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Lewis & Clark County District Court
STATE OF MONTANA
By: Denaye Cooper
DV-25-2024-0000261-CR
Menahan, Mike
11.00

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* *Pro hac vice applications forthcoming*

IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

JESSICA KALARCHIK, an individual, and JANE DOE, an individual, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; CHARLES T. BRERERTON, in his official capacity as the Director of the Montana Department of Public Health and Human Services; the MONTANA DEPARTMENT OF JUSTICE; and AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,

Defendants.

Case No. DV-25-2024-0000261-CR

Presiding Judge:
Hon. Mike Menahan

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

In accordance with § 27–19–201 of the Montana Code Annotated, Montana Uniform District Court Rule 2, and Local Rule 5, Plaintiffs[1] apply for a preliminary injunction to prohibit Defendants from enforcing (1) Montana Administrative Rule 37.8.311(5) (the "2022 Rule") on its face or as applied to issuing amended birth certificates, (2) the Montana Motor Vehicle Division's ("MVD") new policy and practice as applied to issuing amended driver's licenses, and (3) Senate Bill 458 ("SB 458") as applied to issuing amended birth certificates and amended driver's licenses, including but not limited to by prohibiting Defendants from denying applications to amend the sex designation on birth certificates or driver's licenses based on the 2022 Rule, the new MVD policy and practice, SB 458, or any further administrative rulemaking directed toward the subject matter of the 2022 Rule, the new MVD policy and practice, or SB 458.

Plaintiffs' counsel provided notice of this motion to Defendants' counsel on May 16, 2024. Plaintiffs are contemporaneously filing their brief in support of this motion for a preliminary injunction.

Dated: May 17, 2024

Respectfully submitted,

By: */s/ Alex Rate*

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[1] "Plaintiffs" refers to Jessica Kalarchik and Jane Doe. "Defendants" refers to State of Montana; its governor, Gregory Gianforte; the Montana Department of Public Health and Human Services ("DPHHS"); the DPHHS's director, Charles T. Brererton; the Montana Department of Justice; and Montana Attorney General Austin Knudsen.

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EXHIBIT 1

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Plaintiffs,

v.

STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; CHARLES T. BRERERTON, in his official capacity as the Director of the Montana Department of Public Health and Human Services; the MONTANA DEPARTMENT OF JUSTICE; and AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,

Defendants.

Case No. DV-25-2024-261-CR

Hon. Judge Mike Menahan

DECLARATION OF JESSICA KUSNER-KALARCHIK IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, Jessica Kusner-Kalarchik, declare as follows,

1. I am a transgender woman who has not changed the sex designation on her birth certificate and one of the Plaintiffs in this case. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction against the enforcement of Montana Administrative Rule 37.8.311(5) and Senate Bill 458 as applied to amending birth certificates.

2. I am a 49-year-old woman who was born and raised in Montana and who currently resides in Anchorage, Alaska.

3. I am currently working as a forensic nurse examiner at a hospital in Alaska. Previously I assisted counsel in the prosecution of Courts Martial as a military JAG NCO in the JAG Corps for eight years. I am a veteran of the army where I served for 31 years.

4. I am a transgender woman. At birth I was assigned the sex designation of male, so the sex designation on my birth certificate also incorrectly identified me as male. I have known I am a woman since junior high school.

5. I began living and presenting as the woman I know myself to be approximately two years ago. I have worked with medical and mental health providers to assist me in bringing my physical appearance and presentation into alignment with the sex I know myself to be.

6. I was diagnosed with gender dysphoria and have been using hormone treatment to further align my body with my sex for the last two years. I socially transitioned in 2022, the year before I retired from the armed forces in July 2023. I legally changed my

name to one that is traditionally female. Additionally, I have changed my Alaska nursing license, driver's license, and federal social security card to accurately reflect who I am.

7. I would like to change the sex designation on my birth certificate to accurately match the sex I know myself to be but have been unable to do so due to the state's policies. Before the Department of Health and Human Services ("DPHHS") announced they would be permanently adopting the 2022 Rule, I attempted to change my birth certificate and was told any changes to sex designations had been put on hold because they were in the process of changing the rules governing amendments. I informed the DPHHS official that the policy in place at that time allowed me to change the sex designation on my birth certificate, but the official did not allow me to proceed. Moreover, the official would not allow me to amend the name on my birth certificate, despite the fact that I had an Alaska court order changing my legal name. My inability to obtain a birth certificate that accurately reflects my sex is stigmatizing, humiliating, and opens me up to discrimination.

8. Denying me an accurate birth certificate places me at risk of embarrassment and even violence every time I am required to present my birth certificate because it incorrectly identifies me as male. This is not only a violation of my privacy but also denies me the ability to correctly use an essential government document necessary for employment and identification purposes in many other contexts.

9. I am two years into my social transition and typically I am referred to as "ma'am." As my transition continues and I continue to be perceived more female, any time I am forced to present a birth certificate that incorrectly identifies me as male, I am outed as transgender. Being outed to a stranger causes me anxiety because I do not know if the

stranger is biased or hostile to people who are transgender. I am well aware of the kind of discrimination and humiliation that transgender people commonly face.

10. I have faced discrimination because I am transgender in both my personal and professional life. For example, I applied to a job where the company refused to use my female-identified name and stated my previous male-identified name ("dead name") would be used on my nametag instead. This experience was humiliating, and had I continued in that position using the wrong name tag while working it would have resulted in further incidents of harassment because my physical appearance and sex did not match my nametag.

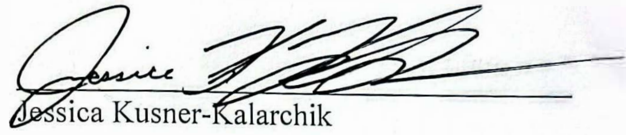
11. I have experienced other incidents that put me in danger and made me fear for my safety because of my transgender status. For instance, I have been tracked and followed by cars on the highway multiple times where I need to make evasive maneuvers to escape. I feared for my life in that moment because I know about the violence that transgender people face when others learn they are transgender. I have learned to take extra precautions for my personal safety and have continued concerns about being outed in places where I do not know others or trust that they are supportive of transgender people.

12. In October 2023, another hostile incident occurred while I was volunteering at a youth and adult Halloween event hosted by Identity Clinic in Alaska. There was a photographer harassing attendees and taking pictures of them, their vehicles and license plates to publicly out them as LGBTQ+ and shame them on the internet.

13. Because of these hostile incidents, I do not feel safe when leaving my home as a transgender woman. As such, I am extremely cautious about the places I am willing to go and must often assess the safety of each location before I arrive.

I, Jessica Kusner-Kalarchik, declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

Dated: May 16, 2024.



Jessica Kusner-Kalarchik

EXHIBIT 2

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IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY-

JESSICA KALARCHIK, an individual, and JANE DOE, an individual, on behalf of themselves and all others similarly situated,	
Plaintiffs,	**Case No. DV-25-2024-261-CR**
v.	**Hon. Judge Mike Menahan**
STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; CHARLES T. BRERERTON, in his official capacity as the Director of the Montana Department of Public Health and Human Services; the MONTANA DEPARTMENT OF JUSTICE; and AUSTIN KNUDSEN, in his official	**DECLARATION OF JANE DOE IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

capacity as Attorney General of the State of Montana,

Defendants.

I, Jane Doe, declare as follows,

1. I am a transgender woman who has not changed the sex designation on her birth certificate or her driver's license and one of the Plaintiffs in this case. I submit this declaration in support of Plaintiffs' Motion for Preliminary Injunction against the enforcement of Montana Administrative Rule 37.8.311(5), the Montana Motor Vehicle Division's ("MVD") new policy and practice as applied to issuing amended driver's licenses, and Senate Bill 458 as applied to issuing amended birth certificates and driver's licenses.

2. I am a 25-year-old woman who was born and raised in Helena, Montana and currently reside there.

3. I am a transgender woman. At birth I was assigned the sex designation of male, so the sex designation on my birth certificate also incorrectly identifies me as male. I have experienced discomfort surrounding my assigned sex and have had symptoms of gender dysphoria since I was in middle school. I understood that I was transgender when I was in college.

4. I began living and presenting as the woman I know myself to be over two years ago. I have worked with medical and mental health providers to assist me in bringing my physical appearance and presentation into alignment with the sex I know myself to be. I was diagnosed with gender dysphoria and have been taking feminizing

hormone therapy since January of 2022. I socially transitioned after I graduated from college. I have changed my federal social security card to accurately reflect who I am.

5. I would like to change the sex designation on my birth certificate and driver's license to match the sex I know myself to be but have been unable to do so due to the state's policies. I have attempted to change the sex designation on both my birth certificate and driver's license but have been unable to do so.

6. I went to the office of the Vital Records of the Montana Department of Health and Human Services ("DPHHS") on or about September 28, 2023, and initially was told by one employee that changes to sex designation on birth certificates were not allowed. Shortly after during the same visit, I was told by another employee that sex designation changes were still allowed by DPHHS and the second employee assisted me in filling out the paperwork. I was advised that it would take about six months for the sex designation to be made and I paid the required fee. On or about March 4, 2024, I received a letter from DPHHS stating that under Montana Administrative Rule 37.8.311(5) I could not change my sex designation on my birth certificate.

7. I went to the Helena MVD to change the sex designation on my driver's license on or about December 14, 2023. I brought my updated social security card with the correct sex designation which I planned to use in support of my application to amend my driver's license. They told me at the MVD that I could not amend my sex designation on my driver's license without a court order and a corrected birth certificate. My inability to obtain a birth certificate and a driver's license that accurately reflects my sex is stigmatizing, humiliating opens me up to discrimination, and undermines the purpose of my driver's license which is to identify me.

8. Denying me an accurate birth certificate and driver's license places me at risk of discrimination, harassment and even violence every time I am required to present my identity documents because they incorrectly identify me as male. This is not only a violation of my privacy but also denies me the ability to correctly use an essential government document necessary for employment and for identification purposes in the many other contexts where that is required.

9. I am two years into my social transition and typically people identify me as a woman. My appearance has changed significantly following my transition and no longer matches my driver's license photo or the sex designations on my driver's license and birth certificate. Any time I am forced to present a driver's license or birth certificate that incorrectly identifies me as male, I am outed as transgender. Being outed to a stranger causes me anxiety because I do not know if the stranger will discriminate against me based on my transgender status. I am well aware of the kind of discrimination and humiliation that transgender people commonly face.

10. I have faced discrimination because I am transgender in both my professional and personal life. For example, there are people at my current job who refuse to use my pronouns, or any pronouns, when referring to me. I have been pulled over by law enforcement and the interaction was prolonged because the officer struggled to determine whether I, a woman, was in fact the same person identified by my driver's license, which lists my sex as male and includes a photograph of me prior to my transition. It took the officer a long time to stare at my photo and accept that it was my driver's license. I am concerned that in the future, as I appear more and more feminine, this will get worse, and I will face discrimination when I present my identity documents

or that law enforcement will not be able to identify me at all putting me at risk of criminal prosecution.

11. In my personal life, most of my family has effectively disowned me because I am transgender, and in the past one of my parents kicked me out of my home. I know that if my family can treat me like that, people who do not know me could be even more cruel. I currently do everything in my power to avoid violence or discrimination, as I know it is prevalent that transgender people experience these consequences of people learning they are transgender. For instance, I do not use public dressing rooms or restrooms. I have learned to take these extra precautions for my personal safety and have continued concerns about being outed in places where I do not know others or trust that they will act appropriately toward transgender people.

12. For all these reasons, I urgently need to correct the sex designations on my birth certificate and driver's license.

***

I, Jane Doe, declare under penalty of perjury that the foregoing is true to the best of my knowledge and belief.

Dated: ~~April~~ May 16th, 2024.

Jane Doe

Jane Doe

EXHIBIT 3

IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS and CLARK COUNTY

JESSICA KALARCHIK, an individual, and JANE DOE, an individual, on behalf of themselves and all others similarly situated, **Plaintiffs,** **v.** **STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; CHARLES T. BRERERTON, in his official capacity as the Director of the Montana Department of Public Health and Human Services; the MONTANA DEPARTMENT OF JUSTICE; and AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,** **Defendants.**	)	**Case No. DV-24-2024-0000261-CR** **Presiding Judge Hon. Mike Menahan**

<u>EXPERT DECLARATION OF DR. RANDI C. ETTNER, Ph.D.</u>

I, Dr. Randi C. Ettner; declare as follows:

1. I submit this expert declaration based on my personal knowledge.

2. I have been retained by counsel for Plaintiffs as an expert in connection with the above-mentioned litigation. Specifically, I have been asked by Plaintiffs' counsel to provide my expert opinion regarding Montana's policies and practices prohibiting transgender persons born in Montana from obtaining amended birth certificates, or for transgender people in Montana obtaining amended driver's licenses, that accurately reflect their sex and gender identity.

3. I have actual knowledge of the matters stated herein. If called to testify in this matter, I would testify truthfully and based on my expert opinion.

I. BACKGROUND AND QUALIFICATIONS

4. I am a licensed clinical and forensic psychologist with expertise concerning the diagnosis and treatment of gender dysphoria. I received my Doctorate in Psychology (with honors) from Northwestern University in 1979. I was the chief psychologist at the Chicago Gender Center from 2005 to 2016, when it moved to the Weiss Memorial Hospital. Since that time, I have been a member of the Weiss Medical Staff and a consultant to Rush University Medical Center's Gender Affirm Program. I have been involved in the treatment of patients with gender dysphoria since 1977, when I was an intern at Cook County Hospital in Chicago.

5. During the course of my career, I have evaluated and/or treated approximately 3,000 individuals with gender dysphoria and mental health issues related to gender variance.

6. I have published four books related to the treatment of individuals with gender dysphoria including the medical text entitled *Principles of Transgender Medicine and Surger*y (Ettner, Monstrey & Eyler, 2007) and the second edition (Ettner, Monstrey & Coleman, 2016). I have authored numerous articles in peer-reviewed journals regarding the provision of care to this population. I serve as a member of the editorial boards for the *International Journal of Transgender Health* and *Transgender Health*.

7. I am the past Secretary of the World Professional Association for Transgender Health ("WPATH") (formerly the Harry Benjamin Gender Dysphoria Association), and was a member of the WPATH Board of Directors for twelve years, and an author of the *WPATH Standards of Care for the Health of Transsexual, Transgender and Gender-nonconforming People* (7th version), published in 2011, and the current *WPATH Standards of Care* Version 8, published in 2022. The WPATH-promulgated *Standards of Care* ("*Standards of Care*") are the internationally recognized guidelines for the treatment of persons with gender dysphoria and serve to inform medical treatment in the United States and throughout the world.

8. I have lectured throughout North America, South America, Europe, and Asia on topics related to gender dysphoria, and on numerous occasions I have presented grand rounds on gender dysphoria

at medical hospitals. I am the honoree of the externally funded *Randi and Fred Ettner Fellowship in Transgender Health* at the University of Minnesota. I have been an invited guest at the National Institutes of Health to participate in developing a strategic research plan to advance the health of sexual and gender minorities, and in November 2017 was invited to address the Director of the Office of Civil Rights of the United States Department of Health and Human Services regarding the medical treatment of gender dysphoria. I received a commendation from the United States Congress House of Representatives on February 5, 2019, recognizing my work for WPATH and gender dysphoria in Illinois.

9. I have been retained as an expert regarding gender dysphoria and its treatment in multiple court cases in both state and federal courts, as well as administrative proceedings, and have repeatedly qualified as in expert. I have also been a consultant to policy makers regarding appropriate care for transgender inmates and for the Centers for Medicare and Medicaid in the state of Illinois.

10. A true and accurate copy of my Curriculum Vitae is attached hereto as Exhibit A. It documents my education, training, research, and years of experience in this field and includes a list of publications. A bibliography of the materials reviewed in connection with this declaration is attached hereto as Exhibit B. The sources cited therein are authoritative, scientific peer-reviewed publications. I generally rely on these materials when I provide expert testimony, and they include the documents specifically cited as supportive examples in particular sections of this declaration. The materials I have relied on in preparing this declaration are the same type of materials that experts in my field of study regularly rely upon when forming opinions on the subject.

11. I have not met or spoken with the Plaintiffs for purposes of this declaration. My opinions are based solely on the information I have been provided by Plaintiffs' attorneys, the materials referenced in the Bibliography as Exhibit B and cited herein, and my extensive experience studying gender dysphoria and in treating transgender patients.

a. Previous Testimony

12. In the last four years, I have testified as an expert at trial or by deposition in the following cases: *Cordellione v. Commissioner, Indiana Dept. of Corrections, No. 3:23-cv-135* (S.D. Ind.)*; Zayre-*

Brown v. North Carolina Dept. of Public Safety, No. 3:22-cv-00191 (W.D.N.C.); *Roe v. Herrington*, No. 4:20-cv-00484-JAS 9 (D. Ariz.); *Diamond v. Ward*, No. 5:20-cv-00543 (M.D. Ga. 2022); *Stillwell v. Dwenger*, No. 1:21-cv-1452-JRS-MPB (S.D. Ind. 2022); *Letray v. Jefferson Cty.*, No. 20-cv-1194 (N.D.N.Y. 2022); *C.P. v. BCBSIL*, No. 3:20-cv-06145-RJB (W.D. Wash. 2022); *Kadel v. Folwell*, No. 1:19-cv-00272 (M.D.N.C. 2021); *Iglesias v. Connor*, No. 3:19-cv-00415-NJR (S.D. Ill. 2021); *Monroe v. Jeffreys*, No. 3:18-CV-00156-NJR (S.D. Ill. 2021); *Singer v. Univ. of Tennessee Health Sciences Ctr*., No. 2:19-cv-0243l-JPM-cgc (W.D. Tenn. 2021); *Morrow v. Tyson Fresh Meats, Inc.*, No. 6:2A-cv-02033 (N.D. Iowa 2021); *Claire v. Fla. Dep't of Mgmt. Servs*., No. 4:20-ov-00020-MW-MAF (N.D. Fla. 202A); *Williams v. Allegheny Cty.*, No. 2.17-cv-A1556-MJH (W.D. Pa.2A20); *Gore v. Lee*, No. 3:19-CV-00328 (M.D. Tenn. 2020); *Eller v. Prince George 's Cty. Public Sch*., No. 8: 18-cv-03649-TDC (D. Md. 2020); *Monroe v. Jeffreys*, No. 18-CV-00156-NIR-MAB (S.D. Ill. 2020); *Ray v. Acton*, No. 2:18-cv-00272 (S.D. Ohio 2019); and *Soneeya v. Turco*, No. 07-12325-DPW (D. Mass. 2019).

b. Compensation

13. I am being compensated for my work on this matter at a rate of $375.00 per hour for preparation of declarations and expert reports. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I may provide.

II. SUMMARY OF OPINIONS

14. Medical management of gender dysphoria includes the alignment of appearance, presentation, expression, and often, the body, to reflect a person's true sex as determined by their gender identity. Correcting the gender marker on identification documents confers social and legal recognition of identity and is crucial to this process. The necessity and importance of privacy is universal and exists even in animals. A wide range of species avoid predators by managing information about internal states and future intentions, for purposes of survival (Krebs & Davies, 1993). Privacy enables normal psychological functioning, the ability to have experiences that promote healthy personal growth and interpersonal relationships and allows for measured self-disclosure. It is the basis for the development of individuality and autonomy (Atman, 1977; Margulis,2003).

15. For a transgender person, a birth certificate bearing an incorrect gender marker invades privacy, releases confidential medical information, and places the individual at risk for grave psychological and physical harm. This is even more of a problem when a transgender person has a driver's license bearing an incorrect gender marker given how frequently and in how many settings individuals must present their driver's license.

III. EXPERT OPINIONS

a. Sex and Gender Identity

16. At birth, infants are assigned a sex, typically male or female, based solely on the appearance of their external genitalia. For most people, that assignment turns out to be accurate, and their birth-assigned sex matches that person's actual sex. However, for transgender people, the sex assigned at birth does not align with the individual's genuine, experienced sex, resulting in the distressing condition of gender dysphoria.

17. External genitalia alone—the critical criterion for assigning sex at birth—is not an accurate proxy for a person's sex.

18. A person's sex is comprised of a number of components including, *inter alia*, chromosomal composition (detectible through karyotyping); gonads and internal reproductive organs (detectible by ultrasound, and occasionally by a physical pelvic exam); external genitalia (which are visible at birth); sexual differentiations in brain development and structure (detectible by functional magnetic resonance imaging studies and autopsy); and gender identity.

19. Gender identity is a person's inner sense of belonging to a particular sex, such as male or female. It is a deeply felt and core component of human identity. It is detectible by self-disclosure in adolescents and adults.

20. When there is divergence between anatomy and identity, one's gender identity is paramount and the primary determinant of an individual's sex. Developmentally, identity is the overarching determinant of the self-system, influencing personality, a sense of mastery, relatedness, and emotional

reactivity, across the life span. It is also the foremost predictor of satisfaction and quality of life. Psychologist Eric Erickson defined identity as "the single motivating force in life" (1956).

21. Like non-transgender people (also known as cisgender people), transgender people do not simply have a "preference" to act or behave consistently with their gender identity. Every person has a gender identity. It is a firmly established elemental component of the self-system of every human being.

22. The only difference between transgender people and cisgender people is that the latter have gender identities that are consistent with their birth-assigned sex whereas the former do not. A transgender man cannot simply turn off his gender identity like a switch, any more than anyone else could.

23. In other words, transgender men are men and transgender women are women.

24. A growing assemblage of research documents that gender identity is immutable and biologically based. A significant body of scientific and medical research that gender dysphoria has a physiological and biological etiology (cause or origin). It has been demonstrated that transgender women, transgender men, non-transgender women, and non-transgender men have different brain compositions, with respect to the white matter of the brain, the cortex (central to behavior), and subcortical structures. See, e.g., Rametti, et al., 45 J. Psychiatric Res. 199 (2011); Rametti, et al., 45 J. Psychiatric Res. 949 (2011); Luders, et al. (2006); Krujiver, et al. (2000). Differences between transgender and non-transgender individuals primarily involve the right hemisphere of the brain. The significance of the right hemisphere is important because that is the area that relates to attitudes about bodies in general, one's own body, and the link between the physical body and the psychological self. In addition, scientific investigation has found a co-occurrence of gender dysphoria in families. Gomez-Gill et al. concluded that the probability of a sibling of a transgender individual also being transgender was 5 times higher than someone in the general population. Gomez-Gil, et al. (2010). And, in identical twins, there was a very high likelihood (33%) of both twins being transgender, even when reared apart, demonstrating the role of genetics in the development of gender dysphoria. *See* Diamond (2013) (abstract: "[t]he responses of our twins relative to their rearing along with our findings regarding some of their experiences during childhood and adolescence show their [gender] identity was much more influenced by their genetics than their rearing."); *see also* Green (2000).

25. It is now believed that gender dysphoria evolves as a result of the interaction of the developing brain and sex hormones. For example, one study found that:

> [d]uring the intrauterine period a testosterone surge masculinizes the fetal brain, whereas the absence of such a surge results in a feminine brain. As sexual differentiation of the brain takes place at a much later stage in the development than sexual differentiation of the genitals, these two processes can be influenced independently of each other. Sex differences in cognition, gender identity . . ., sexual orientation . . ., and the risks of developing neuropsychiatric disorders are programmed into our brain during early development. There is no evidence that one's postnatal social environment plays a crucial role in gender identity or sexual orientation.

Bao & Swaab (2011). Similarly, Hare et al. found that "a decrease in testosterone levels in the brain during development might result in incomplete masculinization of the brain . . . resulting in a more feminized brain and a female gender identity." Hare, et al. at 93, 96.

26. I have reviewed Montana Administrative Register Notice 37-1002 (dated June 10, 2022), which includes a "Statement of Reasonable Necessity" for a proposed rule, which I understand was adopted as ARM 37.8.311. The Statement of Reasonable Necessity opines that because chromosomes are biological, sex based on genital appearance alone should be conclusive in determining an individual's sex. This argument is reductive, fails to recognize that there are several biological contributors to sex, including hormones and the brain, and fails to account for the developmental influence of the gonadal hormones before and early after birth. Human neurobiology is far more complex, as is the brain, which is the ultimate determinant of sex.

27. Efforts to change an individual's gender identity are unethical, harmful, and futile. Researchers have documented the risks and harms of attempting to coerce individuals to conform to their birth-assigned sex. These include, but are not limited to, the onset or increase of depression, suicidality, substance abuse, loss of relationships, family estrangement, and a range of post-traumatic responses. *See* Byne (2016); Green, et al. (2020); Turban, et al. (2019).

28. The evidence demonstrating that gender identity cannot be altered, either for transgender or for non-transgender individuals, further underscores the innate and immutable nature of gender identity.

Past attempts to "cure" transgender individuals by means of psychotherapy, aversion treatments or electroshock therapy, in order to change their gender identity to match their birth-assigned sex, proved ineffective and caused extreme psychological damage. Numerous professional organizations have endorsed the United States Joint Statement Against Conversion Efforts, including the American Medical Association, The American Academy of Family Physicians, The American Psychological Association, The American Psychoanalytical Association, WPATH, and many other professional organizations. Several countries throughout the world, and states and municipalities in the United States, have enacted laws prohibiting health care professionals from engaging in conversion attempts.

b. Gender Dysphoria and Its Treatment

29. Gender dysphoria is the clinically significant distress or impairment of functioning that can result from the incongruence between a person's gender identity and the sex assigned to them at birth. Gender dysphoria is a serious medical condition associated with severe and unremitting emotional pain from the incongruity between various aspects of one's sex. It is codified in the *International Classification of Diseases* (10th revision: World Health Organization), the diagnostic and coding compendia for mental health and medical professionals, and the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* Fifth Edition (DSM-5). People diagnosed with gender dysphoria have an intense and persistent discomfort with their assigned sex that leads to impairment in functioning.

30. Gender dysphoria was previously referred to as gender identity disorder. In 2013, the American Psychiatric Association changed the name and diagnostic criteria to be "more descriptive than the previous DSM-IV term gender identity disorder and focus[] on dysphoria as the clinical problem, not identity per se." DSM-5 at 451.

31. The diagnostic criteria for Gender Dysphoria in Adolescents and Adults in DSM-5 are as follows:

a. A marked incongruence between one's experienced/expressed gender and assigned gender, of at least six months' duration, as manifested by at least two of the following:

i. A marked incongruence between one's experienced/expressed gender and

primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).

ii. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated sex characteristics).

iii. A strong desire for the primary and/or secondary sex characteristics of the other gender.

iv. A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).

v. A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).

vi. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

b. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

32. Once a diagnosis of gender dysphoria is established, individualized treatment should be initiated. Without treatment, individuals with gender dysphoria experience anxiety, depression, suicidality, and other attendant mental health issues and. are often unable to adequately function in occupational, social, or other areas of life.

33. Although rates of suicide are higher amongst the transgender community than the general population, a 2015 study identified several factors that were associated with large reductions in suicide risk. The study reported that having an identity document with a gender marker notation that matched their lived gender was associated with a large reduction in suicidal ideation and attempts. The study noted that having one or more of these concordant identity documents has the potential to prevent suicidal ideation and suicide

attempts-demonstrating that in a hypothetical sampling of 1,000 transgender people who were permitted to. change an identity document gender marker, 90 cases of ideation could be prevented, and, in a hypothetical sampling of 1,000 transgender people with suicidal ideation who were permitted to change an identity document gender marker, 230 suicide attempts could be prevented (Bauer, Scheim & Pyne). A review of 24 studies similarly found that social and legal gender validation was positively related to improved health outcomes (King & Gamarel, 2021).

34. The medically accepted standards of care for treatment of gender dysphoria are set forth in the *WPATH Standards of Care* (7th version, 2011), first published in 1979 and the WPATH Standards of Care (8th version, 2022). The WPATH-promulgated *Standards of Care* are the internationally recognized guidelines for the treatment of persons with gender dysphoria and inform medical treatment throughout the world.

35. The American Medical Association, the Endocrine Society, the American Psychological Association, the American Psychiatric Association, the World Health Organization, the American Academy of Family Physicians, the National Commission of Correctional Health Care, the American Public Health Association, the National Association of Social Workers, the American College of Obstetrics and Gynecology, the American Society of Plastic Surgeons, and The American Society of Gender Surgeons all endorse protocols in accordance with the WPATH standards. (*See*, *e.g.*, American Medical Association (2008) Resolution 122 (A-85); *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline* (2009); *American Psychological Association Policy Statement on Transgender, Gender Identity and Gender Expression Nondiscrimination* (2009).)

36. The *Standards of Care* identify the following treatment protocols for treating individuals with gender dysphoria, which should be tailored to the patient's individual medical needs:

- Changes in gender expression and role, also known as social transition (which involves living in the gender role consistent with one's gender identity);
- Hormone therapy to feminize or masculinize the body in order to reduce the distress caused by the discordance between one's gender identity, and sex assigned at birth;

- Surgery to change primary and/or secondary sex characteristics; and
- Psychotherapy (individual, couple, family, or group) for purposes such as exploring gender identity, role, and expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia; enhancing social and peer support; improving body image; and promoting resilience.

