IN THE

SUPREME COURT OF THE UNITED STATES

Docket No. 22-8976

APRIL NARDINI, IN HER OFFICIAL CAPACITY AS 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

Attorneys for Respondents

Team 3119

QUESTIONS PRESENTED

1. Whether the "serious questions" standard for preliminary injunctions continues to be viable after *Winter v. Natural Resources Defense Council, Inc.*, when it was never expressly overruled, several circuits still utilize the standard, and it gives courts flexibility to determine appropriate equitable relief.

2. Whether the preliminary injunction was properly granted to Respondents concerning their substantive due process and equal protection claims against the SAME Act when they demonstrated a likelihood of success on the merits, irreparable harm, and that the balance of equities and public interest tips in their favor.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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. *Id.* at 23-34.

RELEVANT PROVISIONS

This case involves the Stop Adolescent Medical Experimentations ("SAME") Act, 20 LINC. STAT. §§ 1201-06. The relevant portion states, "[n]o healthcare provider shall engage in or cause any procedure, practice, or service, to be performed on any individual under eighteen," which includes "prescribing or administering puberty blocking medication to stop or delay normal puberty." *Id.* at § 1202. The statute in its entirety is reprinted in Appendix A. This case also involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. U.S. Const. Amend XIV § 1.

STATEMENT OF THE CASE

STATEMENT OF FACTS

Respondents Jess Mariano, Elizabeth Mariano, and Thomas Mariano live in the State of Lincoln (hereinafter referred to as "Respondents" or "the Marianos") R. at 2. Jess Mariano is a transgender minor diagnosed with gender dysphoria and is currently taking puberty blockers to prevent him from undergoing puberty as a girl. *Id.* Jess was diagnosed with depression when, at age eight, he attempted suicide by taking a handful

of Tylenol pills with the hope he would "never wake up." *Id.* at 4. From that point on, the Marianos have engaged Jess in continuous therapy for his well-being. *Id.* After extensive therapy, Jess's psychiatrist, Dr. Dugray, diagnosed him with gender dysphoria in accordance with the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5"). *Id.* The Marianos have battled to provide meaningful care for a child who told them that he did not "want to grow up if [he] had to be a girl." *Id.* at 4-5. At ten years old, just two years after Jess tried to take his own life, Dr. Dugray and Jess's pediatrician prescribed Jess GnRH agonists, also referred to as puberty blockers. *Id.* at 5. In Dr. Dugray's opinion, Jess should begin hormone therapy at age sixteen, and Jess may need chest surgery to remove unwanted breast tissue before eighteen. *Id.* Jess's depression and gender dysphoria symptoms have improved significantly since he began his puberty blocker regimen. *Id.* Dr. Dugray warns that a treatment interruption as little as one month could substantially undermine Jess's progress in dealing with his gender dysphoria. *Id.*

Lincoln has recently enacted the SAME Act. *Id.* at 1. The statute makes several legislative findings, including: that the State has a compelling interest in ensuring the health and safety of vulnerable children; gender dysphoria is serious but only experienced by a small number of children; gender dysphoria is usually resolved by adulthood; studies demonstrating health benefits of gender-affirming care are insufficient; and there are other methods to treat gender dysphoria besides the use of puberty blockers, hormones, and reassignment surgery. *Id.* at 2-3. The SAME Act bars providing minors with gender-affirming care, such as puberty blockers, hormone therapy, and surgery when the intent is to instill or create physiological or anatomical

characteristics that resemble a sex different from the individual's biological sex. *Id.* at 3-4. Any healthcare provider who violates this law may be fined up to $100,000 or imprisoned for up to ten years. *Id.* at 4. The Act's statutory requirements will disrupt Jess's care and bar future procedures. *Id.* at 5.

The motion hearing took place on December 1, 2021. *Id.* at 1. The District Court heard arguments in support of the Mariano's Motion for a Preliminary Injunction preventing the SAME Act from going into effect, and Lincoln's Motion to Dismiss and request to deny the preliminary injunction. *Id.* Respondents presented medical and scientific evidence to support their claims. R. at 5-7. Principally, the Endocrine Society and World Professional Association for Transgender Health ("WPATH") have published guidelines and widely accepted evidence-based treatments for gender dysphoria. *Id.* at 6. Once puberty begins, these guidelines suggest clinicians should begin pubertal hormone suppression with patients, consisting of puberty blockers. *Id.* Puberty blockers are reversible if the child changes their mind and have no impact on fertility. Ceasing puberty blockers causes puberty to resume. *Id.* The best practices for gender-affirming care include reversibly pausing puberty to prevent development of secondary sex characteristics and medical guidelines provide that patients should only receive medically necessary and appropriate interventions that are tailored to their individual needs. *Id.* While surgical interventions are generally not recommended until adulthood, transmasculine teens may benefit from surgical interventions to reduce breast tissue. *Id.* Untreated gender dysphoria can lead to anxiety, depression, eating disorders, substance abuse, and suicide. *Id.* at 7. Additionally, gender dysphoria in those twelve and older is more likely to persist into adulthood than gender dysphoria in younger

adolescents. *Id.* at 7. For all of these reasons, every leading medical organization in the United States opposes denying gender-affirming care to transgender adolescents. *Id.* at 7.

Lincoln presented a single medical expert at the hearing who testified that two countries had banned gender-affirming treatments due to inadequate proof of their effectiveness and safety. R. at 7-8. Lincoln also called two witnesses who anecdotally shared regretting their gender transition. R. at 8. No other information about thre treatment plans, including whether it complied with WPATH or DSM-5 guidelines, was included in the record.

PROCEDURAL HISTORY

Respondents Jess Mariano, Elizabeth Mariano, and Thomas Mariano, all citizens of the State of Lincoln, filed suit in the United States District Court for the District of Lincoln on November 4, 2021, against Defendant April Nardini, in her official capacity as Attorney General of the State of Lincoln (hereinafter "Lincoln" or "Petitioner"). R. at 1. Plaintiffs alleged that enforcing the SAME Act violates their rights to Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. *Id.* On November 11, 2021, Plaintiffs filed a Motion for a Preliminary Injunction. *Id.* On November 18, 2021, Lincoln filed a Motion to Dismiss and a response urging the Court to deny the preliminary injunction request. *Id.*

The District Court granted the Mariano's Motion for Preliminary Injunction. *Id.* at 2. The court found that they were likely to succeed on their Equal Protection and Due Process Claims. *Id.* Additionally, the District Court found the Marianos would be

irreparably harmed absent an injunction, the harm greatly outweighs any damage the Act seeks to prevent, and there is no overriding public interest requiring the court to deny injunctive relief at this stage of the litigation. *Id.* The District Court denied Lincoln's Motion to Dismiss. *Id.* at 22.

Lincoln appealed the action to the United States Circuit Court of Appeals for the Fifteenth Circuit. *Id.* at 23. In a 2-1 decision, the Fifteenth Circuit affirmed the District Court's decision in its entirety, albeit for different reasons. *Id.* at 23-24. The appellate court agreed that the "serious questions" standard remains intact. *Id.* at 24. The majority reasoned the Marianos showed a likelihood of success on their substantive due process claim because the lower court critically examined Lincoln's legislative findings and found them insufficient to justify the ban of gender-affirming treatment for minors. *Id.* at 25. Additionally, the appellate court held with respect to Jess Mariano's Equal Protection claim that the same act was likely subject to heightened scrutiny on at least two bases–because the law discriminated on the basis of sex, as well imposing a special disability. *Id.* at 27.

