Docket No. 22-8976

In The

Supreme Court of the United States

October Term, 2022

April Nardini, in her official capacity

as the Attorney General of the State of Lincoln,

Petitioner,

v.

Jess Mariano, Elizabeth Mariano, and Thomas Mariano,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTEENTH CIRCUIT

BRIEF FOR RESPONDENT

Team 3101
Attorneys for Respondent

QUESTIONS PRESENTED

I. Did the "serious questions" standard for preliminary injunctions survive *Winter v. Natural Resources Defense Council, Inc.*, a case that employed the standard in its analysis and never commented on its continued viability?

II. Was it proper to grant a preliminary injunction in connection with Respondents' Substantive Due Process and Equal Protection claims, considering their likelihood of success on the merits and their showing of both devastating irreparable harm and significant public interest weighing in their favor?

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The opinion and order of the United States District Court for the District of Lincoln is unreported and set out in the record. R. at 1–22. The opinion and order for the United States Court of Appeals for the Fifteenth Circuit is also unreported and set out in the record. R. at 23–34.

CONSTITUTIONAL PROVISIONS

The following provisions of the Fourteenth Amendment are relevant to this case: U.S. CONST. amend. XIV, § 1. This provision is reproduced in Appendix A.

STATUTORY PROVISIONS

The following provisions of the United States Code are relevant to this case: 28 U.S.C. §§ 2201(a); 2202; 42 U.S.C. § 1983. The following provisions of the Stop Adolescent Medical Experimentations Act are relevant to this case: 20 Linc. Stat. §§ 1201; 1202; 1203; 1204; 1205; 1206. These provisions are reproduced in Appendix B.

RULES PROVISIONS

The following provisions of the Federal Rules of Civil Procedure are relevant to this case: Fed. R. Civ. P. 57; Fed. R. Civ. P. 65(a)(1). These provisions are reproduced in Appendix C.

STATEMENT OF THE CASE

Factual Background

Jess Mariano suffers from life-threatening gender dysphoria. Thomas and Elizabeth Mariano can recount numerous occasions that their child, Jess, remarked that he "didn't want to grow up" if he had to be a girl. R. at 4-5. Despite being assigned female at birth, Jess perceived himself as male from a very young age. *Id.* at 4. For years, he suffered severe anxiety and depression stemming from the disconnect between his gender identity and assigned sex, culminating in a suicide attempt when he was only eight years old. *Id.*

Jess survived. After the devastation of nearly losing their child, Elizabeth and Thomas started Jess in therapy under the care of a psychiatrist, Dr. Dugray. Jess eventually informed Dr. Dugray of his "strong desire to be treated as a boy." *Id.* Despite experiencing years of depression and anxiety at that point, it took another nine months of therapy before Jess received a formal diagnosis of gender dysphoria. *Id.* That diagnosis proved critical two years later, when Jess's dysphoria worsened as the nightmare of a female puberty loomed: he had started to develop breast tissue. *Id.* at 5. His care team agreed on prescribing GnRH agonists, commonly known as puberty blockers, to pause developments related to sexual maturation. *Id.* Jess improved with treatment, displaying fewer symptoms of depression and less intense gender dysphoria, although he remained distressed by the amount of breast tissue he had developed. *Id.* Because his dysphoria persists, Dr. Dugray anticipates that Jess will need to continue taking puberty blockers until he can receive hormone replacement therapy ("HRT") and potentially undergo chest surgery at age sixteen.

Id. Today, Jess is fourteen and lives as a male. *See id.* at 2. He continues to see a therapist and treat his dysphoria with puberty blockers. *Id*. at 5.

Treatment for dysphoric adolescents is medically necessary healthcare. The treatment of gender dysphoria is far from new, and efforts to attain gender-affirming care date back millennia.[1] Psychiatric and medical providers, empowered by the recognition of "gender dysphoria" in the Diagnostic and Statistical Manual of Mental Disorders, have long sought to refine the standard of care for such individuals. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS (5th ed. 2013) at 452. Medical treatment of gender dysphoria emphasizes three overriding principles and an additional concern for minor patients:

- Individualized care
- Harm reduction
- Informed consent
- Likelihood that dysphoria persists into adulthood

Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, WORLD PRO. ASS'N FOR TRANSGENDER HEALTH (WPATH) 11, 55-56 (7th ed. 2012), at https://www.wpath.org/media/cms/Documents/SOC%20v7/

[1] Famously, the Roman Emperor Elagabalus preferred to be addressed by a feminine moniker and even inquired whether physicians could surgically create a vagina. *E.g.*, Eric R. Varner, *Transcending Gender: Assimilation, Identity, and Roman Imperial Portraits*, 7 U. MICH. PRESS 201 (2008).

SOC%20V7_English.pdf [hereinafter *Standards of Care*]. Because of this, leading medical organizations overwhelmingly favor beginning medical interventions for dysphoric youth only after the onset of puberty. Such treatments routinely include the use of completely reversible puberty blockers, because, as the World Professional Organization for Transgender Health ("WPATH") recognizes, dysphoria that presents in childhood does not inevitably persist into adulthood. *Id.* at 11. However, WPATH cautions that uncertainty as to the length of time an individual suffers from gender dysphoria is not a medically adequate reason to forego the use of puberty blockers. *Id.* at 21 ("[W]ithholding puberty suppression and subsequent feminizing or masculinizing hormone therapy is not a neutral option for adolescents.").

Adolescent dysphoria has a much stronger chance of persisting into adulthood. For patients who have begun puberty, like Jess, both HRT and gender-affirming surgery have been found to be medically necessary components of treating dysphoria. *Id.* at 8. An individualized approach to care as envisioned by WPATH requires that these interventions—and puberty blockers—remain available because resuming an unwanted puberty is a risk factor unique to gender dysphoric youth. *Id.* at 68 ("A 'freeze-frame' approach is not appropriate care in most situations.").

Gender dysphoria, like many conditions that afflict the human body, can be deadly if left untreated. *Id.* at 68 (finding an increased risk of autocastration and suicidality accompanies abrupt withdrawal from hormones). Because dysphoric adolescents are more likely to develop into dysphoric adults, any lapse in or lack of

treatment puts them at a sustained risk for depression, anxiety, and suicide. *Id.* Lack of available treatment–anywhere–increases social stigma against transgender individuals, which in turn exacerbates existing mental health conditions.

Despite these findings, the medical profession, in fulfilling its pledge to do no harm, enforces numerous procedural steps that delay the age at which patients may properly consent to certain treatments. *Id.* at 55. As is always the case in medicine, certified providers must carefully weigh the risks of treatment and convey those risks to dysphoric patients.

In other words, the medical profession already treats gender dysphoria much like any other condition: under the practiced guidance of a certified provider and with great concern for the present and future well-being of the patient. State attempts to regulate the treatment of gender dysphoria frequently fail to recognize this, often placing young patients in the unenviable position of continuing to live with immense psychological distress rather than attain care for the treatable but irrepressible condition of gender dysphoria.

The SAME Act will prevent Jess from accessing gender-affirming healthcare. In 2021, Lincoln passed the Stop Adolescent Medical Experimentations ("SAME") Act, which prohibits healthcare providers from providing patients under the age of eighteen with treatment "performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex, including without

limitation" puberty blockers, supraphysiologic doses of testosterone and estrogen, and surgeries that construct genitalia. *See* 20 Linc. Stat. § 1203.

Animating the Act's prohibition is the State of Lincoln's desire to "protect children from risking their own mental and physical health and lifelong negative medical consequences that could be prevented by receiving a more conventional treatment of their gender dysphoria." 20 Linc. Stat. § 1201(b)(1). Without reference to individualized medical judgments, it includes legislative findings that gender dysphoria can be treated by "conventional and widely-accepted methods . . . that do not raise informed consent or experimentation concerns." 20 Linc. Stat. § 1201(a).

Nevertheless, the Act encourages "treatments supported by medical evidence" but paradoxically finds "no established causal link between use of medical treatments . . . such as puberty blockers, sex hormones and reassignment surgery, and decreased suicidality." 20 Linc. Stat. §§ 1201(b)(2); 1201(a)(4). The SAME Act does not define what qualifies as an "experimental" treatment, only prohibiting interventions administered for the purpose of "instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." 20 Linc. Stat. § 1203; *see also* 20 Linc. Stat. § 1202.

Procedural History

The *District of Lincoln enjoined enforcement of the SAME Act.* Jess and his parents ("the Marianos") filed suit against April Nardini in her official capacity as Attorney General of the State of Lincoln ("Lincoln") on November 4, 2021. R. at 1. They alleged under 42 U.S.C. § 1983 that enforcement of the SAME

Act would deprive Jess of his right to the Equal Protection of the law and the Marianos of their right to Substantive Due Process under the Fourteenth Amendment. *Id*. One week later, the Marianos filed a Motion for Preliminary Injunction, which Lincoln requested the court deny when it responded with a Motion to Dismiss. The District Court of Lincoln found that the Marianos had established four factors relevant to the grant of a preliminary injunction, as explained in *Winter v. Natural Resources Defense Council, Inc.*; that they had established a likelihood of success on the merits of their constitutional claims; they would suffer irreparable harm if the court failed to enjoin the Act; that harm "greatly" outweighed any damage the Act seeks to prevent; and that no overriding public interest required denial of injunctive relief. *Id.* at 2.

