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.

APPELLANT COREY STAPLETON'S OPENING BRIEF

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Donald L. Harris, Presiding

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(1) Whether the district court erred by applying strict scrutiny to enjoin enforcement of Montana's election laws.

(2) Whether the district court erred by enjoining the election deadline requiring that absentee and mail ballots be received by 8pm on election day (Election Day deadline).

(3) Whether the district court erred by enjoining the Ballot Interference Prevention Act (BIPA).

STATEMENT OF THE CASE

On March 13, 2020, Appellees Robyn Driscoll, Montana Democratic Party, and Democratic Senatorial Campaign Committee filed their complaint, alleging that 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. (Doc. 1 at 3–4, 31.)

Appellees then moved for a preliminary injunction, seeking to enjoin the State from enforcing BIPA and the Election Day deadline. (Docs. 4–16.) In their supporting brief, Appellees referred to Mont. Code Ann. § 13-13-211, which references the Election Day deadline, as well as Mont. Code Ann. § 13-13-201. (Doc. 5 at 3, 8.) In its response, the State noted Appellees could not use their brief to bypass pleading requirements and expand the scope of the suit. (Doc. 20 at 11, n.10.) The State also pointed out that a third statute—Mont. Code Ann.

§ 13-19-106—imposes the Election Day deadline on mail ballots. *Id*. at 11. Appellees responded that the court could enjoin these additional provisions "under its equitable powers to afford further relief that it deems necessary and proper" or, alternatively, that they "would respectfully seek the Court's leave to amend the complaint to explicitly reference these provisions." (Doc. 21 at 8, n.4.) Appellees then waited until June 12, 2020, to move to amend their complaint, well after their preliminary injunction motion was fully briefed, ruled on, and appealed to this Court. (Doc. 40.)

On May 22, 2020, the district court granted the preliminary injunction motion. (Doc. 25.) The court concluded Appellees had demonstrated "irreparable harm per se by presenting a *prima facie* case" that BIPA and the Election Day deadline "violate Montanans' constitutional right to vote." *Id*. at 14. It "reserve[d] ruling upon whether these statutes also violate additional constitutional rights" as Appellees alleged. *Id*. at 13. The court ordered that the State is:

> IMMEDIATELY restrained and prohibited from enforcing the provisions of [BIPA], Mont. Code Ann. § 13-35-701 *et seq*. and the election receipt deadline for absentee ballots set forth in Mont. Code Ann. § 13-13-201(3), Mont. Code Ann. § 13-13-211(3), and Mont. Code Ann. § 13-19-106(5)(b) pending resolution of [Appellees'] request that the [State] be permanently enjoined from enforcing the statutes cited above.

Id. at 17. Additionally, the court ordered: "All absentee ballots postmarked on or before election day shall be counted, if otherwise valid, provided such ballots are

received by the deadline for *federal* write-in ballots for military and overseas voters." *Id*. (emphasis added).

The State filed a petition for writ of supervisory control and, alternatively, asked this Court to immediately stay the order enjoining the Election Day deadline and set an expedited briefing schedule for the appeal. (Pet'n for Writ of Supervisory Control, OP 20-0293 (May 26, 2020).) The State did not seek a stay of the district court's preliminary injunction of BIPA. *Id*. On May 27, 2020, this Court stayed the district court's order enjoining the Election Day deadline, denied the State's petition for writ of supervisory control, and set an expedited briefing schedule for the appeal. (Or., OP 20-0293 (May 27, 2020).) On June 3, 2020, the State notified the Court that it would appeal the district court's preliminary injunction of BIPA as well as the Election Day deadline. (Am. Notice of Appeal, DA 20-0295 (June 3, 2020).)

STATEMENT OF THE FACTS

A. Election Day Deadline

The requirement that election officials receive mail ballots *by 8pm* on Election Day was first codified in 2009. Mont. Code Ann. § 13-19-106 (2009). But long before 2009, dating back to 1985, the statute provided that mail ballots must be "received before a specified time *on election day*." Mont. Code Ann. § 13-19-106 (1985) (emphasis added).

In 2011, the Legislature approved House Bill (HB) 99, adding the Election Day deadline to Mont. Code Ann. § 13-13-201. (Doc. 30, ¶ 2); *see also* House State Admin. Hearing at 8:30:52–8:31:50 (Jan. 21, 2011).[1] The bill's purpose was to create uniformity between the mail-ballot and absentee statutory schemes, thereby ensuring fairness and preventing voter and election administrator confusion. House State Admin. Hearing at 8:27:15–32, 8:28:41–45, 8:30:52–8:31:50, 8:32:04–17, 8:35:40–8:36:16. In 2013, the Legislature added a reference to the Election Day deadline to Mont. Code Ann. § 13-13-211 (2013).

The Election Day deadline in HB 99 codified Montana election administrators' long-standing practice. At least as far back as 2001, election administrators uniformly applied the deadline to absentee and mail ballots. (Doc. 30, ¶ 3.) Any absentee ballots received after 8pm on Election Day, other than those received pursuant to Mont. Code Ann. § 13-21-206, were disregarded. *Id*. This practice was based on Montana's statutory scheme for elections. *Id*. ¶ 4.

B. BIPA

BIPA provides that "a person may not knowingly collect a voter's voted or unvoted ballot" unless he or she is "(a) an election official; (b) a United States postal service worker or other individual specifically authorized by law to transmit

[1] *Available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/21810?agendaId=99704.

United States mail; (c) a caregiver; (d) a family member; (e) a household member; or (f) an acquaintance." Mont. Code Ann. § 13-35-703. The latter four categories of persons may collect only six ballots. *Id*. Ballot collectors must "sign a registry when delivering the ballot to the polling place, a place of deposit, or the election administrator's office." Mont. Code Ann. § 13-35-704.

