



Hon. R. Kyle Ardoin
Louisiana Secretary of State
P.O. Box 94125
Baton Rouge, LA 70804-9125

Submitted via email

February 8, 2021

Dear Secretary Ardoin,

On January 28, 2021, the State Board of Election Supervisors met to discuss several legislative proposals, during which you encouraged members of the public to contact your office to share their views on the proposals. I write on behalf of Fair Elections Center to reiterate its opposition to Item 23 and to voice its concerns about Item 20. Both items were approved by the Board.

Item 23 would amend LSA-R.S. 18:1307(B)(2) to require absentee voters to submit their mail ballot request applications no later than 15 days before Election Day, rather than the current four days, ostensibly to prevent the disenfranchisement of absentee voters through U.S. Postal Service (USPS) delivery delays or failures. As Fair Elections Center stated via written comments during the Board's meeting, this change would be especially harmful to voters as COVID-19 continues to threaten public health. Voters may fall ill in the 14 days before Election Day and find themselves unable to vote in person during the early voting period or on Election Day, but may not require hospitalization, thereby making them ineligible for the hospitalization excuse—and disenfranchising them. Others, unwilling to give up their right to vote, may nonetheless appear to vote in person and put their fellow voters and election workers at risk of infection.

There are other ways to mitigate the harms of potential mail delays. For example, the state could amend LSA-R.S. 18:1307(B)(1)(d) to allow all eligible voters—not just those with a valid Louisiana driver's license or Louisiana special identification card—to request a mail ballot through the state's online request portal. This change would reduce the time it takes for registrars to receive and process ballot request applications and issue mail ballots. Additionally, registrars already have the option to fax voters their ballots, where "the voter feels he will not have time to vote timely by mail" and the registrar's office has a fax machine. LSA-R.S. 18:1308(A)(1)(b). This provision could be modernized to allow for delivery through the state's online voter portal or email. Other states like Wisconsin have used these modes of ballot delivery for years, including in the 2016

General Election. Finally, registrars could add additional locations for voters to return their completed mail ballots in person, so that they do not have to rely on the USPS to return their ballots.

Item 20 would amend LSA-R.S. 18:1461.7 to make it an offense to “knowingly, willfully, or intentionally. . . [f]alsify the election information obtained from contacting a telephone number of the office of the secretary of state, clerk of court or registrar of voters, or impersonating the secretary of state, clerk of court or registrar of voters in connection with any statutorily mandated election duty of the secretary of state, clerk of court or registrar of voters.” It was explained during the Board’s meeting that Item 20 responds to a series of text messages sent to some Louisiana voters last year which misstated election information and included the telephone number for your office, making it seem as though the texts were official communications issued by your office.

Proposal 20 would chill protected speech. As written, advocates who conduct voter engagement could face prosecution for publishing education materials or making oral communications that contain typographical or other inadvertent errors, if the underlying information was obtained by contacting election officials by phone. Even the mere fear of prosecution could deter many advocates from participating in First Amendment protected speech with voters and make it more difficult for civic engagement groups to recruit volunteers, further chilling their speech. Indeed, chilling effects on protected voter education communications have recently been held to likely violate the First Amendment. *See League of Women Voters of Tenn. v. Hargett*, 400 F.Supp. 3d 706 (M.D. Tenn. 2019).

Voter education programs conducted by private organizations are critical to voter participation and cannot operate in the absence of information obtained from official sources. While it is a laudable goal to prevent voters from being misled, these restrictions as drafted are too broad and excessively vague.¹ They should not move forward unless it is clarified that they are limited to instances in which a communicator had the intent to mislead or intimidate voters or potential voters. However, it appears that such prohibitions are in fact already covered by Louisiana statute; Louisiana law already makes it a felony to “knowingly, willfully, or intentionally . . . [i]ntimidate, deceive, or misinform, directly or indirectly, any voter or prospective voter in matters concerning voting or nonvoting or voter registration or nonregistration, . . .”. LSA-R.S. 18:1461.4(A)(1).

If enacted, this proposal may well have the perverse effect of driving individuals or organizations conducting voter education or campaign activities to refrain from contacting election officials for direct information, for fear of legal consequences if there is a dispute over whether it is conveyed accurately. This could result in *less accurate*, rather than more accurate, information being disseminated to voters. Similarly, where proponents indicate Item 20 targets text messages that misstated information and provided the Secretary of State’s phone number, this proposal could

¹ *See Johnson v. United States*, 576 U.S. 591, 595 (2015) (a law violates due process when it is “so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”).

also have the effect of discouraging private groups from directing *voters* to contact official sources for election information. When conducting voter outreach, it is often useful for organizations to direct voters to official information sources, not to falsely intimate that the organization's educational materials come from these official sources, but rather to help voters obtain additional information from an authoritative source—the officials running elections.

Fair Elections Center agrees that disinformation in our elections is a serious problem, especially when employed by bad actors to depress the vote in historically marginalized communities. However, at minimum, any law aimed at quelling disinformation should be narrowly drawn and should explicitly require prosecutors to show specific intent to mislead voters, so that law enforcement officials cannot use the statute to punish speech with which they disagree.

Should the Secretary and registrars determine that voters would benefit from more election information disseminated through election officials, the Secretary should recommend passage of a robust statutorily-required civic and voter education program to ensure citizens are fully aware of their rights and the means to exercise them. In the interim, Louisiana should avoid chilling protected First Amendment speech and creating disincentives to contacting election officials for authoritative information.

Thank you for considering Fair Elections Center's concerns about Items 23 and 20. Should you have any questions, I can be reached at caguilera@fairelectionscenter.org or (202) 331-0114.

Sincerely,

Cecilia Aguilera, Counsel
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