CHERYL L. JOHNSON
CLERK

GLORIA J. LETT
DEPUTY CLERK

ROBERT F. REEVES
DEPUTY CLERK

H–154 THE CAPITOL

Office of the Clerk
U.S. House of Representatives
Washington, DC 20515–6601

March 18, 2021

The Honorable Zoe Lofgren
The Honorable Rodney Davis
Committee on House Administration
1309 Longworth House Office Building
Washington, DC 20515

Dear Chairperson Lofgren and Ranking Member Davis:

I transmit herewith correspondence captioned "Contestee's Reply in Support of Motion to Dismiss Contestant's Notice of Contest Regarding the Election for Representative in the One Hundred Seventeenth Congress from Illinois' Fourteenth Congressional District". The enclosed correspondence was received in the Office of the Clerk by hand delivery on March 18, 2021.

With best wishes, I am

Sincerely,

Cheryl L. Johnson
Clerk

Enclosures

IN THE

United States House of Representatives

JAMES "JIM" OBERWEIS,

Contestant,

v.

LAUREN UNDERWOOD,

Contestee.

CONTESTEE'S REPLY IN SUPPORT OF 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

March 18, 2021

TABLE OF CONTENTS

INTRODUCTION

Contestant James Oberweis's response brief is many things—a litany of grievances against various state and local actors; a revisionist reinterpretation of both the Federal Contested Elections Act ("FCEA") and the Federal Rules of Civil Procedure; an extensive catalogue of insults, intrigue, and hyperbole. What it is not, however, is a cogent and compelling defense of his notice of contest—which remains a collection of fatally insufficient allegations that cannot sustain a viable election contest in the U.S. House of Representatives.

Rather than engage with the myriad grounds for dismissal raised in Contestee Lauren Underwood's motion to dismiss, *see generally* Contestee's Mot. to Dismiss Contestant's Notice of Contest ("Mot."), Mr. Oberweis relies on a series of misconceptions and red herrings. He argues that the legal standard Representative Underwood articulates is inconsistent with precedent and other House contests; it is not. He claims that she has failed to satisfy her evidentiary burden; she has not. And he maintains that he is entitled to discovery in this matter; given that the allegations in his notice and the factual enhancement supporting them fail to state with particularity grounds to change the result of the election, he most assuredly is not.

As an introductory matter, it is useful to consider which issues are *not*, Mr. Oberweis's brief notwithstanding, before the Committee:

- The purported refusals of certain counties to respond to Mr. Oberweis's requests for discovery recounts. *See* Contestant's Resp. to Contestee's Mot. to Dismiss Contestant's Notice of Contest ("Resp.") 1–2, 18–19, 26 n.24. If Mr. Oberweis feels that any jurisdictions have failed to comply with their legal obligations—which, ultimately, has nothing to do with whether lawful votes were cast and counted last November—then that is a matter for Illinois courts, not the U.S. House of Representatives.

- The decision of the Illinois Legislature to make voting easier during the pandemic. Mr. Oberweis repeatedly questions the Legislature's enactment of laws that expanded access to mail voting last year, *see id.* at 28 & n.25, but those legislative judgments—the legality of which has been considered and upheld by a federal

court, *see Cook Cnty. Republican Party v. Pritzker*, No. 20-cv-4676, 2020 WL 5573059, at *1 (N.D. Ill. Sept. 17, 2020)—is beyond the ambit of this Committee.

- The Gettysburg Address. Mr. Oberweis concludes his brief with a soaring peroration about Abraham Lincoln and the Civil War, *see* Resp. 34, but this House contest ultimately has nothing to do with the cause for which those honored dead gave the last full measure of devotion—and, indeed, the sacrifices made by men and women in uniform in defense of our basic freedoms have never been in doubt.

Instead, the *only* issue the Committee must address in considering Representative Underwood's motion is whether Mr. Oberweis's notice of contest provides plausible allegations, supported by sufficient factual enhancement, to satisfy the applicable pleading standard and entitle him to the time and expense of FCEA discovery. For the reasons discussed in Representative Underwood's motion and this reply, it does not. Dismissal of this contest is therefore required.