BIPA was introduced as Senate Bill (SB) 352 during the 2017 Legislative Session. (Doc. 16, Ex. 1.) SB 352 proposed a legislative referendum in the 2018 election to prohibit unsolicited ballot collection, with exceptions for persons known to the voter. The bill sponsor testified that ballot collection in Montana had raised "concern by many people across the state." *Id*. at 2:23–24. The sponsor testified:

> [W]hat I've heard from constituents is, . . . someone approached my door, I opened the door, they asked me for my ballot and [] said they were here picking up ballots [and] . . . they knew I had my ballot. They wanted to help me deliver it in, and I gave it to him because I was fearful. I was alone and by myself and there was two people at my door. Or I gave it to him. They seemed so nice. But then after I did so, I had doubts that maybe that wasn't the right thing to do.

Id. at 42:10–19.

BIPA appeared on the November 2018 ballot as Legislative Referendum (LR) 129. (Doc. 20, Corson Decl., ¶ 4.) On November 6, 2018, Montanans approved LR 129 with 63% of the vote: 301,172 Montanans voted YES for

LR 129 and 178,324 voted NO. *Id*. ¶ 5. Every county reported a majority of "Yes" votes. *Id*. ¶ 6.

STANDARDS OF REVIEW

"The purpose of a preliminary injunction is to preserve the status quo," and it should only "be granted with caution." *Citizens for Balanced Use v. Maurier*, 2013 MT 166, ¶ 11, 370 Mont. 410, 303 P.3d 794 (citation omitted). "In the context of a constitutional challenge, an applicant . . . must establish a prima facie case of a violation of its rights under the constitution." *Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, 440 P.3d 4 (citation omitted). "[A] preliminary injunction should not issue absent an accompanying prima facie showing, or showing that it is at least uncertain, that the applicant will suffer irreparable injury prior to final resolution on the merits." *Davis v. Westphal*, 2017 MT 276, ¶ 24, 389 Mont. 251, 405 P.3d 73 (citations and emphasis omitted).

A preliminary injunction order is immediately appealable. *Mont. Cannabis Indus. Ass'n v. State (MCIA I)*, 2012 MT 201, ¶ 13, 366 Mont. 224, 286 P.3d 1161. Typically, this Court reviews a preliminary injunction order for "a manifest abuse of discretion," meaning "one that is obvious, evident, or unmistakable." *State v. BNSF*, 2011 MT 108, ¶ 16, 360 Mont. 361, 254 P.3d 561 (citation omitted). A district court's conclusions of law, however, are reviewed *de novo* "to determine whether its interpretation is correct." *Id*. Thus, "where the district court grants or

denies injunctive relief based on conclusions of law, no discretion is involved," and this Court "review[s] the conclusions of law to determine whether they are correct." *MCIA I*, ¶ 12.

"A statute's constitutionality undoubtedly is a question of law" that is reviewed for correctness. *Comm'r of Political Practices for Mont. v. Wittich*, 2017 MT 210, ¶¶ 14, 71, 388 Mont. 347, 400 P.3d 735 (citations omitted). The applicable level of judicial scrutiny likewise is a legal question reviewed for correctness. *See Wadsworth v. State*, 275 Mont. 287, ___, 911 P.2d 1165, 1170 (1996); *see also MCIA I*, ¶ 35 (reversing preliminary injunction because district court incorrectly applied strict scrutiny).

SUMMARY OF ARGUMENT

The district court indiscriminately applied strict scrutiny to enjoin enforcement of Montana's election laws. Instead, the court should have applied the more flexible balancing test used by federal courts, weighing the character and magnitude of the asserted constitutional burden against the interests advanced by the State as justifications for the burden imposed by the challenged laws. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation omitted).

Applying this test, any burden the Election Day deadline and BIPA impose on Appellees' rights is minimal at most, and the State's interests in maintaining election uniformity, preventing fraud, and ensuring voter confidence in the

electoral system justify the burden. Because the district court applied the wrong standard of scrutiny, and because Appellees failed to demonstrate a prima facie case that these election regulations are overly burdensome under the proper balancing test, this Court should reverse the preliminary injunction.

ARGUMENT

I. The district court incorrectly applied strict scrutiny to enjoin enforcement of Montana's election laws, which threatens to hamstring the State's ability to regulate elections.

Courts should not automatically default to strict scrutiny when assessing election laws. While voting undoubtedly "'is of the most fundamental significance under our constitutional structure,' . . . [i]t does not follow . . . that the right to vote *in any manner* and the right to associate for political purposes through the ballot are absolute." *Burdick*, 504 U.S. at 433 (holding prohibition on write-in voting, taken as part of state's comprehensive election scheme, did not impermissibly burden right to vote) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)) (emphasis added).

Both the United States and Montana constitutions not only place the power to regulate elections squarely with the Legislature, they *require* the Legislature to regulate elections. U.S. Const. art. I, § 4 ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof."); Mont. Const. art. IV, § 3 ("The legislature shall provide by

law the requirements for residence, registration, *absentee voting*, and administration of elections . . . and shall insure the purity of elections and guard against abuses of the electoral process.") (emphasis added). And the U.S. Supreme Court unequivocally has determined that states have "the power to regulate their own elections." *Burdick*, 504 U.S. at 433 (citation omitted).

State governments "must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id*. (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). "Election laws will invariably impose some burden on voters" because each provision of an election code "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Id*. (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Thus, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id*.

Instead, the U.S. Supreme Court has adopted a balancing test whereby, in "considering a challenge to a state election law," courts "must weigh the character and magnitude of the asserted injury to" a 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." *Id*. at 434 (quoting *Anderson*, 460 U.S. at 789, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213–214 (1986)) (internal quotation marks omitted). Under this "more flexible" standard, the rigorousness of 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*.

