No. 22-8976

The

Supreme Court of the United States

October 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 THE PETITIONER

Team 3123
Attorneys for the Petitioner

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STATEMENT OF THE ISSUES

I. **Is the "serious question" or "fair grounds" standard still appropriate to describe a movant's burden for a preliminary injunction after this Court's decision in *Winter v. Nat. Res. Def. Council, Inc.***

II. **Does a state action restricting minors from accessing gender-transition treatments violate equal protection or due process rights when the appropriateness and safety of the treatments are uncertain?**

STATEMENT OF FACTS

I. Factual Background

In 2021, the duly-elected Lincoln legislature and governor enacted the Stop Adolescent Medical Experimentations ("SAME") Act, codified at 20 Linc. Stat. §§ 1201-06. R. at 2. The Act's purpose sought to protect vulnerable adolescents from the life-long impacts of experimental treatments for gender dysphoria. R. at 2. The Lincoln legislature recognized the serious and rare nature of pediatric gender dysphoria. R. at 2-3. The legislature also recognized gender dysphoria naturally resolves by adulthood in the large majority of cases. R. at 2.

The Lincoln legislature expressed concerns about the harms of emerging treatments. R. at 2-3. Specifically, the legislature cited "emerging scientific evidence" of the questionable effectiveness and harmful, life-long effects of the experimental pharmaceutical and surgical treatments for pediatric gender dysphoria. R. at 3. These risks include cancer, irreversible infertility, and hepatic and cardiac disease. R. at 3. The legislature was also concerned about how informed patients and parents were in consenting to these treatments given the novelty of these treatments and the dearth of data on long-term side effects. R. at 3.

These findings and Lincoln's compelling state interest in and responsibility for its citizens' health and well-being prompted Lincoln to enact this statute. R. at 2-3. The SAME Act seeks to protect its citizens–specifically vulnerable adolescents–suffering from gender dysphoria. R. at 3. The Act does bars health care providers from "engag[ing] in or caus[ing] any procedure, practice or service to be performed upon any individual under the age of eighteen." R. at 3-4. These procedures, practices, or services include:

1. Prescribing or administering medications to stop or delay normal pubescent development;
2. Prescribing or administering "supraphysiologic" doses of hormones; or

3. Surgical construction of genital tissue or removal of healthy tissue except for male circumcision.

The SAME Act only bars these acts when undertaken "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. Lincoln further tailored this Act to apply only to minors older than nine and younger than eighteen years of age. R. at 3. Violations are punishable by imprisonment and fines upon felony conviction. R. at 4. The Act vests the Lincoln Attorney General, Ms. April Nardini ("Petitioner"), with enforcement authority.

Jess Mariano ("Respondent") is a fourteen year old adolescent residing in Lincoln with parents Elizabeth and Thomas Mariano. R. at 2. From an early age, Respondent has suffered from anxiety and depression. R. at 4. Respondent eventually began psychiatric treatment at eight years of age after consuming an excessive dose of Tylenol and expressing a desire to never awaken. *Id*. Nearly a year later, Respondent's treating psychiatrist diagnosed Respondent with gender dysphoria. *Id*. Respondent is biologically female and self-perceives as a male. R. at 4.

Over a year post-diagnosis, Respondent's psychiatrist prescribed Respondent a gonadotropin-releasing hormone ("GnRH") agonist. R. at 5. These medications, known as "puberty blockers", are monthly injections that delay the onset of puberty and related physiological development. R. at 5. Respondent's psychiatrist prescribed the medication to impede puberty, the onset of adult reproductive capability marked by the natural development of secondary sex characteristics,

maturation of the genital organs, acceleration in growth, and the occurrence of menstrual cycles.[1] Respondent has continued these treatments since. R. at 5.

II. Procedural History

Respondent and parents filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Lincoln against April Nardini ("Petitioner"), in her capacity as Attorney General for the State of Lincoln. R. at 1. Respondent alleges the Act violates the Equal Protection Clause of the Fourteenth Amendment. R. at 8. Respondent's parents allege the Act violates the Due Process clause of the Fourteenth Amendment.*Id*. Respondent and parents moved to enjoin enforcement of the SAME Act prior to trial. R. at 1. Petitioner moved to deny Respondent's motion for preliminary injunction and to dismiss the suit. *Id*.

Respondent alleges the SAME Act violates the Equal Protection clause by classifying on sex and transgender status to determine the availability of treatments. R. at 18. Respondent so alleges on the theory that the GnRH agonist would be available to a fourteen year old male, but is not available to Respondent as a biological female. R. at 11, 18. Respondent's parents allege violations of the Due Process clause on the theory the Act violates a fundamental right to access any medical care for Respondent. R. at 14.

Petitioner defends the statute–enacted by and through democratic process–against the constitutional claims on several grounds. R. 18-19 First, Petitioner states the Act expressly does not apply to Respondent because Respondent's treatment is not for the prohibited purpose of

[1] Puberty, Science Direct, https://tinyurl.com/53c5k6vb (last visited Sept. 7, 2022).

"instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 18-19 (internal quotation marks omitted). Rather, Respondent's purpose is to prevent the formation of physical characteristics *in accordance with* Respondent's biological sex by suppressing the onset of puberty. *Id*. Second, Petitioner denies Respondent's characterization the Act classifies on the basis of sex but rather does so on status as a minor, and by medical procedure. R. at 19. In regard to the parents' claim of Due Process infringement, Respondent states clearly no parent has a fundamental right to inflict on a child experimental medical treatments. R. at 14. And even if such right possibly existed, Petitioner has two compelling state interests justify the SAME Act. *Id*. First, Petitioner has a compelling interest in child protection and welfare. *Id*. Second, Petitioner has a compelling interest in regulating health care–in accordance with a long tradition in this country–through its police powers. *Id*.

The district court conducted a hearing on both Respondent's preliminary injunction motion and Petitioner's motion to dismiss. R. at 1. Respondents offered medical history, treatment effects, testimony from the treating psychiatrist, and other medical and scientific literature in support of its motion. R. at 5-7. In response, Petitioner expressly stated the Act does not apply to Respondents. R. at 12. Petitioner also offered its own physician expert that testified on domestic and international standards of care discouraging–or outright banning–the subject treatments for pediatric gender dysphoria. R. at 7. Further, Petitioner offered testimony from two witnesses. R. at 8. These witnesses testified they regretted undertaking the treatments subject to the Act as adolescents. *Id*. Further, these witnesses regretted they did not adequately understand or consider the physical and mental consequences of these treatments. *Id*.

The district court granted Respondents' motion for preliminary injunction and denied Petitioner's motion to dismiss. R. at 22. In its decision, the district court first addressed a question of precedence and jurisprudence before proceeding to the merits. R. at 8-10.

The Fifteenth Circuit adopts the Second Circuit's jurisprudence for reviewing motions for preliminary injunction. R. at 9. As such, the Fifteenth Circuit holds a movant to a standard known as the "serious questions", "fair grounds", "fair chance", or "sliding scale" standard to obtain this relief.[2] *Id* at 9. First, the movant may obtain relief if it clearly shows it is likely to succeed on the merits. *Id*. But failure to do so is not fatal; the movant may still succeed if it raises a question on the merits sufficient to create a fair ground for litigation and it would incur decidedly greater hardship than its adversary absent relief. *Id*. Under this standard, the degree of hardship necessary to obtain relief "slides" inversely to the likelihood of success on the merits. R. at 10. The greater the hardship, the less likely succeed need be. *Id*. Alternatively, the more likely success, the less the hardship relative to the other party. *Id*.

The district court applied this standard to the instant injunction. R. at 10. It did so after acknowledging this Court's holding in *Winter v. Nat. Res. Def. Council, Inc.* In *Winter*, this Court reversed and vacated an injunction granted under that circuit's version of the fair grounds standard. R. at 9. This Court did so after expressly stating and applying the appropriate standard. R. at 8-9. This standard requires a movant to clearly show (1) that it is likely to succeed on the merits; (2) that is is likely to suffer irreparable harm absent grant of relief; (3) that the balance of equities tips in its favor; and (4) that relief is in the public interest. R. 8-9.

[2] This standard, at a minimum, seeks a fair ground for litigation before enjoining a movant's adversary. As such, we will refer to this standard as the "fair grounds" standard.

Despite this acknowledgement, the district court reviewed and granted Respondent's motion under the fair grounds standard. R. at 10, 14, 21-22. First, the court found Respondent and parents "will likely suffer immediate, irreparable harm if injunctive relief is denied" from the purported loss of access to this treatment. R. at 11-12. The court so held despite Respondent's explanation the statute did not apply. *Id*. Next, the court found the balance of equities and public interest to be in Respondent's and the parent's favor. R. at 12. The court reviewed Petitioner's harm if enjoined; but, the court did not so review Respondent's burden absent relief. *Id*. Finally the court found Respondent and parents raised "serious questions going to the merits" on the Equal Protection and Due Process claims, respectively. R. at 13. The district court reasoned the SAME Act's survivability under strict scrutiny for the Due Process claim and intermediate scrutiny for the Equal protection to be in sharp dispute and poses questions sufficient for a fair ground for litigation. R. at 17, 21-22. The district court applied strict scrutiny on the basis the SAME Act infringed on a fundamental right to "direct the medical care of their child." R. at 17. The court proceeded to apply intermediate scrutiny upon asserting the Act discriminated on the basis of sex. R. at 18.

