

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 REPLY BRIEF

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

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Appellees and Intervenors cannot overcome the simple fact that there is no constitutional right to return a ballot after Election Day or have a stranger return a ballot. Even under the rubric of the right to vote, the district court applied the wrong standard—strict scrutiny—and should be reversed for that reason alone. Under the proper balancing test, Appellees fail to show that the receipt deadline for absentee and mail ballots (Election Day deadline) or the Ballot Interference Prevention Act (BIPA), Mont. Code Ann. §§ 13-35-701–705, constitutes a prima facie violation of the right to vote. The District Court incorrectly granted a preliminary injunction, and its decision should be reversed.

Under Appellees' proposed standard, every state that limits voting to (primarily) in-person, and every state that has a ballot receipt deadline of Election Day or earlier (a significant majority of states), is running unconstitutional election systems. Not to mention that Montana's deadline has apparently been unconstitutional for thirty-five years unbeknownst to (and uncontested by) anyone. Additionally, any provision in Montana's election code that restricts voting in any way is presumed unconstitutional under Appellees' strict-scrutiny-for-all-election-laws theory, including the signature matching requirements for absentee ballots and timing limitations to request absentee ballots. Such a strict test would be unworkable for these time, place, and manner restrictions. Under the proper balancing test, however, Montana's common-sense regulations easily pass muster.

I. This Court should adopt the federal balancing test.

Election laws are unique: they fall squarely within a state’s police power under the federal and Montana constitutions, but also involve the constitutional rights to vote and associate. Consequently, the U.S. Supreme Court has held these important interests should be balanced, and this flexible standard should also guide review under the Montana Constitution.

While the Montana Constitution protects the right to vote, it does not protect the right to vote in whatever manner a voter sees fit. *See* Mont. Const. art. II, § 13. On the contrary, the Constitution requires the Legislature to “provide by law the requirements for residence, registration, absentee voting, and administration of elections.” Mont. Const. art. IV, § 3.

Similarly, the U.S. Supreme Court has recognized that states can (and must) regulate elections, particularly as to their “times, places, and manner.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting U.S. Const. art. I, § 4, cl. 1). While the federal constitution does not explicitly confer a right to vote, the U.S. Supreme Court has long held the right is fundamental. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Thus, contrary to Appellees’ and Intervenors’ assertions, the Montana Constitution does not provide greater protections for absentee voting than federal law; rather, these provisions are on all fours.

Moreover, this Court consistently follows U.S. Supreme Court precedent in analyzing election regulations. For example, in *Johnson v. Killingsworth*, this Court looked to several U.S. Supreme Court cases in deciding *not* to apply strict scrutiny to irrigation district apportionment. *Johnson*, 271 Mont. 1, ___, 894 P.2d 272, 273–74 (1995) (holding strict scrutiny unwarranted where law did not “distinguish[] between citizens on an arbitrary or invidious basis in regulating voter qualification or apportioning representation”). And in *Finke v. State ex rel. McGrath*, which both Appellees and Intervenors cite, this Court heavily relied on U.S. Supreme Court cases in analyzing a challenge to a property-owner voting limitation. *Finke*, 2003 MT 48, ¶¶ 15–21, 314 Mont. 314, 65 P.3d 576 (applying strict scrutiny where limitation to property owners was arbitrary). There is no reason to break from this practice.

Even the state cases Intervenors cite carve out exceptions for time, place, and manner restrictions. *See, e.g., Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1131–34 (Idaho 2000) (distinguishing *Burdick* in part because the law at issue was “not simply a time, place or manner voting restriction to which a more deferential standard of review might be applied”). Here, by contrast, the Election Day deadline is a time restriction, and BIPA is a manner restriction.

