IN THE SUPREME COURT STATE OF NORTH DAKOTA

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, on behalf of himself and his patients, Plaintiffs/Appellants, -vs- 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; AMANDA ENGELSTAD, in her official capacity as the State's Attorney for Stark County. Defendants/Appellees.	**Supreme Ct. No. 20260075** **D. Ct. No. 08-2023-CV-02189** South Central Judicial District

On Appeal from Amended Final Judgment Dated December 19, 2025
Burleigh County District Court, South Central Judicial District
Hon. Jackson J. Lofgren, District Court Judge

APPELLANT DR. LUIS CASAS'S PRINCIPAL BRIEF

ORAL ARGUMENT REQUESTED

Christina Sambor (ND #06648)
SAMBOR LAW & CONSULTING
220 E. Rosser Ave., #1703
Bismarck, ND 58502
Telephone: (701) 354-3375
christina@samborlaw.com

Jess Braverman (ND # P02755)
Greta Wiessner (ND# P03099)
GENDER JUSTICE
663 University Ave W Suite 200
St. Paul, MN 55104
Telephone: (651)789-2090
jess.braverman@genderjustice.us
greta.wiessner@genderjustice.us

Tanya Pellegrini (ND # P027776)
LAWYERING PROJECT
584 Castro St. #2062
San Francisco, CA 94114
Telephone: (646) 480-8973
tpellegrini@lawyeringproject.org

Paige Suelzle (ND # P02775)
LAWYERING PROJECT
300 Lenora St., No. 1147
Seattle, WA 98121
Telephone: (347) 515-6073
psuelzle@lawyeringproject.org

Counsel for Appellant Dr. Luis Casas

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STATEMENT OF ISSUES

[¶1] Did the District Court err in subjecting the Health Care Ban to only rational basis review?

[¶1a] Did the District Court err in deciding that the Health Care Ban does not implicate the inalienable rights guaranteed by Article I, § 1, of the North Dakota Constitution?

[¶1b] Did the District Court err in deciding that the Health Care Ban does not implicate the right to equal protection enshrined in Article I, §§ 21 and 22, of the North Dakota Constitution?

[¶2] Assuming rational basis review is the proper standard of review, did the District Court err in finding that the Health Care Ban is rationally related to a legitimate government interest and is therefore constitutional?

STATEMENT OF THE CASE

[¶3] The legislature passed House Bill 1254, codified at N.D.C.C. § 12.1-36.1 ("the Health Care Ban" or "the Ban") and available at Add. #1, as an emergency measure and it was signed into law on April 19, 2023, and filed with the Secretary of State on April 21, 2023.

[¶4] A North Dakota licensed physician, Dr. Luis Casas, and three transgender adolescents and their families filed a complaint challenging the Ban under the North Dakota Constitution both on its face and as applied to Dr. Casas and his patients diagnosed with gender dysphoria. Amended Complaint (R273).

[¶5] A bench trial took place from January 27, 2025, through February 4, 2025, regarding Dr. Casas's claims that the law is facially unconstitutional or alternatively is

unconstitutional as applied to himself and his patients diagnosed with gender dysphoria and who are not subject to the Ban's Legacy Clause, under Article I, §§ 1, 21, and 22. Transcript of Court Trial Days 1–7 (R764–770). The provisions of the Ban regarding surgical procedures, which Dr. Casas does not provide, were not at issue at trial. Order Granting in Part and Denying in Part Motions for Summary Judgment (R537:¶¶115, 124).

[¶6] The Court issued a Findings of Fact, Conclusions of Law, and Order for Judgment on October 21, 2025, and found that the law does not implicate Article I, §§ 1, 21, or 22 of the North Dakota Constitution, and that the law survives rational basis review. Findings of Fact, Conclusions of Law, and Order for Judgment (R785). Appellant appeals from the amended final judgment issued December 19, 2025. Amended Judgment (R813).

STATEMENT OF FACTS[1]

A. Plaintiff Dr. Casas

[¶7] Dr. Casas, a board-certified pediatric and adult endocrinologist licensed to practice medicine in North Dakota and Minnesota, has been practicing pediatric endocrinology for about 20 years. Plaintiff's Trial Exhibit 10, CV of Dr. Luis Casas (R197); (R767:119:5–9, 120:13–19, 120:21–23). He treats conditions in minor patients such as diabetes, thyroid problems, metabolic conditions, growth hormone deficiency, growth hormone excess, late puberty, early puberty, adrenal problems, disorders of sex development, and gender dysphoria, among others. (R767:121:20–122:10). Dr. Casas has substantial training and experience with pediatric behavioral and cognitive development, and the physical, mental, and psychological maturity of children and adolescents. (R767:125:5–9).

[1] A more fulsome summary of the trial record is available in Plaintiff's Proposed Findings of Fact (R773).

[¶8] Dr. Casas has treated more than 200 transgender patients for symptoms of gender dysphoria, at least 75% of whom were North Dakotans. (R767:122:16–22).

[¶9] Dr. Casas brings this lawsuit on his own behalf and on behalf of his patients that are denied life- and health-preserving medical care by the Health Care Ban. (R273:1–2, ¶16).

B. The Health Care Ban

[¶10] The Health Care Ban is a criminal law, and violation by physicians can result in a misdemeanor, prison, fines, and license revocation. N.D.C.C. §§ 12.1-36.1-02(2)(b), 43-17-31(1)(c); (R767:154:2–5).

[¶11] The Ban prohibits health care providers in North Dakota from prescribing, dispensing, administering, or otherwise supplying any medication with a "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." N.D.C.C. § 12.1-36.1-02(1)(c).

[¶12] "Sex" is defined in the Ban as "the biological state of being female or male, based on the individual's nonambiguous sex organs, chromosomes, or endogenous hormone profiles at birth." N.D.C.C. § 12.1-36.1-01(3).

[¶13] This prohibition includes a ban on prescribing puberty-blocking medication to "stop normal puberty," testosterone to females, and estrogen to males. N.D.C.C. § 12.1-36.1-02(1)(c).

C. The North Dakotans Impacted By The Health Care Ban

[¶14] Each person is assigned "male" or "female" at birth by medical providers based solely on external genitalia. (R764:69:14–24). Most people are cisgender and align with the sex assigned to them at birth, while a small population of people are transgender and

do not. (R764:73:4–10). Being transgender, while relatively uncommon, is a normal feature of human diversity. (R764:74:9–14).

[¶15] Gender dysphoria is a medical condition under the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"), defined as "a marked incongruence" between a person's gender identity and their sex assigned at birth that meets certain enumerated criteria, and that persists for at least six months. Plaintiff's Trial Exhibit 20, Am. Psychiatric Ass'n's Diagnostic and Statistical Manual of Mental Disorders (R590:9, 10); (R764:74:15–25). It is diagnosed only when accompanied by clinically significant distress or impairment in social, school, occupational, or other important areas of functioning, which is caused by the mismatch between the development of their bodies and their identities. (R590:9–11; R764:96:15–97:6; R767:21:12–23:25).

[¶16] Symptoms of clinically significant distress associated with gender dysphoria include self-harm, attempts at self-castration, suicide, inability to attend school, refusal to speak altogether for over a year at a time, and refusal to look in the mirror, among other harms. (R767:22:1–23:25, 149:11–150:1). Dr. Casas testified that he has had patients with gender dysphoria "in North Dakota who have not only attempted suicide but have been the only type of patient that [he] ha[s] taken care of that have actually successfully committed suicide." (R767:149:21–150:1).

[¶17] It is undisputed that for some adolescents with gender dysphoria, gender-affirming medical care is the *only* effective treatment to address their clinically significant distress. (R764:151:5–15; R767:24:1–24, 156:9–157:1). Psychotherapy alone does not prevent irreversible physical changes associated with puberty, and "[p]sychotherapy alone was never sufficient" to address severe distress associated with gender dysphoria.

(R767:24:18–24).

[¶18] Potential medical interventions for adolescent patients with gender dysphoria may include hormonal interventions, such as pubertal suppression to delay puberty and allow families to consider their options with clear minds rather than under the duress of the ticking clock of puberty, (R764:107:1–5, 113:9–14), and, in older adolescents, cross-hormone therapy, (R764:118:13–25). These interventions are generally referred to as "gender-affirming medical care."

[¶19] For people with gender dysphoria, puberty is a critical time for medical intervention, as this is when unwanted secondary sex characteristics begin to develop. (R764:80:12–81:11; R766:98:7–25; R767:22:4–23:25). Secondary sex characteristics associated with puberty, such as the development of breasts or facial hair, can cause "debilitating" harm to people with gender dysphoria. (R764:77:16–20). Forcing transgender people to wait until they are eighteen years old to access gender-affirming medical care is "not a reasonable alternative to providing timely and appropriate care in adolescence" because they will experience the unwanted, permanent, and irreversible effects of puberty that could have been avoided, and they will miss the opportunity to go through a desired puberty at an age-appropriate time. (R764:151:16–152:3; R767:68:3–6) ("Not giving treatment is not neutral because the alternative is that puberty goes on, and this will have irreversible effects. So the alternative is not that neutral at all.").

