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 GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT

Background

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

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

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

[¶3] During the 68th Legislative Assembly, the North Dakota Legislature overwhelmingly passed House Bill 1254. The bill passed through the House of

Representatives with a vote of 66 yeas to 25 nays and through the Senate with a vote of 37 yeas to 10 nays. The bill was signed by North Dakota Governor, Doug Burgum, on April 21, 2023. It contained an emergency clause making it effective immediately.

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

[¶5] **Section 12.1-36.1-01. Definitions**

As used in this chapter:

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

[¶6] **Section 12.1-36.1-02. Perception of a minor's sex-- Prohibited practices-- Penalty**

1. Except as provided under section 12.1-36.1-03, if a minor's perception of the minor's sex is inconsistent with the minor's sex, a health care provider may not engage in any of the following practices for the purpose of changing or affirming the minor's perception of the minor's sex:

a. Perform castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, or vaginoplasty;

b. Perform a mastectomy;

c. Prescribe, dispense, administer, or otherwise supply any drug that has the purpose of aligning the minor's sex with the minor's perception of the minor's sex when the perception is inconsistent with the minor's sex, including:

(1) Puberty-blocking medication to stop normal puberty;

(2) Supraphysiologic doses of testosterone to females; or

(3) Supraphysiologic doses of estrogen to males; or

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

2. A health care provider who willfully violates:

a. Subdivision a, b, or d of section 1 is guilty of a class B felony.

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

[¶7] **Section 12.1-36.1-03. Exceptions**

Section 12.1-36.1-02 does not apply:

1. To the good-faith medical decision of a parent or guardian of a minor born with a medically verifiable genetic disorder of sex development, including:

a. A minor with external biological sex characteristics that are irresolvably ambiguous, including having forty-six, XX

chromosomes with virilization, forty-six, XY chromosomes with undervirilization, or having both ovarian and testicular tissue; or

b. When a physician otherwise has diagnosed a disorder of sexual development in which the physician, through genetic testing, has determined the minor does not have the normal sex chromosome structure for a male or female; or

2. If performance or administration of the medical procedure on the minor began before April 21, 2023.

[¶8] **Section 12.1-36.1-04. Statutory limitation**

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

[¶9] For brevity, the Court will hereinafter refer to chapter 12.1-36.1 as the "Health Care Law."

Relevant Procedural History

[¶10] On September 15, 2023, the Plaintiffs, T.D., by and through his parents, Devon Dolney and Robert Dolney, Devon Dolney, an individual, Robert Dolney, an individual, Pamela Roe, by and through her parents, Peter Roe and Paula Roe, Peter Roe, an individual, Paula Roe, an individual, James Doe, by and through his parents, John Doe and Jane Doe, John Doe, an individual, Jane Doe, an individual, and Dr. Luis Casas, an individual, (collectively "the Plaintiffs"), filed a *Summons* and *Complaint* against the Defendants, Drew H. Wrigley, in his official capacity as Attorney General for the State

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

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

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

[¶13] 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).

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

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

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

[¶17] On August 20, 2024, the Defendants filed a *Motion for Summary Judgment.* (R:375). The Defendants argue the Plaintiffs "…lack the requisite standing necessary to challenge the Health Care Law as the amended complaint fails to allege any of the

individual plaintiffs suffered a redressable injury." (R:376:6:19). The Defendants argue the minor Plaintiffs were receiving medical treatment for gender dysphoria prior to April 21, 2023, and fall under the exceptions found in N.D.C.C. § 12.1-36.1-03. (R:376:7:16). They further assert the Plaintiffs lack third-party standing to challenge the Health Care Law. (R:376:10:21).

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

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

[¶20] On October 7, 2024, the Defendants filed a second *Motion for Summary Judgment*. (R:445). The Defendants' second *Motion for Summary Judgment* contests the legal sufficiency of the Plaintiffs' claims. (R:446). The Defendants claim the Plaintiffs

have brought a facial constitutional challenge to the Health Care Law and the burden for declaring acts of the Legislature is so onerous the Plaintiffs cannot succeed. (R:446:15-10). They argue the State of North Dakota has a legitimate interest in regulating the medical profession. (R:446:20-23). The Defendants suggest the Plaintiffs' equal protection claim fails as the Health Care Law does discriminate based on sex and, therefore, is subject to a rational basis standard of review. (R:446:23-27). The Defendants allege the Health Care Law does not violate the right to parent or the right to personal autonomy and self-determination. (R:446:29-35). They argue the Health Care Law containing an emergency measure did not violate procedural Due Process. (R:446:35-36). Finally, they assert the Health Care Law is not unconstitutionally vague. (R:446:36-38).

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

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

[¶23] A hearing on the Defendants' two summary judgment motions was held on November 25, 2024. The Plaintiffs and Defendants presented their arguments regarding summary judgment.

Summary Judgment Standard

[¶24] The standard for summary judgment is well-established. "Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law." *Kutcka v. Gateway Bldg. Sys.*, Inc., 2023 ND 91, ¶ 5, 990 N.W.2d 605 (quoting *Markgraf v. Welker*, 2015 ND 303, ¶ 10, 873 N.W.2d 26). "A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

[¶25] In determining whether summary judgment is appropriate the evidence must be viewed "...in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record." *Larson Latham Huettl LLP v. Burckhard*, 2022 ND 230, ¶ 10, 983 N.W.2d 169 (quoting *Poppe v. Stockert*, 2015 ND 252, ¶ 4, 870 N.W.2d 187). "On a motion for summary judgment, the district court's 'role is limited to determining whether the evidence and inferences to be drawn therefrom, when viewed in the light most favorable to the party opposing summary judgment, demonstrate that there are no genuine issues of material fact.'" *Farmers Union Oil Co. of Garrison v. Smetana*, 2009 ND 74, ¶ 10, 764 N.W.2d 665 (quoting *Heng v. Rotech Med. Corp.*, 2004 ND 204, ¶ 34, 688 N.W.2d 389). "In determining whether summary judgment is appropriate, the court may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence." *Burris Carpet Plus, Inc. v. Burris*, 2010 ND 118, ¶ 11, 785 N.W.2d 164.

[¶26] However, "[a] party opposing a motion for summary judgment cannot simply rely on the pleadings or on unsupported conclusory allegations." *Larson Latham Huettl LLP v. Iversen*, 2023 ND 16, ¶ 5, 985 N.W.2d 662 (quoting *Cuozzo v. State*, 2019 ND 95, ¶ 7, 925 N.W.2d 752). "'Factual assertions in a brief do not raise an issue of material fact...'" *Zuger v. State*, 2004 ND 16, ¶ 8, 673 N.W.2d 615 (quoting *Kemp v. City of Grand Forks,* 523 N.W.2d 406, 408 (N.D.1994)). "Rather, a party opposing a summary judgment motion must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact."

Iverson, at ¶ 5 (quoting *Cuozzo*, 2019 ND 95 at ¶ 7). "In summary judgment proceedings, neither the trial court nor the appellate court has any obligation, duty, or responsibility to search the record for evidence opposing the motion for summary judgment." *Zuger*, at ¶ 8 (quoting *Iglehart v. Iglehart*, 2003 ND 154, ¶ 10, 670 N.W.2d 343).

