No. 22-8976

In the

Supreme Court of the United States

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 PETITIONER

Team #: 3117
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether, as a result of judicial usurpation of legislative authority and a serious threat to the safety of the children of Lincoln, Petitioner has established irreparable harm and the balance of hardships tip in their favor.

2. Whether there is a substantial likelihood of success regarding Respondents' Substantive Due Process and Equal Protection claims.

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JURISDICTIONAL STATEMENT

The court of appeals issued its judgment on May 12, 2022. Petitioner filed a timely petition for writ for certiorari, which was then granted on July 18, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

U.S. CONST. AMEND. XIV, § 1

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

The text of the Stop Adolescent Medical Experimentations ("SAME") Act is located in the Appendix.

STATEMENT OF THE CASE

This appeal challenges a federal district court's preliminary injunction enjoining a Lincoln statute before it ever affected anyone, including the Marianos (Respondents). Respondent Jess Mariano is a fourteen-year-old minor. R. at 2. He cannot purchase alcohol. He cannot vote. He cannot enter into a binding contract. Yet the courts below decided that he can choose to make an irreversible change to his body.

Respondent has been diagnosed with gender dysphoria and currently receives medications to block him from going through puberty as a girl. R. at 2. Lincoln's Legislature found a lack of scientific evidence demonstrating the health benefits of these treatments. R. at 2-3. Responding to scientific evidence about the long-term harm from gender transition treatments, the State of Lincoln has acted to protect its most vulnerable citizens by enacting the Stop Adolescent Medical Experimentations ("SAME") Act. 20 Linc. Stat. §§ 1201-06. R. at 7. The Act highlights the concerning lack of evidence regarding the safety of gender affirmation treatments. R. at 2-3. The Act also stresses the irreversible consequences and numerous potential harms faced by children who undergo these treatments, including "irreversible infertility, cancer, liver dysfunction, coronary artery disease, and bone density." R. at 3.

The SAME Act therefore prohibits healthcare providers from providing gender affirmation treatments to any child under the age of eighteen. R. at 3. A treatment is prohibited if it is "for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex," which includes "prescribing or administering puberty blocking medication" or performing gender reassignment surgery. R. at 3-4.

Ignoring the well-established science, Respondents sued Lincoln's Attorney General, April Nardini (Petitioner) and sought a preliminary injunction. R. at 1. Respondents claim protection under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment and claim they will suffer irreparable harm as a result of not having access to irreversible gender affirmation medications. R. at 8.

Procedural History

On December 16, 2021, the District Court issued an Order granting Respondent's Motion for Preliminary Injunction, in which Respondents asked the District Court to enjoin Petitioner's newly enacted SAME Act from going into effect on January 1, 2022. Petitioner filed an interlocutory appeal. On May 12, 2022, the United States Court of Appeals for the Fifteenth Circuit affirmed the decision of the District Court. Petitioner made an application to the Supreme Court of the United States for a writ of certiorari to consider the merits of the preliminary injunction and denial of Petitioner's motion to dismiss. On July 18, 2022, the Supreme Court of the United States granted certiorari.

SUMMARY OF THE ARGUMENT

Ignoring the judgment of the Legislature and the people of Lincoln, the district court usurped the authority of the legislature. In the process, it ignored basic separation of power principles and created a new fundamental right. This Court should reverse.

A preliminary injunction is an extraordinary, disfavored remedy. Unless the statute is unconstitutional, enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm [the State]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Serious and irreparable harm will thus result if Lincoln cannot enact its duly-elected law voted for by the citizens of Lincoln. Comparatively, Respondents have not shown that complying with the SAME Act will harm them. To the contrary, the SAME Act protects Respondents from irreversible consequences. The balance of the equities

also favors Petitioner. Giving effect to the will of the people by enforcing the laws they and their representatives enact serves the public interest.

Respondents are also unlikely to prevail on the merits of their Substantive Due Process and Equal Protection claims. Respondents argue that the SAME Act violates their fundamental right to get their children medical treatments and that the SAME Act violates the Equal Protection Clause by preventing transgender minors from receiving medical treatment. This Court should evaluate both claims under the rational basis test because there is no fundamental right to receive experimental medical treatments and because the SAME act is classified by age and medical procedure, not transgender status.

First, substantive due process protects only deep-rooted fundamental rights. Courts widely agree that there is no fundamental rights to experimental treatments. The full effects of gender affirming treatment remain unknown, with evidence showing potential permanent harmful effects from the treatment with little to no positive effects. Moreover, States are often given broad deference to regulate potentially harmful medical treatments. The Supreme Court has recently reiterated the need to let States determine their own rules when it comes to controversial medical treatments, consistent with our nation's longstanding tradition of federalism. As such, the rational basis test should apply. The SAME Act passes the rational basis test because it is rationally related to preserving adolescent health and safety. The SAME Act was enacted with the main purpose of preventing children from

undergoing harmful and potentially permanent treatment, and therefore, passes the rational basis test.