ARGUMENT

Mr. Oberweis's response does not cure his contest's procedural and substantive infirmities. He thoroughly mischaracterizes the proper standard of review for an FCEA motion to dismiss, which Representative Underwood properly articulates in her motion. He then fails to adequately defend the sufficiency of the allegations in his notice, which do not state with particularity grounds to change the result of the election and therefore cannot support a House contest.[1]

[1] Representative Underwood's motion focuses in part on the issue of service, the propriety of which was not clear at the time she filed that initial brief. *See* Mot. 5–8. Mr. Oberweis's arguments in response leave much to be desired; whether filing his notice with the Clerk of the House alone satisfies 2 U.S.C. § 382(c)(3) is a readily disputable proposition, as is the claim that sliding a copy of the notice under the door of Representative Underwood's empty office constituted personal service under subsection 382(c)(1). Mr. Oberweis indicates that his counsel's legal assistant placed a copy of the notice, ostensibly addressed to Representative Underwood, in the mail on the service deadline of January 4, 2021. *See* Resp. 6; Affidavit of Glorisell Pomales ("Pomales Aff.") ¶¶ 5–6, Ex. B-2. But even this effort was apparently insufficient—under the FCEA, a notice must be mailed to a contestee's "principal office or place of business," 2 U.S.C. § 382(c)(5), and the mailed parcel was addressed to the wrong office. *Compare* Affidavit of Andrea Harris ¶ 2 (attesting that Representative Underwood's office is 1130 Longworth House Office Building), *with* Pomales Aff. ¶ 5, Ex. B-2 (indicating that notice was mailed to 1118 Longworth House Office Building).

I. Mr. Oberweis misunderstands the proper standard of review.

The FCEA includes the procedural mechanism of a motion to dismiss for precisely these circumstances: to ensure that a contestant does not proceed to costly discovery where their meritless claims do not support a viable contest. Drawing on both House precedent and the Federal Rules of Civil Procedure, Representative Underwood's motion identifies the proper standard of review for the Committee to apply. *See* Mot. 2–5.

Specifically, because a notice of contest must "state with particularity the grounds upon which contestant contests the election," 2 U.S.C. § 382(b), an FCEA contestant "must support [their] claim with *specific credible allegations* of irregularity or fraud that, if proven true, would entitle the Contestant to the office." *Project Hurt v. Waters*, H.R. Rep. No. 113-133, at 3 (2013) (emphasis added); *see also Anderson v. Rose*, H.R. Rep. No. 104-852, at 6–7 (1996) (emphasizing that contestant cannot rely "on general, or disproven claims of fraud or irregularities"). To survive a motion to dismiss, an FCEA 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). And in adjudicating the motion, previous House contest task forces have adopted "a blend of [Federal Rules of Civil Procedure] 12(b)(6) and 56," scrutinizing both the plausibility of the contestant's allegations and the evidence martialed in support. *Dornan v. Sanchez*, H.R. Rep. No. 105-416, at 10 (1998); *see also Anderson*, H.R. Rep. No. 104-852, at 8 ("As a comparison with the federal civil procedure rules . . . the House utilized a standard blending of Rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.").

Representative Underwood will nevertheless focus on the merits of Mr. Oberweis's contest in this reply rather than this procedural shortcoming.

Mr. Oberweis challenges this straightforward explication of House precedent. *See* Resp. 8–17. His arguments, however, do not undermine Representative Underwood's articulation of the governing legal standard, let alone establish an alternative standard that the Committee should employ. As a general matter, Mr. Oberweis argues that the exacting standard described by Representative Underwood "finds no support in the plain reading of the ***FCEA***, its legislative history, this Committee's earlier rulings, or the substantially less onerous standard urged by Contestee Underwood's counsel in another proceeding before this House." Resp. 15. This assertion is roundly mistaken:

- The exacting standard is consistent with the plain text of the FCEA; the statute requires that the grounds for contest be stated "*with particularity*," 2 U.S.C. § 382(b) (emphasis added), thus requiring more than vague, factually unsubstantiated allegations.

- The standard is consistent with the legislative history; the drafters of the FCEA allowed motions to dismiss because "exhaustive hearings and investigations ha[d], in the past, been conducted only to find that if the contestant had been required at the outset to make *proper allegations with sufficient supportive evidence* that could most readily have been garnered at the time of the election such further investigation would have been unnecessary and unwarranted." *Tunno*, H.R. Rep. No. 92-626, at 3 (emphasis added).

- The standard is consistent with this Committee's earlier rulings; indeed, it is derived from House precedent. *See* Mot. 2–5.

- The standard is consistent with the other contest proceeding currently pending before this Committee, as discussed below.

The exacting standard articulated by Representative Underwood is, in short, fully grounded in applicable precedent and persuasive authorities.