Notably, states have overwhelmingly adopted the federal balancing test to uphold time, place, and manner regulations. *See, e.g., League of Women Voters*

of Mich. v. Sec’y of State, No. 353654, 2020 Mich. App. LEXIS 4454 (Ct. App. July 14, 2020) (holding Election Day deadline and voter-paid postage requirement are “reasonable, minimal, and nondiscriminatory restriction[s]”); *Libertarian Party of Ohio v. Husted*, 97 N.E.3d 1083 (Ohio Ct. App. 2017); *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections*, 141 A.3d 335 (N.J. App. Div. 2016) (upholding advance-registration requirement); *Carlson v. San Juan Cnty.*, 333 P.3d 511 (Wash. Ct. App. 2014); *Milwaukee Branch of NAACP v. Walker*, 851 N.W.2d 262 (Wis. 2014) (upholding voter identification requirements under rational basis review); *Libertarian Political Org. v. Clingman*, 162 P.3d 948 (Okla. Civ. App. 2007) (upholding signature requirements for political party registration as “reasonable and justified by legitimate state interests”); *Edelstein v. City & Cnty. of S.F.*, 56 P.3d 1029 (Cal. 2002) (upholding prohibition against write-in voting); *State v. Hodges*, 92 S.W.3d 489 (Tex. 2002). And even where state courts have found election laws unconstitutional, it was typically under *Burdick*. See *Guare v. State*, 117 A.3d 731 (N.H. 2015); *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006); *State v. Green Party of Alaska*, 118 P.3d 1054 (Alaska 2005).

The balancing test is not *per se* acceptance of every election regulation; it merely adds the threshold question of whether the regulation significantly burdens a plaintiff’s rights. *Burdick*, 504 U.S. at 434. While laws severely impacting constitutional rights necessitate strict scrutiny, *id.*, the Legislature is allowed to

“enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder,” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Finally, like the federal courts, this Court does not always apply strict scrutiny when fundamental rights are involved: the level of burden or infringement matters, as demonstrated in *Mont. Cannabis Indus. Ass’n v. State*, 2012 MT 201, 366 Mont. 224, 286 P.3d 1161, a case Appellees and Intervenor fail to distinguish or, in Appellees’ case, even cite.

The District Court erred in indiscriminately applying strict scrutiny to BIPA and the Election Day deadline.¹ Its decision should be reversed for this reason.

II. The challenged laws do not severely burden the right to vote.

As discussed above, the Montana Constitution does not protect the right to vote however a voter sees fit. Nowhere in the constitution is there a requirement for no-excuse absentee voting. In fact, the only constitutional provision referring to absentee voting is Mont. Const. art. VI, § 3, which compels the Legislature to “provide . . . requirements” for absentee voting. (Emphasis added.)

While states must regulate their elections in a constitutional, nondiscriminatory manner, there is no unfettered right to vote absentee. *See Burdick*, 504 U.S. at 433 (holding, while voting “is of the most fundamental

¹ The district court stated that, alternatively, Appellees would prevail under the balancing test. (Doc. 25 at 12.) This conclusion, however, was cursory, and the Court did not undertake any substantive analysis.

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”); *McDonald v. Bd. of Election Comm’rs of Chi.*, 394 U.S. 802, 807–08 (1969) (“It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots.”); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) (“[T]here is no constitutional right to an absentee ballot.”) (citation omitted); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (rejecting claim that there is “a blanket right of registered voters to vote by absentee ballot”); *Zessar v. Helander*, No. 05 C 1917, 2006 U.S. Dist. LEXIS 9830, at *17–18 (N.D. Ill. Mar. 13, 2006) (“state regulations or restrictions on absentee voting do not, as a general matter, violate a fundamental constitutional right”) (citations omitted).

Even if an absentee voting regulation could lead to infringement of the right to vote, Appellees cannot establish a *prima facie* right to return a ballot after Election Day or to have a ballot collected by a stranger. The Election Day deadline and BIPA are precisely the kinds of time, place, and manner regulations the Legislature has the duty to enact and courts routinely uphold.

