Docket No. 22-8976

In 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 PETITIONER

Team 3124
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether the flexible "serious question" standard for granting a preliminary injunction remains viable following the Court's explicit statement in *Winter* that "a preliminary injunction is an extraordinary remedy never awarded as of right?"

II. Have the Respondents met the requirements of showing success on the merits of their Substantive Due Process and Equal Protection claims despite the SAME Act's survival under the applicable levels of scrutiny?

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The opinions and order of the United States District Court for the District of Lincoln is unreported and is set out in the record. R. at 1—22. The opinion and order of the United States Court of Appeals for the Fifteenth Circuit is also unreported and set out in the record. R. at 23—27.

STATUTORY PROVISIONS

The following provision of the United States Constitution is relevant to this case: U.S. Const. amend. XIV, § 1. This provision is reproduced in Appendix A.

The following provisions of the United States Code are relevant to this case: 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 1983. These provisions are reproduced in Appendix A.

RULES PROVISIONS

The following provisions of the Federal Rules of Civil Procedure are relevant to this case: Fed. R. Civ. P. 57 and Fed. R. Civ. P. 65. These provisions are reproduced in Appendix B.

STATEMENT OF THE CASE

Factual Background

The present case involves a dispute over the newly enacted Stop Adolescent Experimentations ("SAME") Act, 20 Linc. Stat §§ 1201-06. Petitioner, April Nardini, and Respondents, the Marianos, disagree over whether the Act is a proper use of discretion by the State of Lincoln. Petitioner asserts that the Act is necessary to protect vulnerable children through limiting medical treatments and procedures fraught with medical and scientific uncertainty, while Respondents argue that the Act violates their rights to Substantive Due Process and Equal Protection under the Fourteenth Amendment to the United States Constitution.

The SAME Act. Lincoln's newly enacted SAME Act goes into effect on January 1, 2022. R. at 1. Although experienced by a minimal number of children, Lincoln recognizes that gender dysphoria (GD) is a serious mental health diagnosis. R. at 2. The State also finds that many cases of GD in adolescents resolve naturally by the time the adolescents reach adulthood. *Id.* The Act prohibits certain gender transition procedures 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 puberty-blocking medication to stop or delay normal puberty, cross-sex hormone therapy, and reassignment surgery. R. at 4. The Act permits children already using puberty blockers and hormone therapies to discontinue the use at a safe rate and to obtain these medical treatments at eighteen if they still wish to seek them. R. at 12.

Jess Mariano. When Jess Mariano was a ten-year-old child, he started receiving puberty blockers to block him from going through puberty as a female. R. at 5. Medical professionals claim they prescribe puberty blockers to give children time to decide what to do next, however, Jess's psychiatrist projects years into the future, already anticipating hormone therapy for him at sixteen and breast removal surgery before he turns eighteen. R. at 5-6. Reassured by practitioners' misleading "handout," Jess's parents believe that puberty blockers are safe because the United States Food and Drug Administration (FDA) approved their use in 1993. R. at 6. The handout does not inform the patient or their parents that the FDA has not approved the use of puberty blockers to treat GD and, as a result, has not performed the necessary clinical trials to support their use for this purpose. R. at 6.

Experimental Treatments. Lincoln passed the SAME Act to regulate the medical profession's use of experimental medical treatments and procedures for minors. R. at 14. The State highlights that the FDA has not approved using the prohibited treatments for GD. R. at 15. The State finds that studies demonstrating the health benefits of these treatments have not been sufficiently longitudinal or randomized. R. at 3. Additionally, the State finds that emerging scientific evidence shows potential harm to children from gender affirming drugs and surgeries, including but not limited to risks related to irreversible infertility, cancer, liver dysfunction, coronary artery disease, and bone density. *Id.* Most significantly, Lincoln shines a light on the absence of a causal link between the use of medical

treatments for so-called "gender-affirming care," such as puberty blockers, sex hormones, and reassignment surgery, and decreased suicidality. R. at 2-3.

Harmful and irreversible medical interventions. From a very young age, Jess Mariano was prone to episodes of anxiety and depression and, at eight years old, attempted suicide. R. at 4. Shortly after that episode, Jess's psychiatrist, Dr. Dugray, diagnosed him with GD. *Id.* Driven by fear that without these treatments their child would kill himself, the Marianos consented to the medications prescribed by Dr. Dugray, even though the FDA has not approved this use of puberty blockers. R. at 4-6, 15. The Act's purpose is to encourage treatments supported by medical evidence, and discourage harmful and irreversible medical interventions by prohibiting certain gender affirming treatments specifically for minors. R. at 3. The State wants to protect children from putting their mental and physical health at risk and suffering lifelong negative medical consequences that could be prevented by receiving conventional treatment for their GD. R. at 3. The Attorney General has indicated that she intends to enforce the Act. R. at 1.

Procedural History

District Court of Lincoln. Jess Mariano, Elizabeth Mariano, and Thomas Mariano ("Respondents") filed suit seeking to enjoin Lincoln's newly enacted SAME Act from going into effect on January 1, 2022. R. at 1. The Respondents filed their complaint on November 4, 2021, alleging under 42 U.S.C. § 1983 that enforcing the SAME Act would violate their rights to Due Process and Equal Protection guaranteed by the Fourteenth Amendment. R. at 1. The Respondents then filed a Motion for Preliminary Injunction on November 11, 2021. R. at 1. On November 18, 2021, April Nardini, in her official capacity as Attorney General of the State of

Lincoln, ("Petitioner") filed a motion to dismiss along with a response asking the Court to deny the Respondents' request for a preliminary injunction. R. at 1. A hearing for both motions was held on December 1, 2021. *Id*. After considering both parties' submissions, the Court found that the Respondents showed (1) a likelihood of success on the merits of their claims because the SAME Act violates their rights to Due Process and Equal Protection under the Fourteenth Amendment, (2) that they will suffer immediate and irreparable harm if the Court does not enjoin the Act, (3) that harm greatly outweighs any damage the Act seeks to prevent, and (4) there is no overriding public interest that requires the Court to deny injunctive relief. R. at 2. The Court ultimately granted the Respondents' motion for a preliminary injunction, denied the Petitioner's motion to dismiss, and enjoined the Petitioner from enforcing 20 Linc. Stat. §§ 1201-06 for the duration of this litigation. R. at 22. To avoid any problems regarding the scope of appeal, the Court also certified this case for an interlocutory appeal under 28 U.S.C. § 1292(b). *Id.*

Court of Appeals for the Fifteenth Circuit. Petitioner appealed the District Court's denial to the United States Court of Appeals for the Fifteenth Circuit. R. at 23. Petitioner further requested that the Court of Appeals reverse the preliminary injunction entered by the District Court, reverse the denial of Lincoln's motion to dismiss, and remand with instruction to dismiss the Respondents' claims. *Id*. The Court of Appeals found that the Respondents were likely to suffer imminent and irreparable harm, that they raised serious questions about the likelihood of success on the merits of their claims, and that the balance of interests strongly tipped in their favor. R. at 27. Consequently, the Court of Appeals affirmed the District Court's decision to grant the preliminary injunction, noting that the lower court did not abuse its discretion in issuing the preliminary injunction while denying Petitioner's motion to dismiss. *Id*.

SUMMARY OF THE ARGUMENT

Based on this Court's language in various cases, and the use of the traditional standard by a majority of the Circuit Courts, the "serious question" standard for preliminary injunctions does not survive Winter.

A preliminary injunction is a remedy that may be granted for the purpose of preserving the status quo and the rights of the parties until a final judgment is issued. Prior to this Court's decision in *Winter*, some courts applied a "serious question" standard while others applied the traditional four-factor test. Because this Court explicitly held that a preliminary injunction is an extraordinary remedy never awarded as of right, and a multitude of Circuit Courts use the traditional test, the "serious question" standard is no longer viable following *Winter*. Regardless of which standard this Court chooses to apply, however, Respondents fail to meet either standard because they have not shown that the costs of granting an injunction outweigh the harms it will prevent.

Respondents fail to meet the requirements to succeed on the merits of their Substantive Due Process and Equal Protection claims.

