Docket No. 22-8976

In The

Supreme Court of the United States

November 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 3104
Attorneys for Petitioner

QUESTIONS PRESENTED

I. The "serious question" standard allows courts to grant injunctive relief based on inconsistent, subjective interpretations of a party's claim. Should this standard still be used after this Court established a uniform approach for reviewing preliminary injunctions in *Winter v. Natural Resources Defense Council, Inc.*?

II. The Fourteenth Amendment guarantees citizens' due process of law and equal protection under the United States Constitution. If a law does not burden a fundamental right nor target a suspect class, a state's legislative classification will be upheld. Was the preliminary injunction erroneously granted after the Fifteenth Circuit held that the SAME Act violated Respondents' Substantive Due Process and Equal Protection rights?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages(s)

U.S. SUPREME COURT CASES

TABLE OF AUTHORITIES (CONT.)

TABLE OF AUTHORITIES (CONT.)

TABLE OF AUTHORITIES (CONT.)

TABLE OF AUTHORITIES (CONT.)

COURT OF APPEALS CASES

TABLE OF AUTHORITIES (CONT.)

TABLE OF AUTHORITIES (CONT.)

DISTRICT COURT CASES

TABLE OF AUTHORITIES (CONT.)

United States Constitution

Statutory Provisions

Rule Provision

Other Authorities

TABLE OF AUTHORITIES (CONT.)

OPINIONS BELOW

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 PROVISIONS

The following provisions of the Stop Adolescent Medical Experimentations Act are relevant to this case: 20 Linc. Stat. §§ 1201-1206.

The following provision of the California Vehicle Code is relevant to this case: CAL. VEH. Code § 27360.

The following provision of the Illinois Child Passenger Protection Act is relevant to this case: 625 ILL. COMP. STAT. ANN. 25/4.

The following provision of the U.S. Code is relevant to this case: 23 U.S.C. § 158.

These provisions are reproduced in Appendix A.

RULE PROVISION

The following provision of Federal Practice and Procedure is relevant to this case: CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. 2022). This provision is reproduced in Appendix B.

CONSTITUTIONAL PROVISIONS

The following provisions of the United States Constitution are relevant to this case: U.S. Const. art. I, § 2, cl. 2; *id.* art I. § 3, cl. 3; *id.* art. II, § 1, cl. 5; *id.* amend. XIV, § 1. These provisions are reproduced in Appendix C.

STATEMENT OF THE CASE

FACTUAL BACKGROUND

The SAME Act. Due to the State of Lincoln's ("Lincoln") compelling interest to ensure the health and safety of its citizens, Lincoln plans for the provisions of their Stop Adolescent Medical Experimentations ("SAME") Act, 20 Linc. Stat. §§ 1201-06, to take effect on January 1, 2022. R. at 1-2. The SAME Act prohibits healthcare providers from engaging in certain gender transition treatments performed upon any individual under the age of eighteen. R. at 3. The purpose behind the SAME Act is to (1) protect children from risking lifelong negative medical consequences to both their mental and physical health; (2) discourage harmful, irreversible medical interventions; and (3) protect against social influences surrounding gender transition treatments. R. at 3.

Reasoning Behind the SAME Act. In support of the SAME Act, Lincoln finds that gender transition drugs and surgeries can lead to extreme health risks for children. R. at 3. There are contradictory medical opinions regarding the support for the banned treatments. R. at 7. Emerging scientific evidence shows that there are risks associated with these treatments, including "irreversible infertility, cancer, liver disfunction [sic], coronary artery disease, and bone density." R. at 3. Parents and adolescents are often not fully informed about the life-altering complications these treatments can have on a child. R. at 3. The small percentage of adolescents that are affected by gender dysphoria may not be able to give informed consent due to a lack of comprehension and appreciation for these risks.

R. at 3. Furthermore, Lincoln finds that in cases where adolescents experience gender dysphoria, many of them are naturally resolved by the time the adolescent reaches adulthood. R. at 2. Of the majority whose gender dysphoria resolved itself by adulthood, the individuals who were prescribed gender transition drugs as children expressed deep regret and "identified 'social influence' as playing a significant role in their decision to identify as a different sex." R. at 3.

To further Lincoln's interest in protecting children from lifelong medical consequences, the SAME Act prohibits specific medical treatments like the (1) prescription or administration of puberty blocking hormones; (2) prescription or administration of supraphysiologic doses of testosterone or estrogen; and (3) performance of surgeries that artificially construct genitalia tissue or remove any healthy body part or tissue. R. at 4. As an alternative, Lincoln emphasizes more conventional and widely accepted treatment methods for gender dysphoria. R. at 3. These methods, such as conventional psychology, do not raise informed consent and experimentation concerns because they safely and effectively defer decisions on gender transition treatments until adulthood. R. at 3.

Respondents Interest in The SAME Act. Jess Mariano, a transgender minor, lives in the state of Lincoln with his parents, Elizabeth and Thomas Mariano. R. at 2. From a young age, Jess perceived himself as male even though he was born a female. R. at 4. Around the age of eight, Jess was diagnosed with gender dysphoria when his psychiatrist, Dr. Dugray, found "evidence of distress manifested by [Jess's] strong desire to be treated as a boy . . . ." R. at 4. At the age

of ten, Dr. Dugray and Jess's pediatrician prescribed Jess with puberty blockers because he began to show signs of puberty. R. at 5. Now, Jess and his parents fear that the SAME Act will pause his current, and postpone any future, medical treatments until he reaches adulthood in four years. R. at 5.

PROCEDURAL HISTORY

District of Lincoln. Jess Mariano, Elizabeth Mariano, and Thomas Mariano ("Respondents") filed a lawsuit against April Nardini, in her official capacity as Attorney General of the state of Lincoln ("Petitioner") on November 4, 2021, alleging Lincoln's newly enacted SAME Act would infringe upon their rights to Due Process and Equal Protection of the law. R. at 1. On November 11, 2021, Respondents filed a motion for preliminary injunction alleging they would suffer immediate and irreparable harm unless the court preserves the status quo and allows Respondent Jess Mariano to receive gender-affirming care from his physician. R. at 1, 8. On November 18, 2021, Petitioner filed an opposition to the motion for preliminary injunction and filed a motion to dismiss. R. at 1. On December 16, 2021, the court found: (1) Respondents showed a likelihood of success on the merits of their claim, (2) they would suffer immediate and irreparable harm once the SAME Act goes into effect, (3) the harm greatly outweighs the damage the SAME Act seeks to prevent, and (4) there is no compelling public interest reason for the court to deny injunctive relief at this stage of litigation. R. at 1, 22. Using the "serious question" standard, the court granted Respondents' request for a preliminary injunction, denied Petitioner's motion to dismiss, and enjoined

Petitioner from enforcing the SAME Act during the remainder of litigation. R. at 2, 9.

Fifteenth Circuit. Petitioner appealed the district court's decision, requesting that the court (1) reverse the preliminary injunction, (2) reverse its denial of the motion to dismiss, and (3) remand the case with instructions to dismiss Respondents' claims regarding the Fourteenth Amendment. R at 23. The Fifteenth Circuit affirmed both the district court's decision to grant the preliminary injunction and to deny the motion to dismiss. R. at 27. Judge Gilmore dissented, arguing the district court and Fifteenth Circuit were misguided in granting and affirming the preliminary injunction. R at 28. He pointed out the court's erroneous use of the "serious question" standard and asserted that the error would be reason enough to remand the case. R at 28. Moreover, he stated that Respondents' Due Process claim fails because there is no fundamental right to participate in experimental medicine, and Respondent Jess Mariano's Equal Protection claim fails because transgender status is neither a suspect nor quasi-suspect class to which a heightened level of scrutiny applies. R at 29, 32. Petitioner made an application to this Court for a stay of the district court's preliminary injunction and for a writ of certiorari to review the merits of Respondents' injunction and the denial of the motion to dismiss. R. at 35. On July 18, 2022, this Court granted Petitioner's request for a writ of certiorari and denied the stay of the injunction. *Id.*

SUMMARY OF THE ARGUMENT

This Court should reverse the Fifteenth Circuit's decision for the following two reasons. First, the Fifteenth Circuit erroneously held that the "serious

question" standard is still viable after *Winter v. Natural Resources Defense Council, Inc.* Second, Respondents' Substantive Due Process and Equal Protection claims fail because access to experimental treatment is not a fundamental right, and the SAME Act does not target a suspect class.

First, to standardize the examination of preliminary injunctions, this Court established the four-factor *Winter* standard. The Fifteenth Circuit misapplied *Winter* by merging this standard with the "serious question" standard that was used by courts prior to *Winter*. The "serious question" approach allows courts to balance the strength of each factor on a case-by-case basis. However, the "serious question" standard is no longer viable after *Winter* because this Court established that each of the four factors must be weighed equally and separately.

The *Winter* framework was created as a homogenous standard by this Court to rectify the circuit splits on interpretation of the "serious question" standard. Prior to *Winter*, the flexibility allowed by the "serious question" standard gave individual judges unchecked discretion that transformed and diluted the original intent of the judiciary. Further, the plain language of *Winter* supports this Court's intent to eliminate the "serious question" and sliding scale standards.

