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IN THE FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY

SCARLET VAN GARDEREN, a minor by and through her guardians Jessica van Garderen and Ewout van Garderen; JESSICA VAN GARDEREN, an individual; EWOUT VAN GARDEREN, an individual;	)	**Case No. DV-23-541** **Hon. Judge: Jason Marks**

PHOEBE CROSS, a minor by and through his guardians Molly Cross and Paul Cross; MOLLY CROSS, an individual; PAUL CROSS, an individual; JANE DOE, an individual; JOHN DOE, an individual; JUANITA HODAX, on behalf of herself and her patients; KATHERINE MISTRETTA, on behalf of herself and her patients, **Plaintiffs,** **v.** **STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as Governor of the State of Montana; AUSTIN KNUDSEN, in his official capacity as Attorney General; MONTANA BOARD OF MEDICAL EXAMINERS; MONTANA BOARD OF NURSING; MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; CHARLIE BRERETON, in his official capacity as Director of DPHHS,** **Defendants.**	**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

INTRODUCTION

This lawsuit challenges the constitutionality of Montana Senate Bill 99 (the "Act"), which bars the provision of a wide range of medical treatments and procedures when, and only when, they are provided to transgender youth for the purpose of treating gender dysphoria. Gender dysphoria is a serious condition that can have dire consequences when left untreated, and the prohibited interventions are evidence-based and medically necessary care essential to the health and well-being of transgender adolescents. Through the Act, the State attempts to override the informed medical decision-making of doctors, patients, and their parents. This is an unprecedented and unlawful governmental intrusion into Montanans' lives and the practice of medicine in Montana. Regrettably, the Act is just one piece of a broader effort by the Montana State Legislature and many state legislatures nationwide to target and harm a politically disfavored group of people who already experience daily marginalization, discrimination, and high rates of violence.

The Act unconstitutionally burdens the rights of transgender minors in Montana to receive critical, medically necessary, and potentially life-saving health care. However, the Act allows the use of the same treatments when provided to minors for the purpose of treating other conditions. Plaintiffs—transgender adolescents and their parents, and healthcare providers who provide care that would be prohibited by the Act—are likely to succeed on the merits of their claims that the Act unlawfully infringes on their constitutional right to equal protection of the laws, the right of parents to direct the upbringing of their children, the right to privacy, the right to seek health care, the right to dignity, and the right to freedom of expression. Plaintiffs meet all additional requirements for preliminary injunctive relief: They will be irreparably harmed by the Act; the balance of equities weighs in their favor; and an injunction would further the public interest.

Based on these considerations, Plaintiffs are entitled to a preliminary injunction prohibiting Defendants from enforcing the Act, directly or indirectly, against the transgender youth across Montana whose lives hang in the balance.

BACKGROUND

I. Gender Dysphoria and Its Treatment

Gender identity refers to a person's core sense of belonging to a particular gender—it is not a personal decision, preference, or belief, and cannot be altered through medical intervention. (Olson-Kennedy Dec. ¶¶ 24, 27.) People whose gender identity matches their sex assigned at birth are referred to as "cisgender." (*Id.* ¶ 28.) Transgender people have gender identities that are not congruent with their sex assigned at birth, and this incongruence can lead to clinically significant distress, a diagnosable condition that is termed "gender dysphoria." (*Id.* ¶¶ 28, 29.) As the American Psychiatric Association (APA) has stressed, "gender nonconformity is not in itself a mental disorder. The critical element of gender dysphoria is the presence of clinically significant distress associated with the condition." (*Id.* ¶ 29.) For a person to be diagnosed with gender dysphoria, the incongruence must have persisted for at least six months and cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. (*Id.* ¶ 30.) Untreated, gender dysphoria can result in significant lifelong distress, clinically significant anxiety and depression, self-harming behaviors, and suicidality. (Moyer Dec. ¶ 20.)

The World Professional Association for Transgender Health ("WPATH") has published widely accepted and evidence-based standards of care for the assessment, diagnosis, and treatment of gender dysphoria, including its most recent Standards of Care Version 8. (Olson-Kennedy Dec. ¶ 31.) The WPATH Standards of Care have been endorsed and cited as authoritative by leading medical organizations, including the American Medical Association, the American

Psychological Association, and the American Academy of Pediatrics, among several others. (*Id.* ¶ 32; Moyer Dec. ¶ 21.) These organizations agree that the treatment supported by these standards is safe, effective, and—for many adolescents with gender dysphoria—medically necessary. (Olson-Kennedy Dec. ¶¶ 32, 34.) The WPATH Standards of Care Version 8 set out regimens of care designed to address and alleviate a patient's gender dysphoria. (*Id.* ¶ 34; Moyer Dec. ¶ 23.) This treatment is sometimes referred to as "gender transition," "transition-related care," or "gender-affirming care."

The precise treatment for gender dysphoria depends upon each person's individualized needs, and the guidelines for medical treatment differ depending on whether the treatment is for an adolescent or an adult. (Olson-Kennedy Dec. ¶¶ 34, 36; Moyer Dec. ¶ 23.) No medical interventions beyond mental health counseling are recommended or provided to any person before the onset of puberty. (Olson-Kennedy Dec. ¶ 35; Moyer Dec. ¶ 23.) Medical interventions may become medically necessary and appropriate once a transgender person reaches puberty. (Olson-Kennedy Dec. ¶ 35.) Before any medical interventions, a qualified provider with training and experience regarding gender dysphoria in adolescents assesses the individual to ensure that treatment is appropriate. (Moyer Dec. ¶ 22.) At the earliest sign of the beginning of puberty, the standard of care for transgender adolescents is to consider providing puberty-delaying medical treatment through medications, generically known as puberty blockers. (Olson-Kennedy Dec. ¶¶ 38–39.) "Puberty blockers" refers broadly to the gonadotropin-releasing hormone ("GnRH") agonist treatment. (*Id.* ¶ 38; Moyer Dec. ¶ 24.) A puberty blocker interrupts the sequence of hormonal signals of the pituitary gland that control puberty. (Olson-Kennedy Dec. ¶ 38.) Puberty-delaying medical treatment is reversible because if an adolescent discontinues the medication, puberty consistent with their assigned sex at birth will resume. (*Id.* ¶ 39.)

For many transgender adolescents, puberty blockers mitigate the significant anxiety and extreme distress experienced as endogenous puberty begins and they start experiencing potentially permanent physical changes in their bodies that are incongruent with their gender identity. (Olson-Kennedy Dec. ¶¶ 37–49; Moyer Dec. ¶ 24.) Puberty blockers allow them to avoid these permanent changes, minimizing and potentially preventing the heightened gender dysphoria that endogenous puberty would cause. (Olson-Kennedy Dec. ¶ 38; Moyer Dec. ¶ 24.) Puberty blockers are particularly time-sensitive given the irreversible changes to secondary sex characteristics that occur during puberty. (Moyer Dec. ¶ 28.) Delaying treatment until age 18 could lead to many unnecessary years of suffering. Research shows that transgender individuals who wish they had received pubertal suppression but could not access it have higher odds of lifetime suicidal ideation compared to those who have had access. (*Id.* ¶ 29.)

For some young people, it may be medically necessary and appropriate to initiate gender-affirming hormone therapy to ameliorate the potentially severe symptoms of gender dysphoria. (Olson-Kennedy Dec. ¶ 50.) As with all medical care, the care provided to each transgender young person with gender dysphoria is tailored to their unique circumstances and needs. (*Id.* ¶ 51.) As with all medications, transgender young people and their parents or guardians are counseled on the potential risks of the medical intervention, and treatment is only initiated where parents and adolescents are properly informed, the adolescent's parents consent to the care, and the adolescent assents to the care. (*Id.* ¶¶ 51, 62, 66.) Gender-affirming hormone therapy involves administering steroids—e.g., estrogen and testosterone—to attain the appropriate masculinization or feminization of the transgender person. (*Id.* ¶ 50.) As with the use of puberty blockers, evidence shows that gender-affirming hormone therapy can greatly ameliorate the potentially severe symptoms of gender dysphoria, including anxiety,

depression, distress, and suicidality. (*Id.* ¶¶ 52–60; Moyer Dec. ¶ 25.) While they can be necessary in individual circumstances, any medical interventions beyond puberty blockers or hormone therapy are rare for transgender adolescents. (Olson-Kennedy Dec. ¶ 63.)

II. The Act

The Act, effective October 1, 2023, prohibits the provision of a wide range of health care treatments "only when knowingly provided to address a female minor's perception that her gender or sex is not female or a male minor's perception that his gender or sex is not male" and thus allows cisgender people to access the same treatments when necessary to address their medical needs. Act, § 4(1)(c). The law mandates that healthcare professionals who provide such care are subject to discipline for unprofessional conduct by the appropriate licensing entity or disciplinary review board and, furthermore, may be sued by the Attorney General or private parties. The Act also prohibits coverage of or reimbursement by Medicaid or other public funds for gender-affirming care provided to minors.

In passing the Act, the Legislature ignored testimony from Montana physicians, pediatricians, psychiatrists, and other healthcare professionals about the life-saving benefits of gender-affirming care to their patients and the substantial harm that youth would suffer if they were prohibited from receiving this care.[1] The Legislature also ignored the testimony of transgender Montanans who shared their painful experiences of depression, anxiety, and suicidal ideation prior to receiving

[1] Senator Emrich, for instance, insisted that gender dysphoria was a dissociative disorder, based on information from the internet, despite testimony from a licensed Montana psychiatrist to the contrary based on the DSM-V. *See* 2/7/23 Senate Floor Session, 13:33:09, *available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230207/-1/46207#agenda [hereinafter 2/7/23 Senate Floor Session]; *see also* 1/27/23 Senate Judiciary Committee Hearing, 12:44:45, *available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230127/-1/45413#agenda.

treatment for their gender dysphoria, as well as the testimony of parents pleading for the State not to risk their children's health and survival by stripping them of medical care that has enabled them to survive and thrive.