The Due Process Clause provides that no person shall be deprived of life, liberty, or property, without due process of law. Fundamental rights protected by the Due Process Clause are those deeply rooted in U.S. history and tradition, and implicit in the concept of ordered liberty. Although parental autonomy is considered fundamental, it is not absolute. Further, the Respondents parental autonomy cannot presume the right to gender affirming medical treatment. Respondents' claim fails to meet the requirements to succeed on the merits of a Substantive Due Process claim because the State of Lincoln narrowly tailored the

SAME Act to achieve its compelling interest in protecting children from harm. Consequently, the Act survives under the most stringent level of review—strict scrutiny.

The Equal Protection Clause effectively prohibits states from denying to any person in its jurisdiction the equal protection of the laws. In other words, the clause emphasizes that all similarly situated individuals should be treated alike. Respondents fail to meet the requirements for success on the merits of their Equal Protection claim because Jess has not been treated differently from others with whom he is similarly situated, and even if he was, unequal treatment was not the result of intentional or purposeful discrimination. Because the SAME Act is substantially related to an important government interest, protecting the health and wellbeing of minors, it survives both a rational basis review and an intermediate scrutiny analysis.

STANDARD OF REVIEW

When requested, courts have the discretion and authority to enter declaratory judgments and to provide preliminary and permanent injunctive relief. *Winter* v. *Nat. Res. Def. Council, Inc.* 555 U.S. 7, 22 (2008). A preliminary injunction is an "extraordinary remedy" requiring the requesting party to show that they are entitled to such relief. *Id.* The standard for granting preliminary injunctions further requires the party who is seeking relief "to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Id.*

Rule 57 of the Federal Rules of Civil Procedure governs the procedure for obtaining a declaratory judgement, whereby the claimant must establish that an actual controversy exists and provide reasonable notice and hearing against any adverse party whose rights have been determined by the declaratory judgment. Fed. R. Civ. P. 57; 28 USC §§ 2201 and 2202. Rule 65 sets forth the procedure for issuing injunctive relief. *See* Fed. R. Civ. P. 65.

ARGUMENT

I. The lower courts erroneously concluded that the "serious question" standard remains viable following the Supreme Court's decision in *Winter v. Natural Resources Defense Council, Inc.*, and improperly granted the Respondents' request for a preliminary injunction.

Based on the Supreme Court's explicit language in several cases and the use of the traditional standard for injunctive relief by majority of the Circuit Courts, the "serious question" standard for preliminary injunctions is no longer viable. *See Winter* v. *Nat. Res. Def. Council, Inc.* 555 U.S. 7, 22 (2008). As a result, both the District Court and the Court of Appeals failed to apply the proper standard for injunctive relief and improperly granted the Respondents' request for a preliminary injunction. Furthermore, even if the Court holds that the "serious question" standard survived *Winter*, Respondents fail to establish that a preliminary injunction is proper because they fail to show irreparable harm, that the balance of equities tips in their favor, that injunctive relief is in the public interest, and that they are likely to succeed on the merits.

A. The language used by the Supreme Court in various cases and the application of the traditional standard for injunctive relief by most Circuit Courts supports that the "serious question" standard did not survive *Winter*.

A preliminary injunction is a remedy that may be granted for the purpose of preserving the status quo and the rights of the parties until a final judgment is issued. *Hsiao v. Stewart*, 527 F.Supp.3d 1237, 1243-44 (D. Haw. 2021). Prior to the Supreme Court's decision in *Winter*, some courts applied a "serious question" standard while others applied a four-factor traditional test. Under the "serious question" sliding-scale standard, district courts are permitted "…to

grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1133 (9th Cir. 2010). Conversely, the four-prong traditional test requires a movant to show (1) a substantial likelihood of success on the merits, (2) irreparable injury without an injunction, (3) that threatened injury outweighs the possible harm an injunction may cause the opposing party, and (4) that the injunction would not disserve public interest. *See Georgiacarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015). Due to the lack of clarity in *Winter*, courts are split over which standard for preliminary injunctions applies and whether the "serious question" standard remains a viable option. *Cottrell*, 632 F.3d at 1132.

In *Winter*, the Supreme Court clarified that the standard for granting preliminary injunctions requires "…[parties] seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction" and that "issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Court's] characterization of injunctive relief…" *Winter*, 555 U.S. at 22. The Court also held that "a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the

public interest." *Id.* at 20. When the Government is the opposing party, like in the present case, the last two factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Although the Court clearly rejected the Ninth Circuit's "possibility" standard in its decision, it did not clarify when a claim is "likely" to succeed on the merits or how to show irreparable harm. *See Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010); R. at 9-10. When applying this decision to the case at hand, the District Court and Court of Appeals relied on the Second Circuit's holding in *Citigroup* and incorrectly concluded that the Court's failure to set a threshold for these factors means that the standard for granting a preliminary injunction should remain flexible and, subsequently, that the "serious question" standard survives *Winter*. *See Citigroup*, 598 F.3d at 38; *See also* R. at 9-10. This erroneous conclusion contradicts not only the language employed by the Supreme Court in several cases, but also various Circuit Court holdings.

1. Based on the language of Supreme Court in various cases, the "serious question" standard is no longer viable.

In its decision, the District Court acknowledged that the Second Circuit's sliding-scale approach balanced the aforementioned four factors in such a way that a "weaker claim on one factor could be offset by a stronger claim on another." R. at 9. It went on to support the application of this "serious question" sliding-scale approach by asserting that the standard for granting a preliminary injunction "should remain flexible to meet the complex and varied factual issues

presented early in the litigation." *See* R. at 10. This balancing approach is contrary to the Supreme Court's intentions as evidenced through its wording in *Winter*, *Monsanto*, and *Grupo Mexicano*. *Winter*, 555 U.S. at 24; *Monsanto Co. v. Geertson Seed Farm*, 561 U.S. 139 (2010); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999); Rachel A. Weisshaar, *Hazy Shades of Winter: Resolving the Circuit Split over Preliminary Injunctions*, 65 VAND. L. REV. 1011 (2019).

For example, in *Winter*, the Court explicitly states that "a preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. Considering the Court's use of the term "extraordinary," and rejection of the Ninth Circuit's "possibility" standard, it is evident the Court did not intend for the standard of injunctive relief to be an easily met, "flexible" standard. *Winter*, 555 U.S. at 22; *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). This intention is further demonstrated through the Court's assertion in *Monsanto*, that "an injunction should issue only if the traditional four-factor test is satisfied." *Monsanto*, 561 U.S. at 157; *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009), *cert. granted, judgment vacated*, 559 U.S. 1089 (2010), *and adhered to in part sub nom. The Real Truth About Obama, Inc. v. F.E.C.*, 607 F.3d 355 (4th Cir. 2010); Weisshaar, 65 VAND. L. REV. at 1033; *Winter* 555 U.S. at 20. The traditional four-factor test that the Court is referring to requires movants to show a *substantial* likelihood of success on the merits, likelihood of irreparable harm, threatened injury that outweighs

damage to the opposing party, and public interest in favor of granting the injunction. *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 288 (5th Cir. 2012); *Georgiacarry.org,* 788 F.3d at 1322. Earlier Supreme Court holdings, in conjunction with *Winter*, support that the Court intended for movants to introduce compelling evidence to show that success is likely on each individual factor. *See Doran v. Salem Inn, Inc.* 422 U.S. 922 (1975); *See also Yakus v. U.S.*, 321 U.S. 414 (1944).

In *Doran*, the Court addressed how the traditional standard for granting a preliminary injunction "…requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and *also* that he is likely to prevail on the merits." *Doran*, 422 U.S. at 931. Similarly, in *Yakus*, the Court indicated that irreparable injury is essential, but not enough on its own, to support a preliminary injunction. *See* Weisshaar, 65 VAND. L. REV. at 1026; *See also Yakus*, 321 U.S. at 440. In totality, no part of this test that suggests movants are able to satisfy the requirements of the test through balancing the four prongs or through considering one prong with greater weight than another prong. *Real Truth About Obama*, 575 F.3d at 347; *Winter*, 555 U.S. at 20. Finally, while the Court acknowledged that equity is flexible in its holding in *Grupo Mexicano*, it also clarified that "flexibility is confined within the broad boundaries of traditional equitable relief." *Grupo Mexicano*, 527 U.S. at 322. This statement by the Court suggests that the "serious questions" standard is improper, especially when considering that its increased flexibility may give

courts the ability to grant preliminary injunctions in circumstances where the traditional standard would not. *See Real Truth About Obama*, 575 F.3d at 347. For this reason, the "serious question" standard is in direct contradiction with the well-established rule that preliminary injunctions are extraordinary remedies. *See Winter*, 555 U.S. at 24; *See also Munaf v. Geren*, 553 U.S. 674, 689-690 (2008).

