

IN THE
UNITED STATES HOUSE OF REPRESENTATIVES

RITA HART,
Contestant,

v.

MARIANNETTE MILLER-MEEKS,
Contestee,

MOTION TO DISMISS NOTICE OF CONTEST
REGARDING THE ELECTION FOR REPRESENTATIVE
IN THE 117th CONGRESS FROM THE
SECOND CONGRESSIONAL DISTRICT OF IOWA

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Introduction

Congresswoman Mariannette Miller-Meeks won Iowa's Second Congressional District election. A full recount reaffirmed her victory, and the bipartisan State Board of Canvass certified her win. At every step of the process, and under the laws of Iowa, Congresswoman Miller-Meeks has been declared the rightful winner. And she has the election certificate to show for it. Indeed, this House has accepted the results from the State Board of Canvass for all four of Iowa's Members in this body (including a member of the majority party).

Contestant Rita Hart now wants this body to take that certificate away from Congresswoman Miller-Meeks, disregard state laws and processes, overturn Iowa's certified election results and declare that the seat is Hart's. Hart claims there are votes that should have been counted (for both parties, but of course more for her) and she asks the House of Representatives to conduct *another* recount under different rules and procedures than the first two counts conducted in this race, simply because she does not like how the first two counts turned out.

Those claims should be rejected summarily and this contest dismissed.

If Hart wanted to challenge the legality of specific ballots or make legal arguments about the sufficiency of the recount, then she should have brought those claims before the Iowa contest court. This is precisely what Iowa's contest court is designed for. Indeed, the House of Representatives has said over and over—and for

good reason—that it will not intervene in an election if the losing party has not first exhausted all state remedies. Under the Constitution, Congressional elections are conducted under state law, so it is natural (and preferable) that state judges first decide any dispute about the results. Review by the states promotes public confidence and integrity in the election process, because the public trusts and expects that the judiciary and its politically independent judges¹ will first weigh in on matters of state election law. Requiring losing parties to exhaust state processes first also gives this Committee the benefit of the facts and state law should the losing party still decide to file a contest in the House.

But Hart has ignored that. She skipped over Iowa's court system, rated one of the most fair and independent in the country, and brought her legal claims straight to this body. *That* fact cannot be ignored, and it is a decision that the House should not condone.

If losing candidates can shield their claims from independent judges when the House is controlled by their party, then they will. A parade of contests will in the future proceed here any time there's a close election and the losing candidate's party

¹ Iowa's judges are not elected but instead selected under a merit-selection process, where "a commission composed of nonpartisan Iowans makes a study of the credentials of the individuals who are nominated for judicial office. The commission then nominates the individuals whom it finds best qualified and sends their names to the governor for final selection." Iowa Judicial Branch, *Judicial Selection and Retention*, <https://www.iowacourts.gov/for-the-public/judicial-selection-and-retention>.

holds the majority in the House. The effect of this gamesmanship will be to severely undermine the public's confidence in our election process.

If this Committee thinks this is hyperbole, take a look at how Hart's decision to skip Iowa's courts is being received in Iowa. The members of the *Des Moines Register* editorial board, having endorsed Hart before the election and having heard from her attorney, said that Hart should concede because of her decision not to file a state contest first. Going through the Iowa judicial contest process, the Editorial Board said, "would have demonstrated a commitment to having neutral Iowa arbiters resolve vote-counting problems instead of out-of-state partisans."² And they noted that "the option to go to the House would have still been available," so there was no risk to Hart—other than the risk of receiving an unfavorable ruling from Iowa's independent judiciary. As this Committee said many years ago in another contest involving an Iowa seat: "It would be a strange rule which would permit the substitution of the judgment of contestant for the decision of the courts of Iowa in construing the provisions of the Iowa law." *Swanson v. Harrington*, H.R. Rep. 76-1722.

Because Hart chose not to exhaust state remedies, she has failed to state grounds that are sufficient to overturn the result and she has failed to claim the right

² Editorial Board, *Rita Hart's appeal to Congress doesn't have a happy ending, especially after she passed over Iowa judges. She should concede.*, DES MOINES REGISTER, Dec. 12, 2020, <https://www.desmoinesregister.com/story/opinion/editorials/2020/12/12/iowa-2nd-congressional-district-election-rita-hart-challenge-error-editorial/3875981001/>

to this seat. *See* 2 U.S.C. § 383(B). The House should thus take no further action. It should dismiss the contest and fully recognize what the people of Iowa already have: that Congresswoman Miller-Meeks represents Iowa's Second Congressional District.

Factual and Legal Background

I. Contested House Elections and Exhaustion

Hart is not the first Iowan to file a contest in the House, and this is not the first time a contestant has failed to exhaust state remedies (and thus had their contest dismissed).

In 1938, Republican Albert Swanson filed a contest in the House after losing the race to Democrat Vincent Harrington for Iowa's Ninth (yes, ninth) Congressional District. The district's 13 county boards of supervisors had canvassed the votes and the Governor had issued an election certificate to Harrington, but Swanson filed a notice of contest with this body, alleging 52 counts of fraud, misconduct, and illegality. He also asked for a full recount of the district. *Swanson v. Harrington*, H.R. Rep. 76-1722.

