

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,)
)
) Petitioner,)
)
) v.) No. 23-477
)
JONATHAN SKRMETTI, ATTORNEY GENERAL)
)
AND REPORTER FOR TENNESSEE, ET AL.,)
)
) Respondents.)

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v.) No. 23-477
JONATHAN SKRMETTI, ATTORNEY GENERAL)
AND REPORTER FOR TENNESSEE, ET AL.,)
Respondents.)
- - - - -

Washington, D.C.
Wednesday, December 4, 2024

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 10:05 a.m.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 23-477, United States versus Skrmetti.

General Prelogar.

ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

ON BEHALF OF THE PETITIONER

GENERAL PRELOGAR: Mr. Chief Justice, and may it please the Court:

This case is about access to medications that have been safely prescribed for decades to treat many conditions, including gender dysphoria. But SB1 singles out and bans one particular use. In Tennessee, these medications can't be prescribed to allow a minor to identify with or live as a gender inconsistent with the minor's sex.

It doesn't matter what parents decide is best for their children. It doesn't matter what patients would choose for themselves. And it doesn't matter if doctors believe this treatment is essential for individual patients. SB1 categorically bans treatment when and only when it's inconsistent with the patient's birth

1 sex.

2 Tennessee says that sweeping ban is
3 justified to protect adolescent health. But the
4 State mainly argues that it had no obligation to
5 justify the law and that SB1 should be upheld so
6 long as it's not wholly irrational.

7 That's wrong. SB1 regulates by
8 drawing sex-based lines and declares that those
9 lines are designed to encourage minors to
10 appreciate their sex. The law restricts medical
11 care only when provided to induce physical
12 effects inconsistent with birth sex. Someone
13 assigned female at birth can't receive
14 medication to live as a male, but someone
15 assigned male can.

16 If you change the individual's sex, it
17 changes the result. That's a facial sex
18 classification, full stop, and a law like that
19 can't stand on bare rationality. To be clear,
20 states have leeway to regulate gender-affirming
21 care, but, here, Tennessee made no attempt to
22 tailor its law to its stated health concerns.

23 Rather than impose measured
24 guardrails, SB1 bans the care outright no matter
25 how critical it is for an individual patient,

1 and that approach is a stark departure from the
2 State's regulation of pediatric care in all
3 other contexts. SB1 leaves the same medications
4 and many others entirely unrestricted when used
5 for any other purpose, even when those uses
6 present similar risks.

7 The Sixth Circuit never considered
8 whether Tennessee could justify that sex-based
9 line. Because the Equal Protection Clause
10 requires more, this Court should remand so that
11 SB1 can be reviewed under the correct standard.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Much of your -- the
14 latter part of your opening statement suggests
15 that the -- well, seemed to suggest that there's
16 an outright ban on this treatment. But that's
17 not the case. It's really for minors.

18 So why isn't this simply a case of age
19 classification when it comes to these treatments
20 as opposed to a ban, as you suggested in your
21 opening statement?

22 GENERAL PRELOGAR: It's certainly
23 true, Justice Thomas, that the statute
24 classifies based on age, but it packages that
25 age classification with a sex restriction and

1 says that for all adolescents, you cannot take
2 these medications if they're inconsistent with
3 your sex.

4 So I acknowledge that the State so far
5 has not banned this care for adults, although I
6 think that the arguments it's making that this
7 isn't a sex-based line in the first place would
8 equally apply in that context. But the Court
9 has likewise made clear that when you classify
10 on the basis of multiple characteristics, you
11 can't avoid heightened scrutiny just because you
12 have a non-protected characteristic that
13 accompanies the protected one.

14 And if you look at it from the
15 standpoint of the plaintiffs who are actually
16 affected by this law, the reason I'm calling it
17 a categorical ban is because the State has left
18 no out for those patients to obtain these
19 medications when there's a showing of
20 individualized medical need, and that is, I
21 think, a -- a stark departure from how the State
22 ordinarily handles issues related to measuring
23 risks and benefits even in the pediatric
24 context.

25 JUSTICE THOMAS: Well, is there no

1 difference in the -- if a girl takes
2 testosterone or if a boy takes testosterone?

3 GENERAL PRELOGAR: So the district
4 court specifically considered this question in
5 detail and found that with respect to the risks
6 that the State had identified, it was not
7 substantiated that there would be unique risks
8 associated with --

9 JUSTICE THOMAS: No. I --

10 GENERAL PRELOGAR: -- a cross-sex use
11 of the hormones.

12 JUSTICE THOMAS: Is there no
13 physiological difference?

14 GENERAL PRELOGAR: Certainly, I
15 understand that there are biological differences
16 between males and females, but when it came to
17 the specific risk factors that the State was
18 focused on, what the district court found is
19 that many of those risk factors would exist
20 regardless of the birth sex of who was taking
21 those medications.

22 JUSTICE THOMAS: Well, I'm more
23 interested in whether or not there is a
24 difference in testosterone and its reaction in a
25 male as opposed to in a female --

1 GENERAL PRELOGAR: So --

2 JUSTICE THOMAS: -- and vice versa for
3 estrogen.

4 GENERAL PRELOGAR: So, if you take
5 hormones, they will prompt the development of
6 secondary sex characteristics, and -- and
7 whether you're a male or a female, if you take
8 testosterone, you might develop a deeper voice
9 register, you might have facial hair growth,
10 and, in fact, that's one of the intended effects
11 of these treatments because that can be critical
12 to helping manage gender dysphoria that
13 transgender adolescents would ever -- would
14 otherwise experience.

15 But I think, when it comes to the
16 question of whether that creates unique risks,
17 the district court found that for the most part,
18 the State had not substantiated those risks and
19 that it leaves regulation of medication
20 unrestricted even in contexts where these same
21 medications or others would pose a comparable
22 set of risks.

23 JUSTICE JACKSON: General --

24 CHIEF JUSTICE ROBERTS: Counsel --

25 JUSTICE JACKSON: -- can I just --

1 CHIEF JUSTICE ROBERTS: Counsel, you
2 rely very heavily in your briefing on cases like
3 Morales-Santana, which was about the
4 distinctions between men and women when it came
5 to adoption and things of that sort.

6 Here, it seems to me that the medical
7 issues are much more heavily involved than in
8 many of the cases that you -- you look to,
9 including -- I understand there's a dispute
10 between both sides on how extensive any
11 evolution or increase in uncertainty in Europe
12 has been and elsewhere.

13 And, of course, we are not the best
14 situated to address issues like that, unlike in,
15 you know, like Morales and Craig v. Boren and
16 some of the other ones, where it doesn't strike
17 me that they're intensely affected by medical
18 considerations.

19 And if that's true, doesn't that make
20 a stronger case for us to leave those
21 determinations to the legislative bodies rather
22 than try to determine them for ourselves?

23 GENERAL PRELOGAR: So let me respond
24 to that concern with a couple of different
25 points, Mr. Chief Justice.

1 I certainly take the point that you
2 might think that states should have a lot of
3 leeway to regulate when it comes to medical
4 uncertainty. And we're not arguing otherwise.
5 If the State is not restricting access to
6 medications on the basis of a protected
7 characteristic, that is only going to be
8 rational basis review from the outset, and it's
9 only in a circumstance where the State is saying
10 your access to drugs depends on your birth sex
11 or your sex generally that the Court would apply
12 heightened scrutiny.

13 But, even at that stage, I don't think
14 it's necessary for the Court to step in and
15 suggest that states have no ability to draw
16 those kinds of lines. And I think this relates
17 to my point in colloquy with Justice Thomas as
18 well. We, of course, recognize that if there's
19 a lot of medical uncertainty or differential
20 risk, and if the State can actually come forward
21 and show that it has an important reason to
22 restrict access based on sex, that can be taken
23 into account in heightened scrutiny, and it
24 wouldn't provide a basis to displace the state
25 legislatures altogether from weighing this

1 evidence.

2 But I think it would be a pretty
3 remarkable thing for the Court to say that just
4 because we're in the space of medical
5 regulation, you are not going to apply the
6 traditional standards that ordinarily are
7 applied when there's a sex classification.

8 CHIEF JUSTICE ROBERTS: Well, I guess
9 I wouldn't say just in the area of medical
10 regulation if it -- it's more in the area of
11 evolving standards and technical treatment
12 issues and the effect of certain -- prescribing
13 particular medications.

14 That seems to me to be very much in
15 the area of medical nuances, unlike, you know,
16 Craig v. Boren, different drinking ages, or
17 Morales, can men and women adopt children in the
18 same -- the same way.

19 GENERAL PRELOGAR: And I think the
20 Court could recognize that that concern can be
21 accommodated under intermediate scrutiny. It is
22 not like strict scrutiny, where states are
23 automatically prohibited from drawing lines
24 based on sex. They just have to come forward
25 and demonstrate that they do have an important

1 state interest.

2 And I don't think it would be any
3 different, Mr. Chief Justice, than if the State
4 were to say we think there is some concern about
5 safety and efficacy for this drug with respect
6 to women, so we're going to ban women from
7 taking it. The Court would recognize that's a
8 facial sex classification.

9 And then the role for the Court is not
10 to come in and entirely second-guess the
11 legislature, but you would ask questions like:
12 Well, is there evidence to suggest it's risky
13 for women but not for men? And what does the
14 state do when there's comparable risk in other
15 contexts? Does it just ban medication outright,
16 or are there less restrictive measures? And
17 could the state have tailored its approach to
18 the unique concerns and tried to potentially
19 screen for the people for whom this would be
20 safe and effective while more -- while enacting
21 a more tailored law to try to safeguard against
22 that important state interest?

23 So I don't think we're asking the
24 Court to break new ground in this case. And, in
25 fact, we don't even think the Court needs to

1 delve into the heightened scrutiny analysis
2 itself here. We think it would be sufficient
3 for the Court to recognize that a law that on
4 its face says you can't have medications
5 inconsistent with sex is a sex classification,
6 but then you could send this case back and have
7 the Sixth Circuit do the heightened scrutiny
8 analysis in the first instance.

9 JUSTICE ALITO: General, can I ask you
10 a question about the state of medical evidence
11 at the present time? In your petition, you made
12 a sweeping statement, which I will quote:
13 "Overwhelming evidence establishes that the
14 appropriate gender-affirming treatment with
15 puberty blockers and hormones directly and
16 substantially improves the physical,
17 psychological well-being of transgender
18 adolescents with gender dysphoria." That was in
19 November 2023.

20 Now, even before then, the Swedish
21 National Board of Health and Welfare wrote the
22 following: They currently assess "that the
23 risks of puberty blockers and gender-affirming
24 treatment are likely to outweigh the expected
25 benefits of these treatments," which is directly

1 contrary to the sweeping statement in your
2 petition.

3 After the filing of your petition, of
4 course, we saw the -- the release of the Cass
5 report in the United Kingdom, which found a
6 complete lack of high-quality evidence showing
7 that the benefits of the treatments in question
8 here outweigh the risks.

9 And so I wonder if you would like to
10 stand by the statement that you made in your
11 petition or if you think it would now be
12 appropriate to modify that and withdraw the
13 statement that there is overwhelming evidence
14 establishing that these treatments have benefits
15 that greatly outweigh the risks and the dangers.

16 GENERAL PRELOGAR: I, of course,
17 acknowledge, Justice Alito, that there is a lot
18 of debate happening here and abroad about the
19 proper model of delivery of this care and
20 exactly when adolescents should receive it and
21 how to identify the adolescents for whom it
22 would be helpful.

23 But I stand by that there is a
24 consensus that these treatments can be medically
25 necessary for some adolescents, and that's true

1 no matter what source you look at. You
2 mentioned both the Cass report and Sweden --

3 JUSTICE ALITO: Well, can be --

4 GENERAL PRELOGAR: -- but neither of
5 those jurisdictions --

6 JUSTICE ALITO: -- can be medically
7 necessary for some minors. But, for the general
8 run of minors, do you dispute the proposition,
9 in fact, that in almost all instances, the
10 judgment at the present time of the health
11 authorities in the United Kingdom and Sweden is
12 that the risks and dangers greatly outweigh the
13 benefits?

14 GENERAL PRELOGAR: I --

15 JUSTICE ALITO: Do you dispute that?

16 GENERAL PRELOGAR: -- I do dispute
17 that because, if you actually look at how those
18 jurisdictions are addressing this issue, they
19 have not outright banned this care.

20 The Cass report says at multiple
21 points that this care can be medically indicated
22 for some transgender adolescents. And, of
23 course, it's true that they have called for a
24 more individualized approach to these issues and
25 have questioned whether it should be readily

1 applied to all adolescents as a matter of
2 course.

