Docket No. 22-8976

In The

Supreme Court of the United States

November Term, 2022

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

Petitioner,

v.

Jess Mariano, Elizabeth Mariano, and Thomas Mariano,

Respondents.

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

BRIEF FOR RESPONDENTS

Team 3122
Attorneys for Respondents

QUESTIONS PRESENTED

I. Should the Supreme Court's injunctive relief standard, as articulated in *Winter v. Natural Resources Defense Council, Inc.*, be interpreted to abrogate the sliding scale approach used by the United States Court of Appeals for the Fifteenth Circuit which better allows the Court to preserve the status quo for issues with complex factual disputes?

II. Under the Due Process Clause and the Equal Protection Clause of the United States Constitution, is there a serious question as to the merits of plaintiffs' claims when an enacted law seeks to prevent parents from directing the medical care of their child and effectively bans transgender minors from receiving integral medical care?

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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.

STATUTORY PROVISIONS

The following statutory provisions are relevant to this case: the Stop Adolescent Medical Experimentation Act, 20 Linc. Stat. §§ 1201-06, and the Fourteenth Amendment to the United States Constitution, § 1. These provisions have been reproduced in Appendix A.

MEDICAL PROVISIONS

The following medical provisions are relevant to this case: Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, 7th edition, and *Psychiatric Comorbidity in Gender Dysphoric Adolescents*. Selected materials are reproduced in Appendix B.

STATEMENT OF THE CASE

Factual Background

Jess Mariano and His Gender Dysphoria Diagnosis. Elizabeth and Thomas Mariano are parents of Jess Mariano, a fourteen-year-old transgender minor living in the state of Lincoln. R. at 2. Jess was born biologically female but has consistently perceived himself as male throughout his childhood. R. at 4. Jess's self-assigned sense of being is male, using he/him/his pronouns. R. at 4. By the age of eight, Jess's gender disconnect, and resulting depression and anxiety, became so severe, he took a handful of Tylenol pills and said he hoped he would "never wake up." R. at 4. Jess's childhood has been riddled with similar distress associated with his gender; the Marianos recount many times Jess said he did not "want to grow up if [he] ha[d] to be a girl." R. at 4–5.

The Marianos lovingly sought medical treatment for Jess's symptoms by placing him in therapy with psychiatrist Dr. Dugray. R. at 4. In accordance with current medical protocol, Dr. Dugray diagnosed Jess with gender dysphoria, marked by an incongruence between a clinical patient's expressed gender and their gender assigned at birth. R. at 4. Working in tandem with Jess's pediatrician, Dr. Dugray prescribed puberty blockers, which Jess currently receives as an injection on a monthly basis. R. at 5. Because Jess has received this medication to pause his impending puberty, he experiences fewer symptoms of depression and, overall, less distress from his still-manifesting gender dysphoria. R. at 5. According to Dr. Dugray, Jess's expected treatment should include hormone therapy within the next two years, given the strength and persistence of his gender dysphoria. R. at 5. Because Jess

continues to express concern about the development of his body, Dr. Dugray has expressed that Jess may require chest surgery in the future to fully treat his gender dysphoria. R. at 5.

The Standard of Care. Gender dysphoria is recognized as a medical diagnosis that requires gender-affirming interventional care. The care must be specifically tailored to the individual patient's needs. R. at 6. Accordingly, adolescents diagnosed with gender dysphoria may require a prescription for medications commonly referred to as puberty blockers. R. at 6. The next step in treatment is "consideration of gender-affirming hormones…that induce physical feminization or masculinization, respectively, that align with the adolescent's gender identity." R. at 6. Imperative to a successful medical result, current medical guidelines recommend clinicians begin prescribing pubertal hormone suppression before a child reaches puberty. R. at 6. Gender dysphoria in minors twelve and over is "more likely to persist into adulthood than gender dysphoria in minors under twelve." R. at 7. All leading medical organizations in the United States recognize that gender-affirming care should be available to all transgender adolescents when deemed medically necessary by their treating physician. R. at 7.

The SAME Act. In the fall of 2021, Lincoln enacted a blanket ban on gender-affirming care; the Stop Adolescent Medical Experimentations ("SAME") Act. R. at 2. The SAME Act, if enforced, would make it a felony for any healthcare professionals to provide gender-affirming care to adolescents, punishable by up to ten years imprisonment and civil fines in excess of $100,000. R. at 2. (citing 20 Linc. Stat. §§

1201-06). Specifically, The SAME Act would prohibit a range of medical treatments from being performed for "the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 2. In its section entitled "Prohibition on Certain Gender Transition Treatments," the SAME Act bans the prescription or administration of puberty blockers, hormone therapy, and surgeries that artificially construct or remove genitalia tissue. R. at 4. (citing 20 Linc. Stat. § 1203).

The SAME Act seeks to undermine the success Jess's treatment plan has provided him for the last several years. R. at 5. According to Dr. Dugray, even a one-month interruption of Jess's current treatment could allow puberty to resume, compromising the progress he has made thus far in treating his gender dysphoria. R. at 5. Left untreated, gender dysphoria causes "anxiety, depression, eating disorders, substance abuse, self-harm, and suicide." R. at 7. Jess would be left without access to the medical treatment "his physician describes as crucial to his physical and mental health." R. at 12. Without the necessary treatment, Jess will be forced to endure "physical changes that cannot be fully reversed." R. at 12.

Procedural History

District of Lincoln. The Marianos originally filed the complaint on November 4, 2021, alleging under 42 U.S.C. § 1983 that enforcing Lincoln's newly enacted SAME Act, §§ 1201–06, would violate their constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution. R. at 1. April Nardini, in her official capacity as Attorney General of Lincoln ("Lincoln"), confirmed that she

intended to enforce the SAME Act. R. at 1. The Marianos then filed for a Motion for Preliminary Injunction on November 11, 2021, to enjoin Lincoln from enforcing the SAME Act, effective January 1, 2022. R. at 1. Based on the evidence presented at the hearing on December 1, 2021, the district court determined that the Marianos had raised serious questions regarding the merits of their constitutional claims, that they were likely to suffer irreparable harm in the absence of preliminary relief, and that the balance of equities tipped in their favor. R. at 12–13, 21–22. Using the sliding scale approach, the district court found that the balance of hardships favored granting the preliminary injunction, and enjoined Lincoln from enforcing the SAME Act during the pendency of the litigation. R. at 22.

Fifteenth Circuit. Lincoln filed an interlocutory appeal of the district court's preliminary injunction pursuant to 28 U.S.C. § 1292(b) to the United States Court of Appeals for the Fifteenth Circuit. R. at 23. The Fifteenth Circuit affirmed the district court's decision, finding no abuse of discretion in granting the preliminary injunction. R. at 23, 27. The circuit court likewise determined that the Marianos raised serious questions as to the merits of their constitutional claims, that they were likely to suffer irreparable harm without the injunction, and that the balance of equities tip in their favor. R. at 27. Judge Gilmore dissented, arguing that the district court should have deferred to Lincoln's legislative judgment in passing the SAME Act. R. at. 28. But the majority found that the district court acted within its discretion and, therefore, its decision to grant the preliminary injunction was affirmed. R. at 27.

SUMMARY OF THE ARGUMENT

The* Winter *case does not abrogate the sliding scale approach. Preliminary injunctions are granted to preserve the status quo of the parties during the pendency of the litigation. In *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court articulated the preliminary injunction standard as requiring the plaintiff to prove that they are likely to succeed on the merits of their claims, they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. Historically, the Fifteenth Circuit has adopted the Second Circuit's sliding scale approach to evaluate the need for preliminary injunctions. Using this approach, a plaintiff may show that there are serious questions as to the merits of their claims, and, if all other elements are satisfied, then a preliminary injunction may be granted. The Supreme Court has never expanded on how to evaluate whether a plaintiff has shown a likelihood of success on the merits; the *Winter* Court focused its analysis on the element to show a likelihood of irreparable harm in the absence of the preliminary injunction. And even after the *Winter* decision, the Supreme Court has recognized that, as a tool of equity for the court, the preliminary injunction standard must remain flexible in cases with complex factual disputes, as in the Marianos' case.