A. The Election Day deadline does not severely burden the right to vote.

Simply put, the right to vote does not confer a right to return a ballot after the polls have closed. A late vote is not disenfranchisement, it is an invalid vote, just like an overvoted ballot is an invalid vote. The Election Day deadline is a clear, bright-line rule that provides all voters with a concrete date on which their ballot must be received, thus treating all Montana voters equally.

Under the Election Day deadline, 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. *See e.g.*, Mont. Code Ann. §§ 13-1-106 (polling locations); 13-13-246(2)(d) (electronic ballots for disabled persons); 13-13-201 (absentee ballots); 13-19-306 (mail ballots); 13-21-206 (regular absentee ballots returned by overseas voters). The *only* exceptions are for the special federal write-in absentee ballots (FWABs) and military-overseas ballots returned electronically, which are processed according to federal law, and which represent a tiny percentage of ballots returned. Mont. Code Ann. §§ 13-21-206, -226.² Absentee voters actually have *more* opportunity than in-person voters: they receive additional time with

² In the 2016 general election, just 1.3% of the absentee ballots returned by Montana voters were federal absentee ballots, and this number does not distinguish between regular absentee ballots and FWABs. *See* 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. Under Mont. Code Ann. § 13-21-226, military-overseas ballots must be counted if received “by 5 p.m. on the day after election day if transmitted electronically by 8 p.m. on election day.”

their ballot, which they may mail early to ensure timely arrival, submit in-person early or on Election Day, or have someone else submit. *Compare* Mont. Code Ann. §§ 13-1-404 and 13-13-201 *with* 13-13-117.

Appellees' complaints about varying postal service delivery times do not render the Election Day deadline unconstitutional. Rather, they support the State's decision to use a delivery deadline instead of an unreliable postmark. The State has no control over the postal service. Moreover, if delivery times are as unpredictable as Appellees allege, a vote cast on Election Day may not arrive within 6 days of the election, Appellees' proposed cutoff date. And if a voter's ballot is late, he or she will have no remedy. With the Election Day deadline, however, voters can track ballots online or by phone³ and, if concerned a ballot has been lost or will not arrive on time, may vote a replacement in-person. Mont. Code Ann. § 13-13-204.

Neither in-person nor absentee voters have a constitutional right to return ballots after Election Day. That a small number of mailed absentee ballots arrive late (385 in the 2018 general election⁴) despite a clear delivery deadline (just like some number of in-person voters are unable to vote by Election Day) does not demonstrate a severe burden. Instead it demonstrates a fair, accessible system

³ See Montana Secretary of State, *My Voter Page*, <https://app.mt.gov/voterinfo/>.

⁴ Corson Decl. ¶ 5 (Jul. 23, 2020).

where all voters are subject to the same deadline for returning ballots. The district court erred in assuming otherwise.

B. BIPA likewise does not severely burden the right to vote.

Whereas the Election Day deadline is a time restriction, BIPA is a manner restriction the Legislature likewise is empowered to enact. *See* Mont. Const. art. VI, § 3; *McDonald*, 394 U.S. at 807–08. Montana voters simply do not have a constitutional right to have their ballots collected by strangers.

Appellees’ and Intervenors’ arguments to the contrary rely on several incorrect assumptions. First, Appellees incorrectly assert that BIPA “restrict[s] delivery of absentee ballots to sites staffed by elections officials during business hours,” an assertion Intervenors parrot. (Appellees’ Br. at 31; Intervenors’ Br. at 6–7.) BIPA makes no mention of staffing requirements. Irrespective of BIPA, absentee ballots may only be returned in-person to the election office, a polling place (or, in special circumstances, to the absentee election board or an authorized election official), or, in mail ballot elections, a designated place of deposit, which “must be staffed by at least two election officials.” Mont. Code Ann. §§ 13-13-201(e); 13-19-307(b)(5). Thus, the requirement that a place of deposit be staffed predates BIPA.

