IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 20-0295

ROBYN DRISCOLL; MONTANA DEMOCRATIC PARTY; AND DEMOCRATIC SENATORIAL CAMPAIGN COMMITTEE,

Plaintiffs and Appellees,

V.

COREY STAPLETON, IN HIS OFFICIAL CAPACITY AS MONTANA SECRETARY OF STATE,

Defendant and Appellant.

INTERVENORS WESTERN NATIVE VOICE, MONTANA NATIVE VOTE, ASSINIBOINE AND SIOUX TRIBES OF FORT PECK, BLACKFEET NATION, CONFEDERATED SALISH AND KOOTENAI TRIBES, CROW TRIBE AND FORT BELKNAP INDIAN COMMUNITY'S ANSWER BRIEF

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INTRODUCTION

With this appeal the State asks this Court to carve out one of our fundamental rights – the right to vote – for less exacting scrutiny. The District Court properly employed a strict scrutiny standard in enjoining the Ballot Interference Prevention Act ("BIPA"). The Court should refrain from heading down this slippery slope. The Framers of the Montana Constitution specifically enumerated fundamental protections in our Declaration of Rights. Those protections have historically been jealously safeguarded by the Montana Supreme Court. The Court should reaffirm the principle that any law burdening the right to vote is subject to strict scrutiny.

The BIPA is a solution in search of a problem. The State presented no evidence to the District Court that voter fraud or intimidation is present in Montana elections. And the other side of the ledger is heavy. By effectively ending ballot collection and conveyance, the BIPA violates Appellees' and Intervenors' rights under the Montana Constitution, including the right to vote. In particular, rural tribal communities across the seven reservations in Montana depend on ballot collection to participate in elections, and many Native Americans will be denied the right to vote in the upcoming 2020 elections unless the BIPA is enjoined. Now, more than ever, voters need to have the option to cast their ballots outside of the polling place. Native American communities in Montana—many of whom already face barriers that render travel to polling places infeasible—will be disproportionately

disenfranchised during this pandemic if they cannot rely on ballot collection because they have insufficient access to the vote by mail apparatus.

Allowing the BIPA to be in effect for the 2020 primaries and general election will irreparably harm Native Americans living on rural reservations and the organizations working with them. The District Court's order enjoining the Ballot Interference Prevention Act should be affirmed.

STATEMENT OF THE ISSUES

1. Whether the constitutional right to vote is treated differently than other fundamental rights and subjected to a reduced level of scrutiny.
2. Whether the district court erred by enjoining the Ballot Interference Prevention Act.

STATEMENT OF THE CASE

On March 13, 2020, Appellees Robyn Driscoll, the Montana Democratic Party, and the Democratic Senatorial Campaign Committee filed a complaint in Yellowstone County District Court alleging that the BIPA, Mont. Code Ann. § 13-35-701 *et seq*., and the Election Day deadline set forth in Mont. Code Ann. § 13-13-201 are unconstitutional. Dkt. 1. Appellees alleged that the BIPA violates their fundamental right to vote, right to speak and associate, and their due process rights. Their case was assigned to the Honorable Donald L. Harris in the 13th Judicial District Court. One day prior, on March 12, 2020, Intervenors Western Native

Voice, Montana Native Vote, Assiniboine and Sioux Tribes of Fort Peck, Blackfeet Nation, Confederate Salish and Kootenai Tribes, Crow Tribe and Fort Belknap Indian Community ("Intervenors") also filed a complaint in Yellowstone County District Court alleging that the BIPA violates their fundamental right to vote, right to speak and associate, and their due process rights. The Honorable Jessica Fehr presides over Intervenors' District Court case.

Appellees also moved for a preliminary injunction enjoining enforcement of the BIPA and the Election Day deadline in advance of the June primary election. Dkt. 4-16. The parties proceeded without a hearing, and the State provided virtually no sworn testimony in opposition to Appellees' Motion.[1]

On May 22, 2020, Judge Harris issued an order granting Appellees' Motion for Preliminary Injunction. Dkt. 25. The Court concluded that "[b]ecause voting rights are fundamental, statutes like the BIPA and the Receipt Deadline that allegedly infringe upon the right to vote 'must be strictly scrutinized and can only survive strict scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest'…" *Id.* (citations omitted). In granting the injunction the Court found that "the State failed to present any evidence to dispute Plaintiffs' evidence." *Id.* It further found that the evidence in the record

[1] Intervenors similarly moved for a temporary restraining order and preliminary injunction enjoining enforcement of the BIPA for the primary election and pending final resolution of their claims. Judge Fehr entered a TRO enjoining the BIPA on May 20, 2020.

demonstrated that "there has never been a documented case of absentee ballot collection fraud in Montana." Ultimately, the Court concluded that the Plaintiffs had demonstrated *both* that they were likely to succeed on the merits of their claims *and* that they would suffer irreparable injury absent an injunction. *Id.*

On June 3, 2020, the State notified the Court that it would appeal the Preliminary Injunction of the BIPA as well as the Election Day deadline. (Am. Notice of Appeal, DA 20-0295 (June 3, 2020).)

