**No. 22-8976**

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**IN THE**

# Supreme Court of the United States

**October Term 2022**

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

***Petitioner,***

***— versus —***

**Jess MARIANO, Elizabeth MARIANO,**
**and Thomas MARIANO,**

***Respondents.***

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

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## BRIEF FOR PETITIONER

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**Team 3114**

***Attorneys for Petitioner***

## QUESTIONS PRESENTED

I. Whether this Court's adoption of the traditional four-prong standard in *Winter*, which requires movants to show a likelihood of success on the merits of their claims before granting preliminary injunctions, forecloses the "serious questions" standard, which dispenses with the likelihood of success requirement in cases with problems of proof and instead asks if the movants have raised "serious questions" regarding the merits of their claim.

II. Whether the district court properly granted a preliminary injunction enjoining enforcement of a law enacted to safeguard public health based on the theory that parents have a substantive due process right to seek gender transitioning treatment for their minor children and that the law discriminates based on transgender status.

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## OPINIONS BELOW

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

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment of the United States Constitution. The Due Process and Equal Protection Clauses of the Fourteenth Amendment provide that "no State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1. *See* App. A.

This case also involves the Stop Adolescent Medical Experimentations Act, 20 Linc. Stat. §§ 1201–06 (2022). *See* App. B.

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

This case is about whether the state of Lincoln has the authority to regulate risky experimental treatments to protect children. R. at 3. Gender dysphoria is a serious mental health disorder. Experts are uncertain about many aspects of gender dysphoria in children, including how the disorder manifests, whether it will persist over time, and even which treatment options are medically necessary or effective. R. at 2. Emerging scientific evidence indicates some treatments pose grave risks to children, including irreversible loss of fertility, cancer, liver dysfunction, and cardiovascular disease. R. at 3. Concerned by the harm these experimental procedures may inflict, Lincoln passed the Stop Adolescent Medical Experimentations

("SAME") Act in 2021. R. at 2–4. Respondents, the Marianos, sued to enjoin enforcement of the Act. R. at 1.

***Gender Dysphoria.*** Gender dysphoria is a mental health condition experienced by a small percentage of children and is characterized by emotional distress resulting from a sense of discomfort at the physical characteristics or social roles of one's assigned sex. R. at 1. The disorder has not been thoroughly studied and many questions exist regarding its manifestation. Physicians cannot predict with certainty whether the disorder will persist. R. at 7. In fact, many cases of the disorder resolve naturally by adulthood with no need for transitional treatment. R. at 2.

***Treatment Options.*** All leading medical organizations agree that children suffering from gender dysphoria should receive gender-affirming care. R. at 7. Because of the unpredictability inherent in manifestation and persistence of the disorder, there is no universal course of treatment for any child so treatment options are tailored to each patient's individual needs. R. at 6. Gender-affirming care spans a spectrum of different options, ranging from social affirmation of a child's expressed gender identity; mental health treatment to help children cope with co-morbid anxiety and depression which is a hallmark of the disorder; use of puberty blockers to delay onset of hormonal development; cross-sex hormones to induce development of secondary sex characteristics; and finally, gender reassignment surgery. The "best [clinical] practices" in helping children cope with social and emotional distress are mental health treatment and counseling. R. at 6. The Diagnostic and Statistical Manual of Mental Disorders,[1] the leading psychiatric diagnostic manual in the United States, recommends a supportive treatment environment as being the most effective way to mitigate distress. R. at 5. But experts agree that

[1] Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013).

medical interventions are not appropriate before a child reaches puberty, and gender reassignment surgery is not appropriate before adulthood. R. at 6. Most importantly, the Federal Drug Administration ("FDA") has not authorized the use of puberty blockers, cross-sex hormones or gender reassignment surgery to treat gender dysphoria in children. R. at 15. The Lincoln Legislature found these risks include irreversible infertility, cancer, liver dysfunction, cardiovascular disease, and bone density. R. at 3.

***Lack of Studies.*** There are very few studies examining the medical necessity or efficacy of gender transitioning treatments for treating children with gender dysphoria. R. at 7. Emerging scientific studies show that gender transition drugs and surgeries pose grave potential harms when administered to children. R. at 3. Studies undertaken in Sweden and Finland determined that the risks of puberty blockers and other gender transitioning drugs were outweighed by their benefits R. at 7. The use of these treatments for children is banned in Sweden and Finland. R. at 7.

***The Stop Adolescent Medical Experimentations Act.*** In 2021, the Lincoln Legislature passed the Stop Adolescent Medical Experimentation ("SAME") Act. The Legislature recognized that many cases of gender dysphoria resolve naturally by childhood; there is a lack of studies demonstrating the health benefits of gender transition drugs and surgery in treating children with dysphoria; that evidence is emerging that these gender transition drugs and surgeries pose grave harms when administered to children; that in the face of such uncertainty regarding efficacy and safety of these treatments, parents and children cannot give valid informed consent; and there are other conventional and widely accepted methods that effectively and safely treat children with gender dysphoria. R. at 2–3.

Accordingly, the Legislature banned physicians from performing or prescribing any gender transition drugs or surgeries to any individual under the age of eighteen. R. at 3. Although the Act prohibits the use of these treatments in changing an individual's biological sex, the treatments are still accessible for their approved purposes. R. at 3. The purpose of the Act is to protect children from the risks of unstudied transitioning treatments, especially when the efficacy is unsubstantiated by conclusive evidence. R. at 3. Rather, the Legislature sought to encourage more fundamental, safer forms of treatment, such as therapy and counseling. R. at 3.

***The Marianos.*** Jess Mariano is a fourteen-year-old who lives in Lincoln with his parents. R. at 4. Jess was diagnosed with gender dysphoria at eight years old. R. at 4. At age ten, Jess's body showed signs of puberty, including early breast tissue development. R. at 5. Because this development was causing Jess severe mental distress, Jess's physicians treated him with puberty blockers. R. at 5. The blockers stopped Jess' hormonal development, but if he discontinues using them, he will resume natural puberty. R. at 5. The treatment has not been effective in alleviating his symptoms, his physicians recommended "breast [removal] surgery may be necessary to the successful treatment of his gender dysphoria before he turns eighteen." R. at 5.

## II. PROCEDURAL HISTORY

***District Court.*** On November 4, 2021, the Marianos filed a complaint, alleging under 42 U.S.C. § 1983 that the SAME Act violated their constitutional rights to Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment. R. at 1. A week later, the Marianos moved to enjoin the government from enforcing the SAME Act before it became effective on January 1, 2022. R. at 1. On November 18, 2021, Lincoln responded with a motion to dismiss, and a response urging the court to deny the Marianos' motion for preliminary injunction. R. at 1. Less than a month after the Marianos first sued, a hearing on the motion for

preliminary injunction was held on December 1, 2021. R. at 1–2. On December 16, 2021, only six weeks after the Marianos first sued, the district court issued an order enjoining the government from enforcing the SAME Act. R. at 22. The court certified this case for interlocutory appeal. R. at 22.

***Appellate Court.*** Lincoln appealed the district court's grant of the preliminary injunction under 28 U.S.C. § 1292(b). R. at 23. On May 12, 2022, the Fifteenth Circuit affirmed the district court's order. R. at 27. Judge Gilmore dissented, arguing that the district court and the majority failed to recognize the proper standard for granting a preliminary injunction. R. at 28. Judge Gilmore also argued the district court erred in concluding the Marianos could prevail in any of their claims, and therefore, the district court had abused its discretion in granting the preliminary injunction. R. at 29–34.

## SUMMARY OF THE ARGUMENT

This case involves the right of the state of Lincoln to regulate healthcare to protect its most vulnerable population, its children. The Lincoln Legislature passed the Stop Medical Experimentations on Adolescents ("SAME") Act to protect children from the harmful and irreversible effects of certain gender transitioning treatments. The Food and Drug Administration ("FDA") has not approved the banned gender transitioning treatments to treat children with gender dysphoria, so the Act prohibited physicians from prescribing the treatments off-label for all individuals under the age of eighteen for the purpose of arresting their biological growth. The Marianos filed suit to enjoin enforcement of the SAME Act, alleging that it violated their constitutional rights to obtain specific medicine and discriminated on the basis of transgender status. Because the district court enjoined the government from being able to enforce a legally enacted statute without even finding that the Marianos were likely to succeed on the merits of

their claim, this Court should reverse the Fifteenth Circuit and vacate the district court order granting preliminary injunction.