When the right to vote is "subjected to 'severe' restrictions, the election regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Id*. (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). However, "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon" the constitutional rights of voters, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Id*. (quoting *Anderson*, 460 U.S. at 788) (internal quotation marks omitted). Under this latter level of review, "[i]f any doubt exists" as to the constitutionality of a statute, "it must be resolved in favor of the statute." *Mont. Cannabis Indus. Ass'n v. State (MCIA II)*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131.

Although this Court has not specifically applied the federal balancing test, it historically has followed federal caselaw in analyzing the constitutional impacts of election laws. *See Finke v. State ex rel. McGrath*, 2003 MT 48, ¶¶ 15–18,

314 Mont. 314, 65 P.3d 576 (citing *Kramer v. Union School District*, 395 U.S. 621, 626–27 (1969)); *Johnson v. Killingsworth*, 271 Mont. 1, 894 P.2d 272, 274–75 (1995) (applying rational basis review to affirm Mont. Code Ann. § 85-7-1501) (citing *Ball v. James*, 451 U.S. 355 (1981)). This Court also cites federal cases for its strict scrutiny standard. *E.g.*, *Wadsworth v. State*, 275 Mont. 287, 911 P.2d 1165, 1174 (1996) (citing *Shapiro v. Thompson*, 394 U.S. 618, 635 (1969)). And finally, this Court has followed well-established constitutional tests articulated by the U.S. Supreme Court in other contexts. *See MCIA II*, ¶ 67 (holding that the district court erred by applying strict scrutiny to a commercial speech prohibition, rather than the test employed by the U.S. Supreme Court); *Carmichael v. Workers' Compensation Court*, 234 Mont. 410, 414, 763 P.2d 1122, 1124 (1988) ("In analyzing a contract clause challenge, this Court has often implemented a three-tiered analysis set forth by the United States Supreme Court.").

Notably, the federal balancing test—and not strict scrutiny—is the standard Appellees cited in their complaint. (Doc. 1, ¶ 64.) As the complaint notes, "Other state courts and the federal courts have applied a balancing test to restrictions on the right to vote challenged under analogous provisions of state and federal constitutions that protect the fundamental right to vote." *Id*. (citing *Burdick*; *Norman*; *Guare v. State*, 167 N.H. 658, 667 (2015)); *see also Chelsea Collab.*,

Inc. v. Sec. Commonwealth, 480 Mass. 27, 33-34, 40 (2018) (applying rational basis review to voter registration law after conducting balancing test). Just as this Court has turned to the federal courts for guidance in the past, it should do so now.

A balancing test is appropriate, indeed necessary, in the context of election regulation since "all election regulations[] have an impact on the right to vote." *Burdick*, 504 U.S. at 434. Montana has the right and duty to regulate elections without each regulation being subject to strict scrutiny. Mont. Const. art. IV, § 3. The Montana Legislature "indisputably has a compelling interest in preserving the integrity of its election process" because "[c]onfidence in the integrity of [the] processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.").

The Legislature promotes the integrity of elections by substantially regulating them to ensure "they are . . . fair and honest and [that] some sort of order, rather than chaos, [accompanies] the democratic processes." *Burdick*, 504 U.S. at 433. The end result is that, while citizens have a fundamental right to vote, that right to vote does not encompass voting in a particular manner. *Id.* Analogously, this Court has determined that the Legislature may circumscribe

other fundamental rights under its police power, subject to rational basis review. *See MCIA I*, ¶¶ 20, 22 (holding "although individuals have a fundamental right to pursue employment, they do not have a fundamental right to pursue a particular employment or employment free of state regulation," and "the Constitution is clear that the right to seek health is circumscribed by the State's police power to protect the public's health and welfare").

Thus, as explained by the U.S. Supreme Court, applying strict scrutiny as a default to election laws is inappropriate. Rather, the proper standard of review should be determined based on the balancing test. *Burdick*, 504 U.S. at 433. This is especially important given Montana's constitutional mandate directing that the Legislature—not the courts—enact laws controlling elections. *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241 (noting that the political question doctrine precludes courts from hearing "controversies . . . which revolve around policy choices and value determinations constitutionally committed for resolution to other branches of government") (citation and internal quotation marks omitted). Under the district court's rationale, however, every election law would be subject to strict scrutiny, a result that will unduly interfere with the State's ability to regulate elections. Therefore, this Court should overturn the district court's default application of strict scrutiny to Montana's election regulations and reverse the preliminary injunction.

II. The district court incorrectly enjoined the Election Day deadline without properly balancing the State's interests in setting deadlines to facilitate an orderly election.

Applying the balancing test to the Election Day deadline, the State's compelling interests in ensuring a fair and honest election, counting votes within a reasonable time, and maintaining uniformity in election laws justify the slight burden, if any, on the right to vote.

A. The district court erred by not considering the merits of the Election Day deadline apart from BIPA.

The Election Day deadline, a significantly older and more entrenched facet of Montana election law, should be considered on its own merits, not as an appendage of BIPA. To do otherwise violates the balancing test and the State's inherent right to regulate elections. The district court erred by conflating the two provisions when undertaking its analysis in the preliminary injunction order. (*See* Doc. 25 at 7–8, 12.) While the district court made some separate findings as to the Election Day deadline, Doc. 25 at 9, its analysis was lacking and, in any case, did not apply the appropriate balancing test. The District Court incorrectly enjoined both laws based on its analysis of their joint affects, applying strict scrutiny; it did not sufficiently assess the merits of the Election Day deadline independently from BIPA, even though it also enjoined BIPA.

When analyzed on its own merits, the Election Day deadline at most imposes an inconvenience, which "does not result in a denial of 'meaningful access

to the political process.'" *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) (quoting *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004)). Voters whose ballots are not received until after the polls close on Election Day are no more disenfranchised than voters who wish to vote in person after the polls close Election Day. And absentee voters who wait until Election Day to vote have other options for submitting their ballots (namely submitting in person or having another do so). The Election Day deadline thus easily passes muster under the balancing test, as described below.

