IN THE

United States House of Representatives

JAMES "JIM" OBERWEIS,

Contestant,

v.

LAUREN UNDERWOOD,

Contestee.

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

MARC E. ELIAS
STEPHANIE I. COMMAND
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 800
Washington, D.C. 20005
Telephone: (202) 654-6200

ABHA KHANNA
JONATHAN P. HAWLEY
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, Washington 98101
Telephone: (206) 359-8000

February 3, 2021

TABLE OF CONTENTS

INTRODUCTION

In the November 3, 2020 general election, Contestee Lauren Underwood, the incumbent representative from Illinois's Fourteenth Congressional District, defeated Contestant James Oberweis by 5,374 votes. The election was fair, free, and properly administered by dedicated election workers in accordance with applicable laws and procedures. And at the end of the day, after the votes were counted by the seven counties entrusted to administer the election, the people of the district made their voices heard, and Representative Underwood won.

Mr. Oberweis now seeks to undo the election through a baseless contest that is both procedurally and substantively irredeemable. As a threshold matter, he failed to properly serve Representative Underwood, which in and of itself warrants dismissal of his contest at the outset. But even setting aside this dispositive procedural error, Mr. Oberweis's substantive claims are plainly inadequate and must be dismissed. Accepting his allegations as true, his contest notice—which does not demonstrate that even a *single* unlawful ballot was cast or counted, let alone 5,374—does not plead facts sufficient to change the election result and thus falls well short of the minimum showing required to sustain a contest in the U.S. House of Representatives. Because his paltry evidentiary submission provides no proof of fraud or irregularity, Mr. Oberweis must instead rely on speculative allegations that he hopes *might* eventually yield evidence that supports his claims. But this is not how House contests operate; the burden at this stage is on Mr. Oberweis, and he has failed to satisfy any standard of review that might be applied to his notice of contest.

Ultimately, Mr. Oberweis repeatedly misinterprets both the law and the facts, mischaracterizing evidence, improperly interpreting data and statistics, and betraying a hopeless misunderstanding of Illinois's election statutes and voting requirements. He has failed to plead—

let alone prove—grounds sufficient to change the result of the election, and his contest must be dismissed.

State and federal courts across the United States have summarily rejected unsubstantiated challenges to the results of the November election, including claims similar to those raised in this contest.[1] Because Mr. Oberweis's notice was improperly served and lacks sufficient allegations and evidence to support his contentions, the U.S. House of Representatives should do the same and dismiss his contest notice.

LEGAL BACKGROUND

The Federal Contested Elections Act of 1969 ("FCEA"), 2 U.S.C. §§ 381–396, governs adjudication of election contests in the House. Because "there is an institutional deference to, and

[1] *See, e.g.*, *Law v. Whitmer*, No. 82178, 2020 WL 7240299, at *1–2, *12 (Nev. Dec. 8, 2020) (affirming district court's dismissal of election contest challenging President Joe Biden's victory in Nevada, including its rejection of claims regarding nonresident voters, where contestants failed to provide evidence that any voters were actually ineligible to cast ballots); *Bowyer v. Ducey*, No. CV-20-02321-PHX-DJH, 2020 WL 7238261, at *1 (D. Ariz. Dec. 9, 2020) (rejecting effort to "set aside the results of the 2020 General Election" where "the Complaint's allegations are sorely wanting of relevant or reliable evidence"); *King v. Whitmer*, No. 20-13134, 2020 WL 7134198, at *1, *13 (E.D. Mich. Dec. 7, 2020) (rejecting plaintiffs' "claims of widespread voter irregularities and fraud in the processing and tabulation of votes and absentee ballots" and noting that "this lawsuit seems to be less about achieving the relief Plaintiffs seek—as much of that relief is beyond the power of this Court—and more about the impact of their allegations on People's faith in the democratic process and their trust in our government"), *appeal docketed*, No. 20-2205 (6th Cir. Dec. 10, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 4:20-CV-02078, 2020 WL 6821992, at *1, *10–13 (M.D. Pa. Nov. 21, 2020) (rejecting effort "to discard millions of votes legally cast by Pennsylvanians," including claims that certain counties violated equal protection principles by expanding access to franchise, where plaintiffs "presented [] strained legal arguments without merit and speculative accusations, unpled in the operative complaint and unsupported by evidence"), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Commonwealth*, 830 F. App'x 377 (3d Cir. 2020); *Wood v. Raffensperger*, No. 1:20-cv-04651-SDG, 2020 WL 6817513, at *12–13 (N.D. Ga. Nov. 20, 2020) (denying motion to halt certification of Georgia's election results where plaintiff could not show likelihood of success on merits and failed to demonstrate "a legally cognizable harm, much less an irreparable one"), *aff'd*, 981 F.3d 1307 (11th Cir. 2020).

a 'presumption of the regularity' of state election proceedings, results and certifications," "[a]n election certificate from the authorized state official . . . is deemed to be prima facie evidence of the regularity and results of an election to the House." Jack Maskell & L. Paige Whitaker, Cong. Rsch. Serv., RL33780, *Procedures for Contested Election Cases in the House of Representatives* 2 (2010); *accord* 2 *Deschler's Precedents* ch. 8, § 15, H.R. Doc. No. 94-661, at 946 (1994) ("Once Congress meets, the certificate constitutes evidence of a prima facie right to a congressional seat in the House."). Accordingly, under the FCEA, "the burden is upon contestant to prove that the election results entitle him to contestee's seat." 2 U.S.C. § 385.[2]

A contestant's notice of contest must "state *with particularity* the grounds upon which contestant contests the election." 2 U.S.C. § 382(b) (emphasis added). As one recent contest report explained,

> [u]nder the FCEA, it is not sufficient for a Contestant merely to allege irregularities or fraud in an election. The Contestant must claim a right to the office. The Contestant must support this claim with specific credible allegations of irregularity or fraud that, if proven true, would entitle the Contestant to the office. Unless a Contestant credibly claims in his Notice of Contest a right to the office, the House of Representatives will dismiss the Contest.

Project Hurt v. Waters, H.R. Rep. No. 113-133, at 3 (2013); *see also Anderson v. Rose*, H.R. Rep. No. 104-852, at 6–7 (1996) (noting that "[t]he credibility element of the test allows for consideration of evidence confirming or refuting allegations of election errors or fraud" and that "[a] contestant must provide specific, credible allegations" and cannot rely "on general, or disproven claims of fraud or irregularities"); *Pierce v. Pursell*, H.R. Rep. No. 95-245, at 4 (1977)

[2] A pre-FCEA House contest listed three "postulates deemed established by law and the rules and precedents of the House of Representatives": (1) "[t]he official returns are prima facie evidence of the regularity and correctness of official action"; (2) "election officials are presumed to have performed their duties loyally and honestly"; and (3) "[t]he burden of coming forward with evidence to meet or resist these presumptions rests with the contestant." *Gormley v. Goss*, H.R. Rep. No. 893, at 2 (1934).

(Republican minority stating that contestant must "allege [] specific irregularities justifying the conclusion that the result of the election was in error" and that "an allegation of fraud or mistake on the basis of information and belief alone is insufficient as a matter of law").

"[W]hen challenged by motion to dismiss, [a contestant] must have presented, in the first instance, sufficient allegations and evidence to justify his claim to the seat in order to overcome the motion to dismiss." *Tunno v. Veysey*, H.R. Rep. No. 92-626, at 3 (1971). One House contest task force majority concluded that "because of the peculiarities of the contested election process and the important concern that only substantive challenges be permitted discovery, the proper standard [of review] is a blend of [Federal Rules of Civil Procedure] 12(b)(6) and 56," with the House free to "consider available evidence in deciding whether a contest deserve[s] further consideration." *Dornan v. Sanchez*, H.R. Rep. No. 105-416, at 8–10 (1998); *see also Anderson*, H.R. Rep. No. 104-852, at 9 ("In order to keep frivolous cases from reaching discovery, the Committee standard 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."). Accordingly, to survive a motion to dismiss, a notice of contest must *at the very least* not only 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)), but also provide sufficient evidence "on which the [factfinder] could reasonably find" in favor of the contestant, "upon whom the *onus* of proof is imposed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (quoting *Schuylkill & Dauphin Improvement Co. v. Munson*, 81 U.S. 442, 448 (1871)) (observing that the Rule 56 inquiry "unavoidably asks whether reasonable [factfinders] could find by a preponderance of the evidence that the [contestant] is entitled to" prevail).

This is an exacting standard. It requires contestants "at the outset to make proper allegations with sufficient supportive evidence" to ensure that the House does not undertake "exhaustive hearings and investigations" that are "unnecessary and unwarranted." *Tunno*, H.R. Rep. No. 92-626, at 3. Consequently, "[s]ince enactment of the FCEA, most House contested election cases have been dismissed due to failure by the contestant to sustain the burden of proof necessary to overcome a motion to dismiss." Maskell & Whitaker, *supra*, at 9.

ARGUMENT

Mr. Oberweis's notice should be dismissed because it is both procedurally defective and substantively deficient.

I. Mr. Oberweis failed to properly serve the notice of contest on Representative Underwood.

Mr. Oberweis did not timely serve his notice of contest on Representative Underwood in accordance with the FCEA. Accordingly, the House need not consider the substance of Mr. Oberweis's notice, as this threshold defect constitutes an independent ground for dismissal. *See* 2 U.S.C. § 383(b)(1) (listing "[i]nsufficiency of service of notice of contest" as defense); *Perkins v. Byron*, H.R. Rep. No. 96-78, at 2, 4 (1979) (dismissing contest where contestee "filed a motion to dismiss based on improper service of notice of contest" and "contestant [] failed to provide documented proof of service of the notice of contest on [contestee] in accordance with the provisions of" FCEA); *cf. Rayner v. Stewart*, H.R. Rep. No. 96-316, at 4–5 (1979) (dismissing contest "on procedural and substantive grounds" in part because "Contestant untimely filed his Notice" and "there was no proof of service"); *Gonzalez v. Diaz-Balart*, H.R. Rep. No. 110-175, at 5–6 (2007) (Republican minority concluding that contest's "procedural failings are [] fatal and sufficient to warrant dismissal on their own" where contestant failed "to meet the statutorily

imposed deadline" for filing); *Russell v. Brown-Waite*, H.R. Rep. No. 110-178, at 5–6 (2007) (same).

The FCEA clearly enumerates the permissible methods of serving a notice of contest on a contestee. The five methods are:

> (1) by delivering a copy to [contestee] personally;
>
> (2) by leaving a copy at [contestee's] dwelling house or usual place of abode with a person of discretion not less than sixteen years of age then residing therein;
>
> (3) by leaving a copy at [contestee's] principal office or place of business with some person then in charge thereof;
>
> (4) by delivering a copy to an agent authorized by appointment to receive service of such notice;
>
> (5) by mailing a copy by registered or certified mail addressed to contestee at [her] residence or principal office or place of business.

2 U.S.C. § 382(c). Service of the written notice "upon the contestee" must occur "within thirty days after the result of such election shall have been declared." *Id.* § 382(a).

The Illinois State Board of Elections certified the results for the November elections—including the election for the IL-14 congressional seat—on December 4, 2020. *See All Press Releases*, Ill. State Bd. of Elections, https://elections.il.gov/AboutTheBoard/PressReleasesAll.aspx?T=637470164465026964 (last visited Feb. 2, 2021). Accordingly, the 30-day window for service ended on January 4, 2021. *See* 2 U.S.C. § 394(a) (noting that if "[t]he last day of the period so computed" is Sunday, then "the period shall run until the end of the next day"). Any attempts at service after that date are barred by statute.

