Docket No. 22-8976

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In The

# Supreme Court of the United States

October Term, 2022

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

*Petitioner*,

v.

**Jess Mariano, Elizabeth Mariano, and Thomas Mariano,**

*Respondents.*

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*ON WRIT OF CERTIORARI TO*
*THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTEENTH CIRCUIT*

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## BRIEF FOR PETITIONER

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Team 3121
Counsel for Petitioner

## QUESTIONS PRESENTED

1. Is the serious question standard for preliminary injunction still viable after the Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.*?
2. Was the preliminary injunction properly granted regarding Respondents' Substantive Due Process and Equal Protection claims?

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## OPINIONS BELOW

The opinion 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 and order of the United States Court of Appeals for the Fifteenth Circuit is also unreported and set out in the record. R. at 23–34.

## CONSTITUTIONAL AND STATUTORY PROVISION

The following Constitutional provision is relevant to this case: U.S. CONST. amend. XIV, § 1. This provision is reproduced in Appendix A.

The following provisions of the Lincoln Code are relevant to this case: 20 LINC. STAT. §§ 1201–06 (2022).

## STATEMENT OF THE CASE

This case involves allegations that the State of Lincoln's ("Lincoln") Stop Adolescent Medical Experimentations ("SAME") Act violates the Substantive Due Process and Equal Protection rights of transgender minors and their parents.

### *Factual Background*

There is medical uncertainty, both nationally and internationally, regarding the safety and efficacy of gender-affirming medical treatment for minors. R. at 7. An increase in social pressure surrounding gender transition has caused the number of adolescents identifying as transgender to significantly increase. R. at 21. As such, many minors who identify as transgender or suffer from gender dysphoria will undergo irreversible medical treatments without adequately contemplating the long-term mental and physical consequences. R. at 8. In response to this epidemic, the Lincoln State Legislature enacted the SAME Act, which protects the state's vulnerable children from receiving such experimental treatment until they reach the age of majority. R. at 2–4. The Act prohibits healthcare providers from performing any services, practices, and procedures on a minor if the purpose of such procedure is to instill or create biological characteristics that resemble a sex different than one's sex at birth. R. at 3. Such practices, services, and procedures include the prescribing or administering of puberty blockers and hormone treatments, as well as the performance of surgeries that artificially construct genitalia tissue or remove healthy tissue. R. at 4. Violation of the SAME Act is punishable by up to $100,000 or

imprisonment between two and ten years. R. at 4. The Act was set to take effect January 1, 2022. R. at 4.

### *Procedural History*

Respondents are Elizabeth, Thomas, and Jess Mariano. R. at 2. Jess is a fourteen-year-old transgender minor who was born biologically female. R. at 2–4. Jess, who currently lives in Lincoln with his parents, Elizabeth and Thomas, currently receives medication that prevents him from going through puberty as a female. R. at 4–5. Jess has struggled with gender dysphoria since he was at least eight and has been taking puberty blocker since age ten. R. at 4–5.

Respondents filed suit in the United States District Court for the District of Lincoln on November 4, 2021, alleging that enforcement of the SAME Act would violate their Substantive Due Process and Equal Protection rights under the Fourteenth Amendment. R. at 1. Respondents followed the suit with a motion for preliminary injunction on November 11, 2021. R. at 1. On November 18, 2021, Lincoln filed a motion to dismiss and asked the district court to deny the request for preliminary injunction. R. at 1. A hearing was held on December 1, 2021, at which both parties submitted extensive evidence. R. at 1–2. The district court granted the request for preliminary injunction and enjoined enforcement of the Act, finding that 1) the Marianos showed a likelihood of success on the merits of their Substantive Due Process and Equal Protection Clauses claims, 2) the Marianos would suffer immediate and irreparable harm if the court did not enjoin the Act, 3) that harm greatly outweighed any damage the Same Act sought to prevent, and 4) there was no

overriding public interest that required the Court to deny the injunctive relief. R. at 2.

Lincoln appealed the action to the United States Court of Appeals for the Fifteenth Circuit. R. at 23. In a 2–1 decision, the Fifteenth Circuit affirmed the injunction for similar reasons with Judge Gilmore in dissent. R. at 27–28. Specifically, Judge Gilmore argued that both the district court and the appellate court applied the wrong preliminary injunction standard. R. at 28. He further argued that the Marianos' Substantive Due Process and Equal Protection claims should have failed because there is no fundamental right to access experimental medical treatments and because the SAME Act classifies on the basis of age and procedure. R. at 29–34. Lastly, Judge Gilmore noted that even if these rights were implicated, the SAME Act could still pass heightened scrutiny. R. at 31–32, 34. On July 18, 2022, Lincoln's writ of certiorari was granted and limited to the following issues: 1) whether the "serious question" standard for the preliminary injunctions continues to be viable after *Winter v. Natural Resources Defense Council, Inc.*, and 2) whether the preliminary injunction was properly granted regarding Respondents' Substantive Due Process and Equal Protection claims. R. at 35.

## SUMMARY OF THE ARGUMENT

The Supreme Court should reverse the holdings of the United States Court of Appeals for the Fifteenth Circuit for both the preliminary injunction and Equal Protection/Substantive Due Process issues.

### I. Preliminary Injunction

The Supreme Court made clear in *Winter v. Natural Resources Defense Council* that the proper standard for a preliminary injunction requires that the movant must establish a likelihood of success on the merits. Despite this clear language, circuit courts have turned a blind eye to the Court's instruction and instead employ a variety of different standards. One such test is the less burdensome serious question standard, which merely requires that a movant establish serious questions regarding the merits that make a fair-ground for litigation. As such, because the Supreme Court unequivocally stated the proper preliminary injunction standard over a decade ago, the sequential likelihood of success on the merits standard should have been applied in this case.

Even if the serious question standard survived *Winter*, a sequential likelihood of success standard should still apply to preliminary injunctions dealing with state statutes enacted in the public interest. A preliminary injunction is both a powerful tool and a drastic remedy, and it should be used sparingly when dealing with such statutes to avoid interference with the democratic process. The United States Court of Appeals for the Second Circuit, which typically employs the serious question standard, recognizes this conundrum and applies a *Winter*-like sequential test when such statutes are implicated. Lincoln enacted the SAME Act in the public's interest.

The Act protects vulnerable children from receiving experimental gender-affirming medical treatment that can cause serious irreversible medical issues such as infertility, coronary artery disease, and bone density problems. Therefore, because the improper preliminary injunction standard was applied, the Fifteenth Circuit Court of Appeals abused its discretion when it affirmed the district court's application of the serious question standard to the Marianos' claim.

## II. Equal Protection and Substantive Due Process

Applying the proper standard, the Marianos' constitutional claims should have failed because they did not show a likelihood of success on the merits. The SAME Act should not have been subjected to heightened scrutiny, as the Act does not violate Equal Protection or Substantive Due Process. The SAME Act classifies based on age, mental health condition, and medical procedure, which have historically triggered rational basis review, not heightened scrutiny. The SAME Act does not violate Equal Protection because the Act bans minors from engaging in gender-affirming medical treatment.

