

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 08-2023-CV-2189

T.D, by and through his parents, Devon Dolney and Robert Dolney, Devon Dolney, and individual, Robert Dolney, and individual, Pamela Roe, by and through her parents, Peter Roe and Paula Roe, Peter Roe, an individual, Paula Roe, an individual, James Doe, by and through his parents, John Doe and Jane Doe, John Doe, and individual, Jane Doe, an individual, and Dr. Luis Casas, an individual,

Plaintiffs,

v.

Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota, Kimberlee Jo Hegvik, in her official capacity as State's Attorney for Cass County, Julie Lawyer, in her official capacity as State's Attorney for Burleigh County, and Amanda Engelstad, in her official capacity as the State's Attorney for Stark County,

Defendants.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER FOR JUDGMENT**

Background

[¶1] Gender dysphoria is a recognized mental health condition included in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders Fifth Edition* or *DSM-5-TR*. (R:206). It is "[a] marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least six [criteria]." *Id.* These criteria include: a strong desire to be the other gender or an insistence that one is the other gender; crossdressing; a strong

preference for cross-gender roles in make-believe play or fantasy play; a strong preference for toys, games, or activities stereotypically used or engaged in by the other gender; a strong preference for playmates of the other gender; a strong rejection of toys, games, and activities associated with the assigned gender; a strong dislike of one's sexual anatomy; and a strong desire for the sex characteristics of one's experienced gender. *Id.*

[¶2] Since 2021, more than twenty states have enacted laws restricting the medical treatment of minors for gender dysphoria. *See* Ala. Code §§ 26-26-1 to 9; Ariz. Rev. Stat. Ann. § 32-3230; Ark. Code Ann. §§ 16-114-401 to 403; Fla. Stat. Ann. § 456.52; Ga. Code Ann. § 31-7-3.5; Idaho Code § 18-1506C; Ind. Code §§ 25-1-22-1 to 18; Iowa Code § 147.164; Ky. Rev. Stat. Ann. § 311.372; La. Stat. Ann. § 40:1098.1-1099.1; Miss. Code Ann. §§ 41-141-1 to 9; Mo. Rev. Ann. § 191.1720; Mont. Code Ann. §§ 50-4-1001 to 1006; Neb. Rev. Stat. §§ 72-7301 to 7307; N.C. Gen. Stat. §§ 90-21.150 to 154; N.D. Cent. Code §§ 12.1-36.1-01 to 04; Ohio Rev. Code Ann. § 3129.02; Okla. Stat. tit. 63 § 2607.1; S.D. Codified Laws §§ 34-24-33 to 38; Tenn. Code Ann. §§ 68-33-101 to 109; Tex. Health & Safety Code Ann. §§ 161.701 to 706; Utah Code Ann. §§ 58-1-603, 78B-3-427; W. Va. Code § 30-14-17. A number of other states have enacted laws to provide protections for “gender-affirming care.” *See* Cal. Penal Code § 819; Colo. Rev. Stat. § 12-30-121(1)(d); Conn. Gen. Stat. §§ 52-571n, 54-155b; 735 Ill. Comp. Stat. 40/28-10; Mass. Gen. Laws ch. 12, § 11 et seq.; Minn. Stat. § 260.925; N.M. Stat. Ann. § 24-34-4; N.Y. Educ. § 6531-b(2); Ore. Rev. Stat. ch. 228; Vt. Stat. Ann. tit. 15, § 150; Wash. Rev. Code § 7.002.002.

[¶3] These laws, and laws like them, have resulted in litigation throughout the United States. *Cross by & through Cross v. State*, 2024 MT 303, ¶ 60, 560 P.3d. 637 (McKinnon,

J.)(concurring)(noting “[g]ender-affirming care is currently being litigated on equal protection grounds around the country . . .”). As summarized by the Supreme Court of Iowa in 2023, “. . . the law nationally is in flux, with conflicting rulings on transgender constitutional rights.” *Vasquez v. Iowa Dep’t of Hum. Servs.*, 990 N.W.2d 661, 668 (Iowa 2023). “Some courts have applied intermediate scrutiny for transgender rights claims.” *Id.* at 669. “Some courts have applied rational basis review.” *Id.* “Other courts have questioned whether transgender persons satisfy traditional tests for status as a quasi-suspect class triggering heightened scrutiny.” *Id.*

[¶4] This disparity in outcomes was largely caused by a lack of precedent from the United States Supreme Court. *See Ray v. McCloud*, 507 F. Supp. 3d 925, 936 (S.D. Ohio 2020)(observing “[t]here is no binding precedent from the United States Supreme Court . . . regarding whether transgender people are a quasi-suspect class.”). However, in June 2025, the United States Supreme Court issued its opinion in *United States v. Skrametti*, 605 U.S. ___, 145 S.Ct. 1816 (2025). In *Skrametti*, the Supreme Court granted certiorari to determine whether a Tennessee law prohibiting certain medical treatments for minors with gender dysphoria violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 1824.

[¶5] The Supreme Court rejected the argument that the application of Tennessee’s law turned on sex and found it did not make sex-based classifications. *Id.* at 1830-31. Therefore, the law did not trigger heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment and was subject to the rational basis standard of review. *Id.* at 1829. The Supreme Court found Tennessee’s law clearly satisfied the rational basis standard of review and did not violate the Equal Protection Clause. *Id.* at 1835.

Relevant Procedural History

[¶6] During the 68th Legislative Assembly, the North Dakota Legislature overwhelmingly passed House Bill 1254. The bill passed through the House of Representatives with a vote of 66 yeas to 25 nays. It passed through the Senate with a vote of 37 yeas to 10 nays. The bill was signed by North Dakota Governor Doug Burgum on April 21, 2023. It contained an emergency clause making it effective immediately.

[¶7] House Bill 1254 created North Dakota Century Code chapter 12.1-36.1. This newly added chapter to the criminal code contains four sections:

Section 12.1-36.1-01. Definitions

As used in this chapter:

1. "Health care provider" means a licensed physician, physician assistant, nurse, or a certified medical assistant.
2. "Minor" means an individual under the age of eighteen. The term includes an emancipated individual.
3. "Sex" means the biological state of being female or male, based on the individual's nonambiguous sex organs, chromosomes, or endogenous hormone profiles at birth.

Section 12.1-36.1-02. Perception of a minor's sex--Prohibited practices--Penalty

1. Except as provided under section 12.1-36.1-03, if a minor's perception of the minor's sex is inconsistent with the minor's sex, a health care provider may not engage in any of the following practices for the purpose of changing or affirming the minor's perception of the minor's sex:
 - a. Perform castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, or vaginoplasty;
 - b. Perform a mastectomy;
 - c. Prescribe, dispense, administer, or otherwise supply any drug that has the purpose of aligning the minor's sex with the minor's perception of the minor's sex when the perception is inconsistent with the minor's sex, including:
 - (1) Puberty-blocking medication to stop normal puberty;
 - (2) Supraphysiologic doses of testosterone to females; or
 - (3) Supraphysiologic doses of estrogen to males; or
 - d. Remove any otherwise healthy or nondiseased body part or tissue, except for a male circumcision.

2. A health care provider who willfully violates:
 - a. Subdivision a, b, or d of section 1 is guilty of a class B felony.
 - b. Subdivision c of subsection 1 is guilty of a class A misdemeanor.

Section 12.1-36.1-03. Exceptions

Section 12.1-36.1-02 does not apply:

1. To the good-faith medical decision of a parent or guardian of a minor born with a medically verifiable genetic disorder of sex development, including:
 - a. A minor with external biological sex characteristics that are irresolvably ambiguous, including having forty-six, XX chromosomes with virilization, forty-six, XY chromosomes with undervirilization, or having both ovarian and testicular tissue; or
 - b. When a physician otherwise has diagnosed a disorder of sexual development in which the physician, through genetic testing, has determined the minor does not have the normal sex chromosome structure for a male or female; or
2. If performance or administration of the medical procedure on the minor began before April 21, 2023.

Section 12.1-36.1-04. Statutory limitation

Notwithstanding the limitations of section 29-04-02, prosecution for a violation of section 12.1-36.1-02 must be commenced within three years of the date of the offense or within three years after the offense is reported to law enforcement, whichever is later.

For brevity, the Court will hereinafter refer to chapter 12.1-36.1 as the “Health Care Law.”

[¶8] On September 15, 2023, the Plaintiffs, T.D., by and through his parents, Devon Dolney and Robert Dolney, Devon Dolney, an individual, Robert Dolney, an individual, Pamela Roe, by and through her parents, Peter Roe and Paula Roe, Peter Roe, an individual, Paula Roe, an individual, James Doe, by and through his parents, John Doe and Jane Doe, John Doe, an individual, Jane Doe, an individual, and Dr. Luis Casas, an individual, (collectively “the Plaintiffs”), filed a *Summons* and *Complaint* against the Defendants, Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota, Kimberlee Jo Hegvik, in her official capacity as the State’s Attorney for

Cass County, Julie Lawyer, in her official capacity as the State's Attorney for Burleigh County, and Amanda Engelstad, in her official capacity as the State's Attorney for Stark County, (collectively "the Defendants"). (R:1; R:2).

[¶9] The Plaintiffs argue the Health Care Law is unconstitutional on the grounds it violates the Equal Protection Clause of Article I, § 21, of the North Dakota Constitution, the fundamental right to parent and the right to personal autonomy and self-determination found in Article I, § 1, of the North Dakota Constitution, the Procedural Due Process Clause of Article I, § 9, of the North Dakota Constitution, and the Health Care Law is unconstitutionally vague in violation of Article I, § 9, of the North Dakota Constitution.

[¶10] The Defendants filed *Answers* denying the Plaintiffs' claims. (R:70; R:76). On November 3, 2023, the Plaintiffs and the State's Attorney Defendants entered a *Stipulation for Non-Enforcement Pending Final Resolution Between Plaintiffs and State's Attorney Defendants*. (R:96). The State's Attorney Defendants agreed they would honor an order blocking the Health Care Law if one was issued. (R:96:3:7). The Plaintiffs and the State's Attorney Defendants further agreed the State's Attorney Defendants would no longer be required to participate in this case, as the North Dakota Attorney General intended to defend the constitutionality of the Health Care Law. (R:96:4:11). The stipulation was approved by the Court. (R:99).

[¶11] The Plaintiffs filed a *Motion for a Temporary Restraining Order and Preliminary Injunction* (R:8) on the same day they filed their *Complaint*. The Defendants opposed the *Motion*. (R:82; R:84). The Court held a hearing on the temporary restraining order on November 7, 2023. The Court issued an *Order Denying Motion for Temporary Restraining Order* on November 13, 2023. (R:104).

[¶12] The Court held a full-day hearing on the *Motion for Preliminary Injunction* on January 19, 2024. Six individuals testified: four for the Plaintiffs, Dr. Casas, Dr. Gabriela Balf, T.D., and Peter Roe, and two for the Defendants, Dr. James Cantor and Dr. Michael Laidlaw. The Court received numerous exhibits. (R:166-263). The Court allowed the parties to supplement their arguments with post-hearing briefs. The Plaintiffs and the Defendants both submitted closing arguments. (R:276; R:278). A transcript of the hearing was filed into the electronic court record. (R:267; R:268).

[¶13] On February 15, 2024, the parties stipulated to an amendment of the *Complaint*. (R:271). The stipulation indicated the Plaintiffs were only “. . . seeking to make minimal changes to the Complaint.” (R:271:1:4). This expressly included clarification “. . . that Dr. Luis Casas [wa]s bringing claims on his own behalf and on behalf of his patients.” (R:271:1:4). The Court granted the Plaintiffs leave to file their *Amended Complaint*. (R:275). The *Amended Complaint* contained additional language that Dr. Casas was bringing his claims “. . . as [an] individual . . .” and “. . . on behalf of himself, and his minor patients seeking gender-affirming care . . .” (R:273:1-2).

[¶14] The Court issued its *Order Denying Preliminary Injunction* on June 5, 2024. (R:365). The Court found “. . . the Plaintiffs have failed to meet their burden on each of the four factors relevant to the issuance of a preliminary injunction.” (R:365:26:77).

[¶15] On August 20, 2024, the Defendants filed a *Motion for Summary Judgment*. (R:375). The Defendants argued the Plaintiffs “. . . lack the requisite standing necessary to challenge the Health Care Law as the amended complaint fails to allege any of the individual plaintiffs suffered a redressable injury.” (R:376:6:19). The Defendants argued the minor Plaintiffs were receiving medical treatment for gender dysphoria prior to April

21, 2023, and fall under the exceptions found in N.D.C.C. § 12.1-36.1-03. (R:376:7:16). They further asserted the Plaintiffs lack third-party standing to challenge the Health Care Law. (R:376:10:21).

[¶16] The Plaintiffs timely submitted a *Brief in Opposition to the State's Motion for Summary Judgment*. (R:413). The Plaintiffs argued the Defendants were wrongly asking the Court to treat findings made in the *Order Denying Preliminary Injunction* as the law of the case. (R:413:16:16). They argued only one plaintiff needs standing for all claims to proceed. (R:413:20:59). The Plaintiffs suggested Dr. Casas has first-party standing to challenge the Health Care Law and the right to assert third-party standing on behalf of his patients. (R:413:20-25). They argued the minor Plaintiffs and their parents “. . . have all suffered actual injuries directly caused by the Health Care Ban, and an order permanently enjoining the Health Care Ban would redress their harm.” (R:413:26:72).

[¶17] The Defendants submitted a *Reply Brief in Support of Motion for Summary Judgment*. (R:440). The Defendants argued interpretation of the Health Care Law is strictly a question of the law and the Court has already found it is not unconstitutionally vague. (R:440:3:5). They argued the Plaintiffs' claims are distinct and standing for one does not equate to standing for all. (R:440:6:11). The Defendants asserted Dr. Casas has not met the requirements to assert third-party standing. (R:440:8-10).

[¶18] On October 7, 2024, the Defendants filed a second *Motion for Summary Judgment*. (R:445). The Defendants' second *Motion for Summary Judgment* contested the legal sufficiency of the Plaintiffs' claims. (R:446). The Defendants claimed the Plaintiffs have brought a facial constitutional challenge to the Health Care Law, and the burden for declaring acts of the Legislature is so onerous the Plaintiffs cannot succeed.

(R:446:15-10). They argued the State of North Dakota has a legitimate interest in regulating the medical profession. (R:446:20-23). The Defendants suggested the Plaintiffs' equal protection claim fails as the Health Care Law does not discriminate based on sex and, therefore, is subject to a rational basis standard of review. (R:446:23-27). The Defendants alleged the Health Care Law does not violate the right to parent or the right to personal autonomy and self-determination. (R:446:29-35). They argued the Health Care Law, containing an emergency measure, did not violate procedural due process. (R:446:35-36). Finally, they asserted the Health Care Law is not unconstitutionally vague. (R:446:36-38).

[¶19] The Plaintiffs timely filed a *Brief in Opposition to the State's Second Motion for Summary Judgment*. (R:488). The Plaintiffs argued summary judgment was not appropriate as there are genuine issues of material fact. (R:488:4:5). They claimed the prevailing medical consensus supports gender-affirming care, and it is safe and effective. (R:448:5-16). The Plaintiffs asserted their constitutional challenges are both facial and as-applied. (R:448:17-18). They argue the Health Care Law is subject to strict scrutiny and violates the right to parent and right to personal autonomy and self-determination. (R:448:22-25, 29-36). The Plaintiffs argued the Health Care Law discriminates based on sex in violation of the Equal Protection Clause of the North Dakota Constitution. (R:448:25-28). They urged the Court to find that transgender individuals constitute a suspect classification under the North Dakota Constitution. (R:448:28-29). They argued the Health Care Law violates procedural due process and is unconstitutionally vague. (R:448:36-38).

[¶20] The Defendants submitted a *Reply Brief in Support of Motion for Summary Judgment*. (R:511). They argued there were no material facts in dispute. (R:511:1-4). They suggested conflicting expert opinions do not preclude summary judgment. (R:511:1-3). They argued the safety and effectiveness of “medical gender transition care” is not conclusive. (R:511:3-4). The Defendants argued the Plaintiffs brought a facial constitutional challenge and cannot win as the Health Care Law is a valid exercise of the State’s power to regulate the medical profession. (R:511:5-6). They asserted the Plaintiffs brought a facial constitutional challenge. (R:511:5:10). They argued the Health Care Law is a valid regulation of the medical profession that does not violate the North Dakota Constitution. (R:511:5-11).

[¶21] A hearing on the Defendants’ two summary judgment motions was held on November 25, 2024. The Plaintiffs and Defendants presented their arguments regarding summary judgment. On January 14, 2025, the Court issued its *Order Granting in Part and Denying in Part Motions for Summary Judgment*. (R:537).