[¶27] "The opposing party must also explain the connection between the factual assertions and the legal theories in the case, and cannot leave to the court the chore of divining what facts are relevant or why facts are relevant, let alone material, to the claim for relief." *Id.* at ¶ 8 (quoting *Iglehart*, 2003 ND 154, ¶ 10, 670 N.W.2d 343). "Mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim." *Id.* "When no pertinent evidence on an essential element is presented to the trial court in resistance to the motion for summary judgment, it is presumed that no such evidence exists." *Kummer v. City of Fargo*, 516 N.W.2d 294, 297 (N.D. 1994).

Legal Analysis

I: <u>Standing to challenge the Health Care Law</u>

[¶28] The Plaintiffs can be separated into three categories. T.D., Pamela Roe, and James Doe are minors living in North Dakota who are being treated for gender dysphoria with prescription medications. Devon Dolney, Robert Dolney, Peter Roe, Paula Roe, John Doe, and Jane Doe are the parents of T.D., Pamela Roe, and James Doe. Dr. Luis Casas is a pediatric endocrinologist who treated minors for gender dysphoria by prescribing medications in North Dakota prior to passage of the Health Care Law.

[¶29] The Defendants in their August 20, 2024, *Motion for Summary Judgment* argue the Plaintiffs "...lack the requisite standing necessary to challenge the Health Care Law

as the amended complaint fails to allege any of the individual plaintiffs suffered a redressable injury." (R:375; R:376:6:19). The Defendants' October 7, 2024, *Motion for Summary Judgment* contests the legal sufficiency of the Plaintiffs' claims. (R:445; R:446).

[¶30] Statutes are construed to avoid constitutional infirmities. *Kjolsrud v. MKB Mgmt. Corp.*, 2003 ND 144, ¶ 12, 669 N.W.2d 82 (citing *Lawrence v. N. Dakota Workers Comp. Bureau*, 2000 ND 60, ¶ 10, 608 N.W.2d 254). "...[T]he Legislature may not expand the scope of a judge's duties beyond the judiciary's institutional role." *Id.* (citing *City of Carrington v. Foster County,* 166 N.W.2d 377, 385 (N.D.1969)). "Under our constitutional framework for the separation of powers, it is well established that courts perform judicial functions and do not render advisory opinions on abstract disagreements." *Id.* "A party is entitled to have a court decide the merits of a dispute only after demonstrating the party has standing to litigate the issues placed before the court." *Dakota Res. Council v. Stark Cnty. Bd. of Cnty. Comm'rs*, 2012 ND 114, ¶ 5, 817 N.W.2d 373. "'Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court.'" *Billey v. N. Dakota Stockmen's Ass'n*, 1998 ND 120, ¶ 7, 579 N.W.2d 171(quoting *Black's Law Dictionary* 1405 (6th ed.1990)). "Standing is a threshold issue to determine whether the litigant is entitled to have the court decide the merits of the dispute" and "[t]he ultimate decision on the merits is generally not a factor when addressing whether the court has jurisdiction to hear it." *Whitecalfe v. N. Dakota Dep't of Transp.*, 2007 ND 32, ¶¶ 27-28, 727 N.W.2d 779 (internal citations omitted). "Standing is a question of law which is reviewed de novo on appeal." *Dakota Res. Council,* at ¶ 5.

[¶31] "[The North Dakota Supreme Court's] seminal case on standing is *State v. Carpenter,* 301 N.W.2d 106, 107 (N.D.1980), in which a two-pronged test was established to determine whether a litigant has alleged such a personal stake in the outcome of the controversy as to justify the exercise of the court's remedial powers to decide the merits of the dispute." *N. Dakota Fair Hous. Council, Inc. v. Peterson,* 2001 ND 81, ¶ 65, 625 N.W.2d 551 (Kapsner, J., dissenting). "First, the plaintiff must have suffered some threatened or actual injury resulting from the putatively illegal action." *Carpenter*, at 107 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)). "Secondly, the asserted harm must not be a generalized grievance shared by all or a large class of citizens; the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties." *Id.* (citing *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Raines*, 362 U.S. 17 (1960). As Justice Scalia memorably said, standing requires a plaintiff first answer a basic question: "What's it to you?" A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983).

[¶32] This Court briefly addressed standing in its *Order Denying Preliminary Injunction.* (R:365:3:7-R:365:4:8). Section 12.1-36.1-02 makes it a crime for health care providers to engage in certain medical practices for the purpose of changing or affirming a minor's perception of the minor's sex. These practices included "...castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, or vaginoplasty" N.D.C.C. § 12.1-36.1-02(1)(a).

[¶33] The Plaintiffs acknowledge that "[u]nder the WPATH standards of care, transgender young people may...receive medically necessary chest reconstructive

surgeries before the age of majority, provided the young person has lived in their affirmed gender for a significant period of time." (R:2:14:52; R:273:14:52). "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." (R:2:14:52; R:273:14:52).

[¶34] Section 12.1-36.1-02(1)(a) 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." The minor Plaintiffs have not received these procedures and cannot receive them in North Dakota under the acknowledged current standard of care. They may undergo these procedures after age eighteen but the Health Care Law does not apply to the medical treatment of adults. Dr. Casas does not perform these surgeries and treats minors with gender dysphoria by prescribing medications. (R:16).

[¶35] The Plaintiffs have not suffered a threatened or actual injury from N.D.C.C. § 12.1-36.1-02(1)(a). They, therefore, lack standing to challenge this portion of the Health Care Law.

[¶36] The Health Care Law also contains a statutory exception to its application. Section 12.1-36.1-03 states:

> Section 12.1-36.1-02 does not apply:
>
> 1. To the good-faith medical decision of a parent or guardian of a minor born with a medically verifiable genetic disorder of sex development, including:

a. A minor with external biological sex characteristics that are irresolvably ambiguous, including having forty-six, XX chromosomes with virilization, forty-six, XY chromosomes with undervirilization, or having both ovarian and testicular tissue; or

b. When a physician otherwise has diagnosed a disorder of sexual development in which the physician, through genetic testing, has determined the minor does not have the normal sex chromosome structure for a male or female; or

2. If performance or administration of the medical procedure on the minor began before April 21, 2023.

N.D.C.C. § 12.1-36.1-03. The Plaintiffs argue this "Legacy Clause" is unconstitutionally vague and violates due process under Article I, Section 9 of the North Dakota Constitution. (R:2:37:158-R:2:39:168; R:273:35:158-R:273:36:163). Specifically, they argue "[t]he law does not define 'medical procedure' and does not, on its face, indicate whether providers can write new prescriptions for patients who have already been receiving medication and have run out of refills, or whether they can dispense any medication refills." (R:2:37:161; R:273:35:161).

[¶37] The standard for reviewing vagueness claims under the North Dakota Constitution is well established:

> Whether a law is unconstitutional is a question of law, which is fully reviewable on appeal. 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). "'But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision.'" *State v. Schwalk*, 430 N.W.2d 317, 320 (N.D. 1988)(quoting *Rose v. Locke*, 423 U.S. 48, 49, 96 S.Ct. 243 (1975)). "All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." *Id.* In other words, criminal laws must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited[.]" *City of Belfield v. Kilkenny*, 2007 ND 44, ¶ 19, 729 N.W.2d 120.

