

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

**MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY**

<p>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,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>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,</p> <p>Defendants.</p>	<p>Cause No: DV-2020-377</p> <p>Judge: Jessica T. Fehr</p> <p>ORDER GRANTING PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF</p>
---	--

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 have sued Corey Stapleton, in his official capacity as Montana Secretary of State, Tim Fox, in his official capacity as Montana Attorney General, and Jeff Mangan, in his official capacity as Montana Commissioner of Political Practices, to enjoin enforcement of the Ballot Interference Prevention Act (hereinafter “BIPA”), Mont. Code Ann. § 13-35-701 *et seq.* On March 25, 2020, Plaintiffs applied,

1 pursuant to Mont. Code Ann. § 27-19-301 for a preliminary injunction to enjoin the enforcement of the
2 BIPA, which Plaintiffs allege prevents the organized collection of ballots in violation of their
3 constitutional rights. On April 13, 2020, the Defendants filed their Response in Objection to Plaintiffs'
4 Motion for Preliminary Injunction. On April 27, 2020, Plaintiffs filed their Reply Brief in Support of
5 Motion for a Preliminary Injunction. Before the Court conducted a hearing on the matter, Plaintiffs filed
6 a Motion for Temporary Restraining Order on May 1, 2020. Defendants filed their Response in Objection
7 on May 4, 2020. Plaintiffs filed their Reply Brief in Support on May 5, 2020. On May 20, 2020, the Court
8 granted the Plaintiffs' Motion for Temporary Restraining Order.

9 On May 27, 2020, a Joint Stipulation to Waive Preliminary Injunction Hearing was filed by the
10 parties. On May 27, 2020, the Court granted the parties request to waive the hearing on the Motion for
11 Preliminary Injunction and set a Status Conference for May 29, 2020. On the same date, May 27, 2020,
12 the Defendants filed a Motion to Dismiss Plaintiffs' Motion for Preliminary Injunction, claiming the
13 motion was moot due to a Preliminary Injunction being issued in *Driscoll v. Stapleton*, Cause No. DV-
14 20-408 (13th Jud. Dist. May 22, 2020). Plaintiffs filed a Brief in Opposition to the Motion to Dismiss on
15 May 28, 2020 and Plaintiffs filed a Reply in Support of the Motion to Dismiss on May 28, 2020, as well.

16 On May 29, 2020, the Court held a Status Conference with the parties. The Court denied the
17 Defendants' Motion to Dismiss, ruling that the Plaintiffs in the present matter are separate and distinct
18 from those of the *Driscoll* case. On May 29, 2020, following the Status Conference, the Court issued a
19 written Order Denying the Defendants' Motion to Dismiss. At the conclusion of the May 29, 2020, Status
20 Conference, the Court took the parties' briefing on the Preliminary Injunction under advisement. This
21 written order follows.
22

23 **THEREFORE, BASED ON THE COURT'S REVIEW, IT IS HEREBY ORDERED** that the
24 Plaintiffs' Motion for Preliminary Injunction is **GRANTED**.
25

BACKGROUND

1
2 The Ballot Interference Protection ACT (hereinafter referred to as “BIPA”) was passed by the
3 House during the 2017 Montana legislative session. BIPA was placed on the ballot as ballot referendum
4 LR 129 for the 2018 November general election. BIPA was approved by the voters during the 2018 general
5 election. BIPA restricts who can collect registered voters voted or unvoted ballots and creates exceptions
6 only for election officials and employees of the United States Postal Office. Mont. Code Ann. § 13-35-
7 703. BIPA allows caregivers, family members, household members and acquaintances to collect ballots,
8 but limits the same categories of individuals from collecting and conveying more than six ballots per
9 election. Mont. Code Ann § 13-35-703 (2) and (3). BIPA compels every caregiver, family member,
10 household member or acquaintance who delivers another individuals ballot to sign a registry and provide
11 their name, address, and phone number; the voter’s name and address; and the individual’s relationship to
12 the voter. See Mont. Code. Ann. § 13-35-703(2)(c)-(2)(f). BIPA authorizes a \$500 fine for each ballot
13 unlawfully collected. Mont. Code. Ann § 13-35-703.
14