37. These treatments do not change a transgender person's sex, which is already determined by their gender identity.

c. The Process of Gender Transition

38. A complete gender transition is one in which a person attains a sense of lasting personal comfort with their gendered self, thus maximizing overall health, well-being, and personal safety. Social role transition has an enormous impact in the treatment of gender dysphoria. An early seminal study emphasizes the importance of aligning presentation and identity, Greenberg and Laurence (1981), compared the psychiatric status of individuals with gender dysphoria who had socially transitioned with those who had not. Those who had implemented a social transition showed "a notable absence of psychopathology" compared to those who were living in their birth-assigned sex, Similarly, a recent study found that use of a transgender person's chosen name, if different from the one given at birth, was linked to reduced depression, suicidal ideation and suicidal behavior (Russell, Pollitt & Grossman, 2018).

39. Hormones are often medically indicated for patients with gender dysphoria and are extremely therapeutic. In addition to inducing a sense of well-being, owing to the influence of sex steroids on the brain, hormones induce physical changes which attenuate the dysphoria. One or more surgical procedures are medically indicated for some, but by no means all, transgender individuals.

40. A person's gender identity is an innate, immutable characteristic; it is not determined by a particular medical treatment or procedure. The medical treatments provided to transgender people (including social transition), do not "change a woman into a man" or vice versa. Instead, they affirm the authentic gender that an individual person is.

41. The goal of proper treatment is to align the person's body and lived experience with the person's fixed identity which already exists. Treatment creates more alignment between the person's identity and the person's appearance, attenuating the dysphoria, and allowing the person's actual sex to be seen and recognized by others. Treatments fall below the accepted *Standards of Care* if they fail to recognize that a person's affirmed gender identity is not how they feel, but rather essentially who they are.

d. The Importance of Accurate Identity Documents, Including Birth Certificates and Driver's Licenses, for Transgender People

42. Being unable to correct the gender marker on one's identity documents, including one's birth certificate and driver's license, means that transgender people are forced to display documents that indicate their birth-assigned sex (typically based only on the appearance of genitalia at birth), rather than their actual sex as determined by their gender identity and their lived experience. This discordance creates a myriad of deleterious social and psychological consequences.

43. Identity documents consistent with one's lived experience affirm and consolidate one's gender identity, mitigating distress and functional consequences. Changes in gender presentation and role, to feminize or masculinize appearance, and social and legal recognition, are crucial comportments of treatment for gender dysphoria. Social transition involves dressing, grooming, and otherwise outwardly presenting oneself through social signifiers of a person's true sex as determined by their affirmed gender identity, including on one's identity documents such as a birth certificate and driver's license.

44. Through this process, the shame of growing up living as a "false self" and the grief of being born into the "wrong body" are ameliorated (Ettner, 1999; Bockting, 2014). Being socially and legally recognized with correct identification is essential to successful treatment. The WPATH *Standards of Care* explicitly state that changing the gender marker on identity documents greatly assists in alleviating gender dysphoria. Uncorrected identity documents serve as constant reminders that one's identity is perceived by society and government as "illegitimate." Individuals who desire and require surgery must, as a prerequisite, undergo social role transition, which can be thwarted or upended by inaccurate identification documents.

45. An inability to access identity documents that accurately reflect one's true sex is harmful and exacerbates gender dysphoria, kindling shame and amplifying fear of exposure. Inaccurate documents can cause an individual to isolate (Inness, 1992) in order to avoid situations that might evoke discrimination, ridicule, accusations of fraud, harassment, or even violence—experiences that are all too common among transgender people. Ultimately, this leads to feelings of hopelessness, lack of agency, and despair. Being stripped of one's dignity, privacy, and the ability to move freely in society can lead to a degradation of coping strategies and cause major psychiatric disorders, including generalized anxiety disorder, major depressive disorder, posttraumatic stress disorder, emotional decompensation, and suicidality. Research has demonstrated that transgender women who fear disclosure are at a 100% increased risk for hypertension, owing to the intersection of stress and cardiac reactivity (Ettner, Ettner & White, 2012).

46. An abundance of research establishes that transgender people suffer from stigma and discrimination. The "minority stress model" explains that the negative impact of the stress attached to being stigmatized is socially based. This stress can be both *external*, i.e., actual experiences of rejection or discrimination (enacted stigma), and, as a result of such experiences, *internal*, i.e., perceived rejection or the expectation of being humiliated or discriminated against (felt stigma). Both are corrosive to physical and mental health (Bockting, 2014; Bradford, et al, 2013; Frost, Lehavot, & Meyer, 2015).

47. Until recently, it was not understood that these experiences of humiliation and discrimination have serious and enduring consequences. It is now well documented, however, that stigmatization and victimization are the most powerful predictors of current and future mental health problems. The presentation of a birth certificate and/or driver's license is required in numerous situations. For the transgender individual, an inaccurate birth certificate or driver's license can transform a mundane interaction into a traumatic experience. Repeated negative experiences inevitably erode resilience, creating an ingravescent (medically worsening) course of gender dysphoria and attendant psychiatric disorders (Ohasi, Anderson & Bolder, 2017; Hazenbuehler, et al, 2014).

48. Many people who suffer from gender dysphoria go to great lengths to align their physical characteristics, voice, mannerisms, and appearance to match their gender identity. Since gender identity is

immutable, these changes are the appropriate, and indeed the only treatment for the condition. Understandably, the desire to make an authentic appearance is of great concern for transgender individuals, as the *sine qua non* of the gender dysphoria diagnosis is the desire to be regarded in accordance with one's true sex as determined by one's gender identity. Privacy, and the ability to control whether, when, how, and to whom to disclose one's transgender status, is essential to accomplishing this therapeutic aim.

49. Thus, when an individual implements a social role transition, legal recognition of that transition is vital and a birth certificate and driver's license that accurately reflect the individual's sex as determined by their gender identity is a crucial aspect of that recognition, in large part because congruent identity documentation confers privacy—the right to maintain stewardship of personal and medical information-allowing an individual to live a safe and healthy life (Barry, 2019; Restar et al, 2020). A 2021 study explored the association of uncorrected identity documents and harassment. Among 1,301 transgender participants in the state of Texas, only 22% reported corrected identity documents. Those individuals without corrected identity documents reported having been fired at some point or denied services/benefits as their lived gender did not match their identity documents. Having corrected identity documents, however, was associated with lower odds of harassment in public settings, fewer housing-related issues, more respectful treatment by doctors/health care providers, and more comfort asking police for help (Loza, et.al).

50. From a medical and scientific perspective, there is no basis for refusing to acknowledge a transgender person's sex, as determined by their gender identity, on their identity documents.

IV. CONCLUSION

51. Medical management of gender dysphoria includes the alignment of appearance, presentation, expression, and often, the body, to reflect a person's true sex as determined by their gender identity. Correcting the gender marker on identification documents to accurately reflect an individual's sex, as determined by their gender identity, confers social and legal recognition of identity and is crucial to this process.

52. The necessity and importance of privacy is universal. A wide range of species avoid predators by managing information about internal states and future intentions, for purposes of survival. Privacy enables normal psychological functioning, the ability to have experiences that promote healthy personal growth and interpersonal relationships and allows for measured self-disclosure. It is the basis for the development of individuality and autonomy.

53. For a transgender person, a birth certificate and driver's license bearing an incorrect gender marker or revealing one's sex or name assigned at birth risks disclosing the fact that the person is transgender. This disclosure invades privacy, releases confidential medical information, and places the individual at risk for grave psychological and physical harm. Drawing on the largest sample of transgender people ever surveyed—22,286 U.S. respondents—investigators found that those who had gender-concordant identity documents had far less psychological distress and less suicide attempts than individuals who were barred from correcting identity documents. The authors underscored the important role of government and administrative bodies in reducing distress by allowing access to documents that accurately reflect identity (Scheim, et al, 2020). Given the unequivocal health implications, The American Medical Association adopted a policy supporting removal of sex designation from public birth certificates to shield people from discrimination and the invasion of privacy. According to a June 25, 2021 AMA press release: "Designating sex on birth certificates as male or female, and making that information available on the pubic portion, perpetuates a view that sex designation is permanent and fails to recognize the medical spectrum of gender identity. This ... risks stifling an individual's self-expression and self-identification and contributes to marginalization and minoritization" (http://www.ama-assnorg/press-releases/ama-announced-policies-adopted-final-day-special-meeting).

I declare under penalty of perjury under the laws of the state of Montana that the foregoing is true and correct.

Dated this 29 day of April, 2024 in Evanston, Illinois.

Dr. Randi C. Ettner

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POSITIONS HELD

Clinical Psychologist
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Fellow and Diplomate in Trauma/PTSD
President, New Health Foundation Worldwide
Past Secretary, World Professional Association for Transgender Health (WPATH)
Chair, Committee for Institutionalized Persons, WPATH
Global Education Initiative Committee Curriculum Development, WPATH
University of Minnesota Medical Foundation: Leadership Council
Psychologist, Center for Gender Confirmation Surgery, Weiss Memorial Hospital
Adjunct Faculty, Prescott College
Editorial Board, *International Journal of Transgender Health*
Editorial Board, *Transgender Health*
Television and radio guest (more than 100 national and international appearances)
Internationally syndicated columnist on women's health issues
Private practitioner
Adjunct Medical staff; Department of Medicine: Weiss Memorial Hospital, Chicago, IL
Advisory Council, National Center for Gender Spectrum Health
Global Clinical Practice Network; World Health Organization
Harvard Law School LGBTQ Clinic Leadership Council

EDUCATION

PhD, 1979	Northwestern University (with honors) Evanston, Illinois
MA, 1976	Roosevelt University (with honors) Chicago, Illinois
BA, 1969-73	Indiana University Bloomington, Indiana Cum Laude Major: Clinical Psychology; Minor: Sociology
1972	Moray College of Education Edinburgh, Scotland International Education Program
1970	Harvard University Cambridge, Massachusetts Social Relations Undergraduate Summer Study Program in Group Dynamics and Processes

CLINICAL AND PROFESSIONAL EXPERIENCE

2017-2024	Psychologist: Weiss Memorial Hospital Center for Gender Confirmation Surgery
	Consultant: Walgreens; Tawani Enterprises; Starbucks, Rush University Medical Center
	Private practitioner: clinical and forensic practice
2013	Instructor, Prescott College: Gender-A multidimensional approach
	ICD-11 Member of International Working Group
2011	
	Consultant to Wisconsin Public Schools
2010	
	President New Health Foundation Worldwide
2000	Instructor, Illinois School of Professional Psychology
1995-present	Supervision of clinicians in counseling gender non-conforming clients
1993	Post-doctoral continuing education with Dr. James Butcher in MMPI-2 Interpretation, University of Minnesota
1992	Continuing advanced tutorial with Dr. Leah Schaefer in psychotherapy
1983-1984	Staff psychologist, Women's Health Center, St. Francis Hospital, Evanston, Illinois
1981-1984	Instructor, Roosevelt University, Department of Psychology: Psychology of Women, Tests and Measurements, Clinical Psychology, Personal Growth, Personality Theories, Abnormal Psychology
1976-1978	Research Associate, Cook County Hospital, Chicago, Illinois, Department of Psychiatry
1975-1977	Clinical Internship, Cook County Hospital, Chicago, Illinois, Department of Psychiatry
1971	Research Associate, Department of Psychology, Indiana University
1970-1972	Teaching Assistant in Experimental and Introductory Psychology Department of Psychology, Indiana University
1969-1971	Experimental Psychology Laboratory Assistant, Department of Psychology,

Indiana University

INVITED PRESENTATIONS AND GRAND ROUNDS

Clinical Perspectives and the Experience of Transgender Prisoners Federal Death Penalty Strategy Session, 2023

IGEN POLITICS intergenerational politics podcast; July, 12, 2023 Episode 199; Apple Podcast, Spotify, YouTube

Working with Transgender Clients National Employment Lawyers Association, St. Louis, MO, 2023

Shifting Sands: Challenges in Providing Surgical Care American Society of Reconstructive Microsurgery, Miami, FL 2023

The Standard of Care for Institutionalized Persons WPATH 27th Scientific Symposium, Montreal, Canada 2022

Healthcare for Transgender Prisoners Rush University, Department of Plastic and Reconstructive Surgery, Chicago, IL 2022

Sexual Function: Expectations and outcomes for patients undergoing gender-affirming surgery. Whitney, N., Ettner, R., Schechter, L. Rush University, Department of Plastic and Reconstructive Surgery, Chicago, IL 2022

Care of the Older Transgender Patient, Weiss Memorial Hospital, Chicago, IL, 2021

Working with Medical Experts, The National LGBT Law Association, webinar presentation, 2020

Legal Issues Facing the Transgender Community, Illinois State Bar Association, Chicago, IL, 2020

Providing Gender Affirming Care to Transgender Patients, American Medical Student Association, webinar presentation, 2020

Foundations in Mental Health for Working with Transgender Clients; Center for Supporting Community Development Initiatives, Vietduc University Hospital, Hanoi, Vietnam, 2020

Advanced Mental Health Issues, Ethical Issues in the Delivery of Care, Development Initiaves, Vietduc University Hospital, Hanoi, Vietnam, 2020

What Medical Students Need to Know about Transgender Health Care, American Medical Student Association, webinar presentation, 2019

The Transgender Surgical Patient, American Society of Plastic Surgeons, Miami, FL 2019

Mental health issues in transgender health care, American Medical Student Association, webinar presentation, 2019

Sticks and stones: Childhood bullying experiences in lesbian women and transmen, Buenos Aires, 2018

Gender identity and the Standards of Care, American College of Surgeons, Boston, MA, 2018

Expectations of individuals undergoing gender-confirming surgeries Schechter, L., White, T., Ritz, N., Ettner, R. Buenos Aires, 2018

The mental health professional in the multi-disciplinary team, *pre-operative evaluation and assessment for gender confirmation surgery,* American Society of Plastic Surgeons, Chicago, IL, 2018; Buenos Aires, 2018

Navigating transference and countertransference issues, WPATH Global Education Initiative, Portland, OR; 2018

Psychological aspects of gender confirmation surgery International Continence Society, Philadelphia, PA 2018

The role of the mental health professional in gender confirmation surgeries, Mt. Sinai Hospital, New York City, NY, 2018

Mental health evaluation for gender confirmation surgery, Gender Confirmation Surgical Team, Weiss Memorial Hospital, Chicago, IL 2018

Transitioning; Bathrooms are only the beginning, American College of Legal Medicine, Charleston, SC, 2018

Gender Dysphoria: A medical perspective, Department of Health and Human Services, Office for Civil Rights, Washington, D.C, 2017

Multi-disciplinary health care for transgender patients, James A. Lovell Federal Health Care Center, North Chicago, IL, 2017

Psychological and Social Issues in the Aging Transgender Person, Weiss Memorial Hospital, Chicago, IL, 2017

Psychiatric and Legal Issues for Transgender Inmates, USPATH, Los Angeles, CA, 2017

Transgender 101 for Surgeons, American Society of Plastic Surgeons, Chicago, IL, 2017

Healthcare for transgender inmates in the US, Erasmus Medical Center, Rotterdam, Netherlands, 2016

Tomboys Revisited: Replication and Implication; Amsterdam, Netherlands, 2016

Orange Isn't the New Black Yet- Care for incarcerated transgender persons, WPATH symposium, Amsterdam, Netherlands, 2016

Can two wrongs make a right? Expanding models of care beyond the divide, Amsterdam, Netherlands, 2016

Foundations in mental health; WPATH Global Education Initiative, Chicago, IL 2015

Role of the mental health professional in legal and policy issues, WPATH Global Education Initiative, Chicago, IL 2015

Healthcare for transgender inmates; WPATH Global Education Initiative, Chicago, IL 2015

Children of transgender parents; WPATH Global Education Initiative; Atlanta, GA, 2016

Transfeminine genital surgery assessment: WPATH Global Education Initiative, Columbia, MO, 2016

Foundations in Mental Health; WPATH Global Education Initiative; Ft. Lauderdale, FL, 2016; Washington, D.C., 2016, Los Angeles, CA, 2017, Minneapolis, MN, 2017, Chicago, IL, 2017; Columbus, Ohio, 2017; Portland, OR, 2018; Cincinnati, OH, 2018, Buenos Aires, 2018.

Role of the forensic psychologist in transgender care; WPATH Global Education Initiative, Minneapolis, MN, 2017; Columbus, Ohio, 2017.

Pre-operative evaluation in gender affirming surgery-American Society of Plastic Surgeons, Boston, MA, 2015

Gender affirming psychotherapy; Fenway Health Clinic, Boston, 2015

Transgender surgery- Midwestern Association of Plastic Surgeons, Chicago, 2015

Assessment and referrals for surgery-Standards of Care- Fenway Health Clinic, Boston, 2015

Adult development and quality of life in transgender healthcare- Eunice Kennedy Shriver National Institute of Child Health and Human Development, 2015

How do patients choose a surgeon? WPATH Symposium, Bangkok, Thailand 2014

Healthcare for transgender inmates- American Academy of Psychiatry and the Law, Chicago, 2014

Supporting transgender students: best school practices for success- American Civil Liberties Union of Illinois and Illinois Safe School Alliance, 2014

Addressing the needs of transgender students on campus- Prescott College, Prescott, AZ, 2014

The role of the behavioral psychologist in transgender healthcare – Gay and Lesbian Medical Association, 2013

Understanding transgender- Nielsen Corporation, Chicago, 2013
Grand Rounds: Evidence-based care of transgender patients- North Shore University Health Systems, University of Chicago, Illinois, 2011

Care of the aging transgender patient University of California San Francisco, Center for Excellence, 2013

Grand Rounds: *Evidence-based care of transgender patients* Roosevelt-St. Vincent Hospital, New York, 2011

Grand Rounds: *Evidence-based care of transgender patients* Columbia Presbyterian Hospital, Columbia University, New York, 2011

Hypertension: Pathophysiology of a secret. WPATH symposium, Atlanta, GA, 2011

Exploring the Clinical Utility of Transsexual Typologies- Oslo, Norway, 2009

Children of Transsexual Parents-International Association of Sex Researchers, Ottawa, Canada, 2005

Children of Transsexual Parents- Chicago School of Professional Psychology, Chicago, 2005

Gender and the Law- DePaul University College of Law, Chicago, Illinois, 2003

Family and Systems Aggression against Providers, WPATH Symposium, Ghent, Belgium 2003

Children of Transsexual Parents-American Bar Association annual meeting, New York, 2000

Grand Rounds: Gender Incongruence in Adults, St. Francis Hospital, 1999.

Gender Identity, Gender Dysphoria and Clinical Issues:

WPATH Symposium, Bangkok, Thailand, 2014
Argosy College, Chicago, Illinois, 2010
Cultural Impact Conference, Chicago, Illinois, 2005

Weiss Hospital, Department of Surgery, Chicago, Illinois, 2005
Resurrection Hospital Ethics Committee, Evanston, Illinois, 2005
Wisconsin Public Schools, Sheboygan, Wisconsin, 2004, 2006, 2009
Rush North Shore Hospital, Skokie, Illinois, 2004
Nine Circles Community Health Centre, University of Winnipeg, Winnipeg, Canada, 2003
James H. Quillen VA Medical Center, East Tennessee State University, Johnson City, Tennessee, 2002
Sixth European Federation of Sexology, Cyprus, 2002
Fifteenth World Congress of Sexology, Paris, France, 2001
Illinois School of Professional Psychology, Chicago, Illinois 2001
Lesbian Community Cancer Project, Chicago, Illinois 2000
Emory University Student Residence Hall, Atlanta, Georgia, 1999
Parents, Families and Friends of Lesbians and Gays National Convention, Chicago, Illinois, 1998;
In the Family: Psychotherapy Network National Convention, San Francisco, California, 1998;
Evanston City Council, Evanston, Illinois 1997;
Howard Brown Community Center, Chicago, Illinois, 1995;
YWCA Women's Shelter, Evanston, Illinois, 1995;
Center for Addictive Problems, Chicago, 1994
Highland Park Early Child Development Program, Highland Park, IL 1994

Psychosocial Assessment of Risk and Intervention Strategies in Prenatal Patients- St. Francis Hospital, Center for Women's Health, Evanston, Illinois, 1984; Purdue University School of Nursing, West Layette, Indiana, 1980

Psychonueroimmunology and Cancer Treatment- St. Francis Hospital, Evanston, Illinois, 1984

Psychosexual Factors in Women's Health- St. Francis Hospital, Center for Women's Health, Evanston, Illinois, 1984.

Grand Rounds: Sexual Dysfunction in Medical Practice- St. Francis Hospital, Dept. of OB/GYN, Evanston, Illinois, 1990

Sleep Apnea - St. Francis Hospital, Evanston, Illinois, 1996; Lincolnwood Public Library, Lincolnwood, Illinois, 1996

The Role of Denial in Dialysis Patients - Cook County Hospital, Department of Psychiatry, Chicago, Illinois, 1977

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Witten, T., Benestad, L., Berger, L., Ekins, R., Ettner, R., Harima, K. Transgender and Transsexuality. Encyclopeida of Sex and Gender. Springer, Ember, & Ember (Eds.) Stonewall, Scotland, 2004.

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Post-traumatic Stress Disorder, *Chicago Daily Law Bulletin*, 1995.

Compensation for Mental Injury, Chicago Daily Law Bulletin, 1994.

Workshop Model for the Inclusion and Treatment of the Families of Transsexuals, Proceedings of the Harry Benjamin International Gender Dysphoria Symposium; Bavaria, Germany, 1995.

Transsexualism- The Phenotypic Variable, Proceedings of the XV Harry Benjamin International Gender Dysphoria Association Symposium; Vancouver, Canada, 1997.

The Work of Worrying: Emotional Preparation for Labor in Pregnancy as Healing. A Holistic Philosophy for Prenatal Care, Peterson, G. and Mehl, L. Vol. II. Chapter 13, Mindbody Press, 1985.

PROFESSIONAL AFFILIATIONS

University of Minnesota Institute for Sexual and Gender Health–Leadership Council

American College of Forensic Psychologists

World Professional Association for Transgender Health

WPATH GEI SOC 8 Certified Member

New Health Foundation Worldwide

World Health Organization (WHO) Global Access Practice Network

TransNet national network for transgender research

American Psychological Association

American College of Forensic Examiners

Society for the Scientific Study of Sexuality

Screenwriters and Actors Guild

Phi Beta Kappa

AWARDS AND HONORS

University of Minnesota, Institute for Sexual and Gender Health; 50 *Distinguished Sex and Gender Revolutionaries* award, 2021

Letter of commendation from United States Congress for contributions to public health in Illinois, 2019

WPATH Distinguished Education and Advocacy Award, 2018

The Randi and Fred Ettner Transgender Health Fellowship-Program in Human Sexuality, University of Minnesota, 2016

Phi Beta Kappa, 1972

Indiana University Women's Honor Society, 1970-1972

Indiana University Honors Program, 1970-1972

Merit Scholarship Recipient, 1970-1972

Indiana University Department of Psychology Outstanding Undergraduate Award Recipient, 1970-1972

Representative, Student Governing Commission, Indiana University, 1970

LICENSE

Clinical Psychologist, State of Illinois, 1980

EXHIBIT 4

IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS and CLARK COUNTY

JESSICA KALARCHIK, an individual, and JANE DOE, an individual, on behalf of themselves and all others similarly situated,	)	**Case No. DV-25-2024-0000261-CR**
Plaintiffs,	)	**Presiding Judge: Hon. Mike Menahan**
v.	)	
STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; CHARLES T. BRERERTON, in his official capacity as the Director of the Montana Department of Public Health and Human Services; the MONTANA DEPARTMENT OF JUSTICE; and AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana,	)	
Defendants.	)	

EXPERT DECLARATION OF AYDEN SCHEIM, PhD

Pursuant to § 1-6-105, MCA, I, Ayden Scheim, Ph.D., state and affirm that the following facts are true and correct:

1. I have been retained by counsel for Plaintiffs as an expert in connection with the above-captioned litigation. Specifically, I have been asked by Plaintiffs' counsel to provide an expert opinion on the harms that may be caused to transgender people by being unable to change the gender marker on their birth certificate or driver's license.

2. I have actual knowledge of the matters stated herein. If called to testify in this matter, I would testify truthfully and based on my expert opinion.

I. BACKGROUND AND QUALIFICATIONS

A. Qualifications

3. I am an epidemiologist and received my Ph.D. in Epidemiology and Biostatistics from The University of Western Ontario (Western University) in 2017. I completed postdoctoral training at the University of California, San Diego School of Medicine from 2017 to 2019. Since September 2019, I have been an Assistant Professor of Epidemiology and Biostatistics in the Dornsife School of Public Health at Drexel University in Philadelphia, Pennsylvania. I hold affiliate faculty positions at the Li Ka Shing Knowledge Institute at St. Michael's Hospital in Toronto, Canada and in the Department of Epidemiology and Biostatistics in the Schulich School of Medicine and Dentistry at Western University in London, Canada. My professional experience and publications are detailed in my curriculum vitae, which is attached as Exhibit A to this declaration.
4. My opinion expressed herein is based on my experience conducting original research on transgender health and well-being since 2005, reviewing research in the field, and additional original analyses conducted at the request of Plaintiffs' counsel. I have held multiple federal research grants on transgender health from the National Institutes of Health and the Canadian Institutes of Health Research and currently serve as Principal Investigator of transgender health studies funded by both agencies. My research draws on observational epidemiologic data (i.e., surveys) to identify social determinants of mental health, physical health, and access to healthcare among transgender persons.
5. As a professor of epidemiology, I also teach graduate-level courses in quantitative research methodology and survey design.

6. I have published 54 peer-reviewed research articles specifically on transgender health, in addition to more than two dozen commentaries, reports, or research briefs. In recognition of my expertise in this field, I was invited to lead a review article in transgender health in the prestigious *Annual Review of Public Health* in 2022.
7. Specific to the issues in this case, I was commissioned by the World Health Organization to conduct a systematic review on legal gender recognition (name and gender marker changes on legal documentation) for their forthcoming guidelines on transgender health.
8. I have been invited to deliver scientific presentations on transgender health at local, national, and international meetings in the United States, Canada, Europe, Asia, Australia, South America, and Africa. I have served on clinical and research guideline committees for the World Professional Association for Transgender Health (Standards of Care), the National Institutes of Health, the Canadian Institutes of Health Research, and the Williams Institute at the University of California, Los Angeles School of Law.

B. Compensation

9. I am being compensated at an hourly rate of $400 per hour plus expenses for my time spent communicating with plaintiffs' counsel, drafting written testimony and reports, being deposed, or testifying, and traveling in connection with this matter. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I may provide.

C. Previous Testimony

10. I have given expert testimony at trial or by deposition in the following cases:

- I testified as an expert witness on name changes for transgender people in cases before the Court of Common Pleas of Butler County, PA (Case No. 640 WDA 2022),

the Court of Common Pleas of Allegheny County (GD No. 21-11804; GD No. 21-11805), and the Court of Common Pleas of Philadelphia County (Case No. 210901990) in Pennsylvania.

- I also testified as an expert witness on anti-transgender stigma in a trial before he Ontario Superior Court of Justice, Canada (*Her Majesty the Queen. v. Cardle*, 2020 ONSC 7878).

11. I also provided an expert report on gender marker changes for transgender people in the Thirteenth Judicial District Court, County of Yellowstone (*Marquez v. Montana*, Case No. DV 21-00873)

II. BASIS FOR OPINIONS

My opinions contained in this declaration are based on all of the following:

1. Transgender persons experience discrimination and poor treatment due specifically to identity documents and records that do not accurately reflect their gender presentation. In the 2015 United States Transgender Survey ("U.S. Trans Survey"), the largest-ever survey of transgender adults in the United States (n=27,715),[1] 32% of respondents who had presented an identity document that did not match their gender presentation had at least one negative experience, including verbal harassment (25%), denial of service (16%), being asked to leave a venue (9%), and assault (2%). Further, racial and ethnic minority respondents including Middle Eastern, American Indian, and Black individuals were more likely to report harassment or violence when presenting mis-matched identity documents.
2. In addition to directly experiencing the abovementioned discrimination, transgender individuals often anticipate stigma and discrimination in interpersonal and institutional

[1] James SE, Herman JL, Rankin S, Keisling M, Mottet L, Anafi M. The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality; 2016:1-302.

interactions and may avoid such situations as a means of self-protection.[2] The vast majority – 84% – of respondents to a 2019 national transgender health survey that I conducted in Canada (n=2,873) reported that, in the past five years, they had avoided public spaces or situations (e.g., restrooms, schools, travel) due to fears of being harassed or "outed" (having their transgender status non-consensually disclosed).[3]

3. Conversely, two recent studies indicate that being able to change the gender designation on birth certificates or other identity documents is associated with increased employment and reduced exposure to discrimination among transgender people in the United States.
4. An econometric study found that employment of transgender men increased by 9 to 20 percentage points after removal of state policies requiring surgery to change the gender marker on a birth certificate.[4] The removal of such policies increases access to gender marker changes on both birth certificates and other legal documents for which birth certificates are foundational. The study compared employment of transgender and cisgender people prior to and following removal of state-level surgical requirements, using data from the Centers for Disease Control's Behavioral Risk Factor Surveillance System (BRFSS) that represent the populations of 39 states that collected information on gender identity in the study's 2014-2019 timeframe. The study's findings held after a range of additional checks including sensitivity analyses accounting for differences in timing of policy changes, alternative policy definitions (including states with unclear policies), and a placebo test examining whether the policies impacted cisgender lesbian, gay, and bisexual people (which they would not be expected to).