[¶38] To support their vagueness argument, the Plaintiffs reference Dr. Casas' alleged inability to interpret the law. ("The Legacy Clause exception is vague, and it does not give Dr. Casas notice of what care is permitted and what care is prohibited for patients who had received some form of gender affirming care prior to April 21, 2023")(R:413:5:16); ("Here, Plaintiff Dr. Casas, a medical provider who could be criminally liable under the statute, testified that it is not clear to him what medical treatments he is allowed to provide under the Legacy Clause"). (R:488:37:74). In his *Declaration*, Dr. Casas states:

> The Health Care Bill does not make it clear whether I can continue to provide appropriate care to current patients by, for example, changing medication dosages or filling new prescriptions where older prescription have been filled or expired. As a result all of patients now have to seek care outside the state.

(R:16:6:42).

[¶39] However, the North Dakota Supreme Court has stated a "reasonable person" standard is used to determine whether a statute is impermissibly vague. *Simons v. State, Dep't of Hum. Servs.*, 2011 ND 190, ¶ 30, 803 N.W.2d 587 (internal citations omitted). Statutes are viewed "...from the standpoint of a reasonable person who might be subject to its terms when determining whether the meaning of the statute is fairly ascertainable and whether adequate warning is given." *Id.* "Ordinary people" must be able to understand what conduct is prohibited. *Kilkenny*, 2007 ND 44, ¶ 19, 729 N.W.2d 120. Therefore, Dr. Casas' subjective ability to interpret the Health Care Law is not determinative.

[¶40] The North Dakota Supreme Court has stated, "[o]ur primary goal in interpreting statutes is to ascertain the Legislature's intentions." *State v. Laib*, 2002 ND 95, ¶ 13, 644 N.W.2d 878 (citing *State v. Brossart,* 1997 ND 119, ¶ 14, 565 N.W.2d 752). Courts 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. Criminal statutes must be construed "...to avoid ludicrous and absurd results" with any ambiguities viewed "against the government and in favor of the defendant." *State v. Laib,* 2002 ND 95, ¶ 13, 644 N.W.2d 878. "When engaging in statutory interpretation...it must be presumed the legislature intended all that it said, said all that it intended to say, and meant what it has plainly expressed." *Estate of Christeson v. Gilstad*, 2013 ND 50, ¶ 12, 829 N.W.2d 453.

[¶41] The Plaintiffs argue the phrase "medical procedure" in N.D.C.C. § 12.1-36.1-03(2) makes the Health Care Law unconstitutionally vague. The Defendants disagree. Section 12.1-36.1-02 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.

The relevant portion of N.D.C.C. § 12.1-36.1-03(2) reads: "[s]ection 12.1-36.1-02 does not apply…[i]f performance or administration of *the medical procedure* on the minor began before April 21, 2023." (emphasis added).

[¶42] "Statutory provisions are given their plain, ordinary, and commonly understood meaning, unless they are specifically defined or a contrary intention plainly appears." *State v. Brown*, 2018 ND 31, ¶ 18, 906 N.W.2d 120 (citing N.D.C.C. § 1-02-02). Generally, "the" is an article that particularizes the subject it precedes. *Yellowbird v. N. Dakota Dep't of Transp.*, 2013 ND 131, ¶ 12, 833 N.W.2d 536. It is a word of limitation as opposed to "a" or "an," which are indefinite and equivalent to "one" or "any." *Id.* "Medical" is an adjective meaning "of, relating to, or concerned with physicians or the practice of medicine." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/medical. "Procedure" is defined as "a specific method or course of action." *Black's Law Dictionary* (12th ed. 2024). The phrase "medical procedure" can, therefore, be interpreted to mean "the course of action relating to the practice of medicine."

[¶43] Sections 12.1-36.1-02 and 12.1-36.1-03 reference each other. They must be construed together and harmonized to give meaningful effect to each. *See Minnesota Grain, Inc.*, 2008 ND 184 at ¶ 20. The phrase "the medical procedure" in section 12.1-36.1-03(2) relates to "any of the following practices" set out in section 12.1-36.1-02(1). Had the Legislature intended to limit the exception found in section 12.1-36.1-03(2) to each distinct "practice" listed in section 12.1-36.1-02(1) it could have done so. Instead, the term "medical procedure" was used which denotes a course of medical treatment

rather than a single act. The purpose of section 12.1-36.1-03(2) was to allow minors who were receiving the care prohibited by section 12.1-36.1-02 prior to April 21, 2023, to continue receiving that care.

[¶44] Giving the words "medical" and "procedure" their plain ordinary meaning, and construing the statutes of the Health Care Law together, none of the practices prohibited by 12.1-36.1-02 are criminalized if the minor was receiving any of the identified care prior to April 21, 2023. Even if these statutes could be considered ambiguous this would be the correct interpretation as ambiguities are viewed "against the government..." *State v. Laib,* 2002 ND 95, ¶ 13, 644 N.W.2d 878.

[¶45] While the Health Care Law could have been written more clearly this does not equate to impermissible vagueness. "Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid." *Schwalk*, 430 N.W.2d at 320 (quoting *Rose,* 423 U.S. at 49. Further, "judicial interpretations clarifying vague or ambiguous language may be taken into consideration in determining whether the public has been put on notice of the conduct proscribed." *Id.* (internal citations omitted). The Court finds the Health Care Law defines the conduct it criminalizes with sufficient definiteness that ordinary people can understand what is prohibited.

[¶46] This leads to the issue of standing. A litigant must have a personal stake in the outcome of the controversy to have standing. "First, the plaintiff must have suffered some threatened or actual injury resulting from the putatively illegal action." *Carpenter*, 301 N.W.2d at 107 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)). "Secondly, the asserted harm must not be a generalized grievance shared by all or a large class of

citizens; the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties." *Id.* (citing *Warth v. Seldin*, 422 U.S. 490 (1975); *United States v. Raines*, 362 U.S. 17 (1960)).

[¶47] The Plaintiffs argue they have been harmed by the Health Care Law. Minor Plaintiff, T.D., states, "[i]f I am not able to keep getting healthcare for my gender dysphoria in North Dakota, I will probably have to miss more school and other activities because we will have to go further for doctor appointments and pharmacy visits." (R:10:3:18). T.D.'s parent, Devon Dolney, indicates they were told they could only discuss T.D.'s care with Dr. Casas when he was practicing at his Moorhead, Minnesota, clinic which is only two Tuesdays per month. (R:11:3:20).

[¶48] According to minor Plaintiff, James Doe, "[i]f I am not able to keep getting healthcare for my gender dysphoria in North Dakota, I will definitely miss more school activities, because it would mean we would have to drive a long way to have doctor appointments in Minnesota." (R:12:2:17). James Doe's parents indicate:

> Since the passage of HB 1254, we now have to travel to Moorhead, MN, a 4-hour drive from home to seek seeing Dr. Casas, when we used to be able to get appointments closer to home in Bismarck. Dr. Casas is only in Moorhead two times a month which makes discussing any concerns with him much harder. The choice of appointment times and days are very limited. In order to make appointments in Minnesota, we now have to take a day off of work and school, plus cover the cost of a hotel room and gas. Adding to the irritation and inconvenience, the appointments in Moorhead are in the Central Time Zone, and we live in Stark County where we are in the Mountain Time Zone. Having to travel out of state to access healthcare that helps our child live a happier, healthier life has created significant burdens on our family.