Lincoln applied to this Court for a stay of the District Court's preliminary injunction. *Id.* at 35. Lincoln further requested a writ of certiorari to consider the merits of the injunction and denial of Lincoln's motion to dismiss. *Id.* The application for a stay pending the filing and disposition of a petition for writ of certiorari presented to the Court was denied. *Id.* This Court granted the petition for writ of certiorari to the United States Court of Appeals for the Fifteenth Circuit, limited to the following questions: (1) whether the "serious questions" standard for preliminary injunctions continues to be viable after *Winter v. Natural Resources Defense Council, Inc.*; and (2)

whether the preliminary injunction was properly granted regarding the Marianos' substantive due process and equal protection claims. *Id.*

SUMMARY OF THE ARGUMENT

This Court should affirm the Fifteenth Circuit's judgment because the "serious questions" standard remains viable after *Winter,* and a preliminary injunction was properly granted with regard to Respondents' substantive due process and equal protection claims.

Although courts are divided on whether the "serious questions" standard was overruled by *Winter*, this Court should find that *Winter* did not do so. The "serious questions" standard calls for a holistic approach to reviewing applications for preliminary injunctive relief. When the balance of equities tips sharply in the moving party's favor, a party need only show "serious questions" on the merits. This approach gives courts discretion based on the particular facts before them to grant equitable relief. Only two circuits have interpreted *Winter* to overrule the "serious questions" standard; however, those circuits read *Winter* too broadly because the Court only overruled the "possibility of irreparable harm" standard. This Court should affirm the Fifteenth Circuit and hold *Winter* did not overrule the "serious questions" approach because this standard is necessary for district courts to have the discretion to determine whether a preliminary injunction should be issued in each case with its distinct facts.

Second, Respondents were properly granted a preliminary injunction with respect to their substantive due process. As parents, Elizabeth and Thomas Mariano have a substantive due process right to direct their child's medical care. The State may only take on a *parens patriae* role when the State can show a parent is causing harm to

their child. Respondents, in conjunction with Jess's psychiatrist and pediatrician, follow professionals' medical advice in accordance with the latest medical guidelines. Nothing in Jess's treatment plan is experimental. Elizabeth and Thomas Mariano have a substantive due process right under the Fourteenth Amendment to make decisions regarding the medical care of their child, and the SAME Act obliterates that right by putting it in the hands of Lincoln. Under strict scrutiny, Lincoln's purported interest to protect vulnerable children is not compelling because the State does not have moral interest in regulating a person's gender identity. Additionally, the SAME Act is not narrowly tailored because there are less restrictive alternatives to protect children and regulate the medical profession.

Third, Respondent Jess Mariano was properly granted a preliminary injunction with respect to his equal protection claim. Lincoln violates the Equal Protection Clause of the Fourteenth Amendment because the SAME Act discriminates based on sex and fails to satisfy intermediate scrutiny. Ensuring the health and safety of citizens is a substantial government interest, but denying evidence-based medical care supported by every major medical organization in the United States is harmful to the health and safety of citizens. Because denying citizens access to evidence-based care based on their gender is not substantially related to ensuring the health and safety of the citizens of Lincoln, the SAME Act violates Jess Mariano's rights under the Fourteenth Amendment.

Thus, because the "serious questions" standard gives courts discretion to afford equitable relief on the merits of each case, this Court should hold that the standard remains viable. Because Respondents have demonstrated that they were properly

granted a preliminary injunction with respect to their substantive due process and equal protection claims, and Lincoln has not shown that the lower courts abused their discretion or made a clear error, this Court should affirm the decision of the Fifteenth Circuit.

STANDARD OF REVIEW

This Court reviews the grant or denial of a preliminary injunction under the abuse of discretion standard. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 664 (2004) (quoting *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 336 (1985)(O'Connor J., concurring)). If the underlying constitutional question is "close," the injunction should be upheld and remanded for a trial on the merits. *Id.* at 664-65.

LEGAL ARGUMENT

II. THE "SERIOUS QUESTIONS" STANDARD REMAINS VIABLE AFTER *WINTER* BECAUSE IT WAS NEVER EXPRESSLY OVERRULED AND IT IS A NECESSITY FOR THE COURTS TO USE A FLEXIBLE STANDARD TO DETERMINE PROPER EQUITABLE RELIEF.

The "serious questions"[1] standard remains viable after *Winter* because it was never

[1] Circuits have used the term "serious questions" and "sliding scale" interchangeably to describe this standard. For brevity, and in accordance with the opinions below, this brief will refer to the standard

expressly overruled by this Court, and it is necessary to determine whether a party is entitled to preliminary relief. A plaintiff seeking a preliminary injunction must establish (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). The last two prongs merge when the government is a party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). "A preliminary injunction is an 'extraordinary, drastic remedy.'" *Munaf v. Green*, 553 U.S. 674, 689-90 (2008) quoting § 2948 *Ground for Granting or Denying a Preliminary Injunction*, 11A Fed. Prac. & Pro. Civ. § 2948 (3d ed.).

Under the "serious questions" standard, a "preliminary injunction could issue where the likelihood of success is such that 'serious questions going to the merits were raised and the balance of hardships tips sharply in [Plaintiff's] favor.'" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In other words, when the balance of equities tips sharply in the plaintiff's favor, they must only raise "serious questions" on the merits, which is a lesser showing than likelihood of success. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. Of Educ.*, 22-15827 2022 WL 3712506 *12 (9th Cir. Aug. 29, 2022). This standard "permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty 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."

---

for preliminary injunctions as the "serious questions" standard.

Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 35 (2d Cir. 2010). Its burden is "no lighter" than the likelihood of success standard. *Id.*

Several circuits utilize the "serious questions" standard and demonstrate its viability in practice. *See Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 215 (2d Cir. 2015); *Reilly v. City of Harrisburg*, 858 F.3d 173, 178 (3rd Cir. 2017) *Dodds v. United States Dept. of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016); *Joseph v. Sasafrasnet, LLC*, 734 F.3d 745, 747 (7th Cir. 2013); *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1188 (9th Cir. 2022); *F.T.C. v. Whole Foods Market*, 548 F.3d 1028, 1036 (D.C. Cir. 2008). The Federal and Fourth Circuits do not approve. *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products LLC*, 660 F.3d 1293, 1298 (Fed. Cir. 2011). This Court should follow the majority of circuits and affirm the use of the "serious questions" standard.

A. *Winter* Overruled the Ninth Circuit's "Possibility of Irreparable Harm" Standard, Not the "Serious Questions" Standard.

This Court did not address the "serious questions" standard in *Winter*, but instead addressed that the "frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.* at 22. In *Winter*, the Natural Resources Defense Council ("NRDC") contended that "mid-frequency active" sonar used by the Navy harmed marine mammals and ocean habitats in the Pacific Ocean. *Id.* at 19 The district court granted a preliminary injunction in favor of NRDC because they established a possibility of irreparable harm by demonstrating marine mammals would be injured. *Id.* at 20. This

Court reversed the Ninth Circuit, concluding that the possibility of irreparable harm standard is "too lenient." *Id.* at 22.

