

1
2
3
4
5
6
7 MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
8 YELLOWSTONE COUNTY

9 ROBYN DRISCOLL; MONTANA
10 DEMOCRATIC PARTY; and
11 DEMOCRATIC SENATORIAL
CAMPAIGN COMMITTEE,

12 Plaintiffs,

13 vs.

14 COREY STAPLETON, in his official capacity
as Montana Secretary of State,

15 Defendant.
16

Cause No. DV 20-408

JUDGE DONALD L. HARRIS

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
MEMORANDUM, AND
ORDER GRANTING PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION

17 INTRODUCTION

18 Plaintiffs Robyn Driscoll, Montana Democratic Party, and Democratic Senatorial
19 Campaign Committee have sued Defendant Corey Stapleton, in his official capacity as
20 Montana Secretary of State, to enjoin enforcement of the Ballot Interference Prevention
21 Act, Mont. Code Ann. § 13-35-701 *et seq.*, and the election day receipt deadline for
22 absentee ballots set forth in Mont. Code Ann. § 13-13-201(3), Mont. Code Ann. § 13-13-
23 211(3), and Mont. Code Ann. § 13-19-106(5)(b). Pending before the Court is Plaintiffs'
24 Motion for Preliminary Injunction. The parties have agreed to submit the issue of whether
25 the Court should issue a preliminary injunction based upon the parties' briefs and
26 affidavits. Both parties have waived their right to a hearing under Mont. Code Ann. §27-19-
27

1 303. The preliminary injunction issues have been fully briefed and the matter is now ripe
2 for decision.

3 **I. The Ballot Interference Protection Act.**

4 Except for election officials or United States postal workers, the Ballot Interference
5 Protection Act (BIPA) restricts who can collect a voter's voted or unvoted ballot. Mont.
6 Code Ann. § 13-35-703. BIPA permits only caregivers, family members, household
7 members, or acquaintances to collect ballots, but prohibits them from collecting and
8 conveying more than six ballots. Mont. Code Ann. § 13-35-703(2) and (3). The BIPA also
9 requires every caregiver, family member, household member, or acquaintance who
10 delivers another person's ballot to sign a registry and provide: (1) the individual's name,
11 address, and phone number; (2) the voter's name and address; and (3) the individual's
12 relationship to the voter whose ballot is being delivered. Mont. Code Ann. § 13-35-704.
13 The BIPA imposes a \$500.00 fine for each ballot unlawfully collected. Mont. Code Ann.
14 § 13-35-705.

15 **II. The Absentee Ballot Election Day Receipt Deadline.**

16 The absentee ballot election day receipt deadline (Receipt Deadline) requires
17 absentee ballots to be received at a designated election office, polling place, place of
18 deposit, or by an authorized election official before 8:00 p.m. on election day. Mont. Code
19 Ann. § 13-13-201(2)(e)(i)-(iv). Absentee ballots received after the 8:00 p.m. election day
20 deadline are not counted. Mont. Code Ann. § 13-13-201(3); Mont. Code Ann. § 13-13-
21 211(3); Mont. Code Ann. § 13-19-106(5)(b).
22
23
24
25
26
27

1 **III. Plaintiffs Alleged Constitutional Violations.**

2 Plaintiffs claim that, without furthering any legitimate state interests, the BIPA and
3 Receipt Deadline significantly burden the right to vote and infringe upon the rights to free
4 speech, association, and due process. The Plaintiffs argue that the BIPA and Receipt
5 Deadline violate the fundamental constitutional rights of suffrage, assembly, speech, and
6 due process under Montana's Constitution. Mont. Const. art. II, § 13, § 6, § 7, and § 17¹.
7 Unless enjoined, Plaintiffs assert that the BIPA and Receipt Deadline will make it
8 significantly more difficult for many Montanans to vote or to have their votes counted.
9

10 **IV. State's Justifications for the BIPA and Receipt Deadline.**

11 The State argues that the BIPA is necessary to prevent fraud when absentee
12 ballots are collected and delivered. The State contends that the Receipt Deadline is
13 necessary to treat absentee voters the same as in person voters and to provide timely,
14 accurate election results. Because the BIPA and Receipt Deadline are alleged to serve
15 legitimate and compelling state interests, the State argues that the laws are constitutional.
16 The State further argues that Plaintiffs have failed to establish a *prima facie* case showing
17 that a preliminary injunction is necessary.
18

