No. 22-8976

IN THE

SUPREME COURT OF THE UNITED STATES

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

Petitioner

v.

Jess MARIANO, Elizabeth MARIANO, and Thomas MARIANO,

Respondents

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

BRIEF FOR RESPONDENTS

Date: September 15, 2022

Team #3111

Counsel for Respondents

Oral Argument Requested

QUESTIONS PRESENTED

1. The serious question standard has long been used by lower courts when ruling on whether to grant or deny a preliminary injunction. The standard allows district judges flexibility when making their determination so as not to further harm the moving party. Respondents argue that the serious question standard coexists with the four factors outlined in *Winter v. National Resources Defense Council, Inc*. and that the district court properly applied the serious question standard when granting the preliminary injunction. Does the serious question standard remain viable after *Winter*?

2. The State of Lincoln's Stop Adolescent Medical Experimentations ("SAME") Act prohibits healthcare providers from providing certain gender-affirming medical care to transgender minors. Respondents argue that enforcement of the SAME Act would violate their fundamental rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. Was the preliminary injunction to prevent enforcement of the SAME Act properly granted regarding Respondents' constitutional claims?

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The decision and order of the United States District Court for the District of Lincoln is unreported and contained in the Record. R. at 1–22. The opinion of the United States Court of Appeals for the Fifteenth Circuit is also unreported and contained in the Record. R. at 23–34.

RELEVANT PROVISIONS

This case involves the State of Lincoln's Stop Adolescent Medical Experimentations ("SAME") Act, 20 Linc. Stat. §§1201-06, which is reprinted in Appendix A. The constitutional provisions at issue, the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, are reprinted in Appendix B. This case also involves 28 U.S.C §§ 2201 and 2202 and 42 U.S.C. § 1983, which are reprinted in Appendix C. Additionally, this case involves Rules 57 and 65 of the Federal Rules of Civil Procedure, which are reprinted in Appendix D.

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

Respondents in this case are Jess Mariano, a 14-year-old transgender[1] minor, and his parents, Elizabeth and Thomas Mariano, all of whom live in the state of Lincoln. R. at 2. Petitioner April Nardini is party to this case in her official capacity as Attorney General of the state of Lincoln. R. at 1.

Nardini has authority in her official capacity to enforce Lincoln's newly enacted Stop Adolescent Medical Experimentations ("SAME") Act, 20 Linc. Stat. §§ 1201-06, and she has indicated that she intends to enforce it. *Id.* The statutory effective date of the SAME Act was January 1, 2022. 20 Linc. Stat. § 1206. The SAME Act would prohibit healthcare providers from providing many types of gender-affirming care to individuals under eighteen years old.[2] Specifically, the SAME Act would prohibit healthcare providers from engaging in any procedure, practice, or service for any patient younger than eighteen "for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individuals biological sex[.]" 20 Linc. Stat. § 1203. This prohibition would include prescribing or administering puberty blocking medication, prescribing or administering certain doses of

[1] Transgender refers to individuals whose gender identity or gender expression differs from cultural expectations based on the sex they were assigned at birth. American Medical Association, *Issue Brief: Health Insurance Coverage for Gender-Affirming Care of Transgender Patients*, https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf (2019).

[2] Gender-affirming care refers to transition-related care to improve the mental and physical health of transgender people. Accepted medically necessary services may include mental health counseling, social transition, gender-affirming hormone therapy and gender-affirming surgery. American Medical Association, *Issue Brief: Health Insurance Coverage for Gender-Affirming Care of Transgender Patients*, https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf (2019).

testosterone to biological females or estrogen to biological males, or performing certain surgeries. *Id.*

Jess Mariano was born biologically female but saw himself as male from a very young age. R. at 4. He suffered from anxiety and depressive episodes throughout childhood due to his gender disconnect. Jess began therapy at age eight after he took a handful of Tylenol pills and said he hoped he would "never wake up." *Id.* His psychiatrist, Dr. Dugray, diagnosed him with gender dysphoria after about nine months of therapy and found "evidence of distress manifested by a strong desire to be treated as a boy and a desire to prevent the development of the anticipated secondary sex characteristics." *Id.* Jess's parents reported hearing Jess say many times that he didn't "want to grow up if I have to be a girl." R. at 5.

Jess began to show signs of puberty including breast development at age ten. *Id.* Dr. Dugray, after consulting with Jess's pediatrician, prescribed medications commonly known as puberty blockers. *Id.* Jess has continued to receive puberty blocking injections each month. *Id.* Dr. Dugray has observed fewer symptoms of depression and less distress associated with feelings of gender incongruence in Jess since he began receiving puberty blockers. *Id.* Dr. Dugray anticipates that Jess will begin hormone therapy at age sixteen due to the persistence and strength of his gender dysphoria. *Id.* Dr. Dugray said that Jess may need chest surgery to treat his gender dysphoria due to his "considerable distress" about the amount of breast tissue he developed. *Id.*

Enforcement of the SAME Act would prevent Jess from legally obtaining the gender-affirming care he currently receives and anticipates needing in the future from a healthcare provider in Lincoln until he turns eighteen. R. at 5, 8. Dr. Dugray stated that an interruption of even one month in Jess's treatment could allow puberty to progress and undermine the progress he has made in his depression and dysphoria. R. at 5.

PROCEDURAL HISTORY

Respondent filed the present case in the U.S. District Court for the District of Lincoln on November 4, 2021, alleging under 42 U.S.C. § 1983 that enforcement of Lincoln's newly enacted SAME Act would violate their rights guaranteed by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. R at 1. Respondents filed a Motion for Preliminary Injunction on November 11, 2021. On November 18, 2021, Petitioner filed a Motion to Dismiss along with its response, urging the district court to deny the request for a preliminary injunction. *Id.* A hearing on both motions was held on December 1, 2021. *Id.* After consideration of both parties' submissions, the district court held that Respondents had met their burden of persuasion requisite when moving for a preliminary injunction. R. at 1-2. Namely, the district court found that Respondents had established that they would suffer immediate and irreparable harm if denied a preliminary injunction, that Respondents' harm would outweigh any speculative harm that Petitioner would endure, and that the preliminary injunction was not adverse to the public interest. R at 10-13.

Additionally, the district court held that the serious question standard survived *Winter v. National Resources Defense Council, Inc.* and found that Respondents had demonstrated sufficiently serious questions going to the merits of the Respondents' substantive due process and equal protection claims. R. at 13. Consequently, the district court granted Respondents' Motion for Preliminary Injunction and denied Petitioner's Motion to Dismiss. R at 2. On appeal, the Fifteenth Circuit affirmed the district court's decision, finding that the district court acted within its discretion when granting the preliminary injunction. R. at 27.

The Supreme Court granted certiorari to address two questions. *Id.* at 35. First, does the serious question standard for preliminary injunctions continue to be viable after *Winter v. National*

Resources Defense Council, Inc.? *Id.* And second, was the preliminary injunction property granted in regard to Respondents' substantive due process and equal protection claims? *Id.*

SUMMARY OF THE ARGUMENT

This Court should assert that the serious question standard remains viable for preliminary injunctions and should the affirm the Fifteenth Circuit's decision upholding the properly granted preliminary injunction barring enforcement of the State of Lincoln's Stop Adolescent Medical Experimentations ("SAME") Act.

I. The Serious Question Standard Survives Winter, Continues to be a Useful Tool for District Courts, and Was Properly Applied in Granting the Preliminary Injunction to Prevent Enforcement of Lincoln's SAME Act.

When ruling on a preliminary injunction, courts traditionally assessed (1) whether the moving party would be irreparably harmed in the absence of an injunction, (2) whether the moving party had demonstrated a likelihood of success on the merits, (3) whether the balance of harms tipped in favor of the moving party, and (4) whether the preliminary injunction was in favor of the public interest. Prior to *Winter v. National Resources Defense Council*, several circuits and the Supreme Court analyzed the propriety of a preliminary injunction by employing a sliding scale analysis to the traditional, four-factor test, allowing a stronger showing on one factor to be offset by another, weaker factor.