On May 12, 2022, the State appealed to the U.S. Court of Appeals for the Fifteenth Circuit. The court found that Respondent and parents are likely to suffer imminent irreparable harm should the SAME Act become effective. R. at 27. In its reasoning, the Circuit Court determined that Respondent has a "special disability" subjecting the case to heightened review, and that Respondent and parents have raised serious questions about the likelihood of success on the merits of their claims. *Id*. The Circuit Court, therefore, affirmed the District Court's decision finding that the District Court acted within its discretion to grant the preliminary injunction and deny the State's motion to dismiss. *Id*.

Petitioners submitted a petition for writ of certiorari from the Supreme Court of the United States to consider the merits of the preliminary injunction and denial of the motion to dismiss. R. at 35. The Supreme Court granted certiorari limited to the questions of 1) whether the "serious question" standard for preliminary injunctions continues to be viable after *Winter v. Nat. Res. Def. Council, Inc.* and 2) whether the preliminary injunction was properly granted in regard to the Respondents' Substantive Due Process and Equal Protection claims.

SUMMARY OF ARGUMENTS

I. Any standard other than the *Winter* standard is incorrect.

A preliminary injunction is a drastic and extraordinary form of relief that modifies the parties' rights and obligations prior to full fact discovery and adjudication on the merits. This Court has expressly specified the correct standard for the burden a movant must meet for this relief. This burden requires a movant to clearly show that it is likely to succeed on the merits, that it is likely to suffer irreparable harm absent relief, that the balance of equities tips decidedly in its favor, and that relief serves public policy.

Despite this Court's clear precedent, some circuits continue to apply an alternative rule. But this alternative rule conflicts with this Court's clear precedent.

II. This injunction is improper on both the Equal Protection and Due Process claims.

The Marianos failed to meet their burden to enjoin Lincoln prior to a trial on the merits on both the Due Process and the Equal Protection claims. First, the Marianos cannot show any possibility of harm absent injunction because the Act simply does not apply. Second, the Marianos are unlikely to succeed on the merits of either claim because the Due Process and Equal Protection clauses do not extend protections as far as claimed. And finally, the balance of

equities and public interests tip decidedly in Lincoln's favor because of the lack of harm the Act inflicts.

ARGUMENTS

I. The serious question or fair grounds standard is invalid.

A preliminary injunction is an equitable relief available to a court in certain circumstances. The Federal Rules of Civil Procedure govern this "extraordinary and drastic remedy" procedurally. Fed. R. Civ. P. 65(a); *Munaf v. Green*, 553 U.S. 674, 689 (2008). But the movant's burden of persuasion when seeking any injunctive relief is based on traditional, long-standing principles of equity. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982). To meet this burden, a movant must clearly show (1) that it is likely to succeed the merits; (2) that it is likely to suffer irreparable harm absent injunctive relief; (3) that the balance of equities decidedly tips in its favor; and (4) that relief better serves public interests. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

More recently, another standard under which a court may grant this relief has emerged. *See e.g., Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (explaining the circuit's application of this new standard "[f]or the last five decades…") (citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)). This "fair grounds" standard is a less rigorous burden than the traditional principle upon which this Court and others have relied. *Trump v. Deutsche Bank AG*, 943 F.3d 627, 637 (2d Cir. 2019)(*vacated on other grounds*). This lack of rigor led this Court to declare the fair grounds standard insufficient for enjoining a party prior to full fact discovery and adjudication on a case's merits. *Winter*, 555 U.S. at 12, 33.

But this Court's finding is neither novel nor unique. For many years preceding *Winter*, all circuits but one have declined to enjoin governmental action when the movant merely shows it has raised a fair grounds. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731-32 (8th Cir. 2008); *Nova Health Systems v. Edmondson*, 460 F.3d 1295, 1298-99 (10th Cir. 2006); *Richenberg v. Perry*, 73 F.3d 172, 172-73 (8th Cir. 1995); *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989). Accordingly, the fair grounds standard is, and has long been, invalid.

A. Standard of Review

Whether the fair grounds standard remains appropriate for preliminary injunction determinations is reviewed *de novo* because it is a question of law. The fair grounds matter is a question of law because it asks this Court to "expound on the law, particularly by amplifying or elaborating on a broad legal standard." *Guerrero-Lasprilla v. Barr*, 140 S.Ct 1062, 1069 (2020) (quoting *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 138 S.Ct. 960, 966 (2018)). This Court reviews questions of law *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991). Any deference to lower courts is unacceptable when a question of law compels *de novo* review. *Id*.

This Court reviews grants and denials of preliminary injunction for abuse of discretion. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 33 (2008). A court abuses its discretion when it fails to apply the proper legal principle, framework, or standard in its decision. *See eBay, Inc. v. MercExchange, L.L.C*, 547 U.S. 388, 393 - 94 (2006); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 280 (2d Cir. 2021). This Court determines whether the lower court so failed upon *de novo* review to ensure "doctrinal coherence." *Salve Regina College v. Russell*, 499 U.S. 225, 231 - 32 (1991). This independent review means "no form of appellate deference is

acceptable." *Id* at 238. Failures to apply the correct legal principle or standard result in judgments that cannot stand and require reversal. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 864 (2008).

B. This Court has expressly abrogated the fair grounds standard.

This Court finds great import and presumes sincerity in the words comprising its and other courts' opinions. *See Salve Regina College v. Russell*, 499 U.S. 225, 236 (1991). Whether this standard is valid law is a matter of settled law. This Court expressly deprecated the fair grounds standard to grant preliminary injunction and elucidated the correct standard in *Winter v. Nat. Res. Def. Council, Inc.* 555 U.S. 7, 20 (2008). Moreover, this Court has continued to apply its *Winter* standard since. *See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 66-67 (2020).

In *Winter*, this Court vacated and reversed a preliminary injunction against the United States Navy from conducting military training and readiness activities. 555 U.S. at 33. In determining the injunction inappropriate, this Court applied a four-part test against the movant's burden and found the burden unmet. *Id*.

> A plaintiff seeking a preliminary injunction must 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, [(30)] that the balance of equities tips in his favor, *and* [(4)] that an injunction is in the public interest.

Id at 20 (emphasis added). The lower courts enjoined the Navy after finding the plaintiff showed one issue to be a fair ground for litigation and a likelihood of success on another; the possibility of irreparable harm absent relief; and both the balance of equities and public interests in its favor. *Winter v. Nat. Res. Def. Council, Inc.*, 518 F.3d 658, 696 (9th Cir. 2008). On appeal, this Court expressly stated "[t]he Court of Appeals was wrong, and its decision is reversed."

Winter, 555 U.S. at 12. The Court elaborated by expressly stating "…the Ninth Circuit's 'possibility' standard [was] too lenient" and "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id* at 22.

1. Fair is not always likely, but likely is always fair.

To satisfy the *Winter* standard, a movant must clearly show both it is likely to succeed on the merits and it is likely to suffer irreparable harm absent relief. 555 U.S. at 20. But a movant may meet its burden under the less-rigorous fair grounds standard when it raises a question merely sufficient for a fair ground for litigation and the right balance of hardships. R. at 23; *see also Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.,* 598 F.3d 30, 35 (2d Cir. 2010). A movant's showing an issue to be a fair ground for litigation does not require it to show it "is more likely than not to prevail on the merits of the underlying claim." *Citigroup Global Markets*, 598 F.3d at 35.

Likely has a very clear plain meaning. The plain meaning of likely is "having a high probability of being true", "very probable", and "probably." *Likely*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/likely (last visited Sep. 9, 2022). Further, "probably" means "without much doubt." *Probably*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/likely (last visited Sep. 9, 2022). As such, it is clear that "likely" means a chance of success on the merits greater than fifty percent. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

The fair grounds standard is antithetical to this. *See Citigroup Global Markets*, 598 F.3d at 35. In some cases, the fair ground standard amounts to little more than a standing or jurisdiction

analysis. *Munaf v. Green*, 553 U.S. 674, 690 (2008) (questions to jurisdiction mean nothing to likelihood of success other than to decrease the likelihood). In fact, this Court has stayed preliminary injunctions granted under this fair ground standard. *See Barr v. East Bay Sanctuary Covenant*, 140 S.Ct. 3, 3-5 (2019) (the dissent cited the "serious question"–a simile for the fair ground–the District Court found).

Accordingly, the two standards cannot co-exist. This Court's express language in *Winter*–that a movant must show it " is likely to succeed on the merits"–is clear by its plain meaning. The fair ground standard does not require a movant to clearly show it is likely to succeed and is opposite to this Court's precedent.