The Fifteenth Circuit affirmed. Lincoln filed an interlocutory appeal, arguing that the District Court abused its discretion by applying the wrong legal standard on the preliminary injunction. The Fifteenth Circuit found no abuse of discretion because the serious questions standard survived *Winter*. Additionally, it recognized "no clear error" in the District Court's assessment that the balance of harms strongly favored the Marianos. *Id.* at 24.

Turning to the merits of the constitutional claims, the court addressed each using the sliding-scale approach. Rejecting uncritical deference to legislative findings, it declined to find a compelling government interest in "regulating a person's gender identity." *Id.* at 25. The court concluded that serious questions made the Substantive Due Process claim a "fair ground for litigation, especially

when balanced against the imminent irreparable [sic] harm [to] Jess Mariano." *Id.* at 26. Then, recognizing that "the raison d'être of the SAME Act is treatment of young people whose gender identity does not conform to their biological male-female sex," it held that the Act is subject to intermediate scrutiny because it discriminates based on sex. *Id.* The Marianos' Equal Protection claim was therefore likely to succeed, even on heightened review, because the Act is faultily premised on the idea that transgender healthcare is "experimental." *Id.* at 27.

Accordingly, the Fifteenth Circuit affirmed the grant of preliminary injunction.

SUMMARY OF THE ARGUMENT

The serious questions standard survives* Winter *because this Court has not unequivocally addressed its viability. The District Court did not commit clear error by finding that the serious questions standard remains viable after *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), because this Court has, at best, provided mere hints about the standard's continued validity. It never modified the means by which courts assess a movant's "likelihood of success on the merits," leaving space for courts to adopt their own criteria. Rather than replacing the existing calculus with an entirely new analytical framework, *Winter* articulated factors relevant to injunction analysis but preserved the Circuits' differing approaches to weighing those factors.

The proof comes from the text of *Winter* itself. *Winter* neither commented on serious questions—despite having the opportunity to do so—nor functionally

abrogated them from preliminary injunction analysis. Rather, this Court applied sliding-scale analysis, ultimately finding that a single factor could, in some cases, decide the propriety of granting an injunction. In so doing, this Court upheld serious questions as an appropriate means of assessing a grant of preliminary injunction.

Because the serious questions standard survives *Winter*, this Court has the opportunity to resolve whether it or another standard applies within the *Winter* framework. While some courts have decried serious questions in their respective circuits, the majority of courts apply serious questions or a similar approach to injunction review. As a result, the serious questions standard as understood by the Second Circuit is the correct articulation of a court's equitable discretion to grant a preliminary injunction. In any case, the debate about the standard's viability proves that the lower courts did not err by applying it.

The Marianos' Substantive Due Process claim warrants granting a preliminary injunction. The District Court did not abuse its discretion in granting the preliminary injunction because the Marianos showed a likelihood of success on the merits of their Due Process claim. If the SAME Act is enforced, it will violate the Marianos' parental rights because it will prevent them from choosing gender-affirming care for Jess.

Violation of the Marianos' rights in this way is impermissible unless the SAME Act survives strict scrutiny, which it cannot. First, Lincoln's interest in protecting children from experimental treatments is not compelling as neither experimental treatments nor the treatments banned by the Act, which Lincoln

incorrectly characterized as experimental, carry a sufficient risk of harm. Second, the Act is not narrowly tailored as Lincoln did not use the least restrictive means possible, or even consider less restrictive alternatives. Third, banning gender-affirming care does not serve Lincoln's asserted goal of protecting children from experimental treatments.

The SAME Act could not survive even the more forgiving rational basis review as the chosen means cannot possibly be found rationally related to a legitimate governmental interest. In considering these arguments together, there can be no doubt that the Marianos showed they are substantially likely to succeed on the merits of this claim.

Jess's claim under the Equal Protection Clause warrants granting a preliminary injunction. The District Court correctly issued an injunction because Jess is likely to succeed on the merits of his Equal Protection claim. The SAME Act must be subjected to intermediate scrutiny because it discriminates against transgender youth. Absent the finding of a quasi-suspect class deserving of heightened protection for those who are transgender, intermediate scrutiny is still appropriate due to the special burden the SAME Act places on children.

Lincoln has failed this required bar of heightened scrutiny. The treatments the State prohibits here are only prohibited when treating gender dysphoria. Children under the age of eighteen without gender dysphoria are permitted to access the very medical care the State is restricting for transgender minors. This contradicts the State's position that they want to protect children from supposedly

"experimental" medical treatment. The SAME Act bears no substantial relation to furthering that interest. Furthermore, in prohibiting medically necessary care for dysphoric youth, the State subjects these already vulnerable children to greater harm. This stands in conspicuous opposition to Lincoln's expressed purpose. Jess is likely to succeed on the merits of his Equal Protection claim under intermediate scrutiny.

Even under the rational basis review advocated by Lincoln, this statute fails to satisfy its necessary burden as there is no rational connection between Lincoln's expressed purposes in passing the SAME Act and the actual legislation it is imposing on vulnerable youth. Regardless of the standard of review applied, Jess has a strong likelihood of success on the merits of his Equal Protections claim.

The irreparable harm that will result absent enjoinment of the SAME Act, along with the balance of equities and public interest, favor granting the preliminary injunction. Enforcement of the SAME Act will lead to immediate and irreparable harm through the violation of the Marianos' constitutional parental rights and the infliction of devastating mental and physical harm to Jess. The violation of Thomas and Elizabeth Mariano's constitutionally protected rights, by its very nature, constitutes irreparable harm. If the SAME Act is enforced, Jess will suffer a devastating setback in his physical and mental health. The Act would require Jess to return to a treatment that was ineffective on its own and undergo puberty as a female in direct conflict with his identity. The preliminary injunction

was properly granted in light of the irreparable injury that will be inflicted on both the Marianos and Jess by the SAME Act.

Preventing the violation of constitutional rights always serves the public interest. The SAME Act weakens the fundamental rights of parents to provide appropriate medical care for their children and subjects transgender youth to inadequate medical care simply because they have gender dysphoria. The irreparable harm threatening both Jess and the Marianos outweighs any possible harm to Lincoln in delaying enforcement of this statute. The preliminary injunction will allow Jess to continue receiving his medical care until a final opinion on the SAME Act's constitutionality is issued, truly preserving the current positions of both parties.

For the foregoing reasons, this Court should affirm the decision of the Fifteenth Circuit and sustain the preliminary injunction against the SAME Act.

STANDARD OF REVIEW

A federal court of appeals reviews a grant of a preliminary injunction for abuse of discretion and may only disturb the district court's ruling if it rests on a clearly erroneous legal conclusion or lacks a rational basis in the record. *Free the Nipple–Fort Collins v. City of Fort Collins*, 916 F.3d 792, 798 (10th Cir. 2019). "Clear error exists when…the reviewing court on the entire [record] is left with the firm conviction that a mistake has been committed," although there may be evidence to support it. *Hollinger v. Home State Mut. Ins.*, 654 F.3d 564, 569 (5th Cir. 2011). Questions of law, such as whether the movant is likely to succeed on the merits, are reviewed de novo. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689 (6th Cir. 2014).

ARGUMENT

I. The serious questions standard for preliminary injunctions remains viable after *Winter v. Natural Resources Defense Council, Inc.* because this Court has never unequivocally rejected it.

The viability of the serious questions standard is implicit in this Court's decision in *Winter v. Natural Resources Defense Council, Inc.* and its affirmation of flexible standards in preliminary injunction analysis. 555 U.S. 7 (2008). Though the exact scope of the standard is far from clear, the lower courts did not err by finding that serious questions weighed in favor of granting the Marianos' preliminary injunction.

The Federal Rules of Civil Procedure empower a court to grant a preliminary injunction but do not explain under what circumstances one should be granted. F. R. Civ. P. 65. Because of this, courts have developed standards governing the exercise of equitable discretion. *E.g., Tay v. Dennison*, 457 F. Supp. 3d 657 (S.D. Ill. 2020) (holding an injunction may issue if the movant establishes "better than negligible" likelihood of success on the merits). Though the exact wording of these standards varies across circuits, the purpose of a preliminary injunction remains the same: to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

Winter v. Natural Resources Defense Council, Inc. demonstrates rather than expounds on the "frequently reiterated" standard for preliminary injunctions. 555 U.S. 7, 22 (2008) (vacating an injunction that prevented the Navy from using

certain sonar technologies during training exercises). Writing for the majority, Chief Justice Roberts explained:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Id. at 20. Despite phrasing the rule conjunctively, the Court declined to comment on the lower courts' favorable findings as to the first factor. *Id*. at 23-24. Instead, it addressed the Ninth Circuit's ruling that a plaintiff need only show a "possibility" of irreparable harm as to the second factor. *Id.* at 22-24 ("[P]laintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction."). The Court disposed of the case entirely on the third and fourth factors, finding that no likelihood of success or irreparable injury could outweigh the public's and Navy's interest in realistic training. *Id*. at 23.

