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.

PLAINTIFFS/APPELLEES' RESPONSE TO APPELLANTS' OPENING BRIEF

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

APPEARANCES:

Alex Rate
Marthe Y. VanSickle
Akilah Deernose
ACLU OF MONTANA
PO Box 1968
Missoula, MT 59806
Phone: 406-203-3375
ratea@aclumontana.org
vansicklem@aclumontana.org
deernosea@aclumontana.org

Malita Picasso*
ACLU FOUNDATION
125 Broadway Street
New York, NY 10004
Phone: 212-549-2561
mpicasso@aclu.org

Matthew P. Gordon
Heather Shook*
Courtney Schirr*
Sara Cloon*
Kayla Lindgren*
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101
Phone: 206-359-8000
mgordon@perkinscoie.com

Peter C. Renn*
Kell Olson*
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND
800 S. Figueroa Street, Suite 1260
Los Angeles, CA 90017
Phone: 213-382-7600
prenn@lambdalegal.org
kolson@lambdalegal.org

Elizabeth O. Gill*
ACLU FOUNDATION
39 Drumm Street
San Francisco, CA 94109
Phone: 415-343-1237
egill@aclunc.org

Nora Huppert*
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND
65 E. Wacker Place, Suite 2000
Chicago, IL 60601
Phone: 312-663-4413
nhuppert@lambdalegal.org

Attorneys for Plaintiffs/Appellees

Austin Knudsen
Montana Attorney General
Thane Johnson
Michael D. Russell
Alwyn Lansing
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
thane.johnson@mt.gov
michael.russell@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

**admitted pro hac vice*

Attorneys for Defendants/Appellants

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (continued)

Page(s)

TABLE OF CONTENTS (continued)

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES (continued)

Page(s)

OTHER AUTHORITIES

Introduction

Montana Senate Bill 99 ("SB 99") seeks to strip Montana families of access to the only evidence-based treatment for gender dysphoria—supported by the prevailing standards of care—risking severe, irreversible, and life-threatening harm to patients. The law does not target a particular drug or procedure. Instead, it bans an entire class of necessary health care for one group and one group alone: transgender adolescents. At the same time, it allows all other minors to access the same treatments for any other purpose.

For patients and families who seek to protect themselves and the health of their loved ones, SB 99 presents an intense, existential intrusion into personal health and autonomy. It replaces the medical needs of a patient, supported by their parents and trained health care providers, with a government-dictated outcome that is known to cause life-long harm and invite even more extensive treatment in the future. SB 99 substitutes the Legislature's judgment wholesale for the reasoned and informed judgment of doctors, patients, and families.

It is eminently reasonable—with so much at stake for minor patients, the parents who love them, and the providers who care for them—that the District Court grounded its decision to maintain the status quo during the pendency of the litigation on the collective professional judgment of leading major medical associations. Those authorities agree that the treatments banned by SB 99 are safe, effective for

treating gender dysphoria, and medically necessary. While noting Appellants' disagreement with those medical standards and reserving final disposition for trial, the District Court found that Appellees were likely to show that the threatened intrusion into the private realm of their bodily integrity is not justified.

There is no reason for this Court to disturb the District Court's grant of a preliminary injunction. Appellants' disagreement with patient needs and providers' experience, and their request to re-weigh the evidence, do not establish an abuse of discretion. This Court should affirm and preserve the status quo until a final determination on the merits.

Statement of the Issues

1. Whether, on appeal from a preliminary injunction, this Court should overrule decades of precedent correctly holding that medical providers have standing to sue on behalf of their patients.

2. Whether the District Court manifestly abused its discretion by preliminarily enjoining SB 99, which would unconstitutionally infringe on Montanans' right to equal protection and right to privacy by banning medically necessary gender-affirming care.

3. Whether the District Court manifestly abused its discretion by issuing an injunction sufficiently broad enough to prevent the widespread irreparable harm likely to result from the enforcement of a facially unconstitutional law.

4. Whether the District Court manifestly abused its discretion by relying on extensive affidavit testimony and oral arguments instead of allowing redundant oral witness testimony given the time-sensitive nature of the relief requested.

Statement of the Case

On May 9, 2023, Appellees filed a Complaint challenging the constitutionality of SB 99, which bars the provision of a range of medical treatments and procedures when, and only when, they are provided to transgender youth to treat gender dysphoria. Appellees include two Montana transgender adolescents with gender dysphoria who have benefited from gender-affirming care ("Minor Appellees"), six Montana parents ("Parent Appellees") and two Montana-licensed heath care providers who prescribe gender-affirming care to treat gender dysphoria ("Provider Appellees"). SB 99 was set to take effect on October 1, 2023. Appellees filed a Motion for Preliminary Injunction ("PI Motion") (Doc. 49) and an Amended Complaint on July 17, 2023 (Doc. 60.) After briefing was complete, the District Court held a preliminary injunction hearing on September 18, 2023. The record before the District Court on the PI Motion was extensive. It consisted of over 2,000 pages of evidence, including affidavit testimony from twenty-one witnesses. (Docs. 51-59, 71-73, 78-108, 121-23, 126-30.) The District Court granted Appellants' request to file rebuttal expert declarations after the hearing. (9/18/23 Tr. at 57:13-19.)

On September 27, 2023, in a detailed order issued after examining all evidence in the record ("Order") (Doc. 131), the District Court held that Appellees were likely to succeed on the merits of at least two of their six claims brought under Montana's Constitution: 1) SB 99 violates Appellees' right to equal protection under the laws (Count I); and 2) SB 99 unconstitutionally infringes Appellees' right to privacy (Count III). The District Court did not reach Appellees' four additional constitutional claims, (Doc. 60 Counts II, IV, V, and VI), and did not address Appellants' challenge to standing, as Appellants did not raise those arguments below.

Considering the evidence from all parties and explaining its reasoning in a thorough order, the District Court made extensive factual findings that are entitled to deference on appeal, including that:

1. The record does not support a finding that minors in Montana are being pressured to receive medical care, which is the stated purpose of SB 99 (Doc. 131 at 30);
2. SB 99 would ban treatments for gender dysphoria that are the accepted standard of care endorsed overwhelmingly by the medical community and by leading medical organizations including the American Medical Association, the American Psychological Association, and the American Academy of Pediatrics (Doc. 131 at 30, 37-38);

3. The same leading medical organizations agree that the treatments banned by SB 99 are "safe, effective for treating gender dysphoria, and medically necessary" (Doc. 131 at 30);
4. The treatments banned under SB 99 are well documented and studied (Doc. 131 at 32);
5. SB 99 bars health care for transgender minors while allowing the same care for other minors (Doc. 131 at 35);
6. The standard of care for treatment of gender dysphoria addresses potential risks via informed consent, and Montana's Legislature has deemed parents of minors able to consent to other forms of care, even those deemed "investigational" (Doc. 131 at 31, 32-33);
7. SB 99 does not protect minors and would have "the opposite effect" (Doc. 131 at 30); and
8. The care banned by SB 99 is a lifeline for Minor Appellees and the patients of Provider Appellees; its removal would threaten severe irreparable harm to minor Montanans, including an "increase in depression, anxiety, suicidal ideation, and suicidal attempts." (Doc. 131 at 41-42; Doc. 54 at ¶ 20.)

The District Court concluded that Appellees had "satisfied all four preliminary injunction factors" (Doc. 131 at 47) and were entitled to the requested relief, noting that the ultimate merits would be resolved after trial. Appellants appeal.

Statement of Facts

I. Gender Dysphoria Is a Diagnosable Medical Condition that Is Treated in Accordance with Established Medical Guidelines.

Based on the declarations of both Appellants' and Appellees' expert witnesses, the District Court found facts regarding the diagnosis and treatment of gender dysphoria.[1] "At birth, infants are generally assigned a sex … based on their external genitalia." (Doc. 131 at 5, citing Laidlaw Rep. (Doc. 78) at ¶¶ 14-15.) "Gender identity refers to a person's core sense of belonging to a particular gender." (Doc. 131 at 5, citing Olson-Kennedy Rep. (Doc. 59) at ¶¶ 24, 27; Sven Roman Dec. (Doc. 88) at ¶ 48; Doc. 60 at ¶ 25.) "The term "cisgender" refers to people whose gender identity matches their sex assigned at birth," while "transgender" refers to people whose gender identity differs from their sex assigned at birth. (Doc. 131 at 5-6; Doc. 59 at ¶¶ 28-29.) "Gender identity is resistant to voluntary change, and substantial evidence has shown that efforts to change a person's gender identity are ineffective and harmful." (Moyer Dec. (Doc. 58) at ¶ 17.)

A. Gender Dysphoria Is a Diagnosable and Treatable Medical Condition.

The District Court found that gender dysphoria is a diagnosable condition that refers to the clinically significant distress that many transgender people experience

[1] The District Court made clear, however, that these findings "will not affect the ultimate fact-finding decision on this issue at trial." (Doc. 131 at 30.)

as a result of having a gender identity that does not align with their sex assigned at birth. (Doc. 131 at 6; Doc. 59 at ¶¶ 28-29; Doc. 58 at ¶ 18.) The diagnostic criteria for gender dysphoria are set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, ("DSM-5"), published by the American Psychiatric Association ("APA"). (Doc. 131 at 6.)

Within the field of medicine, there are established standards of care designed to address and alleviate gender dysphoria, including in minor patients. (Doc. 59 at ¶¶ 31, 34; Doc. 58 at ¶ 23.) The District Court found, based on undisputed evidence, that these prevailing standards of care are "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." (Doc. 131 at 30; Doc. 59 at ¶ 32; Doc. 58 at ¶ 21.) "These organizations agree that the treatments outlined are safe, effective for treating gender dysphoria, and often medically necessary." (Doc. 131 at 30; Doc. 59 at ¶¶ 32, 74.)

For a person to be diagnosed with gender dysphoria, the incongruence between assigned sex and gender identity must have persisted for at least six months and "cause clinically significant distress or impairment in social, occupational, or other important areas of functioning." (Doc. 59 at ¶ 30.) "Without treatment, gender dysphoria can cause depression, anxiety, suicidal ideation, … suicide attempts and suicide itself as well as other forms of self-harm." (Doc. 58 at ¶ 20.) The District

Court further found that, "gender dysphoria does not solely relate to mental health, it also relates to physical health." (Doc. 131 at 23.)

B. Treatment of Gender Dysphoria in Adolescents Is Individualized.

The precise treatment for gender dysphoria depends upon each person's individualized needs and age. (Doc. 59 at ¶¶ 34, 36; Doc. 58 at ¶ 23.) The District Court found that "puberty blockers, cross-sex hormones, and gender-affirming surgery" "constitute recognized forms of treatment for gender dysphoria[.]" (Doc. 131 at 30-31.) This care seeks to "alleviate the patient's gender dysphoria by bringing their body into closer alignment with their gender identity[.]" (Doc. 59 at ¶ 31.) Before any medical interventions, a qualified healthcare provider with training and experience regarding gender dysphoria in adolescents assesses the individual to ensure that treatment is appropriate. (Doc. 58 at ¶ 22.) Mental health counseling is the only recommended treatment for prepubescent minors. (Doc. 59 at ¶ 35; Doc. 58 at ¶ 23.)