3 JUSTICE ALITO: Is it not --

4 GENERAL PRELOGAR: But what that
5 supports --

6 JUSTICE ALITO: -- is it not true that
7 in England -- I -- I'm sorry to interrupt --

8 GENERAL PRELOGAR: Yeah.

9 JUSTICE ALITO: -- but I -- time is
10 running out -- that the National Health Service
11 some months ago limited the prescription of
12 puberty blockers to adolescent males who are
13 over the age of 16 and are already on estrogen,
14 but, for those who are under the age of 16, it's
15 allowed only for experimental purposes? Is that
16 not true?

17 GENERAL PRELOGAR: So the approach in
18 the U.K. right now is to allow hormone therapy
19 for anyone 16 and older, and with respect to
20 puberty blockers, the U.K. has restricted new
21 prescriptions outside of research settings. But
22 the Cass implementation plan itself makes clear
23 that if a medical team determines that these
24 medications are necessary for a particular
25 patient, they will be provided.

1 And that is a --

2 JUSTICE ALITO: The restriction that I
3 mentioned was imposed by the British government
4 some months ago. It was reaffirmed by the
5 current Labour government, was it not? It was
6 upheld by the High Court of Justice as based on
7 sufficient medical evidence? Isn't all of that
8 true?

9 GENERAL PRELOGAR: I believe that all
10 of that's true. It's outside the record in this
11 case, and so I -- I haven't myself confirmed
12 everything that you just cited, which wasn't
13 before the district court in this case. But let
14 me make a couple of additional points.

15 To the extent that you think that this
16 needs to be taken into account in the
17 application of heightened scrutiny, there's a
18 time and a place for that, and it's with record
19 evidence on remand. We think the Court here
20 just needs to recognize the sex-based
21 classification in this statute and send the case
22 back.

23 If the Court wants to go ahead and
24 look at what's happening in Europe, the U.K. has
25 not categorically banned this care. Sweden,

1 Finland, and Norway, the other jurisdictions
2 that my friends point to, have not banned this
3 care, and I think that's because of the
4 recognition that this care can provide critical,
5 sometimes life-saving, benefits for individuals
6 with severe gender dysphoria.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas, anything further?

10 Justice Alito?

11 JUSTICE ALITO: In your opening brief,
12 you did not mention any of these European
13 developments. And in your reply brief, is it
14 true -- is it not true that you just relegated
15 the Cass report to a footnote?

16 GENERAL PRELOGAR: So, Justice Alito,
17 with respect to the developments, there has been
18 no change in the law that I'm aware of in
19 Sweden, Finland, and Norway. Each of the
20 medical authorities in those states has called
21 for an individualized approach to care. They've
22 said it shouldn't be routinely applied. But
23 they have not changed their laws to do anything
24 like what Tennessee is doing here, which is to
25 categorically ban it no matter the need.

1 With respect to the Cass report, that
2 isn't in the record in this case, but we have
3 discussed that report in our reply brief, and,
4 as I just noted, it likewise recognizes the need
5 for this care on -- in individual cases. The
6 U.K. has not banned the care, and -- and Hilary
7 Cass was not calling for such a ban.

8 JUSTICE ALITO: Your primary argument
9 in the -- in your oral presentation this morning
10 is based on Bostock-like reasoning, is that not
11 correct?

12 GENERAL PRELOGAR: I think that's
13 incorrect. Our primary argument is that this
14 statute on its face says you can't have
15 medications inconsistent with sex. And no
16 matter what you think about transgender
17 discrimination generally, that's a sex-based
18 line.

19 It's no different than saying you
20 can't dress inconsistent with your sex. My
21 friends concede on page 25 of their brief that's
22 obviously a facial sex classification. But our
23 primary argument is SB1 is worded exactly the
24 same way and it works exactly the same way.

25 JUSTICE ALITO: Well, you have a

1 Bostock-like argument, and you say that a -- a
2 girl who wants to live like a boy cannot be
3 administered testosterone, but a boy who wants
4 to live like a boy can be administered
5 testosterone. So -- and that -- and that's one
6 of your major arguments. I take that to be a --
7 a Bostock-like argument.

8 So my question is: Why should we look
9 to Bostock here? Bostock involved the
10 interpretation of particular language in a
11 particular statute.

12 And this is not a question of
13 statutory interpretation. It's a question of
14 the application of the Equal Protection Clause
15 of the Fourteenth Amendment, and the Court has
16 addressed the -- the question of how an equal
17 protection claim should be analyzed when the law
18 in question treats a medical condition or
19 procedure differently based on a characteristic
20 that is associated with just one sex. And that
21 was *Geduldig* in 1974, reaffirmed in *Dobbs* in
22 2022.

23 And neither *Bostock* nor *Dobbs* saw any
24 connection between the *Bostock* reasoning and the
25 *Geduldig/Dobbs* standard. *Bostock* did not

1 mention Geduldig, and Dobbs did not mention
2 Bostock. So why should we -- we look to this
3 Bostock-type reasoning here?

4 GENERAL PRELOGAR: So, with respect to
5 how to identify a facial sex classification in
6 the first place, I don't think there's any
7 relevant difference between the Court's approach
8 in Bostock and what this Court has long done
9 under the Equal Protection Clause.

10 In both contexts, the Court has made
11 clear that the right to equal treatment is an
12 individual right, so you look at the particular
13 person and see how the law affects them. And
14 the Court in both contexts has already made
15 clear that sex just needs to be one but-for
16 causal factor, it doesn't have to be the sole
17 reason or the primary reason.

18 So, for purposes of identifying
19 whether facial sex classification is happening
20 at the outset, we think it's equal protection
21 principles, as much as Bostock, that carries the
22 day, although, of course, Bostock reinforces
23 those principles.

24 You asked why this case isn't
25 controlled by Geduldig and Dobbs. The Court's

1 reasoning there was that when you have a statute
2 that doesn't classify based on sex on its face
3 at all, the fact that the medical condition
4 might be something that only one sex can
5 experience isn't a basis to necessarily say
6 that's facial sex discrimination.

7 But that doesn't apply in any -- in
8 any relevant respect here, first, because, here,
9 we have the facial sex classification. The
10 statute says no medications that are
11 inconsistent with your sex.

12 And, second, these aren't drugs that
13 are limited to one sex or another. Both males
14 and females alike for decades have been
15 prescribed puberty blockers, hormones,
16 testosterone, estrogen. They produce the same
17 physical characteristics as I was saying to
18 Justice Thomas, no matter whether your birth sex
19 is male or female. So this doesn't look
20 anything like pregnancy, where the Court found
21 that the medical condition itself was expressly
22 limited to one sex.

23 JUSTICE ALITO: Well, I -- I -- I'm
24 sure -- I'm not sure that's anything more than a
25 play on words. Suppose the statute said --

1 let's just talk about puberty blockers. Suppose
2 the statute said that puberty blockers may not
3 be prescribed or administered to any minor for
4 the purpose of preventing the onset of puberty
5 prior to the time when puberty generally occurs.
6 Okay? That statute makes no reference
7 whatsoever to anybody's sex. It applies to all
8 minors.

9 Would you say the same thing about
10 that?

11 GENERAL PRELOGAR: So, I'm sorry, if
12 I'm understanding the hypothetical correctly,
13 the statute says you can't take puberty blockers
14 before the time when you would ordinarily have
15 puberty, so it's ruling out precocious puberty?

16 JUSTICE ALITO: You cannot -- no, it
17 doesn't rule out precocious puberty. It rules
18 out the administration of a puberty blocker for
19 the purpose of preventing puberty from occurring
20 at the time when it generally does.

21 GENERAL PRELOGAR: I see. So, if
22 you're hypothesizing a statute where, in
23 essence, the legislature is trying to get at the
24 idea of prohibiting access to these medications
25 for gender dysphoria reasons or otherwise, then

1 maybe you would apply an Arlington Heights type
2 of analysis. But, of course, that kind of law
3 that you're hypothesizing would also prevent
4 people from taking puberty blockers if they have
5 cancer and want to preserve their fertility
6 because it would prevent them from undergoing
7 puberty at the ordinary time. I think that's
8 why the legislature hasn't tried to try to
9 circumvent a facial sex classification by
10 drafting a law like that. It would have many
11 other applications that the State might not want
12 to aim at.

13 That's very different from a law like
14 this, where the State was being clear we only
15 want to prevent the medications when it's
16 inconsistent with sex, and we're doing that
17 because we have an interest in having minors
18 appreciate their sex and not be disdainful of
19 their sex.

20 JUSTICE ALITO: Well, let me ask one
21 final question that addresses *Geduldig* and
22 *Dobbs*. Let's take *Geduldig* first.

23 One could make the same argument in
24 *Geduldig* that you've made here. A man cannot --
25 which concerned whether a pregnant woman was

1 entitled to disability benefits for -- for time
2 missed at work when a man would be entitled to
3 disability -- to benefits for time missed at
4 work.

5 So, in that situation, a man cannot
6 work due to a medical condition that prevents
7 him from working. He gets benefits. A woman
8 cannot work due to a medical condition,
9 pregnancy, that prevents her from working for a
10 period of time. She doesn't get benefits. It's
11 the same argument you're making here.

12 Or we could do it in Dobbs. A man who
13 has a medical condition that causes physical and
14 mental distress and pain and limits his daily
15 activities cannot -- can get a corrective
16 medical procedure. Let's say it's a hip
17 replacement. But a woman who has a medical
18 condition that produces similar consequences,
19 namely pregnancy, cannot get an abortion.

20 So you can make exactly the same
21 argument that you make here under Geduldig and
22 under Dobbs, and yet there was no equal
23 protection problem in either of those cases.

24 GENERAL PRELOGAR: And that's because
25 the Court said that there was no facial sex

1 classification insofar as using pregnancy does
2 not automatically mean that that's a proxy for
3 sex. But, here, there's a facial sex
4 classification. No one can take these
5 medications if it would be inconsistent with
6 their sex. And that's imposing on the face of
7 the statute two parallel rules on classes of
8 people according to their sex, all adolescent
9 males who want to take these medications to
10 feminize their bodies and all adolescent females
11 who want to take these medications for
12 masculinizing purposes. That's a facial sex
13 classification through and through --

14 JUSTICE ALITO: All right.

15 GENERAL PRELOGAR: -- and I don't
16 think it's controlled by Dobbs or Geduldig.

17 JUSTICE ALITO: Thank you, General.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: General, just to
21 unpackage some of this argument, your point, I
22 think, is very clear that Bostock is pertinent
23 only to the extent that, whether it's Title VII
24 or the Equal Protection Clause, the first
25 question is, is the legislature using sex as a

1 classification, correct?

2 GENERAL PRELOGAR: That's right. So
3 our argument is that when you're looking for
4 whether there's a facial sex classification,
5 under the Equal Protection Clause, it has always
6 been the same but-for causation principles.
7 And, of course, we agree with the logic of
8 Bostock, but we think that that logic carries
9 over in this context, where the Court has
10 already said it just needs to be one but-for
11 cause, it doesn't need to be the only cause, and
12 one way you look at that is seeing whether the
13 application of the statute changes when you
14 change the person's sex.

15 JUSTICE SOTOMAYOR: Now Bostock is
16 very different than this case because, in
17 Bostock, what we said is, if you use sex at all,
18 unless you have a statutory exemption, you can't
19 do it, correct?

20 GENERAL PRELOGAR: Exactly. And I
21 think that's an important --

22 JUSTICE SOTOMAYOR: And, here, under
23 the Equal Protection Clause, we recognize there
24 are inherent differences between the sexes.

25 GENERAL PRELOGAR: And that can

1 sometimes provide a legitimate basis for
2 classification.

3 JUSTICE SOTOMAYOR: That's the point,
4 isn't it?

5 GENERAL PRELOGAR: So you're exactly
6 right. The standards for liability are
7 different.

8 JUSTICE SOTOMAYOR: Now --

9 GENERAL PRELOGAR: Under Bostock and
10 under Title VII, you can't use sex.

11 JUSTICE SOTOMAYOR: -- with respect to
12 the discussion about the European countries and
13 the fact that they haven't limited these
14 treatments altogether, the Cass report, as you
15 point out, explicitly says that medical
16 intervention might be necessary for some
17 adolescents, correct?

18 GENERAL PRELOGAR: That's right.

19 JUSTICE SOTOMAYOR: And that is
20 recognized by all the European countries,
21 correct?

22 GENERAL PRELOGAR: Yes. I think it's
23 reflected in the laws of those countries, which
24 have not outright --

25 JUSTICE SOTOMAYOR: All right.

1 GENERAL PRELOGAR: -- banned the care.

2 JUSTICE SOTOMAYOR: Isn't the purpose
3 of intermediate scrutiny to make sure that we
4 guard against our -- I want to -- I'm not
5 intending to insult, but we all have instinctual
6 reactions, whether it's parents or doctors or
7 legislatures, to things that are wrong or right.
8 For decades, women couldn't hold licenses as
9 butchers or as lawyers because legislatures
10 thought that our -- that we weren't strong
11 enough to pursue those occupations.

