IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2026 ND 162

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

and

Dr. Luis Casas, an individual, on behalf of himself and his patients, Plaintiff and Appellant

v.

Drew H. Wrigley, in his official capacity as Attorney General for the State of North Dakota, Defendant and Appellee

and

Kimberlee Jo Hegvik, in her official capacity as State's Attorney for Cass County, Julie Lawyer, in her official capacity as State's Attorney for Burleigh County, and Amanda Engelstad, in her official capacity as the State's Attorney for Stark County, Defendants

No. 20260075

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Jackson J. Lofgren, Judge.

AFFIRMED.

Opinion of the Court by Bahr, Justice, in which Chief Justice Fair McEvers, Justices Tufte and Jensen, and District Judge Hurly joined. Justice Tufte filed an opinion specially concurring, in which Justice Jensen joined.

Tanya G. Pellegrini (argued), San Francisco, CA, Christina A. Sambor (appeared), Bismarck, ND, Jess Braverman (appeared) and Greta A. Wiessner (on brief), St. Paul, MN, and Paige B. Suelzle (on brief), Seattle, WA, for plaintiff and appellant.

Philip Axt (argued), Solicitor General, and Courtney R. Titus (on brief), Assistant Attorney General, Bismarck, ND, Daniel L. Gaustad (appeared), Joseph E. Quinn (appeared), and Marcus C. Skonieczny (on brief), Special Assistant Attorneys General, Grand Forks, ND, for defendant and appellee.

Timothy Q. Purdon, Amy R. Sisk, Bismarck, ND, and Michael Milov-Cordoba, Douglas E. Keith, Alicia Bannon, New York, NY, for amici curiae Brennan Center for Justice at NYU School of Law and Professor Robert F. Williams.

Brenda L. Blazer, Bismarck, ND, and D. Jean Veta, William R. Isasi, Jeffrey E. Sandberg, and Max M. Larson, Washington, DC, for amici curiae American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Academy of Family Physicians, American Academy of Nursing, American College of Obstetricians and Gynecologists, American College of Osteopathic Pediatricians, American College of Physicians, Academic Pediatric Association, American Pediatric Society, Association of American Medical Colleges, Endocrine Society, GLMA: Health Professionals Advancing LGBTQ+ Equality, National Association of Pediatric Nurse Practitioners, Pediatric Endocrine Society, Pediatric Endocrinology Nursing Society, Societies for Pediatric Urology, Society for Adolescent Health and Medicine, Society of Pediatric Nurses, and World Professional Association for Transgender Health.

Dane DeKrey, Moorhead, MN, and Michelle Banker, Alison Tanner, Catherine E. Stetson, and Jason A. Mills, Washington, DC, for amici curiae National Women's Law Center and Legal Scholars.

Stormy Vickers, Fargo, ND, Matthew Benedetto, Los Angeles, CA, Jaime M. Gher, New York, NY, and Emily Stark, Washington DC, for amicus curiae Global Justice Center.

David A. Tamisiea and Christopher T. Dodson, Bismarck, ND, for amicus curiae North Dakota Catholic Conference.

Reed A. Soderstrom, Minot, ND, and Henry W. Frampton, IV and Daniel J. Grabowski, Scottsdale, AZ, for amicus curiae Alliance Defending Freedom.

Zachary E. Pelham, Bismarck, ND, and A. Barrett Bowdre, Solicitor General, Montgomery, AL, for amici curiae State of Alabama, State of Arkansas, State of Florida, State of Georgia, State of Idaho, State of Indiana, State of Iowa, State of Kansas, State of Kentucky, State of Louisiana, State of Mississippi, State of Missouri, State of Montana, State of Nebraska, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of Texas, State of Utah, State of West Virginia, and State of Wyoming.

T.D., et al. v. Wrigley, et al.
No. 20260075

Bahr, Justice.

[¶1] Dr. Luis Casas appeals from an amended judgment denying declaratory relief that N.D.C.C. ch. 12.1-36.1 violates the North Dakota Constitution and denying injunctive relief restraining Defendants from enforcing chapter 12.1-36.1. On appeal, Dr. Casas argues chapter 12.1-36.1 violates Article I, §§ 1, 21, and 22 of the North Dakota Constitution. For the reasons explained below, Dr. Casas's appeal is limited to whether section 12.1-36.1-02(1)(c) is unconstitutional under § 1 or § 21. The district court did not err in denying Dr. Casas's requested declaratory and injunctive relief. We affirm.

I

[¶2] The North Dakota Legislative Assembly enacted 2023 H.B. 1254, codified at N.D.C.C. ch. 12.1-36.1 (the Act), in April 2023. In doing so, it joined the more than two dozen states that statutorily restrict health care providers from providing certain gender-affirming treatment to minors. *See, e.g.*, Ala. Code §§ 26-26-1 to -9; Ariz. Rev. Stat. Ann. § 32-3230; Ark. Code Ann. §§ 20-9-1501 to -1504; Fla. Stat. Ann. § 456.52; Ga. Code Ann. § 31-7-3.5; Idaho Code § 18-1506C; Ind. Code Ann. §§ 25-1-22-1 to -18; Iowa Code Ann. § 147.164; Kan. Stat. Ann. §§ 65-28,137 to 65-28,142; Ky. Rev. Stat. Ann. § 311.372; La. Rev. Stat. Ann. §§ 40:1098.1 to :1099.1; Miss. Code Ann. §§ 41-141-1 to -9; Mo. Ann. Stat. § 191.1720; Mont. Code Ann. §§ 50-4-1001 to -1006, 37-2-307, 53-6-135; Neb. Rev. Stat. Ann. §§ 71-7301 to -7307; N.H. Rev. Stat. Ann. §§ 332-M:1 to -M:5; N.C. Gen. Stat. Ann. §§ 90-21.150 to -154; Ohio Rev. Code Ann. §§ 3129.02 to 3129.06; Okla. Stat. Ann. tit. 63, § 2607.1; S.C. Code Ann. § 44-42-310 to -360; S.D. Codified Laws §§ 34-24-33 to -38; Tenn. Code Ann. §§ 68-33-101 to -110; Tex. Health & Safety Code Ann. §§ 161.701 to -706; Utah Code Ann. §§ 58-1-603 to -603.1, 78B-3-427; W. Va. Code § 30-14-17; Wyo. Stat. Ann. § 35-4-1001.

A

[¶3] During the legislative process, the House and Senate Human Services Committees held public hearings regarding H.B. 1254. The legislative record for

H.B. 1254 reflects extensive committee deliberations in both chambers. Supporters, opponents, and witnesses testified about the medical evidence, including the risks, benefits, and potential serious and irreversible adverse effects of gender-affirming treatment; the standard of care for gender-affirming treatment; detransition accounts and rates; the capacity of minors to make decisions about medical procedures; and parental authority.

[¶4] The legislature passed H.B. 1254. Governor Doug Burgum signed the bill into law, and it became effective on April 21, 2023. The bill is codified as N.D.C.C. ch. 12.1-36.1. The Act, which contains four sections, provides:

> **12.1-36.1-01. Definitions.**
> As used in this chapter:
> 1. "Health care provider" means a licensed physician, physician assistant, nurse, or a certified medical assistant.
> 2. "Minor" means an individual under the age of eighteen. The term includes an emancipated individual.
> 3. "Sex" means the biological state of being female or male, based on the individual's nonambiguous sex organs, chromosomes, or endogenous hormone profiles at birth.
>
> **12.1-36.1-02. Perception of a minor's sex - Prohibited practices - Penalty.**
> 1. Except as provided under section 12.1-36.1-03, if a minor's perception of the minor's sex is inconsistent with the minor's sex, a health care provider may not engage in any of the following practices for the purpose of changing or affirming the minor's perception of the minor's sex:
> a. Perform castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, or vaginoplasty;
> b. Perform a mastectomy;
> c. Prescribe, dispense, administer, or otherwise supply any drug that has the purpose of aligning the minor's sex with the minor's perception of the minor's sex when the perception is inconsistent with the minor's sex, including:
> (1) Puberty-blocking medication to stop normal puberty;

(2) Supraphysiologic doses of testosterone to females; or
(3) Supraphysiologic doses of estrogen to males; or

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

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

12.1-36.1-03. Exceptions.

Section 12.1-36.1-02 does not apply:

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

12.1-36.1-04. Statutory limitation.

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

[¶5] In summary, the Act prohibits health care providers from engaging in certain practices for the purpose of aligning a minor's sex with the minor's perception of the minor's sex when the perception is inconsistent with the minor's biological sex. N.D.C.C. § 12.1-36.1-02(1). In this opinion, we refer to the practices identified in N.D.C.C. § 12.1-36.1-02(1) as "gender-affirming

treatment." We refer to the drugs identified in section 12.1-36.1-02(1)(c) as "gender-affirming medication." The Act does not prohibit health care providers from providing gender-affirming treatment to adults. *Id.* Section 12.1-36.1-03 establishes two additional exceptions. The Act does not apply to a procedure performed on a minor born with a medically verifiable genetic disorder of sex development. N.D.C.C. § 12.1-36.1-03(1). The Act also does not apply to any procedure if its performance or administration began before April 21, 2023, the Act's effective date. N.D.C.C. § 12.1-36.1-03(2). A health care provider who violates the Act may be subject to criminal penalties. N.D.C.C. § 12.1-36.1-02(2).[1]

[¶6] The Act defines "sex" as "the biological state of being female or male, based on the individual's nonambiguous sex organs, chromosomes, or endogenous hormone profiles at birth." N.D.C.C. § 12.1-36.1-01(3). Under this definition, "sex" is a biological characteristic determined at birth, not by an individual's gender identity or the individual's perception of the individual's sex.

B

[¶7] Three minors, their parents, and Dr. Casas challenged the Act, seeking declaratory relief that the Act violates the North Dakota Constitution and injunctive relief prohibiting Defendants from enforcing the Act. Each minor plaintiff was receiving gender-affirming medication when the Act took effect. Dr. Casas is a board-certified pediatric and adult endocrinologist. He joined the action asserting claims on behalf of himself and his minor patients. Defendants are the North Dakota Attorney General and three state's attorneys, all sued in their official capacities.

[¶8] Plaintiffs asserted five challenges to the Act under the North Dakota Constitution. They asserted the Act violates equal protection under Article I,

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[1] Dr. Casas asserts a physician who violates the Act may be subject to disciplinary action under N.D.C.C. § 43-17-31(1)(c) (providing the North Dakota Board of Medicine may impose disciplinary action against a physician for "[t]he conviction of any misdemeanor determined by the board to have a direct bearing upon a person's ability to serve the public as a practitioner of medicine or any felony").

§ 21; the fundamental right to parent under Article I, § 1; the right to personal autonomy and self-determination under § 1; procedural due process under Article I, § 9; and due process under § 9 because the Act is vague. Plaintiffs moved for a temporary restraining order and preliminary injunction on the same day they filed the complaint.

[¶9] After Defendants filed answers, Plaintiffs and the defendant state's attorneys stipulated that the state's attorneys would not enforce the Act pending final resolution, would honor an order blocking the Act if the court issued one, and were not required to participate in the case because the Attorney General intended to defend the Act's constitutionality. The district court approved the stipulation.

[¶10] The district court denied Plaintiffs' motion for a temporary restraining order after a hearing. Later, after another hearing, the court denied Plaintiffs' motion for preliminary injunction.

[¶11] The North Dakota Attorney General (the State) filed two motions for summary judgment. In the first motion, the State argued Plaintiffs lacked standing to challenge the Act. In the second motion, the State argued the Act does not violate the North Dakota Constitution. After oral argument, the district court granted the motions in part and denied them in part.

[¶12] The district court held no Plaintiff had standing to challenge the surgical prohibitions in N.D.C.C. § 12.1-36.1-02(1)(a). It did so because Plaintiffs acknowledged that the applicable standards of care do not recommend the prohibited genital surgery for minors, and that no North Dakota provider performs genital surgery on minors to treat gender dysphoria.[2]

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[2] As explained by the district court:

> Gender dysphoria is a recognized mental health condition included in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders Fifth Edition* or *DSM-5-TR*. It is "[a] marked incongruence between

[¶13] The district court dismissed the three minor plaintiffs for lack of standing. Interpreting N.D.C.C. § 12.1-36.1-03(2), the court held the practices prohibited by section 12.1-36.1-02 are not criminalized if the minor was receiving any of the identified treatment prior to April 21, 2023. Because each minor plaintiff was receiving "prescription medications to treat gender dysphoria in North Dakota prior to April 21, 2023," the court concluded they are not subject to the Act's prohibitions and "can receive any medical care in North Dakota they could have received prior to the [Act's] passage." It held, "The minor Plaintiffs and their parents have not suffered threatened or actual injury from the [Act]. They lack standing to challenge it."

[¶14] Dr. Casas remained the sole plaintiff. The district court held he had first-party standing to pursue claims for procedural due process and vagueness, and third-party standing on behalf of his minor patients to pursue claims for equal protection and violation of the right to personal autonomy and self-determination. The district court held Dr. Casas "does not have first-party standing to pursue claims the [Act] violates the fundamental right to parent. He is not the parent of a child being denied medical treatment in North Dakota because of the [Act]." It further held Dr. Casas does not have third-party standing to advocate for the rights of the plaintiff parents. Because it previously held the plaintiff parents lacked standing, the court held no party has standing to advance the claim the Act violates parents' fundamental right to parent. Thus, the court concluded it need not decide that issue. On the merits, the court granted the State summary judgment on Dr. Casas's procedural due process and vagueness claims under Article I, § 9.

[¶15] The district court held a seven-day trial on the personal autonomy and equal protection claims. During trial, the court received testimony from endocrinologists, psychologists, psychiatrists, current and former Food and Drug Administration staff, historians, and lay witnesses with personal

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> one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least six [criteria]."

(Internal record citation omitted.)

knowledge of the Act's effects. It also received more than 180 exhibits, including the legislative record of H.B. 1254.

[¶16] On October 8, 2025, the court issued an 85-page order for judgment including its findings of fact and conclusions of law. Among other things, the district court found, "the evidence establishes there is a legitimate ongoing debate regarding the safety and effectiveness of the practices prohibited by the [Act]." In its order, the court addressed the "acknowledged health risks when prescribing puberty-blocking medications and cross sex hormones to minors." The court noted evidence that the medications impact bone density, can cause blood clots, can increase blood pressure and the risk of heart disease, and might impact fertility. The court noted testimony that the use of the medications for the prohibited purposes "is expected to have a very significant and likely permanent effects on fertility and in many respects the likelihood is high that it will result in irreversible sterility."

[¶17] The district court stated the legislative record shows legislators were concerned whether minors have the capacity to make decisions regarding irreversible long-term health effects. The court found "[t]he evidence presented at trial establishes this is a valid concern." After noting "there are inherent risks in all forms of medical treatment," the court stated "the risks associated with providing minors with puberty blockers and cross-sex hormones are potentially severe and irreversible. The evidence presented at trial establishes there is a legitimate concern regarding the capacity of minors to understand and appreciate the long-term consequences of the practices prohibited by" the Act.