Soon after *Winter*, courts contended with whether the case preserved the various standards that had been applied to preliminary injunction analysis for years. In particular, certain courts have held that *Winter* implicitly overruled the serious questions standard employed in some circuits. *E.g., Real Truth About Obama, Inc., v. Fed. Election Comm'n*, 575 F.3d 342 (4th Cir. 2009), *cert. granted, judgment vacated,* 559 U.S. 1089 (2010), *adhered to in part,* 607 F.3d 355 (4th Cir. 2010). Conversely, others have found that failure to apply the serious questions standard is a reversible error of law. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-1135 (9th Cir. 2011).

The serious questions standard survives *Winter* for three crucial reasons. First, it is consistent with *Winter* and therefore could not have been implicitly overruled. Second, this Court has signaled support for a flexible standard that functions within the *Winter* framework. Third, it persists because it represents but one plausible reading of *Winter*, which this Court can and should resolve like the Second Circuit in *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30 (2d Cir. 2010).

Debate about the viability of the standard is itself proof that the District Court and Fifteenth Circuit made no "clearly erroneous legal conclusion" by applying serious questions in the decisions below. Accordingly, this Court should affirm their judgment.

A. *Winter* did not implicitly overrule the serious questions standard because the standard is consistent within the *Winter* framework.

The serious questions standard survives *Winter* because this Court never established a rule that unequivocally overruled use of the standard. Court of Appeals precedent is implicitly overruled if a subsequent Supreme Court opinion establishes a rule of law inconsistent with that precedent; such a decision must be unequivocal rather than a "hint" of how the Court might rule in the future. *Miller v. Dunn*, 35 F.4th 1007, 1012 (5th Cir. 2022).

In the years since *Winter*, numerous courts have found that the serious questions standard survives in one form or another. A minority of courts have found that *Winter* implicitly overruled serious questions, but such holdings are based on faulty readings of *Winter*. The serious questions circuit split is evidence that, at

best, *Winter* merely hints at the standard's viability. The lower courts therefore committed no clear error and should be affirmed.

1. The majority of courts recognize that *Winter* leaves open the possibility of introducing additional nuance into preliminary injunction analysis.

In the jurisdictions that have found the serious questions doctrine consistent with *Winter*, there is simply no argument that it was implicitly overruled. The most notable of these cases, *Alliance for the Wild Rockies v. Cottrell*, held that "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." 632 F.3d at 1131-32. The Second Circuit found "no command" from this Court denying the application of serious questions to the first *Winter* factor, likelihood of success on the merits. *Citigroup*, 598 F.3d at 37-38 (noting that *Winter* scrutinized the Ninth Circuit's irreparable harm standard but withheld comment on the serious question standard's viability).

Despite recognizing "tension" with *Winter*, most circuits have found that the serious questions standard is consistent with its holding. *See P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1126 (C.D. Cal. 2015); *see also Joseph v. Sasafrasnet, LLC*, 734 F.3d 745 (7th Cir. 2013). This is possible—and correct—because the serious questions standard does not replace any of the *Winter* factors; rather, it serves as an alternate articulation of a court's discretion to grant a preliminary injunction. Holdings like those in *Alliance* and *Citigroup* are consistent

with *Winter* because they recognize that this Court did not revoke the circuits' authority to apply their own standards within the four-factor framework.

Winter, therefore, did not implicitly overrule the serious questions standard because it does not prevent courts from adopting idiosyncratic methods of evaluating preliminary injunctions. The District Court of Lincoln followed *Winter* when it found serious questions going to the merits of this case because the two standards are consistent.

2. A minority of courts have misinterpreted *Winter* as narrowing the likelihood of success factor despite evidence that this Court did not intend to do so.

The small number of courts holding that the serious questions standard no longer applies rely on a faulty understanding of *Winter*. The Fourth Circuit reads *Winter* as prescribing a high bar for likelihood of success on the merits. *Real Truth*, 575 F.3d at 346-47 (overruling use of "grave or serious questions" to measure first *Winter* factor). This understanding ignores key language in *Winter* that distinguishes a "likelihood" of success from "actual" success. *See* 555 U.S. at 32. It also fails to account for *Winter*'s apparent lack of concern with evaluating the first factor. *See id*. at 17 (discarding an injunction despite lower court findings that likelihood of success on the merits was a "near certainty").

Following the Fourth Circuit's lead, the Ninth Circuit has even changed course in several cases but for analytically inadequate reasons. *See Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, n.6 (C.D. Cal. 2012) (declining to follow *Cottrell* because it conflicts with "the Supreme

Court's ruling in *Winter*"); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir.2009) (reversing a district court's use of the Ninth Circuit's pre-*Winter* "sliding-scale" standard and remanding for application of the proper standard). These cases presume, but do not explain how, the serious questions standard is inconsistent with *Winter*, despite clear precedent articulating just that. The courts in the majority identify exactly how serious questions fit into the *Winter* framework—and importantly, they tailor the standard to fit within it. *See Rockwell Automation, Inc. v. Beckhoff Automation*, LLC, 23 F. Supp. 3d 1236, 1243 (D. Nev. 2014).

Cases holding that *Winter* overruled the serious questions standard often make the mistake of repeating *Winter*'s holding without explaining how to examine each of the factors. They are hardly the byword of careful drafting. *E.g.*, *Brown v. U.S. Forest Serv.*, 465 F. Supp. 3d 1119 (D. Or. 2020) (repeatedly referring to *Winter* as "*Winters*"). Here, the District Court and Fifteenth Circuit applied the majority standard; failure to adopt a minority theory is not cause for reversal. Even if this Court is persuaded by the minority decisions, the debate over serious questions is itself evidence that the law in this area is unclear. *Winter*, therefore, did not implicitly overrule the serious questions doctrine. Likewise, it was not "clearly erroneous" for the District Court and Fifteenth Circuit to apply the standard in this case and their judgment should be affirmed.

B. This Court has quietly signaled support for serious questions because *Winter* never commented on the standard but implicitly affirmed its use in the analysis.

This Court's indication that use of a flexible criterion is implicit in preliminary injunction analysis suggests that it condones use of the serious questions standard. In *Winter*, this Court could have commented on the viability of the standard but noticeably omitted that issue from the analysis. This was no mere oversight; this Court deliberately declined to set a threshold for the "likelihood of success on the merits" factor, allowing lower courts to apply their own standards. *See Citigroup,* 598 F.3d at 37. By disposing of the case entirely on public interest grounds, this Court engaged in sliding-scale balancing and use of serious questions as envisioned by the Second Circuit. Together, these facts confirm that this Court intended the survival of the serious questions standard. Because the standard survives, the District Court and Fifteenth Circuit could not have erred by applying it.

1. This Court had the opportunity to comment on the viability of the serious questions doctrine but chose not to.

This Court was certainly aware of the serious questions standard in 2008 because it denounced the Ninth Circuit's holding that a preliminary injunction may issue if a plaintiff demonstrates a "possibility" of irreparable harm. *Winter*, 555 U.S. at 21-22 (analyzing *Nat. Res. Def. Council, Inc. v. Winter*, 518 F.3d 658 (9th Cir.), *rev'd*, 555 U.S. 7 (2008) (employing the serious questions standard)). The failure to account for the standard is particularly notable because *Winter*'s petition for certiorari placed the question of continued viability directly in the hands of the

Court. *See* Petition for a Writ of Certiorari, *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008) (No. 07-1239), WL 859374, at I (requesting review of "[w]hether [the Council on Environmental Quality] permissibly construed its own regulation in finding "'emergency circumstances,'" which the Ninth Circuit analyzed using serious questions). It is therefore telling that the Court declined to comment on how serious questions fit into the analysis announced in *Winter*, especially once it had already overruled other Ninth Circuit precedent.

Other cases have also asked this Court to resolve the standard's apparent intractability with regard to *Winter*. *E.g.,* Brief of Amicus Curiae for the Town of Southold, New York in support of Petitioner *Town of East Hampton v. Friends of the East Hampton Airport*, 137 S.Ct. 2295 (2017) (No. 16-1070) 2017 WL 1291698 ("We believe the law of the Second Circuit permitting a 'serious questions' alternative to be in direct conflict with *Winter*. If the Second Circuit requires more clarity on *Winter*, granting the petition provides a clear opportunity to do so."); Petition for Writ of Certiorari, *Whelan v. Pascale*, 136 S. Ct. 896 (No. 15-468), 2015 U.S. S. Ct. Briefs LEXIS 3615 (positing conflict between *Winter* and the serious questions doctrine). Despite such clear opportunities to resolve the ambiguity, this Court has denied certiorari. *Town of E. Hampton, N.Y. v. Friends of the E. Hampton Airport*, 137 S. Ct. 2295 (2017); *Whelan v. Pascale*, 136 S. Ct. 896 (2016). It is apparent that this Court does not intend to do away with serious questions in *Winter*; because of this, the serious questions standard persists and courts do not err by applying it.

2. *Winter* explicitly did not set a threshold for likelihood of success on the merits, leaving it open for courts to interpret.

