IN THE

SUPREME COURT OF THE UNITED STATES

Docket No. 21-8976

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

Petitioner,

v.

JESS MARIANO, ELIZABETH MARIANO, and THOMAS MARIANO,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Did the Fifteenth Circuit abuse its discretion by continuing the viability of the "serious question" standard which allows movants access to extraordinary and drastic preliminary injunctive relief without establishing all four-factors as required by established Supreme Court precedent from *Winter v. Natural Resources Defense Council, Inc.*?

II. Did the Fifteenth Circuit abuse its discretion by granting the preliminary injunction when Respondents failed to make a clear showing they are substantially likely to succeed on the merits of their constitutional claims because the Court would have to expand current Substantive Due Process and Equal Protection jurisprudence?

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The Decision and Order of the United States District Court for the District of Lincoln, *Jess Mariano, Elizabeth Mariano, and Thomas Mariano v. April Nardini, in her official capacity as Attorney General of the State of Lincoln*, Case No. 21-cv-12120 (November 4, 2021), is contained in the Record of Appeal at pages 1-22. The Decision and Order of the United States Court of Appeals for the Fifteenth Circuit, *April Nardini, in her official capacity as Attorney General of the State of Lincoln* v. *Jess Mariano, Elizabeth Mariano, and Thomas Mariano*, No. 22-2101 (May 12, 2022), is contained in the Record of Appeal at pages 23-34.

RELEVANT PROVISIONS

This case involves the democratically enacted Stop Adolescent Medical Experimentations ("SAME") Act, 20 Linc. Stat. §§ 1201-06. The SAME Act, in relevant portions, prohibits healthcare providers from engaging in or providing services to individuals under the age of eighteen "for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." 20 Linc. Stat. §§ 1203. Correspondingly, the SAME Act provides that "[t]he attorney general may bring an action to enforce compliance with this chapter [i.e., §§ 1203]." 20 Linc. Stat. §§ 1203. As implicated by Respondents' claims, this case also involves 42 U.S.C. § 1983. This section of the United States Codes provides a civil cause of action against a, "person who, under color of any statute,. . ., of any State. . ., 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." 42 U.S.C. § 1983 (West). Accordingly, this case also implicates the Fourteenth Amendment to the U.S. Constitution. Amendment XIV, Section 1. U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case is about whether a State is required by the Constitution to permit minor children and their parents to obtain harmful and understudied gender transitioning treatments, after the State has carefully weighed the effectiveness and the proposed benefits of the treatments against the plethora of medical risks.

PARTIES IN THIS CASE

Petitioner April Nardini ("Nardini") is the Attorney General of the State of Lincoln. R. at 1. In her official capacity as Attorney General, Nardini has authority under the SAME Act to enforce the provisions of the Act, and she has indicated she will lawfully do so. R. at 1.

Respondents are Jess Mariano, a minor child, and his parents Elizabeth and Thomas Mariano. R. at 1. Jess was born biologically female but was diagnosed with gender dysphoria after only nine months of therapy. R. at 4. Jess' doctor, Dr. Dugray, found evidence of distress manifested by a strong desire to be treated as a girl and a desire to prevent anticipated secondary sex characteristics that come with normal puberty. R. at 4. The Mariano's allege that the SAME Act will disrupt Jess's current puberty blocker treatments, as well as his future cross-sex hormone treatments, until Jess reaches the legal age of consent. R. at 5.

FACTUAL BACKGROUND

Lincoln "has a compelling interest in ensur[ing] the health and safety of its citizens." R. at 2. This interest arouses particular force with respect to vulnerable children. R. at 2. Accordingly, Lincoln, through its democratically elected legislature,

enacted the SAME Act as logical vehicle "[t]o protect children from risking their own mental and phsyical health and lifelong negative medical consequences." R. at 3. Before Lincoln endeavored to institute this legislative scheme, its legislature reviewed established medical research on the important, yet infrequent, issue of gender dysphoria effecting but a "very small number" of the state's children from an independent and non-emotionally involved perspective. R. at 2. Therein, Lincoln's legislature found, amongst other concerning information:

> (4) There is as of yet ***no established causal link*** between use of medical treatments for so-called "gender affirming care," . . . and decreased sucidiality. . . .
> (5) Emerging scientific evidence shows potential ***harms to children from gender transition drugs and surgeries***, . . ., and may not be able to give informed consent to the treatments. . . .
> (6) Parents and adolescents often ***do not fully comprehend and appreciate the risks*** and life complications that accompany these surgeries . . .
> (8)There are conventional and widely-accepted methods to treat gender dysphoria that do not raise informed consent and experimentation concerns."

R. at 2-3.

The Food and Drug Administration ("FDA"), the governmental body that is "responsible for protecting the public health by ensuring the safety, efficacy, and security of human and veterinary drugs, biological products, and medical devices," has not approved any of the "treatments" proffered by Respondents' personal medical professional. R. at 31. Although the United States government, through the FDA, similarly aligns with Lincoln's state legislative findings, Respondents cite numerous special-interest medical studies that rebut the findings of Lincoln's legislature. R. at 5-7. However, Lincoln contracts these claims with their own medical experts. R. at 7.

Specifically, Lincoln, by example, highlights the health systems of foreign nations which have banned the life-altering treatments argued for by Respondents. R. at 7. For example, both Sweden and Finland have banned the same gender constitute treatments which are prohibited by the SAME Act because of "inadequate proof of their effectiveness and safety and a large-scale evidence review initiated by the National Health Sevices in the United Kingdon." R. at 7-8.

Beyond the Lincoln legislature's express findings of no causual connection between so-called "gender-affirming" care, its noble purpose to protect vulnerable children, the federal government's decision to not approve these treatments, and other governments' determination that these treatments must be banned, Lincoln still elected to further investigate these potential treatments with their citizens who had experimented with puberty blocking and cross-sex hormone treatment. R. at 8. Both of the witness who testified before the state's legislature "expressed regret that they did not adequately contemplate the physical and mental consequences of the coure of medical and surgical treatment they received," an expressly stated purpose for implementing this Act. R. at 3, 8.

Without aiming at any specific citizens but instead targeting the state's vulnerable children in the aggregate, the SAME Act was to become effective on January 1, 2022. R. at 4.

By contrast, Respondents brought a filed a Complaint on November 11, 2021 attempting to enjoin enforcement of this Act on account of the individualized and potential harm it may cause fourteen-year-old Jess Mariano and the derivative

implications for his parents, Elizabeth and Thomas. R. at 1. Jess has gender dysphoria and received gender dysphoria treatments from her personal medical professional.

Before this diagnosis and treatment, however, Jess was diagnosed with depression. R. at 4. And before that from an even younger age, Jess suffered from anxiety and depressive episodes, including suicidal thoughts. R. at 4. After only nine months of therapy, Jess's personal medical professional had apparently received sufficient information on Jess's condition so as to diagnose Jess with gender dysphoria. R. at 5. Thereafter, Jess's personal medical professional put him through the non-FDA-approved treatments at issue in this case. R. at 5. Jess's personal medical professional noted that Jess had fewer symptoms of depression and distress. R. at 5.

Although the non-FDA-approved treatments have seemed to improve Jess's mental state, his depression persists. R. at 5. Because of his individual improvement, when Jess turns just sixteen-years-old, his personal doctor plans to implement a more severe hormore therapy regimene. R. at 5. Because of the uncertainty surrounding this type of treatment, Jess' personal doctor, although unable to state with certainty, is concerned that a lapse in strict and severe treatment plan could potentially have negative consequences. R. at 5.

The SAME Act, by generally prohibiting only certain life-altering gender dysphoria treatments, would interfere with Jess's ability to continue his personal non-FDA-approved treatments. R. at 8. Jess's parents would also not be able to defer

to Jess's personal doctor's individually-tailored treatment plan. R. at 8. As such, this cause of action was initiated so that Jess, individually, would be able to continue his personally prescribed treatment. R. at 8.

