No. 22-8976

IN THE

SUPREME COURT OF THE UNITED STATES

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

Petitioner,

v.

Jess Mariano, Elizabeth Mariano, and Thomas Mariano,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifteenth Circuit

PETITIONER'S BRIEF ON THE MERITS

Date: September 15, 2022

Team #3110

Attorneys for Petitioner

Oral Argument Requested

QUESTIONS PRESENTED

I. In *Winter v. Nat. Res. Def. Council, Inc.*, the Supreme Court held that plaintiffs seeking a preliminary injunction must show, among other things, that they are likely to succeed on the merits. Instead, the lower courts below applied the Second Circuit's "serious questions" standard and imposed the less rigorous burden of a general hardship-balancing test. Are these "balancing of hardships" tests no longer viable because the *Winter* holding proscribes the overly lenient burden?

II. State regulation of an unenumerated individual right is only subject to heightened standards of scrutiny when history and tradition reveal that the narrowly defined right is fundamental or upon a showing of a discriminatory purpose to target a protected class. Respondents allege that they are likely to succeed on their Substantive Due Process and Equal Protection claims. Did the District Court below abuse its discretion in granting a preliminary injunction when it failed to consider the history and tradition of the constitutional rights at issue and applied the incorrect legal standard?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

OPINIONS BELOW viii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED viii

STATEMENT OF THE CASE 1

I. STATEMENT OF THE FACTS 1

II. PROCEDURAL HISTORY 3

SUMMARY OF THE ARGUMENT 6

I. THE "SERIOUS QUESTIONS" STANDARD 6

II. LIKELIHOOD OF SUCCESS ON RESPONDENTS' CONSTITUTIONAL CLAIMS 7

ARGUMENT 10

I. THE LOWER COURTS MISAPPLIED THE "SERIOUS QUESTIONS" STANDARD AND IMPOSED A LOWER BURDEN THAT DIRECTLY CONTRADICTS THIS COURT'S DECISION IN *WINTER*. 10

A. The lower courts misapplied the Second Circuit's "serious questions" standard, which does not create a "balance of hardships" test. 11

B. Regardless of the proper standard for the "success on the merits" element, injunctive relief was inappropriate because the Marianos failed to establish the other three elements of the *Winter* test. 14

II. THE COURT SHOULD REVERSE THE PRELIMINARY INJUNCTION BECAUSE THE MARIANOS HAVE DEMONSTRATED NEITHER A LIKELIHOOD OF SUCCESS ON THE MERITS NOR A "SERIOUS QUESTION." 19

A. The Substantive Due Process claim does not survive rational basis review because the narrow right of parental control over experimental medical treatments does not exist in the history and tradition of this Nation. 20

B. The Equal Protection claim does not survive rational basis review because transgender is not a protected class and the SAME Act does not have a discriminatory purpose 31

C. Alternatively, the SAME Act survives all levels of scrutiny under both Substantive Due Process and the Equal Protection Clause. 40

CONCLUSION 48

APPENDIX A .... A

APPENDIX B .... B

TABLE OF CITED AUTHORITIES

United States Supreme Court Cases

Alabama Legislative Black Caucus v. Alabama,
575 U.S. 254 (2015).. 45

Ashcroft v. Am. C.L. Union,
542 U.S. 656 (2004).. 10

Bethune-Hill v. Virginia State Bd. of Elections,
137 S. Ct. 788 (2017) 45

Bostock v. Clayton Cnty., Georgia,
140 S. Ct. 1731 (2020) .... passim

Box v. Planned Parenthood of Indiana & Kentucky, Inc.,
139 S. Ct. 1780 (2019) 42

Bray v. Alexandria Women's Health Clinic,
506 U.S. 263 (1993).. 38, 39

Buck v. Bell,
274 U.S. 200 (1927).. 43

City of Cleburne, Tex. v. Cleburne Living Ctr.,
473 U.S. 432 (1985)... passim

Dobbs v. Jackson Women's Health Org.,
142 S. Ct. 2228 (2022) .... passim

Frontiero v. Richardson,
411 U.S. 677 (1973).. 34, 35

Geduldig v. Aiello,
417 U.S. 484 (1974).. 37

Ginsberg v. State of N. Y.,
390 U.S. 629 (1968).. 26, 44

Gonzales v. Carhart,
550 U.S. 124 (2007).. 25

Greenwood v. United States,
350 U.S. 366 (1956).. 43

Heller v. Doe,
509 U.S. 312, 319 (1993).. 20

Jacobson v. Commonwealth of Massachusetts,
197 U.S. 11, 39 (1905).. 27

Kennedy v. Bremerton Sch. Dist.,

142 S. Ct. 2407 (2022) 44

Lambert v. Yellowley,
272 U.S. 581 (1926)........ 25

Lee v. Weisman,
505 U.S. 577 (1992)........ 44

Massachusetts Bd. of Ret. v. Murgia,
427 U.S. 307 (1976)........ 34, 39

McKeiver v. Pennsylvania,
403 U.S. 528 (1971)........ 26

Meyer v. Nebraska,
262 U.S. 390 (1923)........ 23, 29

Michael H. v. Gerald D.,
491 U.S. 110 (1989)........ 24

New Jersey v. T.L.O.,
469 U.S. 325 (1985)........ 26

New York State Rifle & Pistol Ass'n, Inc. v. Bruen,
142 S. Ct. 2111 (2022) 21

Nken v. Holder,
556 U.S. 418, 435 (2009)........ 17

Parham v. J. R.,
442 U.S. 584, 602 (1979)........ 22, 30

Pers. Adm'r of Massachusetts v. Feeney,
442 U.S. 256 (1979)........ 38, 39

Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary,
268 U.S. 510 (1925)........ 23, 29

Plyler v. Doe,
457 U.S. 202 (1982)........ 27

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989)........ 32

Prince v. Massachusetts,
321 U.S. 158 (1944) 22

Reno v. Flores,
507 U.S. 292 (1993) 25, 40

Sampson v. Murray,
415 U.S. 61 (1974)........ 15

Troxel v. Granville,
530 U.S. 57 (2000)....................22, 30

United States v. Carolene Prod. Co.,
304 U.S. 144 (1938)....................35

United States v. Virginia,
518 U.S. 515 (1996)....................33, 35, 38, 41

Walters v. Nat'l Ass'n of Radiation Survivors,
473 U.S. 305 (1985)....................19, 45

Washington v. Davis,
426 U.S. 229 (1976)....................38

Washington v. Glucksberg,
521 U.S. 702 (1997)....................21, 24, 29

Weinberger v. Romero-Barcelo,
456 U.S. 305 (1798)....................18

Williamson v. Lee Optical of Oklahoma Inc.,
348 U.S. 483 (1955)....................20, 33

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008).................... passim

United States Appellate Court Cases

Able v. United States,
44 F.3d 128, 131 n. 4 (2d Cir.1995)....................12

Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.,
598 F.3d 30 (2d Cir. 2010)....................11, 12, 14

Deerfield Med. Ctr. v. City of Deerfield Beach,
661 F.2d 328 (5th Cir. 1981) 15

Doe By & Through Doe v. Pub. Health Tr. of Dade Cnty.,
696 F.2d 901 (11th Cir. 1983) 26

Doe v. Snyder,
28 F.4th 103 (9th Cir. 2022)....................16, 33

Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,
596 F.2d 70 (2d Cir.1979)....................11

Mitchell v. Clayton,
995 F.2d 772 (7th Cir. 1993) 26

Real Truth About Obama, Inc. v. Fed. Election ,
575 F.3d 342 (4th Cir. 2009) 13

Rutherford v. United States,
616 F.2d 455 (10th Cir. 1980) 41

State v. Bailey,
157 Ind. 324, 61 N.E. 730 (1901) 22

United States District Court Cases

Almurbati v. Bush,
366 F. Supp. 2d 72 (D.D.C. 2005) 15

Hennessy-Waller v. Snyder,
529 F. Supp. 3d 1031 (D. Ariz. 2021) 16

State Court Cases

Baker's Appeal.,
1851 WL 6021 (Pa. Quar. Sess. 1851) 23

Gishwiler v. Dodez,
4 Ohio St. 615 (1855) 23

People v. Ewer,
141 N.Y. 129 (1894) 23

State v. Clottu,
33 Ind. 409 (1870) 22

United States v. Blakeney,
44 Va. 405 (1847) 23

Constitutional Provisions

U.S. Const. amend. XIV § 1 .... viii, 31, 33

Federal Statutes

42 U.S.C § 1983 3

State Statutes

Stop Adolescent Medical Experimentations Act,
20 Linc. Stat. § 1201(b) (2022) 2, 41, 42

Stop Adolescent Medical Experimentations Act,
20 Linc. Stat. § 1202(b)(1) (2022) 46

Stop Adolescent Medical Experimentations Act,
20 Linc. Stat. § 1203 (2022) 1, 46

Stop Adolescent Medical Experimentations Act,
20 Linc. Stat. § 1206 (2022) 2

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20 Linc. Stat. §§ 1201–06 (2022) ....viii, 1, 3

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OPINIONS BELOW

The decision and order of the United States District Court for the District of Lincoln are unreported and contained in the Record. R. at 1–22. The decision and order of the United States Court of Appeals for the Fifteenth Circuit are similarly unreported and available in the record. R. at 22–34.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Stop Adolescent Medical Experimentations Act, 20 Linc. Stat. §§ 1201–06 (2022), which is reprinted in Appendix A.

