IN THE SUPREME COURT OF IOWA

No. 23–0661

JOEL MILLER,

Appellant,

vs.

IOWA VOTER REGISTRATION COMMISSION,

Appellee.

Appeal from the Iowa District Court
Polk County Case No. CVCV059748
Honorable David Porter, District Judge

APPELLEE'S FINAL BRIEF

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ISSUES PRESENTED

I. Does a person who files a complaint with the Iowa Voter Registration Commission have standing to seek judicial review of the Commission's decision to dismiss the complaint?

Important Authorities
52 U.S.C. § 21112
Iowa Code § 17A.19
Iowa Admin. Code r. 721—25.35
Dickey v. Iowa Ethics & Campaign Disclosure Bd.,
943 N.W.2d 34 (Iowa 2020)
Richards v. Iowa Dep't of Revenue & Fin.,
454 N.W.2d 573 (Iowa 1990)

II. Complaints filed under the Help America Vote Act (HAVA) and corollary state administrative rules must include a "hearing on the record" at the complainant's request. Is that hearing on the record required to be an evidentiary hearing?

Important Authorities
52 U.S.C. § 21112
Iowa Admin. Code r. 721—25.8
Ida Cty. Courier v. Att'y Gen., 316 N.W.2d 846 (Iowa 1982)
McGrath v. Minn. Sec'y of State, No. A11-613,
2011 WL 5829345 (Minn. Ct. App. Nov. 21, 2011)
Henry J. Friendly, *"Some Kind of Hearing*,"
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ROUTING STATEMENT

Although this case appears to be the first Iowa appeal involving the Help America Vote Act (HAVA) and corollary state administrative rules about the complaint process, it does not present a *substantial* issue of first impression. *See* Iowa R. App. P. 6.1101(2)(*c*). Rather, the district court dismissed the case for lack of standing, which requires only a straightforward application of precedents both new and old. *See Dickey v. Iowa Ethics & Campaign Disclosure Bd.*, 943 N.W.2d 34, 36 (Iowa 2020); *Richards v. Iowa Dep't of Revenue & Fin.*, 454 N.W.2d 573, 575 (Iowa 1990). Transfer to the court of appeals is therefore appropriate. *See* Iowa R. App. P. 6.1101(3)(*a*)

STATEMENT OF THE CASE

Joel Miller filed an administrative complaint with the Iowa Voter Registration Commission (VRC) in 2019. He contended the Iowa Secretary of State was not taking adequate steps to protect the State of Iowa's voter databases from cyberattacks, hacking, or fraud perpetrated by external actors in the then-upcoming 2020 general election. He asked the VRC to compel the Secretary to adopt certain procedures in time to protect the integrity of the election and, in Miller's view, to better comply with HAVA.

The Secretary asked the VRC to dismiss Miller's complaint as legally insufficient. Miller resisted and contended he was entitled to robust discovery, subpoena power, significant document review of the Secretary's files, and a full contested case hearing, simply because he had filed the complaint and the applicable administrative rules authorize complainants to request a "hearing on the record." Iowa Admin. Code r. 721—25.8(1).

The VRC convened, heard argument from both parties for about an hour, deliberated, and eventually granted the Secretary's motion to dismiss. Miller sought judicial review in district court, contending he was entitled to a full evidentiary hearing and so motion practice should have been unavailable before the VRC. The district court denied his petition, concluding he lacks standing—so Miller now appeals again.

STATEMENT OF THE FACTS

A. HAVA's provisions and requirements.

Congress enacted HAVA after the contentious presidential election of 2000. *See* Brian Kim, *Help America Vote Act*, 40 Harv. J. Legis. 579, 579 (2003). HAVA is a wide-ranging enactment that pursues multiple goals. Title I of HAVA provides "funding for states to replace out-dated voting machines." *Id.* at 589. Title II creates "voting systems standards" and a federal agency—the Election Assistance Commission—to research and report "on the most efficient, accessible, and accurate methods of voting." *Id.* at 589–90. Title III chiefly addresses "provisional voting and computerized registration lists," and "specifies uniform election technology and administration requirements for voting systems." *Id.* In some respects, Title III's uniform requirements aimed to prevent another instance in which "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." *Bush v. Gore*, 531 U.S. 98, 106–07 (2000).

Most relevant here, however, is Title IV of HAVA. Title IV requires states "to establish and maintain State-based administrative complaint procedures" that meet statutory requirements. 52 U.S.C. § 21112(a)(1) (2018). Section 21112(a)(2) contains several requirements. The administrative procedures

must be uniform, nondiscriminatory, and available to any person who believes a violation of Title III of HAVA "has occurred, is occurring, or is about to occur." *Id.* § 21112(a)(2)(A)–(B). The procedures must also require complaints to be notarized and submitted in writing. *Id.* § 21112(a)(2)(C). The crux of this case, though, is one phrase in section 21112(a)(2): the requirement that at the complainant's request, "there shall be a hearing on the record." *Id.* § 21112(a)(2)(E) State-level HAVA procedures that include the VRC.

Because the Court has "not grappled with" a case involving a HAVA administrative complaint before, it is useful to "provide some background before discussing whether [Miller] could properly bring this petition for judicial review." *Klein v. Iowa Pub. Info. Bd.*, 968 N.W.2d 220, 228 (Iowa 2021).

