Docket No. 22-8976

In The

Supreme Court of the United States

November Term, 2022

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

Petitioner,

v.

United States ex rel. 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 RESPONDANTS

Team 3125
Attorneys for Respondents

QUESTIONS PRESENTED

I. Whether the "serious question" standard for preliminary injunctions continues to be viable after *Winter v. Natural Resources Defense Council, Inc.*?

II. Whether the preliminary injunction was properly granted in regard to the Respondents' Substantive Due Process and Equal Protection claims?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases *Page(s)*

TABLE OF AUTHORITIES (con't)

TABLE OF AUTHORITIES (con't)

Constitutional Provisions

TABLE OF AUTHORITIES (con't)

Statutory Provisions

Rules Provisions

OPINIONS BELOW

The opinion and order of the United States District Court for the District of Lincoln, Case No. 21-cv-12120, is unreported and set out in the record. R. at 1-22. The opinion and order of the United States Court of Appeals for the Fifteenth Circuit, Case No. 22-2101, is also unreported and set out in the record. R. at 23-34.

CONSTITUTIONAL PROVISIONS

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

STATUTORY PROVISIONS

The following provisions of the Stop Adolescent Medical Experimentations ("SAME") Act are relevant to this case: 20 Linc. Stat. §§ 1201-06. These provisions are reproduced in Appendix B.

The following provisions of the Civil Rights Act are relevant in this case: 42 U.S.C. § 1983. These provisions are reproduced in Appendix B.

The following provisions of Declaratory Judgment are relevant in this case: 28 U.S.C §§ 2201; 2202. These provisions are reproduced in Appendix B.

The following provisions of the Interlocutory Decisions Act are relevant in this case: 28 U.S.C. § 1292(b). These provisions are reproduced in Appendix B.

RULES PROVISIONS

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

STATEMENT OF THE CASE

Factual Background

The SAME Act. The Lincoln State Legislature adopted the SAME Act, 20 Linc. Stat. §§ 1201-06, which went into effect on January 1, 2022. R. at 1.The SAME Act establishes that healthcare providers cannot engage in medical or surgical treatments on any individual under the age of eighteen for the purposes of "creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." R. at 3. Treatments include but are not limited to delaying normal puberty, providing supraphysiologic doses of androgens to females, or supraphysiologic doses of estrogen to males, and surgery that artificially constructs genitalia tissue or removes any healthy body part or tissue. R. at 4. Healthcare providers that violate the SAME Act are subject to a Class 2 felony punishable by fines up to $100,000, or imprisonment between two and five years. R. at 4. Additionally, healthcare providers that violate the SAME Act are subject to discipline by their licensing entity for unprofessional conduct. R. at 4.

The State Legislature of Lincoln cited it has a compelling interest to ensure health and safety of its citizens, including "vulnerable children." The Legislature acknowledged gender dysphoria as a "serious mental health diagnosis" affecting "a very small number" of children. R. at 2. The Legislature also stated there are many cases of gender dysphoria that resolve "naturally" in adolescence by the time the individual reaches adulthood with no established causal link to medical treatments for "gender affirming care." R. at 2-3. Additionally, the Legislature stated there is

emerging scientific evidence demonstrating potential harms to children from gender affirming treatments such as drugs and surgeries. R. at 3. The Legislature pointed to conventional and "widely-accepted" methods to treat gender dysphoria that are reversible, in contrast to treatment with puberty blockers, sex hormonal therapy, and surgical interventions. R. at 3. The Legislature determined that adolescents and their parents could not fully "comprehend and appreciate" the risks associated with gender affirming care, and may not be able to give informed consent to the treatments. R. at 3.

The stated purposes of the SAME Act are to 1) Protect children from the potential consequences of gender affirming care that could be prevented by more conventional treatments for gender dysphoria, 2) To dissuade "harmful, irreversible" medical treatments, and encourage treatments supported by medical evidence, 3) To protect against "social influence" encompassing gender affirming treatments. R. at 3.

Jess Mariano. Jess Mariano ("Jess") is a fourteen-year-old transgender male, born biologically female. R. at 1, 4. He perceived himself as male from a very young age. R. at 4. At the age of eight, Jess was diagnosed with depression after attempting suicide by taking a handful of Tylenol pills, stating he hoped he would "never wake up" due to his gender incongruence. R. at 4. Jess' parents, Elizabeth and Thomas Mariano, started him in therapy, which he currently continues to receive. R. at 4. Jess was diagnosed with gender dysphoria by his psychiatrist, Dr. Dugray, after about nine months of therapy at the age of eight and nine in

accordance with existing medical guidelines. R. at 4. Dr. Dugray made the diagnosis based on evidence Jess exhibited "of distress manifested by a strong desire to be treated as a [male] and a desire to prevent the development of the anticipated secondary sex characteristics." R. at 4-5. According to his parents, Jess said on many occasions the he didn't "want to grow up if I have to be a girl." R. at 4-5.

At the age of ten, Jess started exhibiting signs of puberty, such as early breast tissue. R. at 5. In consultation with Jess's pediatrician, Dr. Dugray prescribed GnRH agonists ("puberty blockers"). R. at 5. Dr. Dugray anticipates that Jess will start hormone therapy when Jess turns sixteen due to the persistence and strength of Jess' gender dysphoria. R. at 5. Additionally, Dr. Dugray expressed that Jess may need chest surgery for the breast tissue he had developed before the age of eighteen due to the considerable distress the breast tissue had already caused him. R. at 5.

Since Jess started receiving puberty blockers, he has experienced less distress and depressive symptoms associated with his feelings of gender incongruence. R. at 5. Dr. Dugray has previously stated that interruption of as little as one month of Jess' treatment with puberty blockers could allow puberty to progress and "substantially undermine the treatment progress Jess has made so far in dealing with his depression and dysphoria." R. at 5. The SAME Act would interrupt and delay Jess' gender affirming medical treatments until he turns eighteen. R. at 5.

Gender Dysphoria and Best Practices for Care. The Marianos provided evidence in support of gender affirming care. R. at 5. This included the Endocrine Society and the World Professional Association for Transgender Health ("WPATH"), both of which provided guidelines for care. R. at 5-6. These organizational guidelines did not recommend medical or surgical interventions before a child reaches puberty. R. at 6. The Endocrine Society and the WPATH both provided evidence that puberty blockers are "reversible treatments that pause puberty." R. at 6. Also, the American Medical Association ("AMA") provided the best practices for gender-affirming care. R. at 6. This included social transition, puberty blockers, and consideration of gender-affirming hormones. R. at 6. Gender-affirming genital surgery was generally not recommended until adulthood, but some "transmasculine adolescents may benefit from masculinizing chest surgery to lessen chest dysphoria." R. at 6.

The Endocrine Society recommended evaluation, diagnosis, and treatment by a qualified mental health professional to ensure care that is evidence-based, medically necessary, and appropriate interventions tailored to the patient. R. at 6. Additionally, the WPATH indicated that the symptoms of gender dysphoria should be long-lasting and intense before an adolescent is eligible for treatment with puberty blockers. R. at 6. This included limiting various treatments based off of the child's needs in their assessment and obtaining informed consent. R. at 6. The WPATH guidelines start for individuals at age eleven. R. at 7. The AMA found that minors age twelve and over with gender dysphoria were more likely to have their

symptoms persist into adulthood. R. at 7. Furthermore, there was an association between affirmation of an adolescent's transgender identity and favorable mental health outcomes. R. at 7. Studies by the American Psychiatric Association found that untreated gender dysphoria may cause or lead to anxiety. R. at 7. Similarly, studies by the American Academy of Pediatrics found that untreated dysphoria may lead to depression, eating disorders, substance abuse, self-harm, and suicide. R. at 7. Young adults who were treated with puberty blockers for gender dysphoria showed lower odds of considering suicide. R. at 7.