Mr. Oberweis did not effectuate any of these permissible methods of service in the time allotted. Representative Underwood and her Chief of Staff arrived at her congressional office on January 6, 2021 and found a manila envelope containing a copy of Mr. Oberweis's contest notice on the floor just inside a door separating the office from a public hallway. *See* Ex. 2, Affidavit of

Andrea Harris ("Harris Aff."), ¶¶ 4–5. Neither Representative Underwood nor any member of her staff accepted service of these documents, *see* Ex. 1, Affidavit of Lauren Underwood ("Underwood Aff."), ¶ 4; Harris Aff. ¶ 7, and so service was not completed pursuant to subsection 382(c)(3), which requires that a copy be left at a contestee's "principal office . . . *with some person then in charge thereof*." (Emphasis added). Nor was service effectuated pursuant to subsection 382(c)(1), (c)(2) or (c)(4), since at no time did Representative Underwood receive the notice in person, at her Illinois residence, or at her apartment in Washington, D.C., and she did not authorize an agent to receive service on her behalf. *See* Underwood Aff. ¶¶ 4–6.

On January 25, 2021, Representative Underwood's staff received at her House office a parcel delivered via certified mail, which contained the notice of contest. *See* Harris Aff. ¶¶ 8–9. Under the FCEA, "[s]ervice by mail is complete upon mailing," 2 U.S.C. § 382(c)(5), and so Mr. Oberweis was required to mail the notice no later than January 4. The postmark stamped on the parcel, however, is dated *January 5*, *see* Harris Aff. Attach. B, which is also the date of the earliest entry on the U.S. Postal Service's tracking history for the parcel. *See* Ex. 3, Affidavit of Jonathan Hawley, ¶ 5 & Attach. A; *see also Postmarks*, U.S. Postal Serv., https://about.usps.com/handbooks/po408/ch1_003.htm (last visited Feb. 2, 2021) ("A postmark indicates the location and date the Postal Service accepted custody of a mailpiece."); *cf. Houston v. Lack*, 487 U.S. 266, 268 (1988) (describing "postmark" as "evidence of when [senders] actually mailed the letter"); *Laboski v. Ashcroft*, 387 F.3d 628, 631–32 (7th Cir. 2004) (similar); *Van Brunt v. Comm'r*, 100 T.C.M. (CCH) 322, at *2 (2010) (noting that, under Internal Revenue Code, "timely mailing is generally determined by the postmark date" (citing 26 U.S.C. § 7502(a); Treas. Reg. § 301.7502-1(c)(1))).

Unless Mr. Oberweis can prove that—notwithstanding the January 5 postmark—he mailed the parcel on or before the January 4 deadline, he failed to properly serve Representative

Underwood.[3] Simply slipping a copy of the notice under the door of Representative Underwood's empty office is not a cognizable method of service under the FCEA. Nor is mailing the notice after the January 4 service deadline. Because service was not properly effected under the statute, the notice of contest must be dismissed. *See Perkins*, H.R. Rep. No. 96-78, at 2, 4.

II. Mr. Oberweis's notice of contest fails to state grounds sufficient to change the result of the election or claim a right to Representative Underwood's seat.

Even if Mr. Oberweis had properly served Representative Underwood, his notice of contest and accompanying evidence do not demonstrate *any* viable grounds to contest a single vote, let alone to reverse Representative Underwood's 5,374-vote margin of victory. The notice should therefore be dismissed. *See* 2 U.S.C. § 383(b)(3)–(4) (enumerating "[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" as defenses).

A. Mr. Oberweis's equal protection argument is fatally flawed.

Mr. Oberweis prefaces his claims with a brief exegesis on the U.S. Constitution's Equal Protection Clause, arguing that the state may not "value one person's vote over that of another" or employ "voting systems that result in varying chances that an individual's vote will be counted based on their jurisdiction." Notice of Contest Regarding the Election for Representative in the One Hundred Seventeenth Congress from Illinois' Fourteenth Congressional District ("Notice") ¶¶ 21–23. These general observations inform several of his claims, leading to the repeated conclusion that votes counted in purported violation of equal protection should be discarded. *See*,

[3] The FCEA specifies that "the verified return by the person so serving such notice, setting forth the time and manner of such service shall be proof of same, and the return post office receipt shall be proof of the service of said notice mailed by registered or certified mail as aforesaid." 2 U.S.C. § 382(c)(6). Moreover, "[p]roof of service shall be made to the Clerk promptly and in any event within the time during which the contestee must answer the notice of contest." *Id*.

e.g., *id.* ¶¶ 25, 28. But Mr. Oberweis fails to understand the parameters of the Equal Protection Clause, and his proposed remedy is inconsistent with basic constitutional precepts and House contest precedent.

First, claims directed at conduct that *expands* access to the franchise without otherwise imposing differing standards on whose votes are ultimately counted—such as Mr. Oberweis's allegations relating to distribution of vote-by-mail ("VBM") applications, *see id.* ¶ 28—are not cognizable under the Equal Protection Clause. After all, one county's decision to, say, mail VBM applications to more voters than required by law does not result in the sort of arbitrary tabulation of votes that runs afoul of *Bush v. Gore* and its progeny. *See* 531 U.S. 98, 109 (2000) (per curiam) (permitting "local entities, in the exercise of their expertise, [to] develop different systems for implementing elections"); *see also, e.g.*, *Short v. Brown*, 893 F.3d 671, 677–79 (9th Cir. 2018) (rejecting equal protection challenge to law that permitted automatic distribution of mail ballots in some counties but not others and noting that appellants failed to "cite[] any authority explaining how a law that makes it easier to vote would violate the Constitution"); *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, at *9 (D. Nev. May 27, 2020) (rejecting equal protection challenge where "Clark County's Plan may make it easier or more convenient to vote in Clark County, but does not have any adverse effects on the ability of voters in other counties to vote").

Second, even if Mr. Oberweis pleaded colorable equal protection claims, the remedy for such violations is not to *discard* otherwise-lawful votes, but instead to *count* all votes. As a federal court recently explained,

> [w]hen remedying an equal-protection violation, a court may either "level up" or "level down." This means that a court may either extend a benefit to one that has been wrongfully denied it, thus leveling up and bringing that person on par with others who already enjoy the right, or a court may level down by withdrawing the

> benefit from those who currently possess it. Generally, "the preferred rule in a typical case is to extend favorable treatment" and to level up. In fact, leveling down is impermissible where the withdrawal of a benefit would necessarily violate the Constitution. Such would be the case if a court were to remedy discrimination by striking down a benefit that is constitutionally guaranteed.

Donald J. Trump for President, Inc. v. Boockvar, No. 4:20-CV-02078, 2020 WL 6821992, at *12 (M.D. Pa. Nov. 21, 2020) (footnotes omitted) (quoting *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701 (2017)), *aff'd sub nom. Donald J. Trump for President, Inc. v. Sec'y of Commonwealth*, 830 F. App'x 377 (3d Cir. 2020); *see also, e.g.*, *Heckler v. Mathews*, 465 U.S. 728, 740 (1984); *Califano v. Westcott*, 443 U.S. 76, 90–91 (1979).

Here, leveling up—which is to say, *counting all votes*—is not only the most intuitive remedy, but also the only constitutional remedy. As the *Boockvar* court correctly concluded, "level[ing] down" in the election context by *not* counting otherwise-lawful votes is unconstitutional:

> "The disenfranchisement of even one person validly exercising his right to vote is an extremely serious matter." "To the extent that a citizen's right to vote is debased, he is that much less a citizen."
>
> Granting Plaintiffs' requested relief would necessarily require invalidating the ballots of [lawful voters]. Because this Court has no authority to take away the right to vote of even a single person, let alone millions of citizens, it cannot grant Plaintiffs' requested relief.

2020 WL 6821992, at *13 (footnotes omitted) (first quoting *Perles v. Cnty. Return Bd.*, 202 A.2d 538, 540 (Pa. 1964); and then quoting *Reynolds v. Sims*, 377 U.S. 533, 567 (1964)); *see also*, *e.g.*, *United States v. Saylor*, 322 U.S. 385, 387–88 (1944) ("[T]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place."); *cf. Bognet v. Sec'y of Commonwealth*, 980 F.3d 336, 342 (3d Cir. 2020) (considering election challenge "with commitment to a proposition indisputable in our democratic process: that the lawfully cast vote of every citizen must count"), *petition for cert. filed*, No. 20-740 (U.S. Nov.

27, 2020). Accordingly, Mr. Oberweis's proposed reduction of votes from the candidates' totals in response to alleged equal protection violations *is itself* constitutionally impermissible.

Mr. Oberweis's attempt to remedy purported equal protection violations by removing otherwise-lawful, previously tabulated votes from his and Representative Underwood's vote totals runs afoul of not only constitutional principles, but also House contest precedent. Previous House contest decisions have expressed a clear preference for ensuring that "the will of the voters [is] not invalidated" based on state law technicalities that nullify ballots despite the voters' intent being obvious. *McCloskey v. McIntyre*, H.R. Rep. No. 99-58, at 24 (1985) (quoting 2 *Deschler's Precedents* ch. 9, § 38.5, H.R. Doc. No. 94-661, at 1075). As a Congressional Research Service report explained,

> the 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. In addition, the committee has noted that the "House has chosen overwhelmingly in election cases throughout its history not to penalize voters for errors and mistakes [of] election officials." That is, in the absence of fraud, and where the honest intent of the voters' may be determined, "the House has counted votes . . . rather than denying the franchise to any individual due to malfeasance of election officials."

Maskell & Whitaker, *supra*, at 15–16 (second alteration in original) (footnotes omitted) (quoting *McCloskey*, H.R. Rep. No. 99-58, at 23–24)); *see also, e.g.*, *Pullen v. Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990) ("Our courts have repeatedly held that, where the intention of the voter can be ascertained with reasonable certainty from his ballot, that intention will be given effect even though the ballot is not strictly in conformity with the law."); *Parra v. Harvey*, 89 So. 2d 870, 874 (Fla. 1956) ("After an elector casts a ballot that is regular in all particulars, he transfers control to the election officials and should not be charged with their mishandling afterward."); *State v. Barnett*, 195 N.W. 707, 712 (Wis. 1923) ("As a general rule a voter is not to be deprived of his

constitutional right of suffrage through the failure of election officers to perform their duty, where the elector himself is not delinquent in the duty which the law imposes upon him."); *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 595, 597–98 (6th Cir. 2012) (concluding that rejection of ballots invalidly cast due to poll worker error likely violates due process); *Griffin v. Burns*, 570 F.2d 1065, 1075–76 (1st Cir. 1978) (concluding that absentee ballots should be counted even where state supreme court later determined that such ballots were not validly issued in election).

In short, where the intent of lawful voters is clear, the House cannot discard otherwise-valid votes to remedy alleged equal protection violations—or *any* sort of violation on the part of election administrators—without violating both due process and its own precedent. Mr. Oberweis's understanding of the Equal Protection Clause and his proposed remedy of discarding votes are thus fatally flawed.

B. Mr. Oberweis has not alleged unlawful or irregular conduct that changes the outcome of the election.

Even under the most generous standard of review—accepting Mr. Oberweis's allegations as true and in the light most favorable to him—his notice fails to allege irregularities and misconduct sufficient to change the outcome of the election and entitle him to Representative Underwood's seat. Dismissal of his notice is therefore required.

i. Mr. Oberweis's claims fail to allege unlawful or irregular conduct.

To plead a viable contest notice, Mr. Oberweis "must show that but for the *voting irregularities or acts of fraud*, the results of the election would have been different and the contestant would have prevailed." Maskell & Whitaker, *supra*, at 9 (emphasis added). Because he has failed to allege that *any* fraud or irregularities actually occurred, he has not pleaded viable grounds for an election contest, and his notice should be dismissed.

Nonresident Voters. Mr. Oberweis first claims that "over 4,903 voters illegally cast ballots from addresses in ILCD-14 at which they no longer lived, by mail." Notice ¶ 24. He apparently reached this 4,903-vote figure, according to his former campaign manager Thomas J. Mannix, by: (1) producing a list of VBM voters and early voters in Illinois's Fourteenth Congressional District ("IL-14") using a state database and voter file; (2) sending that list to a data vendor (Aristotle Inc.), which compared it to the National Change of Address ("NCOA") and Social Security Death ("SSD") databases "using industry standard matching"; and (3) reviewing this material and (somehow) arriving at a total of 4,903 voters. Notice Ex. 1, Affidavit of Thomas J. Mannix ("Mannix Aff."), ¶¶ 3–7.[4] But setting aside the fundamental flaws in Mr. Oberweis's selection and interpretation of evidence, *see infra* Part II.C, these allegations fail on their face to demonstrate that any IL-14 voters cast ballots unlawfully.