B. The burden on Appellees' right to vote is minimal.

Article II, section 13 of the Montana Constitution provides: "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 to suffrage." This provision protects an individual's right to vote, not the right to turn his or her ballot in after the polls have closed. *See State ex rel. Cashmore v. Anderson*, 160 Mont. 175, 190, 500 P.2d 921, 929 (1972) ("The word 'voting' means the affirmative act of marking one's ballot properly and depositing it in the ballot box in conformity with the election laws.") (citations omitted). Just as voters do not have the right to vote after Election Day, they do not have the right to submit ballots after Election Day. Moreover, the Election Day deadline is not based on race or any other protected class, and nothing in its legislative history suggests a discriminatory purpose.

The Election Day deadline does not disenfranchise Montana voters who choose to vote by mail; it does the opposite. All Montana voters—whether voting by mail or in-person—must ensure their ballots are received, or they are in line, by 8pm on Election Day to be counted. In this way, the Election Day deadline treats all Montana voters the same. And absentee voters to some degree have *more* opportunity than in-person voters to register their vote, not less. They receive additional time with their ballots, which they may mail early to ensure timely arrival, submit in-person early or on Election Day, or have someone else submit. In-person voters, by contrast, may only vote at the polls.

That a voter might wait too long to mail a ballot does not impact the constitutionality of the statute. *Burdick*, 504 U.S. at 438 ("Reasonable regulation of elections [requires voters] to act in a timely fashion if they wish to express their views in the voting booth."); *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (upholding constitutionality of voter registration deadline and noting, if petitioners' "plight can be characterized as disenfranchisement at all, it was not caused by [the challenged statute], but by their own failure to take timely steps to effect their enrollment"); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 U.S. Dist. LEXIS 90812, at *74 (D.S.C. May 25, 2020) ("South Carolina's generally applicable deadline for receipt of absentee ballots [by 7pm on election day] is constitutional because it imposes only a minimal burden, if any, on [the] right to vote.").

Similarly, the postal service's independent decisions with respect to mail routes and when and how mail is processed—decisions the State does not control—are not attributable to the State and thus should not be factored into the balancing test.

Appellees' unsubstantiated allegations of voter confusion and misunderstanding likewise do not render the Election Day deadline unconstitutional. The deadline has been codified in its present form for more than eight years and existed in practice for decades prior. (Doc. 30, ¶ 3). In past elections, each absentee ballot informed voters of the deadline. (Doc. 20, Corson Decl. ¶¶ 7, 9).) For example, instructions for the June 2, 2020 primary election stated in three separate places that ballots must be received by the election office by 8pm on Election Day. *Id*. ¶ 9. The instructions also emphasized "[a] postmark is not accepted" and warned that the Postal Service recommends mailing a ballot at least one week before the election. *Id*. ¶ 10. The Secrecy Ballot Envelope contained a similar caution. *Id*. ¶ 12.

Appellees presented no first-hand testimony of voter confusion regarding when a ballot must be returned; instead, their allegations were based on hearsay not made positively in the record. (Docs. 6–16.) Even if they had presented direct testimony of confusion, a voter's failure to read instructions does not render the Election Day deadline unconstitutional. *See Matter of Moody v. N.Y. State Bd. of Elections*, 165 A.D.3d 479, 481 (N.Y. App. Div. 2018) (Slip Op.) ("Viewed as a

whole, the Election Law gives persons of ordinary intelligence fair notice of what they must do to meet the primary enrollment deadline, and likewise provides officials with clear standards for enforcement.") (citation omitted). Tellingly, of the 417,279 absentee ballots mailed in the 2018 general election, *just 372* arrived too late to be counted. (Doc. 20, Corson Decl. ¶ 14.) Appellees' general allegations of voter confusion as to this deadline, if accepted as sufficient, also bring into question the absentee ballot application deadline, Mont. Code Ann. § 13-13-211, voter registration deadlines, Mont. Code Ann. § 13-2-301, and many other deadlines scattered throughout Montana's election laws.

Indeed, voter confusion, if any, was created not by the Election Day deadline, but by the district court's decision to change the status quo less than two weeks before Election Day. The U.S. Supreme Court has "repeatedly emphasized" its disfavor of judicial alteration of election rules on the eve of an election. *Rep. Nat'l Comm. v. Dem. Nat'l Comm.*, 206 L. Ed. 2d 452, 453–54 (2020) (per curiam) (citing *Purcell*, 549 U.S. 1; *Frank v. Walker*, 574 U.S. 929 (2014); *Veasy v. Perry*, 574 U.S. 951 (2014)). "Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4–5.

And the district court's order risks further voter confusion and disenfranchisement going forward because mail in Montana does not always get stamped with the postmark date at the location and time it is mailed. (Doc. 20, Keller Decl. ¶¶ 4, 7); *see also* National Conference of State Legislatures, *VOPP: Table 11: Receipt and Postmark Deadlines for Absentee Ballots* (*VOPP Report*) (June 15, 2020) (noting "less mail gets truly postmarked" than in the past).[2] Although a voter may request an item of mail be stamped when he or she drops it off at a post office in person, mail submitted in drop boxes or without this specific request typically is not postmarked until it reaches a major processing facility. (Doc. 20, Keller Decl. ¶ 4.) Therefore, a postmark date does not reliably indicate when a ballot was placed in the mail. For example, if an item is put in a postal service drop box after pickup, it will not be stamped that day. By contrast, the absentee ballot receipt deadline provides a clear, bright line by requiring ballots to be received by 8pm on Election Day regardless of how they are delivered.