19 **V. Preliminary Injunction Requirements.**

20 Under Mont. Code Ann. § 27-19-201, a preliminary injunction may be granted:
21

- 22 (1) when it appears that the applicant is entitled to the relief demanded and
23 the relief or any part of the relief consists in restraining the commission or
24 continuance of the act complained of, either for a limited period or
25 perpetually;
26 (2) when it appears that the commission or continuance of some act during
the litigation would produce a great or irreparable injury to the applicant;
(3) when it appears during the litigation that the adverse party is doing or

27 ¹ Because of time constraints, the Court will address the Plaintiffs' Article II, Section 13 claim and reserve ruling upon the other alleged constitutional violations at this time.

1 threatens or is about to do or is procuring or suffering to be done some act
2 in violation of the applicant's rights, respecting the subject of the action, and
tending to render the judgment ineffectual;

3 (4) when it appears that the adverse party, during the pendency of the
4 action, threatens or is about to remove or to dispose of the adverse party's
property with intent to defraud the applicant, an injunction order may be
granted to restrain the removal or disposition;

5 (5) when it appears that the applicant has applied for an order under the
6 provisions of 40-4-121 or an order of protection under Title 40, chapter 15.

7 The above subsections are disjunctive, "meaning that findings that satisfy one subsection
8 are sufficient." *Sweet Grass Farms, Ltd. v. Bd. Of Cty. Comm'rs of Sweet Grass Cty.*,
9 2000 MT 147, ¶ 27 (quoting *Stark v. Borner*, 226 Mont. 356, 359, 735 P.2d 314, 317
10 (1987)). Consequently, only one subsection of Mont. Code Ann. 27-19-201 needs be met
11 to support the issuance of a preliminary injunction. See *Stark*, 735 P.2d at 317.
12 Additionally, the "grant or denial of injunctive relief is a matter within the broad discretion
13 of the district court based on applicable findings of fact and conclusions of law." *Weems v.*
14 *State by & through Fox*, 2019 MT 98, ¶ 7 (quoting *Davis v. Westphal*, 2017 MT 276,
15 ¶ 10).

17 Further, the district court "does not determine the underlying merits of the case in
18 resolving a request for preliminary injunction." *Weems*, ¶ 18. And "[i]n the context of a
19 constitutional challenge, an applicant for preliminary injunction need not demonstrate that
20 the statute is unconstitutional beyond a reasonable doubt, but 'must establish a *prima*
21 *facie* case of a violation of its rights under' the Constitution." *Id.* (quoting *City of Billings v.*
22 *Cty. Water Dist. of Billings Heights*, 281 Mont. 219, 227, 935 P.2d 246, 251
23 (1997)). "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to
24 further evidence or information.'" *Weems*, ¶ 18 (quoting *Prima facie*, *Black's Law*
25 *Dictionary* (10th ed. 2014)). Because Plaintiffs have moved for a preliminary injunction
26
27

1 based on constitutional challenges, they must establish a *prima facie* case of a
2 constitutional violation.

3 Section 13 of Montana's Constitution states: "All elections shall be free and open,
4 and no power, civil or military, shall at any time interfere to prevent the free exercise of the
5 right of suffrage." Mont. Const. art. II, § 13. The right of suffrage is a fundamental
6 right. See e.g. *State v. Riggs*, 2005 MT 124, ¶ 47 (citations omitted) ("A right is
7 'fundamental' under Montana's Constitution if the right ... is found in the Declaration of
8 Rights.")

9
10 Because voting rights are fundamental, statutes like the BIPA and the Receipt
11 Deadline that allegedly infringe upon the right to vote "must be strictly scrutinized and can
12 only survive scrutiny if the State establishes a compelling state interest and that its action
13 is closely tailored to effectuate that interest and is the least onerous path that can be
14 taken to achieve the State's objective." *Montana Env'tl. Info. Ctr. v. Dep't. of Env'tl. Quality*,
15 1999 MT 248, ¶ 63; *Finke v. State ex. Rel. McGrath*, 2003 MT 48, ¶ 15. The State must
16 "prove the compelling interest by competent evidence." *Wadsworth v. State*, 275 Mont.
17 287, 911 P.2d 1165, 1174 (1996). Merely alleging that a compelling interest exists is not
18 enough to justify interference with the exercise of a fundamental right. *Id.*