[¶22] The Court found the Plaintiffs did not have standing to bring some of their claims. (R:32:72; R:537:12:28). The Court found no party had standing to challenge N.D.C.C. § 12.1-36.1-02(1)(a), which criminalizes “. . . castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, or vaginoplasty” for the purpose of changing or affirming a minor’s perception of the minor’s sex. The Plaintiffs had acknowledged “[u]nder the WPATH standards of care, transgender young people may . . . receive medically necessary chest reconstructive surgeries before the age of majority, provided the young person has lived in their affirmed gender for a significant period of time.” (R:2:14:52; R:273:14:52). They had further acknowledged “[g]enital

surgery is not recommended until patients reach the age of majority, and providers in North Dakota do not provide minors with genital surgery to treat gender dysphoria.” (R:2:14:52; R:273:14:52). Because no Plaintiff could receive these procedures as a minor under the acknowledged current standard of care, and these procedures are not being performed on minors in North Dakota, the Court found no Plaintiff had standing to challenge this portion of the Health Care Law. (R:537:15:34).

[¶23] Minor Plaintiffs, T.D., James Doe, and Pamela Roe, were all receiving medical care for the treatment of gender dysphoria prior to April 21, 2023. (R:537:23:50). The Court determined they were therefore subject to the Health Care Law’s grandfather or “Legacy Clause” located in N.D.C.C. § 12.1-36.1-03. This section created an exception to the Health Care Law’s criminal penalties “if performance or administration of the medical procedure on the minor began before April 21, 2023.” N.D.C.C. § 12.1-36.1-03(2). The Court found T.D., James Doe, and Pamela Roe could receive any medical procedure in North Dakota they could have received prior to the enactment of the Health Care Law, and therefore they, and their parents, did not have standing to challenge the Health Care Law. (R:537:23-24:52).

[¶24] The Court held Plaintiff, Dr. Luis Casas, had first-party standing to challenge the Health Care Law on the grounds its passing violated procedural due process because it was passed as an emergency measure. The Court also found Dr. Casas had first-party standing to bring his claim the Health Care Law was impermissibly vague. (R:537:25:56). However, the Court found Dr. Casas lacked first-party standing to challenge the Health Care Law under the theories it violated equal protection or the fundamental right to parent. (R:537:26:57).

[¶25] Regarding third-party standing, the Court found Dr. Casas had a sufficient relationship with his patients to establish third-party standing to pursue their claims the Health Care Law violated equal protection and the right to personal autonomy and self-determination. (R:537:32:70).

[¶26] Based on the Court's standing analysis, the Court determined T.D., James Doe, Pamela Roe, Devon Dolney, Robert Dolney, Peter Roe, Paula Roe, John Doe, and Jane Doe should be dismissed as Plaintiffs. (R:537:52:125). Absent a party with standing, the Court granted summary judgment in favor of the Defendants regarding the Health Care Law's ban on surgical procedures and the claim it violated the fundamental right to parent. (R:537:52:124-25).

[¶27] For substantive reasons, the Court granted summary judgment in favor of the Defendants on the claims the Health Care Law violates Dr. Casas' right to procedural due process and on the claim, it is unconstitutionally vague. (R:537:53:130-31). The Court denied summary judgment on the claims the Health Care Law violates equal protection and violates the right to personal autonomy and self-determination. (R:537:52:127-28). These claims were the only two claims remaining for trial.

Trial was held from January 27, 2025, through February 4, 2025. (R:764-70). The Court heard multiple witnesses including endocrinologists, psychologists, psychiatrists, current and former U.S. Food and Drug Administration staff, historians, minors with gender dysphoria, and the parents of minors with gender dysphoria. In addition to testimony, both sides introduced numerous exhibits. (R:576- 762). The parties filed post-trial briefs. (R:771; R:775; R:777).

Facial Challenge or As-Applied Challenge

[¶10] The Plaintiffs assert that even if the Health Care law is a facially valid statute, the Court could still determine it is invalid as applied. (R:771:45-46:121-24). The Plaintiffs point to the lack of other treatment options known to be effective for the patients. (R:771:46:123). The Defendants assert this is a facial challenge. (R:775:56:111). “A facial challenge is an attack on a statute itself as opposed to a particular application.” *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 415 (2015). The Plaintiffs’ pleadings establish this is a facial challenge. The *Complaint* and *Amended Complaint* request a declaratory judgment that the Health Care Law violates the North Dakota Constitution and is void and has no effect and that the State be prohibited from enforcing it. (R:2:39; R:273:37). This is a facial challenge to the statute itself under all circumstances.

Standard for Challenging the Constitutionality of a Statute

[¶28] “A statute enjoys a conclusive presumption of constitutionality unless it is clearly shown that it contravenes the state or federal constitution.” *Haney v. N. Dakota Workers Comp. Bureau*, 518 N.W.2d 195, 197 (N.D. 1994). “[A]n Act of the legislature is presumed to be correct and valid, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity.” *Southern Valley Grain Dealers Ass’n v. Board of Cnty Comm’rs*, 257 N.W.2d 425, 434 (N.D.1977). The presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its invalidity is proven beyond a reasonable doubt. *In re Craig*, 545 N.W.2d 764, 766 (N.D. 1996). “Under N.D. Const. art. VI, § 4, the concurrence of four members of [the North Dakota Supreme Court] is required to declare a statute unconstitutional.” *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 60, 855 N.W.2d 31. “One who attacks a statute on

constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely.” *Southern Valley Grain Dealers*, at 434.

Interpreting the North Dakota Constitution

[¶29] “Judicial review is part of our constitutional form of government.” *Access Indep. Health Servs., Inc. v. Wrigley*, 2025 ND 26, ¶ 40, 16 N.W.3d 902. ““The judiciary’s proper function and duty is to say what the law is and what the Constitution means.”” *Id.* (quoting *Grisham v. Van Soelen*, 539 P.3d 272, 285 (N.M. 2023) (cleaned up)). “. . . [P]roperly restrained judicial review of a statute is merely the fulfillment of [the court system’s] constitutional duty as a co-equal branch of the government.” *Id.*

[¶30] The North Dakota Supreme Court has stated, “[i]n interpreting constitutional provisions, we apply general principles of statutory construction.” *MKB Mgmt. Corp.*, 2014 ND 197, ¶ 25, 855 N.W.2d 31 (citing *Thompson v. Jaeger*, 2010 ND 174, ¶ 7, 788 N.W.2d 586). “Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional provision.” *Id.* (citing *City of Bismarck v. Fettig*, 1999 ND 193, ¶ 8, 601 N.W.2d 247). “The intent and purpose of constitutional provisions are to be determined, if possible, from the language itself.” *Id.* (citing *Thompson*, at ¶ 7). “In construing a constitutional provision we must undertake to ascribe to the words used that meaning which the people understood them to have when the constitutional provision was adopted.” *Kadrmās v. Dickinson Pub. Sch.*, 402 N.W.2d 897, 899 (N.D. 1987)(citing *State ex rel. Sanstead v. Freed*, 251 N.W.2d 898 (N.D. 1977)). “We may consider contemporary legal practices and laws in effect when the people adopted the constitutional provisions.” *MKB Mgmt. Corp.*, at ¶ 25 (citing *State v. Orr*, 375 N.W.2d

171, 177-78 (N.D. 1985)). As explained by Thomas M. Cooley, the leading jurist and scholar of state constitutions, who addressed the North Dakota Constitutional Convention,

A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written Constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion.

Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 67, ch. IV. (5th ed. 1883).

[¶31] “We must be mindful that our state Constitution is different in nature than the federal constitution.” *Access Indep. Health Servs.*, 2025 ND 26, ¶ 7, 16 N.W.3d 902. “[T]he North Dakota Constitution must be read in the light of history.” *State v. Allesi*, 216 N.W.2d 805, 817 (N.D. 1974). “Compared to the U.S. Constitution, the North Dakota Constitution has its origins in a dramatically different historical context.” Jerod E. Tufte, *The North Dakota Constitution: An Original Approach Since 1889*, 95 N.D. L. Rev. 417, 419 (2020). “North Dakota adopted its constitution more than 100 years after ratification of the U.S. Constitution, following the Civil War and the significant reconstruction amendments, but before the U.S. Supreme Court incorporated the Bill of Rights against the states.” *Id.* The North Dakota Constitutional Convention did not use the Federal Constitution as a model in formulating the state constitution. *State v. Jacobson*, 545 N.W.2d 152, 157 (N.D. 1996) (Levine, SJ, dissenting) (internal citations omitted). “. . . [A]nalysis of the state constitution will not always parallel analysis of the federal constitution.” *Wrigley v. Romanick*, 2023 ND 50, ¶ 55, 988 N.W.2d 231 (McEvers, J. concurring).

A) Equal Protection

[¶32] The Plaintiffs claim the Health Care Law violates the guarantees of equal protection found in Article I, Section 21 of the North Dakota Constitution. (R:273:31:138-41). Section 21 has “[l]ong viewed as our state constitutional guarantee of equal protection under the law . . .” *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 563 (N.D. 1993).

[¶33] Section 21 states:

No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

This provision was originally included in the North Dakota Constitution as Article I, Section 20. However, the language has not changed since the original draft Constitution of North Dakota. The change in numbering does not appear to be substantive and the North Dakota Supreme Court has never indicated the change in numbering altered its interpretation. Section 21 is often associated with Article I, Section 22, of the North Dakota Constitution, formerly Article I, Section 11, which states: “[a]ll laws of a general nature shall have a uniform operation.” *See Snyder’s Drug Stores, Inc. v. N. Dakota State Bd. of Pharmacy*, 219 N.W.2d 140, 145 (N.D. 1974)(arguing one “requires laws of a general nature to have a uniform impact . . .” while the other is “. . . essentially the converse . . . for it prohibits the legislature from conferring special benefits or privileges upon small groups . . .”). For clarity, the Court will refer to these provisions by their current numbering and update their numbering in any North Dakota Supreme Court opinions where they are referenced.

[¶34] Early on, the North Dakota Supreme Court adopted a standard of deference to the Legislature in creating legislative classifications. Just two years after statehood, Guy Corliss, the first Chief Justice of the North Dakota Supreme Court, wrote:

Where shall the line properly be traced? We believe that in testing this question these inquiries should be made: Would it be unjust to include the classes of objects or persons excluded? Would it be unnatural? Would such legislation be appropriate to them? Could it properly be made applicable? Is there any reasonable ground for excluding them? It is impossible, from the very nature of the case, to state with precision the true doctrine. But it is our opinion that every law is special which does not embrace every class of objects or persons within the reach of statutory law, with the single exception that the legislature may exclude from the provisions of a statute such classes of objects or persons as are not similarly situated with those included therein, in respect to the nature of the legislation. The classification must be natural, not artificial. It must stand upon some reason, having regard to the character of the legislation.

Edmonds v. Herbrandson, 2 N.D. 270, 50 N.W. 970, 971 (1891).

[¶35] “It is doubtless true that, notwithstanding constitutional inhibitions such as those contained in sections [22] and [21], the Legislature may provide a certain classification of citizens to be differently affected by the same general rule.” *State v. Hamilton*, 20 N.D. 592, 129 N.W. 916, 918 (1910). “The prohibition against what is popularly styled ‘class legislation,’ does not prohibit proper classification or discrimination for the purpose of legislation.” *Beleal v. Northern Pac. Ry. Co.*, 108 N.W. 33, 35 (N.D. 1906). “It is not necessary that a law shall operate upon all alike, but . . . it must operate alike upon all who are in like situations.” *Id.* “The law need not have a universal operation, but it must be uniform.” *Id.* “Proper classification is permitted, but arbitrary and unreasonable discrimination is forbidden.” *Id.* (internal citations omitted). “It must rest upon some difference which bears a reasonable and just relation to the act in respect to which the

classification is proposed, and can never be made arbitrarily and without any such basis.” *Hamilton*, at 918 (internal citations omitted).

[¶36] “[Section 21] inhibits the Legislature from granting to any citizen or class of citizens any privileges or immunities which, upon the same terms, are not granted to all citizens; in other words, this section prohibits the Legislature from granting to any citizen or class of citizens advantages, or exemptions from the common burdens, which, upon the same terms, that is, under like circumstances and conditions, are not granted to all citizens.” *State v. Lawler*, 205 N.W. 880, 884 (N.D. 1925). “The object of the constitutional provision is to prevent the Legislature from enlarging the rights of some in discrimination against others.” *Id.* “But the provision does not inhibit the Legislature from making reasonable classification of persons and things for the various purposes of legislation; so long as all are treated alike, under like circumstances, the provision is not violated.” *Id.* “If there is a reasonable ground for the classification and the law operates equally on all within the same class it is valid.” *Id.* “In determining whether or not a basis of classification is reasonable, it must be looked at from the standpoint of the Legislature enacting it; the question of classification being primarily for the Legislature.” *Id.* “A statute will be sustained where the basis for classification made by it could have seemed reasonable to the Legislature, even though such basis seems to the courts to be unreasonable.” *Id.* “Legislative discretion in this matter is not subject to review by the courts, except to the extent of determining whether the classification adopted is arbitrary, unreasonable, and unjust.” *Id.*

[¶37] “Sections [22] and [21] of the State Constitution do not nor does the Fourteenth Amendment to the Constitution of the United States prohibit or prevent classification

provided such classification is reasonable for the purpose of legislation, is based on proper and justifiable distinctions considering the purpose of the law, is not clearly arbitrary, and is not a subterfuge to shield one class or to burden another or to oppress unlawfully in its administration.” *F.W. Woolworth Co. v. Gray*, 46 N.W.2d 295, 309 (N.D. 1951). “Where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review.” *Id.* (quoting *Chicago, B. & Q. R. Co. v. McQuire*, 219 U.S. 549, 563 (1911)). “[Section 21] does not prohibit appropriate legislative classification where proper facts justify such action as long as the act applies uniformly to all those within the class under similar circumstances.” *Ferch v. Hous. Auth. of Cass Cnty.*, 59 N.W.2d 849, 862-63 (N.D. 1953). “Any classification is permissible which has a reasonable relation to some permitted end of governmental action.” *Id.* (citing *Thomas v. Housing & Redevelopment Authority*, 48 N.W.2d 175, 189 (Minn. 1951)). “Summed up . . . where a statute creates a classification of citizens to be differently affected by the same general rule the classification must be natural and not artificial, reasonable and not arbitrary or capricious and must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.” *Herr v. Rudolf*, 25 N.W.2d 916, 920 (N.D. 1947).

[¶38] Under this deferential standard, the North Dakota Supreme Court upheld many laws against claims they violated section 21. See *Patterson v. Wollmann*, 67 N.W. 1040 (N.D. 1896)(upholding the authority of the State to grant exclusive ferry franchises); *Investors’ Syndicate v. Pugh*, 142 N.W. 919 (N.D. 1913)(affirming statutes that favored surety companies over private individuals in the posting of bonds); *Moody v. Hagen*, 162 N.W. 704 (N.D. 1917)(upholding an inheritance tax of 25% on nonresident aliens

compared to a 1.5-2.5% inheritance tax on citizens and resident aliens); *Klein v. Hutton*, 191 N.W. 485 (N.D. 1922)(affirming statutes that required certain controversies to be submitted to a conciliation board); *Lawler*, 205 N.W. 880 (N.D. 1925)(upholding statutes regarding redemption rates for property acquired by counties for unpaid taxes); *State v. Ehr*, 221 N.W. 883 (N.D. 1928)(finding laws that limited the hours women could work to be constitutional); *State v. Diamond*, 219 N.W. 831 (1928)(sustaining the prohibition of certain business activities on Sunday); *F.W. Woolworth Co.*, 46 N.W.2d 295 (N.D. 1951)(upholding the requirement retailers pay taxes on gross receipts without allowing the burden to shift to purchasers); *Ferch*, 59 N.W.2d 849 (N.D. 1953)(upholding laws designed to foster low-income housing); *State v. Miller*, 129 N.W.2d 356 (N.D. 1964)(finding the giving of preference to farm operators in the awarding pronghorn antelope licenses to be constitutional); *State v. Gamble Skogmo, Inc.*, 144 N.W.2d 749 (N.D. 1966)(finding Sunday closing laws that allowed some business activities did not constitute “invidious discrimination”); *Horst v. Guy*, 211 N.W.2d 723 (N.D. 1973)(finding legislation designed to compensate only residents of North Dakota who were veterans of the Vietnam Conflict to be reasonable and constitutional); *Snyder’s Drug Stores*, 219 N.W.2d 140 (N.D. 1974)(finding North Dakota’s pharmacy ownership laws to be constitutional); *Johnson v. Elkin*, 263 N.W.2d 123 (N.D. 1978)(upholding the authority of the Public Service Commission to regulate house movers).