## I.

The district court lacked discretion to grant preliminary injunctive relief without a showing that the Marianos were likely to succeed on the merits of their claims. A preliminary injunction is an extraordinary and drastic remedy because it sidesteps the many components of our justice system by allowing movants to get relief before they have even tried the merits of their case. Accordingly, this Court has adopted a four-prong standard for courts to apply when deciding whether to grant relief. Under this standard, a movant must show a likelihood of success on the merits of their claim. Historically, application of this standard has been stringent to protect the extraordinary and drastic nature of preliminary injunctive relief.

Contrary to this Court's precedent, the district court applied an alternative "serious questions" standard, which allowed the court to grant preliminary injunctive relief without the Marianos showing a likelihood they would succeed on their claims. Applying this lesser standard was an abuse of discretion. In doing so, the district court ignored decades of controlling precedent. As demonstrated by the application here, use of the "serious questions" standard allows movants to sidestep the deliberative judicial process and makes it easy for courts to invade the province of the legislature.

The district court and Fifteen Circuit's reliance on the "serious questions" standard directly conflicts with this Court's precedent, which forecloses the viability of this alternative standard. The "serious question" standard dispenses with the essential threshold requirement—that the movant show a likelihood of success on the merits of their claim. Because the "serious questions" standard directly contradicts this Court's precedent, this Court should reverse the

district court's order and vacate the preliminary injunction enjoining enforcement of the SAME Act.

Moreover, even if this Court holds that the viability of the "serious questions" standard is not foreclosed by its own jurisprudence, this is not an appropriate case for this Court to recognize this lower standard. The injunction sought by the Marianos is disfavored because it enjoined enforcement of a government action taken in the public interest. As a result, the Marianos should be required to demonstrate that their claims are likely to succeed. Therefore, because the district court necessarily erred when it applied the "serious questions" standard, which is unviable and inappropriate in this case, this Court should vacate the preliminary injunction.

**II.**

Even if this Court is to recognize the "serious questions" standard and apply it to this case, the district court still erred in granting preliminary injunctive relief because the Marianos failed to raise a serious question regarding their constitutional challenges.

First, Elizabeth and Thomas Mariano have no cognizable substantive due process claim. Parents do not have a fundamental right to access any specific treatment, much less an experimental one. This Court should not create a new fundamental right where it is not found in our Nation's history or traditions or deeply rooted in our implicit notion of ordered liberty. But regardless of how this Court characterizes this right, the SAME Act survives strict scrutiny because the Lincoln legislature had a compelling interest in safeguarding the wellbeing of children and the Act is narrowly tailored because it prohibits the use of only those untested, experimental treatments which pose grave, irreversible risks of harm.

Second, Jess Mariano has no cognizable equal protection claim. The SAME Act classifies based on age and medical procedure because it protects any child under the age of eighteen,

regardless of gender, from accessing certain experimental treatments. The SAME Act easily survives rational basis review because the Legislature rationally prohibited only experimental treatments whose grave risks outweighed their unsubstantiated efficacy. But even if this Court is to find that the Act classifies based on gender, the SAME Act also survives heightened scrutiny because the Legislature banned only those treatments which had not been adequately studied but posed grave dangers, only for individuals under the age of eighteen, and there were other treatment options proven to be effective and safe in treating the same disorder.

Therefore, this Court should vacate the preliminary injunction because even under the "serious questions" standard, the district court erred when it found that the Marianos raised serious questions regarding the merits of their Substantive Due Process and Equal Protection claims.

## ARGUMENT AND AUTHORITIES

***Standard of Review.*** Federal Rule of Civil Procedure 65(a) authorizes the courts to issue preliminary injunctions. Fed. R. Civ. P. 65(a). The rule does not supply a standard—courts have discretion on what standard to apply when considering whether to grant injunctive relief. This Court reviews a grant of a preliminary injunction for abuse of discretion. *Ashcroft v. ACLU*, 542 U.S. 656 (2004). A district court "necessarily abuses its discretion" if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, or makes findings of fact clearly erroneous. *Highmark, Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559 (2014) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). Even under an abuse of discretion standard, "a misunderstanding of the applicable law generally constitutes reversible error." *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191 n.1 (2022).

## I. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT RELAXED THE STANDARD FOR A PRELIMINARY INJUNCTION BY GRANTING RELIEF WITHOUT A CLEAR SHOWING THAT THE MARIANOS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGES TO THE SAME ACT.

The preliminary injunction is an "extraordinary and drastic" remedy because it allows a court to grant relief before a trial on the merits, and sometimes even before the parties have engaged in meaningful discovery. *Yakus v. United States*, 321 U.S. 414, 440 (1944). When a court grants preliminary injunction, it directs the conduct of a party, and does so with the full backing of its coercive powers**.** *Nken v. Holder*, 556 U.S. 418, 428 (2009). As a result, the enjoined party is prevented from engaging in conduct it may have every right to do, such as enforcing duly enacted legislation. Dan B. Dobbs, *Law of Remedies: Damages—Equity—Restitution* 253 (2d ed. 1993). Because this remedy is such a "powerful exercise of judicial authority in advance of trial," a movant is never entitled to it and courts should only grant injunctions careful consideration of the public consequences. *Ne. Fla. Chapter of Ass'n of Gen Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990); *see Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (holding injunctive relief is not a matter of right even in cases where the movant may eventually suffer irreparable harm).

To be granted relief, a movant must clearly "show (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of the equities tips in his favor, and (4) that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 550 U.S. 7, 20 (2008). This Court has stated: "An injunction should issue only if the traditional four-factor test is satisfied." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010). This Court's expressly commands that a court must deny relief if the movant cannot show a likelihood of success. *Real Truth About Obama v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) (finding "serious questions" standard no longer

applicable after *Winter*), *vacated on other grounds*, 559 U.S. 1089 (2010), *and adhered to in part sub nom.* 607 F.3d 355 (4th Cir. 2010).

An overwhelming majority of circuits apply the traditional four-prong standard to preliminary injunctions[2] A minority, including the Fifteenth Circuit, permit an alternative standard, one which lowers the burden on movants because it dispenses with the requirement that the movant show a likelihood of success on the merits of their claim. Instead, movants need only show "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in their favor." *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015); *see also Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011) (holding serious questions test remains viable but movants "must also satisfy other *Winter* factors"). This option permits the court to grant preliminary injunctive relief if the movant cannot show a likelihood of success in the merits of their claim. *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

Despite this Court's well-established precedent and its explicit directive in Winter requiring movants to show a likelihood of success on the merits of their claim before granting preliminary relief, the Marianos ask this Court to lower the bar and grant relief if the movant raises only "serious questions." This alternative standard is clearly inconsistent with this Court's express

[2] The First, Third, and Seventh Circuits treat one or more factors as threshold requirements before continuing the inquiry. *Doe v. Trs. Of Bos. Coll.*, 942 F.3d 527, 533 (1st Cir. 2019) (likelihood of success); *Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012) (likelihood of success); *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357 (7th Cir. 2019) (likelihood of success and irreparable harm). The Sixth Circuit encourages an equal balancing of all four factors. *Wilson v. Williams*, 961 F.3d 829, 944 (6th Cir. 2020). The Fourth, Fifth, Eighth, Ninth, Eleventh and Federal Circuit assert all factors must be satisfied. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 234 (4th Cir. 2014); *Butts v. Aultman*, 953 F.3d 353, 361 (5th Cir. 2020); *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 649, 699 (8th Cir. 2021); *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1080 (9th Cir. 2020); *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016); *Pitman v. Cole*, 267 F.3d 1269, 1292 (11th Cir. 2001).

requirements, so the district court and Fifteenth Circuit erred in upholding its viability. This Court's precedent requires the Marianos demonstrate a likelihood of success on the merits of their claims before the district court may quash the authority of another branch of government from enforcing a statute enacted to protect the public. The traditional standard is necessary to protect the extraordinary nature of preliminary injunctive relief by imposing a burden proportionate to the relief granted and to preserve judicial economy. The lesser "serious questions" standard is no longer viable because it dispenses with the most essential consideration a court must make before granting relief—whether a movant can show likelihood of success on the merits of their claim. Therefore, this Court should reverse the Fifteenth Circuit and vacate the district court's order granting preliminary injunctive relief.

