IN THE SUPREME COURT OF IOWA

Supreme Court No. 23-0661

District Court No. CVCV059748

LINN COUNTY AUDITOR JOEL MILLER,

PLAINTIFF-APPELLANT

v.

IOWA VOTER REGISTRATION COMMISSION,

DEFENDANT-APPELLEE

Appeal from Polk County District Court
The Hon. David M. Porter, Judge

PLAINTIFF-APPELLANT'S FINAL REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Linn County Auditor Joel Miller ("Auditor Miller") submits this brief in reply to the Iowa Voter Registration Commission's ("Commission") Appellee Brief.

For all times material to this matter, Auditor Miller served as the Commissioner of Elections (sometimes referred to as "Commissioner of Registration") for Linn County, the second-largest county in the state of Iowa, based on his capacity as the elected Auditor of that county. Iowa Code § 331.505(1). Under the Code of Iowa, Auditor Miller was personally responsible for conducting all elections. *See id.* § 331.505(2), (4). For example, Auditor Miller was responsible for various tasks with respect to maintaining the voting registration record in Linn County, as set forth in Iowa Code chapter 48A.

On July 16, 2019, Auditor Miller filed a Complaint with the Commission, alleging that Secretary of State Paul Pate had violated one or more provisions of federal law, the Help America Vote Act ("HAVA"), 52 U.S.C. §§ 20901 to 21145. The Secretary of State filed a motion to dismiss the Complaint. Notice of a hearing was issued by the Commission. At the time and date of the hearing, the participants were repeatedly admonished that the pending motion to dismiss, only, would be considered. Auditor Miller was explicitly denied the opportunity to submit evidence or testimony in support of his Complaint. Limited arguments were allowed on the

pending motion. The Commission subsequently issued a written ruling, on a vote of 2-1, finding in favor of the motion to dismiss. In that ruling, Auditor Miller was advised by the Commission of his right to appeal the Commission's decision to the Iowa District Court. Auditor Miller timely filed an appeal to the Iowa District Court for Polk County.

As Linn County's commissioner of elections and registration, Auditor Miller had standing to appeal the Commission's dismissal of his HAVA Complaint to the district court. The district court erred in applying state, rather than federal, law to the issue of whether Auditor Miller had standing to appeal the Commission's ruling. Citing the judicial review provision of the Iowa Administrative Procedures Act ("IAPA"), Iowa Code section 17A.19, the district court pointed to the requirement that an appellant be "aggrieved or adversely affected" by the Commission's dismissal of a HAVA Complaint. The district court erred in ignoring the clear text of HAVA and the legislative history of the federal act, both of which create federal legal definitions for standing that should have been applied to Auditor Miller's judicial review appeal. However, even if, *arguendo*, Auditor Miller must be aggrieved or adversely affected by a HAVA dismissal, the district court erred in determining that he was not.

At the time he filed his Complaint, Auditor Miller was serving as county auditor and, therefore, was statutorily required to administer elections in Linn

County. *See* Iowa Code § 331.505 and ch. 48A. If the state-wide electronic voter registration system, I-Voters, is vulnerable to unauthorized use and improper removal of voter registrations, then Auditor Miller's efforts to ensure free and fair elections in Linn County were significantly harmed. He was required to take all reasonable and prudent measures to ameliorate this problem to the best of his ability and to advise other county auditors to do the same. Auditor Miller therefore possessed a specific, individual legal interest in assuring the Iowa Secretary of State's compliance with HAVA that was different from a generalized interest that any citizen of Iowa might have had in assuring that the Secretary of State upheld the law. Auditor Miller's interest was more like that which was described by the Iowa Supreme Court in *Richards v. Iowa Department of Revenue and Finance*, 454 N.W.2d 573 (Iowa 1990), wherein a taxpayer was found to have had an individual interest in the tax exempt status of an entity in his taxing district, and is unlike that found in *Dickey v. Iowa Ethics & Campaign Disclosure Board*, 943 N.W.2d 34 (Iowa 2020), where an attorney was found to have had only a generalized interest in seeing campaign finance law followed correctly.

Moreover, despite the Commission's revisionist arguments to the contrary, there was no compliance with the minimal procedural requirements of HAVA. It is a misreading of HAVA to interpret a "hearing on the record," 52 U.S.C. § 21112(a)(2)(E), as simply requiring that a hearing be "recorded." Those are not the

same words, let alone the same meaning. In the context of the statute, and in its plain meaning, "the record" must be an evidentiary record, because the procedures established by Congress in the HAVA statute only anticipate a decision on the merits of allegations made in a Complaint. Such a determination can be made only if it is based upon a review of evidence, or "the record." The entirety of HAVA and the legislative history of the statute supports this reading.

