No. 22a-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 RESPONDENT

Team 3108
Counsel for Respondent

QUESTIONS PRESENTED

I. Should the standard in *Winter*, which fails to specifically alter the scope of the likelihood of success factor, preclude the use of the serious questions standard which has long been utilized and upheld by many Circuits?

II. Should preliminary injunction be upheld to protect the Respondent's ability to choose the effective treatment for their child that the SAME Act currently bans on the basis of sex and transgender status?

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

STATUTORY PROVISIONS

Relevant to this case is the Stop Adolescent Medical Experimentations ("SAME") Act, 20 Linc. Stat §§1201-06, which is reprinted in Appendix A. Of specific relevance is section 20-1203, which bans medical treatments "performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." Linc. Stat. 20-1203. The Fourteenth Amendment of the United States Constitution is also relevant in this case. Of specific relevance is the Due Process Clause, which states that no State shall "deprive any person of life, liberty, or property, without due process of law" and the Equal Protection Clause, which states that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Factual Background

The Respondents in this case are Elizabeth and Thomas Mariano and their transgender son Jess Mariano, who is fourteen years old. R. at 2. Jess's assigned sex at birth was female; however, Jess began to identify as a male at a young age and has struggled with gender disconnect. R. at 4. Prior to receiving treatment, Jess's mental health began to rapidly deteriorate, causing him to attempt suicide at the age of eight. R. at 4. In response, Jess began receiving therapy from a psychiatrist and was diagnosed with gender dysphoria. R. at 4. After many months of receiving psychiatric care and at the recommendation of his psychiatrist and pediatrician, Jess began taking GnRH agonists, which delay female puberty, via monthly injections at the age of ten years old. R. at 5. These treatments have improved Jess's mental health and lessened his symptoms of gender dysphoria; however, given the persistence and strength of his gender dysphoria, his psychiatrist testified that hormone treatment and chest surgery later in Jess's teenage years may be needed. R. at 5.

If preliminary injunction is reversed, the SAME ACT will prevent Jess from receiving puberty blockers in the State of Lincoln. R. at 5. Jess's psychiatrist testified that even one month without medication could cause Jess's body to undergo puberty, which would increase his symptoms of gender-dysphoria as his body begins to more closely resemble a sex he does not identify with. R. at 5. Since Jess's symptoms have previously caused him to have suicidal thoughts and actions

prior to receiving gender-affirming treatment, the passage of the SAME Act threatens Jess's life. R. at 4.

Procedural History

Preliminary Proceedings

On November 4, 2021, the Respondents filed a Complaint with the United States District Court for the District of Lincoln against the Defendant, who has the power and intent to enforce the SAME Act, under her capacity as Attorney General of the State of Lincoln. R. at 1. In their Complaint, the Mariano's alleged that the SAME Act violated their Due Process and Equal Protection rights granted by the Fourteenth Amendment of the United States Constitution. R. at 1. Subsequent to filing their Complaint, the Mariano's filed a Motion for Preliminary Injunction on November 11, 2021. R. at 1. On November 18, 2021, the Defendant responded to the Complaint and filed a Motion to Dismiss. R. at 1.

Hearing

On December 1, 2021, a hearing on the Complainants Motion for Preliminary Injunction and the Defendant's Motion to Dismiss was conducted. R. at 1. At the hearing the Respondents provided medical and scientific evidence to support their Motion. R. at 5. This information included (1) and (2) that the Endocrine Society and World Professional Association for Transgender Health (WPATH) support individualized treatments of gender dysphoria, including the use of puberty blockers; (3) that puberty blockers are reversable treatments that do not have long-term effects on fertility; (4) that effective forms of gender-affirming care include:

facilitating social transitions, puberty blockers, and gender-affirming hormones and surgeries; (5) that treatments for youth with gender-dysphoria should be determined on an individualized basis at the recommendation of a qualified mental health professional; (6) the positive impact that puberty blockers has on the mental health of youth with gender dysphoria; (7) that gender dysphoria in minors twelve and older is likely to persist; and (8) that the majority of medical organizations in the United States support gender-affirming treatment for youth. R. at 5-7. In response, the Defendant referred to the legislative findings of the SAME Act, which question the validity of the medical evidence that supports the treatments prohibited in §20-1203 of the SAME Act. R. at 7. The State of Lincoln also cited other countries who have restricted access to gender-affirming care to support the SAME Act. R. at 7-8. Lastly, the State of Lincoln called two witnesses who testified that they regretted using puberty blockers and hormone treatments. R. at 8.

District Court Ruling

In considering this matter, the District Court held that the serious question standard is still viable despite the precedent established in *Winter v. Nat. Res. Def. Couns., Inc*.. R. at 9. Thus, the court considered the irreparable harm and the balance of hardships if preliminary junction were to be granted. R. at 9. The court concluded that the Mariano's would suffer immediate and irreparable harm if injunctive relief was denied and that the balance of equities was in their favor. R. at 10, 12. In consideration of the Mariano's constitutional claims, the court found that there are serious questions as to whether the SAME Act interferes with Elizabeth

and Thomas Mariano's right to parent under the substantive Due Process Clause. R. at 16. Additionally, the court found serious questions as to whether the SAME Act interfered with Jess's Equal Protection right to be free from unwarranted discrimination on the basis of sex and transgender status. R. at 21-22. Giving these findings, on December 16, 2021, the court granted the Plaintiff's Motion for Preliminary Injunction, denied the State of Lincoln's Motion to Dismiss, and enjoined the State from enforcing the SAME Act. R. at 22.

Appellate Court Ruling

Subsequent to the District Court's decision, the State of Lincoln filed an interlocutory appeal requesting that preliminary injunction be reversed and that the matter be remanded with instructions to dismiss. R. at 23. In agreement with the lower court, the Appellate Court held that the precedent established in *Winter* does not preclude the use of the sliding-scale serious question approach for matters of preliminary injunction. R. at 24. Furthermore, the court agreed with the finding of the lower court that the Mariano's would likely suffer irreparable harm if the SAME Act was passed, and that the balance of interests is in the Mariano's favor. R. at 25. In consideration of Elizabeth and Thomas Mariano's substantive Due Process claim, the Appellate Court agreed that there were serious questions regarding the SAME Act's infringement on the Mariano's right to parent. R. at 25-26. Lastly, the court held that there are serious questions regarding the SAME Act's infringement on Jess Mariano's right to Equal Protection because the SAME Act discriminates on the basis of sex, or alternatively on the basis of transgender

individuals as a quasi-suspect class. R. at 26-27. As such, the Appellate Court affirmed the District Court's holding. R. at 27.