Alternatively, even if this Court is to carve out a place in its precedent for the "serious questions" standard, that standard still should not apply because the Marianos are seeking to enjoin government enforcement of a duly enacted statute.

### A. A District Court Lacks the Discretion to Grant Preliminary Injunctive Relief in Any Case Where a Movant Cannot Establish a Likelihood of Success on the Merits.

The traditional standard is appropriate and adequate because it honors the extraordinary nature of preliminary injunctive relief. By requiring movants to prove their likely to succeed on the merits, the standard imposes a burden proportional to the remedy sought and promotes judicial economy.

This Court's precedent provides a strong foundation for the preliminary injunction four-prong test provided in *Winter*. *See Nken v. Holder*, 556 U.S. 418 (2009) (adopting traditional standard for stays); *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citations omitted) (movant must demonstrate likelihood of success on the merits); *Ashcroft v. ACLU*, 542 U.S. at 666 ("[A]

district court must consider whether the plaintiffs have demonstrated they are likely to prevail on the merits.").

Historically, the likelihood of success prong has been considered one of the primary threshold considerations. *Trump v. Hawaii*, 138 S. Ct. 2392, 2422 (2018) (citing *Winter*, 550 U.S. at 32) ("Because plaintiffs have not shown that they are likely to succeed on the merits of their claims, we reverse the grant of the preliminary injunction as an abuse of discretion."); *see S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (holding this Court should not grant preliminary injunctive relief unless the applicants can establish their entitlement to relief is "indisputably clear").

More recently, this Court has emphasized that obtaining preliminary injunctive relief must be predicated on the likelihood of success prong. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, this Court upheld a preliminary injunction because the movants made "a strong showing" of the likelihood that their First Amendment claims were likely to succeed. 141 S. Ct. 63, 66 (2020).

This is a tradition adhered to by most of the circuit courts.[3] Following *Winter*, several circuits abolished use of the "serious questions" standard. *Am. Trucking Ass'n v. City of Los*

[3] Nine circuit courts require movants to demonstrate a likelihood of success on the merits as a threshold requirement to prevail on a motion for preliminary injunction. *Doe v. Trs. of Bos. Coll.*, 942 F.3d 527, 533 (1st Cir. 2019) ("[L]ikelihood of success on the merits is the most important of the four preliminary injunction factors."); *Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012) ("[M]oving party's failure to show a likelihood of success on the merits 'must necessarily result in the denial of a preliminary injunction.'") (citation omitted); *see League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 234 (4th Cir. 2014); *Butts v. Aultman*, 953 F.3d 353, 361 (5th Cir. 2020); *Wilson v. Williams*, 961 F.3d 829, 944 (6th Cir. 2020) (holding that court cannot issue preliminary injunction when there is no likelihood of success); *GEFT Outdoors, LLC v. City of Westfield*, 922 F.3d 357, 362 (7th Cir. 2019) (holding that court "must deny" injunction if movant fails to show some likelihood of success) (citation omitted); *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 649, 699 (8th Cir. 2021) (holding that probability of success is most significant factor when party seeking preliminary injunction preventing implementation of government statute); *Innovation L. Lab v. Wolf*, 951 F.3d 1073, 1080 (9th Cir. 2020) ("Likelihood of success on the merits is a threshold inquiry and the most important factor."); *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016)

*Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) ("To the extent that our cases have suggested a lower standard, they are no longer controlling, or even viable."); *Real Truth About Obama v. FEC*, 575 F.3d at 347 (finding "serious questions" standard no longer applicable after *Winter*), *vacated on other grounds*, 559 U.S. 1089 (2010), *and adhered to in part sub nom.* 607 F.3d 355 (4th Cir. 2010).

The serious questions standard is fatally flawed in light of this Court's precedent and the practice adhered to in most circuit courts. The traditional standard correctly imposes the right burden on movants. By requiring movants to show a likelihood of success on the merits, this Court can ensure that preliminary injunctive relief is granted in the most extraordinary and drastic circumstances.

### 1. The traditional four-prong standard imposes a burden proportionate to the relief sought and guarantees that preliminary injunctive relief is reserved for extraordinary and drastic circumstances.

By requiring movants to show a likelihood of success on the merits, the traditional four-prong test serves as a check on both plaintiffs and courts. It ensures plaintiffs do not easily sidestep the judicial process and obtain relief they are not entitled to.

Injunctions lack the safeguards against abuse or error that come with a full trial on the merits. *Ne. Fla. Chapter of Ass'n of Gen Contractors of Am.*, 896 F.2d at 1285. Relief is being granted before the movant has been able to prove the merits of their case, *Gonzales v. O Centro Espirita Beneficente Unia do Vegetal*, 546 U.S. 418, 428–30 (2006). Preliminary injunction hearings are based on expedited briefing and little opportunity for the adversarial testing of

("[A]ny modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible."); *Pitman v. Cole*, 267 F.3d 1269, 1292 (11th Cir. 2001) ("[W]hen a plaintiff fails to establish a likelihood of success on the merits, a court does not need to even consider the remaining three prerequisites of a preliminary injunction.").

evidence. They tend to push judges into making rushed, high-stakes, low-information decisions. *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 793 (7th Cir. 2013).To combat the high risk of error, movants must make a clear showing of each required element. *Real Truth About Obama, Inc.*, 575 F.3d at 346–47.

To protect the extraordinary nature of this remedy, this Court expressly imposed "stringent" requirement, including that a movant show a likelihood of success on the merits of their claim. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). Courts grant preliminary injunctions soon after cases are filed and sometimes before discovery has even begun. Because there is such room for error, the "burdens at the preliminary stage track the burdens at trial." *O Centro Espirita Beneficente Unia do Vegetal,* 546 U.S. at 428–30. The traditional standard serve as an important check to ensure the integrity of our judicial system by requiring courts to only grant preliminary relief to parties who show they are entitled to it.

This Court has overturned preliminary injunctions because movants have not met their burden to obtain such drastic and extraordinary relief. In *Winter*, the environmental organizations were concerned that the Navy's use of mid-frequency sonar in training exercises would cause serious harm to various species of marine mammals. 550 U.S. at 13. The organizations sought a preliminary injunction based on certain environmental statutes. The District Court and Ninth Circuit concluded that because plaintiffs had shown a strong likelihood of success on the merits, a preliminary injunction may be granted based on only a "possibility" of irreparable harm. *Id.* at 17. This Court reversed, holding that even though plaintiffs had shown a likelihood of success on their claim, a mere "possibility" of harm was not enough to sustain a preliminary injunction was too lenient. *Id.* at 20.

This Court expressly requires movants to show a likelihood of success on the merits of their claim before granting preliminary injunctive relief. This requirement serves an important gate-keeping function because it limits frivolous claims and ensures that this extraordinary relief is only granted to movants who are entitled to it.

**2. This Court's adoption of the traditional, four-part standard in *Winter* necessarily forecloses viability of the "serious questions" standard because the "serious questions" standard does not require movants to show a likelihood of success on the merits.**

The "serious questions" standard permits with unsound claims even though they are not entitled to it. Instead, the standard sidesteps this requirement completely, allowing for courts to award relief even when a movant *cannot* show a likelihood of success. *Citigroup*, 598 F.3d at 35; *see Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings*, 696 F.3d 206, 215 (2d Cir. 2012) (indicating that plaintiffs can show either a likelihood of success on the merits or that there are sufficiently serious questions regarding the merits as to make "a fair ground for litigation and a balance of hardships tipping decidedly toward the" movant). This directly contradicts this Court's requirement that movants show a clear likelihood of success. *Winter*, 550 U.S. at 58.

