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 RESPONDENTS

Team # 3103
Attorneys for Respondents

QUESTIONS PRESENTED

I. Is the serious question standard still viable when it provides the only way to rationally consider the appropriateness of a preliminary injunction for plaintiffs raising questions of first impression, and still places a heavy burden on plaintiffs to ensure they are entitled to such relief?

II. Does the SAME Act likely violate Due Process and Equal Protection rights when it prohibits parents from pursuing readily available medical procedures for their child solely because of the child's biological sex?

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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 of the United States Court of Appeals for the Fifteenth Circuit is also unreported and set out in the record. R. at 23–34.

STATUTORY PROVISION

The Stop Adolescent Medical Experimentations (SAME) Act, 20 Linc. Stat. §§ 1201-06 is relevant to this case and is set forth in Appendix A.

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV, § 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.

STATEMENT OF THE CASE

Factual Background

Introducing Jess Mariano. Jess Mariano is a transgender boy who has been insistent from a young age that he does not desire to live if he is forced to live as a girl. R. at 5. Before Jess was diagnosed with gender dysphoria and able to receive gender affirming medical care, he suffered from anxiety and depressive episodes. R at 4. As a result of Jess's undiagnosed and untreated gender dysphoria, he attempted suicide at eight years old by swallowing a handful of Tylenol pills. *Id.* Following nine months of therapy after his suicide attempt, Jess was diagnosed with gender dysphoria due to his persistence that he be treated as a boy and his distress over wanting to prevent female puberty. *Id.* Jess's gender dysphoria, and the connected consequences for his mental health, continued to manifest as he began to show signs of puberty and develop breast tissue. R. at 5. After extensive consultations between Jess's pediatrician and his psychiatrist, Jess was prescribed puberty blockers at the age of ten and continues to receive monthly injections of puberty blocking medications. *Id.*

While the puberty blockers have not completely treated Jess's gender dysphoria, they have helped Jess experience fewer symptoms of depression and have prevented him from undergoing increased distress, which he would have experienced if his breast tissue had continued to develop. *Id.* Jess is currently 14 years old and continues to express torment over the breast tissue that he developed before he was

able to obtain puberty blocking medications. R. at 2, 5. Due to the continuous distress that Jess has experienced over his physical appearance not aligning with his gender identity, Jess is expected to start hormone therapy when he turns sixteen. R. at 5. Furthermore, to adequately treat his gender dysphoria before he turns eighteen, Jess may need chest surgery. *Id.*

The SAME Act. In January of 2022, the State of Lincoln enacted the Stop Adolescent Medical Experimentations (SAME) Act. R. at 1. The SAME Act prohibits all healthcare providers from giving medical care to transgender minors that is performed for the purpose of "instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 3. The SAME Act prohibits three types of medical treatments for gender dysphoria: (1) "[p]rescribing or administering puberty blocking medication to stop or delay normal puberty;" (2) "[p]rescribing or administering doses of testosterone or other androgens to females" and "doses of estrogen to males;" and (3) "[p]erforming surgeries that artificially construct genitalia tissue or remove any healthy or non-diseased body part or tissue, except for male circumcision." R. at 4.

The state legislature found that "many cases of gender dysphoria in adolescents resolve naturally" and claimed there is no established link between gender-affirming care for transgender minors and decreased suicidality. R. at 2-3. The legislature cited "emerging" research on *potential* harms of gender-affirming care and found that parents of transgender minors do not fully appreciate these risks. R. at 3. Any healthcare provider who knowingly and willingly violates any provision of the

SAME Act is guilty of a class 2 felony and is subject to a fine of up to $100,000 and imprisonment of two to ten years. R. at 4.

The risk to transgender children's lives. If the treatment for Jess's gender dysphoria is interrupted for even one month, Jess will immediately resume unwanted female puberty. R. at 5. This will completely undermine the progress made towards treating Jess's gender dysphoria and depression. *Id.* The SAME Act would ban all medical treatment for Jess's gender dysphoria, and all relief from his depression and the distress caused by his physical appearance not matching his gender identity, until he turns eighteen. *Id.* If permitted to take effect, the SAME Act will cause Jess to experience irreversible physical changes and significantly increase the symptoms of his depression and suicidal ideation. R. at 12.

Procedural Background

District of Lincoln. The Marianos filed suit on November 4th, 2021, on the grounds that the SAME Act violates their Substantive Due Process and Equal Protection rights under the Fourteenth Amendment. R. at 1. Because Lincoln sought to enforce the statute, the Marianos filed a motion for a preliminary injunction on November 11th, 2021. R. at 1. Seven days later, the government moved to dismiss, requesting that the injunction be denied; a hearing was held on both motions on December 1st, 2021. R. at 1. After hearing the evidence, the district court granted the preliminary injunction and denied the motion to dismiss, finding that the Marianos

were likely to succeed on their constitutional claims and that they would suffer irreparable and immediate harm. R at 2. Additionally, the district court found that the harm outweighed any benefits of the Act and injunctive relief fell within the public interest. R. at 2.

Fifteenth Circuit. On interlocutory appeal, the government sought to have the injunction reversed and the case dismissed. R. at 23. The Fifteenth Circuit found that the district court did not abuse its discretion in finding irreparable harm and determining that the balance of interests favored the Marianos. R. at 24. Moreover, it found that serious questions were raised as to the constitutional claims—a likelihood of success. R. at 27. Lastly, it agreed that the balance of interests weighed in favor of the Marianos; accordingly, it affirmed the district court. R. at 27.