12 And some -- some people rightly
13 believe that gender dysphoria may cause -- may
14 be changed by some -- in some children. But the
15 evidence is very clear that there are some
16 children who actually need this treatment, isn't
17 there?

18 GENERAL PRELOGAR: Yes. I think the
19 evidence is uniform on that, whether you look at
20 the standard of care, whether you look at the
21 view of every major American medical association
22 that has taken a position, many of whom are
23 amici here. It's reflected in the clinical
24 practice. The nation's leading children's
25 hospitals for decades have been providing this

1 care.

2 JUSTICE SOTOMAYOR: Some -- some
3 children suffer incredibly with gender
4 dysphoria, don't they?

5 GENERAL PRELOGAR: Yes. It's a very
6 serious medical condition.

7 JUSTICE SOTOMAYOR: I think some
8 attempt suicide?

9 GENERAL PRELOGAR: Yes. The rates of
10 suicide are -- are striking --

11 JUSTICE SOTOMAYOR: Some --

12 GENERAL PRELOGAR: -- and it's a
13 vulnerable population.

14 JUSTICE SOTOMAYOR: Drug addiction is
15 very high among some of these children because
16 of their distress, correct?

17 GENERAL PRELOGAR: It is a serious
18 condition, yes.

19 JUSTICE SOTOMAYOR: One of the
20 Petitioners in this case described throwing up
21 every day, going almost mute because of his --
22 because of their inability to speak in a voice
23 that they could live with.

24 These are physically challenging
25 situations as well too, correct?

1 GENERAL PRELOGAR: Yes, that's
2 correct.

3 JUSTICE SOTOMAYOR: And isn't the
4 purpose of intermediate scrutiny, the level of
5 scrutiny that we apply, necessary to ensure that
6 whether it's legislatures or this Court, that we
7 don't make those personal judgments but that we
8 subject the judgments about these issues to a
9 heightened review to ensure that those children
10 who are going to suffer all of these
11 consequences will be made to do so only when
12 it's compellingly necessary?

13 GENERAL PRELOGAR: Yes, in a
14 circumstance where the state has an important
15 interest. And we don't think that that means
16 the states are entirely barred from regulating
17 in this space. Obviously, they are grappling
18 with these issues in a variety of contexts, but
19 you're right to say that when the state is using
20 sex-based line-drawing, a court needs to look at
21 that.

22 And the problem with Tennessee's law
23 here is not that it's just a little bit
24 overinclusive or a little bit underinclusive but
25 that it's a sweeping categorical ban where the

1 legislature didn't even take into account the --
2 the significant health benefits that can come
3 from providing gender-affirming care, including
4 reduced suicidal ideation and suicide attempts,
5 and where the state leaves unregulated entirely
6 access to these treatments in all other
7 pediatric contexts where there's a similar
8 risk/benefit trade-off.

9 And for the families affected by this,
10 Justice Sotomayor, these are -- are difficult
11 decisions. Obviously, anytime you're thinking
12 about a medical intervention, you need to weigh
13 risks and benefits. But the State has come in
14 here and, in a sharp departure from how it
15 normally addresses this issue, it has completely
16 decided to override the views of the parents,
17 the patients, the doctors who are grappling with
18 these decisions and trying to make those
19 trade-offs.

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: General, I wanted to
23 get your thoughts first on why one should think
24 of this as primarily a sex-based classification,
25 because there's another way of looking at a law

1 like this, maybe a more obvious way, which is
2 that it's a classification based on transgender
3 status. In other words, there are trans young
4 people on one side of the line and cis young
5 people on the other side of the line, both male
6 and female on both sides of the line.

7 And why what is really going on here
8 -- I understand the formal ways in which this is
9 a sex-based classification, but I'm wondering
10 whether that's not a little bit formal, and
11 what's really going on here is a -- a -- a
12 discrimination against, a disregard for young
13 people who are trans, and why we shouldn't think
14 of the law in that way.

15 GENERAL PRELOGAR: I think you can
16 conceive of the law in that way, and we
17 certainly do think that this law discriminates
18 on the basis of transgender status, and that,
19 likewise, should trigger heightened scrutiny,
20 both because that's inherently a sex-based
21 classification and because we think transgender
22 status discrimination warrants heightened
23 scrutiny in its own right.

24 But I don't think it's unduly formal
25 to look at this as a sex classification, and the

1 reason for that is because of the first
2 operative provision of SB1, which says: You
3 can't have these medications to live or identify
4 in a manner inconsistent with your sex.

5 That is quintessentially imposing
6 sex-based rules and expectations on adolescents
7 in the State. And it's true it arises in the
8 context of medical care for transgender youth,
9 but, here, we think it's a very straightforward
10 path for the Court to look at that and say:
11 Well, in any other context, when you say you
12 can't do something inconsistent with a protected
13 characteristic, that's obviously classifying
14 people on the basis of that characteristic.

15 And, here, it wasn't accidental or --
16 or incidental. This is threaded throughout the
17 statutory scheme because the legislature was
18 quite upfront that part of the interest here is
19 in ensuring that minors appreciate their sex and
20 not become disdainful of their sex, or, as Judge
21 White put it in dissent below, that they look
22 and live like boys and girls.

23 And I think that adds on an additional
24 layer of sex classification here insofar as it
25 shows that part of what the State was attempting

1 to do is ensure that adolescents conform their
2 bodies to the State's physical expectations of
3 how males and females should appear. It's not
4 at all surprising to think of that as a sex
5 classification.

6 JUSTICE KAGAN: So is what you're
7 saying is that the two are just embedded in each
8 other, or is what you're saying that sex
9 stereotyping is built into our understandings of
10 trans and cis classifications? Or, again, is it
11 this more sort of logical analysis that might be
12 found in an opinion like Bostock? And maybe
13 those are not exclusive, but, you know, what's
14 your sense of that?

15 GENERAL PRELOGAR: So I think those
16 aren't exclusive. I think they're reinforcing
17 here. And I guess what I would say is I think
18 this is an even easier sex classification than
19 maybe the one the Court confronted in Bostock or
20 the one the Court would confront if the statute
21 simply discriminated on the basis of transgender
22 status because, here, the legislature actually
23 put the sex classification into the face of the
24 law and made the first-order restriction here
25 one that prohibits inconsistency with sex.

1 And I just go back to the kinds of
2 examples we give about dressing inconsistent
3 with sex or pursuing a profession inconsistent
4 with sex. You know, I think the Court's
5 recognition that that is a sex classification is
6 obviously right, but it also can build in a
7 layer of conformance with sex stereotypes that
8 might be underlying those laws and that we think
9 equally underlie this one.

10 JUSTICE KAGAN: Let me flip now to
11 what it means to do heightened scrutiny in this
12 this area because, as you point out, this law
13 and I think almost all of the similar -- or
14 maybe all of the similar laws that have been
15 passed like this allow this exact same kind of
16 treatment for the opposite purpose, if you will,
17 for, you know, a person -- a -- a -- a -- a --
18 a -- a person born male who wants to get to
19 puberty already.

20 GENERAL PRELOGAR: Right.

21 JUSTICE KAGAN: And -- and you say
22 that that's a kind of underinclusion problem.
23 And, you know, it strikes me that on formal
24 equal protection analysis, it is, unless the
25 State can come forward with some piece of

1 medical evidence that says that the risks are
2 greater in the one area than in the other area,
3 which you say Tennessee has not done.

4 I guess what I'm asking is, like,
5 isn't the -- the structure of these laws going
6 to mean that all of them are going to have to be
7 struck down once you get to heightened scrutiny?
8 Because you seem to want to say: No, you can do
9 heightened scrutiny, but you can also make
10 certain deferential moves towards the
11 legislature. And I guess I'm pressing you on
12 whether that's really true.

13 GENERAL PRELOGAR: So I think it is
14 true. To be sure, we think that a categorical
15 ban like this one is severely underinclusive and
16 also severely overinclusive, which is an
17 important ingredient here, and so should be
18 invalidated.

19 And if other states likewise have this
20 kind of sweeping ban, then they would fail under
21 heightened scrutiny. But I don't think that
22 means that heightened scrutiny ties the hands of
23 the states in this regard.

24 One of the problems with the State's
25 approach here is that although it has targeted

1 this gender-affirming care for disparate
2 treatment on the basis of sex, as we say, it has
3 leaved these exact same medications entirely
4 unregulated for all other purposes and also
5 turned its back on how it handles the
6 risk/benefit calculus with respect to all other
7 pediatric treatments.

8 But we do think there is a real space
9 for states to regulate here, and I point to the
10 example of West Virginia.

11 West Virginia was thinking about a
12 total ban, like this one, on care for minors,
13 but then the Senate majority leader in West
14 Virginia, who's a doctor, looked at the
15 underlying studies that demonstrate sharply
16 reduced associations with suicidal ideation and
17 suicide attempts, and the West Virginia
18 legislature changed course and imposed a set of
19 guardrails that are far more precisely tailored
20 to concerns surrounding the delivery of this
21 care.

22 West Virginia requires that two
23 different doctors diagnose the gender dysphoria
24 and find that it's severe and that the treatment
25 is medically necessary to guard against the risk

1 of self-harm.

2 The West Virginia law also requires
3 mental health screening to try to rule out
4 confounding diagnoses. It requires the parents
5 to agree and the primary care physician to
6 agree.

7 And I think a law like that is going
8 to fare much better under heightened scrutiny
9 precisely because it would be tailored to the
10 precise interests and not serve a more sweeping
11 interest like the one asserted here in having
12 minors appreciate their sex.

13 JUSTICE KAGAN: Thank you, General.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 Justice Kavanaugh?

17 JUSTICE KAVANAUGH: First, I want to
18 ask about our role here and pick up on the Chief
19 Justice's questions at the beginning, who
20 decides.

21 You've put forth forceful policy
22 arguments to allow these medical treatments, and
23 Justice Sotomayor's questions elaborated on --
24 on that. But the 20-plus states on the other
25 side put forth very forceful arguments against

1 allowing these medical treatments for minors.

2 So it seems to me that we look to the
3 Constitution, and the Constitution doesn't take
4 sides on how to resolve that medical and policy
5 debate. The Constitution's neutral on the
6 question. At least that's one way to look at
7 it. I want to get your reaction to that.

8 You know, if the Constitution doesn't
9 take sides, if there's strong, forceful
10 scientific policy arguments on both sides in a
11 situation like this, why isn't it best to leave
12 it to the democratic process?

13 GENERAL PRELOGAR: Well, I do think
14 that the Constitution takes a position that
15 individuals are entitled to equal protection of
16 the law.

17 And I totally understand the force of
18 your intuition that states need space to
19 regulate and to try to take into account
20 concerns like adolescent health. We're not
21 denying that that's an important interest here.

22 But, when you look at how this law
23 actually operates, what it is doing is denying
24 individual plaintiffs the ability to access
25 medications on the basis of their sex. And that

1 doesn't mean that the states are disabled from
2 taking into account the actual biological
3 differences between males and females, but that
4 has to be channeled to the heightened scrutiny
5 stage.

6 And I think that there would be a real
7 danger in this Court saying -- looking ahead,
8 essentially, and saying: We think there might
9 be benign justifications here, or we think that
10 states should have some flexibility in this
11 regard to overlook the facial sex classification
12 in the statute.

13 If you are concerned, Justice
14 Kavanaugh, about moving too fast in this space
15 and maybe restricting the ability of states to
16 take a close look at these issues, I think the
17 Court could write a very narrow opinion in
18 this -- in this case, and -- and the Court could
19 say simply that when you prohibit conduct that's
20 inconsistent with sex, that is a sex-based line,
21 so you do have to apply heightened scrutiny.

22 But the Court has made clear that
23 that's an intermediate standard, and if the
24 State can come forward with an important
25 interest and substantiate that it needed to draw

1 those sex-based lines to substantially serve the
2 interest, that's going to be okay. And --

3 JUSTICE KAVANAUGH: Just on -- keep
4 going, sorry.

5 GENERAL PRELOGAR: Well, and the final
6 point is then you can send it back and let the
7 Sixth Circuit grapple with this in the first
8 instance.

9 JUSTICE KAVANAUGH: On the sex
10 discrimination point, I guess picking up on
11 Justice Kagan's questions, the -- the way you
12 would think about this is, I guess, it prohibits
13 all boys and girls from transitioning using
14 certain medical treatments, and it doesn't say
15 only boys can do so or only girls could do so.

