In the

Supreme Court of the United States

Docket No. 22-8976

APRIL NARDINI, in her official capacity as the Attorney General of the STATE OF LINCOLN,

Petitioner,

v.

JESS MARIANO, ELIZABETH MARIANO, and THOMAS MARIANO,

Respondents.

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

BRIEF FOR RESPONDENTS

Team 3116 Attorneys for Respondents

QUESTION PRESENTED

1. Does the "serious question" standard for preliminary injunctions remain valid after *Winter v. Natural Resources Defense Council, Inc.*, where the Supreme Court only narrowly held that movants must demonstrate more than a mere possibility of irreparable harm for a preliminary injunction to be granted?
2. Was enjoinment of Lincoln's "SAME Act" proper where the Act prohibited parents from making informed medical decisions on behalf of their minor children, in violation of their Substantive Due Process rights; and where the Act facially discriminated against transgender children, in turn, barring them from receiving doctor-recommended medical care, in violation of their Equal Protection rights?

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Statement of Jurisdiction

Pursuant to Rule 4(a)(i) of the Official Rules of the National Health Law Moot Court Competition, the identification of the basis for this Court's jurisdiction has been waived.

Opinions Below

The Decision and Order of the United States District Court for the District of Lincoln is unreported and set out in the Record. R. at 1–22. The opinion of the United States Court of Appeals for the Fifteenth Circuit is also unreported and provided in the Record. R. at 23–34.

Relevant Provisions

The following constitutional provision is used in this case and can be found, in relevant part, in Appendix A: U.S. Const. amend. XIV.

The following statutes are used in this case and can be found, in relevant parts, in Appendix A: 42 U.S.C. § 1983; 28 U.S.C. § 1292(b); 20 LINC. STAT. § 1201 *et seq*. (2022).

Statement of the Case

The Mariano Family's Effective Treatment of Their Child's Gender Dysphoria

Jess Mariano is a normal teenage boy with one exception: he is transgender. R. at 2. Jess was born biologically female, but his true gender identity is male. R. at 4. He resides in Lincoln with his parents, Elizabeth and Thomas, where he enjoys a stable life thanks to their continuous care and his doctors' medical interventions. R. at 2, 5. Jess, who was 14 when this case commenced, began gender-affirming care at age eight. R. at 2, 4. At present, he attends therapy with his psychiatrist, Dr. Dugray, and he takes puberty blockers prescribed by his pediatrician. R. at 5. Jess's puberty blockers, which suppress his female hormones, have proven to be a success as they have mitigated much of his gender incongruence. R. at 5. As a result of this progress, Jess is on track to receive male hormone therapy, and from there, he will be eligible for chest surgery

to remove unwanted breast tissue—a procedure that Jess has expressed a strong desire for. R. at 5.

Although Jess is currently doing well according to Dr. Dugray, this was not always the case. R. at 4, 5. Before Jess started receiving gender-affirming care, he suffered from severe gender dysphoria, which triggered debilitating depression and anxiety. R. at 4. On top of this, it made him despise his body and caused him to lament his female traits, including his breast tissue. R. at 4, 5.

If that were not enough, gender dysphoria also made Jess suicidal. R. at 4. On numerous occasions, Jess's parents overheard him say that he did not "want to grow up if I have to be a girl." R. at 5. In fact, Jess attempted suicide at the age of eight when he consumed a handful of Tylenol and said he hoped he would "never wake up." R. at 4. Since beginning his gender-affirming care though, his dysphoria is under control, his depression and anxiety have subsided, and his suicidal thoughts have ceased. R. at 5.

The State of Lincoln's Ban on Gender-Affirming Care

State of Lincoln's Stop Adolescent Medical Experimentations Act ("SAME Act") threatens to upend Jess's progress. This Act, which Attorney General Nardini seeks to enforce but is temporarily enjoined, will ban Jess and other underage transgender individuals in Lincoln from receiving certain gender-affirming treatments if it goes into effect. R. at 2–4. Namely, it will ban treatments that "instill[] or creat[e] physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 3.

The State contends that based on "emerging scientific evidence," this Act will protect transgender children from experimental gender-affirming drugs and surgeries. R. at 2–3. But it is the Act, not the procedures, that will harm Jess. R. at 5. This Act will have a detrimental effect on Jess and his parents because it will bar him from continuing his current doctor-recommended

medical treatment and commencing future medical interventions until he turns 18. R. at 2–3. In other words, he will not be able to obtain puberty blockers from his physician anymore, nor will he be able to successfully complete hormone therapy, which in turn will delay his chest surgery. R. at 4–5.

As Dr. Dugray, has explained, even a one-month interruption in Jess's current treatment will accelerate his unwanted female puberty and exacerbate his gender dysphoria. R. at 5. Moreover, untreated dysphoria can retrigger his anxiety and depression, and lead to self-harm or suicide. R. at 7. By contrast, "young adults who [] access[] puberty blockers for treatment of their gender dysphoria show[] lower odds of considering suicide. R. at 7 (citing data). Therefore, without this preliminary injunction, Jess will experience serious mental and physical harm. R. at 5. With this preliminary injunction, he will remain a stable and healthy child. R. at 5.

Procedural History

On November 2, 2021, Jess filed a complaint with the United States District Court for the District of Lincoln alleging that the SAME Act violates their rights to Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution. R. at 1. Defendant April Nardini, as Attorney General of Lincoln ("Lincoln"), indicated her intent to enforce the Act. R. at 1. Jess filed a Motion for Preliminary Injunction on November 11, 2021. R. at 1. Lincoln filed a motion to dismiss together with its response asking the Court to deny the request for a preliminary injunction. R. at 1. A hearing on both motions was held on December 1, 2021. The United States District Court for the District of Lincoln granted Jess's request for a preliminary injunction and denied the defendant's motion to dismiss. R. at 2.

Lincoln filed an interlocutory appeal in the United States Court of Appeals for the Fifteenth Circuit, requesting that the preliminary injunction entered by the United States District

Court for the District of Lincoln be overturned, and remanded with instructions to dismiss Jess's claims. R. at 23. On May 12, 2022, the Fifteenth affirmed the District Court's ruling, because the District Court acted within its discretion to grant Jess's motion for a preliminary injunction. R. at 27. Lincoln then appealed to the Supreme Court of the United States requesting a stay of the district court's preliminary injunction and for a writ of certiorari to evaluate the merits of the injunction and denial of Lincoln's motion to Dismiss. R. at 35. The application for a stay was denied by the Court. R. at 35. The petition for writ of certiorari was granted. R. at 35.

Summary of the Argument

This Court should affirm the Fifteenth Circuit's judgment and preserve enjoinment of the SAME Act because the court below correctly found that the Mariano family is substantially likely to prevail on their constitutional claims against the State, and that all other preliminary injunction factors weigh in their favor.

The Supreme Court in *Winter v. Natural Resources Defense Council, Inc.* did not invalidate the serious question standard. The Supreme Court merely found that a preliminary injunction may not be entered based only upon a "possibility" of irreparable injury. But the Court did not evaluate the merits of the parties' underlying claims and remained silent on how likely success on the merits must be. Had the Court intended to invalidate the serious question standard, it could have explicitly done so in *Winter*. Because *Winter* only takes issue with the Ninth Circuit's lightened standard for irreparable harm, it does nothing to invalidate the serious question standard.

The serious question standard also conforms with the Supreme Court's historical approach of permitting flexibility where factual disputes make it difficult to determine the likelihood of success. It can be difficult for courts to predict success on the merits at the early stages of litigation and courts need to be able to mold a ruling for the necessities of each

particular case. Because of this, the Court has historically valued flexibility, and has never invalidated the serious question standard. Therefore, this Court should find that the serious question standard remains valid after *Winter*.