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[2] White Hughto JM, Reisner SL, Pachankis JE. Transgender stigma and health: A critical review of stigma determinants, mechanisms, and interventions. Soc Sci Med. 2015;147:222-231. Doi:10.1016/j.socscimed.2015.11.010.

[3] The Trans PULSE Canada Team. Health and health care access for trans and non-binary people in Canada. 2020-03-10. Available from: https://transpulsecanada.ca/research-type/reports

[4] Mann S. Transgender employment and gender marker laws. Labour Economics. 2021; 73:102072. Doi:10.1016/j.labeco.2021.102072.

5. An analysis of 1,301 Texas residents who completed the U.S. Trans Survey found that those with their preferred name and gender marker on all identity documents (which would include the birth certificate and driver's license) were less likely to experience eviction, homelessness, or harassment in places of business, government agencies, or public spaces.[5] They were more likely to be comfortable asking police for help, and if they had police contact, were less likely to be perceived as transgender or called the wrong pronoun by the officers. Further, those with fully gender-congruent identity documents were more likely to travel by air, and less likely to report negative airport experiences (questioning by airport staff, incorrect pronoun use, being patted down by an officer of the wrong gender) when they did travel.
6. Among approximately 4,000 U.S. Trans Survey participants who were living in a gender different from their sex assigned at birth and who had passed through airport security in the previous year, those who had updated the gender on their driver's license were less likely to report questioning of their identity documents by airport security (8.9% versus 26.0% of those who had not updated their driver's license).[6]
7. Transgender people in the United States face a disproportionate burden of poor mental health. For example, in BRFSS data from 2014-2016, 24.2% of transgender women, 31.1% of transgender men, and 38.2% of gender non-conforming transgender persons had ever been diagnosed with depression, as compared to 12.5% of cisgender men and 21.1% of cisgender women.[7] It is estimated that 40% of transgender adults have ever

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[5] Loza O, Beltran O, Perez A, Green J. Impact of name change and gender marker correction on identity documents to structural factors and harassment among transgender and gender diverse people in Texas. Sexuality, Gender, & Policy. 2021;4:76–105. Doi: 10.1002/sgp2.12035.

[6] Herman J, O'Neill K. Gender Marker Changes on State ID Documents: State-Level Policy Impacts. The Williams Institute, UCLA School of Law, June 2021. Available from: https://williamsinstitute.law.ucla.edu/publications/gender-marker-policies/

[7] Downing JM, Przedworski JM. Health of transgender adults in the U.S., 2014-2016. American Journal of Preventive Medicine. 2018;55(3):336-344. Doi:10.1016/j.amepre.2018.04.045.

attempted suicide, approximately nine times the rate of the general population in the U.S.[8] A growing body of research seeks to identify modifiable factors that contribute to these mental health disparities.

8. To the best of my knowledge, five published studies have specifically examined the relationship between the sex/gender designation on one's legal identity documents and mental health outcomes among transgender people in the United States and Canada. All found that having identity documents consistent with one's gender identity or presentation – and particularly having all identity documents (including birth certificates and driver's licenses) changed – was associated with improved mental health.

9. A study from Ontario, Canada, which I co-authored, found that transgender persons possessing at least one legal identity document (including but not limited to birth certificates and driver's licenses) with a gender marker congruent with their lived gender were at reduced risk of past-year suicide ideation and attempts.[9] Specifically, adjusting for a wide range of potentially confounding variables, having at least one piece of identification with a gender marker congruent with lived gender was associated with a 44% reduction in the relative risk of seriously considering suicide and, among those who had considered suicide, with an estimated 74% reduction in the risk of attempts. These data were collected using respondent-driven sampling, a data collection and analysis method that uses structured sampling within social networks to generate population-level estimates for populations that cannot be conventionally enumerated.

10. A study of 503 transgender adults in Massachusetts and Rhode Island who wanted to change the gender on their driver's license or passport found that individuals who had

[8] James SE, Herman JL, Rankin S, Keisling M, Mottet L, Anafi M. The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality; 2016:1-302.

[9] Bauer GR, Scheim AI, Pyne J, Travers R, Hammond R. Intervenable factors associated with suicide risk in transgender persons: a respondent driven sampling study in Ontario, Canada. BMC Public Health. 2015;15(1):525. Doi:10.1186/s12889-015-1867-2.

changed the gender marker on both documents had lower odds of clinically significant anxiety, psychological distress, somatization (bodily symptoms resulting from psychological distress, e.g., pain), and emotional upset due to gender-based mistreatment.[10] Underscoring the importance of being able to change all of one's identity documents, the mental health of participants who had only changed one document was largely similar to that of participants who changed no documents. The only significant difference was that those who changed one of the documents had lower odds of emotional upset due to gender-based mistreatment.

11. A 2018 survey of 818 transgender and non-binary people in New Zealand found that participants who reported barriers to changing the gender marker on their identity documents (e.g., lack of suitable gender marker options, cost, fear of discrimination) had higher psychological distress and twice the odds of suicidal ideation as compared to participants who faced no such barriers, adjusting for demographic differences.[11]

12. In a sample of 6,581 transgender youth aged 13-24 who participated in a 2020 online survey, those who wanted to update the gender marker on their identity documents but believed they were unable to do so in their jurisdiction were at increased risk of attempting suicide in the past year.[12] Youth who believed they were legally able to change their gender marker but who had not yet done so were also at increased risk of attempting suicide. This analysis adjusted for potential confounders including demographic characteristics, hormone therapy, and parental support.

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[10] Restar A, Jin H, Breslow A, et al. Legal gender marker and name change is associated with lower negative emotional response to gender-based mistreatment and improve mental health outcomes among trans populations. SSM - Population Health. 2020;11:100595. Doi:10.1016/j.ssmph.2020.100595.

[11] Tan KKH, Watson RJ, Byrne JL, Veale JF. Barriers to possessing gender-concordant identity documents are associated with transgender and nonbinary people's mental health in Aotearoa/New Zealand. LGBT Health. 2022;9(6):401-410. Doi:10.1089/lgbt.2021.0240.

[12] DeChants JP, Price MN, Green AE, Davis CK, Pick CJ. Association of updating identification documents with suicidal ideation and attempts among transgender and nonbinary youth. International Journal of Environmental Research and Public Health. 2022; 19:5016. Doi:10.3390/ijerph19095016.

13. Drawing on data from the U.S. Trans Survey, in November 2019, I conducted an analysis of data from 22,286 respondents to assess the relationship between gender-concordant identity documents or records and mental health.[13] Specifically, I examined whether current psychological distress and past-year suicidal ideation, planning, and attempts varied based on whether all, some, or none of a respondent's documents reflected the name or gender marker they preferred to have listed on their documents. I found that as compared to transgender individuals who had no identity documents with the correct gender marker, those who had the correct gender marker on some or all documents were less likely to report psychological distress and suicidality. Indicating the importance of consistently gender-concordant documents, the protective associations with mental health were notably larger for having the correct gender on all documents, including birth certificates. As compared to respondents with the correct gender marker on none of their documents, those with the correct gender marker on all documents were 29% less likely to meet criteria for serious psychological distress (a validated proxy for clinically significant mental illness[14]), 20% less likely to have seriously considered suicide in the past year, and 19% less likely to have made a plan to die by suicide in the past year. These analyses adjusted for a range of potential confounders including demographic characteristics, region, medical gender transition status, length of time since transition, and family support.
14. At the request of counsel for the Plaintiffs, I conducted a new analysis of the data underlying the abovementioned publication in May 2022, focusing specifically on the relationship between changing the gender marker on one's birth certificate and mental health outcomes. I used the same analytic sample of 22,286 respondents and the same

[13] Scheim AI, Perez-Brumer AG, Bauer GR. Gender-concordant identity documents and mental health among transgender adults in the USA: a cross-sectional study. The Lancet Public Health. 2020;5(4):e196-e203. Doi:10.1016/S2468-2667(20)30032-3.

[14] Kessler RC, Barker PR, Colpe LJ, et al. Screening for serious mental illness in the general population. Archives of General Psychiatry 2003; 60: 184–89.

coding and statistical analysis subjected to peer review by The Lancet Public Health, except the focal independent variable of gender-concordant identity documents. In this new unpublished analysis, I compared the 1,903 participants who had changed the gender marker on their birth certificate, and the 6,001 participants who had the correct gender marker on some identity documents but had not changed their birth certificate, to the 14,382 participants who did not have the correct gender marker on any of their documents. Results of this analysis were consistent with the published findings, which we would expect because most participants who indicated having the correct gender marker on all identity documents would have changed their birth certificates. Specifically, I found that those who had changed the gender marker on their birth certificate were 26% less likely to meet criteria for serious psychological distress, 15% less likely to have seriously considered suicide in the past year, and 15% less likely to have made a plan to die by suicide in the past year, relative to those who had not changed the gender marker on any documents. Possessing gender-concordant identity documents other than a birth certificate – most often including a driver's license or state ID (in 91% of cases) – was associated with smaller but significant reductions in the risk of psychological distress (17%) and suicidal ideation (8%). This is again consistent with the published findings, as those with only "some" gender-concordant ID experienced smaller but meaningful reductions in psychological distress and suicidal ideation.

15. In April 2024, I conducted further analysis at the request of counsel for the Plaintiffs. I examined whether participants who had changed the gender marker on all or some of their identity documents were at lower risk of having experienced mistreatment due to presenting identity documents that do not match their gender presentation. Mistreatment included having been verbally harassed, assaulted, denied services, or asked to leave a venue. Participants who had changed the gender marker on all of their documents were 35% less likely to have ever experienced identity document-related mistreatment than those had not changed the gender marker on any documents; they were also 34% less

likely to have experienced such mistreatment than individuals who had the correct gender marker on only some of their documents. As implied by that finding, there was not a statistically or practically significant difference in the experience of mistreatment between participants with some gender-concordant documents and those with no gender-concordant documents (with a prevalence ratio of 0.99, where 1.0 equals no difference). In other words, gender marker changes on identity documents were negatively associated with document-related mistreatment *only* if participants had changed the gender marker on all of their documents. This analysis adjusted for potential confounders including age, race/ethnicity, gender identity, disability, poverty, education, nativity, census region, medical gender transition status, and years since the beginning of gender transition.

16. In addition to the aforementioned research on gender designations on identity documents, additional research indicates positive health impacts of social and legal gender affirmation.

17. Among 2,940 transgender Oregon Medicaid beneficiaries, having changed the gender of record with Medicaid (which may or may not coincide with a legal gender marker change) was associated with reduced burden of diagnosed depression, anxiety, or substance use disorder.[15]

18. In my U.S. Transgender Survey analysis, having one's chosen name on identity documents was also associated with better mental health (18% reduction in the risk of serious psychological distress, 11% reduction in the risk of suicide ideation, 18% reduction in the risk of suicide planning.[16]

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[15] Yee K, Lind BK, Downing, J. Change in gender on record and transgender adults' mental or behavioral health. American Journal of Preventive Medicine. 2022; 62(5):696-704. Doi:.1016/j.amepre.2021.10.016.

[16] Scheim AI, Perez-Brumer AG, Bauer GR. Gender-concordant identity documents and mental health among transgender adults in the USA: a cross-sectional study. The Lancet Public Health. 2020;5(4):e196-e203. Doi:10.1016/S2468-2667(20)30032-3.

19. Among 157 transgender people surveyed in Quebec, Canada, having made at least one change to legal or administrative name and/or gender was associated with greater life satisfaction and fewer symptoms of psychological distress.[17]
20. A survey of 65 primarily low-income transgender women of color compared those who had completed a legal name change at least nine months earlier to those who were preparing to initiate the process.[18] Those who had completed legal name changes were more likely to be employed, to report incomes above $1,000 per month, and to rent or own their own housing. In addition, they were less likely to report postponing needed medical care in the previous six months.
21. Another study, among transgender youth aged 15-21 in the U.S., found that use of one's chosen name by others was associated with reduced depression, suicidal ideation, and suicidal behavior, with the lowest levels of depression and suicidality when one's chosen name was used across home, school, work, and social contexts.[19]

III. SUMMARY OF OPINIONS

22. Gender affirmation, comprising social, legal, medical, and psychological dimensions, is a critical determinant of health and well-being for transgender persons. Being consistently referred to and perceived in a manner consistent with one's self-identification promotes positive mental health.
23. Conversely, identity documents that display a transgender individual's birth-assigned sex may cause the individual to experience gender non-affirmation (e.g., being addressed as

[17] Cotton JC, Martin-Storey A, Le Corff Y, Beauchesne Lévesque SG, Sansfaçon AP. En Reponse Au Projet De Loi 2 : Associations Entre Les Demarches Legales D'affirmation Du Genre et Deux Indicateurs De Bien-etre Chez Des Personnes Trans et Non-Binaires Du Quebec. The Canadian Journal of Psychiatry / La Revue Canadienne de Psychiatrie 2022; 67(7): 578-580.

[18] Hill BJ, Crosby R, Bouris A, et al. Exploring transgender legal name change as a potential structural intervention for mitigating social determinants of health among transgender women of color. Sexuality Research & Social Policy. 2018;15(1):25-33. Doi:10.1007/s13178-017-0289-6.

[19] Russell ST, Pollitt AM, Li G, Grossman AH. Chosen name use is linked to reduced depressive symptoms, suicidal ideation, and suicidal behavior among transgender youth. Journal of Adolescent Health. 2018;63(4):503-505.

the wrong gender), harassment or ridicule, accusations of fraud, denial of service, or even violence. These experiences, in turn, can contribute to worsened mental health and avoidance of settings in which official documents or records must be displayed.

24. Although birth certificates are not frequently presented in daily life, they are foundational documents required to establish citizenship when obtaining other official documents and records (such as driver's licenses) which, in turn, are required for myriad aspects of daily life. These include but are not limited to access to healthcare, employment, education, social services, and financial services; entry to age-restricted or secured spaces (e.g., bars, government buildings, schools, airplanes); making purchases (i.e., by credit card or check); and voting. Therefore, not being able to change the sex designation on one's birth certificate or on one's driver's license may not only lead to emotional distress, but also may curtail access to services, employment, and social participation. The research analyses presented in this report indicate that having the ability to update all of one's identity documents, including birth certificates and driver's licenses, is necessary to prevent the negative consequences of gender-discordant documents.

25. Policies that prevent trans people from updating the gender marker on their driver's licenses or other identity documents also may limit the utility of identity documents for security screening and identity verification, as evidenced by the increased airport security questioning experienced by trans people traveling with valid identity documents without an updated gender marker.

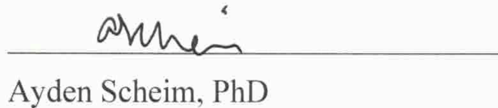
IV. CONCLUSION

26. In summary, legal gender recognition is a critical part of gender affirming treatment for transgender persons and is associated with substantial reductions in the mental health challenges they too often face. Being able to change the gender marker on one's birth certificate or driver's license may also improve the social, health, and economic conditions of transgender individuals by reducing their exposure to discrimination,

harassment, and violence related to gender-incongruent identity documents. Further, policies prohibiting or restricting access to gender marker changes on birth certificates or driver's licenses may be at odds with the primary purpose of identity documents – identity verification.

I declare under penalty of perjury under the laws of the state of Montana that the foregoing is true and correct.

DATED this 30 day of April, 2024, in Philadelphia, Pennsylvania



Ayden Scheim, PhD

Ayden I. Scheim

CONTACT

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EDUCATION

2017 **Ph.D., Epidemiology and Biostatistics**
Western University (The University of Western Ontario), London, Canada

2011 **B.A. (Honors)**, **Sociology**
University of Toronto, Toronto, Canada

ACADEMIC APPOINTMENTS

2023 – **Faculty Affiliate,** Urban Health Collaborative, Dornsife School of Public Health, Drexel University.

2023 – **Visiting Assistant Professor,** Center for AIDS Prevention Studies, University of California, San Francisco, USA.

2019 – **Assistant Professor**, Department of Epidemiology and Biostatistics, Dornsife School of Public Health, Drexel University, Philadelphia, USA.

2020 – **Adjunct Assistant Professor,** Department of Epidemiology and Biostatistics, Schulich School of Medicine and Dentistry, Western University, London, Canada.

2019 – **Affiliate Scientist,** Li Ka Shing Knowledge Institute, St. Michael's Hospital, Toronto, Canada.

2018-2019 **Associate Scientist,** Li Ka Shing Knowledge Institute, St. Michael's Hospital, Toronto, Canada.

2017-2019 **Postdoctoral Fellow,** Division of Infectious Diseases and Global Public Health, Department of Medicine, University of California San Diego.

CONSULTING

2023 – Systematic reviews on legal gender recognition and trans-inclusive health policies. *World Health Organization.*

2022-2023 Gender and sexuality-based equity in supervised injection sites. *Health Canada.*

2018-2019 Development of a Global Fund-supported needle and syringe exchange program in Sierra Leone. *National HIV/AIDS Secretariat, Government of Sierra Leone.*

2018 Preparation of application for an exemption to operate mobile supervised injection services. *Middlesex London Health Unit*, Canada.

2017-2019 Monitoring and evaluation. Capacity-building intervention for transgender organizations in low- and middle-income countries. *IRGT: A Global Network of Trans Women and HIV, Global Forum on MSM and HIV*.

2015-2017 Health care provider transgender education. *Rainbow Health Ontario.*

2015-2016 Research and writing of technical brief on transgender HIV data collection. *IRGT: A Global Network of Trans Women and HIV, Global Forum on MSM and HIV*.

2013 Trans-inclusive policy and practice. *Public Service Alliance of Canada Local 610*.

EMPLOYMENT HISTORY

2017-2018 **Research Manager**, Centre on Drug Policy Evaluation, Centre for Urban Health Solutions, Li Ka Shing Knowledge Institute, *St. Michael's Hospital*, Toronto, Canada.

2013-2014 **Research Assistant**, Linking Molecular and Social Cluster Analyses in HIV Transmission, *University of Windsor* (PI: Barry Adam).

2012-2013 **Research Assistant**, Trans PULSE Project, *Western University* (PI: Greta Bauer).

2011 **Counselor**, AIDS & Sexual Health Info Line. *Toronto Public Health.*

2011 **Research Assistant**, Health Systems and Health Equity Research Group, *Centre for Addiction and Mental Health* (PI: Lori Ross), Toronto, Canada.

2009-2010 **Project Manager**, Trans Men's Pap Testing Campaign. *Sherbourne Health Centre*, Toronto, Canada.

2008-2011 **Shelter and Housing Worker**, *Fred Victor Centre*, Toronto, Canada.

2006-2009 **Research Assistant**, Bisexual Mental Health Study, *Sherbourne Health Centre* and *Centre for Addiction and Mental Health* (PI: Lori Ross), Toronto, Canada.

2005-2007 **Trans Youth Program Coordinator**, Supporting Our Youth. *Sherbourne Health Centre*, Toronto, Canada.

2005-2006 **Research Assistant**, Queer Youth Speak Project, *Shout Clinic* and *Centre for Addiction and Mental Health,* Toronto, Canada.

2003-2006 **HIV/AIDS Educator**, *Griffin Centre,* Toronto, Canada.

ADDITIONAL TRAINING

Competitive Workshops

2017 Health Disparities, Health Inequities, and Vulnerable Populations Workshop
Inter-University Consortium for Social and Political Research Summer Program,

University of Michigan – Ann Arbor, USA

2015 Summer Institute in LGBT Population Health
Fenway Institute, Boston, USA

HONORS & AWARDS

2023	Dornsife School of Public Health Junior Faculty Research Award
2021	Alumni of Distinction Award – Basic Sciences, Schulich School of Medicine and Dentistry, Western University
2018	Canadian Association for HIV Research New Investigator Award, Key Populations ($1,000)
2017-2020	Canadian Institutes of Health Research Postdoctoral Fellowship ($150,000)
2017	World Professional Association for Transgender Health Outstanding Contribution ($500)
2017	Best Oral Presentation, Canadian Society for Epidemiology and Biostatistics ($250)
2014-2017	Pierre Elliott Trudeau Foundation Scholarship ($233,000; partially declined)
2014-2017	Canadian Institutes of Health Research (CIHR) Vanier Scholarship ($150,000)
2014	Western University Vice President of Research Support Grant ($10,000)
2014-2015	Ontario Graduate Scholarship ($15,000; declined)
2014	CIHR Institute of Gender and Health Travel Award ($2,500)
2013-2017	Schulich Dean's MSc-PhD Transfer Award ($20,000; partially declined)
2012	Dr. Carol Buck Graduate Scholarship in Epidemiology ($1,000)
2011-2013	CIHR HIV/AIDS Community-Based Research Master's Award ($35,000)
2011-2012	Ontario Graduate Scholarship ($15,000; declined)
2011-2012	Universities Without Walls, CIHR National HIV Training Fellowship ($17,000)
2011-2016	Western Graduate Research Scholarship ($40,000)

PUBLICATIONS

Peer-reviewed Articles

91. Mitra S, Bouck Z, Larney S, Zolopa C, Hoj S, Minoyan N, Upham K, Rammohan I, Mok WY, Hayashi K, Milloy MJ, DeBeck K, Scheim AI, Werb D. The impact of the COVID-19 pandemic on people who use drugs in three Canadian cities: A cross-sectional analysis. Accepted at Harm Reduction Journal, April 1, 2024.

90. Adams N, Jacobsen K, Li L, Francino M, Rutherford L, Tei C, Scheim AI, Bauer G. Health and health care access of autistic transgender and nonbinary people in Canada: a cross-sectional study. Autism in Adulthood. Online ahead of print April 1, 2024.

89. Greenwald ZR, Werb D, Feld JJ, Austin PC, Fridman D, Bayoumi AM, Gomes T, Kendall CE, Lapointe-Shaw L, Scheim AI, Bartlett SR, Benchimol EI, Bouck Z, Boucher LM, Greenaway C, Janjua NZ, Leece P, Wong WWL, Sander B, Kwong JC. Validation of case-ascertainment algorithms using health administrative data to identify people who inject drugs in Ontario, Canada. Journal of Clinical Epidemiology. Online ahead of print March 24, 2024.

88. Wiegand AA, Zubizarreta D, Kennedy R, Baral S, Scheim AI, Appenroth MN, Radix AE, Cole SW, Reisner SL. Global Human Immunodeficiency Virus prevalence and risk behaviors in transmasculine individuals: a scoping review. Transgender Health. Online ahead of print February 26, 2024.

87. Scheim AI, Rich AJ, Zubizarreta D, Malik M, Baker KE, Restar AJ, van der Merwe LA, Wang J, Beebe B, Ridgeway K, Baral SD, Poteat T, Reisner SL. Health status of transgender people globally: a systematic review of research on disease burden and correlates. PLOS ONE 2024; 19(3): e0299373.

86. Rammohan I, Gaines T, Scheim AI, Bayoumi A, Werb D. Overdose mortality incidence and supervised consumption services in Toronto, Canada: an ecological study and spatial analysis. The Lancet Public Health 2024; 9:e79-e87.

85. Nafeh F, Mbichila T, Bouck Z, Scheim A, Mitra S, Bonn M, Morris F, Atkinson K, Mason K, Eeuwes J, Strike C. A preliminary assessment of short-term social and substance use-related outcomes among clients of integrated safer opioid supply pilot programs in Toronto, Canada. International Journal of Mental Health and Addiction. Online ahead of print December 22, 2023.

84. Jacobsen K, Davis CE, Burchell D, Rutherford L, Lachowsky N, Bauer GR, Scheim AI. Misgendering and the health and wellbeing of nonbinary people in Canada. International Journal of Transgender Health. Online ahead of print November 10, 2023.

83. Jones J, Butler G, Woody M, Sheets M, Castel AD, Kulie P, Scheim AI, Reisner SL, Valencia R, Wang M, Stephenson R, Stekler JD, Sullivan PS. Adaptation of a HIV prevention mobile app for transmasculine people: A pilot acceptability and feasibility study. Transgender Health. Online ahead of print August 11, 2023.

82. Ghabrial MA, Scheim AI, Chih C, Santos H, Adams NJ, Bauer GR. Change in finances, peer access, and mental health among trans and nonbinary people during the COVID-19 pandemic. LGBT Health 2023; 10(8):595-607.

81. Jones J, Butler G, Woody M, Castel AD, Kulie P, Sheets M, Scheim AI, Reisner SL, Valencia R, Wang M, Stekler JD, Sullivan PS, Stephenson R. Preferences for a HIV prevention mobile app designed for transmasculine people: A qualitative investigation. JMIR Formative Research 2023;7:e51055.

80. Bowles JM, Kolla G, Smith LR, Scheim AI, Dodd Z, Werb D. Disease-related stigma among people who inject drugs in Toronto amidst the COVID-19 pandemic. Drug and Alcohol Dependence Reports 2023;7:100167.

79. Lacombe-Duncan A, Kattari SK, Kattari L, Scheim AI, Misiolek BA. Sexually transmitted infection testing among transgender and non-binary persons: results of a community-based cross-sectional survey. Sexual Health 2023; 20:87-91.

78. Tran GM, Lachowsky N, Urbanoski KA, Scheim AI, Bauer GR. Correlates of hazardous alcohol drinking among trans and non-binary people in Canada: a community-based cross-sectional study. Drug and Alcohol Dependence 2023; 250:110872.

77. Wiginton JM, Maksut JL, Scheim AI, Zlotorzynska M, Sanchez TH, Baral SD. Intersecting sexual behavior and gender identity stigmas among transgender women in the United States: burden and associations with sexual health. AIDS & Behavior 2023;27(9):3064-3079.

76. Scheim AI, Santos H, Ciavarella S, Vermilion J, Arps FSE, Adams N, Nation K, Bauer GR. Intersecting inequalities in access to justice for trans and non-binary sex workers in Canada. Sexuality Research and Social Policy 2023; 20:1245–1257.

75. Greenwald ZR, Bouck Z, McLean E, Mason K, Lettner B, Broad J, Dodd Z, Nassau T, Scheim AI, Werb D. Integrated supervised consumption services and hepatitis C testing and treatment among

people who inject drugs in Toronto, Canada: a cross-sectional analysis. Journal of Viral Hepatitis 2023; 30(2): 160-171.

74. Tran NK, Baker KE, Lett E, Scheim AI. State-level heterogeneity in associations between structural stigma and individual healthcare access: A multilevel analysis of transgender adults in the United States. Journal of Health Services Research & Policy 2023; 28(2): 109-118.

73. Navarro JM, Scheim AI, Bauer GR. Transgender and non-binary people's preferences for virtual health care post-pandemic: A cross-sectional Canadian study. Journal of Medical Internet Research 2022; 24(10):e40989.

72. Tran NK, Martinez O, Scheim AI, Goldstein ND, Welles SL. Perceived barriers and facilitators of long-acting injectable HIV PrEP use among Black, Latino/Hispanic and White gay, bisexual and other men who have sex with men. AIDS Education & Prevention 2022; 34(5):365-378.

71. Coleman E, Radix AE, Bouman WP, et al (116 additional authors). Standards of Care for the Health of Transgender and Gender Diverse People, Version 8. International Journal of Transgender Health. 2022;23(sup1):S1-S259.

70. Restar A, Dusic EJ, Garrison-Desany H, Lett E, Everhart A, Baker KE, Scheim AI, Wilson Beckham S, Reisner S, Rose AJ, Mimiaga MJ, Radix A, Operario D, Hughto J. Gender affirming hormone therapy dosing behaviors among transgender and nonbinary adults. Humanities and Social Sciences Communications 2022;9(1):304.

69. Lacombe-Duncan A, Kattari L, Kattari SK, Scheim AI, Alexander F, Yonce S, Misiolek BA. HIV testing among transgender and nonbinary persons in the midwestern United States: Results of a community-based survey. Journal of the International AIDS Society 2022; 25:e25972.

68. Kia H, Rutherford L, Jackson R, Grigorovich A, Ricote CL, Scheim AI, Bauer GR. Impacts of COVID-19 on trans and non-binary people in Canada: a qualitative analysis of responses to a national survey. BMC Public Health 2022; 22(1):1284.

67. Rammohan I, Bouck Z, Fusigboye S, Bowles J, McDonald K, Maghsoudi N, Scheim AI, Werb D. Drug checking use and interest among people who inject drugs in Toronto, Canada. International Journal of Drug Policy 2022; 107:103781.

66. Lazor T, Blondal E, Scheim AI, Cubillos P, Werb D, Milloy M-J, Bonato S, Maghsoudi N, Rueda S. Measurement of public health impacts of cannabis legalization in Canada to reflect policy maker priorities: A rapid scoping review of instruments and content domains. Drug and Alcohol Dependence 2022; 236:109463.

