STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF MCPHERSON

FIFTH JUDICIAL CIRCUIT

MCPHERSON COUNTY,

45 CIV 24-

Plaintiff,

V.

COMPLAINT FOR EMERGENCY
DECLARATORY JUDGMENT

LINDLEY HOWARD, in her official capacity as McPherson County Auditor,

Defendant.

Plaintiff, County of McPherson, for their cause of action, including the abovenamed Defendant, Lindley Howard, in her official capacity as McPherson County Auditor, state and allege as follows:

GENERAL ALLEGATIONS

- 1. McPherson County is a county organized under South Dakota law.
- 2. Lindley Howard is the Auditor for McPherson County and serves as its election administrator.
- 3. All ballots in McPherson County were counted using a tabulation machine for the June 4, 2024 primary election.
- 4. On February 12, 2024, the McPherson County Board of County Commissioners voted in favor of completing a hand-counted post-election audit of 100% of the

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Filed: 6/20/2024 10:48 AM CST McPherson County, South Dakota 45CIV24-000013

voted ballots in McPherson County for the June 4, 2024 South Dakota primary election.

- 5. On June 13th, 2024, McPherson County citizens conducted a hand-counted postelection audit of 100% of the voted ballots in McPherson County in accordance with SDCL Chapter 12-17B.
- 6. On June 18th, 2024, the McPherson County Board of County Commissioners voted in favor of filing this Emergency Declarant Action in order to reconcile and complete the hand-counted post-election audit.

PRECINCT 3

- 7. In accordance with SDCL 12-17B-20, Precinct 3 in McPherson County was randomly selected for the mandatory post-election audit.
- 8. Poll workers, as well as the resolution board, for Precinct 3 stated there were 127 Republican ballots cast on June 4, 2024 for the primary election in Precinct 3. However, one ballot was not stamped. Therefore, 126 Republican ballots were counted by a tabulation machine on election night in Precinct 3. The Recap Sheet, required under ARSD 05:02:09:16, stating such is included with this filing and incorporated by reference. (Exhibit 1).
- 9. The unstamped ballot for Precinct 3 was not included in the ballots to be counted by and given to the post-election audit board for Precinct 3.
- 10. The post-election audit board for Precinct 3, stated they received 127 Republican ballots for Precinct 3 on their official ballot and tally sheet. The auditing board

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receipt for official ballots, required under ARSD 05:02:23:06, stating such is included with this filing and incorporated by reference. (Exhibit 2).

- 11. The post-election audit board for Precinct 3 tallied 127 votes for the State Senate District 23 race in Precinct 3. The post-election audit board tally sheets for the State Senate District 23 vote for Precinct 3 are included with this filing and incorporated by reference. (Exhibit 3).
- 12. If the post-election audit board for Precinct 3 did have 127 ballots, the tally for the State Senate District 23 race would be correct.
- 13. Voters were able to vote for two (2) candidates in the Republican State Representative District 23 vote.
- 14. If a voter voted for only one or no candidates in the Republican State

 Representative District 23 vote, that would have been tallied as an undervote and included in the total votes tallied.
- 15. The post-election audit board for Precinct 3 tallied 253 votes for the Republican State Representative District 23 vote. The post-election audit board tally sheets for the Republican State Representative District 23 vote for Precinct 3 are included with this filing and incorporated by reference. (Exhibit 4).
- 16. If there were 127 Republican ballots counted by the post-election audit board for the Republican State Representative District 23 vote in Precinct 3, there should have been two (2) votes, including any under votes, tallied per ballot and the total tallied votes, including under votes, should have totaled 254 votes.

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McPherson Co. v. McPherson Co. Auditor McPherson County Civ. 24-00000

Complaint

17. It is not numerically possible to have 253 total votes tallied, including under votes,

with 127 ballots.

18. After counting the ballots and tallying the votes for the Republican State

Representative District 23 race in Precinct 3, the post-election audit board for

Precinct 3 chose not to re-count the ballots and re-tally the votes in order to

reconcile the numerically impossible vote tally count.

19. Because the total tally count for the Republican State Representative District 23

race in Precinct 3 is not numerically possible, and because the post-election audit

board for Precinct 3 choose not to attempt to reconcile the tally count, the post-

election audit for the Republican State Representative District 23 race in Precinct

3 is not completed in accordance with ARSD 5:02:23:07.