The district court properly found that the Marianos were likely to suffer irreparable harm in the absence of the preliminary injunction. Lincoln's SAME Act would prevent the Marianos from deciding what medical treatment is appropriate to treat Jess's gender dysphoria and Jess would be denied his ability to continue the treatment he is already receiving and to seek out treatment in the future.

Additionally, the evidence shows that the balance of equities tips heavily in favor of granting the Marianos' preliminary injunction. The Marianos' interest in following the advice of medical professionals in treating Jess's gender dysphoria far outweighs any speculative harms Lincoln faces if the preliminary injunction were denied. Because the Marianos satisfied these elements, the district court correctly focused on whether there were serious questions as to the merits of the Marianos' constitutional claims sufficient to enjoin Lincoln from enforcing the SAME Act.

A showing of serious questions as to the merits of plaintiffs' claims is sufficient to support a granting of a preliminary injunction. There was no clear error in the district court's determination that the Marianos have shown that there are serious questions as to the merits of their Due Process and Equal Protection claims. Under the Due Process Clause of the U.S. Constitution, parents have a fundamental right in directing the upbringing of their child. This right includes the parent's duty to recognize medical issues and seek out the appropriate medical treatment for their child. And because the Marianos' right to seek treatment for Jess's gender dysphoria is a fundamental right, the SAME Act must be assessed using strict scrutiny. A law fails strict scrutiny if it does not further a compelling governmental interest and is not the least restrictive means to achieve that interest. Lincoln's claimed interest, to protect children from "experimental" medical treatment, is not compelling because treatment for gender dysphoria is decidedly *not* experimental. It is widely recognized in the medical community. Further, there are several ways that Lincoln could tailor the SAME Act to be less restrictive, such as limiting it to minors

under the age of twelve. There are serious questions as to the merits of Elizabeth and Thomas' claim that the SAME Act infringes on their fundamental right to direct the upbringing of their child.

There is also sufficient evidence on the record to find that there are serious questions as to the merits of Jess's Equal Protection claim. Under the Equal Protection Clause, states are required to treat all similarly situated people alike. Any law which discriminates against a protected class is unconstitutional. There is a long history of the courts finding that discrimination based on sex or gender is unconstitutional and has deemed that classification as quasi-suspect. More recently, the courts have expanded the umbrella of what is defined as sex-based discrimination to discrimination based on a person's transgender status. The district court properly recognized the transgender minors of Lincoln as a quasi-suspect class under the Equal Protection of the law. Therefore, the SAME Act must be submitted to a heightened level of scrutiny. Under intermediate scrutiny, the state must show that the law is substantially related to a sufficiently important governmental interest, a burden which Lincoln has failed to meet. Thus, the Marianos sufficiently showed that there were serious questions as to the merits of their constitutional claims, that they were likely to suffer irreparable harm without the injunction, and that the balance of equity weighed in their favor. The district court correctly granted the preliminary injunction and the circuit court correctly affirmed.

STANDARD OF REVIEW

When a preliminary injunction is granted, the appellate court reviews the decision for abuse of discretion. *Roe v. Dep't of Def.*, 947 F.3d 2017, 219 (4th Cir. 2020). Legal conclusions are assessed *de novo*, while factual findings are reviewed for clear error. *Fusaro v. Cogan*, 930 F.3d 241, 248 (4th Cir. 2019). No abuse of discretion occurred if the district court "applied a correct preliminary injunction standard, made no clearly erroneous findings of material fact, and demonstrated a firm grasp of the legal principles pertinent to the underlying dispute." *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 192 (4th Cir. 2013) (en banc).

ARGUMENT

I. Under this Court's injunctive relief standard, a preliminary injunction is granted to preserve the status quo until a final and full determination can be made based on the merits of the plaintiffs' claims.

The U.S. Constitution vests power in the federal courts to grant injunctive relief where there is "irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (citing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958)). The purpose of a preliminary injunction is "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Because preliminary injunctions are granted early in the proceedings, the court is not required to conclusively determine the rights of the parties, but to *balance* the equities as the litigation moves forward. *Id.* at 398.

In *Winter v. Natural Resources Defense Council, Inc.*, the Supreme Court articulated the standard for injunctive relief, requiring the plaintiff to establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest." 555 U.S. 7, 20 (2008). The focus of the Court in *Winter* was on the second element and whether a mere "possibility" of irreparable harm, after the likelihood of success on the merits had been established, would be sufficient to grant a preliminary injunction. *Id.* at 21–22. Notably, the Court declined to expand on the analysis required for the first element. *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010) (finding that the *Winter* Court "expressly withheld any

consideration of the merits of the parties' underlying claims"). Because the Court refused to address "the considerable history of th[is] flexible standard," the *Winter* opinion did not abrogate the sliding scale approach. *Id.* at 38.

A. The sliding scale approach used in the serious question test is consistent with this Court's preliminary injunction standard.

The Supreme Court has repeatedly emphasized that it is in favor of granting preliminary injunctions "in cases where a factual dispute renders a fully reliable assessment of the merits impossible." *Id.* at 36; *see also Ohio Oil Co. v. Conway*, 279 U.S. 813, 814–15 (1929); *Mazurek v. Armstrong*, 520 U.S. 968, 975–76 (1997). To recognize room for uncertainty regarding the merits of plaintiffs' claims at this stage, this Court has acknowledged the use of a sliding scale approach. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (holding that in "close cases the Circuit Justice[s] or the Court will balance the equities and weigh the relative harms to [the parties]"). As the district court and the Fifteenth Circuit recognized in this case, the Fifteenth Circuit has historically applied the Second Circuit's sliding scale analysis, also known as the "serious question" test. R. at 9, 24.

The serious question test requires the plaintiff to show (1) either a likelihood of success on the merits *or* sufficiently serious questions going to the merits to make them a fair ground for litigation, (2) irreparable harm without the injunction, and (3) a balance of hardships tipping decidedly in favor of the plaintiff. *Citigroup*, 598 F.3d 30, 35 (2d Cir. 2010) (quoting *Almonaster v. N.Y.C. Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008)). If the plaintiff has a weaker claim on one of the elements, that element may be offset by a stronger claim on another element. *See Christian Louboutin S.A.*

v. Yves Saint Laurent Am. Holdings, Inc., 696 F.3d 206, 215 (2d Cir. 2012). Specifically, the court is more likely to accept a finding of sufficiently serious questions going to the merits if the balance of hardship weighs greatly in favor of the plaintiff. *Id.*

1. This Court has declined to provide specific guidelines for determining if the plaintiff has proven a likelihood of success on the merits sufficient for purposes of injunctive relief.

The district court and court of appeals correctly determined that a serious question regarding the merits of plaintiffs' claims is sufficient to satisfy the first element of the injunctive relief analysis as articulated by *Winter* because the Supreme Court failed to provide any specific requirements for analyzing that specific element. R. at 9–10. In fact, the Supreme Court has "provided nothing in the way of a definition of the phrase 'a likelihood of success.'" *Citigroup*, 598 F.3d at 30, 37. When applying the injunctive relief test, the *Winter* court "expressly withheld any consideration of the merits of the parties' underlying claims." *Id.* (citing *Winter*, 555 U.S. 7 at 24, 31–32). Given the great lengths the Court went through to provide specifics of the irreparable harm analysis, the Court would have provided more guidance on the first element if the sliding scale approach was incorrect.