[¶39] During the first eighty years of statehood, only laws that were deemed arbitrary or unreasonable were found to violate section 21. For example, in *State v. Mayo*, 108 N.W. 36 (N.D. 1906), the North Dakota Supreme Court held a law that required county treasurers to remand the interest and penalties on city and city school taxes to the cities

was, “. . . an unjust and unreasonable discrimination in favor of city property owners, and against those who own property outside the city limits.” *Id.* at 38. The Supreme Court stated, “. . . we can conceive of no reason which would warrant this manifestly unjust discrimination in favor of city taxpayers as against other taxpayers in the county.” *Id.* “The act clearly contravenes section [22] of the Constitution, which declares that all laws of a general nature shall have a uniform operation, and is likewise an infringement of that part of section [21] which forbids the granting of any privilege or immunity to one citizen or class of citizens which is not granted on the same terms to all.” *Id.*

[¶40] In *Figenskau v. McCoy*, 265 N.W. 259 (N.D. 1936), the Supreme Court addressed statutes that regulated fees for commercial freighting. *Id.* at 259. Fees were not required if the hauling was done for farmers “. . . in transporting agricultural products to or from market” or “. . . anyone hauling farm products to or from a railroad station in his farming territory.” *Id.* at 261. The Supreme Court found this exemption to be “. . . a sufficiently clear and reasonable classification.” *Id.* The Supreme Court noted “[a]griculture is a basic industry of the state . . .” and “[i]t is a matter of common knowledge that under the present transportation and marketing system the cost of transportation of agricultural products from the farm to the market or to the railway station usually falls upon the farmer.” *Id.* “The Legislature may have reasonably decided that, since the fee here considered adds to the cost of transportation between farm and market or at least between the farm and the railroad station, it should not impose a further transportation burden upon agricultural products.” *Id.* The Supreme Court upheld the farm products exemption as “a reasonable and distinguishable classification . . . not in conflict with the provisions of either the state or federal Constitutions.” *Id.*

[¶41] However, the Supreme Court found other exemptions to be arbitrary. Retailers engaged in delivering gas and gas products directly from a bulk station to a farm were exempted from paying fees. *Id.* at 264. The Supreme Court determined “[n]o reasonable distinction can be made between the retailer engaged in delivering gas and gas products to the farmer directly from a bulk station and a retailer who delivers the same products from elsewhere” and “[n]o such distinction can be made between a retailer . . . and someone other than a retailer who delivers such products from a bulk station.” *Id.* “There is no reasonable distinction between a retailer who delivers such products from a bulk station to a farmer and a retailer who delivers the same products over the same roads for the same use or purpose to one who is not a farmer.” *Id.* “There appears to be no distinction between a retailer delivering gas and gas products to a farmer and another retailer delivering household necessities, clothing, or lignite coal.” *Id.* As such, the Supreme Court found “[t]he classification set up by this exemption is purely arbitrary.” *Id.*

[¶42] Likewise, the Supreme Court found an exemption for “farmers hauling lignite coal . . . for other farmers and in exchange for work and not for cash” is impermissible. The Supreme Court stated “[o]ne farmer who hauls lignite coal for gain, in the form of work, should not be classified differently from another farmer who hauls lignite coal for gain, in the form of cash.” *Id.* “Such an attempted distinction is arbitrary.” *Id.* “There appears to be no reasonable distinction between the farmer who hauls lignite coal in exchange for work and some one not a farmer who might do the same thing.” *Id.* “The fact that a person is a farmer does not entitle him to a favored classification as a hauler of coal.” *Id.*

[¶43] In *Melland v. Johanneson*, 160 N.W.2d 107 (N.D. 1968), the Supreme Court found a statute criminalizing legislative conflicts of interest to be unconstitutional. An initiated measure made it a misdemeanor for members of the legislature, their spouses, or businesses in which legislators or their spouses owned five percent or more, to sell goods or services to the state or its political subdivisions for consideration in excess of \$10,000.00. *Id.* at 111. In its review of the law, the Supreme Court found the \$10,000.00 threshold “. . . constitutes an arbitrary classification, a classification that cannot be supported by reason, and that this alone must cause the statute to fall as being in contravention of §§ [22] and [21] of the North Dakota Constitution and § 1 of the fourteenth amendment to the United States Constitution as a denial of the equal protection of the laws.” *Id.* at 115.

[¶44] The Supreme Court went further stating, “[t]here is another feature of the statute, however, which we believe to be even more discriminatory, and that is the feature which distinguishes between a stockholder-legislator and his spouse and an employee-legislator and his spouse.” *Id.* “This distinction lies in permitting a partnership, corporation, or association which employs a legislator to do any amount of business with the State or its subdivisions but prevents a similar partnership, corporation, or association from doing more than \$10,000 business with the State or its subdivisions if any of its members or stockholders or their spouses owning five per cent or more of its assets serves in the legislature.” *Id.* “This is so, notwithstanding that the employee’s salary or his spouse’s salary from the partnership, corporation, or association might be tied directly or indirectly to the business done with the State or its subdivisions by the partnership, corporation, or

association.” *Id.* “This feature also constitutes a denial of the equal protection of the laws.” *Id.*

[¶45] In *Christman v. Emineth*, 212 N.W.2d 543 (N.D. 1973), the Supreme Court addressed statutes that treated transfers of coal differently based on the nature of the transfer. *Id.* at 554. Transfers of coal by reservation or exception were required to be described accurately as to their nature, in length, width, and thickness. *Id.* These same requirements were not required for transfers by direct grant. *Id.* The Supreme Court found “[w]e can conceive of no reasonable basis for requiring that the nature, length, width and thickness of coal reservations be described when such a description is not required of grants of coal.” *Id.* at 556. “It would seem that if the description was of value it would be so regardless of how title to the coal was acquired.” *Id.* “Accordingly, [the Supreme Court] conclude[d] that the classification inherent in [these sections] is unreasonable and the discrimination resulting therefrom is invidious.” *Id.* “The sections therefore must fall as unconstitutional, being in violation of the equal protection clauses of Section [21] of the Constitution of North Dakota and Amendment XIV, Section 1, of the Constitution of the United States.” *Id.*

[¶46] In 1974, the Supreme Court issued several opinions that greatly impacted its future application of equal protection under section 21. The first of these decisions was *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974), where the Supreme Court addressed North Dakota’s “guest law” which prevented any person riding in a vehicle without giving compensation from recovering for damages caused by the ordinary negligence of a host. Nonpaying passengers could only recover for damages caused by “intoxication,

willful misconduct, or gross negligence” of the driver, and only if the injury occurred on a public highway. *Id.* at 777.

[¶47] The Supreme Court engaged in a lengthy discussion regarding the relationship between the United States Supreme Court and its own history:

Our review of constitutional questions has some similarity to but is different from the review by the United States Supreme Court, particularly as to its review of State legislation. And our approach through the years to constitutional questions has differed from the approach of that Court.

...

Since 1937, that Court rarely has declared State law unconstitutional on substantive due-process grounds, although often doing so on procedural due-process grounds.

In more recent years, that Court has modified its post-1937 hands-off attitude toward State economic and social legislation and has examined such legislation under the Equal Protection Clause of the Fourteenth Amendment, rather than under the Due Process Clause. Some commentators have noticed a remarkable resemblance between the ‘old substantive due process’ and the ‘new equal protection.’

The Federal examination of State statutes under the ‘new equal protection’ has been on two levels. On the one level there has been a group of cases involving ‘inherently suspect’ or ‘fundamental interest’ classifications, which are ‘subjected to strict judicial scrutiny.’ The suspect classifications include those based upon some ‘immutable characteristics determined solely by the accident of birth’ such as race, national origin, sex, or illegitimacy, ‘which violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility.’

At the other level, which involves non-suspect classifications, the Supreme Court has used the ‘traditional’ equal-protection analysis, under which a ‘legislative classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest.’

Some commentators now are suggesting that the Supreme Court is using a new intermediate analysis, a ‘strict scrutiny’ test, requiring a ‘close correspondence between statutory classification and legislative goals.’ Such a test closely approximates the test historically used by this court and some other State courts, discussed below.

The State courts have not all, and not always, followed the changing approaches of the highest Court. As pointed out by commentators, even after 1937, the State courts continued to examine legislation on the basis of whether it complied with substantive due process, as well as equal

protection and other constitutional provisions. Certainly this court has done so.

Throughout the years this court has regularly considered constitutionality of statutes under Sections [22], [12], and [21] of our Constitution, quoted above. We have had no hiatus such as the Federal courts had in their journey from the old due process to the new equal protection. Whatever our individual preferences might be as members of this court (and some of us might have preferred a greater degree of judicial abstention), it cannot be doubted that the power of this court to examine challenges based on the State Constitution and to decide them has been regularly invoked and regularly exercised, even during the period when the Federal courts were not doing so. “. . . [O]ur constitutional decisions from before 1937 to today indicates a steady course of constitutional adjudication.

While some of our decisions would pass muster under the ‘inherently suspect’ criteria. . . it may be that some of our statutes which we have declared unconstitutional might have passed the Federal constitutional screening. Such results are to be expected under a dual constitutional system. The Federal courts examine State statutes only to determine if they comply with the United States constitutional mandates. . . ; examine them for that purpose and also to determine if they comply with State constitutional mandates. In addition, Federal courts should, and usually do, defer to State courts as to interpretation of their own statutes. No one should be surprised if a statute passes the one set of standards and not the other.

. . .

We have, of course, exercised our power of constitutional adjudication with what each membership of the court deemed appropriate restraint: presuming that each statute is constitutional unless there is clear proof to the contrary, resolving doubts in favor of constitutionality, recognizing that the Legislature has a broad power to make classifications, and declaring laws unconstitutional only if there is no room for any question or doubt as to their constitutionality.

With this background in mind, we feel obligated to consider the constitutionality of the guest law, now that the matter has been brought before us for the first time, and to determine whether the statute contains arbitrary classifications violative of Sections [22], [12], or [21] of the North Dakota Constitution. Even when a statute has been in effect for a long time, our duty to consider its constitutionality, when the matter comes before us, continues, and this duty has been performed even in the face of prior holdings of constitutionality.

Furthermore, as the foregoing historical comments show, we are obliged to use different standards in considering federal constitutionality and state constitutionality. (cleaned up with citations omitted).

Id. at 775-77.

[¶48] The Supreme Court upheld the guest law under the Fourteenth Amendment of the United States Constitution, “. . . believing that the Federal courts would (and should) leave the matter to the State courts and might perhaps hold that the statute complies with minimum Federal standards. . . .” *Id.* at 780. However, the Supreme Court found the guest law violated the North Dakota Constitution “. . . find[ing] that the statutory classification is unreasonable for any proper purpose of legislation and is not based upon justifiable distinctions concerning any proper purpose of the law, and that it is arbitrary and over-inclusive.” *Id.*

[¶49] Just a few weeks after issuing its opinion in *Johnson*, the Supreme Court issued its opinion in *In Interest of G. H.*, 218 N.W.2d 441 (N.D. 1974). G.H. was a girl born “with severe physical handicaps. . . .” *Id.* at 442. “She spent some time at the Grafton State School (for retarded children), but did not really belong there, so she was sent to the Crippled Children’s School at Jamestown, North Dakota, at the request of the superintendent of the Grafton State School.” *Id.* “The Crippled Children’s School [was] a private, nonsectarian, nonprofit institution.” *Id.* At the time of the opinion, “G. H. ha[d] now spent most of her 17 years of life there.” *Id.*

[¶50] “All went well until the parents of G. H. moved to Minneapolis, Minnesota, in 1969, leaving her at the Crippled Children’s School in Jamestown.” *Id.* After her parents moved, the Williston School District stopped paying for G.H.’s tuition while the County Welfare Board continued to pay for her foster care. *Id.* A dispute arose regarding the responsibility for paying G.H.’s tuition. *Id.* at 443-44. The district court ordered the Public Welfare Board and Williams County Welfare Board to pay G.H.’s tuition. *Id.* at 444. Both entities appealed. *Id.* at 445.

[¶51] The Supreme Court recognized the United States Supreme Court had determined there was no right to education under the Federal Constitution. *Id.* (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)). However, the Court found the right to a “public school education” existed under the North Dakota Constitution *Id.* at 446. The Supreme Court held the “. . . failure to provide educational opportunity for handicapped children (except those, if any there are, who cannot benefit at all from it) is an unconstitutional violation of . . . Section [22] of the North Dakota Constitution and Section [21] of the North Dakota Constitution, which provide that all laws of a general nature shall have a uniform operation and that no class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens.” *Id.*

[¶52] The Supreme Court opined “we are confident that [the United States Supreme Court] would have held that G. H.’s terrible handicaps were just the sort of ‘immutable characteristic determined solely by the accident of birth’ to which the ‘inherently suspect’ classification would be applied, and that depriving her of a meaningful educational opportunity would be just the sort of denial of equal protection which has been held unconstitutional in cases involving discrimination based on race and illegitimacy and sex.” *Id.* at 446-47. (citations omitted). “When North Dakota undertakes to supply an education to all, and to require all to attend school, that right must be made available to all, including the handicapped, on equal terms.” *Id.* at 447. “The plain language of our constitutional provisions requires this conclusion” and “[e]ven if it did not, the Federal Constitution would.” *Id.* “[The Supreme Court held] that G. H. [was] entitled to an equal educational opportunity under the Constitution of North Dakota, and that depriving her

of that opportunity would be an unconstitutional denial of equal protection under the Federal and State Constitutions and of the Due Process and Privileges and Immunities Clauses of the North Dakota Constitution.” *Id.*

[¶53] *In Interest of G.H.* is significant because the Supreme Court recognized G. H.’s “terrible handicaps” as the type of “immutable characteristic determined solely by the accident of birth” that would place her into a suspect classification. *Id.* at 447. However, prior to making this finding, the Supreme Court had already determined that failing to provide G.H. with a public-school education violated section 21. Therefore, when the Supreme Court recognized the suspect classification, it was arguably doing so in an attempt to apply the Fourteenth Amendment and not the North Dakota Constitution.

[¶54] The lines between section 21 and the Fourteenth Amendment were further blurred in *Snyder’s Drug Stores*, 219 N.W.2d 140 (N.D. 1974). In *Snyder’s Drug Stores*, the Supreme Court addressed North Dakota’s pharmacy ownership laws after being reversed by the United States Supreme Court. *Id.* at 143-44. In deciding these laws were constitutional, the Supreme Court stated “. . . we consider the objectives of Section [22] and Section [21] of the North Dakota Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to be similar. *Id.* at 146. “Notwithstanding that we have in the recent case of *Johnson v. Hassett*, 217 N.W.2d 771 (N.D.1974), recognized that we may give a meaning to Sections [22] and [21] of our State Constitution relating to Equal Protection . . . different from that which the United States Supreme Court may give to the Equal Protection [Clause] of the Fourteenth Amendment to the United States Constitution, we conclude that in this case there is no compelling reason to do so.” *Snyder’s Drug Stores*, at 150.

[¶55] A few years later, the Supreme Court dealt with the unequal treatment of female prisoners in *State ex rel. Olson v. Maxwell*, 259 N.W.2d 621 (N.D. 1977). At the time, North Dakota had facilities to hold male prisoners within North Dakota while female inmates were sent to facilities in other states. *Id.* at 624. The Supreme Court noted “[c]ourts have employed basically a two-tiered test in determining the constitutional validity of particular classifications.” *Id.* at 627. “Under the traditional equal-protection analysis, classifications are sustained if they are rationally related to a conceivable, legitimate, governmental objective.” *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)). “A more stringent standard of review is applied where the classification is termed ‘inherently suspect’ or where the classification impinges on fundamental rights.” *Id.* “Included within the ‘inherently suspect’ category are classifications based upon such criteria as race, sex, illegitimacy, and immutable characteristics determined solely by accident of birth.” *Id.* “In such cases strict judicial scrutiny is called for, and classifications will be held invalid unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose.” *Id.* (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

[¶56] Citing to *In Interest of G.H.*, the Supreme Court stated “[w]e have recognized the suspect category . . . and used it in analyzing the North Dakota constitutional provision on equal protection, Section [21].” *Id.* The Supreme Court went further stating, “[w]e have also indicated that classifications based on sex are ‘inherently suspect’ under our State Constitution.” *Id.* Neither statement was entirely accurate.

[¶57] First, as previously noted, it was unclear in *In Interest of G.H.* whether the Supreme Court was recognizing a suspect category under the North Dakota Constitution

or the United States Constitution. Second, the Supreme Court had not recognized sex-based classifications as inherently suspect under the North Dakota Constitution. In stating it had recognized sex as a suspect classification, the Supreme Court cited its decision in *Tang v. Ping*, 209 N.W.2d 624 (N.D. 1973). *Maxwell*, 259 N.W.2d at 627. In *Tang*, the Supreme Court expressed “we are mindful . . . that a recent decision of the United States Supreme Court has determined that classifications based upon sex are inherently suspect and must be subjected to strict judicial scrutiny.” *Tang*, at 627 (citing *Frontiero v. Richardson*, 411 U.S. 677 (1973)). But, the Supreme Court did not recognize sex-based classifications as inherently suspect. *Id.* at 627. To the contrary, it stated “[w]e need not determine. . . whether sex is a suspect criterion in this case, since we can resolve the problem presented by using a traditional equal protection criterion, namely: that of whether the classification created has any reasonable relationship to the purpose of the statute in question.” *Id.*

[¶58] The Supreme Court also cited its decision in *Bingert v. Bingert*, 247 N.W.2d 464 (N.D. 1976). *Maxwell*, 259 N.W.2d at 627. Like *Tang*, *Bingert* also did not support the Supreme Court’s statement it had recognized sex-based classifications as inherently suspect. In *Bingert*, the Supreme Court upheld the constitutionality of North Dakota’s alimony statute. *Bingert*, at 469. However, it clarified “[i]n so holding, we do not mean to indicate that we do not recognize the *possibility* of the existence of sex as a ‘suspect classification.’” *Id.* (emphasis added).