[¶18] After discussing the evidence in detail, the district court reiterated there is "an ongoing debate among medical experts regarding the evidence in support of providing puberty blockers and cross-sex hormones to minors for the treatment of gender dysphoria. In this area, the parties' witnesses could not be more opposite." It then discussed the significant disagreement among qualified medical professionals concerning the quality of the available evidence; the reliability of the studies and reviews regarding the safety of gender-affirming treatment, including whether they are scientific or evidence-based, independent, or biased and influenced by political pressure; the appropriate standards of care;

and the long-term benefits and risks of gender-affirming treatment. The court discussed a 2024 review commissioned by England's National Health Service (NHS England), known as the Cass Review. It explained:

> In the foreword of the Cass Review, Dr. Cass noted "[d]espite the best intentions of everyone with a stake in this complex issue, the toxicity of the debate is exceptional." Dr. Cass indicated "[t]his is an area of remarkably weak evidence, and yet results of studies are exaggerated or misrepresented by people on all sides of the debate to support their viewpoint." "The reality is that we have no good evidence on the long-term outcomes of interventions to manage gender related distress." The Cass Review indicated its findings raised questions about the quality of currently available guidelines and that most guidelines had not followed international standards for guideline development. Regarding puberty blockers, the Cass Review reported "[the] systematic review found no evidence that puberty blockers improve body image or dysphoria, and very limited evidence for positive mental health outcomes, which without a control group, could be due to placebo effect or concomitant psychological support." On cross-sex hormones, the Cass Review reported the authors of the systematic review had determined that based on a lack of high-quality evidence, "[n]o conclusions can be drawn about the effect on gender dysphoria, body satisfaction, psychosocial health, cognitive development, or fertility."

(Internal record citations omitted.) The Supreme Court discussed the Cass Review in *United States v. Skrmetti*, 605 U.S. 495, 525 (2025), "to demonstrate the open questions regarding basic factual issues before medical authorities and other regulatory bodies."

[¶19] Later, the district court summarized:

> The evidence presented in this case establishes there are recognized concerns regarding the medical risks associated with providing hormone blockers and cross-sex hormones to minors to treat gender dysphoria. There are legitimate concerns about the ability of these minors to understand the long-term effects of these interventions fully. The evidence establishes there is an ongoing

> international debate regarding the safety and effectiveness of the medical procedures prohibited by the [Act]. . . .

[¶20] The district court concluded the Act does not violate Article I, § 1 (the right to personal autonomy and self-determination) or Article I, § 21 (equal protection). The court denied Dr. Casas's requests for declaratory judgment that the Act violates the North Dakota Constitution and for a permanent injunction restraining Defendants from enforcing the Act. It granted Dr. Casas's alternative request for a declaration that the Act does not apply "to the medical treatment of a minor who was receiving any of the practices identified under N.D.C.C. § 12.1-36.1-02(1) prior to April 21, 2023[.]" Dr. Casas timely appealed.

[¶21] The scope of this appeal is limited. Neither the minor plaintiffs nor their parents appealed any aspect of the district court's orders and judgment, including the court's partial summary judgment order dismissing them for lack of standing and dismissing the fundamental right to parent claim. Dr. Casas does not challenge the court's order holding he lacks standing to pursue the right to parent claim, holding no plaintiff has standing to challenge N.D.C.C. § 12.1-36.1-02(1)(a), and dismissing his procedural due process and vagueness claims. The State does not challenge the court's interpretation of N.D.C.C. § 12.1-36.1-03(2) and declaratory judgment that the Act does not apply "to the medical treatment of a minor who was receiving any of the practices identified under N.D.C.C. § 12.1-36.1-02(1) prior to April 21, 2023[.]" On appeal, Dr. Casas challenges only the prohibitions in section 12.1-36.1-02(1)(c) (prohibiting gender-affirming medication). His briefs do not cite or argue section 12.1-36.1-02(1)(a), (b), or (d). Thus, the issue on appeal is whether Dr. Casas has met his burden of demonstrating section 12.1-36.1-02(1)(c), read together with the Act's definitions (section 12.1-36.1-01) and criminal penalties (section 12.1-36.1-02(2)), is unconstitutional under § 1 or § 21 of Article I of the North Dakota Constitution.

II

[¶22] The United States Supreme Court and several federal and state appellate courts have addressed the constitutionality of legislative enactments similar to N.D.C.C. ch. 12.1-36.1. *See, e.g.*, *Skrmetti*, 605 U.S. at 505–07, 525 (holding Tennessee's Prohibition on Medical Procedures Performed on Minors Related to

Sexual Identity law, Tenn. Code Ann. § 68-33-101 to -110, does not violate the equal protection guarantee of the Fourteenth Amendment); *Poe by & through Poe v. Drummond*, 149 F.4th 1107, 1119, 1132 (10th Cir. 2025) (holding plaintiffs failed to show a likelihood of success on the merits of their challenge to Okla. Stat. tit. 63, § 2607.1 on the grounds the law violates the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment); *Brandt by & through Brandt v. Griffin*, 147 F.4th 867, 877–78, 884, 888, 890 (8th Cir. 2025) (holding Arkansas's Save Adolescents from Experimentation Act, Ark. Code Ann. §§ 20-9-1501 to -1504, does not violate the First Amendment, the Equal Protection Clause, or the Due Process Clause); *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, 121 F.4th 604, 612, 632, 634 (7th Cir. 2024) (reversing the district court's order and vacating its injunction because plaintiffs have not shown a likelihood of success on their challenges to Ind. Code §§ 25-1-22-1 to -18 under the Equal Protection Clause, the Due Process Clause, the First Amendment's Free Speech Clause, the Affordable Care Act, and the Medicaid statute); *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1210, 1231 (11th Cir. 2023) (vacating the district court's preliminary injunction because the court reviewed Alabama's Vulnerable Child Compassion and Protection Act, Ala. Code §§ 26-26-1 to -9, under the wrong standard of scrutiny for federal due process and equal protection claims); *E.N. v. Kehoe*, 726 S.W.3d 679, 684–86, 689–91 (Mo. 2026) (holding Missouri's Save Adolescents from Experimentation Act, Mo. Ann. Stat. § 191.1720, and "Medicaid ban," Mo. Ann. Stat. § 208.152(15), do not violate the equal protection, due process, and gains of industry clauses of the Missouri Constitution); *Cross by & through Cross v. State*, 2024 MT 303, ¶¶ 1, 57, 419 Mont. 290, 560 P.3d 637 (affirming the district court's grant of a preliminary injunction temporarily enjoining Mont. Code Ann. §§ 50-4-1001 to -1006, 37-2-307, 53-6-135 on the basis of plaintiffs' state constitutional claim of right to privacy); *Moe v. Yost*, 2025-Ohio-914, 265 N.E.3d 158, ¶¶ 39, 125 (Ohio Ct. App. 2025) (holding Ohio Rev. Code Ann. § 3129.02(A)(2) violates Ohio's Health Care Freedom Amendment, Art. I, § 21, and parents' substantive due process right to direct the medical care and upbringing of their children under Ohio's Due Course of Law Clause, Art. I, § 16), *appeal accepted for review*, 179 Ohio St. 3d 1425, 2025-Ohio-2537, 263 N.E.3d 360 (2025); *State v. Loe*, 692 S.W.3d 215, 222–25, 227 (Tex. 2024) (concluding plaintiffs failed to establish a probable right to relief on their claims Tex. Health

& Safety Code Ann. §§ 161.701 to -706 violate the Texas Constitution, including Art. I, § 19 (Due Course of Law Clause) and Art. I, §§ 3 and 3a (equal rights clauses)). However, each of the cited cases is distinguishable on multiple grounds. For example, the plaintiffs in the cases include minors and parents whose claims the district court in this case dismissed for lack of standing. Although similar in many ways, the laws challenged in the cases are textually distinct from North Dakota's Act. Importantly, the plaintiffs in the cases challenged the laws under federal or state constitutional provisions different from those Dr. Casas invokes. Finally, although less significant, the procedural posture of some of the cases differs from that of this case, an appeal from a final decision after trial. *See, e.g.*, *Skrmetti*, at 508–09, 526 (affirming the circuit court's reversal of the district court's grant of preliminary injunction); *Poe*, at 1119, 1132 (affirming preliminary injunction denial); *K.C.*, at 634 (reversing the district court's order and vacating its preliminary injunction); *Eknes-Tucker*, at 1210, 1231 (holding the district court abused its discretion in issuing a preliminary injunction and vacating the preliminary injunction); *Cross*, at 654 (affirming district court's grant of a preliminary injunction); *Loe*, at 239 (reversing and vacating the trial court's temporary injunction order); *see also Doe v. Surgeon Gen.*, No. 24-11996, 2024 WL 4132455, at *1 (11th Cir. Aug. 26, 2024) (granting stay on appeal of district court's order enjoining defendants' enforcement of Fla. Stat. Ann. § 456.52 and the regulations and rules implementing it). Although the cited cases are legally and factually distinguishable in many ways, the courts' analyses provide guidance, are often persuasive, and generally support this Court's analysis and holdings.

III

[¶23] This Court has a longstanding and consistent method of interpreting our constitution: we interpret constitutional provisions "to give effect to the intent and purpose of the people who adopted the constitutional provision." *Sorum v. State*, 2020 ND 175, ¶ 19, 947 N.W.2d 382; *see also Cardiff v. Bismarck Pub. Sch. Dist.*, 263 N.W.2d 105, 107 (N.D. 1978) ("In construing a written constitution we must make every effort to determine the intent of the people adopting it."). We do that because all powers of government derive from the people of this state. N.D. Const. art. I, § 2 ("All political power is inherent in the people.").

[¶24] "The Constitution of the state is its paramount law. It is a self-imposed restraint upon the people of the state in the exercise of their governmental sovereign power, either by themselves through the initiative or by their agency, the Legislature." *Egbert v. City of Dunseith*, 24 N.W.2d 907, 909 (N.D. 1946). We have explained:

> When interpreting constitutional provisions, we apply general principles of statutory construction. We aim to give effect to the intent and purpose of the people who adopted the constitutional provision. We determine the intent and purpose of a constitutional provision, if possible, from the language itself. In interpreting clauses in a constitution we must presume that words have been employed in their natural and ordinary meaning.
>
> A constitution must be construed in the light of contemporaneous history—of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect. Ultimately, our duty is to reconcile statutes with the constitution when that can be done without doing violence to the language of either.

SCS Carbon Transp. LLC v. Malloy, 2024 ND 109, ¶ 19, 7 N.W.3d 268 (quoting *Sorum*, 2020 ND 175, ¶¶ 19–20).

IV

[¶25] "Challenges to the constitutionality of a statute may be 'facial' challenges or 'as-applied' challenges." *State v. Anderson*, 2022 ND 144, ¶ 7, 977 N.W.2d 736. "The distinction between an as-applied challenge and a facial challenge relates to the breadth of the requested relief." *Access Indep. Health Servs., Inc. v. Wrigley*, 2025 ND 199, ¶ 18, 28 N.W.3d 850. "A claim that a statute on its face violates the constitution is a claim that the Legislative Assembly exceeded a constitutional limitation in enacting it, and the practical result of a judgment declaring a statute [facially] unconstitutional is to treat it 'as if it never were enacted.'" *SCS Carbon Transp.*, 2024 ND 109, ¶ 7 (quoting *Anderson*, ¶ 7). "An 'as-applied' challenge, on the other hand, is a claim that the constitution was violated by the application of a statute in a particular case." *Id.* ¶ 8. If we conclude a statute is unconstitutional

as applied, relief is generally limited to the circumstances in the particular case. *Id.*

[¶26] The district court held Dr. Casas brought a facial challenge rather than an as-applied challenge. It noted Dr. Casas requests the court enter declaratory judgment that the Act violates the North Dakota Constitution and is void and of no effect. Dr. Casas asserts he brought both an as-applied and a facial challenge.

[¶27] In his complaint, Dr. Casas requested the district court enter declaratory judgment prohibiting enforcement of the Act in its entirety, not under certain facts. In his post-trial brief, he requested the court "permanently enjoin" enforcement of the Act. On appeal, Dr. Casas requests this Court hold the district court "erred in applying rational basis review" of the Act and remand for reconsideration or, alternatively, hold the Act "fails rational basis review, declare the [Act] unconstitutional, and enjoin its enforcement."

[¶28] Dr. Casas's only claims on appeal are based on his third-party standing on behalf of his minor patients. His third-party claims are not fact-specific. Rather, the claims relate generally to the Act's prohibition on health care providers prescribing gender-affirming medication to minors.

[¶29] Dr. Casas's claims are not based on a specific fact situation, but challenge N.D.C.C. § 12.1-36.1-02(1)(c)'s prohibitions under all circumstances. He also requests we enjoin enforcement of the Act under all circumstances. Dr. Casas's challenges on appeal are facial challenges. *See E.N.*, 726 S.W.3d at 686 ("Challengers mount only facial challenges. The only remedies requested seek to invalidate and prevent the enforcement of the SAFE Act and the Medicaid ban in their entireties.").

[¶30] A claim that a statute is unconstitutional on its face is a question of law fully reviewable on appeal. *City of Fargo v. State*, 2024 ND 236, ¶ 10, 14 N.W.3d 902; *see also State v. King*, 2025 ND 174, ¶ 4, 26 N.W.3d 695 ("This Court reviews a challenge to the constitutionality of a law de novo."). We have explained:

> All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging

> the statute clearly demonstrates that it contravenes the state or federal constitution. Any doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity. The power to declare a legislative act unconstitutional is one of the highest functions of the courts, and that power must be exercised with great restraint. The presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt. The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity.

City of Fargo, ¶ 10 (quoting *Simons v. State, Dep't of Hum. Servs.*, 2011 ND 190, ¶ 23, 803 N.W.2d 587).

V

[¶31] Dr. Casas contends the Act "infringes on fundamental and inalienable rights enshrined in Article I, § 1 of the North Dakota Constitution[.]"

[¶32] Article I, § 1 provides:

> All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

[¶33] The people of North Dakota ratified this state's original constitution in 1889. Except for an amendment in 1984, Article I, § 1 has remained unchanged since 1889. 1985 N.D. Sess. Laws ch. 702, § 1. The 1984 amendment changed the word "men" to "individuals" and added the right "to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed." *Id.*

[¶34] Courts review a statute that burdens a fundamental right under strict scrutiny. *Wrigley v. Romanick*, 2023 ND 50, ¶ 28, 988 N.W.2d 231. To survive strict

scrutiny, the statute must further a compelling state interest and be narrowly tailored to serve that interest. *Id.* "Fundamental rights are those which are deeply rooted in history and tradition and are implicit in the concept of ordered liberty." *Id.* ¶ 27.

[¶35] The district court held the Act does not implicate a fundamental right and the Act is subject to rational basis review. Dr. Casas asserts the court erred in its conclusion. He requests this Court remand to the district court to apply strict scrutiny.

A

[¶36] We first identify the right at issue. Only then can we evaluate whether the right is fundamental. We require a "careful description" of the right at issue because the level of generality with which we define the right matters. *Abdullah v. State*, 2009 ND 148, ¶ 27, 771 N.W.2d 246. Defining the right too broadly may take in more than the liberty interest at issue and offer no guidance. However, defining the right too narrowly or microscopically could leave a fundamental right unprotected as technology and medicine advance. The right at issue must be defined with a level of generality sufficient to protect the rights intended by the people at the time they adopted Article I, § 1.

