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6 MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
7 YELLOWSTONE COUNTY

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

11 Plaintiffs,

12 v.

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

15 Defendant.

CAUSE NO. DV 20-408

JUDGE DONALD L. HARRIS

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

16 The Court conducted a non-jury trial in this case on Plaintiffs' Amended Complaint
17 for Declaratory and Injunctive Relief. Both parties appeared and were represented by
18 counsel. Trial was conducted on September 14, 15, 16, 20 and 21 of 2020. After
19 considering the evidence presented and counsels' arguments, the Court makes the
20 following Findings of Fact:
21

22 **FINDINGS OF FACT**

23 **I. Parties.**

24 1. Plaintiff Montana Democratic Party ("MDP") is a political party established
25 pursuant to Montana Code Section § 13-38-101, *et seq.*
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1 2. Plaintiff Robyn Driscoll is the chair of Plaintiff Montana Democratic Party.

2 3. Plaintiff Democratic Senatorial Campaign Committee ("DSCC") is the
3 national senatorial committee of the Democratic Party as defined by 52 U.S.C. §
4 30101(14).
5

6 4. Defendant Corey Stapleton is the Montana Secretary of State. The
7 Secretary is the chief elections officer of the State of Montana and is responsible for
8 obtaining and maintaining uniformity in the application, operation, and interpretation of the
9 election laws. Mont. Code Ann. § 13-1-201.

10 **II. Claims for Relief.**

11 5. The Plaintiffs' Amended Complaint seeks declarative and injunctive relief.
12
13 The Plaintiffs request the Court to declare that Montana's Ballot Interference Prevention
14 Act ("BIPA") (Mont. Code Ann. § 13-35-701 *et seq.*), Election Day Receipt Deadline
15 statutes (Mont. Code Ann. §§ 13-13-201(3), 13-19-106(5)(b), 13-13-211(3), 13-13-246
16 (2)(c), (d) and 13-21-206(b)), and Cure Deadline statutes (Mont. Code Ann. §§ 13-13-245
17 and 13-15-107) violate Montana's Constitution. The Plaintiffs request that the Secretary
18 be permanently enjoined from enforcing BIPA, the Election Day Receipt Deadline, and the
19 Cure Deadline. The Plaintiffs further request: (a) that all mailed absentee ballots
20 postmarked on or before Election Day be counted if received by election officials by 5:00
21 p.m. on the Tuesday after Election Day; and (b) that the Cure Deadline be extended to
22 5:00 p.m. on the second Thursday after Election Day, provided that any cure information a
23 voter mails to election officials is received by 5:00 p.m. on the Thursday after Election Day.
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1 6. BIPA prohibits unauthorized persons from collecting absentee ballots and,
2 except for U.S. postal workers and election officials, limits the number of ballots an
3 authorized person can collect and deliver to six ballots.
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5 7. Those persons authorized to collect and deliver up to six absentee ballots
6 are: a caregiver, a family member, a household member, or an acquaintance. BIPA
7 requires caregivers, family members, household members, or acquaintances to deliver
8 collected ballots to "a polling place, a place of deposit, or the election administrator's
9 office." Upon delivery they also must sign a registry and provide in writing: their name,
10 address, and phone number; the voter's name and address; and "the individual's
11 relationship to the voter required to collect and convey a ballot pursuant to 13-35-703(2)(c)
12 through (2)(f)." Mont. Code Ann. § 13-35-704. BIPA imposes a \$500.00 fine for each
13 ballot collected in violation of BIPA.
14

15 8. The Election Day Receipt Deadline statutes mandate that absentee ballots
16 must be received by authorized election officials by 8:00 p.m. on Election Day. Absentee
17 ballots received after 8:00 p.m. on Election Day are not counted.
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19 9. The Cure Deadline allows absentee voters until 5:00 p.m. on the day after
20 Election Day to correct deficiencies in their ballot such as a missing signature on the
21 outside ballot envelope, a signature that appears not to match the voter's signature on file,
22 or other concerns about the ballot's validity. If contacted in time by election officials, the
23 absentee voter can cure the deficiency in person by 5:00 p.m. the day after Election Day
24 or by mailing corrective information to election officials if postmarked by 5:00 p.m. the day
25 after Election Day and verified by 3:00 p.m. on the sixth day after the election. If corrected
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1 by the Cure Deadline, deficient absentee ballots are counted. Deficient absentee ballots
2 not corrected by the Cure Deadline are not counted.

3 **III. BIPA.**

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5 10. Plaintiffs claim that BIPA violates Montana's Constitution by burdening the
6 right to vote, by infringing upon the rights of free speech and association, and by denying
7 the right to due process. Plaintiffs also claim that BIPA violates Montana's Constitution
8 because BIPA is vague.

9
10 11. BIPA was passed by the Montana legislature as a legislative referendum on
11 April 13, 2017. BIPA was intended to curtail the organized collection and delivery of
12 absentee ballots by third parties as a way to prevent ballot interference and fraud.

13
14 12. Before BIPA was enacted, organizations like the Montana Democratic Party,
15 Disability Rights of Montana, MontPIRG, Montana Conservation Voters, Western Native
16 Voice, and Montana Native Voice collected and delivered absentee ballots to election
17 officials when requested by voters to do so. Nursing home staff would often collect and
18 deliver ballots for elderly voters unable to deliver or mail their ballots. Family members
19 also collected and delivered more than six absentee ballots from other family members in
20 large families or households.