(R:13:4:20).

[¶49] Similarly, minor Plaintiff, Pamela Roe, states, "[s]hould the gender affirming healthcare ban be allowed to stand, I may have to start traveling to Minnesota to continue

my care. This would mean I would definitely have to miss school and other activities, because appointments are on weekdays and it's a 3-hour drive each way." (R:14:2:18). Pamela Roe's father, Peter Roe, indicates "[d]ue to the ban, Pamela and her mother, Paula Roe, are now having to travel to Moorhead, Minnesota to see the endocrinologist. That is a 6 to 7-hour drive round trip, so my wife is having to take off work, and once school starts then Pamela would have to miss a whole day of school." (R:25:4:18).

[¶50] But, T.D., James Doe, and Pamela Roe were all receiving prescription medications to treat gender dysphoria in North Dakota prior to April 21, 2023. (R:10:2:11-14; R:12:2:12-14; R:14:2:12-14). The Legacy Clause in N.D.C.C. § 12.1-36.1-03(2) applies to them. They can receive any medical care in North Dakota they could have received prior to the Health Care Law's passage.

[¶51] At the preliminary injunction hearing held on January 19, 2024, Dr. Casas testified he believed the Legacy Clause applied to surgeons but not to his prescribing medications. (R:267:49:18-R:267:50:1-11). Based on his concerns with the law, he told his administrators he would not "practice in North Dakota for risk of losing my license." (R:267:53:24-25; R:267:1-11). According to Devon Dolney, they were told Dr. Casas would not even discuss T.D.'s care unless he was practicing at his Moorhead, Minnesota, clinic. (R:11:3:20). No reading of the Health Care Law supports an interpretation that a health care provider cannot discuss the treatment of gender dysphoria with minor patients in North Dakota. While the minor Plaintiffs and their families have had to travel to Moorhead, Minnesota, to receive medical care since April 21, 2023, it is because of Dr. Casas' reaction to the Health Care Law rather than the law itself.

[¶52] A Plaintiff must suffer some threatened or actual injury resulting from the

putatively illegal action to have standing. All three minor Plaintiffs were receiving prescription medications to treat gender dysphoria in North Dakota prior to April 21, 2023. They are not subject to the Health Care Law's prohibitions. They can receive any medical care in North Dakota they could have received prior to the passage of the Health Care Law. The minor Plaintiffs and their parents have not suffered threatened or actual injury from the Health Care Law. They lack standing to challenge it.

[¶53] That leaves Dr. Casas. The Defendants assert Dr. Casas does not have first-party standing to challenge the Health Care Law. (R:376:8:16). They argue, "...Dr. Casas has either not suffered a cognizable injury based on the enactment of the Health Care Law or has not properly alleged he suffered a cognizable injury based on the enactment of the Health Care Law..." The Plaintiffs respond, "Dr. Casas has standing because he is directly regulated by the Health Care Ban, and he intends to engage in a course of conduct that puts him in imminent risk of prosecution." (R:413:20:60). "Dr. Casas has been injured because he is regulated by the Health Care Ban, which limits his practice of medicine and his ability to serve his patients, and could be incarcerated, fined, and/or stripped of his license for providing the care he wishes to provide." (R:413:21:61).

[¶54] At the preliminary injunction hearing, 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). The Court noted in its *Order Denying Preliminary Injunction* that "... the minor Plaintiffs may not be the only transgender youth who could be treated by Dr. Casas in North Dakota." Subsequently, Dr. Casas was

deposed. During his deposition, he testified since the enactment of the Health Care Law he has had new patients come to him for care that were not being treated for gender dysphoria prior to the ban and cannot be treated in North Dakota. He testified:

> We have -- you know, since the ban we have patients that have -- who have come to me as new patients who were not being treated before the ban who can no longer -- who cannot be treated in North Dakota even with this grandfather clause in there that allows us to continue treating those who were previously treated. Those can't be treated because they weren't' started before the ban. I have at least, you know, that I can think of ten patients in the last year who cannot be treated in North Dakota.

The Court can consider this testimony in determining whether summary judgment is appropriate. *See* N.D.R.Civ.P. 56(e)(1).

[¶55] Dr. Casas' deposition testimony establishes that since the enactment of the Health Care Law he has had minor patients he cannot treat for gender dysphoria in North Dakota. These patients fall outside of the Legacy Clause. He can only treat them while practicing in Morehead, Minnesota. If he were to treat them in North Dakota he could face criminal penalties. Enough information has been provided for the Court to find Dr. Casas has been subjected to a threatened or actual injury from the Health Care Law. Further, the harm is not a generalized grievance as he is one of the few pediatric endocrinologists in North Dakota who treat minors for gender dysphoria.

[¶56] The Plaintiffs claim the Health Care Law deprived Dr. Casas of procedural due process as it was passed as an "emergency measure" and there was not a "sufficient grace period" for Dr. Casas to become familiar with his obligations under the law. (R:273:34:156). As previously noted, the Plaintiffs also assert the Health Care Law violates due process as it is impermissibly vague, and Dr. Casas cannot understand what

is prohibited and what is allowed. Dr. Casas would have first-party standing to assert these claims.

[¶57] However, Dr. Casas does not have first-party standing to assert all of the Plaintiffs' claims. To have standing a Plaintiff "...must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties." *Carpenter*, 301 N.W.2d at 107 (citing *Linda R.S.*, 410 U.S. at 617). Dr. Casas is not part of any suspect class that is being denied medical care. He does not have first-party standing to challenge the Health Care Law under the theory it violates equal protection. He also does not have first-party standing to pursue claims the Health Care Law violates the fundamental right to parent. He is not the parent of a child being denied medical treatment in North Dakota because of the Health Care Law. Finally, he does not have first-party standing to assert a claim the Health Care Law violates the right to personal autonomy and self-determination. This right is a personal right of bodily autonomy that is possessed by the patient, not the health care provider.

[¶58] The Plaintiffs argue Dr. Casas has thirty-party standing to pursue these claims. (R:413:23:67-R:413:25:71). They suggest "[i]t is well-established that the doctor-patient relationship traditionally qualifies for third-party standing." (R:413:23:68). In response, the Defendants indicate Dr. Casas has not established a sufficient relationship with his patients to assert third-party standing and argue the Plaintiffs have not sufficiently pled their claim to incorporate minors with gender dysphoria who are not subject to the Legacy Clause. (R:440:8:16-R:440:10:20).

[¶59] At the outset, the Court must address whether the Plaintiffs' pleadings assert third-party standing. Their forty-page *Complaint* lacks any such indication. (R:2). To the

contrary, both the caption and pre-amble identify the Plaintiffs, including Dr. Casas, acting in an "individual" capacity." (R:2:1). After the preliminary injunction hearing, but before the Court's ruling, the parties submitted a *Stipulation to Amend Complaint.* (R:271). The *Stipulation* expressly stated, "...Plaintiffs are only seeking to make minimal changes to the complaint. Among those changes is that Plaintiffs wish to further clarify that Dr. Luis Casas is bringing claims on his own behalf of his patients." (R:271:1:4). The Court signed the stipulated *Order to Enter Stipulation Granting Leave to Plaintiffs to File Amended Complaint.* (R:276). The caption of the *Amended Complaint* identified that Dr. Casas was proceeding as "an individual, on behalf of himself and his patients." (R:273). The first paragraph identifies the Plaintiffs to include "DR. LUIS CASAS, an individual, through his attorneys, brings this complaint on behalf of himself, and his minor patients seeking gender-affirming care..." (R:273:1-2). The biography section of the *Amended Complaint* states, "Plaintiff Dr. Luis Casas sues on behalf of himself the patients he intends to serve." (R:273:5:16).