Swanson had not asked for a recount under state law, nor had he filed an election contest with state courts, but he argued that Iowa law could not be construed to allow such processes and thus he should not be faulted for failing to file a court action. The Committee disagreed, concluding that, before going to the House, Swanson should have "establish[ed] that the door was closed to relief in the nature of obtaining

a recount under the laws of Iowa” from Iowa’s courts. *Swanson*, H.R. Rep. 76-1722 p.2. He had not even attempted to do that, so the Committee recommended, and the House decided by voice vote, to dismiss the contest. *Id.* “It would be a strange rule which would permit the substitution of the judgment of contestant for the decision of the courts of Iowa in construing the provisions of the Iowa law,” the Committee wrote. *Id.*

In addition to Swanson’s failure to exhaust state remedies (or to even try), the Committee also suggested that it would not have ordered the recount in any event. “It is a well-settled principle established by the precedents and accepted by the Congress that an application for a recount must be founded upon some proof sufficient at least to raise a presumption of irregularity or fraud, and a recount will not be ordered upon the mere suggestion of possible error.” *Id.* at p. 3. Quoting its report in *Frank v. LaGaurdia* (68th Cong., 6 Cannon’s Precedents § 164), the Committee stated that “[i]t has been said again and again by the House, by the courts, by every tribunal that has the duty of passing upon contested elections, that the returns which are made by the inspectors, regularly appointed by the laws of the State where the election is held, are presumed to be correct until they are impeached by proof of irregularity and fraud.” *Id.* The race between Swanson and Harrington was close, but the House determined that it “will not erect itself nor will it erect its committees as mere boards of recount.” *Id.* at p 4 (quoting *Bailey v. Walters*, (Cannon’s Precedents § 166)).

Almost 20 years later, another Iowan tried his hand at contesting a Congressional election in the House. Steven Carter, having lost in Iowa's Fourth Congressional District to Karl LeCompte, alleged that state-certified election results should be overturned because, among other things, county officials made mistakes in counting ballots, mishandled absentee voting, and created ballots that did not comply with Iowa law. Carter had not pursued these claims in state court, so the issue of exhaustion came up again. But unlike Swanson 18 years before, Carter had done the work to show that Iowa had no post-election contest. He solicited and received an opinion from the Iowa Attorney General, which stated that "[n]o statutory provision exists in Iowa for a determination of an election contest for a seat in the national House of Representatives," so the "[p]ower to determine such contest lies exclusively in that branch of the government." *Carter v. LeCompte*, H.R. Rep. 85-1626.

Because of the Iowa Attorney General's opinion, the Committee allowed Carter to file the contest without first going through Iowa's judicial system. But even that did not end Carter's exhaustion problems. One of his claims—that the ballots were not designed correctly—was an issue that Carter could have, and as it turns out should have, challenged in state court before the election. Because Carter did not avail himself of the judicial process before complaining to the House, the Committee recommended, and the House voted, not to hear his complaint on that issue. The Committee emphasized that "[f]ailing to exhaust the remedies available to him under State law,

the final election having been held, with no allegations or evidence of fraud, and the results proclaimed, the committee is of the opinion that the results of that election cannot be overturned.” *Carter*, H.R. Rep. 85-1626 (quoting *Huber v. Ayres*, H.R. Rep. 82-906).

Following the Committee’s decision, and in the wake of one Congressman calling out Iowa as being just one of four states at the time that “do not provide methods for resolving serious questions concerning election of Representatives in Congress” (104 Cong. Rec. 11513, 85th Cong. 2d Sess.), Iowa added Congressional races to its state contest statutes, finally providing a judicial contest process that still exists today (which Hart chose to ignore).

As it stands now, if a Congressional candidate wants to challenge the results of an election, he or she may do so by filing a notice of contest in Iowa’s judicial system, which, by statute, will be heard by the Chief Justice of the Iowa Supreme Court and four district court judges selected by the Iowa Supreme Court. Iowa Code § 60.1. The contest court has broad discretion to consider matters ranging from misconduct and fraud to wrongly rejected votes. Iowa Code § 57.1. Indeed, a contestant can challenge “any error in any board of canvassers in counting the votes, or in declaring the result of the election” or “any other cause or allegation which, if sustained,” would change the result. Iowa Code § 57.1.

II. Overview of Iowa's Election Process and this Election

To fully understand the magnitude of what Hart is asking the House to do—overturn Iowa's certified election results—it is important to understand the breadth and fairness of Iowa's election process, the amount of time and effort that goes into it, and what happened in this election. This is because “[w]ith respect to election contests, Congress has repeatedly said that it will follow state laws and decisions of state courts unless they are shown to be unsound.” *Carney v. Smith*, H.R. Rep. 63-202; Cannon's Precedents, Ch. 162, §§ 91 and 92. “This deference applies to statutes, rulings concerning particular issues of ballot interpretation, and to the final determination of the winner of an election, as well as the official actions of state elections officials.” Deschler's Precedents, Ch. 9 §§ 57.3 and 59.1.

The Iowa election process is supervised by locally elected county auditors and the Iowa Secretary of State, Iowa Code §§ 47.1 and 47.2. The panels of local election workers must be bipartisan, and transparency is the hallmark of the process. Iowa Code § 49.12. Iowa's early voting and absentee voting laws are also generous: Iowa law does not require an excuse to vote absentee and permits voters to start voting on October 5, a full 29 days before Election Day. Iowa Code §§ 53.1. Iowans who vote by absentee ballot can also wait until the day before Election Day to send their ballot, which will then be counted as long as it arrives at the county auditor's office within six days of the election. Iowa Code § 53.17(2).

