

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT  
COUNTY OF YELLOWSTONE

WESTERN NATIVE VOICE, Montana  
Native Vote, Assiniboine and Sioux Tribes of )  
Fort Peck, Blackfeet Nation, Confederated )  
Salish and Kootenai Tribes, Crow Tribe, Fort )  
Belknap Indian Community, )

Cause No. DV 20-0377

Hon. Jessica Fehr

Plaintiffs, )

vs. )

**COURTS FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER**

COREY STAPLETON, in his official )  
capacity as Montana Secretary of State, TIM )  
FOX, in his official capacity as Montana )  
Attorney General, JEFF MANGAN, in his )  
official capacity as Montana Commissioner )  
of Political Practices, )

Defendants. )

**INTRODUCTION**

The Court finds itself in an unprecedented time of divisiveness in all matters – including questions of equality under the law. The questions presented in this matter are broader than a simple referendum and perceived insecurity in the voting process in Montana. The questions presented relate back to the basic, and fundamental rights set forth by those intrepid Montana pioneers that convened Montana’s Constitutional Convention and arrived at a document that protects all Montanans – irrespective of race, color or creed. This case and the facts presented at trial turn a spot light to our fellow citizens that still live below the poverty line with limits to health care, government services, mail services and election offices – those citizens are the Native Americans that reside on reservations within Montana’s borders. The questions presented cannot be viewed through the lens of our own upbringings or own life experiences, but through the lens

of the cold, hard data that was presented at trial about the clear limitations Native American communities in Montana face, and how the costs associated with the Ballot Interference and Protection Act (“BIPA”) are simply too high and too burdensome to remain the law of the State of Montana.

### **PROCEDURES AND PRELIMINARY MATTERS**

This matter was tried before this Court on September 8, 2020 to September 10, 2020, sitting without a jury. Plaintiffs Western Native Voice, Montana Native Vote, Assiniboine and Sioux Tribes of Fort Peck, Blackfoot Nation, Confederated Salish and Kootenai Tribes, Crow Tribe and Fort Belknap Indian Community appeared and were represented by Natalie Landreth, Jacqueline De León, Samantha Kelty, and Megan Condon of the Native American Rights Fund, Alora Thomas, Ihaab Syed and Theresa Lee of ACLU’s Voting Rights Project, and Alex Rate and Lillian Alvernaz of the ACLU of Montana. Defendants Corey Stapleton, Tim Fox and Jeff Mangan appeared and were represented by Aislinn Brown, Hannah Tokerud and Stuart Segrest from the Montana Attorney General’s office. Numerous exhibits were offered, admitted and referenced in separate court filings. The issue at trial was whether the Ballot Interference Prevention Act (“BIPA”) violates Plaintiffs’ constitutional right to vote, right to freedom of speech, right to freedom of association and right to due process. Having heard the evidence and reviewed the proposed Findings of Fact and Conclusions of Law of both parties, the Court now makes the following:

### **FINDINGS OF FACT**

#### **A. Voting in Montana.**

1. In-person voting in Montana is logistically challenging due to the state’s large size and rural nature. Agreed Fact No. 48, 69, 70.

2. Montana is the fourth-largest state in terms of land size. Agreed Fact No. 48.
3. As of 2010, Montana is the third-least densely populated state in the nation. Agreed Fact No. 48.
4. Thus, 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%); in the 2018 primary election, of 282,704 votes, 222,190 were absentee votes (78.59%); in the 2017 special election, of 383,301 votes, 280,269 were absentee votes (73.12%). Agreed Fact No. 49.
5. Montana law allows certain elections to be conducted entirely by mail. Mont. Code Ann. § 13-19-104(2). For example, municipal-level elections in the state may be conducted entirely by mail. Agreed Fact No. 50.
6. Ballots may be dropped off at county election offices during the early voting period. Agreed Fact No. 51.
7. Voters can cast an absentee ballot, by mail or in-person, or vote in-person at their polling place on Election Day. Mont. Code Ann. §§ 13-13-201, -222; Ex. S001 at 19.
8. For those electors who choose to vote absentee, a range of return options is available, including delivery through the mail or another common carrier (e.g., FedEx) or in person to the county election office or satellite office, any polling location within the voter's county of residence, or a designated place of deposit. Mont. Code Ann § 13-13-201; Ex. S001 at 19; Tr. Trans. 532:7–14 (Sept. 10, 2020).
9. Montana's elections overall are very accessible. For example, Montana is among a minority of states that allow election-day registration, allowing voters to show up,

register, and cast a ballot on Election Day. Mont. Code Ann. § 13-2-304; Ex. S001 at 4.

**10. Secretary of State.**

- a. Defendant Corey Stapleton is the Secretary of State for the State of Montana. Agreed Fact No. 45.
- b. Dana Corson is the Election Director for the Montana Secretary of State. 09/09/20 Trial Tr.<sup>1</sup> (Corson) at 402:17-402:21.
- c. The Secretary of State's Office sets policy regarding the conduct of elections; statewide election procedures; and provides technical support to county election administrators on election day. Scribner Dep. Tr. 173:12-19; 176:4-7; *see also* Mont. Code. Ann. §§ 13-1-201–13-1-204.

**11. Attorney General.**

- a. Defendant Tim Fox is the Attorney General for the State of Montana. Agreed Fact No. 46.

**12. Commissioner of Political Practices (COPP).**

- a. Defendant Jeff Mangan is the Commissioner of Political Practices for the State of Montana. Mangan Dep Tr. 19:7-8; *see also id.* at 22:17-21.
- b. Katie Beall was the Outreach and Education Coordinator for the Office of Political Practices until March 2020. Mangan Dep. Tr. 54:14-18; Beall Dep. Tr. 20:3-7.
- c. Scott Cook is the Legal Investigator for the Office of Political Practices. Mangan Dep. Tr. 55:11-12; Cook Dep. Tr. 15:20-16:2.

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<sup>1</sup> All citations in this document are to the daily rough transcript rather than the final transcripts in as the parties were directed by the Court due to the time sensitive nature of the matters being litigated and upcoming election. 09/10/20 Trial Tr. (Order) at 703:10-17.

**13. Election Administrators.**

- a. Nichol Scribner is the Election Administrator for Sanders County. Scribner Dep. Tr. 23:13-18.
- b. Rina Moore is the Election Administrator for Cascade County. Moore Dep. Tr. 13:13-18.
- c. Dulcie Bear Don't Walk is the Big Horn County Election Administrator. 09/08/20 Trial Tr. (Bear Don't Walk) at 167:9-10.
- d. Election Administrators establish election procedures for their counties and administer all aspects of county elections. 09/08/20 Trial Tr. (Bear Don't Walk) at 167:14-24.

**B. Voting on Indian Reservations in Montana.**

- 11. 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. Agreed Fact No. 16.
- 12. Sixteen counties intersect with these reservations: Glacier and Pondera Counties (the Blackfeet Indian Reservation); Big Horn and Yellowstone Counties (the Crow Reservation); Lake, Sanders, and Missoula Counties (the Flathead Reservation); Blaine and Phillips Counties (the Fort Belknap Reservation); Valley, Daniels, Roosevelt, and Sheridan Counties (the Fort Peck Indian Reservation); Big Horn and Rosebud Counties (the Northern Cheyenne Indian Reservation); and Hill and Chouteau Counties (the Rocky Boy's Reservation). Agreed Fact No. 17.

13. The total on-reservation population of the seven reservations is approximately 70,000.  
Agreed Fact No. 18.

14. 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. *See generally* Pl. Ex. 23/Stip. Ex. 4; Pl. Ex. 24/Stip. Ex. 6; Pl. Ex. 26/Stip. Ex. 8.

**15. Assiniboine and Sioux Tribes of Fort Peck.**

a. The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation are a sovereign, federally recognized tribe with over 13,000 enrolled Tribal members. Approximately 7,000 of those members live on the Reservation, and over 4,500 are 18 years of age or older. Agreed Fact No. 21.

b. The Fort Peck Reservation is home to two separate Indian nations, each composed of numerous bands, and jointly governed a single Tribal Executive Board. Agreed Fact No. 22.

c. The Fort Peck Reservation spans approximately 110 miles from east to west and 40 miles from the Missouri River north towards the Canadian border, covering a little over 2 million acres. Agreed Fact No. 23.

d. Some houses on the Fort Peck Reservation do not receive home mail delivery. Agreed Fact No. 24.

e. Fort Peck has a transit bus system that does not follow a route—it responds to calls of individual and takes them to their desired location on the Reservation. Pl. Ex. 114 (Fort Peck Affidavit), ¶ 11.

- f. Organizational Plaintiffs collect ballots on the Fort Peck Reservation. Agreed Fact No. 25.

**16. Blackfeet Nation.**

- a. Blackfeet Nation is a federally recognized tribe with 17,251 enrolled members. Agreed Fact No. 26.
- b. The total population of Native Americans on the Blackfeet reservation is estimated to be 7,000 across 1.5 million acres (2343.7 square miles) for a population density of 2.98 Native people per square mile. Pl. Ex. 113 at 8 (table 1)/Stip. Ex. 2.
- c. The Reservation is located in northwestern Montana and covers approximately 1.5 million acres. Agreed Fact No. 27.
- d. Houses on the Blackfeet Reservation do not receive home mail delivery. Agreed Fact No. 28.
- e. Some Native Americans who are enrolled members of the Blackfeet Nation have voted in Montana elections through the collection and conveyance of their ballots to their local election offices by community members and third parties. Agreed Fact No. 29.
- f. Organizational Plaintiffs collect ballots on the Blackfeet Reservation. Agreed Fact No. 30.

**17. Confederated Salish and Kootenai Tribes.**

- a. The Confederated Salish and Kootenai Tribes of the Flathead Reservation (“CSKT”) is a federally recognized tribe with 8,020 enrolled members with approximately 5,500 members living on the Flathead Reservation. CSKT members make up approximately one fifth of the population on the Reservation. There are

also numerous Native Americans that are members of other tribes living on the Reservation, with 65 different tribes represented within the reservation boundary. The total Native American population comprises one quarter of the reservation population. Agreed Fact No. 31.

- b. The Reservation is located in western Montana and spans 1.3 million acres. Agreed Fact No. 32.
- c. Shelly Fyant is the Chairwoman of the Confederated Salish and Kootenai Tribes. 09/08/20 Trial Tr. (Fyant) at 88:15-17.
- d. Houses on the Flathead Reservation receive home mail delivery. Agreed Fact No. 33.
- e. Some Native Americans who are enrolled members of CSKT have voted in Montana elections through the collection and conveyance of their ballots to their local election offices by community members and third parties. Agreed Fact No. 34.
- f. CSKT spends \$5,000 per year on GOTV efforts. 09/08/20 Trial Tr. (Fyant) at 99:13-17.
- g. CSKT's GOTV program mobilized CSKT community members during the 2016 Election, Montana's 2017 Special Election, and the 2018 Election. CSKT hires one seasonal, temporary worker to run the program. The program utilizes voter education and various forms of support. CSKT organizes ballot collection events where the temporary worker collects ballots and disseminates non-partisan voter information. CKST's GOTV program resulted in registration of eligible voters in Native American communities, an increase of early voting in Montana's Native

American communities, and an increase of Native American voters on Election Day. 09/08/20 Trial Tr. (Fyant) at 99:18-101:14; Pl. Ex. 104.