[¶60] "Under North Dakota's notice pleading requirements, a complaint need contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Tibert v. Minto Grain, LLC*, 2004 ND 133, ¶ 8, 682 N.W.2d 294 (quoting N.D.R.Civ.P. 8(a)). "The purpose of this liberalized pleading requirement is to 'place the defendant on notice as to the general nature of a plaintiff's claim...look[ing] to the substance of the claim alleged.'" *Id.* (quoting *Daley v. American Family Mutual Insurance Co.,* 355 N.W.2d 812, 815 (N.D.1984)). "North Dakota's rules do not require plaintiffs to 'allege every element of their claim.'" *Id.* (quoting *Kaler v. Kraemer,* 1998 ND 56, ¶ 7, 574 N.W.2d 588). "'If the complaint contains a short and plain statement apprising the

defendant of plaintiff's claim, it is sufficient.'" *Id.* (quoting *Gowin v. Hazen Memorial Hosp. Ass'n,* 311 N.W.2d 554, 556 (N.D.1981)). "Indeed, '[a]ll pleadings shall be so construed as to do substantial justice.'" *Id.* (quoting N.D.R.Civ.P. 8(f). "This provision has been interpreted to mean that complaints should be construed liberally so as to do substantial justice." *Id.* (internal quotations omitted).

[¶61] The parties stipulated to amend the complaint to clarify Dr. Casas was acting on his own behalf and on behalf of his patients. The *Amended Complaint* notes this includes "patients he intends to serve." The Defendants are correct this does not expressly identify patients who do not qualify for the Legacy Clause. However, it would be unreasonable to interpret it any other way. The minor Plaintiffs, and any other patients meeting the criteria for the Legacy Clause, would be current patients. "[P]atients he intends to serve" denotes future patients.

[¶62] The Plaintiffs point to Dr. Casas' deposition testimony to support their argument. The Defendants argue the Plaintiffs are attempting to use this deposition testimony to expand their claims beyond the pleadings. But there is no need for an expansion. In North Dakota a complaint need only provide a short plain statement sufficient to apprise the defendants of the plaintiffs' claims. Complaints should be liberally construed to do substantial justice. Based on the record in this matter, the Court finds the *Amended Complaint* sufficiently appraised the Defendants Dr. Casas was proceeding on his own behalf and on behalf of his patients, including patients who do not meet the requirements of the Legacy Clause.

[¶63] But, sufficiency of the pleadings is separate from the issue of third-party standing. "[The North Dakota Supreme Court] has recognized that under certain circumstances a

party may acquire third party standing to challenge the constitutionality of a statute." *Am. Express Centurion Bank v. Corum*, 2017 ND 261, ¶ 8, 903 N.W.2d 710 (citing *City of Fargo v. Stensland*, 492 N.W.2d 591, 594 (N.D. 1992)). There are three situations that justify third-party standing. *State v. Tibor*, 373 N.W.2d 877, 881 (N.D. 1985). "First, it exists where there is a close relationship between the litigant's rights and the rights of a third party such that the litigant is fully, or very nearly, as effective a proponent of those rights as the third party." *Id.* (internal citations omitted). "Second, there is standing when individuals not parties to a particular suit stand to lose by the outcome of litigation and yet have no effective way of preserving their rights themselves." *Id.* "Third, there is third-party standing when the challenged law allegedly infringes upon speech protected by the first amendment." *Id.* The Plaintiffs have not argued the Health Care Law is an infringement upon speech and this third situation does not apply.

[¶64] The North Dakota Supreme Court has not directly held physicians have third-party standing to assert claims on behalf of their patients. The North Dakota Supreme Court entertained a request for a supervisory writ in *Wrigley v. Romanick*, 2023 ND 50, 988 N.W.2d 231, where one of the plaintiffs in the underlying suit was an abortion doctor suing "on behalf of herself and her patients." But, standing was not an issue addressed on appeal.

[¶65] "[The United States Supreme Court] ha[s] long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Med. Servs. L. L. C. v. Russo*, 591 U.S. 299, 318 (2020)(internal citations omitted). "And [the United States Supreme Court] ha[s] generally permitted plaintiffs to assert third-party rights in cases where the enforcement of the challenged

restriction *against the litigant* would result indirectly in the violation of third parties' rights." *Id.* The United States Supreme Court has stated, "[i]n such cases, we have explained, 'the obvious claimant' and 'the least awkward challenger' is the party upon whom the challenged statute imposes 'legal duties and disabilities.'" *Id.* at 319.

[¶66] The United States Court of Appeals for the Tenth Circuit determined physicians had third-party standing to challenge mandatory reporting laws on behalf of their minor patients noting, "[m]any courts have found the physician-patient relationship to be sufficiently close for third-party standing." *Aid for Women v. Foulston*, 441 F.3d 1101, 1112 (10th Cir. 2006). Similarly, the United States Court of Appeals for the Second Circuit stated, "...we believe, as did the district judge, that [United States Supreme Court precedent] allows physicians to assert the interests of the unemancipated minors." *State of N.Y. v. Heckler*, 719 F.2d 1191, 1195 (2nd Cir. 1983)(citing *Singleton v. Wulff*, 428 U.S. 106, 113–18 (1976)). The United States Court of Appeals for the Third Circuit found psychiatrists have standing to sue on behalf of their patients stating "[p]sychiatrists clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf." *Pennsylvania Psychiatric Soc. v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 289 (3rd Cir. 2002). "This intimate relationship and the resulting mental health treatment ensures psychiatrists can effectively assert their patients' rights." *Id.*

[¶67] Consistent with these federal authorities, the Court finds the physician-patient relationship between Dr. Casas and his patients is sufficiently close to justify third-party standing to assert his patients' rights. He is as effective a proponent of those rights as his patients. He is the health care provider directly regulated by the Health Care Law and subject to criminal penalties. He is the party upon whom the Health Care Law imposes

liabilities and is the "obvious claimant" and "least awkward challenger." Dr. Casas has third-party standing to assert the rights of his patients.

[¶68] The Plaintiffs suggest if the Court finds one plaintiff has standing it need not address the standing of the others. (R:413:19:58)(stating "[o]nly one plaintiff needs to establish standing when the issues raised and the relief requested by other plaintiffs are identical; if one plaintiff has standing, the Court need not reach the question of standing for others"). The Plaintiffs cite to *N. Dakota Legislative Assembly v. Burgum*, 2018 ND 189, 916 N.W.2d 83, where the North Dakota Supreme Court engaged in the following discussion:

> The Legislative Assembly argues that the Attorney General lacks standing to challenge the constitutionality of the budget section provisions of House Bill 1020 and Senate Bill 2013. The Legislative Assembly concedes that the Governor has standing to challenge these provisions. Because the issues raised and the relief requested by the Governor and the Attorney General are identical, we need not resolve whether the Attorney General has standing in his own right to bring the cross petition.