Members of the Legislature also voiced their disapproval of gender transition, including based on their personal views about sex, morality, and religion. For example, Senator Manzella stated that "you cannot change your sex" because "the Creator has reserved that for Himself."[2] Likewise, Senator Fuller, the primary sponsor of the Act, objected to gender-affirming care because he believed that it is not "natural,"[3] and claimed that a young person seeking gender-affirming care to treat their gender dysphoria was tantamount to someone seeking to engage in self-harm.[4] Multiple legislators described gender-affirming treatments as "mutilation" and "disfigurement."[5] Representative Seekins-Crowe acknowledged concerns that without gender-affirming care, "the risk of suicide goes way up," but she nonetheless supported the Act.[6]

The Act's sole purpose is to burden transgender people's ability to seek necessary care to align their body with their gender identity. The Act establishes a complete ban on well-established, evidence-based, and medically necessary medical treatments for minors "only when knowingly provided to address a female minor's perception that her gender or sex is not female or a male minor's perception that his gender or sex is not male." Act, § 4(1)(c). It permits the use of

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[2] *See* 2/7/23 Senate Floor Session, at 13:44:46.
[3] *See id.* at 13:15:30.
[4] *See id.* at 13:15:20.
[5] *See* 2/7/23 Senate Floor Session, at 14:16:40; *see also* 3/20/23 House Judiciary Committee Hearing, 8:25:25, *available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230320/-1/47786#agenda. Senator Hertz went so far as to compare receiving gender-affirming care to getting a lobotomy. *See* 2/7/23 Senate Floor Session, at 14:01:15.
[6] *See* 3/23/23 House Floor Session, 14:02:30, *available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20230323/-1/46152#info.

these treatments for any other purpose. The Act prohibits puberty-delaying medical treatment for treating gender dysphoria in transgender adolescents, but permits it for treating central precocious puberty (premature initiation of puberty by the central nervous system) in cisgender patients, for instance. (Olson-Kennedy Dec. ¶¶ 67–68.) The Act prohibits hormone therapy when the treatment is prescribed to transgender patients to treat gender dysphoria, but the same hormone therapy is permitted when prescribed to cisgender patients for other purposes; estrogen and testosterone therapy are regularly prescribed to cisgender children to treat a range of conditions, including Turner's Syndrome and hypogonadism, and cisgender girls with polycystic ovarian syndrome may use testosterone blockers to manage the increased facial and body hair often associated with that condition. (*Id.* ¶ 69.) The same treatments that are permitted for cisgender minors are banned if provided to transgender minors.

The Legislature failed to offer any legitimate public purpose for the Act and supplied no legislative findings to support any such purpose because none exist. The Act was passed to express antipathy toward and to harm transgender people.

III. The Need for Gender-Affirming Medical Care

If the Act goes into effect, health care professionals and physicians in Montana will cease providing gender-affirming care to minor patients. For adolescents with gender dysphoria and a clinical need for gender-affirming care, withholding or denying this treatment exacerbates the significant distress associated with their dysphoria and may cause anxiety, depression, and suicidality, among other serious harms. (Olson-Kennedy Dec. ¶ 75.) If a healthcare provider is forced to stop puberty-delaying medication or hormone therapy due to the Act, it may cause patients to resume their endogenous puberty. (*Id.* ¶¶ 39, 50.) This could result in extreme distress for patients who have been relying on medical treatments

to prevent bodily changes from endogenous puberty, and whose gender dysphoria had been relieved by medical treatment. (Moyer Dec. ¶¶ 30–31.)

Additionally, the effects of undergoing one's endogenous puberty may not be reversible even with subsequent hormone therapy and surgery in adulthood, thus exacerbating lifelong gender dysphoria in patients who have this necessary treatment withheld or prematurely terminated. (*Id.* ¶ 28; Olson-Kennedy Dec. ¶ 49.) Secondary sex characteristics, such as stature, genital growth, voice, and breast development, can be impossible or more difficult to counteract. (Moyer Dec. ¶ 28.) And forcing transgender adolescents to undergo endogenous puberty may increase the need for more invasive surgeries in the future. (*Id.*; Olson-Kennedy Dec. ¶ 38.)

Gender-affirming medical care can save the lives of transgender minors experiencing gender dysphoria, including those of the minor Plaintiffs and the patients of the provider Plaintiffs. (Olson-Kennedy Dec. ¶ 61.)

IV. Plaintiffs and the Act's Effect on Them

A. The Minor Patients and Their Families

The van Garderen Family

Plaintiffs Jessica van Garderen, Ewout van Garderen, and Scarlet van Garderen live in Belgrade, Montana. (Jessica van Garderen Dec. ¶ 2; Scarlet van Garderen Dec. ¶ 3.) Jessica and Ewout are the parents of Scarlet, who is 17 years old. (Jessica van Garderen Dec. ¶ 3.) Scarlet is a rising senior in high school, where she is actively involved with activities including jazz band, concert band, marching band, and speech and debate. (Scarlet van Garderen Dec. ¶ 2.) She has lived in Montana her whole life and wants to attend college in Montana. (*Id.* ¶¶ 3, 15.) Scarlet is transgender. When she was born, she was designated as male on her birth certificate, but her gender identity is female. (*Id.* ¶ 4.)

Scarlet started seeing a therapist in November 2021, and she was eventually referred to a doctor to discuss gender-affirming medical care. (*Id.* ¶ 9.) In or around February 2022, Scarlet started seeing an endocrinologist and was prescribed puberty-blocking medication. (*Id.* ¶ 10.) After she turned 16, in July 2022, Scarlet started gender-affirming hormone therapy. (*Id.* ¶ 11.) She was prescribed estrogen to initiate puberty consistent with her gender identity. (Jessica van Garderen Dec. ¶ 8.) Scarlet now continues her gender-affirming hormone therapy under the care of her nurse practitioner in coordination with her naturopath, and with continued support from her therapist. (*Id.*; Scarlet van Garderen Dec. ¶ 11.)

Before Scarlet began accessing gender-affirming care, Scarlet's parents, Jessica and Ewout, had noticed that Scarlet had withdrawn, and found it increasingly hard to get her out of bed. (Jessica van Garderen Dec. ¶ 9.) Jessica noticed that Scarlet would wear a baggy hoodie all the time, even when it was warm out, as if she did not want anyone to see her. (*Id.*) Her distress reached such an intense point that Jessica remembers times when she would open Scarlet's bedroom door and fear she would not be alive. (*Id.*)

After starting care, Scarlet felt like a weight had been lifted. (Scarlet van Garderen Dec. ¶ 13.) Within weeks of Scarlet starting her puberty-blocking medication, Jessica was not so worried that Scarlet would hurt herself. (Jessica van Garderen Dec. ¶ 10.) The positive change Scarlet's parents have witnessed since she has been able to access gender-affirming care has been "night and day." (*Id.*) Now that Scarlet is receiving this care, Jessica knows that "[t]here is no way [they] can go back" without the same distress and pain resurfacing. (*Id.*) Scarlet finally feels safer in her body and does not believe she could live without the gender-affirming care she is now receiving. (Scarlet van Garderen Dec. ¶¶ 13–14.) Her parents fear that if her treatment is cut off, she will lose herself and all motivation she has for living. (Jessica van Garderen Dec. ¶ 11.)

Scarlet's family has built ties in the community and they do not want to be pressured to leave in order to live in a place where they can access necessary medical care. (*Id.* ¶ 14.) Jessica is the color guard coach at the school and volunteers extensively. (*Id.*) Ewout started a local handyman business through local contacts. (*Id.*) Scarlet is looking forward to being a section leader in her high school band next year and does not want to leave her friends. (Scarlet van Garderen Dec. ¶¶ 13, 15.) As Scarlet puts it: "I don't want to be forced out of the state I love to access the health care I need." (*Id.* ¶ 15.)

The Cross Family

Plaintiffs Molly Cross, Paul Cross, and Phoebe Cross live in Bozeman, Montana. (Paul Cross Dec. ¶ 18.) Molly and Paul are the parents of Phoebe, who is 15 years old. (*Id.* ¶ 2.) Phoebe just finished his freshman year of high school, where he is actively involved in many activities, including playing the saxophone in symphonic band, speech and debate, and art. (Phoebe Cross Dec. ¶ 2.) Phoebe is transgender. When he was born, he was designated as female, but his gender identity is male. (*Id.* ¶ 3.)

He has known he was not a female since preschool, and throughout childhood expressed his gender identity in a traditionally male manner. (*Id.* ¶¶ 4–6.) In response to persistent harassment, he tried to dress in a more traditionally feminine way, but the social affirmations he received when he did so led him to begin experiencing acute gender dysphoria. (*Id.* ¶¶ 7–8.) Phoebe's parents, Molly and Paul, noticed his deteriorating mental health condition, expressed through suicidal ideations, attempts, and gestures, through his seventh and eighth grade years. (Paul Cross Dec. ¶ 6.) In the fall of his eighth grade year, Phoebe came out to his parents as transgender and began socially transitioning. (*Id.* ¶ 7.) His parents noticed a marked improvement in his health after he began socially transitioning, but he nonetheless suffered an acute mental health crisis in January 2022, resulting

in the need for emergency medical treatment due to a suicide attempt. (*Id.* ¶ 8; Phoebe Cross Dec. ¶ 11.) Following this incident, Phoebe began asking about other ways to better align his body with a male gender, including options to prevent menstruation and the potential of starting hormone replacement therapy. (Paul Cross Dec. ¶ 8.)

In July 2022, Phoebe was diagnosed with gender dysphoria, and with the aid of medical and mental health professionals, Phoebe has taken certain steps to bring his body into conformity with his male identity. (Phoebe Cross Dec. ¶¶ 13–14.) In September 2022, Phoebe was prescribed and began taking testosterone to treat his gender dysphoria. (*Id.* ¶ 14.) Phoebe continues to see a therapist, a Family Nurse Practitioner specializing in gender-affirming care, and a psychiatrist. (*Id.* ¶ 16.)

Phoebe feels that receiving gender-affirming care, including testosterone, has been a lifeline—he directly links this care to his being here today, and would be devastated if it were taken away. (*Id.* ¶¶ 15, 21.) Before accessing gender-affirming care, Phoebe suffered from severe depression and anxiety, lost motivation, and felt constant discomfort being in his body. (*Id.* ¶¶ 18–19.)