2. The sliding scale necessary in the fair grounds standard contradicts the *Winter* standard.

The standard in *Winter* clearly abrogates this sliding scale approach so vital to the fair ground standard. The *Winter* rule requires a movant to clearly show each independent element tips in its favor in probability, relative to its adversary, and in public policy priorities. 555 U.S. at 20. This Court clearly established the independence of each element by its structure, the nature of each element, and its analysis.

The fair ground standard is only functional with sliding-scale relationship between how fair the ground for litigation and the possibility of irreparable harm. *See Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189, 195 (4th Cir. 1977), *abrogated by Real Truth About Obama, Inc. v. Federal Elec. Comm'n*, 575 F.3d 342 (4th Cir. 2009), *cert. granted, vacated on other grounds*, 559 U.S. 1089 (2010), *and aff'd in part sub nom. The Real Truth About Obama, Inc. v. Federal Election Comm'n*, 607 F.3d 355 (4th Cir. 2010); *see also Hamilton Watch Co. v Benrus Watch Co.*, 206 F.2d 738, 743 (2d Cir. 1953). The movant's

burden to clearly show it is likely to succeed on the merits dwindles–to a mere need to show a fair ground for litigation–the higher the possibility of irreparable harm. *Citigroup Global*, 598 F.3d at 37-38. In short, the movant need only show a possibility of irreparable harm if it tips the scales of probability sufficiently in its favor, or vice versa. *See Blackwelder*, 550 F.2d at 194-95.

But, again, this sliding scale approach is antithetical to the *Winter* standard. The *Winter* standard clearly elucidates its four-parts as elements in its structure. 555 U.S. at 20. An element is a "constituent part" of a claim or rule that must be proven as part of the whole. Element Definition, *Black's Law Dictionary* (11th ed. 2019), *available at* Westlaw. A comma-separated series of phrases, the last two of which are joined by a conjunction after the comma, signify the phrases are of "equal stature." Bryan A. Garner, *The Redbook: A Manual on Legal Style* 3, 233-34 (4th ed. 2018). The conjunction "and" joins these phrases to be equal. *Id* at 236.A series in which each phrase begins with a subordinating conjunction joins that dependent phrase to the main clause. *Id*.

This Court clearly stated the parts of the *Winter* rule as elements, each of which a movant must satisfy or the injunction request fails. First, this Court listed each element in a comma separated series: "…that he is likely to succeed on the merits, that he is likely to suffer irreparable harm…" and so on. This series joins each comma-separated elements in the series equally because the inclusive conjunctive "and" joins the last two elements. And the movant must prove each element because the subordinating conjunction "that" prefaces the phrase elucidating each element, thus making each phrase dependent on "[a] plaintiff seeking a preliminary injunction must establish…". Accordingly, this Court clearly intended the *Winter* rule to specify the elements of a movant's standard, each of which the movant must satisfy.

How this Court applied the *Winter* rule also leads to this conclusion. In its opening paragraph, this Court expressly faulted the Court of Appeals for affirming the preliminary injunction. 555 U.S. at 12. The sole reason for finding fault: the record contained no evidence of harm. *Id*. There was no balancing. Reversing solely on this element clearly leads to the conclusion this Court intends the *Winter* rule to be one of elements.

To be sure, this Court also analyzed two additional elements: the balance of harms and the public policy implications. *Winter*, 555 U.S. at 23-24. But a close reading reveals the nature of this review. This Court analyzed these two elements as hypotheticals. *Id* ("…*even if* plaintiffs have shown irreparable injury…) (emphasis added). This Court concluded this paragraph by disclaiming any need to address whether the movant established a likelihood of success because of the movant's failure on the other elements. *Id*.

Why analyze these elements if unnecessary? This Court sought to rectify the "cursory fashion" with which the District Court reviewed the balance of equities and public policy elements. *Id* at 26-27. Moreover, this Court sought to exercise the discretion the District Court "barely exercised." *Id*.

This analysis aligns with this Court's holding in *Munaf*. In *Munaf*, this court reversed a preliminary injunction granted by the lower court. *Munaf*, 553 U.S. at 705. The lower court granted the relief because the movant raised issues sufficient for a fair ground for litigation and showed it would suffer irreparable harm absent relief. *Omar v. Harvey*, 479 F.3d 1, 11-12 (D.C. Cir. 2007), *vacated*. This Court reasoned a difficult question sufficient for a fair ground "is no reason to grant a preliminary injunction." *Munaf*, 553 U.S. at 690-91.

3. Critics of this precedent ignore similar equitable principles and standards.

Critics would further point out how this Court referred to these elements in *Winter* as factors. True, this Court referred to the elements as "factors." *See e.g.*, 555 U.S. at 26, 31. Understandably, this creates an impression these parts are of "indeterminate or commensurable weight" for granting equitable relief. *Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 256 (2016) (clarifying parts of plaintiff's burden for equitable tolling relief as elements). But this Court commonly refers to independent elements as factors in similar matters of equitable relief. *See Monsanto Co. v Geertson Seed Farms*, 561 U.S. 139, 162-63 (2010); *see also Nken v. Holder*, 556 U.S. 418, 434-36 (2009).

In *Monsanto*, this Court reversed and vacated a permanent injunction. 561 U.S. at 166. A movant's burden to obtain permanent injunctive relief is to satisfy a "traditional four-factor test" that is "essentially the same" as a preliminary injunction. 561 U.S. at 162; *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n. 12 (1987). This Court faulted the Ninth Circuit's conclusion on a single "factor"–irreparable harm–and reversed because the four-factor test was thus unsatisfied. 561 U.S. at 162.

This lexicon extends to stays, another form of equitable relief closely related to preliminary injunctions. *Nken*, 556 U.S. at 433-34. In *Nken*, this Court applied another–but very similar–traditional "four-factor" standard in vacating the lower court's denial of a stay of removal in an immigration case. *Id* at 434. The analysis, much like that for preliminary and permanent injunctions, delineated the first two elements by proceeding to assessing government harm and public interest consideration after finding the movant "satisfie[d] the first two factors." *Id*. Absent meeting either of the first two "factors", no need for further analysis exists. *Id*.

Fair ground proponents also argue nothing in *Winter* abrogates the standard and, were it to do so, would unjustly restrict a court's discretion in exercising its equitable powers. *Winter*, 555 U.S. at 391-92 (Ginsburg, J., dissenting) ("This Court has never rejected the [fair grounds] formulation, and I do not believe it does so today."). With all due regard to the late Justice, this conclusory statement ignores the opinion's plain meaning and grammatical structure already reviewed. Moreover, this statement contradicts her concurrence with the standard despite dissenting in the outcome. *See Grupo Mexicano*, 527 U.S at 340 (Ginsburg, J., concurring in part, dissenting in part) (explaining questionable claims and mere speculations of injury are insufficient for each "criterion."). And a court's equitable discretion is in its judgment, not preferences, which must be grounded in sound legal principles and standards. *Id* at 434.

Accordingly, none of these objections or criticism detracts from the conclusion that this Court has abrogated the fair ground standard.

As such, this Court expressly abrogated the fair ground standard in *Winter*. The plain meaning of this Court's words–for which we presume their express meaning–makes this the only possible conclusion. Moreover, this Court's construction of the *Winter* rule so reinforces. And this Court's reversal for the movant's failure on a single element is dispositive.

C. The *Winter* standard reflects traditional principles of equity.

Federal courts possess jurisdiction in "…all Cases, in Law and in Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made…" U.S. Const. art. III § 2. The court's equity jurisdiction includes the ability to enjoin a party upon motion and notice before full fact discovery and adjudication on the merits, or to deny such motion in the alternative. Fed. R. Civ. P. 65; *Ex parte Young*, 209 U.S. 123, 155-56 (1908). Like

other equitable relief, this Court and all other federal courts rely on traditional equity principles in determining both the availability of injunctive relief and the movant's substantive burden. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) (per curiam). Traditional equity principles are those Congress "borrowed in conferring equitable powers on the federal courts" from the English Court of Chancery at the time of the Judiciary Act of 1789. *Id* at 318, 327-28; *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14 (1982).

II. This preliminary injunction is improper and warrants *vacatur*.

This Court should reverse and vacate the extraordinary and drastic injunction imposed upon Petitioner. First, this injunction issues under the incorrect legal standard and in violation of circuit law. Second, the injunction fails under any legal standard on the merits because there is no irreparable harm, the balance of equities and public interest tip decidedly toward Petitioner, and Respondent cannot show even a scintilla of likelihood of success on the merits.

A preliminary injunction is an extraordinary and drastic form of equitable relief granted only after proper notice and upon the movant's clear demonstration of its entitlement thereto. Fed. R. Civ. P. 65(a); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008). No movant has a right to a preliminary injunction. *Winter*, 555 U.S. at 24. A court that grants a movant's request for a preliminary injunction impacts the parties' rights and obligations "through judicial fiat" prior to a full discovery of facts and other due process protections. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 331 - 32 (1999).