On the other hand, regardless of what level of scrutiny this Court elects to apply to the SAME Act, the Act passes even the highest level of scrutiny because it is narrowly tailored to achieve the compelling governmental interest of preserving the health and safety of minors. Courts have widely accepted the preservation of a group's health and safety as a compelling government interest. The SAME Act is narrowly tailored because it only restricts those seeking gender affirming treatment until they are eighteen. There are no less restrictive means to achieve the goals of the SAME Act. As such, Respondents are unlikely to prevail on the merits of their due process claim.

Secondly, Respondents are also unlikely to prevail on the merits of their Equal Protection Claim. This claim should be analyzed under the rational basis test because the SAME Act is classified by age and medical procedure and because transgender status is not a suspect or quasi-suspect class.

The SAME Act does not classify by transgender status. A seventeen-year-old with gender dysphoria is prohibited from receiving gender affirming treatment only until their eighteenth birthday. There is no other differentiating class. The SAME Act applies equally to men who want to transition to women and women who want to transition to men. The only factors relevant to whether a transgender can receive treatment under the SAME act is how old that individual is and what medical

treatment they want to receive. As such, the SAME Act should be analyzed under the rational basis test because there is no heightened scrutiny for age discrimination.

Furthermore, transgenders are not a suspect nor quasi-suspect class. The ruling in *Bostock* does not apply to this issue because it was decided narrowly and applies only to Title VII of the Civil Rights Act. Additionally, transgenders do not satisfy the factors used to determine quasi-suspect status. Although transgenders face varying levels of discrimination, the wide range of experiences and categories of gender incongruity make it impossible to have a concretely defined unchanging class of people. As such, there can be no quasi-suspect status for transgender identifying people; the rational basis test should apply.

The SAME Act survives the rational basis test for the same reasons described above. However, even if this Court elects to use intermediate scrutiny, the SAME Act still passes muster because it is substantially related to achieving the governmental interest of preserving adolescent health and safety. Accordingly, Respondents are unlikely to prevail on the merits of either of their constitutional claims. Therefore, this Court should reverse the lower courts' decisions and deny the preliminary injunction.

ARGUMENT

Standard of Review

Respondents failed to meet their burden of making "a clear showing" that each preliminary injunction factor favors them. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). Because Respondents' requested relief would prevent "implementation of a duly enacted state statute," they must first make a "more rigorous showing" than

usual "that [they are] 'likely to prevail on the merits.'" *Planned Parenthood Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957-58 (8th Cir. 2017) (emphasis added) (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc)). That requirement guards against attempts to "thwart a state's presumptively reasonable democratic processes." *Rounds*, 530 F.3d at 733. "A more rigorous standard 'reflects the idea that government policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.'" *Id.* at 732 (quoting *Able v. U.S.*, 44 F.3d 128, 131 (2d Cir. 1995) (per curiam)).

This Court reviews the district court's legal determinations underlying its preliminary injunction order *de novo*. *Lankford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006).

I. Respondents' Preliminary Injunction Was Improperly Granted.

The proper standard governing the issuance of injunctive relief is the preliminary injunction test set forth in *Winter*. 129 S. Ct. 365. Under *Winter*, the party seeking the "extraordinary remedy" of a preliminary injunction must demonstrate: (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest. *Id.* at 374.

Respondents contend in the alternative, however, that the Ninth Circuit's "sliding scale" test, also known as the "serious questions" test, remains good law after *Winter*. The sliding scale test permits a district court to issue a preliminary injunction if the movant demonstrates (1) that "serious questions are raised," and (2)

that "the balance of hardships tips sharply in his favor." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (quotation marks omitted). The courts below applied the sliding scale test, referring to it as Lincoln's "long-standing" approach to determine the propriety of a preliminary injunction. R. at 24.

Respondents suggest that the proper standard for preliminary injunctions was applied. However, Ninth Circuit cases have concluded that, after *Winter*, Ninth Circuit cases like *Flowers* "are no longer controlling, or even viable." *Am. Trucking Ass'n., Inc. v. City of L.A*, 559 F.3d 1046, 1052 (9th Cir. 2009). That is because such sliding scale cases "suggested a lesser standard" for the issuance of a preliminary injunction than the test enunciated in *Winter*, under which a plaintiff must satisfy each element of the traditional four-part test for the issuance of such relief. *Id.* Therefore, the sliding scale test is plainly not a sufficient standard.[1]

In *Am. Trucking*, the court specifically cited *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007), as an example of a Ninth Circuit precedent that is "no longer controlling, or even viable" after *Winter*. 559 F.3d at 105. *Martin* states the same sliding scale test that Respondents advocate for here. 479 F.3d at 639. The court in *Am. Trucking* applied the correct four-part *Winter* test to determine preliminary relief. 559 F.3d at 1052-60.