After Congress enacted HAVA, the Iowa Legislature instructed the state commissioner of elections—which is the secretary of state, *see* Iowa Code § 47.1(1)—to adopt rules implementing "administrative complaint procedures for resolution of grievances relating to violations of [HAVA]." Iowa Code § 47.1(5). The secretary of state did so. *See* Iowa Admin. Code r. 721—25.1(1) ("The administrative complaint procedure set forth in this chapter is established to comply with Title IV . . . of [HAVA] . . . .").

The legislature further established a dual-track system for complaints. If the complaint asserts a violation by local election officials, the presiding officer for the complaint is the secretary of state. Iowa Code § 47.1(5). But if the complaint asserts a violation *by* the secretary of state, the presiding officer is a panel of the VRC consisting of all commissioners except the secretary of state or designee. *Id.* The VRC is a four-member politically balanced commission, *see id.* § 47.8(1)(*a*)–(*b*), that is reduced to three members for HAVA proceedings. *See id.* § 47.8(5). Presiding over a subset of HAVA complaints is just one of the VRC's many functions, but it's the only one relevant here. *Compare id.*, *with id.* § 47.8(1), (2), (4) (setting forth other VRC duties and functions).

The administrative complaint procedures are "limited to allegations of violations of Title III [of HAVA] in a federal election." Iowa Admin. Code r. 721—25.2. Matching HAVA's language, "[a]ny person who believes that there is a violation of any provision of Title III, including a violation which has occurred, is occurring, or is about to occur, by any state or local election official may file a complaint." *Compare id.*, *with* 52 U.S.C. § 21112(a)(2)(A)–(B). Further matching HAVA's language, the complaint must be in writing, signed and notarized, and sworn under oath. *Compare* Iowa Admin. Code r. 721—25.2, *with* 52 U.S.C. § 21112(a)(2)(C). Complainants must both file the complaint with the secretary of

state and serve it upon the respondent. Iowa Admin. Code r. 721—25.3(1)–(2). Separate filing and service steps accommodate the possibility that, although the secretary of state was also the respondent here, that may not always be the case.

Once the secretary of state receives the complaint, the director of elections conducts an initial review, after which the complaint is either accepted and forwarded to the presiding officer, or rejected with a written statement specifying the reason for rejection. *Id.* r. 721—25.3(3); *see also Oels v. Dunleavy*, No. 3:23-cv-00006-SLG, 2023 WL 3948289, at *1 (D. Alaska June 12, 2023) (discussing complainants' attempt to file administrative HAVA complaints, and noting the director of the Alaska Division of Elections "rejected the complaint for filing because . . . [it] did not comply with the Division's HAVA complaint regulations").

To expedite complaint resolution, generally the presiding officer issues a decision based only on written submissions. Iowa Admin. Code r. 721—25.8(1). Even so, a hearing may occur if the presiding officer concludes an evidentiary hearing would be beneficial, or if either the complainant or respondent requests a hearing. *See id.* rs. 721—25.8, 721—25.10. Although either party may request a hearing, the procedures expressly contemplate motion practice, including motions for summary judgment. *See id.* r. 721—25.19. And whatever the VRC's final decision, judicial

review "may be sought in accordance with . . . Iowa Code chapter 17A." *Id.* r. 721—25.35.

B. Miller's VRC complaint.

Miller filed a HAVA complaint through a letter dated July 16, 2019. (Certified Record [CR] at 3, 183; Appendix [App.] at 22, 202.)[1] Although Miller dated the letter July 16, he did not serve it in accordance with rule 721—25.3 until August 12. (CR at 7, 183; App. 26, 202.) *See* Iowa Admin. Code r. 721—25.3 (requiring a complaint to "be accompanied by adequate proof of service" and listing acceptable methods of service). The complaint alleged the secretary of state "failed to comply with HAVA regulations." (CR at 3; App. 22.) The complaint also enclosed a records request Miller made to the secretary of state on July 1, and explained that Miller filed the HAVA complaint after he received no response to his records request within ten business days.[2] (CR at 3; App. 22.)

The complaint alleged the secretary of state had not implemented "adequate technological security measures to

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[1] The certified record is D00012 on the district court docket.

[2] Although tangential, Miller's implicit assertion that a response to his open records request was strictly required within ten business days is incorrect. While ten business days is a guideline for government bodies to follow, a response time of twenty *calendar* days is also reasonable. Iowa Code § 22.8(4)(*d*). Miller filed his HAVA complaint fewer than twenty calendar days after his open records request. (CR at 3–6; App. 22–25.)

prevent" unauthorized access to computerized voter rolls. 52 U.S.C. § 21083(a)(3). (CR at 4; App. 23.) The complaint also alleged the secretary of state had not implemented "[s]afeguards to ensure that eligible voters are not removed in error from the official list of eligible voters." 52 U.S.C. § 21083(a)(4)(B). (CR at 4; App. 23.) The complaint asserted any existing security measures were not adequate because hackers might remove, change, or modify voter registration records. (CR at 4; App. 23.)

