Docket No. 22-8976

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In The

# Supreme Court of the United States

October Term, 2022

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

*Petitioner*,

v.

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

*Respondents*,

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

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**BRIEF FOR RESPONDENTS**

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Team 3126
Attorneys for Respondents

## QUESTIONS PRESENTED

I. Does this Court's holding in *Winter v. Natural Resources Defense Council, Inc.*, rejecting the Ninth Circuit's possibility of irreparable harm standard as too lenient, also preclude the use of the "serious question" standard for preliminary injunctions when a majority of circuit courts prioritize flexibility in equity jurisdiction?

II. Did the District Court abuse its discretion in finding that the Marianos' Equal Protection and Substantive Due Process claims posed a serious question when the court considered evidence that the SAME Act prohibits access to treatment based on sex and violates a parent's right to obtain a widely accepted medical treatment for their child?

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## OPINIONS BELOW

The opinion and order of the United States District Court for the District of Lincoln is unreported and set out in the record. R. at 1–22. The opinion and order of the United States Court of Appeals for the Fifteenth Circuit is also unreported and set out in the record. R. at 23–34.

## STATUTORY PROVISIONS

The following provisions are relevant to this case: Section 1 of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983, and Lincoln's Stop Adolescent Medical Experimentations ("SAME") Act, 20 Linc. Stat. §§ 20-1201–06. These provisions are reproduced in Appendix A.

## STATEMENT OF THE CASE

### *Factual Background*

***Jess Mariano's Gender Dysphoria.*** From an early age, Jess knew he was not meant to be a girl, and this gender disconnect led to severe anxiety and depression. R. at 4. At age eight, Jess attempted suicide by taking a handful of Tylenol pills and hoped he would "never wake up." R. at 4. Jess's parents took him to a psychiatrist who diagnosed him with gender dysphoria per existing medical guidelines. R. at 4.

At age ten, Jess began puberty and started developing breasts, further exacerbating his gender dysphoria. R. at 5. Per gender-affirming care guidelines, Jess's therapist and pediatrician prescribed him puberty blockers to reversibly delay puberty. R. at 5, 6. The World Professional Association for Transgender Health ("WPATH") and Endocrine Society publish these medical guidelines and all leading U.S. medical organizations, including the American Medical Association and the American Academy of Pediatrics endorse them as evidence-backed treatments for gender dysphoria in minors. R. at 5–6; *see also Eknes-Tucker v. Marshal*, No. 2:22-cv-184-LCB, 2022 WL 1521889, at *2 (M.D. Ala. May 13, 2022) (finding these organizations and at least 18 others "endorse [the WPATH] guidelines as evidence-based methods for treating gender dysphoria in minors."). These guidelines recommend a phased approach to gender-affirming care that begins with reversible puberty suppression, then partially reversible hormone therapy, and end with irreversible surgeries which are generally not recommended for minors. *See* R. at 6

(citing Hembree WC, *et al.*, *Endocrine Treatment of Gender-dysphoric/Gender-incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clin. Endocrinology & Metabolism 3869 (2017), at https://doi.org/10.1210/jc.2017-01658)).

After a diagnosis of gender dysphoria, transgender individuals first undergo a social transition, such as assuming pronouns consistent with their gender identity and adopting a new name. R. at 6. Then, as Jess did, they begin using puberty blockers only after the individual has shown signs of puberty and has experienced long-lasting and intense feelings of gender dysphoria. R. at 5–6. This medicine simultaneously gives the child time to decide what to do next and prevents the development of secondary sex characteristics, such as breasts, that exacerbate feelings of gender dysphoria. R. at 6. Doctors have long prescribed puberty blockers for adolescents who enter puberty too early, and they do not affect fertility. R. 6, 15.

Next, doctors prescribe hormone therapy to instill secondary characteristics of the opposite sex in accordance with their gender identity. R. at 6. Jess's doctors anticipate that he will begin masculinizing hormone therapy when he reaches age 16. R. at 6. As with puberty blockers, doctors have long used hormones to stimulate puberty in children with below normal hormone levels. R. at 16. While some individuals have regretted initiating hormone therapy, most diagnoses of gender dysphoria in adolescents will persist into adulthood. R. at 7–8.

Finally, doctors may recommend gender-affirming surgeries. R. at 6. The guidelines do not recommend genital surgery for minors but will sometimes recommend masculinizing chest surgery for transgender males. R. at 6. Due to the

considerable distress Jess has experienced from developing breasts, Jess's psychiatrist believes he may need chest surgery before turning 18.

Left untreated, adolescents who experience gender dysphoria are at a heightened risk for anxiety, depression, eating disorders, substance abuse, self-harm, and suicide. R. at 7. In contrast, there is a strong association between adolescents who begin gender-affirming care and favorable mental outcomes, including lower risks of suicide. R. at 7. Since beginning puberty blockers, Jess has experienced fewer symptoms of depression and distress associated with his gender dysphoria. R. at 5. Passage of the SAME Act means Jess may not be able to obtain treatment for his gender dysphoria until he turns 18, and his doctors believe that even one month without puberty blockers could undermine the progress he has made fighting his depression and gender dysphoria. R. at 5.

***The SAME Act.*** The Lincoln Legislature passed the SAME Act, believing it will protect children from experimental medical treatments and making life-changing decisions based on peer pressure. R. at 20. In pertinent part, the SAME Act forbids doctors from providing treatments that "instill[] or creat[e] physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." § 20-1203. Prohibited treatments for transgender minors include puberty blockers, hormone therapy, and gender-affirming surgeries. § 20-1203(a)–(c).

In support of its experimental claims, Lincoln provided medical testimony that gender-affirming care has uncertain medical outcomes and that certain European countries have called into question its effectiveness and safety. R. at 7–8. The state's

concerns include gender-affirming care's possible effects on fertility, cancer, liver dysfunction, coronary artery disease, and bone density. § 20-1201(5); R. at 13.

Lincoln bases its peer pressure claim on anecdotal evidence that social influence played a significant role in some who have expressed regret for transitioning. § 20-1201(7). In part, the state argues parents and children lack appropriate knowledge of the risks to acquire informed consent before beginning gender-affirming care. § 20-1201(7); R. at 13.

### *Procedural History*

***District of Lincoln.*** On November 4, 2021, the Marianos filed a complaint in the District Court of Lincoln seeking to enjoin the SAME Act from taking effect. R. at 1. The Marianos alleged that the SAME Act violated their Fourteenth Amendment Equal Protection and Due Process rights and sought relief under 42 U.S.C. § 1983. R. at 1. On November 11, the Marianos moved for a preliminary injunction. R. at 1. Lincoln moved to dismiss on November 18 and urged the court to deny the preliminary injunction. R. at. 1.

First, the court considered the proper standard for granting relief under a preliminary injunction. R. at 8. Historically, the Fifteenth Circuit had followed the serious question standard used by the Second Circuit, but the court noted that the circuits remain divided on whether that standard remains viable after this Court's decision in *Winter v. Natural Resource Defense Council, Inc.* R. at 9. The court concluded that the serious question standard survived *Winter* because the standard

for injunctive relief should remain flexible to meet the complex and varied factual situations presented early in litigation. R. at 10.