Second, Appellees are wrong that individuals must “be interrogated” by election officials to determine whether they must sign a registry. (Appellees’ Br. at 32.) BIPA does not require an election official to question a ballot collector about his or her relationship to the voter, confirm his or her identity, or ensure the form is complete. *See* Mont. Code Ann. §§ 13-35-701–705.⁵ Intervenor’s repeated attempts to inflate the penalty prescribed by BIPA likewise lack merit: the statute only imposes a fine, not criminal sanctions. *Id.*

Finally, Intervenor’s blanket allegation that “burdened voters have few alternative means of access to the ballot” is demonstrably false. (Intervenor’s Br. at 27) (citation omitted). Under BIPA, all Montana voters, including those on reservations, have the option to: vote in person; drop their ballot off at a polling place (even outside their precinct), 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, 13-35-703. Voters also may have someone else mail their ballot, as BIPA does not apply to ballots returned by mail.⁶ And Montana reservations have satellite election

⁵ *See also Montana Election Judge Handbook 2020*, 58, <https://sosmt.gov/Portals/142/Elections/Documents/Officials/Election-Judge-Handbook.pdf>.

⁶ Commissioner of Political Practices, *Montana Ballot Interference Prevention Act (BIPA)*, <http://politicalpractices.mt.gov/BIPA>.

offices open for absentee voting, with the location, days, and times of operation determined by mutual agreement between the county and the Tribes.⁷

Considering Montana’s voter-friendly election framework and the multiple ways absentee voters can return ballots, BIPA imposes only a minor burden, if any, and certainly not a severe one, on the right to vote.

III. The State has compelling interests in the Election Day deadline and BIPA.

The State has compelling interests in facilitating orderly elections and protecting election integrity, which easily outweigh any minor burdens imposed by the challenged laws. *See* Mont. Const. art. VI, § 3; *Burdick*, 504 U.S. at 433 (holding 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”) (citation and internal quotation marks omitted); *Griffin*, 385 F.3d at 1130 (“an unregulated election system would be chaos”).

⁷ Montana Secretary of State, *Election Directive #01-2015* (Oct. 15, 2015), available at <https://sosmt.gov/Portals/142/Elections/Documents/Officials/DIR-1-15.pdf>.

A. The Election Day deadline specifically addresses the State’s compelling interests in preserving the integrity, reliability, timeliness, and fairness of its elections.

The Election Day deadline, an exercise of the Legislature’s innate authority to create election deadlines (and thereby orderliness), directly advances compelling state interests in protecting the public’s trust in the veracity and timeliness of election results. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008); *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1377 (S.D. Fla. 2004). Montana’s statutory regime, the deadline’s legislative history and lengthy pedigree, and legal conclusions from other courts upholding similar deadlines all demonstrate the importance of the Election Day deadline to election administration in Montana.

Whether the tradeoff between a uniform deadline and increased time to mail ballots is worthwhile is exactly the kind of line-drawing policy decision reserved to state legislatures. *Burdick*, 504 U.S. at 434. The interconnected nature of election laws is one reason for this. Appellees contend, with no support, that the relief they seek—extending the timeline for ballot receipt by six days—would not “meaningfully impinge” on the State’s interest in maintaining timely reporting of election results. In making this argument, they ignore the myriad post-election deadlines in Montana’s election code that could be affected. *E.g.*, Mont. Code Ann.

§§ 13-15-401 (14 days for county canvass), 13-15-502 (27 days for state canvass), 13-17-503 (post-election audit before county canvas).⁸

Similarly, despite Appellees’ repeated additions, there still are multiple unchallenged statutes containing Election Day deadline references. *See* Mont. Code Ann. §§ 13-13-222 (“[A]n official ballot is voted when the ballot is received at the election administrator’s office.”); 13-13-229 (“An absentee ballot cast by a qualified elector . . . may not be rejected by the election administrator if the ballot was in the possession of the board or an authorized election official before the time designated for the closing of the polls.”); 13-13-232 (“If an absentee ballot is received after the official ballots are delivered to the election judges but prior to the close of the polls, the election administrator shall process it”); 13-15-201 (“[A] marked absentee ballot is valid only if . . . it is received before 8 p.m. on election day”); 13-19-301 (“[A]n official ballot is voted when the marked ballot is received at a place of deposit.”); 13-19-306 (“[I]n order for the ballot to be counted, each elector shall return it in a manner that ensures it is received prior to 8 p.m. on election day.”). These statutes, combined with the mounting number of deadlines Appellees challenge, demonstrate precisely why the Legislature—not the courts—is best equipped to determine the timing of elections.