On June 12, 2020, Intervenors moved to intervene in this proceeding. Intervenors noted that there are two pending district court proceedings seeking a permanent injunction preventing enforcement of the BIPA for the 2020 general election and all future elections. *Driscoll et al. v. Stapleton*, Cause No. DV 20-0408 (13th Judicial District, Hon. Donald Harris) ("*Driscoll*"); *Western Native Voice et al. v. Stapleton et al.*, Cause No. 20-0377 (13th Judicial District, Hon. Jessica Fehr) ("*Western Native Voice*"). The cases are similar, but not identical. Both involve constitutional claims pursuant to Article II, §§ 6, 7, 13 and 17 of the Montana Constitution. However, the cases involve different parties, different expert witnesses, and different factual allegations about how the BIPA infringes upon the constitutional rights of the respective plaintiffs. Specifically, the *Western Native Voice* Plaintiffs allege that rural tribal communities across the seven reservations in Montana depend on ballot collection to participate in elections, and many Native

Americans will be denied the right to vote in the upcoming 2020 elections unless the BIPA is enjoined. On June 18, 2020, this Court granted Intervenors' Motion to participate in the instant proceeding.

On July 7, 2020, Judge Fehr issued an order granting Plaintiffs' Motion for Preliminary Injunction in *Western Native Voice*. Like Judge Harris's Order, Judge Fehr concluded that the Plaintiffs were likely to succeed on the merits of their claims, and also would suffer irreparable harm if the law were to remain in effect. In addition to demonstrating a violation of the right to vote, Judge Fehr concluded that the "Plaintiffs have established a *prima facie* violation of their right to free speech, right to freedom of association and right to due process." Order Granting Plaintiffs' Motion for Preliminary Injunctive Relief, DV 2020-377 (July 7, 2020).

STATEMENT OF FACTS

Intervenors incorporate by reference Appellees' Statement of Facts. In addition, the record before the District Court when it considered Appellees' Motion for Preliminary Injunction included both Intervenors' Brief in Support of their Motion for Preliminary Injunction in the *Western Native Voice* proceeding (Exhibit 22 to Plaintiffs/Appellees' Brief) as well as the affidavit of Marci McLean, the executive director of *Western Native Voice* (Exhibit 23 to Plaintiffs/Appellees' Brief). Accordingly, the Court may properly consider those facts presented to the

District Court in support of the *Western Native Voice* Motion for Preliminary Injunction.[2]

The vast majority of Montana voters who cast a vote utilize the absentee voting process: in the 2018 general election, of 509,213 votes, 372,400 were absentee votes (73.13%). Dkt. 5 at 4; Dkt 7 at 7. The BIPA prohibits the knowing collection of a ballot, unless the collector is the voter's acquaintance, family member, caregiver, household member, postal service worker, or election official. Mont. Code Ann. § 13-35-703. Unless they are a postal service worker or election official, the limited individuals who can collect ballots may collect no more than six ballots in any instance and must sign a registry form. Mont. Code ann. §§ 13-35-703; 13-35-704. Failure to follow the BIPA subjects one to a fine of $500 per ballot collected. Mont. Code ann. § 13-35-705. Further, because BIPA forms are signed and sworn to under penalty of perjury, violations of the BIPA could lead to imprisonment. Mont. Code Ann. § 45-7-201.

The Montana Association of Clerk and Recorders ("MACR") disputed the need for the BIPA. Dkt. 5 at 7-8; Dkt. 15 at ¶¶ 6-8, 17-18. During a hearing before the State Administration and Veteran Affairs Committee on February 27, 2020, the Cascade County Elections Administrator testified that she refers to the BIPA as the "Voter Suppression Act of 2018 … because we've taken away the rights, in my

[2] The State did not object to Intervenors' Motion to Intervene provided they "rely only on the record in *Driscoll*."

county specifically, to drop the ballot 24 hours a day to utilize that office on the weekends, to drive up and drop it off, unless we have somebody staffing that." Dkt. 5 at 8; Dkt. 16 at Exh. 3. During the same hearing, the Gallatin County Clerk testified that "this is a suppressive act. This is a way of impeding voters from accessing their enfranchisement." Dkt. 16 at Ex. 3.

Voter fraud has historically been rare, if not nonexistent in Montana. The BIPA's legislative history identifies no instances of abuse of organized absentee ballot assistance. Indeed, *no members of the public testified in support of the bill.* The bill's sponsor offered merely a few anecdotes about voters giving a collector their ballots and then calling law enforcement to report the collection activity as suspicious. Dkt. 5 at 11. Elections administrators testified that ballot collection has not resulted in any voting irregularities and that there was no legitimate need for the ban. Dkt. 15 at ¶¶ 8-11; Dkt. 16 at Ex. 1. Their testimony is consistent with analyses by the current and former Montana Secretaries of State, which have found that voter fraud of any kind is exceedingly rare. Dkt. 16 at Ex. 18, 13, 19. Indeed, Appellees' expert witness was unable to identify even a single case of documented fraud relating to ballot collection. Dkt. 7 at 4-5. In any event, no such evidence was offered in support of the BIPA.

