Docket No. 22-8976

In The

Supreme Court of the United States

October Term, 2022

April Nardini, in her official capacity as the Attorney General of the State of Lincoln,

Petitioner,

v.

Jess Mariano, Elizabeth Mariano, and Thomas Mariano

Respondents.

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

BRIEF FOR RESPONDENTS

Team 3106
Attorneys for Respondents

QUESTIONS PRESENTED

I. Under *Winter* does the "serious question" standard for preliminary injunctions survive when the Supreme Court never addressed the serious question in *Winter*, the majority of federal circuit courts continue to use the "serious question" analysis in post-*Winter* cases, and public policy aligns with the "serious question" standard?

II. Under the Fourteenth Amendment of the United States Constitution, does a family raise a "serious question" regarding the merits of their Substantive Due Process and Equal Protection claims, when state legislation denies parents and their child, who is diagnosed with gender dysphoria and suffering from depression and suicidality, the right to continue the only medical treatment that has shown positive effects?

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OPINIONS BELOW

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

STATUATORY PROVISIONS

The following statue are relevant to this case: Stop Adolescent Medical Experimentations ("SAME") Act, 20 Linc. Stat. §§ 1201-06. This provision is reproduced in Appendix B.

CONSTITUTIONAL PROVISIONS

The following constitutional provisions are relevant to this case: U.S. Const. amend. IX; U.S. Const. amend XIV, § 1. These Provisions are reproduced in Appendix A.

STATEMENT OF THE CASE

Factual Background

This is a case about a family fighting to protect their child's life and mental health from the tyranny of the State. Just six years ago, Jess was eight years and in anguish. Record 4. He struggled with his identity, with anxiety, and depression. Record 4. Six years ago, Thomas and Elizabeth Mariano found their eight-year-old child after he took a handful of pills. Record 4. When they found him, he told them he hoped he'd "never wake up." Record 4.

That is just the beginning of the Mariano family's journey. Since that dreadful day, that child, Jess, has been going to therapy with psychiatrist Dr. Dugray. Record 4. After nine months of treatment, Dr. Dugray diagnosed Jess with gender dysphoria in accordance with medical guidelines. Record 4. Gender dysphoria is an incongruence between the person's assigned gender and the gender they express. Record 4. Jess was born biologically female, but he has seen himself as male from a very young age. Record 4. In their time together, Dr. Dugray found that Jess was distressed by the desire to stop his body from growing female secondary sex characteristics. Record 4. Jess felt so strongly that he told his parents that he did not "want to grow up if he had to be a girl." Record 4-5.

Sadly, Jess began puberty at age ten and started to grow breast tissue. Record 5. He has shown pressing distress about the amount that has grown already and may need chest surgery before 18 to treat gender dysphoria successfully. Record 5. Dr. Dugray consulted with Jess' pediatrician and prescribed GnRH agonists, puberty blockers. Record 5. He has been receiving them every month. Dr. Dugray

testified that when Jess reaches the age of 16, he will begin hormone therapy. Record 5. He is 14 today. Record 2. Since Jess has been on puberty blockers, he has suffered less and less from the pains of depression and distress stemming from his dysphoria. Record 5.

The State of Lincoln passed the SAME Act, which criminalizes any health care provider engaging in any treatment for a child under 18 to affirm qualities that don't match their biological sex. Record 3. These treatments include but are not limited to, puberty blockers, hormone therapy, and surgeries. Record 3-4. While this Act prohibits these treatments for the purpose of gender-affirming care because the State believes them to be harmful or risky, it leaves the treatments available to all children for any other medical purpose. Record 3-4. The State hides its incongruence with justifications of government interests, protecting children and regulating the medical field. Record 2.

Because of the SAME Act, neither Jess, his parents, nor their physician can legally obtain the gender-affirming care for Jess that he so desperately needs. Record 8. Obtaining gender-affirming treatment has turned this family's lives around for the better and given them a glimmer of hope and positivity. Record 5. The State is snatching the decision from their hands. Record 5. For these reasons, the Marianos have filed suit against the State of Lincoln's Attorney General April Nardini in her official capacity, requesting this court grant a preliminary injunction pending trial. Record 8.

Procedural History

The Marianos filed a motion for preliminary injunction in response to the State's newly enacted SAME Act. Record 1. The State then filed a motion to dismiss, urging the district court to deny the request for a preliminary injunction. Record 1. The district court granted the Marianos' request and denied the State's motion to dismiss Record 2. On interlocutory appeal, the Fifteenth Circuit affirmed the district court's ruling. Record 27. The State appealed to this Court seeking a stay on the district court's preliminary injunction and a writ of certiorari to consider the merits of the injunction and denial of its motion to dismiss Record 33.

SUMMARY OF THE ARGUMENT

A movant seeking a preliminary injunction must establish: (1) success on the merits, (2) irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is the public's interest. After this Court expressly overruled the Ninth Circuit's "possibility" of irreparable harm standard in *Winter*, some courts began to question the validity of the "serious question" standard for the merit element. The "serious question" standard is one of two approaches that have emerged to address the merit element of the preliminary injunction analysis. The "serious question" analysis permits movants to establish the merit element if they show (1) there is a serious question regarding the merits and their case and (2) the balance of irreparable harm tips decidedly in their favor. The alternative "likeliness" standard rigidly requires movants to establish that they are "likely" to win the case before they step foot in the courtroom.

Despite debate among a handful of courts, the "serious question" standard survived the *Winter* opinion and is supported by public policy. A plain reading of the *Winter* opinion reveals that the Court, despite ample opportunity, deliberately avoided eliminating the "serious question" standard. Meanwhile, the *Winter* Court struck down the Ninth's circuit "possibility of harm standard" and chose to not respond to Justice Ginsburg's dissent explicitly saying that the serious question survived *Winter*. The majority of federal circuit courts that have ruled on this issue agree with this reading of *Winter*. Not only did the serious question survive procedurally but it also upholds the public policy behind preliminary injunctions: providing a high burden but equitable relief to deserving movants.

The Marianos are “serious question” movants who have met this high burden. They demonstrated at both the trial and appellate level that the balance of irreparable harm weighs decidedly in Jess’s favor. Furthermore, the Marianos at the very least have raised serious questions regarding the merits of their constitutional claims.

The Marianos are likely to succeed on the Substantive Due Process claim. The Supreme Court has long held that parents have a fundamental right to make decisions on the care, custody, and control of their children, including medical decisions. While parents' rights include seeking experimental medical treatment for their child, gender-affirming care is not experimental. The State of Lincoln stripping Thomas and Elizabeth Mariano of their choice to obtain puberty blockers and other gender-affirming treatments is a breach of their fundamental right. Because this is a

breach of a fundamental right, the State's action, the SAME Act, is subject to strict scrutiny. The State fails strict scrutiny for three reasons; the SAME Act does not provide the least restrictive means possible, is underinclusive, and is not necessary to achieve the State's compelling interests.