One version of the sliding scale analysis employed by circuits is the serious question standard, which allowed district courts to grant a preliminary injunction if the moving party had demonstrated serious questions going to the merits that made a fair ground for litigation. Most circuits had varying ways of how this standard would be employed in their respective jurisdictions, but the underlying reason for this standard was to allow district courts flexibility when granting preliminary injunctions rather than requiring rigid factors. Flexibility is valuable because hearings

for preliminary injunctions are often conducted hastily, using informal procedures with little to no evidence or evidence that would not generally be allowed under the Federal Rules of Evidence.

In *Winter*, this Court articulated the standard for preliminary injunctions but remained silent on the issue of whether the serious question standard survived *Winter*. However, this Court should assert that the serious question standard survives *Winter* because this Court did not expressly overrule the standard as this Court has chosen to do in other rulings. Further, the serious question standard remains viable because the standard comports with traditional principles of equity that promote flexibility when determining whether equitable relief is proper. Additionally, by allowing district courts flexibility when ruling on preliminary injunctions, district judges are better able to serve the purposes of a preliminary injunction without unfairly disadvantaging the non-moving party. As such, this Court should assert that the serious question standard co-exists with the four factors outlined in *Winter*.

II. The Preliminary Injunction Was Properly Granted As to Respondents' Constitutional Claims Under the Serious Question Standard that Co-exists With the Four Factors Outlined in *Winter*.

This Court should affirm the judgment of the district court and Fifteenth Circuit because Respondents can establish that they will suffer irreparable harm without a preliminary injunction. Additionally, the harm to Respondents outweighs any harm to the Petitioner caused by enjoining enforcement of the SAME Act. Respondents can show that Jess and other similarly situated minors in Lincoln who suffer from gender dysphoria would likely suffer psychological distress if denied access to gender-affirming treatment including puberty blockers and gender-affirming hormones. Untreated gender dysphoria in children leads to significantly negative health consequences, including anxiety, depression, and severe psychological distress. This psychological distress and

other negative health implications put children with untreated gender dysphoria at risk of death by suicide.

Respondents have established that the preliminary injunction is in favor of the public interest because the injunction protects and supports a class of people, namely transgender minors in Lincoln who suffer from gender dysphoria, by allowing them to continue receiving treatment until this case is fully litigated. Petitioner's assertions and evidence in support of the SAME Act is speculative and cursory at best and is overshadowed by leading healthcare organizations that support gender-affirming care as well as studies and guidelines that show that gender-affirming treatments can be administered safely with the informed consent of adolescent patients and their parents. As such, this Court should find that the preliminary injunction was properly granted because Respondents established that they would endure immediate, irreparable harm without the preliminary injunction, that the harm Respondents would face outweighs any harm to Petitioner resulting from the preliminary injunction, and that the preliminary injunction is in the public interest.

Further, Respondents are likely to succeed on the merits because the SAME Act violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Due Process Clause prohibits states from depriving "any person of life, liberty or property without due process of law." Under the doctrine of substantive due process, this Court requires strict scrutiny of any state action that would infringe upon certain fundamental liberties, including the right of parents to make decisions about the upbringing and care of their children. Lincoln's SAME Act would deprive parents of the right to direct the medical care of their transgender children in consultation with healthcare providers following well-established professional guidelines. Because the SAME Act would infringe on parents' fundamental liberties, Lincoln bears the burden of justifying the

Act by showing that it serves a compelling state interest and that it was narrowly tailored using the least restrictive means available to achieve that interest, which Lincoln cannot meet. because less restrictive means clearly are available, such as those employed in several European countries. At a minimum, Respondents raise serious questions about the constitutionality of the SAME Act and Petitioner's assertion that gender-affirming care is experimental.

Additionally, Respondents raise serious questions about whether Lincoln's SAME Act discriminates on the basis of sex and transgender status in violation of the Equal Protection Clause. The SAME Act facially discriminates on the basis of sex by barring medical professionals from providing certain doses of testosterone or other androgens to biological females or estrogen to biological males who are younger than eighteen, but it includes no such prohibition against providing testosterone to biological males or estrogen to biological females. A state's discrimination on the basis of sex or gender requires intermediate scrutiny from the courts. A prohibition against unwarranted discrimination on the basis of gender logically extends to discrimination on the basis of transgender status. The state must provide an exceedingly persuasive justification to show that the discrimination serves important governmental objectives and that the means employed are substantially related to those objectives. Lincoln cannot meet this burden because respondents raise serious questions about the validity of Lincoln's proffered justifications.

Further, Respondents raise serious questions about whether Lincoln's SAME Act discriminates against transgender persons as members of a disfavored group in violation of the Equal Protection Clause. This Court has repeatedly held that state discrimination based on animosity toward a politically unpopular group is never rationally related to a legitimate government interest. Lincoln's SAME Act emerged at a time when the introduction of anti-transgender legislation was at an all-time high in the United States. The timing of this discriminatory statute raises serious

questions and additional evidence of purpose beyond the face of the challenged law would likely arise through further litigation.

Because the preliminary injunction was properly granted under the serious question standard that co-exists with the four factors outlined by this Court in *Winter*, the preliminary injunction should be affirmed by this Court.

ARGUMENT

This Court faces the legal questions of (1) whether the serious question standard for preliminary injunctions remains viable after *Winter v. Natural Resources Defense Council, Inc.* and (2) whether the district court properly granted the preliminary injunction in regard to Respondents' substantive due process and equal protection claims. Both issues presented to this Court and discussed herein are subject to *de novo* standard of review. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

I. The Preliminary Injunction Was Properly Granted by the District Court and Affirmed by the Fifteenth Circuit Because the Serious Question Standard Survived *Winter* and Continues to Be a Viable Tool for District Courts to Use.

This Court should affirm the district court and Fifteenth Circuit's judgment because the serious question standard remains viable following *Winter* and, thus, the district court and Fifteenth Circuit properly applied the serious question standard when granting Respondents' motion for a preliminary injunction. The serious question standard remains viable following *Winter* because this Court did not expressly overrule the sliding scale approach and serious question standard in *Winter*. *See Winter v. Nat'l. Res. Def. Council*, 555 U.S. 12, 20-33 (2008). Additionally, the serious question standard is still viable because the standard allows district courts greater flexibility when ruling on motions for preliminary injunctions, where the hearings can be conducted hastily and informally, with minimal evidence. Lastly, the serious question standard is still viable because its use serves the ultimate purpose of preliminary injunctions, which is to preserve the status quo of the parties. Therefore, because the serious question standard survives *Winter*, the district court and Fifteenth Circuit properly applied it to this case as this case presents serious questions about the constitutionality of Lincoln's SAME Act.

This section will first discuss the traditional preliminary injunction standard, including use of the serious question standard by the circuits. This section will then address this Court's articulation of the preliminary injunction standard and the response from the circuits resulting from this Court's silence on the viability of the serious question standard. Lastly, this section will discuss why the serious question standard survives *Winter* and the uniform standard for preliminary injunctions that this Court should adopt going forward.

A. Circuits Traditionally Used the Four Factors Outlined in *Winter but Many Circuits Also Employed the Serious Question Standard Because of the Flexibility It Allowed District Judges Ruling on Preliminary Injunctions.*

A moving party is entitled to equitable relief when there is no other adequate remedy at law. *Mazurak v. Armstrong*, 520 U.S. 968, 972 (1997); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975). Federal Rule of Civil Procedure 65 authorizes a district court to issue a preliminary injunction when the court believes that one is appropriate. *See* Fed. R. Civ. P. 65(a). The Federal Rules of Civil Procedure do not specify the circumstances under which a preliminary injunction can be granted, so a trial court has broad discretion when ruling on a request for a preliminary injunction. *See* Fed. R. Civ. P. 65(a), (c); *Entergy, Ark., Inc. v. Nebraska*, 21 F.3d 887, 898 (8th Cir. 2000).