Montana is home to seven Indian reservations: the Blackfeet Indian Reservation, the Crow Reservation, the Flathead Reservation, the Fort Belknap

Reservation, the Fort Peck Indian Reservation, the Northern Cheyenne Indian Reservation, and the Rocky Boy's Reservation. Sixteen counties intersect with these reservations. These reservations are home to thousands of Montana voters who lack equal access to the ballot and who experience greater barriers to casting mail ballots (both absentee and ballots in mail-only election) than do other Montanans. Dkt. 5 at 6-7; Dkt. 16 at Exh. 22 and 23 ("Perhaps no segment of Montana voters is more burdened by the ban than Native American voters in rural tribal communities. Those voters have been forced to rely on ballot collection at particularly high rates because of geographic isolation, unreliable access to mail service, high rates of poverty, and other factors."); *see also*, Dkt. 7 at 2.

Native American voters face multiple obstacles to voting. First, there is a lack of uniform and consistent addressing systems. Dkt. 16, Exh. 23, ¶ 16. County offices reject hundreds of voter registration forms, largely due to inconsistencies in the home addresses provided by tribal registrants. *Id.* Second, most tribal nation residents no not receive mail at home and must instead use a post office box. *Id.*, ¶ 17. It is a common occurrence for multiple families to share a single post office box. *Id.* In recent years the return rate for absentee ballots issued in tribal nations has decreased significantly. *Id.* Third, many Native American voters must travel long distances to reach county election offices to hand deliver ballots. *Id.*, ¶ 18. On average, tribal members must travel 85 miles round trip to reach their county election

offices. *Id.* Finally, even though there are some satellite voting locations now open in Indian country, they are generally staffed for short periods of time and are often located far away from rural communities within tribal boundaries. The BIPA exacerbates all of these problems. *Id.*, ¶ 20.

Western Native Voice ("WNV") and Montana Native Vote ("MNV") are Native-led voting rights organizations dedicated to enhancing the political effectiveness of Native communities in Montana. *Id.*, ¶ 6. These organizations hire community organizers to collect ballots on each of the reservations in the state. *Id.*, ¶ 9. No other organizations perform the type of work that WNV and MNV do. *Id.*, ¶ 25. During the 2018 election cycle, these organizations hired dozens of community organizers and collected at least 853 ballots. *Id.*, ¶ 10. The work of WNV and MNV has helped increase voter turnout in Indian Country. *Id.*, ¶ 13. In part because of these organizations' work, 7,704 more tribal community members voted in 2018 than in 2014. *Id.*, ¶ 14. Unfortunately, with the BIPA in effect WNV and MNV made the decision not to hire ballot collectors in advance of the 2020 primary election. *Id.*, ¶ 15. Indeed, with the BIPA in place it would be virtually impossible for these organizations to recruit, hire, and train enough organizers to adequately carry out ballot collection efforts. *Id.*, ¶ 22. The cost of ballot collection operations will increase astronomically with the BIPA in effect. *Id.*

The BIPA will cause confusion and anxiety among organizers. *Id.*, ¶ 23. Because of the vague language in the statute, organizers are uncertain as to whether they qualify as an "acquaintance" of a particular voter. *Id.* Organizers are also chilled by the criminal penalties that the BIPA imposes. *Id.*, ¶ 24.

STANDARD OF REVIEW

This Court reviews a district court's order granting a preliminary injunction for manifest abuse of discretion. *Shammel v. Canyon Res. Corp*., 2003 MT 372, ¶¶ 11–12, 319 Mont. 132, 136–37, 82 P.3d 912, 916; *see also Cole v. St. James Healthcare*, 2008 MT 453, ¶ 22, 348 Mont. 68, 74, 199 P.3d 810, 815 ("Under the manifest abuse of discretion standard, we give great deference to a district court's findings of fact in reviewing the grant or denial of a preliminary injunction."). "A 'manifest' abuse of discretion is one that is obvious, evident or unmistakable." *Shammel*, ¶ 12.

A preliminary injunction may be granted "when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant." Mont. Code Ann. § 27-19-201(2). Where, as here, the underlying claim involves constitutional rights, that constitutional rights may be violated is *per se* irreparable harm. *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 229, 286 P.3d 1161, 1165 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The parties below satisfied the requirements for a

preliminary injunction under Montana law. "An applicant need only establish a prima facie case, not entitlement to final judgment." *Weems v. State by & through Fox*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4. Under Montana law, "'[p]rima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Id.* (citations omitted).

A district court's decision to apply strict scrutiny and its conclusion, at this stage, that a statute is likely unconstitutional are also questions of law reviewed *de novo*. *See Wadsworth v. State*, 275 Mont. 287, 298, 911 P.2d 1165, 1171 (1996). The underlying issues of fact are reviewed for clear error. *See State v. Reynolds*, 2017 MT 25, ¶ 13, 386 Mont. 267, 389 P.3d 243.

SUMMARY OF ARGUMENT

The District Court properly subjected the BIPA to a strict scrutiny analysis. The general rule in Montana is that legislation burdening a fundamental right is subjected to strict scrutiny. The State has failed to articulate any reason why the Court should apply a relaxed standard to statutes burdening the right to vote. While the State may regulate the right to vote, that authority can only be exercised within constitutional limits.

