2022-2023
SOUTHERN ILLINOIS UNIVERSITY
**NATIONAL HEALTH LAW MOOT COURT COMPETITION**

---

Transcript of Record
Docket No. 22-8976

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.

---

# *COMPETITION PROBLEM*

---

*SPONSORED BY:*

*Southern Illinois University School of Law*

*In conjunction with the*

*The American College of Legal Medicine*

*and*

*The American Health Law Association*

*This page is left intentionally blank*

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF LINCOLN**

| | |
|---|---|
| Jess Mariano, Elizabeth Mariano, and Thomas Mariano, Plaintiffs, | ) |
| v. | ) |
| April Nardini, in her official capacity as Attorney General of the State of Lincoln, Defendant. | ) |

Case No. 21-cv-12120

**MEMORANDUM OPINION**

This case comes before the Court on plaintiffs' motion for preliminary injunction and defendant's motion to dismiss.[1] Plaintiffs seek to enjoin Lincoln's newly enacted Stop Adolescent Medical Experimentations ("SAME") Act, 20 Linc. Stat. §§ 1201-06, from going into effect on January 1, 2022. Plaintiffs filed a complaint on November 4, 2021, alleging under 42 U.S.C. § 1983 that enforcing the SAME Act would violate their rights to Due Process and Equal Protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. Defendant in her official capacity as Attorney General of Lincoln ("Lincoln") has authority under the Act to enforce the Act and has indicted she intends to do so. Plaintiffs then filed a Motion for Preliminary Injunction on November 11, 2021. On November 18, 2021, Lincoln filed a motion to dismiss along with its response urging the Court to deny the request for a preliminary injunction. A hearing on both motions was held on December 1, 2021, at which

[1] Competition note: Advocates should assume the plaintiffs have standing, each court has properly exercised jurisdiction, and all procedural steps outside of the issues discussed in the problem have been properly followed.

both parties submitted extensive evidence.

After considering both parties' submissions, this Court finds that 1) plaintiffs have shown a likelihood of success on the merits of their claims that the SAME Act violates of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, 2) they will suffer immediate and irreparable harm if the Court does not enjoin the Act, 3) that harm greatly outweighs any damage the Act seeks to prevent, and 4) there is no overriding public interest that requires the Court to deny injunctive relief at this stage of the litigation. As such, the Court **GRANTS** plaintiffs' request for a preliminary injunction and **DENIES** defendant's motion to dismiss.

## FACTUAL BACKGROUND

Jess Mariano is a 14 year old transgender[2] minor living in the state of Lincoln with his parents, Elizabeth and Thomas. Jess has been diagnosed with gender dysphoria and currently receives medications to block him from going through puberty as a girl. He and his parents seek to enjoin Lincoln's SAME Act, which provides:

**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-

[2] A transgender person as one whose gender identity is different from the sex the person had or was identified as having at birth. Transgender, MERRIAM-WEBSTER UNABR. DICTIONARY (3rd ed. 2002)."Gender identity" is defined as a person's internal sense of being a male or a female. Gender Identity, MERRIAM-WEBSTER UNABR. DICTIONARY (3rd ed. 2002). These terms and definitions are largely consistent with those used by the parties. Accordingly, the Court relies on these terms throughout this opinion, but recognizes that they might mean different things to different people and in different contexts. Plaintiff Jess Mariano uses the pronouns "he/him/his," which the Court will use as well when referring to Jess.

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.

Jess was born biologically female, but even from a young age, perceived himself as male. Throughout his childhood, Jess has suffered from anxiety and depressive episodes due to his gender disconnect. He was diagnosed with depression when he was eight years old after he took a handful of Tylenol pills and said he hoped he would "never wake up." His parents then started him in therapy, which he continues to receive to this date. After about nine months of therapy, Jess's psychiatrist, Dr. Dugray, diagnosed him with gender dysphoria in accordance with existing medical guidelines, which require the treating physician mark an incongruence between the patient's expressed gender and assigned gender. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) ("DSM-5") at 452. Dr. Dugray found "evidence of distress manifested by a strong desire to be treated as a girl and a desire to prevent the development of the anticipated secondary sex characteristics." Jess's

parents also recount hearing Jess say on many occasions that he didn't "want to grow up if I have to be a girl."

When Jess was ten, he began to show signs of puberty, including early breast tissue development. Because Jess's gender dysphoria was still manifesting, Dr. Dugray, in consultation with Jess's pediatrician, prescribed that Jess take GnRH agonists, commonly referred to as puberty blockers. Jess is currently continuing to receive puberty blocking medications by injection every month. His psychiatrist testified at the motion hearing that given the persistence and strength of Jess's gender dysphoria, she anticipates that when Jess turns sixteen, he will start hormone therapy. She also noted that Jess has expressed considerable distress related to the amount of breast tissue he developed and that chest surgery may be necessary to successful treatment of his gender dysphoria before he turns eighteen. Dr. Dugray testified that since Jess started receiving puberty blockers, she has observed that Jess has experienced fewer symptoms of depression and overall less distress associated with his feelings of gender incongruence. *See* DSM-5 at 455 (describing how the distress experienced by adolescents with gender dysphoria "may . . . be mitigated by the supportive environment and knowledge that biomedical treatments exist to reduce his incongruence"). The SAME Act would disrupt Jess's current and future medical treatments for his gender dysphoria until the age of eighteen. Dr. Dugray testified that even a one month interruption of his treatment could allow puberty to progress and substantially undermine the treatment progress Jess has made so far in dealing with his depression and dysphoria.

At the hearing, the Marianos presented the following additional medical and scientific evidence in support of their claims:

1. Both the Endocrine Society and the World Professional Association for Transgender Health ("WPATH") have published widely-accepted evidence-based for the treatment of

gender dysphoria that direct individualized treatments based on the needs of the patient. Hembree WC, *et al.*, *Endocrine Treatment of Gender-dysphoric/Gender-incongruent Persons: An Endocrine Society Clinical Practice Guideline,* 102 J. Clin. Endocrinology and Metabolism 3869 (2017), at https://doi.org/10.1210/jc.2017-01658; World Pro. Ass'n for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 10-21 (7th ed. 2012), at https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.