PROCEDURAL HISTORY

Respondents, Jess, Elizabeth and Thomas Mariano, commenced this action upon the filing of their Complaint on November 4, 2021 in the Disctict Court for the District of Lincoln. R. at 1. Therein, Respondents alleged violations of their purported Due Process and Equal Protection righs under the Fourteenth Amendment to receive non-FDA approved medical treatment pursuant to 42 U.S.C § 1983 upon the imminent enforcement of the SAME Act by Petitioner, April Nardini, in her official capacity at Attorney General of the State of Lincoln. R. at 1. While in the District Court of Lincoln, Respondents also filed for a Preliminary Injunction on November 11, 2021 to enjoin enfocement of the SAME Act. R. at 1.

Respectively, Elizabeth and Thomas argued, in part, that they possessed a constitutionally-protected right to allow non-FDA-approved treatment at the direction of their personal family physician and Jess claimed that the SAME Act discriminated on the basis of sex by prohibiting these non-FDA treatments for all of the State's citizens under the age of eighteen. R. at 1.

In a swift response, Petitioners filed at Motion to Dismiss Respondents' claims on November 18, 2021. R. at 1. The Motion to Dismiss the Complaint contemporaneously urged the District Court to deny Respondents' preliminary injunction. R. at 1. After a December 1, 2021 hearing on both issues, the Disctict

Court found that 1) Respondents showed a sufficient likelihood of success on their Due Process and Equal Protection claims, 2) Respondents would potentially suffer immediate and irreparable harm if enforcement of the SAME Act was not enjoined, 3) the certain damage that the Act seeks to prevent did not outweigh the alleged harm to the individual Respondent, and 4) the public interest considerations were not sufficient to require the Court to deny the injunction. R. at 2. Accordingly, the Disctrict Court granted the Repsondents' request for a preliminary injunction and denied Petitioner's motion to dismiss. R. at 2.

Given the quick verdict from the District Court, Petitioner immediately filed and interlocutory appeal with the United States Court of Appeals for the Fifteenth Circuit. R. at 23. On appeal, Petitioner, on behalf of the State of Lincoln, requested the Court of Appeals to reverse both the grant of preliminary injunction and the lower court's denial of Lincoln's motion to dismiss with instructions to remand and dismiss Respondents' claims. R. at 23.

In a slight two-to-one margin, the Court of Appeals found that the District Court did not abuse its disretion in granting a preliminary injunction. R. at 23. In its May 12, 2021 Opinion, the Court of Appeals affirmed the lower court's issuance of a preliminary injunction, albeit under a contested standard of review. R. at 23. Notably, the Court of Appeals arrived at this conclusion "although not always for the same reasons" as the District Court. R. at 23. The Court also affirmed the denial of Petitioner's motion to dismiss. R. at 23. Additionally, the Court noted that case is

currently scheduled for trial in the Disctrict Court in February 23, 2023, after an initial schedule of August, 2022. R. at 23.

On July 18, 2022, Petitioner filed an application to the Supreme Court of the United States, given the two lower courts' orders, in which Petitioner requests that this Supreme Court stay the District Court's preliminary injunction and applied for a writ of certiorari to consider the merits of the injunction, along with the denial of the motion to dismiss. R. at 35. The Supreme Court denied the application for a stay, but the petition for a writ of certiorari to the Supreme Court is granted. R. at 35. The Supreme Court limited its review to two questions: 1) Whether the "serious question" standard for preliminary injunctions continues to be viable after *Winter v. Natural Resources Defense Council, Inc.*; and 2) Whether the preliminary injunction was properly granted in regard to the Respondents' Substantive Due Process and Equal Protection claims. R. at 35.

STANDARD OF REVIEW

This Court reviews the grant of a preliminary injunction for abuse of discretion, revewing any underlying legal conclusions *de novo* and any findings of fact for clear error. *NetChoice, LLC v. AG, Fla.,* 34 F.4th 1196, 1209 (11th Cir. 2022) (citing *Gonzalez v. Governer of Ga.,* 978 F.3d 1266, 1270 (11th Cir. 2020). Plaintiffs failed to meet their burden of making a "clear showing" that each preliminary-injunction factor favors them. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). A mere possibility of either success on the merits or irreparable injury will not suffice. *Id.*

SUMMARY OF THE ARGUMENT

The State of Lincoln is entitled to enact laws to address problems affecting its citizens. Lincoln's legislature found that the health and safety of its citizens, in particular that of vulnerable children, and the ethics of the medical profession, were at risk from the recent recognition and encouragement of puberty blockers, sex hormones, and reassignment surgery for minor children, despite the medical and scientific uncertainty surrounding such treatments. Lincoln sought to address these concerns through the democratically enacted SAME Act. Before the SAME Act was even able to make any significant progress toward addressing Lincoln's concerns, the Act was undermined by an erroneous application of the preliminary injunction standard and of the United States Constitution. Thus, the Fifteenth Circuit improperly found that the Respondents have shown they are likely to succeed on the merits in regard to their Substantive Due Process and Equal Protection Claims.

The Fifteenth Circuit improperly maintained the viability of the "serious question" standard for reviewing preliminary injunctive relief after *Winter* clearly established a more stringent four-factor standard of review. Preliminary injunctions are extraordinary and drastic remedies, and historical treatment thereof demonstrates that courts employ stringent standards of review rooted in all four traditional factors. The *Winter* test aligns with this historical treatment by requiring a proportionate burden for movants and also better promotes judicial equity by more frequently maintain the status quo until the litigation process concludes. By contrast, the "serious question" standard applies a less stringent standard that erodes the historical treatment of preliminary injunctive relief and results in inequitable

outcomes by allowing judicial discretionary action to preempt the litigation process. Moreover, continued reliance on the less-stingent "serious question" standard by inferior courts would force the Court to overturn many recent decisions on account of an inferior court's contrary interpretation of the law.

The SAME Act does not violate Respondents' parental rights under Substantive Due Process because there is no fundamental parental right for parents to obtain specific medical treatments for their child that have been reasonably prohibited by the government. The Supreme Court has never recognized such a specific parental right, and parental rights may be enlarged, limited, and restrained dependent on the determinations made by the State. Moreover, because there is no personal constitutional right of access to specific medical treatments deemed harmful by the government, there is no parental right to obtain those treatments for their children. However, if this Court does find such a specific parental right, the SAME Act is still constitutional because it directly advances Lincoln's interests in protecting public health, protecting vulnerable children, and regulating the use of dangerous drugs. Further, the SAME Act only bans gender transition treatments for minor children, not consenting adults, and allows minor children to discontinue the treatments at a a safe rate, thus illustrating that the prohibition is narrowly tailored to achieve Lincoln's interests. Therefore, the SAFE Act passes any form of heightened scrutiny.

The SAME Act does not violate Jess Mariano's rights under the Equal Protection Clause because the Act classifies based on age and medical procedure, not

sex or transgender status. Classifications based on age and medical procedure are entitled to a strong presumption of validity. Even assuming the SAME Act did classify based on transgender status, the SAME Act is still constitutional because the Supreme Court has never recognized transgender status as a quasi-suspect class and the transgender community fails to satisfy the criteria to warrant heightened protection. The SAME Act would pass any form of heightened scrutiny for the foregoing reasons. Thus, the SAME Act, as a constitutional excericse of the State of Lincoln, is consistent with the Due Process and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Therefore, this Court must abolish the "serious question" standard and accordingly REVERSE the grant of preliminary injunction and REMAND this case with instructions to implement the precedential *Winter* four-factor test.

ARGUMENT

I. THE SUPREME COURT MUST ABOLISH THE "SERIOUS QUESTIONS" STANDARD AND CONFIRM THAT THE FOUR-FACTOR *WINTER* TEST IS THE CORRECT STANDARD FOR ANALYZING GRANTS OF PRELIMINARY INJUNCTIONS.

The Supreme Court must abolish the "serious question" standard and confirm that the four-factor *Winter* test is the proper standard for analyzing preliminary injunctions because it more closely aligns with historical treatment of injunctive relief, it correctly requires a proportionate burden for the corresponding extraordinary and drastice remedy, and continued reliance on the less-stingent "serious question" standard by inferior courts would force this Court to overturn recent decisions and lead to inequitable outcomes.

