Docket No. 22-8976

IN THE SUPREME COURT OF THE UNITED STATES

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 PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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

BRIEF FOR RESPONDENT

TEAM 3105
ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

I. Under this Court's precedent, may a court grant a preliminary injunction if the movant will likely be irreparably harmed, the balance of the equities tips decidedly in the movant's favor, and the movant raises a serious question as to success on the merits?

II. Under the Fourteenth Amendment, does a state violate the Equal Protection Clause and Due Process Clause when it passes a statute prohibiting gender-affirming care for adolescents diagnosed with gender dysphoria?

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STATEMENT OF THE CASE

1. Statement of Facts

Throughout childhood, fourteen-year-old Jess Mariano suffered from anxiety and depressive episodes due to his gender disconnect. R. at 4. Jess was born biologically female but identified as male from a very young age. R. at 4. Elizabeth and Thomas Mariano, Jess's parents, recount Jess lamenting on many occasions that he "didn't want to grow up if I have to be a girl." R. at 4-5. Discouraged, Jess, at only eight years old, hoped to "never wake up" and swallowed a handful of Tylenol pills. R. at 4. Because of this incident, the Marianos sought therapy for Jess. R. at 4. Dr. Dugray, Jess's therapist, diagnosed Jess with depression and found "evidence of distress manifested by a strong desire to be treated as a boy and a desire to prevent the development of the anticipated secondary sex characteristics." R. at 4. In accordance with medical guidelines[1], Jess was diagnosed with gender dysphoria. R. at 4. Dr. Dugray noted Jess expressed considerable distress related to the amount of breast tissue he developed and determined that Jess's gender dysphoria would continue to accelerate if left untreated. R. at 5.

A physician diagnoses gender dysphoria by marking an incongruence with a patient's expressed gender and assigned gender. DSM-5 at 452. The distress adolescents experience with gender dysphoria can be mitigated by a supportive environment and biomedical treatment that reduces the incongruence. *Id.* at 455.

[1] Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 452 (5th ed. 2013).

Treatment with GnRh agonists, puberty blockers, is a generally reversible treatment that pauses puberty, giving children time to consider and decide whether to pursue the more invasive and less reversible medical options. R at 5-6. The existing guidelines recommend clinicians begin pubertal hormone suppression once puberty begins.[2] Jess's pediatrician, Dr. Dugray prescribed Jess puberty blockers to slow the intensity of Jess's gender dysphoria in accordance with established guidelines requiring physicians to prescribe "only evidence-based, medically necessary, and appropriate interventions that are tailored to the patient's individual needs." R. at 5-6 (citing Hembree, *supra* note 1, at 3869-96). Dr. Dugray anticipates that when Jess turns sixteen, he will start hormone therapy, given the persistence and strength of Jess's gender dysphoria. R. at 5. Because Jess expressed considerable distress related to the amount of breast tissue he developed, Dr. Dugray advised that chest surgery may be necessary to successfully treat his gender dysphoria before he progresses too far into adulthood. R. at 5.

Since Jess started receiving puberty blockers, Dr. Dugray observed Jess suffering fewer symptoms of depression and less distress associated with feelings of gender incongruence. R. at 5. Jess continues to medically treat his gender dysphoria, receiving monthly puberty blocking medications by injection. R. at 5. Just a one-month interruption of his treatment could allow puberty to progress and

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[2] *See* Wylie C. Hembree, et al., *Endocrine Treatment of Gender-dysphoric/Gender-incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clin. Endocrinology and Metabolism 3869, 3876-77 (2017) (discussing evaluation of youth and adults); World Pro. Ass'n for Transgender Health (WPATH), Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People 10-21 (7th ed. 2012) (discussing assessment and treatment of children and adolescents with gender dysphoria).

substantially undermine the treatment progress Jess has made so far in dealing with his depression and dysphoria. R. at 5.

Lincoln's Stop Adolescent Medical Experimentation Act ("the Act") prevents Jess from continuing medical treatment for his gender dysphoria. R. at 2-3; *see also, Appendix C.* The Act specifically prohibits, "[p]rescribing or administering puberty blocking medication to stop or delay normal puberty." R. at 3. Although Lincoln is concerned with "protect[ing] 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[,]"[3] medical and scientific evidence asserts that "all leading medical organizations in the United States . . . oppose denying gender-affirming care to transgender adolescents."[4] R. at 3, 7. Moreover, the Act prohibits well-established puberty blocking medication and gender-affirming testosterone and estrogen treatments, which are "[a]mong the best practices for gender-affirming care[.]"[5] R. at 4,6. Dr. Dugray testified the Act would disrupt and undermine Jess's current and future medical treatments for his gender dysphoria. R. at 5.

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[3] *But see* Am. Med. Ass'n, *Advocating for the LGBTQ Community*, ama-assn.org (last visited Sep. 12, 2020) (discussing medically necessary treatment is as critically important for transgender individuals as social transition).

[4] *See Frontline Physicians Oppose Legislation That Interferes in or Penalizes Patient Care,* Am. Acad. of Pediatrics, Apr. 2, 2021, at psychiatry.org (issuing joint statement of organizations representing nearly 600,000 physicians); Am. Med. Ass'n, *supra* note 3 (discussing withholding gender-affirming care "impair[s] [transgender individual's] social and emotional development, leading to poorer health outcomes throughout life").

[5] *See also* Jack L. Turban, MD, MHS1, *et al., Legislation to Criminalize Gender-Affirming Medical Care for Transgender Youth*, 325 J. Am. Med. Ass'n 2251, 2260 (2021).

2. Procedural History

The Marianos filed their Complaint under 42 U.S.C. Section 1983, on November 4, 2021, asserting the Act violates their rights to Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment. R. at 1. April Nardini, in her official capacity as Attorney General of the State of Lincoln ("Lincoln"), has authority under the Act to enforce the Act and indicated intention to do so. R. at 1.

The Marianos moved for a preliminary injunction on November 11, 2021, to enjoin Lincoln from enforcing the Act. R. at 1. Lincoln responded with a motion to dismiss, on November 18, 2021, requesting the court deny the preliminary injunction. R. at 1.

The hearing on both motions was held on December 1, 2021. R. at 1. The Marianos produced medical and scientific evidence asserting the banned treatments are well-established, among the best practices for gender-affirming care for transgender youth, and endorsed by all leading American medical organizations, including the American Medical Association, the American Academy of Pediatrics, and the American Psychiatric Association. R. at 5-7; *see also* Appendix D.

Likewise, Lincoln produced legislative findings supporting the ban. R. at 7-9. Lincoln's medical expert exclusively referenced Swedish and Finnish healthcare developments finding the banned treatments lacked adequate proof of their

effectiveness and safety[6], as well as a United Kingdom large-scale review finding the same[7]. R. at 7-9. At the hearing, Lincoln called two witnesses who testified before the legislature about their regret that they did not fully contemplate the physical and mental consequences of their medical and surgical treatments for gender dysphoria. R. at 8. Although the Act also prohibits "[p]erforming surgeries that artificially construct genitalia tissue or remove any healthy or non-diseased body part or tissue, except for male circumcision[,]" Dr. Dugray noted that continuing to administer puberty blockers would spare Jess from further surgical intervention. R. at 3, 4-5.

The District Court, in their Memorandum Opinion, granted the preliminary injunction and denied the motion to dismiss. R. at 2. The District Court found:

> 1) plaintiffs have shown a likelihood of success on the merits of their claims that the SAME Act violates of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, 2) they will suffer immediate and irreparable harm if the Court does not enjoin the Act, 3) that harm greatly outweighs any damage the Act seeks to prevent, and 4) there is no overriding public interest that requires the Court to deny injunctive relief at this stage of the litigation.