Mr. Oberweis's more specific arguments and objections are equally unavailing. First, he suggests that Representative Underwood "mysteriously cites" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), as sources of guidance for the proper standard of review. Resp. 10. He then goes on at length describing the factual and

procedural histories of these two cases, ultimately suggesting that neither is relevant to this proceeding because they did not concern House contests. *See id.* at 11–15. But House precedent has described the proper standard for an FCEA motion to dismiss as a blend of Rules 12(b)(6) and 56, and *Iqbal* and *Liberty Lobby* are canonical cases interpreting these rules. The substantive distinctions between the causes of action in those cases and this one—the "substantive evidentiary standard[s]" on which Mr. Oberweis fixates in his brief, Resp. 14—have no bearing on the *procedural* standards the cases articulated. Those bedrock procedural principles, articulated in *Iqbal*, *Liberty Lobby*, and their progeny, inform proper application of Rules 12(b)(6) and 56—and, by extension, the FCEA. What is truly mysterious is Mr. Oberweis's objection to this unremarkable use of legal analogy, not Representative Underwood's attempt to guide this Committee's inquiry by citing to hornbook principles of civil procedure. Those foundational tenets inform what Mr. Oberweis's notice must accomplish to survive an FCEA motion to dismiss: allege sufficient facts "to 'state a claim to relief that is plausible on its face,'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), and provide sufficient evidence "on which the [factfinder] could reasonably find" in his favor. *Liberty Lobby*, 477 U.S. at 252.[2]

[2] To the extent Mr. Oberweis faults these cases because they did not concern election contests—which, again, is irrelevant to the universal procedural standards they articulated—Representative Underwood notes that state election contests also require that contestants' initial statements contain specific factual allegations, and not, like Mr. Oberweis's notice, only vague, generalized claims of fraud or irregularity. *See, e.g.*, *Tataii v. Cronin*, 198 P.3d 124, 127 (Haw. 2008) (per curiam) ("An election contest cannot be based upon mere belief or indefinite information." (quoting *Akaka v. Yoshina*, 935 P.2d 98, 103 (Haw. 1997))); *In re Contest of Nov. 8, 2005 Gen. Election for Off. of Mayor of Parsippany-Troy Hills*, 934 A.2d 607, 630 (N.J. 2007) (Rivera-Soto, J., concurring in part and dissenting in part) ("[Contest] petition should have contained factual representations—not bare conclusions—as to the wherefores and the whys regarding those [petitioner] identified as legal voters whose votes had been rejected or those [petitioner] identified as illegal voters."); *Greenly v. Indep. Sch. Dist. No. 316*, 395 N.W.2d 86, 91 (Minn. 1986) ("[T]he legislature has required that one who plans to challenge an election clearly state the points upon which he will do so.").

Mr. Oberweis also suggests that Representative Underwood "completely ignores ***Dornan's*** facts and their close similarity with [his] Notice of Contest." Resp. 10. He likewise implies that application of *Dornan*'s legal standard militates against dismissal of this contest. *See id.* at 15–16. Setting aside the fact that Representative Underwood certainly does not ignore *Dornan*—her motion relies on the precedent extensively—the notable factual distinctions between that contest and this one actually *support* dismissal of Mr. Oberweis's notice. In *Dornan*, by Mr. Oberweis's own acknowledgement, the contestant "earned his right to discovery" because he "submitted affidavits, witness statements, statistical charts, newspaper accounts and correspondence" to support his specific allegations. *Id.* at 10, 12. The task force thus concluded that the contestant's notice contained "substantial and credible allegations of fraud" *supported by evidence. Dornan*, H.R. Rep. No. 105-416, at 5. Here, for the various reasons discussed in Representative Underwood's motion and rearticulated below, Mr. Oberweis's notice contains only vague allegations of misconduct that fail to implicate sufficient votes to change the outcome of the election—and what paltry evidence he has submitted is neither credible nor persuasive.

In short, *Dornan* has not been nor should be ignored in this contest; it is not only a source of the applicable legal standard, but also provides a striking and telling contrast with Mr. Oberweis's contest. This is *not* a case where a contestant has alleged "specific ballot errors in an amount sufficient to change the result of the election." *Id.* at 11 (quoting *Pierce v. Pursell*, H.R. Rep. No. 95-245, at 4 (1977)). Instead, Mr. Oberweis has provided only "allegations [that are] either vague, improbable on their face, or insufficient even if true to place the election result in doubt," *id.*, and thus—under the legal standard articulated in *Dornan*—dismissal of his contest is required.