[¶37] In his brief, Dr. Casas argues there is a fundamental "right to medical decision-making without undue government interference." That description of the right is unworkable. Dr. Casas improperly folds the government's interest into the question whether a fundamental right exists. But we must decide whether a right is fundamental before we select the level of scrutiny and weigh the governmental interest under it. In other words, whether there is "undue government interference" may depend on whether the law is subject to strict scrutiny or rational basis review, which depends on whether the right is fundamental. Thus, determining whether the right is fundamental based on whether there is "undue government interference" is circular and unworkable.

[¶38] Dr. Casas also argues adolescents diagnosed with gender dysphoria and their families have a fundamental right to make medical decisions in partnership

with licensed medical providers. Dr. Casas identifies the purported right at issue too broadly. However, he also identifies the right too narrowly.

[¶39] Dr. Casas does not have standing as a parent, and the district court dismissed as plaintiffs the parents and their fundamental right to parent claim. No party appealed the dismissal of the parents or the dismissal of the parental rights claim. Dr. Casas's identification of the right at issue is too broad because the parental rights claim is not before this Court.

[¶40] Dr. Casas's identified fundamental right of adolescents diagnosed with gender dysphoria to make medical decisions in partnership with licensed medical providers is too narrow. Identifying the right by a medical diagnosis or procedure, especially one that did not exist in 1889, may be too narrow to protect the rights intended by the people who adopted Article I, § 1. We must apply the constitution to the situation that now exists. "The constitution is unchanged but the needs over which it may control have changed." *Ferch v. Hous. Auth. of Cass Cnty.*, 59 N.W.2d 849, 856 (N.D. 1953). Although times have changed, the meaning of the constitution has not. *See* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 67 (5th ed. 1883) ("A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion."). Defining a fundamental right by a modern medical diagnosis or procedure, as some courts have done, forecloses recognition of a fundamental right because the diagnosis or procedure could not be shown to be deeply rooted in history and tradition. *See Poe*, 149 F.4th at 1130–31 ("This recent development in the medical field regarding gender transition procedures for minors shows that our Nation does not have a deeply rooted tradition in providing gender transition procedures to minors."); *K.C.*, 121 F.4th at 625 (stating "the gender transition procedures at the heart of appellees' claimed right have no such long history. The first report of a minor transgender patient treated with puberty blockers was in the Netherlands in 1998."); *Eknes-Tucker*, 80 F.4th at 1220–21 ("But the use of these medications in general—let

alone for children—almost certainly is not 'deeply rooted' in our nation's history and tradition. Although there are records of transgender or otherwise gender nonconforming individuals from various points in history, the earliest-recorded uses of puberty blocking medication and cross-sex hormone treatment for purposes of treating the discordance between an individual's biological sex and sense of gender identity did not occur until well into the twentieth century."); *Loe*, 692 S.W.3d at 233 ("The law merely restricts the availability of new treatments with which medical providers may treat children diagnosed with a newly defined medical condition, gender dysphoria.").

[¶41] Based on the procedural posture of this case, and Dr. Casas's third-party standing on behalf of his minor patients, the issue is whether a minor has a fundamental right to a particular course of medical treatment.[3]

[¶42] Having identified the right at issue, we address whether the right is one the people intended when they adopted Article I, § 1.

B

[¶43] This Court does not create fundamental rights. Rather, it recognizes "inalienable rights" established in Article I, § 1. The rights expressed in § 1 are "of a general nature" and "not capable of specific definition or limitation[.]" *State v. Cromwell*, 9 N.W.2d 914, 918 (N.D. 1943). For that reason, when interpreting § 1, our "overriding objective is to give effect to the intent and purpose of the people adopting the provision." *Haugland v. City of Bismarck*, 2012 ND 123, ¶ 25, 818 N.W.2d 660. To avoid members of this Court establishing fundamental rights based on their "policy preferences," we "exercise the utmost care" when asked to acknowledge a previously unrecognized fundamental right. *Abdullah*, 2009 ND 148, ¶ 27 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). When asked to acknowledge a fundamental right, we carefully analyze the text and

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[3] Under North Dakota law, a minor's parent generally makes health care decisions for the minor. *See* N.D.C.C. § 23-12-13(3) ("Unless otherwise determined by court order, a parent may make health care decisions for the parent's minor child."). However, "[a] parent's right to demand care for his child could not be stronger than the child's right to access it." *K.C.*, 121 F.4th at 627.

history of § 1 to avoid usurping the authority our constitution "entrusts to the people's elected representatives." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 240 (2022); *see Dep't of State v. Muñoz*, 602 U.S. 899, 910 (2024) (explaining that "[i]dentifying unenumerated rights carries a serious risk of judicial overreach").

[¶44] "[T]o give effect to the intent and purpose of the people adopting the provision," *Haugland*, 2012 ND 123, ¶ 25, we construe Article I, § 1 "in light of the contemporaneous history existing at and prior to" its adoption, *Wrigley*, 2023 ND 50, ¶ 21. "We determine the intent and purpose of a constitutional provision, 'if possible, from the language itself.'" *Sorum*, 2020 ND 175, ¶ 19 (quoting *Kelsh v. Jaeger*, 2002 ND 53, ¶ 7, 641 N.W.2d 100). Because "the North Dakota Constitution must be read in the light of history," *State v. Allesi*, 216 N.W.2d 805, 817 (N.D. 1974), this Court may consider "contemporary legal practices and laws in effect when the people adopted the constitutional provisions." *Wrigley*, ¶ 17 (quoting *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶ 25, 855 N.W.2d 31). We also consider the conditions existing at and prior to the provision's adoption and other historical evidence. *See City of West Fargo v. McAllister*, 2022 ND 94, ¶ 6, 974 N.W.2d 393 ("A constitution 'must be construed in the light of contemporaneous history—of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect.'" (quoting *State ex rel. Heitkamp v. Hagerty*, 1998 ND 122, ¶ 17, 580 N.W.2d 139)); *City of Bismarck v. Fettig*, 1999 ND 193, ¶ 8, 601 N.W.2d 247 ("We look to the appropriate historical context when construing a constitutional amendment.").

[¶45] When interpreting our constitution, "[w]e must be mindful that our state Constitution is different in nature than the federal constitution." *Access Indep. Health Servs., Inc. v. Wrigley*, 2025 ND 26, ¶ 7, 16 N.W.3d 902; *see also Wrigley*, 2023 ND 50, ¶ 55 (McEvers, J., concurring specially) ("[A]nalysis of the state constitution will not always parallel analysis of the federal constitution."). "[W]e are charged with interpreting the North Dakota Constitution and its distinct provisions." *N.D. Legis. Assembly v. Burgum*, 2018 ND 189, ¶ 42, 916 N.W.2d 83. In contrast with the United States Constitution, our constitution is a constitution of limitations. *See Wrigley*, 2023 ND 50, ¶ 50 (McEvers, J., concurring specially)

(quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 173 (2d ed. 1871)). Under our constitution, the state is "possessed of all [the] general powers of legislation" *except* as prohibited or limited by a constitutional provision. *Id.* (quoting Cooley, *Constitutional Limitations*, at 173). The object of our constitution "is not to grant legislative power, but to confine and restrain it. . . . These limitations are created and imposed by express words, or arise by necessary implication[.]" *Id.* (quoting Cooley, *Constitutional Limitations*, at 174); *see also State v. Blue*, 2018 ND 171, ¶ 23, 915 N.W.2d 122 ("Under the Constitution of this state all governmental sovereign power is vested in the Legislature, except such as is granted to the other departments of the government, or expressly withheld from the Legislature by constitutional restrictions." (cleaned up)). For this reason, "[t]he only test of the validity of an act regularly passed by [our] Legislature is whether it violates any of the express or implied restrictions of the state or federal Constitution." *Blue*, ¶ 23 (quoting *State v. Miller*, 129 N.W.2d 356, 361 (N.D. 1964)).

C

1

[¶46] The plain language of Article I, § 1 does not mention a minor's right to determine the minor's medical care. Dr. Casas argues the "sweeping concept of individual liberty" and "individual freedom" embodied in the text of § 1 provide the right to determine one's medical care. Dr. Casas does not discuss the 1984 amendment to § 1 or rely on the language added in 1984. Because Dr. Casas's argument is based on the original language in § 1, not the 1984 amendment, we interpret the meaning of the original language of § 1 as the people adopting the provision understood it in 1889.

a

[¶47] Dr. Casas performs no meaningful historical inquiry tied to the alleged right at issue. He does not argue the records of the constitutional convention discuss a right for a minor to receive a particular course of medical treatment. He points to no newspaper coverage of the convention reporting public

discussion of the right he asserts on behalf of his minor patients. Dr. Casas also does not cite a single case before or around 1889 interpreting another state's natural rights provision to include the right of a minor to receive a particular course of medical treatment. Dr. Casas's briefs also cite no law from the time of the constitution's adoption, or shortly after, indicating the people of North Dakota then understood Article I, § 1 to include a natural right of a minor to receive a particular course of medical treatment. *See Wrigley*, 2023 ND 50, ¶¶ 23–25 (considering state and territorial statutes and medical journals published shortly after statehood as relevant context for understanding the meaning of § 1); *Newman v. Hjelle*, 133 N.W.2d 549, 555–57 (N.D. 1965) (considering advertisements, publicity pamphlets, and statutes in effect as evidence of how the framers and the people who adopted a provision understood it). To the contrary, since statehood, the State has regulated the practice of medicine and prohibited certain medical practices. It has also protected minors' health and welfare by limiting their rights to make certain decisions or participate in certain activities.

[¶48] The Dakota Territory regulated the practice of medicine, and the State has regulated it since statehood. *See* Compiled Laws of the Territory of Dakota § 205 (1887) (regulating who can practice medicine); N.D.R.C. §§ 275–83 (1895) (creating the state board of medical examiners); N.D.C.C. ch. 43-17 (creating the North Dakota Board of Medicine to regulate the practice of medicine). The State has also prohibited certain medical practices. *See* N.D.R.C. § 7086 (1895) (criminalizing the administration or prescription of medicine or the use of any instrument to destroy a quick child except when necessary to preserve the mother's life); N.D.R.C. § 7177 (1895) (criminalizing the administration or prescription of medicine or the use of any instrument to procure an abortion except when necessary to preserve the woman's life); N.D.R.C. § 7595 (1895) (regulating under what conditions physicians may prescribe liquor). North Dakota's long history of prohibiting abortions except to preserve a woman's life belies Dr. Casas's argument that minors have a fundamental right to a particular course of medical treatment. *See* Compiled Laws of the Territory of Dakota §§ 6538–39 (1887) (prohibiting abortion unless necessary to preserve the woman's life); N.D.R.C. § 7086 (1895) (criminalizing the administration or

prescription of medicine or the use of any instrument to destroy a quick child except when necessary to preserve the mother's life); N.D.R.C. § 7177 (1895) (criminalizing the administration or prescription of medicine or the use of any instrument to procure an abortion except when necessary to preserve the woman's life); N.D.R.C. § 7178 (1895) (criminalizing soliciting or submitting to an attempt to procure a miscarriage except when necessary to preserve the woman's life). These laws show the people who adopted § 1 did not understand adults to have a right to any medical treatment recommended by a medical provider. If an adult does not have a general right to a particular medical treatment, even if recommended by a medical provider, neither does a minor. This is because the State's authority over the actions and activities of minors is broader than its authority over adults. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("[T]he States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences."); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (stating the mere fact a state cannot prohibit certain adult activity does not mean it cannot prohibit the same activity for children); *Prince,* at 169 ("What may be wholly permissible for adults . . . may not be so for children[.]"). Since its founding, North Dakota has regulated the actions and activities of minors differently from the actions and activities of adults. *See, e.g.*, N.D.R.C. § 267 (1895) (requiring a parent or guardian of a minor to cause the minor to be vaccinated); N.D.R.C. § 7213 (1895) (prohibiting showing or delivery of obscene literature to children); N.D.R.C. § 7338 (1895) (prohibiting giving or selling tobacco to minors); N.D.R.C. § 2721 (1895) (limiting age capable of consenting to marriage); N.D.R.C. §§ 2701–05 (1895) (addressing minor's ability to contract); N.D.R.C. § 2148(35) (1895) (giving city councils the power to "forbid and punish the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor to any minor"); N.D.R.C. § 2148(74) (1895) (giving city councils the power to "tax, license and regulate secondhand and junk stores and to forbid their purchasing or receiving from minors without the written consent of their parents or guardians, any article whatever, and to prescribe punishment for any violation hereof").

[¶49] North Dakota's history shows it has regulated the medical profession and prohibited medical procedures since statehood. It also shows the State has

regulated the actions and activities of minors even more closely than those of adults. This history is inconsistent with the alleged right of a minor to a particular course of medical treatment.

b

[¶50] Dr. Casas argues the text, structure, and history of Article I, § 1 reflect a broad constitutional tradition of individual liberty that forecloses categorical legislative prohibitions on physician-directed medical treatment. In support of this argument, Dr. Casas presented testimony from Dr. Karissa Haugeberg, a historian, who opined North Dakota has a longstanding tradition of deference to the physician-patient relationship. In the district court, Dr. Casas asserted the Act "is a stark departure from and antithetical to North Dakota's history and tradition of respect and deference to the medical community."

[¶51] North Dakota's criminalization of abortion since statehood belies Dr. Casas's argument that the State defers to the medical community. The State has regulated the practice of medicine since statehood, including prohibiting particular medical procedures notwithstanding physician approval.

c

[¶52] Dr. Casas argues frontier communities accepted transgender people, "even if they were perceived as different." Dr. Jesse Bayker, a historian, opined there were transgender people living in North Dakota before statehood whom their communities accepted.

[¶53] Whether the people of North Dakota historically accepted transgender people (a term that did not exist in 1889) is irrelevant to whether a minor has a fundamental right to receive a particular course of medical treatment. *See* Webster, *A Dictionary of the English Language* (1881) ("transgender" not included in dictionary); Webster's Complete Dictionary of the English Language (unabridged 1886) (same); Webster's International Dictionary of the English Language (unabridged 1898) (same). The issue is not about transgender people; it is about whether Article I, § 1 bars the legislature from prohibiting

certain medical treatment for minors. Whether North Dakotans historically accepted transgender people has no legal or historical bearing on that issue.

d

[¶54] Citing *State ex rel. Schuetzle v. Vogel*, 537 N.W.2d 358 (N.D. 1995), Dr. Casas asserts "[t]he right to personal autonomy and self-determination includes, among many other things, a person's right to medical decision-making without undue government interference." In *Vogel*, this Court stated "[a] competent person has a constitutionally protected liberty interest to refuse unwanted medical treatment." *Id.* at 360. That statement was not based on Article I, § 1. The opinion does not cite or discuss § 1. Rather, the opinion cites *Cruzan by Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990), in which, referencing the Fourteenth Amendment to the United States Constitution, the United States Supreme Court stated "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." Thus, *Vogel* is based on federal case law interpreting the Fourteenth Amendment, not Article I, § 1. *Vogel* did not interpret § 1 or identify a state fundamental right.