2. Neither guideline recommends any medical interventions before a child reaches puberty, but once puberty begins, they suggest clinicians begin pubertal hormone suppression. *See* 102 J. Clin. Endocrinology and Metabolism at 3871; *See* WPATH Guidelines at 18.

3. Puberty blockers are reversible treatments that pause puberty and give children time to decide what to do next. *See* WPATH Guidelines at 19. Puberty-delaying medication does not affect fertility. Doernbecher Children's Hospital, *About Puberty Blockers*, https://www.ohsu.edu/sites/default/files/2020-12/Gender-Clinic-Puberty-Blockers-Handout.pdf. Ceasing puberty-delaying medication will cause puberty to resume in adolescents. 102 J. Clin. Endocrinology and Metabolism at 3885.

4. Among the best practices for gender-affirming care are:

> facilitation of a social transition (*i.e.*, taking on the name, pronouns, and other elements of gender expression that match the adolescent's gender identity), consideration of pubertal suppression (*i.e.*, gonadotropin releasing hormone analogues that temporarily and reversibly pause puberty to prevent the development of secondary sex characteristics that often cause psychological distress for transgender youth), and consideration of gender-affirming hormones (*i.e.*, medications including estradiol and testosterone that induce physical feminization or masculinization, respectively, that align with the adolescent's gender identity). . . . [G]ender-affirming genital surgery is generally not recommended until adulthood, [but] some transmasculine adolescents may benefit from masculinizing chest surgery to lessen chest dysphoria.

Jack L. Turban, MD, MHS1, *et al.*, *Legislation to Criminalize Gender-Affirming Medical Care for Transgender Youth*, 325 J. Am. Med. Ass'n 2251, 2251 (2021).

5. The guidelines provide that youth with gender dysphoria should be evaluated, diagnosed, and treated by a qualified mental health professional. 102 J. Clin. Endocrinol Metab. at 3871. Further, the guidelines provide that each patient who receives gender-affirming care receive only evidence-based, medically necessary, and appropriate interventions that are tailored to the patient's individual needs. *See generally id*. at 3869-3896. The guidelines indicate that gender dysphoria should be long lasting and intense before the adolescent is eligible for puberty-delaying treatment, and that the healthcare provider should thoroughly assess the child's needs including "the possibilities and limitations of various treatments" as part of both the assessment and obtaining informed consent. WPATH Guidelines, at 15, 19.

6. Untreated gender dysphoria may cause or lead to anxiety, depression, eating disorders, substance abuse, self-harm, and suicide. *See* de Vries AL, Doreleijers TA, Steensma TD, Cohen-Kettenis PT, *Psychiatric Comorbidity in Gender Dysphoric Adolescents*, 52 J. Child Psych. and Psychiatry 1195, 1202 (2011). By contrast, young adults who had sought and accessed puberty blockers for treatment of their gender dysphoria showed lower odds of considering suicide. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 Pediatrics (Feb. 2020), at 1, 5, at https://doi.org/10.1542/peds.2019-1725.

7. Gender dysphoria in adolescents (minors twelve and over) is more likely to persist into adulthood than gender dysphoria in children (minors under twelve). WPATH Guidelines at 11. There is an association between affirmation of an adolescent's transgender identity and favorable mental health outcomes. *See* Turban, 325 J. Am. Med. Ass'n at 2251.

8. All leading medical organizations in the United States, including the American Medical Association, the American Academy of Pediatrics, and the American Psychiatric Association oppose denying gender-affirming care to transgender adolescents. *See* Press Release, Am. Acad. of Pediatrics, *Frontline Physicians Oppose Legislation That Interferes in or Penalizes Patient Care* (April 2, 2021), at https://www.aap.org/en/news-room/news-releases/aap/2021/frontline-physicians-oppose-legislation-that-interferes-in-or-penalizes-patient-care/?_ga=2.89126099.973451188.1655923488-1054175941.1655923488 (issuing joint statement of organizations representing nearly 600,000 physicians); Am. Med. Ass'n, *Advocating for the LGBTQ Community*, at https://www.ama-assn.org/delivering-care/population-care/advocating-lgbtq-community#:~:text=The%20AMA%20supports%20public%20and,sexual%20orientation%20or%20gender%20identity.

Lincoln by contrast points to the SAME Act's legislative findings that the medical evidence supporting the banned treatments is uncertain. The state's expert, Dr. Geller, testified regarding recent international developments involving gender-affirming care for individuals under the age of eighteen, including health systems in Sweden and Finland that banned these treatments due to what they found to be inadequate proof of their effectiveness and safety[3] and a large-scale evidence

[3] *See Guideline Regarding Hormonal Treatment of Minors with Gender Dysphoria at Tema Barn—Astrid Lindgren Children's Hospital (ALB)* (April, 2022), unofficial English translation by Soc'y for Evidence Based Med. available at https://segm.org/sites/default/files/Karolinska%20Policy%20Change%20K2021-3343%20March%202021%20%28English%2C%20unofficial%20translation%29.pdf; *Finland's Council for Choices in Healthcare Policy Statement, Palveluvalikoima, Recommendation of the Council for Choices in Health Care in Finland (PALKO / COHERE Finland)*, unofficial English

review initiated by the National Health Services in the United Kingdom.[4] Lincoln also called two witnesses who had testified before the legislature about their decision to detransition after starting puberty blockers and cross-sex hormones as adolescents, in which those witnesses expressed regret that they did not adequately contemplate the physical and mental consequences of the course of the medical and surgical treatment they received.

Because of the passage of the SAME Act, Jess and his parents will no longer be able to legally obtain Jess's gender-affirming care from a health care provider in Lincoln. For this reason, Jess and his parents filed this suit in the United States District Court of the Southern District of Lincoln against Attorney General Nardini in her official capacity and moved to enjoin the Act's enforcement pending trial. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201 and 2202.