Given the district court's error in denying his appeal of the Commission's dismissal of his Complaint without a hearing, based on an adverse determination of Auditor Miller's standing, ignoring federal law under HAVA, Auditor Miller therefore requests that this matter be remanded to the Voter Registration Commission with instruction that a contested case proceeding must be convened to consider the merits of his Complaint. Alternatively, even if this Court were to determine that chapter 17A.19 of the Iowa Code supplies the definition of "standing" to an appeal of the Commission's dismissal of a HAVA Complaint to the district court, this matter should be remanded to the Commission with instruction that a contested case proceeding must be convened to consider the merits of Auditor Miller's Complaint.

ARGUMENT

I. A County Auditor Who Files a HAVA Complaint with the Commission has Standing to Seek Judicial Review of the Commissions' Decision to Dismiss the Complaint Without a Hearing Even Under the "Aggrieved or Adversely Affected" Standard of Iowa Code Chapter 17A.

In his opening brief, Auditor Miller lays out fully how the district court erred in applying the IAPA's standing requirement, as interpreted in Iowa caselaw, to a HAVA Complaint given the express language of HAVA and Congress's intent in passing the law. In the interests of economy, this argument will not be repeated here.[1] However, even assuming *arguendo* that it was proper for the district court to

[1] In its brief before this Court, the Commission asserts that Auditor Miler is foreclosed from arguing that HAVA's broader standing requirement applies in Iowa courts in actions to enforce HAVA because of *Richards v. Iowa Dep't of Revenue and Finance*, 454 N.W.2d 573 (Iowa 1990). In *Richards*, a taxpayer brought an administrative action to enforce Iowa tax law under a code provision allowing any taxpayer to apply to revoke any property tax exemption. *Id.* at 574. In determining whether the taxpayer had standing to challenge the administrative denial of his request to revoke a property tax exemption in district court, the Iowa Supreme Court determined that Iowa tax law enabling any taxpayer to bring an administrative action did not in turn authorize any taxpayer to appeal the same matter to district court under Iowa Code section 17A.19. *Id.* at 575. The *Richards* Court wrote, however, that Iowa tax law allowing a challenge by any taxpayer "does evidence a legislative intent to allow concerned taxpayers to challenge the tax exemption granted another's property" and went on to find that the taxpayer did in fact have section 17A.19 standing. *Id.* at 575-76. Importantly, *Richards* did not involve the enforcement of federal law in a state administrative action, unlike here, but instead involved an Iowa administrative action enforcing Iowa law. The *Richards* Court may well have presumed that the Iowa legislature was aware of Iowa Code section 17A.19 and how it would apply to judicial appeals, and so was not willing to infer any intent to impose a separate standing requirement, but this same presumption cannot be made of the U.S. Congress in its granting of power to states to quicky and effectively enforce HAVA through an administrative action. Because HAVA is federal law and not state law, Iowa courts should not be imposing additional

have analyzed whether Auditor Miller was aggrieved or adversely affected by the Commission's dismissal of his Complaint within the meaning of Iowa Code section 17A.19, the district court erred in concluding that Auditor Miller was not aggrieved or adversely affected. As the Linn County Auditor, Auditor Miller was intimately involved in ensuring that residents of Linn County enjoyed the full protections of HAVA, both with respect to previous elections and prospectively into the future. *See* Iowa Code § 331.505 (setting forth the duties of county auditors with respect to elections); *see generally* Kimberly Breedon & Christopher Bryant, *Conflicts of Interest and Election Cybersecurity: How Bipartisan Congressional Oversight Can Inform the Public, Address Election System Vulnerabilities, and Increase Voter Confidence in Election Integrity*, 67 Wayne L. Rev. 13, 45 (2020) (noting the role of a Utah county auditor in arguing for increased federal funding to improve electoral cybersecurity). It is hard to imagine many other individuals with greater personal investment and who are more adversely affected by a Commission dismissal than a county auditor bringing a Complaint under HAVA concerning issues that affect voters in that person's county. The Commission's arguments to the contrary are unavailing for the following reasons.

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requirements designed to foreclose effective enforcement in light of the remedial text and purposes of HAVA.

First, to have standing under Iowa Code section 17A.19, a person or party must be "aggrieved or adversely affected by [the] agency action." Current Iowa caselaw interpreting this section requires that to show one is aggrieved or adversely affected, the person or party must demonstrate "a specific personal and legal interest" in the subject matter of the agency decision and a specific and injurious effect on this interest by the decision. *State ex rel. Dickey v. Besler*, 943 N.W.2d at 37; *but see Godfrey v. State*, 752 N.W.2d 413, 419 (Iowa 2008) (explaining that either specific personal *or* legal interest must be shown).

