No. 22-8976

IN THE

Supreme Court of the United States

October Term 2022

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

Petitioner,

v.

Jess MARIANO,
Elizabeth MARIANO,
and
Thomas MARIANO,

Respondents.

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

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BRIEF FOR RESPONDENTS

Team 3115

ATTORNEYS FOR RESPONDENTS

QUESTIONS PRESENTED

I. Whether the "serious question" standard for preliminary injunctions continues to be viable after *Winter* when the standard is consistent with the judicial purpose of preliminary injunctions, equitable principles of judicial discretion, burden requirements, and follows Supreme Court precedent?

II. Whether the preliminary injunction was properly granted regarding a transgender minor's and his family's Substantive Due Process and Equal Protection claims when the parent's medical decision-making power was nullified, and the enjoined statute only affected specific children based on gender and psychological diagnoses?

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The opinion of the United States District Court for the District of Lincoln is unreported but appears on pages 1–22 of the record where the district court GRANTED the Plaintiff's motion for preliminary injunction. The opinion of the United States Court of Appeals for the Fifteenth Circuit is also unreported but appears on pages 23–34 of the record where the circuit court AFFIRMED the district court's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves two provisions of the United States Constitution, U.S. Const. amend. XIV and U.S. Const. amend. V. *See* App. A. This case also involves the application of Lincoln's Stop Adolescent Medical Experimentations Act. *See* App. B.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case involves the constitutional challenge of the State of Lincoln's ("Lincoln") Stop Adolescent Medical Experimentations Act (the "SAME Act" or the "Act"). R. at 1. The SAME Act would prevent the Mariano family from making informed medical decisions concerning their child. R. at 5. The Act would also forbid doctors from prescribing medications or treatments for transgender[1] minors suffering from gender dysphoria[2] but allows these same medications or

[1] A transgender person is one who identifies as a gender different from the one assigned at birth. *Transgender*, *Merriam-Webster Unabr. Dictionary* (3d ed. 2002).

[2] Gender dysphoria is a diagnosed incongruence between the patient's expressed gender and assigned gender. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 452 (5th ed. 2013).

treatments to cisgender[3] minors for any other reason. R. at 5, 15. Lincoln appeals the district court's ruling enjoining the enforcement of the SAME Act during the pending lawsuit. R. at 23.

Jess Mariano's Transition. Despite being born biologically female, Jess Mariano's parents recognized that Jess perceived himself as male before he was eight years old. R. at 4. Jess wanted to be treated as a male and would often tell his parents that he did not want to grow up if he had to be a girl. R. at 4–5. After Jess turned eight, he attempted to take his own life by overdosing on Tylenol. R. at 4. As he shoved the pills in his mouth, he uttered that he hoped he would "never wake up." R. at 4. His parents rescued Jess by placing him in psychiatric therapy where he was diagnosed and treated for depression. R. at 4.

The doctor treated Jess for nine months where he analyzed and studied Jess's symptoms to determine the underlying cause of his depression. R. at 4. Based on existing medical guidelines, the doctor determined that Jess was suffering from gender dysphoria. R. at 4; *see* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 452 (5th ed. 2013). Jess continued to attend therapy to control his depression and further understand his gender dysphoria. R. at 4.

Two years later while Jess's gender dysphoria continued to manifest, he exhibited signs of puberty in the form of breast tissue. R. at 5. After consulting with Jess's pediatrician, Jess's psychiatrist prescribed him puberty blockers on a monthly basis. R. at 5. Jess remains on puberty blockers because his doctor believes even a month interruption could cause irreversible physical changes in his body. R. at 5. Additionally, the physical changes could reverse the psychological progress Jess has achieved in therapy for his depression. R. at 5. The puberty blockers have aided

[3] Cisgender is a person with a gender identity that corresponds with the gender assigned at birth. *Cisgender*, *Merriam-Webster Unabr. Dictionary* (3d ed. 2002).

Jess in his mental health. But to continue progressing mentally, he may require surgery because his body already underwent changes from puberty. R. at 5.

The SAME Act. The SAME Act seeks to stop nearly all of Jess's treatment. R. at 3–4. Under the Act, Jess's only current treatment that he could continue would be talking to his therapist. R. at 3–4. The Act forbids any healthcare performed with "the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex . . . ." R. at 3; 20 Linc. Stat. § 1203. The exact same healthcare would be allowed for any other purpose such as treating a person's natural hormone levels that are below average. R. at 3–4, 15.

The SAME Act includes no exceptions. R. at 2–4. The Act would still apply to minors diagnosed with any psychological disorder, who exhibited suicidal tendencies, or who received any number of years of therapy. R. at 2–4. The Act has the goal of protecting against medically caused irreversible consequences but does nothing to protect against the side effects of untreated gender dysphoria. R. at 2–4. Untreated gender dysphoria may lead to several psychological disorders such as anxiety, depression, substance abuse, and suicide. R. at 7; *see* Annelou L.C. de Vries et al., *Psychiatric Comorbidity in Gender Dysphoric Adolescents*, 52 J. Child Psych. & Psychiatry 1195, 1202 (2011). Contrary to the Act's findings, transgender minors exhibit less suicidal tendencies while being treated with gender affirming care. R. at 2–3, 7; Jack L. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 Pediatrics (Feb. 2020), at 1, 5, https://doi.org/10.1542/peds.2019-1725 [hereinafter Turban et al., *Pubertal Suppression*].

The Act qualifies itself by saying few children suffer from gender dysphoria, many cases of gender dysphoria (but not all) resolve themselves, and parents rarely appreciate the risks of

gender affirming care. R. at 2–3. These generalizations are incorrect in the majority of situations. R. at 2–3, 5–7. The Act places a complete ban on certain medical treatments only for transgender minors even if those treatments could save their life. R. at 2–4, 5–7.

II. NATURE OF PROCEEDINGS

The District Court. The Mariano family sued alleging that the enforcement of the SAME Act would violate their Due Process and Equal Protection rights under the Fourteenth Amendment of the Constitution. R. at 1. Due to the Act going into effect within two months, the Marianos moved for preliminary injunction while Lincoln moved to dismiss. R. at 1. The court denied the motion to dismiss and granted the request for preliminary injunction because a likelihood of success on the merits was shown, the plaintiffs would suffer irreparable harm if the Act was not enjoined, that harm greatly outweighed any damage the Act sought to prevent, and there was no overriding public interest requiring denial of the injunction. R. at 2.

Fifteenth Circuit Court of Appeals. Lincoln filed an interlocutory appeal to challenge the district court's granting of the preliminary injunction. R. at 23. The circuit court affirmed the district court's decision and held that the district court used the proper "serious question" standard for preliminary injunctions. R. at 24–25. Additionally, the lower court did not abuse its discretion in finding that the plaintiffs sufficiently raised serious questions about their likelihood of success in conjunction with a showing of likely irreparable harm and a balance of interests in their favor. R. at 27.

SUMMARY OF THE ARGUMENT

This Court should affirm the holding of the Fifteenth Circuit Court of Appeals. The district court used the proper serious question standard in determining whether to grant a preliminary injunction enjoining the SAME Act. The district court also correctly held that the Mariano

family made a sufficient showing of success on their constitutional claims to warrant a preliminary injunction.

I.

A preliminary injunction is a tool used by courts to prevent irreparable harm caused by the opposing party. Preliminary injunctions are determined and enforced before a case has been tried on the merits. This Court has stated a four-factor test that must be used in analyzing the necessity of preliminary injunctions. The first factor, the likelihood of success on the merits, has been interpreted differently by courts.

The circuit court properly affirmed the district court's application of the more flexible serious question standard. The opposing more rigid standard strictly requires a clear showing that a party will likely succeed on the merits. The rigid standard goes against this Court's underlying purpose for preliminary injunctions. The main purpose being to protect parties from irreparable harm and maintaining the status quo until the case can be decided on the merits. The serious question standard complies more closely with the purpose of preliminary injunctions without lessening the burden on the movant. The burden must not be lessened because preliminary injunctions are not granted as a matter of right and must be necessary due to the extraordinary nature of the remedy. The serious question standard comports with the required burden of preliminary injunctions by being a balancing test. When the likelihood of success is lower, the required showings on the other factors increase. This allows for injunctions to be granted only in necessary situations. The balancing between the purpose and necessary burden of preliminary injunctions is properly achieved with the serious question standard but not with the rigid interpretation.