## ANALYSIS

### I. Injunctive Relief Standards

The Marianos seek a preliminary injunction because they allege the Act violates Elizabeth and Thomas's fundamental rights of parental autonomy under the Due Process Clause and Jess Mariano's rights under the Equal Protection Clause of the Fourteenth Amendment, and that immediate and irreparable harm will occur unless the Court preserves the status quo that allows Jess Mariano to continue to receive his physician's recommended gender-affirming care. In order for a preliminary injunction to issue, the plaintiffs "must establish that [they are] likely

translation by Soc'y for Evidence Based Med. available at *https://segm.org/sites/default/files/Finnish_Guidelines_2020_Minors_Unofficial%20Translation.pdf*

[4] U.K. Nat'l Health Servs., *NHS announces independent review into gender identity services for children and young people* (Sept. 22, 2020), https://www.england.nhs.uk/2020/09/nhs-announces-independent-review-into-gender-identity-services-for-children-and-young-people/.

to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Prior to *Winter*, this circuit followed the Second Circuit's sliding-scale approach that balanced the four factors such that a weaker claim on one factor could be offset by a stronger claim on another. *See Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 215 (2d Cir. 2012) (indicating that plaintiffs can show either a likelihood of success on the merits or that there are sufficiently serious questions regarding the merits as to make "a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief"). As the Second Circuit explained:

> The "serious questions" standard permits a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction.

*Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

Some courts have questioned whether the serious questions approach survived *Winter*. *See, e.g., Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 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) (interpreting *Winter* to reject a balance-of-hardship test). The Court believes this circuit will agree with the Second Circuit that the flexible approach survives *Winter*.

*Winter* rejected a Ninth Circuit standard that required movants to show only that irreparable harm was "possible" once the movant showed a likelihood of success on the merits. *Winter*, 555 U.S. at 22. Beyond that, the Court did not set out the threshold for when a claim is

"likely" to succeed or to show irreparable harm. *See Citigroup Global Mkts, Inc.*, 598 F.3d at 37. As the Second Circuit recognized, the standard for granting a preliminary injunction should remain flexible to meet the complex and varied factual issues presented early in the litigation. *See id.* at 38. The key question is the net harm the preliminary injunction can prevent. *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) (reasoning that "the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief"). The Court starts then, by looking at irreparable harm and the balance of hardships.

**A. Irreparable Harm**

The Court finds that the Marianos have shown they will likely suffer immediate, irreparable harm if injunctive relief is denied. The Sixth Circuit has emphasized that "[i]f the plaintiff isn't facing imminent and irreparable injury, there's no need to grant relief *now* as opposed to at the end of the lawsuit." 942 F.3d 324, 327 (6th Cir. 2019) (citations omitted). Harms generally are irreparable "only if [they] cannot be undone through monetary remedies." *Ne.Fla. Chapter of Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). However, irreparable harm can be presumed when "a constitutional right of privacy is 'either threatened or in fact being impaired.'" *See Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The Supreme Court has also upheld a finding of irreparable harm based on a risk of suffering "a severe medical setback." *See Bowen v. City of New York*, 476 U.S. 467, 483 (1986) (considering whether parties would be irreparably harmed if administrative exhaustion requirements were enforced).

The Marianos allege an on-going violation of their constitutional rights if the SAME Act is allowed to go into effect. If the Act is not enjoined, the Marianos' rights to decide Jess's

appropriate medical treatment will be stripped from them and Jess will be denied his ability to continue his treatments because of his sex. That alone may suffice, but the facts themselves show imminent and irreparable medical harm will occur. The Act forbids the Marianos from continuing Jess's medical treatment for gender dysphoria, which if untreated will result in significant negative health consequences including anxiety, depression, and severe psychological distress. *See Campbell v. Kallas*, Case No. 16-cv-261-jdp, 2020 WL 7230235, at *8 (W.D. Wis. Dec. 8, 2020) (slip op.) (finding plaintiff demonstrated "irreparable injury" required for an injunction where plaintiff "continue[d] to suffer from gender dysphoria, which cause[d] her anguish and put[] her at risk of self-harm or suicide"). Dr. Dugray testified at the motion hearing that withdrawing puberty blockers at this age will cause Jess to immediately resume going through an unwanted female puberty that conflicts with his male identity. In other words, Jess will suffer devasting and lifelong mental and physical consequences with immediate consequences that cannot be undone.

However, Lincoln disputes that Jess will suffer harm that is both immediate and irreparable. First, Lincoln argues that practitioners have no way of knowing whether further gender-transition procedures would benefit Jess because even the Endocrine Society acknowledges that "with current knowledge, we cannot predict the psychosexual outcome for any specific child" with gender dysphoria. *See* 102 J. Clin. Endocrinol Metab. 3869, 3876 (2017). Practitioners cannot distinguish those children whose transgender identity will persist from those whose will not. *See id.* Lincoln asserts that the Marianos have at most shown some possibility of harm to Jess but that is not enough. *See Nken v. Holder*, 556 U.S. 418, 434-35 (2009) (reiterating that" simply showing some possibility of irreparable injury fails to satisfy" the imminent, irreparable harm factor) (internal citations and quotations omitted).

Lincoln additionally points out that allowing the Act to take effect would not mean that children will be unable to obtain any medical treatment of gender dysphoria. The Attorney General assured the Court at the motion hearing that her office interprets the SAME Act to permit children like Jess to discontinue using puberty blockers at a safe rate, because the SAME Act permits appropriate and necessary medical care as long as the purpose of the procedure is not "instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." Linc. Stat. 20-1203. The state suggests this undermines the Marianos' need for relief now rather than waiting for trial. Moreover, the state argues the treatments Jess and his parents seek will be available to him at age eighteen if he still wishes to seek them—adults can and do transition. Thus, Lincoln asserts Jess cannot show that he will be irreparably harmed by enforcing the Act.

Regardless of whether a tapering period is permitted under the statute, however, the end result will be that Jess cannot access the medical treatment his physician describes as crucial to his physical and mental health, that his parents want him to receive. The Marianos' constitutional rights to make these decisions are threatened, and the Court finds without continued treatment, Jess is likely to experience physical changes that cannot be fully reversed; given his history, his gender dysphoria will likely worsen. *See Brandt v. Rutledge*, 551 F. Supp. 3d 892, 892 (E.D. Ark. 2021) (describing the life-long effects likely to suffered by both the child and the parents). The Court finds the prospect of harm is imminent and irreparable.