16 GENERAL PRELOGAR: Well, I think
17 the -- the problem with trying to put that
18 "transitioning" label on it as a basis to avoid
19 the sex classification is that transition itself
20 is inherently tied to sex.

21 In other words, the prohibited purpose
22 here are those treatments that would allow a
23 minor to live and identify inconsistent with
24 sex, and the statute would permit anyone to have
25 those treatments for the non-prohibited purpose,

1 which, again, is when it's consistent with sex.

2 The Court has said many times that
3 labels don't control in this space. And I
4 think, when you have that kind of purpose that's
5 expressly defined using sex-based line-drawing,
6 you have to recognize that for what it is.

7 JUSTICE KAVANAUGH: And no matter how
8 you articulate the standard, whether it's
9 rational basis or intermediate scrutiny, it'll
10 come down to whether the State -- and I think
11 you said this -- has sufficient justification
12 for limiting these treatments for minors.

13 And the State says its justification
14 here is health and safety for minors. You say
15 there are benefits from allowing these
16 treatments. But there are also harms, right,
17 from allowing these treatments -- at least the
18 State says so -- including lost fertility, the
19 physical and psychological effects on those who
20 later change their mind and want to
21 de-transition, which I don't think we can
22 ignore.

23 We can't ignore what you're talking
24 about and what Justice Sotomayor raised, I agree
25 with that, but you can't ignore, I think, the

1 risks on the other side of the balance.

2 So, even if it is intermediate
3 scrutiny or rational basis, those justifications
4 for the State, how do -- how do we as a Court
5 choose which set of risks is more serious in
6 deciding whether to constitutionalize this whole
7 area?

8 GENERAL PRELOGAR: So let me react to
9 a couple of different points you brought up.

10 First of all, I do think that the
11 standard of review very much matters. And the
12 Court has made clear that rational basis is an
13 entirely forgiving standard. It applies to, you
14 know, mundane economic regulation, where there's
15 no reason for courts to take a closer look. So
16 I think the Court should hold the line that
17 anytime the State classifies based on sex, you
18 do need to take a look at practice.

19 But I totally take the point that, of
20 course, when a state is coming forward with an
21 important interest like protecting adolescent
22 health, that may well justify the lines the
23 state has drawn. And it's not about asking
24 courts to step in and make a -- a first-order
25 determination about how to weigh risks and

1 benefits, but I do think that the State is under
2 a basic obligation to first substantiate its
3 concern -- and, here, there were extensive
4 factual findings by the district court that many
5 of the risks that the State was asserting are
6 not uniquely tied to gender-affirming care at
7 all -- and also to take into account the harms
8 that would come from categorically banning
9 access to medications on the basis of drugs,
10 including the benefits that I was discussing
11 with Justice Sotomayor.

12 You mentioned fertility and regret,
13 and I'd like to take both of those concerns
14 head-on. I do want to acknowledge that there is
15 evidence to suggest that gender-affirming care
16 with respect to hormones can have some impacts
17 on fertility. Critically, puberty blockers
18 are -- are -- have no effect in and of
19 themselves on fertility, so I don't think that
20 concern can justify the ban on puberty blockers,
21 which is just pressing pause on someone's
22 endogenous puberty to give them more time to
23 understand their identity.

24 With respect to hormone use, there are
25 some effects on fertility, but the court found

1 that many individuals who are transgender remain
2 fertile after taking these medications. They
3 can conceive biological children. There are
4 fertility preservation measures that they can
5 undertake and that they have to be counseled on
6 those risks.

7 And as I said before, I can understand
8 that that could be a hard trade-off, but it's
9 not unique to this care. There are other
10 treatments for adolescents that likewise affect
11 fertility, including some of those that SB1
12 expressly permits, like on intersex individuals,
13 who often have surgeries as infants that might
14 permanently affect their fertility.

15 I would also say that if you are
16 concerned about fertility, there are measures
17 the State could undertake, like requiring
18 warnings, more informed counseling, trying to
19 ensure that there's informed consent in this
20 area.

21 You also mentioned the possibility of
22 regret. The record evidence demonstrates that
23 the rates of regret are very low because, for
24 the population that has access to this
25 treatment, so these are adolescents who have

1 marked and sustained gender dysphoria that has
2 worsened with the onset of puberty, they are
3 very likely to persist in their gender identity.

4 But, if you're thinking about this
5 from the standpoint of there's no harm in just
6 making them wait until they're adults, I think
7 you have to recognize that the effect of denying
8 this care is to -- to produce irreversible
9 physical effects that are consistent with their
10 birth sex because they have to go through
11 puberty before they turn 18.

12 So, essentially, what this law is
13 doing is saying we're going to make all
14 adolescents in the State develop the physical
15 secondary sex characteristics consistent with
16 their gender or with their sex assigned at
17 birth, even though that might significantly
18 worsen gender dysphoria, increase the risk of
19 suicide, and, I think critically, make it much
20 harder to live and be accepted in their gender
21 identity as an adult because, if you're
22 requiring someone to undergo a male puberty and
23 they develop an Adam's apple, that's going to be
24 hard to reverse, and they're more likely to be
25 identified as transgender and subject to

1 discrimination and harassment as adults.

2 So I think the relevant question is
3 you have this population of adolescents and
4 there are documented, very essential benefits
5 for a large number of them and maybe a small
6 number that will regret this care just like with
7 any other medical care, but for the State to
8 come in and just say, across the board, you
9 can't have the medication because of your birth
10 sex, we don't think that's a tailored law.

11 JUSTICE KAVANAUGH: You acknowledge
12 there is some group, though, who later changes
13 their mind and wants to de-transition? That
14 doesn't defeat your case. I just want to make
15 sure you acknowledge there is, as a factual
16 matter, some group of people?

17 GENERAL PRELOGAR: Yes, yes. We're
18 certainly not denying that some people might
19 de-transition or regret this care, but all of
20 the available evidence shows that it's a very
21 small number.

22 JUSTICE KAVANAUGH: Then, to pick up
23 on the Chief Justice and Justice Alito's
24 questions, it's obviously evolving debate. I
25 mean, just in the last couple years in Europe,

1 big changes in terms of how they're thinking
2 about it and how they're thinking about these
3 risks and benefits that you and I have just been
4 talking about and you've been elaborating.

5 If it's evolving like that and
6 changing and England's pulling back and Sweden's
7 pulling back, it strikes me as, you know, a
8 pretty heavy yellow light, if not red light, for
9 this Court to come in, the nine of us, and to
10 constitutionalize the whole area when the rest
11 of the world or at least the people who -- the
12 countries that have been at the forefront of
13 this are, you know, pumping the brakes on this
14 kind of treatment because of concerns about the
15 risks.

16 GENERAL PRELOGAR: We certainly are
17 not asking the Court to set forth some
18 bright-line constitutional rule in this space
19 that is going to -- to really take further
20 debate and evaluation of regulatory options away
21 from states. We think, as I mentioned, that the
22 Court really only needs to decide the
23 first-order question here of whether this law
24 classifies based on sex.

25 I think that's entirely distinct from

1 some of the concerns you've identified about
2 what justifications the State has.

3 JUSTICE KAVANAUGH: Do you think that
4 West Virginia law you mentioned is
5 constitutional?

6 GENERAL PRELOGAR: I think it would
7 likely satisfy heightened scrutiny. It hasn't
8 been subject to adversarial testing because I
9 don't think anyone has sued to challenge it, so
10 I haven't looked at the record that West
11 Virginia would build, but I do think that there
12 is room here for states to enact tailored
13 measures to try to guard against the kind of
14 risks that you're concerned about and that the
15 State has identified.

16 JUSTICE KAVANAUGH: And last topic, on
17 the heightened review -- and you -- you say all
18 we need to do is do heightened review and that's
19 kind of a minimal approach -- step, I mean, I'm
20 not sure, really, that the follow-on effects of
21 that could be pretty significant. I think
22 Justice Kagan alluded to that in her question or
23 at least raised that as a question.

24 And I want to ask in particular about
25 one thing. If you prevail here on the standard

1 of review, what would that mean for women's and
2 girls' sports in particular? Would transgender
3 athletes have a constitutional right, as you see
4 it, to play in women's and girls' sports,
5 basketball, swimming, volleyball, track, et
6 cetera, notwithstanding the competitive fairness
7 and safety issues that have been vocally raised
8 by some female athletes seen in the amicus brief
9 of the many women athletes in this case?

10 So can you explain how intermediate
11 scrutiny would apply to women's sports?

12 GENERAL PRELOGAR: Yes. And just as a
13 threshold clarifying point, I want to be clear
14 that when it comes to access to sex-separated
15 spaces, like sports and bathrooms, courts
16 already recognize that those are facial sex
17 classifications that trigger heightened
18 scrutiny. So it's actually not the question
19 teed up here about how to classify the law in
20 the first place or how to identify whether it's
21 a sex classification. Instead, that's taken as
22 given in that litigation. And the entire focal
23 point of the disputes in those cases has been,
24 well, does the state have an important
25 governmental interest and does it need to draw

1 the lines to exclude --

2 JUSTICE KAVANAUGH: If we -- if we --

3 GENERAL PRELOGAR: -- transgender
4 people.

5 JUSTICE KAVANAUGH: Right. But how
6 would it -- how would intermediate scrutiny,
7 which we may not -- if we went to intermediate
8 scrutiny, there's a possibility we would apply
9 it here. How would it apply to, in your view --
10 and maybe you don't have fully informed views,
11 which would be fine -- but how do you think they
12 would -- it would apply to sports?

13 GENERAL PRELOGAR: So courts have
14 split on that issue, and I hesitate to -- to try
15 in -- you know, in a vacuum without an actual
16 factual record, to try to opine on the State's
17 justification and whether it will satisfy that
18 standard.

19 It's obviously a different set of
20 governmental interests that are being asserted
21 there, and those would have to be analyzed in
22 their own right. But I think that this Court,
23 if it wants to preserve space to make clear that
24 nothing here should be understood to affect
25 the -- the separate questions that are arising

1 there, the Court could very well do so.

2 And we would have no objection --

3 JUSTICE KAVANAUGH: Do you think --

4 GENERAL PRELOGAR: -- to explicit
5 language saying this decision does not in any
6 way or should not be understood to affect the
7 separate state interests there that have to be
8 evaluated on their own terms.

9 JUSTICE KAVANAUGH: Okay. But looking
10 ahead, do you think it's logically possible as a
11 matter of constitutional decision-making to say
12 that laws like the ones at -- the one at issue
13 here do not satisfy intermediate scrutiny, but
14 laws that restrict women's and girls' sports in
15 a way that transgender athletes cannot
16 participate would satisfy intermediate scrutiny?
17 Is that logically possible?

18 GENERAL PRELOGAR: Oh, yes,
19 definitely. So we do think intermediate
20 scrutiny applies in both contexts, but there are
21 a different state of -- a different set of state
22 interests at play. And I think one readily
23 apparent difference is that in the context of
24 sports, there are arguments made that that
25 affects the rights of cisgender women and that

1 the ability to allow transgender women to
2 compete on those teams is going to be other
3 regarding in the sense of having those external
4 impacts.

5 There's nothing like this here.
6 Allowing transgender individuals who have
7 carefully thought about this and consulted with
8 their parents and their medical team to access
9 these medications that have health benefits
10 recognized here and abroad in no way affects the
11 rights of other people. And so I think the
12 Court could well understand the statute here to
13 fail intermediate scrutiny even if it would
14 survive there.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: Good morning,
19 General.

20 I want to pick up on one of Justice
21 Kavanaugh's early questions. You know, he -- he
22 pointed out that the burdens of the law fall
23 equally on boys and girls because neither can
24 transition. And you responded that it's kind of
25 the -- the sex classification or the

1 expectations that one will conform to one's, you
2 know, biological or gender assigned at birth.

3 Why isn't that more of an Arlington
4 Heights argument about intentional
5 discrimination than if what you're really saying
6 or what the legislature is really saying is the
7 burden of this is going to be equally
8 applicable, neither boys nor girls can have
9 access to these drugs, but the reason why is
10 because we want girls to be girls and boys to be
11 boys at least until they're old enough to decide
12 otherwise?

13 GENERAL PRELOGAR: So I think it would
14 be wrong to overlook the fact that even separate
15 and apart from any interest in conformity here
16 or sex stereotyping, this is a law on its face
17 that does not subject boys and girls to equal
18 treatment.

19 And you can see that if you look at
20 how the law applies to some of the individual
21 plaintiffs. You know, take Ryan Roe, who is one
22 of the individual plaintiffs here. He wants to
23 take testosterone in order to live and identify
24 as a boy, and he's prohibited by SB1 from doing
25 so because his birth sex was female.

