IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0572

SCARLET VAN GARDEREN, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

APPELLANTS' OPENING BRIEF

On appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV 2023–541, the Honorable Jason Marks, Presiding

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STATEMENT OF THE ISSUES

1. Whether Plaintiffs demonstrated standing sufficient for the District Court to enjoin Senate Bill 99 (2023) ("SB99") in its entirety.

2. Whether the District Court erred in finding Plaintiffs met their burden to demonstrate all factors necessary for issuing a preliminary injunction.

3. Whether the scope of the District Court's injunction was overbroad.

4. Whether the District Court erred in disallowing live testimony at the preliminary injunction hearing.

STATEMENT OF THE CASE

This case presents a direct challenge to the State of Montana's authority to exercise its police power to protect a generation of children from grievous harms such as sterilization, disfigurement, and lifelong medicalization. The state of the science on gender-affirming care—nationally and internationally—is currently conflicted and uncertain, and it continues to trend in support of the conclusion that the treatments at issue result in far more harm than good. Yet Plaintiffs claim that children—who cannot vote, purchase alcohol or tobacco, enter into contracts, join the military, or consent to sexual intercourse—can consent to experimental and irreversible procedures likely to exacerbate mental and emotional problems, harm them physically, suppress the natural development of their bodies and brains, and subject them to sterilization. In preliminarily enjoining SB99, the District Court

adopted Plaintiffs' contorted reasoning and stymied the State's ability to regulate or prohibit harmful treatments in furtherance of its compelling governmental interest of protecting vulnerable Montana children from permanent harm.

Plaintiffs in this case are minors Scarlet Van Garderen and Phoebe Cross ("Minor Plaintiffs"); parents Ewout and Jessica Van Garderen, Molly and Paul Cross, and Jane and John Doe ("Parent Plaintiffs"); and providers Dr. Juanita Hodax and Dr. Katherine Mistretta ("Provider Plaintiffs") (collectively, "Plaintiffs"). Defendants are the State of Montana; Gregory Gianforte, in his official capacity as Governor of the State of Montana; Austin Knudsen, in his official capacity as Attorney General; Montana Board of Medical Examiners; Montana Board of Nursing; Montana Department of Public Health and Human Services ("DPHHS"), and Charlie Brereton, in his official capacity as DPHHS Director (collectively, "Defendants").

SB99—titled the "Youth Health Protection Act,"—prohibits certain medical and surgical treatments for gender dysphoria when their purpose is to medically "transition" a minor from their sex to their perceived gender identity. (Doc. 102.) SB99 also prohibits the use of public resources and assets to fund or facilitate the treatments at issue; designates violations by health care professionals as professional misconduct; creates a private cause of action; and prohibits the discharge of

professional liability through insurance. (*Id*.) SB99 further contains a severability clause. (*Id*. at § 10.)

On May 9, 2023, Plaintiffs filed their Complaint challenging SB99. (Doc. 1.) On July 17, 2023, Plaintiffs filed their Motion for Preliminary Injunction and supporting Brief accompanied by declarations from the Plaintiffs, a declaration from their expert, Dr. Danielle Moyer, and an expert report by Dr. Johanna Olson-Kennedy. (Docs. 49–51, 57–59.) Plaintiffs also filed their First Amended Complaint the same day. (Doc. 60.)

The District Court held a conference on July 28, 2023 to schedule the preliminary injunction hearing. (Doc. 64.) At the conference, Defendants requested a four-hour evidentiary hearing or any amount of time the District Court would provide. (Scheduling Conf. Tr. 5:17–24 (July 28, 2023), **attached as Appendix A**.) Plaintiffs had initially requested four hours (*Id*. at 6:17–18), but reconsidered and requested eight hours (*Id*. at 7:1–2.) The District Court set the hearing for September 18, 2023, but denied the opportunity to present live evidentiary testimony, allocating two hours for argument. (*Id*. at 8:24–25.)

On September 1, 2023, the State filed its Response in Opposition to Plaintiffs' Motion for Preliminary Injunction. (Doc. 77.) In support, the State provided five expert reports: two endocrinologists; a clinical psychologist and neuroscientist; and two child and adolescent psychologists. (Docs. 78–79, 87–88, and 92.) Defendants

also submitted five declarations: two from parents whose children suffered from "gender-affirming" treatments; two from youth "detransitioners"—youth who once identified as transgender, received "gender-affirming" treatments, and later regretted it; and one from a whistleblower who worked at a gender clinic and saw the direct harms to youth who underwent such treatments. (Docs. 104–108.) Lastly, Defendants submitted numerous primary documents, including studies, medical literature, and reviews from around the world. (Docs. 78–108.) Prior to the hearing, Defendants filed a Motion and Brief in Support of a Fact Witness to Appear Via Zoom. (Docs. 114–15.) Plaintiffs opposed, and the District Court denied the State's request for live testimony. (Doc. 119.) Plaintiffs filed their Reply Brief on September 15, 2023. (Docs. 120–22.)

The District Court held the preliminary injunction hearing on September 18, 2023. The District Court issued its order preliminarily enjoining SB99 on September 27, 2023. (Doc. 131.) Defendants timely appealed. (Doc. 135.)

STATEMENT OF FACTS[1]

The sudden rise in gender dysphoria in young individuals is cause for concern considering this condition was extremely rare just a generation ago. (Doc. 81.)

[1] For the sake of brevity, Defendants provide an abbreviated Statement of Facts in this Brief, but incorporate by reference their full Statement of Facts in their Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction and all supporting materials. (*See* Doc. 77 at 2-26.)

"Currently, 2–9% of U.S. high school students identify as transgender, while in colleges, 3% of males and 5% of females identify as gender-diverse." (Doc. 81.) This phenomenon spans the western world. In 2018, the UK reported a 4,400 percent rise over the previous decade in teenage girls seeking gender treatments." (Doc. 77 at n.16.) The same was true for Canada, Germany, Finland, and Sweden over the same time period. (Doc. 82); (Doc. 77 at n.17.) Based on 256 reports from parents of adolescent girls who discovered transgender identity in adolescence, almost 65% of those girls had done so after a period of prolonged social media/internet use. (Doc. 84.)

"Gender-dysphoric children and teens can intensely occupy the belief that their lives will be immensely improved by transition." (Doc. 81.) But, despite these feelings, transitioning frequently fails to address the core issue. "Many suffer from significant comorbid mental health disorders, have neurocognitive difficulties such as ADHD or autism or have a history of trauma." (Doc. 81.) In fact, "[a] formal analysis of children (ages 4–11) undergoing assessment at a Dutch child gender clinic showed that 52% fulfilled criteria for a formal DSM diagnosis of a clinical mental health condition other than Gender Dysphoria." (Doc. 79 at ¶ 154.)

The cessation of gender dysphoria ("desistance") often occurs as a child progresses into adulthood. The DSM–5 reports that persistence rates (the continuation of dysphoria) in biological males range "from 2.2% to 30%" and from

12% to 50% for biological females." DSM–5 at 455. This means that 70–97.2% of boys and 50–88% of girls will grow out of dysphoria by adulthood. Version 7 of the World Professional Association for Transgender Health ("WPATH") Standard of Care concedes this point: "Gender dysphoria during childhood does not inevitably continue into adulthood." (Doc. 85 at 11.) The Endocrine Society agreed in 2017: "the large majority (about 85%) of prepubertal children with a childhood diagnosis did not remain [gender dysphoric]/gender incongruent in adolescence." (Doc. 86.)

Because the vast majority of gender dysphoric youths desist, "watchful waiting" is the safest treatment method for affected children. Watchful waiting is not a passive approach—rather, it provides time for the child to "undergo therapy, resolving other issues which may be exacerbating psychological stress or dysphoria." (Doc. 79 at ¶ 244.) Watchful waiting is a compassionate, effective, and much less risky approach that entails "a comprehensive assessment, individual and family therapy, and harnessing a support network for the patient." (Doc. 87 at ¶ 164.)

In stark contrast, so-called "gender-affirming care" is an experimental and *far* riskier treatment modality. This model represents a branch of medicine which, outside of cosmetic surgery, may be the only one in which *the patient* makes the diagnosis and prescribes the treatment. Gender-affirming care "aim[s] to directly and immediately validate the adolescent's feelings about becoming the opposite gender" and then sets the patient on a likely irreversible path toward puberty blockers, cross-

sex hormone therapy, and eventually gender reassignment surgery. (Doc. 87 at ¶ 118.) "Social transition serves to convince the child or adolescent that they can be the opposite sex." (Doc. 78 at ¶ 285.) Early validation and encouragement of socially transitioning sets the child's course toward full gender transitioning. The study finding the highest rate of persistence "included some patients who had made a partial or complete gender social transition prior to puberty and *this variable proved to be a unique predictor of persistence*[.]" (Doc. 89 at 14) (emphasis added.) Social transitioning encourages full medical transition, including puberty suppression.

Based on a study of 54 participants (sponsored by a manufacturer of puberty blockers), the Dutch Protocol published in 2006 advocates puberty blockers at age 12, cross-sex hormones at 16, and reassignment surgery at 18. (Doc. 77 at nn.42, 44.) "After a short activation," the use of puberty suppressing hormones "bring[s] the patients into a hypogonadotropic state." (*Id.* at n.46.) This "is a condition in which the male testes or the female ovaries produce little or no sex hormones," with potential complications including early menopause, infertility, low bone density and fractures later in life, low self-esteem, and sexual problems. (*Id.* at n.47.) Due to the risk of infertility, one study's author recommended discussing "cryopreservation of semen" prior to the start of treatment in boys. (*Id.* at n.48.)

In 2019, a former patient of the Gender Identity Development Service ("GIDS") in England sued the GIDS, alleging that practices of prescribing puberty

blockers for minors were unproven and potentially harmful and that minors were incapable of providing informed consent in this context. *Bell v. Tavistock*, [2020] EWHC 3274 (Admin), ¶ 7 (*see* Doc. 91.) The *Bell* court made numerous striking findings, based on extensive expert testimony:

- "the clinical interventions involve significant, long-term and, in part, potentially irreversible long-term physical, and psychological consequences for young persons." *Id*. at ¶ 148.

- "[I]t is right to call the treatment experimental or innovative in the sense that there are currently limited studies/evidence of the efficacy or long-term effects of the treatment." *Id.*

- The vast majorit*y* of patients taking puberty blockers go on to cross-sex hormones and therefore follow a pathway to much greater medical interventions. *Id*. at ¶ 138.

Contrary to Plaintiffs' contentions that puberty blockers are safe and reversible (Doc. 50 at 3), experts continue to raise the exact concerns expressed by the *Bell* court. GnRH analogs are puberty blockers—they are not approved by the Food and Drug Administration ("FDA") for use in children with gender dysphoria. (Doc. 92 at ¶ 125.) "They are approved for use in children who have the relatively rare disorder called central precocious puberty." (*Id.*) "There are no controlled trials that prove the safety of GnRH analogs in children with normal puberty." (*Id.* at ¶ 128.) "Children who fail to progress through puberty are infertile." (*Id.* at ¶ 135.) "If the testes or ovaries fail to mature, sperm and ova cannot be produced. Infertility will likely occur especially if followed by opposite sex hormones." (*Id.* at ¶ 136.)

Further, "brain maturation may be temporarily or permanently disrupted by puberty blockers, which could have significant impact on the ability to make complex risk-laden decisions, as well as possible longer-term neuropsychological consequences." (Doc. 93 at 6.) Systematic reviews by Sweden, Finland, and England all identified low bone density issues as negative outcomes. (Doc. 79 at ¶ 215.) Ultimately, "there is not sufficient evidence to conclude that the use of puberty blockers to block natural puberty is safe when administered as part of gender-affirming therapy, or that its effects are reversible." (Doc. 78 at ¶ 81.)

"Sex hormones have been prescribed for transgender adults for several decades, and the long-term risks and side effects are well understood. These include increased cardiovascular risk, osteoporosis, and hormone-dependent cancers." (Doc. 79 at ¶ 91.) "Short term effects of testosterone given to natal females include acne, baldness, facial hair, clitoral enlargement, and pelvic pain." (Doc. 92 at ¶ 153.) "There may be deepening of the voice." (*Id.* at ¶ 153.) "Longer term adverse effects of testosterone given to females include: a greater than 3-fold increase in rate of heart attack and an almost doubling of the rate of stroke." (*Id.* at ¶¶ 161–62.) "Biologic males treated with estrogen have a 22-fold increase in the rate of breast cancer," an "increased risk of prostate cancer," "a 36-fold higher risk of strokes," and "an increased risk of autoimmune disorders." (*Id.* at ¶¶ 163–64, 167, 169.)

Despite Plaintiffs' claims that "medical interventions beyond puberty blockers and hormone therapy are rare" (Doc. 50 at 5), gender-affirming surgeries tripled in the United States between 2016 and 2019. (Doc. 94.) The most common surgery for gender dysphoric minors is a bilateral mastectomy, also known as "top surgery." (Doc. 92 at ¶ 170.) "Between 15-38% of children who undergo mastectomies require additional surgeries. Up to a third have post-operative complications. These complications include excessive scarring, pain and swelling from blood or fluid buildup, wound dehiscence (opening up where the surgical incisions were sewn together), and nipple necrosis (death of the nipple tissue)." (*Id.* at ¶ 173). "It is important to note that this operation cannot be reversed. The female will never regain healthy breasts capable of producing milk to feed a child." (Doc. 78 at ¶ 166.)

Other surgeries for females include removal of the ovaries, uterus, fallopian tubes, cervix, and vagina, resulting in sterilization. (*Id.* at ¶ 170.) For those who seek the surgical construction of a penis, "a roll of skin and subcutaneous tissue is removed from one area of the body, say the thigh or the forearm, and transplanted to the pelvis." (*Id.* at ¶ 172.) Because the transplanted structure cannot become erect, "erectile devices such as rods or inflatable devices are placed within the tube transplanted in order to simulate an erection." (*Id.* at ¶ 172.) "A recent systematic review and meta-analysis of 1,731 patients who underwent phalloplasty found very

high rates of complications (76.5%) including a urethral fistula rate of 34.1% and urethral stricture rate of 25.4%." (*Id.* at ¶ 173.)

Surgeries for males include removal of testicles to permanently lower testosterone levels, causing infertility. (*Id.* at ¶ 168.) If vaginoplasty is sought, "the penis is surgically opened and the erectile tissue is removed. The skin is then closed and inverted into a newly created cavity in order to simulate a vagina. A dilator must be placed in the new cavity for some time so that it does not naturally close." (*Id.* at ¶ 168.) Complications include "urethral strictures, infection, prolapse, fistulas and injury to the sensory nerves with partial or complete loss of erotic sensation." (*Id.* at ¶ 169).

There is insufficient evidence to demonstrate that gender reassignment surgery improves health outcomes. (Doc. 77 at n.59.) Additionally, "No methodologically sound studies have provided meaningful evidence that medical transition reduces suicidality in minors." (Doc. 79 at ¶ 146.) According to a Swedish study, "[w]hen followed out beyond ten years, the sex-reassigned group had *nineteen times the rate of completed suicides* and *nearly three times* the rate of all-cause mortality and inpatient psychiatric care compared to the general population." (Doc. 78 at ¶ 214) (emphasis added). "Among post-operative patients in the Netherlands, long-term suicide rates of six times to eight times that of the general population were observed depending on age group." (Doc. 79 at ¶ 147.) Another study in the

Netherlands "reported the 'important finding' that 'suicide occurs similarly' before and after medical transition." (Doc. 79 at ¶ 147.) In other words, transitioning failed to resolve and may in fact have *exacerbated* the children's core medical/mental health issues.

In this context, it is unclear how informed consent can possibly be achieved. As the *Bell* court stated:

> the child or young person would have to understand not simply the implications of taking [puberty blockers] but those of progressing to cross-sex hormones. The relevant information therefore that a child would have to understand, retain and weigh up in order to have the requisite competence in relation to [puberty blockers], would be as follows: (i) the immediate consequences of the treatment in physical and psychological terms; (ii) the fact that the vast majority of patients taking [puberty blockers] go on to [cross-sex hormones] and therefore that s/he is on a pathway to much greater medical interventions; (iii) the relationship between taking [cross-sex hormones] and subsequent surgery, with the implications of such surgery; (iv) the fact that [cross-sex hormones] may well lead to a loss of fertility; (v) the impact of [cross-sex hormones] on sexual function; (vi) the impact that taking this step on this treatment pathway may have on future and life-long relationships; (vii) the unknown physical consequences of taking [puberty blockers]; and (viii) the fact that the evidence base for this treatment is as yet highly uncertain.

Bell, [2020] EWHC at ¶¶ 138, 143.

"That adolescents find it difficult to contemplate or comprehend what their life will be like as adults and that they do not always consider the longer-term consequences of their actions is perhaps a statement of the obvious." *Id*. at ¶ 141. "There does not exist—indeed, there cannot exist—an age-appropriate way to equip

a child who has not gone through puberty to make an informed decision about age-inappropriate issues, such as their future sex life, choices of sexual partners, sex-bonded relationships including marriage, and sacrificing ever experiencing orgasm." (Ex. 79 at ¶ 234). A parent cannot make this drastic and consequential decision for a child, and a child is simply incapable of making such a decision. (Doc. 79 at ¶¶ 207, 212, 234; Doc. 87 J at ¶¶ 61–112, 115–135.)

STANDARD OF REVIEW

This Court reviews a District Court's grant or denial of a preliminary injunction for a manifest abuse of discretion. *Planned Parenthood of Mont. v. State*, 2022 MT 157, ¶ 5, 409 Mont. 378, 515 P.3d 301 (citing *Porter v. K & S P'ship*, 192 Mont. 175, 181, 627, 836, 839 (1981)); *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386 (citing *Davis v. Westphal*, 2017 MT 276, ¶ 10, 389 Mont. 251, 405 P.3d 73). A court abuses its discretion when it acts "arbitrarily, without employment of conscientious judgment, or exceeds the bound of reason resulting in substantial injustice." *Planned Parenthood of Mont.*, ¶ 5 (citing *In re Marriage of Elder & Mahlum*, 2020 MT 91, ¶ 10, 399 Mont. 532, 462 P.3d 209). "A manifest abuse of discretion is one that is 'obvious, evident, or unmistakable.'" *Driscoll*, ¶ 12 (citing *Weems v. State*, 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4 ("*Weems I*") (quotation omitted).