Procedural History

District of Lincoln. Jess Mariano, Elizabeth Mariano, and Thomas Mariano filed a complaint on November 4, 2021 alleging under 42 U.S.C. § 1983 that enforcing the SAME Act would violate Elizabeth and Thomas Mariano's fundamental rights of parental autonomy under the Due Process Clause and Jess Mariano's rights under the Equal Protection Clause as guaranteed by the Fourteenth Amendment of the United States Constitution. R. at 1. The Plaintiffs sought to enjoin the SAME Act from going into effect on January 1, 2022. R. at 1. On November 11, 2021, Plaintiffs filed a Motion for Preliminary Injunction. R. at 1. On November 18, 2021, the Defendant, in her official capacity as the Attorney General of Lincoln ("Lincoln"), filed a motion to dismiss along with its response, urging the Court to deny the request for a preliminary injunction. R. at 1. A hearing on both motions was held on December 1, 2021, at which both parties submitted extensive evidence. R. at 1-2.

The Court found the balance of hardships favored granting the preliminary injunction. R. at 2. The Court GRANTED Plaintiffs' motion for preliminary injunction, DENIED Defendant's motion to dismiss, and ENJOINED Defendants from enforcing the SAME Act during the pendency of the litigation in this case. R. at 2. First, the plaintiffs showed a likelihood of success on the merits of their claims that the SAME Act violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. R. at 2. Second, the plaintiffs would suffer immediate and irreparable harm if the Court did not enjoin the Act. R. at 2. Third, that harm greatly outweighed any damage the Act sought to prevent. R. at 2. Fourth, there was no overriding public interests that requires the Court to deny injunctive relief at this stage in the litigation. R. at 2.

Fifteenth Circuit. The interlocutory appeal under 28 U.S.C. § 1292(b) arose from a challenge to the State of Lincoln's SAME Act. R. at 23. The Appellant, Lincoln, requested the Court to reverse the preliminary injunction entered by the District of Lincoln, reverse its denial of Lincoln's motion to dismiss, and to remand with instructions to dismiss Appellees' claims. R. at 23. The Court found that the district court acted within its discretion to grant the Marianos' motion for a preliminary injunction and deny Lincoln's motion to dismiss. R. at 23. The Marianos showed they were likely to suffer imminent irreparable harm if the SAME Act was permitted to go into effect, they raised serious questions about their likelihood of success on the merits of their claims, and the balance of interests strongly tipped in their favor. R. at 27.

Judge Gilmore dissented, stating the federal court effectively overrules a decision "of the people and, thus, in a sense interferes with the processes of democratic government" when a court preliminary enjoins a state law passed by duly elected officials. R. at 28. Furthermore, Judge Gilmore implies that the sliding-scale "serious questions" approach, used as a factor in the court's ruling, is contrary to *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). R. at 28. He proposes the "*Winter* requirement that the plaintiff clearly demonstrate that it will likely succeed on the merits is far stricter than the previous requirement that the plaintiff demonstrate only a grave or serious question for litigation." R. at 28.

Judge Gilmore stated the Substantive Due Process claim would fail since there was not a substantive due process right to access experimental medical procedures. R. at 29. Additionally, the Equal Protection claim did not apply because *Bostock* did not apply to constitutional claims and transsexual status was neither a "quasi-suspect" classification nor one to which heightened rational basis review applied. R. at 32. Therefore, the lower court should have denied the preliminary injunction because there was not a substantial likelihood of success on the Equal Protection claim. R. at 34

SUMMARY OF THE ARGUMENT

The "serious question" standard for preliminary injunction is viable after *Winter v. Natural Resources Defense Council, Inc.* The *Winter* standard does not preclude the use of the serious question standard set by *Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir.

1977) in its application. Even though the Circuit courts are split on how to handle the interplay between the *Winter* holding and serious question standard, the serious question approach survives *Winter* when applied as part of the four-element *Winter* Test. Given that the serious question analysis is viable, the Marianos are likely to succeed on the merits due to heightened scrutiny. Intermediate scrutiny is applied since The SAME Act discriminates on the basis of sex. Additionally, the balance of equities tips in favor of the Marianos due to the substantial risk of irreparable harm if Jess is denied access to gender affirming care.

The preliminary injunction was properly granted in regard to the Respondents' Substantive Due Process claim. The district court's decision to grant the preliminary injunction in regards to the Mariano's parental Substantive Due Process claims was properly granted because a parent's right to raise their child as they see fit is deeply rooted in our nation's tradition and history. The parent's Constitutional right to raise their child also includes their right and obligation to provide medical treatment for their child as recommended by physicians. The Marianos can show that raising a healthy child necessarily means that they must exercise their parental rights to raise a transgender child and provide that transgender child gender affirming care in the form of medical treatment.

The preliminary injunction was properly granted in regard to the Respondent's Equal Protection claim. The district court's decision to grant the preliminary injunction in regards to Jess Mariano's Equal Protection claim was

properly granted because the SAME Act discriminates on the basis of gender. Because the SAME Act discriminates based on gender, it is subject to intermediate scrutiny. The SAME Act states that it furthers the governmental objective to protect the health and safety of vulnerable children, however the means that it uses are not substantially related or narrowly tailored enough to survive intermediate scrutiny. Even if the SAME Act is found to not discriminate based on gender, it is subject to and fails enhanced rational review because it distinguishes between two similarly situated groups and unfairly prejudices one of those groups.

STANDARD OF REVIEW

When a party seeks a preliminary injunction on the basis of a potential constitutional violation, "the likelihood of success on the merits often will be the determinative factor." *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (quoting *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009)). In such a case, the likelihood of success on the merits is a legal question and there is little dispute of the facts in the record. *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 649 (6th Cir. 2007). Because the "determination of whether the movant is likely to succeed on the merits is a question of law and is accordingly reviewed de novo," the standard of review for a district court decision regarding a preliminary injunction with First Amendment implications is de novo. *Bays v. City of Fairborn*, 668 .3d 814, 809 (6th Cir. 2012) (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007).

ARGUMENT

I. The "serious question" standard for preliminary injunction is still viable after *Winter v. Natural Resources Defense Council, Inc.*

As an approach to evaluate a request for preliminary injunction, the court in *Winter v. Natural Resources Defense Council, Inc.* developed four conditions the party must meet in order for the injunction to be granted. 555 U.S. 7, 20, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008). The party "must establish that they are likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equites tips in [their favor], and that an injunction is in the public interest." *Id.* All requirements must be satisfied for preliminary injunction to be granted. *Id.* However, the third and fourth requirements are merged when the government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The plaintiff must show more than a "possibility" of irreparable harm since injunctive relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 375-76.

Before *Winter*, the "serious question" standard was applicable when asked to evaluate a request for preliminary injunction relief. *Blackwelder Furniture Co. of Statesville v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977). *Blackwelder* adopted the "balance-of-hardship test," which begins with balancing the hardships of the parties. *Id.* at 196. First, the court balances the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant. *Id.* Next, if there is an imbalance in the plaintiff's favor, the court determines whether the plaintiff

"raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair grounds for litigation and thus for more deliberate investigation." *Id.*

A. The "serious question" analysis is not precluded by the *Winters* framework.

Even though the standard held in *Winter* has some additional requirements beyond the "serious question" standard used in *Blackwelder*, the "serious question" analysis is not precluded by the *Winter* framework.