C. Procedural steps and prehearing motion practice.

After Miller served the complaint, State Director of Elections Heidi Burhans forwarded it to the VRC. (CR at 7; App. 26.) In an accompanying letter, Burhans explained it was her obligation under the rules to examine the complaint. (CR at 7; App. 26.) *See* Iowa Admin. Code r. 721—25.3(3)(*a*). But Burhans highlighted a gap in the rules—she, as the director of elections, was required to examine each complaint even if it named her superior, the secretary of state, as a respondent. (CR at 7; App. 26.) *Compare* Iowa Code § 47.1(5) (designating an alternative presiding officer for complaints against state elections officials), *with* Iowa Admin. Code r. 721—25.3(3)(*a*) (requiring the director of elections to examine each complaint, without any alternate screening provision).

Therefore, to avoid even the appearance of a conflict, Burhans simply forwarded the complaint to the VRC for further action. (CR

at 7, 183; App. 26, 202.) *See* Iowa Admin. Code r. 721—25.3(3)(*d*). This meant the complaint moved forward even though it was not notarized or sworn under oath, as HAVA requires—and therefore could have been rejected on that basis. *See* 52 U.S.C. § 21112(a)(2)(C) ("Any complaint filed under the [state] procedures shall be in writing and notarized, and signed and sworn by the person filing the complaint."); Iowa Admin. Code r. 721—25.3(3)(*a*)(1) (authorizing the director of elections to reject any administrative HAVA complaint if it "is not signed, notarized, or sworn under oath").

The VRC met on October 30, 2019, and discussed Miller's complaint, eventually setting a December 9 hearing date. Commissioner W. Charles Smithson volunteered to serve as the "chief" commissioner during the HAVA proceedings. Commissioner Smithson requested that any pretrial motions or filings wait until after the VRC issued a formal notice of hearing. Commissioner Smithson then issued a Notice of Hearing and Statement of Charges on November 6 and an Amended Notice on November 7. (CR at 10–13; App. 29–32.) Both notices memorialized the December 9 hearing date and set forth other general information about the administrative process.

The secretary of state moved to dismiss the complaint. (CR at 14–26; App. 33–45.) The motion asserted that Miller's complaint

did not allege any violation of HAVA with respect to a federal election, and further contended Miller's complaint was not clear, concise, or detailed, as the relevant rules require. (CR at 16; App. 35.) *See* Iowa Admin. Code r. 721—25.2 ("The complainant must… include a clear and concise description of the alleged violation that is sufficiently detailed to apprise both the respondent and the presiding officer of the nature of the alleged violation."). Commissioner Smithson then established a schedule for further briefing on the motion to dismiss. (CR at 27, 184; App. 46, 203.) Miller filed both a "resistance" and an "answer" to the motion to dismiss, and included dozens of pages of attachments. (CR at 28–42, 44–157, 184; App. 47–61, 63–176, 203.)[3] The secretary of state then filed a reply, and Miller filed a surreply. (CR at 158–63, 164–67, 169, 184; App. 177–82, 183–86, 188, 203.)

D. Oral arguments and the VRC's Final Decision.

The hearing date was continued briefly, from December 9 to December 30. (CR at 184, App. 203.) But on December 30, Miller and the secretary of state presented arguments on the motion to dismiss to the VRC for approximately an hour, and fielded

[3] The document appearing at page 43 of the Certified Record is identical to page 9 and appears to have been inadvertently duplicated when submitting the record below. It was not part of Miller's exhibits submitted with his resistance to the motion to dismiss.

questions from commissioners. Although Commissioner Smithson explained the purpose of the hearing was to address only the motion to dismiss, not the merits of Miller's complaint, Miller later remarked that the discussion addressed the merits of his complaint in significant part.

During the argument, both Miller and his counsel acknowledged Miller filed the HAVA complaint after receiving what he believed to be an unsatisfactory response to a records request. Miller further distilled his complaint down to desiring greater communication between his office and the secretary of state, so that Miller's feelings of voter vulnerability could be alleviated. In response, the secretary of state contended (1) it was not the VRC's job to referee an information-sharing kerfuffle between state and local officials, and (2) wanting better information sharing did not constitute a HAVA violation.

Following the arguments, the VRC began deliberations, then invited post-hearing briefs from the parties and scheduled another meeting for January 17, 2020. (CR at 168, 185; App. 187, 204.) The parties indeed filed briefs, and on January 15, Miller also filed what he titled a "request for hearing." (CR at 170, 172–82, 185; App. 189, 191–201, 204.) In other words, Miller did not formally request a contested case hearing until after the motion hearing.

On January 17, 2020, the VRC convened for final discussion and a vote on the motion to dismiss. The VRC deliberated for just under fifteen minutes. Commissioner Smithson characterized the complaint the same way Miller characterized it: an attempt to obtain information from the secretary of state that Miller had not obtained through other avenues. Commissioner Smithson further observed Miller's complaint was less about voting access and more about seeking robust communication between the secretary of state and county election officials. To that end, although Commissioner Smithson concluded Miller's complaint should not move forward based on the applicable standard, he still encouraged greater communication outside the HAVA complaint process between the secretary of state and county election officials.

Following deliberation, Commissioner Susan Bonham moved to grant the motion to dismiss. The motion carried by a 2-1 vote. (CR at 185 & n.4, App. 204.) Commissioner Smithson then drafted and issued a Final Decision and Order, dated February 10, 2020. The Final Decision memorialized the procedural history of the complaint and the conclusions the VRC reached. (CR at 183–88, App. 202–207.) In relevant part, the Final Decision found Miller's complaint was speculative, and concluded that asserting "a hack may happen in the future and thus a violation of HAVA 'is about to occur' is not sufficient." (CR at 187, App. 206.) It also found that

based on the complaint's wording, "even if all facts were true," they did not demonstrate a HAVA violation. (CR at 187, App. 206.)