Next, the court considered the Marianos' claim that they will suffer immediate and irreparable harm if the court allowed the SAME Act to go into effect because Jess would no longer be able to obtain his gender dysphoria treatment. R. at 8. The court granted the Marianos' request finding that (1) the Marianos will suffer immediate and irreparable harm because Jess would experience irreversible physical changes, worsening his gender dysphoria, and the SAME Act threatened Jess's parents' constitutional rights to make medical decisions for their child; (2) the Marianos' immediate and irreparable harm outweighed the harm of overriding duly enacted legislation; and (3) the Marianos' claims raised a serious question for litigation that the SAME Act discriminates based on sex and infringes on a parent's fundamental right to obtain medical treatment for their children. R. at 12, 13, 14, 22. In evaluating the Marianos' constitutional claims, the court applied strict scrutiny to the parental rights Due Process claim and heightened scrutiny to the Equal Protection claim. R. at 16, 20.

***Fifteenth Circuit.*** Lincoln filed an interlocutory appeal challenging the District Court's enjoinment of the SAME Act. R. at 23. The court found that the District Court did not abuse its discretion in using the serious question standard or in granting the preliminary injunction. R. at 24. Judge Gilmore dissented, arguing that the District Court used an improper standard for preliminary injunctions because this Court abrogated the serious question standard in *Winter*. R. at 28. On

the Marianos' constitutional claims, Judge Gilmore also argued that the family was not likely to succeed on their claims because the SAME Act does not discriminate based on sex and there is no substantive due process right to obtaining experimental medical procedures. R. at 29, 32.

## SUMMARY OF THE ARGUMENT

***The "serious question" standard provides courts the flexibility they need to administer equity.*** Generally, courts will grant a preliminary injunction when the plaintiff is likely to succeed on the merits, is likely to suffer irreparable harm without the injunction, demonstrates that the balance of equities tips in their favor, and shows that an injunction is in the public interest. Some circuits apply a flexible approach to the likelihood of success factor and will grant an injunction if the plaintiff poses a serious question for litigation and the balance of harm tips sharply in their favor. Other circuits disagree, applying an element-based formulation to the factors. Some of the latter circuits believe that this Court prescribed the stricter formulation in *Winter v. Natural Resource Defense Council.*

In *Winter*, this Court devoted its analysis to the likelihood of irreparable harm factor and rejected the Ninth Circuit's possibility of harm test. This Court devoted little discussion to the likelihood of success factor and nothing in the opinion explicitly rejected the serious question standard as a viable substitute. In her dissent, Justice Ginsburg agreed, explaining that the purpose behind the serious question standard is to allow the District Court flexibility to do equity in the face of complex and varied facts early on in litigation. She further explained that U.S. courts have long embraced

flexibility in equity jurisdiction and that she did not believe this Court was abandoning that position.

After *Winter*, the circuits have further split with the Fourth and Tenth Circuits interpreting *Winter* to reject the serious question standard. These courts perceive the serious question standard as too lenient, undermining a preliminary injunction's status as an extraordinary remedy. However, these courts misunderstand the application of the serious question standard and overlook the importance of flexibility in equity jurisdiction. The serious question standard poses no lighter a burden on the District Court in granting an injunction because it requires the court to also find a strong likelihood of irreparable harm. Moreover, most circuits cite the need for flexibility in granting a preliminary injunction, and the majority do not require the plaintiff to show they are likely to succeed by a preponderance of the evidence.

***The SAME Act discriminates based on sex.*** The Equal Protection Clause protects people from intentional and arbitrary discrimination. When a law discriminates based on sex, it must do so for an exceedingly persuasive reason. The SAME Act prohibits minors from taking medication that will instill or create characteristics resembling those opposite their biological sex. Thus, it is impossible to enforce this law without taking sex into consideration.

The SAME Act treats similarly situated minors differently for arbitrary reasons. For example, the SAME Act allows minors to use puberty blockers or hormones to regulate "normal" puberty but prohibits the use of the identical drugs to treat gender dysphoria. This difference in allowed treatments exposes the state's

inherent bias for traditional gender stereotypes. As this Court explained in *Bostock v. Clayton County*, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."

Because the SAME Act discriminates based on sex, the state must show that the Act advances important government objectives and that its discriminatory methods substantially advance those interests. Lincoln argues the SAME Act protects children from experimental medical treatments and from making life-changing decisions based on peer pressure. However, the SAME Act advances neither of these objectives. Instead, the Act prevents transgender minors from obtaining an evidence-based treatment endorsed by nearly all major medical associations.

***The SAME Act violates Due Process parental rights.*** The Due Process clause guarantees a person's fundamental rights. Parents possess a fundamental right in the care, custody, and control of their children. Both parties agree that parents have a right to obtain medical treatment for their children, but Lincoln argues there is no right to experimental medical treatment. However, gender-affirming care is not experimental. Instead, it is the primary means of treating gender dysphoria.

Laws that violate Due Process rights must serve a compelling government interest and must be narrowly tailored to achieve that purpose. As stated above, the SAME Act does not advance any of the state's interests. Moreover, the SAME Act would be narrowly tailored to protect minors from these treatments only if it banned the medication for all minors.

## STANDARD OF REVIEW

This Court reviews the decision to grant a preliminary injunction for an abuse of discretion. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004). An abuse of discretion occurs when the District Court based its decision "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990). A District Court's assessment of the evidence is clearly erroneous when a court "is left with the definite and firm conviction that a mistake has been committed." *United States. v. Gypsum Co.*, 333 U.S. 364, 395 (1948). A court should uphold a preliminary injunction if it contains an underlying constitutional question that is close. *Ashcroft*, 542 U.S. at 664–65.

## ARGUMENT

**I. The serious question standard for preliminary injunctions survives this Court's decision in *Winter v. Natural Resources Defense Council, Inc.* because it provides courts with the flexibility required to administer equitable relief.**

To obtain a preliminary injunction, a plaintiff must show, "[1] he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). This appeal concerns the first factor.

Since this Court's opinion in *Winter*, a circuit split on preliminary injunctions has deepened. Some circuits employ a sliding-scale approach where the court balances each of the four parts as factors. The serious question standard is a common variant of this approach and requires that plaintiffs show, "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently *serious questions* going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *See, e,g.*, *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunity Masters Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979)) (emphasis added). Where courts cannot accurately estimate a likelihood of success on the merits, the serious question standard permits a preliminary injunction when the plaintiff's claim presents a question "so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *All. for the Wild Rockies v. Cottrell*, 632

F.3d 1127, 1134 (9th Cir. 2011). Thus, courts in sliding-scale jurisdictions augment the first element by allowing a court to award a preliminary injunction on a two-sided continuum: (1) where the plaintiff's chance of success is more likely than not, or (2) where the likelihood of success is something less than certain, but the costs of not granting the injunction outweigh the benefits. *Citigroup*, 598 F.3d at 35. Jurisdictions using the slide-scale approach must still consider each of the other factors. *Wild Rockies*, 632 F.3d at 1135. Other courts treat each of the four parts as independent elements that the plaintiff must establish and only consider whether the plaintiff is likely to succeed on their claim. *See generally* Taylor Payne, *Now is the Winter of Ginsburg's Dissent: Unifying the Circuit Split as to Preliminary Injunctions and Establishing a Sliding Scale Test*, 13 Tenn. J. L. & Pol'y 15 (2018) (surveying approaches taken by various circuits).