The Marianos are likely to succeed on the Equal Protection Claim. The State of Lincoln triggered a heightened level of scrutiny in two ways through the SAME Act. First, historically, government discrimination using sex-based classification triggers a heightened level of scrutiny under the Equal Protection Clause. Discriminating against someone for being transgender is included in sex-based classifications. The State denying Jess and other transgender children access to medical treatment that it leaves available to all other children is a sex-based classification subject to heightened scrutiny. Secondly, when the State places a special disability on children for reasons out of the child's control, the State's actions are subject to a heightened level of scrutiny. The State of Lincoln fails heightened scrutiny because The SAME Act is not substantially related to a substantial government interest. The Act is severely underinclusive as it relates to the interest of protecting children and is unnecessary because legitimate procedures well regulate the medical field.

STANDARD OF REVIEW

Questions of law on appeal are reviewed de novo. *See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). This is case involves two questions of law on the preliminary injunction merit analysis and the constitutional claims of petitioners. Thus, this Court will independently review the district court's preliminary injunction de novo. Under this standard of review, the district court will not be afforded deference.

ARGUMENT

I. This Court should affirm because the Court of Appeals properly ruled that the "serious question" standard prevailed after Winter.

The district court and Fifteenth Circuit properly granted the Marianos' motion for a preliminary injunction and denied the State of Lincoln's motion to dismiss. To be afforded preliminary injunctive relief a movant must show: (1) success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities or hardships in their favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def Council, Inc.*, 555 U.S. 7, 20 (2008). Two primary approaches have emerged as legal frameworks for evaluating the "merits" element of a preliminary injunction: the "likeliness" standard and the "serious question" standard. *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.,* 598 F.3d 30, 35 (2d Cir. 2010). The "likeliness" standard requires the movant to prove that they are "likely" to succeed on the merits. *Id.* The "serious question" standard "permits a district court to grant preliminary injunctions in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits." *Id.*

A handful of courts questioned the continuance of the "serious question" standard after this Court struck down the Ninth Circuit's "possibility of irreparable harm" standard, regarding the irreparable harm element, in *Winter v. Nat. Res. Defense Counsel*. *Winter*, 55 U.S. at 20; *See e.g. Real Truth About Obama v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009). These courts conflate the *Winter* opinion to an overruling of the "serious question" standard. The issue before this Court is whether the "serious

question" standard, regarding the merit element of the preliminary injunction analysis, survived *Winter*.

The district court and Fifteenth Circuit correctly applied the "serious question" standard as the proper legal framework to resolve preliminary injunctions disputes. The *Winter* opinion and federal circuit case law after *Winter* support the continuance of the "serious question" standard. Thus, the "serious question" standard has both judicial support and aligns with the fundamental purpose and public policy behind preliminary injunctions. This Court should uphold the "serious question" standard and protect the judicial rights of deserving individuals.

A. The *Winter* opinion and the post-*Winter* case law across federal circuit courts permit the continuance of the serious question standard.

The *Winter* opinion and post-*Winter* case law among federal circuit courts support the continuance of the "serious question" standard. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011) (Noting that the *Winter* court never directed lower courts to abandon the "serious question" standard). The body of case law on this issue does not support the contention that *Winter* overruled the "serious question" standard for two reasons. First, a plain reading of the *Winter* opinion reveals that the Court declined to address the "serious question" standard despite ample opportunity. Second, most federal circuit courts have upheld the serious question standard after *Winter*.

1. The intent of the Winter Court, as seen in the express words of the opinion, does not overrule the “serious question” standard.

A plain reading of the *Winter* opinion reveals that this Court did not intend to overrule the “serious question” standard. First, despite ample opportunity, it did not expressly overrule the "serious question" standard. Second, this Court did not address Ginsburg's dissent, which says that the "serious question" standard likely survived *Winter*. Third, the *Winter* Court explicitly overruled a legal test used for the "irreparable harm" element of preliminary injunctions but did not discuss the "serious question" standard.

The *Winter* Court never addressed the "serious question" standard regarding the merit element of a preliminary injunction analysis. In *Winter*, a group of individuals devoted to protecting marine mammals and ocean habitats sought a preliminary injunction to stop Navy MFA sonar training exercises. *Winter,* 555 U.S. at 367. The plaintiffs established that the FMA sonar possibly harmed marine life. *Id.* The element in contention in *Winter* was "irreparable harm." *Id.* The Ninth Circuit granted the preliminary injunction under the "possibility of irreparable harm" standard. *Id*. at 17. However, this Court reversed because "the 'possibility' standard is too lenient." *Winter*, 555 U.S. at 22. The *Winter* court notably declined to address the standards used for the "merit" element of the preliminary injunction analysis. The Winter court's silence regarding the “serious question” standard speaks volumes about its intent: to singularly overrule the “possibility of harm” standard. Unlike the plaintiffs in *Winter*, the Marianos decidedly established irreparable harm to Jess.

Using this case as a vehicle to deny the Marianos injunctive relief would be a gross mischaracterization of *Winter's* purpose and holding.

The majority opinion's silence in regard to the "serious question" analysis is also telling in light of Justice Ginsburg's dissenting opinion. *See Id.* Justice Ginsburg explicitly noted in her dissent that the "Court has never rejected [the sliding scale] formulation, and I do not believe it does so today . . . the majority opinion in *Winter* did not disapprove the sliding scale approach." *Cottrell*, 632 F.3d at 1132. Before publishing the majority opinion, Justice Robert had ample opportunity to address Justice Ginsburg's dissent regarding the "serious question/sliding scale" standard. Justice Robert notably declined to address the standard anywhere in the opinion. *See Winter*, 555 U.S. at 22 **(**Declining to address the merit question despite Justice Ginsburg's dissent asserting that the "serious" question standard survived); *See* Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 1, 3 (2010). (Explaining the important role dissenting opinions have on guiding and refining majority published opinions). Thus, pointing to *Winter* as grounds for overruling the "serious question" standard would misrepresent the actual opinion and lead to injustice for deserving individuals seeking relief.

While the express language does not overrule the serious question approach, it does overrule the Ninth Circuit's "possibility of irreparable harm standard" standard. *Id*. The *Winter* court expressly overruled the use of the Ninth circuit's "possibility of irreparable harm" standard when it said, "Issuing a preliminary injunction based only a possibility of irreparable harm is inconsistent with our

characterization of injunctive relief. . ." *Id*. This is relevant to our evaluation of the merit element of a preliminary injunction analysis because it demonstrates that the *Winter* court did not shy away from overruling preliminary injunction standards. In other words, the *Winter* court took time to overrule one legal standard in the preliminary injunction analysis but intentionally did not address the other. This Court's decision that the Ninth Circuit's "possibility of harm standard is too lenient" also emphasizes the purpose of the *Winter* opinion: to evaluate the "irreparable harm" element of the preliminary injunction analysis. *Id.* at 11. This Court should not conflate *Winter's* overruling of the "possibility of irreparable harm" standard to encompass an additional overruling of the "serious question" standard.