Winter did not explain *how likely* a plaintiff must be to succeed on the merits before an injunction can issue. 555 U.S. at 23-24 ("[W]e do not address the lower courts' holding that plaintiffs have also established a likelihood of success on the merits."). Doing so created logical and legal space for lower courts to adopt their own criterions for *Winter* likelihood, which is precisely what the Second Circuit did in 2010. *Citigroup* held:

> The "serious questions" standard permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction.

598 F.3d at 35. Other courts recognized that *Winter* didn't prescribe a way to determine when a movant is likely to succeed on the merits. *See Lopez v. Brewer*, 680 F.3d 1068, 1073 (9th Cir. 2012) (applying *Winter* and serious questions to an enforcement injunction).

Because *Winter* did not set rules for every step of preliminary injunction calculus, courts necessarily filled in the gaps with existing standards. If this Court ever intended to overrule the standard, it certainly did not do so by ignoring the additional problems raised in *Winter*'s wake.

3. This Court affirmed the sliding-scale approach's viability when it disposed of *Winter* entirely on public interest grounds.

Finally, *Winter*'s own analysis supports a contention that this Court has affirmed use of the serious-questions-sliding-scale approach. By disposing of *Winter*

on the third and fourth factors, this Court signaled that governmental and public interest can outweigh a "near certainty" of success on the merits to the extent that a court may find an abuse of discretion. 555 U.S. at 17. "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter*, 556 U.S. at 32 (citing *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 311–312 (1982)). In other words, likelihood of success is neither a dispositive nor necessary factor. This Court implicitly applied a version of the serious questions standard that allowed public interest to outweigh a likelihood of success on the merits. Logically, that level of discretion only makes sense if the likelihood threshold is a lower bar than proving a case outright at a preliminary stage. Otherwise, one must read *Winter* as condoning the denial of a preliminary injunction when the movant has all but proven their case on the merits, which would result in extended, unnecessary litigation and affront judicial efficiency. This Court's use of the standard implies its viability and supports important judicial efficiency interests. Similarly, the lower courts were correct to apply the standard.

C. This Court should resolve the circuit split in favor of *Citigroup*, which properly articulates a court's equitable discretion to grant an injunction.

The serious questions standard survives because it reinforces, rather than contravenes, *Winter*'s central holding: that courts must employ flexible standards when ruling on preliminary injunctions. An overwhelming majority of circuits have followed *Winter* while preserving the serious questions standard, which suggests that preliminary injunctions should maintain a broad measurement for likelihood of

success on the merits. Preserving the Second Circuit's conception of the standard is the best way to follow *Winter*'s holding while preserving efficiency in federal courts.

The proper alternative is to understand *Winter*'s instruction as encompassing *Citigroup*'s, allowing a court to weigh multiple factors even if the likelihood of success on the merits is lower than a "certainty." 598 F.3d at 35. Such an understanding promotes both the goal of a preliminary injunction—to preserve the status quo pending the results of litigation—and *Winter*'s conception of flexibility in the determination of whether to grant one.

Because the serious questions standard aligns within the legal and policy framework that *Winter* laid out, it is the correct means for assessing the Marianos' injunction. This Court should affirm the Fifteenth Circuit and resolve the circuit split in favor of the Second Circuit's conception of the serious questions standard.

II. The preliminary injunction was properly granted because the Marianos made strong showings of all four *Winter* factors.

The District Court did not err in issuing a preliminary injunction because the Marianos established that they met all requirements under *Winter*. Four factors must be fulfilled for a preliminary injunction to be appropriate: 1) likelihood of success on the merits, 2) irreparable harm, 3) balance of equities, and 4) public interest. *Winter*, 555 U.S. at 20. As the District Court found, the Marianos provided sufficient evidence that each of these factors are satisfied. R. at 2. Regardless of the serious question standard's viability, the preliminary injunction was properly granted and upheld because the Marianos showed a very high likelihood of success

on the merits. While they only need to "establish a likelihood of succeeding on the merits of any one of [their] claims," *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1040 (8th Cir. 2016), the Marianos have shown they are likely to succeed on the merits of both their Substantive Due Process and Equal Protection claims. This Court should uphold the preliminary injunction as the Marianos have shown that they have a likelihood of success on the merits, the injunction is supported by the balance of the equities and public interest, and that enjoinment of the SAME Act is necessary to prevent irreparable harm.

A. The Marianos are likely to succeed on the merits of their Substantive Due Process claim because the SAME Act infringes upon fundamental parental rights and cannot survive strict scrutiny.

The SAME Act limits fundamental parental rights to an impermissible extent and thus the Marianos have a high likelihood of succeeding on the merits of their Substantive Due Process claim. The Marianos not only raised a serious question regarding the merits of this claim, as affirmed by the Fifteenth Circuit, R. at 27, but showed they are substantially likely to be successful on the merits. Their likelihood of success on the merits is supported by several recent cases where courts found plaintiffs seeking preliminary injunctions against statutes which banned medical care for transgender minors substantially likely to succeed on the merits of their Due Process claims. *Eknes-Tucker v. Marshall*, No. 2:22-cv-184-LCB, 2022 U.S. Dist. LEXIS 87169, at *29 (M.D. Ala. May 13, 2022); *See Brandt v. Rutledge*, 551 F.

Supp. 3d 882, 893 (E.D. Ark. 2021), aff'd, No. 21-2875, 2022 U.S. App. LEXIS 23888 (8th Cir. Aug. 25, 2022).

The Due Process Clause protects against government violation of fundamental rights, and any statute that infringes upon such rights is subject to strict scrutiny analysis. *Washington v. Glucksberg,* 521 U.S. 702, 719-20 (1997). Because the SAME Act infringes upon parental rights, it must be reviewed using strict scrutiny. The Act cannot survive strict scrutiny because the State's interest is not compelling, the statute is not narrowly tailored, and the means do not serve the state interest. Accordingly, neither the District Court nor the Fifteenth Circuit erred in finding the Marianos showed a likelihood of success on the merits of their Due Process claim.

1. The SAME Act is subject to strict scrutiny because it infringes upon the fundamental parental right to direct children's medical care.

Parental rights are one of "the oldest of the fundamental liberty interests" and parents retain the right to make "decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *see Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). Included in parental rights is the power to direct medical care for one's child, and parents "retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment." *Parham v. J.R.*, 442 U.S. 584, 604 (1979); *Kanuszewski v. Mich. Dep't of Health and*

Hum. Serv's, 927 F.3d 396, 419 (6th Cir. 2019). Strict scrutiny must be applied to the SAME Act because it violates fundamental parental rights by preventing parents from choosing lifesaving care for their children and forcing them to accept inadequate, outdated alternatives.

Lincoln argued that the SAME Act is not subject to strict scrutiny because parents have no right to choose experimental medical treatment for their children. R. at 14. Whether parental medical rights extend to experimental treatments is irrelevant as the banned treatments are not experimental. Contrary to Lincoln's argument, lack of FDA approval, being "unproven," or an opinion from one medical association advising against use do not make a treatment experimental. *Id.* at 15.

First, lack of FDA approval does not make a treatment experimental. According to FDA definitions, the "use of a marketed drug, in the course of the medical practice" does not qualify as an "experiment." 21 U.S.C. § 312.3. An experiment is defined as a "procedure carried out . . . in order to discover an unknown effect or law, to test or establish a hypothesis, or to illustrate a known law." *Experiment*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/experiment (last visited Sept. 8, 2022). In contrast, off-label treatments are used during medical practice for the "primary purpose of . . . benefit[ing] the individual patient." Lois Snyder et al., *American College of Physicians Ethics Manual*, 170 ANNALS OF INTERNAL MED. 73, 98 (2019).

The puberty blockers and hormone replacement therapy prohibited by the SAME Act are marketed drugs which are prescribed off-label to treat gender

dysphoria. The medical guidelines presented by the Marianos instruct that gender-affirming treatments should only be provided when it is "medically necessary" and "tailored to the patient's individual need," R. at 6., supporting that they are primarily intended to benefit the patient and are not experimental. Moreover, it is illogical that medically necessary treatments would qualify as experimental. *Pirozzi v. Blue Cross-Blue Shield*, 741 F. Supp. 586, 590 (E.D. Va. 1990) ("[A] treatment found to be 'in accordance with generally accepted standards of medical practice' would hardly be 'experimental.'"). If off-label treatments are experimental, it would suggest parents have no right to seek many drugs for their children, as it is estimated that more than a third of prescriptions for children in the U.S. are off-label. H. Christine Allen et al., *Off-Label Medication use in Children, More Common than We Think*, 111 J. OKLA. STATE MED. ASS'N 776, 787 (2018).

Second, being "unproven" does not make a treatment experimental, and even if it did Lincoln did not provide convincing evidence that the banned treatments are unproven. While experimental treatments are typically unproven, that a treatment is unproven does not make it experimental. For example, off-label treatments could be considered "unproven," but, as discussed above, they are not experimental. Assuming, *arguendo,* being "unproven" did make a treatment experimental, the Marianos provided substantial evidence of a medical consensus supporting use of the treatments banned by the SAME Act to treat gender dysphoria in minors. R. at 6. These therapies also have been prescribed for precocious puberty and as a supplement for those with low hormones for decades, as noted by the District Court.