This case also involves the Due Process and Equal Protections Clauses of the Fourteenth Amendment to the United States Constitution, which states in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The full text of the first section of the Fourteenth Amendment is reprinted in Appendix B.

STATEMENT OF THE CASE

This case involves a preliminary injunction staying the enforcement of the State of Lincoln's Stop Adolescent Medical Experimentations Act based on allegations that it would unconstitutionally infringe on the unenumerated individual rights of respondents Jess, Elizabeth, and Thomas Mariano.

I. STATEMENT OF THE FACTS

The State of Lincoln recently passed the Stop Adolescent Medical Experimentations ("SAME") Act, 20 Linc. Stat. §§ 1201–06 (2022). The SAME Act was written in response to a growing concern about the safety of popular medical treatments among the transgender[1] community usually prescribed to adolescents suffering from gender dysphoria,[2] a psychological disorder. R. at 7–8. These treatments include puberty-blocking medication meant to "stop or delay normal puberty," hormone replacement therapies involving supraphysiologic doses of androgens to females or estrogens to males, and surgeries on the healthy tissue of sex organs. SAME Act § 1203. The concern over these specific treatments stemmed from the relatively new and experimental nature of the procedures combined with the alarming risk of severe and permanent harm to the vulnerable children of Lincoln.

[1] This brief will use the same definitions employed by the district court. "A transgender person as one whose gender identity is different from the sex the person had or was identified as having at birth. 'Gender identity' is defined as a person's internal sense of being a male or a female." R. at 2 (citations omitted).

[2] Gender dysphoria is a psychological disorder characterized by the "discomfort or distress" associated with a discrepancy between one's assigned sex at birth and internal feelings of gender identity. World Pro. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 2 (Heidi Fall eds., 7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.

Id. § 1201(b). Therefore, the SAME Act only prohibits these procedures for minors under 18 years old and allows for current users to discontinue use at a safe rate. R. at 12.

Before the vote, Lincoln legislators carefully considered detailed evidence from both the medical and transgender communities. R. at 7. This evidence included expert testimony and scientific papers which addressed the uncertain nature of gender-affirming care for minors. *Id.* Additionally, Lincoln highlighted that health systems in Sweden and Finland have banned gender-affirming care for minors because of a remaining safety concern. *Id.* at 7–8. Of particular importance was the personal testimony of two witnesses significantly injured by puberty blockers and hormone therapies. *Id.* at 8. The witnesses testified that they were prescribed these treatments despite a lack of understanding that bordered on an inability to consent. *Id.* It was implied that the stresses of gender dysphoria and the potential for peer pressure that comes with it led these teens to make permanent and life-altering choices that they would later come to regret. *Id.* The SAME Act was originally set to go into effect on January 1, 2022. SAME Act § 1206.

Fourteen-year-old Jess Mariano[3] was born biologically female but became male-presenting at a young age. R. at 2, 4. When he was 8 years old, Jess was diagnosed with gender dysphoria, anxiety, and depression. R. at 4. At the age of 10 he began to take puberty blockers. R. at 5. In addition to these monthly injections, Jess sees a psychiatrist, Dr. Dugray, for regular therapy sessions as a treatment for his gender

[3] This brief will use the Respondent's preferred pronouns, "he/him/his," when referring to Jess Mariano.

dysphoria, anxiety, and depression. R. at 4–5. Jess's parents, Elizabeth and Thomas Mariano, are supportive of his treatment. R. at 2, 4. Jess uses "he/him/his" pronouns and presents physically as male. R. at 2 n.2, 5. After more than four years of these treatments and a supportive environment, Jess's psychological symptoms have shown improvement. R. at 5. While Dr. Dugray has discussed the possibilities of hormone therapy and chest surgery with the Marianos, Jess is not currently prescribed those treatments. R. at 5. Of his current treatments, only the puberty blockers would be made temporarily unattainable to Jess under the SAME Act. R. at 5; SAME Act §§ 1201–06.

II. PROCEDURAL HISTORY

On November 4, 2021, Jess Elizabeth, and Thomas Mariano filed a complaint under 42 U.S.C § 1983 with the United States District Court of Lincoln. Elizabeth and Thomas Mariano alleged that the SAME Act violated their Due Process rights under the Fourteenth Amendment to the United States Constitution by infringing their "right to determine the proper medical care of their children." R. at 14. Jess Mariano alleged the SAME Act violated his right to Equal Protection under the Fourteenth Amendment to the United States Constitution because it "classifies based on sex." R. at 18.

The Marianos filed a Motion for Preliminary Injunction on November 11, 2021. On November 18, 2021, April Nardini, in her official capacity as the Attorney General of the State of Lincoln, filed a motion to dismiss. The District Court held a hearing on December 1, 2021, in which both parties presented extensive evidence. R. at 1, 5–8.

The prescribing doctor, Dr. Dugray, testified about Jess's progress with gender dysphoria. R. at 5. The State of Lincoln reiterated its legislative findings, including expert testimony from Dr. Geller and personal testimony from the same two witnesses that testified in front of Lincoln's legislators. R. at 7–8. These two witnesses shared personal stories about the harm they experienced because of the medical treatments addressed in the SAME Act. *Id.* Both parties submitted extensive scientific journals and other medical evidence. R. at 5–8. On December 16, 2021, Judge Jackson Belleville for the District Court granted the Marianos' Motion for Preliminary Injunction, denied the State's motion to dismiss, and enjoined the State from enforcing the SAME Act. R. at 22.

After the State of Lincoln timely filed an interlocutory appeal and motion for an expedited hearing, the United States Court of Appeals for the Fifteenth Circuit expedited the briefing and hearing schedule, setting the trial in the district court for February 2023. R. at 23 n.6. The Fifteenth Circuit found no abuse of discretion and affirmed the district court's decisions, including the preliminary injunction. R. at 23. Judge Gilmore filed a dissenting opinion. R. at 28.

The State of Lincoln filed a timely petition seeking a stay of the district court's preliminary injunction and writ of certiorari from the Supreme Court of the United States. R. at 1 n.1, 35. On July 18, 2022, The Supreme Court denied the stay but granted certiorari on the questions of (1) "[w]hether the 'serious question' standard for preliminary injunctions continues to be viable after *Winter v. Natural Resources Defense Council, Inc.*" and (2) "[w]hether the preliminary injunction was properly

granted in regard to the Respondents' Substantive Due Process and Equal Protection claims." R. at 35.

SUMMARY OF THE ARGUMENT

The Supreme Court should reverse the preliminary injunction entered by the District Court and the holdings of the United States Court of Appeals for the Fifteenth Circuit on the injunctive standard and constitutional issues.

I. THE "SERIOUS QUESTIONS" STANDARD

The Supreme Court in *Winter v. Nat. Res. Def. Council, Inc.* laid out four clear elements required for a preliminary injunction: the claimant must show that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm without the injunction, (3) the balance of equities tips in their favor, and (4) the injunction is in the public interest. After the *Winter* decision, the Second Circuit clarified that its prior "serious questions" standard should apply only to the first element and specifically limited its use, holding that the "serious questions" standard is not proper in cases where a government statute is enacted in the public interest.

Despite these clear guidelines, the District Court below applied the lesser burden of the "serious questions" standard. The Fifteenth Circuit below affirmed this approach. The SAME Act explicitly states that its purpose is to protect children from physical and psychological harm. The protection of children is a classic example of a state's public interest. Thus, the SAME Act falls easily into the bounds set by the Second Circuit and the use of the "serious questions" standard was an abuse of discretion. The Supreme Court should follow these decisions and reject the "serious questions" standard as applied to state statutes enacted in the public interest.