The Commission maintains that Auditor Miller was not aggrieved or adversely affected by its dismissal of Auditor Miller's HAVA Complaint because, the Commission asserts, ensuring compliance with the law is not sufficient for standing, citing *Dickey* to that effect. *See* 943 N.W.2d at 34. However, *Dickey* is readily distinguishable from the instant case because Auditor Miller had asserted an *individual* legal interest in the outcome of the HAVA Complaint. Indeed, the Iowa Supreme Court in *Dickey* expressly recognized a distinction for standing in an overall "informational" interest where the attorney who brought *Dickey* already knew the information, as opposed to being in a watchdog group or member of the same trying to demonstrate whether a violation had occurred with the information. 943 N.W.2d at 40-41.

In *Dickey*, an attorney had filed a complaint against the Iowa Governor with the Iowa Ethics and Campaign Disclosure Board, alleging that the Governor had underestimated the market value of a campaign donor's gift of a private jet ride. 943 N.W.2d at 35-36. The complaining attorney's only asserted interest in the matter was his own campaign finance experience, including prior experience in advising political campaigns. *Id.* at 36 & 39. The *Dickey* Court concluded that the attorney lacked standing since he only had a general interest in ensuring that the Governor complied with campaign finance law, the same type of general interest shared by all citizens. *Dickey* at 38-39.

Auditor Miller, by contrast, had a particular, personalized interest in the proper operation of the I-Voters system, which is used to store voter registration data. (Appendix on Appeal page ("App.") 22-25). Should the I-Voters system continue to be vulnerable to cyberattack, county auditors, just like Auditor Miller, may need to take certain remedial actions to ensure that county auditors comply with their duties to the voting public to ensure free and fair elections. This is directly contrary to *Dickey*, where the complaining attorney had all the information he needed about the Governor's trip in order to make an informed voting choice, 943 N.W.2d at 39-40, because, here, Auditor Miller lacked the information necessary to determine whether he should have imposed additional safeguards or scrutiny to the results of I-Voters. For example, depending on whether any cybersecurity

improvements have been made, a county auditor may decide to create additional safeguards to ensure that felon disenfranchisement is properly recorded in the system or whether voters who are flagged as having moved have, in fact, genuinely left the county. (App. 47-50). Where an action could have been taken with additional information, there is clearly a particularized interest, and standing, in knowing such information and being correspondingly able to take an action.

Auditor Miller's HAVA Complaint is more similar to the judicial review action filed in *Richards*, 454 N.W.2d 573. In *Richards*, a taxpayer challenged whether the Department of Revenue and Finance had properly designated a retirement community as a tax-exempt charitable organization. *Id.* at 574. The department had not revoked the retirement community's exemption, and the taxpayer's judicial review suit was dismissed by the district court due to the taxpayer's lack of standing. *Id.* The Iowa Supreme Court reversed the district court, finding that the taxpayer had alleged a specific personal interest since he had owned property in the same taxing district where the retirement community was located. *Id*. at 575. When one taxpayer received an exemption in a taxing district, the *Richards* Court reasoned, then other taxpayers may be required to pay a greater amount. *Id.* While *general* taxpayer interest would not be sufficient to confer standing, a specific taxpayer interest with unique identifiable harms was sufficient. *Id.*

Like the taxpayer in *Richards*, Auditor Miller had more than a generalized interest in ensuring that the Secretary of State complies with HAVA. Auditor Miller's interest was specific because of his own statutorily-based role in administering elections and using the I-Voters system in administering the elections. *See Iowa Code* § 331.505 and ch. 48A. Auditor Miller had his own obligations with respect to Linn County voters, with important decisions in how best to fulfill those obligations depending on the outcome of this matter. *See id.* Auditor Miller's ability to protect free and fair elections in Linn County would be harmed to the extent that it would be determined that no improvements had been made to I-Voters cybersecurity. In other words, Auditor Miller could have taken specific redress actions based upon the information received, if such information had been provided. Again, this contrasts starkly with *Dickey*, 943 N.W.2d at 35, where the attorney who had sued the Governor over campaign finance violations had no particular interest in more information being revealed about the Governor's campaign-funded trip.