The necessity of each of the four *Winter* factors is supported by case law. The "serious question" standard does not require a likelihood of success on the merits or a likelihood of irreparable harm for the issuance of a preliminary injunction. *Winter* is the only standard that guarantees an examination of these factors and a review of the effect the injunction will have on the public. Respondents' claims fail under the

Winter standard, the "serious question" standard, and the sliding scale version of the "serious question" standard.

Second, Respondents' Substantive Due Process claim fails because there is no fundamental right to access experimental medical treatments. This Court construes Substantive Due Process claims narrowly and rejects a broad Due Process right determination. Respondents' general liberty interests cannot be extended to include gender transitioning treatments because it would stretch the boundaries of the Due Process Clause. Courts have held that access to experimental medicine is not a fundamental right. The procedures that the SAME Act limits are modern phenomena and are not deeply rooted in this Nation's history. Because experimental treatments have not been proven safe or effective, access to them is not a protected fundamental right.

Additionally, parental autonomy is not absolute when it involves a countervailing public interest concern. The State has discretion when a minor's health is jeopardized, and this Court holds that the State can intervene to protect the welfare of children. In situations where there is medical uncertainty, courts are obliged to defer to the State because the Constitution entrusts State officials with protecting public health. Respondents' apprehension of the SAME Act cannot overcome the State's interest in ensuring that minors are not subject to situations where there are no safeguards against the risks and magnitude of their decisions.

The SAME Act also does not violate the Equal Protection Clause because it does not target a suspect class and is thus subjected to rational-basis review. The

SAME act distinguishes on only two criteria: age and medical procedure. Neither of these classifications are identified by this Court as being a suspect or quasi-suspect class. Instead, the SAME Act only distinguishes between individuals who are over eighteen and those who are not. Further, the SAME Act does not discriminate based on transgender status. Even if this Court finds that the SAME Act does classify based on transgender status, such a classification would not be treated as a suspect class. None of the four factors used to determine whether a class qualifies as suspect favor creating a new classification based on transgender status. Thus, the SAME Act is subject to rational-basis review.

If this Court applies intermediate scrutiny, the SAME Act still survives because it is substantially related to the State's goal of protecting children and regulating the medical profession. The SAME Act is sufficiently narrow because it only limits experimental gender transition procedures and allows less permanent and more-widely accepted methods. Ultimately, the SAME Act does not classify against any individual or category of persons. Instead, it represents Lincoln's policy against experimental medical treatments.

STANDARD OF REVIEW

In reviewing an appeal from a motion for a preliminary injunction, courts apply an abuse of discretion standard of review. *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 814 (4th Cir. 1991). A motion to dismiss, however, is reviewed *de novo*. *Muto v. CBS Group*, 668 F.3d 53, 56 (2d Cir. 2012). A standard of review for a mixed question depends "on whether answering it entails primarily legal or factual work." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018). Here, it does not matter what level of review is used because "an abuse of discretion standard does not mean a mistake of law is beyond appellate correction." *Koon v. United States*, 518 U.S. 81, 100 (1996). A district court abuses its discretion when it makes an error of law, and "whether a factor is a permissible basis for departure under any circumstance is a question of law . . . ." *Id.* When a party "seeks a preliminary injunction [for] a potential constitutional violation, 'the likelihood of success on the merits often will be the determinative factor.'" *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)).

ARGUMENT

I. THE "SERIOUS QUESTION" STANDARD IS NO LONGER VIABLE AFTER *WINTER v. NATURAL RESOURCES DEFENSE COUNCIL, INC.*

The *Winter* standard states that a plaintiff seeking a preliminary injunction must show (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

When the Court established the *Winter* standard for reviewing preliminary injunctions, it invalidated the previously used "serious question" standard because (1) the *Winter* standard eliminates the subjectivity and leniency of all versions of the "serious question" standard, and (2) legislative history demonstrates all four factors of the *Winter* standard are necessary to demonstrate a need for a preliminary injunction. Even if this Court finds that the "serious question" standard was not invalidated by *Winter*, Respondents' claims still fail under the "serious question" standard.

A. The "Serious Question" Standard and Sliding Scale Version of the "Serious Question" Standard Are Not Viable Because They Allow Inconsistent Judicial Interpretation.

The "serious question" standard is employed using combinations of the four factors present in *Winter*. The sliding scale standard is a version of the "serious question" standard that allows judges to offset weaker showings of one factor with stronger showings of another. *All. of the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Both approaches leave room for individual judges to apply

varying levels of importance to each factor depending on their subjective interpretation of the case. This pitfall was demonstrated in the Ninth Circuit's reading of the "serious question" standard. *Winter*, 555 U.S. at 22. The *Winter* test was subsequently designed to eliminate ambiguity surrounding the evaluation of a motion for preliminary injunction.

1. The "serious question" standard fails because it allows individual judicial interpretation and does not require likelihood of success on the merits.

In 1979, the Second Circuit used the "serious question" standard in *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, to evaluate the requirements for granting preliminary relief. 597 F.2d 814, 819 (2d Cir. 1979). Courts were meant to use this standard when they could not decide with certainty if the moving party was likely to prevail based on the merits of their underlying claim. *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). Using the "serious question" standard, a court can grant preliminary injunction if the moving party establishes "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Christian Louboutin S.A. v. Yves Saint Laurent America Holding, Inc.*, 696 F.3d 206, 215 (2d Cir. 2012) (quoting *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979)).

a. Judicial action requires principled standardization which is not present in the "serious question" approach.

The "serious question" approach allows the trial judge discretion to balance the relative strength of each preliminary injunction factor on a case-by-case basis. Curtis Cranston, *The Department that Cried Wolf: Tenth Circuit Vacates Preliminary Injunction in Absence of Likely Injury in New Mexico Department of Game & Fish v. United States Department of the Interior*, 59 B. C. L. Rev. E-Supplement 23, 36-37 (2018). "'Judicial action must be governed by *standard*, by *rule*', and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004)). Judicial action cannot be governed by standard and rule if judges are free to decide if movants present "serious question[s]" on a case-by-case basis. Instead of allowing standard and rule to guide their decisions, the district court and Fifteenth Circuit adopt an approach specifically for its flexibility. R. at 10, 24.

b. The "serious question" standard fails because it does not require likelihood of success on the merits.

The Second Circuit's version of the "serious question" standard requires proof of future irreparable harm for every preliminary injunction. *Christian Louboutin*, 696 F.3d at 206. Plaintiffs then have the option of showing either (1) a likelihood of success on the merits, or (2) "sufficiently serious questions going to the merits to make fair ground for litigation" plus "a balance of hardships tipping decidedly"

towards the plaintiff. *Id.* Consequently, for any preliminary injunction using the "serious question" standard in the Second Circuit, a likelihood of success on the merits is optional.

Preliminary injunctions are extreme remedies and moving parties must demonstrate the likelihood of success based on the merits of their claim to be granted such a drastic measure. CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. 2022). Under the "serious question" standard, likelihood of success on the merits is dispensable. This is contrary to the extreme nature of preliminary injunctions, and the drastic effects they have on parties.

2. The sliding scale standard fails because it allows for a "lower likelihood" of harm, which mirrors the erroneous possibility standard invalidated by *Winter*.

In her dissent to the *Winter* opinion, Justice Ginsberg explained that the sliding scale standard "evaluate[s] claims for equitable relief . . . [by] sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high." *Winter*, 555 U.S. at 51. The Seventh Circuit explained its version of the "serious question" standard by stating that the more likely a plaintiff will win on the merits, the less heavy the balance of harms needs to weigh in his favor. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). The less likely a plaintiff is to win on the merits, the more the balance of harms needs to weigh in his favor. *Id.* The sliding scale

standard is therefore reduced to a seesaw, with the probability of success on the merits at one end and the low likelihood of harm at the other.

a. The sliding scale standard creates a lower threshold than the Ninth Circuit's erroneous possibility standard.

The Seventh Circuit asserts that the essential question when considering preliminary injunctions is how much net harm the injunction can prevent. *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). However, according to the various definitions of the sliding scale standard, a preliminary injunction may be granted when the movant faces a "lower likelihood" or "less likely balance" of harms. *Winter*, 555 U.S. at 51; *Girl Scouts*, 549 F.3d at 1086.

The standard fails to define how a court should determine the difference between a possibility of harm, which was expressly discounted by *Winter*, and a lower likelihood of harm, which is expressly accounted for in the sliding scale standard. Therefore, as with the "serious question" standard, nothing stops a court from determining that a "lower likelihood" of harm is equivalent to the *possibility* a movant will be harmed at some future date if relief is not granted. A movant must show they are likely to suffer irreparable harm before a decision on the merits can be rendered. *Winter*, 555 U.S. at 22. The Tenth Circuit, which adopts the *Winter* standard, stated, "a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other

requirements for the issuance of an injunction will be considered." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp*, 356 F.3d 1256, 1260 (10th Cir. 2004) (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990)).

3. The flexibility allowed by the "serious question" standard resulted in the possibility of irreparable harm standard which transformed the original judicial intent.