1 But, if you change Ryan's birth sex
2 and suppose he was assigned male at birth, then
3 SB1's restriction lifts. So he is not being
4 treated the same as a boy in -- as a boy who was
5 assigned male at birth. And I think that is the
6 kind of quintessential test the Court has
7 applied for purposes of identifying when there's
8 a sex classification.

9 JUSTICE BARRETT: So what would your
10 argument be if a new drug is developed within,
11 say, two or three years that just the only
12 purpose of the drug, it -- it -- there's no
13 precocious puberty purpose or anything like
14 that, the only reason to give this drug is it
15 targets minors who have gender dysphoria
16 particularly?

17 And a state passes a law -- you know,
18 the FDA approves it, so it's available in some
19 states, but a state passes a law saying no one
20 has access to it. So now you don't have that --
21 that whole thing falls out.

22 GENERAL PRELOGAR: Yeah. So that
23 would not be a facial sex classification. And,
24 there, I do think that you would have to apply
25 an Arlington Heights type of analysis to see

1 whether the context and history demonstrate that
2 actually the state was intending to treat people
3 differently based on their sex. But I think
4 that would function very differently from SB1.

5 JUSTICE BARRETT: Well, why don't you
6 have an Arlington Heights argument here too?
7 Because I take it one thing you think would be
8 wrong with that law is the stereotyping
9 function.

10 GENERAL PRELOGAR: Well, I think that
11 Arlington Heights doesn't seem like the natural
12 doctrinal home for a law like SB1 that says on
13 its face you can't act inconsistent with sex.

14 And I take your point about that's
15 applying some equal rules to boys and girls, but
16 that's true anytime you have a law that says you
17 can't act inconsistent with a characteristic.
18 That means that there's going to be a
19 restriction on males and a restriction on
20 females. It's true of any other factor too,
21 inconsistent with race, inconsistent with
22 religion.

23 You might say: Well, that's not just
24 singling out one religion or one race or one sex
25 for disparate treatment. But I think it

1 actually increases the number of classifications
2 when you're applying parallel restrictive rules
3 on the basis of a protected characteristic
4 across the board.

5 JUSTICE BARRETT: So let me return to
6 Justice Kagan's questions.

7 You know, she asked you whether,
8 really, the more natural way to think about this
9 is that it is discriminating on the basis of
10 transgender status rather than -- you know, I --
11 I feel like trying to make the Bostock-like
12 argument, holding all things equal or that you
13 have to do this by reference to, you know,
14 biological sex, feels like an odd way to solve
15 the problem and kind of that hypothetical I gave
16 you about the drug that just has the
17 transitioning purpose.

18 So, if we just head-on confront the
19 question which you raise in the second part of
20 your brief about whether transgender status
21 should be a suspect class, one question I have
22 is: At least as far as I can think of, we don't
23 have a history of de jure -- or that I know of,
24 we don't have a history of de jure
25 discrimination against transgender people,

1 right?

2 It's -- you -- you point out in -- in
3 your brief that in the last three years there
4 have been these laws, but before that, we might
5 have had private societal discrimination. But
6 I -- I don't know of, but am I miss -- you know,
7 is there a history that I don't know about where
8 we have de jure discrimination?

9 And my concern about it is this. All
10 of the other suspect classes that we've
11 recognized so far do have that long de jure
12 history of discrimination. And, you know, the
13 Equal Protection Clause applies to state action,
14 so it feels like an odd fit to say that in their
15 private lives, people have discriminated against
16 transgender people; therefore, we're going to
17 treat it as a suspect class for purposes of the
18 Equal Protection Clause.

19 GENERAL PRELOGAR: So I think you may
20 be right that the discrimination -- historical
21 discrimination against transgender people may
22 not have been reflected in the laws, but I think
23 there's no dispute that there is a broad history
24 here, and it hasn't just been confined to
25 private actors.

1 I -- I think that if you actually
2 looked at the facts, there's a wealth of
3 evidence to suggest that transgender people
4 throughout history have been subjected to -- to
5 violence and discrimination and maybe lost
6 employment opportunities or housing
7 opportunities even in contexts where there might
8 be state public employment at play.

9 And, of course, that's especially
10 reflected now in the law, where there has been
11 this, I think, attention and focus on trying to
12 limit transgender people from being able to live
13 and identify consistent with their gender
14 identity in our society.

15 So I don't even understand the State
16 to be disputing the historical discrimination
17 point. But, if you're approaching this from the
18 standpoint of saying is this a group with a
19 distinguishing characteristic that has no
20 bearing on their ability to contribute and that
21 needs some protection from the courts, I think,
22 if any group qualifies, this one does in light
23 of the current laws and what might come in the
24 future.

25 And our -- our basic argument is, if

1 you can look ahead and say maybe the states will
2 ban medical care for adults who are transgender,
3 maybe they'll ban adoption by transgender people
4 or not allow them to be teachers, you know, that
5 doesn't look anything like the workaday economic
6 regulation that just gets rational basis review.
7 And I think the Court could give effect to that
8 intuition.

9 JUSTICE BARRETT: Yeah, and I don't
10 want to be misunderstood to say that I don't
11 think there's a problem or that there hasn't
12 been private discrimination.

13 I guess it doesn't seem analogous to
14 me to say race or gender or national origin,
15 those kinds of things, because we did have de
16 jure discrimination to point to.

17 And so I guess what my -- what I'm
18 thinking is, when we are in the business of
19 identifying suspect classes, you know, in
20 Cleburne, we expressed -- and I'm not saying
21 that this is analogous to Cleburne in that
22 respect, but we expressed in Cleburne hesitancy,
23 you know, to identify groups such as the
24 elderly, you know, or the mentally disabled as
25 suspect classes, in part because those are

1 judgments that are pretty hard for courts to
2 make.

3 And at least de jure discrimination of
4 the sort experienced by women, you know, or
5 people on the basis of race gives us something
6 to point to if we're going to be identifying a
7 new suspect class, which we haven't done for a
8 long time.

9 GENERAL PRELOGAR: Yeah. And I, of
10 course, take that point. And I should reiterate
11 we don't think the Court has to confront it
12 here.

13 But, in -- in the cases involving age
14 and disability, I understand the -- the Court to
15 have approached those issues with somewhat
16 different reasoning, that age is something we
17 all experience, that disability is a broad and
18 diverse group, and that individuals with
19 disabilities have been able to harness the
20 majoritarian political forces to protect their
21 rights. And none of that is true here.

22 Transgender individuals are a discrete
23 minority. I think there's no dispute that they
24 are being subject to a wave of legislation
25 across the states today, and -- and I think that

1 this is the kind of circumstance where the Court
2 could rightly recognize that heightened scrutiny
3 should apply.

4 JUSTICE BARRETT: Last question. Do
5 you agree with me that the resolution of this
6 case has no impact on the parental rights claim
7 that the Sixth Circuit also addressed?

8 GENERAL PRELOGAR: That's right. I --
9 I think we are not making a substantive due
10 process parental rights claim here, and this
11 Court obviously didn't grant review of that
12 issue.

13 I will say that I think parental
14 rights are actually relevant to the Equal
15 Protection Clause as well insofar as it's
16 significant to me that Tennessee, in choosing to
17 categorically ban this care, is taking a -- a
18 sharp turn away from how it ordinarily handles
19 parental rights in the medical decision-making
20 space.

21 Justice Kavanaugh said: Who decides
22 here? But, when it comes to medical risks and
23 benefits, the State's general approach is to say
24 parents get to decide, along with their doctors
25 and their children.

1 And so I think, from the standpoint of
2 underinclusivity, it's pretty significant that
3 Tennessee now is completely overriding parents'
4 wishes when they are best positioned to know
5 their individual child and to have a good sense
6 of whether the risks of this treatment are
7 outweighed by the benefits.

8 JUSTICE BARRETT: But this isn't -- I
9 guess my point is: Even if we decided that this
10 wasn't a sex-based classification that triggered
11 intermediate scrutiny, that would not prevent
12 parents from still asserting the substantive due
13 process right?

14 GENERAL PRELOGAR: Yes, yes, of
15 course. I agree with that. I do think that the
16 sex-based classification under Equal Protection
17 Clause is the most straightforward way to think
18 about what's going on here, though.

19 JUSTICE BARRETT: Yeah. Thanks.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: So I'm glad that
23 you've clarified that how we characterize this
24 law is really the issue on the table today, not
25 the risks or benefits or the policies that

1 justify it but how we characterize it.

2 And I guess I -- I think there might
3 be some confusion a little bit, at least I'm
4 confused, because there's so many lines that
5 this statute could draw. The classification, as
6 far as I can tell, is a line-drawing, is the
7 statute drawing lines. And there are lots of
8 different ones.

9 And Tennessee says this is drawing a
10 line between people on the basis of age and
11 purpose. And I totally see that. You say this
12 is drawing a line on the basis of sex. I see
13 that as well. But I guess my sort of initial
14 question is: Are those mutually exclusive? Do
15 we have to choose between those
16 characterizations?

17 Isn't there a world in which this
18 statute is doing both of those things, and the
19 question for equal protection purposes is, if
20 you're right that there is a sex-based line
21 being drawn, then, to the extent the plaintiffs
22 are implicated by that line, don't we have to
23 apply heightened scrutiny in evaluating their
24 claims?

25 GENERAL PRELOGAR: Yes, that's exactly

1 right. And I think, of course, you could say
2 this is a statute that classifies based on age
3 and purpose and sex. Critically, we think that
4 purpose incorporates sex here because the
5 purpose is expressly defined in terms of
6 treatments that are inconsistent with sex.

7 JUSTICE JACKSON: Right.

8 GENERAL PRELOGAR: So I think the
9 problem with the State's approach is to say,
10 well, it's just purpose going on. You take one
11 look at that, and that just dissolves down into
12 drawing a sex-based line itself.

13 JUSTICE JACKSON: Can we put -- can we
14 put more flesh on that, though? Because, I
15 mean, even -- even if we separate out their age
16 and purpose and we just say okay, so how is this
17 actually drawing a line on the basis of sex, I
18 think I heard you say it a couple times with
19 respect to some examples, but I think it would
20 be helpful to get on the table exactly who's
21 falling on what sign -- side of the line in a
22 particular situation related to sex.

23 GENERAL PRELOGAR: Yes. So the -- the
24 way that the sex-based classification is working
25 here is that from the standpoint of any

1 individual who wants to take these medications,
2 their sex determines whether SB1 applies.

3 John Doe, one of the plaintiffs, wants
4 to take puberty blockers to undergo a typical
5 male puberty, but SB1 says that because John's
6 sex at birth was female, he can't have access to
7 those medications. And if you change his sex,
8 then the restriction under SB1 lifts and it
9 changes the result.

10 And my friends say, well, that also
11 simultaneously changes the medical purpose of
12 using these medications. We don't dispute that
13 point, that it might also inherently change
14 purpose when you're changing sex.

15 JUSTICE JACKSON: But it doesn't have
16 to, right? I thought of an example in which we
17 have a plaintiff, a person who -- a minor who
18 would like to take this medication to affirm
19 their gender as a male because the medication
20 deepens their voice, for example. They want a
21 deeper voice, and they are biologically male.
22 They're taking the medication because that's
23 what they want.

24 They, I think, can get that
25 medication.

1 GENERAL PRELOGAR: That's right. And
2 so --

3 JUSTICE JACKSON: But a person who is
4 biologically female who wants to take the
5 medication for that same purpose, to deepen
6 their voice because they would like to live as a
7 male, can't get it? Is that right?

8 GENERAL PRELOGAR: That's correct.

9 JUSTICE JACKSON: All right. So
10 the --

11 GENERAL PRELOGAR: And that is on the
12 basis of their sex.

13 JUSTICE JACKSON: So the purpose is
14 held constant with that example. It's not
15 changing. What is changing is just the
16 biological sex of the individual?

17 GENERAL PRELOGAR: I think that that's
18 correct. But, even in a circumstance where you
19 might characterize that as treating delayed
20 puberty instead of gender dysphoria, if you
21 said, well, there is a different purpose there,
22 even though the effects are exactly the same and
23 they want the medications for exactly the same
24 reason, that doesn't eliminate the sex-based
25 classification because sex only has to be one

1 but-for cause of disparate treatment.