As with most cases involving a preliminary injunction, the *Winter* case requires an understanding of the facts of the case to understand the implications of the holding. In *Winter*, the plaintiffs, an environmental organization, sought a preliminary injunction which would require the Navy to prepare an environmental impact statement to determine the true impact of its training on local marine life. *Id.*

at 12. The district court granted the injunction finding that there was a "possibility" of irreparable harm and that the other three elements were satisfied. *Id.* at 16. The Ninth Circuit Court of Appeals affirmed, but the Supreme Court reversed ruling that the lower courts' standard was too lenient, and a possibility of irreparable harm was not consistent with a likelihood of irreparable harm. *Id.* at 22. Any attempt by lower courts to use this ruling to analyze the likelihood of success element of the injunctive relief standard is seriously misguided. If any rule is to be taken from *Winter*, it is that a plaintiff must satisfy a higher standard of irreparable harm for the court to grant a preliminary injunction when the other side's harm implicates public interest in national defense.

The sliding scale approach is still viable because the Court made no effort to tailor the analysis required for the likelihood of success on the merits element. Given that *Winter* was an appeal from the Ninth Circuit, which also applies the sliding scale approach, this Court had the opportunity to eliminate the sliding scale approach and explicitly declined to. In the present case, the district court correctly applied the sliding scale approach when granting the preliminary injunction because the Marianos have proven a likelihood of irreparable harm, not a mere possibility.

2. Injunctive relief falls under the court's equitable jurisdiction and the district court should be afforded broad discretion when granting prohibitive preliminary injunctions.

As Justice Ginsburg articulated in the *Winter* dissent, "[f]lexibility is a hallmark of equity jurisdiction." 555 U.S. 7, 51 (Ginsburg, J., dissenting). The Fifteenth Circuit is not the only circuit that agrees with Justice Ginsburg in

recognizing that the sliding scale approach is simply a variant of the standard articulated in *Winter*. *See, e.g., D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 326–27 (6th Cir. 2019); *Hoosier Energy Rural Elec. Co-op, Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *Ramos v. Wolf*, 975 F.3d 872, 887 (9th Cir. 2009). Only three circuits forego a more flexible approach and limit the preliminary injunction analysis to the elements as articulated in *Winter*. *See, e.g., Snook v. Trust Co. of Ga. Bank of Savannah*, 909 F.2d 480, 483 n. 3 (11th Cir. 1990); *Concerned Women for Am. Educ. and Legal Def. Fund., Inc. v. Lafayette* County, 883 F.2d 32, 34 (5th Cir. 1989); *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 n. 14 (3d Cir. 1982).

A certain level of formality that is required in other stages of litigation is lowered for preliminary injunctive relief standards because it necessarily takes place well before the case is fully developed. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits."). Further, the standard of review must be flexible when considering if the plaintiff is seeking a mandatory or prohibitory preliminary injunction. Mandatory injunctions are "particularly disfavored" and require a heightened standard, because the moving party is asking the court to force the other party to act. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (citing *Meghrig v. KFC Western*, 516 U.S. 479, 484 (1996). On

the other hand, prohibitory injunctions stop "a party from taking action and preserve the status quo pending a determination of the action on the merits." *Id.*

Where the Plaintiffs in *Winter* sought a mandatory preliminary injunction—requiring the Navy to complete an environmental impact report—the Marianos are seeking a prohibitive injunction. Rather than forcing Lincoln to act, Jess and his parents are simply seeking an injunction which would prohibit the SAME Act from going into effect until there can be a fair determination of their claims on the merits. R. at 1. Given the different facts of the cases, type of preliminary injunction sought, and the interests of the parties involved, it would be illogical to use the same preliminary injunction standard in the present case as that which was used in the *Winter* case. The district court correctly aligned with the Second Circuit in finding that "[t]he value of [a sliding scale] approach to assessing the merits of a claim at the preliminary injunction stage lies in its flexibility in the face of varying factual scenarios and the greater uncertainties inherent at the outset of particularly complex litigation." *Citigroup*, 598 F.3d 30 at 35. Equitable jurisdiction demands that there be flexibility in the court's approach and that the reviewing courts should grant broad discretion to those decisions. *Id.* at 36. And because a flexible approach is required, the sliding scale approach used by the district court falls squarely in line with this Court's preliminary injunction standards. Accordingly, the district court correctly weighed the irreparable harm the Marianos face as well as the balance of equities involved in the case.

B. The Marianos have successfully shown that they will suffer irreparable harm if Jess is prevented from receiving the medical treatment prescribed by his physician.

Courts often find the second element of the injunctive relief standard to be the most important in the analysis: is the plaintiff likely to suffer irreparable harm in the absence of the injunction? *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324 (6th Cir. 2019). This element is assessed with such reverence because "[i]f the plaintiff isn't facing imminent and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit." *Id.* Accordingly, the harm or injury cannot be "a mere possibility in the remote future," but must be both, "clear and immediate." *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 536 (1925). Injunctive relief is a tool to be used where the harm consists of more than just "money, time and energy necessarily expended in the absence of a stay." *Sampson v. Murray*, 415 U.S. 61, 90 (1974).

The Court has been more willing to find a likelihood of irreparable harm when certain rights or liberty interests are at stake. In *Bowen v. N.Y.C.*, the Court granted an injunction requiring the state prison to allow the plaintiff to undergo a surgical gender affirming procedure. 476 U.S. 467 (1986). Specifically, the court found that suffering a "severe medical setback" while the case was litigated demonstrated irreparable harm. *Id.* at 483. Likewise in *Elrod v. Burns,* the Court found that a plaintiff is irreparably harmed when a constitutional right is "either threatened or in fact being impaired." 427 U.S. 347, 373 (1976). In the *Elrod* case, the plaintiffs sought a preliminary injunction because their employer allegedly threatened them with discharge based on their political affiliations. *Id.* at 349–50. The Court agreed with

the court of appeals' finding that injunctive relief was appropriate based on a finding of irreparable harm because constitutional rights "must be carefully guarded against infringement by public office holders." *Id.* at 373.

In the present case, without the injunction, "the Marianos' rights to decide Jess's appropriate medical treatment will be stripped from them and Jess will be denied his ability to continue his treatments because of his sex." R. at 10–11. Prior to his diagnosis of and treatment for gender dysphoria, Jess suffered from anxiety and depressive episodes due to his gender disconnect. R. at 4. Following a suicide attempt, his parents placed him in therapy, where he continues to receive treatment to this day. *Id.* Since Jess began treatment for his gender dysphoria in the form of puberty blockers prescribed by his doctor, his symptoms of anxiety and depression have greatly decreased. R. at 5. But because he continues to express concern about the development of his body, his physician has expressed that Jess is expected to begin hormone therapy at the age of sixteen and may require chest surgery to fully treat his gender dysphoria. *Id.*

Lincoln's SAME Act seeks to prevent healthcare providers from providing Lincoln minors with any medical treatment for "the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." Under the SAME Act, Jess would be forced to stop taking the puberty blockers, which have been directly linked to his decrease in anxiety and depression. He would be prevented from following his doctor's advice to begin hormone therapy in less than two years. And finally, he would be unable to determine

for himself, based on the medical guidance of his doctor and psychologist, whether chest surgery would be necessary before the age of eighteen. Without treatment, Jess's puberty will be allowed to progress, and the progress made towards treating his gender dysphoria will be dangerously halted.

Jess's parents face the very real harm of watching their child plunge back into depression, while knowing the medical means necessary to treat the illness exist but would not be allowed in the state of Lincoln for those under the age of eighteen. They would be required to make the unfair decision between watching their child suffer from a treatable illness or uprooting their family to a new location that would allow them to seek the appropriate medical care. The Marianos face an irreparable harm if their constitutional right to direct the upbringing of Jess is not protected against the proposed infringement by the state of Lincoln. Jess himself faces irreparable harm, not only because his constitutional right to due process is being threatened by the State of Lincoln, but also because he will face a severe medical setback without the injunction. There is no monetary remedy which could undo the mental and emotional trauma facing Jess and his family. Based on these findings, the district court and court of appeals correctly found that the Mariano's harm would be imminent and irreparable.