The "serious question" standard for demonstrating potential harm was inevitably lowered when the Ninth Circuit established preliminary injunctions may be granted based on a possibility of irreparable harm. *Faith Ctr. Church Evangelistic Ministries v. Glover*, 462 F.3d 1194, 1198 (9th Cir. 2007). In *Faith Center*, the court stated, "[a] preliminary injunction may issue when the moving party demonstrates either '(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor.'" *Id.* at 1201-02.

Here, the Ninth Circuit reconstructs the Second Circuit's original "serious question" standard by changing the Second Circuit's requirement for showing "irreparable harm" to "the possibility of irreparable harm." *Id.* This permits movants with weaker claims to have a higher likelihood of success. The Ninth Circuit was able to lower the standard because the "serious question" approach leaves room for subjective judicial interpretation on a case-by-case basis.

a. The Ninth Circuit's "serious question" standard fails because likelihood of success on the merits and likelihood of irreparable harm are not required.

The Ninth Circuit does not require any of the four preliminary injunction elements to remain a constant. It gives movants the option of demonstrating one of two possible combinations. The first option is probable success on the merits, and the possibility of irreparable harm. *Faith Ctr.*, 462 F.3d at 1201-02. The second option is serious questions raised regarding the merits of the claim making it fair grounds for litigation and a balance of hardships tipping in the plaintiff's favor. *Id.*

Theoretically, a plaintiff could be granted preliminary injunction without providing any probability of success on the merits or a possibility of irreparable harm. If a plaintiff makes a showing using the first option, he could be granted preliminary relief without showing a serious question regarding the merits or a balance of hardships tipping in his favor. Not only does the Ninth Circuit mirror the Second Circuit's erroneous omission of likelihood of success on the merits, it also does not require a plaintiff to show potential irreparable harm. This Court should adopt the holding in *Winter* because it rectifies these errors and creates uniformity across the circuits.

4. The *Winter* standard should be upheld because it invalidates the leniency of the "serious question" standard.

This Court eventually recognized the erroneous leniency of the "serious question" and the sliding scale standards by establishing a new, intentionally constructed, framework to determine whether a moving party should be granted

preliminary relief. *Winter*, 555 U.S. at 20. In *Winter*, this Court agreed with the petitioner's analysis that the respondents must establish a likelihood of irreparable injury, not just a possibility, to obtain preliminary relief. *Id.* at 21-22.

While at first glance, the *Winter* standard seems to only counteract the "possibility of irreparable injury" threshold established by the Ninth Circuit, this Court goes on to state, "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a *clear* showing that the plaintiff is entitled to such relief." *Id.* at 22. (emphasis added). This Court, in the same opinion, defined what constitutes a *clear* showing by explicitly stating, "[a] plaintiff seeking a preliminary injunction must establish he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. There is no language in the opinion suggesting a sliding scale or balance of factors when determining a clear showing, and this Court should interpret that to mean that the "serious question" standard is invalid.

Words are an integral component of the legal profession. Statutes and judicial opinions are meant to clearly define rules and standards, not obfuscate them. This Court's use of commas and the conjunction "and" to connect the factors of the *Winter* standard indicate their intention that each factor be addressed

separately when evaluating a motion for preliminary injunction. This Court would have used the word "or" to connect the factors if it meant otherwise.

Since *Winter*, many courts, including this Court, have explicitly adopted the *Winter* standard instead of the "serious question" or sliding scale approaches. *See Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 156 (2010) (stating a plaintiff "must satisfy a four-factor test" to be granted preliminary relief); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (classifying the four factors eventually used in *Winter* as "well-established principles of equity"); *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009) (explaining why the Fourth Circuit's previous use of the "balancing-of-hardship" test would be erroneous in light of the recent *Winter* decision); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 105 F. Supp. 3d 108, 112 (D.D.C. 2015) (employing the four-factor *Winter* test and stating it is unclear whether the sliding scale approach survives *Winter*, which establishes that a likelihood of success on the merits must always be shown).

The new framework was designed by this Court to strike a proper balance between the competing interests at stake, a goal which the "serious question" standard was too malleable to achieve. The original "serious question" standard leaves room for individual judges to interpret what constitutes a sufficiently serious question going to the merits. A motion for preliminary injunction is an extreme measure, and a standard that allows subjective review jeopardizes the parties' right to a fair trial.

B. The "Serious Question" Standard Is Invalid Because Courts Have Established the Importance of All Four *Winter* Factors.

"The purpose of a preliminary injunction 'is to preserve the positions of the parties' pending trial." *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). "A preliminary injunction is an 'extraordinary and drastic remedy,'" and is never awarded as a right. C. WRIGHT & A. MILLER, FED. PRAC. & PROC. § 2948.1 (3d ed. 2022); *Yakus v. United States,* 321 U.S. 414, 440 (1944).

As stated above, *Winter* established a four-factor test for the courts to use when evaluating a movant's request for preliminary injunction. This Court evaluated the movant's likelihood of success on the merits, the movant's likelihood of suffering irreparable harm in the absence of preliminary relief, the balance of equities, and whether the injunction is in the public interest. *Winter*, 555 U.S. at 20. Courts have demonstrated that each of these factors are of equal importance because they create a consistent standard of review.

1. Showing a likelihood of success on the merits is necessary because it reduces the possibility of judicial error.

An examination of a plaintiff's likelihood of success on the merits is of paramount importance. Without this examination, plaintiffs who are wrong are just as likely to secure preliminary relief as plaintiffs who are right. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 547 (1978). The closer the examination of the merits, the less likely a court will erroneously grant an injunction. *Id.*

In *Real Truth About Obama*, the Fourth Circuit states that, "[b]ecause a preliminary injunction affords, on a temporary basis, the relief that can be granted permanently after trial, the party seeking the preliminary injunction must demonstrate by 'a clear showing' that, among other things, it is likely to succeed on the merits at trial." 575 F.3d at 345. The Fourth Circuit goes on to examine how its own use of the "serious question" standard was in contention with this Court's holding in *Winter*. *Id.* The contention arises in part, because under the "serious question" standard a likelihood of success on the merits is evaluated only after the court balances the hardships and imposes the relaxed "grave or serious questions presented" standard. *Id.* Identifying whether a movant will likely succeed on the merits is stricter than the "serious question" standard, and therefore more appropriate because preliminary relief is an extraordinary remedy afforded to the movant. *Id.* at 345, 347. The more regimented a standard, the less likely a judge is to decide based on their subconscious biases.

Respondents do not demonstrate a likelihood of success on their Due Process claim because they are seeking the right to access treatment unapproved by the FDA, and there is no fundamental right in this Nation's history to use experimental drugs. R. at 15; *see also Abigail All. for Better Access to Developmental Drugs v. von Eschenbach,* 495 F.3d 695, 711 (D.C. Cir. 2007). There is no likelihood of success on the merits of Respondents' Equal Protection claim because the SAME Act applies to citizens of Lincoln based on age and whether they request specific medication and medical procedures. 20 Linc. Stat. § 1203. According to this Court, neither of these

groups qualify as a suspect or quasi-suspect class. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

From the onset, Respondents fail to meet the criteria for likelihood of success on the merits. On this basis alone, this Court must reverse the grant of preliminary injunction.

2. Preliminary injunctions require the likelihood that a plaintiff will suffer irreparable harm.

A preliminary injunction is a measure that grants remedy to a plaintiff before a full trial on the merits. Therefore, a plaintiff must show a compelling reason for relief before the defendant has a chance to present his case. To be granted preliminary relief under the *Winter* standard, plaintiffs must be likely to otherwise suffer irreparable harm. *Winter*, 555 U.S. at 20. The two important words in the second element of the *Winter* standard are "likely" and "irreparable."

a. A demonstration of likelihood prevents relief from being erroneously granted for potential harm in the remote future.

Likelihood is crucial because "[p]reliminary injunctions are not issued to prevent "the possibility of some remote future injury." *Winter*, 555 U.S. at 22. "Plaintiffs must show a definitive threat of future harm . . . not mere speculation." *City of Austin v. Kinder Morgan Tex. Pipeline, LLC*, 447 F. Supp. 3d 558, 567 (W.D. Tex. 2020). Even *Jackson Dairy*, the case championing the "serious question" standard, acknowledges that recent decisions used the probable harm standard defined as "not remote or speculative but… actual and imminent", therefore

expressly rejecting the possibility of injury as sufficient basis for injunction. 596 F.2d at 72.

b. A demonstration of irreparable harm prevents relief erroneously granted when a movant can recover from an injury.

Irreparableness is equally important. The Eighth Circuit defines irreparable harm as occurring, "when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Grasso Enter., LLC v. Express Scripts, Inc.*, 809 F.3d 1033, 1040 (8th Cir. 2016) (holding there was no need for injunctive relief because the plaintiffs could bring a lawsuit against the defendants under the Employee Retirement Income Security Act if preliminary relief was denied). Even a strong showing of the other factors for preliminary relief cannot eliminate the irreparable harm requirement. *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982).