- h. CSKT members are more likely to live in the foothills and more rural parts of the reservation. This makes the travel times to amenities such as the post office more burdensome for many Natives than for non-Natives that live closer to amenities. 09/08/20 Trial Tr. (Fyant) at 90:15-91:2; 98:4-99:7.
- i. Chairwoman Fyant testified at trial that “racism is alive and well on the Flathead Reservation.” Given the tensions between members and non-members, many tribal members do not feel comfortable traveling to majority non-Native areas and do not feel comfortable going to in-person polling places staffed by non-members. 09/08/20 Trial Tr. (Fyant) at 108:20-111:14.
- j. Organizational Plaintiffs collect ballots on the Flathead Reservation. Agreed Fact No. 35.

**18. Fort Belknap Indian Community.**

- a. The Fort Belknap Indian Community is a sovereign, federally recognized tribe with over 8,400 enrolled Tribal members. Approximately 4,084 of those members live on the Reservation, and over 2,000 are 18 years of age or older. Agreed Fact No. 39.
- b. The Fort Belknap Reservation is home to the Assiniboine (Nakoda) and Gros Ventre (Aaniiih) Tribes and is governed by a tribal council. Agreed Fact No. 40.
- c. The Fort Belknap Reservation spans approximately 675,147 acres. Agreed Fact No. 41.
- d. Andy Werk is the Fort Belknap President. Agreed Fact No. 66.

- e. Delina Cuts the Rope is the Fort Belknap Chief Administrative Officer. 09/08/20 Trial Tr. (Cuts the Rope) at 115:22-25.
- f. The vast majority of houses on the Fort Belknap Reservation do not receive home mail delivery. 09/08/20 Trial Tr. (Cuts the Rope) at 120:13-121:7.
- g. There is only one Post Office on the Fort Belknap reservation, at Hayes. 09/08/20 Trial Tr. (Cuts the Rope) at 122:20-123:1.
- h. On the Fort Belknap Reservation, “most folks will have others pick up their mail for them.” 09/08/20 Trial Tr. (Cuts the Rope) at 124:19-22.
- i. Some Native Americans who are enrolled members of the Fort Belknap Tribes have voted in Montana elections through the collection and conveyance of their ballots to their local election offices by community members and third parties. Agreed Fact No. 43.
- j. To encourage Fort Belknap members to vote, Fort Belknap has assisted voters by assigning and paying staff to take administrative leave so they can drive voters to the polls on Election Day and allowing government vehicles to be used to transport voters. This service is free of charge to the voter. Pl. Ex. 115, ¶ 12.
- k. Fort Belknap also allows its employees to provide security at “alternative” voting sites on the reservation and provides the space for these locations. 09/08/20 Trial Tr. (Cuts the Rope) at 133:16-134:20.
- l. “Alternative” voting sites are those in which the actual county office moves its equipment and staff onto the reservation for a limited time period before the election. It is not a true “satellite” office in that it is not in addition to the county office. 09/09/20 Trial Tr. (Corson) at 452:15-455:12; 456:22-457:1; 457:14-18.

- m. Fort Belknap provides contributions to the Snake Butte Voter Coalition, which is a separate group not affiliated with the Tribe that hires temporary organizers to perform ballot collection on the Tribe's behalf. 09/08/20 Trial Tr. (Cuts the Rope) at 142:21-143:5; 143:13-145:11.
- n. Fort Belknap contributes approximately \$3,000 in election years to the Snake Butte Voter Coalition. 09/08/20 Trial Tr. (Cuts the Rope) at 136:23-137:3; Pl. Ex. 97. In 2016, Fort Belknap contributed \$1,520 to this Coalition for similar work. Pl. Ex. 98.
- o. Fort Belknap provides staffing, building space, wireless internet connectivity, and security for alternate election sites. 09/08/20 Trial Tr. (Cuts the Rope) at 134:10-15; 136:7-15.
- p. Organizational Plaintiffs collect ballots on the Fort Belknap Reservation. Agreed Fact No. 44.

**19. Voting by Mail in Indian Country.**

- a. One barrier to voting is the mail system on Indian reservations. Pl. Ex. 23 at 5/Stip. Ex. 4.
- b. Many Native Americans living on rural reservations lack home mail service. Agreed Fact Nos. 24, 28, 33, 42.
- c. There are limited mail routes and drop-off mail locations on rural reservations. Pl. Ex.'s 114, ¶ 4; 118, ¶ 4; 09/08/20 Trial Tr. (Bear Don't Walk) at 169:6-25; *see also* 09/09/20 Trial Tr. (McCool) at 338:19-339:14.

- d. Testimony at trial demonstrated that mail service is non-existent on many parts of Native American reservations in Montana. 09/09/20 Trial Tr. (McCool) at 338:19-339:14; Agreed Fact Nos 24, 28, 42.
- e. A significant percentage of Native Americans living on rural reservations have non-traditional mailing addresses and do not receive mail at home. Pl. Ex. 23 at 6-7/Stip. Ex. 4; Pl. Ex. 24 at 8/Stip. Ex. 6.
- f. Instead, Native Americans often rely upon post office boxes (“P.O. box”) to conduct affairs. Pl. Ex. 23 at 6-7/Stip. Ex. 4.
- g. On some reservations, residents must drive many miles one-way to get to their local P.O. Box. Pl. Ex. 23 at 6-7/Stip. Ex. 4.
- h. On average, persons living in communities off reservations have a shorter distance to travel to the nearest post office. The average one-way distance to a post office off-reservation is 7.16 miles. The average one-way distance to a post office on-reservation is 12.25 miles. 09/10/20 Trial Tr. (Weichelt) at 679:17-680:15; Pl. Ex. 27.
- i. The longest distance to a nearest Post Office faced by Native American voters in Montana is 34 miles one-way, or 68 miles roundtrip, for some members on the Fort Peck reservation. 09/10/20 Trial Tr. (Weichelt) 681:6-11; Pl. Ex. 27.
- j. On average, off-reservation post offices are open longer on both Monday through Friday and Saturdays compared to on-reservation post offices. Pl. Ex. 82, 83, 84/Stip. Ex. 31-34.
- k. P.O. Boxes are often shared by multiple tribal members. 09/08/20 Trial Tr. (Fyant) at 98:4-12; 09/08/20 Trial Tr. (Cuts the Rope) at 121:18-22; 122:1-2.

- l. Because of the lack of transportation and remote locations, not many people can check their mail every day. 09/08/20 Trial Tr. (Cuts the Rope) at 124:19-125:11.
- m. When mail is collected from a P.O. box, it is commonly pooled among individuals. 09/08/20 Trial Tr. (Fyant) at 98:4-12, 13-17; 09/08/20 Trial Tr. (Cuts the Rope) at 121:18-22; 122:1-2.
- n. On Fort Belknap, for example, it is common that people with cars and gas money collect mail for others and take it to the post office. 09/08/20 Trial Tr. (Cuts the Rope) at 124:15-125:11; 126:2-127:20.
- o. Now with reports of postal delays, it is more difficult than in the past to judge when a ballot must be placed in the P.O. Box so that it is mailed on-time—this is especially true on Indian reservations. 09/09/20 Trial Tr. (McCool) at 341:24-342:17; Pl. Ex. 23 at 5-7/Stip. Ex. 4; 09/09/20 Trial Tr. (Street) at 274:23-276:23; Pl. Ex. 26 at 4-6/Stip. Ex. 8.
- p. The United States Postal Service is facing problems and delays in mail delivery nationally. The State may be less able to respond to the expected increase in mail-in ballots. 09/09/20 Trial Tr. (McCool) at 341:21-342:2; Pl. Ex. 23/Stip. Ex. 4; 09/09/20 Trial Tr. (Street) at 274:23-276:23; Pl. Ex. 26 at 4-6/Stip. Ex. 8.
- q. Absentee ballots are mailed to voters approximately one month before the election. 09/09/20 Trial Tr. (Corson) at 443:12-16; Pl. Ex. 24 at 8/Stip. Ex. 6.
- r. The Secretary of State and counties recommend that voters return their ballots by mail no later than one week prior to the election. 09/09/20 Trial Tr. (Corson) at 443:17-20; 09/09/20 Trial Tr. (Street) at 274:23-275:6, 276:25-277:23; Pl. Ex. 26 at 9/Stip. Ex. 8.

- s. If unvoted mail ballots (either absentee ballots or regular ballots for all mail in elections) are received at a P.O. Box, the person handling the mail of multiple people as part of a trip to the post office could handle more than six ballots. 09/08/20 Trial Tr. (Fyant) at 98:18-99:7.
- t. Given the large extended families living closely together on reservations, it is not uncommon that a person may handle mail, including ballots, for more than six family members. 09/08/20 Trial Tr. (Fyant) at 92:12-15.
- u. In order to deal with mail delays, Native Americans living on rural reservations would need to mail in their ballots more than a week before an election. 09/09/20 Trial Tr. (McCool) at 343:16-344:13; 09/09/20 Trial Tr. (Street) at 274:23-276:23; Pl. Ex. 26 at 4-6/Stip. Ex. 8. But mailing in their ballots that early would have voter costs of missing the last week of campaigns when important campaign information is shared and when key get-out-the-vote initiatives are active. 09/09/20 Trial Tr. (McCool) at 343:16-344:14.
- v. “[B]allot collection is a great way to not have to deal with the problems created by terrible mail service. So a ballot collector comes to your door, you give them a ballot, it’s signed and sealed, and they then logically they’d take it to an election office, but they can’t do that now. But that would be the logical way to get around all the terrible problems that the postal service is experiencing right now. So there’s a direct relationship there.” 09/09/20 Trial Tr. (McCool) at 339:17-24.
- w. There are also longer distances to the polls and shorter hours at satellite polling locations and county seats, resulting in additional voter costs and reliance on ballot

collectors. 09/09/20 Trial Tr. (McCool) at 325:22-326:21, 332:5-10, 339:17-24;  
*see also* 09/10/20 Trial Tr. (Hood) at 583:4-21.

**20. Geographic and socioeconomic barriers.**

- a. Voting by mail can increase voter costs for low-income people, people with less education and voters who live in remote areas with poor mail service – demographic and geographic attributes that Native American voters residing on rural reservations reflect at a far higher rate than the general population. Pl. Ex. 23 at 3-7/Stip. Ex. 4; *see also* 09/09/20 Trial Tr. (McCool) at 319:15-320:16, 341:24-343:13; 09/08/20 Trial Tr. (Street) at 210:8-212:13.
- b. Testimony at trial established that considerable numbers of Native Americans living on reservations are unemployed and live below the poverty level. 09/08/20 Trial Tr. (McLean) at 50:14-16; 09/08/20 Trial Tr. (Fyant) at 91:10-12; 91:22-25; 92:8-9; 09/08/20 Trial Tr. (Cuts the Rope) at 123:13-16; 127:21-128:10; 09/09/20 Trial Tr. (McCool) at 351:22-355:12; Pl. Ex. 113, ¶¶ 65-69/Stip. Ex. 2.
- c. Testimony presented at trial demonstrated that higher poverty levels than the rest of Montana’s population result in a lack of working vehicles, money for gasoline, or car insurance, making travel difficult on the reservations. 09/08/20 Trial Tr. (Perez) at 71:17-73:22; 74:13-18; 09/08/20 Trial Tr. (Cuts the Rope) at 123:13-124:6; 09/08/20 Trial Tr. (Fyant) at 94:22-95:15 “Sometimes we have to make choices between buying a tank of gas or, you know, buying food for our family.”; 09/08/20 Trial Tr. (Bear Don’t Walk) at 186:7-12; Pl. Ex. 113, ¶¶ 13, 23, 37, 65-69/Stip. Ex. 2.