2. The use of the traditional four-factor test for preliminary injunctions by most Circuit Courts suggests that the "serious question" standard is improper.

In addition to the Supreme Court's language and prior holdings, more Circuit Courts employ and use the traditional four-factor test than the "serious question" standard, indicating that the traditional test is the proper standard to apply for injunctive relief. The Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits use the traditional four-factor test, which requires movants to make a showing of success on all four factors. *See Real Truth About Obama, Inc.*, 575 F.3d at 346; *See also Opulent Life* Church, 697 F.3d at 288; *See also Gresham v. Swanson*, 866 F.3d 853, 854 (8th Cir. 2017); *See also First Western Capital Management Company v. Malamed*, 874 F.3d 1136, 1138-39 (10th Cir. 2017); *See also Georgiacarry.org, Inc.*, 788 F.3d at 1322. The Fourth Circuit even addressed the injunctive relief standard issue in *Real Truth About Obama, Inc.*, and concluded that the "serious question" sliding-scale standard may no longer be applied following the Court's decision in *Winter*. *See Real Truth About Obama, Inc.*, 575 F.3d at 346-47. The Sixth Circuit also employs the traditional test;

however, it considers the four factors as factors to be balanced rather than prerequisites. *See S. Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir. 2017). Similarly, the First and Third Circuits do not require movants to make a showing of all four factors. Instead, they use versions of the traditional test under which movants must first meet specific "threshold inquiries." *See Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10 (1st Cir. 2012); *See also Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). In the First Circuit, movants must first show a "strong likelihood" of success on the merits before additional factors will be considered. *See Sindicato*, 699 F.3d at 10. In the Third Circuit, movants must show that there is a reasonable probability of eventual success in the litigation and that they will be irreparably injured if relief is not granted, before the court will consider the possibility of harm and public interest. *See Reilly*, 858 F.3d at 179.

Both the Second Circuit and Ninth Circuit typically apply one of two standards when considering whether to grant a preliminary injunction. While the Ninth Circuit generally uses the traditional test, it also applies a sliding-scale test comparable to the Seventh Circuit's. *See Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 738 (9th Cir. 2014); *See also Cottrell*, 632 F.3d at 1135. The Second Circuit employs its own two-part test and a sliding-scale four-part test, allowing movants to prevail on a preliminary injunction under either standard. *Citigroup*, 598 F.3d at 35; *See also Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015); *See also Am. Civ. Liberties Union*

v. Clapper, 785 F.3d 787, 825 (2d Cir. 2015). In contrast, the Seventh Circuit applies a singular sliding-scale test that balances the four traditional factors. *Illinois Republican Party v. Pritzker*, 973 F.3 760, 762 (7th Cir. 2020). In their decisions, the lower courts relied primarily on holdings from the Second and Seventh Circuits to support the conclusion that the "serious questio" sliding-scale standard survives *Winter*. R. at 9-10; R at 24. There is noted confusion, however, in the Second Circuit over the appropriate standard for granting preliminary injunctions and the Seventh Circuit's sliding-scale standard is contrary to the Court's explicit intentions. *See Scofero v. Zucker*, 2016 WL 3964589, at *3 (W.D.N.Y. July 25, 2016); *See also Hoosier Energy Rural Elec. Co-op, Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009). For example, the Seventh Circuit noted that "the more net harm an injunction can prevent, the weaker the…claim on the merits can be while still supporting a preliminary injunction," even though this Court has directly held that movants must show they will suffer irreparable injury and *also* that they are likely to prevail on the merits. *See Hoosier*, 582 F.3d at 725; See also *Doran*, 422 U.S. at 931.

Because a majority of Circuit Courts employ the traditional four-factor test for preliminary injunctions, that there is confusion in the Second Circuit over which standard for preliminary injunctions applies, and that the Seventh Circuit's argument in favor of a "sliding-scale" standard is in direct contradiction of the Court's intentions, the "serious question" standard does not survive

Winter. As a result, the lower courts applied the incorrect standard for injunctive relief and improperly granted Respondents' request for a preliminary injunction. Nevertheless, even if the "serious questions" standard survived *Winter*, Respondents have failed to show that a preliminary injunction is proper under both the traditional test and the sliding-scale standard.

B. Regardless of what standard the Court chooses to apply, Respondents fail to meet the requirements of both the traditional four-factor test and the "serious question" standard.

Respondents fail to meet the requirements of the "serious question" standard and the traditional standard because they fail to show *any* of the following factors: (1) that they will suffer irreparable harm, (2) that threatened injury outweighs the harm an injunction would cause, (3) that the injunction is in the public interest, and (4) that they are likely to succeed on the merits of their claim. Not only have Respondents failed to establish any one of these four factors, but they also fail to demonstrate that the costs outweigh the benefits of not granting the injunction.

1. Respondents fail to show that they will suffer irreparable harm.

To be considered "irreparable," harm must be "actual and imminent," and cannot be undone through monetary remedies. *Northeastern Florida Chapter of the Association of General Contractors of America v. City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990). Some courts presume irreparable harm when a constitutional right to privacy is being threatened or impaired. *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981).

In *Dobbs*, however, the Supreme Court expressly refutes the accuracy of this presumption. *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (acknowledging that the right to privacy is not mentioned in the Constitution). Based on this Court's recognition that there is no right to privacy noted in the Constitution, irreparable harm cannot be presumed in the case at hand. As a result, the only way for Respondents to show irreparable harm is to prove that their alleged harm is actual and imminent and that it cannot be undone through monetary remedies.

Respondents contend that Jess would suffer an imminent and irreparable medical injury without a preliminary injunction based on their belief that ceasing treatment for Jess's GD would result in anxiety, depression, severe psychological distress, and lifelong mental and physical consequences resulting from going through an unwanted female puberty. R. at 11. Even when considering these concerns, Respondents fail to show that Jess' s injury is actual and imminent and that the alleged harm could not be undone through monetary remedies.

a. Respondents fail to show that alleged harm is "actual and imminent."

Respondents do not show that Jess will suffer actual and imminent harm absent an injunction and cannot establish that the continued use of puberty blockers would result in a better outcome. A study conducted in the United Kingdom failed to show any psychological benefits to receiving puberty

blocking hormones when treating GD.[1] Similarly, some professionals express concern with the validity of statements claiming that puberty blockers administered in childhood reduce suicidality in adults.[2]

Furthermore, Respondents cannot claim to know what Jess's mental, or physical outcomes will be in the present or distant future. As noted by the Endocrine Society, the psychosexual outcome for any specific child with GD cannot be predicted with current knowledge.[3] There is additional evidence noted in both the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5") and the Journal of the American Academy of Child & Adolescent Psychiatry, supporting that GD does not persist into adolescence or adulthood for most children.[4] Based on the unpredictable nature surrounding both mental illness and GD, Respondents fail to show anything more than a remote and speculative injury that may, or may not, result from the SAME Act's ban on puberty blockers for individuals under the age of eighteen. R. at 3; 20 Linc. Stat. §§ 1201-6.

b. Respondents fail to show that their alleged harm could not be undone with monetary remedies.

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[1] *See* Polly Carmichael et al., *Short-term Outcomes of Pubertal Suppression in a Selected Cohort of 12- to 15-Year-Old Young People with Persistent Gender Dysphoria in the UK.* 16 PLoS One. (2021).
[2] *See* Alison Clayton et al., *Commentary: The Signal and the Noise – Questioning the Benefits of Puberty Blockers for Youth with Gender Dysphoria – A Commentary on Rew et al.*, 27 Child and Adolescent Mental Health 259-262 (2021).
[3] *See* 102 J. Clin. Endocrinol Metab. 3869, 3876 (2017).
[4] *See Hennessy-Waller v. Snyder*, 529 F.Supp.3d 1031, 1045 (D. Ariz. 2021); *See also* Thomas D. Steensma et al., *Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study*, 52 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 582 (2013).

