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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 20-0295

DA 20-0295

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 247

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

Plaintiffs and Appellees,

v.

COREY STAPLETON, in his official capacity as Montana
Secretary of State,

Defendant and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. 20-408
Honorable Donald L. Harris, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Timothy C. Fox, Montana Attorney General, J. Stuart Segrest, Civil Bureau Chief, Aislinn W. Brown, Hannah E. Tokerud, Assistant Attorneys General, Helena, Montana

For Appellee:

Peter Michael Meloy, Meloy Law Firm, Helena, Montana

Matthew Gordon, Perkins Coie, LLP, Seattle, Washington

For Intervenors:

Alex Rate, Lillian Alvernaz, ACLU of Montana, Missoula, Montana

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Submitted on Briefs: August 26, 2020

Decided: September 29, 2020

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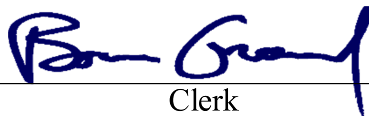

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Montana Secretary of State Corey Stapleton appeals a Thirteenth Judicial District Court order that temporarily enjoined two Montana election laws, one requiring absentee ballots to be returned to local election offices no later than 8:00 p.m. on Election Day and the other restricting the delivery of such ballots by persons other than the elector. We stayed the court's injunction on the first issue shortly before the June 3, 2020 primary election, and we now reverse its preliminary injunction against the election-day ballot deadline. Applying the same standard of review, we affirm the preliminary injunction against the ballot-delivery restriction.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 The case comes before this Court following a preliminary injunction hearing and order in favor of Appellees Robyn Driscoll, the Montana Democratic Party, and the Democratic Senatorial Campaign Committee (collectively "Democrats"). They filed a Complaint in Yellowstone County District Court against Appellant Corey Stapleton in his official capacity as Secretary of State ("Secretary") on March 13, 2020; the case was assigned to the Honorable Donald L. Harris. Democrats alleged the unconstitutionality of the Ballot Interference Prevention Act ("BIPA"), Tit. 13, ch. 35, part 7, MCA, and the election-day ballot deadline ("Ballot Deadline") found in §§ 13-13-201(3), 13-13-211(3), and 13-19-106(5)(b), MCA. The Complaint alleged constitutional violations against the fundamental right to vote, the right to speak and associate, and the right to due process. Democrats' Motion for Preliminary Injunction sought to enjoin BIPA and the Ballot Deadline during the pendency of the case. A related case, *Western Native Voice v.*

Stapleton, DV-2020-377, was filed the day before—also in the Thirteenth Judicial District Court for Yellowstone County—alleging the same constitutional infirmities of BIPA. Plaintiffs in that case, assigned to the Honorable Jessica Fehr, are 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 (collectively "WNV"), and Defendant is the Secretary in his official capacity.

¶3 BIPA was introduced in the 2017 Montana Legislature with an asserted purpose of protecting election integrity and instilling voter confidence in the election process. The bill's sponsor said during legislative committee hearings that he had brought the bill because of voters' suspicions and concerns he had received over ballot-collection activity. The bill received no public testimony in support but significant testimony in opposition. No one testified to specific instances of voter fraud or ballot tampering.[1] BIPA passed both houses of the Legislature, and Montana voters approved it as a legislative referendum on November 6, 2018. It has not yet been in effect for a statewide general election.

¶4 Under BIPA's provisions, absentee ballots, voted or unvoted, may be collected from individual voters only by certain persons, including election officials, postal workers, or the voter's family members, household members, caregivers, or acquaintances. Section 13-35-703, MCA. With the exception of election officials and postal workers, these enumerated individuals are limited to collecting and conveying up to six ballots during an

[1] Democrats submitted an affidavit to the District Court attesting that election officials "carefully looked into [the referenced] calls to law enforcement. In each of the three cases where voters called to report that they had given a canvasser their ballot, all three ballots had been delivered to the county elections office on time and without issue."

election cycle; they must sign a registry upon delivery of the ballots, providing their name, address, phone number, relationship to each voter, the voter's name, and the voter's address. Sections 13-35-703(3), 13-35-704, MCA. Violation of BIPA's restrictions carries a fine of $500 for each ballot collected unlawfully. Section 13-35-705, MCA.

¶5 Democrats allege that BIPA places an unconstitutional barrier between the polls and certain voting groups that likely would not have their votes counted without the ballot-collection efforts the law now prohibits. Since no-excuse absentee ballots first were permitted in 1999, there has been a significant increase in absentee ballot use in Montana. Democrats showed that in 2018, over 73 percent of votes in Montana were cast by absentee ballots. Democrats presented evidence before the District Court to demonstrate certain distinct voting groups' reliance on this option for voting and the accompanying organized and unorganized ballot-collection efforts, including: senior and disabled voters who may have trouble with transportation, standing in line, or the unavailability of a caregiver to assist them; first-time student voters, who often are less familiar with the voting process; and working students, working parents, or low-wage workers, who may not have the time or availability to vote in person.

¶6 Democrats also presented evidence to demonstrate that the importance of absentee ballots and ballot-collection efforts is more significant for Native American voters than for any other group. Disregarding BIPA's possible impact, Native American voters as a group face significant barriers to voting: many live far away from county elections offices and

postal centers;[2] many have limited access to transportation; many have limited access to postal services, lacking residential mailing services and using Post Office boxes instead, which brings associated costs and travel; mail for those living on reservations may take longer to reach its destination than for other voters in the state; some reservations lack a uniform and consistent addressing system, which makes it difficult for residents to register to vote; and many experience higher rates of poverty. Further, despite satellite voting locations on some reservations, this requires tribes to submit annual written requests, a significant administrative hurdle, and typically those locations still are located quite far from many Native American voters. Democrats argued that these barriers have led to the disenfranchisement of a significant number of Native American voters.

¶7 By using absentee ballots and organized ballot collection efforts, Democrats contend, individual Native American voters and organizations like Western Native Voice have been successful in overcoming many of these barriers to allow Native Americans to exercise their right to vote in Montana. According to Western Native Voice, it and other similar organizations' overall efforts (including canvassing, education, ballot-collection, and similar efforts) have led to increased Native American voter turnout. Compared to the 2014 midterm election, 7,704 more tribal community members voted in the 2018 election with an increase on each reservation within Montana: from 39% to 70% in Fort Belknap, 47% to 68% in CSKT, 32% to 59% in Fort Peck, 33% to 59% in Blackfeet, 29% to 57% in Crow, 23% to 51% in Rocky Boy's, and 30% to 50% in Northern Cheyenne. Referenced

[2] Democrats' evidence showed that, on average, tribal community members must travel 85 miles round-trip to reach a county elections office.

by Democrats in their argument below and on appeal was the evidence that many Native Americans living on reservations pool their ballots together with one family or community member who will collect and deliver them. Thus, Democrats argue, BIPA's prohibition on who may collect ballots and how many ballots may be collected presents a new challenge to these ongoing efforts.

¶8 Unlike BIPA, the Ballot Deadline has been in place through numerous election cycles. Even before it was codified in 2011, election officials followed the same deadline as a matter of policy. The statute requires that absentee ballots be received in the proper election offices by 8:00 p.m. on Election Day, regardless of when they were mailed. Section 13-13-201(3), MCA. There are very limited exceptions, including federal write-in absentee ballots for military and overseas voters. Section 13-21-206(c), MCA. The Secretary contested Democrats' effort to enjoin the Ballot Deadline on the ground that it provides uniformity, fairness, clarity, and expediency in determining election results. In response, Democrats presented evidence of the variability and inconsistency of mail delivery as well as misunderstanding and confusion over when ballots must be mailed, which the District Court found may lead to burdens for first-time voters, persons with less education, and persons who historically have relied on ballot-collection services.

¶9 The District Court issued its Findings of Fact and Conclusions of Law on May 22, 2020, roughly ten days before the primary election. It granted Democrats' motion and enjoined BIPA and the Ballot Deadline until a trial on the permanent injunction could be held. The District Court found that Democrats had made a prima facie showing that the

challenged statutes may violate the right to vote under Montana's constitution based on credible evidence that the laws would:

> significantly suppress voter turnout by disproportionately burdening voters who are Native American, elderly, disabled, poor, parents working low-wage jobs, college students, first-time voters, and voters who have historically relied on GOTV and ballot collection services like those provided by Western Native Voice, MontPIRG, Disability Rights Montana, Forward Montana, Montana Conservation Voters, unionized labor, and the Montana Democratic Party.