Turning to the merits of the case, the Mariano family has a substantial likelihood of succeeding on their constitutional claims. The Fourteenth Amendment to the Constitution guarantees individuals the right to due process and equal protection under the laws. These guarantees prohibit a state from infringing on fundamental rights as well as discriminating against anyone on impermissible grounds. Lincoln's SAME Act, which is at issue today, violates both of these constitutional provisions. First, the SAME Act violates the Due Process Clause because it deprives Jess Mariano's parents of their fundamental liberty interest in their child's medical care. Under this Court's substantive due process jurisprudence, state laws that infringe on fundamental constitutional rights must meet the highest level of judicial scrutiny. Here, the SAME Act fails under such scrutiny. Second, and independently, the SAME Act violates the Equal Protection Clause because it denies Jess and other transgender children the opportunity to receive scientifically-backed, doctor-recommended healthcare on the basis of their sex and transgender status. Laws that implicate sex-based classifications are subjected to heightened scrutiny, which once again, this Act fails.

Having demonstrated that there are serious questions going to the merits of the case with a likelihood of succeeding on the merits, the Marianos also satisfy the remaining three elements of a preliminary injunction. First, the Marianos can show that enforcement of the SAME Act will cause them irreparable harm because if the Act goes into effect, Jess will be blocked from receiving necessary medical treatments, and as a result, he will experience severe and immediate mental and physical distress. Second, the hardship Jess will suffer if the Act is not enjoined

vastly outweighs any potential damage suffered by the State. An injunction causes no cognizable harm to the State, whereas the enforcement of the Act will detrimentally affect Jess's health and wellbeing. Finally, the public interest stands to benefit from maintaining the status quo rather than putting Jess's life in jeopardy.

For these reasons, this Court should affirm the decision of the court below and find enjoinment of the SAME Act proper

Argument

I. THE SERIOUS QUESTION STANDARD CONTINUES TO BE VIABLE AFTER *WINTER* BECAUSE *WINTER* DEALS NARROWLY WITH IRREPARABLE HARM, AND THE SUPREME COURT HAS NEVER INVALIDATED THE STANDARD.

To successfully obtain relief through a preliminary injunction, a movant must establish: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary injunctive relief; (3) that the balance of the equities tip in their favor, and; (4) that the injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Fifteenth Circuit, along with several other circuits, has long applied a sliding-scale approach that balances the four factors, allowing a stronger showing in one factor to offset a lesser showing in another. *See Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc*., 696 F.3d 206, 215 (2d Cir. 2012). Under this approach, when the latter three factors tip decidedly toward the plaintiff, a preliminary injunction can be granted if the movant shows *serious questions* going to their likelihood of success on the merits. *UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc.,* 660 F.3d 643, 648 (2d Cir. 2011).

However, *Winter* has created a split amongst the circuits, as the Fourth Circuit has improperly found that *Winter* precludes the use of the sliding-scale approach and serious question standard. *Real Truth about Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346

(4th Cir. 2009). Yet, the Second, Seventh, Ninth, and Fifteenth Circuits have all continued to use the sliding-scale or serious question standard for preliminary injunctions, just as they did prior to *Winter*. *See Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd*., 598 F.3d 30 (2d Cir. 2010); *Jones v. Caruso*, 569 F.3d 258 (6th Cir. 2009); *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010); *All. for the Wild Rockies v. Cottrell*, 362 F.3d 1127 (9th Cir. 2011). This Court should affirm the Fifteenth Circuit and find that the serious questions standard continues to be viable.

A. ***Winter*** **Deals Narrowly with Irreparable Harm, Rather than the Likelihood of Success on the Merits.**

Winter did not invalidate the serious questions standard because the Supreme Court overruled the Ninth Circuit based on their evaluation of the movants potential irreparable harm, not based upon the Ninth Circuit's evaluation of the movant's likelihood of success on the merits. 555 U.S. at 22. In *Winter*, a group of plaintiffs hoping to protect marine mammals sought preliminary injunction preventing the Navy from conducting certain training exercises in the waters off southern California. *Id*. at 13. During the training exercises, the Navy would use mid-frequency sonar, which the plaintiffs believed caused serious injuries to marine mammals, such as permanent hearing loss and decompression sickness. *Id*. at 13-14. The Ninth Circuit determined that the plaintiffs had "carried their burden of establishing a 'possibility' of irreparable injury," and granted the preliminary injunction. *Id*. at 17-19.

The Supreme Court overturned and held that a preliminary injunction may not be entered based only upon a mere "possibility" of irreparable harm. *Id*. at 22. But the Court did not evaluate the merits of the parties' underlying claims, and instead only evaluated the other three factors of the preliminary injunction test. *Id*. at 26. The Court found that the Navy's need to conduct realistic training exercises outweighed the plaintiffs' interest in the marine mammals,

tipping the balance of the equities and public interest in the Navy's favor. *Id*. at 26. But nowhere did the Court analyze the parties' likelihood to succeed on the merits. *Winter* merely holds that irreparable harm must be likely, as opposed to merely "possible," for an injunction to be issued. *Id*. at 22.

Had the Supreme Court intended to abolish the serious question standard or sliding scale approach, it could have explicitly done so, but the "Court has never rejected that formulation" and it did not do so in *Winter*. *Id*. at 51 (Ginsburg, J., dissenting). Nowhere in *Winter* did the Court mention the use of the serious questions standard when evaluating parties' likelihood of succeeding on the merits. And as the Fifteenth Circuit properly recognized, nothing in the *Winter* decision requires them to abandon their long-standing sliding-scale approach when evaluating preliminary injunctions. *Winter* only takes issue with the Ninth Circuit's relaxed standard for irreparable harm, allowing a movant to be granted a preliminary injunction by demonstrating a mere "possibility" of harm, and therefore, the serious questions standard remains valid.

B. The Supreme Court has Historically Valued Flexibility in Preliminary Injunction Standards and has Never Invalidated the Serious Question Standard.

The Supreme Court's history demonstrates that the Court values flexibility when determining whether to grant a preliminary injunction, and the Court has never cast doubt on the validity of the serious questions standard. The Court has continuously "counseled in favor of a preliminary injunction standard that permits the entry of an injunction in cases where a factual dispute renders a fully reliable assessment of the merits impossible." *Citigroup Glob. Mkts., Inc.*, 598 F.3d at 36. In *Ohio Oil Co. v. Conway*, the Supreme Court granted an injunction after finding that there were questions that could not "be satisfactorily resolved" at that stage of litigation. 279 U.S. 813, 813-15 (1929). The Court reasoned that where the "questions presented

by an injunction are grave, and the injury to the moving party will be certain and irreparable . . . the injunction usually will be granted." *Id*. at 814. The Court recognized that at the early stages of litigation, a court may be unable to determine which party is more likely to succeed on the merits, so courts need flexibility when deciding whether to grant an injunction.

This history of flexibility is especially notable given that the "Supreme Court's recent opinions in *Munaf*, *Winter*, and *Nken* have not undermined its approval of the more flexible approach signaled in *Ohio Oil*." *Citigroup Glob. Mkts., Inc.*, 598 F.3d at 37. *Munaf v. Geren* involved a preliminary injunction that was granted based on "jurisdictional issues . . . so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation." 553 U.S. 674, 690 (2008). The Court vacated the injunction because a "difficult question, as to jurisdiction is, of course, no reason to grant a preliminary injunction." *Id*. Jurisdiction "says nothing" about the likelihood of success on the merits, and if a likelihood of success could be established based on jurisdiction, then preliminary injunctions "would be the rule, not the exception." *Id*. Instead, the focus should be on "a likelihood of success on the merits." *Id*. But this ruling does not require anything beyond what *Winter* already requires. It only holds that jurisdictional issues are not enough to demonstrate a likelihood of success on the merits.

In *Nken v. Holder*, the Supreme Court was dealing with the standard for stays rather than preliminary injunctions. 556 U.S. 418, 423 (2009). Like the preliminary injunction standard from *Winter*, The Court articulated a four-factor standard for granting a stay pending appeal, requiring there be: (1) a likelihood of success on the merits; (2) irreparable injury; (3) balancing of the hardships; and (4) an evaluation of where the public interest lies. *Id*. at 426. The Court

found that it "is not enough that the chance of the merits be 'better than negligible,'" and more than a "mere 'possibility' of relief is required." *Id*. at 434.