**B. Risk/Benefits and Public Interest**

Next, the Court finds that the balance of equities and the public interest are in the Marianos' favor. To satisfy the third and fourth elements of a preliminary injunction, a plaintiff must show that the harm he will likely suffer without an injunction outweighs any harm that his

opponent will suffer from the injunction, and that the injunction would not be adverse to the public interest. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010). When the opposing party is the government, the third and fourth elements merge into one inquiry. *Nken*, 556 U.S. at 435.

Lincoln argues the harm of granting an injunction outweighs the harm to the Marianos and is adverse to public interest because "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). Lincoln points to the underlying basis for the Act, namely concerns about the harmful and irreversible effects that may result from these unproven treatments and the lack of adequate informed consent. Lincoln also reiterates that the Act permits other forms of gender-affirming care and only pauses the covered treatments until age eighteen.

Having weighed the arguments, the Court finds the likelihood of immediate and irreparable physical and/or psychological harm from discontinuing Jess's plan of care outweighs the speculative harm the state will suffer from the injunction prior to the full trial on the merits. Accordingly, the third and fourth elements favor a preliminary injunction against the SAME Act.

## II. Likelihood of Success on Plaintiffs' Constitutional Claims

The Court, having found the balance of hardships strongly favors the Marianos, considers whether they have raised sufficiently serious questions going to the merits of their Substantive Due Process and Equal Protection claims. Lincoln asserts that the plaintiffs have failed to show a basis for either claim. This Court disagrees and finds instead that Lincoln is unlikely to be able to meet its burden to justify the Act.

### A. Parental Rights under Substantive Due Process

Elizabeth and Thomas Mariano assert that the SAME Act violates their fundamental constitutional right to determine the proper medical care of their children. The Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Clause protects against governmental violations of "certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). A parent's right "to make decisions concerning the care, custody, and control of their children" is one of "the oldest fundamental liberty interests" recognized by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000). The Supreme Court has further recognized that parents have the right to obtain medical treatment for their children, dependent on a physician's medical advice and judgment. *See Parham v. J.R.*, 442 U.S. 584, 604 (1979). The state does not contest this basic right, but argues two things make it inapposite here.

First, Lincoln argues parents have no fundamental right to subject their child to experimental medical treatment because there is no substantive due process right to obtain a particular medical treatment. Thus, Lincoln argues the Act is subject to and easily survives rational basis review. Lincoln alternatively argues that the Act would survive strict scrutiny because Lincoln has a compelling interest in protecting children from experimental medical procedures and regulating the medical profession, and the SAME Act is narrowly tailored to those compelling interests.

#### 1. "Experimental" Treatment

As to Lincoln's assertion that there is no fundamental parental right to obtain "experimental" medical treatments, the Court finds that the Marianos have shown at least that this issue is in sharp dispute. The Supreme Court has indicated that the fact that pediatric

medication "involves risks does not automatically transfer the power" to choose that medication "from the parents to some agency or officer of the state." *Parham*, 442 U.S. at 603. There is a countervailing risk in prohibiting gender dysphoria treatment the way that Lincon has, because young people who are currently under a doctor's care will be forced to either end their treatment when this law goes into effect or disrupt their lives and their families' lives to seek treatment elsewhere, which has its own negative mental and physical health consequences.

In support of its claim this course of care is experimental, Lincoln points to the fact the FDA has not approved the use of these treatments to treat gender dysphoria. Lincoln also asserts the international examples show the state legislature had considerable emerging evidence regarding the concerns over the unproven nature of the treatment. Moreover, Lincoln notes that even the Endocrine Society, which is otherwise supportive of medical interventions, advises against genital surgery before the age of majority and acknowledges there is insufficient evidence to determine age-appropriateness of chest surgery in adolescents. *See* 102 J. Clin Endocrinol Metab. at 3872.

The Court is not persuaded that any of Lincoln's evidence compels a conclusion the banned treatments are experimental. Rather, the Court finds that, as set out above, many medical associations in the United States endorse them as well-established, evidence-based treatments for gender dysphoria in adolescents. Moreover, medical providers have used these treatments for decades to treat medical conditions other than gender dysphoria, such as central precocious puberty, a condition in which a child enters puberty at a young age. *See* Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, American Academy of Pediatrics Policy Statement (Oct. 1, 2018) at 5, https://perma.cc/D4R6-GP6C (noting puberty blockers have been used since the 1980s). Thus,

blocking puberty is in and of itself not "experimental." Doctors have also long used sex hormone therapies for patients whose natural levels are below normal. Cagnacci, A., & Venier, M., *The Controversial History of Hormone Replacement Therapy*. 55 Medicina 602 (2019), https://doi.org/10.3390/medicina55090602. Finally, the use of drugs "off-label," *i.e.*, for purposes other than those for which the drug is formally approved, does not make the treatment experimental. Zain Mithani, *Informed Consent for Off-Label Use of Prescription Medications*, 14 AMA Journal of Ethics 576, 576 (2012), at https://journalofethics.ama-assn.org/article/informed-consent-label-use-prescription-medications/2012-07.

Based on the current evidence, the Court finds a serious question whether the Act criminalizes a widely-accepted course of medical treatment provided by qualified medical professionals, preventing parents from exercising their fundamental right to obtain that treatment for their child. To hold otherwise would allow the Act to put politicians rather than pediatricians in charge of a child's medical care. The Act is thus subject to strict scrutiny.

**2. Strict Scrutiny**

To satisfy strict scrutiny, a statute must be narrowly tailored to achieve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). The burden is on the government to prove the statute is necessary to achieve that interest. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 (1938). Here, the state argues it has a compelling interest to protect children from experimental medical procedures that have consequences neither the parents or children can foresee or understand, and to regulate the medical profession to prevent such experimental procedures. For reasons explained above, the Court rejects the state's characterization of the medical and surgical gender-affirming care as experimental.

However, even if the state's interests are compelling, the Act is not narrowly tailored to achieve those interests. Under strict scrutiny, a narrowly tailored statute must employ the "least restrictive means" necessary to achieve its purpose. *Holt v. Hobbs,* 574 U.S. 352, 364 (2015). "[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000).