[¶20] There are serious risks to patients with a gender dysphoria diagnosis who qualify for gender-affirming medical care under the relevant guidelines but are prohibited from receiving this care. (R767:159:7–14). Left untreated, clinically significant distress can cause suffering, and in some cases death. (R767:149:11–150:1).

[¶21] For transgender youth, gender-affirming care is life- and health-preserving because it alleviates the clinically severe distress caused by gender dysphoria, thereby reducing the symptoms which include self-harm and suicide and allowing them to live as their authentic selves and to thrive. (R764:137:24–138:10) (treating gender dysphoria "allow[s] these individuals . . . [to] have the ability to live the life that . . . they are deserving of, that they know that they want to live based on their gender identity, and to launch them into adulthood being healthy, happy, and successful, and loving themselves and their body"); (R767:54:8–15).

[¶22] For example, Pamela Roe is a transgender adolescent who received gender-affirming medical care in the state of North Dakota prior to the Ban. (R765:129:12–17, 134:1–7). Prior to accessing gender-affirming medical care, Pamela testified that she had no control over what was happening to her body and felt hopeless because she knew that these unwanted changes would be permanent. (R765:130:24–131:6). Pamela's symptoms of clinical distress included anxiety so significant that it was like panic and terror. (R766:98:12–14). She experienced thoughts of suicide, spoke of not wanting to be alive, and engaged in self-harm. (R765:140:14–18; R766:99:5–18). Gender-affirming medical care has been a "huge benefit" to Pamela, and the difference between Pamela's life before and after accessing gender-affirming medical care is like "night and day." (R766:108:14–18). Her depression and hopelessness are gone, she is now happy to leave the house, she is excelling in school, and she is making friends. (R766:108:18–109:7). At the time of trial, Pamela was an eleventh grader who liked learning languages, including French and Scottish Gaelic, and researching historical topics. (R765:128:24–129:7).

[¶23] The Health Care Ban prohibits Dr. Casas from providing certain medications, while

he is in North Dakota, to the small population of transgender patients experiencing severe distress due to gender dysphoria in order to preserve their life or health, (R767:155:16–156:5), while permitting him to provide these very same medications to any other adolescent for any other diagnosis, (R767:155:6–15). There is no other population of patients that he is prohibited from treating pursuant to the Ban. (R767:159:15–160:8).

D. The Provision of Gender-Affirming Care Prior to the Ban

[¶24] Before the Health Care Ban went into effect in North Dakota, a multidisciplinary team oversaw treatment for minors with gender dysphoria. (R766:142:22–143:14; R767:32:20–33:22, 123:15–25). The multidisciplinary team was usually comprised of mental and behavioral health specialists, such as a counselor, therapist, or psychiatrist; pediatric endocrinologists; internists or family doctors; and social workers, who are licensed and trained to treat minors for an array of diagnoses. (R767:33:13–22, 123:15–25).

[¶25] As with all other pediatric health care in North Dakota, parents of adolescent patients were considered a critical part of the care team, (R767:33:13–22), and were involved in the treatment plan, (R767:137:11–138:11). Dr. Casas did not provide gender-affirming medical care without parent or guardian consent, (R767:38:15–25, 137:22–138:11, 139:22–24), and assent from adolescents before initiating treatment, (R767:138:12–139:2). He engaged in a lengthy and thorough informed consent process during which he provided this information both orally and in writing. (R767:139:25–141:20). He moved forward with treatment only if, based on his medical judgment, he believed it was the best course of action for a minor patient. *See, e.g.*, (R767:136:1–137:6).

[¶26] The medications implicated by the Ban are still provided to other minor patients in

North Dakota to treat other conditions. (R767:155:6–15). The Food and Drug Administration ("FDA") approved puberty blockers for the purpose of delaying puberty in minors, specifically for the treatment of central precocious puberty ("CPP") (a condition in which puberty begins at an unusually early age). (R764:108:4–14; R766:29:10–19). Puberty blockers are a safe medication, and there are no "serious adverse effects from [] puberty blockers." (R767:145:19–146:7). One of the State's witnesses has prescribed puberty blockers to minor patients who are in kindergarten. (R768:71:17–72:14). The risks and side effects of puberty blockers are the same regardless of whether they are prescribed for a patient experiencing gender dysphoria or for CPP. (R767:145:15–146:20).

[¶27] Testosterone and estrogen are hormones prescribed to patients for many different conditions. (R764:119:15–120:6; R767:146:21–23, 147:22–25; R768:17:23–18:2). For example, testosterone or estrogen may be prescribed to a minor who has hypogonadism (a condition where the patient is unable to produce typical levels of their own sex hormones). (R767:146:21–147:5). The side effects and risks of taking estrogen or testosterone for any condition are the same as when estrogen or testosterone are used to treat gender dysphoria. (R767:147:6–148:19, 149:5–10). Dr. Casas can still prescribe testosterone or estrogen to his adolescent patients for any purpose except for treating gender dysphoria. (R767:155:10–156:8).

[¶28] In North Dakota, Dr. Casas and the multidisciplinary team monitored patients closely to mitigate side effects and risks of puberty blockers, testosterone, and estrogen. (R767:148:20–149:4).

[¶29] Though the banned medications carry side effects, (R767:147:6–148:11), adolescents in North Dakota can be prescribed medications that, unlike the banned care,

carry severe and even life-threatening side effects. (R767:17:7–19); *see infra* ¶ 113.

[¶30] Although the medications described in the Ban are prescribed off-label for gender dysphoria, meaning the FDA approved them to treat a different condition, off-label use is typical for pediatric care. For example, 85% of medications used in pediatric adolescent psychiatry are prescribed off-label. (R767:15:18–23). In fact, North Dakota law requires insurance coverage for off-label usage when, as is the case for gender-affirming care, it is considered the standard of care. (R765:108:15–109:17); Plaintiff's Trial Exhibit 104, N.D.C.C. § 26.1-36-06.1 (R665).

E. Legislative History of the Ban

[¶31] Gender dysphoria is a formal diagnosis in the DSM-5. (R590:9–11; R767:19:12–21:25; R770:69:3–12). Yet, the legislature enacted the Health Care Ban following a debate overwhelmingly characterized by inflammatory and demeaning comments about transgender people that were not grounded in fact or science. *See, e.g.*, Plaintiff's Trial Exhibit 3, Bill Hearing on H.B. 1254 Before the House Hum. Servs. Comm., February 15, 2023 (R578:33–34); Plaintiff's Trial Exhibit 4, Bill Hearing on H.B. 1254 Before the House, February 17, 2023 (R579:11); Plaintiff's Trial Exhibit 5, Bill Hearing on H.B. 1254 Before the Senate Hum. Servs. Comm., March 15, 2023 (R580:5); Plaintiff's Trial Exhibit 6, Bill Hearing on H.B. 1254 Before the Senate, April 3, 2023 (R581:8); Plaintiff's Trial Exhibit 108, Deposition of Representative Brandon Prichard (R669:202:13–203:4).

[¶32] For instance, lawmakers referred to gender dysphoria as a "childhood fantasy," Plaintiff's Trial Exhibit 2, Bill Hearing on H.B. 1254 Before the House Hum. Servs. Comm., January 24, 2023 (R577:1), repeatedly claimed that providing gender-affirming care to an adolescent is like giving a kid "eye removal" surgery or "peg leg surgery"

because that young person wants to be a pirate, (R577:1; R579:9), and likened gender-affirming care to cutting off the leg of a youth who "wants to be a disabled person, really bad," (R581:7).

[¶33] Lawmakers falsely claimed that around 75 to 90% of children will outgrow gender dysphoria if untreated. (R578:34). Adolescents with severe gender dysphoria that worsens at the onset of puberty—the *only* minors who have ever been eligible for gender-affirming care in North Dakota—are overwhelmingly likely to persist in their identity. (R764:159:23–160:18; R767:14:25–15:6, 84:7–24). There is no evidence of regret among the population of minors who received gender-affirming medical care in North Dakota. (R767:141:21–142:6).

[¶34] Despite implying that parents of transgender adolescents are weak and easily manipulated, (R578:34; R580:5), none of the lawmakers who testified in support of the bill spoke directly with families who would be impacted by it (R579:5). Numerous transgender North Dakotans and their family members testified in opposition to the bill. *See, e.g.*, (R577:25–28). None testified in favor of the bill. *See generally*, (R577–R581).

F. North Dakota's History of Deference to Physicians

[¶35] The Health Care ban is antithetical to North Dakotan's historical tradition of affording deference to physicians and medical associations when it comes to diagnosing and treating specific conditions. Prior to statehood, the Dakota Territory was an early adopter of medical associations. (R766:66:1–24). As medicine became more regulated and professionalized, physicians themselves exercised authority over the practice of medicine. To distinguish themselves from charlatans or lay providers, physicians wrote the first laws regulating medicine at North Dakota's founding. (R766:67:2–14, 90:19–23).