Sometimes, government action should not be enjoined if the public interest is at risk. But if the public interests cannot be easily determined due to obscurity and debate between the parties and constitutional rights are at stake, a more flexible standard like the serious question variation should be applied. Here, due to the opposing views on the best interests of the public and transgender rights hanging in the balance, the serious question standard was properly applied by the district court.

Furthermore, the serious question standard complies with this Court's precedent including *Winter*. This Court only struck down the "possibility" standard for irreparable injury but continued to allow for interpretation of the other factors. The serious question standard is consistent with the burden guidelines set in *Winter*. The serious question standard does not lessen the overall burden on the movant as required by *Winter*. Instead, it shifts the requirement of the likelihood of success factor while increasing the required showing from the other factors. By shifting the showing required on different factors, the preliminary injunction test becomes more flexible while still maintaining a high burden as required by *Winter* and the purpose of preliminary injunctions.

Therefore, this Court should affirm the Fifteenth Circuit Court of Appeals' judgment and hold that the serious question standard was properly applied to the SAME Act.

II.

The district court properly granted the preliminary injunction because the Mariano family showed a sufficient likelihood of success under both standards for their Substantive Due Process and Equal Protection claims. The serious question standard requires a showing of sufficiently serious questions going to the merits to make them a fair ground for litigation. The rigid standard requires a clear showing that the party would likely succeed on the merits.

The Marianos are likely to succeed on their Substantive Due Process claim because the Act violates the parents' fundamental right to make decisions concerning their child's medical care, and it fails strict scrutiny. Even if the likelihood is not clear or considered "likely," there are sufficiently serious questions to whether the parents' constitutional rights have been violated. The Act fails strict scrutiny because Lincoln's interest in protecting children from experimental gender affirming care is misplaced. The treatments are not experimental. The SAME Act does not ban the "experimental" treatments for cisgender children because they are safe and have been used for decades. Thus, Lincolns interest is not compelling. The Act also fails strict scrutiny because banning prescribed gender affirming care with the purpose of protecting transgender youth actually harms children. Therefore, the Act is not narrowly tailored towards their interest.

The Marianos are also likely to succeed on two Equal Protection claims because the Act is likely subject to, and will fail, intermediate scrutiny. Even if the likelihood of success cannot be ascertained, there are still serious questions as to the likelihood of success. The Act discriminates against Jess based on sex and transgender status. The SAME Act textually discriminates on its face based on an individual's sex because one gender is allowed the gender affirming care whereas the other is not purely based on the born sex of the person. This Court explained in *Bostock* that transgender falls within the sex classification meaning that discrimination against transgender status is discrimination on the basis of sex. The Act also textually discriminates against transgender youth because it discriminates against people that are born as one sex but identify as another which is the definition of transgender. Because the statute discriminates on its face, intermediate scrutiny should be applied.

Even if the statute is found not to discriminate on its face against transgender individuals, the Act has the purpose and effect of discriminating against transgender individuals warranting

intermediate scrutiny. The SAME Act alleges it protects minors from gender affirming care, but only attempts to enforce the Act against transgender youth. Therefore, the Act's purpose is to prevent only transgender individuals from having this specific care making it discriminatory. The effect of the statute also only discriminates against transgender individuals. All other classes of people still may receive the banned treatments under the statute's enforcement. Thus, the effect is discriminatory against transgender individuals. Because the statute discriminates in its purpose and effect, intermediate scrutiny should be applied.

Even if transgender status is not treated as within the sex classification, transgender status should be its own quasi-suspect class. Transgender individuals have suffered long standing discrimination, possess characteristics that do not impair them from contributing to society, have distinct immutable characteristics, and have been politically powerless. Therefore, transgender status should be its own quasi-suspect class.

The SAME Act fails under intermediate scrutiny because the means are not substantially tailored towards achieving an important purpose. The Act's purpose does not meet the important standard because the treatments are not experimental. Additionally, the Act is not substantially tailored to its purpose because some children are allowed the "experimental" healthcare whereas others are not. Therefore, the Act fails intermediate scrutiny.

Lastly, the Mariano family has shown a sufficient likelihood of success under both standard even if rational basis is applied. The Act fails rational basis because Lincoln's interests are not legitimate, and the Act is not rationally related to that interest. Lincoln's interest is not legitimate because calling the healthcare experimental is incorrect, and it is not something that children need to be protected from. Furthermore, the Act is not even rationally related to protecting

children because it allows some children to undergo the procedures and forbids others. Therefore, the Act fails every level of scrutiny.

This Court should AFFIRM the lower court's judgment and hold that the Marianos showed a sufficient likelihood of success on all their constitutional claims.

ARGUMENT AND AUTHORITIES

Standard of Review. This appeal considers the grant of preliminary injunctive relief. Federal Rule of Civil Procedure 57 and 65 along with 28 U.S.C. §§ 2201 and 2202 authorize courts to issue preliminary injunctions. Fed. R. Civ. P. 57, 65(a); 28 U.S.C. §§ 2201–02. The district court's grant of a preliminary injunction should not be reversed unless there is a clear abuse of discretion. *Bell S. Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 968 (11th Cir. 2005); *Proctor & Gamble Co. v. Kraft Foods Glob., Inc.*, 549 F.3d 842, 845 (Fed. Cir. 2008). Review of a preliminary injunction "is exceedingly narrow because of the expedited nature of the proceedings in the district court." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). The standard this Court applies in reviewing a district court's grant of preliminary injunction recognizes that "the trial court is in a far better position than this Court to evaluate th[e] evidence, and this Court will not disturb its factual findings unless they are clearly erroneous." *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002). This Court reviews the underlying legal conclusions de novo. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428 (2006); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).

I. THE DISTRICT COURT PROPERLY APPLIED THE "SERIOUS QUESTION" STANDARD TO DECIDE THE MOTION FOR PRELIMINARY INJUNCTION WHEN IT COULD NOT DETERMINE WITH CERTAINTY THAT THE MARIANOS WERE MORE LIKELY THAN NOT TO PREVAIL ON THE MERITS OF THE UNDERLYING CLAIMS.

A district court has the inherent discretion to consider all relevant factors and factual scenarios in balancing the equities between the parties. Where irreparable harm is likely, a court may prevent injury through interim relief even though it cannot yet ascertain the merits of underlying claims. In developing, novel, complex, and other uncertain cases, a court may grant a preliminary injunction if the case involves "serious questions" going to the merits of the claims and a balance of hardships tips decidedly toward the movant. If the merits are discernible, then a court may grant a preliminary injunction if it also determines that the movant is likely to succeed on the merits.

The flexibility of the serious question standard fulfills the primary purpose of preliminary injunctions and the equitable principles of judicial discretion, while complying with this Court in *Winter* and not lessening the burden on the movant. *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 592 (6th Cir. 2001). The serious question standard allows a movant to show either a "likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation" in addition to the other three *Winter* factors. *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

The four-pronged traditional test established by this Court in *Winter* requires the movant to show "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in his favors, and that an injunction is in the public interest." 555 U.S. 7, 19 (2008). Under a rigid interpretation, the four factors are independent prerequisites to grant a preliminary injunction. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346–47 (4th Cir. 2009), *cert. granted*, *judgment vacated*, 559 U.S. 1089

(2010). Under the serious question standard, not one requirement is determinative over the others; rather, they should be balanced against each other. *Dataphase Sys., Inc., v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). For example, "the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." *Hoosier Energy Rural Elec. Coop., Inc. v. Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *see Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544 (7th Cir. 2007). This balancing by the serious question standard provides the required flexibility without lessening the burden on the movant. *Dataphase*, 640 F.2d at 113. The serious question variation should be the applied standard because it continues to be consistent with the purpose of preliminary injunctions, the *Winter* requirements, and remains applicable in some cases against government actors.

A. A District Court Has the Discretion to Use the "Serious Question" Standard to Grant a Preliminary Injunction in Situations Where Uncertainties at the Outset of Complex Litigation Involving a Pre-Enforcement Challenge to a State Statute Prevent Movants from Showing They Would Likely Succeed on the Merits.