Thus, even though the Ninth Circuit's "possibility of harm" standard was replaced, the "serious question" standard, used in the Ninth and at least six other circuits, was not addressed. The lower court's opinion included the following: a "court may grant the injunction if the plaintiff demonstrates a combination of probable success on the merits and the possibility of irreparable injury *or that serious questions are raised and the balance of hardships tips sharply in their favor*." *Natural Resources Defense Council, Inc. v. Winter*, 518 F.3d 658, 677 (9th Cir. 2008) *overruled on other grounds* (emphasis added). This Court overruled the first standard, but kept the viability of the latter.

Several circuits utilize the "serious questions" standard, demonstrating its viability after *Winter*. "[N]o test for considering preliminary equitable relief should be so rigid as to diminish, let alone disbar, discretion." *Reilly*, 858 F.3d at 178. By disallowing district courts from balancing the four factors of the *Winter* test, courts rejecting the "serious questions" standard are inconsistent with this Court's command in *Nken* that "when evaluating whether interim equitable relief is appropriate, '[t]he first two factors of the traditional standard are the most critical.'" *Id.* at 179 quoting *Nken*, 556 U.S. at 439. To weigh all four factors equally is "logically incompatible" with *Nken*. *Id.* at 179.

This Court has even implied that the "serious questions" standard remains viable. *See Whole Woman's Health v. Jackson*, 141 S.Ct. 2494, 2495 (2021) (affirming denial of preliminary injunctive relief because plaintiffs "have raised serious questions

regarding the constitutionality of the Texas law at issue. But, their application also presents complex and novel antecedent procedural questions" for which the Court believed they did not carry their burden.). In denying preliminary injunctive relief in *Whole Woman's Health*, this Court implicated the "serious questions" standard. The relief was denied because of the complex procedural issues presented, including whether the named defendants in *Whole Woman's Health* could actually enforce the disputed law, and not because the Court merely held there were serious questions regarding the law.

A minority of circuits incorrectly hold that the "serious questions" standard was overruled by *Winter*. For example, the Fourth Circuit stated in the wake of *Winter* that plaintiffs must "make a clear showing that [they] will likely succeed on the merits at trial." *Real Truth About Obama, Inc. v. Federal Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009) *vacated on other grounds*, 559 U.S. 1089 (2010). This "clear" demonstration of likelihood of success on the merits, however, is "far stricter" than the requirement that a plaintiff demonstrate "only a grave or serious question for litigation." *Id.* at 346-47. *See also* Jacob S. Crawford*, Unlikely to Succeed: How the Second Circuit's Adherence to the Serious Questions Standard for the Granting of Preliminary Injunctions Contradicts Supreme Court Precedent and Turns an Extraordinary Remedy into an Ordinary One,* 64 Okla. L. Rev. 437 (2012). ("As long as there are serious questions going to the merits of the case, some circuits allow the grant of a preliminary injunction without the movant showing a likelihood of success on the merits.").

Lincoln's reliance on one circuit's interpretation of *Winter* pales in comparison to

the plethora of circuits that still adhere to the "serious questions" approach. A showing of serious questions going to the merits of Lincoln's claim is "no lighter" than a likelihood of success on the merits when the balance of equities and public interest tip sharply in their favor. The "serious questions" standard is not a lower bar than likelihood of success; it is a more flexible standard allowing litigants to show that *because* there are serious questions going to the merits of the opposing party's claim, there *is* a likelihood of success on the merits for the moving party. Respondents did so in this case under the appropriate standard, and the lower court's decision should be affirmed.

B. The Preliminary Injunction Standard Should Remain Flexible Given the Distinct Factual Issues in Each Case.

Preliminary injunctions are an extraordinary remedy; it does not follow that extraordinary remedies must be granted under rigid standards. "Flexibility is a hallmark of equity jurisdiction." *Winter*, 555 U.S. at 51 (Ginsburg, J., dissenting). The "serious questions" standard "accommodates the needs of the district courts in confronting motions for preliminary injunctions in factual situations that vary widely in difficulty and complexity." *Citigroup*, 598 F.3d at 38. *See also Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1286 (10th Cir. 2016) (referring to the "serious questions" standard: "[t]his commonsense approach reflects the need to provide district courts with flexibility to maintain the status quo when confronted with difficult cases that will surely result in irreparable harm."). Courts are better equipped to determine equitable relief in a wide range of fact scenarios when they can weigh the factors of the *Winter* test so long as irreparable harm has been proven.

Here, the District Court considered the complexity of medical care for a transgender minor and found that serious questions existed about the SAME Act's violations of the Marianos' constitutional rights. Courts have similarly considered other complex factual scenarios where equitable relief is warranted. *See Barr v. Lee*, 140 S.Ct. 2590 (2020) (federal death row inmates seeking to prevent the use of pentobarbital sodium in executions because it allegedly violated the Eighth Amendment); *Benisek v. Lamone*, 138 S.Ct. 1942 (2018) (voters in Maryland seeking to enjoin election officials from holding congressional elections under an allegedly gerrymandered map); *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (religious sect seeking to block enforcement of the Controlled Substances Act to allow them to use hallucinogenic tea in accordance with their religious beliefs). *Any* factual scenario may come before courts across the country, and a rigid standard will prevent judges from awarding equitable relief in circumstances where irreparable harm is apparent. This is precisely why the "serious questions" standard remains viable–a rigid standard requiring litigants to prove success immediately before the lawsuit is litigated not only defeats the element of *likelihood* of success, but effectively denies preliminary relief in scenarios where irreparable harm absent an injunction is clear.

C. The Government Action Caveat is Incompatible with this Court's Precedent and Should Be Disregarded.

The District Court and Fifteenth Circuit, in acknowledging the viability of the "serious questions" standard, did not discuss a caveat of the standard applicable to government action. The caveat states:

[W]hen a party seeks an injunction that will affect governmental action taken in

> the public interest pursuant to a statutory or regulatory scheme, the plaintiff must typically show a likelihood of success on the merits - a serious question going to the merits is usually insufficient, even if the balance of hardships tips decidedly in the Plaintiff's favor.

Mullins v. City of New York, 626 F.3d 47, 53 (2d Cir. 2010). Thus, a party "cannot rely on the [serious questions standard] to challenge 'governmental action taken in the public interest pursuant to a statutory or regulatory scheme.'" *Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Svcs.*, 769 F.3d 105, 110 (2d Cir. 2014) quoting *Plaza Health Labs, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989). *See also Rodgers v. Bryant*, 942 F.3d 451, 455 (8th Cir. 2019). "This exception reflects the idea that governmental 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." *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995). *See also Planned Parenthood v. Rounds*, 530 F.3d 724, 731-32 (8th Cir. 2008).

The fatal flaw of this caveat of the "serious questions" standard is that "uncritical deference" to the legislature is inappropriate. *Gonzalez v. Carhart*, 550 U.S. 124, 166 (2007). In addition, when a government "undertakes such intrusive regulation of the family . . .the usual judicial deference to the legislature is inappropriate." *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977). Applying this caveat of the "serious questions" standard to the current case would be contradictory; it would say that the decisions of Lincoln are presumptively reasoned despite this Court's command that legislative intrusions on the family, such as interfering with parental decision-making, are never entitled to judicial deference. This Court should not adopt this caveat, and

the "serious questions" standard remains viable.