The Sixth Circuit emphasized there is no need to grant relief now as opposed to later if the plaintiff is not facing imminent and irreparable injury. *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019). In *D.T. v. Sumner*, the plaintiffs moved for preliminary injunction against the State because they wanted the option of removing their son from public school without the threat of another truancy conviction. *Id.* at 326. The Sixth Circuit affirmed the district court's decision to deny the injunction because the threat of future prosecution is not irreparable. *Id.* at 327. The court stated, "[i]f the plaintiff isn't facing imminent

and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit." *Id.*

The facts before this Court do not show Respondent Jess Mariano demonstrated that he is likely to suffer irreparable harm that is certain and immediate. Respondent's doctor testified that an interruption of Jess's treatment could undermine his progress. R. at 5. Use of the word "could" implies possibility, not likelihood. Respondents' demonstration of potential harm is based on medical and scientific articles to which the Court has no obligation to defer. *Miller v. Baker Implement Co.*, 439 F.3d 407, 412 (8th Cir. 2006). Respondents, by design of the SAME Act, will not suffer irreparable harm, because in four years, when Jess turns eighteen, he can give informed consent to resume his experimental, gender-affirming treatment. R. at 2; 20 Linc. Stat. §§ 1201, 1203.

Even if the effects of Respondent Jess Mariano's gender-affirming treatment are undone by the time he turns eighteen, he can still transition as an adult. Research suggests that while masculinizing hormone therapy can be safe and effective, gender affirming hormone therapy is not typically used in children. *Masculinizing hormone therapy*, Mayo Clinic (July 21, 2021), https://www.mayoclinic.org/tests-procedures/masculinizing-hormone-therapy/about/pac-20385099. The risk that Jess's mental health will deteriorate is weighed against the health and safety of the citizens of Lincoln, which the SAME Act is designed to protect. R. at 2, 11.

Respondents' demonstration of potential harm is neither likely nor irreparable. Therefore, they fail on the second factor of the *Winter* standard, which was established to assure relief is only granted when extreme circumstances warrant extreme judicial action.

3. The balance of equities and public interest factors account for the effect of injunctive relief on both parties.

The third and fourth factors of the *Winter* standard merge when the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The United States has a long history of distinguishing itself from English law by paying special attention to how a preliminary injunction would affect the public. Leubsdorf, *supra*, at 539. The increased attention towards the public's interest when deciding on preliminary relief is informed by recent "judicial concern with the impact of legal decisions on society . . . ." *Id.* at 549.

This Court stated that, "in each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987). Examining the balance of equities when deciding on an injunction is crucial because it guarantees an examination of the effect on the defending governing body. This Court must balance Respondents' individual claims against Petitioner's goal to protect the children of Lincoln.

In *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of America v. City of Jacksonville, Fla.*, the Eleventh Circuit examined a motion for preliminary injunction brought against a city ordinance allocating a specific percentage of

funding to minority contractors each year. 896 F.2d 1283, 1284 (11th Cir. 1990). The court stated that when pretrial motions are brought against duly elected city officials, the court runs the risk of overruling the decision of elected representatives, and by extension, the citizens of that democratic body. *Id.* at 1285.

While enjoining a legislative act is occasionally justified by the Constitution, preliminary relief should be granted reluctantly and only upon a clear showing, under strict legal and equitable principals, that the act is unconstitutional. *Id.* Otherwise, "[w]hen a federal court before trial enjoins the enforcement of a municipal ordinance adopted by duly elected city council, the court . . . interferes with the process of democratic government." *Id.* "[P]reliminary injunctions of legislative enactments—because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits—must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts." *Id.*

Respondents are unable to show the denial of a preliminary injunction would infringe upon their Constitutional rights[1]. A preliminary injunction enjoining the SAME Act would prevent Lincoln, and its citizens who elected the legislative body, from protecting parents and children from the risk and life-long complications that often accompany gender transition drugs and surgeries. R. at 3.

[1] Respondents' Constitutional claims are further discussed in Issue II.

The third and fourth factors of the *Winter* standard account for the effect of injunctive relief on a legislative body effectuating a law. Respondents are unable to show the SAME Act infringes upon their Constitutional rights.

C. Respondents' Claims Fail Under the "Serious Question" Standard and Sliding Scale Standard.

Even if the Court finds the "serious question" standard is applicable to the facts, Respondents still do not meet the criteria for obtaining a preliminary injunction. Respondents' claims would fail because they cannot show irreparable harm and either a likelihood of success on the merits or sufficiently serious questions going to the merits. *Christian Louboutin*, 696 F.3d at 215.

1. Respondents are unable to demonstrate they meet the "serious question" factors.

This court has categorized irreparable harm as a "severe medical setback." *Bowen v. City of N.Y.*, 476 U.S. 467, 483 (1986). Respondent Jess Mariano's alleged future harm does not have the potential to constitute a severe medical setback because his lack of access to treatment is temporary. Other non-drug or surgery related treatments, such as therapy—which Respondent has been attending since the age of eight—will still be available to him during that time. 20 Linc. Stat. § 1203; R. at 4, 12.

The "serious question" standard allows a court to grant injunctive relief using an ambiguous and subjective definition of the likelihood of success. As established by this Court in *Winter*, a possibility of success does not meet the proper standard of likelihood of success when evaluating a preliminary injunction. *Winter*

555 U.S. at 22. Here, Respondents show neither a likelihood nor a possibility of success on their Constitutional claims because their fundamental rights are not infringed upon. Since there is no dispute between the parties over the facts of the case, there is no serious question to be considered by this Court.

2. Respondents' claims fail under the sliding scale version of the "serious question" standard.

If this Court finds the sliding scale version of the "serious question" standard is applicable, Respondents still do not meet the criteria for obtaining a preliminary injunction. Using the Seventh Circuit's sliding scale balancing test, a court should minimize "the cost of being mistaken" when weighing the interests of the private parties and the public interest. *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 902 (7th Cir. 2001). The Seventh Circuit states "the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harm need weigh towards its side . . . ." *Abbot Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992). It follows that, "the less likely it is the plaintiff will succeed, the more the balance need weigh towards its side." *Id.* Despite the lack of clarity surrounding this interpretation of the standard, Respondents are still unable to demonstrate preliminary relief is appropriate.

As demonstrated below, there is no likelihood of success on the merits of Respondents' claims. Further, the potential harm does not weigh in favor of Respondents. They face a pause in treatment after tapering-off medication at a safe rate, whereas Petitioner faces the upheaval of a democratically elected statute that does not interfere with a Constitutional right. R at 12, 28.

While the *Winter* standard invalidates the "serious question" standard and is the correct test to use when evaluating preliminary injunctions, Respondents' claims fail under *Winter*, the "serious question" standard, and the "sliding scale" approach.

II. THE FIFTEENTH CIRCUIT ERRONEOUSLY HELD THAT THE SAME ACT VIOLATED THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY PROHIBITING CHILDREN FROM RECEIVING GENDER TRANSITION TREATMENT.

The Fourteenth Amendment of the United States Constitution provides that no state shall "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." U.S. Const. amend. XIV, § 1. While the Fourteenth Amendment was passed to establish civil and legal rights for Black Americans, this Court has interpreted the Due Process Clause and the Equal Protection Clause to guarantee a wide array of fundamental rights and protect individuals from discrimination. *See Cantwell v. State of Conn.*, 310 U.S. 296, 296 (1940) (right to religious freedom); *Chaplinsky v. State of N.H.*, 315 U.S. 568, 568 (1942) (right to free speech); *Skinner v. State of Okla.*, 316 U.S. 535, 535 (1942) (right to procreate); *Reynolds v. Sims*, 377 U.S. 533, 533 (1964) (right to vote); *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965) (right to marital privacy); *Loving v. Virginia*, 388 U.S. 1, 1 (1967) (right to marry); *McDonald v. City of Chi., Ill.*, 561 U.S. 742, 742 (2010) (right to bear arms). The Fifteenth Circuit erred in their decision that Lincoln's SAME Act violates the Due Process Clause and Equal Protection Clause for two reasons: (1) the right to access

experimental medical treatments has not been established as a protected fundamental right; and (2) the SAME Act does not target individuals based upon impermissible criteria, such as race or gender.

A. Respondents' Substantive Due Process Claim Fails Because Access to Experimental Medical Treatments is Not a Protected Fundamental Right.

While this Court has emphasized many rights and liberties are protected by due process, it is important to note that not "all important, intimate, and personal decisions are so protected." *Washington v. Glucksberg,* 521 U.S. 702, 727 (1997). Therefore, this Court has long established a method for evaluating Substantive Due Process claims. *Id.* at 720. First, a court must determine whether the right is "specially protected . . . [and] deeply rooted in this Nation's history and tradition." *Id.* Second, there must be a "careful description of the asserted fundamental liberty interest." *Id.* at 721. This allows courts "to narrowly frame the specific facts . . . so that [courts] do not stray into broader constitutional vistas than are called for by the facts of the case at hand." *Doe v. Moore,* 410 F.3d 1337, 1344 (11th Cir. 2005). Such rights must be "implicit in the concept of ordered liberty." *PBT Real Est. LLC v. Town of Palm Beach*, 988 F.3d 1274, 1283 (11th Cir. 2021). Third, "[c]ommon law rights are not equivalent to fundamental rights, which are created only by the constitution." *Id.* at 1284 (citing *DeKalb Stone, Inc. v. Cnty. of DeKalb*, 106 F.3d 956, 959 n.6 (11th Cir. 1997).