This statement by the Court does not conflict with the serious questions standard, which is more rigorous than the "better than negligible" standard overruled in *Nken* because it requires that there be serious questions going to the merits. The *Nken* Court recognized the importance of flexibility for motions such as stays and injunctions, saying that "an exercise of judicial discretion" and the "propriety of the issue is dependent upon the circumstances of the particular case." 556 U.S. at 433. The Court also noted the importance of courts intervening in situations where, like the SAME Act, "if a court takes the time it needs, the court's decision may . . . come too late for the party seeking review." *Id*. at 421.

If the 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" by the circuits and the Supreme Court itself. *Citigroup Glob. Mkts., Inc.*, 598 F.3d at 38. But when the Supreme Court has been confronted with articulating a standard for how "likely" a claim must be to succeed on the merits, they have never invalidated or cast doubt upon the serious questions standard.

C. Many of the Circuits Have Properly Determined that the Serious Question Standard Remains Viable After *Winter*.

Since *Winter*, the Second, Sixth, Seventh, Ninth, and Fifteenth Circuits have each upheld the serious questions standard or some version of the sliding-scale approach. *See Citigroup Glob. Mkts., Inc*., 598 F.3d at 35; *Jones*, 596 F.3d at 277; *Judge*, 612 F.3d at 546; *All. For the Wild Rockies*, 362 F.3d at 1131. The Seventh Circuit was the first circuit to hold that the sliding-scale test survives *Winter*, finding that there only must be a "plausible claim on the merits" for the likelihood of success on the merits prong. *Hoosier Energy Rural Elec. Co-op., Inc. v. John*

Hancock Life Ins. Co., 582 F.3d 721, 725 (7th Cir. 2009); *see also Judge*, 612 F.3d at 546 (stating that "the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted."). The Sixth Circuit takes a similar approach, holding that a court may "grant a preliminary injunction even where the plaintiff fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits." *Jones*, 569 F.3d at 277.

Tellingly, the Ninth Circuit—who the Supreme Court overruled in *Winter*—has continued to use their serious questions version of the sliding-scale approach. *All. for the Wild Rockies*, 362 F.3d at 1131. But the Ninth Circuit properly recognized that *Winter* did not "explicitly discuss the continuing validity of the 'sliding scale' approach to preliminary injunctions," or articulate how likely success on the merits must be. *Id*. The Ninth Circuit explicitly found that the serious questions approach "survives *Winter* when applied as part of the four-element *Winter* test." *Id*. at 1132. Under the Ninth Circuit's post-*Winter* test, "'serious questions going to the merits' and a hardship balance that tips sharply towards the plaintiff can support the issuance of a preliminary injunction," so long as there is also a likelihood of irreparable injury and the injunction is in the public interest. *Id*.

The Second Circuit has also continued to use the serious questions standard after *Winter*. According to the Second Circuit, because the moving party must both show that there are serious questions going to the merits and establish that the balance of the hardships tips decidedly in their favor, the "overall burden is no lighter than the one it bears under the 'likelihood of success' standard." *Citigroup Glob. Mkts., Inc.*, 598 F.3d at 35. The Second Circuit believed that if the Supreme Court had meant to invalidate the serious questions doctrine, it would have referenced the standard and its widespread use throughout the circuits. *Id*. at 38. From a policy

perspective, the Second Circuit believed that the serious question standard provides needed flexibility and "permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting an injunction." *Id*. at 35.

While many of the circuits have properly found that the serious questions standard survives *Winter*, the Fourth Circuit incorrectly held that *Winter* invalidated their two-part sliding scale test. *Real Truth About Obama, Inc.*, 575 F.3d at 346. Their old standard began by balancing the hardship of the parties, and if the balancing resulted in an imbalance in the movant's favor, then the court would determine whether the movant "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation." *Id*. The Fourth Circuit invalidated this version of their test, because *Winter* articulates four requirements, and each of those requirements must be satisfied as articulated. *Id*. at 347. The Fourth Circuit believed this invalidated their old test, but they were flawed in their reasoning.

The Fourth Circuit failed to recognize that the serious questions standard still articulates all four requirements that *Winter* requires. To be granted an injunction under the serious questions test, a party must demonstrate that the injunction is in the public interest, that the balance of equities tip in their favor, that they will suffer irreparable harm, and must additionally show that there are serious questions going to the merits. *Citigroup Glob. Mkts., Inc.*, 598 F.3d at 35. Overall, this is a "burden [that] is no lighter than the one [] under the 'likelihood of success' standard." *Id*.

The Fourth Circuit also failed to adequately understand the policy supporting the more flexible serious question standard. As Justice Ginsburg noted in her dissent in *Winter*, "[f]lexibility is a hallmark of equity jurisdiction" and "courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief." *Winter*, 555 U.S. at 391-92. The Supreme Court has emphasized that the essence of equity jurisdiction is "[f]lexibility rather than rigidity," which allows the court to mold each ruling "to the necessities of the particular case." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). And historically, the Court has not been concerned "with the specific criteria which should govern the Court in exercising [the] power" to grant injunctive relief. *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 17 (1942).

Furthermore, if courts were restricted to granting preliminary injunctions to only those cases where they are able determine if there is a likelihood of success, courts would be unable to grant injunctions in difficult cases. It can be difficult for a court to predict success on the merits at this preliminary injunction stage where there are expedited briefings and hearings. Especially so when the issue before the court is one of first impression, as it is here. If a movant has made the requisite showing that they will suffer irreparable harm, the injunction is in the public interest, and the balance of equities tip in their favor, they should not be required to bear the additional burden of showing a strong or overwhelming likelihood of success. The serious question standard provides courts with necessary flexibility when evaluating the likelihood of success. The Supreme Court has historically valued this flexibility, and the Court has never overruled the serious question standard. Therefore, this Court should find that the serious question standard remains valid after *Winter*.

II. RESPONDENTS HAVE A SERIOUS LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS BECAUSE THE SAME ACT VIOLATES THEIR CONSTITUTIONAL RIGHTS TO PARENTAL AUTONOMY AND EQUAL PROTECTION.

Lincoln's SAME Act strips parents of their fundamental right to make medical decisions on behalf of their children, and in tandem, it denies children access to doctor-recommended healthcare on the basis of their sex and gender-nonconforming status. The Due Process and Equal Protection Clauses of the Fourteenth Amendment guard against such government action. Because the SAME Act infringes on parental autonomy and discriminates against transgender children for being transgender, the Act must meet heightened scrutiny, which it cannot survive. In fact, this Act cannot withstand any level of scrutiny because the State of Lincoln's articulated rationale for enforcing this law is illegitimate. In other words, the Act is unconstitutional. As such, the Mariano family has a substantial likelihood of proving the success of their Due Process and Equal Protection claims against the State.

A. The SAME Act Unconstitutionally Infringes a Parent's Fundamental Interest in the Care, Custody, and Control in their Child's Upbringing.

The Court has long held that the liberty protected by the Due Process Clause includes the constitutional right of parents to decide on the care, custody, and control of their children. Accompanying that right is a responsibility on the parent to seek or withhold medical treatment for the welfare of their child. Well-established familial principles forbid the state from injecting itself into the private realm of parental authority, as the child is not the mere creature of the state. Instead, it is the parents—who are best positioned to understand their child's unique needs and interest—responsibility to safeguard their child's physical health and well-being, and to further their child's developing personhood. Thus, the constitutionally protected liberty interest of Respondent's parents was infringed when the State of Lincoln assumed the role of a surrogate parent and independently determined what's best for their child.

1. The Constitution protects a robust domain of rights belonging to the parent including the right to make healthcare decisions for one's child.

