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

Respondents.

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

BRIEF FOR PETITIONER

Team 3102
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Under *Winter*, can a court grant the extraordinary remedy of a preliminary injunction to enjoin a duly enacted state statute if a movant has not satisfied the traditional requirement of likelihood of success on the merits and has merely shown that there are serious questions going to the merits of their case?

II. Under *Winter*, has a movant clearly shown a likelihood of success on the merits of their substantive due process and equal protection claims where none of this Court's precedents recognize a fundamental parental right to obtain specific medical treatment for their child or recognize statutory classifications based on age or medical treatment sought as suspect classes subject to heightened scrutiny, sufficient to support this Court affirming a grant of preliminary injunction?

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The Memoranda and Order of the United States District Court for the District of Lincoln is set out in the record. R. at 1–22. The Opinion and Order of the United States Court of Appeals for the Fifteenth Circuit is set out in the record. R. at 23–34.

CONSTITUTIONAL PROVISIONS

Both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution are relevant to this case.

STATUTORY PROVISIONS

The following sections of the United States Code are relevant to this case: 28 U.S.C. §§ 2201; 2202; 42 U.S.C. § 1983. These provisions are reproduced in Appendix A.

The following sections of the Lincoln 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). These provisions are reproduced in Appendix C.

STATEMENT OF THE CASE

Factual Background

Inception of Lincoln's SAME Act. The State of Lincoln's legislature created the SAME Act, prohibiting the use of surgical or hormonal Gender Confirming Treatment ("GCT") on anyone under the age of eighteen. R. at 2–3. Lincoln determined the Act was necessary to protect the health and safety of its children. R. at 2. The legislature found that, while some of the medical community in the United States supports GCT in minors, there is a large degree of uncertainty regarding potential latent side effects, informed consent, and the efficacy of hormone and surgical intervention in treating gender dysphoria in adolescents. R. at 3. The legislature was also unable to find a definitive, causal link between GCT and decreased cases of suicide in gender dysphoric youth; the studies that presented evidence to the contrary were unpersuasive based on a lack of randomization and observation time. R. at 3.

Many Western Nations are becoming more and more critical of hormonal and surgical GCT prior to adulthood, specifically Finland, Sweden, and England. R. at 7–8. Both Finland and Sweden announced in 2020 that these treatments would be banned for minors moving forward, and around that same time, England launched a large-scale review of its GCT procedures. R. at 7–8. Lincoln heard the testimony of two de-transitioned individuals who expressed regret and remorse about their decision to transition in adolescence and did not believe the "consent" to treatment they gave was truly informed, but rather a byproduct of social pressure.

R. at 3. However, the Lincoln Legislature was sympathetic to the plight of patients—like Jess Mariano—currently prescribed hormonal GCT and drafted the Act to allow patients to discontinue their current treatment slowly and safely under the direction of their physician to avoid any complications. R. at 12. Only hormonal and surgical procedures on minors are regulated under the Act, and it has no effect on therapeutic remedies for gender dysphoria, which are currently the proven and tested methods of treatment. R. at 2–3.

The Act was slated to go into effect on January 1, 2022, however, this lawsuit preceded its enactment. R. at 4.

The Mariano Family. Jess Mariano, a minor citizen of the State of Lincoln, has a long history of depression and anxiety, going back to an unfortunate attempt on his own life at the age of eight. R. at 4. Jess began therapy and was diagnosed with gender dysphoria—a mental health condition—in which he felt "an incongruence between [his] expressed gender and assigned gender." R. at 4; *see* Am. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5") at 452. When Jess was ten, he began to receive puberty blocker injections once a month, off-label, to suppress any signs of female puberty in an attempt to treat his gender dysphoria. R. at 5. Jess is now fourteen years old and still suffers from persistent gender dysphoria, something his psychiatrist does not believe will go away without further hormone treatment and potentially, surgery. R. at 5. While Jess' psychiatrist has stated that his mental health conditions have marginally improved while on puberty blockers, they have not been alleviated, nor has the

treatment completely resolved his feelings of dysphoria. R. at 5. Outside of his hormonal treatments, Jess has also been concurrently treated with conventional therapy for the last six years. R. at 4.

Procedural History

District of Lincoln. Elizabeth and Thomas Mariano, in their capacity as Jess' parents, and on behalf of Jess Mariano, ("the Marianos") filed suit against the State of Lincoln on November 4, 2021, alleging that the SAME Act would violate their Due Process and Equal Protection rights under 42 U.S.C. § 1983. R. at 1. On November 11, 2021, the Marianos filed a Motion for Preliminary Injunction, and moved to enjoin the enforcement of the Act pending trial so Jess could continue to receive puberty blockers. R. at 1, 8. Lincoln responded by filing its own motion to dismiss along with a response asking the district court to deny the preliminary injunction request. R. at 1. At trial, both sides presented extensive scientific evidence along with expert and witness testimony. R. at 5–8.

When ruling on the motion for injunctive relief, the district court used its pre-*Winter* sliding-scale approach, wherein the Marianos merely had to show that there were serious questions going to the merits of their case, instead of clearly showing a likelihood of success on the merits. R. at 9. Relying on this dated standard, the court placed a great deal of weight on the irreparable harm prong of *Winter*, only considering the merits of the Marianos' claims secondarily. R. at 10. After moving on to the merits, it found that the Marianos had raised serious questions as to whether the Act infringed on their fundamental Due Process rights and thus, was

not narrowly tailored enough to pass strict scrutiny. R. at 16–17. As to the Equal Protection claim, the court held that the Act discriminated against Jess based on his transgender status. R. at 18. The district court improperly construed the precedent of this Court to mean that the Act discriminated on the basis of sex and ultimately held it did not pass intermediate scrutiny. R. at 18–22.

The Court of Appeals. The State of Lincoln filed an interlocutory appeal, requesting that the Fifteenth Circuit Court of Appeals reverse the preliminary injunction and the denial of Lincoln's motion to dismiss, with instructions to dismiss the Marianos' claims. R. at 23. The Fifteenth Circuit affirmed the district court's grant of the preliminary injunction and its denial of Lincoln's motion to dismiss, determining the district court did not abuse its discretion. R. at 27. However, the Fifteenth Circuit only briefly discussed the merits of the Marianos' claims. R. at 25–27. Judge Gilmore dissented, arguing that the district court erred as to the proper injunctive relief standard, effectively tainting its later analysis. R. at 28. Judge Gilmore noted that this alone would have been grounds for a reversal, so he reasoned that the lower court gave little consideration to Lincoln's arguments regarding its public interest in banning the treatments. R. at n.7. Lastly, Judge Gilmore argued that the Marianos were unlikely to succeed on the merits of either constitutional claim and the district court erred in holding otherwise. R. at 29, 32.

SUMMARY OF THE ARGUMENT

This case presents an affront to the rights of state governments to legislate in the public interest of their citizens' safety. The Marianos assert an unprotected and unconstitutionally recognized "right" to experimental medical treatment for minors who cannot give informed consent. This Court should reject the Marianos' arguments and vacate the improperly granted preliminary injunction, reaffirming the States' constitutionally protected right to ensure the safety of its citizens.

I.

Preliminary injunctions allow courts the equitable power to enjoin a party from potentially lawful action before considering the merits of their case. For that reason, this Court has acknowledged that injunctive relief is extraordinary and drastic and thus, must be granted sparingly. This Court has traditionally required a movant to make a clear showing of four independent factors in order to obtain relief: a likelihood of success on the merits, a likelihood of irreparable harm, that the balance of equities tip in their favor, and that injunctive relief is in the best interest of the public.