Id. at ¶ 38. The Plaintiffs also cite to *Bismarck Pub. Sch. Dist. No. 1 v. State By & Through N. Dakota Legislative Assembly,* 511 N.W.2d 247 (N.D. 1994), where the North Dakota Supreme Court addressed a constitutional challenge to the statutory method for distributing funding for education. *Id.* at 251. The North Dakota Supreme Court noted prior cases "...suggest that the nine plaintiff school districts do not have standing to raise those issues." *Id.* "However, the defendants concede[d] that the remaining plaintiffs have standing to challenge the constitutionality of the statutory method for distributing funding for education." As such, the Supreme Court found "...it is not necessary for us to resolve the standing issue." *Id.*

[¶69] Here, the claims are not universal amongst all Plaintiffs and the Court has

addressed the standing of each. The minor Plaintiffs are subject to the exception to the Health Care Law and lack standing to challenge it. As a result, the parent Plaintiffs also lack standing. Dr. Casas has first-party standing to challenge the Health Care Law based on procedural Due Process and on the claim it is impermissibly vague.

[¶70] Dr. Casas also has third-party standing to assert his patients' claims the Health Care Law violates Equal Protection and the right to personal autonomy and self-determination. This third-party standing is based upon the close relationship between his rights and the rights of his patients and the general recognition of other courts that the intimate relationship between health care providers and their patients ensures they will effectively assert their patients' rights.

[¶71] However, Dr. Casas' close relationship is with his patients and not their parents. No authority has been provided that health care providers can assert the rights of their patients' family members. The Plaintiffs do not argue Dr. Casas has third-party standing to advocate for the rights of the parent Plaintiffs. No party has standing to advance the claim the Health Care Law violates the right to parent. Absent a party with standing, the Court need not decide the issue.

[¶72] Having addressed the issue of standing, the Court will address the arguments stemming from the Defendants' second *Motion for Summary Judgment*.

II. The Plaintiffs' Substantive Challenges to the Heath Care Law

A) Equal Protection

[¶73] The Plaintiffs claim the Health Care Law violates the Equal Protection Clause found in Article I, Section 21 of the North Dakota Constitution. (R:273:31:138-141). However, Equal Protection under the North Dakota Constitution is guaranteed by both

Article I, Sections 21 and 22 which state:

> 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.

[¶74] 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*, 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)).

[¶75] "[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).

[¶76] "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*, at ¶ 7.

[¶77] In *Bismarck Public School Dist. No.1*, the North Dakota Supreme Court outlined the standards of judicial scrutiny when addressing 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.

Bismarck Public School Dist. No.1, 511 N.W.2d. at 256 (internal citations and quotations omitted).

[¶78] The Plaintiffs argue "[t]he Health Care Ban is unconstitutional because it denies North Dakotans equal protection of the laws based on sex and because it makes sex-based classifications, thus lacking a uniform operation." (R:448:25:47). They claim the Health Care Law "contains express sex-based classifications that determine whether a person can access the health care in question" and "relies on sex stereotyping and mandates gender conformity." (R:448:26:49-50). They argue "...the ban discriminates against North Dakotans whose gender identity does not conform to their sex assigned at birth which is inherently a form of sex discrimination." (R:448:27:51). The Plaintiffs suggest because the Health Care Law contains a "sex-based" classification, the Court need not determine whether "transgender status" constitutes an independent suspect classification. (R:448:28:53). But, they urge the Court rule transgender status is a suspect class nonetheless.

[¶79] The Defendants argue the Healthcare Law regulates the "...medical gender transition care of all minors, regardless of the sex of the minor." (R:446:24:53). They argue the law distinguishes between children and adults. (R:446:25:53). The Defendants assert, "Plaintiffs are not members of, and the Health Care Law does not regulate, a recognized suspect class." (R:446:25:55).

[¶80] The United States Supreme Court has held, "[t]o withstand constitutional challenge [under the Equal Protection Clause] classifications by gender must serve important governmental objectives and must be substantially related to achievement of

those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Gender is a "quasi-suspect" classification. *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 325, (1976)(Marshall, J. dissenting). Discriminatory classifications based on sex or illegitimacy receive "intermediate scrutiny" lying between the extremes of strict scrutiny and rational basis review. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

[¶81] It does not appear the North Dakota Supreme Court has ever recognized a "quasi-suspect" classification triggering intermediate scrutiny under the North Dakota Constitution. Under Article I, Sections 21 and 22 an "inherently suspect classification" triggers strict scrutiny. Where no suspect classification is involved a rational basis standard applies. Under the North Dakota Constitution, "[t]he suspect classifications include those based upon some immutable characteristics determined solely by the accident of birth such as race, national origin, sex, or illegitimacy, which violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Johnson v. Hassett*, 217 N.W.2d 771, 775 (N.D. 1974)(internal quotations omitted). The North Dakota Supreme Court has "...recognized the suspect category...and used it in analyzing the North Dakota constitutional provision on equal protection..." *State ex rel. Olson v. Maxwell*, 259 N.W.2d 621, 627 (N.D. 1977). "[The North Dakota Supreme Court] ha[s] also indicated that classifications based on sex are 'inherently suspect' under our State Constitution." *Id.* (citations omitted).

[¶82] As previously discussed, since 2021, more than twenty states have enacted laws restricting the medical treatment of minors for gender dysphoria. Other states have passed protections for transgender individuals. These laws, and laws like them, have led to litigation throughout the country. The decisions stemming from these cases are far from

consistent.

[¶83] "There is no binding precedent from the United States Supreme Court…regarding whether transgender people are a quasi-suspect class." *Ray v. McCloud*, 507 F. Supp. 3d 925, 936 (S.D. Ohio 2020)). "…[T]he law nationally is in flux, with conflicting rulings on transgender constitutional rights." *Vasquez v. Iowa Dep't of Hum. Servs.*, 990 N.W.2d 661, 668 (Iowa 2023). "Some courts have applied intermediate scrutiny for transgender rights claims." *Id.* at 669. "Some courts have applied rational basis review." *Id.* "Other courts have questioned whether transgender persons satisfy traditional tests for status as a quasi-suspect class triggering heightened scrutiny." *Id.* No federal courts have determined that transgender persons qualify as a suspect class receiving strict scrutiny. *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553, 570 (Minn. Ct. App. 2020). "Gender-affirming care is currently being litigated on Equal Protection grounds around the country, and the United States Supreme Court is poised to take up the issue this term…" *Cross by & through Cross v. State*, 2024 MT 303, ¶ 60, --P.3d.-- (McKinnon, J.)(concurring)(citing *L.W. v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023), *cert. granted sub nom. United States v. Skrmetti*,--U.S.--, 144 S. Ct. 2679 (2024))."

[¶84] 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. The term "transgender" is not found in any North Dakota Supreme Court decisions. All North Dakota statutes referencing transgender individuals were passed in the 2023 Legislative session. *See* N.D.C.C. § 12-44.1-09.1, N.D.C.C. § 12-46-26, N.D.C.C. § 12-47-40, N.D.C.C. § 15.1-06-21, N.D.C.C. § 15-10-68.