In *Winter*, the Court could not have been more clear. "A plaintiff seeking a preliminary injunction *must* establish that he is [(1)] *likely* to succeed on the merits, that he is [(2)] *likely* to suffer irreparable harm in the absence of preliminary relief, that [(3)] the balance of equities tips in his favor, and that [(4)] an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added). The clear and obvious reading of this standard elicits an understanding that the Court requires all four of these factors to be established by a movant for an issuance of a preliminary injunction. Moreover, given that this standard was specifically stated by the Court, the doctrine of precedent operates to require all inferior courts (i.e., all courts in the United States) to abide by the law set forth within the superior court's opinions.

Constrastingly, the Second Circuit, along with the Ninth, and Fifteenth Circuits, allow movants to bypass the the aforementioned four-factor test.[1] Specifically, the "serious question" standard allows for elimination of the "likelihood of success on the merits" requirement. *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). Under the "serious question" standard, movants are only required to show "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships

[1] Generally, the Ninth Circuit requires a four-part test requiring "(1) [the movant] is likely to succeed on the merits." See *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 738 (9th Cir. 2014) (citing to the four-factor Winter test). However, the Ninth Circuit also has concluded the "serious question" test survived *Winter*. See *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134 (9th Cir. 2011). The Fifteenth Circuit affirmed the validity of the "serious question" standard below. R. at 9.

tipping decidedly toward the party requesting the preliminary relief." *Id.* In comparison to *Winter*, this "serious question" standard allows a movant to bypass the "likelihood of success on the merits" requirement by establishing only "serious questions" as to the litigation and that "hardships tip decidedly in their favor." *Id.* Additionally, the "serious question" standard does not even address the public interest consideration, which was noted as important by the *Winter* court. *Id.* Lastly, as noted within the footnotes of the *Citigroup* opinion, the court recognized three frequent exceptions wherein the "serious question" test is rendered inapplicable and a more stringent version need be employed.

Instead of containing multiple exceptions varying the test, the *Winter* standard sets forth clear and always applicable elements that clarify the current variance amongst the inferior courts, which has generated inequitably disjointed results. Therefore, this Court must reaffirm the *Winter* test as correct and abolish the "serious question" standard. However, before demonstrating the *Winter* test's policy benefits and endeavoring to explain the discrepancies in the inferior courts' standards of review, it is integral to establish the historical framework which gave rise to the issue now before this Court.

A. The Winter Test More Closely Aligns With Historical Treatment Of Injunctive Relief Compared To The Less-Stringent "Serious Question" Standard.

The *Winter* test more closely aligns with historical treatment of injunctive relief compared to the less-stringent "serious question" standard because it requires all of the traditional, heightened elements be established before allowance of this discretionary grant of extraordinary relief, and it follows the historical trend of increasing the stringent analytical framework for granting preliminary injunctive relief.

1. The Winter Test Correctly Requires A Movant To Establish All Four Historically Employed Factors Wheras The "Serious Question" Standard Requires A Significantly Less-Stringent Burden.

Federal Rule of Civil Procedure 65(a) provides that "[t]he court may issue a preliminary injunction only on notice to the adverse party." Rule 65. *Injunctions and Restraining Orders*, 2 Federal Rules of Civil Procedure, Rules and Commentary Rule 65. This rule's purpose is to "*preserve the status quo* during the course of the lawsuit, until a trial can be held." *Id.* (citing *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (finding that the purpose of a preliminary inunction is to "merely preserve the relative positions of the parties until a trial on the merits can be held.") (emphasis added). This purpose has both long been held as true and also more recently affirmed as such. See e.g. *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 67 U.S. 545, 552 (1862); *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018). Preserving the status quo until litigation can correctly determine an issue is also important because the relief from the a grant of a preliminary injunction can endure for years. John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 525 (1978) [heinafter *Standard for Preliminary Injunction*].

Although its historical purpose is clear, it is vital to look at the Rule's historical application to gain a better perspective on its place within the legal system given the wanting guidance from Federal Rule of Civil Procedure 65(a). Historical treatment of injunctive relief is an important consideration for this Court because, as stated in one of the leading treatises on federal jurisprudence, "the grant or denial of a preliminary injunction remains a matter for the trial court's discretion, which is *exercised in conformity with historic federal equity practice.*" 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948 (3d ed. 2002) [hereinafter *Federal Practice and Procedure*]. This important historical precedent clearly establishes that preliminary injunctions are an "*extraordinary and drastic remedy*, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Federal Practice and Procedure* at § 2948. Moreover, preliminary injunctions have been classifdied as "the most striking remedy wielded by comtemporary courts." *The Standard for Preliminary Injunctions* at 525.

This Court recently and specifically confirmed the extreme nature of this equitable relief in *Winter* and its citing references therein: "[a] preliminary injuncgion is an *extraordinary remedy never awarded as of right*." *Winter*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689 – 690 (2008) (emphasis added). See also *Yakus v. United States*, 321 U.S. 414, 440 (1944) (stating that injunctive relief is an "extraordinary and drastic" remedy); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (stating that injunctive relief is not a matter of right even in circumstances where the movant may suffer irreparable harm).

The extreme nature of this relief, therefore, required preliminary injunctions to be historically reviewed against four factors: "(1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest." *Federal Practice and Procedure* at § 2948, and cases cited there. From the plethora of federal case law reviewing injunctions against these four factors, ranging from the Supreme Court down through nearly every Circuit, it is overtly evident that these four considerations constitute the historical framework against which the extraordinary relief provided by preliminary injunctions is reviewed. *Id*. As such, to turn away from this historically prevalent and stringent analytical framework, as desired by the inferior courts proliferating the "serious question" standard, would require a violent pivot from centuries of established federal jurisprudence requiring high standards for this extraordinary equitable relief.

2. The Historical Trend Within Federal Preliminary Injunction Jurisprudence Demonstrates A Movement Towards An Increasingly Stringent Standardized Test Like *Winter*.

Throughout applicable federal jurisprudence, courts have historically added to the stated test for granting preliminary injunctive relief to standardize the requirements for this extraordinary relief. Long before *Winter*, the Supreme Court discussed the requisite analytical framework for a preliminary injunction seeking to enjoin a state statute in *Doran*. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). Therein, the Court only explicitly provided a two-prong test to determine whether the

grant a preliminary injunction: "The traditional standard for granting a preliminary injunction requires [(1)] the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also [(2)] that he is likely to prevail on the merits." *Id*. However, after providing this two-pronged test, the Court emphasized that the standard to be applied in determining the viability of a movant's preliminary injunction request is "stringent." *Id*. Lastly, the Court instructed subsequent reviewing courts to also consider the injuries and conveniences to the relevant parties as a result of wielding this impressive power. *Id*.

Accordingly, although the *Doran* Court only specified two "prongs" in its test, the stringent standard required for reviewing preliminary injunctions has been enumerated and explicitly expanded in subsequent federal jurisprudence. A few years after *Doran*, the Court provided an updated specific framework for preliminary injunctive review. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-213 (1982). In *Weinberger*, the Court explained that "the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Id*. at 312. But, in addition to these two requirements, the Court additionally required the considerations of "balan[cing] the conviences of the parties" and "particular regard for the public consequences in employing the extraoirdinary remedy of injunction." *Id*. The *Weinberger* Court specifically added these balancing of the equities and public interest considerations to the preliminary injunction analytical framework. In doing this, the Court specificed and enumerated all four factors, which would later be explicity stated in *Winter*.

In a more recent pre-*Winter* decision, this Court, again analyzed the grant of a preliminary injunction. *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 670 (2003). In *Pharm. Rsch.*, the Court based its decision on the fact that the movant failed to establish (1) a probability of success on the merits and insufficiently argued (2) risk of irreparable harm, (3) balance of equities and (4) public interest considerations. *Id.* From *Doran*, to *Weinberger*, to *Pharm. Rsch.*, we see a clear trend from this Court: refining and adding to its analytical framework for reviewing preliminary injunctions. Most importantly, throughout its process, the Court continued to abide by the "stringent" requirements and clarified its reviewing elements to now require all four traditional elements. Each of these articulated elements reinforced the severe and extraordinary nature of preliminary relief by reducing the discretion available to courts and requiring adherence to a more standardized and stringent test.