C. The Marianos' interest in following the advice of medical professionals regarding treatment for Jess's gender dysphoria far outweighs Lincoln's alleged interests.

When the party opposing a preliminary injunction is the government, as in the present case, the analysis of the third "balance of the inequities" element and the

fourth "public interest" element becomes so similar that it is combined. *Nken v. Holder*, 556 U.S. 418, 435 (2009). This analysis requires that the court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding the requested relief." *Winter*, 555 U.S. 7 at 24 (quoting *Amoco Production Co. v. Vill. of Gambell,* 480 U.S. 531, 542 (1987)). It is also important to remember that the purpose of injunctive relief is to maintain the status quo until a final determination on the merits may be reached. *Fellowship of Christian Athletes v. San Jose Unified School District Board of Education*, No. 22-15827, 2022 WL 3712506 at *12 (Aug. 29, 2022 9th Cir.).

The current status quo in Lincoln is that Jess is able to receive the medical care that his doctor prescribes to treat his gender dysphoria diagnosis. Notably, the injunction requires nothing of Lincoln: the state is not being forced to act, but to merely refrain from enforcing the SAME Act until the constitutionality of the act can be determined in a court of law. The injunction causes no harm to Lincoln by merely pausing its ability to enforce the SAME Act.

On the other hand, the harm Jess, his family, and all other transgender minors in Lincoln will face is certain, immediate, and severe. Untreated gender dysphoria results in anxiety, depression, eating disorders, substance abuse, self-harm, and even suicide. *See* de Vries AL, Doreleijers TA, Steensma TD, Cohen-Keetenis PT, *Psychiatric Comorbidity in Gender Dysphoric Adolescents*, 52 J. Child Psych. and Psychiatry 1195, 1200 (2011). The true impact of forcing a transgender minor to stop taking puberty blockers during the onset of puberty is mostly unknown, other than

the fact that any progress made in treating gender dysphoria is greatly diminished. R. at 5. Physically, puberty is a process that cannot be easily undone once complete. Mentally, the SAME Act would have a devastating effect on transgender minors in Lincoln who would, once again, be forced to maintain an identity they no longer align with.

Although Lincoln argues that treating minors for gender dysphoria may have "harmful and irreversible effects," Lincoln is largely ignoring the mental health of those very same minors. The doctors of Lincoln are following the best practices for treating transgender youth provided by the Endocrine Society and the World Professional Association for Transgender Health. The treating physicians, not politicians, should be responsible for evaluating the minors on a case-by-case basis, weighing the physical and mental risks, and making a determination based on their medical knowledge. In an effort to maintain the status quo, the district court and court of appeals correctly granted the injunction to allow the transgender minors of Lincoln to continue to follow the advice of medical professionals.

The Marianos have proven that the balance of equity tips heavily in their favor and that the irreparable harm they face is certainly more severe than any speculative harm faced by Lincoln. And because the sliding scale approach remains viable following the *Winter* decision, the Marianos need only show that a serious question exists as to the merits of their Equal Protection and Due Process claims.

II. The preliminary injunction was properly granted because the Marianos have shown that there is, at least, a serious question as to whether the SAME Act violates their constitutional rights.

As the Fourth Circuit Court of Appeals recently stated, "many of us carry heavy baggage into any discussion of gender and sex." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020). The minor transgender children and their parents living in the State of Lincoln, such as Jess and the Marianos, now bear most of that burden due in large part to Lincoln's recent passage of the SAME Act. But both the district court and court of appeals correctly found that the Marianos have, at least, raised sufficiently serious questions going to the merits of their claims that the SAME Act violates their Due Process and Equal Protection rights. R. at 13, 27. And because the Marianos provided enough evidence to support the other three elements, the district court properly granted the preliminary injunction prohibiting the SAME Act from going into effect.

A. Under the Due Process Clause of the United States' Constitution, parents have a deeply rooted fundamental right to direct the upbringing of their child.

The Fourteenth Amendment of the United States Constitution provides citizens heightened protection from state action that "deprive[s] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Courts have historically interpreted the Due Process Clause to protect those fundamental rights and liberties that are "deeply rooted in th[e] Nation's history and tradition." *Moore v. E. Cleveland,* 431 U.S. 494, 503 (1977). In assessing a Fourteenth Amendment Due Process claim, there are two determinations the court must make: (1) whether there is a liberty interest in the asserted right and (2) the "careful

description" of that asserted right. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

The Supreme Court has recognized liberty interests in the right to marry, *Loving v. Virginia*, 388 U.S. 1 (1967), the right to custody of children, *Stanley v. Illinois*, 405 U.S. 645 (1972), the right to keep the family together, *Moore v. E. Cleveland,* 431 U.S. 494 (1977), and the right to control the upbringing of children, *Troxel v. Granville*, 530 U.S. 57 (2000). As is clear, the Supreme Court has placed a special emphasis on those fundamental rights which "protect[ ] the sanctity of the family." *Moore,* 431 U.S. at 503. Within this desire to protect the family, the Supreme Court has recognized that parents possess a fundamental right to "direct the education and upbringing of their children." *Washington*, 521 U.S. at 720; *see also Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). Upbringing includes decisions "concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66. In fact, parents have "a 'high duty' to recognize symptoms of illness and to seek and follow medical advice." *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

Thomas and Elizabeth Mariano have done exactly that: recognized an issue with Jess' health, sought medical care, and now Lincoln seeks to limit the type of care that their doctor can provide. The district court correctly rejected Lincoln's attempt to mischaracterize the right at issue in this case as a right to obtain an "experimental" medical treatment. This is an issue regarding the right of a parent to obtain treatment for their child based on the recommendation of a medical professional.

Because the Marianos have a liberty interest in seeking treatment for Jess' gender dysphoria, the court must apply strict scrutiny when analyzing the SAME Act. The SAME Act is not narrowly tailored to achieve a compelling state interest, and, therefore, the district court correctly held that the Marianos are likely to succeed on their Substantive Due Process Claim.

1. The Marianos' fundamental right to direct the upbringing of Jess includes their liberty interest in seeking medical care recommended by his physician to treat his gender dysphoria.

As early as 1923, the Supreme Court has recognized that the Constitution guarantees certain liberties: "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children." *Meyer*, 262 U.S. at 399. And because of the special relationship between a parent and a child, it is important that "the custody, care and nurture of the child reside first in the parents." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The Court has repeatedly made clear that "[t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Additionally, the Court has recognized that parents are in the best position to be making difficult medical decisions for their child. *See, e.g.*, *Parham v. J.R.*, 422 U.S. 584 (1979).

In *Parham*, the district court ruled that a Georgia law which allowed parents to voluntarily admit minor children to mental hospitals was unconstitutional. *Id.* at 588. But the Supreme Court disagreed and reversed and remanded for further

proceedings. *Id.* at 621. Although this was an issue involving a procedural due process violation, the Court's analysis of parental authority is relevant here. The Court noted that its "jurisprudence historically reflected Western civilization concepts of the family as a unit with broad parental authority over minor children," and that children are not "the mere creature of the state." *Id.* at 602. Further, the parents' right to direct the upbringing of their child "includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice." *Id.* (quoting *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925)).

The Court then goes on to discuss at length why parents are afforded such responsibilities: "natural bonds of affection lead parents to act in the best interest of their children." *Parham,* 442 U.S. at 602. And "[s]imply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to [the state]." *Id.* at 603. Specifically in the *Parham* case, the Court found that a Georgia law was constitutional because it allowed "[the parents to] retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment." *Id.* at 604.