According to the prevailing standards of care, puberty blockers may be medically indicated at the onset of puberty for some adolescents with gender dysphoria. (Doc. 59 at ¶¶ 38–39.) Puberty blockers prevent gender dysphoria from worsening by pausing the development of secondary sex characteristics that are inconsistent with the patient's gender identity. (Doc. 59 at 37-39; Doc. 58 at ¶ 24.) Treatment using puberty blockers is temporary and reversible—if an adolescent

discontinues the medication, puberty consistent with their assigned sex at birth will resume. (Doc. 59 at ¶ 39.)

Another treatment for gender dysphoria in adolescents recognized by the prevailing standards of care is gender-affirming hormone therapy, which involves administering steroids consistent with the patient's gender identity. (Doc. 59 at ¶ 50.) Gender-affirming hormone therapy can greatly ameliorate symptoms of gender dysphoria. (Doc. 59 at ¶¶ 52-60; Doc. 58 at ¶ 25.) In some rare circumstances, gender-affirming surgery, generally chest surgery, may be medically necessary to treat an adolescent with gender dysphoria. (Doc. 131 at 39; Doc. 59 at ¶ 63.) For adolescents, gender-affirming surgery other than chest surgery is "extraordinarily rare." *Id*. The use of puberty blockers, cross-sex hormones, and surgery to treat gender dysphoria has been "well documented and studied, through years of clinical experience, observational scientific studies, and even some longitudinal studies." (Doc. 131 at 32; Doc. 59 at ¶ 74.)

As with all medications, transgender adolescents and their parents are counseled on the potential risks of the medical intervention, and treatment is only initiated when parents and adolescents are properly informed, the adolescent's parents consent to the care, and the adolescent assents to the care. (*Id*. at ¶¶ 51, 62, 66.) The District Court found that this informed consent process is used to address potential risks and benefits of the care, just as informed consent is used to discuss

risks and benefits for other medical treatments. (Doc. 131 at 31.) The District Court also found that the potential risks associated with the medical care used to treat gender dysphoria in minors is not unique to this care. (Doc. 131 at 30-31.)

II. SB 99 Threatens to Harm Transgender Adolescents in Montana by Categorically Banning Their Access to Gender-Affirming Care.

In 2023, the Montana Legislature passed SB 99, a law that prohibits the use of certain medical care recommended by the prevailing standards of care to treat gender dysphoria in adolescents, but *only* "when 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." (Doc. 131 at 21; Mont. S. 99, § 4(1)(c).) In addition to prohibiting this medical treatment when used to treat a minor's gender dysphoria, "SB 99 also contains directives for health care professionals' licensing entities and disciplinary review boards[.]" (Doc. 131 at 4; Mont. S. 99, § 4(2)(a).) And SB 99 includes "additional prohibitions and warnings," aimed to prevent transgender minors from accessing the prohibited medical care. (Doc. 131 at 4; Mont. S. 99, § 4(3)-(11)); Appellants' Opening Brief ("Appellants' Br.") at 2-3.)

The District Court found that SB 99 "goes against the accepted medical standard of care for minors with gender dysphoria" and acknowledged that the "medical community overwhelmingly agrees that these treatments" are safe for treating gender dysphoria in minors. (Doc. 131 at 36-39.)

The District Court found that Appellees and other transgender minors with gender dysphoria "are at risk of facing severe psychological distress if they are blocked from receiving" the gender-affirming care that SB 99 proscribes. (Doc. 131 at 40-41; Hodax Decl. (Doc. 51) at ¶¶ 19-20.) Interruptions in care can cause patients to undergo permanent puberty changes that cause significant long-term distress and will likely require future surgery to reverse. (Doc. 51 at ¶¶ 19-20.) Denying adolescent transgender patients access to this care "will likely lead to an increase in their depression, anxiety, suicidal ideation, and even suicidal attempts." (Doc. 131 at 41; Mistretta Dec. (Doc. 54) at ¶ 20.)

Describing the impact that accessing gender-affirming care has had on her life, Appellee Scarlet van Garderen attests,

> 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.

(Doc. 131 at 41-42; Scarlet van Garderen Dec. (Doc. 57) at ¶¶ 13-14.)

Appellee Phoebe Cross attests that his gender dysphoria resulted in acute-mental health crises and a suicide attempt, and receiving gender-affirming care was a "lifeline" that saved his life. (Doc. 131 at 42; Phoebe Cross Dec. (Doc. 56) at ¶¶ 11, 21.)

III. SB 99 Does Not Protect Minors.

The District Court also found that SB 99's "legislative record does not support a factual finding that minors in Montana are being faced with pressure related to receiving harmful medical care[,]" or that SB 99 protects minors. (Doc. 131 at 30.) Instead, it found the record was "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." (Doc. 131 at 34.)

The District Court found that risk associated with medical care is "inherent in the field of medicine" and is "not unique to the treatments proscribed by SB 99," and that "[t]he standard of care for treatment of gender dysphoria addresses potential risks via informed consent." (Doc. 131 at 31; Doc. 59 at ¶¶ 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.".) Because the treatments proscribed by SB 99 are "the accepted standard of care for treating gender dysphoria," the District Court assigned "very little weight" to the Appellants' assertion that this care is "'experimental' and therefore unsafe." (Doc. 131 at 31.)

The District Court correctly found that "once the [United States Food and Drug Administration ("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 patients." (Doc. 131 at 32, Doc. 59 at ¶ 71.) The District Court further found that "most therapies prescribed to children are on an off-label … basis." (Doc. 131 at 32; Doc. 59 at ¶¶ 71-72.)

The District Court also made factual findings about Senate Bill 422 ("An Act Expanding the Right to Try Act"), which was passed in the same legislative session as SB 99. (Doc. 131 at 14.) SB 422 allows minors to obtain medical treatment that includes an "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. (Doc. 131 at 14, 31-33; S. 422, 2023 Leg., 68th Sess., Rec. Sess. § 2(1) (Mont. 2023) ("SB 422")). These "investigational" treatments include those that have "not yet been approved for general use by the [FDA]; and [remain] under investigation in [an FDA]-approved clinical trial." (Doc. 131 at 14-15; SB 422 at §1(3).) SB 422 also explicitly provides an informed consent process for minors and prohibits the State from blocking a patient's access to an unapproved investigational drug. (Doc. 131 at 15; SB 422 at § 4(1), 4(a)(ii), 8(1).)

Standard of Review

This Court reviews the grant of a preliminary injunction for a manifest abuse of discretion. *Weems v. State ex rel. Fox* (*Weems I*), 2019 MT 98, ¶ 7, 395 Mont. 350, 440 P.3d 4. An abuse of discretion is "manifest" if it is "obvious, evident, or unmistakable." *Id.* The grant of injunctive relief is within "the broad discretion of the district court" based on its findings of fact, and this Court reviews the District Court's conclusions of law to determine whether they are correct. *Id.* Issues of standing are reviewed de novo. *Id.*

Summary of the Argument

The District Court did not manifestly abuse its discretion by concluding that Appellees are likely to succeed on the merits of their equal protection and privacy claims, that Appellees would suffer severe and irreparable harm unless SB 99 was enjoined, and that the risk of harm to Appellees "certainly outweighed" any harm to Appellants from maintaining the status quo until a full trial on the merits is held. (Doc. 131 at 44.)

SB 99 facially classifies based on transgender status and sex. It also interferes with the right to make medical judgments affecting one's health, which is central to personal autonomy and individual privacy. *See Armstrong v. State*, 1999 MT 261, ¶¶ 52, 53, 296 Mont. 361, 989 P.2d 364. Therefore, the law is subject to strict scrutiny and the District Court properly found, after considering and weighing the

evidence, that Appellants had failed to demonstrate that SB 99 serves a compelling government interest. There was no evidence minors are being "pressured" to receive treatment, which is the only purpose stated in the law; and the banned care is safe, effective, and necessary according to leading major medical associations. SB 99 gravely threatens the health and well-being of transgender adolescents by denying them access to life-saving care while allowing other minors to access the same treatments for other purposes. This evidence supports the District Court's finding that the "purported purpose given for SB 99 is disingenuous" (Doc. 131 at 33) and that the law would likely fail any level of scrutiny.

Appellees meet the remaining requirements for preliminary relief by establishing they would suffer irreparable harm absent relief. In addition to impairing constitutional rights, the testimony of providers and individuals who receive this care and fear that its loss would be life-threatening demonstrate that dire consequences would result from removing this medically necessary care. The balance of equities and the public interest necessarily weigh in favor of preserving the status quo by preliminarily enjoining SB 99 and avoiding the disruption of necessary health care while litigation proceeds.

Appellants' other arguments are meritless. This Court has long held that providers may challenge a law that is directed at those providers and impacts the constitutional rights of their patients. *Armstrong*, ¶ 3. This precedent should not be

overruled in an appeal of a preliminary injunction. Appellants also attack the scope of the injunction, but there is no basis to disturb the District Court's discretionary determination that enjoining SB 99 in its entirety statewide was appropriate to maintain the status quo and avoid the constitutional harms SB 99 threatens to inflict. Finally, the District Court acted within its discretion when it decided to limit testimony to written affidavits, especially after Appellants conceded that there was no witness they would have called to testify who was unable to submit an affidavit, and given the exigencies of the relief sought.

Argument

I. Appellees Have Sufficiently Alleged and Established Standing to Challenge SB 99.

To have standing to bring a lawsuit a plaintiff must "clearly allege past, present or threatened injury to a property or civil right," and that the injury alleged is "one that would be alleviated by successfully maintaining the action." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80; *see* Article VII, Section 4(1) of the Montana Constitution.

A. Parent and Minor Appellees Have Standing to Challenge SB 99.

Appellants do not dispute, nor could they, that Parent and Minor Appellees have standing to challenge SB 99, a statute whose purpose is to prevent transgender minors from accessing gender-affirming medical care and whose provisions work in concert to achieve that objective. Instead, Appellants assert without support that a

plaintiff raising a facial challenge to the constitutionality of a statute must plead injury-in-fact for every conceivable application of the challenged statute.

After reviewing the facts established in this case, the District Court found that Appellees would suffer actual and concrete harm if SB 99 took effect and concluded that "[t]he evidence before the Court, including Youth Plaintiffs' declarations, establishes that irreparable injury is indeed likely" if they lose access to gender affirming care.[2] (Doc. 131 at 43.) The harms identified by the District Court include "impermissible constitutional violations" of Appellees' constitutional rights to equal protection and privacy, and the "risk of severe psychological distress" if Appellees are denied access to gender-affirming care. (Doc. 131 at 40-43.) These injuries are sufficiently concrete to establish that Appellees have standing to challenge SB 99. Moreover, these injuries are attributable to SB 99 in its entirety because its provisions are unified by the singular goal of categorically banning all forms of gender-affirming medical care to transgender adolescents.