Since receiving gender-affirming care and taking testosterone, Phoebe feels much better just existing—he feels his baseline is happier, and when he looks in the mirror, he feels like he is finally seeing his real self. (*Id.* ¶ 20.) Paul and Molly have witnessed numerous positive changes in Phoebe since he has been able to access gender-affirming care: significant improvement in his mental health, his comfort with his appearance, an immense growth in his confidence, and his hope for his own future. (Paul Cross Dec. ¶ 15.) Phoebe and his parents fear that without gender-affirming care, Phoebe's mental health would deteriorate and slip back into a state of depression, possibly even leading to self-harm. (*Id.* ¶ 17; Phoebe Cross Dec. ¶ 21.)

The Cross family does not wish to leave Bozeman—Paul has been working at his dream job for the past 18 years, studying wildlife issues around the Yellowstone ecosystem, and his expertise is very specific. (Paul Cross Dec. ¶ 18.) The family loves Montana and feels immersed in the community. (*Id.*) They have a supportive friend network with whom they participate in many Montanan activities, including hiking, fishing, rafting, and skiing. (*Id.*)

The Doe Family

Jane and John Doe have a 15-year-old daughter, Joanne Doe, and they live in Montana.[7] (Jane Doe Dec. ¶ 2.) Joanne, who is not a party to this case, is transgender and is currently receiving medically necessary care that would be prohibited by the Act. (*Id.* ¶¶ 5, 23.) Jane and John are both physicians; Jane is a board-certified licensed pediatrician in Montana, although not currently practicing, and currently works as a medical educator, and John is a board-certified licensed emergency medicine physician in Montana. (*Id.* ¶¶ 3–4.) Throughout most of her childhood, Joanne expressed her gender identity in a traditionally female manner, including in her preferred style of clothing and play. (*Id.* ¶ 6.) They noticed when she was around age three that her mental health was declining—she did not want to leave home, had significant emotional outbursts, and appeared to be suffering from worsening depression and anxiety; when she was six and a half years old, John found her self-harming. (*Id.* ¶ 13.)

They began to seek mental health counseling for Joanne, and both undertook intensive research to better understand the cause of their daughter's struggles. (*Id.* ¶¶ 13–14.) As she began socially transitioning, including wearing traditionally female clothing outside of the home, Jane and John noticed immediate and striking

[7] The parties have conferred regarding the terms of a stipulated protective order, and Plaintiffs anticipate filing an unopposed motion for leave for Jane and John Doe to proceed using pseudonyms.

improvement. (*Id.* ¶¶ 15–16.) While they sought professional advice elsewhere and learned that Joanne was transgender, Joanne was unable to see any health care professionals for her gender dysphoria for a significant period of time due to a dearth of professional support in their local community. (*Id.* ¶¶ 16–18.)

When Joanne was in fourth grade, she first saw a pediatric endocrinologist at the Seattle Children's Gender Clinic. (*Id.* ¶ 21.) Once she had begun puberty, in sixth grade, she—along with Jane and John Doe and her treating healthcare professionals—determined that gender-affirming care was right for her. (*Id.* ¶ 23.) After extensive battles with insurance and specialty pharmacies, she was eventually able to start puberty suppressant medication during seventh grade, and during eighth grade was also prescribed estrogen to initiate feminine pubertal changes consistent with her gender identity. (*Id.*) After Joanne started on estrogen, she appeared to be ecstatic with the physical changes to her body; Jane can see how it has dramatically increased her self-esteem, and she appears visibly more comfortable in her body. (*Id.* ¶ 25.)

If the Act goes into effect, it would impede Jane and John Doe's parental rights to seek out medically necessary health care for their daughter, taking away their ability to make such decisions notwithstanding the fact that they spent countless hours and resources to determine the best course of care for her. (*Id.* ¶ 30.) Jane fears for the mental health harms Joanne will experience as a result of the Act, and her biggest fear is that if the lifesaving medication that Joanne receives were no longer accessible to her and she was forced to undergo male puberty, Joanne might commit suicide. (*Id.* ¶¶ 31–32.)

Montana is their home and they do not want to be forced out by the Act—Jane Doe's entire extended family lives in their town, and Joanne has a large network of supportive friends and is thriving in her academics, her job, and her activities. (*Id.* ¶ 34.) John Doe is a leader in the hospital where he works, and Jane

Doe is well established in her career. (*Id.*) The community they have built for themselves is one that they love and do not wish to leave. (*Id.*)

B. The Provider Plaintiffs

Dr. Juanita Hodax

Plaintiff Dr. Juanita Hodax ("Dr. Hodax") is a pediatric endocrinologist licensed to practice medicine in Montana and Washington, an Assistant Professor in the Department of Pediatrics at the University of Washington, and Co-Director of the Gender Clinic at Seattle Children's Hospital. (Hodax Dec. ¶¶ 2, 5, 6, 8.; Hodax Dec. Ex. A.) Dr. Hodax has regularly traveled to Montana since 2019 in order to provide care through Community Children's at Community Medical Center in Missoula, Montana ("the Missoula Clinic") to young Montanans who travel from across the state because of the extent to which that care is needed in the community. (Hodax Dec. ¶ 10.) Her current practice at the Missoula Clinic is focused exclusively on providing gender-affirming care to patients under 18 that would be prohibited by the Act, on whose behalf Dr. Hodax brings suit. (*Id.* ¶¶ 10–11.) Over the course of her career, Dr. Hodax has treated hundreds of minors for gender dysphoria and provided them with gender-affirming care. (*Id.* ¶ 9.) The Gender Clinic at Seattle Children's Hospital, for which Dr. Hodax serves as Co-Director, sees thousands of minor patients each year. (*Id.* ¶ 6.)

As part of the care she provides for gender dysphoria, Dr. Hodax prescribes medically necessary medications, including those to delay puberty and hormone replacement therapy where medically appropriate. (*Id.* ¶ 11.) A significant portion of the time that Dr. Hodax spends with families is devoted to discussing treatment options and explaining their risks and benefits, just as she discusses options and risk with other patients experiencing other medical conditions. (*Id.* ¶ 13.) Dr. Hodax requires parental consent before treating minors with puberty blockers or hormone replacement therapy. (*Id.*) She has repeatedly witnessed dramatic benefits

for her patients who are able to access gender-affirming care, including reduction in depression, anxiety, and suicidality from untreated gender dysphoria. (*Id.* ¶ 14.)

The Act would prohibit Dr. Hodax from providing medically necessary care, even though the very same medications could be prescribed to cisgender minors for reasons other than to treat gender dysphoria. (*Id.* ¶¶ 12, 16.) The Act would also interfere with Dr. Hodax's ability to support referrals for other gender-affirming care that her patients may need. (*Id.* ¶ 17.) If the Act were to take effect, Dr. Hodax would likely cease providing medical care in Montana altogether, and give up her Montana medical license, because the nature of her medical practice in Montana would be prohibited by the Act. (*Id.* ¶ 18.)

Dr. Katherine Mistretta

Plaintiff Dr. Katherine Mistretta is a Board-Certified Family Nurse Practitioner and Advanced Practice Registered Nurse, licensed by the Montana Board of Nursing. (Mistretta Dec. ¶ 2.) She is also a Doctor of Nursing Practice with extensive training in both nursing and family medicine. (*Id.*) Dr. Mistretta has worked as a Family Nurse Practitioner at Bozeman Creek Family Health in Bozeman, Montana since 2013, where she provides a wide range of care to patients of all ages. (*Id.* ¶ 4.) As part of her practice, Dr. Mistretta provides gender-affirming care to transgender patients under the age of 18, including puberty blockers and hormone therapy that would be prohibited by the Act. (*Id.* ¶ 5.)

Over the course of her career, Dr. Mistretta has provided gender-affirming care to several hundred transgender patients. (*Id.* ¶ 8.) As one of the few providers of gender-affirming care in Montana, a massive state in which the population is spread widely, many of her patients travel long distances to obtain this care. (*Id.* ¶ 10.) Several of her current patients are insured by Medicaid, including transgender adolescents receiving gender-affirming care to treat their gender dysphoria. (*Id.* ¶

7.) Dr. Mistretta treats all of her minor transgender patients in accordance with well-established standards of care. (*Id.* ¶ 6.)

If the Act goes into effect, Dr. Mistretta will be prohibited from continuing to provide these medications to treat gender dysphoria in her minor transgender patients, though she will be permitted to continue providing the same treatments to cisgender patients to address their medical needs. (*Id.* ¶ 12.) If enforced, the Act would require Dr. Mistretta to either abandon the needs of her transgender patients or risk the loss or suspension of her license, depriving her of the ability to care for any of her patients and thereby negatively impacting her livelihood. (*Id.* ¶ 13.)

Dr. Mistretta knows, from both her training and personal experience in treating adolescents with gender dysphoria, that allowing the Act to take effect will be devastating to her patients and will significantly compromise their health and wellbeing. (*Id.* ¶ 16.) She is concerned that some transgender youth with gender dysphoria will seek alternative means of accessing the care, including buying medication from unauthorized suppliers and using medication that they obtain from friends, which obviously presents serious health and safety risks. (*Id.* ¶ 17.) Several of her patients and their families have told her that, if the Act takes effect, they may need to leave the state in order to obtain this life-saving medical care. (*Id.* ¶ 18.) She has seen how even discussing the loss of gender-affirming care can cause so much discomfort, pain, fear, and anxiety in her patients that she must seriously consider the most appropriate time and manner to initiate the discussion to minimize its negative consequences to their health and wellness. (*Id.* ¶ 19.) Dr. Mistretta is deeply concerned for her young transgender patients because her educational, clinical, and practical experience fully confirm her knowledge that denying them access to the gender-affirming care proscribed by the Act will likely lead to an increase in their depression, anxiety, suicidal ideation, and even suicidal attempts. (*Id.* ¶ 20.)

LEGAL STANDARD

Montana's preliminary injunction standard was recently revised to follow the federal standard. *See* S.B. 191, 2023 Leg., 68th Sess. (Mont. 2023) ("SB 191") (amending § 27–19–201, MCA). Under the new standard, a court may grant a preliminary injunction when an applicant establishes: "(a) the applicant is likely to succeed on the merits; (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in the applicant's favor; and (d) the order is in the public interest." SB 191 § 1; *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Montana Legislature intended for this standard to "mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law." SB 191 § 1(4).