Finally, Mr. Oberweis claims that the exacting standard articulated in Representative Underwood's motion is inconsistent with the position taken by Contestant Rita Hart in a separately pending election contest. *See* Resp. 3, 15. This is incorrect. There, in the briefing cited by Mr. Oberweis, Contestant Hart relied on *Iqbal*, *Liberty Lobby*, and the same House precedents cited in Representative Underwood's motion to dismiss. *Compare* Contestant's Resp. to Contestee's Mot. to Dismiss Notice of Contest ("Hart Resp.") 3–5, *Hart v. Miller-Meeks* (Feb. 2, 2021), *with* Mot. 2–5. Mr. Oberweis finds particular support in Contestant Hart's statements that "a Contestant 'is not required to provide convincing evidence in the form of documents and/or affidavits,'" and that factual allegations "need not be 'detailed' so long as they are not 'devoid of "further factual enhancement."'" Hart Resp. 7 (first quoting *Dornan*, H.R. Rep. No. 105-416, at 8; and then quoting *Iqbal*, 556 U.S. at 678). But—as Representative Underwood emphasizes in her motion—while Mr. Oberweis might not be required to submit conclusive evidence at this stage, his allegations separately lack even the minimal factual enhancement needed to bring his speculative claims into the realm of plausibility. *See, e.g.*, Mot. 14, 26, 29, 34. Consistent with *Iqbal*, other cases applying Rule 12(b)(6), and Contestant Hart's briefing, such insufficient pleading must be dismissed.[3]

[3] Moreover, any comparison with Contestant Hart's pending contest only underscores the fatal inadequacy of Mr. Oberweis's notice. This contest concerns an election decided by more than 5,000 votes, and Mr. Oberweis's claims of fraud and irregularity are not only uniformly vague and speculative, but frequently describe what is properly interpreted as lawful conduct. By contrast, Contestant Hart is challenging a final margin of only *six votes*, and her notice of contest identifies specific ballots, cast for specific candidates by specific voters in specific counties, that she alleges were wrongfully excluded from the final tally and change the result of that election. *See generally* Notice of Contest, *Hart v. Miller-Meeks* (Dec. 22, 2020).

II. Mr. Oberweis has failed to meet his burden because he has not stated grounds sufficient to claim a right to Representative Underwood's seat.

Mr. Oberweis's response does not—and cannot—transform his fatally inadequate allegations into grounds sufficient to change the result of the election and thus entitle him to further proceedings.[4]

Before considering his specific allegations, Mr. Oberweis wrongly suggests that he deserves a discovery process simply because he desires it and has thus far been stymied by county officials. *See* Resp. 18–19. He neglects that FCEA discovery is only justified if a contestant *first* states with particularity grounds to contest the election and claim entitlement to a House seat. Discovery is not a "legitimate right" bestowed on Mr. Oberweis by virtue of his current situation. Resp. 19. Indeed, as discussed in Part I *supra*, the FCEA's provision allowing motions to dismiss was enacted for the express purpose of avoiding the time and expense of discovery where a contestant's allegations and factual support do not state plausible grounds for contest. *See Tunno*, H.R. Rep. No. 92-626, at 3. Such is the case here; even accepting Mr. Oberweis's allegations as true and affording him all favorable inferences, he has failed to plead fraud or irregularity implicating sufficient votes to change the result of the election for Illinois's Fourteenth Congressional District. For this basic reason, discovery in this contest is not warranted—and dismissal is required.

Additionally, Mr. Oberweis incorrectly attempts to raise Representative Underwood's burden, suggesting that the absence of countervailing evidence submitted by her precludes dismissal of his contest. *See* Resp. 19. But the burden is upon *Mr. Oberweis*, and no one else, "to

[4] Mr. Oberweis states that he will not address in his brief—and yet at the same time, somehow, "does not waive"—most of the allegations contained in his notice and challenged in Representative Underwood's motion. Resp. 4 n.2. As to each of these claims, Representative Underwood rests on her prior arguments. *See* Mot. 41–44 (cataloguing arguments in support of dismissal).

prove that the election results entitle him to" Representative Underwood's seat. 2 U.S.C. § 385. Although an FCEA contestee has the *ability* to submit countervailing evidence, there is no *requirement* that they do so—nor is such evidence necessary where, as here, Mr. Oberweis's allegations on their own fall far short of the standard required to survive a motion to dismiss.[5]

A. Mr. Oberweis has neither alleged nor proven that nonresident voters cast ballots in the election.

In her motion to dismiss, Representative Underwood explains why Mr. Oberweis's allegations regarding nonresident voters do not constitute a valid ground for contest, since a voter's inclusion in the U.S. Postal Service's National Change of Address ("NCOA") database is not sound evidence of impermissible voting under Illinois law. *See* Mot. 13–15. Nothing in Mr. Oberweis's response changes this conclusion.