[¶59] Along with misstating its precedent, the Supreme Court in *Maxwell* did not find an equal protection violation. Instead, the majority of justices found the transfer of female inmates outside of North Dakota was an unconstitutional violation of procedural due

process not equal protection. *Maxwell*, 259 N.W.2d at 629. As only three justices concurred in the opinion, the underlying statute was not declared unconstitutional. *Id.* Rather, the majority of the Supreme Court held “. . . under our supervisory powers, the majority of the court has the power to order compliance with due-process requirements regardless of the constitutionality or unconstitutionality of the statute, and we so order.” *Id.*

[¶60] Even stranger, the Supreme Court never addressed by the time of *Maxwell*, the United States Supreme Court no longer considered sex to be a suspect classification. In *Maxwell* the Supreme Court referenced *In Interest of G.H., Tang, and Bingert*. These three cases, as well as *Johnson*, all cited to the United States Supreme Court’s plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973). In *Frontiero*, four justices of the United States Supreme Court found sex to be a suspect classification.

[¶61] However, two years following *Frontiero*, the United States Supreme signaled sex may not be a suspect classification. *See Stanton v. Stanton*, 421 U.S. 7, 13 (1975) (stating “[w]e find it unnecessary in this case to decide whether a classification based on sex is inherently suspect.”). In 1976 the United States Supreme Court issued its opinion *Craig v. Boren*, 429 U.S. 190 (1976). In *Craig*, the Supreme Court acknowledged classifications based on gender are ““subject to scrutiny under the Equal Protection Clause.”” *Id.* at 197 (quoting *Reed v. Reed*, 404 U.S. 71, 75 (1971)). The Supreme Court held “. . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Id.* Thus, the Supreme Court ruled sex-based classifications are entitled to heightened scrutiny but sex is not a suspect classification. *Id.* at 217 (Berger, CJ, dissenting)(stating “[t]hough today’s decision does

not go so far as to make gender-based classifications ‘suspect,’ it makes gender a disfavored classification.”).

[¶62] *Craig* was decided prior to *Maxwell* but was not discussed by the North Dakota Supreme Court. Instead, the Supreme Court cited to its own cases that were based on *Frontiero*’s outdated plurality opinion. Ultimately, the Supreme Court failed to reach the four-justice majority needed to declare a statute unconditional and made its decision based on procedural due process grounds and not equal protection.

[¶63] It is therefore difficult to interpret *Maxwell* as the Supreme Court recognizing higher protections for sex-based classifications under section 21 than under the Fourteenth Amendment. If that was the Supreme Court’s intention, it would have said so. Instead, *Craig* was not discussed at all. *Maxwell* is more easily explained as the Supreme Court not recognizing that its precedent was based on a plurality opinion that no longer reflected the position of the United States Supreme Court.

[¶64] In the years following *Maxwell*, the Supreme Court repeatedly cited to *Johnson*’s discussion of the three standards of review used by the United States Supreme Court in interpreting the Fourteenth Amendment as the standard that applied to all equal protection claims. See *Benson v. N. Dakota Workmen’s Comp. Bureau*, 283 N.W.2d 96, 99 (N.D. 1979); *State v. Knoefler*, 279 N.W.2d 658, 661 (N.D. 1979); *Herman v. Magnuson*, 277 N.W.2d 445, 450-51 (N.D. 1979); *Arneson v. Olson*, 270 N.W.2d 125, 132-33 (N.D. 1978). The standards of review for evaluating equal protection claims under section 21 and the Fourteenth Amendment became the same. See *Mund v. Rambough*, 432 N.W.2d 50, 55 (N.D. 1988); *Nygaard v. Robinson*, 341 N.W.2d 349, 358 (N.D. 1983)(stating

“[w]e have previously discussed the three standards of review relevant to the Federal Constitution and to our State Constitution.”).

[¶65] The Supreme Court has summarized this analysis as follows:

We apply strict scrutiny to an inherently suspect classification or infringement of a fundamental right and strike down the challenged statutory classification “unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose.” *State ex rel. Olson v. Maxwell*, 259 N.W.2d 621, 627 (N.D.1977). When an “important substantive right” is involved, we apply an intermediate standard of review which requires a “‘close correspondence between statutory classification and legislative goals.’” *Hanson v. Williams County*, 389 N.W.2d 319, 323, 325 (N.D.1986)(quoting *Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D.1978)). When no suspect class, fundamental right, or important substantive right is involved, we apply a rational basis standard and sustain the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose. *See State v. Knoefler*, 279 N.W.2d 658, 662 (N.D.1979).

Gange v. Clerk of Burleigh Cnty. Dist. Ct., 429 N.W.2d 429, 433 (N.D. 1988). Thus, “[l]egislative classifications are subject to different standards of scrutiny, depending on the right infringed by the challenged classification.” *State v. Leppert*, 2003 ND 15, ¶ 7, 656 N.W.2d 718. “When a statute is challenged on equal protection grounds, [a court must] first locate the appropriate standard of review.” *Id.*

[¶66] For the first eighty years of statehood, the Supreme Court applied a “traditional” equal protection analysis to challenges brought under section 21. In *Johnson*, the Supreme Court recognized its equal protection analysis had drifted apart from that of the United States Supreme Court. The cases that followed *Johnson* reflect an intent by the Supreme Court to align its equal protection analysis with that of the United States Supreme Court. *See Snyder’s Drug Stores, Inc.*, 219 N.W.2d 140, 150 (stating “[n]otwithstanding that we have in the recent case of *Johnson v. Hassett*, 217 N.W.2d 771 (N.D.1974), recognized

that we may give a meaning to Sections [22] and [21] of our State Constitution relating to Equal Protection . . . different from that which the United States Supreme Court may give to the Equal Protection [Clause] of the Fourteenth Amendment to the United States Constitution, we conclude that in this case there is no compelling reason to do so.”).

[¶67] If the Supreme Court would have addressed sex-based classifications under section 21 following *Maxwell*, it would have likely continued to look to the United States Supreme Court’s equal protection decisions for guidance. In doing so, it would have followed the United States Supreme Court in its progression from labeling sex-based classifications as inherently suspect to finding they warrant heightened scrutiny. The Court believes the Supreme Court would treat sex-based classifications under section 21 similar to their treatment under the Fourteenth Amendment.

[¶68] Language from the Supreme Court’s decision in *City of Mandan v. Fern*, 501 N.W.2d 739 (N.D. 1993) supports this conclusion. In *Fern*, the Supreme Court addressed a claim the prosecution had made gender-based peremptory challenges in violation of the defendant’s equal protection rights under *Batson v. Kentucky*, 476 U.S. 79 (1986). *Fern*, at 742. In determining whether gender-based preemptory challenges violated *Batson*, the Supreme Court stated “[w]e review alleged sex discrimination under an intermediate standard of scrutiny.” *Id.* at 744 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)). “Under that standard, sex discrimination is not unconstitutional if it is substantially related to the achievement of important governmental objectives.” *Id.* This is the test used by the United States Supreme Court. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988)(stating discriminatory classifications based on sex receive “intermediate scrutiny” lying between the extremes of strict scrutiny and rational basis review); *United States v. Virginia*, 518 U.S. 515, 533

(1996)(holding“[t]he State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”). The Court believes this is the test that should apply under section 21 if the Health Care Law discriminates based upon sex.

[¶69] The Plaintiffs argue the Health Care Law decimates based on sex in violation of the equal protection guarantees of section 21 and is subject to strict scrutiny. (R:771:23:71). They argue the Health Care Law discriminates based on sex in three ways. (R:771:23:71-72). First, they assert it “restricts a person’s ability to access medical care based on their sex.” (R:771:23:72). The Plaintiffs argue the definition of “sex” found in N.D.C.C. § 12.136.1-01(3) is too narrow and “[t]here are many qualities that make up a person’s sex that are not part of the Hand Care Ban’s definition. . . .” (R:771:24:72). They assert a physician must verify a patient satisfies the government’s definition of “male” or “female” before being prescribed medication. (R:771:24:73).

[¶70] Second, the Plaintiffs assert the Health Care Law creates a sex-based classification because it “. . . relies on sex stereotyping and mandates gender conformity. . . .” (R:771:24:74). They argue it “. . . mandates gender conformity by forcing a small minority of adolescents . . . to develop secondary sex characteristics that are consistent with their sex assigned at but inconsistent with their gender identity.” (R:771:24:74). The suggest the Health Care Law forces adolescents “. . . to conform to the government’s sex stereotypes. . . .” (R:771:25:74).

[¶71] Finally, they argue the Health Care Law “. . . discriminates against North Dakotas whose gender identity does not conform to their sex assigned at birth, which is inherently

a form of sex discrimination.” (R:771:25:75). They argue that by discriminating against transgender persons the Health Care Law discriminates based on sex. (R:771:26:75).

[¶72] The Defendants urge the Court to adopt an analysis similar to that used by the United States Supreme Court in *Skrametti*, 605 U.S. ___, 145 S.Ct. 1816 (2025). (R:775:65:127). Specifically, that the Health Care Law incorporates two classifications—age and medical use. They argue “[t]he plain language of the Health Care Law does not prohibit conduct for one sex and permit it for the other.” (R:775:66:129).

[¶73] The Plaintiffs respond the United States Supreme Court applied a test that is not used under North Dakota law and “rewrote the Tennessee law at issue in order to characterize it as not sex-based. . . .” (R:777:23:42). They criticize *Skrametti* as “. . . an example of federal inconsistency.” (R:777:24:44). They argue “*Skrametti*’s reasoning is also unpersuasive because it had to rewrite the statute in order to reach its conclusion that it was not a sex-based classification.” (R:777:25:45).

[¶74] It is easy to see the similarities between this case and *Skrametti*. “In March 2023, Tennessee joined the growing number of States restricting sex transition treatments for minors. . . .” *Skrametti*, 145 S. Ct. at 1826. Tennessee’s law prevented healthcare providers from knowingly performing or offering to perform on a minor, or administer or offer to administer to a minor, a medical procedure if done for the purpose of “enabling a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex” or “treating purported discomfort or distress from a discordance between the minor’s sex and asserted identity.” *Id.*; *See* Tenn. Code Ann. § 68-33-103.

[¶75] “Three transgender minors, their parents, and a doctor (plaintiffs) brought a pre-enforcement challenge to [Tennessee’s law].” *Id.* at 1827. “Among other things, the

plaintiffs asserted that [it] violates the Equal Protection Clause of the Fourteenth Amendment.” *Id.* “The District Court partially enjoined enforcement of [it’s] prohibitions.” *Id.* “The court concluded that the plaintiffs lacked standing to challenge the law’s ban on sex transition surgery for minors” but “. . . were likely to succeed on their equal protection challenge to the law’s prohibitions on puberty blockers and hormones.” *Id.* “The court found that transgender individuals constitute a quasi-suspect class, that the discriminates on the basis of sex and transgender status, and that [the law] was unlikely to survive intermediate scrutiny.” *Id.*

[¶76] “The Sixth Circuit reversed” *Id.* “. . . [T]he Sixth Circuit held that the United States and plaintiffs were unlikely to succeed on the merits of their equal protection claim.” *Id.* The Sixth Circuit found the law did not classify based on sex because regulated sex-transitioning for all minors, regardless of sex, and declined to recognize transgender individuals as a suspect class. *Id.* “Finally, the court concluded that the United States and plaintiffs had failed to establish that animus toward transgender individuals as a class was the operative force behind [the law].” *Id.* at 1827-28. “The Sixth Circuit held that [the law] was subject to and survived rational basis review, finding that Tennessee had offered ‘considerable evidence’ regarding the risks associated with the banned medical treatments and the flaws in existing research.” *Id.* The United States Supreme Court granted certiorari to decide whether Tennessee’s law violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1828.

[¶77] Analyzing Tennessee’s law, the Supreme Court noted “[o]n its face, [it] incorporates two classifications.” *Id.* at 1829. “First, [it] classifies on the basis of age.” *Id.* “Healthcare providers may administer certain medical treatments to individuals ages

18 and older but not to minors.” *Id.* “Second, [it] classifies on the basis of medical use.” *Id.* “Healthcare providers may administer puberty blockers or hormones to minors to treat certain conditions but not to treat gender dysphoria, gender identity disorder, or gender incongruence.” *Id.*

[¶78] “Neither of the above classifications turns on sex.” *Id.* “Rather, [Tennessee’s law] prohibits healthcare providers from administering puberty blockers and hormones to *minors* for certain *medical uses*, regardless of a minor’s sex.” *Id.* “Classifications that turn on age or medical use are subject to only rational basis review.” *Id.* (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-14 (1976); *Vacco v. Quill*, 521 U.S. 793, 799-808 (1997)).

[¶79] The plaintiffs argued that Tennessee’s law creates facial sex-based classifications by defining the prohibited medical care based on the patient’s sex. *Id.* at 1829. They suggested it classifies by sex because its prohibitions reference sex and because application of the law turns on sex. *Id.* The Supreme Court found “[n]either argument is persuasive.” *Id.*

[¶80] The Supreme Court clarified “[t]his Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny.” *Id.* “We also reject the argument that the application of [Tennessee’s law] turns on sex.” *Id.* at 1830. “. . . [Tennessee’s law] clearly does not classify on the basis of sex.” *Id.* “. . . [It] does not mask sex-based classifications” as “. . . the law does not prohibit conduct for one sex that it permits for the other.” *Id.* at 1831. “Under [Tennessee’s law], *no* minor may be administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender

incongruence; minors of *any* sex may be administered puberty blockers or hormones for other purposes.” *Id.*

[¶81] The Supreme Court rejected the plaintiff’s argument that, “by design, [Tennessee’s law] enforces a government preference that people conform to expectations about their sex.” *Id.* at 1832. The Supreme Court acknowledged “a law that classifies on the basis of sex may fail heightened scrutiny if the classifications rest on impermissible stereotypes.” *Id.* (citing *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 139, n. 11 (1994)). “But where a law’s classifications are neither covertly nor overtly based on sex, contrast . . . we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose. . . .” *Id.* (citations omitted). The Supreme Court found “. . . the plaintiffs’ allegations of sex stereotyping are misplaced.” *Id.* The Supreme Court found the plaintiff’s failed to acknowledge Tennessee’s legitimate interests of protecting minors from procedures that put them at risk. *Id.*

[¶82] Finally, the Supreme Court rejected the argument Tennessee’s law “. . . warrants heightened scrutiny because it discriminates against transgender individuals, who the plaintiffs assert constitute a quasi-suspect class.” *Id.* at 1832. The Supreme Court found the law’s two classifications, age and medical use, did not classify on the basis of transgender status. *Id.* at 1832-33. “[A] State does not trigger heightened constitutional scrutiny by regulating a medical procedure that only one sex can undergo unless the regulation is a mere pretext for invidious sex discrimination.” *Id.* at 1833. “. . . [Tennessee’s law] does not exclude any individual from medical treatments on the basis of transgender status but rather removes one set of diagnoses—gender dysphoria, gender identity disorder, and gender incongruence—from the range of treatable conditions.” *Id.*

[¶83] The Supreme Court specified it had not held that transgender individuals are a suspect or quasi-suspect class. *Id.* at 1832. The plaintiffs urged the Supreme Court to extend its reasoning in *Bostock v. Clayton County*, 590 U.S. 644 (2020) to their equal protection claims. *Skrmetti*, 145 S. Ct. at 1843. In *Bostock*, the Supreme Court held “. . . that an employer who fires an employee for being gay or transgender violates Title VII’s prohibition on discharging an individual “because of” their sex.” *Skrmetti*, 145 S. Ct. at 1843 (citing *Bostock*, at 650-52). The Supreme Court declined the invitation stating “[w]e have not yet considered whether *Bostock*’s reasoning reaches beyond the Title VII context, and we need not do so here.” *Id.* “For reasons we have already explained, changing a minor’s sex or transgender status does not alter the application of [Tennessee’s law].” *Id.*

[¶84] The Supreme Court determined Tennessee’s law was subject to a rational basis inquiry. *Id.* at 1835. This inquiry “employs a relatively relaxed standard reflecting the Court’s awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one.” *Id.* (quoting *Massachusetts Bd. of Retirement*, 427 U.S. at 314). “Under this standard, [the Supreme Court] will uphold a statutory classification so long as there is ‘any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *Id.* (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)). “Where there exist “plausible reasons” for the relevant government action, ‘our inquiry is at an end.’” *Id.* (quoting *Beach Communications*, at 313-14).

[¶85] The Supreme Court found Tennessee’s law “. . . clearly meets this standard.” *Id.* “Tennessee determined that administering puberty blockers or hormones to a minor to

treat gender dysphoria, gender identity disorder, or gender incongruence ‘can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences.’” *Id.* (quoting Tenn. Code Ann. § 68-33-101(b)). “It further found that it was ‘likely that not all harmful effects associated with these types of medical procedures when performed on a minor are yet fully known, as many of these procedures, when performed on a minor for such purposes, are experimental in nature and not supported by high-quality, long-term medical studies.’” *Id.* “Tennessee determined that ‘minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and that many individuals have expressed regret for medical procedures that were performed on or administered to them for such purposes when they were minors.’” *Id.* at 1835-36 (quoting Tenn. Code Ann. § 68-33-101(h)). “At the same time, Tennessee noted evidence that discordance between sex and gender ‘can be resolved by less invasive approaches that are likely to result in better outcomes for the minor.’” *Id.* at 1835 (quoting Tenn. Code Ann. § 68-33-101(c)). “[Tennessee’s law’s] age- and diagnosis-based classifications are plainly rationally related to these findings and the State’s objective of protecting minors’ health and welfare.” *Id.* (quoting Tenn. Code Ann. § 68-33-101(a)).