[1] Courts in the Second Circuit have also expressed their belief that the sliding scale test for preliminary injunctions is no longer viable after *Winter*. *See International Business Machines Corp. v. Johnson*, 629 F. Supp. 2d 321, 328, 334-335 (S.D.N.Y. 2009); *Bellamy v. Mount Vernon Hosp.*, No. 07 Civ. 1801 (SAS), 2009 WL 1835939, *5 & n.84 (S.D.N.Y. June 26, 2009); *see also J.P.T. Automotive, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, No. 09-CV-0204, 2009 WL 2985445, *2, n.2 (E.D.N.Y. Sept. 14, 2009) (noting that *Zino Davidoff SA v CVS Corp.*, 571 F.3d 238, 242 [2d Cir. 2009] "appears to conflict with [*Winter*]").

In light of the foregoing, it is disingenuous to assert that the sliding scale test survived after *Winter*. However, regardless of which test the Supreme Court adopts, Respondents have not demonstrated their entitlement to a preliminary injunction under either test. Petitioner's harm far surpasses any harm suffered by Respondents, and Respondent's weak constitutional claims are a death knell to their likelihood of success on the merits.

A. Judicial Usurpation of Legislative Authority Inflicts Irreparable Harm on the State.

A plaintiff seeking a preliminary injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. In satisfying the second element of the burden of proof for a preliminary injunction - that he or she is likely to suffer irreparable harm in the absence of preliminary relief - a plaintiff must show more than a mere "possibility" of irreparable harm. *Id.* at 22. He or she must "demonstrate that irreparable injury is likely in the absence of an injunction." *Id.* (emphasis in original). The mere possibility of future injury, or a conjectural or hypothetical injury is not sufficient to obtain a preliminary injunction. *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr.*, 636 F.3d 1150, 1160 (9th Cir. 2011).

The decisions below subject Lincoln to ongoing irreparable harm. The "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott*, 138 S. Ct. at 2324; *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) ("[A]ny time a State is enjoined by a court from

effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (Rehnquist, J., in chambers). As a result of Lincoln's inability to legislate, the injunction upsets, rather than preserves, the status quo. *See Planned Parenthood of Blue Ridge v. Camblos*, 116 F.3d 707, 721 (4th Cir. 1997) (Luttig, J., staying injunction in single-judge order). Here, there is emerging research demonstrating that the treatments prohibited under the SAME Act are not safe and effective for children. That Lincoln may not employ a duly enacted statute to help prevent these injuries constitutes irreparable harm.

When functioning properly, the Framers believed that the legislature would be the dominant branch under the Constitution. As James Madison wrote, "[i]n republican government, the legislative authority necessarily predominates." THE FEDERALIST NO. 51 (James Madison). Ignoring basic constitutional principles, the district court usurped unto itself the lawmaking authority of the Lincoln Legislature. It is common knowledge that the courts, unlike legislators, are simply not structured to legislate. They cannot introduce legislation gradually, nor fine-tune existing legislation, as can the legislature. In a democratic republic, judicial power should never be exercised lawlessly – even for desirable ends. A judicial edict is not redeemed by its good consequences, "for any such edict constitutes a usurpation of the just authority of the people to govern themselves through the constitutional procedures of deliberative democracy." Robert P. George, *Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage*, 17 REGENT U. L. REV. 21 (2005). The possibility that the Lincoln Legislature may have been mistaken in

enacting the SAME Act, or that some judges disagree with it, is not a basis for holding the statute unconstitutional. That role belongs to the citizens of Lincoln.

There is no greater harm to a state Legislature than the inability to legislate. Respondent is attempting to usurp these functions by asking the court to legislate rules and regulations. Such action is inappropriate for the Court to entertain.

B. The Balance of Interests Favors Petitioner.

The district court viewed its preliminary injunction as maintaining the status quo. However, the district court's injunction does quite the opposite, as it opens the floodgates to procedures that will undisputedly cause children to undergo irreversible biological changes. The injunction additionally harms the interests of Lincoln citizens in seeing their duly enacted law prohibiting these procedures take effect. Finally, by facially enjoining the SAME Act, the district court failed to tailor relief to Respondents claims.

1. The State of Lincoln Has Correctly Recognized The Critical Gap In Research Underlying Gender Affirmation Treatments.

Emerging research demonstrates that the treatments prohibited under the SAME Act are not safe and effective for children. The Lincoln Legislature has specifically noted the lack of longitudinal and randomized studies of cross-sex hormonal gender affirmation treatments. *See* 20 Linc. Stat. § 1201(a)(4). The potential long-term impacts are serious: a child or adolescent who is successfully "affirmed" in a sex-discordant gender faces serious risks, such as irreversible infertility, cancer, loss of fertility, and loss of sexual function. *See* 20 Linc. Stat. §

1201(a)(5)-(6). Understandably, the State Legislature had a well-founded concern about this data gap.

