STATE OF NORTH DAKOTA **IN DISTRICT COURT**

COUNTY OF BURLEIGH **SOUTH CENTRAL JUDICIAL DISTRICT**

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

Plaintiffs,

v.

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

Defendants.

Case No. 08-2023-CV-2189

ORDER DENYING PRELIMINARY INJUNCTION

Procedural History

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

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

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

[¶3] The Court held a hearing on the *Motion for Preliminary Injunction* on January 19, 2024. At the hearing six individuals testified, four for the Plaintiffs – Dr. Casas, Dr. Gabriela Balf, T.D., and Peter Roe – and two for the State – Dr. James Cantor and Dr. Michael Laidlaw. The Court received 73 exhibits into evidence from the Plaintiffs. (R:186-263). The Court received ten exhibits from the Defendants. (R:166-185). After hearing all of the evidence, the Court allowed the parties to supplement their arguments with post-hearing briefs. The Plaintiffs and the Defendants both submitted closing arguments. (R:276; R:278). A transcript was also completed from the testimony received at the evidentiary hearing. (R:267; R:268).

Legislative History

[¶4] During the 2023 Legislative Assembly, the North Dakota House of Representatives and Senate passed House Bill 1254, containing the legislation at issue in this case. The bill was signed by North Dakota Governor, Doug Burgum, and became law on April 21, 2023. The bill had an emergency clause making it effective immediately. North Dakota Century Code chapter 12.1-36.1, ("the Health Care Law"), codified House Bill 1254 and contained four sections. The body of the chapter is contained within N.D.C.C. § 12.1-36.1-02 which states:

1. Except as provided under section 12.1-36.1-03, if a minor's perception of the minor's sex is inconsistent with the minor's sex, a health care provider may not engage in any of the following practices for the purpose of changing or affirming the minor's perception of the minor's sex:
    a. Perform castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, or vaginoplasty;
    b. Perform a mastectomy;

c. Prescribe, dispense, administer, or otherwise supply any drug that has the purpose of aligning the minor's sex with the minor's perception of the minor's sex when the perception is inconsistent with the minor's sex, including:
   (1) Puberty-blocking medication to stop normal puberty;
   (2) Supraphysiologic doses of testosterone to females; or
   (3) Supraphysiologic doses of estrogen to males; or
d. Remove any otherwise healthy or nondiseased body part or tissue, except for a male circumcision.

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

[¶5] Section 12.1-36.1-03 contains the exceptions to N.D.C.C. § 12.1-36.1-02. It states N.D.C.C. § 12.1-36.1-02 does not apply:

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

[¶6] The Plaintiffs filed their *Complaint* after implementation of the Health Care Law alleging the Health Care Law is unconstitutional based upon: 1) equal protection; 2) fundamental right to parent; 3) right to personal autonomy and self-determination; 4) procedural due process; and 5) unconstitutional vagueness. (R:2).

Legal Analysis

[¶7] At the outset, the Court would note N.D.C.C. § 12.1-36.1-02(1) lists four categories of prohibited acts. The Plaintiffs acknowledge that "[u]nder the WPATH standards of care, transgender young people may also receive medically necessary chest reconstructive surgeries before the age of majority, provided the young person has lived in their affirmed gender for a significant period of time." (R:2:14:52). "Genital surgery is

not recommended until patients reach the age of majority, and providers in North Dakota do not provide minors with genital surgery to treat gender dysphoria." Subsection 1(a) to N.D.C.C. § 12.1-36.1-02 prohibits "...castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, or vaginoplasty..." "for the purpose of changing or affirming the minor's perception of the minor's sex." This portion of the Health Care Law is therefore consistent with the identified standards of care. The Plaintiffs acknowledge these surgeries are not occurring in North Dakota.

[¶8] "A court may decide the merits of a dispute only if the parties demonstrate they have standing to litigate the issues." *Whitecalfe v. N. Dakota Dep't of Transp.*, 2007 ND 32, ¶ 15, 727 N.W.2d 779 (citing *Kjolsrud v. MKB Mgmt. Corp.*, 2003 ND 144, ¶ 13, 669 N.W.2d 82). "Standing is the concept used to determine if a party is sufficiently affected so as to ensure that a justiciable controversy is presented to the court." *Id.* (internal quotations omitted). "The litigant must have an interest, either in an individual or representative capacity, in the cause of an action, or a legal or equitable right, title, or interest in the subject matter of the controversy in order to invoke the jurisdiction of the court." *Id.* (citing *Nodak Mut. Ins. Co. v. Ward County Farm Bureau,* 2004 ND 60, ¶ 11, 676 N.W.2d 752). As genital surgery is not recommended under the identified standards of care, and are not being performed in North Dakota, the Plaintiffs lack standing to challenge subsection 1(a) to section 12.1-36-02.1.

[¶9] Regarding the other provisions of the Health Care Law, N.D.C.C. § 32-06-02 outlines when the Court may issue an injunction, including: "[w]hen, during the litigation, it shall appear that the defendant is doing or threatening, or is about to do, or is procuring or suffering, some act to be done in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual[.]" Before deciding whether to grant a preliminary injunction, a trial court must consider four factors: "(1) substantial probability of succeeding on the merits; (2) irreparable injury; (3) harm to other interested parties; and (4) effect on the public interest." *Nodak Mut. Ins. Co. v. Ward County Farm Bureau*, 2004 ND 60, ¶ 24, 676 N.W.2d 752.

[¶10] "Generally, 'a preliminary injunction is an extraordinary and drastic remedy and should not be granted unless the movant, by a clear showing, carries the burden of

persuasion.'" *Vorachek v. Citizens State Bank of Lankin*, 461 N.W.2d 580, 585 (N.D. 1990) (quoting 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2948, at 428 (1973)). The most important prerequisite for the issuance of a preliminary injunction is a demonstration that, if the preliminary injunction is not granted, the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." *Id.* Additionally, "the purpose of a temporary or preliminary injunction 'is to maintain the cause in status quo until a trial on the merits.'" *State v. Holecek*, 545 N.W.2d 800, 804 (N.D. 1996) (quoting *Gunsch v. Gunsch*, 69 N.W.2d 739, 745 (N.D. 1954)). The ultimate "decision to grant or deny a preliminary injunction is within the discretion of the trial court[.]" *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 406 (N.D. 1992).