A district court has the discretion to apply the serious question standard because it comports with the purpose of preliminary injunctions and has the required flexibility. In determining the need for an injunction, the question is "whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase*, 640 F.2d at 113. The court's approach must "be flexible enough to encompass the particular circumstances of each case." *Id.* Since a court must make this determination before fully deciding the merits, the preliminary injunction test applied must be wide-ranging to compensate for being merely an approximation of the merits. *See Unicorn Mgmt. Corp., v. Koppers Co.*, 366 F.2d 199, 203 (2d Cir. 1966). The serious question variation of the traditional standard provides the necessary flexibility. *Dataphase*, 640 F.2d at 113.

1. The serious question standard fulfills the primary purpose of injunctive relief when the merits of the underlying claims are difficult or impossible to determine.

When the merits are difficult or cannot be determined, the serious question standard provides the necessary flexibility to ensure that injunctive relief is granted in accordance with the primary purpose of preliminary injunctions. The controlling reason for a preliminary injunction is to prevent irremediable harm to the parties before adjudication. *Love v. Atchinson, T. & S.F. Ry. Co.*, 185 F. 321, 331 (8th Cir. 1911). In *Hamilton Watch Co. v. Benrus Co.*, the court articulated that preliminary injunctions are meant to maintain the status quo throughout litigation and not be a mini trial on the merits. 206 F.2d 738, 741 (2d Cir. 1953); *Engler*, 257 F.3d at 592. An injunction, by its very nature, is not permanent, and relief is subject to change after a full hearing. *Hamilton Watch*, 206 F.2d at 741. The test for preliminary injunctions must be flexible enough to account for any possible error weighing the factors across any type of case. *Dataphase*, 640 F.2d at 113. In complex, heavily emotional, or political cases, determining the likelihood of success on the merits requires close to a full trial. Forcing courts to make premature decisions based off a rigid interpretation of the test would cause unnecessary irreparable harm.

Furthermore, the serious question standard aligns more closely with the underlying purpose of preliminary injunctions than a rigid interpretation of *Winter* because the rigid interpretation is not flexible enough. A strict unbending test puts too much emphasis on the fifty-one percent requirement for "likelihood of success" determinations in every scenario. *Id.* A party facing irreparable injury with only a small, but serious, percentage of winning should be given a fair chance because once the irreparable damage is done, relief becomes moot. This is particularly true in cases of statutory discrimination. In these cases, the potential consequences could be life altering not only for the individual but the world. Halting the SAME Act would not only save the

mind, body, and life of Jess but also all the other transgender children going through the same struggles. Not granting an injunction purely because the likelihood of success is an estimated forty percent instead of sixty percent blatantly defies the purpose of protecting the parties during litigation.

Additionally, a rigid interpretation requires the denial of an injunction if the likelihood of success cannot be ascertained. Cases of first impression, politically split issues, and complex litigation can muddy the water for likelihood of success determinations. A more flexible test can help alleviate any conscious or subconscious biases a judge may have towards the likelihood of success. Because the injunction may be decided before the merits have fully come to light, a judge must rely on his or her own knowledge and experience instead of only the merits.

The serious question standard fixes both of these problems. The serious question test creates more of a sliding scale style of test that can encompass the correct scenarios. *Citigroup*, 598 F.3d at 35. Having a greater showing in one *Winter* factor and lesser in success creates an overall fairer test. Because courts have a long history of granting injunctions with the goal of preventing irreparable harm, a test that protects more deserving citizens should be welcomed. *Love*, 185 F. at 331; *Hamilton*, 206 F.2d at 740; *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 595 F.2d 70, 72 (2d Cir. 1979).

2. The equitable principles of judicial discretion and flexibility require that the traditional four considerations be treated as factors to be balanced, not prerequisites to be met.

The serious question standard, being a balancing test, is completely consistent with the balancing necessary in judicial discretion. Creating equitable solutions among parties would be impossible without balancing their injuries and interests. A test like the rigid interpretation that allows for no balancing of the factors creates possible inequitable outcomes. By its very own

nature, equitable relief requires balancing. To give a court the ability to create the fairest outcomes, flexible balancing tests, like the serious question standard, should remain within the court's discretion.

Complex and confusing cases require a flexible preliminary injunction standard allowing courts to balance *Winter* factors at their own discretion. In *Dataphase*, the court granted a preliminary injunction in an antitrust and non-compete case concerning computer automation. 640 F.2d at 111. The court held that the lower court did not properly assess the factors. *Id.* at 114. The court explained that a sufficiently serious question to the merits was shown, but the amount of irreparable injury was uncertain and speculative. *Id.* The court reasoned that since there was only a serious question, a greater showing from irreparable injury was necessary. *Id.* The court further explained that "[t]he equitable nature of the proceeding mandates that the court's approach be flexible enough to encompass the particular circumstances of each case." *Id.* at 113. The very nature of preliminary relief goes against a "wooden application" of the traditional test. *Id.*

Here, a great showing of irreparable injury was exhibited, but the likelihood of success is difficult to ascertain. Just like in *Dataphase*, the court needs to balance the factors to find the most equitable outcome for the Marianos and Lincoln. By using the flexible serious question balancing standard, the court can exercise its judicial discretion as needed to grant proper equitable relief.

3. The Movant's burden under the serious question standard is no lighter than under the traditional standard.

The serious question standard complies with the purpose of preliminary injunctions while not lessening the overall burden by being a balancing test. As the likelihood of success lowers or becomes impossible to determine, the showings in the other three factors must increase. The

burden on the movant must remain high because preliminary injunctions are an "extraordinary and drastic remedy" that should be "the exception rather than the rule." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *United States ex rel. Citizen Band Potawatomi Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888 (10th Cir. 1989). Preliminary injunctions are not a "matter of right" but are only available to those that can show a disproportionate "balance of hardships" in their favor. *Citigroup*, 598 F.3d at 35 (quoting *Jackson Dairy*, 596 F.2d at 72). The purpose and high burden, seemingly being in conflict, require the applied test to be a delicate balance. On one hand, preliminary injunctions are needed to prevent irreparable harm but on the other, they should only be used when necessary. *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008); *Yakus v. United States*, 321 U.S. 414, 440 (1944).

The serious question standard walks this line. It does not increase the number of people that should be granted an injunction. Instead, it shifts the scales for those that need the remedy and away from those that do not. The rigid test grants injunctions only for those that meet arbitrary requirements while leaving others in the dark. As this may comply with the high burden, it falls short of the purpose for preliminary injunctions. The serious question standard keeps both purpose and the required burden within reach by lowering one threshold and simultaneously raising another. This flexibility better complies with the purpose and burden requirements than the rigid interpretation and, for that reason, was properly applied here.

4. Enforcement of a state statute does not foreclose application of the serious question standard due to the gravity of constitutional violations.

If the public interest cannot be specifically determined in a constitutional rights case, the district court should still have the discretion to use the serious question standard when enjoining government action. The serious question standard has been applied against governmental entities

especially when governmental enforcement of a law is not being enjoined. *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1339 (2d Cir. 1992) (overturned for other reasons); *Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, 836 F.2d 760, 763 (2d Cir. 1988); *Patton v. Dole*, 806 F.2d 24, 30 (2d Cir. 1986). Historically, courts default to the traditional test when government action is being enjoined, but that is not the case if the adverse public concerns are in debate. *Haitian*, 969 F.2d at 1339. The government does not have "an exclusive claim on the public interest." *Id.* In these situations, the serious question standard should be used, and the competing harms should be weighed in the fourth factor of the *Winter* test. *Time Warner Cable of N.Y.C., a div. of Time Warner Ent. Co., L.P. v. Bloomberg L.P.*, 118 F.3d 917, 923–24 (2d Cir. 1997); *Haitian*, 969 F.2d at 1339; *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010).

Despite Lincoln's interest in protecting children, its argument that enjoining the SAME Act would harm the public fails to consider the harms caused by denying the injunction. Additionally, the public harm caused by the SAME Act outweighs the harm prevented. In *Time Warner Cable*, the serious question standard was used because the plaintiff along with the government defendants both had competing concerns about the public interest from an alleged First Amendment violation. 118 F.3d at 923. Both parties alleged that their use of the cable channels was in the best interest of the public. *Id.* The court held that the serious question standard was applicable to this litigation because of the constitutional implications and competing public concerns even though the injunction was against government action. *Id.* at 923–24.