### A. This Court's holding in *Winter* did not invalidate the serious question standard.

In *Winter*, this Court held that the Ninth Circuit's possibility of irreparable harm standard was too lenient but did not explicitly address the serious question standard. *Winter*, 555 U.S. at 22–24 ("[W]e do not address the lower courts' holding that plaintiffs have also established a likelihood of success on the merits."). The Natural Resource Defense Council (NRDC) sought to enjoin the Navy from using sonar in training exercises due to its potentially harmful effects on marine wildlife. *Id.* at 12. A California District Court granted a preliminary injunction against the Navy, finding its sonar use likely violated federal environmental regulations. *Id.* at 16–17. The Ninth Circuit affirmed after requiring the District Court to narrow its

blanket injunction on sonar use so that the Navy could continue training with mitigations. *Id.* at 17–20. In its analysis, this Court rejected the Ninth Circuit's take on the sliding-scale approach where a court could grant an injunction when the plaintiff could only demonstrate a possibility of irreparable harm, but a strong likelihood of success on the merits. *Id.* at 21–22. This court reasoned that a mere possibility of irreparable harm was inconsistent with the policy that a preliminary injunction should be an extraordinary remedy. *Id.* at 22.

**1. Nothing in the text of *Winter* invalidated the serious question standard.**

The majority devoted its analysis to rejecting the possibility of irreparable harm standard and to discussing the balance of equities and public interest. As for the latter, this Court concluded that the Navy's interest in conducting realistic training exercises and the public's associated national security interests outweighed NRDC's interest in protecting marine wildlife. *Id.* at 26. Justice Roberts explained that the Court did not need to consider the likelihood of success factor because the Navy's interest and the public interest clearly outweighed it. *Id.* at 23–24. Nothing in this analysis challenges the validity of the serious question standard because courts using a sliding scale still require consideration of each factor.

As for irreparable harm, this Court reasoned that a mere possibility of harm was inconsistent with the policy that a preliminary injunction should be an extraordinary remedy. *Id.* at 22. This Court agreed with the Navy that this standard allowed harms too speculative to NRDC's environmental interests to proceed to an

injunction. *Id.* at 21–22. Here too, this Court's decision does not reject the serious question standard because it only discusses the irreparable harm factor.

While Lincoln may argue this holding's logic extends to the likelihood of success on the merits, this argument fails because the serious question standard does not undermine the extraordinary remedy policy. As the Second Circuit explained in *Citigroup Global Markets, Inc. v. VCG Special Opportunity Master Fund Ltd.*, the burden under the serious question standard is no lighter than under a likelihood of success standard because it requires the court to fully analyze the plaintiff's claim and find that balance of hardships decidedly tip in his favor. *Citigroup*, 598 F.3d at 35. Therefore, it does not follow that the serious question standard deprives a preliminary injunction of its status as an extraordinary remedy.

In contrast, requiring a strong likelihood of success for every preliminary injunction would defeat its purpose because, by design, a preliminary injunction occurs before trial where a decision on the merits actually occurs. In *Citigroup*, the Second Circuit explained that courts should not have to deny preliminary injunctions just because the plaintiff's case presents significant difficulties. 598 F.3d at 35–36 (citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.3 (2d ed.2009)). Such a requirement would strip a preliminary injunction of its usefulness. *Id.*

**2. Justice Ginsburg's Dissent offers persuasive insight into why this Court did not reject the sliding-scale standard in *Winter*.**

In her dissent, Justice Ginsburg disagreed with the majority's assessment of the District Court's analysis on the balance of equities but agreed with the majority's

holding on the possibility of irreparable harm standard. *Winter*, 555 U.S. at 51. She explained that the courts have traditionally relied on the sliding-scale approach and that the majority did not reject that approach. *Id.* Further, Justice Ginsburg explained that as a tool of equity, preliminary injunctions rely on flexibility, and that "courts do not insist that litigants uniformly show a particular, predetermined quantum of probable success or injury before awarding equitable relief." *Id.* Instead, courts sometime award "relief based on a lower likelihood of harm when the likelihood of success is very high." *Id.* Though in the dissent, Justice Ginsburg's commentary provides valuable insight on the purpose of a preliminary injunction.

**3. If the Court had wanted to invalidate the serious question standard it would have said so.**

This Court's silence on the serious question standard implies acquiescence to its validity because it had the opportunity to reject the standard in *Winter* but declined. In a footnote, Justice Roberts specifically addressed the dissent, pointing out that Justice Ginsburg's argument focused on the likelihood of success. *Winter*, 555 U.S. at 32 n.5. However, this Court said nothing of her characterization of the majority opinion as not rejecting the sliding-scale approach. This silence implies tacit agreement that preliminary injunctions require flexibility.

Similarly, this Court evaluated a preliminary injunction claim from a Circuit that used and continues to use the serious question standard but did not address it. *See*, *e.g.*, *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, No. 22-15827, 2022 WL 3712506 at, *12 (9th Cir. August 29, 2022) (quoting *Winter* factors and describing serious question standard). This Court chose to single out this

factor even though it may not have changed the lower court's decision. *Winter*, 555 U.S. at 22 ("It is not clear that articulating the incorrect standard affected the Ninth Circuit's analysis of irreparable harm."). Moreover, this Court noted that the Ninth Circuit used the serious question standard when NRDC challenged one environmental agency's decision to allow the Navy to continue training under emergency circumstances. *Id.* at 19. Had this Court wanted to invalidate the serious question standard it would have because it was specifically confronted with the standard but declined to discuss it.

### B. Supreme Court precedent supports use of the serious question standard.

This Court has commented on preliminary injunctions in *Ohio Oil Co. v. Conway*, *Munaf v. Green*, and *Nken v. Holder*. The decision in *Ohio Oil* supports using the serious question standard, while the other two, like *Winter*, do not preclude its use.

Long before *Winter*, this Court ruled in *Ohio Oil Co. v. Conway* that a factual dispute need not bar a preliminary injunction. *Ohio Oil Co. v. Conway*, 279 U.S. 813, 813–14 (1929). Ohio Oil sought to enjoin a state tax from taking effect, alleging that it violated the Fourteenth Amendment. *Id.* at 813. This Court could not adequately assess whether the plaintiff was likely to succeed due to the parties' conflicting affidavits but explained that an "injunction will usually be granted" where "the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable." *Id.* at 813–14. This Court's past formulation mirrors the modern formulation of the serious question

standard. Furthermore, this decision underscores the longstanding commitment of U.S. courts to exercise flexibility when granting injunctions because as in *Ohio Oil*, it is difficult to a apply rigid formulation to complex factual disputes.

More recently, this Court held in *Munaf v. Green*, that a determination on standing was not equivalent to assessing the likelihood of success. *Munaf v.* Green, 553 U.S. 674, 690 (2008). This Court considered whether a District Court had the power to prevent the U.S. Military from transferring detainees in another country to that country's control for criminal prosecution. *Id.* at 689. The District Court granted an injunction because the issue of standing presented questions "so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberative investigation." *Id.* at 690. While this formulation is identical to the serious question standard, this Court did not reject the standard outright. Instead, this Court reasoned that evaluating standing is not the same as evaluating the merits. *Id.* Therfore, this Court's holding in *Munaf* does not reject the serious question standard.