E. The district court finds Miller lacks standing.

Miller sought judicial review of the Final Decision. Miller and the VRC filed briefs and the district court heard oral argument on July 20, 2020. (3/27/23 Dist. Ct. Ruling [D0031] at 1, App. 240.)

The district court did not issue a decision within a few months; the delay was neither Miller's nor the VRC's fault. But in November 2020, with no ruling yet issued, the general election occurred as scheduled. See *State v. Minnick*, 15 Iowa 123, 125 (1863) (concluding Iowa courts "judicially know" when general elections occur). In February 2021, the VRC moved to dismiss the case as moot, because it was now temporally impossible for Miller to obtain any relief requiring the secretary of state to implement specific safeguards before the 2020 general election. (2/11/21 Motion to Dismiss, D0019.)

The district court denied the motion to dismiss and concluded the case was not moot, reasoning that although it was now 2021, should the case eventually be remanded, the VRC could still "grant injunctive relief related to the 2020 election." (4/26/21 Dist. Ct. Ruling, D0024, at 5, App. 238.) This conclusion was legally erroneous—an injunction "looks to the future rather than to the past," *Jenkins v. Pedersen*, 212 N.W.2d 415, 420 (Iowa 1973), and

"is not corrective of past injuries," *Universal Loan Corp. v. Jacobson*, 237 N.W. 436, 437 (Iowa 1931)—but the VRC elected not to seek interlocutory appeal before receiving a decision on the merits.[4]

That decision on the merits eventually confirmed Miller lacks standing. (D0031, at 5–6.) The district court concluded Miller did not show an adverse effect on a specific or personal interest, and instead asserted a general interest in ensuring compliance with the Title III of HAVA, which is not an adequate interest to support standing under chapter 17A. (D0031, at 4–5.) *See Dickey*, 943 N.W.2d at 38, 40; *accord Richards v. Iowa Dep't of Revenue & Fin.*, 454 N.W.2d 573, 575 (Iowa 1990) (finding "a general interest in proper application of the property tax exemption statute" insufficient to confer standing).[5]

Miller now appeals.

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[4] On appeal, Miller also asserts the 2021 ruling concluding the case was not moot impliedly established, as law of the case, that Miller had standing. (Miller Br. at 54–58.) That too is incorrect; "[s]tanding and mootness are related, but they are not synonymous." *Klein*, 968 N.W.2d at 234 n.9.

[5] Because the district court denied the petition on standing grounds, it did not reach the VRC's alternative contentions that (1) neither HAVA nor the administrative rules prohibit motions to dismiss, and (2) Miller in fact received a "hearing on the record," which is not the same thing as an evidentiary hearing or contested case hearing. (D0016, at 17–28.)

ARGUMENT

The key phrase in both HAVA and the state administrative rules is "hearing on the record." 52 U.S.C. § 21112(a)(2)(E); Iowa Admin. Code r. 721—25.8(1). The phrase is not "contested case hearing" or "evidentiary hearing" and HAVA requires neither thing—yet Miller repeatedly conflates the terms. Indeed, his brief assumes its conclusion, referring to a "required" evidentiary or contested case hearing on nearly every page (Miller Br. at 11–16, 26, 28–30, 33, 36–44, 47–52, 54, 57–58, 60–61)—while referencing "hearing on the record" (the operative language) much less often (Miller Br. at 23, 34–35, 38–39, 45).

But "not every hearing is necessarily one which entitles the parties to present evidence." *Ida Cty. Courier v. Att'y Gen.*, 316 N.W.2d 846, 849 (Iowa 1982). An evidentiary hearing is always a hearing, but the converse is not necessarily true. *See Des Moines Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 848 (Iowa 2015) (Hecht, J., dissenting) ("Every square is a rectangle, but not every rectangle is a square."). Miller's failure to appreciate the difference illustrates that his appeal both fundamentally misunderstands state administrative law—including about what is required to

demonstrate standing under chapter 17A—and overstates federal law's import. The Court should affirm.

I. Under *Dickey*, Miller lacks standing to seek judicial review of the VRC's decision to close his informational complaint.

A. Error preservation and standard of review.

The VRC raised standing below and the district court resolved the case on that ground. Thus, Miller preserved error. *See Andrew v. Hamilton Cty. Pub. Hosp.*, 960 N.W.2d 481, 490–91 (Iowa 2021) (finding an issue preserved when it "was raised and decided by the district court"). Review is for errors at law. *Dickey*, 943 N.W.2d at 37.

B. Standing to file a complaint does not automatically establish standing to seek judicial review.

Any person may file an administrative HAVA complaint. Iowa Admin. Code r. 721—25.1(1). But "a person may be a proper party to agency proceedings and not have standing to obtain judicial review." *Richards*, 454 N.W.2d at 575. So while any person may file a HAVA complaint with the VRC, it does not follow that judicial review by the district court is automatically available.