III. THE DISTRICT COURT PROPERLY GRANTED A PRELIMINARY INJUNCTION TO RESPONDENTS BECAUSE THE SAME ACT VIOLATES THE MARIANOS' RIGHTS TO SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION.

This Court should affirm the decision of the Fifteenth Circuit because Respondents have shown serious questions to the merits of Lincoln's claims *and* a likelihood of success on the merits of their claims. Additionally, Respondents will suffer irreparable harm absent an injunction, the balance of equities tips strongly in their favor, and the injunction is in the public interest. This conclusion holds true even if the "serious questions" standard is no longer viable, as Respondents have shown a likelihood of success on the merits of their claim under the standard pronounced in *Real Truth*.

A plaintiff seeking a preliminary injunction must establish (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. *Winter,* 555 U.S. at 20. The last two prongs merge when the government is a party. *Nken*, 556 U.S. at 435.

A preliminary injunction was properly granted with respect to Elizabeth and Thomas Mariano's substantive due process claims and Jess Mariano's equal protection claim. The District Court properly granted a preliminary injunction to prevent Lincoln's unprecedented effort to criminalize fit parents who make medical decisions for their children in conjunction with medical professionals while discriminating by sex to prohibit access to evidence-based medicine. Respondents will suffer irreparable harm

if the injunction is not granted because Elizabeth and Thomas Mariano will have their fundamental right to direct the medical care of their child taken away from them and Jess Mariano will be unable to reverse female puberty once it begins. The balance of equities and public interest tip sharply in their favor because Lincoln will remain in the same position and the public always has an interest in the erroneous deprivation of constitutional rights.

A. Respondents Elizabeth and Thomas Mariano Were Properly Granted A Preliminary Injunction in Respect to Their Substantive Due Process Claim.

Under either preliminary injunction standard, the District Court properly granted a preliminary injunction with respect to Respondents' substantive due process claims. Respondents will be irreparably harmed absent an injunction because they will have a fundamental right to direct the care and custody of their child stripped away from them and experience the repercussions of that deprivation, the potential death of their child. The balance of equities and public interest tip sharply in their favor because Lincoln will remain in the same position as it was prior to this lawsuit, while Respondents are deprived of their fundamental right to direct the care and custody of their child. Put simply, the public has an interest in preventing the deprivation of the rights of fit parents to direct the upbring of their children. Therefore, Respondents have made an affirmative showing on every prong of the *Winter* test, and this Court should so affirm.

1. The SAME Act Deprives Respondents Elizabeth and Thomas Mariano Of Their Fundamental Right to Raise Their Child as They See Fit and Does Not Satisfy Strict Scrutiny.

The Fourteenth Amendment guarantees "[n]o State shall… deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend XIV § 1. Substantive due process analysis requires "an unenumerated right be 'deeply rooted in this Nation's history and tradition' before it can be recognized as a component of the 'liberty' protected in the Due Process Clause." *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2260 (2022) quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

No right is more deeply rooted in our Nation's history than the ability of parents to care for their offspring. The fundamental right of parents to make decisions regarding the care and custody of their children is firmly rooted in this Court's precedent. *See Troxel v. Granville*, 530 U.S. 57 (2000); *Lassiter v. Dept. of Social Svcs. of Durham Cty.*, 452 U.S. 18 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) *Meyer v. Nebraska*, 262 U.S. 390 (1923). This Court has held that the Due Process Clause protects, in addition to freedoms enumerated specifically by the Bill of Rights, the right of parents to direct the upbringing of their children. *Glucksberg*, 521 U.S. at 720 citing *Pierce*, 268 U.S. at 534-35; *see also Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). *See also Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018) ("Substantive due process has . . . been largely confined to protecting fundamental liberty interests, such as . . . familial relationships, children rearing . . .).

a) Respondents have a fundamental right to direct the upbringing of

their child, Jess Mariano, including determining whether he receives gender-affirming care.

The right of Elizabeth and Thomas Mariano to make decisions regarding their child's care is established and protected by the Constitution and this Court. Parents across the country have the right to control the care of their children, including medical decisions. Simply because the medical decisions include hot-button political issues does not mean they do not have a right to make those decisions so long as they are not causing harm to their children.

As long "as a parent adequately cares for [their] children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decision concerning the rearing of that parent's children." *Troxel*, 530 U.S. 57 at 68-69. "Parents possess a fundamental right to make decisions concerning the medical care of their children." *Kanusxewski v. Michigan Department of Health & Human Svcs.*, 927 F.3d 396, 418 (6th Cir. 2019). *See also PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) ("[W]e do not doubt that a parent's general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child's care."). The Constitution protects the right of Elizabeth and Thomas Mariano to decide how they raise their child. Their determination that gender-affirming care is in their child's best interest must be accorded "at least some special weight." *Troxel*, 530 U.S. at 70.

Elizabeth and Thomas Mariano do more for Jess than "adequately" care for him– they strive to provide Jess with the best care available. They listen to the advice of

Jess's doctors to determine the best course of care for him, and that care includes a regimen of puberty blockers to ensure he will not undergo puberty as a female. R. at 5. These treatments prevent him from experiencing the worst of his symptoms with regard to depression and gender dysphoria. *Id.* Significantly, there is overwhelming scientific evidence supporting their decision to treat their child. *Id.* at 4-5. It is irrelevant that Lincoln *en loco parentis* may have made different decisions regarding the care of Jess.

Lincoln cannot argue that the gender-affirming care Respondents provide to their child is experimental. Experimental treatment is "an intervention or regimen that has shown some promise as a cure or ameliorative for a disease or condition but is still being evaluated for efficacy, safety, and acceptability. American Psychological Ass'n. APA DICTIONARY OF PSYCHOLOGY https://dictionary.apa.org/experimental-treatment (last visited Sept. 12, 2022) *See also Ways to Access Experimental Cancer Drugs*, https://www.cancer.gov/about-cancer/treatment/drugs/access-experimental#:~:text=An%20experimental%20drug%20is%20one,be%20called%20%E2%80%9Cinvestigational%20drugs.%E2%80%9D National Cancer Institute (last visited Sept. 12, 2022) ("An experimental drug is one that has been tested in the lab and with animals and approved for testing in people by the [FDA]. But, such a drug can't be advertised, sold, or prescribed."). The puberty blockers that Jess uses are not "experimental." Respondents, in conjunction with Jess's doctors, have made decisions in the best interest of their child. Lincoln attempts to define a new contour of the fundamental right of parents, which has no support in this Court's precedents, by asking the Court to hold that evidence-based medical treatment following established guidelines supported by every

major medical in the United States is "experimental." This Court has never qualified the rights of parents directing their care of their children by stating it must not be experimental; however, the District Court, in its opinion below, also made findings supporting the conclusion that the treatment is not experimental. R. at 15. *See* Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, American Academy of Pediatrics Policy Statement (Oct. 1, 2018) at 5, https://perma.cc/D4R6-GP6C. The District Court did not abuse its discretion in determining that the treatments Respondents chose for Jess were not experimental. In any case, experimental treatments that do not jeopardize Jess's health are not subject to interference by the government.