In the present case, there is no question that the Marianos are acting in the best interest of their child and take their duties as his parents seriously. Based on Jess's behavior, Elizabeth and Thomas recognized symptoms of illness, sought medical advice from both Jess's psychiatrist and pediatrician, and are currently following their recommended medical advice. R. at 4–5. The *Parham* case provides direct support that parents, not the state, are to be trusted with making medical

decisions that are in the child's best interest. Unlike the *Parham* case, where the children disagreed with the parents' course of action, Jess, his parents, and his physicians are all on the same page regarding his care. Because the Court has recognized that the authority to direct medical care falls squarely on the parents in cases where the parents' course of action is against the wishes of the child, the parental authority is even stronger in cases where the parents and the child are in concert regarding the prescribed medical care. And although the medical care may pose risks for the child, the power to determine whether the care is necessary does not shift to Lincoln and remains with the parents.

The Court in *Troxel v. Granville*, likewise, recognized a "presumption that fit parents act in the best interests of their children." 530 U.S. 57, 68 (2000). In the *Troxel* case, the Supreme Court, likewise recognized that where the parent is fit and adequately cares for their child, there is "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 decisions concerning the rearing of that parent's children." *Id.* at 68–69. Lincoln is incorrectly acting under the presumption that every parent who is seeking doctor prescribed treatment for their child's gender dysphoria is intentionally subjecting their child to medical "experimentation" without any regard for that child's overall health or well-being. But the Due Process Clause demands that Lincoln operate under the presumption that Elizabeth and Thomas Mariano, exceedingly loving and fit parents, along with any other parents seeking treatment for their child's gender dysphoria, are acting in the best interests of their child. These types of

medical decisions undeniably fall within parents' fundamental right to follow medical advice concerning their child.

The Fifteenth Circuit's dissent in this case incorrectly analogizes the holding in *Gonzalez v. Carhart* to the present facts. R. at 30. The holding in *Gonzalez,* 550 U.S. 124 (2007), is specifically tailored to the issue of abortion, not to every issue where there may be medical and scientific uncertainty. In fact, the Court recently emphasized that the claimed right to abortion is "critically different from any other right that this Court has had to fall within the Fourteenth Amendment's protection of 'liberty.'" *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022). Further, the Court in *Dobbs* expressly limited the holding to the facts at bar: "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Id.* at 2280. Therefore, any attempt by Lincoln to align analysis regarding the Mariano's asserted liberty interest in directing the medical care of their child with the Court's holdings regarding abortion should not be afforded any weight.

The SAME Act strips the Marianos of their fundamental right to direct Jess's upbringing. This fundamental right includes, not only a liberty interest, but a *duty* to recognize their child's medical issues and seek the appropriate treatment. Lincoln is seeking to justify this infringement on the parents of transgender minors constitutional right by wrongly classifying all gender affirming care as "experimental" and offering only pretextual interests for enacting the legislation.

2. The treatment sought by Jess and other transgender minors in Lincoln is not experimental.

Whether gender affirming care is considered "experimental" is a question that should be left to doctors and patients, not the legislature. And many doctors have spoken on the issue. Every leading medical organization in the United States agrees that transgender adolescents should not be denied gender-affirming care. R. at 7. These organizations include the American Medical Association, the American Academy of Pediatrics, and the American Psychiatric Association. R. at 7. The best practices for gender-affirming care require that youth with gender dysphoria should be evaluated, diagnosed, and treated by qualified mental health professionals to determine if puberty blockers, hormone treatments, and gender-affirming genital surgery is appropriate for that particular patient.

The medical treatments in dispute have been used "for decades to treat medical conditions other than gender dysphoria." R. at 15. Simply because the treatments are being used to cure a different ailment does not make them inherently experimental. In fact, "off-label drug usage is not unlawful, and the FDA's drug approval process generally contemplates that approved drugs will be used in off-label ways." *United States v. Caronia*, 703 F.3d 149, 166 (2d Cir. 2012). Accordingly, "physicians can prescribe, and patients can use, drugs for off-label purposes." *Id.* Lincoln's true disagreement is not with the proposed medical procedures, which are not new or experimental, but rather with the new way they are being used: to treat gender dysphoria.

3. The SAME Act fails to pass strict scrutiny because there are less restrictive means to achieve Lincoln's claimed interests.

Because the liberty interest at stake is that of a parent directing the medical care of their child, the district court properly found that there is a serious question as to whether the SAME Act is likely to fail a strict scrutiny analysis. Infringement of any fundamental right triggers the strict scrutiny test. *Troxell v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J. concurring) ("I would apply strict scrutiny to infringements of fundamental rights."). Under the strict scrutiny test, the legislation must have been passed in furtherance of a compelling governmental interest and must be the least restrictive means of furthering that compelling governmental interest. *See, e.g., Holt v. Hobbs*, 574 U.S. 352, 362 (2015). The government bears the burden of proving that the statute is necessary to achieve its alleged interest. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938).

Lincoln argues that the SAME Act was enacted to protect children from experimental medical procedures and to regulate the medical profession. But as discussed previously, the majority of gender affirming care is not considered experimental by the medical profession. The evidence to suggest that puberty blocking medication or hormone therapy are considered experimental treatments simply does not exist. The government has failed to show that it has a compelling interest, but even so, the SAME Act is not narrowly tailored to achieve Lincoln's sham interests.

The dissent from the appellate court's opinion correctly noted that the state's interest in "safeguarding the physical and psychological well-being of a minor is a compelling one." *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596,

607 (1982). But to truly understand what that quote means, it is important to be aware of the context of the case cited. In *Globe Newspaper Co.*, the newspaper claimed that a judge's mandatory closure rule during an underage witness's testimony about sexual abuse was unconstitutional. The Supreme Court found that, while the state's interest was compelling, a mandatory disclosure rule was not justified because "the circumstances of the particular case may affect the significance of the interest." *Id.* at 608. Further, the Court determined that whether closure is necessary should be determined on a case-by-case basis based on the weighing of factors such as "the minor['s] . . . age, psychological maturity and understanding, . . . and the interest of parents and relatives. *Id.*

In effect, the SAME Act bans *all* treatment for gender dysphoria. But, as in *Globe Newspaper Co.*, a blanket ban is not justified. To be constitutional, the state must allow for determinations on a case-by-case basis when the minor's age, psychological maturity and understanding, and the interest of parents and relatives may be considered. The medical guidelines published by the World Professional Association for Transgender Health ("WPATH"), and which are widely recognized as setting the standard of care for transgender individuals, already require "that each patient who receives gender-affirming care receive only evidence-based, medically necessary, and appropriate interventions that are tailored to the patient's individual needs." R. at 6. The SAME Act is effectively seeking to prevent doctors from following these guidelines.

Additionally, the SAME Act is not the least restrictive means to achieve Lincoln's interests because it is overinclusive. A law is overinclusive if it applies to those who need not be included for the government to achieve its purpose. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944). Notably, the SAME Act defines adolescents as those between the age of nine to eighteen. R. at 3. Research shows that "[g]ender dysphoria in adolescents (minors twelve and over) is more likely to persist into adulthood than gender dysphoria in children (minors under twelve)." R. at 7. (citing WPATH Guidelines at 11). If Lincoln is concerned about children undergoing irreversible procedures and later changing their minds, the law must be limited to those under the age of twelve. Including minors over the age of twelve is depriving them of the medical care they require and the affirmation from their family and peers which will undoubtedly make the transition more successful because "[t]here is an association between affirmation of an adolescent's transgender identity and favorable mental health outcomes." R. at 7.

As the district court and court of appeals correctly determined, Lincoln has failed to prove that the SAME Act was enacted to further a compelling interest. Because it will not pass a strict scrutiny analysis, the Marianos have a successful claim that there is, at least, a serious question as to whether the SAME Act is in violation of their Substantive Due Process rights.