Judge Gilmore dissented, arguing that the serious question standard is contrary to *Winter* and thus the case should be remanded for adjudication without use of the serious question standard. R. at 28. Judge Gilmore also argued that the substantive Due Process right to parent does not give parents the right to choose experimental treatment for their children and that the SAME Act is narrowly tailored to achieve the State's compelling interest to prevent children from undergoing harmful medical treatments. R. at 29-31. Judge Gilmore also disagreed with the majority regarding Jess Mariano's Equal Protection claim, arguing that the SAME Act does not discriminate on the basis of sex or transgender status. R. at 32-33.

Present Posture

The State of Lincoln applied to the Supreme Court of the United States for a stay of the preliminary injunction and for a writ of certiorari to consider on the merits the injunction and the District Court's denial of the Petitioner's Motion to Dismiss. R. at 35. The Petitioner's application for a stay pending the filing and disposition of a petition for a writ of certiorari was denied. R. at 35. However, on July 18, 2022, the Petitioner's petition for writ of certiorari to the United States Court of Appeals for the Fifteenth Circuit was granted in regard to the following limited issues: (1) Whether the "serious question" standard for preliminary injunctions continues to be viable after *Winter v. National Resources Defense*

Council, Inc.; and (2) whether the preliminary injunction was properly granted in regard to the Respondent's substantive Due Process and Equal Protection claim. R. at 35.

SUMMARY OF THE ARGUMENT

The Court should uphold the judgements of the United States' District Court for the District of Lincoln and the United States Court of Appeals for the Fifteenth Circuit because *Winter* does not preclude the use of the serious question standard. Furthermore, injunction in favor of the Respondent's must be granted to uphold the substantive Due Process right to parent and the Equal Protection right to be free from discrimination on the basis of sex and transgender status.

The preliminary injunction standard established by the Court in *Winter* does not prohibit application of the serious questions standard because *Winter* does not require a heightened showing for the likelihood of success factor. The serious questions standard acts as a variation of the likelihood of success factor by providing a flexible approach to the inquiry in which serious questions as to the merits of the claim may be sufficient in the absence of a more likely than not showing as to the merits of the claims, so long as the balance of hardships strongly favors the movant, and the other *Winter* factors are met. In *Winter*, the Supreme Court granted certiorari to review the preliminary injunction standard previously employed by the Ninth Circuit, where it established the four factors required to obtain the injunctive relief. The Court began by rebutting the Ninth Circuit's assertion that preliminary injunctions are permitted where irreparable harm is

possible in the absence of injunctive relieve. The Court maintained that simply requiring a possibility of irreparable harm was not appropriate for such an extraordinary remedy. Instead, there must be a probability of irreparable harm. The Court then proceeded to emphasize the significant role played by the public interest and balancing of hardships factors. However, the Supreme Court remained silent on how the likelihood of success as to the merits factor should be interpreted. The Supreme Court would have addressed this factor if it intended to restrict the likelihood of success inquiry to a heightened standard. However, its failure to do suggests that the Court supported a flexible approach to address this factor, a notion that Justice Ruth Bader Ginsburg asserts in her dissent. Therefore, the serious questions standard was not expressly overturned by the Court in *Winter*, and it continues to be viable as a complementary variation of the likelihood of success factor stated in *Winter*.

Preliminary injunction in favor of the Respondents must be upheld because they have raised serious questions on the merits of their claims that the SAME Act is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. The SAME Act violates Elizabeth and Thomas Mariano's substantive Due Process fundamental right to parent, a right that has long been acknowledged and protected by this Court under strict scrutiny review. The State of Lincoln claims that the right to parent does not protect the parental right to choose experimental treatments for their children. As the State purports that the SAME Act only bans experimental treatments, they

argue that strict scrutiny review should not be applied. However, the treatments banned in the SAME Act are not experimental but instead are broadly supported by the medical community and have been proscribed for decades. Even if the gender-affirming care banned by the SAME Act was deemed experimental, as it meets all five parts of the *McLaughlin v. Williams* test to determine if a medical treatment is effective, the gender-affirming care should be considered effective treatment for gender dysphoria that parents should have the right to choose on behalf of their children. The SAME Act fails strict scrutiny review because the States' interest in protecting children is not furthered by the SAME Act, which has the effect of withholding lifesaving and well supported treatment from all youth with diagnosed gender dysphoria. Even if the SAME Act was reviewed under rational basis scrutiny, the Act would be deemed unconstitutional because it is not rationally related to a legitimate state interest.

The SAME Act is facially discriminatory on the basis of sex and transgender status and does not support the State of Lincoln's interest in protecting children. While there is some debate, many Circuits believe that discrimination on the basis of transgender status constitutes discrimination on the basis of sex; thus, the SAME Act should be subjected to intermediate scrutiny review. Alternatively, the SAME Act should be reviewed under a higher standard than the rational basis test because transgender individuals meet the four-factor test in *Grimm v. Gloucester County* that is used to determine if a group should be considered a quasi-suspect class for matters of Equal Protection claims. The SAME Act does not survive

intermediate/heightened scrutiny because the State's interest in protecting children from experimental care and peer pressure is not substantially related to or furthered by the SAME Act. Even if the SAME Act is reviewed under rational basis scrutiny, the SAME Act would still violate Jess Mariano's right to Equal Protection because the Act is not rationally related to legitimate state interest.

ARGUMENT

I. The serious questions standard is not precluded by Winter because it is a complementary variation of the likelihood of success factor.

When a party is likely to suffer irreparable harm from the enforcement of a state statute, a court may grant a preliminary injunction to enjoin enforcement of the statute until a trial on the merits can be held. *See Winter v. Nat. Res. Def. Couns., Inc.*, 555 U.S. 7, 20 (2008); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009); *Brandt v. Rutledge*, 551 F. Supp. 3d 892, 892 (E.D. Ark. 2021), *aff'd*, No. 21-2875, 2022 U.S. App. LEXIS 23888, at *1, *12 (8th Cir. Aug. 25, 2022). Before a court can grant a preliminary injunction, the party seeking injunctive relief must establish (1) a likelihood of success on the merits of their claims; (2) a likelihood of irreparable harm if deprived injunctive relief; (3) that the balance of hardships tips in their favor; and (4) that relief is in the public interest. *Winter*, 555 U.S. at 20 (internal citations omitted). When the injunction enjoins government action, the balancing of the hardships and public interest evaluations merge into one inquiry. *Nken*, 556 U.S. at 435. This standard, derived from *Winter*, has been interpreted differently by the Circuit courts. Jim Wagstaffe, *Pretrial Injunctive Relief Standards (Federal)* (2022). While some Circuits have interpreted the *Winter* standard to require a showing of all four factors, including that there is likelihood of success on the merits, others have concluded that the factors can be measured on a sliding scale. *Id.* Several Circuits have applied a sliding scale approach through the application of the serious questions test. *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (internal citations

omitted); *Northeast Ohio Coal. v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012) (internal citations omitted); *All. For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). These Circuits have asserted that the serious questions test still applies in the wake of the *Winter* opinion. *Citigroup*, 598 F.3d at 36*; see Husted*, 696 F.3d at 591*; Cottrell*, 632 F.3d at 1134. Public policy supports pretrial injunctive relief that maintains the status quo until a trial can be held on the merits when irreparable harm is probable in absence of such relief. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (stating that preservation of the parties' relative positions awaiting trial is the primary purpose of injunctive relief).