⁸ While there is the ability to “postpone” the county canvass (*not* the State canvass) if “all returns are not received,” Mont. Code Ann. § 13-15-402(2), the county canvass board is still required to meet “within 14 days after [the] election,” Mont. Code Ann. § 13-15-401.

Notably, Montana is not alone in setting its ballot receipt deadline on Election Day. As the National Conference of State Legislatures (NCSL) recently noted, “[t]he most common state deadline for election officials to receive absentee or mail ballots is on Election Day when the polls close.”⁹ Like Montana, the legislatures in these states made the reasoned decision that an Election Day deadline better serves the public interest than a postmark deadline.

Given the compelling state interests advanced, it is not surprising that courts considering deadlines like Montana’s have uniformly upheld them. *See, e.g., Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 U.S. Dist. LEXIS 90812, *62–67 (D.S.C. May 25, 2020) (denying request for preliminary injunction of absentee ballot receipt deadline of 7pm on Election Day); *Friedman*, 345 F. Supp. 2d at 1377 (upholding ballot receipt deadline of 7pm on Election Day); *In re Ocean Cnty. Comm’r of Registration for a Recheck of the Voting Machs.*, 879 A.2d 1174, 1179 (N.J. Super. Ct. App. Div. 2005) (upholding ballot receipt deadline of close of polling place on Election Day).

Appellees’ arguments to the contrary do not undercut the important interests in the deadline. For example, that FWABs may be received after Election Day does not negate the State’s special interest in maintaining the deadline for all voters not

⁹ NCSL, *VOPP: Table 11: Receipt and Postmark Deadlines for Absentee Ballots (VOPP Report)* (June 15, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx>.

subject to these exceptional circumstances, adoption of laws specific to those circumstances, and incorporation of federal law. The exception for FWABs—which arrive in very small numbers—does not comprise an “identical or analogous election process[]” to allowing hundreds of thousands of other absentee ballots to arrive after Election Day. (*See* Appellees’ Br. at 27.)

Similarly, Appellees’ criticism that in-person voters may return their ballot if they are in line by 8pm, but absentee ballots must be received by 8pm, is a red herring. Absentee voters also have the choice to return a ballot in-person and thus avail themselves of the ability to be in line by 8pm. Ironically, one way to resolve Appellees’ complaint would be to close the polls—regardless of whether anyone is in line—at 8pm. Yet Appellees undoubtedly would find this problematic.

Finally, despite Appellees’ assertion to the contrary, postmarks are not a reliable indicator of when an item is placed in the mail.¹⁰ By contrast, the Election Day deadline has been a clear, bright-line rule for Montana voters for decades and has been heavily advertised by the Montana Secretary of State and election administrators. (Doc. 20, Corson Decl. ¶¶ 7, 9.)

¹⁰ *See VOPP Report* (“[L]ess mail gets truly postmarked.”); Doc. 20, Keller Decl. ¶¶ 4–6 (noting postmarks are not applied until mail reaches processing center, and Montana only has three such centers: Missoula, Great Falls, and Billings). Appellees ask the Court to ignore the NCSL study because it was published after the District Court’s opinion was issued, but then request that the Court take judicial notice of the opinion in *Western Native Voice v. Stapleton*, DV-2020-377 (Or. July 7, 2020), which they attached to their brief, and which was issued more than a month-and-a-half after the preliminary injunction order in this case.

