Hon. Jason Marks, District Court Judge
Fourth Judicial District, Dept. No. 4
Missoula County Courthouse
200 West Broadway
Missoula, Montana 59802
(406) 258-4774

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

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

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

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ORDERS

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

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

MEMORANDUM

I. INTRODUCTION

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

II. BACKGROUND

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

A. Montana Senate Bill 99

SB 99 reads as follows:

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

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

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

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

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

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

(ii) supraphysiologic doses of estrogen; or

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

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

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

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

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

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

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

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

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

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

B. Terminology

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

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

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

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

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

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

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

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

C. Parties

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

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

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

D. Standards of Care for Treatment of Gender Dysphoric Minors

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

i. Plaintiffs' Argument

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

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

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

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

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

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

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

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

ii. Defendants' Argument

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

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

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

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

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

iii. Plaintiffs' Reply

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

E. Senate Bill 422

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

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

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

Id., § 3.

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

F. Procedural History

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

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

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

III. PRELIMINARY INJUNCTION STANDARD

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

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

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

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

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

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

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

IV. ANALYSIS

A. Plaintiffs are Likely to Succeed on the Merits

i. Count I – Violation of the Equal Protection Clause

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

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

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

1. Whether the Classes are Similarly Situated

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

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

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

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

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

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

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

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

2. Which Level of Scrutiny Applies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Applying Strict Scrutiny to SB 99

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Count III – Violation of the Right to Privacy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Phoebe Decl., ¶¶ 11, 21.

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

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

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

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

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

DATED this 27th day of September, 2023.

Hon. Jason Marks
District Court Judge

cc: Akilah Deernose, Esq.
Alex Rate, Esq.
Malita Picasso, Esq.
Elizabeth O. Gill, Esq.
Arijeet Sensharma, Esq.
Peter C. Renn, Esq.
Kell Olson, Esq.
Nora Huppert, Esq.

Matthew P. Gordon, Esq.
Heather Shook, Esq.
Courtney Schirr, Esq.
Sara Cloon, Esq.
Kayla Lindgren, Esq.
Austin M. Knudsen, Esq.
Alwyn Lansing, Esq.
Thane Johnson, Esq.
Michael D. Russell, Esq.
Michael Noonan, Esq.
Emily Jones, Esq.