Not only have Respondents failed to show actual and imminent harm, but they also fail to show that the alleged harm could not be undone with monetary remedies. This assertion is supported by an Arizona court's decision in *Hennessy-Waller*, where transgender minors brought action against the Director of Arizona Health Care Cost Containment System for excluding gender-reassignment surgery from coverage under Arizona Medicaid. *See Hennessy-Waller*, 529 F.Supp.3d at 1035. The court determined that it was not clear that the minors' alleged injury was incapable of compensation in damages because the minors could be reimbursed for surgery if they prevailed on the merits of their claim. *See id.* at 1046. Although factually distinguishable from the case at hand, this conclusion is applicable.

For example, if Respondents ultimately succeed on the merits of the present case, monetary remedies could cover the costs of approved treatments for adolescents suffering from GD, such as psychotherapy.[5] Additionally, once Jess turns eighteen, monetary remedies could cover the costs of hormone therapy and gender reassignment surgery—allowing Jess to transition into a male, fully and successfully, despite going through puberty as a female. R. at 12. Overall, the Respondents' alleged harm is neither actual nor imminent and is capable of resolution with monetary damages. Consequently, Respondents fail to show that they will suffer irreparable harm absent an injunction.

[5] *See* Az Hakeem, *Psychotherapy for Gender Identity Disorders*, 18 CAMBRIDGE UNIVERSITY PRESS 17-24 (2012).

2. Respondents fail to show that threatened injury outweighs the harm an injunction would cause and that an injunction is in the public interest.

In addition to failing to show that they will suffer irreparable harm, Respondents cannot show that the balance of equities or public interest tips in their favor. As previously mentioned, factors a court considers when determining whether to grant a preliminary injunction include whether the injunction would "do more good than harm (which is to say that the balance of equities favors the [Respondent])" and whether an injunction is in the public interest. *See Hoosier Energy Rural Elec. Co-op.,* 582 F.3d at 721; *See also Winter*, 555 U.S. at 20. Since the government is a party to this case, these factors merge into one inquiry. *Nken*, 556 U.S. at 435. When considering these factors in a singular analysis, the lower courts incorrectly concluded that "the likelihood of immediate and irreparable physical and/or psychological harm from discontinuing Jess's plan of care outweighs the speculative harm the state will suffer from the injunction." R. at 13. What the lower courts failed to acknowledge in their decisions, is the government's substantial interest in protecting children from harm and the irreparable injury the public would face if an injunction is granted.

The Supreme Court recognizes a fundamental government interest in protecting children and that a State has "an independent interest in the well-being of its youth."[6] More specifically, this Court established a compelling

[6] *See Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (acknowledging that protecting children is of the utmost importance); *See also* Nicole DiGiose, *Protecting Children? The Evolution of the First*

interest in "protecting the physical and psychological well-being of minors." *See e.g., Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989). Considering the government's reiterated interest in protecting children and their wellbeing, the State of Lincoln has a significant and compelling interest in enforcing the SAME Act and protecting vulnerable children. This interest is particularly sound when considering the irreversible medical consequences the SAME Act's prohibited forms of gender-affirming care may cause, and the amount of harm the public will suffer if an injunction is granted.

The SAME Act prohibits individuals under the age of eighteen from receiving puberty blocking medication, obtaining supraphysiologic doses of androgens and estrogen, and undergoing surgeries that artificially construct genitalia or remove any healthy or non-diseased body part. R. at 4. Respondents argue that, without an injunction, Jess will not have access to these treatments and will suffer irreparable harm as a result. R. at 10-11. Due to the severe medical consequences resulting from these forms of treatment, however, an injunction blocking the Act would result in irreparable harm to *all* adolescents who partake in these treatment plans, *including* Jess.

For example, the effects of puberty suppression on the brain and bone density are uncertain and the long-term effects of gonadotropin-releasing

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Amendment: A Historical Timeline of Children and Their Access to Pornography and Violence, 33 PACE LAW REV. 462, 464 (2013); *See also Ginsberg v. N.Y.*, 390 U.S. 629, 640 (1968).

hormone (GnRH) analog therapy is unclear.[7] Additional evidence suggests that, although rarely reported, GnRH analog therapy may result in significant adverse effects such as arterial hypertension and pseudotumor cerebri.[8]

Other studies suggest that hormone therapy increases the risk of myocardial infarction, unfavorable changes in lipid profiles, low bone mineral density, and increased blood pressure.[9] Furthermore, in circumstances where an individual directly transitions from using GnRH agonists to receiving cross-sex hormones, they become permanently infertile.[10] The outcome is similar for individuals who undergo sex-reassignment surgeries to remove their reproductive organs.[11] In addition to the dangerous and unknown consequences of these treatments, there are currently no gender-affirming medications approved by the FDA for adolescents with GD, despite the requirement that all drugs be proven safe and

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[7] *See* Wylie Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons" An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY AND METABOLISM 3869-3903 (2017); See also Mariska Vlot et al., *Effect of Pubertal Suppression and Cross-Sex Hormone Therapy on Bone Turnover Markers and Bone Mineral Apparent Density (BMAD) in Transgender Adolescents*. 95 BONE 11-19 (2017); *See also* Kanthi Bangalore Krishna et al., *Use of Gonadotropin-Releasing Hormone Analogs in Children: Update by an International Consortium*, HORMONE RESEARCH IN PAEDIATRICS (2019) at 367.

[8] *See* Natalie Allen et al., *Use of Gonadotropin-Releasing Hormone Analogs in Children*, 33 CURR. OPIN. PEDIATRI. 442-448 (2021).

[9] *See* Talal Alzahrani et al., *Cardiovascular Disease Risk Factors and Myocardial Infarction in the Transgender Population*, 12 CIRCULATION: CARDIOVASCULAR QUALITY AND OUTCOMES (2019); *See also* Nyein Chan Swe et al., *The Effects of Gender-Affirming Hormone Therapy on Cardiovascular and Skeletal Health: A Literature Review*, 13 METABOLISM OPEN (2022); *See also* Janet Lee et al., *Low Bone Mineral Density in Early Pubertal Transgender/Gender Diverse Youth: Findings from the Trans Youth Care Study*, 4 J. ENDOCR. SOC. (2020).

[10] *See* Michelle Cretella, *Gender Dysphoria in Children*, AMERICAN COLLEGE OF PEDIATRICIANS (November 2018), https://acpeds.org/position-statements/gender-dysphoria-in-children.

[11] *See e.g.,* Evan Eyler et al., *LGBT Assisted Reproduction: Current Practice and Future Possibilities*, 3 LGBT HEALTH 151-156 (2014); Lauren Schmidt & Rachel Levine, *Psychological Outcomes and Reproductive Issues Among Gender Dysphoric Individuals*, 44 ENDOCRINOLOGY AND METABOLISM CLINICS OF NORTH AMERICA 773-785 (2015); Hembree, *supra* note 7.

effective by the FDA.[12] Considering the severe known, and unknown, consequences of these gender-affirming medications and procedures, there is a significant public interest in prohibiting their use in adolescents.

When weighing the State of Lincoln's substantial interest in protecting *all* children against the Respondents' interest in avoiding *potential* harm to their transgender son, the balance of equities and public interest tips powerfully in favor of the Petitioner. Accordingly, Respondents fail to show that the threatened injury outweighs the harm an injunction would cause and that an injunction is in the public interest.

II. Respondents fail to show they will succeed on the merits of their Fourteenth Amendment Due Process and Equal Protection Claims.

When determining whether to grant a preliminary injunction—in addition to considering factors such as irreparable harm, the balance of equities, and public interest—courts further consider whether there is a likelihood of success on the merits. *See* Winter, 555 U.S. at 20. In the present case, Respondents allege that the SAME Act violates Elizabeth and Thomas's rights of parental autonomy under the Due Process Clause and Jess's rights under the Equal Protection Clause. R. at 8. When evaluating claims of constitutionality, courts apply one of three standards—rational basis, intermediate scrutiny, or strict scrutiny. Because the SAME Act survives the relevant standards of review for both Due Process and

[12] *See* Johanna Olson-Kennedy et al., *Histrelin Implants for Suppression of Puberty in Youth with Gender Dysphoria: A Comparison of 50 mcg/Day (Vantas) and 65 mcg/Day (SupprelinLA)*, 6 TRANSGENDER HEALTH 36-42 (2021); *See also Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 71 (D.D.C. 1998).