1) Substantial Likelihood of Succeeding on the Merits

[¶11] As outlined above, the Plaintiffs seek relief from N.D.C.C. chapter 12.1-36.1 arguing the Health Care Law is unconstitutional on the grounds of 1) fundamental right to parent; 2) personal autonomy and self-determination; 3) equal protection; 4) procedural due process; and 5) unconstitutional vagueness. The Court will address each of these claims in determining the Plaintiffs' substantial likelihood of succeeding on the merits.

a) Fundamental Right to Parent

[¶12] The North Dakota Supreme Court has stated "[i]n interpreting constitutional provisions, we apply general principles of statutory construction." *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 25, 855 N.W.2d 31. (citing *Thompson v. Jaeger*, 2010 ND 174, ¶ 7, 788 N.W.2d 586). "Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional provision." *Id.* (citing *City of Bismarck v. Fettig*, 1999 ND 193, ¶ 8, 601 N.W.2d 247). "The intent and purpose of constitutional provisions are to be determined, if possible, from the language itself." *Id.* (citing *Thompson*, 2010 ND 174 at ¶ 7). "In construing constitutional provisions, [the Supreme Court] ascribe[s] to the words the meaning the framers understood the provisions to have when adopted." *Id.* (citing *Kadrmas v. Dickinson Pub. Schs.*, 402 N.W.2d 897, 899 (N.D. 1987)). "We may consider contemporary legal practices and laws in effect when the people adopted the constitutional provisions." *Id.* (citing *State v. Orr*, 375 N.W.2d 171, 177-78 (N.D. 1985)).

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

[¶14] "North Dakota Constitution article I, section 1 was enacted in 1889 when North Dakota was admitted as a state to the Union." *Wrigley*, 2023 ND 50 at ¶ 22. "Section 1 provides, in part, '[a]ll individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness[.]'" *Id.* (quoting N.D. Const. art. I, § 1). "The North Dakota Constitution explicitly provides all citizens of North Dakota the right of enjoying and defending life and pursuing and obtaining safety." *Id.* "...[T]he language in N.D. Const. art. I, § 1, embodies the essence of 'self-evident truths,' and the term 'liberty' includes 'in general, the opportunity to do those things which are ordinarily done by free men.'" *MKB Management Corp.*, 2014 ND 197 at ¶ 27 (quoting *State v. Cromwell*, 72 N.D. 565, 573, 9 N.W.2d 914 (1943)). "[The North Dakota Supreme Court] has recognized the due process language in N.D. Const. art. I, § 12 'protects and insures the use and enjoinment of the rights declared' by N.D. Const. art. I, § 1." *Id.* at ¶ 26 (quoting *Cromwell*, at 574-575).

[¶15] "[P]arents have a fundamental, natural right to their children, including the right of companionship, which is of constitutional dimension." *State v. Ehli*, 2003 ND 133, ¶ 7, 667 N.W.2d 635. "[The North Dakota Supreme Court] has often addressed the

constitutional nature of parents' rights in making decisions in the course of raising their children." *Hoff v. Berg*, 1999 ND 115, ¶ 10, 595 N.W.2d 285. "A parent's paramount and constitutional right to the custody and companionship of their children is superior to that of any other person." *Id.* (internal citations omitted). "Keeping State intervention in the matter of child rearing to a minimum, consistent with necessity, is essential to the American ideal." *Id.* (quoting *In re R.D.S.,* 259 N.W.2d 636, 639 (N.D. 1977)). "[P]arents have a fundamental right to autonomy in child rearing decisions." *Id.* at ¶ 11 (quoting *In re Smith*, 969 P.2d 21, 27 (WA 1998)). "'The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment.'" *Id.* (quoting *In re Smith,* 969 P.2d at 31). "Ordinarily, 'parents should be the ones to choose whether to expose their children to certain people or ideas.'" *Id.*

[¶16] "It is beyond question in this jurisdiction that parents have a fundamental constitutional right to parent their children which is of the highest order." *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 564 (N.D. 1993) (internal citations omitted). The North Dakota Supreme Court has consistently applied strict scrutiny to legislative acts that infringe upon the right to parent. *See Kulbacki v. Michael,* 2014 ND 83, ¶ 6, 845 N.W.2d 625; *Hoff,* 1999 ND 115, ¶ 16, 595 N.W.2d 285 (holding "...we employ strict scrutiny when analyzing statutory intrusions on parents' fundamental right to control their children's associations"); *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 565 (N.D. 1993) (stating "[o]nly a compelling state interest justifies burdening the parent's fundamental right to enjoy a relationship with his or her child, and the state must bear the burden of demonstrating the necessity for doing so in this instance"). "...[T]he state bears the burden of proving that such deprivation is narrowly tailored to a compelling state interest." *Hoff*, 1999 ND 115 at ¶ 9. The North Dakota Supreme Court has stated:

> Generally, a statute is narrowly tailored, for purpose of determination whether it survives strict scrutiny review, only if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. As with the compelling interest determination, whether or not a regulation is narrowly tailored for purposes of a strict scrutiny analysis is evidenced by factors of relatedness between the regulation and the stated governmental interest.

MKB Mgmt. Corp., 2014 ND 197 at ¶ 100 (quoting 16A Am.Jur.2d *Constitutional Law* § 403 (2009).

[¶17] "[The right to parent] is not, however, absolute and unconditional, and it may be curtailed or suspended if harmful to the child." *State v. Ehli*, 2003 ND 133, ¶ 7, 667 N.W.2d 635 (internal citations omitted). The expansive rights under N.D. Const. art. I, § 1 are "...limited by the police power to impose such restrictions upon private rights as are practically necessary for the general welfare of all." *MKB Management Corp.*, 2014 ND 197 at ¶ 28 (quoting *Johnson v. Elkin*, 263 N.W.2d 123, 128-129 (N.D. 1978)). "...[P]arents must provide care that satisfies minimum community standards." *In re C.R.C.*, 2001 ND 83, ¶ 6, 625 N.W.2d 533.

