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,

Respondents.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

I. Whether the "serious question" standard for preliminary injunctions continues to be viable after *Winter v. Natural Resources Defense Council, Inc.* when the "serious question" standard provides courts with the flexibility to utilize their own discretion, the standard mirrors the sliding-scale approach, and *Winter* does not explicitly state that it overrules more flexible standards.

II. Whether the preliminary injunction was properly granted in regard to the Respondents' Substantive Due Process and Equal Protection claims when Respondent has established that the SAME Act violates their fundamental constitutional right to determine the proper medical care of their child, when that medical care is prescribed by a doctor, and the Act disproportionately targets the transgender community but cannot withstand strict scrutiny review.

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The unreported opinion of the United States Court of Appeals for the Fifteenth Circuit appears on pages 23-34 of the record. The unreported opinion of the United States District Court for the District of Lincoln appears on pages 1-22 of the record.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute at issue, Stop Adolescent Medical Experimentations ("SAME") Act, 20 Linc. Stat. §§ 1201-06, is located in Appendix A. The constitutional provisions at issue, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment, are located in Appendix B.

RULES PROVISION INVOLVED

The following provisions of the Federal Rules of Civil Procedure are relevant to this case: Fed. R. Civ. P. 12(b)(1), (6); Fed. R. Civ. P. 56(a). The United States Code for interlocutory decisions, 28 U.S.C. § 1292 is also relevant for this case. These provisions are located in Appendix C.

STATEMENT OF THE CASE

This appeal follows a final order of preliminary injunction against the state of Lincoln entered by the United States Court of Appeals for the Fifteenth Circuit. See Fed. R. Civ. P. 65(c). The action was brought by the state of Lincoln (hereinafter "Petitioner" or the "state") against Jess Mariano, Elizabeth Mariano, and Thomas Mariano (hereinafter "Respondent" or the "Marianos"). R. at 1. The state alleges that the SAME Act falls within the state's authority and therefore they intend to enforce this statute. *Id.* Respondents then filed their Motion for Preliminary Injunction under Fed. R. Civ. P. 65(c) on November 11, 2021, stating that the state's statute violated their right to Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. *Id.*

Factual History

Elizabeth and Thomas Mariano have a biologically female child named Jess. R. at 1. Jess was biologically female but from an early age he perceived himself as a male. R. at 4. Jess suffered from anxiety and depression because of his gender disconnect. R. at 4. He was diagnosed with depression after an event where he took many Tylenol pills and wished he would "never wake up." R. at 4. After that incident, Jess's parents put him into therapy. Nine months later his psychiatrist diagnosed him with gender dysphoria, in accordance with the American Psychiatric Association guidelines. R. at 4. Jess's psychiatrist, Dr. Dugray, found "evidence of distress manifested by a strong desire to be treated as a girl and a desire to prevent the development of the anticipated secondary sex characteristics" R. at 4. Jess has said that he did not "want to grow up if [he had] to be a girl." R. at 4-5. Due to Jess's gender dysphoria, and in consultation with Jess's pediatrician, Jess was prescribed to take what is commonly known as

puberty blockers. R. at 5. Once Jess turns sixteen, they will likely start hormone therapy because of the severity of gender dysphoria. R. at 5.

Dr. Dugray has observed that since Jess has been on the hormone blockers, he has had fewer depressive episodes. R. at 5. Although Jess's condition has improved, Dr. Dugray also noted that Jess still has distress related to the amount of breast tissue that he has developed and may need surgery to remove for successful treatment of his gender dysphoria. R. at 5. Additionally, Dr. Dugray has said that even a month of interruption in Jess's treatment would allow his puberty to progress and undermine his treatment thus far and push Jess into a downward spiral of depression and dysphoria. R. at 5.

Gender Dysphoria

In the event that a child faces gender disconnect, guidelines state that youth should be evaluated, diagnosed, and treated by a mental health professional. R. at 6. For children diagnosed with gender dysphoria, the World Professional Association for Transgender Health (WPATH) recommends puberty hormone suppression once the child reaches puberty. R. at 6.

Puberty blockers are a form of puberty hormone suppression that temporarily pauses puberty to prevent the development of secondary sex characteristics that often cause psychological distress for transgender youth. R. at 6. This treatment method is seen as a way to provide children with time to decide how they would like to proceed with further treatment. R. at 6. Puberty blockers are reversible and do not affect fertility. R. at 6.

When untreated, gender dysphoria has been found to cause or lead to anxiety, depression, eating disorders, substance abuse, self-harm, and suicide. R. at 7. Dissimilarly, young adults who receive treatment and are prescribed puberty blockers for gender dysphoria have shown lower odds of considering suicide. R. at 7. Gender dysphoria in youth above the age of 12 is more

likely to persist into adulthood than when gender dysphoria is presented in youth under the age of 12. R. at 7. All notable medical organizations in the United States including the American Medical Association, the American Academy of Pediatrics, and the American Psychiatric Association oppose denying gender-affirming care to transgender adolescents. R. at 7.

Legislative History

The case before this Court involves a dispute over the SAME Act, 20 Linc. Stat. §§ 1201-06. R. at 1. The state is proposing this Act because they believe that hormone blockers are harmful and irreversible. R at 13. The state further argues that they are concerned by the lack of informed consent by the children and parents who take the drugs. R. at 13. Lastly, the state argues no one knows the long-term side effects, if any, of hormone blockers. R. at 13. However, the state understands that hormone blockers may be the best option for some treatment which is why the SAME Act only prohibits the drugs until a child is 18. R. at 13.

