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

BRIEF FOR PETITIONER

Team 3017
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QUESTIONS PRESENTED

I. When a party moves for a preliminary injunction, this Court has affirmed that a movant must meet a high burden, requiring the movant to prove a likelihood to prevail on the merits. The lower courts granted a preliminary injunction applying a standard that does not always require a movant to prove a likelihood of success on the merits. Is the standard applied by the lower courts consistent with Supreme Court precedent?

II. To prevail on a preliminarily injunction regarding a Substantive Due Process claim, which guards against government violations of fundamental rights, or a Equal Protection claim, which guards against intentional and arbitrary governmental discrimination, the movant has a burden to show a likelihood to prevail on the merits. State legislation bans gender-affirming care among all minors, regardless of gender identity, to protect children and regulate the medical profession because there are few studies on the efficacy and safety of gender-affirming care in minors. Given those facts, are the Respondents entitled to a preliminary injunction on their Substantive Due Process and Equal Protection claims?

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The opinion and order of the United States District Court for the District of Lincoln is unreported and set out in the record. Record 1–22. The opinion and order of the United States Court of Appeals for the Fifteenth Circuit is also unreported and set out in the record. Record 23–34.

CONSTITUTIONAL PROVISIONS

The following constitutional provisions are relevant to this case: The Fourteenth Amendment to the United States Constitution. This provision is reproduced in Appendix A.

STATUTORY PROVISIONS

The following provisions of the Stop Adolescent Medical Experimentations Act are relevant to this case: Linc. Stat. 20-1201; 20-1202; 20-1203; 20-1204; 20-1205; 20-1206. These provisions are reproduced in Appendix B.

RULES PROVISIONS

The following provision of the Federal Rules of Civil Procedure is relevant to this case: Fed. R. Civ. P. 65(a). This provision is reproduced in Appendix C.

STATEMENT OF THE CASE

I. Factual Background

This case is about protecting the health and welfare of the children of Lincoln—an issue of the utmost importance to Lincoln's legislature. In furtherance of this purpose, Lincoln passed the Stop Adolescent Medical Experimentations Act (Act) to ensure that children had adequate time, maturity, and resources prior to making life-altering, elective medical decisions regarding gender-affirming care.

After substantial hearings and testimony, Lincoln found that gender dysphoria, a serious yet rare mental health diagnosis, naturally resolves in most adolescents by the time the child reaches adulthood. Record 2. However, gender-affirming care, including puberty blockers, supraphysiologic testosterone or estrogen, and surgical reconstruction, among minors persists despite no established causal link between the use of such treatments and health benefits among minors. Record 2-3. Further, serious risks result from minors obtaining gender-affirming care, such as irreversible infertility, cancer, liver dysfunction, coronary artery disease, decreased bone density, and loss of sexual function—not to mention the potential mental health effects of premature treatment. Record 3. Because children lack adequate maturity, they often do not fully comprehend and appreciate the severity of the risks that accompany these treatments. This can result in regret and severe difficulties if children, upon reaching maturity, discover their treatment was misguided and wish to detransition. Record 3.

Lincoln supports the use of traditional, widely accepted treatment methods for children with gender dysphoria, such as conventional psychology, which do not result in irreversible, potentially adverse effects. Record 3. Thus, to protect the mental and physical health of minors and regulate the medical profession, the Act prohibits minors from receiving gender-affirming care that changes their birth sex, such as puberty blockers, hormone treatments, and gender reassignment surgery, until they reach the age of maturity. Record 3. *See*, Appendix B.

Despite Lincoln's attempt to protect children from such life-altering, elective treatments, some residents advocate for unregulated access to gender-affirming care for minors, including the Respondents. The Respondents, Jess Mariano, minor child, Elizabeth Mariano and Thomas Mariano, parents of the minor child, advocate for unrestricted access to gender-affirming care. Record 1. Jess is a child that was born biologically female but identifies as male. Record 4. Throughout Jess's childhood, he suffered from anxiety and depression and even, at the mere age of eight, tried to take his own life. Record 4. Later, Jess's psychiatrist diagnosed him with gender dysphoria. Record 4. By the age of ten, Jess's psychiatrist prescribed puberty blockers to Jess to stop him from developing female characteristics. Record 5. Jess's psychiatrist predicts that by the age of sixteen, Jess will begin hormone therapy to begin his transition as a male. Record 5. The Marianos contest the constitutionality of the Act because it will preclude Jess from accessing gender-affirming care that creates or instills physiological or anatomical characteristics that resemble a sex different than Jess's birth sex until Jess reaches eighteen years old and can

adequately contemplate the physical and mental consequences of gender-affirming care. Record 8.

Lincoln maintains that it seeks to protect all children of Lincoln by limiting access to gender-affirming care among children. Record 3. Lincoln's state expert, Dr. Geller, even points to health systems in Sweden and Finland that have banned gender-affirming care due to inadequate proof of its safety and effectiveness despite having long permitted gender-affirming care among minors. Record 7-8. The Act is aimed at protecting the children of Lincoln from such lifelong, elective medical treatments until there are adequate studies reflecting the safety and efficacy of such treatments among minors. Record 3. Until then, the Act limits children's access to such treatments until the age of maturity. Record 3-4.

II. Procedural History

District of Lincoln. The Marianos filed a complaint under 42 U.S.C. § 1983 on November 4, 2021, alleging that the Act would violate their Due Process and Equal Protection rights under the Fourteenth Amendment. Record 1. The Marianos filed a Motion for a Preliminary Injunction. Record 1. Shortly thereafter, Lincoln filed a motion to dismiss along with its response requesting the court to deny the preliminary injunction. Record 1. The court granted the Marianos' preliminary injunction request and denied Lincoln's motion to dismiss. Record 2. The district court used the serious question standard to analyze the Marianos' preliminary injunction request. Record 9. The court held the Marianos were entitled to preliminary injunctive relief for their Due Process and Equal Protection claims. Record 2. Under

a Substantive Due Process analysis, the court held the Act violated the Marianos' fundamental right to determine the proper medical care for their children and subjected the Act to strict scrutiny. Record 14. Further, the court held that the Act equates to a sex-based classification and is thus subject to heightened scrutiny under the Equal Protection Clause.

Fifteenth Circuit. Lincoln appealed the district court's ruling granting the Marianos' preliminary injunction and denying Lincoln's motion to dismiss. Record 23. The Fifteenth Circuit affirmed the district court's use of the serious question standard. Record 24. The court also affirmed the preliminary injunction, and the classifications under the constitutional claims. Record 26. Judge Gilmore dissented, arguing the court failed to use the proper preliminary injunction standard. Record 28. Judge Gilmore disagreed that the Act violated a fundamental right and accordingly would apply rational basis review. Record 30-31. Judge Gilmore also argued that the Act did not make a sex-based classification and therefore should not be subject to any heightened scrutiny. Record 31.

SUMMARY OF THE ARGUMENT

Protecting vulnerable children is a delicate and important function in any society. When a state legislature passes a law, a party seeking to avoid the application of the law via a preliminary injunction must satisfy a high burden.

The lower courts used a preliminary injunction standard that is no longer viable. This Court should reverse because the lower courts applied a preliminary injunction standard contrary to the Court's ruling in *Winter v. Natural*

Resources Defense Council. A preliminary injunction standard less stringent than the Court's rule in *Winter* is not viable. Under *Winter*, a movant must prove that 1) they are likely to succeed on the merits, 2) they are likely to suffer irreparable harm in the absence of a preliminary injunction, 3) the balance of equities tips in his favor, and 4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 23 (2008).

