

LETTER TO THE EDITOR

Before I get to the substance of this article, I want to assure people understand these are my opinions. Nothing in the legal world is final until there is a ruling from a judge. Even then, it can be appealed and possibly overturned, or overturned years later by a new statute or a ruling from a superseding court. This article is also not meant to be legal advice but is intended to inform the public about an issue. I also want to make it very clear that nothing in this article is meant to belittle, publicly shame, or disparage anyone. I simply believe it's important the public has a fair understanding of this issue.

Several weeks ago, a petition circulated in McPherson County to put a publicly initiated ordinance to a county-wide vote. The ordinance would change the way elections are handled in McPherson County. If passed, it is my belief this petition would violate state and federal law causing McPherson County to be sued, and possibly costing the County a significant amount of money.

The petition contained six parts, that if passed by a vote, McPherson County would have to implement. Those six parts are:

- 1) All elections in McPherson County shall be conducted by paper ballots only;
- 2) Tabulation of votes shall be by hand count after polls are closed in accordance with SDCL 12-20;
- 3) Electronic voting devices, of any kind, are prohibited;
- 4) Electronic tabulation devices, of any kind, are prohibited;
- 5) Absentee ballots property obtained and marked by the individual voter in accordance with SDCL 12-19 shall be tabulated by hand after the polls close. Ballots received after 7pm on election day shall be disqualified; and
- 6) The establishment of vote center, or the like, in McPherson County, is prohibited.

After speaking with several individuals who signed the petition, they were only told that the petition was to get rid of the tabulation machines (the machines that count the ballots), and to do a hand count of all ballots. However, this petition would do considerably more than that. Every person I have spoken to, who signed the petition, stated they would not have signed it if they knew the full extent of the ramifications of it.

While there are several legal concerns with the petition, I am only going to focus on Number 3, "Electronic voting devices, of any kind, are prohibited," as this section causes the largest legal concern. In 2002, Congress passed the Help America Vote Act

(HAVA) to get rid of the issues that plagued the 2000 elections (remember the hanging chad controversy in Florida). Under HAVA, if there is a federal election on the ballot, each polling place is required to have at least one direct recording electronic voting machine or other type of voting system that lets those who are disabled have the same opportunity to vote as everyone else. This also includes being able to vote privately and independently.¹ South Dakota law also requires each polling place to have an electronic ballot marking machine if there is a federal election on the ballot.²

Currently, South Dakota uses the Express Vote machine, which meets these requirements, and lets anyone who is disabled vote just like everyone else. Under Number 3 of the proposed petition, McPherson County would be forced to not have these Express Vote machines at the polls because they are considered electronic voting devices. I feel very strongly that if we do not have the Express Vote machines at every polling place, we would be in violation of HAVA as well as South Dakota state law. It would also possibly violate the Americans with Disabilities Act, however, that would require more research for a definitive opinion.

There are, in my opinion, incorrect arguments that getting rid of the Express Vote machines would not violate State or Federal law. South Dakota law also gives Counties the right to experiment with, use, or not use electronic ballot marking systems.³ However, we must remember that there is another state law requiring an electronic ballot marking system if there is a federal election on the ballot. The argument is that the state law giving counties the choice supersedes the state law requiring the voting machines. That is not how statutory interpretation works. The South Dakota Supreme Court has stated that when two statutes are in conflict with each other, we must interpret them together to make them harmonious and workable.⁴

What this means is that you can't simply say that one statute nullifies another statute. Under the current situation, I believe it would mean that counties have the right to experiment with, use or not use the electronic ballot marking systems. However, if there is a federal election on the ballot, an electronic ballot marking system must be at each polling place.

There is also an argument that we are only required to meet the requirements under HAVA if we have accepted federal funds through HAVA. While it is my belief that this argument is incorrect, even if it were correct, we would still need to comply with HAVA because all of the Express Vote machines in South Dakota were purchased

using a \$3-million Election Security Grant through HAVA in 2018.⁵ Even though complying with the requirements of HAVA is not conditioned on the acceptance of federal grant money, HAVA specifically states that every state and jurisdiction must be in compliance with its regulations.⁶

When interpreting our South Dakota State Constitution, the South Dakota Supreme Court on several occasions has stated that a county ordinance cannot be in violation of state law.⁷ The Supremacy Clause of the United States Constitution also states that federal law overrides everything else.⁸ It is my belief that Number 3 of this petition would be in violation of South Dakota and federal law and is not something a county can legally do.