¶10 The day the court issued the preliminary injunction, the Secretary moved for a stay with respect to the Ballot Deadline, making no similar request as to the preliminary injunction against BIPA. The Secretary filed both an appeal with this Court and a Petition for Writ of Supervisory Control on May 26, 2020. On May 27, 2020, this Court denied supervisory control but stayed the preliminary injunction against the Ballot Deadline and ordered expedited briefing to ensure a decision in time for the November election preparations.

¶11 Meanwhile, WNV similarly sought a preliminary injunction against BIPA. On May 20, 2020, Judge Fehr entered a temporary restraining order enjoining BIPA; she followed with a preliminary injunction on July 7, 2020. The Secretary appealed Judge Fehr's preliminary injunction, and that appeal is pending. *Western Native Voice, et al. v. Stapleton*, S. Ct. No. DA 20-0394. Due to the unlikelihood that their case would proceed to appeal in time for the November election preparations, WNV filed an

Unopposed Motion to Intervene in this appeal on June 12, 2020. We granted the motion on June 18, 2020.[3]

STANDARD OF REVIEW

¶12 We review a district court's grant or denial of a preliminary injunction for a manifest abuse of discretion. *Davis v. Westphal*, 2017 MT 276, ¶ 10, 389 Mont. 251, 405 P.3d 73. "A manifest abuse of discretion is one that is 'obvious, evident, or unmistakable.'" *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4 (quoting *Davis*, ¶ 10). If the

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[3] The Western Native Voice preliminary injunction appeal is in its infancy, with no party's brief yet due or filed. We did, however, grant leave for the Speaker of the Montana House of Representatives and State Senate President to file an amicus brief, of which we take judicial notice. M. R. Evid. 202(6). In part, the Legislators' amicus brief argues that, because the United States and Montana constitutions bestow the Legislature with the exclusive duty and authority to regulate elections, the district court exceeded its authority in ruling on the issues raised. Given the threshold importance of the Legislators' separation of powers argument, we address it briefly.

"At least since *Marbury* v. *Madison*, 5 U.S. 137 [at 177], 1 Cranch 137, 2 L. Ed. 60 (1803), [the Supreme Court has] recognized that when an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.' [Citation omitted.] That duty will sometimes involve the 'resolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S. Ct. 1421, 1427-28 (2012) (quoting *INS* v. *Chadha*, 462 U.S. 919, 943, 103 S. Ct. 2764, 2780 (1983)). The Constitution, with the rights and powers it contains and delegates to the various branches of government, is the "mandate of a sovereign people to its servants and representatives. No one of them has a right to ignore or disregard its mandates, and the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations." *Gen. Agric. Corp. v. Moore*, 166 Mont. 510, 515-16, 534 P.2d 859, 862-63 (1975).

Once the legislative branch has exercised its authority to enact a statute, whether through legislative referendum or a bill signed by the Governor, it is within the courts' inherent power to interpret the constitutionality of that statute when called upon to do so. A court is thus duty-bound to decide whether a statute impermissibly curtails rights the constitution guarantees. As the Supreme Court has "made clear," "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction." *Chadha*, 462 U.S. 919, 941, 103 S. Ct. 2764, 2779 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 132, 96 S. Ct. 612, 752 (1976)). The District Court thus did not exceed its authority by considering Democrats' constitutional challenge.

decision on a preliminary injunction was based on legal conclusions, however, we review those conclusions to determine if the district court's interpretation of the law is correct. *City of Whitefish v. Bd. of Cty. Comm'rs of Flathead Cty.*, 2008 MT 436, ¶ 7, 347 Mont. 490, 199 P.3d 201. Finally, "[i]n considering whether to issue a preliminary injunction, neither the [d]istrict [c]ourt nor this Court will determine the underlying merits of the case giving rise to the preliminary injunction, as such an inquiry is reserved for a trial on the merits." *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 7, 395 Mont. 160, 437 P.3d 142 (citing *Caldwell v. Sabo*, 2013 MT 240, ¶ 19, 371 Mont. 328, 308 P.3d 81).

DISCUSSION

¶13 Section 27-19-201, MCA, allows a party to obtain a preliminary injunction by demonstrating the criteria of one of its five subsections. These subsections are disjunctive; a court need find just one subsection satisfied in order to issue a preliminary injunction. *BAM Ventures*, ¶ 14 (citing collected cases). The District Court found that Democrats met the first two subsections, which provide for a preliminary injunction:

> (1) when it appears that the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually; [or]
>
> (2) when it appears that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant[.]

Section 27-19-201(1)-(2), MCA.

¶14 In considering whether to issue a preliminary injunction, a district court must exercise its otherwise broad discretion only "in furtherance of the limited purpose of [a] preliminary injunction[:] to preserve the status quo and minimize the harm to all parties

pending final resolution on the merits." *Davis*, ¶ 24 (emphasis omitted, citing *Porter v. K & S P'ship*, 192 Mont. 175, 183, 627 P.2d 836, 840 (1981)); *see also BAM Ventures*, ¶ 16; *Yockey v. Kearns Properties, LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185. The "status quo" is the "last actual, peaceable, non[-]contested condition which preceded the pending controversy." *Benefis Healthcare v. Great Falls Clinic, LLP*, 2006 MT 254, ¶ 14, 334 Mont. 86, 146 P.3d 714 (internal quotations, citations omitted); *see also BAM Ventures*, ¶ 18; *State v. BNSF Ry. Co.*, 2011 MT 108, ¶ 17, 360 Mont. 361, 254 P.3d 561. "If a preliminary injunction will not accomplish its limited purposes, then it should not issue." *Davis*, ¶ 24 (brackets omitted, quoting *Porter*, 192 Mont. at 183, 627 P.2d at 840).

¶15 Beyond that, a district court need find only that an applicant made a prima facie showing she will suffer a harm or injury—"whether under the 'great or irreparable injury' standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA." *BAM Ventures*, ¶ 16. Prima facie is defined as "at first sight" or "on first appearance but subject to further evidence or information." *Weems*, ¶ 18 (quoting *prima facie*, *Black's Law Dictionary* (10th ed. 2014)). For the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury. *See MCIA I*, ¶ 15.

¶16 A statute enjoys a presumption of constitutionality. *See City of Billings v. Cty. Water Dist.*, 281 Mont. 219, 227, 935 P.2d 246, 250 (1997). Because a preliminary injunction does not decide the ultimate merits of a case, however, a party need establish only a prima facie violation of its rights to be entitled to a preliminary injunction—even if

such evidence ultimately may not be sufficient to prevail at trial. *See City of Billings*, 281 Mont. at 227, 935 P.2d at 251; *see also Weems*, ¶ 18; *City of Whitefish*, ¶¶ 25-26; 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.3, 201 (3d ed. 2013) ("All courts agree that a plaintiff must present a prima facie case but need not show a certainty of winning"); *Davis v. Stapleton*, CV 20-62-H-DLC, 2020 U.S. Dist. LEXIS 150267, *12 (D. Mont. Aug. 19, 2020) (observing that "when the balance of equities tips sharply in the plaintiff's favor, the plaintiff need demonstrate only 'serious questions going to the merits'") (citations omitted).

¶17 With the foregoing in mind, we will affirm the preliminary injunction if the record shows that Democrats demonstrated either a prima facie case that they will suffer some degree of harm and are entitled to relief (§ 27-19-201(1), MCA) or a prima facie case that they will suffer an "irreparable injury" through the loss of a constitutional right (§ 27-19-201(2), MCA). We must conclude that by enjoining BIPA and the Ballot Deadline, or either of them, the District Court preserved the status quo and minimized the harm to both parties pending a final resolution of the matter on the merits. *Davis*, ¶ 24. Our analysis as to each statute follows.

1. *Did the District Court err by enjoining BIPA?*

¶18 When determining whether an applicant has made a prima facie showing of constitutional injury or appears to be entitled to the relief sought, a court may determine with which level of scrutiny to evaluate the challenged statute. *See MCIA I*, ¶ 16. "The extent to which the Court's scrutiny is heightened depends both on the nature of the

interest and the degree to which it is infringed." *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1173 (1996) (citing *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 254-56, 94 S. Ct. 1076, 1080-81 (1974)). The most stringent level of scrutiny, and the one employed by the District Court, is strict scrutiny, used when a statute implicates a fundamental right found in the Montana Constitution's declaration of rights. *MCIA I*, ¶ 16; *see generally* Mont. Const. art. II. "Strict scrutiny of a statute is required only when the classification impermissibly interferes with the exercise of a fundamental right." *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (citing *Arneson v. State, By Dept. of Admin.*, 262 Mont. 269, 272, 864 P.2d 1245, 1247 (1993)). Under strict scrutiny, statutes will be found unconstitutional "unless the State can demonstrate that such laws are necessary to promote a compelling governmental interest." *Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 15, 314 Mont. 314, 65 P.3d 576 (internal quotations and emphasis omitted, quoting *Johnson v. Killingsworth*, 271 Mont. 1, 4, 894 P.2d 272, 273-74 (1995)). Middle-tier scrutiny is used "[i]f a law or policy affects a right conferred by the Montana Constitution, but is not found in the Constitution's declaration of rights." *MCIA I*, ¶ 16 (citing *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 18, 325 Mont. 148, 104 P.3d 445). Under middle-tier scrutiny, the State must demonstrate that the law is reasonable and that the need for the law outweighs the value of the right to the individual. *Snetsinger*, ¶ 18.