The serious question standard applied by the lower courts is less stringent than the Court's rule in *Winter*. First, the serious question standard requires the movant to merely raise a serious question so as to make it a fair ground for litigation. Second, under the serious question standard, the movant need only show it suffers more harm than the non-movant. This is a departure from *Winter*, which requires the movant to prove irreparable harm in the absence of a preliminary injunction. Third, the public interest is a necessary element under *Winter* while only an afterthought using the serious question standard.

The Marianos fail to make a clear showing that they are substantially likely to succeed on their Substantive Due Process claim because the Act survives rational basis review. The Act does not infringe upon a fundamental right because 1) there is no fundamental right to access experimental medical treatments, 2) there is no fundamental right to access non-FDA-approved treatments, 3) there is no fundamental right for minors to obtain medical treatments deemed damaging to their physical or mental wellbeing, and 4) gender-affirming care is not deeply rooted in the history and tradition of our Nation. As the Act does not infringe upon a

fundamental right, it is subject to rational basis review. The Act survives rational basis review because it is rationally related to the legitimate governmental interest of protecting children and regulating the medical profession as the safety, efficacy, and full effects of gender-affirming care in minors are unknown and potentially irreversible. Thus, The Marianos failed to make a clear showing that they are substantially likely to succeed on this claim.

Similarly, The Marianos fail to make a clear showing that they are substantially likely to succeed on their Equal Protection claim because the Act survives rational basis review. The Act classifies on the basis of age and medical procedure—not gender—because it applies equally to all children despite their gender identity. Because age and medical procedure are not suspect classifications, the Act is subject to rational basis review. The Act survives rational basis review because the classifications are rationally related to achieving the governmental interest of protecting children and regulating the medical profession as the classification will ensure all children receive adequate medical care without sacrificing their mental or physical wellbeing through elective medical procedures to which the effects in minors remain largely unknown. Therefore, The Marianos failed to make a clear showing that they are substantially likely to succeed on this claim, in addition to their Substantive Due Process Claim.

Therefore, we ask this Court to reverse the lower courts' decision to grant preliminary injunctive relief to The Marianos.

STANDARD OF REVIEW

When reviewing motions for a preliminary injunction, the "decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, but if the decision is based on erroneous legal principles, it is reviewed de novo." *Netherland v. Eubanks*, 302 Fed. Appx. 244, 246 (2008). Because the issue concerns the correct legal standard to apply, the Court should review this issue de novo. *See id*. Courts review questions of law de novo. *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 163 (2014). Constitutional interpretation issues are questions of law that appellate courts review de novo. *Arbon Steel & Serv. Co. v. United States*, 315 F.3d 1332, 1334 (Fed. Cir. 2003). Therefore, both issues are reviewed de novo.

ARGUMENT

I. This Court should reverse because the serious question standard is contrary to *Winter*.

A preliminary injunction is an extraordinary remedy and should only be awarded in specific circumstances when the movant shows it is entitled to the injunction. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 23 (2008). The rationale behind a preliminary injunction is to preserve the status quo so that the court may render a meaningful decision after a full trial. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991). The issue, in this case, is whether the standard applied by the lower court is contrary to this Court's approach in *Winter*.

The district court erred when it granted the Marianos' Motion for Preliminary Injunction and denied the State of Lincoln's Motion to Dismiss. The court of appeals erred when it affirmed the district court's decision. Because the "serious question" standard for preliminary injunctions is less stringent than the "likelihood of success on the merits" approach, the serious question standard is contrary to this Court's holding in *Winter v. Natural Resources Defense Council*. The Court should respect the State's interest in protecting children by applying the more strict preliminary injunction standard articulated in *Winter*. Therefore, this Court should remand the case on this issue alone.

Circuit Courts are split over whether the serious question standard is still viable after this Court's ruling in *Winter*. *See, e.g., Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) (explaining the difference between the approach used in *Winter* and the 4th Circuit's previous "balance of hardships" test,

also known as the serious question standard). Some circuits still apply the serious question standard. *E.g.*, *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). Under the serious question standard, a plaintiff must show 1) irreparable harm and 2) either a showing that the movant is a) likely to succeed on the merits or b) at least a showing of a sufficiently serious question to make the questions a fair ground for litigation and the "balance of hardships" tips in favor of the party seeking the preliminary injunction. *Citigroup*, 598 F.3d at 35. However, other courts have held that the serious question approach is no longer viable because it provides a lower burden to the plaintiff. *Real Truth About Obama,* 575 at 347.

A. If the serious question standard is less stringent than *Winter*, then the serious question standard is contrary to *Winter*.

This Court in *Winter* established the lightest burden a movant must show to be entitled to preliminary injunctive relief. In *Winter*, the issue was whether the preliminary injunction standard requiring a "possibility of irreparable harm" was consistent with Supreme Court precedent. *Winter*, 555 U.S. at 19. This Court held the possibility of harm standard was not viable because it is more lenient than the Court's "frequently reiterated standard." *Id* at 22. This frequently reiterated standard is the four-element *Winter* test. *Id* at 20. Therefore, this Court established that a preliminary injunction standard must be at least as stringent as the *Winter* approach. Even circuits that affirm the serious question standard after this Court's clear holding in *Winter* do not claim that a lesser burden than *Winter* is acceptable. S*ee Citigroup*, 598 F.3d at 35 (arguing because the overall burden is no lighter than

the burden under the *Winter* standard, the serious question standard is applicable). Therefore, if the serious question standard is less stringent than the *Winter* test, this Court should hold the serious question standard is no longer viable.

B. The serious question standard is less stringent than the *Winter* approach.

The serious question approach set out by courts in cases like *Citigroup* and *Alliance for the Wild Rockies* provides a lower burden for a plaintiff seeking preliminary injunctive relief. *See generally*, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011) (applying the serious question standard). This Court in *Winter* created a strict four-element test to determine whether a movant is entitled to a preliminary injunction. *See Winter*, 555 U.S. at 20. Notably, *Winter* requires a movant to prove it is "likely to succeed on the merits." *Id*. The serious question approach uses similar prongs but instead balances the factors and allows for a stronger showing of one factor to make up for a weaker showing of another. *Alliance for the Wild Rockies*, 632 F.3d at 1131. The *Winter* approach and the serious question standard differ in form, and the *Winter* approach requires the movant to satisfy a higher burden. This is most apparent in the first element, the likelihood of success on the merits. However, the serious question standard alters the entire test, reducing the movant's burden.

1. The Court in *Winter* affirmed a four-element test while the serious question standard utilizes a balancing approach.

This Court in *Winter* created a four-element test. Under *Winter*, a movant must prove 1) a likelihood of success on the merits, 2) a likelihood of suffering irreparable

harm in the absence of a preliminary injunction, 3) the balance of equities tips in the movant's favor, and 4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20. The third and fourth elements are largely the same when the state is a party. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). This test is a four-element conjunctive test. *Winnemucca Indian Colony v. U.S. ex Rel*, 837 F.Supp. 2d 1184, 1189 (D. Nev. 2011). Because this is a conjunctive test, "[a]ll four requirements must be satisfied to obtain the extraordinary remedy of a preliminary injunction." *JAK Prods. v. Bayer*, 616 Fed. Appx. 94, 95 (4th Cir. 2015). This Court did not require lower courts to precisely adopt the approach used in *Winter*, leaving open the questions of which preliminary injunction standards are still viable.

Conversely, the serious question standard allows movants to sidestep one element of *Winter* by showing a heightened injury on the other elements. The serious question standard requires a "party seeking a preliminary injunction to show a) irreparable harm and b) either 1) likelihood of success on the merits or 2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup*, 598 F.3d at 35. Thus, under this test, the elements of the preliminary injunction test are balanced, allowing a stronger showing of one factor to offset a weak or nonexistent showing of another factor. *Alliance for the Wild Rockies*, 632 F.3d at 1131.