15 Plaintiffs argue that BIPA infringes on their fundamental right to vote; Plaintiffs claim that BIPA
16 places a significant burden on Native Americans living on reservations, many of whom rely ballot
17 collection organizations to vote. Plaintiffs argue that, while many Montanans may drop their ballots in the
18 U.S. mail postal drop boxes or drive to their local elections offices, Native Americans living on
19 reservations lack equal access to these opportunities due to scarcity of post offices, non-traditional mailing
20 addresses, coupled with geographical isolation and higher levels of poverty, which make it harder for
21 Native Americans to drop off their ballots at polling places. Plaintiffs stress that Native Americans living
22 on reservations often deliver their ballots by pooling them with family and community ballots. Plaintiffs
23 further contend that BIPA violates Organizational Plaintiffs’, Plaintiff CSKT’s and Plaintiff Fort
24 Belknap’s fundamental right to freedom of speech, fundamental right to freedom of association, and
25

1 fundamental right to due process. Plaintiffs posit that BIPA does not meet strict scrutiny and that the law
2 must be enjoined; that Plaintiffs will suffer irreparable injury absent a preliminary injunction and that the
3 balance of equities weighs in favor of Plaintiffs and that the injunction would not be adverse to the public
4 interest.

5 The State contends that the Plaintiffs' motion for a preliminary injunction should be denied
6 because Plaintiffs have not demonstrated a *prima facie* constitutional violation and, therefore, have not
7 made a *prima facie* showing that they will suffer irreparable injury before this case can be fully litigated.
8 The State argues that any urgency was self-created by the Plaintiffs and that their assertions of irreparable
9 harm are insufficient to establish a *prima facie* case that BIPA will violate their constitutional rights or
10 the constitutional rights of their members if it remains in effect for the upcoming elections. The State
11 posits that Plaintiffs' have no constitutional right to have their absentee ballots collected by a person other
12 than an election official or United States Postal Service worker and that Organizational Plaintiffs have no
13 constitutional right to collect ballots.
14

15 **DISCUSSION**

16 Pursuant to M.C.A. §27-19-201, a preliminary injunction may be granted:

- 17 (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part
18 of the relief consists in restraining the commission or continuance of the act complained of,
either for a limited period or perpetually;
- 19 (2) when it appears that the commission or continuance of some act during the litigation would
20 produce a great or irreparable injury to the applicant;
- 21 (3) when it appears during the litigation that the adverse party is doing or threatens or is about to
22 do or is procuring or suffering to be done some act in violation of the applicant's rights,
respecting the subject of the action, and tending to render the judgement ineffectual;
- 23 (4) when it appears that the adverse party, during the pendency of the action, threatens or is about
24 to remove or to dispose of the adverse party's property with intent to defraud the applicant, an
injunction order may be granted to restrain the removal or disposition;
- 25 (5) when it appears that the applicant has applied for an order under the provision of 40-4-121 or
an order of protection under Title 40, chapter 15.

1 The subsections outlined above are disjunctive, “meaning that findings that satisfy one subsection
2 are sufficient.” *Sweet Grass Farms, Ltd. v. Bd. Of Cty. Comm’rs of Sweet Grass County*, 2000 MT 147,
3 ¶ 27, NEED FULL CITE (quoting *Stark v. Borner*, 266 Mont. 256, 259, 375 P. 2d 314, 317 (1987)). Only
4 one subsection of M.C.A. §27-19-201 needs to be met to support the issuance of a preliminary injunction.
5 *Stark*, 266 Mont. at 259, 735 P.2d at 317. The “grant or denial of injunctive relief is a matter within the
6 broad discretion of the district court based on applicable findings of fact and conclusions of law.” *Weems*
7 *v. State by & through Fox*, 2019 MT 98, ¶ 7 (quoting *Davis v. Westphal*, 2017 MT 276, ¶ 10). The district
8 court “does not determine the underlying merits of the case in resolving a request for preliminary
9 injunction. *Weems*, ¶ 18. In the context of a constitutional challenge, an applicant for preliminary
10 injunction need not demonstrate that the statute is unconstitutional beyond a reasonable doubt but must
11 establish a *prima facie* case of a violation of its rights under the Constitution. *Id.* (quoting *City of Billings*
12 *v. Cty. Water Dist. Of Billings Heights*, 281 Mont. 219, 228, 935 P.2d 246, 251 (1997)). Thus, in the
13 present matter, because Plaintiffs have moved for a preliminary injunction based on constitutional
14 challenges, they must establish a *prima facie* case of a constitutional violation.
15