¶19 Here, the Secretary argues the District Court erred by applying strict scrutiny when evaluating BIPA. The right to vote in any manner, the Secretary maintains, is not absolute and must be balanced against the regulatory power the constitution confers on the Legislature. The Montana Constitution directs the Legislature to "provide by law the

requirements for residence, registration, absentee voting, and administration of elections" and to "insure the purity of elections and guard against abuses of the electoral process." Mont. Const. art. IV, § 3. In light of this directive, the Secretary urges this Court to adopt the more flexible balancing approach set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059 (1992).[4]

¶20 At this stage of the proceedings, we find it unnecessary to set forth a new level of scrutiny. The case is not before us on a full evidentiary record for evaluation of the ultimate merits. We conclude that, for purposes of resolving the instant preliminary injunction dispute, the level of scrutiny is not dispositive to the issues presented on appeal.

¶21 Noting that voters have come to rely on ballot-collection services, Democrats argue that BIPA will disproportionately affect the right of suffrage for certain subgroups, including Native Americans, rural and elderly voters, students with full-time jobs, low-wage workers, working parents, disabled voters, and first-time voters. Democrats presented evidence of increased Native American voter turnout between the 2014 and 2018 elections due to the efforts of organizations like Western Native Voice that do ballot-collection work on reservations. The District Court found that the evidence of various factors contributing to unequal access to the polls for Native American voters would be exacerbated by BIPA, burdening this subgroup's constitutional right to vote.

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[4] Under this standard, a reviewing court weighs the "character and magnitude" of the plaintiff's asserted injury against the "precise interests" the state put forward to justify the challenged rule and considers the "legitimacy and strength" of those interests and the necessity of any burden on the plaintiffs. *Anderson*, 460 U.S. at 789, 103 S. Ct. at 1570.

¶22 The Secretary asserts on appeal, as he did before the District Court, that the State has important interests to ensure voter confidence in the electoral process and to guard against abuses of that process. But he did not present evidence in the preliminary injunction proceedings of voter fraud or ballot coercion, generally or as related to ballot-collection efforts, occurring in Montana. More importantly, the Secretary has pointed to no evidence in the preliminary injunction record that would rebut the District Court's finding of a disproportionate impact on Native American voters, and he leaves the contention largely undisturbed in his briefing on appeal. The Secretary's only suggestion is a general one—that the alternative means of returning ballots or of voting in person remain equally available to all voters. But this does not address Democrats' evidence that the burden on Native American communities is disproportionate, and the Secretary fails to refute the District Court's finding.

¶23 The Secretary has not demonstrated clear error in the District Court's finding of sufficient evidence for a preliminary injunction of a disproportionate burden to Native American voters' right against "interfere[nce with] . . . the free exercise of the right of suffrage." Mont. Const. art. II, § 13. Democrats' evidence was sufficient to make a prima facie showing of the harm BIPA may impose on Native American voters in particular. On review of the preliminary injunction record, we conclude that the District Court did not err in finding prima facie evidence that BIPA may unconstitutionally burden the right of suffrage, particularly with respect to Native American communities, or in concluding that the Secretary did not demonstrate an interest that weighed more heavily than the burdens Democrats assert. The court thus did not manifestly abuse its discretion

in concluding that a preliminary injunction should issue, even under the *Anderson-Burdick* balancing standard.

¶24 Finally, the District Court did not err by finding a possibility of irreparable injury absent an injunction against BIPA. We are mindful that BIPA was passed in the 2018 general election and has not yet been in effect for a statewide general election. Democrats presented evidence of election officials' concerns about the strain BIPA puts on them leading up to Election Day, especially in rural counties, and the record before us shows uncertainty regarding BIPA's effects on such things as a ballot-collector mailing another voter's ballot, the use of after-hours ballot drop-boxes, or the need for election officials to question every person returning a ballot. In light of Democrats' evidence, and absent evidence of fraudulent ballot collection in Montana elections, preliminarily enjoining BIPA pending full consideration will minimize the harm to all parties and maintain the status quo pending final resolution on the merits. *Davis*, ¶ 24.

¶25 In sum, we conclude that the District Court did not manifestly abuse its discretion by granting the preliminary injunction against enforcement of BIPA.

2. Did the District Court err by enjoining the Ballot Deadline?

¶26 The "status quo" is the last actual, peaceable, non-contested condition preceding the pending controversy. *Benefis*, ¶ 14. Here, the contested condition is the 8:00 p.m. election-day deadline to have a mailed-in absentee ballot delivered. That condition, however, is the last *actual* non-contested condition as well. The Ballot Deadline in its current form has been in effect since 2011. Before that, the same deadline had been in

effect through non-statutory practices of the Secretary of State since at least 2001. Democrats presented no evidence that a postmark deadline was in effect before then.

¶27 That the Ballot Deadline has been in effect in some form or another for at least the last two decades is not on its own enough to prevent its enjoinment. *See Weems*, ¶ 26 (discussing how the length of time a statute has been on the books is not the relevant inquiry in considering a request to enjoin it, and affirming a preliminary injunction that preserved a known, uncontested right). But election administrators throughout the state long have relied upon and been trained under the Ballot Deadline, and it is tied to many other election-related functions and deadlines found throughout the election codes. Among these, by way of example, are § 13-21-206, MCA, (stating the procedure by which an election official determines whether to accept a federal write-in ballot by determining whether a regular absentee ballot had been received by the Ballot Deadline); § 13-13-245, MCA, (concerning notification of an elector with a deficiency in her ballot); and § 13-15-107, MCA, (concerning the timeline for a provisionally registered elector to cure any deficiencies in his identification or eligibility information).

¶28 Neither Democrats nor the District Court took issue with the need for a deadline by which absentee ballots must be returned. In a tacit recognition of the Secretary's argument on the importance of clear deadlines, the District Court bootstrapped a remedy by affirmatively requiring the Secretary to accept mailed absentee ballots by their postmarked date up until the time the office accepts federal military and overseas ballots. Section 13-21-206(1)(c), MCA. The District Court's preliminary injunction not only fails to preserve the status quo, it substitutes the District Court's choice of deadline for that of

the Legislature. The postmark deadline was never the law or the status quo for the general absentee ballots at issue. The District Court failed to analyze how the Ballot Deadline would impact other related election functions and deadlines or to consider whether enjoining the Ballot Deadline would maintain the status quo. Because it would not, we reverse those portions of the District Court's order enjoining the Ballot Deadline and mandating that absentee ballots postmarked on or before Election Day be counted as valid provided they are received by the deadline for federal write-in ballots.

CONCLUSION

¶29 The District Court's preliminary injunction against the election-day ballot-receipt deadline prescribed in §§ 13-13-201(3), 13-13-211(3), and 13-19-106(5)(b), MCA, is VACATED**.** The election-day ballot deadline shall remain in effect for the November 3, 2020 general election. The District Court's preliminary injunction against the Ballot Interference Prevention Act, Tit. 13, ch. 35, part 7, MCA, is AFFIRMED, and the Act is enjoined through the November 3, 2020 general election.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON

Justice Dirk Sandefur concurring in part and dissenting in part.

¶30 I concur that the District Court manifestly abused its discretion in granting a preliminary injunction enjoining enforcement of §§ 13-13-201(3), -211(3), and 13-19-106(5), MCA (absentee ballots Receipt Deadline). However, I disagree with the Majority's holdings that: (1) the District Court did not manifestly abuse its discretion in granting the BIPA injunction under strict scrutiny; (2) determination of the applicable level of constitutional scrutiny is not necessary or proper upon review of the correctness of the BIPA injunction; and (3) the District Court in any event did not manifestly abuse its discretion in granting the BIPA injunction under intermediate scrutiny.

¶31 I would contrarily hold that the District Court manifestly abused its discretion in granting the BIPA injunction, whether under strict or intermediate constitutional scrutiny, based on erroneous findings of fact and conclusions of law that Plaintiffs made an unrebutted prima facie showing that BIPA will likely substantially burden the fundamental right to vote of specified third-parties. I would further hold that the BIPA injunction is erroneous based on the District Court's erroneous recognition and application of the threshold burdens of proof and persuasion on a preliminary injunction applicant under § 27-19-201(1)-(2), MCA, and the applicable level of constitutional scrutiny, to make a prima facie showing that a challenged statute is likely unconstitutional as alleged and/or that great or irreparable injury is likely, or at least a distinct possibility, absent temporary enjoinder.