[¶18] The Defendants argue in their *Post Hearing Brief* "...there has never been a decision that extended [the right to parent] to include an absolute right for a parent to consent to, and therefore obtain any desired medicate treatment the parent wants to be performed on their child." (R:276:29:63). The Plaintiffs counter that they are not arguing the right to parent includes the right to obtain any medical care desired. *Id.* Rather, they are arguing "the right to parent protects them from government infringement on their right to consent to medical care in collaboration with their child when that care is consistent with the 'applicable standard of care' for treating a condition." (R:278:14:28).

[¶19] "The prominent late nineteenth century American legal scholar Thomas Cooley cautioned against mistaking a state constitution's recognition of a right as being the source..." *Wrigley,* 2023 ND 50 at ¶ 49 (McEvers, J. concurring). Professor Cooley stated:

> In considering State constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed.

Id. (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union,* *36 (2d ed. 1871)). "Professor Cooley explained a constitution 'grants no rights to the people,' but instead is '[d]esigned for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made.'" *Id.*

[¶20] The fundamental right to parent, therefore, does not require a judicial determination to expand its boundaries. It can only be limited by judicial decision. The

Court finds the Health Care Law implicates the fundamental right to parent. Specifically, a parent's right to make informed medical decisions for their child regarding the treatment of gender dysphoria consistent with recognized standards of care. This is particularly true when viewed in conjunction with the right to personal autonomy and self-determination. Strict scrutiny applies and the State must prove N.D.C.C. chapter 12.1-36.1 is narrowly tailored to a compelling state interest. The Defendants assert "the State maintains the ability to regulate the medical profession..." and the purpose of the Health Care Law is "to protect the health and well-being of minors within the State." (R:276:29:64; R:276:30:66).

[¶21] The State has the authority to regulate the medical profession. *See Harrie v. Kirkham, Michael & Assocs., Inc.*, 179 N.W.2d 413, 415 (N.D. 1970) (stating the profession of architecture should be treated like the professions of medicine, dentistry, and law and the State in the exercise of its police power may regulate these professions). "While the limit of police power cannot be defined accurately . . . it is subject to constitutional limitations." *State ex rel. Cleveringa v. Klein*, 249 N.W. 118, 126 (N.D. 1933). The police power "'is not to be arbitrarily or colorably exercised or used as a subterfuge for oppressing some individual or class of individuals.'" *Cofman v. Ousterhous*, 168 N.W. 826, 830 (N.D. 1918) (Christianson, J. dissenting) (quoting 9 Ency. U. S. Supreme Court Reports, 523).

[¶22] To support their position, the Defendants rely heavily upon the Sixth Circuit Court of Appeals decision in *L.W. by and through Williams v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023). In March 2023, Tennessee passed laws "ban[ning] certain medical treatments for minors with gender dysphoria." *Skrmetti*, 73 F.4th 408 at 413. "Three transgender minors, their parents, and a doctor sued several state officials, claiming the Act violated the United States Constitution's guarantees of due process and equal protection." *Id.* They moved for a preliminary injunction which the district court granted in part. *Id.* "[The District Court] concluded that the challengers lacked standing to contest the ban on surgeries but could challenge the ban on hormones and puberty blockers." *Id.* at 413-414. The district court found the ban infringed upon parents' fundamental right to direct the medical care of their children, improperly discriminated based on sex, and transgender persons constitute a quasi-suspect class. *Id.* at 414. Tennessee appealed. *Id.*

[¶23] The Sixth Circuit reversed. The Sixth Circuit noted "[t]he challengers have not shown that a right to new medical treatments is 'deeply rooted in our history and traditions' and thus beyond the democratic process to regulate." *Id.* at 417 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 727, 117 S. Ct. 2258 (1997)). "That many members of the medical community support the plaintiffs is surely relevant . . . [b]ut it is not dispositive." *Id.* at 416. "At all events, the medical and regulatory authorities are not of one mind about using hormone therapy to treat gender dysphoria." *Id.* "Else, the FDA would by now have approved the use of these drugs for these purposes" and "[t]hat has not happened..." *Id.* "No Supreme Court case extends [the right to parent] to a general right to receive new medical or experimental drug treatments." *Id.* "Gender-affirming procedures often employ FDA-approved drugs for non-approved, 'off label' uses." *Id.* at 418. "It is well within a State's police power to ban off-label uses of certain drugs." *Id.*

[¶24] The Eleventh Circuit Court of Appeals reached a similar decision in *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023). In 2022, Alabama banned the prescription or administration of puberty blocking medication or cross-hormone treatment for minors. *Eknes-Tucker*, *Id.* at 1210. "Shortly after the Act was signed into law, a group of transgender minors, their parents, and other concerned individuals challenged the Act's constitutionality, claiming that it violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment." *Id.* The district court granted a preliminary injunction enjoining Alabama from enforcing portions of the law. *Id.*

[¶25] The Eleventh Circuit reversed. The Eleventh Circuit stated "...the use of these medications in general—let alone for children—almost certainly is not 'deeply rooted' in our nation's history and tradition. *Id.* at 1220. "Although there are records of transgender or otherwise gender nonconforming individuals from various points in history, the earliest-recorded uses of puberty blocking medication and cross-sex hormone treatment for purposes of treating the discordance between an individual's biological sex and sense of gender identity did not occur until well into the twentieth century." *Id.* at 1220-1221. "[T]here is no binding authority that indicates that the general right to make decisions concerning the care, custody, and control of [one's] children' includes the right to give one's children puberty blockers and cross-sex hormone treatment." *Id.* "[T]hose decisions

applying the fundamental parental right in the context of medical decision-making do not establish that parents have a derivative fundamental right to obtain a particular medical treatment for their children as long as a critical mass of medical professionals approve." *Id.* at 1224. "Moreover, all of the cases dealing with the fundamental parental right reflect the common thread that states properly may limit the authority of parents where 'it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.'" *Id.* (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233–34, 92 S.Ct. 1526 (1972)). "...[W]ithout any historical analysis specifically tied to the medications at issue, Plaintiffs have not shown it to be likely that the Due Process Clause of the Constitution guarantees a fundamental 'right to treat [one's] children with transitioning medications subject to medically accepted standards.'" *Id.* (quoting *Skrmetti*, 73 F.4th 408 at 416-17).