21
22 13. BIPA effectively prevents organizations from collecting and delivering
23 absentee ballots by limiting collection to six ballots and by authorizing only caregivers,
24 family members, household members, or acquaintances to collect and deliver absentee
25 ballots. Virtually all absentee ballots collected by organizations are collected in
26 circumstances where the person collecting the ballot did not know the voter before
27 introducing themselves during a get out the vote ("GOTV") campaign. Even if the voter

1 and collector could be deemed "acquaintances" after introducing themselves and having a
2 short conversation, the six-ballot collection limitation makes it too expensive for
3 organizations to hire enough collectors to offer organized ballot collection services.
4

5 14. Plaintiffs provided overwhelming evidence that BIPA burdens the right to
6 vote. BIPA makes it more difficult for disabled voters in institutions or group homes, for
7 the elderly in assisted living facilities, for college students, for Native Americans, for large
8 families and households, for first-time voters, and for those working multiple low-wage jobs
9 to vote because BIPA eliminates the organized ballot collection services upon which these
10 voters once relied.
11

12 15. BIPA also eliminates the use of the unstaffed secure drop boxes used by
13 election officials that allowed voters to deposit their ballots during non-work hours.
14 Removing these drop boxes imposes additional burdens on all absentee voters delivering
15 ballots. Because of BIPA's registration requirements, absentee voters who deliver their
16 ballots now must travel to county election offices during business hours, wait to be
17 questioned by an election official, and if delivering another voter's ballot, complete the
18 BIPA registration form.
19

20 16. BIPA also burdens the right to vote by raising the costs of absentee voting,
21 thereby placing significant burdens on those voters who are socioeconomically vulnerable.
22 Ballot collection services typically begin collecting and delivering ballots as part of their
23 GOTV efforts starting the week before Election Day. These collection services do so
24 because the United States Postal Service (U.S.P.S.) warns voters that absentee ballots
25 should be mailed at least one week before Election Day to insure delivery by 8:00 p.m. on
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1 Election Day. Many voters do not understand that their ballot must be mailed at least a
2 week before Election Day to be delivered on or before Election Day.

3 17. Before BIPA, voters often learned through a conversation with a GOTV
4 worker that mailing in their ballot less than a week before Election Day would not insure its
5 arrival before 8:00 p.m. on Election Day. If the voter expressed concern about being able
6 to deliver their ballot, GOTV workers would then offer to deliver their ballot. BIPA not only
7 eliminated organized ballot collection, but also the opportunity for GOTV workers to
8 educate voters about absentee ballot requirements such as signing the outside absentee
9 ballot envelope. The result is that, especially for the November 2020 general election,
10 more voters who relied upon ballot collection services are more likely to vote by mail, if
11 they vote at all. The evidence demonstrates that voters with lower educational and
12 socioeconomic status are less able to overcome the obstacles to voting created by BIPA
13 than higher income and more highly educated voters. This means that, without ballot
14 collection services, more voters are likely to vote by mail and voters having lower
15 educational and socioeconomic status are more likely to have their ballots rejected
16 because their ballots arrive late or have signature deficiencies.

17 18. By eliminating organized ballot collection services, BIPA also precludes
18 ballot collectors from organizations like the Montana Democratic Party, Disability Rights of
19 Montana, MontPIRG, Montana Conservator Voters, Western Native Voice, and Montana
20 Native Voice from expressing their values such as their commitment to democracy and the
21 right to vote. Such organizations affirm these values by offering to deliver a voter's ballot
22 when necessary and doing so when asked. BIPA infringes upon the fundamental rights of
23 free speech and association that ballot collectors would otherwise exercise when,
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1 particularly during the week before Election Day, they would discuss the voter's plan to
2 vote, review mailing deadlines and in-person delivery options, signature requirements, and
3 whether the voter needed help with delivering their ballot in time to be counted. The
4 evidence was undisputed that BIPA restricts the expression of political speech and
5 association. In the critical week before Election Day, BIPA significantly limits the kinds of
6 discussion and conduct that organized ballot collectors can engage in with voters.
7

8 19. It is undisputed that there has not been a single instance in Montana of
9 interference, intimidation, tampering, or delay by organized ballot collection services. Nor
10 has there been a single instance of ballot collection fraud in Montana.
11

12 20. Though labeled the Ballot Interference Protection Act, BIPA is not tailored to
13 actually prevent ballot interference or fraud. BIPA, for example, only prohibits authorized
14 persons from collecting and conveying more than six ballots to election officials. BIPA
15 does not prevent authorized persons from collecting and destroying any number of ballots.
16 The Secretary currently interprets BIPA as permitting organized ballot collection services
17 to collect and mail absentee ballots to election officials while prohibiting only in-person
18 delivery. BIPA does not prevent ballot tampering, voting another person's ballot, bribing
19 voters, coercing or intimidating voters, or defrauding voters. All BIPA does is prohibit the
20 otherwise lawful activity of helping voters deliver their absentee ballots to election officials
21 in time to be counted.
22

23 21. The Secretary claims that BIPA protects against ballot interference and
24 fraud, thereby enhancing the public's confidence in the integrity of Montana elections. No
25 evidence supports that claim. First, the Secretary presented no evidence that organized
26 ballot collection services have ever interfered with or defrauded voters. Second, as noted
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1 above, BIPA was not designed to prevent voting misconduct. Montana already had a
2 robust and effective statutory scheme that criminalizes and punishes voting misconduct.
3 Mont. Code Ann. § 13-35-101, *et seq.*; Mont. Code Ann. § 45-7-101 and 102. Third, the
4 Secretary presented no evidence that BIPA was necessary to foster the public's
5 confidence in Montana elections.
6

7 22. In fact, the Court finds that the Secretary failed to present any evidence that
8 BIPA furthered any legitimate state interest. For example, Jeff Mangan serves as
9 Montana's Commissioner of Political Practices and is responsible for investigating and
10 enforcing BIPA as well as other campaign and election laws set forth in Chapter 35, Title
11 13 of the Montana Code Annotated. Mr. Mangan testified that BIPA is unnecessary and is
12 "...a solution in search of a problem."
13