Applying a strict scrutiny analysis, the District Court properly concluded that the law is not narrowly tailored to achieve a compelling government interest. The State failed to present *any* evidence that the BIPA: (1) will promote the integrity,

security or efficiency of absentee voting; (2) will reduce election costs or burdens; and (3) will increase voter turnout. Accordingly, the State cannot meet its burden to demonstrate that the BIPA meets a compelling state interest.

Even if the Court were to adopt the flexible *Anderson-Burdick* standard, the BIPA was properly enjoined because the District Court correctly found that the BIPA advances "no legitimate state interests," yet places "significant burdens on the fundamental right to vote" and disproportionately burdens Native American voters. Dkt. 25 at 12.

ARGUMENT

1. The fundamental right to vote requires strict scrutiny of any statute imposing a burden on the ability to cast a ballot.

The State asks this Court to carve out a dangerous exception to the well-established rule that legislation implicating a fundamental constitutional right is evaluated under a strict scrutiny standard. Yet the State provides no binding authority supporting its argument that the right to vote should be treated differently than its constitutional counterparts. Rather, the State urges the Court to rely instead on federal cases: *Burdick v. Takushi* 504 U.S. 428, 434 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) to adopt the flexible "balancing test," known as *Anderson-Burdick*. This Court is not bound by *Anderson-Burdick* and should instead reaffirm the established Montana rule that fundamental rights are subject to strict scrutiny under the Montana Constitution.

In Montana, it is the "general rule" that strict scrutiny applies in voting rights cases. *Johnson v. Killingsworth*, 271 Mont. 1, 4, 894 P.2d 272 (1995). As the State concedes, this Court has "not specifically applied the federal balancing test." State Br. at 10. The U.S. Supreme Court decided *Anderson* in 1983 and *Burdick* in 1992. Since then, every voting rights case decided by the Montana Supreme Court under our own Constitution has reaffirmed the general rule that strict scrutiny applies in voting rights cases. *Killingsworth*, 271 Mont. 1; *Fink v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576.

And there is good reason for this Court to refrain from adopting the federal *Anderson-Burdick* balancing test. This Court has never been afraid to "walk alone" in terms of its divergence from federal constitutional interpretation. *State v. Long*, 216 Mont. 65, 69, 700 P.2d 153 (1985). "In interpreting the Montana Constitution, this Court has repeatedly refused to 'march lock-step' with the United States Supreme Court, even where the state constitutional provision at issue is nearly identical to its federal counterpart." *State v. Guillaume*, 1999 MT 29, ¶ 16, 293 Mont. 224, 975 P.2d 312.

The right to vote is foundational. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Larson v. State*, 2019 MT 28, 394 Mont. 167, 434 P.3d

241 (McKinnon dissent) (citations omitted). The suggestion that legislation impacting this most fundamental right should be subjected to a lower level of scrutiny runs counter to well-recognized principle that "the rights and guarantees afforded by the United States Constitution are minimal, and that states may interpret provisions of their own constitutions to afford greater protection than the United States Constitution." *State v. Johnson* (1986), 221 Mont. 503, 512, 719 P.2d 1248, 1254.

And in fact, Montana would not be "walking alone" in applying strict scrutiny to the BIPA and in rejecting the *Anderson-Burdick* test. In *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129, 2000 Ida., the Idaho Supreme Court rejected the *Anderson-Burdick* test and held that "[b]ecause the right of suffrage is a fundamental right, strict scrutiny applies." The Court distinguished *Anderson-Burdick* because, "*Burdick* did not deal with the Idaho Constitution and instead was decided under the United States Constitution." Moreover, "[t]he ballot designation here relates to the very basic right of a voter to express support for a candidate within the sanctity of the voting booth. We find no reason to apply a different standard to the exercise of this fundamental right and will apply strict scrutiny to our analysis of I.C. § 34-907B." *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 15 P.3d 1129, 2000 Ida.

The State argues that the legislature can regulate the right to vote, and that is of course correct. However, the State's authority to regulate elections must be exercised "within constitutional limits." *Larson*, 2019 MT 28, ¶ 21. The Legislature certainly does not have authority to enact voting restrictions that run afoul of the Montana constitution. Yet that is what the State argues – that because there is a "constitutional mandate directing that the Legislature. . . enact laws controlling elections," State Br. at 13, therefore the legislature has wide discretion to circumscribe the fundamental right to vote. This is not an outcome that this Court should sanction. And indeed it has not.

In *Finke*, the Court applied strict scrutiny to a law that limited participation in municipal building code elections. *Finke*, 2003 MT 48, ¶ 15. The Court first noted that increased state regulation might be permitted "in the event of a special-purpose unit of government whose functions affect a distinct group of citizens more than other citizens." *Id.*, ¶ 19. Nevertheless, the Court concluded that "that elections to determine who may impose and enforce building codes in a given area are general interest rather than special interest elections. This being so, a law restricting the franchise may be upheld only upon the State showing a compelling interest." *Id.*, ¶ 21. Indeed, as the Court (in 2002, ten years after *Burdick* was decided) held that municipal building code elections are subject to strict scrutiny, it is no doubt true that the BIPA – a law impacting all Montanans – should likewise be reviewed under

that standard. And that the Court relied upon federal authority to arrive at this result is not relevant – the Court appropriately relied on persuasive authority to create law that is now mandatory. To agree with the State and adopt the *Anderson-Burdick* test would require this Court to expressly overrule *Finke.*