Procedural History

The Respondents filed a complaint in the United States District Court for the District of Lincoln, under 42 U.S.C. § 1983, stating that the SAME Act violated their rights under the Equal Protection and Due Process Clause of the Fourteenth Amendment to the United States Constitution. R. at 1. Respondents then filed a Motion for Preliminary Injunction. In response, Petitioner filed a Motion to Dismiss along with a response urging the court to deny the request for a preliminary injunction. R. at 1. On December 16, 2021, the United States District Court filed a judgment granting the preliminary injunction in favor of Respondents and denied the Petitioner's motion to dismiss. R. at 22. The District Court denied the motion to dismiss because of the balancing of hardships and that. R. at 22. The District Court found that the Act could not withstand heightened scrutiny and it did infringe on the Mariano's rights under the Equal

Protection and Due Process Clause. R. at 19-22. The District Court enjoined Petitioner from enforcing 20 Linc. Stat. §§ 1201-06 during the pendency of the litigation. R. at 22. In addition, the District Court certified the case for interlocutory appeal under 28 U.S.C. § 1292(b). The Fifteenth Circuit affirmed the District Court's decision in granting the Respondent's Motion for a Preliminary Injunction, holding that the SAME Act is unconstitutional. R. at 23, 27. The Fifteenth Circuit agreed with the District Court that the Marianos were likely to suffer imminent harm under the SAME Act and the Government did not have sufficient rationale to enforce a law stripping citizens of their Constitutional rights. R. at 27.

This Court granted certiorari on July 18, 2022 and defined the scope of review to two issues: (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.

SUMMARY OF THE ARGUMENT

I. The "Serious Question" Standard is still viable after *Winter v. Natural Resource Defense Council*

Winter v. Natural Resource Defense Council established a new approach for determining whether it is appropriate to issue a preliminary injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Although this case established a new method for this analysis, the "serious question" standard is still currently viable. The "serious question" standard closely resembles the sliding-scales approach, a more flexible standard with a well established and distinct history. The sliding-scale approach alongside the "serious question" standard illustrates the value in keeping this analysis flexible to provide courts with greater discretion in relation to the complex and varying facts associated with preliminary injunction cases. In addition, there is no explicit mention in *Winter* stating that it intended to overturn the "serious question" standard. Moreover, several cases post-*Winter* and the dissent in *Winter* definitively state that more flexible approaches are still viable and often preferred by US circuit courts. In the case before the Court, the "serious question" standard is a preferable method for determining whether a preliminary injunction should be issued because it carefully determines whether the costs of passing the statute outweighs the benefits of not granting the injunction. Although this is the case, the Mariano's would likely prevail under any of the three methods. Therefore, the "serious question" standard is still a viable approach after *Winter* was established.

II. Respondent's Rights Under the Due Process and Equal Protection Guaranteed under the Fourteenth Amendment were Violated

Respondent's rights under the Due Process and Equal Protection Clause of the Fourteenth Amendment would be violated if the SAME Act was put into place. The Mariano's have the Constitutional right to control the care and custody of their child. An Act that prohibits its

citizens from furthering that Constitutional right, and Western societal norms, should be reviewed through a close lens. The government's reasoning for the Act could not withstand the scrutiny of taking away a Constitutional right. Further, the transgender community is seen as a quasi-suspect group in many other court systems which warrants a heightened level of scrutiny. The government's Act could not withstand the heightened level of review at the lower courts nor should this court part ways with the lower court's reasoning.

ARGUMENT

Both the Fifteenth Circuit and the Lincoln District Court correctly concluded that the SAME Act violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment and causes immediate and irreparable harm. R. at 2, 24. When considering whether injunctive relief is proper, courts have utilized the sliding-scale approach, which requires the court to weigh which party the balance of harms falls in favor of. *See Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013).

The District Court and the Fifteenth Circuit Court of Appeals held that the state failed to show that the cost associated with the statute outweighs the benefit of not granting the injunction. Therefore, the Fifteenth Circuit properly held that under Federal Rules of Civil Procedure, the motion for preliminary injunction should be granted.

I. STANDARD OF REVIEW

This Court is reviewing the Fifteenth Circuit's affirmation of preliminary injunction against the state's statute, the SAME Act, under Fed. R. Civ. P. 65(c). This Court reviews preliminary relief under the *de novo* standard of review. *See Celotex v. Catrett*, 477 U.S. 317, 322 (1986). When reviewing a decision to grant preliminary injunction, the Second Circuit's sliding-scale approach is utilized. *See Christian Louboutin S.A. v. Yves Saint Laurent Am.*

Holdings, Inc., 696 F.3d 206, 215 (2d Cir. 2012). This approach requires the movant to establish "(1) no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is denied and (2) some likelihood of success on the merits." *Planned Parenthood of Wisconsin, Inc.*, 738 F.3d at 795.