Under the VRC's rules, judicial review of the VRC's decision on a HAVA complaint "may be sought," but only "in accordance with the terms of Iowa Code chapter 17A." Iowa Admin. Code r. 721—25.35. Merely mentioning chapter 17A does not establish that a

person indeed *satisfies* chapter 17A, nor does it independently confer a right to seek judicial review. Referring to the chapter simply notifies potential petitioners of what else they must satisfy and the path they must follow to seek judicial review.

Under chapter 17A, "[o]nly those persons aggrieved or adversely affected by agency action may seek judicial review." *Northbrook Residents Ass'n v. Iowa State Dep't of Health*, 298 N.W.2d 330, 331 (Iowa 1980); *see also* Iowa Code § 17A.19; *Dickey*, 943 N.W.2d at 37 (setting forth what a judicial review petitioner must demonstrate "to have standing to challenge an administrative action"). And here, *Dickey* establishes that dismissing Miller's complaint did not make him aggrieved or adversely affected.

C. *Dickey* establishes that a person lacks standing to seek judicial review when a state agency closes or dismisses an informational complaint they made.

Dickey is directly on point. In *Dickey*, an attorney filed a complaint with the Iowa Ethics and Campaign Disclosure Board. *Dickey*, 943 N.W.2d at 36. After "the Board dismissed the complaint, the attorney petitioned for judicial review." *Id.* at 36. The Court concluded the complainant was "not an 'aggrieved or adversely affected' party within the meaning of Iowa Code section 17A.19." *Id.* *Dickey* establishes that a person who files a complaint with an administrative agency is not aggrieved or adversely

affected by, and therefore lacks standing to seek judicial review of, the agency's dismissal of their complaint.

Dickey materially matches this case. Just as the complainant in *Dickey* filed the complaint with a state agency, here Miller filed a complaint with the VRC. Just like the complainant in *Dickey*, after the agency dismissed his complaint, Miller petitioned for judicial review. But *Dickey* forecloses Miller's standing because it establishes he is not aggrieved or adversely affected by the dismissal of his complaint. The purported adverse effect from the dismissal is that it cuts off Miller's attempt to seek enforcement of or compliance with HAVA. But an interest in ensuring compliance with the law is not sufficient for standing. *See Dickey*, 943 N.W.2d at 38; *Godfrey v. State*, 752 N.W.2d 413, 423–24 (Iowa 2008); *Richards*, 454 N.W.2d at 575.

And the record establishes that Miller's complaint, like the one in *Dickey*, was informational. Miller's complaint facially reflects Miller filed it because he *sought information* from the secretary of state and either did not receive it or did not receive a satisfactory amount. (CR at 3, App. 22.) Miller's records request—a request *for information*—is the first thing mentioned in his letter after the subject line. (CR at 3, App. 22.) And both Miller and his counsel stated to the VRC that the HAVA complaint was Miller's effort to obtain *more information* about the secretary of state's

technological preparations for the then-upcoming election. Given these factual similarities to the complaint in *Dickey*, the same legal principles govern too. Just as the complainant in *Dickey* lacked standing to seek judicial review after the agency dismissed his complaint as legally insufficient, so does Miller.

Klein does not compel a different result. *Klein* held a person who filed a complaint with the Iowa Public Information Board could seek judicial review after that board dismissed his complaint on the merits. *Klein*, 968 N.W.2d at 234. But *Klein* "applies only to the [Public Information] Board and chapter 23." *Id.* It does not otherwise disturb the *Dickey* rule for other agency complaints, like the one Miller made to the VRC here. The Court should reaffirm that *Klein* is agency-specific and limited.

The Colorado case Miller relies on does not compel a different result either. *See Marks v. Gessler*, 350 P.3d 883, 901 (Colo. App. 2013). In *Marks*, Colorado officials dismissed a citizen's HAVA complaint *at the administrative level* for lack of standing, because she had not "personally witnessed a violation." *Id.* at 889. And they did so "[w]ithout holding a hearing" of any kind. *Id.* The Colorado Court of Appeals held that was erroneous because under HAVA, "any person" may file a complaint, regardless whether they personally witnessed the alleged violation. *Id.* at 897.

But here, the VRC did not dismiss Miller's complaint for lack of standing at the administrative level; the VRC dismissed the complaint after considering it, hearing argument from both Miller and the Secretary for about an hour, and finding it legally insufficient. It did not impose a standing requirement to file the complaint in the first place. Miller is "any person," and he could file the complaint—thus avoiding the core of the *Marks* problem.

Moreover, under Iowa law it does not follow that standing to file the complaint equals standing to seek judicial review. *See Richards*, 454 N.W.2d at 575. *Marks* addressed that issue under Colorado law, and concluded both an alleged deprivation of the right to file a complaint and an alleged deprivation of the right to a hearing were enough to demonstrate standing to seek judicial review. *Marks*, 350 P.3d at 900. But (1) no deprivation of the right to file a complaint occurred here; and (2) in *Marks* there were no arguments before the administrative agency or tribunal, which is vastly different from the record here. *See id.* at 889.

Most importantly, though, *Marks* is neither controlling nor persuasive under the circumstances because *Dickey* and *Richards* are Iowa decisions stating otherwise. These cases establish that a person may be able to file a complaint yet not have standing to seek judicial review. "That other states" might do something different should "not persuade [the Court] to overrule [its] holdings to the

contrary." *Bd. of Water Works v. Sac Cty. Bd. of Supervisors*, 890 N.W.2d 50, 69 (Iowa 2017).