In 2020, under these procedures, Iowans voted in record numbers, with 75.77% of all eligible voters statewide casting a ballot.³ Pursuant to Iowa law, the 24 county boards of supervisors in this district completed their canvass and sent their vote tallies to the Iowa Secretary of State by Tuesday, November 10, 2020. The results showed that Miller-Meeks received 196,862 votes and that Hart received 196,815 votes, a margin of 47 votes for Miller-Meeks. Despite already knowing the likely results before the official canvass, Hart waited until the last day, November 12, to request a full district-wide recount.

That request triggered the selection of bipartisan recount boards in each of the district's 24 counties. Iowa Code § 50.48. Under Iowa law, Congressional recounts are not automatically done district-wide; instead, the challenger can limit herself to specific counties or even specific precincts. Iowa Code § 50.48(1)(a). And even where the challenger requests a recount in all counties and all precincts, each county has its own recount board that governs the process. *See*, Iowa Administrative Code 721—26-100 *et seq.* That board is composed of three people: one designee from each campaign and a third member who is agreed to by the campaign designees or, failing agreement, is selected by the chief judge of the district. Iowa Code § 50.48(3)(b).

³ <https://sos.iowa.gov/elections/pdf/2020/general/turnout.pdf>

Those 24 recount boards, which are assisted by the county auditor, each have the option to conduct the recount by machine or by hand. Iowa Administrative Code 721—26.105(2). And, if the board believes it is prudent, it can count some precincts within the district by hand and some by machine. Iowa law specifically gives its recount boards that flexibility, and it gives the campaigns—through their designees—the ability to influence that process. *See* Email from Secretary of State General Counsel, Molly Widen, Nov. 20, 2020, included the appendix (noting that recount boards may count ballots by hand or machine and make that determination on a precinct-by-precinct basis); *see also* Letter from Molly Wide to Hart Counsel Shayla McCormally, included in the appendix.

Hart took full advantage of that flexibility. Through her designees, she decided the process would not be the same in each county. In 14 of the 24 counties, all rural and where the outcomes favored Miller-Meeks, Hart’s designees advocated for or agreed to a machine recount.⁴ In the other counties, especially the more populous ones

⁴ *See* Affidavit of Craig Schoenfeld, Appanoose County; Affidavit of Bill Barglof, Cedar County; Affidavit of Matt McKinney, Clarke County; Affidavit of David Sivright, Clinton County; Affidavit of Trudy Caviness, Davis County; Affidavit of Logan Murray, Decatur County; Affidavit of Kendra Jahn, Des Moines County; Affidavit of Brett Marshall, Henry County; Affidavit of Paula Dierenfeld, Jasper County; Affidavit of Lee Dimmitt, Jefferson County; Affidavit of Derek Muller, Johnson County; Affidavit of Patricia Lipski, Keokuk County; Affidavit of Tim Coonan, Lee County; Affidavit of Tom Sands, Louisa County; Affidavit of Adam Freed, Lucas County; Affidavit of Natalie Ginty, Mahaska County; Affidavit of Daniel Huitink, Marion County; Affidavit of Brittany Lumley, Monroe County; Affidavit of C.J. Ryan, Muscatine County; Affidavit of Laura Kamienski, Van Buren County; Affidavit of Trudy

where the outcomes appeared to favor Hart, Hart’s designees pushed for and usually received some form of manual recount or hybrid process where the board members reviewed ballots that had registered as “undervotes” or “overvotes.”⁵

In Johnson County, the district’s second largest and Iowa’s most Democratic-leaning, Hart’s designee advocated for a manual review of each ballot and received agreement from the third board member to do so. (Affidavit of Derek Muller.) The three-member board carefully inspected 84,197 ballots, putting their eyes on each one of them—just as Hart wanted. *Id.* But in rural Wayne County, which Miller-Meeks carried with 2,050 votes to Hart’s 726,⁶ Hart’s designee was the first member of the board to recommend a machine recount, which the board voted to do. (Affidavit of Nancy Dieleman.)

That story played out again and again: Hart, through her designees, generally got the recount procedure she wanted. In all, 72 Iowans in a bipartisan fashion spent more than a week counting votes, with the assistance of the local county auditors and their staff and the Secretary of State, who traveled from county to county to observe the

Caviness, Wapello County; Affidavit of Sandy Greiner, Washington County; Affidavit of Nancy Dieleman, Wayne County.

⁵ Overvotes occur when the voter, often because he or she changed their mind or made a mistake, votes for two candidates. An undervote occurs when the voter decides not to cast a vote in that particular race, something that happens in every election and with great frequency, especially as voters move down the ballot.

⁶ <https://sos.iowa.gov/elections/pdf/2020/general/canvsummary.pdf>.

recount process. When each board had finished recounting, following substantially the processes suggested by Hart's representatives, Miller-Meeks was in the lead by six votes, and the bipartisan State Board of Canvass—composed of the Governor, the Secretary of State, the State Treasurer, the Secretary of Agriculture, and the State Auditor—certified the results. Iowa Code § 50.37.