Mr. Oberweis maintains that the scant allegations lodged in his notice are sufficient, and that he "should be allowed to prove what this credible evidence suggests." Resp. 20. But the evidence he has martialed is *not* credible; for the reasons discussed in Representative Underwood's motion, *see* Mot. 37–40, the NCOA database is a notoriously unreliable tool for challenging voter eligibility. Even if this evidence did not lack credibility, that a voter might have a mailing address outside of the Fourteenth Congressional District does not demonstrate an ineligibility to vote there, since Illinois voters can have multiple mailing addresses (or even multiple domiciles) without losing their voter status—and, indeed, temporary relocations were not uncommon in 2020 due to the displacing effects of the COVID-19 pandemic. *See id.* at 14–15.

---

[5] Moreover, for many of Mr. Oberweis's claims, countervailing evidence is impractical or impossible to obtain. For example, although he claims that "4,903 voters illegally cast ballots from addresses in ILCD-14 at which they no longer lived," Notice of Contest ¶ 24, he has provided the specific names of fewer than three dozen of these voters. *See* Affidavit of Thomas J. Mannix Ex. A. Representative Underwood cannot prove the eligibility of nearly 5,000 voters whose identities are a matter of pure speculation.

In response, Mr. Oberweis disingenuously suggests that Representative Underwood would require that he "***provide conclusive proof***" of nonresident voting in order to survive a motion to dismiss. Resp. 20–22. This is not the case. As discussed in Part I *supra*, definitive proof is not needed at the pleading stage, whether under the FCEA or the Federal Rules of Civil Procedure. But nor is it true that vague, implausible, unsubstantiated allegations of the sort that undergird Mr. Oberweis's claims satisfy the applicable pleading standard. *Something more* than idle guesswork and questionable evidence is required to nudge Mr. Oberweis's allegations of nonresident voting from wholly speculative to remotely credible. Because he has failed to supply that requisite factual enhancement, this claim is not a viable ground for contest.

Mr. Oberweis also argues that, by questioning the credibility of his evidence, Representative Underwood "pick[s] at it from the 'cheap seats' on the sidelines, but produce[s] no countervailing evidence nor support for the hearsay and speculation running rife through her argument." Resp. 21. Setting aside the glaring fact that it is *Mr. Oberweis's notice* that is rife with speculation and hearsay—his notice is an exercise in unfounded extrapolation, while his affidavits rely heavily on third-party assertions like Robert Sandy's tweets and claims from campaign volunteers—Representative Underwood is under no obligation to submit evidence when the burden in this contest is on Mr. Oberweis. Furthermore, there is nothing inappropriate or unsporting about Representative Underwood's valid questions regarding the credibility and probity of Mr. Oberweis's evidence. To the contrary, House precedent has repeatedly noted that credibility determinations are an essential component of this process. *See Dornan*, H.R. Rep. No. 105-416, 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 viewing the evidence at issue in a Rule 56 motion for summary

judgment."); *Anderson*, H.R. Rep. No. 104-852, at 9 (same). Mr. Oberweis's evidence does not pass even a cursory credibility inquiry; he relies on self-serving affidavits, questionable statistical methodology, and an NCOA database that is wholly improper for the task at hand. *See* Mot. 36–41. This is not mere sniping from the sidelines; nor is it "legal analysis overkill in an attempt to cover up the very simple fact that [Representative Underwood] has not offered" countervailing evidence. Resp. 20 n.15. Instead, these are critical questions that Mr. Oberweis tellingly leaves unanswered. Mr. Oberweis cannot dodge this credibility inquiry by faulting Representative Underwood for failing to meet an evidentiary standard that was never hers to begin with.

Lastly, in addition to the enduring pleading and evidentiary shortcomings inherent in Mr. Oberweis's nonresident voting claim, he still fails to address the central and fatal problem of arithmetic. *See* Mot. 31–36. Reducing Representative Underwood's lead from 5,374 votes to 4,393.4 votes, *see* Resp. 20, would still fall far short of changing the result of the election. This basic numerical insufficiency is yet another reason why Mr. Oberweis's claims fail as a matter of law.