14 23. Dana Corson, Director of Election and Voter Services, was the Secretary's
15 designee to testify at trial and his testimony is binding upon the Secretary. Mr. Corson
16 admitted: (a) that there is no evidence of absentee ballot collection interference or fraud in
17 Montana; (b) that BIPA only prohibits the otherwise lawful collection of over six ballots; and
18 (c) that BIPA makes it more difficult for absentee voters to vote. Speaking for the
19 Secretary, Mr. Corson acknowledged that BIPA is bad for democracy.
20

21 24. As part of her duties as the Cascade County Clerk and Recorder, Rina
22 Moore serves as the Elections Administrator. Ms. Moore described BIPA as unnecessary
23 legislation that not only made it more difficult and time-consuming for voters to vote, but
24 significantly increased the administration time and expense necessary to implement
25 BIPA's requirements. Ms. Moore testified that voters were confused and frustrated about
26 BIPA's registration requirements. Because BIPA made it more difficult for voters to vote
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1 without accomplishing anything useful, Ms. Moore characterized BIPA as the "voter
2 suppression act of 2018".

3 25. Linda Stoll served as a lobbyist for the Montana Association of County Clerk
4 and Recorders (the Association) in 2017 during the legislative process relating to BIPA
5 (Senate Bill 352). The Association represents election officials in all 56 of Montana's
6 counties. The Association opposed BIPA because Montana election administrators had
7 not encountered any problems with organized ballot collection services and had concluded
8 that BIPA would not solve an actual problem in Montana. The Association also opposed
9 BIPA because it targeted people for helping people vote and because it created significant
10 burdens for county election officials and voters.
11

12 26. The Plaintiffs retained Dr. Kenneth Mayer to evaluate the effects of BIPA, the
13 Election Day Receipt Deadline, and the Cure Deadline on Montana absentee ballot voters.
14 The Court has carefully reviewed Dr. Mayer's expert opinions that: (1) BIPA burdens
15 voters by prohibiting organized ballot collection services and by eliminating the use of
16 unstaffed, secure drop boxes by election officials; (2) BIPA will suppress voter turnout
17 while increasing the number of absentee ballots that are rejected; (3) BIPA
18 disproportionately burdens already vulnerable voting populations consisting of the elderly,
19 disabled, working poor, inexperienced voters, and Native Americans by increasing voting
20 costs; (4) BIPA does not prevent ballot interference or fraud; (5) BIPA will not promote
21 election integrity or the public's confidence in the election process; (6) BIPA creates
22 additional, but unnecessary, work for election officials and staff; and (7) BIPA's ripple
23 effects increase the time voters must wait in line to vote. The Court finds that Dr. Mayer's
24 opinions are based upon recognized, widely accepted methodology and extensive
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1 research. Dr. Mayer is a recognized expert on the subjects upon which he provided expert
2 opinions. The Court finds Dr. Mayer's opinions to be credible and persuasive. The Court
3 finds that Dr. Mayer's opinions are consistent with and are supported by the testimony of
4 the organized ballot collectors, election officials, and voters who testified at trial or whose
5 deposition testimony, declarations or stipulated testimony was admitted at trial. The Court
6 finds that Dr. Mayer's opinions are more credible and persuasive than the contrary
7 opinions expressed by the Secretary's experts, Dr. Hood and Dr. Atkeson.

9 27. The Secretary relies upon the testimony of Dr. M.V. Hood III as proof that
10 BIPA: (a) will not adversely affect voter turnout; (2) will not disenfranchise any voters; and
11 (3) strengthens the chain of custody by requiring a voter to give their ballot to a person
12 they trust. The Court finds that Dr. Hood's opinions were based upon an incomplete
13 investigation, flawed assumptions, and speculation. The Court finds that his opinions are
14 not credible.

16 28. Dr. Hood opined that how BIPA affects voter turnout cannot be determined
17 because BIPA was enjoined just before the June 2020 primary election and has never
18 been fully implemented. Dr. Hood disagrees that the Utility of Voting methodology used by
19 Plaintiffs' expert, Dr. Mayer, can be applied to BIPA because not enough empirical
20 evidence exists to know how BIPA actually affects voter turnout.

22 29. The Court finds that the Utility of Voting methodology has been a widely
23 tested and accepted method for evaluating the potential impact of how changes to election
24 laws will affect voter behavior. In essence, the Utility of Voting methodology predicts that
25 voter turnout is a function of the costs and benefits of voting. Increasing the direct or
26 indirect costs of voting decreases total voter turnout as well as the likelihood that any
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1 given individual will vote. Conversely, decreasing the direct or indirect costs of voting
2 increases both voter turnout and the probability that a given individual will vote. Direct
3 costs can include items like the cost of driving to a polling place to vote, the postage to
4 mail a ballot, the costs to obtain a photo I.D., lost income if a voter must miss work to vote,
5 child care expenses if a voter must obtain child care to vote, and other out-of-pocket costs.
6 Indirect costs can include complex or confusing voter requirements, compliance
7 requirements, administrative processes, and the loss of established voting options.
8

9 30. As examples, Dr. Mayer testified that the Utility of Voting methodology has
10 been used to correctly predict that, by lowering costs, states that adopted same day
11 registration and voting laws increased voter turnout. In contrast, by increasing costs,
12 states that adopted photo identification laws as a prerequisite to voting decreased voter
13 turnout. In evaluating the effects of changing the Election Day Receipt Deadline to a
14 Postmark Deadline and extending the Cure Deadline, Dr. Lonna Atkeson, another defense
15 expert, also used the Utility of Voting methodology to predict how such changes would
16 affect the numbers of late or rejected absentee ballots. The Court rejects Dr. Hood's
17 opinion that Dr. Mayer misapplied the Utility of Voting methodology in this case.
18