- d. Some Native voters do not have licenses to drive off-reservation. 09/08/20 Trial Tr. (Perez) at 72:7-12.
- e. Voter costs were defined by expert testimony at trial as socioeconomic barriers that could prevent an individual from casting their ballot.
- f. Poverty is a voter cost resulting in lower turnout by low income individuals. 09/09/20 Trial Tr. (McCool) at 351:10-21; *see also* 09/08/20 Trial Tr. (Street) at 211:5-212:3.
- g. Lack of childcare options on reservations is also a voter cost faced by some Native voters. 09/08/20 Trial Tr. (Perez) at 74:11-23.
- h. Many Native Americans living on rural reservations without home mail access have difficulties accessing their P.O. box due to distance, socioeconomic conditions, and lack of reliable transportation. 09/08/20 Trial Tr. (Cuts the Rope) at 120:15-125:11; *see* Pl. Ex. 113, ¶¶ 13, 37, 65-69/Stip. Ex. 2.
- i. Testimony at trial established that vehicles on reservations in Montana are sometimes scarce and often shared. A single vehicle is sometimes responsible for getting everyone in a household to and from work, to all social engagements, doctor's office visits, as well as any mail runs or ballot drop offs. 09/08/20 Trial Tr. (Cuts the Rope) at 123:9-125:11; 126:10-127:20; 09/09/20 Trial Tr. (McCool) at 332:16-333:14; Pl Ex. 113, ¶ 12/Stip. Ex. 2. Additionally, these vehicles may not be in good repair or "road legal." 09/08/20 Trial Tr. (Perez) at 71:17-72:12; 73:14-22.

- j. Challenging weather can also make travel difficult, particularly in the election month of November. 09/08/20 Trial Tr. (McLean) at 42:19-43:1; 09/08/20 Trial Tr. (Perez) at 71:11-73:22.
- k. On the Blackfeet Reservation, for example, dependable vehicles that can manage difficult road conditions are rare, making a working vehicle in the election month of November especially difficult to come by. Pl. Ex. 118, ¶ 8.
- l. Tribal members on the Flathead Reservation frequently choose to forego a mail run to spend funds on food and heating. 09/08/20 Trial Tr. (Fyant) at 95:9-15.
- m. The Secretary of State's Office agrees that Native American voters from rural reservations in Montana are challenged by remoteness and a lack of electrical power, cell phone and internet. 09/09/20 Trial Tr. (Corson) at 433:5-12 and 434:6-25; *see also* 09/09/20 Trial Tr. (McCool) at 333:20-337:5.
- n. There is evidence that Native Americans may be deterred from electoral participation by discrimination, especially discrimination at border towns. 09/09/20 Trial Tr. (McCool) at 347:15-351:3; 09/08/20 Trial Tr. (Fyant) at 109:1-111:14.

## **21. Satellite Voting Locations.**

- a. The same burdens make it difficult to travel to "satellite" voting locations, which were first opened on reservations pursuant to a settlement in a federal voting rights case. Pl. Ex. 77/Stip. Ex. 28.
- b. The settlement agreement entered into by parties to *Wandering Medicine v. McCulloch*, CV No. 12-135, BLG-DWM (D. Mont.), and Election Directive #01-2015 require the tribes and county officials to work together to determine the

location and operation hours of “satellite” offices. 09/09/20 Trial Tr. (Corson) at 414:16-415:5; 455:13-456:2.

- c. Election Directive #01-2015, issued by the Montana Secretary of State, directs each county with an American Indian reservation that includes voting-eligible residents to open satellite election offices on those reservations if required to protect the voting rights of tribal members under the Voting Rights Act (VRA). 09/09/20 Trial Tr. (Corson) at 455:13-456:2.
- d. The State does not play a role in these negotiations and was not a party to the settlement agreement in *Wandering Medicine v. McCulloch*, CV No. 12-135, BLG-DWM (D. Mont.), which requires the tribes and counties to work together to create satellite offices. Ex. S028; Corson Deposition Designation (Corson Dep.) 73:4–7, 77:19–22, 98:22–99:3 (Aug. 21, 2020).
- e. Satellite election offices are provided in addition to the polling places on each reservation. Polling places are open on election day, and satellite offices are open on reservations during the early voting period. Tr. Trans. 515:10–516:14 (Sept. 10, 2020); Ex. S031.
- f. Satellite offices provide in-person absentee voting and late registration services equivalent to the services at the main election office of the county. Agreed Fact 55.
- g. Individual Montana counties are directed to work with Tribal governments to open and staff satellite offices. For example, counties are supposed to work with and consult the Tribal government to arrive at a determination and mutual agreement of the location and days and times of operation for each “satellite” office. 9/8/20 Trial

Tr. (Cuts the Rope) at 133:18-134:20; 09/09/20 Trial Tr. (Corson) at 414:11-415:5, 456:22-457:1.

- h. However, according to Fort Belknap, they are simply told where the alternate election office will be and when it will be open, and not given options to change this. 9/8/20 Trial Tr. (Cuts the Rope) at 133:18-134:20; 09/09/20 Trial Tr. (Corson) at 414:11-415:5, 456:22-457:1.
- i. Pursuant to Election Directive #01-2015, “satellite” offices must provide in-person absentee voting and late registration services equivalent to the services at the main election office of the county. Pl. Ex. 74/Stip. Ex. 26.
- j. During the 2018 general election, there were satellite offices on all seven reservations in Montana: one on Crow (Big Horn County), two on Northern Cheyenne (Big Horn and Rosebud counties), three on Fort Belknap (Blaine County), two on Rocky Boy’s (Hill and Chouteau counties), three on Blackfeet (Pondera and Glacier counties), one on Flathead (Lake county), and two on Fort Peck (Roosevelt and Valley counties). 09/09/20 Trial Tr. (Corson) at 415:6-11.
- k. While satellite election offices currently operate on all seven Indian reservations, generally those locations are open only a few of the days of the early voting period (and only for limited hours) and do not comply with Directive #01-2015. 09/08/20 Trial Tr. (McLean) at 52:15-21; 09/09/20 Trial Tr. (Corson) at 451:3-457:18; *see also* 09/09/20 Trial Tr. (Perez) at 69:14-20; 75:15-76:3; 77:4-8.
- l. Corson, on behalf of the Secretary of State’s Office, testified that the Office has no affirmative role in the hours that satellite polling places are open, including no affirmative obligation to assist should a county refuse a tribe’s request for a polling

location or for specific hours that a polling location is open. 09/09/20 Trial Tr. (Corson) at 414:11-22; 415:20-22; and 457:19-458:5.

- m. Based on the above identified socio-economic and geographic barriers Native American voters living on rural reservations still have reduced access to early voting. Stip. Ex. 31-34.

## 22. Early Voting

- a. While individual Native American voters' ballots may also be dropped off at county election offices during the full early voting period, they are located in county seats off-reservation. 09/08/20 Trial Tr. (Bear Don't Walk) at 189:24-190:4; Pl. Ex. 113, ¶ 22/ Stip. Ex. 2.
- b. Chairwoman Fyant testified that in her experience some CSKT members will not vote in person because of tensions between non-Native and Native populations co-existing on the reservation. 09/08/20 Trial Tr. (Fyant) at 108:16-25.
- c. Native Americans living on reservations wanting to avail themselves the full early voting period, using county election offices, would have to travel further than their non-Native counterparts who live off-reservation. Pl. Ex. 113 at 9-11/Stip. Ex. 2; *see also* 09/10/20 Tr. (McCool) at 325:10-326:16, 330:10-322:10; 09/10/20 Trial Tr. (Hood) at 583:12-21.
- d. Because of these many barriers, individual Native American voters in rural reservation communities rely on third parties' collection and conveyance of their ballots to cast their votes. Agreed Facts Nos. 25, 30, 35, 44; *see also* 09/08/20 Trial Tr. (Perez) at 74:11-75:2.

- e. Prior to BIPA, voters frequently brought someone else's ballot into the election offices. 09/08/20 Trial Tr. (Perez) at 79:20-25.
- f. Whatever manner the ballot arrives to the election office, it is marked as received and voters can confirm that by calling the election office or online through the My Voter page, which is extensively used and for which voters are automatically registered. 09/10/20 Trial Tr. (Corson) at 506:13-507:19.

### **23. Place of Deposit**

- a. BIPA registry forms must be collected at "places of deposit." Mont. Code Ann. § 13-35-704
- b. Neither the Commission of Political Practices nor the Secretary of State have provided guidance on what a "place of deposit" is. *See* Mangan Dep. Tr. 67:9-68:13, 69:6-8, 85:11-14; Pl. Ex. 25 at 2-3; *see generally* Pl. Ex.'s 14, 17.
- c. Voters cannot tell from the face of the documents whether a post office is a place of deposit. Mangan Dep. Tr. 67:6-8.
- d. Voters have included their BIPA forms with their mailed ballots. Mangan Dep. Tr. 130:3-11.
- e. Each county election office decides whether and where to place drop boxes in the county, and as they considered a place of deposit, they must be staffed by two election officials at all times. Corson Dep. Tr. (Vol. I) at 49:17-22, 53:17-20.
- f. As of September 10, the Secretary of State had not placed on its website where the drop boxes would be located for the general election. 09/10/20 Trial Tr. (Corson) at 501:12-502:10.

**24. Western Native Voice, Montana Native Vote.**

- a. Marci McLean is the Executive Director for Western Native Voice and Montana Native Vote. 09/08/20 Trial Tr. (McLean) at 18:19-20.
- b. Western Native Voice and Montana Native Vote (collectively “Organizational Plaintiffs”) engage in get-out-the-vote (“GOTV”) efforts in Montana tribal communities and in Missoula, Great Falls, and Billings. These efforts include canvassing, discussing the importance of voting and civic participation, and prior to BIPA, ballot collection. 09/08/20 Trial Tr. (McLean) at 19:16-22; 24:21-25; 27:15-24; 09/08/20 Trial Tr. (Perez) at 74:11-75:2.
- c. Western Native Voice and Montana Native Vote are separate legal entities, each with its own boards of directors. The two Organizational Plaintiffs share staff members, but staff differentiate the work they do depending on which organization is funding the work. 09/08/20 Trial Tr. (McLean) at 19:14-22.
- d. Western Native Voice and Montana Native Vote are membership organizations. 09/08/20 Trial Tr. (McLean) at 19:23-24.
- e. Western Native Voice has over 10,000 members across Montana. 09/08/20 Trial Tr. (McLean) at 19:25-20:1.
- f. Montana Native Vote has over 1,000 members across Montana. 09/08/20 Trial Tr. (McLean) at 20:2-3.
- g. Ballot collection is a critical part of Organizational Plaintiffs’ work, as they spend a significant portion of their time on ballot collection. 09/08/20 Trial Tr. (McLean) at 26:4-14.