Practitioners outside of Lincoln have recognized that long term research into the safety and efficacy of gender affirmation treatment is seriously lacking. Lincoln's expert, Dr. Geller, testified regarding health systems in Sweden and Finland that banned gender-affirming treatments due to inadequate proof of their effectiveness and safety. R. At 7. Respondents rely on evidence from the World Professional Association for Transgender Health ("WPATH"), but ironically, even practitioners from WPATH question whether children should be given puberty blockers. *See* Abigail Shrier, *Top Trans Doctors Blow the Whistle on 'Sloppy' Care,* COMMON SENSE, October 4, 2021, https://www.commonsense.news/p/top-trans-doctors-blow-the-whistle. Among the concerns practitioners raise is that puberty blockers result in infertility and sexual dysfunction. *Id.*

Transgender children and adolescents are "poorly understood and a distinctly understudied population in the United States . . . there is minimal available data examining the long-term physiologic and metabolic consequences of gender-affirming hormone treatment in youth. *This represents a critical gap in knowledge that has significant implications for clinical practice across the United States.*" J. Olson-Kennedy, et al. *Impact of Early Medical Treatment for Transgender Youth: Protocol for the Longitudinal, Observational Trans Youth Care Study*, 8 JMIR Rsch. Protocols (2019) (emphasis added).

Recognizing this data gap, the SAME Act is a prudent, rational measure that defers risks of medical gender affirmation treatments until adulthood and protects Lincoln children from those substantial risks.

2. Minors Lack The Mental Capacity To Assess The Risks.

Children lack the capacity to assess the severity of the risks associated with gender affirming treatments. The "power to sterilize, if exercised, may have subtle, far-reaching and devastating effects." *Skinner v. Oklahoma,* 316 U.S. 535, 541-42 (1942). The person who is sterilized is "forever deprived of a basic liberty," *i.e.,* the decision of whether to procreate, which is "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race" *Id.* All persons possess the liberty interest in preserving the right to create children of their own in the future. *See Vaughn v. Ruoff*, 253 F.3d 1124, 1128-29 (8th Cir. 2001).

Children are unable to comprehend the deprivation of these basic liberties. To prove this, Lincoln called two witnesses who had testified before the Legislature about their decision to detransition after starting puberty blockers and cross-sex hormones as adolescents, in which those witnesses expressed regret that they did not adequately contemplate the physical and mental consequences of the course of the medical and surgical treatment they received. R. At 8.

A child's brain is immature and lacks an adult capacity for risk assessment before the early to mid-20s. Michelle A. Cretella, *Gender Dysphoria in Children and Suppression of Debate*, 21 J. OF AM. PHYSICIANS & SURGEONS 52 (2016). And extant research cannot assure them that the procedures will prove safe or effective. "There are a large number of unanswered questions that include the age at start,

reversibility[,] adverse events, long term effects on mental health, quality of life, bone mineral density, osteoporosis in later life and cognition . . . The current evidence base does not support informed decision making and safe practice in children." Carl Henneghan, *Gender-Affirming Hormone in Children and Adolescents*, BMJ EBM SPOTLIGHT (Feb. 25, 2019), https://bit.ly/BMJ_GEIDHormoneConsent.

By upholding the injunction, these gender affirmation treatments will effectively sterilize children before they are mature enough to understand the consequences of their decisions.

3. Upholding The Preliminary Injunction Upsets The Status Quo.

Contrary to Respondent's assertions, irreparable harm will occur if this Court upholds the preliminary injunction. By granting the injunction, the district court opened the floodgates to treatments that will cause children to undergo irreversible biological changes. The injunction also harms the interests of Lincoln citizens who wish to see their duly enacted law prohibiting these treatments take place. Finally, by facially enjoining the SAME Act, the district court failed to tailor relief to Respondent's claims.

Reversing the preliminary injunction will end ongoing harm suffered by children in Lincoln who are undergoing irreversible gender-transition procedures. The Record contains an example of two witnesses expressing regret for the irreversible damage that the gender-transition procedures caused to them, stating that they did not adequately contemplate the physical and mental consequences. R. at 8. A plethora of children will be similarly situated as a result of the injunction.

This harm alone justifies reversal. Even more concerning, data suggests that gender-transition procedures actually increase the risk of suicide. *See* Ryan T. Anderson, Ph.D., *Sex Reassignment Doesn't Work. Here Is the Evidence.*, THE HERITAGE FOUNDATION (Mar. 9, 2018), https://www.heritage.org/gender/commentary/sex-reassignment-doesnt-work-here-the-evidence. These medical uncertainties disprove Respondents' basis that these procedures are potentially lifesaving.

The harm suffered by the people of Lincoln far outweighs any potential harm suffered by Respondents. The people of Lincoln decided, through their elected representatives, that the harms of gender affirmation treatments on children outweigh any hypothetical benefits. Thus, Lincoln's "inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott*, 138 S. Ct. at 2324. A State always suffers irreparable harm when it is "precluded from applying its duly enacted legislation." *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020); *see also Hand v. Scott*, 888 F.3d 1206, 1214 (11th Cir. 2018) (holding that State "would be harmed if it could not apply its own laws . . . now, even if it might later be able to" apply altered version of law). Relatedly, by enjoining legislation from taking effect, the district court not only ignored the harm it caused Lincoln, it also upset the status quo. Whenever a party seeks to enjoin legislation, "the status quo is that which the People have wrought, not that which unaccountable federal judges impose upon them." *Camblos*, 116 F.3d at 721 (4th Cir. 1997) (Luttig, J., staying injunction in single-judge order).