19 31. The Court also rejects Dr. Hood's opinions that BIPA will not disenfranchise
20 voters or will not disenfranchise enough voters to affect election results. Dr. Hood
21 appeared unaware of the undisputed testimony from persons who actually collected
22 ballots on behalf of the Montana Democratic Party, Disability Rights of Montana,
23 MontPIRG, Montana Conservation Voters, Western Native Voice, and Montana Native
24 Voice, demonstrating that they had collected and delivered hundreds of ballots each
25 election from voters who would not otherwise have been able to deliver or mail in their
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1 ballots in time to be counted. Dr. Hood's opinion that BIPA will not disenfranchise enough
2 voters to impact election results is irrelevant and speculative. It also contradicts his
3 opinion that BIPA will not disenfranchise any voters.
4

5 32. Dr. Hood's opinion that BIPA enhances election integrity by strengthening
6 the chain of custody of a voter's ballot is without merit. That opinion assumes that those
7 engaged in organized ballot collection efforts are somehow less trustworthy than the
8 persons BIPA authorizes to collect ballots. Yet, while there has never been a single
9 instance of an organized ballot collector failing to deliver a ballot entrusted to them, Rina
10 Moore testified that, in the June 2020 primary election, the U.S.P.S. had forgotten to
11 deliver approximately 46 ballots to the Cascade County election office until the day after
12 Election Day. No evidence supports Dr. Hood's opinion that BIPA strengthens the chain of
13 custody for delivering a voter's ballot.
14

15 33. The Court finds that BIPA's language is vague, confusing and overbroad.
16 BIPA's use and definition of the term "acquaintance" is vague. BIPA defines
17 "acquaintance" as "an individual known by the voter." The problem is determining
18 whether, upon introducing themselves to the voter, the ballot collector immediately
19 becomes the voter's acquaintance or whether the voter must know more about the ballot
20 collector and, if so, how much more. Is saying, "I'm pleased to make your acquaintance"
21 upon introduction enough to be an acquaintance? Or, must the relationship between voter
22 and collector be more than a passing familiarity, but less than friendship? When
23 questioned, none of the Secretary's witnesses professed to know what criteria a ballot
24 collector needed to satisfy to be deemed an acquaintance under BIPA. This is a critical
25 issue because organized ballot collectors rarely know the voter before meeting them
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1 during GOTV efforts the week before Election Day. The penalty for being mistaken about
2 whether the ballot collector qualifies as an acquaintance under BIPA is a \$500.00 fine per
3 ballot. This uncertainty alone has caused organized ballot collection services to
4 discontinue collecting ballots.
5

6 34. BIPA's six-ballot collection limitation is also overbroad because it penalizes
7 non-fraudulent ballot collection. For example, BIPA entrusts a family member to help six
8 other family members deliver their votes to be counted, but not seven or more family
9 members. BIPA's six-ballot limitation is entirely arbitrary.
10

11 **IV. Election Day Receipt Deadline.**

12 35. The Court finds that the Election Day Receipt Deadline statutes violate
13 Montana's Constitution by burdening the right to vote and by denying the right to due
14 process.
15

16 36. Plaintiffs provided overwhelming evidence that the Election Day Receipt
17 Deadline statutes burden the right to vote. The Election Day Receipt Deadline statutes have
18 disenfranchised thousands of Montanans because voters who cast their ballot through the
19 mail on or before Election Day and whose ballots arrive at election offices after 8:00 p.m. on
20 Election Day do not have their vote counted.
21

22 37. The Election Day Receipt Deadline statutes burden Montana voters who vote
23 by mail by requiring voters to cast their ballot at least a week before Election Day. Even then
24 there is no guarantee their ballot will be received in time to be counted. Conversely, voters
25 who are able to return their absentee ballots directly to election officials or who can vote in
26 person by 8:00 p.m. on Election Day do not have to cast their ballot until Election Day. The
27

1 Election Day Receipt Deadline statutes place voters who vote by mail at a disadvantage
2 relative to other voters.

3 38. Mail delivery times throughout and within Montana counties vary, and voters in
4 some locations are likely to have quicker delivery of their ballots than other voters. For
5 example, in the June 2020 primary election a voter in Great Falls, Montana had his ballot
6 delivered by mail in one day while a voter in Helena, Montana had her ballot delivered in one
7 week. Inconsistent mail delivery times throughout Montana cause vote-by-mail voters to be
8 treated differently depending on where they are mailing their ballot.

9
10 39. Voters with less experience voting by mail are more likely to be
11 disenfranchised. Voters who have voted by mail in previous elections have lower ballot
12 rejection rates.

13
14 40. There is confusion among voters about the applicable deadline by which they
15 must mail their ballot to have it counted. Some voters believe a postmark deadline applies to
16 their ballot like it does for other government deadlines such as when mailing federal tax
17 returns, voter registration forms, or hunting license applications.

18
19 41. The COVID-19 pandemic will increase demand among voters to use the mail
20 to participate in the 2020 General Election. Increased reliance on the U.S.P.S. to deliver a
21 larger number of ballots has placed great stress upon the U.S.P.S.'s ability to meet demand.
22 Former U.S.P.S. Deputy Postmaster General Ronald Stroman described that the COVID-19
23 pandemic has resulted in U.S.P.S. operating with far fewer employees. Mr. Stroman also
24 explained the incongruity between Montana's Election Day Receipt Deadline and the current
25 U.S.P.S delivery standards, noting U.S.P.S. delivery capabilities vary and make it impossible
26 to guarantee that ballots will be returned by Election Day. Mr. Stroman testified that he has
27

1 recommended that all states adopt a postmark deadline to reduce the number of ballots
2 being rejected for late delivery.