B. Under the Equal Protection Clause of the United States Constitution, states are prohibited from passing legislation which discriminates against individuals based on their transgender status.

The United States Constitution requires states to provide "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. The Equal Protection Clause was created "to secure every person within the state's jurisdiction against intentional and arbitrary discrimination . . . occasioned by express terms of a statute." *Sunday Lake Iron Co. v. Twp. of Wakefield*, 247 U.S. 350, 352 (1918). In practice, the Equal Protection Clause has acted as a directive to states "that all persons similarly situated should be treated alike." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 606 (4th Cir. 2020) (quoting *City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985)).

When evaluating an equal protection claim, the court must first identify the classification by looking at the distinction between the people affected by the law. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Next, the court must identify the proper level of scrutiny to be applied when analyzing the constitutionality of the challenged law. These tests include strict scrutiny, intermediate scrutiny, and rational basis. The Court applies the test to assess if the particular government action meets that level of scrutiny.

Both the district court and the court of appeals correctly identified the SAME Act as a classification based on the minor's transgender status. R. at 20, 26. Several circuits have recently and consistently found that discrimination based on transgender status falls under the umbrella of sex-based classifications. *See Brandt v. Rutledge*, No. 21-2875, 2022 U.S. App. LEXIS 23888 (8th Cir. Aug. 25, 2022); *accord*

Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020); *accord Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *accord Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *accord Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). Because the SAME Act seeks to discriminate based on sex, a heightened scrutiny must be applied to assess the constitutionality of the Act. There is a serious question, if not a clearly established answer, as to whether Jess's Equal Protection rights have been violated because Lincoln's discrimination based on his transgender status, by way of the SAME Act, is not substantially related to achieving its claimed interests.

1. **Discrimination based on a person's transgender status is discrimination based on sex and transgender people are, therefore, recognized as a quasi-suspect class under the Equal Protection Clause.**

It is important to remember that the purpose of the Equal Protection clause is to provide shelter to those individuals in need of "extraordinary protection from the majoritarian political process." *Carolene*, 304 U.S. at 152–53. Although the Supreme Court has not yet issued an opinion specifically classifying transgender people as a suspect class in the Equal Protection context, the state must not pass any law with a "desire to harm a politically unpopular group." *Cleburne*, 473 U.S. at 446–47. Further, these constitutional rights can evolve—they are not exclusively "defined by who exercised them in the past." *Obergefell v. Hodges*, 576 U.S 644, 671 (2015). Today, Jess and his family are asking the Court to formally recognize that status as a transgender person falls under the protection of the Equal Protection Clause.

Discrimination based on sex was recognized by the Court as early as 1971 as a quasi-suspect class in *Reed v. Reed*, 404 U.S. 71 (1971). In *Reed*, the Court found that a statute preferring males as administrators of estates over females "provid[ed] dissimilar treatment for men and women who are thus similarly situated," and therefore, violated the Equal Protection Clause. *Id.* at 77. Gender discrimination was again addressed by the Court in *Miss. Univ. for Women v. Hogan* where the court focused its analysis on gender stereotypes. 458 U.S. 718 (1982). When determining if the state's proffered justification for the all-female nursing school was sufficient, the Court noted that "the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724–25. Further, the Court emphasized that it must take steps in its analysis to "assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 725-26; *see also Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (holding classifications must be reasonable, not arbitrary).

The Court has consistently built on its expansive case law outlining why discrimination based on sex or gender is wholly unconstitutional. In *United States v. Virginia*, like the *Miss. Univ. for Women* case, the Court held that Virginia's male-only military college was unconstitutional. 518 U.S. 515 (1996). The opinion noted that "[t]oday's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history" and that "our Nation has had a long and

unfortunate history of sex discrimination." *Virginia*, 518 U.S. at 531 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)). Most importantly, the Court recognized that "[a] prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded" and that "our comprehension of 'We the People'" continues to expand. *Virginia*, 518 U.S. at 557.

In more recent cases the Court has inched closer to expanding "We the People" to include transgender individuals—it is now time to fully extend the protection afforded for sex-based discrimination to transgender people by recognizing them as a quasi-suspect class under the Equal Protection Clause. Although arising in a Title VII context, the analysis that the Court used in *Bostock v. Clayton Cnty.* is relevant here. 140 S. Ct. 1731 (2020). Title VII prohibits employers from discriminating against employees based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a). Many of the classes protected under Title VII have also been recognized as a suspect or quasi-suspect class under the Equal Protection Clause. *See, e.g. Hunt v. Cromartie*, 526 U.S. 541 (1999) (finding all laws that classify on the basis of race are constitutionally suspect); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995) (concluding that a federal set-aside program which provided financial incentives to hire minority subcontractors would be subject to strict scrutiny). Based on the *Bostock* ruling which recognized that transgender status falls under sex classification, the Court should extend this finding to the Equal Protection Clause context.

In *Bostock*, an employee brought a Title VII action against her former employer alleging that she was fired based on gender stereotypes after she revealed that she was transitioning from male to female. *Bostock,* 140 S. Ct. at 1737. The Court reasoned that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex. *Id.* at 1741. To make clear the connection between sex discrimination and discrimination based on transgender status, the Court provided the following hypothetical:

> [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth . . . . [T]he individual employee's sex plays an unmistakable and impermissible role in the discharge decision."

Id. at 1741–42. Accordingly, any employer who "discriminates against . . . transgender employees necessarily and intentionally applies sex-based rules" because they "unavoidably discriminate against persons with one sex identified at birth and another today." *Id.* at 1745–46. It is hard to imagine that the same Court who classified transgender discrimination as a variant of sex-discrimination for Title VII purposes would fail to make that same connection for purposes of the Equal Protection Clause.

Several circuit courts have already declared that transgender status falls under the umbrella of sex discrimination for claims brought under the Equal Protection Clause. In *Grimm v. Gloucester Cnty. Sch. Bd.*, the Fourth Circuit held that a school policy requiring students to use bathrooms based on sex assigned at

birth was unconstitutional. 972 F.3d 586, 620 (4th Cir. 2020) ("[h]ow shallow a promise of equal protection that would not protect [the transgender student]"). This finding was based on the understanding that "[j]ust like being cisgender, being transgender is natural and is not a choice." *Id*. at 594. Further, "[b]eing transgender is also not a psychiatric condition, and 'implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'" *Id.* (quoting Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* (2012)). Based on this understanding, the court found "heightened scrutiny applie[d] to Grimm's claim because the bathroom policy rest[ed] on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class." *Id*. at 607.

The Fourth Circuit is certainly not alone in finding that "various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause." *Id.* at 608. This is true "because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Id.* at 608. The Sixth, Seventh, Eighth, and Eleventh Circuit have all reached similar conclusions. See*, e.g.*, *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that the transgender plaintiff stated a claim of sex discrimination for purposes of an equal protection violation based on his alleged "failure to conform to sex stereotypes"); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that the bathroom policy "treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated

with their assigned sex at birth, differently"); *Brandt v. Rutledge*, No. 21-2875, 2022 U.S. App. LEXIS 23888 at *18 (8th Cir. Aug. 25, 2022)(upholding an injunction blocking enforcement of a state ban on gender-affirming health care for transgender youth by finding a "likelihood of success on the merits of their equal protection claim"); *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (holding discrimination based on gender nonconformity "is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause")). The Eighth Circuit case, *Brandt v. Rutledge* bears a striking resemblance to the facts at issue in the present case.

In the *Brandt* case, transgender minors, their parents, and physicians sought a preliminary injunction to prevent an Arkansas statute from going into effect. The act prohibited gender transition procedures for minors, which meant that, in effect, "medical procedures that [were] permitted for a minor of one sex [were] prohibited for a minor of another sex." *Id.* at *2. Accordingly, the Eighth Circuit found that the act was subject to heightened scrutiny because "[t]he biological sex of the patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not." *Id.* at *3.

