

No. 2020-CV-0001-JAJ

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

JESS MARIANO, ELIZABETH MARIANO, AND THOMAS MARIANO,
Plaintiff-Appellees.

v.

APRIL NARDINI, in her official capacity as the Attorney General of the State of
Lincoln,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Lincoln

BRIEF OF PLAINTIFF-APPELLEES, JESS MARIANO, *et al.*

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4. JURISDICTIONAL STATEMENT

The appellant’s jurisdictional statement is complete and correct.

5. STATEMENT CONCERNING ORAL ARGUMENT

Plaintiff-Appellees respectfully request that the Court hear oral argument in this appeal.

6. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the “serious question” standard for preliminary injunctions is viable after the *Winter v. Natural Resources Defense Council, Inc.* decision?
2. Whether the preliminary injunction was properly granted in regard to the Respondents’ Substantive Due Process and Equal Protection claims?

7. STATEMENT OF THE CASE

A. BACKGROUND

Jess Mariano (“Jess”) is a 14-year-old transgender¹ minor living in the state of Lincoln with his parents, Elizabeth and Thomas. Jess was diagnosed with gender dysphoria and currently receives medications to block him from going through puberty as a female. He and his parents seek to enjoin Lincoln’s SAME Act, which,

¹ A transgender person as one whose gender identity is different from the sex the person had or was identified as having at birth. Transgender, MERRIAM-WEBSTER UNABR. DICTIONARY (3rd ed. 2002). “Gender identity” is defined as a person’s internal sense of being a male or a female. Gender Identity, MERRIAM-WEBSTER UNABR. DICTIONARY (3rd ed. 2002). Plaintiff Jess Mariano uses the pronouns “he/him/his.”

in relevant part, provides, “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. . .”

Jess was born biologically female, but even from a young age, perceived himself as male. Throughout his childhood, Jess has suffered from severe anxiety and depressive episodes due to his gender disconnect. He was diagnosed with depression when he was eight years old after he took a handful of Tylenol pills and said he hoped he would “never wake up.” His parents then started him in therapy, which he continues to receive to this date. After about nine months of therapy, Jess’s psychiatrist, Dr. Dugray diagnosed him with gender dysphoria in accordance with existing medical guidelines, which require the treating physician to mark an incongruence between the patient’s expressed gender and assigned gender. *See* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (“DSM-5”) at 452. Jess’s parents also recount hearing Jess say on many occasions that he didn’t “want to grow up if I have to be a girl.”

When Jess was ten, he began to show signs of puberty, including early breast tissue development. Because Jess’s gender dysphoria was still manifesting, Dr. Dugray, in consultation with Jess’s pediatrician, prescribed that Jess take GnRH agonists, commonly referred to as puberty blockers. Jess is currently continuing to receive puberty blocking medications by injection every month. His psychiatrist testified at

the motion hearing that given the persistence and strength of Jess's gender dysphoria, she anticipates that when Jess turns sixteen, he will start hormone therapy. She also noted that Jess has expressed considerable distress related to the amount of breast tissue he developed and that chest surgery may be necessary to successful treatment of his gender dysphoria before he turns eighteen. Dr. Dugray testified that since Jess started receiving puberty blockers, she has observed that Jess has experienced fewer symptoms of depression and overall less distress associated with his feelings of gender incongruence. *See* DSM-5 at 455 (describing how the distress experienced by adolescents with gender dysphoria "may . . . be mitigated by the supportive environment and knowledge that biomedical treatments exist to reduce his incongruence"). The SAME Act would disrupt Jess's current and future medical treatments for his gender dysphoria until the age of eighteen. Dr. Dugray testified that even a one month interruption of his treatment could allow puberty to progress and substantially undermine the treatment progress Jess has made so far in dealing with his depression and dysphoria.

B. OPINIONS BELOW

Jess, Elizabeth, and Thomas Mariano (collectively "Plaintiff-Appellees") filed a Complaint on November 4, 2021, alleging under 42 U.S.C. § 1983 that enforcing the SAME Act would violate their rights to Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. On November 11, 2021, Plaintiff-Appellees filed a Motion for Preliminary Injunction in the United States District Court for the District of Lincoln. On November 18, 2021,

Lincoln filed a Motion to Dismiss. On December 1, 2021, a hearing was held in the district court. The district court granted Plaintiff-Appellees' request for preliminary injunction and denied Defendant-Appellant's motion to dismiss.