Finally, the impropriety of the injunction justifies reversal. The district court, by utilizing an all-or-nothing approach, abused its discretion by failing to tailor the injunction to remedy Respondent's harm. *See St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022-23 (8th Cir. 2015) ("[A] preliminary injunction 'must be narrowly tailored to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law.'") (citations omitted). Moreover, "medical uncertainties" like those presented here "afford little basis for judicial responses in absolute terms." *Marshall v. U.S.*, 414 U.S. 417, 427 (1974). Thus, Lincoln's "legislative options must be especially broad." *Id.* at 427. To justify a facial injunction, Respondents needed to "establish that no set of circumstances exists under which the Act would be valid." *U.S v. Salerno*, 481 U.S. 739, 745 (1987).

Here, based on their own claims, Respondents cannot meet the above standard. It is evident from the Record that Respondents do not seek any surgical procedures, but rather seek medication to stop or delay normal puberty. Yet, the preliminary injunction completely bars the Act's application, which includes surgeries. *See* 20 Linc. Stat. § 1203(c) (prohibited procedures include "performing surgeries that artificially construct genitalia tissue or remove any healthy or non-diseased body part or tissue, except for a male circumcision.").

Additionally, according to Respondents' "medical and scientific" evidence regarding children with gender dysphoria, "each patient who receives gender-affirming care receives only evidence-based, medically necessary, and appropriate interventions *that are tailored to the patient's individual needs*." R. at 6 (emphasis

added). Thus, even assuming that Respondents would be harmed by the SAME Act, that does not prove that *every* child facing gender dysphoria would likewise suffer similar harm. *Cf. Brakebill v. Jaeger*, 932 F.3d 671, 678 (8th Cir. 2019) ("[E]ven assuming that a plaintiff can show that an election statute imposes excessively burdensome requirements on *some* voters, that showing does not justify broad relief that invalidates the requirements on a statewide basis as applied to *all* voters.").

Overall, the facial injunction sweeps broader than the relief necessary to remedy Respondent's injuries, and is an abuse of discretion. Rejecting reversal will only encourage the district court to continue legislating from the bench whilst simultaneously granting overly broad remedies.

II. Respondents are Unlikely to Prevail on the Merits of Their Due Process and Equal Protection Claims.

Lincoln enacted the SAME Act to ensure the health and safety of "vulnerable children." 20 Linc. Stat. §§ 1201(a)(1). The Respondents' motion for preliminary injunction of the SAME Act should have been denied because Respondents cannot show that the SAME Act would violate their constitutional rights. In order to be granted a preliminary injunction, Respondents must "establish that [they are] likely to succeed on the merits." *Winter*, 555 U.S. at 20. Respondents allege that the SAME Act would violate the parents' right to parental autonomy afforded to them by the Due Process Clause by preventing them from making choices about their child's medical care. Respondents further allege that the SAME act discriminates against Jess in violation of the Fourteenth Amendment because the act is classified by gender. However, Respondents cannot meet the burden of establishing that they are

likely to succeed on the merits. Therefore, the preliminary injunction should have been denied.

A. The SAME Act Does Not Violate the Parents' Right to Due Process Because There is No Longstanding Tradition of a Right to Experimental Medical Procedures.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. However, this Court held that substantive due process protects only "fundamental rights found to be deeply rooted in our legal tradition." *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). Although parents do hold a fundamental right to parental autonomy, that right is limited by the state's interest in the health and safety of children. *See Prince v. Massachusetts*, 321 U.S. 158, 168-69 (1944) (holding that a state's authority over children is broader than its authority over adults). The medical treatments for gender affirming care are still highly suspect in their efficacy. 20 Linc. Stat. §§ 1201(a)(5-6). As such, gender affirming treatments should be classified as experimental medical treatments, and the SAME Act should be subject to rational basis theory because there is no fundamental right to experimental medical treatments. *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711 (D.C. Cir. 2007) (en banc). However, even if this Court finds that strict scrutiny should apply, the SAME Act still survives because it is narrowly tailored to achieve the compelling government interest in preserving adolescent health and safety.

1. The SAME Act Only Prevents Experimental Medical Procedures.

The SAME Act should be analyzed under the rational basis test because the gender affirming treatment Respondents seek should be classified as an experimental treatment. The legislative findings of the SAME Act show that there is "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. 20 Linc. Stat. §§ 1201(a)(4). Furthermore, "Studies demonstrating health benefits of these treatments have not been sufficiently longitudinal or randomized." *Id*. The health benefits of gender affirming care are, at best, inconclusive. In fact, the Endocrine Society advises against genital surgery before the age of 18 and admits that the effects of sex hormone treatment for children less than 14 years old remains largely unstudied. Hembree WC, *et al.*, *Endocrine Treatment of Gender-dysphoric/Gender-incongruent Persons: An Endocrine Society Clinical Practice Guideline,* 102 J. Clin. Endocrinology and Metabolism 3869 (2017), at https://doi.org/10.1210/jc.2017-01658.