2. Post-*Winter* case law across federal circuit courts uphold the "serious question" standard when granting or denying preliminary injunctions.

Post-*Winter* case law from sister courts across the federal circuits also supports the continuance of the "serious question" standard despite *Winter's* overruling of the "possibility of irreparable harm" standard. The Second Circuit in *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.* upheld the "serious question" approach. *Citigroup Glob. Markets*, 598 F.3d at 39. This trend is seen among numerous other sister courts. *E.g.*, *Cottrell*, 632 F.3d at 1132.

For example, the Tenth Circuit adopted a similar sliding scale approach in which "a movant need only show questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *Id.* at 1134. The Tenth Circuit went on to state that the

"'serious question' test is one version of the 'sliding scale' approach to preliminary injunctions" and that a majority of "sibling circuits have adopted a similar test." *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1286 (10th Cir. 2016).

Additionally, Judge Easterbrook, presiding over the Seventh Circuit, was the first to hold that the sliding scale test survives *Winter*. *Id.* at 1133. In *Hoosier Energy Rural Elec. Co-op, Inc. v. John Hancock Life Ins. Co.,* the Seventh Circuit, held that the strength of a claim on the merits "depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.,* 582 F.3d 721, 725 (7th Cir.2009). Notably, the Seventh Circuit only cites *Winter* when discussing the irreparable harm element of a preliminary injunction analysis.

Finally, in 2011 the Ninth Circuit again emphasized the fact that *"Winter* did not, however, explicitly discuss the "sliding scale" approach to preliminary injunctions employed by this circuit and others." *Cottrell*, 632 F.3d at 1131. Consequently, the Ninth Circuit decided to "join the Seventh and Second Circuits in the conclusion that the "serious question" remains viable after the Supreme Court's decision in *Winter*." *Id.* at 1134. Thus, the cases above illuminate that sister circuit courts have concluded that *Winter* does not preclude the application of the "serious question" standard.

B. The "serious question" standard is a high burden for movants and promotes the public policy behind preliminary injunctions.

Not only does the *Winter* opinion and post-*Winter* caselaw support the continuance of the "serious question" standard, but the standard also maintains a high burden for the movant and aligns with public policy. "The value of this circuit's approach to assessing the merits of a claim at the preliminary injunction stage lies in its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation" *Citigroup Glob. Markets, Inc.*, 598 F.3d at 35–36. The serious question standard, unlike the "likeliness standard" promotes flexibility, while maintaining a high burden for movants. Furthermore, it aligns with the preliminary injunction's purpose.

1. The "serious question" standard provides flexibility while still creating a high burden for movants to establish.

A "serious question" movant must not only show that there are "serious questions" going to the merits but must additionally establish that "the balance of hardships tips *decidedly*" in its favor. *Id.* at 35. The movant's burden under the "serious question" standard is not less than the "likeliness" standard because the moving party has the additional burden of decidedly establishing that that they are more irreparably harmed than the opposing party. *Id.* Thus, a "serious question" movant faces an additional high burden that the "likeliness of success" movant does not.

Although the "serious question" standard is more flexible than the "likelihood" standard, it cannot be characterized as "back door" to preliminary injunctive relief.

Movants that survive the serious question standard, but not the "likeliness" standard, are still deserving of a temporary relief during litigation. This is because "serious question" movants must establish that there is fair ground for litigation and that they will be irreparably harmed more than the opposing party in the interim. Fairness necessitates that parties be given temporary injunctive relief when they can establish that "the balance of hardships tips *decidedly*" in their favor. *Id*.

2. Public policy and the purpose of preliminary injunctions support the continuance of the "serious question" standard.

Public policy necessitates that the equitable relief provided by preliminary injunctions be flexible enough to account for the facts and circumstances of each case. *Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109, 113 (8th Cir. 1981). The purpose of preliminary injunctions is to give temporary relief based on an estimate of the plaintiff's suit prior to trial resolution. *Id*. This purpose will not be realized if the tool is only applied to cases where there are no significant difficulties. *See* § 2948.3 Grounds for Granting or Denying a Preliminary Injunction—Probability of Success on the Merits, 11A Fed. Prac. & Proc. Civ. § 2948.3 (3d ed.) (Explaining the purpose of a preliminary injunction). Application of the rigid "likeliness of success" standard alone contradicts the purpose of the preliminary injunction while depriving deserving parties of temporary relief. In doing so, it also denies flexibility to the facts of individual cases, again undermining the preliminary injunction's purpose as a civil procedure tool.

To require the likeliness of success standard for all movants seeking a preliminary injunction would narrow the pool of successful movants to an unjust few.

The preliminary injunction, although an extreme remedy, is only temporary during the pendency of a trial. In cases where there is an argument about the application of the "likeliness" or the "serious question" standard, the movant has likely already established irreparable harm. Otherwise, the preliminary injunction would be void due to lack of irreparable harm. Without the "serious question" standard, courts may become stagnant. They will deny irreparably harmed movants temporary relief despite the movant's ability to show there is a fair chance in litigation. There is no justice in this rigidity when the stakes for movants are so high. Not only would this be unjust, but it would also deprive the remedy of much of its utility. *Citigroup Glob. Markets, Inc.,*598 F.3d at 36. (Explaining that limiting preliminary injunctions exclusively to cases without significant merit difficulties will strip the equitable remedy of its usefulness). As a result, the preliminary injunction will become a relic, rarely ever providing just relief in our judicial system.

C. The "serious question" standard survives the Winter opinion because the Winter opinion, post-Winter federal circuit case law, and public policy support its continuance.

The serious question standard creates a high burden for the preliminary injunction movant but is flexible enough to afford deserving individuals temporary relief. It is the only legal framework that provides relief for parties who will be irreparably harmed but can't meet the rigid standard of proving that their case will likely succeed on the merits. In other words, it does not force irreparably harmed movants to win their case before they step foot in the courthouse. For the foregoing

reasons, this Court should affirm the lower courts' decision, uphold the "serious question" standard, and afford the Marianos injunctive relief.

II. The lower courts properly granted injunctive relief because the Marianos are likely to succeed on the merits of their Substantive Due Process and Equal Protection Claims.

For the Court to grant a preliminary injunction, the movant must prove they raise a serious question on the merits of their claim. The Mariano family is raising a Substantive Due Process claim and an Equal Protection claim. The Mariano family has raised a serious question on their Substantive Due Process claim. The State of Lincoln, through the SAME ACT, has infringed upon Thomas and Elizabeth Marianos' fundamental rights to medical decisions and decisions on the care, custody, and control of their child, Jess. This government infringement of a fundamental right is subject to strict scrutiny. The State fails strict scrutiny because it did not tailor the SAME Act to be narrowly tailored to its compelling government interests. The Mariano family has raised a serious question on their Equal Protection claim. The State is subject to a heightened level of scrutiny for two reasons; first, the SAME Act discriminates against Jess using a sex-based classification, and second, the State places a special disability on a subgroup of children, and not others, for reasons outside of the children's control. The State fails the heightened level of scrutiny because the SAME Act is not substantially related to its important government interests.