The Due Process Clause of the Fourteenth Amendment provides that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. A century ago, this Court acknowledged that a parent has a fundamental right in the care, custody, and control of their child. *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *see also Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children – is perhaps the oldest fundamental liberty interest recognized by this Court"). In subsequent cases, the Court expounded upon the robust domain of parental rights over their minor children, such as in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, where it held that a law prohibiting parents from sending their child to private school was unconstitutional. 268 U.S. 510, 535 (1925). "The child is not the mere creature of the State." *Id.* Instead, the decision-making authority of a minor is vested to the parent—"those who nurture him and direct his destiny"—who are given a "high duty, to recognize and prepare him for additional obligations." *Id.* "In a long line of cases" over the past century, *Meyer* and its progeny speak with one resounding voice: parents are afforded a broad sphere of constitutional protection in their decision-making authority in their children. *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997); *see*, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children); *Quilloin v. Walcott,* 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (highlighting that the Court has historically recognized "freedom of choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment").

A parents fundamental liberty interest in their child includes the right to decide their child's healthcare. The Court in *Parham v. J.R.* articulated that principle when upholding a state law governing child voluntary confinement procedures. *Parham v. J.R.,* 442 U.S. 584, 603-4 (1979). There, the Court questioned the scheme in place because it had substantial "likelihood of parental abuse" and considered whether a parent's decision to admit their child to voluntary confinement is a liberty interest protected by the Due Process Clause. *Id.* at 603. The Court refused to adopt such a narrow interpretation of the right involved, and instead focused on the "high duty" of parents to recognize and prepare their children for additional obligations. *Id.* at 602, 604. This "high duty" includes an obligation to "recognize symptoms of illness and *to seek and follow* medical advice." *Id.* at 602 (emphasis added). Although the decisions of a parent may not be agreeable to a child or may involve some risks, that fact "does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Id.* at 603. "Neither state officials nor federal courts are equipped to review such parental decisions." *Id.* at 604.

Parents have a fundamental right to decide what is in their child's best interest when faced with difficult medical decisions and deference is given to those decisions. *See Troxel,* 530 U.S. at 68 ("there is a presumption that fit parents act in the best interests of their children"). While the rights of parenthood are not without limitations, intervention is necessary only when there is a finding of neglect or abuse. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). The state may not interject itself in the private realm of parental authority, except in dire cases when the decision-making of parents may expose the child to "ill health or death." *Id.* at 166-67 (1944); *see also Troxel*, 530 U.S. at 68 ("there will normally be no reason for the state

to . . . question the ability of that parent to make the best decisions in the rearing of that parent's children") (alternation in original).

In contending that the Court should resolve this case without regard for longstanding principles of the decision-making authority of a parent in their child, Petitioner's rely on the split decision by the D.C. Circuit en banc in *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*. The court's decision dealt specifically with providing access to *new drugs* with unproven efficacy and safety to the terminally ill. 378 U.S. App. D.C. 33, 47 (2007). The drugs were still in the clinical testing phase and had not yet reached FDA approval. *Id.* at 41. The plaintiff's sought access to such treatment after exhausting all other available treatment, and neither party disputed uncertainties and "enormous risks" inherent in the drugs." *Id.* As neither party disputed uncertainties and "enormous risks" inherent in the drugs, the plaintiffs sought access to such treatment after exhausting all other treatment options. *Id.* Despite the last resort attempt for treatment, the court refused to override FDA regulations and permit access to the unapproved drugs. *Id.* at 43. Instead, it held that the right to access experimental drugs is not liberty protected by the Due Process Clause. *Id.* at 47. This rationale is supported by our nation's history and tradition in regulating the safety and efficacy of drugs. *Id.* at 41. Yet the court found no reason to address whether "access to medicine might ever implicate fundamental rights." *Id.* at 39.

These precedents support Jess's parents having a fundamental interest in their child's medical treatment, as the court below found. As recognized in *Parham*, the Mariano's have a "high duty" to seek and follow medical advice for treatment of their son's gender dysphoria. And that is exactly what the Mariano's did. After devastatingly seeing their eight-year-old child ingest a handful of pills and telling his parents he wishes to "never wake up," the Mariano's made a

concerted effort to care for their child. R. at 4 For six years, Jess's parents have sought comprehensive medical treatment for their son's gender dysphoria. R. at 4-5. As part of that treatment, Jess receives puberty blockers and has had a remarkably positive reaction to the treatment. R. at 4-5. Six years since hearing their son wants to "never wake up," Jess has made vast improvement in his bought with early childhood depression, along with progress with his gender dysphoria. R. at 4-5.This case is far from involving any sort of neglect or abuse which the welter of historical authority finds appropriate for state intervention. No, instead, this case is about two loving, caring parents who urgently sought treatment at the advice of a medical professional to safeguard their child's well-being. History, tradition, and precedent forbid the State of Lincoln from intervening in such a monumental decision.

The State of Lincoln's attempt to distinguish *von Eschenbach* because that case involved insufficiently tested, and understudied medications and this case involves a treatment pending FDA approval for specific diagnosis is not just unavailing, but counterproductive. Not only is it unconvincing, but the decision cuts the wrong way. *Von Eschenbach* rooted its decision because FDA procedures reflect our Nation's long held interest in drug regulation and the associated efficacy and risks. And yet, here, the Mariano's are not seeking access to any new drugs or procedures. In fact, puberty blockers have been FDA approved for nearly three decades. While certain medical decisions may come with certain medical risks, it is well noted by this Court that the fundamental liberty interest of a parent in their child does not automatically transfer to the state.

Society also encourages parents to be proactive in pursuing medical care for their child because it helps further the child's development of personhood and autonomy,—a principle that is deeply rooted in the fundamental liberty interest of the parent in their child. The Court has

never gone as far as mandating non-treatment of a minor against the decision of parents, based on the sound judgment of a medical professional. Permitting the state to enact a blanket ban tarnishes the core principles of a parent's fundamental right to make healthcare decisions for their child's well-being, and effectively mandates non-treatment as the only course of action for minors with gender dysphoria. A decision in Petitioner's favor would undoubtedly cast aside the high duty parents have to seek and follow medical treatment for their children.

Well-established concepts in the history of this Court's jurisprudence recognize that a child's parents are best positioned to make medical decisions for their child. Allowing the states to decide the best course of treatment for all children on its own accord directly intervenes with a parent's fundamental liberty to safeguard their child's best interest. Accepting Petitioner's claim that the best form of treatment here is non-treatment, despite its inaccuracy, is detrimental to the health of minors with gender dysphoria, the historical concept of a fit parent, and public trust in modern medicine. Thus, this Court should find that the State of Lincoln's intervention implicates the Mariano's fundamental liberty interest in their child, and therefore warrants strict scrutiny.

2. Infringement of a fundamental right demands strict scrutiny and the State of Lincoln fails to satisfy their burden.

Having substantially burdened the fundamental liberty interest of Jess's parents, the State of Lincoln fails to demonstrate that it has narrowly tailored its actions to further a compelling government interest.

a. *The State of Lincoln's legislative record warrants independent Constitutional review because the findings are factually and scientifically void.*

To survive strict scrutiny, the state must assert a legislative goal that is properly considered a compelling government interest. *Rothe Dev., Inc. v. DOD,* 107 F. Supp. 3d 183, 207 (D.D.C. 2015). The government bears the burden of establishing that the law is necessary to

achieve the asserted interest. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 (1938). The Court previously recognized that the State has a significant role in regulating the medical profession. *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007). The Court has previously recognized that the State has a significant role in regulating the medical profession. *Id.* at 157. Yet, the State of Lincoln's distinction of gender affirming care as an experimental procedure must be criticized.

When fundamental rights are implicated, precedent supports the view that this Court should hesitate to defer to the findings of the state legislature. In *Yoder,* the Court accepted the argument that the State has a compelling interest in promoting education but rejected its assertion that there is a compelling interest in compulsory high school education. 406 U.S. at 221. In making that determination, the Court weighed the evidence presented on both sides and ultimately sided with the Amish parents in holding that the State's interest in mandating conventional education was a compelling one. *Id.* at 224-5. On the other hand, in *Carhart,* the Court conducted independent review of the medical support presented by the parties to determine whether the state's compelling interest was factually supported. 550 U.S. at 165. Although there was insufficient evidence to conclude that the abortion regulation must contain a health exception, the Court refused to uphold the abortion ban on the congressional findings alone because some findings were factually incorrect. *Id.* Thus, congressional findings do not deserve dispositive weight when a fundamental liberty interest is implicated.