Appellants cite no binding authority to support their assertion that a plaintiff raising a facial challenge to the constitutionality of a statute must plead injury-in-

[2] Those harms also include not only stripping access to gender-affirming hormones and puberty blockers but also removing even the equal ability to consider surgical care where necessary. (*See, e.g.*, Doc. 56 at ¶ 17.) And providers are likewise constrained from providing resources and referrals to support such care, (*see, e.g.*, Doc. 51 at ¶ 17), including through the inability to obtain professional liability insurance for doing so.

fact for every conceivable application of the challenged statute. In fact, this Court's settled caselaw relating to severability demonstrates that this is not an issue of justiciability, but rather relates to the District Court's exercise of discretion in crafting an injunction to ensure adequate relief. *See, e.g.*, *Simpkins v. Speck*, 2019 MT 120, ¶ 19, 395 Mont. 509, 443 P.3d 428 ("An injunction is an equitable remedy, and it must be fashioned according to the circumstances of a particular case." (internal quotes omitted)). As such, the breadth of the District Court's injunction is discussed below. *See infra* Section III.

B. The Provider Appellees Have Standing to Challenge SB 99.

Dr. Hodax and Dr. Mistretta have both first- and third-party standing. This Court has made it clear that "[w]hen 'governmental regulation directed at health care providers impacts the constitutional rights of [their] patients,' the providers have standing to challenge the alleged infringement of such rights." *Weems I*, ¶ 12; *see also Armstrong*, ¶ 13; *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118–19 (2020), *abrogated on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).[3] This is consistent with this Court's recognition "that the special

[3] This Court has repeatedly reviewed the merits of constitutional privacy claims brought by medical providers on behalf of patients outside of the abortion context. *See e.g.*, *Wiser v. State Dep't of Com.*, 2006 MT 20, 331 Mont. 28, 129 P.3d 133 (involving denturists asserting the rights of their patients to challenge various regulations); *Mont. Cannabis Indus. Ass'n v. State* No. DDV-2011-518, 2013 WL 496762 (Mont. Dist. Ct. Jan. 16, 2013) (involving Plaintiffs consisting of "persons and entities having a variety of connections with medical marijuana.

relationship between patient and physician will often be encompassed within the domain of private life protected by the [Constitution]." *Armstrong*, ¶ 9 (citing Justice Stevens' dissent in *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 340 n.12 (1990)). Moreover, physicians litigating on their own behalf regarding injuries to their practice and ability to recover payment have first-party standing over such matters. *See Singleton v. Wulff*, 428 U.S. 106, 112-13 (1976) (holding that there was "no doubt" that the physician-appellees suffered concrete injury from the challenged statute that prohibited reimbursement under the Medicaid program for operations they regularly performed). There is no reason to depart from this well-established precedent in this matter.

Provider Appellees, Dr. Juanita Hodax and Dr. Katherine Mistretta, are currently licensed by the appropriate agencies that govern licensing for their respective professions, and they each challenge SB 99 on their own behalf and on behalf of their transgender minor patients who receive gender-affirming medical care. (Doc. 51 at ¶¶ 2, 16-18, 20; Doc. 55 at ¶¶ 2, 12-14, 20.) As part of their regular practices, both provide gender-affirming care to minor patients in Montana, some of whom are Montana Medicaid beneficiaries, including the medical treatments expressly prohibited by SB 99 § 4(1) when used for the purpose of treating gender dysphoria. (Doc. 51 at ¶¶ 2, 5-12; Doc. 55 at ¶¶ 5-7, 11.) Both have extensive

education, training, and experience to provide the medical procedures and care proscribed by SB 99. (Doc. 51 at ¶¶ 2-9, 11; Doc. 55 at ¶¶ 3-5, 8.)

Provider Appellees have first-party standing because they fall squarely within the scope of providers targeted by SB 99 § 4(2) and would face serious professional and civil sanctions if SB 99 took effect and they did not immediately discontinue their practice of treating gender dysphoria in minors with the medical treatment identified in § 4(1). SB 99 also bans them from obtaining professional liability insurance or being reimbursed by Montana Medicaid for providing such care. Accordingly, Dr. Hodax and Dr. Mistretta have first-party standing to challenge SB 99 given that they are "precisely the individuals against whom the statute is intended to operate." *Weems I*, ¶ 14 (quoting *Gryczan v. State*, 283 Mont. 433, 443-46, 942 P.2d 112, 118-20 (1997)). And they have third-party standing to challenge SB 99 on behalf of their patients because it impacts their patients' constitutional rights. *Weems I*, ¶ 12.

Appellants cite *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023), but that case provides no basis to depart from *Armstrong* and its progeny. *Id.* at 1069. *Tingley* involved a conversion therapist who sought to assert third-party standing on behalf of his patients but failed to sufficiently articulate how the challenged statute actually injured his patients, who could still access the care he claimed they needed. *Id*. Here, Appellees have demonstrated

through substantial evidence that SB 99 would require Provider Appellees to cease providing their minor patients gender-affirming medical care to treat gender dysphoria, causing significant psychological harm.

Contrary to Appellants' assertions,[4] neither a patient's ability to vindicate her own constitutional rights pseudonymously nor a doctor's alleged "financial incentive" in raising claims on her behalf changes the analysis here. Courts have repeatedly permitted physicians to assert third-party standing to raise claims on behalf of their patients without regard to the patients' ability to assert their own claims or to the patients' payment, or lack thereof, for the medical care received. *See, e.g.*, *Armstrong*, ¶¶ 8-13; *Weems I*, ¶¶ 8-14; *Planned Parenthood of Mont. v. State ex rel. Knudsen*, 2022 MT 157, ¶ 2 n.1, 409 Mont. 378, 515 P.3d 301; *Singleton*, 428 U.S. at 118.

Provider Appellees are seeking to vindicate the constitutional right to privacy of their transgender minor patients by challenging SB 99, which operates by directly targeting providers. Provider Appellees have met the requirements to establish standing.

[4] Appellants' Br. at 24-25.

II. The District Court Did Not Abuse Its Discretion by Preliminarily Enjoining SB 99.

Under the federal preliminary injunction standard, which Montana has adopted, "[t]he purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits," generally by preserving the status quo. *Doe #1 v. Trump*, 957 F.3d 1050, 1068 (9th Cir. 2020) (internal citation omitted). Neither the District Court, nor this Court, resolves the ultimate merits of a case at the preliminary injunction stage. *Caldwell v. Sabo*, 2013 MT 240, ¶ 19, 371 Mont. 328, 308 P.3d 81; *see also Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 679 (9th Cir. 1984) (reserving determination of ultimate issues until after trial). A district court may grant a preliminary injunction where the applicant has established: (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. § 27-19-201, MCA.

Although the District Court did not need to apply it here, (*see* Doc. 131 at 18 n.4, finding Appellees met higher burden of conjunctive standard the Ninth Circuit uses a "sliding scale" in applying the federal standard, where "a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). When the "balance of hardships tips sharply" in favor of a plaintiff, the plaintiff need only show "serious questions going

to the merits," "a likelihood of irreparable injury[,] and that the injunction is in the public interest." *Id.* at 1135.

Appellants overstate the significance of the general presumption that a statute is constitutional. (Appellants' Br. at 14, 34, 39, 43.) Once a "challenger shows an infringement on a fundamental right, a presumption of constitutionality is no longer available." *Mont. Democratic Party v. Jacobsen*, No. DA 22-0667, 2024 WL 1291935, at *3 (Mont. Mar. 27, 2024). The presumption, along with the "traditional approval" of statutes based on any conceivable rational basis, disappears when a statute implicates a suspect class or fundamental right. *See id.* at *10.; *compare Powder River County. v. State*, 2002 MT 259, ¶ 73, 312 Mont. 198, 60 P.3d 357 (rational basis case cited repeatedly by Appellants).

A. Appellees Are Likely to Succeed on the Merits of Their Claims.[5]

1. The District Court Properly Held that Appellees Are Likely to Succeed on Their Equal Protection Claim.

The Montana Constitution guarantees equal protection under the law:

[5] While not necessary to affirm, this Court may also consider Appellees' additional claims. *Peeler* v. *Rocky Mountain Log Homes Canada, Inc.*, 2018 MT 297, ¶ 28, 393 Mont. 396, 431 P.3d 911. SB 99 deprives parents of the fundamental right to direct their children's medical care free from government interference. (Mont. Const. art. II, § 17; Plaintiffs' Brief in Support of Motion for Preliminary Injunction Doc. 50 at 32-34.) SB 99 also violates Montanan's fundamental right to seek health care, preventing transgender adolescents the right to elect gender-affirming care and parents' rights to obtain coverage for such care. (Mont. Const. art. II, § 3; Doc. 50 at

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of … sex.

Mont. Const. art. II, § 4. Montana's equal protection clause "provides even more individual protection" than the federal equal protection clause. *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445. Its purpose "is to ensure citizens are not subject to arbitrary and discriminatory state action." *Id.* ¶ 27.

a. SB 99 classifies based on sex and transgender status.

The District Court concluded that "the language of SB 99 classifies based directly on transgender status" and therefore necessarily classifies based on sex. (Doc. 131 at 21, 24-25.) According to SB 99's plain terms, whether a person can receive certain medical treatments depends on their assigned sex at birth, whether they are transgender, and whether the care tends to reinforce or disrupt stereotypes associated with their sex assigned at birth.

37-38.) SB 99 infringes on the fundamental right to dignity by drastically limiting the ability of transgender people to seek potentially life-saving care that would allow them to live in alignment with their gender identity. (Mont. Const. art. II, § 4; Doc. 50 at 38-39.) By barring healthcare professionals from speaking, and their patients and parents form hearing, about medically accepted treatments for gender dysphoria, SB 99 is also a presumptively unconstitutional content-based regulation of speech. (Mont. Const. art. II, § 7; Act, § 4(4); Doc. 50 at 39-41.) SB 99 cannot survive strict scrutiny under any of these constitutional violations, and Appellees are likely to succeed on the merits of these additional claims.

(i) SB 99 discriminates based on sex.

SB 99 facially classifies minors for differential treatment based on sex. It proscribes 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 that his gender or sex is not male." Act, § 4(1)(c). As a result, under SB 99, a minor assigned male at birth may be prescribed testosterone, but a minor assigned female at birth is not permitted to seek the same medical treatment. To know whether a treatment is legal or illegal under SB 99, one must know the adolescent's sex.