Additionally, the District Court below interpreted the "serious questions" standard to create a sliding-scale "balancing of hardships" test, directly contravening the *Winter* precedent. After *Winter*, the Second Circuit interpreted the "serious questions" standard to impose the same burden as the *Winter* test and only on the first element. Despite this precedent, the courts below focused on the overall net harm as the key question, effectively applying the less rigorous standard to a balance of three elements and brushing aside the importance of the fourth element. However, Respondents have not met the irreparable harm element because the treatment in question is experimental and there is no medical consensus that harm will occur. And the courts below addressed the balance of equities and public interest elements in the same cursory fashion the *Winter* court specifically proscribed. Thus, even if the District Court below in its discretion could have applied the "serious questions" standard, it did not apply it correctly.

II. LIKELIHOOD OF SUCCESS ON RESPONDENTS' CONSTITUTIONAL CLAIMS

While Respondents have failed to demonstrate any element of the *Winter* test, the first element—the likelihood of success on the merits—is particularly important because of the constitutional issues presented. The District Court below found that Respondents' Substantive Due Process and Equal Protection claims presented a serious question. The more stringent likelihood of success standard is the appropriate measure, however, under either standard the District Court below abused its discretion because it did not follow the appropriate Supreme Court precedent.

When determining whether a right is fundamental under Substantive Due Process precedent, the court must narrowly define the right and conduct a searching examination of the history and tradition surrounding that right. Respondents claim a broadly defined right—the parental right to control medical decisions. The courts below failed to narrow this right and engaged in no discussion about history or tradition whatsoever. As a result, the courts below found that the SAME Act did not pass the high burden of strict scrutiny. However, even assuming arguendo that the SAME Act implicated a broadly defined parental right, relevant precedent shows that the Supreme Court has historically reviewed regulations concerning the parental right under a rational basis standard and has traditionally granted a measure of deference to the interest-balancing and fact-finding conclusions of legislative bodies.

The courts below committed a similar error of precedent in Respondents' Equal Protection claim. First, the District Court below relied almost exclusively on *Bostock v. Clayton County,* which the Supreme Court specifically limited to issues under Title VII that are not present in this case. Second, a look at the history and tradition surrounding the transgender community and other relevant factors show that the transgender class neither falls under the sex-based discrimination umbrella nor is a separate quasi-suspect class. The SAME Act does not target transgender people as a class because discriminatory impact is not enough and there is no evidence of a discriminatory purpose.

Additionally, in June 2022 the Supreme Court shed further light on constitutional issues concerning medical procedures in *Dobbs v. Jackson Women's Health Org.*,

which was not available to the lower courts below at the time of opinion. The Supreme Court clarified that the history and tradition analysis is a requirement for Substantive Due Process claims and that legislative restrictions on medical procedures do not violate the Equal Protection Clause even if they discriminatorily impact a single class. Therefore, because the SAME Act was based on a narrowly tailored and compelling interest and considering the *Dobbs* clarification, Respondents' claims fail under any level of scrutiny, and they are not likely to succeed on the merits of their claims. Accordingly, the opinion of the Fifteenth Court of Appeals should be reversed and the preliminary injunction should be overruled.

ARGUMENT

Before the Court are issues regarding the standard for and scope of preliminary injunctions. The Court faces the legal questions of whether the "serious questions" standard contradicts the standard this Court set forth in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008), and whether the scope of injunctions properly encompasses the Substantive Due Process and Equal Protection claims presented in this case. The standard of review for preliminary injunctions is abuse of discretion. *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 664 (2004). Where a constitutional issue is involved, the Court will reverse a preliminary injunction unless it is a close constitutional question. *Id.* "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24.

I. THE LOWER COURTS MISAPPLIED THE "SERIOUS QUESTIONS" STANDARD AND IMPOSED A LOWER BURDEN THAT DIRECTLY CONTRADICTS THIS COURT'S DECISION IN *WINTER*.

The Court should reverse the District Court's preliminary injunction because the Second Circuit's "Serious Questions" standard as applied in this case imposes a low burden that is too lenient under the guidance compelled by *Winter*. 555 U.S. at 20. In *Winter*, this Court unambiguously laid out four elements required to obtain a preliminary injunction:

> A plaintiff seeking a preliminary injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest.

Id. (numbering added). Emphasizing that a preliminary injunction is an extraordinary remedy, this Court held that the lower "possibility" burden was "too lenient" and didn't rise to the level of "likely." *Id.* at 24.

For decades prior to this Court's decision in *Winter*, the Second Circuit applied the "serious questions" standard to questions of injunctive relief:

> [A] party seeking a preliminary injunction [must] 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 Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979)). The lower courts below interpreted this "serious questions" standard to impose a sliding-scale "balancing of hardships" test that creates a lower burden contrary to the holdings in both the Second Circuit and this Court. R. at 9, 24. Therefore, the District Court abused its discretion by granting a preliminary injunction that did not meet the standards set out in *Winter*.

A. The lower courts misapplied the Second Circuit's "serious questions" standard, which does not create a "balance of hardships" test.

While the Second Circuit did conclude that the "serious questions" standard remains valid after *Winter*, it did not envision the standard applicable to the types of issues presented below. The District Court below wrongly interpreted the law because, by the Second Circuit's own reasoning, the "serious questions" standard is

inapplicable to the types of issues presented in this case and because the courts below ignored the high burden imposed by this Court in *Winter*.

1. The Second Circuit did not consider the "serious questions" standard applicable to the issues below.

The Second Circuit specifically carved out three limitations to the "serious questions" standard, the first of which is directly applicable to the issues in this case. "[W]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous [serious questions] standard." *Citigroup*, 598 F.3d at 35 n.4 (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir.1995). Here, the Marianos' Motion for Preliminary Injunction sought to enjoin the SAME Act's statutory scheme meant to protect the state's public interest. R. at 1. Thus, the "serious questions" standard is facially inapplicable and the lower court "should not [have] grant[ed] the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." *Citigroup*, 598 F.3d at 35 n.4 (2d Cir. 2010) (quoting *Able*, 44 F.3d at 131).

However, even if the issues in this case do not fall within the limitations set by the *Citigroup* court, the Second Circuit's application of the "serious questions" standard is so similar to the "likelihood of success" element in *Winter*, that the distinction is effectively null as applied to this case. The burden for the "serious questions" standard "is no lighter than the one it bears under the 'likelihood of success' standard." *Citigroup*, 598 F.3d at 35. If the burdens are the same, the standards must also be similar.

2. *The District Court's "sliding-scale" approach creates a balancing of hardships test that is inapplicable under the standards set by both the Second Circuit and the Winter Court.*

The lower courts' overly lenient and inappropriate use of a "balance of hardship" test creates a loophole that allows litigants to escape the higher burden compelled by the *Winter* decision. The District Court interpreted the "serious questions" standard to create a "sliding-scale approach that balances the four factors." R. at 9. This "sliding-scale" interpretation of the "serious questions" standard is nearly identical to the "balance of hardship test" that the Fourth Circuit has concluded is in "fatal tension" with this Court's decision in *Winter*. *See Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 607 F.3d 355 (2010) (per curiam); R. at 9. This fatal tension can also be seen in the *Winter* decision itself, where this Court found an abuse of discretion in part because the "Ninth Circuit held that there was a serious question regarding whether the . . . regulation was lawful." *Winter*, 555 U.S. at 19, 33.

The "balance of hardship" approach contradicts the *Winter* test by making one required element optional and ignoring another element altogether. First, the lower courts transformed the required "likelihood of success on the merits" element into an either/or option by applying the language, but not the reasoning, of *Citigroup*. As explained above, the Second Circuit reframed the "serious questions" standard to incorporate the same burdens of the *Winter* test. Second, the "serious questions" standard does not consider whether the injunction is in the public interest, a particularly important element in the *Winter* test. 555 U.S. at 26. The *Citigroup* court

reconciled this incompatibility by specifically limiting the "serious questions" standard as inapplicable to statutory schemes enacted in the public interest. 598 F.3d at 35. But the lower courts below did not address this guidance.

Additionally, the Second Circuit never meant the "serious questions" standard to create a "balance of hardships" test of all four *Winter* elements. In *Citigroup*, the court explained that the "serious questions" standard is merely "a means of assessing a movant's likelihood of success on the merits." 598 F.3d at 38. The Second Circuit was clear that "all four [*Winter*] requirements must be satisfied." *Id.* at 35; *see also Real Truth About Obama*, 575 F.3d at 345. Thus, the "serious questions" standard does not affect all four elements of the *Winter* test. Because all four elements of the *Winter* test must be met to grant a preliminary injunction and the "serious questions" standard only addresses the first element; the Fifteenth Court of Appeals abused its by applying a sliding-scale balancing test to all four elements.