21 VI. Findings of Fact.

22 1. In support of their Motion for Preliminary Injunction, the Plaintiffs submitted
23 the following Affidavits:

- 24 a. Affidavit of Kenneth Mayer, Ph.D.
25 - expert opinions on voter suppression effects of BIPA and Receipt
26 Deadline;
27

- 1 b. Affidavit of Trent Bolger
2 - Montana Democratic Party Get Out the Vote (GOTV), absentee
3 ballot collection, Receipt Deadline;
4
5 c. Affidavit of Beth Brenneman
6 - Disability Rights of Montana, absentee ballot collection, Receipt
7 Deadline;
8
9 d. Affidavit of Shelbi Dantic
10 - Montana Conservation Voters, absentee ballot collection,
11 Receipt Deadline;
12
13 e. Affidavit of Robyn Driscoll
14 - Chair, Montana Democratic Party, GOTV, absentee ballot collection;
15
16 f. Affidavit of Mary Glueckert
17 - College student, MontPIRG, ASUM, student voting, absentee
18 ballot collection;
19
20 g. Affidavit of Denver Henderson
21 - Missoula County Election Advisory Committee, BIPA, absentee
22 ballot collection, Receipt Deadline, COVID-19;
23
24 h. Affidavit of Sophie Moon
25 - MontPIRG, student voting, Receipt Deadline, working class voters,
26 minority voters;
27
i. Affidavit of Linda Stoll
- Montana Association of County Clerk and Recorders; BIPA,
absentee ballot collection, absentee ballot tracking, absentee
ballot verification, proposed BIPA amendments, Native American
voting;
j. Affidavit of Mary Hall
- Chief election official for Thurston County, Washington; postmark
deadline, counting postmarked ballots after Election Day;
k. Affidavit of Marci McLean
- Executive director of Montana Native Vote and Western Native
Voice; GOTV for Indigenous voters on reservations in Montana
BIPA.

1 2. The Court finds that, without exception, all Affidavits were verified and that
2 the material allegations in each Affidavit were made positively and not upon information
3 and belief.

4
5 3. The Court finds that, for the purposes of determining whether the Plaintiffs
6 have presented a *prima facie* case for a preliminary injunction, the statements made by
7 the Affiants are credible and based upon extensive personal experience. The Court further
8 finds that the expert opinions expressed by Dr. Mayer are credible and persuasive. Dr.
9 Mayer has extensive education, training, and experience in the field of election
10 administration, the impact of direct and indirect costs² on voter turnout, and the
11 relationship between socioeconomic and educational status on the ability to absorb voting
12 costs³. The methodology Dr. Mayer used is widely recognized and accepted in his field.
13 Dr. Mayer's expert testimony has been accepted by both state and federal courts⁴. His
14 research has been published in many peer reviewed journals⁵. The Court finds that the
15 State has not challenged Dr. Mayer's opinions.

16
17 4. Based upon Plaintiffs' Affidavits, the Court finds that the BIPA and Receipt
18 Deadline will significantly suppress voter turnout by disproportionately burdening voters
19 who are Native American⁶, elderly⁷, disabled⁸, poor⁹, parents working low-wage jobs¹⁰,
20 college students¹¹, first-time voters¹², and voters who have historically relied on GOTV and
21
22

23 ² Includes administrative burdens and compliance costs.

24 ³ Affidavit of Dr. Kenneth Mayer at 2-3

25 ⁴ *Id.*

26 ⁵ *Id.*

27 ⁶ Affidavit of Linda Stoll

⁷ Affidavit of Trent Badger and Affidavit of Robyn Driscoll

⁸ Affidavit of Beth Brennehan

⁹ Affidavit of Robyn Driscoll and Affidavit of Mary Glueckert

¹⁰ Affidavit of Shelbi Dantic

¹¹ Affidavit of Mary Glueckert and Affidavit of Sophie Moon

¹² Affidavit of Mary Glueckert

1 ballot collection services like those provided by Western Native Voice¹³, MontPIRG¹⁴,
2 Disability Rights Montana¹⁵, Forward Montana¹⁶, Montana Conservation Voters¹⁷,
3 unionized labor¹⁸, and the Montana Democratic Party¹⁹.
4