65. Ward KM, Scheim AI, Wang J, Cocchiaro B, Singley K, Roth AM. Impact of reduced restrictions on buprenorphine prescribing during COVID-19 among patients in a community-based treatment program. Drug and Alcohol Dependence Reports 2022; 3:100055.

64. Dang M, Scheim AI, Teti M, Quinn KG, Zarwell M, Petroll AE, Horvath KJ, John SA. Barriers and facilitators to HIV pre-exposure prophylaxis (PrEP) uptake, adherence, and persistence among transgender populations in the United States: A systematic review. AIDS Patient Care and STDs 2022; 36(6):236-248.

63. Mitra S, Kolla G, Bardwell G, Wang R, Sniderman R, Mason K, Werb D, Scheim AI. Requiring help injecting among people who inject drugs in Toronto, Canada: Characterizing the need to address sociodemographic disparities and substance-use specific patterns. Drug and Alcohol Review 2022; 41(5):1062-1070.

62. Bouck Z, Scheim AI, Gomes T, Ling V, Caudarella A, Werb D. Evaluating interventions to facilitate opioid agonist treatment access among people who inject drugs in Toronto, Ontario during COVID-19 pandemic restrictions. International Journal of Drug Policy 2022; 104:103680.

61. Tami A, Ferguson T, Bauer GR, Scheim AI. Avoidance of primary healthcare among transgender and non-binary people in Canada during the COVID-19 pandemic. Preventive Medicine Reports 2022; 27:101789.

60. Nassau T, Kolla G, Mason K, Hopkins S, Tookey P, McLean E, Werb D, Scheim AI. Service utilization patterns and characteristics among clients of integrated supervised consumption sites in Toronto, Canada. Harm Reduction Journal 2022; 19:33.

59. Werb D, Scheim AI, Soipe A, Aeby S, Rammohan I, Fischer B, Hadland SE, Marshall BDM. Health harms of non-prescription opioid use: A systematic review. Drug and Alcohol Review 2022; 4(4):941-952.

58. Maghsoudi N, Tanguay J, Scarfone K, Rammohan I, Ziegler C, Werb D, Scheim AI. Drug checking services for people who use drugs: a systematic review. Addiction 2022; 117(3):532-544.

57. Bouck Z, Tricco AC, Rosella LC, Ling V, Gomes T, Tadrous M, Fox MP, Scheim AI, Werb D. Validation of self-reported opioid agonist treatment among people who inject drugs using prescription dispensation records. Epidemiology 2022; 33(2):287-294.

56. Everhart AR, Boska H, Sinai-Glazer H, Wilson-Yang JQ, Butler Burke N, LeBlanc G, Persad Y, Ortigoza E, Scheim AI, Marshall Z. 'I'm not interested in research; I'm interested in services': How to better health and social services for transgender women living with and affected by HIV. Social Science and Medicine 2022; 292:114610.

55. Chakrapani V, Scheim AI, Newman PA, Shunmugam M, Rawat S, Baruah D, Bhatter A, Nelson R, Jaya A, Kaur M. Affirming and negotiating gender in family and social spaces: Stigma, mental health and resilience among transmasculine people in India. Culture, Health & Sexuality 2022; 24(7):951-967.

54. Lacombe-Duncan A, Logie CH, Persad Y, Leblanc G, Nation K, Kia H, Scheim AI, Lyons T, Horemans C, Olawale R, Loutfy M. Implementation and evaluation of the 'Transgender Education for Affirmative and Competent HIV and Healthcare (TEACHH)' provider education pilot. BMC Medical Education 2021; 21:561.

53. Scheim AI, Coleman TC, Lachowsky NJ, Bauer GR. Health care access among transgender and non-binary people in Canada, 2019: A cross-sectional survey. Canadian Medical Association Journal Open 2021; 9(4):e1213-e1222.

52. Scheim AI, Bauer GR, Bastos JL, Poteat T. Advancing intersectional discrimination measures for health disparities research: Protocol for a mixed-methods bilingual measurement study. JMIR Research Protocols 2021; 10(8):e30987.

51. Scheim AI, Sniderman R, Wang R, Bouck Z, McLean E, Mason K, Bardwell G, Mitra S, Greenwald ZR, Thavorn K, Garber G, Baral SD, Rourke SB, Werb D. The Ontario Integrated Supervised Injection Services cohort study of people who inject drugs in Toronto, Canada (OiSIS-Toronto): Cohort profile. Journal of Urban Health 2021; 98(4):538-550.

50. Roth AM, Mitchell AK, Mukherjee R, Scheim AI, Ward KM, Lankenau SE. Prevalence and correlates of syringe disposal box use in a Philadelphia neighborhood with high levels of public drug injection. Substance Use & Misuse 2021; 56(5):668-673.

49. Meyers SA, Rafful C, Mittal ML, Tirado-Muñoz J, Smith LR, Jain S, Sun X, Garfein R, Strathdee S, DeBeck K, Hayashi K, McNeil R, Milloy M-J, Olding M, Guise A, Werb D, Scheim AI. Examining the gender composition of drug injecting initiation events: A mixed methods investigation of three North American contexts. International Journal of Drug Policy 2021; 90:103056.

48. Scheim AI, Bouck Z, Tookey P, Hopkins S, Sniderman R, McLean E, Garber G, Baral S, Rourke SB, Werb D. Supervised consumption service use and recent non-fatal overdose among people who inject drugs in Toronto, Canada. International Journal of Drug Policy 2021; 87:102993.

47. Lacombe-Duncan A, Kia H, Logie CH, Todd KP, Persad Y, Leblanc G, Nation K, Scheim AI, Lyons T, Horemans C, Loutfy M. A qualitative exploration of barriers to HIV prevention, treatment, and support: Perspectives of transgender women and service providers. Health and Social Care in the Community 2021, 29(5):e33-e46.

46. Zlotorzynska M, Sanchez T, Scheim AI, Lyons C, Maksut J, Wiginton JM, Baral S. Transgender Women's Internet Survey and Testing (TWIST): Protocol and key indicators report. Transgender Health 2021;6(5): 256-266.

45. Rich A, Scheim AI, Koehoorn M, Poteat T. Non-HIV chronic disease burden among transgender populations globally: A systematic review and narrative synthesis. Preventive Medicine Reports 2020; 20:101259.

44. Scheim AI, Kacholia V, Logie CH, Chakrapani V, Ranade K, Gupta S. Health of transgender men in low- and middle-income countries: A scoping review. BMJ Global Health 2020; 5:e003471.

43. Gicquelais RE, Werb D, Marks C, Ziegler C, Mehta SH, Genberg BL, Scheim AI. Prevalence and correlates of providing and receiving assistance with the transition to injection drug use. Epidemiologic Reviews 2020; 42(1):4-18.

42. Scheim AI, Maghsoudi N, Marshall Z, Churchill C, Ziegler C, Werb D. Impact evaluations of drug decriminalisation and legal regulation on drug use, health and social harms: A systematic review. BMJ Open 2020; 10:e035148.

41. Maksut JL, Sanchez TH, Wiginton JM, Scheim AI, Logie CH, Zlotorzynska M, Lyons CE, Baral SD. Gender identity and sexual behavior stigmas, severe psychological distress, and suicidality in an online sample of transgender women in the United States. Annals of Epidemiology 2020; 52:15-22.

40. Ferlatte O, Panwala V, Rich AJ, Scheim AI, Blackwell E, Scott K, Salway T, Knight R. Identifying health differences between transgender and cisgender gay, bisexual and other men who have sex with men using a community-based approach. The Journal of Sex Research 2020; 57(8):1005-1013.

39. Lacombe-Duncan A, Logie CH, Persad Y, Leblanc G, Nation K, Kia H, Scheim AI, Lyons T, Loutfy M. Transgender Education for Affirmative and Competent HIV and Healthcare (TEACHH): Protocol of community-based participatory intervention development and a non-randomized multi-site pilot study with pre- post-test design in Canada. BMJ Open 2020; 10: e034144.

38. Scheim AI, Perez-Brumer AG, Bauer GR. Gender-concordant identity documents and mental health among transgender adults in the United States: A cross-sectional survey. The Lancet Public Health 2020; 5(4): E196-E203.

37. Maghsoudi N, McDonald K, Stefan C, Beriault D, Mason K, Barnaby L, Altenberg J, MacDonald R D, Caldwell J, Nisenbaum R, Leece P, Watson T M, Tupper K W, Kufner L, Scheim AI, Werb D. Evaluating networked drug checking services in Toronto, Ontario: Study protocol and rationale. Harm Reduction Journal 2020; 17:9.

36. Moran A, Scheim AI, Lyons C, Liestman B, Drame F, Ketende S, Diouf D, Ba I, Ezouatchi R, Bamba A, Kouame A, Baral S. Characterizing social cohesion and gender identity as risk determinants of HIV among cisgender men who have sex with men and transgender women in Côte d'Ivoire. Annals of Epidemiology 2020; 42: 25-32.

35. Bardwell G, Strike C, Mitra S, Scheim AI, Barnaby L, Altenberg J, Kerr T. "That's a double-edged sword": Exploring the integration of supervised consumption services within community health centres in Toronto, Canada. Health and Place 2020; 102245.

34. Scheim AI, Knight R, Shulha H, Nosova E, Hayashi K, Milloy M-J, Kerr T, DeBeck K. Characterizing men who have sex with men and use injection drugs in Vancouver, Canada. AIDS & Behavior 2019; 23(12):3324-3330.

33. Dharma C, Scheim AI, Bauer GR. Exploratory factor analysis of two sexual health scales for transgender people: Trans-specific condom/barrier negotiation self-efficacy (T-Barrier) and trans-specific sexual body image worries (T-Worries). Archives of Sexual Behavior 2019; 48(5):1563-1572.

32. Scheim AI, Lyons C, Ezouatchi R, Liestman B, Drame F, Diouf D, Ba I, Bamba A, Kouame A, Baral S. Sexual behavior stigma and depression among transgender women and cisgender men who have sex with men in Côte d'Ivoire. Annals of Epidemiology 2019; 33:79-83.

31. Scheim AI, Bauer GR. The Intersectional Discrimination Index: Development and validation of measures of self-reported enacted and anticipated discrimination for intercategorical analysis. Social Science & Medicine 2019; 226:225-235.

30. Bauer GR, Scheim AI. Methods for analytic intercategorical intersectionality in quantitative research: Discrimination as a mediator of health inequalities. Social Science & Medicine 2019; 226:236-245.

29. Leonardi M, Frecker H, Scheim AI, Kives S. Reproductive health considerations in sexual and/or gender minority adolescents. Journal of Pediatric and Adolescent Gynecology 2019; 32(1):15-20.

28. Scheim AI, Bauer GR. Sexual inactivity among transfeminine persons: A Canadian respondent-driven sampling survey. The Journal of Sex Research 2019; 56(2):264-271.

27. Scheim AI, Adam BD, Marshall Z. Gay, bisexual, and queer trans men navigating sexual fields. Sexualities 2019; 22(4):566-586.

26. Meyers SA, Scheim A, Jain S, Sun X, Milloy MJ, DeBeck K, Hayashi K, Garfein R, Werb D. Gender differences in the provision of injection initiation assistance: A comparison of three North American settings. Harm Reduction Journal 2018; 15:59.

25. Scheim AI, Nosova E, Knight R, Hayashi K, Kerr T. HIV incidence among men who have sex with men and inject drugs in a Canadian setting. AIDS & Behavior 2018; 22(12):3957-3961.

24. Scheim AI, Bardwell G, Rachlis B, Mitra S, Kerr T. Syringe sharing among people who inject drugs in London, Canada. Canadian Journal of Public Health 2018; 109:174-182.

23. Kennedy MC, Scheim AI, Rachlis B, Mitra S, Bardwell G, Rourke S, Kerr T. Willingness to use drug checking within supervised injection services in a mid-sized Canadian city. Drug and Alcohol Dependence 2018; 185:248-252.

22. Poteat T, Malik M, Scheim A, Elliot A. HIV prevention among transgender populations: Knowledge gaps and evidence for action. Current HIV/AIDS Reports 2017; 14(4):141-152.

21. Scheim AI, Zong X, Giblon R, Bauer GR. Disparities in access to family physicians among transgender people in Ontario, Canada. International Journal of Transgenderism 2017; 3:343-352.

20. Mitra S, Rachlis B, Scheim A, Bardwell G, Rourke S, Kerr T. Acceptability and design preferences of supervised injection services among people who inject drugs in a mid-sized Canadian city. Harm Reduction Journal 2017; 14:46.

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18. Bauer GR, Braimoh J, Scheim AI, Dharma C. Transgender-inclusive measures of sex/gender for population surveys: Mixed-methods evaluation and recommendations. PLoS ONE 2017; 12(5):e0178043.

17. Scheim AI, Bauer GR, Shokoohi M. Drug use among transgender people in Ontario, Canada: Disparities and associations with social exclusion. Addictive Behaviors 2017; 72:151-158.

16. Scheim AI, Rachlis B, Bardwell G, Mitra S, Kerr T. Public drug injecting in London, Ontario: A cross-sectional survey. Canadian Medical Association Journal Open 2017; 5:e290-e294.

15. Scheim AI, Bauer GR, Travers R. HIV-related sexual risk among transgender men who are gay, bisexual, or have sex with men. Journal of Acquired Immune Deficiency Syndromes 2017; 74:e89-e96.

14. Scheim AI, Travers R. Barriers and facilitators to HIV and sexually transmitted infections testing for gay, bisexual, and other transgender men who have sex with men. AIDS Care 2017; 8:990-995.

13. Scheim AI, Bauer GR, Shokoohi M. Heavy episodic drinking among transgender persons: Disparities and predictors. Drug and Alcohol Dependence 2016; 167:156-162.

12. Poteat T, Scheim AI, Xavier J, Reisner SL, Baral S. Global epidemiology of HIV infection and related syndemics affecting transgender people. Journal of Acquired Immune Deficiency Syndromes 2016; 73(Suppl 3):S210-219.

11. Scheim AI, Santos G-M, Arreola S, Makofane K, Do TD, Hebert P, Thomann M, Ayala G. Inequities in access to HIV prevention services for transgender men: Results of a global survey of men who have sex with men. Journal of the International AIDS Society 2016; 19(Suppl 2):20779.

10. Souleymanov R, Kuzmanović D, Marshall Z, Scheim AI, Mikiki M, Worthington C, Millson MP. The ethics of community-based research with people who use drugs: Results of a scoping review. BMC Medical Ethics 2016; 17:25.

9. Scheim AI, Bauer GR, Coleman T. Socio-demographic differences by survey mode in a respondent-driven sampling study of transgender people in Ontario, Canada. LGBT Health 2016; 3(5):391-395.

8. Bauer GR, Zong X, Scheim AI, Hammond R, Thind A. Factors impacting transgender patients' discomfort with their family physicians: A respondent-driven sampling survey. PLoS ONE 2015; 10(12):e0145046-16.

7. Bauer GR, Scheim AI, Pyne J, Travers R, Hammond R. Intervenable factors associated with suicide risk in transgender persons: A respondent-driven sampling study in Ontario, Canada. BMC Public Health 2015; 15:525.

6. Scheim AI, Bauer GR. Sex and gender diversity among transgender people in Ontario, Canada: Results from a respondent-driven sampling survey. Journal of Sex Research 2015; 52(1):1-14.

5. Bauer GR, Scheim AI, Deutsch M, Massarella C. Reported emergency department avoidance, utilization and experiences of transgender persons in Ontario, Canada: Results from a respondent-driven sampling survey. Annals of Emergency Medicine 2014; 63(6):713-720.

4. Scheim AI, Jackson R, James E, Dopler S, Pyne J, Bauer GR. Barriers to well-being for Aboriginal gender-diverse people: Results from the Trans PULSE Project in Ontario, Canada. Journal of Ethnicity and Inequalities in Health and Social Care 2013; 6(4):108-120.

3. Marcellin RL, Bauer GR, Scheim AI. Intersecting impacts of transphobia and racism on HIV risk among trans persons of colour in Ontario, Canada. Journal of Ethnicity and Inequalities in Health and Social Care 2013; 6(4):97-107.

2. Bauer GR, Redman N, Bradley K, Scheim AI. Sexual health of trans men who are gay, bisexual, or who have sex with men: Results from Ontario, Canada. International Journal of Transgenderism 2013; 14(2):66-74.

1. Li T, Dobinson C, Scheim AI, Ross LE. Unique issues bisexual people face in intimate relationships: A descriptive exploration of lived experience. Journal of Gay and Lesbian Mental Health 2013; 17(1):21-39.

Invited Articles

1. Scheim AI, Baker KE, Restar AJ, Sell RL. Health and health care among transgender adults in the United States. Annual Review of Public Health. 2022; 43:503-523.

Commentaries and Letters

11. Aghi K, Anderson BM, Castellano BM, Cunningham A, Delano M, Dickinson ES, von Diezmann L, Forslund-Startceva SK, Grijseels DM, Groh SS, Guthman EM, Jayasinghe I, Johnston J, Long S, McLaughlin JF, McLaughlin M, Miyagi M, Rajaraman B, Sancheznieto F, Scheim AI, Sun SD, Titmuss FD, Walsh RJ, Weinberg ZY. Rigorous science demands support of transgender scientists. Cell 2024; 187(6): 1327-1334.

10. Logie CH, van der Merwe LL, Scheim AI. Measures of sex, gender, and sexual orientation: ideological narratives or empirical evidence?–Authors' reply. The Lancet 2022;400(10368):2046-2047.

9. Logie CH, van der Merwe L, Scheim AI. Measuring sex, gender, and sexual orientation – one step to health equity. The Lancet 2022; 400(10354):715-717.

8. Earnshaw VA, Rendina HJ, Bauer GR, Bonett S, Bowleg L, Carter J, English D, Friedman MR, Hatzenbuehler ML, Johnson MO, McCree DH, Neilands TB, Quinn KG, Robles G, Scheim AI, Smith JC, Smith LR, Sprague L, Taggart T, Tsai AC, Turan B, Yang LH, Bauermeister JA, Kerrigan DL. Methods in HIV-related intersectional stigma research: Core elements and opportunities. American Journal of Public Health 2022; 112(S4):S413–S419.

7. Morgan R, Baker P, Griffith DM, Klein SL, Logie CH, Mwiine AA, Scheim AI, Shapiro JR, Smith J, Wenham C, White A. Beyond a zero-sum game: how does the impact of COVID-19 vary by gender? Frontiers in Sociology 2021:126.

6. Rich AJ, Salway T, Scheim A, Poteat T. Sexual minority stress theory: Remembering and honoring the work of Virginia Brooks. LGBT Health 2020; 7(3):124-127.

5. Scheim AI, Appenroth MN, Beckham SW, Goldstein Z, Grinspan Cabral M, Keatley JG, Radix A. Transgender HIV research: nothing about us without us. The Lancet HIV 2019; 6(9):e566-e567.

4. Bauer GR, Scheim AI. Advancing quantitative intersectionality research methods: Intracategorical and intercategorical approaches to shared and differential constructs. Social Science & Medicine 2019; 226:260-262.

3. Scheim AI, Werb D. Integrating supervised consumption into a continuum of care for people who use drugs: The next generation of research. Canadian Medical Association Journal 2018; 190(31):e921-e922.

2. Gilbert M, Swenson L, Unger D, Scheim A, Grace D. Need for robust and inclusive public health ethics review of the monitoring of HIV phylogenetic clusters for HIV prevention. The Lancet HIV 2016; 3(10):e641.

1. Bauer GR, Scheim AI. Sampling bias and transgender HIV studies. The Lancet Infectious Diseases 2013; 13:832.

Book Chapters

7. Scheim AI. Epidemiology. In Goldberg A, Beemyn G, eds., *SAGE Encyclopedia of Trans Studies*; 2021.

6. Scheim AI. HIV/STIs. In Goldberg A, Beemyn G, eds., *SAGE Encyclopedia of Trans Studies*; 2021.

5. Scheim AI. Measuring Intersectional Stigma. In Stall R, Dodge B, Bauermeister JA, Poteat T, Beyrer C, eds. *LGBTQ Health Research: Theory, Methods, Practice*. Johns Hopkins University Press; 2020.

4. Bauer GR, Braimoh J, Scheim AI, Dharma C. New Multidimensional Sex/Gender Measure. In Milhausen R, Fisher T, Davis C, Yarber B, Sakaluk J, eds., *Handbook of Sexuality-Related Measures*, 4th ed. Taylor and Francis; 2015: 351-353.

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Research Reports

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24. The Our Health Matters Research Team. *Our Health Matters: Indian Trans Men and Transmasculine Health Study*. October 2023. https://bit.ly/3FjlnX7

23. Devor A, Forrester R, Grigorovich A, Kia H, Lopez C, Navarro J, Tei C, Tran GM, Scheim A, Bauer G. *Health and well-being among trans and non-binary older adults*. September 2023. https://bit.ly/4998ixx

22. Navarro J, Lachowsky N, Hammond R, Burchell D, Arps FSE, Davis C, Brasseur J, Islam S, Fosbrook B, Jacobsen H, Walker M, Lopez C, Scheim A, Bauer G, on behalf of the Trans PULSE Canada Team. *Health and well-being among non-binary people*. July 2021. https://bit.ly/48NplVs

21. Navarro J, Johnstone F, Temple Newhook J, Smith M, Wallace Skelton j, Prempeh K, S L, Lopez C, Scheim A, Bauer G, on behalf of the Trans PULSE Canada Team. *Health and well-being among trans and non-binary youth*. June 2021. https://bit.ly/48SsTWC

20. Arps FSE, Ciavarella S, Vermilion J, Hammond R, Nation K, Churchill S, Smith M, Navarro J, Thaker P, Bauer G, Scheim A, on behalf of the Trans PULSE Canada Team. *Health and well-being among trans and non-binary people doing sex work*. March 2021. https://bit.ly/3FktLFL

19. Trans PULSE Canada COVID Cohort Working Group on behalf of the Trans PULSE Canada Team. *Social and economic impacts of COVID-19 on transgender and non-binary people in Canada*. December 2020. https://bit.ly/45zkwMw

18. Trans PULSE Canada COVID Cohort Working Group on behalf of the Trans PULSE Canada Team. *COVID-19 testing and diagnosis among transgender and non-binary people in Canada*. December 2020. https://bit.ly/3QkNhZl

17. Trans PULSE Canada COVID Cohort Working Group on behalf of the Trans PULSE Canada Team. *Impact of COVID-19 on health care access for transgender and non-binary people in Canada*. December 2020. https://bit.ly/3FjG3yf

16. Santos H, Chakrapani V, Battala M, Gupta S, Batavia A, Scheim A. *"It felt great when I saw myself": Our Health Matters report on gender-affirming health care for transmasculine people.* 2023. Available in English, Hindi, and Marathi at https://ourhealthmatters.in/reports/

15. Aryal A, Siddiqui SJ, Vee V, Ritwik, Santos S, Scheim A. *"The most important thing is that my parents have accepted me, it does not matter what society says": Our Health Matters Report on family experiences.* 2022. Available in English, Hindi, and Marathi at https://ourhealthmatters.in/reports/

14. Maghsoudi N, Rammohan I, Bowra A, Sniderman R, Tanguay J, Bouck Z, Scheim A, Dan Werb, Owusu-Bempah A. *How diverse is Canada's legal cannabis industry? Examining race and gender of its executives and directors.* October 2020. https://bit.ly/3dHrKVP

13. The Trans PULSE Canada Team. *Health and health care access for trans and non-binary people in Canada.* March 2020. https://bit.ly/3c4gXTu

12. Kerr T, Scheim AI, Bardwell G, Mitra S, Rachlis B, Bacon J, Murray K, Rourke S. *Ontario Integrated Supervised Injection Services Feasibility Study: London report.* Toronto: Ontario HIV Treatment Network; 2017. http://bit.ly/2kIU1Q2

11. Scheim AI, for the IRGT: A Global Network of Trans Women and HIV. *Counting trans people in: Advancing global data collection on transgender communities and HIV*. Oakland, CA: Global Forum on MSM and HIV; 2017. http://tinyurl.com/hejj8vf

10. Bauer GR, Scheim AI, for the Trans PULSE Team. *Transgender people in Ontario, Canada: Statistics from the Trans PULSE Project to inform human rights policy*. London, Ontario; 2015. http://tinyurl.com/zzb266w

9. Bauer G, Bowleg L, Rouhani S, Scheim A, Blot S. *Harnessing the power of intersectionality: Guidelines for quantitative intersectionality health inequities research*. London, Canada; 2014. https://tinyurl.com/yymhrghc

8. Scheim A, Bauer G, Pyne J. *Avoidance of public spaces by trans Ontarians*. Trans PULSE Project; 2013. http://tinyurl.com/hb3dqsp

7. Scheim A, Bauer G. *Cervical and breast cancer screening among trans people in Ontario: A report prepared for the Canadian Cancer Society*. Trans PULSE Project; 2013. http://tinyurl.com/zu8yhpo

6. Scheim A, Cherian M, Bauer G, Zong X. *Joint effort: Prison experiences of Trans PULSE participants and recommendations for change*. Trans PULSE Project; 2013. http://tinyurl.com/hbmso7e

5. Marcellin RL, Scheim A, Bauer G, Redman N. *Experiences of racism and ethnicity-related discrimination among trans people in Ontario.* Trans PULSE Project; 2013. http://tinyurl.com/zchjp9n

4. Marcellin RL, Scheim A, Bauer G, Redman N. *Experiences of transphobia among trans Ontarians*. Trans PULSE Project; 2013. http://tinyurl.com/gmazvm4

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Health Care for Transgender People. NY: Open Society Foundations; 2013. http://tinyurl.com/zegy45y

2. Scheim A, Robinson M, Anderson S. *Reproductive options for trans people*: Rainbow Health Ontario; 2012. http://tinyurl.com/oyvyj49

1. Sevelius J, Scheim A, Giambrone B. *What are transgender men's HIV prevention needs*? Center for AIDS Prevention Studies, University of California San Francisco; 2010. https://tinyurl.com/yxdr3p49

Popular Press

1. Peirce J, Stoicescu C, Thumath M, Scheim A, Forrest J. How to heal the scars of Canada's war on drugs (Opinion). *Ottawa Citizen*, 1 September 2017. http://bit.ly/2gmx5EB

RESEARCH FUNDING

Active Grants

*Note: Direct costs only. Canadian grants do not include investigator salaries.

Examining associations between structural stigmatization and discrimination and HIV-related outcomes among Latines (Subaward PI: Scheim AI). NIH/NIAID R25 AI154589-03: $18,514 USD, 2023-2024.

The Toronto Disparities, Overdose, and Treatment (T-DOT) Study: Investigating clinical outcomes among people who inject drugs during a period of rapid programmatic and policy change (PI: Werb D). Canadian Institutes of Health Research: $1,560,600 CDN, 2022-2027. Role: Co-investigator.

Advancing intersectional discrimination measures for HIV-related health disparities research (PI: Scheim AI). NIH/NIMHD R21 MD016177-01S1: $250,648 USD, 2021-2023.

Advancing intersectional discrimination measures for health disparities research (PI: Scheim AI). NIH/NIMHD R21 MD016177-01: $275,000 USD, 2021-2023.

Gendered situated vulnerabilities and mental health among transgender men in India (PI: Scheim AI). NIH/NIMH R21 MH125263-01: $275,000 USD, 2021-2023.

Effectiveness of relationship education for reducing HIV incidence in men who have sex with men (PI: Newcomb M). NIH/NIAID U01AI156874-01: 2021-2026. Role: Consultant.

Preventing Injecting and Overdose by Disrupting Injection Drug Use Transitions: The PRIMER II Study (PI: Werb D). Canadian Institutes of Health Research: $761,175 CDN, 2021-2026. Role: Co-Investigator.

Trans PULSE Canada: A national study of transgender health (MPIs: Bauer G, Scheim AI). Canadian Institutes of Health Research: $1,298,801 CDN, 2018-2025.

Completed Grants

Queer Inclusion, Equality, Health, & Rights Working Group (PIs: Scheim AI, Sell R, Voyles C). Urban Health Collaborative, Drexel Dornsife School of Public Health: $15,000 USD, 2022-2023.

Daily oral ART use, barriers, and preferences for long-acting ART (PI: Wells S). Merck & Co.: 2021-2023. Role: Co-Investigator.

Gender-based differences in non-HIV STI testing among sexually active transgender and nonbinary persons: Bridging gaps in STI research (PI: Lacombe-Duncan A). NIH/NIAID R03AI159298-01: $100,000 USD, 2021-2022. Role: Consultant.

Canadian Research Initiative in Substance Misuse Implementation Science Program on Opioid Interventions and Services – Prairies (PI: Wild C). Canadian Institutes of Health Research: $1,875,000 CDN, 2018-2022. Role: Co-Investigator.

CIHR HIV/AIDS Community-Based Research Collaborative (PI: Rourke S). Canadian Institutes of Health Research: $1,500,000 CDN, 2017-2022. Role: Co-Investigator.

A cross-sectional survey of PrEP awareness, barriers and facilitators for PrEP uptake, and the impact of dosing mechanisms on willingness to take PrEP among MSM indicated for PrEP use in Philadelphia (PI: Wells S). Merck & Co.: 2020-2022. Role: Co-Investigator.