R. at 2.

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[6] R. at 7-8 (citing Lincoln's referenced evidence)("*See* Guideline Regarding Hormonal Treatment of Minors with Gender Dysphoria at Tema Barn—Astrid Lindgren Children's Hospital (ALB) (April, 2022), unofficial English translation by Soc'y for Evidence Based Med. available at https://segm.org/sites/default/files/Karolinska%20Policy%20Change%20K2021-3343%20March%202021%20%28English%2C%20unofficial%20translation%29.pdf; Finland's Council for Choices in Healthcare Policy Statement, Palveluvalikoima, Recommendation of the Council for Choices in Health Care in Finland (PALKO / COHERE Finland), unofficial English translation by Soc'y for Evidence Based Med. available at https://segm.org/sites/default/files/Finnish_Guidelines_2020_Minors_Unofficial%20Translation.pdf").

[7] R. at 8-9 (citing Lincoln's referenced evidence) ("U.K. Nat'l Health Servs., NHS announces independent review into gender identity services for children and young people (Sept. 22, 2020), https://www.england.nhs.uk/2020/09/nhs- announces-independent-review-into-gender-identity-services-for-children-and-young-people/").

The Fifteenth Circuit rejected Lincoln's appeal, holding the lower court "acted within its discretion to grant the [ ] preliminary injunction and deny Lincoln's motion to dismiss, because the Marianos are likely to suffer irreparable harm if [the Act] is permitted to go into effect, they have raised serious questions about their likelihood of success on the merits of their claims, and the balance of interests strongly tips in their favor." R. at 24-25.

This Court granted Lincoln's petition for writ of certiorari on July 18, 2022, to consider the merits of the preliminary injunction. R. at 35.

STANDARD OF REVIEW

This Court reviews the district court's decision to grant a preliminary injunction for abuse of discretion. *Ashcroft v. Am. C.L. Union,* 542 U.S. 656, 664 (2004). District court decisions on a motion to dismiss are reviewed *de novo*. *See Pierce v. Underwood*, 487 U.S. 552, 563 (1988).

SUMMARY OF ARGUMENT

A state has no protectable interest in enforcing an unconstitutional law. Here, Lincoln's statute will harm the same vulnerable children it claims to protect, resulting in two constitutional violations.

Jess Mariano is a fourteen-year-old who has suffered immense psychological distress due to diagnosed gender dysphoria. R. at 4. This affliction, which started at an early age, was so pervasive that it led Jess to attempt suicide. R. at 4. Upon being formally diagnosed, Jess was prescribed puberty blockers to mitigate his symptoms. R. at 5. Jess's therapist reported a decrease in Jess's symptoms of

depression following the medically-approved use of puberty blockers. R. at 5. Jess's healthcare providers and family agree that Jess needs to continue using gender-affirming care throughout his teens. R. at 5. Enforcing the Act will irreparably undermine and disrupt Jess's treatment plan. R. at 5. The Act will force Jess to undergo puberty as a biological female, inducing psychological distress and the need for more invasive future procedures.[8] As medical research shows, the risk of psychological distress is imminent.[9]

This Court should find the serious question standard is a viable approach for preliminary injunction relief, and the Fifteenth Circuit properly affirmed such relief on both the Due Process and Equal Protection claims.

First, to grant a request for preliminary relief against the government, a district court must consider whether (1) the moving party is likely to succeed on the merits, (2) the moving party is likely to suffer irreparable harm in the absence of preliminary relief, and (3) the balance of equities weighs in the moving party's favor. The serious question standard permits a district court to grant a preliminary injunction where the equities weigh decisively in movant's favor, but the moving party raises only a serious question as to the likelihood of success on the merits. As the majority of Circuits recognize, this Court's decision in *Winter* does not eliminate the serious question standard or any other balancing approach. This Court should

[8] *See* Hembree, *supra* note 1, at 3876-77.

[9] *See* Am. Med Ass'n, *supra* note 2.

uphold the serious question standard to protect a district court's ability to exercise its discretion, as mandated by the principles of equity jurisprudence.

Enforcement of the Act will irreparably harm the Marianos by violating the parents' constitutional right to privacy and subjecting Jess to the risk of severe medical setbacks. The irreparable harm to the Marianos outweighs Lincoln's demand for risk-free gender affirming care and the slight interest, if any, that Lincoln has in enforcing a likely unconstitutional law. The Marianos make a strong showing on two of the three preliminary injunction factors and so need only raise a serious question regarding success on the merits.

Second, the Act violates the Due Process Clause of the Fourteenth Amendment because it's prohibition against gender-affirming medical treatment for adolescents violates a parent's fundamental right to obtain proper medical care for their child. A statute is unconstitutional for implicating substantial due process when its broad language does not serve a compelling state interest. The Act prohibits Jess from continuing to receive the appropriate medical treatment without providing for alternative means of acquiring treatment. Although Lincoln is concerned with protecting adolescents and regulating the medical profession, its concern does not outweigh the risk of unconstitutionally harming Marianos.

Third, transgender discrimination warrants heightened scrutiny because it is sex-based discrimination. Even if it is not sex-based, transgender discrimination warrants its own quasi-suspect class. Circuits are increasingly applying this rationale to Equal Protection claims. Using a heightened level of scrutiny is

necessary and requires Lincoln to offer an exceedingly persuasive justification for the Act. Lincoln cannot meet this standard, and thus the preliminary injunction was properly granted on the Equal Protection claim. Even if rational basis standard applies, the Marianos still prevail.

For the foregoing reasons, the Marianos respectfully request this Court to AFFIRM the Fifteenth Circuit's decision and uphold the preliminary injunction and denial of Lincoln's Motion to Dismiss.

ARGUMENT

The Fifteenth Circuit correctly affirmed the preliminary injunction pursuant to the serious question standard because: (1) the Act irreparably harms the Marianos; (2) the balance of the equities weighs in their favor; and (3) the Marianos are likely to succeed on the merits of their constitutional claims because their Due Process and Equal Protection rights were violated.

I. THE FIFTEENTH CIRCUIT CORRECTLY APPLIED THE SERIOUS QUESTION STANDARD TO AFFIRM THE PRELIMINARY INJUNCTION.

The serious question standard continues to be a viable approach because this Court's precedent embraces the standard, the standard protects the principles of equity jurisprudence, and the overwhelming Circuit majority applies the standard or a similar approach. The Marianos' medical and constitutional injuries outweigh Lincoln's burden, thus the Marianos need only raise a serious question on the merits of their constitutional claims.

The Marianos sought a preliminary injunction to prevent Lincoln from enforcing the Act pending the outcome of this case. A court can issue a preliminary injunction only upon considering whether "[the movant] is likely to succeed on the merits, [the movant] is likely to suffer irreparable harm in the absence of preliminary relief, . . . the balance of equities tips in [the movant's] favor, and . . . an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008). When a party moves for an injunction against the government, the balance of equities factor and the public interest factor merge into one. *Nken v. Holder,* 556 U.S. 418, 435 (2009).

At issue is whether a strong showing on one factor can compensate for a weaker showing on another factor (a balancing approach), or whether the three factors must be independently satisfied (a sequential test). *See e.g., Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.,* 598 F.3d 30, 35 (2d Cir. 2010) (applying a balancing approach); *Siegel v. LePore,* 234 F.3d 1163, 1176 (11th Cir. 2000) (applying a sequential test).

The serious question standard is a balancing approach that permits a court to grant preliminary injunctive relief even if it cannot determine that the movant is more likely than not to prevail on the merits. *Citigroup Glob. Markets, Inc.,* 598 F.3d at 35. To grant preliminary relief under the serious question standard, a court must find that there are "serious questions" going to the merits, irreparable harm is likely, and the balance of the equities weighs decidedly in the movant's favor. *Id.*

In *Winter,* this Court rejects a different balancing approach that permitted a court to grant preliminary injunctive relief upon finding the "'possibility' of irreparable harm." 555 U.S. at 21-22. The "extraordinary remedy" of injunctive relief is not available to movants who fail to show irreparable injury is likely to occur in the absence of a preliminary injunction. *Id*. This Court declined to address the permissibility of other balancing approaches—specifically those lowering the requisite showing on the remaining two factors. *See id.*

Here, the Marianos show a strong likelihood of irreparable harm in the absence of a preliminary injunction because the Act threatens the parents' constitutional right to privacy and subjects Jess to the risk of severe medical setbacks. The Marianos also show these irreparable injuries outweigh Lincoln's demand for risk-free gender affirming care and the slight interest, if any, that Lincoln has in enforcing its likely unconstitutional law. This Court should affirm the Fifteenth Circuit's decision upholding the preliminary injunction pursuant to the serious question standard because the Marianos raise serious questions going to the merits and make a strong showing on the other two factors.