Once the result of the race has been certified, the losing candidate may contest the outcome of the election before a contest court. Iowa Code Chapters 57 and 60. For federal offices, the contest court is the Chief Justice of the Iowa Supreme Court and four district court judges selected by the Iowa Supreme Court. Iowa Code § 60.1. The law permits the losing candidate to assert a variety of claims about the conduct of the election, including acts of elections officials and workers, decisions made by recount boards, misconduct by candidates, or *any* other error in declaring the result of the election. Iowa Code § 57.1(2). For federal candidates, the contest court must decide the contest by six days before the first Monday after the second Wednesday in December. Iowa Code § 60.5. This year, that date fell on December 8, 2020.

Not satisfied with the recount process that she had largely directed, Hart skipped over Iowa's contest court and filed a contest with this body. Although she did not let Iowa's courts weigh in, Hart is now claiming that there are 22 ballots that should have been counted under Iowa law, but were not. And despite the fact that there is no allegation of fraud or misconduct on behalf of the bipartisan recount

boards, and despite the fact that Hart agreed to a machine recount of the majority of the district's counties, she now wants another recount--this one all by hand, and contrary to what she advocated for under Iowa's system.

Argument

Contestant Rita Hart brings her claims under the Federal Contested Elections Act. The FCEA, codified at 2 U.S.C. §§ 381-396, guides the House in its exercise of its constitutional authority to be the "Judge of the Elections, Returns and Qualifications of its own Members..." U.S. Const., Art. I, § 5. Among the procedural mechanisms available to a Member whose election is challenged under the FCEA is a motion to dismiss the contest. 2 U.S.C. § 383(b). "[T]he burden of proof is upon the contestant in the first instance to present sufficient evidence, even prior to the formal submission of testimony under the statute, to overcome the motion to dismiss, since exhaustive hearings and investigations should be avoided where contestant cannot make a prima facie case." Deschler's Precedents, Ch. 9 § 25.

"Allegations without substantiating evidence are insufficient to meet the requirement of a burden of proof as against a motion to dismiss." *Anderson*, H.R. Rep. 104-852. Asking this House to investigate an election contest is no small thing. It consumes valuable legislative time better spent on the pressing needs of the American people. This is why "[i]n order to keep frivolous cases from reaching discovery, the Committee standard [on a motion to dismiss] incorporates the component of

credibility into the review of a contestant's allegations similar to the standard a judge would utilize in reviewing the evidence at issue in a Rule 56 motion for summary judgment." *Dismissing the Election Contest against Charlie Rose*, H.R. Rep. 104-852.

State certified election results "are presumed to be correct until they are impeached by proof of irregularity and fraud," and "the mere closeness of the result of an election raises no presumption of fraud, irregularities or dishonesty." *Chandler v. Burnham*, H.R. Rep. 73-1278. Because Hart did not first bring her claims to Iowa's contest court, and because she has alleged no violation of Iowa law during the recount (only that the race is close), Hart has not met even her initial burden to state grounds sufficient to change the results of the election or to claim a right to Congresswoman Miller-Meeks' seat. *See*, 2 U.S.C. 383(b).

III. Hart's entire contest must be dismissed because Hart skipped Iowa's judicial process.

Overturning a state certified election is, as this body has already recognized, "a dangerous power" that "should be exercised only in an extreme case." *Chandler v. Burnham*, H.R. Rep. 73-1278 (1934). Hart does not seem to understand that. If she did, she would not be asking the House to overturn Iowa's certified results without first having taken her claims to Iowa's independent judiciary.

A. This House has repeatedly required contestants to exhaust state procedures before filing a contest.

The House has consistently dismissed election contests where the contestant has failed to exhaust remedies under state law. This committee's examination of the exhaustion requirement has caused it to examine the law of Iowa on two prior occasions. This experience, in turn, caused the Iowa legislature to specifically provide a legal mechanism for candidates for federal office to contest an election result.

1. Statutory basis for an exhaustion requirement.

The House has derived an exhaustion requirement from two provisions of the FCEA. To be sufficient, a contestant's notice of contest must state (among other things) grounds sufficient to change the result of the election and the contestant must claim a right to the seat. 2 U.S.C. § 383(b)(3) and (4). This provision was included in the FCEA because prior experience with election contests had taught "that if the contestant had been required at the outset to make proper allegations with sufficient supportive evidence that could most readily have been garnered at the time of the election such further investigation would have been unnecessary and unwarranted."

Tunno v. Veysey, H.R. Rep. 92-626.

"The requirement that the contestant make a claim to the seat is not a hollow one. It is rather the very substance of the contest." *Id.* As this committee noted, "a contest for a seat in the House of Representatives is a matter of most serious import

and not something to be undertaken lightly. It involves the possibility of rejecting the certified returns of a state and calling into doubt the entire electoral process. Thus, the burden of proof placed on the contestant is necessarily substantial.” *Id.*

Nothing could undermine the duty placed on a contestant more than permitting her to bypass available state procedures to raise and resolve factual and legal complaints about the conduct of the election. This House has wisely, both before and after the adoption of the FCEA, dismissed election contests where the contestant failed to pursue available state remedies first.

2. The precedents of the House, both before and after the adoption of the Federal Contested Elections Act, uniformly require a contestant to exhaust state procedures before filing a contest with the House.