16 Section 13 of Montana’s Constitution states: “All elections shall be free and open, and no power,
17 civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Mont.
18 Const. Art. II, § 13. The right of suffrage is a fundamental right. *State v. Riggs*, 2005 MT 124, ¶ 47
19 (citations omitted). Because voting rights are fundamental, BIPA, which Plaintiffs contend infringes upon
20 the right to vote, “must be strictly scrutinized and can only survive scrutiny if the State establishes a
21 compelling state interest and that its action is closely tailored to effectuate that interest and is the least
22 onerous path that can be taken to achieve the State’s objective.” *Montana Envtl. Info Ctr. V. Dept’t. of*
23 *Envtl. Quality*, 1999 MT 248, ¶ 63 FULL CITE; *Finke v. State ex Rel. McGrath*, 2003 MT 48, ¶ 15 FULL
24 CITE. It is the State’s burden to prove the compelling interest by competent evidence. *Wadsworth v. State*,
25

1 275 Mont. 287, 911 P.2d 1165, 1174 (1996). Merely alleging that there is a compelling state interest is
2 insufficient to justify interference with the exercise of a fundamental right. *Id.*

3 FINDINGS OF FACT

4 1. In support of the Motion for Preliminary Injunction, the Plaintiffs have submitted the following

5 Affidavits:

- 6 a. Floyd G. Azure
7 - Tribal Chairman of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation
8 ("Fort Peck Tribes")
- 9 b. Shelly R. Fyant
- Chairwoman of the Confederated Salish and Kootenai Tribes ("CSKT")
- 10 c. Dawn Gray
- Managing Attorney of the Blackfeet Nation
- 11 d. Daniel Craig McCool, Ph.D.
12 - Professor Emeritus of Political Science at the University of Utah
- 13 e. Marci McLean
14 - Executive Director of Montana Native Vote and Western Native Voice
- 15 f. Ryan D. Weichelt, Ph.D.
- Associate Professor of Geography at the University of Wisconsin-Eau Claire
- 16 g. Andrew Werk, Jr.
17 - President of the Fort Belknap Indian Community
- 18 h. Alex Rate
19 - Legal Director of the American Civil Liberties Union of Montana

20 2. The Court finds that, without exception, all Affidavits were verified and that the material
21 allegations in each Affidavit were made positively and not upon information and belief.

22 3. The Court finds that, for the purposes of determining whether the Plaintiffs have presented a *prima*
23 *facie* case for a preliminary injunction, the statements made by the Affiants are credible and based
24 upon extensive personal experience. The Court further finds the expert opinions expressed by Dr.
25 Craig McCool are credible and persuasive. Dr. McCool has extensive education, training and

1 experience in the political relationship between American Indians and Anglos and Indian voting
2 issues.¹ The methodology used by Dr. McCool has been accepted in numerous federal cases.² His
3 research has been published in many peer reviewed journals.³ The Court finds that the State has
4 not challenged Dr. McCool's opinions.

- 5 4. Based upon Plaintiffs' Affidavits, the Court finds that BIPA will significantly suppress voter
6 turnout by disproportionately harming rural communities, especially individual Native Americans
7 in rural tribal communities across the seven Indian reservations located in Montana by limiting
8 their access to the vote by mail process.⁴
- 9 5. The State argues that the Plaintiffs' Motion for a Preliminary Injunction should be denied because
10 Plaintiffs delayed filing their Motion until March 25, 2020, more than sixteen months after BIPA
11 took effect on November 6, 2018; that Plaintiffs did not file their Complaint until March 12, 2020,
12 didn't serve the Attorney General until March 24, 2020 (six weeks before absentee ballots were
13 made available for the primary election), and therefore, should be estopped from complaining
14 about purported irreparable harm that would result from proceeding with the normal course of
15 litigation.
- 16 6. In Montana, the right to vote is a fundamental right guaranteed by the Montana Constitution. *State*
17 *v. Riggs*, 2005 MT 124, ¶ 47. The loss of a constitutional right "constitutes irreparable harm" for
18 the purpose of determining whether a preliminary injunction should be issued." *Mont Cannabis*
19 *Indus. Ass'n v. State*, 2012 MT 201, ¶ 15 (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).
20 Plaintiffs have shown that BIPA impedes on Montanans' constitutional right to vote; they have
21
22
23