A. The injunction issued under an incorrect standard.

The district court enjoined Petitioner after finding the Respondent satisfied the fair grounds standard for both the Equal Protection and Due Process claims. Both findings are improper. This Court has expressly held the drastic and extraordinary nature of a preliminary injunction warrants a standard more stringent than the fair grounds standard. But not withstanding this question, the lower courts issued the injunction in conflict with their own precedent. Under Fifteenth Circuit precedent, Respondent assumed a higher burden of persuasion for two separate reasons. First, Respondent sought to enjoin a government act. Second, Respondent sought a disfavored type of preliminary injunction. These legal errors alone warrants *vacatur*.

1. This Court has repeatedly invalidated the Fifteenth Circuit's adopted standard.

A preliminary injunction is an extraordinary and drastic remedy never given as a right. *Winter*, 555 U.S. 7, 24. The lower courts in the instant matter follow the Second Circuit's approach in reviewing motions for preliminary injunctions. *Mariano v. Nardini*, Case No. 21-cv-12120, slip op. at 9 (D. Lincoln, Dec. 16, 2021). Thus, current law of the Fifteenth Circuit is described below.

The Second Circuit has "repeatedly" held a district court may grant a preliminary junction when the movant satisfies one of two standards of varying rigor one it demonstrates irreparable harm would result absent injunctive relief. *Trump v. Deutsche Bank AG*, 943 F.3d 627, 635-37 (2d Cir. 2019) (*rev'd on other grounds*). Under the more rigorous standard, a movant must demonstrate it is likely to succeed in its case on the merits. *Id*. But a failure here does not doom a movant's preliminary junction request. Alternatively, a court may also grant a preliminary junction under a "less rigorous standard" that merely requires a movant to demonstrate its claim poses "sufficiently fair grounds going to the merits to make them a fair ground for litigation, and

a balance of hardships tipping decidedly in the movant's favor." *Id* at 635. A court may grant a preliminary injunction when the movant satisfies one of these two standards. *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34-36 (2d Cir. 2010).

To be sure, the district court and the Fifteenth Circuit granted and affirmed, respectively, respondent's preliminary injunction motion under the less-stringent fair grounds standard. The district court applied the four "elements" of the fair grounds standard to grant injunctive relief. R. at 12. As the final element, the court "…consider[ed] whether [the Marianos] have raised sufficiently serious questions going to the merits." *Id* at 13. Regarding Due Process protections of experimental treatment access, the court concluded "the Marianos have shown at least that this issue is in sharp dispute." *Id* at 14. The court doubled down and "found a serious question whether the Act criminalizes a widely-accepted course of medical treatment…preventing parents from exercising their fundamental rights to obtain that treatment for their child." *Id* at 16. Later, the court found the plaintiffs "have raised serious questions regarding whether the SAME Act…would unconstitutionally infringe their fundamental Substantive Due Process rights to direct the medical care of their child." *Id* at 17. To close, the court found plaintiffs "ha[ve] raised serious questions regarding whether he is likely to succeed on his Equal Protection claim" and granted the injunction "[f]or all of the foregoing reasons…"*Id* at 21-22.

As discussed above, this Court has repeatedly found the fair grounds standard lacking. Despite this precedent, the Fifteenth Circuit applied this standard.

2. The fair grounds standard is insufficient to enjoin government action.

Enjoining state government action requires a court to interfere with "reasoned democratic processes", infringes on federalism principles, blurs separation of powers, and raises risks to public interests. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Able*, 44 F.3d at 131. These concerns and risks warrant judicial deference. *Id*. Requiring a higher showing from a movant allows that deference. *Id*. As such, the Second Circuit requires one seeking a preliminary injunction against government action taken "pursuant to a statutory or regulatory scheme" to satisfy the traditional standard this Court reinforced in *Winter*. *Deutsche Bank*, 943 F.3d 627 (quoting *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 580-81 (2d Cir. 1989) (quotations marks omitted)). Circuits adopting the Second Circuit's jurisprudence also adopt this rule. *D.M.*, 917 F.3d at 1000 (Eighth Circuit); *accord Nova Health*, 460 F.3d at 1303 (Sixth Circuit). A movant fails to meet its burden by merely satisfying the fair grounds standard. *Deutsche Bank*, 943 F.3d 627.

A case from an adopting circuit clearly illustrates this rule. The Eight Circuit Court of Appeals vacated a preliminary injunction against enforcement of a state statute alleged to infringe on the First Amendment under 42 U.S.C. § 1983. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 738 (8th Cir. 2008). The district court granted plaintiff's motion for preliminary injunction against enforcement of § 34-23A-10.1 of the South Dakota Codified Laws. 530 F.3d at 726. This statute strengthened procedural requirements for informed consent to an abortion. *Id*. The district court enjoined South Dakota upon finding the plaintiffs met their burden under the fair grounds standard. *Id* at 729 (Plaintiffs "had a fair chance of success on its claim that § 7(1)(b) violated physicians' free speech rights and that the balance of harms favored Planned Parenthood.")

The Eighth Circuit found the district court erred by enjoining South Dakota under the incorrect, less-vigorous legal standard. 530 F.3d at 731-32, 738. The Court of Appeals emphasized "…where a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the less rigorous fair-ground-for-litigation standard should not be applied." *Id* at 731 (citations and internal quotation marks omitted). The Eighth Circuit vacated. *Id* at 738.

In this case, the preliminary injunction suffers the same fatal flaw. The district court applied the wrong legal standard to Respondent's Equal Protection and Due Process claims. Respondent and the plaintiff in *Rounds* both filed the respective actions under 42 U.S.C. § 1983, alleging state infringement of constitutional rights. Both Respondents and the plaintiff in *Rounds* sought to enjoin the government act of enforcing a duly-enacted state statute. This district court enjoined the State of Lincoln under the same fair grounds standard as the *Rounds* district court enjoined the State of South Dakota. And both the Fifteenth Circuit and the Eighth Circuit adopted the Second Circuit standards for preliminary injunctions. The Eighth Circuit's reasoning in vacating the injunction in *Rounds* makes inevitable only one conclusion. The district court in this case applied the incorrect legal standard and, thus, erred.

The court's cited precedent does not ameliorate this error. Both cases involved litigation between commercial entities. *Citigroup Global*, 598 F.3d at 32; *Louboutin*, 696 F.3d at 212 - 213. The parties in *Citigroup Global* were a hedge fund and a subsidiary of a publicly-traded bank. 598 F.3d at 32. *Louboutin* was a trademark dispute case involving two high-end fashion companies. 696 F.3d at 212 - 213. Neither involved any level of government. Both cases are inapposite and, thus, do nothing to lessen the error.

3. The district court's defense misses the point.

The district court vigorously defended its use of the fair grounds standard in granting the injunction. R. at 9-10. But this defense omitted the lede. The district court opined nothing in *Winter* abrogated the fair grounds standard. R. at 8-9. Even preceding *Winter*, the Second Circuit and adopters of its jurisprudence held a movant can not enjoin government acts when it merely satisfies the fair grounds standard. *See, e.g., Rounds*, 530 F.3d at 738. The relevant factor is not the impact of *Winter*, rather the nature of the party and act to be enjoined. As such, the district court's defense is irrelevant.

B. Whether gender-transition treatments are appropriate and safe is uncertain and, therefore, the Court must defer to the judgments of legislatures.

The U.S. Constitution authorizes the states to "guard and protect" the "safety and health of the people." *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 38 (1905); *Food & Drug Admin. v. Am. Coll. of Obstetricians & Gynecologists,* 141 S. Ct. 10, 12 (2020). This Court recently clarified that the "normal rule" is for courts to defer to the judgments of legislatures "in areas fraught with medical and scientific uncertainties." *Dobbs v. Jackson Women's Health Org.,* 142 S. Ct. 2228, 2268 (2022); *see also Marshall v. United States,* 414 U.S. 417, 427 (1974). The Constitution grants legislatures "especially broad latitude" in such instances. *Marshall,* 414 U.S. at 427. Where legislative decisions are broad involving areas fraught with medical and scientific uncertainties, this Court determined that those decisions "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to access public health and is not accountable to the people." *Food & Drug Admin.,* 141 S. Ct. at 12.

1. Courts should not conflate "gender" and "sex" when the medical community, scientific community, and transgender advocacy groups agree that "gender" and "sex" are distinct.

Gender is undoubtedly a psychological, behavioral, social, and cultural construct that is not constrained by or conditioned upon one's assigned sex. The American Psychiatric Association defines "gender" as two components: gender identity and gender expression.[3] "Gender identity" is a person's "psychological sense of their gender."[4] "Gender expression" is "conveyed through appearance (e.g., clothing, make-up, physical features), behaviors, and personality styles."[5]

"Gender dysphoria" is a condition in which a person suffers "psychological distress that results from an incongruence between one's sex assigned at birth and one's gender identity."[6] "Dysphoria" means unhappiness, uneasiness, and dissatisfaction. DYSPHORIA, Merriam-Webster. "Gender dysphoria" describes a sense of unease or dissatisfaction over a perceived mismatch between biological sex and gender identity.[7]

In contrast, Sex undoubtedly refers to the biological and physiological characteristics of males and females, including reproductive organs, chromosomes, and hormones. Sex is a determination based on a biological construct defined on an anatomical, hormonal, or genetic

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[3] *What is Gender Dysphoria?,* American Psychiatric Association, (Aug. 2022), https://psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

[4] *Ibid*.