Lincoln's SAME Act makes the same distinction as the Arkansas law discussed in the *Brandt* case. The SAME Act seeks to prevent medical providers from providing care "for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 3. In Lincoln, as in Arkansas, "[a] minor born as a male may be prescribed

testosterone or have breast tissue surgically removed . . . but a minor born as a female is not permitted to seek the same medical treatment." *Id.* at *2. Medical procedures of this nature are permitted, unless they are for the purpose of treating gender dysphoria. There is no question that, in this case, the court should recognize that the SAME Act creates a classification based on a minor's transgender status, and therefore qualifies as gender discrimination. When the statute "cannot be stated without referencing sex," as in the SAME Act, "[o]n that ground alone, heightened scrutiny should apply." *Grimm,* 972 F.3d at 608. Therefore, the Court must apply a heightened level of scrutiny to assess the constitutionality of the SAME Act.

2. Lincoln's claimed interests for passing the SAME Act fail both heightened scrutiny and rational basis review because those interests are pretextual, at best.

All classifications made by the state "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Reed v. Reed*, 404 U.S. 71, 76 (1971) (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). The Supreme Court has recognized a spectrum of tests to use when analyzing a claim brought under the Equal Protection Clause. On one end is the rational basis test, which requires the law to be rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Ctr., 47* U.S. 432, 440 (1985). The Court has also found a middle-ground for classifications which are not yet recognized as fundamental rights. Classifications based on groups of people that fall in the middle-ground are made despite the fact that the characteristics at issue "frequently bear[] no relation to the ability to perform or contribute to society." *Cleburne*, 47 U.S. at 440–41 (quoting *Frontiero v. Richardson*,

411 U.S. 677, 686 (1973) (plurality opinion)). Discrimination towards this group, or a quasi-suspect class, requires a heightened level of scrutiny. *Id.* at 440. Intermediate scrutiny demands that the classification "fails unless it is substantially related to a sufficiently important governmental interest." *Id.* at 441.

Accordingly, any government action based on sex or gender fails intermediate scrutiny unless the state is able to provide an "exceedingly persuasive justification [for the classification]." *United States v. Virginia*, 518 U.S. 515, 530 (1996)(quoting *Miss. Univ. for Women*, 458 U.S. 718, 734 (1982)). Notably, "[t]he burden of justification is demanding, and it rests entirely on the State." *Id.* at 533. The state's justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.*

The burden here falls squarely on Lincoln, which has failed to provide justifications for the SAME Act that are exceedingly persuasive. Liberty's alleged concerns arise only when specific treatment is prescribed to minors in line with gender affirming care. Both the district court and the court of appeals failed to find Lincoln's claimed interest in "protecting children from experimental medical treatments" persuasive. R. at 20–21, 27. As discussed previously, gender affirming care is not experimental. If these treatments were truly dangerous, Lincoln would have an interest in protecting all citizens, not just transgender minors from the procedures. Because Lincoln has limited the procedures to those generally recommended for transgender minors, Lincoln discriminatorily seeks to prevent the results of the gender-affirming procedures, not the occurrence of the procedures.

Further, Lincoln has provided no information to support its claimed justification that the SAME Act seeks to protect children from making life-changing decisions based on peer pressure. R. at 20. This analysis blatantly ignores the fact that minors are not able to unilaterally make the decision as to what medical care is necessary. Transgender minors must not only cross the often-difficult hurdle of gaining parental consent, but also have to be under the supervision of a medical professional who recommends the procedures. The decision to seek out gender affirming care is not one made wantonly on the playground during recess, as Lincoln would like to frame it. Lincoln cites to the fact that the number of adolescents identifying as transgender has significantly jumped recently. R. at 20. While Lincoln views this statistic as a problem in need of a solution, perhaps this is a result of medical advancements and a more accepting community.

Likewise, Lincoln's justifications even fail to survive a rational basis review. Under a rational basis review, "the State may not rely on a classification whose relationship to the asserted goal is so attenuated as to render the decision arbitrary or irrational." *Cleburne,* 473 U.S. at 446. Even under this lowered standard, this Court recently recognized that "rational-basis review is a deferential standard, but it is not 'toothless.'" *United States v. Vaello-Madero*, 142 S. Ct. 1539, 1559-60 (2022) (quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). Plainly, "a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer,* 517 U.S. at 634–35 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). The SAME Act prevents the selected treatments for transgender minors

while providing no restriction for the same procedures or medical treatment for cisgender minors. R. at 3–4. Further, the doctors of Lincoln are following the proper standard of care established for treating transgender minors. R. at 21.

Lincoln's SAME Act bears no legitimate governmental interest, only a bare desire to harm the transgender minors in Lincoln. And because no legitimate government interest is furthered by the SAME Act, it unconstitutionally deprives the transgender minors in Lincoln, a quasi-suspect class, of Equal Protection under the law. Both the district court and the Fifteenth Circuit correctly found that Jess and the Marianos have raised sufficiently serious questions as to the merits of their constitutional claims and that the preliminary injunction was necessary.

CONCLUSION

The Supreme Court's opinion in *Winter v. Natural Resources Defense Council, Inc.* allows for the continued use of the preliminary injunction sliding-scale approach currently adopted by several circuits. Accordingly, the Marianos need only show that there is a serious question as to the merits of their claims. The Marianos provided sufficient evidence for a rational trier of fact to determine that they were likely to suffer irreparable harm in the absence of the preliminary relief and that the balance of equities tips in their favor. Because all other elements for a preliminary injunction were satisfied, both the district court and the court of appeals correctly focused its analysis on whether there was a serious question as to the merits of the Marianos' Equal Protection and Due Process Claims.

There is a serious question as to whether the SAME Act is a violation of Elizabeth and Thomas Mariano's parental rights under the Substantive Due Process Clause because it prevents them from directing Jess's upbringing and determining which procedures are medically necessary to treat his gender dysphoria. Further, there is also a serious question as to whether the SAME Act is a violation of Jess's right to Equal Protection because the act discriminates against transgender minors, a quasi-suspect class, and the act ultimately fails to pass even a rational basis review. Because the Marianos have provided sufficient evidence that there are serious questions as to the merits of their Equal Protection and Due Process claims, that they were likely to suffer irreparable harm in the absence of the preliminary relief, and that the balance of equities tips in their favor, the court of appeals correctly affirmed the district court's granting of the Marianos' motion for a preliminary injunction and denial of Lincoln's motion to dismiss.

It is for these reasons that this court should affirm the Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

/s/ 3122

Attorneys for Respondents

CERTIFICATE OF SERVICE

We certify that a copy of Respondents' brief was served upon Petitioner, April Nardini, in her official capacity as the Attorney General of the State of Lincoln,

through the counsel of record by certified U.S. mail return receipt requested, on this, the 15th day of September, 2022.

/s/ 3122

Attorneys for Respondents

APPENDIX A

Statutory Provisions

Stop Adolescent Medical Experimentations ("SAME") Act

20 Linc. Stat. § 1201. Findings and Purposes

(a) Findings:

The State Legislature finds -

(1) Lincoln has a compelling interest to ensure the health and safety of its citizens, in particular that of vulnerable children.

(2) Gender dysphoria is a serious mental health diagnosis experienced by a very small number of children.

(3) Many cases of gender dysphoria in adolescents resolve naturally by the time the adolescent reaches adulthood.

(4) There is as of yet no established causal link between use of medical treatments for so-called "gender affirming care," such as puberty blockers, sex hormones and reassignment surgery, and decreased suicidality. Studies demonstrating health benefits of these treatments have not been sufficiently longitudinal or randomized.