SUMMARY OF THE ARGUMENT

Equity demands the survival of the serious question standard. The serious question standard should be affirmed as a viable alternative to a merit analysis when plaintiffs moving for a preliminary injunction raise questions of first impression. For preliminary relief to remain equitable and capable of encompassing the circumstances of each case, a flexible standard must be available. The serious question standard does not undermine the need for a plaintiff to face a heavy burden to obtain the extraordinary remedy of a preliminary injunction. When courts are unable to assess the merits of a plaintiff's claim without full adjudication on the merits, the

serious question standard still requires that a plaintiff carry the burden of demonstrating that the injunction will prevent irreparable harm, that the injunction is in the public interest, and that the balance of equities tips in their favor.

Previous decisions from this Court do not undermine the validity of the serious question standard, because it was possible in those cases to assess the merits of the plaintiffs' claims at the preliminary stage. Here, Jess Mariano raises a question of first impression, for which no court could rationally assess the merits of his claim before full adjudication on the merits. Because Jess will immediately resume unwanted female puberty without the preliminary injunction, causing irreversible physical changes and a substantially higher risk of suicide, this case demonstrates the pressing need to affirm the serious question standard.

The SAME Act deprives the Marianos of their constitutional rights. This Court has long held that parents possess a fundamental right to seek care for their children, as Lincoln concedes. Because the SAME Act infringes upon that right, strict scrutiny applies. Uncertain evidence indicating that gender-affirming treatments are experimental is not sufficient to override that right—the district court properly found that the treatments are not experimental. Accordingly, the SAME Act is subject to and fails strict scrutiny—it categorically bans gender-affirming care, depriving the Marianos of a fundamental right without employing the least restrictive means. The Marianos are likely to succeed on their Due Process claim.

Next, the SAME Act, by its plain language, discriminates against children solely on their transgender status, triggering heightened scrutiny. Because the treatments, again, are not experimental, the government's alleged interest in protecting children misses the mark. The Act cannot possibly further such an interest when it prohibits standard medical treatment. Accordingly, the SAME Act fails heightened scrutiny—the Marianos are likely to succeed on their Equal Protection claim.

STANDARD OF REVIEW

In this appeal, the State of Lincoln must satisfy a significant hurdle to prevail.

The State of Lincoln must demonstrate that the district court and court of appeals abused their discretion when granting and upholding the preliminary injunction. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Even if this Court would have arrived at a different result than the lower courts, it may not reverse the preliminary injunction unless it finds that the lower courts' decisions were based on an erroneous legal standard or finding of fact. *Id.*; *see Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002) (noting that the trial court is best positioned to evaluate the evidence). Further, if the constitutional question is close, the injunction must be upheld. *See Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 664 (2004) (citing *Walters v. Nat'l Assn. of Radiation Survivors*, 473 U.S. 305, 336 (1985) (O'Connor, J. concurring)).

ARGUMENT

I. This Court should affirm the serious question standard because it allows for judicial discretion and flexibility when the merits of a plaintiff's claim cannot be rationally judged at the preliminary stage, though still imposes a heavy burden on plaintiffs to prevent unwarranted preliminary relief.

If a preliminary remedy is not flexible enough to account for cases when the moving party will experience irreparable harm even if final adjudication is in their favor, it is neither equitable nor a remedy at all. "Preliminary injunctions should not be mechanically confined to cases that are simple or easy." *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). The purpose of a preliminary injunction is to provide temporary relief prior to trial based on an *estimate* of the strength of a plaintiff's claim. *Id.* "The essence of equity jurisdiction" requires courts to account for the necessities of each case with a flexible, rather than rigid, approach. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). To deny preliminary injunctions in cases that present questions of first impression "would deprive the remedy of much of its utility." *Citigroup*, 598 F.3d at 36. The serious question standard preserves the equitable nature of preliminary injunctions by allowing a court to grant temporary relief when success on the merits is uncertain but the costs outweigh the benefits of not granting the injunction. *Id.* at 35.

This Court in *Winter v. National Resources Defense Council, Inc.* articulated a sequential test for a plaintiff to satisfy to obtain preliminary relief:

> "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."

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *see also Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987); *Weinberger*, 456 U.S. at 311-12. The serious question standard does not undermine the focus of this Court in *Winter*, which was concerned with granting an "extraordinary remedy" based on only a likelihood of success on the merits and the possibility of irreparable harm to the moving party. *Winter*, 555 U.S. at 22, 24.

The serious question standard simply permits a plaintiff who has satisfied the other three factors of the sequential test to replace the merit analysis with a showing that there are serious questions going to the merits. *Citigroup*, 598 F.3d at 33. This Court has used the serious question standard to grant preliminary relief when the merits of a plaintiff's claim could not be "satisfactorily resolved" before trial and the plaintiff had no remedy for their injury even if final adjudication was in their favor. *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929). This Court has declined to overrule the serious question standard when it applied the sequential test in three previous cases. *All. for the Wild Rockies*, 632 F.3d at 1134. The serious question standard is consistent with this Court's recent jurisprudence on preliminary injunctive relief and maintains the equitable nature of the remedy while providing clear standards to prevent unwarranted preliminary injunctions.

A. The serious question standard provides an equitable substitute for consideration of the merits when plaintiffs raise questions of first impression.