II. THE FIFTEENTH CIRCUIT CORRECTLY DETERMINED THAT THE "SERIOUS QUESTION" STANDARD IS VIABLE AFTER *WINTER V. NATURAL RESOURCE DEFENSE COUNCIL*

The Fifteenth Circuit Court correctly determined that the "serious question" standard is viable after *Winter v. Natural Resource Defense Council* was established. The "serious question" standard consists of two factors. *See e.g., Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 33 (2d Cir. 2010). The first requires the movant to establish that they will suffer irreparable harm if a preliminary injunction is denied. *See id.* at 35. The second provides the movant with the option of either demonstrating that they will likely succeed on the merits, or to show that there are sufficiently serious questions going to the merits to make their claim a fair ground for litigation, and that a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *See id.*

The "serious question" standard does include one exception that states that if the moving party aims to delay government action taken in the public's interest in the form of a statutory or regulatory scheme, then the elements are slightly altered. *See id.* If this is the case the movant must then establish that they will (1) suffer irreparable harm if a preliminary injunction is denied and (2) likely succeed on the merits. *See e.g., Citigroup Glob. Markets, Inc.*, 598 F.3d at 40 n.4. This is important to note as the altered version of the "serious question" standard under this exception is nearly identical to the sliding-scale approach.

In contrast, the *Winter* test is comprised of four factors to determine if preliminary relief is appropriate. This four factor test requires the movant to establish that (1) they are likely to succeed on the merits, (2) they will suffer irreparable harm if injunctive relief is not granted, (3) the balance of equity tips in their favor, and (4) the injunction is in the public's interest. *Winter*, 555 U.S. at 20. When analyzing these elements, the third and fourth elements are reviewed together in the event that the opposing party is the government. *See Nken v. Holder*, 556 U.S. 418, 434-35 (2009).

Although all three of these standards exist, there is no indication noted in *Winter* that the case itself intended to invalidate other methods utilized to determine whether preliminary relief should be granted. The analysis in *Winter* promotes commitment to public interest, but never once states that it is rejecting the "serious question" approach. *See Winter*, 555 U.S. at 11.

A. The "Serious Question" Standard Provides a Level of Flexibility That Allows Courts to Use Their Own Discretion When Evaluating a Case

The "serious question" standard provides a level of flexibility that allows courts to use their own discretion when evaluating a case. Generally, cases involving preliminary injunction contain complex factual issues. *See Citigroup Glob. Markets, Inc.*, 598 F.3d at 12. Due to the nature of these cases, increasing flexibility to accommodate the type of facts and evidence presented early in litigation is beneficial when determining whether preliminary relief is appropriate. *See id.* Utilizing a more lenient approach allows for courts to focus on the net harm the preliminary injunction can prevent. *See Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). The "serious question" standard and the sliding-scale approach show that some preliminary relief may be granted even when the plaintiffs claim on the merits is weaker if the injunction can prevent a larger proportion of harm. *See id.* at 725. Furthermore, *Alliance for the Wild Rockies v. Cottrell* also emphasizes the value

in protecting the level of flexibility that models like the sliding-scale approach and the "serious question" standard provide. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1133 (9th Cir. 2011). In *Alliance*, the court states that preliminary injunctions lie in complex litigation and therefore flexibility is needed to face the diverse factual scenarios and uncertainty involved. *Id.*

Although the *Winter* test has been established as an alternative test to determine whether a preliminary injunction has been issued, the "serious question" standard is still viable because it can offer a perspective that *Winter* cannot. The *Winter* test differs because it is much narrower in its analysis. This has the ability to pinpoint cases where movants are in dire need of a preliminary injunction but is not as adaptable to the differing facts in each and every case the way a more flexible approach would be. For this reason, the value of the "serious question" standard is rooted in its flexibility and similarities to the sliding-scale approach, all of which contribute to its continuous viability.

B. The "Serious Question" Standard is Closely Related to The Sliding Scale Approach, Which is Ultimately The Oldest And Most Established Method of Determining Whether Preliminary Relief Should Be Granted

The "serious question" standard is closely related to the sliding-scale approach, which is ultimately the oldest and most established method of determining whether preliminary relief should be granted. When utilizing the "serious question" standard in relation to the facts presented in this case, the exception noted in *Citigroup* must be utilized. *Citigroup Glob. Markets, Inc.*, 598 F.3d at 40 n.4. Due to the exception, the method of determining whether a preliminary injunction is appropriate under the "serious question" standard is identical to the sliding-scale approach meaning that the interpretation and weight that this analysis holds is nearly identical. The considerable history of this sliding-scale approach speaks to its

effectiveness in practice. *See Citigroup Glob. Markets, Inc.*, 598 F.3d at 38. The similarities between these two methods ultimately illustrates the viability of the "serious question" approach.

1. *Winter* Does Not Explicitly State That it is Overruling The "Serious Question" Standard or The Sliding Scale Approach

Winter does not explicitly state that it is overruling the "serious question" standard or the sliding-scale approach. The *Winter* test differs from both these approaches, but it has been noted that the "serious question" standard is simply seen as a variation of the *Winter* test. *See Planned Parenthood of Wisconsin, Inc.*, 738 F.3d at 795. Moreso, the dissent in *Winter* written by Justice Ginsburg and Justice Souter explicitly states, "courts have evaluated claims for equitable relief on a "sliding scale," sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high. This Court has never rejected that formulation, and I do not believe it does so today." *Winter*, 555 U.S. at 51. Accordingly, this statement establishes that there is no reason to believe the *Winter* test is the only method of determining whether to issue a preliminary injunction.