The State of Lincoln asserts that it has a compelling interest to "protect children from experimental medical procedures that have consequences neither the parents or children can foresee or understand." R. at 3. Yet, the State of Lincoln's characterization of gender affirming

care as "experimental" disregards the wealth of scientific studies and evidence that conclude it is the standard care of treatment for adolescents with gender dysphoria.

These findings deserve no deference because there is no foundation to support these misleading and damaging claims as true. Many studies revealed the long-term positive outcomes for transgender individuals that underwent puberty suppression. Simona Martin et al., *Criminalization of Gender-Affirming Care – Interfering with Essential Treatment for Transgender Children and Adolescents*, NEW ENG. J. MED (2021). The results of a longitudinal study done by the American Academy of Pediatrics found that the use of puberty blockers among transgender adolescents not only resolved gender dysphoria, but also reflected comparable well-being with their cisgender peers. *Major Health, Education, and Child Welfare Organization Oppose Anti-LGBTQ State-Based Legislation*, AM. ACAD. OF PEDIATRICS (Mar. 5, 2021). Similarly, an analysis of the past 25 years of peer-reviewed articles indicates that treatments such as hormone therapy improved the overall well-being of transgender individuals. *What does the scholarly research say about the effect of gender transition on transgender well-being?*, CORNELL UNIV. (https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people/).Transgender individuals have also seen improvements of quality of life where there is greater availability of treatment and positive social support systems. *Id.* Accordingly, the widespread consensus among the medical community is that gender affirming care is standard medical care of treatment for adolescents with gender dysphoria because of the empirical evidence that supports the claim. Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender Diverse Children and Adolescents,* 142(4) AM. ACAD. OF PEDIATRICS 1 (Oct. 2018).

The Act also completely overlooks established medical guidelines by insinuating parents and children will not comprehend potential risks of treatment. R. at 3. The State of Lincoln fails to recognize that it is the ethical duty of the treating physician to advise the patient and the parents of potential risks associated with a procedure. Under the current medical guidelines, before receiving any medical treatment, a mental health professional must provide a comprehensive review of the diagnosis and obtain informed consent from the patient and parent. Eli Coleman et al., *The World Professional Association for Transgender Health Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 13, 19 (7th ed. 2012). Not only that, but a certified pediatric endocrinologist specializing in gender assessment must confirm whether treatment is necessary and inform the family of the potential effects and risks associated with treatment. *Id.* The State of Lincoln's rationale fails to recognize that the medical profession already has safeguards in place to fully inform parents before proceeding with treatment.

The legislative findings also provide that many cases of adolescent gender dysphoria will "naturally" subside. R. at 2. The state treads dangerous waters by making such a claim. This harmful assumption has been proven false, as "gender variance with the desire to be the other sex is present in adolescence, the desire usually does persist throughout adulthood." Stewart L. Andelson, *Practice parameter on gay, lesbian, or bisexual sexual orientation, gender non-conformity, and gender discordance in children and adolescents*, 51 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, 957 (2020). Comparatively, studies have shown that there is a lower level of suicidal ideation among transgender adults who received gender affirming care as an adolescent than those who did not. Jack K. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation,* 145(2) PEDIATRICS e20191725 (Feb. 2020). It is also

estimated that nine in ten transgender adults who wanted such treatment as an adolescent, but were denied, report experiencing suicidal ideation. *Id.* Prohibition of gender affirming care runs the highly probable risk of suicide among transgender youth, and an even greater likelihood of continuing throughout adulthood. AM. MED. ASS'N, *Issue Brief: Health Insurance Coverage for Gender-Affirming Care of Transgender Patients* (4) (2019). The bulk of the legislative record contains many debunked, factually incorrect claims, and accordingly, this Court should afford no deference to the State of Lincoln's findings.

b. *Even if the Court finds that the State of Lincoln's interest is a compelling one, the Act is not narrowly tailored to serve that interest.*

Even if the Court finds that the State's interest is compelling, a prohibition on the only proven form of medical treatment for gender dysphoria is not narrowly tailored to achieve the stated interest. The substantive due process of the Fourteenth Amendment forbids government infringement on certain fundamental liberty interests "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). The burden is on the government to show that substantially burdening the fundamental right is "the least restrictive means of furthering a compelling government interest." *Holt v. Hobbs*, 574 U.S. 352, 364 (2015).

The Court has never gone as far as prohibiting all forms of available treatment. Although the decision in *Carhart* dealt specifically with a woman's fundamental right to abortion, the Court held that a state ban on dilation and evacuation abortion procedures did not pose an unconstitutional burden on the liberty interest at stake. 550 U.S. at 161. There, the parties heavily disputed needing the medical treatment. *Id.* The state's prohibition contained no health exceptions which would permit a woman to seek such procedures even where her own life was at risk. *Id.* at 143. Yet the Court found that the prohibition on the specific procedure survives

constitutional scrutiny because it did not outlaw "standard, safe medical" alternatives to abortion and therefore did not unduly burden the right. *Id.* at 127.

Applying the Court's rationale in *Carhart*, the Act cannot be justified under a more demanding form of scrutiny. Though unlike *Carhart*, the interest involved here has been deeply rooted in history and tradition, the state does not justify its ban on gender affirming care by pointing to other forms of standard treatment available to the Mariano's and their son—it bans the only form of standard treatment. At the same time, the law does not prohibit prescription of puberty blockers for all minors. Instead, the Act only denies access to puberty blockers for treatment of gender dysphoria. R. at 2-3. Even if the relevant treatment posed the "harmful" side effects that the legislative findings allege, the Act is far from narrowly tailored because this option for treatment would still be available for minors that do not have gender dysphoria. For that reason alone, the Act does not survive strict scrutiny because it only eliminates the availability of treatment because of a child's diagnosis.

Even then, the Act accomplishes the exact opposite of what it seeks to achieve. Banning gender affirming care dooms the health and safety of minors with gender dysphoria because suicide rates among transgender youth is already a public health crisis. Michelle M. Johns et al., *Transgender identity and experiences of violence victimizations substance use, suicide risk, and sexual risk behaviors among high school students –19 states and large urban school districts,* 2017*,* US DEP'T OF HEALTH AND HUMAN SERVS., CENTERS FOR DISEASE CONTROL & PREVENTION, 68(3) MMWR 57 (Jan. 25, 2019). Over fifty percent of transgender youth have contemplated suicide, including Jess, with one-in-three who have attempted suicide in the past year. *Id.* The State of Lincoln pays no mind to the fact that the harm to transgender youth can be mitigated as gender affirming care is championed as the only known form of effective treatment

for children suffering from gender dysphoria. Denying access to such treatment present a grave danger as studies have reasoned that it will lead to a greater likelihood transgender adolescent seeking dangerous, non-medically approved forms of treatment such as self-prescribed hormones or construction grade silicone injections. Issue Brief, *supra* at 4. Although providing supportive care for transgender youth has proven to reduce the emotional and psychological risks to baseline levels, enactment of the SAME Act will inevitably fuel the crisis further by banning the only form of appropriate treatment. The Act is not narrowly tailored to achieve a compelling interest, and therefore this Court should find that the Act is unconstitutional infringement of the Mariano's fundamental liberty interest in their child.

B. The SAME Act Violates Transgender Children's Right to Equal Protection by Restricting Their Access to Medical Treatments on the Basis of Their Sex and Gender-Nonconforming Status.

The Fourteenth Amendment to the Constitution preserves an individuals' right to equal protection under the laws. Without this safeguard, a state could discriminate against a group of people on impermissible or irrational grounds. This Court looks with suspicion at state laws that target on the basis of a protected characteristic. Such laws must meet a rigorous level of judicial scrutiny (in this case intermediate scrutiny), in order to comport with the Equal Protection Clause. Lincoln's SAME Act cannot withstand such scrutiny. This law impermissibly and irrationally targets transgender youth on the basis of their sex and gender-nonconformity status. As such, it is unconstitutional.