The serious question standard provides clear measures to prevent courts from arbitrarily granting preliminary injunctions. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). Preliminary injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). The serious question standard affords a safety-valve for judicial discretion when equity demands a balancing of two factors of the sequential test: the likelihood of irreparable harm and the likelihood of success on the merits. *Id.* This idea is consistent with the holding in *Winter*, which declined to implicitly or expressly reject the serious question standard. Elisabeth Long, *Alliance for the Wild Rockies v. Cottrell: Raising "Serious Questions" About Post-Winter Injunctive Relief in the Ninth Circuit*, 39 Ecology L.Q. 643, 645 (2012). Flexibility is required when considering a preliminary injunction, because interim relief is "a means of ensuring that appellate courts can responsibly fill their role in the judicial process." *Nken v. Holder*, 556 U.S. 418, 427 (2009).

This Court's rejection of the Ninth Circuit's standard in *Winter* supports the validity of the serious question standard by demonstrating that success on the merits is not the penultimate factor when considering a preliminary injunction. *See Winter*, 555 U.S. at 18. In *Winter*, this Court was concerned with affording extraordinary relief where the plaintiff had a significantly lessened burden. *Id.* at 22. Prior to

Winter, the Ninth Circuit permitted plaintiffs to obtain a preliminary injunction by showing that irreparable harm was simply possible if they had demonstrated a likelihood of success on the merits. *Id.* at 19. The error of the lower courts in *Winter* was an improper analysis of the effect of the injunction on the public interest. *Id.* at 24. The balance of equities and consideration of the public interest are pertinent when assessing the appropriateness of preliminary relief. *Id.* at 32. The majority in *Winter* even recognized that "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Id.* at 32. This pronouncement suggests that no single factor is dispositive when considering if a plaintiff is entitled to a preliminary injunction. *Dataphase Systems, Inc.*, 640 F.2d at 113.

The serious question standard does not significantly lessen the burden on plaintiffs. *See id.* When the serious question standard applies, a plaintiff must still demonstrate that the balance of equities is in their favor, that an injunction prevents irreparable harm, and that an injunction is in the public interest. *Citigroup*, 598 F.3d at 33. The burden of demonstrating success on the merits is reallocated to the other three prongs of the sequential test, ensuring no single consideration is determinative. *See Dataphase Systems, Inc.*, 640 F.2d at 113. Furthermore, when a plaintiff is not raising a question of first impression, the serious question standard would not apply. *See id.* This ensures that plaintiffs cannot evade demonstrating a likelihood of success on the merits when there is ample precedent against them—preventing the serious question standard from becoming a loophole to obtain unwarranted preliminary relief. *See id.*

The origin of preliminary injunctions supports the continuing validity of the serious question standard. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 529 (1978). At Eighteenth Century common law, a plaintiff could seek a preliminary injunction from courts of equity when there was no adequate remedy at law for their injury. *Id.* Before standards for granting a preliminary injunction were developed, the main prerequisite for obtaining preliminary relief was that the plaintiff had to be threatened by an injury for which there was no adequate legal remedy after final adjudication. *See* Bethany M. Bates, *Reconciliation After Winter: The Standard for Preliminary Injunctions in Federal Courts*, 111 Colum. L. Rev. 1522, 1524-25 (2011). The purpose of a preliminary injunction is to maintain the status quo, which preserves the relative position of the parties until a case can be fully adjudicated on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Preservation of the status quo prior to a full hearing on the merits would be impossible for plaintiffs raising questions of first impression. *See Citigroup*, 598 F.3d at 35. Just as plaintiffs at common law had to turn to courts of equity when there was no relief at law, modern day plaintiffs must turn to the serious question standard when precedent is inadequate to permit a rational assessment of the merits of their claims. *Dataphase Sys., Inc.*, 640 F.2d at 113.

This Court and the lower circuits recognized the conundrum of a merits analysis for plaintiffs raising questions of first impression before the sequential test was ever articulated. *See Ohio Oil Co.*, 279 U.S. at 814; *see also Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 194-95 (4th Cir. 1977);

Fennell v. Butler, 570 F.2d 263, 264 (8th Cir. 1978). Courts acknowledged the need for "flexible interplay" among all the factors considered when deciding to grant or deny a preliminary injunction. *See Blackwelder*, 550 F.2d at 196. After *Winter*, the need for a flexible standard did not disappear. The Second and Ninth Circuits have recognized that no language in *Winter* forecloses courts from exercising their discretion to allow for a flexible approach in narrow circumstances. *See All. for the Wild Rockies*, 632 F.3d at 1131; *Citigroup*, 598 F.3d at 32. Justice Ginsburg's dissent in *Winter* recognized, uncontroverted by the majority, that nothing in the majority opinion foreclosed a flexible approach. *Winter*, 555 U.S. at 52 (Ginsburg, J. dissenting). To permit plaintiffs raising questions of first impression to suffer irreparable harm based on a mechanical and rigid application of the sequential test would be repugnant to equity. *See Citigroup*, 598 F.3d at 36. If preliminary injunctive relief is to maintain an equitable nature and fulfill its purpose, the serious question standard must survive.

B. Supreme Court precedent that focuses on a merit analysis concerns issues in which consideration of the merits was possible at the preliminary stage because there was near certainty as to who would prevail.