Under Illinois law, Mr. Oberweis cannot conclude that voters lack the ability to cast ballots in IL-14 simply because they appear in the NCOA database with addresses outside of the district. To be eligible to vote in IL-14, a voter must have been a resident of the district for at least 30 days prior to election day—in the case of last November's general election, since October 4, 2020. *See* 10 ILCS 5/3-1. Given that Mr. Oberweis provides no information about when the NCOA database was accessed or how up-to-date its contents are (indeed, neither his notice nor Mr. Mannix's affidavit provides any specific details regarding the methodology used to conduct this analysis), it

[4] Mr. Oberweis's arithmetic for this claim is incomprehensible. He alleges that "over 4,903 voters illegally cast ballots from addresses in ILCD-14 at which they no longer lived, by mail." Notice ¶ 24. But Mr. Mannix's affidavit clearly states that "[o]f those 5,373 [IL-14 VBM and early] voters that were found in the NCOA database," only "2,299 voters were listed as [VBM] voters." Mannix Aff. ¶ 6. It is unclear where Messrs. Oberweis and Mannix derived 4,903 illegal mail votes from these figures; indeed, that number would seem to be foreclosed by the fact that, of the 5,373 voters on the NCOA database, "2,838 were listed as having voted early in person." *Id*. Such internally incoherent tabulation falls far short of the showing required for a viable election contest.

is just as likely that any purported irregularities are due simply to issues of timing—either a voter moved to IL-14 on or before October 4 and the NCOA database does not reflect this change, or a voter moved after election day and thus appears in the database despite having satisfied the residency requirements. Without verifying such crucial details, it is impossible to conclude that 4,903 voters were ineligible merely because their names appeared in the NCOA database at the time Aristotle Inc. accessed it.

Moreover, nothing in Illinois's election laws prevents a voter from having multiple mailing addresses or even multiple domiciles. In order to be considered a resident of Illinois, a person must have a "permanent abode" in the relevant election district, 10 ILCS 5/3-2(a), which requires both physical presence at an address and an intent to remain at that address. *See, e.g.*, *Maksym v. Bd of Election Comm'rs*, 950 N.E.2d 1051, 1054 (Ill. 2011). But Illinois courts have made clear that an individual can maintain permanent residency in a given jurisdiction despite prolonged absences at another location. *See, e.g.*, *Dillavou v. Cnty. Officers Electoral Bd.*, 632 N.E.2d 1127, 1131 (Ill. 1994) (demonstrating that candidate can have multiple domiciles); *People ex rel. Madigan v. Baumgartner*, 823 N.E.2d 1144, 1151–52 (Ill. App. Ct. 2005) ("Prior to moving to Champaign to attend U of I, defendant was unquestionably a resident of Moultrie County. . . . Although he probably could have chosen to make Champaign his residence, defendant affirmatively sought to exercise his rights of citizenship in Moultrie County by maintaining his voting registration and driver's license in Moultrie County."). For any voters who temporarily relocate during election season, "[a] residence, for voting purposes, is not lost by temporary removal with the intention to return." *Coffey v. Bd. of Election Comm'rs*, 31 N.E.2d 588, 589 (Ill. 1940).

Accordingly, pleading the mere fact that IL-14 voters have mailing addresses or even domiciles outside the district does not sufficiently allege that they are ineligible to vote in IL-14.

It is not difficult to conceive the myriad reasons why some IL-14 voters might temporarily reside at other locations while retaining their residences in the district, especially in the context of a pandemic that has disrupted the living circumstances of countless Illinoisans. Temporary relocations are always true of students, members of the military, workers on temporary assignment, and people without homes, and the need to quarantine and shelter-in-place during the ongoing COVID-19 pandemic has also displaced individuals who still retain permanent residences elsewhere. For all these reasons, Mr. Oberweis's claim that these allegedly nonresident voters cast unlawful ballots cannot support an election contest.

Kenosha Voter. Relatedly, Mr. Oberweis also alleges that "at least one alleged Kenosha, Wisconsin resident"—Robert Sandy—"'tweeted' that he drove from his home in Wisconsin on Election Day to vote in person for Contestee Underwood at his former polling place in Illinois, where he remained a registered voter." Notice ¶ 30(F). Mr. Oberweis concludes that this action constituted an unlawful vote for Representative Underwood. *See id.*

However, the evidence submitted in support of this allegation—an apparent voter profile and a pair of tweets attributed to Mr. Sandy, *see* Mannix Aff. Ex. E—does *not* indicate that he voted unlawfully. Under Illinois law, a person only loses his residency, and hence his right to vote in a jurisdiction, if he "abandons" a residence. *See Maksym*, 950 N.E.2d at 1060 (explaining abandonment rules and noting that "once a person has *established* residence, he or she can be physically absent from that residence for months or even years without having abandoned it"). Here, even assuming that Mr. Sandy's story is accurate, neither he nor Mr. Oberweis has provided any indication that he abandoned his IL-14 residence such that he would no longer be eligible to vote there. Indeed, Mr. Sandy's tweets suggest that he has *not* permanently relocated to Wisconsin, since he (1) did not "attempt to change [his] voter registration from IL-14 prior to the election"

and (2) indicated that he did not "f[eel] secure enough . . . with [his] ability to maintain a life" in Kenosha. Mannix Aff. Ex. E, at 2; *see also Madigan*, 823 N.E.2d at 1151–52. A temporary relocation to Kenosha would not necessarily preclude Mr. Sandy from exercising his right to vote in IL-14—where, indeed, he is registered, as evidenced by Mr. Oberweis's own evidentiary submission. *See* Mannix Aff. Ex. E, at 1. Neither the facts as alleged nor the evidence provided indicates that Mr. Sandy, or anyone else, unlawfully voted for Representative Underwood.

Ballot Initialing. Mr. Oberweis claims that "Illinois law requires that all ballots be initialed by an election judge in order to be counted," and suggests that because "Kane County's Clerk did not require the initialing of any VBM ballots," none of the 39,647 VBM ballots cast in Kane County for this election should be counted. Notice ¶ 25. This claim suffers from several legal shortcomings.

At the outset, Mr. Oberweis seeks to discard *previously counted* ballots from the candidates' vote totals, both because Kane County's allegedly uninitialed VBM ballots are "invalid under Illinois law," *id.* ¶ 25(C), and to avoid "the type of unconstitutional disparate treatment derided in ***Bush v. Gore***," *id.* ¶ 25(B). However, as discussed in Part II.A *supra*, "leveling down" to remedy equal protection violations in the context of elections is precluded by principles of due process, and House contest precedent mandates that votes be counted—regardless of administrative errors—when the intent of the voters is clear. Accordingly, Mr. Oberweis's proposal that Kane County's uninitialed ballots be removed from the final vote tally is not only ill-advised, but unconstitutional as well.

Even setting aside these threshold considerations, this claim suffers from a fundamental mischaracterization of applicable law. While it is true that Illinois requires election judges to initial

ballots, Mr. Oberweis is wrong to suggest that the rule applies with equal force to VBM ballots. In fact, the Illinois Supreme Court has found precisely the opposite.

The relevant state law provides that "[i]f any ballot card or ballot card envelope is not initialed, it shall be marked on the back 'Defective,' initialed as to such label by all judges immediately under such word 'Defective,' and not counted, but placed in the envelope provided for that purpose labeled 'Defective Ballots Envelope.'" 10 ILCS 5/24A-10(b). But in determining the scope of this initialing requirement, the Illinois Supreme Court has distinguished between *in-precinct* ballots—to which the requirement applies, *see, e.g.*, *DeFabio v. Gummersheimer*, 733 N.E.2d 1241, 1242 (Ill. 2000)—and *VBM* ballots, which are the only ballots targeted by Mr. Oberweis's initialing claim. Specifically, that court has concluded that the rejection of uninitialed VBM ballots (as opposed to uninitialed in-precinct ballots) deprives voters of the right to vote through no fault of their own, since voters casting ballots by mail cannot possibly determine whether election judges initial their ballots. *See Craig v. Peterson*, 233 N.E.2d 345, 347 (Ill. 1968). As the court concluded, this presents both constitutional and practical concerns that militate against the rejection of VBM ballots based on lack of initials:

> The net result of a mandatory application of the initialling requirement to the absentee ballots in the circumstances of this case would be to disenfranchise a substantial number of qualified voters who have done everything in their power to comply with the law, a result which neither our State nor Federal constitutions will tolerate . . . . [T]he initialling requirement as to absentee ballots, if held valid and mandatory in this case, might well serve as the means of achieving the very result it was intended to prevent, for corrupt election judges could deliberately refrain from initialling ballots of those absentee voters whom they had reason to believe voted otherwise than the judges desired.

Id. at 349–50. Moreover, requiring initials on VBM ballots does not substantially enhance the integrity of elections. The initialing requirement is intended to prevent "stuffing" by voters who surreptitiously slip multiple or fraudulent ballots into ballot boxes, a concern that is simply not present when voters mail their VBM ballots directly to election judges using envelopes that allow

for verification that the voters did not also cast ballots elsewhere. *Id.* at 348–49. Given these crucial distinctions between in-precinct ballots and VBM ballots, the Illinois Supreme Court has made clear that the initialing requirement is *not* mandatory for VBM ballots when (1) those ballots can be distinguished from in-precinct ballots and (2) exempting VBM ballots from the initialing requirement does not undermine election integrity. *See Pullen*, 561 N.E.2d at 598 (citing *Craig*).

Mr. Oberweis wrongly suggests that neither prong is satisfied here. Regarding the first requirement, he seems to contend that the VBM ballots cast in Kane County cannot be distinguished from in-precinct ballots because the VBM ballots were "mixed in with 'lock-box' ballots." Notice ¶ 25 n.4. Regarding the second prong, he claims that "a new statutory scheme, enacted by the Illinois legislature in June 2020 in response to the COVID-19 situation, opened a Pandora's Box of potential equal protection violations, making the initialing of [VBM] ballots critical to protecting the integrity of the election." *Id.* ¶ 25. Neither argument is compelling.

First, VBM ballots cast in Kane County *can* be distinguished from in-precinct ballots. Just like the election at issue in *Craig*—where the Illinois Supreme Court concluded that initialing was not required for VBM ballots, *see* 233 N.E.2d at 349—Kane County uses voting machines for in-precinct voters. There is thus no question that the VBM ballots in Kane County satisfy this prong of the *Craig* exception to the initialing requirement. This fact notwithstanding, Mr. Oberweis suggests that the *Craig* exception cannot apply here because VBM ballots were intermingled with, and cannot be distinguished from, "lock-box" ballots. Notice ¶ 25 n.4. But the ballots placed in Kane County's drop-boxes *were* VBM ballots. Public Act 101-642, enacted by the Illinois General Assembly in May 2020 to make temporary administrative modifications for the November election, *see Cook Cnty. Republican Party v. Pritzker*, No. 20-cv-4676, 2020 WL 5573059, at *1–2 (N.D. Ill. Sept. 17, 2020), permitted election authorities to "establish secure collection sites"—

in other words, drop-boxes—"for the postage-free return *of vote by mail ballots*." 10 ILCS 5/2B-20(e) (emphasis added); *see also Cook Cnty. Republican Party*, 2020 WL 5573059, at *7 (demonstrating that drop-boxes were intended for "mail-in ballot[s]").[5] Accordingly, no improper intermingling occurred since the ballots placed in the alleged "lock-boxes" were themselves VBM ballots—as Mr. Oberweis himself concedes elsewhere in his notice. *See* Notice ¶ 30(C) (referencing "[v]oters in DuPage and McHenry Counties, who *cast VBM ballots*, either through the mail *or by dropping them in the 'lock-boxes'*" (emphases added)).