B. Regardless of the proper standard for the "success on the merits" element, injunctive relief was inappropriate because the Marianos failed to establish the other three elements of the *Winter* test.

Because the "serious questions" standard creates the same burden as the first element of the *Winter* test, the lower courts below insufficiently considered the other three required elements. The courts below failed to address Lincoln's arguments concerning irreparable harm and the balance of the public interest. And the legal reasoning the District Court below employed was cursory at best. Therefore, even if the "serious questions" standard applied to the first *Winter* element, the Court should

reverse the preliminary injunction based on the inadequacy of the latter three elements alone.

1. *The Marianos failed to show irreparable harm, Winter's second required element.*

Even under the "serious questions" standard, the Marianos must show irreparable harm. *See Citigroup*, 598 F.3d at 35. To satisfy this element "plaintiffs seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. If the feared injury is merely "remote and speculative" it does not rise to the level off irreparable harm. *Almurbati v. Bush*, 366 F. Supp. 2d 72, 78 (D.D.C. 2005).

The District Court below relied on *Deerfield Med. Ctr. v. City of Deerfield Beach* for the conclusion that the mere allegation that the SAME Act violates the Marianos' constitutional rights constituted irreparable harm. *See* R. at 10 (citing *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981)). But *Deerfield* only applies upon a determination that a constitutional right is in fact threatened. 661 F.2d at 338. As explained in Part II, there are no constitutional rights at issue in this case. There can be no threat to a right that is itself speculative.

However, even if a concrete constitutional right were threatened, there is still no risk of irreparability. If an injury can be "undone" at any point, it does not rise to the level of irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."); *see also Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1046

(D. Ariz. 2021), *aff'd sub nom*; *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022) (finding that a similar deprivation of gender-affirming medical care to minors did not rise to the standard of likely harm). Because the SAME Act only applies to minors, any injury stemming from a loss of rights will be "undone" the moment Jess Mariano turns 18, which is only in a few years' time.

The psychological and medical harm alleged in this case also does not rise to the level of irreparable harm because there is no consensus from the medical community that can show these injuries are likely to occur. In *Winter*, this Court specifically rejected the Ninth Circuit's "possibility" standard, concluding that just because the Navy's sonar *could* inure marine animals, it did not mean those injuries were *likely* to occur. Similarly, just because gender dysphoria *could* lead to anxiety or depression, does not mean that it is *likely* to do so in the case of Jess Mariano. The medical community currently has no way to predict whether negative health consequences like anxiety and depression are *likely* to occur in a single case.[4] Thus, the Marianos' alleged phycological harm is a mere possibility that could occur, but there is no evidence that it is likely enough to meet the irreparable harm standard. And as for his physical health, it is undisputed that the SAME Act will allow Jess Mariano to taper his use of puberty blockers at a medically safe rate. R. at 12

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[4] *See* Wylie Hembree et al., *Endocrine Treatment of Gender-dysphoric/Gender-incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clin. Endocrinology & Metabolism 11, 3869 (2017).

2. The lower courts below failed to adequately consider the third and fourth elements of the Winter test.

The District Court below erred by neglecting to consider the latter two elements of the *Winter* test; "(3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." *Winter*, 555 U.S. at 20 (numbering added). These elements are not optional and the lower courts' failure to adequately address them is a clear abuse of discretion.

Because the public interest represents the government's side of the balance of equities, the lower courts treated elements three and four as a single entity. R. at 13, 24. When addressed in this manner, the public interest is defined in the broad sense, not as applied in each specific case. *Nken v. Holder*, 556 U.S. 418, 435 (2009). While there is nothing inherently wrong with this approach, the result in this case was that a full half of the test articulated by this Court in *Winter* was discussed for less than a single page out of a twenty-page opinion—about 5% of discussion for 50% of the *Winter* test. R. at 13.

The courts below addressed Lincoln's concerns about the risks to the public interest in the same "cursory fashion" that invalidated the preliminary injunction in *Winter*. In that case, this Court chastised the lower courts for not giving enough weight to the public interest prong. *Winter*, 555 U.S. at 26 ("Despite the importance of assessing the balance of equities and the public interest in determining whether to grant a preliminary injunction, the District Court addressed these considerations in only a cursory fashion."). Here, the District Court below engaged in no reasoned analysis or assessment of public interest. The 5% of discussion consists of three

sentences that state the *Winter* test, three sentences summarizing Lincoln's argument, and two sentences stating a conclusory opinion. R. at 12–13. The Fifteenth Circuit afforded this element less than two sentences of consideration in total and engaged in no substantive reasoning. *Id.* at 24. This fleeting attention to an essential element is exactly the kind of "cursory fashion" this Court prohibited in *Winter*.

Cursory treatment of the public interest element not only fails to satisfy the *Winter* test but also undermines the broader good of statutory regulation. This Court was explicit that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1798)). Enjoining Lincoln from enforcing the SAME Act removes protection from millions of children for the sake of a singular child. The SAME Act seeks to protect children from making medical decisions that could have serious and lasting negative consequences. SAME Act § 1201(b). Children are a particularly vulnerable segment of the population and protecting them from a lack of informed consent is the subject of many state statutes and regulations.[5] Laws aimed at protecting children are exactly the kind of "public consequences" that merit "particular regard" as outlined in *Winter*. 555 U.S. at 24 (quoting *Weinberger*, 456 U.S. at 312).

Additionally, the Lincoln legislators who passed the SAME Act undertook to balance the hardships. R. at 7. This Court should not dismiss their reasoned decision. The Court often grants deference to "congressional judgements" even under Due

[5] Gregory Stevens et. al., *Disparities in Primary Care for Vulnerable Children: The Influence of Multiple Risk Factors*, 41 Health Serv. Res. 2, 507–11 (2006).

Process challenges. *See e.g., Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). The State of Lincoln believes that the public interest in protecting children outweighs any hypothetical benefit an individual child might receive. R. at 7. Before passing the law, the legislators considered opinions from medical experts, domestic and international scientific studies, and testimony from two witnesses who had experienced the exact negative effects that the SAME Act seeks to prevent. *Id.* No new scientific information has come to light since the Lincoln legislators decided that this balance of equities tips in the favor of the state. This Court should honor Lincoln's congressional judgments and uphold the legislator's original balancing of the issues.

The lower courts below ignored both the Second Circuit's guidance and this Court's precedent when they applied the "serious questions" standard to the issues in this case. But even under this unauthorized "balancing of hardships" interpretation, the courts below failed to properly consider irreparable harm and public interest balancing. The lower court's cursory reasoning and heavy-handed conclusions constitute a clear abuse of discretion. This Court should reverse the preliminary injunction enjoining the enforcement of the SAME Act.

II. THE COURT SHOULD REVERSE THE PRELIMINARY INJUNCTION BECAUSE THE MARIANOS HAVE DEMONSTRATED NEITHER A LIKELIHOOD OF SUCCESS ON THE MERITS NOR A "SERIOUS QUESTION."

This Court should reverse the preliminary injunction and allow the State of Lincoln to enforce the SAME Act because the constitutional issues in this case are largely settled by this nation's history and tradition. Though the proper measure of

the first *Winter* element is a "likelihood of success on the merits," even under the less rigorous "serious question" standard, the Marianos have failed to show a need for the "extraordinary burden" that is a preliminary injunction. *See Winter*, 555 U.S. at 24.

The proper standard of review for constitutional claims involving healthcare regulation is the rational basis test. "[H]ealth and welfare laws [are] entitled to a 'strong presumption of validity.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022) (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). Because "it is for the legislature, not the courts, to balance the advantages and disadvantages of [a] new requirement," as long as the statute is necessary in some cases, the rational basis test is still proper even if it is "wasteful" in other cases. *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 487 (1955). Given the requisite deference to legislatures in general and health laws in particular, the SAME Act easily passes the rational basis test as applied to the Marianos' Substantive Due Process and Equal Protection claims. However, this Court should reverse the preliminary injunction under any standard of review because SAME Act passes scrutiny under all levels of means-end interest balancing.

A. The Substantive Due Process claim does not survive rational basis review because the narrow right of parental control over experimental medical treatments does not exist in the history and tradition of this Nation.

The Court should find the Marianos are unlikely to succeed on their Substantive Due Process claim because the SAME Act passes rational basis review. The lower courts below failed to properly consider this Nation's history and tradition, defined the fundamental right too broadly, and did not account for the experimental

nature of the treatments. Additionally, the Court has never applied heightened levels of scrutiny to even the broadly defined parental right and has no reason to do so now.