Standing requires both a specific personal or legal interest *and* an adverse effect. *See Dickey*, 943 N.W.2d at 37–38. As the district court found, Miller has suffered no adverse effect; he did not "provide any facts or analysis to support the claim that" the dismissal of his complaint on the Secretary's motion "directly and substantively affected his ability to carry out his statutory duties" as county auditor. (D0031, at 5.) Instead, Miller merely seeks to probe whether the Secretary of State adequately complied with HAVA. (Miller Br. at 50.) But an interest in ensuring compliance with the law is not sufficient for standing. *See Dickey*, 943 N.W.2d at 38; *Godfrey*, 752 N.W.2d at 423–24; *Richards*, 454 N.W.2d at 575.

Miller's contention that he has standing is mistaken in multiple respects. If the personal or legal interest he posits is his ability to carry out his statutory duties, he did not show any adverse effect on that interest from the VRC's dismissal of his complaint. And if the personal or legal interest he posits is, as his brief suggests, "fully to litigate the question of whether the State is in compliance with Title III of HAVA" (Miller Br. at 50), that's not a sufficient interest at all. The district court correctly dismissed Miller's petition for judicial review for lack of standing.

D. Miller's other arguments lack merit.

Miller amalgamates several other procedural arguments about why the district court purportedly erred. None of them are convincing.

1. Federal versus state law.

Miller first contends HAVA contains "express language" that is "broader than the language" of Iowa Code chapter 17A with respect to standing. (Miller Br. at 33.) But the two frameworks (HAVA on one hand; the state administrative rules plus chapter 17A on the other) don't address the same thing.

Federal law requires that "any person" be able *to file a complaint* with the administrative agency (here, the VRC). 52 U.S.C. § 21112(a)(2)(B). But HAVA says nothing about judicial review beyond the agency. Instead, the state administrative rules make judicial review available, but only "in accordance with the terms of Iowa Code chapter 17A." Iowa Admin. Code r. 721—25.35. One of the requirements of chapter 17A is standing. *See Richards*, 454 N.W.2d at 575; *see also Northbrook Residents Ass'n*, 298 N.W.2d at 331 ("Only those persons aggrieved or adversely affected by agency action may seek judicial review.").

Put another way, Miller conflates standing to file a complaint with standing to seek judicial review, but the two are not the same. Indeed, *Richards* recognizes that even when "any person" may file

an administrative complaint, that by itself "does not give . . . standing to obtain judicial review." *Richards*, 454 N.W.2d at 575. *Richards* forecloses Miller's quasi-supremacy argument.

2. Mootness and "implied" law of the case.

Miller next contends the 2021 mootness ruling "impliedly" established, as law of the case, that Miller had standing. (Miller Br. at 55.) He asserts the district court could not have adjudicated mootness without necessarily concluding he had standing. (Miller Br. at 57.) But that's not how law of the case works.

The doctrine establishes the "familiar legal principle that an *appellate* decision becomes the law of the case." *United Fire & Cas. Co. v. Iowa Dist. Ct.*, 612 N.W.2d 101, 103 (Iowa 2000) (emphasis added); *accord Des Moines Bank & Tr. Co. v. Iowa S. Utils. Co.*, 245 Iowa 186, 189, 61 N.W.2d 724, 726 (1953) (committing to "the doctrine that the legal principles announced . . . *by us* in an opinion, right or wrong, are conclusively binding, throughout further progress of the case" (emphasis added)). The district court's 2021 mootness ruling was not an "appellate decision" even though judicial review under chapter 17A involves the district court sitting in an appellate capacity. *See Lowe's Home Ctrs., LLC v. Iowa Dep't of Revenue*, 921 N.W.2d 38, 45 (Iowa 2018).

That's because Miller's standing to file the complaint at the agency level was uncontested. He could file the complaint, and he

did. But Miller's standing *to seek judicial review* only became an issue upon the case reaching the district court—so any decision by the district court was not "appellate" as to that issue. An unappealed district court decision on judicial review might be binding on the agency, *see New Midwest Rentals, LLC v. Iowa Dep't of Commerce*, 910 N.W.2d 643, 649 n.4 (Iowa Ct. App. 2018), but is not binding on the district court itself as the same case progresses before any remand or further appeal. *See Davenport Bank & Tr. Co. v. City of Davenport*, 318 N.W.2d 451, 455 (Iowa 1982) ("Numerous rulings of various kinds during the pendency of a case in district court . . . may be changed in the progress of the case, even by a different presiding judge."). Miller's law-of-the-case contention thus goes nowhere.

3. "Waiver" of an affirmative defense.

Miller also contends the VRC "waived" a standing defense by (1) not pleading standing as an affirmative defense in its answer and (2) moving to dismiss in 2021 on mootness grounds and not reiterating standing as a separate ground for dismissal. (Miller Br. at 58–59.) Both contentions are misguided.

Although the VRC's answer did not contain a heading labeled "affirmative defenses," paragraph 13 of the answer expressly denied Miller "is aggrieved or adversely affected within the meaning of Iowa Code 17A.19," cited *Dickey*, and stated a person

"does not have standing to seek judicial review" of an agency's decision to dismiss their complaint. (D0007, at 2.) The VRC raised standing in its answer—even though it did not do so in a separate section labeled "affirmative defenses" or move to dismiss on that ground right away.