Lincoln argues that it has narrowly tailored the SAME Act because it does not ban all gender-affirming care, only those medical treatments for minors that may have serious consequences including irreversible loss of fertility. Lincoln again points to healthcare systems in several European countries that restrict these treatments for minors because of concern about their unproven nature and potentially permanent consequences. *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. No country has enacted a blanket ban of these medications in the manner of the SAME Act, however, and the Swedish hospital system on which Lincoln relies itself recognizes the need to allow use of the treatments for research purposes. *See id.* The Court is not convinced there is no less restrictive way to advance the state's interest in protecting children and regulating the medical profession other than to prevent access to those treatments in all situations.

The Court, therefore, finds that Elizabeth and Thomas Mariano have raised serious questions regarding whether the SAME Act, if permitted to go into effect, would unconstitutionally infringe their fundamental Substantive Due Process rights to direct the medical care of their child. This right includes the more specific right to obtain medical and surgical gender-affirming care according to current medically accepted standards in this country.

### B. Jess Mariano's Right to Equal Protection

Jess Mariano alleges that the SAME Act violates his constitutional rights under the Equal Protection Clause because the Act classifies based on sex and is subject to heightened scrutiny, which defendant cannot meet. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Clause's purpose "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350, 352 (1918). The Supreme Court has stated that "'all gender-based classifications today' warrant '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)).

Jess argues the Act classifies based on his being transgender, which equates to a sex-based classification for purposes of the Equal Protection Clause. That would make the Act subject to intermediate scrutiny. *Id.* at 516 (reasoning that sex based discrimination is subject to heightened scrutiny under the Equal Protection Clause). Lincoln argues that the Act is subject to rational basis review because the Act classifies only on the basis of age and medical procedure, neither of which qualify for heightened review. The Court concludes that Jess's position is correct based on recent Supreme Court rulings regarding what amounts to "sex" discrimination.

#### 1. Discrimination based on transgender status and sex

The Supreme Court recently pronounced 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). The SAME Act treats individuals differently based on whether they are seeking medical treatment related to being transgender.

Doctors can treat children with puberty blockers and cross-sex hormones as long as it is not "performed for the purpose of instilling or creating physiological or anatomical characteristics that resemble a sex different from the individual's biological sex." *See* 20 Linc. Stat. § 1203 (2022). There is no denying that the child's sex is a determinative factor in whether the treatment is legal.

Lincoln argues, however, that the Act does not classify based on sex but rather on minority status and medical procedure. According to the state, the Act creates two categories of people: (1) minors who seek certain types of gender-affirming care; and (2) all other minors. The State asserts that Act does not disadvantage one sex relative to the other sex but rather forbids any minor, regardless of sex, from obtaining the covered experimental treatments. The Act, therefore, draws no gender-based classification that would warrant heightened scrutiny. *See Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976) (holding that age based classifications receive only rational basis review).

The Court finds a fundamental flaw in the State's argument because the Act categorically prohibits providing transgender minors medical care recommended to treat their *gender* dysphoria. By distinguishing minors who seek gender affirming care from all other minors, the Act places a special burden on minors whose gender identity does not match their birth sex, disadvantaging transgender minors relative to all other minors. *See Brandt*, 51 F. Supp. 2d at 889 (rejecting similar argument because the statute "refer[s] to gender transition which is only sought by transgender individuals").

Similarly, the State's argument that the Act classifies based on medical procedure is unpersuasive. Lincoln relies on Arizona district court reasoning that mastectomies used as a gender-transition procedure were not the "same" as chest surgeries performed as other

treatments. *See Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1034 (D. Ariz. 2021). However, the Court rejects this reasoning because it believes the Supreme Court would apply *Bostock* to this question and find it is impossible to distinguish transitional chest surgery from other chest surgeries without taking a person's sex and transgender status into account. *See Grimm v. Gloucester County Sch. Bd*., 972 F.3d 586, 609 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (rejecting school's argument it was not discriminating based on sex because its "biological sex" bathroom policy applied to both male and female students). The Act therefore amounts to a sex-based classification for purposes of the Equal Protection Clause and must survive intermediate scrutiny to be constitutional under the Equal Protection Clause.

### 2. Intermediate Scrutiny

To satisfy intermediate scrutiny, the state bears the burden to show its "classification serves 'important governmental objectives and that the discriminatory means employed' 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)). The State must proffer "an exceedingly persuasive justification" for the classification. *Virginia*, 518 U.S. at 531. An exceedingly persuasive justification is one that is "genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 533.

Lincoln ineffectively argues the Act survives intermediate security because the state has two important interests that are substantially advanced by the Act's provisions: protecting children from experimental medical treatments and protecting children from making life-changing decisions based on peer pressure. As to the first interest, even under this somewhat lessened form of review, the state's arguments that the treatment is experimental are simply unpersuasive.

As to the second, even accepting the legislative findings that the number of adolescents identifying as transgender has significantly jumped recently in a way that suggests some role of social pressure in self-identification as transgender, the Act targets adolescents who are diagnosed with gender dysphoria and provided medical treatment after meeting the rigorous criteria for treatment under the Guidelines. Lincoln has not proffered an exceedingly persuasive justification for overriding the judgment of an adolescent's treating physician following accepted medical guidelines simply because it fears some children are susceptible to peer pressure.

In addition, Lincoln fails to show the Act's classification is substantially and directly related to its proposed objectives. *See Miss. Univ. for Women*, 458 U.S. at 730 (concluding Mississippi's policy of limiting nursing school admission to women was not substantially related to its object to compensate for discriminatory barriers suffered by women because men were allowed to audit the classes). A direct and substantial relationship is required to "assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions…." *Id.* at 726, *see also Stanton v. Stanton*, 421 U.S. 7, 1377 (1975) (reasoning that once traditional assumptions about gender-based classifications were abandoned, there was no basis for a state statute to specify a greater age of majority for males than for females). The Act seeks to protect children from the treatments, but allows them for non-gender affirming purposes. The Act seeks to regulate the medical profession but doctors treating gender dysphoria are following the proper standard of care. *Cf. Adams & Boyle, P.C. v. Slatery,* 956 F.3d 913, 926 (6th Cir. 2020) (concluding district court was correct in not deferring to state's medical regulation when "every serious medical or public health organization to have considered the issue has said the opposite"). The Court,

therefore, finds Jess Mariano has raised serious questions regarding whether he is likely to succeed on his Equal Protection claim.