[¶86] The Supreme Court held “. . . there is a rational basis for [the law’s] classifications. *Id.* “Tennessee concluded that there is an ongoing debate among medical experts regarding the risks and benefits associated with administering puberty blockers and hormones to treat gender dysphoria, gender identity disorder, and gender incongruence.” *Id.* “[Tennessee’s] ban on such treatments responds directly to that uncertainty.” *Id.* “We afford States ‘wide discretion to pass legislation in areas where

there is medical and scientific uncertainty.” *Id.* (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)). “[T]he fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.” *Id.* (quoting *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)).

[¶87] Following *Skrmetti*, the United States Court of Appeals for the Eighth Circuit addressed Arkansas’ ban on gender transition procedures to minors in *Brandt by & through Brandt v. Griffin*, 147 F.4th 867 (8th Cir. 2025). In 2021 the Arkansas legislature enacted laws that “prohibited physicians and other healthcare professionals from providing ‘gender transition procedures to any individual under eighteen (18) years of age.’” *Id.* at 877 (citing Ark. Code Ann. § 20-9-1502(a)). “[Arkansas’ law] also prohibited physicians and other healthcare professionals from referring minors to any healthcare professional for gender transition procedures.” *Id.* (citing Ark. Code Ann. § 20-9-1502(b)). The law’s definition of “gender transition procedures” included “medical services that provide puberty-blocking drugs, cross-sex hormones, or other mechanisms to promote the development of feminizing or masculinizing features in the opposite biological sex, or genital or non-genital gender reassignment surgery performed for the purpose of assisting an individual with a gender transition.” Ark. Code Ann. § 20-9-1501(6)(A).

[¶88] “Four minors in Arkansas, their parents, and two healthcare professionals sued for declaratory and injunctive relief.” *Brandt*, 147 F. 4th at 877. “They alleged that the [law] violated the Fourteenth Amendment’s Equal Protection Clause and Due Process Clause, as well as the First Amendment.” *Id.* “The district court granted a preliminary injunction against the enforcement of the Act.” *Id.* “On appeal, a panel of [the Eighth

Circuit] affirmed the district court, finding a likelihood of success on the merits that the Act violated the Equal Protection Clause.” *Id.* “The case proceeded to trial on the merits.” *Id.* “After an eight-day bench trial, the district court concluded that the Act violated the Equal Protection Clause, the Due Process Clause, and the First Amendment.” *Id.* “The [district] court permanently enjoined the Attorney General and the State Medical Board from enforcing the [law].” *Id.*

[¶89] The matter was appealed. The plaintiffs argued the Arkansas law “classifies based on sex in violation of the Equal Protection Clause.” *Id.* at 878. “They argue[d] that a minor’s sex determines whether he or she can receive certain medical treatments.” *Id.* They asserted “. . . a male minor can receive testosterone to masculinize his appearance, but a female minor cannot.” *Id.* “[They] reason[ed] that because a minor’s sex determines whether he or she may receive certain medical treatments, the [law] classifies based on sex.” *Id.*

[¶90] The Eighth Circuit rejected these arguments stating “[t]o the contrary, as the Supreme Court explained about a similar Tennessee law, the [Arkansas law] classifies based only on age and medical procedure.” *Id.* (citing to *Skrmetti*, 145 S. Ct. at 1829). “Under [Arkansas law], just like the Tennessee law, healthcare professionals ‘may administer certain medical treatments to individuals ages 18 and older but not to minors.’” *Id.* “Thus, the Act classifies based on age.” *Id.* “[It] does not classify based on sex.” *Id.* at 879. “A minor male who receives testosterone in order to masculinize his appearance receives a different procedure than a minor female who receives testosterone as a gender transition procedure.” *Id.*

[¶91] “Citing *Bostock*, . . . the [plaintiffs] argue[d] that prohibiting gender transition procedures inherently discriminates on the basis of sex because the [law] punishes a minor for seeking to acquire sex characteristics ‘different from the individual’s biological sex.’” *Brandt*, 147 F.4th at 879-80 (citing Ark. Code Ann. § 20-9-1501(6)(A)(ii)). “[They] reason[ed] that the [Arkansas law] must classify based on sex because it would otherwise be impossible to distinguish whether a drug or surgery for a minor was permitted or prohibited.” *Id.* at 880. The Eighth Circuit noted that in *Skrametti* the United States Supreme Court “declined to decide ‘whether *Bostock*’s reasoning reaches beyond the Title VII context.’” *Brandt*, 147 F.4th at 880. “Like the Tennessee law, [Arkansas’ law] prohibits providing medical treatment for certain purposes, and these prohibitions apply even if one switches the sex of a hypothetical minor.” *Id.* “Thus, the Act does not discriminate on the basis of sex.” *Id.* “This court need not decide whether *Bostock*’s reasoning applies in Equal Protection Clause cases because applying *Bostock*’s reasoning does not change the outcome of this case.”

[¶92] The plaintiffs further argued Arkansas’ law reinforces “fixed notions” about “roles and abilities” tied to an individual’s sex. “[They] conclude[d] that [it] thus compels individual conformity to generalizations about sex.” *Id.* Pointing to *Skrametti*, the Eighth Circuit recognized that “. . . a law that classifies on the basis of sex may fail heightened scrutiny if the classifications rest on impermissible stereotypes” but “where a law’s classifications are neither covertly nor overtly based on sex . . . we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose.” *Id.* (quoting to *Skrametti*, 145 S. Ct. at 1832). “A concern about potentially irreversible

medical procedures for a child is not a form of stereotyping.” *Id.* at 1831 (quoting *L.W. ex rel. Williams v. Skrametti*, 83 F.4th 460, 485 (6th Cir. 2023)).

[¶93] The Eighth Circuit determined that the Arkansas law classified based on age and medical procedure and was therefore to be evaluated under rational basis review. *Id.* “Laws reviewed for rational basis receive a ‘wide latitude.’” *Id.* at 882 (quoting *Skrametti*, 145 S. Ct. at 1828). The Eighth Circuit looked to the district court’s findings. *Id.* at 883. “The district court here found that there were risks to minors from the prohibited gender transition procedures.” *Id.* “The court found that risks for minors using cross-sex hormones include changes in cholesterol and blood thickness, blood clots (increasing stroke risk), and infertility.” *Id.* “The court found that the risk of infertility from using hormones is not ‘the same regardless of the condition for which they are being used and whether they are used to treat birth-assigned males or birth-assigned females.’” *Id.* “The court expressly found: ‘There are some individuals who undergo gender-affirming medical treatment who later come to regret that treatment and, for some, it was because they came to identify with their birth-assigned sex (sometimes referred to as detransitioning).’” *Id.* “[T]he district court also acknowledged that many studies underlying the associations’ guidelines for gender transition procedures for minors are not of the highest scientific quality.” *Id.* “The district court also acknowledged the policies of Sweden, Finland, and the United Kingdom, regulating access to gender transition procedures for minors.” *Id.* The Eighth Circuit held “the undisputed facts found by the district court demonstrate that there is a ‘reasonably conceivable state of facts that could provide a rational basis for the classification’ in the Act.” *Id.* (quoting *Skrametti*, at 1835).

[¶94] The United States Court of Appeals for the Tenth Circuit reached similar conclusions in addressing Oklahoma’s ban on gender transition procedure for minors in *Poe by & through Poe v. Drummond*, 149 F.4th 1107 (10th Cir. 2025). “On May 1, 2023, Oklahoma enacted SB 613, which prohibits healthcare providers from “provid[ing] gender transition procedures” to anyone under eighteen years old.” *Id.* at 1119 (citing Okla. Stat. tit. 63, § 2607.1(B)). The Oklahoma law defined “gender transitions procedures” as “medical or surgical services performed for the purpose of attempting to affirm the minor’s perception of his or her gender or biological sex, if that perception is inconsistent with the minor’s biological sex” including “puberty-blocking drugs, cross-sex hormones, or other drugs to suppress or delay normal puberty or to promote the development of feminizing or masculinizing features consistent with the opposite biological sex.” *Id.* (citing Okla. Stat. tit. 63, § 2607.1(A)(2)(a)(1-2)).

[¶95] The plaintiffs challenged Oklahoma’s law on several grounds including arguments it violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* After summarizing *Skrmetti*, the Tenth Circuit stated “[l]ike Tennessee’s [law], Oklahoma’s [law’s] applicability turns on the same two factors: age and medical use.” *Poe*, 149 F.4th at 1121-22. “Age does not trigger heightened scrutiny. . . so we subject [Oklahoma’s law] to a rational basis review.” *Id.* at 1122 (internal citations omitted).

[¶96] The Tenth Circuit found the Oklahoma law “. . . also discriminates on the basis of medical procedure or use.” *Id.* at 1123. “[W]hether a provider may administer these procedures turns on the condition to be treated.” *Id.* However, both classifications based on age and classifications that turn on medical use are subject to only a rational basis review. *Id.*

[¶97] The Tenth Circuit recognized “[t]he states have ‘a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.’” *Id.* (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990)). The Tenth Circuit found “[i]n this continuing and evolving area of medicine, Oklahoma has a legitimate interest in the health and welfare of its children and using age to determine the accessibility of gender transition procedures rationally relates to that legitimate interest.” *Id.* (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000)). The district court found ““that there is no consensus in the medical field about the extent of the risk or benefits of the Treatment Protocols to address a minor’s gender dysphoria.” *Id.* “Thus, in light of the ongoing debates among medical professionals, Oklahoma’s decision to enact [its law] rationally relates to its concerns about the safety and efficacy of treating gender dysphoria with these gender transitioning procedures.” *Id.* (citing *Skrmetti*, 145 S. Ct. at 1835). “So although [Oklahoma’s law] discriminates based on age and medical purpose or use, it does not do so unconstitutionally.”

[¶98] Finally, the Tenth Circuit addressed the plaintiff’s argument “. . . that Oklahoma adopted the law as pretext to purposefully discriminate against transgender persons.” *Id.* at 1125. “[W]here a law’s classifications are neither covertly nor overtly based on sex . . . we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose.” *Id.* (quoting to *Skrmetti*, 145 S. Ct. at 1832). “. . . [C]ontemporary statements from a few legislators do not persuade us of discriminatory intent.” *Id.* “What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.” *Id.* (citations omitted). The Tenth

Circuit found the “[p]laintiffs failed to prove that the legislature enacted [the law] for invidious discriminatory purpose.” *Id.* at 1126. “In sum, [Oklahoma’s law] does not violate the Equal Protection Clause of the Fourteenth Amendment because it discriminates based on age and medical purpose and satisfies rational basis review.” *Id.*

[¶99] *Skrmetti*, *Brandt*, and *Poe* are not binding on this Court. Those cases reviewed state laws dealing with the medical treatment of minors with gender dysphoria under the Fourteenth Amendment. Here, the Plaintiffs have limited their equal protection claim to Article, I, Section 21 of the North Dakota Constitution. (R:273:31:138-41). However, the cases are persuasive. The courts were addressing similar state laws against arguments that are nearly identical to the arguments being made here.

[¶100] To determine whether North Dakota’s Health Care Law involves a sex-based classification, the text of the law must be examined. The operative section of the Health Care Law is N.D.C.C. § 12.1-36.1-02 which states:

Perception of a minor’s sex--Prohibited practices--Penalty

1. Except as provided under section 12.1-36.1-03, if a minor’s perception of the minor’s sex is inconsistent with the minor’s sex, a health care provider may not engage in any of the following practices for the purpose of changing or affirming the minor’s perception of the minor’s sex:
 - c. Perform castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, or vaginoplasty;
 - d. Perform a mastectomy;
 - e. Prescribe, dispense, administer, or otherwise supply any drug that has the purpose of aligning the minor’s sex with the minor’s perception of the minor’s sex when the perception is inconsistent with the minor’s sex, including:
 - (1) Puberty-blocking medication to stop normal puberty;
 - (2) Supraphysiologic doses of testosterone to females; or
 - (3) Supraphysiologic doses of estrogen to males; or
 - f. Remove any otherwise healthy or nondiseased body part or tissue, except for a male circumcision.
2. A health care provider who willfully violates:
 - g. Subdivision a, b, or d of section 1 is guilty of a class B felony.

h. Subdivision c of subsection 1 is guilty of a class A misdemeanor.

[¶101] By its expressed terms, the Health Care Law applies only to the medical treatment of minors who are defined as individuals under the age of eighteen. N.D.C.C. § 12.1-36.1-01(2). The medical treatment of adults is not restricted. The Health Care Law inherently discriminates based upon age. The North Dakota Supreme Court has never recognized that age-based classifications are subject to heightened scrutiny under section 21. Many laws prohibit the conduct of minors when that same conduct is allowed for adults. Minors generally cannot consume alcohol, cannot use tobacco products, may not vote, and are restricted in their ability to marry. *See* N.D. Const. art. II, § 1; N.D.C.C. § 5-01-08, N.D.C.C. § 12.1-31-03, N.D.C.C. § 14-03-02. Age is not a suspect classification. It is not an ‘immutable characteristic’ as it changes with the natural progression of time.

[¶102] The Health Care Law also discriminates based upon medical purpose. For example, a minor could receive puberty blocking medications to treat conditions such as precocious puberty, but not for “the purpose of aligning the minor’s sex with the minor’s perception of the minor’s sex. . . .” A minor could likewise receive testosterone or estrogen so long the purpose behind the medication is not to align the minor’s sex with the minor’s perception of the minor’s sex. The Health Care Law therefore limits medical treatment based upon the purpose of that treatment, not based upon the sex of the person seeking the treatment. It applies to all minors regardless of sex. The North Dakota Supreme Court has never given heightened equal protection scrutiny to laws that classify based on medical purpose. Thus, like the laws of Tennessee, Arkansas, and Oklahoma, North Dakota’s Health Care Law discriminates based upon age and medical purpose and is subject to a rational basis standard of review under section 21.

[¶103] The Plaintiffs argue the Health Care Law’s definition of “sex” is too narrow and “[t]here are many qualities that make up a person’s sex that are not part of the Healthcare Ban’s definition. . . .” (R:771:24:72). The Health Care Law defines “sex” as “the biological state of being female or male, based on the individual’s nonambiguous sex organs, chromosomes, or endogenous hormone profiles at birth.” N.D.C.C. § 12.1-36.1-01(3). The Plaintiffs contend transgender people are not new and existed in North Dakota even prior to statehood. (R:278:1:1). Nevertheless, they were not discussed or considered at the North Dakota Constitutional Convention. At trial, the Plaintiffs called Dr. Jesse Bayker who works as an assistant teaching professor in the Department of History at Rutgers University. (R:765:8:7-20). According to Dr. Bayker, the only discussion of gender during the North Dakota Constitutional Convention related to whether women should have the right to vote. (R:765:46:3-5). Dr. Bayker described the discussion as “very, very brief” and it was decided “women should not vote and that if women were to vote someday that, that should be a question for the next generation to decide using statewide referendum.” (R:765:46:6-11). Dr. Bayker further testified that by 1800 a “two-sex model” had developed that set up the modern thinking of the binary sex system and it would have been part of the public information when the North Dakota Constitution was drafted. (R:765:60:18-25, R:765:61:5)

[¶104] The Plaintiffs have not cited to any North Dakota Supreme Court decisions that have addressed a different definition of “sex.” No North Dakota statutes addressed transgender individuals prior to 2023. *See* N.D.C.C. § 12-44.1-09.1, N.D.C.C. § 12-46-26, N.D.C.C. § 12-47-40, N.D.C.C. § 15.1-06-21, N.D.C.C. § 15-10-68. The Plaintiffs have failed to establish that the definition of “sex” found in the Health Care Law is

inconsistent with the understood meaning of the term at the time the North Dakota Constitution was adopted. The Court finds the argument the Health Care Law is entitled to heightened scrutiny under section 21 because it defines “sex” too narrowly to be unpersuasive.

[¶105] The Plaintiffs assert the Health Care Law creates a sex-based classification because it “. . . relies on sex stereotyping and mandates gender conformity. . . .” (R:771:24:74). They argue it “. . . mandates gender conformity by forcing a small minority of adolescents . . . to develop secondary sex characteristics that are consistent with their sex assigned at but inconsistent with their gender identity.” (R:771:24:74). The suggest the Health Care Law forces adolescents “. . . to conform to the government’s sex stereotypes. . . .” (R:771:25;74).

[¶106] In support of their position, the Plaintiffs cite to *City of Mandan v. Fern*, 501 N.W.2d 739 (N.D. 1993) and *Rustad v. Rustad*, 2014 ND 148, 849 N.W.2d 607. As previously addressed, *Fern* dealt gender-based preemptory challenges to a jury in a criminal trial. The Supreme Court found that “. . . expressions of an intention to exclude on the basis of group membership or on stereotypical assumptions about members of certain groups will not constitute a neutral explanation” in response to a *Batson* challenge. *Fern*, at 749.