Alternatively, even if the SAME Act did classify based on one's transgender status, under this Court's Equal Protection jurisprudence, a transgender individual has not been recognized as suspect or quasi-suspect class that deserves heightened scrutiny. Transgender individuals have not been historically discriminated against, nor do they have shared immutable, distinguishable characteristics that are required of constitutionally protected classes. Transgender individuals are also supported by many worldwide advocacy groups and are therefore not politically powerless. Nonetheless, if heightened scrutiny did apply, Lincoln would still have met its

burden. The SAME Act is substantially related to the important governmental objective of protecting vulnerable children from dangerous medical treatments and unwarranted social pressure.

Likewise, the SAME Act does not violate Substantive Due Process. While parents have the right to make decisions regarding the care, custody, and control of their children, that right is not unlimited. Additionally, courts have historically refused to recognize a right to use experimental drugs. In order to find a Substantive Due Process right, the asserted right must be carefully described and must be deeply rooted in the Nation's history and traditions. The Marianos' asserted right is more than the right to make decisions regarding the care of their child; it is the right to subject their child to gender-affirming treatment. Such a right is not deeply rooted in the history and traditions of this country, as puberty blockers have only been in use since the 1980s. Lincoln enacted the SAME Act to protect vulnerable children from the physical and mental anguish that experimental gender-affirming treatment can cause. Other countries have banned the use of these treatments on minors, and Lincoln has also found medical concerns relating to such treatment. As such, the Marianos did not show a likelihood of success on the merits of their constitutional claims.

## STANDARD OF REVIEW

"Like appellate courts, the Supreme Court applies the abuse of discretion standard on review of a preliminary injunction." *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). A district court abuses its discretion when its decision "rests 'on a clearly erroneous finding a fact or error of law.'" *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010) (quoting *Almontaser v. N.Y. City Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008)). However, the legal conclusions on which the denial is based are reviewed *de novo*. *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011).

## ARGUMENT

### I. Under the Court's plain-language, the serious question standard is no longer a valid preliminary injunction standard.

The district court abused its discretion when it applied the serious question standard to its preliminary injunction analysis because the serious question standard is not the law of the land. A preliminary injunction is an "extraordinary remedy never awarded as a right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689 (2008)). It is a "powerful use of judicial authority . . . ." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1284 (11th Cir. 1990). Its purpose is to "preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." *Id.* (quoting *Amer. Radio Ass'n v. Mobile S.S. Ass'n, Inc.*, 483 F.2d 1, 4 (5th Cir. 1973)). One court has explained that preliminary injunctions should only be used in the most extreme circumstances, noting that:

> When a federal court before trial enjoins the enforcement of a municipal ordinance adopted by a duly elected city council, the court overrules the decision of the elected representatives of the people and, thus, in a sense interferes with the processes of democratic government. Such a step can occasionally be justified by the Constitution (itself the highest product of democratic processes). Still, preliminary injunctions of legislative enactments—because they interfere with the democratic process and lack the safeguards against abuse or error that come with a full trial on the merits—must be granted reluctantly and only upon a clear showing that the injunction before trial is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts.

*Id.* at 1285.

In 2007, the United States Supreme Court explicitly stated that "a plaintiff seeking a preliminary injunction *must* establish that he is likely to succeed on the

merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an injunction is in the public interest." *Winter*, 555 U.S. 7, 20 (2008) (emphasis added). The party seeking the preliminary injunction bears the burden of establishing the elements. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). Despite the Court's clear, unequivocal text, the circuits are split on the proper preliminary injunction standard. *Compare Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342 (4th Cir. 2009), *cert. granted, judgment vacated*, 559 U.S. 1089 (2010), *and adhered to in part sub nom.* (applying the *Winter* sequential test), *with Citigroup Glob. Mkts., Inc., v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30 (2d Cir. 2010); *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2007) (applying the more flexible serious question standard), *with Scott*, 612 F.3d at 1279; *Deerefield Med. Ctr. v. City of Deerefield Beach*, 661 F.2d 328 (5th Cir. 1981) (applying a sequential standard with a higher burden than *Winter* (i.e., a substantial likelihood of success on the merits)). Even more baffling, at least two circuit courts apply both the *Winter* sequential standard and the serious question standard. *See Citigroup*, 598 F.3d at 30; *Wild Rockies*, 632 F.3d at 1127 (both applying the serious question standard). *But see Able v. United States*, 44 F.3d 128 (2d Cir. 1995) (per curiam); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020); *DISH Network Corp. v. FCC*, 653 F.3d 771 (9th Cir. 2011), *amending and superseding DISH Network Corp. v. FCC*, 636 F.3d 1139 (9th Cir. 2011); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207 (9th Cir. 2009) (all employing a *Winter*-like likelihood of success on the merits standard).

Under the more flexible "serious question" standard, a district court can grant a preliminary injunction when "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*, 598 F.3d at 35. Instead of *Winter's* standard of likelihood of success on the merits, 555 U.S. at 20, the serious question standard requires the lesser burden of "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Citigroup*, 598 F.3d at 34.

### A. The serious question standard did not survive *Winter* because the Court in *Winter* both explicitly and implicitly adopted the sequential test.

In *Winter v. Natural Resources Defense Council*, environmental advocacy groups sought to enjoin the United States Navy from using certain sonar equipment, believing that it caused serious injury to marine life. 555 U.S. at 12–14. The Ninth Circuit Court of Appeals upheld the district court's preliminary injunction because the environmental groups showed a strong likelihood of succeeding on the merits and a possibility of irreparable injury. *Id.* at 17. However, the Supreme Court rejected that interpretation and held that a movant must show a likelihood of irreparable injury, not a mere probability. *Id.* at 22. The Court also noted that even if the advocacy groups showed a likelihood of success and the merits and irreparable harm, the preliminary injunction would still be reversed because both the public and the Navy had a great interest in the training exercises. *Id.* at 23–24.

The Supreme Court's decision in *Winter* both explicitly and implicitly recognized the sequential likelihood of success on the merits test as the lone preliminary injunction standard. The Court plainly stated that "[a] plaintiff seeking a preliminary injunction *must* establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an injunction is in the public interest." *Id.* at 20 (emphasis added). The usage of "must" and "and" clearly show that each individual element must be met for a preliminary injunction to be granted. Even if that were not persuasive enough, the *Winter* Court's reasoning also shows that a sequential approach was adopted because the Court's plain denial of the public interest factor suggests a more rigid approach. See *Id.* at 23 ("[E]ven if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of these factors alone requires denial of the requested injunctive relief.").