Additionally, in *Alliance* the court states that if the Supreme Court had intended for *Munaf*, *Winter*, or *Nken* to overturn more flexible approaches for determining whether to issue a preliminary injunction they would have explicitly stated so. *Alliance for the Wild Rockies*, 632 F.3d at 1134. The case also stated that this explicit command is required due to the considerable history that more flexible approaches such as the "serious question" standard hold in a majority of US circuit courts. *See id*. For this reason, this court held that the "serious question" standard is still viable after *Winter*. *See id*.

C. The "Serious Question" Standard is a Variation of Both the Sliding-Scale Approach and the *Winter* Test, and the Facts of This Case Would Establish That a Preliminary Injunction is Appropriate Under All Three Standards

The "serious question" standard is ultimately a variation of both the sliding-scale approach and the *Winter* test, and the facts of this case would establish that a preliminary injunction is appropriate under all three standards. It has been noted that the "serious question" standard and the sliding-scale approach are noticeably similar especially in instances where the first exception of the "serious question" standard is necessary. *See Citigroup Glob. Markets, Inc.*, 598 F.3d at 40 n.4. Additionally, The *Winter* test is a narrower approach that includes four required factors rather than two. *Winter*, 555 U.S. at 20. This test is more stringent due to the fact that it places an emphasis on investment in the public's interest. *Id.* at 11. *Winter's* focus on public interest intends to evaluate external consequences of providing the requested relief. *Id*. The factors under *Winter* include the two required under the "serious question" standard plus two more. *Id*. at 12. The two factors the "serious question" standard do not directly require the movant to establish are whether (3) the balance of equity tips in their favor, and (4) the injunction is in the public's interest. *Id.*

1. The Application of the "Serious Question" Standard And Sliding Scale Approach

When applying the "serious question" standard and the sliding scale approach the movant must establish both factors in the test. *See Citigroup Glob. Markets, Inc.*, 598 F.3d at 35. The first factor of the "serious question" standard establishes whether it is necessary to grant relief immediately. *See D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019). The intention of this factor is to show whether the plaintiff is facing imminent and irreparable injury. *See Citigroup Glob. Markets, Inc.*, 598 F.3d at 35. Irreparable injury is defined as harm that "cannot be undone through monetary remedies." *Ne.Fla. Chapter of Ass'n of Gen. Contractors v. City of*

Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990). Under this lens, the Supreme Court has also constituted a "severe medical setback" to be irreparable harm. *Bowen v. City of New York*, 476 U.S. 467, 483 (1986).

In the case before the Court, the SAME Act would require the Respondent, Jess to stop his puberty blockers. Stopping this treatment would result in puberty starting immediately. R. at 5. As a result, Jess would begin developing breast tissue. *See* Jack L. Turban, MD, MHS1, *et al.*, *Legislation to Criminalize Gender-Affirming Medical Care for Transgender Youth*, 325 J. Am. Med. Ass'n 2251, 2251 (2021). Jess's psychiatrist states that stopping this medication has the capacity to increase symptoms of anxiety, depression, and gender dysphoria. *See Psychiatric Comorbidity in Gender Dysphoric Adolescents*, 52 J. Child Psych. and Psychiatry 1195, 1202 (2011). This is of grave concern, as when these symptoms have been heightened in the past, Jess has attempted suicide. R. at 4. The fact that the passing of the SAME Act would result in complete reversal of the effect of Jess's puberty blockers and increased symptoms from prior to the treatment illustrates that this would be a "severe medical setback." Additionally, the harm inflicted by this statute cannot be undone through monetary remedies, the only thing that could truly eliminate this harm is the availability of treatment for Jess's symptoms.

In order to determine the second factor, Respondents' likelihood to succeed on the merits, it must be determined whether the Mariano's have raised a sufficiently serious question regarding their Substantive Due Process and Equal Protection claims. If these claims do not survive the relevant level of scrutiny, then the Mariano's will likely succeed on the merits.

The Cagnacci article illustrates that the treatments the SAME Act criminalizes are widely accepted treatments within the medical community. Cagnacci, A., & Venier, M., *The Controversial History of Hormone Replacement Therapy*, 55 Medicina 602 (2019),

https://doi.org/10.3390/medicina55090602. This illustrates that the Act may be placing the medical fate of transgender children in the hands of politicians as opposed to licensed pediatricians. As a result, the SAME Act is subject to strict scrutiny in relation to the Substantive Due Process claim. Here, the burden falls on the state to establish that the statute is necessary to achieve a compelling state interest. *See United States v. Carolene Prod. Co*., 304 U.S. 144, 153 (1938). In this situation, the state claims they aim to protect children from experimental treatments that have more permanent consequences, to ensure that children and their parents are making informed decisions. R. at 16. Additionally, the state considers medical and surgical gender-affirming care to be experimental. R. at 16.

Here, the government would not survive strict scrutiny as the SAME Act is too restrictive. This level of scrutiny requires the state to employ the "least restrictive means" necessary to accomplish its purpose. *See Holt v. Hobbs*, 574 U.S. 352, 364 (2015). According to the Cagnacci article, there is currently no other country that has a blanket ban of these medications and treatments the way the SAME Act intends to do so. R. 16. For this reason, the state should determine an alternative, less restrictive course of action to protect children in Lincoln.