1. The *Winter* standard does not preclude the use of the "serious question" standard set by *Blackwedler* in its application.

In *Winter*, first the plaintiff must make a clear showing that they will likely succeed on the merits at trial. 129 S.Ct. at 374, 376. In *Blackwelder*, the "likelihood-of-success" requirement may be considered only after evaluating the balance of hardships by showing that "grave or serious questions are presented." 550 F.2d at 195.

Second, per *Winter*, there must be a clear showing there will be irreparable harm to the plaintiff absent relief. 129 S.Ct. at 374-76. The *Blackwelder* standard requires a balance of irreparable harm, with the harm to the plaintiff outweighing the harm to the defendant. 550 F.2d at 196. Additionally, after a strong showing on the probability of success, the plaintiff is required to show only a possibility of irreparable injury. *Id.* at 195.

Third, per *Winter*, the court should evaluate for "public consequences" when granting an injunction. 129 S.Ct. at 376-77. In *Blackwelder*, the public interest must always be considered, but may not appear in length. 550 F.2d at 196.

Fourth, per *Winter*, each of the four requirements must be satisfied before injunctive relief is granted. 129 S.Ct. at 374. In *Blackwelder*, granting injunctive relief depends on a "flexible interplay" among all the factors considered, conditionally redefining requirements while others are more fully satisfied. 550 F.2d at 196. "All four [factors] are intertwined and each affects in degree all the others." *Id.*

2. The Circuit courts are split on how to handle the interplay between the *Winter* holding and "serious question" standard.

Winter's standard for preliminary injunction was decided in 2008. *See generally,* 129 S.Ct. 365. Since that decision, the federal circuit courts have split their interpretation of how to incorporate the "serious question" standard and the holding in *Winter* when deciding motions for preliminary injunctions.

In *The Real Truth About Obama v. Fed. Election Comm'n*, the Fourth Circuit found that the *Blackwelder* balance-of-hardship standard may no longer be applied in granting or denying preliminary injunctions due to the differences the Supreme Court found in *Winter*. 575 F.3d 342, 347 (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). The *Winter* standard governed the issuance of preliminary injunctions in both the Fourth Circuit and all

federal courts. *Id.* However, in a later Fourth Circuit case, the *League of Women Voters of North Carolina v. North Carolina*, the court used the balance-of-hardship test to evaluate a preliminary injunction. 769 F.3d 224, 237 (4th Cir. 2014). The plaintiff in that case was denied a preliminary injunction based on the *Blackwelder* "serious question" standard, with the court stating that the district court did not abuse its discretion in determining the plaintiffs did not show the "balance of hardships tips in their favor." *Id.*

In the Ninth Circuit in 2011, *Alliance for the Wild Rockies v. Cottrell*, a serious question and hardship balance that tips sharply towards the plaintiff may support the granting of a preliminary injunction. *See* 632 F.3d 1127 (9th Cir. 2011). That court reasoned they were able to incorporate the "serious question" standard since the Supreme Court did not issue a command that would foreclose its application as a means of assessing the likelihood of success on the merits. *Id.* at 1134. The Supreme Court had not meant for *Munaf v. Gren*, *Winter*, and *Nken* to abrogate the more flexible standard for a preliminary injunction. *Id.*; *See generally* 553 U.S. 674, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008); *See generally* 129 S.Ct. 365; and *see generally* 556 U.S. 418. If so, there would have been some reference to the considerable history of the "flexible standards" applied in many circuits. *Id.*

In addition to the Seventh and Secord Circuits preserving the flexibility of the sliding-scale, "serious question" approach, the Tenth Circuit and the D.C. Circuit have also created a modified test to incorporate the "serious question" test. *All. for the Wild Rockies*, 632 F.3d at 1134. In the Tenth Circuit, the court had a

similar "modified test" in which the movant only needs to show "questions going to the merits so serious, substantial, difficult, and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *RoDa Drilling Co.* v. *Siegal*, 552 F.3d 1203, 1208-09 (10th Cir. 2009) (quoting *Walmer v. U.S. Dep't of Def.*, 52 F.3d 851, 854 (10th Cir. 1995). Also, the Tenth Circuit has declined to state definitely whether or not the "serious question" doctrine has survived *Winter*, but mentioned a "modified test" structured after the Second Circuit's "serious questions" analysis. *Id.* The D.C. Court found that the *Winter* standard "does not squarely discuss whether the four factors are to be balanced on a sliding scale." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009).

Eight circuits and in the Supreme Court continue to use the "serious question" standard. *All. for the Wild Rockies*, 632 F.3d at 1134. Therefore, the "serious question" standard for granting a preliminary injunction by assessing the probability of success on the merits is still valid. *Id.*

3. The "serious questions" approach survives *Winter* when applied as part of the four-element *Winter* Test.

Circuit courts have struggled with the validity of the sliding scale approach after *Winter* was decided. In the Ninth Circuit, the court has reasoned that *Winter* can be construed to hold that the moving party must always show a probability of success on the merits as well as a probability of injury. *Save Strawberry Canyon v. Dep't of Energy*, No. C08-03494 WHA, 2009 WL 1098888, at 1-3 (N.D.Cal. Apr. 22 2009). However, *Winter* addresses the end of the sliding scale where the weaker factor involves the injury, not the end of the scale where the weaker factor involves

the merits. *Id.* The elimination of discretion of the district judge to preserve the "status quo" with preliminary injunction until the merits could be sorted out in cases where clear irreparable injury would otherwise result and at least "serious questions" going to the merits are raised would be unfortunate. *Id.* Otherwise, the Supreme Court and the Ninth Circuit would take away the ability of district judges to preserve the "status quo" pending some discovery and further hearing on the merits of the case. *Id.* This would need to be clearly indicated at the appellate level before such a drastic change in law be made and very clearly indicated before this discretion is taken away from district courts. *Id.* As a result, the Ninth Circuit, and several other circuits including the Second, Seventh, Ninth, and Tenth, and the Supreme Court itself through nondefinitive language in *Munaf*, *Winter*, and *Nken* have concluded that the "serious question" version of the sliding-scale test for preliminary injunction remains viable after the Supreme Court's decision in *Winter*. *All. for the Wild Rockies*, 632 F.3d at 1134.

"A preliminary injunction is appropriate when a plaintiff demonstrates ... that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir.2008). The plaintiffs must also satisfy the *Winter* factors. *Al. for the Wild Rockies*, 632 F.3d at 1135. The "serious questions" approach survives *Winter* when it is applied as part of the four-element *Winter* test. *Id.* "Serious questions going to the merits" and the balance-of-hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows

there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id.*

B. Given that the serious question analysis is viable, the Marianos are likely to succeed on the merits due to heightened scrutiny.

The Marianos are likely to succeed on the merits of their equal protection and due process claims.

1. Intermediate scrutiny is applied since The SAME Act discriminates on the basis of sex.

The SAME Act prohibits "Certain Gender Transition Treatments," which is defined as a "procedure, practice, or service performed for the purpose of instilling or creating physiological or anatomical characters that resemble a sex different from the individual's biological sex." The statute defines "sex" as the "biological state of being male or female, based on the individual's sex organs, chromosomes, and endogenous hormone profile." Under the SAME Act, medical or surgical treatments that are permitted for a minor of one sex are prohibited for a minor of another sex. The biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not. *See Heckler v. Mathews*, 465 U.S. 728, 744, 104 S.Ct. 1387, 79 L.Ed. 2d 646 (1984). Since the individual's sex at birth determines whether or not they can receive certain types of medical under the law, the SAME Act discriminates on the basis of sex. Therefore, the SAME act is subject to heightened scrutiny.