The federal standard—now also the Montana standard—in the Ninth Circuit follows a "sliding scale" approach where "a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). When the "balance of hardships tips sharply" in favor of a plaintiff, the plaintiff need only show "serious questions going to the merits" as long as the plaintiff can also show that "there is a likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1135. "Serious questions" are "questions which cannot be resolved one way or the other at the hearing on the injunction and . . . are 'substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation.'" *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (citation omitted).

Plaintiffs satisfy each element of the sliding scale standard: Because Plaintiffs are in fact likely to succeed on the merits and the balance of hardships tips sharply in their favor, they certainly satisfy the lower standard and establish serious questions going to the merits.

ARGUMENT

The Court should grant Plaintiffs' motion for a preliminary injunction as they satisfy all four elements of the sliding scale standard.

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims and Have at Minimum Shown Serious Questions Going to the Merits of Plaintiffs' Claims.

A. The Act Violates Equal Protection.

The Montana Constitution guarantees that "no person shall be denied the equal protection of the laws" and "embod[ies] a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *McDermott v. Mont. Dep't of Corr.*, 2001 MT 134, ¶ 30, 305 Mont. 462, 470, 29 P.3d 992, 998. It states:

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

Mont. Const. art. II, § 4. Montana's equal protection clause "provides for even more individual protection than does the federal equal protection clause." *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 58, 325 Mont. 148, 166, 104 P.3d 445, 457 (internal citation and quotation marks omitted). The principal purpose "is to ensure citizens are not subject to arbitrary and discriminatory state action." *Id.* ¶ 27.

In evaluating an equal protection claim, a court must identify whether similarly situated classes are being treated differently and, if so, decide the appropriate level of scrutiny. *Id.* ¶ 16. Because the Act classifies based on transgender status and sex, it triggers heightened equal protection scrutiny. However, the Act cannot survive any level of scrutiny because it serves no legitimate purpose.

1. The Act Discriminates Based on Sex and Transgender Status.

Under the Act, whether a person can receive certain medical treatments turns on their assigned sex at birth, whether they are transgender, and whether the care tends to reinforce or disrupt stereotypes associated with their sex assigned at birth.

a) The Act Discriminates Based on Sex.

The Act classifies adolescents for differential treatment based on sex. "[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020). If the legislature cannot "writ[e] out instructions" for determining whether treatment is permitted "without using the words man, woman, or sex (or some synonym)," the law classifies based on sex. *Id.* at 1746.

That is precisely what the Act does. "[T]he minor's [assigned] sex at birth determines whether or not the minor can receive certain types of medical care under the law." *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 669 (8th Cir. 2022). "A minor born as a male may be prescribed testosterone . . . but a minor born as a female is not permitted to seek the same medical treatment." *Id.* "Under the challenged statute, is the treatment legal or illegal? To know the answer, one must know the adolescent's sex. If the adolescent is a natal male, the treatment is legal. If the adolescent is a natal female, the treatment is illegal. This is a line drawn on the basis of sex, plain and simple." *Doe v. Ladapo*, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *8 (N.D. Fla. June 6, 2023) (finding Florida's ban differentiates based on sex); *see also K.C. v. Individual Members of the Med. Licensing Bd. of Ind.*, No. 1:23-cv-00595-JPH-KMB, 2023 WL 4054086, at *8 (S.D. Ind. June 16, 2023) ("[W]ithout sex-based classifications, it would be impossible for [Indiana's Ban] to define whether puberty-blocking or hormone treatment involved transition from one's sex (prohibited) or was in accordance with one's sex (permitted)."). By "discriminating against transgender persons," the

Act "unavoidably discriminates against persons with one sex identified at birth and another today." *Bostock*, 140 S. Ct. at 1746; *see also Brandt*, 47 F.4th at 669 (finding that by relying on "the minor's sex at birth," Arkansas' ban on gender-affirming care for minors "discriminates on the basis of sex"); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1147 (M.D. Ala. 2022) (relying on *Bostock* to support conclusion that discrimination based on transgender status in the equal protection context constitutes discrimination based on sex).

The Act likewise discriminates based on a person's failure to conform to sex stereotypes or expectations associated with a particular sex designated at birth. Banning gender-affirming care "entrenches" the sex-stereotyped "belief that transgender individuals must preserve the genitalia and other physical attributes of their sex [assigned at birth] over . . . specific medical and psychological recommendations to the contrary." *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018). In other words, "sex plays an unmistakable and impermissible role" in the Act, which "intentionally penalizes a person . . . for traits or actions that it tolerates" in another individual simply because of sex assigned at birth. *See Bostock*, 140 S. Ct. at 1741–42. The sex stereotypes that motivated the Act are also evidenced by its restrictions on promoting the use of "clothing or devices, such as binders, for the purpose of concealing a minor's secondary sex characteristics." Act, §§ 3(10), 4(7). And such sex stereotyping runs afoul of equal protection. *See Tudor v. Se. Okla. State Univ.*, 13 F.4th 1019, 1028 (10th Cir. 2021); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011).

b) The Act Discriminates Based on Transgender Status.

Transgender and non-transgender adolescents in Montana seeking health care of the type potentially subject to the Act are similarly situated for equal protection purposes. Both groups seek medically necessary healthcare, including

the treatments covered by the Act, when indicated for their medical needs. However, the Act only affects transgender youth seeking gender-affirming medical care to treat their gender dysphoria. Act, § 4(1)(c). The purpose of gender-affirming medical care is to alleviate the patient's gender dysphoria by bringing their body into closer alignment with their gender identity and minimizing or eliminating the physical characteristics generally associated with their sex assigned at birth. (Olson-Kennedy Dec. ¶ 31.) Yet the same treatments and procedures utilized in the provision of gender-affirming care are also provided to cisgender minors for the purposed of treating other conditions, such as precocious or delayed puberty, hypogonadism, Turner's Syndrome, and polycystic ovarian syndrome. (*Id.* ¶ 69.)

The Act specifically bars the provision of a wide range of medical treatments and procedures when, and only when, they are provided to minors for the purpose of treating gender dysphoria. Act, § 4(1)(c) (the medical treatments covered by the Act "are prohibited only when knowingly provided to address a female minor's perception that her gender or sex is not female or a male minor's perception that his gender or sex is not male" but not "for other purposes"). Having a gender identity that is inconsistent with one's sex assigned at birth is exclusive to transgender people, making them the only people who the Act would deny care to. *See Fain v. Crouch*, 618 F. Supp. 3d 313, 325 (S.D.W. Va. 2022) ("A person cannot suffer from gender dysphoria without identifying as transgender."); *see also C. P. ex rel. Pritchard v. Blue Cross Blue Shield of Ill.*, No. 3:20-cv-06145-RJB, 2022 WL 17788148, at *6 (W.D. Wash. Dec. 19, 2022); *Kadel v. Folwell*, No. 1:19-cv-272, 2022 WL 11166311, at *4 (M.D.N.C. Oct. 19, 2022). The Act therefore singles out medical care that only transgender people need or seek. *See Fain*, 618 F. Supp. 3d at 327; *Toomey v. Arizona*, No. CV-19-00035-

TUC-RM (LAB), 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 950 (W.D. Wis. 2018).

Because the Act "prohibits medical care only transgender people undergo, i.e., medical or surgical procedures related to gender transition," it discriminates based on transgender status. *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 WL 4073727, at *31, *38 (E.D. Ark. June 20, 2023) (granting permanent injunction against Arkansas's ban, finding it discriminates against transgender people). The Act expressly and exclusively targets transgender adolescents by prohibiting medical treatments based on whether they "attempt[] to . . . affirm the minor's perception of his or her gender or [biological] sex, if that . . . perception is inconsistent with the minor's sex [assigned at birth]." *Eknes-Tucker*, 603 F. Supp. 3d at 1139, 1147 (explaining Alabama's similar ban "places a special burden on transgender minors because their gender identity does not match their birth sex" because it "prohibits transgender minors—and only transgender minors—from taking transitioning medications due to their gender nonconformity"). This necessarily singles out transgender children for differential treatment as compared to cisgender children who are similarly situated. *See Ladapo*, 2023 WL 3833848, at *8 (concluding Florida's ban discriminates based on transgender status, explaining that to know whether puberty blockers are legal or illegal, "one must know whether the child is cisgender or transgender"); *see also Williams v. Kincaid*, 45 F.4th 759, 772 (4th Cir. 2022) (noting that the strong connection between gender dysphoria and transgender identity supports the conclusion that singling out the condition of gender dysphoria for differential treatment as compared to that for other conditions "would discriminate against transgender people as a class, implicating the Equal Protection Clause of the Fourteenth Amendment").

Similarly, the Act's prohibition of Montana Medicaid and Healthy Montana Kids coverage violates equal protection by excluding a class of otherwise-eligible

people from coverage for medically necessary treatment based on their transgender status. *See Jeannette R. v. Ellery*, No. BDV-94-811, 1995 Mont. Dist. LEXIS 795, at *27 (Mont. Dist. Ct. May 22, 1995) ("The denial of equal protection is clear. The state has taken the class of indigent pregnant Medicaid eligible women and divided them.").[8] The Act makes it such that transgender adolescents who are eligible for state assistance are unable to access medically necessary treatment, while non-transgender adolescents who are eligible for state assistance can access such treatment.

2. The Act is Subject to Heightened Scrutiny.

The Montana Supreme Court has not identified the level of scrutiny applicable to classifications based on transgender status or sex. As discussed below, strict scrutiny should apply because the Act affects a suspect class and fundamental rights. *Snetsinger*, ¶ 17 ("Strict scrutiny applies if a suspect class or fundamental right is affected.") (citation omitted).

a) The Act Affects a Suspect Class.

Strict scrutiny applies to classifications that discriminate against transgender Montanans because they are a suspect class. *See id.* (noting that strict scrutiny applies when the classification affects a suspect class). "A suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *In re S.L.M.*, 287

[8] *See, e.g.*, *Fain*, 618 F. Supp. 3d at 335 (holding state Medicaid plan's exclusion of gender-affirming care violated the Medicaid Act, Affordable Care Act, and Equal Protection Clause); *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1015, 1019, 1022 (W.D. Wis. 2019) (holding state Medicaid plan's exclusion of gender-affirming care violated the Medicaid Act, Affordable Care Act, and Equal Protection Clause); *see also Kadel*, 2022 WL 11166311, at *3–5 (holding state employee insurance plan's categorical exclusion of gender-affirming care violated the Equal Protection Clause, Affordable Care Act, and Title VII); *Boyden*, 341 F. Supp. 3d at 998–1000 (holding state employee insurance plan's exclusion of gender-affirming care violated Title VII, the Affordable Care Act, and the Equal Protection Clause).