[5] *Ibid*.

[6] *Ibid*.

[7] *Overview: Gender dysphoria,* National Health Service, (May 28, 2020), https://tinyurl.com/yx553d72.

basis with the sex assigned at birth based on external genitalia.[8] Numerous health and transgender advocacy groups agree with this distinction between gender and sex. They include the Canada Institutes of Health Research,[9] the National Institutes of Health,[10] Planned Parenthood,[11] the Gay & Lesbian Alliance Against Defamation,[12] the World Health Association,[13] the Council of Europe,[14] the European Institute for Gender Equality,[15] and others. All define "gender" as a person's "internal sense"[16] and a "social," "psychological," "behavioral," and "cultural" construct.[17] They explain how gender is fluid and can change over time as societal expectations about behaviors, characteristics, and thoughts change.[18]

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[8] Science Direct, *supra* note 1.

[9] *What is gender? What is sex?,* Canadian Institutes of Health Research, (Apr. 28, 2020), https://cihr-irsc.gc.ca/e/48642.html.

[10] Susan E. Short, PhD, Yang Claire Yang, PhD, & Tania M. Jenkins, MA, *Sex, Gender, Genetics, and Health,* 103 (Suppl 1) Am J Public Health S93 (2013).

[11] *Sex and Gender Identity,* Planned Parenthood, https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity (last visited Sept. 11, 2022).

[12] *Glossary of Terms: LGBTQ,* Gay & Lesbian Alliance Against Defamation, https://www.glaad.org/reference/terms (last visited Sept. 11, 2022).

[13] *Gender and health,* World Health Association, https://www.who.int/health-topics/gender#tab=tab_1 (last visited Sept. 11, 2022).

[14] *Sex and gender,* Council of Europe, https://www.coe.int/en/web/gender-matters/sex-and-gender (last visited Sept. 11, 2022).

[15] *Sex,* European Institute for Gender Equality, https://eige.europa.eu/thesaurus/terms/1361?lang=en (last visited Sept. 11, 2022).

[16] *Transgender FAQ, What does transgender mean?,* GLAAD, https://www.glaad.org/transgender/transfaq (last visited Sept. 11, 2022).

[17] Council of Europe, *supra* note 13.

[18] Canadian Institutes of Health Research, *supra,* note 8; *see also* Sabra L. Katz-Wise, PhD, *Gender fluidity: What it means and why support matters,* Harvard Health Publ'g, Harvard Med. Sch., (December 3, 2020), https://www.health.harvard.edu/blog/gender-fluidity-what-it-means-and-why-support-matters-2020120321544.

Even groups cited by the Respondents, such as the American Medical Association, agree with these definitions and affirm that gender is a person's psychological manifestation of self-perceptions, attitudes, and expectations.[19] The World Professional Association for Transgender Health published in its *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* that gender identity is a person's intrinsic sense of being male, female, or an alternative gender.[20] The Endocrine Society claims that gender identity is a person's internal sense of being a boy, girl, neither, or both.[21] The American Academy of Pediatrics agrees that gender identity is a person's deep internal sense of being female, male, a combination of both, somewhere in between, or neither, resulting from a multifaceted interaction of biological traits, environmental factors, self-understanding, and cultural expectations.[22]

The same organizations agree that "sex" refers to biological distinctions, both external and internal, between males and females.[23] The World Professional Association for Transgender Health states that sex is assigned at birth as male or female, usually based on the appearance of the external genitalia.[24] According to the American Academy of Pediatrics, sex is an assignment that is made at birth, usually male or female, typically based on external genital anatomy but

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[19] Jennifer Tseng, *Sex, Gender, and Why the Differences Matter,* The AMA J. of Ethics, (July 2008), https://journalofethics.ama-assn.org/article/sex-gender-and-why-differences-matter/2008-07.

[20] *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People,* The World Professional Association for Transgender Health, 96 (7th Version 2011).

[21] *Transgender and Gender Diverse Children and Adolescents,* The Endocrine Society, (January 4, 2022), https://www.endocrine.org/patient-engagement/endocrine-library/transgender-and-gender-diverse-children-and-adolescents.

[22] Jason Rafferty, MD, et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents,* 142(4) Pediatrics e20182162, (2018).

[23] Council of Europe, *supra* note 13.

[24] European Institute for Gender Equality, *supra* note 14.

sometimes based on internal gonads, chromosomes, or hormone levels.[25] Planned Parenthood asserts that sex is a label — male or female —assigned by a doctor at birth based on medical factors including hormones, chromosomes, and genitals.[26] Even Justice Ginsburg affirmed that "physical differences between men and women…are enduring." *United States v. Virginia,* 518 U.S. 515, 533 (1996). Gender identity clearly is not restricted by or conditioned upon one's assigned sex. Gender and sex are distinct.

2. The medical and scientific communities are uncertain whether the potentially irreparable physiological transformation of biological sex organs to treat gender dysphoria in minors is appropriate and safe.

Recently, an Arizona district court relied on an opinion from the United Kingdom's High Court of Justice in which the court reviewed a National Health Service clinic's practice of prescribing puberty-suppressing medications to individuals under the age of eighteen with gender dysphoria. *Hennessy-Waller v. Snyder,* 529 F. Supp. 3d 1031, 1042 (D. Ariz. 2021). The Court in *Bell v Tavistock and Portman NHS Foundation Trust*, [2020] EWHC 3274 considered the issue of consent, stating that "the degree to which the treatment is experimental and has, as yet, an unknown impact, does go to the critical issue of whether a young person can have sufficient understanding of the risks and benefits to be able lawfully to consent to that treatment." *Tavistock,* [2020] EWHC 3274 at ¶ 151. The court concluded that "there is *real uncertainty* over the short and long-term consequences of the treatment with very limited evidence as to its efficacy, or indeed quite what it is seeking to achieve…this means it is, in our

[25] Jason Rafferty, MD, et al., *supra* note 21.

[26] Planned Parenthood, *supra* note 10.

view, properly described as experimental treatment." *Id.* at ¶ 134 (emphasis added). The court continued, "the consequences of the treatment are highly complex and potentially lifelong and life changing in the most fundamental way imaginable." *Id.*

The National Health Service subsequently commissioned an independent review to make recommendations regarding the services provided to children and young people who are exploring their gender identity or experiencing gender incongruence.[27] The review found that "the administration of puberty blockers is arguably more controversial than administration of the feminising/masculinising hormones, because there are more *uncertainties* associated with their use" (emphasis added).[28] The review presented arguments for starting puberty blockers at older ages to allow children and young people time to achieve fertility and, in the case of males, time to achieve adequate penile growth for successful vaginoplasty.[29] The National Health Service shuttered the clinic after the review found the practice was "not safe" for children.[30]

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[27] *Independent review into gender identity services for children and young people,* National Health Service, https://tinyurl.com/2p9y2tjy (last visited Sept. 11, 2022).

[28] *Independent review of gender identity services for children and young people: Interim report,* The Cass Review, 37 (2022).

[29] *Ibid*.

[30] Haley Dixon, *Tavistock transgender clinic shut down by NHS after review finds it is 'not safe' for children,* The Telegraph (July 28, 2022), https://www.telegraph.co.uk/news/2022/07/28/tavistock-transgender-clinic-shut-nhs-review-finds-not-safe/.

a. **The medical community's reclassification of gender identity disorder as gender dysphoria is suspect.**

Historically, the medical community classified gender dysphoria as a disorder, originally identified as "gender identity disorder.[31]" A diagnosis of gender dysphoria requires the presence of specific signs and symptoms, the foremost being distress stemming from an incongruence between a person's experienced gender and assigned sex.[32] The gender identity disorder diagnosis created controversy in the transgender community causing advocates to argue that the diagnosis "pathologizes a natural form of gender variance, reinforces the binary model of gender, and can result in stigmatization of transgender individuals."[33] The American Psychiatric Association responded to advocacy efforts by reclassifying gender dysphoria to apply "only to the discontent experienced by some persons resulting from gender identity issues, rather than suggesting that their identity is disordered."[34]

However, gender dysphoria remains a diagnosable psychiatric disorder in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.[35] Advocates have a vested interest in continuing to classify gender dysphoria as a diagnosable psychiatric disorder ensuring the willingness of some commercial insurance companies to cover expenses

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[31] Jack Drescher, *Controversies in Gender Diagnoses,* 1(1) LGTB Health 10, (2022).

[32] Jason Rafferty, MD, et al., *supra* note 21.

[33] *Ibid*.

[34] *Ibid*.