Equal Protection, Respondents fail to show they will succeed on their merits of their claims. Consequently, a preliminary injunction is improper under the circumstances.

A. Respondents fail to show they will succeed on the merits of their Substantive Due Process claim.

The Due Process Clause of the Fourteenth Amendment provides that no State shall make or enforce a law which shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Respondents allege that the SAME Act is unconstitutional because it violates their fundamental rights of parental autonomy under the Due Process Clause. R. at 8. Specifically, Respondents argue that the Act violates their right to determine proper medical care for their child. *See* R. at 14. As previously mentioned, when evaluating claims of constitutionality, courts apply one of three standards of review. *See Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). Because the Respondent's purported right to decide medical treatment for their minor child is not a fundamental right, the SAME Act is subject to rational basis scrutiny. *See Wash. v. Glucksberg,* 521 U.S. 702, 722 (1997)(noting that "a challenged state action [must] implicate a fundamental right" to avoid rational basis review). Even if the Court finds that a parent's right to determine medical care for their child is a fundamental right, however, parental autonomy is not absolute and, regardless of which standard the Court applies, the SAME Act satisfies the applicable requirements of review.

1. Respondents do not have a fundamental right to experimental treatment for their child.

Courts have long recognized the necessity to begin with a "careful description" of the fundamental right asserted. *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005). A narrow frame of specific facts prevents courts from straying into unnecessarily "broad constitutional vistas." *Moore*, 410 Fd.3d at 1344. Respondents have not asserted that they have a fundamental right to gender transitioning medical treatment. Rather, they skipped this important step in the analysis and asserted that their right to direct medical treatment for Jess should presume the right to gender affirming medical treatment. This Court says otherwise, noting that a claim that is "derivative from" another can be "no stronger than" a personal claim. *Whalen v. Roe*, 429 U.S. 589, 604 (1977). Therefore, we must first assess if the right to puberty blockers, cross sex hormones, and reassignment surgery is a fundamental right protected by the Fourteenth Amendment. *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach,* 495 F.3d 695 (D.C. Cir. 2007); Dobbs at 2228. Although factually different, when applying a *Glucksberg* and *Dobbs* analysis, the answer is unequivocally no.

The Court interprets fundamental rights protected by substantive due process as those that are "deeply rooted in U.S. history and tradition," and "implicit in the concept of ordered liberty." *Glucksberg,* 521 U.S. at 702; *Dobbs*, 142 S. Ct. at 2242. Considering this precedent, Respondents must show that their "fundamental right" to determine the proper medical care for Jess is rooted in the nation's history and tradition and is an essential component of "ordered liberty," before they can

assert that their constitutional rights were violated. *Glucksberg*, 521 U.S. at 702; *Abigail*, 495 F.3d at 695; *Dobbs*, 142S.Ct. at 2242.

a. The right for Respondents right to experimental medical treatment for their child is not rooted in the nation's history and tradition or an essential component of ordered liberty.

The Constitution does not guarantee a right to medical treatment, let alone one at the heart of national controversies, such as the medically generated gender transition by use of puberty blocking medication, hormone therapy, or reassignment surgery. Abigail, 495 F.3d at 711; Dobbs, 142 S.Ct. at 2242 (rejecting the claim that a fundamental right to abortion could be derived from the Fourteenth Amendments protection of "liberty"). Additionally, courts have held that there is no substantive due process right to obtain drugs that the FDA has not approved. *Carnohan v. United States, 616 F.2d* 1120, 1122 (9th Cir. 1980) (*per curiam*). Even when drugs are sought by terminally ill cancer patients, there is no substantive due process right to obtain those medications. *See Rutherford v. United States,* 616 F.2d 455,457 (10th Cir. 1980). Because there is no fundamental right for an *individual* to obtain medical treatment, no greater right exists for a parent to seek medical treatment for their child. *Doe By & Through Doe v. Pub. Health Tr. Of Dade Cty,* 696 F.2d 901, 903 (11th Cir. 1983). A parent has no greater right to seek treatment for their child then they would for themselves. *Id.*

Moreover, it is impossible for the nation to have much history with the use of puberty blockers and hormone therapies in treating GD. The diagnosis of

GD was incorporated in the DSM-V less than ten years ago.[13] Currently, there are no FDA-approved medications to provide gender affirming care to adolescents with GD.[14] The use of puberty blockers and hormone therapies prescribed to treat this diagnosis is a recent phenomenon and remains an off-label, experimental application of the medications. *See Morrissey v. United States*, 871 F.3d 1260, 1269 (11th Cir. 2017). Regardless of the volume at which the advocates shout, the lack of direct approval by the FDA for this application of puberty blockers echoes with deafening silence.

Tradition further reveals a nation conflicted over GD treatments. "Particularly in view of the ethical issues" and continued public controversy, the lower courts erred by presuming that gender affirming medical treatment is a fundamental right absorbed under parental autonomy, thereby placing "the issue out of the arena of public debate and legislation." *Morrissey* 871 F 3d. at 1270. At the time of this brief almost twenty states have passed bills or are considering restricting access by minors to gender affirming medical treatment.[15] State perspectives range from banning puberty blockers and hormone replacement treatment for GD, to criminalizing doctors that continue to recommend these medications and procedures.[16] Some states consider parental action in pursuing these treatments for children as child abuse and ultimately remove children from

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[13] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, *Fifth Edition*, AMERICAN PSYCHIATRIC PUBLISHING (2013).
[14] Olson-Kennedy, *supra* note 12.
[15] Canela López, *Every Anti-Trans Bill US Lawmakers Introduced this Year, From Banning Medication to Jail Time for Doctors*, https://www.insider.com/over-half-of-us-states-tried-passing-anti-trans-bills-2021-3 (April 7, 2021).
[16] *See id.*

their homes as a consequence.[17] The increasing popularity of gender affirming treatments do not make puberty blockers and hormone treatments a fundamental right but rather, a modern phenomenon. *Morrissey*, 871 F.3d at 1269 (finding that an asserted right to reproduction assisted by IVF and surrogacy was not a fundamental right). The newness of these treatments, and the fervor of advocates should give the Court pause before expanding fundamental rights not expressly granted by the Constitution and interfering with the State's right to protect its citizens health and welfare. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

When "interpreting what is meant by liberty," the Court must "guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court's own ardent views about the liberties that Americans should enjoy." *Dobbs*, 142 S.Ct. at 2235. Consequently, considering the nation's history and tradition, the authority to regulate gender affirming treatments must be returned to the people and their elected representatives. *Id.* at 2228. The State of Lincoln and its citizens have spoken with a narrowly tailored statute restricting access to gender transition affirming medical treatment for minors.

2. Even if Respondents have a fundamental right to experimental medical treatment for their child, the SAME Act does not violate that right because it survives the highest level of scrutiny.

Because the SAME Act regulates the public welfare of minors, it should be reviewed in deference to the government under a rational basis review.

[17] *Id.*

R. at 16, 25. The lower courts improperly applied a strict scrutiny review based on their erroneous conclusion that the Act infringes on the Respondents' fundamental right. *See Ecknes-Tucker v. Marshall*, 2022 WL 1521889 (2022)(explaining that regulation was subject to strict scrutiny when it infringed on fundamental rights). Although the SAME Act should be subject *only* to a rational basis review, even if this Court decides that strict scrutiny is the relevant standard of review, the Act survives a strict scrutiny analysis because it is narrowly tailored to achieve a compelling state interest.

a. The SAME Act survives a strict scrutiny analysis because it is narrowly tailored to achieve a compelling state interest.

To satisfy strict scrutiny, a statute must be "narrowly tailored" to achieve "a compelling state interest." *Reno v. Flores*, 507 U.S. 292 (1993). Where the 'state's interest in safeguarding the physical and psychological well-being of a minor is compelling, the law should be indisputable. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020); *New York v. Ferber*, 458 U.S. 747 (1982). Under strict scrutiny, the burden is on the State to prove the statute is necessary to achieve its interest. *United States v. Carolene Prod.Co.,* 304 U.S. 144, 153 (1938); *Dobbs*, 142 S.Ct. at 2234. Because the Act only prohibits minors from using specific experimental gender affirming treatments, and it was passed to protect the health and safety of vulnerable youths, the SAME Act is narrowly tailored to achieve a compelling state interest. R. at 3-4.