3 42. Sanders County Elections Administrator Nicole Scribner testified that Sanders
4 county election administrators have an informal arrangement with the local U.S.P.S. office
5 whereby U.S.P.S. sets aside incoming ballots, instead of sending them out of the county to
6 be postmarked by a U.S.P.S. processing center, to provide a more timely return of the ballots
7 to the local election office. Mr. Stroman testified, however, that a postmark deadline is
8 beneficial because it eliminates the need for these kinds of informal, unauthorized
9 agreements between local U.S.P.S. facilities and county election officials and strengthens the
10 chain of custody of ballots.
11

12 43. Mr. Stroman also explained that due to the increased reliance on U.S.P.S. to
13 deliver more ballots coupled with the logistical limitations presented by COVID-19, U.S.P.S.
14 is not delivering first class mail (including ballots) within its performance goal of 96% of first
15 class mail being delivered within two to five days. Rather, the latest data available for
16 September 2020 shows U.S.P.S. is delivering only 88% of first class mail within two to five-
17 days. Under the current COVID-19 conditions, the U.S.P.S. first class mail delivery rate,
18 which includes ballot delivery, is down 8%. The decrease in the U.S.P.S.'s delivery rate will
19 cause even more mailed ballots to be delivered after Election Day, thereby disenfranchising
20 even more voters.
21

22 44. Many absentee ballots arrive to election offices on Election Day. 18,120 ballots
23 arrived by mail on Election Day in 2016, 17,901 in 2018 and 21,655 in the 2020 primary
24 election. Ballots received on or near Election Day are at risk of not being counted if
25 unanticipated mail delivery issues delay their arrival.
26
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1 45. The June 2020 primary election was held during the COVID-19 pandemic
2 under an all-mail election. In the June 2020 primary election, 1,429 ballots were rejected as
3 late. In the 2016 general election, 290 ballots were rejected as late and in the 2018 general
4 election 385 ballots were rejected as late.¹ The rejection rate for the June 2020 primary
5 election was high relative to previous elections. The number of late rejected ballots received
6 after the Election Day Receipt Deadline is higher in predominantly-mail elections held under
7 COVID-19 conditions.
8

9 46. The November 2020 general election is more likely to resemble the June 2020
10 primary than previous general elections because the November 2020 general election will
11 also be held during the COVID-19 pandemic and will be a predominantly all-mail election.
12

13 47. The COVID-19 pandemic exacerbates the burdens imposed by the Election
14 Day Receipt Deadline. To vote in the November 2020 general election, voters must decide
15 between returning their absentee ballot by mail or casting their vote in person. A voter must
16 choose between mailing their ballot to avoid COVID-19 exposure and forego having
17 complete information by the time they mail their ballot while also risking that their ballot will
18 not arrive on time. Or, voters can choose to return their ballot or vote in person up until 8 p.m.
19 on Election Day, thereby having more time to gather full information but also risking COVID-
20 19 exposure. The COVID-19 pandemic presents an untenable problem for voters who wish
21 to have all the available information prior to casting their ballot, who wish to reduce potential
22 COVID-19 exposure, and who also wish to have their vote counted. Moving the Election Day
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24

25 ¹ Dr. Mayer testified that the data suggest that the number of absentee ballots arriving late is undercounted.
26 He explained that additional ballots arrived late but were rejected for other reasons (such as lack of
27 signature) and would have been rejected even if there were no other issues with the ballot because they
were late.

1 Receipt Deadline to a postmark deadline would alleviate the pressures voters are facing in
2 the November 2020 general election and result in less disenfranchised voters.

3 48. A postmark deadline would treat all voters the same. In-person voters who are
4 in line at the election office by 8:00 p.m. on Election Day are entitled to vote after the Election
5 Day Receipt Deadline while absentee voters must cast their ballot at least a week before
6 Election Day for the best chance that their vote is counted. Under a postmark deadline,
7 absentee voters could also cast their ballots on Election Day and have their vote counted,
8 just like the in-person voters.
9

10 49. Mary Hall, the County Auditor from Durston County, Washington testified that a
11 postmark system levels the playing field for rural and urban voters. Washington conducts all-
12 mail elections. Ms. Hall explained that mail travels slower in rural areas and that a postmark
13 deadline ensures that rural voters in Washington have the same allotted time in which to mail
14 their ballot as urban voters do. A postmark system makes absentee voting more equitable for
15 voters from different areas of the state. The Court finds that a postmark deadline would place
16 all Montana voters—urban and rural—on an even playing field for voting.
17

18 50. A postmark deadline would significantly reduce the risk of disenfranchisement
19 posed by the Election Day Receipt Deadline. Voters can more easily control when their ballot
20 is postmarked than when their ballot is delivered. The U.S.P.S. operational policy and
21 practice in Montana is to postmark mail the same day it is picked up. Voters can control when
22 they put their ballot in the mail and therefore when it is postmarked.
23

24 51. The U.S.P.S. sprays barcodes on and scans images of envelopes it receives,
25 both of which indicate the date U.S.P.S. took possession of a piece of mail. In the event a
26 postmark is not placed on a ballot, the U.S.P.S. barcode and scanned images verify which
27

1 date a voter placed their ballot in the mail. These markers can all be used to determine
2 whether a ballot was mailed on or before Election Day.

3 52. A postmark deadline is administratively feasible. Under the current statutory
4 scheme, counties already receive and count federal write-in ballots for military and overseas
5 voters until the Monday after Election Day and provisional ballots cannot be counted until the
6 sixth day after the election pursuant to Mont. Code. Ann. §§ 13-21-206, 13-15-107.