A. Winter's silence on the issue implies Court approval for a flexible approach to the likelihood of success inquiry.

Winter explicitly abrogated specific aspects of the standard for preliminary injunction that was previously employed by the Ninth Circuit. 555 U.S. at 21-22, 24. Specifically, the Court expressly identified the level of harm necessary to warrant injunctive relief. *Id.* at 21. Additionally, the Court emphasized the significance of public interest and the balance of hardships when evaluating the need for a preliminary injunction. *Id.* at 24. These factors are so pertinent to the inquiry that their absence may warrant denial of injunctive relief, even when there is a strong likelihood of success on the merits. *See id.* at 32. The emphasis on public interest and the balance of hardships aligns with public policy because preliminary injunctions are extraordinary remedies that are only warranted when irreparable harm is likely in the absence of relief. *See id.* at 24, 32. Since equitable relief can be requested based on a wide variety of facts, courts are often faced with unique cases

that require an in-depth evaluation. *See Citigroup*, 598 F.3d at 35. Mandating a specific showing of harm in each case prevents abuse of the extraordinary remedy, and ensures that injunctive relief serves its purpose to prevent irreparable harm. *See Winter*, 555 U.S. at 20. However, due to the immense number of unique cases that can come before a court, it is important that some flexibility as to finding a likelihood of success may be practiced. *Id.* at 51 (Ginsburg, J., dissenting) (holding that the District Court sufficiently balanced the equities). In the absence of such flexibility, injunctive relief could be wrongfully denied, resulting in unfair and unnecessary suffering from irreparable harm. *See id.*; *see also Citigroup*, 598 F.3d at 35-36.

Winter unambiguously suppressed any interpretation as to the scope of the likelihood of success factor. *See* 555 U.S. at 24; *Citigroup*, 598 F.3d at 37; *Cottrell*, 632 F.3d at 1131. However, the Court provided specific guidance for evaluating irreparable harm, the balance of the hardships, and the public interest factors. *Winter*, 555 U.S. at 22-24. Therefore, since *Winter* neglects to provide any pre-requisite level for the likelihood of success, serious questions can be sufficient to establish this factor. *Citigroup*, 598 F.3d at 37-38; *Cottrell*, 632 F.3d at 1132. However, allowing serious questions does not eliminate the need for the other *Winter* factors necessary to obtain a preliminary injunction. *Cottrell*, 632 F.3d at 1134-35.

1. **If preliminary injunction is reversed, the Mariano's will be irreparably harmed because Jess will not be able to receive gender-affirming treatment.**

Injunctive relief is only appropriate when a party is likely to suffer irreparable harm if denied preliminary injunction. *Winter*, 555 U.S. at 20. *Winter* rejected the Ninth Circuit's assertion that there only needs to be a possibility of irreparable harm when there is a strong likelihood of success. *Id.* at 21. Instead, *Winter* specified that a probability of harm is always necessary. *Id.* In *Brandt*, the court found that irreparable harm would occur if a statute prohibiting transgender minors from starting or continuing to receive gender-affirming treatment went into effect. LEXIS 23888, at *18-19. The injury alleged was that, without the prohibited treatment, the minors would begin puberty and would develop features associated with their sex assigned at birth. *Id.* This legislation was deemed to be extremely harmful because of the irreversible impacts of puberty that would worsen the minors' symptoms of gender dysphoria. *Id.* The court held that the claimed injury clearly showed that, in the absence of a preliminary injunction, the minors would suffer irreparable harm. *Id.*

Jess will suffer irreparable harm if the injunction is reversed. R. at 4. Indeed, the irreparable injury that threatened the movants in *Brandt* is identical to the threat Jess would face. R. at 5. If deprived of his medication, Jess will undergo female puberty, which in turn will heighten the symptoms of his gender dysphoria. R. at 5. The preliminary injunction must be affirmed to protect Jess from irreparable and potentially life-threatening harm that will occur if the same act is enforced.

2. The Mariano's will suffer significant hardship in the absence of the preliminary injunction that far outweighs the State's speculative assertion that reversal is in the public interest.

The balance of hardships and public interest are necessary elements that must be considered before a preliminary injunction may be granted. *Winter*, 555 U.S. at 32. The balance of hardships is evaluated by weighing the effect that the grant or denial of the preliminary injunction will have on each party. *Id.* at 24. Ultimately, the benefits for the movant of granting the preliminary injunction must outweigh the consequences for the adverse party. *Id.* at 20. Additionally, public consequences arising from the grant of the preliminary injunction must be carefully and thoroughly considered before providing a remedy. *Id.* at 24. When the adverse party is a government actor, these factors become one consideration. *Nken*, 556 U.S. at 435. In *Brandt*, the court specified that there is always public interest in preventing a violation of a party's constitutional right. LEXIS 23888, at *19. Additionally, the lower court found that a probability of severe, irreparable harm to the movant tips the balance of hardships in favor of granting injunctive relief, especially where enjoining the law only minimally harms the State. *Brandt*, 551 F. Supp. 3d at 892 (stating that Arkansas's interest in enforcing a law that would deprive transgender minors of gender-affirming treatment pending litigation was insignificant in comparison to the severe irreparable harm that would be suffered by the minors, and that States have no interest in enforcing unconstitutional laws).

There is a high probability that Jess will suffer severe, irreparable harm that is so significant that it tips the balance of the hardships in his favor. R. at 4-5. This

is especially true in light of the State's speculative and unpersuasive assertion of a public interest. R. at 24. In fact, the most significant public interest focus here, as held in *Brandt*, is ensuring that the Mariano's constitutional rights will not be violated. R. at 12-13. Therefore, the preliminary injunction should be affirmed because the benefit to Jess, that he will not lose access to necessary gender-affirming care, far outweighs the State's attempt to claim that reversing the injunction is in the public interest.