[¶26] Other Courts have viewed bans on the medical treatment of minors with gender dysphoria differently. In *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 887 (E.D. Ark. 2021) the United States District Court for the Eastern District of Arkansas dealt with a 2021 Arkansas law that prohibited healthcare providers from referring any minor for "gender transition procedures." The District Court stated the law "...bans potentially life-saving treatment to transgender adolescents given in accordance with widely accepted medical protocols for treatment of adolescent gender dysphoria." *Brandt*, 551 F. Supp. 3d 882 at 890. "At this point in the proceedings, the Court finds that Act 626 is not substantially related to protecting children in Arkansas from experimental treatment or regulating the ethics of Arkansas doctors and Defendant's purported health concerns regarding the risks of gender transition procedures are pretextual." *Id.* at 891. The district court denied the State's motion to dismiss and granted a preliminary injunction. *Id.* at 894. The United States Court of Appeals for the Eighth Circuit affirmed the preliminary injunction holding "[w]e find no clear error in the district court's weighing of the competing evidence." *Brandt by & through Brandt v. Rutledge*, 47 F.4th 661, 670 (8thCir. 2022).

[¶27] Similarly, the United States District Court for the Northern District of Georgia determined "...the medical risks and benefits of hormone therapy shows that a broad ban on the treatment is not substantially likely to serve the state's interest in protecting children." *Koe v. Noggle*, 2023 WL 5339281, at *19 (N.D. Ga. 2023). "...[E]very medical

treatment carries risks…" and "[h]ormone therapy is no different…" *Id.* The benefits of medical treatment "…include improved mental health outcomes caused by the relief of distress including but not limited to reduced suicidality and self-harm, reduced anxiety and depression, and improved social and psychological functioning." *Id.* at *20. "A ban on hormone therapy would deprive patients of the possibility of these benefits." *Id.* The District Court granted a preliminary injunction. *Id.* at *31.

[¶28] The United States District Court for the District of Idaho reached a similar conclusion. In addressing Idaho's ban on the medical treatment of minors with gender dysphoria, the District Court found:

> (1) the medical treatments banned by HB 71 have a long history of safe use in minors for various conditions and are supported by medical evidence that has been subjected to rigorous study; (2) the medications and procedures used in gender-affirming medical care (such as puberty blockers, hormones, and mastectomies) are used to treat cisgender adolescents for other purposes; (3) gender-affirming medical care raises risks comparable to risks associated with other types of medical care families are free to seek for minors; (4) gender-affirming medical care improves the wellbeing of some adolescents with gender dysphoria, and delaying or withholding such care can be harmful, potentially increasing depression, anxiety, self-harm, and suicidal ideation; and (5) adolescents with gender dysphoria are unlikely to later identify as their birth sex.

Poe by & through Poe v. Labrador, 2023 WL 8935065 *5 (D. Idaho 2023). The District Court acknowledged "[a]t a general level, safeguarding the physical wellbeing of children is of course important." *Id.* at *14. "But in this case, the Court finds that the asserted objective is pretextual, given that HB 71 allows the same treatments for cisgender minors that are deemed unsafe and thus banned for transgender minors." *Id.* The District Court granted a preliminary injunction. *Id.* at *19.

[¶29] The United States District Court for the Northern District of Florida reached a similar conclusion in *Doe v. Ladapo*, 676 F. Supp. 3d 1205 (N.D. Fla. 2023). Florida passed a statute and rules prohibiting transgender minors from receiving specific kinds of medical care and doctors from providing it. *Ladapo*, 676 F. Supp. 3d 1205 at 1209. In its order granting a preliminary injunction, the District Court stated "[g]ender identity is real." *Id.* at 1211. "There are well-established standards of care for treatment of gender

dysphoria." *Id.* at 1212. "The overwhelming weight of medical authority supports treatment of transgender patients with GnRH agonists and cross-sex hormones in appropriate circumstances." *Id.* at 1213. The District Court labeled the "...laundry list of purported justifications for the statute and rule" as "pretextual." *Id.* at 1221-1222. "...[T]here are risks attendant to treatment with GnRH agonists and cross-sex hormones." *Id.* at 1222. "There are also substantial benefits for the overwhelming majority of patients treated with GnRH agonists and cross-sex hormones." *Id.*

[¶30] The Court references these federal cases for the sole purpose of illuminating the lack of consistency regarding state bans on the medical treatment of minors with gender dysphoria. The courts, like the states themselves, are "all-over-the-map" regarding laws related to gender dysphoria. *Skrmetti*, 73 F.4th 408 at 416. Further, these federal courts examined state health care bans under the United States Constitution. The Plaintiffs have made the conscious decision to bring their claims under the North Dakota Constitution.

[¶31] Gender dysphoria is a recognized mental health condition. It is included in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders Fifth Edition* or *DSM-5-TR*. (R:206). It is "[a] marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least six [criteria]." *Id.* These criteria include: a strong desire to be the other gender or an insistence that one is the other gender; crossdressing; a strong preference for cross-gender roles in make-believe play or fantasy play; a strong preference for toys, games, or activities stereotypically used or engaged in by the other gender; a strong preference for playmates of the other gender; a strong rejection of toys, games, and activities associated with the assigned gender; a strong dislike of one's sexual anatomy; and a strong desire for the sex characteristics of one's experienced gender. *Id.*

[¶32] The Defendants argue "[t]here is no objective verification for gender dysphoria." (R:276:8:19). To the extent this suggests gender dysphoria is not an actual mental health condition it is unavailing. The Court is not aware of any laboratory tests for schizophrenia, bipolar disorder, narcissistic personality disorder, or any other mental health condition.

[¶33] Clearly, there are benefits to medically treating minors with gender dysphoria. At the preliminary injunction hearing, Plaintiff, Dr. Luis Casas, a pediatric endocrinologist, testified that research suggests adolescents who receive gender-affirming care are at a

lesser risk of self-harm or suicide. (R:267:48:7-10). Psychiatrist, Dr. Gabriella Balf, testified studies have shown adolescents with gender dysphoria who are treated with puberty blockers, have improved body image, lower depression, and improved quality of life. (R:267:106:3-10). One referenced study showed suicidal ideation dropped from 41 percent to 4 percent with the use of puberty blockers.