[¶36] Formed in 1890, the Board of Medical Examiners was made up of mostly physicians and had the power to license and discipline physicians. (R766:67:17–24). The North Dakota Board of Medical Examiners' early regulations did not mandate or prohibit treatment for any specific conditions. (R766:68:18–24). As medicine became more regulated in the Nineteenth Century, the Board of Medical Examiners entrusted physicians to diagnose and treat conditions. (R766:68:25–69:4). North Dakota was also at the forefront of medical and technological advances that drastically improved health outcomes. (R766:69:5–70:7).

[¶37] There was tremendous deference to physicians in North Dakota in the Nineteenth Century, and a capaciousness to how North Dakotans and physicians defined health and life. (R766:69:2–4, 70:13–16, 74:10–21, 75:7–10, 78:19–25). Medical guidelines are still drafted by physicians and medical associations comprised of learned medical professionals with relevant training and experience.

[¶38] The enactment of the Ban contradicts this deferential history and tradition. Numerous licensed medical and mental health care providers, (R577:37–44, 46–50), including North Dakota's only two pediatric endocrinologists, (R577:31–37), testified in opposition to the Health Care Ban. They said that it puts their patients at risk of self-harm and suicide and prevents doctors from practicing consistently with their Hippocratic Oath. (R577:33-34, 35, 36, 37). Over 200 health care providers signed a letter opposing the bill. (R766:144:9–147:6); Plaintiff's Trial Exhibit 29, Sturgill InForum Article About Letter (R220).

[¶39] All the leading American medical and mental health organizations support the provision of gender-affirming care because it is effective, evidence-based care. *See*

Plaintiff's Trial Exhibit 24, Brief of Amici Curiae Am. Acad. of Pediatrics et al. in Support of Motion for a Temporary Restraining Order and Preliminary Injunction. (R128:¶5).

[¶40] By contrast, the State presented testimony only from out-of-state outliers who disagree with the medical consensus. (R768:61:16–62:16, 64:4–6; 67:4–70:4, 119:14–16, 139:23–142:24, 144:19–145:12; R769:109:9–18, 159:24–161:12; R770:73:18–21). With the exception of Dr. Levine, none of these outliers has ever treated any minor with gender dysphoria. (R768:63:11–20, 121:10–24; R769:121:19–24). Courts around the country have repeatedly discredited each of the State's witnesses. *E.g.* (R768:77:13–79:10, 135:20–136:5; R770:90:25–92:5).

[¶41] At trial, the State provided no examples from North Dakota's early history in which the government disregarded the medical expertise of licensed in-state providers and instead dictated that a group of North Dakotans must receive health care based on the views of outliers. *See generally* (R764–770).

STANDARD OF REVIEW

[¶42] "Whether a statute is unconstitutional is a question of law . . . fully reviewable on appeal." *Teigen v. State*, 2008 ND 88, ¶ 7, 749 N.W.2d 505 (N.D. 2008). This Court reviews de novo whether a statute violates the North Dakota Constitution. *See Simons v. Dep't of Hum. Servs*., 2011 ND 190, ¶ 23, 803 N.W.2d 587 (N.D. 2011); *see also State v. Hilgers*, 2004 ND 160, ¶ 25, 685 N.W.2d 109 (N.D. 2004).

[¶43] Under Article VI, § 4 of the North Dakota Constitution, a consensus of at least four members of this Court is required to declare a state law unconstitutional. N.D. Const. art. VI, § 4. But a simple majority will suffice for this Court to remand to the District Court to apply strict scrutiny to the Ban. *See City of Mandan v. Fern*, 501 N.W.2d 739, 748 (N.D. 1993) (holding that equal protection prohibits gender-based preemptory challenges and

remanding for the trial court to apply the correct standard in the first instance); *see also, e.g.*, *Moody v. NetChoice, LLC*, 603 U.S. 707, 726 (2024) (reversing and remanding for lower courts to apply correct constitutional framework); *Johnson v. California*, 543 U.S. 499, 515 (2005) ("hold[ing] only that strict scrutiny is the proper standard of review and remand[ing]" for lower courts to determine whether prison's race-based classification policy violates equal protection).

[¶44] Appellant asks this Court to find, by simple majority, that the District Court erred in subjecting the Ban to rational basis review, and to remand to the lower court to apply heightened review. In the alternative, Appellant asks this Court to find that the law fails rational basis review and is therefore unconstitutional and unenforceable.

LEGAL ARGUMENT

I. The Legislature's Power to Regulate Medicine Ends Where The Individual Rights of North Dakotans Begin

[¶45] "The provisions of [the North Dakota] constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise." N.D. Const. art. I, § 24; *Ford Motor Co. v. Baker*, 300 N.W. 435, 438 (N.D. 1941); *Wilson v. City of Fargo*, 186 N.W. 263, 268 (N.D. 1921). Constitutions are restrictions on the primarily plenary powers of the legislature, which means that the general police powers of the state end where the constitutionally protected rights of North Dakotans begin. *See Martin v. Tyler*, 60 N.W. 392, 395 (N.D. 1894).

[¶46] Although courts must presume laws are constitutional and resolve doubtful questions in favor of constitutionality, a court that fails to protect citizens from government overreach "fails in the purposes of its creation." *Id.* The Constitution serves as a "shield" against legislative encroachment on individual rights, and courts are charged with ensuring

that unlawful legislative acts "fall[] harmlessly upon that shield." *Id.*

II. The Health Care Ban Is Subject To Strict Scrutiny

[¶47] The Health Care Ban warrants heightened review because: 1) it infringes on fundamental and inalienable rights enshrined in Article I, § 1 of the North Dakota Constitution; and 2) it involves a fundamental right and inherently suspect classification for purposes of North Dakota's equal protection analysis under Article I, §§ 21 and 22. *See Bouchard v. Johnson*, 555 N.W.2d 81, 87 (N.D. 1996). Under strict scrutiny, courts may uphold statutes "justified only by a compelling state interest and . . . narrowly drawn to express only the legitimate state interest[] at stake." *Hoff v. Berg*, 595 N.W.2d 285, 290 (N.D. 1999).

[¶48] Because the District Court erred in applying rational basis review to a law that criminalizes the provision of essential medical care to a vulnerable class of North Dakotans, this Court should reverse and remand for the District Court to apply the appropriate level of scrutiny. *See Johnson*, 543 U.S. at 515.

III. The Health Care Ban Implicates The Fundamental Rights Shielded By Article I, § 1 Of The North Dakota Constitution

[¶49] The District Court applied rational basis review based on its erroneous legal conclusion that the right to personal autonomy and self-determination under Article I, § 1 of the North Dakota Constitution protects only the right to refuse unwanted medical procedures, but not the right to access life- and health- preserving healthcare with the aid of a licensed physician. (R785:¶¶183–84). This Court must correct that error.

[¶50] When North Dakota was admitted to the Union in 1889, it enshrined a comprehensive inalienable rights clause which now reads, in part, that "[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; [and] pursuing and obtaining safety and happiness[.]" N.D. Const. art. I, § 1.

[¶51] This Court has broadly construed Article I, § 1 to guard against government overreach by protecting a sweeping concept of individual liberty beyond the enumerated rights. *Wrigley v. Romanick*, 2023 ND 50, ¶ 54, 988 N.W.2d 231 (N.D. 2023) (McEvers, J., concurring) ("[T]he drafters [of the North Dakota Constitution] did not set out to delineate in Article I, § 1 the specific rights it protects and to exclude others," but rather to "'define the limits' of the State's exercise of power." (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union,* at *3 (2d ed. 1871))).

[¶52] "[L]iberty 'includes the right of the citizen to be free to use his faculties in all lawful ways . . . to earn his livelihood by any lawful calling . . . and, in general, the opportunity to do those things which are ordinarily done by free men.'" *State v. Cromwell*, 9 N.W.2d 914, 918 (N.D. 1943) (citation omitted). Similarly, the right to pursue and obtain safety and happiness is "one of the most comprehensive [rights] to be found in the constitutions," *id.* at 919 (internal quotation marks and citation omitted), and "must comprise personal freedom, [and] exemption from oppression or invidious discrimination," *id.* at 918.

[¶53] The North Dakota Supreme Court has recognized that Section 1 also encompasses the right to personal autonomy and self-determination, which "is a fundamentally commanding one, with well-established legal and philosophical underpinnings." *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358, 360 (N.D. 1995); *see also Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control

of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."); *Natanson v. Kline*, 350 P.2d 1093, 1104 (Kan. 1960) ("Anglo-American law starts with the premise of thorough-going self-determination," and "that each man is considered to be master of his own body.").

[¶54] North Dakota is not alone in recognizing personal autonomy and self-determination as fundamental rights. As the Montana Supreme Court has explained, the "fundamental right of self-determination and personal autonomy [is] both a limitation on the power of the government and a[] principle of preeminent deference to the individual." *Armstrong v. State*, 1999 MT 261, ¶ 31, 989 P.2d 364 (Mont. 1999). That principle reflects the long held understanding that a paternalistic government may not compel individuals to act for "[their] own good" absent harm to others. *Id.* (quoting John Stuart Mill, *On Liberty*, 43 Great Books of the Western World 271 (R. Hutchins ed., 1952)); *see also id.* ("[T]he only purpose for which power can be rightfully exercised over any member of a civilised [sic] community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because, it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.").

