



# OFFICE OF THE SECRETARY OF STATE

STEVEN J. BARNETT, SECRETARY OF STATE

JASON LUTZ, DEPUTY SECRETARY OF STATE

## Public Rules Hearing and State Board of Elections **DRAFT** Meeting Minutes

Wednesday, August 19, 2020

1:00 p.m. CT

Conference Call Dial-in Information:

Dial-in Number is 866.410.8397

Conference Code is 2178377981

SD Association of County Officials

211 East Prospect

Pierre, South Dakota

Due to phone issues the meeting was moved from 211 East Prospect to 215 East Prospect.

Secretary of State Steve Barnett called the meeting to order at 1:22 p.m. CT.

**Present via conference call** (those that announced they were on the call): Margaret Gillespie (Board of Elections member), Karen Layher (Board of Elections member), Carri Crum (Board of Elections member), Linda Lea Viken (Board of Elections member), C.J. Moit (Disability Rights South Dakota), Koni Sims (President, SD Association of the Blind), Cindy Mohler (Pennington County Auditor), Susan Lamb (Sully County Auditor) and Lisa Schieffer (Meade County Auditor).

**Present in person:** Rick Knobe (Board of Elections member), Mike Buckingham (Board of Elections member), Secretary of State Steve Barnett (Chair, Board of Elections), Jason Lutz (Deputy Secretary of State), Kea Warne (Director, Division of Elections), Rory Mennenger (Elections and Federal Programs Coordinator), Christine Lehrkamp (State Election Coordinator), Rachel Soulek (HAVA Coordinator), Bailey Tibbs (Elections Assistant) and Emily Kerr (Director, Business Services Division).

Quorum present.

A **motion** to approve agenda by Buckingham; second by Knobe.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

Viken stated that on page 2 of the October 30, 2019 minutes that “concealed” should be changed to “sealed.”

**Motion** by Gillespie to make that correction; second by Viken.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

A **motion** to approve the October 30, 2019 Board of Elections minutes as amended by Viken; second by Knobe.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

**Rules Hearing began at 1:28 p.m. CT.** The proposed rule changes are as follows: §§ 05:02:03:21, 05:02:04:06, 05:02:08:00, 05:02:08:07, 05:02:08:08, 05:02:08:09, 05:02:08:11, 05:02:08:20, 05:02:08:24, 05:02:08:25, 05:02:08:26, 05:02:08:27, 05:02:08:28, 05:02:08:34, 05:02:08:35, 05:02:08:36, 05:02:08:42, 05:02:09:01.03, 05:02:09:02, 05:02:09:16, 05:02:10:01, 05:02:10:04, and 05:02:10:05.

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**5:02:03:21** – Added “nondriver identification number” to registration affidavit requirements per HB 1054.

Director Warne explained the rule change and its necessity due to the passage of HB 1054 during the 2020 legislative session.

No written comments were received regarding this rule.

A *motion* to approve the proposed rule changes by Buckingham; second by Layer.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:04:06** – Added registered mail filing option per SB 61 and also added 9-13-7 as source code.

Director Warne explained the need for consistency per SB 61.

No written comments were received regarding this rule.

A *motion* to approve the proposed rule changes by Crum; second by Knobe.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:08:00** – Clarified oaths must be administered by officers authorized in this state in subsection 3 and removed a requirement from subsection 6 per SB 180. Added “municipal offices” in the final paragraph per SB 61 along with adding 9-13-7 as source code.

Director Warne explained the necessity for the changes.

No written comments were received regarding this rule.

Viken *motioned* to amend the rule changes by adding 18-3-1 as a source code to refer to those authorized to administer oaths in SD (referring to new language in subsection 3). Second by Gillespie.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

A *motion* to approve the proposed rule changes as amended by Crum; second by Knobe.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:08:07** – Added consistency to date formats (20 \_\_\_\_). Added “Circulator ID Number” per SB 180.