In Auditor's Miller's HAVA Complaint filed with the Commission, he had alleged that county auditors were required to use the Secretary of State's I-Voters system (App. 22-25). Under HAVA, the I-Voters system must be protected from unauthorized access so that eligible voters are not removed in error, and Auditor Miller alleged that these protections were not in place. (*Id*). On its face, Auditor Miller's Complaint alleges a violation of HAVA. Further, Auditor Miller alleges

that he had been responsible for maintaining voting records in Linn County, and that he had been unable to be sure that this was being done adequately, and so was uncertain as to how to act to fulfill his Iowa Code section 331.505 and chapter 48A statutory duties. (*Id.*) Yet, the Commission characterizes Auditor Miller's Complaint as having been "informational," arguing that Auditor Miller had been simply alleging that he had not received the information he believed he had been owed from the Secretary of State. This is a mischaracterization of Auditor Miller's Complaint, and ignores the specific harms alleged by Auditor Miller that had individually applied to him as the Linn County Auditor. Moreover, the mischaracterization ignores the specific actions in redress that Auditor Miller could have taken, which is also a consideration in standing: that the injury is "likely to be remedied by a favorable decision." *LS Power Midcontinent, LLC v. State*, 988 N.W.2d 316, 329-30 (Iowa 2023) (citing *Iowa Citizens for Cmty. Improvement v. State*, 926 N.W.2d 780, 790 (Iowa 2021)).

Therefore, even if Auditor Miller must be "aggrieved or adversely affected" within the meaning of Iowa Code section 17A.19, the district court erred in holding that he had not been so-affected. In fact, Auditor Miller had described a specific, individual interest in seeing that HAVA was obeyed, and he was injured by HAVA not being obeyed by the Secretary of State, or not being able to confirm the same.

II. Under HAVA, a "Hearing on the Record" Must Mean a Hearing After an Opportunity to Develop an Evidentiary Record, Not Simply a Hearing that is Recorded.

The Commission argues that even if this Court finds that Auditor Miller had standing, the Court should still affirm dismissal because Auditor Miller had a "hearing on the record," by which the Commission means that a hearing was held that was recorded and preserved for later review. Commission's Brief, pp. 34-39. A reading of HAVA's 52 U.S.C. § 21112(a)(2)(E) "hearing on the record" requirement in this way by the Commission, if allowed, would gut the judicial enforceability of the act in a way that does not match a fair reading of the statute nor the intent of Congress.

The polestar of statutory interpretation is the intent of the legislature. *Schonberger v. Roberts*, 456 N.W.2d 201, 202 (Iowa 1990). In interpreting legislative intent, a court will first look to the plain language of the statute, read in the context of the entire statute. *State v. Doe*, 903 N.W.2d 347, 351 (Iowa 2017). If the plain language is vague or ambiguous, the court will resort to other tools of statutory construction. *Id.* "A statute is ambiguous if reasonable minds differ or are uncertain as to the meaning of the statute." *Rhoades v. State*, 880 N.W.2d 431, 446 (Iowa 2016).

HAVA is codified in the United States Code at 52 U.S.C. §§ 20901 to 21145. The law, at 52 U.S.C. § 21112, requires that states have an administrative Complaint

system to remedy grievances under HAVA, with requirements for grievance procedures listed in § 21112 (a)(2). These requirements are:

> (A) The procedures shall be uniform and nondiscriminatory.
> (B) Under the procedures, any person who believes that there is a violation of any provision of subchapter III (including a violation which has occurred, is occurring, or is about to occur) may file a complaint.
> (C) Any complaint filed under the procedures shall be in writing and notarized, and signed and sworn by the person filing the complaint.
> (D) The State may consolidate complaints filed under subparagraph (B).
> (E) At the request of the complainant, there **shall be a hearing on the record**.
> (F) If, **under the procedures,** the State determines that there is a violation of any provision of subchapter III, the State shall provide the appropriate remedy.
> (G) If, under the procedures, the State determines that there is no violation, the State shall dismiss the complaint and publish the results of the procedures.
> (H) The State shall make a final determination with respect to a complaint prior to the expiration of the 90-day period which begins on the date the complaint is filed, unless the complainant consents to a longer period for making such a determination.
> (I) If the State fails to meet the deadline applicable under subparagraph (H), the complaint shall be resolved within 60 days under alternative dispute resolution procedures established for purposes of this section. **The record and other materials from any proceedings conducted under the complaint procedures established under this section shall be made available for use under the alternative dispute resolution procedures.**

52 U.S.C. § 21112 (a)(2) (emphasis added).

The meaning of "a hearing on the record" or what is meant by "the record" is not defined elsewhere in HAVA. In context, however, it is clear from the surrounding text of 52 U.S.C. § 21112 (a)(2) that "the record" anticipated by Congress would be an evidentiary record, for at least two reasons. First, a "hearing on the record" is not automatically provided, but is instead available at the request

of the complainant, suggesting that more than simply a recorded hearing is anticipated. Second, the "procedures" expressly described set out two possible outcomes that a state administrative body can reach: either the state body finds a violation of HAVA and then the state body provides an appropriate remedy under § 21112 (a)(2)(F), or the body finds no violation of HAVA and dismisses the Complaint under § 21112 (a)(2)(G). The state body not making any finding with respect to HAVA violations is not contemplated within these procedures. In other words, in order to determine whether violations have occurred, some evidence must be presented on the record.