The Fourth Circuit perfectly encapsulated the spirit of *Winter* in *Real Truth About Obama*, 575 F.3d at 342. In this case, the court explained that all four *Winter* elements "must be satisfied." *Id.* at 346. In fact, the court discussed several reasons why its previous preliminary injunction standard, the *Blackwelder* test, a flexible sliding scale test, was now defective. *Id.* at 346–47; *see Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 194–96 (4th Cir. 1977), *overruled by Real Truth About Obama*, 575 F.3d at 342. First, the court noted that *Winter*'s likelihood to succeed on

the merits requirement invalidated *Blackwelder's* "grave or serious questions presented" test. *Real Truth About Obama*, 575 F.3d at 346. Second, regarding the likelihood of an irreparable harm standard, the court observed that *Blackwelder* was insufficient because it only required a showing that the movant's harm was greater than the opponent's harm. *Id.* at 347. Next, the court noted that the *Blackwelder* test did not always require the consideration of the public interest element, whereas *Winter* stated it must always be considered and that courts should pay "'particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Id.* (quoting *Winter*, 555 U.S. at 24). Last, the Court held that the wholly flexible nature of the test is no longer viable past *Winter*. *Id.* Thus, the Fourth Circuit ruled that its flexible approach to preliminary injunctions "may no longer be applied . . . as the standard articulated in *Winter* governs the issuance of preliminary injunctions not only in the Fourth Circuit but in all federal courts." *Id.*

However, other circuits, including the Second Circuit, believe the serious question standard is coterminous with the *Winter* sequential standard. In *Citigroup Global Markets*, the party opposing the preliminary injunction argued that *Winter* and two other Supreme Court preliminary injunctions cases, *Munaf v. Geren* and *Nken v. Holder,* barred the court's application of the serious question standard. *Citigroup*, 598 F.3d at 34; *see also Munaf v. Geren*, 553 U.S. 674 (2008); *Nken v. Holder*, 556 U.S. 418 (2009). However, the Second Circuit was not convinced and noted that the serious question standard has been around for fifty-years. *Citigroup*, 598 F.3d 34. The court further reasoned that because the serious question standard

requires that the merits and balance of hardship tip decidedly in the mover's favor, the standard has the same effect as the *Winter* likelihood of success standard. *Id.* at 35.

The court upheld the serious question test because it believed that if the Supreme Court wanted to invalidate a flexible preliminary injunction standard, it would have done so in *Winter*, *Munaf,* or *Nken*. *Id.* at 36, 38. The court reasoned that because the majority opinions in those cases make no mention of the serious question standard, it must still be good law. *Id.* ("None of the three cases comments at all, much less negatively, upon the application of a preliminary injunction standard that softens a strict 'likelihood' requirement in cases that warrant it."). Because *Winter* clearly recognized a sequential likelihood of success on the merits standard, the Court should find that the serious question standard is no longer viable.

**B. Even if the serious question standard survived *Winter*, it should not be used when dealing with statutes enacted for the public interest.**

Through the Second's Circuit's opinion in *Citigroup Global Markets*, a reasonable person may assume that the serious question standard is used exclusively in that circuit; however, that is not the case. In fact, the circuit employs a sequential, *Winter*-like standard in cases involving statutes enacted for the public interest. *See We The Patriots USA, Inc.* 17 F.4th at 279 n.13 (per curiam) ("But we have consistently applied the likelihood-of-success standard to cases challenging government actions taken in the public interest pursuant to a statutory or regulatory scheme, including in cases involving emergency regulations and orders."); *see also*

*Able v. United States*, 44 F.3d 128 (2d Cir. 1995) (per curiam); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620 (2d Cir. 2020).

In *Able v. United States*, a group of homosexual armed forces members challenged the constitutionality of a federal "don't ask, don't tell" law. 44 F.3d at 130. As litigation commenced, the district court enjoined the United States Military from discharging the service members, and the United States appealed the injunctions, arguing that the district court abused its discretion by applying the serious question standard. *Id.*

In reaching its decision that the incorrect standard was applied, the Second Circuit noted that although the serious question standard is typically used in preliminary injunctions, the sequential likelihood of success on the merits test is required "where the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme." *Id.* at 131 (quoting *Plaza Health Labs., Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989)). The court further noted that applying this more rigid standard 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." *Id.* Finally, the court stated that it would be inappropriate "to substitute its own determination of the public interest for that [of] political branches, whether or not there may be doubt regarding the wisdom of their conclusion." *Id.* Therefore, because the moving party sought to enjoin a government action related to the public interest, the Second Circuit opted for the

more rigid likelihood of success on the merits approach, which is almost identical to the test outlined in *Winter*. *Id.* Accordingly, even if the serious question standard survived *Winter*, it is inappropriate to use in cases involving public interest statutes.

### C. Therefore, the lower courts abused their discretion because they applied the incorrect legal standard to the Marianos' challenge.

In this case, the lower courts improperly applied the serious question standard, R. at 9–13, 24–25, instead of the likelihood of success on the merits standard that was specifically articulated by the Supreme Court. *Winter*, 555 U.S. at 20. Because the courts applied the wrong preliminary injunction standard, this was an abuse of discretion. In his dissent, Judge Gilmore states that the proper standard requires that the "movants must make a clear showing that they are substantially likely to succeed on the merits." R. at 28. We disagree. Since the Court's decision in *Winter*, the only proper preliminary injunction standard requires that a movant "must establish that he is likely to succeed on the merits." 555 U.S. at 20. While this burden is not as strong as the "substantially likely" standard that Judge Gilmore calls for, it is still sufficient to overcome Respondents' Equal Protection and Substantive Due Process challenges.

Alternatively, even if the serious question standard survived *Winter*, it should not have been applied. A preliminary injunction is a drastic remedy and a powerful tool and should be exercised sparingly, especially when dealing with statutes enacted for the public interest. The Second Circuit Court of Appeals, from which the District of Lincoln adopted its preliminary injunction standard, recognizes this and applies a *Winter*-like likelihood of success standard when dealing with such statutes. *See* R. at

9. The SAME Act is clearly a statute enacted for the public interest. The Act explicitly states that its purpose is to "protect children from risking their own mental and physical health and lifelong negative medical consequences . . . ." 20 LINC. STAT. § 1201(b)(1) (2022). The lower courts' application of a more flexible approach interferes with the people of Lincoln's democratic process. As such, even if the serious question standard survived Winter, the lower courts still abused their discretion because they misapplied the less burdensome standard to a statute enacted in the public interest.

## II. The preliminary injunction was improperly granted because the SAME Act does not violate Respondents' Substantive Due Process or Equal Protection rights.

The SAME Act should be subjected to heightened scrutiny because it does not distinguish on transgender status. The Act distinguishes on the basis of age, medical procedure, and mental health condition, which are subject to rational basis review. Similarly, the SAME Act does not violate Substantive Due Process. While there is a fundamental right for a parent to make decisions regarding their children, that power is not unlimited, and parents do not have the right to subject their children to experimental, controversial medical treatment. Further, Lincoln is well within its right to enact the SAME Act, as the state's broad regulatory power allows it to pass laws that protect children and regulate the medical profession. As such, the preliminary injunction was improperly granted.

### A. Under this Court's Equal Protection analysis, rational basis should be applied to the SAME Act because the Act does not implicate a suspect or quasi-suspect classification that triggers heightened scrutiny.

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. In layman's terms, this provision "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *see also Plyler v. Doe*, 457 U.S. 202, 245 (1982) ("The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility; it is not an all-encompassing 'equalizer' designed to eradicate every distinction for which persons are not 'responsible.'"); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 352 (1918) ("The [Equal Protection 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."). However, the Constitution recognizes that not all persons are similarly situated, as it "does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The ability to "determine what is 'different' and what is 'the same' resides [with] the [state] legislatures . . . ," which have "substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill." *Plyler*, 457 U.S. at 218. Therefore, under most state actions, courts only look at whether a classification "bears some fair relationship to a legitimate public purpose." *Id.*; *see also Vacco v. Quill*, 521 U.S. 793, 799 (1997) (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996)) ("If a legislative classification or distinction

'neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears a rational relation to some legitimate end.'").