For these reasons, changing the decades-old Election Day deadline would likely create “voter confusion,” as recognized by this Court in its Order staying the preliminary injunction of the deadline. *Stapleton v. Thirteenth Jud. Dist. Ct.*, OP 20-0293 (Or. May 27, 2020) (“[W]e conclude that there is good cause to maintain the election-day deadline for this primary election in order to avoid voter confusion and disruption of election administration.”).¹¹ Voter confusion and administrative disruption are directly at odds with the Legislature’s interests in creating orderly, accessible, and fair elections.

The Election Day deadline imposes only reasonable, nondiscriminatory restrictions on the right to vote, if any. *Burdick*, 504 U.S. at 433. The State’s compelling interests outlined above outweigh any minimal burden imposed by this uniform, time-tested restriction. The district court’s determination that the deadline “advance[s] no legitimate state interests” is legally incorrect and requires reversal. (Doc. 25 at 12.)¹²

¹¹ Appellees’ contention that voters are used to postmark deadlines ignores the many other “received by” deadlines Montanans must follow. *See e.g.*, Mont. Code Ann. §§ 13-1-403 and -502 (“A declaration of intent to be a write-in candidate must be filed with the election administrator by 5 p.m. on the 65th day before the date of the election.”); 13-27-104 (“[A]ll petitions filed with the secretary of state, certified as provided by law, must be received before 5 p.m. of the third Friday of the fourth month prior to the election at which they are to be voted.”).

¹² The district court also erred by conflating the deadline with BIPA in its analysis.

B. The State likewise has compelling interests in BIPA.

As discussed in the State’s opening brief, BIPA advances the compelling state interests of preventing fraud, protecting voters from harassment, ensuring voters feel secure in the voting process, and protecting public confidence in election integrity. (Appellants’ Br. at 38 (citing Doc. 16, Ex. 1 at 2:9–3:8; 42:5–19).) Not only is the Montana Legislature constitutionally mandated to protect voters from ballot collection fraud, it also must ensure the appearance of propriety in its elections. *See* Mont. Const. art. IV, §§ 1 (“All elections by the people shall be by secret ballot.”), 3 (“The legislature . . . shall insure the purity of elections and guard against abuses of the electoral process.”); *Crawford*, 553 U.S. at 197 (“[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process.”). Where the line should be drawn between preventing ballot collection fraud or the appearance of fraud and allowing ballot collection as an additional convenience is, ultimately, a task reserved for the Legislature.

It is not necessary for Montana to experience, much less provide evidence of, systematic or coordinated election fraud before the State is permitted to act to prevent such fraud from occurring. *See Crawford*, 553 U.S. at 197 (“[T]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud.”) (citation and internal quotation marks omitted). “Voting fraud is

a serious problem in U.S. elections generally . . . , and it is facilitated by absentee voting.” *Griffin*, 385 F.3d at 1130–31. Anti-fraud measures can be forward-looking, designed to prevent future instances of fraud, regardless of whether evidence of past election fraud exists. *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.”); Building Confidence in U.S. Elections, § 5.2 (Sept. 2005) (“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.”).¹³

As the State noted in its opening brief, even if ballot collection fraud has not been documented in Montana, it exists and has been documented in other states. (Appellants’ Br. at 32–33.) In addition to the examples the State cited, the New Jersey Attorney General very recently brought voting fraud charges against a city councilman and several other individuals based on their conduct of tampering with ballots they collected from voters.¹⁴

¹³ Available at https://web.archive.org/web/20070609115256/http://www.american.edu/ia/cfer/report/full_report.pdf.

¹⁴ N.J. Office of the Attorney General, *AG Grewal Announces Voting Fraud Charges Against Paterson Councilman Michael Jackson, Councilman-Elect Alex Mendez, and Two Other Men* (June 25, 2020), <https://www.nj.gov/oag/newsreleases20/pr20200625a.html>.