5 5. The Court further finds that, in opposing the Plaintiffs' Motion for Preliminary
6 Injunction, the State failed to present any evidence to dispute the Plaintiffs' evidence (1)
7 that the BIPA and Receipt Deadline statutes disproportionately burden the voters identified
8 in paragraph 4 above or (2) that the statutes significantly suppress voter turnout by making
9 voting more burdensome and costly for absentee voters.
10

11 6. The Court finds that the BIPA and Receipt Deadline statutes will only
12 exacerbate voter suppression because of the COVID-19 pandemic. Requiring absentee
13 voters to line up, fill out a registry form, and be quizzed by an election official before
14 delivering someone else's ballot violates the social distancing required to prevent the
15 unnecessary spread of COVID-19. Because a significant percentage of absentee voters
16 deliver their ballots shortly before or on election day, long lines and crowded election
17 offices will be commonplace²⁰. The BIPA's registry requirement eliminated the previous
18 use of secure ballot drop boxes that election officials could place at various sites
19 throughout a community or county to make absentee voting easy, convenient, and safe.
20 The COVID-19 pandemic will only increase absentee voting, thereby amplifying the voter
21 suppression effects of the BIPA and Receipt Deadline²¹.
22
23

24 ¹³ Affidavit of Dr. Kenneth Mayer

25 ¹⁴ Affidavit of Mary Glueckert

26 ¹⁵ Affidavit of Beth Brenneman

27 ¹⁶ Affidavit of Dr. Kenneth Mayer

¹⁷ Declaration of Shelbi Dantic

¹⁸ Affidavit of Denver Henderson

¹⁹ Affidavit of Dr. Kenneth Mayer

²⁰ Affidavit of Dr. Kenneth Mayer

²¹ *Id.*

1 7. Based upon Dr. Mayer's Affidavit, the Court finds that there has never been
2 a documented case of absentee ballot collection fraud in Montana.

3 8. The Court finds that the Receipt Deadline disproportionately burdens voters
4 who mail their absentee ballots when compared to voters who vote in person. The Receipt
5 Deadline requires mailed absentee ballots to be received by 8:00 p.m. on election day. If a
6 mailed absentee ballot is not received by 8:00 p.m. on election day, it is not counted. The
7 Receipt Deadline deadline disenfranchises voters who vote before election day, but whose
8 ballots are not delivered by the United States Postal Service until after election day.
9 Delivery times can vary as much as two weeks in Montana depending upon a voter's
10 location²². Even if living in the same city, delivery times can vary from one to seven days.

11 9. The Court finds that the disparity and inconsistency of how long it takes to
12 deliver a mailed absentee ballot significantly burdens absentee voters (1) because they
13 must vote at least a week before the election to have a good chance of having their vote
14 counted; (2) because they have less time and information to decide how to vote; and (3)
15 because there is no guarantee that, even by voting a week early, their ballot will be
16 delivered in time to be counted.

17 10. The Court also finds that there is considerable confusion and
18 misunderstanding among voters about when they must vote by mail. Many believe, based
19 upon filing income tax returns and paying property taxes, that their vote will be counted if
20 postmarked on or before election day. Others reasonably believe that their mailed ballot
21 will be delivered expeditiously if mailed a day or two before election day, especially if
22 mailed to their local election office.

23
24
25
26
27

²² *Id.*

1 11. The Court finds that this misunderstanding and confusion disproportionately
2 burdens first time voters, persons with less education, and persons who have historically
3 relied on ballot collection services.
4

5 12. The Court finds that, during the current 2020 election cycle, the combined
6 effects of the BIPA and Receipt Deadline will cause thousands of Montanans to not vote or
7 will result in their votes not being counted.

8 13. Though the State alleges that the BIPA promotes the State's compelling
9 interest in preventing voting fraud, the Court finds that the State has failed to present any
10 evidence of absentee ballot collection fraud in Montana.

11 14. The Court finds that the BIPA serves no legitimate purpose: it does not
12 enhance the security or integrity of absentee voting; it does not reduce the costs or
13 burdens of conducting elections; it does not make absentee voting easier or more efficient;
14 it does not reduce confusion about absentee voting requirements; and it does not increase
15 voter turnout.
16

17 15. The Court finds that not a single election official in Montana supported the
18 BIPA in legislative hearings; nor has the State presented any evidence from any election
19 official that the BIPA: (1) will promote the integrity, security or efficiency of absentee voting;
20 (2) will reduce election costs or burdens; and (3) will increase voter turnout. The evidence
21 from election officials has been just the opposite. In fact, one election official from Cascade
22 County who testified before the State Administration and Veteran Affairs Committee on
23 February 27, 2020 characterized the BIPA as the "Voter Suppression Act of 2018."
24
25 Plaintiffs' Ex.3 at p. 24.
26
27

1 16. The Court finds that the State also failed to present any evidence that the
2 Receipt Deadline promotes a compelling state interest.