Admittedly, state legislatures are not given this "substantial latitude" in every classification, as the Court has outlined certain suspect and quasi-suspect classes that receive heightened scrutiny. *Plyler*, 457 U.S. at 218. These classes have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). For instance, classifications of race and national origin are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . . [B]ecause such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny." *Cleburne*, 473 U.S. at 440. Strict scrutiny "must be narrowly tailored to promote a compelling Government interest, and if a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 804 (2000). The government has the burden of proof under strict scrutiny. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 (1938).

Between strict scrutiny and rational basis lies intermediate scrutiny, which is applied to discriminatory classifications of sex/gender and non-marital children. *Clark v. Jeter*, 486 U.S. 456 (1988); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). To

satisfy intermediate scrutiny, "a statutory classification must be substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. This justification "must be genuine, not hypothesized or invented post hoc in response to litigation [, and] it must not rely on overbroad generalizations . . . ." *United States v. Virginia*, 515 U.S. 518, 533 (1996).

All other classifications are subject to rational basis. These classifications are presumptively rational and the "individual challenging its constitutionality bears the burden of proving that the 'facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). Under rational basis, a classification will be "upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993); *see also Bradley*, 440 U.S. at 97 ("[A court] will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."). Rational basis is a relaxed standard that requires the attacker to negate "every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). "Perfection in making the[se] necessary classifications is neither possible nor necessary." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976). Rational basis is "not a license for courts

to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns, Inc.*, 508 U.S. at 313.

**1. The SAME Act does not distinguish on transgender status; it distinguishes on the basis of age, medical procedure, and mental health condition.**

The Supreme Court has historically recognized certain classifications that do not trigger a heightened level of scrutiny. For instance, the Court has consistently held that classifications based on age, mental health status, and medical procedure do not violate Equal Protection if the classification at issue satisfies rational basis. *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Heller v. Doe by Doe*, 509 U.S. 312 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); In fact, under the Fourteenth Amendment, "a state may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests," as the "Constitution does not preclude reliance on such classifications." *Kimel*, 528 U.S. at 84; *see also Murgia*, 427 U.S. at 316 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)) ("[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'"); *Heller*, 509 U.S. at 321 ("Courts are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.").

**a. The SAME Act distinguishes on the basis of age.**

In *Gregory v. Ashcroft*, Missouri state judges contested a state constitutional mandatory retirement provision, arguing that it violated the Age Discrimination in

Employment Act (ADEA) and the Equal Protection Clause. 501 U.S. at 455. After dispelling the ADEA claim, the Court noted that it had repeatedly held that "age is not a suspect classification under the Equal Protection Clause." *Id.* at 470. Because neither a suspect class nor a fundamental interest was involved, rational basis was applied and the Court easily found many legitimate purposes for the mandatory retirement provision. *Id.* at 470–73. Specifically, the Court noted that mental and physical capacity deteriorate with age and that judges, unlike other political officials who have regular elections, lack general accountability. *Id.* at 472–73. Notably, although the Court recognized that it was dealing with generalities that could negatively affect judges who are still cognitively competent, it explained that a state statute "'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" *Id.* at 473 (quoting *Murgia*, 427 U.S. at 316).

The present case is analogous to *Gregory* because the SAME Act expressly forbids certain gender-affirming treatments "upon any individual under the age of eighteen." 20 LINC. STAT. § 1203 (2022). The Act does not restrict transgender individuals who have reached the age of majority. This fact is further supported through Lincoln's assertion that the treatments sought by the Marianos will be available when the child turns eighteen. R. at 12. Thus, the Act discriminates based on age rather than transgender status, and because of this, rational basis should have been applied. Like the *Gregory* Court, Lincoln has found many legitimate purposes for the mandatory retirement provision, including "to protect children from risking

their own mental and physical health and lifelong negative medical consequences . . . ." 20 LINC. STAT. § 1202(b)(1). Although the SAME Act may deal in generalities, the Equal Protection Clause is not violated when classifications are imperfect. *Gregory*, 501 U.S. at 473.

**b. The SAME Act distinguishes on the basis of mental health condition.**

In *Heller v. Doe by Doe*, the state of Kentucky authorized involuntary civil commitments of alleged mentally retarded (hereinafter, "mentally impaired") and mentally ill individuals by two separate statutes. 509 U.S. at 314. The statutes required two different burdens of proof in involuntary commitment proceedings. *Id.* at 315. The applicable burden of proof for mentally impaired persons was clear and convincing evidence, whereas the applicable burden of proof for mentally ill persons was beyond a reasonable doubt. *Id.* Plaintiffs, a group of mentally impaired involuntarily committed persons, challenged the statutes, arguing that the distinctions were arbitrary, irrational, and in violation of the Equal Protection Clause. *Id.* The complaining parties argued that the Court should apply heightened scrutiny over rational-basis review. *Id.* at 318–19. Yet, the Court declined to do so, explaining that it had "applied rational-basis review in previous cases involving the mentally [impaired] and the mentally ill." *Id.* at 321 (citing *Cleburne*, 473 U.S. at 432; *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981).

The State of Kentucky argued that the burden of proof for mentally impaired persons was lower because, unlike mentally ill persons who may suddenly develop mental health issues like depression or schizophrenia, mentally impaired individuals

usually have a developmental disability that becomes noticeable well before adulthood. *Id.* at 322. Therefore, the state instituted different burdens of proof because mentally impaired persons usually have much more evidence of their handicap then mentally ill persons. *Id.* As such, because rational basis applied, the Court found the statute requiring a lower burden of proof for mentally impaired individuals was rationally related to the state's legitimate purpose of preventing "erroneous determinations." *Id.*

The present case is analogous to *Heller* because the SAME Act only applies to transgender minors who want to "resemble a sex different from the individual's biological sex." 20 LINC. STAT. § 1203. The majority of children desiring this outcome will most likely suffer from gender dysphoria, which is listed in the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"). R. at 4; *see American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5") at 452. Thus, in addition to age, the SAME Act classifies based on mental health condition rather than transgender status.

**c. The SAME Act distinguishes on the basis of medical procedure.**

In *Bray v. Alexandria Women's Health Clinic*, abortion clinics and abortion rights organizations brought an action for a permanent injunction to enjoin an anti-abortion organization and its members from conducting demonstrations at Washington, D.C. clinics. 506 U.S. 263, 266–67 (1993). The demonstrations involved trespassing on and obstructing general access to the clinics. *Id.* at 266. The district court granted the injunction and held that the anti-abortion organization was in violation of a federal statute that allowed a federal cause of action to begin against

person who obstruct access to abortion clinics. *Id*. at 266–67. The Supreme Court granted certiorari and explained that a conspirator's actions must have 1) some class-based discrimination, and 2) the actions must be meant to interfere with protected rights for a federal violation to occur—the Court held that the elements were not met. *Id.* at 268. Regarding the first element, the Court reasoned that the class being discriminated against was not women as a whole but people who are getting an abortion, although the latter is made-up of predominantly women. *Id.* at 269. Because the facts indicated that the demonstrations were not "motivated by a purpose directed specifically at women as a class," there was no qualifying class. *Id.* at 269–70.