Statutes that discriminate based on sex must be supported by an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 531, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). The government needs to demonstrate that the statute is substantially related to a sufficiently important government interest. *Id.* at 553, 116 S.Ct. 2264. "The recognized standard of care for adolescent gender dysphoria, that such treatment is supported by medical evidence that has been subject to rigorous study, and that the purpose of the [Act] is not to ban a treatment [but] to ban an outcome that the State deems undesirable." *Brandt by & through Brandt v. Rutledge*, No. 21-2875, 2022 WL 3652745 at 3 (8th Cir. Aug. 25, 2022).

Here, the State of Lincoln states the purpose of the SAME Act is to "ensure the health and safety of its citizens, in particular that of vulnerable children." The SAME Act prohibits medical treatment that conforms with recognized standard of care for adolescents with gender dysphoria. Lincoln cites to cases in Finland that ban gender-affirming care due to inadequate proof of their effectiveness and safety. R. at 7. The Council for Choices in Health Care in Finland report concluded that "in light of available evidence, gender reassignment of minors is an experimental practice." However, the report continues to recommend that gender-affirming care be available to minors under appropriate circumstances. The Finnish council's recommendations closely mirror the standards laid out by the WPATH and Endocrine Society. Both WPATH and the Finnish council conclude that puberty-suppressing hormones might be appropriate at the onset of puberty in adolescents exhibiting persistent gender nonconformity and addressing coexisting psychological

issues. Additionally, both recommend considering cross-sex hormones only when the adolescent is experiencing gender dysphoria, other mental health conditions are managed, and the minor is able to consent to treatment. Furthermore, the Marianos have produced substantial evidence to support gender-affirming care to minors within current medical guidelines by both the WPATH and Endocrine Society. Therefore, the Marianos have demonstrated a likelihood of success on the merits of their equal protection claim, and the SAME Act is not substantially related to Lincoln's interests in ensuring the health and safety of its citizens.

2. The Balance of Equities tips in favor of the Marianos due to the substantial risk of irreparable harm if Jess is denied access to gender affirming care.

Prohibiting access to puberty-blockers and hormonal treatment would allow adolescents to undergo endogenous puberty, an irreversible process. Minor patients could suffer heightened gender dysphoria, including worsening psychological effects, and symptoms of gender nonconformity. Since the process of endogenous puberty is irreversible, prohibiting gender-affirming care will cause irreparable harm unless a preliminary injunction is granted. The Marianos presented evidence in the case below that even one month of non-treatment could cause irreparable harm to Jess Mariano.

Additionally, it is "always in the public interest to prevent the violation of a party's constitutional rights." *D.M. ex rel. Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 1004 (8th Cir. 2019). Some minors experiencing gender dysphoria may choose not to pursue gender-affirming care and would not be harmed

by its enforcement. However, a facial challenge must "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Here, if the SAME Act were to go into effect, Jess Mariano, and all minor patients, would be denied access to gender-affirming care. Jess would endure the irreversible effects of puberty as a female, including development of breast tissue, and would be at risk of worsening depression due to gender nonconformity. Jess has a history of suicide attempts, and has expressed suicidal ideation if he has to endure puberty as a female, despite psychological treatment. The balance tips in favor of Jess as a party who would be at substantial risk for irreparable harm if denied access to gender-affirming care.

Additionally, Lincoln has not established circumstances that would exist under which the SAME Act would be valid. As justification, Lincoln's statute would also include minors upon which the SAME Act would have no application. Additionally, Lincoln has failed to offer a more narrowly tailored injunction that would remedy Jess' injuries. The State of Lincoln, through the SAME Act, purports to protect public interest. However, Jess is a member of that same public the SAME Act is supposed to protect.

Therefore, the balance of equities tips in favor of the Marianos due to the substantial risk of irreparable harm if Jess were denied access to gender affirming care.

II. The Respondent's preliminary injunction was properly granted because the Respondents raised sufficiently serious questions going

towards the merits of their Substantive Due Process and Equal Protection claims.

The Fourteenth Amendment was not included in the original Constitution when it was written in 1787. The Fourteenth Amendment was adopted in 1868 and includes two important clauses. Section One of 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. This is known colloquially as "the Due Process Clause". The following clause asserts that no state shall, "deny to any person within its jurisdiction the equal protection of the laws". U.S. Const. amend. XIV. This is known as the Equal Protection Clause. Both clauses protect citizens from state laws that may deprive citizens of their constitutional rights.

A. The Marianos have parental rights under Substantive Due Process; those parental rights are deeply rooted in our nation's tradition and history.

The Due Process Clause of the United State Constitution dictates state government's abilities to make laws governing their citizens. The Due Process Clause states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Due Process Clause "provides heightened protection against governmental interference with certain fundamental rights and property interests." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302(1993); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)). The fundamental rights include two distinct categories: the rights guaranteed by the first eight amendments and the rights that are not mentioned in the Constitution.

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022). The Supreme Court acknowledged the difficulties that accompany these judicially created rights in their recent opinion *Dobbs v. Jackson Women's Health Org*., stating that, "the term 'liberty' alone provides little guidance." *Id.* at 2247.

Rights concerning children or raising children are not found within the first eight amendments of the Constitution. Any rights concerning raising children or caring for children belong to the judicially created rights that are not specifically mentioned in the Constitution. The inquiry into whether a right is one of the fundamental rights protected by the Due Process Clause is two-fold: the right must be "deeply rooted in [our] history and tradition" and it must be "essential to our Nation's 'scheme of ordered liberty.'" *Dobbs*, 142 S. Ct. at 2235 (citation omitted).

1. The SAME Act violates the Mariano's parental rights under Substantive Due Process to choose how to raise their children and to obtain physician recommended medical treatment for their children.

The SAME Act violates two related fundamental rights: first, the parent's right to bring up their children as they see fit, which is "one of the oldest fundamental liberty interests" and has been recognized by the Supreme Court since the 1920's. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). Acts that interfere with a parent's liberty to "direct the upbringing... of children under their control" have a long- and well-established history of being declared unconstitutional. *See Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Second, the parent's right to obtain medical treatment for their children, provided the course of treatment is physician recommended and the treatment is not abusive or likely to cause harm, was also recognized by the Supreme Court as a fundamental right. *Parham v. J.R.*, 442 U.S. 584, 604 (1979). As early as 1920, the Supreme Court recognized that a child's parents have the right and a high duty, to prepare their child for "additional obligations." *Pierce*, 268 U.S. at 535. Some parents do abuse or neglect their children, however the Supreme Court acknowledged that parents generally act in their child's best interests. *Id.* at 602. The actions of the abusive few cannot give the government the authority to supersede parental authority when it comes to parents making decisions for their children. *Id.* at 603.