A. The Marianos are likely to succeed on the merits of their Substantive Due Process Claim

The Due Process Clause in the Fourteenth Amendment holds that the government cannot deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. The Supreme Court has held that some rights are so essential that the Constitution includes them in the Fourteenth Amendment word "liberty." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). These rights are called fundamental rights. *Id*. To be deemed fundamental, a right must be so "deeply rooted in this Nation's history and tradition" as to be implicit in the concept of liberty. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022). Many fundamental rights are taken directly from the Bill of Rights, and some the Supreme Court has incorporated through the Ninth Amendment, which holds that the Bill of Rights is not an exhaustive list of all rights. U.S. Const. amend. IX, § 1. When the State infringes upon a person's fundamental right, it triggers a Substantive Due Process claim under the Fourteenth Amendment. *Dobbs,* 142 S. Ct. at 2242. If the State does not satisfy the strict scrutiny hurdle, its actions will be deemed unconstitutional. *See e.g. Troxel*, 530 U.S. 57, 65, (2000). For the Court to grant a preliminary injunction, as discussed *supra* at I, the Mariano family does not have to prove that they will win on the merits of their Substantive Due Process claim but only raise a serious question on the merits.

1. Lincoln unjustly deprived the Marianos of their fundamental right to make decisions regarding their child's care, custody, and control by restricting Jess's access to gender-affirming care.

The Supreme Court has long held that parents have a fundamental right to make decisions on their children's care, custody, and control. *Id*. A government regulation that denies a parent the ability to make decisions on the care of their child breaches the parent's fundamental right to decide on the care, custody, and control of their children. *Id*. The Troxel Court walked through over 75 years of history surrounding the right. *Id*. The Court designated that, considering this "extensive precedent", this right of parents is undoubtedly fundamental under the Due Process Clause of the Fourth Amendment. *Id*.

The Court has further held that parents have the fundamental right to make medical decisions for their children, subject to a physician's independent judgment. *See Parham v. J. R.*, 442 U.S. 584, 604 (1979). The *Parham* Court permitted parents' voluntary admission of their children to a Georgia state mental hospital. *Id* at 584. The hospital would only release the child at the parent's request or a discharge order from the hospital superintendent. *Id*. The Court discussed the broad parental authority that Western civilization and this decision reflect. *Id* at 602. It stated that parents have a right and high duty to seek care for their children, which surely includes right and duty to "recognize symptoms of illness and to seek and follow medical advice." *Id*. The *Parham* Court held that precedent establishes that parents have the fundamental right to make medical decisions for their children, subject to a physician's independent examination and judgment. *Id* at 603.

a. The parental right to make medical decisions for their child includes experimental treatments.

In *Parham*, This Court held that a medical decision involving risk does not strip parents of their decision-making power and responsibility or transfer it to the State. *Id*. Supreme Court precedent established that in the medical setting, parents "retain a substantial, if not the dominant, role in the decision." *Id*. At the heart of *Parham* decision is the presumption that the parent's decision is in the child's best interest, absent the parent being found unfit. *Id*. The contention that some parents do not make decisions in the best interests of their children does not rebut this presumption. In his fierce defense of the family unit in the *Parham* opinion, Justice Burger wrote, "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Id* at 602.

Presently, the State seeks to strip the Marianos of their right to make the best choice for their child, not over parental abuse or neglect, but because the State perceives some risk associated with the treatment. The State's primary contention is that gender-affirming treatment imposes risks upon children. Record 3. Simply because the State perceives that there might be risk in the decision to seek this treatment for children does not give the State the power to override parents' decision to do so for their child. If the State has the power to strip parents of their rights and authority to care for their children because of any risk it may perceive, parents will lack the ability to make any important decisions for their children. The State would have the power to obstruct a parent from seeking chemotherapy for their child

diagnosed with cancer or steroids for their child's asthma, simply because there are significant health risks involved. The State is snatching the role of parent away from families.

The State is administering the SAME Act because it believes there are some risks to children. Record 3. The State points to risks as an indicator that gender-affirming care is experimental. Record 15. However, precedent has established that risk is not sufficient to obstruct parents' right to make medical decisions for their children. *Parham*, 442 U.S. at 602. Following the Supreme Court's precedent in *Parham*, the Marianos have a superior right to make this medical decision for Jess, even if the treatment is considered experimental.

b. Gender-affirming care is not experimental.

Regardless of if the Court finds that experimental treatment is, or is not, included in parents' fundamental rights, gender-affirming treatment is not experimental. While this Court has never provided a test to define "experimental treatment", many circuit courts have addressed the issue. The word "experimental" is very ambiguous when used in medical terms, making it difficult to establish an effective judicial standard. *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1260 (3d Cir. 1993). Because of this ambiguity problem, the circuit courts have reinforced that the proper way to determine if a treatment is experimental relies on medical research and practice. *E.g. id.*

i. Gender-affirming care is not experimental because it is in accordance with standard medical practice.

Medical treatment done in accordance with "generally accepted standards of medical practice" is not experimental. *Pirozzi v. Blue Cross-Blue Shield of Virginia*, 741 F. Supp. 586, 590 (E.D. Va. 1990). In *Pirozzi*, the respondent denied the petitioner insurance coverage for high-dose chemotherapy treatment because the company claimed the treatment was experimental. *Id* at 588. The *Pirozzi* court defined "experimental" by looking to the medical practice. *Id* at 590. While deciding the treatment was not experimental, the court reasoned that medical treatment "in accordance with generally accepted standards of medical practice" would hardly be "experimental." *Id*.

Similarly, the medical profession has created and practiced generally accepted standards for gender-affirming care. Several universities and health organizations have developed widely accepted guidelines for treating gender dysphoria.[1] These guidelines include gender-affirming care and persons of all ages.[2] Furthermore, all leading medical organizations in the United States, including the American Medical Association, oppose denying gender-affirming care to minors.[3]

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[1] *E.G.* 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] *Id.*
[3] 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/newsroom/news-releases/aap/2021/frontline-physicians-oppose-legislation-that-interferes-inor-penalizes-patient-

ii. FDA approval does not determine if medical treatment is experimental.

The Federal Drug Administration (FDA) is a federal agency dedicated to determining the safety and regulating the use of medical drugs. When the FDA approves a drug for treatment, health care providers may legally prescribe it for treatments other than those approved; this practice is called off-label prescription.[4] One in five prescriptions in the country today are off-label prescriptions.[5] This statistic includes relatively mild, low-risk treatments such as nicotine patches.[6] These patches are FDA-approved but not for children under 18.[7] While nicotine patches are not FDA approved for children, they are still widely prescribed to combat vaping and smoking cessation addiction.[8] This practice is so widespread that there are medical guidelines for using the treatment in this non-FDA-approved manner.[9] While this treatment is not FDA approved it is almost universally accepted, indicating that it is hardly experimental.