Similarly, in *Nken v. Holder*, this Court granted certiorari to determine the correct standard for stays. *Nken v. Holder*, 556 U.S. 418, 423 (2009). Its analysis on the proper standard relied on *Winter*, noting substantial overlap in the factors used. *Id.* at 434. Extending *Winter*, this Court held that the possibility of irreparable harm standard was also too lenient for stays and similarly held that the likelihood of success on the merits be "better than negligible." *Id.* at 434–35 (quoting *Sofinet v. INS*, 188 F.3d 703, 707 (C.A.7 1999)). This reasoning does not explicitly mandate that

plaintiffs must demonstrate they are more likely than not to succeed on the merits. Moreover, the serious question standard demands a likelihood of success determination far more than merely negligible because it requires courts to fully evaluate the plaintiff's claims and determine the balance of hardships tips sharply in their favor.

### C. A majority of Circuits prioritize some kind of flexibility with a variation of the sliding-scale test.

This Court should follow the approach of the seven circuits that have endorsed the sliding-scale approach or serious question standard because they provided courts with the flexibility they need to preserve the status quo before trial in the face of varied and complex factual issues. Likewise, this court should reject the rigid element-based formulation adhered to by five of the circuits because it places too heavy a burden on courts to determine the merits before trial.

#### 1. The Second and Ninth Circuits' Serious Question Standard.

In *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, the Second Circuit defended its use of the serious question standard. 598 F.3d at 35. The defendant argued that a serious question is not sufficient because this Court's holding in *Winter* mandated that the plaintiff show a probability of success greater than 50 percent. *Id.* at 34–35. Rejecting this interpretation, the court stressed the importance of a flexible standard at the early stages of litigation where there are "varying factual scenarios" and "greater uncertainties." *Id.* at 35. The Second Circuit considered the opinions in *Munaf*, *Winter*, and *Nken* and concluded that none of these cases rejected the serious question standard. *Id.* at 37–38. The court reasoned that if

this Court intended to reject the standard, it would expect an explicit discussion because "one would expect some reference to the considerable history of the flexible standards applied in this circuit, seven of our sister circuits, and in the Supreme Court itself." *Id.* at 38.

Similarly, in *Alliance for the Wild Rockies v. Cottrell*, the Ninth Circuit defended its use of the serious question standard, concluding that this Court only rejected its possibility of irreparable harm standard. 632 F.3d at 1131. The court endorsed the Second Circuit's reasoning in *Citigroup* and reemphasized the need for flexibility. *Id.* at 1133–34. The Ninth Circuit rejected the possibility that this Court would have eliminated a District Court's power to preserve the status quo with a preliminary injunction before it could fully resolve the merits at trial. *Id.* at 1134.

**2. The Third and Seventh Circuits' Sliding-Scale.[1]**

In *Reilly v. City of Harrisburg*, the Third Circuit clarified its own intra-circuit split on the sliding-scale approach and held that the approach survived *Winter*. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176–77 (3rd Cir. 2017). The court reasoned that the opinions in *Winter* and *Nken* supported the traditional flexibility provided by

[1] This analysis excludes the Sixth, D.C., and Federal Circuits because they have not squarely defended their adherence to the sliding-scale approach in light of *Winter*. *See D.T. v. Sumner Cnty. Schls.*, 942 F.3d 324, 328–29 (6th Cir. 2019) (Nalbandian, J. concurring) (acknowledging circuit split and noting that "no panel has ever explicitly discussed whether *Winter* affected our [sliding-scale] test."); *Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 726 (D.C. Cir. 2022) (noting D.C. Circuit has repeatedly declined to override the sliding-scale approach even though it may conflict with *Winter*); *Silfab Solar, Inc. v. U.S.*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (declining to override sliding-scale approach and noting that since *Winter*, this circuit requires at least a "fair chance" of success on the merits). Additionally, this analysis excludes the Eighth Circuit's approach which treats the factors as elements, but also requires only a "fair chance" of success on the merits. *Rodgers v. Bryant*, 942 F.3d 451, 455–56 (8th Cir. 2019) (explaining that with regard to likelihood of success only a "fair chance" is required unless parties seek to enjoin a state statute because legislative acts are entitled to higher deference).

equitable relief and noted that the Second and Seventh Circuits agreed with that interpretation. *Id.* at 178. The Sixth Circuit added to the flexibility rationale by arguing standards for equitable relief should not be so rigid as to ignore a District Court's discretion. *Id.* at 178–79. The court concluded that appellate courts should respect the sound discretion of District Courts to levy equitable relief because they "are on the frontline and are much more familiar with the unique facts of a particular case." *Id.* at 179.

Similarly, the Seventh Circuit has repeatedly defended its use of the sliding-scale approach, rejecting only its "better than negligible standard" for the likelihood of success factor abrogated by this Court in *Nken*. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013) ("[The sliding-scale] formulation is a variant of, though consistent with, the Supreme Court's recent formulations of the standard, in . . . *Winter*[.]"); *Mays v. Dart*, 974 F.3d 810, 818, 821–22 (7th Cir. 2020) (instructing use of sliding-scale approach and rejecting District Court's use of "better than negligible" standard.); *see also Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762–63 (7th Cir. 2020) (holding *Nken's* rejection of the "better than negligible standard" for stays equally applies to preliminary injunctions.).

In *Mays v. Dart*, the Seventh Circuit rejected a District Court's granting of a preliminary injunction where the irreparable injury to the plaintiff was very high but the chances of success were better than negligible. 974 F.3d at 821–22. Five days earlier, the Seventh Circuit explained in *Illinois Republican Party v. Pritzker*, that the "better than negligible standard" was no longer acceptable because a mere

possibility of success it not enough after *Winter*. 973 F.3d at 762. However, the court reasoned that the plaintiff need not prove they will win by a preponderance of the evidence because "that would spill too far into the ultimate merits for something designed to protect both the parties and the process while the case is pending." *Id.* at 763. In *Mays*, the court clarified further stating the plaintiff must show "its claim has *some* likelihood of success on the merits" and that "'some' depends on the facts of the case at hand because of our sliding scale approach." 974 F.3d at 822 (emphasis added).

This case well illustrates the need for maintaining a flexible standard because transgender issues are complex. In granting a preliminary injunction, the District Court considered medical issues that are controversial and in "sharp dispute." R. at 14. A more stringent standard would defeat the purpose of a preliminary injunction because it is difficult to see how the District Court could have analyzed these medical issues in further detail without going to trial. As the Ninth Circuit indicated, the District Court was able to prevent further irreparable harm to Jess Mariano by preserving the status quo of his treatment before fully addressing the merits at trial.

**3. The Fourth and Tenth Circuits' Rejection of the Sliding-Scale.**[2]

In *Real Truth About Obama, Inc. v. Federal Election Commission*, the Fourth Circuit abandoned its sliding-scale variant because it interpreted *Winter* to require a clear showing the plaintiff was likely to succeed on the merits. 575 F.3d at 346–47.

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[2] Similarly, this analysis excludes the First, Fifth, and Eleventh Circuits because their analysis continued largely unchanged after *Winter*. *See Russomano v. Novo Nordisk Inc.*, 960 F.3d 48, 52–53 (1st Cir. 2020) (upholding District Court's refusal to grant a preliminary injunction solely because there was no likelihood of success on the merits); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 536 (5th Cir. 2013) (treating preliminary injunction factors like elements); *Swain v. Winter*, 961 F.3d 1276, 1284–85 (11th Cir. 2020) (same); *see generally,* Payne, *supra* note 1, at 58–59 (surveying the circuits and discussing how the Fifth and Eleventh Circuits' analysis is largely unchanged).