Second, Mr. Oberweis fails to explain why the other temporary changes enacted by the Illinois General Assembly—which, among other things, expanded early voting hours at permanent polling places, *see* 10 ILCS 5/2B-35; improved the signature verification process, *see* 10 ILCS 5/2B-20; and made election day a state holiday, *see* 10 ILCS 5/2B-10—undermined election integrity in such a way as to necessitate the initialing of VBM ballots. In fact, various provisions of Public Act 101-642, including its allowance of drop-boxes, were the subject of a federal lawsuit where the court *rejected* the argument that these temporary changes would lead to unlawful voting. *See Cook Cnty. Republican Party*, 2020 WL 5573059, at *7–10 (concluding that plaintiff failed to "demonstrate that Illinois faces the risk of illegal ballot harvesting or other fraud as a result of" Public Act 101-642). This result was consistent with the conclusions of courts across the country that rejected arguments that similar voting processes—many of which were essential during the pandemic—would somehow lead to unlawful voting. *See, e.g.*, *Donald J. Trump for President, Inc. v. Way*, Civil Action No. 20-10753 (MAS) (ZNQ), 2020 WL 5912561, at *1, *13 (D.N.J. Oct.

[5] Although "lock-box" does not appear in Illinois's election code, it seems that Mr. Oberweis is referring to ballot drop-boxes when he uses the term. *See* Notice ¶ 25(A) (explaining that "lock-box[es were] allowed because of the COVID-19 situation"); *Id.* Ex. 2, Affidavit of Daniel Zahm, ¶ 7 (describing "lock-box" ballots as "ballots simply dropped off in lock-boxes in the County").

6, 2020) (rejecting challenge to New Jersey's COVID-19 election response where plaintiffs failed to connect allegations of voter fraud to state's decision to conduct election "predominantly by mail"); *Donald J. Trump for President, Inc. v. Bullock*, Nos. CV 20-66-H-DLC, CV-20-67-H-DLC, 2020 WL 5810556, at *12 (D. Mont. Sept. 30, 2020) (rejecting challenge to directive permitting use of mail ballots in November election where plaintiffs did not "introduce[] even an ounce of evidence supporting the assertion that Montana's use of mail ballots will inundate the election with fraud"); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 927–30 (D. Nev. 2020) (rejecting challenge to Nevada's "plan to implement an all-mail election . . . in order to diminish the spread of COVID-19" where plaintiffs' "claim of voter fraud is without any factual basis"). Mr. Oberweis fails to explain why his contentions are meaningfully different from these previously rejected arguments.

In short, under the Illinois Supreme Court's rulings in *Craig* and its progeny, Kane County's uninitialed VBM ballots were not invalid. This conclusion is wholly unaffected by the temporary changes applied during the November election. For this reason—and because rejecting otherwise-valid ballots would violate both due process and House contest precedent, *see supra* Part II.A—this claim is not a valid ground for contest.

Provisional Voting. Mr. Oberweis contends that Kane County misapplied laws relating to provisional voting; specifically, that "voters in Kane County were not allowed to provide the Affidavit required by ***I0 ILCS 17-10*** when their voting address was challenged at the polls" and "were either turned away" *or* were "allowed to vote ***non-provisionally***." Notice ¶ 26. Neither the law nor the facts support this claim.

First, under Illinois law, a challenged voter is only required to cast a provisional ballot if her status was *successfully* challenged by an election worker, a pollwatcher, or another voter. *See*

10 ILCS 5/18A-5 (providing for provisional voting if challenge to voting status "has been sustained by a majority of the election judges"); 10 ILCS 5/17-10 (requiring completion of affidavit if "vote is challenged by a legal voter" *and* "person offering to vote is not personally known to the judges of election to have the qualifications required"). Accordingly, the allegation that a voter "was challenged at the polls," Notice ¶ 26, says nothing about whether the voters was required to complete an affidavit and vote a provisional ballot.

Second, the Illinois Supreme Court has concluded that the completion of a similar affidavit is not needed where, as here, the law "does not expressly declare that the observance of its provisions shall be mandatory or that failure to sign . . . will invalidate that ballot." *Pullen*, 561 N.E.2d at 604. Instead, where a statute "merely directs that the voter shall sign the affidavit," "its requirements should be considered directory." *Id.* at 604–05. The court explained,

> [T]here is no allegation that any unqualified voters voted in the election or that failure to comply with [the affidavit requirement] hindered the rights of any person to challenge the qualifications of any voter. Ballots duly received by the judges of an election and deposited in the ballot box are presumed to be legal until the contrary is shown. Here, the disputed ballots were so received and deposited and there was no evidence to rebut the presumption that these ballots were cast by qualified voters. In such circumstances, we conclude . . . that voters should not be disfranchised because of any failure to strictly comply with the statute requiring signed certificates. The general purpose of all election laws is to obtain fair and honest elections, and "this end is paramount in importance to the formal steps prescribed as a means to its achievement."

Id. at 605 (quoting *Carr v. Bd. of Educ.*, 150 N.E.2d 583, 586 (Ill. 1958)). Accordingly, even if signed affidavits were required in the instances alleged, the failure to effectuate that requirement should not lead to the invalidation of votes.

Third, the only corroboration provided in support of these claims is a single sentence of Mr. Mannix's affidavit: "I am also aware that voters in Kane County were not allowed to vote provisionally." Mannix Aff. ¶ 16. *That's it*. There is no explanation of *who* was not allowed to

vote provisionally, *how* they were prevented from doing so, or *why* they should have been required to vote provisionally. Such paltry allegations are wholly insufficient to survive a motion to dismiss.

Unsealed Ballots. Mr. Oberweis next attempts to manufacture a claim based on certain counties' handling of ballot storage boxes, alleging that "when the VBM ballots were inspected during Contestant Oberweis' discovery recounts in both Kane and McHenry Counties, they were found stored in unsealed boxes, in contravention of very elaborate Illinois law describing a precise manner of sealing and storing ballots." Notice ¶ 27; *see also id.* ¶ 30(D) (describing purportedly unsealed ballots in Lake County). But although Illinois's election statutes do indeed describe in detail how ballot boxes should be sealed, *see, e.g.*, 10 ILCS 5/24A-10, and suggest that the boxes can only be unsealed for election contests and discovery recounts or by court order, *see* 10 ILCS 5/24A-15; 10 ILCS 5/24A-15.01, Mr. Oberweis alleges only that these boxes were unsealed *when brought to the observer table during the discovery recount*, not that they were unsealed at any other time. *See* Mannix Aff. ¶ 15 ("I am aware that, during the discovery recount, boxes of VBM votes were brought to the inspection tables where Oberweis staff and volunteers sat, ready to inspect the VBM ballots. The boxes in McHenry, Lake and Kane Counties were unsealed, in contravention of Illinois law."); Notice Ex. 2, Affidavit of Daniel Zahm ("Zahm Aff."), ¶¶ 4, 7–8 ("While in Kane County, I observed that boxes of ballots were not sealed when they were brought to the tables for inspection. . . . When I observed the discovery recount for several days in McHenry County, I did not see any sealed ballot boxes; all boxes were unsealed when brought to our tables for inspection."). Given that Illinois law explicitly provides that boxes can be unsealed for discovery recounts, *see* 10 ILCS 5/24A-15, Mr. Oberweis does not actually allege a statutory violation relating to unsealed ballots, let alone that any unlawful ballots were cast as a result.

VBM Applications. In alleging that the distribution of VBM applications was somehow improper, Mr. Oberweis lodges yet another challenge to a temporary change to the Illinois election laws enacted to help voters exercise their franchise during the pandemic. Specifically, Mr. Oberweis claims that a provision directing election officials to mail or email VBM applications to recent voters, *see* 10 ILCS 5/2B-15(b), was unconstitutional. *See* Notice ¶ 28. This claim suffers from several defects.

Most fundamentally, this provision only mandated distribution of VBM *applications*, not *ballots*. Even if a voter received multiple applications, Mr. Oberweis provides no indication that any voters received multiple ballots, let alone cast them for Representative Underwood.

Moreover, Illinois election officials did not violate equal protection by expanding access to mail voting. Although Mr. Oberweis characterizes this as a vote-dilution claim, *see* Notice ¶ 28, this doctrine is implicated only in certain contexts, such as when laws are crafted that structurally devalue one community's votes over another's. *See, e.g.*, *Bognet*, 980 F.3d at 355 ("[V]ote dilution under the Equal Protection Clause is concerned with votes being weighed differently."); *see also Reynolds*, 377 U.S. at 568 ("Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."). Courts have uniformly rejected as fundamentally unsound the theory of "vote dilution" that Mr. Oberweis urges here. That doctrine cannot and should not be used to challenge measures that expand access to the franchise; "[t]hat is not how the Equal Protection Clause works." *Bognet*, 980 F.3d at 355; *see also supra* Part II.A; *Partido Nuevo Progresista v. Perez*, 639 F.2d 825, 827–28 (1st Cir. 1980) (per curiam) (rejecting challenge to purportedly invalid ballots where "plaintiffs claim that votes were 'diluted' by the votes of others, not that they themselves were prevented from voting"); *Donald J. Trump for*

President, Inc. v. Boockvar, No. 2:20-cv-966, 2020 WL 5997680, at *67–68 (W.D. Pa. Oct. 10, 2020) (rejecting equal protection challenge to poll-watcher restrictions grounded in vote-dilution theory because restrictions did not burden right to vote or discriminate based on suspect classification); *Cook Cnty. Republican Party*, 2020 WL 5573059, at *4 (denying motion to enjoin law expanding deadline to cure votes because plaintiff did not show how alleged voter fraud would dilute votes).

Mr. Oberweis's county-specific challenges to implementation of this provision fare no better. He notes, for instance, that

> individual County Clerks in the 7 Counties in ILCD-14 took it upon themselves to "supplement" the statutory scheme: the Kane County Clerk added the 2016 General Election voters to his mailing list; and, upon information and belief, the DuPage, Kendall and DeKalb County Clerks simply sent the VBM application ***to every registered voter without regard to the statute***.

Id. ¶ 28(A). But again, there is nothing unconstitutional about efforts to expand the franchise, and Mr. Oberweis has failed to identify *any* IL-14 voters who were somehow denied the opportunity to cast mail ballots or who cast unlawful ballots as a result of this action. Nor has he identified any provision of Illinois law prohibiting county officials from widely circulating VBM applications—and even if he had, such administrative errors would not serve to invalidate any votes. Similarly, although Mr. Oberweis complains at length about Lake County's decision to prevent a local Republican Party organization from "us[ing] its website as a 'portal' to the Clerk's website for the purpose of obtaining a VBM application," *id.* ¶ 28(B); *see also* Mannix Aff. ¶¶ 21–23, he at no point suggests that this decision was unlawful or that it otherwise compromised the results of the election.

Other Mail Ballot Issues. Mr. Oberweis also alleges other issues stemming from the distribution of VBM applications, but none has merit. He claims that "VBM ballots were counted even though the application for the ballot was mailed prior to the effective date of the statute."

Notice ¶ 30(A); *see also* Mannix Aff. ¶ 12 & Ex. C (attesting that "[p]rior to June 16, 2020 . . . election authorities in ILCD-14 illegally accepted 63 voter requests to receive a vote-by-mail ballot"). But this action, even if true, did not run afoul of Illinois law; although the statute requiring election authorities to distribute VBM application became effective on June 16, 2020, *see* 10 ILCS 5/2B-15, there is nothing in the election laws that otherwise precludes election officials from mailing applications *to voters who requested them*—as these voters apparently did. *See* Mannix Aff. Ex. C, at 3 (listing "RequestDate").[6]

Similarly, Mr. Oberweis claims that "VBM ballots were counted even though the application for the VBM ballot was received after the October 29, 2020 deadline for same." Notice ¶ 30(A); *see also* Mannix Aff. ¶ 13 & Ex. D (attesting that "28 voters on the ILCD-14 Voter List are listed as having applied to vote by mail after October 29, [] 2020"). Again, this was not unlawful. Although VBM applications "by mail or electronically" must generally be submitted "[no] less than 5 days prior to the date of such election," 10 ILCS 5/19-2, the temporary law in place for the November election provided that "*[n]otwithstanding any other provision of law to the contrary* . . . . [a]n election authority shall mail official ballots to any elector requesting an official ballot after October 1, 2020 no later than 2 business days after receipt of the application." 10 ILCS 5/2B-20(a) (emphasis added). No five-day deadline was included with this provision.