## III. Conclusion

For all of the foregoing reasons, the Court finds the balance of hardships favors granting the preliminary injunction. The Court therefore GRANTS Plaintiffs' motion for preliminary injunction and DENIES Defendant's motion to dismiss, and ENJOINS Defendants from enforcing 20 Linc. Stat. §§ 1201-06 during the pendency of the litigation in this case. In addition, to avoid any problem concerning scope of appeal, the Court also certifies this case for an interlocutory appeal under 28 U.S.C. § 1292(b).

DONE and ORDERED December 16, 2021.

_____

Jackson Belleville
UNITED STATES DISTRICT COURT JUDGE

**UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT**

**April Nardini, in her professional capacity as**
**the Attorney General of the State of Lincoln,**
**Appellant,**
**v.**
**United States ex rel. Jess Mariano, Elizabeth Mariano, and Thomas Mariano**
**Appellees.**

No. 22-2101
May 12, 2022

Before: Danes, Hayden, and Gilmore, Circuit Judges.

**OPINION**
Danes, C.J. delivered the opinion of the Court in which Hayden, C.J., joined.
Gilmore, C.J., filed an opinion dissenting.

Danes, C.J.

This interlocutory appeal arises from a challenge to the state of Lincoln's newly enacted Stop Adolescent Medical Experimentations Act. Appellant April Nardini, in her official capacity as Lincoln's Attorney General,[5] requests the Court to reverse the preliminary injunction entered by the lower court and its denial of Lincoln's motion to dismiss, and remand with instructions to dismiss Appellees' claims. On Appellant's motion, we set an expedited briefing and hearing schedule.[6] We now find the lower court did not abuse its discretion in issuing the preliminary injunction.

The lower court set out the factual background with some detail and we do not repeat that here except as relevant to our analysis. The court concluded the elements required for a

[5] Similar to the lower court, because this case is in essence a claim against the state, this Court will refer to Appellant as "Lincoln."
[6] The case is currently scheduled for trial in the district court in February, 2023, after having initially been scheduled for August, 2022.

preliminary injunction were met. We agree, although not always for the same reasons.

**Standard for Injunctive Relief**

Lincoln argues the district court abused its discretion by applying the wrong legal standard to the preliminary injunction motion. We disagree. The district court was correct that nothing in the Supreme Court's decision in *Winter v. Natural Resources Defense Council* requires us to abandon our long-standing sliding-scale approach to determine the propriety of a preliminary injuction. *See, e.g., Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 795 (7th Cir. 2013) (describing the balancing test as "a variant of, though consistent with" *Winter*); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010) (explaining the flexible standard for granting preliminary injunctions has a "considerable history" that *Winter* does not alter).

We find that the district court acted within its discretion in first finding the Marianos demonstrated a likelihood of immediate and irreparable harm. Assuming the Marianos show a likelihood of success on the merits of their constitutional claims, the SAME Act threatens an on-going interference with those rights. The state's evidence did not clearly contradict the evidence considered by the district court that showed immediate and severe harm to Jess Mariano's physical and mental health if the status quo of his treatment regime is not maintained. As to the balance of interests, there was no clear error in the district court's finding that the balance of harms weighs strongly in the family's favor because the likelihood of their harm was great as compared to the state's assertions of a public interest the court found unpersuasive on the evidence presented. *See Brandt v. Rutledge*, 551 F. Supp. 3d 892, 892 (E.D. Ark. 2021) (finding "State's interest in enforcing [its similar statute] during the pendency of this litigation pales in comparison to the certain and severe harm faced by Plaintiffs").

Therefore, we conclude the lower court acted within its discretion in finding both the irreparable harm and the balance of interests were strongly in the Marianos' favor. We now turn to whether the Marianos have shown they are likely to succeed on the merits because there are serious questions as to the constitutionality of the SAME Act.

**Substantive Due Process**

Unless the state can constitutionally ban the relevant treatments, the Act intrudes on the Marianos' fundamental right to obtain appropriate medical care for their child. See *Parham v. J.R.*, 442 U.S. 584, 604 (1979). Our dissenting colleague argues that the district court should have found the Marianos were unlikely to succeed on the merits of their SDP claim because the Supreme Court's decision in *Gonzales v. Carhart* directs us to defer to the state's decision when there is medical uncertainty, even when highly contested. *See* 550 U.S. 124, 163 (2007). But *Gonzales* arose in the distinct context of whether a federal statute imposed an undue burden the right to seek an abortion, where the Supreme Court has held states have a compelling interest to promote respect for human life as well as to protect the health and safety of women. *Id.* at 146. Here, the state does not assert nor does it have a similar moralistic interest in regulating a person's gender identity. Moreover, the statute in question in *Gonzales* did not foreclose other safe alternative forms of the involved medical procedure. *See id.* at 164 (emphasizing that "the Act does not proscribe D & E," only one particular form of it).

The Court in *Gonzales* also rejected the notion that courts should give uncritical deference to legislative findings. *Id.* at 165 (noting "[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake"). We, therefore, conclude the lower court correctly looked critically at the legislative findings and found them insufficient to justify the treatment ban. We find no basis to reverse the lower

court's determination at this stage of the litigation that the Marianos have shown there are sufficiently serious questions regarding the merits of their Substantive Due Process claim to make them a fair ground for litigation, especially when balanced against the imminent irreparable harm Jess Mariano would suffer if the Act were permitted to go into effect prior to trial on those merits.

**Equal Protection**

Similarly, we find no basis to reverse the lower court's findings regarding the merits of Jess Mariano's claim that the SAME Act discriminates on the basis of sex in violation of the Fourteenth Amendment's Equal Protection Clause. The lower court relied on the Supreme Court's recent decision in *Bostock* and we agree that case raises a serious question whether the SAME Act discriminates based on sex. There is at least one other reason Jess Mariano can likely to show a classification based on sex. The *raison d'être* of the SAME Act is treatment of young people whose gender identity does not conform to their biological male-female sex. The Supreme Court has held that treating an individual less favorably because they do not conform to gender expectations is evidence of sex discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236 (1989). The SAME Act is, therefore, subject to intermediate scrutiny.