[¶55] The right to personal autonomy and self-determination includes, among many other things, a person's right to medical decision-making without undue government interference. *Schuetzle*, 537 N.W.2d at 360; *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 98, 855 N.W.2d 31 (N.D. 2014). While this constitutionally protected interest, like others, is not absolute, countervailing state interests are "often subordinate" compared "to the scope of a patient's autonomy." *Schuetzle*, 537 N.W.2d at 360.

[¶56] Contrary to the District Court's formulation, this essential right includes both the right to refuse unwanted medical treatment, and to "preserve [one's] life and health with the aid of a physician." *Romanick*, 2023 ND 50, ¶ 43, 988 N.W.2d 231 (N.D. 2023) (Tufte, J., concurring); *see also MKB Mgmt. Corp.*, 2014 ND 197, ¶ 98, 855 N.W.2d 31 (Op. of Kapsner, J) (recognizing "the right . . . with the advice of [one's] doctor, to choose the course of medical treatment that [one] believes is best among comparable alternatives"); *Access Indep. Health Servs., Inc. v. Wrigley,* 2025 ND 199, ¶ 121, 28 N.W.3d 850 (N.D. 2025) (Op. of Tufte, J.) ("Section 1 limits state power to regulate [medical care] where it is a necessary means to the constitutionally protected end of 'defending life.'").

[¶57] For the small population of North Dakotans impacted by the Health Care Ban, this law is the greatest barrier to exercising their inalienable right to access life- and health-preserving medical care protected by the North Dakota Constitution.

A. The Health Care Ban Infringes On The Inalienable Rights Of North Dakotans In Need Of Life- And Health-Preserving Medical Care

[¶58] For North Dakotan adolescents diagnosed with gender dysphoria, assenting to gender-affirming medical care on the advice of their physician(s) and with the consent of their parents, is essential to their ability to enjoy and defend life, to pursue and obtain safety and happiness, and to exercise their personal autonomy and self-determination. *See supra* ¶¶ 49-57. The Ban infringes on the rights of these adolescents to life- and health-preserving care.

[¶59] Because prolonged and significant emotional distress is a defining symptom of gender dysphoria, untreated gender dysphoria can cause serious and life-threatening mental health crises, including suicide, self-harm, depression, and anxiety. *See supra* ¶¶ 16, 19-22. Gender-affirming care is a safe and effective medical treatment to alleviate this distress,

and the provision of such care is consistent with the relevant medical guidelines that are supported by every major medical association nationwide. *See supra* ¶¶ 17, 39; (R128:¶¶1, 5, 12).

[¶60] The Ban threatens the lives and well-being of transgender North Dakotans by prohibiting Dr. Casas from exercising his professional judgment to treat his patients with gender dysphoria, even if he determines gender-affirming care is the only effective and evidence-based treatment for their clinically serious distress. *See Supra* ¶¶ 11, 17-23. Denying transgender adolescents treatment for gender dysphoria at the time of puberty, thereby forcing them through puberty inconsistent with their gender identity, is irreversible and excruciating. *See Supra* ¶ 19.

[¶61] The record is replete with evidence regarding the life- and health-saving nature of gender-affirming care, and the deleterious effect of criminalizing it. Research shows gender-affirming care lessens the risk of self-harm or suicide. *E.g.* Plaintiff's Trial Exhibit 51, Kaltiala Study (R612:4) (finding that the rate of suicidal ideation in transgender adolescent participants dropped from 35% to 4% with the use of hormones).

[¶62] The evidence includes powerful testimony from adolescent patients themselves. Sixteen-year-old Pamela Roe described experiencing "hopeless[ness]," panic, and terror at the prospect of undergoing male puberty, along with suicidal ideation; access to care restored her hope, alleviated her anxiety, and allowed her to thrive socially and academically. (R765:135:8–21, 136:23–137:6, 137:23–138:12, 139:1–15); *see also* (R766:97:12–25, 108:14–109:7, 116:12–117:1). Similarly, thirteen-year-old James Doe testified that hormone replacement therapy makes him feel "more comfortable with [him]self" and no longer "lost," explaining that the medication "really makes [him]…who

[he is] today," a transformation his mother confirmed allowed him to live as his authentic self. (R764:223:5–10, 226:4–5; R765:78:2–8). Together, this testimony demonstrates that, for these adolescents, gender-affirming medical care is essential to their mental health, identity, and ability to live safely and fully.

[¶63] Given the severity of a gender dysphoria diagnosis and the gravity of non-treatment, adolescents diagnosed with gender dysphoria and their families, like all North Dakotans, have a fundamental right to access best-practice medical care, as determined by their licensed medical providers. *See Access Indep. Health Servs., Inc. v. Wrigley*, 2025 ND 26, ¶ 18, 16 N.W.3d 902 (N.D. 2025) (subjecting statute to strict scrutiny "[g]iven the undisputable gravity" of criminalizing medical care when "[p]hysicians are expected to apply their knowledge of medicine in a manner that will protect the health and lives of their patients"). Such a significant curtailment of the rights protected under Section 1 must be subjected to strict scrutiny.

B. The Health Care Ban Is Antithetical To The Fundamental Freedoms Guaranteed To All North Dakotans

[¶64] The Health Care Ban is antithetical to the individual freedom embodied in the text, structure, and history of the North Dakota Constitution. Inspired by colonists' revolt against tyranny, the Framers of the North Dakota Constitution aspired to "see all safeguards thrown around the people in the protection of their rights." *See* Official Report of the Proceedings and Debates of the First Constitutional Convention of North Dakota 377 (1889). They declared the supremacy of individual rights by enacting a sweeping inalienable rights clause as the first provision of the North Dakota Constitution. *See* Lynn Boughey, *An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation*, 63 N.D. L. Rev. 157, 255 (1987). "[A]rticle I, section 1 of the North Dakota

state constitution has articulated a liberty interest that is more expansive and without parallel in the federal constitution." *MKB Mgmt. Corp.*, 2014 ND 197, ¶ 86, 855 N.W.2d 31. (Op. of Kapsner, J.). The Framers intended to "celebrate liberty as a fundamental interest to be fostered and protected." *Id*. The inclusion of "obtaining safety" along with pursuing happiness reflects the comprehensive protections of Section 1, and the Framers' intent to protect bodily integrity and mental wellbeing. *See* Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L. Q. 1, 17 (1997) ("[S]afety connotes not merely physical safety, but a state of wholeness, or well-being.").

[¶65] Consistent with the values expressed in the Constitution, westward pioneers were drawn to North Dakota for its economic freedom and "live and let live" ethos. (R765:22:12–23, 26:1–5). This autonomy was extended to all comers, including transgender people who migrated to the upper Midwest around the time of statehood to enjoy independence from repression. (R765:12:22–13:2, 23:2–24:2). They enjoyed freedom of movement and did not have to register with state agencies or have their gender appear on identification documents. (R765:38:16–20).

[¶66] Transgender people, as others, were measured by their contributions to building up these fledgling frontier communities. (R765:26:11–13, 27:6–28:5). As long as someone was willing to contribute, they were accepted, even if they were perceived as different. (R765:26:1–3, 26:11–13, 27:6–28:5, 29:22–30:18, 32:16–20).

[¶67] Likewise, at and around the time of statehood, North Dakota physicians enjoyed significant deference in the provision of medical care. *See supra* ¶¶ 35-37. Physicians could exercise their professional judgment to determine when health- or life-saving care was

appropriate without government interference. *Id.* Early regulations—crafted by North Dakota physicians themselves— included licensure prerequisites but did not involve second-guessing the reasoned medical judgment of physicians nor interfering in the doctor-patient relationship. *Supra* ¶ 36.

[¶68] While "the North Dakota Constitution must be read in the light of history," the District Court erred in selectively and narrowly relying on history to deny Appellant's claims. *State v. Allesi*, 216 N.W.2d 805, 817 (N.D. 1974).

[¶69] The District Court found it significant that the Framers of the North Dakota Constitution did not expressly discuss transgender people. (R785:¶174). Excluding transgender persons from constitutional protections not only flies in the face of the purposefully broad language of Section 1, which provides that "[a]ll individuals are by nature equally free and independent and have certain inalienable rights," N.D. Const. art. I, § 1, but would give the State free rein to target historically marginalized or disfavored groups with discriminatory legislation, *see also* N.D. Const. art. I, § 21 ("[N]or shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."); *Thompson v. Jaeger*, 2010 ND 174, ¶ 7, 788 N.W.2d 586 (N.D. 2010) ("The intent and purpose of a constitutional provision is to be determined, if possible, from the language itself." (quoting *State ex rel. Heitkamp v. Hagerty*, 1998 ND 122, ¶ 13, 580 N.W.2d 139 (N.D. 1998))). The District Court cannot disregard the plain language and original meaning of the Constitution in favor of a keyword search through contemporary records of the Constitutional Convention.