This ultimately puts the McPherson County Board of County Commissioners in a very difficult position. Under South Dakota law, a county commission shall submit any verified petition brought before the board to a public vote.⁹ However, in a case similar to the issue we have in McPherson County, the South Dakota Supreme Court has found that a county ordinance brought forward through the petition process must be something a county has the legal authority to do.¹⁰ If the petition is not something a county has the legal authority to do, a county commission may reject the petition.¹⁰

If this petition goes to a public vote and passes, I believe it could lead to McPherson County being sued by the American Civil Liberties Union (ACLU), any organization that advocates on behalf of the disabled, or any disabled individual. Due to the nature of these lawsuits, a judge almost always orders the losing party to pay the legal fees of the winning party. In 2018, the ACLU sued South Dakota and won. South Dakota was ordered to pay more than \$600,000.00 in legal fees.¹¹ It is also not uncommon for these fees to be in excess of a million dollars. These types of fees are also not covered under the County's insurance and would come directly out of the County budget. As you can imagine, this would take an extreme financial toll on McPherson County and has the possibility of skyrocketing real estate taxes.

Before this petition began circulating, the same group that pushed the petition forward came to the Commission and asked the Commission to do away with the tabulation machines and do a hand count of all ballots. This request seemed to stem from a belief that the tabulation machines are inaccurate and susceptible to fraud. I fully understand there are a lot of varying opinions regarding the 2020 election. But facts are facts. In the 2020 general election, 1,374 McPherson County residents cast a vote. Of that, 1,075 voted for Donald Trump, 222 voted for Joe Biden, and the

remainder voted for an independent candidate.¹² If there was fraud in McPherson County for the 2020 election, whoever was behind it did a terrible job.

But that leaves the question if the tabulation machines are accurate. Ultimately, the Commission voted to do a full audit of the tabulation machines. What this means is that the ballots will be officially counted by the tabulation machines and then a hand count of every ballot will also be done. If there is a difference, the candidates on the ballot may be notified and may have the right to ask for a recount. This is something that would let everyone know if the tabulation machines are or are not accurate and appeared to be a common-sense middle ground between only using the tabulation machines or only doing a hand count.

The same petition was recently presented to the Lawrence County Board of County Commissioners. Lawrence County rejected the petition because they believe it is not something they have the legal authority to do since it violates South Dakota and federal law. If this is something you feel strongly about, either way, the McPherson County Commission meetings are always open to the public. Let your voice be heard.

At the end of the day, outside of all the legalese, we also have to ask ourselves what is the right thing to do. Being able to vote privately and independently is one of the cornerstones of our country. For those of you who are able-bodied, ask yourself if you would like to be forced to have someone else fill out your ballot. We all live in a small community and know what happens when you tell one person something. In a short time, everyone knows. While some of you might not care if everyone knows how you vote, there are many who care very much. If passed, this petition would trample on the rights of those who are disabled. That should not be the legacy of McPherson County.

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¹ Each voting system used in an election for Federal office shall meet the following requirements: Accessibility for individuals with disabilities: The voting system shall (A) be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters; (B) satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place. 52 USCA 21081(a)(3).

² If a candidate for federal office appears on the ballot at a polling place, such polling place is required to have an electronic ballot marking system present. SDCL 12-17B-6.1.

³ Any governing body having supervision of elections within any political subdivision may adopt, experiment with, or abandon any automatic tabulation or electronic ballot marking system approved for use by the State Board of elections. Any governing body may use the system in all or some of the precincts within its jurisdiction or in combination with any other type of voting system approved for use by the State Board of Elections. SDCL 12-17B-3

⁴ Where two statutes appear to conflict, it is our duty to reasonably interpret both, giving effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable. Faircloth v. Raven Industries, Inc., 620 N.W.2d 198, 201, 2000 S.D. 158, ¶ 7 (S.D.,2000)

⁵ https://www.eac.gov/sites/default/files/eac_assets/1/6/ES_Requests_Received.pdf

⁶ Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2006. 52 USCA 21081(d)

⁷ [A] county may not pass an ordinance which conflicts with state law. SD Const art IX Section 2. Rantapaa v. Black Hills Chair Lift Co., 633 N.W.2d 196, 203, 2001 S.D. 111, ¶ 22 (S.D.,2001)

⁸ This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. US Constitution Article VI, Clause 2.

⁹ The board shall enact the proposed ordinance or resolution and shall submit it to a vote of the voters in the manner prescribed for a referendum within sixty days after the final enactment. SDCL 7-18A-13.

¹⁰ A county commission has only those powers as are expressly conferred upon it by statute and such as may be reasonably implied from the powers expressly granted. . . If the Yankton County Commission could not adopt such an ordinance, neither could the residents of Yankton County through their right of initiative. Heine Farms v. Yankton Cnty. ex rel. Cnty. Com'rs, 649 N.W.2d 597, 601, 2002 S.D. 88, ¶ 16 (S.D.,2002)

¹¹ <https://www.argusleader.com/story/news/politics/2018/10/04/aclu-south-dakota-pick-up-619-k-third-party-ballot-access-lawsuit/1520341002/>

¹² <https://sdsos.gov/elections-voting/assets/2020GeneralStateCanvassFinal&Certificate.pdf>