Mont. 23, 33, 951 P.2d 1365, 1371 (1997) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)); *see also In re C.H.*, 210 Mont. 184, 198, 683 P.2d 931, 938 (1984). Transgender people satisfy this test.

First, transgender people, in Montana and elsewhere, have been "subjected to such a history of purposeful unequal treatment." *In re S.L.M.*, 287 Mont. at 33, 951 P.2d at 1371; *see also Ray v. McCloud*, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020) ("[T]here is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare.") (internal quotations marks omitted); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (finding that "transgender people have suffered a history of persecution and discrimination"); *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016) (finding that transgender individuals have been historically subject to discrimination), *stay of preliminary injunction denied sub nom. Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016).

Discrimination based on transgender status has been extensively documented. *E.g.*, S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality (2016), *available at* https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf ("Transgender Survey"). The Transgender Survey describes the discrimination, harassment, and even violence that transgender people encounter at school, in the workplace, when trying to find a place to live, during encounters with police, in doctors' offices and emergency rooms, at the hands of service providers and businesses, and in other aspects of life. *See id.* Transgender Montanans have

become particularly susceptible to violence and harassment in light of legislation like the Act, which places a target on their backs.[9]

Transgender people nationally and in Montana continue to face discrimination, and the ongoing spate of discriminatory legislation passing in state legislatures nationwide—including the Montana State Legislature—highlight this discrimination. The Act is not the only piece of legislation intentionally and facially discriminating against transgender Montanans passed by the Legislature in recent years. For example, the 2021 Legislature passed SB 280, which discriminated against transgender people seeking to change the sex designation on their birth certificates. And the 2023 Legislature, in addition to the Act, passed SB 458, which seeks to codify a binary definition of sex based on reproductive capacity. Nationwide, laws restricting gender-affirming care for minors have been enacted in at least 17 states, with several other states actively considering such laws. *See* Andrew DeMillo, *Here Are the Restrictions on Transgender People That Are Moving Through U.S. Statehouses*, PBS Newshour (May 19, 2023), *available at* https://www.pbs.org/newshour/politics/here-are-the-restrictions-on-transgender-people-that-are-moving-through-u-s-statehouses. Taken together, these examples illustrate the long, troubling history of invidious discrimination against transgender people in Montana and throughout the country.

Second, transgender people suffer a level of "political powerlessness" sufficient to warrant "extraordinary protection" under the law because of the community's small population size and the enduring societal prejudices against transgender people. *In re S.L.M.*, 287 Mont. at 33, 951 P.2d at 1371. A 2022 study

[9] *See, e.g.*, Nicole Girten, *Patient Recovering After Attack in Great Falls; Missoula Rep Said Bill Would Help LGBTQ Victims*, Daily Montanan (Feb. 22, 2023), *available at* https://dailymontanan.com/2023/02/22/patient-recovering-after-attack-in-great-falls-missoula-rep-said-bill-would-help-lgbtq-victims ("A Great Falls victim [suffered] serious injuries after a man who yelled the person was "trans" drove his car into them at a bar on Friday . . . .").

by the Williams Institute estimates that just 0.78 percent of adolescent Montanans identify as transgender. Jody L. Herman, Andrew R. Flores & Kathryn K. O'Neill, *How Many Adults and Youth Identify as Transgender in the United States*, Williams Inst. (June 2022), *available at* https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states; *see also Ray*, 507 F. Supp. 3d at 937 (explaining that less than 1% of the adult population in the United States are transgender). Transgender people face staggering rates of poverty and homelessness. Nearly a third of transgender people fall below the poverty line, more than twice the rate of the general U.S. population. *See supra* Transgender Survey at 5. Nearly a third of transgender people have experienced homelessness. *Id.* Transgender people also face barriers to political representation. *See* Philip E. Jones et al., *Explaining Public Opinion Toward Transgender People, Rights, and Candidates*, 82 Pub. Opinion Q. 252, 265 (2018), *available at* https://academic.oup.com/poq/article/82/2/252/4996117 (finding that nominating a transgender candidate reduced proportion of respondents who would vote for their own party's candidate from 68 percent to 37 percent). And when transgender people are able to overcome these barriers and attain political office, they face heightened harassment and opposition from their fellow public officials.[10]

A person's gender identity or transgender status bears no relation to their ability to contribute to society, and gender identity is a core defining trait—fundamental to a person's identity—that a person cannot be required to abandon. These factors, joined with the "history of purposeful unequal treatment" and the

[10] *See* Amy Beth Hanson & Sam Metz, *Montana Transgender Lawmaker Silenced Again, Backers Protest*, AP News (Apr. 24, 2023), *available at* https://apnews.com/article/transgender-lawmaker-silenced-montana-censure-21ae94ed0de1aab68c5be1cc37d11484.

presence of "political powerlessness" of transgender people—warrant strict scrutiny here. *In re S.L.M.*, 287 Mont. at 33, 951 P.2d at 1371.

b) Federal Courts Support Applying Heightened Scrutiny to Transgender Discrimination.

Numerous federal courts have concluded that heightened scrutiny applies to an equal protection claim challenging similar bans on gender affirming care in adolescents. *See Brandt*, 47 F.4th at 670; *K.C.*, 2023 WL 4054086, at *7–9; *Ladapo*, 2023 WL 3833848, at *8–9; *Eknes-Tucker*, 603 F. Supp. 3d at 1147.

Moreover, federal courts routinely apply heightened scrutiny (strict or intermediate) to classifications based on transgender status, reasoning that transgender people have suffered a history of discrimination and prejudice, a person's identity as transgender has nothing to do with the person's ability to contribute to society, and transgender people represent a discrete minority class that is politically powerless to bring about change on its own.[11]

Federal courts have reasoned that discrimination against transgender people is a form of sex discrimination as further support for applying heightened scrutiny. *See Bostock*, 140 S. Ct. at 1741–43; *United States v. Virginia*, 518 U.S. 515, 555 (1996) ("[A]ll gender-based classifications today warrant heightened scrutiny.") (internal quotations and citations omitted); *see also Maloney v. Yellowstone*

[11] *See, e.g.*, *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020); *Glenn*, 663 F.3d at 1316; *Hecox v. Little*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020), *aff'd*, No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023); *Ray*, 507 F. Supp. 3d at 937; *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1144–45 (D. Idaho 2018); *Adkins*, 143 F. Supp. 3d at 140; *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Marlett v. Harrington*, No. 1:15-cv-01382-MJS (PC), 2015 WL 6123613, at *4 (E.D. Cal. Oct. 16, 2015); *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 874; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *M.A.B. v. Bd. of Educ.*, 286 F. Supp. 3d 704, 718–22 (D. Md. 2018); *Flack*, 395 F. Supp. 3d at 1019–22; *Stone v. Trump*, 400 F. Supp. 3d 317, 355 (D. Md. 2019).

County, Nos. 1570–2019 & 1572–2019 (Mont. Dep't of Lab. & Industry Aug. 14, 2020) (finding that discrimination based on gender identity is sex discrimination).

Given that the Montana Constitution's equal protection clause "provides for even more individual protection than" its federal equivalent, *Snetsinger*, ¶ 58, heightened scrutiny should also apply to the Act.

c) The Act Burdens a Fundamental Right.

The Act is also subject to heightened scrutiny for the separate reason that it burdens several fundamental rights. *See infra* Pts. I(B)-(F); *Stand Up Mont. v. Missoula Cnty. Pub. Schs.,* 2022 MT 153, ¶ 10, 409 Mont. 330, 337, 514 P.3d 1062, 1067 (strict scrutiny applies when a statute affects a fundamental right). A right is "fundamental" under Montana's Constitution if it is either found in the Declaration of Rights or is a right "without which other constitutionally guaranteed rights would have little meaning." *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986).

3. The Act Fails Heightened Scrutiny Because It Is Not Narrowly Tailored to Serve a Compelling Government Interest, Nor Does Its Purported Need Outweigh the Value of the Right It Impairs.

The Act cannot survive heightened scrutiny. "Under the strict scrutiny standard, the state carries the burden of demonstrating the challenged law or policy is narrowly tailored to serve a compelling government interest and only that interest." *Stand Up Mont.*, ¶ 10 (citations omitted). Any compelling state interest "must be closely tailored to effectuate only that compelling state interest." *Wadsworth v. State*, 275 Mont. 287, 302, 911 P.2d 1165, 1174 (1996) (citation omitted). Further, "the State, to sustain the validity of such invasion [to a fundamental right], must also show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective." *Id*. (citation omitted).

The Act does not serve a compelling governmental interest. The Act's only stated justification "is to enhance the protection of minors and their families . . . from any form of pressure to receive harmful, experimental puberty blockers and cross-sex hormones and to undergo irreversible, life-altering surgical procedures prior to attaining the age of majority." Act, § 2. Nothing in the legislative record supports a finding that minors are in fact being faced with any such pressure, and certainly the record contains nothing suggesting that the Act would "protect[] . . . minors and their families." There are no legislative findings at all. *See Wadsworth*, 275 Mont. at 303, 911 P.2d at 1174 ("Necessarily, demonstrating a compelling interest entails something more than simply saying it is so.") (emphasis omitted).