There is simply not enough evidence to show that gender affirming care improves the harmful effects of gender dysphoria, as Respondents claim. 20 Linc. Stat. §§ 1201(a)(4). Respondents can only offer evidence that gender affirming care may help with gender dysphoria. R. at 6. However, there is emerging scientific evidence showing that gender affirming treatment can lead to significant harmful effects, "including but not limited to risks related to irreversible infertility, cancer, liver disfunction, coronary artery disease, and bone density." 20 Linc. Stat. §§

1201(a)(5). There remain legitimate unanswered questions about the effectiveness of the treatment and its potential harmful side effects. With so much uncertainty surrounding gender affirming treatment, it is unreasonable to provide a fundamental right to this treatment.

While there is a recognized right to parental autonomy, the Eleventh Circuit held that parents cannot make decisions for their children based on rights that would not exist for themselves. *See Doe By & Through Doe v. Pub. Health Tr. of Dade Cty.*, 696 F.2d 901, 903 (11th Cir. 1983). The D.C. Circuit concluded that there is no deep-rooted right to receive an experimental medical treatment. *Von Eschenbach*, 495 F.3d at 711. Even terminally ill patients do not have a right to treatment that is not proven safe and effective. *Id.* at 697. Recently, this Court held that the right to obtain an abortion was not a deep-rooted right protected by the Due Process Clause. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2254-55 (2022).

Certainly, abortion is more prevalent than gender affirming care and the effects of abortion have been heavily studied, unlike the treatment Respondents seek. It is true that there are distinct concerns regarding human life with abortion. However, the decision in *Dobbs* is consistent with the idea that there is not a fundamental right to medical procedures. As such, the lower courts erred in providing a right to gender affirming treatment.

Furthermore, the ruling in *Dobbs* is consistent with our nation's longstanding tradition of federalism by leaving decisions regarding controversial medical procedures to the individual states. *Dobbs,* 142 S.Ct. at 2283. Even before Dobbs, this

Court "has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (citing *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997); *Jones v. United States*, 463 U.S. 354, 364–365 (1983); *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926); *Collins v. Texas*, 223 U.S. 288, 297–298 (1912); *Jacobson v. Massachusetts*, 197 U.S. 11, 30–31 (1905)). Here, there is a lack of certainty around both the health benefits of gender affirming care for adolescents and the potential severe harmful side effects of the treatments. 20 Linc. Stat. §§ 1201(a)(5-6). Gender affirming treatment is exactly the type of medical procedure that the Court held should be governed by the states. Furthermore, Lincoln is not banning the treatment outright, the legislature is only requiring adolescents to wait until they are eighteen. 20 Linc. Stat. §§ 1203. The fact that treatments for gender dysphoria will still be available for those over the age of eighteen provides even more reasoning for deferring to the States' judgment in this instance. Therefore, this Court should analyze the SAME Act under a rational basis standard.

2. The SAME Act Survives the Rational Basis Test Because it is Rationally Related to Child Health and Safety.

The ability to undergo experimental procedures is not a fundamental right "deeply rooted in our nation's history," and therefore, should not be subject to heightened scrutiny. *Glucksberg*, 521 U.S. at 722 (1997). As such, the correct standard to use is the rational basis test. *Dobbs,* 142 S.Ct. at 2283. Under this test, "a legislative classification must be sustained if the classification is rationally related to a legitimate government interest." *U. S. Dept. of Agric. v. Moreno*, 413 U.S. 528,

533 (1973). A law regulating health and wellness should be provided a "strong presumption of validity." *Dobbs*, 142 S.Ct. at 2283 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993)). Lincoln has a legitimate government interest in ensuring "the health and safety of its citizens, in particular that of vulnerable children." 20 Linc. Stat. §§ 1201(a)(1). Because there are unknown significant and severe health defects that may occur as a result of gender affirming treatment, the SAME Act is rationally related to their interest in health and safety of vulnerable children. Moreover, the stated health benefits of the procedures regulated in the SAME Act are inconclusive. Therefore, under the rational basis test, the SAME Act does not violate the Due Process clause and the parents are not likely to succeed on the merits of their claim.

3. The SAME Act Also Survives Strict Scrutiny Because It Is Narrowly Tailored to Achieve the Compelling Interest of Health and Safety.

Although the rational basis test is the appropriate standard, if this Court elects to use a heightened level of scrutiny the SAME Act still does not violate a Constitutional right because it satisfies the requirements of strict scrutiny. In order to pass strict scrutiny, there must be a compelling state interest behind the policy and the law must be narrowly tailored to achieve that result. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Infringements on that right may be justified by regulations adopted to serve compelling state interests"). Courts have consistently acknowledged that preserving public safety, especially child safety, is a compelling government interest. *See, e.g. Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982) ("safeguarding the physical and psychological well-being of a minor" is a compelling

government interest). Thus, because the law is narrowly tailored and achieves the government's interest, the SAME Act does not violate the Due Process Clause.