[¶55] Furthermore, the federal constitutional right noted in *Vogel* "is not absolute" and is limited to the right to "refuse unwanted medical treatment." 537 N.W.2d at 360. The right to refuse unwanted medical treatment is vastly different from a right to receive unlawful medical treatment. *See Loe*, 692 S.W.3d at 228–29 (stating the court has "never questioned the Legislature's constitutional authority to regulate medical treatments—including by prohibiting certain treatments outright—for both adults and children"); *E.N.*, 726 S.W.3d at 689 (stating the common law right of individual autonomy over decisions relating to one's health and welfare "has not been applied to minors seeking treatments prohibited by the legislature"); *see also K.C.*, 121 F.4th at 610 ("Courts have long permitted states to hold closely the power to regulate the practice of medicine. This power is strongest when the safety and effectiveness of the treatment is uncertain, as is true here.").

[¶56] Finally, *Vogel* stated a "competent person" has the right to refuse medical treatment; it did not distinguish between adults and minors. 537 N.W.2d at 360. As discussed above, the State has a stronger interest in regulating the actions and activities of minors than it does in regulating adults.

[¶57] Dr. Casas asserts this Court's holding in *Wrigley* supports his argument. In *Wrigley*, this Court held "the history and traditions of North Dakota support the conclusion that there is a fundamental right to receive an abortion to preserve the life or the health of the mother." 2023 ND 50, ¶ 33. The majority's holding was based on "the contemporaneous history existing at and prior to the adoption of the constitutional provision," *id.* ¶ 21, which included North Dakota's "long history of permitting women to obtain abortions to preserve their life or health," *id.* ¶ 23. The majority explained that, both before and after statehood, North Dakota enacted laws criminalizing abortions except when done to preserve the life of the woman. *Id.* ¶¶ 23–24. No such history and tradition exist here. At statehood in 1889, gender dysphoria was not a recognized medical condition, and the procedures the Act restricts did not exist. More importantly, as noted above, Dr. Casas has not identified any "contemporaneous history existing at and prior to the adoption" of Article I, § 1 supporting a minor's right to receive a particular course of medical treatment.

[¶58] We need not decide whether a minor has a fundamental right to receive a particular course of medical treatment to preserve the minor's life or health. Dr. Casas brings a facial challenge. "A facial challenge to a statute requires the challenger to establish that no set of circumstances exists under which the statute would be valid." *Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 2018 ND 71, ¶ 38, 908 N.W.2d 442. A facial challenge is a question of law because the violation "does not depend on any facts or circumstances arising later.'" *Nw. Landowners Ass'n v. State*, 2022 ND 150, ¶ 12, 978 N.W.2d 679 (quoting *Sorum*, 2020 ND 175, ¶ 21); *see also Nw. Landowners Ass'n v. State*, 2025 ND 147, ¶ 25, 25 N.W.3d 220 (stating "a facial challenge does not require consideration of circumstances outside the text of the law"). "As a general rule a court will inquire into the constitutionality of a statute only to the extent required by the case before it and will not anticipate a question of constitutional law in advance of the necessity of deciding it." *SCS Carbon Transp.*, 2024 ND 109, ¶ 8 (quoting *Anderson*, 2022 ND 144, ¶ 11). Because

Dr. Casas brings a facial challenge, we need not decide the constitutionality of N.D.C.C. § 12.1-36.1-02(1)(c) under the hypothetical facts that gender-affirming medication would preserve a minor's life or health.

[¶59] Neither *Vogel* nor *Wrigley* supports Dr. Casas's argument that a minor has a fundamental right to a particular course of medical treatment.

2

[¶60] Dr. Casas argues adolescents diagnosed with gender dysphoria have a fundamental right to life- and health-preserving gender-affirming treatment.

a

[¶61] Dr. Casas asserts that gender-affirming treatment is "life- and health-saving" and that puberty blockers have no serious adverse effects. Dr. Casas's assertions ignore the intense international debate regarding the safety and effectiveness of gender-affirming treatment, as the Act's legislative history and the district court's findings show. *See also Poe*, 149 F.4th at 1123 (concluding Oklahoma's comparable law "rationally relates to Oklahoma's interest in safeguarding the physical and psychological well-being of minors in light of the debate among medical experts about the risks and benefits associated with treating a minor's gender dysphoria with gender transitioning procedures"); *K.C.*, 121 F.4th at 611, 632 (stating the "efficacy and risks" of the medical interventions are unclear and referring to gender transition treatment as "a new and heavily debated medical treatment with unknown risks"); *E.N.*, 726 S.W.3d at 688–89 ("The state has demonstrated the ongoing debate among medical and ethical experts regarding the risks and benefits associated with the treatments at issue."); *Loe*, 692 S.W.3d at 222 (noting that identifying the most appropriate treatment for a child suffering from gender dysphoria "is a complicated question hotly debated by medical experts and policy makers throughout this country and the world"); *Skrmetti*, 605 U.S. at 536 (Thomas, J., concurring) ("The ongoing debate over the efficacy of sex-transition treatments for children confirms that medical and regulatory authorities are not of one mind about the treatments' risks and benefits."). The legislature need not defer to certain medical experts, professional associations, or advocacy groups when determining whether or

how best to protect the health and welfare of our children from medical procedures with potential serious and irreversible adverse effects. *Cf. Eknes-Tucker*, 80 F.4th at 1224 (stating "those decisions applying the fundamental parental right in the context of medical decision-making do not establish that parents have a derivative fundamental right to obtain a particular medical treatment for their children as long as a critical mass of medical professionals approve").

[¶62] The forum for Dr. Casas's factual arguments regarding the safety and effectiveness of gender-affirming treatment is the legislature, not this Court. *See Burgum*, 2018 ND 189, ¶ 69 (stating "fact gathering" before enacting legislation is "properly a legislative function"); *State v. Boushee*, 284 N.W.2d 423, 432 (N.D. 1979) (stating legislative factfinding is the province of the legislature). The risks and benefits of gender-affirming treatment, and how best to protect the health and welfare of minors, are debated *policy* questions. "It is for the legislature, not the courts, to identify and determine the public policy of the state." *In re Mangelsen*, 2014 ND 31, ¶ 19, 843 N.W.2d 8; *see also Montana-Dakota Utils. Co. v. Johanneson*, 153 N.W.2d 414, 423 (N.D. 1967) ("As a part of the law-making power of the Legislative Assembly, it has the right to determine legislative policy."). This Court's role is not to resolve the medical debate regarding the safety and effectiveness of gender-affirming treatment, but to determine whether a minor has a right to a particular course of medical treatment. Whether a minor has a constitutional right to a particular course of medical treatment depends on the intent and purpose of the people who adopted Article I, § 1, not the safety or effectiveness of a particular medical procedure or treatment.

b

[¶63] Dr. Casas asserts the reasoning in *Cross* is persuasive. In *Cross*, the Montana Supreme Court affirmed a district court's grant of a preliminary injunction of Mont. Code Ann. §§ 50-4-1001 to -1006. 560 P.3d at 654. Contrary to Dr. Casas's argument, *Cross* does not help resolve the issues before this Court.

[¶64] Addressing *Skrmetti*, Dr. Casas argues the case is "neither controlling nor persuasive" because the Supreme Court's analysis was "at the preliminary

injunction stage of the case and therefore did not have the benefit of a trial record[.]" Dr. Casas's argument regarding *Skrmetti* applies equally to *Cross*.

[¶65] In *Cross*, the Montana Supreme Court emphasized the limited nature of the record, noting the district court considered the parties' conflicting evidence when issuing its injunction. 560 P.3d at 643–44, 646, 650. Both courts stressed the preliminary nature of the district court's decision. "The District Court noted that it did not need to conclusively resolve disputed facts at the preliminary injunction stage, writing, 'trial is the appropriate stage for ultimate fact finding on the science presented in this matter.'" *Id.* at 646. The Montana Supreme Court explained, "The parties will have the opportunity during the merits proceeding for full development of the record, where their experts may offer insight on any new research, and for briefing on the current case law relative to their claims." *Id.* at 654; *see also id.* ("The case will proceed to trial, at which point the District Court will finally resolve the disputed facts and issue a final determination on the constitutional issues presented."). The appellate court also emphasized that it reviews the district court's grant of a preliminary injunction for a manifest abuse of discretion. *Id.* at 644. Finally, the Montana Supreme Court noted that neither it nor the district court was deciding the merits of the case. "In considering whether to issue a preliminary injunction, neither the District Court nor this Court will determine the underlying merits of the case giving rise to the preliminary injunction, as such an inquiry is reserved for a trial on the merits." *Id.* (quoting *BAM Ventures, LLC v. Schifferman*, 2019 MT 67, ¶ 7, 395 Mont. 160, 437 P.3d 142). The court explained a preliminary injunction is not equivalent to a holding that the statute is unconstitutional. *Id.* at 649. *See, e.g.*, *Brandt*, 147 F.4th at 877, 891 (although a panel of the Eighth Circuit affirmed the district court's grant of a preliminary injunction, on the merits appeal the court held the Act did not violate the Equal Protection Clause, the Due Process Clause, or the First Amendment and reversed the district court).

[¶66] Even more significant than the procedural posture of *Cross* is that the Montana Supreme Court did not decide the case based on a constitutional provision similar to Article I, § 1. Rather, the court decided the case on Montana's constitutional right to privacy, added to the Montana Constitution in 1972. *Cross*, 560 P.3d at 646–47; *see also* Mont. Const. art. II, § 10 ("The right of individual

privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."). Montana courts apply strict scrutiny when a law affects that state's constitutional right to privacy. *Cross*, at 647. Noting its limited holding, the court wrote, "Because, on the record here, the District Court's conclusions on Montana's express privacy protections are sufficient to uphold its preliminary injunction, we affirm on that basis." *Id.* at 654.

[¶67] Many courts have addressed constitutional challenges to statutes similar to North Dakota's Act. Although their decisions apply different constitutional provisions, they address and reject the arguments that parents have a fundamental right to obtain legislatively prohibited medical care for their children and those children have a right to access it. The arguments rejected in those cases, unlike the privacy argument in *Cross*, are similar to Dr. Casas's fundamental right argument. *See, e.g.*, *Poe*, 149 F.4th at 1129 (concluding "there is no deeply rooted tradition in parents' right to access gender transition procedures for their children"); *Brandt*, 147 F.4th at 887 (stating the court "does not find a deeply rooted right of parents to exempt their children from regulations reasonably prohibiting gender transition procedures"); *K.C.*, 121 F.4th at 627 (holding parents do not have a fundamental right to access gender transition procedures for their children); *Eknes-Tucker*, 80 F.4th at 1226 ("Neither the record nor any binding authority establishes that the 'right to treat [one's] children with transitioning medications subject to medically accepted standards' is a fundamental right protected by the Constitution."); *E.N.*, 726 S.W.3d at 689 (rejecting plaintiffs' argument the challenged law "violates parents' fundamental right to decide the appropriate medical care for their children and children's fundamental right to healthcare autonomy[,]" the court held "there is no fundamental right to seek care the legislature has prohibited"); *Loe*, 692 S.W.3d at 232–33 (rejecting parents' fundamental liberty argument and stating "novel treatments for a novel condition are generally within the Legislature's power to regulate without facing heightened scrutiny").

3

[¶68] North Dakota's history is different from the history of other states and our nation in some respects. However, it is similar in many respects. Although our state constitution may provide different or greater protections than the United States Constitution and other state constitutions, Dr. Casas provided "no separate analysis of our state constitution or its history" showing that North Dakota's history differs from that of other states or the nation on whether minors have a right to a particular course of medical treatment. *State v. Loh*, 2010 ND 66, ¶ 16, 780 N.W.2d 719. Consistent with North Dakota's history, federal appellate courts have rejected the argument that history and tradition support a right for minors to receive particular medical treatment. *See, e.g.*, *Poe*, 149 F.4th at 1130 (stating "our Nation does not have a deeply rooted history of affirmative access to medical treatment the government reasonably prohibited"); *Brandt*, 147 F.4th at 887 (stating our nation's history and traditions do not support the claim that there is a fundamental right for a child to receive "a medical treatment that, although the child desires it and a doctor approves, the state legislature deems inappropriate for minors").

4

[¶69] Dr. Casas's argument that Article I, § 1 establishes a fundamental right for minors to receive a particular course of medical treatment is "not rooted in the text, history, or structure of the state constitution." *City of Bismarck v. Brekhus*, 2018 ND 84, ¶ 28, 908 N.W.2d 715. He offers no textual or historical hook on which to hang his position. He did not provide, and we have not found, any evidence indicating the convention delegates or the people who adopted the North Dakota Constitution understood the inalienable rights in § 1 to include a minor's right to a particular course of medical treatment. There is no evidence of public debate about limiting the legislature's power to regulate medical procedures for minors before or during adoption of the 1889 Constitution. His argument is not supported by the territorial laws in effect in 1889 or the laws passed shortly after statehood. He identifies nothing in our state's history and traditions suggesting a minor's right to a particular course of medical treatment was understood to be constitutionally guaranteed by Article I, § 1 in 1889.

Simply put, Dr. Casas "has not marshaled any persuasive authority to support his argument" that minors have a fundamental right to receive a particular course of medical treatment. *Richter v. N.D. Dep't of Transp.*, 2010 ND 150, ¶ 21, 786 N.W.2d 716.

[¶70] Article I, § 1 does not expressly withhold from the legislature the authority to regulate the medical treatment provided to or received by minors. Nor does such a limitation arise by necessary implication. Minors do not have a fundamental right under Article I, § 1 of the North Dakota Constitution to a particular course of medical treatment. *See State ex rel. Gaulke v. Turner*, 164 N.W. 924, 936 (N.D. 1917) ("When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, we cannot declare a limitation, under the notion of having discovered something in the spirit of the Constitution *** which is not even mentioned in the instrument." (quoting *People ex rel. Smith v. Fisher*, 24 Wend. 215, 220 (N.Y. Sup. Ct. 1840))); *see also RECALLND v. Jaeger*, 2010 ND 250, ¶ 13, 792 N.W.2d 511 ("We must interpret what is actually contained in the Constitution, not what the parties would prefer it contained.").

VI

[¶71] On appeal, Dr. Casas contends the Act "involves a fundamental right and inherently suspect classification for purposes of North Dakota's equal protection analysis under Article I, §§ 21 and 22."

[¶72] Article I, § 21, the privileges and immunities clause, provides:

> No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

The language in § 21, numbered § 20 in the original constitution, has not changed since the people of North Dakota ratified the original constitution in 1889. *See* N.D.C.C. § 46-03-11.1 (providing for the republication of the North Dakota Constitution in a new numbering arrangement). This Court has viewed § 21 "as

our state constitutional guarantee of equal protection under the law." *Haney v. N.D. Workers Comp. Bureau*, 518 N.W.2d 195, 197 (N.D. 1994) (quoting *Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 563 (N.D. 1993)); *see also Teigen v. State*, 2008 ND 88, ¶ 25, 749 N.W.2d 505 (stating § 21, "the privileges and immunities clause, is this State's equal protection clause"); *Bouchard v. Johnson*, 555 N.W.2d 81, 87 (N.D. 1996) (stating § 21 "is generally considered as the North Dakota Constitution's equal protection clause").