[¶107] In *Rustad*, 2014 ND 148 the Supreme Court reviewed a district court’s award of primary residential responsibility. In its application of the best interest factors, the district court commented that one factor favored the mother as she would be in a better position to “explain a female’s needs” to a daughter. *Id.* at ¶ 12. The Supreme Court found this finding troubling noting the court should not subscribe to sex-based rules based on

stereotypes. *Id.* However, the Supreme Court determined the district court's finding was not based solely on the child's gender and was supported by the evidence. *Id.*

[¶108] Neither *Fern* or *Rustad* addressed gender stereotypes or conformity in regards to the constitutionality of a statute. Nevertheless, as addressed by the United States Supreme Court in *Skrmetti*, “. . . a law that classifies on the basis of sex may fail heightened scrutiny if the classifications rest on impermissible stereotypes.” *Skrmetti*, 145 S. Ct. at 1832 (citing *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 139, n. 11 (1994)). “But where a law's classifications are neither covertly nor overtly based on sex, [it is not subject to heightened review] unless it was motivated by an invidious discriminatory purpose. . . .” *Id.* (citations omitted).

[¶109] As already addressed, the Healthcare Law does not covertly or overtly classify based on sex. However, unlike in *Skrmetti*, the Plaintiffs here argue the Health Care Law was “motivated by invidious discrimination against transgender individuals.” (R:771:30:83). They argue contemporary statements by lawmakers provide evidence “that the ban was based on animus rather than a genuine concern for the well-being of transgender adolescents in North Dakota.” (R:771:42:109). They point to comments made by legislators that compared minors with gender dysphoria to children who believe they are “cats, dogs, pirates, or who want to be a disabled person, really bad.” (R:577:1; R:578:33; R:579:9; R:581:7; R:771:43:112).

[¶110] The North Dakota Supreme Court has stated “[r]andom statements by legislative committee members, while possibly useful if they are consistent with the statutory language and other legislative history, are of little value in fixing legislative intent.” *Little v. Tracy*, 497 N.W.2d 700, 705 (N.D. 1993). “Generally, the law is what the Legislature

says, not what is unsaid.” *Id.* Other courts have similarly found that the comments of individual legislators cannot be considered the intent to the entire legislature. *See Texas Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136-37 (Tex. 2018)(stating “. . . statements explaining *an individual legislator’s* intent cannot reliably describe *the legislature’s* intent.”); *Eagleman v. Diocese of Rapid City*, 862 N.W.2d 839, 845 (S.D. 2015)(stating “. . . the motivation of a few representatives cannot be attributed to the Legislature as a whole.”); *Gillihan v. Gump*, 92 P.3d 514, 518 (Idaho 2004)(stating “. . . the accepted rule in most jurisdictions is that the beliefs of one legislator do not establish that the legislature intended something other than its express declaration.”); *State v. Carpenter*, 541 N.W.2d 105, 112, n11 (Wis. 1995)(noting “[i]n judging the constitutionality of a statute, we cannot assume that the statements of a few constitute the motivation of the entire legislature.”). As stated by the Tenth Circuit in *Poe*, “. . . contemporary statements from a few legislators do not persuade us of discriminatory intent.” 149 F.4th at 1125. “What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.” *Id.* (citations omitted). Therefore, the statements referenced by the Plaintiffs are insufficient to show the Legislature passed the Health Care Law for an invidious discriminatory purpose.

[¶111] Further, the Plaintiffs’ argument ignores the voluminous legislative record. (R:576-81). Multiple hearings were held and testimony was received from many individuals. There was significant debate amongst members of the House and Senate regarding H.B. 1254 and the language of the bill changed as it moved through the legislative process. The Plaintiffs have cited to the most inflammatory statements made by a small group of legislators. Even without the votes of these legislators, the Health

Care Law would have still overwhelmingly passed. The legislative record does not support, and the Plaintiffs have not established, that the Legislature passed the Health Care Law for an invidious discriminatory purpose.

[¶112] The Plaintiffs argue that transgender status should be treated as a suspect classification under Section 21. (R:771:26:76). The North Dakota Supreme Court has never held being transgender is a classification that triggers heightened scrutiny. No North Dakota statutes addressed transgender individuals prior to 2023. *See* N.D.C.C. § 12-44.1-09.1, N.D.C.C. § 12-46-26, N.D.C.C. § 12-47-40, N.D.C.C. § 15.1-06-21, N.D.C.C. § 15-10-68.

[¶113] Prior to *Skrmetti*, “. . . the law nationally [wa]s in flux, with conflicting rulings on transgender constitutional rights.” *Vasquez v. Iowa Dep’t of Hum. Servs.*, 990 N.W.2d 661, 668 (Iowa 2023). No Federal Courts have found transgender persons qualify as a suspect class receiving strict scrutiny. *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 570 (Minn. Ct. App. 2020). “Some courts . . . applied intermediate scrutiny for transgender rights claims.” *Vasquez*, at 669. “Some courts . . . applied rational basis review.” *Id.* “Other courts questioned whether transgender persons satisfy traditional tests for status as a quasi-suspect class triggering heightened scrutiny.” *Id.* This disparity in outcomes was largely caused by a lack of precedent from the United States Supreme Court. *See Ray v. McCloud*, 507 F. Supp. 3d 925, 936 (S.D. Ohio 2020)(observing “[t]here is no binding precedent from the United States Supreme Court . . . regarding whether transgender people are a quasi-suspect class.”).

[¶114] In *Skrmetti*, the United States Supreme Court clarified it had not held that transgender individuals are a suspect or quasi-suspect class and was declining to do so.

Skrmetti, 145 S. Ct. at 1832. In *State v. Knoefler*, 279 N.W.2d 658 (N.D. 1979), the North Dakota Supreme Court stated “[f]rom our research, it appears that neither the United States Supreme Court, nor any Federal or State court has defined what constitutes an inherently suspect classification.” *Id.* at 661. “Under these circumstances we do not believe it necessary or appropriate to formulate a definition.” *Id.* The following year, in *State v. Carpenter*, 301 N.W.2d 106, 109 (N.D. 1980) the Supreme Court reiterated “[t]he United States Supreme Court has not formulated a clear test for determining whether a classification is a suspect classification . . . [h]owever, the Court has cited factors which include immutable and highly visible characteristics, historical disadvantage, and relative lack of political representation as relevant in determining which classifications are suspect.” *Id.* at 109 (citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976)).

[¶115] In the case of *In Interest of G. H.*, 218 N.W.2d 441 the North Dakota Supreme Court found a child’s “. . . terrible handicaps were just the sort of ‘immutable characteristic determined solely by the accident of birth’ to which the ‘inherently suspect’ classification would be applied. . . .” *Id.* at 446. The key to this finding was that G.H.’s handicaps were “immutable.” Something is “immutable” if it is “not capable of or susceptible to change.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/immutable>.

[¶116] A diagnosis of gender dysphoria is a prerequisite to receiving the medical interventions banned by the Health Care Law. The American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* or *DSM-5-TR*, recognizes that gender dysphoria may go into remission and/or desist. (R:590:14).

[¶117] During his testimony, Dr. Danial Sturgill, a licensed psychologist practicing at Sanford Health, testified there is no way of knowing for certain if a transgender adolescent will desist or persist in their gender identity later in life. (R:766:162:5-16). Dr. Sturgill testified “a very small amount” of individuals who meet the criteria for gender dysphoria during childhood will identify with their birth sex later in life. (R:766:167:7-10). During his testimony, Plaintiff, Dr. Casas, also acknowledged some children diagnosed with gender dysphoria may identify with their biological sex later in life. (R:767:173:11-16).

[¶118] Defense witness, Dr. Stephen Levine, a Clinical Professor of Psychiatry at Case Western Reserve University School of Medicine, testified “. . . [t]he vast majority of children who are left alone who are cross-gender identified, who are not intervened in by changing their gender presentation, the vast majority of those kids desist on their own.” (R:771:27:18-22). An article co-authored by Dr. Levine in the *Journal of Sex & Marital Therapy* argued a review of data from eleven research studies suggested “[a]mong children meeting the diagnostic criteria for ‘Gender Identity Disorder’ in DSM-IV (currently ‘Gender Dysphoria’ in DSM-5), 67% were no longer gender-dysphoric as adults. . . .” (R:678:6).

[¶119] It is clear there is significant disagreement about the prevalence of desistance in individuals with gender dysphoria and the reasons for that desistance. Nevertheless, it is a condition that may go into remission or desist. Gender dysphoria is therefore not an immutable characteristic like race. It is subject to change, and therefore, not the type of immutable characteristic that would result in transgender individuals being considered a suspect classification.

[¶120] Further, while a small minority, transgender individuals are not politically powerless. The legislative record in this matter reflects there was testimony from many individuals who opposed the Health Care Law. Laws that impact transgender individuals have been significantly litigated in courts throughout the country, with some rulings in favor of transgender rights. At least fourteen states have passed laws specifically protecting the medical treatment of transgender individuals. *See L. W. by & through Williams v. Skrmetti*, 83 F.4th 460, 487 (6th Cir. 2023). “. . . [T]ransgender individuals do not occupy ‘a position of political powerlessness’ that requires ‘extraordinary protection from the majoritarian political process.’” *Gore v. Lee*, 107 F.4th 548, 559 (6th Cir.2024)(quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). The Court finds that transgender status is not a suspect classification justifying heightened scrutiny under the North Dakota Constitution.

[¶121] In summary, the Court finds North Dakota’s Health Care Law discriminates based upon age and medical purpose. It does not discriminate based on sex. The Plaintiffs have not established that the Health Care Law was passed by the North Dakota Legislature for an invidious discriminatory purpose. Finally, transgender status is not a suspect classification justifying heightened scrutiny under the North Dakota Constitution. The Court finds the Plaintiffs’ claim the Health Care Law violates the equal protection guarantees of Article I, Section 21, of the North Dakota Constitution is subject to a rational basis standard of review.

[¶122] Under the rational basis standard of review, a law will be upheld unless the classification is patently arbitrary and bears no rational relationship to a legitimate governmental purpose. *Gange*, 429 N.W.2d at 433 (citations omitted). “This test has been

described as a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Ferguson v. City of Fargo*, 2016 ND 194, ¶ 10, 886 N.W.2d 557 (internal quotations omitted). "For purposes of rational basis review, equal protection does not demand that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification; however, there must be an identifiable purpose that may conceivably or reasonably have been that of the government decisionmaker." *Hamich, Inc. v. State By & Through Clayburgh*, 1997 ND 110, ¶ 32, 564 N.W.2d 640. "Thus, if a reviewing court can conceive of a reason justifying the choice made by the legislature or government decisionmaker in service of a legitimate end, the statute does not violate the equal protection clause." *Id.* (citing *Best Products Co., Inc. v. Spaeth*, 461 N.W.2d 91, 97 (N.D.1990)).

[¶123] In the 1970s, the Harry Benjamin International Gender Dysphoria Association was formed by health professionals to study a condition then known as "transsexualism." (R:770:5:8-13). In 2007, the organization changed its name to the World Professional Organization for Transsexual Health or "WPATH." "Transsexualism" later became known as "gender identity disorder" then "gender dysphoria" in an attempt to relieve stigma. (R:770:17:8-25).

[¶124] Services for children and young people began in the mid-1970s in Canada and in 1987 in the Netherlands. (R:594:67). The main focus of early services was on therapeutic work with children and families, with only a small portion with persisting gender incongruence being referred for hormone treatment from around age 16. (R:594:67). Studies from that period suggested a minority of pre-pubertal children presenting with

gender incongruence would persist into adulthood, and if gender dysphoria continued or intensified after puberty, it was likely the young person would go on to have a transgender identity into adulthood. (R:594:67).

[¶125] The approach to treatment changed with the emergence of “the Dutch Protocol.” (R:594:68). In 1998, a single case study described a female-to-male transition where puberty blockers were started at age 13. (R:594:68). The rationale for the approach was to buy time for the subject to think and improve the longer-term ability to pass as the preferred gender. (R:594:68). The Dutch Protocol was further elaborated in two articles published in 2006 and 2011. (R:594:68). In the 2006 article, 54 patients were being treated, and in the 2011 article, 70 patients were discussed who had received early treatment with puberty blockers. (R:594:68). To be included, the patients had to be a minimum age of 12 and be psychologically stable with no serious comorbid psychiatric disorders. (R:594:68).

[¶126] It was reported that during puberty suppression, there was no change in body dysmorphia, but behavioral and emotional problems decreased, and general functioning improved. (R:594:68). However, not all participants, possibly between 59-73%, did not complete questionnaires after treatment, making it difficult to draw conclusions from the results. (R:594:68). Further, all patients were seen regularly by their psychiatrist or psychologist whilst on puberty blockers, making it difficult to assess the source of the reported improvements. (R:594:68).

[¶127] In 2007, a clinic was established in Boston, Massachusetts, modeled on the Dutch Protocol, which prescribed puberty blockers from early puberty. (R:594:70). Practice in

the United States began to diverge from the models of care in Canada and the Netherlands, following a gender affirmative care model. (R:594:70).

[¶128] In the United Kingdom, puberty blockers were trialed starting in 2011 under a research protocol. (R:594:70). Between 2011 and 2014, 44 patients aged 12-15 were recruited. (R:594:70). In contrast to the Dutch group, the United Kingdom's preliminary findings did not demonstrate improvement in psychological well-being and, in some cases, showed worsening internalizing problems. (R:594:70). A subsequent reanalysis of the data found 37-70% experienced no reliable change in distress across timepoints, 15-34% deteriorated, and only 9-29% reliably improved. (R:594:70).

[¶129] In 2017, the Endocrine Society issued its *Gender Dysphoria/Gender Incongruence Guideline Resources*. (R:593). The Endocrine Society Guidelines recommend adolescents who meet the criteria for a diagnosis of gender dysphoria, meet the requirements for treatment, and request treatment, should initially undergo pubertal suppression. (R:593). The Endocrine Society Guidelines further suggest that hormone therapy be provided to patients who request the treatment. (R:593:5). However, the Endocrine Society Guidelines acknowledge “. . . there are minimal published studies of gender-affirming hormone treatments before age 13.5 to 14 years.” (R:593:5).

[¶130] In 2022, WPATH issued its *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8* or “SOC 8.” (R:591). Initially, SOC 8 contained age recommendations for treatment. However, a “Correction” was published shortly thereafter, removing all age suggestions. (R:677). It has been argued that WPATH removed these age recommendations based on political pressure. (R:768:114:14-24). Soc 8 indicates the appropriate care for transgender youth includes the use of puberty

suppression and gender affirming hormones. (R:591:6). From the outset, the Plaintiffs have asserted healthcare providers in North Dakota follow the Endocrine Society Guidelines and Soc 8. (R:2:8-9:29-32). The three healthcare providers from North Dakota who testified on behalf of the Plaintiffs stated they apply the Endocrine Society Guidelines and Soc 8. (R:766:130:3-6; R:767:35:60:12-14, 16-17; R:767:137:7-10).

[¶131] The Plaintiffs have consistently argued that providing puberty blocking medications and cross-sex hormones is supported as the only safe and effective way for treating gender dysphoria by the American Medical Association, American Academy of Pediatrics, the Endocrine Society, the American Psychological Association, and other leading medical organizations. (R:2:3:7; R:771:3:11; R:771:21:67). An *Amici Curiae Brief* was filed by a number of medical and mental health organizations in support of the Plaintiffs. (R:128). The Plaintiffs cite to this support to bolster their argument there is no legitimate dispute amongst members of the medical and mental health community about the appropriateness of treating gender dysphoria in minors with puberty blocking medications and cross-sex hormones.

[¶132] The Court will note, however, that the positions of these associations are just that—the positions of these associations. Many healthcare professionals may not be members of these associations, and not all members of these associations may share a uniform opinion. Lawyers are not dissimilar. Not all lawyers are members of the American Bar Association. Not all members of the American Bar Association may agree with the positions it may or may not take on a particular issue.

[¶133] Further, the evidence establishes there is a legitimate ongoing debate regarding the safety and effectiveness of the practices prohibited by the Health Care Law. There are

acknowledged health risks when prescribing puberty-blocking medications and cross sex hormones to minors. The use of puberty blocking medications can impact bone density and cause intracranial pressure. (R:764:115:1-25). Prescribing estrogen or testosterone can have permanent impacts. (R:764:128:7-8). The Endocrine Society Guidelines acknowledge the effects of sex hormone treatment are partially irreversible. (R:593:5). Estrogen can cause blood clots. (R:764:123:12-15; R:767:147:6-13). Testosterone can increase blood pressure and the risk of heart disease. (R:767:125:1-3). Perhaps most significant are the risks these medications might have on fertility. (R:767:140:22-25).

[¶134] At trial, the defense called Dr. Paul Hruz, an associate professor of pediatrics at Washington University. (R:768:4:5-10). Dr. Hruz testified it is not the same to prescribe estrogen to biological males and biological females, and conversely, it is not the same to prescribe testosterone to biological females and biological males. (R:768:18:20-25; R:768:19:1-12). He testified testosterone is not prescribed to a female in any situation other than for gender dysphoria. (R:768:20:8-12). Similarly, estrogen is not prescribed to males outside of gender dysphoria, other than an extremely rare condition that most practitioners will never see. (R:768:21:23-25; R:768:22:1-6). Dr. Hruz opined “[t]he exposure of an immature gonad to sex discordant sex steroid hormones is expected to have a very significant and likely permanent effects on fertility and in many respects the likelihood is high that it will result in irreversible sterility.” (R:768:35:14-18).