**5:02:08:08** – Added consistency to date formats (20 \_\_\_\_). Added “Circulator ID Number” per SB 180.

**5:02:08:09** – Added consistency to date format (20 \_\_\_\_). Added “Circulator ID Number” per SB 180.

Director Warne explained that adding the 20 for the year was due to many petitions being filed without a year indicated. Adding the circulator ID number space was a result of SB 180.

No written comments were received regarding this rule.

A ***motion*** to approve the proposed rule changes to the three rules above by Buckingham; second by Layer.  
**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approve

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**5:02:08:11** – Added consistency to address format (South Dakota, \_\_\_\_).

Director Warne explained that this change will add consistency to the address format by adding a space for the zip code.

No written comments were received regarding this rule.

A ***motion*** to approve the proposed rule changes by Knobe; second by Buckingham.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:08:20** – Added consistency to address formats (\_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_).

**5:02:08:24** – Added consistency to address format (\_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_).

**5:02:08:25** – Added consistency to address format (\_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_).

**5:02:08:26** – Added consistency to address format (\_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_).

**5:02:08:27** – Added consistency to address format (\_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_).

**5:02:08:28** – Added consistency to address format (\_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_).

Director Warne explained the changes to the rules above are in line with the changes to the previous rules to try to maintain consistency in all petition forms. Director Kerr explained the changes in red regarding the statute reference going from 46A-18-5 to 46A-18-25 was a Legislative Research Council (LRC) edit due to 46A-18-5 being repealed. Deputy Secretary Lutz further explained that a law was passed a couple years ago requiring agencies to accept LRC style and form changes unless the agency appeals the change.

No written comments were received regarding this rule.

A ***motion*** to approve the proposed rule changes by Viken; second by Crum.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:08:34** – Added consistency to address formats (\_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_). Added consistency to date formats (20\_\_\_\_).

**5:02:08:35** – Added consistency to address formats (\_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_). Added consistency to date format (20\_\_\_\_).

Director Warne explained the need for consistency in petition forms.

No written comments were received regarding this rule.

A ***motion*** to approve the proposed rule changes by Knobe; second by Viken.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:08:36** – Revised language describing term option. Added consistency to date formats (20\_\_\_\_).

Director Warne explained that there were issues with candidates not selecting a term or the correct term and we are trying to word that section of the petition to make it clearer for candidates. We are also adding consistency to the date formats.

No written comments were received regarding this rule.

A *motion* to approve the proposed rule changes by Layer; second by Crum.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:08:42** – Added consistency to address formats (\_\_\_\_\_, \_\_\_\_\_, SD \_\_\_\_\_). Added consistency to date formats (20\_\_\_\_).

Director Warne explained this is another special district petition and we are trying to maintain consistency in them all.

No written comments were received regarding this rule.

A *motion* to approve the proposed rule changes by Buckingham; second by Knobe.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:09:01.03** – Repealed (direct recording electronic voting machines not allowed by statute).

Director Warne explained that state law was repealed that allowed for the option for counties to use direct recording electronic voting machines and this rule was missed when other rules were repealed relating to direct recording electronic voting machines. Viken asked what replaced these. Director Warne stated nothing as South Dakota has never had DRE's.

No written comments were received regarding this rule.

A *motion* to approve the proposed rule changes by Gillespie; second by Viken.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:09:02** – Removed references to direct recording electronic systems (see note above). Removed reference to 2002 EAC standards and replaced with “most current”.

Deputy Lutz explained the need for these rule changes and the planned appeal to the Legislative Rules Review Committee regarding LRC's style and form changes. Our office will ask for 2002 to be replaced with 2015 in the rule. LRC is in support of this change.

No written comments were received regarding this rule.

A *motion* to amend the rule by replacing 2002 to 2015 by Knobe; second by Crum.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

A *motion* to approve the proposed rule changes as amended by Viken; second Knobe.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:09:16** – Adding language allowing counties to use separate columns on their recapitulation (recap) sheets for optical scan and express vote (EV) ballots.

Director Warne explained that a recap sheet is what election boards in each polling place have to fill out on election day. Counties had requested to have a separate column for the EV ballots, and the rule change would allow them to add as many columns as they needed.