The Fifteenth Circuit Court of Appeals adopted a flexible standard, allowing a mere showing of "serious questions" going to the merits of the case rather than a *clear* showing of likelihood of success. This more lenient, vague standard is improper and is in conflict with this Court's jurisprudence. Additionally, it has been modified from circuit to circuit, leading to an inequitable application of the law and confusion as to the correct test for preliminary injunctive relief. Even more

damaging, this flexible standard allows a movant to obtain relief without showing that they are likely to succeed on the merits, which was traditionally a threshold requirement that foreclosed consideration of the remaining factors. This Court should reaffirm their traditional four-part test, which requires the movant to make a clear showing of all factors in order to obtain such extraordinary and drastic relief.

Furthermore, even if this Court finds that the "serious questions" standard is permissible, it is not permissible when the injunction is sought against governmental action. Circuit courts that allow alternative standards do not apply them when a duly enacted statute is at issue. This Court must give deference to the actions of state legislatures taken in the interest of ensuring the public safety of the electorate they are charged to protect. When a statute such as this is contested, this Court must apply the traditional four-part test and require a showing of likelihood of success on the merits in order to protect the political process.

II.

The district court abused its discretion when it granted the preliminary injunction. It was in error because while the Marianos raised "serious questions" about their likelihood of success, they did not clearly show this likelihood as required by this Court's standard in *Winter*. The merits inquiry is the most crucial inquiry under the four-prong *Winter* test because if the movant is unlikely to succeed on the merits, the injunction is functionally irrelevant to the overall result

of the litigation. The district court should have considered the merits as a threshold inquiry before moving on to the balance of equities.

The Marianos cannot establish their likelihood to succeed on the merits of their substantive due process claim because there is no substantive due process right—found in the Constitution or under the laws of the United States—to obtain specifically requested medical treatment. Because there is no right to receive specific medical treatment, the Marianos cannot have a fundamental parental right to obtain a particular GCT for their minor child. Furthermore, there cannot be a right to receive medical treatment deemed harmful by the state because this Nation has a long-standing tradition allowing states to regulate the medical field—including medical treatments—to protect their people from new and harmful compounds.

Because the SAME Act does not implicate fundamental rights, it is subject only to rational basis review. The Act passes rational review because Lincoln has a well-established, legitimate state interest in protecting the health and safety of its citizens. Legislation, such as this Act, is given a large amount of deference by courts when it concerns health and safety, specifically where medical uncertainty or the well-being of minors is implicated as it is here. The GCT sought by the Marianos, while not experimental per se, is riddled with informed consent issues, is seldom studied, and the medical community knows little about its potential side effects.

Moreover, the Marianos also cannot establish their likelihood of prevailing on the merits of their equal protection claim because the Act does not discriminate

based on transgender status or sex. Instead, it only classifies based on age and medical procedure—both classifications in which this Court has found discrimination permissible. Further, even if the Act did purport to discriminate based on transgender status, transgender individuals are not a suspect class that trigger heightened review. If LGBTQ status or transgender status initiated heightened review, courts would invalidate laws enacted to protect these vulnerable communities, and the class would lose a great deal of protection under the political process. Therefore, absent a suspect class, rational review is the appropriate standard, which the Act passes.

Lastly, even if the Court rules against Lincoln as to the first issue and endorses the "serious question" standard, the preliminary injunction should still be denied due to the balance of equities. When courts forbid a state from executing a statute passed by duly elected officials acting in their official capacity, the state is irreparably harmed, and the principles of federalism this Nation was founded on are called into question.

This Court should REVERSE the judgment of the Fifteenth Circuit Court of Appeals, VACATE the improperly granted preliminary injunction, and hold that a movant must satisfy all four traditional factors to obtain injunctive relief, including clearly showing a likelihood of success on the merits.

STANDARD OF REVIEW

This appeal regards the Fifteenth Circuit's grant of preliminary injunctive relief. Courts are empowered to grant preliminary injunctions by Federal Rule of Civil Procedure 65(a). Fed. R. Civ. P. 65(a). However, because preliminary injunctions are an equitable remedy, courts are given volition to decide the standard of what will qualify for injunctive relief. *See id*. A court's decision to grant or deny a preliminary injunction is reviewed for abuse of discretion. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018). When a court applies the wrong legal standard, it has necessarily abused its discretion. *See Ayestas v. Davis*, 138 S. Ct. 1080, 1085 (2018). If an abuse of discretion is found, the judgment of the lower court must be vacated. *See id.*

ARGUMENT AND AUTHORITIES

I. The court of appeals abused its discretion by applying the incorrect legal standard for preliminary injunctive relief.

Injunctive relief is an equitable remedy prescribed to the courts to decide its outer limits. Fed. R. Civ. P. 65(a). To give guidance to the lower courts, the Supreme Court outlined a four-factor test in *Winter v. Natural Res. Def. Council, Inc.* 555 U.S. 7, 20 (2008). Movants must satisfy each factor independently to qualify for injunctive relief. *See id*. One of these traditional factors requires movants to clearly establish their likelihood of success on the merits of their claim. *Id*. This is an unequivocal prerequisite to a grant of preliminary injunction. *Id*.

A. Parties moving for a preliminary injunction must satisfy all four parts of the traditional standard.

The district court used an alternative sliding-scale test to determine whether the Marianos qualified for injunctive relief. R. at 9. This deviation allows the court to sidestep the traditional standard of likelihood of success on the merits for the lower burden of raising "sufficiently serious questions going to the merits of their Substantive Due Process and Equal Protection claims." R. at 13. Since the *Winter* verdict, circuit courts have clashed on whether these alternative standards are acceptable grounds for granting a preliminary injunction. This case provides an opportunity to clarify the uncertainty among circuit courts.

Under the traditional standard, a preliminary injunction requires the moving party to show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) that the balance of equities is in their favor; and (4) that the injunction is

in the public interest. *Winter*, 555 U.S. at 20. Along with the other elements, the movant must also establish by "a clear showing" that they are likely to succeed on the merits at trial. *Winter*, 555 U.S. at 22; *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam). If the movant is unable to satisfy this element, or merely shows a balance of the other elements rather than satisfying all four, the preliminary injunction must be denied. *See The Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 130 U.S. 1089 (2010) (quoting *Winter*, 555 U.S. at 22).

When courts allow flexibility on the preliminary injunction standard, movants can be granted injunctive relief by merely satisfying the lower serious questions bar. *See* R. at 13. So long as the movant shows a relative balance of the other three factors, a sufficiently serious question as to the merits will suffice to grant the injunction. *See Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (allowing the movant to substitute the lower serious questions bar if the balance of hardships tips *distinctly* in their favor) (emphasis added). However, the serious questions standard is not the only alternative; the ambiguity has led to circuits adopting a multitude of alternative tests to grant preliminary injunctions.[1]

[1] The Fourth, Fifth, Eleventh, and sometimes the Third, Ninth, and Tenth Circuits use a "sequential" test, requiring each factor to be satisfied independently. Rachel A. Weisshaar, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, VAND. L. REV. 1012, 1015 (2012). The Sixth, Eighth, D.C., and sometimes the Tenth Circuits evaluate all four factors using a balancing test. *Id.* Finally, the First, Second, Seventh, and sometimes the Third and Ninth Circuits use a threshold test, requiring the movant to establish one or two of the factors and balance them with the remaining factors. *Id.*

The Fifteenth Circuit Court of Appeals adopted one of these alternative standards and granted the Marianos' preliminary injunction, even though they did not show a likelihood of success on the merits. *See* R. at 26. Instead, the court merely found that the Marianos showed there were "sufficiently serious questions regarding the merits of their . . . claim[s]" that warranted a grant of preliminary injunction "when balanced against the imminent irreparable harm Jess Mariano would suffer" if the Act went into effect. R. at 26. The Marianos cannot shirk their traditional duty of satisfying all four *Winter* factors and must be held to their exacting burden of showing likelihood of success on the merits. This Court should rule in line with its traditional jurisprudence and reinforce the more rigorous standard for the drastic nature of a preliminary injunction.