The serious question standard allows the required elements under *Winter* to be conditionally refined if the other factors are more fully satisfied. *See Blackwelder*

Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 196 (4th Cir. 1977) (explaining a court must "balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant; and if a decided imbalance of hardship should appear in plaintiff's favor, then the likelihood-of-success test is displaced"). In *Blackwelder*, the Fourth Circuit describes the serious question standard as a "flexible interplay" where all the factors are "intertwined and each affects in degree all others." *Id.* No element is dispositive as all the elements are just one factor to weigh. *See id.*

2. The *Winter* approach creates a more stringent standard for three separate elements.

To determine whether the *Winter* approach is more stringent than the serious question standard this Court should compare the requirements of the two approaches. If the serious question standard is less stringent than *Winter*, then this Court should hold that the serious question standard is no longer viable. The *Winter* approach requires the plaintiff to satisfy a higher burden for each element. First, this Court in *Winter* required a plaintiff to show they are likely to succeed on the merits in every circumstance. The serious question standard does not always require the movant to show this. Second, the *Winter* approach requires the movant to make a clear showing of irreparable harm**,** whereas the serious question standard only requires balancing of the harms against the parties. Last, the public interest is a necessary element in *Winter*, but does not carry significant weight under the serious question standard. Therefore, the serious question standard provides an easier burden for the movant than *Winter* and accordingly should no longer be viable.

a. Contrary to *Winter*, the serious question standard allows plaintiffs to succeed without a clear showing they are likely to succeed on the merits.

The first element of the *Winter* test highlights the difference between the two approaches most clearly. Under *Winter*, the Court first addresses whether the plaintiff is "likely to succeed on the merits." *Winter*, 555 U.S. at 20. The First Circuit characterized this element by explaining "[i]n the ordinary course, plaintiffs who are unable to convince the trial court that they will probably succeed on the merits will not obtain interim injunctive relief." *Weaver v. Henderson*. 984 F.2d 11, 12 (1st Cir. 1993).

However, the serious question standard may only require the movant to show a serious question on the merits. A movant may succeed if the movant can show "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008). "The importance of probability of success increases as the probability of irreparable injury diminishes" and the reverse is also true. *Blackwelder, 550 F.2d at 195.* If the potential of harm is high, then the plaintiff need only show that there is a serious question that is "fair ground for litigation." *Id*.

Comparing the two tests, the *Winter* approach provides a higher burden for movants. *Winter* requires the plaintiff to clearly demonstrate that it will likely succeed on the merits. *Real Truth About Obama*, 575 F.3d at 346-47. This is far stricter than the "requirement that the plaintiff demonstrate only a grave or serious question for litigation." *Id*. A court's first step under the *Winter* approach is to

determine whether the plaintiff is likely to succeed on the merits. *Winter*, 555 U.S. at 20. If the plaintiff is not likely to succeed in a full trial, then the plaintiff is not entitled to this extraordinary relief. *See id*. A court need not consider the remaining elements because the movant has failed to show a necessary factor. *See Le Beau v. Spirito*, 703 F.2d 639, 645 (1st Cir. 1983**)** ("Because the plaintiffs did not meet their burden [of showing a likelihood of success on the merits], we need not consider the other criteria for issuance of a preliminary injunction"). The serious question standard weakens this element by allowing the movant to move forward without a clear showing they are likely to succeed on the merits.

b. The *Winter* approach requires the plaintiff to clearly show irreparable harm, not simply a balancing of the harm against the defendant.

The second element in *Winter* requires the movant to show a likelihood to suffer irreparable harm in the absence of a preliminary injunction. *Winter*, 555 U.S. at 20. A court would reach this issue only *after* the court determines the movant was likely to succeed on the merits. *See Le Beau*, 703 F.2d at 645. The movant cannot succeed without showing a likelihood to suffer irreparable harm. *Winter*, 555 U.S. at 20. The second element in *Winter* does not consider the burdens on the defendant, nor does it weigh the burdens against one another. *Id*.

Conversely, the serious question standard requires that the court *balance* the irreparable harm to the respective parties. "[W]hile 'irreparability' may suggest some minimum of probable injury which is required to get the court's attention, the more important question is the relative quantum and quality of plaintiff's likely harm."

Blackwelder, 550 F.2d at 196. Further, under the serious question standard, a mere possibility of irreparable harm may suffice if there is a strong possibility of success on the merits. *Id*. This is in direct conflict with *Winter*, which requires the movant to prove a likelihood of irreparable harm without considering the harm or lack of harm on the opposing party. *Winter*, 555 U.S. at 20. Therefore, the second element under the *Winter* approach provides a more challenging burden for movants.

c. The public interest is a necessary element in *Winter*, while it does not carry significant weight under the serious question standard.

Under *Winter*, courts must pay particular attention to the public consequences in employing the extraordinary remedy of an injunction. *Winter*, 555 U.S. at 24. A preliminary injunction should only be granted when the public interest is clearly in line with the plaintiff's request. Because the defendant here is the state of Lincoln, elements three and four merge into one element. *See Scott*, 612 F.3d at 1290 (stating that when the defendant is the government, the analysis for elements three and four is largely the same). Because each element is necessary under *Winter*'s conjunctive test, a court should not grant a preliminary injunction if the public interest is not in line with the plaintiff's request.

However, the public interest is often treated as a secondary consideration under the serious question approach. "The public interest factor does not appear always to be considered at length in preliminary injunction analyses." *Rum Creek*, 926 F.2d at 366. The court in *Rum Creek* analyses the public interest considerations in one sentence. *Id* at 367. It concludes, "if we had to align the public interest with

anyone, we would align it with the Company." *Id*. Ultimately, the public interest considerations played no substantial role in the court's analysis. *See id* (concluding that "the public interest does not appear to alter the conclusion to be drawn from the other factors."). In its consideration of the balance of hardships, the Second Circuit in *Citigroup* did not address the public interest. *See Citigroup*, 598 F.3d at 39 (stating "[the district court] expressly considered the impact of delay on VCG and weighed that hardship against those that would be imposed on CGMI in the absence of a preliminary injunction). The Court only addressed the interests of the parties, never the public interest. *See generally, id*. Therefore, the *Winter* approach provides a higher burden for the movant to satisfy.

C. A reduced preliminary injunction standard is contrary to public policy.

Public policy favors a high bar for preliminary injunction relief. "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). When a federal court enjoins a state law passed by elected officials via preliminary injunction, the court effectively overrules a decision of the people, interfering with the democratic process. *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. Jacksonville*, 896 F.2d 1283, 1285 (1990). Importantly, preliminary injunctions interfere with the democratic process without the safeguards of a full trial on the merits. *Id*. While preliminary injunctions can be useful in protecting the rights of citizens, they "must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded

by the Constitution and by the other strict legal and equitable principles that restrain courts." *Id*.

The necessity of democratic safeguards, and in the alternative, the full power of the judicial branch, becomes even more apparent for laws aimed at protecting vulnerable individuals. Here, the Marianos attempt to avoid enforcement of a law intended to protect the health and safety of its citizens. Record 2. Lincoln has specifically attempted to protect children as a vulnerable class. Linc. Stat. 20-1201(a)(1).

To prevail on their Motion for a Preliminary Injunction, this Court should apply the *Winter* standard, or a standard that provides an equally high burden on the Marianos' Substantive Due Process and Equal Protection claims. Under the *Winter* approach, the Marianos first must show a likelihood of success on the merits. Then, the Marianos must prove a likelihood of irreparable harm in the absence of a preliminary injunction, the balance of equities tips in the Marianos' favor, and last that the public interest favors granting a preliminary injunction. If the Marianos fail any of these elements, they are not entitled to a preliminary injunction. As elaborated below, a preliminary injunction is not appropriate because the Marianos cannot prove a likelihood of success on the merits of either their Substantive Due Process or Equal Protection claims.