Opposing parties have the right to litigate their dispute and have a judgment rendered based upon all the evidence presented in favor of their claims. *See Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983) ("The right of access in the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution.") (citing *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148-49 (1907). As such, the purpose of issuing a preliminary injunction at the outset of a lawsuit is to preserve the status quo of the parties

and to prevent irreparable harm until the parties have had a chance to conduct a trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

Traditionally, courts have applied four factors[3] in determining whether to grant a preliminary injunction: (1) whether the moving party will be irreparably harmed in the absence of an injunction, (2) the moving party's likelihood of success, (3) the balance between the harm to the moving party and the harm to the nonmoving party, and (4) the public interest. *Univ. of Tex.*, 451 U.S. at 392. Prior to *Winter*, many circuits[4] also employed a balancing or sliding scale analysis to the traditional, four-factor test, allowing a stronger showing on one factor to be offset by another weaker factor.

Before *Winter*, many circuits also employed the serious question standard, which is a version of the sliding scale analysis. *E.g., All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). The serious question standard allowed movants to demonstrate sufficiently serious and substantial questions going to the merits that made an issue deserving of a more thorough investigation and a full and fair trial. *All. for the Wild Rockies, 632 F.3d at 1131-35* (discussing how other circuits had integrated the serious question standard pre-*Winter*). Circuits that employed this standard generally allowed a demonstration of serious questions as an alternative to demonstrating a likelihood of success on the merits when it was uncertain or indiscernible by a district judge whether the moving party was more likely than not to prevail on the merits or where

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[3] *Jackson Diary, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979); *Clear Channel Outdoor, Inc. v. City of L.A.*, 340 F.3d 810, 813 (9th Cir. 2003); *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 194 (4th Cir. 1977).

[4] *Buchanan v. U.S. Postal Serv.*, 508 F.2d 259, 266 (5th Cir. 1975); *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994); *Stork USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 313-314 (7th Cir. 1994); *Nnadi v. Richter*, 976 F.2d 682, 690 (11th Cir. 1992); *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974); *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) (citing 11 Charles Allan Wright & Arthur R. Miller, Federal Practice & Procedure § 2948).

the moving party had demonstrated the other three traditional factors. [5] As such, the serious question standard afforded courts greater flexibility in issuing preliminary injunctions and, thus, mitigated the possibility of irreparable harm to moving parties while further discovery was conducted and trial ensued. *All. for the Wild Rockies*, 632 F.3d at 1133-35 (9th Cir. 2011).

B. In Winter, the Court Remained Silent on the Serious Question Standard Resulting in Confusion Amongst the Circuits Regarding Whether the Serious Question Standard Survived Winter.

In *Winter*, the Supreme Court reversed the Ninth Circuit's decision to uphold the preliminary injunction issued by the district court in favor of the Natural Resources Defense Council, Inc. and other plaintiffs. *Winter*, 555 U.S. at 12. In moving for a preliminary injunction, the plaintiffs argued that the Navy's sonar training program was harming marine animals living in

[5] *Jackson Dairy, Inc.*, 596 F.2d at 72 (indicating that moving parties had to demonstrate either (a) "irreparable harm" and (b) either a (1) "likelihood of the 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"); *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (indicating that moving parties had to demonstrate either (1) a likelihood of the success on the merits and the possibility of irreparable injury or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor); *Blackweder Furniture Co. of Statesville, Inc.*, 550 F.2d at 194-95 (indicating that if district courts decided that an imbalance of hardship appeared in the plaintiff's favor, then the likelihood-of-success test was displaced by a "a showing that the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation"); *Okla., ex rel., OK Tax Com'n v. Int'l Registration Plan, Inc.*, 455 F.3d 1107, 1112-1113 (10th Cir. 2006) (indicating that moving parties could meet the requirement for the likelihood of success on the merits requirement by a showing of questions going to the merits that were "so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation if the moving party demonstrated the other three elements); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386-387 (7th Cir. 1984) (indicating that moving parties could demonstrate either a "combination of probable success and the possibility of irreparable injury or that serious questions are raised the balance of hardships tips sharply in his favor."); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998) (stating that the essential inquiry in ruling on a preliminary injunction was whether the balance of other factors tips decidedly toward the movant and the movant has also raised questions so serious and difficult as to call for a more deliberate investigation).

the waters of southern California and that the Navy should have prepared an environmental impact statement before commencing its naval readiness training. *Id.* at 14-16

The district court granted the preliminary injunction, holding that the plaintiffs had "demonstrate[d] a strong likelihood of prevailing on the merits of their claims." Further, the district court held that equitable relief was appropriate because the plaintiffs had established that there was "near certainty of irreparable injury to the environment" and that the "injury outweighed any possible harm to the Navy." *Id.* However, the district court stated that "when a plaintiff demonstrates a strong likelihood of prevailing on the merits, a preliminary injunction may be entered based only on a 'possibility' of irreparable harm." *Id.* at 21. The Ninth Circuit affirmed the preliminary injunction and reiterated that moving parties need only show a possibility of irreparable harm. *Id.* at 17, 20-22.

This Court reversed the preliminary injunction and, in doing so, articulated the standard for preliminary injunctions. *Id.* at 20. The articulated standard reflected the four traditional factors, but this Court clearly stated that the Ninth Circuit had misstated the "irreparable harm" factor by only requiring movants to show a possibility of irreparable harm. *Id.* at 22. In correcting the Ninth Circuit, this Court clearly and expressly stated that plaintiffs seeking preliminary relief must demonstrate that irreparable harm is likely in the absence of an injunction. *Id.*

However, in articulating the preliminary injunction standard, this Court did not discuss whether lower courts should continue using the sliding scale analysis, including the serious question standard. *All. for the Wild Rockies*, 632 F.3d at 1131. This Court's silence on the serious question standard resulted in confusion and a lack of uniformity among the circuits as to the standard's continued viability following *Winter*. *See All. for Wild* Rockies, 632 F.3d at 1132-34. In response to *Winter*, the Second Circuit stated that their pre-*Winter* standard that incorporated

the serious question standard survived *Winter* because this Court did not expressly overrule it and because eradicating the standard would go against historical principles of equitable relief that this Court has reiterated. *Citigroup Glob. Mkts. v VCG Special Opportunities*, 598 F.3d 30, 35-39 (2d Cir. 2010). Additionally, the Second Circuit held that the serious question standard survived, reasoning that their continued use of the standard was supported by this Court based on this Court's recognition of serious questions as a contributing basis for granting a preliminary injunction in prior rulings. *Id.; See also Ohio Oil v. Conway*, 279 U.S. 813, 814 (1929).

The Ninth Circuit modified its preliminary injunction standard following *Winter*, holding that moving parties must demonstrate the four *Winter* factors but that evidence of serious questions may support an issuance of a preliminary injunction in their favor. *All. for the Wild Rockies,* 632 F.3d at 1134-35. Other circuits overruled the serious question standard, holding that the standard was not viable because this Court did not include it among the factors listed when dictating the preliminary injunction standard. *Diné Citizens Against Ruining Our Env. v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016); *The Real Truth About Obama, Inc. v. Fed. Elec. Comm'n*, 607 F.3d 342, 346-47 (4th Cir. 2010). Following *Winter*, the Seventh Circuit suggested that the sliding-scale analysis was still viable but did not address the specific viability of the serious question standard. *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). The Eighth Circuit has not directly addressed the issue but continues to refer to *Dataphase Systems, Inc. v. C L Systems, Inc.* when citing the preliminary injunction standard, which supported the serious question standard. *Jet Midwest Int'l Co. v. Jet Midwest Grp., L.L.C.*, 953 F.3d 1041, 1044 (8th Cir. 2020) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

C. The *Serious Question Standard Continues to Be Viable After Winter Because This Court Did Not Expressly Overrule It, the Standard Allows District Judges Greater Flexibility When Ruling on Preliminary Injunctions Without Unfairly Prejudicing the Non-Moving Party, and the Standard Comports with Traditional Principles of Equitable Relief.*