[¶85] To trigger strict scrutiny under the North Dakota Constitution, the Plaintiffs argue the Health Care Law discriminates based on sex. As noted by the Defendants, the Health Care Law applies equally to individuals regardless of whether they were assigned the gender of male or female at birth. The North Dakota Supreme Court has never recognized transgender individuals as a suspect class. They are entirely absent from North Dakota's legal history until 2023. This lack of historical reference, the strong presumption of constitutionality, and the heavy demanding burden the Plaintiffs must satisfy before an act of the legislature can be deemed unconstitutional is potentially insurmountable.

[¶86] However, a surmise that a party will not prevail is not a sufficient basis to grant summary judgment. *Albers v. NoDak Racing Club, Inc.*, 256 N.W.2d 355, 358 (N.D. 1977). The Defendants bear the burden of showing they are entitled to judgment of a matter of law. At this point, the Court finds there is a sufficient controversy that Dr. Casas should be allowed to assert third-party standing on behalf of his patients and the equal protection claim should proceed.

B) Right to Personal Autonomy and Self-Determination

[¶87] "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, 855 N.W.2d 31 (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).

[¶88] "Anglo-American law starts with the premise of thorough-going self-determination." *Natanson v. Klein,* 350 P.2d 1093, 1104 (K.S. 1960). "It follows that each man is considered to be master of his own body and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment." *Id.* "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 (1990)). The right of personal autonomy and self-determination applies, not only to refusing unwanted medical treatment, but also to making decisions regarding available treatment. *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 98, 855 N.W.2d 31 (Kapsner, J., concurring). "A person's interest in personal autonomy and self-determination is a fundamentally commanding one, with well-established legal and philosophical underpinnings." *State ex rel. Schuetzle*, 537 N.W.2d 358 at 360 (citing *Thor v. Superior Court (Andrews)*, 855 P.2d 375, 380-383 (G.A. 1993)).

[¶89] "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). "When a state statute is alleged to burden a liberty right under the state constitution, [the North Dakota Supreme Court] applies strict scrutiny." *MKB Mgmt. Corp*, 2014 ND 197 at ¶ 100 (citing *Hoff v. Hoff,* 1999 ND 115, ¶ 13, 595 N.W.2d 285). "'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.*

[¶90] The Plaintiffs claim "[t]he Health Care Ban infringes the right to bodily autonomy and self-determination by dictating how transgender minors must experience puberty, even when they have a medical diagnosis, the full support of knowledgeable medical providers abiding by guidelines supported by all major medical associations, and the support of caring parents." (R:273:34:152). The Defendants respond, "Plaintiffs' argument fails to acknowledge the purpose of the Health Care Law is a proper regulation of the medical profession to ensure the health and well-being of minors within the State." (R:446:32:69).

[¶91] 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).

[¶92] Decisions from other jurisdictions addressing similar state laws are far from uniform. In its examination of a 2023 Tennessee ban, the United States Court of Appeals for 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." *L.W. by and through Williams v. Skrmetti*, 73 F.4th 408, 417 (6th Cir. 2023)(quoting *Washington v. Glucksberg*, 521 U.S. 702, 727 (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.* "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.*

[¶93] Similarly, in addressing a 2022 Alabama ban, the United States Court of Appeals for 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. *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1220 (11th Cir. 2023). "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. "...[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).

[¶94] Recently, a Circuit Court in Missouri found "...there is a substantial medical dispute about the causes and treatments of gender dysphoria" following a nine-day trial. *Noe v. Parson*, 23AC-CC-04530 pg. 4. The Circuit Court determined "[i]ndeed, the medical dispute has become more fractured in the last year, with even more medical authorities questioning the evidence for these interventions." *Id.* "This Court heard conflicting testimony as to the ethical propriety of performing various levels of gender-affirming treatment on children and adolescents." *Id.* at pg. 55. "Such a conflict within the medical profession itself is cause for alarm, and gives rise to a legitimate basis for a legislature to enact legislation." *Id.*

[¶95] Other Courts have expressed different views. In *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021), the United States District Court for the Eastern District of Arkansas dealt with a 2021 Arkansas law that prohibited Health Care providers from referring any minor for "gender transition procedures." *Id.* at 887. 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." *Id.* 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.

[¶96] Similarly, in addressing a Georgia ban, 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.*

[¶97] 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.*

[¶98] 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). 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.*

[¶99] Finally, the Supreme Court of Montana recently addressed that state's ban in an appeal from an order granting a preliminary injunction. *Cross by & through Cross v. State,* 2024 MT 303, --P.3d--. The Montana Supreme Court stated "...the Legislature generally has no interest in restricting 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." *Id.* at ¶ 28 (internal citations omitted). "That privacy right

empowers an individual to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government." *Id.* "The Legislature may restrict this fundamental right to privacy only when it can demonstrate a medically acknowledged, bona fide health risk." *Id.* In affirming the preliminary injunction the Montana Supreme Court went on to state:

> The exceptions to Montana's expansive right to privacy... do not apply here. ...SB 99 proscribes lawful medications and procedures administered by competent and licensed health care providers. The Legislature did not make gender-affirming care unlawful. Nor did it make the treatments unlawful for all minors. Instead, it restricted a broad swath of medical treatments only when sought for a particular purpose. The record indicates that Provider Plaintiffs, or other medical professionals providing gender-affirming care, are recognized as competent in the medical community to provide that care. ...[T]he law puts governmental regulation in the mix of an individual's fundamental right "to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider." The District Court therefore did not err...

Id. at ¶ 32 (internal citations omitted).

[¶100] Here, both sides presented expert witnesses at the preliminary injunction hearing. Dr. Casas testified for the Plaintiffs along with psychiatrist, Dr. Gabriella Balf. The Defendants elicited testimony from Dr. James Cantor, a psychologist, and Dr. Michael Laidlaw, an endocrinologist.

[¶101] Dr. Casas 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). 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. However, 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).

[¶102] 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). 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).

[¶103] Dr. Laidlaw described the use of puberty blockers and cross-sex hormones in adolescents as "experimental." (R:268:256:12). He 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).

[¶104] Dr. Cantor 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).

[¶105] 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).

[¶106] Since the preliminary injunction hearing both sides have identified multiple additional expert medical witnesses. (R:425;R:459;R:489;R:515). Some of these expert medical witnesses have testified in the ongoing cases in other jurisdictions. Generally, the Plaintiffs' experts assert treating minors diagnosed with gender dysphoria with puberty blocking medications and hormones is safe and effective and overwhelmingly supported by the scientific medical community. The Defendants experts disagree and claim the medications are being used "off-label" and have not been proven safe, there is a lack of consensus amongst the medical community regarding the appropriate method of care, and there is a glaring absence of research regarding the long-term impacts of these medications on minors.

[¶107] In determining whether summary judgment is appropriate the evidence must be viewed in the light most favorable to the Plaintiffs and they are entitled to the benefit of all favorable inferences that can be reasonably drawn from the record. Determining whether the constitutionally protected right to personal autonomy and self-determination has been violated requires balancing the interests of the individual against the relevant state interests. At this stage, there are genuine issues of material fact and the Defendants are not entitled to summary judgment on the Plaintiffs' claim the Health Care Law violates the right to personal autonomy and self-determination.