No written comments were received regarding this rule.

A *motion* to approve the proposed rule changes by Layer; second by Crum.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:10:01** – Amended language in Section 4 of the Absentee Ballot application. Added “You will receive the Primary Election ballot of your party registration, if one is available.” Also added “no party affiliation”, “ Libertarian” and “(You can only mark one selection.)”, as the Libertarian Party is a recognized political party and Independent/NPA voters have the choice of Democratic (open primary), Libertarian (open primary), and Non-Political primary ballots. Revised coloring of certain language to draw attention to instructions. Delayed implementation of Dec. 1, 2020.

Director Warne explained that this rule is the Absentee Ballot application. The confusion during the Primary was that independent voters are allowed to choose which ballot they want per recognized political party by-laws. Republican voters were confused as to why they didn’t get a choice also. Our office is trying to make this clearer. Also, we bolded the word “OR” in section 7 to try to make it clearer that both do not have to be done.

Cindy Mohler, Auditor in Pennington County asked about increasing the font size for date and signature block.

No written comments were received regarding this rule.

A *motion* to amend the rule to authorize the Secretary of State’s office to increase the font size by Crum; second by Knobe.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

A *motion* to approve the proposed rule changes as amended by Viken; second Buckingham.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:10:04** – Added language to the absentee voter instructions to include USPS postage cost estimate to return ballot via mail. Delayed implementation of December 1, 2020.

Grant County Auditor Layer asked if there an issue regarding this? Director Warne explained that many voters called asking what the cost would be to return their ballot. The Meade County Auditor stated she writes the cost of postage on the return envelope where the postage would go. Clay County Auditor has spoken with the election material printing company, McLeods, about personalizing the instructions.

No written comments were received regarding this rule.

A *motion* to table the rule changes by Viken; second Buckingham.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

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**5:02:10:05** – Amended language in (5) to “Postage” instead of “Stamp”. Delayed implementation of Dec. 1, 2022.

Deputy Secretary Lutz explained that our office received feedback regarding individuals reading the word “stamp” as meaning placing “one” stamp only for the postage. We felt that having the delayed implementation allowed for the current stock of envelopes to be used through the 2022 elections that way auditors did not have to throw out what they hadn’t used yet. There was much discussion on different ways to change the language: Place extra postage here or Extra postage required etc.

No written comments were received regarding this rule.

A *motion* to table the rule changes by Viken; second Gillespie.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

The Rules Hearing has ended.

**The Board of Elections meeting began at 2:35pm CT.** The public rules hearing was conducted prior to this meeting. The remaining agenda items were addressed in order.

**5. Update on County Held HAVA Funds**

Rory Mennenger (Secretary of State (SOS) staff) explained that Director Warne sent out the spreadsheets with the HAVA balances. All counties have received notice to send in, by October 1, their requests for HAVA reimbursements. Our office is also currently receiving CARES Act reimbursement requests from the Counties. Deputy Lutz stated the county held HAVA balances and the state held HAVA balances were the following – State-Held Title 1 = \$1,994,224.91, State-Held Title 2 = \$3,3471,061.88, County-Held Title 2 = \$2,001,517.98. Recurring uses for those funds include federal election related costs, which includes grants to counties, equipment purchases, statewide voter file system maintenance and upgrades, and staff salary. Deputy Lutz plans to send out the breakdown to the BOE members.

**6. Update on Election Cares Act Funds**

Deputy Lutz briefed the committee on pandemic related election expenses incurred to date. The CARES Act consists of two funding sources the office has used to seek reimbursement for pandemic related election expenses, which are the Coronavirus Relief Fund and the HAVA Emergency grant. Total costs expensed through the Coronavirus Relief Fund were \$543,910.31. These expenses included a statewide absentee ballot application mailing, precinct protection kits - which provide PPE for each polling location throughout the state - and public outreach costs. The office has also processed more than \$150,000 in primary election reimbursements from the counties as part of the HAVA Emergency grant. These costs include increased absentee ballot costs, PPE (plexiglass barriers), and increased staff costs.