Understandably, Montana is not alone in addressing the problem of ballot collection fraud. Many states restrict ballot harvesting, in some cases more strictly than BIPA.¹⁵ This is unsurprising; Legislatures have the authority to regulate the

¹⁵ See e.g., Ala. Code § 17-11-18 (ballot must be returned by voter, or designee in medical emergency); Ark. Code §§ 7-5-403, 7-5-411 (ballot must be returned by voter, except for residents of residential care facilities, or designee for medical reasons who may only return two ballots); Conn. Gen. Stat. Ch. 145 § 9-140b (only voter, immediate family member, or designee for medical reasons may return ballot); Ga. Code § 21-2-385 (only voter, or immediate family or household member for voter with physical disability, may return ballot); Ind. Code § 3-11-10-1 (only voter or immediate family member may return ballot); La. Stat. § 18:1308 (voter or authorized individual must return ballot; outside of immediate family no person may return more than one ballot); Me. Rev. Stat. 21A §§ 753-A, 753-B, and 754-A (ballot must be returned by voter, immediate family member, or agent designated in writing to pick up ballot and limited to returning five ballots); Md. Code, Elec. Law, § 9-307 (designated agent may return ballot; voter and agent must complete form); Mass. Gen. Laws ch. 54 § 92 (only voter or immediate family member may return ballot); Mich. Comp. Laws § 168.764A (only voter, family member, household member, or election official may return ballot); Minn. Stat. §§ 203B.08, 203B.11 (designated agent may return ballot but only for three other voters); Miss. Code Ann. § 23-15-719 (voter must return absentee ballot by mail; cannot be returned in-person); Missouri Stat. § 114.291 (only voter or immediate family member may return ballot); Nev. Rev. Stat. §§ 293.330, 293.316 (only voter, immediate family member, or emergency designee (hospitalization) may return ballot); N.H. Rev. Stat. § 657:17 (ballot may only be returned by voter, immediately family member, nursing home/residential care administrator, or agent assisting blind or disabled voter, who may only return four ballots); N.J. Stat. §§ 19:63-27, 19:63-16 (ballot may only be returned by voter, immediate family member, or authorized individual limited to returning three ballots); N.M. Stat. §§ 1-6-9, 1-6-10.1, 1-20-7 (only voter, immediate family member, or caregiver may return ballot); N.C. Gen. Stat. § 163-231(b)(1) (only voter or immediate family member may return ballot); Ohio Rev. Code § 3509.05 (same); Okla. Stat. tit. 26 §§ 14-108, 14-110.1, 14-115.1 (voter must return ballot by mail, and can only be returned in-person if physically incapacitated or by designated agent with emergency request); 25 Pa. Stat. §§ 3146.6, 3146.2a (only voter, or emergency designee with completed form, may return ballot); Tenn. Code § 2-6-202 (voter must return ballot by mail; cannot be returned in-person); Tex. Elec. Code §§ 86.006, 86.0051 (only voter may return ballot in-person; other individual may return ballot by mail provided information is recorded on envelope); Va. Code Ann. §§ 24.2-707, 24.2-705 (voter can only designate emergency absentee to return ballot by application); W. Va. Code § 3-3-5 (no one may deliver more than two absentee ballots in-person).

manner in which state elections are held, and there is no constitutional right to absentee ballot collection.

BIPA advances Montana's legitimate, concrete objectives of preventing election fraud before it occurs and ensuring voter confidence. It at most imposes at reasonable, nondiscriminatory manner restrictions on ballot collection. *Burdick*, 504 U.S. at 433. Montana's interests in protecting election integrity far outweigh any burden BIPA's safeguards impose on voters. The district court erred in determining otherwise. Even if the restrictions were considered severe—which they are not—BIPA is narrowly drawn to advance these compelling state interests.

CONCLUSION

The State's compelling interests in facilitating orderly and fair elections and protecting election integrity far outweigh any minimal burden that either the Election Day deadline or BIPA impose on voting. The district court erred by failing to apply the proper test to the challenged election laws and in ignoring these compelling interests; its issuance of a preliminary injunction was incorrect as a matter of law. This Court should reverse.

Respectfully submitted this 10th day of August, 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 4,919 words, excluding certificate of service and certificate of compliance.

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