2 And I think the State will say it's
3 perfectly reasonable to treat different medical
4 purposes or uses differently. We don't
5 disagree, but that's something that's channeled
6 to the application of heightened scrutiny. And
7 if the State has a really good reason to say
8 there's a danger in using these drugs if your
9 birth sex was female and you want to deepen your
10 voice --

11 JUSTICE JACKSON: Right. That's --

12 GENERAL PRELOGAR: -- and it's
13 different --

14 JUSTICE JACKSON: So that's -- that's
15 Justice Alito's studies and all of this.

16 GENERAL PRELOGAR: That all --
17 exactly.

18 JUSTICE JACKSON: That -- that can
19 come in at that point?

20 GENERAL PRELOGAR: That all goes to
21 the application of heightened scrutiny. And
22 maybe the State can prove it up and show they
23 have an important state interest and they really
24 have a reason to distinguish between who can
25 have these drugs for which purposes based on

1 their sex. But that doesn't eliminate the
2 facial sex classification or provide a reason
3 for this Court to turn its back on 50 years of
4 precedent saying, if you classify based --

5 JUSTICE JACKSON: Yeah.

6 GENERAL PRELOGAR: -- on sex, you have
7 to justify that.

8 JUSTICE JACKSON: And it's interesting
9 to me that you mentioned precedent because some
10 of these questions about sort of who decides and
11 the concerns and legislative prerogatives, et
12 cetera, sound very familiar to me. They sound
13 in the same kinds of arguments that were made
14 back in the day, '50s, '60s, with respect to
15 racial classifications and inconsistencies.

16 I'm thinking in particular about
17 Loving, and I'm wondering whether you've thought
18 about the parallels, because I see one, as to
19 how this statute operates and how the
20 anti-miscegenation statutes in Virginia
21 operated?

22 GENERAL PRELOGAR: Yes. And I think
23 the Court has recognized that the Equal
24 Protection Clause was -- was intended to force
25 some changes in society and get us to think more

1 closely about the way that people were being
2 classified, including when that was based on
3 overbroad generalizations of how we expect them
4 to -- to live and order their affairs.

5 And the Court has made that clear in
6 the sex discrimination cases as well, where --

7 JUSTICE JACKSON: Well --

8 GENERAL PRELOGAR: -- it said
9 sometimes these laws operate to disadvantage
10 someone who falls outside the average
11 description, and that person needs the
12 protection of the courts.

13 JUSTICE JACKSON: Well, and a thing I
14 thought was most interesting about the potential
15 comparison to Loving is that in that case,
16 everyone seemed to concede upfront that a racial
17 classification was being drawn by the statute.
18 That was sort of like the starting point. The
19 question was whether it was discriminatory
20 because it applied to both races and it wasn't,
21 you know, necessarily invidious or whatever.

22 But, you know, as I read the statute
23 here, the -- excuse me, the case here, you know,
24 the Court starts off by saying that Virginia is
25 now one of 16 states which prohibit and punish

1 marriages on the basis of racial
2 classifications.

3 And when you look at the structure of
4 that law, it looks in terms of -- you know, you
5 can't do something that is inconsistent with
6 your own characteristics. It's sort of the same
7 thing. So it's interesting to me that we now
8 have this different argument, and I wonder
9 whether Virginia could have gotten away with
10 what they did here by just making a
11 classification argument the way that Tennessee
12 is in this case.

13 GENERAL PRELOGAR: Yes. I think
14 that's exactly right, that there is absolutely a
15 parallel between any law that says you can't act
16 inconsistent with a protected characteristic.
17 And in all other contexts, the Court has
18 recognized that as a facial classification based
19 on that characteristic. And Tennessee even
20 concedes the point when it comes to dress codes
21 and to seeking a profession inconsistent with
22 sex.

23 But I think one other way to look at
24 this, Justice Jackson, is that, to me, it would
25 be a remarkable proposition for this Court to

1 say that a statute that on its face says you
2 can't have medications inconsistent with your
3 sex, and in part, that's because we want you to
4 appreciate your sex, isn't drawing a sex-based
5 line in the first place.

6 That would have no correspondence to
7 or grounding in the text of the statute or how
8 it works in operation or what effects it
9 produces for individuals on the ground.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Strangio.

14 ORAL ARGUMENT OF CHASE B. STRANGIO
15 ON BEHALF OF RESPONDENTS L.W., ET AL.,
16 SUPPORTING THE PETITIONER

17 MR. STRANGIO: Mr. Chief Justice, and
18 may it please the Court:

19 On its face, SB1 bans medical care
20 only when it is inconsistent with a person's
21 birth sex. An adolescent can receive medical
22 treatment to live and identify as a boy if his
23 birth sex is male but not female. And an
24 adolescent can receive medical treatment to live
25 and identify as a girl if her birth sex is

1 female but not male.

2 Tennessee claims the sex-based
3 line-drawing is justified to protect children.
4 But SB1 has taken away the only treatment that
5 relieved years of suffering for each of the
6 adolescent plaintiffs. And, critically,
7 Tennessee's arguments that SB1 is sex-neutral
8 would apply if the State banned this care for
9 adults too.

10 By banning treatment only when it
11 allows an adolescent to live, identify, or
12 appear inconsistent with their birth sex, SB1
13 warrants heightened scrutiny under decades of
14 precedent. Because the Sixth Circuit failed to
15 apply that standard, this Court should vacate
16 and remand.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: If you are
19 successful, what would your remedy be?

20 MR. STRANGIO: Your Honor, if we're
21 successful here, the remedy would be to enjoin
22 the State of Tennessee defendants from enforcing
23 SB1 as applied to our individual plaintiffs.

24 JUSTICE THOMAS: So, in practical
25 terms, what would it be? What would you get?

1 Wouldn't you get the -- the -- you would get
2 different treatment based on sex?

3 MR. STRANGIO: In practical terms,
4 what it would mean is that an individual like
5 John Doe, who was receiving medical treatment to
6 undergo a typical male puberty prior to SB1 and
7 is now barred from doing so because his birth
8 sex is female, could then receive that treatment
9 as he had been doing with the -- with the
10 consent of -- of his parents. So his sex would
11 no longer be the basis for the denial of the
12 medical care that his doctors recommended and
13 his parents consented to.

14 CHIEF JUSTICE ROBERTS: Counsel, is
15 there any significant respect in which your
16 position departs from that of the Solicitor
17 General?

18 MR. STRANGIO: No, Your Honor. The
19 only thing that -- the only argument that we
20 make before the Court here that the Solicitor
21 General has -- has not advanced is that this is
22 a law that fails under any standard of review,
23 that it is so discontinuous with the asserted
24 interests in protecting children and, therefore,
25 fails under -- under any standard, but we think,

1 as -- as the Solicitor General made clear in her
2 remarks, that it is clearly a sex classification
3 on -- on its face and should be resolved on --
4 on that basis and remanded for the Sixth Circuit
5 to apply that standard in the first instance.

6 CHIEF JUSTICE ROBERTS: Is there
7 anything you would like to add, and maybe there
8 isn't, but with respect to the Solicitor
9 General's responses to my concern that this is
10 unlike a case like Craig versus Boren, unlike a
11 case like Morales, and those where it was quite
12 clearly simply stereotyping with respect, you
13 know, can men have the same rights as women with
14 respect to adoption and the liquor laws.

15 This does strike me, whether --
16 whatever you think about the disagreements
17 between where Europe was some years ago and
18 where Europe is now, where Europe is, where the
19 United States is in that, that it is quite a
20 distinct type of inquiry that involves medical
21 expertise, predictive judgments in medical area
22 than in -- in those cases?

23 MR. STRANGIO: I don't dispute,
24 Mr. Chief Justice, that at the application of --
25 of heightened scrutiny there will be particular

1 considerations that involve the underlying
2 medical evidence, as -- as there always is, but
3 I -- I don't think that it would break new
4 ground to apply heightened -- heightened
5 scrutiny here.

6 The purpose of applying heightened
7 scrutiny has been because, in part, we don't
8 know at the outset whether a classification is
9 benign. And -- and many justifications for
10 sex-based differential treatment in law were
11 defended on the ground of biological differences
12 and were upheld by the Court under rational
13 basis.

14 And the role of heightened scrutiny is
15 not to make sex a proscribed classification. It
16 is just to shift the burden to the state to
17 show -- to show their work and show that, in
18 fact, this is a law that substantially advances
19 an important governmental interest.

20 CHIEF JUSTICE ROBERTS: Thank you.

21 JUSTICE BARRETT: Counsel, are there
22 other situations -- the Chief Justice's question
23 just made me think of this -- in which any of
24 our levels of heightened scrutiny, whether they
25 be intermediate or strict, require courts to

1 make the judgment, the means-ends calculation,
2 in this kind of medical context?

3 Because I agree with you -- I mean, I
4 can see your point, like, well, you know, as a
5 matter of logic, we should shift this to that
6 stage, assuming that the -- the suspect class
7 is -- is triggered and we say this is sex
8 classification.

9 But is there any other situation in
10 which courts get into that in the tiers of
11 scrutiny?

12 MR. STRANGIO: I mean, so I -- I -- I
13 would point Your Honor to recent cases involving
14 the -- the COVID-19 pandemic, in which many
15 cases came up before this -- this Court in which
16 the states were regulating, you know, undeniably
17 in areas of public health and evolving science,
18 and the Court repeatedly made -- made clear
19 that, yes, of course, the states have latitude
20 through their police power to -- to regulate.

21 But, when they do so in ways that
22 classifies based on suspect lines or infringes
23 constitutional rights, then heightened scrutiny
24 remains the -- the standard that the courts
25 apply to ensure that the state is advancing an

1 important governmental interest.

2 CHIEF JUSTICE ROBERTS: So --

3 JUSTICE BARRETT: I mean, I guess I'm
4 thinking of some -- oh.

5 CHIEF JUSTICE ROBERTS: I'm sorry.

6 JUSTICE BARRETT: Can I just --

7 CHIEF JUSTICE ROBERTS: Sure.

8 JUSTICE BARRETT: -- this last
9 follow-up?

10 But, even in those COVID-19 cases, you
11 know, courts weren't, and we certainly weren't,
12 diving deep into the medical evidence and
13 comparing Europe and America and looking at
14 research. I mean, this would be, I think, of a
15 different order.

16 Do you agree?

17 MR. STRANGIO: I -- I don't agree,
18 Justice Barrett, in the -- in the sense that I
19 do think it is precisely the -- the role of the
20 courts to assess the tailoring and -- and look
21 at the evidence, whether it's presented through
22 expert testimony or not.

23 It is not the role of the court
24 necessarily to say definitively these risks
25 out -- outweigh these benefits or vice versa,

1 but do what the district court did here, which
2 is to look at the assertions of harm, make
3 comparisons to how Tennessee treated all other
4 medical care, and then see whether or not
5 Tennessee had met -- had met its burden under --
6 under heightened scrutiny.

7 That type of tailoring inquiry I
8 believe is precisely the -- the role of the --
9 the courts.

10 JUSTICE SOTOMAYOR: Counsel, in the
11 COVID, I have a colleague to my right whom I
12 think very highly of who spoke about the need
13 to -- of the courts to look at that evidence to
14 ensure that there wasn't suppression of
15 religion, correct?

16 MR. STRANGIO: That's correct, Justice
17 Sotomayor.

18 JUSTICE SOTOMAYOR: Now, with respect
19 to Justice Barrett's question on COVID, in my
20 mind, it's a little similar -- more similar to
21 the bathroom situation because, there, COVID was
22 a risk not just to the individual and the threat
23 to their own life, but their contact with others
24 could threaten others. So it -- the compelling
25 state interest was different than just a pure

1 medical issue, correct?

2 MR. STRANGIO: That -- that's correct.
3 I totally agree, the state interest was
4 different.

5 JUSTICE SOTOMAYOR: All right. With
6 respect to treating that issue, you can hear
7 from some of my colleagues that they're worried
8 that -- and there is a plethora of science in
9 this area, both that developed in Europe, and
10 the lower court hasn't really looked at it, no
11 one has -- that courts are ill-suited to that.

12 Why do you think they're not? What --
13 what about the fundamental role of the Court
14 makes us suited to answer those questions?

15 MR. STRANGIO: Well, I think, first,
16 Justice Sotomayor, the role of the Court is to
17 ensure that when the government draws lines
18 based on suspect classifications, that the --
19 the states are tested to ensure that they're
20 substantially advancing an important
21 governmental interest.

22 And when it concerns underlying
23 questions of medicine or science, the -- the --
24 the -- the judges and just -- and just -- judges
25 in the lower courts have every ability to assess

1 the testimony before them, as the district court
2 did here.

3 This is not an area where I suggest --
4 I -- I believe Tennessee is saying that medicine
5 is altogether an area in which suspect
6 classifications have no bearing on the -- on the
7 judicial inquiry. It is precisely the role of
8 the Court to ensure that the government of
9 Tennessee has -- has substantially advanced
10 an -- an important governmental interest.