Lastly, although *Bray* is a civil rights case, the reasoning of *Bray* is analogous to the present case. In a footnote accompanying the *Bray* opinion, the Court states that "the characteristic that formed the basis of the targeting here was not womanhood, but the seeking of abortion—so that the class the dissenters identify is the one we have rejected earlier: women seeking abortion." *Id.* at 269 n.4. To illustrate why women seeking abortion was not the correct classification, the Court used an analogy. *Id.* The Court proffered that if a state legislature passed a law allowing rapists to be paroled if they attend a weekly counseling meeting, then opposers of that law could also be liable under the same federal statute because, statistically, men commit more rape than woman. *Id.* The present case is analogous to *Bray* because the SAME Act only applies to individuals seeking specific gender-affirming medical treatment. Although persons who identify as transgender will predominantly seek medical procedures to "resemble a sex different from the individual's biological

sex," the SAME Act is not a transgender classification because anyone can seek specific medical procedures to resemble another sex. 20 LINC. STAT. § 1203. Thus, because Lincoln is banning these procedures for all people, the SAME Act is a medical procedure classification and not a transgender classification. Further, the Act does not discriminate against persons who identify as transgender because it does not restrict them from receiving other types of care. *See Id.* § 1201(b)(1) ("It is the purpose of this chapter [t]o protect children from . . . lifelong negative medical consequences that could be prevented by receiving a more conventional treatment of their gender dysphoria.").

Like the classifications the state legislatures made in *Gregory*, *Heller*, and *Bray*, the classifications the State of Lincoln made are based on factors like age, mental health condition, and/or medical procedure, and as such, these classifications are valid as long as they pass rational basis review. The SAME Act easily passes rational basis because the Act is rationally related to the legitimate governmental purposes of protecting its youth and encouraging safe medical treatment. *Id.* § 1201(b)(1)–(2). Therefore, because the SAME Act only applies to transgender minors who have been diagnosed with gender dysphoria and are seeking certain types of medical treatment, it discriminates based on age, mental health condition, and medical procedure, which does not implicate a suspect or quasi-suspect class.

**2. Despite the lower court's holding, transgender status is not a constitutionally protected class; the SAME Act does not discriminate against similarly situated individuals.**

The Court in *Lyng v. Castillo*, which involved the statutory definition of a

"household" for food stamps purposes, outlined a list of factors that all suspect/quasi-suspect classes share when it rejected a heightened scrutiny classification for "close relatives." 477 U.S. 635, 638 (1986). The *Lyng* Court noted that all suspect and quasi-suspect classes have been, "[a]s a historical matter . . . subjected to discrimination . . . exhibit[ed] obvious, immutable, or distinguishing characteristics that define them as a discrete group; and . . . are not a minority or politically powerless." *Id.* (citing *Murgia*, 427 U.S. at 313–14); *see also Parham v. Hughes*, 441 U.S. 347, 351 (1979); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (both explaining that sex, race, and national origin are all immutable characteristics determined only by birth).

**a. Even if the SAME Act's classification were based on transgender status, transgender classifications would not pass the *Lyng* factors.**

While it may be true that transgender individuals could experience discrimination in their daily lives due to their transgender status, Respondents have presented no evidence that such discrimination is historically pervasive. Further, those identifying as transgender do not share an "'immutable characteristic determined solely by the accident of birth'" that defines them as transgender in the way that those belonging to certain ethnic or gender groups do. *Gallagher v. City of Clayton*, 699 F.3d 1013, 1018 (2012) (quoting *Frontiero*, 411 U.S. at 686). This lack of a shared immutable characteristic is further supported by the fact that health providers cannot distinguish "children whose transgender identity will persist [into adulthood] from those whose will not." R. at 11. Finally, Respondents have failed to provide evidence that transgender individuals are politically powerless. On the

contrary, Respondents argue that politically powerful advocacy groups such as the World Professional Association for Transgender Health ("WPATH") oppose the SAME Act and others like it. R. at 5. Therefore, transgender status cannot be said to constitute a suspect or quasi-suspect class because those who identify as transgender have not been historically discriminated against, do not share immutable characteristics that define them as a group, and are not politically powerless.

**b. The SAME Act does not treat similarly situated individuals differently on the basis of sex.**

Using the faulty premise that a transgender classification is a sex classification that triggers intermediate scrutiny for Equal Protection purposes, the district court erroneously held that the SAME act violated the Equal Protection Clause because it is treating similarly situated individuals, transgender teens and cisgender teens who have precocious puberty, differently. R. at 18–21. The SAME Act does not discriminate against similarly situated individuals on the basis of sex, but even if it did, a statute does not raise constitutional problems simply because it recognizes sex differences at some level. *Tuan Anh Ngyen v. INS*, 533 U.S. 53, 73 (2001) (explaining how failing to acknowledge biological differences would "risk making the guarantee of equal protection superficial, and so disserving it."). As discussed above, the Equal Protection clause is violated only when one group of similarly situated individuals are disadvantaged relative to another group of similarly situated individuals. *Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 439, 439 (1985).

This Court has held numerous times that unequal treatment of a member of one sex when compared to a similarly situated member of the opposite sex violates

Equal Protection. *See, e.g., Craig v. Boren*, 429 U.S. 190, 191–92 (1976) (higher drinking age for men); *Frontiero*, 411 U.S. at 678–79 (higher standard for servicewomen to prove spousal dependency); *Reed v. Reed*, 404 U.S. 71, 73–75 (1971) (preference for men administering estates). In *Reed v, Reed*, Sally and Cecil Reed separately petitioned to administer their decedent son's estate; however, under Idaho law, males were preferred to females to administer estates. 404 U.S. at 71–73. As such, despite recognizing that both parties were equally entitled, the probate court "compel[led] a preference for Cecil because he was a male." *Id.* at 72–73. After Ms. Reed appealed, the state of Idaho argued that the statute was designed to "reduce the workload of probate courts by eliminating one class of contests." *Id.* at 76. The Court was not persuaded by this argument and held that while the objective was legitimate, giving mandatory preference to similarly situated members of one sex over the other just to eliminate certain hearings was an "arbitrary legislative choice forbidden by the Equal Protection Clause." *Id.* at 76–77.

In *Craig*, an Oklahoma state statute prohibited the sale of 3.2% beer to males under twenty-one and females under eighteen. 429 U.S. at 191–92. Craig, a male between eighteen and twenty-one years of age and a licensed vendor of 3.2% beer, brought suit, complaining that the statute constituted "invidious discrimination against males 18-20 years of age." *Id.* at 192. The state argued that its objective of the statute was to enhance traffic safety. *Id.* at 199. The Court held that the statistics cited by the state to support the notion that males between the ages of eighteen to twenty-one were more likely to drive drunk than females of the same age exhibited

"a variety of shortcomings" that were not sufficient to justify the statute's discrimination. *Id.* at 200–04. Therefore, the gender-based statute violated the Equal Protection Clause. *Id.* at 210.