- h. They collect ballots on all seven reservations in Montana. 09/08/20 Trial Tr. (McLean) at 27:15-20; 09/08/20 Trial Tr. (Perez) at 68:18-69:1.
- i. Organizational Plaintiffs hire organizers living on reservation and pay them to collect voted ballots on their reservation and deliver them to election offices. For example, in 2016 Organizational Plaintiffs had 14–18 organizers working to deliver and collect ballots in Montana. During the 2018 election cycle, Organizational Plaintiffs employed 32 organizers in Montana, with between 15 and 22 organizers on staff at a given time. 09/08/20 Trial Tr. (McLean) at 27:5-11, 37:5-12; *see also* 09/08/20 Trial Tr. (Perez) at 68:3-5; 75:5-8.
- j. Each organizer participates in several days of training, which includes a discussion of the history of suppression of the Native American vote and the importance of the Native vote. 09/08/20 Trial Tr. (McLean) at 32:2-5; Pl. Ex. 139.
- k. Organizational Plaintiffs' GOTV work has been critical to increasing voter turnout in Montana. 09/08/20 Trial Tr. (McLean) at 40:15-18; Pl. Ex. 22.
- l. In 2018, Organizational Plaintiffs hired local community organizers to collect and convey ballots for Native American voters on reservations and in urban Indian centers. 09/08/20 Trial Tr. (McLean) at 27:5-11, 37:5-12.
- m. These organizations have been very successful in their work to facilitate Native American voting, due largely to their ballot collection efforts. Pl. Ex. 22; 09/08/20 Trial Tr. (McLean) at 51:21-52:13; 09/08/20 Trial Tr. (Perez) at 68:18-69:13.
- n. In 2018, eighty percent of the voters they contacted voted. Pl. Ex. 22.
- o. In 2018, these organizers collected and conveyed at least 853 ballots. 09/08/20 Trial Tr. (McLean) at 39:11-17; Pl. Ex.'s 22, 128.

- p. Those 853 ballots represent fully 9-10% of total absentee ballots cast in precincts targeted by Organizational Plaintiffs. 09/08/20 Trial Tr. (McLean) at 39:24-40:11; Pl. Ex. 128; *see also* 09/10/20 Trial Tr. (Hood) at 626:1-15 (nearly 6% of *all* on-reservation absentee ballots).
- q. Before the passage of BIPA, the Secretary of State's Office did not have any concrete concerns regarding ballot collection in Montana. 09/09/20 Trial Tr. (Corson) at 458:19-459:6.
- r. One of the Secretary of State's goals is to promote democracy, which includes participation and increasing voter turnout. 09/9/20 Trial Tr. (Corson) at 431:12-25.
- s. The Secretary of State's Office finds that making sure ballots are returned is one element of a successful election. 09/09/20 Trial Tr. (Corson) at 458:9-12.
- t. When a voter entrusts Organizational Plaintiffs with their ballot, Organizational Plaintiffs feel responsible for delivering that ballot in person. 09/08/20 Trial Tr. (McLean) at 43:6-13.
- u. BIPA impedes Organizational Plaintiffs' ability to clearly communicate with voters about collection options and timelines. 09/08/20 Trial Tr. (McLean) at 49:19-24; 50:3-6.
- v. McLean testified that ballot collection is a political statement. 09/08/20 Trial Tr. (McLean) at 55:7-12.
- w. Organizational Plaintiffs have never been the subject of an investigation by any entity for alleged voter fraud. 09/08/20 Trial Tr. (McLean) at 56:3-16.

**C. The Ballot Interference Prevention Act (“BIPA”).**

25. 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 an election official. Mont. Code Ann. § 13-35-703.
26. Unless they are a postal service worker or election official, a ballot collector may collect no more than six ballots in any instance and must sign a registry form. *Id.* §§ 13-35-703; 13-35-704.
27. Failure to follow BIPA subjects one to a fine of \$500 per ballot collected and potential imprisonment for false statements made on the registry form. *Id.* §§ 13-35-705; 45-7-201; *see also* 09/08/20 Trial Tr. (McLean) at 50:3-24.

**28. Relevant Legislative History.**

- a. Montana State Senator Albert Olszewski introduced BIPA as Senate Bill 352 on March 16, 2017, as a legislative act subject to referendum.
- b. On March 22, 2017, the Senate Committee on State Administration conducted a hearing to consider the bill. Stip. Ex. 9.
- c. On March 30, 2017, SB-352 passed the Senate and was transmitted to the House.
- d. On April 6, 2017, the House Committee on the Judiciary conducted a hearing to consider the bill. Stip. Ex. 11.
- e. The Secretary of State’s office was not asked its position on BIPA. 09/10/20 Trial Tr. (Corson) at 469:12-14.
- f. Senator Olszewski repeated twice that the purpose of the bill was to ask the people of Montana to determine whether unsolicited absentee ballot collection is legal. Stip. Ex.’s. 9 at 3, 11 at 2; *see also* Stip. Ex. 9 at 39.

- g. The Montana Association of Clerk and Recorders (“MACR”) disputed the need for BIPA. Stip. Ex. 10.
- h. The Secretary of State’s Office holds clerks highly credible. 09/10/20 Trial Tr. (Corson) at 469:19-21.
- i. A representative of the MACR testified that BIPA would, in their opinion, target voters who are doing things right, rather than creating a deterrent for the people who would do things wrong. Stip. Ex. 10.
- j. She further testified that BIPA needed to be specific and clear in defining ballot interference and make only that conduct illegal. Stip. Ex. 10.
- k. Witnesses also testified about the impacts of the bill upon Native Americans. Stip. Ex.’s 9, 10, 11.
- l. A member of the Confederated Salish and Kootenai Tribes testified that the measure would hurt tribal communities because many live in remote areas and have limited resources making transportation, and even the ability to get stamps, difficult. Stip. Ex. 9 at 14-15.
- m. There was testimony that BIPA’s limit to who can pick up a ballot and the limit of picking up six ballots creates even more obstacles to voting for Native Americans. Stip. Ex.’s 9 at 15; 11 at 19-20.
- n. Further testimony asserted that BIPA ignores how many Native people vote. Groups like Western Native Voice have gone out and collect[ed] ballots for Natives. Stip. Ex. 11 at 19-20.
- o. Testimony was given that this bill could eliminate that vital service for Native people. Stip. Ex.’s 9, 11.

- p. There was testimony explaining that the limit to six collected ballots does not align with how many of Native families are structured. Stip. Ex.'s 9 at 15, 25-26; *see also* Stip. Ex. 11 at 47.
- q. Following an exchange about BIPA's impact on individuals 40 miles away from a post office, who have no access to public transportation and only unreliable roads, and whether BIPA puts an additional burden onto Native American community members that is beyond their control, Senator Olszewski stated that the disproportionately long distances Native Americans must travel to vote does not hinder them. Stip. Ex. 9 at 36-37.
- r. There is also no basis for the six-ballot limit in the bill. When Senator Olszewski was queried about the arbitrary cap of six ballots that may be collected, he justified the cap by stating that he had performed a small survey sample. Stip. Ex. 11 at 29; *see also* 09/10/20 Trial Tr. (Hood) at 606:23-607:15, 610:15-17.
- s. Defendant Mangan testified that he did not know how the six-ballot limit would protect election integrity. Mangan Dep. Tr. 49:16-19; 49:22.
- t. Katie Beall, a former employee with the Office of the Commissioner of Political Practices, testified that she has no idea why it is the number six, not a hundred and not two, and she does not know what data informed that. Beall Dep. Tr. 164:12-22.
- u. The Attorney General's Office representative testified that he did not know why the limit was set at six ballots. AG Dep. Tr. 69:1-3.
- v. The Montana legislature passed SB-352, and it was filed with Defendant Stapleton's office on May 3, 2017.

- w. BIPA went to a vote of the public as Legislative Referendum 129 (“LR-129”).
- x. In November 2018, Montana voters went to the polls to vote on LR-129.
- y. The ballot summary of the measure stated that caregivers, family members, household members, and acquaintances were exempt from the law and would have to sign a registry, but not that individuals would be limited to collecting just six ballots. The summary also failed to define the categories of individuals who would be exempt from the law. The ballot summary was written by the Attorney General.  
Stip. Ex. 18.
- z. The complete language on the November 2018 ballot was:

The 2017 Legislature has submitted this proposal for a vote. LR-129 prohibits a person from collecting another voter’s ballot, with certain exceptions. The prohibition would not apply to an election official, postal worker, caregiver, family member, household member, or an acquaintance. Any such individuals that are caregivers, family members, household members or acquaintances would be required to sign a registry at the polling place or the election administrator’s office when delivering the ballot and are required to provide the following information: the individual’s name, address, and phone number; the voter’s name and address; and the individual’s relationship to the voter. An individual who violates any provision within LR-129 could be fined \$500 for each ballot unlawfully collected.

YES on Legislative Referendum LR-129

NO on Legislative Referendum LR-129.

Stip. Ex. 18.

- aa. Voter fraud has historically been rare, if not nonexistent in Montana. *See* Mangan Dep. Tr. 31:9-21 (only one instance of alleged voter fraud); Cook Dep. Tr. 20:6-20:20, 21:3-21:12; 25:21-26:6 (aware of no instances of voter fraud); 09/10/20 Trial Tr. (Hood) at 639:25-640:5; *see also* 09/09/20 (McCool) at 372:7-373:1; Pl. Ex. 23 at 11.

- bb. Both the Commissioner of Political Practices Jeff Mangan and Scott Cook, the legal investigator for the Commissioner of Political Practices, testified that the Commissioner of Political Practices Office was responsible for investigating complaints of voter fraud. Mangan Dep Tr. 25:21-26:11; 27:14-28:6; 28:20-29:19; 34:15-17; 35:3-5; 35:8-13; 35:15-18; 35:20-21; 36:2-9; 36:10-37:19; Cook Dep. Tr. 20:6-20, 21:3-12; *see also* Pl. Ex. 28. Commissioner Mangan has given trainings to election administrators where he has told them to inform his office if they suspect vote fraud. Mangan Dep. Tr. 159:21-163:1; 163:21-164:16.
- cc. Commissioner Mangan testified that during his tenure he could only recall one instance of voter fraud, and that case involved a ballot signature. Mangan Dep. Tr. 31:9-21.
- dd. Scott Cook testified that he was aware of all the investigations conducted in the office and he was unaware of any voter fraud investigations. Cook Dep. Tr. 25:21-26:6.
- ee. The Secretary of State's Office said there is no evidence in Montana of collectors not returning ballots or of a collector interfering with a voter or with a ballot. 09/10/20 Trial Tr. (Corson) at 511:10-22.
- ff. The Attorney General's Office agreed that Montana does not have a problem with voter fraud. AG Dep. Tr. 31:22-32:6.
- gg. Big Horn County Elections Administrator Dulcie Bear Don't Walk agreed that there are no documented instances of voter fraud in the context of ballot collection and conveyance. 09/08/20 Trial Tr. (Bear Don't Walk) at 171:4-14.