A parent can bring up their children to best fulfill their obligations as American citizens. This is a Constitutional right that is deeply rooted in our nation's history and tradition. In *Pierce v. Society of Sisters*, Oregon passed a law that required parents and guardians to send their child to a public school in the district where the child resided. 268 U.S. at 530. The failure to send the child to a public school would result in a misdemeanor. *Id*. The purpose of the act was to compel children's attendance at public schools. The appellants were a private school who filed suit alleging, among other things, that the act violated the parental right to choose which schools their children should receive education at. *Id.* at 532. Using precedent from *Meyers*, the precedential case that established parental rights, the Court determined that the Act did interfere with the parents' liberty to direct how

their children were brought up and how they were educated. *Pierce,* 268 U.S. at 534. The state did not have the power to "standardize its children by forcing them to accept instruction from public teachers only." *Id. a*t 535. The court concluded that a child is "not a mere creature of the state" and that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

In *Prince v. Massachusetts*, a child's guardian gave a child religious magazines and had the child standing on a street corner, selling the magazines to passersby. 321 U.S. 158, 161 (1944). There was a labor law in Massachusetts at the time that forbade children under the age of twelve from selling magazines and punished anyone who provided the child with the materials to sell. *Id.* The Supreme Court examined whether the statute violated the guardian's parental rights under substantive due process. *Id.* at 164. The Court balanced the strength of "a parent's claim to authority in her own household and in the rearing of her children" against the State's interest to protect children's welfare and how much authority the state can assert in that matter. *Id*. at 165. Respecting the tradition set by *Pierce* and *Meyer* that the State should stay out of the family life, the Court wrote, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166. The appellants were Jehovah's Witnesses who were raising children in their house to be Jehovah's Witnesses and who believed that the work staved off eternal damnation. *Id. a*t 162-163. With this

in mind, the Court specifically stated that in order to protect a youth's well-being, the state may restrict the parent's control in some cases. *Id*. These circumstances primarily include school attendance and child labor; a child selling magazine, be they religious or not, is a form of child labor. *Id.* Weighing the importance of a guardian's right to raise their child as they see fit and the state's authority over the health and welfare of children, the Court concluded that child employment is an area over which the governmental authority usurps parental authority. *Id.* at 168. Child employment, especially this type of child employment which exposes a child to a variety of harms that occur on streets, can have a "crippling effect" on the child. *Id*. The Court stressed that, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Id*. An evil that threatens the continued well-being of America's youth is child labor and therefore the state can prevent harm from befalling children by passing laws which limit when and where it is appropriate for children to work. *Id.* at 170. At the end of the opinion, the Court specifies that the ruling in *Prince*, "[did]not extend beyond the facts the case presents". *Id.* at 171.

Not only do parents have the right to raise their children as they see fit, but parents also have the judicially created right to obtain medical treatments for their child provided the medical treatment has been recommended by a physician and the treatment will not harm the child. In *Parham v. J.R.*, children being treated in a state mental hospital brought action against mental health officials. 442 U.S. 584, 584 (1979). The children were under the age of 18 and had been voluntarily

committed to a state mental hospital under a Georgia statute which allowed for a minor's voluntary admission to state hospitals. *Id.* The admissions process started with an application for hospitalization which had to be signed by a parent or a guardian. *Id.* The hospital superintendent had to authorize admission and, depending upon their hospital course, they were either kept for further treatment or discharged after five days per the parent's wishes or at the hospital superintendent's will. *Id.* When it came to medical decisions, the Court first referenced *Pierce*, *Prince*, and *Meyer*, all cases that recognize the parent's right and responsibility to bring their child up as they see fit. *Parham*, 442 U.S. at 585. The parents did not have absolute discretion to make medical decisions for their children - the children also have a say - however parents do "retain plenary authority to seek such care for their children subject to an independent medical judgment." *Id*. The Court again dives into the history and tradition of decisions that have defined what rights parents have when it comes to their children and again emphasizes the Western tradition of "broad parental authority over minor children". *Id.* at 602. The Court expanded upon the "high duty" previously discussed in *Pierce* and included the parental duty to "recognize symptoms of illness and to seek and follow medical advice." *Id.* Parents are more mature than children, have more experience, and possess the judgment necessary to make a difficult medical decision. *Id.* In addition to this, parents act in their child's best interest and will likely not make a medical decision that they think is likely to harm their child. *Id.*

The preliminary injunction was granted correctly in regards to the Marianos's Due Process claim because it is well established that they have the right to bring their child up as best suits them and they have the right to obtain medical treatment for their child at the recommendation of a physician. At first glance, the gap between an act compelling a student to attend public school and an act that forbids a child from making decisions about gender affirming treatment seems wide. In *Pierce*, the Act compelling public-school attendance was found to be unconstitutional because it interfered with a parent's liberty to direct how their child was to be brought up. 268 U.S. at 530. At surface level, the Marianos are faced with a similar issue: their state is trying to pass an act that interferes with their liberty to direct how their child is to be brought up. Similarly, to the children in *Pierce*, Jesse Mariano is "not a mere creature of the state" and his parents, the ones who are nurturing him, directing him towards his destiny, have the dominant right and a high duty to "recognize and prepare him for additional obligations. *Id.* at 535.

The SAME Act seeks to "ensure the health and safety of its citizens, in particular that of vulnerable children." 20 Linc. Stat. § 1201. The legislation in *Prince* also sought to protect the citizens of Massachusetts, in particular vulnerable children. The defining difference between the legislation on *Prince* and the legislation in the present case is that the legislation in *Prince* concerned child labor and the legislation in the present case concerns children's medical care. In *Prince*, the Court explained that child employment, especially child employment that involves a child standing on a street corner, exposes a child to the variety of harmful

influences that are found on the street. 321 U.S. at 168. These harmful influences could cripple an otherwise normal young person and prevent them from growing into healthy, well-rounded citizens that can continue the democratic society of America. *Id*. Because of this harmful influence, the State was permitted to encroach upon the parents' rights to raise their children. *Id*. At the end of the opinion, however, the Court specifically states that the ruling "[did] not extend beyond the facts the case presents." *Id*. at 171. The case at hand does not involve child labor laws, as *Prince* did, which is one reason that the State's incursion into the rights of parents to direct the upbringing of their children is unconstitutional. The Court in *Prince* emphasized that the facts in *Prince* were what lead to the ruling and that the case should not be regarded as permission by the Court to intrude upon parental rights whenever the State feels it necessary. *See id*. at 171. Furthermore, in *Princ*e, the Court explains that it is appropriate for the State to usurp the parent's rights to raise their children because the activity they are having their child partake in can be harmful and have a permanent, crippling effect on that child's future. *Id*.

The very harm the Court sought to prevent in *Prince* would befall Jesse Mariano if the SAME Act were put into effect: there would be a permanent, crippling effect on Jesse Mariano's future and every other transgender child's future. From a young age, Jess suffered from anxiety and depression due to his gender dysphoria. He tried to commit suicide when he was eight years old and stated that he didn't "want to grow up if [he] had to be a girl." When Jess would have started puberty, he was started on puberty blockers, which his doctor testified

improved his depression and other emotions related to gender dysphoria. When he is older, his doctor will likely start him on hormone therapy. Without Jess's puberty blockers and without his future hormone therapy, he will go through puberty. This will likely exacerbate his depression and worsen his gender dysphoria. The State shows that there are potential harms from both medications to assist with gender transition and from gender affirming surgeries. These include fertility issues, cancer, liver issues, heart disease, and bone density problems. The State also puts forth that "conventional and widely accepted methods to treat gender dysphoria", such as conventional psychology, exist and that they are not as risky or experimental as the medication or the surgery. Through the SAME Act, the State seeks to prevent potential harm against the children while enacting actual harm against those same, vulnerable children. *See* 20 Linc. Stat. § 1201. Depriving transgender children access to gender affirming care until they are eighteen will likely lead to those children suffering from worsening depression due to their gender dysphoria. At best, this will bleed into their lives, prevent them from effectively participating in society as they grow into adults, and therefore have a crippling effect on their future; at the worst, it will lead to their deaths.