In addition to the lack of any evidence of a burden, Appellees' "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm." *Oakland Tribune, Inc. v. Chronicle Publ'g Co*., 762 F.2d 1374, 1377 (9th Cir. 1985); *see also Garcia v. Google, Inc.*, 786 F.3d 733, 746 (9th Cir. 2015)

[2] *Available at* https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx.

(en banc) (months-long delay in seeking injunction undercut claim of irreparable harm). This is especially true given the lack of urgency to Appellees' challenge, which came decades after the Legislature created the mail-ballot deadline. Even Mont. Code Ann. § 13-13-201, the only deadline challenged in the complaint, was codified more than eight years ago.

The district court thus incorrectly concluded that Appellees had demonstrated a prima facie constitutional violation of their right to vote. Appellees do not have a right to ballot collection or to return ballots after Election Day. Their argument essentially comes down to an assertion that some small number of additional votes may be recorded if the Election Deadline were changed to a postmark deadline (and never mind the confusion over whether a ballot is postmarked the day it is mailed). At most, any burden on the right to vote is minimal and easily outweighed by the State's important interests in setting clear election deadlines as outlined below.

C. The State's interests in the Election Day deadline outweigh any burden on the right to vote.

Setting election deadlines is at the heart of a state's right to regulate elections. *See Rosario*, 410 U.S. at 758 (upholding constitutionality of voter registration deadline); *Mays v. LaRose*, 951 F.3d 775 (6th Cir. 2020) (holding Ohio's deadline for requesting absentee ballots did not violate voting rights of arrestees who expected to be confined through election). Indeed, for there to be an

election at all, a state must set election deadlines, and changing them typically invokes a nonjusticiable political question. *See Bennett v. Yoshina*, 140 F.3d 1218, 1225 (9th Cir. 1998) ("The Supreme Court has long held that the structure of a state's internal democratic processes is a 'political question' beyond the ken of judicial review.") (citing *Baker v. Carr*, 369 U.S. 186, 218-26 (1962)); *Larson*, ¶ 40 ("Montana has a compelling interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes.").

Montana also "indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4 (citation omitted). This is because "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Id.* Likewise, the Legislature has clearly expressed its interest in maintaining uniformity in Montana's election code. *See* Mont. Code Ann. § 13-1-201 (requiring the Secretary of State to "maintain uniformity in the application, operation, and interpretation of the election laws").

Montana's Election Day deadline serves these interests by ensuring timely and accurate results, a key aspect of promoting public faith in elections. *See Thomas*, 2020 U.S. Dist. LEXIS 90812 (upholding South Carolina's absentee ballot deadline of 7pm on Election Day); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004) (holding "the State's interests in ensuring a fair and

honest election and to count votes within a reasonable time justifies the light imposition on Plaintiffs' right to vote" imposed by Florida's ballot receipt deadline of 7pm on Election Day); *Fritszche v. Maryland State Bd. of Elections*, 916 A.2d 1015 (Md. 2007) (upholding election regulation requiring absentee ballots to be mailed by the day before the election); *In re Ocean Cnty. Com'r of Registration for a Recheck of the Voting Machs.*, 879 A.2d 1174, 1179 (N.J. Super. Ct. App. Div. 2005) (holding Election Day deadline for absentee ballot receipt—as opposed to postmark date—served state interests of deterring fraud, maintaining integrity of election process, and providing reasonably prompt determination of election results). And Montana is not alone: as the National Conference of State Legislatures noted just last week, "[t]he most common state deadline for election officials to receive absentee or mail ballots is on Election Day when the polls close." *VOPP Report*.

Montana's desire to maintain timeliness in elections is reflected throughout Title 13. For example, election judges must provide results to the election administrator "immediately" after ballots are counted, Mont. Code Ann. § 13-15-101; the vote count must begin "immediately upon the closure of the polls," Mont. Code Ann. § 13-15-207; and the canvass board must meet no later than 14 days after an election to canvass the vote, Mont. Code Ann. § 13-15-401. The entire statutory scheme behind Montana elections is focused on a series

of deadlines ensuring orderly voting and that vote counts begin as soon as the polls close.

As discussed above, the Election Day deadline also advances the State's interests in ensuring uniform and equal treatment with in-person voters. Montana does not require special circumstances to vote absentee, and thus there is no reason absentee voters should receive preferential treatment over in-person voters. Montanans voting in person at the polls must return their ballots by 8pm, or at least be in line to vote by 8pm. Mont. Code Ann. § 13-1-106. Likewise, absentee voters—who already have extra time to fill out their ballots—must return their ballots by 8pm (whether by mail or in person) or be in line to return them. Consequently, these otherwise similarly situated voters are treated equally.

Additionally, the Election Day deadline is key to maintaining uniformity in Montana's election code. Because other election laws interface with the Election Day deadline, Appellees have repeatedly revised their argument to include an ever-increasing number of constitutional challenges to Montana statutes. *See* Doc. 1 at 4 (challenging, in complaint, only § 13-13-201 (absentee ballots)); Doc. 5 at 3, 8 (challenging, in preliminary injunction motion, § 13-13-201 and 13-13-211 (absentee ballots)); Doc. 21 at 8, n.4 (challenging, in reply to preliminary injunction motion, §§ 13-13-201, 13-13-211, and 13-19-106 (mail ballots)); Doc. 31 at 12 (challenging, in response to motion to stay, §§ 13-13-201,

13-13-211, 13-19-106, and 13-13-246 (mail ballots returned by disabled voters)). Appellees' attempt to pull on not just one—but multiple and increasing—strings of Title 13 risks causing the whole statutory scheme to unravel. This is precisely why election regulation is the purview of the Legislature, not the courts.