The Due Process Clause protects the fundamental right of parents to make decisions as to care, custody, and control of their children. *Troxel v. Granville*, 530

U.S. 57, 66 (2000). A State's interest in protecting the well-being of children, however, "is not nullified" merely because the parent claims "to control the child's course of conduct." *Matter of McCauley*, 565 N.E.2d 411, 413 (1991). For example, the State may limit parental rights and intercede on a child's behalf when the child's health or safety is in jeopardy, intervene when a parent refuses necessary medical care for a child, and, in some cases, even require the compulsory vaccination of children. *See Prince v. Massachusetts,* 321 U.S. at 166; *See also Jehovah's Witness v. King Cnty. Hosp.*, 278 F. Supp. 488, 504 (W.D. Wash. 1967); *See also Bendiburg v. Dempsey,* 909 F. 2d 463, 470 (11th Cir. 1990); *See also Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *See also Zucht v. King*, 260 U.S. 174 (1922). Ultimately, the state has a compelling interest in protecting the "best interest of the child." *See* Troxell, 530 U.S. at 57.

Lincoln has a particularly compelling interest in protecting children from the medical uncertainty of gender affirming treatments promoted by the medical industry, especially when considering issues surrounding informed consent, lack of research, and the experimental nature of these treatments.

Informed Consent. For example, the degree to which the treatment is experimental and the impact unknown leaves unanswered the critical issue of whether a parent, let alone a minor, can understand the risks and benefits to consent to the treatment lawfully. *Bell v. Tavistock*, 2020 E.W.H.C. 3274 (2020) (finding it "unlikely" that a 13-year-old or under would be competent to give consent to puberty blockers and doubtful that a 14- or 15-year-old could give consent).

Practitioners offering gender affirming treatments have a standard "handout" called *About Puberty Blockers*,[18] which is given to patients like Jess and their parents. R. at 6. This handout purports that puberty blockers are safe because the FDA approved them in 1993. R. at 6. It is noteworthy that the handout does not inform the patient, nor their parents, that the FDA has not approved the use of puberty blockers to treat GD in minors, and therefore, has not undergone the necessary clinical trials and rigorous research to support their use for the named purpose. Ultimately, the exclusion of this information from the handout leaves parents and their children wholly uninformed.

Lack of Rigorous Research. Additionally, the current evidence on the reversibility and long-term implications of gender affirming medical treatments is limited and unclear. *Bell*, 2020 E.W.H.C. at 94. Research is insufficient and existing studies demonstrate that these treatments are not sufficiently longitudinal or randomized.[19] More specifically, the National Institute for Health and Care Excellence (NICE)(2020), concluded that studies investigating the adverse effects of GnRH analogs were not reliable and NHS England suspended the use of puberty blockers due to a lack of sufficient research.[20] The Karolinska Institute in Sweden also suspended the use of puberty blockers as treatment for GD youth outside of

[18] Doernbecher Children's Hospital, *About Puberty Blockers*, https://www.ohsu.edu/sites/default/files/2020-12/Gender-Clinic-Puberty-Blockers- Handout.pdf
[19] *See Clayton*, *supra* note 2.
[20] *Id.*

clinical trials and Finland curtailed the use of these drugs after concluding that there are uncertain risks.[21]

Experimental Nature. Based on the above information, it follows to reason that gender affirming medical treatments are experimental. There is nothing finalized about the medical techniques in prescribing puberty blockers, cross sex hormones or gender reassignment surgeries, and the record reveals that there is no medical consensus regarding the use of puberty blockers, cross-sex hormones, or reassignment surgery in the treatment of GD in minors. R. at 30.

Due to concerns surrounding informed consent, research pertaining to gender affirming treatments, and the experimental nature of these treatments, the State of Lincoln has a compelling interest in protecting the health and safety of its youth. This Court has given states wide discretion to pass legislation in areas where there is medical and scientific uncertainty, and even when professional organizations support medical treatments, the state is not required to defer to those guidelines. *Gonzales v. Carhart,* 550 U.S. 124, 163 (2007); *Dobbs*, 142 S.Ct. at 2242; *EMW Women's Surgical Ctr., P.S.C. v. Beshear,* 920 F.3d 421, 438 (6th Cir. 2019). Considering this discretion, and the fact that the SAME Act only restricts *minors* from receiving specific experimental gender affirming medical treatments, the Act is narrowly tailored to achieve a compelling state interest and is consequently constitutional. R. at 4.

[21] *Id.*

Because the SAME Act is narrowly tailored to achieve a compelling State interest, the Act is constitutional under all three standards of scrutiny. As a result, Respondents fail to show that they are likely to succeed on the merits of their Due Process claim.

B. Respondents fail to show that they will succeed on the merits of their Equal Protection Claim.

The Court of Appeals erroneously concluded that the SAME Act violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. As noted in *City of Cleburne,* this clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985). The Equal Protection Clause ensures that governmental decision makers do not treat persons differently "who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

An Equal Protection claim requires a two-step analysis. A plaintiff must demonstrate (1) that he has been treated differently from others with whom he is similarly situated, and (2) that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison*, 239 F.3d at 654. If a plaintiff has satisfied this burden, then "the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Id.* When, like in the present case, a specific law is alleged to violate the Equal Protection Clause, the law is commonly subject to one of three levels of

scrutiny—strict, intermediate, or rational basis review. *See Cal. Grocers Ass'n v. City of Long Beach*, 521 F.Supp.3d 902, 913 (C.D. Cal. 2021). Because strict scrutiny, the most stringent standard, "applies to laws that 'discriminate against a suspect class, such as a racial group…'" it is not relevant to the case at hand. *See Cal. Grocers Ass'n*, 521 F.Supp.3d at 913; R. at 27. As a result, the only potentially applicable standards in this case are intermediate scrutiny and rational basis review.

1. Respondents fail to satisfy the burden of proof for an Equal Protection claim because Jess has not been treated differently from others with whom he is similarly situated, and even if there was unequal treatment, it was not the result of intentional or purposeful discrimination.

Respondents failed to show that (1) Jess has been treated differently from others with whom he is similarly situated, and (2) unequal treatment was the result of intentional or purposeful discrimination." *Morrison*, 239 F.3d at 654. In the present case, Jess is treated the same as all minors who seek certain kinds of gender affirming care. R. at 2. Even if the Court finds that Jess has been treated differently, however, differential treatment was not the result of purposeful discrimination, but rather the result of an intent to protect children's health and wellbeing. R. at 3. As a result, the Respondent's Equal Protection claim fails.

a. Jess is not treated differently from others with whom he is similarly situated because the Act treats all minors the same.

Jess is not treated differently from similarly situated children because the SAME Act does not discriminate against transgender persons, nor does it

explicitly reference transgender persons. R. at 2-4. Rather, the Act protects *all* children from experimental medical procedures by creating two groups of minors: (1) minors who seek certain types of gender-affirming care; and (2) all other minors. R. at 3, 19. The Act does not disadvantage any sex, but instead, prohibits any minor from obtaining certain experiential treatments. R. at 3.

The Respondents cite *Brandt* to assert that the SAME Act "refers to gender transition, which is only sought by transgender individuals." R. at 19; *See Brandt v. Rutledge*, 551 F.Supp. 3d 892 (E.D. Ark. 2021). In *Brandt*, the court erroneously concluded that the State's goal in passing Act 626 was not to ban a treatment, but rather to ban an outcome—transgender youths undergoing experimental gender affirming medical care. *See id* at 889. The State's goal in *Brandt* was to ban a treatment, specifically a treatment that had yet to gain FDA approval for the purpose of treating gender dysphoria. *Id*. Similarly, Lincoln's SAME Act protects children against unapproved, experimental treatments with unknown and irreversible risks. R. at 3. The Act further ensures the safety of all minors through the prohibition of specific procedures, demonstrating that is not targeted at banning an "undesirable" outcome. R. at 3.

Moreover, while most gender affirming treatments are sought by transgender individuals, the Act treats all minors, transgender or otherwise, the same. In *DaVita*, a major provider of dialysis services sued a health plan alleging that the plan's limited coverage for outpatient dialysis violated the Medicare Secondary Payer statute. *Marietta Mem'l Hosp. Emp. Health Benefit Plan v. DaVita,* 142 S.