Id. at 15. It is unlikely that these treatments would be characterized as "best practices for gender-affirming care," *Id.* at 6, if they were "unproven."

Finally, the fact that a single medical society suggests against use of one gender-affirming treatment for minors does not support that said treatment is experimental. A respected organization could recommend that a specific approved and marketed treatment, such as aspirin, not be prescribed for a specific group, such as those older than 60. *See* U.S. PREVENTIVE SERVS. TASK FORCE, TASK FORCE ISSUES DRAFT RECOMMENDATION STATEMENT ON ASPIRIN USE TO PREVENT CARDIOVASCULAR DISEASE, (Oct. 12, 2021), https://www.uspreventiveservicestaskforce.org/uspstf/sites/default/files/file/supporting_documents/aspirin-cvd-prevention-final-rec-bulletin.pdf. This does not suddenly transform the treatment into an experiment. In sum, Lincoln did not succeed in establishing that the gender-affirming treatments banned by the SAME Act are experimental.

Lincoln may argue that the Court should defer to the legislature's decision to ban these treatments as there is medical uncertainty surrounding them. However, the Court has the duty to "review [legislative] factual findings where constitutional rights are at stake," and in this case it is clear the findings do not support that the treatments at issue are "experimental." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). As the banned treatments are not experimental, the SAME Act limits a parent's right to choose medical care for their child, and the Act is subject to strict scrutiny.

2. The SAME Act cannot survive strict scrutiny because it is not narrowly tailored to serve a compelling government interest.

To satisfy strict scrutiny, a statute must be "narrowly tailored to serve a compelling government interest" *Reno v. Flores*, 507 U.S. 292, 302 (1993). Strict scrutiny is a high bar which the SAME Act cannot meet. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) ("[I]t is the rare case in which we have held that a law survives strict scrutiny."). The Act cannot withstand strict scrutiny because a) the governmental interest is not compelling, b) it is not narrowly tailored, and c) the chosen means do not *serve* the governmental interest.

a. Lincoln's proffered governmental interest is not compelling.

The interest provided by Lincoln is not compelling, and thus the SAME Act cannot survive strict scrutiny. A compelling interest must be "of the highest order." *Yoder*, 406 U.S. at 215. Lincoln argued it had a compelling interest in "protect[ing] children from experimental medical procedures that have consequences neither the parents or children can foresee or understand and regulat[ing] the medical profession to prevent such experimental procedures." R. at 16. In several recent cases, nearly identical governmental interests were not compelling enough to justify banning gender-affirming care for transgender minors. *Brandt*, 551 F. Supp. 3d at 893 (finding "interest in protecting children from experimental gender-transition procedures and safeguarding medical ethics" uncompelling); *Eknes-Tucker,* LEXIS 87169 at *24 (finding interest in "'protect[ing] children from experimental medical procedures,' the consequences of which neither they nor their parents often fully

appreciate or understand" uncompelling). Similarly, the interest provided by Lincoln cannot rise to the level of compelling.

Protecting minors from experimental treatments which only carry a *risk* of harm cannot qualify as a compelling interest. "Safeguarding the physical and psychological well-being of a minor" is undeniably a compelling interest. *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982). However, an interest in protecting children is only compelling when the postulated danger they are shielded from is actually harmful. That a treatment "involves risks does not automatically transfer the power" to choose it "from the parents to some agency or officer of the state." *Parham*, 442 U.S. at 603. An interest in preventing experimental treatments which only pose a generalized risk of harm thus cannot be compelling. Likewise, an interest in regulating medical professionals to prevent experimental treatments which only carry a risk of harm cannot be compelling. If an interest in preventing experimental treatments were compelling, the government would have a justification to block any clinical trial, potentially negatively affecting millions of children.[2]

Even if protecting children from a risk of harm is compelling, such a risk must be "sufficiently great" to justify violation of a constitutional right. *See Parham*, 442 U.S. at 606 (1979). This Court has consistently found interests in protecting children from clear threats of harm compelling. *E.g., Denver Area Educ. Telecomms.*

[2] In the United States, there are "as many as two million minors participating in clinical research at any given time." Richard F. Ittenbach, *How many Minors are Participating in Clinical Research Today?* 5 J. CLINICAL TRANSLATIONAL SCI. e179 (Sept. 2021),https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8596071.

Consortium v. FCC, 518 U.S. 727, 743 (1996) ("[T]his Court has often found compelling . . . the need to protect children from exposure to patently offensive sex-related material."). In cases where there was no substantial risk of harm, however, the same interest has been uncompelling. *E.g., Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 804 (2011) (finding government had no compelling interest in protecting minors from violent video games as it failed to show they were harmful).

Experimental treatments generally do not pose a significant enough risk of harm to make their prevention a compelling interest. Clinical trials are highly regulated to ensure that there is as little risk to participants as possible, and the FDA even requires extra safeguards for research involving children. 21 CFR §§ 50.50-.56. Lincoln also did not successfully show that the treatments banned by the SAME Act, which it labeled experimental, present a sufficient risk of harm. The evidence provided only supports that there were "concerns" about harmful effects that "may" result from the treatments. R. at 13. While Lincoln produced a few witnesses who regretted receiving gender-affirming care, *Id.* at 8, anecdotal reports of a rare occurrence does not establish that these treatments pose a serious enough risk of harm. *See Denver Area Educ. Telecomms.*, 518 U.S. 727, 766 (1996) ("It is difficult to see how such borderline examples could show a compelling need, nationally, to protect children from significantly harmful materials."). Only 1% of those that undergo gender-affirming treatments regret it. Valeria P. Bustos et al., *Regret After Gender-affirmation Surgery: A Systematic Review and Meta-analysis of Prevalence*, 9 PLASTIC RECONSTRUCTIVE SURGERY e3477, e3488 (2021),

https://journals.lww.com/prsgo/fulltext/2021/03000/regret_after_gender_affirmation_surgery__a.22.aspx.

Lack of evidence of the harm these treatments pose significantly undermines the argument that Lincoln has a compelling interest in banning them. An interest in preventing harm which *may* occur in *some* cases is simply not compelling enough to justify "supersed[ing] parental authority in all cases." *Parham*, 442 U.S. at 603. The reasons Lincoln provides for the SAME Act are not compelling enough to justify infringing fundamental parental rights, and thus the Act cannot withstand strict scrutiny.

b. The SAME Act is not narrowly tailored because it does not use the least restrictive means possible.

Even if Lincoln's interest is compelling, the SAME Act still cannot survive strict scrutiny because it is not narrowly tailored. This Court has found multiple statutes which served the compelling purpose of protecting children to be unconstitutional because they were not narrowly tailored. *E.g., United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 810 (2000) ("The objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative."); *United States v. Am. Library Ass'n,* 539 U.S. 194, 203 (2003). To qualify as "narrowly tailored" a statute must use the "least restrictive means" possible to achieve its objective. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). The State must consider if there are any "lawful alternative and less restrictive means," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6

(1986), and if a less restrictive means exists, "must use it." *Playboy Ent. Grp., Inc.*, 529 U.S. at 815. Because there are less restrictive alternatives Lincoln could have selected, the SAME Act is not narrowly tailored.

The SAME Act is overly restrictive because it bans all treatments for minors which create "physiological or anatomical characteristics that resemble a sex different from the individual's biological sex" in all circumstances. 20 Linc. Stat. § 1203. Lincoln argued that the Act was narrowly tailored because it did not ban all *types* of gender-affirming treatments. R. at 17. In reality, the Act is not narrowly tailored because it bans these treatments in all *circumstances.*

Lincoln itself provided examples of a less restrictive alternative it could have adopted and should have at least considered. The State attempted to support their argument by pointing to a Swedish hospital system that restricts gender-affirming care for minors. *Id*. However, the hospital at issue allows use of the banned treatments for research, as noted by the District Court. *Id*. Rather than banning treatments in all circumstances, Lincoln should have included exceptions for clinical trial use. Lincoln also should have at least considered allowing minors to access the banned treatments on a case-by-case basis. *See Eknes-Tucker*, LEXIS 87169 at *24 (describing European countries that allow exceptions to gender-affirming treatment bans for special cases). Because there are less restrictive means available the SAME Act is not narrowly tailored and cannot endure strict scrutiny.

c. The means chosen do not serve *the governmental interest.*

If this Court somehow finds Lincoln's governmental interest compelling and chosen means permissibly restrictive, the SAME Act still cannot survive strict scrutiny because the means do not *serve* the governmental interest. *See Reno*, 507 U.S. at 302. The restrictions the Act puts on gender-affirming care do not serve Lincoln's goals of "protecting children from experimental medical procedures," as the banned treatments are not experimental. Even if the treatments at issue were experimental, Lincoln's chosen means do not protect children because the ban causes more harm than it prevents.