DISCUSSION

1. **Preliminary Injunction Standards – § 27-19-201, MCA**.

¶32 Preliminary injunctive relief is an equitable remedy governed by the general principles of equity codified in Montana in Title 27, chapter 19, MCA. *Davis v. Westphal*, 2017 MT 276, ¶ 23, 389 Mont. 251, 405 P.3d 73 (internal citations omitted). Based on applicable findings of fact and conclusions of law, district courts have broad discretion to grant preliminary injunctive relief on any of the five grounds enumerated in § 27-19-201, MCA. *Davis*, ¶¶ 10 and 24. *Accord Atkinson v. Roosevelt Cty.*, 66 Mont. 411, 421, 214 P. 74, 77 (1923) ("[T]he court must exercise discretion . . . according to correct principles of law and evidence."). The standard of review of a grant or denial of preliminary injunctive relief is whether the court manifestly abused its discretion. *Shammel v. Canyon Resources Corp.*, 2003 MT 372, ¶ 11, 319 Mont. 132, 82 P.3d 912; *Atkinson*, 66 Mont. at 421, 214 P. at 76-77. An abuse of discretion occurs if a court exercises discretion based on a mistake of law, clearly erroneous finding of fact, or arbitrary reasoning, lacking conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. *Montana State Univ.-Bozeman v. Montana First Jud. Dist. Ct.*, 2018 MT 220, ¶ 15, 392 Mont. 458, 426 P.3d 541.[1] A manifest abuse of discretion is an abuse of discretion that is "obvious,

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[1] We review conclusions, interpretations, and applications of law de novo for correctness. *BNSF Ry. Co. v. Cringle*, 2012 MT 143, ¶ 16, 365 Mont. 304, 281 P.3d 203; *Hulstine v. Lennox Indus., Inc.*, 2010 MT 180, ¶ 16, 357 Mont. 228, 237 P.3d 1277. We review lower court findings of fact only for clear error. *Ray v. Nansel*, 2002 MT 191, ¶ 19, 311 Mont. 135, 53 P.3d 870. Findings of fact are clearly erroneous only if not supported by substantial evidence, the court misapprehended the effect of the evidence, or, based on our review of the record, we have a definite and firm conviction that the lower court was mistaken. *Interstate Prod. Credit Ass'n of Great Falls v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991).

evident, or unmistakable." *Shammel*, ¶ 12. Whether a district court manifestly abused its discretion is a question of law reviewed de novo. *See Montana State Univ.-Bozeman*, ¶ 15. However, while the grant or denial of temporary injunctive relief is generally subject to review only for a manifest abuse of discretion, and is often critically dependent on the particular facts, circumstances, and equities of each case, district courts have no discretion in the determination of predicate questions or applications of law. *Krutzfeldt Ranch, LLC v. Pinnacle Bank*, 2012 MT 15, ¶ 13, 363 Mont. 366, 272 P.3d 635; *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 21, 341 Mont. 368, 178 P.3d 696; *M.H. v. Mont. High Sch. Ass'n*, 280 Mont. 123, 130, 929 P.2d 239, 243 (1996). To the extent that a preliminary injunction is based on a conclusion or application of law, we review the underlying question or application of law de novo for correctness. *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4; *City of Whitefish v. Flathead Cty. Comm'rs ex rel. Brenneman*, 2008 MT 436, ¶ 7, 347 Mont. 490, 199 P.3d 201.

¶33 Because satisfaction of the grounds for issuance of a preliminary injunction is not an adjudication on the merits of any aspect of an underlying claim for relief, *Yockey v. Kearns Properties, LLC*, 2005 MT 27, ¶ 18, 326 Mont. 28, 106 P.3d 1185, an applicant has the initial burden of making a prima facie showing of the asserted basis for the requested preliminary injunction under § 27-19-201, MCA. *City of Whitefish*, ¶ 25; *Porter v. K & S Partnership*, 192 Mont. 175, 181, 627 P.2d 836, 839 (1981). A prima facie showing is no more than a legal and factual showing that would satisfy the claimant's burden of proof or persuasion if unrebutted. *See Jones v. All Star Painting Inc.*, 2018 MT 70, ¶ 20, 391 Mont. 120, 415 P.3d 986; *Antonick v. Jones*, 236 Mont. 279, 287, 769 P.2d 1240, 1244 (1989);

State ex rel. Fitzgerald v. Mont. Eighth Jud. Dist. Ct., 217 Mont. 106, 118-19, 703 P.2d 148, 156-57 (1985). The burden then shifts to the opposing party to rebut the applicant's prima facie showing. *See Porter*, 192 Mont. at 182-83, 627 P.2d at 840.

¶34 In this case, the District Court issued the preliminary BIPA injunction on two distinct statutory grounds—§§ 27-19-201(1) and (2), MCA. I separately address them in turn.

2. Section 27-19-201(1), MCA—Apparent Entitlement to Relief.

¶35 A preliminary injunction "may be granted . . . when it appears that the applicant is entitled to the relief demanded" on the underlying claim "and the relief or any part of the relief consists" of enjoining a predicate act. Section 27-19-201(1), MCA. An applicant for a preliminary injunction on this ground thus has the burden of making a prima facie showing of entitlement to relief on the predicate claim. *See City of Whitefish*, ¶ 25; *Porter*, 192 Mont. at 181, 627 P.2d at 839. Here, the District Court ultimately concluded that Plaintiffs made an unrebutted prima facie showing that they will likely prevail on the merits of their predicate claim that BIPA unconstitutionally burdens or interferes with the fundamental right to vote of a specified class of Montana voters under Article II, Section 13 of the Montana Constitution. Not so.

¶36 The constitutionality of a statute is a question of law subject to plenary de novo review. *City of Missoula v. Duane*, 2015 MT 232, ¶ 11, 380 Mont. 290, 355 P.3d 729; *Seven Up Pete Venture v. State*, 2005 MT 146, ¶ 18, 327 Mont. 306, 114 P.3d 1009; *Pickens v. Shelton-Thompson*, 2000 MT 131, ¶ 7, 300 Mont. 16, 3 P.3d 603; *Woirhaye v. Mont. Fourth Jud. Dist. Ct.*, 1998 MT 320, ¶ 7, 292 Mont. 185, 972 P.2d 800. As with other

issues of law, district courts have no discretion in determining the correct interpretation or application of a constitutional provision. *State v. Norquay*, 2011 MT 34, ¶ 13, 359 Mont. 257, 248 P.3d 817.

¶37 Statutes are presumed constitutional as a threshold matter of law. *Duane C. Kohoutek, Inc. v. Mont. Dep't of Revenue*, 2018 MT 123, ¶ 14, 391 Mont. 345, 417 P.3d 1105; *State v. Stark*, 100 Mont. 365, 368-69, 52 P.2d 890, 891 (1935). On the ultimate merits, the presumption of validity is overcome only upon a showing that the challenged statutory provision is clearly unconstitutional under the applicable level of constitutional scrutiny. *Kershaw v. Montana Dep't of Transp.*, 2011 MT 170, ¶ 22, 361 Mont. 215, 257 P.3d 358; *Stratemeyer v. Lincoln Cty.*, 259 Mont. 147, 149-50, 855 P.2d 506, 508-09 (1993); *Bd. of R. R. Comm'rs v. Aero Mayflower Transit Co.*, 119 Mont. 118, 133, 172 P.2d 452, 460 (1946); *Stark*, 100 Mont. at 368-69, 52 P.2d at 891; *Parham v. Hughes*, 441 U.S. 347, 351-52, 99 S. Ct. 1742, 1745-46 (1979). *See also Cooper v. Harris*, __ U.S. __, __, 137 S. Ct. 1455, 1463-64 (2017) (presumption overcome on strict scrutiny by challenging party's showing of threshold infringement of constitutional right—burden then shifts to defender to show statute survives strict scrutiny); *compare Heller v. Doe by Doe*, 509 U.S. 312, 320, 113 S. Ct. 2637, 2642-43 (1993) (state has no burden to demonstrate constitutionality of statute subject only to rational basis scrutiny).