The SAME Act is sufficiently narrow because it is limited only to the individuals the Act is trying to protect. Under strict scrutiny, the government must show that the legislation is the least restrictive means of achieving the compelling interest. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). Here, Lincoln could not achieve their goal of preventing children from undergoing potentially irreversible and harmful procedures in any less restrictive way. The SAME Act prohibits administering gender affirming treatments only to people under eighteen years old. 20 Linc. Stat. §§ 1203. It does not prevent the use of treatments, such as hormone therapy, for uses other than gender affirming treatment, and it does not prevent anyone over the age of 18 from receiving gender affirming treatments. As such, the Act is sufficiently narrowly tailored to survive strict scrutiny.

Finally, the SAME Act does achieve the purpose outlined in the legislative intent of the statute. The listed purposes are (1) to protect children from lifelong harmful effects resulting from certain treatment options, (2) to encourage fully researched and safe treatment options, and (3) to protect against social influence that could have permanent or long-lasting consequences. 20 Linc. Stat. §§ 1201(b)(1-3). The SAME Act achieves those purposes by preventing healthcare providers from administering treatment to minors that could result in the listed potential harmful effects. As a result no adolescents will undergo treatments that Lincoln has determined are unsafe or unhealthy for minors to undergo. Therefore, although the

rational basis test is the appropriate standard to analyze the SAME Act under, the Act does not violate the parent's Due Process right, regardless of what standard is applied. Accordingly, the parents are unlikely to succeed on the merits of their Due Process claim.

B. The SAME Act Does Not Violate Jess' Equal Protection Rights Because the Act is Classified by Age and Procedure, Not Gender.

This Court should also analyze the SAME Act under the rational basis test for Jess' equal protection claim because the Act is not classified by transgender status. The Equal Protection Clause of the Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To be subject to heightened review, a law must be either facially or purposely discriminatory; mere disproportionate impact is not enough. *See Washington v. Davis*, 426 U.S. 229, 239 (1976). As such, rational basis is the appropriate standard because (1) the SAME Act is classified by age and medical procedure, not gender, and (2) because transgender status is not a quasi-suspect classification. However, even if intermediate scrutiny applies, the SAME Act still survives because the Act is substantially related to ensuring adolescent health and safety.

1. Heightened Scrutiny Cannot Apply Because the SAME Act is Classified by Age and Medical Procedure.

The lower courts incorrectly found that the SAME Act is classified by transgender status. The Act prevents individuals under the age of 18 from undergoing certain gender affirmation treatments regardless of whether they are male or female. 20 Linc. Stat. §§ 1203. The law applies equally to both males looking to transition to

females and females looking to transition to males. Furthermore, the Act allows certain medical procedures, like hormone therapy, for other treatments unrelated to gender dysphoria. Thus, the two classes are those above and below the age of eighteen and those seeking treatment for gender dysphoria versus those seeking treatment for other ailments. Neither of the above classifications discriminate by gender.

This Court has routinely held that age discrimination does not violate the Equal Protection Clause. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). Unlike other forms of discrimination, age discrimination cannot be described as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Under the SAME Act, the exact same medical procedure that is prohibited for a seventeen-year-old is available for a nineteen-year-old, regardless of any other characteristics. Therefore, because the SAME Act classifies by gender, it should be reviewed under the rational basis test.

Similarly, the SAME Act is classified by medical procedure. The lower courts incorrectly found that because the individuals seeking treatment for gender dysphoria are transgender, they are disadvantaged compared to minors who identify as their biological sex. However, gender dysphoria is a medical condition and the treatments prohibited by the SAME Act are specific to gender dysphoria. Respondents argue that the Act is discriminatory because non-transgender minors can receive hormone treatment and other treatments prohibited by the SAME Act to

treat ailments other than gender dysphoria. But that argument is flawed because the goal of the treatments is entirely different. There are many pharmaceuticals used to treat widely varying diseases. For example, Amitriptyline is an antidepressant that can also be prescribed off-label to treat migraines. Ruben Castaneda, *8 Medications That Treat Multiple Medical Conditions*, U.S. NEWS (March 9, 2017, at 4:47 p.m.), https://health.usnews.com/wellness/slideshows/8-medications-that-treat-multiple-conditions?slide=3. As such, medical treatments must be categorized by the condition they aim to treat, not by the treatment itself.

This Court held that many laws "affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law." *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 271–72 (1979) (holding that a law preferencing veterans was not discriminating to women because the classification was veterans and non-veterans, which happened to have a negative impact on women). So long as the law in question is "rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Id.* For example, pregnant women and non-pregnant individuals are not gender differentiated classes. *Geduldig v. Aiello*, 417 U.S. 484, 493-94 (1974) (holding that there was a "lack of identity" because non-pregnant people could be either men or women); s*ee Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-73 (1993). Here, receiving gender affirmation treatment is analogous to pregnancies. Both genders are treated equally under the SAME Act, creating a lack of identity, especially when the procedures are available after the age of eighteen. Accordingly,

the SAME Act should not be subject to heightened review because it does not discriminate against transgenders, but instead those seeking certain treatments for gender dysphoria.