A. The Fifteenth Circuit Correctly Held the Serious Question Standard Continues to Be a Viable Approach to Preliminary Injunctive Relief Post-*Winter*.

A court ruling on a request for a preliminary injunction against the government must consider whether: (1) the movant is likely to succeed on the merits; (2) the movant is likely to suffer irreparable harm in the absence of an injunction; and (3) the balance of the equities tips in the moving party's favor.

Winter, 555 U.S. at 20; *Nken,* 556 U.S. at 435. This Court's decision in *Winter* mandates the movant to show irreparable harm is likely to occur. 555 U.S. at 22. This decision divided the Circuit Courts regarding whether a court must consider all three factors independently, or whether a strong showing on one factor offsets a weak showing on another factor. *See e.g., Citigroup Glob. Markets, Inc.,* 598 F.3d at 35; *Diné Citizens Against Ruining Our Env't v. Jewell,* 839 F.3d 1276, 1282 (10th Cir. 2016).

The serious question standard permits a district court to balance the three factors and grant preliminary injunctive relief even if it cannot determine that the movant is more likely than not to succeed on the merits. *Citigroup Glob. Markets, Inc.,* 598 F.3d at 35. The present case requires the Court to determine if *Winter* or its progeny barred either: (1) preliminary injunctive relief where the movant raises only a serious question of success on the merits or (2) balancing approaches, generally. As the majority of Circuits recognize, this Court never mandated a sequential test or prohibited a court from granting relief when it cannot determine with certainty that the moving party is likely to succeed on the merits. *See Reilly v. City of Harrisburg,* 858 F.3d 173, 179 (3rd Cir. 2017). This Court should resolve the disagreement among the Circuits and hold that the long-standing serious question standard continues to be an applicable standard for the preliminary injunction inquiry.

1. Nine of the fifteen Circuits continue to apply the serious question standard or a similar approach.

The overwhelming majority of Circuits continue to use the serious question standard, an approach that closely resembles the serious question standard, or a balancing approach. *See e.g., Ashley Furniture Industries, LLC v. United States,* 569 F. Supp. 3d 1261, 1290-91 (Fed. Cir. 2022); *MPAY, Inc. v. Erie Custom Computer Applications, Inc.,* 970 F.3d 1010, 1019 (8th Cir. 2020); *Memphis A. Philip Randolph Institute v. Hargett,* 978 F.3d 378, 385 (6th Cir. 2020).

The Second, Third, Seventh, and Fifteenth Circuits explicitly held the serious question standard survives this Court's ruling in *Winter*. *See e.g.,* R. at 24; *Reilly,* 858 F.3d at 179; *Citigroup Glob. Markets, Inc.,* 598 F.3d at 35; *Planned Parenthood of Wisconsin, Inc. v. Van Hollen,* 738 F.3d 786, 795 (7th Cir. 2013).

The Federal and D.C. Circuits continue to apply the serious question standard without addressing *Winter*. *Ashley Furniture,* 569 F. Supp. 3d at 1290-91 (noting a strong showing of irreparable harm lowers a movant's burden on the likelihood of success factor to "rais[ing] 'questions which are serious, substantial, difficult, and doubtful'"); *Davis v. Pension Ben. Guar. Corp.,* 571 F.3d 1288, 1291-92 (D.C. Cir. 2009) (asserting "if the movant makes a very strong showing of irreparable harm and there is no substantial harm to the non-movant, then a correspondingly lower standard can be applied for likelihood of success" and declining to consider whether *Winter* mandates a stricter standard).

The Eighth Circuit applies a test resembling the serious question standard because "no single preliminary injunction factor is 'determinative[.]'" *MPAY, Inc.,*

970 F.3d at 1019 (permitting a court to grant a preliminary injunction even if the movant "has not shown a likelihood of success on the merits").

The Fifth and Sixth Circuits balance the factors. *See e.g., Memphis A. Philip Randolph,* 978 F.3d at 385 (declaring the "factors are not prerequisites, but [ought to be] balanced against each other"); *State of Tex. v. Seatrain Intern., S.A.,* 518 F.2d 175, 180 (5th Cir. 1975) (utilizing a "sliding-scale" and holding "the importance and nature of the [likelihood of success] requirement can vary significantly, depending on the magnitude of the injury . . . and the relative balance of the [equities]").

2. Among the Circuits interpreting whether *Winter* eliminated the serious question standard, the Fifteenth Circuit joined the Circuit majority.

The Second, Third, and Seventh Circuits explicitly held the serious question standard is consistent with this Court's ruling in *Winter*. *See e.g., Reilly,* 858 F.3d at 179; *Citigroup Glob. Markets, Inc.,* 598 F.3d at 35; *Planned Parenthood of Wisconsin,* 738 F.3d at 795. Only the Fourth and the Tenth Circuits held the serious question standard did not survive this Court's ruling in *Winter*. *See e.g., Diné Citizens,* 839 F.3d at 1282; *Real Truth About Obama, Inc. v. Fed. Election Comm'n,* 575 F.3d 342, 346 (4th Cir. 2009), *cert. granted, judgment vacated,* 559 U.S. 1089 (2010), *and adhered to in part sub nom. The Real Truth About Obama, Inc. v. F.E.C.,* 607 F.3d 355 (4th Cir. 2010).

The Seventh Circuit was the first Circuit to apply the serious question standard after *Winter*. *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Like Ins. Co.,* 582 F.3d 721, 725 (7th Cir. 2009). The Circuit subsequently explained

the standard "is a variant of, though consistent with" this Court's ruling in *Winter*. *Planned Parenthood of Wisconsin,* 738 F.3d at 795 (enjoining Wisconsin from enforcing a statute restricting a doctor's ability to perform abortions).

The Second Circuit affirmed the continued viability of the serious question standard when upholding a preliminary injunction to enjoin arbitration proceedings. *Citigroup Glob. Markets, Inc.,* 598 F.3d at 32. The court reasoned that because the moving party must make a stronger showing on the other two factors, "its overall burden is no lighter than the one it bears under the 'likelihood of success' standard." *Id.* at 35.

The Third Circuit also found that the serious question standard survived *Winter* when considering whether the district court properly enjoined defendant city's ordinance prohibiting demonstrations within the vicinity of health care facilities. *Reilly,* 858 F.3d at 175. The court reasoned: (1) *Winter* does not foreclose a balancing approach; (2) other Circuits held similarly; (3) preliminary injunction inquiries require flexibility and discretion; and (4) this Court's subsequent discussion of injunctive relief supports balancing the factors. *Id.* at 179.

In contrast, the Fourth Circuit held that *Winter* established a new preliminary injunction standard requiring the movant to show it is likely to succeed on the merits. *Real Truth About Obama,* 575 F.3d at 345-46. Similarly, the Tenth Circuit held that *Winter* abolished "any modified test which relaxes one of the prongs for preliminary relief." *Diné Citizens,* 839 F.3d at 1282.

The Fifteenth Circuit's decision joins the Circuit majority, which adopts the proper standard.

3. This Court should apply the rationales of the Second, Third, and Seventh Circuits, because they adhere to the principles of equity jurisprudence.

District courts possess the authority to "exercise their sound discretion" to fashion equitable relief. *Winter,* 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982)). To empower the district court "to do equity and to mould each decree to the necessities of the particular case," this Court prefers "flexibility rather than rigidity." *Romero-Barcelo,* 456 U.S. at 312.