By "discriminating against transgender persons," SB 99 "unavoidably discriminates V persons with one sex identified at birth and another today." *Bostock v. Clayton County*, 590 U.S. 644, 669 (2020). If the legislature cannot "writ[e] out instructions" for determining whether treatment is permitted "without using the words man, woman, or sex (or some synonym)," the law classifies based on sex. *Bostock*, 590 U.S. 660-61. That is precisely what SB 99 does. A minor's sex assigned at birth determines whether or not the minor can receive certain types of medical care under the law.

As the District Court observed, "it is impossible to discriminate against a person for being … transgender without discriminating against that individual based on sex." (Doc. 131 at 24, quoting *Bostock*, 590 U.S. at 660; *see also* Order Denying Respondent's Motion for Summary Judgment and Granting Charging Party's Partial

Motion for Summary Judgment, *Maloney v. Yellowstone County*, Nos. 1570–2019, 1572–2019 (Mont. Dep't of Lab. & Indus. Aug. 14, 2020) (discrimination based on gender identity is sex discrimination)).

Appellants urge this Court to disregard *Bostock*'s reasoning as "limited to Title VII," (Appellants' Br. at 33-34), but Appellants confuse classification with liability. Nothing exempts SB 99 from the core logic underlying *Bostock*'s conclusion—discriminating against a person for being transgender constitutes discrimination based on sex. Other courts, including the Fourth, Seventh, and Ninth Circuits, have similarly recognized *Bostock*'s sex discrimination analysis cannot be arbitrarily limited to Title VII. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); *Hecox v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023); *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023), *cert denied*, 144 S. Ct. 683 (2024).

Appellants highlight another reason *Bostock*'s logic applies with particular force here: Title VII's language is more similar to the Montana Constitution than to the federal Constitution. (Appellants' Br. at 33-34), arguing Title VII and federal Equal Protection Clause are so "differently worded" that the same reasoning should not apply). Like Title VII, which prohibits discrimination "because of sex," (Appellants' Br. at 33-34), the Montana Constitution specifically prohibits discrimination "on account of … sex," Mont. Const. art. II, § 4. If Appellants are

correct that this distinction matters, it is more reason to apply *Bostock*'s reasoning to this case, not less. Furthermore, Montana's counterpart to Title VII—the Montana Human Rights Act—extends beyond the employment context, *see* § 49-2-301 *et seq.*, MCA; "implements the non-discrimination rights enumerated in Article II, Section 4 of the Montana Constitution," *Edwards v. Cascade Cnty. Sheriff's Dep't*, 2009 MT 451, ¶ 73, 354 Mont. 307, 223 P.3d 893; and proscribes "[d]iscrimination based on transgender status" through its "prohibition on sex discrimination," Order Denying Respondent's Motion for Summary Judgment and Granting Charging Party's Partial Motion for Summary Judgment at 10, *Maloney v. Yellowstone County*, Nos. 1570–2019, 1572–2019 (Mont. Dep't of Lab. & Indus. Aug. 14, 2020).

Because SB 99 is not a neutral listing of excluded physical conditions, Appellants add nothing to the discussion by attempting to apply *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 235-37 (2022), to bar all equal protection claims of "sex-based classifications involving a medical procedure" absent evidence of pretext. (Appellants' Br. at 31.) *Dobbs* merely observed that facially neutral regulations of medical procedures do not always receive heightened scrutiny under the federal Constitution simply because they disparately impact members of one sex. Equal protection jurisprudence has long drawn a fundamental distinction between sex-neutral classifications and facial sex classifications. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273-74 (1979). Here, SB 99 facially classifies based on sex:

in each instance, a person's sex assigned at birth must be known and used to determine whether treatment is allowed. And SB 99 targets transgender people by banning treatments to address needs that are central to what makes them transgender. *See Hecox*, 79 F.4th at 1025 (finding that law was "designed precisely" to exclude transgender women from women's athletics).

Appellants argue SB 99 does not discriminate based on sex because it does not "close a door to only one sex" and bars care for both transgender males and females. (Appellants' Br. at 31-32.) But equal application of discriminatory treatment (e.g., injuring both transgender men and transgender women) does not change the character of the discrimination. *See Bostock*, 590 U.S. at 662; *see also Adams ex rel. Kasper v. Schl. Bd. of St. Johns Cnty.*, 57 F.4th 791, 801 (11th Cir. 2022) (en banc) (applying intermediate scrutiny to policy under which entry into designated bathroom was legal or not depending on sex assigned at birth). A statute that contains classifications subject to elevated scrutiny raises equal protection concerns even if applied even-handedly to both sexes. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141 (1994) (equal protection right to a jury selection process free of sex discrimination "extends to both men and women"); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("The suggestion that racial classifications may survive when visited upon all persons … has no place in our modern equal protection jurisprudence.").

SB 99 likewise discriminates based on a person's failure to conform to sex stereotypes or expectations. Banning gender-affirming care "entrenches" the sex-stereotyped "belief that transgender individuals must preserve the genitalia and other physical attributes of their … sex [assigned at birth] over … specific medical and psychological recommendations to the contrary." *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018). In other words, "sex plays an unmistakable and impermissible role" in SB 99, which "intentionally penalizes a person … for traits or actions that it tolerates" in another individual simply because of sex assigned at birth. *See Bostock*, 590 U.S. at 660. That sex stereotypes motivated SB 99 is particularly evident here, where SB 99 restricts promoting the use of "clothing or devices, such as binders, for the purpose of concealing a minor's secondary sex characteristics." Act, §§ 3(10), 4(7). Such sex stereotyping violates equal protection. *See Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 803 (10th Cir. 2019) (laws "grounded in stereotypes" serve no important governmental interest); *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576 (6th Cir. 2018) ("stereotypical notions of how sexual organs and gender identity ought to align" are inherent in discrimination against transgender people), *aff'd sub nom. Bostock v. Clayton County*, 590 U.S. 644 (2020).

Appellants argue SB 99 does not discriminate based on sex, but merely recognizes that "[t]he two sexes are not fungible" and "acknowledge[s] … our most

basic biological differences." (Appellants' Br. at 34, citing *United States. v. Virginia*, 518 U.S. 515, 533 (1996)). Appellants confuse whether SB 99 *triggers* heightened scrutiny with their arguments about whether it *survives* heightened scrutiny. Neither is served by their statement. SB 99 does not merely "recognize" differences; it uses them to impose unequal constraints based on those categories. *See Virginia*, 518 U.S. at 533 (after acknowledging differences, proceeds to hold that they cannot be used to constrain individual opportunity).

(ii) SB 99 discriminates based on transgender status.

As the District Court found, "[T]he language of SB 99 classifies based directly on transgender status." (Doc. 131 at 21, citing Mont. S. 99, § 4(1)(c)). Transgender and cisgender adolescents in Montana seeking health care subject to SB 99 are similarly situated: treatments are prohibited only if the goal of treatment is "to alleviate the patient's gender dysphoria by bringing their body into closer alignment with their gender identity." (Doc. 59 at ¶ 31.) The same treatments and procedures are provided to cisgender minors to treat other medical conditions, such as precocious or delayed puberty, hypogonadism, and polycystic ovarian syndrome. (*Id.* ¶ 69; *see also* Doc. 131 at 10-11.)

Having a gender identity that is inconsistent with one's sex assigned at birth is exclusive to transgender people, making them the only people denied care under SB 99. *See Fain v. Crouch*, 618 F. Supp. 3d 313, 325 (S.D.W. Va. 2022) ("[A]

person cannot suffer from gender dysphoria without identifying as transgender."), *appeal filed*, No. 22-1927 (4th Cir. Sept. 6, 2022); *see also C. P. ex rel. Pritchard v. Blue Cross Blue Shield of Ill.*, No. 3:20-cv- 06145-RJB, 2022 WL 17788148, at *6 (W.D. Wash. Dec. 19, 2022); *Kadel v. Folwell*, No. 1:19-cv-272, 2022 WL 11166311, at *4 (M.D.N.C. Oct. 19, 2022). SB 99 therefore singles out medical care that only transgender people need or seek. *See Fain*, 618 F. Supp. 3d at 327; *Toomey v. Arizona*, No. CV-19-00035-TUC-RM (LAB), 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 950 (W.D. Wis. 2018).

Because SB 99 prohibits medical care only transgender people undergo—i.e., medical or surgical procedures related to gender transition—it discriminates based on transgender status. *See Williams v. Kincaid*, 45 F.4th 759, 772 (4th Cir. 2022) (the strong connection between gender dysphoria and transgender identity supports the conclusion that singling out gender dysphoria for differential treatment as compared to other conditions "would discriminate against transgender people as a class"), *cert. denied*, 143 S. Ct. 2414 (2023).

Appellants argue that transgender minors are not similarly situated to other minors seeking the same treatments because, they contend, gender dysphoria is psychological rather than physical. But Appellants never explain why such a distinction would be relevant when the touchstone of medical treatment is its

necessity, regardless of the reason for that need. (Appellants' Br. at 28-29.) The District Court correctly rejected this argument below. Even assuming arguendo Appellants' characterization of gender-affirming treatments as treating a purely "psychological" condition,[6] SB 99 does not prohibit treatment for all psychological conditions: it squarely draws a line around only treatments offered to transgender adolescents. Moreover, as the District Court noted, both groups—transgender minors and their cisgender counterparts—seek the relevant treatments for "medical reasons" that may require "the aid of a medical professional." (Doc. 131 at 21, 22.) If the distinction based on "gender perception" is removed, the two groups become a single "group of Montanans under the age of 18" (which also negates Appellants' contention that the law merely discriminates based on age). (Doc. 131 at 21.) At most, distinctions between gender dysphoria and other conditions would go to why—in Appellants' view—SB 99 might by justified, but not to whether the discrimination in fact exists.

Appellants next argue that SB 99 does not discriminate based on transgender status because not all transgender minors seek gender-affirming care. (Appellants' Br. at 29-30). But SB 99 prohibits care for the entire class of transgender minors,

[6] The District Court also correctly rejected the premise of this proposed distinction, noting that gender-affirming care "may be medically appropriate and necessary to improve the *physical and mental health* of transgender people." (Doc. 131 at 22.)

regardless of whether each individual seeks that care. Categorical discrimination by the government is not cured by the fact that not every individual in the category will equally feel its consequences. *See Virginia*, 518 U.S. at 550 (state required to show justification for excluding women where "some women, at least, would want to attend [VMI] if they had the opportunity" even if others would not).

b. SB 99 is subject to strict scrutiny.

The District Court correctly held that strict scrutiny applies because SB 99 discriminates on the basis of transgender status and sex and burdens the right to privacy. *Snetsinger*, ¶ 17; (Doc. 131 at 24, 25 n.7, 28.)

(i) Classifications based on sex and transgender status warrant strict scrutiny.