In concluding that a postmark date is a required alternative to the Election Day deadline, the district court hijacked the Legislature's constitutional duty to make law and regulate elections. *See* Mont. Const. art. IV, § 3 and art. V, § 1. The court's decision that absentee ballots should be counted "provided such ballots are received by the deadline for federal write-in ballots for military and overseas voters" ignores the Legislature's recognition of these voters' special circumstances, adoption of laws specific to those circumstances, and incorporation of federal law under Montana's Absent Uniformed Services and Overseas Voter Act; by contrast, special circumstances are not required to request an absentee ballot. *Compare* Mont. Code Ann. §§ 13-21-102–228 (incorporating Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301–20311), 13-21-102 (applying only to uniformed-service and overseas voters and their dependents), 13-21-222 (providing for federal postcard applications and federal write-in absentee ballots), *and* Compilers Comments: Preamble to Mont. Code Ann. § 13-21-104 (recognizing, based on federal guidance, overseas and military voters may provide digital signatures available

with U.S. Department of Defense identification cards and adopting state law to implement UOCAVA's allowance of facsimile ballots), *with* Mont. Code Ann. § 13-13-201 (requiring no special circumstances to vote by absentee ballot).

And federal overseas ballots represent just a tiny fraction of the absentee ballots returned. For example, in the 2016 general election, just 4,260—less than 1.3%—of the 337,926 absentee ballots returned by Montana voters were federal absentee ballots.[3] Changing the deadline for all absentee ballots to match the deadline for federal overseas ballots not only bypasses the legislative process, it ignores the disproportionate burden this would place on government resources and the impact it would have on Montana's election code.

Furthermore, the district court's decision directly contravenes the State's interest in maintaining uniformity in the election code by not accounting for other deadlines in Chapter 13 that impact how election administrators count ballots. (Doc. 29, ¶¶ 7–8) (citing Mont. Code Ann. §§ 13-15-401 (county canvass board meeting deadline), 13-15-502 (state canvass board meeting deadline), 13-17-503 (requiring post-election audit after unofficial results are available but before official county canvass)). It ignores that state and county election official resources are allocated in a manner that reflects the various deadlines in Title 13 and the

[3] 2016 Election Administration Voting Survey Data Brief, *available at* https://www.eac.gov/sites/default/files/eac_assets/1/6/Montana_-_EAVS_2016_Data_Brief_-_508.pdf.

related critical election functions. (Doc. 29, ¶ 8.) For example, staffing decisions are based on staff's ability to perform different functions based on upcoming deadlines. *Id*. Under the district court's order, however, the timing of critical election functions would overlap, creating numerous personnel issues and resource constraints. *Id*. Whether this tradeoff is worthwhile is exactly the kind of line-drawing policy decision reserved to state legislatures in the election law context. *Burdick*, 504 U.S. at 434; *MCIA II*, ¶ 39 (holding it is "beyond [a court's] purview to second-guess the wisdom or expediency of the legislation") (citation and internal quotation marks omitted).

The court's order also makes other statutes unworkable. For example, uniformed and overseas voters sometimes submit both a mail-ballot and a write-in ballot, and Mont. Code Ann. § 13-21-206 dictates which ballot to accept. (Doc. 29, ¶ 10.) If no mail ballot is received by 8pm on Election Day, the election administrator accepts the write-in ballot. *Id*. Under the order, though, a mail ballot could arrive later than 8pm on Election Day, causing confusion as to which ballot should be accepted. *Id*.

A postmark deadline also would disrupt the period to cure under Mont. Code Ann. § 13-15-107(5). Under this statute, a provisional ballot may only be counted if the voter's information is verified by 5pm the day after the election or postmarked by 5pm the day after the election and received by 3pm the sixth day

after the election. If a voter does not mail a ballot until 8pm on Election Day, it may not be received in time for the election administrator to notify the voter of an issue and allow the voter to correct it within these time limits.

Similarly, under Mont. Code Ann. § 13-13-246(2)(c) and (d), disabled voters may return a voted ballot by mail provided it is received by 8pm on Election Day. By failing to take these voters into account, the Order treats disabled voters differently from other voters who return their ballots by mail. These are just some of the statutes that could be affected by a change in the Election Day deadline.

The importance of the Legislature's authority to create election deadlines, the public's trust in the veracity of election results, and the need for uniformity more than outbalances increased time to mail votes. *See Crawford*, 553 U.S. at 197; *Friedman*, 345 F. Supp. 2d at 1377. The Election Day deadline serves Montana's interests in providing an orderly election and protecting election integrity and should be upheld. Appellees have not met their burden to demonstrate the Election Day deadline is unconstitutional beyond a reasonable doubt under the balancing test.[4] As Appellees failed to make a prima facie case under the proper balancing test, this Court should reverse the preliminary injunction as to the Election Day deadline.

[4] Even under a strict scrutiny standard, the deadline is narrowly drawn to advance the compelling state interests outlined above.

III. The district court incorrectly enjoined BIPA.

Just as the State's interests justifying the Election Day deadline outweigh any minimal constitutional burden the statute imposes, the State's interests in ensuring voter confidence in the electoral process and guarding against abuses of that process outweigh any minimal burden BIPA places on the right to vote.

A. The burden on the right to vote, if any, is minimal.

The Montana Constitution protects an individual's right to vote, not to have his or her ballot collected by others. *See* Mont. Const. art. II, § 13. As with the Election Day deadline, BIPA is not based on race or any other protected class, and nothing in its legislative history suggests a discriminatory purpose. Significantly, BIPA was not just a bill; it was a legislative referendum approved by a majority of Montanans. (Doc. 20, Corson Decl. ¶ 4.) As noted above, every county in Montana reported a majority of "Yes" votes on LR 129. *Id.* ¶ 6. And Plaintiffs have not demonstrated that BIPA bears more heavily on any class of voter.