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care/?_ga=2.89126099.973451188.1655923488-1054175941.1655923488. (Issuing a joint statement of organizations representing nearly 600,000 physicians).

[4] *Understanding the Regulatory Terminology of Potential Preventions and Treatments for COVID-19,* U.S. Food & Drug Admin. Oct. 22, 2020, https://www.fda.gov/consumers/consumer-updates/understanding-regulatory-terminology-potential-preventions-and-treatments-covid-19.

[5] Carolyn M. Clancy, M.D., *Navigating the Health Care System,* Apr. 21, 2009, https://www.ahrq.gov/patients-consumers/patient-involvement/off-label-drug-usage.html#:~:text=Off%2Dlabel%20prescribing%20is%20when,are%20for%20off%2Dlabel%20use.

[6] Meredithe McNamara, M.D., M.S., *A Critical Review of the June 2022 Florida Medicaid Report on the Medical Treatment of Gender Dysphoria,* at 20-21, Yale Univ. Medicine 2022.

[7] *Id.*

[8] *Id.*

[9] *Id.*

If the SAME Act were to take effect, it would disallow the common practice of physicians providing puberty blockers for gender-affirming care. Puberty blockers are FDA approved and have been used to delay puberty in young children since the 1980s.[10] Puberty blockers are legal and have been deemed safe for children by the FDA and numerous health institutions. This treatment is still safe and legal whether or not the child is diagnosed with gender dysphoria. The wide acceptance and use of off-label treatments for gender-affirming care over nearly 50 years indicate the treatment option is not experimental. The lack of FDA approval for many gender-affirming treatments does not determine their experimentality status.

iii. Insurance providers support gender-affirming care.

Insurance companies invest substantial effort and resources to define "experimental treatment" because they have compelling financial interests in the determination. *See Pirozzi*, 741 F. Supp. at 590 (holding that a bone marrow transplant was not experimental and, as such, respondent could not deny petitioner insurance coverage). Insurance companies collect premiums from thousands of customers who have an insurance plan.[11] When a customer needs coverage, the company uses the pool of premiums to pay.[12] The fewer instances of coverage a

[10] *See* Jason Rafferty, Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents, American Academy of Pediatrics Policy Statement (Oct. 1, 2018) at 5, https://perma.cc/D4R6-GP6C (noting puberty blockers have been used since the 1980s).
[11] Sonia Barkat, *How Do Health Insurance Companies Make Money?* Healthcare Insider (Feb. 18, 2021), https://healthcareinsider.com/how-health-insurance-companies-make-money-60577.
[12] *Id.*

company must pay for, the more money it retains.[13] This dynamic gives insurance companies a compelling interest in not covering high-risk medical care, such as experimental treatment. Through research, medical treatments that are perceived to have less risk tend to be the treatments most covered by insurance providers. Insurance providers covering medical treatment indicate that the treatment is not experimental.

Gender-affirming care has high rates of insurance coverage in the United States today.[14] Upwards of 98% of insurance companies cover some kind of gender-affirming surgery.[15] Furthermore, 31% of insurance plans cover puberty blockers as necessary for the purpose of gender-affirming care.[16] The high coverage rate by insurance providers is a strong indicator that there is compelling research behind the safety of gender-affirming care, and it is not experimental.

In both *Parham* and the present case, the Court determines who decides what is in the best interest of children needing medical treatment for their mental health. In Parham, this Court's deafening response is that parents decide. The SAME Act strips the Mariano parents of the choice to seek medical treatment for their child. This treatment has been independently approved and recommended by Dr. Dugray, a licensed physician. Record 5. Supreme Court precedent highlights that the

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[13] *Id.*
[14] Cohen, Wess A. MD, *Navigating Insurance Policies in the United States for Gender-affirming Surgery*, 7 PRS Global Open (2019).
[15] *Id.*
[16] Nadia L. Dowshen, *Health Insurance Coverage of Recommended Gender-Affirming Health Care Services for Transgender Youth: Shopping Online for Coverage Information*, 4 Transgender Health 131 (2019).

fundamental right to make a child's medical decision is in the hands of the parents, not the State; any risk involved does not supersede that right. Even if this Court decides that this right does not protect experimental treatment, the lack of experimental classification guarantees the protection of the Mariano parents' choice to seek gender-affirming care for their child.

2. The State's breach of the Marianos' fundamental right is subject to strict scrutiny.

Statutes that interfere with fundamental rights are subject to strict scrutiny. *E.g. Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983). In *Regan*, the Supreme Court dealt with the State's infringement of another fundamental right. *Id* at 540. The Reagan Court notes that a statute is ordinarily constitutionally valid if it rationally relates to a legitimate government interest. *Id* at 2001. However, Supreme Court precedent holds that regulations interfering with fundamental rights are subject to stricter scrutiny. *Id.*

Like *Regan,* the Court addresses if a statute unconstitutionally breaches a fundamental right. As discussed in the prior section, the SAME Act directly and substantially interferes with the Marianos' fundamental rights to make medical decisions and decisions on the care, custody, and control of their child. Precedent holds that any regulation that interferes with a fundamental right must satisfy strict scrutiny. *E.g. id*. Following the long-held Supreme Court precedent, the SAME Act is subject to strict scrutiny.

3. The SAME Act fails strict scrutiny because it is not narrowly tailored to the State's compelling interest.

A statute must be narrowly tailored to achieve a compelling state interest to satisfy strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 302 (1993). In *Reno,* the Court decided if a child with no legal guardian had a fundamental right to refuse government living placement and if immigration procedure infringed upon it. *Id* at 292. The Court explained the strict scrutiny analysis, indicating that unless the government's infringement on a fundamental right is "narrowly tailored to serve a compelling state interest," it fails the test. *Id* at 302. The Marianos concede that the State has compelling interests in protecting children and regulating the medical profession. For that reason, this brief will only address the remaining element of strict scrutiny.

a. The SAME Act is not narrowly tailored because it does not provide the least restrictive means necessary to fulfill its purpose.