1. The broad guarantees of the Equal Protection Clause squarely apply to gender-nonconforming individuals.

In no uncertain terms, the Equal Protection Clause mandates: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This robust and sweeping constitutional provision thereby guarantees to all individuals and

groups the right to be free from unjustifiable state-backed discrimination. *E.g.*, *Plyler v. Doe,* 457 U.S. 202, 210 (1982) (holding that a state cannot deny any person, no matter his or her immigration status, protection from invidious discrimination); *e.g.*, *Cty. of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 447 (1985) (holding that an irrational government policy aimed at burdening a community of mentally disabled individuals violated equal protection principles).

Yet the State of Lincoln trampled these constitutional precepts when it enacted the SAME Act. This law runs afoul of the Equal Protection Clause because it expressly targets gender-nonconforming children and restricts them from receiving necessary medical treatments solely because of their sex and transgender status.

a. *The SAME Act facially discriminates against transgender youth on the basis of their sex.*

Transgender discrimination is sex discrimination, and the Equal Protection Clause protects against state-imposed discrimination on the basis of sex. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976) (declaring that the Equal Protection Clause requires state legislatures to enact gender-neutral laws or adequately justify their use of sex-based classifications in their statutory schemes). This is so because "legislative classifications based on gender . . . generally provide[] no ground for differential treatment." *Cleburne*, 473 U.S. at 440.

Traditionally, sex discrimination occurs when the government enacts a policy that, on its face, draws an unjustifiable distinction between men and women. *E.g.*, *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding a state law that gave mandatory preference to men over women in estate administration matters was unconstitutional); *e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 727 (1982) (holding that a public university's policy of categorically denying admissions to male nursing students was discriminatory). Accordingly, this Court has a long history of

invalidating discriminatory policies because "statutes distributing burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women." *Cleburne*, 473 U.S. at 441.

Yet, the guarantees of the Equal Protection Clause, as they relate to sex, do not stop there. The protections of the Equal Protection Clause go beyond combatting impermissible classifications between men and women; they extend to other sex-based classifications as well. For example, in *Obergefell v. Hodges*, this Court invalidated several facially discriminatory laws across multiple states that restricted the right of same-sex couples to marry. 576 U.S. 644, 647 (2015). While *Obergefell* was largely decided on substantive due process grounds, this Court correctly and unequivocally recognized that "the right of same sex couples to marry is also derived from the Fourteenth Amendment's guarantee of equal protection." *Id*.

Additionally, in *United States. v. Virginia*, this Court recognized that pregnancy regulations and other policies that expressly discriminate on the basis of sexual stereotypes are sex-based classifications to which Equal Protection principles (and scrutiny) apply. 518 U.S. 515, 533-45(1996) (citing *Cal. Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987)); *contra Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding a facially neutral law that burdened pregnant women), *superseded by statute*, Pregnancy Discrimination Act of 1978, PUB. L. NO. 95-555, *as recognized in Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 677-78 (1983). Ultimately, facial classifications based on homosexuality, pregnancy, and sexual stereotypes are forms of sex-based discrimination, and as a result, they fall within the purview of the Equal Protection Clause.

In a similar vein, transgender classifications are a form of sex discrimination because transgender status cannot be siloed from sex. In fact, as this Court held in *Bostock v. Clayton*

County, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." 140 S. Ct. 1731, 1741 (2020). This is because "discrimination based on . . . transgender status *necessarily* entails discrimination based on sex; the first cannot happen without the second." *Id*. at 1747 (emphasis added). While Petitioner correctly notes that *Bostock* concerns protections under Title VII of the Civil Rights Act of 1964 (the federal government's most prominent anti-discrimination statute), rather than the Equal Protection Clause, the *Bostock* Court's justification for ruling that transgender discrimination is a form of sex-discrimination logically transcends application under Title VII. Indeed, as Justice Alito acknowledged in his dissent, under the majority's logic, the Court's holding extends "beyond the domain of federal antidiscrimination statutes." *Id*. at 1783 (Alito, J., dissenting).

To be sure, since *Bostock*, several circuits have applied *Bostock's* holding to Equal Protection claims. For instance, in *Adams ex rel. Kasper v. School Board of Johns County*, the Eleventh Circuit held that a School Board's policy of singling out transgender children was "discrimination on the basis of sex or gender" in violation of the Equal Protection Clause because transgender status is inseparable from sex. *See* 968 F.3d 1286, 1296 (11th Cir. 2020) (citing *Bostock*, 140 S. Ct. at 1741), *rehearing en banc granted*, 9 F.4th 1369 (11th Cir. 2021); *accord Grimm v. Gloucester Cty. Sch. Bd*., 972 F.3d 586, 608 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

Yet even before *Bostock*, numerous courts of appeals had already reached the conclusion that transgender discrimination amounts to sex discrimination under the Equal Protection Clause. For example, in *Whitaker v. Kenosha Unified School. District. No. 1 Board. of Education*, the Seventh Circuit ruled that a School Board's policy of forcing students to use bathrooms based on

their biological sex was a "form of sex discrimination." 858 F.3d 1034, 1051 (7th Cir. 2017), abrogated on other grounds. There, the Court based its holding on the fact that "the School District's policy cannot be stated without referencing sex." *Id*. Likewise, in *Glenn v. Brumby*, the Eleventh Circuit held that a State-employer's decision to terminate an employee on the basis of her gender-nonconformity was sex-based discrimination under the Equal Protection Clause because there is a congruence between transgender discrimination and discrimination on the basis of sex-stereotyping. 663 F.3d 1312, 1316 (11th Cir. 2011); *accord Smith v. Cty. of Salem*, 378 F.3d 566, 578 (6th Cir. 2004).

Here, Lincoln's SAME Act discriminates against transgender children on the basis of sex in several ways. First, the SAME Act facially references sex and gender in its statutory language, which this Court and the lower courts have explicitly cautioned against. *See Cleburne,* 473 U.S. at 440 (calling for gender-neutral laws).; *see e.g., Whitaker*, 858 F.3d at 1051. In fact, the operative provisions of the Act are replete with terms such as "biological sex," "sex hormones," "gender transition," "gender affirmation," and "gender dysphoria." R. at 1–3. Second, the Act singles out gender-nonconforming minors, whose transgender status is tethered to their sex as the *Bostock* Court has explained, while it simultaneously excludes everyone else from its reach. In particular, the Act targets "transgender" minors who "identify as a different sex." R. at 1–3. Third, the Act materially burdens these transgender children by denying them "certain gender transition treatments"—or more precisely—doctor recommended, gender-affirming care. R. at 3. In the instant case, for example, the Act categorically bars Jess Mariano, who was born biologically female but identifies as male, from being able to undergo numerous medical treatments including future chest surgery, which his own doctor has asserted may be necessary to successfully treat his gender dysphoria. R. at 5; *cf.* Coleman *supra* at 21 (explaining that chest

surgery in female–to-male patients is an accepted medical intervention for those under the legal age). By contrast, under this law, any non-dysphoric female whose preferred sex matches her biological sex would be able to undergo this same procedure (breast reduction surgery), free from government interference.

Petitioners overlook these points when they wrongly contend that the SAME Act classifies on the basis of age and medical condition rather than sex. This is simply untrue. Because the Act's objective cannot be stated without referencing sex, because the Act forces a distinction between gender-nonconforming youth and gender-conforming youth, and because the Act disadvantages only those who are transgender, this Act expressly discriminates on the basis of sex.

b. *The SAME Act further discriminates against transgender youth on the basis of their transgender status.*

Besides discriminating against transgender children on the basis of their sex, the SAME Act also discriminates against them on the basis of their transgender status. This is an independent intrusion on their constitutional freedoms because transgender status, like sex, qualifies as a protected class in its own right under the Equal Protection Clause. *Grimm,* 972 F.3d at 606–07 ("[T]ransgender people constitute at least a quasi-suspect class"); *accord Karnoski v. Trump,* 926 F.3d 1180, 1201 (9th Cir. 2019).