**7. 2021 Proposed Election Related Legislation – Online voter registration system**

Deputy Lutz explained the proposed legislation. He stated that this version is more involved than what had been proposed during the 2020 Legislative session. The 2020 piece of legislation passed the House but was defeated in the Senate Committee. Our office is hopeful that having the BOE recommendation would help to move it along in 2021. Deputy Lutz said there are 41 states plus DC that already have online voter registration in place. One of the greatest benefits of online voter registration would be allowing a voter to update their address electronically. This should help to keep voter rolls clean. Viken asked if an individual doesn't have an SSN would they be able to register using this system. Deputy Lutz explained that providing the last five of your SSN is a security piece to be able to utilize the online system. Viken then asked how someone gets a non-driver identification card. Deputy Lutz explained that individuals get this like you get a driver's license. Viken asked about tribal ID's being allowed to register to vote with. Deputy Lutz explained that the reason that a driver license number is able to be used to register is because the information provided by the voter is able to be immediately verified against the information that is tied to that driver license number. He went on to explain that our office does not have direct access to tribal databases and therefore cannot immediately verify any information.

Rep. Frye-Mueller announced that she joined at 3:04.

Knobe asked for clarification that there are 41 states and that what the Secretary of State's office has proposed is modeled after other states. Deputy Lutz explained that the proposed legislation is a mesh of several states systems. Knobe explained that there could be individuals around the state don't have a driver license or SSN along with being apprehensive to go out to the auditor's office to register. Secretary Barnett explained that this is another secure *option* for citizens to register to vote. Knobe thinks this a good first step.

A *motion* to move forward with the proposed legislation by Viken; second Knobe.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.

## 8. *HB 1054 /voter affidavit discussion*

Deputy Lutz explained that HB 1054 was passed during the 2020 legislative session. This piece of legislation was consistent with federal law and approved by the BOE. Many amendments were added during the legislative process that were not amendments brought by the Secretary of State's office. All amendments were removed by the Senate upon the final passage of the bill. SOS said they would share discussions from the legislators with the BOE. District 30 Representative Julie Frye-Mueller would like to require additional documentation to register to vote. She said the House overwhelmingly passed her amendment, but the Senate removed it. The Representative commented that "why would someone not want to provide documentation as to who they are. If they don't want to then why are they concerned with voting." She went on to say why shouldn't they have to provide proof of citizenship. Viken asked how you provide proof of citizenship. Representative Frye-Mueller said, "there has to be a database available that shows who is a citizen." In addition, she said that a birth certificate shows where you were born. Viken asked what about being born on a military base in another country. The Representative said, "you shouldn't be able to vote unless you provide documentation."

District 35 Representative Tina Mulally stated that amendments were put on with a vote of 62-5 and then removed in Senate. She went on to say voting is a sacred privilege that we have, and it should be protected, honored and scrutinized and only US citizens should be allowed to vote. The Representative stated that SDCL 12-4-5.5 does not require any documentation if a SSN and driver license are not provided. She explained that SDCL 32-12-3.1, 3.3 and 3.5 allow an individual who is applying for a driver license, eight different forms of documentation to provide. She then asked "if the state requires more documentation to get a driver license is it unreasonable for those registering to vote to have to provide the same."

Knobe if an individual does not have a driver license or SSN, is your birth certificate proof of who you say you are? Are they saying this is not adequate and that they want more than that. Deputy Lutz answered yes. Director Warne reminded everyone that the affidavit has to be signed **and** the voter registration form must be filled out. Deputy Lutz mentioned that other states do require some additional forms of identification. Knobe asked if we have a history of people who are not eligible to vote. Deputy Lutz stated no and that only one person has *ever* used this affidavit. Representative Frye-Mueller said, "just because we don't have a problem doesn't mean we shouldn't have this." She then said, "saying not to our knowledge is loose language." She wants to maintain the integrity of the elections in South Dakota. Representative Mulally said, "we are seeing an influx of people from other states who are fleeing their restrictions, we are going to see more people who may not have these forms of identification. The intent of living in South Dakota is allowed in order to be a legislator without showing any documentation of them living here." She then commented, "seeing a lot of people from other states who we do not want living here." Representative Frye-Mueller said, "you have to provide an ID to do anything so if people don't care enough to have an ID then why do they care about voting."