If a preliminary injunction decision was based on legal conclusions, however, this Court reviews those conclusions de novo to determine whether the District Court's interpretation of the law is correct. *Planned Parenthood of Mont.*, ¶ 5; *Driscoll*, ¶ 12. Issues of justiciability, such as standing and ripeness, also are questions of law subject to de novo review *Weems I*, ¶ 7 (citing *Reichert v. State*, 2012 MT 111, ¶ 20, 365 Mont. 92, 278 P.3d 455).

This Court's review of constitutional questions is plenary. *Weems v. State*, 2023 MT 82, ¶ 33, 412 Mont. 132, 529 P.3d 798 ("*Weems II*") (citing *Williams v. Bd. of County Comm'rs*, 2013 MT 243, ¶ 23, 371 Mont. 356, 308 P.3d 88. A district court's resolution of a question of constitutional law is a legal conclusion reviewed for correctness. *Id.* (citing *Bryan v. Yellowstone County Elem. Sch. Dist. No. 2*, 2002 MT 265, ¶ 16, 312 Mont. 257, 60 P.3d 381. Montana courts presume that enacted laws are constitutional. *Powder River Cnty. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357. "The constitutionality of a legislative enactment is prima facie presumed, and every intendment in its favor presumed, unless its unconstitutionally appears beyond a reasonable doubt." *Id.* at ¶ 73. "Every possible presumption must be indulged in favor of the constitutionality of a legislative act." *Id.* at ¶ 74. The question is not whether it is possible to condemn, but whether it is possible to uphold the legislative action. *Id.* at ¶ 73; *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 10, 353 Mont. 265, 222 P.3d 566 (quoting *Powell v. State Compen. Ins. Fund*,

2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877). If any doubt exists, it must be resolved in favor of the statute. *Powder River Cnty*, ¶ 74 (citing *Grooms v. Ponderosa Inn*, 283 Mont. 459, 467, 942 P.2d 699, 703 (1997) (citing *Heisler v. Hines Motor Co.*, 282 Mont. 270, 279, 937 P.3d 45, 50 (1997)); *Satterlee* ¶ 10 (citing *Powell*, ¶ 13).

"Analysis of a facial challenge to a statute differs from that of an as-applied challenge." *Mont. Cannabis Indus. Assn.*, 2016 MT 44, ¶ 14, 382 Mont. 256, 368 P.3d 1131 ("*MCIA II*"). Parties presenting a facial challenge must establish that "no set of circumstances exists under which the [challenged sections] would be valid." *Id.* (internal citations and quotations omitted). "The crux of a facial challenge is that the statute is unconstitutional in all its applications." *Advocates for Sch. Tr. Lands v. State*, 2022 MT 46, ¶ 29, 408 Mont. 39, 505 P.3d 825. If any constitutional application is shown, the facial challenge fails. *Id*

SUMMARY OF THE ARGUMENT

The District Court erred in imposing a statewide preliminary injunction for several reasons. First, jurisprudential standing flaws preclude Plaintiffs from obtaining injunctive relief. Plaintiffs failed to plead harm or injury fairly traceable to most of SB99's provisions, and the Provider Plaintiffs lack standing altogether. For this reason and others, the scope of the preliminary injunction was overbroad.

Second, the District Court erred in finding that Plaintiffs satisfied the four conjunctive factors necessary to obtain a preliminary injunction. Plaintiffs are not likely to succeed on the merits—SB99 does not violate the rights to equal protection or privacy under the Montana Constitution. Therefore, the District Court erred in subjecting SB99 to strict scrutiny, because SB99 does not discriminate based on transgender status, does not implicate a suspect class, and does not impermissibly burden a fundamental right. The District Court also contradicted well settled law establishing that Plaintiffs have no constitutional right to access a particular medication, no less one of dubious efficacy. The District Court found the remaining injunctive factors weighed in favor of Plaintiffs by uncritically accepting Plaintiffs' assertions of consensus in the medical community and disregarding Defendants' extensive evidence demonstrating widespread medical and scientific uncertainty, thereby manifestly abusing its discretion.

Even assuming Plaintiffs had satisfied their burden (they did not), the District Court issued an overly broad injunction that severely and unreasonably burdens Defendants' clear authority to protect Montana children from harm. The District Court disregarded its obligation to craft the least burdensome preliminary injunction that provides the Plaintiffs relief. Lastly, the District Court erred in disallowing oral testimony and depriving Defendants of the opportunity to conduct cross examination of witnesses at the Preliminary Injunction hearing, despite the existence of sharply

disputed facts and the weight of the issues at hand. Because of these errors, this Court should reverse the District Court.

ARGUMENT

I. PLAINTIFFS DID NOT PLEAD OR DEMONSTRATE INJURY SUFFICIENT FOR THE DISTRICT COURT TO ENJOIN SB99 IN ITS ENTIRETY.

Justiciability is a threshold jurisdictional issue—"without it [courts] cannot adjudicate a dispute." *Broad Reach Power, LLC v. Mont. Dept. of Pub. Serv. Regul., Pub. Serv. Commn.*, 2022 MT 227, ¶ 10, 410 Mont. 450, 520 P.3d 301; *cf. Larson v. State*, 2019 MT 28, ¶ 18, 394 Mont. 167, 434 P.3d 241 (justiciability is a mandatory prerequisite to initial and continued exercise of subject matter jurisdiction). "Standing is one of several justiciability doctrines that limit Montana courts to deciding only cases and controversies." *Mitchell v. Glacier County*, 2017 MT 258, ¶ 6, 389 Mont. 122, 406 P.3d 427 (citing *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80). *See also Bullock v. Fox*, 2019 MT 50, ¶ 28, 395 Mont. 35, 435 P.3d 1187 (standing is a threshold jurisdictional requirement).

Here, District Court erred in enjoining the bill in its entirety because Plaintiffs failed to allege harm from or injury attributable to most of SB99's provisions. The Provider Plaintiffs also lack standing both for themselves and on behalf of their patients. Because this threshold jurisdictional requirement is not met, this Court should reverse.

A. PLAINTIFFS NEITHER PLED NOR DEMONSTRATED ANY INJURY FAIRLY TRACEABLE TO MOST OF SB99'S PROVISIONS.

To establish standing, a plaintiff "must clearly allege past, present or threatened injury to a property or civil right, and the alleged injury must be one that would be alleviated by successfully maintaining the action." *Mont. Immigrant Justice All. v. Bullock*, 2016 MT 104, ¶ 19, 383 Mont. 318, 371 P.3d 430. The District Court abused its discretion by blocking SB99 in its entirety since Plaintiffs' allegations implicate only a few of its provisions.

Indeed, no Plaintiff alleges injury from the ban on use of public funds to provide any of the prohibited treatments. (*See* Doc. 102 at § 4(3).) No Plaintiff claimed an injury from the ban on using public funds or state property, facilities, or buildings to provide, promote, or advocate for the prohibited treatments. (*See id*. at §§ 4(4) (7), (9).) No Plaintiff alleged an injury from the loss of a tax deduction. (*See id*. at § 4(5).) No Plaintiff is a state employee. (*See id*. at §§ 4(8) and 4(10).) No Plaintiff alleges an injury from the ban on professional liability insurance including coverage for damages assessed against a healthcare professional or physician for providing the prohibited treatments. (*See id*. at § 6.) Furthermore, as Defendants noted below, "no Plaintiff challenges Section 4, subsections (3), (4), (5), (7), (8), (9), or (10), of SB99, nor does any Plaintiff assert harm stemming from SB99's prohibition of 'gender affirming' surgeries on minors." (Doc. 77 at 33.) The District

Court thus lacked jurisdiction to enjoin SB99's unchallenged provisions from which Plaintiffs established no alleged injury.

Plaintiff likewise failed to overcome the applicable presumption of constitutionality. *See Powder River Cnty.*, ¶ 73. For example, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (citing *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1997)). This is because the government is "not required to assist others in funding the expression of particular ideas, including political ones." *Ysursa v. Pocatello Educ. Assn.*, 555 U.S. 353, 358 (2009). And "[t]ax deductions are a matter of legislative grace and it is the taxpayer's burden to clearly demonstrate the right to the claimed deduction." *Robison v. Mont. Dept. of Rev.*, 2012 MT 145, ¶ 12, 365 Mont. 336, 281 P.3d 218. (citations omitted). The District Court accordingly erred in enjoining Section 4, subsections (3), (4), (5), (7), (8), (9), (10), and Section 6 of SB99.

Lastly, as previously mentioned, no Plaintiff asserted an injury from the prohibition on surgical procedures. (*See* Doc. 102 at §§ 4(1)(a)(i), (b)(i)).) No Minor Plaintiff currently taking puberty blockers or cross-sex hormones states any intention of imminently undergoing "gender-affirming" surgery. (Docs. 56, 57.) While Plaintiff Phoebe Cross allegedly plans on "ultimately getting top surgery," (Doc. 56 at ¶ 17), Cross does not say if this will occur as a minor. Nor does any Parent Plaintiff

state that their child plans to undergo surgery as a minor. (Docs. 52, 53, 55.) And no Provider Plaintiff performs or provides gender reassignment surgery. (Docs. 51, 54.)

In sum, Plaintiffs failed to demonstrate standing by alleging any injury from most of SB99's provisions. The District Court therefore lacked jurisdiction to enjoin SB99 in its entirety. Such a plenary injunction is clearly erroneous and arbitrary, lacks employment of conscientious judgment, and exceeds the bounds of reason. The District Court's preliminary injunction must be reversed.

B. THE PROVIDER PLAINTIFFS LACK STANDING.

1. The Provider Plaintiffs Lack First Party Standing.

Provider Plaintiffs do not have a constitutional right to perform any specific medical procedure—especially those procedures the Legislature has prohibited based on its determination that minors are likely to be harmed by the same. SB99's ban on experimental and harmful medical practices therefore does not violate any constitutional rights of Provider Plaintiffs. Although the Provider Plaintiffs do assert injury stemming from the potential for disciplinary proceedings and private suit,[2] this is insufficient to establish standing.

Like any garden variety medical malpractice lawsuit, the intent of these provisions is to provide an injured party a mechanism for redress. This is no different

[2] *See* Doc. 60 at ¶¶ 16–17, 20–24, 65, 75–76, 89, 142, 145, 148–49, 153, 158–160; Doc. 51 at ¶¶ 16-18; Doc. 54 at ¶¶ 12–15.

than the risk presented by any other treatment Provider Plaintiffs provide that may deviate from the applicable standard of care. This is not a specific, concrete (or even unusual) injury, especially since Provider Plaintiffs assert no actual, concrete threat of a civil action. An alleged injury cannot be hypothetical. *Fox*, ¶ 31.

The generalized threat of a medical malpractice suit also is not a concrete injury—it is an inherent risk of the medical profession. The only treatments at issue here that Provider Plaintiffs offer to minor patients are the provision of puberty blockers and cross-sex hormones. (*See* Doc. 60 at ¶¶ 145, 153.) If such treatments are truly as safe and effective as Plaintiffs claim, the risk of a suit should be no greater than the risk of liability from any legitimate medical procedure. The Provider Plaintiffs, therefore, fail to show injury from SB99's relevant provisions.

The Provider Plaintiffs also claim injury stemming from SB99's denial of Medicaid reimbursement. However, this Court has held that "there is no fundamental right to receive Medicaid benefits in Montana, nor does any other provision of the Montana Constitution confer such a right." *Timm v. Mont. Dept. of Public Health & Human Servs.*, 2008 MT 126, ¶ 34, 343 Mont. 11, 184 P.3d 994 (citing *State v. Ellis*, 2007 MT 2010, ¶ 11, 339 Mont. 14, 167 P.3d 896). If there is no fundamental right to receive Medicaid benefits, providers certainly have no right—fundamental or otherwise—to receive Medicaid payment for services provided to Medicaid beneficiaries. Moreover, the State makes the determination of what constitutes

"medical necessity" for Medicaid purposes and, therefore, can choose to exclude certain procedures from Medicaid reimbursement.[3] It is the Legislature's clear prerogative to exclude these treatments as reimbursable services, especially considering their experimental nature as discussed in greater detail below. In sum, the Provider Plaintiffs can show no actual, imminent, concrete injuries to themselves and lack standing, accordingly.

2. The Provider Plaintiffs Lack Third-Party Standing.

Provider Plaintiffs similarly lack third party standing sufficient to permit them to bring claims on behalf of their patients in this case. A "plaintiff generally must assert her own legal rights and interests." *Heffernan*, ¶ 32. Limited exceptions to this rule are permitted only when three criteria are satisfied:

> The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute . . .; the litigant must have a close relation to the third party . . .; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Baxter Homeowners Assn. v. Angel, 2013 MT 83, ¶ 15, 369 Mont. 398, 298 P.3d 1145 (citing *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991)). The Provider Plaintiffs cannot satisfy this test.

[3] Admin. R. Mont. 37.85.410(1) ("The department shall only make payment for those services which are medically necessary as determined by the department or by the designated review organization.").

The Provider Plaintiffs fail the first prong because, as shown above, they have not demonstrated an "injury in fact." They also fail the second prong because they have not alleged a sufficiently close relationship with their patients. They merely assert broad claims that SB99 "would insert itself into the relationship" with patients and "interfere with [their] ability to support referrals," and they reference the alleged harms of discontinuing treatment. (Doc. 51 at ¶¶ 16–20.)

The Ninth Circuit's denial of third-party standing to a therapist who sought to bring claims on behalf of his minor clients in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022) is instructive. There, the therapist—who provided "conversion therapy" to minors—failed to satisfy the close relationship element even though he engaged in a service that undoubtedly involved establishing personal relationships with minor clients. *Id.* at 1069. His claims that the challenged law "denies clients access to ideas that they wish to hear, and to counseling that is consistent with their own personal faith, life goals, and motivations" were insufficient for him to bring claims on behalf of his patients. *Id.*

Similarly here, the Provider Plaintiffs' mere assertion of general relationships with their patients does not suffice. Provider Plaintiffs give no detail about their patients aside from them being minors who seek puberty blockers and cross-sex hormones to treat their psychological condition, some of them possibly being Medicaid recipients, and some of them having to travel to their clinics. (Docs. 51,

54.) These general and impersonal statements fail to show the requisite "close relationship" to establish third-party standing.

Further, third-party standing is not appropriate where there is a potential conflict of interest between the plaintiff and the third party. *Elk Grove Unified School Dist. v. Newdow*, 542 U. S. 1, 9, 15 (2004). A conflict of interest exists in this context because Provider Plaintiffs have a financial incentive to provide "gender-affirming" care at an early age. At a minimum, administering puberty blockers, cross-sex hormones, and surgery is likely to result in lifelong medicalization. (*See*, *e.g.*, Doc. 77 at 14-18 (The vast majority of patients taking puberty blockers go on to cross-sex hormones and follow a pathway to much greater medical intervention; These drugs also greatly increase the risk of heart problems, stroke, cancer, loss of bone density, and other severe medical problems.).) Third-party standing for Provider Plaintiffs cannot be appropriate when they have a financial incentive to facilitate the lifelong medicalization of their patients.

Finally, third-party standing requires a demonstration of a "genuine obstacle" to a party asserting his or her own interest. *See Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 489 (9th Cir. 1996). In *Tingley*, the Ninth Circuit rejected the therapist's claims that his clients would face hinderances to bringing their own suits because his allegations were speculative. *Tingley*, 47 F.4th at 1069. That Court specifically noted that minors seeking conversion therapy have brought their own suits in other

states and that any concerns of privacy are easily resolved through pseudonymous filings:

> Tingley does not engage with why pseudonymous filing would not ease the alleged stigma and emotional hardship he claims is preventing his clients from being able to assert their own rights, or why his minor clients are different from those in other states who brought their own lawsuits.

Id. at 1069–70.

Applying *Tingley's* reasoning, Provider Plaintiffs fail this element as well. First, Minor Plaintiffs' assertion of their own claims in this case undermines any argument that genuine obstacles prevent such plaintiffs from suing on their own behalf. Second, some Plaintiffs in this case have used pseudonymous filings to assert their own rights, which the *Tingley* court recognized resolved many barriers to litigation. And third, the numerous lawsuits across the country (many of which are cited by Plaintiffs) show that minor patients face no hinderance to bringing their own claims in these types of cases. The presence of Parent Plaintiffs—named and unnamed—further demonstrates that others with closer relationships to Minor Patients, can adequately assert the rights of their minor children. In sum, Provider Plaintiffs fail to meet the elements necessary for third-party standing. Because they lack standing in their own right and they lack standing to bring claims on behalf of their patients, Provider Plaintiffs cannot establish this threshold requirement to obtain a preliminary injunction.

II. THE DISTRICT COURT ERRED IN ENJOINING SB99 BECAUSE PLAINTIFFS FAILED TO SATISFY THE APPLICABLE FACTORS.

Montana's preliminary injunction standard is now the same standard that federal courts have employed for decades. *See* SB 191 (2023). This means a preliminary injunction may be granted only when the applicant establishes: (a) likelihood of success on the merits; (b) likelihood of suffering irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; *and* (d) the order is in the public interest. Mont. Code Ann. § 27-19-201(1) (2023). It is Plaintiffs' burden to satisfy all four of these elements. Mont. Code Ann. § 27-19-201(3) (2023). The Legislature emphasized its intent that "interpretation and application of subsection (1) closely follow United States supreme court case law." Mont. Code Ann. § 27-19-201(4) (2023). Injunctive relief is "an extraordinary remedy never awarded as of right." *Winter v. Natl. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

A. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits." *Winter*, 555 U.S. at 20. The first factor "is a threshold inquiry and is the most important factor." *Baird v. Bonta*, 81 F.4th 1036, 1040 (9th Cir. 2023) (citing *Envt. Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020)). Thus, a "court need not consider the other factors" if a movant fails to show a

likelihood of success on the merits. *Id.* (citing *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017)). It is not enough that the chance of success on the merits be "better than negligible." *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761 (2009) (citing *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999). *See also Block Communications, Inc. v. Moorgate Cap. Partners, LLC*, 2023 U.S. App. LEXIS 33516, *3 (6th Cir. 2023) (The movant must show more than a mere "possibility" of success) (citing *Nken*, 556 U.S. at 434).

Here, the District Court erred in concluding that Plaintiffs were likely to succeed on the merits of their equal protection and privacy claims. The District Court likewise erred in applying strict scrutiny to SB99 because it does not discriminate on the basis of sex or any other protected class and does not impermissibly burden a fundamental right. Rational basis review, not strict scrutiny or middle tier scrutiny, is the appropriate level of review.