As to omitting standing from the later motion to dismiss, when that motion was filed in 2021, the substantive briefing on the merits and submission to the district court from July 2020—in which the VRC argued Miller lacked standing—was still pending. It cannot be that the VRC needed to raise standing *again* when it had already fully briefed and argued that issue and it remained pending. Miller offers no legal support for this assertion.

4. Ninety-day decision timeline.

Miller never raised below any contention that the VRC improperly exceeded the 90-day decision timeline set forth in 52 U.S.C. section 21112(a)(2)(H) and Iowa Administrative Code rule 721—25.1(2). (Miller Br. at 15 n.3, 34.) His district court briefs on judicial review do not contain the word "ninety" or the word "consent" and only contain the numeral "90" when citing (1) a case decided in 1990 and (2) Rule of Appellate Procedure 6.904. He cannot now claim that error on appeal.

Moreover, Miller never raised the 90-day provisions before the VRC. He served his complaint in August 2019 and the VRC

convened on October 30, 2019, within 90 days. (CR at 183, App. 202.) At that meeting, which Miller attended, the VRC suggested it would schedule a hearing for December 2019. (CR at 183, App. 202.) Miller did not object to that hearing date or protest that it was more than 90 days after the complaint was served; indeed, he agreed to the elongated schedule. He also did not raise the 90-day timeline at any point after the 90-day period would've expired—until his appellate brief. Under the circumstances, his acquiescence in the VRC's schedule constitutes consent to a determination beyond 90 days under both HAVA and the relevant state administrative rule. *See* 52 U.S.C. § 21112(a)(2)(H); Iowa Admin. Code r. 721—25.1(2).

Because none of Miller's assorted procedural contentions are correct, the district court did not err in finding he lacked standing to seek judicial review.

II. Even if the Court concludes Miller has standing, his challenge fails on the merits because a "hearing on the record" is different from an "evidentiary hearing"—and Miller received a "hearing on the record" when he presented legal argument to the VRC.

A. Error preservation and standard of review.

In the judicial review context, typically the Court does not decide the merits when "[t]he only question presented . . . is the district court decision dismissing the petition for want of standing."

Iowa-Ill. Gas & Elec. Co. v. Iowa State Commerce Comm'n, 347 N.W.2d 423, 427 (Iowa 1984). Doing so "would not be performing [a] review function," but instead "would be deciding issues that were not decided by the district court." *Id.* Thus, if the Court concludes Miller had standing to seek judicial review, the remedy would usually be to remand for the district court to consider whether Miller received a "hearing on the record" because the VRC permitted him to present oral argument before it.

But there also exists a line of cases outside the judicial review context providing that the Court can affirm a district court ruling "on any ground urged on appeal that was also raised in the district court." *Little v. Davis*, 974 N.W.2d 70, 73 (Iowa 2022). Should the Court rely on that principle here, the merits arguments the VRC raised below also compel affirmance.

Even if Miller were entitled to *a* hearing, it does not follow that he was entitled to an *evidentiary* hearing. The two terms mean different things, and requiring one doesn't necessarily require the other. A hearing can range "from a full trial-type inquiry to oral presentation of legal arguments without the right to produce evidence." *Ida Cty. Courier*, 316 N.W.2d at 848. Additionally, as one Minnesota court specifically addressing a HAVA complaint explained, "[t]he definition of hearing does not pr[e]scribe any particular length or process." *McGrath v. Minn. Sec'y of State*, No.

A11-613, 2011 WL 5829345, at *5 (Minn. Ct. App. Nov. 21, 2011) (finding that dispositive motion practice prior to a full evidentiary hearing was consistent with HAVA).

Here, Miller presented substantive legal argument to the VRC in a public meeting lasting approximately an hour. Even without an evidentiary component, that constituted a "hearing" adequate to satisfy the hearing requirement. *See Ida Cty. Courier*, 316 N.W.2d 848 (confirming a hearing does not necessarily include production of evidence). After all, only "a hearing" and not an "evidentiary hearing" or "contested case hearing" is required—no matter how fervently Miller tries to suggest otherwise.

B. The December 30 meeting was a "hearing."

"[W]ith the . . . number and types of hearings required in all areas in which the government and the individual interact, common sense dictates that we must do with less than full trial-type hearings" at times. Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1295 (1975) [hereinafter Friendly]. A hearing includes any oral presentation before a tribunal—especially one involving or featuring legal argument. *See Ida Cty. Courier*, 316 N.W.2d at 849 (citing with approval an administrative law treatise defining "hearing" as "any oral proceeding before a tribunal"). Even forty years ago, it was "generally agreed that not every hearing is necessarily one which entitles the parties to present evidence." *Id.*

The HAVA rules illustrate that not every HAVA hearing must be an evidentiary hearing. Rule 721—25.8(1) establishes a preference for resolving HAVA complaints "based upon written submissions unless the complainant or respondent requests a *hearing on the record* or the presiding officer determines that an *evidentiary hearing* will assist in resolution of outstanding factual disputes." Iowa Admin. Code r. 721—25.8(1) (emphasis added). The rule uses both the phrase "hearing on the record" and the phrase "evidentiary hearing." That means the two phrases don't simply refer to the same thing. *Cf. State v. Stoneking*, 379 N.W.2d 352, 356 (Iowa 1985) (concluding "administer" and "provide" were not synonyms when they appeared in the same statute, and further concluding "the legislature intended to reinforce that difference by inserting both words"); *Secor v. Siver*, 161 N.W. 769, 773 (Iowa 1917) ("It would be going too far to say that the word 'transaction' will in no case include or embody the meaning of communication or conversation; but that in general they are not equivalent terms is quite evident. Had the Legislature so regarded them, both words would not have been used."). Every part of the rule has independent meaning and, like statutes, the Court should not interpret administrative rules to contain surplus language. *Cf.* Iowa Code § 4.4(2) (presuming an "entire statute is intended to be effective").