Recently this Court reaffirmed the *Glucksberg* standard for Substantive Due Process claims. *Dobbs*, 142 S. Ct. at 2242. To find an individual right in the Constitution's Due Process Clause, two requirements must be met. First, the right "must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Second, the right must be phrased with "a 'careful description' of the asserted fundamental liberty interest. *Glucksberg*, 521 U.S. at 721. Because the lower courts below did not follow this precedent, they committed a clear abuse of discretion that this Court should remedy by reversing the preliminary injunction remanding for consideration under the proper standard.

1. It is an abuse of discretion to define the parental right without considering this Nation's history and tradition.

"[W]hen it comes to interpreting the Constitution, not all history is created equal." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136 (2022). History and tradition from the era in which the Constitutional provision in question was passed shed light on the original intention of the framers. *Id.* However, the lower courts relied on two cases to establish the existence of the parental custodial right under the Due Process Clause, neither of which shed light on the intention of the authors of the Fourteenth Amendment. R. at 14, 25. The Fourteenth Amendment, which supplies the substantive due process right, was ratified in 1868. *Dobbs*, 142 S. Ct. at 2252–53. This Court recently emphasized how a court can fatally misinterpret

the Constitution by simply failing to consider the history and tradition from the appropriate era. *Id.* at 2237 ("*Roe*'s failure even to note the overwhelming consensus of state laws in effect in 1868 is striking.").

While it is true that the parent-child relationship has some importance in the history and tradition of the United States, the parental right has never been absolute. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The state has at least some significant authority to interfere with the rights of parents. *State v. Clottu*, 33 Ind. 409, 411 (Ind. 1870) ("[A]ll civilized governments have regarded this relation as falling within the legitimate scope of legislative control."). For example, while parents can decide which languages the child can learn, they cannot wholly prevent their child from receiving an education. *Compare Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) *with State v. Bailey*, 157 Ind. 324, 61 N.E. 730, 732 (1901). This suggests that the parental right as viewed in the appropriate time period involves only the smaller parts of the whole; the details (language) but not the overarching umbrella (education).

The District Court below relied on *Troxel v. Granill* and *Parham v. J.R.*. R. at 14. These cases were decided in 2000 and 1979 respectively and failed to follow the *Glucksberg* precedent because neither considered authority from the 1868 period when the Due Process Clause was ratified. *See generally Troxel v. Granville*, 530 U.S. 57 (2000); *Parham v. J. R.*, 442 U.S. 584 (1979). The earliest precedent the Court discussed in both *Troxel* and *Parham* were the *Meyer* and *Pierce* cases from the 1920s. *Troxel*, 530 U.S. at 65; *Parham*, 442 U.S. at 602; . More than just stemming from the

inappropriate era, the *Meyer* and *Pierce* cases provided no authority that was grounded in this Nation's history and tradition and thus did not properly define the parental right. *See Meyer*, 262 U.S. at 392 (1923); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 532 (1925).

The period surrounding the enactment of the Fourteenth Amendment is not clear-cut as to the existence of the parental right. For example, some early courts saw this type of regulation not as an abrogation of the parental right, but merely as a way to direct "the way in which parental authority shall be exercised in order that the child may be properly trained." *Baker's Appeal.*, 1851 WL 6021, at *3 (Pa. Quar. Sess. 1851). Historical precedent showcases many instances where a parent has no rights over a child. *See e.g., Gishwiler v. Dodez*, 4 Ohio St. 615 (1855) (no right that conflicts with the welfare of the child); *United States v. Blakeney*, 44 Va. 405, 424 (1847) (no right to prevent state enlisting minors in the military); *Baker's Appeal.*, 1851 WL 6021, at *3 (Pa. Quar. Sess. 1851) (no right to prevent mandatory curfews); *People v. Ewer*, 141 N.Y. 129 (1894) (no right to let her child dance on Broadway). Both federal and state courts in the late 1800's routinely upheld child vaccination laws despite parental objections.[6] During this era, therefore, the parental custodial right excluded instances where the government regulation concerned the welfare of the child, government security interests, or public health and safety.

[6] *See* James G. Hodge & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 850–52 (2002) (detailing early mandatory child vaccination laws from more than a dozen states).

The lower courts' mere failure to consider the history and tradition surrounding the parental right is enough to show abuse of discretion. But even under a proper review, history and tradition do not show that parental control is a fundamental right. And when the right is properly defined in a narrower fashion, the history and tradition are even less supportive. In fact, it disappears entirely.

2. The lower courts defined the parental right too broadly, failing Glucksberg's "careful description" requirement.

The lower courts erred by defining the right at issue too broadly. Unenumerated rights must be "carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). "We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989). For example, in *Dobbs* this Court considered the history and tradition of another medical procedure, abortion. 142 S. Ct. at 2258. This Court defined that right by the particular medical treatment—abortion. The broadest right—bodily autonomy—was not the proper definition, nor was the slightly more specific right of a pregnant woman to seek medical care. *Id.* at 2258. ("These attempts to justify abortion through appeals to a broader right to autonomy and to define one's "concept of existence" prove too much.").

Similarly, the right at issue here is not the broadest right—parental custody. It is also not the slightly more specific right as asserted by the Marianos—the right of parents to "determine the proper medical care for their children." R. at 14. Just as in *Dobbs*, the right at issue here is narrowly defined—parental control over a child's

access to a specific medical procedure or treatment. Because the SAME Act regulates only healthcare providers, not minor patients or their parents, no fundamental right is called into question by the enforcement of the statute. R. at 2–4; *see also Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) ("[T]here is no right to practice medicine which is not subordinate to the police power of the states.").

There is no fundamental right for a parent to control their child's access to a specific medical treatment because, as this Court has explained, "[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it." *Reno v. Flores*, 507 U.S. 292, 303 (1993). The specific procedures in the SAME Act are new and thus have no ties to the history and tradition of 1868. R. at 15. Puberty blockers in general were only approved by the FDA in the 1990s and the FDA still has not approved them for gender-affirming care. *Id.* The FDA has recently found that puberty blockers such as Triptodur may cause brain swelling and vision loss in children.[7] There is no fundamental right under Substantive Due Process to access such novel and unproven procedures.

3. There is no fundamental right at issue because the medical treatments addressed by the SAME Act are undisputedly experimental.

Substantive Due Process precedents have long recognized the special case of experimental procedures. Medical uncertainty weighs heavily in favor of the state. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and

[7] Federal Drug Administration, *Highlights of Prescribing Information*, FDA (April 1, 2022), https://www.accessdata.fda.gov/drugsatfda_docs/label/2022/208956s010lbl.pdf.

scientific uncertainty."); *see also Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) ("[M]ost federal courts have held that a patient does not have a constitutional right to obtain a particular type of treatment."). For example, after engaging in a lengthy *Glucksberg*-type analysis, the D.C. Circuit in *Abigail Alliance* concluded that there is no history or tradition supporting fundamental right to access experimental drugs. *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 712 (D.C. Cir. 2007). That court found a long tradition of state regulation of "the risks associated with both drug safety and efficacy." *Id.* at 703.

The parent-child relationship does not create a loophole in the parental right that allows unregulated access to experimental treatment. If a parent has no right to a medical procedure for themself, it follows there is also no right to obtain the same procedure for a child. *See Doe By & Through Doe v. Pub. Health Tr. of Dade Cnty.*, 696 F.2d 901, 903 (11th Cir. 1983). The rights of parents do not override other constitutional limits placed on children, not even when the right at issue is unquestionably fundamental. *See Ginsberg v. State of N. Y.*, 390 U.S. 629, 639 (1968) (The First Amendment does not prohibit special obscenity laws for minors); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (Fourth Amendment probable cause requirements do not extend to minors); *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (The Sixth Amendment right to a jury trial does not extend to juveniles). It follows that the constitutional limits placed on experimental procedures are not usurped by even the most broadly defined parental right. And the Constitution allows state regulation that both positively enforces certain medical procedures and

negatively restricts them. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 39 (1905) (states can positively enforce vaccine procedures); *Dobbs*, 142 S. Ct. at 2284 (states can negatively restrict abortions procedures). Therefore, the SAME Act negatively restricts access to a medical procedure, which is not a fundamental right, and the parental right cannot override this precedent to create a loophole right accessible only to children.

The Fifteenth Circuit pointed to *Pyler v. Doe* for the claim that a heightened standard applies when the law "impose[s] a special disability on children for something that is beyond their control." R. at 27. But that holding relied on the fact that the "needs of the children statutorily excluded were not different from the needs of children not excluded." *Plyler v. Doe*, 457 U.S. 202, 209 (1982). Here, the needs of children suffering from gender dysphoria are undisputedly different than the needs of the general population of children. And as explained above, *Dobbs* stands against the proposition that legislative discrimination can be found solely in the fact that only one group seeks a particular medical treatment.