The District Court first concluded that SB 99's sex-based classification triggers strict scrutiny. After outlining the characteristics of suspect classification and non-binding Montana precedent on the issue, (Doc. 131 at 25 n.7), the District Court accurately observed that Montana's middle-tier scrutiny imposes a lower burden than federal heightened scrutiny (applied to sex-based classifications under the federal Constitution), while Montana's equal protection guarantee provides even more individual protection than its federal equivalent, *Snetsinger*, ¶ 15, concluding

that strict scrutiny therefore was the appropriate level of review. (Doc. 131 at 26-27.)[7]

The District Court also stated that it "believes that transgender persons comprise a suspect class" apart from the inherent sex classification, but did not need to extensively analyze the issue because it had already found heightened scrutiny was triggered. (Doc. 131 at 25 n.7, citing *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).) Appellants concede that "sex is a suspect class under Montana law," (Appellants' Br. at 31), but do not discuss the proper level of scrutiny for classifications based on transgender status.

Although this Court need not reach the issue to uphold the District Court's decision, Appellees provided extensive authority below to support the District Court's observation that such classifications warrant strict scrutiny under Montana's Constitution, and that SB 99 also warrants heightened scrutiny on that basis. (Doc. 50 at 23-27 (outlining history of discrimination against transgender Montanans and documentation of political powerlessness)). *See Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019) (applying heightened scrutiny to classifications based on transgender status).

[7] Appellants do not explain their position on appeal that this logical comparison "conflates" heightened and strict scrutiny. (Appellants' Br. at 41.)

(ii) SB 99 burdens a fundamental right.

SB 99 is also subject to heightened scrutiny because it burdens several fundamental rights. The District Court found that SB 99 burdens the right to privacy, *infra* Part II(A)(2). Moreover, as established below, SB 99 burdens several additional fundamental rights. (Doc. 50 at 32-41; *Stand Up Mont. v. Missoula Cnty. Pub. Schs.*, 2022 MT 153, ¶ 10, 409 Mont. 330, 337, 514 P.3d 1062, 1067 (strict scrutiny applies when a statute affects a fundamental right).

c. The District Court correctly held that SB 99 fails strict scrutiny.

"Under the strict scrutiny standard, the state carries the burden of demonstrating the challenged law or policy is narrowly tailored to serve a compelling government interest and only that interest." *Stand Up Mont.*, ¶ 10 (citations omitted). The State must also show that the legislative action is the "least onerous path that can be taken to achieve the state objective." *Pfost v. State*, 219 Mont. 206, 222, 713 P.2d 495, 505 (1985).

Here, the District Court considered extensive evidence before concluding Appellants had not demonstrated that SB 99 serves a compelling interest. (Doc. 131 at 34.) The District Court thoroughly reviewed the parties' preliminary arguments on the merits, noted the parties' agreement that the government has a compelling interest in the physical and psychosocial well-being of minors, and then turned to the dispositive question of whether SB 99 serves that interest. (Doc. 131 at 29.) The

court's weighing of the evidence is supported by the record and is entitled to deference on appeal.

SB 99's only stated justification "is to enhance the protection of minors and their families … *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." SB 99, § 2 (emphasis added). The District Court correctly found that the record "does not support a factual finding that minors in Montana are being faced with pressure related to receiving harmful medical care." (Doc. 131 at 30.) Appellants do not dispute this finding; in fact, the word "pressure" is conspicuously absent from their brief. *See Wadsworth v. State*, 275 Mont. 287, 303, 911 P.2d 1165, 1174 (1996) (compelling interest requires "something more than simply saying it is so").

The District Court found that SB 99 does not protect minors and that it "would have the opposite effect." (Doc. 131 at 30.) It assigned particular weight to evidence that the medical care prohibited by SB 99 has been robustly documented and studied and is the accepted standard of care for gender dysphoria endorsed by "leading medical organizations, including the American Medical Association, the American Psychological Association, and the American Academy of Pediatrics, among others." (Doc. 131 at 30, citing Doc. 59 at ¶ 32; Doc. 58 at ¶ 21); *see also* (Doc. 59 at ¶ 74.) The District Court found that those "organizations agree that the treatments outlined

are safe, effective for treating gender dysphoria, and often medically necessary." (Doc. 131 at 30, citing Doc. 59 at ¶¶ 32, 34, 75 (gender-affirming medical and surgical care is "the accepted standard of care by all major medical organizations in the United States").

The District Court acknowledged that Appellants dispute the determinations made by those leading medical organizations. (Doc. 131 at 12-13 outlining Appellants' arguments and evidence.) And it reiterated that its weighing of the evidence at the preliminary injunction stage would not determine its ultimate resolution on the merits. (Doc. 131 at 30 n.8.) Nonetheless, its assignment of weight to leading professional organizations was reasoned, supported by the record, and within its discretion under the appropriate legal standard. (Doc. 131 at 34); *Armstrong*, ¶ 62 (legal standards for medical practice must be grounded in collective professional scientific judgment, including knowledge and experience of medical community).

On appeal, Appellants ask this Court to re-weigh the evidence regarding the necessity, effectiveness, and safety of the banned health care. They argue, for example, that the ongoing study of medical treatments provides a compelling basis to ban all approved treatments for a medical condition. (Appellants' Br. at 44-45.) The District Court's Order demonstrates that it properly considered and weighed Appellants' evidence. (*See, e.g.*, Doc. 131 at 12-13, citing to Appellants' expert

testimony regarding medical consensus, international approaches, consent, and purported desistance.) The fact that the District Court assigned Appellants' evidence less weight than of the considered positions of major domestic medical organizations and Appellees' expert testimony (along with personal testimony regarding the benefits of care and harm of its removal) is not a basis to find manifest abuse of discretion.[8]

Moreover, the record amply supports the District Court's factual conclusions. The evidence supporting gender-affirming medical care is comparable to the evidence supporting other forms of medical care. (Olson-Kennedy Rebuttal Rep. (Doc. 122) at ¶¶ 36-55.) As with any medical interventions, potential risks are weighed against benefits, as well as the risks of doing nothing. (*See* Doc. 122 at ¶ 43.) There is *no record evidence* to support Appellants' dangerous alternative: to rely on psychotherapy alone, while categorically banning gender-affirming medical care. In fact, the long history of treatment for gender dysphoria has demonstrated that "psychiatric intervention cannot alter people's gender, nor does it lead to a diminishing of the distress that arises from gender incongruence." (Doc. 122 at ¶ 118.) And the harm of "waiting" to see what happens when people are denied care

[8] This is particularly true given that none of the Appellants' proffered experts have experience providing the type of care prohibited by SB 99. *See* Doc. 120 at 3-7 outlining details for each expert and related findings from other courts.

is tragically certain, as the District Court found. (Doc. 131 at 45-46) (*see infra*, Parts II(B)-(C).) There is no basis for this Court to replace those findings with the opposite conclusion that removing care is safer or less harmful than maintaining patients' health care while this case proceeds.

Appellants also suggest the District Court "ignored" other countries' approaches to the ongoing study of gender-affirming treatments. (Appellants' Br. at 44-45.) To the contrary, the District Court acknowledged Appellants' argument that current standards of care in the United States are purportedly "not in line with international approaches." (Doc. 131 at 12.) The court was not required to give this evidence more weight than evidence of leading professional standards from major United States medical associations, especially where Appellants have consistently misrepresented these countries' approaches by suggesting they have banned care as SB 99 would. To the contrary, "[s]ome or all of these [countries] insist on appropriate preconditions and allow care only in approved facilities … just as care in the United States is ordinarily provided through capable facilities." *Dekker v. Weida*, No. 4:22CV325-RH-MAF, 2023 WL 4102243, at *17 (N.D. Fla. June 21, 2023), *appeal filed sub nom. Dekker v. Sec'y, Fla. Agency for Health Care Admin.*, No. 23-12155 (11th Cir. June 27, 2023).

Further, there is no evidence that *any* country has done what Montana has done: ban gender-affirming care for minors entirely. Appellants cite the lower court

decision in the United Kingdom case *Bell v. Tavistock*, including directly relying on some of the medical evidence before that court. (Appellants' Br. at 8.) But that decision was overturned by the Court of Appeals precisely because the lower court inappropriately relied on the very evidence to which Appellants point. *Bell v. Tavistock*, [2021] EWCA Civ 1363, ¶¶ 63-64 (rejecting lower court's decision to credit the propositions "that treatment of gender dysphoria with puberty blockers was 'experimental' and that the vast majority of patients taking puberty blockers … are on a pathway to much greater medical interventions"). The appellate court ultimately held that it was for adolescents, their parents, and their clinicians to decide on treatment. *See id.* ¶¶ 76, 92.

Appellants also argue the District Court "minimiz[ed]" their argument that the off-label use of FDA-approved medications justifies the banning of gender-affirming care treatments when it acknowledged that other off-label uses of drugs are common in pediatrics, including antibiotics, antihistamines, and antidepressants. (Appellants' Br. at 47; Doc. 131 at 32.) As the District Court found: "[O]nce 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." (Doc. 131 at 32, citing Doc. 59 at ¶ 71.) Neither of Appellants' arguments on appeal attempts to justify using off-label status as a basis for categorizing banned treatments. They first contend other off-label uses have a lower level of risk—a fact

that, even if established, would not support their argument that the off-label status of gender-affirming care sets it apart for special restriction (i.e., would not explain the under-inclusiveness of the ban to address off-label use). (Appellants' Br. at 47.) They next contend that states generally have the power to ban both FDA-approved and off-label uses, (Appellants' Br. at 47-48), which is another circular argument that still leaves Appellants with the burden of proving why this particular sub-category of treatments was targeted.

Appellants next object to the District Court's discussion of SB 422, which provides a route for Montanans to obtain investigational drugs not yet approved by the FDA for general use. The District Court relied on SB 422 for one reason: to highlight the absurdity and inconsistency of Appellants' post-hoc arguments in support of SB 99. The District Court explained that SB 422, passed in the same legislative session as SB 99, allows parents to consent to the administration of any investigational drug that might fall under SB 422's scope. (Doc. 131 at 14-15.) Far from conceding that gender-affirming care treatments are experimental, the District Court explained, "[e]ven assuming *arguendo*" *Appellants'* characterization of the "care proscribed by SB 99 as experimental," Appellants' safety "argument falls flat once SB 422 is brought into the picture." (Doc. 131 at 32.) This is not because SB 99's proscription violates SB 422 directly (the strawman argument Appellants spend time refuting at Appellants' Br. pp. 47-48), but because SB 422 throws into

stark relief the Legislature's decision to carve out only gender-affirming care for its most drastic restriction, while expanding access to investigational treatments.[9]

The passage of SB 422 also supports the District Court's finding that nothing about gender-affirming care makes informed consent impracticable. (Doc. 131 at 31, explaining process where parents make decisions after providers inform them about risks, benefits, and alternatives). Adolescents have the capacity to make informed decisions in the context of medical care and provide assent, and parents consent to treatments for their minor children in other areas of medicine, including treatments that may result in irreversible changes. (Moyer Rebuttal Dec. (Doc. 121) at ¶¶ 13-16; Doc. 122 at ¶ 120.)