Any reliance on *Dobbs* by Petitioners is misleading. This Court's decision did nothing to infringe on the substantive due process rights of parents directing their children's care. Referring to *Pierce* and other substantive due process precedents, this Court stated that its abortion decision "does not undermine [those decisions] in any way." *Dobbs*, 142 S.Ct. at 2288. Despite Justice Thomas's call in his concurrence to "reconsider all of this Court's substantive due process precedents" and to "correct the error" in those precedents, they remain untouched today. *Id.* at 2301. Justice Thomas's concurrence is not binding on any court; even if it were, it did not include cases such as *Pierce* or *Meyer*, which gives parents fundamental liberty interests, in his list. The substantive due process rights of Respondents and all parents, therefore, remain intact.

The Middle District of Alabama recently held that a preliminary injunction was proper on a parent's substantive due process claim that an Alabama statute barring gender-affirming care infringed on their fundamental right to direct medical care for

their children. *Eknes-Tucker v. Marshall*, 2022 WL 15218889 *7 (M.D. Al. 2022). "The Act prevents Parent Plaintiffs from choosing that course of treatment for their children by criminalizing the use of transitioning medications to treat gender dysphoria in minors, even at the independent recommendation of a licensed pediatrician." *Id.* The government "failed to produce evidence showing that transitioning medicals jeopardize the health and safety of minors suffering from gender dysphoria." *Id.* at *8. The court further reasoned that "parents, pediatricians, and psychologists–not the State or this Court–are best qualified to determine whether transitioning medications are in a child's best interest on a case-by-case basis." *Id.* *See also Brandt v. Rutledge*, 551 F.Supp. 3d 882, 892-93 (E.D. Ark. 2021) *appeal docketed*, No. 21-2875 (8th Cir. Apr. 19, 2022) (holding that parents have a fundamental right to seek medical care for their children including gender-affirming care and in conjunction with their doctors, make judgments that medical care is necessary). This Court should follow the reasoning of the Middle District of Alabama because the facts are nearly identical, and the District Court recognized the constitutional violations.

The facts of *Eknes-Tucker* and *Brandt* are all but indistinguishable from the current case. They both challenge state laws barring gender-affirming care for minors. Respondents do not subject their child to dangerous experimental medical treatment to cause Jess harm. The SAME Act indeed prevents the Marianos from choosing their preferred course of treatment for Jess. R. at 8. The Marianos are making these decisions in conjunction with their pediatrician and psychologist. *Id.* at 5. Lincoln has only presented evidence that healthcare systems in two countries have banned these treatments due to inadequate proof of effectiveness and safety through witnesses who

testified before the legislature about their decision to detransition. *Id.* at 7-8. This evidence does not demonstrate that puberty blockers are harmful to Jess. In addition, the witness who testified about their decision to de-transition and regret towards taking puberty blockers *and* cross-sex hormones are not even in the same position as Jess because her gender-affirming care consists of taking *only* puberty blockers. *Id.* at 5. The District Court did not abuse its discretion in weighing the evidence the Mariano's presented against Lincoln, and the government cannot point to any clear error.

The Fifteenth Circuit and the District Court correctly looked to *Parham* to determine the SAME Act intrudes on Elizabeth and Thomas Mariano's fundamental right to obtain proper medical care for Jess. In *Parham*, children being treated at a state mental hospital instituted a class action against state mental health officials. *Parham*, 442 U.S. at 584. They sought a declaratory judgment that the state's procedures for the voluntary commitment of children under the age of eighteen to state mental hospitals violated the Due Process Clause of the Fourteenth Amendment. *Id.* This Court disagreed, reasoning that "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks *does not* automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Id.* at 603 [emphasis added]. Most children cannot "make sound judgments concerning many decisions, including their need for medical care or treatment." *Id.*

Respondents have an even stronger substantive due process claim under *Parham* than the parents did in that case. Elizabeth and Thomas Mariano are not only providing their son with proper medical care with the guidance of medical professionals–Jess himself *wants the care*. R. at 4-5. This Court held in *Parham* that even if a child declines

medical treatment, their parents still have a substantive due process right to decide for them. In the current case, the Marianos do not need to force Jess to do *anything*. Not only are the Marianos acting with their child's best interests at heart, they are doing so with his permission. This Court cannot hold that the Marianos do not have a substantive due process right to direct their child's medical care, a willing participant in the care, without overruling *Parham*. This is no occasion for the Court to do so.

A parent's fundamental right to direct their child's upbringing includes a variety of decisions, one of them being the ability to make medical decisions for the child. Parental autonomy can be limited "when parental decisions jeopardize the health or safety of a child, and the state can intercede on the child's behalf." *Bendiburg v. Dempsey*, 909 F.2d 463, 470 (11th Cir. 1990). The state cannot, while being concerned for a child's medical needs, "willfully disregard the right of parents to generally make decisions concerning the treatment to be given to their children." *Id.* Children are presumed to be subject to the control of their parents, and when "parental control falters, the State must play its part as parens patriae." *Schall v. Martin*, 467 U.S. 253, 265 (1984).

The alternative to the rule announced in *Bendiburg* must be true. Parental autonomy can *not* be limited when parental decisions *do not* jeopardize the health and safety of their children. Not only are Lincoln's concerns for the medical needs of transgender children completely rooted in the personal opinions of the legislature, the SAME Act willfully disregards Elizabeth and Thomas Mariano's rights to make decisions regarding what proper medical care to give their child. Respondents are in no way jeopardizing the health and safety of their son Jess. In fact, their decision

regarding his medical treatment safeguards his health and safety. Lincoln is in no position to enforce the SAME Act against Respondents and all other parents of transgender minors where they are unable to demonstrate it protects the health and safety of children.

Respondents determined what was best for Jess with the assistance of medical doctors. They took their son to a psychiatrist who diagnosed him with gender dysphoria. R. at 4. Jess's psychiatrist worked in consultation with Jess's pediatrician to begin puberty blockers. *Id.* at 5. Because Respondents followed the medical advice of trusted professionals, Jess has exhibited "fewer symptoms of depression and overall, less distress associated with his feelings of gender incongruence." *Id.* Jess's psychologist testified that a one-month interruption of treatment could undermine his treatment progress in dealing with his depression and gender dysphoria. *Id.*

Elizabeth and Thomas Mariano are two parents who love and care for their child. They followed the advice of medical professionals to allow Jess to be where he is today. Lincoln has chosen to improperly invoke *parens patriae* to step into the shoes of the Respondents and completely disrupt Jess's progress because of their legislative findings motivated by political disdain for those of transgender status, which pale in comparison to the weight of medical evidence supporting gender-affirming care for children like Jess.

b) Under strict scrutiny, the Respondents' fundamental right to raise their child has been violated because "SAME" is not narrowly tailored to achieve the purported compelling state interest of protecting children from experimental medical treatment.