The State cites *Killingsworth* to support the proposition that Montana courts follow federal law, but *Killingsworth* is distinguishable from the instant case. In *Killingsworth* the Court took pains to note that application of the rational basis test derived from the fact that "Montana irrigation districts are special, limited-purpose units of government, the activities of which have a disproportionate effect on landowners within such districts as a group. As a result, it is appropriate to depart *from the usual strict scrutiny applied to statutes impacting on a citizen's right to vote* and analyze the freeholder requirement contained in § 85-7-1501, MCA, under the reasonable relationship standard." *Killingsworth*, 271 Mont. at 12 (emphasis added). Unlike the freeholder requirement at issue in *Killingsworth*, the BIPA potentially impacts every voter in Montana, and, in particular, the Intervenors. Voting rights cases involving "general" governance issues such as "taxing authority, street maintenance, sanitation, health, or welfare services" are properly evaluated under a strict scrutiny standard. *Killingsworth*, 271 Mont. at 19.

Thus, in every case involving Montana's general elections scheme the Court has held that – with very narrow exceptions not applicable here – strict scrutiny applies.

In addition, the legislature's authority to regulate voting is designed to ensure free and fair elections, not limit them. The vast majority of Montana's statutes regulating elections (Mont. Code Ann. § 13-13-101 *et seq*.) are designed to expand, not limit the franchise. *See, e.g.* Mont. Code Ann. § 13-13-111 (the election administrator shall provide a sufficient number of voting stations to allow voting to proceed with as little delay as possible); Mont. Code Ann. § 13-13-112 (instructions for electors on how to prepare their ballots or use a voting system must be posted in each voting station provided for the preparation of ballots); Mont. Code Ann. § 13-13-114 (providing an expansive list of identification and documents to permit voter registration); Mont. Code Ann. § 13-13-118 (providing accommodations for disabled voters); Mont. Code Ann. § 13-13-120 (providing for poll watchers); Mont. Code Ann. § 13-13-122 (preventing obstructions to a polling place). These statutes, which are designed to ensure free and fair elections, are examples of the appropriate exercise of the legislature's authority to regulate voting.

Subjecting the BIPA, or indeed any statute, to strict scrutiny does not automatically mean that it does not pass constitutional muster. Instead, it must be narrowly tailored to achieve a compelling governmental interest. The District Court

preliminarily found that the BIPA is neither narrowly tailored nor targeted at a compelling state interest. That is, the Plaintiffs established a prima facie case. This matter is scheduled for a District Court trial on September 14, 2020. At that trial the State will have the opportunity to present facts and testimony demonstrating that the BIPA is narrowly tailored to further a compelling government interest.

Finally, the State argues that, using the police power, the Legislature may circumscribe fundamental constitutional rights. State's Br. at 12-13. No party would argue otherwise. In *Wiser v. State*, 2006 MT 20, 331 Mont. 28, 129 P.3d 133, the Court rejected denturists' claims that they should not be regulated by the Montana Board of Dentistry. The Court held that the police power circumscribes certain fundamental rights: "The State of Montana holds police power to regulate for the health and welfare of its citizens. . . Furthermore, the idea that the right to pursue employment and life's other 'basic necessities' is limited by the State's police power is imbedded in the plain language of the Constitution." *Wiser*, ¶ 24. The Court found that regulation of denturists by the Board of Dentistry was necessary to protect the health and welfare of Montanans. Here, the fundamental right to vote cannot be circumscribed by the police power because there is no issue implicating the health and welfare of Montana voters. Nor does the State make any such assertion. The State provides no other authority supporting its position that

fundamental rights can so circumscribed for a simple reason: there is no such authority.

It is clear that Montana's fundamental rights – those that are either found in the Declaration of Rights or rights "without which other constitutionally guaranteed rights would have little meaning" – are evaluated on a strict scrutiny standard. *Butte Community Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986); *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445; *see also, Oberg v. Billings*, 207 Mont. 277, 674 P.2d 494 (1983) ("Examples of fundamental rights include privacy, freedom of speech, freedom of religion, right to vote and right to interstate travel."). The right to vote "is protected in more than the initial allocation of the franchise, [but also] the manner of its exercise." *Big Spring v. Jore*, 2005 MT 64, ¶ 18, 326 Mont. 256, 261, 109 P.3d 219, 222 (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)). As far back as 1895, the Montana Supreme Court held, "[s]tatutes tending to limit a citizen in the exercise of the right to vote should be liberally construed in his favor." *Stackpole v. Hallahan* (1895), 16 Mont. 40, 40 P. 80. The State asks this Court to start down a dangerous path that inevitably leads to the erosion of these fundamental rights. If the Court were to single out the right to vote for relaxed scrutiny, will the State next argue that the right to know, or the right to free speech, or the right of privacy, likewise be evaluated using a federal balancing test? The Court should reject this invitation and reaffirm the intent of the

framers that these rights are the building blocks of our democratic system. Any legislation burdening these fundamental rights must be evaluated according to the strict scrutiny standard.