Traditionally, this Court has used a four-factor test to determine whether a specific class qualifies for a heightened level of protection under the Equal Protection Clause. These factors include: (1) whether the class has been historically "subjected to discrimination," *Bowen v. Gilliard,* 483 U.S. 587, 602 (1987); (2) whether the class has a defining characteristic that "frequently bears [a] relation to [the] ability to perform or contribute to society," *Cleburne,* 473 U.S. at 440–41; (3) whether the class exhibits "obvious, immutable, or distinguishing

characteristics that define them as a discrete group;" *Bowen,* 483 U.S. at 602; and (4) whether the class is "a minority or politically powerless." *Id.* At present, the most important factor is whether the group's defining characteristic is relevant to its ability to contribute to society. *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE UNIV. L. REV., 135, 145 (2011).

Transgender status decisively satisfies each of the four factors. *See* Kevin M. Barry, et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*. B.C. L. REV. 507, 551-67 (2016). This fact is demonstrated in *Grimm.* There, the Fourth Circuit ruled that a School Board's policy that denied transgender children access to bathrooms that matched their preferred gender was discrimination on the basis of sex, and separately, discrimination on the basis of being transgender. 972 F.3d at 607; *contra Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) (relying on a since-overruled Ninth Circuit decision to hold that a transgender plaintiff was "not a member of a protected class"). In reaching its conclusion, the *Grimm* court first noted that it is indisputable that transgender people have been historically subjected to discrimination based on their gender identity. *Id*. at 611. For years, transgender people have faced high rates of violence as well as discrimination in housing, education, employment, military service, and more. *Id*. (citing *Grimm v. Gloucester Cty. Sch. Bd*., 302 F. Supp 3d 730, 749 (E.D. Va. 2018)). Based on this evidence, the court concluded that the first factor—namely, historical discrimination—was easily met. *Id.*

Turning to the second factor—whether transgender people have a defining characteristic that impacts their ability to contribute to society—the court concluded they do not. *Id*. at 612. In other words, the court found that being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." *Id*. From there, the court looked at the third factor and found that transgender people are a discrete group with immutable

characteristics because "being transgender is not a choice;" rather, it is a natural characteristic that is evident from a young age. *Id*. at 613. Finally, with regard to the fourth factor, the court recognized that transgender individuals unquestionably constitute a minority group lacking power because transgender individuals make up only 0.6% of the adult population and are underrepresented in every branch of government. *Id.* Altogether, the court concluded that transgender people constitute a "quasi-suspect" class— which is to say—a protected class, under the Equal Protection Clause.

The *Grimm* court's findings directly apply to the case at bar. So too does the *Grimm* court's holding. Under the four-factor test, Petitioner is hard-pressed to deny that transgender individuals constitute a quasi-suspect class. Instead, Petitioner's only argument is that the naming of a new protected class is something that "courts have been very reluctant to recognize" in the past. *See Cleburne*, 473 U.S. at 441–42; *cf.* Strauss, *supra* at 141–45 (noting that classifications based on religion, race, and alienage "command extraordinary protection" under the Equal Protection Clause whereas age, disability, and poverty status do not). While it is true that courts infrequently establish protected classes because doing so calls into question "legislative choices," such judicial action is not unprecedented. *Grimm*, 972 F.3d at 613 ("[N]o hard-and-fast rule prevents this Court from concluding that a quasi-suspect class exists, nor have *Cleburne's* dicta prevented many other courts from so concluding.").

Moreover, in this case, recognition of transgender status as a protected class is warranted. As this Court has acknowledged, the most significant factor for recognizing a protected class is whether the class's defining characteristic has any relevance to the group's ability to perform or contribute to society. Strauss, *supra* at 145 (citing *Frontiero v. Richardson*, 411 U.S 677, 686 (1973)). Here, the answer is no. Transgender status—like sex—but unlike non-suspect

classifications such as age or disability, "frequently bears no relation to the ability to perform or contribute to society." *See Cleburne*, 473 U.S. at 440–41; *see also* Grimm, 972 F.3d at 612 (clarifying that "transgender" and "impairment" are not synonymous) (internal citations omitted).

For the foregoing reasons, transgender discrimination is sex-based discrimination, and independently, transgender status constitutes a protected class. Because the SAME Act blatantly discriminates on the basis of both sex and transgender status, it warrants rigorous review under the Equal Protection Clause.

2. The SAME Act's discrimination against transgender children demands heightened scrutiny, which it fails.

Lincoln's SAME Act compels intermediate scrutiny. Under the Equal Protection Clause, government classifications that are based on sex or transgender status are subject to intermediate scrutiny and are presumptively unconstitutional. *See Boren*, 429 U.S. at 197–98 (establishing that gender-based classifications require heightened scrutiny); *see Karnoski*, 926 F.3d at 1201 (stating that policies that "treat transgender persons differently than other persons" warrant intermediate scrutiny). Hence, classifications that discriminate on these bases can only satisfy intermediate scrutiny if they advance important state objectives, and if the state proves "that the discriminatory means are substantially related to the advancement of those objectives." *Virginia,* 518 U.S. at 531.

Lincoln's SAME Act fails intermediate scrutiny because the State lacks a justifiable reason for advancing its policy of denying transgender children physician-recommended medical treatments. Indeed, the State's articulated reason: "to ensure the health and safety of its citizens, in particular that of vulnerable children" cuts its own throat. R. at 2. While all states invariably

have a substantial interest in ensuring the health and well-being of their residents, Lincoln's SAME Act does the opposite. This law does not protect vulnerable children; it harms them.

The consensus among the medical community, including renowned organizations like the Endocrine Society, World Professional Association for Transgender Health (WPATH), American Pediatric Association, and American Psychiatric Association, to name a few, is that children with gender dysphoria substantially benefit from receiving gender-affirming care. Brief for Am. Academy of Pediatrics, et al., as Amici Curiae Supporting Respondents, *Brant v. Rutledge*, 551 F. Supp 3d. 882 (8th Cir. 2021) (No 21-2875). In fact, it is "the only effective treatment." *Id*. Such care begins with therapeutic approaches such as psychological diagnosis and counseling, and in some but not all cases, it culminates with medical intervention such as hormone therapy and surgery, which require informed consent. Coleman, *supra* at 8.

Petitioner relies heavily on so-called "emerging scientific evidence" to suggest that experimental gender transition drugs and surgeries cause irreversible damage to transgender minors and therefore should be blocked. R. at 3. But contrary to Petitioner's assertions, such interventions are safe and "medically necessary." Coleman, *supra* at 54. According to WPATH's widely-accepted clinical guidelines, which are peer-reviewed and based on the best available scientific evidence, puberty-blockers are fully reversible and safe on children as young as nine. Coleman, *supra* at 18. Similarly, hormone therapy, which is recommended for use for individuals beginning at age 16, is partially reversible and carries with it controllable risks. Coleman, *supra* at 20 (acknowledging that the risks of weight gain and elevated liver enzymes are common, but clarifying that the risk of cancer is nonexistent or inconclusive). Likewise, surgery, though irreversible, is also a safe and effective avenue for adolescents. *See generally*

Coleman, *supra* at 62–63 (noting that breast reduction surgery carries with it no more risk when performed on a gender dysphoric person than when performed on a non-dysphoric person).

By contrast, what is not safe and effective is Lincoln's draconian regulatory scheme. This policy prohibits all minors in the State of Lincoln from receiving puberty-suppressants, hormone therapy, surgical procedures, or any other medical intervention that may "instill[] or creat[e] physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 3. This is harmful to children because, as WPATH identifies, there are manifold risks to withholding medical treatment for adolescents, including psychiatric distress and the likelihood for abuse and stigmatization. Coleman, *supra* at 21. In fact, "if not treated, or not treated properly, gender dysphoria can result in debilitating anxiety, depression, self-harm, and is associated with higher rates of suicide." Brief for Respondents, *Brant v. Rutledge*, 551 F. Supp 3d. 882 (2021) (No 21-2875) (noting that more than one in three transgender adolescents reported having attempted suicide in the year prior). Based on this evidence, the State's contention that the SAME Act protects children belies itself.