Finally, as stated *supra*, the Supreme Court clearly articulated these four required factors as the appropriate test for analyzing the grant of premliminary injunctions in *Winter*, seemingly bringing unity to the confusion amongst the lower courts. *Winter*, 555 U.S. at 20. However, the Second Circuit, and by extension the Fifteenth Circuit, continue to revolt against the requirement of these four factors and allow a much less stringent standard to survive in complete disregard of the aforementioned historical treatment of preliminary injunctive relief. *Citigroup*, 598 F.3d at 35.

Secondly, the "serious question" standard is infact a less-stringent standard and affords courts more discretion. *Id*. The *Citigroup* court additionally attempted to justify its decision to ignore the *Winter* precedent by claiming that the *Winter* opinion did not undermine the serious question standard because it did not explicity state the "serious question" standard was overturned. *Id*. at 37. This is clearly an erroneous reading of the *Winter* opinion because the *Winter* court, although not saying it was overturning the "serious question" standard, explicitly highlighted that a weaker showing of one of its elements cannot be outweighed by the strength of another, the main thrust of the "serious question" standard. *Winter*, 555 U.S. at 22. Similarly, the *Winter* court specifically ratified the importance of the public interest consideration in preliminary injunction analysis. *Id*. at 24. However, the "serious question" standard completely ignores this consideration. See *Citigroup*, 598 F.3d at 35 (stating movants are not required to show the preliminary injunction in in the "public interst").

Accordingly, the Winter test's stringent requirements more closely comport with historical preliminary injunctive jurisprudence compared to the less stringent "serious question" standard. Because the "serious question" standard allows a short-cut to the extraordinary preliminary injunction relief which United States court have historically held to stringent standards it must be abolished.

B. The "Serious Question" Standard Must Be Abolished Because It Does Not Comport To The Presently-Utilized *Winter* Test, And Therefore It Contradicts Binding Supreme Court Precedent.

The "serious question" standard must be abolished because it does not comport to the presently-utilzied *Winter* test, and therefore it contradicts binding supreme court precedent because it diminishes both the "likelihood of success on the merits" and "public interest" considerations of the *Winter* test. The four-factor test set forth in *Winter* must be treated as binding and precedential statement of the elements for granting a preliminary injunction in federal courts because the court expressly clarified the elements necessary for granting a preliminary injunction and provided exemplary analysis for its application. *Winter*, 555 U.S. at 20.

1. The Winter Court's Reasoning Clarifies That A Stronger Showing of One Element Cannot Make Up For An Insufficient Showing Another Element.

Specifically, the Winter court's reasoning establishes that the absence of one element cannot be disregarded by a stronger showing of another element, the exact reasoning the Second Circuit employed in *Citigroup*. Beyond explicity stating the elements required for granting a preliminary injunction, the *Winter* court attacked the decision process of the Ninth Circuit by stating that "the Ninth Circuit's 'possibility' standard is too lenient." *Id.* at 22.

Below *Winter*, the Ninth Circuit employed a test for granting an injunction, which allowed for preliminary injunctive relief where the movant establishes only a "possibility" of irreparable harm if the other elements on the whole demonstrate a preliminary injunction should be granted. *Id.* at 17. Constrastingly, the *Winter* court confirmed that "[o]ur frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of

an injunction." *Id*. (emphasis in original). As support, the *Winter* court cited to multiple cases affirming this "likelihood of irreparable injury" requirement. *Id*. (citing to *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). This aggressive denouncement of the Ninth Circuit's "possibility" standard demonstrates that each one of the stated elements must be established for the issuance of a preliminary injunction. As further support for this reading of the *Winter* opinion, the court highlighted that allowing the grant of a preliminary injunction pursuant to a less-stringent or diminished showing of one of the enumerated elements is "inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. at 22. Because the *Winter* court would not allow the weight of one element to override the mere "possibility" or absence of another element, this reasoning clearly denounces the reasoning employed by the the "serious question" standard.

Additionally, another issue the *Winter* court addressed with the lower courts' reasoning was their lack of consideration for the public interest element. *Id*. at 24. The *Winter* court highlighted that "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id*. The Court there found that the lower courts "significantly understated the burden the preliminary injunction would impose" in concluding that the action sought to be enjoined was aimed to protect the public's safety. *Id*. This issue of public safety is not

even addressed by the "serious question" standard in its application. *Citigroup*, 598 F.3d at 35. The public interest consideration is, in theory made up for by the other "serious question" considerations. Therefore, this side-stepping of a clearly important consideration for the *Winter* test is another indication that the "serious question" standard is not compatible with the precedential four-factor *Winter* test.

Taken as a whole, the *Winter* opinion makes quite clear that a weak or insufficient showing by the movant as to one of the factors cannot be later balanced out by a strong showing of the other factors. *Winter*, 555 U.S. at 22. Therefore, the *Winter* opinion must be read as abolishing that the "serious question" standard as inapposite in light of the Supreme Court's express language and reasoning.

2. By Granting Preliminary Injunctions For Mere "Serious Questions" As To Litigation Outcomes, The "Serious Question" Standard Allows A Stronger Showing of One Element To Make Up For An Insufficient Showing of Another Element.

By granting preliminary injunctions for mere "serious questions" as to litigation outcomes, the "serious question" standard allows a stronger showing of one element to make up for the insufficient showing of another element, thereby diminishing the importance of the "likelihood of success on the merits" and "public interest" elements of the *Winter* test. This "likelihood of success on the merits" element deserves heigntened attention because Courts have previously determined the issuance of preliminary injunctions almost entirely based upon on this element. *Sole v. Wyner*, 551 U.S. 74, 84-86 (2007).

Clearly, the showing of only "sufficiently serious questions going to the merits to make them a fair ground for litigation" is a lesser threshold than establishing a

movant is "likely to succeed on the merits." The *Winter* test provides for a better and more thorough evaluation of the merits of a case before granting such extraordinary relief. This heightened standard acts as a protection against frivolous and meritless claims with may bog down the judicial system. By allowing lesser showings related to the merits of a movant's case, courts encourage parties to file motions for preliminary injunctions and extend the lifetime of potentially unsuccessful claims.

In the case at bar, the Fifteenth Circuit attempts to maintain the validity of the "serious question" standard on account of its preferred "flexible approach." R. at 9. Similarly, the Second Circuit defended its continued reliance on the "serious question" standard because its "overall burden is no lighter [than the Winter test." *Citigroup*, 598 F.3d at 35. However, this statement is clearly erroneous. In fact, the Second Circuit has previously contradicted this attempted defense. See *Forest City Daily Housing, Inc. v. Town of N. Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999) (describing the "serious question" requirement "less[ ] demanding" than the "likelihood of success on the merits); *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989) (describing the "serious question requirement "less rigorous" than the traditional "success on the merits" test). This Court cannot continue to allow this less demanding and rigorous test given the extraordinary relief at stake.

Moreover, extension of cases provided by preliminary injunctions could have grave consequences. In the case *sub judice*, the clear purpose of the SAME Act is to protect children from life altering experimental medical treatments for which the top medical experts in this country do not fully understand the side effects. By enjoining

the implementation of this Act because the Fifteenth Circuit prefers the "flexibility" afforded by the lesser showing of mere "serious questions," the lower courts here are granting continued access to these dangerous medical treatments without even fully reviewing the merits of Respondents' claims. But not only that, the "serious question" standard does not require courts to consider the public interest in granting injunctions. Therefore, this less-stringent standard risks the lives of many by ignoring the obvious public interest considerations at the root of this Act by not fully considering the public interest considerations and merits of this claim like it would have to do under the *Winter* test.

C. Continued Reliance On The "Serious Question" And Other Less-Stringent Standards For Preliminary Injunctive Relief Would Force This Court To Overturn Precedent And Lead To Undesireable Results.