Mr. Oberweis further alleges that "VBM ballots were requested after Election Day and were voted after Election Day." Notice ¶ 30(A). But he provides no factual allegations whatsoever to buttress this claim, and the evidence he submits in support actually undermines it. Although six

[6] By contrast, the law relating to distribution of VBM *ballots* for the November election specified that "an election authority shall mail official ballots to any elector requesting an official ballot no earlier than September 24, 2020." 10 ILCS 5/2B-20(a). No such language appears in the provision governing VBM *applications*.

voters purportedly requested VBM ballots after election day, *see* Mannix Aff. Ex. D, at 2, none of these voters is reported on the spreadsheet that Mr. Oberweis submitted as having returned a ballot after election day. (Indeed, only one of those six voters is shown to have even returned a ballot at all, and apparently did so on October 30, 2020—four days *before* election day. *See id.* Ex. D, at 2.) Absent any corroborating allegations, this is a wholly specious claim that is inadequate for an election contest.

Finally, Mr. Oberweis claims that "VBM ballots were counted which were received after the two-week grace period following the November 3, 2020 election." Notice ¶ 30(A); *see also* Mannix Aff. ¶ 14 (attesting that "2 votes were received and counted more than two weeks after Election Day"). But other than Mr. Mannix's conclusory assertion that two such votes were cast and counted, Mr. Oberweis's notice is bereft of any corroborating allegations. Indeed, the latest ballot-return date recorded in the voter spreadsheets included with Mr. Mannix's affidavit is November 12, 2020, *see* Mannix Aff. Ex. C, at 3–4, which was within the two-week window for receipt of VBM ballots. *See* 10 ILCS 5/19-8(c), 10 ILCS 5/18A-15(a).

In sum, election officials did not violate Illinois law if they distributed VBM applications prior to election day or counted VBM ballots that were requested after October 29, and although Mr. Oberweis *claims* that VBM ballots were either voted after election day or counted after the two-week deadline, these allegations are belied by his own evidentiary submissions. Accordingly, none of these claims is a plausible ground for contest.

DuPage County Ballot Discrepancy. Mr. Oberweis alleges that "491,067 ballots were actually cast in DuPage County, but only 489,441 were recorded by the County Clerk as having voted, resulting in 1,626 more ballots being cast than voters at the polls." Notice ¶ 29. But other than identifying the purported tabulation inconsistency, Mr. Oberweis never actually alleges *why*

these ballots are unlawful. Indeed, the more likely explanation for the apparent discrepancy is that he is comparing the number of VBM ballots sent to voters with ballots submitted for tabulation. Some voters who requested VBM ballots might have surrendered these ballots in favor of voting in-precinct; others might not have voted at all. Either scenario would result in additional "ballots" that are not reflected in the total number of "votes." The burden is on Mr. Oberweis—not Representative Underwood or anyone else—to provide an explanation. Indeed, he "must support this claim with *specific credible allegations of irregularity* or fraud that, if proven true, would entitle [him] to the office." *Project Hurt*, H.R. Rep. No. 113-133, at 3 (emphasis added). This claim, lacking even elementary explanation or elaboration, falls far short of this standard.

Similarly, Mr. Oberweis cavalierly proposes that "[g]iven that 1/9th of DuPage County's Townships are located in ILCD-14, some proportionate number of these votes, if they cannot be traced to the actual DuPage precincts in the ILCD-14, must be proportionately deducted from the respective vote totals of Contestant Oberweis and Contestee Underwood." Notice ¶ 29. Setting aside the problematic reliance on proportional reduction of votes, *see infra* Part II.B.iii, Mr. Oberweis does not even attempt to quantify the number of impacted votes cast in IL-14. He cannot simply apportion some chunk of these votes, split them between himself and Representative Underwood, and deduct these votes from their totals without risking the disenfranchisement of lawful voters.

DuPage County Touchscreen Voting. Mr. Oberweis's notice contains an odd allegation regarding touchscreen voting devices in DuPage County; specifically, he claims that

> [v]oters in DuPage County, using an allegedly ADA compliant touch-screen voting device saw Democrat candidates highlighted in red at the top of each race on the ticket. The voter was forced to manipulate the voting machine to force the cursor to move to the Republican candidate who was next on the ballot in order to be able to cast a vote for the Republican.

Id. ¶ 30(B). There is, however, no suggestion in the notice that use of such a device was unlawful or that any votes intended for Mr. Oberweis were wrongfully cast for Representative Underwood.

Ballot Segregation. Mr. Oberweis alleges that "[v]oters in DuPage and McHenry Counties, who cast VBM ballots, either through the mail or by dropping them in the 'lock-boxes[,'] did not have their VBM envelopes segregated for later identification and authentication." *Id.* ¶ 30(C). But again, he neither identifies any provision of Illinois law that was purportedly violated nor alleges that any ballots were wrongfully cast or counted.

McHenry County Cure Process. Finally, Mr. Oberweis claims that "[c]ertain 'select'[] McHenry voters (*i.e.*, at least 50 of them)[] were permitted to 'cure' defective late-arriving VBM[s] and/or provisional ballots without ever signing the appropriate affidavit to do so." *Id.* ¶ 30(E). This impermissibly cryptic allegation falls well short of the requirement that a contestant plead grounds for contest "with particularity." 2 U.S.C. § 382(b). Mr. Oberweis fails to explain why "select" and "cure" are placed in scare quotes, what he means by "defective" and "late-arriving" ballots, and which affidavit these voters purportedly failed to sign.

Moreover, the conduct alleged in this claim is not unlawful. Mr. Oberweis does not identify a single provision of Illinois's election code that McHenry County purportedly violated here—and none is apparent. Voters *are permitted* to cure ballots that arrive after election day; VBM ballots are accepted up to 14 days after election day, *see* 10 ILCS 5/19-8(c), 10 ILCS 5/18A-15(a), and

> [i]f a vote by mail ballot is rejected by the election judge or official for any reason, the election authority shall, within 2 days after the rejection but in all cases before the close of the period for counting provisional ballots, notify the vote by mail voter that his or her ballot was rejected. The notice shall inform the voter of the reason or reasons the ballot was rejected and shall state that the voter may appear before the election authority, on or before the 14th day after the election, to show cause as to why the ballot should not be rejected.

10 ILCS 5/19-8(g-5). And although a voter attempting to cure a ballot "may present evidence to the election authority supporting his or her contention that the ballot should be counted," which is

then reviewed by "a panel of 3 election judges" along with "the contested ballot, application, and certification envelope," *id.*, the statute does *not* require completion of an affidavit. Once again, Mr. Oberweis describes only lawful conduct, and thus this claim is not a viable ground for an election contest.

The factual foundation for this claim is as unavailing as its legal basis. Mr. Oberweis cites to former campaign worker Daniel Zahm's affidavit in support of this claim, but Mr. Zahm attested only that he learned from a "volunteer's tabulation sheets for the discovery recount . . . that 50 voters were permitted to 'cure' defective late-arriving VBMs and provisional ballots, but saw no affidavit allowing them to do so." Zahm Aff. ¶ 11. Accordingly, although Mr. Oberweis definitively alleges that these "select" voters were permitted to cure their ballots "without ever signing the appropriate affidavit to do so," Notice ¶ 30(E), Mr. Zahm's statement only suggests that either he or the volunteer who produced the tabulation sheets "*saw* no affidavit" allowing those voters to cure their ballots. Zahm Aff. ¶ 11 (emphasis added). The fact that a volunteer did not *see* an affidavit is hardly proof that no affidavit was signed, and so this allegation lacks even minimal factual corroboration, let alone specific factual support.

ii. Mr. Oberweis's administrative grievances are improper grounds for contest.

A review of these various allegations reveals a recurring theme: many of Mr. Oberweis's claims are mere administrative grievances that are inappropriate grounds for a House election contest.

Mr. Oberweis clearly takes issue with the administration of the November election. He disapproves of the alleged lack of initials on VBM ballots in Kane County and that jurisdiction's policies relating to provisional voting. *See* Notice ¶¶ 25–26. He complains about the allegedly insufficient sealing of ballot boxes in three counties. *See id.* ¶¶ 27, 30(D). He disagrees with the

decisions of the Illinois General Assembly to proactively distribute VBM applications and of certain counties to supplement this mandate. *See id.* ¶ 28. He faults counties for failing to segregate ballots, and objects to DuPage County's touchscreen voting device and McHenry County's cure procedures. *See id.* ¶ 30(B)–(C), (E). But even if these claims described unlawful conduct—they do not, *see supra* Part II.B.i—they would still not constitute cognizable grounds for contest.

First, most of these claims do not actually implicate the propriety of ballots cast and counted in the November election for the IL-14 congressional seat. Mr. Oberweis neither alleges nor proves that any unlawful votes were counted—or that lawful votes were *not* counted—due to the distribution of VBM applications, the allegedly improper sealing of ballot boxes, or DuPage County's touchscreen voting device. Such claims, which have no impact on the final vote tally in IL-14, are irrelevant to the House's determination of who is "entitle[d] to contestee's seat." 2 U.S.C. § 385.

Second, even for those claims that *do* implicate votes cast, as discussed in Part II.A *supra*, invalidating otherwise-lawful votes is an improper remedy. Such an action would violate basic tenets of due process and run afoul of House precedent, particularly given that Mr. Oberweis at no point suggests that any administrative shortcomings rendered the intent of voters unclear.

Third, when a contest raises an issue for the first time that could have been resolved prior to the election, the House may find that the contestant waived the issue. *See, e.g.*, *Carter v. LeCompte*, H.R. Rep. No. 85-1626, at 17–18 (1958) (dismissing contest because contestant could have raised ballot-form irregularities prior to election and failed to do so (citing *Huber v. Ayres*, H.R. Rep. No. 82-906, at 2 (1951))). Here, several of Mr. Oberweis's administrative challenges could have *and should have* been raised before ballots were cast and counted. Indeed, the Cook County Republican Party, like Mr. Oberweis, challenged Public Act 101-642—in particular, its

mandated distribution of VBM applications—in August of last year, nearly three months before election day. *See* Complaint, *Cook Cnty. Republican Party v. Pritzker*, No. 20-cv-4676 (N.D. Ill. Aug. 10, 2020). The House should therefore decline to consider Mr. Oberweis's claims—in particular, challenges to VBM application distribution, DuPage County's touchscreen voting device, and Lake County's decision to prevent a local Republican Party organization from "us[ing] its website as a 'portal' to the Clerk's website for the purpose of obtaining a VBM application," *id.* ¶ 28(B)—that should have been asserted before votes were cast, tabulated, and certified.

Ultimately, if Mr. Oberweis objects to the administration of the November election, his recourse lies with the counties that purportedly mismanaged their processes or the State of Illinois that oversaw them—not the U.S. House of Representatives.

iii. Even if Mr. Oberweis's allegations demonstrated unlawful or irregular conduct, they fail to overturn Representative Underwood's 5,374-vote margin of victory.

Setting aside the legal infirmities of Mr. Oberweis's allegations, his notice also suffers from a failure of arithmetic: even if his claims constituted actual irregularities or improprieties—and not merely speculative allegations and administrative grievances—they simply *do not demonstrate* that he received more votes than Representative Underwood and is thus entitled to her seat.