Here, although the December 30 VRC meeting did not involve formal presentation of evidence, it was still a hearing because it involved substantive legal arguments before the tribunal. Both Miller and his counsel argued at length to the VRC. The VRC afforded Miller more time (twenty minutes) than the Court generally affords advocates appearing before it (fifteen). The commissioners asked questions of all presenters, and the presenters responded to those questions. Considered in its totality, the December 30 meeting constituted a "hearing" under the accepted definition of that term.

It was not required to be anything more. HAVA requires only *a* hearing, not necessarily an evidentiary hearing—and Miller received a hearing because he made substantive legal argument to the tribunal.

Ida County Courier illustrates the difference. There, a person subject to an antitrust investigation was entitled to an evidentiary hearing. *See Ida Cty. Courier*, 316 N.W.2d at 851. But that evidentiary hearing was necessary because the person was a respondent subject to affirmative government enforcement, and thus deserved the opportunity to rebut it. *See id.* (finding an evidentiary hearing necessary for the respondent so that they could "show the investigation should not proceed"). By contrast, Miller's request for hearing came in the quite different context of making a

request *for* enforcement rather than defending against it. In that context, less than a full trial-type hearing is and was sufficient. *See* Friendly, 123 U. Pa. L. Rev. at 1295.

C. The December 30 meeting was "on the record."

"[T]he meaning of 'on the record' and 'upon the record' vary." *State v. Jones*, 817 N.W.2d 11, 15 (Iowa 2012). But on a basic level, the phrase simply means "not *off* the record:"

> Typically, when we think of court actions that are "on the record," we have in mind events that become part of the official court record. This is to be contrasted with matters that are "off the record." In this sense, something can become part of the official record whether it is a writing or whether it is said aloud before a court reporter . . . .

Id. at 25–26 (Mansfield, J., dissenting) (citations omitted). In other words, something occurring "on the record" simply means those events or proceedings are recorded and preserved for later review. A determination "on the record" does not necessarily mean or require that "a formal adjudication process" must take place. *Messamaker v. Iowa Dep't of Human Servs.*, 545 N.W.2d 566, 567–68 (Iowa 1996).

Here, though, the VRC used a formal process, both by accepting written filings and by offering both parties an opportunity to address the VRC during a public meeting. The process also enabled later review because the audio recordings of

the meetings, and all filings submitted by both Miller and the secretary of state, are now in the agency record filed with the district court and transmitted to this Court on appeal. Accordingly, the VRC proceedings were "on the record" within the meaning of both HAVA and Iowa law. Because they were, and because they also involved a "hearing" within the meaning of that word, the VRC afforded Miller any hearing to which he was entitled, and the district court's denial of his petition for judicial review can be affirmed on that alternative basis.

D. The complaint was deficient from the outset.

Moreover, everything that happened before the VRC was *more* than Miller was entitled to receive given the complaint he filed. HAVA requires all complaints filed in any state's administrative process to be in writing, notarized, and signed and sworn by the complainant. 52 U.S.C. § 21112(a)(2)(C). Miller's complaint was in writing and signed, but not notarized or sworn. (CR at 3–6, App. 22–25.)

For that reason, the director of elections could have rejected the complaint outright. Iowa Admin. Code r. 721—25.3(3)(*a*)(1). But she instead punted the complaint to the VRC "to avoid the appearance of a conflict" (CR at 7, App. 26)—even in the preliminary ministerial evaluation. The director of elections' decision to avoid any appearance of conflict was understandable,

but also highlights a gap in the initial review provision that—unlike the selection of a presiding officer—does not provide for an alternate screener when the complaint names the secretary of state. The gap worked out favorably to Miller here because it meant his complaint moved forward—but it also means any failure to hold a "hearing" was harmless given the facial jurisdictional deficiencies in the complaint.

CONCLUSION

Miller lacks standing to seek judicial review under *Dickey*. Alternatively, even if he has standing to seek judicial review, HAVA does not require an *evidentiary* hearing. Agencies may allow dispositive motion practice prior to a full evidentiary hearing on the merits. *See McGrath*, 2011 WL 5829345, at *5. And Miller received a "hearing" within the meaning of the term while litigating the secretary of state's motion to dismiss. The Court should affirm.

REQUEST FOR ORAL SUBMISSION

The VRC requests oral argument. The interplay between HAVA and state administrative law is intricate and unique. Thus, oral argument may help navigate the administrative framework.

Respectfully submitted,

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CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

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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 Century Schoolbook in size 14 and contains 7,189 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

I, David M. Ranscht, hereby certify that on March 4, 2024, I, or a person acting on my behalf, filed this brief and served it on counsel of record to this appeal with via EDMS.

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