Here, Lincoln and the Marianos have directly competing public concerns in this constitutional rights violation case. R. at 2–3, 10–13. Forcing a transgender child to go through puberty against doctor's recommendations and will of the family would not only cause

irreversible physical changes but psychological trauma. This trauma can lead to self-harm, substance abuse, and the most unfortunate situation of taking their own life. Thus, enjoining the act will protect transgender children. R. at 10. Lincoln states that its public concern is to protect children from experimental treatments but gives no evidence to show that the treatments are experimental. R. at 3–4. Lincoln's reasons all consist of generalizations such as "Parents and adolescents *often* do not fully comprehend . . . the risks" or "*Many* cases of gender dysphoria in adolescents resolve naturally . . . ." R. at 2–3 (emphasis added). The district court found these reasons unpersuasive due to the lack of evidence, and that factual determination is entitled to deference. R. at 15. Because these assertions are in direct and total conflict, the Court should apply the serious question standard even though government action is being enjoined.

In complex cases like the one at hand, the serious question standard should remain within the discretion of the court. The purpose and equitable nature of preliminary injunctions require a certain level of flexibility to protect the proper individuals. *Dataphase*, 640 F.2d at 113. The serious question standard reaches this level while the rigid test does not. The serious question standard meets this goal all while maintaining the required high burden on the movant. *Munaf*, 553 U.S. at 689–90; *Yakus*, 321 U.S. at 440. Additionally, a government defendant does not make the test automatically default to the rigid standard. *Haitian*, 969 F.2d at 1339. In constitutional rights cases where the public intertest is in dispute, the serious question standard remains within the court's discretion. *Time Warner Cable*, 118 F.3d at 923–24. Therefore, this Court should affirm the lower court's application of the serious question standard.

B. *Winter* Did Not Abrogate the "Serious Question" Standard.

The serious question standard was not struck down by *Winter* because this Court only set a floor on the irreparable harm factor. 555 U.S. at 20–22; *Citigroup*, 598 F.3d at 37. In *Winter v.*

Natural Resources Defense Council, Inc., this Court determined whether the "possibility" standard for irreparable injury applied by the lower court complied with the preliminary injunction factors. 555 U.S. 7, 20 (2008). The lower court applied the four factors, now deemed the *Winter* factors, but only required that a "possibility" of irreparable harm be shown once a strong likelihood of success was determined. *Id.* This Court held that showing only a "possibility" of irreparable harm was too lenient of an application of the preliminary injunction rule. *Id.* at 20–22. This Court reasoned that irreparable injury must at least be "likely in the absence of an injunction." *Id.* at 21.

The serious question variation applies this standard. *Citigroup*, 598 F.3d at 37. In fact, the serious question standard can require an even stronger showing of irreparable injury depending on the seriousness of the question towards the merits. *Id.* Because the serious question standard only affects the "likelihood of success" factor and the irreparable injury likelihood is not decreased, the serious question standard complies with *Winter*.

Additionally, the serious question standard remains applicable under *Winter* because it does not lessen the burden on the movant. *Citigroup*, 598 F.3d at 35. A more lenient standard contradicts this Court's "characterization of injunctive relief as an extraordinary remedy." *Winter*, 555 U.S. at 20–21. The serious question standard is not more lenient because balancing factors does not lower the overall burden. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013). Just because a test becomes more flexible, does not mean that the burden is now lower. Under the serious question standard, the overall burden remains the same because the movant now must have a greater showing from the other three factors. *Citigroup*, 598 F.3d at 35.

Lincoln points to the Fourth Circuit Court of Appeals' interpretation of *Winter* in *Real Truth About Obama* stating that the serious question standard should no longer be in use. R. at 9. In *Real Truth About Obama*, the lower court applied the serious question standard. 575 F.3d at 346–47. The circuit court held that *Winter* required a clear showing of likely success on the merits. *Id.* This interpretation is inaccurate. Although this Court in *Winter* provided no guidelines for the "likelihood of success on the merits" factor specifically, this Court did require that the overall burden of the preliminary injunction test is not lessened. 555 U.S. at 19–20, 22.

The basis for the circuit court's misinterpretation likely comes from this Court's guidelines for irreparable injury. This Court specifically required that a showing of at least "likely" was required for irreparable injury. *Id.* This Court was then silent towards any requirements for the "likelihood of success on the merits" factor. *Id.* at 19–22. Placing a floor on one factor does not place that same floor on every other factor in test.

The circuit court also misinterpreted this Court in *Winter* by stating this Court rejects a balancing of the preliminary injunction factors. *Real Truth About Obama*, 575 F.3d at 347. This Court only specifically rejected the Ninth Circuit Court of Appeals' lenient "possibility" standard for irreparable injury. *Winter*, 555 U.S. at 22. This Court also set out the guidelines that preliminary injunction tests must not lessen the overall burden on the movant. *Id.* at 24. This is precisely what the serious question standard does. The serious question standard abides with the irreparable injury floor, while not lessening the overall burden on the movant. *Citigroup*, 598 F.3d at 35–36.

The serious question standard remains consistent with this Court's other precedent concerning preliminary injunctions. This Court did not change the preliminary injunction standard in *Nken v. Holder*. 556 U.S. at 418 (2009). In *Nken*, this Court determined the standard

for a stay of removal. *Id.* at 423. This Court held that the standard for granting a request for a stay of removal should be the same as the traditional rigid preliminary injunction standard. *Id.* at 428. However, this Court did not expressly or implicitly overrule the serious question standard for preliminary injunctions. *See Citigroup*, 598 F.3d at 37. This Court distinguished the two methods of relief by contrasting their underlying purposes. *Nken*, 556 U.S. at 427. "An injunction and a stay have typically been understood to serve different purposes. The former is a means by which a court tells someone what to do or not to do. . . . By contrast, instead of directing the conduct of a particular actor, a stay operates upon the judicial proceeding itself." *Id.* This Court did not state which standard should be used for preliminary injunctions, therefore, the standard applied in Nken is not controlling in preliminary injunction cases.

Moreover, it follows that because the purposes are different, the standards should not be identical. Because a stay of removal prevents action by a judicial proceeding, the standard should be more rigid. *See id.* Preliminary injunctions apply in a broader range of cases, so the test needs to conform to that ever-changing medium. By having a more flexible test than the rigid interpretation, the applied standard becomes more tailored to the specific case. Nevertheless, this Court in *Nken* is silent toward to what standard should be used for preliminary injunctions. *See id.* at 418. For that reason, the holding in *Nken* is not relevant towards the serious question standard.

This Court in *Munaf* also did not discredit the serious question standard. 553 U.S. at 674. In *Munaf*, this Court resolved the question of whether analyzing habeas jurisdiction to satisfy the "likelihood of success on the merits" factor was sufficient to grant a preliminary injunction. *Id.* at 690–91. This Court held this was an improper application of the factor. *Id.* This Court reasoned that if "likelihood of success on merits" only meant a showing of success towards jurisdiction,

"then preliminary injunctions would be the rule, not the exception." *Id.* at 690. Based on the purpose and required high burden for preliminary injunctions, this application would be improper. Simply put, the merits of the case must be analyzed when determining the likelihood of success on the merits. The serious question standard analyzes the merits thereby following the *Munaf* requirement.

The serious question standard has been applied for decades before the analysis in these Supreme Court cases. *Hamilton Watch*, 206 F.2d at 740. "None of the three cases comments at all, much less negatively, upon the application of a preliminary injunction standard that softens a strict 'likelihood' requirement in cases that warrant it." *Citigroup*, 598 F.3d at 37. This Court has allowed for flexible applications of the standard and struck down those that have been too lenient. *Winter*, 555 U.S. at 20–22. "If the Supreme Court had meant for *Munaf*, *Winter*, or *Nken* to abrogate the more flexible standard for a preliminary injunction, one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself." *Citigroup*, 598 F.3d at 37–38.

This Court has allowed the serious question standard to be applied for decades and should continue to allow it. The serious question standard complies not only with the purpose and required burden for preliminary injunctions but remains consistent with this Court's precedent. Thus, this Court should declare the serious question standard as within the discretion of district courts for determining the grant of preliminary injunctions.

II. THE DISTRICT COURT PROPERLY ENJOINED THE SAME ACT'S BAN ON PHYSICIAN-RECOMMENDED, GENDER AFFIRMING MEDICAL TREATMENT FOR MINORS BECAUSE THE MARIANOS HAVE RAISED SUFFICIENTLY SERIOUS QUESTIONS GOING TO THE MERITS OF THEIR DUE PROCESS AND EQUAL PROTECTION CLAIMS.