- hh. The Heritage Foundation, a conservative think-tank, maintains a running account of all cases of voter fraud across the country dating back to the early 1980's. That database includes only one case from Montana. 09/09/20 Trial Tr. (McCool) at 372:7-373:1; Pl. Ex. 23 at 11.
- ii. The one case of confirmed voter fraud in Montana since the Heritage Foundation began keeping statistics involved a man in Liberty County on July 26, 2011 pleading guilty to Limits on Voting Rights after he voted his ex-wife's ballot without her permission. *See also* 09/09/20 Trial Tr. (McCool) at 372:7-373; Pl. Ex. 23 at 11.
- jj. There is no evidence of the integrity of elections being at risk in Montana. 09/10/20 Trial Tr. (Corson) at 504:25-505:4; Mangan Dep. Tr. 31:9-21 (only one instance of alleged voter fraud); Cook Dep. Tr. 20:6-20; 21:3-12; 25:21-26:6 (aware of no instances of voter fraud); 09/10/20 Trial Tr. (Hood) at 639:25-640:15.
- kk. There is no evidence of voter intimidation or voter harassment in Montana. 09/10/20 Trial Tr. (Corson) at 510:12-24; Mangan Dep. Tr. 34:15-14, 35:3-5, 35:8-13, 35:15-18, 35:20-21, 36:2-9.
- ll. There is no evidence of ballot tampering in Montana. 09/10/20 Trial Tr. (Corson) at 512:2-4; Mangan Dep. Tr. 36:10-14; 36:17-22; 37:2-16; 37:19.
- mm. There is no evidence of deceptive election practices or illegal consideration from voting in Montana. Mangan Dep. Tr. 37:21-38:16.

**29. Implementation of BIPA.**

- a. BIPA is codified at Mont. Code Ann. § 13-35-701 *et seq.*

**b. Outreach on BIPA.**

- i. The Secretary of State is responsible for outreach and education. 09/09/20 Trial Tr. (Corson) at 407:7-11; 439:18-23; *see also* Mangan Dep. Tr. 58:5-11; Beall Dep. Tr. 135:21-136:6.
- ii. Public education is necessary to ensure compliance with BIPA. Mangan Tr. Dep. 81:20-82:8.
- iii. Despite the Secretary's belief that education and outreach increase awareness, and that outreach is crucial to increasing voter turnout, the Secretary of State's Office only did one public service announcement (PSA) and put information on its website regarding BIPA. 09/10/20 Trial Tr. (Corson) at 475:9-476:16; 478:3-8
- iv. COPP's primary role is enforcement of BIPA but the COPP has had to take on public education to step in for the Secretary of State. Mangan Dep. Tr. 57:21-58:11; 150:14-22; 155:16-159:14; Pl. Ex. 41.
- v. The Secretary of State's Office conducted no outreach specific for tribes or targeted to reservations and had no mechanism by which Native American voters would know that any new information was on its website, even though it believed that including relevant information on its website is one way to promote democracy. 09/10/20 Trial Tr. (Corson) at 477:1-478:15.

**c. Registry.**

- i. Following its passage, all individuals engaging in ballot collection and conveyance (apart from postal workers and election officials) must submit a registry form for all ballots they deliver. Mont. Code Ann. § 13-35-704.

- ii. A ballot collector who delivers ballots to an election administrator's office or a designated polling place must register their name and contact information. *Id.*
- iii. They must report their association to each voter whose ballot they collect, as well as the voter's name, address, and phone number. *Id.*
- iv. They must also include their own names, addresses and phone numbers. *Id.*
- v. Ballot collectors must affirm the truth of the information on the registry form under penalty of perjury. Stip. Ex. 20.
- vi. Perjury is punishable by up to 10 years in prison and a \$50,000 fine. Mont. Code Ann. § 45-7-201. It is unclear if this penalty applies to BIPA in addition to the delineated statutory fine.
- vii. The Secretary of State's Office's asserts timely access to voting is a major factor to a successful election. Signing the BIPA registry form would slow down the process of voting at individual polling stations and election offices. 09/10/20 Trial Tr. (Corson) at 492:8-493:4.
- viii. The Secretary of State's Office agrees that clear instructions on a ballot is one factor to a successful election. 09/09/20 Trial Tr. (Corson) at 447:8-16.
- ix. Although the Secretary of State's Office drafted a registry form, the final design of the form and where it is placed at the election office is left to the discretion of each of the 56 counties. 09/10/20 Trial Tr. (Corson) at 493:5-494:14.
- x. The Secretary of State has directed that registry forms should be turned over to local county election officials at polling locations and election administrator offices and then sent to Defendant Mangan's office. Pl. Ex. 14 at 1-2.

- xi. If a person dropping off ballots on behalf of another refuses to sign the registry or appears not to meet the collection eligibility requirements, election administrators have been instructed that they must report the violation to Defendant Mangan's office. Pl. Ex. 33.
  - xii. Since BIPA has been in effect, some county election administrators receive incomplete registry forms, receive BIPA forms when not necessary, and receive mail ballots with BIPA forms in them. *See* Mangan Dep. Tr. 81:7 -83:7; 86:10-87:18; 87:21-90:18; 91:7-92:20; 126:4-127:20; 128:8-129:22; 130:3-131:2.
- d. **Potential violations.**
- i. Election administrators have been told that if they do not have the individual violator's name, they should record as much information as possible (height, weight, hair color, vehicle information, etc.). Election administrators can send complaints of BIPA violations directly to Defendant Mangan or to the county attorneys. *See, e.g.,* Mangan Dep. Tr. 135:13-139:5.
  - ii. Additionally, individual citizens may file a complaint with Defendant Mangan's office if they believe a ballot collector has violated BIPA. Pl. Ex. 33
  - iii. Defendant Mangan and county attorneys each have the authority to investigate violations of the law. *See* Mont. Code Ann. §§ 13-37-111(1); 13-37-125.
  - iv. The COPP has no written policies governing when the office would keep an investigation of BIPA in its office or when it would be turned over county attorneys. Mangan Dep. Tr. 73:20-74:1; 146:7-12; Cook Dep. Tr. 18:4-13.
  - v. The COPP has provided no training to county attorneys or local enforcement governing BIPA violations. Cook Dep Tr. 78:11-79:2.

- vi. The COPP has spent a fair amount of time working on BIPA implementation. Mangan Dep. Tr. 40:2-12.
- vii. Once it has been determined that a violation of the law has occurred, a county attorney may prosecute; if they fail to prosecute, then Defendant Mangan may prosecute. Mont. Code Ann. § 13-37-124.
- viii. During local elections in 2019, there was at least one instance of an individual being referred to county prosecutors for violation of BIPA. Mangan Dep. Tr. 135:13-139:5.
- ix. The COPP did not coordinate with the county attorneys on any of the three allegations of BIPA violations that were reported directly to the COPP office. *See* Mangan Dep. Tr. 135:13-145:8.
- x. For the three instances of voters refusing to sign BIPA forms, the COPP sent letters to the voters informing them of BIPA requirements but never followed up with the county election administrator to see if the forms were actually filled out and returned. Mangan Dep. Tr. 140:12-145:8.
- xi. For the one incident of an alleged BIPA violation that was reported directly to the county attorney, the COPP never checked in with the county attorney. Mangan Dep. Tr. 135:13-139:5
- xii. Should a collector fail to include any required information on the Registry form, the collector is in violation of BIPA, and although the COPP received incomplete forms, they are not investigated because Defendant Mangan believes it could be very cumbersome to enforce the missing data on and it

would be too cumbersome for their office to investigate each and every form that may have been missing some information. Mangan Dep. Tr. 81:7-83:7.

- xiii. The COPP has received Registry Forms that have been turned in blank or filled out by fictional characters but has not investigated any of these occurrences. *See* Mangan Dep. Tr. 86:9-87:18; 87:21-90:18; 91:1-92:20; 126:4-127-20; Pl. Exs. 49, 50, 51, 52.
- xiv. The Attorney General's office could also prosecute violations of BIPA but has determined it will leave prosecutions up to the County Attorneys, even if there is uneven enforcement of BIPA. AG Dep. Tr. 88:11-89:9.
- xv. The Attorney General acknowledges the risks of inconsistent enforcement but has not issued any guidelines or directives for enforcement of BIPA. AG Dep. Tr. 88:11-89:9.

e. **\$500 fine.**

- i. Violation of BIPA is subject to "a fine of \$500 for each ballot unlawfully collected." Mont. Code Ann. § 13-35-705; *see also* 09/08/20 Trial Tr. (McLean) at 50:3-24.
- ii. The statute fails to delineate whether this penalty is civil or criminal in nature. Mont. Code Ann. § 13-35-705; *see also* Mangan Dep. Tr. 70:1-5.
- iii. No document produced by the offices of the Secretary of State or Political Practices provides any guidance on whether the penalty is civil or criminal. 09/10/20 Trial Tr. (Corson) at 472:18-474:16; Mangan Dep. Tr. 70:1-5, 70:13-18, 124:8-22; *see also* Cook Dep. Tr. 34:22-35:5; 35:8-9.

f. **Acquaintance.**

- i. “Acquaintance” is one of the categories of individuals that may collect ballots. Mont. Code Ann. § 13-35-702(1).
- ii. BIPA defines an “acquaintance” as “an individual known to the voter.” *Id.*
- iii. The definition is vague and fails to identify who qualifies as an “acquaintance.” See 09/08/20 Trial Tr. (McLean) at 55:13-17; 09/08/20 Trial Tr. (Fyant) at 108:14-15; 09/10/20 Trial Tr. (Hood) at 579:13-581:14; Pl. Ex. 24 at 2/Stip. Ex. 6.
- iv. No guidance regarding the term “acquaintance” has been issued by the Secretary of State, Commissioner of Political Practices, any other state agency, any law enforcement official, or any other elected or government official. 09/10/20 Trial Tr. (Corson) at 487:3-488:2.
- v. For example, it is unclear whether an “acquaintance” may include an individual whom a voter just became acquainted with for the purposes of ballot collection. 09/08/20 Trial Tr. (McLean) at 55:13-17.
- vi. Assuming that the answer is yes, the statute further fails to clarify whether a ballot collector must meet the person prior to collection of the voter’s ballot. 09/08/20 Trial Tr. (McLean) at 55:13-17.
- vii. Further, the definition of “acquaintance” in BIPA does not explain whether an individual may collect and convey a voter’s ballot if the individual has not previously met in person but share common acquaintances or had previously communicated through telephone. 09/08/20 Trial Tr. (McLean) at 55:13-17;

09/08/20 Trial Tr. (Fyant) at 108:14-15; 09/08/20 Trial Tr. (Cuts the Rope) at 152:4-18.

- viii. Because the word “acquaintance” is not a word of common usage in Indian Country, Native Americans living on reservations are likely to be confused as to who is an acquaintance. 09/08/20 Trial Tr. (McLean) at 55:13-17; 09/08/20 Trial Tr. (Fyant) at 108:14-15; 09/08/20 Trial Tr. (Cuts the Rope) at 152:4-18
- ix. The lack of a clear definition of what it means to qualify as an “acquaintance” makes the description vague and causes voter and ballot collector confusion.