II. The lower courts incorrectly granted the preliminary injunction on Respondents' Substantive Due Process and Equal Protection claims, and this Court should reverse.

A preliminary injunction requires the plaintiffs to "establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter,* 555 U.S. at 20. As discussed in more detail above, a plaintiff must make a clear showing that they are substantially likely to succeed on the merits of their claims. *The Real Truth about Obama, Inc.,* 575 F.3d at 346. Thus, The Marianos must make a clear showing that they are substantially likely to succeed on either their Substantive Due Process or Equal Protection claims to survive. However, The Marianos fail to succeed on both accounts.

As for the Substantive Due Process claim, The Marianos do not make a clear showing that they are substantially likely to succeed because the Act survives rational basis review. Because the Act does not infringe upon a fundamental right, rational basis review applies. The Act survives rational basis review because the Act is rationally related to the legitimate governmental interest of protecting children and regulating the medical field. Thus, The Marianos' Substantive Due Process claim fails.

Similarly, The Marianos fail to make a clear showing that they are substantially likely to succeed because the Act survives rational basis review. Because the act classifies on age and medical procedure, which are not suspect categories, rational basis review is the proper judicial scrutiny. The classifications

are rationally related to the legitimate governmental interest of protecting children and regulating the medical field because they seek to regulate medical procedures that have life-altering and potentially adverse effects on children before they can fully appreciate the gravity of their decisions, meaning The Marianos' Equal Protection claim fails.

A. The Marianos failed to make a clear showing that they are substantially likely to succeed on their Substantive Due Process claim because the Act survives rational basis review.

The due process clause states that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. This protects against governmental violations of "certain fundamental rights and liberty interests." *Washington v. Glucksberg,* 521 U.S. 702, 719-20 (1997). The due process clause is designed to protect individuals' fundamental rights. *Glucksberg,* 521 U.S. at 721.

When asserting that a statute infringes upon a substantive due process right, "the first step is to determine whether the asserted right is 'fundamental,'" meaning rights deeply rooted in the nation's history and tradition or fundamental to our scheme of ordered liberty. *Leebaert v. Harrington,* 332 F.3d 134, 140 (2nd Cir. 2003); *See also, Glucksberg,* 521 U.S. at 721-22 (stating that the threshold requirement is that "a challenged state action implicates a fundamental right"). The next step is determining the level of scrutiny applicable to the statute and seeing if the statute survives the challenge. *Glucksberg,* 521 at 721-22.

Courts apply rational basis review if a statute does not infringe upon a fundamental right. *Id.* at 722. Under rational basis review, the statute must be reasonably related to a legitimate governmental objective. *Id.* However, if the statute does infringe upon a fundamental right, the court applies strict scrutiny to the challenged statute. *See Id.* at 720 (finding that the Due Process Clause provides "heightened protection against government interference with…fundamental rights"). Under strict scrutiny, the statute must be necessary to achieve a compelling government interest. *Id.* at 721. This requires the statute to be "narrowly tailored," meaning there are no other less restrictive means available to achieve the compelling government interest. *Id.*

Here, the Act does not infringe upon a fundamental right for three reasons. First, parents have no fundamental right to access experimental medical treatments for their children. Second, there is no fundamental right to obtain non-FDA-approved treatments, such as the gender-affirming care the Act forbids. Third, there is no fundamental right to access treatments the state has deemed harmful to children. Fourth, gender-affirming care is not deeply rooted in the history and traditions of our nation.

As the Act does not infringe upon a fundamental right, rational basis review is proper, and the Act survives. The Act serves the legitimate governmental interest of protecting children and regulating the medical profession. The Act is rationally related to these governmental interests because it prevents children from making

potentially adverse life-altering decisions before they can understand the consequences.

1. The Act does not infringe upon a fundamental right.

As stated above, a fundamental right is a right "deeply rooted in our history and tradition" and "essential to this Nation's scheme of ordered liberty." *Dobbs v. Jackson Women's Health Organization,* 142 S. Ct. 2228, 2235 (2022). For example, the right to marriage, privacy, and procreation are all fundamental rights. *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage)*; Griswold v. Connecticut,* 381 U.S. 479 (1965) (privacy)*; Skinner v. Okl. ex rel. Williamson,* 316 U.S. 535 (1942) (procreation). Additionally, parents have the fundamental right "to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville,* 530 U.S. 57, 65-66 (2000).

However, parents' right to make decisions concerning their children's care, custody, and control "is not without limitations." *Fields v. Palmdale School Dist.,* 427 F.3d 1197, 1204 (9th Cir. 2005). In fact, the Supreme Court found that a parent's rights are "not beyond regulation in the public interest" and that "the state has a wide range of power for limited parental freedom and authority in things affecting the child's welfare." *Prince v. Mass.,* 321 U.S. 158, 166-67 (1944); *See also, Id.* at 170 (stating that the state has greater power over children than over adults). Thus, not every parental decision is constitutionally protected and, thus, results in an infringement of the parent's right when the state legislates around that parental decision.

While Elizabeth and Thomas Mariano have the fundamental right to make decisions regarding the care, custody, and control of their child, Jess Mariano, the State of Lincoln maintains the right to regulate and limit their freedom and authority within constitutional limits. When reviewing the Act critically, it becomes apparent that the supposed rights truly at stake are not parental decision-making rights but the right for parents to obtain certain medical treatments for their children. Namely, the right to obtain experimental, non-FDA-approved treatments.

There is no fundamental upon which this Act infringes. The Respondent merely presents a thinly veiled argument that the act infringes upon parental rights for the sole reason that the act disallows parents from deciding whether to pursue gender-affirming care for their child.[1] However, looking past this veil, it is clear that the Act is comprised of restrictions on non-fundamental rights—the right to obtain experimental medical treatment, the right to obtain non-FDA-approved treatment, and the right to obtain gender-affirming care. First, there is no fundamental right to obtain experimental medical treatment or non-FDA-approved treatment. Second, minors have no fundamental right to obtain medical treatments deemed adverse or damaging to their physical and mental wellbeing. Lastly, access to gender-affirming care is not deeply rooted in the history and tradition of our Nation. Thus, it is not an unenumerated fundamental right.

[1] This argument is akin to a parent suing a state for violating their fundamental right to the care, custody, and control of their child after a state passes legislation forbidding minors from receiving an abortion. Clearly, abortion is no longer a fundamental right. *Dobbs,* 142 S. Ct. at 2279. As it is not a fundamental right, no one—adult or minor—has the right to obtain an abortion. It makes no difference whether a statute takes away the parent's right to obtain an abortion for their child, as no one has the right to access an abortion.

a. There is no fundamental right to obtain the gender-affirming care that the Act prohibits because it is a form of experimental medical treatment and is not FDA-approved.

There is no fundamental "right to procure and use experimental drugs that is deeply rooted in our Nation's history and traditions." *Abigail All for Better Access to Developmental Drugs v. Von Eschenbach,* 495 F.3d 695, 711 (D.C. Cir. 2007). In *Abigail,* the court found that there is no right to experimental drugs even when the patient is terminally ill, the experimental procedure is the patient's only option, and delayed access to the experimental drug may be fatal. *Id.*

Because a parent does not have a right to access experimental treatments for themselves, they necessarily cannot have that right for their child. It is well established that parents cannot have a greater right to medical treatment for their children than they would for themselves. *Doe by & through Doe v. Pub. Health Tr. Of Dade Cty.,* 696 F.2d 901, 903 (11th Cir. 1983). Thus, if a parent does not have a particular right for themselves, they necessarily cannot have that right for their child. *Id.* Thus, the true question is not whether the gender-affirming care the Act forbids infringes upon a parent's decision-making authority, but whether the prohibited gender-affirming care is experimental such that there is no right to obtain it—whether parent or child.