It is axiomatic that government policy can only survive strict scrutiny "if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1881 (2021) quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Strict scrutiny is properly applied to the restriction of fundamental rights. *Troxel*, 530 U.S. at 80 (Thomas J., concurring.) A statute is not narrowly tailored when the Government fails "to rebut the… contention that there are plausible, less restrictive alternatives to the statute." *Ashcroft*, 542 U.S. at 660. Laws, such as the SAME Act, which burden Elizabeth and Thomas Mariano's exercise of their fundamental right to raise their children, require strict scrutiny. *See also Eknes-Tucker*, 2022 WL at *8. ("Statutes that infringe on fundamental rights are constitutional only if they satisfy strict scrutiny"). Lincoln has not demonstrated how the SAME Act advances such an interest, and is not narrowly drawn to achieve them. To the contrary, the SAME Act causes further harm to the parents who love and care for transgender children.

The government is vested with the "responsibility of protecting the health, safety, and welfare of its citizens." *United Hauler's Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985); *See also Gonzales v. Raich*, 545 U.S. 1, 66 (2005) (Thomas, J., dissenting). Respondents do not dispute Lincoln's police power to promote the health and safety of all citizens and that they have the power to step into their shoes if they were faltering in their care for Jess. Respondents vehemently dispute the idea that the SAME Act achieves Lincoln's purported goals of safety for minors. The SAME Act tramples on Respondents' fundamental right to raise Jess as they see fit, and there is

no evidence in the record this treatment has harmed Jess. Even if there were evidence of the same, this law would still infringe on the rights of *fit* parents.

The SAME Act is also not narrowly tailored to the purported state interest of protecting "vulnerable children." LINC. STAT. § 20-1201. As the District Court correctly concluded, a blanket ban on gender-affirming care is not narrowly tailored to achieve that interest. R. at 17, *see also* Eknes-Tucker, 2022 WL 1521889, at *9. Lincoln fails to rebut the contention that there is a plausible and less restrictive alternative to protect vulnerable children, such as subjecting the SAME Act to parents who jeopardize the health and safety of their children By enacting the SAME Act, Lincoln bans all gender-affirming care in an attempt to protect children and take power away from their parents to make decisions regarding their medical care. And in doing so, Lincoln is taking away Elizabeth and Thomas Mariano's fundamental right to make medical decisions for their child. In doing so, Lincoln ignores the wishes of Respondents in caring for their child and harms them in the process.

3. Respondents Will Be Irreparably Harmed Absent An Injunction Enjoining Lincoln From Enforcing The SAME Act Because They Will Have A Fundamental Right Taken Away And Experience The Life-Altering Effects Of Terminating Gender-Affirming Care For Their Son.

It is a well-established principle that irreparable harm occurs when "a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages." *Grasso Enterprises, LLC v. Express Scripts, Inc.*, 809 F.3d 1033, 1040, (8th Cir. 2016) quoting *General Motors Corp. v. Harry Brown's, LLC*, 563 F.3d 312, 319 (8th Cir. 2009) *See also Ramirez v. Collier*, 142 S.Ct. 1264, 1282 (2022) (finding irreparable harm where death row prisoner would be unable to engage

in protected religious exercise in the final moments of his life and harm was spiritual rather than pecuniary). The existence of irreparable injury is necessary for awarding preliminary injunctive relief. "It 'is the basic doctrine of equity jurisprudence that courts of equity should not act…when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'" *Klayman v. Rao*, 2022 WL 4114077 *2 (D.C. Cir. 2022) quoting *Younger v. Harris*, 401 U.S. 37, 43-44 (1971).

Children who suffer from gender dysphoria "are at a substantially elevated risk of numerous adverse physical and psychosocial outcomes compared with their cisgender peers." *See* Kimberly, L. et al. *Ethical Issues in Gender-Affirming Care for Youth*, AMERICAN ACADEMY FOR PEDIATRICS December 2018; 142 (6): e20181537 https://publications.aap.org/pediatrics/article/142/6/e20181537/37504/ Ethical-Issues-in-Gender-Affirming-Care-for-Youth?autologincheck=redirected?nf Token=00000000-0000-0000-0000-000000000000. The article further details the grim future for transgender minors denied access to gender-affirming treatment:

> As a result of profound stigma, [transgender] youth may be less likely to seek and obtain professional medical care for gender-affirming procedures or other health issues, which in turn places them at greater risk of poor mental health outcomes. A number of studies across Europe and North America reveal that [transgender] youth are more likely to have comorbid mental health issues along with gender dysphoria that contributes to psychological suffering, including anxiety, depression, and suicidal tendencies. These comorbidities often are associated with delays in accessing treatment.

Id. The negative effects in this case do not only have an impact on Jess, they will also impact Elizabeth and Thomas in a profound way. Parents experience irreparable injury at even the *thought* of their children being denied gender-affirming care. *See e.g.,* Kidd, K.M. et al. "*This Could Mean Death for My Child*": Parent Perspectives on Laws

Banning Gender-Affirming Care for Transgender Adolescents. THE JOURNAL FOR ADOLESCENT HEALTH: OFFICIAL PUBLICATION OF THE SOCIETY FOR ADOLESCENT MEDICINE, 68(6),1082-88 https://doi.org/10.1016/j.jadohealth .2020.09.010 (quoting parents saying "it would mean that my son would go back to hating himself every month when we began to menstruate again. The thoughts of hurting himself would return;" and "without hormones and surgery my teen would probably have committed suicide;" and "male puberty would kill my daughter"). Nearly all parents who participated in the study for this article "expressed concern that the proposed legislation would lead to worsening mental health outcomes for their children including decreased depression, anxiety, gender dysphoria, and suicidal ideation." *Id.* Similarly here, Respondents not only deserve to make medical decisions regarding their child's care, but also, they deserve to have their child stay alive. A preliminary injunction could prevent Elizabeth and Thomas Mariano from burying their child because of a statute purported to protect their health and safety. There is no greater irreparable harm to Respondents than the death of their child because Lincoln unconstitutionally infringed on their fundamental right as fit parents to raise their child as they saw fit. And this Court has rejected the argument that injunctions against the government *per se* cause irreparable harm to the government. *See FDA v. American College of Obstetricians & Gynecologists*, 141 S.Ct. 578, 584 (2021) (holding this Court's precedent does not support a "sweeping rule" in which "all injunctions against the government inherently cause irreparable harm, especially for agencies charges with protecting public health, and that Courts should look no further").

There is no remedy at law or any amount of monetary damages which could

compensate Elizabeth and Thomas Mariano for the infringement of their fundamental rights and the loss of their child's life. Not only is there scientific evidence that those with gender dysphoria are likely to be depressed and have suicidal ideations, but the record shows Jess also dealt with these grave problems. R. at 4. Jess did not want to grow up if he was going to be a girl. *Id.* If Lincoln is not enjoined from enacting and enforcing the SAME Act, no court will be able to fashion a proper remedy should Jess choose to take his own life.

2. The balance of equities and public interest weigh in favor of granting a preliminary injunction because Lincoln will remain in the same position prior to the lawsuit and Respondents Elizabeth and Thomas Mariano will not be restricted from making medical decisions for their child.