1. SB99 Does Not Violate the Equal Protection Clause.

Plaintiffs are not likely to succeed on their equal protection claim. Courts evaluate equal protection claims under a three-step process. "First, the Court identifies the classes involved and determines if they are similarly situated. Second, the Court determines the appropriate level of scrutiny to apply to the challenged statute. Finally, the Court applies the appropriate level of scrutiny to the statute." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445.

Plaintiffs' equal protection claim fails at the first step because the classes at issue are not similarly situated, and transgender status is not a protected class. The District Court incorrectly determined that transgender children and all other children are similarly situated. (Doc. 131 at 20–23.) The basic rule of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive similar treatment. *Powell*, ¶ 22. However, the equal protection clause does not preclude different treatment of different groups or classes of people so long as all persons within a group or class are treated the same. *Id.* Groups are similarly situated if "they are equivalent in all relevant respects other than the factor constituting the alleged discrimination." *Id.* "If the classes are not similarly situated, then it is not necessary for us to analyze the challenge further." *Donaldson v. State*, 2012 MT 288, ¶ 21, 367 Mont. 228, 292 P.3d 364. (Rice, J., concurring) (quoting *Kershaw v. Mont. Dept. of Transp.*, 2011 MT 170, ¶ 17, 361 Mont. 215, 257 P.3d 358); *see also Rausch v. State Compen. Ins. Fund*, 2005 MT 140, ¶ 18, 327 Mont. 272, 114 P.3d 192; *Powell*, ¶ 21. On its face, SB99 treats all minors the same and does not create two different classes of minors.

SB99 bans certain treatments and procedures for minors who seek "to address the minor's perception that [his/]her gender or sex is not [male/]female" versus minors who may use the same medications, such as puberty blockers, to treat physical conditions like precocious puberty. (Doc. 102 §§ 4(1)(a), 4(1)(b)).)

Plaintiffs' assertion that this constitutes an equal protection violation is meritless. (*See* Doc. 50 at 20-23.) Indeed, precocious puberty is a *physical* condition that causes puberty to begin at an abnormally young age, sometimes as young as four years old. (Doc. 78 at ¶ 76.) A puberty blocker is used to "disrupt the signaling to the sex glands, stop early sex hormone production, and, therefore, stop abnormal pubertal development." (*Id*.) A minor seeking to use puberty blockers to treat the *psychological* condition of gender dysphoria (beginning just prior to the onset of puberty)[4] is not similarly situated to a minor who has an endocrine disorder (*i.e.* a *physical* condition) and must take a puberty blocker to prevent puberty at an abnormally age as early. Plaintiffs' equal protection claim fails on this basis alone.

Contrary to the District Court's finding, SB99 also does not discriminate based on transgender status. (*See* Doc. 131 at 21.) Indeed, not all transgender-identifying minors seek "gender-affirming" treatments or procedures. Even Plaintiffs admit as much. (*See* Doc. 50 at 4 ("For *some* young people, it *may* be medically necessary and appropriate to initiate gender-affirming therapy") (emphasis added). WPATH also agrees that some "do not feel the need to feminize or masculinize their body" because some find "changes in gender role and expression sufficient to alleviate gender dysphoria." (Doc. 85 at 8–9.) *See also Doe v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, J., concurring) ("the

[4] (*See* Doc. 60 at ¶ 42.)

transgender community is not a monolith in which every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her biological sex).”). The Eleventh Circuit has also acknowledged this distinction in an analogous context:

> This appeal centers on. . .whether discrimination based on biological sex necessarily entails discrimination based on transgender status. It does not—a policy can lawfully classify on the basis of biological sex without unlawfully discriminating on the basis of transgender status. *See, e.g., Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60, 121 S. Ct. 2053, 2059 (2001). Indeed, while the bathroom policy at issue classifies students on the basis of biological sex, it does not facially discriminate on the basis of transgender status. Because the bathroom policy divides students into two groups, both of which include transgender students, there is a ‘lack of identity’ between the policy and transgender status, as the bathroom options are ‘equivalent to th[ose] provided [to] all’ students of the same biological sex.

Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 809 (11th Cir. 2022) (en banc) (citing *Geduldig v. Aiello*, 417 U.S. 484, 496–97, n.20 (1974)).

SB99 does not create two similarly situated classes and it does not treat similarly situated classes differently. Since transgender minors may be in either group—those that seek gender-affirming treatment and those that do not (including all other Montana children)—the transgender status argument suffers from a “lack of identity” like the plaintiffs in *Adams*. *See also Geduldig*, 417 U.S. at 496-97 n. 20, (though everyone pregnant is a woman, “members of both sexes” are in the nonpregnant group). Plaintiffs’ equal discrimination claim therefore fails at the first prong.

The District Court further erred in determining that SB99 implicates sex as a suspect class. (Doc. 131 at 24-25.)[5] Although sex is a suspect class under Montana law (*see A.J.B. v. Mont. Eighteenth Jud. Dist. Court*, 2023 MT 7, ¶ 24, 411 Mont. 201, 523 P.3d 519), a party asserting a sex-based discrimination claim must demonstrate an "official action that closes a door or denies an opportunity to women (or to men)." *United States v. Virginia*, 518 U.S. 515, 532 (1996). SB99 does not close a door to only one sex. Moreover, sex-based classifications involving a medical procedure "do[] not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245–46 (2022) (quoting *Geduldig*, 417 U.S. at 496). The District Court did not find invidious discrimination here.

SB99's prohibitions also apply equally to all minors. No minor—regardless of sex—can obtain the experimental treatments to transition. It applies evenly across the board. A plain reading of SB99 demonstrates that it neither discriminates based on sex nor implicates sex as a protected class. SB99 addresses surgeries, cross-sex

[5] As to whether "transgender persons comprise a suspect class," the District Court "decline[d] to fully engage in this analysis as it finds SB99 discriminates on the basis of sex." (Doc. 131 at 25, n.7.) Transgender status is not recognized as a protected class under Montana law. *See Snetsinger*, 2004 MT 390, ¶ 82 (Nelson, J., concurring).

hormones, and the use of puberty blockers in an equivalent manner with respect to *both* sexes.

The District Court nevertheless determined that "because SB99 classifies based on transgender status, it inherently classifies based on sex." (Doc. 131 at 25.) However, as established above, SB99 does not classify based on transgender status, and no Montana law recognizes transgender status as a suspect class or ties transgender status to sex.[6] The District Court also appears to have accepted the distinction between gender and sex (*see* Doc. 131 at 5), underscoring the self-contradictory and inherently flawed nature of the District Court's analysis in this regard.

Additionally, other courts have rejected the reasoning adopted by the District Court. *See*, *e.g.*, *L.W. v. Skrmetti*, 83 F.4th 460, 480–84 (6th Cir. 2023) (Tennessee's ban applies to "all minors, regardless of sex. Such an across-the-board regulation lacks any of the hallmarks of sex discrimination. It does not prefer one sex over the other. The availability of testosterone, estrogen, and puberty blockers does not turn on invidious sex discrimination but on the age of the individual and the risk-reward

[6] Indeed, it is clear that sex and gender identity are two distinct concepts. "According to the National Institutes of Health ("NIH"), sex is a distinct biological classification that is encoded in every person's DNA." (Doc. 77 at 2.) "*Every cell* in your body has a sex… Each cell is either male or female depending on whether you are a man or woman. Sex is much more than genitalia." (*Id*.) Gender identity "refers to subjective feelings that cannot be defined, measured, or verified by science." (*Id*. at 3.)

assessment of treating this medical condition (as opposed to another) with these procedures."); *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1228–30 (11th Cir. 2023) ("Of course, [the Alabama ban] discusses sex insofar as it generally addresses treatment for discordance between biological sex and gender identity, and insofar as it identifies the applicable cross-sex hormone(s) for each sex—estrogen for males and testosterone and other androgens for females. [But] the statute did "not discriminate based on sex for two reasons. First, the statute does not establish an unequal regime for males and females…Second, the statute refers to sex only because the medical procedures that it regulates—puberty blockers and cross-sex hormones as a treatment for gender dysphoria—are themselves sex-based…Chiefly, the regulation of a course of treatment that, by the nature of things, only transgender individuals would want to undergo would not trigger heightened scrutiny unless the regulation is a pretext for invidious discrimination against such individuals, and, here, the district court made no findings of such a pretext.").

The District Court also premised its conclusion that SB99 inherently classifies based on sex on its misapprehension of the United States Supreme Court's holding in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). In *Bostock*, the Court concluded that Title VII's prohibition on employment discrimination covers gay and transgender individuals "in part because of sex," which "has always been prohibited by Title VII's plain terms." *Id*. at 1743. But this reasoning is limited to Title VII, as

Bostock itself makes clear. *Id*. at 1753 (expressly declining to "prejudge" other applications, including "sex-segregated bathrooms, locker rooms, and dress codes.") Title VII focuses on but-for discrimination—it is "unlawful…for an employer to discriminate against any individual because of sex." *Skrmetti*, 83 F. 4th at 484 (cleaned up) (citing 42 U.S.C. § 2000e-2(a)(1)). "The Equal Protection Clause focuses on the denial of equal protection: 'No State shall…deny to any person within its jurisdiction the equal protection of the laws.'" *Id.* (citing U.S. Const. amend. XIV, § 1). "'That such differently worded provisions'—comparing the Constitution and Titles VI and VII— 'should mean the same thing is implausible on its face.'" *Id.* (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2220 (2023) (Gorsuch, J., concurring). "[T]he Court in *Bostock* relied exclusively on the specific text of Title VII." *Eknes-Tucker*, 80 F.4th at 1228. "Because *Bostock* therefore concerned a different law (with materially different language) and a different factual context, it bears minimal relevance to the instant case." *Id.* at 1229.

Like the Tennessee and Alabama statutes, SB99 does not discriminate based on sex. It instead recognizes and accounts for the scientific reality that "[t]he two sexes are not fungible." *U.S. v. Virginia*, 518 U.S. at 533. "To fail to acknowledge even our most basic biological differences…risks making the guarantee of equal

protection superficial, and so disserving it." *Nguyen*, 533 U.S. at 73. Thus, the District Court erred in equating transgender status with sex in this context.

Ultimately, SB99 does not create two similarly situated classes, does not treat similarly situated classes differently, does not discriminate based on transgender status (even if it were a suspect class under Montana law), and does not inherently classify based on sex. Plaintiffs therefore cannot overcome the presumption of SB99's constitutionality by satisfying their burden to demonstrate otherwise beyond a reasonable doubt. *Powder River Cnty.*, ¶ 73. The District Court erred in finding that Plaintiffs are likely to succeed on the merits of their equal protection claim.

2. SB99 Does Not Violate the Right of Privacy.

SB99 also does not impermissibly burden the right of privacy under settled Montana law. The right to privacy is bounded by the State's police power, which "shall never be abridged." Mont. Const. art. XV, § 9; *Billings Properties v. Yellowstone Cnty.,* 144 Mont. 25, 30, 394 P.2d 182 (1964). "Liberty is necessarily subordinate to reasonable restraint and regulation by the state in the exercise of its sovereign prerogative—police power." *Wiser v. State*, 2006 MT 20, ¶ 24, 331 Mont. 28, 129 P.3d 133 (quoting *State v. Safeway Stores*, 106 Mont. 182, 203, 76 P.2d 81, 86 (1938)). Indeed, the State possesses "an inherent power to enact reasonable legislation for the health, safety, welfare or morals of the public." *State v. Skurdal*, 235 Mont. 291, 294, 767 P.2d 304, 306 (1988) (citing *Charles River Bridge v.*

Warren Bridge Co., 11 Peters 496, 9 L.Ed. 773 (1837)). "That the states currently possess that police power is unquestioned." *Id.*, 767 P.2d at 306 (citing *Polk v. Okla. Alcoholic Beverage Control Bd.*, 420 P.2d 520 (Okla. 1966)). "Montana recognizes that such police power exists even when the regulations are an infringement of individual rights." *Id.*, 767 P.2d at 306 (citing *State v. Rathbone*, 110 Mont. 225, 241, 100 P.2d 86, 92 (1940)).

The District Court concluded that SB99 burdens the right to privacy "by limiting Youth Plaintiffs' ability to pursue certain medical treatments and by limiting their ability to make decisions in concert with their guardians and healthcare providers." (Doc. 131 at 28.) The District Court relied heavily on *Armstrong* in reaching this conclusion (*see* Doc. 131 at 34, 36–38, 46), but it was mistaken in doing so because *Armstrong* is readily distinguishable from the facts and issues present here.

"In *Armstrong*, the statute at issue prevented individuals from receiving a lawful, *constitutionally* protected medical procedure, abortion." *Mont. Cannabis Indus. Assn. v. State*, 2012 MT 201, ¶ 28, 366 Mont. 224, 286 P.3d 1161 ("*MCIA I*") (emphasis in original). Here, SB99 protects children from experimental medical procedures whose scientific basis is increasingly under legitimate scrutiny, whose safety and efficacy are questionable at best, and which subject a vulnerable

population to lifelong, irreversible damage. This is a far cry from medical procedures subject to (or deserving of) protection under Montana's Constitution.

Such regulation is clearly within the State's constitutional police power, and this Court has already rejected the argument that access to a particular drug is constitutionally protected. *MCIA I*, ¶ 28 ("Unlike *Roe* and *Armstrong*, Plaintiffs' alleged affirmative right to access a particular drug has not been constitutionally protected under the right to privacy."). In *MCIA I*, this Court concluded that "the right to privacy does not encompass the affirmative right of access to medical marijuana" because "no court has acceded to the notion that the right to privacy encompasses an affirmative right to access a particular drug or treatment." *MCIA I*, ¶¶ 28, 32 (citing *Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach*, 495 F.3d 695, n.18 (D.C. Cir. 2007)). Also, in *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980), the Ninth Circuit considered whether the right to privacy encompassed the right to use laetrile (an unapproved cancer drug) free of government regulation. *Id.* at 1121. The Ninth Circuit held that "[c]onstitutional rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of the lawful exercise of government police power." *Id.* at 1122.

Against this clear precedent, the District Court found that *Armstong* applied, incorrectly asserting that the "parties agreed" it controlled[7] and stating that Defendants "cannot show that gender-affirming care poses a medically acknowledged, bona fide health risk, leaving it without a compelling interest and without justification to rely on its police powers." (Doc. 131 at 40.) The District Court reached this conclusion by wholesale accepting Plaintiffs' argument that the "medical community overwhelmingly agrees" that gender-affirming care is standard for treating gender dysphoria. (*Id*. at 38–39.) The District Court failed to employ conscientious judgment by completely disregarding Defendants' extensive evidence to the contrary. (*See* Doc. 77 at 2–24, Docs. 78–108.) The District Court also mischaracterized Defendants' arguments, stating that "the emphasis Defendants' place on surgical procedures proscribed…is misplaced," (Doc. 131 at 39) even though Defendants' argument also focused on the dangers of puberty blockers and cross-sex hormones. (*See* Doc 77 at 37–40.)

The District Court further erred by applying *Armstrong* without first making the prerequisite finding that the treatment at issue is constitutionally protected and, thus, subject to *Armstrong*'s analysis. *MCIA I*—not *Armstrong*—is the controlling

[7] The District Court stated that, "The parties agree that the standard set forth in *Armstrong* controls here." (Doc. 131 at 38.) Defendants by no means conceded this. (*See* Doc. 77 at 37–40.) Responding to Plaintiffs' argument that *Armstrong*'s standard controls by showing SB99 is not defeated by its standard is not a concession that the standard applies.

precedent. "In *Wiser*, ¶ 15, this Court circumscribed its holding in *Armstrong* when we stated that 'it does not necessarily follow from the existence of the right to privacy that every restriction on medical care impermissibly infringes that right.'" *MCIA I*, ¶ 27. Thus, "it does not follow that the right to privacy is necessarily implicated when a statute regulates a particular medication." *Id.* (citing *Wiser*, ¶ 20; *Armstrong*, ¶ 65). The District Court erred in applying *Armstrong* just because Plaintiffs asserted a right to privacy. But SB99 does not prohibit a constitutionally protected medical procedure nor do Plaintiffs have a constitutional right to access a particular drug or medication. *Armstrong* simply does not apply here, and SB99 does not impermissibly burden the right to privacy under settled Montana law.

3. The District Court Wrongfully Imputed Malintent to the Legislature.

The District Court further erred to the extent it rejected SB99's stated purpose of protecting minors from harm based on its conclusion that SB99 is actually the product of legislative malintent. (*See* Doc. 131 at 33-34.) The District Court based this conclusion on cherry-picked comments of individual legislators and unspecified instances of "animus" and "mischaracterizations." The District Court incorrectly attributed this perceived wrongdoing to the Legislature as a whole, particularly in the face of extensive scientific evidence supporting SB99's stated purpose.

Laws passed by the Montana Legislature are entitled to significant presumptions of constitutionality and good faith. *See Powder River Cnty.*, ¶ 73;

Abbott v. Perez, 138 S. Ct. 2305, 2324 (2018); *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990). Inquiries into the motivations for legislative acts are a "sensitive" undertaking. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Indeed, it is "a problematic undertaking" and "a hazardous matter" when attempting to "[p]rov[e] the motivation behind official action[.]" *Hunter v. Underwood*, 471 U.S. 222, 228 (1985); *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Accordingly, invalidating a statute on these grounds is a heavy burden—"[o]nly the clearest proof could suffice to establish the unconstitutionality of a statute." *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

The reality is that legislators act for independent reasons—"the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021). *See also O'Brien* at 384 ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.") The presumptions of constitutionality and good faith require courts to exercise "extraordinary caution" when considering claims that a legislature enacted a statute with an unlawful or improper purpose, *Miller v. Johnson*, 515 U.S. 900, 916 (1995), and to "resolv[e] all doubts in favor of" the statute's validity. *Davis v. Dep't of Labor & Indus.*, 317 U.S. 249, 258 (1942). *See also Powder River Cnty.*, ¶ 73.

Here, the District Court's reliance on two legislator's comments and vague references to the legislative record and resulting preliminary injunction directly contravenes these authorities. The District Court simply cannot project the perceived motivations of a few onto the Legislature as a whole, effectively taking Plaintiffs' side in what amounts to a dispute over the best policy to address a controversial issue. This was clear error, and this Court should reverse for this reason as well.