But let us assume our dissenting colleague is correct that discrimination based on transgender status is not discrimination based on sex for Equal Protection purposes. Does that lead to the conclusion the state need only meet rational basis in defending the Act? We think not, and can reach that conclusion without doing what the dissent accuses us of, namely creating a new quasi-suspect class. It is now widely recognized that the Supreme Court applies heightened scrutiny even in cases where it refuses to find a quasi-suspect class. *See City of Cleburne, Tex. v. Cleburne Living Ctr*, 473 U.S. 432, 441 (1985) (applying heightened scrutiny under Equal

Protection doctrine despite refusing to find individuals with intellectual disabilities to be members of a quasi-suspect class); *see also* Richard Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 Ky. L.J. 591, 617 (2000) (discussing the impact Cleburne left on the Equal Protection Clause and rational basis review).

The Supreme Court has in particular imposed a more exacting scrutiny on state laws that impose a special disability on children for something that is beyond their control. See *Plyer v. Doe*, 457 U.S. 202, 210 (1982) (reasoning that when a special disability is placed on certain children and not others, it must be justified by showing that it furthers some substantial state interest, as opposed to just a legitimate state interest). Under the SAME Act, children with gender dysphoria are denied access to medical and surgical treatments that are not denied to children who do not seek treatment for gender dysphoria. We believe that is the type of special disability that would prompt the Supreme Court to apply heightened review. We also agree with the lower court that the state's arguments fare no better under that heightened/intermediate review than they do under strict scrutiny because they are grounded in the erroneous notion the treatments are "experimental."

Therefore, we conclude that the district court acted within its discretion to grant the Marianos' motion for a preliminary injunction and deny Lincoln's motion to dismiss, because the Marianos are likely to suffer imminent irreparable harm if the SAME Act is permitted to go into effect, they have raised serious questions about their likelihood of success on the merits of their claims, and the balance of interests strongly tips in their favor.

The decision of the district court is AFFIRMED.

Judge Gilmore, dissenting.

The purpose of a preliminary injunction "is to preserve the positions of the parties" pending trial. *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). When a federal court preliminarily enjoins a state law passed by duly elected officials, the court effectively overrules a decision "of the people and, thus, in a sense interferes with the processes of democratic government." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am.* 896 F.2d 1283, 1285 (1990). There is no basis for interfering with Lincoln's legislative judgment in passing the SAME Act and the district court order should not have granted the motion for a preliminary injunction.

**Proper Standard for Preliminary Injunction**

The majority starts off on the wrong foot by refusing to recognize the proper standards for granting a preliminary injunction. The sliding-scale "serious questions" approach is contrary to *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008). *Winter* reiterated that preliminary injunctions are a form of extraordinary relief. *Id.* at 24. The Fourth Circuit correctly recognized that "[t]he *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." *The Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346-47 (4th Cir. 2010), *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 movants must make a *clear* showing that they are substantially likely to succeed on the merits. *See id.* at 346. Because the lower court failed to apply the proper standard, I would remand on that basis alone.[7]

[7] Relatedly, given the unproven nature of the treatments at issue and real concerns about informed consent, I would find the public interest favors the state's desire to put a pause on these treatments. The lower court gave short shrift to the state's arguments in that regard.

**Substantive Due Process Claim**

The Marianos' Substantive Due Process claim fails because they cannot make a clear showing they are substantially likely to succeed on the merits for one important reason—there is no substantive due process right to access experimental medical procedures. As the majority correctly notes, fundamental rights are those that are (1) deeply rooted in our nation's history and tradition or (2) are fundamental to our scheme of ordered liberty. *Glucksberg*, 521 U.S. at 721. What the majority fails to adequately acknowledge is that parental autonomy has limits, and the state may intervene on a child's behalf if the parents are jeopardizing that child's health or safety. The Supreme Court has made it clear that the "rights of parenthood" are "not beyond regulation in the public interest." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). Indeed, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Id.* at 167.

Parent have no greater right to seek treatment for their child than they would have for themselves. See *Doe By & Through Doe v. Pub. Health Tr. of Dade Cty.*, 696 F.2d 901, 903 (11th Cir. 1983) (holding that the parent's "rights to make decisions for his daughter can be no greater than his rights to make medical decisions for himself"). The D.C. Circuit en banc concluded there is no "right to procure and use experimental drugs that is deeply rooted in our Nation's history and traditions." *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711 (D.C. Cir. 2007) (en banc). As that court noted, the Constitution does not afford even terminally ill patients a right of access to drugs that have not been proven safe and effective. *Id.* at 697. The Supreme Court itself has indicated that "[t]he mere novelty of . . . a claim is reason enough to doubt that 'substantive due process' sustains it; the alleged right certainly cannot be considered so rooted in the traditions and conscience of people as to be

ranked as fundamental." *Reno v. Flores*, 507 U.S. 292, 303 (1993) (holding a child does not have a constitutional right to refuse to be placed in a decent and humane temporary custodial institution if no legal guardian will assume custody).

The district court should have deferred to the Lincoln legislature's determination that these treatments are insufficiently proven and potentially unsafe. When there is medical and scientific uncertainty, the Supreme Court has given states wide discretion to pass legislation regulating the medical profession even when it intrudes on a fundamental right. *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). What the record before this Court demonstrates is that there is, at present, no medical consensus regarding this efficacy and safety of treating adolescents with gender dysphoria by giving them medications designed to suppress their natural puberty and prompt development alternative sex characteristics, let alone for performing surgical "sex confirming" surgeries on them.

While the majority finds no clear error in the district court's rejection of the state's evidence, neither court disputes that conflicting medical evidence nonetheless exists. The SAME Act's findings are based on hours of testimony presented to the legislature, including from experts like Dr. Geller who explained that the prohibited medical and surgical treatments have irreversible consequences and potentially no mental health benefits, and from individuals who had de-transitioned as young adults and expressed concerns about their ability to have given informed consent. Regardless of whether some or even many professional organizations support these treatments, *Gonzales* tells us that the state is not required to defer to these guidelines. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 438 (6th Cir. 2019) (discussing how cases like *Gonzales* upheld laws that "conflicted with official positions of American College of Obstetricians and Gynecologists").