The Fourth Circuit's sliding-scale approach required that a court consider whether the plaintiff's claim raised serious questions only after determining the balance of hardships weighed in the plaintiff's favor. *Id.* Accordingly, courts did not always consider each of the factors when granting an injunction. *Id.* at 347. The court concluded that it could no longer grant an injunction where there was a lower likelihood of success but a high degree of irreparable harm because *Winter* required a plaintiff to show it was likely to succeed on the merits. *Id.* Further, the court argued that *Winter* prohibited its approach because the decision required courts to always consider each of the factors, which Fourth Circuit courts did not always do. *Id.*

This Court should not adopt the Fourth Circuit's approach because its reasoning for abandoning its former approach does not apply to contemporary sliding-scale approaches. As explained, contemporary courts using a sliding-scale approach consider each of the *Winter* factors. The Fourth Circuit's reasoning does not extend to the other circuits because it was unique in its ability to ignore factors when granting an injunction.

Likewise, this Court should reject the Tenth Circuit's rejection of the sliding-scale approach because *Winter* does not demand plaintiffs show a likelihood of success by a preponderance of the evidence. In *Diné Citizens Against Ruining Our Environment v. Jewell*, the Tenth Circuit rejected the plaintiff's argument that the court could substitute the likelihood of success factor with a serious question test if each of the other factors weighed heavily in the plaintiff's favor. *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1281–82 (10th Cir. 2016).

Interpreting *Winter*, the court extended this Court's rejection of the Ninth Circuit's possibility of harm standard to the likelihood of harm factor. *Id.* at 1282. However, this Court should reject this interpretation because the serious question standard does not undermine a preliminary injunction's status as an extraordinary remedy and courts require flexibility in adapting to complex facts before trial can take place.

## II. The District Court correctly found the SAME Act violates the Equal Protection Clause because it discriminates based on sex.

The Equal Protection Clause of the Fourteenth Amendment prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Its purpose "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923)). Anytime state legislatures create laws prescribing different treatment based on class, those laws must be, at a minimum, tied to some rational state interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). When state law classifies based on gender, the state's burden increases to heightened scrutiny,[3] which requires an exceedingly persuasive justification. *United States. v. Virginia*, 518 U.S. 515, 524 (1996).

### A. The District Court correctly held the SAME Act must withstand heightened scrutiny because it classifies based on sex.

Laws that require inquiry into a person's sex to regulate conduct necessarily rest on a sex-based classification. *See Virginia*, 518 U.S. at 530–34 (summarizing

[3] Sometimes referred to by this Court as "intermediate scrutiny." *Cleburne*, 473 U.S. at 437–38 (1985); *Virginia*, 518 U.S. at 567 (Scalia, J., dissenting).

history of laws struck down for sex-based discrimination). Heightened scrutiny helps distinguish between laws that classify based on sex for good reasons from those that do so for the wrong reasons. *See Id.* at 533–34 (comparing laws that promote equal employment opportunities with those that perpetuate women's inferiority to men). A state may not regulate an individual's conduct based simply on traditional gender roles. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725–26, 29–30 (1982) (rejecting university admission policy largely based on stereotype that only women should become nurses). Sex-based classification may "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975)).

**1. The SAME Act rests on a sex-based classification because access to treatment depends on a minor's biological sex.**

In *Brandt ex rel. Brandt v. Rutledge*, the Eighth Circuit upheld a preliminary injunction against an almost identical Arkansas law because it likely discriminated based on sex. *Brandt ex rel. Brandt v. Rutledge*, No. 21-2875, 2022 WL 3652745, at *1, *2, *4 (8th Cir. August 25, 2022). Similarly worded as the SAME Act, Arkansas's Act 626 forbids physicians from "[i]nstill[ing] or creat[ing[ physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." *Compare Id*. at *1 *with* 20 Linc. Stat. § 20-1203. From the statute's text, the Eighth Circuit reasoned that male minors could obtain testosterone therapy or have breast tissue removed, but a minor born female could not obtain the same treatment. *Brandt*, 2022 WL 3652745, at *2. The Eighth Circuit concluded that the law

discriminated based on sex because the minor's birth sex determined access to treatment. *Id.*

The Eighth Circuit's reasoning illustrated Jess's position because when Jess turns 16 he will likely begin testosterone therapy and may need chest surgery before he turns 18. R. at 5. Had Jess been born biologically male, he would have access to these same treatments under the SAME Act. *See* R. at 18–19 (noting "[d]octors can treat children with . . . cross-sex hormones as long as [it is consistent with their birth sex.]"). As with Act 626, the District Court correctly concluded that the SAME Act discriminates based on sex because Jess's birth sex determines his access to treatment. R. at 19.

Similarly, in *Eknes-Tucker v. Marshal*, the Middle District of Alabama granted a preliminary injunction against the Alabama Vulnerable Child Compassion and Protection Act, finding it also likely violated the Equal Protection Clause by discriminating based on sex. *Eknes-Tucker v. Marshal*, No. 2:22-cv-184-LCB, 2022 WL 1521889, at *9–10 (M.D. Ala. May 13, 2022). Like the SAME Act, Alabama's law prohibits anyone to treat a minor with puberty blockers or hormone therapy "for the purpose of attempting to alter the appearance of or affirm the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor's sex." *Compare Id.* at *2 *with* § 20-1203(a)–(b). The court concluded that the Act discriminated based on sex because it targets transgender minors and only transgender minors. *Eknes-Tucker*, 2022 WL 1521889, at *9. Accordingly, the court

found the Act placed a special burden on transgender minors because their gender identity did not match their birth sex. *Id.* at *10.

The District Court similarly observed that the SAME Act only applies to transgender minors because only transgender minors seek to instill characteristics of the opposite sex. R. at 19. Therefore, the District Court correctly concluded that the SAME Act discriminates based on sex because it places a special burden on minors with gender dysphoria. *R.* at 19.

Analogously, recent decisions on transgender bathroom policies also help illustrate why laws targeting transgender individuals amount to sex-based discrimination. In *Grimm v. Gloucester County School Board*, the Fourth Circuit found the school board's biological bathroom policy violated the Equal Protection Clause because a policy requiring inquiry into the sex listed on a birth certificate necessarily rested on a sex classification. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020).[4] In response to Gavin Grimm's use of male bathrooms, the school board implemented a biological sex bathroom policy requiring transgender males like Grimm to use the bathroom corresponding to their birth certificate's sex. *Id.* at 593. The court held that it could apply heightened scrutiny to the policy solely because schools could not implement it without reference to sex. *Id.* at 608.

Just as in *Grimm*, the SAME Act requires state officials to grant or prohibit treatment by inquiring into the individual's birth sex. R. at 19. Like the school board's

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[4] *See also Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (holding heightened review applies because where the policy cannot be stated without referencing sex, it "is inherently based upon a sex-classification"), *abrogated on other grounds recognized by Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

bathroom policy which required inquiry into the student's birth certificate, the SAME Act prohibits treatments with reference to the "individual's biological sex." § 20-1203. On that basis alone, as the Fourth Circuit concluded, the SAME Act requires heightened scrutiny because the state cannot enforce the law without reference to sex.