This present case is distinguishable from *Reed* and *Craig* because the SAME Act does not treat similarly situated individuals differently on the basis of sex. A child taking puberty blockers in order to treat precocious puberty is not similarly situated to one taking them for gender transition. The same is true for a child taking cross-sex hormones to treat a hormone deficiency versus one taking them to induce physiological and anatomical changes, as well as one undergoing surgery to remove unhealthy breast tissue versus one using the procedure for the treatment of chest dysphoria. *See* R. at 3. As such, the SAME Act does not discriminate against similarly situated individuals on the basis of sex because transgender and cisgender individuals are not similarly situated, as the two groups have different motivations for undergoing said procedures.

Despite Respondents' assertion that the Court's decision in *Bostock v. Clayton County* held it impossible to discriminate against someone for being transgender without also discriminating based on sex, rational basis review should apply because the SAME Act's transgender classification does not discriminate based on sex. 140 S. Ct. 1731, 1741 (2020). In *Bostock*, the Court noted that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741. However, *Bostock* involved a Title VII case and not an Equal Protection case. *Id.* The Court only held

that firing employees based on a statutorily protected trait equates to sex discrimination under Title VII of the Civil Rights Act of 1964. *Id.* at 1753. In fact, the term "Equal Protection" is not mentioned once in the majority opinion. Therefore, *Bostock* does not establish transgender classifications as a quasi-suspect class because it is not an Equal Protection case; it is a Title VII case. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) (noting that Title VII and the Equal Protection Clause have different scopes).

**3. Even if the Same Act is subject to intermediate scrutiny, it would still survive.**

The SAME Act is subject to rational basis because it makes a classification not based on transgender status, but on age, medical procedure, and mental health condition. However, even if the Court did treat transgender classifications as a quasi-suspect class, the SAME Act would still survive intermediate scrutiny, which requires that "a statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *United States v. Virginia*, 515 U.S. 518, 524 (1996). The substantially related requirement "assure[s] that the validity of a classification is determined through reasoned analysis rather than through [a] mechanical application of traditional, often inaccurate, assumption . . . ." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725–26 (1982).

The district court erred when it held that the SAME Act was not substantially related to Lincoln's important governmental objectives of protecting children "from experimental medical treatments and protecting children from making life changing decisions based on peer pressure." R. at 19–20. The SAME Act is substantially related

to these purposes because the Act only bans certain gender-affirming medical treatments on minors that can cause severe irreversible health issues. 20 LINC. STAT. § 1201(a)(5), (8) (2022). Although these same treatments remain available for cisgender minors suffering from precocious puberty, these minors suffer from severe medical issues such as hormone deficiencies. The district court stated that Lincoln did not provide an adequate justification for overriding a physician's judgment; however, as discussed above, there is a great amount of scientific uncertainty regarding gender-affirming medical treatments, R. at 7–8, 25, 30, and when such uncertainty exists, the state has "wide-discretion" to pass laws in those areas. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). Therefore, because the SAME Act only bans certain gender-affirming medical treatments that have irreversible health consequences, the SAME Act is substantially related to Lincoln's important governmental objective of protecting vulnerable children from experimental medical procedures.

### B. Under this Court's Substantive Due Process jurisprudence, the SAME Act is subject to rational-basis review because it does not implicate a fundamental right.

The Fourteenth Amendment's Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. However, the Court has interpreted this clause to "guarantee[] more than fair process"; the clause also includes a substantive aspect that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702,

719–20 (1997). "A 'fundamental' right is one that is 'explicitly or implicitly guaranteed by the Constitution.'" *Morrissey v. United States*, 871 F. 3d 1260, 1268 (2017) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973)). Although not exhaustive, this Court has held that the Due Process Clause protects the right to marry, have children, and make decisions regarding the care, custody, and control of those children. *Loving v. Virginia*, 388 U.S. 1 (1967); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Troxel v. Granville*, 530 U.S. 57 (2000).

Substantive Due Process has been a "treacherous field" for the Supreme Court at times. *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977). Because such rights are not expressly stated in the Constitution, the Court has "always been reluctant to expand the concept of substantive due process because [the] guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). Expanding Substantive Due Process runs afoul of this Nation's democratic process because doing so places the matter outside the public arena. *See Glucksberg*, 521 U.S. at 720 ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action."). Therefore, the Court must use the utmost care when handling Substantive Due Process issues. *Id.*

Recognition of a Substantive Due Process right is a two-step analysis. First, the asserted right must be "careful[ly] desci[bed]." *Reno v. Flores*, 507 U.S. 292, 302 (1993). Second, the Court will determine if the right in question is "deeply rooted in

this Nation's history and tradition and implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721. To determine these questions, the Court uses the country's history, legal traditions, and practices as "guideposts for reasonable decision making." *Collins*, 503 U.S. at 125. If the Court recognizes a fundamental liberty interest in an asserted right, then strict scrutiny applies. *Flores*, 507 U.S. at 302. If no fundamental right exists, rational basis applies.[1] *See id.* at 303.

**1. Petitioner concedes that parents have a fundamental right to make decisions regarding the care, custody, and control of their children, but that right is not unlimited.**

It is well documented that parents have a fundamental interest in "direct[ing] the education and upbringing of their children." *Glucksberg*, 521 U.S. at 720 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). In other words, parents have "a fundamental right to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 72. Included in this right may be the "right to direct their child's medical care," but that right has never been expressly stated by this Court. *Kanuszewski v. Mich. Dep't of Health and Human Servs.,* 927 F.3d 396, 418 (6th Cir. 2019); *see also Parham v. J.R.*, 442 U.S. 584, 604 (1979) (holding that parents retain some authority to seek medical care on behalf of their children); *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) ("The Supreme Court has . . . never specifically defined the scope of a parent's right

[1] While this Brief does not address the issue, it is important to note that the Supreme Court's recent decision in *Dobbs vs. Jackson Women's Health Organization* has, perhaps, opened the door for the Court's entire Substantive Due Process doctrine to be overturned. *See* 142 S.Ct. 2228, 2300-04 (2022) (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents . . . . Because any substantive due process decision is "demonstrably erroneous.") (citation and internal quotation marks omitted).

to direct her child's medical care . . . [but] precedent reasonably suggests that the Due Process Clause provides some level of protection for parents' decisions regarding their children's medical care."). To a certain degree, this makes sense because children do not have the mental capacity to make serious determinations regarding their health. *See Schall v. Martin*, 467 U.S. 253, 265 (1984) ("Children . . . are not assumed to have the capacity to take care of themselves . . . [and] are subject to the control of their parents."); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.").

**2. Regardless of one's majority or minority status, there is no fundamental right to access experimental and medically controversial gender-affirming medical treatment.**

Many appellate courts have consistently held that there is no substantive-due-process right to access experimental and medically controversial procedures. *Morrissey*, 871 F.3d at 1260; *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (en banc); *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007); *Rutherford v. United States*, 616 F.2d 455 (10th Cir. 1980). For instance, in *Morrissey v. United States*, Mr. Morrisey, a homosexual male, decided to have children with his partner through in vitro fertilization (IVF). 871 F.3d at 1263. Over a five-year-period, Mr. Morrissey spent an excess of $100,000 on IVF related expenses. *Id.* In response to an Internal Revenue Code provision that allowed deductions for medical care, Mr. Morrissey attempted to recover some of the IVF related costs. *Id.* However, the IRS rejected his claim because the majority of

Morrissey's expenses were related to third-parties, like egg donors and surrogates, and not Mr. Morrissey, his partner, or a dependent. *Id.* at 1263–64. Morrissey filed suit and later appealed to the Eleventh Circuit Court of Appeals, arguing that the IRC provision was in violation of a fundamental right to procreate. *Id.* at 1264, 1269.