3. Injunctive relief is an equitable remedy that must be evaluated on a case-by-case basis.

Not only does *Winter*'s silence regarding the likelihood of success requirement leave room for varying interpretations, it also implies Supreme Court support of a flexible approach to resolve this factor. *See Citigroup*, 598 F.3d at 36-38; *see also Cottrell*, 632 F.3d at 1131-32, 34. Despite thoroughly evaluating the other three elements necessary for preliminary injunction, *Winter* neglected to even hint at the possible scope of the likelihood of success factor. *Citigroup*, 598 F.3d at 37. Although the Court states that it does not need to evaluate the likelihood of success because the other *Winter* factors have not been met, the Court's lack of discussion may have come from an intentional decision to avoid discussing the appropriate scope for the likelihood of success. *See Winter*, 555 U.S. at 23-23; *see also Citigroup*, 598 F.3d at 38. The application of the serious questions standard in determining whether to grant injunctive relief has a vast and thorough history. *See Citigroup*, 598 F.3d at 35 (asserting that the 2nd Circuit has used this approach for at least the last five decades). If the Supreme Court intended to clarify one

particular standard for the likelihood of success, it would have expressly done so, as it did with the other factors, so as to make clear that it was overturning longstanding flexible standards adopted by eight of the Circuits. *Id.* at 38. Even if the Court did not want to fully elaborate upon the likelihood of success factor, but still intended to void the serious questions standard, it could have easily indicated that the standard was insufficient, especially given that the serious question standard was discussed in the lower court proceedings. *See Citigroup*, 598 F.3d at 38; *see Winter v. Nat. Res. Def. Couns., Inc.*, 503 F.3d 859 at 38, *aff'd*, 555 U.S. 7, 20 (2008). Additionally, a key part in determining whether to grant injunctive relief is the flexibility granted to judges so they may provide equitable remedies on a case-by-case basis. *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting). Since a preliminary injunction is a unique remedy, courts have not required that probable success be shown by a predetermined, specific amount, and have instead evaluated claims based on a sliding scale. *Id.* Supreme Court jurisprudence has never rejected such a standard, nor does it today. *Id.* Therefore, the Supreme Court has indicated implied acceptance of a flexible approach to the likelihood of success factor, meaning that the serious questions standard is still viable.

B. The serious questions standard ensures that injunctive relief is available to prevent irreparable harm when a strong likelihood of success as to the claims is uncertain.

Winter's requirement for a likelihood of success on the merits is met when there are serious questions as to the merits of the claims, and when the balance of the hardships strongly favors the party seeking injunctive relief. *See Citigroup*, 598

F.3d at 35 (internal citations omitted) (stating that when the costs of denying the injunction outweigh the benefits of granting it, flexibility in applying the *Winter* standard is important); *see also Husted*, 696 F.3d at 591 (internal citations omitted) (stating that a showing for a likelihood of success on the merits is generally enough if there are serious questions as to the merits of the claims); *Cottrell*, 632 F.3d at 1134-35 (stating that injunctive relief is suitable when there are serious questions as to the merits of the claims and the balance of the hardships strongly favors the party requesting the preliminary injunction if the other two prongs of the *Winter* standard are met). The questions raised as to the merits must be "so serious, substantial, difficult, and doubtful," that litigation and in-depth investigation is necessary to fairly resolve them. *Husted*, 696 F.3d at 591 (internal citations omitted). Policy supports the acceptance of serious questions for the purpose of granting preliminary injunction because injunctive relief is designed to provide a remedy based on a preliminary estimate of the merits of the claims. *Citigroup*, 598 F.3d at 35 (internal citations omitted). If preliminary injunction required a more likely than not showing of success, injunctive relief would only be available in easy cases that do not raise significant difficulties. *Id. (internal citations and quotations omitted).* Imposing such a significant limitation on the availability of injunctive relief would inhibit the intended utility of preliminary injunctions, resulting in an immense risk of irreparable harm to movants. *Id.* at 35-36. As, in addition to the serious question standard, the balance of hardships must strongly favor the movant, the serious question standard is no less burdensome than proving a

likelihood of success. *Id.* at 35. Requiring every case, regardless of its unique circumstances, to establish a likelihood of ultimate success "is unacceptable as a general rule." *Id. (internal citations and quotations omitted).*

1. **Since the Mariano's will suffer irreparable harm in the absence of injunctive relief, the balance of hardships weighs strongly in their favor.**

If serious questions are asserted to obtain a preliminary injunction, it is also necessary that the balance of the hardship tips decidedly in favor of the movant. *Citigroup,* 598 F.3d at 35; *Cottrell,* 632 F.3d at 1131. The threshold for this balance, which must significantly favor the movant, is much higher than simply establishing a likelihood of success. *Winter*, 555 U.S. at 20 (stating that the balance of the hardships under the traditional *Winter* standard only needs to tip in favor of the movant); *Citigroup*, 598 F.3d at 35; *Cottrell,* 632 F.3d at 1131. The balancing of the hardships determines whether the costs outweigh the benefits of denying injunctive relief. *Citigroup*, 598 F.3d at 35. Due to the heightened requirement for the balancing of the hardships, the overall burden of successfully raising serious questions is no less onerous than establishing a likelihood of success. *Id.* In *Cottrell*, the court found that the balance of hardships tipped strongly in favor of the party seeking the preliminary injunction. *Cottrell*, 632 F.3d at 1138. The court made this finding based on a conclusion that, while the denial of injunctive relief would result in irreparable harm to the movant, granting the injunction only raised speculative risks for the adverse party. *Id.*

Here, the preliminary injunction should be affirmed because the balance of the hardships significantly favors injunctive relief. Similar to the finding in *Cottrell*,

the Mariano's would be irreparably harmed in the absence of injunctive relief, while there are only speculative risks that the State will be harmed if the injunction is affirmed. R. at 10, 13. If the preliminary injunction is stayed, Jess will no longer have access to the gender-affirming treatment that prevents the onset of puberty. R. at 5. If Jess started undergoing puberty, he would develop features associated with the female sex, which would have a significantly negative impact on his mental health and his symptoms of gender dysphoria. R. at 5. Jess has already tried to take his life once because of his gender dysphoria, and to deprive him of his lifesaving medication will result in irreparable harm. R. at 4. Therefore, the balance of the hardships significantly favors affirming the preliminary injunction.