Rapidly assessing the impact of the COVID-19 pandemic and response on clinical and social outcomes, service utilization, and the unregulated drug supply experienced by people who use drugs in Toronto (PI: Werb D). Canadian Institutes of Health Research: $206,760 CDN, 2020-2021. Role: Co-Investigator.

Comparing treatment outcomes opioid use disorder before and after the COVID-19 outbreak in Philadelphia: A natural experiment (PI: Roth A). Fordham University HIV and Drug Abuse Prevention Research Ethics Training Institute: $30,000 USD, 2020-2021. Role: Co-Investigator.

Securing safe supply during COVID-19 and beyond: Scoping review and knowledge mobilization (PI: Herder M). Canadian Institutes of Health Research: $49,952 CDN, 2020. Role: Co-Investigator.

The Ontario Integrated Supervised Injection Services Research Program: Examining uptake and impacts in different community settings and models of care (MPIs: Rourke S, Scheim AI, Leonard L, Baral S, Garber G). Canadian Institutes of Health Research: $646,424 CDN, 2017-2021.

A community-based cohort study of HIV pre-exposure prophylaxis in Ontario (PI: Tan D). Canadian Institutes of Health Research: $450,000 CDN, 2017-2020. Role: Co-Investigator.

Developing a community-based study of transgender men's health and human rights in India (PI: Scheim AI). Canadian Institutes of Health Research Planning and Dissemination Grant: $19,130 CDN, 2018-2019.

Adaptation of a theoretically based mobile app to increase PrEP uptake among MSM (PI: Sullivan P). NIH R01DA045612-02S1: 2018-2019. Role: Consultant.

Leveraging psychometric strategies and biovalidation to characterize optimal metrics of stigma for transgender women (PI: Baral S). NIH R01MH110358-02S1: 2018-2019. Role: Consultant.

Transgender women removing healthcare barriers to engagement in the HIV prevention and care cascades (PI: Logie C). Canadian Institutes of Health Research: $40,000 CDN, 2018-2019. Role: Co-Investigator.

HIV prevention for gay and bisexual men: A multisite study and development of new HIV prevention interventions (PI: Hart T). Canadian Institutes of Health Research: $1,500,000 CDN, 2014-2019. Role: Co-Investigator.

Health and social experiences of transgender men in India (PI: Scheim AI). UC San Diego Global Health Institute Faculty/Postdoc Research Grant: $1,500 USD, 2017.

Ontario Integrated Supervised Injection Site Feasibility Study (MPIs: Kerr T, Scheim AI, Marshall Z, Rourke S). Canadian Institutes of Health Research Centre for REACH in HIV/AIDS: $89,150 CDN, 2015-2017.

Trans Priorities: Cross-country trans women and HIV research priority setting (PI: Marshall Z). Canadian Institutes of Health Research Centre for REACH in HIV/AIDS: $69,821 CDN, 2015-2017. Role: Co-Investigator.

Planning Trans PULSE Canada: A national survey of transgender health (MPIs: Bauer G, Scheim AI, Hammond R, Travers R). Canadian Institutes of Health Research Planning and Dissemination Grant: $9,972 CDN, 2015-2016.

Improving quantitative research methods in gender, sex and population health: Theory, evidence and applications for multi-dimensionality and intersectionality (PI: Bauer G). Canadian Institutes of Health Research: $296,749 CDN, 2013-2018. Role: Co-Investigator.

Community-based research and research ethics: Creating community products to promote ethical research practices with people who use drugs (PI: Milson P). Canadian Institutes of Health Research Social Research Centre in HIV Prevention: $24,000 CDN, 2013-2015. Role: Co-Investigator.

Trans Men Who Have Sex with Men Sexual Health Study (MPIs: Adam B, Scheim AI, Marshall Z, Travers R, Ware S). Canadian Institutes of Health Research: $99,552 CDN, 2012-2015.

PRESENTATIONS

Presentations at Scientific Meetings

Scheim AI, Battala M, Logie C, Batavia A, Vee V. Suicide risk among transmasculine people in India: Results of a community-based survey**.** *National Institute of Mental Health 12th Global Mental Health Research without Borders Conference.* Bethesda, MD. October 31, 2023.

Scheim AI, Chakrapani V, Santos H, Siddiqui SJ, Aryal A, Battala M. Access to gender-affirming care among trans men and transmasculine people: Findings from the "Our Health Matters" study. *Association for Transgender Health in India – IPATHCON 2022* [Oral]. New Delhi, India. October 29, 2022.

Scheim AI, Allen B, Arredondo Sanchez Lira J, Kral A, Roth A. Evaluating supervised consumption sites across diverse North American contexts: Challenges, opportunities, and strategies. *National Harm Reduction Conference.* San Juan, Puerto Rico. October 15, 2022.

Scheim AI, Chakrapani V, Santos H, Siddiqui SJ, Aryal A, Battala M. Access to gender-affirming health care among trans men and transmasculine people in India. *World Professional Association for Transgender Health Symposium* [Oral], Montreal, Canada. September 19, 2022.

Scheim AI, Ciavarella C, Vermilion J, Arps FSE, Santos H, Adams N, Nation K, Bauer GR. Access to Justice for Trans and Non-Binary Sex Workers in Canada: An Intersectional Analysis of Trans PULSE Canada. *World Professional Association for Transgender Health Symposium* [Oral], Montreal, Canada. September 18, 2022.

Scheim AI, Ciavarella C, Vermilion J, Arps FSE, Santos H, Adams N, Nation K, Bauer GR. Intersecting inequities in access to justice for trans and non-binary sex workers in Canada [Poster]. *International AIDS Conference.* Montreal, Canada and online. July 29-August 2, 2022.

Scheim AI, Bouck Z, Tookey P, Hopkins S, Sniderman R, Garber G, Baral S, Kerr T, Rourke S, Werb D. Supervised consumption service use and non-fatal overdose among people who inject drugs in Toronto, Canada [Poster]. *Society for Epidemiologic Research Annual Meeting.* Online. December 16-18, 2020.

Scheim AI, Kamara HT, Mansary K, Thumath M. Sierra Leone's first needle and syringe program: Lessons learned [Poster]. *International AIDS Conference: Virtual.* July 6-10, 2020.

Scheim AI, Perez-Brumer A, Bauer G. Legal gender recognition, psychological distress, and suicide risk among trans adults in the United States [Oral]. *U.S. Professional Association for Transgender Health Conference,* Washington, D.C. September 6, 2019.

Scheim AI, Twahirwa Rwema JO, Liestman B, Nyombayire J, Ketende S, Mazzei A, Mbayiha A, Malamba S, Lyons CE, Olawore O, Mugwaneza P, Kagaba A, Sullivan P, Allen S, Karita E, Baral S. Characterizing the HIV treatment cascade among transgender women in Kigali, Rwanda [Poster]. *International AIDS Society Meeting,* Mexico City. July 22, 2019.

Scheim AI, Maghsoudi N, Churchill S, Ghaderi G, Marshall Z, Werb D. What matters and what has been measured? A systematic review of research on the impacts of implementing drug decriminalization or regulation [Oral]. *International Society for the Study of Drug Policy Conference*, Paris, France. May 22, 2019.

Scheim AI, Maghsoudi N, Churchhill C, Marshall Z, Werb D. Health and social impacts of implementing drug decriminalization or regulation: A systematic review [Poster]. *Harm Reduction International Conference,* Porto, Portugal. April 29, 2019.

Scheim AI, Bauer GR. Gender-affirming genital surgery associated with reduced HIV sexual risk among transgender women: A respondent driven-sampling survey [Poster]. *International AIDS Conference*, Amsterdam, NL. July 24, 2018.

Scheim AI, Knight R, Shulha H, Nosova E, Hayashi K, Milloy M-J, Kerr T, DeBeck K. Men who have sex with men and inject drugs in a Canadian setting [Poster]. *The College on Problems of Drug Dependence Annual Meeting*, San Diego, CA. June 10, 2018.

Scheim AI, Nosova E, Knight R, Hayashi K, Kerr T. HIV incidence among men who have sex with men and inject drugs in Vancouver, Canada [Oral]. *Canadian Association for HIV/AIDS Research Conference*. Vancouver, Canada. April 28, 2018.

Scheim AI, Bauer GR. The intersectional discrimination index: Validity and reliability of a new measure for population health research [Oral]. *Canadian Society for Epidemiology and Biostatistics Conference.* Banff, Canada. May 31, 2017.

Scheim AI, Bardwell G, Mitra S, Rachlis B, Kerr T. Public injecting in London, Canada: A role for supervised injection services? [Poster] *International Harm Reduction Conference*, Montreal, Canada. May 16, 2017.

Scheim AI, Bardwell G, Rachlis B, Mitra S, Kerr T. Syringe sharing among people who inject drugs in London, Ontario [Poster]. *Canadian Association for HIV/AIDS Research Conference*, Montreal, Canada. April 6-9, 2017.

Scheim AI, Bauer GR, Shokoohi M. Impacts of social exclusion on problematic substance use among transgender people: A respondent-driven sampling survey in Canada's most populous province [Oral]. *Annual Meeting of the American Public Health Association*. Denver, USA. October 31, 2016.

Scheim AI, Adam B, Marshall Z, Murray J. Accounting for high vulnerability and low risk for HIV among transgender men: a sexual fields analysis [Poster]. *International AIDS Conference*. Durban, South Africa. July 20, 2016.

Scheim AI, Santos G-M, Arreola S, Makofane K, Do TD, Hebert P, Thomann M, Ayala G. Transgender men who have sex with men report lower access to basic HIV prevention services than their non-transgender counterparts [Oral]. *Action + Access: The Rights and Demands of Gay and Bisexual Men in the Global Response to HIV*. Durban, South Africa. July 16, 2016.

Scheim AI, Bauer GR, Hammond R, Shokoohi M. Substance use among transgender people in Canada's most populous province: A respondent-driven sampling survey [Oral]. *World Professional Association for Transgender Health Symposium*, Amsterdam, Netherlands. June 20, 2016.

Scheim AI, Bauer GR, Travers R. HIV/STI sexual risk among transgender men who are gay, bisexual, or have sex with men: Trans PULSE Project [Oral]. *Canadian Association for HIV/AIDS Research Conference*, Winnipeg, Canada. May 13, 2016.

Scheim AI, Souleymanov R, Kuzmanovic D, Marshall Z, Worthington C, Mikiki, Millson P. Ethics in community-based research with people who use drugs [Poster]. *International Harm Reduction Conference*, Kuala Lumpur, Malaysia. October 21, 2015.

Scheim AI, Adam BD, Marshall Z. Gay, bi, and queer trans men navigating sexual fields [Oral]. *Annual Meeting of the American Sociological Association*, Chicago, USA. August 25, 2015.

Scheim AI, Bauer GR, Travers R, Redman N. Factors associated with HIV risk in Ontario's broad transfeminine population [Poster]. *Canadian Association for HIV/AIDS Research Conference*, Toronto, Canada. May 1-4, 2015.

Scheim AI, Souleymanov R, Kuzmanovic D, Marshall Z, Worthington C, Mikiki, Millson P. Ethics in community-based research with people who use drugs: A scoping review and community resource [Poster]. *Canadian Association for HIV/AIDS Research Conference*, Toronto, Canada. May 1-4, 2015.

Scheim AI, Bauer GR, Zong X, Hammond R. Discomfort discussing trans issues with family physicians: Correlates and implications for clinical practice [Poster]. *European Professional Association for Transgender Health*, Ghent, Belgium. March 12-14, 2015.

Scheim AI, Adam BD, Nault C, Marshall Z. "I didn't get the feeling that they knew what they were doing": HIV/STI testing experiences of trans men who have sex with men in Ontario [Poster]. *Canadian Association for HIV/AIDS Research Conference*, St. John's, Canada. May 1, 2014.

Scheim AI, Bauer GR. Practice and policy implications of sex and gender diversity within trans communities [Oral]. *World Professional Association for Transgender Health Symposium*, Bangkok, Thailand. February 17, 2014.

Scheim AI, Jackson R, James E, Dopler TS, Pyne J, Bauer GR. Well-being of Aboriginal gender-diverse people in Ontario, Canada [Oral]. *World Professional Association for Transgender Health Symposium*, Bangkok, Thailand. February 17, 2014.

Scheim AI, Adam BD, Marshall Z, Travers R, Ware SM. Safer sex decision-making and negotiation among trans men who have sex with men: Results from a qualitative study in Ontario, Canada [Oral]. *World Professional Association for Transgender Health Symposium*, Bangkok, Thailand. February 16, 2014.

Scheim AI, Cherian M, Bauer GR, Zong X. Characteristics and experiences of trans people in Ontario, Canada who have been in prison [Oral]. *World Professional Association for Transgender Health Symposium*, Bangkok, Thailand. February 14, 2014.

Scheim AI. A third checkbox is not enough: Implications of sex and gender diversity among trans Ontarians [Oral]. *London Health Research Day*, London, Canada. March 19, 2013.

Scheim A. Promoting and providing Pap tests for trans men [Oral]. *National Transgender Health Summit*, University of California San Francisco, USA. April 9, 2011.

Invited Conference or Academic Presentations

Undoing erasure to promote trans, non-binary, and intersex people's health. *Anatomy Connected 2024 (Annual meeting of the American Anatomy Association).* Toronto, Canada. March 24, 2024.

Upstream and up close: Community-engaged social epidemiology to advance LGBTQ+ health equity. *Stanford University School of Medicine LGBTQ+ Health Seminar Series.* March 11, 2024.

Structural and intersectional approaches to trans population health. *Epidemiology and Biostatistics Seminar Series, Western University.* March 1, 2024.

Intersectionality in substance use research. *Center for Drug Use and HIV Research, New York University.* April 24, 2023.

Intersectional approaches to measuring stigma and discrimination for trans and nonbinary health research. *SHINE Strong R25 Seminar, University of California Irvine.* April 21, 2023.

Development and evaluation of intersectional discrimination measures for people living with HIV. *Culturally focused HIV Advancements through the Next Generation for Equity (CHANGE) T32 Training Program Seminar, University of Miami.* April 8, 2023.

Intersectionality and survey measures. *Intersectionality Training Institute.* March 8, 2023.

Global insights on transgender health. *Taylor and Francis Group.* October 4, 2022.

Plenary presentation: Social determinants of mental health among transmasculine people in India. *8th National LGBTQ Health Conference.* Chicago, IL. July 29, 2022.

Transmasculine people's health and human rights in India. *Centre for Gender and Sexual Health Equity (University of British Columbia) Speaker Series.* June 16, 2022.

Our Health Matters: A community-based mixed-methods study of transmasculine mental health in India. *Social and Behavioural Health Sciences Seminar Series, University of Toronto.* June 14, 2022.

Putting community and intersectionality at the center: Social epidemiology to advance global LGBTQ+ health equity. *Department of Health, Behavior, and Society, Johns Hopkins University*. June 7, 2022.

Keynote: Strategies for measuring intersecting forms of stigma and discrimination in population health research. *U.S. Department of Health and Human Services Stigma Working Group.* April 14, 2022.

Research on transmasculine health globally and in India: Gaps and opportunities. *2nd National LGBTQI+ Health Symposium.* New Delhi, India. December 10, 2021.

Health disparities and health equity for transgender populations. *Drexel – Tower Health LGBTQ+ Health Symposium*. June 30, 2021.

Keynote: Epidemiology of HIV among transgender populations globally. *International Workshop on HIV and Transgender People.* Mexico City. July 20, 2019.

How transgender people experience Canada's health care system. Canadian Health Coalition Research Roundtable, *Talking Across Silos in Canada's Health Movements.* Ottawa, Canada. December 1, 2018.

Approaches to measuring intersectional stigma. Johns Hopkins University and Population Council Satellite Session on Intersectional Stigma, *International AIDS Conference.* Amsterdam, Netherlands. July 25, 2018.

Barriers to care and strategies to overcome for trans men. TRANS action: Building Bridges to Safety, Pre-Conference to the *International AIDS Conference.* Amsterdam, Netherlands. July 21, 2018.

Keynote: Transgender health and HIV. *Israeli LGBT Centre* and *Israel AIDS Task Force.* Tel Aviv, Israel. May 10, 2018.

HIV vulnerabilities among transgender women in sex work. *Johns Hopkins University Center for Public Health and Human Rights Symposium*. April 13, 2018.

Stigma, discrimination, and transgender health disparities. *Department of Social Medicine, University of North Carolina – Chapel Hill.* November 13, 2017.
Keynote: Transgender health and HIV: The view from Canada. *Australasian HIV & AIDS Conference.* Canberra, Australia. November 6, 2017.

Keynote: From washrooms to classrooms and beyond: Transgender rights and social inclusion. *University of Waterloo*. Waterloo, Canada. October 20, 2016.

Trans health and workplace inclusion. *Bluewater Health* [hospital]. Sarnia, Canada. September-December, 2016.

Understanding health care and transition for Ontario's transgender population. *London Health Sciences Centre Endocrinology Grand Rounds.* April 6, 2016.

Improving LGTB health data: assessing survey measures of sex, gender and sexual orientation. *Rainbow Health Ontario Conference.* London, Canada. March 10, 2016.

Plenary presentation: Trans men and stigma: A research snapshot. *British Columbia Gay Men's Health Summit.* Vancouver, Canada. November 6, 2015.

Plenary presentation: Access to health care for transgender men. *8th International AIDS Society Conference on HIV Pathogenesis, Treatment, & Prevention.* Vancouver, Canada. July 20, 2015.

Plenary presentation: Improving access to HIV/STI testing for trans communities: Learning from the experiences of trans MSM in Ontario. *Ontario AIDS Bureau HIV Testing Conference.* Toronto, Canada. March 25, 2015.

Community-led participatory research with trans communities: Case studies from Ontario, Canada. *Global Forum on MSM and HIV Pre-Conference to the International AIDS Conference.* Melbourne, Australia. July 20, 2014.

Is it time for HIV home testing? Presentation at the *Ontario HIV Treatment Network Research Conference*, Toronto, Canada. November 12, 2012.

The flipside of democratization in global Taiwan: Global civil society, the Taiwanese state, and challenges to gay rights and sexual freedom. Invited oral presentation: *Ministry of Foreign Affairs, Republic of China (Taiwan)*, Taipei, Taiwan. December 9, 2010.

Check It Out: Women who have sex with women, trans men, and Pap tests. *Guelph Sexuality Conference*, University of Guelph. June 23, 2010.

Getting Primed: Informing HIV prevention with gay, bi, queer trans men. *Europride Pride House*, Stockholm, Sweden. July 30, 2008.

Sexual health and trans communities. *Toronto Public Health Sexual Health Unit*. September 18, 2007.

Trans generation: Developments in transgender youth activism, services, and culture. Invited faculty, *National Gay and Lesbian Taskforce Creating Change Conference*, Kansas City, MS. November 8, 2006.

TEACHING

Instructor

Fall 2023 Epidemiology EPI749: Research and Practice in Epidemiology, Drexel University
Winter 2023 Epidemiology EPI550: Applied Survey Research in Epidemiology, Drexel University
Fall 2021 Epidemiology EPI750: Integrative Learning Experience in Epidemiology, Drexel University
Winter 2021 Epidemiology EPI550: Applied Survey Research in Epidemiology, Drexel University
Fall 2018 Health, Aging, and Society 3R03: Health Inequalities (undergraduate), McMaster University

Guest Lectures

2023 *Transmasculine Health and Human Rights. Reproductive Justice & the Law.* Jindal Global University (India).
2021 *Developing a community-based participatory research program.* Community Health and Prevention Doctoral Seminar, Drexel University.
2019 *Epidemiology of Transgender Health*, Bloomberg School of Public Health, Johns Hopkins University.
2019 *Sex and Gender.* Social Epidemiology, Drexel University.
2017 *Discrimination & Transgender Health Disparities.* HIV and Substance Use Seminar, UC San Diego.
2017 *Transgender Mental Health.* Transgender Studies, Smith College School of Social Work.
2016, 2018, 2019, 2020, 2021 *Drug Use and Policy.* Public Health, Western University.
2016 *Transgender Health.* Endocrinology, Medicine Year 2, Western University.
2015-2017 *Epidemiology of HIV.* Epidemiology of Major Diseases, Western University.

2015, 2016 *Sex and Gender in Survey Research*. Survey Research Methods, Western University.
2015 *Gender and Health*. Social Determinants of Health, University of Waterloo.

MENTORSHIP

Faculty mentor

2022 – Jennifer Jain, PhD, Assistant Professor, Department of Community Health Systems, University of California, San Francisco. Advisor on NIDA K01 DA056306.

Doctoral advisor

Dates	Name	Program or School	Thesis	Role	Current Position
2022-now	Victoria Ryan	PhD, Epidemiology, Drexel University	Longitudinal Population Size Estimation and Drug Use Patterns Associated with Overdose Prevalence Among People Who Inject Drugs in Philadelphia	Advisor	PhD Student
2022-now	Heather Santos	PhD, Epidemiology, Drexel University	Suicide risk among transgender and non-binary people in Canada	Advisor	PhD Student
2020-2022	Tanner Nassau	PhD, Epidemiology, Drexel University	Supervised injection sites and infectious disease risk among people who inject drugs	Co-advisor	Epidemiologist, Philadelphia Department of Public Health

Thesis committee member

Dates	Name	Program or School	Thesis	Current Position
2022-now	Mannat Malik	PhD Candidate, Health Behavior, University of North Carolina – Chapel Hill	Resistance to intersectional stigma among transgender women	PhD Candidate
2022-now	Jason Hallarn	PhD, Epidemiology and Biostatistics, Western University	Sexual health among transgender and non-binary persons living in Canada	PhD Candidate
2022-now	Lux Li, PhD	MSc, Epidemiology and Biostatistics, Western University	Gender positivity and gender distress in transgender and non-binary communities: Predictive factors and impact on health	MSc Candidate
2022-2023	Bisola Hamzat	MSc, Epidemiology and Biostatistics, Western University	Intersectional analysis of intimate partner violence among transgender and non-binary people in Canada	Epidemiologist/Research Coordinator, Ontario Drug Policy Research Network
2021-2022	Emily Sanders	MSc, Epidemiology and Biostatistics, Western University	Fertility preservation discussions among transgender youth and adults beginning gender-affirming care in Canada	MD candidate, University of Limerick
2020-2021	Sara Todorovic	MSc, Epidemiology and Biostatistics, Western University	Impact of delays to gender-affirming medical care during COVID-19 on anxiety and depression among trans and non-binary people	Epidemiologist, IPRO

Dates	Name	Program or School	Thesis	Current Position
2020-now	Gioi Tran Minh	PhD Candidate, Social Dimensions of Health, University of Victoria	Substance use among transgender people in Canada	PhD Candidate
2019-now	Leo Rutherford	PhD Candidate, Social Dimensions of Health, University of Victoria	A Community-based survey of trans men's sexual health and wellness after metoidioplasty or phalloplasty	PhD Candidate
2017-2019	Emily Nunez	MSc, Epidemiology and Biostatistics, Western University	Impacts of identity versus targetability on the relationship between discrimination and health	Epidemiologist/ Biostatistician, Public Health Agency of Canada

SERVICE

Academic Service

2023 – Chair, Department of Epidemiology and Biostatistics Social Committee
2022 – Queer Inclusion, Equality, Health, & Rights Working Group (Co-Chair, 2022-2023)
2022 – Guiding Team, Robert Wood Johnson Foundation Transforming Academia for Equity
2022 – Department of Epidemiology and Biostatistics Chair's Advisory Committee
2022 – Dornsife School of Public Health Executive Committee of the Faculty
2021 - 2023 Department of Epidemiology and Biostatistics Seminar Committee
2021 - 2023 Drexel University Senate Committee on Student Life
2021 Epidemiology PhD Admissions Committee
2020 Epidemiology PhD Comprehensive Exam Committee

Editorial and Peer Review Activities

Editorial Roles
2023 – Associate Editor, *LGBT Health*
2020 - 2021 Guest Editor, *PLOS ONE*: Health and Health Care in Gender Diverse Communities
2019 – Editorial Board Member, *International Journal of Transgender Health*
2018 - 2022 Associate Editor, *BMC Infectious Diseases*
2017 – Editorial Board Member, *Psychology & Sexuality*

Ad Hoc Reviewer
Addictive Behaviors, AIDS & Behavior, American Journal of Epidemiology, American Journal of Public Health, BMC Infectious Diseases, BMC International Health and Human Rights, BMJ Open, Canadian Journal of Public Health, Canadian Medical Association Journal, Culture, Health, and Sexuality, Epidemiology, Harm Reduction Journal, Health & Human Rights Journal, HIV Medicine, International Journal of Drug Policy, International Journal of STDs and AIDS, JAMA Network Open, Journal of Acquired Immune Deficiency Syndromes, Journal of Homosexuality, Journal of the International AIDS Society, Journal of Sex Research, The Lancet HIV, The Lancet Public Health, LGBT Health, PLOS ONE, Sexually Transmitted Infections, Social Psychology and Psychiatric Epidemiology, Social Science & Medicine, Transgender Health

Leadership in Scientific Meetings
2023 Symposium co-organizer, Measuring sex, gender, and sexual orientation in epidemiologic research. *Society for Epidemiologic Research 2023 Annual Meeting*
2021 Track C (Prevention Science) Scientific Committee, *IAS Conference on HIV Science*
2019 - 2021 Organizing Committee, *International Workshop on HIV and Transgender People*
2019 - 2020 Track C (Epidemiology and Prevention) Scientific Committee, *AIDS 2020*

2019	Scientific Committee, U.S. Professional Association for Transgender Health Conference
2019	Organizing Committee, *Community-Based Research Centre Gay Men's Health Summit* (Vancouver)
2018	Invited Rapporteur (Epidemiology and Prevention), *AIDS 2018* (Amsterdam)
2017	Organizing Committee, *Canada's Drug Futures Forum* (Ottawa)
2016	Invited moderator, Briefing on HIV indicator for transgender persons, *White House Office of National AIDS Policy*
2016	Organizing Committee, *Transgender Pre-Conference to AIDS 2016* (Durban)
2016	Organizer*,* Improving methods for transgender population health and epidemiologic research, *World Professional Association for Transgender Health Symposium* (Amsterdam)

Abstract Review for Scientific Meetings

2019	National LGBTQ Health Conference (Emory University)
2018	Annual Meeting of the Society for Epidemiologic Research
2015-2018	Canadian Conference on HIV/AIDS Research

Funding Peer Review

2021	*National Institutes of Health* - Transformative Research to Address Health Disparities and Advance Health Equity (U01)
2020	*Canada Research Coordinating Committee* - New Frontiers in Research Fund
2020	*Canadian Institutes of Health Research* - COVID-19 Mental Health & Substance Use
2019	*UC San Diego Center for AIDS Research* - International Pilot Grants
2017	*Canadian Institutes of Health Research* - Global Health Planning and Dissemination Grants

Professional Service

2024 –	Institute Advisory Board, *Institute of Gender and Health, Canadian Institutes of Health Research*
2023	Invited panelist, Expanding the Evidence Base in Gender-Affirming Care for Transgender and Gender Diverse Populations, *NIH Sexual & Gender Minority Research Office.*
2020	Invited participant, HIV-Related Intersectional Stigma Research Advances and Opportunities Workshop. *NIH Office of AIDS Research and NIMH.*
2019	Expert participant [nominated by the Government of Canada], 2nd Expert Working Group on improving drug statistics and strengthening the Annual Report Questionnaire (ARQ). *United Nations Office on Drugs and Crime.* Vienna.
2018 - 2022	Leadership Group, Supervised Consumption Services, *Canadian Research Initiative in Substance Misuse.*
2018 - 2022	Revision Committee, *World Professional Association for Transgender Health* Standards of Care Version 8 (Chapter 8: Sexual Health Across the Lifespan).
2018	Invited participant, Methods and Measurement in Sexual and Gender Minority (SGM) Health Research workshop, *National Institutes of Health*.
2018, 2016	Invited meeting participant, Exploring International Priorities and Best Practices for the Collection of Data About Gender Minorities, *The Williams Institute.* (Buenos Aires, Argentina and Amsterdam, Netherlands)
2014	Writing Group member, Implementation Tool on Men who have Sex with Men and Transgender People in Low- and Middle-Income Countries, *United Nations Population Fund.*

Community Service

2020 –	ViiV Positive Action Technical Review Committee
2019 –	International Working Group on Trans Men and HIV, *Global Action for Trans Equality*
2016-2019	Co-chair, Trans Working Group, *Canadian HIV Trials Network*
2015-2019	Advisory Committee, *Ontario HIV Epidemiology and Surveillance Initiative*

2013-2016 Research Group, *Global Forum on MSM and HIV*
2007-2015 Provincial Advisory Body, *Ontario Gay Men's Sexual Health Alliance*
2007-2011 Co-Chair, Board of Directors, *LGBT Youth Line* (Ontario)
2006-2016 Chair, Trans Men's Working Group, *Ontario Gay Men's Sexual Health Alliance*
2006-2009 Trans Men's HIV Prevention Needs Assessment Steering Committee, *AIDS Bureau, Ontario Ministry of Health and Long-Term Care*

Expert Reports and Testimony

2023 Transgender health research methodology, Discipline Committee of the British Columbia College of Nurses and Midwives
2023 Name changes for transgender people, Court of Common Pleas of Butler County, PA (Case No. 640 WDA 2022)
2022 Gender marker changes for transgender people, Thirteenth Judicial District Court, County of Yellowstone, MO (Marquez v. Montana, Case No. DV 21-00873)
2021 Name changes for transgender people, Courts of Common Pleas of Allegheny County, PA (GD No. 21-11804; GD No. 21-11805)
2021 Name changes for transgender people, Courts of Common Pleas of Philadelphia, PA (Case No. 210901990)
2020 Anti-transgender stigma (Cardle v. Her Majesty the Queen, 2020 ONSC 7878)

Memberships

International AIDS Society
Society for Epidemiologic Research
World Professional Association for Transgender Health
US Professional Association for Transgender Health

EXHIBIT 5

FILED
04/21/2022
Terry Halpin
CLERK
Yellowstone County District Court
STATE OF MONTANA
By: Pamela Owens
DV-56-2021-0000873-CR
Moses, Michael G.
61.00

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,

YELLOWSTONE COUNTY

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual;

Plaintiffs,

v.