1. Parents do not have a fundamental right to subject their children to experimental medical treatments.

The Fifteenth Circuit erroneously held that Respondents are likely to succeed on their Due Process claim that parents have a constitutional right to determine the proper medical care for their children. R. at 25. However, the court's decision was not supported by case law showing that experimental medical treatments are deeply rooted in this Nation's history or traditions.

a. Expanding the definition of "fundamental rights" in Substantive Due Process claims is the responsibility of the legislature.

This Court is consistently wary of expanding protections under the Due Process Clause. *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.,* 489 U.S. 189, 195, (1989) (holding that history does not support an "expansive reading of the constitutional text."); *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-226 (1985). When evaluating Due Process Claims, "the doctrine of judicial self-restraint requires . . . the utmost care whenever [this Court is] asked to break new ground." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992).

Extending constitutional protection to an asserted right takes the matter "outside the arena of public debate and legislative action." *Glucksberg,* 521 U.S. at 720. In *Gonzales v. Raich*, this Court declined to evaluate the Due Process claims regarding the right to access medical marijuana. 545 U.S. 1, 33 (2005). Instead, this Court suggested that such concerns should be taken through the "democratic process, in which the voices of voters . . . may one day be heard in the halls of Congress." *Id.*; *Abigail All. For Better Access to Developmental Drugs,* 495 F.3d at

710 (stating that the "democratic branches are better suited to decide the proper balance between the uncertain risks and benefits of medical technology.") This issue blurs the line between science and policy, suggesting the need for a democratic resolution, away from the judiciary.

b. Respondents' characterization of the Due Process Right to obtain medical care for their child is overly broad and incompatible with the guidelines set by this Court.

Respondents' Substantive Due Process claim fails because there is no right to access medical procedures that may jeopardize a child's health or safety. Respondents erroneously frame the Due Process claim as a general, fundamental right to obtain medical care for their child. R. at 25. However, numerous courts frame access to specific medical procedures narrowly. *Morrissey v. United States*, 871 F.3d. 1260, 1270, (11th Cir. 2017) (rejecting plaintiff's expansive description of a fundamental right to procreate in favor of the State's specific construction of a fundamental right to procreate via IVF); *Abigail All. for Better Access to Developmental Drugs,* 495 F.3d at 711; *Raich,* 545 U.S. at 33; *United States v. Rutherford*, 442 U.S. 544, 559 (1979).

Parents' rights to make decisions for their children are no greater than the right to make decisions for themselves. *Whalen v. Roe*, 429 U.S. 589, 604 (1977) (holding that derivative claims are "no stronger than" personal claims); *see also Doe By & Through Doe v. Pub. Health Tr. of Dade Cnty.*, 696 F.2d 901, 903 (11th. Cir. 1983). Therefore, this issue hinges upon whether there is a constitutional right to

experimental medical treatments. In the present case, Respondents erroneously generalize the fundamental right.

The Fifteenth Circuit erred by accepting this generalized characterization of the right rather than using a "careful" description of the "asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721. While parents have a general right to obtain medical care for their children, due process does not protect a right to unsafe or ineffective treatment.

Multiple courts have rejected the notion that specific access to medical procedures is a protected fundamental right. In *Morrissey*, the Eleventh Circuit did not extend a due process right "to father a child through the use of advanced IVF procedures . . . ." 871 F.3d at 1269. The court declined to extend the plaintiff's broad description of the right as "a fundamental right to procreation generally." *Id.* at 1268-69. Instead, the court looked at the more specific issue of "whether a man has a fundamental right to procreate via an IVF process that necessarily entrails the participation of an unrelated third-party egg donor and a gestational surrogate." *Id.* The court highlighted that such procedures are a decidedly modern phenomena and thus are not deeply rooted in this Nation's history and traditions. *Id.*

Similarly, this Court recently held that a fundamental right to abortion cannot be extended from "a broader entrenched right" of privacy or liberty. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2236 (2022). This Court emphasized that "historical inquiries . . . are essential whenever [this Court] is asked to recognize a new component of the 'liberty' protected by the Due Process Clause." *Id.* at 2247. Using this analysis, this Court held there is no fundamental right to

abortion because it is not specifically rooted in this Nation's "history and tradition that map the essential components of our Nation's concept of ordered liberty." *Id.* at 2248. This Court further cautioned that deriving specific rights from broader rights outlined within the constitution "could license fundamental rights to illicit drug use . . . and the like." *Id.*

Additionally, "the mere novelty of . . . a claim is reason enough to doubt that substantive due process sustains it; the alleged right certainty cannot be considered 'so rooted in the traditions and consciences of our people as to be ranked as fundamental.'" *Reno v. Flores,* 507 U.S. 292, 303 (1993). Here, the specific right that Respondents are claiming is protected under Substantive Due Process is too specific to be granted protection under *Reno*.

Like the IVF treatments in *Morrissey*, the experimental transitioning treatments are modern phenomena. 871 F.3d at 1269. Following the analysis undertaken in *Dobbs*, it is implausible to assume Respondents' general liberty interests can be extended to include gender transitioning treatments. 142 S. Ct. at 2247. These procedures are not rooted in our history because they are new and experimental.

Finally, Respondents' Due Process claim fails because courts do not extend a fundamental right to affirmative access for experimental drugs. To recognize this as a fundamental right would stretch the constitutional boundaries of the Due Process Clause and allow *any* right to be treated as deeply rooted in this Nation's history. Ultimately, the fundamental right that Respondents assert is contradictory to the limits set forth by this Court. *Id.* at 2239; *Glucksberg,* 521 U.S. at 721.

c. The right to experimental medical treatments is not deeply rooted in this Nation's history.

Affirmative access to experimental medicine is not a fundamental right under the constitution. *Abigail All. for Better Access to Developmental Drugs,* 495 F.3d at 711 (holding terminally ill patients seeking access to medicine do not have a fundamental right under the constitution for such treatments). There, the court emphasized "there is no fundamental right deeply rooted in this Nation's history and tradition of access to experimental drugs." *Id.* at 697. Instead, our Nation has a greater history of regulating drugs and the risks associated with them. *Id.* at 711. The court expanded on their decision by stating that the procurement of experimental drugs is not lawful because the drugs have not been proven effective or safe. *Id.* at 703; *see also Rutherford*, 442 U.S. at 559 (holding that there are no exceptions to denying drugs that are not demonstrated as safe by the FDA.) In *Abigail All. for Better Access to Developmental Drugs* the tradition of protecting "individual freedom from life-saving, but forced, medical treatments" is distinguished from "affirmative access to a potentially harmful" drug. 495 F.3d at 711 n.19. While the former is recognized as a fundamental right, the latter is not. *Id.* This Court should be equally skeptical of experimental treatments for vulnerable youth.

The SAME Act specifies the potential harms of gender transitioning treatment including "irreversible infertility, cancer, liver dysfunction" and more. 20 Linc. Stat. § 1201; R. at 2. Similar to *Abigail All. for Better Access to Developmental Drugs*, Lincoln's legislature found that there is not a "causal link between . . .

'gender affirming care'" and safe and effective treatment for transgender minors. 20 Linc. Stat. § 1201.

The Fifteenth Circuit erroneously affirmed the district court's mischaracterization that puberty blockers are not experimental. The district court cited studies that show similar treatments being used for other medical conditions. R. at15. An experimental drug "may be approved for use in one disease or condition but still [be] considered investigational in other diseases or conditions." *Experimental Drug*, NAT'L CANCER INST. DICTIONARY, https://www.cancer.gov/publications/dictionaries/cancer-terms/def/experimental-drug (last visited Sep. 15, 2022). To accept the Fifteenth Circuit's mischaracterization would expose children to serious risks and allow potential victims to access treatments that are not effective or safe. *See, e.g., Abigail All. for Better Access to Developmental Drugs*, 495 F.3d at 703. The SAME Act does not inhibit Respondents' right to access all types of treatment for gender transition, but instead allows Respondents to use "conventional and widely accepted methods." R. at 3; 20 Linc. Stat. § 1201(a)(8). Only experimental treatments are limited by the SAME Act.

Even in situations where professional organizations provide countervailing opinions, states do not need to defer to their expertise. *EMW Women's Surgical Ctr. P.S.C. v. Beshear*, 920 F.3d 421, 438 (6th Cir. 2019) (holding that "certain medical groups' views . . . is not the type of evidence deemed material by the Supreme Court."). There, the court upheld laws that conflict with the official positions of many professional organizations. *Id.*

Additionally, this Court does not "demand of legislatures 'scientifically certain criteria of legislation.'" *Ginsberg v. State of N.Y.*, 390 U.S. 629, 642-643 (1968) (quoting *Noble State Bank v. Haskell,* 219 U.S. 104, 110, (1911)). This Court should not overemphasize the findings of medical organizations because medicine is imperfect and always evolving. For example, "every article on the subject of eugenic sterilization published in a medical journal between 1899 and 1912 endorsed the practice." Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* 66 (2016). If the State blindly follows the latest opinions of medical organizations, it ignores the obligation to protect its citizens.