7 53. The State's expert Dr. Lonna Atkeson testified that a postmark deadline would
8 increase the rejection rate and that Montana already has a favorable rejection rate compared
9 to other states. Dr. Atkeson also claimed that states with election day receipt deadlines have
10 lower late absentee ballot rejection rates than states with postmark deadlines. The Court
11 finds this analysis is flawed and not based on pertinent evidence. Dr. Mayer explains that Dr.
12 Atkeson's comparison of six or seven states, the first group with election day deadlines and
13 the other group with postmark deadline, fails to capture a full range of variables describing a
14 state's electoral system including population, demographics, geography, and election rules,
15 among other factors. The Court finds Dr. Mayer's assessment persuasive that Dr. Atkeson
16 cannot reliably assert that the rejection rate differences between the small sample of states
17 she selected are attributable to the existence of an election day deadline without controlling
18 for these confounding factors. The Court finds Dr. Atkeson's generalized comparison of a
19 small number of states flawed. Dr. Mayer points out that if one changes the states Dr.
20 Atkeson selected, the data can show the opposite result using the same logic. For instance,
21 Dr. Mayer explained that if we examine late ballot rejection votes among all states in the
22 2016 Election Administration and Voting Survey data, seven of the ten states with the highest
23 rates of late ballot rejection had election day receipt deadlines.
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1 54. If Montana allowed the counting of ballots postmarked on or before Election
2 Day and received by 3:00 p.m. the Monday following Election Day, county elections officials
3 could count any such ballots along with the provisional ballots and federal write-in ballots.
4 Changing to a postmark deadline would not imperil any post-election deadlines.
5

6 55. By using a postmark deadline, the State can accurately and timely certify
7 election results without disenfranchising many eligible voters whose ballots would be rejected
8 under the current Election Day Receipt Deadline statutes.

9 56. The Secretary and voters have a strong interest in having ballots counted and
10 the risk of not having ballots counted under the Election Day Receipt Deadline statutes
11 presents a substantial risk of erroneous deprivation through voter disenfranchisement. The
12 Election Day Receipt Deadline does not promote a compelling state interest. Rather, a
13 postmark deadline would result in more voters having their ballots counted while not
14 imposing an additional burden on election officials or imperiling any post-election deadlines.
15

16 **V. Cure Deadline.**

17 57. The Court finds the Cure Deadline statutes violate Montana's Constitution by
18 burdening the right to vote and by denying the right to due process.
19

20 58. Montana law has provided voters an opportunity to cure any deficiency in a
21 mail ballot since at least 1985 when the legislature enacted Mon. Code Ann. § 13-19-313.
22 Since 1999, Montana has allowed all eligible citizens to vote by absentee ballot without
23 excuse, in all elections. The number of Montanans who cast absentee ballots has steadily
24 grown since 2000. Since 2012 more than half of Montanans have cast absentee ballots in
25 federal elections and in 2018 nearly three quarters of all votes were absentee. The Cure
26 Deadline has not been adjusted to account for the adoption of no-excuse absentee voting
27

1 and an increasing number of Montanans choosing to vote absentee. The failure to adjust the
2 Cure Deadline as most Montanans have shifted to voting absentee makes the compliance
3 costs of voting higher.
4

5 59. In Montana, absentee ballots are not counted if a voter failed to sign their ballot
6 envelope, if an election official determines the signature on the ballot and the voter's
7 signature on file with the county elections office does not match, or if there is a question
8 concerning the validity of the ballot. Mont. Code Ann. § 13-13-241.

9 60. In these cases, absentee (and provisional) voters have only until 5:00 p.m. on
10 the day after Election Day to remedy the issue with their ballot. Mont. Code Ann. *Id.* §§ 13-
11 13-245; 13-15-107. If a voter is curing a ballot issue by mail, the voter must place the
12 necessary information in the mail with a postmark by 5:00 p.m. on the day after Election Day
13 and the information must be received by 3:00 p.m. on the sixth day after Election Day. *Id.*
14

15 61. Plaintiffs provided evidence that thousands of Montanans are disenfranchised
16 by curable signature-related issues. For example, since 2006 over 22,000 ballots have been
17 rejected for curable signature deficiencies and the number of ballots rejected for signature-
18 related deficiencies has increased steadily since 2006. The June 2020 primary election had
19 the highest signature-related rejection rate yet with 2,170 voters' ballots rejected for a
20 missing signature or signature mismatch.
21

22 62. In the June 2020 primary election, rejection rates for ballots returned by mail
23 rose steadily as Election Day approached and the rejection rate for ballots returned by mail
24 was twice as high as the overall rejection rate for ballots received on Election Day.
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1 63. Election administrators must provide notice to the voter if there is a defect with
2 their ballot "as soon as possible . . . by the most expedient method available." Mont. Code
3 Ann. § 13-13-245.

4 64. Election administrators use a variety of methods to provide notice to voters
5 whose ballot is defective, including sending voters a letter, calling voters, or emailing voters.
6 Election officials have discretion for how they attempt to contact voters. Not all voters have
7 current phone numbers or email addresses on file with the county elections office.
8

9 65. The risk of having a ballot rejected for signature-related defects falls more
10 heavily on absentee voters. Like the June 2020 primary election, the November 2020 general
11 election will be a predominately all-mail election held during the COVID-19 pandemic. A
12 predominantly all-mail election will result in more ballots being delivered to county elections
13 offices through the mail and as such, more absentee voters will be at risk of
14 disenfranchisement due to the limitations imposed by the Cure Deadline.
15

16 66. The burden imposed by the Cure Deadline falls heaviest on voters whose
17 absentee ballot arrives to a county elections office near or on Election Day and subsequently
18 deemed deficient. These voters have less time to cure defective ballots than other voters
19 whose ballots arrived at elections offices earlier or voters who voted in person and were
20 notified of deficiencies immediately. Montana Democratic Party Senior Advisor Trent Bolger
21 testified that the list of voters with deficient ballots is not published until late morning to early
22 afternoon on the day after Election Day, giving those voters mere hours to cure their ballots if
23 they can even be contacted and notified of the deficiency in that time.
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67. If the Cure Deadline were extended, absentee voters whose ballot was received on or near Election Day would have more time to cure deficiencies and have their vote counted.