11 JUSTICE SOTOMAYOR: I have --

12 JUSTICE ALITO: But -- but --

13 CHIEF JUSTICE ROBERTS: Counsel --

14 JUSTICE SOTOMAYOR: -- a small
15 question to finish with.

16 The regret issue that was raised to
17 the Solicitor General, Respondents cite a figure
18 of 85 percent of children expressing gender
19 dysphoria regret later.

20 You use a figure of 1 percent of
21 minors who receive this treatment expressing
22 regret. Can you tell me where that -- where
23 those figures lie and exactly what the
24 difference is between that 1 percent of children
25 who receive these treatments expressing regret

1 and the 85 percent?

2 MR. STRANGIO: Certainly, Justice
3 Sotomayor. And so -- so the first point I would
4 say about the 85 percent -- and we addressed
5 this on -- on page 22 of our reply brief --
6 that's a misleading figure for -- for two
7 reasons.

8 I think, most critically, it refers to
9 older studies of -- of prepubertal children.
10 And everyone here agrees that the -- the
11 medications that are banned by SB1 are only
12 prescribed to individuals after the onset of
13 puberty. And so, in JA 151 to 153, the evidence
14 shows that once an adolescent reaches the onset
15 of puberty, their likelihood to ultimately
16 desist and identify with their birth sex is very
17 low.

18 And then, as to the question of the
19 1 percent, the question of regret, which is a
20 different question than what happens with
21 prepubertal children, the record shows there
22 that the rate of regret when people receive this
23 medication after the onset of puberty is as low
24 as 1 percent. And that's in JA 131 to 133.

25 And I think what's important here --

1 and the Solicitor General mentioned this -- is
2 that is -- that is exponentially lower than the
3 rates of regret of treatments that are expressly
4 permitted by SB1.

5 JUSTICE SOTOMAYOR: Thank you,
6 counsel.

7 JUSTICE ALITO: Could we explore what
8 intermediate scrutiny might look like in
9 operation in assessing laws like Tennessee's?

10 So the Solicitor General, on pages --
11 on page 48 of her brief, lists a lot of things
12 that -- she says: Well, if Tennessee were
13 really concerned about the health and welfare of
14 these minors, it would have taken into account a
15 variety of things.

16 So one is waiting periods. Another is
17 whether puberty blockers should be exempted.
18 Another concerns things to make sure that the --
19 the future of these minors is properly respected
20 even though they personally cannot make mature
21 judgments about potentially irreversible
22 procedures.

23 So she -- she mentions things like
24 two-parent -- two-parent consent or counseling,
25 readiness criteria, age recommendations,

1 licensing, certification, or reporting
2 requirements for physicians, and other
3 guardrails which are not specified.

4 So, if intermediate scrutiny were the
5 regime that would apply, would it not be the
6 case that individual -- that judges would have
7 to decide which -- whether a particular package
8 containing this much of that and that much of
9 the other thing is sufficient? Wouldn't this be
10 endless litigation based on -- with a decision
11 based on determinations by lay judges regarding
12 complicated medical issues?

13 MR. STRANGIO: So if I could make two
14 points in -- in response, Justice Alito.

15 And -- and the first is going back to
16 the Solicitor General's example of -- of West
17 Virginia, where West Virginia looked at the
18 underlying science and, instead of categorically
19 banning this medical treatment, created pathways
20 with guardrails for individuals to access
21 medical care.

22 There has been no litigation over --
23 over West Virginia's law. And if there were, as
24 if there were in -- in other contexts, the
25 question would remain whether or not the state

1 could make out the showing that this is being
2 treated in such a substantially different way
3 than -- than other forms of medical care.

4 I do think that judges are equipped to
5 make those determinations, as they do in many --
6 many other contexts.

7 JUSTICE ALITO: A lot of categorical
8 statements have been made this morning in
9 argument and in the briefs about medical
10 questions that seem to me to be hotly disputed,
11 and that's a bit distressing. One of them has
12 to do with the risk of suicide.

13 Do you maintain that the procedures
14 and medications in question reduce the risk of
15 suicide?

16 MR. STRANGIO: I do, Justice Alito,
17 maintain that the medications in question reduce
18 the risk of depression, anxiety, and
19 suicidality, which are all indicators of
20 potential suicide.

21 JUSTICE ALITO: Do you think that's
22 clearly established? Do you think there's
23 reason for disagreement about that?

24 MR. STRANGIO: I do -- I do think it
25 is clearly established in the science and in --

1 in the record. I think, as with all underlying
2 questions of looking at evidence, there can be
3 disagreement. I don't dispute that.

4 But, here, and -- and sort of going
5 back to questions about the Cass review, for
6 example, the Cass review only looked at studies
7 up until 2022. After --

8 JUSTICE ALITO: Well, I -- I don't
9 regard the Cass review as -- necessarily as --
10 as the Bible or as something that's, you know,
11 true in every respect, but, on page 195 of the
12 Cass report, it says: There is no evidence that
13 gender-affirmative treatments reduce suicide.

14 MR. STRANGIO: What I think that is
15 referring to is there is no evidence in some --
16 in the studies that this treatment reduces
17 completed suicide. And the reason for that is
18 completed suicide, thankfully and admittedly, is
19 rare and we're talking about a very small
20 population of individuals with studies that
21 don't necessarily have completed suicides within
22 them.

23 However, there are multiple studies,
24 long-term, longitudinal studies that do show
25 that there is a reduction in -- in suicidality,

1 which I -- I -- I think is a -- is a positive
2 outcome to this treatment.

3 JUSTICE ALITO: Let me ask a question
4 about another issue that came up during Justice
5 Kagan's questioning and Justice Barrett's
6 questioning in particular, and that is whether
7 transgender status should be regarded as a
8 quasi-suspect classification.

9 And Justice Barrett referred to one of
10 the things that our cases have mentioned in
11 explaining when something should be specified as
12 a quasi-suspect classification, and that is a
13 history of discrimination.

14 Another one is immutability. Is
15 transgender status immutable?

16 MR. STRANGIO: May I answer, Mr. Chief
17 Justice?

18 CHIEF JUSTICE ROBERTS: Sure.

19 MR. STRANGIO: So I would -- I would
20 say that under this -- this Court's
21 consideration of that criteria, it -- it -- it
22 is a distinguishing characteristic. Transgender
23 people are characterized by having a gender
24 identity that differs from their birth sex.
25 That is distinguishing and -- and discrete.

1 And that also within the -- the
2 characterization, I would also point, if I
3 could, to the history of discrimination, and
4 there are many examples of in -- in law
5 discrimination, exclusions from the military,
6 criminal bans on cross-dressing, and others.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 I -- I think I lost track of the
10 discussion you were having about COVID. What --
11 what was the point you were trying to make?

12 MR. STRANGIO: I -- I think --

13 CHIEF JUSTICE ROBERTS: Or somebody
14 was trying to make?

15 MR. STRANGIO: Yes.

16 (Laughter.)

17 MR. STRANGIO: I -- I -- I think it
18 was me.

19 (Laughter.)

20 MR. STRANGIO: And the -- the point
21 about -- about COVID and the question of whether
22 or not this Court has ever considered applying
23 heightened scrutiny to contexts in which states
24 are grappling with evolving medical evidence,
25 and I -- I would point to Justice Gorsuch's

1 statement in -- in South -- South Bay United
2 Pentecostal, in which the -- the purpose of
3 heightened scrutiny, even when the government is
4 grappling with experts of -- of a medical
5 character, is to still test whether or not that
6 infringement on an individual right or that use
7 of a suspect classification meets the heightened
8 scrutiny standard. It is not exempt simply
9 because it is in the context of public health or
10 medicine.

11 CHIEF JUSTICE ROBERTS: Well, I don't
12 want to relive the COVID cases.

13 (Laughter.)

14 MR. STRANGIO: You and me both, yeah.

15 CHIEF JUSTICE ROBERTS: But it does
16 seem to me that one of the issues that came up
17 and as to which courts around the country had
18 vastly different views was the lack of knowledge
19 about precisely how -- what was going on, what
20 the effects were going to be, what the remedies
21 were going to be.

22 And if this is similar to that, I
23 think that would be very troubling to say that
24 in such a evolving situation, we are going to
25 decide what the right approaches are. I mean,

1 you said at some point that the -- the Tennessee
2 court or -- or not the Tennessee court -- that
3 this Court is just as qualified as the -- as
4 Tennessee to make the decisions here.

5 And it's not really so much a question
6 of qualifications. It's more questions of
7 constitutional allegation of authority. And,
8 you know, we might think that we're -- you know,
9 we can do just as good a job with respect to
10 the -- the evidence here as -- as, you know,
11 Tennessee or anybody else, but my understanding
12 is that the Constitution leaves that question to
13 the people's representatives rather than to nine
14 people, none of whom is a doctor.

15 And particularly in -- maybe I'm just
16 repeating myself, but you can look -- should we
17 follow the United Kingdom position from three
18 years ago? Should we follow the United
19 Kingdom's position now? It seems to me that it
20 is something where we are extraordinarily bereft
21 of expertise.

22 MR. STRANGIO: Well --

23 CHIEF JUSTICE ROBERTS: Anyway, what
24 do you think?

25 MR. STRANGIO: -- Mr. Chief Justice,

1 if I could first respond to the -- to the first
2 half of your -- your question about whether or
3 not this is comparable in terms of the
4 underlying science with respect to COVID-19, and
5 I think absolutely it is not. I merely used
6 that example to say that the Court has not
7 hesitated to suggest that heightened scrutiny
8 applies in contexts that deal with -- with
9 medicine and science.

10 And then, with -- with respect to what
11 is the -- the role of the courts, I -- I
12 continue to think it is to test whether or not a
13 law is -- is properly tailored. And -- and that
14 is what the district court did here. And, in
15 fact, the underlying science and the evidence
16 showed that Tennessee's assertion of harm and
17 their prevalence were not supported. The
18 district court made factual findings to that
19 effect, of which Tennessee has not argued
20 were -- were clearly erroneous.

21 And so, if what is left here is just
22 bare rationality review, Tennessee is in essence
23 saying let's not look at the evidence at all,
24 whether this is a law that bans this medical
25 treatment for minors or for adults, that in all

1 other contexts, what Tennessee does is recognize
2 that there are risks and there are benefits.

3 And, usually, the State regulates by
4 informing patients of the risks and tailoring
5 to -- to minimize them. Here, what they've done
6 is impose a blunderbuss ban overriding the very
7 careful judgment of parents who love and care
8 for their children and the doctors who have
9 recommended the treatment.

10 CHIEF JUSTICE ROBERTS: Thank you.
11 Justice Thomas?

12 JUSTICE THOMAS: I think the point
13 I -- I was getting at with respect to remedies
14 is normally, in -- in equal protection cases,
15 there's a difference between one group and
16 another. In Boren, it would be that the women
17 could buy alcohol, but the men could -- the male
18 students could not.

19 And what would that be in this case?

20 MR. STRANGIO: So -- so two point --
21 points, Your Honor.

22 I think that what the birth males can
23 do that birth females cannot do is receive
24 medical treat -- treatment to -- to live and
25 identify as boys. And what birth females can do

1 that birth males can't do is receive medical
2 treatment to -- to live and identify as girls.
3 That's a group of them.

4 JUSTICE THOMAS: Okay. Let's -- let's
5 change. What if -- would you make the same
6 argument if we were only talking about puberty
7 blockers?

8 MR. STRANGIO: If it was puberty
9 blockers, I would -- I would point to -- to John
10 Doe, who -- who is receiving puberty blockers.
11 The purpose of receiving puberty blockers for
12 John Doe is so that in the future he can undergo
13 a typical male puberty.

14 JUSTICE THOMAS: No, actually, I'm
15 talking about from an equal protection
16 standpoint the difference in treatment.
17 Normally, in these cases, one group receives
18 something that the other group does not, and I'm
19 trying to make -- discern that in this case.

20 MR. STRANGIO: And so what I would
21 say, Justice Thomas, is that the -- a birth sex
22 male can receive puberty blockers to undergo a
23 typical male puberty, and a birth sex female
24 cannot.

25 And if I could slow it down and just

1 explain a little bit how that works, if -- if
2 you're someone who was born male and you are
3 going through puberty too early, you want to be
4 able to have a final adult height that is
5 typical of -- of boys. You may receive puberty
6 blockers so that you can develop as a typical
7 boy. Someone who has a sex of female at birth
8 is also receiving puberty blockers so that they
9 can undergo a puberty like other boys.