[¶73] Article I, § 22 provides, "All laws of a general nature shall have a uniform operation." The language in § 22, numbered § 11 in the original constitution, has not changed. This Court sometimes considers both §§ 21 and 22 when addressing equal protection claims. *See In re P.F.*, 2008 ND 37, ¶ 15, 744 N.W.2d 724 ("Article I, §§ 21 and 22, N.D. Const., provide our state constitutional guarantee of equal protection[.]"); *Baldock v. N.D. Workers Comp. Bureau*, 554 N.W.2d 441, 444 (N.D. 1996) (stating "we have long viewed" Art. I, §§ 21 and 22 "as providing our state constitutional guarantee of equal protection").

A

[¶74] Count I of Dr. Casas's complaint is titled "North Dakota Constitution Article I, § 21 (Equal Protection)." The complaint does not cite Article I, § 22, much less state a claim under it. In its order, discussing the complaint, the district court explained that Plaintiffs argued the Act "is unconstitutional on the grounds it violates the Equal Protection Clause of Article I, § 21, of the North Dakota Constitution[.]" When addressing the equal protection claim, the court stated Plaintiffs limited their equal protection claim to § 21. During its analysis, the court noted § 21 is often associated with § 22 and discussed some cases that referenced both sections. Although § 22 came up in its analysis, the court held the Act "does not violate the equal protection guarantees of Article I, Section 21, of the North Dakota Constitution." At the end of its order, the court held the Act "does not violate Article I, Section 21, or Article I, Section 1, of the North Dakota Constitution. Therefore, the Plaintiff[']s request for a declaratory judgment that the [Act] violates the North Dakota Constitution should be denied."

[¶75] In his notice of appeal, Dr. Casas identified a preliminary issue on appeal as: "Did the District Court err in deciding that the [Act] does not implicate the right to Equal Protection guaranteed by Article I, Sections 1, 21, and 22 of the North Dakota Constitution?" The second issue Dr. Casas identifies in his opening brief is: "Did the District Court err in deciding that the [Act] does not implicate the right to equal protection enshrined in Article I, §§ 21 and 22, of the North Dakota Constitution?" He asserts, incorrectly, that the court held "the law does not implicate Article I, §§ 1, 21, or 22 of the North Dakota Constitution[.]" He then argues the Act "warrants heightened review because . . . it involves a fundamental right and inherently suspect classification for purposes of North Dakota's equal protection analysis under Article I, §§ 21 and 22." His argument regarding § 22 is limited to stating "[t]he 'equal protection' provisions of the North Dakota Constitution are found in Article 1, §§ 21 and 22," and quoting the sections. He offers no textual analysis, historical analysis, or argument regarding § 22.

[¶76] Dr. Casas did not bring a claim under Article I, § 22. The district court made no ruling regarding § 22. Dr. Casas did not meaningfully brief the constitutionality of the Act under § 22. *See Montana-Dakota Utils. Co. v. Behm*, 2019 ND 139, ¶ 19, 927 N.W.2d 865 ("We do not address inadequately briefed issues."); *Bolinske v. Jaeger*, 2008 ND 180, ¶ 17, 756 N.W.2d 336 ("A party raising a constitutional challenge must bring up the 'heavy artillery' or forego the attack entirely."). Thus, we do not address § 22 further in this opinion.

B

[¶77] This Court has repeatedly stated our state constitution may afford broader rights than those guaranteed by the federal constitution. *See, e.g.*, *Smith v. Isakson*, 2021 ND 131, ¶ 12, 962 N.W.2d 594 ("[W]e may provide the citizens of our state, as a matter of state constitutional law, greater protection than the safeguards guaranteed in the Federal Constitution." (quoting *City of Bismarck v. Altevogt*, 353 N.W.2d 760, 766 (N.D. 1984))); *State v. Mittleider*, 2011 ND 242, ¶ 16, 809 N.W.2d 303 ("The North Dakota Constitution may afford broader individual rights than those granted under its federal counterpart."); *State v. Herrick*, 1999 ND 1, ¶ 22, 588 N.W.2d 847 ("It is axiomatic our state constitution may provide greater

protections than its federal counterpart."); *Bismarck Pub. Sch. Dist. No. 1 v. State By & Through N.D. Legis. Assembly*, 511 N.W.2d 247, 255 (N.D. 1994) ("[W]e have often recognized that our state constitution may afford broader rights than those granted under the equivalent provision of the federal constitution."). Based on that precedent, Dr. Casas correctly requests we evaluate his equal protection claim by interpreting the provisions of our constitution. *See Burgum*, 2018 ND 189, ¶ 42 ("[U]ltimately we are charged with interpreting the North Dakota Constitution and its distinct provisions."). But his briefs offer no alternative framework under which to analyze his equal protection claim, and he argues the claim under our established framework. Because Dr. Casas has not briefed an alternative framework to address his equal protection claim, we resolve the claim under our current framework.

C

[¶78] Dr. Casas argues the Act classifies based on sex and discriminates against transgender individuals, a class he asserts should be recognized as a suspect class. He argues the district court erred by reviewing the Act under the rational basis standard instead of the strict scrutiny standard. The State responds the Act classifies based on age and medical purpose, not sex or transgender status, and therefore is subject to rational basis review.

[¶79] Article I, § 21 does "not prohibit legislative classifications or mandate identical treatment of different categories of persons but, rather, subject[s] legislative classifications to different standards of scrutiny, depending upon the right that may be infringed by the challenged classification." *Baldock*, 554 N.W.2d at 444. In other words, "the equal protection clause prohibits the government from treating individuals differently who are alike in all relevant aspects." *Hector v. City of Fargo*, 2014 ND 53, ¶ 34, 844 N.W.2d 542. "When a classification involves a fundamental interest or is inherently suspect, we analyze the classification under strict scrutiny." *Teigen*, 2008 ND 88, ¶ 25. "When there is an important substantive right involved in the classification, we apply an intermediate standard of review." *Id.* "If there is no fundamental or important substantive interest involved, we analyze the classification under a rational basis

standard and sustain the legislation unless it is arbitrary and bears no rational relationship to a legitimate governmental interest." *Id.*

[¶80] We have already determined the Act does not involve a fundamental right. Thus, we address whether it involves an inherently suspect classification.

1

[¶81] Dr. Casas argues the Act classifies based on sex. "[C]lassification by sex is an inherently suspect classification, requiring strict judicial scrutiny to determine whether it is required by a compelling State interest." *State ex rel. Olson v. Maxwell*, 259 N.W.2d 621, 631 (N.D. 1977).

[¶82] By its plain terms, the Act prohibits a health care provider from providing a minor certain medical care. The Act defines a minor as "an individual under the age of eighteen." N.D.C.C. § 12.1-36.1-01(2). Thus, the Act classifies based on age. Dr. Casas does not argue age has been or should be recognized as a suspect classification.

[¶83] By its plain terms, the Act prohibits a health care provider from prescribing, dispensing, administering, or supplying any drug to a minor for "the purpose of aligning the minor's sex with the minor's perception of the minor's sex when the perception is inconsistent with the minor's sex[.]" N.D.C.C. § 12.1-36.1-02(1)(c). Thus, the Act classifies based on the medical purpose of the treatment. The Act's classification is not based on the patient's sex. A biological male and a biological female are subject to the same restrictions under the Act; neither may receive the treatments for the prohibited purpose.

[¶84] "Equal protection analysis should generally be considered when a statute creates a classification of individuals and grants something to one group but not the other." *Bouchard*, 555 N.W.2d at 87. The Act grants no privilege to minor males that it denies minor females, and none to minor females that it denies minor males. Neither may receive the treatments for the purpose of aligning their sex with their perception of their sex when their perception is inconsistent with their biological sex. Thus, neither minor males nor minor females receive a benefit or advantage enjoyed by one but not by the other. *K.A.S.*, 499 N.W.2d at

563 (defining a "privilege" as "a particular and peculiar benefit or advantage enjoyed by a person, company or class beyond the common advantage of other citizens" (quoting *Daigh v. Schaffer*, 23 Cal. App. 2d 449, 454–55, 73 P.2d 927, 930 (Cal. Dist. Ct. App. 1937))). In other words, the Act does not place "a benefit within reach of one sex and out of reach of the other or burden[] one sex in a way it ha[s] not burdened the other." *K.C.*, 121 F.4th at 616. There is no "differential treatment or door-closing" based on the minor's sex. *Id*. at 615.

[¶85] Dr. Casas argues "[t]he legislative definition of 'sex' is the operating mechanism" of the Act. He asserts the Act cannot be applied without first identifying the patient's sex because the Act's prohibitions apply only when a minor's perception of the minor's sex is inconsistent with the minor's sex.

[¶86] As previously noted, the Act does not treat male or female minors differently. The prohibitions apply to both sexes. The Act's sex-related terminology does not draw a line between males and females to treat them differently. Rather, it identifies the medical purpose of the treatment to determine whether the treatment is prohibited. Under its terms, the Act imposes the same treatment prohibitions on minor males and minor females based on the purpose of the treatment.

[¶87] Our conclusion that the Act does not classify based on sex rests on Article I, § 21 and our independent application of our established equal protection framework. Our conclusion also accords with that of every federal and state appellate court of which we are aware to have addressed an equal protection challenge to an analogous state law. Although those courts considered different laws under different constitutional provisions, their analysis of materially identical constitutional challenges is persuasive.

[¶88] In *Skrmetti*, the United States Supreme Court held Tennessee's law "incorporates two classifications"—it classifies "on the basis of age" and "on the basis of medical use"—neither of which "turns on sex." 605 U.S. at 511. The Court explained the law "does not mask sex-based classifications" because it "does not prohibit conduct for one sex that it permits for the other." *Id.* at 514–15.

[¶89] In *Eknes-Tucker*, the Eleventh Circuit Court of Appeals held Alabama's comparable law "targets specific medical interventions for minors" and "classifies on the bases of age and procedure, not sex[.]" 80 F.4th at 1227. The court explained the law "discusses sex insofar as it generally addresses treatment for discordance between biological sex and gender identity, and insofar as it identifies the applicable cross-sex hormone(s) for each sex—estrogen for males and testosterone and other androgens for females." *Id.* at 1228. It stated "the statute refers to sex only because the medical procedures that it regulates—puberty blockers and cross-sex hormones as a treatment for gender dysphoria—are themselves sex-based." *Id.* However, "the statute does not establish an unequal regime for males and females." *Id.* "[T]he law simply reflects real, biological differences between males and females and equally restricts the use of puberty blockers and cross-sex hormone treatment for minors of both sexes." *Id.* at 1231. The court held Alabama's law does not impermissibly distinguish between men and women. Instead, it "establishes a rule that applies equally to both sexes: it restricts the prescription and administration of puberty blockers and cross-sex hormone treatment for purposes of treating discordance between biological sex and sense of gender identity for *all* minors." *Id.* at 1228.

[¶90] Similarly, the Eighth Circuit, sitting en banc, held Arkansas's Act "classifies based on age and medical procedure, not sex." *Brandt,* 147 F.4th at 879. It explained the Act "classifies based on medical procedure, treating different medical procedures differently." *Id.*

[¶91] The Seventh Circuit Court of Appeals reached the same result in *K.C.* The court addressed the constitutionality of Indiana's law prohibiting physicians from altering a child's sex characteristics through medication or surgery. It held the law "bars gender transition procedures regardless of whether the patient is a boy or a girl: Nobody may receive the treatment the state has chosen to regulate. So," the court concluded, "sex does not indicate on what basis treatment is prohibited." 121 F.4th at 617. "The law does not create a class of one sex and a class of another and deny treatment to just one of those classes." *Id.*; *see also Poe*, 149 F.4th at 1122 (rejecting the sex-classification argument and holding Oklahoma's law's applicability turns on "age and medical use"); *E.N.*, 726 S.W.3d at 687 (concluding the SAFE Act "classifies only on age and medical

use"; it "classifies based on medical use in that healthcare providers may prescribe or administer cross-sex hormones or puberty-blocking drugs to treat certain medical concerns but not others"); *Loe*, 692 S.W.3d at 237 ("The statute treats both males and females receiving treatment for gender dysphoria the same by prohibiting medical providers from prescribing or supplying cross-sex hormone therapy or other treatments that conflict with the child's sex at birth.").

[¶92] The Act classifies based on age and medical purpose. It does not classify based on sex.

2

[¶93] Dr. Casas argues the Act discriminates against transgender individuals and is subject to strict scrutiny. He contends that the Act targets transgender individuals and that being transgender is an immutable characteristic warranting heightened constitutional protection.

[¶94] Relying on *Maxwell*, 259 N.W.2d at 627, and *In Interest of G.H.*, 218 N.W.2d 441, 447 (N.D. 1974), Dr. Casas argues transgender status is a suspect class because it is an immutable characteristic determined solely by the accident of birth. The district court held transgender status is not a suspect class. In reaching its decision, the court relied on *State v. Carpenter*, 301 N.W.2d 106, 109 (N.D. 1980), which identified factors the United States Supreme Court used to determine whether a classification is suspect. The factors cited in *Carpenter* are "immutable and highly visible characteristics, historical disadvantage, and relative lack of political representation[.]" *Id.*

[¶95] We decide constitutional issues on the narrowest grounds possible to avoid reaching unnecessary ones. *SCS Carbon Transp.*, 2024 ND 109, ¶ 8. As previously noted, the Act classifies based on age and medical purpose; a minor's ability to receive the regulated treatment is based on the medical purpose of the treatment, not the minor's transgender status. Because the Act does not classify based on transgender status, whether transgender status is a suspect class does not affect the Act's constitutionality, and we do not address it. Although our conclusion that the Act does not classify based on transgender status rests on the Act's specific language, we note other courts considering similar statutes have

found it unnecessary to decide whether transgender individuals constitute a suspect or quasi-suspect class. *See Skrmetti*, 605 U.S. at 517–18 (noting the Court "has not previously held that transgender individuals are a suspect or quasi-suspect class" and that the case does not raise the issue because the law "does not exclude any individual from medical treatments on the basis of transgender status"); *Poe*, 149 F.4th at 1124 (concluding Oklahoma's law "does not discriminate based on transgender status" because "a minor's ability to receive medical treatment" under the law "does not turn on the minor's transgender status"); *Brandt*, 147 F.4th at 881 (stating Arkansas's Act "regulates a class of procedures, not people. . . . The Act does not classify based on transgender status."); *K.C.*, 121 F.4th at 620 (rejecting the argument the Indiana law classifies based on transgender status); *E.N.*, 726 S.W.3d at 688 n.7 (concluding it "need not determine whether transgender status is a quasi-suspect class because the SAFE Act classifies only based on age and medical use, not on the basis of transgender status").

3

[¶96] Dr. Casas argues, if we hold the Act does not implicate a fundamental right, we should remand the case so the district court can apply intermediate scrutiny. Quoting *Hanson v. Williams County*, 389 N.W.2d 319, 328 (N.D. 1986), Dr. Casas argues the Act "deprives a population of adolescents of 'important substantive rights to life and safety which are available to other persons.'" Dr. Casas provides no further analysis. He also does not identify how he preserved this issue for review.