2. **The serious questions standard ensures that courts have full discretion to determine when a preliminary injunction is necessary to protect the status quo.**

Use of the serious questions standard when deciding whether to grant injunctive relief generally furthers the policy goals of preliminary relief. *Citigroup*, 598 F.3d at 35 (internal citations omitted). The adoption of a flexible approach to determining the likelihood of success ensures that the district courts can properly exercise their full discretion, especially when a request for injunctive relief is rooted in difficult and complex factual situations. *Id. at 38.* Then, upon a finding that the serious questions standard, and all other *Winter* factors have been met, a preliminary injunction can be issued to prevent a party from suffering irreparable harm. *Cottrell*, 632 F.3d at 1132. Additionally, it is especially significant to note that *Winter* seemingly endorses a flexible approach regarding the public

consequences of granting injunctive relief. *Winter*, 555 U.S. at 24; *Cottrell*, 632 F.3d at 1132. Ultimately, the serious questions standard acts as a complementary variation of the traditional *Winter* test because it further empowers the judiciary to grant or deny injunctive relief in unique and complex cases. *Citigroup*, 598 F.3d at 35; *Husted*, 696 F.3d at 591; *Cottrell*, 632 F.3d at 1134-35.

II. Preliminary injunction was properly granted because the Mariano's have raised serious questions as to whether the SAME Act violates their constitutional right to Due Process and Equal Protection.

The Fourteenth Amendment of the U.S. Constitution states that no state shall "deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the Equal Protection of the laws;" thus, creating the textual justification for rights of Due Process and Equal Protection. U.S. Const. amend. XIV, § 1. While the terms, "life, liberty, and property" can be ambiguous, this Court has created rights to substantive Due Process and has held that, among other rights, liberty includes the right of the individual to "establish a home and bring up children" and "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Moreover, this court has found that the substantive Due Process Clause is a living doctrine, not to be constrained by the text of the Constitution but to be interpreted by judges to continuously re-define and protect "liberty for all". *Planned Parenthood v. Casey*, 505 U.S. 833, 846-51 (1992).

The Equal Protection Clause of the Fourteenth Amendment has been interpreted to grant the courts the duty of determining whether state legislation interferes with the right of individuals to be treated equally by state law. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). While state legislation is normally presumed to be valid, legislation that includes gender and sex-based classifications are reviewed under heightened scrutiny, as this Court has ruled that legislation that accounts for gender and sex-based classifications are often motivated by outdated and stereotypical notions of gender and sex. *Id.* at 440-41. Like the substantive Due Process Clause, the Equal Protection Clause is not a static document, and this Court has used the Equal Protection Clause to invalidate legislation that is unjust in light of new information and updated social practices and moral beliefs. *Obergefell v. Hodges*, 576 U.S. 644, 647 (2015) (citations omitted).

A. The SAME Act's infringement on Elizabeth and Thomas Mariano's fundamental right to parent granted by the substantive Due Process Clause is unjustified because the SAME Act is not sufficiently narrowly tailored to meet a compelling State interest.

For the right to parent to be protected by the substantive Due Process clause, there must be a liberty interest implicated. *See Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). The right to parent and to control the upbringing of one's children is one of the oldest liberty interests recognized by this Court in relation to substantive Due Process. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Meyer*, 262 U.S. at 399, 401 and *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925)). This Court has also ruled that there is a liberty interest implicated in a parent's right to make decisions regarding their child's care and that children have a liberty

interest in having freedom from the "emotional and psychic harm" that can be caused by forms of medical care. *See Parham v. J.R.*, 442 U.S. 584, 597 (1979) (holding that children have a liberty interest in the freedom from emotional and psychic harm caused by institutionalization for medical reasons); *See Troxel*, 530 U.S. at 67 (citing *Stanley v. Ill.*, 405 U.S. 645, 651 (1971)).

Once a liberty interest has been established, it must be determined if the alleged interest is rooted in the nation's traditions and practices. *See Washington v. Glucksberg*, 521 U.S. at 723. This Court has repeatedly ruled that a child is not a "mere creature of the State" and has supported the notion that the parent's right to control the upbringing of their children is deeply rooted in the nation's beliefs and practices. *Parham v. J.R.*, 442 U.S. at 602 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. at 535). This Court has included that parents historically have the duty to "recognize symptoms of illness [in their children] and to seek and follow medical advice" on behalf of their children. *Id.* at 602. Additionally, parents can determine that care is necessary, especially when the child and their child's care team agree the care is needed. *See Brandt*, 551 F. Supp. 3d at 892.

As there is a liberty interested implicated in the right to parent that is supported by the traditions of the Nation, this Court has ruled that there is a fundamental right to parent, and for parents to make determinations concerning the care of their children, that is protected by the substantive Due Process Clause. *See Troxel*, 530 U.S. at 67 (citing *Stanley v. Ill.*, 405 U.S. at 651). Thus, legislation is unconstitutional if it interferes with the right to parent and fails to withstand

strict scrutiny review. *Brandt*, 551 F. Supp. 3d at 893 (citing *Washington v. Glucksberg*, 521 U.S. at 719-20). As such, the State must have a compelling interest that is narrowly tailored to accomplish the State's interest to justify infringing on the parental right. *Id.* at 894. While strict scrutiny offers the highest level of constitutional protection, the right to parent is not absolute, and can be restricted by the State when necessary for the interest of the child or the public. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). However, unless given reason to believe otherwise, courts should presume that a fit parent is acting on behalf of the best interests of their child and "there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children." *Troxel*, 530 U.S. at 68-69 (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

1. **The SAME Act bans effective, non-experimental gender-affirming care that decreases patient's mortality, increases patient's quality of life, and is well-supported by the medical community.**

While the Petitioner claims that the SAME Act only bans experimental treatments which do not interfere with the right to parent, in reality the SAME Act outlaws well-established, non-experimental treatments that are supported by the medical community. *Eknes-Tucker v. Marshall*, No. 2:22-cv-184-LCB, 2022 U.S. Dis. LEXIS 87169, at *1, *24 (M.D. Ala. May 13, 2022) (finding that gender-transitioning medications for minors are not experimental); R. at 14. In considering the constitutionality of state legislation which outlawed gender-affirming care such as puberty blockers and chest surgery, the court in *Eknes-Tucker* found insufficient

proof that these methods of care should be considered experimental. 2022 LEXIS 87169, at *24-25. While there is not a definite legal definition of experimental care, the Petitioner argues that the treatments banned by the SAME Act are experimental because they are not broadly supported by the medical community and their access been restricted in other countries. R. at 7-8, 15. However, many prominent medical associations in the United States, including the Endocrine Society and the Pediatric Endocrine Society, support similar gender-affirming care that is banned by the SAME Act. *Eknes-Tucker*, 2022 LEXIS 87169, at *15-16, 27 (finding that "twenty-two major medical associations in the United States endorse transitioning medications"). Additionally, while the Petitioner claims that the SAME Act is supported by European countries that have taken the same initiatives against gender-affirming care, unlike the State of Lincoln, these countries still allow minors to receive this care on a case-by-case basis. *Id.* at *28.