The gender-affirming care that the Act prohibits is experimental medical treatment such that there is no fundamental right to obtain it for three reasons. First, there is a dearth of reliable studies that follow the long-term effects of gender-affirming care among minors. Second, studies among adult transitioners have shown

high rates of regret and misinformation. Third, clinicians disagree as to the proper treatment of minors undergoing gender-affirming care.

First, the true effects of gender-affirming care among minors remain unknown because of the lack of reliable studies on minors. Opposers to acts such as the one in this case often cite a widely flawed 2018 study of transgender youth to boast about the success and necessity of gender-affirming care among minors with little rates of regret.[2] To start, the population studied is not representative of today's transgender youth, for they had no significant mental health comorbidities[3] and the study only evaluated people who underwent an uncommon procedure,[4] gonadectomy.[5] Further, the study excluded the 20% of the study subjects who dropped out of care and 22% did not proceed with a gonadectomy.[6] The study's follow-up time was also only ten years.[7] Lastly, the definition of regret that the study utilized was far too narrow. The study defined a "regretter" only as an individual who reverted to living in their natal sex role by starting natal-sex hormone supplementation under the medical supervision of the same clinic that facilitated the original transition.[8] Thus,

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[2] Chantal M. Wiepjes, et al., *The Amsterdam Cohort of Gender Dysphoria Study (1972-2015),* 15 Journal of Sexual Medicine 4 (Apr. 1, 2018)

[3] Maria Paz-Otero, et al., *A 2020 Review of Mental Health Comorbidities in Gender Dysphoric and Gender Non-Conforming People,* 3 Journal of Psychiatry Treatment and Research 44, 46 (2021) (finding that "many studies support the fact that the transgender population has significantly higher rates in terms of psychiatric comorbidity, with alarming figures for depression, anxiety, self-harming behaviors and suicidal tendencies" with multiple studies demonstrating that 40% to 45% of transgender adolescents have a psychiatric comorbidity).

[4] Maya Kailas, et al., *Prevalence and Types of Gender-Affirming Surgery Among a Sample of Transgender Endocrinology Patients Prior to state Expansion of Insurance Coverage,* 23 Endocrine Practice 780 (2017) (finding that a small proportion of transgender adults undergo gonadectomies).

[5] Wiepjes, supra note 1.

[6] *Id.*

[7] Wiepjes, supra note 1.

[8] *Id.*

detransitioners who went to a different medical care facility or simply discontinued gender-affirming care drugs and treatments were not considered. Studies have shown that a mere 24% of adult detransitioners tell their treating clinicians that they discontinued medical treatment.[9] Thus, this study did not account for the likely 76% of detransitioners that did not advise their clinicians of their detransition. With such an unreliable, misinformed study serving the basis for many proponents for minors receiving gender-affirming care, the true effects of such experimental treatments are unknown.

Second, studies with adults undergoing gender-affirming care report high rates of misinformation and regret, of which children will undoubtedly experience more as their maturity and capacity to understand their choices is lower. Among adults who have detransitioned[10] after receiving gender-affirming care, 30% indicated that they wish they had never transitioned.[11] Additionally, over 70% reported that the transition counseling and information they received prior to their gender-affirming care was inaccurate regarding the benefits and risks of receiving the gender-affirming care.[12] Lastly, 46% reported that the doctors' counseling before the gender-affirming care was overly positive about the benefits of the gender-affirming care.[13] With adults, who have a better capability of understanding and

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[9] Lisa Littman, *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned,* Archives of Sexual Behavior 50 (Oct. 19, 2021).
[10] A detransitioned individual refers to an individual who has decided to stop identifying as transgender. Record 3. Detransitioning refers to the process of someone stopping to identify as transgender, which can entail stopping medical or social transitioning practices.
[11] Littman, supra note 18.
[12] *Id.*
[13] *Id.*

appreciating the severity and consequences of their choices, experiencing such high rates of misinformation and regret, children will undoubtedly experience more.

Third, there is disagreement among clinicians regarding the proper course of care. Even proponents of gender-affirming care acknowledge that gender exploratory therapy, which is permitted and encouraged under the Act, is essential prior to doctors prescribing medical courses of action.[14] These proponents, however, acknowledge that "few are trained to do [gender exploratory therapy] properly, and some clinicians don't believe in it, contending without evidence that treating dysphoria medically will resolve other mental health issues."[15] This lack of consensus can result in children being pushed into undergoing irreversible medical treatments and procedures before they understand their gender identity and are ready.

In sum, gender-affirming care among minors is experimental due 1) to the lack of reliable long-term studies regarding its efficacy, 2) the prevalence of regret and inaccurate information among adults who receive gender-affirming care, and 3) the disagreement among clinicians regarding the proper course of care. Because gender-affirming care among minors is experimental, there is no fundamental right to it. Thus, Elizabeth and Thomas do not have a fundamental right to subject their child, Jess, to the gender-affirming care that the Act prohibits because the parents themselves do not have that right.

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[14] Laura Edwards-Leeper and Erica Anderson, *The mental health establishment is failing trans kids,* The Washington Post (Nov. 24, 2021), https://www.washingtonpost.com/outlook/2021/11/24/trans-kids-therapy-psychologist/

[15] *Id.*

Additionally, there is no fundamental right to obtain medical treatments that the FDA has not approved—such as the treatments this act prohibits. *Carnohan v. U.S.,* 616 F.2d 1120, 1122 (9th Cir. 1980); *Rutherford v. U.S.,* 616 F.2d 455, 457 (10th Cir. 1980). Here, the FDA has not approved the use of puberty blockers for gender-affirming care.[16] Because the FDA has not approved the use of certain gender-affirming care methods, there can be no fundamental right to obtain those gender-affirming care treatments. Again, a parent cannot claim a right on behalf of their child that they do not possess themselves. Thus, Elizabeth and Thomas cannot claim that they have a right to provide Jess with gender-affirming drugs that are not FDA-approved.

b. There is no fundamental right to obtain the gender-affirming care this Act prohibits because gender-affirming care is not deeply rooted in the history and tradition of our Nation.

As stated earlier, a fundamental right is a right that is deeply rooted in our Nation's history and traditions or is implicit in our scheme of ordered liberty. *Glucksberg,* 521 U.S. at 721. As the Supreme Court has held, "historical inquiries…are essential whenever we are asked to recognize a new component of 'liberty'" because the Supreme Court must "guard against the natural human tendency to confuse what the Amendment protects with our own ardent views about the liberty that Americans should enjoy." *Dobbs,* 142 S. Ct. at 2247. Thus, if an

[16] Renuka Rayasam, *The transgender care that states are banning, explained,* Politico (Mar. 25, 2022) https://www.politico.com/newsletters/politico-nightly/2022/03/25/the-transgender-care-that-states-are-banning-explained-00020580.

alleged right is not deeply rooted in the history and traditions of our Nation, it cannot be an unenumerated fundamental right.

When applied to the alleged right to gender-affirming care, this alleged right is not deeply rooted in our Nation's history and traditions such that it does not qualify as an unenumerated fundamental right. In fact, the term transsexual was not used in the United States medical world until 1947 when Dr. Alfred Kinsey, a biologist, began his gender studies and introduced the term to America.[17] Doubt regarding transgender treatment continued to persist far past the 1940s. In 1979, a study from Johns Hopkins called sex reassignment surgeries into question by suggesting that psychosocial outcomes in transgender patients who underwent reassignment surgery were not better than those who went without surgery.[18] Gender identity disorder was not even added to the DSM-3 until 1980, which was replaced with gender dysphoria in the DSM-5 in 2013.[19] Thus, the history of gender-affirming care in America is extremely modern when compared to other unenumerated rights. Because access to gender-affirming care is not deeply rooted in our Nation's history and traditions, it cannot be an unenumerated fundamental right.