Deputy Lutz pointed out that homeless individuals have the right to vote. Deputy Lutz asked the Representatives if they think if this issue comes back for the 2021 legislative session, would it mirror what was proposed during the 2020 session? Representative Frye-Mueller said, "you have to provide proof of where you would be voting at. The state is softening the restrictions instead of making them stronger." Representative Mulally said, "I have been homeless and lived on the streets and they go to shelters etc. There is documentation required to get into these shelters."

Koni Sims pointed out if the legislators require additional documentation, they will be making it harder for those who are visually impaired.

Deputy Lutz said that if an individual didn't have identification they have the option to go to the auditor's office. He asked the Representatives if they would be removing this option? They said no they would not.



Koni Sims said our hands are our sight so they are limited due to COVID and haven't been able to go out and about because they need to touch everything.

The Representatives both stated that they didn't know very far in advance that this meeting was being held. Viken asked if the rules hearing was posted? Deputy Lutz said yes, in four papers and on several websites.

Viken asked if the state laws can be more restrictive than federal laws? Deputy Lutz said yes, it's the state's discretion. Deputy Lutz said it's safe to say, regardless of action today, this will be a topic during the 2021 session.

Knobe noted that the Senate removed all the house amendments, did we know why? Deputy Lutz explained that multiple amendments (six) were added, and the bill got messy. The Secretary of State's office wanted the bill to be what the BOE had approved. Deputy Lutz asked if the SOS staff should draft some legislation or let it come from legislators? Knobe said he doesn't want to muddy the waters but isn't the BOE obligated to continue with this legislation. Viken disagreed as the bill that BOE approved, passed. The amendments were from the legislators not the BOE or the SOS staff. She said that this is not something the BOE should do and that the legislators should do this.

No action taken.

## **9. Public Comments**

Koni Sims, with the SD Association of the Blind, commented that she has a concern with the ExpressVote machines being used by anyone instead of just only for the hearing and visually impaired especially during the pandemic. Since the visually impaired have to use their hands as their eyes this is a concern. She would like to see other options for those with disabilities to vote such as voting online. But many don't have printers so sending ballots back electronically is easier. What about larger print ballots being available? Sample ballots in larger print. They want to do things privately and independently. She stated if nothing is done then lawsuits will have to be filed.

Representative Frye-Mueller interrupts and says that we aren't talking about ballots, but we are talking about people registering to vote. The Representative was told that the BOE had moved on from agenda item #8 and item #9.

A colleague of Koni Sims, Eric, explained his experiences voting as someone who is visually impaired. He was able to see the first 28 years of his life but then was in a horrific car accident. He feels the ExpressVote is amazing when it was setup. Another accessible way to vote would be appreciated if the ExpressVote were to go down.

Koni Sims would like to work with the SOS and Legislators.

CJ Moit has concerns regarding being able to get a copy of their identification or have someone notarize the application. With the pandemic many are unable to do either of those things. She echoed the sentiments of the South Dakota Association of the Blind. Director Warne explained that taking a picture of their identification and emailing or texting it to the county auditor is an option.

## **10. General remarks**

Viken asked if HAVA funds may be used for increasing the ballot size. Secretary Barnett suggested that his office can reach out to the ballot printing vendor, other states and the EAC to see if this can be done and how it would work. Viken asked what are the lawsuits that have been filed in other states. Koni Sims said go to ACB.org, then under advocacy and it will show other state lawsuits.

## **11. Adjournment**

A *motion* to adjourn by Buckingham; second Gillespie.

**Roll call vote:** Buckingham-Aye, Crum-Aye, Gillespie-Aye, Knobe-Aye, Layher-Aye, Viken- Aye, Secretary Barnett-Aye. Approved.