The serious question standard, a version of the sliding scale analysis, continues to be a viable standard for the following reasons: (1) the Supreme Court did not expressly renounce the serious question standard when it articulated the standard for preliminary relief in *Winter*; (2) the serious question standard allows for greater flexibility for district courts when ruling on preliminary relief at the outset of complex litigation with minimal discovery; and (3) the serious question standard is in accordance with traditional principles of equitable relief and serves the ultimate purpose of preliminary injunctions by preserving the status quo of the parties.

i. The Serious Question Standard Is Still Viable Because This Court Did Not Expressly Renounce It in Winter *As It Has Done Previously in Other Cases.*

The serious question standard for preliminary injunctions continues to be viable after *Winter* because this Court did not expressly renounce or eliminate use of the standard in its opinion, as it has in prior cases. In *Winter* itself, this Court held that the Ninth Circuit was wrong in stating that that a moving party must show a "possibility of irreparable harm." *Winter,* 555 U.S. at 22. This Court expressly clarified that a "plaintiff seeking preliminary relief [must] demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.*

In contrast, when stating the preliminary injunction standard, this Court did not address the sliding scale analysis and serious question standard, indicating that the analysis and standard survive *Winter*. *Id.* at 20-23. Notably, in her dissent in *Winter*, Justice Ginsburg, joined by Justice Souter, stated that "courts have evaluated claims for equitable relief on a 'sliding scale,' sometimes

awarding relief based on a lower likelihood of harm when the likelihood of success is very high." *Id.* at 51. Further, Justice Ginsburg also stated that this "Court has never rejected the [sliding scale approach]" and that she did not believe that this Court did so when ruling on *Winter*. *Id.* Justice Ginsburg's dissent indicates that this Court was aware of the serious question standard, a version of the sliding scale analysis, employed by lower courts, but that this Court refused to overrule the analysis and standard.

Moreover, a recent Supreme Court ruling indicates that this Court will expressly overrule prior precedent to state what the governing law is, which indicates that this Court chose not to negate the viability of the serious question standard that has traditionally been employed by lower courts. In *Dobbs v. Jackson Women's Health Organization*, this Court expressly overruled the right to abortion, which was previously recognized as a fundamental right under the Fourteenth Amendment in *Roe v. Wade* and *Planned Parenthood v. Casey*. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2239 (2022). In *Dobbs*, this Court expressly stated that the Fourteenth Amendment does not protect the right to abortion and that, going forward, state abortion laws were subject to rational basis review. *Id.* This Court's opinion in *Dobbs*, as well as its express mention of the Ninth Circuit's incorrect preliminary injunction standard in *Winter*, demonstrates how this Court will expressly state and clarify the governing law on particular issues and instruct lower courts on what standards to apply. *Winter*, 55 U.S. at 22. Thus, this Court signaled its intention for the serious question standard to remain viable and to co-exist alongside the four factors outlined in *Winter* through its silence on this issue. *Id.* at 20.

ii. The Serious Question Standard Is Still Viable Because It Provides District Courts Flexibility When Ruling on Preliminary Injunctions for Difficult-to-Predict and Factually Complex Situations While Not Unfairly Disadvantaging the Non-Moving Party.

The serious question standard also continues to be viable and co-exist with the four *Winter* factors because the standard provides district courts with much-needed flexibility when ruling on preliminary relief, which comports with traditional principles of equitable relief. Because the purpose of a preliminary injunction is to preserve the relative positions of the parties until a trial is held on the merits and to prevent any additional harm, preliminary injunction hearings are often conducted hastily to serve these purposes. *Univ. of Tex.*, 451 U.S. at 395. As such, preliminary injunctions are customarily granted "on the basis of procedures that are less formal and evidence that is less than complete than a trial on the merits." *Id.* Accordingly, a court may consider hearsay, accept affidavit testimony, and consider evidence that in other ways does not strictly comply with the Federal Rules of Evidence.[6] Further, a party is not required to prove their case in full at a preliminary injunction hearing. *Univ. of Tex.*, 451 U.S. at 395. Consequently, a district judge likely only has a partial view of a disputed issue when ruling on a preliminary injunction. *Id.* at 396.

Moreover, the task becomes that much harder when a district court judge must rule on a case with complex and varying factual scenarios, situations, or legal issues in which it is not clear at the outset what the outcome will be at trial. *Citigroup Glob. Mkts.*, 598 F.3d at 34-39. However, if a situation were to arise in which a district judge wrongly granted a preliminary injunction, Rule

[6] *Mullins v. City of N.Y.C*, 626 F.3d 47, 52 (2d Cir. 2010); *Dexia Credit Local v. Rogan*, 602 F.3d 879, 885 (7th Cir. 2010); *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004); *Levi Strauss & Co. v. Sunrise Intern. Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *Sierra Club, Lone Star Chapter v. F.D.I.C.*, 992 F.2d 545, 551 (5th Cir. 1993); *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (citing 11 Charles Allan Wright & Arthur R. Miller, Federal Practice and Procedure § 2949 at 491 (3d ed. 1973)).

65(c) allows a court to condition granting a preliminary injunction on the moving party posting a bond to pay for any costs and damages the non-moving party accrues if found to have been wrongfully enjoined. Fed. R. Civ. P. 65(c). As such, moving parties may be required to assume the risk of having to compensate the non-moving party when seeking a preliminary injunction if the preliminary injunction was wrongfully granted. Thus, the flexibility granted to district judges through the availability of the serious question standard does not unfairly disadvantage the non-moving party because the non-moving party is able to be made whole if a district judge wrongly grants a preliminary injunction.

iii. The Serious Question Standard Is Still Viable Because the Standard Comports with Traditional Principles of Equitable Relief and Allows District Judges to Preserve the Status Quo of the Parties Until a Trial on the Merits Occurs.

The need for flexibility when ruling on preliminary injunctions comports with traditional equitable relief principles. This Court has repeatedly emphasized that "flexibility is the hallmark of equity jurisdiction," allowing courts of equity to mold their decrees to the necessities of a particular case. *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting); *See Holland v. Florida*, 560 U.S. 631, 649-650 (2010); *Holmburg v. Armbrecht*, 327 U.S. 392, 396 (1946) *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) In *Holland*, only two years after the *Winter* decision, this Court stated, "flexibility [that is] inherent in equitable procedure enables courts to 'meet new situations [that] demand equitable intervention, and to accord all of the relief necessary to correct . . . particular injustices.'" *Holland*, 560 U.S. at 649-650. Additionally, this Court elaborated in *Holland* that while courts of equity can draw upon decisions made in similar cases for guidance when ruling on equitable relief, courts of equity may need to approach hard-to-predict circumstances with special treatment. *Id.* This Court's statements regarding the importance of

flexibility in equitable procedure underscore that the process of awarding or denying equitable relief cannot be a rigid, one-size-fits-all determination. Moreover, these statements also highlight the long-standing discretion that district judges need, and are entitled to, when granting or denying equitable relief because situations in which equitable relief is prayed for need to be assessed in a case-by-case manner. *Id.*

The serious question standard allows district judges flexibility in ruling on preliminary injunctions, accorded to them by long-standing principles of equitable relief as well as the long-standing discretion conferred on district judges in ruling on preliminary injunctions, especially when district judges are confronted with hard to predict new legal issues or complex factual situations in which they cannot turn to long-standing precedent to help support the reasoning for granting or denying a preliminary injunction. Considering the importance that this Court has placed on flexibility in equitable relief, it would be antithetical for the standard stated in *Winter* to abrogate the serious question standard in favor of a rigid, four-factor test. In doing so, this Court would effectively displace the discretion that district judges are given when ruling on preliminary injunctions.

D. <u>This Court Should Hold That the Serious Question Standard and the Four Factors from *Winter* Co-exist Together As One Standard to Provide District Judges the Requisite Flexibility When Ruling on Preliminary Injunctions for Complex or Uncertain Factual Situations or Legal Issues.</u>

This Court's deliberate silence on the serious question standard in *Winter* has created confusion among the circuits as to what the proper standard is when ruling on a preliminary injunction. Consequently, this confusion has led to a lack of uniformity, resulting in the employment of varying preliminary injunction standards among the circuits. As such, this Court

should articulate the appropriate standard that lower courts should use when ruling on the propriety of a preliminary injunction.