A balance of equities means "to explore the relative harms to the applicant and respondent, as well as the interests of the public at large." *Trump v. Int'l Refugee Assistance Project*, 137 S.Ct. 2080, 2087 (2017) quoting *Barnes v. E-Systems, Inc. Grp. Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers) (internal quotation marks omitted). The public interest prong requires the movant to make a showing that a preliminary injunction will not be harmful to the public. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 14 S.Ct. 63, 68 (2020). These prongs merge when the Government is a party. *Nken*, 556 U.S. at 435. "[W]hen a constitutional violation is likely . . . the public interest militates in favor of injunctive relief because it is always in the public interest to prevent violation of a party's constitutional rights." *American Civil Liberties Union Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 649 (6th Cir. 2015) quoting *Miller v. City of Cincinnati*, 622 F.3d

524, 540 (6th Cir. 2010).

Here, the balance of harms tilts strongly in favor of affirming the injunction. Lincoln will remain in the same position as they were in prior to the lawsuit; the SAME Act was never implemented because the injunction was entered on December 16, 2021, and the Act was to go into effect on January 1, 2022. R. at 22, 4. The case is scheduled for trial in February of 2023, mere months from this hearing. *Id.* at 23. Lincoln is in the same position they were in on the day the injunction was issued–the *status quo has been maintained*. If Lincoln prevails at trial, they will then be able to implement the law.

With the stay of implementation, the Marianos are still able to exercise their substantive due process rights to parent their child, and Jess Mariano can exercise his equal protection right to non-discriminatory medical care. Unlike the philosophical harms Lincoln claims to have suffered by the delay of implementation of the SAME Act, the Marianos will be gravely harmed absent an injunction. Elizabeth and Thomas will lose their right to parent their child as they see fit, and Jess's body will begin to undergo irreversible physical changes within a month. *Id*. at 5. Jess's treatment progress in dealing with his depression and dysphoria could also be substantially undermined. *Id.* The consequences for the Marianos are those of life and death, while the consequences for Lincoln are a delay of a few more months. The balance here tilts sharply in favor of affirming the injunction.

The interests of the public are also served by affirming the injunction because there are other parents of transgender children whom this law may negatively impact. It is unlikely that the Marianos are not the only parents who this law affects. Lincoln

has failed to show that the law passes the requisite scrutiny at two levels, and similar decisions have been handed down to nearly identical laws in Arkansas and Alabama. The public has an interest in maintaining the rights of the citizens and therefore, the balance of equities and public interest weigh sharply in favor of affirming the preliminary injunction. Under the "serious questions" standard, Respondents have demonstrated serious questions going to the merits of Lincoln's claim, and the balance of equities and public interest weigh sharply in their favor. If this Court chooses to overrule the standard, then Respondents have still demonstrated a likelihood of success on the merits of their claims. The decision of the Fifteenth Circuit should therefore be affirmed.

B. Jess Mariano was properly granted a preliminary injunction with respect to his Equal Protection Claim.

The Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the law." U.S. Const. Amend XIV, § 1. Petitioners fail to demonstrate the District Court committed clear error when it granted a preliminary injunction with respect to Respondent's Equal Protection claim and were properly granted a preliminary injunction. Jess Mariano demonstrates under both the "serious questions" standard and the more stringent standard articulated in *Real Truth* that they are likely to succeed on their claim. He will be irreparably harmed because lifting the injunction will abruptly terminate his treatment, causing puberty to restart and making irreversible changes to his body. The balance of equities and public interest tip sharply in his favor because Lincoln will remain in the same position as it was prior to this lawsuit, while Jess will begin puberty and remain forever changed. The public

interest weighs in favor of Jess Mariano because there are other transgender minors who are affected by the SAME Act. Therefore, Jess Mariano has made an affirmative showing on every element necessary to receive a preliminary injunction.

1. Mariano is likely to succeed on his equal protection claim because the Act discriminates against transgender minors on the basis of sex and cannot survive intermediate scrutiny.

The SAME Act is subject to intermediate scrutiny because it forbids transgender youth from accessing the same procedures available to cisgender minors. The lower courts correctly recognized transgender discrimination as sex-based discrimination. *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1741 (2020) ("It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that discrimination "against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause.").

The Act explicitly discriminates based on sex because it only prohibits procedures based on the intent to facilitate gender-affirming care to transgender minors. 20 LINC. STAT. § 1203 (making it a felony to provide puberty blockers, hormone treatments, and surgical interventions "performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex."). Lincoln discriminates based on sex because the government would permit an adolescent cisgender girl to receive puberty blockers to delay the onset of puberty at the recommendation of their doctor, but if the same doctor

provides the same care to a transgender girl, the doctor has committed a felony under The Act. Put simply, the SAME Act discriminates on the basis of sex.

Sex-based discrimination, like the SAME Act, is subject to intermediate scrutiny. Because Lincoln seeks to uphold government action based on sex, Lincoln "must establish 'an exceedingly persuasive justification' for the classification" and that "the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996), citing *Mississippi Univ. for Women*, 458 U.S 718, 724 (1982). Lincoln cannot do so and the act violates Jess Mariano's Equal Protection rights.

Even if this Court decides it is possible to discriminate against a person for their transgender status without discriminating on the basis of sex, the SAME Act should still be evaluated under intermediate scrutiny because discrimination against both quasi-suspect classes and against children for circumstances beyond their control both merit heightened scrutiny. *United States. v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (discussing whether "prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry" than rational basis review); *see Plyer v. Doe*, 457 U.S. 202, 210 (1982) (finding a denial of education to children based on their legal immigration status violated equal protection rights under intermediate scrutiny). Transgender children in Lincoln are a discrete and insular minority facing a denial of rights based on factors beyond their control.

Laws that discriminate based on transgender status merit intermediate scrutiny because transgender persons meet this Court's test for a suspect classification. A

suspect class is one that has suffered a history of discrimination, can be identified by an obvious, immutable trait that is unrelated to a person's ability to participate in society, and lacks the power to achieve equality through the political process. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976). "Engaging with the suspect class test, it is apparent that transgender persons constitute a quasi-suspect class." *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020) as amended (Aug. 28, 2020), cert denied, 141 S. Ct. 2878 (2021). The Court in *Grimm* noted broad recognition of transgender persons as a quasi-suspect class, citing at least eight other courts had held the same. *Id.* at 610.

Petitioners arguments that the statute operates based on age and procedure lack merit because cisgender minors are permitted to have the same procedures prohibited to transgender minors. As the Fifteenth Circuit noted, "children with gender dysphoria are denied access to medical and surgical treatment that are not denied to children who do not seek treatment for gender dysphoria." R. at 27. If the statute prohibits a transgender girl at age ten from obtaining the same medical care provided to a cisgender girl at age ten, the statute cannot reasonably be read to operate based on age and procedure. The Act targets neither the age nor the procedure, instead, the person is the target of the legislation.

Because the SAME Act discriminates based on sex, the quasi-suspect class of transgender persons, and does not operate based on age or procedure, Lincoln bears the burden of establishing, which they cannot, that the law is sufficiently related to substantial government interest and that the justification is exceedingly persuasive.