Continued reliance on the "serious question" standard by inferior courts would force this Court to overturn its recent decisions and lead to undesirable outcomes because this Court, along with numerous Circuits, has continually affirmed the four-factor *Winter* test in subsequent cases and the continued viability of less-stringent legal standard would lead to unjust results for citizens.

Since the issuance of the *Winter* decision, there have been at least fourteen Supreme Court cases which have directly cited to the *Winter* test for granting preliminary injunctions.[2] For example, in *Benisek*, this Court affirmed the denial of

[2] See e.g., *Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022); *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2618 (2020) (C.J. Roberts, concurring); *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 42 (2020) (J. Kagan, dissenting); *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2176 (2020) (J. Gorsuch, dissenting); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018); *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017); *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1675 (2017); *Glossip v.*

a preliminary injunction for Maryland voters seeking to stay alleged unconstitutional pollical gerrymandering based off this more-stringent *Winter* standard. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). Similarly, in *Glossip*, this Court affirmed the denial of a preliminary injunction to a death-row inmate alleging the method of execution was in violation of his Eighth Amendment rights, again relying on the *Winter* test. *Glossip v. Gross*, 576 U.S. 863, 876 (2015). Notably, Glossip specifically turned on the element of "likelihood of success on the merits," which is the exact element the "serious question" standard reduces of its importance. *Id*. These are but two examples of the Supreme Court relying on this *Winter* test. See also *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (affirming that "[a]n injunction should issue only if the traditional four-factor test [i.e., Winter test] is satisfied.); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (reversing lower court's grant of preliminary injunction because "plaintiffs have not shown that they are likely to succeed on the merits of their claims") (citing to *Winter*).

Aside from these Supreme Court decisions reaffirming the Winter test as the appropriate test for preliminary injunctions, multiple Circuit Courts have also interpreted *Winter* to operate as abolishing the "serious question" standard. For example, the Fourth Circuit explained that, when determining whether to grant a preliminary injunction, "all four [*Winter*] requirements must be satisfied. . . [because] [t]he *Winter* requirement that the plaintiff clearly demonstrate that it will likely succeed on the merits is *far stricter* than the [prior circuit precedent] requirement

Gross, 576 U.S. 863, 876 (2015); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 33 (2010); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010); *Nken v. Holder*, 556 U.S. 418, 434-35 (2009)

that the plaintiff demonstrate only a grave or *serious question* for litigation." *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), cert. granted, judgment vacated, 559 U.S. 1089 (2010), and adhered to in part sub nom. *The Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010) (emphasis added). The *Real Truth* Court further explained that "the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts." *Id*. at 348. Additionally, the Tenth and Fifth Circuits have similarly recognized the incompatibility of Winter with less stringent tests. See *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016) (holding that "[u]nder *Winter's* rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible.); *Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 206 (5th Cir. 2010) (citing to *Winter* as the correct test for preliminary injunctive relief analysis). Clearly from the examples set forth herein, the *Winter* test has become common place amongst federal courts and should be affirmed by this Court, once again, to remove further discrepancies amongst the circuits.

Lastly, this Court must put an end to the circuit splits and affirm the Supreme Court's *Winter* decision because to do otherwise would set the dangerous precedent that precedent can merely be ignored. Since the early days of this nation, "[i]t [has been] emphatically the province and duty of the Judicial Department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This is why the Constitution purposefully declared that "[t]he judicial Power of the United States, shall be vested

in one supreme Court." U.S. CONST. art. 3, § 1. Because when confusion threatens the equal application of the law to its subjects, our legal system requires one governing body to clarify the unequal application of the law. Although circuit courts are bound to create splits in opinion when presented with questions regarding uncertain laws or procedures, when the Supreme Court issues an opinion to clarify such uncertain law or procedure, thereby "stating what the law is," it does not follow that such a split in opinion amongst the inferior courts should persist. Surprisingly, this is precisely what has occurred in the case at bar. In *Winter*, the Supreme Court laid out explicit criteria for granting preliminary injunctions and moreover provided the framework of analysis in determining whether specified criteria was established. However, the Fifteenth Circuit, along with others, has continued to allow a less-stringent standard to survive and, in the process, has proffered an alternative path to circumventing the stated law by this Supreme Court. Accordingly, this Court must once again reiterate "what the law is" to prevent further inequitable results that deteriorate our judicial system.

II. THE PRELIMINARY INJUNCTION WAS NOT PROPERLY GRANTED IN REGARD TO RESPONDENTS' SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAIMS BECAUSE RESPONDENTS FAILED TO SHOW A BASIS FOR EITHER CLAIM.

The preliminary injunction was not properly granted in regard to Respondents' Substantive Due Process and Equal Protection Claims because Respondents failed to show a basis demonstrating that they would likely succeed on the merits as to either claim. In order for a preliminary injunction to issue, the Respondents "must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer

irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that the injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008).

The District Court erred in concluding that Respondents had a likelihood of success on the merits because the Mariano's asserted right to determine the proper medical care of their children, and Jess Mariano's asserted right that the SAME Act violates his constitutional rights under the Equal Protection Clause fails as a matter of law. Therefore, this Court should reverse the Fifteenth Circuit's decision and deny the preliminary injunction, allowing Lincoln's SAME Act to stand.

A. There is No Fundamental Substantive Due Process Right For Parents to Obtain Specific Medical Treatments for Their Children That Have Been Reasonably Prohibited by the Government.

There is no fundamental Substantive Due Process right for parents to obtain specific medical treatments for their children that have been reasonably prohibited by the government. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. § 1. This Court's established method of substantive due process analysis has two primary features: (1) This court has regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively deeply rooted in this Nation's history and tradition; and (2) the court has required a careful description of the asserted fundamental liberty interest. *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). In expanding constitutional

protection to an asserted right, this court has "always been reluctant" because "guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). Thus, courts must "exercise the utmost care whenever [they] are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of [the] court." *Glucksberg,* 521 U.S. at 720.

The Supreme Court has never explicitly held that the due process right to freedom in child rearing encompasses the right to direct the medical care of their child. *Parham v. J.R.,* 442 U.S. 584, 630 (1979) (recognizing that parental decisions concerning the medical care of their children should receive deference, but not holding that this right is fundamental). Conversely, the Supreme Court has rejected arguments that parents have the right to decide whether their child may have an abortion, *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976), and whether their child remains on life sustaining treatment. *Cruzan v, Dir., Mo. Dep't of Health*, 497 U.S. 261, 286 (1990).

In the present case, the Mariano's asserted right is not the broad parental authority over minor children, but the right of parents to obtain a particular form of gender dysphoria treatment for their children that the legislature of Lincoln has deemed harmful. *See Glucksberg,* 521 U.S. at 720-21 (holding that courts should precisely define purported substantive due process rights to direct and restrain exposition of the Due Process Clause). Thus, while this Court has held certain parental rights in the context of education and upbringing to be fundamental under

the Due Process Clause, it surely has not held the right of parents to obtain gender dysphoria treatments as fundamental. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (establishing the parental right to bring up children); *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (establishing the parental right to make decisions concerning child's education).

1. There is no Affirmative Right of Access to Particular Medical Treatments Reasonably Prohibited by the Government.

There is no affirmative right of access to particular medical treatments reasonably prohibited by the government. There is no right to procure and use experimental drugs that is deeply rooted in our Nation's history and traditions. *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach,* 495 F.3d 695 (D.C. Cir. 2007). Regardless of whether a drug is deemed to be "experimental," federal courts consistently have held that a patient does not have a constitutional right to obtain a particular type of medical treatment if the government has reasonably prohibited that type of treatment. *See Mitchell v. Clayton,* 995 F.2d 772, 775 (7th Cir. 1993) (no constitutional right to obtain accupunture treatments from unlicensed practicioners where Illinois law requires acupuncturists to be medically licensed); *see also Carnohan v. United States,* 616 F.2d 1120, 1122 (9th Cir. 1980) (no constitutional right to obtain laetrile where laetrile is unapproved by the FDA); *see also N.Y. State Ophthalmological Soc'y v. Bowen,* 854 F.2d 1379, 1389 (D.C. Cir. 1988) (asserting that even if there is some "right" to protect health, such a right does not protect from regulatory interference). These cases reveal that government interests of protecting

public health supersede the individual's interests in obtaining a certain medical treatment.