The Marianos have made a showing so high on the "likelihood of success on the merits" determination that both the serious question standard and the rigid interpretation are satisfied for

their Substantive Due Process claim and Equal Protection claims. Because the only issue before this Court concerns the likelihood of success on the merits factor from the *Winter* test, the other three factors are presumed to be satisfied. R. at 35. The Marianos need only show a sufficient likelihood of success for *one* of their constitutional claims to justify the lower court's grant of a preliminary injunction. *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1040 (8th Cir. 2016). In determining the plaintiff's likelihood of success on the merits for a constitutional claim, the appropriate level of scrutiny must first be determined. *Libertarian Party of Ark. v. Thurston*, 962 F.3d 390, 399 (8th Cir. 2020). The level of scrutiny then must be applied to the constitutional claim to determine whether the claimant's constitutional right was violated.

Under the serious question standard, the questions raised must be "so serious, substantial, difficult and doubtful to make them a fair ground for litigation and thus for more deliberate investigation." *Hamilton Watch*, 206 F.2d at 740. Adequate serious questions must have "sufficiently serious factual merit to warrant further investigation . . . ." *Trump v. Deutsche Bank AG*, 943 F.3d 627, 673 (2d Cir. 2019). Legal merit on its own is not sufficient. *Id.* Were that the case, every constitutional claim would require an injunction. *Id.* The serious questions must also be fair grounds for litigation meaning there must be a factual dispute that can be resolved at trial. *Id.* The plaintiffs need only show a substantial enough fact question to satisfy the serious question standard.

Under the rigid interpretation, the plaintiff must make a clear showing that success on the merits is likely. *Real Truth About Obama*, 575 F.3d at 346. Courts have not put an exact percentage on likelihood, but it is presumably more than the fifty-one percent standard "more

likely than not." To satisfy the rigid standard, success must be clear, and not just a possibility. *Real Truth About Obama*, 575 F.3d at 346.

A. The SAME Act Likely Violates Elizabeth and Thomas Mariano's Rights of Parental Autonomy Guaranteed by the Due Process Clause.

Elizabeth and Thomas Mariano's parental right to make decisions regarding their child's medical care was violated by the SAME Act warranting strict scrutiny. The Fourteenth Amendment provides that "no state shall deprive any person of life, liberty, or property without due process." U.S. Const. amend. XIV. This Court has long recognized that the Fourteenth and Fifth Amendment guarantee more than just a fair process. *Id.*; U.S. Const. amend. V; *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Within the Due Process Clause there is a substantive component which "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Glucksberg*, 521 U.S. at 720.

1. Strict Scrutiny applies to this Due Process challenge because parents have a fundamental right to pursue a well-accepted course of medical treatment provided by qualified medical professionals for their children.

The Mariano's right to make informed medical decisions for their child is fundamental under the Due Process Clause because it is "deeply rooted in tradition, history, and precedent and . . . implicit in the concept of ordered liberty." *Griswold v. Connecticut*, 381 U.S. 479, 488–90 (1965); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Lincoln's assertion there is no fundamental parental right to obtain experimental treatments is an inaccurate characterization of the right. R. at 14. The Mariano's have shown that gender affirming care is far from experimental, and Lincoln failed to provide evidence to the contrary. R. at 5–7. Additionally, this Court should not defer to the state's decision because there is no medical uncertainty about the treatments.

a. The right to make informed medical decisions for one's children is fundamental under the Due Process Clause because it is consistent with tradition, history, precedent, and implicit in the concept of ordered liberty.

The Marianos' right to make decisions about the care, custody, and control of their children by seeking and following medical advice is fundamental under the Due Process Clause because of a century worth of tradition, history, and precedent. "[T]he interest of parents in the care, custody and control of their children—is perhaps the oldest of the liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Nearly one hundred years ago, this Court held in *Meyer v. Nebraska* that the Due Process Clause includes the right of parents "to establish a home and bring up children and to control the education of their own." 262 U.S. 390, 399 (1923). Two years following *Meyer*, this Court again held that "liberty of parents and guardians includes the right to direct the upbringing and education of children under their control." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). This Court explained that "[a] child is not [a] mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. Once again, this Court confirmed the fundamental right to direct the upbring of one's own children in *Prince v. Massachusetts*. 321 U.S. 158, 164–66 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

The history and tradition of parental rights continued in 1972 when this Court reiterated the recognized "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66 (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). "The history and culture of Western civilization reflects a strong tradition of parental concern for the nurture and upbringing of children. This primary role of the parents in the

upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This Court has continued to follow its own precedent deeming parental rights over their children as fundamental rights. *See, e.g.*, *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Glucksberg*, 521 U.S. at 720. Moreover, the right to make informed decisions for one's child is also implicit in the concept of ordered liberty because it is one of the most basic and deeply rooted rights in our society. *Griswold*, 381 U.S. at 485, 511. Based off this extensive history, tradition, and precedent, the right of parents to make decisions concerning the care, custody, and control of their children is a fundamental right under the Due Process Clause.

Additionally, this fundamental right has been extended to include the right of parents to seek and follow medical advice for their children. *Parham v. J.R.*, 442 U.S. 584, 602 (1979). This Court not only recognized this right as fundamental but stated that parents have a "high duty" to recognize symptoms of illness then exercise their parental rights. *Id.* In *Parham*, a state statute that allowed parents the ability to institutionalize their children against the child's consent was held to be constitutional. *Id.* at 584. This Court reasoned that since parents possess the maturity and experience that children lack, their decision-making will generally trump the child's opinion. *Id.* at 602. However, the reality is that not every parent has their child's best interest in mind. *Id.* This Court explained that the presumption shall be that the parents are acting in the best interest of the child. *Id.* at 602–03. But, to "create a basis for caution," a third party such as a doctor should be consulted to aid in the medical decision-making process. *Id.* at 605. Furthermore, parents do not have an absolute right to force medical treatment on a child over the minor's objection. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 96 (1976)

(declaring a state statute unconstitutional for giving parents an absolute veto over a minor child's decision to have an abortion).

Like in *Parham*, Jess's parents properly exercised their parental rights by taking Jess to a licensed psychiatrist before making medical decisions. R. at 4–5; 442 U.S. at 584. They employed their best judgement with Jess's best interests at heart and made the informed decision to pursue gender affirming care after advisement from the doctor. R. at 4–5. Contrary to *Parham*, all of this was done without objection by Jess. R. at 4–5; 442 U.S. at 584. The SAME Act would directly prevent Jess's parents from making this decision. R. at 2–4. Jess's opinion; his parents experience, maturity, and capacity for judgment; and the doctor's diagnosis and recommendation do not matter whatsoever in the eyes of the SAME Act. R. at 2–4. Lincoln attempting to take away all decision-making power for transgender treatments, blatantly violates the Marianos' fundamental right to make informed medical decisions for their child. The state does not have an absolute right over the public interest. *Haitian*, 969 F.2d at 1339.

b. This Court should not follow Lincoln's characterization of the Mariano family's right because gender affirming care is not experimental.

Lincoln's claim this is merely a right to experimental treatment and should not be a fundamental right has no founding. Gender affirming care has been well-established over decades for use with cisgender individuals for hormonal imbalances. R. at 15. Gender affirming care serves the exact same purpose for transgender individuals. For example, testosterone blockers can be used for females to stop the growth of facial hair just like a biological born male could use the same medication to stop facial hair growth. The only difference between these two examples is that the first is legal under the SAME Act but the second is illegal. R. at 3–4. This

does not make the treatment experimental. Lincoln cites no evidence to refute this assertion except for guidelines from Sweden and Finland and two detransitioned witnesses. R. at 7–8.

Lincoln's testifying expert inaccurately recounted the guidelines from Sweden and Finland stating that they banned gender affirming care for individuals under eighteen. R. at 7. But these guidelines allow for hormonal treatments for minors under clinical supervision, and current users of the drug can continue the treatments after an individual assessment and giving informed consent. *Guideline Regarding Hormonal Treatment of Minors with Gender Dysphoria at Tema Barn–Astrid Lindgren Children's Hospital* (ALB) (Sept. 2022), https://segm.org/sites/default/files/Karolinska%20Guideline%20K2021-4144%20April%202021%20%28English%2C%20unofficial%20translation%29.pdf ("*Guideline Regarding Hormonal Treatment*"). These guidelines show these treatments should not be banned. Instead, they should be allowed with informed consent and doctor supervision.