[¶34] There are also risks associated with this treatment. Some of these risks are inherent with all medications. (R:267:41:17-21). Dr. Casas testified the injections could be painful and there was a risk of abscess formations at the site of injection. (R:267:41:22-25). There could be potential changes in weight and headaches. (R:267:42:1).

[¶35] Specific to medications used to treat gender dysphoria, prescribing testosterone carries a risk of acne, polycythemia, and changes in cholesterol and liver enzyme production. (R:267:42:20-25). Prescribing estrogen carries the risk of blood clotting, weight gain, and breast tenderness. (R:267:43:1-4). Dr. Michael Laidlaw, an endocrinologist, testified at the preliminary injunction hearing and described the use of puberty blockers and cross sex hormones in adolescents as "experimental." (R:268:256:12). Dr. Laidlaw testified using puberty blockers to treat minors with gender dysphoria could impact bone density and increase the risk of bone fractures later in life. (R:268:258:14-25; R:268:259:1-7). Dr. Laidlaw stated the use of medications for the treatment of adolescents with gender dysphoria would cause infertility. (R:268:256:12-25).

[¶36] The Plaintiffs argue puberty blockers have long been used to treat other conditions such as precocious puberty. (R:9:11:21). For example, Plaintiff, T.D., was diagnosed with precocious puberty and began taking puberty blockers before receiving them as treatment for gender dysphoria. (R:10:2:11-13). The Court appreciates the argument that if the medications are safe for the treatment of one condition they are necessarily safe for treatment of another. However, this argument has its flaws. For the treatment of precocious puberty, the puberty inhibiting medications are taken for a finite period. At some point the medications are discontinued and the minor is allowed to go through puberty. When these same medications are used for the treatment of gender dysphoria they are taken for the purpose of preventing puberty all together.

[¶37] The Plaintiffs and the Amici, 21 professional medical and mental health organizations, argue "gender-affirming care is the appropriate treatment for gender dysphoria and that, for some adolescents, gender affirming medical interventions are necessary" consistent with the guidelines established by the Endocrine Society and the World Professional Association for Transgender Health. (R:278:3:5). However, the parties disagree about the research behind these guidelines and the existence of an international consensus. Dr. James Cantor, a psychologist, testified "there's no clear consensus" on the best model of care for adolescents experiencing gender incongruence or dysphoria. (R:268:202:1-15). He described the United States as "an outlier amongst the international scientific community." (R:268:202:1). Dr. Cantor testified there was an enormous amount that had not been studied. (R:268:205:1-14). Specific examples cited were the long-term impacts of puberty blockers and cross-sex hormones on bone density, fertility, and neurocognitive development. (R:268:205:3-14; 263:209:15-211:17).

[¶38] In her written rebuttal, Dr. Balf disagreed with much of Dr. Cantor and Dr. Laidlaw's testimony. (R:264). Dr. Balf indicated the use of puberty blockers for the treatment of gender dysphoria has been studied since the 1980s and unequivocally establishes favorable mental health outcomes. (R:264:1). Dr. Balf argued the side effects of puberty blockers have been extensively studied. (R:264:3). However, during her testimony at the preliminary injunction hearing, Dr. Balf acknowledged "[t]here are things we don't know that well, things that we don't know much of, and things we know quite well." (R:267:119:19-20). This statement summarizes the evidence presented to the Court at this point regarding the medical treatment of minors with gender dysphoria.

[¶39] Parties seeking a preliminary injunction bear the burden of establishing a substantial probability of succeeding on the merits of at least one of their claims. Inherent in article I, section 1 of the North Dakota Constitution is the fundamental right of parents to make child rearing decisions. This right is not absolute or unconditional and may be curtailed if harmful to the child. However, any infringement upon the right to parent triggers strict scrutiny. The State bears the burden of proving such deprivation is narrowly tailored to a compelling state interest.

[¶40] Here, the compelling interest proffered by the State is its authority to regulate the medical profession. While the State has the authority to regulate the medical profession

this police power also has limits. The Plaintiffs argue the Health Care Law infringes upon the fundamental right to parent. They have identified an established right under the North Dakota Constitution and their claim is cognizable. The Plaintiffs may ultimately be successful in their challenge.

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

[¶42] At this stage in the proceedings, the Court cannot find there has been a clear showing the Plaintiffs are *substantially* likely to succeed on their claim the Health Care Law violates the fundamental right to parent.

b) Right of Personal Autonomy and Self-Determination

[¶43] "Anglo–American law starts with the premise of thorough-going self-determination. It follows that each man is considered to be master of his own body and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment." *Natanson v. Klein,* 350 P.2d 1093, 1104 (K.S. 1960). "A competent person has a constitutionally protected liberty interest to refuse unwanted medical treatment." *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358, 360 (N.D. 1995) (citing *Cruzan v. Director, Missouri Dept. of Health,* 497 U.S. 261, 278, 110 S.Ct. 2841, 2851 (1990)). "A person's interest in personal autonomy and self-determination is a fundamentally commanding one, with well-established legal and philosophical underpinnings." *Id.* (citing *Thor v. Superior Court (Andrews)*, 855 P.2d 375, 380–383 (G.A. 1993)). "But this right, like other constitutionally protected interests, is not absolute." *Id.* "[W]hether a person's constitutionally protected liberty interest in refusing unwanted medical treatment has been violated must be determined by balancing his

liberty interests against the relevant state interests." *Id.* (internal quotations omitted). The right of personal autonomy and self-determination applies, not only to refusing unwanted medical treatment, but also to making decisions regarding available treatment. *In MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 98, 855 N.W.2d 31 (Kapsner, J., concurring). "When a state statute is alleged to burden a liberty right under the state constitution, [the North Dakota Supreme Court] applies strict scrutiny." *Id.* at ¶ 100 (citing *Hoff*, 1999 ND 115 at ¶ 13). "'Where fundamental rights or interests are involved, a state regulation limiting these fundamental rights can be justified only by a compelling state interest and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.'" *Id.*

[¶44] In the United States, the professional medical community recognizes the use of puberty blockers and cross-sex hormones as the appropriate treatment for gender dysphoria, and that for some adolescents, this care is necessary. (R:128:6:12). The State would have extreme difficulty justifying the Health Care Law if it attempted to ban the medical treatment of adults with gender dysphoria. But, the fact a state may not prohibit an adult from doing something does not mean it cannot do so for children. *See Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S. Ct. 438 (1944). "The state's authority over children's activities is broader than over like actions of adults." *Id.* "The police power and the power as *parens patrice* and the right of the state to exercise such powers for the welfare and protection of infants who are in need of such protection are inherent in the state." *State ex rel. City of Minot v. Gronna*, 59 N.W.2d 514, 539 (N.D. 1953).