The Act flatly does not serve any compelling governmental interest, and indeed accomplishes precisely the opposite result.[12] As explained in the expert declarations of Dr. Johanna Olson-Kennedy and Dr. Danielle Moyer, gender-affirming care is medically necessary and effective treatment well-supported by research and experience, and its prohibition will have dire consequences for transgender adolescents. (Olson-Kennedy Dec. ¶¶ 74–75; Moyer Dec. ¶¶ 30–31.) And far from being "experimental," the medical care prohibited by the Act has been robustly documented and studied, and is the accepted standard of care by all major medical organizations in the United States. (Olson-Kennedy Dec. ¶ 74.) "Rather than protecting children . . . the prohibited medical care improves the mental health and well-being of patients and . . . , by prohibiting it, the State

[12] Indeed, the legislative record is replete with animus toward transgender people and gross mischaracterizations of the care prohibited by the Act, and suggests that members of the Legislature were motivated by nothing other than their personal, moral, or religious disapproval of gender transition. *See supra* Background, Pt. II. This is not a compelling governmental interest. *See Ladapo*, 2023 WL 3833848, at *10 (concluding that plaintiffs were likely to succeed on the merits in showing that Florida's ban, motivated in substantial part by the illegitimate purposes of disapproving transgender status and discouraging individuals from pursuing their honest gender identities, did not satisfy intermediate scrutiny).

undermined the interests it claims to be advancing." *See, e.g.*, *Brandt*, 2023 WL 4073727, at *35 (rejecting Arkansas's contention that banning gender affirming care advances the important government interest of protecting children from experimental medical treatment). In other words, the Act bans potentially life-saving care provided in accordance with widely accepted medical protocols to treat adolescent gender dysphoria.

Additionally, even if the Act served a compelling state interest (which it does not), the Act is not narrowly tailored to meet that interest. It institutes a blanket ban on gender-affirming health care for adolescents, with no provision for circumstances where such care may be permissible. *See, e.g.*, *K.C.*, 2023 WL 4054086, at *10–11 (concluding Indiana's ban is not closely tailored to serve a legitimate state interest of protecting children). It does not work toward ensuring that adolescents do not feel "pressure" to receive certain forms of health care, or that informed consent is respected—to the contrary, it substitutes the Legislature's judgment wholesale for the reasoned and informed judgment of doctors, patients, and families alike. *See Brandt v. Rutledge*, 551 F. Supp. 3d 882, 891 (E.D. Ark. 2021) ("Every major expert medical association recognizes that gender-affirming care for transgender minors may be medically appropriate and necessary to improve the physical and mental health of transgender people."), *aff'd sub nom. Brandt ex. rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022). The Act is nothing less than a full-scale ban on gender-affirming care for adolescent transgender Montanans, even when such care is medically necessary. It is not narrowly tailored, and is therefore unconstitutional.

The Act also does not survive middle-tier review, which Montana courts apply if a law "affects a right conferred by the Montana Constitution, but is not found in the Constitution's Declaration of Rights." *Snetsinger*, ¶ 18 (citing *McDermott*, ¶ 32). For a law to survive middle-tier scrutiny, the State must show

that it is reasonable and the need for the resulting classification outweighs the value of the right to an individual. The Act cannot survive this middle-tier scrutiny because the value of the rights to the Plaintiffs—including the right of transgender minors to access life-saving medical care and the right of parents to make medical decisions on behalf of their children in conjunction with medical professionals and after having given informed consent—far outweigh the Act's alleged purpose, which is both unreasonable and unnecessary.

4. The Act Fails Any Level of Review.

The Act fails rational basis review. "Under the rational basis test, the law or policy must be rationally related to a legitimate government interest." *Snetsinger*, ¶ 19. The Act serves no legitimate purpose—it is purely motivated by animus towards transgender people,[13] and animus towards a politically disfavored group can never be a legitimate governmental interest. *Romer v. Evans*, 517 U.S. 620, 632, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

Moreover, to the extent the Act's purpose is to protect the health and well-being of minors, which is wholly unsupported by the legislative record, it fails to rationally relate to that interest. *See, e.g.*, *Ladapo*, 2023 WL 3833848, at *10 (concluding Florida's "decision to ban the treatment is not rationally related to a legitimate state interest" and survives no level of scrutiny). First, rather than protecting the health of minors, it gravely threatens the health and well-being of transgender adolescents by denying them access to life-saving care. *See supra* Background, Pt. III. Second, though the legislature claims that medical treatments

[13] *See supra* Background, Pt. II.

and procedures used to treat gender dysphoria in minors pose risks to the health of those minors, that argument is completely undermined by allowing those same treatments for cisgender minors with no explanation as to why the care is only safe for the latter group. The Act cannot withstand any level of scrutiny, and its enforcement should be enjoined.

B. The Act Violates the Right to Parental Autonomy.

The Due Process Clause of the Montana Constitution states: "No person shall be deprived of life, liberty, or property without due process of law." Mont. Const. art. II, § 17. This Due Process Clause protects "the fundamental right of a parent to make decisions regarding the care of their children, including, among other things, the upbringing, education, health care, and mental health of their children." *Stand Up Mont.*, ¶ 28 (internal quotations omitted). As the Montana Supreme Court has explained, "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests the [United States] Supreme Court has recognized." *Snyder v. Spaulding*, 2010 MT 151, ¶ 12, 357 Mont. 34, 40, 235 P.3d 578, 582 (internal quotations and citations omitted). In Montana, this fundamental liberty interest includes parents' rights to direct their children's medical care. *Stand Up Mont.*, ¶ 28.

The Montana Legislature codified this fundamental right. § 40-6-701(1), MCA (a "government entity may not interfere with the fundamental right of parents to direct the upbringing, education, health care, and mental health of their children" unless it satisfies strict scrutiny). It further provided: "[a]ll fundamental parental rights are exclusively reserved to the parent of a child without obstruction or interference by a government entity, including but not limited to the rights and responsibilities to . . . make and consent to all physical and mental health care decisions for the child." § 40-6-701(2)(e), MCA. These fundamental rights are enforceable through a private right of action. § 40-6-701(5), MCA.

The Act's prohibition against well-accepted medical treatments for adolescents with gender dysphoria infringes on parents' fundamental rights to make decisions regarding the medical care of their children. Courts across the nation overwhelmingly recognize that such laws infringe on the fundamental right to parental autonomy. *See, e.g.*, *Eknes-Tucker*, 603 F. Supp. 3d at 1145 (concluding an Alabama statute that prevents parents from choosing gender dysphoria treatment for their children likely infringes on parent's "fundamental right to treat their children with transitioning medications subject to medically accepted standards"); *Ladapo*, 2023 WL 3833848, *11 (finding that plaintiffs were substantially likely to succeed on the merits for their claim that Florida's ban violated parents' rights under the Due Process Clause). Indeed, parents' fundamental right to seek and follow medical advice is at its apogee when the parents, their minor child, and that child's doctor all agree on an appropriate course of medical treatment. *See Brandt*, 551 F. Supp. 3d at 892–93 (concluding plaintiffs will likely succeed in showing Arkansas's ban interferes with parents' "fundamental right to seek medical care for their children and, in conjunction with their adolescent child's consent and their doctor's recommendation, make a judgment that medical care is necessary").

The Act deprives minors and their parents of the right to seek what every major medical association has recognized is safe, effective, and necessary care, and in so doing it endangers children against their wishes and the wishes of their parents. "Parents, pediatricians, and psychologists—not the State or this Court—are best qualified to determine whether [gender-affirming] medications are in a child's best interest on a case-by-case basis." *Eknes-Tucker*, 603 F. Supp. 3d at 1146; *see also Snyder*, ¶ 17 (quoting *Polasek v. Omura*, 2006 MT 103, ¶ 15, 332 Mont. 157, 162, 136 P.3d 519, 522) ("The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing

decisions simply because a state judge believes a 'better' decision could be made.").

Because one's parental right to direct their children's medical care is fundamental under Montana law, the State may not interfere with that right unless it can satisfy strict scrutiny. *See Stand Up Mont.*, ¶ 10 ("Strict scrutiny applies if a fundamental right is affected."); § 40-6-701(a), MCA. As discussed above, the Act cannot survive any level of scrutiny, let alone the most stringent scrutiny required for intrusions on fundamental rights.

Accordingly, Plaintiffs are likely to succeed on the merits in proving that the Act unlawfully interferes with the fundamental rights of parents to direct the medical care of their own child, and there are at least serious questions as to whether it does. Courts across the nation have granted preliminary injunctions against similar statutes after concluding that the plaintiffs in those actions were likely to succeed on their parental rights claims. *See Eknes-Tucker*, 603 F. Supp. 3d at 1151; *Brandt*, 551 F. Supp. 3d at 892–93; *Ladapo*, 2023 WL 3833848, at *11. The Court should so rule here.

C. The Act Violates the Right to Privacy.

The Montana Constitution provides that the right of individual privacy is essential to a free society and "shall not be infringed without the showing of a compelling state interest." Mont. Const. art. II, § 10. This right is "one of the most stringent protections of its citizens' right to privacy in the United States" and "affords significantly broader protection than does the federal constitution." *Armstrong v. State*, 1999 MT 261, ¶ 34, ¶ 41, 296 Mont. 361, 373, 376, 989 P.2d 364, 373, 375 (citing *Gryczan v. State*, 283 Mont. 433, 448, 942 P.2d 112, 121 (1997)). Montana's right to privacy includes "one's right to choose or refuse medical treatment," because "[f]ew matters more directly implicate personal

autonomy and individual privacy than medical judgments affecting one's bodily integrity and health." *Id.* ¶¶ 52, 53.

The Act violates patients' right to privacy by drastically limiting their ability to "choose . . . medical treatment," *id.* ¶ 52, and make necessary and appropriate medical decisions in concert with their parents and provider. The Act also intrudes upon the private relationship between a patient and a health care provider, essentially imposing the State's ideological opinion on the patient-provider relationship and restricting providers' ability to rely on their expertise and reasoned medical judgment in recommending and seeking the best health care options for their patients. Only transgender people are subjected to these infringements on their right to privacy when seeking the banned care, and the medical options foreclosed by the Act are often of critical importance to their health and well-being.

In *Armstrong*, the Montana Supreme Court set forth the standard for laws that infringe on "personal autonomy and privacy that accompanies the government usurping . . . the patient's own informed health care decisions made in partnership with his or her chosen health care provider." *Armstrong*, ¶ 58. Under this standard, the State must present clear and convincing evidence of "a medically-acknowledged, *bona fide* health risk," *Armstrong*, ¶ 62. Otherwise, "the legislature has no interest, much less a compelling one, to justify its interference with an individual's fundamental privacy right to obtain a particular lawful medical procedure from a health care provider that has been determined by the medical community to be competent to provide that service and who has been licensed to do so." *Armstrong*, ¶ 62; *see also Weems v. State ex rel. Knudsen* (*Weems II*), 2023 MT 82, ¶¶ 45, 51, 412 Mont. 132, 153, 155, 529 P.3d 798, 811, 812 (holding that because the State "failed to articulate a medically acknowledged, bona fide health

risk," the statute at issue was "an unconstitutional interference with a woman's right of privacy to seek medical care from a qualified provider of her choice").