1. This Court has long held the traditional standard is controlling.

This Court has held, without ambiguity, that a party moving for a preliminary injunction must satisfy *all four* of the traditional factors. *See Winter*, 555 U.S. at 21 (emphasis added). In *Winter*, this Court overturned a grant of preliminary injunction from the Ninth Circuit, finding that its standard was "too lenient." *Id*. at 22. There, an injunction was granted against the United States Navy to enjoin them from using sonar technology because of its possibility of harm to marine mammals. *Id*. The Ninth Circuit affirmed the district court's grant of injunctive relief, holding that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm." *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d

658, 696 (9th Cir. 2008) (quoting *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (9th Cir. 2007)). This Court, in overturning the injunction, took serious issue with the method the lower court used to balance the four traditional factors. *See Winter*, 555 U.S. at 26 ("Despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion."). This stands in tension with the notion that courts can merely implement a lower standard for one factor so long as another is met to a higher degree. *See id*. Since this Court's *Winter* verdict, the Ninth Circuit has ceased use of this alternative standard. *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) ("To the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable.").

Additionally, this Court also expressly rejected the serious questions approach in *Munaf v. Geren,* 553 U.S. 674 (2008). There, an American citizen with alleged ties to al Qaeda was detained by Iraq's multinational force. *Id*. at 681. Upon his impending transfer to the Iraqi court system, the defendant sought to enjoin his transfer and petitioned the District Court for the District of Columbia for a writ of habeas corpus. *Id*. Because the case presented jurisdictional issues "so serious, substantial, difficult and doubtful," neither the district court nor the appellate court even considered the likelihood of the defendant's success on the merits. *Id*. at 690 (quoting *Omar v. Harvey*, 416 F. Supp. 2d 19, 23–24, 27 (D.D.C. 2006), *aff'd*, 479 F.3d 1 (D.C. Cir. 2007), *vacated sub nom. Munaf v. Geren*, 553 U.S. 674 (2008)). This

Court overturned the grant of preliminary injunction and expressly rejected the lower courts' implementation of a "difficult question" standard, holding:

> A difficult question as to jurisdiction is, of course, no reason to grant a preliminary injunction. It says nothing about the likelihood of success on the merits, other than making such success more *unlikely* due to potential impediments to even reaching the merits. Indeed, if all a "likelihood of success on the merits" meant was that the district court likely had jurisdiction, then preliminary injunctions would be the rule, not exception.

Munaf, 553 U.S. at 690. Therefore, this Court has traditionally declined to adopt an alternative serious questions standard for the four traditional preliminary injunction requirements, especially likelihood of success on the merits. *See id*.

2. Preliminary injunctions must be reserved for extraordinary and drastic circumstances.

Preliminary injunctions enjoin parties from presenting the merits of their case in its entirety at trial. Thus, they should be granted sparingly to avoid prohibitions on potentially legal behavior by non-moving parties. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (pointing out the problematic nature of courts "disallow[ing] anticipated action before the legality of that action has been conclusively determined"). This Court has oft acknowledged the unusual nature of preliminary injunctions and emphasized the gravity of using them scarcely. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1962) ("[An injunction] is not a remedy which issues as of course, or to restrain an act the injurious consequences of which are merely trifling.") (internal quotations omitted). Furthermore, preliminary injunctions should never be awarded merely as a matter of right. *Winter*, 555 U.S.

at 24; *see also Munaf*, 553 U.S. at 689–90. If courts are too lenient in granting preliminary injunctions, rights of enjoined parties may be infringed upon; these endangered rights must be paramount, even where the movant may otherwise be harmed. *Weinberger v. Romero-Barcelo*, 456 U.S. at 305–06. The more rigorous traditional standard ensures that preliminary injunctions will not be abused and remain the exception, not the rule. *See Munaf*, 553 U.S. at 690; *see also United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888–89 (10th Cir. 1989).

3. The Marianos' proposed alternative standard improperly skirts their burden of showing their likelihood of success on the merits.

The district court's grant of preliminary injunction was dependent on its use of the alternative "serious questions" standard. R. at 13. However, the serious questions standard is simply one of the many tests that create doubt as to the correct standard for granting preliminary injunctions. *See* Rachel A. Weisshaar, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, VAND. L. REV. 1012, 1015 (2012). Rather than relying on a vague, questionable standard, this Court should reinforce its holding in *Winter* to create an absolute, unquestionable rule: the traditional standard. *See Winter*, 555 U.S. at 20.

First, in allowing flexibility on the likelihood of success requirement, circuit courts have adopted vastly different standards for granting preliminary injunctive relief. The Fourth and Ninth Circuits have embraced *Winter*'s holding, requiring satisfaction of all four traditional factors. *See, e.g., The Real Truth About Obama*, 575 F.3d at 347 (rejecting the *Blackwelder* balance-of-hardship test as it stands in

conflict with *Winter*); *Am. Trucking Ass'ns*, 559 F.3d at 1052 (eliminating the earlier Ninth Circuit test that lessened the burden on movants to merely show a possibility of irreparable harm). Certain circuits, such as the Sixth, have incredibly lenient preliminary injunction tests. *See, e.g., Mich. Bell Tel. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001) (holding that none of the traditional factors are outcome-determinative and are merely guideposts). Conversely, the Second Circuit applies an incredibly rigorous threshold test for preliminary injunctions. *See, e.g., Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34–35 (2d Cir. 2010) (re-affirming its threshold test post-*Winter* verdict and requiring a higher standard of a "greater than fifty percent probability of success on the merits"). Thus, the flexible alternative standards used nationwide mean the burden is heightened or lessened depending on the circuit.

Second, if a movant cannot decidedly establish their likelihood of success on the merits, the other factors should not even be considered. Likelihood of success on the merits has been described as the "sine qua non," or the most essential element, of a preliminary injunction determination by the First Circuit. *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993). The D.C. and Eleventh Circuits have also held that likelihood of success on the merits is a threshold requirement that will either foreclose or open the door to a determination on the remaining three factors. *See, e.g., Nat'l Steel Car, Ltd. v. Can. Pac. Ry., Ltd.*, 357 F.3d 1319, 1325 (Fed. Cir. 2004) (holding that a movant must demonstrate a likelihood of success on the merits to be entitled to a preliminary injunction); *Pittman v. Cole*, 267 F.3d 1269, 1292 (11th Cir.

2001) (holding that the court need not consider the other factors if a movant cannot establish its likelihood of success on the merits). Thus, these alternative standards are improperly lessening the movant's burden of meeting this threshold requirement.

Third, the wide variety of alternative tests and subjective undefined standards afford the circuit courts too much volition in deciding when to grant a preliminary injunction, opening the door for abuse of discretion. As shown above, flexible standards for preliminary injunctions vary across the circuit courts from incredibly harsh to incredibly lax. *Compare Oklahoma ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1113 (10th Cir. 2006) (allowing the alternative serious questions standard but requiring the other three factors to tip *decidedly* in the movant's favor) (emphasis added); *with Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 729 n.1 (8th Cir. 2008) (granting preliminary injunctive relief where a movant has shown a flexible balance of the four requirements). However, the threshold has become so low in certain circuits that this Court's recognition of preliminary injunctive relief as an "extraordinary remedy" has lost all meaning. *See Winter*, 555 U.S. at 22. For example, in *Citigroup*, the Second Circuit acknowledged that 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." 598 F.3d at 35. Likewise, in *Hoosier Energy Rural Electric Co-op., Inc. v. John Hancock Life Insurance Co.*, the Seventh Circuit upheld a preliminary injunction and, in the

same breath, recognized that the movant's likelihood of success on the merits was paltry at best. *See* 582 F.3d 721, 730 (7th Cir. 2009) (". . . Hoosier Energy has some prospect of prevailing on the merits."). There, the court merely found "uncertainties" that gave them pause. *See id.* This Court contemplated this very issue in *Winter* regarding the irreparable-harm prong; just as it held that the mere "possibility" of harm would not be sufficient to grant a preliminary injunction, neither should the mere possibility of success on the merits. *See Winter*, 555 U.S. at 21–22. The bar for such drastic relief must be grounded in more than mere uncertainties and possibilities to safeguard against abuse of discretion.