Winter, *Munaf v. Geren*, and *Nken v. Holder* applied a merit analysis because consideration on the merits was possible due to the weight of precedent against plaintiffs. *See Winter*, 555 U.S. at 26; *Munaf*, 553 U.S. at 689; *Nken*, 556 U.S. at 434. The Court in *Winter* rejected the Ninth Circuit's test that allowed a preliminary injunction to be granted based on only the likelihood of success on the merits and the possibility of irreparable harm. *Winter*, 555 U.S. at 19. There, the plaintiffs moved to enjoin the

Navy from conducting sonar training exercises off the coast of southern California. *Id.* at 14. The plaintiffs argued that the training exercises caused behavioral disruptions in marine animals and interfered with the ability to engage in recreational marine hobbies and scientific research on marine mammals. *Id.* at 15, 25-26. In granting the injunction, the district court held that the harm to marine animals outweighed any possible harm to the Navy. *Id.* at 17. The Ninth Circuit upheld the injunction. *Id.*

The plaintiffs in *Winter* were highly unlikely to prevail because the case implicated national defense. *Id.* at 26. This Court held that the lower courts improperly weighed the consideration of irreparable harm and the effect of the injunction on the public interest. *Id.* at 22. The Navy had been conducting these sonar training exercises for 40 years without a single documented case of injury to marine animals. *Id.* at 21. This Court held that any harm to the plaintiffs was "plainly outweighed by the Navy's need to conduct realistic training exercises." *Id.* at 33. The discussion of irreparable harm in this context also directly speaks to the plaintiffs' likelihood of success on the merits. *See United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). When dealing with questions that directly impact national defense and international relations, this Court will give significant deference to the federal government. *See id.* Not only were the plaintiffs in *Winter* highly unlikely to ultimately succeed on the merits due to the concern for national defense, but this concern also exemplified the fact that the injunction was not in the public interest. *Winter*, 555 U.S. at 26. While scientific and recreational interest in marine animals is a serious

concern, it does not outweigh the public's interest in having a Navy equipped for times of war, especially considering that *Winter* was decided during the wars in Afghanistan and Iraq. *See Id.* at 32.

The same issue of balancing preliminary injunctive relief with questions that affect international relations and national defense arose in *Munaf*. *Munaf*, 553 U.S. at 689. In *Munaf*, two American citizens sought to enjoin the international coalition force operating in Iraq from transferring them to Iraqi custody. *Id.* at 680. One petitioner, Shawqi Omar, was suspected of providing aid to the former Iraqi leader of al-Qaeda. *Id.* at 681. The other petitioner, Mohammed Munaf, was suspected of orchestrating the kidnapping of journalists. *Id.* at 683. The central question in *Munaf* was whether American courts had jurisdiction to enjoin the transfer of individuals detained in another sovereign's territory. *Id.* at 689. This Court vacated the injunctions granted by the lower courts, citing concerns for the effects of such injunctions on national defense and international relations:

> "Here there is the further consideration that those issues arise in the context of ongoing military operations conducted by American forces overseas. We therefore approach these questions cognizant that courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."

Id. at 689 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)) (cleaned up).

While this Court in *Munaf* did reject the use of the serious question standard by the lower courts, it did so because of the case's context. *Id.* at 692. This Court favored a merit analysis in *Munaf*, stating "[a]djudication on the merits is most appropriate if the injunction rests on a question of law *and* it is plain that the plaintiff

cannot prevail." *Id.* at 691 (emphasis added). This Court's merit analysis was "the wisest course," "[g]iven that the present cases involve[d] habeas petitions that implicate sensitive foreign policy issues in the context of ongoing military operations." *Id.* at 692. This Court in *Munaf* did not overturn the serious question standard, rather it held that the serious question standard did not apply there because it was possible to assess the strength of the plaintiffs' claim at the preliminary stage. *Id.* at 690.

In *Nken*, this Court imposed a test nearly identical to *Winter's* for stays of removal. *Nken*, 556 U.S. at 434. Jean Marc Nken was a Cameroon citizen who entered the United States on a transit visa. *Id.* at 422. He later applied for asylum on the grounds that the Cameroonian Government persecuted him for participation in political protests. *Id.* After Nken was denied asylum, there was disagreement over which standard to apply when considering the stay of an illegal immigrant's removal. *Id.* at 424. The imposition of a merits-based approach in *Nken* is consistent with this Court's jurisprudence on questions of naturalization. *See Graham v. Richardson*, 403 U.S. 365, 377 (1971). This Court defers to the federal government on issues of immigration policy because the treatment of foreign citizens can directly impact international relations. *See id.* Furthermore, in *Nken* this Court noted prompt execution of removal orders is in the public interest because delays in removal could potentially be dangerous. *Nken*, 556 U.S. at 436. Therefore, the plaintiff in *Nken*, such as the plaintiffs in *Winter* and *Munaf*, raised issues on which the government would almost certainly prevail at final adjudication; thus, it was possible to assess the merits of the plaintiffs' claims at a preliminary stage. *See Munaf*, 553 U.S. at 692.

This is not to imply that a merits analysis is only appropriate when dealing with issues of national defense, international relations, or naturalization. *See Mazurek*, 520 U.S. at 975. However, in situations when the balance of equities tips decidedly in favor of the plaintiff and it would be impossible or arbitrary for a court to determine the mathematical probability of success without full adjudication on the merits, the serious question standard appropriately fills the place of a merit analysis. *See Dataphase Systems, Inc.*, 640 F.2d at 113. Furthermore, the concern for the impact of preliminary relief on the public interest in *Winter*, *Munaf*, and *Nken* demonstrates that a merit analysis is not the penultimate consideration and the appropriate standard requires a balancing of the other factors of the sequential test. *See Winter*, 555 U.S. at 26; *Munaf*, 553 U.S. at 689; *Nken*, 556 U.S. at 436.