This Court should not be left with the definite and firm conviction that the District Court erred in its analysis because it carefully considered the law's practical effect of prohibiting treatment based on a minor's sex.

**2. The SAME Act rests on a sex-based classification because the law prohibits treatment based on traditional gender roles and outmoded generalizations about males and females.**

In *Grimm*, the Fourth Circuit also held the bathroom policy amounted to sex-based discrimination because it punished transgender people for defying traditional gender norms. 972 F.3d at 608–09. Moreover, the court reasoned that the policy relied on overbroad generalizations regarding sex. *Id.* As written, the SAME Act exposes an inherent bias for traditional gender stereotypes because it allows the use of puberty blockers or hormones to regulate natal sex characteristics but prohibits use of the same drugs for transgender applications. *See* R. at 15–16, 19 (noting that transgender minors cannot obtain puberty blockers and hormones even though doctors have long prescribed them to regulate abnormal puberty). The SAME Act relies on overbroad generalizations about sex by punishing minors who do not conform to traditional stereotypes about gender. While the District Court did not comment on this bias, it

could have independently concluded that the SAME Act classifies based on sex because it prohibits treatment based on gender stereotypes.

**3. Discrimination against someone for being transgender is sex-based discrimination.**

In *Bostock v. Clayton County*, this Court evaluated a civil rights claim under Title VII and found that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cnty.,* 140 S. Ct. 1731, 1741 (2020). Several courts have extended the reasoning in *Bostock* to find that discrimination against transgender individuals constitutes sex-based discrimination that violates the Equal Protection Clause. *Eknes-Tucker*, 2022 WL 1521889, at *9 (applying *Bostock* to conclude Alabama's law prohibiting transgender care for minors amounted to a sex-based classification); *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 889 (E.D. Ark. 2021) (same for Arkansas's law) *aff'd, Brandt,* 2022 WL 3652745; *M.E. v. T.J.*, 854 S.E.2d 74, 109 (N.C. Ct. App. 2020) (finding this Court's analysis in *Bostock* equally applicable to Equal Protection claims).

Regardless of the Title VII context, the holding in *Bostock* extends to Equal Protection claims because this Court's reasoning on transgender discrimination broadly applies to any civil rights litigation. This Court explained that employers who make employment decisions based on transgender status discriminate on sex because "discriminat[ing] on these grounds requires an employer to intentionally treat individual employees differently because of their sex." *Bostock*, 140 S. Ct. at 1742. After notifying her employer that she intended to live as a female due to her gender

dysphoria diagnosis, the defendant terminated plaintiff Aimee Stephens's employment. *Id.* at 1738. This Court reasoned that the decision to terminate on these facts could not be made by an employer without discriminating based on gender because the employer necessarily treated two like individuals differently. *Id.* at 1741–42. This Court considered an example of an employer who fires a person who identified as a male at birth but now identifies as a female and explained:

> If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision. *Id.*

Extending this Court's logic to the SAME Act, a state which creates laws based on transgender status discriminates based on sex because discriminating on these grounds requires a state to intentionally treat people differently because of their sex. The SAME Act treats like people differently by regulating medical procedures based on traditional gender stereotypes because while the act prohibits transgender minors from seeking puberty blockers, hormonal treatments, or physical surgeries, those treatments remain open for cisgender minors. § 20-1204(a)–(c); R. at 19–20. Just as in *Bostock*, the child's sex "plays an unmistakable and impermissible role" in whether to allow treatment. Accordingly, the District Court correctly relied on *Bostock* to infer that transgender discrimination is sex-based discrimination.

### B. The District Court correctly held that the SAME Act does not withstand heightened scrutiny.

Under heightened scrutiny, the state carries the burden to show that the law rests on an exceedingly persuasive justification, which means the classification serves important government objectives and that its discriminatory methods are substantially related to their achievement. *Virginia,* 518 U.S. at 532–33. Any justifications advanced by the state must be genuine and not devised merely in response to litigation. *Id.* at 533.

Lincoln advances two questionable objectives underpinning the SAME Act. First, it seeks to protect children from experimental medical treatments. R. at 20. Second, it seeks to prevent children from making life-changing decisions based on peer pressure. R. at 20. This Court should find Lincoln's justifications unpersuasive because the law's ban on gender-affirming care do not advance either of its stated objectives.

#### 1. The District Court correctly concluded that the SAME Act is not substantially related to protecting minors from experimental medical treatment.

In *Brandt*, the Eighth Circuit found that the lower court correctly dismissed Arkansas's claims that the law does not protect minors from experimental medical treatment because it prohibits a recognized standard of care for gender dysphoria. *Brandt*, 2022 WL 3652745, at *3. Arkansas condemned the research on gender-affirming care and pointed to British and Finnish research criticizing the treatment. *Id.* However, the Eighth Circuit found the Finnish council still recommends gender-affirming care guidelines remarkably similar to WPATH's Standard of Care and even

under Finnish regulation, the state permits treatment with puberty blockers and cross-sex hormones when minors exhibit persistent gender dysphoria. *Id.* at *4.

As in *Brandt*, the District Court correctly held the SAME Act "criticizes a widely-accepted course of medical treatment." R. at 16. Like Arkansas, Lincoln questioned the validity of research on gender-affirming care and cited the same research from the UK and Finland. R. at 7–8, 15. The District Court found this argument unpersuasive because there was evidence in the record to conclude that gender-affirming care is a well-established, evidence-based treatment backed by all major U.S. medical associations. R. at 5–6, 15. Further, the Arkansas District Court's finding on the Finnish guidelines undermines Lincoln's argument because even though Finland questions some of the research on gender-affirming care, the country still recommends its use.

Likewise, in *Brandt*, the lower court found Arkansas's law was not substantially related to protecting children from experimental treatments because the state's true goal was to prevent an outcome it deemed undesirable for discriminatory reasons. *Brandt*, 551 F. Supp. 3d at 891. The court explained that if the state truly wanted to protect children's health it would prohibit the treatments for all minors because the same potentially irreversible affects are present in cisgender or transgender applications. *Id.* at 891. Instead, the court reasoned that the law demonstrated the state's bias toward preventing outcomes contrary to traditional stereotypes about biological sex. *Id.*

The District Court made similar observations about the SAME Act, questioning the state's desire to protect minors from experimental treatments when it "allows [those treatments] for non-gender affirming purposes." R. at 21. The court was right to conclude that the SAME Act did not substantially advance the state's protection goals because, like the Arkansas law, the difference in treatments permitted for minors demonstrates Lincoln's desire to prevent an outcome it deems socially undesirable.

While Lincoln may argue the District Court erred in its analysis because it applied inappropriate weight to the state's evidence on the potential dangers of gender-affirming care, this argument fails under an abuse of discretion standard. The District Court acknowledged that the medical evidence on these treatments is at least "in sharp dispute." R. at 14. After considering the evidence on both sides, it deferred to the medical community's overwhelming endorsement of the gender-affirming care guidelines despite the risks associated with treatment. This Court should find no clear error in the District Court's analysis because it applied a reasonable analytical approach to a complex medical issue.