B. Mr. Oberweis has not plausibly alleged that unlawful votes were cast in DuPage County.

Mr. Oberweis continues to claim that 1,626 improper overvotes were cast in DuPage County without providing a sound explanation for this conclusion. He claims that "the illegality of those double votes speaks for itself, whether or not they were cast with actual intent to defraud," Resp. 22, but this misses the point. The issue is not that Mr. Oberweis has failed to provide a *motive* for these allegedly unlawful votes, but that he has failed to explain the very basis for the claim. He simply relies on *another contestant's* comparison of official canvas numbers with a list of registered voters who voted in the election. *See id.* Left unaddressed, however, are *what* precisely these documents measured and *when* Mr. Oberweis's source obtained them. Without

understanding what Mr. Oberweis's underlying evidence actually demonstrates, it is impossible to gauge the plausibility of the allegation itself. And again, even accepting Mr. Oberweis's conceit, these allegedly improper votes would still fall well short of reversing Representative Underwood's margin of victory. *See* Mot. 34 & n.8.

C. Mr. Oberweis's claim relating to uninitialed vote-by-mail ballots does not entitle him to relief.

Mr. Oberweis's claim regarding uninitialed vote-by-mail ("VBM") ballots relies on a faulty premise: that accepting these ballots violates Illinois law. It does not.

While state law generally provides that uninitialed ballots must be "marked on the back 'Defective' . . . and not counted," 10 ILCS 5/24A-10(b), the Illinois Supreme Court has held that this initialing requirement is *not* required for VBM ballots where (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 v. Mulligan*, 561 N.E.2d 585, 598 (Ill. 1990). As that court has noted, while the initialing requirement is a "patently reasonable" means to "safeguard against corrupt practices such as 'stuffing' a ballot box" with in-precinct ballots, "[t]he net result of a mandatory application of the [initialing] requirement to the absentee ballots" in cases like this "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 where, as here, the rule causing their disenfranchisement made no substantial contribution to the integrity of this election." *Craig v. Peterson*, 233 N.E.2d 345, 348–50 (Ill. 1968). And, as Representative Underwood demonstrates in her motion, the requisite prongs for exempting VBM ballots from the initialing requirement are readily satisfied here: Kane County's VBM ballots can be easily distinguished from in-precinct ballots due to the use of in-

person voting machines, and there is no risk of vote stuffing since the VBM ballots are mailed directly to election officials for verification. *See* Mot. 17–20.

Mr. Oberweis's response does not undermine these conclusions. *See* Resp. 23–26. He claims that Representative Underwood must present clear and convincing evidence proving that Mr. Oberweis's uninitialed VBM ballot claim is *not* a valid ground for contest, and asserts, without explanation, that there is "simply no way" for her to do so "by any standard." Resp. 26 n.23. Mr. Oberweis is mistaken on both counts. This is *his* contest, not Representative Underwood's, and he alone bears the burden of persuasion. *See, e.g.*, *Tunno*, H.R. Rep. No. 92-626, at 3. And even if the burden were Representative Underwood's to satisfy, she has done so: there is no dispute that Kane County employed distinguishable voting machine ballots for in-precinct voting and that the Illinois Supreme Court concluded that VBM ballots need not be initialed to preserve election integrity in circumstances virtually identical in all meaningful respects to those here. *See Craig*, 233 N.E.2d at 349–50.

Mr. Oberweis's attempt to dismiss this Illinois Supreme Court precedent is no more availing. He notes that the initialing statute was amended effective January 1, 2019, suggesting that these changes somehow abrogate *Craig* or otherwise lessen its precedential authority. *See* Resp. 26 n.23. But, as he admits just sentences later, neither this 2019 amendment nor any other act of the Illinois Legislature "has [] repealed or altered, in any way" the very provision that the Illinois Supreme Court addressed in *Craig*. *Id.* Mr. Oberweis then suggests that the Illinois Legislature's *failure* to amend the language of the initialing provision somehow annuls the Illinois Supreme Court's decision. *See id.* However, no principle of statutory interpretation permits—let alone requires—reading a legislature's failure to amend a statutory provision in the wake of a court decision interpreting it as somehow superseding the court's decision. Courts, in fact, reach the

opposite conclusion from such inaction. *See, e.g.*, *United States v. Johnson*, 481 U.S. 681, 686–88 & n.6 (1987) (affirming decades-old, court-imposed standard in part because Congress had "recently considered, but not enacted" legislation that would have superseded it).