"Uncertainties inherent at the outset of particularly complex litigation" make it difficult to assess the merits of some claims. *Citigroup Glob. Markets, Inc.,* 598 F.3d at 35. Preliminary injunctions should not be reserved for "cases that are simple or easy." *Id.* The serious question standard affords district courts flexibility when it is difficult, if not impossible, to determine whether the moving party is likely to succeed.

"No test for considering preliminary equitable relief should be so rigid as to diminish, let alone disbar discretion." *Reilly,* 858 F.3d at 178. District courts are more familiar with the facts of a particular case and are therefore better suited to determine when equitable relief is appropriate. *Id.* at 179. For this reason, appellate courts review decisions on preliminary equitable relief for abuse of discretion. *Id.* The serious question standard adheres to these principles of flexibility and discretion—it permits district courts to consider each factor in

context. The sequential test reduces a district court's preliminary injunction inquiry to a rigid and formulaic exercise.

The serious question standard affords the district court an appropriate amount of discretion. The standard merely permits a court to relax the required likelihood of success to "significantly better than negligible but not necessarily more likely than not." *Reilly,* 858 F.3d at 179. The district court must make a stronger finding on the other two factors, so the "overall burden is no lighter." *Citigroup Glob. Markets, Inc.,* 598 F.3d at 35.

4. This Court should reject the rationales of the Fourth and Tenth Circuits, because they misinterpret this Court's preliminary injunction precedent.

The Fourth and Tenth Circuits incorrectly held that *Winter* eliminated balancing approaches entirely. *See Diné Citizens,* 839 F.3d at 1282; *Real Truth About Obama,* 575 F.3d at 345-46. Both Circuits based their conclusions on scattered words and phrases in the Court's opinion without fully considering the broader context of this Court's approach to the preliminary injunction standard. *See Diné Citizens,* 839 F.3d at 1282; *Real Truth About Obama,* 575 F.3d at 345-46.

This Court approved of the serious question standard in 1929, holding that "[w]here the questions presented by [a request for a preliminary] injunction are grave, and the injury to the moving party will be certain and irreparable…the injunction usually will be granted." *Ohio Oil Co. v. Conway,* 279 U.S. 813, 814 (1929). In other words, a court may grant a preliminary injunction upon finding a

serious question as to the merits of the claim and a strong likelihood of irreparable harm.

This Court further addressed the serious question standard in 1997, acknowledging that a court may grant a preliminary injunction upon finding the movant has a "fair chance of success" on the merits. *Mazurek v. Armstrong,* 520 U.S. 968, 970. This Court held that movants had not met the "fair chance of success" requirement of the Ninth Circuit's preliminary injunction approach. *Id.* at 975-76. However, the Court recognized the legitimacy of the "fair chance" approach. *Mazurek,* 520 U.S. at 975-76.

In *Winter,* this Court rejected a balancing test that granted injunctive relief upon a showing of the "'possibility' of irreparable harm." 555 U.S. at 21-22. This Court only referred to the likelihood of success factor in its initial list of the requirements for preliminary relief, but never discussed it. *Id.* at 20.

Five months before *Winter,* this Court explicitly discussed the likelihood of success factor. *Munaf v. Geren,* 553 U.S. 674, 690 (2008). However, this Court only held that a court must *consider* the moving party's likelihood of success. *Id.* This Court did not define *how likely* the moving party must be to succeed. *Id.*

Five months after *Winter*, this Court further explained the four equitable relief factors. *Nken,* 556 U.S. at 418. This Court noted the appropriateness of equitable relief turns on the "*consideration* of [the] four factors" and "the first two factors are the most critical." *Id*. (emphasis added). This formulation of the preliminary injunction standard conflicts with the minority interpretation that

Winter established a sequential test. Although *Nken* considered a different form of equitable relief, this Court noted a substantively similar analysis applied to the preliminary injunction inquiry. *Id.* at 434

Despite any clear indication from this Court, the Fourth and Tenth Circuits misinterpreted this Court's discussion of the irreparable harm factor in *Winter* to overrule *Ohio Oil*. *See Diné Citizens,* 839 F.3d at 1282; *Real Truth About Obama,* 575 F.3d at 345-46. Neither *Winter, Munaf,* nor *Nken* reference *Ohio Oil* or balancing approaches, generally. If this Court intended to eliminate those approaches and mandate a sequential test, one would expect a clear and direct command—considering the long-standing application of the serious question standard and other balancing approaches, including by this Court itself.

B. The Fifteenth Circuit Correctly Held the Marianos Need Only Raise a Serious Question Going to the Merits Because the Marianos Made a Strong Showing on the Other Two Factors.

Pursuant to the serious question standard, a court may grant a preliminary injunction upon finding (1) there are serious questions going to the merits, (2) irreparable harm is likely, and (3) the balance of the equities weighs decidedly in the movant's favor. This Court should affirm the finding that the Marianos need only raise a serious question going to the merits because irreparable harm is likely and the balance of the equities tips decidedly in the Marianos favor.

1. Absent a preliminary injunction, the Marianos suffer irreparable harm because the Act violates the parents' constitutional right to privacy and subjects Jess to the risk of severe medical setbacks.

To qualify for injunctive relief, a movant must "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter,* 555 U.S. at 22 (emphasis omitted). An injury is irreparable "only if it cannot be undone through monetary remedies." *Ne.Fla. Chapter of Ass'n of Gen. Contractors v. City of Jacksonville,* 896 F.2d 1283, 1285 (11th Cir. 1990). An irreparable injury qualifies a movant for injunctive relief if it is "certain and immediate, not speculative or theoretical." *D.T. v. Sumner County Schools,* 942 F.3d 324, 327 (6th Cir. 2019) (quotations omitted).

A loss or threatened loss of a person's constitutional right to privacy, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). The Act threatens the parents' right to decide the appropriate medical treatment for their child. This infringement violates the parents' constitutional right to privacy and constitutes an irreparable injury. *Id.* at 373.

Additionally, the risk of suffering "a severe medical setback" is an irreparable injury. *See Bowen v. City of New York,* 476 U.S. 467, 483 (1986). By prohibiting Jess from continuing to receive medical treatment for gender dysphoria, the Act subjects Jess to the risk of a severe medical setback. A court enjoined similar legislation, finding plaintiff's increased risk of self-harm or suicide because of gender dysphoria constituted irreparable harm. *See Campbell v. Kallas,* No. 16-CV-261-JDP, 2020 WL 7230235 (W.D. Wis. Dec. 8, 2020). Here, the district court found

that Jess will suffer "devasting (sic) and lifelong mental and physical consequences with immediate consequences that cannot be undone."[10] Failing to properly treat young adults with gender dysphoria frequently results in anxiety, depression, eating disorders, substance abuse, self-harm, and suicide.[11] R. at 7. Failing to treat gender dysphoria before puberty frequently prolongs psychological harm past adulthood.[12] R. at 11. Medical expert testimony warns that forcing Jess to withdraw from treatment will "cause [him] to immediately resume going through an unwanted female puberty that conflicts with his male identity." R. at 11.

Failing to enjoin the Act violates the parents' constitutional right to privacy and subjects Jess to the risk of a severe medical setback—each an irreparable injury sufficient to satisfy the requirement under the preliminary injunction standard.

2. The balance of equities weighs in favor of the preliminary injunction because the Marianos' medical and constitutional injuries outweigh Lincoln's speculative burden.

When a party moves for an injunction against the government, the balancing of the equities factor and the public interest factor merge into one analysis. *Nken,* 555 U.S. at 435. That analysis "must balance the competing claims of injury and

[10] *See Frontline Physicians Oppose Legislation That Interferes in or Penalizes Patient Care, supra* note 4 (issuing joint statement of organizations representing nearly 600,000 physicians); Am. Med. Ass'n, *supra* note 3 (discussing withholding gender-affirming care "impair[s] [transgender individual's] social and emotional development, leading to poorer health outcomes throughout life").

[11] Hembree, *supra* note 2, at 3876-77.

[12] Hembree, *supra* note 2, at 3876-77.

must consider the effect on each party of the granting or withholding of the requested relief." *Winter,* 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Vill. of Gambell, AK,* 480 U.S. 531, 542 (1987)).