[¶135] The Endocrine Society Guidelines and Soc 8 do not deny the health risks of prescribing puberty-blocking medication. (R:591; R:593). Rather, they suggest the risks should be discussed and the medications prescribed if appropriate and desired. In other words, medications should be prescribed only if the provider feels they are appropriate

and informed consent has been obtained. During his testimony, Dr. Casas referred to both “consent” and “assent.” He testified he provides the same information to both his minor patients and their parents. (R:768:13:19-24). He requires “consent” from the parents and “assent” from the minor patients. (R:768:13:14-25).

[¶136] Does a 12- or 13-year-old have the capacity to make decisions regarding irreversible long-term health effects? Can a 12- or 13-year-old appreciate that taking cross-sex hormones may mean sterility later in life? The legislative record reflects this was a concern considered by members of the Legislature in passing the Health Care Law. (R:580:5)(testimony of Representative Bill Tviet before the Senate Human Services Committee: “My concern is until they become of age, do they really realize what they’re doing? It’s non reversible.”).

[¶137] The evidence presented at trial establishes this is a valid concern. At trial, Plaintiffs called Dr. Daniel Shumer, a pediatric endocrinologist and Associate Professor of Pediatrics at the University of Michigan. (R:764:62:6-10). On cross-examination, Dr. Shumer was directed to an article he coauthored in 2016 that stated “[h]owever, as clinicians continue to prescribe hormonal interventions for gender dysphoria, they must also be prepared to prescribe these interventions in situations where patients are not able to demonstrate clear ‘knowledge and understanding’ of the interventions.” (R:761:5; R:764:203:8-11). Dr. Shumer was also directed to a different article he coauthored in 2017, in which it was stated “[i]n our experience, many adolescent patients, even those who are not transgender, are often reticent to discuss their future fertility.” (R:753:14; R:764:187:13-20). According to the Defendants’ expert, Dr. Hruz, studies that have looked at efforts to maintain fertility indicate that less than 5% of adolescents will

consider harvesting gametes. (R:768:44:8-17). Dr. Casas testified most of his patients “know what they want.” (R:767:139:3). “They have watched YouTube, they have watched TikTok, they know exactly what they want.” (R:767:139:4-5).

[¶138] Obviously, there are inherent risks in all forms of medical treatment. However, the risks associated with providing minors with puberty blockers and cross-sex hormones are potentially severe and irreversible. The evidence presented at trial establishes there is a legitimate concern regarding the capacity of minors to understand and appreciate the long-term consequences of the practices prohibited by the Health Care Law.

[¶139] There is also an ongoing debate among medical experts regarding the evidence in support of providing puberty blockers and cross-sex hormones to minors for the treatment of gender dysphoria. In this area, the parties’ witnesses could not be more opposite. The Plaintiffs’ experts testified that the use of these medications has been extensively studied and found to be a safe and effective way to treat gender dysphoria. (R:747:44:13-R:747:53-24; R:764:131:3-R:764:137:21). At trial, the Plaintiffs called Dr. Gabriella Balf, a psychiatrist and Clinical Associate Professor of Psychiatry at the University of North Dakota. (R:583; R:767:3). Dr. Balf provided extensive testimony regarding the treatment of gender dysphoria in North Dakota and the studies performed in this field.

Regarding her opinion of the results of these studies, Dr. Balf testified:

They invariably show improvement, whether some studies are maybe not reaching statistical significance because they were--could not recruit enough kids. Maybe the outcome was between zero and one but all of them are converging to the same conclusion, which is that this treatment works. This treatment gets kids back to functioning. We avoid a lot of trouble that we know otherwise would occur.

(R:767:53:6-13).

[¶140] The Defendant's witnesses reject the conclusiveness of the studies performed in this area. Multiple defense witnesses criticized the evidence supporting the Endocrine Society Guidelines. Dr. Hruz testified there was ". . . a very concerning disconnect between the quality of evidence that's present in those guidelines and the strengths of the recommendations that are made--in--in respect to the administration of the affirmative model of care to these effective patients." (R:768:47:8-15). Defense witness, Dr. Michael Laidlaw, an endocrinologist practicing in California, testified the Endocrine Society Guidelines are transparently based on "low quality, very low quality . . . or no evidence." (R:763; R:768:115:11-17). Significant testimony was provided by defense witness, Dr. James Cantor, a psychologist and the Director of the Toronto Sexuality Centre. (R:672; R:769). Dr. Cantor testified the only systematic review conducted by the Endocrine Society was of adults and noted only one research paper at the time they produced their guidelines. (R:769:48:12-25).

[¶141] Similar testimony was provided regarding WPATH's promulgation of SOC 8. Dr. Cantor testified the reviews conducted by WPATH did not include the safety of medical gender transition care. (R:769:49:23-25). Dr. Cantor testified WPATH actively prevented the groups that were supposed to be conduct independent reviews from publishing their results. (R:769:69:1-5). Dr. Levine was the chairman of the fifth edition of WPATH's standards of care. (R:771:6:5-11). Dr. Levine testified that SOC 8 was not scientific or evidence-based and was based on dramatic political influences. (R:771:43:3-17).

[¶142] Regarding providing puberty blockers and cross-sex hormones to treat minors with gender dysphoria, Dr. Cantor testified the systematic reviews that have been performed are unanimous. (R:769:51:17-25). The evidence is of very low quality and not

reliable. (R:769:51:24-25). Dr. Cantor characterized the systematic reviews as showing very little evidence of change or benefit. (R:769:52:1-13). Dr. Levine similarly testified that the systematic reviews that have been performed do not support the idea that there are clearly overwhelming benefits of this care when compared to the harms of these treatments. (R:771:42:1-6).

[¶143] The Plaintiffs submitted numerous exhibits regarding the research that has been conducted regarding providing puberty blockers and cross-sex hormones to minors for the treatment of gender dysphoria. (R:590-762). Similar limitations were noted across many of the studies. (R:602:9)(acknowledging the sample was small, did not focus on physical side effects, and the potential for selection bias existed); (R:605:6)(stating “[t]he present study can, therefore, not provide evidence about the direct benefits of puberty suppression over time and long-term mental health outcomes”); (R:606:4)(acknowledging the small sample size and the limitations caused by the majority of participants having at least one supportive parent); (R:609:8)(recognizing a small sample size, the measurement of only psychosocial wellbeing, and that the positive results could have different explanations); (R:610:5)(noting the limited research in the use of hormones in transgender adolescents); (R:611:7)(noting the study sample may not reflect the general adolescent transgender population); (R:613:12)(noting certainty is limited by high risk of bias in study designs, small sample sizes, and confounding other interventions)(R:616:10)(recognizing the lack of a comparison group limits the ability to establish causality);(R:618:13)(warning the study cannot establish causality).

[¶144] At trial, multiple witnesses for both sides referenced the Cass Review, which was submitted by the Plaintiffs as an exhibit. (R:594). The National Health Service in the

United Kingdom commissioned Dr. Hilary Cass, the former President of the Royal College of Pediatrics and Child Health, to chair the review. Over four years, the Cass Review examined the research on the treatment of youth with gender dysphoria. The Cass review itself commissioned eight systematic reviews. An interim report was released in February 2022 and the final report in April 2024. (R:178; R:594). The United States Supreme Court cited the Cass Review in *Skrametti*. 145 S. Ct. at 1844-45.

[¶145] In the forward of the Cass Review, Dr. Cass noted “[d]espite the best intentions of everyone with a stake in this complex issue, the toxicity of the debate is exceptional.” (R:594:13). Dr. Cass indicated “[t]his is an area of remarkably weak evidence, and yet results of studies are exaggerated or misrepresented by people on all sides of the debate to support their viewpoint.” (R:594:13). “The reality is that we have no good evidence on the long-term outcomes of interventions to manage gender related distress.” (R:594:13). The Cass Review indicated its findings raised questions about the quality of currently available guidelines and that most guidelines had not followed international standards for guideline development. (R:594:27). Regarding puberty blockers, the Cass Review reported “[the] systematic review found no evidence that puberty blockers improve body image or dysphoria, and very limited evidence for positive mental health outcomes, which without a control group, could be due to placebo effect or concomitant psychological support.” (R:594:179). On cross-sex hormones, the Cass Review reported the authors of the systematic review had determined that based on a lack of high-quality evidence, “[n]o conclusions can be drawn about the effect on gender dysphoria, body satisfaction, psychosocial health, cognitive development, or fertility.” (R:594:184).

[¶146] The Plaintiffs are quick to point out that the Cass Review agreed that for some adolescents with gender dysphoria, treatment with puberty blockers and cross-sex hormones may be effective and did not recommend a categorical ban on the care. (R:777:8:14). While this is true, the Cass Review recommended only the Finnish and Swedish guidelines. (R:594:27). These guidelines indicate the interventions should only be available within a formal research protocol. (R:769:54:18-19; R:769:55:10-14; R:597). Ultimately, the Cass Report recommended puberty blockers be administered as part of a research program. (R:594:35). It further recommended that cross-sex hormones only be available from age 16, used with extreme caution and only in cases where there is a clear clinical rationale for providing them, and that every case where medical treatment is being considered be reviewed by a national multi-disciplinary team. (R:594:35-36). The Cass Report cannot be interpreted to support the affirmative care model of the Endocrine Society Guidelines and SOC 8.

[¶147] Under the rational basis standard of review, a law will be upheld unless the classification is patently arbitrary and bears no rational relationship to a legitimate governmental purpose. *Gange*, 429 N.W.2d at 433 (N.D. 1988) (citations omitted). “This test has been described as a relatively relaxed standard reflecting the Court’s awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one.” *Ferguson*, 2016 ND 194 at ¶ 10. (internal quotations omitted). The State has the authority to use its regulatory powers in furtherance of its legitimate interests in regulating the medical profession. *See MKB Mgmt. Corp.*, 2014 ND 197, ¶ 21; *Harrie v. Kirkham, Michael & Assocs., Inc.*, 179 N.W.2d 413, 415 (N.D. 1970) (stating the

profession of architecture should be treated like the professions of medicine, dentistry, and law, and the State in the exercise of its police power may regulate these professions).

[¶148] The evidence presented in this case establishes there are recognized concerns regarding the medical risks associated with providing hormone blockers and cross-sex hormones to minors to treat gender dysphoria. There are legitimate concerns about the ability of these minors to understand the long-term effects of these interventions fully. The evidence establishes there is an ongoing international debate regarding the safety and effectiveness of the medical procedures prohibited by the Health Care Law. Where there is uncertainty, deference is given to the Legislature to decide where the line should be drawn. The Court finds the Health Care Law bears a rational relationship to the State of North Dakota's legitimate interest in regulating the medical profession. The Health Care Law does not violate the equal protection guarantees of Article I, Section 21, of the North Dakota Constitution.

Right to Personal Autonomy and Self-Determination

[¶149] The Plaintiffs assert the Health Care Law violates the right to personal autonomy and self-determination found in Article I, Section 1 of the North Dakota Constitution. (R:2:35; R:273:33). "North Dakota Constitution article I, section 1 was enacted in 1889 when North Dakota was admitted as a state to the Union." *Romanick, Wrigley v. Romanick*, 2023 ND 50, ¶ 22, 988 N.W.2d 231 2023. Section 1 originally held:

All men are by nature and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; and pursuing and obtaining safety and happiness.

It was amended by an initiated measure approved on November 6, 1984, to read:

All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

1985 N.D. Sess. Laws ch. 702. “The only evident substantive purpose of the 1984 amendment was to expressly guarantee a right to bear arms.” *Access Indep. Health Servs., Inc.*, 2025 ND 26 at ¶ 83 (Tuft, J., dissenting). The Supreme Court has recognized the due process language of article I, section 12 protects and ensures the rights declared in section 1. *State v. Cromwell*, 9 N.W.2d 914, 918 (1943).

[¶150] Unlike the long-standing recognition of equal protection under the North Dakota Constitution, there does not appear to be any reference to the right to personal autonomy until the Supreme Court’s 1995 decision in *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358 (N.D. 1995). In *Schuetzle*, the Supreme Court dealt with a diabetic prison inmate who was refusing to take his prescribed insulin. *Id.* at 359. The warden of the prison brought a declaratory action to determine whether the inmate’s refusal to take the insulin violated his Eighth Amendment right to be free from cruel and unusual punishment. *Id.* The district court determined the inmate could be required to take his insulin if necessary to prevent a deterioration in his health or premature death. *Id.* at 360. The inmate appealed arguing “he ha[d] an absolute right to refuse medical treatment regardless of his reasons for doing so.” *Id.*

[¶151] In addressing the inmate’s claim, the Supreme Court stated:

A competent person has a constitutionally protected liberty interest to refuse unwanted medical treatment. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278, 110 S.Ct. 2841 (1990). A person’s interest in personal autonomy and self-determination is a fundamentally commanding

one, with well-established legal and philosophical underpinnings. *See, e.g., Thor v. Superior Court (Andrews)*, 855 P.2d 375, 380–383 (Cal. 1993). But this right, like other constitutionally protected interests, is not absolute. As *Cruzan*, 497 U.S. at 279, (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321, 102 S.Ct. 2452, 2461 (1982)), explains, whether a person’s constitutionally protected liberty interest in refusing unwanted medical treatment has been violated “‘must be determined by balancing his liberty interests against the relevant state interests.’”

Id.

[¶152] The Supreme Court stated, “courts cannot condone a prisoner’s manipulation of his medical circumstances to the detriment of a state’s interest in prison order, security, and discipline.” *Id.* at 361 (internal citations omitted). “Because the state’s interest in orderly prison administration is the controlling factor here, we need not address other possible state interests in assessing the scope of this patient’s autonomy.” *Id.* “We conclude the requirement that [the inmate] take diabetes medication against his will is reasonably related to legitimate penological interests.” *Id.* at 364.

[¶153] When the Supreme Court stated “a competent person has a constitutionally protected liberty interest to refuse unwanted medical treatment,” it was citing the United States Supreme Court’s decision in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1990). In *Cruzan*, the United States Supreme Court recognized a “liberty interest” in refusing unwanted medical treatment *under the Fourteenth Amendment*. *Id.* at 278-79. The other case cited by the North Dakota Supreme Court was a California Supreme Court case addressing the amorphous right to consent or refused medical treatment existing under the common law. *Shuetzle*, 537 N.W.2d at 360 (citing *Thor v. Superior Ct.*, 855 P.2d 375, 378 (1993)).

[¶154] Noticeably absent in *Shuetzle* is any discussion of article I, section 1. The North Dakota Constitution is not mentioned at all. The case was initiated as a declaratory action

to address the Eighth Amendment. Nowhere in *Schuetzle*, did the Supreme hold it was applying a right to personal medical autonomy under the North Dakota Constitution.

[¶155] The right to personal autonomy appears to have next been discussed in *MKB Mgmt. Corp.*, 2014 ND 197, 855 N.W.2d 31. In *MKB Mgmt. Corp.* the Supreme Court dealt with a challenged to two provisions of the Abortion Control Act. *Id.* at ¶ 4. The challenged provisions regulated medication abortions and required physicians performing abortion procedures to have admitting and staffing privileges at a hospital within 30 miles of the abortion facility. *Id.*

[¶156] It was argued these prohibitions violated patients' rights under article I, sections 1 and 12. *Id.* at ¶ 9. The district court permanently enjoined the State from enforcing the challenged provisions. The district court determined that a right to abortion is a fundamental liberty interest under section 1 and subject to strict scrutiny. *Id.* ¶ 11. The district court further found that prohibiting medical abortions violated the state constitution and violated a woman's right to an abortion under the Federal Constitution. *Id.*

[¶157] Chief Justice Vandewalle wrote an opinion in which he discussed the rights declared under section 1. *Id.* at ¶ 26. In this discussion, he cited to *Schuetzle* as recognizing a constitutionally protected liberty interest in refusing unwanted medical treatment. *Id.* ¶ 26. However, as previously noted, the Supreme Court in *Schuetzle* never clearly identified that it was recognizing a right under the North Dakota Constitution.

[¶158] Chief Justice Vandewalle recognized "[a] common thread in this Court's precedent construing the language in N.D. Const. art. I, §§ 1 and 12 in the context of individual liberty and the state's countervailing interests, recognize the application of the

state's police power, which is not always compatible with applying strict scrutiny to challenged regulations. *MKB Mgmt. Corp.*, 2014 ND, ¶ 31, 855 N.W.2d 31. Chief Justice Vandewalle found “[o]ur state constitution is silent about creating a state constitutional right to abortion. . . .” and “[t]he laws of the Dakota Territory and this State thus provide no long-standing tradition recognizing a separate state right to abortion” *Id.* at ¶ 37. “In view of the laws affirmatively prohibiting abortion in the Dakota Territory and North Dakota when the relevant constitutional provisions were adopted and the absence of a reference to abortion during proceedings leading up to adoption of the state constitution, however, I decline to hold the people of North Dakota intended to create a liberty right to abortion under the state constitution.” *Id.* at ¶ 38. Chief Justice Vandewalle further found the challenged legislation did not violate the Federal Constitution. *Id.* at ¶ 59.