[35] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).

related to gender-affirming treatments.[36] Without classifying gender dysphoria as a medical disorder, insurance companies may consider gender-affirming surgery a cosmetic treatment."[37]

b. **The diagnosis of gender dysphoria and treatments considered by some medical experts to be "appropriate" and "safe" for minors are controversial.**

The treatment of extremely gender variant minors remains controversial because "some underlying assumptions of the treating clinicians are a matter of opinion rather than of empirical data."[38] The medical community first classified gender dysphoria as a diagnosable psychiatric disorder, focusing on identity rather than the symptoms. Under pressure from advocacy groups over social stigmas, the medical community revised the classification by limiting the diagnosis to symptoms rather than the root condition to normalize what the medical community originally considered an abnormality.

Conflicting with the effort to normalize gender dysphoria is the desire by transgender advocates, parts of the medical community, and Respondents to justify treatments designed to produce a potentially irreparable physiological transformation of biological sex organs to alleviate symptoms and "affirm" one's perceived gender identity. Advocates view the treatments as "innovative."[39] This perception, however, has developed through "a dearth of, or the contested

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[36] *Know Your Rights in Health Care,* National Center for Transgender Equality, (October 2021), https://transequality.org/know-your-rights/health-care.

[37] Alex Dubov, PhD & Liana Fraenkel, MD, MPH*, Facial Feminization Surgery: The Ethics of Gatekeeping in Transgender Health,* 18(12) Am. J. Bioeth. 3 (2018).

[38] Jack Drescher, *supra* note 30.

[39] Michelle M. Taylor-Sands & Georgina Dimopoulos, *Judicial Discomfort Over 'Innovative' Treatment for Adolescents with Gender Dysphoria,* 30 Med. Law Rev. 479, 487 (2022).

nature of, expert or scientific evidence regarding the nature, risks, and long-term impacts of treatment."[40] The treatments lack a "clear or consistent line of medical authority" and "longitudinal data" to "support long-term efficacy."[41]

c. **The medical community treats gender dysphoria differently than other abnormal psychological conditions.**

The only analogous field of medicine which treats abnormal psychological conditions with physiological alterations is psychosurgery, also called functional neurosurgery for psychiatric disorders or psychiatric neurosurgery.[42] Psychosurgery was controversial from its origins and remains so today under the stigma of doubts about its usefulness and ethical questions.[43] Today, psychosurgery is not a common practice.[44]

An analogous disorder to gender dysphoria is body dysmorphia. Body Dysmorphic Disorder is a mental health condition in which a person cannot stop thinking about one or more perceived defects or flaws in appearance when that perceived flaw is either unnoticeable by others or does not exist.[45] Body dysmorphia often develops in adolescents and teens, affects men

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[40] *Ibid*.

[41] *Ibid*.

[42] J. N. Missa, *Psychosurgery and Physical Brain Manipulation,* Encyclopedia of Applied Ethics, (2nd ed. 2012).

[43] *Ibid*.

[44] *Ibid*.

[45] *Body dysmorphic disorder,* Mayo Clinic (Mar. 19, 2022), https://www.mayoclinic.org/diseases-conditions/body-dysmorphic-disorder/symptoms-causes/syc-20353938.

and women almost equally, and presents with symptoms of depression and suicidal tendencies.[46] Between twenty-four and twenty-eight percent of individuals with body dysmorphic disorder have attempted suicide.[47] Comparably, thirty percent of youth with gender dysphoria attempt suicide.[48] The causes of body dysmorphia are certain biological and environmental factors including genetic predisposition, neurobiological factors, personality traits, and life experiences.[49]

Two common presentations of body dysmorphia are anorexia nervosa and bulimia nervosa. Anorexia, a condition in which people severely reduce their food intake to lose weight, arises from a distorted body image often resulting from emotional trauma, depression, or anxiety.[50] Bulimia is a similar condition in which people eat excessively in a short period of time and subsequently purge or use other methods to prevent weight gain.[5150] The standard of care for treating body dysmorphia, including anorexia and bulimia, consists of cognitive behavioral therapy and psychotropic medications to treat the underlying disorder.[52] No medical authority would tolerate treatments that cause physiological transformations, such as the prescription of

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[46] *Body Dysmorphic Disorder,* Anxiety & Depression Association of America, https://adaa.org/understanding-anxiety/body-dysmorphic-disorder (last visited Sept. 11, 2022).

[47] Katharine A. Phillips, *Suicidality in Body Dysmorphic Disorder,* 14 Prim. Psychiatry 58 (2007).

[48] Claire M. Peterson, Abigail Matthews, Emily Copps-Smith, & Lee Ann Conard, *Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria,* 47 Suicide and Life-Threatening Behavior 475 (2017).

[49] *Ibid*.

[50] *Anorexia vs. Bulimia: What's the Difference?,* Healthline, (Sept. 18, 2018), https://www.healthline.com/health/eating-disorders/anorexia-vs-bulimia.

[51] *Ibid*.

[52] *Body Dysmorphic Disorder,* Johns Hopkins Medicine, https://tinyurl.com/3uvd8hdt (last visited Sept. 11, 2022).

weight loss pills or bariatric surgery, to "affirm" body dysmorphia. Such a practice would violate medical standards of care; yet, Respondents seek treatments that cause physiological transformations for adolescents to "affirm" what the medical community originally identified as a psychological disorder.

The medical community is conflicted in its conclusions regarding the appropriateness and safety of gender-transition treatments for minors. Gender dysphoria—a condition deserving of continued research and medical attention—is a psychiatric, social, cultural, and behavioral construct. Providing treatments that cause physiological change to biological sex organs to minors does not align with the standard of care for analogous psychiatric conditions. Actions by portions of the medical community to discontinue the gender identity disorder diagnosis and instead focus on the symptoms by reclassifying the condition as gender dysphoria give the appearance of acquiescence to transgender advocacy efforts to normalize the condition. At best, gender-transition treatments for minors are controversial, and some experts claim they are experimental. It is under this rationale that the Court should analyze Respondents' equal protection and substantive due process claims.

3. The SAME Act does not create a "special disability" in minors.

The Circuit Court claimed that the SAME Act imposes a "special disability" by denying children with gender dysphoria "access to medical and surgical treatments that are not denied to children who do not seek treatment for gender dysphoria." R. at 27. The Circuit Court reasoned that "this is the type of special disability that would prompt the Supreme Court to apply heightened review." *Id.* This Court has only described "special disabilities" in cases involving religious status, national origin, sex or racial discrimination, and freedom of the press. None of those circumstances are present in the case before this Court.

This Court has addressed "special disabilities" in twelve cases since 1958. The majority of cases involved religious status. *See Espinoza v. Montana Dep't of Revenue,* 140 S. Ct. 2246, 2254 (2020), *Morris Cnty. Bd. of Chosen Freeholders v. Freedom From Religion Found.,* 139 S. Ct. 909, 910 (2019), *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012, 2019 (2017), *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993), *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith,* 494 U.S. 872, 877 (1990). Two cases involved national origin. *See Toll v. Moreno,* 458 U.S. 1, 23-4 (1982), *Plyler v. Doe,* 457 U.S. 202, 224 (1982). One case involved freedom of the press. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 582 (1980). Another case involved racial discrimination. *Evers v. Dwyer,* 358 U.S. 202, 204 (1958). The facts of each case distinguish them from the case before this Court.

In *Craig v. Boren,* a case about sex discrimination, J. Stevens reasoned in a footnote to his concurrence that "the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to responsibility…'." 429 U.S. 190, 212 n.2 (1976) (Stevens, J.) (a classification is objectional because it is based on an accident of birth). J. Stevens referenced two U.S. Supreme Court opinions. First, this Court asserted that "imposing disabilities on [an] illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber v. Aetna Cas. & Sur. Co.,* 406 U.S. 164, 175 (1972) (no child is responsible for their birth). Second, this Court determined that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens

should bear some relationship to individual responsibility." *Frontiero v. Richardson,* 411 U.S. 677, 686 (1973). This Court continued by affirming that "the sex characteristic frequently bears no relation to ability to perform or contribute to society" and that "differentiates sex from such non-suspect statuses as intelligence or physical disability." *Id.*

In contrast, the SAME Act does not discriminate based on sex. No evidence supports the notion that children are born with gender dysphoria. Rather, gender dysphoria is a psychological, behavioral, social, and cultural construct that is not constrained by or conditioned upon one's assigned sex at birth. *See infra* note 16. Attempts to normalize the underlying condition of gender identity disorder and instead affirm the underlying condition through treatment of gender dysphoria may give rise to legal burdens that bear some relationship to individual responsibility or wrongdoing.

Moreover, the SAME Act does not restrict children with gender dysphoria from accessing the same medically appropriate and safe treatments available to other children—such as those suffering from body dysmorphia—including cognitive behavioral therapy and psychotropic medications. Furthermore, the Act *does* prohibit access to treatments for a child who *does not* suffer from gender dysphoria but for some alternative reason seeks treatments intended to instill or create physiological or anatomical characteristics that resemble a sex different from their biological sex.

C. Respondents are unlikely to prevail on their Equal Protection claim.

The SAME Act does not involve "fundamental rights" nor does it "proceed along suspect lines;" therefore, the Act "is accorded a strong presumption of validity.