Finally, Appellants ask this Court to assume the District Court assigned too much weight to legislative evidence of animus. (Appellants' Br. at 39-41.) They suggest the District Court concluded that SB 99 did not serve its purported interest based solely on legislator comments. (Appellants' Br. at 40 (only "clearest of proof" is sufficient to establish unconstitutionality on this basis), and Appellants' Br. at 41

[9] The District Court's hypothetical ponders what might happen under SB 422 if gender-affirming care treatments were experimental, not yet FDA approved, not the existing evidence-based standard of care for treating gender dysphoria, and not therefore already subject to existing consent procedures. (Doc. 131 at 33.) The hypothetical discrepancies Appellants note (e.g., treatments banned by SB 99 are not "investigational" and have been approved by the FDA) make the discriminatory treatment more obvious—not less.

("reliance" on legislative record and "resulting" injunction).) Even a cursory reading of the District Court's Order refutes this mischaracterization. The District Court's one-paragraph discussion of legislative animus is preceded by five pages of analysis leading to its conclusion that "the purported purpose given for SB 99 is disingenuous." (Doc. 131 at 28-33.) And the District Court's observation that the legislative record is "replete with animus," is supported by the comments it cited that reflect "personal, moral, or religious disapproval of gender transition." (Doc. 131 at 34.) As private biases cannot provide a legitimate basis for a law, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985), the District Court did not err in considering the evidence, and there is no basis to find it was given too much weight.

Even if the SB 99 served a compelling state interest (which it does not), it is not narrowly tailored.[10] SB 99 institutes a blanket ban on gender-affirming health care for adolescents, with no provision for circumstances where such care may be permissible. *See, e.g.*, *Poe ex rel. Poe v. Labrador*, No. 1:23-CV-00269-BLW, 2023 WL 8935065, at *14-15 (D. Idaho Dec. 26, 2023) (concluding Idaho's ban was not tailored to purported interests where it allowed same treatment for cisgender

[10] The District Court declined to analyze whether SB 99 was "narrowly tailored" because it found that it served "no compelling government interest." (Doc. 131 at 34.) However, this Court may affirm "for any reason supported by law and the record that does not expand the relief granted by the lower court." *Peeler*, ¶ 28.

minors), *appeal filed*, No. 24-142 (9th Cir. Jan. 9, 2024). This Court need not resolve the credibility of, or disputes among, the designated experts to conclude that SB 99 likely fails strict scrutiny. Even Appellants' experts' egregiously misleading commentary regarding desistence rates among prepubertal children (who do not receive any medical treatment) acknowledge that some portion of transgender adolescents do not desist (Appellants' Br. at 5-6 and *infra* Part II(C)). Therefore SB 99 categorically bans care that both parties agree is medically necessary for *some* transgender adolescents. *See* (Doc. 122 at ¶ 14) (in fact, the vast majority of such adolescents will need care, as desistance is incredibly rare where gender identity persists at adolescence). SB 99 does not alleviate "pressure" to receive certain forms of health care—to the contrary, it substitutes the Legislature's judgment wholesale for the reasoned and informed judgment of doctors, patients, and families. It is not narrowly tailored and is therefore unconstitutional.

d. SB 99 fails any level of review.

Although the District Court held strict scrutiny was the correct standard, it concluded in the alternative that SB 99 also failed under both middle-tier scrutiny and rational basis scrutiny. (Doc. 131 at 35-36.) For a law to survive middle-tier scrutiny, Appellants must show that it is reasonable and the need for the resulting classification outweighs the value of the right to an individual. *Mont. Democratic Party*, 2024 WL 1291935, at *9-10. The District Court weighed the evidence and

found, based on substantial evidence in the record, that "Youth Plaintiffs' interest in their fundamental rights is greater than Defendants' interest in the classification." (Doc. 131 at 35); *see also, infra* Part II(C) (weighing harms).

The District Court also found the law lacked a rational relationship to a legitimate government interest. *See Snetsinger*, ¶ 19. For the reasons discussed above, the District Court provided a reasoned basis for its conclusion that "SB 99 does not serve its purported interest of protecting minors" by barring the only evidence-based standard of care for gender dysphoria. (Doc. 131 at 36.) SB 99 gravely threatens the health and well-being of transgender adolescents by denying them access to life-saving care while allowing other minors to access the same treatments. (Doc. 131 at 36.) The court's finding of animus also provides a reasoned basis for its conclusion. *Romer v. Evans*, 517 U.S. 620, 632, 634 (1996) ("[A] bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

2. The District Court Properly Held that Appellees Are Likely to Succeed on Their Fundamental Right to Privacy Claim.

In analyzing Appellees' likelihood of success on the merits of their right to privacy claims, the District Court applied the correct legal standard as established by this Court and did not abuse its discretion in finding that Appellees are likely to prevail in proving that SB 99 violates their right to privacy.

This Court has recognized that Article II, Section 10's right to privacy is simultaneously

> as narrow as is necessary to protect against a specific unlawful infringement of individual dignity and personal autonomy by the government … and as broad as are the State's ever innovative attempts to dictate in matters of conscience, to define individual values, and to condemn those found to be socially repugnant or politically unpopular.

Armstrong, ¶¶ 35-38. For over two decades, this Court has held that this right protects "one's right to choose or refuse medical treatment" because "[f]ew matters more directly implicate personal autonomy and individual privacy than medical judgments affecting one's bodily integrity and health." *Id.* ¶¶ 52, 53.

a. The District Court applied the correct legal standard.

The District Court applied the correct legal standard by relying on this Court's settled law recognizing that "the Montana Constitution guarantees each individual the right to make medical judgements affecting her or his bodily integrity and health in partnership with a chosen health care provider free from government interference." (Doc. 131 at 36-37.) This Court first recognized this right in *Armstrong*, ¶ 39, and has since repeatedly affirmed the scope of this right including as recently as 2023. *See Weems v. State ex rel.*, 2023 MT 82, ¶¶ 35-50, 412 Mont. 132, 529 P.3d 789 (*Weems II*); *Weems I*, ¶ 19; *Wiser*, ¶ 15.

The District Court recognized that "not every restriction on medical care 'necessarily impermissibly infringes on the right to privacy [because t]he State

possesses a general and inherent 'police power by which it can regulate for the health and safety of its citizens.'" (Doc. 131 at 37, citing *Weems II*, ¶ 38.) The District Court correctly noted that this inherent police power is not without limits, and that a governmental infringement on "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[,]" can only be upheld if the government can "clearly and convincingly" establish that it poses a "medically-acknowledged, *bona fide* health risk." (Doc. 131 at 38, citing *Armstong*, ¶ 62.)[11] "[I]t is axiomatic that under our system of laws, the parameters of the legislature's policy-making power are defined by the Constitution and that its ability to regulate morals and to enact laws reflecting moral choices is not without limits." *Gryczan*, 283 Mont. at 454, 942 P.2d at 125. This legal standard is wholly consistent with this Court's binding precedent

[11] The State possesses an *inherent* police power, which Appellees do not dispute. However, Appellants' insistence—both on appeal (Appellants' Br. at 35), and before the District Court (Doc. 77 at 37)—that this power "shall never be abridged" refers to a provision of the Montana Constitution that no longer exists, and to cases decided before the Montana Constitutional Convention of 1972-1973.

Article XV, Section 9 of the Montana Constitution of 1889 read, "[T]he police powers of the State shall never be abridged, *or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the State.*" (emphasis added). The Montana Constitution of 1973 does not contain this language.

in matters involving claims under the Montana Constitution's right to privacy in the medical context.

Wiser and *Montana Cannabis Industry Association* are both distinguishable from this matter in critical ways. In *Wiser*, denturists challenged a regulation designating when denturists rather than dentists could perform certain dental procedures, and this Court clarified that the right to privacy protects the 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." *Wiser*, ¶ 15 (quoting Armstrong, ¶ 62); *see also Weems I*, ¶ 29 (Rice, J., dissenting). And in *MCIA* this Court held that "the right to privacy does not encompass the affirmative right of access *to medical marijuana*," and reasoned that "[p]laintiffs cannot seriously contend that they have a fundamental right to medical marijuana when it is still *unequivocally illegal* under the Controlled Substances Act."[12] *MCIA* at ¶ 32 (emphasis added).

---

[12] *People v. Privitera*, 23 Cal. 3d 697 (1977) and *Carnohan v. United States*, 616 F.2d 1120 (9th Cir. 1980) are also distinguishable because they involved government restrictions on the use of Laetrile to treat certain symptoms of cancer. However, Laetrile has never been approved by the FDA for *any* medical purpose *See* https://www.cancer.gov/about-cancer/treatment/cam/patient/laetrile-pdq#_28

And *County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192 (N.D. Cal. 2003), involved a challenge to the enforcement of the federal Controlled Substance Act against patients using medical marijuana to alleviate pain. The *County of Santa Cruz* court denied the request for an injunction finding that the prohibited medical marijuana was not the only means of treating the pain that patients experienced.

Unlike the denturists in *Wiser*, Provider Appellees here are licensed by the state to provide the medical care they use to treat gender dysphoria in minors, they have done so for years, neither has ever been subject to any type of professional sanction or civil liability arising from their practice, and they would continue to administer the same medical procedures and care to treat other conditions in minor patients. (Doc. 54 at ¶¶ 2, 5-6, 8-9, 12-14 and Doc. 51 at ¶¶ 2, 9-13, 16-18.)

Unlike the medical marijuana at issue in *MCIA*, gender-affirming care is not criminally prohibited under federal or state law. And SB 99 does not simply "regulate a particular medication," like the law in *MCIA* which uniformly restricted the use of marijuana for any and all medical purposes. Rather SB 99 prohibits the use of medical care to treat one serious medical condition, gender dysphoria in minors, while permitting the use of the same medications and procedures on minor patients for any "other purpose." *See* SB 99(4)(1)(c).

Overall, *MCIA* and *Wiser* are narrow distinctions to the "expansive" right to privacy set forth in *Armstrong* and repeated in *Weems II*, where this Court recognized that "Montana adheres to one of the most stringent protections of its citizens' right to privacy in the United States[,]" which reflects "Montanan's historical abhorrence and distrust of excessive governmental interference in their personal lives." *Weems II*, ¶¶ 35-36 (citing *Armstrong*, ¶ 34).

b. The District Court did not abuse its discretion in finding that Appellants cannot clearly and convincingly show that gender-affirming care poses a medically acknowledged, *bona fide* health risk.