Circuit courts have recognized the insufficiency of the "serious questions" standard. Some courts have upheld use of "serious questions" standard is viable, but only if the other requirements of the traditional standard have also been met. This is to say, that they adopt the standard's balancing test, but require for movants to show a likelihood of success on the merits of their case. This is necessary because there is little clarity on what kind of bar the "serious questions" standard requires a movant to clear to be granted preliminary injunctive relief. In *Citigroup*, the district court granted a preliminary injunction based on a "serious question," even though the movant had failed to make a showing of likelihood of success on the merits. 598 F.3d

at 33–34. The Second Circuit provided no clarity on what constituted a "serious question," only that it was "grave." *Id.* at 36.

Circuits have split on the status of the serious question standard in light of *Winter*. Some circuits have abandoned use of the standard, finding it to directly contradict *Winter*'s holding. Others have modified its application to still be able accommodate the flexibility espoused in applying the standard. The Seventh Circuit held that although the serious questions standard may be applicable, it still requires movants to show a "plausible claim on the merits." *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). In that case, the Seventh Circuit balanced the requirements imposed by the traditional four-prong test, reasoning that "the more net harm an injunction can prevent, the weaker the plaintiff's claims can be while still supporting some preliminary relief." But even "irreparable injury is not enough to support equitable relief . . . there *must* also be a plausible claim on the merits." *Id.* at 725 (emphasis added).

Application of the "serious questions" standard is fraught with uncertainty. Under it a court may direct the conduct of a party and grant relief, even if movants cannot "promise a certainty of success, nor even present a probability of success." *Cascadia Wildlands v. Scott Timber Co.*, 715 F. App'x 621, 644 (9th Cir. 2017). In fact, some courts have explicitly held this test permits the grant of pretrial injunctive relief even if the movant has "less than a 50% chance of success on the merits." *See D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 999 (8th Cir. 2019). The little consensus regarding what this standard requires magnifies the uncertainty in its application.

The Marianos argue that the "serious questions" standard should apply because it allows courts to remain flexible when granting relief. But this argument undermines the entire purpose

of preliminary injunctive relief. The integrity of the judicial system lies on granting relief after a party shows that it is legally entitled to it and its claims have been tested by an adversarial process. Allowing for movants to obtain relief on claims which have no chance of success, and sometimes before the discovery process has even begun, undermines the integrity of the judicial system. To do so when enjoining a government agency from enforcing a law enacted to safeguard public health is a breach of separation of powers. The extraordinary nature of preliminary injunctive relief demands a stringent application and should at the very least require that movants show they are entitled to relief before relief is granted.

The serious questions standard is not viable in light of *Winter* and this Court's precedent. It endangers the integrity of the judicial system.

### B. The District Court Necessarily Erred When It Granted a Preliminary Injunction Enjoining Enforcement of a Law Enacted Through the Democratic Process Without a Clear Showing of Substantial Likelihood of Success on the Merits.

A court's consideration of whether to grant a preliminary injunction presents serious public interest concerns. *Ne. Fla. Chapter*, 896 F.2d 1283. When a court preliminary enjoins a state law passed by elected officials, the court effectively overrules a decision of the people. *Id.* at 1285. When a court preliminary enjoins enforcement, a law passed by elected officials, the court is effectively overruling a decision of the people without a final adjudication on the merits of the case in front of it. *Id.* The remedy subverts the democratic process by taking policy decisions out of the hands of a publicly accountable legislature and placing it in the hands of the court.

Historically, this Court has required movants to demonstrate a "stronger showing of entitlement to relief" when the pretrial injunction affects "government action taken in the public interest pursuant to statutory or regulatory scheme." *See, e.g., City of Los Angeles v. Lyons*, 461 U.S. 95, 104 (1983). There is a lot of wisdom in requiring a "stronger showing of entitlement"

because of the dramatic nature of enjoining a government agency from enforcing a valid law it has legally enacted. *Id.*

Even circuits which still apply the "serious questions" standard recognize its limitation in contexts where government enforcement of a duly enacted law is being challenged. In fact, the very case relied on by the district court here explicitly holds that the "serious questions" standard does not apply when a movant is seeking to enjoin a government action. *Citigroup*, 598 F.3d at 35 n.4[4] ("We have recognized an exception [to the serious questions standard]: [W]here the moving party seeks to stay government action taken in the public interest, the district court should not apply the less rigorous ["serious questions"] standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim.") (citing *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)).

The district court erred in using the "serious questions standard to enjoin the SAME Act. R. at 11. It was required to apply the traditional four-prong standard before stopping the executive branch from enforcing a law validly enacted by Lincoln's Legislature. *See Citigroup*, 598 F.3d at 35 n.4.

This Court requires movants to adhere to the more rigorous four-prong standard and show a likelihood of success on the merits of their claim. *See, e.g.*, *Lyons*, 461 U.S. at 104. Here, the district court necessarily erred in applying the less rigorous "serious questions" standard. The

[4] The Second and Eighth Circuits have expressly held that alternative standards are not sufficient when a movant seeks to enjoin government action taken in the public's interest. *Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020) (holding that in such cases, the "movant *must* demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction.") (emphasis added); *see We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 295 (2d Cir. 2021); *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 394, 699 (8th Cir. 2021) (holding that more rigorous likelihood of success standard required when party seeking to enjoin government action).

stakes are too high, and the court's discretion is too broad. The SAME Act was passed by elected officials, speaking on behalf of their constituents. R. at 1. Applying this lesser standard was clear reversible error and unsupported even by the precedent cited by the district court. The district court necessarily abused its discretion when it failed to apply the proper standard, so this Court should reverse the district court's judgment and remand this case with instructions to vacate the preliminary injunction.

## II. THE MARIANOS FAILED TO RAISE SUFFICIENTLY SERIOUS QUESTIONS GOING TO THE MERITS OF THEIR CLAIMS.

Even if this Court recognizes an application of the "serious questions" standard in this, the district court nonetheless erred when it found that the Marianos raised "serious questions" regarding their Substantive Due Process or Equal Protection claims. Neither constitutional theory provides a legal basis under which they could be entitled to relief.

The Marianos fail to raise a serious question regarding their Substantive Due Process claim because they do not have a fundamental right to access any specific treatment, much less an experimental one. This Court should not create a new fundamental right where it does not exist. But regardless of how this Court characterizes this right, the SAME Act survives strict scrutiny because the Lincoln legislature had a compelling interest in safeguarding the wellbeing of children and the Act is narrowly tailored to achieve these purposes.

Similarly, the Marianos failed to raise serious questions regarding the Equal Protection claim because the SAME Act classifies based on age and medical procedure. It protects any child under the age of eighteen, regardless of gender, from accessing certain experimental treatments. The SAME Act easily survives rational basis review. But even if this Court is to find that the Act classifies based on transgender status, the SAME Act also survives heightened scrutiny.

This Court should vacate the preliminary injunction because the district court erred when it found that the Marianos raised serious questions regarding the merits of their claims.

### A. The Marianos Fail to Allege Sufficiently Serious Questions Regarding Their Substantive Due Process Claim.

The Due Process Clause of the Fourteenth Amendment forbids states from depriving any person of life, liberty or property without due process of law. U.S. Const. amend. XIV. The Clause includes a substantive component which provides for heightened protection against government interference with certain fundamental rights and liberty interests. *Dobbs v. Jackson Whole Women's Health*, 142 S. Ct. 2228, 2242–43 (2022). In deciding whether a right not expressly referred to in the Constitution is fundamental, judicial precedent "has long asked whether the right is deeply rooted in the Nation's history and tradition and whether it is essential to the Nation's scheme of ordered liberty." *Id.* at 2244–45 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

The Marianos assert they have a fundamental right to direct the medical care of their child, and that this right includes the right to access any treatment, even if it experimental and has not approved for such usage. Although parents have a fundamental right to direct the care of their child, this right is not so extensive as to grant parents access to any specific treatment, much less an experimental one. This Court should not create a new fundamental right if it is not deeply rooted in this Nation's history or tradition or essential to the scheme of ordered liberty.