[¶159] Justice Kapsner wrote a lengthy concurring opinion that was joined by Surrogate Justice Maring. Like Chief Justice Vandewalle, Justice Kapsner cited to *Schuetzle* as having found a right to refuse unwanted medical treatment under section 1 and section 12. *Id.* at ¶ 90. Justice Kapsner cited a footnote in *Schuetzle* as the Supreme Court having “. . . held that individuals have both a federal and state constitutional liberty interest in refusing unwanted medical treatment. . . .” that was “fundamental commanding.” *Id.* at ¶ 98. The cited footnote from *Schuetzle* reads:

Nor do the federal and state statutes relied on by [the inmate] give him an absolute right to refuse medical treatment regardless of penological concerns. *See, e.g.*, Omnibus Budget Reconciliation Act of 1990, 42 U.S.C. § 1395cc(f)(1); N.D.C.C. Chapters 23-06.4 and 23-06.5; N.D.C.C. 25-01.2-15 and 25-03.1-02(11). None of these statutes specifically apply to [the inmate] in his current situation. Moreover, to the extent these statutes demonstrate the general importance accorded by federal and state lawmakers to a person's interest in personal autonomy and self-determination, we have already recognized in this opinion that a person's interest in self-determination is a “fundamentally commanding one.”

Schuetzle, 537 N.W.2d at 362 n. 2. While the cited footnote discusses federal and state statutes and federal and state lawmakers, whether the Supreme Court was recognizing rights under the Federal or State Constitution is unclear.

[¶160] Justice Kapsner determined that a liberty interest existed that included a woman's right "to choose the course of medical treatment that she believes is best amount comparable alternatives" *MKB Mgmt. Corp.*, 2014 ND, ¶ 98, 855 N.W.2d 31. Justice Kapsner indicated this was an exercise of a woman's right to personal autonomy and self-determination, a fundamental right protected by the right to liberty under the North Dakota Constitution. *Id.* As a burden on a liberty right under the state constitution, Justice Kapsner opined strict scrutiny should apply. *Id.* at ¶ 100. Justice Kapsner stated the evidence shows the challenged legislation is not narrowly tailored and "... the State must establish a compelling interest to interfere with a woman's fundamental right to an abortion prior to viability and must establish a narrow means of addressing its interest." *Id.* at ¶¶ 112-13. She opined the challenged legislation failed both tests.

[¶161] Justice Kapsner and Surrogate Justice Maring agreed the changes to the Abortion Control Act violated both the state and Federal Constitutions. *Id.* at ¶ 151.

[¶162] Justice Crothers wrote a concurring opinion. He agreed with the results reached by Justice Kapsner and disagreed with the results reached by Chief Justice Vandewalle. *Id.* at ¶ 157. However, he opined the case should not have been decided under the North Dakota Constitution because Federal Constitutional interpretations of the right to an abortion made analysis under the North Dakota Constitution unnecessary. *Id.* Justice Crothers wrote, "... the challenges to H.B. 1297 have been answered by analysis

under Federal Constitutional law and we provide inappropriate advice by passing judgment one way or the other under North Dakota's Constitution." *Id.* at ¶ 165.

[¶163] Justice Sandstrom dissented. *Id.* at ¶ 168. He stated "[t]he Chief Justice persuasively argues there is no separate state constitutional right to an abortion." *Id.* at ¶ 169. However, he disagreed with the other justices, indicating the matter could only be decided under the North Dakota Constitution as the only claim pleaded. *Id.*

[¶164] Two justices found the challenged laws violated the North Dakota Constitution and two justices found they did not violate the North Dakota Constitution. Three justices agreed there was a violation of the Federal Constitution. The overall precedential value of *MKB Mgmt. Corp.* relating to the North Dakota Constitution is therefore limited. This is especially true regarding the discussion of the right to personal autonomy and self-determination, as it was comingled with and overshadowed by the discussion of the then recognized right to an abortion under the Federal Constitution.

[¶165] Do the Plaintiffs enjoy a right to personal autonomy and self-determination under the North Dakota Constitution that is violated by the Health Care Law? ". . . [R]eading of the Constitution requires a recognition that the drafters did not set out to delineate in Article I, § 1 the specific rights it protects and to exclude others." *Romanick*, 2023 ND 50, ¶ 54, 988 N.W.2d 231 (McEvers, J., concurring). "Rather, the limitations placed on the legislature in Article I, § 1 arise by necessary implication." *Id.* By its nature, the Constitution was meant to "define the limits" of the State's exercise of power. . . ." *Id.*

[¶166] "Anglo-American law starts with the premise of thorough-going self-determination." *Natanson v. Klein*, 350 P.2d 1093, 1104 (K.S. 1960). "It follows that each man is considered to be master of his own body and he may, if he be of sound mind,

expressly prohibit the performance of life-saving surgery, or other medical treatment.” *Id.* “As John Stuart Mill succinctly stated, ‘[o]ver himself, over his own body and mind, the individual is sovereign.’” *Thor*, 855 P.2d at 380. (quoting Mill, *On Liberty* (1859) p. 13.)

[¶167] The common law recognized a physician who performs a medical procedure without consent commits battery. *Id.* at 381. “As a corollary, the law has evolved the doctrine of informed consent.” *Id.* “Under this doctrine, the patient must have the capacity to reason and make judgments, the decision must be made voluntarily and without coercion, and the patient must have a clear understanding of the risks and benefits of the proposed treatment alternatives or nontreatment, along with a full understanding of the nature of the disease and the prognosis.” *Id.* (citations omitted). As stated by Justice Cardozo, while on the Court of Appeals of New York, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body...” *Schloendorff v. Soc’y of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914). “The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.” *Cruzan*, 497 U.S. at 270.

[¶168] But, would such a right have been understood to be embodied in article I, section 1 at the time of enactment of the North Dakota Constitution? At trial, the Plaintiffs elicited testimony from two historians, Dr. Bayker, and Dr. Karissa Haugeberg, an Associate Professor in the Department of History at Tulane University. (R:588).

[¶169] Dr. Bayker testified that transgender people were present in America and the upper Midwest in the 19th century. (R:765:20:15-22). Dr. Bayker indicated transgender people of the time would have been drawn to the frontier to “affect social transition, to

change their reputation, to start a new life.” (R:765:23:4-25). Dr. Bayker indicated there were a variety of reactions and responses from Americans to transgender people, but that people on the frontier were more tolerant. (R:765:25:10-12; R:765:26:1-3).

[¶170] Dr. Bayker discussed an individual known as “Mrs. Nash” who came with George Custer’s troops to Ft. Abraham Lincoln. (R:765:28:8-15). Mrs. Nash worked as a laundress and was with the troops from the late 1860s to the early 1870s. (R:765:28:16-18). Dr. Bayker described Mrs. Nash as “a pillar of the community” whom “everybody at the fort knew.” (R:765:28:20-23). Mrs. Nash had male anatomy but lived as a woman. (R:765:29:3-12).

[¶171] When Mrs. Nash died, her body was viewed by the women who were preparing her for burial and they started talking to journalists and new reporters about the fact Mrs. Nash was an anatomical male living as a woman. (R:765:29:6-11). A few people in her community had suspected she was different than other women, but to a lot of people, she had been private about her body. (R:765:29:15-18). Her story gained fame across the United States, with hundreds of newspaper articles published throughout the country. (R:765:30:19-20). In interviews, people still referred to her as “Mrs. Nash.” (R:765:31:1-8). Elizabeth Custer was interviewed and stated she considered Mrs. Nash a treasure because of the work that she did. (R:765:31:6-11).

[¶172] Dr. Bayker opined that the story of Mrs. Nash showed there were transgender people living in North Dakota prior to statehood who were accepted by people in their community, even though it was understood their bodies were different. (R:765:32:12-16; R:765:33:5-9). Dr. Bayker suggested people being interviewed, referencing “Mrs. Nash,”

was a signal she was accepted in the community as a woman both before and after her death. (R:765:33:5-9).

[¶173] However, differing conclusions could be drawn from the same information. The fact that women preparing Mrs. Nash's body for burial discovered male anatomy and the story became news might be indicative of Mrs. Nash being a male, not being publicly known to members of the community. The national sensation might be indicative of people at the time being shocked. People being interviewed referencing "Mrs. Nash" might be a sign of familiarity and not an affirmative acceptance of her as a woman.

[¶174] Dr. Bayker conceded there were a variety of views regarding transgender people in the 19th century. (R:765:33:22-25). Doctors in the 19th century did not fully understand how hormones worked. (R:765:34:12-14). It was not until the 1930s that scientists started talking about controlling hormone levels (R:765:34:15-18). Most transgender people during the 19th century did not go to the doctor or seek out medical treatment, as the only medical treatment at the time was castration. (R:765:35:1-8). Dr. Bayker agreed transgender people were not discussed during the North Dakota Constitutional Convention, and there was no evidence to establish what opinion any of the delegates may have held regarding transgender people. (R:765:52:1-25).

[¶175] Dr. Haugeberg testified there was a dramatic shift in the regulation of medicine during the 19th century. (R:766:65:1-14). States began to regulate who could practice medicine, and it became expected physicians have training in biology and physiology and attend medical school. Initially, there were few physicians in the Dakota Territory, and it would have been remarkable for the average citizen to encounter a physician in their lifetime. (R:766:70:19-22). The few physicians who did come were with the army or

railroad, treating soldiers and men laying track. (R:766:70:22-25). The number of physicians began to increase with the influx of people brought by the Homestead Act. (R:766:71:1-5).

[¶176] According to Dr. Haugeberg, the Dakota Territory was an earlier adopter of medical associations. (R:766:66:1-6). Medical societies formed in the eastern and western portions of what would become North Dakota. (R:766:66:18-24). The Medical Practice Act was written by physicians in the North Dakota Medical Association and passed upon statehood. (R:766:67:1-7). In 1890, the North Dakota Board of Medical Examiners was formed and given the authority to regulate who could practice medicine. (R:766:67:7-24). However, all physicians had to be trained out of state until the University of North Dakota School of Medicine was founded in 1905. (R:766:71:7-16).

[¶177] Dr. Haugeberg testified physicians in North Dakota at the time of statehood enjoyed status and prestige and were given deference by society. (R:766:73:1-18). To justify this conclusion, Dr. Haugeberg, referenced abortion. (R:766:73:19-25). Like all states, North Dakota criminalized abortions in the 19th century. (R:766:73:24-25). Dr. Haugeberg testified:

[I]n the handful of instances when physicians were brought into court and charges were pressed for clearly violating the North Dakota prohibition on abortion, juries were incredibly reluctant to convict those physicians. And in the small handful of cases when jurors did convict physicians, judges often overruled them or so like even the North Dakota Supreme Court overturned one of those convictions. And so whenever there's been a tension between the regulatory body of the state starting to interfere with the doctor/patient relationship, the citizens of North Dakota and even judges have tended to prefer to keep a hands-off position to allow physicians to exercise their good judgment, but also to work in favor for individual liberty and to prioritize that over the police powers of the state to enforce medical regulations. And, again, I would say it's-it's-as a historian, it's-it's just clear that there is a--a commitment to keep the doctor/patient relationship private, historically.

(R:766:73:24-25).

[¶178] Dr. Haugeberg's conclusions are widely speculative. There could have been many reasons why physicians were not routinely convicted of performing abortions early in North Dakota's history. The evidence in these cases could have been weak, the witnesses uncooperative, and there could have been defenses regarding the necessity of the procedure to save the life of the mother, which would have likely required a second physician to rebut. The Supreme Court case cited by Dr. Haugeberg is likely *State v. Belyea*, 83 N.W. 1 (N.D. 1900). In *Belyea*, the information attempted to charge the defendant with committing the offense of murder in the second degree for the death of a mother that occurred while the defendant was performing an abortion. *Id.* at 1-2. The information was apparently so confusingly worded that it could not be deciphered whether there was one or two charges. *Id.* Ultimately, the jury convicted the defendant of unlawfully procuring an abortion. *Id.* at 2. The Supreme Court reversed the conviction and remanded for a new trial because the defendant was convicted of a crime he had not been charged with and was not a lesser offense. *Id.* at 4-5. The case had nothing to do with taking a "hands off" approach to the doctor/patient relationship.

[¶179] Dr. Haugeberg's testimony attempts to establish an argument that permeates across the Plaintiff's claims. That argument being "the Health Care Ban is a stark departure from and antithetical to North Dakota's history and tradition of respect and deference to the medical community." (R:771:2:3). Stated otherwise, "... North Dakota has a history and tradition of respect and deference to medical practitioners in the treatment of their patients..." and therefore the State has no business regulating the practice of medicine beyond the North Dakota Board of Medicine. (R:771:14:36).

[¶180] This argument is flawed for several reasons. First, even at the time of statehood, it was recognized that the State had the authority to prohibit certain medical practices as evidenced by the criminalization of abortions. Furthermore, it has long been recognized that the State has the authority to regulate the medical profession. *See MKB Mgmt. Corp.*, 2014 ND, ¶ 2, 855 N.W.2d 31; *Harrie*, 179 N.W.2d at 415. “The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant. . .” *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950).

[¶181] The Court believes the right to personal autonomy and self-determination is protected by article I, section 1, through article I, section 12. The North Dakota Constitution is not the source of the right. Rather, it is a right that existed as part of tradition and the common law.

[¶182] However, the fact that a right may generally exist does not mean it applies to the Plaintiffs or prohibits the Health Care Law. A review of the common law doctrine evidences the right was recognized as belonging to a person of adult years with the capacity to reason and have a clear understanding of the risks and benefits of the medical treatment. Here, the Health Care Law only limits medical procedures performed on minors. Concerns over the ability of minors to understand and appreciate the consequences of the medical procedures prohibited by the Health Care Law have already been discussed.

[¶183] Further, the right to personal autonomy under the common law was recognized as the right to refuse medical treatment. The Plaintiffs are asking that the reverse be recognized-the right to obtain a medical treatment that has been statutorily prohibited.

There appears to be no affirmative right to care under the Federal Constitution. *See Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 697 (D.C. Cir. 2007)(stating “. . . we conclude that there is no fundamental right ‘deeply rooted in this Nation’s history and tradition’ of access to experimental drugs . . .”); *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir.1993) (“most federal courts have held that a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider”); *N.Y. State Ophthalmological Soc’y v. Bowen*, 854 F.2d 1379, 1389 (D.C. Cir. 1988) (“[w]e disagree that the constitutional right to privacy comprehensively protects all choices made by patients and their physicians or subjects to ‘strict scrutiny’ all government interference with choice of medical treatment.”); *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (“[c]onstitutional rights of privacy and personal liberty do not give individuals the right to obtain [the cancer drug] laetrile free of the lawful exercise of government police power”); *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980) (“[T]he patient[’s] . . . selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health.”).

[¶184] At the time of statehood, it would have been understood the State had the authority to regulate medical practices as evidenced by the criminalization of abortion. Therefore, the understanding of the right to personal autonomy and self-determination would have been consistent with tradition and the common law, that is, the State may prohibit certain medical practices but may not force unwanted medical procedures upon an adult with the capacity to refuse.

[¶185] As such, the Court does not find that the Health Care Law implicates the right to personal autonomy and self-determination. Absent a fundamental or important substantive right, the law is subject to a rational basis standard of review, which the Court has determined the Health Care Law satisfies.

[¶186] The Court finds the Health Care Law, N.D.C.C. chapter 12.1-36.1, does not violate Article I, Section 21, or Article I, Section 1, of the North Dakota Constitution. Therefore, the Plaintiffs request for a declaratory judgment that the Health Care Law violates the North Dakota Constitution should be denied. (R:2:39; R:273:37). The Plaintiff's request that a permanent injunction be ordered restraining enforcement of the Health Care Law should be denied. (R:2:39; 273:37).

[¶187] The Plaintiff's alternatively requested a declaratory judgment that the Health Care Law permits providers to prescribe and dispense medications, change medication dosages, and to provide puberty blockers and hormone therapy to transgender patient who had been receiving care prior to April 21, 2023. (R:38:169; R:273:36:167). This request is consistent with N.D.C.C. § 12.1-36.1-03 and this Court's previous findings and should be granted. (R:365:23:63; R:537:21:53).

[¶188] Based on the foregoing findings and conclusions of law,

[¶189] **IT IS HEREBY ORDERED** that the Plaintiffs' request for a declaratory judgment that the Health Care Law, N.D.C.C. chapter 12.1-36.1, violates the North Dakota Constitution is **DENIED**.

[¶190] **IT HEREBY ORDERED** that the Plaintiffs' request that a permanent injunction be ordered restraining enforcement of the Health Care Law, N.D.C.C. chapter 12.1-36.1, is **DENIED**.

[¶191] **IT IS HEREBY ORDERED** that the Plaintiffs' request for a declaratory judgment that no portion of the Health Care Law, N.D.C.C. chapter 12.1-36.1, applies to the medical treatment of a minor who was receiving any of the practices identified under N.D.C.C. § 12.1-36.1-02(1) prior to April 21, 2023, is **GRANTED**.

[¶192] **IT IS FURTHER ORDERED** that counsel for the Defendants shall prepare a proposed judgment consistent with the Courts findings and conclusions and submit it to the Burleigh County Clerk of District Court for consideration within thirty (30) days of this Order.

Dated October 8, 2025.

A handwritten signature in black ink, appearing to read "Jackson J. Lofgren", written over a horizontal line.

Jackson J. Lofgren, District Judge
South Central Judicial District