¶38 There are generally three recognized standards for assessing the alleged unconstitutionality of a statute—strict scrutiny, intermediate scrutiny, and rational basis scrutiny. *See, e.g.*, *State v. Ellis*, 2007 MT 210, ¶ 11, 339 Mont. 14, 167 P.3d 896; *Snetsinger v. Montana Univ. Sys.*, 2004 MT 390, ¶¶ 17-20, 325 Mont. 148, 104 P.3d 445;

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641-62, 114 S. Ct. 2445, 2458-69 (1994) (discussing levels of applicable constitutional scrutiny in First Amendment and substantive due process contexts); *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 1914 (1988) (discussing levels of applicable constitutional scrutiny in the context of Fourteenth Amendment equal protection challenges).[2] Strict and intermediate scrutiny are at issue here.

(A) Erroneous Application of Strict Scrutiny.

¶39 Only statutes that substantially interfere with the "exercise of a fundamental right" are subject to strict scrutiny. *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996) (citing *Arneson v. Mont. Dept. of Admin.*, 262 Mont. 269, 272, 864 P.2d 1245, 1247 (1993)). A fundamental constitutional right is a right either explicit in the federal or state constitution or one manifestly implicit from explicit constitutional rights. *Wadsworth*, 275 Mont. at 299, 911 P.2d at 1171-72 (an implicit fundamental right is a non-explicit right

[2] It is not entirely clear from Count I in Plaintiffs' Complaint, their briefing here and below, or the District Court's judgment whether the court analyzed the claim as a substantive due process or equal protection challenge of BIPA. Without reference to equal protection, Count I states a claim that BIPA unduly burdens the fundamental right to vote of a specified class of Montana voters in violation of Montana Constitution Article II, Section 13. In Count I, Plaintiffs cite two federal cases analyzing claims challenging election procedure regulations (*i.e.*, *Burdick v. Takushi*, 504 U.S. 428, 112 S. Ct. 2059 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1983)), in neither of which the Supreme Court analyzed or decided on equal protection grounds. *See Anderson*, 460 U.S. at 786 n.7, 103 S. Ct. at 1569 (specifically noting that the Court was not deciding the case on equal protection grounds but nonetheless drawing from equal protection jurisprudence to resolve the case on "direct" constitutional grounds, *i.e.* substantive due process grounds). Without reference to equal protection or substantive due process, the District Court applied strict scrutiny to Plaintiffs' Count I claim. Unlike Plaintiffs and the District Court, the Majority analyzes the claim in terms of equal protection without more specific characterization of the claim. This dissent treats the BIPA claim as essentially a substantive due process claim but in a manner not inconsistent with an equal protection analysis.

"without which other constitutionally guaranteed rights would have little meaning"—quoting *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986)); *Washington v. Glucksberg*, 521 U.S. 702, 719-21, 117 S. Ct. 2258, 2267-68 (1997) (an implicit fundamental right is a specifically articulable non-explicit right deeply-rooted in American history and tradition and implied from explicit rights). On the ultimate merits, the challenging party has the initial burden of demonstrating that the challenged statute substantially interferes with the exercise of a fundamental constitutional right. *Cooper*, __ U.S. at __, 137 S. Ct. at 1463-64; *Bethune-Hill v. Va. State Bd. of Elections*, __ U.S. __, __, 137 S. Ct. 788, 801 (2017); *Jana-Rock Const., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006). *See also McDermott v. Montana Dep't of Corr.*, 2001 MT 134, ¶ 34, 305 Mont. 462, 29 P.3d 992. The questions of whether an asserted right is a fundamental right and whether the challenged statute substantially interferes with that right are questions of law. *Wadsworth*, 275 Mont. at 295-98, 911 P.2d at 1170-71.[3] Upon satisfaction of the challenging party's initial burden to show substantial interference with a fundamental constitutional right, the burden shifts to the government or other defending party to demonstrate that the challenged statute survives strict scrutiny. *See Cooper*, __ U.S. at __, 137 S. Ct. at 1463-64; *Bethune-Hill*, __ U.S. at __, 137 S. Ct. at 801; *Jana-Rock Const.*, 438 F.3d at 204 (2d Cir. 2006). *Accord McDermott*, ¶¶ 31-32.

¶40 A statute withstands strict scrutiny only if narrowly tailored to further a compelling government interest. *Gryczan v. State*, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997);

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[3] It is undisputed here that the right of suffrage is a fundamental Montana Constitutional right. *See* Mont. Const. art. II, § 13; *Willems v. State*, 2014 MT 82, ¶ 32, 374 Mont. 343, 325 P.3d 1204.

Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 1447 (1993). The questions of whether an asserted government interest is constitutionally compelling and whether a challenged statute is narrowly tailored to further that interest are questions of law. *W. Tradition P'ship, Inc. v. State*, 2011 MT 328, ¶ 35, 363 Mont. 220, 271 P.3d 1 (citing *State v. Pastos*, 269 Mont. 43, 47, 887 P.2d 199, 202 (1994)), *cert. granted, judgment rev'd sub nom. on other grounds by Am. Tradition P'ship, Inc. v. Bullock*, 567 U.S. 516, 132 S. Ct. 2490 (2012); *Wadsworth*, 275 Mont. at 295-98, 911 P.2d at 1170-71; *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 93 (1st Cir. 2013); *Garner v. Kennedy*, 713 F.3d 237, 242 (5th Cir. 2013); *Lomack v. City of Newark*, 463 F.3d 303, 307 (3d Cir. 2006); *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002).[4]

¶41 Here, based primarily on the affidavit of a political scientist (Dr. Kenneth Mayer, Ph.D.), the District Court first made the unqualified findings of fact that:

> BIPA . . . will significantly suppress voter turnout by disproportionately burdening voters who are Native Americans, elderly, poor, parents working low-grade jobs, college students, first-time voters who have historically relied on GOTV and ballot collections services like those provided by Western Native Voice, MontPIRG, Disability Rights Montana, Forward Montana, Montana Conservation Voters, unionized labor, and the Montana Democratic Party.
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> . . .

[4] Whether a statute satisfies strict scrutiny remains a question of law even if dependent on mixed questions of fact and law in a particular case. *See Barrus v. Montana First Jud. Dist. Ct.*, 2020 MT 14, ¶ 15, 398 Mont. 353, 456 P.3d 577 (mixed questions of fact and law are questions of law reviewed de novo for correctness); *BNSF Ry. Co. v. Cringle*, 2012 MT 143, ¶ 16, 365 Mont. 304, 281 P.3d 203 (de novo review of mixed questions of fact and law); *Farmers Union Cent. Exch., Inc. v. Montana Dep't of Rev.*, 272 Mont. 471, 474, 901 P.2d 561, 563 (1995) (clearly erroneous standard applies only to "'pure' findings of fact"); *Maguire v. State*, 254 Mont. 178, 181-82, 835 P.2d 755, 757-58 (1992) (conclusions of law, questions of law, and legal components of ultimate facts or mixed questions of law and fact reviewed de novo for correctness).

> [D]uring the current 2020 election cycle, the . . . effects of BIPA . . . will cause thousands of Montanans not to vote.

Upon close inspection, however, the record basis of those key findings amounts to no more than a specified sociological model upon which the political scientist projected that BIPA will in fact unduly burden a wide swath of Montana's electorate by requiring them to either timely mail their absentee ballots, arrange for a BIPA-qualified vote collector, or personally deliver their ballots to a polling place. Despite cursory assertion of a causal link, the modeling and referenced data, along with the other anecdotal observations, opinions, and characterizations obtained from various sources,[5] proves no more than a projected correlation, based on various general assumptions and statistical data, between BIPA and the anticipated turn-out of the specified class of voters. Without more, evidence of a correlation between an asserted cause and an asserted effect is not evidence of a direct causal link for purposes of assessing the constitutionality of a statute. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 800, 131 S. Ct. 2729, 2739 (2011) (rejecting California assertion that psychological studies correlating exposure to violent video games to asserted harmful effects on children was competent evidence of a causal link sufficient to manifest a compelling state interest for purposes of strict scrutiny).

¶42 For example, as to Native Americans, conspicuously absent is any particularized proof as to where and to what extent, if any, adequate postal service is in fact unavailable

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[5] For example, the District Court's finding that "not a single election official in Montana supported the BIPA in legislative hearings" and that one local official opposed it as the "Voter Suppression of Act of 2018" is proof of nothing relevant here.

on Montana Reservations, whether universally or in specific areas. Aside from the generic political modeling information and theory provided in the Dr. Mayer Affidavit, Plaintiffs *inter alia* submitted an affidavit regarding the registration, canvassing, and voter assistance efforts of political advocacy organizations (*Montana Native Vote* and *Western Native Voice*) on Montana's Indian Reservations, to wit as pertinent to absentee voting:

- "During the 2018 election cycle, 80% of the people our organizations contacted as part of our non-partisan GOTV effort actually voted. Those efforts included knocking on 33,769 doors, sending 11,064 text messages, registering 2,015 new voters, giving 482 voters rides to the polls, and collecting and conveying 853 [absentee] ballots."