A statute must provide the least restrictive means necessary to fulfill a compelling government interest to be narrowly tailored. *Holt v. Hobbs*, 574 U.S. 352, 365 (2015). In *Holt* an Arkansas correctional facility prohibited prisoners from growing beards. *Id* at 322. A Muslim inmate sought an exemption on religious grounds. *Id*. The Court found that the State had a compelling government interest in preventing prisoners from hiding their identities. *Id* at 364. However, the restriction still failed strict scrutiny because it was not the least restrictive means of fulfilling its purpose. *Id* at 366. *Holt* presented the Court with the alternative of photographing

inmates without beards when entering the prison and then again if the beard reached a designated length. *Id*. The Court accepted this as a valid, less restrictive means. *Id.*

Like *Holt,* The SAME Act is not the least restrictive means to fulfill the government's interests of protecting children or regulating the medical field. Similar to the solution the Supreme Court presented in *Parham*, the State could allow neutral factfinders (likely physicians) to decide if a child would likely benefit or be harmed by gender-affirming care on an individual basis. *Parham*, 442 U.S. at 606-07. An individual who gathers knowledge about the child's health, history, environment, and other factors is much more likely to make an informed decision than a legislator who knows nothing about the child. *See id*. This option would be much less restrictive than a blanket ban on gender-affirming care for all children who seek it. The State allowing this neutral factfinder the discretion to analyze risk factors of the individual child and deny treatment to only those with sufficient risk accomplishes the States objectives of protecting children and regulating the medical field. The SAME Act is not the least restrictive means to fulfill the purpose of protecting children or regulating the medical field. Subsequently, it fails strict scrutiny.

b. The SAME Act is not narrowly tailored to government interests because it is underinclusive because does not protect all children.

To be narrowly tailored, the government's legislation cannot be underinclusive. *Holt*, 574 U.S. at 359. In *Holt*, a state prison regulation disallowed inmates from growing a half-inch beard. *Id* at 366. The Court held that the State had a compelling interest in security. The Court also held that the state regulation was insufficient to

pass strict scrutiny. *See id* at 367-68. The regulation was underinclusive for two reasons (1) it allowed inmates with a dermatological condition to grow a quarter-inch beard which, posed the same risk (2) inmates were allowed to grow hair on their head longer than a half inch which, is just as plausible, if not more plausible, a place to hide a weapon or contraband. *Id*. This under-inclusiveness was enough reason for the Court to decide the State did not narrowly tailor its regulation to its compelling interest. *See id*.

Like *Holt*, the SAME Act is underinclusive as it relates to the compelling government interest of protecting children. The Act criminalizes medically treating children with the purpose of gender-affirming care. Record 3-4. However, these same treatments are available to children for other purposes. Record 3-4. For example, hormone treatment remains available for children with endocrine disorders or precocious puberty. The State claims its goal is to protect children from potentially dangerous medical treatment but leaves the treatment available to most children in its jurisdiction. This severe under-inclusiveness indicates that the State did not narrowly tailor the SAME Act to fit the compelling government interests. Consequently, the Act fails strict scrutiny here.

c. The SAME Act is not narrowly tailored to government interests because regulating the medical profession is unnecessary when physicians follow the law and standard practice

For the State to narrowly tailor its action, it must be "necessary to achieve" the compelling interest. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632 (1969). In this case, the school district restricted its elections to those who could otherwise

vote in a state election that (1) own taxable property within the district or (2) have children enrolled in the school district. *Id* at 621. The State claimed that the school district had compelling interests to limit the education decisions to those directly affected by them. *Id* at 631. The Court held that the State did not narrowly tailor the regulation to achieve the compelling interest because it was not necessary to further that interest. *Id* at 633.

The SAME Act denies vital gender-affirming care for transgender children. The State justifies stripping children of this necessary medical care by pointing to its interest in regulating the medical profession. It is not necessary because the profession already adequately regulates this area. Physicians who provide gender-affirming care do it legally and while following standard practice. Madeline B. Deutsch, MD, MPH, *Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People*, (2016). The medical profession has guidelines and standard procedures for gender-affirming care. *Id*. It is not necessary to regulate the medical profession where it is already sufficiently regulated. Thus, the State did not narrowly tailor the SAME Act to achieve a compelling interest; subsequently, it fails strict scrutiny, making it unconstitutional under the Fourteenth Amendment.

4. The State fails rational basis review because of the SAME Act's arbitrary nature.

If this Court decides that the State's actions are an infringement on the Mariano's fundamental rights and should be subject to rational basis review, the family is, nevertheless, likely to succeed on the merits. State action in question must

be rationally related to a legitimate government interest to survive rational basis review. *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). In *Moreno*, the Court considered the constitutionality of the Food Stamp Act of 1964 in an Equal Protection claim. *Id* at 529. It took the traditional approach and language of rational basis review, that state action may only be constitutional if it "is rationally related to a legitimate governmental interest." *Id* at 533.

For the same reasons the State has compelling government interests, discussed *supra* at II(A)(4), it is presumed the State has legitimate government interests. For that reason, this brief will address only the remaining element of rational basis review.

One of the few reasons this Court has consistently held state action is not rationally related to a legitimate interest is if the action is arbitrary as it relates to the interest. *See E.g. City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985). In *Cleburne*, the Cleburne Living Center sought a zoning permit from the city for a group home to care for individuals with mental retardation. *Id* at 432. after being denied, the center challenged the zoning ordinance through an equal protection claim. The Court applied rational basis review. *Id*. One of the State's legitimate interests was its concern for the large size and occupancy of the home. *Id* at 449. The Court noted a key distinction: the city would have granted the permit if the potential home residents did not suffer from mental retardation and all other aspects were the same. *Id*. There were no restrictions on size in similar situations like nursing homes or fraternity houses. *Id*. While those with the mental disability were different, the

State did not provide any evidence explaining why people having this disability warranted suffering regulation others were not restrained by. The Court held that the ordinance was not rationally related to the State's interest because there was no rational reason why those with mental retardation could not live together and others could. *Id* at 450.

The Same Act suffers a similar arbitrariness to the ordinance in *Cleburne*. Here, the only line the State draws between those children with and without access to treatment is arbitrary; children with gender dysphoria do not get access to the same treatment all other children do. The State points to evidence such as, risks from medical procedures and permanent effects of some treatments. Record 2-3. However, these contentions do not sufficiently explain why gender dysphoria warrants having suffering restrictions other children do not because the contentions are not exclusive to gender dysphoria. These general concerns may be present in any case where the children obtain treatment, not just for gender-affirming care. There is no rational reason why children suffering from gender dysphoria should have less access to this medical treatment. The State has an interest in protecting children, but there is no rational reason the State's smothering patronage should extend to any one subgroup of children and not others. The State has an interest in regulating the medical profession. Still, there is no rational reason that the State should disallow this treatment for gender-affirming care but leave it accessible for any other medical purpose. The SAME Act's discrimination is arbitrary, and as such, is not rationally related to the State's legitimate interests of protecting children and regulating the

medical field. Subsequently, the State fails rational basis review and is unconstitutional.

B. The Marianos are likely to succeed on the merits of their Equal Protection claim.

The Equal Protection Clause in the Fourteenth Amendment was drafted just after the Civil War to constitutionally combat the injustice of discrimination. This critical clause holds that no state shall deny any person within its jurisdiction "the equal protection of the laws." *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.,* 347 U.S. 483, 488 (1954). Any government action that discriminates against an individual based on a classification, such as race or gender, triggers the Equal Protection Clause. *E.g. Obergefell v. Hodges,* 576 U.S. 644, 673 (2015). Depending on how suspect the classification is, the government must satisfy a certain test of scrutiny, or its action will be deemed unconstitutional. *See id* (discussing Equal Protection cases including sex-based and race-based discrimination). For the Court to grant a preliminary injunction, as discussed *supra* at I, the Mariano family does not have to prove that they will win on the merits of their Equal Protection claim, but only raise a serious question on the merits.