4. Rational Basis Review, Not Strict Scrutiny or Middle Tier Scrutiny, Is the Appropriate Level of Scrutiny.

In reviewing the constitutionality of a law, courts apply one of three levels of scrutiny: strict, middle-tier, or rationality review. *Powell*, ¶¶ 17–19. Strict scrutiny applies "when a law affects a suspect class or threatens a fundamental right." *Jaksha v. Butte-Silver Bow Cnty.*, 2009 MT 263, ¶ 17, 352 Mont. 46, 214 P.3d 1248 (citation and quotations omitted). Middle-tier scrutiny applies "when the law affects a right conferred by the Montana Constitution but is not found in the Constitution's Declaration of Rights." *Id.* And rational basis review applies "when neither strict nor middle-tier scrutiny applies." *Id.* The District Court erred in applying strict scrutiny because, as shown above, SB99 neither implicates nor burdens any fundamental right.

At the outset, the District Court erroneously conflated heightened scrutiny and strict scrutiny. (Doc 131 at 25–27.) For a law to survive "heightened" or "intermediate" scrutiny, it must "serv[e] important governmental objectives," and

"the discriminatory means employed [must be] substantially related to the achievement of those objectives." *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 724 (2003) (citing *United States v. Virginia*, 518 U.S. at 533). The law will be upheld if it is "substantially related to the achievement of an important governmental objective." *Adarand Constructors v. Pena*, 515 U.S. 200, 220 (1995) (citation and internal quotations omitted). Middle-tier scrutiny does not require the state to show that a law "is narrowly tailored to serve a compelling government interest." (Doc. 131 at 27) (citing *Snetsinger*, ¶ 17), but, instead, "the State must demonstrate the law or policy in question is reasonable and the need for the resulting classification outweighs the value of the right to an individual." *Snetsinger*, ¶ 17. Conversely, "[u]nder strict scrutiny, the government must adopt 'the least restrictive means of achieving a compelling state interest,' rather than a means substantially related to a sufficiently important interest." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)). These are two different standards, and the District Court erred in conflating them.

The District Court determined the two fundamental rights burdened by SB99 were equal protection[8] and privacy. As demonstrated above, plaintiffs are not in a protected class, and SB99 does not impermissibly burden any fundamental rights. The application of strict scrutiny was, therefore, erroneous. SB99 instead classifies based on age[9] and medical treatment or procedure. This renders it subject to rational basis review.

Moreover, SB99, "like other health and welfare laws, is entitled to a strong presumption of validity." *Dobbs*, 142 S. Ct. at 2284. *See also Powder River Cnty.*, ¶¶ 73–74. SB99 "must be sustained if there is a rational basis on which the legislature could have thought it would serve legitimate state interests." *Dobbs*, 124 S. Ct. at 2284. As "[t]he parties agree[,]…the government has a compelling [not merely substantial or legitimate] interest in the physical and psychosocial well-being of minors." (Doc. 131 at 29).

Preventing harm to minors from harmful medical treatment falls well within the State's compelling interest. And the State presented extensive evidence that so-

[8] The District Court effectively held that because equal protection is a fundamental right, in can only be burdened if requires strict scrutiny is satisfied, (Doc. 131 at 27–28, 35 n.13), but this is manifestly incorrect. If this were the case, the default tier would *always* be strict scrutiny whenever a plaintiff asserted an equal protection claim, eliminating the need for courts to determine which level of scrutiny to apply. This defies both logic and precedent.

[9] Classifications based on age are subject to rational basis review. *In re Wood*, 236 Mont. 118, 125, 768 P.2d 1370, 1375 (1989).

called "gender-affirming" care carries the significant risk of lifelong and irreversible harmful effects. But the District Court disregarded the actual harm suffered by many children from gender-affirming care. (*Id*. at 30 (finding Defendants' arguments about harm "unpersuasive").) The District Court determined that "[r]isk is a factor inherent in the field of medicine" and deferred to WPATH's unscientific standard of care and Plaintiffs' experts for support. (*Id*. at 31.) But even WPATH admits that it lacks the data to support the treatment,[10] which is shown in recently released videos of a September 2022 training session where its own doctors admit that puberty blockers are not as reversible as WPATH touts.[11] Here again, the District Court acted arbitrarily and failed to exercise conscientious judgment in its patently one-sided consideration of the evidence. This is particularly egregious in this case because the District Court denied the State the opportunity to cross-examine Plaintiffs' witnesses and experts and test the veracity of their claims, as discussed further below.

The District Court's determination also completely disregarded the stark reality that this treatment regime is fraught with uncertainty, as explained by the

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[10] (Doc. 77 at 28, n. 102 ("Overall, the existing data should be considered a starting point, and health care would benefit from more rigorous epidemiologic study in different locations worldwide.")); (Doc. 77 at 30, n. 108 ("Systematic long-term follow-up studies are urgently needed to compare individuals with the same intersex conditions who differ in the age at surgery or have had no surgery with regard to gender identity, mental health, and general quality of life."))

[11] Mairead Elordi, *Top Doctors In Transgender Field Admit Puberty Blockers Aren't So 'Reversible'*: *Report*, The Daily Wire (Jan. 17, 2024), available at http://tinyurl.com/4rxc2hdw.

statement of facts accounting for *half* of Defendants' Response below (Doc. 77 at 2–24); numerous studies, medical literature, and critical reviews from the United Kingdom, France, Sweden, Norway, Finland, Australia, and New Zealand (Docs. 78–108); extensive reports from five experts in the fields of endocrinology and psychology, none of which the District Court found unqualified (Docs. 78, 79, 87, 88, and 92); and five declarations from four victims[12] (including children and parents) and one whistleblower who worked at a gender clinic and witnessed horrific harms suffered by youth who transitioned. (Docs. 104–108.) The District Court also erroneously—and inexplicably—ignored the fact that many of the countries initially at the forefront of "gender-affirming" care have since backtracked to a significant degree.[13]

[12] Defendants requested an opportunity for at least one of the declarants to testify via Zoom at the preliminary injunction hearing, but the District Court again refused. (Doc. 119.)

[13] UK's National Health Service announced that puberty blockers would be prescribed only in clinical trials, recognizing the experimental nature of their use in transgender youth. (Doc. 77 at 21.) France declared that "the greatest reserve is required…given the side effects." (*Id*. at 22.) Sweden conducted a review and determined puberty blockers "should be considered experimental treatment of individual cases." (*Id*. at 23.) Norway formally declared gender-affirming care to be "experimental treatment." (*Id*.) Finland determined that "[i]n light of available evidence, gender reassignment for minors is an experimental practice." (*Id*.) And the Royal Australian & New Zealand College of Psychiatrists issued a statement recognizing the "paucity of quality evidence on the outcomes of those presenting with Gender Dysphoria." (*Id*. at 24.) Thus, contrary to the District Court's conclusion, "gender-affirming" treatments are by no means the global standard of care.

The key takeaway is that Defendants presented overwhelming evidence of uncertainty in this case, and the profound consequences to children clearly warrant State regulation here. The underlying premise and justification of SB99 only become more salient with new reports and developments in this field—even the World Health Organization and the New York Times have recently thrust the attendant uncertainty and consequences into the spotlight. [14] [15] Indeed, just two days before the filing of this Brief, the American College of Pediatricians announced its conclusion based on a review of over 60 studies that "social transition, puberty

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[14] World Health Organization, *WHO development of a guideline on the health of trans and gender diverse people*, (Jan. 15, 2024), available at http://tinyurl.com/yc6jrxmv (WHO declined to craft transgender healthcare guidelines for minors because "the evidence base for children and adolescents is limited and variable regarding the longer-term outcomes of gender affirming care"); Mairead Elordi, *'Gender Dysphoria' Diagnoses Rise In Every State Except One*, The Daily Wire (Jan. 11, 2024), available at http://tinyurl.com/9kxdezxr; Madeline Leesman, *Over 70 Children Under Age 5 Were Sent to the UK's Shuttered Gender Clinic*, Townhall (Jan. 1, 2024), available at http://tinyurl.com/2hadbdbx.

[15] Pamela Paul, *As Kids, They Thought They Were Trans. They No Longer Do*., The New York Times (Feb. 2, 2024), http://tinyurl.com/s84pdk96 ("Studies show that around eight in 10 cases of childhood gender dysphoria resolve themselves by puberty and 30 percent of people on hormone therapy discontinue its use within four years, though the effects, including infertility, are often irreversible"; "Most of her patients now…have no history of childhood gender dysphoria. Others refer to this phenomenon…as rapid onset gender dysphoria, in which adolescents, particularly tween and teenage girls, express gender dysphoria despite never having done so when they were younger. Frequently, they have mental health issues unrelated to gender"; "Parents are routinely warned that to pursue any path outside of agreeing with a child's self-declared gender identity is to put a gender dysphoric youth at risk for suicide, which feels to many people like emotional blackmail.").

blockers, and cross-sex hormones have no demonstrable, long-term benefit on psychosocial well-being of adolescents with gender dysphoria."[16] There should be little doubt under these circumstances that the State is well within its rightful authority to enact legislation like SB99. *See Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) ("The Court has given state and federal legislatures *wide discretion* to pass legislation in areas where there is *medical and scientific uncertainty*.") (emphasis added).

Additionally, the District Court erred in minimizing the fact that puberty blockers lack FDA approval for treatment of gender dysphoria because other drugs "used 'off-label' in pediatrics," include "antibiotics, antihistamines, and antidepressants." (Doc. 131 at 32.) This is not a fair comparison—unlike puberty blockers and cross-sex hormones, these drugs do not cause bone density loss, inhibit brain maturation, increase cancer risk, double or triple the risks of cardiovascular and heart disease and stroke, damage sex organs, or cause infertility. (*See* Doc. 77 at 14–18.) Regardless, states have the power to ban both certain FDA-approved drugs and off-label uses. *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997) (a State may prohibit the use of a drug for a certain purpose despite the patients' desire to the

[16] *Pediatricians Release Position Statement Reviewing Over 60 Studies on Mendal Health in Adolescents with Gender Dysphoria*, The American College of Pediatricians (February 7, 2024), available at https://acpeds.org/press/pediatricians-release-position-statement-reviewing-over-60-studies-on-mental-health-in-adolescents-with-gender-dysphoria.

contrary, the "personal and profound" liberty interests are at stake, and the drug's potential use for other purposes.); *Gonzales v. Raich*, 545 U.S. 1, 27–28 (2005) (Congress may ban marijuana use even when doctors approve its use for medical purposes). The absence of any constitutional right to a particular drug or treatment further highlights this conclusion. *MCIA I*, ¶ 28.

The District Court also erred in finding the Legislature's intent behind SB99 "disingenuous" (Doc. 131 at 31–34) in part based on its concurrent passage of Senate Bill 422 (2023) ("SB422"), a bill allowing patients to seek experimental treatments. This argument is a red herring because SB422 has no relevancy to SB99 and the laws cannot be "read together." (Doc. 131 at 33.) The treatments banned by SB99 are experimental, but they do not meet SB422's definition of an "investigational drug, biologic product, or device." This definition applies to an experimental treatment that successfully completes "a phase 1 clinical trial but has not yet been approved for general use by the [FDA]," and "remains under investigation in a [FDA]-approved clinical trial." Mont. Ann. Code § 50-12-102(3)(a)–(b) (2023). This definition does not apply to the medical practices banned by SB99.

Moreover, Plaintiffs have made no allegations that they considered all other FDA-approved treatment options—another of SB422's requirements. Mont. Code Ann. § 50-12-104(1). Tellingly, Plaintiffs are adamant that gender-affirming care is "far from experimental" (Doc. 120 at 10); they contend that it is "well-supported by

research and experience." (Doc. 120 at 29.) If so, Plaintiffs must disagree that puberty blockers, cross-sex hormones, and gender reassignment surgeries are investigational drugs, biologic products, or devices subject to SB422. Despite the District Court's criticism of SB99 in light of SB422, the District Court made no findings that SB422 actually applies to the circumstances presented by this case.[17] SB422, therefore, does not subject SB99 to heightened or strict scrutiny or otherwise serve to invalidate it in any respect.

Because SB99 does not implicate a suspect class, a fundamental right, or another right conferred by the Montana Constitution,[18] SB99 is subject only to rational basis review. This means it must only "bear[] a rational relationship to a legitimate governmental interest." *State v. Jensen*, 2020 MT 309, ¶ 17, 402 Mont. 231, 477 P.3d 335. Again, Montana's *compelling* interest in protecting minors from harm is not in dispute. SB99 furthers this interest by prohibiting certain treatments—whose efficacy and safety are far from certain—to treat gender dysphoria based on the permanent and irreversible harm they are likely to cause, along with the rational understanding that minors may not fully appreciate the associated risks. (*See, e.g.*,

[17] This also includes whether SB422's rigorous *written* informed consent standards were met. Mont. Code Ann. § 50-12-104(3). These standards require, among other things, "a description of the potentially best and worst outcomes of using the investigational drug, biological product, or device and a realistic description of the likely outcome." Mont. Code Ann. § 50-12-105(2)(d).

[18] Plaintiffs' claims were limited to Article II of the Montana Constitution. (Doc. 60 at ¶¶ 166–238.)

Doc. 77 at 19–21.) Additionally, the State's decision to draw the line at the age of majority sufficiently approximates the divide between those who may better grasp the impact of a fundamental life changing decision and those who warrant government protection.[19]

As established above, SB99 passes any level of scrutiny. (*See also* Doc. 77 at 27–32.) The District Court erred in concluding otherwise. This Court should reverse the preliminary injunction, accordingly.

B. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

The District Court likewise erred in finding that Plaintiffs were likely to suffer irreparable harm absent injunctive relief. Plaintiffs must show more than a possibility of future harm; they are required "to demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in the original); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1, 139 (2d ed. 1995) (applicant must establish that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"). "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of

[19] Other examples of age-restricted access include voting; obtaining a driver's license; purchase of alcohol, tobacco, and marijuana; entering into contracts; joining the military; gun purchases; consent to sexual intercourse; and marriage.

its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (citation omitted).

Despite the substantial evidence of harm from the procedures at issue, the District Court found that "likely constitutional violations" and "the risks reflected" in the sentiments made by Plaintiffs "constitute a high likelihood of irreparable harm." (Doc. 131 at 40–43.) Both findings constitute error. First, allowing children's bodies to go through the natural biological process of puberty does not constitute legal harm. This is especially true given the extensive contradictory evidence discussed above. Plaintiffs' entire argument hinges on the false assertion that the prohibited treatment and procedures are in fact medically appropriate and necessary rather than experimental and dangerous. As shown in Defendants' opposition brief below (Doc. 77 at 2–24), Plaintiffs cite no evidence in support of their irreparable harm argument that is not subject to significant legitimate criticism that seriously undermines its reliability and scientific validity. Plaintiffs' own expert admits, "the majority of drugs prescribed [for gender-affirming care] have not been tested in children and safety and efficacy of children's medicines are frequently supported by low quality evidence." (Doc. 59 at ¶ 72.) The reality is that there is a substantial amount of evidence from all over the world that gender transition procedures do not, in fact, alleviate gender dysphoria, but instead lead to exacerbated mental health problems and even more significant distress. (Doc. 77 at 14–19; 21–24.)

Even more concerning is the impossibility of predicting whether desistance will occur in any particular child. In fact, the vast majority of gender dysphoric children desiring to transition (61–88%) do desist. (Doc. 77 at 13–14.) This means that most children, given time, will decide against medically transitioning. Statistically, the Minor Plaintiffs themselves are overwhelmingly likely to desist. Thus, to allow children to make life-altering choices that they lack the maturity and developmental ability to fully understand deprives them of the opportunity to later change their minds, as most of their peers eventually do. By the time they realize they want to desist, it is too late, and a lifetime of regret ensues. (*See*, *e.g.*, Doc. 105 at ¶¶ 19-20) ("I detransitioned in 2022…I hate that I underwent surgery. I can never breast feed if I have children. For many years I did not want a family because I felt so poorly physically and mentally. Now I want to marry and have kids."); (Doc. 106 at ¶ 15) ("The medical interventions that were promoted to my daughter with a promise that they would relieve her problems, in fact, increased them and led to her death.").

Defendants provided five declarations consisting of real stories from those that, as the District Court put it, "claim[ed] to have witnessed or experienced negative effects of gender-affirming care." (Doc. 131 at 43.) These declarations demonstrate in vivid and alarming detail the real-world harms of the treatments at issue. (*See* Docs. 104–108.) These harms include grievous physical, psychological,

and emotional injury to the affected minor and his or her family, as well as the coercion of parents to go along with "gender-affirming" care, despite instincts to the contrary. (*Id.)*

When the State has a compelling interest in protecting the physical and psychological well-being of minors, it has a duty to intervene when the data reveals a substantial likelihood of severe physical, emotional, and mental trauma occurring in children. If left unaddressed, these harms will impact an entire generation, as underscored by the rapid increase of gender dysphoric children,[20] the increased suicide rates among those who transition,[21] and the rise of malpractice lawsuits against doctors and clinics engaged in "gender-affirming" care that caused serious, lifelong harm to children.[22]

Defendants demonstrated that the harms of "gender-affirming" treatments outweigh the harms alleged by Plaintiffs. If the State is prevented from enforcing SB99, the irreparable harm to Montana's children and families will continue unabated. More children will begin taking puberty blockers and cross-sex hormones

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[20] Mairead Elordi, *'Gender Dysphoria' Diagnoses Rise In Every State Except One*, The Daily Wire (Jan. 11, 2024), available at http://tinyurl.com/9kxdezxr. ("Virginia saw the steepest rise in gender dysphoria diagnoses at 274%. Indiana was next with a 247% rise, and Utah was third at 193%.").

[21] (*See* Doc. 77 at 18–19.)

[22] Dan Hart, '*Only the Beginning': Malpractice Suits From Detransitioners Rising*, The Daily Signal (Dec. 7, 2023), available at http://tinyurl.com/kp7rb7we. (One law firm in Texas "has filed lawsuits on behalf of four clients, and the firm says that it is currently in discussions with 40 more potential clients.").

and experience severe health problems as a result. (Doc. 77 at 15.) And more children will be permanently sterilized. (*Id.* at 16–17.) Enjoining SB99 irreparably damages those children's lives and the State's ability to prevent that harm. The District Court erred in this regard, and this Court should reverse.

C. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST CLEARLY FAVOR THE STATE.