All Montana voters still have the option to vote in person; drop their ballot off at a polling place, a place of deposit, or the election administrator's office; have an acquaintance, family member, or caregiver drop their ballot off; or mail their ballot. Mont. Code Ann. §§ 13-13-201, 13-13-204, and 13-35-703. Montanans may also have someone else mail their ballot for them. *See* Commissioner of Political Practices, Montana Ballot Interference Prevention Act (BIPA),

http://politicalpractices.mt.gov/BIPA (stating BIPA does not apply to ballots returned by mail).

The Montana Constitution does not provide voters the right to have their ballots collected by strangers who are not election officials or postal workers. And the outbreak of COVID-19—which is outside the State's control—does not impact BIPA's constitutionality. To the contrary, allowing third-party ballot harvesting is particularly dangerous given the nature of COVID-19. Persons wishing to entirely avoid the threat of contracting the virus may place their ballot in the mail, have someone else place their ballot in the mail, or have an acquaintance, family member, or caregiver turn in their ballot to a polling place, a place of deposit, or the election administrator's office.

Moreover, BIPA is in line with other statutes Appellees have not challenged. For example, Mont. Code Ann. § 13-13-214 allows election administrators to deliver an absentee ballot by mail to an elector. *Id*. at (1)(a). If the elector wishes to have his or her ballot received by someone else, the election administrator must deliver the ballot in person, and the following conditions must be met:

> (i) the elector has designated the individual, either by a signed letter or by making the designation on the application form in a manner prescribed by the secretary of state or pursuant to 13-1-116;
> (ii) the individual taking delivery of the ballot on behalf of the elector verifies, by signature, receipt of the ballot;
> (iii) the election administrator believes that the individual receiving the ballot is the designated person; and

(iv) the designated person has not previously picked up ballots for four other electors.

Id. at 1(c). Most absentee voters thus receive their ballots directly by mail. Yet Appellees have no complaints about this process and have not explained why regulations on ballot collection are unconstitutional when the more restrictive regulations on receiving a ballot are constitutionally acceptable.

At most, BIPA's requirements impose a minimal burden, and thus, strict scrutiny thus does not apply. *See Burdick*, 504 U.S. at 434.

B. The State has compelling interests in BIPA.

Article IV, section 3 of the Montana Constitution requires the Legislature to "insure the purity of elections and guard against abuses of the electoral process." Article IV, section 1 provides for elections by secret ballot. While Montana allows for absentee voting, it recognizes the potential for ballot fraud and voter intimidation, particularly if unrelated third parties can collect and submit ballots. *See* Building Confidence in U.S. Elections, § 5.2 (Sept. 2005) (Carter-Baker Report) ("States . . . should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots.");[5] Michael Morley, *Election Modifications to Avoid During the Covid-19 Pandemic, Lawfare* (Apr. 17, 2020) ("Third-party

[5] *Available at* https://web.archive.org/web/20070609115256/http:/www.american.edu/ia/cfer/report/full_report.pdf.

absentee ballot harvesting unnecessarily exacerbates the risks of absentee voting, undermining public confidence in the electoral system."). [6]

As discussed above, the appearance of propriety is independently vital to election integrity. *See Crawford*, 553 U.S. at 197. To that end, BIPA's purpose is to prevent voter fraud, protect voters from harassment, ensure voters feel secure in the voting process, and protect public belief in the integrity of elections. (*See* Doc. 16, Ex. 1 at 2:9–3:8; 42:5–19.)

Importantly, BIPA was not just a legislative undertaking; it was passed by Montana voters by a wide majority, and a "statewide vote on [an initiative] is a demonstration of a compelling state interest in [its] enactment." *Montana Auto. Ass'n v. Greely*, 193 Mont. 378, 384, 632 P.2d 300, 303 (1981). In response to Montanans' desire to feel more secure in the election process, BIPA provides safeguards to deter and detect fraud by ensuring ballot collectors are known to voters and thus less likely to tamper with ballots. *See Crawford*, 553 U.S. at 197 ("[T]he 'electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud.'") (quoting Carter-Baker Report, § 2.5). BIPA represents Montanans' desire to control the absentee voting process just as in-person voting is controlled at the polling place.

[6] *Available at* https://www.lawfareblog.com/election-modifications-avoid-during-covid-19-pandemic.

And states need not wait for evidence of fraud to justify preventive measures. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively."); *accord Crawford*, 553 U.S. at 194–96 (finding state interest in requiring photo identification even though record contained "no evidence of" in-state fraud because "flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history"). Montana thus may rely on examples from other states to proactively take steps to prevent fraud, which is difficult to detect, before it occurs.

For example, in the 2003 East Chicago Mayor Democratic primary, fraudulent voting was "perpetrated using absentee ballots." *Crawford*, 553 U.S. at 195. During a 2016 Texas primary election, an "organized ring" of ballot harvesters targeted elderly voters by fraudulently "filling out applications for mail-in ballots, with forged signatures. Then they would either 'assist' the voter with filling out the ballot, or fill it out themselves, and use deception to get the voter to sign the envelope the ballot would be sent back in." Jason Allen, *4 Women Accused in Paid Voter Fraud Ring*, CBS DFW (Oct. 12, 2018).[7] And just last year,

[7] *Available at* https://dfw.cbslocal.com/2018/10/12/women-accused-paid-voter-fraud-ring/.

North Carolina's State Board of Elections unanimously vacated a 2018 congressional general election because a "coordinated, unlawful, and well-funded absentee ballot scheme . . . perpetrated fraud and corruption upon the election." *In re Investigation of Election Irregularities Affecting Counties within the 9th Congressional District*, ¶ 151 (N.C. Bd. of Elections Mar. 13, 2019).[8]

Montana is not alone in proactively combatting this problem: many states restrict ballot harvesting, in some cases more strictly than *BIPA*. *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1068–69 (9th Cir. 2020) (Bybee, J., dissenting).[9]

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[8] *Available at* https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Order_03132019.pdf.