Lincoln erroneously claims that enjoining the Act will subject children to experimental medical procedures and peer pressure. R. at 3. However, the evidence supporting these claims is anecdotal and "emerging scientific evidence." R. at 3. No evidence suggests these risks are inherent to gender-affirming care. R. at 3. Lincoln proffered no evidence indicating the percentage of individuals who "express regret" after receiving gender-affirming care. R. at 3. As a result, Lincoln's claim that failing to enjoin the act will harm the public is vague, speculative, and unconfirmed.

Lincoln also argues that it will be injured if the Court enjoins enforcement of the Act because "[a]ny time a State is enjoined from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *See Maryland v. King,* 567 U.S. 1301, 1301 (2012). However, a state "has no interest in enforcing a state law that is unconstitutional." *Hispanic Interest Coalition of Alabama v. Governor of Alabama,* 691 F.3d 1236, 1249 (11th Cir. 2012). Although Lincoln contends the Act is not unconstitutional, both lower courts have found a serious question as to the constitutionality of the Act. R. at 17, 21-22, 27. The disputed constitutionality of the Act lessens Lincoln's interest in enforcing it.

The significant, immediate, and irreparable medical and constitutional injuries that Marianos suffer outweigh the speculative risk of gender-affirming care and Lincoln's interest in enforcing a potentially unconstitutional law.

II. THE FIFTEENTH CIRCUIT PROPERLY AFFIRMED THE PRELIMINARY INJUNCTION BECAUSE THE ACT VIOLATES THE FOURTEENTH AMENDMENT.

The preliminary injunction is valid because the Marianos will succeed on the merits of their Due Process and Equal Protection claims. The Act infringes on the Marianos' fundamental right as parents to obtain appropriate medical care for Jess. The Act also violates Jess's right to Equal Protection because Lincoln fails to adequately justify the Act under both a heightened and rational basis standard.

A. The Act Infringes on Parental Autonomy Because It Prevents The Marianos From Obtaining Essential Medical Care For Their Child.

The Act violates the Marianos fundamental parental right to obtain appropriate medical care for their child. Since the parental right is fundamental, the Act is subject to strict scrutiny. The Act fails constitutional review because it is not narrowly tailored to effectuate a compelling state interest.

1. The Marianos' parental right to obtain medical care for Jess is a fundamental right protected by the Due Process Clause.

"Substantive due process analysis must begin with a careful description of the asserted right for the doctrine of judicial self-restrain requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Reno v.*

Flores, 507 U.S. 292, 301-302 (1993) (quotations omitted). Here, the Act implicates a parent's fundamental right to obtain established medical care for their children.

"The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty or property without due process of law.'" *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Under the Due Process Clause, the parental right over "the care, custody, and control of their children" is fundamental. *See Id.* at 65-66 (collecting cases to demonstrate that the Court has long recognized the importance of parental rights, including *Parham v. J.R*, 442 U.S. 584, 602 (1979), and *Quillion v. Walcott*, 434 U.S. 246, 255 (1978)); *see also Parham,* 442 U.S. at 602 (concluding the "high duty" of a parent to care for their children is based on the presumption that fit parents act in the best interests of their children). This right "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65-66; *see also May v. Anderson*, 345 U.S. 528, 533 (1953) (recognizing parental rights are "far more precious . . . than property rights"). "It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66.

The Marianos' right to make decisions concerning Jess's medical care is fundamental, because, contrary to Lincoln's claim, gender dysphoria treatments banned by the Act are *not* "experimental." Lincoln misrepresents puberty blocking medical treatments as experimental because they carry risk. *See* R. at 2. Although access to specific experimental medical treatments is not constitutionally protected,

Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 671 (2007) (upholding statute banning experimental drugs for the terminally ill because medical treatments have passed limited safety trials and have not been proven safe and effective), this Court has long recognized that medical treatments and the medical practice necessarily carries risk. *See Parham*, 442 U.S. at 606 (recognizing the inherent risk of error in health care and in the parental decision to have a child be medically treated); *see also Moore v. East Cleveland,* 431 U.S. 494, 501 (1977) (finding this Court's precedent on parental liberties is "built upon postulates of respect for the liberty of the individual" and "the demands of organized society").

The gender-affirming medical treatments banned by the Act are not experimental. Puberty blocking medication, as well as testosterone and estrogen treatments, are well-established medical treatments for gender dysphoria.[13] R. at 6. In fact, these treatments are endorsed by all leading American medical associations[14] and are among the best practices for gender-affirming care.[15] R. at 7. While the Act's language asserts interest in protecting children from irreversible gender-affirming medical care, "[p]uberty blockers do not cause permanent changes

[13] Hembree, *supra* note 3, at 3869; WPATH, *supra* note 1.

[14] Am. Acad. of Pediatrics, *supra* note 3.

[15] Jack L. Turban, MD et al., *Legislation to Criminalize Gender-Affirming Medical Care for Transgender Youth*, 325 J. Am. Med. Ass'n 2251, 2251 (2021).

to the body."[16] *See* R. at 3. Adolescents treated with puberty blockers "can stop taking them at any time [and their] body will go back to the puberty that had already started"[17] and fertility is not affected.[18] Contrary to Lincoln's misrepresentation, the banned medical treatments are far from "experimental." Lincoln's categorization of the prescribed medical treatment for Jess's gender-dysphoria as experimental distorts widely-accepted scientific medical evidence on transgender adolescent care.

Accordingly, the Marianos' parental rights are fundamental and not limited by an experimental treatment exception.

2. The Act warrants review under strict scrutiny because the Act implicates a fundamental right.

Because the Marianos' parental right to obtain medical care for Jess is fundamental, the Act is subject to strict scrutiny to assess any substantial infringement on parental autonomy. *See Lofton v. Sec'y of Dep't of Child. & Farm. Servs.*, 358 F.3d 804, 815 (11th Cir. 2004); *Troxel*, 530 U.S. at 80 (Thomas, J., concurring). Government action fails to meet the strict scrutiny standard under the Due Process Clause, "which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno*, 507

[16] Oregon Health & Science University (OHSU), *About Puberty Blockers*, 2 (2020) (advising adolescent patients on puberty blocking medical treatments).

[17] OHSU, About Puberty Blockers, *supra* note 6.

[18] *See* WPATH, *supra* note 1, at 19.

U.S. at 301-302. The Act's prohibition against prescribing and administering essential gender-affirming treatment infringes on the Marianos' fundamental, parental right and "high duty" to obtain medical care for Jess. *See Parham.*, 442 U.S. at 602. Lincoln must show the Act is narrowly tailored to to serve a compelling interest.

3. The Act fails to satisfy strict scrutiny because the act is not narrowly tailored to serve a compelling state interest.

The Act fails to meet the strict scrutiny standard because none of Lincoln's justifications for the Act constitute a compelling state interest, and the Act still fails to be narrowly tailored enough to implement those interests. *See Reno*, 507 U.S. 301-302; *see also Parham*, 442 U.S. at 604; Appendix A. When state legislation implicates parental rights, state interests are compelling when they involve specific and distinct objectives that are specifically targeted by a well-defined statute. *See Parham*, 442 U.S. at 604; *see e.g., Prince v. Massachusetts,* 321 U.S. 158, 159 (1944) (affirming a statute prohibiting children from street preaching because the statute specifies the activity is "conducive to the child's protection against some clear and present danger"); *Moore*, 431 U.S. at 505 (holding state ordinance categorizing grandchildren living in their grandparent's home as illegal occupants unconstitutional because "decisions concerning child rearing, which . . . cases have recognized as entitled to constitutional protection extend to relatives . . . who occupy the same household"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (holding Oregon law banning enrollment in private primary schools unconstitutional because the restriction is an unreasonable interference with parental liberty).