Thereafter, Lincoln filed an interlocutory appeal in the United States Court of Appeals for the Twelfth Circuit to request a reversal of the preliminary injunction entered by the district court and its denial of Lincoln's Motion to Dismiss. The United States Court of Appeals for the Twelfth Circuit affirmed the decision of the district court.

The United States Court of Appeals for the Twelfth Circuit has now granted the State of Lincoln's writ of certiorari.

8. SUMMARY OF ARGUMENT

Appellee requests the appellate court to affirm the district court's judgment.

The first issue presented is whether the "serious question" standard for preliminary injunctions continues to be viable after *Winter v. Natural Resources Defense Council, Inc.*

The second issue presented is whether the preliminary injunction was properly granted in regard to the Respondents' Substantive Due Process and Equal Protection claims.

For the reasons set out above, Appellee respectfully urges the court to affirm the district court's ruling and find that (1) the "serious question" standard for preliminary injunctions is viable after *Winter v. Natural Resources Defense*

Council, Inc. and (2) the preliminary injunction was properly granted in regard to the Respondents' Substantive Due Process and Equal Protection claims.

9. ARGUMENT

The standard of review for both issues in the present case is De Novo. "An appeal de novo is a complete consideration of all of the issues, facts, and law in the case without regard for the findings made by the court that had previously heard the case." *Bouvier, 1853*, DE NOVO.

I. The "serious question" standard for preliminary injunctions continues to be viable after *Winter v. Natural Resources Defense Council, Inc.*

Jess and his family sought a preliminary injunction because the Act violates Jess's parents' fundamental rights of parental autonomy under the Due Process Clause and Jess's rights under the Equal Protection Clause of the Fourteenth Amendment, and that immediate and irreparable harm will occur unless the Court preserves the status quo that allows Jess Mariano to continue to receive his physician's recommended gender-affirming care. The appellate court should affirm the district court's ruling and reasoning under the "serious question" standard following *Winter*. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 367, 172 L. Ed. 2d 249 (2008).

A party may obtain a preliminary injunction by showing that (1) it is 'likely to succeed on the merits,' (2) it is 'likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'the balance of equities tips in its favor,' and (4) 'an injunction is in the public interest.' *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20

(2008). A preliminary injunction may also be appropriate if a movant raises ‘serious questions going to the merits’ and the ‘balance of hardships tips sharply towards’ it, as long as the second and third Winter factors are satisfied.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). This “serious questions” standard 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 the injunction. *See Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

Prior to Winter, this circuit followed the Second Circuit’s sliding-scale approach that balanced the four factors such that a weaker claim on one factor could be offset by a stronger claim on another. *See Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 215 (2d Cir. 2012). As the Second Circuit explained:

The “serious questions” standard 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 the injunction.

Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010).

Some courts have questioned whether the serious questions approach survived

Winter. *See, e.g., Real Truth About Obama, Inc. v. Fed. Election Comm’n*, 575 F.3d 342, 347 (4th Cir. 2009), *cert. granted, judgment vacated*, 559 U.S. 1089 (2010), *and*

adhered to in part sub nom. The Real Truth About Obama, Inc. v. F.E.C., 607 F.3d 355 (4th Cir. 2010) (interpreting *Winter* to reject a balance-of-hardship test).

In *Winter v. Natural Resources Defense Council*, the United States Navy used mid-frequency active (MFA) sonar in training exercises which environmental organizations alleged caused serious harm to marine mammals. *Winter* at 366. As such, the Natural Resources Defense Council sought a preliminary injunction based on alleged violations of national and international environmental acts. *Id.* The District Court entered a preliminary injunction prohibiting the Navy from using MFA sonar training in its exercises. *Id.* Conversely, the Court of Appeals held that the injunction was overbroad and remanded to the District Court for a narrower remedy. *Id.* at 366. The District Court then entered another preliminary injunction, imposing six restrictions on the Navy's use of sonar during its SOCAL training exercises. Subsequently, the Navy then sought relief from the Executive Branch through the Council on Environmental Quality (CEQ), which authorized the Navy to implement “alternative arrangements” to NEPA compliance in light of “emergency circumstances.” The Navy moved to vacate the District Court’s preliminary injunction to which the District Court refused. The Court of Appeals affirmed, and, in relevant part, held that there was a “serious question” whether the CEQ’s interpretation of the emergency circumstances regulation was lawful.

In sum, *Winter* rejected the Ninth Circuit standard that required movants to show only that irreparable harm was “possible” once the movant showed a likelihood of success on the merits. *Winter* at 22. Beyond that, the Court did not set out the

threshold for when a claim is “likely” to succeed or to show irreparable harm. *See Citigroup Global Mkts, Inc.*, 598 F.3d at 37. As the Second Circuit recognized, the standard for granting a preliminary injunction should remain flexible to meet the complex and varied factual issues presented early in the litigation. *See id.* at 38.