As the Lincoln legislature concluded, the medical treatments regulated by the SAME Act are experimental and pose a potential risk of harm to minors. The World Professional Association for Transgender Health categorizes medical treatments like puberty suppressing hormones as fully reversible interventions.[8] However, this categorization negates the truth of these medical treatments. There are concerns

[8] World Pro. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 18 (Heidi Fall eds., 7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.

regarding "negative physical side effects of GnRH analog use … on bone development and height," and other long-term effects of the treatment "can only be determined when the earliest treated patients reach the appropriate age."[9] Those treated with hormone suppressants cannot be assessed properly by the medical community, leading to a lack of conclusive evidence as to the potential risk to minors.[10] The SAME act attempts to protect minors from these types of undiscovered harms of irreversible medical treatments.

The lower courts pointed out hormone therapies are sometimes used in patients who are not transgender to counteract abnormal hormone levels. R. at 16. But this does not mean those treatments are not experimental in a different context. Hormone therapy is sometimes used for young female patients who pre-maturely begin their menstrual cycle. For example, in cases of precocious puberty, hormone therapy is simply a counterweight, meant to balance an impaired endocrine system.[11] In contrast, giving the same treatment to a young girl with a healthy endocrine system is an attempt to unbalance a previously balanced system. The effects of the same treatment can be wildly different even in similar patients.[12] When patients start from extremely different health conditions, the potential for dangerous unforeseen

[9] World Pro. Ass'n for Transgender Health, *supra*, at 20.

[10] Peggy Cohen-Kettenis et al., *Puberty suppression in a gender-dysphoric adolescent: A 22-year follow-up*, 40 Archives Sexual Behav. 843, 843–47 (2011); Annelou de Vries, et al., *Clinical management of gender dysphoria in adolescents*, 9 Int'l J. Transgenderism 3, 3–4 (2006).

[11] Craig Alter et al., *Precocious Puberty*, Endocrine Society (Jan. 24, 2022), https://www.endocrine.org/patient-engagement/endocrine-library/precocious-puberty.

[12] Ruben H. Willemsen et al, *Pros and Cons of GnRHa Treatment for Early Puberty in Girls*, 10 Nat. Rev. Endocrinology 352, 352–63 (2014).

outcomes is a great risk. The State of Lincoln has chosen not to force its children to bear that risk.

4. *Even if Substantive Due Process creates a broadly defined parental right, the proper standard is still rational basis.*

History and tradition show that the rational basis test is the proper standard under any proper precedent concerning the parental right. As explained in more detail below, the SAME Act more than satisfies the rational basis standard, which is the proper test for state regulation of a professed right that is not a fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). Because the narrowly defined right of parental control over experimental procedures has no support in the history and tradition of this nation, it is not a fundamental right and the rational basis test is proper.

However, the rational basis test is the proper standard for this case regardless of the *Glucksberg* analysis because this Court has never applied the high standard of strict scrutiny even to the broadly defined parental right.[13] The landmark parental rights cases themselves employed a less exacting analysis that is closer to today's rational basis test, even while finding a fundamental right. *See Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534 (1925) (finding the state regulation "unreasonably interferes" with the parental authority); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding the proper standard for the parental right is

[13] Elchanan G. Stern, *Parens Patriae and Parental Rights: When Should the State Override Parental Medical Decisions?*, 33 J.L. & Health 79, 91 (2019).

whether the regulation is "arbitrary or without reasonable relation to some purpose within the competency of the state to effect.").

The precedent relied on by the lower courts also supports a rational basis approach. As Justice Thomas pointed out, the holding in *Troxel* did not articulate a standard of review but the statute in that case would have failed the rational basis test. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring). And *Parham* was largely a Procedural Due Process case that primarily concerned the pre-deprivation requirement. *Parham*, 442 U.S. at 603. The heightened scrutiny in that case can be attributed to the undisputable fundamental right of Procedural Due Process. *Id.* But recent Substantive Due Process decisions that dealt with medical procedures found the rational basis test most appropriate. *Dobbs*, 142 S. Ct. at 2284 ("It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.").

Additionally, the convoluted precedent surrounding the definition of the parental right has made the right itself subject to questions of validity. As Justice Antonin Scalia pointed out in *Troxel*, the definition of the parental right is so contradicting and convoluted as to be unworkable as precedent. 530 U.S. at 92 ("A legal principle that can be thought to produce such diverse outcomes in the relatively simple case before us here is not a legal principle that has induced substantial reliance.") (Scalia, J., dissenting). If the right is invalid under this line of thinking, then rational basis is the default standard of review for the Marianos' Substantive Due Process claim.

Therefore, the rational basis test is unquestionably the proper standard in this case, whether because the narrowly defined right is unsupported by history and tradition or because precedent only prohibits arbitrary or unreasonable regulation of the broadly defined right. Thus, the SAME Act easily survives rational basis scrutiny and this Court should find that the Marianos are not likely to succeed on the merits of their Substantive Due Process claim.

B. The Equal Protection claim does not survive rational basis review because transgender is not a protected class and the SAME Act does not have a discriminatory purpose.

Jess Mariano is not likely to succeed on the merits of his claims because the less exacting rational basis standard is also the proper measure of claims brought under the Equal Protection Clause. The lower courts below inappropriately relied on the case of *Bostock*, which this Court specifically distinguished as applying to Title VII claims only. R. at 20; *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1753 (2020). Unlike Title VII, claims brought under the Equal Protection Clause are reviewed under a rational basis standard unless the claimant shows the statute in question targets a protected class. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Additionally, "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant . . . to closely scrutinize legislative choices." *Id.* at 441–42.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

A statute violates the Equal Protection Clause and triggers a heightened level of scrutiny only if (1) it specifically targets a protected class or (2) the legislature had discriminatory intent. *City of Cleburne*, 473 U.S. at 440. This special treatment for protected classes is based on the reasoning that restrictions on certain classes "are so seldom relevant to the achievement of any legitimate state interest" that discriminatory intent can be presumed. *Id.* Because the courts below imposed the wrong standard of scrutiny, this Court should reverse the clear abuse of discretion and remand for analysis under the rational basis test.

1. Bostock and other Title VII cases are fundamentally different from constitutional issues brought under the Equal Protection Clause and thus inapplicable to this case.

Bostock is not binding on the questions presented here because this Court expressly limited the holding of *Bostock* to Title VII cases only. 140 S. Ct. at 1753. ("Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these."). There are no Title VII claims at issue in this case. R. at 1. Despite this clear limitation, the District Court below based its equal protection analysis almost exclusively on the reasoning in *Bostock*. *Id.* at 20 ("[T]he [district court] . . . believes the Supreme Court would apply *Bostock* to this question."). The Fifteenth Circuit additionally relied on precedent in *Price Waterhouse v. Hopkins*. *Id.* at 26. However, *Price Waterhouse* was also a Title VII case and thus an inappropriate precedent. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989).

The Equal Protection Clause is undeniably distinct from Title VII. The text of Title VII specifically denotes sex as a class and prohibits actions taken against specific individuals. *Bostock*, 140 S. Ct. at 1740. The holding in *Bostock* rested on this textual distinction between the individual and the class. *Id.* ("The consequences of the law's focus on individuals rather than groups are anything but academic.").

In contrast, the text of the Equal Protection Clause offers no such specificity. It does not mention sex as a class and is focused on restrictions against the group, not the individual. U.S. Const. amend. XIV, § 1; *United States v. Virginia*, 518 U.S. 515, 550 (1996). Unlike Title VII, "[t]he prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955); *see also Doe v. Snyder*, 28 F.4th 103, 115 (9th Cir. 2022) (finding no error in the lower court's conclusion that Equal Protection Clause analysis could not rely on *Bostock* and that a state law that prevented transgender minors from receiving gender-affirming surgery was likely constitutional). Because *Bostock* is wholly inapplicable to the Equal Protection Clause and the issues in this case, the District Court below abused its discretion by relying on the case as the sole guiding precedent.

2. Transgender is not a sex-based classification nor a quasi-suspect class of its own.

Even if *Bostock* creates the transgender class, the SAME Act does not trigger heightened scrutiny because transgender is not a protected class. It does not fall under the umbrella of a sex-based classification and the SAME Act does not discriminate against transgender people in such a way as to create a new quasi-

suspect class. In fact, the class of people regulated by the SAME Act is not transgender at all, it is minors with gender dysphoria. *See* SAME Act § 1203. As the state's legislature found, not all people with gender dysphoria are transgender. R. at 8. And "minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process." *City of Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring).