C. Adolescents Diagnosed With Gender Dysphoria And Their Families Have A Fundamental Right To Make Medical Decisions, In Partnership With Their Licensed Medical Providers

[¶70] Similarly, the District Court's conclusion that the fundamental right to medical

decision-making belongs exclusively to "person[s] of adult years with the capacity to reason" is unavailing. (R785:¶182). "The North Dakota Constitution explicitly provides *all citizens* of North Dakota the right of enjoying and defending life and pursuing and obtaining safety." *Romanick*, 2023 ND 50, ¶ 22, 988 N.W.2d 231 (emphasis added). Minors, people with certain intellectual disabilities, and others who may not be able to provide legal consent are afforded constitutional protection. *See, e.g.*, *Bergstrom v. Bergstrom*, 296 N.W.2d 490, 495 (N.D. 1980) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights." (quoting *Planned Parenthood of Central Missouri v. Danford*, 428 U.S. 52, 74 (1976))); *In re G.H.*, 218 N.W.2d 441, 446 (N.D. 1974) ("Handicapped children are certainly entitled to no less than unhandicapped children under the explicit provisions of the Constitution.").

[¶71] Further, when it comes to medical decision-making regarding adolescents, it is the parent, not the government, that participates in the informed consent process. The government only steps into that role when "parental control falters." *Schall v. Martin*, 467 U.S. 253, 265 (1984); *In re Kol*, 88 N.W. 273, 276–78 (N.D. 1901); *State ex rel. City of Minot v. Gronna*, 59 N.W.2d 514, 534–37 (N.D. 1953). Indeed, "[k]eeping State intervention in the matter of child rearing to a minimum, consistent with necessity, is essential to the American ideal." *In re R.D.S.*, 259 N.W.2d 636, 639 (N.D. 1977). Prior to the Ban, transgender adolescents were treated like all other adolescents in that they and their parents made medical decisions together with the assistance and advice of licensed medical professionals. *See supra* ¶ 25. Now, the government makes that decision for all adolescents impacted by the Ban, regardless of what care the adolescents need, what treatment their parents support, and what course of action their licensed physicians advise.

[¶72] Critically, accepting the District Court's atextual reasoning would strip minors of constitutional protections in the context of medical care. Under this approach, the State could regulate and restrict pediatric health care with near-total discretion, subject to only cursory judicial review, on the misguided premise that minors are categorically unable to appreciate risks. This upends the robust individual rights protections in Section 1 and, ironically, results in fewer guardrails to ensure minor's access to life- and health-preserving medical care.

[¶73] Recently, the Supreme Court of Montana affirmed a preliminary injunction prohibiting a similar ban on gender-affirming care for transgender adolescents from going into effect. *Cross ex rel. Cross v. State*, 2024 MT 303, ¶ 1, 560 P.3d 637 (Mont. 2024). That reasoning is persuasive here. Like Section 1 of the North Dakota Constitution, Montana's Constitution includes an expansive personal autonomy provision reflecting "Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives" and protecting medical decision-making. *Id.* ¶ 22 (internal quotation marks and citations omitted). Accordingly, the Montana Supreme Court affirmed the lower court's application of strict scrutiny. *Id.* ¶¶ 38–39. Although the Montana Supreme Court recognized the state's compelling interest in safeguarding minors, its ban on gender-affirming care did not serve that interest because it "prohibit[ed] individualized care tailored to the needs of each patient based on the exercise of professional medical judgment and informed consent." *Id.* ¶ 37. Thus, the Montana Supreme Court found the law fatally overbroad. *Id.* ¶¶38–39.

[¶74] So it is here. Like Montana's ban on gender-affirming care, the Health Care Ban "proscribes lawful medications and procedures administered by competent and licensed

health care providers" when sought by a subset of minors for a particular purpose. *Id.* ¶ 32. Indeed, the case against the Ban is even more compelling than the case against Montana's ban, as the District Court here was presented with significant evidence of the safety and efficacy of the care Appellant provides to his patients, and the harm that will befall North Dakotans if this life-affirming care is criminalized. *Id.* ¶ 46; *see also supra* ¶¶ 16-22. Nevertheless, the District Court in this case concluded that the Ban does not implicate fundamental rights under Section 1 without addressing the significant evidence of the dire—and sometimes deadly—health consequences of banning the only effective treatment for North Dakotan minors suffering from gender dysphoria.

[¶75] The District Court contravened the constitutional framework envisioned by Section 1 by failing to recognize that the Ban encroaches on the fundamental right to personal autonomy and self-determination under Article I, § 1 by denying Appellant, his patients, and their families the ability to choose life- and health-saving treatment that qualified medical providers have determined aligns with the standard of care and individual patient needs. The remedy is to remand for the District Court to apply strict scrutiny.

IV. The Health Care Ban Is Also Subject to Heightened Review On Equal Protection Grounds

[¶76] The "equal protection" provisions of the North Dakota Constitution are found in Article 1, §§ 21 and 22. *Bismarck Pub. Sch. Dist. No. 1 v. State ex rel. N.D. Legislative Assembly*, 511 N.W.2d 247, 255 (N.D. 1994). Section 21 prohibits the legislature from granting any "citizen or class of citizens" any "privileges or immunities which upon the same terms shall not be granted to all citizens." N.D. Const. art. I, § 21. Section 22 directs that "[a]ll laws of a general nature shall have a uniform operation." *Id.* § 22.

[¶77] North Dakota's equal protection provisions do not mirror, and were not modeled

on, the Federal Equal Protection Clause. *See, e.g.*, Hon. Robert Vogel, *Sources of the 1889 North Dakota* Constitution, 65 N.D. L. Rev. 331 (1989) (discussing the various influences of the North Dakota Constitution). When analyzing Equal Protection claims under the North Dakota Constitution, the Court first determines what tier of scrutiny to apply to the challenged law. *Gange v. Clerk of Burleigh Cnty. Dist. Ct.*, 429 N.W.2d 429, 433 (N.D. 1988). Strict scrutiny applies "to an inherently suspect classification or infringement of a fundamental right." *Id.* (citing *State ex rel. Olson v. Maxwell*, 259 N.W.2d 621, 627 (N.D. 1977)). If an "important substantive right" is involved, the Court applies intermediate scrutiny. *Id.* (citing *Hanson v. Williams Cnty.*, 389 N.W.2d 319, 323, 325 (N.D. 1986)); *see also infra* ¶ 99-100. Only if no suspect class or fundamental right is implicated, the Court applies rational basis review. *Id.* (citing *State v. Knoefler*, 279 N.W.2d 658, 662 (N.D. 1979)).

[¶78] Suspect classifications that warrant strict scrutiny include sex and "immutable characteristics determined solely by the accident of birth." *Maxwell*, 259 N.W.2d at 627 (noting that North Dakota Court accepted and adopted this classification in *G.H.*, 218 N.W.2d 441). Because the Health Care Ban classifies based on sex and on a minor's immutable transgender identity, the Court erred in failing to apply strict scrutiny.

A. The Health Care Ban Classifies Based on Sex

[¶79] The plain language of the Health Care Ban explicitly classifies based on sex. The Court's "primary goal when interpreting a statute is to determine the intent of the legislature by first looking to the plain language of the statute and attempting to give each word, phrase, and sentence its ordinary meaning." *State v. Long*, 2020 ND 216, ¶ 6, 950 N.W.2d 178 (N.D. 2020) (citation omitted). "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing

its spirit." N.D.C.C. § 1-02-05. North Dakota Courts "do not adopt a construction which would render part of the statute mere surplusage." *State v. McCreary*, 2021 ND 212, ¶ 8, 967 N.W.2d 447 (N.D. 2021) (citation omitted).

[¶80] The Health Care Ban facially classifies based on sex, so the Court need look no further. *See* N.D.C.C. § 1-02-05. The Ban defines "sex" as "the biological state of being female or male, based on the individual's nonambiguous sex organs, chromosomes, or endogenous hormone profiles at birth." N.D.C.C. § 12.1-36.1-01(3). The legislative definition of "sex" is the operating mechanism of the Ban. If, for example, a girl visits a pediatric endocrinologist seeking puberty suppressing medications and feminizing hormones, the pediatric endocrinologist must do only one thing to avoid criminal sanction: determine whether the Ban has classified her as "female." *See id.* § 12.1-36.1-02(1).

[¶81] Under the Ban, a "female" may access puberty blockers and estrogen to treat unwanted facial hair to look more like a girl. *Id.* She may do so regardless of whether she can demonstrate that she needs this care to preserve her life or health. *Id.* But a "male" may not do so, even if his family and physician(s) all agree this care is life- and health-preserving. *Id.* Similarly situated minor patients who have a diagnosis for which puberty suppression and hormones are indicated by the standards of care, whose parents provide informed consent and they provide assent, and whose physician is recommending their treatment are treated differently based on their sex. *Id.* Indeed, to enforce the Health Care Ban, the State would have to establish the patient's sex to a jury beyond a reasonable doubt. *Id.* § 12.1-36.1-02(2).