The Marianos have the right to obtain medical treatments for their children provided the medical treatment has been recommended by a physician and the treatment will not harm the child. Under Georgia statute, minor children were committed voluntarily to hospitals after their parents had signed off on an application for hospitalization. In *Parham*, most of the mental institutions that

these children were being admitted to required that the child's outpatient mental health clinic recommend the hospitalization and the court recognized that parents have a "high duty" to "recognize symptoms of illness and to seek and follow medical advice." 442 U.S. at 602. In the Mariano's case, Jess's parents noticed that he was suffering from depression and anxiety after he took Tylenol pills in hopes that they would end his life. The Mariano parents fulfilled their "higher duty" and recognized that Jess's depression needed treatment. They started him in therapy where he was diagnosed with gender dysphoria. His psychologist found that his distress was brought on by being perceived and treated as a girl. This distress worsened when he began to show signs of puberty and Jess's psychologist consulted with his pediatrician. Through this consultation, they prescribed puberty blockers. Jess's parents did not arbitrarily start him on puberty blockers. They sought out medical advice and are following the medical advice recommended by Jess's doctors. This medical advice is based in scientific evidence provided by multiple medical associations. The WPATH Guidelines suggest that clinicians begin pubertal hormone suppression once puberty has begun. World Pro.Ass'n for Transgender Health (WPATH), Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People10-21(7th ed. 2012), at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf. Furthermore, the WPATH Guidelines explain that puberty blockers are reversible treatments that provide children with a safe period during which they are not going through puberty and can continue other, more conventional forms of treatment such

as psychology. *Id*. This relatively harmless period may give them the stability and psychological health they need to come up with a plan that does not require such drastic measures as hormone therapy or gender affirming surgery. *Id.*

The State also raises issues that parents and their children may not fully comprehend or appreciate the risks associated with gender affirming surgeries and that people who have detransitioned regretted taking puberty-suppressing medications and hormone replacement therapy. These people who detransitioned blame "social influence" on their decisions related to gender affirming medical care. *Parham* specifically addresses situations such as this. The Court acknowledged that, while children may be immature and may not fully understand some medical decisions, parents make up for their lack of maturity, experience and judgment. *Id.* at 602. Furthermore, the Court has always assumed that parents act in their child's best interest. *Id.* The State does the parents of transgender children a disservice by explicitly stating that they do not fully appreciate the risks associated with gender affirming surgeries. As we see in Jess's case, the Marianos watched their child suffer for years due to their gender dysphoria. After seeing such suffering, they took the appropriate steps to consult doctors about Jess's condition. They followed well-supported medical advice and their decisions can hardly be called misinformed. The precedent set by *Prince*, *Pierce*, and *Parham*, afford the Marianos the substantive due process right to raise Jess as transgender and to make decisions about what medical care he needs, free from the burden of overreaching State power.

2. The SAME Act is subject to strict scrutiny because it violates a fundamental right and does not pass strict scrutiny because there are less discriminatory means available.

If a fundamental right, in this case the right to parental authority under substantive due process, is infringed upon, the infringement must be "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302. When this "strict scrutiny" is applied, the government trying to institute the offending rule must prove that the statute is necessary to achieve that interest. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 (1938). The means that the statute employs must be the "least restrictive" possible to employ the purpose that the statute sets forth. *Holt v. Hobbs*, 574 U.S. 352, 364 (2015).

The SAME Act puts forth that its compelling state interest is to, "ensure the health and safety of its citizens, in particular that of vulnerable children." It purports to protect the health and safety of vulnerable children by both denying them crucial medical treatment for gender affirming care by labeling that care "experimental" and by chipping away at parent's rights to make decisions how the children should be raised and what medical treatments their child should receive.

The Court in *Prince* phrased it best when it said, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." 321 U.S. at 168. Protecting the health and safety of children and therefore the health and safety of society as a whole is indeed a compelling government, however the Lincoln statute is not the "least restrictive" means possible to achieve its purposes. Lincoln argued in District Court

that the SAME act was narrowly tailored because the ban was not against all gender-affirming care; it was only a ban against treatments for minors that had serious consequences. As examples, they pointed towards healthcare systems in different European countries that did restrict medical treatment in minors because of the experimental nature and long-term adverse effects. *See, e.g.,* Sweden's Karolinska Ends All Use of Puberty Blockers and Cross-Sex Hormones for Minors Outside of Clinical Studies, Society for Evidence Based Gender Medicine (May 5, 2021), https://segm.org/Sweden_ends_use_of_Dutch_protocol. The District Court, however, accurately pointed out that none of these countries have the "blanket ban" that Lincoln proposes. There are less restrictive ways to protect children and to regulate medical decisions of this nature. For example, the Amsterdam gender identity clinic does not provide physical medical intervention before puberty and requires, at the onset of puberty, requires a comprehensive diagnostic procedure involving an intake session with adolescents and their parents, psychodiagnostics assessments, child psychiatric examinations, and a medical screening by a pediatric endocrinologist. Annelou L. C. de Vries MD PhD & Peggy T. Cohen-Kettenis, Clinical Management of Gender Dysphoria in Children and Adolescents: the Dutch Approach, National Library of Medicine, https://pubmed.ncbi.nlm.nih.gov/22455322/. At the conclusion of this, a recommendation regarding treatment is made. *Id.* This clinic's approach is in line with WPATH guidelines which recommend that the decision to transition be taken in several steps. Lincoln can employ methods similar to the Amsterdam gender

identity clinic that are less restrictive than the blanket ban the SAME Act employs. Lincoln can require more psychiatric evaluation prior to a recommendation for medical treatment or they can require more conventional psychologic treatment to treat gender dysphoria while children and adolescents are on medical treatment.

The lower courts were correct in determining that the Marianos showed that there was a sufficiently serious question regarding the merits of their Substantive Due Process claim that their parental rights were being violated. Previous cases support their right to raise their child as they see fit and to make medical choices for their child, free from the unauthorized influence of the State. If the State were to have a hand in Mariano's parenting, it would likely cause imminent irreparable harm because his gender dysphoria would worsen and lead to exacerbation of his depression which, in the past, has made him suicidal.

B. The SAME Act discriminates against transgender children and violates Jess Mariano's right to equal protection under the laws of the United States.

The Equal Protection Clause of the Fourteenth Amendment prohibits the state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Equal Protection Clause serves to protect people from "intentional and arbitrary discrimination" that is brought about by state statutes. *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918). If there is concern that a statute violates the Equal Protection Clause, it is important to determine whether the statute is discriminating against a person

because of their race, ethnicity, or alienage, because of their gender or legitimacy, or because of something else entirely.

1. **The SAME Act employs gender-based discrimination and is therefore subject to intermediate scrutiny. The SAME Act fails intermediate scrutiny because the means employed are not substantially related to the important government objective.**

The Supreme Court recently held in *Bostock v. Clayton County* that "...it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." 140 S. Ct. 1731, 1741 (2020). A law that discriminates against individuals based on gender is subject to heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 555 (1996) (quoting *J. E. B. v. Alabama ex rel T.B.*, 511 U.S. 127, 136 (1994)). Intermediate scrutiny demands that the state show that "the classification serves an 'important governmental objective'" and that the discriminatory means are "substantially related to the achievement of those objectives." *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)). There must be "an exceedingly persuasive justification" for the classification. *Virginia*, 518 U.S. at 531. Finally, the exceedingly persuasive justification must be genuine, rather than hypothetical. *Id*. at 533.