PRECINCT 4

20. Poll workers, as well as the resolution board, stated there were 135 Republican

ballots cast on June 4, 2024 for the primary election in Precinct 4. The Recap

Sheet, required under ARSD 05:02:09:16, stating such is included with this filing

and incorporated by reference. (Exhibit 5).

21. The post-election audit board for Precinct 4, stated they received 135 Republican

ballots for Precinct 4 on their official ballot and tally sheet. The auditing board

receipt for official ballots, required under ARSD 05:02:23:06, stating such is

included with this filing and incorporated by reference. (Exhibit 6).

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- 22. The post-election audit board for Precinct 4 tallied 135 votes for the State Senate District 23 race for Precinct 4. The post-election audit board tally sheets for the State Senate District 23 vote for Precinct 4 are included with this filing and incorporated by reference. (Exhibit 7).
- 23. The number of votes counted by the tabulation machine on June 4, 2024 for the McPherson County primary election and the number of votes tallied by the post-election audit board for the State Senate District 23 race in Precinct 4 matched.
- 24. Voters were able to vote for two (2) candidates in the Republican State Representative District 23 vote.
- 25. If a voter voted for only one or no candidates in the Republican State

 Representative District 23 vote, that would have been tallied as an undervote and included in the total votes tallied.
- 26. The post-election audit board for Precinct 4 tallied 262 votes for the Republican State Representative District 23 vote. The post-election audit board tally sheets for the Republican State Representative District 23 vote for Precinct 4 are included with this filing and incorporated by reference. (Exhibit 8).
- 27. If there were 135 Republican ballots counted by the post-election audit board for the Republican State Representative District 23 vote in Precinct 4, there should have been two (2) votes, including any under votes, tallied per ballot and the total tallied votes, including under votes, should have totaled 270 votes.

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- 28. It is not numerically possible to have 262 total votes tallied, including under votes, with 135 ballots.
- 29. There were four (4) of the 135 Republican ballots in Precinct 4 that included the McPherson County Commission race.
- 30. It is believed that the post-election audit board for Precinct 4 tallied the four (4) ballots including the McPherson County Commission race first, then tallied the State Senate District 23 race on the four (4) ballots that included the McPherson County Commission race, set those four (4) ballots aside, then tallied State Senate District 23 race the remaining 131 Republican ballots.
- 31. It is believed that when the post-election audit board for Precinct 4 tallied the votes for the Republican State Representative District 23 race, they failed to reincorporate the four (4) ballots containing the McPherson County Commission race.
- 32. If the post-election audit board for Precinct 4 did fail to reincorporate the four (4) ballots containing the McPherson County Commission race, that would lead to a vote tally of 262. Which, as hereinabove stated, is the tally count that the post-election audit board for Precinct 4 ended with.
- 33. The post-election audit board did re-count the Republican ballots to attempt to reconcile the tally numbers for the Republican State Representative District 23 race. However, it is believed that the four (4) ballots containing the McPherson

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County Commission vote were again not included in this re-count and the tally again came out to 262.

- 34. The post-election audit board for Precinct 4 elected not to count the ballots and tally the votes for the Republican State Representative District 23 race for a third time to attempt to reconcile the tally count.
- 35. Because the total tally count for the Republican State Representative District 23 race in Precinct 4 is not numerically possible, and because the post-election audit board did not reconcile the tally count, the post-election audit for the Republican State Representative District 23 race in Precinct 4 is not completed in accordance with ARSD 5:02:23:07.

Count 1: Declaratory Judgment

36. Time is of the essence, and McPherson County requests a hearing on this matter be waived under SDCL 15-6-57.

SDCL 15-6-57. Declaratory Judgments

The procedure for obtaining a declaratory judgment pursuant to chapter 21-24, shall be in accordance with this chapter, and the right to trial by jury may be demanded under the circumstances and in the manner provided in §§ 15-6-38 and 15-6-39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

(Bolding and italicized added.)

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The rights of all candidates in the McPherson County Republican State

Representative District 23 race, Scott Moore, Spencer Gosch, and James

Wangsness, will not be affected by the results of a post-election recount.