[¶45] Minors cannot use alcohol or tobacco, they cannot vote, they are generally prohibited from marrying. These are just a few of the numerous examples of the State treating minors and adults differently in the exercise of its powers.

[¶46] The Plaintiffs may ultimately be successful in their challenge, but the Court cannot find, at this point, there has been a clear showing the Plaintiffs are *substantially* likely to succeed on their claim the Health Care Law violates the right to personal autonomy and self-determination.

c) Equal Protection

[¶47] The equal protection clause in the North Dakota Constitution is contained within Article 1 §§ 21 and 22, stating:

> **Section 21.** No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.
>
> **Section 22.** All laws of a general nature shall have a uniform operation.

[¶48] "The equal protection clauses of the state and federal constitutions do not prohibit legislative classifications or require identical treatment of different groups of people." *State v. Leppert*, 2003 ND 15, ¶ 7, 656 N.W.2d 718. They "... simply [keep] government decisionmakers from treating differently persons who are in all relevant respects alike." *Hamich, Inc. v. State By & Through Clayburgh*, 1997 ND 110, ¶ 31, 564 N.W.2d 640 (citing *Nordlinger v. Hahn,* 505 U.S. 1, 10, 112 S.Ct. 2326 (1992). "Legislative classifications are subject to different standards of scrutiny, depending on the right infringed by the challenged classification." *Leppert*, 2003 ND 15 at ¶ 7.

[¶49] The North Dakota Supreme Court in *Bismarck Public School Dist. No.1 v. State by and Through North Dakota Legislative Assembly*, 511 N.W.2d 247 (N.D. 1994) outlined the standards of judicial scrutiny for claims of equal protection under the North Dakota Constitution:

> When a statute is challenged on equal protection grounds, we first locate the appropriate standard of review. We apply strict scrutiny to an inherently suspect classification or infringement of a fundamental right and strike down the challenged statutory classification unless it is shown that the statute promotes a compelling governmental interest and that the distinctions drawn by the law are necessary to further its purpose. When an important substantive right is involved, we apply an intermediate standard of review which requires a close correspondence between statutory classification and legislative goals. When no suspect class, fundamental right, or important substantive right is involved, we apply a rational basis standard and sustain the legislative classification unless it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose.

Id. at 256 (internal citations and quotations omitted).

[¶50] The Plaintiffs argue North Dakota's equal protection clause is triggered by the Health Care Law because it "[u]nequely burdens transgender adolescents experiencing gender dysphoria for a denial of medically necessary care consistent with prevailing standards of care, while allowing this exact same care to be provided to non-transgender

patients for any reason whatsoever." (R:2:33:140). The Plaintiffs argue, "[b]y singling out who can access specific medications based purely on the sex of the patient, the Health Care ban clearly discriminates on the basis of sex and infringes the fundamental right of equal protection enjoyed by all North Dakotans." (R:278:17:32). The Defendants disagree and argue North Dakota has "never recognized transgender status to be a suspect class." (R:82:12:27). The Defendant argue any discrimination is age based.

[¶51] As the Plaintiffs note, transgender people are not new and existed in North Dakota even prior to statehood. (R:278:1:1). Nevertheless, there is no evidence they were discussed or considered at the North Dakota Constitutional Convention. Prior to 2023 North Dakota had no laws dealing with transgender individuals. While transgender individuals share similar characteristics to groups that have been acknowledged as suspect classes, there is nothing in the history of North Dakota that would lead to the conclusion they would be recognized by the North Dakota Supreme Court as a new suspect class.

[¶52] For the reasons above, the Court finds being transgender is not a protected class and the proper level of scrutiny under an equal protection analysis is rational basis. The North Dakota Supreme Court has described the rational basis standard as:

> Under the rational basis standard of review, a legislative classification will be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest. A classification does not deny equal protection if any state of facts reasonably can be conceived that would sustain it. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial re-examination. A classification with a reasonable basis does not violate the equal protection clause merely because in practice it results in some inequality.
>
> . . . A court need not know the special reasons, motives, or policies of a State legislature in adopting a particular classification, so long as the policy is one within the power of the legislature to pursue, and so long as the classification bears a reasonable relation to those reasons, motives, or policies. The Equal Protection Clause does not demand for purpose or rationale supporting its classification. While a governmental decisionmaker need not have articulated a purpose for a classification, for purposes of judicial review there must be an identifiable purpose that may conceivably or reasonably have been that of the governmental decisionmaker.

Haney v. North Dakota Workers Compensation Bureau, 518 N.W.2d 195, 201 (N.D. 1994) (internal citations and quotations omitted).

[¶53] As previously noted, while there are documented psychological benefits to gender affirming care, there are also potential risks. There is also disagreement regarding the soundness of the research and data available and the potential for unforeseen consequences. The Health Care Law would survive a challenge under the rational basis standard.

d) Procedural Due Process

[¶54] The Plaintiffs' next argument is that the Health Care Law violates Dr. Casas's right to procedural due process. The Plaintiffs argue the Health Care Law deprived Dr. Casas with the opportunity to comply with the Health Care Law and to pursue his profession. Specifically, their argument is the Health Care Law "infringes on Dr. Casas's protected interests because it prohibits him from providing gender-affirming care . . . to his adolescent patients in North Dakota, forcing him to violate the ethics of his profession or risk criminal liability." (R:278:18:35).