Finally, these flexible tests withhold and grant preliminary injunctions in different circuits for drastically different reasons, aiding in unjust administration of the law. *Compare Towery v. Brewer*, 672 F.3d 650, 652, 661 (9th Cir. 2012) (finding that two inmates' requests for stays of execution after a change in lethal injection protocol on the eve of their executions did *not* raise sufficiently serious questions) (emphasis added); *with Lam Yeen Leng v. Pinnacle Performance Ltd.*, 474 F. App'x 810, 813 (2d Cir. 2012) (upholding a grant of preliminary injunction over a jurisdictional issue). To ensure equitable application of the law, this Court must apply "a definite set of standards" and reinforce its holding in *Winter*. *See, e.g., Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999). Flexible alternative standards are likely making this "extraordinary remedy" far too common in certain circuits. *See Winter*, 555 U.S. at 22.

Alternative standards unequally applied from circuit to circuit are opening the door for egregious abuses of discretion. This Court's four-part traditional test for injunctive relief must be reinforced to ensure that movants are being held to the same rigorous burden to achieve such radical intervention. *See Winter*, 555 U.S. at 24.

B. The use of an alternative sliding-scale test does not make the "serious question" standard permissible for laws enacted for the benefit of the public interest.

When a statute is enacted for the public interest, likelihood of success on the merits becomes a necessary factor, even if the court deigns to invoke an alternative standard. *See Planned Parenthood*, 530 F.3d at 731–32. Preliminary injunctive relief must be granted even more sparingly where the democratic process has passed a statute for the public interest, even if there is a strong likelihood that the movant will be harmed. *See Yakus v. United States*, 321 U.S. 414, 440 (1994) ("But where an injunction is asked which will adversely affect a public interest . . . the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff."). This Court has acknowledged that it is permissible, and even advisable, to "withhold relief in furtherance of the public interest" more freely than "when only private interests are involved." *Yakus*, 321 U.S. at 441 (quoting *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937)).

Neither the Second nor Eighth Circuits allow alternative standards where the public interest is hindered. *See Able v. United States*, 44 F.3d 128, 132 (2d Cir.

1995); *Planned Parenthood*, 530 F.3d at 732. Both have found the more lenient "serious questions" standard to be inappropriate "where the full play of the democratic process . . . has produced a policy in the name of the public interest embodied in a statute." *Able v. United States*, 44 F.3d at 131; *accord Planned Parenthood*, 530 F.3d at 732. In fact, both circuits view likelihood of success on the merits as a *threshold* requirement for actions against duly enacted statutes that could end a party's preliminary injunction claim altogether. *Planned Parenthood*, 530 F.3d at 732–33; *accord Able*, 44 F.3d at 131–32. The public interest exception rightfully gives a "higher degree of deference" to policies enacted "through presumptively reasoned democratic processes." *Able*, 44 F.3d at 131. As the *Able* court noted, actions of state legislatures for the benefit of the public they represent "should not be enjoined lightly." *Id.*

This Court has long recognized the public interest as overriding any other justification for a preliminary injunction. *See, e.g., Winter*, 555 U.S. at 26 (vacating a preliminary injunction that this Court found to be "jeopardizing national security"); *Yakus*, 321 U.S. at 441 (denying an injunction where Congress acted "in the exercise of its discretion to protect the public interest"). The Eleventh Circuit noted that granting preliminary injunctions against government actions "overrules the decision of the elected representatives of the people and, thus, in a sense interferes with the processes of democratic government." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Because preliminary injunctions "lack the safeguards against abuse or error that

come with a full trial on the merits," they "must be granted reluctantly." *Id*. Courts must give judicial deference to the democratic process. *See Forest City Daly Hous., Inc. v. Town of North Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999).

Furthermore, this Court has acknowledged states' rights to pass laws banning medical treatment where there are uncertainties regarding its safety, even if it infringes on a fundamental right. *Gonzales v. Carhart*, 550 U.S. 124, 129 (2007). Here, Lincoln's elected State Legislature passed the Act—based on a font of medical evidence—to protect young, vulnerable children from potentially dangerous experimental treatments with relatively unknown long-term effects. R. at 2–3. The Marianos were granted a preliminary injunction based on evidence to the contrary. R. at 5–7. However, this conflicting evidence was somehow not enough to show that there is no medical consensus on the topic of gender dysphoria treatment in adolescents. This Court has recognized that "lack of information" on the effects of a treatment is enough to preserve a state's interest in protecting its citizens against it. *See Carhart*, 550 U.S. at 129. Lack of consistent evidence, even more so, should entitle a state to legislate against the contested treatment. Courts must give states authority to protect their citizens from novel and potentially dangerous medical procedures. *See id*.

Allowing a more lenient standard to stall government action does not consider the potential public harm that the legislature was elected to defend against. In order to give respect to the hallmarks upon which this country was founded there must be deference to the actions of legislatures. A more rigorous

injunctive standard is imperative where relief is sought against "government action taken in the public interest." *Able*, 44 F.3d at 131.

II. The district court incorrectly granted the Marianos' motion for preliminary injunction because they are unlikely to succeed on the merits and the balance of equities favors denying the injunction.

A preliminary injunction is an extraordinary remedy that is not granted as a matter of right. *Winter*, 555 U.S. at 24. To succeed on a motion for a preliminary injunction to enjoin the enforcement of a state statute, a movant must clearly show its likelihood to succeed on the merits of a claim, along with the other three *Winter* requirements. *See* cases cited *supra* p. 11–12 and accompanying text; *Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Serv.*, 769 F.3d 105, 110 (2d Cir. 2014) ("A plaintiff [seeking preliminary injunctive relief] cannot rely on the fair-ground-for-litigation alternative to challenge governmental action taken in the public interest pursuant to a statutory or regulatory scheme.") (internal quotations omitted).

If a court issued a preliminary injunction based only on one factor, it would be inconsistent with this Court's established jurisprudence requiring a movant to show that they are entitled to such extraordinary relief *clearly*; therefore, a movant must meet all four requirements to justify granting relief. *See The Real Truth About Obama*, 575 F.3d at 346 (quoting *Winter*, 555 U.S. at 22). Because the burden on the movant requires a clear showing, and due to the extraordinary nature of the remedy, courts have held that the merits inquiry is the most important of the four

factors and must be resolved as a threshold issue before turning to irreparable harm and balance of equities. [2]

Here, the district court determined that the Marianos raised "serious questions" about whether they were likely to prevail on the merits of their constitutional claims. R. at 17, 22. However, the standard of this Court requires a *clear showing* of that likelihood, not merely a "serious question." *Winter*, 555 U.S. at 20 (emphasis added). Therefore, on appeal, the Marianos must do more than raise doubts. They must clearly show both Lincoln and this Court that their constitutional claims are likely to succeed. *Id.*

A. The Marianos cannot establish that they were deprived of a fundamental right secured by the Constitution or laws of the United States and, therefore, are unlikely to succeed on the merits of their substantive due process claim.