The Petitioners also argue that gender-affirming care, such as puberty blockers, come with medical risks, and patients may later regret their choice to receive the treatment. R. at 7-8. However, puberty-blockers have been proven to reduce suicidal ideation in transgender individuals, increase confidence in transgender youth, and increase the quality of life and mental health of patients. *Fain v. Crouch*, No. 3:20-0740, 2022 LEXIS 137084, at *32-33 (S.D. W. Va. Aug. 2, 2022); *Developments in the Law -- Intersections in Healthcare and Legal Rights: Chapter One: Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 Harv. L. Rev. 2163, 2169-70 (2021).

Moreover, "risk alone does not make a medication experimental." *Eknes-Tucker*, 2022 LEXIS 87169, at *25. The State of Lincoln argues that the SAME Act bans treatments that are "insufficiently proven and potentially unsafe." R. at 30. However, the gender-affirming treatment banned by the SAME Act is supported by "prevailing consensus of the medical community" for treatment of gender dysphoria. *Fain v. Crouch*, 2022 LEXIS 137084, at *31. Additionally, the treatments have also been well-established within the medical community as an effective treatment of other medical issues since the 1980's and the first report on using puberty blockers to treat gender dysphoria was published almost twenty-five years ago. *Eknes-Tucker*, 2022 LEXIS 87169, at *25; Natalie J. Nokoff, *Medical Interventions for Transgender Youth*, National Library of Medicine, https://www.ncbi.nlm.nih.gov/books/NBK577212/ (updated Jan. 19, 2022). Thus, the Petitioners claim that the care banned by the SAME Act is experimental is unsubstantiated because the treatment has been deemed non-experimental by other courts, is broadly supported by the medical community, has positive impacts on transgender youth, and has been supported and used by the medical community for an extended period of time.

Even if the gender-affirming care banned by the SAME Act is classified as experimental, the Respondent's Preliminary Injunction claim should still succeed on the merits because it is an effective treatment. In *McLaughlin v. Williams* the court established a five-part test to determine the efficacy of new procedures that are considered experimental but may be permittable because of their effectiveness.

McLaughlin v. Williams, 801 F. Supp. 633, 639 (S.D. Fla. 1992). As the treatments banned by the SAME Act pass this five-part test, they should be considered effective treatments regardless of if they are considered experimental.

Part one of the *McLaughlin* test considers the mortality rate of patients who have received the treatment. *Id.* As youth who experience gender dysphoria are roughly three times more likely to have suicidal thoughts than the general youth population, gender dysphoria poses a significant mortality risk to youth. *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, *supra*, at 2168. However, youth who have received puberty blockers have a reduced likelihood of suicidal thoughts than individuals who did not receive puberty blockers. *Id.* at 2169.

The second part of the *McLaughlin* test asks the court to consider the frequency of the treatment, where it is performed, and its success rate. *McLaughlin*, 801 F. Supp. at 639. As the availability of gender-affirming healthcare has increased, the rate of transgender-youth receiving gender-affirming healthcare is increasing. *See Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, *supra*, at 2165. Furthermore, recent studies have determined that administering gender-affirming care, such as puberty blockers, to youth increases their quality of life and decreases depressive behaviors. Nokoff, *supra*.

Thirdly, the *McLaughlin* test considers the reputation of the medical centers and doctors who support the treatment. *McLaughlin*, 801 F. Supp. at 639. As the

medical community overwhelmingly supports providing gender-affirming health care to minors, the reputation of those who support gender-affirming care is likely unquestionable. *Cf. Eknes-Tucker*, 2022 LEXIS 87169, at *15-16, 27 (finding that "twenty-two major medical associations in the United States endorse transitioning medications"); *Brandt*, 551 F. Supp. 3d at 890 (stating that medical organizations agree that gender affirming care should be the recommended treatment for gender dysphoria).

Fourth, the *McLaughlin* test considers the long-term effects of the treatment on patients. *McLaughlin*, 801 F. Supp. at 639. The long-term effects of puberty-blockers includes impacts on bone density, body composition, and fertility issues. Nokoff, *supra*. However, fertility issues are only temporary, and more research is being conducted to determine the long-term effects of puberty-blockers. *Id.* Moreover, administering puberty-blockers to minors has also been found to improve the psychological functioning, behavior, and emotions of the patients while also decreasing their symptoms of depression related to gender dysphoria. *Id.*

Lastly, the *McLaughlin* test considers the extent that medical science on the treatment is developing. *McLaughlin*, 801 F. Supp. at 639. Research on gender-affirming care for youth has been conducted for decades and is being continually updated with the support of organizations such as WPATH, who has been publishing standards of care for over forty years, and the Endocrine Society, who has been publishing guidelines on gender-affirming therapy since 2009. Nokoff, *supra*.

Based on the considerations outlined in the *McLaughlin* test, the gender-affirming care that is banned by the SAME Act is an effective treatment that should not be banned simply because some outside of the medical community believe it is experimental. While gender-affirming medical care is not perfect or without side-effects, overall, it is an effective form of care that is supported by the U.S. medical community and should be evaluated on a case-by-case basis to determine if it is the appropriate form of care for each patient. *See Eknes-Tucker*, 2022 LEXIS 87169, at *27; Nokoff, *supra*. Of significant importance is the reduction in mortality rates of transgender youth, especially as "the State has an interest in preventing suicide, and in studying, identifying, and treating its causes." *Washington v. Glucksberg*, 521 U.S. at 730.

2. **The SAME Act is not narrowly tailored to meet the State's interest in ensuring the health and safety of children because it prevents children with gender dysphoria from receiving care that is recommended by their medical team.**

To withstand strict scrutiny, the State of Lincoln's infringement on the right to parent must be narrowly tailored to achieve a compelling government interest. *Brandt*, 551 F. Supp. 3d at 893. The State of Lincoln argues that it has a compelling interest in protecting children from experimental treatments. R. at 14. The States' interest in protecting the health of children is legitimate. *See Prince*, 321 U.S. at 441. However, the SAME Act harms this interest because it withholds well-supported, life-saving care from youth with gender dysphoria. *See generally Eknes-Tucker*, 2022 LEXIS 87169, at *26-27 (reasoning that there is insufficient evidence indicating that gender-affirming treatments are unsafe or unjustifiably

recommended to patients by the medical community). Moreover, if the treatments banned by the SAME Act actually posed a significant threat to the safety of children, the State of Lincoln would logically ban the treatments for other conditions. *See Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, *supra*, at 2181. However, section 20-1203 of the SAME Act only bans treatments that are performed with the goal of "instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 3. In *Brandt v. Rutledge* where Arkansas acted pretextually to prevent children from receiving gender-transitioning treatment. 551 F. Supp. 3d at 893. Similarly, the Petitioner's goal when implementing the SAME Act was pretextual and sought to prevent children from receiving medically supported gender-affirming care because the State disagreed with the decision made by the parents and child to have the child receive gender-transitioning treatment. R. at 3.