Thus, a "claim of a right of access to experimental [treatments] is subject only to rational basis scrutiny." *Abigail All. for Better Access to Developmental Drugs*, 495 F.3d at 712. The court should have considered only whether Lincoln had a legitimate purpose in enacting the SAME Act and whether there was any conceivable way the Act advanced that purpose. *Ry. Exp. Agency v. People of State of N.Y.*, 336 U.S. 106, 111 (1949) (holding the railway failed to prove New York had no rational basis for the regulation to address a traffic congestion problem). The current debate within the medical field certainly makes the purpose and scope of this Act an exercise of legitimate state regulation.

Nonetheless, even if we assume that the SAME Act intrudes upon the parental rights to the care, custody and control of their children, the Act survives the strict scrutiny. The Supreme Court has explained that states have a legitimate governmental interest in regulating medicine and promoting medical ethics. *See Gonzales*, 550 U.S. at 157. The SAME Act is also sufficiently narrowly tailored. The Act does not outright prohibit gender-affirming care; it merely postpones certain types of care, namely medical and surgical, until a time when the individual receiving the care has sufficiently matured to be able to make such long-lasting and life-altering decisions. The Act does not prohibit use of puberty blockers for purposes approved by the FDA for premature puberty, and as the state has explained, it does not prohibit treatments for the process of withdrawing children from the prohibited care. The Act is carefully crafted to advance the state's compelling interest in preventing children from being subjected to medical and surgical treatments for gender dysphoria that are unproven and potentially irreversible, as a time when they may not be fully able to give informed consent.

Accordingly, even if strict scrutiny were to apply, the Marianos have not shown they are substantially likely to succeed on the merits of the SDP claim. The Supreme Court has stated

that a state's interest in "safeguarding the physical and psychological well-being of a minor is a compelling one." *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982). The Marianos' desire for these treatments cannot outweigh the Lincoln legislature's determination that, for now at least, there is insufficient evidence to conclude that the benefits of the treatments outweigh the long-term risk they pose to vulnerable children. That policy determination is due deference from this Court.

**Equal Protection Claim**

The lower court also erroneously found Jess Mariano is likely to succeed on his Equal Protection claim because first, *Bostock* does not apply to constitutional claims and second, transsexual status is neither a "quasi-suspect" classification nor one to which heightened rational basis review applies. The Act's classifications are based on age and procedure, not sex. The lower court should, therefore, have denied the preliminary injunction because there was no substantial likelihood of success on the Equal Protection claim.

First, it is not clear to me that the Supreme Court would extend its reasoning in *Bostock* to Equal Protection claims. *Bostock* interpreted Title VII of the Civil Rights Act of 1964, which the Supreme Court emphasized adopted a "sweeping standard" of causation. *Bostock*, 140 S. Ct. at 1739. The Supreme Court has rejected equating the scope of the Equal Protection Clause with that of Title VII. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that unlike Title VII, the Equal Protection Clause does not prohibit actions based only on the fact they create a disparate impact based on sex). Justice Gorsuch in *Bostock* expressly refused to "prejudge" arguments under "other federal or state laws that prohibit sex discrimination," emphasizing that the Court was deciding only that "[f]iring employees because of a statutorily protected trait surely counts" as sex discrimination under that statute. *Bostock*, 140 S. Ct. at 1753.

*Bostock* was a heavily text-based decision in which Justice Gorsuch emphasized how Title VII focuses on treatment of individuals, not classes. *Id*. at 1741 (noting "[t]he consequences of [Title VII]'s focus on individuals rather than groups"). The Equal Protection Clause is class-based; it prohibits treating a class of individuals less favorably than a similarly-situated class. *See, e.g, Plyler v. Doe*, 457 U.S. 202, 216 (1982) (noting "[t]he initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States"). As Lincoln persuasively argues, its statute does not treat either men or women less favorably than any other similarly situated group; rather, it operates on the basis of age and procedure. *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993) (reasoning that "the characteristic that formed the basis of the [state regulation] not womanhood, but the seeking of [an] abortion"). *Id.* at 273. Even if the Supreme Court does decide to extend *Bostock* to Equal Protection claims, that distinction should still be considered. S*ee Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (recognizing an unresolved issue regarding whether limiting access to a medical procedure while allowing other treatments can be discrimination because of sex).

Aside from *Bostock*, the Marianos argue that transgender individuals form a quasi-suspect class subject to heightened review. To paraphrase the Supreme Court in rejecting heightened scrutiny in another context, "[a]s a historical matter, [transsexuals] have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority, or politically powerless." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding "parents, children, and siblings" is not a quasi-suspect class). Most fatal to this claim, the proposed classification encompasses individuals with varied and discrete needs. *See City of Cleburne, Tex. v. Cleburne Living Ctr*, 473 U.S. 432, 442 (1985) (reasoning that individuals with intellectual disabilities vary across a

continuum of needs that made them "different, immutably so"). Pre-pubescent children with gender dysphoria differ from adolescents who differ from adults, in how gender dysphoria manifests and appropriate treatment approaches. *See* WPATH Guidelines at 10-11. On the question of political powerlessness, it should be sufficient to point out the number of professional organizations advocating against these laws as well as the protection of statutes such as Title VII of the Civil Rights Act of 1964.

But suppose the Supreme Court does apply heightened review. All of the reasons I set forth above about how the Act passes strict scrutiny apply with even more force under this less exacting standard. Therefore, I would hold that Jess Mariano failed to show he has a substantial likelihood of success on his Equal Protection claim..

The lower court should not have issued a preliminary injunction and I respectfully dissent from this Court's decision upholding it.

IN THE SUPREME COURT OF THE UNITED STATES

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.

Docket No. 22-8976

Petitioner made an application to this Court for a stay of the district court's preliminary injunction and for a writ of certiorari to consider the merits of that injunction and denial of its motion to dismiss. The application for a stay pending the filing and disposition of a petition for a writ of certiorari presented to Justice St. James and by her referred to the Court is denied. The petition for writ of certiorari to the United States Court of Appeals for the Twelfth Circuit is granted limited to the following Questions:

1) Whether the "serious question" standard for preliminary injunctions continues to be viable after *Winter v. Natural Resources Defense Council, Inc.*
2) Whether the preliminary injunction was properly granted in regard to the Respondents' Substantive Due Process and Equal Protection claims.

Dated: July 18, 2022