When analyzing the equal protection claim, intermediate scrutiny is appropriate as this issue is related to sex based discrimination. *See United States v. Virginia*, 518 U.S. 516, 555 (1996). The Act forces individuals seeking medical treatment to be treated differently when their treatment is related to being transgender. The Act itself specifies that restrictions are set specifically for those being treated for gender dysphoria. In order for the state to establish intermediate scrutiny they must demonstrate that the classification that the SAME Act creates serves an important government objective and the discriminatory nature of that classification is

related to reaching that objective. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

In the case before the Court, the state fails to provide a direct and substantial relationship between the Act and its intended objective. The Act is purportedly aimed at protecting children by regulating certain medical procedures but is only choosing to impose that restriction upon transgender youth. This allows non-transgender children to utilize these medical services and forces physicians to stray from the proper standard of care when treating individuals with gender dysphoria. As a result, the state would not survive intermediate scrutiny in relation to its Equal Protection Claim.

The Mariano's case contains very unique and complex facts, therefore allowing the evaluation for preliminary relief to occur in a more flexible manner is highly necessary. Ultimately, the facts of the case illustrate that Jess Mariano will suffer imminent and irreparable injury if the preliminary injunction is not granted and that the Mariano's will likely succeed on the merits in relation to their Substantive Due Process and Equal Protection claims. As a result, the Mariano's established both of these factors, therefore, they would likely prevail if the court utilized the "serious question" standard or the sliding-scale approach.

2. Application of The *Winter* Test

As conveyed above, the Mariano's would likely prevail if a traditional and more flexible standard for establishing whether a preliminary injunction should be issued is utilized. Although this has been demonstrated, if the Mariano's had to plead their case and establish the *Winter* test, they would likely still prevail.

In order to issue a preliminary injunction under the *Winter* test, all four factors must be established. *Winter*, 555 U.S. at 20. The first two factors of this test are identical to the two

factors within the "serious question" standard and therefore have already been established. *Id.* at 12. The third factor that must be established is whether the balance of equity tips in the Mariano's favor and the fourth requires the Mariano's to demonstrate that the injunction is in the public's best interest. *See Nken,* 556 U.S. at 434-35. Due to the fact that the Mariano's are bringing this action against the government, the third and fourth elements are required to be established together. *See id.* at 435.

Based on the facts of the case, the SAME Act directly affects the well-being of Jess, and also has the capacity to affect many other children with gender dysphoria in the same manner. The state justifies the Act itself by stating that they believe that individuals above the age 18 are most equipped to make informed decisions regarding their transgender care. R. at 12. This may be the case in some instances, but children facing gender dysphoria are often more likely to suffer from depression and anxiety, and to attempt suicide at a young age. *See Psychiatric Comorbidity in Gender Dysphoric Adolescents*, 52 J. Child Psych. and Psychiatry 1195, 1202 (2011). It is advantageous to the public to block the SAME Act as it restricts physicians from practicing the standard of care established for transgender youth and would increase risk of depression, anxiety and suicide in transgender youth. *See id.* These risk factors indicate that the SAME Act would cause children more harm than protection. As a result, the preliminary injunction would be in the public's best interest.

This analysis shows that all four factors within the *Winter* test have been established by the Mariano's. For that reason, the Mariano's would likely prevail if the *Winter* test is utilized to determine if a preliminary injunction is an appropriate course of action. Ultimately, this illustrates that the methodology and evaluation process for the *Winter* test, sliding-scale approach, and "serious question" standard do not differ as significantly as the state aims to

illustrate. Additionally, circuit courts across the United States have valued the flexibility and level of discretion the "serious question" standard has provided for the last five decades. *Citigroup Glob. Markets, Inc.,* 598 F.3d at 35. For this reason, the "serious question" standard continues to be a viable approach after *Winter*.

III. THE FIFTEENTH CIRCUIT DID NOT ERR IN DETERMINING THAT THE STATE OF LINCOLN VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY PROHIBITING HORMONE BLOCKERS TO MINORS FOR THE USE OF TREATING GENDER DYSPHORIA

The District Court did not err in determining that Lincoln violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment when proposing an Act that would prohibit hormone blockers to minors for the use of treating gender dysphoria. The Fourteenth Amendment guarantees that "no state shall make or enforce any law which . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. The Fourteenth Amendment was put in place to be suspicious of legal classifications made by the government to disadvantage a suspect class. Selene C. Vázquez, *The Equal Protection Clause & Suspect Classification: Children of Undocumented Entrants*, 51 U. Miami Inter-Am. L. Rev. 63, 68 (2020). Therefore, any act that threatens to strip such citizens of their Constitutional rights should be evaluated under a microscope to ensure the rights guaranteed in this nation are not lost in modern society.

The Constitution cannot control prejudices, but it can safeguard against them. *Grimm v. Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 627 (4th Cir. 2020), *cert. denied,* 141 S. C. 2878 (2021). "A bare . . . desire to harm a politically unpopular group cannot be upheld under equal protection." *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). The SAME Act is

alarming to the transgender community because it would put a limitation on their freedom of choice in deciding which prescribed medical treatment is best suited for them. The language of the Act targets the transgender community as it prohibits healthcare providers from prescribing hormone blockers specifically to patients within that community. The Act explicitly states that no healthcare provider can engage in service to an individual "for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 3. Therefore, if Jess's natural hormone levels were high, his doctor could prescribe him hormone blockers to correct those levels without violating the Act. However, because Jess wants to use hormone blockers to treat his gender dysphoria, his parents are barred from bringing his physician's prescribed treatment plan into fruition.