Lincoln's two witnesses both express regret for not adequately contemplating the consequences of gender affirming care, but this does not make a treatment experimental or uncertain. R. at 8. These witnesses confirm the need for parents to exercise their right to make informed decisions for their children after consulting with a doctor because treatments for gender dysphoria should be individualized. Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clin. Endocrinology and Metabolism 3869 (2017), https://doi.org/10.1210/jc.2017-01658. Because gender affirming care is not experimental, characterizing the Mariano's rights as "the right to experimental treatment" is inaccurate.

Lastly, the use of treatments for other "off-label" purposes than what the drug was formally approved by the FDA, does not make the treatment experimental. Zain Mithani, *Informed*

Consent for Off-Label Use of Prescription Medications, 14 AMA Journal of Ethics 576, 576 (2012), https://journalofethics.amaassn.org/article/informed-consent-label-use-prescription-medications/2012-07.

The FDA approved purpose for these treatments mirrors their use with transgender minors. These treatments are prescribed with the purpose of changing anatomical characteristics no matter who they are prescribed to, cisgender or transgender. For example, puberty blockers are prescribed to halt puberty in a transgender individual just as they are prescribed to halt puberty in a minor with central precocious puberty, a condition in which a child enters puberty at a young age. R. at 15; *see* Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, American Academy of Pediatrics Policy Statement (Oct. 1, 2018) at 5, https://perma.cc/D4R6-GP6C ("Ensuring Comprehensive Care and Support for Transgender"). Therefore, gender affirming care is not experimental.

c. This Court should not default to the state's decision when there is medical uncertainty because constitutional rights are at stake.

The district court did not err by using its discretion in deciding factual inquires when this case concerns constitutional rights because there is little to no medical uncertainty. In *Gonzales v. Carhart*, this Court deferred to the state's position because the risks concerning partial birth abortions were in dispute. 550 U.S. 124, 163 (2007). Yet, this Court rejected the notion that district courts should defer to the state's position in all cases of medical uncertainty. *Id.* at 165. This Court explained that in cases "where constitutional rights are at stake," district courts retain the right to review factual findings. *Id.* Because the Mariano's constitutional rights were at issue, the lower court properly used its discretion in reviewing the factual findings instead of defaulting to the state's "experimental" position for the preliminary injunction. Because there was no clear error by the lower court in using its discretion, there was no abuse of discretion.

Furthermore, there is practically no medical uncertainty about the usefulness and nonhazardous nature of gender affirming care. The level of treatment needed for each individualized case of gender dysphoria should be up to the discretion of the individual's doctor. Because the treatments may vary person to person does not make them medically uncertain. The best treatments for transgender minors may range from psychiatric therapy up to genital surgery in extreme cases. Jack L. Turban et al., *Legislation to Criminalize Gender-Affirming Medical Care for Transgender Youth*, 325 J. Am. Med. Ass'n 2251 (2021). The international guidelines cited by Lincoln echo this same sentiment. *Guideline Regarding Hormonal Treatment, supra*. Instead of banning the forms of treatment, each individual should be assessed by a doctor and prescribed a treatment plan. The wrong gender treatments can be harmful just as brain surgery does not fix a heart attack. Because one treatment is right in one scenario and wrong in another does not create medical uncertainty justifying a ban.

The overwhelming precedent, history, and tradition all point to parents having a fundamental right to make informed medical decisions for their children. Lincoln's assertion these treatments are experimental does not change this due to the lack of supporting evidence. Moreover, the lower court followed this Court's precedent in *Gonzales*. Therefore, the SAME Act should be subject to strict scrutiny because the parent's right to make informed medical decisions about their child is fundamental under the Due Process Clause.

2. The SAME Act fails strict scrutiny.

The Marianos made a clear showing that they were likely to succeed on the merits under strict scrutiny. Even if the showing was not clear, they raised serious questions on the merits still making the preliminary injunction properly granted. The Act should be subjected to strict scrutiny review because Lincoln is attempting to enforce a statute that violates the Marianos'

fundamental right to make informed medical decisions for their child. *See Glucksberg*, 521 U.S. at 719–21. Under strict scrutiny, state laws that affect an individual's liberty interest under the Fourteenth Amendment's Due Process Clause will be upheld only if they are narrowly tailored to serve a compelling government interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); U.S. Const. amend. XIV. To meet the narrowly tailored requirement, the state must use the least restrictive means to achieve the compelling interest. *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 909–10 (1986). If there are other reasonable ways to achieve the state's purpose, then the state has failed to meet its burden. *Id.* at 909.

a. Lincoln does not have a compelling justification for the SAME Act.

Because the SAME Act violates a fundamental right, it must be "validated by a sufficiently compelling state interest." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977). In *Carey*, a state statute banned contraceptives for minors under sixteen and contraceptives could only be purchased through a pharmacy for those over sixteen. *Id.* at 681. This Court held that the state's interest for the statute was not compelling, and the statute was not narrowly tailored to serve that interest. *Id.* at 688–90. This Court explained that banning nonhazardous contraceptives that are used by adults and minors above sixteen "bears no relationship to the State's interest in protecting health." *Id.* at 690. Furthermore, attempting to protect minors by making sexual activity more hazardous is irrational and counterintuitive thereby failing to serve the state's interest. *Id.* at 694.

The SAME Act fails strict scrutiny for the same reasons. Lincoln's interest in protecting children from experimental gender affirming care is inaccurate and not legitimate. Like the nonhazardous contraceptives in *Carey*, the treatments and procedures are not dangerous or experimental. *Id.* at 690; R. at 5–8. According to WPATH guidelines, puberty blockers are

reversible and cause no long-term harm. World Pro. Ass'n for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 19 (7th ed. 2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf. Also, puberty blockers do not affect a minor's fertility. Doernbecher Children's Hospital, *About Puberty Blockers*, https://www.ohsu.edu/sites/default/files/2020-12/Gender-Clinic-Puberty-Blockers-Handout.pdf. They have safely been used for decades by minors and adults. R. at 15; *Ensuring Comprehensive Care and Support for Transgender*, *supra*. This healthcare is allowed for all cisgender individuals, but Lincoln does not call treatments in this context experimental. R. at 14–15. Lincoln has no basis for its experimental label except international guidelines that suggest healthcare only under doctor supervision instead of an outright ban. R. at 7 *Guideline Regarding Hormonal Treatment*, *supra*. Lincoln failed to show how its interest is compelling or even legitimate because it bears no relationship to protecting transgender minors.

b. The SAME Act is not narrowly tailored to serve Lincoln's interest.

The SAME Act also fails strict scrutiny because it harms children instead of serving its interest. To be constitutional under strict scrutiny, the Act must be the least restrictive means to protect transgender children's mental and physical health. *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). The Act is far from the least restrictive way to protect transgender youth because banning gender affirming care would actually cause psychological and physical damage. Just like the unconstitutional ban in *Carey*, the Act attempts to protect children by making life more hazardous for children. 431 U.S. at 690. Lincoln's method to protect minors is counterintuitive, irrational, and overall harmful. Thus, the Act is not narrowly tailored to serve its interest and should be struck down as unconstitutional.

The Act violated the Mariano family's fundamental right to care and make informed medical decisions for their child. This violation requires the Act to be subject to strict scrutiny which it fails. The Marianos not only raised a sufficiently serious question as to the merits of their Substantive Due Process claim, but they also made a clear showing that they would likely succeed on the merits. Therefore, this Court should AFFIRM the lower court's grant of the preliminary injunction.

B. The SAME Act Likely Violates Jess Mariano's Rights Under the Equal Protection Clause.

The SAME Act violates Jess's Equal Protection rights because the Act discriminates against Jess based on his inclusion in two quasi-suspect classes. This Court has applied intermediate scrutiny to statutes which discriminate based on being a member of a quasi-suspect class. *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982). First, the statute must be shown to discriminate against the specific class. *Washington v. Davis*, 426 U.S. 229, 241 (1976). If the statute discriminates by the plain meaning of its text, then it is facially discriminatory. *Plyler*, 457 U.S. at 216–17. But if the statute is facially neutral, courts must then look to the purpose and effect of the statute to see whether it discriminates based on the class. *Washington v. Davis*, 426 U.S. at 241. In this analysis, courts weigh the impact, historical background of the decision, and the legislative history. *Id.*

Next, the class must be then categorized as either suspect or quasi-suspect. In determining whether a person is a member of a suspect or quasi-suspect class, courts review the history of discrimination against the class, political power of the class, immutability of the characteristic, and the general legitimacy of the class. If a class is suspect, strict scrutiny must be applied, if quasi-suspect, intermediate scrutiny, and if neither, rational basis review.