C. The need for the serious question standard is best exhibited here, because this is a question of first impression and, absent the preliminary injunction, Jess Mariano will immediately resume unwanted female puberty.

The SAME Act disregards established medical science and flagrantly endangers the lives and wellbeing of transgender children. Harm is considered irreparable "only if it cannot be undone through monetary remedies." *Eknes-Tucker v. Marshall*, No. 2:22-CV-184-LCB, 2022 WL 1521889, at *12 (M.D. Ala. May 13, 2022) (citing *Ne. Florida Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990)). Irreparable harm must be "actual and imminent, not remote or speculative." *Id.* "The risk of suffering medical harm constitutes irreparable harm." *Id.*; *see e.g. Bowen v. City of New York*, 476 U.S. 467, 483 (1986). State

courts have upheld preliminary injunctions concerning similar issues, "without commenting on the merits of any party's claims." *In re Abbott*, 645 S.W.3d 276, 283 (Tex. 2022). The United States District Court for the Middle District of Alabama recently considered legislation that was nearly identical to the Act at issue here. *Id.* at *13. There, the "*severe* physical and/or psychological harm" to transgender minors deprived of medical care outweighed any harm the preliminary injunction imposed upon the State. *Id.* (emphasis added). Furthermore, the Eighth Circuit recently recognized that bans on healthcare for transgender minors result in irreparable harm because the deprivation of medical care causes them to undergo irreversible puberty that is incongruent to their gender identity. *Brandt v. Rutledge*, No. 21-2875, 2022 WL 3652745, at *3 (8th Cir. Aug. 25, 2022).

Transgender minors face severe mental and physical consequences from being deprived of gender-affirming medical care and from having their current treatment abruptly terminated. *See* J. Lauren Turner, *From the Inside Out: Calling On States To Provide Medically Necessary Care to Transgender Youth In Foster Care*, 47 Fam. Ct. Rev. 552, 555 (2009). Empirical studies demonstrate that forty-five percent of transgender minors have attempted suicide. Morgan Shell, *Transgender Student-Athletes in Texas School Districts: Why Can't the UIL Give All Students Equal Playing Time?*, 48 Tex. Tech L. Rev. 1043, 1060 n.140 (2016). Twenty-five percent to thirty percent of transgender children are successful in their suicide attempts. *Id.* Transgender minors who receive puberty blocking medications have lower odds of experiencing lifetime suicidal ideation than their transgender peers who were unable

to obtain this treatment. Turban, et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation,* 145 Pediatrics (Feb. 2020), at 1, 1, https://doi.org/10.1542/peds.2019-1725. The purpose of hormone blockers is to delay the onset of puberty to prevent significant distress from the development of secondary sex characteristics that are not congruent with a child's gender identity. *Id.* at 2. Pubertal suppression from hormone blocking medications is fully reversible. *Id.*

Transgender minors whose hormone treatments are interrupted have suffered severe depression and suicidal ideation, along with physical pain from nausea, vomiting, cramps, hair loss, and breast tenderness. *Id.* Transgender minors who are unable to obtain hormone treatment due to barriers in the medical and legal systems commonly source hormones from outside the medical community. Khan et al., *Challenges Facing LGBTQ Youth*, 18 Geo. J. Gender & L. 475, 523-24 (2017). This creates a risk of these children taking hormones of poor quality, taking incorrect dosages, and using or reusing infected needles. *Id.* "[S]everal studies have shown statistically significant positive effects of hormone treatment on the mental health, suicidality, and quality of life of adolescents with gender dysphoria." *Brandt*, 2022 WL 3652745, at *3. None of these studies demonstrate any negative effects. *Id.* Failure to intervene with legislative bans on gender affirming medical care for transgender minors "is not a neutral option." *Chapter One Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 Harv. L. Rev. 2163, 2185 (2021). Failure to intervene here is a choice to impose significant physical and mental harm on transgender minors. *Id.*

The serious question standard is crucial for cases such as this—to provide a remedy when a child's life is at stake and the plaintiff is raising a question of first impression. *See* Rachel A. Weisshaar, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 Vand. L. Rev. 1011, 1048 (2012). The SAME Act does not protect transgender children from allegedly experimental treatments, though it will put them at a substantially higher risk for suicide by requiring they resume puberty that is averse to their gender identity. *See Eknes-Tucker,* 2022 WL 1521889, at *14. Jess's risk of suicide is not speculative; he has already attempted suicide once before when he was not receiving gender affirming medical care. R. at 4; *see id.* at *12. The risk of suicide for Jess is imminent because he has been adamant from a young age that he does not desire to live if he cannot live in accordance with his gender identity. *See* R. at 5. A preliminary injunction is imperative here because monetary remedies cannot undue a child's death. *See Eknes-Tucker,* 2022 WL 1521889, at *12. Furthermore, a sufficient finding of irreparable harm can be supported solely on the irreversible physical harm that Jess will suffer when deprived of medical care. *See id.*

Enjoining the SAME Act is within the public interest as the preliminary injunction protects other transgender minors like Jess. *See Prince v. Massachusetts*, 321 U.S. 158, 168-69 (1944) (noting "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens"). While the State of Lincoln argues that it will face irreparable injury any time statutes enacted by representatives of its people are enjoined, this alleged harm does

not remotely equate to the harm of a child taking their life. R. at 14; see *Eknes-Tucker,* 2022 WL 1521889, at *14. This is a life-or-death issue that warrants "the extraordinary remedy" of preliminary injunction. *Winter*, 555 U.S. at 22. Therefore, the question of first impression raised by this case and the significant and irreparable harm that Jess will face absent the injunction is a prime example of the need to affirm the continuing validity of the serious question standard.