Moreover, "legal standards for medical practice and procedure cannot be based on political ideology, but, rather, must be grounded in the methods and procedures of science and in the collective professional judgment, knowledge and experience of the medical community acting through the state's medical examining and licensing authorities." *Armstrong*, ¶ 62. Indeed, as the Montana Supreme Court aptly recognized, "[u]nless fundamental constitutional rights . . . are grounded in something more substantial than the prevailing political winds, Huxley's *Brave New World* or Orwell's *1984* will always be as close as the next election." *Id.* ¶ 51.

The Act cannot satisfy this standard. There is no State interest, let alone a compelling interest, in denying transgender Montanans the right to make medical decisions without state compulsion. The Legislature flatly ignored "the collective professional judgment, knowledge and experience of the medical community." *Armstrong*, ¶ 62; *see supra* Pt. II. Instead, Members of the Legislature passed the Act based on their political ideology, as well as their personal views about sex, morality, and religion. *See supra* Pt. II. The Act's intent is further evidenced through its restrictions on promoting the use of "clothing or devices, such as binders, for the purpose of concealing a minor's secondary sex characteristics," Act, §§ 3(10); 4(7), which are clearly not aimed at any legitimate health concern.

The medical community is in overwhelming agreement that gender affirming care is safe, *see supra* Pt. III, and there is no basis for finding that the treatments implicated by the Act entail more risk when provided to treat gender dysphoria in transgender adolescents than when provided for other reasons to cisgender adolescents. *See Weems II*, ¶ 51 (holding that the State failed to meet its burden of demonstrating a medically acknowledged, bona fide health risk where it

"failed to present any evidence that demonstrates abortions performed by APRNs include more risk than those provided by physicians or PAs"). Therefore, the State cannot show that gender-affirming care poses a medically acknowledged, bona fide health risk, and the Act will fail strict scrutiny. Plaintiffs are likely to succeed on the merits in proving that the Act violates Plaintiffs' right to privacy and at least raise serious questions going to the merits of this claim.

D. The Act Violates the Right to Seek Health.

The Montana Constitution provides that Montanans have a fundamental and inalienable right to "seek[] their safety, health and happiness in all lawful ways." Mont. Const. art. II, § 3; *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶¶ 22–24, 366 Mont. 224, 231, 286 P.3d 1161, 1166. This right encompasses "the right to seek and obtain medical care from a chosen health care provider and to make personal judgments affecting one's own health and bodily integrity without government interference." *Armstrong*, ¶ 72; *see also Mont. Cannabis Indus. Ass'n*, ¶ 23 ("In pursuing one's own health, an individual has a fundamental right to obtain and reject medical treatment.").

As discussed *supra*, the Act directly violates patients' right to make medical decisions in concert with their health care providers free from government interference. Act, § 4(1)(c). The Act would deny transgender adolescents the right to elect gender-affirming care, even though it is evidence-based care supported by the consensus of qualified medical professionals in the field. (Olson-Kennedy Dec. ¶ 74.) Additionally, the Act violates patients' right to obtain coverage for gender-affirming care. The fundamental right to seek health would have little meaning without the corresponding ability to finance the care one needs. *See Butte Cmty. Union*, 219 Mont. at 430, 712 P.2d at 1311 (a right may be fundamental if it is a right "without which other constitutionally guaranteed rights would have little meaning"). The Act prohibits Montana Medicaid—the State's mechanism for

guaranteeing that all Montanans can receive the health care they need—from covering medically necessary care. Act, § 4(6). Indeed, the Act runs counter to Montana Medicaid's purpose, which is "providing necessary medical services to eligible persons who have need for medical assistance." § 53-6-101(1), MCA.

Because the Act infringes upon Montana's fundamental right to seek health, it is subject to strict scrutiny. *See Snetsinger*, ¶ 17. As discussed above, the Act cannot satisfy this standard. Accordingly, Plaintiffs are likely to succeed on the merits in proving that the Act violates Plaintiffs' right to seek health and at least raise serious questions going to the merits of this claim.

E. The Act Violates the Right to Dignity.

The Montana Constitution provides that "[t]he dignity of the human being is inviolable." Mont. Const. art. II, § 4. The Montana Supreme Court recognizes the right to dignity is a fundamental right, "demand[ing] that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives and the intrinsic value of life in general, answering to their own consciences and convictions." *Armstrong*, ¶ 72. And "[t]reatment which degrades or demeans persons, that is, treatment which deliberately reduces the value of persons, and which fails to acknowledge their worth as persons, directly violates their dignity." *Walker v. State*, 2003 MT 134, ¶ 81, 316 Mont. 103, 121, 68 P.3d 872, 884 (quoting Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 Mont. L. Rev. 301, 307 (2000)).

The Act violates patients' right to dignity by threatening and demeaning the humanity and identity of transgender people. A person's ability to live their life as their true self, consistent with their core identity, and—specifically to the point here—to align their body with their gender identity, is at the heart of the notion of

dignity. By drastically limiting the ability of transgender people to seek potentially life-saving care that would allow them to live in alignment with their gender identity, the Act infringes on their fundamental right to dignity. This analysis is subject to strict scrutiny. *See Walker*, ¶ 74. As discussed above, the State cannot satisfy such scrutiny. Plaintiffs are likely to succeed on the merits in proving that the Act violates Plaintiffs' right to dignity and at least raise serious questions going to the merits of this claim.

F. The Act Violates the Right to Free Speech and Expression.

The Montana Constitution protects the "vast majority" of speech and provides: "No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty." Mont. Const. art. II, § 7; *State v. Dugan*, 2013 MT 38, ¶¶ 18, 79, 369 Mont. 39, 44, 68 303 P.3d 755, 761, 776 (citation omitted). These protections include the right to receive information as an indispensable component of the free exchange of ideas. *See State ex rel. Missoulian v. Mont. Twenty-First Jud. Dist. Ct., Ravalli Cnty.*, 281 Mont. 285, 301, 933 P.2d 829, 839 (1997). Such protections have "great relevance in the fields of medicine and public health, where information can save lives." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011).[14] "Physicians must be able to speak frankly and openly to patients," because "[a]n integral component of the practice of medicine is the communication between a doctor and a patient." *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002); *see also Nat'l Inst. of Fam. & Life Advocs.*

[14] Montana courts have found that Article II, Section 7 is comparable to the United States Constitution. *City of Helena v. Krautter*, 258 Mont. 361, 363–64, 852 P.2d 636, 637–38(1993); *City of Billings v. Laedeke*, 247 Mont. 151, 157, 805 P.2d 1348, 1352 (1991) ("[T]his Court has discussed the First Amendment and its state counterpart without distinguishing between the two provisions."). Federal case law is thus informative.

("NIFLA") v. Becerra, 138 S. Ct. 2361, 2374 (2018) ("Doctors help patients make deeply personal decisions, and their candor is crucial." (citation omitted)).

The Act infringes on Montana's constitutional protection of free speech by providing that "[a]ny individual or entity that receives state funds to pay for or subsidize the treatment of minors for psychological conditions, including gender dysphoria, may not use state funds to promote or advocate the medical treatments prohibited in subsection (1)(a) or (1)(b)." Act, § 4(4). That is, the Act bars healthcare professionals from speaking—and their patients and their parents from hearing—about medically accepted treatments for gender dysphoria. The Act is a content and viewpoint-based regulation of speech. *See State v. Lamoureux*, 2021 MT 94, ¶ 21, 404 Mont. 61, 485 P.3d 192, 200 ("[R]egulation is content-based if the law 'on its face, draws distinctions based on the message a speaker conveys,' such as 'the topic discussed or the idea or message expressed.'" (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (holding that a content-based ban is "obvious" where a law defines speech "by particular subject matter"))), *cert. denied*, 142 S. Ct. 860 (2022).

Such content-based regulation of speech is "presumptively unconstitutional and may be justified only if the government proves that it is narrowly tailored to serve compelling state interests" under strict scrutiny. *NIFLA*, 138 S. Ct. at 2371; *Reed*, 576 U.S. at 163; *see also Lamoureux*, ¶ 21. As discussed above, the Act cannot survive strict scrutiny. The Montana Supreme Court recently affirmed enjoining an act which required healthcare providers to discuss abortion pill reversal, thus regulating the content of their speech and violating the providers and patients' constitutionally protected rights. *Planned Parenthood of Mont. v. State ex rel. Knudsen*, 2022 MT 157, ¶ 48, 409 Mont. 378, 401, 515 P.3d 301, 315.

Accordingly, Plaintiffs are likely to succeed on the merits in proving that the Act interferes with the right to speech and there are at minimum serious questions

going to the merits. *See, e.g.*, *Brandt*, 2023 WL 4073727, at *37 (finding Arkansas regulation restricting "healthcare professionals from making referrals for 'gender transition procedures'" violated the First Amendment as a content and viewpoint-based restriction on speech).