**2. The District Court correctly concluded that the SAME Act is not substantially related to protecting minors from making life-changing decisions based on peer pressure.**

The District Court correctly held that the SAME Act does not advance Lincoln's regret avoidance goals because the evidence fails to show minors seek gender-affirming care due to peer pressure and most banned treatments are not permanent. First, the state argued that the recent jump in adolescents identifying as transgender

suggests that they do so in part, out of peer pressure. R. at 21. Disagreeing, the District Court pointed to the rigorous requirements a minor must meet before starting treatment. R. at 21. The guidelines require long-lasting and intense feelings of gender dysphoria and a thorough assessment by a physician. R. at 6. Instead of citing scientific evidence that peer pressure plays a role in a child's decision to obtain treatment, the state relied on anecdotal evidence to that effect. R. at 3. The District Court concluded the state's evidence failed to provide a reason to override a treating physician's recommendation. R. at 21.

Second, many prohibited treatments are not life-changing because they are reversible or partially reversible. Evidence in the record showed that puberty blockers are fully reversible and hormone treatments are partially reversible. R. at 6 (citing Hembree WC, *et al.*, *Endocrine Treatment of Gender-dysphoric/Gender-incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clin. Endocrinology & Metabolism 3869 (2017), at https://doi.org/10.1210/jc.2017-01658)). Further, the guidelines prevent spontaneous decisions because they only allow treatment after long-lasting and intense feelings of gender dysphoria and a thorough assessment by a physician. R. at 6. Moreover, medical organizations designed the guidelines to minimize the possibility of regret by starting the child on puberty blockers. R. at 6. Even if the child decides to discontinue treatment, puberty blockers treatment is designed to give the child time to decide what to do next. R. at 6. As for irreversible treatments, the guidelines do not recommend genital surgery and only recommend chest surgery in select cases. R. at 6. Accordingly, the SAME Act is not substantially

related to protecting children from regretting a life-changing decision because if most children cannot seek surgery, then the SAME Act primarily targets treatments that can be undone.

This Court should find the District Court committed no clear error in reasoning the SAME Act is not substantially related to protecting minors from making life-changing decisions based on peer pressure if a rigorous medical process exists to prevent that.

### C. The SAME Act fails any level of scrutiny.

While this Court should analyze the SAME Act under heightened scrutiny, it also fails rational basis scrutiny. Laws withstand rational basis review if the classification is based on "any reasonably conceivable state of facts." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Unlike heightened scrutiny, the court may justify the law with any plausible set of facts, not just those stated by the legislature. *Id.* at 315.

Besides Lincoln's stated goals, Arkansas and Alabama suggested their transgender laws sought to regulate medical ethics and to prevent medical providers from aggressively pushing these medications on minors. *Brandt*, 2022 WL 3652745, at *4 (medical ethics); *Eknes-Tucker*, 2022 WL 1521889, at *10 (pushing medications).

In *Brandt*, the District Court rejected Arkansas's contention that ACT 626 sought to regulate medical ethics for the same reason its law did not protect minors from experimental medical treatments. *Brandt*, 551 F. Supp. at 891. The state contended that the risk of treatment was too great to allow healthcare providers to

continue to administer them. *Id.* at 889. Accordingly, Act 626 subjected physicians who subverted the law to civil liability and loss of licensure. *Id.* at 891. Though the court applied heightened scrutiny, it found that Arkansas's law would similarly not withstand rational basis scrutiny because it unnecessarily interfered with a physician's ability to adhere to the recommended standard of care. *Id.* The court reiterated that "every major expert medical association" recognizes that gender-affirming care is medically necessary and punishing a physician for following that guidance forces them to contravene medical ethics. *Id.*

Lincoln advanced a similar rationale of regulating the medical profession in the context of due process, which the District Court found unpersuasive. R. at 16, 19. Like Arkansas, Lincoln argued that it had an interest in preventing healthcare providers from administering a treatment with unproven results. R. at 17. Both laws punished physicians, with the SAME Act defining a violation as a class 2 felony. § 20-1204(B). As in *Brandt*, the District Court considered evidence allowing it to conclude that the SAME Act would not withstand rational basis scrutiny because it instead, "criminalizes a widely-accepted course of medical treatment." R. at 16. Like Arkansas medical providers, the SAME Act would prevent Lincoln's doctors from acting ethically because the law would punish them for following the recommended standard of care.

Likewise, the argument that medical providers push medications on minors fails because gender-affirming care is subject to a rigorous process. In *Eknes-Tucker*, the court rejected the state's argument because it provided no evidence medical

providers were aggressively pushing medications. *Eknes-Tucker*, 2022 WL 1521889, at *8. In contrast, the court concluded that minors and parents undergo an extensive screening and consent process before permitting treatment. *Id.* at *4, *8.

Just as in *Eknes-Tucker*, the SAME Act is not rationally related to preventing medical providers from aggressively pushing treatment on minors. Like minors in Alabama, the District Court could reasonably conclude that minors undergo an extensive consultation process before starting treatment. Just as minors do not choose gender-affirming care out of peer pressure, they are not vulnerable to aggressive pushing of medication because these medications are only available to them after extensive consultation and long-lasting and intense feelings of gender dysphoria. R. at 6.

## III. The District Court correctly found that the SAME Act violates the Marianos' Fundamental Due Process rights.

The Constitution's Due Process Clause guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Court has described "the interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized" under the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). While parental rights are not absolute, the presence of medical risk does not entitle the state to supersede a parent's right to control their child's course of treatment. *Parham v. J.R.*, 442 U.S. 584, 603–04 (1979). Instead, "[p]arents can and must make those judgments." *Id.*

All parties agree that the Fourteenth Amendment guarantees a fundamental due process right for a parent to obtain medical treatment for their children, dependent on a physician's recommendations. R. at 14. However, Lincoln argues parents possess no right to obtain experimental medical treatment for their children. R. at 14.

## A. The District Court correctly concluded that gender-affirming care is not experimental.

### 1. Lincoln failed to demonstrate gender-affirming care is experimental.

In *Eknes-Tucker v. Marshal*, the Middle District of Alabama also considered whether the state's transgender law violated a parent's Due Process rights. Like Lincoln, Alabama argued parents do not possess a right to obtain experimental medication for their children. *Eknes-Tucker*, 2022 WL 1521889, at *7. The court found that risk alone does not make medication experimental because almost every medical regimen carries risks. *Id.* at *8. It further pointed out that doctors have used puberty blockers and hormone therapy for decades in cisgender applications. *Id.* The court concluded that the state failed to meet its burden of showing gender-affirming care is experimental because despite its risks, "at least twenty-two major medical associations in the United States endorse transitioning medications as well-established, evidence-based treatments for gender dysphoria in minors." *Id.*

Lincoln argued that gender-affirming medications are experimental because they are not FDA approved. R. at 15. However, the court rejected this argument, finding evidence that "off-label" use of a drug does not make it experimental. R. at 15. Further, the state reiterated concerns over the uncertain nature of the treatment. R.

at 15. Like the court in *Eknes-Tucker*, the District Court rejected this argument because puberty blockers and hormones have a long history of use in minors. R. at 15. Weighing this evidence, the District Court concluded that the SAME Act does not prohibit an experimental treatment because it instead, "criminalizes a widely-accepted court of medical treatment." R. at 16.

This Court should not be left with the definite and firm conviction that the District Court erred in its analysis because it deferred to the opinion of medical experts who recommend parents pursue this treatment for their children.