Parental discretion is secondary to state interests only where children are exposed to the crippling effects of "evils[,]" such as "child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street." *Prince,* 321 U.S. at 168. In *Prince,* this Court affirmed a state's right to protect children against the dangers of preaching religion and selling religious pamphlets on the highway, especially when legislation is "appropriately designed to reach such evils within the state's police power[.]" 321 U.S. at 167-69.

The Act details Lincoln's interests, in relevant part:

> (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.

R. at 3. None of the listed interests are compelling because they are not specific and distinct, and the Act's prohibitions do not specifically effectuate them. In effect, the prohibitions induce greater risk of lifelong medical consequences and leads untreated, transgender adolescents towards heightened "anxiety, depression, eating disorders, substance abuse, self-harm, and suicide."[19] *See* R. at 7.

[19] *See* AL Vries, et al., Psychiatric Comorbidity in Gender Dysphoric Adolescents, 52 J. Child Psych. And Psychiatry 1195, 1202 (2011); Turban, *supra* note 3(check), at 1,5.

First, ensuring Jess's health and wellbeing by securing appropriate medical treatment is an essential aspect of the Marianos' fundamental parental right that the Act violates. This Court explained the Due Process Clause prohibits a state, claiming concern for the well-being of children, from unjustifiably intruding on the parental right to obtain medical care for their children. *See Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (recognizing that public health concerns "[do] not give Governors and other public officials *carte blanche* to disregard the Constitution") (emphasis in original). As expert medical testimony and scientific medical research show, enforcing the Act irreparably harms the very children Lincoln wishes to protect.

Second, the Act disables the Marianos' fundamental right to seek well-established, evidence-based medical care for their transgender child which Lincoln misclassifies as "experimental." Under the Act, Jess loses access to evidence-based puberty blocking medication for his gender dysphoria because the Act criminalizes physicians from administering them. This care is recognized and endorsed by all leading American medical organizations as effective treatment for their children.[20] Furthermore, puberty blocking medical treatments are reversible.[21] Enforcing the Act forces parents to seek medical care for their children that is subpar to the gender dysphoria treatments the Act bans. Contrary to Lincoln's interest in encouraging evidence-based medical treatments, enforcing the Act unjustifiably

[20] Am. Acad. Of Pediatrics, *supra* note 1. (check)

[21] OHSU, *supra* note (check), at 2.

demands physicians to prescribe and administer gender dysphoria treatments that are less effective and less-established than the treatments the Act bans.

Finally, Lincoln fails to offer evidence supporting its interest in combatting "social influence surrounding gender affirmation treatments" because of their "potential life altering effects[.]"

The Act unconstitutionally infringes on a parent's fundamental right to obtain appropriate medical care for their children because the Act is not narrowly tailored to implement Lincoln's questionable purposes for enforcing the Act. Enforcing the Act causes more irreparable harm to adolescents than the reversible harm Lincoln wishes to protect against. The Marianos are likely to succeed on the merits of their substantive due process claims.

B. This Court Should Affirm the Preliminary Injunction for Jess Mariano's Equal Protection Claim Because Lincoln Fails to Provide Adequate Justification Under Both a Heightened and Rational Basis Standard of Review.

Discrimination based on transgender status is encompassed within the sex suspect class and is therefore subject to intermediate scrutiny. Even if this Court finds that transgender status is not within the sex suspect class, transgender-based discrimination at a minimum warrants its own quasi-suspect class, and therefore intermediate scrutiny. Lincoln does not meet intermediate scrutiny because its justification for the Act is not "exceedingly persuasive." Even if this court uses a rational basis standard, the Marianos still prevail because Lincoln's justification for the act is vague and not backed by sufficient evidence.

The Equal Protection Clause provides that no State shall "[d]eny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, §1. The Clause aims to "secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918). Generally, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). This rational basis test, however, "does not apply when a classification is based upon sex," *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017), or when the classification makes its own quasi-suspect class. *See City of Cleburne.*, 473 U.S. at 442.

1. The Act is subject to heightened scrutiny because it discriminates on the basis of sex and because transgender status is its own quasi-suspect class.

Discrimination based on transgender status warrants heightened scrutiny because courts have found it to be discrimination based on sex, which requires intermediate scrutiny. Even if this Court finds that transgender status does not fall within the sex suspect class, it still warrants heightened scrutiny under its own quasi-suspect class.

a. Transgender discrimination is sex-based discrimination because transgender classification requires the consideration of biological sex.

This Court held that "all gender-based classifications today warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *J.E.B. V. Alabama ex rel. T. B.*, 511 U.S. 127, 136 (1994)).

In *Bostock v. Clayton Cnty.*, this Court held that "[i]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." 140 S. Ct. 1731, 1758 (2020) (foreshadowing future implications on constitutional claims but declining to discuss such consequences). *Bostock's* but-for causation standard provides that "so long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law." *Id.* at 1739.

While this Court analyzed *Bostock* under Title VII of the Civil Rights Act of 1964, recent federal court decisions similarly interpreted transgender status to be included in the sex suspect classification for Equal Protection claims. *See e.g. Brandt v. Rutledge,* No. 21-2875, 2022 U.S. App. LEXIS 23888, *13 (8th Cir. 2022) (holding when a minor's sex at birth "determines whether or not the minor can receive certain types of medical care under the law," the law discriminates on the basis of sex and is subject to heightened scrutiny); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 608-09 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, *Gloucester Cty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878 (2021) (holding, under the Equal Protection Clause, a school could not exclude a transgender male student from using the boys' bathroom without referencing his biological gender, thus applying

intermediate scrutiny); *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (holding that the standard of review should be "more than rational basis but less than strict scrutiny" when considering differential treatment of transgender individuals in the army); *Whitaker*, 858 F.3d 1051 (holding the school district's bathroom policy warrants intermediate scrutiny under the sex-based classification because it "cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate"); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding discrimination based on transgender status constitutes sex-based discrimination and subjecting it to intermediate scrutiny); *Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth (BAGLY) v. United States HHS*, 557 F. Supp. 3d 224, 244 (D. Mass. 2021) (acknowledging the recent circuit trend applying intermediate scrutiny to transgender discrimination and holding, "[t]hough *Bostock* was a Title VII case, the Supreme Court's reasoning applies equally outside of Title VII").

This Court should apply its reasoning from *Bostock* and adopt the interpretation of Circuit Courts who have deemed that transgender status triggers intermediate scrutiny under the sex suspect class of the Equal Protection Clause. Lincoln erroneously maintains the Act is subject to the rational basis standard because it is based on age, not sex. This is incorrect because if respondent were biologically male and identified as male, then he would not be subjected to the same standards set forth in the Act. The Act provides that "no practice or service is 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 individuals biological sex . . . .*" R. at 3 (emphasis added). The language of the act permits heath care providers to provide the same services to individuals who identify with their biological sex, even if they are under the age of 18. *See* Appendix C. Therefore, the Act discriminates based on transgender status, and thus on the basis of sex.

Lincoln argues that this Court has declined to equate the Equal Protection Clause to Title VII, and thus *Bostock* is not applicable to this claim. *See Washington v. Davis*, 426 U.S. 229, 250 (1976). While this Court has declined to explicitly rule whether the sex suspect class encompasses transgender status for Equal Protection claims, it has not overturned Circuit decisions equating constitutional and Title VII based applications for transgender discrimination claims. *See Grimm,* 972 F.3d 608-09 *as amended* (Aug. 28, 2020), *cert. denied*, *Gloucester Cty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878 (2021) (denying writ of certiorari after the Circuit found that transgender discrimination fell within the gender suspect class and deserved heightened scrutiny).

Lincoln may further argue that regardless of whether transgender status falls within the sex suspect class, the Act classifies solely based on medical procedure and age. *See Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1034 (D. Ariz. 2021) (arguing mastectomies used as a gender-transition procedure were not the "same" as chest surgeries performed as other treatments). Under *Bostock,*

however, the Act discriminates on the basis of sex because Lincoln considers a youth's biological sex to determine whether the procedure is appropriate.