Here, there is no binding consensus regarding gender affirming treatments. Large-scale reviews of previous gender affirming treatments exhibit heavy disagreement within the medical community. R. at 7, 8. The SAME Act is not contrary to the opinions of the medical community that oppose denial of gender-affirming care because the SAME Act does not ban access to all types of treatment. R. at 7. Instead, the SAME Act merely limits care for children under the age of eighteen to safe and effective treatment. R. at 3. The uncertainty regarding experimental treatments provides additional support for why gender-affirming care should not be considered a fundamental right under the Due Process Clause.

2. The rights of parenthood are not absolute and are outweighed by the State's interest in preserving public health.

Contrary to Respondents' claims, parental autonomy is not absolute especially when it involves a countervailing public interest concern. This Court makes clear that "the rights of parenthood are not beyond regulation in the public

interest." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). "The State has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . and matters of conscience." *Id.* at 167. Parents do not have a fundamental right to make any medical decision for their children when the protection of the public health is at stake. *Zucht v. King*, 260 U.S. 174, 177 (1922) (holding that an ordinance that requires compulsory vaccinations in schools does not infringe upon a child's Due Process rights.) This Court stated in *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty*., that a state's interest in "safeguarding the physical and psychological well-being of a minor is a compelling one." 457 U.S. 596, 607 (1982); *see also Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 848 (4th Cir. 1998) (holding that "[c]ourts have recognized the peculiar vulnerability of children . . . .").

a. The Fifteenth Circuit mischaracterized the rights of parents and overlooked the State's discretionary authority.

The Fifteenth Circuit heavily relied on two cases put forth by Respondents, *Parham v. J.R.* and *Troxel v. Granville*, that outlined parents' general right to make decisions for their children. R. at 14, 25. Petitioner agrees that parents have a general right to manage the medical care of their children. However, that parental right does not extend to accessing experimental drugs—especially when those drugs do not successfully treat the medical condition and threaten a child's physical and mental health.

The Fifteenth Circuit erroneously held that parents have a right to obtain medical treatment for their children and cite *Parham v. J.R.*, 442 U.S. 584, 602

(1979). However, *Parham* discussed a *Procedural* Due Process issue regarding children's "protectible interests . . . in being free of unnecessary bodily restraints" during forced institutionalization. *Id.* at 601. The holding in *Parham* was limited to the state procedures that curtailed a parent's authority. *Id.* at 604. *Parham* does not grant parents "absolute and unreviewable discretion" when making decisions for their children. *Id.* This Court further emphasized 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 603.

The Fifteenth Circuit additionally relied on *Troxel v. Granville* which states that the Fourteenth Amendment protects the "fundamental right of parents to make decisions concerning the care, custody and control of their children." 530 U.S. 57, 66 (2000). *Troxel* focuses on a parent's right to control the non-parental visitation of third parties. *Id.* at 64. The Fifteenth Circuit's reliance on this decision is misguided because *Troxel* does not provide complete autonomy for parents to make decisions for their children. *Id.* at 69. This Court emphasized that it did not find issue when the State intervened against the parent, just when the intervention was done without any determination of the child's best interest. *Id.* This Court held multiple times that the State can intervene to protect the welfare of children. *Ginsberg*, 390 U.S. at 640 (holding a statute that prohibits the sale of obscene magazines to children under the age of seventeen does not violate the Constitution); *City of Dall. v. Stanglin* 490 U.S. 19, 27 (1989).

The State has a history of protective legislation that strictly limits the rights of parents when making decisions for their children. For example, children under

the age of twenty-one are not allowed to "purchase or publicly possess alcoholic beverages." 23 U.S.C. § 158. Additionally, various state laws require young children to be secured in a car or use a booster seat. CAL. VEH. Code § 27360 (West 2022); 625 ILL. COMP. STAT. ANN. 25/4 (West 2022). These examples illustrate the numerous prohibitions against parental autonomy when the welfare of a child is at stake. It follows that access to experimental drugs that could jeopardize the health and safety of children should be limited by the State.

b. This Court should defer to Petitioner's judgment in matters pertaining to public health.

This Court should defer to Petitioner's judgment to "guard and protect" the public when "officials . . . act in areas fraught with medical and scientific uncertainties" because the Constitution "principally entrusts the safety and health of the people to the politically accountable officials of the States." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020). Courts grant deference to the government in matters concerning public health. When there is documented medical disagreement regarding a legislative act, the State's interest is to protect human life. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). This Court gives "state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Id.* This follows the idea that states have an interest in regulating medicine and promoting medical ethics. *Id*.

Respondents' apprehension over the SAME Act's limitation of certain experimental gender transition treatments is not enough to overcome the State's interest in promoting safety. Here, Respondents do not have a fundamental right to

make medical decisions for their children if the procedure has potential for harmful and irreversible effects. R. at 13. The FDA, the Federal Agency of Health and Human Services, and other professional agencies highlight growing concerns over the unproven effects of such treatment for gender transition. R. at 15. Many adolescents who underwent such treatments did not fully appreciate the physical and mental consequences of their decisions and expressed deep regret. R. at 8. The State has a vested interest in ensuring that minors are not subject to situations in which there are no safeguards against the risks and magnitude of their decisions.

B. The SAME Act Does Not Violate the Fourteenth Amendment's Equal Protection Clause Because It Does Not Burden a Suspect Group or a Fundamental Interest.

When a statute or ordinance discriminates against an individual or a class of individuals, the court will apply one of three levels of scrutiny to the law in question: (1) rational-basis review, (2) intermediate scrutiny, or (3) strict scrutiny. *Clark*, 486 U.S. at 461. Under the Fourteenth Amendment, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996). Because the SAME Act does not burden a group of individuals' fundamental rights or target individuals based upon impermissible criteria, only rational-basis review is applicable.

1. The SAME Act is subject to rational-basis review, not intermediate scrutiny, because it does not draw distinctions based on suspect classifications.

The SAME Act distinguishes on only two bases: age and medical procedure. R. at 18. Neither of these classifications have been identified by this Court as being

among a suspect or quasi-suspect class. To determine whether a class qualifies as suspect or quasi-suspect, this Court established criteria which queries whether the group: (1) possesses a characteristic that "frequently bears no relation to ability to perform or contribute to society," *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985); (2) has been subject to a "history of purposeful unequal treatment," *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); (3) exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); and (4) is a "minority or politically powerless," *Id.* Examples of such suspect and quasi-suspect classes include race, national origin, religion, sex, disability, and illegitimacy. *See Clark*, 486 U.S. at 461.

a. The SAME Act classifies based on a patient's age, and age-based distinctions are subject to rational-basis review.

This Court has repeatedly held that age is not a suspect class under the Equal Protection Clause. *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991); *see also Murgia*, 427 U.S. at 312 (holding that classification based on old age requires rational-basis review because it does not interfere with a fundamental right, and it does not disadvantage a suspect class). The SAME Act clearly distinguishes between individuals who are over eighteen and "individual[s] under the age of eighteen." 20 Linc. Stat. § 1203. The SAME Act only prohibits healthcare providers from engaging in any gender affirming care upon adolescents; adults are free to undergo any of the limited procedures. *Id.* Furthermore, a person of either sex who has been diagnosed with gender dysphoria can partake in any available gender-

transition procedure once that person becomes of legal age. *Id.* Thus, the SAME Act creates two categories: (1) minors who seek certain types of gender affirming care and (2) all other minors. These classifications do not disadvantage one sex relative to the other but rather forbid any minor, regardless of sex, from obtaining specific experimental treatments. *See Geduldig v. Aiello*, 417 U.S. 484, 497 (1974) (stating that the policies provide an objective basis for the State's decision because "there is no risk from which women are protected and men are not," and vice versa).

Courts from various circuits note that youth is not a suspect classification, and classifications burdening children should be treated no differently than those burdening the elderly. *See Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1154 (D.C. Cir. 2004); *United States v. Cohen,* 733 F.2d 128, 135 (D.C. Cir. 1984) (en banc); *Stiles v. Blunt,* 912 F.2d 260, 266 (8th Cir. 1990); *Douglas by Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1247 (7th Cir. 1989); *Williams v. City of Lewiston,* 642 F.2d 26, 26 (1st Cir. 1981). Although one relevant difference between the elderly and youth is political power—evidenced by the elderly's ability to vote on laws—minors are far less immutable since they outgrow any restrictions placed upon them during their youth. *Hedgepath*, 386 F.3d at 1154. Under the SAME Act, minors that are prohibited from receiving gender affirming care will no longer face such a restriction once they reach the age of eighteen. 20 Linc. Stat. § 1203.