Courts have noted the history of Western civilization as being reflected in the strong tradition of parents upbringing of their children. *See Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Under the U.S. Constitution, the Mariano's are entitled to their Fourteenth Amendment right to raise the care for their child, Jess. Because their son's physician wants to prescribe medication for a particular purpose, and that purpose does not align with the state's interest, the state should not have the right to dictate what is best for their son and family.

The Mariano's have raised the issue that their parental rights were violated under the Due Process and Equal Protection Clause of the Fourteenth Amendment. Since Jess will not be able to obtain his hormone medications, which his parents would like him to take for physical health and mental health reasons, the state is infringing on their rights as parents. Courts have stated that parents have the right over the "care, custody and control" of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The state's SAME Act would disproportionately affect minors within the transgender community. R. at 8. Therefore, the state would be discriminating against

individuals based solely on the fact that their gender does not align with their birth-sex. *See Eknes-Tucker v. Marshall*, Case No. 2:22-cv-184-LCB, 2022 WL 1521889 (May 13, 2022 M.D. Al.). The state believes that they know what medication and treatment Jess should be receiving for his medically diagnosed treatment better than his parents. R. at 2-3. According to the state, Jess cannot be treated with hormone blockers even if it is recognized as the correct treatment according to medical professionals and existing medical guidelines for minors, like Jess, diagnosed with gender dysphoria. R. at 4.

The transgender community is one that should be considered a quasi-suspect class because of their history of discrimination in society. If the transgender community is considered a quasi-suspect class, then any Act that infringes on the laws protecting those citizens' rights should be reviewed under a heightened scrutiny review. Lincoln wants to put a blanket ban on hormone blockers for the purpose of sex changes which is a violation of the Mariano's rights under the Due Process and Equal Protection Clause when evaluated under a heightened scrutiny review. R. at 3.

A. The Court Correctly Ruled That the Mariano's Rights Under the Due Process Clause Were Violated

The Mariano's substantive rights under the Due Process Clause were violated by the SAME Act. Substantive Due Process rights protect citizens from an unreasonable loss of fundamental rights. *See Eknes-Tucker*, 2022 WL 1521889, at *7. For example, a parent's right to make decisions "concerning the care, custody, and control of their children" would be a right under the Due Process Clause. *Troxel*, 530 U.S. at 14. The history and culture of Western civilization has a strong tradition of parent's utilizing their rights to raise their children the way they see fit. *See Yoder*, 406 U.S. at 232. Therefore, the Due Process Clause of the Fourteenth Amendment clearly protects substantive fundamental rights guaranteed in the United States

Constitution such as making the medical decisions, prescribed by a trained physician, for a child. *See Troxel*, 530 U.S. at 66.

1. Parents Have a Fundamental Right to Parent Their Children in The Way They See Fit

The Mariano's have a right to provide the medical care they see fit for their child, when prescribed by a certified physician. When Jess was struggling with anxiety and depression the Mariano's found a trained professional to treat their son. R. at 3. His doctor diagnosed him with gender dysphoria and prescribed him hormone blockers, a long standing tradition for people with gender disconnect. *See Eknes-Tucker*, 2022 WL 1521889, at *8. Doctors have continuously used hormone therapy for patients that have an unusually low level of a specific hormone, not just for patients with gender dysphoria. *See id.* at *8. However, the SAME Act specifically takes away a parent's Due Process right to care for their child by preventing them from utilizing hormone medication to aid with their gender dysphoria treatment. This clearly infringes upon the Mariano's parental rights guaranteed under the Due Process Clause in which parents can make decisions concerning the care and custody of their child.

The Mariano's have proven, through a physician's diagnosis and nine months of therapy, that their child needed this medication because of his gender dysphoria diagnosis. Without the proper medication, Jess could have another mental health crisis, similar to a previous episode where he ingested a handful of pain medication with the intention of never waking up. R. at 4. Therefore, the state is making the decision that Jess's life is not as important as banning medication for the specific purpose of transitioning genders.

The hormone blockers in question are endorsed by at least 22 major medical associations. *Eknes-Tucker*, 2022 WL 1521889, at *8. Further, according to medical guidelines, parents have to undergo extensive screening and a consent process before the medications are given to the

child. *Id.* Therefore, hormone blockers are not experimental, and the Mariano's would have had to go through a screening process to make sure that this type of treatment is the best option for their child. *Id.* at *8-9. This directly contradicts the state's arguments. Parents, medical professionals, and the child themselves are in the best position to make a decision about taking hormone blockers, not the state. *Id.* at *9.

No state or country has implemented a blanket ban of hormone blockers. *Id.* at *8-9. Lincoln would be the first state to do such. If this Court ruled against the lower court, it could also open floodgates to other states wanting to take away their citizens' rights under the Due Process Clause and overburden the court system with lawsuits. In order to preserve parents' constitutionally protected rights to care for their children, and to prevent other states from utilizing this precedent to strip the rights of their citizens under the Due Process Clause, this Court should affirm the lower court's ruling.

B. The Court Correctly Ruled That the Mariano's Rights Under the Equal Protection Clause Were Violated

The Court correctly ruled that the Mariano's rights under the Equal Protection Clause would be violated by the implementation of the SAME Act. Equal Protection guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. In order to evaluate if a citizen's rights under the Equal Protection Clause are going to be violated the court needs to evaluate if the group of citizens in question are part of a suspect or quasi-suspect class and whether that strict scrutiny, intermediate scrutiny or rational basis review applies.