1. The SAME Act's classification of transgender people is sex-based.

Discrimination against transgender people is a sex-based classification and subsequently is protected by the Equal Protection Clause. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1741, 207 L. Ed. 2d 218 (2020). In *Bostock*, an employer fired a transgender individual due to gender identity. *Id* at 1734. The Court explained

that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id* at 1741. It is impossible because you cannot discriminate against someone identifying as transgender without discriminating against them for their behavior; this is behavior that you would accept from someone biologically the sex the behavior commonly belongs to. For example, an adult cisgender male running topless in public could do so without fear of legal consequences. However, a transgender male, born biologically female, could be cited for indecent exposure, or jailed for the same conduct. The discrimination based on being a transgender individual is tied with sex-based classification. While the *Bostock* Court adjudicated the case within the scope of Title VII, it does not change the logical conclusion regarding sex-based classification, which is within the scope of both Title VII and Equal Protection. The Court proceeded, explaining that even if other classifications play a part in the discrimination, it is still a sex-based classification. *Id*. It remains a sex-based classification because, but-for the sex-based classification, the discrimination would not have happened. *Id*.

Like Bostock, the SAME Act denies access to treatment, but only to those seeking gender-affirming care. This Act is the State directly discriminating against transgender people. Following Supreme Court precedent, this classification is sex-based under the Equal Protection Clause. Even if the discrimination includes age and procedural aspects in the decision, as the state claims, it is still a sex-based classification.

2. The SAME Act's discrimination against children with gender dysphoria because they do not conform to the stereotypical behavior of their biological sex, is sex-based discrimination.

Discrimination for nonconformity to the stereotypical behavior of a person's biological sex is evidence of sex-based discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). There the Court looked at a case of a company looking over a woman for promotion to partner. *Id* at 228. The respondent presented evidence of the employers' statements about not treating the employee favorably because she did not act like a woman. *Id* at 234-35. One of these statements was that she was too aggressive for a woman. *Id*. While ruling in favor of the employee, the Court reasoned that action based on a person not conforming to common gender stereotypes is action based on sex. *Id*.

Like in *Price Waterhouse,* the SAME Act discriminates against Jess and other children that take actions that do not conform to their biological sex. By definition, the act of obtaining gender-affirming care does not conform with the biological gender of the person seeking it. If Jess had, for example, an endocrine disorder that caused him to produce too much estrogen, hormone therapy would be accessible to him under the SAME Act. However, because Jess is seeking gender-affirming care, which does not conform with his biological sex, he does not have access to the same hormone therapy. Following the precedent set by the Court in *Price Waterhouse,* the State's discrimination against transgender people for not conforming to stereotypical gender behavior is a sex-based classification.

3. The State's sex-based discrimination is subject to a heightened level of scrutiny.

Government discrimination using sex-based classification is subject to a heightened level of scrutiny. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994). In that case, the State used nine of ten peremptory strikes to remove male jurors in the paternity and child support trial. *Id* at 127. The Supreme Court held that the Equal Protection Clause's prohibition of striking jurors based on race extended to gender as well. *Id* at 141. The Court then applied a heightened level of scrutiny to the State's actions, noting its precedent of doing so discrimination based on sex. *Id*.

In the present case, like *J.E.B.*, the State discriminates against Jess and other transgender children using a sex-based classification. This sex-based discrimination triggers the Equal Protection Clause. Following the Supreme Court's long-held precedent, this discrimination is subject to a heightened level of scrutiny. This Court has historically applied this level of scrutiny to sex-based classifications as a strict standard. The scrutiny does not permit severe under-inclusiveness or action unnecessary to fulfill its purpose.

4. The SAME Act is also subject to a heightened level of scrutiny because it places a special disability on transgender children for circumstances out of the children's control.

This Court has applied a heightened level of scrutiny where the government placed a special disability on a subgroup of children for circumstances the children have no control over. *See Plyler v. Doe*, 457 U.S. 202, 224 (1982). In *Plyer v. Doe*, the State of Texas legislatively withheld funds from school districts that would go to

educating children who were not legally admitted to the United States. *Id* at 202. While rational basis review is the customary standard for illegal alienage classification, the Court decided that applying rational basis review would not do the Equal Protection Clause justice. Rather, the State should have the burden of proving that it is furthering a substantial state interest. *Id* at 217-18. The Court reasoned that the standard should be different because they were children of those who illegally immigrated. *Id* at 220. Those children did not choose to violate the law and come into the country, adopting the disabling status of illegal aliens as their parents did. *Id*. Subsequently, imposing disabilities on those children would be "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Id*. This Court has protected children who are not legally admitted to this country with heightened scrutiny. This scrutiny should be the minimum level it uses to protect our citizens.

Like the children in *Plyer*, children with gender dysphoria do not have a choice in the circumstances. Medical disabilities are not a choice but an uncontrolled impairment that the diagnosed must live with or fight to rid themselves of. Furthermore, Gender dysphoria is a qualified disability under the Americans with Disabilities Act. *Williams v. Kincaid*, 45 F.4th 1, 6 (4th Cir. 2022). This qualification indicates a substantial impairment that the children diagnosed do not have control over.[17]

[17] *Information and Technical Assistance on the Americans with Disabilities Act,* U.S. Dept. of Justice Civil Rights Div. (2022) https://www.ada.gov/ada_intro.htm.

The State, through this legislation, is placing a special disability, not being able to seek particular treatment, on this subgroup of children and not others. For example, a child with an endocrine disorder that causes them to produce too much estrogen can obtain puberty blockers, or a boy who genetically grows more breast tissue than males commonly do can receive reduction surgery. However, a child with gender dysphoria cannot receive either of the prior treatments to treat their disability. Contrary to the core of our legal system, the State is punishing children for no wrongdoing or action of their own. Instead, children's DNA is the arbiter of what medical treatment is available to them. Because the State's legislation places a disability on a subset of children, and not others, for reasons out of the children's' control, the legislation is subject to a heightened level of scrutiny.

5. The State fails the heightened level of scrutiny test because the SAME Act is not substantially related to an important governmental interest.

To be successful in a heightened level of scrutiny, the State has the burden of showing that (1) the classification serves the important governmental interest and that (2) the discriminatory means is "substantially related to" the important governmental objectives. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). In *Hogan*, the State sought to limit the enrollment of a nursing school to only women. *Id* at 718. The Court applied a heightened level of scrutiny to the Equal Protection discrimination because it was a sex-based classification. It then detailed that the State can only meet the burden of heightened scrutiny by "showing at least that the classification serves important governmental objectives and that the

discriminatory means employed are substantially related to the achievement of those objectives." *Id* at 724.