This Court should continue to utilize the four-factor preliminary injunction test articulated in *Winter*. *Winter*, 555 U.S. at 20. However, this Court should acknowledge that the serious question standard still coexists alongside the four-factor test in certain compelling situations, especially because this Court has previously recognized serious questions as a contributing basis for granting a preliminary injunction. *Ohio Oil*, 279 U.S. at 813. Namely, these situations would include when a district court cannot determine definitively at the outset of complex litigation if the moving party is likely to succeed on the merits based on the limited evidence that it is presented or when a district court is presented with difficult factual questions or scenarios, including questions of first impression. *See Citigroup Glob. Mkts.*, 598 F.3d at 34-39. In these types of circumstances and to prevent abuse of discretion, this Court can require district judges to thoroughly explain the reasoning behind the use of the serious question standard. By using the serious question standard, district judges are ultimately still serving the purpose of preliminary injunctions by preserving the status quo of the parties while also preventing irreparable harm that the moving parties could have endured under the rigid four-factor *Winter* standard.

II. The Preliminary Injunction Was Properly Granted Because Respondents Raise Serious Questions; They Would Likely Suffer Irreparable Harm Without the Injunction; the Balance of Equities Favors Respondents; and Respondents Can Establish a Likelihood of Success on the Merits of Their Constitutional Claims.

This Court should affirm the Fifteenth Circuit decision upholding the District Court's grant of a preliminary injunction because Respondents raise serious questions about the SAME Act's infringement on the fundamental liberties of parents in violation of the Due Process Clause of the

Fourteenth Amendment and about the Act's discriminatory treatment of transgender minors in violation of the Equal Protection Clause of the Fourteenth Amendment. Respondents can establish that they are likely to suffer irreparable harm in the absence of an injunction, that the injunction is in the public interest, and that the balance of equities favors them. Additionally, Respondents are likely to succeed on the merits of their substantive due process and equal protection claims because Petitioner cannot meet its burden to justify these violations under strict scrutiny or heightened scrutiny. Moreover, Respondents raise serious questions regarding the constitutionality of the SAME Act.

Under the *de novo* standard of review, this Court should apply the complete preliminary injunction test of the four factors articulated in *Winter* proposed herein. If this Court were to find that the Respondents have not established a likelihood of success on the merits, this court should apply the serious question standard to see if there are any serious questions that make a fair ground for litigation. Under the proposed test, the preliminary injunction was proper and should be affirmed because Respondents can establish a likelihood of success on the merits, to protect Respondents and similarly situated Lincoln residents from the irreparable harm that would be caused by enforcement of the SAME Act, because the injunction is in the public interest, and because the balance of equities favors the Respondents. Moreover, if this Court were to find that Respondents cannot establish a likelihood of success on the merits, this Court should find that Respondents have demonstrated serious questions regarding the constitutionality of the SAME Act that deserve to be fully litigated.

A. The Preliminary Injunction Was Properly Granted Because Respondents Have Shown that They Are Likely to Suffer Irreparable Harm Without the Injunction, that the Injunction Is in the Public Interest, and that the Balance of Equities Favors Them.

i. Respondents Are Likely to Suffer Irreparable Harm Without the Injunction.

Under the proposed preliminary injunction standard, this Court should begin their analysis by analyzing the four-factors outlined in *Winter*, starting with whether the moving party has shown that they are likely to suffer irreparable harm in the absence of a preliminary injunction. *Winter*, 555 U.S. at 20, 22. "An injury is only irreparable if it cannot be undone through monetary remedies." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). Further, irreparable harm has been presumed by most courts when a moving party's constitutional rights are being threatened or deprived.[7] Moreover, untreated gender dysphoria in minors may lead to irreparable injury in the form of severe psychological and physical distress, which may lead to their deaths by suicide.[8] Additionally, the likelihood of severe psychological and physical distress resulting from untreated gender dysphoria, both in transgender minors and adults, has previously been recognized as establishing the irreparable harm element. *Brandt v. Rutledge*, 551 F. Supp. 3d 892, 892 (E.D. Ark. 2021); *Edmo*, 935 F.3d at 797-98.

Jess has previously experienced psychological distress in the form of anxiety and depression, resulting from his gender dysphoria, and even attempted suicide when he was eight years old. R. at 4. If denied the ability to continue treatment for his gender dysphoria, Jess's

[7] *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977) (citing 11 Charles Allan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948 at 440 (3d ed. 1973)); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 798 (9th Cir. 2019).

[8] Jason Rafferty et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescence*, Off. J. of Am. Acad. of Pediatrics, Oct. 2018, at 1, 3.

untreated gender dysphoria will result in immediate and irreparable harm by causing an exacerbation of Jess's anxiety and depression. R. at 11. Further, Jess's untreated gender dysphoria will also result in physical distress as withdrawing puberty blockers at Jess's age will immediately resume Jess's female pubertal development that conflicts with Jess's gender identity. *Id.* Petitioner argues that Jess is not at risk of irreparable harm because her office intends to interpret the SAME Act to allow children to still receive gender-affirming care as long as the treatment is not "instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 12. However, this interpretation still denies children in Lincoln who suffer from gender dysphoria access to puberty blockers and gender-affirming hormones and, thus, presents a significant likelihood of immediate and irreparable harm to an entire class of children in Lincoln who suffer from gender dysphoria.

Respondent also argues that Jess and other children in Lincoln suffering from gender dysphoria can just wait until they are eighteen to continue their treatment. *Id.* While it is true that adults can and do transition, Jess was diagnosed with gender dysphoria when he was eight years old, and his diagnosis has not altered or discontinued. R. at 5. Children, like Jess, who are currently suffering from gender dysphoria and who want to receive care to treat their condition should not have to wait until they are eighteen to begin receiving care and, in the interim, suffer mental and physical distress.

Further, puberty catalyzes sweeping change in biology, appearance, self-perception, behavior, and emotion, which presents difficulties for virtually any child.[9] The SAME Act would require minors in Lincoln who suffer from gender dysphoria to endure not only puberty but puberty for a

[9] Carl Pickhardt, *Adolescence and the Problems of Puberty*, Psychology Today (Apr. 13, 2010), https://www.psychologytoday.com/us/blog/surviving-your-childs-adolescence/201004/adolecence-and-the-problems-puberty.

biological sex that is incongruent with their identified gender. Such a requirement would force children and adolescents to suffer through years of mental and physical anguish before receiving relief, which could persist even after treatment has begun or lead to disastrous consequences, such as child deaths by suicide.[10] As such, this Court should find that Respondents will suffer immediate and irreparable harm in the absence of the preliminary injunction.

ii. The Balance of the Equities Favors Respondents, and the Injunction Is in the Public Interest Because the Injunction Would Protect Minors Suffering from Gender Dysphoria from State Interference with Their Medical Care.

The standard in *Winter* requires a moving party to demonstrate that the balance of the equities tips in their favor, meaning that the harm that they will likely suffer outweighs any harm that the opposing party endures. *Winter*, 555 U.S. at 20. Additionally, the *Winter* standard also requires that the moving party demonstrates that the injunction is in the public interest. *Id.* In ruling on a stay pending appeal in *Nken v. Holder*, this Court applied the same four factors from *Winter*, indicating that the standard for a stay pending appeal and a preliminary injunction is very similar because there is significant overlap in the concerns presented when a court is ruling on either a preliminary injunction or a stay pending an appeal at the outset of litigation. *Nken v. Holder*, 556. U.S. 418, 434 (2009) In *Nken*, the Supreme Court stated that the balance of the equities element and the public interest element from Winter merge when the government is the opposing party. *Id.* at 435. These elements merge because the government's interest is the public interest. *Id.* Therefore, the same approach would apply to this case.