Banning gender-affirming treatments will not accomplish Lincoln's goal; in fact, the SAME Act "perpetuate[s] the very harm it is allegedly designed to prohibit." *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014). Not only does withholding gender-affirming care from minors prevent them from experiencing the benefits of medically necessary treatment, but it actually results in harmful outcomes. Rather than "protect[ing] children from risking their own mental and physical health," 20 Linc. Stat. § 1201(b)(1), by blocking access to medically necessary gender-affirming care Lincoln is increasing the likelihood of serious mental distress and even suicide among transgender minors. R. at 7. The SAME Act cannot survive strict scrutiny because the means chosen do not serve, nor do they have any relation to, the governmental interest.

3. Even if rational basis review were applied, the SAME Act cannot survive as it is not rationally related to legitimate government interest.

The evidence presented in the case supports that the SAME Act would fail strict scrutiny because the State did not proffer a compelling interest, draft a narrowly tailored piece of legislation, or choose a means which would effectively serve their interest. While a strict scrutiny analysis is appropriate, if this Court applied the more lenient rational basis review the Act still would not survive. To satisfy rational basis review, a statute must be "rationally related to legitimate government interests." *Glucksberg*, 521 U.S. at 728. The SAME Act cannot withstand even this permissive standard as it is not remotely related to any interest proffered by Lincoln. Attempting to protect children from experimental, harmful treatments by stopping parents from choosing gender-affirming care which is neither experimental nor harmful is nonsensical. Regardless of the level of scrutiny applied, the Marianos satisfied the success on the merits requirement.

The District Court did not err in determining that the Marianos at least raised a serious question as to whether they would succeed on the merits of their Substantive Due Process claim. Even if this Court decided the serious question standard was improperly applied, it should uphold the preliminary injunction as the Marianos showed they are substantially likely to succeed on the merits of this claim. The SAME Act infringes upon a fundamental parental right and falls short of strict scrutiny, making it an unconstitutional, impermissible violation of Substantive Due Process rights.

B. Jess is likely to succeed on the merits of his Equal Protection claim because the SAME Act discriminates based on sex and transgender status and cannot survive intermediate scrutiny.

1. Intermediate scrutiny is the appropriate analysis because the SAME Act discriminates against classes the courts have previously deemed deserving of heightened protection.

Claims under the Equal Protection Clause require a two-part analysis: 1) a decision regarding the level of scrutiny necessary, and 2) an examination of whether the state action in question satisfies the bar of scrutiny that has been established. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (2020). While states are permitted to provide differential treatment to distinct groups under some circumstances, this power is not unfettered and may not be used arbitrarily. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

State statutes that discriminate based on sex, a quasi-suspect class, must satisfy intermediate scrutiny to pass constitutional muster. *Craig v. Boren*, 429 U.S. 190, 197 (1976); *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 135-36 (1994) (offering a brief historical review of caselaw finding heightened scrutiny applies in the context of gender discrimination). Intermediate scrutiny requires that the state action at issue be substantially related to furthering an important government interest. *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980); *Craig,* 429 U.S. 190, 197 (1976).

a. The SAME Act discriminates based on sex, a quasi-suspect class, with no relation to the state's goal in enactment, and so must fail intermediate scrutiny.

Though Lincoln asserts that the SAME Act discriminates based on age and medical procedure rather than sex, R. at 15, this is not so. While the Act certainly does discriminate based on age, it does not discriminate based on medical procedure. The medical procedures involved are not uniformly prohibited; rather, these procedures are prohibited only so far as they are prescribed to treat gender dysphoria. Instead of discriminating based on medical procedures, Lincoln is discriminating against those individuals with gender dysphoria who seek to obtain those procedures: transgender youth. This is a distinction inextricably linked to an individual's sex and gender identity and must be subject to intermediate scrutiny.

Lincoln's expressions of purpose in enacting the SAME Act and the text of the Act itself are inconsistent with the reality of medical care for gender dysphoria, raising serious questions regarding the legitimacy of the government interest here. These purposes attempt to regulate the medical profession's care for transgender youth in favor of conventional treatment, even though the very treatments prohibited by this statute constitute current medical best practices for treating gender dysphoria. R. at 6; Hembree WC et al., *Endocrine Treatment of Gender-dysphoric/Gender-incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLIN. ENDOCRINOLOGY AND METABOLISM 3869 (2017), https://doi.org/10.1210/jc.2017-01658; *Standards of Care* at 10-21. Further, the Act aims to discourage "harmful, irreversible medical interventions," 20 Linc. Stat. §

1203(b)(2), yet not all of the treatments Lincoln prohibits are irreversible, as the SAME Act suggests. R. at 6. Finally, the State contends that children are so susceptible to peer pressure that they may change their entire identity at the drop of a hat, ignoring the fact that the process for obtaining a diagnosis of gender dysphoria is involved, and motivations of social influence are likely to be spotted by qualified mental health professionals along the way. *Standards of Care* at 15, 19. The relationship between the statute enacted and Lincoln's expressed interest in creating it is tenuous at best, and certainly not substantial enough to survive intermediate scrutiny.

Lincoln, instead of deferring to the broad expertise of medical societies here in the United States, finds the actions of a few hospitals in Europe compelling, whose positions they cite both in studies and through the Society for Evidence-based Gender Medicine (SEGM). R. at 17. What Lincoln leaves out, however, is that SEGM's position on treatment for gender dysphoria is that those decisions belong between a patient and their clinicians, not politicians. Soc'y for Evidence-based Gender Med.,*"Gender-affirming" Hormones and Surgeries for Gender-Dysphoric US Youth*, SEGM (May 28, 2021), https://segm.org/ease_of_obtaining_hormones_surgeries_GD_US. SEGM's self-proclaimed position states that "exploratory psychotherapy should be first-line treatment for gender dysphoric people age 25 and under." *Id.* While this position may offer some support for Lincoln's focus on conventional treatment, it does not in any way preclude the application of gender-affirming care to those who, after having utilized said first-line treatment, continue

to suffer and require second-line medical intervention to successfully treat their dysphoria. Why Lincoln has decided the opinion of this one group and a few overseas organizations should outweigh the professional judgments of every leading medical society in the United States remains a mystery. R. at 7. Ignoring the sound judgment of leading U.S. medical organizations directly contradicts the State's purported focus on adolescent medical safety.

b. The SAME Act discriminates based on transgender status with no relation the state's goal in enactment, and so must fail intermediate scrutiny.

Four factors are relevant when considering whether a new group or class necessitates intermediate scrutiny: 1) a history of discrimination, 2) defining class features that are unrelated to their contributions to society, 3) existence as a discrete and identifiable group, and 4) minority status or lack of political power. *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016) (citing *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41(1985)).

Transgender individuals satisfy all four of these factors and are deserving of the special protections afforded under quasi-suspect classification. Recent case law supports this assessment. *Grimm,* 972 F.3d 586 (2020) (Finding "heightened scrutiny applies to Grimm's claim because transgender people constitute at least a quasi-suspect class."); *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019) (commenting on the district court's finding that transgender individuals constitute a quasi-suspect class, "[w]e conclude [the military policy under review] treats

transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies"); *Bd. of Educ. of the Highland Local Sch. Dist.,* 208 F. Supp. 3d 850, 874 (2016) (performing its own four-part analysis and determining that transgender persons satisfy the factors for a quasi-suspect class).

Whether transgender individuals do or do not fall into a distinct quasi-suspect class has been a contentious question. While transgender individuals should be considered a quasi-suspect class deserving of heightened protection, the very essence of being transgender is rooted in a person's sex and gender identity. Transgender individuals do not necessarily need to represent their own quasi-suspect class for Jess to prevail in this case, however, as sex discrimination is apparent in Lincoln's denial of gender-affirming care. Sex, itself, can be considered the class of relevance in this instance. *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015) (holding that discrimination based on transgender status equates to discrimination based on sex). Regardless of whether the relevant class is based on sex alone or transgender status, the SAME Act cannot survive the intermediate scrutiny analysis applied.

c. Intermediate scrutiny is appropriate even if this Court finds that no quasi-suspect class applies, because children are a special population deserving of heightened protection.

The alternative offered to sex discrimination here is discrimination based on age and procedure, but this is rooted in the purpose of the treatment. The medical procedures described are prohibited for minors "if the procedure, practice or service

is performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." 20 Linc. Stat. § 1203. Minors in general are not prohibited from utilizing the exact same treatments so long as the purpose is not treatment of gender dysphoria. Even if this Court finds the law does not directly discriminate based on a minor's sex, the sex and gender identity of minors is paramount to supposed discrimination based on medical procedure.

If, however, focus is directed to the age discrimination within the SAME Act, heightened scrutiny is still warranted in this case. Children represent a special population, as noted in *Plyer v. Doe*, and to discriminate amongst groups of children requires not just a legitimate government interest, but a substantial one. 457 U.S. 202, 210 (1982). Lincoln's expressed interests are not persuasive in context, as the actions the State has taken do not adequately address their stated concerns and bear no real relation to accomplishing their goals. Prohibiting specific medical care only for those children seeking treatment for gender dysphoria does nothing to protect the children who would still be allowed to receive the same, supposedly questionable, medical care to treat other health conditions. Even in the absence of a sex-based classification, Lincoln still fails in its burden under intermediate scrutiny because of the contradictions between what the State says it wants, and what it actually does.