- "Individuals canvassed by us or partner organizations just one time were 4.1% more likely to vote, canvassed through face-to-face conversations at their doors multiple times were 12.2% more likely to vote."

- In 2018, their extensive voter registration, canvassing, and assistance efforts led to significant increases in overall Reservation voter turnout rates and a 73% turnout rate for absentee voters compared to the 60.3% overall turnout rate on Reservations.

- Due to the lack of uniform and consistent addressing systems on unspecified Reservations, county election officials rejected hundreds of voter registration forms "largely due to inconsistencies in the home addresses *provided by tribal registrants*."

- "Most tribal nation residents do not receive mail at home and instead must use a post office box, which is not always free . . . , and there are financial barriers associated with having to travel to collect and post mail and to pay for stamps."

(Emphasis added.) However, as a threshold matter, BIPA did not cause and will not be a cause of the noted "obstacles" to voting on Montana Reservations. *Montana Native Vote* and *Western Native Voice* assert only that BIPA will "exacerbate[]" the noted problems. Moreover, the fact that overall Reservation voter turnout has significantly increased due to

the extensive registration, canvassing, and voter assistance efforts of political organizations is not evidentiary support for the District Court's finding that "BIPA . . . will cause thousands of Montanans to not vote."[6] To the contrary, the *Montana Native Vote*/*Western Native Voice* Affidavit acknowledges that, despite their efforts and noted progress in recent years, "the return rate for absentee ballots issued in tribal nations has *decreased* (from 91% in 2012 to 73% in 2018)" (emphasis added).

¶43 Plaintiffs' central assertion is that BIPA will likely make it harder to vote for those Native Americans who want to vote absentee, which will then likely cause some unknown quantum of them not to vote at all in the absence of the previously available mass ballot collection services. However, the *Montana Native Vote*/*Western Native Voice* affidavit unequivocally states that their absentee ballot collection services, and those provided by partner organizations, have not resulted in any increase in Reservation absentee turnout since those services have been available. To the contrary, Reservation absentee turnout has since decreased. In light of that undisputed fact, Plaintiffs have not shown or explained how a BIPA-caused loss of the mass ballot collection services that did not prevent the significant decline in Reservation absentee turnout over what it was before will likely, or even possibly, be a cause of even lower absentee turnout on Montana Reservations. Consequently, there is no particularized evidence that BIPA will likely cause any significant decrease in absentee voting for any quantifiable segment of the Native

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[6] Of course, BIPA will not prohibit any of the Plaintiffs or other political organizations in Montana from continuing to engage in the extensive voter registration assistance, repetitive canvassing, and other voter assistance efforts that have undoubtedly resulted in significantly higher voter turnout in Montana.

American population on Montana Reservations, or any other significant class of Montana voters for that matter.

¶44 Plaintiffs' generalized voting-cost-increase theory, and accompanying anecdotal observations and concerns of election officials and political organizations, proves no more than a highly speculative *possibility* that some unquantifiable segment of absentee voters, who used previously available mass ballot collection services, *might choose* not to vote rather than timely mail their absentee ballot or use a BIPA-qualified family/friend collector like all other Montanans who choose to vote absentee. Regardless of any disproportionate nature of the independently-caused circumstances that may hamper voter turnout in Montana, the evidentiary record in this case is devoid of any substantial non-speculative evidence that BIPA will likely be a cause of any significant decrease in absentee voter turnout among the broad spectrum of Montana voters as alleged by Plaintiffs. The key findings of fact of the District Court regarding the alleged substantial interference or burden on the *right* of the specified class of Montanans to vote are thus clearly erroneous.

¶45 Further troubling, as endorsed by the Majority in its undiscerning gloss-over of Plaintiffs' patently deficient evidentiary showing, the District Court made much ado about the fact that the State failed to "present any evidence to dispute [Plaintiffs'] evidence that BIPA . . . disproportionately burden[s] the [specified class of] voters" and will "significantly suppress voter turnout by making voting more burdensome and costly for absentee voters." However, the lack of a formal evidentiary showing by the State rebutting the limited evidence presented by Plaintiffs did nothing to bolster the manifest threshold insufficiency of that evidence to make the requisite prima facie showing of a non-

speculative causal link between BIPA and the alleged substantial interference with the specified class's right to vote. Nor have Plaintiffs, the District Court, or the Majority articulated any credible support for the legal proposition that the fundamental right to vote necessarily includes the most convenient or most preferable way to vote, or that BIPA will be the direct cause of the circumstances that may make it less convenient or preferable for the specified class to vote. The District Court's conclusion of law that Plaintiffs satisfied their burden of demonstrating that BIPA will substantially burden or interfere with the right of the specified class to vote is erroneous.[7]

¶46 Based on the limited affidavit showing made by Plaintiffs and the related finding that the State "failed to present any evidence of absentee ballot collection fraud," the District Court made the additional sweeping and unqualified finding of fact that:

> BIPA serves no legitimate purpose: it does not enhance the security or integrity of absentee voting; it does not reduce the costs or burdens of conducting elections, it does not make absentee voting easier or more efficient; it does not reduce confusion about absentee voting requirements; and it does not increase voter turnout.

In conjunction with its earlier finding and conclusion that Plaintiffs met their threshold burden of making a prima facie showing that BIPA "burden[s] and interfere[s] with the fundamental right" of the specified class to vote, the District Court further concluded as

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[7] As an aside, as we are correctly chiding the Montana Republican Party in another of the multitude of 2020 election-eve cases that only the Green Party can submit a petition to obtain ballot eligibility for its candidates, it is difficult to understand how the Democratic Party, and affiliated political organizations, can possibly have standing to assert an alleged infringement of the constitutional rights of persons *other than themselves*. That issue is of course not before us and for another day, but at least puts in some perspective the Majority's lack of critical analysis of the threshold factual and legal showing put forth here, on the eve of the 2020 election, as justification for enjoining enforcement of a statewide referendum approved by voters two years ago.

matters of law that "[t]he State has failed to demonstrate through competent evidence that there is any compelling state interest that warrants the burden and interference on the right to vote imposed by BIPA." The District Court thus ultimately concluded that Plaintiffs "are likely to prevail on the merits and would be entitled to a permanent injunction" enjoining enforcement of BIPA.

¶47 However, even on the ultimate merits, satisfaction of strict scrutiny does not necessarily require the State to make a formal evidentiary showing of a compelling state interest or that the subject statute is narrowly tailored to further that interest. *Montana Auto. Ass'n v. v. Greely*, 193 Mont. 378, 383-84, 632 P.2d 300, 303-04 (1981). A compelling government interest may be manifestly implied from the language and effect of an enactment; judicial notice of precedent from other jurisdictions recognizing a compelling government interest in similar legislation; or judicial notice of a related manifest government interest in preventing corruption of the political process, preserving the integrity of essential government processes, or furthering the protection or exercise of individual rights. *Greely*, 193 Mont. at 383-84, 632 P.2d at 303-04; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 931 (1986); *State v. Hardesty*, 214 P.3d 1004, ¶¶ 12-14 and 17 (Ariz. 2009) (federal citations omitted); *State v. Balzer*, 954 P.2d 931, 938 (Wash. Ct. App. 1998); *State v. Patzer*, 382 N.W.2d 631, 638 n.4 (N.D. 1986) (citing *Greely* and 1 Weinstein's Evidence ¶ 200 [04] at pp. 200-20 through 200-21 (1985) quoting Karst, *Legislative Facts in Constitutional Litigation,* 1960 Sup. Ct. Rev. 75, 84)). *See also W. Tradition P'ship*, ¶¶ 16-36 (judicial notice of published sources of Montana history); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 92 S. Ct. 1526, 1532 (1972)

(judicial notice of compelling state interest in imposing reasonable regulations for control and duration of public education); *United States v. Israel*, 317 F.3d 768, 771-72 (7th Cir. 2003). Nor does satisfaction of strict scrutiny necessarily require evidentiary proof that the disputed means chosen to further an asserted government interest was in fact "actually necessary" to achieve that interest. *Bethune-Hill*, __ U.S. at __, 137 S. Ct. at 801 (internal citations and punctuation omitted). Satisfaction of strict scrutiny further does not necessarily require evidentiary proof that no other feasible and less restrictive means were available to further the asserted government interest. *N.Y. State Univ. Bd. of Trs. v. Fox*, 492 U.S. 469, 476-78, 109 S. Ct. 3028, 3032-33 (1989). *Accord State v. Demontiney*, 2014 MT 66, ¶¶ 16-22, 374 Mont. 211, 324 P.3d 344.[8]