For the above stated reasons, Respondents respectfully request that this Court affirm the serious question standard as a viable substitute to a merits analysis when the balance of equities tips decidedly in the moving party's favor and the plaintiff raises questions of first impression.

II. The Fifteenth Circuit correctly found that the Marianos are likely to succeed on their constitutional claims—the SAME Act violates their Substantive Due Process and Equal Protection rights.

A. The SAME Act violates the Substantive Due Process Clause of the Fourteenth Amendment because it is not narrowly tailored to serve a compelling government interest.

The Marianos are likely to succeed on their Substantive Due Process claim because the act is not narrowly tailored to further a compelling government interest. The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Primarily, it protects individuals from governmental violations of "certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). When a fundamental right is infringed upon, strict scrutiny applies—the government must narrowly tailor the legislation to a compelling government interest. *See Reno v. Flores*, 507 U.S. 292, 302 (1993).

1. The Act deprives the Marianos of their fundamental right to care for their child because the gender-affirming treatments are not experimental—strict scrutiny applies.

Because the SAME Act deprives the Marianos from making medical decisions for their child, the Act is subject to strict scrutiny. A parent's right "to make decisions concerning the care, custody, and control of their children" is one of "the oldest of the fundamental liberty interests" recognized by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000). Specifically, 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). Indeed, here, Lincoln concedes that this fundamental right exists. R. at 14.

First, mere risk associated with medical treatment does not transfer a parent's autonomy to the state. See *Parham*, 442 U.S. at 603. For example, in *Parham v. J.R.*, this Court held that parents retained authority to admit their child to a mental hospital despite inherent risk of error. *See Parham*, 442 U.S. at 606. There, although such a decision carried the risk of a mistaken admission, this Court refused to strip the parents of their fundamental right to make choices for their child, despite the child's protest. *Id.* Instead, it required a physician's examination and judgment, noting that the district court found no evidence of bad faith on behalf of the parents. *Id.*

Next, contrary to Lincoln's assertion, reviewing courts are not bound by legislative findings. *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007). For example, in *Gonzales v. Carhart*, this Court noted that, when constitutional rights are at stake, there

is a constitutional duty to review factual findings. *Id.* There, an attorney general urged this Court to uphold a statute merely on the basis of congressional findings. *Id.* However, this Court rejected that assertion, noting that the act contained flawed representations, as noted by the opposing party and the district court. *Id.* Accordingly, this Court found uncritical deference to legislative findings inappropriate. *Id.* at 166.

Moreover, in this exact context, at least one court has found gender-affirming care is not experimental. *See Eknes-Tucker,* 2022 WL 1521889, at *8. For example, in *Eknes-Tucker v. Marshall*, the district court held that an Alabama law banning gender-affirming care likely violates Due Process. *Id.* at 9. There, Alabama attempted to categorically ban gender-affirming treatments, arguing that such treatments are experimental. *Id.* at 8. However, the court noted that mere risks associated with the treatment did not render it experimental; rather, it emphasized that at least twenty-two medical associations in the United States approve of gender-affirming treatments as evidence-based treatments for gender dysphoria in minors. *Id.* In fact, it emphasized that no country or state in the world categorically bans such treatments. *Id.*

Here, the risk that a child might regret receiving gender-affirming care does not allow the State to usurp parental autonomy. The State cites concerns about peer pressure and potential regret, but it ignores that Jess began taking puberty blockers at the recommendation of his psychiatrist and physician. R. at 5. Like in *Parham*, where parental autonomy reigned because a physician approved of the decision, the

Marianos acted in accord with not only a physician, but a psychiatrist too. *Id.* Moreover, unlike *Parham*, where the children did not approve of the decision, Jess and his parents both desire the same result—safe and necessary gender-affirming care. *See* R. 5-8. Accordingly, this Court should find that any risk associated with the treatments prohibited by the SAME Act is insufficient to override the Marianos fundamental right to make decisions for their child.

Further, rejecting the Act's findings that gender-affirming care is experimental is not an abuse of discretion. At the district court hearing, the Marianos presented extensive medical and scientific evidence supporting gender-affirming care and refuting Lincoln's findings. R. at 5-7. Additionally, Jess's psychiatrist, Dr. Dugray, testified that Jess has had positive experiences since beginning the treatment. R. at 5. Similar to *Gonzales*, where this Court observed that findings were incorrect, the lower court did not abuse its discretion in its determination that Lincoln's findings did not warrant deference, given the extensive evidence presented to the contrary. Like *Gonzales*, here, constitutional rights are at issue; thus, critical review is required—and the district court appropriately found that the Marianos' evidence outweighed the statutory findings. Accordingly, this Court should affirm the district court's refusal to grant deference to Lincoln's findings—the banned treatments are not experimental.