Laws that discriminate against transgender children are laws designed to discriminate based on sex. In *Grimm v. Gloucester County School Board*, appellee, a transgender male, brought suit against the appellants for their refusal to allow him to use the men's bathroom. 972 F.3d 586, 593 (4th Cir. 2020). The school board's

policy created a sex-based classification for restrooms. *Id.* The policy distinguished between male and female restrooms and limited the use of the bathrooms to their respective genders. *Id.* In the aftermath, the school board took the position that gender was the sex marked on the student's birth certificate. *Id.* at 608. In accordance with decisions from both the Seventh and the Eleventh Circuits, on appeal the court determined that when a "'School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate,'" the policy was based upon sex classification. *Id*. at 608. (quoting *Whitaker*, 858 F.3d at 1051 (applying heightened scrutiny to a transgender student's equal protection claim regarding a bathroom policy).

Again, relying on decisions from the Seventh and Eleventh Circuits, the court notes that "various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." G*rimm*, 972 F.3d at 608. (quotations omitted). In fact, the court in *Grimm* goes so far as to classify transgender people as a quasi-suspect class. *Id.* at 607. For these reasons, the court in Grimm held that the policy was sex-based discrimination and subject to intermediate scrutiny. *Id*. at 613. The board asserted that it proposed to protect student's privacy with the policy. *Id*. The court pointed out that the way in which people use the bathroom does not typically invade the privacy of others given the use of stalls and other privacy devices. *Id*. at 614. Furthermore, there was no evidence to support that bodily privacy increased when

the appellee was banned from the restrooms; the harm that the state purported was hypothetical in nature. *Id.* at 615. The court concluded that the policy was not substantially related to the goal and therefore that the policy failed intermediate scrutiny and violated the appellee's equal protection rights. *Id.*

A recent case from Arkansas, *Brandt v. Rutledge*, directly addressed legislation ("Act 626") preventing children under the age of eighteen from receiving any gender transition procedures and a preliminary injunction to enjoin the legislation. These procedures included any medical or surgical treatment. 551 F. Supp. 3d 882, 887 (E.D. Ark. 2021). The plaintiffs put forth that the Act 626 denied gender-affirming care solely because the individual's gender identity did not conform with their sex assigned at birth. *Id.* at 888. The Arkansas court followed in *Grimm*'s path and treated transgender people as a quasi-suspect class and looked at Act 626 through the lens of intermediate scrutiny. *Brandt,* 551 F. Supp. 3d at 889. Under intermediate scrutiny, the court examined whether Act 626 was substantially related to a sufficiently important government interest. *Id.* The State put forth that Act 626 served to protect "vulnerable children from experimental treatment." *Id*. They stated that there was insufficient, credible scientific evidence that supported the assertion that gender-transition procedures improved children's health and that the consequences of these procedures were "too great" to continue performing them. *Id*. Act 626 was supported by judicial rulings in the United Kingdom and in an Arizona district court. *Id*. After examining these two judicial rulings, the court found that the UK ruling did not "categorically prohibit

individuals from all 'gender transition procedures'" but rather found it unlikely that thirteen- to fifteen-year-olds could give consent. *Id.* The UK ruling also allowed children over the age of sixteen to consent to these procedures. *Id.* The Arizona district court decision was similarly narrow in that it prohibited gender reassignment surgery from Arizona's Medicaid coverage but did not generally prohibit all gender transition treatments. *Id.* Plaintiffs put forth the argument that gender-affirming care is, in many cases, also life-saving treatment for transgender adolescents. *Brandt,* 551 F. Supp. 3d at 890. Gender dysphoria causes transgender people distress and gender affirming care mitigates that distress by minimizing gender dysphoria. *Id.* Finally, the Plaintiffs argued that the State's assertion that gender transition treatments are irreversible and harmful is contradicted by the fact that the same treatments that are unavailable to transgender adolescents because of the harmful and irreversible consequences are available to cisgendered adolescents "for any other purpose, including to bring their bodies into alignment with their gender." *Id.* at 891. Act 626 was not substantially related to Arkansas's purpose of protecting children from experimental treatments. *Id.* The Act, which covered all medical and surgical gender transition treatments, was based on judicial opinions that permitted acts that were much more narrowly tailored. *Id.* Furthermore, the court ruled that "[i]f the State's health concerns were genuine, the State would prohibit these procedures for all patients under 18, regardless of gender identity." *Id.* The court concluded that the State's goal was not to ban a harmful and

irreversible treatment. *Id*. The purpose of Act 626 was "to ban an outcome that the State deem[ed] undesirable." *Id*.

The lower courts were right to classify the SAME Act as discrimination based on sex. The recent opinion in *Bostock* stated that "...it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. 140 S. Ct. at 1741. The SAME Act defines "sex" as "the biological state of being male or female, based on individual's sex organs, chromosomes, and endogenous hormone profile." 20 Linc. Stat. § 1202. It prohibits gender transition treatments that changes "physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." *Id.* at § 1203. The school board in *Grimm* distinguished between male and female restrooms and limited the use of each to their respective gender. 972 F.3d at 593. They defined gender as the sex marked upon the student's birth certificate. *Id*. at 608. The SAME Act employs a similar approach: sex is dependent upon biology. The court stated in Grimm that when something is decided based upon the sex listed on a birth certificate, that policy is based on sex classification. *Id*. The SAME Act forces physicians to decide whether to offer treatment to an adolescent based on their biological state of being male or female. 20 Linc. Stat. § 1203. If a transgender girl is in the biological state of being male, a doctor cannot offer any medical or surgical treatment that alters his physiological or anatomical characteristics to resemble that of a female. The lower courts were correct in deciding that the SAME Act

constitutes gender-based discrimination and therefore intermediate scrutiny should be employed.

The SAME Act does not pass intermediate scrutiny because it is not substantially related to a sufficiently important government interest. The SAME Act is similar to Act 626 in *Brandt*. Both acts deny gender affirming care solely because the individual's gender identity did not conform with their sex assigned at birth. *Id*. at 888. The State in Brandt stated that Act 626 was passed to protect "vulnerable children from experimental treatment." *Id*. at 889. The SAME Act also sought to protect vulnerable children from experimental treatment. Both acts also assert that there is insufficient scientific evidence to support the use of gender affirming medication and surgeries, despite WPATH supplying a wealth of knowledge when it comes to the safety and benefits of gender affirming care. Both acts also over rely on examples from other countries: the State in *Brandt* tried to stretch judicial opinions that permitted narrowly tailored acts to remain in effect to fit their blanket ban and Lincoln attempted to coopt health systems from Sweden and Finland and evidence from the United Kingdom. The lower courts determined that while the international examples labeled these treatments as "experimental", many medical associations within the United States endorsed the treatments as "well-established, evidence-based treatments" that can treat dysphoria but can also be used to treat conditions in cisgendered children. Jess Mariano's gender affirming care is lifesaving; he attempted suicide at age eight and, since starting puberty blockers, there has been a noticeable improvement in his gender dysphoria and as a

result, his depression has improved as well. The *Brandt* court emphasizes that gender affirming care does not harm transgender children; it is quite the opposite in fact, and we see that this is true in Jess Mariano's case. Finally, and most importantly, Act 626 and the SAME Act are identical in that the treatments that are banned are only banned for children who identify as transgender, not for children who identify as cisgender. Language in the SAME Act specifically targets vulnerable children who suffer from gender dysphoria. Just as the court in *Brandt* concluded that, if the State truly wanted to protect vulnerable children, it would ban all procedures for children under the age of eighteen, the lower courts also concluded that if Lincoln truly wanted to protect vulnerable children, the statute would not be geared only towards children who identify as transgender. The SAME Act is no different than Act 626; its purpose is not to protect vulnerable children, but rather to "ban an outcome that the state deem[ed] undesirable." *Brandt*, 551 F. Supp. at 891.