¶48 The District Court's rationale here is strikingly similar to the rationale we previously rejected in *Greely* when a district court similarly concluded that a voter-approved ballot initiative did not pass strict scrutiny because it included no declaration of a compelling state interest and the State "offered no proof to establish such a need" in its defense. *Greely*, 193 Mont. at 383, 632 P.2d at 303 (internal citation and punctuation omitted). Upon noting that the "mere recitation of a compelling state interest" in the enactment would not necessarily have been conclusive in any event, we noted that, while the State presented no "evidence to establish a compelling state interest," it nonetheless cited the district court

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[8] *But see Pfost v. State*, 219 Mont. 206, 222, 713 P.2d 495, 505 (1985) (strict scrutiny requires showing "that the choice of legislative action is the least onerous path that can be taken to achieve the state objective"), *overruled on other grounds by Meech v. Hillhaven W., Inc.*, 238 Mont. 21, 776 P.2d 488 (1989).

to various authorities from other jurisdictions recognizing a compelling government interest in similar legislation. *Greely*, 193 Mont. at 383, 632 P.2d at 303. We explained that:

> Laws regulating or monitoring the raising and spending of money in the political arena have been enacted throughout the country as well as by the Congress. When these laws have been challenged, the courts have not had difficulty finding a compelling interest as a basis for enactment. *United States v. Harris* (1954), 347 U.S. 612, 625, 74 S. Ct. 808, 816, 98 L.Ed. 989, 1001 (maintaining the integrity of a basic governmental process); *Young Americans for Freedom, Inc. v. Gorton* (1974), 83 Wash.2d 728, 522 P.2d 189, 192 (informing public officials and the electorate of the sponsors of efforts to influence governmental decision-making); *Plante v. Gonzalez* (5th Cir. 1978), 575 F.2d 1119, 1135 . . . (protecting citizens from abuse of the trust placed in the hands of elected officials); *Montgomery County v. Walsh* (1975), 274 Md. 502, 336 A.2d 97, 106, appeal dismissed (1976), 424 U.S. 901, 96 S. Ct. 1091, 47 L.Ed.2d 306 (fostering a climate of honesty perceptible by the public at large).

Greely, 193 Mont. at 383-84, 632 P.2d at 303. We noted further that:

> Political corruption is a matter of common popular perception, which may or may not reflect the actualities of political life. *Judicial notice may be taken of the compelling need for disclosure laws which have as their purpose the deterrence of actual corruption and the avoidance of appearances of corruption*. *Buckley v. Valeo* (1976), 424 U.S. 1, 67, 96 S. Ct. 612, 657, 46 L.Ed.2d 659, 715.

Greely, 193 Mont. at 384, 632 P.2d at 303 (emphasis added). We thus held that:

> The absence of fact-finding in the initiative process is not proof of the absence of a compelling state interest in the enactment of I-85. To so hold would result in the emasculation of the initiative process in Montana with a result that no initiative could withstand a First Amendment challenge.

Greely, 193 Mont. at 384, 632 P.2d at 303 (emphasis added). As additional indicia of a compelling state interest, we further found "that the statewide vote on I-85 is a demonstration of a compelling state interest" insofar that it demonstrated the "common

understanding" of the electorate of "the compelling need for [that] type of legislation." *Greely*, 193 Mont. at 384, 632 P.2d at 303. We thus ultimately held that, without requirement for formal evidentiary support, the State had sufficiently demonstrated a compelling state interest for purposes of strict scrutiny by judicial precedent and the common understanding of the electorate. *Greely*, 193 Mont. at 383-84, 632 P.2d at 303.

¶49 Here, as in *Greely*, despite the lack of any formal evidentiary showing by the State, BIPA is a voter-approved enactment. As in *Greely*, statewide voter approval of BIPA is indicative of a compelling state interest insofar that it is indicative of the common understanding and mandate of the electorate for such legislation. Moreover, as in *Greely*, the State supported its assertion of BIPA's manifest purposes (*i.e.*, "to prevent voter fraud, protect voters from harassment, ensure voters feel secure in the voting process, and protect public integrity in the elections") by citing the District Court to various federal and state authorities recognizing important state interests in maintaining the integrity of and public confidence in the electoral process and protecting against *the risk* of voter fraud, including absentee voter fraud. The State further cited the District Court to similar enactments in other states, as well as two published papers, and the recommendations of a bipartisan commission providing additional factual support consistent with BIPA and the cited federal and state authorities. Of significant note, this Court has similarly recognized, without requirement for evidentiary support, that "Montana has a compelling interest in imposing reasonable procedural requirements tailored to ensure the integrity, reliability, and fairness of its election processes." *Larson v. State*, 2019 MT 28, ¶ 40, 394 Mont. 167, 434 P.3d 241. As similarly noted by the Supreme Court, "[c]ommon sense, as well as constitutional

law, compels the conclusion that government must play an active role in structuring elections; as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 2063 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974)—internal punctuation omitted).

¶50 Regardless of the lack of empirical or scientific methodology as decried in Dr. Mayer's affidavit, the District Court further inexplicably failed to even note that the State made an irrefutable showing that the Montana Senator (Al Olszewksi) who sponsored the BIPA referendum testified to the legislature, *inter alia*, that he was motivated by the stated concerns of a small sample of constituents that they had been solicited at their homes by third-party ballot collectors, fearfully relented to the collectors' offers to turn-in their absentee ballots, and were later concerned about the propriety of doing so. Thus, as in *Greely* and based on the totality of the legal and factual information cited by the State below, the State made an ample showing to the District Court of a legitimate and compelling state interest related to BIPA.

¶51 Further compounding the District Court's clearly erroneous conclusions of law (that Plaintiffs made a prima facie showing that BIPA will substantially burden or interfere with a fundamental right and that the State failed to make a responsive showing that BIPA would likely pass strict scrutiny), both the District Court's analysis and the Majority inexplicably ignore the critical point of law that, when applying for a preliminary injunction, it is the applicant's burden under § 27-19-201(1), MCA, to make a prima facie showing not only

of the alleged interference with a constitutional right, but also of the applicant-asserted likelihood that the challenged statute will ultimately not pass strict scrutiny. While the defending party has the responsive burden to show that a challenged statute satisfies strict scrutiny *for purposes of final adjudication on the merits*, the applicant for a preliminary injunction enjoining enforcement of a challenged statute has the threshold burden under § 27-19-201(1), MCA, to overcome the presumed constitutionality of a challenged statute by making a prima facie showing that it will likely not pass strict scrutiny as alleged. *See City of Billings v. Billings Heights Water Dist.*, 281 Mont. 219, 227, 935 P.2d 246, 250 (1997). *Accord Weems*, ¶ 18 (citing *City of Billings*). Thus, compounding its erroneous conclusions of law, the District Court more fundamentally erred by failing to recognize the manifest failure of Plaintiffs to meet their threshold burden under § 27-19-201(1), MCA, of making a prima facie showing that BIPA *will not* likely satisfy strict scrutiny. Accordingly, the District Court's ultimate conclusion of law under § 27-19-201(1), MCA, that Plaintiffs are likely to prevail on the merits of their predicate constitutional claim is erroneous in multiple regards.

(B) Application of Intermediate Scrutiny.

¶52 In addition to sidestepping the patent insufficiency of Plaintiffs' threshold evidentiary showing by failing to conduct any *critical* analysis as to its sufficiency as a prima facie showing for a preliminary injunction regarding the asserted constitutional violation, the Majority similarly sidesteps yet another fatal defect in the District Court's analysis—the erroneous application of strict scrutiny as the standard of constitutional scrutiny applicable to both Plaintiffs' claim on the merits and, thus, the sufficiency of their

limited evidentiary showing here to satisfy their related burden to make a prima facie showing for a preliminary injunction. As justification for not addressing the applicable level of constitutional scrutiny, the Majority reasons that "we find it unnecessary" to address the appropriate level of scrutiny applicable here because "[t]he case is not before us on a full evidentiary record for evaluation of the ultimate merits"— "the level of scrutiny is not dispositive" for purposes of "resolving the instant preliminary injunction dispute." However, manifesting the critical threshold pertinence of the appropriate level of constitutional scrutiny to the preliminary injunction at issue, the Majority then goes on to address the propriety of the BIPA injunction under both strict and intermediate scrutiny.

¶53 As a threshold matter, Plaintiffs assert, and the District Court concluded, that issuance of the BIPA injunction was proper under both § 27-19-201(1) and (2), MCA, because Plaintiffs made an unrebutted showing that is likely that BIPA will substantially burden or interfere with the fundamental voting rights of a broad swath of Montana voters. The Majority's superficial reasoning in avoiding the appropriate level of constitutional scrutiny is thus hollow given that that the appropriate level of constitutional scrutiny applicable to a statute is a *pure question of law*, and not at all dependent on the state of the evidentiary record as to the threshold *question of fact* as to whether or to what extent, if any, the statute in fact will substantially burden or interfere with the exercise of a fundamental constitutional right.