Indeed, the district court weighed substantial evidence indicating that gender-affirming care is not experimental. R. at 5-7. The Endocrine Society and World Pro-

fessional Association for Transgender Health (WPATH) approve of and suggest puberty blocking treatments after puberty begins. 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, 3871 (2017), https://doi.org/10.1210/jc.2017-01658; World Pro. Ass'n for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 18 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf. Concerning the risk of those treatments, puberty blockers are reversible. *See* WPATH Guidelines at 19. The record reflects evidence that all leading medical organizations in the United States oppose denying gender-affirming care to transgender children. *See* Am. Acad. of Pediatrics, *Frontline Physicians Oppose Legislation That Interferes in or Penalizes Patient Care* (April 2, 2021), https://www.aap.org/en/news-room/news-releases/aap/2021/frontline-physicians-oppose-legislation-that-interferes-in-or-penalizes-patient-care/?_ga=2.89126099.973451188.1655923488-1054175941.1655923488 (noting that nearly 600,000 physicians oppose banning evidence-based treatment for transgender children).

Accordingly, here, like *Eknes-Tucker*, extensive evidence exists supporting gender-affirming treatments. Just as *Eknes-Tucker* noted twenty-two states that approve of the treatments, the Marianos show that nearly 600,000 physicians approve of the treatments. Both cases involve categorical bans based upon findings that are out of touch with the evidence produced in the record. Similar to *Eknes-Tucker* and

Parham, risk is not sufficient to render a treatment experimental and override a fundamental right.

2. The Act fails strict scrutiny because it is not narrowly tailored—it fails to allow for exceptions.

Because Lincoln banned gender-affirming medications and surgeries instead of utilizing a less restrictive means—implementing a categorical ban with no exceptions—the Act fails strict scrutiny. A narrowly tailored statute must utilize the "least restrictive means" to further its compelling purpose. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). If a less burdensome alternative exists, the government is required to employ it. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000).

First, a categorical ban preventing standard medical treatment is likely unconstitutional because it does not allow for exceptions. *Eknes-Tucker,* 2022 WL 1521889, at *8. For example, in *Eknes-Tucker*, the court found against a law that categorically prohibited children from receiving gender-affirming care. *Id.* at 9. There, the court emphasized testimony that no other state imposed such a categorical ban. *Id.* at 8. Because other countries that implemented such bans allowed exceptions on a case-by-case basis, the court found that less restrictive means existed, noting that Alabama itself offered less restrictive means to achieve its own interest. *Id.* at 9.

Here, because Lincoln's ban does not leave room for exceptions, it is likely unconstitutional. The SAME Act allows for zero exceptions—even for research purposes. Just like *Eknes-Tucker*, where Alabama did not employ the least restrictive

means when categorically banning the treatments without any room for exceptions, Lincoln's ban is not narrowly tailored. Indeed, the very evidence that Lincoln introduced supporting its ban allowed exceptions. *See Sweden's Karolinska Ends All Use of Puberty Blockers and Cross-Sex Hormones for Minors Outside of Clinical Studies,* Society for Evidence Based Gender Medicine *(*May 5, 2021*), https://segm.org/Sweden_ends_use_of_Dutch_protocol* (allowing exceptions for research purposes); *Finland's Council for Choices in Healthcare Policy Statement, Palveluvalikoima, Recommendation of the Council for Choices in Health Care in Finland (PALKO / COHERE Finland)*, unofficial English translation by Soc'y for Evidence Based Med. available at https://segm.org/sites/default/files/Finnish_Guidelines_2020_Minors_Unofficial%20Translation.pdf (allowing treatments on case-by-case basis). Precisely like *Eknes-Tucker*, where Alabama itself produced less restrictive means, Lincoln's evidence is proof that it did not legislate in a narrow fashion.

Further, both Lincoln and the dissent expressed concerns regarding informed consent, but Lincoln refused to take any steps addressing or reforming the alleged issues. Rather than categorically banning the treatments, Lincoln could have strengthened informed consent requirements. *See* Timothy Cavanaugh, et al, *Informed Consent in the Medical Care of Transgender and Gender-Nonconforming Patients*, 18 AMA J. Ethics 1147, 1149-52 (2016), https://journalofethics.ama-assn.org/sites/journalofethics.ama-assn.org/files/2018-07/sect1-1611.pdf (noting issues with informed consent and proposing a better model). Instead, Lincoln took a radical step—attempting to categorically ban gender-affirming treatments.

In sum, the SAME Act invokes a fundamental right—as Lincoln concedes. R. at 14. Further, Lincoln's attempt to deny that right on the basis of experimentality falls short—the district court is required to scrutinize the state's legislative findings, and it properly concluded that the treatments are appropriate. Accordingly, this Court should refrain from being the first to hold that a categorical ban—without exceptions—is likely constitutional.

B. The SAME Act violates the Equal Protection Clause of the Fourteenth Amendment because it is not substantially related to a compelling government interest.

The Marianos are likely to succeed on their Equal Protection claim because the Act is not substantially related to an important government interest. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Primarily, its purpose "is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Wakefield Tp.*, 247 U.S. 350, 352 (1918). If gender-based classifications are at issue, heightened scrutiny must apply. *United States v. Virginia*, 518 U.S. 515, 555 (1996).

1. The Act discriminates on the basis of sex because a child's biological sex is the determinative factor—heightened scrutiny applies.