24 ¹ Affidavit of Dr. Craig McCool at 1-2

25 ² *Id.*

³ *Id.*

⁴ Affidavits of Floyd Azure, Shelly Flynt, Dawn Gray, Andrew Werk, Dr. Ryan Weeichlet and Alex Rate

1 demonstrated irreparable harm for the purposes of determining whether a preliminary injunction
2 should be issued.

3 7. The Defendants cite to *Rep Nat'l Comm v. Dem. Nat'l Comm.*, 206 L.Ed. 2d 452, 453-54
4 (2020)(*per curiam*) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006); *Frank v. Walker*, 574 U.S. 929
5 (2014); *Veasy v. Perry*, 574 U.S. 951 (2014)) to argue that the U.S. Supreme Court has “reputedly
6 emphasized” its disfavor of altering election rules by judicial altercation on the eve of an election.
7 The Court finds this argument misplaced. The preliminary injunction does not “fundamentally
8 alter the nature of the election”. *Rep. Nat'l Com.* 206 L.Ed.2d 452 at 1006-7. The Court’s
9 preliminary injunction will mitigate the voter suppression effects of BIPA. Because the
10 preliminary injunction granted by this court does not “fundamentally alter the nature of the
11 election”, the State’s reliance on *Rep. Nat'l Comm* is not persuasive.

12 8. The State argues that because BIPA was passed by Montana’s voters by a wide margin, the
13 referendum itself demonstrates a compelling state interest. *Def’s Resp.* at 6 (citing *Montana*
14 *Auto. Ass’n v. Greely*, 193 Mont. 378, 384, 632 P.2d 300, 303 (1981)). In *Montana Auto. Ass’n*,
15 the Montana Supreme Court held that “the statewide vote on I-85 is a demonstration of a
16 compelling state interest in the enactment of I-85.” *Id.* However, that did not deter the Montana
17 Supreme Court from declaring portions of the initiative unconstitutional. *Id.* While the Montana
18 Supreme Court has held that a statewide initiative passed by Montana voters can indicate a
19 compelling state interest, initiatives must still pass constitutional muster; statutes, whether passed
20 by the legislature or by the voters, cannot violate the Constitution. The Court is not persuaded by
21 the State’s argument that BIPA’s enactment by referendum shields BIPA from constitutional
22 scrutiny.
23
24
25

1 9. The Court finds that, in their opposition to the Plaintiffs' Motion for Preliminary Injunction, the
2 State has failed to present any evidence to dispute the Plaintiffs' evidence that BIPA
3 disproportionately burdens the voters identified by Plaintiffs or that the statute significantly
4 suppresses voter turnout by making voting more burdensome and costly for voters who rely on
5 ballot collection services.

6 10. Based upon the Plaintiffs' Affidavits, the Court finds that the Plaintiffs have established a *prima*
7 *facie* violation of their right to free speech, right to freedom of association and right to due process.⁵

8 11. The Court finds that, in their opposition to Plaintiffs' Motion for Preliminary Injunction, the State
9 has failed to present any evidence to dispute Plaintiffs' evidence that BIPA infringes on plaintiffs'
10 right to free speech, right to freedom of association and right to due process.

11 12. Although the State alleges that BIPA promotes the State's compelling interest in maintaining the
12 integrity of elections, the Court finds that the State has failed to present any evidence of Montana
13 voters being subjected to harassment and insecurity in the voting process or even a general lack of
14 integrity in Montana's elections.

15 13. The Court finds that BIPA serves no legitimate purpose; it fails to enhance the security of absentee
16 voting; it does not make absentee voting easier or more efficient; it does not reduce the costs of
17 conducting elections; and it does not increase voter turnout.

18
19 **CONCLUSIONS OF LAW**

20 1. The Plaintiffs have successfully demonstrated irreparable harm per se by presenting a *prima*
21 *facie* case that BIPA violates the right to vote guaranteed by the Montana constitution.