[¶82] The Ban not only classifies based on sex but also mandates gender conformity and adherence to sex-stereotypes, even if doing so threatens the person's life and health. *See*

id. § 12.1-36.1-02(1). This Court "should not 'subscribe to sex-based rules that are themselves based on sexual stereotypes.'" *Rustad v. Rustad*, 2014 ND 148, ¶ 12, 849 N.W.2d 607 (N.D. 2014) (quoting *Weber v. Weber*, 512 N.W.2d 723, 729 (N.D. 1994) (Levine, J., concurring)). This is especially so when the consequences of preserving sexual stereotypes are matters of life and death. *See supra* ¶¶ 16-22.

[¶83] The law further discriminates based on sex by denying medically necessary care to transgender individuals in North Dakota, even if it is needed to preserve their life and health, while allowing cisgender people to access the same care to affirm their gender for any reason. As the Montana District Court noted in ruling in favor of transgender plaintiffs, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Cross v. State*, No. DV-23-541, slip op. at 41 (4th Dist. Mont. May 13, 2025) (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660 (2020)). That is because "transgender status" is "inextricably bound up with sex." *Bostock*, 590 U.S. at 660–61.

[¶84] The Ban's sex-based classification is not fatal in itself—it merely triggers strict scrutiny. *See Maxwell*, 259 N.W.2d at 627. When North Dakota courts "use strict scrutiny, [they] do not defer to the legislative choice of classification but, instead, subject the classification to close analysis in order to preserve substantive values of equality.'" *In re Adoption of K.A.S.*, 499 N.W.2d 558, 565 (N.D. 1993) (citation omitted). The very purpose of applying heightened scrutiny to sex-based classifications is to ensure that their reliance on purported sex differences is "genuine, not hypothesized or invented." *United States v. Virginia*, 518 U.S. 515, 516 (1996); *see also K.A.S.*, 499 N.W.2d at 565.

[¶85] By applying only rational basis review, the District Court failed to hold the

government to its burden. The Court should remand with instructions to review the Ban under the proper standard and uphold it only if "the statute promotes a compelling governmental interest and []the distinctions drawn by the law are necessary to further its purpose." *Maxwell*, 259 N.W.2d at 627.

B. The Health Care Ban Targets A Class of People Based on Immutable Characteristics Determined By Accident of Birth

[¶86] When the legislature targets a class of people based on "immutable characteristics determined solely by accident of birth[,]" this Court applies strict scrutiny. *Id.*; *G.H.*, 218 N.W.2d at 447.

[¶87] The District Court found that being transgender is not an immutable characteristic determined solely by accident of birth because gender dysphoria "is a condition that may go into remission or desist." (R785:¶119). This finding is both factually and legally wrong. It misapprehends transgender people and misapplies North Dakota caselaw regarding immutability.

[¶88] A person's transgender status is a fixed identity; it does not go into "remission" or "desist" any more than a person's race goes into remission. *See* (R590:14) (recognizing that gender dysphoria—but not transgender status—may go into remission). The severe distress associated with gender dysphoria can go into "remission" with proper treatment, though the Health Care Ban prohibits precisely this care. *See* (R590:9, 14, 17); N.D.C.C. § 12.1-36.1-02.

[¶89] Moreover, while a person's understanding or beliefs about whether they are transgender can change, that is true of nearly every immutable characteristic. A person may take a DNA test and learn something new about their race. Likewise, a person might believe themselves to be "illegitimate," and then one day find their parents' marriage certificate

hidden in the attic. But race and illegitimacy are undeniably immutable characteristics for equal protection purposes. Thus, while a person's understanding of their membership in an inherently suspect class may shift with new information, the *characteristics themselves* are fixed.

[¶90] Relatedly, *pre-pubescent* children may be mistaken about whether they are transgender, but this is accounted for in the standards of care; pre-pubescent minors are simply ineligible for gender-affirming medical care. (R764:76:24–78:7; R767:62:16–24; R769:73:22–74:4, 143:3–144:4). Adolescents who are eligible under the standards of care are those with severe gender dysphoria that worsens at the onset of puberty, and these adolescents are overwhelmingly likely to persist in their identities, (R764:159:23–160:18; R767:84:7–24), which is why regret rates are far lower for this type of care than for other care that the State has not banned, (R767:63:25–64:7, 65:2–67:2, 141:21–142:6). Indeed, the State has failed to identify a single instance of a transgender adolescent in North Dakota who regrets receiving gender-affirming care.

[¶91] Being transgender is a natural component of human diversity and an immutable characteristic based on accident of birth, and a law targeting only this population for a denial of life- and health-preserving medication is subject to strict scrutiny.

C. The District Court Erred In Deferring To Federal Equal Protection Caselaw

[¶92] In its equal protection analysis, the District Court deferred to various opinions adjudicating similar bans under federal equal protection standards. (R785:¶¶74–98, 102). The District Court erred in failing to conduct an independent analysis under the North Dakota Constitution's "mandatory and prohibitory" guarantee of equal protection, for three reasons. N.D. Const. art. I, § 24.

[¶93] First, the delegates to the North Dakota Constitutional Convention "did not use the federal constitution as a model in formulating" the state Constitution. *State v. Herrick*, 1999 ND 1, ¶ 46, 588 N.W.2d 847 (N.D. 1999) (Maring, J., concurring in part) (citing Vogel, *supra*, at 342).

[¶94] "Federal courts examine State statutes only to determine if they comply with the United States constitutional mandates." *Johnson v. Hassett*, 217 N.W.2d 771, 776 (N.D. 1974). By contrast, North Dakota state courts examine statutes "for that purpose and also to determine if they comply with State constitutional mandates." *Id.* As a result, "[n]o one should be surprised if a statute passes the one set of standards and not the other." *Id.*

[¶95] The prohibitions on special legislation and class legislation were a result of the convention's adoption of what is known as a "long constitution," which has more restraints on legislative powers, as opposed to a "short constitution," like the federal one, which merely enunciates "a few fundamental principles." Vogel, *supra*, at 334.

[¶96] Second, the District Court's reliance on *United States v. Skrmetti*, 605 U.S. 495 (2025) is misplaced. (R785:¶¶74–86). *Skrmetti* is neither controlling nor persuasive here. In *Skrmetti*, the Court analyzed Tennessee's ban on gender-affirming medical care. *Id*. at 495. It did so at the preliminary injunction stage of the case and therefore did not have the benefit of a trial record demonstrating that the Ban has no medical basis and harms young people's health. *Compare id*. at 508 *with* (R764:81:1–8, 151:5–8; R765:81:9–20; R767:24:1–25:11, 149:11–150:1, 157:2–22).

[¶97] Third, in ruling that only rational basis applies to sex-based classifications in a medical context, the *Skrmetti* majority applied a legal test that is contrary to North Dakota law. *Skrmetti*, 605 U.S. 495 at 511. This Court has never applied such a carve-out, and for

good reason. Pseudo-scientific claims based on supposed sex-based biological differences have long been a principal justification for sex discrimination. *See, e.g.*, *Virginia*, 518 U.S. at 536 n.9 (reviewing medical evidence offered to support excluding women from higher education); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 n.10 (1982) (reviewing medical evidence offered to support excluding women from certain employment and professions). The very purpose of applying heightened scrutiny to sex-based classifications is to ensure that their reliance on purported sex differences is "genuine" and not "hypothesized or invented." *Virginia*, 518 U.S. at 533; *see also K.A.S.*, 499 N.W.2d at 565 (the purpose of strict scrutiny is "to preserve substantive values of equality").

[¶98] The *Skrmetti* majority's reasoning is also unpersuasive because it disregarded the plain language of the statute in reaching its conclusion that the law did not classify based on sex. This is inconsistent with North Dakota canons of construction. *See* N.D.C.C. § 1–02–05 ("When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."). Specifically, the *Skrmetti* majority stated that "[o]n its face," Tennessee's ban classifies based on "gender dysphoria, gender identity disorder, or gender incongruence." 605 U.S. at 511. That language is not a quote, nor even a paraphrase, of Tennessee's law. On its face, Tennessee's law expressly classifies based on whether a person seeks to "identify with, or live as, a purported identity inconsistent with [their] sex," or is suffering from "discomfort or distress from a discordance between [their] sex and asserted identity." *Id.* at 505–06 (emphasis added). The Ban at issue here classifies based on whether a person's "perception of [their] sex is inconsistent with [their] sex." N.D.C.C. § 12.1-36.1-02(1)(c). The Health Care Ban's operation expressly turns on a patient's sex. *See Bostock*, 590 U.S. at 667 (holding that it

is sex discrimination where an employer "necessarily and intentionally applies sex-based rules" against an employee). There is simply no basis in North Dakota jurisprudence to rewrite the Ban, as the *Skrmetti* court did with Tennessee's ban, nor to say that the Ban contains no sex-based classification, despite its plain text and its mechanism of operation. Therefore, the District Court erred in relying on *Skremtti* to determine that North Dakota's Ban was subject to rational basis review, instead of strict scrutiny. (R785:¶¶74–86, 102).