3 17. The Court finds that the Receipt Deadline fails to treat in person and
4 absentee ballot voters uniformly. As long as in person voters are in line by 8:00 p.m. on
5 election day, their ballots are counted no matter how many hours after the 8:00 p.m.
6 deadline they actually vote. Not so with absentee voters, whose votes will not be counted if
7 received after the 8:00 p.m. deadline even if they voted days before the deadline.
8

9 18. While the State has a compelling interest in accurately tabulating and
10 reporting election results in a timely fashion, the State failed to present any evidence that
11 the Receipt Deadline furthers that interest. The State does not limit the time period for
12 certifying election results; Montana counts federal write-in ballots for military and overseas
13 votes until the Monday after election day and provisional ballots are not even counted until
14 six days after election day. The State failed to present any evidence that using a postmark
15 deadline, where all mailed ballots are counted if postmarked on or before election day and
16 received by the same deadline for federal write-in ballots for military and overseas voters,
17 would frustrate the State's ability to timely certify election results. The Court finds that, by
18 using a postmark deadline, the State can accurately and timely certify election results
19 without disenfranchising the thousands of eligible voters whose ballots are now ignored
20 under the Receipt Deadline.
21
22

23 **VII. Conclusions of Law.**

24 1. The Plaintiffs have satisfied their burden of presenting a *prima facie* case
25 through credible and persuasive evidence that the BIPA and Receipt Deadline statutes
26
27

1 burden and interfere with the fundamental right to vote guaranteed by article II, section 13
2 of Montana's Constitution.

3 2. The State has failed to demonstrate through competent evidence that there
4 is any compelling state interest that warrants the burdens and interference on the right to
5 vote imposed by the BIPA and Receipt Deadline statutes.
6

7 3. If a preliminary injunction is not granted, the BIPA and Receipt Deadline
8 statutes will cause irreparable harm to thousands of Montana voters by preventing
9 absentee ballot voters from voting or by disenfranchising those whose absentee ballots
10 are received after election day.

11 4. This Court concludes that the BIPA and Receipt Deadline statutes are
12 subject to strict scrutiny and that the State must demonstrate through competent evidence
13 that the statutes further compelling state interests. This Court's decision to grant a
14 preliminary injunction, however, would not change even under the balancing test
15 advocated by the State, i.e. balancing the burdens the statutes impose against the
16 interests the state advances for burdening voting rights. The Court has found that the BIPA
17 and Receipt Deadline statutes advance no legitimate state interests, yet place significant
18 burdens on the fundamental right to vote. The State would not prevail even under the
19 balancing test it advocates.
20
21

22 5. Based upon the evidence submitted thus far, the Court concludes that the
23 Plaintiffs are likely to prevail on the merits and would be entitled to a permanent injunction
24 to enjoin the enforcement of the BIPA and Receipt Deadlines statutes.
25

26 6. The Court concludes that, pursuant to Mont. Code Ann. § 27-19-201(1) and
27 (2), a preliminary injunction should issue enjoining the enforcement of the BIPA and

1 Receipt Deadline statutes because the BIPA and Receipt Deadline statutes violate the
2 right to vote. The Court reserves ruling upon whether these statutes also violate additional
3 constitutional rights as Plaintiffs allege.

4 **VIII. Memorandum.**

5 While not essential to the Court's Findings of Fact and Conclusions of Law, the
6 Court will address the additional arguments asserted by the State.
7

8 **1. Plaintiffs' delay in seeking a preliminary injunction.**

9 The State argues that Plaintiffs' preliminary injunction motion should be denied
10 because Plaintiffs' delay in seeking a preliminary injunction until just before the June 2
11 primary election undermines their claim of irreparable harm. Def.'s Resp. 2. In Montana,
12 the right to vote is a fundamental right guaranteed by Montana's Constitution. *State v.*
13 *Riggs*, 2005 MT 124, ¶ 47. The loss of a constitutional right "constitutes irreparable harm
14 for the purpose of determining whether a preliminary injunction should be issued." *Mont.*
15 *Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15 (citing *Elrod v. Burns*, 427 U.S. 347,
16 373 (1976)). As set forth above, the Plaintiffs have shown the BIPA and the Receipt
17 Deadline violate Montanans' constitutional right to vote. The Plaintiffs have demonstrated
18 irreparable harm for the purposes of determining whether a preliminary injunction should
19 be issued.
20