**g. Family Member.**

- i. A “family member” is another category of non-exempt individuals who may collect ballots. Mont. Code Ann. § 13-35-702(4).
- ii. BIPA defines “family member” as “an individual who is related to the voter by blood, marriage, adoption, or legal guardianship.” *Id.*
- iii. The statute fails to provide any clarification about which family relationships satisfy that statutory definition, which does not track with how family relationships are understood in Indian country. 09/08/20 Trial Tr. (Fyant) at 107:8-108:13; 09/08/20 Trial Tr. (Cuts the Rope) at 150:17-151:22; *see also* 09/10/20 Trial Tr. (Hood) at 582:6-583:3.
- iv. No guidance regarding the term “family member” has been issued by the Secretary of State, Commissioner of Political Practices, any other state agency, any law enforcement official, or any other elected or government official. 09/10/20 Trial Tr. (Corson) at 487:3-488:2.

- v. In Indian Country, close members of the community are sometimes considered family, despite not being directly related through blood, marriage, adoption, or legal guardianship. This is particularly true for children they raise for others. 09/08/20 Trial Tr. (Fyant) at 107:8-108:13; 09/08/20 Trial Tr. (Cuts the Rope) at 150:17-151:22.
- h. Because BIPA fails to adequately define family members and acquaintances, CSKT members, for example, are likely to be confused about who is restricted from picking up and dropping off ballots. The definition of family by CSKT members is more expansive than the nuclear family common in non-Native households and can include distant relatives and community members that may or may not be directly related by blood or marriage. 09/08/20 Trial Tr. (Fyant) at 107:8-108:13.
- i. And while the sponsor of the bill indicated that voters should simply exercise good judgment in defining their family members, more is required as improperly identifying a person as a family member on the registry form could subject the ballot collector to a perjury charge. Stip. Ex.'s 9, 11, 20.
- j. Defendants' interpretations have provided little guidance to mitigate the problems with BIPA.
- k. Defendant Mangan's office similarly has failed to provide additional guidance on what is sufficient to qualify an individual as an "acquaintance," or whether the term "family member" includes family relationships in Indian country. Mangan Dep. Tr. 66:7-18; Pl. Ex.'s 14, 17.
- l. All of the prohibited categories of individuals in BIPA – caregivers, family members, household members or acquaintances – could still tamper with a

collected ballot, and there is no data, evidence, analysis or studies that indicate that ballot collectors who are known to voters are less likely to tamper with a ballot in Montana. 09/10/20 Trial Tr. (Corson) at 488:15-489:3.

m. **Mail Exemption.**

- i. Defendant Mangan and Defendant Stapleton have interpreted BIPA to apply to only ballots hand-delivered and not to ballots put into the mail. 09/10/20 Trial Tr. (Corson) at 482:17-19; Pl. Ex. 14. The Attorney General agrees. AG Dep. Tr. 77:8-17.
- ii. The exemption of mail ballots only further disproportionately impacts Native American communities living on reservations. Pl. Ex. 25 at 9-10/Stip. Ex. 5; *see also* 09/09/20 Trial Tr. (McCool) at 339:17-24.
- iii. Given the limitations and issues with mail service on reservations in Montana, ballots had been historically collected and turned into polling places and election centers and not put in the post. 09/09/20 Trial Tr. (McCool) at 339:17-24; *see also* 09/09/20 Trial Tr. (Street) at 274:19-276:23.

n. **Additional, Unnecessary Work.**

- i. The process of compliance and enforcement is cumbersome and time consuming. Staff in Defendant Mangan's office have complained that BIPA is an unfunded mandate for election administrators and their office. Beall Dep. Tr. 134:12-136:17; Pl. Ex. 40.
- ii. Cascade County election administrator Rina Moore has also called BIPA an "unfunded mandate." She also refers to BIPA as the "Voter Suppression Act of 2018." Moore Dep. Tr. 29:9-10; 53:4-16.

- iii. Election administrators have stated that BIPA causes extra, unnecessary paperwork, additional printing expenses, and more election staff time. County election administrators and their staff have had to deal with agitated voters as a result of BIPA. Moore Dep. Tr. 53:4-16.
- iv. No funding was provided to counties or the Secretary of State to implement or provide education outreach regarding BIPA. 09/10/20 Trial Tr. (Corson) at 481:15-17; Moore Dep. Tr. 53:4-16.
- v. The fiscal statement for this ballot measure indicated it would have zero fiscal impact. Pl. Ex. 18/Stip. Ex. 25; 09/10/20 Trial Tr. (Corson) at 479:13-18.
- o. **No Rational Basis.**
  - i. Defendant Mangan, Scott Cook, Katie Beall and some county elections administrators, including Dulcie Bear Don't Walk and Rina Moore, agree that BIPA is unnecessary. Mangan Dep. Tr. 167:4-8,10, 14-15 (BIPA is "a solution in search of a problem."); Cook Dep. Tr. 74:4-7 ("So, in my personal opinion, BIPA is, yeah, trying to solve a problem of voter fraud without presenting evidence that the problem even exists."); Beall Dep. Tr. 132:13-17 ("I don't feel that there was any data, besides anecdotal stories, that showed that voter fraud was happening and thus [that] BIPA was a solution to a problem.").
  - ii. BIPA makes it harder for people to vote and is more likely to harm rural and Native Voters. Pl. Ex.'s 23/Stip. Ex. 4; 24/Stip. Ex. 6; 26/Stip. Ex. 8; 113/Stip. Ex. 2.

#### **D. Voting on Indian Reservations after BIPA.**

30. BIPA impacts all Montana voters and ballot collectors, but Native Americans are disproportionately affected by BIPA. 09/09/20 Trial Tr. (McCool) at 315:5-13, 319:10-320:16; 09/08/20 Trial Tr. (Street) at 201:5-21, 205:7-207:4, 210:8-212:13, 213:6-226:25, 227:8-249:1, 249:7-250:9, 255:5-257:3, 258:1-24; 09/09/20 Trial Tr. (Street) at 270:10-272:3, 278:4-280:1, 283:23-284:18; *see also* Beall Dep. Tr. 144:11-145:3; Mangan Dep. Tr. 168:3-12, 168:18-22, 169:4-10; Pl. Ex.'s 23/Stip. Ex. 4; 24/Stip. Ex. 6; 26/Stip. Ex. 8; 113/Stip. Ex. 2.
31. Some Native Americans living on reservations rely on ballot collection and conveyance in order to participate in Montana's elections. 09/09/20 Trial Tr. (McCool) at 339:17-24.
32. BIPA has effectively ended the practice of ballot collection and conveyance and burdened Native American's, living on reservations, right to vote. 09/08/20 Trial Tr. (McLean) at 45:5-17; 09/08/20 Trial Tr. (Perez) at 79:6-12; 09/09/20 Trial Tr. (McCool) at 339:17-24, 381:8-23; 09/09/20 Trial Tr. (Street) at 278:16-280:1.
33. BIPA has disproportionately affected turnout of Native American voters on Montana's reservations and has the potential to continue to negatively affect voter turnout in the same demographic. 09/09/20 Trial Tr. (McCool) at 315:5-13, 319:10-320:16; 09/08/20 Trial Tr. (Street) at 201:5-21, 205:7-207:4, 210:8-212:13, 213:6-226:25, 227:8-249:1. 249:7-250:9, 255:5-257:3, 258:1-24; 09/09/20 Trial Tr. (Street) at 270:10-272:3, 278:4-280:1, 283:23-284:18; Pl. Ex.'s 24/Stip. Ex. 8, 26/Stip. Ex. 8.
34. Given the confusion and potential range of penalties associated with BIPA, BIPA will have a chilling effect on the Organizational Plaintiffs ability to provide the vital service

of picking up and dropping ballots for fellow members. 09/08/20 Trial Tr. (McLean) at 50:3-24.

35. Without the benefit of assistance with their ballots, the Native American vote has been and will be harmed. Pl. Ex.'s 23/Stip. Ex. 4; 24/Stip. Ex. 6; 26/Stip. Ex. 8; 113/Stip. Ex. 2; 09/08/20 Trial Tr. (McLean) at 51:21-52:13; 55:7-12; 09/08/20 Trial Tr. (Perez) at 80:8-81:19; 09/08/20 Trial Tr. (Fyant) at 104:3-11.

**36. COVID-19 and BIPA.**

- a. Ballot collection is especially important during the uncertainty of the COVID-19 pandemic. *See, e.g.*, 09/08/20 Trial Tr. (McLean) at 48:2-15 (describing safety protocols prepared to put in place to collect ballots during the pandemic); 09/08/20 Trial Tr. (McLean) at 59:19-60:3 (prior to COVID, canvassed neighborhoods as part of their Get Out the Vote program); 09/08/20 Trial Tr. (Perez) at 76:16-77:3 (prior to COVID, gave voters rides to the polls and conducted door-to-door canvassing to inform voters of the upcoming election and to encourage them to register to vote or check their voter registration status); 09/08/20 Trial Tr. (Cuts the Rope) at 155:10-18 (Fort Belknap's transit system is not currently running due to the pandemic).
- b. Avoiding risky contact is even more important on Indian reservations, where COVID-19 is occurring at a higher rate than in the general population. Pl. Ex. 23 at 7-10/Stip. Ex. 4.
- c. In the face of such dire health threats, BIPA becomes a daunting "voter cost." 09/09/20 Trial Tr. (McCool) at 317:11-22; Pl. Ex. 23 at 7-10/Stip. Ex. 4.

- d. Individuals are encouraged to stay home and practice social distancing. Pl. Ex. 23 at 7-10/Stip. Ex. 4.
  - e. Ballot collecting provides a safer alternative to in person voting. Pl. Ex. 23 at 7-10/Stip. Ex. 4.
  - f. If a voter chooses to have their ballot collected by another person, they do have to travel to a mailbox or polling site; this eliminates travel costs, and during a pandemic, protects them from potential exposure to COVID-19. Pl. Ex. 23 at 1-3, 7-10/Stip. Ex. 4.
  - g. States should not create long-term regulations based on the pandemic. Tr. Trans. 561:19–21; 562:2–5 (Sept. 10, 2020). However, the global pandemic has made the disparities created by BIPA in the Native American communities in Montana even more dramatic and apparent.
37. Since the passage of BIPA, Western Native Vote and Montana Native Voice have been deterred from continuing their robust GOTV program and will have to cease collecting ballots in 2020 if BIPA is allowed to stay in effect. 09/08/20 Trial Tr. (McLean) at 62:18-63:14.
38. BIPA completely stopped the Organizational Plaintiffs' ballot collection and delivery activities. 09/08/20 Trial Tr. (McLean) at 62:18-63:14; 09/08/20 Trial Tr. (Perez) at 79:6-12.
39. Other means of voting are insufficient to replace the loss of these organizations' ballot collection activities. Pl. Ex. 22; 09/08/20 Trial Tr. (Street) at 214:15-215:16.
40. If Organizational Plaintiffs are unable to collect ballots, Fort Peck transit bus system will not have the capacity to increase its bus service on Election Day. Pl. Ex. 114, ¶ 11.