Respondents argue that the SAME Act violates their fundamental constitutional right to determine the proper medical care of their children. However, fail to assert that there is a constitutional right to access a particular medical treatment when the government has determined it poses threats to public health and safety. It is not the Court's role to invade the "historical province of the democratic branches" by "[b]alancing the risks and benefits found at the forefront of uncertain science and medicine." *Abigail Alliance*, 445 F.3d at 486-87 (Griffith J., dissenting). Thus, this Court should give deference to Lincoln's legislative determination that gender dysphoria treatments for minor children are not sufficiently studied and potentially harmful, as this would be consistent with the longstanding tradition of respecting the states' traditional police power to protect the public. *See Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) ("According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety").

The gender dysphoria treatments at issue have not been approved by the FDA, and this Court has given state legislatures "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). While *Gonzales* arose in the context of the right to abortion, "medical uncertainty does not foreclose the exercise of legislative power in the

abortion context any more than it does in other contexts." *Id.* at 164. Thus, courts should give deference to state legislatures when there is medical and scientific uncertainty.

The District Court found that Respondents have shown that the issue of whether gender dysphoria treatments are "experimental" is in sharp dispute. R. at 14. To support their argument, Respondents presented medical and scientific evidence. R. at 5. However, Respondents failed to present the evidence that "the impact of [puberty blockers] administered to transgender youth [before age twelve] has not been published." Johanna Olson-Kennedy, M.D., et al., *Health Considerations for Gender Non-Conforming Children and Transgender* Adolescents (UCSF Transgender Care, 2016), https://transcare.ucsf.edu/guidelines/youth. Jess was prescribed puberty blockers at age ten, and his parents plan to continue this treatment for Jess if the SAME Act is not not upheld. R. at 5. This is troubling, being that "youth cannot remain on [puberty blockers] indefinitely, as bone mineralization relies on the presence of sex sterioids." *Id.* Thus, if the SAME Act is not upheld, Jess will continue to be exposed to experiemental treatments.

2. A Parent's Right to Make Decisions for Their Children Can be No Greater Than Their Right to Make Medical Decisions for Themselves

A parent's right to make decisions for their children can be no greater than their right to make medical decisions for themselves. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). The District Court's reasoning that "parents have a fundamental right to direct the medical care

of their children" is defined too broadly and overlooks the specific right at issue in this case, the right of parents to treat their children with certain gender dysphoria treatments. The parental relationship does not open a door to a new due process right for children because parents have no greater right to seek treatment for their child than they would have for themselves. *Doe By & Through Doe v. Pub. Health Tr. of Dade Cnty.,* 696 F.2d 901, 903 (11th Cir. 1983). There are no cases that specifically address whether a parent's fundamental rights encompass the right to choose for a child a particular type of medical treatment that the state has deemed harmful, but courts that have considered whether patients have the right to choose specific treatments for *themselves* have concluded that they do not. *See, e.g.*, *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490-93 (2001) (holding that there is no right of access to medical marijuana).

The district court relied on dicta from *Parham v. J.R.* to establish the general right of parents to obtain medical treatment for their children, but *Parham* does not support this sweeping generalization. The *Parham* court rejected the contention of unrestrained parental autonomy by concluding that "the risk of error inherent in the parental decision to have a child institutionalized for mental health care was sufficiently great that some kind of inquiry needed to be made by a 'neutral factfinder'" to determine whether there was a "need for commitment." *Parham v. J.R.,* 442 U.S. 584, 606 (1979). Thus, *Parham* illustrates that parents do not have an all encompassing right to determine the proper medical care for their children.

3. The SAME Act is Subject to Rational Basis Review

Because there is no fundamental right for parents to access a particular medical treatment for their child that the government has deemed harmful, the SAME Act is subject to rational basis review. To satisfy rational basis review, a statute must have a legitimate state interest, and there must be a rational connection between the statute's means and goals. *See Glucksberg* 521 U.S. at 728.

Lincoln's Act, "like other health and welfare laws, is entitled to a strong presumption of validity." *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2237 (2022). It has been long recognized by this Court that the Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States," *Andino v. Middleton,* 141 S. Ct. 9, 10 (2020), and that laws concerning the safety and the health of the people "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs* 142 S. Ct. at 2284.

Lincoln's legislature has found that emerging scientific evidence shows potential harms to children from gender transition drugs and surgeries and that there are other conventional and widely-accepted methods to treat gender dysphoria that do not raise concerns. R. at 3. While Respondents assert that some professional organizations and medical providers support the treatments the SAME Act seeks to ban, the recent Supreme Court decision in *Dobbs* illustrates that the Court should defer to the legislature "in areas fraught with medical and scientific uncertainties." *Dobbs* 142 S. Ct. at 2268 (citing *Marshall v. United States,* 414 U.S. 417, 427 (1974). Further, in areas where there is conflicting medical evidence, the state is not required

to defer to the guidelines of professional organizations. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 438 (6th Cir. 2019) (discussing how cases like *Gonzales* upheld laws that "conflicted with official positions of American College of Obstetricians and Gynecologists"). The health and safety of the children of Lincoln should not be determined by the judicial system or interest groups, but rather to the politically accountable officials of the state who can be removed from office by the people of Lincoln.

Additionally, Lincoln has an interest in "protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997). While Respondents argue that many medical professionals have approved the use of these types of drugs and treatments, "the dispensing of new drugs, even when doctors approve their use, must await federal approval." *Gonzales v. Raich,* 545 U.S. 1, 28 (2005). This standard has been applied even in the context of drugs used by the terminally ill. *See Carnohan v. United States,* 616 F.2d 1120 (9th Cir. 1980) (government regulation of cancer drug laetrile). There can be no extraordinary circumstances that exist for children experiencing gender dysphoria that warrants the reversal of this standard that have not already been argued by terminally ill cancer patients seeking the approval of government regulated treatments. Gender dysphoria treatments and drugs have not been approved by the FDA which furthers the Act's relation to the legit state purpose of protecting public health.

4. The SAME Act Satisfies Strict Scrutiny

Even assuming a fundamental right is found for parents to obtain particular medical treatments for their children, it does not necessarily follow that strict scrutiny will apply. For example, in *Troxel v. Granville*, even though it was recognized that parental rights concerning their children is "one of the oldest fundamental liberty interests" recognized by the Supreme Court, the Court did *not* apply the strict scrutiny a fundamental right requires. *Troxel v. Granville,* 530 U.S. 57, 65-66 (2000) (Thomas, J., concurring) ("The opinions of the plurality. . . recognize such a [fundamental parental] right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to the infringements of fundamental rights. [The Court did not]"). Nonetheless, the SAME Act satisfies strict scrutiny. To satisfy strict scrutiny, a statute must be narrowly tailored to achieve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). How compelling the interest and how narrow the tailoring must be will depend not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it. *See Planned Parenthood v. Casey*, 505 U.S. 833, 871-74 (1992). Lincoln's interest in protecting vulnerable groups, such as children, from abuse, neglect, and *mistakes,* is compelling and is served by a narrowly tailored prohibition on gender dysphoria treatments for minors.

The Supreme Court has stated that a state's interest in "safeguarding the physical and psychological well-being of a minor is a compelling one." *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.,* 457 U.S. 596, 607 (1982). The Supreme Court has specifically recognized that the State's compelling interest in

preserving the health of its citizens extends to regulating the administration, sale, prescription, and use of dangerous drugs, such as the puberty blockers and cross-sex hormones that the SAFE Act bans. *See Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41, 45 (1921) (finding that there is no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of drugs).