Moreover, even if Kane County's tabulation of uninitialed VBM ballots ran afoul of Illinois law or violated equal protection principles, Mr. Oberweis's proposed remedy—*discarding all of Kane County's VBM ballots*, *see* Resp. 29—is thoroughly unconstitutional and inconsistent with House precedent. As discussed in Representative Underwood's motion, throwing out otherwise-lawful and valid ballots due to errors made by election administrators is simply beyond the pale. *See* Mot. 9–12. Due process considerations preclude such an outcome, *see id.* 11–12 (collecting cases), and House precedent "has counted votes . . . rather than denying the franchise to any individual due to malfeasance of election officials." Jack Maskell & L. Paige Whitaker, Cong. Rsch. Serv., RL33780, *Procedures for Contested Election Cases in the House of Representatives* 16 (2010) (alteration in original) (quoting *McCloskey v. McIntyre*, H.R. Rep. No. 99-58, at 24 (1985)). In his response, Mr. Oberweis shrugs off these due process concerns, suggesting that the requirement that equal protection violations be "leveled up" should not be taken seriously. *See* Resp. 30–31. But Representative Underwood's emphasis on due process is not mere sophistry that can be cavalierly disregarded; it is a constitutional imperative. Mr. Oberweis's own sense of grievance, no matter how justified he believes it to be, does not give him license to run roughshod over the Due Process Clause in his quest for electoral victory. Neither he nor anyone else can throw out otherwise-lawful ballots consistent with the Due Process Clause where the voters themselves have done nothing wrong. Mr. Oberweis's remedy is as constitutionally problematic as the claim it is meant to redress.

D. Mr. Oberweis's vote-by-mail application claim is fatally flawed.

Lastly, Mr. Oberweis's defense of his VBM application claim is wholly uncompelling.

As an initial matter, his conception of the scope and contours of the Equal Protection Clause remains hopelessly misguided. Representative Underwood addresses his various misconceptions in her motion, *see* Mot. 8–12, but will review certain basic principles in light of Mr. Oberweis's response. First, Mr. Oberweis maintains that the "profligate, uneven and arbitrary distribution of vote-by-mail ballot applications to some voters, but not all voters" violates the Equal Protection Clause. Resp. 27. But complete uniformity in counties' administrations of elections is neither constitutionally required nor even necessarily desirable; as the U.S. Supreme Court explained in *Bush v. Gore*, there is a vital distinction between "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections" and whether ballots can be counted without "rudimentary requirements of equal treatment and fundamental fairness." 531 U.S. 98, 109 (2000) (per curiam). While the latter scenario might implicate the Equal Protection Clause, the former does not. Mr. Oberweis has not "cited any authority explaining how a law that makes it easier to vote would violate the Constitution," *Short v. Brown*, 893 F.3d 671, 677–79 (9th Cir. 2018)—which is *precisely* what the distribution of VBM applications does, by expanding access to the franchise *without* burdening other voters or causing the arbitrary and unequal tabulation of votes.[6] Put differently, the decisions of counties (or the State of Illinois) to distribute VBM applications did not lead to anyone's votes being discounted or disregarded. There is thus no equal protection violation to remedy.

Moreover, Mr. Oberweis continues to misunderstand the theory of vote dilution, which also forms the theoretical basis for his VBM claims. He relies on the U.S. Supreme Court's malapportionment jurisprudence—cases like *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Gray v.*

[6] At one point, Mr. Oberweis suggests that the distribution of VBM applications somehow makes it "***more difficult***" for some voters to cast ballots, but never explains why exactly that would be the case. Resp. 28–29.

Sanders, 372 U.S. 368 (1963), *see* Resp. 26–27—but that form of "'vote dilution' in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). By contrast, there is no viable vote-dilution claim where, as here, "[e]very qualified person gets one vote and each vote is counted equally in determining the final tally." *Baten v. McMaster*, 967 F.3d 345, 355 (4th Cir. 2020). Distribution of VBM applications—even if inconsistent among counties or political parties, as Mr. Oberweis contends, *see* Resp. 28—does not cause *votes themselves* to be counted or weighed differently. Mr. Oberweis's VBM application claim thus does not implicate the Equal Protection Clause under any cognizable theory.