[¶55] There are two elements the Plaintiffs need to prove in order to be successful on a procedural due process argument: 1) that a constitutionally protected property or liberty interest is at stake; and 2) whether minimum procedural due process requirements were met, that is, notice and a meaningful opportunity to be heard. *Whitecalfe v. North Dakota Dept. of Transp.*, 2007 ND 32, ¶ 20, 757 N.W.2d 779; *Curtiss v. Curtiss*, 2016 ND 197, ¶ 8, 886 N.W.2d 565. Procedural due process necessitates fundamental fairness. *Matter of Didier*, 2019 ND 263, ¶ 10, 934 N.W.2d 417. If no constitutionally protected interest is involved, the due process requirements are not necessary. *Morell v. North Dakota Dept. of Transp.*, 1999 ND 140, ¶ 8, 598 N.W.2d 111. "Due process is flexible and must be considered on a case-by-case basis. In all cases, the totality of the circumstances must be considered." *State v. Nice*, 2019 ND 73, ¶ 9, 924 N.W.2d 102.

[¶56] The Plaintiffs argue the statutory exception does not invalidate their argument because the clause is unconstitutionally vague. The Court disagrees, as outline below. The statutory exception allows Dr. Casas to continue to treat his minor patients, just as he had been before the passage of the Health Care Law. Additionally, as discussed below in the third factor of preliminary injunctions, harm to other interested parties, the

Plaintiffs have not alleged the presence of other transgender youth in North Dakota, which were diagnosed with gender dysphoria *after* the passage of the Health Care Law who would not fall under the protection of the statutory exception. As such, Dr. Casas's right to procedural due process argument must fail. Dr. Casas has not shown he has been deprived of life, liberty, or a property interest, as the statutory exception would allow him to continue his medical practice without fear of losing his license or be subject to criminal prosecution.

[¶57] Further, although unnecessary to its analysis, the Court finds Dr. Casas has not been deprived of procedural due process because he was given both notice and an opportunity to be heard on the passage of the underlying bill. Dr. Casas, himself, provided testimony to the legislature before it passed the Health Care Law, months before its actual passage. Therefore, Dr. Casas had notice of the bill, as well as the provisions contained within it, and had the extra ability to be heard by the Legislature on his thoughts on the matter. As such, even with the emergency clause, the Court cannot find Dr. Casas has a substantial probability of succeeding on his claim of procedural due process.

e) Unconstitutionally Vague

[¶58] The last argument of the Plaintiffs is that the Health Care Law is unconstitutionally vague on its face. The requirements for finding a statute unconstitutionally vague is well established in North Dakota:

> A law is not unconstitutionally vague if: (1) the law creates minimum guidelines for the reasonable police officer, judge, or jury charged with enforcing the law, and (2) the law provides a reasonable person with adequate and fair warning of the prohibited conduct. A law is not unconstitutionally vague if the challenged language, when measured by common understanding and practice, gives adequate warning of the conduct proscribed and marks boundaries sufficiently distinct for fair administration of the law.

In Interest of D.D., 2018 ND 201, ¶ 12, 916 N.W.2d 765 (internal citation and quotations omitted).

[¶59] Unconstitutionally vague laws, on their face, encourage arbitrary enforcement. *City of Belfield v. Kilkenny*, 2007 ND 44, ¶ 13, 729 N.W.2d 120. Criminal laws must "define the criminal offense with sufficient definiteness that ordinary people can

understand what conduct is prohibited." *Id.* at ¶ 19. In *Kilkenny*, the North Dakota Supreme Court elaborated:

> The mere use of general language does not support a vagueness challenge: the test of definitiveness of a statute is met if the meaning of the statue is fairly ascertainable by reference to similar statutes or to the dictionary, or if the questioned words have common and generally accepted meaning.

Id. Additionally, just like any other statutory interpretation situation, the Court must give the words used in the statute their plain, ordinary, and commonly understood meaning, unless the terms are specifically defined or contrary intention plainly appears. *State v. Ness*, 2009 ND 182, ¶ 8, 774 N.W.2d 254. "Statutes relating to the same subject matter shall be construed together and should be harmonized, if possible, to give meaningful effect to each, without rendering one or the other useless." *Public serv. Comm'n v. Minnesota Grain, Inc.*, 2008 ND 184, ¶ 20, 756 N.W.2d 763.

[¶60] The Plaintiffs argue the portion of the Health Care Law that provides an exception to its enforcement is unconstitutionally vague. Specifically, subsection 2 to N.D.C.C. § 12.1-36.1-03, states the Health Care Law does not apply "[i]f performance or administration of the medical procedure on the minor began before April 21, 2023." The Plaintiffs contend the term "medical procedure" is unconstitutionally vague because it does not adequately provide notice as to what specific type of conduct is permissible under the exception.

[¶61] The Defendants disagree that the Health Care Law is unconstitutionally vague. The Defendants argue, that when the exception contained within N.D.C.C. § 12.1-36.1-03 is read in conjunction with N.D.C.C. § 12.1-36.1-02 the ambiguity is erased.

[¶62] Section 12.1-36.1-03 cannot be read in isolation and must be read in conjunction with N.D.C.C. § 12.1-36.1-02. Section 12.1-36.1-02(1) states the "following practices" are prohibited and identifies four categories. It states a health care provider may not:

> a. Perform castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, or vaginoplasty;
> b. Perform a mastectomy;
> c. Prescribe, dispense, administer, or otherwise supply any drug that has the purpose of aligning the minor's sex with the minor's perception of the minor's sex when the perception is inconsistent with the minor's sex, including:

(1) Puberty-blocking medication to stop normal puberty;
(2) Supraphysiologic doses of testosterone to females; or
(3) Supraphysiologic doses of estrogen to males; or

d. Remove any otherwise healthy or nondiseased body part or tissue, except for a male circumcision.

The term "medical procedure" in N.D.C.C. § 12.1-36.1-03 relates to the "following practices" listed under N.D.C.C. § 12.1-36.1-02. The Court agrees with the interpretation offered by the Defendants that if a minor was receiving *any* of the medical care identified in subsections (1)(a) through (1)(d) of N.D.C.C. § 12.1-36.1-02(1) prior to April 21, 2023, the *entirety* of section 12.1-36.1-02 does not apply to that minor. (R:276:35:78).

[¶63] For minors, like Plaintiffs T.D., James Doe, and Pamela Roe, who were receiving medications for the treatment of gender dysphoria prior to April 21, 2023, they can receive any medical care for the treatment of gender dysphoria that was available in North Dakota prior to enactment of the Health Care Law.