Most statutes that target classes of people, including minors, are subject only to the rational basis test. *See Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976). "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). Because no claims of "race, alienage or national origin" are contended in this case, strict scrutiny is not appropriate. *See City of Cleburne*, 473 U.S. at 440. The intermediate level of scrutiny is only applied to "quasi-suspect" classes when certain key factors are present. *Id.* at 445. The transgender class neither falls under the umbrella of recognized quasi-suspect sex-based classification nor are these key factors sufficiently present to warrant the creation of a new quasi-suspect class.

Transgender does not fall under the sex-based classification umbrella. Because there is no textual classification of sex in the Equal Protection Clause, it is considered a "quasi-suspect" class. Women qualified as a quasi-suspect class in large part due to the "volumes of history" of sex-based discrimination in this country. *United States v.*

Virginia, 518 U.S. 515, 531 (1996). Other key factors in this determination included a lack of regard for the capabilities of the class members and the immutability of the classification. *Frontiero*, 411 U.S. at 684–87.

However, unlike women, there is no history of discrimination, lack of regard, or immutability of transgender people. First, there is no similar history or tradition of legal discrimination against transgender people. The first transgender rights activist groups were not formed until the 1990s.[14] And unlike women, no legislature or enacted laws even considered transgender as a class until the late 1980s.[15] Second, the only capabilities brought into question by the SAME Act are those of minor children and the certainty of the medical community as a whole. And third, this very case demonstrates that sex is not as immutable as legal minds once imagined—the mutability of his sex is the very relief Jesse Mariano seeks.

Transgender is also not a separate quasi-suspect class because it does not implicate a "discrete and insular" class. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 (1938). Though "[n]o single talisman can define those groups likely to be the target of classifications . . . experience, not abstract logic, must be the primary guide." *City of Cleburne*, 473 U.S. at 472 n.24 (Marshall, J. concurring). In addition to the factors considered in the sex-based analysis, another factor important to the formation of a discrete and insular class is the group's "political powerlessness" as

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[14] Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 508 (2016).

[15] *Id.* at 527.

indicated by "social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs." *Id.*

However, this factor is not enough to create the transgender protected class because "political powerlessness" requires more than just a lack of representation in the legislature. First, the mere fact of minority is not enough. *Id.* at 445 ("Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect."). Second, a law that designates a class with "special status" can be evidence of political power. For example, a Texas law that recognized "real and undeniable differences" among the mentally disabled and singled them out for "special treatment" was itself evidence that the mentally disabled as a class held political power. *Id.* at 444.

In the same way as *City of Cleburne*, the SAME Act shows evidence of transgender political power. It was created in recognition of the particularly vulnerable position of transgender children and the social influences surrounding the issue. R. at 3. The stated purpose of the Act is to protect children from potential harm from, among other things, unreliable medical treatments. *Id.* As the dissent pointed out below, numerous professional organizations are advocating for transgender rights. R. at 34. And *Bostock* illustrates how federal statutes like Title VII provide political power and protection to the transgender class. *Bostock*, 140 S. Ct. at 1741.

The District Court below abused its discretion by wrongly creating a new quasi-suspect class for transgender discrimination. Transgender is not a discrete and

insular quasi-suspect class because there is insufficient historical evidence of transgender discrimination, no class capabilities are at issue, transgender is by definition mutable, and as a class transgender people are not politically powerless.

3. *As Dobbs illustrates, denial of a medical procedure that produces mere disparate impact does not "target" a protected class.*

Even if transgender were a protected class, health and safety laws do not generally "target" a protected class and thus do not usually fall under the Equal Protection umbrella. *Dobbs*, 142 S. Ct. at 2235. In *Doe v. Snyder*, the Ninth Circuit left open the question of whether a medical procedure that is only sought by a particular class should be treated as discrimination against that class. 28 F.4th 103, 114 (9th Cir. 2022). This Court has since answered that question with a resounding no. *Dobbs* held that "a State's regulation of abortion is not a sex-based classification." *Dobbs*, 142 S. Ct. at 2235. If banning abortion—a medical procedure exclusive to women—is not targeting sex-based classifications, then neither does a ban on puberty blockers target transgender people as a class. *See Id.* at 2245–46 ("The regulation of a medical procedure that only one [class] can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination'" against members of one sex or the other.") (quoting *Geduldig v. Aiello*, 417 U.S. 484 (1974)).

The table below illustrates how the much clearer case of abortion in *Dobbs* necessarily controls the outcome of this case:

	Dobbs	**SAME Act**
Class at Issue	Women (Undeniably a protected class)	Transgender (Not a protected class)
Medical Procedure	Abortion	Puberty blockers, hormone replacement, and artificial genitalia surgery
Exclusivity of the Medical Procedure	Exclusive to the entire class of women	Exclusive to a subclass of minor children diagnosed with gender dysphoria
Equal Protection Violation?	No	No

Dobbs, 142 S. Ct. at 2235. *Dobbs* reiterated the proposition that discriminatory impact is not enough to show a protected class has been targeted in violation of the Equal Protection Clause. *Id.* at 2235. "A purpose to discriminate must be present" to find an equal protection violation. *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 260 (1979) ("[A] neutral law does not violate the Equal Protection Clause solely because it results in a . . . disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate."). Even under *Bostock*, discrimination requires an element of intent. 140 S. Ct. at 1741.

Generalized discrimination is not enough, a discriminatory purpose must be "focused upon [trans people] *by reason*" of that class. *Bray v. Alexandria Women's*

Health Clinic, 506 U.S. 263, 270 (1993); *see also Feeney*, 442 U.S. at 279 (holding that discriminatory purpose under the Equal Protection Clause requires a finding of but-for cause). For example, a school that excludes all women from attendance can only do so by reason of gender because the very benefit gained for men was the exclusion of women. *United States v. Virginia*, 518 U.S. 515, 541 (1996). By contrast, there is no apparent gain to cisgender people in the SAME Act at all, much less to the exclusion of transgender people. The Act does not even focus on all transgender people the way the exclusion of women from schools does. The focus of the SAME Act is on age by reason of age. But age is not a protected class nor a "discrete and insular group." *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

A facially neutral ban that "exclusively or predominantly" impacts a particular class can be evidence of discriminatory intent targeting that class only when there are no "common and respectable reasons for opposing it, other than hatred of, or condescension toward . . . a class." *Bray*, 506 U.S. at 270. Thus, a ban on yarmulkes shows discriminatory intent against Jewish people, but abortion at most shows only a disparate impact on women. *Id.*; *see also Dobbs*, 142 S. Ct. at 2235. Similarly, it is not "targeting" under the Equal Protection Clause if deprivation of puberty blockers merely impacts transgender people more than others or in a discriminatory way. Yet the lower courts relied on the exclusive impact on transgender people as the sole evidence of discriminatory purpose. Because the lower courts relied on inappropriate precedent and thus made no finding of discriminatory purpose against a protected or

quasi-suspect class, this Court should reverse the preliminary injunction and remand this case for the appropriate fact analysis.

C. Alternatively, the SAME Act survives all levels of scrutiny under both Substantive Due Process and the Equal Protection Clause.

None of Marianos' claims are likely to succeed on the merits because the SAME Act meets the burden of proof under any means-end interest-balancing standard of review. There are three tiers of judicial review for claims involving unenumerated liberty interests or equal protection of the laws: strict scrutiny, intermediate scrutiny, and rational basis. Strict scrutiny is reserved for issues involving the most precious of fundamental rights or the most unreasonable classifications. Intermediate scrutiny is most often applied to suspect classifications that could potentially be reasonable, but are often not, like sex-based classifications. Rational basis is the proper standard for any other constitutional claim involving unenumerated individual rights or statutory classifications. The District Court below applied only heightened levels of scrutiny and thus improperly granted the Marianos' Motion for Preliminary Injunction. This Court should reverse that injunction and remand this case for review under the rational basis test.

1. The SAME Act easily survives the proper standard of review—the rational basis test.

As discussed in Part II.A and Part II.B, both claims at issue in this case are most appropriately measured under rational basis review. For the Marianos' Substantive Due Process claim, rational basis is the most appropriate standard either because the parental right is not fundamental or based on a straight application of the lower

court's proffered precedent. This Court should also apply the rational basis test to Jess Mariano's equal protection claim because the SAME Act does not target a protected or quasi-suspect class.