A "record" in an administrative or legal matter is a term of art within the field of law. *Beverage v. Alcoa, Inc.*, 975 N.W.2d 670, 682 (Iowa 2022) ("It is a 'cardinal rule of statutory construction that when [the legislature] employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken.'") (quoting *Air Wias. Airlines Corp. v. Hoeper*, 571 U.S. 237, 247-48 (2014)). Black's Law Dictionary defines a "record" as "[a] documentary account of past events" and "[t]he official report of the proceedings in a case, including the filed papers, a verbatim transcript of the trial or hearing (if any), and tangible exhibits." Record, Black's Law Dictionary (7th ed. 2000). The record in an administrative hearing is the body of properly admitted evidence upon which a finder of fact is to deliberate. *See, e.g.*,

John Gedid, *Administrative Procedure for the Twenty-First Century,* 44 St. Mary's L.J. 241 (2012) ("All evidence must be part of the record, and the presiding officer must base his or her decision solely on the record."); Charles H. Koch, Jr., Policymaking by the Administrative Judiciary, 25 J. NAALJ 49, 97 (2005) ("Policy in adjudication requires that the facts compiled in the hearing-level record adequately support policy determinations and the justification for those decisions.")

Contrary to the Commission's argument, *Messamaker v. State Department of Human Services*, 545 N.W.2d 566 (Iowa 1996) does not require a different reading of "on the record" within the context of HAVA. In *Messamaker*, the Court was asked to determine whether a formal adjudication process was required by a federal administrative rule which required "a determination on the record." *Id.* at 567. The *Messamaker* Court rejected the district court's conclusion that this required an "evidentiary hearing" because "[t]he salient feature of a review on the record is that the court should act on a record in existence, not some new record made in the reviewing forum." *Id.* at 568. A determination on the record therefore could be based on a written or oral record, as long as the record was made before the agency. *Id.* The *Messamaker* Court implicitly accepts that a record means "a body of evidence," but only rejects a specific level of formality required to get that evidence. *See id*.

Even if it could be argued that a "hearing on the record" was ambiguous within the context of the statute, the congressional debates that preceded the passage of the law demonstrate the intent of Congress in providing a robust, powerful, and flexible remedy for any determined violations to the right to vote. Indeed, such intent is evidenced all throughout the statute and the legislative history of HAVA, as has been illustrated in detail in Auditor Miller's original brief. Auditor Miller's Brief, pp. 30-41. And indeed, the argument by the Commission would render the language requiring review of the record meaningless, as this case is entirely devoid of any "record" below. Where no evidence was allowed, there was no record created to review.

Therefore, "the record" that is the subject of the hearing which the complainant may request under HAVA is an evidentiary record. That is the only manner in which the procedures can be followed to determine whether a violation of HAVA occurred. 52 U.S.C. § 21112(a)(2). In this instance, the Commission announced that it would consider only the Secretary of State's motion to dismiss and would not entertain evidence or arguments with respect to the merits of Auditor Miller's Complaint. (App. 202-207). The Commission therefore erred in not allowing Auditor Miller the opportunity to have a hearing on the merits, let alone to develop an evidentiary record in support of his claims. And the district court erred

in failing to assure that Auditor Miller would be allowed an evidentiary hearing so that such a record might be made.

CONCLUSION

For the foregoing reasons, as well as those in his opening brief, Auditor Miller respectfully requests that this matter be remanded to the Voter Registration Commission with instruction that a contested case proceeding must be convened to consider the merits of Auditor Miller's Complaint, and any other appropriate relief as the Court deems proper under the circumstances.

Dated this 8th day of March 2024.

Respectfully submitted,

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CERTIFICATE OF COST

Petitioner-Appellant certifies that there was no cost for the reproduction of this brief, as this brief has been electronically filed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903 (1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point typeface and contains 4,519 words, excluding the parts of the brief exempted by Iowa R. App. 6.903(1)(g)(1).

/s/*Andrew Kramer*
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CERTIFICATE OF SERVICE

The undersigned certifies a copy of Petitioner-Appellant's Final Reply Brief was served on March 8th, 2024, upon the clerk of the supreme court and upon the following persons by CM/ECF:

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