2. Under the strict scrutiny standard, the District Court properly enjoined the BIPA

The District Court correctly enjoined the BIPA and held that it was "subject to strict scrutiny and that the State must demonstrate through competent evidence that the statutes further compelling state interests." Dkt. 25 at 12. Voting is a fundamental right and therefore strict scrutiny must apply. *See argument, supra,* at 11-18. The BIPA cannot survive strict scrutiny review.

a. The State has not shown a compelling interest.

The District Court found that the "BIPA serves *no legitimate purpose*," Dkt. 25 at 10 (emphasis added), and that the State failed to present "*any evidence from any election official* that the BIPA: (1) will promote the integrity, security or efficiency of absentee voting; (2) will reduce election costs or burdens; and (3) will increase voter turnout," which necessarily means that the State "failed to demonstrate through competent evidence that there is any compelling state interest that warrants the burdens and interference on the right to vote created by BIPA. . . ." *Id*. at 12 (emphasis added).

This Court has held:

> Strict scrutiny of a legislative act requires the government to show a compelling state interest for its action. When the government intrudes upon a fundamental right, any compelling state interest for doing so must be closely tailored to effectuate only that compelling state interest. In addition to the necessity that the State show a compelling state interest for invasion of a fundamental right, the State, to sustain the validity of such invasion, must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective.

Wadsworth v. State, 922 P.2d 1165, 1174 (1996) (internal citations omitted).

The State's assertions concerning the potential for ballot fraud and voter intimidation are speculative and unsupported by any facts. The State admits there is not a single example of voter fraud in Montana caused by ballot collection. State Br. at 34. The State's suggestion that the BIPA's passage by a majority of the voters constitutes a compelling interest is also not credible. State Br. at 28. One's fundamental right to vote does not depend on the outcome of any election, and a citizen's constitutional right to vote cannot be infringed simply because a majority of the people choose that it be. *Cf. United States v. Windsor*, 570 U.S. 744 (2013). And the District Court properly rejected this argument: "[I]nitiatives must still pass constitutional muster. Whether enacted by the legislature or by voter referendum, statutes cannot violate the Constitution." Dkt. 25 at 15. The State does not meet its burden to present a compelling interest. The State has infringed upon the Appellees' and Intervenors' fundamental right to vote without providing a compelling interest for doing so.

b. The State has not shown that the BIPA is narrowly tailored.

The State also fails to show that the BIPA is narrowly tailored to effectuate the State's asserted compelling interest of preventing potential fraud. *State v. Brooks*, 2012 MT 263, ¶ 17, 367 Mont. 59, 65, 289 P.3d 105, 109; *Armstrong v. State*, 1999 MT 261, ¶ 34, 296 Mont. 361, 373–74, 989 P.2d 364, 374. The burden of proof to show that BIPA is narrowly tailored falls on the State. *In re Adoption of A.W.S.*, 2014 MT 322, ¶ 17, 377 Mont. 234, 238, 339 P.3d 414, 417; *Snetsinger*, 2004 MT 390, ¶ 17.

Of the six categories of individuals who can collect ballots, the BIPA arbitrarily limits the number of ballots they may legally collect to six. The State offers no interest for this specific limitation. Assuming the State's interest is to prevent ballot fraud and voter intimidation, the random limit of six is not narrowly tailored to achieve that. At the House Committee on the Judiciary hearing to consider the bill, in response to a question of, "how did you decide on the number of six," Senator Olszweski stated he performed a "small survey sample" and did not speak to any organizations like Western Native Voice. Dkt. 7 at 4. Nothing in the legislative history suggests that limiting the collection to just six ballots somehow addresses fraud.

Moreover, BIPA applies to *all* ballots collected, even when affirmatively solicited by voters themselves. And the BIPA apparently applies only to ballots

delivered in person, and not ballots returned by mail. This arbitrary distinction demonstrates conclusively that the BIPA is not narrowly tailored.

Assuming there is a potential for fraud in Montana related to ballot collection—and the State admits it cannot show there ever has been any such fraud—the BIPA does not solve that problem. At each hearing on the BIPA, a representative of the Montana Association of Clerk and Recorders testified that BIPA targets voters who are "doing things right, rather than creating a deterrent for the people who would do things wrong." Dkt 16, Exh. 1 at 9. Audrey McCue, the Lewis and Clark County Elections Administrator, further testified that BIPA needed to be specific and clear in defining "ballot interference" and make only that conduct illegal. *Id.* at 7. Linda Stoll, representing the Montana Association of Clerk and Recorders, testified that the clerks had proposed tailored measures to address the alleged issues with ballot interference or tampering and those measures were rejected by the bill sponsor. *Id.*; Dkt. 15 at ¶ 15. The Court should give great weight to this testimony because election administrators have firsthand knowledge of how elections in Montana are administered. *See Upper Missouri Waterkeeper v. Montana Dep't of Envtl. Quality*, 2019 MT 81, ¶ 23, 395 Mont. 263, 273, 438 P.3d 792, 798.