Under the House's exclusive but circumscribed jurisdiction to determine "the Elections, Returns and Qualifications of its own Members," U.S. Const. art. I, § 5, cl. 1, a meritorious contest must prove—and hence, a viable notice must plead—that irregularities or misconduct *changed the outcome of the election*, since the House cannot exclude members unless they fail to satisfy the qualifications of membership, including proper election. *See Powell v. McCormack*, 395 U.S. 486, 522 (1969) ("[T]he Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed

in the Constitution." (footnote omitted)); *Roudebush v. Hartke*, 405 U.S. 15, 26 n.23 (1972) (noting that congressional qualifications include "be[ing] elected by the people"). If the irregularities or misconduct pleaded in a contest could *not* have changed the outcome of the election, then the House lacks authority to exclude the contestee and the contest must be summarily dismissed. *See, e.g.*, *Wilson v. Hinshaw*, H.R. Rep. No. 94-761, at 7 (1975) (recommending dismissal of FCEA contest notice where contestant failed to "sustain the requirement" that there be "a clear, and proven nexus between the [alleged] actions and the outcome of the election"); *Swanson v. Harrington*, H.R. Rep. No. 1722, at 1–4 (1940) (concluding "that contestant has failed to carry th[e] burden" of showing that "due to fraud and irregularity the result of the election was contrary to the clearly defined wish of the constituency involved" where 70 unlawful ballots were identified but 339 votes separated contestant and contestee); *cf. Willis v. Van Nuys*, S. Rep. No. 281, at 2 (1939) (recommending dismissal of Senate contest petition where "[a]ssuming as fact the estimates set forth in allegations of a general nature charging improper voting, irregularities by election officials, and other offenses, the aggregate is less than enough to change the effect of the election").

In other words, it is not enough for a House contestant to simply allege fraud or irregularities unmoored from the ballot count. Instead, the allegations must actually demonstrate that the contestant received more votes than the contestee. This Mr. Oberweis's claims fail to do.

Unspecified Numbers of Votes. Several of Mr. Oberweis's claims fail to even specify the number of votes implicated by the allegedly improper conduct, let alone that they would constitute an amount sufficient to entitle him to Representative Underwood's seat. His notice cites purported errors in the provisional ballot process—"voters in Kane County [who] were not allowed to provide the Affidavit required by ***I0 ILCS 17-10*** when their voting address was challenged at the polls" and "were either turned away" or "allowed to vote non-provisionally," Notice ¶ 26—but in

neither the notice itself nor the evidence accompanying it does Mr. Oberweis identify *how many* of these votes were cast. The same is true of his vague allegation that "VBM ballots were requested after Election Day and were voted after Election Day." *Id.* ¶ 30(A).[7]

Even more unavailing are those claims that lack the allegation that *any* unlawful votes were cast or counted. Mr. Oberweis faults the distribution of VBM applications—both the temporary Illinois law that mandated distribution of applications and the actions of specific counties—and the lack of ballot segregation in DuPage and McHenry Counties, *see id.* ¶¶ 28, 30(C), but at no point does he allege that improper votes were counted, or proper votes *not* counted, as a result of these administrative decisions. Nor does he allege that any votes were improperly cast as a result of DuPage County's use of an allegedly misleading ADA-compliant touchscreen voting device. *See id.* ¶ 30(B). Similarly, Mr. Oberweis claims that VBM ballots from Kane, McHenry, and Lake Counties were found stored in unsealed boxes in alleged contravention of Illinois law, *see id.* ¶¶ 27, 30(D), but he fails to allege that any unlawful ballots were cast because these boxes were purportedly unsealed. Instead, he muses only that "[u]nsealed boxes of uninitiated ballots are a 'ticking time-bomb[,'] ready to blow up any chance for the integrity of a recount," *id.* ¶ 27, which is not only a highly dubious claim—instances of voter fraud nationwide and in Illinois in particular are vanishingly rare, *see, e.g.*, *Cook Cnty. Republican Party*, 2020 WL 5573059, at *4–5—but also plainly insufficient to call the results of this election into question.

The overall insufficiency of Mr. Oberweis's notice is underscored by a comment that accompanies his allegation that "[o]ther voters throughout ILCD-14 were shown to have voted by

[7] Indeed, as discussed in Part II.B.i *supra*, Mr. Oberweis's own evidence belies the allegation that any such votes were cast; although six voters purportedly requested VBM ballots after election day, none of these voters is recorded as having returned a ballot after election day. *See* Mannix Aff. Ex. D, at 2. In fact, only one of the six is shown to have even returned a ballot, and apparently did so on October 30, 2020—four days before election day. *See id.* Ex. D, at 2.

mail, when, in fact, they had not done so": "One can only imagine how many ILCD-14 voters were turned away from the polls by Election Judges who confronted them with alleged 'evidence' of their earlier VBM votes when they, in fact, had not cast these alleged VBM ballots." *Id.* ¶ 26. House election contests are governed by demonstrable evidence, *not* a contestant's imagination. The burden is on Mr. Oberweis to plead facts *with particularity* demonstrating that the House should overturn the duly certified results of this election. His repeated failure to identify specific votes that were improperly cast or improperly excluded, and his constant reliance on speculation and generalizations, are fatal to his notice. Absent allegations that the purported misconduct affected the outcome of the election, Mr. Oberweis's claims are not "grounds sufficient to change [the] result of [the] election," 2 U.S.C. § 383(b)(3), and thus cannot serve as bases for this contest.

Insufficient Numbers of Votes. Even where Mr. Oberweis identifies specific numbers of implicated votes, the total falls far short of what would be required to reverse the results of this election. Mr. Oberweis correctly notes that, in the final tally, 5,374 votes separated his total from Representative Underwood's. Notice ¶¶ 3–4. But even aggregated, Mr. Oberweis's claims of unlawfully cast ballots fall well below this margin. His notice claims the following improper votes:

- 2,941.8 votes for Representative Underwood from a total of 4,903 votes that were "illegally cast [] from addresses in ILCD-14 at which [the voters] no longer lived, by mail," *id.* ¶ 24 & n.2;
- 181 votes (one-ninth of 1,626) that were cast in DuPage County in excess of the number of voters who "were recorded by the County Clerk as having voted," *id.* ¶ 29;[8]

[8] Although Mr. Oberweis does not explicitly request the deduction of 181 votes from DuPage County, this is presumably the result of his proposed remedy: "Given that 1/9th of DuPage County's Townships are located in ILCD-14, some proportionate number of these [1,626] votes, if they cannot be traced to the actual DuPage precincts in the ILCD-14, must be proportionately deducted from the respective vote totals of Contestant Oberweis and Contestee Underwood." Notice ¶ 29. Reducing all 181 votes from Representative Underwood's total even assumes that *all* suspect votes in DuPage County were cast for her.

- Two votes that "were counted which were received after the two-week grace period following the November 3, 2020 election," *id.* ¶ 30(A); *see also* Mannix Aff. ¶ 14;

- 63 votes that "were counted even though the application for the ballot was mailed prior to the effective date of the statute," Notice ¶ 30(A); *see also* Mannix Aff. ¶ 12 & Ex. C;

- 28 votes that "were counted even though the application for the VBM ballot was received after the October 29, 2020 deadline for same," Notice ¶ 30(A); *see also* Mannix Aff. ¶ 13 & Ex. D;

- "[A]t least 50" votes cast by voters who "were permitted to 'cure' defective late-arriving VBM[s] and/or provisional ballots without ever signing the appropriate affidavit to do so," Notice ¶ 30(E); and

- One vote allegedly cast by a Kenosha, Wisconsin resident who was allegedly ineligible to vote in IL-14, *id.* ¶ 30(F).

Added together, these various alleged improprieties implicate *at most* 3,267 votes. This is not nearly enough to overturn Representative Underwood's 5,374-vote margin of victory. A House "contestant must show that *but for* the voting irregularities or acts of fraud, the results of the election would have been different and the contestant would have prevailed." Maskell & Whitaker, *supra*, at 9 (emphasis added) (citing *Pierce v. Pursell*, H.R. Rep. No. 95-245 (1977)). Mr. Oberweis's claims implicate far fewer than the 5,374 votes that separate him and Representative Underwood and thus do not constitute viable grounds for an election contest.

Unidentified Candidate Selections. Even where Mr. Oberweis specifies the numbers of implicated votes, he fails to note a critical detail: for whom these alleged votes were cast. This is not a merely cosmetic consideration; the only way Mr. Oberweis can reduce Representative Underwood's 5,374-vote margin of victory, and thus plausibly claim entitlement to her seat, is by either reducing her vote total or increasing his own. The identities of the candidates for whom implicated votes were cast is therefore an essential component of this inquiry. And yet throughout his notice, Mr. Oberweis's glosses over this point, asserting vague allegations that could just as likely *increase* Representative Underwood's margin of victory as decrease it.

The instances when Mr. Oberweis attempts to distribute votes between himself and Representative Underwood are hardly persuasive. For his claim regarding nonresident voting, he explains that because "Contestee Underwood allegedly took approximately 60% of the VBM total, [] her total vote tally should thus be reduced by 2,941.8," and "Contestant Oberweis' total vote tally should be reduced by roughly 40%, or 1,961.2." *Id.* ¶ 24 n.2. This, he claims, "result[s] in Contestant Oberweis narrowing the gap in vote totals on this subset of votes alone by 980.6 votes." *Id*. This proportional reduction constitutes wholly speculative, back-of-the-envelope reasoning that is simply inadequate under the House contest statute. The FCEA places "the burden [] upon contestant to prove that the election results entitle him to contestee's seat." 2 U.S.C. § 385. Using speculative estimations, as Mr. Oberweis employs here, does not satisfy the requirement that a notice "state *with particularity* the grounds upon which contestant contests the election." *Id.* § 382(b) (emphasis added). Moreover, by employing heavy-handed proportional reduction without pinpointing specific ballots cast for specific candidates, Mr. Oberweis risks disenfranchisement of voters who lawfully and properly cast their ballots.

In short, Mr. Oberweis's numbers just don't add up. Even if his claims implicated improper or irregular conduct (they do not), and even if he had sufficiently alleged irregularities or misconduct in the November election (he has not), he has not pleaded—let alone proved—that enough improper ballots were counted, or proper ballots *not* counted, to change the result of the election and entitle him to Representative Underwood's seat. Dismissal of his contest notice is therefore required.

C. Mr. Oberweis's evidence is plainly insufficient.

In addition to pleading wholly inadequate allegations, Mr. Oberweis also relies on several pieces of evidence that do not stand up to even cursory scrutiny. This evidence fails to create

"genuine factual issues," thus requiring dismissal of the contest. *Anderson*, 477 U.S. at 249–50 (interpreting Rule 56 and noting that "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted" (citations omitted)).

At the outset, Mr. Oberweis's evidence suffers from a distinct lack of credibility. He attaches to his complaint an affidavit signed by Mr. Mannix, his former campaign manager, *see* Mannix Aff. ¶ 1; an affidavit from Mr. Zahm, "a paid field staff person" for his campaign, *see* Zahm Aff. ¶ 1; and an election contest petition filed by an unsuccessful candidate for DuPage County Auditor, *see* Notice Ex. 4. The affidavits from Mr. Oberweis's campaign workers can only be described as self-serving, and the election contest petition contains mere allegations, not verified facts. This evidence provides paltry support for Mr. Oberweis's allegations. Even accepting its veracity, his use and interpretation of the evidence leaves much to be desired.

Nonresident Voters. To support his allegations regarding alleged nonresident voters, Mr. Oberweis relies on a match list created by comparing a list of early and VBM voters in IL-14 with the NCOA and SSD databases. But this methodology is inherently and fatally unreliable.

First, Mr. Mannix attests that Aristotle Inc. "compared the ILCD-14 VBM and Early Voter List to the [NCOA] and [SSD] database using industry standard matching." Mannix Aff. ¶ 5. But this vague statement provides no information about *how* this matching was undertaken, and without a detailed explanation, it is impossible to determine the reliability (and accuracy) of the match list. Mr. Mannix's affidavit is the only source for information on how this procedure was completed; no affidavit from a representative of Aristotle Inc., or any other clarification as to how this comparative process was undertaken, is included with the notice.