The District Court similarly erred in finding that the balance of hardships and public interest favor Plaintiffs. A preliminary injunction movant must show that "the balance of equities tips in his favor." *Shell Offshore, Inc. v. Greenpeace, Inc*., 709 F.3d 1281, 1291 (9th Cir. 2013) (citing *Winter*, 555 U.S. at 20). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009). When a party seeks an injunction that will adversely affect a public interest, a court may in the public interest withhold relief until a final determination on the merits, even if the postponement is burdensome to the plaintiff. *Id.* (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982)). In fact, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id*. (quoting *Weinberger*, 456 U.S. at 312).

As previously noted, states have wide discretion to pass legislation in areas where there is medical and scientific uncertainty. *Gonzales*, 550 U.S. at 163. Medical

and scientific uncertainty regarding the safety and efficacy of "gender-affirming" care unquestionably exists, as Plaintiffs' own expert admits. In the face of this uncertainty, the balance of the equities and the public interest mandate the prudent decision of pausing these treatments—by allowing SB99 to go into effect—at least until a full trial on the merits can be held.

This does not mean that children currently taking puberty blockers or cross-sex hormones have no recourse or treatment options for their gender dysphoria. According to Plaintiffs, "[f]or pre-pubertal children, interventions are directed at supporting the child with family, peers, and at school, as well as supportive individual psychotherapy for the child as needed." (Doc. 60 at ¶ 41.) If providing support, time, and individual psychotherapy works for pre-pubertal children, it can also work for children undergoing puberty. In fact, it is the safest method considering that most children desist and no longer seek "gender-affirming" care when given more time. (Doc. 77 at 9–10.)

The profound nature of the public consequences at issue is abundantly clear. A generation of children are at risk for irreversible and irreparable harm, and the public interest demands that children be protected from these dangers. The District Court erred in finding that this factor favored Plaintiffs. This Court should reverse the preliminary injunction for this reason as well.

III. ANY INJUNCTION SHOULD BE LIMITED TO THE SPECIFIC PATIENT PLAINTIFFS.

Even assuming the District Court were correct in issuing a preliminary injunction (it was not), it nonetheless abused its discretion by crafting a statewide enforcement ban. Judicial remedies should be "limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Specifically, injunctive relief should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 28, 341 Mont. 368, 178 P.3d 696 (citing *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994). "A court order that goes beyond the injuries of a particular plaintiff to enjoin government action against nonparties exceeds the norms of judicial power." *Skrmetti*, 83 F.4th at 490 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)).

The District Court found that "Plaintiffs have provided sufficient evidence to establish that non-parties—specifically those other minors experiencing gender dysphoria like Joanne Doe—will likely be harmed if SB99 goes into effect and treatments for gender dysphoria are proscribed." (Doc. 131 at 45.) However, this contradicts the applicable limitation to enjoin no more of the bill than is necessary to provide relief *to the Plaintiffs*. As shown above, the Court erred in striking the entire bill, because many of its provisions were not even challenged. Further, the

Court had an obligation to limit the injunction to the parties, not to impose a sweeping, state-wide ban. At a minimum, the District Court's overly broad statewide injunction should be reversed on this basis.

IV. THE DISTRICT COURT ERRED IN DISALLOWING LIVE TESTIMONY AT THE PRELIMINARY INJUNCTION HEARING.

The District Court erred in relying solely on affidavits and denying live testimony when the relevant factual issues and evidence were so intensely disputed. An adequate presentation of facts is necessary at a preliminary injunction hearing. *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1442 (9th Cir. 1994). "'The opposing party must be afforded the opportunity to cross-examine the moving party's witnesses and to present evidence.'" *Id*. (quoting *Visual Sciences v. Integrated Communications Inc*., 660 F.2d 56, 58 (2d Cir. 1981). "Like a trial, the purpose of an evidentiary hearing is to resolve disputed issues of fact, or to provide the District Court with a sufficient factual basis for deciding an issue." *Sablan v. Dept. of Fin*., 856 F.2d 1317, 1322 (9th Cir. 1988) (citations omitted).

The facts in this case are sharply disputed, indeed. Plaintiffs contend that providing puberty blockers and cross-sex hormones to minors is safe, effective, reversible, and medically necessary for treating gender dysphoria. (Doc. 50 at 3, 33 and 36.) Defendants vehemently disagree and supported this position with multiple expert reports and declarations from detransitioners, a multitude of scholarly studies, international medical community opinions, and references pulled directly from

Plaintiffs' own medical interest groups. (Doc. 77 at 2–24, 45–47.) With such significant factual issues in dispute—and considering the State's broad authority under its police power to prohibit the harmful treatment at issue—the District Court should have allowed both sides the opportunity for vigorous cross-examination of the other side's evidence and experts.

At the Scheduling Conference, Defendants and Plaintiffs requested significant time to conduct the preliminary injunction hearing. (App. A at 5:17–24; 6:17-18; 7:1-2.) The District Court declined, stating that, "[r]eally, the issue is harm to the plaintiffs if the status quo isn't maintained pending, you know, ultimate resolution of the issues." (*Id*. at 7:14–20.) This statement reveals the District Court's misapprehension of the current preliminary injunction standard, which no longer focuses on maintaining the status quo in the same manner as the old state standard did. *See, e.g., Mont. Democratic Party*, ¶ 20; *Driscoll*, ¶¶ 20, 24; *Planned Parenthood of Mont.*, ¶ 20.

The District Court also did not want "to have a battle of the experts at a preliminary injunction hearing." (*Id*. at 7:25, 8:1.) However, the current preliminary injunction standard requires more than "harm to plaintiffs" and maintaining the status quo—it requires Plaintiffs to establish <u>*all*</u> the elements necessary to obtain a preliminary injunction. To impose a statewide ban, this includes an analysis of

whether the procedures at issue are safe to give to *any* gender dysphoric minor.[23] The remedy to the concern of a "battle of experts" was not to avoid it, but to permit robust cross-examination of all available evidence and testimony. Not only did the Court deny Defendants this opportunity, it also denied them the opportunity to cross-examine the Plaintiffs about their alleged harms—a threshold justiciability question. "Few procedures safeguard accuracy better than adversarial questioning. In the case of competing narratives, 'cross-examination has always been considered a most effective way to ascertain truth.'" *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017) (quoting *Watkins v. Sowders*, 449 U.S. 341, 349, 101 S. Ct. 654, 66 L. Ed. 2d 549 (1981)). The District Court simply accepted Plaintiffs' allegations as true—a prejudicial error and manifest abuse of discretion warranting reversal.

CONCLUSION

Despite profound medical and scientific uncertainty surrounding the safety and efficacy of so-called "gender-affirming" care, proponents and providers continue ushering ill-informed children and their families toward serious adverse and lifelong physical, mental, and emotional consequences. By enacting SB99, the State chose to exercise its police power to safeguard the mental and physical wellbeing of its current generation of children and those to come. The State's age

[23] This analysis is relevant to all the elements—likelihood of success on the merits, irreparable harm, and balance of the equities and public interest.

restriction is a line of demarcation—dividing access between the adults who can better weigh the substantial and inherent risks from the children who cannot. SB99 is rationally related to this legitimate government interest. The District Court erred in finding otherwise. For the many reasons argued above, the District Court's preliminary injunction should be reversed.

DATED this 9th day of February, 2024.

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Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 14,614 words, excluding certificate of service and certificate of compliance.

/s/Michael Noonan
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Dated: 02-09-2024

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23–0572

SCARLET VAN GARDEREN, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

On appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV 2023–541, the Honorable Jason Marks, Presiding

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APPENDIX

Transcript Pages of July 28, 2023 Scheduling Conference …..……..App. A

Order Granting Plaintiffs' Motion for Preliminary Injunction (Doc. 131)…..App. B

APPENDIX A

office. So I just want to begin by, you know, acknowledging that plaintiffs are in agreement with The Court that we don't think an evidentiary hearing is necessary and that The Court is more than able to resolve the motion on briefs, declarations and with oral argument from counsel for the parties. The defendants had informed -- is somebody -- the defendants had informed us that they intended to request an evidentiary hearing and so we wanted to ensure that if the defendants were permitted to present evidence at any such hearing that we would also have an opportunity to present evidence, as well. And so we, at this stage, are really, you know, at the discretion of The Court as to whether an evidentiary hearing is necessary. We are certainly able to present evidence at a hearing if The Court deems it is.

THE COURT: Fair enough. Mr. Johnson, it sounds like I need to hear from you on this issue then.

MR. JOHNSON: Yes, you do. I think an evidentiary hearing is essential in this case. This is cutting edge medical science right now. And it is absolutely at the crux of everybody's thoughts across the world right now. And I -- just relying upon declarations would not -- would not serve justice with regard to The State, Your Honor. I think it will take four hours. I will take whatever time you give us and we'll maximize it and we'll split it equally and make it work.

I work with Alex a ton and we get along very well

and I've worked with Ms. Picasso, as well. And we will work well together and put it on and you just tell us how much time you can give us.

THE COURT: Well, let's talk a little bit more about the evidentiary issue because obviously, I mean, we're going to have a trial on the merits one way or the other down the road. So that's not what we're doing at the preliminary injunction stage. So can you give me an outline of what you would want to present in terms of evidence at a hearing?

MR. JOHNSON: We would have probably three experts and a very limited amount of material with regard to the experts. We would also have some declarations as well from some witnesses. So I would say -- I would anticipate three experts that I would be extremely efficient with.

MS. PICASSO: Your Honor, I apologize.

THE COURT: No, go ahead.

MS. PICASSO: If I may, I think initially we had proposed four hours just because, as I mentioned, it's an evidentiary hearing on the PI and Montana seems a little bit out of the norm for us but we had recently participated or my co-counsel from the ACLU of Montana had recently participated in such an evidentiary hearing and it was able to be completed within four hours.

However, upon further reflection of, you know, looking at who all we would need to call and present at the

hearing, we do think it would require certainly more than four hours, likely eight at the minimum. And our thinking is we would want to present our expert, plaintiffs' experts as well, and there are two at this point. And we would also -- it is important to us that our clients, the plaintiffs be afforded an opportunity to, you know, provide live testimony to The Court about the impact of the SB99 will have on their lives were it to go into effect. And that, I imagine, will take at least an hour, at bare minimum, an hour for each of the plaintiffs and we wouldn't be asking for all of the plaintiffs to testify. But certainly several of them. And so that in and of itself would be, you know, two to three hours of just plaintiff testifying, not including direct examination.

THE COURT: Well, I'm going to make this simple. I'm not taking expert testimony at a preliminary injunction hearing. The issue isn't the merits of the science or, you know, some of these other things that are perfectly appropriate for, you know, full trial on the matter. Really, the issue is harm to the plaintiffs if the status quo isn't maintained pending, you know, ultimate resolution of the issues. So I think unless, you know, there's a compelling argument otherwise, I think that can be done through affidavits and has been done through affidavits, you know, they have attached to the motion for the preliminary injunction, affidavits from plaintiffs. And I am not going to have a battle of the experts

at a preliminary injunction hearing. We can do that at the final hearing in the case. So --

MR. JOHNSON: Your Honor, I hate to interrupt. Would you be willing to read the experts' depositions, because cross-examination is critical with regard to this science or lack thereof, frankly.

THE COURT: Well, let me put it this way, Mr. Johnson, I will read whatever you want to attach to your response. And you can attach whatever you like. And if there's, you know, a need for, given what it sounds like you're going to present, if the plaintiffs feel a need to supplement what they have attached to their motion, you know, they certainly have leave to do that. But I'm not -- I'm going to be focused on the proper issues regarding the preliminary injunction, not the ultimate resolution. So you can, I guess, plan your strategy accordingly.

MR. JOHNSON: Okay. With all due respect the standard now is the federal standard and the likelihood of success on the merits is one of the elements.

THE COURT: I understand that and it's fine for you to, you know, attach what you feel like I need to review. But I want to be clear, we don't have a trial before the trial with a preliminary injunction, even under the federal standard so plan accordingly. So with that, do you think we could have argument within two hours?

APPENDIX B

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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

SCARLET VAN GARDEREN, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Dept. No. 4 Cause No. DV-23-541 **ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

This matter comes before the Court on Scarlet van Garderen et al.'s (collectively "Plaintiffs") *Motion for Preliminary Injunction* ("*Motion*") (Doc. 49). The Court has considered Plaintiffs' *Motion*, the corresponding Brief in Support (Doc. 50), the State of Montana et al.'s (collectively "Defendants") Brief in Opposition (Doc. 77), and Plaintiffs' Reply thereto (Doc. 120). Additionally, the Court heard oral argument on this matter on September 18, 2023. The Court is fully informed and prepared to rule.

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ORDERS

(1) The Court hereby GRANTS Plaintiffs' *Motion*.

(2) The Court hereby ORDERS the parties to file a proposed scheduling order within 21 days of the filing of this order, including the number of days needed for trial.

MEMORANDUM

I. INTRODUCTION

The Montana State Legislature recently passed Senate Bill 99 ("SB 99"), entitled the "Youth Health Protection Act," as part of the 68th Legislative Session. SB 99 bans certain medical treatments for minors who experience gender dysphoria. It is set to take effect on October 1, 2023. This case was initiated on May 9, 2023, when Plaintiffs filed a complaint seeking declaratory and injunctive relief against Defendants and challenging the constitutionality of SB 99. Plaintiffs' *Motion* seeks to enjoin Defendants from enforcing SB 99.

II. BACKGROUND

The following facts are generally derived from the declarations, expert reports, exhibits, and testimony submitted to the Court.

A. Montana Senate Bill 99

SB 99 reads as follows:

> Section 4. Prohibitions. (1)(a) Except as provided in subsection (1)(c), a person may not knowingly provide the following medical treatments to a female minor to address the minor's perception that her gender or sex is not female:

(i) surgical procedures, including a vaginectomy, hysterectomy, oophorectomy, ovariectomy, reconstruction of the urethra, metoidioplasty, phalloplasty, scrotoplasty, implantation of erection or testicular protheses, subcutaneous mastectomy, voice surgery, or pectoral implants;

(ii) supraphysiologic doses of testosterone or other androgens; or

(iii) puberty blockers such as GnRH agonists or other synthetic drugs that suppress the production of estrogen and progesterone to delay or suppress pubertal development in female minors.

(b) Except as provided in subsection (1)(c), a person may not knowingly provide the following medical treatments to a male minor to address the minor's perception that his gender or sex is not male:

(i) surgical procedures, including a penectomy, orchiectomy, vaginoplasty, clitoroplasty, vulvoplasty, augmentation mammoplasty, facial feminization surgery, voice surgery, thyroid cartilage reduction, or gluteal augmentation;

(ii) supraphysiologic doses of estrogen; or

(iii) puberty blockers such as GnRH agonists or other synthetic drugs that suppress the production of testosterone or delay or suppress pubertal development in male minors.

(c) The medical treatments listed in subsections (1)(a) and (1)(b) are prohibited only when knowingly provided to address a female minor's perception that her gender or sex is not female or a male minor's perception that his gender or sex is not male. Subsections (1)(a) and (1)(b) do not apply for other purposes, including:

(i) treatment for a person born with a medically verifiable disorder of sex development . . . .

(ii) treatment of any infection, injury, disease, or disorder that has been caused or exacerbated by a medical treatment listed in subsection (1)(a) or (1)(b), whether or not the medical treatment was performed in accordance with state and federal law and whether or not funding for the medical treatment is permissible under state and federal law.

S. 99, 2023 Leg., 68th Sess., Reg. Sess. § 4(1)(a)–(c) (Mont. 2023).

In addition to prohibiting certain medical treatments when related to a minor's gender or sex perception, SB 99 also contains directives for health care professionals' licensing entities and disciplinary review boards:

> (2) If a health care professional or physician violates subsection (1)(a) or (1)(b):
>
> (a) the health care professional or physician has engaged in unprofessional conduct and is subject to discipline by the appropriate licensing entity or disciplinary review board . . . . That discipline must include suspension of the ability to administer health care or practice medicine for at least 1 year.

Id., § 4(2)(a). Subsection (2)(b) further states that "parents or guardians of the minor subject to the violation have a private cause of action . . . ." *Id.*, § 4(2)(b).

Finally, subsections (3)–(11) of § 4 contain additional prohibitions and warnings, including but not limited to: public funds may not be directly or indirectly used for the purposes of providing the medical treatments listed in subsections (1)(a) and (1)(b); Montana Medicaid and children's health insurance programs may not reimburse or provide coverage for the treatments prohibited in subsections (1)(a) and (1)(b); state property, facilities, and buildings may not be knowingly used to provide the treatments prohibited in subsections (1)(a) and (1)(b); and the attorney general may bring actions to enforce compliance. *Id.*, § 4(3), (6), (9), (11). Subsection (4) specifically states: "any individual or entity that receives state funds to pay for or subsidize the treatment of minors for psychological conditions, including gender

dysphoria, may not use state funds to promote or advocate the medical treatments prohibited in subsection (1)(a) or (1)(b)." *Id.*, § 4(4).

B. Terminology

At birth, infants are generally assigned a sex—male or female—based on their external genitalia, internal reproductive organs, and chromosomal makeup. Expert Report of Michael K. Laidlaw, M.D., ¶¶ 14–15 (Doc. 78) [hereinafter "Laidlaw Rep."]. "Sex" is a "distinct biological classification that is encoded in every person's DNA"[1] and "makes us male or female." Laidlaw Rep., ¶¶ 13–16. "Gender" is the "social and cultural concept" referring to the "roles, behaviors, and identities that society assigns to girls and boys, women and men, and gender-diverse people."[2]

"Gender identity" refers to a person's "subjective feelings" about their "core sense of belonging to a particular gender." Declaration of James Cantor, PhD, ¶ 107 (Doc. 79) [hereinafter "Cantor Decl."]; Expert Report of Olson-Kennedy, M.D., M.S., ¶¶ 24, 27, (Doc. 59) [hereinafter "Olson-Kennedy Rep."]. As SB 99 recognizes, "[a]n individual's gender may or may not align with the individual's sex." S. 99, § 3(3). The term "cisgender" refers to a person whose gender identity matches their sex assigned at birth. Olson-Kennedy Rep., ¶ 28. The term

[1] Nat'l Inst. of Health, Office of Research on Women's Health, *How Sex and Gender Influence Health and Disease*, available at https://perma.cc/9EP5-MXK8 (last visited Sept. 19, 2023); *see also* Mont. S. 99, § 3(2) (defining "sex").

[2] Nat'l Inst. of Health, *How Being Male or Female Can Affect Your Health*, NIH News in Health, available at https://perma.cc/CJM3-ZZP4 (last visited Sept. 19, 2021).