Many courts, at the district level and the Supreme Court, have found the transgender community to be classified as a suspect or quasi-suspect class. *See Bostock v. Clayton Cnty.*, 140 S.C. 1731, 1741 (2020); *Grimm*, 972 F.3d at 608. From *Bowers*, to *Lawrence*, to *Windsor* and

Obergefell, courts have continued to analyze and rule that sex discrimination warrants a heightened scrutiny under the Equal Protection Clause. *Bostock*, 140 S.C. at 1832-33 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

Most recently in states such as Alabama and Texas courts have used heightened scrutiny in analyzing acts that target transgender communities directly. In Alabama, the District Court for the Middle District of Alabama ruled that the transgender community was part of a heighted scrutiny standard because of the sex-based classification that was being made by the Act in question. *See Eknes-Tucker*, 2022 WL 1521889, at *10. In that case, the court concluded that the state could not qualify placing a burden on the transgender community because the state could not justify their reasoning in order to pass the heightened scrutiny standard. *See id.* The state argued that the Act was supposed to protect children from "experimental medical procedures and to stop medical providers from 'aggressively pushing' these medications on minors." *Id.* This is extremely similar to the justification that Lincoln is using. However, 22 medical associations endorse the medication as a "well-established, evidence-based method for treating gender dysphoria in minors." *Id.* Therefore, the court stated that the state's justification was just "hypothesized, not exceedingly persuasive." *Id.*

In Texas, the court ruled in favor of a preliminary injunction because transgender people constitute a quasi-suspect class, and the proposed Act could not withstand the heightened scrutiny review. *Doe v. Abbott*, Plaintiffs' Original Petition and Application for Temporary Restraining Order, Temporary Injunction, Permanent Injunction, And Request for Declaratory Relief, https://www.aclu.org/sites/default/files/field_document/doe_v._abbott_-_petition.pdf (Mar. 1, 2022) [https://perma.cc/TJ3T-ZZLX]. Further, the Seventh and Eleventh Circuits have

held that forms of discrimination against the transgender community is a sex-based discrimination for the purpose of an Equal Protection violations. *See Grimm*, 972 F.3d at 608. According to the Fourth Circuit, transgender people do qualify for heightened scrutiny because they classify as a quasi-suspect class. *See id.* at 607. Therefore, the District Court for the District of Lincoln and the Fifteenth Circuit were aligned with other court's in finding a heightened level of scrutiny was appropriate to apply to the analysis of the SAME Act.

In this specific case, the Fifteenth Circuit agreed with the District Court in ruling that the transgender community should be evaluated under a heighted reviewed. R. at 27. This is also aligned with fellow appellate courts around the country. *See e.g.*, *Grimm*, 972 F.3d at 608. Due to the heightened or intermediate review, the lower courts correctly evaluated the SAME Act under strict scrutiny. Further, the lower courts correctly ruled that the SAME Act would not survive a strict scrutiny analysis. Again, aligned with how the court systems around the country have been ruling. Therefore, this Court should affirm the lower court's decision and agree that the SAME Act infringes upon the Mariano's rights protected under the Equal Protection Clause.

1. The Classifications of Groups: Suspect Class, Quasi-Suspect Class or no Class

There are two different types of classifications for groups based on immutable characteristics or qualifications. Suspect classification generally has to do with race, national origin, or citizenship. *See City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 445-46 (1985). Quasi-suspect class has four factors to analyze in order to determine whether a group is considered a quasi-suspect group. The four factors are; (1) historical background predating the decision; (2) the specific sequence of events leading up to the challenged classification; (3) whether the class may be defined as a discrete group by obvious immutable or distinguishing characteristics; and (4) whether the class is a minority lacking political power. *See Village of*

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265 (1977); *Grimm*, 972 F.3d at 618.

The suspect classification started in the late 1800s when the court in *Korematsu* ruled that the existence of a compelling state interest alone does not justify a violation of the Equal Protection Clause of the Fourteenth Amendment. *See generally*, *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944). The development of the suspect classification went on to develop and include not just national origin race but religion and alienage as well.

A quasi-suspect class was first discussed in *Arlington Heights* where the court ruled that intellectual disability was not a quasi-suspect class. *See Arlington Heights*, 429 U.S. at 265. However, the court did lay out the factors to evaluate if a group of citizens should be considered quasi-suspect. In *Grimm*, the court analyzed these four factors to come to the conclusion that transgender people are a part of a quasi-suspect classification. *See Grimm*, 972 F.3d at 611. Therefore, the Marino's preliminary injunction request would be classified as a quasi-suspect group because it pertains to transgender rights.

The lower court correctly came to the conclusion that the Mariano's are part of a quasi-suspect class by analyzing the four factors that came from *Arlington Heights* and that *Grimm* laid the foundation for. First, the transgender community has been historically subject to discrimination. *See id.* at 597. They have been discriminated against to such a high level that 54% of transgender people report verbal harassment, 53% reported that they were not allowed to dress in the way they wanted, 24% said they had been physically attacked because of their transgender identity. *Id.* at 596. Second, transgender people do not have any intellectual disability therefore they may contribute to society just as well as anyone else. Third, transgender people may not have obvious immutable or distinguishing characteristics but sometimes they do

and that is how other citizens pick out transgender people and harass them. Finally, the transgender class does not have a majority of the political power in the country. Transgender people make up roughly .6% of the population which is approximately 1.4 million adults and very few hold political offices. *Id.* at 594.