41. If Western Native Voice was not able to perform this function, the burden of transporting those voters to the polls or to the post office would fall to the Tribes. Fort Peck Tribes, for example, currently do not have the capacity to cover all voting tribal members' transportation needs during election season and on Election Day. Pl. Ex. 114, ¶ 11; *see also* 09/08/20 Trial Tr. (Perez) at 70:22-72:20; 74:11-75:2.
42. CSKT does not have the capacity to provide rides to the polls or post office for every voting member of the tribe. 09/08/20 Trial Tr. (Fyant) at 97:1-4.
43. Fort Belknap has a limited transportation system that travels just one route from Hays to Fort Belknap Agency. 9/8/20 Trial Tr. (Cuts the Rope) at 163:16-164:1.
44. As a result, many Native American voters will be disenfranchised. Pl. Ex.'s 24/Stip. Ex. 6, 26/Stip. Ex. 8,

## **CONCLUSIONS OF LAW**

### **A. BIPA is subject to strict scrutiny.**

1. This Court has already held in this matter that BIPA is subject to strict scrutiny.
2. 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* (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311; *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 17, 325 Mont. 148, 104 P.3d 445; *see also, Oberg v. Billings* (1983), 207 Mont. 277, 674 P.2d 494 (“Examples of fundamental rights include privacy, freedom of speech, freedom of religion, right to vote and right to interstate travel.”).

3. 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)).
4. 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, 85, 40 P. 80.
5. In Montana, it is the “general rule” that strict scrutiny applies in voting rights cases. *Johnson v. Killingsworth* (1995), 271 Mont. 1, 4, 894 P.2d 272, 274.
6. Voting rights cases involving “general” governance issues are properly evaluated under a strict scrutiny standard. *Id.* at 19.
7. “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.
8. The State agrees that the Montana Supreme Court has “not specifically applied the federal balancing test.” *Driscoll v. Stapleton*, Cause No. DA 20-0295, State’s Appeal Br. at 10.
9. 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; *Finke v. State ex rel. McGrath*, 2003 MT 48, 314 Mont. 314, 65 P.3d 576.

10. 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, ¶ 81, 394 Mont. 167, 434 P.3d 241 (McKinnon dissent) (citations omitted).
11. “[T]he 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. Guillaume*, 1999 MT 29, ¶ 15, 293 Mont. 224, 975 P.2d 312.
12. The State’s authority to regulate elections must be exercised “within constitutional limits.” *Larson*, ¶ 21.
13. The legislature’s authority to regulate voting is designed to ensure free and fair elections, not limit them.
14. The State contends that the Court should apply the balancing test espoused in.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (holding prohibition on write-in voting, taken as part of comprehensive election scheme, did not impermissibly burden right to vote) (citation and internal quotation marks omitted).
15. In *Burdick*, the U.S. Supreme Court applied 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 (citations and internal quotation marks omitted).

16. 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.*
17. When the right to vote is “subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.” *Id.* (citation and internal quotation marks omitted).
18. However, “when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon” voters’ constitutional rights, “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (citation and internal quotation marks omitted).
19. Even if the Court were to apply the balancing test as argued by the State, the facts presented at trial clearly demonstrate that the limitations, burdens and voter costs imposed by BIPA on Native American and rural voters in Montana are not reasonable, are discriminatory and are not justified by any documented regulatory interests.

**B. BIPA infringes on Plaintiffs’ fundamental right to vote.**

14. BIPA infringes on Plaintiffs’ fundamental right to vote. *See Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, ¶ 32, 325 P.3d 1204, ¶ 32 (the right to vote is a fundamental right).
15. The right to vote is protected by Article II, Section 13 of the Montana Constitution. Mont. Const. art. II, § 13 (“All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”).

16. Montana courts have found that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.” *Big Spring*, ¶ 18.
  17. However, BIPA does just that by arbitrarily and disparately infringing on the right of Native Americans in the state to vote.
  18. BIPA disproportionately harms rural communities, especially individual Native Americans in rural tribal communities across the seven Indian reservations located in Montana, by limiting their access to the vote by mail process.
  19. While the majority of Montanans can easily access the vote by mail process by either mailing in their ballots or dropping their ballots off at election offices, Native Americans living on reservations rely heavily on ballot collection efforts in order to vote in elections.
  20. They rely on these efforts because of difficulty sending and receiving traditional mail due to lack of traditional mailing addresses, irregular mail services, and the geographic isolation and poverty that makes travel difficult.
  21. Without ballot collection efforts, especially by Organizational Plaintiffs’ paid ballot collectors, extended family members, and community members, many Native Americans will be unable to cast their vote.
- C. BIPA violates Organizational Plaintiffs’, Plaintiff CSKT’s, and Plaintiff Fort Belknap’s fundamental right to freedom of speech.**
22. BIPA violates Organizational Plaintiffs’ and Plaintiff CSKT’s fundamental right to freedom of speech.

23. Article II, Section 7 of Montana's Constitution protects Plaintiffs' freedom of speech. Mont. Const. art. II, § 7; *see also* *Mont. Auto. Ass'n v. Greely* (1982), 193 Mont. 378, 388, 632 P.2d 300, 305.
24. Montana's free speech provision is afforded the same level of protection as the federal right under the First Amendment. *City of Billings v. Laedeke* (1991), 247 Mont. 151, 158, 805 P.2d 1348, 1352; *see also*, *City of Helena v. Krautter* (1993), 258 Mont. 361, 363–64, 852 P.2d 636, 368 (holding that, if the statute in question was constitutional under the First Amendment, it was also constitutional under Article II, Section 7 of the Montana Constitution).
25. Freedom of speech is a “fundamental” right and is “essential to the common quest for truth and the vitality of society as a whole.” *State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, 303 P.3d 755 (citations omitted).
26. Core political speech is accorded “the broadest protection.” *E.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995).
27. Like the circulation of an initiative petition for signatures, ballot collection activity is “the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988); *see also* *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (citing *Meyer* for this same proposition).
28. “The constitutional guaranty [sic] of free speech provides for the opportunity to persuade to action, not merely to describe facts.” *Greely*, 193 Mont. at 387, 632 P.2d at 305 (citations omitted).

29. Organizational Plaintiffs' public endeavors to collect and convey ballots for individual Native American voters living on rural reservations are an integral part of their message that the Native American vote should be encouraged and protected and that voting is important as a manner of civic engagement.
30. By collecting and conveying ballots, Organizational Plaintiffs are engaged in the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," which is at the heart of freedom of expression protections. *Dorn v. Bd. of Trustees of Billings Sch. Dist. No. 2* (1983), 203 Mont. 136, 145, 661 P.2d 426, 431.
31. Plaintiffs CSKT similarly engages in this exchange when it hires a temporary worker who collects and conveys ballots for its members.
32. Plaintiffs Fort Belknap similarly engages in this exchange when it supports third party ballot collector and conveyors Snake Butte Voter Coalition.
33. Whether individuals should submit their ballots and ultimately participate in an election is a "matter of societal concern that [Plaintiffs] have a right to discuss publicly without risking criminal sanctions." *Meyer*, 486 U.S. at 421; *see also Buckley*, 525 U.S. at 186–87 (quoting *Meyer*, 486 U.S. at 422).
34. Thus, the efforts of Organizational Plaintiffs, Plaintiff CSKT and Plaintiff Fort Belknap should be afforded the broadest judicial protection.
- D. BIPA does not violate Organizational Plaintiffs, Plaintiff CSKT's, and Plaintiff Fort Belknap's fundamental right to freedom of association.**
35. Plaintiffs argue that BIPA also infringes on Organizational Plaintiffs', Plaintiff CSKT's, and Plaintiff Fort Belknap's right to freedom of association. Article II, Section 6 of Montana's Constitution protects freedom of association.

36. Article II, Section 6 of Montana’s Constitution protects the right to “peaceably assemble” and “petition for redress,” which has been read to incorporate the freedom of association, as has been done with its federal counterpart. *See Dorn*, 203 Mont. at 144–45, 661 P.2d at 430 (Article II, Section 6 and 7, Montana Constitution are the state counterpart to the First Amendment); *see also Valley Christian Sch. v. Mont. High School Assoc.*, 2004 MT 41, 320 Mont. 81, 86 P.3d 554; *Matter of C.H.* (1984), 210 Mont. 184, 683 P.2d 931.
37. Freedom of association protects the ability of organizations, like Organizational Plaintiffs, to associate with members, organizers, volunteers, and Native American communities in furtherance of a political belief.
38. Plaintiff CSKT and Plaintiff Fort Belknap also have the right to associate with their members and Organizational Plaintiffs’ organizers in furtherance of the same political belief.
39. Organizational Plaintiffs’, Plaintiff CSKT’s, and Plaintiff Fort Belknap’s rights and ability as organizations, and for their individual members, to organize and to encourage, the Native American vote are not hampered by the ballot collection limitations imposed by BIPA.
40. BIPA leaves unaffected most of the get-out-the-vote efforts described by Plaintiffs, including poll watching, providing rides to the polls, canvassing neighborhoods, providing information on voter rights, monitoring policy that impacts voting access, and educating and engaging with voters through media buys, public events, and text messages. Tr. Trans. 59:19–62:13 (Sept. 8, 2020), 388:24–1 (Sept. 9, 2020); Mont. Code Ann. § 13-35-701 et seq.

**E. BIPA violates Plaintiffs' fundamental right to due process.**

44. BIPA violates Plaintiffs' fundamental right to due process because it is unconstitutionally vague. Article II, Section 17 of Montana's Constitution protects due process. Mont. Const. art. II, § 17 ("No person shall be deprived of life, liberty, or property without the due process of law.").
45. Due process mandates the "basic principle" that "an enactment is void for vagueness if its prohibitions are not clearly defined." *City of Whitefish v. O'Shaughnessy* (1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025.
46. "A vagueness challenge to a statute may be maintained under two different theories: (1) because the statute is so vague that it is rendered void on its face; or (2) because it is vague as applied in a particular situation." *Dugan*, ¶ 66.
47. Plaintiffs have pled both theories: (1) BIPA is unconstitutionally vague so that *any person* of "reasonable intelligence" would not understand what is prohibited and (2) BIPA is vague as applied to Plaintiffs. *Id* at ¶ 65.
48. BIPA's vagueness is especially concerning as it "abuts upon sensitive areas of basic First Amendment freedoms" and "operates to inhibit the exercise of those freedoms." *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025.
49. BIPA is unconstitutionally vague on its face since it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Dugan*, ¶ 67.
50. For example, half the statutory exemptions are not clearly defined. BIPA defines "acquaintance" as "an individual known by the voter." Mont. Code Ann. § 13-35-702(1).

51. That definition is not sufficiently detailed to allow a person to know exactly when someone moves from the category of generally prohibited individual to a permitted “acquaintance.” *See supra* Section C.30.f.
52. The word “known” does not solve the problem of how long must someone know the voter before they can collect their ballot. Further, it is not clear whether this includes a person they may “know of” such as by reputation, or whether it only includes someone the voter has met personally.
53. BIPA also exempts from its prohibition the collection of ballots by a “family member.” Mont. Code Ann. § 13-35-703(2).
54. But the statutory definition of “family member” is also unconstitutionally vague.
55. BIPA defines “family member” as “an individual who is related to the voter by blood, marriage, adoption, or legal guardianship.” *Id.* § 13-35-702(1).
56. The testimony of the election administrators is that some voters read BIPA not to apply to them at all when they turn in the ballots of spouses.
57. BIPA’s definition of “family member” does not correlate with family relationships in Indian country. *See supra* Section C.30.g.
58. During the hearing to place BIPA on the ballot, the bill’s sponsor stated that people should use their “good judgment” when confronted with the ways in which the definition was unclear as applied to Indian country.
59. “Good judgment” is not a legal standard appropriate to be applied to a fundamental right.