[¶97] Rule 28(b)(7)(B)(ii), N.D.R.App.P., requires the appellant's brief contain "citation to the record showing that the issue was preserved for review; or a statement of grounds for seeking review of an issue not preserved[.]" Dr. Casas's brief does not cite the record to show he preserved this issue. His brief also provides no argument regarding why this Court can review the issue if he did not raise it in the district court. Dr. Casas's brief does not meet the minimum requirements of Rule 28(b)(7). "Appellate rules must be complied with and treated respectfully." *Holm v. Holm*, 2025 ND 100, ¶ 6, 21 N.W.3d 96 (quoting *State v. Roller*, 2024 ND 180, ¶ 19, 11 N.W.3d 864).

[¶98] "It is well-settled law that issues not raised in the district court may not be raised for the first time on appeal[.]" *Gerszewski v. Rostvet*, 2024 ND 141, ¶ 16, 10 N.W.3d 104. "This constraint applies with particular force to a constitutional issue." *Anderson v. Krueger*, 2025 ND 161, ¶ 10, 26 N.W.3d 556 (quoting *Peters-Riemers v. Riemers*, 2001 ND 62, ¶ 23, 624 N.W.2d 83). We have explained that the purpose of an appeal is to review the district court's actions, "not to grant the appellant an opportunity to develop and expound upon new strategies or theories." *Albertson v. Albertson*, 2023 ND 225, ¶ 8, 998 N.W.2d 811 (quoting *Schrodt v. Schrodt*, 2022 ND 64, ¶ 7, 971 N.W.2d 861).

[¶99] Dr. Casas did not identify how he raised this argument in the district court. Our review of Dr. Casas's post-trial briefs shows that he did not argue the Act implicated important substantive rights or request the district court apply intermediate scrutiny. Likely for that reason, the district court did not decide whether the Act implicated important substantive rights or whether intermediate scrutiny applied. Dr. Casas failed to show he preserved this argument, and we decline to address it.[4]

[¶100] The Act classifies based on age and medical purpose, not sex or transgender status. Neither age nor medical purpose triggers heightened scrutiny. The district court correctly held the Act is subject to rational basis review.

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[4] Because Dr. Casas failed to show he preserved this argument, we need not decide whether he adequately briefed whether the Act implicates important substantive rights. *See Rent Daddy's, LLC v. Gamel*, 2026 ND 33, ¶ 2, 31 N.W.3d 623 (stating this Court "does not address inadequately briefed issues" and that a conclusory argument that lacks sufficient legal analysis does not meet the minimum requirements of N.D.R.App.P. 28); *State v. Gomez*, 2025 ND 60, ¶ 18, 18 N.W.3d 829 ("A party waives an issue by not providing supporting argument and, without supportive reasoning or citations to relevant authorities, an argument is without merit." (cleaned up)); *State v. Glaum*, 2024 ND 47, ¶ 42, 4 N.W.3d 540 ("When a party fails to provide supporting argument for an issue [the party] is deemed to have waived that issue. This Court does not consider arguments that are not adequately articulated, supported, and briefed on appeal." (internal citations omitted)).

VII

[¶101] Because the Act neither burdens a fundamental right nor classifies based on a suspect class, it is subject to rational basis review. *Hector*, 2014 ND 53, ¶ 34.

[¶102] "Under the rational basis test, a governmental classification will be sustained 'unless it is arbitrary and bears no rational relationship to a legitimate governmental interest.'" *Ferguson v. City of Fargo*, 2016 ND 194, ¶ 10, 886 N.W.2d 557 (quoting *Teigen,* 2008 ND 88, ¶ 25). "This test has been described as 'a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.'" *Id.* (quoting *Hamich, Inc. v. State ex rel. Clayburgh*, 1997 ND 110, ¶ 31, 564 N.W.2d 640). We have stated:

> For purposes of rational basis review, equal protection does not demand that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification; however, there must be an identifiable purpose that may conceivably or reasonably have been that of the government decisionmaker. Thus, if a reviewing court can conceive of a reason justifying the choice made by the legislature or government decisionmaker in service of a legitimate end, the statute does not violate the equal protection clause.

Id. (quoting *Haugland,* 2012 ND 123, ¶ 42).

A

[¶103] The Act's legislative history shows that one purpose of the Act is to protect the health and welfare of minors. North Dakota, like other states, has a strong and legitimate interest in protecting its young citizens from physical and emotional harm. *See Brandt*, 147 F.4th at 882 (stating "states have a 'compelling' interest in 'safeguarding the physical and psychological well-being of a minor'" (quoting *New York v. Ferber*, 458 U.S. 747, 756–57 (1982))). The state's interest in protecting the health and welfare of minors differs from its interest in protecting its adult citizens because minors' "immaturity, inexperience, and lack of

judgment may sometimes impair their ability to exercise their rights wisely." *Poe*, 149 F.4th at 1122 (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990)).

[¶104] Dr. Casas does not dispute that the State has a legitimate interest in protecting the health and welfare of minors. Rather, he argues the Act "is patently arbitrary and not rationally related to the State's asserted interest in protecting children[.]" Dr. Casas's argument ignores the legitimate ongoing debate about the benefits and harms of gender-affirming treatment for minors.

[¶105] The Act's legislative history demonstrates the legitimate ongoing debate regarding the safety, risks, and benefits of gender-affirming treatment, and the legislature's concern with minors' ability to fully understand and appreciate the possible long-term effects of the treatment. The legislature could rationally determine that restricting gender-affirming treatment for minors advances the legitimate governmental interest of protecting the health and welfare of minors.

[¶106] Contrary to Dr. Casas's argument, the legislature's response to the medical uncertainty about the risks and benefits of gender-affirming treatment is not arbitrary. Gender-affirming treatment of minors is relatively novel. *See Poe*, 149 F.4th at 1126 ("These novel treatments only recently became available to children, so understandably, 'limited data' exist on 'the long-term physical, psychological, and neurodevelopmental outcomes in youth.'" (citation omitted)); *Poe*, at 1130 ("As for gender transition procedures specifically, healthcare providers only recently began providing gender transition procedures for minors."); *K.C.*, 121 F.4th at 610 ("More recently, physicians have started using puberty blockers and hormone therapy for a new purpose: to treat gender dysphoria in minors approaching puberty."). In light of the debate among medical experts about the potential serious and irreversible risks associated with providing gender-affirming treatment to minors, the legislature could rationally decide the procedures are too dangerous for minors, particularly because they may not fully appreciate the long-term consequences of the treatment. *See Eknes-Tucker*, 80 F.4th at 1230 (stating "many minors may not be finished forming their identities and may not fully appreciate the associated risks"). Parents, peers, and social media may also exert undue influence on minors. Because the State's interest is to protect the health and welfare of minors,

the legislature rationally limited the Act's restrictions to gender-affirming treatment for minors. *See Poe*, at 1122 (stating "Oklahoma has a legitimate interest in the health and welfare of its children and using age to determine the accessibility of gender transition procedures rationally relates to that legitimate interest"). Policymakers in many states have made judgments similar to our legislature's. *See supra* ¶ 2 (citing state statutes restricting providers from providing certain gender-affirming treatment to minors); *see also Skrmetti*, 605 U.S. at 516–17, 522–23 (stating Tennessee proclaimed a "legitimate, substantial, and compelling interest in protecting minors from physical and emotional harm"; "found that the prohibited medical treatments are experimental, can lead to later regret, and are associated with harmful—and sometimes irreversible—risks"; "can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences"; it is "likely that not all harmful effects associated with these types of medical procedures when performed on a minor are yet fully known, as many of these procedures, when performed on a minor for such purposes, are experimental in nature and not supported by high-quality, long-term medical studies"; "minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and that many individuals have expressed regret for medical procedures that were performed on or administered to them for such purposes when they were minors"; and "evidence that discordance between sex and gender 'can be resolved by less invasive approaches that are likely to result in better outcomes for the minor'" (citations omitted)); *Brandt*, 147 F.4th at 880–81 (reviewing the Arkansas General Assembly's expressed findings, including that the "risks of gender transition procedures far outweigh any benefit at this stage of clinical study on these procedures" (quoting Act 626, § 2(15), 93rd Gen. Assemb., Reg. Sess. (Ark. 2021)); there is a "lack of any long-term longitudinal studies evaluating the risks and benefits of using" puberty-blocking drugs for gender transition (quoting Act 626, § 2(6)(B)); "that no randomized clinical trials have been conducted on the efficacy or safety of the use of cross-sex hormones in . . . children for the purpose of . . . gender transition" (quoting Act 626, § 2(7)); "[t]he use of cross-sex hormones comes with serious known risks," including an increase in red blood cells, severe liver dysfunction, heart attacks, strokes, hypertension, gallstones,

blood clots, irreversible infertility, and increased risks of certain cancers (quoting Act 626, § 2(8))).

[¶107] The Act directly responds to the State's concern about the safety of gender-affirming treatment for minors. Thus, the Act bears a rational relationship to the State's legitimate governmental interest of protecting the health and welfare of minors. *Cf. Skrmetti*, 605 U.S. at 523 (holding Tennessee's statute's "age- and diagnosis-based classifications are plainly rationally related to these findings and the State's objective of protecting minors' health and welfare"); *Poe*, 149 F.4th at 1123 (concluding Oklahoma's enactment of its comparable statute "rationally relates to Oklahoma's interest in safeguarding the physical and psychological well-being of minors in light of the debate among medical experts about the risks and benefits associated with treating a minor's gender dysphoria with gender transitioning procedures"); *Brandt*, 147 F.4th at 884 ("The [Arkansas] Act is rationally related to the state's legitimate interest in protecting the well-being of minors. The Act passes rational basis review under the Equal Protection Clause."); *K.C.*, 121 F.4th at 627 (stating Indiana's statute "is supported by a rational basis" because "protecting minor children from being subjected to a novel and uncertain medical treatment is a legitimate end"); *E.N.*, 726 S.W.3d at 688–89 (holding the SAFE Act satisfies rational basis review because it is rationally related to safeguarding the well-being of minors); *Loe*, 692 S.W.3d at 234 (stating "the Legislature had a rational basis for concluding that the risk of providing these treatments to children solely for the purpose of physically transitioning from their sex at birth was not outweighed by the benefits").

B

[¶108] Dr. Casas argues the Act was motivated by an "invidious discriminatory purpose" to harm transgender individuals. He asserts "[a]nimus against a politically unpopular group can never be a legitimate basis for a legislative classification." Dr. Casas relies on statements made by individual legislators during committee hearings to support his argument.

[¶109] An allegation of invidious discrimination does not change this Court's standard of review. A statute does not violate equal protection "if the classification it draws is not patently arbitrary so as to constitute invidious discrimination and if it is rationally related to a legitimate government interest." *Mauch v. Mfrs. Sales & Serv., Inc.*, 345 N.W.2d 338, 344 (N.D. 1984); *see also Mund v. Rambough*, 432 N.W.2d 50, 56 (N.D. 1988) (holding a classification not to be arbitrary or the discrimination from the classification to be invidious when it was "not inconceivable" that the legislature could have discerned a rational basis for the classification); *Christman v. Emineth*, 212 N.W.2d 543, 556 (N.D. 1973) (concluding the classification "is unreasonable and the discrimination resulting therefrom is invidious"). In three of the four Supreme Court cases cited by Dr. Casas to support his argument, the United States Supreme Court applied the rational basis standard. *See Romer v. Evans*, 517 U.S. 620, 635 (1996) (stating "a law must bear a rational relationship to a legitimate governmental purpose" and that the Court cannot say the challenged classification is "directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests"); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("Our refusal to recognize the [intellectually disabled] as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the [intellectually disabled] and others must be rationally related to a legitimate governmental purpose."); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 538 (1973) (stating the challenged statutory classification "is clearly irrelevant to the stated purposes of the Act" and "the classification here in issue is not only 'imprecise', it is wholly without any rational basis"). It is unclear what standard the Court applied in the other case. *See United States v. Windsor*, 570 U.S. 744, 793–94 (2013) (Scalia, J., dissenting) (stating he "would review this classification only for its rationality" and, as nearly as he can tell, "the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases like *Moreno*. But the Court certainly does not *apply* anything that resembles that deferential framework.").

[¶110] "[E]very presumption is in favor of the propriety and constitutionality of legislation and improper motives in its enactment are never imputed to the Legislature." *Paluck v. Bd. of Cnty. Comm'rs, Stark Cnty.*, 307 N.W.2d 852, 857–58 (N.D. 1981). Statements by individual legislators do not, on their own, demonstrate the legislature's motive or intent in passing a law. *Cf. Little v. Tracy*, 497 N.W.2d 700, 705 (N.D. 1993) ("Random statements by legislative committee members, while possibly useful if they are consistent with the statutory language and other legislative history, are of little value in fixing legislative intent."). As a sister state explained, "the motivation of a few representatives cannot be attributed to the Legislature as a whole." *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶ 11, 862 N.W.2d 839; *see also Poe*, 149 F.4th at 1125 (stating "contemporary statements from a few legislators do not persuade us of discriminatory intent"); *State v. Carpenter*, 541 N.W.2d 105, 112 n.11 (Wis. 1995) ("In judging the constitutionality of a statute, we cannot assume that the statements of a few constitute the motivation of the entire legislature.").

[¶111] The legislative record as a whole does not support Dr. Casas's position the legislature was motivated by an invidious discriminatory purpose when it passed the Act. The voluminous legislative record shows the committees held multiple hearings, took testimony from many individuals on both sides, and that the bill's language changed as it progressed through both chambers. It also shows many legislators expressed neutral health and welfare concerns, including the lack of long-term evidence on the safety of gender-affirming treatment for minors; the potential serious and irreversible effects of gender-affirming treatment, including effects on bone density, fertility, and cardiovascular health; and whether minors have the maturity to appreciate the consequences of gender-affirming treatment. The district court correctly observed that Dr. Casas "cited to the most inflammatory statements made by a small group of legislators" and the Act would have passed overwhelmingly even without those legislators' votes. *See Loe*, 692 S.W.3d at 234 ("Even if we assume the legislative history demonstrates someone voting for this bill may have been improperly motivated, that constitutes no evidence that all, most, or even a significant percentage of the over 100 legislators who voted for the statute were similarly motivated.").

[¶112] Dr. Casas argues the scope of the Act shows it is a pretext for discrimination against transgender individuals. He argues the Act is both too narrow and too broad. "It is too narrow in that the State's purported concerns about gender-affirming medical care apply in equal or greater force to pediatric medical care more broadly, but no other care has been banned or even otherwise restricted." The Act "is too broad in that it proscribes all gender-affirming medical care even where the patient has been diagnosed with gender dysphoria and no other treatments are effective to preserve their life and health." Later, Dr. Casas asserts the Act is pretextual because it does not prohibit minors from accessing puberty blockers, estrogen, or testosterone for all purposes.

[¶113] "It is well settled that legislative enactments need not attempt to cure all evils within the Legislature's reach, and the wisdom, necessity and expediency of legislation are issues for legislative, not judicial, determination." *Eagle v. N.D. Workers Comp. Bureau*, 1998 ND 154, ¶ 16, 583 N.W.2d 97; *see also State v. Gamble Skogmo, Inc.*, 144 N.W.2d 749, 760 (N.D. 1966) (stating the legislature need not address all aspects of a perceived problem at the same time). "The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial re-examination." *Gamble Skogmo*, at 760. "Perfection in making the necessary classifications is neither possible nor necessary." *Ferguson*, 2016 ND 194, ¶ 10 (quoting *Hamich*, 1997 ND 110, ¶ 31).