21
22 The State also argues that Plaintiffs should be estopped from complaining about
23 irreparable harm due to their delay in bringing the case. Def.'s Resp. 2. The cases the
24 State cites to support its argument, however, are inapplicable here because those courts
25 were faced with determining irreparable injury for copyright, trademark, and antitrust and
26 trade violations, not constitutional violations. Def.'s Resp. 2-3 (citing *Oakland Tribune, Inc.*
27

1 *v. Chronical Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *Garcia v. Google, Inc.* 768
2 F.3d 733, 746 (9th Cir. 2015); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2nd Cir.
3 1985)). The Plaintiffs have shown irreparable harm per se by presenting a *prima facie*
4 case that the BIPA and Receipt Deadline statutes violate Montanans' constitutional right
5 to vote.
6

7 **2. Timing of preliminary injunction.**

8 The State also argues that the U.S. Supreme Court has "repeatedly emphasized"
9 its disfavor of altering election rules by injunction on the eve of an election because such
10 orders can result in "voter confusion and consequent incentive to remain away from the
11 polls." Def.'s Resp. 3 (quoting *Rep. Nat'l Comm. V. Dem. Nat'l Comm.*, 206 L.Ed. 2d 452,
12 453-54 (2020) (*pur curiam*); *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). However, the U.S.
13 Supreme Court explained:
14

15 [i]mportantly, in their preliminary injunction motions, the plaintiffs did not ask
16 the District Court allow ballots mailed and postmarked after election day . . .
17 be counted . . . [t]hat is a critical point in the case . . . the District Court
18 unilaterally ordered absentee ballots mailed and postmarked after election
19 day . . . still be counted . . . [e]xtending the date by which ballots may be
20 cast by voters—not just received by the municipal clerks but cast by
21 voters—for an additional six days after the scheduled election day
22 fundamentally alters the nature of the election.

23 *Rep. Nat'l Comm.* 206 L. Ed. 2d 452 at 1206-7.

24 *Rep. Nat'l Comm.* is not applicable here for several reasons. First, the relief sought
25 by the Plaintiffs here is the relief granted by this Court. Second, this Court is not altering
26 the "date by which ballots may be cast by voters," but rather whether absentee ballots
27 postmarked on or before election day can be counted. The preliminary injunction does not
"fundamentally alter the nature of the election". *Id.* Third, the injunction here will not result
in voter confusion nor will it disenfranchise voters. Instead, the Court's preliminary

1 injunction will mitigate the voter suppression effects of the BIPA and Receipt Deadline
2 statutes. Specifically, those absentee ballots received by the election office after the
3 Receipt Deadline and those delivered by persons outside the statutory exceptions in
4 BIPA will now be counted. Because the preliminary injunction granted here does not
5 “fundamentally alter the nature of the election” or result in voter confusion or
6 disenfranchisement, the State’s reliance on *Rep. Nat’l Comm* is misplaced. *Id.*

8 **3. BIPA’s passage by referendum.**

9 The State next argues that because the BIPA was passed by Montana voters by a
10 wide majority, the referendum was a “demonstration of a compelling state interest.” Def.’s
11 Resp. at 6 (citing *Montana Auto. Ass’n v. Greely*, 193 Mont. 378, 384, 632 P.2d 300, 303
12 (1981)). In *Montana Auto. Ass’n*, the Montana Supreme Court stated that “the statewide
13 vote on I-85 is a demonstration of a compelling state interest in the enactment of I-85.” *Id.*
14 However, the Court also declared portions of the initiative unconstitutional. *Id.* While the
15 Montana Supreme Court has recognized that a statewide initiative passed by Montana
16 voters can indicate a compelling state interest, initiatives must still pass constitutional
17 muster. Whether enacted by the legislature or by voter referendum, statutes cannot
18 violate the Constitution. The State’s argument that the BIPA’s enactment by referendum
19 shields the BIPA from constitutional scrutiny is mistaken.