Additionally, the Constitution itself attests to the fact that age-based restrictions are a relevant state concern. *See* U.S. CONST. art. I, § 2, cl. 2

(minimum age for House of Representatives); *id.* § 3, cl. 3 (minimum age for Senate); *id.* art. II, § 1, cl. 5 (minimum age for President). As a result, youth-based classifications are more relevant than classifications based on old age, which this Court has already established does not trigger intermediate scrutiny. Since the SAME Act applies to both males and females for the entirety of their adolescents, it is creating an age-based classification that is constitutional and directly related to Lincoln's objective of protecting the health and safety of its children. R. at 2.

b. The SAME Act also distinguishes based on medical procedure, and health and safety measures are governed by rational-basis review.

Health and welfare laws are entitled to a strong presumption of validity if there are legitimate state interests behind Congress' actions. *Dobbs*, 142 S. Ct. at 2284 (noting that these legitimate state interests include the elimination of gruesome medical procedures or the preservation of the integrity of the medical profession). In *Dobbs*, this Court upheld the precedent that laws prohibiting abortion are not subject to intermediate scrutiny because it is not a sex-based classification. *Id.* at 2246. Rather, these laws are subject to rational-basis review, just like other health and safety measures. *Id.* The only way that a regulation of a medical procedure would be subject to heightened scrutiny is if the regulation is a "mere pretext[] designed to effect an invidious discrimination against members of one sex or the other . . . ." *Geduldig*, 417 U.S. at 496, n. 20.

The SAME Act is a medical procedure-based classification that is subject to rational-basis review because there is a rational relationship between the prohibition of treatment and Lincoln's legitimate governmental purpose.

Heller v. Doe by Doe, 509 U.S. 312, 320 (1993) (stating that if there is any reasonably conceivable state of facts that could provide a rational basis for the classification, it must be upheld). Lincoln's interests in implementing the SAME Act are to (1) protect children from risking their own mental and physical health and lifelong medical consequences; (2) discourage harmful, irreversible medical interventions; and (3) protect against social influence surrounding gender affirmation treatments. 20 Linc. Stat. § 1201(b). Respondent Jess Mariano, being the one who is attacking the rationality behind the SAME Act classification, has the burden "to negat[e] every conceivable basis which might support it." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

Although Respondent Jess Mariano does provide some evidence—mainly from The World Professional Assessment of Transgender Health ("WPATH") and the Endocrine Society—refuting the governmental purpose behind the implementation of the SAME Act, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. This Court should uphold precedent and find that the SAME Act's medical procedure-based classification satisfies rational-basis review because "[t]he initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States." *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *see also Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1043

(D. Ariz. 2021) (holding that mastectomies used as gender transition procedures are not the same as other chest surgeries).

The fact that the SAME Act only prohibits procedures "performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex *different* from the individual's biological sex," means that it falls within the State's right to determine what classifies as "different". 20 Linc. Stat. § 1203 (emphasis added). Furthermore, the SAME Act is also not a sex-based classification because it does not disadvantage one sex relative to the other, but rather it is meant to apply equally to individuals of any gender. 20 Linc. Stat. § 1203.

c. Transgender status is not a suspect class, and the SAME Act does not discriminate based on such status.

Age and medical procedure do not fall within the judicially recognized discriminatory classifications, and neither does transgender status. Respondent Jess Mariano argues that the SAME Act discriminates against transgender individuals and according to *Bostock*, it is "impossible to discriminate against a person for being . . . transgender without discriminating against the individual based on sex." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020). The Fifteenth Circuit's reliance on this decision, however, is misguided because (1) *Bostock* does not apply to constitutional claims and (2) even if it did, transgender status is not a suspect class.

First, *Bostock* interprets Title VII of the Civil Rights Act of 1964 which focuses on the treatment of individuals, not classes, and the Equal Protection

Clause is class-based. *Id.* (noting that "[t]he consequences of [Title VII] focus on individuals rather than groups."). Writing for the majority, Justice Gorsuch expressly refused to prejudge any questions regarding "[w]hether other policies and practices might or might not qualify as unlawful discrimination or find justification under other provisions of Title VII," stating that those are "questions for future cases, not these." *Id.* at 1753. The majority made it explicitly clear that their decision is not intended to sweep beyond Title VII to other federal or state laws. *Id.* This refusal to extend the reasoning in *Bostock* to other sexual discrimination cases stems from the decision in *Washington v. Davis*, where this Court refused to equate the scope of the Equal Protection Clause with that of Title VII., 426 U.S. 229, 239 (1976) (holding that just because a statute may affect a greater proportion of one race than the other does not make it invalid). Furthermore, reliance on *Bostock* is unpersuasive because *Bostock* involved the unlawful discrimination of an employee because of their gay or transgender status, whereas the SAME Act is aimed at restricting certain medical procedures based on an individual's age. *See Hennessy-Waller*, 529 F. Supp. 3d at 1044 (D. Ariz. 2021), (finding the plaintiffs' reliance on *Bostock* to be unpersuasive because it did not involve a state Medicaid plan exclusion for surgical treatment for gender dysphoria in minors).

Second, if this Court finds that the SAME Act does classify based on transgender status, which it does not, such a classification would not be treated as a suspect class under the Equal Protection Clause. None of the four factors used to determine whether a class qualifies as suspect or quasi-suspect favor creating a new

classification based on transgender status. Although transgender individuals are not wholly free of discrimination, Respondent Jess Mariano did not establish that those who identify as transgender have suffered a history of purposeful unequal treatment or are victims of political powerlessness. *See Murgia*, 427 U.S. at 313 (finding that to satisfy the formation of a suspect class, the plaintiffs must have "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."). Jess also fails to provide evidence that transgender individuals share a defining characteristic with no relation to their ability to perform or contribute to society. According to WPATH, the term "transgender" describes a diverse group of people whose gender identity "differs to varying degrees from the sex they were assigned at birth." WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 97 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf. Nowhere does Jess identify a "defining characteristic" that is shared by this diverse group who identifies as transgender. *See Gilliard*, 483 U.S. at 602. This is because individuals who identify as transgender do not share "an immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Transgender refers to "the broad spectrum of individuals who transiently or persistently identify with a gender different from their natural gender." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013)

("DSM-5") at 451. These individuals range between people who experience gender dysphoria as an adolescent versus as an adult and those who want to receive care versus those who do not. *See* WPATH at 10-21. Every transgender individual is thus different, immutably so. Therefore, the group is not a suspect class that subjects the SAME Act to heightened scrutiny. *See Cleburne Living Ctr.*, 473 U.S. at 442 (holding that individuals with intellectual disabilities are not "all cut from the same pattern" and therefore not a quasi-suspect class).

2. Even if this Court finds that the SAME Act is subject to intermediate scrutiny, the State has proffered an exceedingly persuasive justification.

An exceedingly persuasive justification is "genuine, not hypothesized or invented post hoc in response to litigation." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996). To satisfy intermediate scrutiny, the State bears the burden of showing "that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)). If this Court applies intermediate scrutiny, the SAME Act still survives because it is substantially related to the State's goal of protecting children and regulating the medical profession. *See Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (noting that the means behind a statute must be carefully tailored to achieve the government's ends).

a. The SAME Act's classifications are a direct result of the State's goal to protect children.

This Court makes clear that states have a compelling interest in protecting the well-being of children. *Reno v. Am. C.L. Union*, 521 U.S. 844, 869 (1997). This interest in protecting children stems from the fact that "a democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince*, 321 U.S. at 168 (noting that what may be permissible for adults may not be so for children, either with or without their parents' presence). Because the future of the State's society relies on the fate of its children, states have an interest in protecting the vulnerable group from abuse, neglect, and mistakes. *Glucksberg*, 521 U.S. at 731.

By forbidding minors from receiving gender affirming care, the SAME Act is furthering the State's interest in protecting children from entering situations that they cannot fully comprehend. 20 Linc. Stat. § 1201(a)(6). In implementing the SAME Act, Lincoln can protect minors from the regret and irreparable harm that they will face by uninformatively consenting to gender transition drugs and surgeries during adolescence. *See also* WPATH at 11 (stating that gender dysphoria in children—minors under twelve—is not likely to persist into adulthood).

The SAME Act's classification also stems from Lincoln trying to limit the number of children who will transition due to social influence. 20 Linc. Stat. § 1201(b)(3). "The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by . . . membership in a stigmatized social group." *Glucksberg*, 521 U.S. at 732. According to WPATH,

individuals who identify as gender non-conforming or transgender are members of a stigmatized group. *See* WPATH at 4. This stigmatization can lead to mental and physical harm to the transgender individual inflicted by themselves and society at large. *Id.* This risk of subtle coercion and undue influence tends to result in fatal situations, which is directly contrary to the governmental purpose behind the SAME Act. *See Glucksberg*, 521 U.S. at 732.

b. The SAME Act's classifications are a direct result of the State's goal to encourage treatments supported by medical evidence.

This Court has also made it clear that states have an interest in protecting the integrity and ethics of the medical profession. *Glucksberg*, 521 U.S. at 731. This interest is rooted in the State's "power to regulate, reasonably and rationally, all facets of the medical field, even to excluding certain professions or specialists or schools . . . by expressly outlawing them." *England v. La. State Bd. of Med. Exam'rs*, 263 F.2d 661, 674 (5th Cir. 1959). Additionally, this Court held that states get to make their own judgments when passing legislation in areas where there is medical uncertainty. *Carhart*, 550 U.S. at 163.