For the same reasons the State has compelling government interests, discussed *supra* at II(A)(4), it is presumed the State has legitimate government interests. For that reason, this brief will address only the remaining element of heightened scrutiny.

a. The State's discrimination is not substantially related to its interest in protecting children.

A state's legislation cannot be substantially related to an important government interest if it contradicts that interest. *Hogan,* 458 U.S. at 730-32. In *Hogan*, the State sought to limit the enrollment of a nursing school to only women. *Id* at 718. In its heightened scrutiny analysis, the Court recognized that the State has an important government interest to compensate for the discriminatory barriers historically placed on women. *Id* at 730-31. However, the state action was not substantially related to the interest because the school allowed men to attend classes informally. *Id*. The Court reasoned that this was contrary to the State's interest and could not be substantially related. *See id*.

The SAME Act restricts the drugs and procedures used in gender-affirming care only in the case of transgender children, a small subset of children. The State has an important government interest to protect children but leaves the children it effects in the way of serious mental and physical harm. Untreated, gender dysphoria

often leads to higher rates of suicidality and mental illness.[18] In the present case, Dr. Dugray testified that even a single month without gender-affirming treatment could undermine all the progress made with Jess' depression. The State is sentencing Jess and other children to serious mental and physical harm by denying them gender-affirming treatment. If the State wants to protect children, it should listen to the warnings of the physicians who know and treating them rather than legislators. Like *Hogan*, this state action contradicts the important government interest of protecting children. Similarly, the SAME Act is not substantially related to the State's interest and fails the heightened level of scrutiny. Subsequently, the action, the Same Act, is unconstitutional and cannot be enforced.

b. State's discrimination is not substantially related to its interest in regulating the medical profession.

A state action cannot be substantially related to an important government interest if there are legitimate procedures that adequately address the interest. *See Orr v. Orr*, 440 U.S. 268, 281 (1979). In *Orr*, the State of Alabama had legislation requiring husbands to pay alimony in a divorce, not wives. *Id* at 1105. The Court applied a heightened level of scrutiny to the statute. *Id* at 278-79. The State had two important interests (1) to assist needy spouses, using gender as a proxy for need (2) to reduce the economic disparity between men and women in marriage. *Id* at 280. The Court held that even if the Act adequately addressed the government interests, it was not substantially related to them because the court procedures already included

[18] Nicolle K. Strand, JD, MBE*, Invisibility of "Gender Dysphoria"*, AMA Journal of Ethics https://journalofethics.ama-assn.org/article/invisibility-gender-dysphoria/2021-07 (2021).

hearings to consider financial circumstances. *Id* at 1113. This procedure adequately addressed the interests, giving no need for the State's discrimination. *See id*.

Like *Orr*, the State of Lincoln has an important government interest to address, regulating the medical profession. It is specifically regulating general practice around gender-affirming care. However, this regulation is not substantially related to the interest of regulating medical professionals; gender-affirming care is already well regulated. The treatment for gender-affirming care has medical guidelines to address safety concerns.[19] The treatment is standard practice and adequately regulated by the medical profession. The State's interference is not substantially related to the important government interest in regulating the medical profession. Because the State's Act is not substantially related, it fails the heightened level of scrutiny. Subsequently, the action, the Same Act, is unconstitutional and cannot be enforced.

6. The State fails rational basis review because of the SAME Act's arbitrary nature.

If this Court decides that the State's actions are discrimination of a non-suspect classification and should be subject to rational basis review, the Mariano's are, nevertheless, likely to succeed on the merits for the same reasons stated previously for Substantive Due Process. As this court illustrated in *Moreno*, the state action in question must be rationally related to a legitimate government interest to survive rational basis review. *Moreno*, 413 U.S. at 533.

[19] E.g. Madeline B. Deutsch, MD, MPH, *Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People*, Univ. of San Francisco (2016)(The University of San Francisco's published guidelines).

For the same reasons the State has compelling government interests, discussed *supra* at II(A)(4), it is presumed the State has legitimate government interests, protecting children and regulating the medical field. The State fails rational basis review because the SAME Act's discrimination is not rationally related to those interests. *Cleburne*, 473 U.S. at 449. In *Cleburne,* Court furthered the precedent that state action is not rationally related to a legitimate interest is if the action is arbitrary as it relates to the interest. The determining factor in Cleburne city's decision to deny a housing facility a zoning permit was that it would be occupants suffered from mental retardation. The Court deemed this the state action not rationally related because it was arbitrary relating to its concern of occupancy size of the house. There was no rational explanation for why those with mental retardation could not live together but anyone else could, in places like nursing homes or fraternity houses.

The Same Act suffers a similar arbitrariness to the ordinance in *Cleburne*. The State points to evidence such as, risks from medical procedure and permanent effects of some treatments. Record 2-3. However, these contentions do not sufficiently explain why gender dysphoria warrants having suffering restrictions other children do not, because the contentions are not exclusive to gender dysphoria. These general concerns may be present in any case using the treatment, not just for gender-affirming care. The State has an interest in protecting children and regulating the medical field, but there is no rational reason the State's smothering patronage should deny one subgroup of children medical treatment and leave it available to others. The

Same Act's discrimination is arbitrary, and as such, is not rationally related to the State's legitimate interests of protecting children and regulating the medical field. Subsequently, the State fails rational basis review, and consequently, the SAME Act is unconstitutional.

CONCLUSION

This Court should affirm the Marianos preliminary injunction and deny the State's motion to dismiss. The "serious question" standard survived *Winter* because *Winter* never expressly overruled the standard, the majority of federal circuit courts support it, and public policy promotes its flexible approach. To prevail on this standard the Mariano's had to demonstrate that the balance of irreparable harms tipped decidedly in their favor and that there were "serious questions" regarding the merits of their claim. The Marianos established that the potential harm to Jess's physical and mental health decidedly outweighed any potential harm to the State. Further, the Marianos have raised at the very least "serious questions" regarding the merits of their constitutional claims.

However, the Marianos will also prevail under "likeliness" standard. If this case were remanded to trial under the "likeliness standard", the Marianos would establish a likeliness of success on the merits. They are likely to succeed on the merits of their Substantive Due Process claim because the State infringed on their fundamental rights without a narrowly tailored compelling interest. They are likely to succeed on their Equal Protection claims because the State imposed sex-based

discriminated that was not substantial related to important government interests. For the foregoing reasons, this court should affirm the decisions of the lower courts.

CERTIFICATE OF SERVICE

We hereby certify that a copy of the Respondents' brief was served upon April Nardini, in her official capacity as the Attorney General of the State of Lincoln, by certified U.S. mail return receipt requested, on this, the 15th of September 2022

/s/ 3106

Attorneys for Respondents

APPENDIX A

Constitutional Provisions

U.S. Const. amend. IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people

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 law

APPENDIX B

Statutory Provisions

Stop Adolescent Medical Experimentations ("SAME") Act,20 Linc. Stat. §§ 1201-06

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 so2 A transgender person as one whose gender identity is different from the sex the person had or was identified as having at birth.

(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.