To prevail on the merits of a substantive due process claim, a movant must implicate a fundamental right. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); Erwin Cherminsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1520 (1999) (". . . [C]ourts should protect rights . . . only if they are enumerated in the text, intended by the framers or there is a clear tradition of safeguarding such a

[2] *See The Real Truth About Obama*, 575 F.3d at 346–47 (overruling circuit precedent declining to inquire into the merits before looking into the other factors); *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017); *Speech First, Inc., v. Cartwright*, 32 F.4th 1110, 1124 (11th Cir. 2022) ("Likelihood of success on the merits is generally the most important of the four factors.") (internal quotations omitted); *Stevens v. St. Tammany Par. Gov't*, 17 F.4th 563, 576 (5th Cir. 2021) ("If the party requesting a preliminary injunction cannot show a substantial likelihood of success on the merits, the injunction should be denied, and there is no need for the court to address the other requirements for a preliminary injunction.") (internal quotations omitted); *Craig v. Simon*, 980 F.3d 614, 617 (8th Cir. 2020) (per curiam) ("The likelihood of success on the merits is the most important . . . facto[r].").

right."). Fundamental rights are "objectively, deeply rooted in our Nation's history and tradition" and "implicit in the concept of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720–21. To determine if a right is fundamental, courts apply the two-prong analysis from *Washington v. Glucksberg*, which requires that: (1) the court define the asserted right carefully; and (2) that the asserted right must have deep roots in American history. *Id.* at 720–21.

In *Glucksberg*, this Court held that there is no fundamental right to assisted suicide. *Id.* at 702. To reach this conclusion, the Court first redefined the asserted right precisely, following tradition and ensuring that the analysis was clear and based on established precedential examples. *Id.* at 721–24. The Court determined the redefined right to assisted suicide had been previously rejected as fundamental by both courts and lawmakers. *See id.* at 723. Ultimately, the Court determined that holding otherwise would require it to reverse "centuries of legal doctrine and practice," which goes against the test used to determine what is and is not a fundamental right. *Id.* at 728.

Here, the Marianos assert they have a fundamental right to "determine the proper medical care of their children." R. at 14. However, if that were the precise right claimed, this Writ would have been denied as moot because this Court previously held parents have a fundamental right to seek medical care for their children under a physician's guidance. *Parham v. J.R.*, 442 U.S. 584, 585 (1979). Therefore, the right claimed by the Marianos must be precisely redefined to avoid

misunderstanding. *Glucksberg*, 521 U.S. at 721–24; *see Reno v. Flores*, 507 U.S. 292, 302 (1993). Accordingly, we offer to the Court that the Marianos' asserted right is as follows: parents have a fundamental right to obtain *specific* GCT for gender dysphoria—which the state has deemed harmful—for their minor child. *See generally*, R. at 14, 29.

1. Parents do not have a fundamental right secured by the Constitution or laws of the United States to obtain Gender Confirming Treatment for their minor child.

While the question of GCT is an issue of first impression before this Court, most federal courts agree that patients do not have a fundamental right to obtain specific medical treatment when the state has reasonably banned it as harmful. *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993). The D.C. Circuit explained in 2007 that this right could not be fundamental because this Nation's laws—dating back to its founding—established the opposite. *See Abigail Alliance for Better Access to Dev. Drugs v. von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007).

In *von Eschenbach*, terminally ill patients asserted a fundamental right to obtain specific medical treatment, namely, experimental treatment not yet approved by the FDA. *See* 495 F.3d at 697, 701. Because this right is not expressly laid out in the Constitution, the D.C. Circuit analyzed state legislation dating back to the 18th Century. *See id.* at 704. This legislation reflected a long-standing state tradition of regulating the medical industry in response to the risks, safety, and efficacy of new and experimental treatments—protecting patients who might have been uninformed about these concerns. *See id.* at 703–04 ("In the early history of

our Nation, we observe not a tradition of protecting the right of access to drugs, but rather governments *responding to the risks of new compounds as they become aware of and able to address those risks*.") (emphasis added). Considering this, the D.C. Circuit reasoned that it would be oxymoronic for access to experimental treatment to be fundamental if the Nation had a long and deeply rooted history of restricting this right of access instead. *Id.* Ultimately, it held that terminally ill patients, like all other patients, do not have a fundamental right to receive experimental treatment because it is not deeply rooted in this Nation's traditions. *Id*. at 703.

Another example comes from *Pickup v. Brown*, a Ninth Circuit case from 2014. *See, e.g.*, *Pickup*, 740 F.3d 1208, 1236 (9th Cir. 2014), *abrogated on other grounds*, 138 S. Ct. 2361 (2018). There, California law banned therapists from engaging in "sexual orientation change efforts"—conversion therapy or ("SOCE")—with minors, a practice California deemed harmful. *Id.* at 1215. Parents challenged this statute, asserting they had a fundamental right to choose a particular medical or mental health treatment for their child, regardless of the state's safety concerns. *Id.* at 1235. The Ninth Circuit looked to internal and external precedent. *Id.* It reasoned that if patients in general had no fundamental right to specific or state-banned treatment, holding that parents somehow had a superseding right over their children would defy logic. *See, e.g., id.* at 1236. Moreover, it emphasized this Court's viewpoint that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is

jeopardized." *Id*. at 1235. Therefore, it ultimately held that parents do not have a fundamental right to choose specific medical treatment for their children. *Id.*

The right asserted by the Marianos is similar to the right claimed in *Pickup*. *See* 740 U.S. at 1215; R. at 31. There, the district court found it controlling that—like here—California did not outright ban SOCE, and equivalent treatment was available through different, less harmful means. *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1370 (E.D. Cal. 2012). Here, the Act does not prohibit the Marianos or anyone else from seeking GCT in general, only *specific* hormonal and surgical GCT until the age of eighteen, meaning they may still obtain therapeutic treatments and even discontinue puberty blocker use slowly. R. at 31.

Moreover, while not per se experimental, puberty blockers are not approved by the FDA to treat gender dysphoria. R. at 31; *About puberty blockers*, OR. HEALTH & SCI. UNIV. CHILDREN'S HOSP., (2020). Furthermore, off-label use of puberty blockers for gender dysphoria is receiving pushback in other Western nations for two reasons: (1) limited testing; and (2) the medical communities' scant knowledge of long-term effects. *Sweden's Karolinsha Ends All Use of Puberty Blockers and Cross-Sex Hormones for Minors Outside of Clinical Studies*, SOC'Y. FOR EVID. BASED GENDER MED. (May 5, 2021), https://segm.org/Sweden_ends_use_of_Dutch_protocol.

In *von Eschenbach*, the drugs sought had passed "Phase 1" of FDA testing, but the D.C. Circuit recognized that this did not make them safe for the public as a whole, and only indicated safety for limited clinical testing in a controlled environment. 495 F.3d at 705–06. Here, puberty blockers are approved to treat

premature puberty in minors, but only limited trial testing—primarily outside of the United States—has been conducted on their use for gender dysphoria. *See* Madeline B. Deutsch, MD, *What's in a Guideline? Developing Collaborative and Sound Research Designs that Substantiate Best Practice Recommendations for Transgender Health Care* 18 AMA J. OF ETHICS No. 11, 1098, 1098–99 (2016) (explaining the difficulties in developing guidelines for transgender medicine due to most studies being small and outside the U.S.). Lincoln is well within its long-standing state right to regulate new and experimental treatments in response to safety concerns. *See von Eschenbach*, 495 F.3d at 704.