1. Intermediate scrutiny applies to the Equal Protection challenge because the SAME Act discriminates based on sex by facially targeting transgender individuals.

The SAME Act should be subjected to intermediate scrutiny because it specifically targets and only effects transgender individuals. This Court has recognized sex as a protected quasi-suspect class but as of yet, has not precisely named transgender a protected class. *United States v. Virginia*, 518 U.S. 515, 555 (1996). But this Court has explained that transgender falls within sex in employment discrimination cases. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020) Transgender, by definition, is within the sex classification just like male and female, so this Court should extend its reasoning from *Bostock* to apply to the transgender class in Equal Protection cases.

a. The SAME Act facially discriminates on the basis of sex.

The SAME Act should be analyzed under intermediate scrutiny because it facially discriminates based on sex from a plain reading of the statute. The Act specifically forbids healthcare with the purpose of creating changes "that resemble a sex different from the individual's biological sex . . . ." R. at 3. The determining factor whether a child may be prescribed a specific medical treatment is based on sex. R. at 3–4. For example, under the SAME Act, a biologically born male may be prescribed testosterone or have breast tissue surgically removed, but a biologically born female may not. R. at 15. Lincoln's argument that the Act is based off medical procedures and minority status is unpersuasive because neither reason are completely dispositive. R. at 19. To determine what treatment is legal or illegal, the biological sex of the minor must be known. R. at 19. The determinative factor in the Act is sex of the minor. Therefore, the Act facially discriminates based on sex warranting intermediate scrutiny.

b. Transgender status falls within the sex classification warranting intermediate scrutiny.

Because transgender status is included in the sex classification, discrimination against transgender individuals requires intermediate scrutiny. This Court in *Bostock* explained that it "is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." 140 S. Ct. at 1741. This Court held in *Price Waterhouse v. Hopkins*, treating an individual less favorably because they do not conform to gender norms is evidence of sex discrimination. 490 U.S. 228, 236 (1989). In *Bostock*, this Court also held that discriminating based on transgender status violates Title VII of the Civil Rights Act because transgender falls within the category of sex. 140 S. Ct. at 1754.

Here, the dissent in the Fifteenth Circuit Court of Appeals interpreted *Bostock* to not extend to Equal Protection cases because Title VII and the Equal Protection Clause do not have equal burdens. R. at 32. But that is not what the Fifteenth Circuit Court of Appeals majority opinion or the circuit court in *Doe* is stating *Bostock* should be interpreted to do. *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022). This Court in *Bostock* extended the sex classification to include transgender status when determining discrimination. 140 S. Ct. at 1741. The difference between Title VII and Equal Protection is that finding discrimination against a quasi-suspect class is only the first step in Equal Protection analysis, whereas it is the only step in Title VII. *Washington v. Davis*, 426 U.S. at 241. This Court in *Bostock* was not holding that discrimination against transgender individuals allows courts to skip the scrutiny analysis. 140 S. Ct. at 1741. By extending this Court's reasoning in *Bostock* to Equal Protection, transgender would be analyzed under the same lens as sex only for determining what level of scrutiny should be applied. *Id.*; *Doe*, 28 F.4th at 114.

The Act textually discriminates against the transgender class because only transgender individuals are deprived of healthcare to create or suppress anatomical characteristics. R. at 3–4. The Act does not specifically use the word "transgender," but the definition of the type of people targeted by the Act mirrors the definition of the transgender class. Omitting the name of the class does not preclude the Act from textually discriminating. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003). Transgender individuals are the only people seeking treatment to create anatomical characteristics different than their biological sex. By banning healthcare based on a characteristic that only transgender individuals possess, the SAME Act textually discriminates against the transgender class without specifically using the word transgender. Therefore, the Act is facially discriminatory against the transgender class.

Even if the Act is found to not discriminate facially, it still discriminates in purpose and effect. The purpose of the Act is to prevent one sex from getting treatment that would be legal for the other sex. R. at 15, 19. Section (b) of the Act lays out its alleged purpose of protecting children from risking their health, but these reasons are merely aspirations. R. at 3. The true purpose of the Act is to prevent transgender youth from getting gender affirming care with the hopes that this will yield their desired results. R. at 3. Unfortunately, achieving these results by disallowing gender affirming care has no scientific backing. R. at 5–7. On the contrary, studies have shown that disallowing gender affirming care will have the opposite effect. *Id.* Lincoln believes that gender affirming care for minors is harmful and wants it prevented, further illustrating that the underlying purpose is to prevent the transgender healthcare. R. at 2–4. Yet, these treatments are still allowed for cisgender minors. R. at 15. An aspirational secondary purpose does not mask the harmful consequences from the primary discriminatory purpose.

The effect of the SAME Act only discriminatorily affects transgender minors. In *Lawrence*, this Court struck down a statute forbidding sex between two individuals of the same sex. 539 U.S. at 562–63. This Court explained that even though the statute banned same sex intercourse for everyone, it only effected homosexuals. *Id.* at 578–79. Just like the same sex intercourse ban in *Lawrence*, the SAME Act has absolutely no effect on any other class except transgender minors. R. at 2–4.

Healthcare banned for transgender youth is deemed legal for any other class for any other purpose. Under the SAME Act, a female receiving testosterone blockers to halt the growth of facial hair is not forbidden. A male receiving chest surgery to remove enlarged breast tissue is deemed legal. A young child receiving puberty blockers to postpone growth and early onset puberty is also legal. Lincoln specifically worded the Act to allow for any other healthcare except for gender affirming care for transgender youth. R. at 2–4. Along with the underlying purpose of the Act, the Act discriminates against the transgender class and should be subject to intermediate scrutiny because transgender falls within the quasi-suspect class, sex.

c. Transgender status is independently a quasi-suspect classification deserving of intermediate scrutiny.

Even if this Court does not put transgender individuals in the same quasi-suspect class as sex, transgender should be its own quasi-suspect class. In determining a suspect class, this Court looks at a list of factors including:

> whether the class has been historically "subjected to discrimination," whether the class has a defining characteristic that "frequently bears [a] relation to ability to perform or contribute to society," whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," and whether the class is "a minority or politically powerless."

Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Cleburne*, 473 U.S. at 440)). But the immutability and lack of political power are not fully required. *Id.*

Transgender individuals have historically been discriminated against. In *Flack v. Wisconsin Department of Health Services*, the district court uncovered statistics pointing towards long-term discrimination against transgender individuals such as: twice as likely to be in poverty, one in five is unemployed, 60% of transgender people have been mistreated by law enforcement, 30% have been denied insurance coverage due to transgender status, one third have been negatively treated by medical professionals with 25% choosing to not see a doctor due to fear of mistreatment. 328 F. Supp. 3d 931, 952–53 (W.D. Wis. 2018). Besides race, the transgender class is likely the most historically discriminated against class. *Id.* at 953. Circuit courts are recognizing the injustice against transgender individuals and have deemed transgender as a quasi-suspect class. *Brandt by & through Brandt v. Rutledge*, No. 21-2875, 2022 WL 3652745, at *3 (8th Cir. Aug. 25, 2022); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611–13 (4th Cir. 2020); *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019).

Transgender individuals also possess a defining characteristic that does not impair their "ability to perform or contribute to society." *Cleburne*, 473 U.S. at 441. The characteristic being that they identify as a gender different from the biological sex. This characteristic bears no relation to performing in society. *Grimm*, 972 F.3d at 612. "Seventeen of our foremost medical, mental health, and public health organizations agree that being transgender 'implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'" *Id.* (quoting Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* 1 (2012)); Press Release, Am. Acad. of Pediatrics, *Frontline*

Physicians Oppose Legislation That Interferes in or Penalizes Patient Care (Apr. 2, 2021); Am. Med. Ass'n, *Advocating for the LGBTQ Community*, https://www.ama-assn.org/delivering-care/population-care/advocating-lgbtq-community#:~:text=The%20AMA%20supports%20public%20and,sexual%20orientation%20or%20gender%20identity.