In *McLean v. Bowman* the committee considered a contest premised, in part, on the dual nomination of the contestee by the Republican and Prohibition parties. Cannon’s Precedents, Ch. 163 § 98 (H.R. Rep. 62-1182). A different candidate had originally been nominated by the Prohibition Party, but the Republican nominee was later substituted for him. The contestant claimed that the nomination violated both Pennsylvania law and the rules of the Prohibition Party. The committee declined to entertain this argument. “The legality of the substitution should, however, have been tested by filing objections to the nomination papers with the proper official under the laws of Pennsylvania and the contest carried, if necessary to the courts of that

State...with the legality of the nomination unassailed in the proper tribunal, and the absence of specific proof of fraudulent counting of these votes, they cannot be rejected.” *Id.*

Similarly, in *Swanson v. Harrington* (Deschler’s Precedents, Ch. 9 § 50.4 (H.R. Rep. 86-1722)), “the committee found that contestant had not exhausted his remedy of seeking a recount through the state courts, as permitted by the Iowa code, prior to appealing to the committee to itself order a recount.” The contestant claimed that Iowa law did not permit him to contest a federal election. The committee found he “should not be permitted to substitute his own construction of state law for that of the state courts.” In other words, it was not enough for a contestant to simply assert that state law was insufficient to address his claims.

The committee rejected a contest premised on a violation of state law requiring the rotation of candidate names on the ballots in *Huber v. Ayers* (Deschler’s Precedents, Ch. 9 § 56.1 (H.R. Rep. 97-10494)). Noting the contestant’s failure to take advantage of a state law “which provided for the publication and display of ballots for a 24-hour period before the election,” the committee found the contestant had not protested the ballots to the state board of elections or sought recourse from the courts. “Failing to exhaust the remedies available to him under State law, the final election having been held, with no allegations or evidence of fraud, and the results proclaimed,

the committee is of the opinion that the results of that election cannot be overturned because of some preelection irregularity.” *Id.*

As noted above, the availability, or lack thereof, of a contest mechanism for federal candidates in Iowa law again figured into the committee’s examination of the exhaustion requirement in *Carter v. LeCompte* (Deschler’s Precedents, Ch. 9 § 57.1 (H.R. Rep. 103-1217)). The contestant produced the written opinion of the Iowa Attorney General that “the laws of Iowa contained no provision for contesting a House seat.” Because of this, the committee found that the election contest was correctly presented to it and distinguished the ruling of the committee in *Swanson*, “which had required the contestant there to show that the Iowa election laws did not permit him a recount when he had not sought recourse to the highest state court regarding the application of state laws to a House contest.”

But it must be noted that the lack of an Iowa statute permitting federal candidates to contest election results did not excuse the contestant’s failure to take advantage of other provisions of Iowa law available to him “to prevent improper absentee ballots from being cast or to punish those responsible. As contestant had not proven fraud by contestee and had not challenged absentee ballots under state law, he had not sustained his burden of proving that the election results would have been different.” Citing the contest of *Huber v. Ayers* in the 82nd Congress, “the majority determined that contestant had not properly entered objections to errors in the form of

the absentee ballots prior to the election, as permitted by Iowa law, and that therefore the results of the election could not be ‘overturned because of some preelection irregularity.’”

The committee then drove home the point that a contestant must do everything possible under state law. It “pointed out that contestant had not sought a legal opinion from the state attorney general regarding administration of the election laws, which opinion would have been binding on the local election officers.” The committee therefore recommended the election contest be rejected. It should be noted that the Iowa legislature later amended Iowa law to specifically permit the contest of elections for Senator and Member of Congress. *See*, Iowa Acts 1970 (63 G.A.) Ch. 1039 § 53. It was this statute that Hart chose to avoid before filing her contest with the House.

Hart’s notice of contest does not address this failing. She devotes not a single word to explain to the committee why she did not raise her issues before the Iowa courts.

B. Allowing Hart to bypass Iowa’s judicial contest process would reduce the public’s confidence in the outcome of our elections and have enormous consequences for the House.

The reasons for requiring exhaustion are self-evident. If this body were to allow Hart to ignore Iowa’s judicial process now, what are Iowans supposed to think? What are residents of any other state supposed to think? That their procedures and laws do not matter? That the power of the current political majority is the only precedent with

any value? That is certainly the message it sends, as the *Des Moines Register* editorial board said so well, when it too called on Hart to concede and stated that filing an election contest in Iowa state court “would have demonstrated a commitment to having neutral Iowa arbiters resolve vote-counting problems instead of out-of-state partisans.” Editorial Board, *Rita Hart's appeal to Congress doesn't have a happy ending, especially after she passed over Iowa judges. She should concede.*, DES MOINES REGISTER, Dec. 12, 2020.⁷

The *Register* was not alone. The editorial board of the *Dubuque Telegraph Herald*, which is outside Hart’s district but endorsed former Democrat Congresswoman Abby Finkenauer, said that it was an “inappropriate move” for Hart to “take the outcome of this election out of the hands of Iowans” by “sidestepp[ing] Iowa’s process for appeal, which would have sent the question to Iowa’s fair and impartial court system.” *Telegraph Herald, Our opinion: Keep politics out of voting, elections process -- no matter the race*, Dec. 20, 2020.⁸ The editorial board noted, without hiding the sarcasm, that instead of filing a contest in Iowa's court system, she “file[d] a petition directly with the U.S. House of Representatives—which *just happens* to be under Democratic control.” *Id.*

⁷ <https://www.desmoinesregister.com/story/opinion/editorials/2020/12/12/iowa-2nd-congressional-district-election-rita-hart-challenge-error-editorial/3875981001/>

⁸ https://www.telegraphherald.com/news/opinion/article_9c0f7840-dca9-576f-acd9-59a4b4d24b1e.html

If these editorial boards, which frequently agree with Hart’s political views, are so cynical of Hart’s motives and of this process, imagine how the majority of Iowans in the Second Congressional District feel. Imagine how all Americans will feel, regardless of state or party, if the House allows Hart to trade a judicial process for a political one when her party happens to control the House with a narrow majority.