Even presuming that the State of Lincoln implemented the SAME Act to achieve a legitimate compelling government interest, the SAME Act does not survive strict scrutiny because it is not narrowly tailored. For legislation to meet the requirements of strict scrutiny, the State must choose the least restrictive method of achieving the State's compelling interest. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000). When considering a less restrictive method, "a court should not assume a plausible, less restrictive alternative would be ineffective." *Id.* at 824. By establishing a blanket ban on certain gender-affirming treatments for

youth diagnosed with gender dysphoria, the State of Lincoln has not implemented the least restrictive method of achieving the State's interest. *See Eknes-Tucker*, 2022 LEXIS 87169, at *28-29 (ruling that a state's blanket-ban on transitioning medications for children was not narrowly tailored). Instead of proposing the SAME Act, the State of Lincoln could have implemented less restrictive alternatives such as only permitting the treatments for youth with well-documented gender dysphoria, permitting exceptions on a case-by-case basis, or allowing the use transitioning treatments for the purpose of medical research. *Cf. Id.* at 28 (stating that European countries who restricted access to gender-transitioning treatment still allow exceptions).

Even if the SAME Act was reviewed under rational basis scrutiny, the SAME Act would still violate the Mariano's constitutional right to Due Process. Rational basis scrutiny requires that the statute be "rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440 (citations omitted). Like in *Brandt v. Rutledge*, where the court determined that state legislation restricting the use of gender-transitioning treatment violated the substantive Due Process Clause under rational basis scrutiny, the SAME Act is also unconstitutional under this level of scrutiny. 551 F. Supp. 3d at 888, 893.

B. The SAME Act violates Jess Mariano's right to Equal Protection because the SAME Act is facially discriminatory on the basis of sex and is not substantially related to an important government interest.

The standard applied to determine if state legislation violates the Equal Protection Clause differs depending on if the statute is facially neutral but has a

gendered impact, or is facially discriminatory because of its use of gender or sex-based classifications. *Keevan v. Smith*, 100 F.3d 644, 650 (8th Cir. 1996). If legislation is facially discriminatory, it must withstand heightened scrutiny, which requires the classification to serve an important government objective and that the "discriminatory means employed are substantially related to the achievement of those objectives." *Id.*; *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (internal quotations and citations omitted). When evaluating the State's proposed objective, whether the "objective itself reflects archaic and stereotypic notions" should be assessed. *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 725. If the State objective is deemed important and legitimate, it must be determined whether the discriminatory classifications are needed to achieve the State's objective. *Id.* To prove that the discriminatory classification is needed, the State must provide "an exceedingly persuasive justification" that is "genuine, not hypothesized or invented post hoc in response to litigation." *See Eknes-Tucker*, 2022 LEXIS 87169, at *31 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

1. **The SAME Act is subject to heightened scrutiny because it discriminates on the basis of sex by outlawing medical treatments based on a patient's sex and transgender status.**

Circuits are currently split on if discriminatory classifications on the basis of transgender status violate the Equal Protection Clause under the category of sex discrimination or whether a transgender individuals constitute a quasi-subject class that should receive heightened scrutiny. *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, *supra*, at 2181. Many

courts, including the 1st, 6th, 7th, 8th, and 11th Circuits believe that discrimination against transgender individuals should be classified as sex discrimination because legislation discriminating against transgender individuals is often based on sex-based stereotypes and include terms referencing sex. *Id.* at 2179 (citing *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 577 (6th Cir. 2004));)*Brandt v. Rutledge*, LEXIS 23888, at *13-14. Like in *Brandt v. Rutledge* where the court ruled that banning medical treatments for minors based on their assigned sex at birth constitutes sex-based discrimination, section 20-1203 of the SAME Act discriminates on the basis of sex because it prevents minors from receiving care based on their biological sex. *Brandt v. Rutledge*, LEXIS 23888, at *13-14; R. at 3. By banning care based on biological sex, the SAME Act is discriminating against youth diagnosed with gender dysphoria for not conforming to gender expectations, a form of sex-based discrimination which several Circuits have deemed a violation of the Equal Protection Clause. *See Glenn*, 663 F.3d at 1317. The SAME Act's reliance on sex-based classifiers is apparent because the Act cannot be stated with the same meaning without referencing sex, as the distinguishing factor in what care a minor can receive is their biological sex; thus, like in *Whitaker v. Kenosha* where a School's policy was classified as sex-based discrimination because it could not be stated without referencing sex, the SAME Act is "inherently based upon a sex-classification and heightened review applies." 858 F.3d at 1051; R. at 3.

In Judge Gilmore's dissenting opinion he argued that the SAME Act does not discriminate on the basis of sex for purposes of the Equal Protection Clause because the precedent established in *Bostock v. Clayton County* does not apply to Equal Protection claims. R. at 32. When considering a Title VII claim, in *Bostock* this Court ruled that discrimination based on transgender status should be considered sex-based discrimination. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020). Some courts use this precedent to hold that discrimination against transgender individuals constitutes sex-based discrimination for the purposes of the Equal Protection Clause. *Eknes-Tucker*, 2022 LEXIS 87169, at *30. Other courts have argued that the precedent established in *Bostock* is limited to Title VII cases and should not be applied to Equal Protection claims. *Hennessy-Walker v. Snyder*, 529 F. Supp. 3d 1031, 1044 (D. Ariz. 2021). However, because the facts and elements needed to establish an Equal Protection claim and a Title VII claim are largely the same, if discrimination against transgender individuals is classified as sex-based discrimination under Title VII, the same reasoning and classifications should apply to an Equal Protection claim. *Smith v. City of Salem*, 378 F.3d at 577 (holding that a Title VII claim regarding transgender discrimination could "easily constitute a claim of sex discrimination grounded in the Equal Protection Clause"). Therefore, the court's holding in *Bostock* that discrimination against transgender individuals unavoidably discriminates on the basis of sex should support Jess Mariano's Equal Protection claim. *Bostock*, 140 S. Ct. at 1746. However, for the reasons stated above, even if the precedent established in *Bostock* did not apply to Jess Mariano's Equal

Protection claim, the SAME Act should still be reviewed under intermediate scrutiny because it unnecessarily makes medical care determinations on the basis of biological sex, relies on sex-based terminology as classifiers, and discriminates against minors for not conforming to gender stereotypes.