"transgender" refers to a person whose gender identity is not congruent with their sex assigned at birth. *Id.*, ¶¶ 28, 29. This incongruence can lead to clinically significant distress, a diagnosable condition termed "gender dysphoria." *Id.*

SB 99 defines gender dysphoria as "the condition defined in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition" ("DSM-5"). S. 99, § 3(3). The DSM-5 gives the following criteria for gender dysphoria:

> A marked incongruence between one's experienced/expressed gender and natal gender of at least 6 months in duration, as manifested by at least two of the following:
>
> A. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics)[;]
>
> B. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics)[;]
>
> C. A strong desire for the primary and/or secondary sex characteristics of the other gender[;]
>
> D. A strong desire to be of the other gender (or some alternative gender different from one's desired gender)[;]
>
> E. A strong desire to be treated as the other gender (or some alternative gender different from one's designated gender[;]
>
> F. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's desired gender)[.]

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Text Revision*, at 512–513 (5th, ed. 2022).

C. Parties

Plaintiffs are: two transgender minors, Scarlet van Garderen, a 17-year-old who currently receives treatment banned by SB 99, and Phoebe Cross, a 15-year-old who currently receives treatment banned by SB 99 ("Youth Plaintiffs"); their parents, Jessica and Ewout van Garderen and Molly and Paul Cross, respectively, along with John and Jane Doe, parents of non-party Joanne Doe, a 15-year-old transgender minor who currently receives treatment banned by SB 99 ("Parent Plaintiffs"); and Dr. Juanita Hodax, a pediatric endocrinologist who provides treatments banned by SB 99, with Dr. Katherine Mistretta, a Board Certified Family Nurse Practitioner, an Advanced Practice Registered Nurse, and a Doctor of Nursing Practice, who also provides treatments banned by SB 99 ("Provider Plaintiffs").

Defendants are: the State of Montana; Governor Gregory Gianforte, in his official capacity as Governor of the State of Montana; Attorney General Austin Knudsen, in his official capacity as Attorney General for the State of Montana; the Montana Board of Medical Examiners, the entity that governs medical licensing and regulation of medical practices within the State of Montana; the Montana Board of Nursing, the entity that governs licensing and regulation of nursing practices within the State of Montana; the Montana Department of Public Health and Human Services ("DPHHS"), the governmental entity responsible for administering the

State of Montana's Medicaid Program and Healthy Montana Kids Children's Health Insurance Plan; and Charles Brereton, in his official capacity as Director of DPHHS.

D. Standards of Care for Treatment of Gender Dysphoric Minors

The parties both filed extensive evidence, including expert reports, regarding gender dysphoria and the applicable standard of care.

i. Plaintiffs' Argument

Plaintiffs contend that there is wide acceptance in the medical community that the treatments proscribed by SB 99 are safe, effective, and often medically necessary to treat adolescents with gender dysphoria. Olson-Kennedy Rep., ¶¶ 32, 34. Specifically, Plaintiffs cite the World Professional Association for Transgender Health's ("WPATH") Standards of Care Version 8 as the accepted and appropriate standard of care for the assessment, diagnosis, and treatment of gender dysphoria. Olson-Kennedy Rep., ¶ 31. These treatments are generally referred to as "gender transition," "transition-related care," or "gender-affirming care."

The WPATH standards of care are cited by both parties at various points in their respective briefs. The key concepts, as discussed by the parties' experts, include recommended treatment for minors experiencing gender dysphoria and the importance of individualized care and informed consent. Treatment in the form of puberty-delaying medicine and cross-sex hormones are discussed at length.

Plaintiffs argue that treatment for gender dysphoria differs depending on an individual's needs, and the guidelines for medical treatment for gender dysphoria differ depending on whether the patient is a minor or an adult. Olson-Kennedy Rep., ¶¶ 34, 36; Danielle N. Moyer, Ph.D., ¶ 23 (Doc. 58) [hereinafter "Moyer Decl."]. No medical intervention beyond mental health counseling is recommended or provided to any person before the onset of puberty. Olson-Kennedy Rep., ¶ 35; Moyer Decl., ¶ 23. Medical interventions may become necessary and appropriate once a transgender person reaches puberty. Olson-Kennedy Rep., ¶ 35. Further, before any medical intervention is pursued, a qualified provider with training and experience in the field of gender dysphoria in adolescents should assess the individual to ensure medical treatment is appropriate. Moyer Decl., ¶ 22. Informed consent must also be obtained before engaging in gender-affirming care, which includes a careful review of potential risks and benefits of specific treatments with the minor and their guardian. Olson-Kennedy Rep., ¶¶ 51, 66–73.

The use of puberty-delaying medicine is one recommended treatment for gender dysphoria in adolescents at the beginning of puberty. The WPATH standard of care recommends considering providing puberty-delaying medical treatment at the earliest sign of the beginning of puberty. *Id.*, ¶¶ 38–39. Puberty-delaying medications are known as "puberty blockers," which refers broadly to gonadotropin-releasing hormone (GnRGH) agonist treatment. *Id.*, ¶ 38; Moyer Decl., ¶ 24.

Puberty-delaying medical treatment is temporary and reversible: if an adolescent discontinues the medication, puberty consistent with their assigned sex at birth will resume. Olson-Kennedy Rep., ¶ 38. Puberty blockers "can significantly alleviate and prevent worsening distress of gender dysphoria that frequently comes with puberty." *Id.*, ¶ 48. Next, gender-affirming hormone therapy, or cross-sex hormones, is another recommended treatment for gender dysphoria in adolescents under the WPATH standard of care. *Id.*, ¶ 50. Gender-affirming hormone therapy involves administering steroids, e.g., estrogen or testosterone. *Id.* As with the use of puberty blockers, evidence shows that gender-affirming hormone therapy can greatly ameliorate symptoms of gender dysphoria. *Id.*, ¶¶ 52–60; Moyer Decl., ¶ 25. Finally, although surgeries are a recognized form of gender-affirming care for minors under the WPATH standard of care, they are rarely recommended; however, surgery may be necessary in individual circumstances. Olson-Kennedy Rep., ¶ 63.

Plaintiffs point out that puberty blocking medication is routinely prescribed to non-transgender minor patients. *Id.*, ¶ 39; *see also* Declaration of Provider Plaintiff Juanita Hodax, MD, ¶ 12 (Doc. 51) [hereinafter "Hodax Decl."]; Declaration of Provider Plaintiff Katherine Mistretta, DNP, APRN, FNP-BC, ¶ 11 (Doc. 54) [hereinafter "Mistretta Decl."]. For example, these medications are used to treat central precocious puberty and symptoms of polycystic ovarian syndrome ("PCOS"). Olson-Kennedy Rep., ¶ 68; Hodax Decl., ¶ 12; Mistretta Decl., ¶ 11.

Additionally, hormone therapy is routinely used to treat non-transgender minor patients. Olson-Kennedy Rep., ¶ 39. For example, hormone therapy is regularly used to treat hypoglandism and Turner syndrome. *Id.*, ¶ 69; Hodax Decl., ¶ 12.

Finally, Plaintiffs argue that if gender dysphoria is left untreated it can result in significant lifelong distress, clinically significant anxiety and depression, self-harming behaviors, and an increased risk of suicidality. Moyer Decl., ¶ 20. SB 99 proscribes transgender minors from accessing—and healthcare workers from providing—gender-affirming care in the form of puberty blockers, hormone therapy, and surgeries. "Adolescents with gender dysphoria who experience barriers to appropriate medical care, delays in receiving care, or interruptions in care are at risk for significant harm." Olson-Kennedy Rep., ¶ 28. Additionally, "[p]reventing timely medical care puts adolescents at risk for prolonged gender dysphoria, worsening mental health and suicidality . . . ." *Id.* Youth Plaintiffs have stated that they would fear for their own safety if their care is taken away. *See* Declaration of Scarlet van Garderen, ¶¶ 13–14 (Doc. 57) [hereinafter "Scarlet Decl."] ("I do not believe I could live without the gender-affirming care I am now receiving."); *see also* Declaration of Phoebe Cross, ¶¶ 11, 21 [hereinafter "Phoebe Decl."] (Doc. 56) ("Taking away this care would leave me fearful for my life.").

ii. Defendants' Argument

Defendants argue that the treatment outlined by the WPATH standard of care is harmful to minors, unsupported by evidence-based medicine, and not in line with international approaches. First, as to harm, Defendants argue the following are potential harms associated with administering puberty blockers and cross-sex hormones to adolescents: sterilization; loss of capacity for breast-feeding; lack of orgasm and sexual function; interference with neurodevelopment and cognitive development; harms associated with delayed puberty; elevated risk of Parkinsonism in adult females; reduced bone density; short-term side effects like leg pain, headache, mood swings, and weight gain; and long-term side effects like unfavorable lipid profiles. Cantor Decl., ¶¶ 201–224; *see also* Laidlaw Rep., ¶¶ 90–115, 156. Defendants also argue that the surgeries proscribed by SB 99 are dangerous to minors and that the treatments banned by SB 99 are experimental and could result in irreversible effects.

Second, as to Defendants' argument that there is a lack of evidence supporting gender-affirming therapy, they argue there is not a medical consensus supporting the use of puberty blockers and cross-sex hormones for the treatment of gender dysphoria in adolescents. Laidlaw Rep., ¶ 177. They further argue that WPATH is an advocacy organization seeking to promote "social and political activism" and that it did not conduct systematic reviews of safety and efficacy in establishing clinical

guidelines, without which the risk:benefit ratio posed by medicalized transition of minors cannot be assessed. *Id.*, ¶¶ 179–183; Cantor Decl., ¶¶ 87, 92–102.

Finally, Defendants place much emphasis on their assertion that the international community has retreated from gender-affirming care and argue that other treatments, like "watchful waiting," are more appropriate for treating gender dysphoria. Defendants describe "watchful waiting" as a compassionate, effective, less risky approach to treating gender dysphoria, comprised of therapy and "harnessing a support network." Expert Declaration of Dr. Geeta Nangia, ¶ 164 (Doc. 87). This dovetails with Defendants' arguments regarding informed consent and "desistance." As to informed consent, Defendants argue that true informed consent cannot be obtained in these circumstances because children are impulsive, seek immediate gratification, and cannot fully understand the consequences of possible long-term issues like infertility or "sacrificing ever experiencing orgasm[,]" making watchful waiting the better approach. Defs. Br. in Opp., at 20–21; Cantor Decl., ¶ 234. As to desistance, which is the term used to describe the discontinuation of gender dysphoria as a child progresses into adulthood, Defendants argue that the majority of gender dysphoric minors will desist, and that providing gender-affirming care makes this less likely. Cantor Decl., ¶¶ 58, 114–115. In sum, the bulk of Defendants' arguments center around the purported experimental status of the

treatments proscribed by SB 99 and the safety risks those treatments create for minors.

iii. Plaintiffs' Reply

Plaintiffs raised questions about Defendants' experts' qualifications to opine on the subject of gender-affirming care, citing a lack of relevant qualifications and experience, as well as the mischaracterization of treatments for gender dysphoria. They also argue that Defendants' evidence cannot overcome the first-hand accounts of Youth Plaintiffs as to the enormous benefits they have personally experienced from receiving gender-affirming care.

E. Senate Bill 422

The Montana State Legislature also recently passed Senate Bill 422 ("SB 422"), entitled the "An Act Expanding the Right to Try Act," as part of the 68th Legislative Session. SB 422 states: "A manufacturer of an investigational drug, biological product, or device may make the drug, product, or device available to a patient who has requested the drug, product, or device pursuant to this part." S. 422, 2023 Leg., 68th Sess., Reg. Sess. § 2(1) (Mont. 2023). "Investigational drug, biological product, or device" is defined as "a drug, biological product, or device that: (a) has successfully completed phase 1 of a clinical trial but has not yet been approved for general use by the United States food and drug administration; and (b)

remains under investigation in a United States food and drug administration-approved clinical trial." *Id.*, § 1(3). Regarding patients, SB 422 states:

> A patient is eligible for treatment with an investigational drug, biological product, or device if the patient has:
>
> (1) considered all other treatment options currently approved by the United States food and drug administration;
>
> (2) received a recommendation from the patient's treating health care provider for an investigational drug, biological product, or device;
>
> (3) given written informed consent for the use of the investigational drug, biological product, or device; and
>
> (4) documentation from the treating health care provider that the patient meets the requirements of this section.

Id., § 3.

Additionally, SB 422 contemplates informed consent in the context of minors: "A patient or a patient's legal guardian must provide written informed consent for treatment with an investigational drug, biological product, or device" and informed consent must be signed by "a parent or legal guardian, if the patient is a minor[.]" *Id.*, § 4(1), (4)(a)(ii). SB 422 goes on to describe what the minimum requirements are for written informed consent. *Id.*, § 4(2)(a)–(g). Finally, SB 422 prohibits State action: "An official, employee, or agent of the state of Montana may not block a patient's access to an investigational drug, biological product, or device." *Id.*, § 8(1).

F. Procedural History

On May 9, 2023, Plaintiffs filed a complaint seeking declaratory and injunctive relief against Defendants and challenging the constitutionality of SB 99. The complaint was amended on July 17, 2023. Plaintiffs allege six constitutional violations. First, Plaintiffs allege SB 99 unconstitutionally burdens the rights of transgender minors in Montana to receive critical, medically necessary health care, while allowing the same treatments when provided to minors for other purposes, in violation of the Equal Protection Clause (Count I). Second, Parent Plaintiffs allege SB 99's prohibition on medical treatments for minors with gender dysphoria is directly at odds with their right to make decisions concerning the care of their children in violation of their fundamental right to parent (Count II). Third, Plaintiffs allege SB 99 violates patients' right to privacy by limiting their ability to make medical decisions in concert with their guardians and by intruding on the private relationship between a patient and their healthcare provider (Count III). Fourth, Plaintiffs allege SB 99 unconstitutionally burdens the right to seek and obtain medical care (Count IV). Fifth, Plaintiffs allege SB 99 violates patients' right to dignity by threatening and demeaning the humanity and identity of transgender individuals (Count V). Finally, Plaintiffs allege that SB 99 impermissibly burdens freedom of speech and expression by restricting the rights of persons like Provider

Plaintiffs to promote the treatments prohibited by SB 99, as well as the rights of patients to receive such information (Count VI).[3]

On July 17, 2023, Plaintiffs filed the *Motion* at issue seeking a preliminary injunction to enjoin Defendants—along with their agents, employees, representatives, and successors—from enforcing SB 99 once it goes into effect on October 1, 2023. Briefing in the *Motion* concluded on September 15, 2023. Oral argument was held on September 18, 2023. Defendants filed their rebuttal expert declarations on September 22, 2023. Prior to issuing this order, the Court considered all evidence in the record, including the rebuttal expert reports from both parties.

III. PRELIMINARY INJUNCTION STANDARD

In 2023, the Montana Legislature amended Mont. Code Ann. § 27-19-201, which is the statute codifying the circumstances under which courts can grant injunctive relief, via Senate Bill 191 ("SB 191"). The standard was revised to "mirror the federal preliminary injunction standard," and a plain reading of SB 191 makes clear it was "the intent of the legislature that . . . the interpretation of [the new standard] closely follow United States supreme court case law." S. 422, 2023 Leg., 68th Sess., Reg. Sess. § 1(4) (Mont. 2023). Now, Montana courts may grant a preliminary injunction when an applicant establishes: "(a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the

[3] The Court only addresses Counts I and III in this order.

absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." *Id.*, § 1; *cf. Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).[4]

"The applicant for an injunction . . . bears the burden of demonstrating the need for an injunction order." Mont. S. 191, § 1(3). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 9. The United States Supreme Court has made clear that "[c]rafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 579 (2017).

A preliminary injunction hearing has a "limited purpose . . . to preserve the relative positions of the parties until a trial on the merits can be held." *Univ of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Am. Fed. of Gov't Emps., Local 1857 v. Wilson*, 1990 U.S. Dist. LEXIS 15207, No. Civ. S-89-1274 LKK, at *36 (E.D. Cal. July 9, 1990) (stating a preliminary injunction hearing "is not a trial on the merits . . . . a motion for a preliminary injunction['s] . . . purpose . . . is to maintain

[4] The Court recognizes that Plaintiffs utilize the sliding scale approach employed by the Ninth Circuit. Although the United States Supreme Court has not disaffirmed that approach, it also has not explicitly ratified it. Therefore, the Court will use the conjunctive standard as set forth by the State as it carries a higher burden and more closely reflects the approach used by the United States Supreme Court and the plain language of SB 191. The Court notes, however, that the legislative history of SB 191 suggests that the Ninth Circuit standard (making the standard the same in Montana regardless of whether an injunction was sought in state or federal court) was what was contemplated by SB 191's sponsor.

the status quo pending a final judgment on the merits."). Evidence is required even though a preliminary injunction hearing is not a trial on the merits of an issue: "Upon the hearing each party may present affidavits or oral testimony." Mont. Code Ann. § 27-19-303 (2023). Here, due to time constraints and the complex nature of medical evidence, the Court directed the parties to submit their evidence via affidavit. The Court received and reviewed the extensive evidence that was submitted in this matter. Prior to oral argument Defendants affirmed they had no evidence in the form of oral testimony that would be different from what was submitted.

IV. ANALYSIS

A. Plaintiffs are Likely to Succeed on the Merits

i. Count I – Violation of the Equal Protection Clause

"The Fourteenth Amendment to the United States Constitution and Article II, Section 4 of the Montana Constitution guarantee equal protection of the law to every person." *Hensley v. Mont. State Fund*, 2020 MT 317, ¶ 18, 402 Mont. 277, 477 P.3d 1065 (citing *Powell v. State Comp. Ins. Fund*, 2000 MT 321, ¶ 16, 302 Mont. 518, 15 P.3d 977). "Article II, Section 4 of the Montana Constitution provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445 (citing *Cottrill v. Cottrill Sodding Service*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987)). "The principal purpose of the Equal

Protection Clause is 'to ensure that Montana's citizens are not subject to arbitrary and discriminatory state action.'" *Hensley*, ¶ 18 (quoting *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 15, 382 Mont. 356, 368 P.3d 1131); *see also Powell*, ¶ 16.