In the present case, Lincoln is acting to guard the health and safety interests of vulnerable children by preventing serious risks and complications that accompany gender transition drugs and surgeries, such as irreversible fertility, cancer, liver dysfunction, coronoary artery disease, and bone density. R. at 3. The SAME Act is narrowly tailored to achieve Lincoln's compelling interest in protecting vulnerable children from gender dysphoria treatments that are potentially harmful, irreversible, and unapproved by the FDA. Lincoln chose not to ban gender dysphoria treatments for adults, because adults are able to properly consent to obtain gender dysphoria treatments without raising issues of informed consent. R. at 3. Moreover, the SAME Act allows minor children, like Jess, to discontinue gender dysphoria treatments at a safe rate, illustrating that the Act was carefully crafted to preserve the health and safety of children. R. at 12.

Moreover, the Supreme Court has struggled to define a zone of privacy within the family unit that is beyond the purview of state interference. *See Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2237 (2022). The rights of parenthood are not beyond regulation in the public interest, thus the state has a wide range of power for

limiting parental freedom and authority in things affecting the child's welfare. *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). Specifically, the Supreme Court has sharply curtailed parental discretion, even in the exercise of first amendment rights, when the exercise of such discretion may adversely affect the health of a minor. *Id.* The State may act to guard the general interest in children's well being by "requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." *Id.* For example, courts have upheld state bans on conversion therapy for minors on the ground that "the fundamental rights of parents do not include the right to choose… a specific medical or mental health treatment that the state has reasonably deemed harmful." *Pickup v. Brown*, 740 F.3d 1208, 1236 (9th Cir. 2014).

Lincoln has a compelling state interest in restricting access to drugs that have not gone through the FDA drug approval process. *See Abigail All. for Better Access to Developmental Drugs v. von Eschenbach,* 495 F.3d 695 (D.C. Cir. 2007). Lincoln has found that the physical and mental health of children is jeopardized by gender dysphoria treatments. R. at 3. Most children, even in adolescence, "simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment." *Parham v. J.R.,* 442 U.S. 584. While the Respondents may argue this is the precise reason why parents should be afforded the ultimate right of deciding what medical treatment their child may obtain, parental rights over children rests on a presumption that "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decision." *Troxel v. Granville,* 530 U.S. 57, 65-66 (2000). Gender dysphoria treatments are more

than a difficult decision, but a life changing and irreversible decision. A parent cannot have the capacity to make such a decision for their child when the parents themselves lack the capacity and knowledge required for sound judgment being that there is medical uncertainty regarding gender dysphoria treatments. This is the exact reason why State legislatures hold the ultimate authority over health and welfare laws. There can be no less burdensome way to protect vulnerable children from unapproved gender dysphoria treatments until there has been more scientifically backed research on the issue and the FDA finds that they are safe enough to be approved. Thus, this Court should find that the SAME Act satisfies any level of scrutiny.

B. Respondents Have Failed to Show That the SAME Act Violates Jess Mariano's Equal Protection Clause Rights.

Respondents have failed to show that the SAME Act violates Jess Mariano's Equal Protection Clause Rights, thus the Fifteenth Circuit erred when it determined that the Act likely violates the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. § 1. This clause has historically been interpreted to protect classes of "discrete and insular minorities" from unjustifiable discrimination by the state. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 152-53 (1938). However, the Constitution allows for States to make statutory classifications based on age and medical procedure. *Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 317 (1976); *Dobbs* 142 S. Ct. at 2245.

The District Court concluded that the Act classifies based on transgender status, which equates to a sex-based classification for purposes of the Equal Protection Clause. Under this Court's Equal Protection jurisprudence, child gender transition bans, like the SAME Act, should not be subject to heightened scrutiny, since they do not create a classification based on membership of a particular sex. The District Court's reliance on *Bostock v. Clayton Cnty* was erroneous, because *Bostock* does not apply to constitutional claims. While the *Bostock* Court noted that "it is impossible to discriminate against a person for being transgender without discriminating against that individual based on sex," *Bostock* explicitly noted that only Title VII was before it and not "other federal or state laws that prohibit sex discrimination," like the Equal Protection Clause. *Bostock v. Clayton Cnty*., 140 S. Ct. 1731, 1753 (2020). The *Bostock* Court also conceded that "sex," "sexual orientation," and "gender identity" are different concepts. *Id.* at 1746 ("homosexuality and transgender status are distinct concepts from sex"). This conceded statement from the Court furthers the argument that the Act does not classify based on "sex," and is thus subject to only rational basis review.

Thus, since the Supreme Court has not directly addressed the issue of transgender status under the Equal Protection Clause, and since *Bostock* only applies to Title VII, precedent does not mandate that discrimination based on transgender status be treated as sex discrimination under the Equal Protection Clause.

1. The SAFE Act Does Not Discriminate Based on Sex

Lincoln's SAME Act does not classify based on sex but rather on minority status and medical procedure, as a child's sex is not a determinative factor in whether the treatment is legal. Classifications based on age and medical procedure receive only rational basis review. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Dobbs* 128 U.S. at 2245 (reasoning that the regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination against members of one sex or the other). Just as the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women, the SAFE Act's goal of preventing children from undergoing experimental and irreversible treatments does not constitute invidious discrimination against either sex. *Id.* at 2245.

The District Court found that the Act categorically prohibits providing transgender minors medical care reccomended to treat their gender dysphoria, placing a special burden on minors whose gender identity does not match their birth sex. Lincoln rejects this contention, being that the Act permits individuals to have access to gender dysphoria treatments once they turn eighteen and are no longer a minor. R. at 12. Moreover, the child's sex is not a determinative factor in whether the treatment under the SAME Act is legal. The determinative factor is the whether the treatments would cause the potential harms and risks associated with such treatments to the specific child in question wishing to obtain the treatment. R. at 3. The SAME Act prohibits treatments under the age of eighteen and when the

treatments have the potential for risks and harms, thus classifying based on age and medical procedure respectively.

In *Hennessy-Waller v. Snyder,* an Arizona district court reasoned that mastectomies used as a gender-transition procedure were not the "same" as chest surgeries performed as other treatments. *See Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1034 (D. Ariz. 2021). While the District Court finds this argument unpersuasive, *Hennessey-Waller* sheds light on Lincoln's argument that the Act does not classify on the basis of sex. Specifically, that the Act does not classify based on sex, but instead "on the basis of some other permissible rationale," like minority status and medical procedure. *Id.* at 1045. In the present case, Lincoln's "permissible rationale" is illustrated through the legislatures findings that many cases of gender dysphoria in children resolve naturally by the time the child reaches adulthood and that scientific evidence shows potential harms to children from gender dysphoria treatments. R. at 2. Accordingly, the SAME Act seeks to address these findings, not by classifying based on sex, but based on minority status and medical procedure.

The Fifteenth Circuit's reliance on *Price Waterhouse v. Hopkins*, is missguided, being that *Price Waterhouse*, again like *Bostock*, was concerned with sex discrimination under Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 236 (1989). While the Court in *Price Waterhouse* may have held that "treating an individual less favorably because they do not conform to gender expectations is evidence of sex discrimination," this holding was limited to questions under Title VII. *Id.* Additionally, the Act does not treat individuals less favorably because they do not

conform to gender expectations. "Not conforming to gender expectations," is difficult to define, and even if one successfully defined the phrase, it does not relate to obtaining transitioning treatments. An individual can "not conform to gender expectations" and still decide not to obtain gender dysphoria medical treatments. As Respondents pointed out, among the best practices of gender-affirming care include: taking on the name, pronouns, and other elements of gender expression that match the adolescent's gender identity, none of which the Act bans. R. at 6.

2. Transgender Individuals Are Not a Suspect or Quasi Suspect Class Under the Equal Protection Clause

Even if the SAME Act did classify based on transgender status, the District Court erred in determining that transgender status equates to a sex-based classification for purposes of the Equal Protection Clause. In order for the Act to be subjected to heightened scrutiny under the Equal Protection clause, transgender individuals would need to first be recognized as a quasi-suspect class, and the Supreme Court has never recognized transgender status as a quasi-suspect class. The Court has identified four characteristics that suspect classes share: 1) a history of discrimination; 2) a trait that "bears no relation to ability to perform or contribute to society[;]" 3) an immutable trait; and 4) political powerlessness. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-46 (1985). The transgender community does not satisfy at least three of the criteria for a suspect classification.