The court was not persuaded with Morrissey's argument, which used this Court's reasoning in *Skinner v. Oklahoma* as support. *Id.* at 1269. Although the Supreme Court in *Skinner* recognized that procreation is a basic and fundamental civil right and invalidated a criminal offender sterilization statute, 316 U.S. 535, 541, (1942), the appellate court did not find a fundamental right for a male to procreate through IVF. *Morrissey*, 871 F.3d at 1269.

Applying the fundamental rights test described above, the *Morrissey* court carefully described the proposed right as the right to procreate through IVF. *Id.* The court then recognized that this right was not deeply rooted in the Nation's history and tradition. *Id.* In fact, the court noted that the first IVF birth did not occur in this country until the late 1970s, and that doctors did not begin using surrogates with IVF procedures until the mid-1980s. *Id.* The court also recognized a host of ethical issues surrounding gestational surrogates. *Id.* at 1269–70. The unborn child's parents, gestational surrogates, egg donors, and other associated parties can all have conflicting expectations and interests. *Id.* at 1269. This unfortunate reality was further illustrated by the fact that states handle surrogacy contracts in a variety of ways, including extensively regulating them, prohibiting them, and even outright criminalizing them. *Id.* at 1269–70. Thus, because IVF was a relatively "modern

phenomenon" and because there was some ethical uncertainty surrounding surrogacy, the court held there was no Substantive Due Process right for this procedure. *Id.* at 1270.

Likewise, in *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, the Food, Drug, and Cosmetic Act ("FDCA") prohibited access to drugs unless approved by the Food and Drug Administration. 495 F.3d 695, 697 (D.C. Cir. 2007). The Abigail Alliance for Better Access to Developmental Drugs ("Abigail Alliance"), a public interest group advocating for terminally ill patients, brought suit against the FDA and argued that the Constitution provided a right for terminally ill patients to access experimental drugs. *Id.* at 700. The court ultimately held that there is no fundamental right "'deeply rooted in this Nation's history and tradition'" regarding terminal patients' access to experimental drugs. *Id.* at 697 (quoting *Moore*, 431 U.S. at 503).

The court recognized that the colonies were regulating drugs since at least 1736, and that the federal regulation of drugs became commonplace after the Civil War and has continued until the present day. *Id.* at 703–04. The court was also unpersuaded by Abigail Alliance's argument of a fundamental right to access experimental drugs "deeply rooted" in the history of the country because the FDCA did not require FDA approval until 1962. *Id.* at 705–06. The court found that this argument easily led to illogical results and explained that a lack of state interference alone is not sufficient to show that a right is deeply rooted. *See id.* at 706–07 ("A prior lack of regulation suggests that we must exercise care in evaluating the untested

assertion of a constitutional right to be free from new regulation. But the lack of prior governmental regulation of an activity tells us little about whether the activity merits constitutional protection."). Using that logic, the court could find that there was a deeply rooted right to speed because speed limits are a relatively modern regulation. *Id.* at 707. Because the court did not find a fundamental right to use experimental drugs, rational basis was applied to the FDCA's FDA approval requirement, and the court held that the statutory provision bore a rational relationship to its interest of supplying safe medicine to the public. *Id.* at 712–13.

**3. The state's broad regulatory power allows it to protect the well-being of its youth.**

Although "[t]he child is not the mere creature of the state," *Pierce*, 268 U.S. at 535, "[t]he State [nonetheless retains] an independent interest in the well-being of its youth." *Ginsberg v. New York*, 390 U.S. 629, 640 (1968); *see also Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982) ("[S]afeguarding the physical and psychological well-being of a minor is a compelling [interest of the state]."); *Parham*, 442 U.S. at 603 ("[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."); *Kanuszewski,* 927 F.3d at 419 ("The state's interest in preserving the welfare of children is at its zenith when the life of the child is at stake . . . .").

In fact, "if parental control falters, the State must play its part as *parens patriae* [and] the juvenile's liberty interest may . . . be subordinated to the State's . . . interest in preserving and promoting the welfare of the child.'" *Schall*, 467 U.S. at 265 (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)); *see also Prince v.*

*Massachusetts*, 321 U.S. 158, 167 (1944) ("[T]he [S]tate has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . . "); *Reno v. Flores*, 507 U.S. 292, 302 (1993) ("[W]here the custody of the parent or legal guardian fails, the government may . . . either exercise custody itself or appoint someone else to do so."); *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (holding that a vaccination law with some medical exemptions did not violate a constitutional right). Although the parent's right to care, custody, and control of their children is one of the oldest recognized rights, *Troxel v. Granville*, 530 U.S. 57 (2000), parents have no right to seek greater treatment for their child than they would have for themselves. *See Doe By & Through Doe v. Pub. Health Tr. of Dade Cnty.*, 696 F.2d 901, 903 (11th Cir. 1983) (holding that the parent's "right[] to make decisions for his daughter can be no greater than his rights to make medical decisions for himself").

**4. The state also retains the ability to regulate the medical profession, especially when there is scientific uncertainty.**

"The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); *see also Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) ("It is, of course, well settled that the [s]tate has broad police powers in regulating the administration of drugs by the health professions."); *Marshall v. United States*, 414 U.S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad."); *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (The government "has an interest in protecting the integrity and ethics of the medical

profession."); *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) ("[T]here is no right to practice medicine which is not subordinate to the police power of the states."); *Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine."). The state legislature's role is at its strongest when the science is unsettled or there is disagreement about the best course of treatment. "In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes." *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997).

In *Gonzales v. Carhart*, this Court examined a federal statute banning intact dilation and evacuation ("D&E") abortion. 550 U.S. at 135. While considering whether the federal statute was an unconstitutional undue burden on women because the statute banned intact D&E, even in instances where doing so would protect the health of the mother, the Court recognized that the evidence was uncertain as to whether intact D&E abortion was the safest method of abortion. *Id.* at 156, 161–63. While some doctors believed intact D&E cut down on the risk of lacerations or perforations, other doctors believed the health benefits were speculative. *Id.* at 161–63. Although there was medical uncertainty around this issue, the Court still held that legislatures retain the "wide-discretion" to pass litigation in these situations. *See id.* at 163–164 ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."). The Court came to this determination despite the fact that organizations like the American College of Obstetricians and Gynecologists ("ACOG") supported these procedures. *Id.* at 170–71

(Ginsburg, J., dissenting); *see also EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 438 (6th Cir. 2019) (noting that *Gonzales* and other cases have upheld laws that "conflicted with official positions of [the ACOG]"). *Abigail Alliance* also discussed the relationship between the state and the medical profession in detail. 495 F.3d at 713. The *Abigail Alliance* court recognized that the "[n]ation's history and traditions have consistently demonstrated that the democratic branches are better suited to decide the proper balance between the uncertain risks and benefits of medical technology, and are entitled to deference in doing so." *Id.*; *see also Jacobson*, 197 U.S. at 30 ("[The Court] must assume that, when the statute in question was passed, the legislature . . . was [aware] of these opposing theories, and was compelled, of necessity, to choose between them . . . . It is no[t] part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public . . . ."); *Greenwood v. United States*, 350 U.S. 366, 375–76 (1956) ("The only certain thing that can be said about the present state of knowledge and therapy . . . is that science has not reached finality of judgment . . . . Certainly, denial of constitutional power . . . to Congress in dealing with a situation like this ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues.").