C) Procedural Due Process

[¶108] The Plaintiffs' next argument is that the Health Care Law violates Dr. Casas' right to procedural Due Process. The Plaintiffs argue Dr. Casas was deprived of 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). The crux of this argument is because the Health Care Law contained an emergency clause, making it effective immediately, Dr. Casas did not have a reasonable time to comply with the law. (R:488:36:72-488:37:72).

[¶109] Article I, Section 9 of the North Dakota Constitution states:

> All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by Due Process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

N.D. Const. art. I, § 9. There are two elements the Plaintiffs need to prove 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. 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.

[¶110] 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. "Procedural due process requires notice and a meaningful opportunity for a hearing appropriate to the nature of the case." *State v. One Black 1989 Cadillac,* 522 N.W.2d 457, 463 (N.D.1994) (citations omitted). "An opportunity to be heard must be granted 'at a meaningful time *and* in a meaningful manner.'" *State v. One 2002 Dodge Intrepid Auto*, 2013 ND 234, ¶ 7, 841 N.W.2d 239 (quoting *One Black 1989 Cadillac*, at 463). Procedural due process necessitates fundamental fairness. *Matter of Didier*, 2019 ND 263, ¶ 10, 934 N.W.2d 417.

[¶111] Here, Dr. Casas was aware of House Bill 1254 before it became law. The legislative record reflects on January 24, 2023, he provided testimony before the House Human Services Committee. (R:200). He provided testimony to the Senate Human Services Committee on March 15, 2023. (R:203). Dr. Casas had notice of the Health Care Law at least three months before it was enacted and availed himself of the opportunity to be heard at two legislative hearings. Whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter in which state legislatures are given the greatest deference. *See Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982). Dr. Casas was provided with notice and a meaningful opportunity to be heard satisfying the procedural Due Process protections under the North Dakota Constitution.

[¶112] Further, even without an emergency clause the Health Care Law would have become effective on August 1, 2023. *See* N.D. Const. Art. IV, § 13. In his *Declaration* dated September 12, 2023, Dr. Casas alleges even at that time he could not understand the Health Care Law. (R:16:6:42). The Plaintiffs waited until September 15, 2023, to file their *Complaint* and *Motion for a Temporary Restraining Order*. (R:2;R:8). The Plaintiffs

have not adequately explained the connection between the emergency clause and alleged violation of procedural Due Process.

[¶113] There are no genuine issues of material fact regarding the Plaintiffs procedural Due Process claim. Dr. Casas was provided procedural Due Process and the Defendants are entitled to summary judgment.

D) Vagueness

[¶114] The Court has addressed the Plaintiffs' argument the Health Care Law is unconstitutionally vague and violates Due Process under Article I, Section 9 of the North Dakota Constitution. *See* ¶¶ 36-43. The Health Care law is not impermissibly vague. This is a question of law appropriate for summary judgment. The Defendants are entitled to summary judgment on the Plaintiffs' vagueness claim.

Conclusion

[¶115] The Plaintiffs have not suffered a threatened or actual injury from N.D.C.C. § 12.1-36.1-02(1)(a), which bans certain enumerated surgical procedures that are not performed in North Dakota under the acknowledged standard of care. They, therefore, lack standing to challenge this portion of the Health Care Law.

[¶116] The minor Plaintiffs T.D., James Doe, and Pamela Roe were all receiving prescription medications to treat gender dysphoria in North Dakota prior to April 21, 2023. The Legacy Clause in N.D.C.C. § 12.1-36.1-03(2) applies to them. They can receive any medical care in North Dakota they could have received prior to the Health Care Law's passage. They lack standing to challenge any portion of the Health Care Law.

[¶117] The parent Plaintiffs, Devon Dolney, Robert Dolney, Peter Roe, Paula Roe, John Doe, and Jane Doe also lack standing to challenge the Health Care Law as their children

can receive medical care in North Dakota. No other Plaintiff has standing to assert the Health Care Law violates the fundamental right to parent under Article I, § 1, of the North Dakota Constitution.

[¶118] Dr. Casas has first-party standing to assert the passage of the Health Care Law violated procedural due process and violates the vagueness protections found in Article I, § 9, of the North Dakota Constitution.

[¶119] The *Amended Complaint* is sufficient to put the Defendants on notice Dr. Casas is pursuing claims on behalf of his patients including those who cannot avail themselves of the protections of N.D.C.C. § 12.1-36.1-03(2).

[¶120] Dr. Casas has a sufficiently close relationship with his patients to assert third-party standing on their claims the Health Care Law violates Equal Protection and the right to personal autonomy and self-determination found in Article I, § 21, and Article I, § 1, of the North Dakota Constitution.

[¶121] The Defendants have not met their burden of establishing there are no issues of material fact and that they are entitled to judgment on the Plaintiffs' claims the Health Care Law violates Equal Protection and the right to personal autonomy and self-determination.

[¶122] Dr. Casas was provided notice and an opportunity to be heard satisfying the requirements of procedural due process. The Defendants are entitled to summary judgment on the claim passage of the Health Care Law violated Dr. Casas' right to procedural due process.

[¶123] The Health Care Law, while not a model of drafting, is sufficiently worded to allow ordinary people to understand what conduct is prohibited and the Defendants are

entitled to summary judgment on the claim the Health Care Law is unconstitutionally vague.

[¶124] **IT IS HEREBY ORDREED** summary judgment is **GRANTED** regarding any challenge to N.D.C.C. § 12.1-36.1-02(1)(a) which bans certain enumerated surgical procedures on minors not being performed in North Dakota. This claim is dismissed.

[¶125] **IT IS HEREBY ORDERED** summary judgment is **GRANTED** regarding the standing of T.D., James Doe, Pamela Roe, Devon Dolney, Robert Dolney, Peter Roe, Paula Roe, John Doe, and Jane Doe, and they are dismissed as Plaintiffs in this matter.

[¶126] **IT IS HEREBY ORDERED** summary judgment is **GRANTED** on the claim the Health Care Law violates the fundamental right to parent under Article I, § 1, of the North Dakota Constitution as no remaining party has standing to pursue this claim. This claim is dismissed.

[¶127] **IT IS HEREBY ORDERED** summary judgment is **DENIED** on the claim Dr. Casas lacks first-party standing to assert the Health Care Law violates procedural due process and the vagueness protections found in Article I, § 9, of the North Dakota Constitution.

[¶128] **IT IS HEREBY ORDERED** summary judgment is **DENIED** on the claim Dr. Casas lacks third-party standing to assert the Health Care Law violates his patients' rights to equal protection under Article I, § 21, of the North Dakota Constitution.

[¶129] **IT IS HEREBY ORDERED** summary judgment is **DENIED** on the claim Dr. Casas lacks third-party standing to assert the Health Care Law violates his patients' right to personal autonomy and self-determination under Article I, § 1, of the North Dakota Constitution.

[¶130] **IT IS HEREBY ORDERED** summary judgment is **GRANTED** on the Plaintiffs' claim passage of the Health Care Law violated Dr. Casas' right to procedural due process under Article I, § 9, of the North Dakota Constitution. This claim is dismissed.

[¶131] **IT IS HEREBY ORDERED** summary judgment is **GRANTED** on the Plaintiffs' claim the Health Care Law is unconstitutionally vague in violation of Article I, § 9, of the North Dakota Constitution. This claim is dismissed.

Dated January 14, 2025.

Jackson J. Lofgren, District Judge
South Central Judicial District