While Petitioner has a compelling interest to ensure the health and safety of its citizens, especially of its children, the harm that Respondents and other similarly affected parents and

[10] Jason Rafferty, *supra* note 6, at 3.

children subject to Lincoln's statutes would suffer outweighs the speculative harm that Petitioner is seeking to prevent. Petitioner has not cited any medical or scientific evidence or studies in support of its findings stated in Lincoln's SAME Act. 20 Linc. Stat. §1201. The language of the statute is too general and vague to indicate any sort of immediate harm that Petitioner would face if the preliminary injunction were granted. Namely, 20 Linc. Stat. §1201 subsection (a)(4) states that "[s]tudies demonstrating health benefits of [gender-affirming care] treatments have not been sufficiently longitudinal or randomized." 20 Linc. Stat. §1201. The Act does not state which "studies" it is referring to, which does not aid in demonstrating the supposed harm that Lincoln's citizens and children will suffer if the preliminary injunction is granted.

Further, subsection (a)(5) states that "[e]merging 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. *Id.* Like subsection (a)(4), subsection (a)(5) does not provide any citations to medical evidence in support of this finding. Subsection (a)(7) references "individuals" who have "detransitioned . . . have expressed regret for taking puberty-suppressing medications and cross-sex hormones." *Id.* However, in the district court hearing, Petitioner called in support of this finding only two witnesses who had also testified before the legislature that they expressed regret in their decision to start taking puberty blockers and gender-affirming hormones. R. at 8. In contrast, Respondents presented medical and scientific evidence and publications from the Endocrine Society, the American Academy of Pediatrics, the American Medical Association, and the World Professional Association for Transgender Health (WPATH), which all state that these organizations – made up of thousands of healthcare professionals collectively – support providing minors with gender-affirming care. R. at 7.

Petitioner's expert, Dr. Geller, testified about recent developments in gender-affirming treatments in Sweden and Finland as well as a large-scale evidence review initiated by the National Health Services in the United Kingdom. R. at 7-8. However, puberty-suppressant medications have been used since the 1980s, and the effects of these medications are reversible. Caroline Salas-Humara et al., *Gender Affirming Medical Care of Transgender Youth*, 49 Current Probs. in Pediatric and Adolescent Health Care (Sept. 2019) https://doi.org/10.1016/j.cppeds.2019.100683. While the use of gender-affirming hormones comes with potential risks, possible side effects, and some irreversible effects, the Endocrine Society and WPATH provide specific guidelines and standards of care for when transgender adolescents may start receiving gender-affirming hormones and what criteria must be met to ensure that adolescents seeking treatment, along with their parents, are fully informed of the potential risks and side effects, including irreversible effects, at the outset of treatment. *Id.*

Despite the risks and effects that transgender adolescents face when pursuing gender-affirming care, a study published in July 2022 indicated that 94% of transgender adolescents retained their gender identity five years after their initial social transitions. Kristina R. Olson et al., *Gender Identity 5 Years After Social Transition*, Off. J. of Am. Acad. of Pediatrics, Aug. 2022, at 1, 1. This study demonstrates that risks and effects of gender-affirming care may be outweighed by the benefits that transgender youth receive after beginning treatment for their gender dysphoria. While this Court has held that a state endures a form of irreparable injury when enjoined by a court from effectuating one of its statutes[11], the substantial physical and psychological harm that Respondents, along with other transgender youth in the state of Lincoln will face if denied access to gender-affirming care substantially outweighs the scant harm to Lincoln's democratic process and any

[11] *Maryland v. King*, 567 U.S. 1301, 1303 (2012).

other speculative harm Lincoln has minimally evidenced. Additionally, “it is always in the public interest to prevent a violation of a party’s constitutional rights,” as is presented in this case. *Brandt by & through Brandt v. Rutledge*, No. 21-2875, 2022 WL 3652745 at *4 (8th Cir. Aug. 25, 2022). Therefore, this Court should find that the Respondents have met the balance of equities and public interest factors requisite under *Winter*.

B. The Preliminary Injunction Was Properly Granted Because Respondents Are Likely to Succeed on the Merits Because Lincoln Cannot Meet Its Burden to Justify the SAME Act's Infringement on Respondent's Rights Under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Respondents brought their suit for injunctive relief under 42 U.S.C. § 1983, which permits a civil action against any person who under color of law deprives any person within the jurisdiction of the United States of rights secured by the U.S. Constitution and its laws. Respondents claims that enforcement of Lincoln's SAME Act would deprive them of their right to liberty without due process of law and their right to equal protection of the laws in violation of the Fourteenth Amendment are likely to succeed on the merits. The State of Lincoln, through April Nardini in her official capacity as Attorney General, cannot justify the SAME Act under the standards of scrutiny established by this Court.

i. Respondents Are Likely to Succeed on the Merits of Their Claim Because the SAME Act Violates Their Substantive Due Process Rights Under the Fourteenth Amendment.

The Due Process Clause provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. Some liberties are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Com. of*

Mass., 291 U.S. 97, 105 (1934), *overruled by Malloy v. Hogan*, 378 U.S. 1 (1964). Under the doctrine of substantive due process, the state cannot infringe fundamental rights no matter what process is provided unless it can show a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). Even then, this Court's strict scrutiny standard of review requires that any infringement of a fundamental right must be narrowly tailored to achieve the compelling state interest. *Id.* Petitioner cannot meet its burden to justify the SAME Act under the strict scrutiny standard of review of this Court because Petitioner cannot show that the statute is narrowly tailored using the least restrictive means to achieve a compelling state interest. Therefore, Respondents are likely to succeed on the merits of their substantive due process claim. In addition, Respondents raise serious questions about whether the SAME Act infringes on their fundamental liberty interest in determining the appropriate medical treatment for their child in consultation with medical providers following well-established, evidence-based guidelines.

a. The SAME Act Infringes Upon the Fundamental Liberty Interests of Parents to Direct the Care of Their Children in Violation of Their Fourteenth Amendment Substantive Due Process Rights.

This Court has long recognized that the Fifth and Fourteenth Amendments protect certain fundamental liberties that are deeply rooted in the nation's history and traditions.[12] Under the doctrine of substantive due process, states may not unreasonably infringe upon these fundamental liberties. *Meyer v. Nebraska*, 262 U.S. at 399. Although this Court has never attempted to fully enumerate the fundamental liberties protected by substantive due process, it has recognized the right to "establish a home and bring up children" as a right "essential to the orderly pursuit of

[12] *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) ("T] he individual has certain fundamental rights which must be respected."); *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) ("The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."); *see also Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) ("the concept of liberty protects those personal rights that are fundamental").

happiness by free men." *Id.* One of the most deeply rooted liberty interests recognized by this Court is "the interest of parents in the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). *See also Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."). The ability of families to care for each other and of parents to oversee the care of their children must include the ability to obtain recommended, evidence-based health care that their children need without the state imposing unnecessary obstacles that serve no compelling state interest.

This Court has previously upheld the right of parents to make decisions about medical care in the best interest of their children, and this case should be no different. In *Parham v. J.R.*, this Court upheld Georgia statutes giving parents the right to commit their children for mental health treatment even if the children objected. 442 U.S. 584, 604 (1979). The independent medical judgment of the child's doctors, not the interference of the state, provided any oversight that might be required as a check against unnecessary or unwise medical interventions. *Id.* The law's concept of family, this Court noted, recognizes that historically "natural bonds of affection lead parents to act in the best interests of their children." *Id.* at 602. As in *Parham*, this Court should recognize the fundamental liberty of parents in Lincoln to make decisions in the best interests of their children in consultation with medical providers without interference by the state.

This Court has repeatedly held that a state may not unreasonably interfere with the decisions of parents and guardians in the upbringing of their children. Nearly a century ago, this Court struck down an Oregon law that required parents and guardians to send children to public schools, noting that "[t]he child is not the mere creature of the state." *Pierce v. Soc'y of the Sisters*

of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925). In *Troxel*, this Court struck down as unconstitutionally infringing on parental rights a Washington statute that allowed any party to petition a court for visitation regardless of the parent's decisions about what was best for the child. 530 U.S. 57 at 67. The law presumes that parents will make decisions in the best interest of their children and protects their fundamental liberty interest in making those decisions without unreasonable interference by the state.