The immutable nature of being transgender is very much in debate due to the inability to determine whether being transgender begins at birth, is developed based off the person's environment, or can be voluntarily changed. But the immutable nature of distinguishing characteristics need not be literal to be quasi-suspect as illustrated by alienage classification. *Windsor*, 699 F.3d at 183. Alien status can change willingly, yet it is still subjected to heightened scrutiny. *Id.* The real question for distinguishing characteristics is whether it is "central to a person's identity." *Wolf v. Walker*, 986 F. Supp. 2d 982, 1013 (W.D. Wis. 2014). A transgender individual's gender identity is just as or more central to their being as a cisgender individual. *Grimm*, 972 F.3d at 624. Despite popular or political belief, gender identity is not voluntary.

Transgender individuals have struggled to gain political power and achieve justice. The attack on transgender rights have swept the nation with over one hundred bills being introduced and thirteen having passed. Sam Levin, "In an extraordinary attack on trans rights, conservative state lawmakers proposed more than 110 anti-trans bills this year," *Guardian* (June 14, 2021), https://www.theguardian.com/society/2021/jun/14/anti-translaws-us-map. If transgender individuals had any political power, potential laws restricting their rights would not be plaguing the country. Due to this nearly unprecedented level of injustice faced by one class of people, this Court should affirm the lower court's judgment and deem transgender status as a quasi-suspect class.

Because the Act facially discriminates and has the purpose and effect of discriminating against on both classes, this Court should then make a suspect or quasi-suspect determination. This Court has long held sex to be a quasi-suspect class. *United States v. Virginia*, 518 U.S. at 555. Because the Act discriminates based on gender, a quasi-suspect class, intermediate scrutiny is required. *Plyler*, 457 U.S. at 216–17; *Heckler v. Mathews*, 465 U.S. 728, 744 (1984); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). This Court should follow its own reasoning in *Bostock* and place transgender status in the same quasi-suspect class as sex because transgender is its own gender. 140 S. Ct. at 1741; *Grimm*, 972 F.3d at 611–13; *Karnoski*, 926 F.3d at 1200–01.

2. The SAME Act fails intermediate scrutiny.

The SAME Act fails intermediate scrutiny because Lincoln failed to show that the Act even somewhat relates to protecting transgender children. Intermediate Scrutiny requires a showing that the statute is substantially related to the government's important interest. *United States v. Virginia*, 518 U.S. at 533. The state argued that its interest in protecting children from experimental procedures and peer pressure is not only important but also compelling. R. at 16. The state fails to back up these assertions with definitive evidence. On the contrary, the evidence shows these assertions to be false.

The medical treatments and procedures that Lincoln has deemed as experimental have been used to treat other conditions for nearly forty years. R. at 15; *see Ensuring Comprehensive Care and Support for Transgender*, *supra*. This healthcare is not new and nowhere near experimental. As a matter of fact, many treatments have long been used for the same reasons transgender individuals are diagnosed the healthcare. For example, a male may have breast tissue surgically removed for the reason of suppressing female-like characteristics. A biologically born female

who identifies as male would get the surgery for the exact same purpose. The same logic tracks with females who use testosterone blockers compared to biologically born males using the blockers. Lincoln's claim that the treatments are experimental and unsupported is unfounded. Therefore, the interest Lincoln claim's to have is far from compelling, important, or even legitimate.

Additionally, the second important interest alleged by Lincoln also fails to be supported by evidence. Lincoln asserts that social pressures are influencing children to seek gender affirming care. R. at 20. Lincoln cites no evidence to even point to this being true. The district court in *Flack* showed that transgender individuals suffer everyday prejudice for simply being transgender. 328 F. Supp. 3d at 952–53. Based off these statistics, transgender individuals are likely bullied into identifying with their birth sex instead of being peer pressured into transgender acceptance. Thus, Lincoln's second interest is also not an important government interest.

Even if Lincoln's interests are found to be important, the state fails to use a means substantially related to achieving their objective of protecting children. Lincoln's purpose is to protect children from risking their own mental and physical health. R. at 3. Ironically, the SAME Act would demolish transgender youth's mental health by forcing unwanted changes unto their bodies. Transgender individuals have the highest suicide rate with 82% of individuals contemplated suicide and 40% have attempted suicide. Ashley Austin et al., *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, J. Interpersonal Violence (Mar. 2022), https://pubmed.ncbi.nlm.nih.gov/32345113/. Suicide rates are even higher among transgender youth. *Id.* A 2020 study showed that gender affirming care lowered the odds of committing suicide. Turban et al., *Pubertal Suppression, supra*, at 1, 5. The means used to achieve Lincoln's interest are not even rationally related to their goal let alone substantially

related. Lincoln's means actually cause more harm than protecting children and should be struck down as unconstitutional due to their irrational counterintuitive nature. Therefore, the SAME Act fails intermediate scrutiny.

3. Alternatively, the SAME Act fails even rational basis.

The SAME Act fails even rational basis because causing harm to transgender minors to protect them from nonhazardous medically prescribed treatments is outrageous. For a statute to be valid under rational basis review, it must bear a rational relationship to a legitimate governmental purpose. *Romer v. Evans*, 517 U.S. 620, 634–35 (1996).

Lincoln's purpose seems legitimate on its face, but in reality, its "experimental" assertion is false. R. at 20. Lincoln hopes to protect children from experimental treatment that is not experimental at all. These treatments have been deemed safe for children for decades. R. at 15. For that reason, the state of Lincoln's interest is not legitimate.

Furthermore, Lincoln's means are not rationally related to their purpose because the SAME Act has the complete opposite effect on transgender youth. The claim that preventing gender affirming care for minors protects them mentally and physically is false. On the contrary, hindering youth with diagnosed gender dysphoria and increasing their chances for depression, anxiety, self-harm, and suicide goes completely against the alleged purpose Lincoln stated. R. at 3. Therefore, the SAME Act fails any level of scrutiny because Lincoln does not have a legitimate reason to hinder transgender minors, and the means to carry out the interest harm transgender youth instead of protecting them.

CONCLUSION

The serious question standard was within the discretion of the lower court because it gave the necessary flexibility while complying with the purpose, equitable requirements, and this Court's precedent for preliminary injunctions. The SAME Act attempts to create harmful laws for the transgender class and disguise it as protection. The SAME Act violates several constitutional rights of Jess and his parents by preventing Jess the medical treatment he needs. This preliminary injunction was necessary to protect Jess and all other transgender children in Lincoln until the lower court can make a full determination on the merits.

This Court should AFFIRM the Fifteenth Circuit Court of Appeals' judgment in all respects.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

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APPENDIX A

CONSTITUTIONAL PROVISIONS

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

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

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX B

STATUTORY PROVISIONS

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

20-1201 Findings and Purposes

(a) Findings:
The State Legislature finds -

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

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

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

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

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

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

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

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

(b) Purposes:
It is the purpose of this chapter –

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

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

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

20-1202 Definitions

The Act defines –

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

(2) ”Healthcare provider” as a person or organization licensed under Chapters 15 and 16 of the Lincoln Code to provide healthcare services.

(3) ”Puberty” as the time of life when a child experiences physical and hormonal changes that mark a transition into adulthood. The child develops secondary sexual characteristics and becomes able to have children.

(4) ”Puberty blocking medication” as medications that prevent the body from producing the hormones that cause the physical changes of puberty.

(5) ”Sex” as the biological state of being male or female, based on the individual’s sex organs, chromosomes, and endogenous hormone profiles.

20-1203 Prohibition on Certain Gender Transition Treatments

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

(a) Prescribing or administering puberty blocking medication to stop or delay normal puberty.

(b) Prescribing or administering supraphysiologic doses of testosterone or other androgens to females or prescribing or administering supraphysiologic doses of estrogen to males.

(c) Performing surgeries that artificially construct genitalia tissue or remove any healthy or non-diseased body part or tissue, except for a male circumcision.

20-1204 Enforcement

(A) The attorney general may bring an action to enforce compliance with this chapter. Nothing in this chapter shall be construed to deny, impair, or otherwise affect any right or authority of the attorney general, the state, or any agency, officer, or employee of the state, acting under any provision of the Lincoln Code, to institute or intervene in any proceeding.

(B) Any healthcare provider found to have knowingly and willingly violated the provisions of the chapter shall have committed a class 2 felony punishable by civil fines up to and including $100,000 or imprisonment of not less than two years and not more than ten years.

20-1205 Unprofessional conduct of healthcare providers

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

20-1206 Effective Date

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