IN THE

UNITED STATES HOUSE OF REPRESENTATIVES

RITA HART,
Contestant,

v.

MARIANNETTE MILLER-MEEKS,
Contestee,

REPLY TO CONTESTANT'S BRIEF IN RESPONSE TO LETTER FROM CHAIRWOMAN LOFGREN REGARDING THE ELECTION CONTEST FOR REPRESENTATIVE IN THE 117th CONGRESS FROM THE SECOND CONGRESSIONAL DISTRICT OF IOWA

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I. "...the Committee should therefore exercise its discretion to depart from Iowa law..."

This statement appears at page 5 of Rita Hart's brief. It is in keeping with the overall theme of Hart's notice of contest. A notice that does not allege fraud or intentional misconduct by elections officials but simply asks this Committee to give her a set of rules other than the ones chosen by Iowans long before Election Day. In support she cites to the infamous "Bloody Eighth" election contest. A contest that stands as precedent for a fundamentally flawed process that changed rules in an ad hoc manner until the majority party's candidate was on top by a handful of votes.

The Committee should resist Hart's invitation. She does not make the case (or even allege for that matter) that there is something fundamentally wrong with Iowa election law. Instead, she takes a handful of election administration decisions in isolation and claims that the results of those should be flipped in her favor. Never mind what happened with other ballots (Hart doesn't try to show that these are the only instances where election officials enforced the rules in a way that caused a ballot to not be counted) or whether the Committee would truly capture the will of Iowans in this contest.

There is nothing principled about Hart's request. How could the Committee decide how much departure would be too much? At what point would the Committee be merely searching for a result rather than searching for the will of Iowans?

The danger of what Hart proposes cannot be overstated. One cannot change the rules after the election was conducted without favoring one candidate or the other—and without destroying the public's confidence in our election system.

II. The Committee should grant Congresswoman Miller-Meeks' motion to dismiss.

Hart states on page 17 of her brief that she knew of issues with all of the ballots by December 1, 2020. The Committee will remember that 11 of the ballots Hart identifies were known to her during the state recount process (two ballots in Scott County and nine ballots in Marion County). In addition, Hart admits that she knew about the ballots with sealing and signature issues by November 30, 2020, and the remaining ballots she identifies by December 1, 2020.

Hart had until December 2, 2020, to give notice that she intended to contest the election certification under Iowa law. Iowa Code § 60.4. Hart is

represented by a law firm with over 1,100 attorneys. It is inconceivable that she was not able to initiate a contest proceeding under Iowa law. At a minimum she should have at least tried; Hart cannot credibly argue that an Iowa contest court would have denied her a full and fair hearing in an effort to make her case on these ballots. Surely an Iowa court would have worked very hard to get the contest resolved in a rapid manner

Hart claims there wasn't time for an Iowa contest court to establish rules for the proceeding and conduct a hearing by the December 8, 2020, deadline. But Iowa already has rules for these sorts of proceedings: the Iowa Rules of Civil Procedure and the Iowa Rules of Evidence. To say there were no rules to guide an Iowa court is simply false.

Hart lets slip the real reason she chose to not make her case before Iowa judges: She states that "the only proceeding available to her that could have provided the necessary time, investigatory capabilities, and *equitable approach necessary* to ensure that all lawful votes were counted was a House contest..." In other words, Iowa judges would have rejected her claims but perhaps her own political party will be more accommodating. It was Hart's belief that her claims would not survive judicial scrutiny that explains her failure to file a contest

proceeding under Iowa law, not any conjecture about a lack of time or rules for the process.

The appearance of all of this could not be worse. Consider, for example the ominous warning contained in Chairwoman Lofgren's letter to both parties to this contest:

> An initial brief's failure to fully respond to any question in this letter, or a reply brief's failure to fully respond to the views and answers presented in the opposing party's initial brief, could be deemed to waive or forfeit a claim, defense, or argument; so responding with clarity, precision, and comprehensiveness is strongly encouraged.

(Rep. Lofgren March 10, 2021 letter, p. 2.)

If this Committee believes that waiver and error preservation are important, it should immediately reconsider its decision to table Congresswoman Miller-Meeks' motion to dismiss. The motion to dismiss has substantial merit and, under the Committee's own standards for handling this election contest, should be granted immediately.

III. Hart's proposed discovery process is designed to shift the burden of proof in this proceeding contrary to the requirements of the Federal Contested Elections Act and the House's precedents.

Hart proposes a discovery process that effectively places on Congresswoman Miller-Meeks the burden to disprove the claims made by Hart. She proposes to establish her case by affidavits of voters and elections officials and then to allow Congresswoman Miller-Meeks to depose only the elections officials. Apparently, in Hart's view, the affidavits of voters cannot be challenged. These voters cannot, under Hart's view, even be asked questions to verify that they are who they claim to be in their affidavits, or that their signatures are indeed the ones on the affidavits. A court of law would require such a foundation *at a minimum*. Maybe that is another reason Hart skipped the Iowa court system.

Hart bears the burden to prove she is entitled to a seat in this House. 2 U.S.C. § 382(b)(3) and (4). And the mere closeness of an election does not lessen Hart's burden. *Chandler* v. *Burnham*, H.R. Rep. 73-1278. "[T]he burden of proof is upon the contestant in the first instance to present sufficient evidence, even prior to the formal submission of testimony under the statute, to overcome the motion to dismiss, since exhaustive hearings and investigations should be

avoided where contestant cannot make a prima facie case." Deschler's Precedents, Ch. 9 § 25.

Hart's suggestion that Congresswoman Miller-Meeks may only take the deposition testimony of election workers is flatly inconsistent with the text of the FCEA. "Either party may take the testimony of *any* person, including the opposing party, by deposition upon oral examination for the purpose of discovery or for use as evidence in the contested election case, or for both purposes." 2 U.S.C. § 386(a) (emphasis added). "Witnesses may be examined regarding *any* matter, not privileged, which is relevant to the subject matter involved in the pending election case..." 2 U.S.C. § 386(b) (emphasis added).

Hart's citation to *Tunno* v. *Veysey*, H.R. Rep. No. 92-626, for support for the proposition that a voter's declaration of how he voted or intended to vote, misses the mark. Hart does not merely claim that these voters voted in a particular way. She makes specific claims about, for example, how the voter received a ballot security envelope or where the voter dropped off the ballot. These are specific factual claims that must be established by actual testimony and subjected to cross-examination. Hart cannot simply present her case through untested affidavits. And under the clear language of the FCEA, neither

she nor this Committee can stop Congresswoman Miller-Meeks from deposing witnesses about matters "relevant to the subject matter involved in the pending election case" 2 U.S.C. § 386(b). If Hart wants to change that, it would that would take an act of Congress and a signature of the President.

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