Second, even if the match was performed in a reputable manner, a comparison of two datasets—like the NCOA database and IL-14 voter list—to identify individuals appearing on both

can only be performed using a unique identifier, like a social security number, to link entries on both records. *See, e.g., Majority Forward v. Ben Hill Cnty. Bd. of Elections*, No. 1:20-CV-266 (LAG), 2021 WL 50138, at *3 (M.D. Ga. Jan. 4, 2021).[9] Without unique identifiers (and Mr. Oberweis's notice identifies none), there is no safeguard against false matches.[10]

Third, the NCOA data itself is notoriously unreliable when (mis)used to conduct "analyses" for which it is not equipped. According to the U.S. Postal Service, the express purposes of the NCOA registry include "[r]educ[ing] undeliverable mail by providing the most current address information" for individuals, "[p]rovid[ing] faster product/service marketing through accurate mail delivery," and "[r]educ[ing] mailer costs by reducing the number of undeliverable mail pieces." *NCOALink*®, U.S. Postal Serv., https://postalpro.usps.com/mailing-and-shipping-services/NCOALink (last visited Feb. 2, 2021). Indeed, organizations that purchase licenses to access the NCOA database are reminded that "the *sole purpose* of the NCOA^{Link} Product is to update Mailing Lists in preparation for delivery by the USPS®." *Sole Purpose of NCOALink®—Reminder*, U.S. Postal Serv. (Nov. 19, 2020), https://postalpro.usps.com/NL_Sole_Purpose_Reminder (emphasis added).[11]

---

[9] Notably, Illinois uses unique identifiers like driver's license numbers and the last four digits of social security numbers to verify voter registration information. *See NASS Report: Maintenance of State Voter Registration Lists*, Nat'l Ass'n of Sec'ys of State 41 (Dec. 2017), https://www.nass.org/sites/default/files/reports/nass-report-voter-reg-maintenance-final-dec17.pdf.

[10] Nor *could* Mr. Oberweis have received unique identifiers, at least not from the lists Mr. Mannix purportedly acquired from the state; under Illinois law, election officials are prohibited from publicly disclosing confidential information such as "any portion of an applicant's Social Security number" and "any portion of an applicant's driver's license number or State identification number." 10 ILCS 5/1A-16.7(k).

[11] Incidentally, it is unclear whether Mr. Oberweis, Mr. Mannix, or Aristotle Inc. paid the license fee to access NCOALink—an annual license costs over $200,000—but if so, they might be doubly in violation of the NCOA License Agreement, which states that "addresses obtained as a result of the NCOA^{Link} process cannot be shared with parties outside of your organization." *Sole Purpose of NCOALink®*, *supra*.

Fourth, even if Mr. Oberweis had produced a list that accurately reported registered voters who have forwarded their mail to addresses outside of IL-14—to be clear, he has not—that would reveal nothing about these voters' eligibilities to vote in IL-14. Neither the NCOA database nor any other information provided by Mr. Oberweis demonstrates *why* a voter utilized the change-of-address service; indeed, there are countless other reasons why these voters might receive mail outside of their IL-14 addresses while maintaining their IL-14 addresses as their permanent residences. Because NCOA data makes no mention of why anyone requested a change of mailing address, which would be critical for any threshold determination of voter eligibility, Mr. Oberweis cannot rely on this information to challenge the validity of ballots.

Given these various and significant shortcomings, it is unsurprising that courts have consistently rejected reliance on the NCOA database as a basis for challenging voter residency requirements. *See, e.g.*, *Majority Forward*, 2021 WL 50138, at *15 (enjoining county "from upholding a challenge to any voter's eligibility solely on the basis of information in the NCOA registry"); *Common Cause/N.Y. v. Brehm*, 432 F. Supp. 3d 285, 297–98 (S.D.N.Y. 2020) (noting that "'[t]he NCOA registry does not collect certain data . . . that would help' maintain accurate voter-registration records" and concluding that use of the registry "to determine voter movement [is] substantially overinclusive" (alterations in original)).[12] These same considerations apply here

[12] Notably, under the National Voter Registration Act of 1993 ("NVRA"), voter removal based on NCOA information *also* requires use of a notice procedure for confirmation. *See* 52 U.S.C. § 20507(c)(1); *N.C. State Conf. of NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16CV1274, 2018 WL 3748172, at *12 (M.D.N.C. Aug. 7, 2018) (enjoining voter registration removal "when those challenges are based on change of residency and the State has neither received written confirmation from the voter of a change of residency outside of the county, nor complied with the NVRA's prior notice requirement and two-election cycle waiting period"); *see also NASS Report: Maintenance of State Voter Registration Lists*, Nat'l Ass'n of Sec'ys of State 40–41 (Dec. 2017), https://www.nass.org/sites/default/files/reports/nass-report-voter-reg-maintenance-final-dec17.pdf ("Election officials [in Illinois] must follow the removal procedures outlined in the National Voter Registration Act before cancelling a voter's registration.").

and foreclose a claim based on NCOA data; an IL-14 voter's presence in the NCOA database tells us nothing about whether that voter satisfies Illinois's residency requirements.

Significantly, Mr. Oberweis does not indicate that *any* of the 4,903 voters who allegedly cast unlawful ballots were contacted by him regarding their places of residence or voting registrations, or that he otherwise confirmed that any of these voters actually voted in IL-14 despite being unqualified to do so. He relies instead on wholesale speculation based on unverified evidence that *does not demonstrate fraud or irregularity*. He has thus failed not only to plausibly allege this claim, but also to sufficiently prove it.

Erroneously Reported Mail Voters. Evidentiary shortcomings also foreclose Mr. Oberweis's claim that "[o]ther voters throughout ILCD-14 were shown to have voted by mail, when, in fact, they had not done so." Notice ¶ 26. In addition to lacking factual enhancement, this claim is unsupported by the evidence cited in the allegations. Mr. Mannix's affidavit attests only that Mr. Oberweis's "Campaign retained Expert Vendor," which undertook a survey of IL-14 voters and reported that "19 confirmed that they did not vote by mail, even though voter records showed someone had voted in their name, by mail, in the 2020 General Election." Mannix Aff. ¶¶ 17–19. But there is no indication that these 19 voters attempted to vote provisionally but were prevented from doing so, and Mr. Oberweis has failed to identify *any* voters for whom this was the case.

Even if use of the Expert Vendor survey to buttress this claim were not disingenuous, self-reporting surveys are notoriously unreliable in the context of voting. *See, e.g.*, *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1254 (N.D. Miss. 1987) ("The census data concerning registration are based on self-reporting, which research has shown to be inaccurate when the self-reported data on registration and voter turn-out are compared to actual registration

and voting records." (citing J.P. Katosh & M.W. Traugott, *The Consequences of Validated and Self-Reported Voting Measures*, 45 Pub. Op. Q. 519 (1981))), *aff'd sub nom. Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991). Moreover, at no point does Mr. Oberweis prove—or even allege—that any of these 19 purportedly suspect mail ballots were unlawfully cast by individuals other than the contacted voters, let alone for which candidates these ballots were cast. The evidence just doesn't hold up, and it certainly doesn't provide support for Mr. Oberweis's claims.

CONCLUSION

Mr. Oberweis's kitchen-sink approach to this election contest fails at every level, from improper service to a wholly and fatally insufficient notice. No amount of speculation, innuendo, or exclamation points can change the fact that, for multiple reasons, none of his claims demonstrates that he was elected to represent Illinois's Fourteenth Congressional District:

Claim	Source	Reasons for Dismissal
"Voters Not Legally Residing in ILCD-14 Nevertheless Voted in ILCD-14"	Notice ¶¶ 24, 30(F)	• Claim fails to demonstrate that any voters cast ballots unlawfully because voter's presence on NCOA database does not indicate ineligibility to vote in IL-14 • Claim fails to demonstrate that any voters cast ballots unlawfully because voters can temporarily reside outside of IL-14 without abandoning their residences in district • Claim fails to implicate enough votes to change result of election • Claim fails to identify for which candidates implicated votes were cast • Proportional reduction of votes from candidates is impermissible and risks disenfranchisement of lawful voters • NCOA evidence is neither reliable nor properly interpreted

Claim	Source	Reasons for Dismissal
"Ballots Not Initialed by Election Judges in Contravention of Illinois Law"	*Id.* ¶ 25	• Claim fails to demonstrate any fraud or irregularity because VBM ballots do not require initialing • Otherwise-lawful ballots should not be discarded based on administrative errors
"Some Voters Were Not Allowed to Vote Provisionally"	*Id.* ¶ 26	• Claim fails to demonstrate that any voters cast ballots unlawfully because voters need not vote provisionally or complete affidavits merely due to challenges • Claim lacks factual corroboration and necessary details • Claim fails to specify number of implicated votes • Claim fails to identify for which candidates implicated votes were cast • Phone survey evidence is neither reliable nor properly interpreted
"Ballots Were Not Properly Sealed After Canvassing"	*Id.* ¶¶ 27, 30(D)	• Claim fails to demonstrate any fraud or irregularity because ballot boxes can be unsealed for discovery recounts • Claim does not allege that any unlawful votes were counted or any lawful votes were not counted
"VBM Application Unequally Treated, Debasing and Diluting the VBM Vote"	*Id.* ¶ 28	• Theory of vote dilution is inapplicable in this context • Claim does not allege that any unlawful votes were counted or any lawful votes were not counted • Administrative grievances should have been raised earlier
"In DuPage County, 1,626 More Ballots Were Cast Than Voters Who Voted"	*Id.* ¶ 29	• Claim lacks factual corroboration and necessary details • Claim is premised on unverified allegations from another contest petition • Proposed remedy risks disenfranchisement of lawful voters • Claim fails to implicate enough votes to change result of election • Claim fails to identify for which candidates implicated votes were cast

Claim	Source	Reasons for Dismissal
Ballots were counted after the two-week grace period	*Id.* ¶ 30(A)	• Claim lacks factual corroboration and necessary details • Claim is belied by Mr. Oberweis's evidentiary submissions • Claim fails to implicate enough votes to change result of election • Claim fails to identify for which candidates implicated votes were cast
Ballots were counted even though applications were mailed prior to effective date	*Id.* ¶ 30(A)	• Claim fails to demonstrate any fraud or irregularity because statute did not prohibit distribution of VBM applications prior to effective date • Otherwise-lawful ballots should not be discarded based on administrative errors • Claim fails to implicate enough votes to change result of election • Claim fails to identify for which candidates implicated votes were cast
Ballots were counted even though applications were received after October 29 deadline	*Id.* ¶ 30(A)	• Claim fails to demonstrate any fraud or irregularity because applicable statute did not include VBM application receipt deadline • Claim fails to implicate enough votes to change result of election • Claim fails to identify for which candidates implicated votes were cast
Ballots were counted even though applications were requested (and ballots voted) after election day	*Id.* ¶ 30(A)	• Claim lacks factual corroboration and necessary details • Claim is belied by Mr. Oberweis's evidentiary submissions • Claim fails to specify number of implicated votes • Claim fails to identify for which candidates implicated votes were cast
DuPage County's touchscreen voting device defaulted to Democratic candidates	*Id.* ¶ 30(B)	• Claim fails to demonstrate any fraud or irregularity • Claim does not allege that any unlawful votes were counted or any lawful votes were not counted • Administrative grievances should have been raised earlier

Claim	Source	Reasons for Dismissal
VBM ballots in DuPage and McHenry Counties were not segregated	*Id.* ¶ 30(C)	• Claim fails to demonstrate any fraud or irregularity • Claim does not allege that any unlawful votes were counted or any lawful votes were not counted
Certain McHenry County voters were allowed to cure ballots without signing an affidavit	*Id.* ¶ 30(E)	• Claim fails to demonstrate any fraud or irregularity because votes may be cured after election day without affidavits • Claim lacks factual corroboration and necessary details • Otherwise-lawful ballots should not be discarded based on administrative errors • Claim fails to implicate enough votes to change result of election • Claim fails to identify for which candidates implicated votes were cast

Given that Mr. Oberweis has failed—under even the most charitable standard of review—to allege a viable contest, this matter should not proceed to discovery, and his notice of contest should be dismissed.

DATED this 3rd day of February, 2021.

PERKINS COIE LLP

By: 

Marc E. Elias
Stephanie I. Command
700 Thirteenth St., N.W., Suite 800
Washington, D.C. 20005

Abha Khanna
Jonathan P. Hawley
1201 Third Ave., Suite 4900
Seattle, Washington 98101

Attorneys for Contestee Lauren Underwood

EXHIBIT 1

AFFIDAVIT OF LAUREN UNDERWOOD

1. My name is Lauren Underwood. I am over 18 years of age, a citizen of the State of Illinois, suffer from no legal disabilities, and am otherwise competent to testify to the matters contained herein. I have personal knowledge of the facts set forth below, and if called as a witness, can testify thereto.