After analyzing the four factors that are weighed when a court decides whether a group is a quasi-suspect class, it is clear that transgender people are at the very least a quasi-suspect class.

2. Since Transgender People are Considered a Quasi-Suspect Group, The Court Must Use a Heightened Scrutiny Review

The lower court ruled correctly by stating that the Government could not justify the SAME Act under strict scrutiny. R. at 27. There are three types of scrutiny; strict, intermediate, and rational basis. Under strict scrutiny, which is the evaluation used when there is a suspect class, the government has to prove that it is furthering a compelling state interest and that the law is narrowly tailored and necessary to achieve that state interest. *See generally, City of Boerne v. Flores*, 521 U.S. 507, 514 (1997). With intermediate scrutiny, which is applied for gender only, the government has to prove that there is an important state interest, and the law is substantially related to furthering that interest. *See generally*, *Craig v. Boren*, 429 U.S. 190, 197 (1976). Rational basis is the final category. With rational basis the government needs to show that there is a legitimate state purpose, and the law is rationally related to achieving that state interest. *See generally*, *Railway Express Agency, Inc. v. New York,* 304 U.S. 144, 154 (1938).

Since it has been established that the transgender community would be at least a quasi-suspect group, it warrants some type of heightened scrutiny. Courts have continued to rule that transgender groups should fall into a heightened scrutiny. *See Grimm*, 972 F.3d at 607. Since the sex of transgender individuals does not align with their perceived gender, discrimination against this class would be based on sex. *See id.* Therefore, warranting the same scrutiny as a sex-based

classification. *See id.* The court continued to articulate that the Supreme Court has recognized "inherent differences" between the biological sexes which would make the appropriate justification for distinctions. *See id.* at 607-08.

Further, you cannot analyze transgender as a class without talking about sex-classifications. *See Bostock*, 140 S.C. at 1741. The court in *Bostock* rejected the defendant's argument that discriminating on the basis of homosexuality of transgender status does not involve the discrimination of sex. *Id.* at 1744-45. For example, in *Bostock*, an employer discriminated against employees because an employee, who was a male, was attracted to a male. *Id.* Therefore the employer intends to penalize the male employee for being a male. *Id.* Since the employer allowed their employees to be attracted to someone of the opposite sex, male and female, this employee is being discriminated against because they are attracted to the "wrong sex". *Id.* "Discrimination based on . . . transgender status necessarily entails discrimination on sex; the first cannot happen without the second." *Id.* at 1747. In our case, Jess is being discriminated against because he wants to take hormone blockers not because the drug is out right illegal, but because he is a female taking the medication to stop further female development through puberty. As established, if Jess was a male with low levels of hormones, the same medication would be prescribed without backlash. Therefore, the state is discriminating against Jess because he was a female at birth. The discriminating is based on Jess's birth-sex.

To be consistent with other courts' ruling and to maintain the integrity of the court system, this court should use a heightened review to analyze the SAME Act. Many courts, such as the = Middle District of Alabama, Fourth and Seventh Circuit, have found that transgender people are a quasi-suspect class. Under a heightened scrutiny review, the government must show that the law is related to an important government interest and the law is furthering that

important government interest. *See Grimm*, 972 F.3d at 608. The state argues for the SAME Act because there is a compelling state interest in protecting children from experimental medicine. R. at 14. However, as previously stated, 22 major medical associations have endorsed the hormone blocking medication that is prescribed to children with gender dysphoria. *Eknes-Tucker*, 2022 WL 1521889, at *8. Without the puberty blocking medication, Jess will be at risk for severe anxiety and depression. Therefore, the SAME Act does not protect children as in Jess's case, he would be more likely to die from suicide without the hormone blockers because of his diagnosed anxiety and depression due to his gender disconnect. This Court should uphold the lower court's ruling and affirm the Fifteenth Circuit stating that the Mariano's rights under the Due Process and Equal Protection Clauses were going to be violated.

CONCLUSION

For the forgoing reasons, Respondent respectfully requests that this Court 1) affirm the Fifteenth Circuit Court of Appeals and find that the "serious question" standard is viable after *Winter v. Natural Resource Defense Council*, and 2) affirm the Fifteenth Circuit Court of Appeals and find the Marianos' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment were violated.

Respectfully Submitted,

/s/

Team 3113
Attorneys for Respondent

CERTIFICATE OF SERVICE

We certify that a copy of Respondent's brief was served upon Petitioner, April Nardini, through the counsel of record by certified U.S. mail return receipt requested, on this, the 14th day of September 2022.

Team 3113
Attorneys for Respondent

APPENDIX A

Stop Adolescent Medical Experiments 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

Due Process Clause of the Fourteenth Amendment
United States Constitution

U.S. Const. amend. XIV, § 1

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

APPENDIX C

Rules and Provisions

28 U.S. Code § 1292 - Interlocutory Decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)

(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)

(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

Fed. R. Civ. P. 12(b)(1), 12(b)(6) Defenses and Objections: When and How Presdented: Motion for Judgment on the Pleadings: Consolidating Motions: Waiving Defenses

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

Fed. R. Civ. P. 56(a) Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.