Even without using *Bostock*'s reasoning, this Court has urged the use of heightened levels of scrutiny when different subsets of people are treated differently as a result of the same inherent action. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). In *Skinner*, an Oklahoma statute permitted the sterilization of prisoners who committed grand larceny but not embezzlement. *Id.* This Court held, "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Id.* at 541. While sterilization warranted strict scrutiny in *Skinner*, the same rationale for intermediate scrutiny applies here. Here, the Act robs transgender youth of their equal access to medical procedures—procedures non-transgender youth may access for alternative purposes. The Act treats individuals differently depending on whether their biological sex conforms with their identity. This treatment inherently implicates the question of sex.

This Court has also imposed heightened scrutiny in cases concerning children with special disabilities that are out of their control. *See Plyer v. Doe*, 457 U.S. 202, 210 (1982). Under the Act, children with gender dysphoria will be denied access to treatments that would not otherwise be denied to children without gender dysphoria. As such, heightened scrutiny should be used in this case, regardless of whether *Bostock* is applied.

For the foregoing reasons, intermediate scrutiny should be applied because Jess was discriminated against based on sex, not age. Even if *Bostock* does not apply, heightened scrutiny is still appropriate under this Court's precedent.

b. Even if this Court finds that the sex suspect class does not encompass transgender status, transgender status is its own quasi-suspect class.

This Court considers four factors to determine whether a new quasi-suspect class requires heightened scrutiny. *See M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018) (synthesizing this Court's precedent to provide a four-factor test). The factors are: (1) whether the class has been historically "subjected to discrimination," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (2) whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," *City of Cleburne, Tex.,* 473 U.S. at 441; (3) whether the class possesses "obvious, immutable, or distinguishable characteristics that define them as a discrete group," *Bowen*, 483 U.S. at 602; and (4) whether the class is "a minority or politically powerless." *Id.*

First, this Court's extension of protection for transgender individuals in its *Bostock* decision unequivocally acknowledges the historical discrimination faced by transgender individuals. *See Bostock*, 140 S. Ct. at 1739.

Second, it is self-evident that transgender people can contribute to society in the same way a non-transgender person could. Arguments suggesting transgender people are innately hindered lack any reasonable justification.

Third, transgender status provides a distinguishable characteristic—"their gender identity does not align with the gender they were assigned at birth." *M.A.B.*, 286 F. Supp. 3d at 721. Several federal courts have explicitly held that transgender status is immutable. *See e.g., Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1120 (N.D. Cal. 2015); *Adkins v. City of New York,* 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017).

Fourth, Lincoln explicitly cited the fact that gender dysphoria is "experienced by a very small number of children." R. at 2. Transgender underrepresentation is inevitable in politics because transgender people constitute an extreme minority. Moreover, because the Act targets transgender minors, who cannot participate politically, it even further silences an underrepresented group. As one court emphasized:

> As a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group. The efforts of states to pass legislation requiring individuals to use sex-segregated bathrooms that correspond with their birth sex are but one example of the relative political powerlessness of this group.

Bd. of Educ. of the Highland Loc. Sch. Dist., 208 F. Supp. 3d at 874.

Lincoln unconvincingly argues the number of "organizations advocating against such laws" disputes the political powerlessness factor. R. at 34. Advocacy is undermined by legal systems that do not abandon traditional, outdated standards. Lincoln may try and argue prepubescent children with gender dysphoria differ from adults and adolescents with the condition, thus the group is not discrete.

R. at 33. However, suspect classes such as race and gender do not distinguish between individuals of different ages, and they are still found to be discreet.

Because the four factors are met, transgender status is its own quasi-suspect class and warrants intermediate scrutiny.

2. Under an intermediate scrutiny standard of review, the preliminary injunction was properly granted because Lincoln did not proffer an exceedingly persuasive justification for the classification.

Under the intermediate scrutiny standard of review, Lincoln must proffer "an exceedingly persuasive justification" for the classification in the Act. *See Virginia,* 518 U.S. at 559. An exceedingly persuasive justification is "genuine, not hypothesized, or invented post hoc in response to litigation." *See id.* at 555. In an intermediate scrutiny inquiry, a state must show that its classification serves "important governmental objectives" and that the discriminatory means used are "substantially related to the achievement of those objectives." *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quotations omitted). A direct and substantial relationship is required to "assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical approach of traditional, often inaccurate, assumptions." *Id.* at 726. "The mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

Courts typically find a statutory justification is insufficiently persuasive when a state's public policy arguments are not backed by explicit evidence, and

when its actions hinder both the development of equality and advancement of societal health and science. *See e.g.*, *United States v. Virginia*, 518 U.S. at 524; *Stanton v. Stanton*, 421 U.S. 7, 18 (1975); *Sessions v. Morales-Santana*, 137 S. Ct. 1678, (2017).

For example, in *Virginia,* an institution attempted to justify only admitting men by citing (1) the need to protect a "diverse" educational environment, (2) the interest in protecting personal privacy, and (3) the need to shield women from an unmodified "adversative environment." 518 U.S. at 524. This Court held there was "no persuasive evidence in this record" that furthered the State's diversity initiatives, and the "overbroad" generalizations about female ability were not sufficient for the state to satisfy heightened scrutiny. *Id.* at 539; *see also Mississippi Univ. for Women,* 458 U.S. at732 (holding policy of state-sponsored university, which limited admissions to women and denied equally qualified men, violated the Equal Protection Clause).

Similarly, in *Stanton*, this Court considered a child-support payment dispute and deemed a state's justification for having different ages of majority for male and female children did not survive intermediate scrutiny. 421 U.S. at 18. The justification for the statute was that it could eliminate "possible family controversy" and the possibilities of "hearing[s] on the comparative merits of petitioning relatives." *Stanton,* 421 U.S. at 14. These public policy considerations were not based on explicit facts and the justification led to the hindrance of economic development for women in society. Thus, heightened scrutiny did not survive. *Id.*

Moreover, in *Sessions*, this Court considered a gender-based differential in the law concerning acquisition of U.S. citizenship for children born abroad to unwed parents. 137 S. Ct. at 1686. The law prescribed different citizenship requirements depending upon whether the mother or father was an American citizen. *Id*. Using intermediate scrutiny, this Court rejected the government's traditional justification that unwed mothers instill a stronger "national influence" on their child and thus require less physical connection to the U.S. to pass on citizenship than an unwed American father. *See Id*. at 1695. This Court cited the government's lack of evidence and gave great weight to modern societal trends, such as statelessness. This Court found the statute did not survive intermediate scrutiny.

Lincoln's policy argument that the Act "substantially furthers" the protection of children from the consequences of experimental medical procedures is unsubstantiated, as is their argument that the Act protects children from making life-changing decisions based on peer pressure. R. at 3. Lincoln hypocritically downplays the causal link between gender-affirming care and decreases in suicide but cites its own "emerging scientific evidence" as a reason to support the Act. R. at 3. Lincoln cites anecdotal evidence of individuals who have de-transitioned and "expressed regret" for taking puberty-suppressing medications and cross-sex hormones, noting the role of social influence. R. at 3. No evidence in the record points to why these instances of regret are any different than instances of regret for individuals who received the same services for non-gender related reasons. Lincoln fails to proffer statistical evidence disclosing the rate of regret for people who

receive these medical serves for gender-affirming purposes—Lincoln merely cites a two-person survey. Furthermore, Lincoln offers no comparative evidence demonstrating the difference in the prevalence of regret or health complications between transgender individuals who receive gender-affirming care, and those who do not. As such, the Act does not survive intermediate scrutiny because it hinders medical advancements and equality, and Lincoln fails to offer persuasive evidence of the Acts' ability to protect citizens.

Therefore, under an intermediate scrutiny standard, the preliminary injunction was properly granted.

3. Even if this Court adopts a rational basis standard, Lincoln still fails to satisfy scrutiny.

Under the rational basis standard, legislation is only presumed to be valid if "the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 U.S. 440. The legislative goal must not be "so attenuated as to render the distinction arbitrary or irrational." *Armour v. City of Indianapolis*, *Ind.*, 566 U.S. 681 (2012). There must be a "reasonably conceivable state of facts that could provide a rational basis for the classification." *Armour,* 566 U.S. at 681.