The District Court, nor the Fifteenth Circuit, performed analysis regarding transgender individuals as a quasi-suspect class, yet still concluded that heightened scrutiny was warranted, noting only that "[t]he Supreme Court applies heightened

scrutiny even in cases where it refuses to find a quasi-suspect class." R. at 26. However, the Supreme Court has been reluctant to recognize new suspect and quasi-suspect classes. *See City of Cleburne*, 473 U.S. at 432 (declining to recognize mental disability as a quasi-suspect class and explaining that courts "have been very reluctant" to designate new classes).

Further, Supreme Court precedent reveals that transgender status does not satisfy at least three of the requirements to attain quasi-suspect class status. Trangender individuals "do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding close relatives are not a quasi-suspect class). Unlike biological sex, gender identity is fluid and subjective, hence why there are a list of "best practices" for gender-affirming care, including taking on the name, pronouns, and other elements of gender expression that match the identified with gender. R. at 6. While gender dysphoria may be considered a defining characteristic of transgender individuals, not all transgender individuals experience gender dysphoria, and further, gender dysphoria is not immutable.

While transgender individuals have been "subjected to discrimination," it is not enough to assert or even prove that the treatment of those who identify as transgender in this Nation "has not been wholly free of discrimination." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (discussing how the eldery have experienced discrimination historically but this does not constitute a suspect class). Here,

Respondents have not even alleged a "history of purposeful discrimination" required to satisfy the second prong of the suspect class test.

Further, the proposed classification in the Act encompasses individuals with varied and discrete needs. *See City of Cleburne* 473 U.S at 442 (reasoning that individuals with intellectual disabilities vary across a continuum of needs that made them "different, immutably so"). Children experiencing gender dysphoria differ from adults experiencing gender dysphoria, in terms of suitable treatments and how the gender dysphoria manifests. Not all individuals who experience gender dysphoria will choose to obtain medical treatments or surgeries, illustrating the array of needs and measures sought by individuals who identify as transgender. R. at 6 (recognizing that treatments for gender dysphoria are individualized based on the needs of the individual).

Therefore, Respondents' claim under the Equal Protection Clause would be held to the same rational basis scrutiny as discussed under Respondents' Substantive Due Process claim.

3. Even if the SAFE Act is Subject to Heightened Review It Satisfies Any Level of Scrutiny

Even if this Court finds that intermediate scrutiny applies to the SAME Act, the Act satisfies heightened review because it is substantially related to the genuine objective of ensuring the health and safety of vulnerable children. Sex classifications are subject to intermediate scrutiny and have been allowed where they (1) serve important government objectives, and (2) are closely and substantially related to achieving those objectives. *Craig v.* Boren, 429 U.S. 190, 197 (1976). Precedent

involving sex classifications reflects a desire to protect members from a particular sex from being disadvantaged, particularly when one sex is disadvantaged based on stereotypes. *United States v. Virginia,* 518 U.S. 515, 533-34 (1996) (sex based classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.").

The Supreme Court has allowed states to consider sex to redress past discrimination, or when sex-based differences are relevant. *See Nguyen v. INS,* 533 U.S. 53, 73 (2001) ("To fail to acknowledge our most basic biological differences… risks making the guarantee of equal protection superficial"). The Equal Protection Clause does not "demand that a statute necessarily apply equally to all persons" or require "things which are different in fact… to be treated as though they were the same." *Michael M. v. Superior Court of Sonoma Cty.*, 540 U.S. 464, 469 (1981) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966)). Thus, this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances. *Id.*; *see Parham v. Hughes*, 441 U.S. 347 (1979).

Lincoln's justification for the "sex-based" classification, must be an "exceedingly persuasive justification," which is one that is "genuine, not hypothesized or invented post hoc in response to litigation." *Virginia,* 518 U.S. at 531. The legislative findings concerning the Act show that Lincoln has carefully considered the harmful effects of gender dysphoria treatments on minors and decided that the potential risks outweigh the potential benefits as to *minors.* The Act does not place

prohibitions on adults who wish to seek these types of treatments, which shows that Lincoln's justification is genuine and does not rest on invidious discriminatory motives.

When determining the means to promote important government objectives, states may consider "physical differences between men and women." *Virginia*, 518 U.S. at 533. While the Equal Protection Clause directs that all persons in similar circumstances be treated alike, the Constitution does not require things that are different in fact or opinion to be treated in in law as though they were the same. Accordingly, the initial discretion to determine what is "different" and what is the "same" resides in the legislatures of the States. *See, e.g., Plyer v.* Doe, 457 U.S. 202, 216 (1982). Lincoln must have "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." *Id.*] Thus, the Court should defer to Lincoln's determination that these treatments are, at the very least, highly contested, insufficiently proven, and potentially harmful to children, because "respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance." *Dobbs* 142 S. Ct. at 2284.

In order to determine when use of puberty blockers or cross-sex hormones will lead to risks such as infertility, the State must take the child's sex into account since physical differences between boys and girls means that these treatments will lead to infertility depending on the biological sex of the child. This difference means that the

SAME Act's ban on gender dysphoria treatments prohibits the treatments only when they would lead to the potential risks and harms outlined by Lincoln. R. at 3. This explains why the Act does not prohibit sex hormone therapy treatments for minors who are seeking them for reasons other than "instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 3. Thus, the SAME Act's classification is substantially related to preventing severe negative health effects resulting from the medical treatment of children and to decide otherwise would be "to fail to acknowledge even our most basic biological differences." *Nguyen* 533 U.S. at 73.

Respondents argue that the SAME Act would prohibit alleviation of Jess's gender dysphoria and suicidality, with Jess's doctor testifying that "even one month interruption of his treatment could allow puberty to progress and substantially undermine the treatment progress Jess has made so far in dealing with his depression and dysphoria." R. at 5. However, it is disputed that providing children with puberty blockers and cross-sex hormones leads to overall increases in mental well-being. Paul W. Hruz, *Deficiences in Scientific Evidence for Medical Management of Gender Dysphoria*, 87 Linacre Q. 34, 38 (2019). Notably, it is uncertain that gender dysphora treatments reduce the risks of suicide, with recent findings that increasing minors' access to these treatments is associated with a significant increase in the adolescent suicide rate. Jay P. Greene, *Puberty Blockers, Cross-Sex Hormones, and Youth Suicide,* Heritage Found. (Jun. 13, 2022). This illustrates that the implementation of the SAME Act is closely and substantially related to Lincoln's

interest in protecting minors from unsafe medical treatments. Therefore, this Court should find that the SAME Act satisfies any level of scrutiny.

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Fifteenth Circuit and find that the preliminary injunction was erroneously granted in regard to the Respondents' Substantive Due Process and Equal Protection claims.

Respectfully Submitted,

/s/_____
Team 3112
Counsel for Petitioner,
APRIL NARDINI, in her official capacity as
Attorney General of the State of Lincoln

APPENDIX A

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

20-1201 Findings and Purposes

(a) Findings:

The State Legislature finds —

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

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

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

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

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

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

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

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

(b) Purposes:

It is the purpose of this chapter —

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

(2) To encourage treatments supported by medical evidence and discourage harmful, irreversible medical interventions.

(3) To protect against social influence surrounding gender affirmation treatments, which is especially concerning given the potential life-altering effects of gender transition drugs and surgeries.

20-1202 Definitions

The Act defines —

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

20-1203 Prohibition on Certain Gender Transition Treatments

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

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

20-1204 Enforcement

(A) The attorney general may bring an action to enforce compliance with this chapter. Nothing in this chapter shall be construed to deny, impair, or otherwise affect any right or authority of the attorney general, the state, or any agency, officer, or employee of the state, acting under any provision of the Lincoln Code, to institute or intervene in any proceeding.
(B) Any healthcare provider found to have knowingly and willingly violated the provisions of the chapter shall have committed a class 2 felony punishable by civil fines up to and including $100,000 or imprisonment of not less than two years and not more than ten years.

20-1205 Unprofessional conduct of healthcare providers

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

20-1206 Effective Date

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

APPENDIX B

42 U.S.C § 1983

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 C

U.S. Const. amend. XIV, § 1

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