To survive rational basis review, the state regulation must be "rationally related to a legitimate governmental purpose." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). In other words, the Court need only find a "'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose." *Reno v. Flores*, 507 U.S. 292, 305 (1993). The SAME Act more than meets this standard. As explained in more detail in Part II.C.2, the state's purpose of protected minor children is exceedingly legitimate and has extensive precedent in constitutional law. And the protection of this particularly vulnerable class is unquestionably related to the purpose of the SAME Act, as the Act itself explains. SAME Act § 1201(b).

2. The SAME Act passes both heightened levels of scrutiny because the Lincoln legislators had an exceedingly persuasive and legitimate state interest.

Even if this Court were to apply a more stringent standard, the SAME Act easily passes these tests. Intermediate scrutiny as applied to sex-based discrimination under the Equal Protection Clause requires "the reviewing court [to] determine whether the proffered justification is 'exceedingly persuasive.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996). Strict scrutiny as applied to fundamental rights under the Substantive Due Process Clause requires the statute to be "suitably

tailored to serve a compelling state interest." *City of Cleburne*, 473 U.S. at 440. The SAME Act survives both.

Regulations surrounding a particular medical treatment are decidedly "within the area of governmental interest in protecting public health." *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980). As explained above, public health concerns are one of the traditional exceptions to the broad parental custodial right. And recently in *Dobbs*, this Court listed the regulation of medical procedures and "the preservation of the integrity of the medical profession" as legitimate state interests. 142 S. Ct. at 2284. The Fifteenth Circuit recognized that "protect[ing] the health and safety of women" was a compelling state interest. R. at 25. It did not explain why protecting the health and safety of children was any less compelling.

The state's interests in this case are both compelling and exceedingly justifiable. By any means of review, whether historical, logical, or professional, the SAME Act is based on an overwhelmingly compelling state interest. The authors of the SAME Act proffered three state interests the legislation intended to serve: (1) to protect children from the lifelong and permanent consequences of harmful medical procedures, (2) to encourage treatments that are strongly supported by medical evidence and discourage the use of experimental procedures on minors, and (3) to protect children against peer-pressure surrounding gender-affirming treatments. SAME Act § 1201(b).

First, the state's interest in preventing permanent physical harm to children is undoubtedly compelling. Findings by the FDA that multiple GnRH drugs are linked

to pseudotumor cerebri (false brain tumors) do not ease this concern.[16] Children are continuously developing at the time of taking these drugs. It is unthinkable that an undeveloped, constantly changing person should be subjected to the permanent harm that can result from the medical treatments the SAME Act seeks to prevent.

Found within this first proffered interest is another legitimate concern: the prevention of the permanent and harmful consequences of eugenics. *See Box v. Planned Parenthood of Indiana & Kentucky, Inc.,* 139 S. Ct. 1780, 1783 (2019). As many scholars have pointed out, the lasting effects of gender-affirming medical interventions have similar consequences to the sexual sterilization procedures of the early twentieth century.[17] This is because "[a] parent consenting to the transition treatment of his minor child, knowing the risks to fertility and organ development is, in effect, taking away another's ability to have children or to decide, with a sober mind, whether such is even desirable."[18] History is ridden with the alarming consequences of the eugenics movement. *See generally Buck v. Bell*, 274 U.S. 200 (1927). The careful avoidance of eugenics is thus undoubtably a legitimate and exceedingly persuasive state interest.

The second state interest—the pursuit of evidentiary support in the face of experimental and potentially dangerous medical procedures—is not only compelling but also just common sense. Experimental treatments surrounding psychiatric issues

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[16] Federal Drug Administration, *Highlights of Prescribing Information*, FDA (April 1, 2022), https://www.accessdata.fda.gov/drugsatfda_docs/label/2022/208956s010lbl.pdf.

[17] *See e.g.,* Sheila Jeffreys, *The Transgendering of Children: Gender Eugenics*, 35 Womens Studs. Int'l F. 384, 384–86 (2012).

[18] F. Lee Francis, *Who Decides: What the Constitution Says About Parental Authority and the Rights of Minor Children to Seek Gender Transition Treatment*, 46 S. Ill. U. L.J. 535, 564 (2022).

like gender dysphoria are especially legitimate areas for state regulation. *See Greenwood v. United States,* 350 U.S. 366, 376 (1956) ("Certainly, denial of constitutional power . . . ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues."). The District Court below found that these treatments were not experimental because some evidence supports their use. R. at 14–16. But as explained in Part II.A.3, there is a plethora of contradicting scientific evidence and the medical community is far away from a true consensus about the safety of these treatments.

Finally, the third state interest—the protection of Lincoln's children against social influences—is unquestionably a compelling and exceedingly justifiable state interest. The government places special emphasis on the protection of children, even where enumerated fundamental rights are concerned. *Ginsberg v. State of N. Y.*, 390 U.S. 629, 639 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate."). Because minors are particularly vulnerable to outside pressure, the government places a special emphasis on protecting children from corrosive influences. *See Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure [for school children]."); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2430 (2022) (upholding school prayer rights specifically because of an "absence of evidence of coercion in th[e] record.").

The District Court below did not address these proffered interests, it merely disagreed that the treatments were experimental. R. at 16–17. But even accepting

the potentially experimental nature of the treatments, this alone does not negate the first and third interests listed within the SAME Act. Therefore, this Court should find that the lower courts abused their discretion and failed to properly address Lincoln's compelling state interests.

3. The SAME Act passes strict scrutiny because it is suitably tailored to achieve the State's interest.

Because the SAME Act is narrowly tailored to affect only those it seeks to protect, it meets the final requirement of the strict scrutiny test. "[T]he narrow tailoring requirement insists only that the legislature have a 'strong basis in evidence' in support of the . . . choice that it has "made." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015). That standard does not require the State to show that its action was 'actually ... necessary'" nor establish but-for causation. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) (quoting *Alabama Legislative Black Caucus*, 575 U.S. at 278). "[H]eightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 472 (1985) (Marshall, J., concurring).

The Lincoln legislators had a "strong basis in evidence" because before passing the SAME Act, they considered extensive medical research and relevant testimonies. R. at 7–8; *see also Alabama Legislative Black Caucus*, 575 U.S. at 278. This Court grants a significant amount of deference to the interest-balancing conclusions of legislative bodies. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 319 (1985). Here, legislators considered the concerns of individuals by hearing witness

testimony. R. at 8. These witnesses spoke of the devastating consequences of an uninformed decision made during a transitional stage of life. *Id.* Additionally, Lincoln analyzed the growing medical concerns surrounding banned treatments at a national and international level. *Id.* at 7–8. For example, Finland's recommendation that proper evidence gathering and effectiveness monitoring is crucial before issuing gender dysphoria treatment to minors is acknowledged by the international community as a primary way to protect transgender minors. *Id.* As such, when enacting the SAME Act, Lincoln's legislators properly supported the State's interest in protecting minors, and only minors.

The state's interest in protecting children from the potentially harmful and permanent effects of experimental procedures and peer pressure is narrowly tailored. The SAME Act itself reasons that alternative "more conventional treatment" like psychological services are available for gender dysphoria. SAME Act 20 Linc. Stat. § 1202(b)(1). It prohibits only those potentially harmful procedures while leaving more popular social accommodations like clothing selection or pronoun choices up to the discretion of the family. The state's second interest is also narrowly tailored because the legislators considered extensive medical research and relevant testimonies. R. at 7–8. And the SAME Act's prohibitions are carefully worded to include only the uses which could be harmful and makes exceptions for religion. *Id.* § 1203. Additionally, the Act is narrowly tailored to protect children because it only postpones these medical treatments until the person has the mental capacity and more mature physical body of an 18-year-old adult.

Not only did the lower courts below fail to apply the proper rational basis standard, but their analysis under the heightened standards of scrutiny was also so flawed and constituted an abuse of discretion. Therefore, this Court should conclude that the Marianos were unlikely to succeed on the merits of their Substantive Due Process and Equal Protections claims and reverse the preliminary injunction enjoining the State of Lincoln from enforcing the SAME Act.

CONCLUSION

For the foregoing reasons, Petitioner April Nardini, in her official capacity as the Attorney General of the State of Lincoln, respectfully requests that this Court reverse the decision of the Fifteenth Court of Appeals and overturn the preliminary injunction entered by the District Court below.

Respectfully Submitted,
/s/ *Team 3110*
Team 3110
Counsel for Petitioner

APPENDIX A

Stop Adolescent Medical Experimentations ("SAME") Act

20 Linc. Stat. §§ 1201–06

20-1201 Findings and Purposes

(a) Findings:

The State Legislature finds –

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

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

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

(4) There is as of yet no established causal link between use of medical treatments for 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 B

U.S. Const. amend. XIV, § 1

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