Should the court broaden the Marianos fundamental right to include access to any treatment, the SAME Act survives strict scrutiny (and necessarily all other levels) because the Lincoln legislature had a compelling interest in safeguarding the wellbeing of children and the Act is narrowly tailored to achieve these purposes. Therefore, this Court should vacate the preliminary injunction because even under the "serious questions" standard, the district court

erred when it found that the Marianos raised serious questions regarding the merits of their claims.

Alternatively, if this Court is to hold that parents do have a fundamental right to subject their children to experimental treatments, the SAME Act survives the corresponding level of scrutiny because Lincoln has a compelling interest in safeguarding the wellbeing of its children and the Act is narrowly tailored because it protects children only from risky, unproven treatments but leaves open other avenues of treatments proven effective in treating gender dysphoria.

### 1. Parents do not have a fundamental right to subject their children to any specific medical treatments, much less experimental ones.

Fundamental rights are those which are deeply rooted in our nation's history and tradition or are fundamental to our scheme of ordered liberty. *Dobbs*, 142 S. Ct. at 2242–43. Determining whether a right is fundamental begins with a careful description of the asserted right. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (holding that "mere novelty" of a claim is reason enough to doubt it is fundamental). The district court formulated the right at issue as "the right to direct medical care of their child" and includes the "more specific right to obtain medical and surgical gender-affirming care according to currently medically accepted standards in this county." R. at 17.

Although parents have a fundamental right to direct the care of their children, these rights are subject to regulation for the public interest and when in the child's best interest. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Additionally, this parental right to direct a child's care is "no greater than [the parent's] right to make decisions for himself." *Doe By & Through Doe v. Pub. Health Tr. of Dade Cnty.*, 696 F.2d 901, 903 (11th Cir. 1983). No parent has the right to access any treatment for their child which they cannot access for themselves. *Id.* The Marianos

assert they have the fundamental right direct the medical care of their child, "includ[ing] the more specific right to obtain medical and surgical gender-affirming care according to currently medically accepted standards in this county." R. at 17.

The Marianos' fundamental right to direct the care of their child is not at challenge here. The SAME Act does not prohibit Marianos from deciding or obtain medical treatment for Jess. Rather, what is at issue is whether the Marianos can access the *specific* experimental treatments prohibited by the Act, despite the government's determination that such treatments are risky and may be ineffective. This right to access any specific treatment, even if it is not approved for such use, is not a fundamental right. *Dobbs*, 142 S. Ct. at 2242. The Court should not expand parents' fundamental right to direct medical to also allow parents to assert the right to access any treatment, much less experimental ones because this right is not "deeply rooted in our nation's history and tradition or fundamental to our scheme of ordered liberty." *Id.*

Individuals do not have a fundamental right to access any specific treatments. *Dobbs*, 142 S. Ct. 2228; *see Morrissey v. United States*, 871 F.3d 1260, 1268 (11th Cir. 2017) (no right to procreate through IVF); *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711 (D.C. Cir. 2007) (no "right to procure and use experimental drugs"); *Raich v. Gonzales*, 500 F.3d 850, 864 (9th Cir. 2007) (no right to medical marijuana). Certainly, individuals do not have a right to transitioning treatments.

This Court has rejected the assertion that an individual has a fundamental right to any specific medical treatment. *Morrissey*, 871 F.3d at 1269. In *Morrissey*, the Plaintiff sought to access in vitro fertilization, arguing that he had a fundamental right to this treatment because it implicated his right fundamental right to procreate. *Id.* This Court rejected the plaintiff's characterization of the right, reasoning the relevant question was not whether the plaintiff had a

right to procreate but rather whether he had a right to procreate using a specific medical procedure. *Id.* at 1268–69. He did not. Use of such a procedure is a "modern phenomena," not rooted in this Nation's tradition and history. *Id.* Therefore, the right to access specific medical treatment is not a fundamental one, even if for the fundamental right to procreate. *Id.*

Likewise, transitioning treatments are also a "modern phenomena." The use of transitioning treatment is not one which is rooted in our Nation's history and traditions. It is actually not even a practice which is deeply rooted in medicine. The first study to examine the use of the gender transition treatments at issue in treating children with gender dysphoria was published as recently as ten years ago. *See* Johanna Olson-Kennedy, et al., *Impact of Early Medical Treatment for Transgender Youth: Protocol for the Longitudinal Observational Trans Youth Care Study*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6647755/.

The Marianos do not have a right to any specific treatment. If this were the case, parents in this country could assert this right to access marijuana or other banned substances for their children's use, treatments not accessible by anyone else. This Court should not create a fundamental right where it is not supported by our Nation's history, traditions, this Court's precedent or even the medical establishment. There is no fundamental right to access any specific treatments.

Because there is no deeply rooted right to obtain transitioning treatments for children, it make no difference whether those treatments are experimental. Yet even if this Court enlarges a parent's fundamental right to direct medical care of his child to include the right to specific treatment, this Court should not extend that protection to experimental or unapproved treatments.

The Marianos do not have a right to any *experimental* treatment. *Abigail*, 495 F.3d at 711 (no "right to procure and use experimental drugs"). The Legislature found that the use of certain

gender transition therapies, such as puberty blockers and gender reassignment surgery, was experimental because their efficacy had not been adequately examined. 20 Linc. Stat. § 1201 (2022). Most importantly, the use of these treatments has not been approved by the Federal Drug Administration. R. at 7.

The Legislature relied on many sources in drafting the SAME Act, including testimony from experts and patients who had undergone the treatments in question. R. at 7–8. Two benchmark studies characterize the treatments at issue as "experimental." *See Guideline Regarding Hormonal Treatment of Minors with Gender Dysphoria at Tema Barn–Astrid Lindgren Children's Hospital (ALB)* (Apr. 2022), at 12. In reviewing the practice of prescribing puberty blockers for young children diagnosed with gender dysphoria, the United Kingdom's High Court concluded that such treatments were "experimental or innovative in the sense that there are currently limited studies/evidence of the efficacy or long-term effects of the treatment." *Doe v. Snyder*, 28 F.4th 103, 109 (9th Cir. 2022). Relying on this study, the district court in *Snyder* found that the use of puberty blockers and gender reassignment surgery was experimental and may not be "medically necessary . . . or safe and effective for correcting or ameliorating their gender dysphoria." *Id.* at 105.

Even if this Court were to affirm the district court's formulation, the Marianos are not entitled to the use of the gender transitioning treatments at issue because they are not in accordance with "medically accepted standards in this country." R. at 17. The Federal Drug Administration has not approved these treatments to treat children with gender dysphoria.[5] R. at 7. The Marianos have not raised sufficiently serious questions regarding their Substantive Due

[5] No drug may be approved without a finding of substantial evidence that the drug will have the effect it purports or is represented to have. 21 U.S.C. § 355(d)(5). Applications must contain full reports of investigations which have been made to show whether the drug is safe for such use. *Id.* § 355(b)(1)(A). Such reports rely in large measure on clinical trials with human subjects.

Process claim. The Marianos do not have a fundamental right to access any specific treatment for Jess, much less any experimental treatments. Even if they did, they are not entitled to access the gender transitioning treatments at issue because the treatments have not even been approved for such use.

### 2. The SAME Act passes rational basis review because Lincoln has a legitimate interest in protecting its children from unsafe experimental treatments and the Act is rationally tailored to protect children from the risks of these experimental treatments.

Because there is no fundamental right to access any specific treatments, must less experimental ones, the SAME Act is subject to rational basis scrutiny. *Abigail*, 495 F.3d at 712; *Ry. Express Agency v. New York*, 366 U.S. 106, 111 (1949).