In all, this Act does not infringe upon a fundamental right because: 1) there is no right to obtain experimental medical treatment, 2) there is no right to obtain non-FDA-approved medical treatments, and 3) gender-affirming care is not deeply rooted in the history and traditions of our Nation. Because no one has a fundamental right

[17] Farah Naz Khan, *A History of Transgender Health Care,* Scientific American (Nov. 16, 20216) https://blogs.scientificamerican.com/guest-blog/a-history-of-transgender-health-care/
[18] *Id.*
[19] *Id.*

to obtain the treatment the Act forbids, parents cannot claim to have such a right for their child as they do not possess the right themselves. Thus, a parent does not have the right to make such decisions that are already not constitutionally protected. Therefore, the Act does not infringe upon a fundamental right.

2. Because the Act is not in conflict with a fundamental right, rational basis review is proper and the Act survives.

Legislation that does not infringe upon a fundamental right is only subject to rational basis review. *See Glucksberg,* 521 U.S. at 722 (finding that "a challenged state action [must] implicate a fundamental right" to avoid rational basis review). Specifically, a "claim of a right of access to experimental [treatments] is subject only to rational basis" review. *Abigail All for Better Access to Developmental Drugs,* 495 F.3d at 712.

Under rational basis review, a court must find that "there is a rational basis on which the legislature could have thought that it would serve a legitimate state interest." *Dobbs,* 142 S. Ct. at 2284 (citing *Heller v. Doe,* 509 U.S. 312, 319 (1993); *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993); *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976); *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483 (1955)). In other words, rational basis review requires the movant to "prove that the government's restriction bears no rational relationship to a legitimate state interest." *Abigail All for Better Access to Developmental Drugs,* 495 F.3d at 712; *See also, Romer v. Evans*, 517 U.S. 620, 621 (1996) (holding that rational basis review requires the movant to meet the burden of persuading the court that the classification is not rationally related to a legitimate governmental objective). More simply, a movant

must prove that there is 1) no legitimate governmental interest 2) to which the legislation is rationally related.

Here, there is clearly a legitimate government interest. The Supreme Court has long maintained that governments have a legitimate interest in children's mental and physical health and welfare. *See Globe Newspaper Co. v. Superior Ct. for Norfold Cnty.,* 457 U.S. 596, 607 (1982) (finding that the state's interest in "safeguarding the physical and psychological wellbeing of a minor is a compelling one"). Additionally, the Supreme Court has held that regulating the medical profession is a legitimate governmental interest. *Dobbs,* 142 S. Ct. at 2284.

This Act is rationally related to protecting the health and welfare of children because of the likely prevalence of regret among children, as evidenced by adult detransitioners.[20] Not only are the effects of the banned gender-affirming care irreversible and significant, but the mental effects can wreak havoc upon children who simply cannot appreciate the meaning and consequences of their choices. Even adults who pursue gender-affirming care have a risk of regret after receiving such care. Half of the detransitioned adults report intense or extreme regret for seeking and receiving gender-affirming care.[21] With the prevalence of regret so high among adult detransitioners, it naturally follows that a child making such a significant, life-altering decision will be more at risk for feelings of regret.

This Act is also rationally related to protecting the health and welfare of children and regulating the medical profession because of the lack of long-term

[20] *See* Littman, supra note 18.
[21] Littman, supra note 18.

studies. The efficacy of gender-affirming care among children lacks adequate studies such that "with current knowledge, [clinicians] cannot predict the psychosexual outcome for any specific child" with gender dysphoria.[22] In fact, clinicians cannot distinguish between children whose transgender identity will persist from those whose will not.[23] The statute itself explains the legislature's aim to promote the wellbeing of its children through limiting experimental, life-altering gender-affirming care to adults. Record 3.

This Act is also rationally related to regulating the medical profession because it forbids medical care providers from providing such life-altering treatment before the child reaches the age of majority. Record 3-4. Thus, the Act proscribes strict criteria for medical providers to follow and ensures that all children receive access to gender-affirming conservative care, such as therapy and social transitioning, before making life-altering decisions. This ensures that medical providers give children the opportunity to fully explore their gender identity and other related issues before jumping the gun and prescribing drastic measures.

In all, the Act is properly subject to and survives rational basis review. Rational basis review is the proper standard because parents do not have a fundamental right to access experimental medical care for their child or non-FDA-approved drugs and gender-affirming care is not deeply rooted in the history and tradition of our Nation. Because this Act does not infringe upon a fundamental right,

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[22] Wylie C. Hembree, et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons,* 102 J. Clin. Endocrinol Medab. 3869, 3876 (Nov. 1, 2017).
[23] *Id.*

the Act is only subject to rational basis review. The Act survives rational basis review because it is rationally related to the legitimate government interest in protecting children's welfare and regulating the medical profession.

3. Even if this Court finds the Act intrudes upon a parental right, the Act survives strict scrutiny.

While this Court should only subject this Act to rational basis review, it also survives strict scrutiny if this Court determines that a fundamental right is infringed upon. Under strict scrutiny, a statute must be narrowly tailored to achieve a compelling state interest. *Reno v. Flores,* 507 U.S. 292, 302 (1993). The government must prove that the governmental intrusion on the fundamental right is necessary to serve a compelling governmental interest. *U.S. v. Carolene Prod. Co.,* 304 U.S. 144, 153 (1938). To be necessary to serve the compelling governmental interest, the statute must be narrowly tailored. *Holt v. Hobbs,* 574 U.S. 352, 364 (2015). This means that the statute must use the "least restrictive means" necessary to achieve its purpose. *Id.* If the government can employ a less restrictive means to achieve its goal, "the government must use it." *U.S. v. Playboy Ent. Grp., Inc.,* 529 U.S. 803, 815 (2000).

This Act serves the compelling governmental interest of both protecting children from experimental procedures and regulating the medical field. *See Globe Newspaper Co.,* 457 U.S. at 607 (finding that the state's interest in "safeguarding the physical and psychological wellbeing of a minor is a compelling one."); *Dobbs,* 142 S. Ct. at 2284 (finding that regulating the medical field is a compelling governmental interest). Further, The Supreme Court has held that "a state is not without constitutional control over parental discretion in dealing with children when their

physical or mental health is jeopardized." *Parham v. J.R.,* 442 U.S. 584, 603 (1979). Specifically, courts have held that "the fundamental rights of parents do not include the right to choose…a specific medical or mental health treatment that the state has deemed harmful." *Pickup v. Brown,* 740 F.3d 1208, 1236 (9th Cir. 2014). Thus, a state can ban the use of certain drugs or treatments for children when the state deems it adverse to the child's physical or mental health. Thus, governments have a compelling interest in protecting kids from experimental procedures. *Id.*

This Act is narrowly tailored to meet these interests because it does not ban all gender-affirming care. The Act only bans those gender-affirming care options that have serious, potentially irreversible consequences in that they "instill[] or creat[e] physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." Linc. Stat. 20-1203. Specifically, the Act only forbids experimental and non-FDA-approved[24] gender-affirming care.

As argued earlier, the gender-affirming treatment that the Act bans is both experimental and related to protecting the health and welfare of children because of the likelihood of long-lasting regret,[25] the inability of children to appreciate the significance of their decision, and the lack of long-term studies.[26] The Act is also related to regulating the medical profession because it establishes a standard to which all children with gender dysphoria must be treated. Rather than children receiving vastly different treatments from different providers, all children will receive

[24] *Rayasam, supra,* note 16.
[25] *Littman, supra,* note 18.
[26] *Hembree, supra,* note 22.

traditional gender-affirming care, such as therapy and social transitioning, that does not lead to irreversible changes. Linc. Stat. 20-1203.