Alternatively, the SAME Act should be reviewed under a less-permissive standard than the rational-basis test because "transgender persons constitute a quasi-suspect class" entitled to heighted scrutiny review. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020). The holding that transgender persons constitute a quasi-suspect class in Equal Protection claims was made by the court in *Grimm v. Gloucester County School Board* with the use of a four-factor test to determine if a group of people should be considered a quasi-suspect class. *Id.* at 611.

The first part of this test considers if the class has been historically subjected to discrimination. *Id.* at 611 (internal citations omitted). Transgender youth have been subject to, and continue to be subjected to, discrimination in many forms, including but not limited to: social and political stereotyping, lack of access to healthcare, inaccurate and discriminatory psychological diagnoses, and physical and verbal harassment. *Id.* at 611-12. (finding that DSM guidelines have historically discriminated against the transgender population, that 78% of transgender individuals experience harassment in school and 28% in medical settings); *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, *supra*, at 2176-77 (stating that transgender youth

have been portrayed as "predatory, deviant, and mentally unstable" and that proposed legislation is trying to block transgender youth's ability to access care).

The second part of the *Grimm* test asks "if the class has a defining characteristic that bears a relation to its ability to perform or contribute to society." *Grimm*, 972 F.3d at 611 (citing *Cleburne*, 473 U.S. at 440-41). Impairment is not an inherent part of being transgender, and many leading medical organizations believe that there is no legitimate inherent implied inability of transgender individuals to function and thrive in society. *Id.* at 612 (internal citations omitted).

Third, the *Grimm* test looks at "whether the class may be defined as a discrete group by obvious, immutable, or distinguishing characteristics." *Id.* at 611 (internal citations omitted). Transgender individuals do not "choose" to be transgender but similar to cis-gendered individuals, have an immutable characteristic because of their gender identity. *Id.* at 612-13. While Judge Gilmore argues that transgender youth and adults have different needs and therefore should not be considered a discrete group, transgender youth and transgender adults both share the immutable characteristic of their gender identity. R. at 33. Furthermore, because gender is such a popular distinguishing characteristic in American society, deviations from cisgender identities are likely obvious at any age. *See generally Grimm*, 972 F.3d at 612 (finding that often when gender is disclosed, such as in military service, on birth certificates, and medical determinations, transgender individuals are often targeted and treated differently).

Lastly, the Grimm test considers if the class is considered a minority group that lacks political power. *Id.* at 611. (internal citations omitted). As only roughly two percent of public high school students identify as transgender, transgender youth can easily be considered a minority group. *See generally Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, *supra*, at 2165. Judge Gilmore argues that because many organizations advocate for transgender rights, individuals who are transgender do not lack political power. R. at 34. However, transgender individuals are underrepresented in political offices and their lack of political power is clear, as fifteen states have recently tried to pass legislation greatly reducing access to gender-affirming care to minors. *See generally Grimm*, 972 F.3d at 613; *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, *supra*, at 2173-74. As both the class of transgender youth and transgender individuals generally have met the four above considerations, the SAME Act should be evaluated under heightened scrutiny because "transgender persons constitute a quasi-suspect class." *Grimm*, 972 F.3d at 613.

2. **Preventing children from receiving lifesaving, medically approved treatment because of their sex does not further the State of Lincoln's interest in protecting children.**

Regardless of if Jess Mariano's Equal Protection claim against the SAME Act is considered on the basis of sex-discrimination or discrimination against transgender individuals as a quasi-suspect class, an intermediate/heightened form of scrutiny should be used. Intermediate/heighted scrutiny review requires the

State to prove that the discriminatory classifications used are substantially related to achieving an important State interest. *Id.* The State of Lincoln argues that the SAME Act survives intermediate scrutiny because the Act furthers the State's important interests of protecting children from experimental medical treatments and from choosing to undergo gender-transitioning treatments because of peer pressure. R. at 20. For reasons stated above, the State of Lincoln's interest in protecting children from experimental care is not furthered by the SAME Act because the gender-affirming care banned in the SAME Act is not experimental. *Cf. Brandt*, 551 F. Supp. 3d at 891 (holding that gender-affirming care is not experimental and thus banning such care did not further the States interest in protecting children). Regarding the State's claim that they are acting on the important interest of preventing children from being pressured into taking gender-affirming treatment, this scenario is unlikely as transgender youth are often harshly bullied by their peers. *See Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, *supra*, at 2169. Additionally, the decision to administer transitioning-care to a minor is a decision made by parents and licensed doctors which can include a "thorough screening and consent process," and is not a decision merely made by student's peers or the minor considering treatment; moreover, the State has offered little persuasive evidence to support their claim. *See Eknes-Tucker*, 2022 LEXIS 87169, at *24, *27; R. at 20. As such, the State of Lincoln's interests they seek to further in the SAME Act are not legitimate or important.

Even presuming that the State of Lincoln's interests in the SAME Act were important, they are not substantially related to the State's interest, as is required when a statute discriminates on the basis of sex. *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 724. As stated above, the care banned by the SAME Act is not experimental or ineffective, and if the State of Lincoln reasonably believed it was, it would not allow cisgendered children to receive the treatments, as is currently permittable by the Act. *See Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, *supra*, at 2181; R. at 3. The SAME Act also fails to directly address the alleged problem of peers pressuring minors into receiving gender-transitioning care, and instead poses a blanket-ban on the care against the recommendation of many prominent health organizations. *Eknes-Tucker*, 2022 LEXIS 87169, at *27; R. at 3.

Even if the SAME Act is reviewed under rational basis scrutiny, the SAME Act would still violate Jess Mariano's constitutional right to Equal Protection. Rational basis scrutiny of Equal Protection claims requires that the statute be "rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440 (citations omitted) . Like in *Brandt v. Rutledge*, where the court determined that state legislation restricting the use of gender-transitioning treatment violated the Equal Protection Clause under rational basis scrutiny, the SAME Act is also unconstitutional under this level of scrutiny. 551 F. Supp. 3d at 888, 891-92. Additionally, claims that discrimination of transgender individuals should be

reviewed under rational basis scrutiny have been denied review and instead the court has used a higher standard of scrutiny. *Grimm*, 972 F.3d at 614 n.13.

CONCLUSION

For the aforementioned reasons, the Respondents respectfully requests that this Court uphold the rulings of the United States District Court for the District of Lincoln and the Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

/s/ 3108

Team 3108

Counsel for the Respondents

APPENDIX A

Stop Adolescent Medical Experimentations Act

Section 20-1201 Finding 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.

Section 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.

Section 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.

Section 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.

Section 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.

Section 20-1206 Effective Date

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