest is both procedurally and substantively proper, and Contestee Miller-Meeks has identified no deficiency that mandates or even supports dismissal. For these reasons and those above, Contestant Hart respectfully asks the House to deny Contestee Miller-Meeks's motion to dismiss.

DATED this 2nd day of February, 2021.

PERKINS COIE LLP

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Attorneys for Contestant Rita Hart

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to 2 U.S.C. § 384, on this 2nd day of February, 2021, a true and correct copy of **CONTESTANT'S RESPONSE TO CONTESTEE'S MOTION TO DISMISS NOTICE OF CONTEST REGARDING THE ELECTION FOR REPRESENTATIVE IN THE ONE HUNDRED SEVENTEENTH CONGRESS FROM IOWA'S SECOND CONGRESSIONAL DISTRICT** was served upon the attorney representing Contestee Mariannette Miller-Meeks via certified mail at the following address:

Alan R. Ostergren
Alan R. Ostergren, P.C.
500 Locust Street, Suite 199
Des Moines, IA 50309

A courtesy copy will be transmitted to Contestee Miller-Meeks's attorneys of record via email.

DATED this 2nd day of February, 2021.

PERKINS COIE LLP

By: _____

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Attorneys for Contestant Rita Hart