2. Even if the SAME Act does not discriminate based on sex, there is still reason for to apply heightened scrutiny to the act based on its prejudicial treatment of transgender children.

Equal protection cases that do not claim discrimination based on suspect classes or quasi-suspect classes are typically subject to rational review. However, there are instances in which the Supreme Court applied heightened scrutiny even where no suspect or quasi-suspect class was found. *See City of Cleburne, Tex. v. Cleburne Living Ctr*, 472 U.S. 432, 441 (1985). The desire to harm one, specific

politically unpopular group is not a legitimate government interest. *Id.* at 447 (quoting *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534-535 (1973)).

In *City of Cleburne, Texas v. Cleburne Living Center*, the respondent had purchased a building with the intention of leasing it to Cleburne Living Center. *Id.* at 435. Cleburne Living Center planned to operate a home for the mentally disabled. Id. Cleburne Living Center submitted a required a special permit application to the City Council. *Id.* The City Council determined that the group home was "a hospital for the feebleminded" and voted to deny the Cleburne Living Center application. *Id.* at 436-437. The living facility filed suit, alleging that the City Council had discriminated against the mentally disabled and therefore violated their right to Equal Protection. *Id.* The Supreme Court concluded that the mentally disabled are not a suspect or a quasi-suspect class because it is not wholly immutable and the mentally disabled are not homogenous; they are a large and diversified group. *Id.* at 442. The court then established that the rejection should be subject to rational review - that is the means must be rationally related to a legitimate government purpose. *Id.* at 446. Next, the Court examined the city's laws, which did not require a special permit application for a variety of dwellings including apartments, dormitories, sanitariums, and nursing homes. *Id.* at 447. It did, however, require one from Cleburne Living Center because it was meant to be a home for the mentally disabled. *Id.* at 447-448. The Court questioned whether housing mentally disabled people would pose a special threat to the city's interests compared to other occupants and concluded that there was no special threat. *Id.*

The Court examined the City Council's reasoning as to why the Cleburne Living Center could not occupy that house: that because the house was located on a floor plain, there was the possibility of flood. *Id*. at 449. The City Council did not, however, deny that others, the apartments, dormitories, sanitariums, and nursing homes, could live on the floor plain out of concern for flooding. *Id*. The two groups were similarly situated: one was not denied basic housing, but the other was denied basic living and housing for no reason other than their mental disability. *Id*. The Court held that the special application was unconstitutional.

The SAME Act discriminates against transgender children receiving medical treatment, who are similarly situated to cisgender children who can receive the same medical treatment. City of Cleburne involved two groups of people: the mentally disabled who were looking for housing and the other citizens of Cleburne who also needed housing. 472 U.S. at 435. In the Mariano's case, the SAME Act divides children into two groups: those that are transgender and seeking gender affirming care and those that are cisgender and seeking similar treatment. In *City of Cleburne*, the Cleburne Living Center's special application was denied facially because the housing was situated on a flood plain and the City Council defended the denial on the basis that there was a possibility of dangerous flooding. *Id*. at 449. In the Mariano's case, the State will deny medical and surgical gender affirming treatment to transgender children citing foreign medical studies and concerns that the treatments are harmful and irreversible. Identically to the City Council in City of Cleburne, who denied housing to the mentally disabled, but not to people seeking

to build apartments, dormitories, sanitariums, and nursing homes, the state of Lincoln will deny medical and surgical gender affirming treatment to transgender children who seek it, but not to cisgender children who need similar treatments for other conditions. 472 U.S. at 449. The state of Lincoln does not raise similar concerns about irreversibility and harm when it comes to cisgender children receiving treatment; it uses protection from "harmful and irreversible medical treatments" as a guise to discriminate against transgender children and to prevent them from medically transitioning. The SAME Act is prejudicial against transgender children and denies them medical treatment that could significantly improve and, in some cases, save their lives. Because the SAME Act distinguishes two similarly situated groups, transgender children and cisgender children, and denies one group medical treatment while providing it to the other, it qualifies for heightened scrutiny and, ultimately, the court of appeals was correct when it determined that the SAME Act was likely to fail this heightened scrutiny.

The lower courts were correct in determining that the Jess Mariano showed that there was a sufficiently serious question regarding the merits of his Equal Protection claim that the SAME Act discriminated against him due to his transgender status. The SAME Act was a policy based on sex classification and was subject to intermediate scrutiny. The SAME Act is not likely to pass intermediate scrutiny because it is not substantially related to a sufficiently important government interest. The SAME Act also is unlikely to pass enhanced rational

review, because it is unfairly prejudicial against transgender children who are similarly situated to cisgender children.

CONCLUSION

The serious question standard is still viable after the *Winter v. Natural Resources Defense Council, Inc* since the *Winter* standard does not preclude the use of the serious question standard set by *Blackwedler* in its application. Even though the Circuit courts are split on how to handle the interplay between the *Winter* holding and "serious question" standard, the serious question approach survives *Winter* when applied as part of the four-element *Winter* Test. Given that the serious question analysis is viable, the Marianos are likely to succeed on the merits due to heightened scrutiny. Intermediate scrutiny is applied since The SAME Act discriminates on the basis of sex. Additionally, the balance of equities tips in favor of the Marianos due to the substantial risk of irreparable harm if Jess is denied access to gender affirming care.

The preliminary injunction was properly granted in regard to the Respondents' Substantive Due Process and Equal Protection claim. Included in the Substantive Due Process rights is a parent's right to raise their child as they see fit and to make medical decisions on behalf of their child. These rights are deeply rooted in our nation's tradition and history. The Marianos can show that in order to raise a healthy child, they must exercise their parental rights to raise a child as the gender the child identifies as and provide that transgender child gender affirming care in the form of medical treatment. Jess Mariano's Equal Protection claim was

properly granted because the SAME Act discriminates on the basis of gender and is subject to intermediate scrutiny. The SAME Act's means to protect vulnerable children are not substantially related or narrowly tailored enough to survive intermediate scrutiny. Even if the SAME Act is found to not discriminate based on gender, it is subject to and fails enhanced rational review because it distinguishes between two similarly situated groups and unfairly prejudices one of those groups.

It is for these reasons that this Court should uphold the decision of the Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

/s/ 3125

Attorneys for Respondents

CERTIFICATE OF SERVICE

We certify that a copy of Respondents' brief was served upon Petitioner, April Nardini, in her official capacity as the Attorney General of the State of Lincoln, through the counsel of record by certified U.S. mail return receipt requested, on this, the 15th day of September, 2022.

/s/ 3125

Attorneys for Respondents

APPENDIX A

Constitutional Provisions

U.S. Const. amend. XIV, §1. The Due Process Clause and Equal Protection Clause.

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

APPENDIX B

Statutory Provisions

Stop Adolescent Medical Experimentations Act

20 Linc. Stat. § 1201. Findings and Purposes

(a) Findings:

The State Legislature finds -

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

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

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

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

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

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

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

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

(b) Purposes: It is the purpose of this chapter –

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

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

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

20-1202 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.

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.

28 U.S.C §§ 2201(a); 2202. Declaratory Judgment

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.

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.

Interlocutory Decisions Act

28 U.S.C. § 1292(b). Interlocutory Decisions

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance

the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

APPENDIX C

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 Injunctions and Temporary Restraining Orders

(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.

(b) Temporary Restraining Order.

(1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration.* Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve.* On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security.

The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.

(1) *Contents.* Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound.* The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified.

These rules do not modify the following:

(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;

(2) 28 U.S.C. §2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or

(3) 28 U.S.C. §2284, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.