In any event, Montana law already prohibits coercion or undue influence of voters. Mont. Code Ann. § 27-1-1501 *et seq.* There are a number of other statutes that make it illegal to engage in voter fraud, voter intimidation and ballot

interference. *See* Mont. Code Ann. § 13-35-214 (illegal influence of voters); Mont. Code Ann. § 13-35-218 (coercion or undue influence of voters); Mont. Code Ann. § 13-35-235 (incorrect election procedures information); Mont. Code Ann. § 13-27-106 (violations—penalties—false petition); Mont. Code Ann. § 13-35-207 (deceptive election practices); Mont. Code Ann. § 13-35-215 (illegal consideration from voting); Mont. Code Ann. § 13-35-201 (electors and ballots); Mont. Code Ann. § 13-35-205 (tampering with election records and information); Mont. Code Ann. § 13-35-604 (return of voter registration and absentee ballot applications). It is not clear what, if any, marginal benefit the BIPA produces over this existing fraud deterrent as the State was unable to articulate any. The State may deter or eliminate potential fraud with legislation more narrowly drawn. But the BIPA's prohibitions clearly are not.

c. The BIPA is not the least restrictive means.

Finally, the State has not shown the BIPA is the least restrictive means to achieve the State's objectives. The BIPA's prohibition on the collection of a voter's ballot does not take into account the severe obstacles to vote faced by Native Americans. Assistance from someone who is willing to deliver their ballots for them may be the only way they can participate in elections and to access their constitutional right to vote. Dkt. 16, Exh. 23 at ¶ 26. However, ballot collectors are understandably fearful of criminal penalties if they collect and deliver community

members' ballots. *Id.*, ¶ 24. "BIPA puts our communities and clients in a difficult position. Either we must subject some of our members engaged in critical GOTV work to legal scrutiny and potential incarceration, or we must effectively suspend our ballot collection operations." *Id.*, ¶ 25. The law should not suppress lawful conduct in furtherance of the right to vote as a means to suppress unlawful conduct. *See Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 255 (2002). The BIPA disenfranchises Native American voters and as such, cannot be the least onerous path.

Montana's numerical limit on the number of ballots collected makes it one of only 11 other states in the entire country that place a strict limit on the number of ballots that may be collected. Notwithstanding the severe burden that the BIPA places on Native Americans living on rural reservations, the fact alone that 39 other states are able to find a way to conduct fair elections in a less burdensome manner than Montana shows that the BIPA is not the least onerous path. The vast majority of other states regulate elections in a manner that imposes on fewer voters' rights.

3. Even applying a flexible federal court test, the BIPA was properly enjoined.

Though the BIPA should be evaluated under a strict scrutiny standard, even under the *Anderson-Burdick* balancing test, the District Court properly enjoined the statute. When applying the *Anderson-Burdick* balancing test to a state election law, courts "must weigh 'the character and magnitude of the asserted injury'" to the

plaintiff's constitutional rights "against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Under this balancing test, a court's "inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens" the plaintiff's constitutional rights. *Id.* No matter what standard the Court imposes under *Anderson-Burdick*, the BIPA would fail.

When assessing the severity of the burden on plaintiffs' right to vote under *Anderson-Burdick*, "courts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025, n. 2 (9th Cir. 2016). In fact, it is imperative that courts look at the effect on plaintiffs and the groups they represent because the right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561, 84 S. Ct. 1362, 1381, 12 L. Ed. 2d 506 (1964); *see also, Veasey v. Abbott*, 830 F.3d 216, 249, n. 40 (5th Cir. 2016) (en banc) ("The right to vote is personal and is not defeated by the fact that 99% of other people can secure the necessary credentials easily.") (citations omitted). The touchstone of the burden analysis, then, is how significantly the restriction threatens the right to vote for those voters who are harmed.

"Plaintiffs [do] not need to show that they were legally prohibited from voting, but only that 'burdened voters have few alternate means of access to the ballot.'" *Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (quoting *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998)). Intervenors easily meet this standard.

Because the BIPA imposes "severe restrictions" on Appellees' and Intervenors' constitutional rights, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *See id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). The District Court correctly found that the BIPA advances "no legitimate state interests," yet places "significant burdens on the fundamental right to vote" and disproportionately burdens Native American voters. Dkt. 25 at 7, 12. Native American voters in Montana face significant obstacles to voting, including limited access to residential mail service, geographic isolation, and poverty. Dkt. 16, Ex. 22 at 3–4, 9; Dkt. 16, Exh. 23 at ¶¶ 16–19. Native Americans living on reservations rely heavily on ballot collection and conveyance to cast their votes, and the BIPA significantly infringes on their ability to fully exercise their right to vote by taking away that mechanism. Dkt. 16, Ex. 22 at 9, 11; Dkt. 15 at ¶ 20; Dkt. 16, Exh. 23 at ¶ 26 (stating that "BIPA is likely to pose an insurmountable barrier" and "Native Americans in Montana will be disenfranchised because of this law"). The State's arguments that the BIPA's burden on the right to vote is minimal,

if any, miss the mark. *See* State's Br. at 28–30. These arguments ignore Appellees' and Interveners' extensive evidence and fall far short of overcoming the great deference that must be afforded to the District Court's finding that the BIPA *significantly* burdens the right to vote.