V. In The Alternative, The Court Should Remand The Case For The District Court To Apply Intermediate Scrutiny

[¶99] In its ruling, the District Court suggested that intermediate scrutiny would be the proper level of review if the law classifies based on sex or implicates important substantive rights. (R785:¶¶67–68). In support of applying intermediate scrutiny to a sex-based classification, it cited a sentence in *Fern* where the Supreme Court stated, "[w]e review alleged sex discrimination under an intermediate standard of scrutiny," for the proposition that if the Health Care Ban did contain a sex-based classification, then intermediate scrutiny should apply. (R785:68). However, because the litigant in *Fern* failed to properly raise and argue any claims under the North Dakota Constitution, the Court in *Fern* was *only* referring to the Federal Constitution. *Fern*, 501 N.W.2d at 744 n.3. In contrast, North Dakota has never applied intermediate scrutiny to any suspect class under the North Dakota Constitution. *Maxwell*, 259 N.W.2d at 627.

[¶100] However, the District Court erred in finding that the law does not implicate an important substantive right. If this Court finds the Ban does not implicate a fundamental right, it should still apply intermediate scrutiny, not rational basis review, because the Ban deprives a population of adolescents of "important substantive rights to life and safety which are available to other persons." *Hanson*, 389 N.W.2d at 328; *see* (R767:22:4–23:25,

149:11–150:1, 155:1–19). For that reason, and all the reasons stated herein, the District Court erred in applying rational basis review. *Hanson*, 389 N.W.2d at 325.

VI. The District Court Erred In Finding That The Health Care Ban Is Rationally Related To A Legitimate Governmental Interest

[¶101] To the extent this Court determines that the District Court correctly selected rational basis review, it should nevertheless find that the District Court erred in finding that the Health Care Ban is rationally related to a legitimate government interest.

[¶102] The Health Care Ban is unconstitutional both on its face and as-applied to Appellant's patients with a diagnosis of gender dysphoria. When faced with both types of claims, North Dakota courts review the as-applied claim first. If a law is constitutional as applied, then it is necessarily also constitutional on its face. *City of Fargo v. State*, 2024 ND 236, ¶ 12, 14 N.W.3d 902 (N.D. 2024). If the law is unconstitutional as applied, it will then consider the facial analysis. *Id.* However, when determining whether a law is facially constitutional, the proper focus is "the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of Los Angeles v. Patel*, 576 U.S. 409, 418-19 (2015). Appellant seeks a ruling that would allow adolescents who have been diagnosed with gender dysphoria to access the banned care from qualified medical providers. Based on the trial record, this is the only population for whom the law acts as a restriction, as they were the only population that actually received gender-affirming medical care prior to the Ban, (R767:91:15–92:4), notwithstanding lawmakers expressed fantasies about adolescents waking up one day, deciding they are a different sex, and accessing care on demand, (R578:27).

[¶103] Evidence at trial demonstrated that the Ban is patently arbitrary and not rationally related to the State's asserted interest in protecting children, as it harms the only population

impacted by the Ban rather than protecting them. (R764:81:1–8, 151:5–8; R765:81:9–20; R767:24:1–25:11, 149:11–150:1, 157:2–22).

[¶104] Additionally, the Health Care Ban is impermissibly motivated by animus towards transgender adolescents, and animus towards a politically disfavored class is not a legitimate government interest. *Infra* ¶¶ 115-119.

A. The Health Care Ban Is Not Rationally Related To The State's Asserted Interest In Protecting Vulnerable Children Because The Ban Harms The Only Population Impacted By It

[¶105] A legislative classification will not survive if "it is patently arbitrary and bears no rational relationship to a legitimate governmental purpose." *Haney v. N.D. Workers Comp. Bureau*, 518 N.W.2d 195, 197 (N.D. 1994) (citation omitted).

[¶106] The trial record here shows that the Ban is not rationally related to the State's interest in protecting the health of adolescents, and, for several reasons, the District Court erred in finding otherwise. (R785:¶148).

[¶107] First, the District Court erred in failing to consider whether it was reasonable for the State to ban the *only* medical care available and effective for the treatment of gender dysphoria in adolescents. (R785:¶148); *see supra* ¶ 17. Appellant's experts, the Cass Review (a study out of England on which many state experts relied), and even one of the State's experts, all agree that there are at least some adolescents for whom gender-affirming medical care is necessary to alleviate the suffering from gender dysphoria. *See* (R764:102:2–7; R767:24:1–24, 59:15–22, 133:7–134:2, 149:11–150:1; R768:76:1–5; R770:84:23–86:17); Plaintiff's Trial Exhibit 31, The Cass Review (R594:21). The State has left these adolescents without an alternative effective treatment. *See supra* ¶ 17 (psychotherapy alone is not sufficient). Even Dr. Levine, one of the State's experts, agreed that "if families are fully informed about the risks and the state of the science, the decision

about whether to pursue [gender-affirming medical care] for adolescent[s] should be made by the parents, patient and doctor." (R770:94:9–13).

[¶108] Second, depriving a population of adolescents of access to medication for a diagnosable and treatable condition is not a neutral action, but rather one with real world consequences to those impacted. (R767:68:3–6). Yet neither the Legislature nor the District Court took the harm of untreated gender dysphoria into consideration. Symptoms of clinically significant distress due to untreated gender dysphoria include suicide, self-harm, anxiety, and depression. (R767:22:4–23:25, 149:11–150:1, 157:2–22, 159:7–14). It is patently arbitrary to disregard concerns that the law may significantly harm the only the population of adolescents lawmakers are seeking to protect. Both the legislature and the District Court ignored the uncontested evidence at trial about the high risk of suicide for minors with untreated gender dysphoria. (R579:4); *see generally* (R785). There is little doubt that gender dysphoria is a condition that can include deadly consequences if left untreated, and the District Court erred in failing to address this entire body of evidence.

[¶109] Third, it was patently arbitrary for the State to dismiss an entire body of published and peer-reviewed scientific literature supporting the safety and efficacy of medical treatment for gender dysphoria, *see, e.g.*, (R764:130:21–137:21; R770:107:25–112:18); Plaintiff's Trial Exhibit 52, Baker Systematic Review (R613), and to disregard medical guidelines supported by every major medical association in the country, (R128:¶¶1, 12–13), and used by prestigious medical facilities, such as the Mayo Clinic, (R770:100:23–101:3). Paradoxically, in the name of protecting children, the State would force Appellant to retreat from his best professional judgment and the accepted standard of care for treating adolescents with gender dysphoria who are experiencing serious distress. (R767:70:13–

20). Under North Dakota law, this is malpractice. *E.g.*, *Larsen v. Zarrett*, 498 N.W.2d 191, 192 (N.D. 1993) (malpractice occurs where a licensed provider harms a patient by failing to follow the applicable standards of care as established by an expert with relevant training and experience).

[¶110] Fourth, to the extent the State was genuinely concerned that that an adolescent would wake up and say, "I think I'm a boy today, so I want to have puberty blockers, etc., just because I feel that way," (R578:27), and indiscriminately access the banned care, the Ban is not rationally related to preventing this hypothetical. N.D.C.C. §§ 43-17-30.1, 43-17-31. Even before the Ban, such an imaginary minor would not qualify for a gender dysphoria diagnosis and would be ineligible for gender-affirming medical care. (R590:10; R764:96:15–97:6; R767:21:9–25, 91:15–92:4). Indeed, the State presented no evidence at trial of this ever happening in the history of North Dakota, and there is no evidence in the record to suggest that the accountability mechanisms already in place, such as malpractice suits and licensure requirements, are ineffective. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536–37 (1973) (finding that the existence of fraud prevention provisions in the Food Stamp Act "necessarily casts considerable doubt upon the proposition that the [challenged classification] could rationally have been intended to prevent those very same abuses") (citation omitted).

[¶111] Fifth, gender dysphoria is a formal medical diagnosis in the DSM-5, (R590:9–11), and carries serious risks if left untreated, *see supra* ¶¶ 15-22. It was therefore patently arbitrary for the State to equate minors with a documented diagnosis of gender dysphoria with hypothetical minors who believe themselves to be pirates, cats, dogs, or superheroes, and to restrict access to medical care based on those false comparisons. *See supra* ¶¶ 31-

34. The uncontested trial evidence confirms that young people with gender dysphoria who are denied gender-affirming medical care experience significant negative impacts on quality of life and mental health, including increased risk of suicide, self-harm, anxiety, and depression. *See supra* ¶¶ 16, 20-22, 38. Indeed, the Ban "simply does not operate so as rationally to further the prevention of" harm to young people, *Moreno*, 413 U.S. at 537, and the District Court erred in disregarding the extensive undisputed evidence of the harms, *see supra* ¶¶ 16, 20-22, 38.