[¶114] The Act's legislative history shows the legislature was addressing the serious medical debate regarding the safety and effectiveness of gender-affirming treatment. The treatments at issue are novel. There is an intense debate regarding the quality and reliability of the studies and reviews of gender-affirming treatment, the effectiveness of the treatments, the potential serious long-term and irreversible health risks associated with the treatments, and minors' ability to understand and appreciate the associated risks. That the legislature limited the Act's scope to the novel treatments at issue does not show it was motivated by an invidious discriminatory purpose. It was also rational for the legislature not to make exceptions to the Act due to the intense debate regarding the safety and effectiveness of the prohibited treatment, the standard

of care for gender-affirming treatment, minors' capacity to make decisions about medical procedures, and other issues raised during the legislative process. The legislative line drawing is rational based on the Act's purpose; the classification is not "wholly irrelevant to the achievement of the State's objective." *Gamble Skogmo*, 144 N.W.2d at 758.

VIII

[¶115] Minors do not have a fundamental right to a particular course of medical treatment. The Act does not classify on the basis of sex or transgender status. The Act bears a rational relationship to a legitimate governmental interest. The provisions of N.D.C.C. ch. 12.1-36.1 challenged by Dr. Casas on appeal do not violate his minor patients' rights under Article I, §§ 1 and 21 of the North Dakota Constitution. The district court did not err in denying Dr. Casas's requested declaratory and injunctive relief. We affirm.

[¶116] Lisa Fair McEvers, C.J.
Jerod E. Tufte
Jon J. Jensen
Douglas A. Bahr
Michael P. Hurly, D.J.

[¶117] The Honorable Michael P. Hurly, D.J., sitting in place of Friese, J., disqualified.

Tufte, Justice, specially concurring.

[¶118] I join the majority opinion. The parties have asked us to choose a tier of scrutiny within our modern equal-protection framework, and the majority resolves the appeal within that framework. Dr. Casas argues that strict scrutiny follows from *State ex rel. Olson v. Maxwell*, 259 N.W.2d 621, 627 (N.D. 1977), or at least intermediate scrutiny from *Hanson v. Williams County*, 389 N.W.2d 319, 325 (N.D. 1986). The State answers that the statute classifies on age and medical purpose rather than sex, that rational-basis review therefore applies under *Gange v. Clerk of Burleigh County District Court*, 429 N.W.2d 429, 433 (N.D. 1988), and that under *Snyder's Drug Stores, Inc. v. North Dakota State Board of Pharmacy*, 219

N.W.2d 140, 146–47, 150 (N.D. 1974), our framework aligns with the federal framework absent a compelling reason to depart. Noticeably missing from the briefs is what N.D. Const. art. I, §§ 21 and 22 meant to the people who adopted them. The State makes the point itself, observing that the appellant urges independence from federal doctrine but "doesn't actually propose a different analytic framework" for claims under the North Dakota Constitution.

[¶119] That gap has consequences under our precedent. Where a party's state-constitutional argument consists of citing the sections and reminding us that we may construe our constitution more protectively than the federal one, that is "insufficient." *City of Mandan v. Fern*, 501 N.W.2d 739, 744 n.3 (N.D. 1993). The briefing on § 21 provides more than a bare citation, but its analysis stays within the federal framework. The parties dispute how the tiers of scrutiny apply, not whether the tiers are what the state constitution's text requires. On this record, resolving the appeal under our established framework is the correct course, and I join it.

[¶120] I write separately because the briefs rest on a premise our modern cases have repeated but never examined: that §§ 21 and 22 are "equal protection" clauses administered through three tiers of scrutiny determined by suspect classes and a judicial ranking of rights. That construction was assembled between 1974 and 1988 from borrowed federal materials, without examining the text of the state constitution or the history that produced it. The sections themselves are much older. They were copied from an identifiable source and had a settled public meaning when North Dakota's voters approved them on October 1, 1889. The majority applies our traditional analysis in its discussion of N.D. Const. art. I, § 1. It asks what the words of § 1 meant to the people who adopted them in 1889. Majority, ¶¶ 43–49. No party asked us to do the same for §§ 21 and 22. Because it appears to me our modern doctrine has strayed from its proper sources, I set forth some of these sources below so that the meaning of these provisions may be more carefully examined in a future case.

IX

[¶121] Start with the text. Nowhere does it say "equal protection." Article I, § 21 (designated § 20 in the 1889 constitution) provides: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens." Article I, § 22 (designated § 11 in the 1889 constitution) provides: "All laws of a general nature shall have a uniform operation." The two sections state two distinct guarantees in three clauses.

[¶122] Section 21 contains two commands. The first is a revocability rule: special privileges and immunities, if granted at all, must remain subject to legislative amendment. That clause addressed a nineteenth-century concern that corporate charters might be vested contracts protected from amendment by future legislatures. This problem dated to *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), and was answered with reserved-power clauses across many state constitutions. *See Spring Valley Water Works v. Schottler*, 110 U.S. 347, 352 (1884) (tracing state reserved-power clauses to *Dartmouth College* and sustaining California's regulation of water rates against a chartered corporation's contract claim, because the State's reserved power left the charter open to legislative alteration). The second command is a same-terms rule. No citizen or class of citizens may be granted privileges or immunities "which upon the same terms shall not be granted to all citizens." The text protects the citizen and the class alike, and the question it asks is about the terms of a grant: what did the favored recipient get, and could others obtain it on the same terms? Section 22 is a command about laws rather than grants. Laws "of a general nature" must have "a uniform operation." Two terms are central to the meaning. "General nature" marks the boundary between general laws and special or local legislation that the constitution regulated in detail elsewhere. "Operation" directs attention to how a law actually works in practice, not simply to its form.

[¶123] The briefs largely pass over an important structural difference between the Fourteenth Amendment and the state constitution. The federal clause speaks of denial: no State shall "deny to any person . . . the equal protection of the laws."

U.S. Const. amend. XIV, § 1. Sections 21 and 22 speak of grants. Their verbs are about granting special privileges, immunities, and advantages to some upon terms closed to others, and about the operation of general laws. *See* Majority, ¶ 84 (concluding that the Act "grants no privilege" to one sex that it denies the other); *cf.* Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation*, 69 Temp. L. Rev. 1247, 1251 (1996) (contrasting the mischief of "positive favoritism" addressed by state privileges-or-immunities clauses with the "negative discrimination" addressed by the federal clause). The federal and state constitutions provide textually distinct guarantees.

[¶124] No one in the early years after statehood called these provisions "equal protection" clauses. The phrase is a judicial gloss, and a modern one. When this Court described the sections in *Bismarck Public School District No. 1 v. State*, it wrote that they had been "[l]ong viewed as our state constitutional guarantee of equal protection." 511 N.W.2d 247, 255 (N.D. 1994). "Long viewed as" is careful phrasing. It coincided with avoiding the usual methods of interpreting the text in favor of pulling in a body of law arguably having overlapping purposes. The practice of administering the sections as an equal-protection clause dates to 1974. By the late 1990s the gloss had displaced the text entirely. The Attorney General's opinions of that era simply call § 21 North Dakota's "equal protection clause," and most of the briefs in this case use that label.

X

[¶125] The historical documents show where the words came from. In its third week, the convention published a complete draft constitution in its Journal. Journal of the Constitutional Convention for North Dakota 65–113 (1889). That draft's declaration of rights, located in article III and printed at pages 66–69, contained neither a uniform-operation clause nor any privileges-or-immunities provision. The Committee on Preamble and Bill of Rights nonetheless reported a declaration containing both sections, and the two passed into the constitution without any recorded floor debate. Journal, *supra*, at 157–59. The Official Report of the Proceedings and Debates of the First Constitutional Convention of North Dakota (1889) contains no discussion of or amendment to either section.

Provisions with settled public meanings require no explanation and rarely provoke debate. The delegates fought over what was new, local, and contested: prohibition, railroad regulation, the location of institutions. They did not fight over these sections, likely because the sections were neither unfamiliar nor contested.

[¶126] The words were apparently borrowed from the Constitution of California of 1879. "All laws of a general nature shall have a uniform operation." Cal. Const. of 1879, art. I, § 11. "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Cal. Const. of 1879, art. I, § 21. North Dakota's original §§ 11 and 20 reproduce that text word for word, apart from punctuation and conforming "the Legislature" to "the legislative assembly." The provisions traveled as the same pair, from the same article, in the same order. Identity across the forty-six words of § 21, save one conforming substitution, is not coincidence. Other than a passing comment in *Snyder's*, discussed below, the borrowing appears to have gone unnoticed by this Court. The Meschke and Spears survey of the 1889 constitution's sources, which traced the lineage of most of the Declaration of Rights, left these two sections blank in its correlation table. *See* Herbert L. Meschke & Lawrence D. Spears, *Digging for Roots: The North Dakota Constitution and the Thayer Correspondence*, 65 N.D. L. Rev. 343, 379 n.251 (1989).

[¶127] California explained its provisions to its own ratifying public. The 1879 convention's official Address to the People described the new § 21 as "declaring against monopolies." Address to the People of the State of California (Mar. 3, 1879), *in* 3 E.B. Willis & P.K. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California 1522 (1881). The convention met at the height of California's anti-monopoly politics. The animating grievances were the railroad, the exclusive franchise, and the special charter, and the new § 21 answered them with two rules: no grant of advantage that the legislature cannot take back, and no grant to some on terms closed to the rest. The uniform-operation clause was older; California's 1849 constitution took it from Iowa's constitution of 1846. *Brooks v. Hyde*, 37 Cal. 366, 377 (1869)

(Sanderson, J.) (quoting his separate opinion in *Bourland v. Hildreth*, 26 Cal. 161 (1864)); *see* 1 Willis & Stockton, *supra*, at 264 (remarks of Mr. Edgerton) ("The clause as it now stands is from the first Constitution of the State of Iowa.").

[¶128] Both provisions belonged to a national constitutional tradition that the nineteenth century knew as the prohibition of class legislation. Cooley stated its premise in the treatise the era treated as authoritative: "The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious . . . ." Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 487 (5th ed. 1883). The period's systematic treatment of the special-legislation problem cataloged the same movement sweeping the state constitutions. *See* Charles Chauncey Binney, *Restrictions upon Local and Special Legislation in the United States* (pt. 4), 41 Am. L. Reg. & Rev. 922 (1893). The Supreme Court of the United States applied the same doctrine, under the name "class legislation," when it declared unconstitutional a Texas statute imposing attorney's fees on railroad corporations alone. A classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 155 (1897).

[¶129] North Dakota's convention wrote the same commitment into the legislative article. Original article II, § 69 prohibited local or special laws in thirty-five enumerated cases, from "[l]ocating or changing county seats" (subdivision 3) to "[g]ranting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever" (subdivision 20), and § 70 required a general law "[i]n all other cases where a general law can be made applicable." N.D. Const. of 1889, art. II, §§ 69–70 (consolidated today in N.D. Const. art. IV, § 13). Original §§ 11 and 20 of the Declaration of Rights and §§ 69 and 70 of the legislative article were interlocking parts of a single design, under which government was not to deal out advantage by name or by artificial class. Sections 11 and 20 stated the principle; §§ 69 and 70 enforced its most common legislative applications.

[¶130] When text is borrowed, its settled construction comes with it. Courts construing provisions "taken from another state almost invariably hold that the Legislature or the Constitution makers are presumed to have adopted it with knowledge of the construction or interpretation given it by the courts of the state whence it comes, and therefore to have adopted such construction or interpretation." *State ex rel. McCue v. Blaisdell*, 119 N.W. 360, 365 (N.D. 1909); *accord Beleal v. N. Pac. Ry. Co.*, 108 N.W. 33, 34–35 (N.D. 1906). The interpretive materials for §§ 21 and 22 are therefore available: the California text of 1879, the class-legislation tradition it codified, and the constructions settled by 1889. This Court's practice from the beginning has been to consult such sources when construing our constitution. *See State ex rel. Miller v. Taylor*, 133 N.W. 1046, 1049 (N.D. 1911).

XI

[¶131] This Court's early constructions are consistent with this reading. The 1891 Court applied the doctrine and sources the borrowing predicts without a word about the Fourteenth Amendment.

[¶132] In *Vermont Loan & Trust Co. v. Whithed*, the Court construed original §§ 11 and 20 together as this state's guarantee against class legislation, drawing its authorities from Ohio and, fittingly, California. 49 N.W. 318, 320 (N.D. 1891) (citing *McGill v. State*, 34 Ohio St. 228, 237 (1877), and *French v. Teschemaker*, 24 Cal. 518, 544 (1864)). Weeks later, *Edmonds v. Herbrandson*, 50 N.W. 970 (N.D. 1891), supplied the operative test. A statute restricted the relocation of county seats, but only in counties whose courthouses predated the act, a class closed forever on the day of enactment. The Court declared the statute unconstitutional. Classification is permitted, but the classification "must be natural, not artificial." *Id.* at 971. It must rest on real differences germane to the law's own object, the class must remain open to all who come to stand in the same relation to the law's purpose, and the Legislative Assembly's own characterization cannot resolve the question, because "[t]he legislature cannot finally settle the boundaries to be drawn." *Id.* Courts "will look not to its form or phraseology merely, but to its substance and necessary operation." *Id.* at 973 (quoting *Nichols v. Walter*, 33 N.W. 800, 801 (Minn. 1887)).

[¶133] For eight decades the Court applied this doctrine, invalidating some legislation as improper class legislation while upholding other legislation against such claims. Between 1891 and 1936 the Court invalidated legislation under these interlocking provisions at least six more times. It declared invalid a statute channeling city tax penalties to cities alone, *State ex rel. Mitchell v. Mayo*, 108 N.W. 36, 38 (N.D. 1906); a paving act limited to townships adjoining large cities that let some property owners burden others, *Morton v. Holes*, 115 N.W. 256, 257–58 (N.D. 1908); and a county-seat statute drawn around an arbitrary population line, *In re Connolly*, 117 N.W. 946, 947–49 (N.D. 1908). It invalidated a primary-election nomination threshold, *State ex rel. Dorval v. Hamilton*, 129 N.W. 916, 918 (N.D. 1910) (any classification supporting "distinctive or special operation of the law must be natural, not artificial"); graduated probate filing fees, *Malin v. La Moure Cnty.*, 145 N.W. 582, 583 (N.D. 1914); and motor-carrier exemptions drawn to favor particular haulers, *Figenskau v. McCoy*, 265 N.W. 259, 264 (N.D. 1936). The Court sustained far more statutes than it invalidated. The doctrine policed favoritism without judicial superintendence of policy.

[¶134] Even after federal review of economic legislation had receded to conceiving hypothetical justifications, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–89 (1955), this Court applied the traditional formulation: a classification "must be natural and not artificial, reasonable and not arbitrary or capricious and must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed." *Herr v. Rudolf*, 25 N.W.2d 916, 920 (N.D. 1947) (cleaned up). As late as 1968 the traditional class-legislation doctrine was the state-law backbone of a decision invalidating the intestacy disqualification of illegitimate children. *In re Estate of Jensen*, 162 N.W.2d 861, 877–79 (N.D. 1968).