Heller v. Doe ex rel. Doe, 509 U.S. 312, 319 (1993). The Act distinguishes based on age and medical treatment. Neither is a suspect or quasi-suspect classification recognized by the courts. *Gallagher v. City of Clayton,* 699 F.3d 1013, 1018 (8th Cir. 2012); *see Clark v. Jeter,* 486 U.S. 456, 461 (1988). To assert an equal protection claim, Respondents must demonstrate that the Act discriminates based on sex or transgender status. The SAME Act does neither.

1. The SAME Act is subject to rational basis review.

The SAME Act classifies based on age and medical treatment, not transgender status or sex. Neither age nor medical treatment is a suspect or quasi-suspect classification recognized by the courts. *See Clark v. Jeter,* 486 U.S. 456, 461 (1988). Because neither age nor medical treatment is a suspect or quasi-suspect classification that triggers heightened scrutiny, rational basis review applies.

a. **The SAME Act classifies based on age.**

This Court has repeatedly stated that "age is not a suspect classification under the Equal Protection Clause." *Gregory v. Ashcroft,* 501 U.S. 452, 470 (1991); *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 63 (2000); *Vance v. Bradley,* 440 U.S. 93, 97 (1979). The SAME Act clearly distinguishes those subjected to the regulations as persons under the age of eighteen. 20 Linc. Stat. § 1203. The Act does not prohibit any persons eighteen and older from undergoing gender-transition treatments. Furthermore, the Act does not prohibit any healthcare provider from prescribing or providing gender-transition treatments for adults eighteen and older.

b. **The SAME Act classifies based on medical treatments.**

This Court clearly articulated that a person seeking a specific medical treatment does not constitute a protected class. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 269

(1993) ("'Women seeking abortion" is not a qualifying class" in the context of class-based discrimination). The SAME Act defines prohibited treatments as those for which the intent is "instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." 20 Linc. Stat. § 1203. The Act specifically references "prescribing or administering puberty blocking medication to stop or delay normal puberty." *Id.* Contrary to the Circuit Court's finding, minors suffering from gender dysphoria may seek safe, alternative forms of treatment. These include behavioral health treatments such as counseling to improve psychological well-being and psychotropic medications. Minors may also seek nonmedical options including clothing choice, hairstyles, makeup, voice therapy, hair removal, breast binding or padding, and penis tucking or packing.

The State in no way asserts a duty or interest in regulating a person's gender identity or transgender status. Homosexuality and transgender status are distinct concepts from sex. *Bostock v. Clayton Cnty., Georgia,* 140 S. Ct. 1731, 1746–47, (2020). The *Bostock* Court stated that discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex. *Id.* Here, the Act does not discriminate based on homosexuality or transgender; therefore, the Act does not necessarily discriminate based on sex. Therefore, sex discrimination is not inherent in the State's desire to regulate gender-transition treatments for minors.

2. The SAME Act satisfies rational basis review.

The SAME Act is subject to rational basis review; therefore, "if any state of facts reasonably may be conceived to justify" it, the Act is constitutional. *McGowan v. State of Md.,* 366 U.S. 420, 81 (1961); *see also, Armour v. City of Indianapolis, Ind.,* 566 U.S. 673, 681 (2012). The Act must only be "rationally related to a legitimate state interest." *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 83 (2000). Respondents do not dispute that the State has a legitimate interest in

protecting minors and safeguarding the practice of medicine. *See Reno v. Am. C.L. Union,* 521 U.S. 844, 869 (1997) (there is a compelling interest in protecting the physical and psychological well-being of minors); *Washington v. Glucksberg,* 521 U.S. 702, 731 (1997) (the State has an interest in protecting vulnerable groups); *Gonzales v. Carhart,* 550 U.S. 124, 157 (2007) (the government has an interest in protecting the integrity and ethics of the medical profession).

3. Even if the SAME Act were subject to strict scrutiny, the Act would survive.

Courts cannot usurp the State's compelling governmental interests of protecting children and safeguarding the practice of medicine by claiming the balance of interests when the interest is controversial and ambiguous. *Marshall v. United States,* 414 U.S. at 427. The SAME Act is "substantially related" to the State's "important governmental objectives" of protecting children and safeguarding the practice of medicine. *United States v. Virginia,* 518 U.S. 515, 524 (1996); see also *Reno v. ACLU,* 521 U.S. 844, 869 (1997) (there is a compelling interest in protecting the physical and psychological well-being of minors). The State has an interest in protecting children from abuse, neglect, and mistakes. *Washington v. Glucksberg,* 521 U.S. 702, 731 (1997). This interest includes ensuring that children "exercise their rights wisely." *Hodgson v. Minnesota,* 497 U.S. 417, 419 (1990). From this interest in protecting children from harm arises the State's justification to impose "restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible." *Planned Parenthood of Cent. Missouri v. Danforth,* 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part).

Moreover, "there can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession."' *Gonzales v. Carhart,* 550 U.S. 124, 157 (2007) (quoting *Glucksberg,* 521 U.S. at 731). The State has the authority and power to regulate, reasonably and rationally, all facets of the medical field, even to excluding certain professions or

specialists or schools…by expressly outlawing them." *England v. La. State Bd. of Med. Examiners,* 263 F.2d 661, 674 (5th Cir. 1959); *see also Barsky v. Bd. of Regents of Univ.,* 347 U.S. 442, 449 (1954) (A state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there, and such power is a vital part of the state's police power).

a. **Health care providers use hormones in treating central precocious puberty and subnormal hormone levels to promote the natural physiological development of biological sex organs, not to facilitate sex transitioning.**

The Circuit Court failed to acknowledge that the context here is that of a minor physiologically transitioning from one sex to another and not simply delaying natural physiological development when it rationalized that puberty-blocking is not experimental when used to treat central precocious puberty. R. at 15. Likewise, treating minors with sex hormone therapies designed to produce a potentially irreparable physiological transformation of biological sex organs to "affirm" an abnormal psychological condition is not analogous to using sex hormone therapies to treat subnormal hormone levels. The purpose of sex hormones in treating central precocious puberty and subnormal hormone levels is to promote the natural physiological development of biological sex organs, not to transition from one's natural sex to another.

Furthermore, gender-transition treatments do not treat the physical manifestation of a condition, as gender dysphoria has no direct physical manifestation. *See Tavistock,* [2020] EWHC 3274, ¶ 135. A child suffering from precocious puberty does experience physiological symptoms while a child suffering from gender dysphoria may present as physiologically normal. In such a case, gender-transition treatments would destroy the normal physiology of the body.

b. **The SAME Act does not prohibit minors from accessing all gender dysphoria treatments.**

The SAME Act prohibits gender-transition treatments for minors while maintaining access to safe, alternative options. When children undergo gender-transition treatments, including puberty-suppressing hormone therapy, the results on the body are substantially irreversible. *See Tavistock*, [2020] EWHC 3274, ¶ 137 ("[T]he use of puberty blockers is not itself a neutral process by which time stands still for the child on puberty blockers, whether physically or psychologically."). The *Tavistock* Court also identified that there is "very limited evidence as to its efficacy." *Id.* at ¶ 134. The court considered the combination of profound physical effects and limited evidence of benefit and determined that gender-transition treatments are "properly described as experimental treatment." *Id.*; *see also Hennessy-Waller,* 529 F. Supp. 3d at 1042 (although the *Tavistock* case did not involve surgery, the decision regarding puberty-suppressing medication being experimental suggests the irreversible surgery sought was also experimental).

D. Respondents are unlikely to prevail on their substantive due process claim.

Respondents Elizabeth and Thomas Mariano claim that Lincoln's SAME act violates their fundamental due process right to determine for themselves the proper medical care for their children under the Fourteenth Amendment. R. at 14. The Fourteenth Amendment prohibits state governments from depriving any person of "life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Respondents' substantive due process claim fails because, irrespective of the scrutiny applied by the Court, a fundamental right to gender-transition treatment does not exist.

1. The Constitution provides no fundamental right to gender-transition treatments for minors.

The Marianos cannot assert a fundamental right of access to gender-transition treatments for their minor child if that right does not exist for the child. The child has no claim to a fundamental right of affirmative access to gender-transition treatments. "The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Reno v. Flores,* 507 U.S. 292, 303 (1993). Furthermore, numerous federal courts have agreed that a fundamental right of access does not exist. *See, e.g., Abigail All. for Better Access to Developmental Drugs v. von Eschenbach,* 495 F.3d 695 (D.C. Cir. 2007) (terminally ill adult patients had no fundamental right protected by Due Process Clause to have access to investigational drugs); *Morrissey v. United States,* 871 F.3d 1260 (11th Cir. 2017) (an asserted right to reproduction assisted by IVF and surrogacy was not a fundamental right); *Raich v. Gonzales,* 500 F.3d 850, 864 (9th Cir. 2007) (there is no fundamental right to use marijuana to preserve bodily integrity, avoid pain, and preserve life); *Rutherford v. United States,* 616 F.2d 455, 456 (10th Cir. 1980) (terminally ill cancer patients had no affirmative right "to take whatever treatment they wished regardless of whether the FDA regarded the medication as 'effective' or 'safe").