The SAME Act is entitled to a "strong presumption of validity" and must be upheld if there is a rational basis for prohibiting children from being able to access certain gender transitioning treatments that serves a legitimate government purpose. *Dobbs*, 142 S. Ct. at 2284 (citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993)). State legislatures have wide discretion to regulate in areas where there is medical and scientific uncertainty, including authority to ban medical treatments deemed to be a risk to public safety and welfare. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); *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 medical associations).

The SAME Act should be upheld because there is a rational basis upon which the Legislature based its determination that the gender transitioning treatments at issue were experimental and potentially dangerous for children. The SAME Act is a product of intense research and vigorous public debate. R. at 1–2. In drafting the Act, the Legislature took into

consideration hours of testimony from medical experts and citizens diagnosed with gender dysphoria who had undergone gender transitioning treatment. R. at 7–8.

Most medical associations agree that treatment of gender dysphoria is fraught with medical and scientific uncertainty. *See Guideline Regarding Hormonal Treatment of Minors with Gender Dysphoria at Tema Barn–Astrid Lindgren Children's Hospital (ALB)* (Apr. 2022). There is much uncertainty regarding the manifestation of gender dysphoria, a mental health diagnosis. Physicians do not know many things about manifestation of the disorder, including whether it will even persist or what treatments will be effective in mitigating the effects of the disorder.[6] R. at 7.

The concerns expressed by Lincoln's legislature are shared in many other jurisdictions.[7] In *Snyder*, a California district court denied a motion for preliminary relief on a very similar basis. 28 F.4th 103. There, plaintiffs sought a mandatory preliminary injunction, seeking healthcare coverage for their gender dysphoria from a state-held fund. *Id.* The district court denied injunctive relief, finding that plaintiffs had shown no "high-quality study showing male check reconstruction surgery is safe, effective, or optimal for treating minors," that the treatments they were seeking—medical reassignment surgeries—were medically necessary or "safe and effective for correcting or ameliorating their gender dysphoria." *Id.* at 112.

Upon careful consideration, the Legislature found that the effects of gender transitioning treatments for minors were inadequately studied and posed the risks of grave, irreversible consequences with potentially no health benefits. 20 Linc. Stat. § 1202. In arriving at these

[6] Div. of Fla. Medicaid, *Generally Accepted Professional Medical Standard Determination on the Treatment of Gender Dysphoria* (June 2022), https://ahca.myflorida.com/letkidsbekids.

[7] Similar legislation has been proposed in Alabama, Arkansas, Georgia, Kansas, and Kentucky. *See generally* Jack L. Turban et al., *Legislation to Criminalize Gender-Affirming Medical Care for Transgender Youth*, 325 J. Am. Med. Ass'n 2251, 2251 (2021).

findings, the Legislature relied on "considerable emerging evidence" regarding the risks of these treatments. R. at 15. These risks include irreversible infertility, cancer, liver dysfunction, cardiovascular disease, and orthopedic issues. 20 Linc. Stat. § 1201(a)(5). The district court recognized that the "FDA has not approved the use of these treatments to treat gender dysphoria." R. at 15. Additionally, most medical associations advise against genital reassignment surgery in children. R. at 15.

In an area fraught with medical uncertainty, the Legislature is granted deference to regulate treatments in the public interest. The evidence is clear in showing the risk of using transitioning treatments to treat gender dysphoria in children greatly outweighs the possible benefits. Here, the SAME Act is rationally underpinned by extensive research regarding the risks and efficacy of the treatments at issue. Therefore, this Court should find that the SAME Act survives rational basis scrutiny.

### 3. Alternatively, the SAME Act survives strict scrutiny because Lincoln has a compelling interest in protecting children from experimental medical procedures that neither the parents nor children can foresee or understand, and the ACT is narrowly tailored to achieve these objectives.

Even if this Court is to recognize that parents have a fundamental right to access experimental drugs for their children, the SAME Act survives strict scrutiny because Lincoln has a compelling interest in regulating healthcare to protect its children, and the SAME Act is narrowly tailored to achieve those objectives.

This Court has held that the state has a compelling interest in safeguarding the welfare of a child. *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982). Under strict scrutiny, a statute must be narrowly tailored to employ the "least restrictive means" necessary to achieve its purpose. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015).

The ACT is narrowly tailored. It prohibits use of only those therapies whose use in treating children with gender dysphoria has not been thoroughly evaluated. The Act allows and encourages children to obtain alternative avenues of therapies proven to be effective in treating gender dysphoria. The district court found that "untreated gender dysphoria may cause or lead to anxiety, depression, eating disorders, substance abuse self-harm, and suicide." R. at 7 (citing A.L. de Vries et al., *Psychiatric Comorbidity in Gender Dysphoric Adolescents*, 52 J. Child Psych. & Psychiatry 1195, 1202 (2011)).

The Act accommodates treatment for these co-morbid psychiatric conditions. It permits and encourages children to seek mental health care and to receive social support in transitioning treatments. *See* 20 Linc. Stat. § 1201. These therapies are the *only* treatment universally recommended for all children struggling with gender dysphoria because they tackle the root of discomfort in children suffering from gender dysphoria, they help children cope with emotional and social distress and social transitions. Jack L. Turban et al., *Legislation to Criminalize Gender-Affirming Medical Care for Transgender Youth*, 325 J. Am. Med. Ass'n 2251, 2251 (2021). The Act does not prohibit social affirmation of a child's gender identity, a practice found to yield "favorable mental health outcomes." *See id.* Gender transitioning treatments such as puberty blockers and gender reassignment surgery do not treat the psychiatric issues that underpin complications children face in dealing with gender dysphoria. *Snyder*, 28 F.4th at 112.

The Marianos have not raised sufficient serious questions going to the merits of their claim, because they do not have a fundamental right to any specific treatment on behalf of their child, much less an experimental one. But the SAME Act passes any level of scrutiny it is subjected to. Therefore, this Court should reverse the Fifteenth Circuit and vacate the district court's order granting preliminary injunctive relief.

### B. The Marianos Failed to Raise Sufficiently Serious Questions Going to the Merits of Their Equal Protection Challenge to the SAME Act.

The Marianos failed to raise serious questions regarding their Equal Protection claim. The SAME Act classifies based on age and medical procedure because it protects any child under the age of eighteen, regardless of gender, from accessing certain experimental treatments. The SAME Act easily survives rational basis review. Even if this Court is to find that the Act classifies based on gender, the SAME Act also survives intermediate scrutiny.

The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Clause ensures individuals in similar situations be treated equally under the law. *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918). A legislature must have "substantial latitude to establish classifications" to practically accommodate the issue at hand. *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (allowing legislators wide latitude because "improvident decisions will eventually be rectified by the democratic processes"). Legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate interest. *Cleburne*, 473 U.S. at 439.

First, the plain text of the SAME Act explicitly provides for classifications based on age and medical procedure sought. Therefore, the Act is subject to rational basis review, which it easily passes. After considering input from medical experts and patients who had undergone the treatments at issue, Legislature found that efficacy of these treatments had not been adequately established and the risks of grave harm outweighed their benefits. Responding to this public health concern, the Legislature banned the treatments from being used for purposes for which they have not even been approved. Therefore, the SAME Act survives rational basis review.

Second, a close examination of the deliberative and thorough consideration undertaken by the Legislature dispels any notion that the SAME Act was enacted for the purpose of discriminating based on sex. However, even if this Court is to subject the Act to intermediate scrutiny, the SAME Act survives because the Lincoln Legislature has a substantial interest in protecting the welfare of its children. The SAME Act's prohibition on certain risky, experimental treatments is substantially and directly to Lincoln's important interest in safeguarding the health of children. Therefore, the SAME Act survives intermediate scrutiny.

The SAME Act does not violate the Equal Protection clause. Although it classifies based on age and medical procedure sought, this classification is necessary to serve the government's interest in protecting minors from undergoing certain experimental treatments which have lifelong consequences. The Act limits minors from having access to these treatments because the necessity and efficacy of these treatments (which have not even been approved for this use) has not been adequately studied and is a subject of serious debate in the medical community. The Act allows minors to obtain easily accessible treatments already found to be effective and approved for treating children with gender dysphoria. For these reasons, the Marianos failed to raise serious questions that their right to equal protection had been violated. This Court should reverse the Fifteenth Circuit and vacate the district court's judgment granting preliminary injunction.