68. Election officials already process cure information between the second and sixth day after Election Day and processing cure information takes a few minutes.² Extending the Cure Deadline until the second Thursday after Election Day would not result in a substantial burden on county election officials and would result in more voters having their ballot counted.

From the above Findings of Fact, the Court enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Article II, Section 13 of Montana's Constitution states:

Right of suffrage. All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

2. Article II, Section 6 of Montana's Constitution states:

Freedom of assembly. The people shall have the right peaceably to assemble, petition for redress or peaceably protest governmental action.

3. Article II, Section 7 of Montana's Constitution states:

Freedom of speech, expression, and press. No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty. In all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.

4. Article II, Section 17 of Montana's Constitution states:

² Sanders County Elections Administrator Nichol Scribner testified that the county election office in Sanders County utilizes a DS850 high-speed digital ballot tabulator that can count 11,000 ballots per hour.

1 Due process of law. No person shall be deprived of life, liberty, or
2 property without due process of law.

3 5. The rights of suffrage, freedom of assembly, freedom of speech and
4 expression, and due process are all fundamental rights set forth in the Declaration of Rights
5 in Montana's Constitution. See e.g. *State v. Riggs*, 2005 MT 124, ¶ 47 ("A right if
6 'fundamental' under Montana's Constitution if the right . . . is found in the Declaration of
7 Rights.") Because these rights are fundamental, statutes like BIPA, the Election Day
8 Receipt Deadline, and the Cure Deadline that infringe upon these rights "must be strictly
9 scrutinized and can only survive scrutiny if the State establishes a compelling state interest
10 and that its action is closely tailored to effectuate that interest and is the least onerous path
11 that can be taken to achieve the State's objective." *Montana Env'tl. Info. Ctr. v. Dep't. of*
12 *Env'tl. Quality*, 1999 MT 248, ¶ 63; *Finke v. State ex. Rel. McGrath*, 2003 MT 48, ¶ 15. The
13 State must "prove the compelling interest by competent evidence." *Wadsworth v. State*, 275
14 Mont. 287, 911 P.2d 1165, 1174 (1996). Merely alleging that a compelling interest exists is
15 not enough to justify interference with the exercise of a fundamental right. *Id.*

16 6. The Secretary failed to demonstrate any legitimate state interest, much less a
17 compelling interest, that BIPA actually promotes. BIPA does not prevent ballot interference
18 or fraud. BIPA does not promote election integrity or public confidence. BIPA does not
19 decrease the costs of voting or ease the burden upon election officials.

20 7. The Court concludes that BIPA burdens the right to vote by eliminating
21 important voting options that make it easier and more convenient for voters to vote. By
22 increasing the costs of voting, BIPA will decrease voter turnout and increase the number of
23 ballots rejected for being late or for signature deficiencies. The burdens BIPA places on
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1 voting fall disproportionately on the poor; the elderly; the disabled; inexperienced voters;
2 those who cannot miss work to vote; Native Americans, especially those living on rural
3 Native American tribal lands; students; and those whose work and family care
4 responsibilities significantly limit their ability to return their absentee ballot on their own.
5

6 8. The Court concludes beyond a reasonable doubt that BIPA violates Article II,
7 Section 13 of Montana's Constitution by burdening the right to vote in Montana without
8 promoting any legitimate state interest. The Court's conclusion would not change even if
9 BIPA was analyzed under the balancing test proposed by the Secretary. That test would
10 balance the burdens BIPA imposes on voting against Montana's interests in burdening the
11 right to vote. Because BIPA fails to promote any legitimate state interest, the burdens BIPA
12 places on Montana voters do not pass constitutional scrutiny even under the State's
13 proposed balancing test. As the Secretary acknowledged at trial, BIPA is bad for
14 democracy in Montana. BIPA suppresses voting while increasing needless administrative
15 expense and red tape.
16

17 9. The Court concludes beyond a reasonable doubt that BIPA violates the rights
18 to free speech and association guaranteed under Article II, Section 6 and 7 of Montana's
19 Constitution. BIPA significantly restricts Plaintiffs and other organized collection services
20 from exercising their rights to fully engage in GOTV efforts by assisting voters with returning
21 their ballots in time to be counted. Helping voters, particularly vulnerable populations, to
22 return their ballots implicates core political speech and conduct protected by Article II,
23 Sections 6 and 7 of Montana's Constitution. As noted earlier, BIPA does not promote or
24 protect any legitimate state interest. BIPA, however, precludes organized ballot collection
25 services from talking to voters about helping them return their ballots in time to be counted
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1 and from collecting and delivering their ballots unless authorized by BIPA. Because these
2 restrictions are not justified by a compelling state interest, BIPA violates Article II, Sections 6
3 and 7 of Montana's Constitution.