"This Court evaluates potential equal protection violations under a three-step process." *Hensley*, ¶ 18 (citing *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 15, 353 Mont. 265, 222 P.3d 566). "First, the Court identifies the classes involved and determines if they are similarly situated. Second, the Court determines the appropriate level of scrutiny to apply to the challenged statute. Third, the Court applies the appropriate level of scrutiny to the statute." *Hensley*, ¶ 18 (citing *Satterlee*, ¶¶ 15, 17, 18) (internal citations omitted).

1. Whether the Classes are Similarly Situated

First, the Court identifies similarly situated classes "by isolating the factor allegedly subject to impermissible discrimination; if two groups are identical in all other respects, they are similarly situated." *Hensley*, ¶ 19 (citing *Snetsinger*, ¶ 27). Plaintiffs argue that SB 99 classifies based on sex and transgender status, and that "[t]ransgender and non-transgender adolescents in Montana seeking health care of the type potentially subject to [SB 99] are similarly situated for equal protection purposes." Pls.' Br. in Supp., at 18, 20. Defendants argue that "[g]ender dysphoric minors who seek experimental treatment to transition suffer from a *psychological*

condition and are not similarly situated to minors who need hormonal treatments due to a *physical* disorder in sexual development." Defs.' Br. in Opp., at 34 (Doc. 77) (emphasis in original).

Here, SB 99 bars the provision of certain medical treatments only when provided "to address a female minor's perception that her gender or sex is not female or a male minor's perception this his gender or sex is not male." Mont. S. 99, § 4(1)(c). Given the definition of "transgender," a person whose gender identity is not congruent with their sex assigned at birth, the language of SB 99 classifies based directly on transgender status. *See* Olson-Kennedy Rep., ¶ 28. Accordingly, the classes at issue here are: (1) minors who identify as transgender in Montana; and (2) all other minors in Montana. If these two groups are identical in all other respects, they are similarly situated. *See Hensley*, ¶ 18. That is the case here. SB 99 addresses "female minors" and "male minors." If the language classifying minors based on their gender perception is removed, the two groups are identical in all other respects: they are Montanans who are under the age of 18.

The Court is not persuaded by Defendants' argument that the two classes are not similarly situated based on a distinction between a psychological condition versus a physical disorder. Both are medical conditions. The parties agree that gender dysphoria is a diagnosable condition, and even Defendants' experts seem to

believe treatment for gender dysphoria is *medical* care.[5] Transgender minors seeking the treatments proscribed by SB 99 do so for *medical* reasons—to treat gender dysphoria—and based on the advice offered by their healthcare providers. Their cisgender counterparts also seek these treatments for *medical* reasons—such as central precocious puberty, hypogonadism, PCOS—and on the advice of their healthcare providers. Physical conditions, like cysts on ovaries or ataxia, and psychological conditions, like depression or Alzheimer's disease, are all health issues that may require the aid of a medical professional.

Further, "every major expert medical association recognizes that gender-affirming care for transgender minors may be medically appropriate and necessary to improve the *physical and mental health* of transgender people." *Brandt v. Rutledge*, 551 F. Supp. 3d 882, at 891 (E.D. Ark. 2021), *aff'd*, 47 F.4th 661 (8th Cir. 2022) (emphasis added) (enjoining defendants from enforcing an Arkansas law similar to SB 99 and specifically holding plaintiffs were likely to succeed on the merits of their equal protection claim). Therefore, Defendants' argument that is premised on a distinction between physical conditions and psychological conditions fails as it relates to whether classes are similarly situated because both are medical

[5] *See* Response of Michael K. Laidlaw, M.D., to Rebuttal Reports of Plaintiffs' Expert Witnesses, ¶ 2 (Doc. 127) (stating: "Dr. Olson-Kennedy at times discusses the 'clinical care of children, adolescents, or adults with gender dysphoria' as though it is somehow divorced and separate from the rest of medical and endocrine care.")

conditions and because gender dysphoria does not solely relate to mental health, it also relates to physical health.

2. Which Level of Scrutiny Applies

Second, the Court determines which of the three levels of scrutiny—strict scrutiny, middle-tier scrutiny, or the rational basis test—to apply to the challenged statute. *Hensley*, ¶ 18 (citing *Satterlee*, ¶¶ 15, 17, 18). "[W]here the legislation at issue infringes upon a fundamental right or discriminates against a suspect class. . . strict scrutiny [is applied] . . . ." *Powell*, ¶ 17. "[W]here the right in question has its origin in the Montana Constitution, but is not found in the Declaration of Rights, we employ a middle-tier scrutiny." *Id.*, ¶ 18. Finally, "where the right at issue is neither fundamental nor warrants middle-tier scrutiny, we review the challenge under the rational basis test." *Id.*, ¶ 19.

Plaintiffs argue that SB 99 discriminates against a suspect class—both sex and transgender status—and infringes upon several fundamental rights—e.g., the right to privacy—making strict scrutiny the appropriate standard. Pls.' Br. in Supp., at 19–26, 28. Defendants argue that SB 99 does not discriminate based on sex because its prohibitions apply equally to male and female children as it bars all minors, "regardless of sex," from pursuing certain medical treatments "for the purpose of gender transition." Defs.' Br. in Opp, at 33. Defendants also argue that no fundamental right is infringed.

First, the Court turns to the question of whether SB 99 discriminates against a suspect class. "[W]here the legislation at issue discriminates against a suspect class. . . strict scrutiny [is applied] . . . ." *Powell*, ¶ 17. The Court has determined that SB 99 discriminates based on transgender status. The United States Supreme Court has held that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020) (holding that Title VII of the Civil Rights Act of 1964 protects employees against discrimination because they are gay or transgender). The *Bostock* Court provided a useful example:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id., 140 S. Ct. at 1741–42. Accordingly, the Court is unpersuaded by Defendants' argument that SB 99 does not discriminate based on sex simply because it proscribes both minor females and minor males from receiving gender-affirming care. As in the *Bostock* example, under SB 99, a minor's sex plays an "unmistakable and impermissible role" in the determination of who may receive certain treatments. *Id.*

Therefore, because SB 99 classifies based on transgender status, it inherently classifies based on sex.[6]

The Montana Supreme Court has not yet explicitly identified the level of scrutiny applicable to classifications that are sex-based, nor has it explicitly stated that sex is a suspect class.[7] Federal courts and the United States Supreme Court have applied "heightened scrutiny" when an equal protection claim involves gender-based or sex-based discrimination. *See J.E.B. v. Ala. ex re. T.B.*, 511 U.S. 127, 135 (1994) (citing *Reed v. Reed*, 404 U.S. 71 (1971)) ("Since [1971], this Court consistently has subjected gender-based classifications to heightened scrutiny . . . ."); *United States v. Virginia*, 518 U.S. 515, 555 (1996); *Bostock*, 140 S. Ct. at 1783 (2020) (citing *Sessions v. Morales-Santana*, 582 U.S. 47, 57–58 (2017)) (Alito & Thomas, JJ.,

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[6] This determination is in line with decisions by courts around the country faced with similar cases. *See Brandt*, 47 F.4th at 669 (holding a similar Arkansas law discriminated on the basis of sex because the minor's sex at birth determined whether or not the minor could receive certain types of medical care under the law); *Koe v. Noggle*, No. 1:23-CV-2904-SEG, ___ F.Supp.3d___ , at *41–42, 2023 U.S. Dist. LEXIS 147770 (N.D. Georgia Aug. 20, 2023) (holding a similar Georgia law drew distinctions based on both natal sex and gender nonconformity and "classifie[d] on the basis of birth sex.").

[7] A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). First, the Court notes that non-binding Montana precedent has suggested that "[l]aws based on gender orientation are palpably sex-based and are, therefore, suspect classifications . . . ." and that unequal treatment based on gender is sex-based and inherently suspect. *Snetsinger*, ¶¶ 83, 87 (Nelson, J., concurring). Second, the Court believes that transgender persons comprise a suspect class, but the Court declines to fully engage in this analysis as it finds SB 99 discriminates based on sex. To note, the Ninth Circuit has also held that discrimination against transgender individuals is a form of gender-based discrimination subject to intermediate scrutiny. *See, e.g., Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (9th Cir. 2015) ("discrimination based on transgender status independently qualifies as a suspect classification under the Equal Protection Clause because transgender persons meet the indicia of a 'suspect' or 'quasi-suspect classification' identified by the Supreme Court.").

dissenting) (stating "the Equal Protection Clause prohibits sex-based discrimination unless a 'heightened' standard of review is met").

Although the Montana Supreme Court has declined to explicitly label sex or gender a suspect class, if heightened scrutiny is the appropriate level of review when the federal Equal Protection Clause is implicated, the Court posits that strict scrutiny is the appropriate level of review when Montana's Equal Protection Clause is implicated. Again, "Montana's equal protection clause 'provides for even more individual protection' than does the federal equal protection clause . . . ." *Snetsinger*, ¶ 58 (quoting *Cottrill*, 229 Mont. at 42, 744 P.2d at 897) (Nelson, J., concurring).

A comparison between "heightened scrutiny" in the federal system and "middle-tier" scrutiny in Montana supports this outcome. Under the heightened scrutiny standard, "[s]uccessful defense of legislation that differentiates on the basis of gender . . . requires an 'exceedingly persuasive justification.'" *Sessions*, 582 U.S. at 58 (citing *Virginia*, 518 U.S. at 531); *see also J.E.B.*, 511 U.S. at 136. Stated differently, the classification must "substantially further an important government interest." *J.E.B.*, 511 U.S. at 160 (Rehnquist, J., dissenting). Dissimilarly, middle-tier scrutiny "requires the State to demonstrate that its classification is reasonable and that its interest in the classification is greater than that of the individual's interest in the right infringed." *Powell*, ¶ 19. Thus, middle-tier scrutiny imposes a standard lower than heightened scrutiny.

Because Montana's equal protection guarantee is more stringent than that of its federal counterpart, middle-tier scrutiny is too low a bar. Strict scrutiny better mimics the federal "heightened scrutiny" test. "Under the strict scrutiny standard, the State has the burden of showing that the law . . . is narrowly tailored to serve a compelling government interest." *Snetsinger*, ¶ 17 (citing *McDermott v. State Dep't of Corr.*, 2001 MT 134, ¶ 31, 305 Mont. 148, 104 P.3d 445); *see also Stand Up Mont.*, ¶ 10 (citations omitted). To the degree strict scrutiny imposes a higher burden than heightened scrutiny, that higher burden is justified by Montana citizens' heightened protection under Article II, § 4.

Second, the Court turns to fundamental rights. "[W]here the legislation at issue infringes upon a fundamental right. . . strict scrutiny [is applied] . . . ." *Powell*, ¶ 17. "In order to be fundamental, a right must be found within Montana's Declaration of Rights or be a right 'without which other constitutionally guaranteed rights would have little meaning.'" *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986) (quoting *In the Matter of C.H.*, 210 Mont. 184, 201, 683 P.2d 931, 940 (1984)).

The Declaration of Rights are located in Article II of Montana's Constitution. "Article II, § 4, of the Montana Constitution provides in part that 'no person shall be denied the equal protection of the laws.'" *S.M. v. R.B.*, 248 Mont. 322, 331–32, 811 P.2d 1295, 1301–02 (1991) (quoting Mont. Const. art. II, § 4). Because Montana's

equal protection guarantee is located in the Declaration of Rights, it is a fundamental right. SB 99 facially burdens this fundamental right by denying transgender minors from seeking medical treatments available to their cisgender counterparts.

Additionally, Article II, § 10 contains the right to privacy. Because Montana's right to privacy is located in the Declaration of Rights, it is a fundamental right. SB 99 burdens this fundamental right by limiting Youth Plaintiffs' ability to pursue certain medical treatments and by limiting their ability to make medical decisions in concert with their guardians and healthcare providers. *See infra* Part A, ii. Therefore, SB 99 burdens at least two fundamental rights, subjecting it to strict scrutiny.

In sum, because Montana's Equal Protection Clause requires greater protection than its federal counterpart, and because SB 99 infringes on Plaintiffs' fundamental rights, SB 99 must survive strict scrutiny.

3. Applying Strict Scrutiny to SB 99

Third, in engaging in an equal protection analysis, courts must apply the appropriate level of scrutiny. *See Hensley*, ¶ 18 (citing *Satterlee*, ¶¶ 15, 17, 18) (internal citations omitted). Again, "[u]nder the strict scrutiny standard, the State has the burden of showing that the law . . . is narrowly tailored to serve a compelling government interest." *Snetsinger*, ¶ 17 (citing *McDermott*, ¶ 31; *see also Stand Up Mont.*, ¶ 10 (citations omitted). "The constitutionality of a legislative enactment is prima facie presumed," and "[e]very possible presumption must be indulged in favor

of the constitutionality of a legislative act." *Powder River County v. State*, 2002 MT 259, ¶¶ 73–74, 312 Mont. 198, 60 P.3d 357.

Defendants, quoting *Sable Commc'n of Cal. v. FCC*, argue that SB 99 passes any level of scrutiny because the government has "a compelling interest in protecting the physical and psychological well-being of minors." 492 U.S. 115, 126 (1989). Specifically, Defendants argue that Montana's compelling interest here is protecting "Montana's children from experimental medical treatments and procedures that are unsupported by evidence-based medicine and have been shown as likely to cause permanent physical and psychological harm." Defs.' Br. in Opp., at 27. Plaintiffs argue that SB 99 does not serve a compelling governmental interest. They argue SB 99's only stated justification is to protect minors from pressure and from harmful, experimental treatments. Pls.' Br. in Supp., at 29. They argue that nothing in the legislative record supports a finding that minors or their families are being faced with such pressure, nor that SB 99 would protect minors and their families. *Id.*

The parties agree that the government has a compelling interest in the physical and psychosocial well-being of minors. Accordingly, this analysis turns on whether SB 99 serves that interest. The stated purpose of SB 99 is "to enhance the protection of minors and their families, pursuant to Article II, section 15, of the Montana [C]onstitution, from any form of pressure to receive harmful, experimental puberty

blockers and cross-sex hormones and to undergo irreversible, life-altering surgical procedures prior to attaining the age of majority." Mont. S. 99, § 2.

A review of the legislative record does not support a factual finding that minors in Montana are being faced with pressure related to receiving harmful medical care. Furthermore, the legislative record does not support a finding that SB 99 protects minors. In fact, the evidence in the record suggests that SB 99 would have the opposite effect. At this stage in the proceedings, the Court relies on the WPATH standard of care because it is endorsed and cited as authoritative by leading medical organizations, including the American Medical Association, the American Psychological Association, and the American Academy of Pediatrics, among others. Olson-Kennedy Rep., ¶ 32; Moyer Decl., ¶ 21.[8] These organizations agree that the treatments outlined are safe, effective for treating gender dysphoria, and often medically necessary. Olson-Kennedy Rep., ¶¶ 32, 34, 75 (gender-affirming medical and surgical care "is the accepted standard of care by all major medical organizations in the United States.").

Defendants' arguments that rely on potential harm associated with puberty blockers, cross-sex hormones, and gender-affirming surgery are unpersuasive. Beyond the fact that those all constitute recognized forms of treatment for gender

[8] The Court acknowledges that there is a fundamental disagreement between the parties regarding the safety and efficacy of the treatments proscribed by SB 99. The Court's ruling here will not affect the ultimate fact-finding decision on this issue at trial.

dysphoria under the WPATH standard of care, risk associated with medical care is not unique to the treatments proscribed by SB 99. Risk is a factor inherent in the field of medicine. The standard of care for treatment of gender dysphoria addresses potential risks via informed consent, including recommending that a paitent see a qualified healthcare provider and discuss the risks and benefits with that provider and their guardian. Olson-Kennedy Rep., ¶¶ 51, 66, 73 ("There is nothing unique about gender affirming medical care that warrants departing from the normal principles of medical decision-making for youth—the parents make the decision after being informed of the risks, benefits and alternatives by doctors.").

Next, Defendants' arguments that treatments proscribed by SB 99 are "experimental," and therefore unsafe, carry very little weight at this stage considering these treatments are the accepted standard of care for treating gender dysphoria. Defendants specifically point to puberty blockers' lack of approval from the U.S. Food and Drug Administration ("FDA") and the possibility of sterilization as a result of using cross-sex hormones or undergoing surgery. They cite *L.W. v. Skrmetti*, a Sixth Circuit appeal that stayed the lower court's preliminary injunction of a law similar to SB 99 in Tennessee, which states: "[T]he medical and regulatory authorities are not of one mind about using hormone therapy to treat gender dysphoria. Else, the FDA would by now have approved the use of these drugs for these purposes." 73 F.4th 408, 416 (6th Cir. 2023).

However, the treatments proscribed by SB 99 remain the accepted standard of care, even when utilized in an "off-label" way: they are "well documented and studied, through years of clinical experience, observational scientific studies, and even some longitudinal studies." Olson-Kennedy Rep., ¶ 74. Regardless, "'[f]rom the FDA perspective, once the FDA approves a drug, healthcare providers generally may prescribe the drug for an unapproved use when they judge that it is medically appropriate for their patient.'" Olson-Kennedy Rep., ¶ 71.[9]

> Indeed, for over 40 years, the FDA has informed the medical community that "once a [drug] product has been approved . . . a physician may prescribe it for uses or in treatment regimens of patient populations that are not included in approved labeling." Accordingly, the American Academy of Pediatrics has stated that "off-label use of medication is neither experimentation nor research."

Olson-Kennedy Rep., ¶ 71. Additionally, "[m]ost of the therapies prescribed to children are on an off-label or unlicensed basis. Common medications that are used 'off-label' in pediatrics include antibiotics, antihistamines, and antidepressants." *Id.*, ¶ 72.

Even assuming *arguendo* that the care proscribed by SB 99 is experimental, Defendants' argument falls flat once SB 422 is brought into the picture. SB 422 states any person, including a minor,[10] is eligible for treatment with an

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[9] Citing U.S. Food & Drug Admin., *Understanding Unapproved Use of Approved Drugs "Off Label"*, (Feb. 5, 2018), https://www.fda.gov/patients/learn-about-expanded-access-and-other-treatment-options/understanding-unapproved-use-approved-drugs-label.

[10] SB 422 specifically contemplates minors when discussing written informed consent. For example, it states that written informed consent must be signed by "a parent or legal guardian, if the patient is a minor[.]" Mont. S. 422, § 4(4)(a)(ii).

"investigational drug, biological product, or device" so long as they have considered all options approved by the FDA, received a recommendation from their healthcare provider, and given written informed consent.[11] Mont. S. 422, § 3.