Yet, even if that State's articulated interest were genuine, its discriminatory focus on transgender children is not substantially related to the achievement of that interest. If the State were truly concerned with the health effects of experimental therapies on vulnerable children, then it would prohibit all children, not just transgender children, from being able to access gender-aligning or enhancing treatments. But as it stands, that is not the case. As a consequence, Lincoln's SAME Act fails intermediate scrutiny.

3. Even if this Court determines that rational basis review is appropriate, which it should not, the Act does not survive.

The SAME Act cannot survive any level of judicial review, including the most deferential level of review, rational basis. As an initial matter though, rational basis is not the

appropriate level of review for this case. As previously discussed, the SAME Act discriminates on the basis of both sex and transgender status, which triggers heightened scrutiny. Petitioner, however, contends that rational basis review is appropriate here because this Court has previously declined to assign heightened scrutiny to certain sex-discrimination cases like *Obergefell* and *Geduldig*. *See Obergefell*, 576 U.S. at 664 (applying the "[h]istory and tradition" test to a fundamental right's inquiry on marriage equality); *see Geduldig*, 417 U.S. at 495 (applying rational basis review to a disparate impact pregnancy claim). Yet this contention should carry no weight because this Court's decision in *Virginia* controls. 518 U.S. at 518 ("[A]ll gender-based classifications today warrant heightened scrutiny.").

But even if rational basis review is applied here, the Act still fails because Lincoln's interest is not legitimate, nor are its means. *See Cleburne*, 473 U.S. at 443–47 (holding that for state action to withstand rational basis review, it must be rationally related to furthering a legitimate government objective; therefore, if a law or policy "is arbitrary or irrational" or motivated by "a bare . . . desire to harm a politically unpopular group," then it fails rational basis review).

In *Cleburne*, the City instituted a restrictive zoning ordinance that burdened mentally disabled people, but no one else. *Id.* at 435. The City's stated objective was to place remedial restrictions on this group for their protection. *Id.* at 449. But in applying rational basis review, the Court held that the ordinance violated Equal Protection principles because the City's enactment of the law rested on an irrational prejudice and its enforcement had no justifiable rationale. *Id*.

Soo to here. Lincoln's SAME Act is prejudicial and cannot be rationally justified. If the State were legitimately concerned with promoting the health of transgender minors, then it would

further this aim by facilitating doctor-recommended care rather than by restricting it, and in turn, subjecting transgender children to physical and mental harm. Because the State's rationale for advancing the SAME Act is counterintuitive and its means are counterproductive, this Act is unconstitutional.

III. RESPONDENTS' CLAIMS EASILY MEET ALL OTHER PRELIMINARY INJUNCTION FACTORS.

Whether or not this Court concludes that the Marianos have fully demonstrated a likelihood of success on the merits of their claims—which they have—a preliminary injunction is still proper because the Mariano family can satisfy the remaining requirements of a preliminary injunction. *See Louboutin*, 696 F.3d at 215 (discussing the sliding-scale approach whereby failure to satisfy one preliminary injunction factor can be offset by success on another factor). More precisely, the Marianos can show that Lincoln's SAME Act will cause them irreparable harm, that their injuries outweigh any damage to the State, and that enjoinment of the Act serves the public interest. *See generally Winter*, 555 U.S. at 20 (summarizing the factors of a preliminary injunction). The final two factors, the balance of the equities and public interest, "merge when the Government is the opposing party." *Nken,* 556 U.S. at 435 (2009).

A. Without an Injunction, the SAME Act will Irreparably Harm the Mariano Family.

Jess Mariano and his parents will suffer acute and irreparable harm if enjoinment of the SAME Act is not sustained. Irreparable harm is harm that is "actual and imminent, not remote or speculative." *Odebrecht Const. Inc., v. Sec'y, Fla. Dept. Of Transp*., 715 F.3d 1268, 1288 (11th Cir. 2013); *e.g., Bowen v. City of New York,* 476 U.S. 467, 483 (1986) (finding that the risk of severe medical harm is irreparable harm). Moreover, harm is irreparable if it cannot be adequately remedied through money damages. *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am*., 868 F.2d, 1283, 1288 (11th Cir. 1990). Leaving aside their potential constitutional injuries

(violation of their fundamental rights and disparate treatment under the law), the Marianos, particularly Jess, will suffer mental and physical anguish if the Act goes into effect. Indeed, without this preliminary injunction, Jess, who currently takes puberty blockers, will immediately be barred from obtaining this gender-affirming care. *See* R. at 4; 20 LINC. STAT. § 1201-03(a) (2022). This is catastrophic because, as Jess's own psychiatrist has testified, these puberty blockers help Jess control his depression and his feelings of gender incongruence; thus, cessation of this treatment will exacerbate his mental distress.

A decline in Jess's mental health is especially concerning because prior to starting this treatment, Jess had expressed suicidal thoughts by lamenting on numerous occasions that he didn't "want to grow up if I have to be a girl." R. at 5. Enjoinment of the SAME Act will therefore mitigate Jess's mental suffering because, as the district court noted, "young adults who [] access[] puberty blockers for treatment of their gender dysphoria show[] lower odds of considering suicide. R. at 7 (citing data).

Additionally, because there is no telling how long litigation on the merits will take, it is in Jess's best interest for this Court to uphold the preliminary injunction in order to preserve his physical health. At the time the district court first enjoined the SAME Act in December, 2021, Jess was 14. Currently, Jess is 15 and nearly eligible to begin male hormone therapy, and within one year of completing that, he will be eligible for chest surgery. *See* Coleman, *supra* at 21 (outlining the timeframe for adolescents under the legal age to receive chest surgery).

Physical harm will arise if the Act takes effect and Jess cannot receive these medical interventions. On the one hand, if the Act goes into effect and Jess's puberty blockers are stopped, and his male hormone therapy and subsequent remedial procedure are delayed, it will cause agonistic changes to his body—namely, the escalation of unwanted female physical traits.

R. at 5. On the other hand, if his hormone therapy commences but is abruptly cut short because of the State's enforcement of the Act, this too will cause physical havoc on his body. Either way, immediate harm is inevitable. What's more, Jess's parents will suffer as well because they will be forced to watch their child experience this needless mental and physical anguish.

B. The State Will Suffer No Harm by Enjoining the Act, and Enjoinment Serves the Public Interest.

In contrast to the tangible harm the Marianos will suffer if the Act is not enjoined, the State will not be burdened, nor will the public interest be harmed, if the status quo is maintained. This Court has held that when a party challenges a statute, hardship is more likely to occur if the statute has a direct effect on that party's life. *Texas v. United States*, 523 U.S. 296, 301 (1998). On the flip side, hardship is less likely if the harm is abstract. *Id*. 302. In this case, the Act will have a direct and detrimental effect on Jess Mariano and his family as detailed above. Moreover, theirs is the type of "harm which there is no adequate legal remedy" in the absence of an injunction. *Ariz. Dream Act Coal v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014).

Conversely, any harm that the State may suffer is speculative at best. In fact, the State can point to no evidence that it will face an immediate crisis if the injunction is maintained, whereas Jess faces a serious risk to his life, or at the very least—his mental and physical stability. Therefore, in balancing the hardships of the parties, the inequities tip decisively in Jess Mariano's favor. Accordingly, the public interest is best served by halting this Act as opposed to harming this child, which is precisely what will happen if the Act is enforced rather than enjoined. Altogether, the Marianos can satisfy every factor of a preliminary injunction; therefore, this injunction should stand.

Conclusion

For the aforementioned reasons, Respondents, Jess Mariano, et al., respectfully request that this Court affirm the decisions of the United States Court of Appeals for the Fifteenth Circuit.

/s/
Team 3116
Counsel for the Respondents
Jess Mariano, et al.

Appendix A

The Fourteenth Amendment of the United States Constitution

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.

42 U.S.C. §1983 (1996)

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

28 U.S.C. § 1292(b)

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

Stop Adolescent Medical Experimentations ("SAME") Act,

20 LINC. STAT. § 1201, *et seq*.

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.

20-1206 Effective Date

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