Apart from the message to Iowans, the House should also consider the message it sends to future disappointed Congressional candidates. Does the House really want to send the message that if your party is in the majority you can just avoid your state judicial process and bring your complaints to your political allies in Washington, D.C.? That, of course, is not the message this body wants to be sending. And it is not what this body should do. The public generally trusts its state judiciary—Iowans certainly do. There is no reason to break with this body’s precedents on exhaustion. Indeed, there is every reason to reaffirm them. To do otherwise would break more than 100 years of precedent, and essentially license future House majorities to resolve any close elections in favor of its party’s candidate.

C. Requiring exhaustion allows state judiciaries to resolve questions of state law before a contest is filed.

In her contest, Hart raises specific issues of Iowa law that relate to 22 specific votes. Each of these were suitable for resolution in a state contest proceeding. For example, she raises statutory interpretation issues about what it means to “properly

seal” an absentee envelope, when the county boards determined those should be set aside. She argues that voters should be allowed to return absentee ballots to a county auditor in a county different than the voter's county of residence, when the county boards decided those should not be counted. And she raises an issue of how a voter must sign his or her absentee ballot affidavit when the county board decided those ballots should not be counted. None of these issues of Iowa law have been reviewed by an Iowa court, precisely because Hart purposely avoided doing so. This leaves the House in a position of having to interpret and decide issues of Iowa election law for the first and final time, yet the House has repeatedly said that it will follow state laws and decisions of state courts unless they are shown to be unsound. *See Carney v. Smith*, H.R. Rep. No. 63-202, at 2586 (1914); *see also* Clarence Cannon, “Cannon’s Precedents of the House of Representatives of the United States,” Ch. 162 §§ 91 and 92 (quoted in *Kyros v. Emery*, H.R. Rep. No. 94-760); *accord*, *Roudebush v. Hartke*, 405 U.S. 15 (1972)

To alter this precedent now and depart from what this body has allowed in the past, would entirely change the nature of election processes for the U.S. House. House candidates—at least when their party has the majority of the House—would essentially be licensed and encouraged to bypass the state election ascertainment, recount and contest processes. As the House recognized years ago in another Iowa election contest: “It would be a strange rule which would permit the substitution of the judgment of

contestant for the decision of the courts of Iowa in construing the provisions of the Iowa law.” *Swanson*, H.R. Rep. 76-1722.

Strange indeed. And thus, the House should not let Hart ask this body to interpret and decide issues of state law without taking the opportunity to present those issues to the state courts and see the state processes through to conclusion.

Hart seems to suggest that the House should forgive her court-skipping strategy because the process would have been quick. And indeed, it would have been. But that is no excuse. In fact, the speed of the Iowa courts counsels against Hart’s position, not for it. The Iowa judicial system has shown in the recent past that it can work fast, even in important cases. In *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 847 (Iowa 2014), the Court submitted a detailed written ruling on a significant constitutional issue involving voting, and it did so in just five days after oral argument. And just this past election cycle, the Court decided several election cases in a matter of days. See *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204 (Iowa 2020) (decided five days after briefs submitted); *Democratic Senatorial Campaign Comm. v. Pate*, 950 N.W.2d 1 (Iowa 2020) (decided eight days after the appeal was filed). Iowa’s judicial system understands that justice delayed is justice denied; it is willing and able to issue its decisions quickly, even when they involve complex issues of Iowa law.

But regardless, Hart’s excuse—that she should be able to skip the judicial process because it moved too quickly—is just that: an excuse. It does not justify a

decision of this Committee and the House to allow Hart's contest to continue beyond the resolution of this motion. Had Hart gone through Iowa's judicial process, at least then we would know, and at least the Committee would have the benefit of the contest court's wisdom, of the outcome on the issues raised in Hart's contest. Indeed, there was no risk to Hart: had she gotten an unfavorable ruling, or had the court run out of time, she could have still filed a contest in this body. So what did Hart have to lose, other than an unfavorable ruling?

Which was exactly Hart's point. Consider Hart's request for a recount: she claims that the House should conduct another one because the Iowa process "lacked uniformity." But *she is the one who created the lack of uniformity*. In a majority of the counties, all of which were Republican-leaning, she readily agreed to, and often pushed for, a machine recount.⁹ But in the Democratic-leaning counties, her designees argued for and obtained other processes. For example, in Johnson County, the most Democratic-leaning in the State, the board counted all ballots by hand, at Hart's request. In Clinton County (where Hart lives) the board laid eyes on all the overvotes, undervotes, and write-in ballots. In Scott County (largest in the district and the second-most Democratic) the board did a partial hand recount, again at Hart's request.

⁹ The affidavits attached to Hart's Notice of Contest and this Motion demonstrate the varied recount methods agreed to by Hart's recount board representatives.