2. Transgender Status is Not a Suspect nor Quasi-Suspect Class.

On the other hand, even if this Court finds that transgenders are discriminated against by the SAME Act, the rational basis test should still apply because transgender status is not a suspect nor quasi-suspect class. Respondents rely on *Bostock v. Clayton County* to argue that discrimination against transgenders is inherently gender discrimination. 140 S. Ct. 1731, 1741 (2020). However, the Supreme Court did not intend for *Bostock* to apply to constitutional issues. *See Id.* at 1753. In addition, transgender individuals do not meet the criteria established by courts to determine suspect classes warranting heightened review. As such, the rational basis test is the appropriate standard.

The ruling in *Bostock* does not impact the decision in this case because it was not meant to be extended to Equal Protection issues. This Court was careful not to "prejudge" any questions outside of the Title VII issue decided in *Bostock*. *Id.* Contrary to Title VII, which is individually based, the Equal Protection Clause is "class-based; it prohibits treating a class of individuals less favorably than a similarly-situated class." R. at 32. Denying an individual access because of their transgender status is much different than preventing transgender minors from undergoing life-altering, potentially harmful medical procedures. Therefore, this case

is distinct from the issue in *Bostock* and this Court should not extend the ruling to include the Equal Protection Clause.

Finally, transgender individuals are not a quasi-suspect class, as Respondents argue. In order to determine a quasi-suspect class courts have evaluated the following four factors: (1) whether the class has been subject to discrimination, (2) whether the class has a defining characteristic that is related to their ability to contribute to society, (3), whether the class can be defined as a distinct group by obvious or immutable characteristics, and (4) whether the class is a minority without political power to protect their interests. *See, e.g. Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020), as amended (Aug. 28, 2020), cert. denied, 210 L. Ed. 2d 977 (June 28, 2021). Petitioner's do not dispute that transgenders meet the first and fourth factors. However, the absence of a defining and immutable characteristic for the transgender class prevents a court from certifying them as a qausi-suspect class.

The American Psychological Association (APA) defines transgender as "an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth." Am. Psychological Ass'n., *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 70 Am. Psychologist 90 (2015), at http://dx.doi.org/10.1037/a0039906. Each individual's experience with gender identity is different. Transgenders as a class do not have a common distinguishable characteristic that makes them a definable class under the Equal Protection Clause. Those that suffer from gender dysphoria have dramatically different experiences as

others that fall under the APA's definition of transgender. *Id.* Respondents argue that identifying as a gender different than biological gender is a defined group. However, that argument is inconsistent with the ABA's understanding of transgender people. Under the transgender umbrella are transexuals, cross-dressers, genderqueer, "androgynous, multigendered, gender nonconforming, third gender, and two-spirit people." *Id.* And these terms are rapidly changing with new labels constantly arising. These groups of people, all falling under the transgender umbrella, experience differing levels of discrimination making it impossible to narrow down the class to one defining characteristic.

Furthermore, even if there existed at one time a uniform defining characteristic, that characteristic could not be described as "immutable" because the definitions of transgenders are ever-changing, and researchers are continuously learning more about this psychological and sociological construct. Petitioner does not contend that transgenders can never be considered a suspect or quasi-suspect class, but simply that there is not enough research and uniformity to qualify as a quasi-suspect class today. As a result, this Court should rule that transgenders are neither a suspect or quasi-suspect class, and therefore, the SAME Act should be subject to the rational basis test.

3. The SAME Act Passes Muster Because the Act is Substantially Related to Preserving Adolescent Health and Safety.

For the same reasons discussed under the Due Process claim, the SAME Act easily passes the rational basis test. However, even if this court proceeds with heightened scrutiny, the SAME Act passes muster because it is directly related to

protecting the health and safety of minors with gender dysphoria. If this Court extends *Bostock* to constitutional issues, then intermediate scrutiny should apply because that is the standard courts have used to analyze gender and other quasi-suspect classes. E.g., *City of Cleburne, Tex.*, 473 U.S. at 441. In order for a law to pass intermediate scrutiny, there must be an important government objective and the law must be substantially related to achieving that result. *See, e.g., Schenck v. Pro–Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) (holding there is a "significant governmental interest in public safety"). Here, the important government interest is preserving the health and safety of adolescents who suffer from gender dysphoria. The SAME Act is substantially related to that goal because the listed purpose of the SAME Act is to prevent minors from undergoing treatments with unknown and potentially irreversible and harmful effects. When there is uncertainty in the scientific community the state should be given deference to determine what is best for its citizens. As such, even if this Court applies heightened scrutiny, Respondents are unlikely to prevail on the merits of their Equal Protection claim.

CONCLUSION

For these reasons, this Court should reverse the judgment of the United States Court of Appeals for the Fifteenth Circuit.

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APPENDIX

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.