XII

[¶135] The interpretive framework the parties and our modern cases refer to as "equal protection" appeared between 1974 and 1988, in a sequence of cases that did not engage the ordinary materials of interpretation.

[¶136] In *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974), this Court invalidated the automobile guest statute under original §§ 11, 13, and 20, administering those sections under the vocabulary of federal "equal protection" and sketching what would become a three-tier framework. The opinion insisted on the independence of the state grounds: "Federal courts examine State statutes only to determine if they comply with the United States constitutional mandates," while this Court also examines them against "State constitutional mandates," which may be different. *Id.* at 776–77. The Court declined to rest the holding on federal law. *Id.* at 780. In describing its interpretive approach, the Court suggested it was updating the state constitution to sync with the federal doctrine: "In constitutional law, as in other matters, times change and doctrines change with the times." *Id.* at 779 (citing *Ferch v. Hous. Auth. of Cass Cnty.*, 59 N.W.2d 849 (N.D. 1953)). For the emerging three-tier framework, *Hassett* relied on then-recent federal equal-protection cases and on "commentators . . . suggesting that the Supreme Court is using a new intermediate analysis" in an unsigned student survey in the Harvard Law Review, which was erroneously attributed to Professor Tribe's Foreword. *See id.* at 775 (citing "*Tribe, The Supreme Court, 1972 Term*, 87 Harvard L. Rev. 1, 121-122 (1973)"). The cited pages are not in the Foreword, which ends at page 53. They are in the Review's survey of the Term, and the sentence *Hassett* quoted for the new intermediate test, requiring a "close correspondence between statutory classification and legislative goals," is that survey's description of strict scrutiny. *See The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 116, 121 (1973) ("When employing strict scrutiny, a court requires a close correspondence between statutory classifications and legislative goals."). The Court said the resulting test "closely approximates the test historically used by this court," *Hassett*, 217 N.W.2d at 775, but merely quoted the constitutional text without analyzing it or examining its history.

[¶137] *Snyder's Drug Stores* followed within weeks, and because it is the authority on which the State rests its answer to the appellant's call for independent analysis, three points about it matter. First, the sentence most often quoted for the architecture of the two sections, "Section 20 is essentially the converse of Section 11," appears in the opinion "as stated in the introductory part of [Snyder's] brief." 219 N.W.2d at 145. Often repeated in subsequent cases,

this statement was simply a litigant's argument preserved in the reported decision. The statement was not in the Court's voice, and it was not the Court's reasoning. It became doctrine only by later repetition.

[¶138] Second, the "similar" nature of the state and federal provisions was a narrow holding twice limited to "this case." The Court said, "For the purposes of this case, we consider the objectives of Section 11 and Section 20 of the North Dakota Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to be similar." *Id.* at 146. After reaffirming *Hassett*'s point that the state provisions may be given a different meaning, the Court stated, "we conclude that in this case there is no compelling reason to do so." *Id.* at 150. A conclusion twice qualified by "this case" is a holding about pharmacy-permit legislation, not a rule that our interpretation of these provisions presumptively tracks federal doctrine in all cases.

[¶139] Third, *Snyder's* is the one place in our decisions where the Court glanced toward the actual source of our text. "It is interesting to note," the Court wrote, "that Section 11 of Article I of the California Constitution is similar to Section 11 of Article I of our Constitution, and that Section 21 of Article I of the California Constitution is similar to that of Section 20 of our Constitution." *Id.* at 150. In contrast to the overstated similarity to the Fourteenth Amendment discussed above, here *Snyder's* use of "similar" greatly understates the relationship to the California provisions. The provisions are nearly identical, because ours were copied from California's in 1889. Not knowing the provenance, the Court took from California not the meaning the 1879 convention had declared to its ratifying public, and thereby to ours, but a mid-twentieth-century gloss that California's provisions "have been generally thought in California to be substantially the equivalent of the equal protection clause of the Fourteenth Amendment." *Id.* (quoting *Dep't of Mental Hygiene v. Kirchner*, 400 P.2d 321, 322 (Cal. 1965)). The one time this Court looked at the right state, we borrowed from the wrong century.

[¶140] By the end of 1974 the "equal protection" gloss had hardened from a label into a caption. The syllabus in *Gableman v. Hjelle* spoke of "the Equal Protection Clauses of either § 1 of the Fourteenth Amendment to the United States

Constitution or Article I, §§ 11 and 20 of the North Dakota Constitution." 224 N.W.2d 379, 381 (N.D. 1974). *Gableman* erroneously treated two distinct constitutions as carrying one doctrine with interchangeable clauses.

[¶141] Once the Court linked the two constitutions, the apparatus of tiers naturally followed. In *Arneson v. Olson*, we invalidated the 1977 medical-malpractice act, restated three standards of review, and repeated for the middle one the formula *Hassett* had borrowed: an intermediate tier requiring a "close correspondence between statutory classification and legislative goals." 270 N.W.2d 125, 132–33 (N.D. 1978) (quoting *Hassett*, at 775). The tier was constructed in the immediate shadow of *Craig v. Boren*, 429 U.S. 190, 197 (1976), which had just settled the federal intermediate standard for sex classifications—a coincidence of timing unlikely to be missed by any reader of the two opinions. *Hanson* then supplied the trigger, borrowed from New Hampshire: "The intermediate standard of review is usually applied when 'an important substantive right' is involved," and "the right to recover for personal injuries is an important substantive right." 389 N.W.2d at 325 (quoting *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 294 (N.H. 1983)). *Gange* consolidated the whole into the three tiers the parties recite today: strict scrutiny for suspect classifications and fundamental rights, the close-correspondence test for important substantive rights, and rational basis for the rest. 429 N.W.2d at 433.

[¶142] Each step in this sequence cites the step before it and a federal or sister-state model beside it. No step parses the text of the provisions or cites the convention Journal, the Official Report, the California source, the 1891 constructions, or the borrowed-provision presumption of *Blaisdell*. So far as I have been able to determine, no decision of this Court construing §§ 21 and 22 after 1974 engages the 1889 drafting history. The accumulated force of our own repetition is inadequate support for the modern framework. It traces back to *Hassett*'s "times change," to a litigant's brief summarized in *Snyder's*, to the season of *Craig v. Boren*, and to New Hampshire's *Heath*, but not to the constitution.

[¶143] The appellant's authority for strict scrutiny illustrates how casually the modern doctrine was assembled. *Maxwell* was a prisoner-transfer case. For years

every woman sentenced to the penitentiary had been sent out of state while men stayed. *Maxwell*'s equal-protection passage recited the then-current federal two-tier doctrine of rational basis with strict scrutiny reserved for classifications "termed 'inherently suspect.'" The opinion listed, on federal authority, "race, sex, illegitimacy, and immutable characteristics determined solely by accident of birth" as the suspect categories, and added that this Court had already "used" the category under original § 20 and had "indicated" that sex classifications are inherently suspect under the state constitution. 259 N.W.2d at 627 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Interest of G.H.*, 218 N.W.2d 441 (N.D. 1974); *Tang v. Ping*, 209 N.W.2d 624 (N.D. 1973)). The constitutional holding commanded only three votes. *Maxwell,* at 629; *id.* at 633–36 (Sand, J., concurring in part and dissenting in part, joined by Paulson, J.). The passage was not a considered construction of §§ 21 and 22. Neither *Maxwell* nor the cases it invoked asked what original §§ 11 and 20 meant when adopted. The passage merely restates federal doctrine in a state-law paragraph.

[¶144] The district court's authority for an intermediate tier for sex classifications is no more persuasive than *Maxwell*'s analysis. The appellant is right that the sentence in *City of Mandan v. Fern* on which the district court relied, "We review alleged sex discrimination under an intermediate standard of scrutiny," addressed only the federal constitution. The sentence cites only *Craig v. Boren*, and *Fern* resolved a federal *Batson* question, in an opinion that expressly declined to construe the North Dakota Constitution because the defendant's bare citation of §§ 21 and 22 was "insufficient to raise the issue." 501 N.W.2d at 744 & n.3. Neither *Maxwell* nor *Fern* rests on the North Dakota text. We allowed the doctrine to detach from its proper sources. The parties trade dicta about tiers because the tiers themselves have no anchor in anything the people adopted.

[¶145] None of this means the modern results are wrong. Most can be justified, perhaps more convincingly, as applications of the traditional standard. *Hanson*'s statute of repose extinguished claims for a favored class of manufacturers on terms closed to the similarly situated; *Edmonds* reaches that disposition directly, without any detour through "important substantive rights." *See also Dickie v. Farmers Union Oil Co. of LaMoure*, 2000 ND 111, ¶¶ 1, 13, 611 N.W.2d 168 (reenacted repose statute). The cases sustaining statutes under the intermediate

tier are better explained as classification cases asking whether the legislative line rests on real differences germane to the statute's object. *See Bellemare v. Gateway Builders, Inc.*, 420 N.W.2d 733 (N.D. 1988); *Bouchard v. Johnson*, 555 N.W.2d 81 (N.D. 1996); *Olson v. Bismarck Parks & Recreation Dist.*, 2002 ND 61, 642 N.W.2d 864; *Hoffner v. Johnson*, 2003 ND 79, 660 N.W.2d 909; *Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 2018 ND 71, 908 N.W.2d 442; *Condon v. St. Alexius Med. Ctr., 2019 ND 113*, ¶ 16, 926 N.W.2d 136. When the Court has cited the clauses' older formulation, it has had no difficulty applying it. *Best Products Co. v. Spaeth*, 461 N.W.2d 91, 98–99 (N.D. 1990), measured the Sunday-closing law's classifications against the special-laws clause with the *Edmonds* test. The change initiated in 1974 was not primarily in outcomes. The Court stopped deriving meaning from the text and began borrowing from federal cases interpreting different text.

XIII

[¶146] The State reads *Snyder's* to hold that our provisions and the federal clause have similar objectives and that a "compelling reason" is required to diverge from the federal doctrine when applying the state provisions. The State is right that the appellant has supplied no alternative framework. But urging "independent analysis" without saying what the state provisions mean is *Hassett*'s flawed method, and the answer to it is not a presumption that the state provisions carry the same meaning as the federal provision. The state text is an independent enactment with its own sources, and the first question about any enactment is what it meant to the people who ratified it. Whether that meaning diverges from federal doctrine is a question that comes after reading the text of the state constitution and independently interpreting its meaning. *Snyder's* was wrong insofar as it is read to require a compelling reason to depart from *federal* doctrine when interpreting our distinctly worded *state* provisions. The majority resolves the claim under our existing framework because no alternative was briefed, not because federal doctrine presumptively controls. Majority, ¶¶ 77, 87. To be clear, I do not fault the parties for arguing the framework as they found it; litigants must aim at the target the court has hung.

[¶147] Two features of the current framework conflict with the traditional standard. The first is the tier trigger. The "important substantive right" threshold

has no basis in the text, because §§ 21 and 22 turn on the character of the legislative grant and not on a court's unguided ranking of the claimant's interests. The second is the hypothesized-facts mode of federal-style rational basis, under which a classification generally survives if any conceivable state of facts might justify it. The traditional standard tested the statute's substance and operation, and *Edmonds* denied the Legislative Assembly the power to "finally settle" its own classifications' validity; a mode of review that invents justifications the Legislative Assembly never had is inconsistent with that command. A court persuaded by the history could retire both features while leaving the results of the modern cases intact, and in my view would place several of them on firmer ground than the formulations they announced.

[¶148] Briefing that urged that course would have to engage the counterargument. Fifty years of tiered review carries substantial precedential weight. Those who would apply a common-law approach to constitutional interpretation may say that doctrine legitimately grows from its origins through accretion. *See generally* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996). I see three answers. First, whatever force that account has for doctrine grown in reasoned steps, the 1974 change did not happen in reasoned steps. It rested on a misattributed formulation, a similarity holding expressly limited to its case, and a borrowed gloss adopted without knowledge of the text's source. Second, this Court's own interpretive practice, before and after 1974, has been to treat the adopted meaning as the benchmark from which departures must be justified. *See Taylor*, 133 N.W. at 1049. Third, the two approaches lead to nearly the same place. The recovered principle appears to be a better rationale for the line of precedent from *Edmonds* to *Condon*, so we could discard the modern formulations without calling into question the results of these cases.

[¶149] Our modern doctrine's federal vocabulary shapes what litigants ask of the courts. The parties litigated, and the district court resolved, whether transgender status is immutable and whether gender dysphoria may desist; whether the affected class is politically powerless; whether *Maxwell*'s passage makes sex "inherently suspect" in North Dakota; whether *Fern*'s federal *Batson* sentence sets the tier; and how far *United States v. Skrmetti*, 605 U.S. 495 (2025),

controls a state-law claim. The majority finds the suspect-class question unnecessary, Majority, ¶ 95, declines the intermediate-tier question as unpreserved, Majority, ¶ 99, and has no occasion to apply the *Maxwell* premise it recites, Majority, ¶¶ 81, 92. Under the traditional standard none of those questions arises, because the guarantee is directed at the legislative classification, not the characteristics of the claimant. Litigants who ask us to apply federal doctrine more expansively than the federal courts do, by adding or enlarging suspect classes, raising the scrutiny of a tier, or broadening the conception of fundamental rights, are asking us to modify federal doctrine under the name of the state constitution. We can and should apply our own doctrine grounded in state-law sources, wherever it may lead.

XIV

[¶150] I do not apply the recovered traditional standard to this record. The early cases remain instructive. How those cases measured germaneness, how they treated exceptions carved from a general prohibition, and what role trial findings play when a statute's operation is tested in a facial challenge are questions that the parties have not briefed and that I have not fully answered for myself. It is enough to say what the standard would ask here: what classification the Act draws, judged by its actual operation rather than solely its labels; whether the class is open to all who come to stand in the same relation to the law's object; and whether the line between arresting precocious puberty and suppressing normal puberty rests on a real difference germane to the statute's protective object. The district court's findings speak to some of these questions, and nothing in them suggests the recovered standard would change today's result. What it would change is the ground on which the result rests, and in a future case with a different record that difference may matter.

[¶151] I offer this account in a special concurrence, in a case where it was not briefed, so that it can be tested in a case where it is. If the discussion above is flawed or incomplete, adversarial presentation will show it. If it is right, then the framework we applied today does not trace to the constitution, and mere repetition of the error is not beyond reconsideration. *See Dubois v. State*, 2021 ND

153, ¶¶ 23–24, 963 N.W.2d 543 (overruling a "longstanding misinterpretation of N.D.C.C. § 12.1-32-07").

[¶152] The forty-six words of art. I, § 21 and the eleven words of § 22 have not changed since October 1, 1889. Only the Court's memory of where they came from has changed. In an appropriate case, with the benefit of full briefing on their text and history, we should be prepared to consider whether the meaning those words carried when the people approved them, no favors on any terms not open to all, is the meaning they still carry. Because the parties have not asked us to do that here, I concur.

[¶153] Jerod E. Tufte
Jon J. Jensen