The Marianos contend that because organizations like WPATH and the AMA support using hormone blockers off-label for gender dysphoria, the issue of their effectiveness or relative safety is moot. R. at 4–5. However, general acceptance of a practice by the medical community is not a perfect basis for determining whether the method should be widely accepted or not. Lynn D. Wardle *Controversial Med. Treatments for Children: The Roles of Parents and of the State*, 49 FAM. L. Q. 509, 524 (2015). The medical community has a history, dating back centuries, of widespread acceptance of dangerous and harmful medical treatments, including bloodletting and maggot debridement therapy. *Id.*

As a matter of public policy, it follows that—if the terminally ill cannot access specific, lifesaving medication because of its unapproved status—parents do not have a fundamental right to obtain specific GCT. Furthermore, no fundamental right extends to treatment the state has deemed harmful in the complete and utter

absence of a life-threatening physical medical condition. This Court should analyze the Act under rational basis review due to its regulation of in-state health and safety concerns and because the treatment sought is arguably experimental. *See von Eschenbach*, 495 F.3d at 712 (". . . [T]he Alliance's claim of a right of access to experimental drugs is subject only to rational basis scrutiny."); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2246, 2284 (2022) (asserting that the level of scrutiny for health and safety regulations is rational basis review).

2. The SAME Act satisfies rational basis review because Lincoln has a legitimate governmental interest in protecting the health and safety of its children.

States have a legitimate governmental interest in regulating health, especially where there is medical uncertainty.[3] That interest is especially compelling when the laws in question regulate the health and safety of minors. *Otto v. City of Boca Raton*, 981 F.3d 854, 868 (11th Cir. 2020) (quoting *New York v. Ferber*, 458 U.S. 747, 756–57 (1982)) ("It is indisputable 'that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling.'").

As analyzed by the district court in *Pickup*, when in the realm of health and safety, courts afford a wide range of deference to legislatures; the legislative findings—usually based on evidence and empirical data—are not subject to speculative courtroom fact-finding under rational review. *See Pickup*, 42 F. Supp. 3d at 1376 (referencing *F.C.C. v. Beach Commc'n, Inc.*, 508 U.S. 307, 315 (1993));

[3] *Carhart*, 550 U.S. 124, 163 (2007); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) ("It is within a state's police power to enact quarantine laws and *health laws of every description*.") (emphasis added); *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) ("It is, of course, well settled that the [s]tate has broad police powers in regulating the administration of drugs by the health professions.").

accord Dobbs, 142 S. Ct. at 2284; *Heller v. Doe*, 509 U.S. 321, 319–20 (1993) (Kennedy, J., majority).

In *Pickup*, California's stated justification for SB 1172 was to "protec[t] the physical and psychological well-being of minors, including lesbian, gay, bisexual and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts." 2012 CAL. LEGIS. SERV. Ch. 835, § 1(n)). There, the district court held that state protection of adolescent well-being was not only legitimate but a "significant, if not compelling, state interest." *Pickup*, 42 F. Supp. 3d at 1376. It reached this conclusion by looking at California's legislative findings with the aforementioned level of deference. *See id.* It determined that the data relied upon by the legislature supported the rationale for the law; however, it was careful to state in clear terms that even if all the legislative materials were unreliable or inaccurate, the law would still pass rational review. *Id.* This is because, the district court determined that the law was rationally related to California's significant interest because it did exactly what it purported to: prohibit a medical practice deemed "unproven and potentially harmful to minors." *Id.*

Similarly, here, Lincoln's stated justifications are to "protect children from risking their own mental and physical health and lifelong negative medical consequences" and "encourage treatments supported by medical evidence and discourage harmful, irreversible medical interventions"—language virtually identical to SB 1172. R. at 3; 2012 CAL. LEGIS. SERV. Ch. 835, § 1(n)). Moreover, the legislative findings of both statutes are significant concerning the potential risks

and harmful effects of an unproven and unstudied medical treatment. R. at 2–3; 42 F. Supp. 3d at 1354–55.

The similarities do not end there. The language of both SB 1172 and the Act are concerned with protecting the mental and physical health of LGBTQ minors. R. at 3. Like SOCE, GCT is inherently dangerous because clinicians exploit parental fears of suicide—for which LGBTQ minors are a vulnerable population—to induce false informed consent. *See* Stephen B. Levine, et al. *Reconsidering Informed Consent for Trans-Identified Children, Adolescents, and Young Adults*, J. OF SEX & MARITAL THERAPY (2022). Faulty emphasis on the risk of suicide if parents do not seek hormonal transition immediately is an unfortunate consequence of the lack of information about GCT. *Id.* However, studies show that hormonal GCT may not decrease the risk of suicidal inclinations because many minors suffering from gender dysphoria, like Jess Mariano, have mental health co-morbidities that may worsen due to hormone therapy. *Id.* Even studies cited by the Marianos that attribute GCT in adolescents to a reduction in suicidal ideations are self-admittedly problematic due to small sample size, heavy reliance on self-reporting, and a small candidate pool. *See* Annelou L.C. de Vries, et al. *Psychiatric comorbidity in gender dysphoric adolescents*, 52:11 J. OF CHILD PSYCHOLOGY AND PSYCHIATRY 1195, 1201 (2011)

Regardless of their concerns about suicidal tendencies, clinicians may only prescribe hormonal GCT based on informed consent, because of its status as an off-

label treatment for gender dysphoria.[4] However, "the informed consent process rarely adequately discloses this information to patients and their families," evidenced by the sharp acceleration of de-transitions in recent years. Levine *supra* p. 32, at 2–3, 6–7. Researchers attribute this to minors being "rushed to medical gender-affirmative intervention with irreversible effects" before properly evaluating psychological imperatives and setting realistic expectations that gender dysphoria may not persist into adulthood. *Id.* at 7.

Lack of informed consent is specifically problematic when puberty blockers' known potential side effect is infertility. Allison Smith, *Preserving Possibility Future Bio. Family: State-Mandated Insur. Coverage of Fertility Preser. for Youth Patients When Primary Treatment Causes Sterility*, 18 DUKEMINIER AWARDS, 267, 269 (2019). Recently, a British Court ruled against premature prescription of GCT to minors, explaining it was "very doubtful" that a young teenager could be "competent to give consent to the administration of puberty blockers" when things like their future fertility are far from the forefront of their minds. Becky McCall, *NHS Makes Child Gender Identity Service Changes After High Court Ruling*, MedScape UK (Dec. 4, 2020), https://www.medscape.co.uk/viewarticle/nhs-makes-child-gender-identity-service-changes-after-high-2020a1000yka. Informed consent

[4] WORLD PRO. ASS'N FOR TRANSGENDER HEALTH (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 10-21 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf; Zain Mithani, *Informed Consent for Off-Label Use of Prescription Medications*, 14 AMA J. OF ETHICS 576, 576 (July 2012), https://journalofethics.amaassn.org/article/informed-consent-label-use-prescription-medications/2012-07 (explaining the importance of informed consent for off-label treatments).

for GCT should be explicit and should include disclaimers about its potential lack of effectiveness in resolving gender dysphoria, its irreversibility, and the possible long-term effects. Levine *supra* p. 32, at 13–14.

Lincoln has a legitimate governmental interest in ensuring that its state-licensed medical professionals are not prescribing GCT without informed consent when many dangerous side effects are only apparent once the patient has reached adulthood. WPATH, *supra* note 4, at 20. Because many side effects—like brain health—are undeterminable without a time machine, Lincoln has a fundamental and deeply rooted state interest in regulating the treatments based on their risk, safety, and efficacy. *See von Eschenbach*, 495 F.3d at 703–04; *see generally* Levine *supra* p. 32, at 16. The Act is rationally related to this interest because it does exactly what it is purported to do: protect *minors* from dangerous medical treatment, which can only be accomplished by placing age restrictions on the treatment. R. at 3; *Pickup*, 42 F. Supp. 3d at 1376.