Ct. 1968, 1970 (2022). The statute stated that a health plan "may not differentiate in the benefits it provides between individuals having end stage renal disease and other individuals covered by such plan on the basis of the existence of end stage renal disease, the need for renal dialysis, or in any other manner," and a that health plan "may not take into account that an individual is entitled to or eligible for" Medicare due to end-stage renal disease (ESRD). *Id.* The Supreme Court held that the plan did not violate the statute because it does not differentiate between individuals with ESRD and others. *Id.* Based on the Court's decision, so long as the plan provides the same outpatient dialysis benefits to all plan participants, it is abiding by the statute, despite the fact that the majority of patients with ESRD require outpatient dialysis. *Id.*

Although factually dissimilar, the present case also considers two groups of individuals, minors who seek certain gender affirming treatments and other minors. R. at 19. While a majority of patients who require gender affirming treatment may be transgender, the Act treats all children the same—even if it results in limited access to experimental treatment for children experiencing GD. Rather than singling out a specific group of individuals, the Act merely limits accessibility to treatments with unknown or irreversible risks. R. at 3. Additionally, all minors are able to seek approved kinds of gender affirming care that are not prohibited by the Act, such as psychotherapy and the facilitation of a social transition. R. at 3.

b. Even if Jess was treated differently, differential treatment was the result of protecting minors from experimental, unapproved, medical treatments.

Respondents argue that the SAME Act discriminates against people who identify as transgender. R. at 18. This assertion is invalid considering that the Act does not discriminate against a particular group and consequently, is facially neutral. Facially neutral laws require a twofold inquiry: (1) whether the statutory classification is not overtly or covertly designed to prefer a certain class, and (2) whether the adverse effect reflects invidious discrimination. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

In several cases, courts have concluded that statutes addressing gender may not be discriminatory. For example, one court held that laws favoring veterans do not covertly favor men, despite the vast majority of veterans identifying as men. *Id.* at 270. Another court concluded that a law prohibiting abortion does not covertly discriminate against women, despite women being the only group of people who can receive an abortion. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). These cases are relevant to the present case because the SAME Act does not discriminate against transgender individuals, but rather applies to a large subset of the population—adolescents.

According to *Feeney*, the "Fourteenth Amendment guarantees equal laws, not equal results…" and that "…[u]neven effects upon particular groups within a class are ordinarily of no constitutional concern," unless there is a "reason to infer antipathy." *Feeney*, 442 U.S. 256 at 272. In this case, any differential impact on transgender children compared to all other children may be explained on a "neutral ground." Excluding transgender children is unavoidable when the purpose of the

Act is to keep children safe from experimental gender affirming medical treatments, and, as a result, the Act does not treat Jess any differently from other children. R. at 3.

Furthermore, not all transgender adolescents want to receive gender affirming treatments. *Doe v. Shanahan,* 917 F.3d 694, 696 (D.C. Cir. 2019). In *Doe*, the court explained that "the transgender community is not a monolith in which every person wants to take steps necessary to live in accord with his or her preferred gender (rather than his or her biological sex)." *Id.* at 722. The SAME Act does not solely target transgender children, instead it is tailored to protect children who elect to receive a limited number of experimental gender affirmation treatments. Because the Act's purpose is to protect *all* children from experimental medical care, it does not reflect invidious discrimination or a "desire to harm a politically unpopular group." *Shanahan*, 917 F.3d 694 at 699. A discriminatory purpose requires more than an awareness of potentially disparate consequences. *See Feeney*, 442 U.S. 256 at 279.

2. Regardless of whether the Court finds that Respondents satisfied their burden of proof for an Equal Protection claim, the SAME Act is constitutional under a rational basis review and intermediate scrutiny.

Respondents rely on the holding in *Bostock* to support their argument that intermediate scrutiny is the appropriate standard of review, even though *Bostock* is not applicable in the present case. R. at 26; *See Bostock v. Clayton City,* 140 S. Ct. 1731 (2020). Because the SAME Act's classifications are based on age and medical procedure, the applicable scrutiny standard is a rational

basis review. Even if this Court chooses to apply intermediate scrutiny, however, the SAME Act satisfies an intermediate scrutiny analysis because its objective is substantially related to an important government interest—protecting the health and wellbeing of minors. Because the Act satisfies an both a rational basis review and an intermediate scrutiny analysis, Respondents fail to show a likelihood of success on the merits of their Equal Protection claim.

a. The SAME Act survives the relevant standard of scrutiny, a rational basis review, because the Act is rationally related to a legitimate state interest.

States may discriminate based on age if the age classification is rationally related to a legitimate state interest. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976). Under a rational basis review pursuant to the Equal Protections Clause, the court will not overturn a government action unless the treatment of the different groups is "so unrelated to the achievement of any combination of legitimate purposes" that the court must conclude those actions to be irrational. *Kimel*, 528 U.S. 62 at 84. Further, a state may use age as a proxy for other qualities that are relevant to the State's legitimate interests. *Id.* Whether that age ends up being an inaccurate proxy for any given individual case is not relevant. *Id.*

In the present case, age is rationally related to the state's interest in protecting minors from procedures with risks and uncertain consequences. R. at 3. The government has a strong interest in protecting children from harm and injury

because they are more vulnerable than adults.[22] The *parens patriae* doctrine enables the government to intervene in the family unit to protect children whose health and wellbeing may be at risk.[23] Experimental gender affirming treatments put a child's health and wellbeing at risk,[24] and the Act's prohibition on gender affirming treatments is specifically structured to protect these vulnerable adolescents. *See* R. at 3. Once a person reaches adulthood, they may undergo the gender affirming treatments. *See* R. at 3.

The age requirement under the Act is a proxy for vulnerability and maturity. The constitutional rights of children differ from those of adults due, in part, to the peculiar vulnerability of children and their inability to make critical decisions in an informed and mature manner. *Bellotti v. Baird*, 443 U.S. 622 (1979). Although minors are generally protected by the same constitutional guarantees as adults, the government may adjust the legal system to account for a child's vulnerability. *Id.* at 635. For example, the court in *Bellotti* concluded that states are able to limit a child's freedom to make choices for themselves if those choices have potentially serious consequences. *Id.* Courts have reasoned that minors often lack the experience, perspective, and judgment to recognize and avoid choices that may be detrimental to them. *Id.* Gender affirming treatments may have adverse consequences as well as irreversible effects. As a minor, Jess may be unable to recognize that some choices he makes for himself may have irreversible, negative

[22] *See e.g., Brown*, 564 U.S. at 786; Rajan Bal, *The Perils of "Parens Patriae"*, GEORGETOWN JOURNAL ON POVERTY LAW & POLICY (2017).
[23] *Aid for Women v. Foulston,* 441 F.3d 1101, 1119 (2006).
[24] *See e.g.,* Hembree, *supra* note 7; *See also* Vlot, *supra* note 7; *See also* Swe, *supra* note 9.

consequences. The government is tasked with ensuring that minors like Jess make the best possible decisions for themselves.

Additionally, the regulation of a medical procedure that applies only to a particular subset of the population does not trigger heightened scrutiny unless that regulation is a pretext to affect an invidious discrimination against members of one sex or the other. *Dobbs*, 142 S. Ct. at 2228. As noted in *Dobbs*, the objective of preventing abortion does not constitute invidiously discriminatory animus against women, even though people who were assigned female at birth are the only ones who can undergo an abortion. *Id.* at 2246. Thus, the court reasoned those laws regulating or prohibiting abortions are not subject to heightened scrutiny. *See e.g.,* Dobbs, 142 S. Ct. at 2245; *Bray*, 506 U.S. 263 at 273.

Similarly, the Act's goal of regulating certain gender affirming treatments is not designed to affect an invidious discrimination against transgender children in particular. Rather, the objective is to protect all children from unapproved treatments with uncertain and potentially irreversible consequences. Thus, the Act would be governed by the same standard of review as other health and safety measures—a rational basis review.

b. *Bostock* does not apply to constitutional claims, and consequently, intermediate scrutiny is improper in the present case.