If Hart had gone to the judges of Iowa's contest court complaining about this lack of uniformity, they would have easily and swiftly dismissed that argument under basic legal principles like waiver and estoppel. Having pursued a deliberate recount strategy that only embraced hand counts in counties that favored her, no judge would have permitted her to shift course and demand hand counts everywhere. Of course, that is why Hart didn't file an election contest in the Iowa judiciary: She would have lost because, under basic principles of law, a party cannot complain about the "unfairness" of a process they advocated for and received. So she has decided to come directly to this body, asking it to act in the most partisan of ways.

The same goes for Hart's arguments about the 22 specific votes. Because of Hart's decision to skip Iowa's judicial contest, this body has no guide on the Iowa election law issues Hart is raising other than the determinations of the various county boards. But "House precedent is clear that election returns are presumed to be correct and that errors rebutting this presumption must be proven, not assumed." H.R. Rep. No 104-852. Hart's recount request is purely speculative. Her conjecture that something might turn up in her favor is not a reason for the House to disturb the determination, by Iowa officials, of this election's result.

IV. Hart cannot demonstrate she is entitled to this seat by merely pointing to routine election administration decisions that disfavored her.

Election officials routinely and properly enforce election laws. This is necessary to the orderly conduct of elections. “Because the ‘right to vote in any manner ... [is not] absolute’ and the government must play an ‘active role in structuring elections,’ election laws ‘invariably impose some burden upon individual voters.’” *Luft v. Evers*, 963 F.3d 665, 671-72 (7th Cir. 2020) (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

This is why in the election contest *Fox v. Higgins* (Deschler’s Precedents, Ch. 9 § 47.8 (H.R. Rep. 78-4185)) the committee did not disturb a determination by state officials that certain ballots “should have been rejected” due to a state law that prohibited voting more than one straight ticket. The committee rejected the testimony of voters whose ballots had been rejected as “unreliable” and based on conjecture. The committee noted that the allegedly confusing ballot design chosen by state officials was not the product of a deliberate choice to create confusion or for the purpose to favor a particular candidate. As a result, the committee did not add the votes, rejected by state officials, to the contestant’s total.

The committee’s consideration of *Gormley v. Goss* (Deschler’s Precedents, Ch. 9 § 47.9 (H.R. Rep. 78-4035)) is in accord. The contestant claimed that an election official had thrown the election to the contestee by repeatedly entering voting booths. The

committee found that many voters had solicited assistance in understanding a ballot question and that none of the observers from the contestant's political party had raised any objections during the election.

The committee has refused to overrule the decisions of state elections officials that enforced laws that required the voter's substantial compliance for his or her vote to be considered properly cast. In *Oliver v. Hale* (Deschler's Precedents, Ch. 9 § 57.3 (H.R. Rep. 85-2482)), the committee enforced requirements of state law for particular ballots to be counted but did not invalidate other ballots where the contestant claimed that officials had not followed directory provisions of the election code in certain respects. Such conduct by officials "at least in the absence of fraud, is not a sufficient ground for invalidating ballots."

Hart presents claims about 22 ballots. But she does not show, or claim, that these represent the only ballots where election officials engaged in the ordinary course of election administration. It is her obligation to demonstrate irregularities that are sufficient in number to change the outcome of the election. She has not done so. The committee is not required to engage in speculation that there were not other ballots cast for Miller-Meeks that were disallowed for the same reasons as the 22 identified by Hart.

Remember, under the FCEA Hart must demonstrate that she is entitled to this seat. 2 U.S.C. § 382(a). In other words, Hart makes no showing that these 22 ballots

are the only ones where elections officials made ordinary decisions applying Iowa election law and she makes no showing that if the committee were to add all such votes to the tally for both candidates that the result of the election would change. Hart's strategy, if not rejected, invites a troubling precedent where routine election administration decisions would provide an automatic path for the House to insert itself into every close election. This would be unwise.

V. Hart does not get another recount simply because the election is close and her first strategy failed.

In addition to her failure to file a contest with Iowa's court system, Hart's request fails for another reason: on its face, it does not meet the standards that this House has set to conduct a recount.

This body has made clear that it "will not erect itself nor will it erect its committees as mere boards of recount" and thus a "recount will not be ordered upon the mere suggestion of possible error." *Swanson*, H.R. Rep. 76-1722. That's because certified election results "are presumed to be correct until they are impeached by proof of irregularity and fraud," and "the mere closeness of the result of an election raises no presumption of fraud, irregularities or dishonesty." *Chandler v. Burnham*, H.R. Rep. 73-1278.

The precedents of the committee require a candidate to make a substantial showing of fraud or irregularity before ordering a recount. In *Weber v. Simpson*

(Deschler's Precedents, Ch. 9 § 47.16 (H.R. Rep. 73-1494)), the committee declined to order a recount despite claimed discrepancies in various precinct tally sheets. "The committee denied this request, finding no evidence of irregularities, intimidation or fraud in the casting of ballots." Similarly, in *Moreland v. Schuetz* (Deschler's Precedents, Ch. 9 § 52.3 (H.R. Rep. 78-1158)), the committee declined to order a full recount of ballots in the absence of fraud on the part of election officials in the administration of the election. "It is the duty of the contestant to produce evidence sufficient to support the allegations set forth in his petition, and, as this committee has heretofore held, it is not the duty of this committee to take upon itself the obligation of securing evidence for either party."