2. Alternatively, the SAME Act fails rational basis review because there is no rational connection between the interest advanced by Lincoln and the legislation enacted to address that interest.

If this Court determines instead that rational basis review is sufficient in this case, the SAME Act must still fail. Even if the described government purposes are legitimate, the Act fails to live up to it, and is not drafted such that it is rationally connected to those purposes. "Protecting children" from the current best practices in medical care for their gender dysphoria exposes an already sensitive population to enhanced vulnerability and risk of worsening health.

By permitting children not seeking care for gender dysphoria to receive these treatments when medically warranted, yet disallowing transgender youth from the same necessary care, Lincoln is imposing inadequate medical care on minors in direct opposition to their stance on protecting children. This disparate treatment underscores the fact that this Act is not about medical procedures at all - it is about making transgender children wait to obtain critical medical support in the hopes that they will magically cease to experience gender dysphoria in the interim. The underinclusiveness of the SAME Act demonstrates that Lincoln did not draft this legislation to protect children. *See Republican Party v. White*, 416 F.3d 738, 776 (8th Cir. 2005) (Loken, J., dissenting) ("The governmental actor may have missed the target because it was not aiming at it, but was actually seeking to accomplish some other, impermissible goal."). The disconnect between Lincoln's goals and the means employed in the SAME Act suggests that the state's expressed interest here is merely pretextual, with the true purpose found in regulating individuals' gender

identities, as suggested by the Fifteenth Circuit. R. at 25.; *See Hatten v. Rains*, 854 F.2d 687, 690 (5th Cir. 1988) ("[T]he tighter the fit, the less likely the proffered justification is to be a pretext. . . .").

The Eastern District Court of Arkansas grappled with this very issue in *Brandt v. Rutledge*, finding the state's motivation pretextual. 551 F. Supp. 3d at 891. There, as in this case, the state prohibited certain treatments for gender dysphoria for those under age eighteen yet permitted use of those same treatments on minors for other medical conditions. *Id*. As the *Brandt* court stated: "If the State's health concerns were genuine, the State would prohibit these procedures for all patients under 18 regardless of gender identity. The State's goal in passing [state statute] was not to ban a treatment. It was to ban an outcome that the State deems undesirable." *Id*. Here, as in *Brandt*, there is no rational basis that supports the state's discriminatory legislation.

3. Recent district court opinions with strikingly similar facts support finding a high likelihood of success on the merits for Jess' equal protection claim.

In *Kadel v. Folwell*, a state health insurance program denied a nineteen-year old transgender male medically necessary care for his gender incongruence because of a blanket exclusion for gender dysphoria. No. 1:19CV272, 2022 WL 3226731 (M.D. N.C. Aug. 10, 2022). The treatments in question were only excluded as they related to gender dysphoria, and not for other conditions that might utilize the same therapies. *Id.* at 19-20. The state argued in favor of conventional psychotherapy approaches, insisting that medical evidence was inadequate to

support further medical intervention for gender dysphoria. *Id.* at 22. Kadel prevailed under intermediate scrutiny, with the court clearly noting impermissible sex discrimination against transgender individuals in violation of the Equal Protection Clause. *Id.* at 32.

In *Brandt,* Arkansas passed a statute that prohibited gender-affirming medical and surgical care for anyone under age eighteen. 551 F. Supp. 3d at 887. The state's justification in *Brandt* was nearly identical to the purposes Lincoln now advances: protecting children from "experimental" medical care and regulating the medical profession. *Id.* at 889. The *Brandt* court was unconvinced, finding the statute failed the required bar of intermediate scrutiny and infringed Equal Protection rights of the plaintiffs. *Id.* at 891-92.

This Court should align its reasoning in this case with that of *Kadel* and *Brandt*, given the clear parallels in the issues presented. Jess's situation mirrors that of both plaintiff Kadel, a transgender male who had known he was male from a young age and struggled with such severe gender dysphoria that he had contemplated suicide, and Brandt, a transgender minor prohibited by state statute from receiving the medically necessary gender-affirming care he needed, all under the guise of state protection. Lincoln is advancing arguments similar to those advanced in *Kadel* and *Brandt* that this Court should find equally unpersuasive. The end result in each of these cases is an individual being denied standard, medically necessary care for the treatment of a potentially fatal health condition solely because that individual is transgender.

The SAME Act cannot survive analysis under either intermediate scrutiny or rational basis review because Lincoln lacks a legitimate government interest and has shown no rational connection between their expressed purposes and the resulting legislation. Lincoln has created an impermissibly discriminatory statute and Jess is likely to succeed on the merits of his Equal Protection claim.

C. If the SAME Act is enforced, Jess and his parents will suffer immediate, irreparable harm.

The District Court properly granted the preliminary injunction because enforcement of the SAME Act will lead to immediate and irreparable harm by violating the Marianos' parental rights and causing devastating mental and physical harm to Jess. Irreparable harms are those that "cannot be undone through monetary remedies." *Ne. Fla. Chapter of Ass'n of Gen. Contractors v. City of Jacksonville,* 896 F.2d 1283, 1285 (11th Cir. 1990). If the preliminary injunction granted by the District Court is not upheld, Jess and his parents will experience severe irreparable harm, and "the relative positions of the parties" will not have been preserved. *Camenisch*, 451 U.S. at 395.

Irreparable harm is typically presumed from violation of constitutional rights. *Obama for Am. v. Husted,* 697 F.3d 423, 436 (6th Cir. 2012). Because parental rights are fundamental rights protected by the constitution, "it represents a harm when the state denies parents the right to direct the medical care of their children." *Kanuszewski,* 927 F.3d at 411. In absence of injunctive relief, the Marianos would experience ongoing violation of their rights. The Marianos will also suffer the irreparable harm of either watching Jess "experience physical and

emotional pain or of uprooting their families to move to another state where [Jess] can receive medically necessary treatment." *Brandt*, 551 F. Supp. 3d at 892. Violation of these rights cannot be compensated, and thus this harm alone is enough to justify the preliminary injunction.

The SAME Act not only exposes Elizabeth and Thomas Mariano to irreparable harm through violation of their constitutional rights, but also will expose Jess to immediate, irreparable medical harm if the preliminary injunction is not granted. The potential of "a severe medical setback" supports a finding of irreparable harm, *Bowen v. City of N.Y.,* 476 U.S. 467, 483 (1986), and such a setback is virtually certain in this case. Jess has a documented history of severe distress and suicidality which treatment for gender dysphoria reduced. R. at 5. Enforcement of the Act would prevent Jess from accessing medically necessary treatment.

Without this medical intervention, puberty will resume immediately, and Jess will continue to develop physical characteristics that are inconsistent with his identity. *Id.* at 11. This will further increase the severity of the incongruence between Jess's identity and his outward appearance, worsening his anxiety and depression related to gender dysphoria. Lincoln's argument that Jess's transgender identity may not persist long term is irrelevant as withdrawal of gender-affirming care will cause Jess to suffer irreparable mental harm *now*. *Id.* Even if Jess is able to discontinue his treatments at a "safe rate," as Lincoln argued, Dr. Dugray testified that even "one month interruption of his treatment could allow puberty to

progress and substantially undermine the treatment progress Jess has made so far in dealing with his depression and dysphoria." *Id.* at 5, 12.

"Conventional treatment" in the form of psychological intervention, as advocated by the SAME Act, previously was not enough to reduce Jess' depression and distress stemming from his gender incongruence. Jess will not only experience a worsening of his gender dysphoria if this Act is permitted to take effect, but his only real option for treatment for the next four years will be a medical intervention already proven ineffective at resolving his distress. The anguish associated with improperly treated gender dysphoria poses serious risks. Forty percent of transgender individuals without appropriate transition support reported a history of at least one suicide attempt. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 114 (Dec. 2016). The ability to restart treatment at eighteen will not reverse the harm that is inflicted in the intervening time. Lack of access to these medical treatments will have lifelong, irreversible consequences for Jess, both mentally and physically. *See Campbell v. Kallas*, No. 16-cv-261-jdp, 2020 WL 7230235, slip op. at *8 (W.D. Wis. Dec. 8, 2020) (finding plaintiff would experience "irreparable injury" as she "continue[d] to suffer from gender dysphoria, which cause[d] her anguish and put[] her at risk of self-harm or suicide"). This represents a clear and severe medical setback of the cruelest nature which no monetary remedy can rectify.

Lincoln argued that because alternative treatments for gender dysphoria are permitted under the SAME Act, namely conventional psychotherapy, no irreparable

harm will result from denial of other medical treatments. R. at 17. The Seventh Circuit has previously found similar arguments in the context of restrictions on school bathroom usage by transgender individuals unpersuasive. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017). In *Whitaker*, a school district advanced the argument that because alternative bathroom arrangements were offered and available, denying a transgender male student access to the boys' bathroom caused no irreparable harm. *Id.* The Seventh Circuit disagreed, finding a distinction between the standard boys' bathroom that the transgender student had been using for months without incident and the "alternative" provided by the school district which clearly did not adequately meet the student's needs. *Id.* at 1045-46. This is highly relevant for the present case, as the conventional treatment alternatives advanced by Lincoln have proven insufficient to meet Jess's medical needs, and therefore cannot mitigate the irreparable harm Jess will suffer in the absence of this preliminary injunction.