Regardless of the outcome of the post-election audit in McPherson County

Precinct 3 and Precinct 4, the results of the McPherson County Republican State

Representative District 23 race will not be affected.

The rights of all candidates in the McPherson County Republican State Senate

District 23 race, Mark Lapka, and Steve Roseland will not be affected by the

results of a post-election recount. Regardless of the outcome of the post-election

audit in McPherson County Precinct 3 and Precinct 4, the results of the McPherson

County Republican State Senate District 23 race will not be affected.

37. The Court has the power to declare the rights of McPherson County, and the McPherson County Auditor and to remove any uncertainty caused by an unreconciled post-election audit by ordering the ballots to be unsealed and to reconcile the post-election audit for Precinct 3 and Precinct 4.

SDCL 21-24-1. Power of the courts to provide declaratory relief-Form and effect of declarations.

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

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SDCL 21-24-6. Declaratory relief powers not limited by specific enumeration.

The enumeration in §§ 21-24-3 to 21-24-5, inclusive, does not limit or restrict the exercise of the general powers conferred in § 21-24-1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

(Bolding added)

- 38. The three (3) candidates in the McPherson County Republican State

 Representative District 23 race were apprised of the situation before the filing of
 this action and invited to retain their own counsel should they choose to do to. The
 two (2) candidates in the McPherson County Republican State Senate District 23
 race were appraised of the situation before the filing of this action and invited to
 retain their own counsel should they choose to do to. However, as stated
 hereinabove, the rights of any and all candidates in McPherson County are not in
 jeopardy.
 - SDCL 21-24-7. Parties to be joined in action for declaratory relief.

 When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.
- 39. McPherson County and the McPherson County Auditor believe an order from the Court allowing the ballots to be un-sealed and for the post-election audit to be reconciled is the best, and likely the only, manner in which the situation can be

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remedied to serve the interests of the post-election audit as well as the voters of McPherson County.

SDCL 21-24-14. Chapter declared remedial-Liberal construction. This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

Issue of First Impression

- 40. The statutes involving the post-election audit were passed in 2023 and the June 4, 2024 primary election was the first election in South Dakota where a post-election audit was required.
- 41. In accordance with SDCL 12-17B-25, the McPherson County Auditor has resealed the ballots.
- 42. There is no statutory guidance in regards to whether a county Auditor does or does not have the authority to un-seal the ballots when a post-election audit has been only partially completed but the ballots have been re-sealed.
- 43. The post-election audit must be completed by June 25, 2024.

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PRAYER FOR RELIEF

WHEREFORE, McPherson County requests the following relief:

- 1. Declaratory judgment as described above, ordering:
 - a. The McPherson County Auditor shall unseal the June 4, 2024
 McPherson County primary election ballots in order to continue and reconcile the post-election audit for Precinct 3 and Precinct 4 in McPherson County.
 - b. That all parties have waived a right to a hearing and the filing of an answer and McPherson County may proceed immediately.
 - c. Other such relief as this Court deems just and equitable.

Dated this 20th day of June, 2024.

Austin B. Hoffman

McPherson County States Attorney

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5:02:09:16

05:02:23:06. Post-election auditing board receipt for official ballots.

STATE OF SOUTH DAKOTA

MCPHERSON COUNTY

#3 West Eureka - PRECINCT

We, the Post-Election Auditing Board Members, do hereby certify that on the 13th day of June, 2024, at the post-election audit for the Primary election held on June 4th, 2024, we received from Lindley Howard, County Auditor, a sealed package containing the following official precinct ballots:

(Here list the number of official precinct ballots received)

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Source: 50 SDR 66, effective December 5, 2023.

General Authority: SDCL 12-1-9(4)(11). Law Implemented: SDCL 12-17B-18.

Form PE-2306

POST-ELECTION AUDITING TALLY SHEET

ELECTION:	Primary Election - June 4th 2024
AUDIT DATE:	Thursday June 13th, 2024
COUNTY AND PRECINCT:	McPherson County Precinct # 3 # OF BALLOTS: 127
CONTEST NAME:	Received from Auditor Republican State Senator District 23
CANDIDATE NAME:	Steven Ray Roseland TOTAL VOTES:
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CANDIDATE NAME:	Mark Lapka TOTAL VOTES:
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Source: 50 SDR 66, effective December S, 2023, General Authority: SDCL 12-9-9(4)(11), Law Implemented: SDCL 12-178-20.