¶54 Moreover, the Majority's alternative application of intermediate scrutiny is erroneous in any event on two separate grounds. First, aside from the inconsistency between this Court's "middle tier scrutiny" and the standard of intermediate scrutiny

applied by United States Supreme Court when applicable, the Majority first misstates intermediate scrutiny as an overly-simplified *ad hoc* case-by-case balancing between the relative weight of the alleged burden on the constitutional right at issue and the weight of the asserted government interest. While the application of intermediate scrutiny to substantive due process challenges under federal law remains somewhat unsettled beyond content-neutral speech restrictions,[9] intermediate scrutiny applies upon a direct substantive due process challenge if the subject statutory provision is merely a reasonable time, place, or manner restriction that does not substantially burden or interfere with the exercise of the fundamental right at issue. *See Sell v. United States,* 539 U.S. 166, 178-81, 123 S. Ct. 2174, 2183-85 (2003) (applying strict scrutiny to statute authorizing involuntary administration of medication); *Burdick*, 504 U.S. at 432-43, 112 S. Ct. at 2062-68 (affirming state prohibition on write-in political candidates as a reasonable time, place, or manner restriction in furtherance of an important state interest and–which did not substantially interfere with the exercise of the right to vote); *City of Renton*, 475 U.S. at 46-55, 106 S. Ct. at 928-33 (upholding content-neutral time, place, manner restrictions on

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[9] *See District of Columbia v. Heller*, 554 U.S. 570, 634-35, 128 S. Ct. 2783, 2821 (2008) (eschewing application of a "freestanding 'interest-balancing'" standard of constitutional scrutiny distinct from settled "intermediate scrutiny" standard applicable in equal protection and content-neutral free speech regulation incident to holding that certain gun registration limitations failed strict scrutiny under Second Amendment). *Accord Johnson v. City of Cincinnati*, 310 F.3d 484, 502 (6th Cir. 2002) (noting unclear applicability of intermediate scrutiny in substantive due process context). We apply a "middle tier" level of scrutiny to equal protection challenges under the Montana Constitution but have yet to squarely apply it outside that context in reconciliation with the standard of intermediate scrutiny applicable in the federal equal protection context. *See*, *e.g*, *McDermott*, ¶ 32. *Compare Clark*, 486 U.S. at 461, 108 S. Ct. at 1914 (discriminatory statutes withstand Fourteenth Amendment equal protection scrutiny only if "substantially related to an important governmental objective").

commercial sale of pornography under intermediate scrutiny); *Anderson v. Celebrezze*, 460 U.S. 780, 787-806, 103 S. Ct. 1564, 1569-79 (1992) (applying intermediate scrutiny to invalidate early-filing requirement for political candidates as impermissible restriction on fundamental assembly, association, and voting rights); *Lutz v. City of York*, 899 F.2d 255, 268-70 (3d Cir. 1990) (applying intermediate scrutiny to time, place, manner restriction on non-explicit fundamental right of freedom of movement); *Witt v. Dep't of Air Force*, 527 F.3d 806, 816-21 (9th Cir. 2008); *Hutchins v. District of Columbia*, 188 F.3d 531, 538 (D.C. Cir. 1999). In determining the relative reasonableness of a time, place, or manner restriction and whether it substantially burdens or interferes with the exercise of a fundamental right, courts must necessarily balance the relative weight of the "character and magnitude" of the asserted interference or burden upon the subject right against the particular state interest asserted as justification therefor and in light of the extent of the asserted necessity for the burden or interference. *Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063-64 (citing *Anderson*, 460 U.S. at 788-89, 103 S. Ct. at 1570, and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14, 107 S. Ct. 544, 547-48 (1986)). *Accord Wadsworth*, 275 Mont. at 302, 911 P.2d at 1173-74 (level of applicable constitutional scrutiny depends on the nature of the right at issue and the degree to which the subject statute burdens or interferes with it—citing *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250, 253, 94 S. Ct. 1076, 1080 (1974) and Laurence H. Tribe, American Constitutional Law § 16-33, at 1610 (2d ed. 1987)). Upon determination that intermediate scrutiny applies, the subject statutory provision then passes intermediate scrutiny only if "substantially related to an important governmental objective." *Clark*, 486 U.S. at 461,

108 S. Ct. at 1914. *Accord Burdick*, 504 U.S. at 434, 112 S. Ct. at 2063-64 (citing, *inter alia*, *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1569-70).

¶55 Contrary to the Majority's characterization here, *Anderson* and *Burdick* did not apply a new or different standard of intermediate scrutiny. They merely applied the Supreme Court's traditional standard of immediate scrutiny, but in the context of the non-equal protection, undenominated substantive due process challenges of the election statutes at issue. The Majority's characterization and application of intermediate scrutiny is thus erroneous insofar that it does not clearly articulate and distinguish between the distinct analytical steps and standards for first determining whether intermediate scrutiny applies in the substantive due process context and then, if so, whether the challenged statute passes intermediate scrutiny.

¶56 The Majority's application of intermediate scrutiny is further erroneous because it is essentially based on the same erroneous procedural and substantive bases that the District Court applied strict scrutiny. As a threshold matter, it is irrefutable that election laws invariably burden the fundamental voting and associational rights of individual voters to some degree, whether governing "registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself." *Burdick*, 504 U.S. at 433, 112 S. Ct. at 2063 (quoting *Anderson*, 460 U.S. at 788, 103 S. Ct. at 1570 (internal punctuation omitted)). As we and other courts have previously recognized, it is further irrefutable without need for evidentiary proof, that Montana has compelling state interests in preserving the integrity of our election laws, maintaining public confidence therein, and protecting against *the risk* of voting fraud, including absentee voting fraud. To suggest

otherwise is sophistry of the highest order. Thus, upon application of intermediate scrutiny, the Majority's analysis is ultimately erroneous for the same reasons as the District Court's analysis, *i.e.*, Plaintiffs failed to satisfy their threshold burdens under § 27-19-201(1), MCA, of making a prima facie showing that BIPA will likely substantially burden or interfere with the voting rights of the specified class *and* that BIPA is likely *not* substantially related to an important government interest.

3. Section 27-19-201(2), MCA—Great or Irreparable Injury.

¶57 A preliminary injunction "may be granted . . . when it appears that the commission or continuance of [the subject] act during the litigation would produce a great or irreparable injury to the applicant." Section 27-19-201(2), MCA. An applicant for a preliminary injunction under § 27-19-201(2), MCA, thus has the burden of making a prima facie showing that "it is at least doubtful whether or not" great or irreparable injury will result absent enjoinder of the subject act. *Sweet Grass Farms, Ltd. v. Board of County Comm'rs*, 2000 MT 147, ¶ 28, 300 Mont. 66, 2 P.3d 825 (quoting *Porter*, 192 Mont. at 181, 627 P.2d at 839). Here, once again and as previously analyzed, Plaintiffs failed to satisfy their threshold burden under § 27-19-201(2), MCA, of making a prima facie showing that BIPA will substantially burden or interfere with the voting rights of the specified class. They have thus failed to make a prima facie showing that it is even a distinct possibility, much less likely, that great or irreparable injury will result to the specified class of voters absent preliminary enjoinder of BIPA. Aside from their generalized voting-cost-increase theory, the balance of Plaintiffs' preliminary evidentiary showing pertinent to BIPA largely consists of anecdotal observations and concerns of election officials and political

organizations about their uncertainty as to how BIPA will affect the choices of absentee voters and increase the burden on election officials. "Concerns" and "uncertainties" are not evidence of their subjects. Those matters provide no non-speculative, probative support for the District Court's findings of fact. The District Court thus erroneously concluded that Plaintiffs made a sufficient prima facie showing for issuance of a preliminary injunction under § 27-19-201(2), MCA.

CONCLUSION

¶58 I would hold that the District Court manifestly abused its discretion in granting a preliminary injunction enjoining BIPA, whether upon application of strict or intermediate constitutional scrutiny. While Montana certainly has a strong public policy interest in providing voters the most convenient and most preferable manner in which to vote, it remains the constitutional prerogative of the Legislature and/or electorate to address that interest. On their preliminary showing in this case, Plaintiffs have manifestly failed to make a prima facie showing that the failure to do so is of constitutional magnitude or dimension.

¶59 I concur in part, and dissent in part.

/S/ DIRK M. SANDEFUR

Justice Jim Rice joins in the concurring and dissenting Opinion of Justice Sandefur.

/S/ JIM RICE