As discussed, the District Court correctly concluded that when the legislature interferes "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 services and who has been licensed to do so[,]" (Doc. 131 at 38, citing *Armstrong*, ¶ 62) the interference is subject to strict scrutiny, which requires that the State "demonstrate a compelling interest justifying the intrusion is narrowly tailored to advance only that interest." *Weems II*, ¶ 45. Specifically, the State must "clearly and convincingly" show a "medically-acknowledged, [bona fide] health risk," justifying the infringement. *Id.* ¶ 45.

The District Court conducted a thorough review of the extensive evidence filed by both parties and reasonably exercised its discretion in finding that Appellees "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." (Order Doc. 131 at 38-39.) The District Court considered Appellants' "assertion that such treatments are unapproved, experimental, and unaccompanied by any long-term safety data[,]" but ultimately found that Appellants' assertions about the efficacy and safety of gender-

affirming care for the treatment of gender dysphoria in minors were "detached from the evidence presented to the Court." *Id.* at 39. The District Court determined that Appellants' heavy emphasis on the risks associated with surgery was misplaced because "puberty blockers and hormone therapy make up the bulk of recommended treatment." (Doc. 131 at 39; Doc. 59 at ¶¶ 37-62.) And that Appellants' "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." (Doc. 131 at 39.)

The District Court employed "conscientious judgement" in assessing the evidence before it and properly considered the Appellants' arguments, even permitting the Appellants to file additional declarations from their expert witnesses in response to Appellees' expert rebuttal declarations. (Doc. 131 at 17, 23-34.)

The District Court did not abuse its discretion in finding that Appellants failed to show that gender-affirming care poses a medically acknowledged bona fide health risk to serve as a compelling interest justifying SB 99's infringement of Appellees' right to privacy.

B. The District Court Did Not Abuse Its Discretion in Finding that Appellees Will Suffer Severe and Irreparable Harm Under SB 99.

The District Court correctly found a high likelihood that Dr. Hodax, Dr. Mistretta, and their patients "will suffer irreparable harm absent a preliminary injunction." (Doc. 131 at 40.) The court accurately observed that the loss of a

constitutional right constitutes irreparable harm. *Weems I*, ¶ 25 ("We have recognized harm from constitutional infringement as adequate to justify a preliminary injunction.").

Moreover, the severe and immediate harm that SB 99 would cause is not only presumed in this case; it is evident in the record. The District Court found by substantial credible evidence that, if SB 99 was to take effect, it would result in "a high likelihood of irreparable harm" (Doc. 131 at 42.) The court first discussed evidence of harm to minors across Montana, citing Provider Appellees who have treated hundreds of patients with gender dysphoria, finding minors "are at risk of facing severe psychological distress if they are blocked from receiving such care." (Doc. 131 at 41.) The court then credited Dr. Hodax's testimony that the consequences of SB 99 for her patients and their families "would be dire" and cited Dr. Mistretta's testimony that, based on her knowledge and experience, "denying [her patients] 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." (Doc. 131 at 41; *see also* Doc. 51 at ¶¶ 16-18, and Doc. 54 at ¶¶ 12-14 (providers not able to provide appropriate care and guidance without risk of breaking the law).) Indeed, interruptions in care can cause patients to undergo permanent puberty changes that cause significant long-term distress and will likely require future surgery to reverse. (Doc. 51 at ¶¶ 19-20.)

The District Court next cited evidence of SB 99's effect upon the individual minor Appellees. It relied upon the statements of Scarlet van Garderen and Phoebe Cross, who explained how this care has dramatically improved their lives and the threat that SB 99 poses to their well-being. (Doc. 131 at 42, *e.g.*, quoting Phoebe Cross: "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.".) The record is replete with evidence that minors and their families would be painfully impacted by SB 99. *See, e.g.*, Jessica van Garderen Dec. (Doc. 53) at ¶ 13) (worrying family would have to move to avoid interruption in care that would cause more intense treatment in the future); Paul Cross Dec. (Doc. 55) at ¶ 17) (fearing son will slip back into depression suffered before care), Jane Doe Dec. (Doc. 52) at ¶¶ 31-33) (describing being forced to leave state or lose strides in joy and confidence and risking suicide). The court also noted that its findings are consistent with those in many federal cases discussing the impact of untreated gender dysphoria. (Doc. 131 at 42.)

C. The Balance of Equities Tips Sharply in Appellees' Favor and the Injunction Serves the Public Interest.

"It 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). And here, the balance of hardships tips sharply in Appellees' favor. As the District Court found:

> The risk of adverse effects to Youth Plaintiffs' health [and to that of others, including Joanne Doe], 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.

(Doc. 131 at 44.)

The District Court considered Appellants' argument that some "gender dysphoric children" will "desist." (Appellants' Br. at 52; Doc. 131 at 13.) The record supports the court's determination that the alleged harm did not outweigh the harm of an absolute ban on care, as Appellants' claims below were either false or highly misleading. The studies they rely upon to argue high desistence rates pertain to *pre-pubertal* youth and not adolescents, and/or do not distinguish between gender nonconformity and gender dysphoria. (Doc. 122 at ¶¶ 10-13; Doc. 121 at ¶¶ 17-21.) Studies of desistence among pre-pubertal children are "wholly irrelevant" because, as the District Court noted, *no medical interventions are recommended before puberty*. (Doc. 131 at 9; Doc. 122 at ¶ 14; Doc. 121 at ¶ 17.) Evidence shows very low desistence rates among adolescents. (Doc. 122 at ¶ 14; Doc. 121 at ¶ 18.) Appellants' own expert, Dr. Cantor, acknowledges that "the majority of kids who continue to feel trans after puberty rarely cease." (Doc. 121 at ¶ 20.) And among those who obtain care, regret rates are very low—lower even than other forms of medical care that are not banned—and can be for a variety of reasons unrelated to regretting transition itself. (Doc. 58 at ¶ 27 & n.25.)

A handful of declarations about individuals outside Montana, *see* Docs. 105-108, are not evidence of widespread regret. The record supports the District Court's discretionary decision to assign that evidence less weight, finding that those experiences would not reduce the certain harm that a ban would inflict on Montana minors that benefit from care. (Doc. 131 at 43.) Particularly in light of the District Court's finding that there is no evidence in the record of minors in Montana being pressured to receive care, the court's discretionary weighing of the evidence is supported by the record and should not be disturbed on appeal.

III. The District Court Did Not Abuse Its Discretion by Issuing a State-Wide Injunction or by Enjoining SB 99 in Its Entirety.

The District Court did not abuse its discretion by issuing a state-wide injunction based on its findings that SB 99 likely facially violates the fundamental right to equal protection (Doc. 131 at 28), and that barring access to gender-affirming care would harm the mental and physical health of all minors in Montana experiencing gender dysphoria, including but not limited to Appellees. (Doc. 131 at 41, 44-46.) Nor did the District Court abuse its discretion by enjoining SB 99 in its entirety because doing so was necessary to preserve the status quo and prevent the irreparable injury that it found would result if SB 99 took effect. (Doc. 131 at 44-47.)

An injunction is an equitable remedy, and a district court generally possesses a wide range of discretion in framing an injunction in terms it deems reasonable to

prevent the wrongful conduct and injury that the injunction is meant to prevent. *See Simpkins*, ¶ 19, (applying the abuse of discretion standard in reviewing an appeal challenging the breadth of an injunction issued to abate a particular nuisance). "Appellate review of those terms is correspondingly narrow." *Hecox*, 79 F.4th at 1036 (internal quotations omitted). Generally, injunctions are not set aside for overbreadth on appeal "unless they are so vague that they have no reasonably specific meaning." *Id.* at 1037.

A. The District Court Did Not Abuse Its Discretion by Issuing a State-Wide Injunction Against SB 99.

The District Court's findings demonstrate that SB 99's unconstitutionality flows directly from its content, and that, if enforced, its harms would extend to Appellees and all minors in Montana experiencing gender dysphoria. The District Court found that "SB 99 facially burdens [the fundamental right to equal protection] by denying transgender minors from seeking medical treatments available to their cisgender counterparts." (Doc. 131 at 28.) And the District Court found that, absent a preliminary injunction, SB 99 would result in irreparable injuries to all "minors in Montana experiencing gender dysphoria[,]" including "impermissible constitutional violations[,]" and the "risk of facing severe psychological distress" if blocked from receiving gender-affirming care. (Doc. 131 at 40-41.)

Based on these findings, all supported by substantial evidence, the District Court exercised its wide discretion and crafted the relief necessary to resolve the

constitutional infirmities of SB 99, which "are not limited to the present facts but stem from the statute itself." *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 85, 402 Mont. 168, 477 P.3d 288. The District Court issued a state-wide injunction against SB 99 because that was the relief necessary to preserve the status quo and prevent irreparable injury to a suspect class. *See generally Planned Parenthood*, ¶ 6 (noting that the district court should be "guided ultimately by the purpose of a preliminary injunction, which is to 'maintain the status quo pending trial'"); *Koe v. Noggle*, No. 1:23-CV-2904-SEG, 2023 WL 5339281, at *29 (N.D. Ga. Aug. 20, 2023) (recognizing that the scope of relief must be shaped by considering the extent of the violation and "that which is necessary to protect the interests of the parties").

A party-specific injunction would not protect Montanans from the breadth of SB 99's unlawful discrimination, as any current or future healthcare provider, parent, or transgender minor would be swept under the law's exclusionary ban should they ever seek or provide medical care. Nor would it protect Minor Appellees' existing right to receive care from the provider of their choice, as any non-party provider would remain limited by SB 99. Further, a statewide injunction is also necessary to protect the fundamental rights of all Montanans, not just the named parties, in exercising their fundamental right to privacy by choosing medical

treatment and making necessary and appropriate medical decisions in concert with their parents and healthcare providers. (*See* Doc. 131 at 37-40.)

B. The District Court Did Not Abuse Its Discretion by Enjoining SB 99 In Its Entirety.

The District Court did not abuse its discretion by preliminarily enjoining the enforcement of SB 99 in its entirety, including the "additional prohibitions and warnings" that further SB 99's core provisions (Doc. 131 at 4), because doing so was necessary to preserve the status quo and prevent irreparable injury.[13] Limiting the injunction to section 4, subsections (1) and (2) would unreasonably and unavoidably undermine the purpose of the injunction by allowing Appellants to enforce provisions of the law that cannot be disentangled from those the District Court found likely unconstitutional on their face. The text of SB 99 shows that every provision that Appellants insist should have been excluded from the injunction expressly refers to and cannot operate without subsection (1).

> (3) "Public funds may not be directly or indirectly used … for the purposes of providing the *medical treatments prohibited in subsection (1)(a) or (1)(b).*"
>
> (4) Any individual or entity that receives state funds … may not use state funds to promote or advocate the *medical treatments prohibited in subsection (1)(a) or (1)(b)*."

[13] Appellants mischaracterize this argument as a challenge to Appellees' standing, which principally asks whether they have sufficiently alleged an injury-in-fact to challenge SB 99, as opposed to its true nature, which is a challenge to the breadth of the injunction.