The District Court did not make a clear error in determining that Lincoln failed

to meet their burden that the SAME Act was supported by an extremely persuasive justification. Factual findings supported by substantial evidence on the record are not erroneous. *Dixon v. Crete Med. Clinic, P.C.*, 498 F.3d 837, 847 (8th Cir. 2007). Findings of fact are clearly erroneous when the reviewing court is left with a "definite and firm conviction that a mistake has been committed." *Bd. Of Trustees New Orleans Employers Int'l Longshoremen's Ass'n v. Gabriel, Roeder, Smith & Co.*, 539 F.3d 506, 509 (5th Cir. 2008). "As long as findings are plausible in light of the record viewed in its entirety, a reviewing court may not reverse even if it would have reached a different result." *FDIC v. Craft*, 157 F.3d 697, 701 (9th Cir. 1998).

The Eighth Circuit recently addressed a nearly identical case in *Brandt by and through Brandt v. Rutledge*. 2022 WL 3652745 * (8th Cir. 2022). Arkansas enacted a nearly identical statute to Lincoln, and produced expert evidence claiming that gender-affirming care was "experimental." *Id.* at *4. Despite the state's evidence, the district court issued an injunction on the basis that "every major medical association recognizes gender-affirming care for transgender minors may be medically appropriate and necessary to improve the physical and mental health of transgender people." *Id.* at *12. Through amici briefs submitting many of the same reports entered into the record in the present case, the district court found that Arkansas failed to proffer an exceedingly persuasive justification.

Mariano has provided more than enough evidence for the District Court to find Lincoln's justification less than "extremely persuasive." Here, the Marianos presented medical and scientific evidence in support of their claims by way of guidelines, standards of care, and journal articles. *Id.* at 5-8. Notably, "[a]ll leading medical

organizations in the United States, including the American Medical Association, the American Academy of Pediatrics, and the American Psychiatric Association oppose denying gender-affirming care to transgender adolescents." *Id.* at 7. To counter this, Lincoln proffers their own legislative findings, one expert, and two individuals to recount anecdotes of their own experiences. *Id.* at 7-8. It is beyond plausible that the District Court could weigh the evidence in the record and side with all leading medical organizations in the United States over state legislators, one expert, and two anecdotes. The Fifteenth Circuit was correct in finding no clear error, and this Court should affirm the same.

2. Jess Mariano will be irreparably harmed because lifting the injunction will stop his treatment, cause puberty to restart and irreversibly change his body.

Jess Mariano will be irreparably harmed because there is no amount of money that will be able to undo the irreversible physical changes the associated mental distress caused by discontinuing his gender-affirming care. A party suffers irreparable harm when there is no adequate remedy at law because its injuries cannot be compensated by an award of damages. *Harry Brown's, LLC*, 563 F.3d at 319.

Here, the SAME Act harms Jess Mariano in a way that cannot be cured with money damages. Jess's body could resume puberty with as little as a one-month interruption in treatment. R. at 5. When Jess's body begins to change with the onset of puberty, those changes will stay with Jess forever. Jess, and other transgender minors, are in a unique position to avoid permanent physical changes that will cause an increased likelihood of the comorbidities of gender dysphoria – depression, anxiety, and

suicide. Injuries like this, isolated in time, "are exactly what preliminary injunctions are intended to relieve." *D.M. by Bao Xiong v. Minnesota State High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019) (finding a student denied an opportunity to compete on a high school team on the basis of sex the type of temporal injury served by a preliminary injunction).

Here, should Jess be forced to cease his gender affirming care, his body will begin to change nearly immediately. At age ten, Jess began to develop breast tissue, which was halted with puberty blockers. R. at 5. If the preliminary injunction were lifted, Jess would begin to develop breast tissue again almost immediately, which would likely cause Jess considerable stress, as it did before treatment commenced. *Id.* Lifting the injunction will likely cause Jess more symptoms of depression and distress associated with his feelings of gender incongruence. Simply put, there is no amount of money that can repair the permanent changes that Jess's body will undergo if treatment is forced to stop during litigation.

3. The balance of equities and public interest tilt strongly in Jess's favor because Lincoln has never enacted the SAME Act and will continue in the *status quo* during litigation.

The purpose of a preliminary injunction is "to preserve the status quo" until a court can grant final relief. *Kan. City. S. Transp. Co., Inc. v. Teamsters Local Union No. 41*, 126 F.3d 1059-1067 (8th Cir. 1997). The balance of equities looks at the relative harms to the applicant and respondent, as well as the interest of the public. *Int'l Refugee Assistance Project*, 137 S.Ct. at 2087. The balance of the equities and public interest prongs merge when the Government is a party. *Nken*, 556 U.S. at 435. The

"state has no interest in enforcing laws that are unconstitutional," so the state does not suffer irreparable harm when enjoined from enforcing the act. *Hispanic Interest Coalition of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1249 (11th Cir. 2012) (finding the state "has no interest in enforcing a law that is unconstitutional).

Here, the balance of harms tilts strongly in favor of affirming the injunction. Exploration of the relevant harms to Jess Mariano and Lincoln if the SAME Act is not enjoined demonstrates the equities are completely imbalanced. Lincoln will remain in the same position as they were in prior to the lawsuit; the SAME Act was never implemented because the injunction took effect on December 16, 2021, R. at 22, and the SAME Act was to go into effect on January 1, 2022. *Id.* at 4. The trial is scheduled for February of 2023. Lincoln's position on gender-affirming care is the same as the day the injunction was issued, ergo, the *status quo has been maintained.* If Lincoln prevails at trial, they will be able to implement the law at that point.

Unlike the philosophical harms Lincoln suffered by the delay of implementation of the Act, Jess Mariano will be gravely harmed absent an injunction. Jess's treatment progress in dealing with his depression and dysphoria could be substantially undermined. *Id.* The consequences for Jess are those of life and death, while the consequences for Lincoln are a delay of a few more months. The balance here tilts sharply in favor of affirming the injunction.

The interests of the public at large are also served by affirming the injunction because there are other transgender children whom this law may negatively impact. Jess Mariano is likely not the sole transgender adolescent affected by this law. Because Jess will suffer immediate, tangible, irreversible harm that cannot be remedied at law,

and the state has no interest in enforcing unconstitutional laws, the preliminary injunction is proper.

Lincoln has failed to show that the law passes the requisite scrutiny, and similar decisions have been handed down to nearly identical laws in Arkansas and Alabama. *See Brandt*, 551 F. Supp. 3d at 893, aff'd sub nom. *Brandt by & through Brandt v. Rutledge*, No. 21-2875, 2022 WL 3652745 (8th Cir. Aug. 25, 2022); *Eknes-Tucker*, No. 2:22-CV-184-LCB, 2022 WL 1521889, at *13 (M.D. Ala. May 13, 2022). The Act does not pass intermediate scrutiny because it is not substantially related to an important government interest. The state does not have an important government interest in the gender identity of a child, or interfering with evidence-based medical care. The public has no interest in enforcing an unconstitutional law, but has a deep interest in maintaining the rights of its citizens. Therefore, the balance of equities and public interest weigh sharply in favor of affirming the preliminary injunction.

The consequences for the Marianos are those of life and death, while the consequences for Lincoln are a delay of a few more months. The balance here tilts sharply in favor of affirming the injunction.

CONCLUSION

Respondents, Elizabeth, Thomas, and Jess Mariano, respectfully request that this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit.

Respectfully Submitted,

/s/ _____

Team 3119

Counsel for the Respondents

APPENDIX A

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 dysfunction, 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.