STATE OF MONTANA, GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and ADAM MEIER, in his official capacity as the Director of Public Health and Human Services,

Defendants.

Cause No.: DV 21-873

Judge Michael G. Moses

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND GRANTING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff Amelia Marquez and Plaintiff John Doe (collectively "Plaintiffs") submitted a motion for a preliminary injunction and a brief in support on July 21, 2021.

(Dkt. 6; Dkt. 12). Defendants the State of Montana, Gregory Gianforte, the Montana Department of Public Health and Human Services ("DPHHS"), and Adam Meier (collectively "Defendants") submitted a motion to dismiss pursuant to Mont. R. Civ. P. 12(b)(6) on August 18, 2021. (Dkt. 23). Defendants also submitted their combined brief in opposition to the motion for preliminary injunction and in support of their motion to dismiss. (Dkt. 24). These motions have been fully briefed and the Court held a hearing on the motions pending before it on December 22, 2021. (Dkt. 46).

Upon agreement by the parties and with permission from the Court, Defendants submitted their motion and brief in support to dismiss Plaintiffs' amended complaint on January 1, 2022. (Dkt. 50; Dkt. 51). Plaintiffs submitted their response on February 11, 2022. (Dkt. 55; Dkt. 56). Defendants submitted their reply on March 4, 2022. (Dkt. 60). The Court requested that proposed findings of fact and conclusions of law be submitted in regard to the pending motion to dismiss and for the preliminary injunction.

The Court has considered the briefs, evidence presented, and oral arguments made by counsel. The Court now makes the following:

Findings of Fact

A. The Parties

1. Amelia Marquez ("Ms. Marquez") is a woman who was born in Montana and currently resides in Billings, Montana. (Am. Compl., ¶ 19; Marquez Aff., ¶ 2).

2. Ms. Marquez is transgender and wishes to correct her Montana birth certificate, which currently identifies her as male. (Am. Compl., ¶ 19; Marquez Aff., ¶¶ 4, 7).

3. Ms. Marquez has been employed by Yellowstone Boys and Girls Ranch for the last three years. (Am. Compl., ¶ 50; Marquez Aff., ¶ 3).

4. Although Ms. Marquez has known she is female for some years and has lived her life accordingly, her birth certificate designates her as male. (Am. Compl., ¶¶ 51-52; Marquez Aff., ¶¶ 4-5).

5. Ms. Marquez began presenting as the woman she is approximately five years ago. (Am. Compl., ¶ 52; Marquez Aff., ¶ 5).

6. For the last four years, Ms. Marquez has worked with medical and mental-health providers to assist her in bringing her body, and the other ways she expresses her gender, into alignment with her female gender identity. (Am. Compl., ¶ 52; Marquez Aff., ¶ 5).

7. Ms. Marquez was diagnosed with gender dysphoria and has taken feminizing hormone therapy for the last two years. (Am. Compl., ¶ 52; Marquez Aff., ¶ 5).

8. Ms. Marquez legally changed her name to a traditionally female name two years ago. (Am. Compl., ¶ 52; Marquez Aff. ¶ 5).

9. Additionally, Ms. Marquez changed her name and sex designation on her Montana driver's license so that it accurately reflects who she is. (Am. Compl., ¶ 52; Marquez Aff., ¶ 5).

10. Ms. Marquez would like to change her name and sex designation on her birth certificate to match her female gender identity but is unable to do so because of SB 280. (Am. Compl., ¶ 53; Marquez Aff., ¶ 7).

11. Ms. Marquez describes that her "inability to obtain a birth certificate that accurately reflects [her] female gender identity is a painful and stigmatizing reminder of the State of Montana's refusal to recognize [her] as a woman." (Am. Compl., ¶ 53; Marquez Aff., ¶ 7).

12. Ms. Marquez describes that denying her an accurate birth certificate places her at risk of embarrassment or even violence every time she is required to present her birth certificate because it incorrectly identifies her as male. (Am. Compl., ¶ 54; Marquez Aff., ¶ 8).

13. Ms. Marquez has had personal experience with the high incidence of harassment and discrimination experienced by transgender people, having been the target of this treatment in both her personal and professional life. (Am. Compl., ¶ 55; Marquez Aff., ¶ 10).

14. Due to these experiences, Ms. Marquez has learned that she must take extra precautions for her personal safety and is afraid anytime she is in situations where her status as transgender might be revealed to people whom she does not already know and trust. (Am. Compl., ¶ 55; Marquez Aff., ¶ 10).

15. Ms. Marquez is typically perceived as female, so any time she is forced to present an identity document that incorrectly identifies her as male, such as her birth certificate, she is "outed" as transgender. (Am. Compl., ¶ 56; Marquez Aff., ¶ 9).

16. The thought of being outed to a stranger in this way causes Ms. Marquez a great deal of anxiety because she can never be sure whether or not someone will respond negatively, or even violently, to her because she is transgender. (Am. Compl. ¶ 56; Marquez Aff., ¶ 9).

17. Mr. Doe is a man who was born in Montana and currently resides out of state. (Am. Compl., ¶ 20; Doe Aff., ¶ 2).

18. Mr. Doe is transgender and wishes to correct his Montana birth certificate, which identifies him as female. (Am. Compl., ¶ 20; Doe Aff., ¶¶ 1, 3, 7).

19. Mr. Doe works two part-time jobs and is a college student. (Am. Compl., ¶ 57; Doe Aff., ¶ 2).

20. Mr. Doe would like to correct the sex designation on his birth certificate to accurately reflect his male gender identity but does not wish to be forced to share publicly, in court, the private information and records regarding his transgender status, medical treatment, and anatomy. (Am. Compl., ¶ 58; Doe Aff., ¶ 7).

21. Mr. Doe has known that he is a man for approximately five years. (Doe Aff., ¶ 3).

22. Mr. Doe was diagnosed with gender dysphoria in July 2019 and has lived and identified fully as male for the last year and a half. (Am. Compl., ¶ 59; Doe Aff., ¶ 5).

23. Mr. Doe, with the assistance of his treating health professionals, has taken certain steps to bring his body into conformity with his male gender identity. (Am. Compl., ¶ 59; Doe Aff., ¶ 6).

24. Mr. Doe has taken hormone therapy for approximately two years and, in the spring of 2021, underwent masculinizing chest-reconstruction surgery, commonly known as "top surgery." (Am. Compl., ¶ 59; Doe Aff., ¶ 6).

25. Mr. Doe does not wish to undergo additional gender-affirming surgery at this time. (Am. Compl., ¶ 60; Doe Aff., ¶ 6).

26. Mr. Doe does not know whether his top surgery would be sufficient to satisfy the requirements of SB 280. (Am. Compl., ¶ 60; Doe Aff., ¶ 8).

27. Mr. Doe describes that he knew he was a man prior to his top surgery and does not believe that his top surgery is what made him a man. (Am. Compl., ¶ 61; Doe Aff., ¶ 8). Furthermore, even if Mr. Doe's top surgery were sufficient for purposes of obtaining a court order, the idea of having to share private medical records related to his transition in a public court proceeding to determine whether he is the man he knows himself to be is demeaning to Mr. Doe and causes him a great deal of emotional distress due to his fear of exposure and humiliation at having his transgender status revealed. (Am. Compl., ¶ 60; Doe Aff., ¶ 9).

28. Mr. Doe is also concerned about the risk he could face of discrimination, harassment, or even violence if he is required to show his birth certificate to a stranger who is biased or hostile toward people who are transgender. (Doe Aff., ¶ 10).

29. Because Mr. Doe is perceived as male, having to produce a birth certificate that identifies him as female will "out" him as transgender. *Id*. at ¶ 10.

30. It is important for Mr. Doe to retain the freedom to choose when, and under what circumstances, he decides to share deeply personal medical information regarding his transition, his body, and his transgender status. (Am. Compl., ¶ 61; Doe Aff., ¶ 11).

31. The State of Montana is a government entity subject to and bound by the laws of the State of Montana and its Constitution (Am. Compl., ¶ 21).

32. DPHHS is an agency of the State of Montana that is subject to and bound by the laws of the State of Montana and its constitution. (Am. Compl., ¶ 22).

33. As a state agency, DPHHS is not entitled to immunity from suit under Article II, Section 18, of the Montana Constitution. *Id*.; Mont. Const. art. II § 18.

34. DPHHS has supervisory authority over the process for amending birth certificates. § 50-15-103, MCA.

35. DPHHS has been charged under Senate Bill 280 ("SB 280") with amending the State's administrative regulations to make them consistent with SB 280. (Am. Compl., ¶ 22); § 50-15-224, MCA.

36. Governor Gianforte is the governor of the State of Montana. (Am. Compl., ¶ 23).

37. Governor Gianforte is Montana's principal executive officer and is responsible for administering Montana's laws, including SB 280. *Id.*; Mont. Const. art. VI § 18.

38. Director Meier is the Director of DPHHS. (Am. Compl., ¶ 24).

39. Director Meier is the chief executive officer of DPHHS and is responsible for administering SB 280. *Id.*; Mont. Admin. R. 37.1.101.

B. Background

40. Transgender people have a gender identity that differs from their assigned sex at birth. (Am. Compl., ¶ 25; Ettner Decl., ¶¶ 16, 22).

41. Plaintiffs' expert described that "for transgender people, the sex assigned at birth does not align with the individual's genuine, experienced sex, resulting in the distressing condition of gender dysphoria." (Ettner Decl. ¶ 16). Further, that "[e]xternal genitalia alone—the critical criterion for assigning sex at birth—is not an accurate proxy for a person's sex" but rather that "[a] person's sex is comprised of a number of components including, inter alia: chromosomal composition (detectible through karyotyping); gonads and internal reproductive organs (detectible by ultrasound, and occasionally by a physical pelvic exam); external genitalia (which are visible at birth); sexual differentiations in brain development and structure (detectible by functional magnetic resonance imaging studies and autopsy); and gender identity." (Ettner Decl., ¶¶ 17-18; *see also* Am. Compl., ¶ 27).

42. Gender identity refers to a person's fundamental internal sense of belonging to a particular gender. (Am. Compl., ¶ 26; Ettner Decl., ¶ 19); *see also F.V. v. Barron* (D. Idaho 2018), 286 F. Supp. 3d 1131, 1136 (noting that although "[s]ex determinations made at birth are most often based on the observation of external genitalia alone," "[t]here is scientific consensus that biological sex is determined by numerous elements…").

43. "People diagnosed with gender dysphoria have an intense and persistent discomfort with their assigned sex that leads to an impairment in functioning." (Ettner Decl., ¶ 26; Am. Compl., ¶ 28).

44. The medical consensus in the United States is that gender identity is innate and that efforts to change a person's gender identity are harmful to a person's health and well-being, but also are unethical. (Am. Compl., ¶ 26; Ettner Decl., ¶ 25).

45. Treatment of gender dysphoria is guided by the standards of care promulgated by the World Professional Association for Transgender Health ("WPATH"), which were originally published in 1979 and are now in their seventh edition. (Am. Compl., ¶ 29; Ettner Decl., ¶ 31).

46. WPATH's standards of care reflect the professional consensus regarding the psychological, psychiatric, hormonal, and surgical management of gender dysphoria. (Am. Compl., ¶ 29; Ettner Decl., ¶¶ 33, 39).

47. The recognized standard of care for gender dysphoria involves treatments designed to bring a person's body and gender expression into alignment with their gender identity. (Am. Compl., ¶ 30; Ettner Decl., ¶¶ 33, 39).

48. This course of treatment has different components depending on the medical needs of each transgender person. (Am. Compl., ¶ 30; Ettner Decl., ¶¶ 29, 33).

49. As with other forms of healthcare, a patient considers the available treatment options and makes treatment decisions in consultation with their healthcare provider. (Am. Compl., ¶ 30; Ettner Decl., ¶¶ 29, 33).

50. Surgery is not medically necessary, or medically desirable, for all transgender people. (Am. Compl., ¶ 31; Ettner Decl., ¶¶ 37, 49).

51. Even for those for whom surgery is appropriate, the specific surgical procedure will vary based on the person's individual needs. (Am. Compl., ¶ 31; Ettner Decl., ¶ 33).

52. For some, surgery is medically contraindicated; for others it is cost prohibitive. (Am. Compl., ¶ 31; Ettner Decl., ¶¶ 49-50).

53. Like other major healthcare decisions, decisions about gender-affirming surgery are profoundly personal, require confidential medical evaluations, and often involve intimate conversations with family members. (Am. Compl., ¶ 31; Ettner Decl., ¶¶ 29, 33, 46).

54. Treatment for gender dysphoria also includes living one's life consistently with one's gender identity. (Am. Compl., ¶ 31; Ettner Decl., ¶¶ 33, 36, 39).

55. Living one's life consistently with one's gender identity includes using identity documents that accurately reflect one's gender identity. (Am. Compl., ¶ 32; Ettner Decl., ¶¶ 40-41).

56. Gender-affirming surgery, even for those transgender people who have a medical need for it, does not "change" their sex, but rather affirms it. (Am Compl., ¶ 35; Ettner Decl., ¶¶ 33-34, 38).

57. Defendants did not submit any evidence rebutting the evidence submitted by Plaintiffs.

C. SB 280

58. On April 12, 2021, the legislature passed SB 280 and sent it to Governor Gianforte for signature. *See* SB 280, 67th Leg. Reg. Sess. (Mont 2021); (Am. Compl., ¶ 37).

59. On April 30, 2021, Governor Gianforte signed SB 280, which became immediately effective upon his signature. *See* SB 280; (Am. Compl., ¶ 37).

60. SB 280 states, in relevant part that "[t]he sex of a person designated on a birth certificate may be amended only if [DPHHS] receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the person born in Montana has been changed by surgical procedure." *Id*.; (Am. Compl., ¶ 38).

61. The procedures in place prior to the effective date of SB 280 permitted a transgender person to amend his or her original birth certificate by submitting to DPHHS a completed gender-designation form attesting to gender transition or

providing government-issued identification displaying the correct sex designation or providing a certified court order indicating a gender change. *See* 24 Mont. Admin. Reg. 2436-2440 (Dec. 22, 2017) (amending Mont. Admin. R. 37.8.102 and 37.8.311); (Am. Compl., ¶ 39).

62. The 2017 procedures did not require surgery or court proceedings. *See* 24 Mont. Admin. Reg. 2436-2440 (Dec. 22, 2017) (amending Mont. Admin. R. 37.8.311); (Am. Compl., ¶ 39).

63. SB 280 provides that the original sex designation on a birth certificate may be amended only if DPHHS receives a certified copy of an order from a court with appropriate jurisdiction including that the sex of the applicant has been "changed" by surgical procedure. *See* SB 280, 67th Leg. Reg. Sess. (Mont 2021); (Am. Compl. ¶ 41).

64. The order required by SB 280 must contain sufficient information for DPHHS to locate the original birth certificate. *See* SB 280; (Am. Compl., ¶ 41).

65. DPHHS' inability to locate the original birth certificate does not excuse an applicant's obligation to comply with SB 280. *See* SB 280; (Am. Compl. ¶ 41).

66. SB 280 does not specify which Montana or other out-of-state court shall have "appropriate jurisdiction" to issue the order mandated by SB 280. *See* SB 280; (*see* Am. Compl., ¶ 41).

67. SB 280 also does not specify whether any licensed medical or other professional will review the submission to DPHHS; does not define or describe what constitutes a

qualifying surgical procedure or a qualifying surgical result; and does not specify the nature of the proof, or the standards, applicable to the court proceedings the applicant must initiate to obtain the mandated order. *See* SB 280; (Am. Compl., ¶¶ 41, 92).

68. SB 280 also contains no exceptions for medical contraindication or the inability to pay the cost of the mandated procedures. *See* SB 280; (Am. Compl., ¶ 43).

69. A birth certificate is an essential government-issued document that individuals use for various important purposes throughout their lifetime. *See* § 50-15-221, MCA; (Am. Compl., ¶ 46).

70. Birth certificates are used in a wide variety of contexts, such as determining eligibility for school or employment, obtaining a passport, proving age, enrolling in government programs, and obtaining a marriage license. (Am. Compl. ¶ 46).

71. A mismatch between someone's gender identity and the sex designation on their birth certificate discloses that person's transgender identity—a profoundly private piece of information in which a transgender person has a reasonable expectation of privacy. (Am. Compl., ¶¶ 48-49; Ettner Decl., ¶¶ 40, 43, 46).

72. Transgender people who are denied accurate birth certificates are deprived of significant control over where, when, how, and to whom they disclose their transgender identity. (Am. Compl., ¶ 48; Ettner Decl., ¶ 46).

73. A mismatch between someone's gender identity and the information on their birth certificate also subjects transgender people to discrimination and harassment in a

variety of settings, including employment, healthcare, and interactions with government employees and officials. (Am. Compl. ¶¶ 33, 49; Ettner Decl. 43-45).

74. A mismatch between someone's gender identity and the information on their birth certificate may even subject them to violence. (Am. Compl., ¶ 33).

75. On April 12, 2021, the legislature passed SB 280 and sent it to Governor Gianforte for signature. *See* SB 280, 67th Leg. Reg. Sess. (Mont 2021); (Am. Compl., ¶ 37).

D. Procedural History

76. On July 16, 2021, Plaintiffs filed their complaint in this matter. (Dkt. 1).

77. On July 19, 2021, Plaintiffs filed their motion for a preliminary injunction. (Dkt. 6).

78. On July 22, 2021, Plaintiffs filed complaints with the Montana Human Rights Bureau ("MHRB") challenging the constitutionality of SB 280. (*Amelia Marquez v. State*, HRB Case No. 021056 (July 2021)).

79. On August 17, 2021, Defendants responded to Plaintiffs' motion for a preliminary injunction and also submitted a motion to dismiss the complaint. (Dkt. 23; Dkt 24).

80. On September 24, 2021, Plaintiffs filed their reply in support of the motion for a preliminary injunction and their response to defendants' motion to dismiss. (Dkt. 30; Dkt. 31).

81. On October 28, 2021, Defendants filed their reply in support of the motion to dismiss. (Dkt. 37).

82. On November 3, 2021, the MHRB dismissed Plaintiffs' MHRB complaints on the basis that the MHRB lacked the authority to decide the constitutional questions raised by Plaintiffs and authorized Plaintiffs to proceed in this Court. (Am. Compl. Exs. 1, 2).

83. On December 3, 2021, Plaintiffs filed a motion for leave to file an amended complaint asserting statutory claims for violations of the Montana Human Rights Act ("MHRA") and the Montana Governmental Code of Fair Practices ("MGCFP"). (Dkt. 41; Dkt. 42).

84. On December 3, 2021, the Court granted the motion. (Dkt. 44).

85. On December 22, 2021, the Court held a hearing on Plaintiffs' motion for a preliminary injunction and Defendants' motion to dismiss. (Dkt. 46).

86. On January 28, 2022, Defendants filed a motion to dismiss the amended complaint. (Dkt. 50; Dkt 51).

87. On February 11, 2022, Plaintiffs submitted their response to Defendants' motion to dismiss the amended complaint. (Dkt. 56).

88. On March 4, 2022, Defendants submitted their reply in support of the motion to dismiss Plaintiffs' amended complaint. (Dkt. 60).

89. Also on March 4, 2022, both parties submitted proposed findings of fact and conclusions of law.

From the foregoing Findings of Fact, the Court now makes the following:

<u>*Conclusions of Law*</u>

90. To the extent that the foregoing Findings of Fact are more properly considered Conclusions of Law, they are incorporated by reference herein as such. To the extent that these Conclusions of Law are more appropriately considered Findings of Fact, they are incorporated as such.

91. The Court has jurisdiction over this action. § 25-2-125, MCA; § 25-2-126, MCA; *see also* §§ 27-19-101, *et seq*., MCA.

A. Standing

92. To establish standing "[i]n the context of challenges to government action," the complaining party must (1) "clearly allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party." *Armstrong v. State*, 1999 MT 261, ¶ 6, 296 Mont. 361, ¶ 6, 989 P.2d 364, ¶ 6; *see also Gryczan v. State*, 283 Mont. 433, 442-43, 942 P.2d 112, 119 (1997).

93. Plaintiffs have pleaded in Counts I through IV of the Amended complaint that they have suffered, or will suffer, violations of constitutional rights, including under Article II, Section 4, of the Montana Constitution (equal protection of the laws); Article II, Sections 10 and 17, of the Montana Constitution (privacy rights and medical decision

autonomy); and Article II, Section 17 of the Montana Constitution (substantive due process).

94. Defendants contend that Plaintiffs do not have standing to challenge SB 280 because "Plaintiffs' alleged injuries are no more than generalized concerns over abstract, future harm that lack basis, are ill-defined, and may never materialize." (Dkt. 24 at 9). Defendants also argue that Plaintiffs could have changed their birth certificates under the old rule but did not, Plaintiffs purposely availing themselves in this matter undermines their fear of being outed, and that Plaintiffs did not provide specific examples of when a birth certificate must be shown. (Dkt. 24 at 6-9).

95. As set forth in the amended complaint, Plaintiffs allege SB 280 intentionally imposes unnecessary and substantial burdens on transgender people who wish to amend their birth certificate to accurately reflect their sex. Plaintiffs described multiple instances in which a birth certificate must be shown and the necessity of having matching documents in order to assist in the treatment of gender dysphoria.

96. Defendants suggest that because Plaintiffs have voluntarily availed themselves in this case that their fear of being "outed as transgender" in other instances is moot. (Dkt. 24 at 8). The Court does not find this argument persuasive.

97. Transgender people, including Plaintiffs, are precisely the only individuals effected by SB 280.

98. “This [targeted specificity] is sufficient to give [Plaintiffs] standing to challenge the constitutionality of the statute.” *Gryczan*, 283 Mont. at 446.

B. Administrative Exhaustion

99. On July 22, 2021, Plaintiffs filed complaints with the MHRB challenging the constitutionality of SB 280.

100. In response, Defendants argued in their motion to dismiss that this case could not proceed until the MHRB proceedings were exhausted.

101. On November 3, 2021, the MHRB dismissed the complaints, concluding that the MHRB lacked the authority to decide the constitutional questions raised by Plaintiffs.

102. The MHRB authorized Plaintiffs to proceed in this Court. (Am. Compl., ¶¶ 13-15).

103. As a result, Defendants’ argument that Plaintiffs must exhaust administrative remedies is now moot and the Court need not address the arguments of the parties as to this issue further.

C. Defendants’ Motion to Dismiss

104. Defendants moved to dismiss pursuant to Rule 12(b)(6). Under that rule, “a complaint should be dismissed where the factual allegations fail to state a claim upon which relief can be granted.” *Stokes v. State*, 2005 MT 42, ¶ 6, 107 P.3d 494, 495. “A motion to dismiss is viewed with disfavor and rarely granted.” *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, ¶ 9, 32 P.3d 1250, ¶ 9.

105. When addressing a Rule 12(b)(6) motion, "all well-pleaded allegations of fact are taken as true." *Stokes*, ¶ 6. Courts must construe the complaint "in the light most favorable to the plaintiff and all allegations of fact contained therein are taken as true." *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, ¶ 8, 66 P.3d 316, ¶ 8 (quoting *Willson v. Taylor* (1981), 194 Mont. 123, 126, 634 P.2d 1180, 1182)(quotations omitted).

106. "Dismissal of an action is justified only when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim" under any set of facts. *Fennessy*, ¶ 9.

107. Defendants argue that Plaintiffs have failed to state a claim under any of the four counts alleged in Plaintiffs' first complaint (Dkt. 1) or under the additional two counts added in Plaintiffs' amended complaint (Dkt. 42).

108. The taken-as-true allegations of the amended complaint support Counts I-IV and Count VI of the amended complaint's counts.

109. Count I of the amended complaint adequately pleads a claim for violation of the Montana Constitution's equal protection clause, including each of the factual predicates for the claim. *See Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶¶ 15-29, 325 Mont. 148, ¶¶ 15-29, 104 P.3d 445, ¶¶ 15-29; (*see* Am. Compl., ¶¶ 6-8, 40, 47, 63-72).

110. Plaintiffs allege SB 280 substantially burdens their ability to amend their birth certificates to accurately reflect their sex.

111. As set forth in the amended complaint, Plaintiffs may only obtain an amendment to their birth certificates by submitting to intrusive and unnecessary surgical procedures, initiating a court proceeding, and obtaining a court order affirming the completion of a surgery.

112. Further, to obtain a court order, Plaintiffs must publicly disclose confidential, intimate details of their medical treatment.

113. Only transgender individuals are subjected to these procedures and burdens in order to have a birth certificate that accurately reflects their gender.

114. Counts II and III of the amended complaint adequately plead violations of Plaintiffs' fundamental rights to informational privacy and to be free from state interference with medical decisions.

115. Both claims are based on Article II, Section 10, of the Montana Constitution. *See Armstrong v. State*, 1999 MT 261, ¶¶ 29-34, 296 Mont. 361, ¶¶ 29-34, 989 P.2d 364, ¶¶ 29-34; (*see* Am. Compl., ¶¶ 4, 31, 42, 47, 48, 58, 60, 61, 73-86).

116. As set forth in the amended complaint, SB 280 requires Plaintiffs to disclose private medical information, as well as information about their transgender status, in a public proceeding with no assurance of confidentiality.

117. SB 280 also compels Plaintiffs to undergo surgery they may not want or need or that is not part of their prescribed medical care or that they may not be able to afford.

118. Count IV of the amended complaint adequately pleads violations of substantive due process, as protected by Article II, Section 17, of the Montana Constitution. *See Yurczyk v. Yellowstone Cty.*, 2004 MT 3, ¶¶ 32-35, 319 Mont. 169, ¶¶ 32-35, 83 P.3d 266, ¶¶ 32-35; (*see* Am. Compl., ¶¶ 30, 31, 60, 61, 87-96).

119. Count IV of the amended complaint describes the vague and poorly defined requirements SB 280 imposes as a condition of amending Plaintiffs' birth certificates.

120. As described in the amended complaint, SB 280 requires transgender people to undergo "surgical procedures" in order to amend their birth certificates but wholly fails to identify what procedure is sufficient to comply with SB 280, what evidence is necessary to comply with SB 280, and who will make the medical decision that a party has met the vague, undefined requirements of SB 280.

121. Count V of the amended complaint does not adequately plead a claim for discrimination under the MHRA. (Am. Compl., ¶¶ 97-103).

122. The MHRA prohibits discrimination based on sex and recognizes freedom from sex discrimination as a basic right. § 49-1-102, MCA; (Am. Compl., ¶ 98).

123. The Montana Supreme Court has only applied the MHRA to specific acts of discrimination. *See e.g.*, *Lay v. State Dep't of Military Affairs*, 2015 MT 158, ¶ 17, 379 Mont. 365, ¶ 17, 351 P.3d 672, ¶ 17; *Baumgart v. State*, 2014 MT 194, ¶ 7, 376 Mont. 1, ¶ 7, 332 P.3d 225, ¶ 7; *Hansen v. Bozeman Police Dep't*, 2015 MT 143, ¶ 19, 379 Mont. 284, ¶ 19, 350 P.3d 372, ¶ 19.

124. Plaintiffs cite to *Maloney v. Yellowstone County et al*., as supporting the contention that discrimination on the basis of gender identity constitutes discrimination on the basis of sex, however, even in that case a specific act of discrimination was at issue. *See Maloney v. Yellowstone County*, Hearing Officer Decision and Notice of Issuance of Administrative Decision, Case No. 1572-2019, Jan. 24, 2022.

125. Plaintiffs here do not allege a specific act of discrimination given that signing a bill into law is not a specific act of discrimination.

126. Therefore, the Court finds that Plaintiffs have failed to state a claim as to Count V such that Count V should be dismissed.

127. Count VI of the amended complaint alleges a claim for discrimination under the Montana Governmental Code of Fair Practices ("MGCFP"). (Am. Compl., ¶¶ 104-10).

128. The MGCFP requires that government services be made available or performed without discrimination based on sex. § 49-3-205, MCA; (Am. Compl., ¶ 105).

129. No state entity, local governmental agency, or state or local official may become a party to any agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices, including discrimination based on sex. § 49-3-205, MCA; (Am. Compl., ¶ 105).