D. Both the balance of equities and public interest weigh in favor of a preliminary injunction.

To justify a preliminary injunction, any potential harm to the Marianos that would occur if the SAME Act is not enjoined must outweigh harm to Lincoln and the injunction must not be averse to public interest. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). These requirements are met here, with the balance of equities and public interest strongly favoring a preliminary injunction to prevent significant injury to Jess and the Marianos.

Harm to the Mariano family clearly outweighs any harm to Lincoln. While Lincoln argued that it suffers irreparable injury through enjoinment of the Act, this injury does not outweigh the violation of the Marianos constitutional rights and the serious medical injury Jess will experience if the Act is not blocked. R. at 13. Harm to the plaintiff was also found to outweigh harm to the State in *Brandt* and *Eknes-Tucker*, both cases in which the court granted preliminary injunctions enjoining laws banning treatment for transgender minors. *Brandt*, 551 F. Supp. 3d at 893 ("[T]he State's interest in enforcing [similar statute] during the pendency of this litigation pales in comparison to the certain and severe harm faced by Plaintiffs."); *Eknes-Tucker*, LEXIS 87169 at *24.

The public interest supports a preliminary injunction in this case as it is "always in the public interest to prevent the violation of a party's constitutional rights." *Bao Xiong ex rel. D.M. v. Minn. State High Sch. League*, 917 F.3d 994, 1004 (8th Cir. 2019). Enjoining the SAME Act would support the fundamental parental right to nurture and care for one's children. *Yoder,* 406 U.S. at 232. Letting the SAME Act stand would not only infringe upon the rights of parents in Lincoln, but would also generally weaken this fundamental right. The public interest also supports enjoining the Act because medical care should be decided by parents in conjunction with doctors, rather than politicians. *See Parham*, 442 U.S. at 608 ("What is best for a child is an individual medical decision that must be left to the judgment of physicians in each case.").

Just as preventing a violation of the Marianos' constitutionally protected rights is in the public interest, so too is preventing the violation of Jess' right to equal protection under the law. Transgender individuals frequently face stigma, discrimination, and bullying because of their identity. This degrading and harmful prejudice must not be permitted to become state-sanctioned through the enforcement of legislation that many medical professionals agree will only exacerbate the inequities faced by transgender youth. L.D. Hughes et al., *"These Laws Will Be Devastating": Provider Perspectives on Legislation Banning Gender-Affirming Care for Transgender Adolescents.* 69 J. ADOLESCENT HEALTH 976 (2021). Allowing the SAME Act to take effect and prohibiting Jess from continuing to receive medically necessary care for his gender dysphoria is contrary to the public interest and the balance of equities supports upholding the preliminary injunction against the SAME Act.

As the irreparable harm threatening both the Marianos and Jess outweighs any possible harm to Lincoln, a preliminary injunction is "definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts." *Ne. Fla. Chapter of Ass'n of Gen. Contractors v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990).

CONCLUSION

Jess Mariano and his parents will suffer irrevocable harm if Lincoln enforces the SAME Act, an unconstitutional attempt to legislate away the vital healthcare that dysphoric minors need. Because this Court did not unequivocally address the

viability of the serious questions standard in *Winter v. Natural Resources Defense Council, Inc.*, the lower courts did not err by applying it to the Marianos' case. Weighing the preliminary injunction factors using serious questions as envisioned in *Winter,* the District Court recognized that the Marianos presented compelling Due Process and Equal Protection claims that were likely to succeed on the merits. It rightly granted a preliminary injunction to avoid an ongoing deprivation of their constitutional rights, and the Fifteenth Circuit affirmed.

The lower courts did not breach the limits of their permissible discretion because weighty evidence supported both of the Marianos' Fourteenth Amendment claims against the State. The SAME Act diminishes a fundamental right of parenthood and is impermissibly discriminatory. It fails to survive analysis under the requisite levels of scrutiny for each claim. The balance of equities and the public interest favor the Marianos because enforcement of the SAME Act will cause both Jess and his parents to suffer irreparable harm far outweighing any speculative harm to the State from enjoining this statute. These facts, assessed under any formulation of the serious questions standard, support granting and upholding a preliminary injunction.

This Court should therefore affirm the decision of the Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

/s/_____

Attorneys for Respondents
Team 3101

CERTIFICATE OF SERVICE

We certify that a copy of Respondents' brief was served upon Petitioner, April Nardini, through the counsel of record by certified U.S. mail return receipt requested, on this, the 15th day of September, 2022.

/s/_____

Attorneys for Respondent
Team 3101

APPENDIX A

Constitutional Provisions

U.S. Constitution amendment XIV, § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Statutory Provisions

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 2201(a). Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area

country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Stop Adolescent Medical Experimentations Act

20 Linc. Stat. § 1201 Findings and Purposes

(a) Findings: The State Legislature finds –

(1) Lincoln has a compelling interest to ensure the health and safety of its citizens, in particular that of vulnerable children.

(2) Gender dysphoria is a serious mental health diagnosis experienced by a very small number of children.

(3) Many cases of gender dysphoria in adolescents resolve naturally by the time the adolescent reaches adulthood.

(4) There is as of yet no established causal link between use of medical treatments for so-called "gender affirming care," such as puberty blockers, sex hormones and reassignment surgery, and decreased suicidality. Studies demonstrating health benefits of these treatments have not been sufficiently longitudinal or randomized.

(5) Emerging scientific evidence shows potential harms to children from gender transition drugs and surgeries, including but not limited to risks related to irreversible infertility, cancer, liver disfunction, coronary artery disease, and bone density.

(6) Parents and adolescents often do not fully comprehend and appreciate the risks and life complications that accompany these surgeries, such as the loss of fertility and sexual function, and may not be able to give informed consent to the treatments.

(7) Individuals who have detransitioned (decided to stop identifying as transgender) have expressed regret for taking puberty-suppressing medications and cross-sex hormones and identified "social influence" as playing a significant role in their decision to identify as a different sex.

(8) There are conventional and widely-accepted methods to treat gender dysphoria that do not raise informed consent and experimentation concerns. Conventional psychology may safely and effectively guide a

dysphoric youth to stability while deferring decisions on often irreversible medical gender affirming treatments until adulthood.

(b) Purposes: It is the purpose of this chapter –

(1) To protect children from risking their own mental and physical health and lifelong negative medical consequences that could be prevented by receiving a more conventional treatment of their gender dysphoria.

(2) To encourage treatments supported by medical evidence and discourage harmful, irreversible medical interventions.

(3) To protect against social influence surrounding gender affirmation treatments, which is especially concerning given the potential life-altering effects of gender transition drugs and surgeries.

§ 1202 Definitions

The Act defines –

(1) "Adolescent" as the phase of life between childhood and adulthood, from ages 9 to 18.

(2) "Healthcare provider" as a person or organization licensed under Chapters 15 and 16 of the Lincoln Code to provide healthcare services.

(3) "Puberty" as the time of life when a child experiences physical and hormonal changes that mark a transition into adulthood. The child develops secondary sexual characteristics and becomes able to have children.

(4) “Puberty blocking medication” as medications that prevent the body from producing the hormones that cause the physical changes of puberty.

(5) “Sex” as the biological state of being male or female, based on the individual’s sex organs, chromosomes, and endogenous hormone profiles.

§ 1203 Prohibition on Certain Gender Transition Treatments

No healthcare provider shall engage in or cause any procedure, practice or service to be performed upon any individual under the age of eighteen if the procedure, practice or service is performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual’s biological sex, including without limitation to:

(a) Prescribing or administering puberty blocking medication to stop or delay normal puberty.

(b) Prescribing or administering supraphysiologic doses of testosterone or other androgens to females or prescribing or administering supraphysiologic doses of estrogen to males.

(c) Performing surgeries that artificially construct genitalia tissue or remove any healthy or non-diseased body part or tissue, except for a male circumcision.

§ 1204 Enforcement

(A) The attorney general may bring an action to enforce compliance with this chapter. Nothing in this chapter shall be construed to deny, impair, or otherwise affect any right or authority of the attorney general, the state, or any agency, officer, or employee of the state, acting under any provision of the Lincoln Code, to institute or intervene in any proceeding.

(B) Any healthcare provider found to have knowingly and willingly violated the provisions of the chapter shall have committed a class 2 felony punishable by civil fines up to and including $100,000 or imprisonment of not less than two years and not more than ten years.

§ 1205 Unprofessional Conduct of Healthcare Providers

Any provision of gender transition procedures prohibited by 20-1203 to a person under eighteen years of age shall be considered unprofessional conduct and shall be subject to discipline by the licensing entity with jurisdiction over the healthcare provider.

§ 1206 Effective Date

The provisions of this chapter shall take effect on January 1, 2022.

APPENDIX C

Rules Provisions

Fed. R. Civ. P. 57 Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

Fed. R. Civ. P. 65(a)(1) Injunctions and Restraining Orders

(a) Preliminary Injunction.

(1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.