2. Parents do not have an absolute right to access medical treatments for their children.

The Marianos do not have an unfettered right to access medical treatments for their child. The Sixth Circuit determined that parents have limited control over children "particularly in the

context of medical treatment." *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.,* 927 F.3d 396, 419 (6th Cir. 2019). Here, the Marianos' rights as parents are "derivative from, and therefore no stronger than" their child's claim. *Whalen v. Roe,* 429 U.S. 589, 604 (1977) (disposing of a patient's claim also disposes of a physician's derivative claim).

The Circuit Court cited *Parham v. J.R* in support of its reasoning that parents have a "fundamental right to obtain appropriate medical care for their child[ren]". R. at 25. Similarly, the lower court asserted that parents have the right to make decisions concerning the care of their children in *Troxel v. Granville,* 530 U.S. 57, 65-6 (2000) (plurality). R. at 14. Neither case supports the Marianos' claim.

The *Troxel* Court in no way provided a basis for granting authority to parents without limitation to subject their minor children to potentially irreparable gender-transition treatments. The subject statute in *Troxel* was "breathtakingly broad" and involved visitation rights asserted by "any person" at "anytime." *Troxel,* 530 U.S. at 67. Moreover, the *Troxel* Court evaluated a statute that presumed to altogether undermine a parent's authority over their child, distinguishing it from the present case.

Likewise, this Court stated in *Parham* that a child's rights are such that "parents cannot always have absolute and unreviewable discretion" over their child's treatment. While the lower courts asserted that the Court in *Parham* acknowledged a fundamental right of a parent to obtain medical treatment for a child, that right is limited. *Parham v. J. R.,* 442 U.S. 584, 604 (1979) (parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized). Furthermore, the question in *Parham* was whether parents have too much autonomy in making decisions for their children, not too little. *Id.* at 606-07. This Court determined that "the risk of error inherent in the parental decision to have a child

institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied." *Id.*

3. 3The SAME Act survives all levels of scrutiny.

As previously stated, the SAME Act is subject to rational basis review. However, even if strict scrutiny were appropriate, the SAME Act would survive. The State clearly demonstrates a compelling interest in protecting children and safeguarding the practice of medicine. *See, e.g., Gonzales,* 550 U.S. at 157; *Reno,* 521 U.S. at 869; *Glucksberg,* 521 U.S. at 731. Parental interest in access to gender-transition treatments for their minor children is "counterbalanced by the compelling governmental interest in the protection of minor children." *Southerland v. City of New York,* 680 F.3d 127, 152 (2d Cir. 2012).

Furthermore, the SAME Act is narrowly tailored. The Act only prohibits gender-transition treatments on minors intended to instill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex. 20 Linc. Stat. § 1203. Gender-transition treatments for minors are the only treatments that implicate the State's compelling interest. All other treatments remain accessible to minors. All treatments, including those banned for minors under the Act, remain available to persons over eighteen. The standard for strict scrutiny is less than "perfectly tailored." *Williams-Yulee v. Fla. Bar,* 575 U.S. 433, 454 (2015). Thus, the Act would survive strict scrutiny if it were the applicable standard and, therefore, also survives rational basis review.

E. Respondent can barely show a possibility of harm.

This Court has well established a movant cannot obtain a preliminary injunction by merely showing a possibility of irreparable harm under any legal standard. *Winter*, 555 U.S. at 22. In this case, Respondent can, at best, show a small possibility of harm. Accordingly, Respondent fails in this threshold question and warrants the *vacatur* of this injunction.

A harm is irreparable when it damages cannot properly compensate and is long-lasting or permanent. *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). As with every other element, the movant bears the burden of persuasion by a clear showing. *Winter*, 555 U.S. at 20.

1. Respondent cannot show any possibility of any harm because the statute does not apply.

Whether the SAME Act applies to Respondent, as alleged, draws a question of statutory interpretation. Statutes are, first and foremost, interpreted per their express terms. *United States v. Wells*, 519 U.S. 482, 490 (1997). The analysis need not continue beyond the express terms if resolved. *Id*.

Here, the Act's express terms are clear. The SAME Act bars interventions undertaken "for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." Purpose is "an aim" or an "intent." *Purpose*, Merriam-Webster Dictionary. Install means "to impart gradually." *Instill*, Merriam-Webster Dictionary. Impart is "to give." *Impart*, Merriam-Webster Dictionary. Create means "to bring into existence." *Create*, Merriam-Webster Dictionary.

None of these terms describe the aim or intent Respondent has in obtaining the treatments. Respondent is aiming to *prevent* or slow the development and growth of physical characteristics. This is the complete opposite of the Act's express language. Accordingly, the SAME Act does not apply to Respondent. And because the Act does not apply to Respondent, Respondent can not show even a scintilla of possible harm, much less likely irreparable harm.

F. The balance of equities and public policy interests clearly favor Petitioner.

The third and fourth elements of the *Winter* test a movant must clearly demonstrate is that the balance of equities tip decidedly in its favor and public policy favor the injunction. *Winter*, U.S. 555 at 32. The balance of equities assess the harm the movant would suffer absent relief versus the harm the non-movant would suffer were relief granted. 555 U.S. at 26-27. When the non-movant is the government, some jurisdiction merge these elements into one.

Respondent is unable to show even a scintilla of possibility of harm absent relief because the statute does not apply to Respondent's treatments. The purpose in Respondent's treatment are to prevent or slow the development of physical characters in accordance with Respondent's biological sex. These are in direct opposition to the proscribed purpose in the SAME Act. Because the SAME Act causes no harm to Respondent, no harm can be claimed absent injunctive relief.

On the other hand, Petitioner would be enjoined from enforcing its statute enacted through its democratic processes. An injunction harms Petitioner's ability to pursue its compelling interests in ensuring the safety and well-being of its citizens. Accordingly, the balance of equities and public policy interests are decisively in Petitioner's favor.

CONCLUSION

PETITIONER PRAYS THIS COURT FOR RELIEF FROM THE INSTANT INJUNCTION. AT MINIMUM, PETITIONER RESPECTFULLY REQUESTS THIS COURT VACATE AND REVERSE THIS INJUNCTION WITH THE CLEAR PRECEDENT THE FAIR GROUNDS STANDARD IS INVALID. THE INJUNCTION ISSUED UPON LEGAL ERROR AND INDISCRETION. BECAUSE THE DISPOSITIVE ISSUES PRESENTED ARE PREDOMINANTLY LEGAL ISSUE, PETITIONER FURTHER RESPECTFULLY REQUESTS THIS COURT DISMISS THIS CASE WITH PREJUDICE BECAUSE THE SAME ACT DOES NOT APPLY TO RESPONDENT'S TREATMENT. APPENDIX A

20-1201 Findings and Purposes

(a) Findings:

The State Legislature finds -

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

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

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

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

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

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

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

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

(b) Purposes:

It is the purpose of this chapter –

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

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

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

20-1202 Definitions

The Act defines –

(1) "Adolescent" as the phase of life between childhood and adulthood, from ages 9 to 18.

(2) "Healthcare provider" as a person or organization licensed under Chapters 15 and 16 of the Lincoln Code to provide healthcare services.

(3) "Puberty" as the time of life when a child experiences physical and hormonal changes that mark a transition into adulthood. The child develops secondary sexual characteristics and becomes able to have children.

(4) "Puberty blocking medication" as medications that prevent the body from producing the hormones that cause the physical changes of puberty.

(5) "Sex" as the biological state of being male or female, based on the individual's sex organs, chromosomes, and endogenous hormone profiles.

20-1203 Prohibition on Certain Gender Transition Treatments

No healthcare provider shall engage in or cause any procedure, practice or service to be performed upon any individual under the age of eighteen if the procedure, practice or service is performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex, including without limitation to:

(a) Prescribing or administering puberty blocking medication to stop or delay normal puberty.

(b) Prescribing or administering supraphysiologic doses of testosterone or other androgens to females or prescribing or administering supraphysiologic doses of estrogen to males.

(c) Performing surgeries that artificially construct genitalia tissue or remove any healthy or non-diseased body part or tissue, except for a male circumcision.

20-1204 Enforcement

(A) The attorney general may bring an action to enforce compliance with this chapter. Nothing in this chapter shall be construed to deny, impair, or otherwise affect any right or authority of the attorney general, the state, or any agency, officer, or employee of the state, acting under any provision of the Lincoln Code, to institute or intervene in any proceeding.

(B) Any healthcare provider found to have knowingly and willingly violated the provisions of the chapter shall have committed a class 2 felony punishable by civil fines up to and including $100,000 or imprisonment of not less than two years and not more than ten years.

20-1205 Unprofessional conduct of healthcare providers

Any provision of gender transition procedures prohibited by 20-1203 to a person under eighteen years of age shall be considered unprofessional conduct and shall be subject to discipline by the licensing entity with jurisdiction over the healthcare provider.

20-1206 Effective Date

The provisions of this chapter shall take effect on January 1, 2022.

APPENDIX B

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 C

42 U.S.C. § 1983 (1996)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.