130. Plaintiffs allege that the amending of birth certificates constitutes a service provided by the government.

131. Plaintiffs have alleged, Defendants—through SB 280—have violated provisions of the MGCFP, and Plaintiffs have been injured by Defendants' conduct. (*Id*. at ¶ 106).

132. Plaintiffs allege Defendants have discriminated against Plaintiffs based on their gender identity by restricting transgender people's ability to change the sex designation on their birth certificates through requiring any person who seeks to amend their sex designation to undergo surgery and initiate a legal proceeding to prove that their sex "has been changed by surgical procedure." (Am. Compl., ¶ 107).

133. Individuals who are not transgender do not need to undergo such steps to have a birth certificate that accurately reflects who they are and how they identify themselves to others. (*See* Am. Compl., ¶ 68).

134. Plaintiffs have alleged discrimination based on transgender status is sex discrimination under the MGCFP. (Am. Compl., ¶ 108).

135. Based on these allegations, Plaintiffs have properly pleaded the claims set forth in Counts I through IV and VI of the amended complaint. Therefore, Defendants' motion to dismiss is denied as to those counts but granted as to Count V.

D. Plaintiffs' Motion for a Preliminary Injunction

136. Under the Montana Code Annotated, an applicant is entitled to a preliminary injunction where (1) "it appears the applicant is entitled to the relief demanded and the relief or any part of the relief consists in restraining the commission or continuance of the act," (2) "it appears that commission or continuance of some act during the litigation

would produce a great or irreparable injury to the applicant," or (3) "the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights." § 27-19-201, MCA.

137. "These requirements are disjunctive, meaning that findings that satisfy one subsection are sufficient." *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 14, 366 Mont. 224, ¶ 14, 286 P.3d 1161, ¶ 14.

138. "The purpose of a preliminary injunction is to prevent 'further injury or irreparable harm by preserving the status quo of the subject in controversy pending an adjudication on the merits.'" *City of Billings v. Cty. Water Dist*., 281 Mont. 219, 226, 935 P. 2d 246, 250 (1997) (quoting *Knudson v. McDunn*, 271 Mont. 61, 65, 894 P.2d 295, 297-98 (1995)).

139. The Montana Supreme Court has held that the status quo is "the last actual, peaceable, noncontested condition which preceded the pending controversy…" *Porter v. K & S P'ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839 (internal quotations omitted)

140. To obtain a preliminary injunction, a plaintiff only needs to establish a prima facie case, not entitlement to final judgment. *See Weems v. State*, 2019 MT 98, ¶ 18, 395 Mont. 350, ¶ 18, 440 P.3d 4, ¶ 18 (internal citations omitted); *City of Whitefish v. Bd. of Cty. Comm'rs of Flathead Cty.*, 2008 MT 436, ¶ 25, 347 Mont. 490, ¶ 25, 199 P.3d 201, ¶ 25 (internal citations omitted); *City of Billings v. Cty. Water Dist.* (1997), 281 Mont. 219, 226, 935 P.2d 246, 250 (citing *Knudson v. McDunn* (1995), 271 Mont. 61, 894 P.2d 295, 298).

141. "'Prima facie' means literally 'at first sight' or 'on first appearance but subject to further evidence or information.'" *Weems*, ¶ 18 (quoting *Prima facie, Black's Law Dictionary* (10th ed. 2014).

142. In addition, a request "for preliminary injunctive relief require[s] some demonstration of threatened harm or injury, whether under the "great or irreparable injury" standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA." *BAM Ventures, Ltd. Liab. Co. v. Schifferman*, 2019 MT 67, ¶ 16, 395 Mont. 160, ¶ 16, 437 P.3d 142, ¶ 16.

143. The Montana Supreme Court has held that "loss of a constitutional right constitutes irreparable harm for the purpose of determining whether a preliminary injunction should be issued." *Mont. Cannabis Indus. Ass'n*, ¶ 15; *see also Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386.

144. In *Planned Parenthood of Montana, et al v. State of Montana, et al*., this Court applied the prima facie standard in granting preliminary injunctive relief enjoining the enforcement of legislative enactments restricting access to medical and procedural abortions. *See Planned Parenthood of Mont*., No. DV 21-999, Order Granting Preliminary Injunction, at 15-16 ("To make a sufficient showing for a preliminary injunction to issue, applicants need only establish a prima facie case….")(citing *Weems*).

145. This Court applied Montana Supreme Court precedent that descried the additional elements, such as likelihood of success on the merits, are only relevant in

those limited circumstances where "'a party's monetary judgment may be made ineffectual by actions of the adverse party thereby irreparably injuring the applicant.'" *See id.*; *see also Van Loan v. Van Loan* (1995), 271 Mont. 176, 895 P.2d 614, 617 (describing the likelihood of success element and other elements were "adopt[ed] [] as the test in Montana to determine whether a preliminary injunction should issue when a party's monetary judgment may be made ineffectual by the actions of the adverse party thereby irreparably injuring the applicant.").

146. Plaintiffs are not seeking compensation in this matter.

147. The prima facie standard governs Plaintiffs' motion for a preliminary injunction in this case. *See Planned Parenthood of Mont.*, No. DV 21-999, Order Granting Preliminary Injunction, at 15-16 (citing *Van Loan v. Van Loan* (1995), 271 Mont. 176, 895 P.2d 614, 617).

148. As discussed below, Plaintiffs are entitled to preliminary injunctive relief under the prima facie standard.

149. Alternatively, even under the more demanding standard requiring a showing of likelihood of success on the merits, Plaintiffs are entitled to a preliminary injunction based on their pleadings and uncontested evidentiary submissions.

i. Void for Vagueness

150. Article II, section 17 of the Montana Constitution guarantees due process. Mont. Const. art. II, § 17 ("No person shall be deprived of life, liberty, or property without the due process of law.").

151. Due process encompasses the "basic principle" that "an enactment is void for vagueness if its prohibitions are not clearly defined." *Whitefish v. O'Shaughnessy* (1985), 216 Mont. 433, 440, 704 P.2d 1021, 1025. The Montana Supreme Court outlined how "[v]ague laws offend several important values" in *Whitefish*. *Id*. Specifically the Supreme Court described:

> First, we assume that man is free to steer between lawful and unlawful conduct, and we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. .... Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Whitefish, 216 Mont. 433, 440, 704 P.2d 1021, 1025-26 (citing *Grayned v. City of Rockford* (1972), 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99).

152. "A vagueness challenge to a statute may be maintained under two different theories: (1) because the statute is so vague that it is rendered void on its face; or (2) because it is vague as applied in a particular situation." *State v. Dugan*, 2013 MT 38, ¶ 66, 369 Mont. 39, ¶ 66, 303 P.3d 755, ¶ 66 (citing *State v. Watters*, 2009 MT 163, ¶ 24, 350 Mont. 465, 208 P.3d 408; *State v. Nye* (1997), 283 Mont. 505, 513, 943 P.2d 96, 101).

153. Plaintiffs have established a prima facie case under the first theory, as discussed below.

154. “Statutes are accorded a presumption of constitutionality; the burden of proof is upon the party challenging a statute's constitutionality.” *Monroe v. State* (1994), 265 Mont. 1, 3, 873 P.2d 230, 231 (citing *GBN, Inc. v. Montana Dept. of Revenue* (1991), 249 Mont. 261, 265, 815 P.2d 595, 597). Additionally, “[a]ny doubt is to be resolved in favor of the statute.” *Id*.

155. A statute is unconstitutionally vague on its face “if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Dugan*, ¶ 67 (internal quotations omitted); *Monroe*, 265 Mont. at 3, 873 P.2d at 231; *see also Yurczyk v. Yellowstone Cty.,* 2004 MT 3, ¶ 34, 319 Mont. 169, ¶ 34, 83 P.3d 266, ¶ 34.

156. “The complainant attacking a statute's validity must prove that the statute is vague ‘not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.’" *Monroe*, 265 Mont. at 3-4, 873 P.2d at 231 (quoting *Hoffman Estates v. Flipside, Hoffman Estates* (1982), 455 U.S. 489, 495, n. 7, 102 S.Ct. 1186, 1191).

157. When examining a “facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct,” the Court “should uphold the challenge only if the enactment is impermissibly vague in all of its applications.” *Hoffman Estates*, 455 U.S. at 494-95, 102 S. Ct. at 1191.

a. To be clear, **<u>for the purposes of this preliminary injunction</u>**, the Court has declined to analyze whether SB 280 reaches constitutionally protected

conduct. Thus, the issue of whether SB 280 reaches constitutionally protected conduct has not been decided by the Court in the issuance of these Findings of Fact, Conclusions of Law, and Order.

158. SB 280 provides:

Section 1. Sex change designation on birth certificate. (1) The sex of a person designated on a birth certificate may be amended only if the department receives a certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the person born in Montana has been changed by surgical procedure.

(2) The order must contain sufficient information for the department to locate the original birth certificate. If the person's name is to be changed, the order must indicate the person's full name as it appears on the original birth certificate and the full name to which it is to be amended.

(3) If the order directs the issuance of a new birth certificate that does not show amendments, the new birth certificate may not indicate on its face that it was amended.

(4) This section does not apply if the sex of a person was designated incorrectly on the original birth certificate due to a data entry error.

159. Plaintiffs have alleged SB 280 is unconstitutionally vague on its face since it "fails to give a person of ordinary intelligence fair notice" of what conduct is required under SB 280. *See Dugan*, ¶ 67.

160. Plaintiffs point to the following emphasized portions of SB 280 stating that "[t]he sex of a person designated on a birth certificate may be amended *only if [DPHHS] receives a certified copy of an order from a court with appropriate jurisdiction* indicating that the sex of the person born in Montana has been changed by *surgical procedure*." SB 280 (emphasis added).

161. Plaintiffs provided unrebutted evidence describing that neither gender-affirming surgery nor any other medical treatment that a transgender person undergoes changes that person's sex. (Ettner Decl., ¶ 34). Instead, gender-affirming surgery aligns a person's body and lived in experience with the person's gender identity, which already exists. *Id*. Therefore it is unclear what type of "surgical procedure" will meet the requirements to change "the sex of the person born in Montana" given Plaintiff's evidence that no surgery changes a person's sex.

162. Plaintiffs further describe SB 280 requires that, as a condition of amending the sex designation on a transgender person's birth certificate, a transgender person must undergo a "surgical procedure" but does not define what the surgery should be or identify who—DPHHS, the court, or the applicant's physician or other medical professional—decides what type of surgery is sufficient to satisfy SB 280.

163. Plaintiffs provided unrebutted evidence describing there are many types of surgery available to treat gender dysphoria including facial feminization, tracheal shave, vaginoplasty, and phalloplasty. (Lane Aff., ¶ 2).

164. Plaintiffs describe that whether these surgeries qualify under SB 280 is entirely unclear given the ambiguity of the statute and Defendants' failure to promulgate implementing regulations clarifying these standards.

165. Plaintiffs point out that SB 280 also does not identify the standard of proof applicable to the court proceeding that SB 280 requires.

166. Plaintiff Mr. Doe testified that he is unsure of whether his "top surgery" would qualify under the requirements imposed by SB 280.

167. Nor does SB 280 identify the standard, if any, governing DPHHS' review of the court's order.

168. Because this could lead to different interpretations among whichever judge in whatever constitutes a court with appropriate jurisdiction it "impermissibly delegates basic policy matters to…judges…for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" Plaintiffs have demonstrated a prima facie case that SB 280 is void for vagueness. *See Hoffman Estates*, 455 U.S. at 498, 102 S. Ct at 1193.

169. Absent these basic specifications, Plaintiffs contend SB 280 "is so vague that it is rendered void on its face." *Dugan*, ¶ 66; *see also Western Native Voice v. Stapleton*, No. DV

20-0377, 2020 WL 8970685 (13th Dist., Yellowstone Cnty., Sept. 25, 2020) (finding Montana's Ballot Interference and Protection Act unconstitutionally void on its face).

170. The Court finds that Plaintiffs have established a prima facie case that SB 280 impermissibly vague in all of its applications and thereby unconstitutionally violates Plaintiffs' fundamental right to due process because it is unconstitutionally void. Given this finding, the Court need not address the remaining contentions made by Plaintiffs.

ii. Injury

171. The Montana Supreme Court has described that "[f]or the purposes of a preliminary injunction, the loss of a constitutional right constitutes an irreparable injury." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, ¶ 15, 473 P.3d 386, ¶ 15; *see also Weems v. State*, 2019 MT 98, ¶ 25, 395 Mont. 350, ¶ 25, 440 P.3d 4, ¶ 25 ("We have recognized harm from constitutional infringement as adequate to justify a preliminary injunction.").

172. Here, Plaintiffs have described injury due to being unable to change the sex designations on their birth certificates and likely being prevented from doing so due to SB 280.

173. As discussed above, § 27-19-201, MCA, sets forth the applicable standards for obtaining a preliminary injunction.

174. The subsections of § 27-19-201 "are disjunctive; a court need find just one subsection satisfied in order to issue a preliminary injunction." *Driscoll*, ¶ 13; (citing *Bam Ventures*, ¶ 14).

175. To meet the irreparable-injury test, a "district court need find only that an applicant made a prima facie showing she will suffer a harm or injury—'whether under the 'great or irreparable injury' standard of subsection (2), or the lesser degree of harm implied within the other subsections of § 27-19-201, MCA.'" *Driscoll*, ¶ 15 (quoting *BAM Ventures*, ¶ 16).

176. Plaintiffs have made a prima facie case that SB 280 unconstitutionally burdens their constitutional right to due process.

177. This constitutional violation constitutes an irreparable injury.

178. Plaintiffs have also alleged injuries including irreparable emotional and financial harm. Specifically, Ms. Marquez cannot undergo surgery at this time due to monetary constraints and time constraints. (Marquez Aff., ¶ 6). Mr. Doe does not know if the "top surgery" he has undergone will comply with SB 280 and will suffer financial damage if he were to attempt to change the sex designation on his birth certificate. (*See* Doe Aff., ¶¶ 8, 12)). Specifically, Mr. Doe would have to pay for travel costs and the cost of hiring an attorney to represent him in the judicial proceedings required by SB 280. Undertaking this financial burden to meet SB 280's requirements will cause irreparable harm to Mr. Doe.

179. The Court finds that Plaintiffs have demonstrated injury sufficient for a preliminary injunction.

ii. Status Quo

180. "Status quo means 'the last actual, peaceable, noncontested condition which preceded the pending controversy.'" *Weems v. State*, 2019 MT 98, ¶ 26, 395 Mont. 350, ¶ 26, 440 P.3d 4, ¶ 26 (quoting *Porter v. K & S P'ship* (1981), 192 Mont. 175, 181, 627 P.2d 836, 839). Additionally, "[t]hat a statute has been on the books for some time is not the relevant inquiry when entertaining a request to enjoin it." *Weems*, ¶ 26.

181. The last actual, peaceable, noncontested condition preceding the controversy in this matter was that which existed prior to the enactment of SB 280.

E. Conclusion

182. Plaintiffs have adequately alleged under section 27-19-201(1), MCA and (2) that they are entitled to a preliminary injunction. Plaintiffs have shown the lesser degree of harm required by subsection (1) and the irreparable injury required by subsection (2) such that an injunction is necessary to minimize the harm to all parties and preserve the status quo pending final resolution on the merits.

183. Based on the Courts finding that Plaintiffs have demonstrated a prima facie case that SB 280 is vague and therefore unconstitutionally burdens the right to due process, the Court will grant Plaintiffs' motion for a preliminary injunction.

The Court, being fully informed, having considered all briefs on file and in-court arguments, makes the following decision:

1. Plaintiffs have standing to challenge SB 280;

2. Plaintiffs have adequately pleaded claims for violations of equal protection, privacy, and due process under the Montana Constitution and for a violation of the MGCFP sufficient to survive a Rule 12(b)(6) motion;

3. Plaintiffs failed to adequately plead a claim for a violation of the MHRA;

4. Plaintiffs have established a prima facie case of a violation of their right to due process under the Montana Constitution.

5. **IT IS HEREBY ORDERED:**

    a. Plaintiffs' motion for a preliminary injunction is **GRANTED** and Defendants are enjoined from enforcing any aspect of SB 280 during the pendency of this action according to the prayer of the Plaintiffs' motion and complaint;

    b. Defendants' motion to dismiss is **DENIED** as to Counts I-IV and VI;

    c. Defendants' motion to dismiss is **GRANTED** as to Count V;

    d. the Court waives the requirement that the Plaintiffs post a security bond for the payment of costs and damages as permitted by § 27-19-306(1), MCA.

DATED April 21, 2022

/s/ Michael G. Moses
District Court Judge

cc: Akilah Lane
Alex Rate
F. Thomas Hecht
Tina B. Solis
Seth A. Horvath
Malita Picasso
Jon W. Davidson
Elizabeth Halverson
Emily Jones
Austin Knudsen
Kristen Hansen
David M.S. Dewhirst
Kathleen L. Smithgall
Patrick M. Risken

Electronically Signed By:
Hon. Judge Michael Moses
Thu, Apr 21 2022 09:11:54 AM

EXHIBIT 6

FILED
06/26/2023
Terry Halpin
CLERK
Yellowstone County District Court
STATE OF MONTANA
By: Robyn Schierholt
DV-56-2021-0000873-CR
Moses, Michael G.
133.00

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,

YELLOWSTONE COUNTY

AMELIA MARQUEZ, an individual; and JOHN DOE, an individual, Plaintiffs, v. STATE OF MONTANA; GREGORY GIANFORTE, in his official capacity as the Governor of the State of Montana; the MONTANA DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES; and CHARLES T. BRERETON, in his official capacity as the Director of the Montana Department of Public Health and Human Services, Defendants.	Cause No.: DV 21-873 Judge Michael G. Moses **ORDER**

This matter is before the Court to address all outstanding motions. On January 25th, 2023, Plaintiffs, Amelia Marquez and John Doe, filed Plaintiffs' Motion to Enforce

the Preliminary Injunction Order by Ordering Defendants to Show Cause why They Should not be Held in Civil Contempt for Violating the Order. (Court Doc. #102). On February 8th, 2023, Defendants, the State of Montana; Gregory Gianforte, in his official capacity as the Governor of the State of Montana; the Montana Department of Public Health and Human Services; and Charles T. Brereton, in his official capacity as the Director of the Montana Department of Public Health and Human Services, filed Defendant's Response to Plaintiff's Motion for Enforcement of Preliminary Injunction. (Court Doc. #105). On February 16th, 2023, Plaintiffs filed their Reply in Support of Motion to Support the Preliminary Injunction Order by Ordering Defendants to Show Cause why They Should not be Held in Civil Contempt for Violating the Order. (Court Doc. #114).

On March 20th, 2023, Plaintiffs filed a Motion for Summary Judgment pursuant to Rule 56 of M. R. Civ. P. (Court Doc. #122). On April 10th, 2023, Defendants filed their Response to Plaintiffs' Motion for Summary Judgment. (Court Doc. #129). On April 24th, 2023, Plaintiffs filed their Reply Brief in Support of Motion for Summary Judgment. (Court Doc. #130).

A hearing on both outstanding motions was held on June 1st, 2023. Additionally, this Court will consider the matter of attorney fees and costs as requested by Plaintiffs in their Motion for Contempt and their Amended Complaint for Declaratory and Injunctive Relief filed on December 3rd, 2021. (Court Doc. #42).

I. FACTUAL BACKGROUND

On April 12th, 2021, the Montana state legislature passed Senate Bill 280 ("SB 280") and sent it to Governor Gianforte for his signature. SB 280 stated, in relevant part, that "[t]he sex of a person designated on a birth certificate may be amended only if [the Montana Department of Health and Human Services ("DPHHS")] receives a

certified copy of an order from a court with appropriate jurisdiction indicating that the sex of the person born in Montana has been changed by surgical procedure." SB 280 did not define what type of surgical procedure would qualify under the statute. Governor Gianforte signed the bill on April 30th, 2021, and it immediately became effective. (Court Doc. #77).

Prior to the passage of SB 280, the procedure in place allowed those born in Montana to amend the sex designation of their birth certificate by submitting to DPHHS either: (1) a completed gender-designation form attesting to gender transition; (2) a government-issued identification displaying the correct sex designation; or (3) a certified court order indicating a gender change. These procedures, which started in 2017 ("2017 Rule") did not require surgery or a court proceeding. (Court Doc. #77).

On April 21st, 2022, this Court issued an Order preliminarily enjoining SB 280. In that Order, this Court instructed the Defendants to return to the status quo prior to the passage of SB 280. This Court made it clear in the Order that it intended Defendants to return to applying the 2017 Rule. Defendants, instead, engaged in temporary rulemaking and promulgated a temporary rule (the "2022 Rule") whereby DPHHS removed the procedure for changing the sex designation of birth certificates altogether. (Court Doc. #77).

Plaintiffs came before this Court again on June 7th, 2022, and sought clarification of this Court's Order granting the preliminary injunction. This Court clarified the intention behind the preliminary injunction and again told Defendants that they were to return to applying the 2017 Rule until this litigation could be resolved. (Court Doc. #77). Following the clarification, Defendants began applying the 2017 Rule. (Court Doc. #107).

Defendants applied to the Montana Supreme Court for "a writ of supervisory control directing the Thirteenth Judicial District Court, Yellowstone County, to vacate its September 19, 2022 Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Plaintiffs' Motion Seeking Clarification of the Preliminary Injunction". (OP 22-0552). In their Order, the Supreme Court reiterated that the Defendants were to apply the 2017 Rule as the status quo that was present prior to the injunction until this litigation concluded. As an aside, the Supreme Court noted that this Court has no jurisdiction to enjoin the 2022 Rule. The Supreme Court also noted that this Court's clarification was not necessary as the original Order provided Defendants with clear instructions. Following the Order from the Supreme Court, Defendants stopped applying the 2017 Rule and the DPHHS did not provide a method to change the sex designation on birth certificates throughout the remainder of this case. (Court Doc. #107).

On January 25th, 2023, Plaintiffs filed a Motion to Enforce the Preliminary Injunction Order by Ordering Defendants to Show Cause why They Should not be Held in Civil Contempt for Violating the Order. (Court Doc. #102). On March 20th, 2023, Plaintiffs filed a Motion for Summary Judgment pursuant to Rule 56 of M. R. Civ. P., arguing that SB 280 is unconstitutionally void as vague on its face and as applied to Plaintiffs. (Court Doc. #122). This Court set a hearing on both matters for June 1st, 2023. (Court Doc. #127).

II. DISCUSSION

Three matters remain before the Court in this case. First, the Court must address whether to hold Defendants in contempt of court for their repeated failure to follow this Court's Order that preliminarily enjoined SB 280. Second, the Court will address Plaintiffs' request for Summary Judgment under Rule 56 of M. R. Civ. P.

Finally, this Court will consider the issue of whether to award attorney fees to Plaintiffs as the prevailing party.

a. Contempt of Court

On January 25th, 2023, Plaintiffs moved for the Court to Enforce the Preliminary Injunction Order by Ordering Defendants to Show Cause why They Should not be Held in Civil Contempt for Violating the Order. (Court Doc. #102). The January 25th Motion was filed following significant pleadings from both parties regarding this Court's preliminary injunction as well as clarification from this Court and the Montana Supreme Court.

The Order preliminarily enjoining SB 280, issued April 21st, 2022, ordered Defendants to "preserve the status quo pending final resolution" and to return to "that which existed prior to the enactment of SB 280". (Court Doc. #61). This Court unequivocally intended Defendants to return to the 2017 Rule that was in place prior to the passage of SB 280. Instead of following this Court's Order and the law, Defendants engaged in new rulemaking procedures and promulgated the 2022 Rule. Defendants represented that they believed this was necessary as there was "no rule in place". (Court Doc. #77). The "status quo", the 2017 Rule, that Defendants were ordered to return to would have preserved Montanans' constitutional rights, which all parties now concede.

On June 7th, 2022, Plaintiffs filed a Motion to Clarify before this Court. (Court Doc. #71). Plaintiffs requested clarification regarding the preliminary injunction and expressed concern that DPHHS was violating this Court's Order. In that Motion, Plaintiffs requested this Court to "[g]rant any other relief the Court deems just, including but not limited to holding Defendants in contempt."

Defendants responded to Plaintiffs' Motion to Clarify by expressing confusion with this Court's Order temporarily enjoining SB 280. (Court Doc. #72). Defendants asserted that the 2022 Rule filled a vacancy that was created when SB 280 was enjoined. They blatantly ignored this Court's instructions to return to the status quo. Defendants understood what the status quo was prior to SB 280. In a hearing on September 15th, 2022, Defendants acknowledged that prior to the passage of SB 280, the 2017 Rule was in place. (Court Doc. #77).

On September 19th, 2022, this Court issued its Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Plaintiffs' Motion Seeking Clarification of the Preliminary Injunction. (Court Doc. #77). The Court again emphasized that the Order that granted the preliminary injunction of SB 280 had also ordered DPHHS to return to the 2017 Rule. This Court chose not to hold Defendants in contempt at that time. For four months following the clarification, Defendants followed the Order and returned to applying the 2017 Rule. (Court Doc. #107).

Defendants applied to the Supreme Court of Montana for a writ of supervisory control arguing that this Court did not order them to revert to the 2017 Rule. The Supreme Court issued an Order that reaffirmed that this Court's injunction "requires DPHHS to maintain the status quo, which reinstates the 2017 Rule for as long as the Preliminary Injunctive Order … remains in effect." (OP 22-0552). The Supreme Court noted that this Court's original Order that granted the preliminary injunction of SB 280 was clear and that the clarification later issued was not necessary. The Supreme Court also mentioned that this Court had no jurisdiction to address the constitutionality of the 2022 Rule. Following the Order from the Supreme Court, Defendants stopped applying the 2017 Rule and returned to applying the 2022 Rule, in violation of both

this Court's previous Orders and the Montana Supreme Court Order. (Court Doc. #107).

Even after this Court's Order that temporarily enjoined SB 280, this Court's Clarification of that Order, and the Montana Supreme Court's Order upholding that Order, Defendants refused to apply the 2017 Rule. Following the Supreme Court's Order, Defendants announced that they would follow the Supreme Court's decision and implement the 2022 Rule. This was contrary to what the Supreme Court ordered. While the 2022 Rule has not yet been properly challenged, the continued enforcement of that rule violates this Court's Order to preserve the status quo. The requirements placed on Defendants by that Order have been repeatedly clarified and repeatedly disregarded.

In September 2022, this Court decided not to hold Defendants in contempt. However, in the face of continued violations of this Court's Order, Plaintiffs renewed their request to have Defendants held in contempt on January 25th, 2023. Between January 10th, 2023, and June 1st, 2023, Defendants continued to refuse to apply the 2017 Rule, knowing this was in violation of this Court's Order. At the hearing on June 1st, 2023, this Court addressed the issue of contempt and Defendants had the opportunity to provide justification for their continued violations of this Court's Order.

At that hearing, Plaintiffs expressed their concern and frustration at Defendants' continued refusal to follow the Order preliminarily enjoining SB 280. Plaintiffs noted that "it is well within Defendants' power to comply with a preliminary injunction order." New defense counsel came before the Court with "hat in hand" to explain his clients' actions. Defendants reiterated that they believed this Court's Order that granted the preliminary injunction of SB 280 and ordered Defendants to

revert to the status quo was confusing. After this Court clarified the intentions behind that Order yet again, defense counsel apologized and indicated that such contempt "is not going to happen again".

The Court respects the candor of the new defense counsel to finally come before this Court with "hat in hand". However, defense counsel could not provide a legitimate explanation or an explanation of any kind for the continued noncompliance of his clients. There is no legal justification for Defendants' continued refusal to follow Court orders after numerous clarifications by this Court and by the Supreme Court of Montana.

Plaintiffs requested that Defendants be held in contempt of court. While this Court refrained from such a decision in September 2022 after Defendants' initial refusal to follow the temporary injunction, such restraint is no longer warranted.

Courts "are imbued with inherent authority to enforce compliance with their lawful orders by holding noncompliant parties in contempt." *Spallone v. Untied States*, 493 U.S. 265, 276, 110 S. Ct. 625, 107 L. Ed. 2d 644 (1990). Pursuant to MCA § 3-1-501(1)(e), "disobedience of any lawful judgment, order, or process of the court" is contempt to the "authority of the court." Defendants repeatedly disobeyed a lawful order from this Court, showing their contempt for this judicial body and the judicial system as a whole.

In the hearing held June 1st, 2023, Plaintiffs stated that Defendants had "managed to completely frustrate the entire process of the preliminary injunction." This Court agrees. The Plaintiffs requested a preliminary injunction in this case to ensure that Montanans' constitutional rights were protected while this case was pending. When they requested the preliminary injunction nearly two years ago, Plaintiffs expressed concern that SB 280 was unconstitutional on its face and that, if

enacted, would irreparably harm Montanans. The purpose of an injunction is to preserve the status quo and to minimize the harm to all parties pending a final resolution on the merits. *Mont. Democratic Party v. Jacobsen*, 2022 MT 184 ¶ 15, 410 Mont. 114, 518 P.3d 58. Plaintiffs met their burden under MCA § 27-19-201 by showing that a preliminary injunction was necessary to ensure that they would not suffer irreparable injury. This Court granted a preliminary injunction enjoining SB 280. All parties now concede that the Court was correct.