Relevant here, the district court correctly stated the standard for a preliminary injunction issue and correctly stated implemented the “serious question” standard for preliminary injunctions, which continues to be viable after *Winter v. Natural Resources Defense Council, Inc.*

Defendant-Appellant is likely to counter that the “serious question” standard for preliminary injunctions is no longer viable after *Winter v. Natural Resources Defense Council, Inc.*, as that is the only position that keeps their futile argument alive. Defendant-Appellant is likely to argue that requiring a showing of likelihood of success on the merits is burdensome because it asks for an estimation of the ultimate outcome of the case before the case has been fully developed, and it is often on a compressed time frame not conducive to deliberative decision-making.

However, interpretations of *Winter* are clear: the flexible approach is necessary to meet the complex and varied factual issues presented early in litigation. *See Citigroup* at 38. Even in the event the balance-of-hardship test is utilized, Jess would still prevail as the lower Court demonstrated.

The balance of equities are hardships is a straightforward analysis in which “equities” refers to the plaintiff’s interest in obtaining an injunction, and

“hardships” refers to the burden that an injunction would place on the defendant. Defendant-Appellant argued the harm of granting an injunction outweighs the harm to the Marianos and is adverse to public interest because “[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.” *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). Further, Defendant-Appellant pointed to the underlying basis for the Act, namely concerns about the harmful and irreversible effects that may result from these unproven treatments and the lack of adequate informed consent and reiterated that the Act permits other forms of gender-affirming care and only pauses the covered treatments until age eighteen. The problem with Defendant-Appellant’s argument is that it fails to treat Jess as a human and consider him as more than a citizen who must comply with a statute. If Jess’s plan of care must be ceased, he is likely to experience immediate and irreparable physical and/or psychological harm. The State is unlikely to experience any real harm from Jess’s plan of care except for knowing that Jess is able to continue his life ensuring his health and happiness are priority.

II. The District Court properly granted the preliminary injunction regarding the Respondents’ Substantive Due Process and Equal Protection claims.

The appellate court should affirm the district court’s decision to grant the preliminary injunction regarding the Respondents’ Substantive Due Process and Equal Protection claims. Under 42 U.S.C. § 1983, enforcing the SAME Act would

violate the Respondents' rights to Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

42 U.S.C. § 1983 states in relevant part:

Every person, who, under the 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

The Plaintiff-Appellees have a constitutional action under 42 U.S.C. § 1983 for a violation of Elizabeth and Thomas's fundamental rights of parental autonomy under the Due Process Clause and for the violation of Jess's rights under the Equal Protection Clause of the Fourteenth Amendment.

A. The Act violates Elizabeth and Thomas Mariano's fundamental rights of parental autonomy under the Due Process Clause

If the Act is not enjoined, the Marianos' right to decide Jess's appropriate medical treatment will be stripped from them.

The Due Process Clause states that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Due Process Clause protects against governmental violations of "certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). The Supreme Court has an established method of substantive due process analysis, that boils down to two primary features: (1) The Clause protecting fundamental rights and liberties which are objectively rooted in the Nation's history

and traditions, and (2) a requirement of a “careful description” of the asserted fundamental liberty interest. *Id.* at 704.

In *Washington v. Glucksberg*, the Supreme Court declared that the Constitution, specifically under the Due Process Clause of the Fourteenth Amendment, protects the fundamental right of parents to direct the care, upbringing, and education of their children. *Washington v. Glucksberg*, 521 U.S. 702 at 720. The State of Washington enacted a statute that provided that a person was guilty of a felony of promoting a suicide attempt when “he knowingly causes or aids another person to attempt suicide,” which was challenged by physicians who practice in Washington. In the case, the Court held that the State of Washington’s ban on assisted suicide effectively prevented a broader license to voluntary or involuntary euthanasia. *Id.* at 702. In making this determination, however, the Court recognizes that the statute did not violate the due process clause.

Lincoln’s SAME Act notes as a policy reason that parents and adolescents often “do not fully comprehend and appreciate the risks and life complications that accompany these surgeries,” effectively taking a sweeping stance on the ability of parents to govern the health care of their children as a justification for the enactment of the SAME Act. Tr. at 3. However, in *Glucksberg*, the Supreme Court of the United States has held that parents do have a fundamental right to direct the care of their children. In addition, the decision for Jess to undergo gender-affirming care was not made without the guidance of doctors. The Mariano’s listened to the advice of their son’s psychiatrist and his pediatrician in making the decision to help

their son obtain the gender affirming care that he needs. Tr. at 4. To enact this statute would prevent the plaintiff-appellees from seeking the care that their son needs.