Even if Mr. Oberweis had articulated a viable equal protection claim—to be sure, he has not—his proposed remedy is again inconsistent with both the Due Process Clause and House precedent. He proposes that the Committee should "reject all vote-by-mail ballots, District-wide." *Id.* at 29. But as discussed in Part II.C *supra*, neither the House nor anyone else can constitutionally discard otherwise-lawful ballots due to the errors of election officials. *See* Mot. 9–12.

Ultimately, no one was denied the right to vote due to election officials' distribution of VBM applications. No valid votes went uncounted, and no improper ballots were counted, as a result. There was no "patently unconstitutional voting scheme." Resp. 31. And there is, in the end, no legally significant link between the distribution of VBM applications and the final vote tally in Illinois's Fourteenth Congressional District. Accordingly, Mr. Oberweis's VBM application claim cannot serve as a viable basis for his House contest—the only purpose of which is to ascertain the proper winner of the election.

E. Mr. Oberweis's allegations do not justify the remedies he seeks.

Towards the end of his response, Mr. Oberweis explores the various remedies that might be available to him were he to succeed on the merits of his claims. *See* Resp. 31–33. These remedies range from the proportional reduction of votes—itself a problematic option, *see* Mot. 36—to a full recount, to the extreme result of a new election. To say that Mr. Oberweis puts the cart before the horse is an understatement. This Committee need not concern itself with *remedies* when Mr. Oberweis's *allegations* fail to meet even the lesser burden of a motion to dismiss; indeed, as discussed in Part I *supra*, that is the rationale behind the FCEA's procedural provisions.

Mr. Oberweis has failed to plead any wrongs that require redress. The Committee should therefore dismiss his contest, regardless of whatever remedies he might wish to seek.

CONCLUSION

However spirited his rhetoric (and dramatically formatted his brief), Mr. Oberweis has provided no argument—premised in either the law or the facts—that salvages his fatally insufficient notice of contest. Among the grounds for dismissal provided by the FCEA are "[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." 2 U.S.C. § 383(b)(3)–(4). Mr. Oberweis's notice fails on both counts. For the reasons discussed at length in Representative Underwood's motion to dismiss, his notice repeatedly mischaracterizes the Equal Protection Clause and Illinois law; endorses remedies that would violate both the Due Process Clause and House precedent; frequently asserts allegations that describe neither unlawful nor irregular conduct; raises administrative grievances that are improper grounds for contest; relies on insufficient and unpersuasive evidence; and fails to implicate sufficient votes to overturn Representative Underwood's 5,374-vote margin of victory. For these reasons—and because Mr. Oberweis's response fails to even address all of these arguments, let alone refute them—dismissal of his notice is required.

Throughout his response, Mr. Oberweis invokes the "the current ***zeitgeist*** and cynical distrust of fairness of elections in the United States today" and "historic, tsunami-level cynicism with which the American people currently view the electoral process," urging this Committee to "deter 'illegal and improper' acts," "bolster the integrity of our electoral system," and "shred the pall of suspicion and mistrust circling the conduct of [the] election." Resp. 3, 17, 33 (quoting *Dornan*, H.R. Rep. No. 105-416, at 11). But Mr. Oberweis ignores what the past six months have amply demonstrated: that the only way to restore confidence in elections is by vocally, vigorously, and summarily rejecting the baseless claims of fraud and misconduct that are now polluting our democratic system. Mr. Oberweis's meritless notice of contest is simply the latest chapter in this unfortunate saga of unsubstantiated allegations and farfetched speculation, one the Committee should halt at the outset.

Mr. Oberweis accuses Representative Underwood of betraying a "studied indifference" to the allegations in his notice. *Id.* at 33. To the contrary, she is far from indifferent—she is merely trying to uphold the results of a free, fair, and open election that she rightfully won by more than 5,000 votes. Accordingly, for the reasons articulated in her motion to dismiss and this reply, Representative Underwood urges the Committee to dismiss Mr. Oberweis's notice of contest.

DATED this 18th day of March, 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

CERTIFICATE OF COMPLIANCE

Pursuant to Committee Resolution 117-10, the undersigned certifies that this reply brief contains 5,983 words, excluding the items listed in section 1(d).

DATED this 18th day of March, 2021.

PERKINS COIE LLP

By: _____

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

Attorneys for Contestee Lauren Underwood

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to 2 U.S.C. § 384, on this 18th day of March, 2021, a true and correct copy of **CONTESTEE'S REPLY IN SUPPORT OF 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 18th day of March, 2021.

PERKINS COIE LLP

By: 

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

Attorneys for Contestee Lauren Underwood