[¶112] Sixth, it is an arbitrary invasion of personal rights to criminalize treatment only when provided to a politically disfavored group. *See infra* ¶¶ 31-34, 115-119. The pretext is evident: the same providers at risk of prosecution under the Ban are otherwise trusted to prescribe these medications to cisgender minors and to treat minors for all other physical and/or mental health conditions. *See supra* ¶ 23, 26-27. The District Court erred in failing to address why the State may prohibit access to these medications for transgender minors while permitting their unrestricted use for cisgender minors.

[¶113] Finally, the District Court erred in determining that Health Care Ban is rationally related to a legitimate purpose because it "is at once too narrow and too broad." *Romer v. Evans*, 517 U.S. 620, 633 (1996). The Ban is too broad in that it proscribes all gender-affirming medical care even where the patient has been diagnosed with gender dysphoria and no other treatments are effective to preserve their life and health. *See supra* ¶ 17. It is too narrow in that the State's purported concerns about gender-affirming medical care apply in equal or greater force to pediatric medical care more broadly, but no other care has been banned or even otherwise restricted. For example, all medications carry side effects. (R767:145:17–18; R768:71:2–9, 73:24–74:8). The side effects of puberty

suppression medication include pain at the injection site and headaches, which is the same side effect as exists for central precocious puberty, (R767:145:15-146:20), and yet the medication is still allowed for the latter condition, (R767:155:5-9). By contrast, Risperidone (prescribed for schizophrenia and bipolar disorder) include effects related to bone density, fertility, and the shrinking of the brain, but the State has not banned Risperidone to adolescents, (R767:17:7–19), despite "concerns about the ability of [] minors to understand the long-term effects of the[] intervention[] fully," (R785:¶148).

[¶114] Neither the State nor the District Court have identified any rational basis to deny transgender adolescents the only medical care available to treat severe, life-threatening distress, while allowing those same medications to be provided to cisgender adolescents for any other condition. Because the record evidence fails to support the Ban's "discrimination[] of an unusual character," it fails to survive rational basis scrutiny. *United States v. Windsor*, 570 U.S. 744, 770 (2013) (internal quotation marks and citation omitted).

B. The State's Purported Interest In Protecting Vulnerable Children Is Pretext For Discrimination Against Transgender North Dakotans, And Animus Towards A Politically Disfavored Class Is Not A Legitimate Government Interest

[¶115] Animus against a politically unpopular group can never be a legitimate basis for a legislative classification. S*ee, e.g.*, *Windsor*, 570 U.S. at 770; *Romer*, 517 U.S. at 633; *Moreno*, 413 U.S. at 534; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448–450 (1985). "For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534.

[¶116] As this Court explained when invalidating a licensing scheme for professional photographers supposedly passed for the public welfare:

> [A] regulatory statute enacted in the exercise of the police power must be reasonable. Its real purpose must be to protect the public health, morals or general welfare, and it must be reasonably required and suited to attain that purpose. It cannot masquerade as an exercise of the police power and arbitrarily invade personal rights or private property.

Cromwell, 9 N.W.2d at 920; *see also Cofman v. Ousterhous*, 168 N.W. 826, 830 (N.D. 1918) ("[T]he governmental power is not to be arbitrarily or colorably exercised or used as a subterfuge for oppressing some individual or class of individuals." (internal quotation marks and citation omitted)).

[¶117] The District Court erred in determining that the "legislative record does not support . . . that the Legislature passed the Health Care Law for an invidious discriminatory purpose." (R785:¶111). Rather, the legislative record is rife with anti-transgender animus, including legislative history in which lawmakers disparaged transgender peoples' bodies, derided the parents of transgender people, and asserted that being transgender is a "fantasy." *See supra* ¶¶ 31-34, 111. The legislative record also shows that the Ban's proponents declined to speak directly to any transgender people or their families about the bill, and that a wide cross-section of North Dakota's healthcare providers, including the state's pediatric endocrinologists, presented medical evidence that the Ban would be harmful—evidence which legislators, despite conceding a lack of medical expertise, ignored. *See supra* ¶¶ 34, 38.

[¶118] It is clear from the legislative history and trial record that lawmakers who supported the Ban acted with animus toward transgender people and with the invidious discriminatory purpose to harm a politically unpopular group. *Moreno*, 413 U.S. at 534.

Because the Ban harms and stigmatizes the very population of adolescents the State now claims it serves, it is precisely the type of regulatory measure "masquerad[ing] as an exercise of the police power and arbitrarily invad[ing] personal rights" that this Court invalidated in *Cromwell*, 9 N.W.2d at 920.

[¶119] Moreover, the State's asserted interest in banning gender-affirming care cannot be explained by anything other than pretext for discrimination against transgender individuals. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."). For example, the State has not banned cisgender minors from accessing puberty blockers, estrogen, or testosterone for any purpose. *See* N.D.C.C. § 12.1-36.1-02(1). Appellant can still prescribe these medications to any of his cisgender pediatric patients, with no restrictions. (R767:155:1–19). Clearly, it is not the medications themselves that the State believes are too dangerous for minors; rather the State believes *affirming* the gender identity of transgender young people should be criminal. N.D.C.C. §§ 12.1-36.1-02(2)(b), 43-17-31(1)(c). Additionally, it is undisputed that the effects of puberty blockers are not permanent, (R764:108:7–19; R767:37:15–21); therefore, the rationale for banning puberty blockers for transgender minors cannot be to protect minors from their reversible effects. The evidence at trial confirmed that the provision of gender-affirming care is no different than the provision of other pediatric care. *See, e.g.*, (R768:70:5–18) (off-label prescribing is common and unremarkable, especially in pediatrics); (R764:91:13–95:15; R770:109:20–110:1) (it is common for clinicians to rely on evidence deemed "low-quality" under GRADE, especially in pediatrics where there are

ethical considerations that prohibit randomized controlled trials); (R767:145:17–18; R768:71:2–9, 73:24–74:8) (all medical treatments carry potential risks and side effects). The only difference is that the individuals wishing to access the prohibited medical care are members of a class of people who are currently being relentlessly targeted by the legislature. *See, e.g.*, H.B. 1522, 68th Legis. Assemb., Reg. Sess. (N.D. 2023); H.B. 1139, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) and H.B. 1297, 68th Legis. Assemb., Reg. Sess. (N.D. 2023); H.B. 1249, 68th Legis. Assemb., Reg. Sess. (N.D. 2023) and H.B. 1489, 68th Legis. Assemb., Reg. Sess. (N.D. 2023); H.B. 1473, 68th Legis. Assemb., Reg. Sess. (N.D. 2023); H.B. 1474, 68th Legis. Assemb., Reg. Sess. (N.D. 2023). Finally, because the Ban prohibits all transgender adolescents from accessing all gender-affirming care, with no limitation for adolescents with a diagnosis of gender dysphoria, the "sheer breadth is so discontinuous with the reasons offered for it that the [Ban] seems inexplicable by anything but animus toward the class it affects." *Romer*, 517 U.S. at 632. Such a law cannot survive even rational basis review, and the District Court erred in determining otherwise.

[¶120] As set forth herein, this Court should remand for the District Court to apply heightened scrutiny in the first instance. *Supra* ¶¶ 43-44, 75, 85, 99-100. However, should this Court undertake the constitutional analysis itself, because the Ban would not survive even rational basis review, it would also fail any higher level of scrutiny. *See* Plaintiff's Post-Trial Legal Brief (R771:¶¶84–102) (explaining that the Ban is not narrowly tailored to serve a compelling interest because the evidence demonstrates that gender-affirming care posed no harm to transgender adolescents in North Dakota, and, to the contrary, banning such care uniquely and intentionally harms the population targeted by the Ban).

CONCLUSION

[¶121] For the reasons stated herein, this Court should find that the District Court erred

in applying rational basis review to the Health Care Ban and remand the case for reconsideration. In the alternative, this Court should find that the Ban fails rational basis review, declare the Ban unconstitutional, and enjoin its enforcement.

REQUEST FOR ORAL ARGUMENT

[¶122] In light of the extensive trial record and the constitutional questions at issue in this case, Appellant respectfully requests an oral argument before this Court.

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Respectfully submitted,

/s/ Christina Sambor

Christina Sambor (ND #06648)
SAMBOR LAW & CONSULTING
220 E. Rosser Ave., #1703
Bismarck, ND 58502
Telephone: (701) 354-3375
christina@samborlaw.com

Jess Braverman (ND # P02755)
Greta Wiessner (ND #P03099)
GENDER JUSTICE
663 University Ave W
Suite 200
St. Paul, MN 55104
Telephone: (651)789-2090
jess.braverman@genderjustice.us
Greta.Wiessner@genderjustice.us

Tanya Pellegrini (ND # P027776)
LAWYERING PROJECT
584 Castro St. #2062
San Francisco, CA 94114
Telephone: (646) 480-8973
tpellegrini@lawyeringproject.org

Paige Suelzle (ND # P02775)
LAWYERING PROJECT
300 Lenora St., No. 1147
Seattle, WA 98121
Telephone: (347) 515-6073
psuelzle@lawyeringproject.org

Counsel for Appellant Dr. Luis Casas