G. Gender-Affirming Healthcare Bans Like the Act Have Been Enjoined Across the United States.

To date, trial courts have unanimously ruled against every transgender medical care ban that has been challenged, including in Arkansas, Alabama, Florida, Indiana, Kentucky, Missouri, and Tennessee. *See L.W. by & through Williams v. Skrmetti*, No. 3:23-CV-00376, 2023 WL 4232308, at *36 (M.D. Tenn. June 28, 2023) ("To the Court's knowledge, every court to consider preliminarily enjoining a ban on gender-affirming care for minors has found that such a ban is likely unconstitutional. And at least one federal court has found such a ban to be unconstitutional at final judgment."); *Thornbury*, 2023 WL 4230481, at *1–2 (granting preliminary injunction against Kentucky statute banning puberty blockers and hormone therapy for transgender minors); *Brandt*, 2023 WL 4073727, at *1–2 (holding that Arkansas statute banning "gender transition procedures" for minors was unconstitutional after an eight-day bench trial); *K.C.*, 2023 WL 4054086, at *1 (granting preliminary injunction against Indiana statute banning puberty blockers and hormone therapy for transgender youth); *Ladapo*, 2023 WL 3833848, at *1 (granting preliminary injunction against Florida statute and rules banning puberty blockers and hormone therapy for transgender minors); *Eknes-Tucker*, 603 F. Supp. 3d at 1137–38 (granting preliminary injunction against Alabama statute banning puberty blockers and hormone therapy for transgender minors); *Brandt v. Rutledge*, 551 F. Supp. 3d at 892–93 ("The Court finds that the Parent Plaintiffs have a fundamental right to seek medical care for their children and, in conjunction with their adolescent child's consent and their doctor's recommendation, make a

judgment that medical care is necessary."); *cf. Dekker v. Weida*, No. 4:22CV325-RH-MAF, 2023 WL 4102243, at *10–11, *19 (N.D. Fla. June 21, 2023) (holding that Florida's prohibition on Medicaid coverage for treatment of gender dysphoria is unconstitutional after two-week bench trial), *appeal filed*, No. 23-12155 (11th Cir. June 27, 2023); Court Order ¶ 35, *Southampton Cmty. Healthcare v. Bailey*, No. 23SL-CC01673 (Mo. Cir. Ct. May 1, 2023) (granting a temporary restraining order enjoining Missouri Attorney General's emergency rule imposing severe restrictions on the provision of medical treatment for gender dysphoria to transgender adolescents and adults).[15]

[15] On July 8, 2023, the Sixth Circuit in a split 2-1 decision after expedited review granted a stay of the preliminary injunction in *L.W.*, pertaining to Tennessee's ban. In so doing, the Sixth Circuit sharply deviated from the majority of federal courts. However, the Sixth Circuit acknowledged its views "are just that: initial" and they "may be wrong." *L.W. ex rel. Williams v. Skrmetti*, No. 23-5600, 2023 WL 4410576, at *8 (6th Cir. July 8, 2023). Its decision is thus of little persuasive value.

Indeed, the Sixth Circuit based its decision, in large part, on the notion that lack of FDA approval shows there is no medical consensus regarding this care. *Id.* at *4. But courts have rejected that notion, because off-label use of drugs is widely accepted in the medical profession. *Dekker*, 2023 WL 4102243, at *19. Antibiotics, antihistamines, and antidepressants, for instance, are all used "off-label" in pediatrics. (Olson-Kennedy Decl. ¶¶ 71–72.)

In fact, the same Montana Legislature that passed the Act also passed SB 422, which amended the state's Right to Try statute to significantly expand Montanans' access to "experimental medications," including "off-label" use of medications approved for general use by the FDA. *See* S. 422, 2023 Leg., 68th Sess. (Mont. 2023), *available at* https://leg.mt.gov/bills/2023/sesslaws/ch0413.pdf.

Further, the Sixth Circuit's sex discrimination analysis primarily cites the U.S. Supreme Court's 1971 decision in *Reed v. Reed*, but ignores the Court's more recent declarations that "all gender-based classifications today warrant heightened scrutiny," *Virginia*, 518 U.S. at 555 (quotation marks omitted); *see also Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017).

On July 14, 2023, the U.S. District Court for the Western District of Kentucky, which had recently preliminarily enjoined Kentucky officials from enforcing a similar gender-affirming care ban, stayed its earlier injunction in light of the Sixth Circuit's decision in *L.W. Doe 1 v. Thornbury*, No. 3:23-cv-230-DJH-RSE, slip op. at 2–3. (W.D. Ky. July 14, 2023). While the district court noted that the Sixth Circuit did not stay the decision in *Thornbury*, despite having consolidated it with *L.W.* for the purpose of appeal, and that the Kentucky law differed materially from the Tennessee law in *L.W.*, the district court stayed the decision pending a ruling on the merits of the appeal in the consolidated matter before the Sixth Circuit. *Id.*

II. Plaintiffs Will Suffer Irreparable Injury.

Plaintiffs will suffer irreparable injury because of the Act. "Irreparable harm" is "harm for which there is no adequate legal remedy." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). This includes constitutional harm and "severe, ongoing psychological distress and the high risk of . . . suicide" related to gender dysphoria. *Edmo v. Corizon, Inc.*, 935 F.3d 757, 797–98 (9th Cir. 2019); *Mont. Cannabis Indus. Ass'n*, ¶ 15; *Weems v. State ex rel. Fox* (*Weems I*), 2019 MT 98, ¶ 25, 395 Mont. 350, 363, 440 P.3d 4, 13. Absent a preliminary injunction, Plaintiffs will suffer irreparable harm in at least two ways.

First, "the loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *See Mont. Cannabis Indus. Ass'n*, ¶ 15; *Weems I*, ¶ 25 ("We have recognized harm from constitutional infringement as adequate to justify a preliminary injunction."). Plaintiffs have demonstrated that the Act infringes on the constitutional rights of equal protection, parental rights, privacy, health, dignity, and free expression, and have accordingly demonstrated irreparable injuries.

Second, absent an injunction, transgender youth like the minor Plaintiffs here are at risk of facing the "severe, ongoing psychological distress and the high risk of . . . suicide" related to gender dysphoria, which unquestionably constitutes irreparable harm. *See Edmo*, 935 F.3d at 797–98 (holding deprivation of a plaintiff's constitutional right to adequate medical care causes irreparable harm); *see also Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1192 (N.D. Cal. 2015) (finding plaintiff was suffering irreparable harm where she experienced "continued and 'excruciating' 'psychological and emotional pain' as a result of her gender dysphoria"); *Porretti v. Dzurenda*, 11 F.4th 1037, 1050 (9th Cir. 2021) (finding district court did not abuse its discretion in determining that "injuries and risks of

additional harm to [plaintiff]'s mental health likely constituted irreparable harm"). The Act threatens to destroy their lives, and some may not survive its enforcement.

Other courts have found that the denial of access to gender-affirming care causes irreparable harm, including by:

- forcing the "unwanted and irreversible onset and progression of puberty in [plaintiffs'] natal sex." *Ladapo*, 2023 WL 3833848, at *16;
- causing physical and psychological harm to patient plaintiffs, to parent plaintiffs through watching their child experience physical and emotional pain or uprooting their families, and to physician plaintiffs through "choosing between breaking the law and providing appropriate guidance and interventions." *Brandt*, 551 F. Supp. 3d at 892;
- causing "severe medical harm, including anxiety, depression, eating disorders, substance abuse, self-harm, and suicidality" and "significant deterioration in their familial relationships and educational performance." *Eknes-Tucker*, 603 F. Supp. 3d at 1150;
- eliminating "treatments that have already significantly benefited . . . plaintiffs and prevent other transgender children from accessing those beneficial treatments in the future." *Thornbury*, 2023 WL 4230481, at *6;[16] and
- harming physical and mental health because "there's evidence that puberty blockers and cross-sex hormone therapy reduces distress for some minors diagnosed with gender dysphoria." *K.C.*, 2023 WL 4054086, at *13.

The Plaintiffs here will face all these irreparable harms if the Act goes into effect. The minor Plaintiffs will be stripped of their ability to receive medically necessary care that is critical to their health and well-being. (Scarlet van Garderen

[16] Neither the Sixth Circuit's stay order in *L.W.* nor the district court's stay order in *Thornbury* questioned or even discussed the findings of irreparable harm upon which the preliminary injunctions in both cases relied. *L.W.*, 2023 WL 4410576; *Thornbury*, slip op. at 1–2.

Dec. ¶¶ 13–14; Phoebe Cross Dec. ¶¶ 15, 20–21.) The parent Plaintiffs will have to contemplate drastic measures to allow their children to continue receiving necessary health care, including the possibility of leaving Montana if feasible, or else face the devastating consequences of being forced to terminate this care. (Jessica van Garderen Dec. ¶¶ 13–14; Paul Cross Dec. ¶ 18; Jane Doe Dec. ¶¶ 33–34.) The provider Plaintiffs will be faced with the harm of no longer being able to provide the appropriate care and guidance for their patients without risk of breaking the law. (Hodax Dec. ¶¶ 16–18; Mistretta Dec. ¶¶ 12–14.)

III. The Balance of Hardships Tips Sharply in Plaintiffs' Favor, and the Injunction Would Serve the Public Interest.

When "the government opposes a preliminary injunction, the third and fourth factors merge into one inquiry." *Porretti*, 11 F.4th at 1047. If the balance of hardship or equities tips sharply in a plaintiff's favor and the injunction would be in the public interest, a preliminary injunction is justified. *See All. for the Wild Rockies*, 632 F.3d at 1137. And "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

As discussed above, Plaintiffs would suffer irreparable harm and the balance of hardships then tips sharply in Plaintiffs' favor. In contrast to the severe and irreparable ongoing constitutional injuries that Plaintiffs would face under the Act, the State will suffer no harm at all if enjoined from enforcing the Act.

Additionally, injunctive relief would serve the public interest by preventing the violation of several of Plaintiffs' constitutional rights, as detailed above. *See also Brandt*, 2023 WL 4073727, at *38. Granting a preliminary injunction would prevent irreparable harm to Plaintiffs, further the public interest, and cause the State no harm or inconvenience whatsoever. The preliminary injunctive relief

Plaintiffs seek is thus appropriate, warranted, and necessary under the standards set forth under Montana law.

IV. Plaintiffs Should Not Be Required to Post a Bond.

Although an injunction bond may be required "for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained," it may be waived in the interests of justice. § 27–19–306(1), MCA. Here, Defendants do not stand to suffer any pecuniary harm if a preliminary injunction is entered. Therefore, no bond should be required.

CONCLUSION

FOR THESE REASONS, Plaintiffs Scarlet van Garderen, Jessica van Garderen, Ewout van Garderen, Phoebe Cross, Molly Cross, Paul Cross, Jane Doe, John Doe, Dr. Juanita Hodax, and Dr. Katherine Mistretta respectfully request the entry of an order:

(a) preliminarily enjoining Defendants, as well as their agents, employees, representatives, and successors, from enforcing the Act, directly or indirectly; and

(b) granting any other relief the Court deems just.

Dated: July 17, 2023

Respectfully submitted,

By: /s/ Akilah Deernose
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Electronically signed by Krystel Pickens on behalf of Akilah Deernose
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I, Akilah Maya Deernose, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Brief In Support of Motion to the following on 07-17-2023:

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