POST-ELECTION AUDITING TALLY SHEET

ELECTION:	Primary Election - June 4th 2024	
AUDIT DATE:	Thursday June 13th, 2024	
COUNTY AND PRECINCT:	McPherson County Precinct # 3 # OF BALLOTS: 127	
CONTEST NAME:	Received from Auditor Republican State Senator District 23	
CANDIDATE NAME:	Steven Ray Roseland TOTAL VOTES:	
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Source: 50 SDR 66, effective December 5, 2023, General Authority; SDCI, 12-9-9(4)(11), Law Implemented: SDCI, 12-178-20.

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AUDIT DATE:	Thursday June 13th, 2024											
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Source, 50 508 66, effection December 5, 2023. General Audinority: SDCL 12-9-9(4)[13]. Law Implemented: SDCL 12-179-70

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POST-ELECTION AUDITING TALLY SHEET

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AUDIT DATE:	Thursday June 13th,	2024	····	· · · · · · · · · · · · · · · · · · ·	~~~~~~~~~~					
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05:02:23:06. Post-election auditing board receipt for official ballots.

STATE OF SOUTH DAKOTA

MCPHERSON COUNTY

#4 East Eureka - PRECINCT

We, the Post-Election Auditing Board Members, do hereby certify that on the 13th day of June, 2024, at the post-election audit for the Primary election held on June 4th, 2024, we received from Lindley Howard, County Auditor, a sealed package containing the following official precinct ballots:

(Here list the number of official precinct ballots received)

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Republican Commissioner #2	4
<u>Democratic</u>	9
he purpose of conducting a post-election au	dit.
Dated this 13 day of June, 20	24.
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Jack Waltman	Post-Election Auditing Board member
Sid Finlet	Post-Election Auditing Board member
· Nancy Klipfel	Post-Election Auditing Board member
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Form PE-2306

POST-ELECTION AUDITING TALLY SHEET

ELECTION:	Primary Election - June 4th 2024					
AUDIT DATE:	Thursday June 13th, 2024					
COUNTY AND PRECINCT:	McPherson County Precinct #	# OF BALLOTS: 135				
CONTEST NAME:	Republican State Senator District 23	Received from Auditor				
CANDIDATE NAME:	Steven Ray Roseland	TOTAL VOTES: 36				
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CANDIDATE NAME:	Mark Lapka	TOTAL VOTES: 49				
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Source: 50 SDR 66, effective December 5, 2023. General Authority: SDCL 12-3-9(4)(11), Law Implemented: SDCL 12-178-20.

POST-ELECTION AUDITING TALLY SHEET

ELECTION:	Primary Election - June 4th 2024								
AUDIT DATE:	Thursday June 13th, 2024								
COUNTY AND PRECINCT:	900-10-11-11-11-11-11-11-11-11-11-11-11-1	BALLOTS: 135							
CONTEST NAME:	Recei	ived from Auditor							
CANDIDATE NAME:	Steven Ray Roseland	TOTAL VOTES: 36							
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CANDIDATE NAME:	Mark Lapka	TOTAL VOTES: 99							
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CANDIDATE NAME:	Over Votes	TOTAL VOTES:							
oblidering raphs object to the control of the contr									
CANDIDATE NAME:	Under Votes	TOTAL VOTES:							
Parity de la constante de la c									
AUDITING BOARD MEMBER:	Cotin Hoffman	(SIGN)							
AUDITING BOARD MEMBER:	Jodi Waltman	Judi Waltman							
AUDITING BOARD MEMBER:	Sid Feickert (PRINT)	Sid Facility (SIGN)							
AUDITING BOARD MEMBER:	Nancy Klipfel (PRINT)	Many Klippel							
AUDITING BOARD MEMBER:	Diagna Shafer	- Account Shoph							
AUDITING BOARD MEMBER:	(PRINT)	(SIGN)							
	(PRINT)	(SIGN)							

Source: 50 SDR 66, effective December 5, 2023. General Authority: SDCI. 12-9-9(4)(11), Law Implemented: SDCI. 12-179-20.