This Court has found that when governmental justification is vague and not based on sufficient facts, the justification does not provide a rational basis for the classification. *See Romer v. Evans*, 517 U.S. 620, 627(1996); 473 U.S. 432; *City of Cleburne, Tex.,* 473 U.S. 448.

For example, in *Romer*, this Court held that a Colorado amendment did not have a rational basis when it prohibited all legislative, executive, or judicial action in furtherance of protecting homosexual individuals from discrimination. 517 U.S. at 620. The state's justification for the act was that it "put gays and lesbians in the same position as all other persons." *Id.* at 627. This Court noted that laws enacted for a "broad and ambitious purposes can often be explained by references to legitimate public policy which justify the incidental disadvantages they impose on certain persons." *Id.* at 635. However, the Court found that justifications are not rationally related to legitimate public policy when overly general and inflicting "immediate, continuing, and real injuries that outrun and belie any legitimate justifications." *Id.* at 35. The Court also noted that a "desire to harm a politically unpopular group" is not a legitimate governmental interest. *Id.* Therefore, the amendment violated Equal Protection laws.

Similarly, in *City of Cleburne, Tex.*, this Court found that a city's permitting requirement did not have a rational basis because it was based off- of an irrational belief that the construction of a group home would pose a special threat to the City's legitimate interests. 473 U.S. at 448. The court found that "vague, undifferentiated fears" were not validation for the requirement, and thus the Equal Protection Clause was violated. *Id.*

In this case, Lincoln's justifications are vague, anecdotal, and unvalidated. Their policy objective of "protecting youth" is not backed by any legitimate statistics. Though the rational standard holds the government to a low bar,

Lincoln's vagueness and lack of evidence does not allow it to meet the standard. Thus, the Marianos succeed on even a rational basis standard.

CONCLUSION

First, this Court should find the serious question standard continues to be a viable approach to preliminary injunctive relief because this Court's precedent embraces the standard, the standard protects the principles of equity jurisprudence, and the Circuit majority applies the standard or a similar approach. *Second*, this Court should find the Marianos will succeed on their Substantive Due Process claim because the Act violates a parent's fundamental right to obtain proper medical care for their child. *Third,* this Court should find that the Act violates the Equal Protection Clause of the Fourteenth Amendment because transgender status is either encompassed in the sex suspect class or is its own quasi-suspect class—warranting intermediate scrutiny in either case. Even if this Court applies a rational basis standard, the Marianos still prevail on their Equal Protection claim.

Lincoln does not have a protected interest in an unconstitutional law. The Marianos respectfully request that this Court AFFIRM the decision below.

Respectfully Submitted,

s/ TEAM 3105

Team 3105
Attorneys for Respondents
Jess Mariano, Elizabeth Mariano,
and Thomas Mariano

APPENDIX

Lincoln SAME ACT: Findings and Purposes ..... A

Lincoln's SAME Act: Definitions ..... B

Lincoln's SAME Act: Prohibitions C

Respondents' Evidence Offered ..... D

APPENDIX A

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.

APPENDIX B

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) "Sex" as the biological state of being male or female, based on the individual sex organs, chromosomes, and endogenous hormone profiles.

APPENDIX C

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.

APPENDIX D

1. Both the Endocrine Society and the World Professional Association for Transgender Health ("WPATH") have published widely-accepted evidence-based for the treatment of gender dysphoria that direct individualized treatments based on the needs of the patient. Hembree WC, et al., Endocrine Treatment of Gender-dysphoric/Gender-incongruent Persons: An Endocrine Society Clinical Practice Guideline, 102 J. Clin. Endocrinology and Metabolism 3869 (2017), at https://doi.org/10.1210/jc.2017-01658; World Pro. Ass'n for Transgender Health (WPATH), Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People 10-21 (7th ed. 2012), at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.
2. Neither guideline recommends any medical interventions before a child reaches puberty, but once puberty begins, they suggest clinicians begin pubertal hormone suppression. *See* 102 J. Clin. Endocrinology and Metabolism at 3871; See WPATH Guidelines at 18.
3. Puberty blockers are reversible treatments that pause puberty and give children time to decide what to do next. *See* WPATH Guidelines at 19. Puberty-delaying medication does not affect fertility. Doernbecher Children's Hospital, About Puberty Blockers, https://www.ohsu.edu/sites/default/files/2020-12/Gender-Clinic-Puberty-Blockers- Handout.pdf. Ceasing puberty-delaying medication will cause puberty to resume in adolescents. 102 J. Clin. Endocrinology and Metabolism at 3885.
4. Among the best practices for gender-affirming care are: facilitation of a social transition (i.e., taking on the name, pronouns, and other elements of gender expression that match the adolescent's gender identity), consideration of pubertal suppression (i.e., gonadotropin releasing hormone analogues that temporarily and reversibly pause puberty to prevent the development of secondary sex characteristics that often cause psychological distress for transgender youth), and consideration of gender-affirming hormones (i.e., medications including estradiol and testosterone that induce physical feminization or masculinization, respectively, that align with the adolescent's gender identity). . . . [G]ender-affirming genital surgery is generally not recommended until adulthood, [but] some transmasculine adolescents may benefit from masculinizing chest surgery to lessen chest dysphoria. Jack L. Turban, MD, MHS1, et al., Legislation to Criminalize Gender-Affirming Medical Care for Transgender Youth, 325 J. Am. Med. Ass'n 2251, 2251 (2021).
5. The guidelines provide that youth with gender dysphoria should be evaluated, diagnosed, and treated by a qualified mental health professional. 102 J. Clin. Endocrinol Metab. at 3871. Further, the

guidelines provide that each patient who receives gender-affirming care receive only evidence-based, medically necessary, and appropriate interventions that are tailored to the patient's individual needs. See generally id. at 3869-3896. The guidelines indicate that gender dysphoria should be long lasting and intense before the adolescent is eligible for puberty-delaying treatment, and that the healthcare provider should thoroughly assess the child's needs including "the possibilities and limitations of various treatments" as part of both the assessment and obtaining informed consent. WPATH Guidelines, at 15, 19.

6. Untreated gender dysphoria may cause or lead to anxiety, depression, eating disorders, substance abuse, self-harm, and suicide. See de Vries AL, Doreleijers TA, Steensma TD, Cohen-Kettenis PT, Psychiatric Comorbidity in Gender Dysphoric Adolescents, 52 J. Child Psych. and Psychiatry 1195, 1202 (2011). By contrast, young adults who had sought and accessed puberty blockers for treatment of their gender dysphoria showed lower odds of considering suicide. Turban et al., Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation, 145 Pediatrics (Feb. 2020), at 1, 5, at https://doi.org/10.1542/peds.2019-1725.
7. Gender dysphoria in adolescents (minors twelve and over) is more likely to persist into adulthood than gender dysphoria in children (minors under twelve). WPATH Guidelines at 11. There is an association between affirmation of an adolescent's transgender identity and favorable mental health outcomes. See Turban, 325 J. Am. Med. Ass'n at 2251.
8. All leading medical organizations in the United States, including the American Medical Association, the American Academy of Pediatrics, and the American Psychiatric Association oppose denying gender-affirming care to transgender adolescents. See Press Release, Am. Acad. of Pediatrics, Frontline Physicians Oppose Legislation That Interferes in or Penalizes Patient Care (April 2, 2021), at https://www.aap.org/en/news-room/news-releases/aap/2021/frontline-physicians-oppose-legislation-that-interferes-in- or-penalizes-patient-care/?_ga=2.89126099.973451188.1655923488- 1054175941.1655923488 (issuing joint statement of organizations representing nearly 600,000 physicians); Am. Med. Ass'n, Advocating for the LGBTQ Community, at https://www.ama-assn.org/delivering-care/population-care/advocating-lgbtq-community#:~:text=The%20AMA%20supports%20public%20and,sexual%20orientation %20or%20gender%20identity.

R. at 5-7.