2. I serve as the United States Representative from Illinois's Fourteenth Congressional District.

3. On Monday, January 4, 2021, my Chief of Staff Andrea Harris and I were present in the office. When I arrived that morning, no envelopes were underneath the door or in the vicinity of the doorway area, and to the best of my recollection, no items were delivered to the office while I was there that morning. Ms. Harris and I departed together at approximately 11:30 a.m.

4. I was not personally served with a copy of Mr. Oberweis's notice of contest.

5. I did not receive a copy of Mr. Oberweis's notice of contest at either my Illinois residence or my apartment in Washington, D.C.

6. I did not authorize an agent to receive service of a notice of contest on my behalf.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2 day of February, 2021.

Lauren Underwood

Lauren Underwood

Sworn to and subscribed to before me
this 2 day of February, 2021.

Marcus S. Davis
Notary Public

My commission expires: 2/29/24

MARCUS S DAVIS
NOTARY PUBLIC
My Comm. Exp.
Feb 29, 2024
DISTRICT OF COLUMBIA

EXHIBIT 2

AFFIDAVIT OF ANDREA HARRIS

1. My name is Andrea Harris. I am over 18 years of age, a citizen of the District of Columbia, suffer from no legal disabilities, and am otherwise competent to testify to the matters contained herein. I have personal knowledge of the facts set forth below, and if called as a witness, can testify thereto.

2. I serve as Chief of Staff to Representative Lauren Underwood. In this capacity, I generally have knowledge of when staff members are present in Representative Underwood's office (1130 Longworth House Office Building). I include myself as a "staff member" when using the term in this affidavit.

3. On Monday, January 4, 2021, Representative Underwood and I were present in the office. When I arrived that morning, no envelopes were underneath the door or in the vicinity of the doorway area, and to the best of my recollection, no items were delivered to the office while I was there that morning. Representative Underwood and I departed together at approximately 11:30 a.m.

4. Following that time, to the best of my knowledge, no staff members were in Representative Underwood's office until Representative Underwood and I returned at approximately 10:35 a.m. on Wednesday, January 6, 2021.

5. Upon entering the office together at that time, we found a manila envelope on the floor just inside a door separating the office from a public hallway. The envelope contained a notice of filing, a copy of James Oberweis's contest notice, and a notice of appearance for his attorneys. I took photographs of the envelope that we encountered, which are attached as Attachment A.

6. Based on the circumstances set out above, I believe the envelope was placed under the door of Representative Underwood's office sometime between 11:30 a.m. on January 4, 2021 and 10:35 a.m. on January 6, 2021.

7. To the best of my knowledge, neither Representative Underwood nor any staff member was present at the office when the documents photographed in Attachment A were delivered to the office, and neither Representative Underwood nor any staff member accepted service of the documents.

8. On January 25, 2021, a staff member informed me that a parcel with a certified mail label was delivered via mail to Representative Underwood's office on that date while the staff member was present in the office. That staff member personally received a bin of mail in which the parcel was included (alongside other mail being delivered to the office). The staff member took photographs of the certified mail parcel that was delivered to the office on that date, and those photographs are attached as Attachment B.

9. I requested that the staff member personally deliver to me the certified mail parcel referenced in the preceding paragraph. The staff member personally delivered that parcel to me later that day. The parcel that the staff member handed me is pictured in Attachment B. Thereafter, I opened the parcel and found it contained a notice of filing, a copy of James Oberweis's contest notice, a notice of appearance for his attorneys, and a letter describing the contents of the parcel directed to the Clerk of the U.S. House of Representatives.

I declare under penalty of perjury that the foregoing is true and correct.

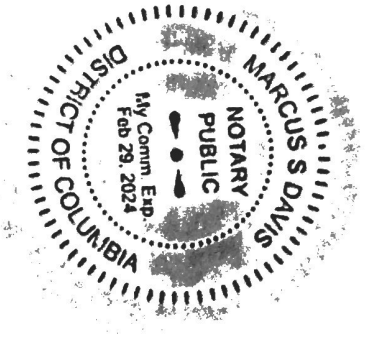
Executed this 2 day of February, 2021.

Andrea Harris

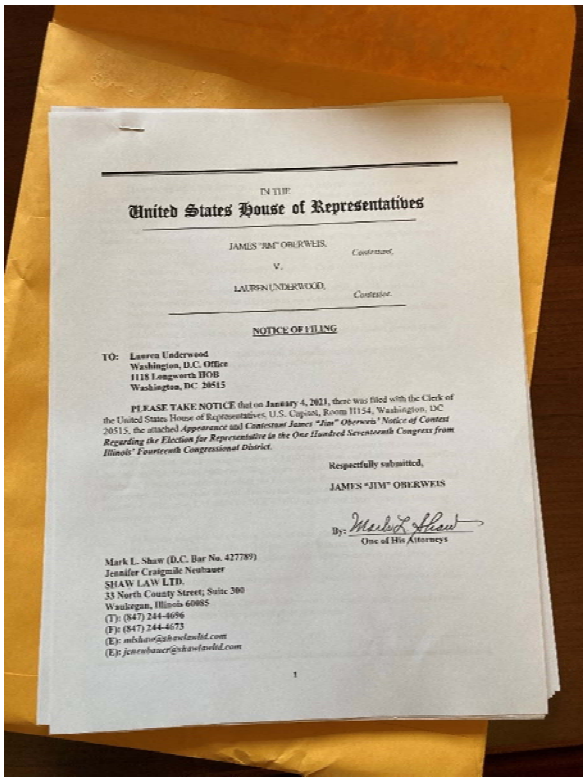
Sworn to and subscribed to before me
this 2 day of February, 2021.

Notary Public

My commission expires: 2/29/24



ATTACHMENT A



IN THE

United States House of Representatives

JAMES "JIM" OBERWEIS, *Contestant,*

v.

LAUREN UNDERWOOD, *Contestee.*

NOTICE OF FILING

TO: **Lauren Underwood**
Washington, D.C. Office
1118 Longworth HOB
Washington, DC 20515

PLEASE TAKE NOTICE that on **January 4, 2021,** there was filed with the Clerk of the United States House of Representatives, U.S. Capitol, Room H154, Washington, DC 20515, the attached ***Appearance*** and ***Contestant James "Jim" Oberweis' Notice of Contest Regarding the Election for Representative in the One Hundred Seventeenth Congress from Illinois' Fourteenth Congressional District.***

Respectfully submitted,

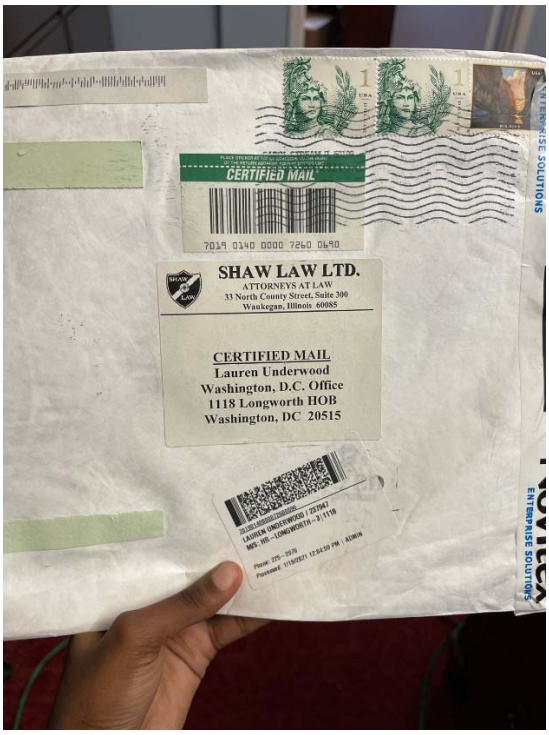
JAMES "JIM" OBERWEIS

By: Mark L. Shaw
One of His Attorneys

Mark L. Shaw (D.C. Bar No. 427789)
Jennifer Craigmile Neubauer
SHAW LAW LTD.
33 North County Street; Suite 300
Waukegan, Illinois 60085
(T): (847) 244-4696
(F): (847) 244-4673
(E): *mlshaw@shawlawltd.com*
(E): *jcneubauer@shawlawltd.com*

1

ATTACHMENT B




1
USA
DOLLAR
TICKER AT TOP OF ENVELOPE TO THE RIGHT
RETURN ADDRESS. FOLD AT DOTTED LINE
ERTIFIED MAIL
0140 0000 7260 0690
HAW LAW LTD.
ATTORNEYS AT LAW
North County Street, Suite 300
Waukegan, Illinois 60085
RTIFIED MAIL

EXHIBIT 3

AFFIDAVIT OF JONATHAN HAWLEY

1. My name is Jonathan Hawley. I am over 18 years of age, a citizen of the State of Washington, suffer from no legal disabilities, and am otherwise competent to testify to the matters contained herein. I have personal knowledge of the facts set forth below, and if called as a witness, can testify thereto.

2. I am an attorney with the law firm of Perkins Coie LLP and am admitted to practice law in the states of Washington and California. I am an attorney for Contestee Lauren Underwood.

3. Representative Underwood's Chief of Staff, Andrea Harris, emailed me images of a parcel that was delivered to Representative Underwood's office on January 25, 2021. The parcel depicted in the images featured a certified mail label with tracking number "70190140000072600690."

4. I accessed the U.S. Postal Service's online tracking portal (https://www.usps.com/manage) and entered this tracking number. Attachment A is a true and correct screenshot of the parcel's tracking history.

5. The earliest entry is dated January 5, 2021 at 11:38 p.m., when the parcel "[a]rrived at USPS Regional Facility" in Carol Stream, Illinois. The parcel arrived at its destination on January 19.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of February, 2021.

Jonathan P Hawley

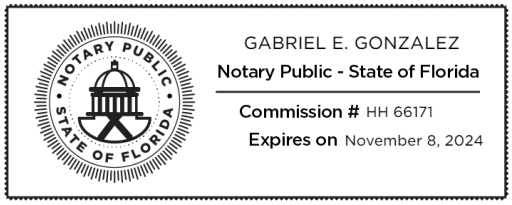
Jonathan Hawley

State of Florida, County of Miami-Dade

Sworn to and subscribed to before me
this 1st day of February, 2021.

Notary Public Gabriel E. Gonzalez

My commission expires: 11/08/2024



Notarized online using audio-video communication

ATTACHMENT A

Tracking Number: 70190140000072600690

Your item was delivered to the front desk, reception area, or mail room at 10:25 am on January 19, 2021 in WASHINGTON, DC 20515.

Status

Delivered

January 19, 2021 at 10:25 am
Delivered, Front Desk/Reception/Mail Room
WASHINGTON, DC 20515

Get Updates

Delivered

Text & Email Updates

Tracking History

January 19, 2021, 10:25 am
Delivered, Front Desk/Reception/Mail Room
WASHINGTON, DC 20515
Your item was delivered to the front desk, reception area, or mail room at 10:25 am on January 19, 2021 in WASHINGTON, DC 20515.

January 19, 2021, 8:40 am
Arrived at Unit
WASHINGTON, DC 20018

January 9, 2021
In Transit to Next Facility

January 5, 2021, 11:38 pm
Arrived at USPS Regional Facility
CAROL STREAM IL DISTRIBUTION CENTER

Product Information

See Less

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to 2 U.S.C. § 384, on this 3rd day of February, 2021, a true and correct copy of **CONTESTEE'S MOTION TO DISMISS CONTESTANT'S NOTICE OF CONTEST REGARDING THE ELECTION FOR REPRESENTATIVE IN THE ONE HUNDRED SEVENTEENTH CONGRESS FROM ILLINOIS' FOURTEENTH CONGRESSIONAL DISTRICT** was served upon the attorney representing Contestant James Oberweis via certified mail at the following address:

Mark L. Shaw
Shaw Law Ltd.
33 N. County St., Ste. 300
Waukegan, IL 60085

DATED this 3rd day of February, 2021.

PERKINS COIE LLP

By: 

Marc E. Elias
700 Thirteenth St., N.W., Suite 800
Washington, D.C. 20005

Attorneys for Contestee Lauren Underwood