When this Court issued its preliminary injunction, Defendants were not without recourse. They could have appealed the preliminary injunction Order to the Supreme Court, but they chose not to. Instead, they chose to ignore the Order and promulgate the new 2022 Rule. Only after Plaintiffs sought to enforce the Order, did Defendants go to the Montana Supreme Court for a writ of supervisory control. Defendants acted in total disregard for this Court and the established procedures of the judicial branch of government.

Later, in this Order, this Court will grant Plaintiffs' Motion for Summary Judgment and permanently enjoin SB 280 because it is unconstitutional. *See infra* Subsection II(b). The preliminary injunction enjoining SB 280 and ordering Defendants to return to the status quo will no longer be in effect following this Order. Most of the remedies for contempt of court are related to imposing sanctions to secure compliance with court orders. Following this Order, Defendants will no longer have to comply with the preliminary injunction, instead they will have to comply with this Order. Sanctions to force compliance would no longer be appropriate.

However, Defendants are in contempt of court and due to the Defendants' flagrant disregard for this Court and its preliminary injunction Order, some form of sanction is warranted. Plaintiffs requested reasonable attorney fees and costs arising

out of the work they were required to perform in connection with the entire contempt proceedings. Because this Court decided not to hold Defendants in contempt in September 2022, fees and costs related to the contempt proceedings will be limited to between January 10th, 2023, when Defendants reverted to no longer applying the 2017 Rule, and June 1st, 2023. (Court Doc. #7); *see In re Marriage of Redfern*, 214 Mont. 169, 173, 692 P.2d, 470 (1984) (finding reasonable attorney fees permissible in a contempt action).

During the June 1st, 2023, hearing, Defendants requested that attorney fees and costs related to the contempt proceedings be limited to "one attorney" on Plaintiffs' side. This Court does not believe narrowing a fee award to such a request is warranted prior to a reasonableness hearing. Defendants were made aware numerous times that their conduct was in violation of this Court's valid Order, yet they willfully and continuously thumbed their nose at this Court, wasting Plaintiffs' time, energy, and money to enforce that Order and violating the constitutional rights of Montanans. Plaintiffs should be reimbursed for the time expended. Defendants will reimburse Plaintiffs for all reasonable attorney fees related to the actions listed in the paragraph above. If necessary, those fees will be determined at a hearing on the reasonableness of the fees and costs.

b. Summary Judgment

Summary Judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits" demonstrate that there is "no genuine issue of material fact" and the movant is entitled to judgment as a matter of law. M. R. Civ. P. 56(c). The movant has the initial burden to demonstrate that no genuine issue of material fact exists. *Toombs v. Getter Trucking, Inc.*, 256 Mont. 282, 846 P.2d 265 (1993). Once this has been accomplished, the burden shifts to the non-moving party to

prove, by more than mere denial and speculation, that a genuine issue does exist. *S.M. v. R.B.*, 261 Mont. 522, 862 P.2d 1166 (1993). Once the court determines that no genuine issue of material fact exists, the court must then determine whether the moving party is entitled to judgment as a matter of law. *Lindey's Inc. v. Professional Consultants, Inc.*, 244 Mont. 238, 797 P.2d 920 (1990).

Plaintiffs moved for summary judgment in March 2023 noting that SB 280 and the rule promulgated to enforce it (the "2021 Rule") are unconstitutionally vague on their face and as applied to Plaintiffs. Defendants, shortly after, conceded that SB 280 is unconstitutionally vague. The parties independently arrived at this conclusion because both agree that no surgical procedure can change an individual's sex. In their Response to Plaintiffs' Motion for Summary Judgment, Defendants conceded that SB 280 was unconstitutional, but did not address the 2021 Rule. However, in the hearing on the motion on June 1st, 2023, Defendants conceded that the 2021 Rule "parrots the statute" and is unconstitutional as well.

This case places the Court in a highly unusual position. Not only have the parties agreed that summary judgment is appropriate, they have also agreed on the legal basis to grant summary judgment.

Article II, Section 17, of the Montana Constitution and The Fifth Amendment of the United States Constitution guarantee due process under the law. Due process bars "arbitrary governmental actions regardless of the procedures used to implement them and serves as a check on governmental action". *Neville v. State, Dept. of Family Services*, 267 Mont. 237, 249, 883 P.2d 793, 800 (1994). Due process encompasses the basic principle that an enactment is void for vagueness if its prohibitions are not clearly defined. *City of Whitefish v. O'Shaughnessy*, 216 Mont. 433, 440, 704 P.2d 1021, 1025 (1985).

A vagueness challenge to a statute may be raised on two different bases: (1) because the statute is so vague that it is rendered void on its face; or (2) because it is vague as applied in a particular situation. *State v. Watters*, 2009 MT 163, ¶ 24, 350 Mont. 465, 208 P.3d 408. Plaintiffs raised both arguments. They asserted that SB 280 and the 2021 Rule are void for vagueness on their face and as applied to Plaintiffs as individuals.

"A statute is 'void on its face if it fails to give a person of ordinary intelligence fair notice'" of how to comply. *Id.* at ¶ 25, quoting *State v. Dixon*, 2000 MT 82, ¶ 20, 299 Mont. 165, 988 P.2d 544. A person challenging the statute bears the burden of showing that the statute is "impermissibly vague in all of its applications". *Id.* at ¶ 18. Here, the Court confronts a statute that both sides have agreed cannot be enforced because it is premised on a factual impossibility. SB 280 and the 2021 Rule require an individual who is trying to change their birth certificate to provide proof that their sex has been changed with a surgical procedure. The parties in this litigation have ultimately agreed that no surgical procedure exists that can change an individual's sex. Complying with SB 280 and the 2021 Rule is thus impossible. Because the law cannot be complied with in any application, it is void on its face.

SB 280 and the 2021 Rule are also void for vagueness as applied to Plaintiffs as individuals. There are two elements in the analysis to determine if a law is vague as applied. The statute must provide: (1) actual notice to citizens; and (2) minimal guidelines to govern law enforcement. *Dixon*, at ¶ 27. A statute or regulation must provide "sufficient guidelines to prevent arbitrary and discriminatory enforcement". *Id.* at ¶ 31. A vague law risks enforcement or resolution on an "ad hoc and subjective basis". *Id.* at ¶ 30.

As applied to Plaintiffs, SB 280 and the 2021 Rule do not provide actual notice to Plaintiffs of how to comply with the law in order to change their birth certificates. Based on the plain language of SB 280 and the 2021 Rule, Plaintiffs have no idea what type of "surgical procedure" would be necessary to amend the sex designation on their birth certificates.

Further, SB 280 and the 2021 Rule do not provide the necessary minimal guidelines so that enforcers know how to uniformly comply with the law. There are no guidelines regarding: (1) what courts have "appropriate jurisdiction" to issue an order to change one's birth certificate; (2) who has authority to decide what types of surgical procedures comply with the law; (3) the standard of proof applicable to a court proceeding pursuant to SB 280 and the 2021 Rule; or (4) the standard governing DPHHS's review of a court's order under SB 280 and the 2021 Rule. Without minimal guidelines to ensure that enforcers apply the law consistently to all persons, ad hoc enforcement that could be arbitrary or discriminatory is likely, if not inevitable. As applied to Plaintiffs, SB 280 and the 2021 Rule are void for vagueness.

In their Response to Plaintiff's Motion for Summary Judgment, Defendants repeatedly expressed concern that this Court would issue a broader ruling that would find SB 280 and the 2021 rule unconstitutional on other grounds. Under the doctrine of judicial restraint, this Court will refrain from moving beyond the Due Process issue presented. "The 'cardinal principle of judicial restraint' is that 'if it is not necessary to decide more, it is necessary not to decide more'". *State v. Tome*, 2021 MT 229, ¶ 31, 405 Mont. 292, 495 P.3d 54; *citing Morse v. Frederick*, 551 U.S. 393, 431, 127 S. Ct. 2618, 2641, 168 L. Ed. 2d 290 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part). Because SB 280 and the 2021 rule are unconstitutionally void for vagueness

under the Due Process Clause, this Court must refrain from addressing whether the law is constitutional under Plaintiffs' additional theories.

Summary judgment is appropriate in this case pursuant to M. R. Civ. P. 56(c). SB 280 and the 2021 Rule are vague on their face and as applied to Plaintiffs and are unconstitutional under the Due Process Clauses of the Fifth Amendment of the United States Constitution and Article II, Section 17, of the Montana Constitution. SB 280 and the 2021 Rule are permanently enjoined. Summary judgment is granted pending the determination of attorney fees and costs to be awarded to Plaintiffs.

c. Attorney Fees

Plaintiffs are entitled to attorney fees and costs for time spent on the latter portion of the contempt of court action. However, in their first Complaint for Declaratory and Injunctive Relief and their Amended Complaint for Declaratory and Injunctive Relief, Plaintiffs requested that the Court "[a]ward Plaintiffs' the reasonable attorney's fees and costs incurred in bringing this action". (Court Doc. #42). MCA § 27-8-313 provides a court with discretionary authority for an award of attorney fees in a declaratory judgment action. *Trs. Of Ind. Univ. v. Buxbaum*, 2003 MT 97, ¶ 46, 315 Mont. 210, 69 P.3d 663. MCA § 27-8-313 states that "[f]urther relief based on a declaratory judgment may be granted whenever necessary or proper."

As a general rule, attorney fees are considered to be the burden of the respective litigants in a case. *City of Helena v. Svee*, 2014 MT 311, ¶ 18, 377 Mont. 158, 399 P.3d 32. Montana follows the "American Rule," which provides that, absent statutory or contractual authority, attorney fees will not be awarded to the prevailing party in a lawsuit. *Id. citing Western Tradition P'ship, Inc. v. Att'y Gen. of Mont*., 2012 MT 271, ¶ 9, 367 Mont. 112, 291 P.3d 545. Attorney fees are only appropriate if

equitable considerations support the award. *United Nat'l Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2009 MT 269, ¶ 38, 352 Mont. 105, 214 P.3d 1260.

The private attorney general doctrine is one of a handful of equitable exceptions to the American Rule that the Montana Supreme Court has recognized. *Western Tradition P'ship*, 2012 MT 271 at ¶ 13. The doctrine is utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens. *Id. citing Montanans for the Responsible Use of the Sch. Trust v. State ex rel Bd. Of Land Comm'rs* ("*Montrust*"), 1999 MT 263, ¶ 64, 296 Mont. 402, 989 P.2d 800. Three factors should be considered in determining whether to award fees under the private attorney general doctrine: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on plaintiff, (3) the number of people standing to benefit from the decision." *Montrust*, 2012 MT 271 at ¶ 66.

The Montana Supreme Court urges caution when applying the first factor of the private attorney general doctrine. *Western Tradition P'ship*, ¶ 16. The first factor should not allow courts' "assessments of the relative strength or weakness of public policies furthered by their decisions … a role closely approaching that of the legislative function." *Bitterroot River Protective Ass'n v. Bitterroot Conserv. Dist.*, 2011 MT 51, ¶ 22, 359 Mont. 393, 251 P.3d 131. To address this concern, the Montana Supreme Court limited the award of fees under the private attorney general doctrine to cases "vindicating constitutional interests". *Id.*

This case vindicates constitutional interests. The statute at the center of this case violates the Due Process Clause of the Montana State Constitution and the United States Constitution because it is void for vagueness. *See Supra* Subsection II(b). "Vague laws offend several important values". *Whitefish v. O'Shaughnessy*, 216 Mont.

433, 440, 704 P.2d 1021 (1985). Preventing "arbitrary and discriminatory enforcement" is critical to due process and requires laws to provide explicit standards for those who apply them. *Id*. Ensuring that laws are clear enough that they can be enforced without violating the Due Process Clause is of great societal importance. This factor weighs towards awarding Plaintiffs attorney fees.

The second factor of the private attorney general doctrine is the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff. *Montrust*, ¶ 66. The private attorney general doctrine "is normally utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens." *Bitterroot River Protective Ass'n*, ¶ 27. In this case, the government fought to enforce a law that they later conceded was unconstitutional. It was necessary for Plaintiffs, as a private party, to bring this case in order to vindicate a critical constitutional right. *See Montrust*, ¶ 67 (finding that when the State argues it must defend a statute, it "does not dispute the necessity of private enforcement of Montana's Constitution").

Further, Plaintiffs exerted considerable effort over nearly two years in order to enforce the Due Process Clauses of the Montana State Constitution and the United States Constitution. Not only did they have to enforce constitutional rights, Plaintiffs also had to exert additional effort to enforce this Court's preliminary injunction and the Order from the Supreme Court. Defendants were in contempt of court for large portions of this litigation. This contempt meant that Plaintiffs were required to put in additional effort and file motions that, had Defendants complied with court orders, would not have been needed. This factor weighs toward finding an award for attorney fees in favor of Plaintiffs.

The third factor considers the number of people standing to benefit from the decision. On its face, SB 280 and the 2021 Rule may only impact a small number of individuals: those individuals who want to amend the sex designation of their birth certificates and those individuals charged with enforcing the 2021 Rule. However, enforcement of critical provisions within the Montana State Constitution has a much broader effect.

The Due Process Clause and the void for vagueness doctrine, under which SB 280 and the 2021 Rule are unconstitutional, are designed to prevent arbitrary or discriminatory enforcement of laws and statutes. According to the United States Supreme Court, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253, 132 S. Ct. 2307, 183 L. Ed. 2d 234 (2012). Preserving a "fundamental principle" of our legal system benefits all people protected by our constitutions. Upholding the Due Process Clause of the Montana State Constitution ensures that it remains in full force to protect all citizens of the state of Montana. Further, permitting unconstitutional laws to remain in force, erodes the constitutional protections enjoyed by all citizens of the state of Montana. This factor weighs heavily towards awarding attorney fees to Plaintiffs.

Attorney fees are not warranted "in every garden variety declaratory judgment action". *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 44, 354 Mont. 50, 221 P.3d 1230. However, this case is far from a "garden variety" declaratory judgment action.

MCA § 15-10-711(1)(b) allows a court to award attorney fees to the prevailing party if the State's defense is frivolous or in bad faith. While not dispositive, MCA § 15-10-711(1)(b) can be used as a guidepost to analyze a claim for fees under the private attorney general doctrine. *Western Tradition P'ship*, ¶ 18. The court has applied this

standard to protect the State against an award of attorney fees when the state acts in good faith. *Id*. at ¶ 18. *See also In re Dearborn Drainage Area*, 240 Mont. 39, 43, 782 P.2d 898.

In their Response to Plaintiffs Motion for Summary Judgment, Defendants asserted **SEVEN** times that they acted in good faith. (Court Doc. #129). This Court is not persuaded. Defendants stated in their Response that this case "obviously began with a mistaken premise that a person's sex could be changed with a medical procedure". However, Defendants then chose to spend considerable time and energy defending a statute that was based on this "mistaken premise". Defendants indicated they understood sex to be immutable multiple times early in the litigation. In their Combined Brief in Opposition to Motion for Preliminary Injunction and in Support of Motion to Dismiss, filed on August 18, 2021, merely a month after litigation commenced, Defendants referred to sex as a "biological (and genetic) fact" at birth. (Court Doc. #24). Later, in June 2022, Defendants acknowledged that the basis of SB 280 was "mistaken" as "no surgery changes a person's sex". (Court Doc. #123).

Even after acknowledging that SB 280 was facially flawed and impossible to comply with, Defendants continued to file pleadings and extend the litigation for another year. At the end of that, in response to Plaintiffs' Motion for Summary Judgment, Defendants finally conceded that, in fact, "no surgery can change a person's sex" and that SB 280 was unconstitutional from its inception. (Court Doc. #129).

Following Defendants' concession to summary judgment, a hearing on pending motions was held. Defendants' attorney came before this Court with "hat in hand" to apologize on behalf of his clients. However, in that hearing, Defendants did not mention good faith.

The state here did not act in good faith or in accordance with constitutional and statutory mandates. This Court determined that it was in contempt of court for a significant portion of this litigation. Weighing the equities, this is not a garden variety case. The Defendants spent considerable time and effort defending a statute that they knew was unconstitutional. They ignored orders from this Court and an Order from the Supreme Court. Pursuant to MCA § 27-8-313, awarding Plaintiffs with reasonable attorney fees and costs for this litigation is proper. However, this determination does not allow Plaintiffs to recover twice on the attorney fees awarded under the contempt of court action. Plaintiffs must provide Defendants with a careful accounting to ensure that no fee or cost is duplicated.

In the Hearing on Pending Motions that occurred on June 1st, 2023, Defendants asserted to the Court that they would "make a very strong effort to try to negotiate" an agreement for attorney fees in order to avoid another hearing. The parties are encouraged to negotiate and will have time to do so. However, that time is limited and, should negotiations break down, this Court will hold a hearing to make a determination of the reasonable attorney fees and costs that should be awarded to Plaintiffs for litigating this case.

III. CONCLUSION

Defendants are in contempt of court and are ordered to pay Plaintiffs the attorney fees and costs associated with the contempt of court action from January 10th, 2023, to June 1st, 2023. Summary judgment is granted in favor of the Plaintiffs pending a determination of reasonable attorney fees and costs. SB 280 and the 2021 Rule are permanently enjoined as unconstitutional. Reasonable attorney fees and costs will be awarded to Plaintiffs for the cost of their litigation pursuant to MCA § 27-8-313.

IT IS HEREBY ORDERED THAT Defendants are in contempt of court and are ordered to pay Plaintiffs the attorney fees and costs related to the contempt of court action from January 10th, 2023, to June 1st, 2023.

IT IS FURTHER ORDERED THAT Pending a determination of attorney fees and costs, summary judgment is granted. SB 280 and the 2021 Rule are unconstitutional and are permanently enjoined.

IT IS FURTHER ORDERED THAT Defendants are to pay Plaintiffs the reasonable attorney fees and costs for litigating this action before this Court from the preparation of the original complaint to June 1st, 2023.

IT IS FURTHER ORDERED THAT Plaintiffs are to serve an itemized statement of attorney fees and costs upon Defendants no later than twenty (20) days from the filing date of this Order. Defendants shall file any response or objection to Plaintiffs' fee calculation no later than twenty (20) days from the date of service. Parties are encouraged to make a strong effort to negotiate attorney fees between them. Should negotiations break down, either party may file a motion requesting a hearing before this Court regarding attorney fees no more than sixty (60) days from the filing date of this Order.

DATED June 26, 2023

/s/ Michael G. Moses
District Court Judge

cc: Counsel of Record

Electronically Signed By:
Hon. Judge Michael Moses
Mon, Jun 26 2023 05:05:43 PM

EXHIBIT 7

DPHHS is offering one-time incentive payments to recruit employees at Montana's state-run health care facilities. For more information go to Work4DPHHS.com

Attention Veterans: Please take the Veterans Long-Term Care Needs survey. This survey is extended to July 15, 2024

FOR IMMEDIATE RELEASE
Date: February 20 2024

Contact: Jon Ebelt, Communications Director, DPHHS, (406) 444-0936, (406) 461-3757
jebelt@mt.gov

DPHHS Officials State 2022 Administrative Rule Governs Sex Marker Birth Certificate Change Requests

Department of Public Health and Human Services (DPHHS) officials announced today that, effective immediately, the agency will process applications to change sex markers on Montana birth certificates pursuant to a 2022 administrative rule on the subject and consistent with a 2023 law.

"DPHHS must follow the law, and our agency will consequently process requests to amend sex markers on birth certificates under our 2022 final rule," DPHHS Director Charlie Brereton said. **"This notification serves to keep the public apprised of the law and what to expect from DPHHS going forward."**

The 2022 final rule states the sex of a registrant on a birth certificate may only be corrected if the sex of an individual was listed incorrectly on the original certificate as a result of a scrivener's error or a data entry error, or if the sex of the individual was misidentified on the original certificate.

In both cases, the department must receive a correction affidavit and supporting documents consistent with the law.

DPHHS adds that all requests for birth certificate sex marker changes received by, or pending with, the DPHHS Office of Vital Records on or after October 1, 2023, which have not yet been adjudicated will be evaluated and processed in accordance with the criteria set forth under the 2022 rule. This implementation date coincides with the effective date of Senate Bill (SB) 458, enacted into law during the 2023 Legislative Session.

While DPHHS adopted the 2022 rule pursuant to independent statutory authority, implementation of the rule aligns with the requirements of SB 458. Recently, the Department has determined that enactment of SB 458, with the ending of the preliminary injunction in *Marquez* v. *State of Montana, et al.*, requires implementation of the 2022 rule.

SB 458 defines sex in Montana law and provides that sex is to be determined by the biological and genetic indication of male or female without regard to an individual's psychological, behavioral, social, chosen, or subjective experience of gender.

This statutory definition controls for purposes of defining references to "sex" under Montana's Vital Statistics statutes and administrative rules.

EXHIBIT 8

FILED SEP 27 2023
AMY MCGHEE, CLERK
By [signature] Deputy

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

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

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

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

131

1 **ORDERS**

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

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

5 **MEMORANDUM**

6 **I. INTRODUCTION**

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

14 **II. BACKGROUND**

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

17 **A. Montana Senate Bill 99**

18 SB 99 reads as follows:

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

> (i) surgical procedures, including a vaginectomy, hysterectomy, oophorectomy, ovariectomy, reconstruction of the urethra, metoidioplasty, phalloplasty, scrotoplasty, implantation of erection or testicular protheses, subcutaneous mastectomy, voice surgery, or pectoral implants;
>
> (ii) supraphysiologic doses of testosterone or other androgens; or
>
> (iii) puberty blockers such as GnRH agonists or other synthetic drugs that suppress the production of estrogen and progesterone to delay or suppress pubertal development in female minors.
>
> (b) Except as provided in subsection (1)(c), a person may not knowingly provide the following medical treatments to a male minor to address the minor's perception that his gender or sex is not male:
>
> (i) surgical procedures, including a penectomy, orchiectomy, vaginoplasty, clitoroplasty, vulvoplasty, augmentation mammoplasty, facial feminization surgery, voice surgery, thyroid cartilage reduction, or gluteal augmentation;
>
> (ii) supraphysiologic doses of estrogen; or
>
> (iii) puberty blockers such as GnRH agonists or other synthetic drugs that suppress the production of testosterone or delay or suppress pubertal development in male minors.
>
> (c) The medical treatments listed in subsections (1)(a) and (1)(b) are prohibited only when knowingly provided to address a female minor's perception that her gender or sex is not female or a male minor's perception that his gender or sex is not male. Subsections (1)(a) and (1)(b) do not apply for other purposes, including:
>
> (i) treatment for a person born with a medically verifiable disorder of sex development . . . .
>
> (ii) treatment of any infection, injury, disease, or disorder that has been caused or exacerbated by a medical treatment listed in subsection (1)(a) or (1)(b), whether or not the medical treatment was performed in accordance with state and federal law and whether or not funding for the medical treatment is permissible under state and federal law.

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

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

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

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

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

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

B. Terminology

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

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

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

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

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

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

7 A marked incongruence between one's experienced/expressed gender and natal gender of at least 6 months in duration, as manifested by at
8 least two of the following:

9 A. A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young
10 adolescents, the anticipated secondary sex characteristics)[;]

11 B. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's
12 experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex
13 characteristics)[;]

14 C. A strong desire for the primary and/or secondary sex characteristics of the other gender[;]

15 D. A strong desire to be of the other gender (or some alternative
16 gender different from one's desired gender)[;]

E. A strong desire to be treated as the other gender (or some
17 alternative gender different from one's designated gender[;]

18 F. A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from
19 one's desired gender)[.]

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

C. Parties

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

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

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

D. Standards of Care for Treatment of Gender Dysphoric Minors

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

i. Plaintiffs' Argument

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

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

1 Plaintiffs argue that treatment for gender dysphoria differs depending on an
2 individual's needs, and the guidelines for medical treatment for gender dysphoria
3 differ depending on whether the patient is a minor or an adult. Olson-Kennedy Rep.,
4 ¶¶ 34, 36; Danielle N. Moyer, Ph.D., ¶ 23 (Doc. 58) [hereinafter "Moyer Decl."]. No
5 medical intervention beyond mental health counseling is recommended or provided
6 to any person before the onset of puberty. Olson-Kennedy Rep., ¶ 35; Moyer Decl.,
7 ¶ 23. Medical interventions may become necessary and appropriate once a
8 transgender person reaches puberty. Olson-Kennedy Rep., ¶ 35. Further, before any
9 medical intervention is pursued, a qualified provider with training and experience in
10 the field of gender dysphoria in adolescents should assess the individual to ensure
11 medical treatment is appropriate. Moyer Decl., ¶ 22. Informed consent must also be
12 obtained before engaging in gender-affirming care, which includes a careful review
13 of potential risks and benefits of specific treatments with the minor and their
14 guardian. Olson-Kennedy Rep., ¶¶ 51, 66–73.

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

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

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

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

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

19

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ii. Defendants' Argument

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

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

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

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

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

iii. Plaintiffs' Reply

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

E. Senate Bill 422

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

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

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

Id., § 3.

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

F. Procedural History

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

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

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

III. PRELIMINARY INJUNCTION STANDARD

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

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

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

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

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

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

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

IV. ANALYSIS

A. Plaintiffs are Likely to Succeed on the Merits

i. Count I – Violation of the Equal Protection Clause

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

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

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

1. Whether the Classes are Similarly Situated

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

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

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

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

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

9 Further, "every major expert medical association recognizes that gender-
10 affirming care for transgender minors may be medically appropriate and necessary
11 to improve the *physical and mental health* of transgender people." *Brandt v.*
12 *Rutledge*, 551 F. Supp. 3d 882, at 891 (E.D. Ark. 2021), *aff'd*, 47 F.4th 661 (8th Cir.
13 2022) (emphasis added) (enjoining defendants from enforcing an Arkansas law
14 similar to SB 99 and specifically holding plaintiffs were likely to succeed on the
15 merits of their equal protection claim). Therefore, Defendants' argument that is
16 premised on a distinction between physical conditions and psychological conditions
17 fails as it relates to whether classes are similarly situated because both are medical
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20 [5] *See* Response of Michael K. Laidlaw, M.D., to Rebuttal Reports of Plaintiffs' Expert Witnesses, ¶ 2 (Doc. 127) (stating: "Dr. Olson-Kennedy at times discusses the 'clinical care of children, adolescents, or adults with gender dysphoria' as though it is somehow divorced and separate from the rest of medical and endocrine care.")

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

2. Which Level of Scrutiny Applies

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

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

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

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

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

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

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

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

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

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

3 Although the Montana Supreme Court has declined to explicitly label sex or
4 gender a suspect class, if heightened scrutiny is the appropriate level of review when
5 the federal Equal Protection Clause is implicated, the Court posits that strict scrutiny
6 is the appropriate level of review when Montana's Equal Protection Clause is
7 implicated. Again, "Montana's equal protection clause 'provides for even more
8 individual protection' than does the federal equal protection clause . . . ." *Snetsinger*,
9 ¶ 58 (quoting *Cottrill*, 229 Mont. at 42, 744 P.2d at 897) (Nelson, J., concurring).

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

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

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

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

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

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

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

3. Applying Strict Scrutiny to SB 99

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Count III – Violation of the Right to Privacy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Phoebe Decl., ¶¶ 11, 21.

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

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

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

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

1 the preliminary injunction test requires that the applicant establish the order is in the
2 public interest. *See* Mont. S. 191, § 1(d); *Winter*, 555 U.S. at 20. "The 'public
3 interest' mostly concerns the injunction's 'impact on non-parties rather than
4 parties.'" *Porretti*, 11 F.4th at 1050 (citing *Bernhardt v. Los Angeles County*, 339
5 F.3d 920, 931 (9th Cir. 2003)). "Where, as here, the government opposes a
6 preliminary injunction, the third and fourth factors merge into one inquiry." *Porretti*,
7 11 F.4th at 1047 (citing *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th
8 Cir. 2014)).

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

15 The risk of adverse effects to Youth Plaintiffs' health, including increased risk
16 of suicidality, certainly outweighs the intangible harm the State will endure if it is
17 enjoined from enforcing SB 99 and the status quo is maintained until a full trial on
18 the merits is held. Further, "[i]t is always in the public interest to prevent the
19 violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002
20 (9th Cir. 2012). Protecting Plaintiffs' constitutional rights is an integral function of

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

V. CONCLUSION

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

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

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

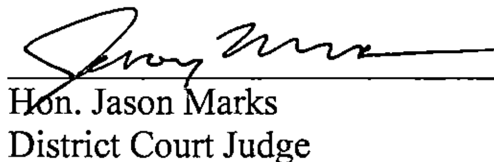
Next, Plaintiffs demonstrated that they are likely to suffer irreparable harm in the absence of preliminary relief. The Court specifically finds irreparable harm is likely to occur for two separate reasons: first, the likely infringement of Plaintiffs' constitutional rights would cause irreparable harm;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

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

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

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

DATED this 27th day of September, 2023.



Hon. Jason Marks
District Court Judge

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