### 1. Rational basis applies because the SAME Act classifies based on age and medical procedure sought.

In determining what level of scrutiny to apply, courts look to the distinction between classifications in the law. *Grimm v. Gloucester*, 972 F.3d 586, 590 (4th Cir. 2020). A classification must be reasonable, not arbitrary, and must rest upon some basis having a fair and substantial relation to the purpose of the legislation, so that all similar situated persons must be

treated alike. *Stanton v. Stanton*, 421 U.S. 7, 14 (1975). A law may classify explicitly, in the plain text of the statute. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 721 (1982). A statute which appears to be neutral on its face may still be discriminatory if it was intended to discriminate on basis of a class. *Washington v. Davis*, 426 U.S. 229, (1976). Discriminatory intent may be inferred from the totality of the relevant facts, including legislative history, impact, and history of discrimination. *Cleburne*, 473 U.S. at 442–43.

But most classifications are "generally benign and are upheld so long as they are rationally related to a legitimate state interest and upheld so long as they are 'rationally related to some legitimate state interest.'" *Grimm,* 972 F.3d at 607, citing Cleburne, 473 U.S. at 440.

The district court erred when it found the Act classified on basis of sex. The plain text of the statute provides that the SAME Act creates classifications based on age and medical procedure sought. Additionally, Act's legislative history dispels any notion that the Act was enacted for a discriminatory purpose. The SAME Act was enacted following thoughtful and inclusive public debate and was drafted with the input of medical experts and patients who had been treated for gender dysphoria. The Act classifies based on age and medical procedure sought. Therefore, the SAME Act is subject to rational basis scrutiny.

#### *a. The SAME Act classifies based on age and medical procedure sought.*

The plain text of the SAME Act reveals classifications based on age and medical procedure. The law provides that no doctor shall perform "any procedure, practice or service upon any individual under the age of eighteen if the procedure, practice or service is performed for the purpose of instilling or creating a physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." Linc. Stat. § 20-1203. The Act

goes on to prohibit access to specific kinds of treatment, including but not limited to puberty blockers, cross-sex hormones, and gender reassignment surgery. Id.

Statutes which discriminate based on age are subject to rational basis review and must be upheld if they serve a legitimate governmental interest. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 301, 312; *see also Cleburne*, 473 U.S. at 441 (declining to apply intermediate scrutiny to age based classifications). In *Murgia*, this Court upheld a statute which mandated that police officers retire from patrol duty upon turning fifty. *Id.* at 312. This Court held that only statutes which discriminated based on a fundamental right or against a suspect class were subject to higher levels of scrutiny. *Id.* The Court held that people over fifty did not constitute a suspect class because there was no history of purposeful discrimination. *Id.* The Court upheld the statute, finding the classification furthered the state's interest in ensuring the health and fitness of its uniformed law enforcement officers. *Id.*

Like the statute in *Murgia*, the SAME Act classifies based on age. Under the Act, no individual under the eighteen-years-old has access to certain gender-transitioning treatment. *See* Linc. § 20-1203 (2022). This limitation applies regardless of the individual's gender or diagnosis. Importantly, the limitation only exists until the child reaches the age of majority—at which point the child, now an adult, has access to the gender transitional treatment previously out of their control. The child's age is the determinative factor is whether the treatment is allowed, not their gender. The Act classifies based on age.

Next, the SAME Act classifies based on medical procedure sought. Under the Act, no healthcare provider may perform "any procedure, practice or service" if such "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."

Linc. Stat. § 20-1203. It's important to note the Act does not prohibit all procedures. Rather, it distinguishes between those procedures which may "instill[] or creat[e] physiological or anatomical" differences within the child's body and all other treatments which treat gender dysphoria, including therapy and social affirming care. The Act classifies prohibited procedures to include only puberty blockers, cross-sex hormones (administering testosterone to girls for the purpose of inducing production of secondary male features), and gender reassignment surgery. *See* Linc. Stat. § 20-1203. Because the Act distinguishes between types of treatments available, the SAME Act classifies based on medical procedure.

***b. The SAME Act does not classify on the basis of gender or transgender status.***

Applying *Bostock*, the district court found the SAME Act discriminated based on sex because even though the plain text of the law limited access to certain treatments, its effect was to treat children with gender dysphoria differently than children without gender dysphoria. R. at 26. The district court's reliance on *Bostock* is misplaced and the SAME Act does not classify based on sex.

First, *Bostock* does not accommodate the district court's assertion the Equal Protection prohibits laws based solely on the fact they create a disparate impact based on sex. This Court limited its holding in *Bostock* to statutory claims brought under "Title VII involving employment." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1753 (2020); *see also Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (extending *Bostock* to similar statutes such as Title IX but leaving open question of whether limiting access to gender transition treatment constitutes discrimination based on sex); *see also Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding Equal Protection clause does not prohibit actions based only on the fact they create a disparate

impact based on sex). *Bostock* does not demand that courts impose heightened scrutiny every time a statute creates a sex-based classification.

Second, the district court held that SAME Act classifies based on sex because it treats individuals differently based on "whether they are seeking medical treatment related to being transgender." R. at 18. It reasoned that the Act must classify based on sex because it "categorically prohibits providing transgender minors medical care recommended to treat their gender dysphoria." R. at 19.

Regulating a procedure that can only be performed on one gender does not constitute gender-based discrimination in violation of the Equal Protection clause. This Court recently struck down a challenge to a statute regulating access to a procedure performed only on women. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). In *Dobbs*, Mississippi enacted a statute which limited women from having access to a medical procedure which would allow them to terminate their pregnancy. *Id.* at 2242. Physicians and a clinic brought suit seeking to enjoin enforcement of the statute, arguing that statute discriminated on the basis of sex. *Id.* This Court explicitly discounted the notion that regulation of abortion constituted a sex-based classification because only the procedure was only performed on women. *Id.* at 2246; *see also Hennessey-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1304 (D. Ariz. 2021) (finding gender reassignment surgery not the same as cosmetic procedures). "Regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is mere pretext designed to effect an invidious discrimination against members of one sex or another." *Dobbs*, 142 S. Ct. at 2235. "States may regulate medical procedures for legitimate reasons, and when such regulations are challenged under the Constitution, courts

cannot substitute their social beliefs for the judgment of legislative bodies." *Id.* at 2284 (quotations omitted).

The Marianos' argument that the SAME Act classifies based on sex falls apart when examined under the light of precedent. Sex-based classification in the SAME Act is even more tenuous than in the sex classification in Dobbs. Transitioning treatments are unavoidably tied to meaningful biological differences between the sexes. *United States v. Virginia*, 518 U.S. 515, 533 (1996) ("the two sexes are not fungible"). But the SAME Act treats every individual the same. No one under the age of eighteen, regardless of gender or transgender status, may obtain the specified treatments for the purpose of transitioning. *See* Linc. Stat. § 20-1203. The Act protects every individual under the age of eighteen, of every gender, from the treatments because the treatments are not even approved for such usage. There is no language in the Act to suggest that the provisions are limited to either gender or even to transgender children. Not all children diagnosed with gender dysphoria will even seek these treatments. Regulating medical procedures which are prescribed on the basis of one's biological gender does not constitute discrimination based on sex under the Equal Protection Clause.

The SAME Act does not classify on the basis of transgender status. But should this Court determine the Act does classify based on transgender status, such status does not constitute a "quasi-suspect" class under this Court's precedent so the Act is still subject to rational basis review. "A suspect class is one saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to commend extraordinary protection from the majoritarian political process." *Murgia*, 427 U.S. at 313, quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (quotations omitted). A proposed classification must encompass individuals who exhibit "obvious,

immutable, or distinguishing characteristics that define them as a discrete group." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *see also Cleburne*, 473 U.S. at 442 (holding individuals with same medical diagnosis whose needs vary across a broad continuum are not a class).