First, this Court has signaled that discrimination on the basis of transgender status is discrimination on the basis of sex. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020). For example, in *Bostock v. Clayton County*, this Court found that a law

that discriminates solely on sex inherently discriminates against transgender people. *See id.* There, this Court analyzed Title VII of the Civil Rights Act; specifically, a transgender individual claimed that they were fired solely for their status as a transgender individual. *Id.* at 1737. This Court emphasized that firing an individual for a statutorily protected trait "surely" counts as discrimination. *Id.* at 1753.

Moreover, several circuit courts already agree that discrimination solely on transgender status implicates the Equal Protection Clause. *Brandt*, 2022 WL 3652745, at *2; *see Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011); *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 609 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021). For example, in *Brandt* v. *Rutledge*, the Eighth Circuit held that preventing a child from receiving gender-affirming care is likely unconstitutional. *Brandt,* 2022 WL 3652745, at *4. There, the Eighth Circuit examined an act that prohibits children from receiving treatment intended to alter their biological sex. *Id.* at 1. Notably, the act prevented some children from receiving treatment that was available to other children. *Id.* at 3. Because the child's sex was determinative, the court found it discriminated on the basis of sex. *Id.* at 2. *See also Brumby*, 663 F.3d at 1317 (holding that discrimination against a transgender person on the basis of gender-nonconformity is sex-based discrimination); *Grimm* 972 F.3d at 609 (noting a policy can amount to sex-based discrimination even if it applies to both male and female students).

Here, because a child's biological sex is determinative, the SAME Act triggers heightened scrutiny. The Act only prohibits treatments that intend to alter a child's

biological sex. *See* 20 Linc. Stat. § 1203. Like *Brandt*, the Act blatantly prohibits gender-affirming care solely on the basis of sex—but for the child's biological sex, the treatments are permitted. The plain language of the text discriminates on the basis of sex.

While Lincoln asserts that *Bostock*'s holding is unique and exclusive to Title VII of the Civil Rights Act, the persuasive opinions of the circuit courts provide guidance for this Court—discrimination on the basis of transgender status is a sex-based classification. Further, Lincoln's assertion that the Act merely creates two categories—minors who seek care and all other minors—misses the mark; one of the categories is composed entirely of transgender children. *See Eknes-Tucker*, 2022 WL 1521889, at *10 (noting the special burden placed on transgender minors lumped into such a class).

2. The banned procedures are not experimental, rendering the restrictions unrelated to the purported interest—the Act fails heightened scrutiny.

Because gender-affirming care is standard, not experimental, the Act does not further any government interest. To survive heightened scrutiny, the regulation must be substantially related to an important government interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *see Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Specifically, this Court requires an "exceedingly persuasive" justification for the legislation. *Virginia*, 518 U.S. at 555. An exceedingly persuasive justification must be genuine rather than hypothesized. *Id.* at 533.

First, courts are inclined to defer to a district court's findings regarding the experimentality of medical procedures. *See Brandt*, 2022 WL 3652745, at *3 (citing *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 803 (8th Cir. 2003)). For example, in *Brandt*, the Eighth Circuit upheld a district court's finding that gender-affirming care is not experimental. *See Brandt*, 2022 WL 3652745, at *4. There, Arkansas argued that it had an important interest in protecting children from experimental medical treatment. *Brandt*, 2022 WL 3652745, at *3. However, the Eighth Circuit emphasized that the district court found the treatments standard, rather than experimental. *Id.* Despite Arkansas' complaint that the district court ignored its evidence, the Eighth Circuit found no clear error in the court's weighing of the evidence and choosing a particular side. *Id.* Specifically, it noted that even foreign countries that believe the treatments might be experimental do not categorically ban the procedures. *Id.* at 4. Accordingly, the court found no clear error. *Id.*

Here, as noted above, the district court appropriately found that the treatments are not experimental. *See* discussion *supra* Section II.A.1. The record is replete with evidence indicating that the treatments are standard, rather than experimental. R. at 5-7. Like *Brandt*, where the reviewing court agreed with the evidence indicating that the treatments are standard, the district court here is entitled to that conclusion. *See Cumulus Media, Inc.*, 304 F.3d at 1171 (noting that the trial court is best positioned to evaluate evidence). The district court heard from both experts, weighed evidence from both sides, and arrived at a reasonable conclusion—just like

the Eighth Circuit in *Brandt*. Given that the treatments are not experimental, Lincoln's supposed interest in protecting children falls short.

In sum, this Court should find no clear error—the treatments are not experimental, and the Act discriminates against children solely because of their biological sex.

CONCLUSION

Jess Mariano will face irreparable harm if stripped of access to gender-affirming medical care. As Jess raises a question of first impression, courts are unable to rationally assess the merits of his claim prior to a full hearing on the merits. Because the serious question standard prevents irreparable harm and preserves the equitable nature of preliminary injunctions, the Fifteenth Circuit properly affirmed the preliminary injunction enjoining the SAME Act.

To find for Lincoln cripples the Marianos' fundamental right to care for their child and blatantly discriminates on the basis of transgender status. Because the Marianos are likely to succeed on their constitutional claims, the Fifteenth Circuit properly affirmed the preliminary injunction enjoining the SAME Act.

For these reasons, this Court should affirm the Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

/s/ 3103

Attorneys for Respondents

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/ 3103

Attorneys for Respondents

APPENDIX A

Statutory Provision

Stop Adolescent Medical Experimentations

20-1201 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.

20-1202 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.

20-1203 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.

20-1204 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.

20-1205 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.

20-1206 Effective Date

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