(5) Emerging scientific evidence shows potential harms to children from gender transition drugs and surgeries, including but not limited to risks related to irreversible infertility, cancer, liver disfunction, coronary artery disease, and bone density.

(6) Parents and adolescents often do not fully comprehend and appreciate the risks and life complications that accompany these surgeries, such as the loss of fertility and sexual function, and may not be able to give informed consent to the treatments.

(7) Individuals who have detransitioned (decided to stop identifying as transgender) have expressed regret for taking puberty-suppressing medications and cross-sex hormones and identified "social influence" as playing a significant role in their decision to identify as a different sex.

(8) There are conventional and widely-accepted methods to treat gender dysphoria that do not raise informed consent and experimentation concerns. Conventional psychology may safely and effectively guide a dysphoric youth to stability while deferring decisions on often irreversible medical gender affirming treatments until adulthood.

(b) Purposes:

It is the purpose of this chapter –

(1) To protect children from risking their own mental and physical health and lifelong negative medical consequences that could be prevented by receiving a more conventional treatment of their gender dysphoria.

(2) To encourage treatments supported by medical evidence and discourage harmful, irreversible medical interventions.

(3) To protect against social influence surrounding gender affirmation treatments, which is especially concerning given the potential life-altering effects of gender transition drugs and surgeries.

20 Linc. Stat. § 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 Linc. Stat. § 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 Linc. Stat. § 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 Linc. Stat. § 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.

U.S. Const. amend. XIV § 1

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

APPENDIX B

Medical Provisions

de Vries AL, Doreleijers TA, Steensma TD, Cohen-Keetenis PT, Psychiatric Comorbidity in Gender Dysphoric Adolescents, 52 J. Child Psych. and Psychiatry 1195 (2011).

Cited material from pg. 1200:

Most prevalent in our study were emotional disorders, with a nearly 10% prevalence of social phobia; studies in the general adolescent population reveal a prevalence of 1.65%–6.5% (Roberts et al., 2007; Verhulst et al., 1997). Disruptive disorders were also observed. Clearly, many gender dysphoric youth are in despair, as reflected by their depression, anxiety and oppositional behavior. Other studies in adolescents with GID, however, show higher rates of associated problems, including aggression, depression, suicidal thoughts and attempted suicide (Di Ceglie et al., 2002; Grossman & D'Augelli, 2007). The 10% prevalence of social phobia may indicate that the development of gender variant adolescents' peer relations is at stake in a non-negligible subgroup. Indeed, in a study comparing gender dysphoric children with adolescents, the latter showed poorer peer relations, which were in turn the strongest predictor of CBCL psychopathology (Zucker, Owen, Bradley, & Ameeriar, 2002). The prevalence rate of 32% of adolescents in the current study was low compared with prepubertal gender dysphoric children in the same clinic, with an observed 52% prevalence rate of one or more psychiatric disorders (Wallien et al., 2007). Our findings are thus in contrast to other studies showing more problem

behavior in adolescents compared with children (Di Ceglie et al., 2002; Zucker et al., 2002).

However, in these studies, puberty suppression was not an option at the time that the studies were conducted. In our study, the trust adolescents felt that puberty suppression would be available by the time they would need it, may have relieved the acute distress accompanying their gender dysphoria and contributed to the fact that we found lower rates of comorbidity.

World Pro. Ass'n for Transgender Health (WPATH), Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (7th ed. 2012).

Cited materials

Differences between Children and Adolescents with Gender Dysphoria

An important difference between gender dysphoric children and adolescents is in the proportion for whom dysphoria persists into adulthood. Gender dysphoria during childhood does not inevitably continue into adulthood.5 Rather, in follow-up studies of prepubertal children (mainly boys) who were referred to clinics for assessment of gender dysphoria, the dysphoria persisted into adulthood for only 6-23% of children (Cohen-Kettenis, 2001; Zucker & Bradley, 1995). Boys in these studies were more likely to identify as gay in adulthood than as transgender (Green, 1987; Money & Russo, 1979; Zucker & Bradley, 1995; Zuger, 1984). Newer studies, also including girls, showed a 12-27% persistence rate of gender dysphoria into

adulthood (Drummond, Bradley, Peterson-Badali, & Zucker, 2008; Wallien & Cohen-Kettenis, 2008).

In contrast, the persistence of gender dysphoria into adulthood appears to be much higher for adolescents. No formal prospective studies exist. However, in a follow-up study of 70 adolescents who were diagnosed with gender dysphoria and given puberty suppressing hormones, all continued with the actual sex reassignment, beginning with feminizing/masculinizing hormone therapy (de Vries, Steensma, Doreleijers, & Cohen-Kettenis, 2010).

Another difference between gender dysphoric children and adolescents is in the sex ratios for each age group. In clinically referred, gender dysphoric children under age 12, the male/female ratio ranges from 6:1 to 3:1 (Zucker, 2004). In clinically referred, gender dysphoric adolescents older than age 12, the male/female ratio is close to 1:1 (Cohen-Kettenis & Pfäfflin, 2003).

As discussed in section IV and by Zucker and Lawrence (2009), formal epidemiologic studies on gender dysphoria – in children, adolescents, and adults – are lacking. Additional research is needed to refine estimates of its prevalence and persistence in different populations worldwide.

When assessing children and adolescents who present with gender dysphoria, mental health professionals should broadly conform to the following guidelines:

1. Mental health professionals should not dismiss or express a negative attitude towards nonconforming gender identities or indications of gender dysphoria. Rather, they should acknowledge the presenting concerns of children, adolescents, and their

families; offer a thorough assessment for gender dysphoria and any co-existing mental health concerns; and educate clients and their families about therapeutic options, if needed. Acceptance and removal of secrecy can bring considerable relief to gender dysphoric children/adolescents and their families.

2. Assessment of gender dysphoria and mental health should explore the nature and characteristics of a child's or adolescent's gender identity. A psychodiagnostic and psychiatric assessment– covering the areas of emotional functioning, peer and other social relationships, and intellectual functioning/school achievement – should be performed. Assessment should include an evaluation of the strengths and weaknesses of family functioning. Emotional and behavioral problems are relatively common, and unresolved issues in a child's or youth's environment may be present (de Vries, Doreleijers, Steensma, & Cohen-Kettenis, 2011; Di Ceglie & Thümmel, 2006; Wallien et al., 2007).

3. For adolescents, the assessment phase should also be used to inform youth and their families about the possibilities and limitations of different treatments. This is necessary for informed consent, but also important for assessment. The way that adolescents respond to information about the reality of sex reassignment can be diagnostically informative. Correct information may alter a youth's desire for treatment, if the desire was based on unrealistic expectations of its possibilities.

Assessing gender dysphoria

Mental health professionals assess clients' gender dysphoria in the context of an evaluation of their psychosocial adjustment (Bockting et al., 2006; Lev, 2004, 2009).

The evaluation includes, at a minimum, assessment of gender identity and gender dysphoria, history and development of gender dysphoric feelings, the impact of stigma attached to gender nonconformity on mental health, and the availability of support from family, friends, and peers (for example, in person or online contact with other transsexual, transgender, or gender nonconforming individuals or groups). The evaluation may result in no diagnosis, in a formal diagnosis related to gender dysphoria, and/or in other diagnoses that describe aspects of the client's health and psychosocial adjustment. The role of mental health professionals includes making reasonably sure that the gender dysphoria is not secondary to or better accounted for by other diagnoses. Mental health professionals with the competencies described above (hereafter called "a qualified mental health professional") are best prepared to conduct this assessment of gender dysphoria. However, this task may instead be conducted by another type of health professional who has appropriate training in behavioral health and is competent in the assessment of gender dysphoria, particularly when functioning as part of a multidisciplinary specialty team that provides access to feminizing/masculinizing hormone therapy. This professional may be the prescribing hormone therapy provider or a member of that provider's health care team.