The Marianos advance an argument that the SAME Act purports to classify based on transgender status. R. at 34. But even if this Court finds that the Act does classify between individuals who identify as transgender and those who do not, transgender status is not a quasi-suspect class. As the legislative record proves, there is a great deal of political support for individuals diagnosed with gender dysphoria and much public support encouraging study of the disorder and viable treatment options. R. at 7 ("All leading medical associations opposed denying gender-affirming care to transgender adolescents."). And similar to the range of individuals with intellectual disability in *Cleburne*, there is no "obvious, immutable, or distinguishing characteristic" to identify transgender individuals in one class. As the dissent so aptly notes, "pre-pubescent children with gender dysphoria differ from adolescents who differ from adults, in how gender dysphoria manifests and appropriate treatment approaches." R. at 34. Thus, the SAME Act is not subject to heightened scrutiny.

**2. The SAME Act survives rational basis review.**

Because the SAME Act classifies on the basis of age and medical procedure, it is subject to rational basis review. Rational basis review is a "relatively relaxed standard" which accommodates the "peculiar[]" difficulty in drafting legislation that create distinctions, because distinctions in the law are unavoidable. *Murgia*, 427 U.S. at 314. "Perfection in making the necessary classifications is neither possible nor necessary." Id. Under rational basis review, a law is presumed to be valid. *Id.*

SAME Act classifies on the basis of age and medical procedure, and is subject to rational basis review. In order to survive rational basis review, a law Rational basis review is a "relatively relaxed standard" which accommodates the "peculiar[]" difficulty in drafting legislation that create distinctions, because distinctions in the law are unavoidable. *Murgia*, 427 U.S. at 312. Under rational basis review, a law is presumed to be valid. *Id.*

Here, as in *Murgia*, the Legislature had a legitimate purpose in classifying based on age and medical procedure. First, the need to classify based on age is both rational and well-grounded. Because gender dysphoria has not been adequately studied, physicians are not able to predict whether an individual will manifest gender dysphoria or even if or for how long its expression will persist. Some studies indicate that 76% of children diagnosed with gender dysphoria will age out of it by the time they reach adulthood. Lynn Rew et al., *Puberty Blockers for Transgender and Gender Diverse Youth—A Critical Review of the Literature*, Child & Adolescent Mental Health (Feb. 2021). The Legislature found a troubling increase "social influence" driving minors' decisions to undergo life-changing gender transitioning treatments. 20 Linc. Stat. § 1201(b)(3); *see generally* Rew et al., *supra*. This concern was compounded by the fact that "emerging scientific evidence shows a potential harm to children from gender transition drugs and surgeries," including but not limited to risks related to irreversible infertility, cancer, liver dysfunction, and cardiovascular disease. 20 Linc. Stat. § 1201(a)(5). Finally, the Legislature sought to create this classification based on age because children cannot comprehend the risks and life-changing effects which accompany these procedures, raising questions of informed consent. The Legislature's choice to classify based on age is well-supported, given the unpredictability of the disorder.

The Legislature also had a rational reason for prohibiting access to certain gender transitioning treatments. After undergoing extensive study and hearing testimony from medical experts, the Legislature found that efficacy and medical necessity of these treatments had not been adequately studied. This concern was compounded by the fact that "emerging scientific evidence shows a potential harm to children from gender transition drugs and surgeries," including but not limited to risks related to irreversible infertility, cancer, liver dysfunction, and cardiovascular disease. Linc. Stat. § 20-1201(a)(5). Because the manifestation of gender dysphoria is so unpredictable, treating it effectively and safely raises real challenges for physicians. Until a procedure or plan is approved by the FDA, the Lincoln Legislature has a rational reason for prohibiting access to treatments for uses for which they have not been approved. Therefore, the classification based on medical procedure is rationally related to the Legislature's legitimate interest in safeguarding the wellbeing of children.

### 3. Even assuming the classification is based on gender, the SAME Act survives intermediate scrutiny.

The district court's reliance on *Bostock* is misplaced and the SAME Act clearly does not classify based on gender or transgender status. But should this Court choose to characterize its classifications as based on sex, the SAME Act survives intermediate scrutiny.

A statute seeking to classify based on sex must pass intermediate scrutiny. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citing *Craig v. Boren*, 429 U.S. 190 (1976)); *see also Brandt v. Rutledge*, 2022 WL 3652745, No. 21-2875, at *11 (8th Cir. Aug. 25, 2022) (applying "heightened rational basis" to Arkansas statute prohibiting access to gender transitional treatment for minors).

Historically, gender-based classifications are subjected to heightened scrutiny to vet out government policies that purport to be based on neutral grounds but are instead based on

outdated misconceptions about gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132 (1994). To survive heightened scrutiny, the law must serve important governmental objectives, and the government must show that the discriminatory means employed are substantially related to the achievement of those objectives. *United States v. Virginia*, 518 U.S. at 531. A party seeking to uphold government action which classifies based on sex must establish "an exceedingly persuasive justification for the classification." *Id.* An exceedingly persuasive justification is one that is "genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

For the reasons the SAME Act passes strict scrutiny, likewise, the Act passes intermediate scrutiny. Lincoln has an important interest in state has an important interest in safeguarding the health and welfare of children. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 970 (1992) ("[A] State has a strong and legitimate interest in the welfare of its young citizens."). The Legislature drafted the SAME Act after taking into consideration hours of testimony from medical experts and citizens who had undergone transitioning treatments. The gender transitioning treatments at issue had not been adequately studied and are not approved to treat gender dysphoria in children. Studies have shown that these treatments pose great harms to children, some of which are irreversible. Regulating access to experimental and ineffective gender transitioning treatments is substantially related to Lincoln's interest in safeguarding the health and welfare of children.

As a result, the Marianos failed to allege serious questions regarding their Equal Protection Claim. Because they have failed to allege serious questions in either of their claims, this Court should reverse the Fifteenth Circuit and vacate the district court's order granting preliminary injunction.

## CONCLUSION

The SAME Act fits well within the purview of rights that the Constitution leaves to the states to regulate. This Court should leave those rights intact and allow the state to regulate healthcare for the safety and welfare of its citizens.

This Court should REVERSE the district court's judgment granting Respondents' preliminary injunction and denying Petitioner's motion to dismiss, and REMAND with instructions to dismiss Respondents' claims.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

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# APPENDIX A

## Provisions of the 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 B

## The Stop Adolescents Medical Experimentation ("SAME") Act

**20-1201 Findings and Purposes**

(a) Findings: The State Legislature finds -

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

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

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

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

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

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

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

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

(b) Purposes:

It is the purpose of this chapter –

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

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

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

**20-1202 Definitions**

The Act defines –

(1) "Adolescent" as the phase of life between childhood and adulthood, from ages 9 to 18.

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

**20-1203 Prohibition on Certain Gender Transition Treatments.**
No healthcare provider shall engage in or cause any procedure, practice or service to be performed upon any individual under the age of eighteen if the procedure, practice or service is performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual’s biological sex, including without limitation to:

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

**20-1204 Enforcement**
(A) The attorney general may bring an action to enforce compliance with this chapter. Nothing in this chapter shall be construed to deny, impair, or otherwise affect any right or authority of the attorney general, the state, or any agency, officer, or employee of the state, acting under any provision of the Lincoln Code, to institute or intervene in any proceeding.
(B) Any healthcare provider found to have knowingly and willingly violated the provisions of the chapter shall have committed a class 2 felony punishable by civil fines up to and including $100,000 or imprisonment of not less than two years and not more than ten years.

**20-1205 Unprofessional conduct of healthcare providers**
Any provision of gender transition procedures prohibited by 20-1203 to a person under eighteen years of age shall be considered unprofessional conduct and shall be subject to discipline by the licensing entity with jurisdiction over the healthcare provider.

**20-1206 Effective Date**
The provisions of this chapter shall take effect on January 1, 2022.