22 **4. Voter fraud in other states.**

23 The State argues that voter fraud in other states constitutes a compelling state
24 interest for adopting the BIPA. The State contends that Montana “need not wait for
25 evidence of fraud [in Montana] to justify preventative measures.” Def.’s Resp. at 7. The
26 State’s argument ignores the Plaintiffs’ evidence: (1) that the BIPA targets **non-fraudulent**
27

1 absentee ballot collection in Montana; (2) that Montana already has a comprehensive set
2 of statutes that prohibit and criminalize fraudulent voting activities, Mont. Code Ann. § 13-
3 35-101 *et seq.*; and (3) that while the BIPA suppresses voting, it does nothing to advance
4 the integrity or security of Montana elections. The State failed to present any evidence that
5 Montana's pre-BIPA statutory scheme for preventing voter fraud would be insufficient to
6 deter fraudulent absentee ballot collection practices. To put in perspective the success of
7 Montana's pre-BIPA statutes prohibiting voter fraud, for the decade from 2006 through
8 2016, there has not been a single case of ballot collection fraud even though voters cast
9 7,079,953 absentee or mail ballots in Montana.²³

11 For those reasons, the State's reliance on the Morley blog-posting entitled "Election
12 Modifications to Avoid During the Covid-19 Pandemic," Lawfare (Apr. 17, 2020), is
13 misplaced. Morley warns that elections officials should avoid adopting new election
14 strategies in response to the Covid-19 epidemic that may create unforeseen problems with
15 election administration and security. Morley identifies one such strategy as authorizing
16 absentee ballot collection. Morley advises that "election officials should reject ... the use of
17 third-party 'designated persons' – frequently referred to as 'ballot harvesters' – to collect
18 absentee ballots from voters (except in jurisdictions where state law expressly authorizes
19 their use)." Morley recommends that, "[e]lection officials should not expand the use of
20 third-party ballot harvesting, particularly as a response to the pandemic." Morley's
21 concerns do not support the BIPA. The BIPA was not enacted in response to COVID-19;
22 the BIPA targets non-fraudulent absentee ballot collection; and Montana has permitted
23
24
25
26
27

²³ Affidavit of Dr. Kenneth Mayer

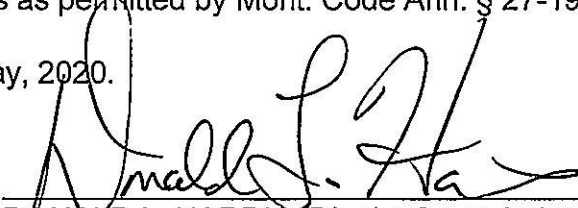
1 third-party absentee ballot collection for many years without a single case of fraud being
2 reported.

3 Based upon the above Findings of Fact, Conclusions of Law, and Memorandum:

4 **IT IS HEREBY ORDERED:**

- 5
- 6 1. The Plaintiffs' Motion for Preliminary Injunction is **GRANTED**;
- 7 2. The Defendant and his agents, officers, employees, successors, and all
8 persons acting in concert with each or any of them are **IMMEDIATELY** restrained and
9 prohibited from enforcing the provisions of the Ballot Interference Prevention Act, Mont.
10 Code Ann. § 13-35-701 *et seq.* and the election receipt deadline for absentee ballots set
11 forth in Mont. Code Ann. § 13-13-201(3), Mont. Code Ann. § 13-13-211(3), and Mont.
12 Code Ann. § 13-19-106(5)(b) pending resolution of the Plaintiffs' request that the
13 Defendant be permanently enjoined from enforcing the statutes cited above;
- 14
- 15 3. All absentee ballots postmarked on or before election day shall be counted,
16 if otherwise valid, provided such ballots are received by the deadline for federal write-in
17 ballots for military and overseas voters; and
- 18
- 19 4. The Court waives the requirement that the Plaintiffs post a security bond for
20 the payment of costs and damages as permitted by Mont. Code Ann. § 27-19-306(1)(b)(ii).

21 DATED this 22nd day of May, 2020.

22
23 
DONALD L. HARRIS, District Court Judge

24 cc: Peter M. (Mike) Meloy
25 Matthew Gordon
26 J. Stuart Segrest, Asst. A.G.
27 Aislinn W. Brown, Asst. A.G.
Hannah Tokerud, Asst. A.G.