[¶64] Therefore, the Court finds the Plaintiffs do not have a substantial probability of succeeding on the merits of their claim that the Health Care Law is unconstitutionally vague.

2) Irreparable Injury

[¶65] The second factor for the Court's consideration in its decision as to whether to grant a preliminary injunction is the irreparable injury a party will suffer if the preliminary injunction is not granted. The North Dakota Supreme Court, in *Wrigley v. Romanick*, outlined what constitutes an "irreparable injury" as:

> An injury is irreparable when it cannot be adequately compensated in damages, and it is not necessary that the pecuniary damage be shown to be great. Acts which result in a serious change of, or are destructive to, the property affected either physically or in the character in which it has been held or enjoyed, do an irreparable injury.

2023 ND 50, ¶ 34, 988 N.W.2d 231 (quoting *Vorachek v. Citizens State Bank of Lankin*, 461 N.W.2d 580, 585 (N.D. 1990)).

[¶66] The Plaintiffs argue if the Health Care Law is allowed to be enforced during the pendency of this litigation irreparable harm will come to the minor Plaintiffs and Dr. Casas. Specifically, the Plaintiffs argue they will suffer irreparable harm because: 1) gender-affirming medical care has been lifesaving to them and has alleviated suicidality,

self-harm, self-hatred, and other emotional and psychological symptoms; 2) the Plaintiffs have to go through extreme measures to access care in another state; 3) Dr. Casas has had to end his gender-affirming medical care in North Dakota due to the threat of criminal prosecution; 4) the Plaintiffs are experiencing stigmatic, emotional, and psychological harm, through not feeling safe in North Dakota; and 5) the minor Plaintiffs are no longer allowed to begin hormone therapy which would allow them to go through their chosen puberty at the same time as their peers.

[¶67] The vast majority of the Plaintiffs' argument regarding irreparable harm is predicated upon the belief the minor Plaintiffs cannot receive gender-affirming care in North Dakota. (R:278:24:50; R:278:25:51-53). As previously discussed, the Court has found that N.D.C.C. § 12.1-36.1-03 is not unconstitutionally vague. The minor Plaintiffs can receive the same medical care in North Dakota they could have received prior to passage of the Health Care Law.

[¶68] The argument that Dr. Casas is suffering irreparable harm because he is no longer able to offer gender-affirming care in North Dakota does not hold muster. The Court recognizes the minor Plaintiffs may not be the only transgender youth who could be treated by Dr. Casas in North Dakota. Dr. Casas testified some of his patients have stopped seeing him since the Health Care Law was enacted but could not identify the reason. (R:267:75:13-25). He further testified he was not financially impacted by the Health Care Law because "...if I don't see them, I'm seeing somebody else. My clinic is full whether they come or not." (R:267:76:18-20). Therefore, the Court finds Dr. Casas will not personally suffer from being denied a preliminary injunction.

[¶69] For these reasons, the Court finds the Plaintiffs have failed to meet their burden of showing irreparable harm which would justify issuing a preliminary injunction.

3) Harm to Other Interested Parties

[¶70] The third factor relevant to the Court is the harm to other interested parties if the Court does not issue a preliminary injunction. The Plaintiffs argue there are other similarly situated transgender minors and physicians in North Dakota who will suffer harm if the preliminary injunction is not granted. The State only alleged the public as "other interested parties" and as such, combined this factor with the fourth factor of their

argument. The State provided no arguments exclusively to this prong. Therefore, the Court will address the State's arguments in factor four.

[¶71] The Plaintiffs claim there are other transgender youth in North Dakota who would suffer harm if the preliminary injunction is not granted. The Plaintiffs cite to their original *Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction.* (R:278:27:58). The Court highlights this because the Plaintiffs specifically allege other "...transgender adolescents currently receiving hormone therapy in North Dakota will also be irreparably harmed..." (R:9:34:74). If these transgender youth were receiving hormone therapy prior to April 21, 2023, they may continue to receive care in North Dakota.

[¶72] Dr. Balf testified gender dysphoria is "...a rare diagnosis..." (R:267:105:16). There may be other transgender youth in North Dakota who were not receiving gender-affirming care prior to April 21, 2023. However, the Court has not been presented with any evidence these transgender youth have subsequently sought medical treatment for gender dysphoria and been turned away.

[¶73] For this same reason, the Plaintiffs' alternative argument, that health care providers are being injured because they are unable to provide treatment to transgender youth in North Dakota, must also fail. The Plaintiffs have not established harm to other interested parties.

4) Effect on Public Interest

[¶74] The fourth and final factor for the Court to consider in granting a preliminary injunction is the effect on public interest. For this factor, the North Dakota Supreme Court has looked at the importance of maintaining the status quo until the case is decided on the merits. *Wrigley*, 2023 ND 50 at ¶ 38. The Plaintiffs argue that the public has no interest in enforcing an unconstitutional law and the preliminary injunction should be granted. Furthermore, the Plaintiffs argue the status quo requires the issuing of the preliminary injunction to allow for minors to receive gender-affirming care.

[¶75] Conversely, the Defendants argue the public has a strong interest in implementing the legislation. The State highlights the wide margins in which the legislation passed the House of Representatives and the Senate. At this point the Health Care Law has been in

place for over a year. The public interest in maintaining the status quo weighs against granting a preliminary injunction.

[¶76] The Court would, however, highlight the status quo may not have been as the Plaintiffs perceived. As previously discussed, the Court agrees with the Defendants that the Health Care Law does not apply to any minors who received gender-affirming medical care in North Dakota prior to April 21, 2023. These minors, including Plaintiffs T.D., James Doe, and Pamela Roe, who received puberty blockers or cross-hormone therapy for the treatment of gender dysphoria prior to April 21, 2023, can receive any gender-affirming care they could have received in North Dakota prior to the Health Care Law's enactment.

Conclusion

[¶77] For the above reasons, Court finds the Plaintiffs have failed to meet their burden on each of the four factors relevant to the issuance of a preliminary injunction. Therefore, the Court **DENIES** the *Motion for Preliminary Injunction.*

IT IS SO ORDERED.

Dated June 5, 2024.

Jackson J. Lofgren, District Judge
South Central Judicial District