By prohibiting access to well-established medical treatment for gender dysphoria for minors, the SAME Act interferes with the fundamental liberty interest of parents to make medical decisions in the best interest of their children. Lincoln's assertion that gender-affirming care is experimental and that parents have no fundamental right to access such care is unconvincing and unsupported by the facts. R. at 15. At a minimum, Respondents raise a serious question about the experimental nature of gender-affirming care is a fair ground for litigation. *See Citigroup Glob. Mkts.*, 598 F. 3d at 36. Risks and benefits accompany almost any healthcare intervention. Medical associations including WPATH, the Endocrine Society, and the American Academy of Pediatrics recognize gender affirming medical care as an appropriate intervention in certain cases for transgender minors diagnosed with gender dysphoria, and these associations have developed detailed practice guidelines for these interventions.[13] Minor transgender patients and their parents,

[13] World Pro. Ass'n for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 10-21 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf; Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline,*102 *J. Clinical Endocrinology & Metabolism* 3869–3903 (Nov. 1, 2017), https://doi.org/10.1210/jc.2017-01658; *Frontline Physicians Oppose Legislation That Interferes in or Penalizes Patient Care*, American Academy of Pediatrics (April 2, 2021), https://www.aap.org/en/news-room/news-releases/aap/2021/frontline-physicians-oppose-legislation-that-interferes-in-or-penalizes-patient-care/?_ga=2.89126099.973451188.1655923488-1054175941.1655923488.

in consultation with physicians following professional guidelines for standards of care, are best equipped to weigh the risks and benefits of gender-affirming medical care and to make decisions about which interventions, if any, are appropriate. Parents and physicians, not politicians with questionable motivations, must be empowered to act in the best interest of minors who suffer from gender dysphoria rather than being impeded by Lincoln's SAME Act. This Court should recognize Respondents' fundamental liberty interest in accessing medical care denied under the SAME Act and apply strict scrutiny to the statute.

b. Petitioner Cannot Meet Its Burden to Justify the SAME Act Under Strict Scrutiny Review Because It Cannot Show a Compelling State Interest or Narrow Tailoring Using the Least Restrictive Means Available.

Although the state needs only a rational basis for the exercise of most police powers, heightened judicial scrutiny is required in certain circumstances, including for legislation that facially infringes on rights protected by the Fifth and Fourteenth Amendments. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938). If the state infringes on fundamental liberty interests "at all," the state bears the burden to show that the infringement is "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. 292 at 302; *Cf. Loving v. Virginia*, 388 U.S. 1, 9 (1967) (placing the "very heavy burden of justification" on the state in applying strict scrutiny review to racial classifications). This Court has made clear that narrow tailoring requires that the state use the least restrictive means available to further its compelling state interest. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). Under this "exceptionally demanding" standard, the state must use a less restrictive means to achieve its goal if one is available. *Id.* at 364-65 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014); *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000)).

Lincoln cannot meet its burden to show a compelling state interest that justifies the SAME Act's infringement upon the fundamental right of parents to make decisions about health care for their minor children in consultation with health care professionals. The SAME Act prohibits health care providers from prescribing or administering medications or hormones to transgender minors that would instill physiological characteristics that differ from those of their biological sex. 20 Linc. Stat. §1203. The medical care that Lincoln prohibits through the SAME Act is widely accepted as an appropriate treatment for gender dysphoria by WPATH, the Endocrine Society, and the American Academy of Pediatrics. WPATH, *supra* note 8. Although Lincoln cites legislative findings and the opinions of two former patients as supportive of its position that medical evidence for the banned treatments is uncertain, Respondents can refute or at least raise serious questions as to Lincoln's claims that these well-established medical treatments are experimental. R. at 7-8. Petitioner offers no other justification for its unwarranted interference with Respondents' fundamental right to make decisions in the best interest of their children.

Even if, *arguendo,* Petitioner could show a compelling state interest in prohibiting access to recommended medical care, Petitioner cannot show that the statue is narrowly tailored using the least restrictive means available. Lincoln points to the legislative record with testimony concerning developments in gender-affirming care in some European countries. *Id.* However, none of the restrictions in those European countries sweep nearly as broadly as those in Lincoln's SAME Act. Sweden has determined that gender-related medical care for young people should be limited to exceptional cases, and both Sweden and Finland are collecting additional data on long-term effects and side effects. Azeen Ghorayahi, *England Overhauls Medical Care for Transgender Youth*, N.Y. Times (July 28, 2022), https://www.nytimes.com/2022/07/28/health/transgender-youth-uk-tavistock.html. In the United Kingdom, treatment for transgender young people has moved from a

single clinic to a more distributed network with additional clinical research on gender medications. *Id.* These European models offer much less restrictive means of addressing any legitimate concerns about gender-affirming care for transgender minors. If Lincoln truly had a compelling state interest, it could have adopted a similar a less restrictive approach. However, serious questions exist about whether Lincoln's true motivations for enacting the SAME Act were based on animus toward transgender persons rather than on any compelling state inerest. *See* discussion *infra* Section II.B.ii.b. Because there are serious questions that should be litigated with time for full discovery and because of the irreparable harm that would be suffered by Respondents and similarly situated Lincoln residents if the SAME Act were enforced, the preliminary injunction was properly granted.

For the reasons stated, the preliminary injunction was properly granted because Respondents are likely to succeed on the merits because Petitioner cannot justify the SAME Act under strict scrutiny review. Lincoln cannot meet its burden to show a compelling state interest in preventing parents from accessing gender-affirming care for their transgender children. Nor can Lincoln show narrow tailoring of the statute using the least restrictive means available. Because the SAME Act would interfere with a fundamental right protected by the Fourteenth Amendment's Due Process Clause and because the SAME Act cannot survive strict scrutiny review, Respondents are likely to succeed on the merits of their substantive due process claim and the preliminary injunction was properly granted.

ii. Respondents Raise Serious Questions About Whether the SAME Act Discriminates on the Basis of Sex and Transgender Status in Violation of the Equal Protection Clause of the Fourteenth Amendment That Deserve to Be Fully Litigated.

Respondents raise serious questions about whether the SAME Act discriminates against transgender minors in violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause guarantees all persons equal protection of the laws. U.S. Const. amend. XIV. The SAME Act prohibits transgender minors in Lincoln from accessing certain medical care including puberty blockers and hormones, which discriminates on the basis of sex and transgender status in violation of the Equal Protection Clause. Such discrimination requires heightened scrutiny. Lincoln cannot show a substantial state interest or even a legitimate state interest in preventing transgender minors like Jess Mariano from accessing gender-affirming care. The SAME Act cannot survive heightened scrutiny. Thus, Respondents demonstrate serious questions about Lincoln's motivations in enacting the SAME Act, which deserve to be fully litigated. Therefore, the preliminary injunction was properly granted.

a. Respondents Raise Serious Questions About Whether the SAME Act Discriminates on the Basis of Sex in Violation of the Equal Protection Clause of the Fourteenth Amendment.

Gender-based discriminatory classifications by the state have long been subject to intermediate scrutiny from the courts.[14] A state seeking to defend gender-based government classification bears the burden of demonstrating an "exceedingly persuasive justification" for that

[14] *Reed v. Reed*, 404 U.S. 71, 75 (1971); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994); *United States v. Virginia*, 518 U.S. 515, 531 (1996).

classification.[15] The state's justification must not be overbroad and must show that the discriminatory classification serves "important governmental objectives" and that the means employed are "substantially related to the achievement of those objectives." *United States v. Virginia,* 518 U.S. 515, 533 (1996). Any gender-based classification requires heightened scrutiny. *Id* at 555. A prohibition against discrimination on the basis of sex logically extends to discrimination on the basis of transgender status. *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1741 (2020) (interpreting Title VII, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.").