POST-ELECTION AUDITING TALLY SHEET

ELECTION:	Primary Election - June 4th 2024	
AUDIT DATE:	Thursday June 13th, 2024	
COUNTY AND PRECINCT:	McPherson County Precinct # # OF BALLOTS:	
CONTEST NAME:	Received from Auditor Republican State Representative District 23 (VOTE 2)	
CANDIDATE NAME:	Spencer Gosch TOTAL VOTES: 78	
American and a second s	m m m m m m m m m m m m m m m m m m m	
CANDIDATE NAME:	Scott Moore TOTAL VOYES: 117	
	HI H	
CANDIDATE NAME:	James D. Wangsness TOTAL VOTES: 33 .	
CANDIDATE NAME:	Over Votes TOTAL VOTES: 2 ·	
CANDIDATE NAME:	Under Votes TOTAL VOTES: 32	
	IIII IIAI IIAII IIAII IIAII -	78
AUDITING BOARD MEMBER:	Sid Feickert Sid finder	17
AUDITING BOARD MEMBER:	Colin Hoffman Stroffman	2
AUDITING BOARD MEMBER:	Jodi Waltman Godi Waltry	34/102
AUDITING BOARD MEMBER:	Nancy Klipfel Janey Klipfel (SIGN)	we
AUDITING BOARD MEMBER:	Dianna Shafer Augus Shafes (PRINT) (SIGN)	
AUDITING BOARD MEMBER:	(PRINT) (SIGN)	

Source: 50 SDR SK, effective December 5, 2023. General Authority: SDCL 12-9-944(12): Law Implemented: SDCL 12-178-20.

POST-ELECTION AUDITING TALLY SHEET

ELECTION:	Primary Election - J	une 4th 202	4		· · · · · · · · · · · · · · · · · · ·						
AUDIT DATE:	Thursday June 13th	, 2024						Tirdes and			
COUNTY AND PRECINCT:	McPherson County Precinct #					# OF BALLOTS:					
CONTEST NAME:	Republican State Representative District 23 (VOTE 2)					d from Aud	litor		•		
CANDIDATE NAME:	Spencer Gosch					TOTAL V	/OTE5:	78	,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,		
	W W	Ш	1/1		Tur	1417					
	IH M	Ш	HIT		W	M	/1				
- Service (Management of the Service	Lyr lyn	HI					**************************************				- Wassey Michigan Sand
CANDIDATE NAME:	Scott Magre					TOTAL V	OTES:	117			
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And the second s		IM	IM	M	Ш	1	1JH	Ш	Й		
And Annual State of Annual Sta	THE LIST	THE	<u>lun</u>	IW							Provention of the services
CANDIDATE NAME:	James D. Wangsnes	5		~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~ ~	- W.C	TOTAL V	OTES:	33		F388 +10 - F1320H72d	
	Ш	JW	IM		Ш		M	Ш			Miller of Prince
Principal de la companya de la compa				<u> </u>	 						
Transfer deprivation of the state of the sta											
CANDIDATE NAME:	Over Votes					TOTAL V	OTES:	2	······································		_
PRICE TO THE PRICE					1			Ì			
CANDIDATE NAME:	Under Votes					TOTAL V	OTES:	32_			1
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AUDITING BOARD MEMBER:	Colint	toff	mai	7	-	10	/	4 <i>1</i>]	lon		33
AUDITING BOARD MEMBER:	Sid Fer	(PRINT)	/			Si	12	SIGN	let		27
AUDITING BOARD MEMBER:	Nancy	Klipt Klipt	Fe!		•	170	ance	SIGN) Y X Le	ppl	ī	2107
AUDITING BOARD MEMBER:	Jodi	(PRINT)	4ma	: 4		A	odi.	SIGN)	Uma	ı	
AUDITING BOARD MEMBER:	Dianna :	(PRINT) Shafer		,		À	ig <u>a ah</u>	Signing	μ		
AUDITING BOARD MEMBER:		(PRINT)				į	()	SIGN)	•		
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Source: S0509 55, effective December 5, 2023. General Authority: SDCL 12-9-9(4)(11), Law Implementad: SDCL 12-178-20.