[9] In Indiana "it is a felony for anyone to collect a voter's absentee ballot, with exceptions for members of the voter's household, the voter's designated attorney in fact, certain election officials, and mail carriers;" Connecticut "permit[s] only the voter, a designee of an ill or disabled voter, or the voter's immediate family members to mail or return an absentee ballot;" and New Mexico "permits only the voter, a member of the voter's immediate family, or the voter's caregiver to mail or return an absentee ballot." *Id*. at 1068 (citing Ind. Code § 3-14-2-16(4); Conn. Gen. Stat. § 9-140b(a); N.M. Stat. Ann. § 1-6-10.1). Additionally, "[a]t least seven other states . . . similarly restrict who can personally deliver an absentee ballot to a voting location." *Id*. (citing Ga. Code Ann. § 21-2-385(a) (limiting who may personally deliver absentee ballot to designees of ill or disabled voters or family members); Mo. Rev. Stat. § 115.291(2) (restricting who can personally deliver absentee ballot); Nev. Rev. Stat. Ann. § 293.330(4) (making it a felony for anyone other than voter or voter's family member to return absentee ballot); Okla. Stat. tit. 26, § 14-108(C) (requiring voter delivering ballot to provide proof of identity); Ohio Rev. Code Ann. § 3509.05(A) (limiting who may personally deliver absentee ballot); Tex. Elec. Code Ann. § 86.006(a) (permitting only the voter to personally deliver ballot)). And finally, "Colorado forbids anyone from collecting more than ten ballots;" North Dakota, four; New Jersey and Minnesota, three; and Arkansas, Nebraska, and West Virginia, two. *Id*. at 1068–69 (citing Colo. Rev. Stat. § 1-7.5-107(4)(b); N.D. Cent. Code § 16.1-07-08(1); N.J. Stat. Ann. § 19:63-4(a); Minn. Stat. Ann. § 203B.08 sbd. 1; Ark. Code Ann. § 7-5-403(a)(1); Neb. Rev. Stat. § 32-943(2); W. Va. Code § 3-3-5(k)).

In fact, BIPA follows the recommendation of a bipartisan Commission on Federal Election Reform led by former U.S. President Jimmy Carter and former U.S. Secretary of State James Baker, which the U.S. Supreme Court has cited with approval. *See Crawford*, 553 U.S. at 197. The Commission recommended that states "should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials," and the practice "of allowing candidates or party workers to pick up and deliver absentee ballots should be eliminated." Carter-Baker Report § 5.2. The Commission recognized that "[a]bsentee ballots remain the largest source of potential voter fraud" and urged states to "reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Id*. at 46.

Additionally, though Montana may not have reported cases of election fraud with respect to ballot collection, there have been cases where election fraud or noncompliance with election laws was present in other ways. *See e.g.*, *Larson*, ¶ 65 (affirming invalidation of 87 signatures gathered due to noncompliance with Mont. Code Ann.§ 13-10-601(2)); *Montanans v. State*, 2006 MT 277, ¶ 80, 334 Mont. 237, 146 P.3d 759 (holding plaintiffs engaged in "pervasive and general pattern and practice of fraud and conscious circumvention of procedural

safeguards" by certifying signatures not signed in presence of affiant, providing false addresses, and employing a "bait and switch" tactic to induce people who knowingly signed one petition to unknowingly sign two others). This Court thus has recognized that laws regulating the manner of elections serve an important purpose and has enforced these laws.

As its sponsor testified, BIPA was drafted to protect voter trust in the electoral process following reports from voters who felt coerced into handing their ballot to a collector. (Doc. 16, Ex. 1 at 42:10–19.) BIPA addresses these concerns by taking reasonable steps to insulate absentee or mail voters: a limited number of completed ballots may be returned by family members, household members, caregivers, and acquaintances. Mont. Code Ann. § 13-35-703. In this way, BIPA enables absentee voters to execute "a secret ballot"—"the prerequisite of a democratic election." Carter-Baker Report § 9.1; *accord State ex rel. Van Horn v. Lyon*, 119 Mont. 212, 214, 173 P.2d 891, 891 (1946) (recognizing secrecy is the essence of voting by ballot).

BIPA also serves the State's interests of maintaining uniformity in the election code. As discussed above, Mont. Code Ann. § 13-13-214 requires election administrators to deliver an absentee ballot either by mail to an elector or in-person to an individual designated by the elector (who may collect ballots for up to four

electors). BIPA ensures that voters return their ballots via a similar method to the way they are collected: by mail, in person, or by an individual known to the voter.

In sum, BIPA serves Montana's interests in protecting election integrity, which outweighs any burden BIPA's safeguards might impose on voters. As with any election regulation, BIPA has some impact on the right to vote. *Burdick*, 504 U.S. at 434. But where the line should be drawn, between preventing fraud or the appearance of fraud in ballot collecting and allowing ballot collection as an additional tool to assist voters is, ultimately, a task reserved for the Legislature.

Appellees thus have not met their burden of demonstrating BIPA is unconstitutional under the appropriate balancing test.[10] The district court thus incorrectly concluded that the challenge to BIPA meets the requirements for a preliminary injunction, and this Court should reverse its Order.

CONCLUSION

The district court erred by failing to apply the proper balancing test to the challenged election laws. The State's interests in facilitating orderly elections and protecting election integrity far outweigh any minimal burden that either the Election Day deadline or BIPA imposes on voting. The district court's issuance of a preliminary injunction was incorrect, and this Court should reverse it.

[10] Even if strict scrutiny were applied, BIPA is narrowly tailored to the State's compelling interests in promoting public faith in elections and preventing voter fraud.

Respectfully submitted this 26th day of June, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 8,650 words, excluding certificate of service and certificate of compliance.

/s/ Aislinn W. Brown
AISLINN W. BROWN

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.

APPENDIX

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