To ensure the SAME Act is not too broad, Lincoln only limits the experimental gender transition procedures and permits the less permanent and more widely-accepted methods, such as conventional psychology. 20 Linc. Stat. § 1201(a)(8). By implementing the SAME Act, Lincoln has decided that the irreversible consequences of gender transition procedures outweigh any supposed benefits. *See Marshall v. United States*, 414 U.S. 417, 427 (1974) (stating that when Congress acts in areas fraught with medical uncertainties, it affords "little basis for

judicial response in absolute terms."). Although Respondent Jess Mariano provides evidence to support his claim that the limited gender affirming care is not experimental and untreated gender dysphoria can lead to more harm, nothing requires a governmental agency to defer to the opinions and policy judgments of an advocacy organization like WPATH. *See Miller*, 439 F.3d at 412 (finding that courts must exercise their role as a "gatekeeper" and keep out unreliable evidence). Furthermore, the organizations that Jess relies upon acknowledge that not all transgender individuals need hormone therapy or surgery to alleviate their gender dysphoria. *See* WPATH at 8 (stating that "[o]ften with the help of psychotherapy, some individuals . . . do not feel the need to feminize or masculinize their body."). As a result of this blatant uncertainty, this Court should uphold the precedent that "courts should be cautious not to rewrite legislation." *Marshall*, 414 U.S. at 427. Because the SAME Act does not classify against any individual or category of persons but is instead representative of Lincoln's policy choice in experimental medical treatments, this Court should reverse the Fifteenth Circuit's decision.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that this Court reverse the decision of the Court of Appeals for the Fifteenth Circuit and remand the case for further proceedings.

Respectfully Submitted,

/s/ Team 3104

Attorneys for Petitioner

CERTIFICATE OF SERVICE

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

/s/ Team 3104

Attorneys for Petitioner

APPENDIX A

Statutory Provisions

Stop Adolescent Medical Experimentation Act

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.

National minimum drinking age

23 U.S.C.A. § 158

(a) Withholding of funds for noncompliance.--

(1) In general.--

(A) Fiscal years before 2012.--The Secretary shall withhold 10 per centum of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(3), and 104(b)(4) of this title on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.

(B) Fiscal year 2012 and thereafter.--For fiscal year 2012 and each fiscal year thereafter, the amount to be withheld under this section shall be an amount equal to 8 percent of the amount apportioned to the noncompliant State, as described in subparagraph (A), under paragraphs (1) and (2) of section 104(b).

(2) State grandfather law as complying.--If, before the later of (A) October 1, 1986, or (B) the tenth day following the last day of the first session the legislature of a State convenes after the date of the enactment of this

paragraph, such State has in effect a law which makes unlawful the purchase and public possession in such State of any alcoholic beverage by a person who is less than 21 years of age (other than any person who is 18 years of age or older on the day preceding the effective date of such law and at such time could lawfully purchase or publicly possess any alcoholic beverage in such State), such State shall be deemed to be in compliance with paragraph (1) in each fiscal year in which such law is in effect.

(b) Effect of withholding of funds.--No funds withheld under this section from apportionment to any State after September 30, 1988, shall be available for apportionment to that State. (c) Alcoholic beverage defined.--As used in this section, the term "alcoholic beverage" means--

(1) beer as defined in section 5052(a) of the Internal Revenue Code of 1986,

(2) wine of not less than one-half of 1 per centum of alcohol by volume, or

(3) distilled spirits as defined in section 5002(a)(8) of such Code.

California Vehicle Code

§27360 Child safety seats; obligation of parent, legal guardian or driver; transporting children under eight years of age; transporting children under two years of age; exception for driver if parent or legal guardian is present and not driving

(a) Except as provided in Section 27363, a parent, legal guardian, or driver who transports a child under eight years of age on a highway in a motor vehicle, as defined in paragraph (1) of subdivision (c) of Section 27315, shall properly secure that child in a rear seat in an appropriate child passenger restraint system meeting applicable federal motor vehicle safety standards.

(b) Except as provided in Section 27363, a parent, legal guardian, or driver who transports a child under two years of age on a highway in a motor vehicle, as defined in paragraph (1) of subdivision (c) of Section 27315, shall properly secure the child in a rear-facing child passenger restraint system that meets applicable federal motor vehicle safety standards, unless the child weighs 40 or more pounds or is 40 or more inches tall. The child shall be secured in a manner that complies with the height and weight limits specified by the manufacturer of the child passenger restraint system.

(c) This section does not apply to a driver if the parent or legal guardian of the child is a passenger in the motor vehicle.

(d) This section shall become operative January 1, 2017.

Illinois Child Passenger Protection Act

25/4. Transporting child under age of 8; restraint system

§ 4. When any person is transporting a child in this State under the age of 8 years in a non-commercial motor vehicle of the first division, any truck or truck tractor that is equipped with seat safety belts, any other motor vehicle of the second division with a gross vehicle weight rating of 9,000 pounds or less, or a recreational vehicle on the roadways, streets or highways of this State, such person shall be responsible for providing for the protection of such child by properly securing him or her in an appropriate child restraint system. The parent or legal guardian of a child under the age of 8 years shall provide a child restraint system to any person who transports his or her child.

When any person is transporting a child in this State who is under the age of 2 years in a motor vehicle of the first division or motor vehicle of the second division weighing 9,000 pounds or less, he or she shall be responsible for properly securing the child in a rear-facing child restraint system, unless the child weighs 40 or more pounds or is 40 or more inches tall.

For purposes of this Section and Section 4b, "child restraint system" means any device which meets the standards of the United States Department of Transportation designed to restrain, seat or position children, which also includes a booster seat.

A child weighing more than 40 pounds may be transported in the back seat of a motor vehicle while wearing only a lap belt if the back seat of the motor vehicle is not equipped with a combination lap and shoulder belt.

APPENDIX B

Federal Practice and Procedure

§ 2948.1 Grounds for Granting or Denying a Preliminary injunction—Irreparable Harm

Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief. Therefore, if a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief. In a similar vein, a preliminary injunction usually will be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief. Thus, for example, the termination of business agreements or of employment typically are not found to result in irreparable injury because, if wrongful, damages will provide adequate compensation for any losses. Even if a loss is fully compensable by an award of money damages, however, extraordinary circumstances, such as a risk that the defendant will become insolvent before a judgment can be collected, may give rise to the irreparable harm necessary for a preliminary injunction. Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted.

There must be a likelihood that irreparable harm will occur. Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant. Thus, a preliminary injunction will not be issued simply to prevent the possibility of some remote future injury. A presently existing actual threat must be shown. However, the injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis. A long delay by plaintiff after learning of the threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction. Additional illustrative cases finding no irreparable injury are set out in the note below.

The courts have found irreparable injury in a wide range of contexts. The following cases simply illustrate some of the situations in which the standard has been held to have been met. A preliminary injunction has been issued to prevent harm to the environment, as, for example, enjoining dredging operations in living coral reefs that were about to be declared a national monument, or enjoining a proposed highway reconstruction project through a rain forest when the project posed imminent danger to endangered species. Irreparable harm also has been found in the loss by an athletic team of the services of a star athlete, suspension of the boxing license of the World Heavyweight Champion, and the payment of an

allegedly unconstitutional tax when state law did not provide a remedy for its return should the statute ultimately be adjudged invalid.

Injury to reputation or goodwill is not easily measurable in monetary terms, and so often is viewed as irreparable. Thus, for example, loss of goodwill often supports a finding of irreparable injury in cases in which employers seek to enforce restrictive covenants against their former employees to prevent them from contacting their customers. Furthermore, when the potential economic loss is so great as to threaten the existence of the moving party's business, then a preliminary injunction may be granted, even though the amount of direct financial harm is readily ascertainable. When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary. Similarly, proof that a copyright is valid and infringed has been held sufficient to justify the grant of a preliminary injunction without a detailed showing of irreparable injury. However, in 2011, the Ninth Circuit rejected its longstanding rule allowing a presumption of irreparable harm in copyright actions if there is a reasonable likelihood of success on the merits. It found that the presumption was irreconcilable with the reasoning by the Supreme Court in its 2006 decision in *eBay Inc v. MercExchange, L.L.C.*, holding that the generally applicable four-factor balancing test for a permanent injunction applies to suits under the Patent Act. Thus, under this reasoning the propriety of preliminary injunctions in copyright cases must be determined by balancing all

factors and not by using presumptions. Similarly, no presumption of irreparable harm applies in trademark cases. In trademark-infringement cases, a showing of "likelihood of confusion" between trademarks suffices to establish both irreparable injury and likelihood of success on the merits. Additional illustrative cases finding irreparable injury are set out in the note below.

APPENDIX C

Constitutional Provisions

United States Constitution

U.S. CONST. art. I, § 2, cl. 2

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

U.S. CONST. art I, § 3, cl.3

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

U.S. CONST. art II, § 1, cl. 5

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

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.