The Equal Protection Clause prohibits sex-based discrimination unless a "heightened" standard of review is satisfied. *See e.g., Sessions v. Morales-Santana*, 582 U.S. (2017); *United States v. Virginia*, 518 U.S. (1996). The Court's

role is not to create new legislation, because that power is with Congress. *Bostock*, 140 S. Ct. 1731 at 1753. Under the SAME Act, "sex" is defined as the biological state of being male or female, based on the individual's sex organs, chromosomes, and endogenous hormone profiles. R. at 3. Sex should not be confused with gender identity, which refers to "a person's internal sense of being a male or a female." R. at 2.

When discussing Title VII of the Civil Rights Act of 1964, the Supreme Court noted that, "it is impossible to discriminate against a person for being… transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. Title VII of the Civil Rights Act of 1964 prohibits employers from taking certain actions "because of" sex. *Id.* at 1740. This analysis requires the "but-for" sweeping causation standard, whereby as long as the plaintiff's sex was one "but-for" cause of an employment decision, the Title VII law is triggered. *Id.* at 1739. As evidenced through the court's decision in *Bostock*, its holding applies only to statutes, not constitutional claims such as equal protection. *Id* at 1753. The majority opinion addressed this point and emphasized that the decision was limited to Title VII claims by explaining that "employers worry…our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination…but none of these other laws are before us…and we do not prejudge any such question today." *Id*. The Supreme Court additionally differentiates Title VII from the Equal Protection Clause. *Wash. v. Davis,* 426 U.S. 229 (1976) (holding the Equal

Protection Clause does not prohibit actions based only on the fact they create a disparate impact based on sex, whereas Title VII does).

More recently, a school prohibited a transgender student from using a restroom consistent with their gender identity. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (U.S. App. 2020). Despite finding that the school policy violated both the Equal Protection Clause and Title IX, the Fourth Circuit referenced *Bostock* only in its Title IX discussion. *Id* at 616-619. The fact that the court only cited *Bostock* in its Title IX analysis further highlights that statutory claims and constitutional claims are distinct sources of law and not coextensive. Consequently, the *Bostock* holding is not applicable to the Respondent's Equal Protection claim and intermediate scrutiny is improper in the present case. R. at 18.

c. Even if the Court finds that intermediate scrutiny is proper, Petitioner satisfies the requirements of an intermediate analysis because the SAME ACT is substantially related to an important governmental interest.

If a group is given a "quasi-suspect" classification, meaning that group has suffered historic discrimination and political disempowerment as a result of an immutable or distinguishing characteristic that defines them as a discrete group, courts must apply intermediate scrutiny. *Lyng v. Castillo*, 477 U.S. 635 (1986). To satisfy this level of scrutiny the classification must be substantially related to an important governmental objective. *N.H. c. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 533 (Minn. App. 2020). To prevail on an intermediate scrutiny analysis, the state must provide an "exceedingly persuasive justification for its classification." *Grimm*, 972 F.3d at 586.

States have a substantial interest in the health and wellbeing of all their citizens. *Doe v. Irwin*, 615 F.2d 1162 (U.S. App. 1980). The Supreme Court has also recognized that states have "an independent interest in the well-being of its youth." *Ginsberg*, 390 U.S. at 629. The act is substantially related to the State's governmental objective of protecting children from experimental treatment.

The Act's first objective is 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. R. at 3. The Supreme Court has noted on multiple occasions the compelling interest they have in "protecting the physical and psychological well-being of minors." *See e.g., Brown*, 564 U.S. at 786 (2011); *Sable Commc'ns of Cal.*, 492 U.S. at 115. Thus, protecting children from risking their own mental and physical health is a substantial government interest.

The Act's second purpose is to encourage treatments supported by medical evidence and discourage harmful, irreversible medical interventions. R. at 3. The government has a substantial interest in encouraging drug manufacturers to get "off-label" treatments "on-label." *Wash. Legal Found. v. Friedman*, 13 F.Supp.2d at 51. Courts have noted that requiring manufacturers to ensure all drug uses are approved by the FDA benefit public health. *Id* at 71. The Food and Drug Amendments of 1997 emphasize that all drug uses must be proven safe and effective by the FDA, even off-label uses of previously approved drugs are subjected to the FDA's evaluation process. *Id*. The Supreme Court has held that the on-label

approval requirement is not subject to exceptions based upon the difficulty of obtaining approval, the cost, or the conceded benefits of the unapproved use. *United States v. Rutherford*, 442 U.S. 544 (1979).

Currently, there are no FDA-approved medications to provide gender affirming care to adolescents with gender dysphoria.[25] Further, there is a lack of scientific research that shows gender affirmation treatments listed in the Act improve children's health. *Brandt*, 551 F.Supp.3d at 889. It is important that the government encourages manufacturers to ensure their medications are approved for on-label treatments, especially when the treatments are made for children. The government has a substantial interest in promoting treatments that are supported by medical evidence. By encouraging manufacturers to get their medications approved for on-label treatments, the government is effectively promoting treatments supported by medical evidence.

The Act's third objective is 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. R. at 3. Courts have noted that minors are "more vulnerable or susceptible to negative influences and outside pressures," and that their character is not "as well formed as that of an adult." *See Brown*, 564 U.S. 786; *See also Roper v. Simmons*, 543 U.S. 551 (2005). Dr. Lisa Littman, a former professor of Behavioral and Social Sciences at Brown University, studies a subcategory of gender dysphoria where transgender youths

[25] Olson-Kennedy, *supra* note 12.

suddenly become dysphoric during or shortly after puberty.[26] The subcategory is referred to as "rapid onset gender dysphoria." *Id.* Researchers hypothesize that this new subcategory of individuals may be transitioning as a result of social influences and maladaptive coping mechanisms, rather than gender dysphoria. *Id.* Since youths are most susceptible to influence and to psychological damage, it is important to protect them against social influences, such as peer pressure to receive gender affirming treatments. *See e.g., Bellotti*, 443 U.S. 622; *State v. Garrett*, 280 N.C. App. 220 (N.C. Ct. App. 2021). The government must ensure that individuals are transitioning for the right reasons. For this reason, the government has a substantial interest in ensuring only adults make any life altering medical decisions that may ultimately affect their fertility.

Because the SAME Act is substantially related to an important government interest, the Act is constitutional under both an intermediate scrutiny analysis and a rational basis review. As a result, Respondents fail to show that they are likely to succeed on the merits of their Equal Protection claim.

CONCLUSION

The Supreme Court's language in various cases, in conjunction with the use of the traditional four-factor test for preliminary injunctions by a majority of the Circuit Courts, demonstrates that the "serious question" standard is no longer viable following *Winter*. As a result, the District Court and Court of Appeals

[26] Lisa Littman, *Parent reports of adolescents and young adults perceived to show signs of a rapid onset of gender dysphoria*. 14 PLoS ONE (2019).

applied the incorrect standard for injunctive relief and erroneously granted the Respondents request for a preliminary injunction.

Regardless of which standard for injunctive relief this Court chooses to apply, however, Respondents fail to meet the requirements of both the traditional test and the "serious question" standard by failing to show irreparable harm, a balance of equities, and that an injunction would be in the public interest. Furthermore, because the SAME Act is narrowly tailored to further a compelling State interest in protecting children from harm, it survives a strict scrutiny Due Process analysis. Similarly, because the Act is substantially related to an important government interest, it survives an intermediate scrutiny Equal Protection analysis.

Accordingly, the SAME Act survives the applicable standards of review for both Due Process and Equal Protection, and Respondents fail to show they will succeed on their merits of their claims. Because the costs of granting the injunction do not outweigh the benefits, injunctive relief is improper under the circumstances.

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

Respectfully submitted,

/s/ 3124

Attorneys for Petitioner

CERTIFICATE OF SERVICE

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

/s/ 3124

Attorneys for Petitioner

APPENDIX A

Statutory Provisions

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.

28 U.S.C. § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(9) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or

not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

28 U.S.C. § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. § 1983. Civil action for deprivation of rights

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.

APPENDIX B

Rules Provisions

Fed. R. Civ. P. 57 Declaratory Judgment

These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. §2201. Rules 38 and 39 govern a demand for a jury trial. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.

Fed. R. Civ. P. 65(a) Preliminary Injunction

(a) Preliminary Injunction.

(1) *Notice*. The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits*. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.