4
5 10. The Court concludes beyond a reasonable doubt that BIPA violates the
6 Plaintiffs' right to due process guaranteed under Article II, Section 17 of Montana's
7 Constitution. To comply with due process, a Montana statute "must be drawn with sufficient
8 clarity and definiteness to inform persons of ordinary intelligence what actions are
9 proscribed (vagueness) and it cannot be susceptible of reaching constitutionally protected
10 activity (vagueness and overbreadth.)" *City of Whitefish v. O'Shaughnessy*, 704 P.2d 1021,
11 1025 (Mont. 1985). As discussed above, BIPA's definition and use of the term
12 "acquaintance" is vague and ambiguous; it requires a ballot collector to speculate about
13 whether the collector and voter have become acquaintances after a GOTV conversation
14 lasting a few minutes. It is undisputed that uncertainty over the meaning of "acquaintance"
15 has caused organized ballot collection services to discontinue collecting and delivering
16 ballots. In so doing, BIPA inhibits the Plaintiffs from exercising their constitutional rights of
17 free speech and association for fear of violating BIPA and being subject to a \$500.00 per
18 collected ballot fine. By failing to define the meaning of "acquaintance" with sufficient clarity
19 and definiteness, BIPA violates the Plaintiffs' right to due process.

22 11. The Election Day Receipt Deadline statutes burden the right to vote because
23 thousands of Montanans have been disenfranchised when voting by mail. All absentee
24 voters who misjudge how long the U.S.P.S. will take to deliver their ballot or who are
25 unaware that a postmark on or shortly before Election Day is insufficient are disenfranchised.

26
27 12. The Election Day Receipt Deadline disproportionately burdens absentee voters

1 because it forces them to cast their ballots at least a week before Election Day, thereby
2 foregoing the opportunity to gather information that arises during the final week leading up to
3 Election Day. The Election Day Receipt Deadline also disproportionately burdens some
4 absentee voters more than others depending on their location within Montana because some
5 counties experience faster mail delivery times than others.
6

7 13. The COVID-19 pandemic exacerbates the number of voters who are
8 disenfranchised by the Election Day Receipt Deadline. The November 2020 general election
9 will be a predominantly all-mail election where more voters will rely on the mail to deliver their
10 ballot. Voters cannot control when their ballot is delivered by the U.S.P.S. and thus whether
11 their ballot will arrive on time.
12

13 14. The Secretary has shown no legitimate interest in maintaining the current
14 Election Day Receipt Deadline nor have they shown that the Election Day Receipt Deadline
15 is narrowly tailored to achieve any legitimate interest.
16

17 15. Montana already allows certain ballots to be counted if they arrive after Election
18 Day and are postmarked before Election Day and Montana already counts such ballots,
19 along with provisional ballots, on the Monday following Election Day. The Secretary
20 presented no evidence that the election certification would be threatened by an extension of
21 time for accepting ballots.
22

23 16. The Secretary and voters have a strong interest in having ballots counted and
24 the risk of not having ballots counted under the Election Day Receipt Deadline presents a
25 substantial risk of erroneous deprivation of the fundamental right to vote. While, the Election
26 Day Receipt Deadline promotes the Secretary's compelling interest in having an election
27 deadline, it is not the least onerous method of furthering that interest. Rather, a postmark

1 deadline would further the Secretary's interest having a deadline and safeguard against
2 disenfranchising voters.

3 17. The Cure Deadline imposes a significant burden on many Montana voters and
4 thousands of Montanans have been disenfranchised by curable signature-related issues.
5

6 18. The short deadline to cure ballot deficiencies prevents voters from curing
7 ballots, especially the large number of voters' whose ballots are received by election offices
8 on or near Election Day.

9 19. The burden of curing a ballot by the Cure Deadline falls disproportionately on
10 voters who vote by mail.

11 20. The Secretary and voters have a compelling interest in having ballots counted.
12 The Secretary has no compelling interest in maintaining the current Cure Deadline. The Cure
13 Deadline presents a substantial risk of erroneous deprivation of voters' right to have their
14 ballots counted. Extending the Cure Deadline would allow more people to cure ballot
15 deficiencies and have their votes counted without significantly burdened election officials or
16 jeopardizing other election deadlines.
17

18 ORDER

19 Based upon the above Findings of Fact and Conclusions of Law;
20

21 **IT IS HEREBY ORDERED:**

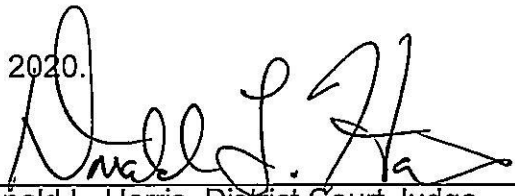
22 1. The Plaintiffs' requested relief that BIPA be declared unconstitutional and
23 BIPA's enforcement enjoined for violating Article II, Sections 13, 6, 7, and 17 of Montana's
24 Constitution is **GRANTED**;
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26
27

1 2. The Defendant and his agents, officers, employees, successors and all
2 persons acting in concert with each or any of them are **IMMEDIATELY** and **PERMANENTLY**
3 prohibited from enforcing the provisions of the Ballot Interference Prevention Act, Mont. Code
4 Ann. § 13-35-701 *et seq.*

5
6 3. The Plaintiffs' requested relief that the Election Day Receipt Deadline statutes
7 and Cure Deadline statutes be declared unconstitutional and their enforcement enjoined for
8 violating Article II, Sections 13 and 7 of Montana's Constitution is **GRANTED ONLY FOR**
9 **THE NOVEMBER 3, 2020 GENERAL ELECTION** as follows:

- 10 a) All absentee ballots postmarked on or before Election Day shall be
11 counted, if otherwise valid, provided such ballots are received by
12 election officials by the deadline for federal write-in ballots for
13 military and overseas voters; and
- 14 b) The Cure Deadline statutes shall be extended until 3:00 p.m. on the
15 second Thursday (9 days) after Election Day, at which time all cure
16 information permitted under Mont. Code Ann. §§ 13-13-245(2)(a)
17 and 13-15-107 must be received by election officials.

18 DATED this 25th day of September, 2020.

19 
Donald L. Harris, District Court Judge

20
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