The Court finds it fascinating that SB 99 and SB 422 were passed in the same legislative session. Again, assuming *arguendo* that the treatments proscribed by SB 99 are experimental, under SB 422, minors should be allowed to continue engaging in that care if they choose to do so in concert with their healthcare provider and guardian and informed consent is obtained.[12] Moreover, SB 422 actually bars the State from proscribing such care: "An official, employee, or agent of the state of Montana may not block or attempt to block a patient's access to an investigational drug, biological product, or device." Mont. S. 422, § 8(1). Read together, SB 99 and SB 422 authorize parents to give consent for their minor children to engage in experimental medical treatments, regardless of efficacy or risk, that cannot be blocked by the State *unless* the minor is transgender and seeking medical treatment for gender dysphoria in line with the recognized standard of care.

The Court is forced to conclude that the purported purpose given for SB 99 is disingenuous. It seems more likely that the SB 99's purpose is to ban an outcome

[11] SB 422 also undermines Defendants' argument that minors cannot give true informed consent by listing informed consent as a requirement to be eligible for treatment with an investigational drug, product, or device. Surely the Montana Legislature would not include a requirement that is impossible to achieve.

[12] To note, these are essentially the same as the steps recommended via the standard of care put forth by Plaintiffs. *See* Olson-Kennedy Rep., ¶¶ 51, 66–73.

deemed undesirable by the Montana Legislature veiled as protection for minors. The legislative record is replete with animus toward transgender persons, mischaracterizations of the treatments proscribed by SB 99, and statements from individual legislators suggesting personal, moral, or religious disapproval of gender transition. *See* First Am. Compl., ¶ 69 (Doc. 60) (Senator Manzella stating "you cannot change your sex" because "the Creator has reserved that for Himself."); *id.*, ¶ 70 (Senator Fuller objecting to providing transgender people with gender-affirming hormones because he believed it was not "natural.").

"[L]egal standards for medical practice and procedure cannot be based on political ideology, but, rather, must be grounded in the methods and procedures of science and in the collective professional judgment, knowledge and experience of the medical community acting through the state's medical examining and licensing authorities." *Armstrong v. State*, 1999 MT 261, ¶ 62, 296 Mont. 361, 898 P.3d 364. Therefore, the Court finds that SB 99 does not serve its purported compelling interest of protecting minors and shielding them from pressure, meaning it cannot survive strict scrutiny. The Court declines to engage in an analysis to determine whether SB 99 is narrowly tailored because it finds no compelling governmental interest is served.

4. Alternatively Applying Middle-Tier Scrutiny and the Rational Basis Test

Alternatively, based on the above analysis, SB 99 cannot survive middle-tier scrutiny nor the rational basis test. Middle-tier scrutiny "requires the State to demonstrate that its classification is reasonable and that its interest in the classification is greater than that of the individual's interest in the right infringed."[13] *Powell*, ¶ 19. Here, Defendants did not demonstrate that its classification—transgender minors versus cisgender minors—was reasonable. Again, SB 99's purported interest is protecting all children from pressure and harm. However, for example, SB 99 proscribes puberty blockers for transgender minors, but does not proscribe all other minors from the same. Defendants cannot have it both ways. In order for the classification to be reasonable, these treatments would have to be banned for all persons under the age of 18. Moreover, even assuming *arguendo* that the classification was reasonable, minors' rights to equal protection is fundamental, as is the right to seek safety, health, and happiness in all lawful ways. Mont. Const. art. II, §§ 3, 4, 15; *see supra* Part A, i, 2. Surely Youth Plaintiffs' interest in their fundamental rights is greater than Defendants' interest in the classification.

"[W]here the right at issue is neither fundamental nor warrants middle-tier scrutiny, we review the challenge under the rational basis test." *Powell*, ¶ 19. "Under a rational basis test, a court will uphold the statute if it bears a rational relationship

[13] "[W]here the right in question has its origin in the Montana Constitution, but is not found in the Declaration of Rights, we employ a middle-tier scrutiny." *Powell*, ¶ 18. The Court again posits that strict scrutiny is appropriate because Montana's Equal Protection Clause is located in the Declaration of Rights. *See* Mont. Const. art. II, § 4.

to a legitimate governmental interest." *State v. Jensen*, 2020 MT 309, ¶ 17, 402 Mont. 231, 477 P.3d 335. Protecting children is a legitimate governmental interest. However, for the reasons previously analyzed, SB 99 does not serve its purported interest of protecting minors because it goes against the accepted medical standard of care for minors experiencing gender dysphoria, a diagnosable condition. Moreover, because the treatment proscribed by SB 99 is used for other reasons—e.g., treating central precocious puberty or PCOS—SB 99 has no rational relationship to protecting children. Under Defendants' classification, SB 99 would only serve to protect transgender minors because all other minors would be able to seek the proscribed treatments. Again, if the State was genuinely concerned with the safety of puberty blockers, hormones, or surgeries for persons under 18, SB 99 would have to bring all minors into its sweep. In sum, Plaintiffs are likely to succeed on the merits in proving that SB 99 violates Montana's Equal Protection Clause under any of the three levels of scrutiny.

ii. Count III – Violation of the Right to Privacy

The Montana Constitution provides that the right of individual privacy is essential to a free society and "shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States--exceeding even that provided by the federal constitution." *Armstrong*, ¶ 34 (citing

State v. Burns, 253 Mont. 37, 40, 830 P.2d 1318, 1320 (1992)). "The express guarantee of privacy in Article II, Section 10 is fundamental:"

> [U]nder Montana's Constitution, the right of individual privacy—that is, the right of personal autonomy or the right to be let alone—is fundamental. It is, perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives.

Weems v. State, 2023 MT 82, ¶ 36, 412 Mont. 132, 529 P.3d 789 (citing *Gryzcan v. State*, 283 Mont. 433, 455, 942 P.2d 112, 125). "Strict scrutiny applies if a fundamental right is affected." *Stand Up Mont.*, ¶ 10 (citing *Snetsinger*, ¶ 17).

Specifically, regarding health care and the right to privacy, "[t]he Montana Constitution 'guarantees each individual the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference." *Weems*, ¶ 36 (citing *Armstrong*, ¶ 14). However, not every restriction on medical care "necessarily impermissibly infringes on the right to privacy. The State possesses a general and inherent 'police power by which it can regulate for the health and safety of its citizens.'" *Weems*, ¶ 38 (citing *Wiser v. State*, 2006 MT 20, ¶ 19, 331 Mont. 28, 129 P.3d 133).

Plaintiffs argue that SB 99 violates patients' right to privacy by limiting their ability to choose medical treatment and to make necessary and appropriate medical decisions in concert with their parents and healthcare providers. Pls.' Br. in Supp., at 35. Additionally, Plaintiffs argue that SB 99 intrudes on the private relationship

between a minor patient and their healthcare provider, which imposes the State's ideological opinion on the patient-provider relationship and restricts providers' ability to rely on their expertise and medical judgment in recommending health care options. *Id.* Defendants, relying on Montana's police power, argue that fundamental rights are not immune from state regulation when protection of the health and welfare of children are at issue. Defs.' Br. in Opp., at 37. Accordingly, Defendants argue SB 99 is a lawful exercise of the State's police power because it protects Montana's children from "well-documented and significant risks of irreversible harm posed by the experimental treatment at issue here." *Id.*

The parties agree that the standard set forth in *Armstrong* controls here:

> [E]xcept in the face of a medically-acknowledged, *bonafide* health risk, clearly and convincingly demonstrated, the legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so.

Armstrong, ¶ 62. What the parties disagree on is whether the treatments proscribed by SB 99 present a bona fide health risk to minors.

The Court has already held that SB 99 cannot survive strict scrutiny under an Equal Protection analysis. Nevertheless, the Court will address the parties' disagreement concerning whether a bona fide health risk has been clearly and convincingly demonstrated. Plaintiffs have put forth sufficient evidence to show that the medical community overwhelmingly agrees that the treatments proscribed by SB

99 are the accepted standard of care for treating gender dysphoria in minors. Defendants again rely on the assertion that such treatments are unapproved, experimental, and unaccompanied by any long-term safety data.[14]

Defendants' argument is detached from the evidence presented to the Court that the treatments proscribed by SB 99 are safe and in line with the recognized standard of care for treating gender dysphoria in minors. In that vein, the emphasis Defendants' place on the surgical procedures proscribed by SB 99 in their attempt to give legs to a police power argument is misplaced. Defendants' argument would be far stronger if SB 99 was limited to regulating surgical procedures rather than broadly proscribing gender-affirming medical care. While any surgery—not just gender-affirming surgery—undoubtedly carries high risks to minors, Plaintiffs have demonstrated that such procedures are rarely recommended in gender dysphoric patients who are under 18 years old. *See* Olson-Kenney Rep., ¶ 63 ("For youth with gender dysphoria under the age of 18, surgery is rare."). Instead, puberty blockers and hormone therapy make up the bulk of recommended treatment. *Id.*, ¶¶ 37–62. And, again, Defendants' safety argument is diminished because not all minors are barred from engaging in the purportedly unsafe treatments proscribed by SB 99, and their argument is gravely diminished when SB 422 is considered. Accordingly, the

[14] Again, the Court recognizes that Defendants put forth competing evidence. The Court reemphasizes that trial is the appropriate stage for ultimate fact finding on the science presented in this matter.

State cannot show that gender-affirming care poses a medically acknowledged, bona fide health risk, leaving it without a compelling interest and without justification to rely on its police powers. Therefore, Plaintiffs are likely to succeed on the merits in proving that SB 99 violates their right to privacy.

In sum, under the first factor of the preliminary injunction test as set forth in SB 191, Plaintiffs have demonstrated a likelihood of success on the merits of at least two of their claims.

B. Plaintiffs are Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief

The second factor of the preliminary injunction test requires an applicant to show they are likely to suffer irreparable harm in the absence of preliminary relief. *See* Mont. S. 191, § 1; *Winter*, 555 U.S. at 20. Irreparable harm is "harm for which there is no adequate legal remedy[.]" *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (citing *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)). "Because intangible injuries generally lack an adequate legal remedy, 'intangible injuries [may] qualify as irreparable harm.'" *Ariz. Dream Act. Coal.*, 757 F.3d at 1068 (citing *Rent-A-Ctr., Inc.*, 944 F.2d at 603).

Here, Plaintiffs will suffer irreparable harm absent a preliminary injunction for two reasons. First, "the loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued."

Mont. Cannabis Indus. Ass'n v. State, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161 (citing *Elrod v. Burns*, 427 U.S. 347, 364 (1976)). Plaintiffs have demonstrated that SB 99 likely impermissibly infringes on their constitutional rights, i.e., equal protection and the right to privacy. Therefore, Plaintiffs have established a likelihood of irreparable harm per se based on impermissible constitutional violations.

Second, if SB 99 goes into effect, minors experiencing gender dysphoria in Montana will be denied access to gender-affirming care. Plaintiffs have demonstrated that Youth Plaintiffs—and other minors in Montana experiencing gender dysphoria—are at risk of facing severe psychological distress if they are blocked from receiving such care. *See, e.g.*, Hodax Decl., ¶¶ 19–20 ("The consequences for my transgender patients in Montana from [SB 99] going into effect would be dire. These patients and their families have deep, painful anxiety about what they will do . . . ."); Mistretta Decl., ¶ 20 ("I am deeply concerned for my young transgender patients because my educational, clinical and practical experience fully confirm my knowledge that denying them access to the gender-affirming care proscribed by [SB 99] will likely lead to an increase in their depression, anxiety, suicidal ideation, and even suicidal attempts."). Youth Plaintiff Scarlet van Garderen has stated:

> Puberty blockers and hormone therapy treatments have changed my life. Since starting gender-affirming medical care, I feel like a weight has been lifted . . . . The prospect of losing access to my medical care

> is unthinkable to me. I do not believe I could live without the gender-affirming care I am now receiving.

Scarlet Decl., ¶¶ 13–14. Youth Plaintiff Phoebe Cross has stated that his gender dysphoria resulted in acute mental health crises and a suicide attempt, but that receiving gender-affirming care was "a lifeline":

> Testosterone saved my life and I would be devastated if this care was taken away. I cannot imagine what would happen to me if I could not access my gender-affirming care, but I fear that I would be back in a place where I was fearful of my life at every moment. Taking away this care would leave me fearful for my life.

Phoebe Decl., ¶¶ 11, 21.

The Court finds that the risks reflected in these sentiments constitute a high likelihood of irreparable harm. This finding is congruent with holdings made in other jurisdictions. *See Edmo v. Corizon, Inc.*, 935 F.3d 757, 797–98 (9th Cir. 2019) (holding plaintiff's clinically significant distress caused by gender dysphoria constituted irreparable harm); *Norsworthy*, 87 F. Supp. 3d at 1192 (finding plaintiff was suffering irreparable harm where she experienced "'continued' and 'excruciating' 'psychological and emotional pain' as a result of her gender dysphoria"); *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021) (finding a district court did not abuse its discretion in determining that "injuries and risks of additional harm to [plaintiff]'s mental health likely constituted irreparable harm."). Therefore, the record clearly demonstrates a likelihood of irreparable harm if a preliminary injunction is not granted.

To the degree Defendants rely on the argument that the treatments proscribed by SB 99 are unsafe and experimental for the assertion that Plaintiffs will not suffer irreparable harm, the Court has already explained why it finds that argument unpersuasive at this stage. Additionally, the Court is not persuaded by Defendants' argument that Plaintiffs have not demonstrated "that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). The evidence before the Court, including Youth Plaintiffs' declarations, establishes that irreparable injury is indeed likely if a preliminary injunction is not granted. To be sure, the Court recognizes that the record includes declarations from persons claiming to have witnessed or experienced negative effects of gender-affirming care. However, those filings do not make it less likely that at least the specific Youth Plaintiffs in this matter will suffer irreparable injury if they lose access to gender-affirming care, and it certainly does not diminish the irreparable harm caused by likely constitutional violations.

C. The Balance of Equities Tips in Plaintiffs' Favor & This Order is in the Public Interest

The third factor of the preliminary injunction test requires an applicant to show that the balance of equities tips in their favor. *See* Mont. S. 191, § 1(c); *Winter*, 555 U.S. at 20. "The 'balance of equities' concerns the burdens or hardships to [Plaintiffs] compared with the burden on Defendants if an injunction is ordered." *Porretti*, 11 F.4th at 1050 (citing *Winter*, 555 U.S. at 24–31). The fourth factor of

the preliminary injunction test requires that the applicant establish the order is in the public interest. *See* Mont. S. 191, § 1(d); *Winter*, 555 U.S. at 20. "The 'public interest' mostly concerns the injunction's 'impact on non-parties rather than parties.'" *Porretti*, 11 F.4th at 1050 (citing *Bernhardt v. Los Angeles County*, 339 F.3d 920, 931 (9th Cir. 2003)). "Where, as here, the government opposes a preliminary injunction, the third and fourth factors merge into one inquiry." *Porretti*, 11 F.4th at 1047 (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)).

Here, the burdens or hardships on the Plaintiffs include constitutional harms and a negative impact on mental and physical health. This must be compared to Defendants' purported hardships, which include being enjoined from effectuating SB 99. Defs.' Br. in Opp., at 43 ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.").

The risk of adverse effects to Youth Plaintiffs' health, including increased risk of suicidality, certainly outweighs the intangible harm the State will endure if it is enjoined from enforcing SB 99 and the status quo is maintained until a full trial on the merits is held. Further, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Protecting Plaintiffs' constitutional rights is an integral function of

this Court. Moreover, Plaintiffs have provided sufficient evidence to establish that non-parties—specifically other minors experiencing gender dysphoria in Montana like Joanne Doe—will likely be harmed if SB 99 goes into effect and treatments for gender dysphoria are proscribed. "Restricting access to gender-affirming medical care for adolescents is not based in science and will raise the risk of poor mental health and suicidality among transgender adolescents." Moyer Decl., ¶ 31. Again, at this juncture, Defendants' competing evidence is well-taken but unpersuasive when measured against Plaintiffs' evidence. Therefore, the balance of hardships tips sharply in Plaintiffs favor and the public interest will be served by a preliminary injunction.

V. CONCLUSION

In sum, the Court may grant a preliminary injunction when an applicant establishes: "(a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." Mont. S. 191, § 1.

First, Plaintiffs demonstrated that they are likely to succeed on the merits of at least two of their constitutional claims. The Court finds that SB 99 likely violates Montana's Equal Protection Clause because it classifies based on transgender status—making it a sex-based classification—and because it infringes on

fundamental rights, subjecting it to strict scrutiny. The Court finds that SB 99 likely does not survive strict scrutiny because it does not serve its purported compelling governmental interest of protecting minor Montanans from pressure to receive harmful medical treatments. Alternatively, the Court finds that SB 99 is unlikely to survive any level of constitutional review. The Court also finds that SB 99 likely violates Plaintiffs' right to privacy under Montana's Constitution because the Court does not find that the treatments proscribed by SB 99 constituted "medically-acknowledged, *bonafide* health risk[s][,]" and because, again, SB 99 likely cannot survive strict scrutiny. *Armstrong*, ¶ 62.

Next, Plaintiffs demonstrated that they are likely to suffer irreparable harm in the absence of preliminary relief. The Court specifically finds irreparable harm is likely to occur for two separate reasons: first, the likely infringement of Plaintiffs' constitutional rights would cause irreparable harm; and second, Plaintiffs demonstrated that barring access to gender-affirming care would negatively impact gender dysphoric minors' mental and physical health.

Finally, Plaintiffs demonstrated that the balance of equities tipped in their favor and that a preliminary injunction is in the public interest. It is always in the public interest to prevent constitutional harms, and Plaintiffs' hardships in the absence of a preliminary injunction—e.g., losing access to medical care and possible

mental and physical health crises—far outweigh any hardship placed on Defendants if the status quo is maintained until a full trial on the merits is held.

Therefore, Plaintiffs have satisfied all four preliminary injunction factors. "[A] party is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Univ. of Tex.*, 451 U.S. at 395. The Court recognizes the Defendants have put forth competing medical evidence, but that alone does not render Plaintiffs' evidence moot or unreliable. At this stage, the Plaintiffs have put forth sufficient evidence to satisfy the preliminary injunction factors and succeed on their *Motion*. The Court emphasizes its findings here are not binding at trial, which will be the appropriate time to fully evaluate the merits of the competing evidence presented in this case. The Court hereby GRANTS Plaintiffs' *Motion*.

DATED this 27th day of September, 2023.

Hon. Jason Marks
District Court Judge

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