B. The Marianos are unlikely to succeed on the merits of their equal protection claim because the SAME Act classifies based on age and medical procedure, not sex or transgender status.

The Fourteenth Amendment, while guaranteeing equal protection, does not take away the power of states to enact statutory classifications. *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 271 (1979). "Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law." *Id.* at 271–72. "When the basis of classification is [rational], uneven effects upon particular groups within a

class are ordinarily of no constitutional concern." *Id.* "In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification." *Id.*

1. The Supreme Court has held that discrimination based on medical treatment sought is not sex discrimination.

When a statute is gender-neutral on its face but has a disparate impact on the classified group, courts apply a two-prong analysis: (1) is the statutory classification indeed neutral; and (2) if so, are the adverse effects just discrete and invidious discrimination in disguise. *Id.* at 274. However, this Court has long held that discrimination based on medical treatment sought is not sex discrimination because there are legitimate reasons to statutorily classify individuals based on the medical treatment they seek.

For example, in *Geruldig v. Aiello*, this Court held that it was not sex discrimination for a California state disability benefits program to exclude coverage for normal pregnancy. 417 U.S. 484, 484 (1974). It reached this conclusion by determining that the statute was neutral on its face because the discrimination was not women versus men, but pregnant people versus non-pregnant people, and the latter included people from both sexes, precluding sex discrimination. *Id.* Further, it reasoned that "while it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Id.* at n.20. Because pregnancy is an "objectively identifiable physical condition with unique characteristics," lawmakers are free to discriminate, like with

"any other physical condition," so long as the classification is "not a mere pretext" to sex discrimination and the law has a rational basis. *Id.*

Geruldig was cited by this Court in *Bray v. Alexandria Women's Health Clinic*, holding that discrimination against "abortion seekers" could not be conflated with sex discrimination. 506 U.S. 263, 263 (1993). There, protestors attempted to "prevent" abortions by blocking entrances outside of abortion clinics. *Id.* This Court reasoned that the protestors' actions were not motivated by malice or explicitly directed at "women as a class" but instead directed at "abortion seekers" as a class. *Id*. at 270. Because there are common and understandable reasons for opposing abortion and many women oppose it, this opposition is not merely a pretext for sex discrimination. *Id.*

Finally, these principles were reaffirmed by this Court as recently as this past summer in *Dobbs*, 142 S. Ct. at 2245–46. There, Justice Alito—writing for the majority—confirmed once again that "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny." *Id.* The opinion concluded by applying the "same standard of review as other health and safety measures," rational basis review. *Id*. at 2246, 2284.

The Marianos argue that the Act is a guise for transgender discrimination; however, it is facially neutral because it prohibits GCT for minors across the board, rather than just transgender minors. R. at 19. In fact, the Act never mentions biological sex because the biological sex of the minor seeking GCT is immaterial to its purpose. R. at 2–4. Gender dysphoria, like pregnancy, is an identifiable condition

with unique characteristics, making it free for regulation like any other medical treatment. *Geruldig*, 417 U.S. at n.20. The classification here is not between transgender and non-transgender minors; it is between minors seeking GCT for gender dysphoria and all other minors. The former group, like in *Geruldig*, is comprised of both sexes and is home to both transgender and non-transgender minors. Further, like abortion in *Bray*, there are legitimate, non-discriminatory reasons to oppose GCT in minors, which is evidenced by the number of adults who have chosen to de-transition after receiving GCT as minors. Levine *supra* p. 32, at 6–7, 16.

Using the logic applied in *Dobbs*, the fact that only those with gender dysphoria receive GCT does not trigger heightened scrutiny. *Dobbs*, 142 S. Ct. at 2246, 2284. Therefore, the Act should be scrutinized using the same metric this Court has used for all other health and safety regulations—rational basis review. *Id.*

2. The Act is not subject to heightened scrutiny because no suspect class is implicated.

Absent a fundamental right or a suspect class, the general rule of this Court is that classifications in statutes are presumed to be valid so long as they are "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985).

In *Cleburne*, this Court considered if it should apply heightened scrutiny to a discriminatory city housing policy regarding the mentally incapacitated—a class that had never before received heightened scrutiny. *Id.* at 432. Writing for the

majority, Justice White reasoned that if the Court considered the disabled a quasi-suspect class and applied heightened scrutiny it would negatively affect the group as a whole. *Id.* at 442–44.

First, the disabled have increasingly varied needs on an individual basis. *Id.* The Court reasoned that the judiciary is likely uninformed and would have difficulty making substantive judgments on statutes regarding the disabled because of these various individualized needs. *Id.* The Court determined that those judgments required a level of nuance best found with the legislature because of its unique opportunity to hear from experts and the disabled community. *Id.* Second, discrimination can be a positive thing for the disabled. *Id.* The Court reasoned that heightened scrutiny could invalidate many health and safety laws aimed at *protecting* the disabled community and their interests. *Id*. It determined that repeated invalidation of laws on equal protection grounds would likely discourage the legislature from acting altogether, taking away this class's protection under the democratic process. *See id.*

Ultimately, the Court held that rational basis review was the appropriate standard. *Id.* However, it also established two important principles for future equal protection analyses. Richard B. Sapphire, *Equal Protection, Rational Basis Review, and The Impact of Cleburne Living Center, Inc.*, 88 KY. L. J. 591, 616 (2000). First, even when rational basis review is applied, a classification violates equal protection if it is merely a pretext to disadvantage a "disfavored" or unpopular group based solely on prejudice. *Id.* Second, even when a classification has a legitimate

legislative purpose, courts may question its "instrumental rationality" if the means applied do not actually seem to further the stated purpose. *Id.*

A few years prior in *Plyler v. Doe*, this Court applied heightened scrutiny to a Texas statute that withheld school district funds for undocumented children. 457 U.S. 202, 202 (1982). There, the Court feared the complete deprivation of education would stigmatize migrant children indefinitely—due to illiteracy—effectively denying them equal access to the democratic process, the exact thing the clause was intended to protect. *See id*. at 222–23. Moreover, like in *Cleburne*, the Court worried that this was merely a pretext to harm a politically unpopular group present in this Nation through no fault of their own. *See id*. at n.14. While age is not a suspect class, the Court held that the gravity of the deprivation warranted some type of heightened scrutiny. *Id*. at 223–24.

The Act here implicates no suspect class whatsoever. R. at 3. While the Act does not purport to discriminate based on transgender identity, even if it did, transgender individuals are not a suspect class under the Fourteenth Amendment because they have protection under the democratic process. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1836–37 (2020) (Kavanaugh, J., dissenting). The Marianos will likely argue that this Court's holding in *Bostock* is controlling on this issue; however, this Court should read this highly text-based opinion narrowly as only applying to Title VII discrimination per tradition. *Bostock*, 140 S. Ct. at 1734; *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that the "rigorous statutory

standard" of judicial review for Title VII cannot apply by analogy to an equal protection analysis).

The Act may discriminate based on age; however, as noted in *Murgia*, there are permissible reasons to discriminate based on age, specifically due to physiological differences and mental capacity. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 311 (1976). Further, the minors here are not subjected to a complete deprivation of education, nor will the prohibition on GCT lead to them having life-long unequal access to the democratic system. *See Disabled Am. Veterans v. U.S. Dept. of Veterans Affairs*, 962 F.2d 136, 142 (2d Cir. 1992) (discussing the Court's reluctance to extend the holding in *Plyler*) ("*Plyler* rests in part on the assumption that children who are denied an education will be barred forever from 'any meaningful degree of individual political equality. . .'"). Outside of these unique circumstances, this Court has refused to extend the holding in *Plyler*. *See, e.g., Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459 (1988) (declining to extend *Plyler* to other equal protection claims concerning children in public schools) ("We have not extended this holding beyond the unique circumstances that provoked its unique confluence of theories and rationales.") (internal quotations omitted).