Thus, the Act survives both rational basis review and strict scrutiny. Because the Act survives rational basis review and, in the alternative, strict scrutiny, The Marianos have conclusively failed to "establish that [they are] likely to succeed on the merits" of their claim, as required by a preliminary injunction. *Winter,* 555 U.S. at 20. Even if this Court decides to utilize the substantial question standard, which the Petitioner maintains is in opposition to *Winter,* The Marianos still fail as the Act survives all scrutiny. As such, this Court should reverse the lower courts' holding.

B. The Marianos failed to make a clear showing that they are substantially likely to succeed on their equal protection claim because the claim cannot survive rational basis review.

The equal protection clause states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This Clause "secure[s] 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." *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U.S. 350, 352 (1918). However, the Equal Protection Clause "does not forbid classifications;" instead, "it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co. v. Virginia.,* 253 U.S. 412, 415 (1920)).

The Supreme Court has held that, as a general rule, "legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their

laws result in some inequality." *McGowan v. Maryland,* 366 U.S. 420, 425-26 (1961). Thus, "unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Nordlinger,* 505 U.S. at 10 (citing *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439-41 (1985); *Dukes,* 427 U.S. at 303).

To determine whether a statute violates the Equal Protection clause, a court must consider whether the classification is a suspect category as a "threshold consideration" prior to subjecting a state law to judicial scrutiny. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 19 (1973). Courts categorize a classification as suspect when: 1) the classification is immutable, such as the color of one's skin, 2) there is a long history of discrimination based on the category, 3) the classification is based on stereotypes, and 4) the group historically had political powerlessness. *Frontiero v. Richardson,* 411 U.S. 677, 683-88 (1973).

The judicial scrutiny applied depends upon how suspect the classification is. When a court deems a classification highly suspect, such as a race-based classification, strict judicial scrutiny is applied to the Act. *Loving,* 388 U.S. at 1823. Conversely, intermediate scrutiny is applied when a court deems a classification to be slightly suspect, such as non-marital children. *Clark v. Jeter,* 486 U.S. 456 (1988). Within intermediate scrutiny is heightened intermediate scrutiny, which the Supreme Court has only ever applied to cases involving gender discrimination. *U.S.*

v. Virginia, 518 U.S. 515 (1996). Lastly, rational basis review is applied to legislation using non-suspect classifications, such as mentally disabled persons. *See, generally, Cleburne Living Center,* 473 U.S.

Here, The Marianos fail to make a clear showing that they are substantially likely to succeed because the Act survives rational basis review. The Act classifies not based on gender but on the basis of age and medical procedure. Because age and medical procedure classifications are not suspect categories, rational basis review is the proper judicial scrutiny. The classifications the Act employs are rationally related to the legitimate governmental interest of protecting children and regulating the medical field because it seeks to protect children from making potentially adverse life-long decisions before they reach an age of maturity. Thus, the Act survives rational basis review. Due to this, The Marianos failed to make a clear showing that they are substantially likely to succeed on the merits of their claim.

1. This Act classifies on the basis of age and medical procedure, not gender.

This Act does not treat an individual less favorably because they do not conform to gender expectations, which the Supreme Court has held to constitute gender discrimination. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 236 (1989). Rather, this Act prohibits all minors from receiving certain serious and experimental forms of gender-affirming care. Because the Act prohibits all children from receiving certain forms of gender-affirming care, the Act does not discriminate against those who do not conform to gender expectations or identify as transgender.

Additionally, The Marianos rely heavily on *Bostock* to advance their position that the Act classifies on the basis of gender; however, *Bostock* does not apply. *Bostock* held that discrimination because a person is transgender is discrimination because of sex. *Bostock v. Clayton Cnty., Ca.,* 140 S. Ct. 1731, 1741 (2020). Specifically, *Bostock* states that "an employer who fires an individual merely for being gay or transgender defies the law;" it does not expand its holding beyond this. *Id.* at 1754. The Supreme Court "expressly limited its holding to Title VII claims involving employers who discriminated against employees because of their gay or transgender status" and other courts have refused to apply it outside of this context. *Hennessy-Waller v. Snyder,* 529 F.Supp 3d 1031, 1044 (D. Az. 2021). Thus, it would be improper for this Court to expand *Bostock* beyond its intended scope.

Further, the Supreme Court has held that "the regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny.'" *Dobbs,* 142 S. Ct. at 2245-46 (quoting *Geduldig v. Aiello,* 417 U.S. 484, 496 (1974)). Thus, just because this Act affects minors with gender dysphoria or who identify as transgender more than other minors does not mean that the Act discriminates against those minors on the basis of their gender identity.

Thus, this Act only classifies people on the basis of age and medical procedure, two non-suspect categories, because the Act applies equally to all minors. *Kimel v. Florida Bd. Of Regents,* 528 U.S. 62, 83 (2000) (holding that age is a non-suspect category subject to rational basis review); *Dobbs,* 142 S. Ct. at 2245 (2022) (holding that there is no right to the medical procedure of abortion).

2. Because this act classifies on the basis of age and medical procedure, rational basis review is proper and this Act survives.

When legislation makes non-suspect classifications, such as this Act, courts apply rational basis review to determine whether the Equal Protection Clause is satisfied. *Nordlinger,* 505 U.S. at 11. Generally, rational basis review under the Equal Protection Clause is satisfied when the classification 1) serves a legitimate governmental interest and 2) "is not so attenuated as to render the distinction arbitrary or irrational." *Id.* (citing, *United States Railroad Retirement Bd. v. Fritz,* 449 U.S. 166, 174 (1980); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 464 (1981); *Cleburne,* 473 U.S. at 446)). While rational basis review "does not demand….that a legislature…actually articulate at any time the purpose or rationale supporting its classification," courts must "require that a purpose my conceivably or 'may reasonably have been the purpose and policy of the relevant governmental decision maker." *Nordlinger*, 505 U.S. at 15 (citing *United States Railroad Retirement Bd.,* 449 U.S. at 179; *Allied Stores of Ohio, Inc. v. Bowers,* 16 358 U.S. 522, 528-529 (1959)).

This Act survives rational basis review because there is an articulable purpose to which the classification is rationally related—protecting the health and safety of children and regulating the medical field. Record 3. Not only are these purposes legitimate, but the Supreme Court has also deemed them compelling. *See Globe Newspaper Co.,* 457 U.S. at 607; *Dobbs,* 142 S. Ct. at 2284. The classification is rationally related to the purpose because it seeks to regulate experimental medical

procedures that have potentially permanent and adverse effects on children before they can comprehend the severity of their decisions.[27]

3. Even if this Act classifies on the basis of gender, the Act survives heightened scrutiny.

The Supreme Court has held that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Virginia*, 518 U.S. at 532. The state must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed are 'substantially related to the achievement of those objectives.'" *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 150, 100 S. Ct. 1540, 1545, 64 L.Ed.2d 107 (1980)). The justification must be "genuine, not hypothesized or invented *post hoc* in response to litigation" and must not "rely on overly broad generalizations about the different talents, capacities, or preferences" of the genders. *Virginia,* 518 U.S. at 533.

First, Lincoln's justifications for the Acts classifications are genuine. Here, the Act serves two important government objectives: 1) protecting children from experimental medical treatments, and 2) regulating the medical field. *See Globe Newspaper Co.,* 457 U.S. at 607; *Dobbs,* 142 S. Ct. at 2284. The State of Lincoln genuinely espouses these government objectives as the purpose behind its litigation. Record 3. Thus, Lincoln did not invent these objectives *post hoc* after this litigation ensued. Thus, the Act survives the first issue under heightened scrutiny.

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[27] *See* Littman, supra note 18.