22 2. The Court finds the cases cited by the Defendant to support their positions to be unpersuasive as
23 these cases dealt with irreparable injury for copyright, trademark, and anti-trust and trade
24

25

⁵ Affidavit of Marci McLean

1 violations, not constitutional violations. Def's Resp. 4. (citing *Oakland Tribune, Inc v.*
2 *Chorinicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); accord *Wreal, Ltd. Liab. Co. v.*
3 *Amazon.com*, 840 F.3d 1244, 1248 (11th Cir. 2016); *Garcia v. Google, Inc.*, 786 F.3d 733, 746
4 (9th Cir. 2015) (en banc); *Citibank, N.A.*, 756 F.2d at 276-77).

- 5 3. The State has failed to demonstrate through any evidence the existence of any compelling state
6 interest that would warrant the interference of the right to vote created by BIPA.
- 7 4. If a preliminary injunction were not granted, BIPA would cause irreparable harm to Montana
8 voters by preventing absentee ballot voters from voting with the assistance of ballot collection
9 organizations.
- 10 5. The Court holds that BIPA is subject to strict scrutiny and that the State must demonstrate through
11 competent evidence that the statute furthers a compelling state interest.
- 12 6. Based on the evidence submitted to the Court thus far, the Court concludes that the Plaintiffs are
13 likely to prevail on the merits and would be entitled to a permanent injunction to enjoin the
14 enforcement of BIPA.
- 15 7. The Court concludes, pursuant to M.C.A. § 27-19-201(1) and (2), that a preliminary injunction
16 should be issued, enjoining the enforcement of BIPA.

17
18 Based upon the above Findings of Fact, Conclusions of Law, and Memorandum:

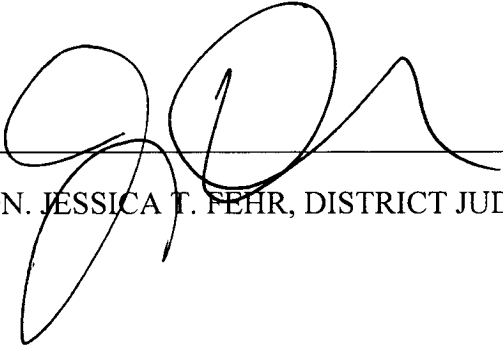
19 **IT IS HEREBY ORDERED:**

- 20 1. The Plaintiffs' Motion for Preliminary Injunction is **GRANTED**.
- 21 2. The Defendants and their agents, officers, employees, successors, and all persons acting in
22 concert with each or any of them are **IMMEDIATELY** restrained and prohibited from enforcing
23 the provisions of the Ballot Interference Prevention Act, M.C.A. § 13-35-701 *et seq.* pending
24
25

1 resolution of the Plaintiffs' request that the State be permanently enjoined from enforcing the
2 statutes cited above.

- 3 3. The Court waives the requirement that the Plaintiffs post a security bond for the payment of costs
4 and damages as permitted by M.C.A. § 27-19-306(1)(b)(ii).

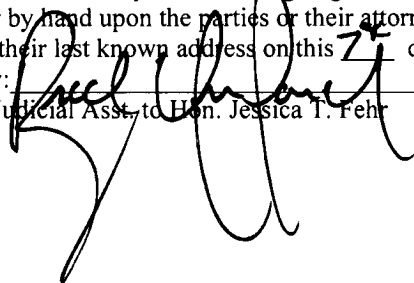
5 **DATED** this 7th day of July, 2020.

6
7
8 
9
10 HON. JESSICA T. FEHR, DISTRICT JUDGE

11 cc: Lillian Alvernaz, ACLU of Montana
12 Alex Rate, ACLU of Montana
13 Alora Thomas-Lundborg, ACLU
14 Dale Ho, ACLU
15 Ihaab Syed, ACLU
16 Natalie Landreth, Native American Rights Fund
17 Jacqueline De Leon, Native American Rights Fund
18 Timothy C. Fox, Montana Attorney General
19 J. Stuart Segrest, Chief Civil Bureau
20 Aislinn W. Brown, Assistant Attorney General
21 Hannah Tokerud, Assistant Attorney General

22
23
24
25
CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail
or by hand upon the parties or their attorneys of record
at their last known address on this 7th day of July, 2020.

By: 
Judicial Asst. to Hon. Jessica T. Fehr