The District Court's finding that BIPA causes a significant burden on the right to vote is in line with recent federal precedent on ballot collection bans. An en banc panel of the Ninth Circuit recently held that Arizona's similar ballot collection ban had both the effect and intent of burdening the right to vote of Arizona's minority population, including the Native American population, under Section 2 of the Voting Rights Act. *Democratic Nat'l Comm. v. Hobbs,* 948 F.3d 989, 1037, 1046 (9th Cir. 2020); *see also, Feldman v. Arizona Sec'y of State's Office*, 840 F.3d 1057, 1090 (9th Cir. 2016) ("When one balances the serious burdens placed on minorities [including Native American voters] by [the Arizona ballot collection ban] against the extremely weak justification offered by the state, one can only conclude under the *Anderson–Burdick* analysis that the plaintiffs have established a likelihood of success on the merits of their Fourteenth Amendment claim.") (Thomas, J dissenting). Like the Arizona ballot collection ban, BIPA results in a "denial or abridgement of" Plaintiffs' right to vote. *Democratic Nat'l Comm.*, 948 F.3d at 1037.

The State must provide evidence to support its contention that the burden on Intervenors' rights is justified to meet State's interest. The Ninth Circuit has found

that "speculative concern[s]" is not sufficient "*as a matter of law* to justify *any* regulation that burdens a plaintiff's right, especially where that burden is more than de minimis." *Soltysik v. Padilla*, 910 F.3d 438, 448 (9th Cir. 2018); *see also, Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 599 (6th Cir. 2012) (The state's "vague public interest concerns" cannot outweigh the harm to plaintiffs). There needs to be some "assessment of whether alternative methods would advance the proffered governmental interests," and the State may also "be required to offer evidence that its regulation of the political process is a reasonable means of achieving the state's desired ends.'" *Soltysik*, 910 F.3d at 448.

The State has not shown a compelling interest or that the BIPA is narrowly drawn to advance such an interest. *See supra*, at 19-23. As discussed more fully *supra*, the State has only offered vague invocations of voter fraud and election integrity to support BIPA. The State has provided no evidence that voter fraud is actually a problem in Montana or that the BIPA would solve voter fraud. Further, as discussed supra, if voter fraud, voter intimidation, and ballot interference are a concern, there are already other means though a number of statutes already on the books of combating these concerns. With so many statutes already making it illegal to engage in nefarious conduct in relation to the handling of ballots and elections in general, the BIPA was not and is not necessary. Further the BIPA is overbroad as the BIPA applies to *all* ballots collected, even when affirmatively solicited by voters

themselves. In the words of the clerks in charge of running elections, the BIPA target voters who "are doing things right, rather than creating a deterrent for the people who would do things wrong." Dkt. 16, Exh. 1 at 9.

Even were the court to find that the BIPA's burden on Intervenors' rights is not severe, the BIPA would still fail *Anderson-Burdick*. The Ninth Circuit has held that, even for less than severe burdens, *Anderson-Burdick* is not a "rational basis test" but rather a "means-end fit framework" that requires more than speculative state concern. *Soltysik,* 910 F.3d at 448–49 ("Permitting a state to justify *any* non-severe voting regulation with a merely 'speculative concern of voter confusion,' . . . would convert *Anderson*/*Burdick*'s means-end fit framework into ordinary rational-basis review wherever the burden a challenged regulation imposes is less than severe. We have already rejected such an approach." (citations omitted).); *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016) (*en banc*) (rejecting the notion that *Anderson-Burdick* calls for "rational basis review").

Under the balancing test, even in "instances where a burden is not severe enough to warrant strict scrutiny review [it can be] serious enough to require an assessment of whether alternative methods would advance the proffered governmental interests." *Soltysik*, 910 F.3d at 448. The BIPA cannot meet any balancing test because it is an irrational regulation that serves no legitimate purpose, disproportionately burdens groups of voters, including Native Americans, and places

significant administrative burdens on county election officials. Dkt. 16, Exh. 23 at ¶¶ 16–19, 26; Dkt. 15 at ¶¶ 17, 20.

The State has arbitrarily and irrationally interpreted the BIPA as applying only to ballots conveyed in person and not ballots returned by mail. There is no reason to believe that prohibiting ballot collection and conveyance in person but permitting it via mail would prevent fraud or voter intimidation. And there is no reason to believe that voters will have more confidence in the integrity of elections if ballots can be collected and delivered to the post office but not the election administrator's office. Under the *Anderson-Burdick* balancing test, a burden on the right to vote triggers a higher level of scrutiny than rational basis review, but the BIPA has no legitimate rational basis and fails to meet even rational basis review. *See Pub. Integrity All.*, 836 F.3d at 1025.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted this 27th day of July, 2020.

/s/ Alex Rate
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CERTIFICATE OF COMPLIANCE

The undersigned, Alex Rate, certifies that the foregoing complies with the requirements of Montana Rules of Appellate Procedure 11 and 12. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with typeface consisting of fourteen characters per inch. The total word count is 10,000 words or fewer, excluding caption, table of contents, table of authorities, signature block and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

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CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing INTERVENORS' ANSWER BRIEF with the Clerk of the Montana Supreme Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Dated this 27th day of July, 2020.

/s/ Alex Rate
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