Second, the classifications are substantially related to achieving the objectives mentioned above. As already stated, this Act prohibits experimental gender-affirming care that is inadequately researched among children and can have high rates of detransitioning and regret among adults.[28] The Act is substantially and directly related to protecting the wellbeing of children because limiting the availability of irreversible, experimental medical procedures to children who cannot comprehend the severity of their choices will likely increase their health and safety, both physically and mentally, of children in Lincoln.

Further, the Act is substantially related to regulating the medical profession because it provides doctors with treatment guidelines that they cannot act against. The Act directs doctors first to pursue therapy and conservative treatment while the patient is a minor, which even proponents of gender-affirming care acknowledge is essential before doctors prescribe medical courses of action.[29] These proponents, however, recognize that "some clinicians don't believe in it, contending without evidence that treating dysphoria medically will resolve other mental health issues."[30] Thus, this Act ensures that every child in Lincoln receives the same access to therapy when dealing with gender dysphoria. This regulation of the medical profession requires that the Act make categorizations among age and procedure, for without such categorizations, the goal could not be achieved.

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[28] *See* Littman, supra note 18.
[29] Laura Edwards-Leeper and Erica Anderson, *The mental health establishment is failing trans kids,* The Washington Post 9Nov. 24, 2021) https://www.washingtonpost.com/outlook/2021/11/24/trans-kids-therapy-psychologist/
[30] *Id.*

In all, the Act survives heightened scrutiny because the Act 1) genuinely serves the important governmental objectives of protecting the health and wellbeing of the children of Lincoln and regulating the medical profession, and 2) the classifications are substantially related to achieving these objectives because it prevents children from making life-altering decisions that could result in physical and mental detriments.

Because the Act survives rational basis review, or, in the alternative, heightened scrutiny, The Marianos have conclusively failed to "establish that [they are] likely to succeed on the merits" of their claim, as required by a preliminary injunction. *Winter,* 555 U.S. at 20. Even if this Court decides to utilize the substantial question standard, which the Petitioner maintains is in opposition to *Winter,* The Marianos still fail because the Act survives rational basis review and heightened scrutiny. As such, this Court should reverse the lower courts' holding.

CONCLUSION

This Court should reject the lower courts' adoption of the serious question standard because it provides movants, the Marianos, with a lower burden than *Winter* requires for a preliminary injunction. It allows movants to subvert this Court's standard in direct conflict with *Winter*. The serious question standard provides an approach that balances the different factors and compromises on each element. *See Real Truth About Obama*, 575 F.3d at 347 (stating that serious question standard can no longer be applied as it conflicts with *Winter*). Notably, the serious question standard does not always require the movant to prove a strong likelihood on the merits. When the people democratically decide to protect our children, courts should

be reluctant to dismiss the people's wisdom and wishes. Thus, the *Winter* standard is the correct method this Court should adopt.

Further, this Court should reverse the lower courts' preliminary injunction because The Marianos fail to make a clear showing that they are substantially likely to succeed on both their Substantive Due Process and their Equal Protection claims. Because the Act does not infringe upon a fundamental right and it classifies on the basis of age and medical procedure, not sex, making rational basis review the proper level of judicial scrutiny. The Act survives rational basis review because both the Act and the classification are rationally related to the legitimate governmental interest of protecting the welfare of children and regulating the medical profession due to the lack of long-term studies, the likelihood of regret and resulting mental anguish, and disagreement among clinicians. For these reasons, we ask this Court to reverse the Fifteenth Circuit Court of Appeals decision and remand the case for further proceedings.

Respectfully submitted,

/s/ 3017

Attorneys for Petitioner

CERTIFICATE OF SERVICE

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

/s/ 3017_____

Attorneys for Petitioner

APPENDIX A

Constitutional Provisions

U.S. Const. amend. XIV, § 1.
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Statutory Provisions

20-1201 Findings and Purposes

(a) Findings:

The State Legislature finds -

(1) Lincoln has a compelling interest to ensure the health and safety of its citizens, in particular that of vulnerable children.

(2) Gender dysphoria is a serious mental health diagnosis experienced by a very small number of children.

(3) Many cases of gender dysphoria in adolescents resolve naturally by the time the adolescent reaches adulthood.

(4) There is as of yet no established causal link between use of medical treatments for so- called "gender affirming care," such as puberty blockers, sex hormones and reassignment surgery, and decreased suicidality. Studies demonstrating health benefits of these treatments have not been sufficiently longitudinal or randomized.

(5) Emerging scientific evidence shows potential harms to children from gender transition drugs and surgeries, including but not limited to risks related to irreversible infertility, cancer, liver disfunction, coronary artery disease, and bone density.

(6) Parents and adolescents often do not fully comprehend and appreciate the risks and life complications that accompany these surgeries, such as the loss of fertility and sexual function, and may not be able to give informed consent to the treatments.

(7) Individuals who have detransitioned (decided to stop identifying as transgender) have expressed regret for taking puberty-suppressing medications and cross-sex hormones and identified "social influence" as playing a significant role in their decision to identify as a different sex.

(8) There are conventional and widely-accepted methods to treat gender dysphoria that do not raise informed consent and experimentation concerns. Conventional psychology may safely and effectively guide a dysphoric youth to stability while deferring decisions on often irreversible medical gender affirming treatments until adulthood.

(b) Purposes:

It is the purpose of this chapter –

(1) To protect children from risking their own mental and physical health and lifelong negative medical consequences that could be prevented by receiving a more conventional treatment of their gender dysphoria.

(2) To encourage treatments supported by medical evidence and discourage harmful,
irreversible medical interventions.
(3) To protect against social influence surrounding gender affirmation treatments, which is especially concerning given the potential life-altering effects of gender transition drugs and surgeries.

20-1202 Definitions

The Act defines –

(1) "Adolescent" as the phase of life between childhood and adulthood, from ages 9 to 18.
(2) "Healthcare provider" as a person or organization licensed under Chapters 15 and 16 of the Lincoln Code to provide healthcare services.
(3) "Puberty" as the time of life when a child experiences physical and hormonal changes
that mark a transition into adulthood. The child develops secondary sexual characteristics and becomes able to have children.
(4) "Puberty blocking medication" as medications that prevent the body from producing the hormones that cause the physical changes of puberty.
(5) "Sex" as the biological state of being male or female, based on the individual's sex
organs, chromosomes, and endogenous hormone profiles.

20-1203 Prohibition on Certain Gender Transition Treatments

No healthcare provider shall engage in or cause any procedure, practice or service to be performed upon any individual under the age of eighteen if the procedure, practice or service is performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex, including without limitation to:

(a) Prescribing or administering puberty blocking medication to stop or delay normal puberty.
(b) Prescribing or administering supraphysiologic doses of testosterone or other androgens to females or prescribing or administering supraphysiologic doses of estrogen to males.
(c) Performing surgeries that artificially construct genitalia tissue or remove any healthy or non-diseased body part or tissue, except for a male circumcision.

20-1204 Enforcement

(A)The attorney general may bring an action to enforce compliance with this chapter. Nothing in this chapter shall be construed to deny, impair, or otherwise affect any right or authority of the attorney general, the state, or any agency, officer, or employee of the state, acting under any provision of the Lincoln Code, to institute or intervene in any proceeding.

(B) Any healthcare provider found to have knowingly and willingly violated the provisions of the chapter shall have committed a class 2 felony punishable by civil fines up to and including $100,000 or imprisonment of not less than two years and not more than ten years.

20-1205 Unprofessional conduct of healthcare providers

Any provision of gender transition procedures prohibited by 20-1203 to a person under eighteen years of age shall be considered unprofessional conduct and shall be subject to discipline by the licensing entity with jurisdiction over the healthcare provider.

20-1206 Effective Date

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

APPENDIX C

Rules Provisions

Fed. R. Civ. P. 65(a) Injunctions and Restraining Orders

(a) Preliminary Injunction.

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

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