**2. The authority cited by the Circuit of Lincoln's Dissenting Opinion fails to show parents have no right to obtain gender-affirming care for their children.**

In her dissent, Judge Gilmore concludes that parents have no Due Process right to obtain experimental treatment for their children because no one has a right to experimental medical treatment and a parent's right to make medical decisions for their child cannot exceed their right to medical treatment for themselves. R. at 29.

In *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, the D.C. Circuit held terminally ill patients have no fundamental right to drugs non-approved by the FDA because the right to seek experimental medication is not deeply rooted in our nation's history. *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711 (D.C. Cir. 2007). Abigail Alliance represented a group of terminally ill patients who sought approval from the FDA to use drugs that had undergone limited safety trials but had not yet been shown to be safe and effective. *Id.* at 697.

The outcome in *Abigail Alliance* is distinct from this case because transgender minors seek no drugs prohibited by the FDA. As the District Court noted, doctors regularly prescribe puberty blockers and hormone treatments to children to regulate abnormal puberty. R. at 15–16. Unlike unapproved cancer drugs, most medical associations recommend puberty blockers and hormones as an effective way to treat gender dysphoria. R. at 15. While Lincoln argues that the FDA has not approved these drugs to treat gender dysphoria, the District Court considered evidence that off-label use of a drug does not constitute experimental use. R. at 16. Therefore, this Court should find the D.C. Circuit's reasoning unpersuasive because the use of gender-affirming care treatments bears little resemblance to unapproved cancer drugs.

Similarly, the Eleventh Circuit, in *Doe ex rel. Doe v. Public Health Trust of Dade County*, reviewed a District Court's dismissal of John Doe's claim that he had the Due Process right to communicate with his child whom he voluntarily committed to a mental institution. *Doe ex rel. Doe v. Public Health Tr. of Dade Cnty.*, 696 F.2d 901, 905–07 (11th Cir. 1983) (Hatchett, J. concurring). The court found that the hospital did not violate John Doe's parental rights because the father exercised that right when he decided to commit his daughter and agreed to a period of no communication. *Id.* at 903. In its next sentence, the court stated, "John Doe's right to make decisions for his daughter can be no greater than his rights to make medical decisions for himself." *Id.* The court reasoned that had John Doe voluntarily admitted

himself that he would not be guaranteed subsequent treatment of his own choice. *See*, *Id*.

Unlike John Doe, the Marianos wish to comply with Jess's physician's recommendations. Moreover, they seek a treatment for Jess that is available to any adult with gender dysphoria. This Court should find the Dissent's argument unpersuasive because its rests on the erroneous premise that the Marianos seek a treatment that is both available to them and recommended by Jess's physician.

### B. The SAME Act cannot withstand strict scrutiny because it does not withstand intermediate scrutiny.

Laws that violate Substantive Due Process rights must withstand strict scrutiny, requiring the law be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citing *City Council of L.A v. Taxpayers for Vincent*, 466 U.S. 789, 808–810 (1984)). Thus, strict scrutiny places a more demanding burden on the state than heightened scrutiny.

There is a strong presumption that parents act in the best interests of their children. *Parham*, 442 U.S. at 602. A state may have a compelling interest when a child's "physical or mental health is jeopardized." *Id.* When the state chooses to do so, courts must carefully examine the "governmental interests advanced and the extent to which they are served by the challenged regulation." *Hodson v. Minnesota*, 497 U.S. 417, 447 (1990) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion)).

As explained above, the SAME Act cannot withstand heightened scrutiny because prohibiting gender-affirming care does not further any of Lincoln's stated interests in protecting children from experimental treatment. While Lincoln may argue the SAME Act is designed to prohibit medication that jeopardizes their physical or mental health, in reality, it takes away the best accepted remedy for gender dysphoria. If the SAME Act cannot withstand lower levels of scrutiny, then it cannot survive the more difficult strict scrutiny.

Even if Lincoln's interests were valid, the District Court did not abuse its discretion in determining the SAME Act is not narrowly tailored to achieve those interests. As the court concluded, if Lincoln were actually interested in protecting children from experimental treatments, it would ban the treatments for all minors because its potentially harmful effects are present for all minors. R. at 17.

## IV. Regardless of the injunctive standard chosen, this Court should uphold the preliminary injunction because the District Court demonstrated the Marianos were likely to succeed on their claims.

Even though the District Court concluded that the Marianos' claims raised a serious question, its analysis shows the Marianos are also likely to succeed on their claims because each argument weighed in their favor. R. 17, 22. For both constitutional claims, the court conducted a full analysis on the merits where it first determined the constitutional right at issue and why the SAME Act could not survive scrutiny. Furthermore, both courts in *Brandt* and *Eknes-Tucker* are located in circuits that employ the more element-based test for preliminary injunctions that only looks at the likelihood of success factor. *See supra*, note 2 (explaining Eighth and Eleventh

circuits use an element-based test). These courts both employed a substantially similar analysis as the District Court and determined the plaintiffs were *likely* to succeed on their claims. *Brandt,* 2022 WL 3652745, *4 (holding District Court did not abuse its discretion in finding plaintiffs demonstrated a likelihood of success on their Equal Protection Claim); *Eknes-Tucker*, 2022 WL 1521889, *9, *10 (holding plaintiffs were *substantially* likely to succeed on their Due Process and Equal Protection claims). Given the thorough analysis the District Court employed, there is no reason to suspect a different standard would have changed the outcome of its analysis.

## **CONCLUSION**

The serious question standard survives this Court's decision in *Winter*. District Courts need the flexibility provided by the serious question standard to meet the complex and varied factual situations presented early in litigation.

Further, the SAME Act arbitrarily discriminates based on sex and violates parental rights to control medical outcomes. Instead of protecting minors, it harms them by prohibiting an evidence-based, widely backed treatment for gender dysphoria. The District Court thoroughly considered the evidence and this Court should not be left with the definite and firm conviction that it erred in its analysis.

It is for this reason that this Court should affirm the decision of the Court of Appeals for the Fifteenth Circuit.

Respectfully Submitted,

/s/ Team 3126

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.

Respectfully Submitted,

/s/ Team 3126

Attorneys for Respondents

## APPENDIX A

## Constitutional Provisions

### Amendment XIV

### Section 1.

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

## Statutory Provisions

**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.

**Stop Adolescent Medical Experimentation ("SAME") Act**

**20 Linc. Stat. §§ 1201–06**

**20-1201 Findings and Purposes**

(a) Findings

The State Legislature finds -

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

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

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

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

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

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

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

(8) There are conventional and widely-accepted methods to treat gender dysphoria that do not raise informed consent and experimentation concerns. Conventional psychology may safely and effectively guide a dysphoric youth to

stability while deferring decisions on often irreversible medical gender affirming treatments until adulthood.

(b) Purposes:

It is the purpose of this chapter –

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

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

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

**20-1202 Definitions**

The Act defines –

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

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

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

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

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

**20-1203 Prohibition on Certain Gender Transition Treatments**

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

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

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

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

**20-1204 Enforcement**

(A) The attorney general may bring an action to enforce compliance with this chapter. Nothing in this chapter shall be construed to deny, impair, or otherwise affect any right or authority of the attorney general, the state, or any agency,

officer, or employee of the state, acting under any provision of the Lincoln Code, to institute or intervene in any proceeding.

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

**20-1205 Unprofessional conduct of healthcare providers**

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

**20-1206 Effective Date**

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