The committee's consideration of *Stevens v. Blackney* (Deschler's Precedents, Ch. 9 § 55.3 (H.R. Rep. 81-1735)) is particularly relevant. The contestant identified a tabulation error in certain precincts, that had been detected by local election officials and corrected before the official returns were prepared. The contestant claimed, without evidence, that similar tabulation errors must have occurred in other precincts. A recount by the committee, he claimed, would find these errors.

This committee wisely rejected the request. "Contestant submitted no evidence, however, that the law of Michigan had been violated either in the appointment of bipartisan election officials or in allowing challengers of contestant's party to be present in any of the remaining 200 precincts. Thus, the majority of the committee

applied a principle of evidence to presume that the failure of contestant to produce party election officials and challengers from any of the 200 precincts as witnesses must have been ‘because their testimony would show an honest and fair count.’” Both the majority and minority members of the committee agreed that “the probability of error should first be shown, that a Member whose election has been certified should not be subject to ‘fishing expeditions,’ that the committee would be overburdened with ‘frivolous contests,’ that an unwise precedent would be set, and that there is no proof that a House-conducted recount would be more accurate.”

That an election’s result is close does not make it irregular. Hart’s stated reasons for a recount are nothing more than a restatement of the decisions she herself made during the Iowa recount process. She complains about a “marked and troubling lack of uniformity across the 24 county” recount (Contest ¶ 112) but, again, Hart’s designees advocated for and were the clear root cause of the lack of uniformity. Through her designees, Hart agreed to and, in some cases, outright advocated for, a machine recount in 14 of the 24 counties; and she advocated for a hand recount in the other, mostly Democratic-leaning counties. The only troubling thing about the recount process is that Hart is now arguing that *because of her recount strategy*, the House has to overturn the election and conduct now a third counting of the ballots.

Yes, this is as illogical as it sounds, and this body should reject the argument out of hand. Indeed, it already has. In *Hansen v. Stallings*, contestant Vernon Hanson

requested that the House conduct a recount of the entire Congressional district because a partial state recount, which Hanson had requested, changed the voting margin. Under Idaho law, Hanson could have requested a full recount, but he chose to focus only on those precincts that he believed were more favorable to him. “Obviously he has multiple incentives to pick those precincts which he believes will best support his position or claim,” the Committee wrote in its report. H.R. Rep. 99-290.

Once the partial recount was complete, and Hanson was still not leading, he asked the Idaho courts for another recount. They said no. Hanson then asked the House; it said no too, deciding that the House was not going to take up a recount simply because Hanson’s original partial-recount strategy did not work. *Id.*

Hart’s claim is similar, if not worse. She criticizes Iowa’s process, calls Iowa’s election workers “haphazard,” and faults the bipartisan recount boards for doing exactly what Iowa law allows them to do and *exactly* what Hart asked them to do, which is to count some precincts by hand and some by machine. For her to ask the House now to step in and conduct a third count of the ballots is insulting to Iowa voters, Iowa election officials, and the dozens of volunteers who spent days and weeks on this recount.

Even if Hart had not been the one requesting the lack of uniformity, her argument would still fail because there was no irregularity. Iowa law specifically allows the recount boards to do what they did. No laws were broken or rules ignored.

Certainly nothing happened serious enough for this body to conduct another recount, and Hart has not raised the specter of fraud.

If Hart thinks that Iowa's recount statutes are somehow unconstitutional, as her contest suggests at times (*see* Contest ¶¶ 114-116), then that claim should have been brought to Iowa's contest court, or to any court of competent jurisdiction for that matter. Raising a constitutional issue of this magnitude for the first time in a House election contest is inappropriate and should not be countenanced by this body. It is not and should not be the purview of the House to start declaring state laws unconstitutional so that the majority party can increase its numbers.

Finally, the fact that there were "undervotes" and "overvotes" is not an irregularity, unless the House is prepared to call every election irregular. It is the normal course, and nothing under Iowa law requires recount boards to review each under- and over-vote by hand. The fact that Hart believes that doing so might—just *might*—turn one of those under or over-votes into a vote for her is nothing more than the "mere suggestion of possible error" that the House has said is not enough to order a recount. *Swanson*, p.3. And again, "the mere closeness of the result of an election raises no presumption of fraud, irregularities or dishonesty." *Chandler v. Burnham*, H.R. Rep. 73-1278.

It was indeed a close election, but it is over. Iowa has certified Congresswoman Miller-Meeks as the winner. Without credible allegations of fraud or irregularity, there

is no basis for the House to “just take one more look.” Doing so would have serious consequences for the confidence Iowans and the country have in their elections. And it would make this body a common court for election disputes. Election contests would become all-too common, especially when the losing candidate in any single race happens to be of the party then in the overall majority. The notion that the House should decide all close contests sitting as a court and ordering recounts is something we can all agree is not healthy for the democratic processes that give legitimacy to our form of government.

Conclusion

Hart’s failure to exhaust her remedies under Iowa law is fatal to her contest. So, too, is the speculative and inconsistent nature of her request for another recount. The House has wisely placed itself as the forum of last, not first, resort for the adjudication of disputes about the elections of its Members. The election processes of states should be honored, most of all by those who would serve in this House. Hart’s notice of contest should be dismissed.

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