Many courts have found that discrimination against transgender people is sex-based discrimination under the Equal Protection Clause "because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Grimm v. Gloucester County School Board,* 972 F.3d 586, 608 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021). This Court has repeatedly stressed that equal protection regarding sex discrimination means that states "must not rely on overbroad generalizations" concerning the sexes. [16]

From school bathroom policies to employment decisions, courts have subjected discrimination against transgender people to heightened scrutiny as sex-based discrimination. In *Grimm,* a school bathroom policy prevented transgender students from using the bathroom that aligned with their gender identity if that gender identity did not match their enrollment documents.

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[15] *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). *See also Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

[16] *Virginia*, 518 U.S. 515 at 533. *See also Reed*, 404 U.S. 71 at 75; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 at 725; *J.E.B.*, 511 U.S. 127 at 135.

The Fourth Circuit applied heightened scrutiny and found the policy was not substantially related to the stated interest in protecting student privacy. 972 F.3d 586, 613. In *Bostock*, a funeral home fired a transgender employee when she began presenting as female, and this Court found the employer's discriminatory firing to be a violation of Title VII. 140 S. Ct. 1731 at 1742 ("homosexuality and transgender status are inextricably bound up with sex"). This Court's reasoning easily could extend to a state's discriminatory action in an equal protection claim. For example, the 11th Circuit affirmed a favorable decision on the equal protection claim of a Georgia state employee who was fired because she had begun a gender transition. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination").

Lincoln's SAME Act discriminates on the basis of sex just as state actions discriminated on the basis of sex in *Grimm* and *Glenn*. The Act specifically prohibits healthcare providers from providing services "performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 3. The Act discriminates because the sex of the individual determines whether healthcare providers are permitted to provide care. Additionally, the Act prohibits healthcare providers from prescribing or administering certain doses of testosterone or other androgens to females or estrogen to males. R. at 4. However, there is no such prohibition against providing testosterone to biological males or estrogen to biological females. Facially, this differential treatment is discrimination on the basis of sex and intermediate scrutiny applies.

Under intermediate scrutiny, Lincoln bears the burden to be "exceedingly persuasive" in showing that the discrimination serves an important state interest and that the means employed are substantially related to achieving that interest. Lincoln cannot meet this burden. Lincoln's

unpersuasive proffered justifications are that using puberty blocking and hormonal medications to treat transgender minors is experimental and that the state needs to protect minors from making life-changing decisions. R. at 20. Lincoln fails to address the fact that decisions to undergo gender-affirming care to treat gender dysphoria are not made independently by minors but in consultation with their parents, who the law presumes to act in the best interest of the child. *Parham*, 442 U.S. 584 at 602. Lincoln also fails to address the fact that transgender minors seeking gender-affirming care work with healthcare providers who have access to well-established, evidence-based medical guidelines to follow for the treatment of gender dysphoria. *See* discussion *supra* Section II.B.i.a.

Even if Lincoln could show that these attempted justifications were important state interests, Lincoln cannot show that the SAME Act's discrimination is substantially related to achieving those interests. The Act does nothing to prohibit the same treatments when used by cisgender minors. It applies only to transgender minors. Lincoln cannot show that its sex-based discriminatory treatment of transgender minors serves an important government interest and cannot show that the restrictions imposed by the SAME Act are substantially related to achieving its asserted interest. Therefore, Lincoln cannot meet its burden under intermediate scrutiny, and Respondents are likely to succeed on their merits of their Equal Protection claim on the basis of sex discrimination.

b. Respondents Raise Serious Questions About Whether the SAME Act Discriminates on the Basis of Transgender Status in Violation of the Equal Protection Clause of the Fourteenth Amendment.

Not only is discrimination on the basis of transgender status sex-based discrimination, but it also is discrimination based on membership in a disfavored group. When a government policy facially treats transgender persons differently than other persons, "something more than rational

basis but less than strict scrutiny applies." *Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019). This Court has repeatedly held that animosity toward a politically unpopular class of persons is never rationally related to a legitimate government interest. [17]

Lincoln's proffered justifications for the SAME Act are weak and speculative, backed by scant evidence. Respondents raise serious questions about Lincoln's true motivations for this law targeting transgender minors. Evidence of purpose beyond the face of a challenged law, such as the historical background of the decision and statements of decision makers, may be considered in an Equal Protection Clause claim. *Washington v. Trump,* 847 F.3d 1151, 1167 (9th Cir. 2017). The SAME Act emerged at a time when anti-transgender bills in the United States are at an all-time high, with 120 such bills introduced in state legislatures in 2021. Beck Sigman, *Keeping Trans Kids Safe: The Constitutionality of Prohibiting Access to Puberty Blockers*, 71 Am. U.L. Rev. F. 173, 175 (2022). Among those bills have been "bathroom bills" attempting to codify policies such as the school policy that the Fourth Circuit struck down in *Grimm* and Arkansas's Act 626, Ark. Code Ann. § 20-9-1502(a), (b). The Eighth Circuit recently affirmed a district court's preliminary injunction against Arkansas's Act 626, which contains provisions that would block "gender transition procedures" for transgender minors much like Lincoln's SAME Act. *Brandt by & through Brand,* 2022 WL 3652745 at *5. The historical timing of Lincoln's SAME Act should be viewed as evidence of purpose beyond the face of the law raising serious questions that are ripe for litigation. Additional evidence of statements by decision makers could well emerge as the case

[17] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446–47 (1985) ("[S]ome objectives--such as 'a bare ... desire to harm a politically unpopular group,'--are not legitimate state interests." (quoting *U. S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *Romer v. Evans*, 517 U.S. 620, 635 (1996) ("[A] law must bear a rational relationship to a legitimate governmental purpose."); *Plyler v. Doe*, 457 U.S. 202, 224 (1982) ("[D]iscrimination . . . can hardly be considered rational unless it furthers some substantial goal of the State.").

progresses through discovery. The serious questions presented as to the SAME Act's lack of rational relation to a legitimate government purpose deserve a full and fair litigation. Therefore, Respondents would be likely to succeed on the merits by showing that the SAME Act has no rational relation to a legitimate governmental purpose.

Without a preliminary injunction to prevent enforcement of the SAME Act as the case progresses, Respondents would suffer irreparable harm by being unable to continue to access the gender-affirming care that Jess needs in Lincoln. The injunction is in the public interest, and the balance of equities favors Respondents. Further, Respondents are likely to succeed on the merits because the SAME Act deprives Respondents of their rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. Moreover, Respondents also raise serious questions whether the SAME Act is in violation of the equal protection clause. Additionally, Respondents raise serious questions about the safety of gender affirming care and the motivations of Lincoln in passing the SAME Act. As such, the preliminary injunction was properly granted and should be affirmed by this Court

CONCLUSION

For the aforementioned reasons, Respondents, Jess Mariano, Elizabeth Mariano, and Thomas Mariano, respectfully request that this Court affirm the judgment of the district court and Fifteenth Court of Appeals and hold that the preliminary injunction was properly granted with regard to Respondents' substantive due process and equal protection claims.

Respectfully Submitted,

/s/ *Team 3111*
Team 3111
Counsel for the Respondents
Jess Mariano, Elizabeth Mariano,
and Thomas Mariano

APPENDIX A

Lincoln's Stop Adolescent Medical Experimentations ("SAME") Act

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

Due Process and Equal Protection Clauses of the Fourteenth Amendment United States Constitution

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 laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

APPENDIX C

28 U.S.C. § 2201 – Creation of a Remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

28 U.S.C. § 2202 – Further Relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. § 1983 – Civil Action for Depravation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX D

Federal Rules of Civil Procedure

Fed. R. Civ. P. 57: Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. §2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

Fed. R. Civ. P. 65:

(a) PRELIMINARY INJUNCTION.

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

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

(b) TEMPORARY RESTRAINING ORDER.

(1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration.* Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve.* On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) SECURITY. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) CONTENTS AND SCOPE OF EVERY INJUNCTION AND RESTRAINING ORDER.

(1) *Contents.* Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound.* The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) OTHER LAWS NOT MODIFIED. These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. §2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. §2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) COPYRIGHT IMPOUNDMENT. This rule applies to copyright-impoundment proceeding.