**5. Because there is not a fundamental right to experimental gender-affirming medical treatment and because the state's broad regulatory power allows it protect the well-being of children and regulate the medical profession, the SAME Act should be subject to rational basis review**

In the case at bar, the Marianos do not have a fundamental right to access gender-affirming medical treatment. Despite the lower courts' holdings, what the Marianos are asking for extends well past the recognized fundamental right to make decisions regarding, care, custody, and control of their child. *Troxel*, 530 U.S. at 72. As such, this right should be framed appropriately. Like the *Morrissey* court, which carefully described the asserted right as the right for a male to procreate through IVF, 871 F.3d at 1269, the district court should have framed the Marianos' asserted right as the right of a parent to subjugate their children to gender-affirming medical treatment.

A careful examination of this Nation's history and traditions shows that the right to access such treatment is not "deeply rooted . . . and implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721. In *Morrissey,* the court found that IVF, which was first in regular use in the 1980s, was not deeply rooted in the history and traditions of this country. 871 F.3d at 1269. Similarly, puberty blockers, like IVF, are a relatively modern phenomenon and have only been in use since the 1980s. R. at 15. Likewise, the asserted right cannot be assumed from a lack of regulation. Gender-affirming treatment is a byproduct of modern society's progression. *See* R. at 5–6. Therefore, the state did not have a prior chance to regulate the treatment. *See Flores*, 507 U.S. at 303 ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it."). Such an argument resembles the failed

argument the *Abigail Alliance* court rejected. *See* 495 F.3d at 706–07 ("[T]he lack of prior governmental regulation of an activity tells us little about whether the activity merits constitutional protection."). As such, because the right to access gender-affirming treatment is not deeply rooted in the history and tradition of the United States, it is not a fundamental right. Alternatively, if the above asserted right is framed too narrowly, there is still no right to experimental medical treatment. Both *Morrissey* and *Abigail* make clear that there is not a right to access experimental medical treatment. 871 F.3d at 1260; 495 F.3d at 695. Gender-affirming medical treatment has irreversible side effects and is psychologically damaging. R. at 7–8, 30. Evidence shows that gender-affirming drugs and surgeries can cause "irreversible infertility, cancer, liver dysfunction, coronary artery disease, and bone density." 20 LINC. STAT. § 1201(a)(5) (2022). Additionally, other countries such as Sweden and Finland have also banned gender-affirming drugs and surgeries for minors. [2] R. at 7.

The Marianos' argument that the SAME Act impedes the parental fundamental right to make decisions regarding the care, custody, and control of their child is also unconvincing. *Troxel*, 530 U.S. at 72. While parents do have a significant role in making decisions regarding their child, that right is not unlimited. The state also has a vested interest in the well-being of the child and can use its broad regulatory power to protect the child when their health is jeopardized. *Parham v. J.R.*, 442 U.S. 584, 603 (1979). In fact, it is these instances where the state's power is

[2] While not dispositive, the Court has, on occasion, looked towards other countries for guidance. *See Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (noting that the right petitioners sought was recognized as an "integral part of human freedom" in many other countries).

at its strongest. *Kanuszewski v. Mich. Dep't of Health and Human Servs.,* 927 F.3d 396, 418 (6th Cir. 2019). Sometimes parental control fails, and when it does it is the obligation of the state to step in. *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

The SAME Act is merely Lincoln's way to ensure its obligation. In addition to the irreversible physical harms outlined above, the SAME Act also protects children from outside social influences and a lack of knowledge. 20 LINC. STAT. § 1201(a)–(b). Before enacting the SAME Act, Lincoln heard testimony from two individuals who received gender-affirming treatment in their adolescence. R. at 8. These individuals stated that they did not have the requisite mental capacity to make decisions regarding their gender-affirming care. R. at 8. They further noted that they believed they did not have the ability to give informed consent. R. at 30. Because children are not mature enough to make decisions regarding gender-affirming care and because gender-affirming care can affect the physical and mental well-being of a child, the State of Lincoln has the authority to regulate gender-affirming medical treatment.

Lastly, Lincoln also has an interest in regulating the medical profession. As discussed above, although many leading medical organizations say otherwise, there is scientific and ethical uncertainty regarding providing gender-affirming treatment to minors. *See* R. at 7–8. Other countries have doubted the efficacy and safety of this treatment, and Lincoln itself found that this treatment can have irreversible medical side-effects. R. 3, 7–8. When there is this level of medical uncertainty, the state retains the "wide-discretion" to pass legislation. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). As illustrated by *Gonzales*, courts are still able to find scientific

uncertainty despite the fact that reputable medical organizations supported the medical treatment. *Id.* at 170–71 (Ginsburg, J., dissenting).

As such, because the right to make decisions regarding the care, custody, and control of one's child is too broad to encapsulate the asserted right and because there is no fundamental right to access gender-affirming medical treatment, rational basis review should apply. However, even if strict scrutiny applies, the SAME Act will survive. As discussed, Lincoln has a compelling state interest in protecting vulnerable children and regulating the medical profession when there is scientific uncertainty. Further, the SAME Act is also narrowly tailored, as it only regulates the area where these two interests intersect. Thus, the lower courts erred in finding that the SAME Act violated Respondents' Substantive Due Process rights.

## CONCLUSION

The Supreme Court's plain language clearly demonstrates that *Winter's* sequential test is the only acceptable preliminary injunction method. Under this standard, a court will only grant a preliminary injunction if the movant establishes a likelihood of success on the merits. Because a more flexible preliminary injunction standard that only requires serious questions regarding the merits was applied, the lower courts abused their discretion when they affirmed the usage of that test.

Further, the SAME Act does not infringe on the rights of a suspect or quasi-suspect class under Equal Protection, nor does it implicate a fundamental right under Substantive Due Process. The SAME Act is a statute that bans minors, who may suffer from a recognized mental health condition, from engaging in certain medical

procedures. As such, the SAME Act does not discriminate against the Court's recognized protected classes. Additionally, although parents have a fundamental right to make decisions about the care, custody and control of children, this right is not unlimited and cannot be asserted to allow children to engage in experimental, medically controversial surgeries and services. Because the Court has not recognized a fundamental right to gender-affirming treatment and because the SAME Act classifies parties based on age, medical procedure, and mental health condition, the Fifteenth Circuit also erred in affirming the district court's decision to apply heightened scrutiny to the SAME Act.

It is for these reasons that this Court should reverse the Fifteenth Circuit Court of Appeal's decision and remand the case for further proceedings.

Respectfully submitted,

/s/ 3121

Attorneys for Petitioner

## CERTIFICATE OF SERVICE

We certify that a copy of Petitioner's brief was served upon Respondents, Jess, Elizabeth, and Thomas Mariano, through the counsel of record by certified U.S. mail return receipt requested, on this, the 15th day of September, 2022.

/s/ 3121

Attorneys for Petitioner

## APPENDIX A

U.S. CONST. amend. XIV, § 1.

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