> (5) "Any amount paid … for the provision of the *procedures described in subsection (1)(a) or (1)(b)* is not tax deductible under state law."
>
> (6) "The Montana Medicaid and children's health insurance programs may not reimburse or provide coverage for the *medical treatments prohibited in subsection (1)(a) or (1)(b).*"
>
> (7) "[S]tate property, facilities, or buildings may not be knowingly used to promote or advocate … *medical treatments prohibited in subsection (1)(a) or (1)(b)*."
>
> (8) "A health care professional or physician employed by the state or a county or local government may not, while engaged in the official duties of employment, knowingly provide the *medical treatments prohibited in subsection (1)(a) or (1)(b).*"
>
> (9) "State property, facilities, or buildings may not knowingly be used to provide the *medical treatments prohibited in subsection (1)(a) or (1)(b)*."
>
> (10) "A state employee whose official duties include the care of minors may not, while engaged in those official duties, knowingly provide or promote the *medical treatments prohibited in subsection (1)(a) or (1)(b).*"

SB 99 (emphasis added).

There is no way of enforcing any of these provisions in a manner that is constitutional because they all rely on SB 99's unlawful sex-based classification that violates the fundamental right to equal protection and its unconstitutional infringement of the fundamental privacy rights of transgender minors. In fact, all of these provisions act in concert to carry out SB 99's primary objective—to prevent transgender minors from accessing gender-affirming medical care. The Appellants attempt to do here what this Court rejected in *Armstrong*—to indirectly "make it as difficult, as inconvenient and as costly as possible," for transgender minors "to

exercise their right to obtain, from the health care provider of their choice, a specific medical procedure." *Armstrong*, ¶ 65.

For these reasons, the District Court did not abuse its discretion in issuing a state-wide preliminary injunction against SB 99 in its entirety because such relief was necessary to maintain the status quo and prevent irreparable harm that it found would result absent such injunction.

IV. The District Court Did Not Abuse Its Discretion by Limiting Hearing Evidence to Extensive Affidavit Testimony Instead of Allowing Redundant Oral Testimony.

The admission of oral testimony at a preliminary injunction hearing is discretionary. § 27-19-303, MCA (at hearing, "each party may present affidavits *or* oral testimony") (emphasis added). Where a district court has considered the parties' conflicting written testimony—even absent oral testimony or cross-examination of the parties' witnesses—it may find "substantial credible evidence" of a likely constitutional violation and reserve a "final resolution of the experts' conflicting opinions" for a trial on the merits. *Planned Parenthood*, ¶¶ 41, 60.

As this Court has observed in the past, neither the federal standard nor Montana's previous standard requires a court to conduct a full trial before entering a preliminary injunction. *See Planned Parenthood*, ¶ 36 (citing 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948.3, 197-201 (4th ed. 2022) (no "meaningful difference" between

federal "likelihood of success" standard and previous Montana standard; both reflect that plaintiff must present "a prima facie case but need not show a certainty of winning")); *see also* § 27-19-303, MCA (statute setting forth evidence required at a preliminary injunction hearing not amended when § 27-19-201 updated).

Here, there is no basis to conclude that the evidence submitted was not "adequate" or "sufficient" for the District Court to make its preliminary determinations. (Appellants' Br. at 57.) The District Court, "due to time constraints and the complex nature of medical evidence," "directed the parties to submit their evidence via affidavit." (Doc. 131 at 19.) At the scheduling conference, the District Court correctly advised the parties that because "we don't have a trial before the trial with a preliminary injunction, even under the federal standard," the parties should prepare accordingly and the court would read any written materials submitted, including deposition testimony subjecting Appellants' experts to cross examination. (Appellants' Appendix A at 8:3-9, 8:22-23.) The court "received and reviewed extensive evidence" (Doc. 131 at 19) submitted by the parties, including over 2,000 pages of testimony and other evidence.

Appellants conceded that they presented written testimony from every witness they wished to call. At the hearing, the District Court asked Appellants, "[D]o you believe there is any information that you were unable to submit due to the limitation on presenting testimony by affidavits and declaration?" (9/18/23 Tr. at 6:6-9.)

Appellants replied, "None other than the inherent limitation of out-of-court testimony." *Id.* at 6:10-11. The court further verified, "But there wasn't a witness that you weren't able to get an affidavit from that you would have been able to achieve live testimony with?" *Id.* at 6:12-14. To which Appellants answered, "Not that I'm aware of." *Id.* at 6:15.

There is no basis for Appellants' argument that the District Court "misapprehended" the preliminary injunction standard by referencing relevant considerations of harm and status quo at the scheduling conference. (Appellants' Br. at 58.) First, the court's ruling reflects the proper preliminary injunction standard and includes conclusions and findings under each element of the test. (Doc. 131 at 17-46.) Second, preventing injury and maintaining the status quo remain a proper focus of a preliminary injunction hearing under the federal standard. *See Trump*, 957 F.3d at 1050, 1068 (purpose of preliminary injunction under federal standard "is always to prevent irreparable injury"); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (purpose of preliminary injunction is to preserve relative positions of parties until trial on merits; this, and limited time, are why procedures are less formal and evidence is "less complete" than at trial). The District Court did not abuse its discretion by limiting testimony to affidavit and other written evidence.

Conclusion

For the foregoing reasons, this Court should uphold the District Court's entry of a preliminary injunction enjoining SB 99.

Dated this 9th day of April, 2024.

Respectfully submitted,

By: */s/ Alex Rate*
Alex Rate
ACLU OF MONTANA
P.O. Box 1968
Missoula, MT 59806

CERTIFICATE OF COMPLIANCE

The undersigned, Alex Rate, certifies that the foregoing complies with the requirements of Rules 11 and 12, Mont. R. App. P. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 14,985 words, excluding the caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

Dated: April 9, 2024

/s/ Alex Rate

Alex Rate
ACLU OF MONTANA
P.O. Box 1968
Missoula, MT 59806

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing document with the Clerk of the Montana Supreme Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Austin Knudsen
Montana Attorney General
Thane Johnson
Michael D. Russell
Alwyn Lansing
Michael Noonan
Assistant Attorneys General
MONTANA DEPARTMENT OF JUSTICE
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
thane.johnson@mt.gov
michael.russell@mt.gov
alwyn.lansing@mt.gov
michael.noonan@mt.gov

Emily Jones
Special Assistant Attorney General
JONES LAW FIRM, PLLC
115 N. Broadway, Suite 410
Billings, MT 59101
Phone: 406-384-7990
emily@joneslawmt.com

Attorneys for Defendant/Appellant

Electronically signed by Krystel Pickens on behalf of Alex Rate.

Dated: April 9, 2024.

CERTIFICATE OF SERVICE

I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-09-2024:

Michael D. Russell (Govt Attorney)
215 N Sanders
Helena MT 59620
Representing: Charlie Brereton, Greg Gianforte, Austin Miles Knudsen, Montana Board of Medical Examiners, Montana Board of Nursing, MT Dept of Public Health & Human Services, State of Montana
Service Method: eService

Alwyn T. Lansing (Govt Attorney)
215 N. Sanders St.
Helena MT 59620
Representing: Charlie Brereton, Greg Gianforte, Austin Miles Knudsen, Montana Board of Medical Examiners, Montana Board of Nursing, MT Dept of Public Health & Human Services, State of Montana
Service Method: eService

Thane P. Johnson (Govt Attorney)
215 N SANDERS ST
P.O. Box 201401
HELENA MT 59620-1401
Representing: Charlie Brereton, Greg Gianforte, Austin Miles Knudsen, Montana Board of Medical Examiners, Montana Board of Nursing, MT Dept of Public Health & Human Services, State of Montana
Service Method: eService

Emily Jones (Attorney)
115 North Broadway
Suite 410
Billings MT 59101
Representing: Charlie Brereton, Greg Gianforte, Austin Miles Knudsen, Montana Board of Medical Examiners, Montana Board of Nursing, MT Dept of Public Health & Human Services, State of Montana
Service Method: eService

Michael Noonan (Govt Attorney)
215 N SANDERS ST

HELENA MT 59601-4522
Representing: Charlie Brereton, Greg Gianforte, Austin Miles Knudsen, Montana Board of Medical Examiners, Montana Board of Nursing, MT Dept of Public Health & Human Services, State of Montana
Service Method: eService

Matthew Prairie Gordon (Attorney)
1201 Third Ave
Seattle WA 98101
Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta, Ewoyt Van Garderen, Jessica Van Garderen, Scarlet Van Garderen
Service Method: eService

Akilah Maya Deernose (Attorney)
1121 Knight St.
Helena MT 59601
Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta, Ewoyt Van Garderen, Jessica Van Garderen, Scarlet Van Garderen
Service Method: eService

Kell Olson (Attorney)
3849 E. Broadway Blvd. #136
Tucson AZ 85716
Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta, Ewoyt Van Garderen, Jessica Van Garderen, Scarlet Van Garderen
Service Method: eService

Peter C. Renn (Attorney)
800 South Figueroa St., Suite 1260
Los Angeles CA 90017
Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta, Ewoyt Van Garderen, Jessica Van Garderen, Scarlet Van Garderen
Service Method: eService

Malita Vencienzo Picasso (Attorney)
67468 Rio Largo Road
Cathedral City CA 92234
Representing: Molly Cross, Paul Cross, Phoebe Cross, Juanita Hodax, Katherine Mistretta, Ewoyt Van Garderen, Jessica Van Garderen, Scarlet Van Garderen
Service Method: eService

Michelle Tafoya Weinberg (Attorney)
PO Box 652
Whitefish MT 59937
Representing: Biomedical Ethics and Public Health Scholars
Service Method: eService

Derek Joseph Oestreicher (Attorney)
974 Guthrie Road

Helena MT 59602
Representing: Montana Family Foundation
Service Method: eService

Colin Michael Gerstner (Attorney)
2828 1st Ave. S.
Billings MT 59101
Representing: Elliot Page, Nichole Maines
Service Method: eService

Robert M. Farris-Olsen (Attorney)
401 N. Last Chance Gulch
Helena MT 59601
Representing: GLBTQ Legal Advocates & Defenders, The National Center for Lesbian Rights
Service Method: eService

Katelyn Kang (Attorney)
55 Hudson Yards
New York NY 10001
Representing: Biomedical Ethics and Public Health Scholars
Service Method: Conventional

Valeria M. Pelet del Toro (Attorney)
55 Hudson Yards
New York NY 10001
Representing: Biomedical Ethics and Public Health Scholars
Service Method: Conventional

Jordan D Hershman (Attorney)
One Federal Street
Boston MA 02110
Representing: GLBTQ Legal Advocates & Defenders
Service Method: Conventional

Electronically signed by Krystel Pickens on behalf of Alexander H. Rate
Dated: 04-09-2024