In *Parham v. J.R.*, the Supreme Court addressed a challenge to a Georgia state statute providing for the voluntary admission of children to state regional hospitals. *Parham v. J.R.*, 422 U.S. 584, at 587 (1979). The admission process was lengthy, involving an application for hospitalization with the consent of parents or guardians, and then the superintendent of the hospital was authorized to temporarily admit any child for “observation or diagnosis.” *Id.* at 591. If after observation there was evidence of mental illness and treatment was needed, the child could be admitted. *Id.* However, any child who had recovered had to be released, and any child who had been admitted for five days could be released with the consent of a parent or guardian. *Id.* The Court held that the process of Georgia’s medical fact finding process was reasonable and constitutional. *Id.* at 618. The Court reasoned that the statute was reasonable given the extensive written records that are compiled about each child while in the State’s custody and review could be allowed on an individual basis for continuing a child’s voluntary commitment. *Id.* at 620.

The State of Lincoln has argued that the Marianos’ substantive due process claim is unsuccessful because there is no substantive due process right to access experimental medical procedures. However, like *Parham* shows, the Supreme Court has recognized a right for parents to make healthcare decisions for their minor

children. These healthcare decisions are made with constant review and extensive records of the child's medical background and history. In addition, the Supreme Court has also recognized in *Parham* that these records do allow for individual review of health care decisions.

Therefore, this Court should affirm the district court's decision to issue a preliminary injunction to allow the plaintiff-appellees to maintain their fundamental right to parental autonomy under the Due Process Clause.

B. The Act violates Jess Mariano's rights under the Equal Protection Clause of the Fourteenth Amendment

The Act denies Jess his ability to continue his gender-affirming treatments because of his sex. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Clause's purpose "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350, 352 (1918).

The Supreme Court has stated that "all gender-based classifications today' warrant 'heightened scrutiny.'" See *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 136 (1994)).

In *Bostock v. Clayton Cnty.*, the Supreme Court held that an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex, is in violation of Title VII of the Civil Rights Act of 1964. *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1731 (2020). The Court addressed three cases where an employer fired a long-standing employee shortly after the employee revealed that they are homosexual or transgender and allegedly for no other reason. *Id.* The Court reasoned that where sex plays a necessary and undisguisable role in the decision, it is a violation, because it is expressly what Title VII forbids. *Id.*

In *Brandt v. Rutledge*, an Arkansas Eastern District Court addressed an Arkansas House Bill that prohibits a physician or other healthcare provider from providing or referring any individual under the age of 18 for “gender transition procedures.” *Brandt v. Rutledge*, 551 F. Supp. 3d 892, 892 (E.D. Ark. 2021). Parents of minors and their healthcare providers challenged the Act on the basis that it violates the Equal Protection Clause and the First Amendment and sought a preliminary injunction. *Id.* at 887. The Court enjoined the state from enforcing any provision of the Act during the pendency of the case. *Id.* at 894.

In the *Brandt* case, the Arkansas Eastern District Court applied a standard of heightened scrutiny because the Act rests on sex-based classifications and because “transgender people constitute at least a quasi-suspect class.” *Id.* at 889.

The SAME Act, like the Act in the *Brandt* case, does not protect the public, children, and is not in the best public interest. Rather, the Act, while not outright prohibiting gender-affirming care, prevents children from obtaining healthcare necessary for their well-being. Jess is currently continuing to receive puberty blocking medications by injection every month. The SAME Act would disrupt Jess's current and future medical treatments for his gender dysphoria under the age of eighteen. According to his doctor, Dr. Dugray, if Jess's treatment is interrupted for even one month, it risks allowing puberty to progress and substantially undermine the treatment progress that Jess has made so far in dealing with his depression and gender dysphoria.

Therefore, this Court should affirm the district court's decision to issue a preliminary injunction to prevent the plaintiff-appellees from being discriminated against on the basis of sex.

10. CONCLUSION

For the foregoing reasons, this court should affirm the District Court's grant of relief for Plaintiff-Appellees.

Dated: _____

Respectfully submitted,
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11. CERTIFICATE OF SERVICE

I hereby certify that on DATE, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Twelfth Circuit by using the CM/ECF system.

Dated: DATE
Location

Respectfully submitted,
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