Lastly, the Act is not merely a covert attempt by Lincoln to harm a politically unpopular group. In fact, quite the opposite is true. Lincoln intended the Act to protect minors with gender dysphoria from a predatory medical system. R. at 3–4. Moreover, discrimination is sometimes good for transgender and LGBTQ youth, as

it was for the disabled in *Cleburne*. Specifically, gender dysphoric minors present as a unique group with various individual needs that cannot be satisfied with blanket legislation, mainly because they experience "some degree of prejudice from . . . the public at large." *Cleburne*, 473 U.S. at 445; R. at 33.

Take California's SOCE ban in *Pickup*. 740 F.3d at 1222. At the time, SOCE was considered a "safe" treatment but in hindsight, it is apparent that SOCE therapy was incredibly harmful to those subjected to it. *See id*. However, if the Ninth Circuit applied heightened scrutiny, it would likely have been invalidated. *See id.* at 1231. From a public policy standpoint, applying heightened scrutiny to legislation aimed at protecting minors with gender dysphoria will do more harm than good in the long run. *See generally Cleburne*, 473 U.S. at 444.

C. Even if this Court finds that the district court correctly applied the serious question standard, the balance of equities tips in favor of the preliminary injunction being denied.

"Where a federal court is asked to interfere with the enforcement of state laws, it should do so only 'to prevent irreparable injury which is clear and imminent.'" *Am. Fed'n of Lab. v. Watson*, 327 U.S. 582, 593 (1946). "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)) (Rehnquist, J., in chambers). "When a statute is enjoined, the state necessarily suffers the irreparable harm of denying the public interest in enforcement of its laws." *Robinson v. Ardoin*, 37 F.4th 208, 227 (5th Cir. 2022).

In *Orrin*, Justice Rehnquist explained that a state's interest is infringed upon by the very nature of a preliminary injunction because it is prevented from engaging in its state functions. *Orrin W. Fox Co.*, 434 U.S. at 1351. The Court reiterated this sentiment in *Maryland v. King*. There, a defendant was convicted of first-degree rape under a Maryland state statute that authorized police to collect DNA from people charged but not convicted of a crime. *King*, 567 U.S. 1301–02. The appellate court overturned the defendant's conviction, stating that the DNA collection violated individual Fourth Amendment privacy interests; Maryland appealed to this Court for a stay of judgment. *Id*. Writing for the Court, Chief Justice Roberts explained that the appellate court's judgment subjected Maryland to ongoing, irreparable, and concrete harm to its law enforcement and public safety interests. *Id.* at 1303. Absent a stay, Maryland could not use a valuable tool for crime prevention. *Id*. This Court granted Maryland's stay, holding that forcing Maryland to abandon a statute "duly enacted" in the public interest constituted irreparable harm. *Id*. at 1303.

The Fifth Circuit applied the same logic in 2021 when it considered whether to grant a stay in favor of the Texas Attorney General, pending appeal of a permanent injunction against the Governor's executive order banning mask requirements in public accommodations following the COVID-19 pandemic. *E.T. v. Paxton*, 19 F.4th 760 (5th Cir. 2021). There, parents of public-school students claimed that the Texas mask ban violated the Americans with Disabilities Act by prohibiting school districts from imposing mask mandates, even in the presence of

immunocompromised students. *Id*. at 763. After determining that Texas was likely to succeed on its merits, the Fifth Circuit turned to the principles of federalism to consider the balance of equities. *Id.* at 770. Federalism counseled that Texas officials, like the governor, are given the solemn duty to carry out state public policy; therefore, enjoining them from completing this duty injures the state irreparably. *Id.* Ultimately, federalism prevailed and the Fifth Circuit stayed the injunction against Texas pending appeal. *Id.* at 771.

Like in *King*, Lincoln will be subjected to continuous, ongoing, concrete harm if the preliminary injunction is granted. Gender dysphoria and coercive transitioning of minors is on the rise around the Nation, while the informed consent issues surrounding puberty blockers remain unmoving. *See* Levine *supra* p. 32 at 1, 5. Until the medical community can come to a determination about what the appropriate standards of informed consent are, the risk of harm to Lincoln's children remains grave. *Id.* Moreover, the harm caused by potential latent side effects of GCT will remain indefinite—likely for many more decades—until studies showing the actual long-term effects of GCT are made widely available. *Id.* at 8. Today, there are virtually no U.S.-based studies in progress, and those ongoing cannot provide the data needed to ensure safety. de Vries *supra* p. 32. If there was ever a time for state regulation of health practices, this is it. The potential harm inflicted upon children subjected to these practices goes beyond merely irreparable; it is reprehensible. How many children must act as lab rats for social science practitioners before a state may step in and say no more?

To deny Lincoln its solemn duty of legislating and executing state laws is an affront to the principles of federalism upon which this Nation was founded. *E.T.*, 19 F.4th at 770. Lincoln is merely asserting its legitimate state interest in protecting its children's public health and safety, which it cannot do if the judiciary abrogates the democratic process of duly elected officials voted on by the people of the state.

CONCLUSION

A preliminary injunction is a drastic and extraordinary form of relief that must be granted in only the most extreme circumstances. Courts must hold parties moving for injunctive relief to the highest standard, by satisfying all four traditional requirements in line with this Court's jurisprudence. The Marianos' preliminary injunction was granted under the more lenient "serious questions" standard. Because the Marianos were held to the incorrect legal standard, the district court abused its discretion when it granted their preliminary injunction.

Alternatively, even if this Court determines the district court applied the correct standard, the balance of equities tips in Lincoln's favor because they will suffer irreparable harm should the injunction be granted. Each time a preliminary injunction enjoins a state statute, the harm to federalism is vast and usurps the democratic principles this Nation was built upon. This harm is disproportionate to that which could ever be suffered by an individual because it cuts through the very fabric of democracy. Therefore, the district court abused its discretion when it held that the balance of equities tipped towards the Marianos.

Further, the Marianos have not clearly shown that they are likely to prevail on the merits of either their substantive due process or equal protection claims. Regarding the former, there is no fundamental parental right to obtain specific medical treatment that the state has reasonably deemed harmful, as this Nation has a long-standing, deeply rooted history of state medical treatment regulation. The latter is dispelled because the Act classifies based on age and treatment sought, not transgender status or sex. Therefore, the district court erred in applying heightened scrutiny to each claim. Had it correctly applied rational basis review the Act would have passed with flying colors.

It is for the aforementioned reasons that this Court should REVERSE the judgment of the Fifteenth Circuit Court of Appeals as to both issues and VACATE the preliminary injunction.

Respectfully submitted,

/s/ 3102

Attorneys for Petitioner

CERTIFICATE OF SERVICE

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

/s/ 3102

Attorneys for Petitioner

APPENDIX A

United States Code Provisions

28 U.S.C. § 2201. 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 of 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.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

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.

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.

APPENDIX B

Lincoln's Stop Adolescent Medical Experimentation 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.

20 Linc. Stat § 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.

20 Linc. Stat. § 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.

20 Linc. Stat. § 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.

20 Linc. Stat. § 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.

20 Linc. Stat. § 1206. Effective Date

The provisions of this chapter shall take effect on January 1, 2021.

APPENDIX C

Federal Rules of Civil Procedure

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). Preliminary Injunction

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

(2) *Consolidating the Hearing with the Trial on the Merits*. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.