60. But given the risk of perjury for incorrect identification of “family members,” it is important for individuals to know whether a ballot has been collected from a “family member” or an “acquaintance” under BIPA.
61. The way BIPA is written now, voters cannot do that. This vagueness has deterred ballot collection activities.
62. BIPA is also unconstitutionally vague as applied to Plaintiffs. “A statute is unconstitutionally vague as applied to [an individual] if: (1) it fails to provide ‘actual notice’ to the [individual], or (2) it fails to provide ‘minimal guidelines’ to law enforcement regarding the defendant’s conduct.” *State v. Hamilton*, 2018 MT 253, ¶ 20, 393 Mont. 102, 428 P.3d 849 (citations omitted).
63. A statute fails to provide “minimal guidelines” when it fails “to prevent arbitrary and discriminatory enforcement.” *Id.*
64. As discussed above, the definitions of exemptions are insufficient to give notice of what is prohibited.
65. Plaintiffs cannot determine for sure whether someone is an “acquaintance” or “family member” under the statute, and that is fatal.
66. BIPA is also ripe for arbitrary enforcement, for several reasons.
67. First, Defendants’ interpretation of the statute arbitrarily distinguishes between the conveyance of ballots in person and via mail.
68. The stated purpose of the statute was to prevent unsolicited ballot collection.
69. But Defendants Stapleton and Mangan have interpreted the statute to apply only to the conveyance of ballots in person and not conveyance of ballots through the mail.

70. This is arbitrary, as the legislative record lacks any rationale to explain why the two forms of delivery should be treated differently.
71. It is also irrational as there is no reason why an individual intent on committing voter fraud could not collect ballots and drop them off at a mailbox, thus circumventing the state purpose of the Act.
72. Second, Defendants have also created the risk of an inconsistent enforcement scheme.
73. The Attorney General acknowledges the risks of inconsistent enforcement but has not issued any guidelines or directives for enforcement of BIPA.
74. While Defendants Stapleton and Mangan have adopted this interpretation of BIPA, their interpretation is not binding on county attorneys, who are also able to bring prosecutions under BIPA.
75. There is nothing in the record to show that ballots returned by mail are any less susceptible to fraud.
76. Their interpretation could also be changed by future administrations.
77. There has been no coordinated enforcement policy between Defendant Mangan and county attorneys, and Defendant Mangan testified that he never spoke to local officials about the one investigation that involved BIPA.
78. Defendant Mangan also did not involve county attorneys in the informal referrals that he received from election administrators of BIPA violations, which he decided to resolve by sending voters letters and not seeking to enforce monetary penalties.
79. Because enforcement may occur both at the state level through Defendant Mangan's office and at the local county attorney level, *see* Mont. Code Ann. §§ 13-37-124; 13-37-125, BIPA invites differences with how each could interpret the same activity.

80. Third, Defendants Stapleton and Mangan's exclusive focus on ballots conveyed in person is discriminatory as applied to Plaintiffs, who face geographic, socio-economic and racism-based barriers.
81. Irregular mail service on reservations frequently makes it difficult to collect and return ballots via mail in sufficient time to be counted.
82. As a consequence, Plaintiffs are more likely to collect ballots and convey them in person than by mail—putting them squarely in BIPA's crosshairs.
83. And fourth, BIPA creates a risk that Native American communities are more likely to be harmed by BIPA's enforcement scheme.
84. BIPA also requires that Defendant Mangan's office investigate all individual citizens' complaints that a ballot collector has violated BIPA. Mont. Code Ann. § 13-37-111(2)(a) ("Upon the submission of a written complaint by any individual, the commissioner shall investigate any other alleged violation of the [BIPA]"); (there is a link to an individual complaint form and email address to transmit the complaint to Defendant Mangan's office).
85. Native Americans are over-represented as victims of crime, and in the criminal justice system in Montana. Native Americans are arrested and incarcerated at a disproportionately higher rate than White Montanans. See S002 (McCook), ¶ 79.
86. Given the disproportionate representation of Native Americans in Montana's justice system, the penalty associated with BIPA along with its reporting requirement, will likely have a chilling effect that makes it even more likely that BIPA will deter ballot collection by Native Americans.

87. A \$500 fine could be prohibitive for families living at the poverty line on the reservation.
88. The vagueness of the statute, coupled with penalties attached to the law, has deterred most ballot collection on reservations.
89. BIPA imposes “a fine of \$500 for each ballot unlawfully collected.” Mont. Code Ann. § 13-35-705.
90. Further, improperly filling out the form runs the risk of a perjury charge. (Ballot collectors must affirm the veracity of the information they supply on the registry form “under penalty of perjury.”).
91. Perjury is punishable by up to 10 years in prison and a \$50,000 fine. Mont. Code Ann. § 45-7-201.
92. Allowing BIPA to stay in effect will “inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked,” meaning that even ballot collection arguably permitted by BIPA will be avoided in elections because individuals will fear investigation and prosecution under BIPA. *City of Whitefish*, 216 Mont. at 440, 704 P.2d at 1025–26.

**F. BIPA does not meet strict scrutiny and the law must be enjoined.**

93. BIPA infringes on Plaintiffs’ fundamental rights, and this Court should enjoin the law. Fundamental rights enjoy “the highest level of protection by the courts.” *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 51, 310 Mont. 123, 54 P.3d 1.
94. As BIPA infringes on fundamental rights, it must meet strict scrutiny. *Mont. Cannabis Indus. Ass’n v. State*, 2012 MT 201, ¶ 16, 366 Mont. 224, 286 P.3d 1161; *see also Kloss*, ¶ 51.

95. Under strict scrutiny, “the government must show that the law is narrowly tailored to serve a compelling government interest.” *Mont. Cannabis Indus. Ass’n*, ¶ 16.
96. As Defendants cannot make that showing, BIPA should be enjoined.
97. BIPA does not serve a compelling governmental interest.
98. The only stated governmental interest for BIPA was to stop unsolicited ballot collection and to prevent ballot interference.
99. Yet, uniform testimony by election administrators and State of Montana officials was that unsolicited ballot collection and ballot interference was not and has never been a problem in Montana.
100. The Court places great weight to this testimony because election administrators have firsthand knowledge of how elections in Montana are administered.
101. Thus, aside from the bill sponsor’s assertion at hearing, nothing in the legislative record supports a finding that Montana has or ever had a problem with unsolicited ballot collection or that ballot interference represents a compelling government interest in Montana.
102. The State admits there is not a single example of voter fraud in Montana caused by ballot collection.
103. However, assuming arguendo that unsolicited ballot collection is a compelling interest, BIPA is not narrowly tailored enough to meet this interest.
104. BIPA applies to *all* ballots collected, even when affirmatively solicited by voters themselves. In the words of the clerks in charge of running elections, BIPA targets voters who are doing things right, rather than creating a deterrent for the people who would do things wrong.

105. Furthermore, BIPA is entirely unnecessary to prevent unsolicited ballot collection, in which voters are harassed or ballots tampered, because it is *already prohibited under Montana law*. Mont. Code Ann. § 27-1-1501 *et seq.*
106. Montana’s Anti-Intimidation Statute states that “[a]n individual or organization who is attempting to exercise a legally protected right and who is injured, harassed, or aggrieved by a threat or intimidation has a civil cause of action against the person engaging in the threatening or intimidating behavior.” *Id.* § 27-1-1503(2).
107. Montana’s Anti-Intimidation Statute provides more protection for the alleged compelling interest of the state than BIPA, because the Anti-Intimidation Statute would apply to *all* acts of intimidation when collecting a ballot, whether a ballot was delivered in person or by mail.
108. 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).
109. In addition, a voted ballot is enclosed in a secrecy envelope which is then placed in a signature envelop, which has a barcode, and when the ballot and envelopes arrive, county election offices compare and validate voters’ signatures.

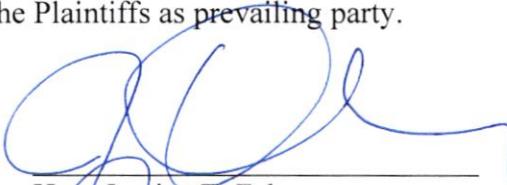
110. An Election Judge Handbook contains numerous provisions to determine how to understand the intent of the voter.
111. All of the provisions in place before BIPA were sufficient to deter and detect election fraud.
112. Even assuming that a registry requirement of all ballot collectors and a limitation on the numbers of ballots collected were both necessary to meet a compelling state interest, there is no basis to support the limit of six ballots per collector.
113. Indeed, the LR-129 ballot language did not mention that ballot collectors would be limited to collecting six ballots per election cycle meaning Montana voters were not provided with key details about the issue while engaging in the voting process.
114. In response to a question of “how did you decide on the number of six” ballots per collector and the observation that “it seems like just kind of an arbitrary number,” Senator Olszewski stated that he performed a “small survey sample.”
115. BIPA, as enacted, is not narrowly tailored and thus fails strict scrutiny.

### **ORDER**

1. Judgment is hereby found in favor of the Plaintiffs 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 and against Defendants Corey Stapleton, Tim Fox and Jeff Mangan that BIPA violates Plaintiffs’ constitutional right to vote.
2. Judgment is hereby found in favor of the Plaintiffs 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 and against Defendants Corey Stapleton, Tim Fox and Jeff Mangan that BIPA violates Plaintiffs' constitutional right to free speech.
3. Judgment is hereby found in favor of the Defendants Corey Stapleton, Tim Fox and Jeff Mangan and against Plaintiffs 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 that BIPA does not violate Plaintiffs' constitutional right to freedom of association.
  4. Judgment is hereby found in favor of the Plaintiffs 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 and against Defendants Corey Stapleton, Tim Fox and Jeff Mangan that BIPA violates Plaintiffs' constitutional right to due process of law.
  5. BIPA is unconstitutional and is hereby permanently enjoined.
  6. Judgment is hereby found in favor of the Plaintiffs as prevailing party.

DATED: September 25, 2020.



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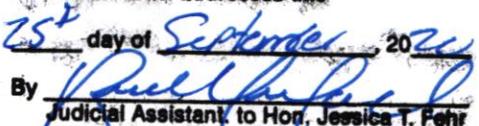
Hon. Jessica T. Fehr  
District Court Judge

cc: Lillian Alvernaz & Alex Rate, ACLU of Montana  
Alora Thomas-Lundborg, Dale Ho, Theresa Lee & Ihaab Syed, ACLU  
Natalie Landreth, Jacqueline De Leon & Samantha Kelthy, Native American Rights Fund  
Stuart Segrest, Aislinn Brown & Hannah Tokerud, Montana Attorney General's Office

**CERTIFICATE OF SERVICE**

This is to certify that the foregoing was duly served by mail/hand/inter-office delivery upon the parties or their attorneys of record at their last known addresses this

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25<sup>th</sup> day of September, 2020  
By   
Judicial Assistant to Hon. Jessica T. Fehr