10 And so it is the same purpose, and
11 what makes the treatment prohibited for the
12 birth sex female is their sex.

13 CHIEF JUSTICE ROBERTS: Justice Alito?

14 JUSTICE ALITO: Counsel, I don't think
15 you had a chance to finish answering my question
16 whether transgender status is immutable. You
17 cited a bunch of other criteria, but is it
18 immutable?

19 MR. STRANGIO: I -- I think that the
20 record shows that the -- the discordance between
21 a person's birth sex and gender identity has a
22 strong biological basis and would satisfy an
23 immutability test.

24 And I also think, under this Court's
25 precedents for determining whether something is

1 a suspect or quasi-suspect classification, a
2 distinguishing characteristic is sufficient.

3 JUSTICE ALITO: Does the category
4 of -- does transgender status apply to
5 individuals who are gender fluid?

6 MR. STRANGIO: I think that the -- the
7 distinguishing characteristic is to have a birth
8 sex that does not align with -- or a gender that
9 does not align with one's birth sex. So it may
10 include people who have different understandings
11 of -- of their gender identity, but I think it
12 is still the distinguishing characteristic of a
13 birth sex and a gender identity that are
14 incongruent.

15 JUSTICE ALITO: Are there individuals
16 who are born male, assigned male at birth, who
17 at one point identify as female but then later
18 come to identify as male, and, likewise, for
19 individuals who are assigned female at birth, at
20 some point identify as male -- as female -- I'm
21 sorry -- identify as male but later come to
22 identify as female? Are there not such people?

23 MR. STRANGIO: There are such people.
24 I agree with that, Justice Alito.

25 JUSTICE ALITO: So it's not an

1 immutable characteristic, is it?

2 MR. STRANGIO: Well, I think people's
3 understanding of it -- of it shifts, but the
4 evidence shows that there is at least a strong
5 underlying basis. And I think the normative
6 reason for that particular consideration is
7 whether or not this is something that someone
8 should or could change and whether they should
9 have to change it in order to receive
10 constitutional protections, and I think
11 transgender status squarely fits within that.

12 JUSTICE ALITO: We -- we have said
13 that having a disability is not a suspect or
14 quasi-suspect classification, so if we were to
15 agree with you on the question of quasi-suspect
16 classification, how could we justify saying, for
17 example, that a person who is schizophrenic does
18 not fall within a category that -- that -- that
19 is not a law that -- that distinguishes on that
20 ground is not a suspect classification?

21 And I'm not suggesting that gender
22 dysphoria is a disease, a mental illness. I'm
23 not suggesting that at all. I'm just saying,
24 how could we justify the different treatment?

25 MR. STRANGIO: I -- I think that --

1 JUSTICE ALITO: It's -- it's immutable
2 in the sense that there isn't any cure for it.
3 There's been severe discrimination against
4 people suffering from schizophrenia. At one
5 point, they were locked up in hellish
6 institutions. They can make a valuable
7 contribution to society. Think of John Nash.

8 How would we distinguish that?

9 MR. STRANGIO: Justice Alito, what I
10 think would be the difference is that in -- in
11 Cleburne, the Court in essence said as to the
12 distinguishing characteristic that this was a
13 large and diffuse group of individuals who have
14 different forms of -- of -- of disabilities and
15 that that group of people had been able to
16 secure some protection through -- through the
17 legislative process.

18 But, again, this Court certainly does
19 not have to reach the question of -- of
20 transgender status as a quasi-suspect
21 classification. SB1 on its face hinges its
22 prohibition on inconsistency as well.

23 JUSTICE ALITO: Well, I understand
24 that, but would you dispute the proposition that
25 transgender status is a very broad category?

1 Doesn't the American Psychological Society --
2 Association say it's an umbrella term?

3 MR. STRANGIO: I don't -- I don't know
4 exactly what the American Psychological
5 Association says, but I -- I don't dispute that
6 there are people who fall within a transgender
7 identity who may not fit into a binary identity.

8 I still think that the distinguishing
9 characteristic applies to every single
10 transgender person, which is a birth sex that is
11 inconsistent with their gender identity.

12 And, of course, here, on SB1, this is
13 a law that I think is easiest to understand
14 in -- in the most straightforward classification
15 on the basis of sex.

16 JUSTICE ALITO: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Sotomayor?

19 JUSTICE SOTOMAYOR: Counsel, when
20 asked whether you differed from the SG's
21 position, I assume that if you win in this
22 proceeding, what you're asking for us to reverse
23 is the Sixth Circuit conclusion that rational
24 basis review applied, correct?

25 MR. STRANGIO: That's correct, Your

1 Honor.

2 JUSTICE SOTOMAYOR: Now you think, as
3 does the other side, that each of you should win
4 on that question, but are you differing from the
5 SG that that should be remanded to the court
6 below to apply strict -- intermediate scrutiny
7 in the first instance?

8 MR. STRANGIO: No, Justice Sotomayor,
9 we're not -- we're not disagreeing.

10 JUSTICE SOTOMAYOR: Now, with respect
11 to Justice Thomas's question, I'm not sure you
12 answered it. You did in part, and you said the
13 relief you're seeking in the lawsuit, assuming
14 you win on the intermediate standard review, is
15 to permit your plaintiffs to receive the
16 medication other children receive.

17 I don't know if he was suggesting that
18 one of the things we -- we can go up in
19 discrimination or we can go down, which is --
20 but I don't -- I don't think we've even decided
21 who makes that choice, because the other
22 alternative is to block the usage of all of
23 these drugs for all children --

24 MR. STRANGIO: Yes.

25 JUSTICE SOTOMAYOR: -- which would

1 present a very different -- an Arlington
2 Heights, perhaps, question, but -- but the point
3 is that what the relief is is still something
4 that has to be determined as well.

5 MR. STRANGIO: Well, so if I could
6 clarify, Justice Sotomayor. I don't think that
7 the relief we're seeking is for our clients to
8 receive the medication. The relief we're
9 seeking is for SB1 to stop being a barrier to
10 their ability to continue to access medical care
11 and make the individualized assessments with
12 their doctors. So it is just simply a
13 injunction of the barrier to the medication that
14 they had been receiving in Tennessee.

15 JUSTICE SOTOMAYOR: Got it. Thank
16 you.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?
18 Justice Gorsuch?
19 Justice Kavanaugh?

20 JUSTICE KAVANAUGH: Two -- two basic
21 questions. So, whether we apply rational basis
22 or intermediate scrutiny, either way, you end up
23 looking at the State's justification. And they
24 are articulating a health and safety
25 justification, so it's not simply morals

1 legislation, as they've described it. It's
2 health and safety justification.

3 And it seems that there are risks and
4 benefits both ways here. So it's very hard to
5 weigh those at least as the briefing has set out
6 the -- the issues. If the treatment's barred,
7 some kids will suffer because they can't access
8 the treatment. If the treatment is allowed,
9 these treatments are allowed, some kids will
10 suffer who get the treatment and later wish they
11 hadn't and want to de-transition. At least
12 that's how I see the positions set out in the
13 briefs.

14 And so there are risks both ways in
15 here, allowing the treatment or not allowing the
16 treatment, and how to choose there is a very
17 difficult judgment call, it seems to me, but
18 it's one -- you know, it's a difficult judgment
19 call as a matter of policy.

20 And then for us to come in -- and this
21 is repeating what I said earlier, but I want
22 your reaction to it -- for us to come in and to
23 choose one side of that, knowing that either way
24 people are going to be harmed, this is --
25 there's no kind of perfect way out, at least as

1 I've read the briefs here, where everyone
2 benefits and no one is harmed, right?

3 The -- the -- the -- the difficulty of
4 the issue is some people are going to be harmed?

5 MR. STRANGIO: Well --

6 JUSTICE KAVANAUGH: And then the
7 question becomes, how does the Court choose
8 which group -- why isn't that a choice for
9 policymakers as best they can to -- to make that
10 choice in the first instance?

11 So I just throw that out there and
12 take your reactions and anything you want to say
13 on that.

14 MR. STRANGIO: Okay. So if I could
15 just make a few points in -- in reaction.

16 JUSTICE KAVANAUGH: Well, can I add
17 one -- one more point, sorry --

18 MR. STRANGIO: Okay.

19 JUSTICE KAVANAUGH: -- to add to that.
20 And I don't think, with respect, that what you
21 and the Solicitor General said, oh, we'll just
22 send it back to the district court and they'll
23 make fact findings. It'll be back here in a
24 year and we're going to have this same
25 discussion as I see it. So just to get you

1 thinking about that too.

2 Go ahead. Have at it.

3 MR. STRANGIO: So -- so -- so a few
4 points, Justice Kavanaugh. And the first is I
5 don't see this as -- as the Court choosing what
6 is the appropriate response here. What -- what
7 I see the role of the Court is assessing whether
8 the choice that Tennessee made is one that they
9 can justify under heightened scrutiny.

10 And so that question is whether or
11 not, by taking this decision away from the
12 adolescents, their parents, and their doctors
13 based on claims of harm, that protects children
14 and -- and -- and protects children from adverse
15 side effects.

16 And what I think the record here
17 shows -- and, again, this is a preliminary
18 injunction record -- what it shows is that that
19 broad categorical ban does not advance that --
20 that interest.

21 That doesn't mean that a more tailored
22 response would not advance that interest in
23 which you may be able to actually come up with a
24 solution to ensure that you are protecting those
25 who may come to regret this -- this treatment,

1 which are much, much smaller than those who
2 benefit and -- and find it medically necessary,
3 something like West Virginia did.

4 And I think the relevant inquiry here
5 is whether what Tennessee did meets their --
6 their constitutional burden because they used
7 sex-based classifications to -- to pass this --
8 this law.

9 And then on -- on two quick other
10 points that with respect to the difference
11 between rational basis and -- and heightened
12 scrutiny, yes, of course, it will be weighing
13 the State's asserted interest in both
14 circumstances, but there's a world of difference
15 between rational basis and -- and heightened
16 scrutiny. And we think the Sixth Circuit got it
17 wrong by simply applying rational basis here.

18 And to the question of, well, is
19 remand, you know, a sufficient --

20 JUSTICE KAVANAUGH: Well, can I just
21 stop you there? If -- if -- even under rational
22 basis, if there were no benefit to anyone,
23 then -- then it would probably lack a rational
24 basis.

25 So I guess, in the end, you still come

1 down to there are risks and benefits both ways,
2 either way you go here, and I don't know whether
3 rational basis or intermediate scrutiny, however
4 that gets applied, you still have to kind of
5 look, is there a real justification here? I
6 think you look at that either way.

7 MR. STRANGIO: And I think the
8 difference under heightened scrutiny, there's a
9 chance to look at -- at the evidence in -- in a
10 much more substantial way and have the State
11 come forth and -- and show whether they've --
12 they've met their burden.

13 In terms of your -- your question,
14 Justice Kavanaugh, about, well, is it sufficient
15 to just -- to just remand it, it will be back up
16 here, again, I -- I would say two things in
17 response.

18 I think that there are often examples
19 where there's a threshold question, and it goes
20 back down on the application of heightened
21 scrutiny. And I do think an instructive case is
22 Johnson versus California here, in part because
23 it gives us some guidance for what happens on
24 remand in the application of scrutiny. And
25 that, of course, was what -- when the Court was

1 considering whether or not to apply strict
2 scrutiny to racial classifications in prison or
3 Turner deference. And when -- when the Court
4 reversed and said the wrong standard was
5 applied, strict scrutiny still applies, and sent
6 it back down, it did so with guidance that even
7 under strict scrutiny, the lower courts could
8 take into account the -- the particular context
9 of -- of prison.

10 And -- and I think, here, the -- this
11 Court could send it back down with instructions
12 to take into account the particular context.

13 JUSTICE KAVANAUGH: And just one point
14 there. You agree that there's some group of
15 people who receive the treatments who later wish
16 they hadn't and wish to de-transition? I know
17 you say it's a smaller group. I understand
18 that. I just want to make sure you agree as a
19 factual matter there is some set of people?

20 MR. STRANGIO: I -- I agree as a
21 factual matter, as there is in all areas of
22 medicine.

23 JUSTICE KAVANAUGH: And then, on the
24 sports question, I want to get your reaction as
25 well, which is, is it logically and legally

1 possible to apply intermediate scrutiny and say
2 that the Tennessee law and the other laws like
3 it do not satisfy intermediate scrutiny, but
4 laws that limit women's and girls' sports to
5 exclude transgender athletes would be
6 constitutionally permissible? Is that legally
7 and logically possible?

8 MR. STRANGIO: I -- I agree with the
9 Solicitor General that it's legally and
10 logically possible because, in the application
11 of -- of heightened scrutiny, it's wholly
12 different state interests that are -- that are
13 being asserted.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 JUSTICE BARRETT: Mr. Strangio, I
18 wanted to give you a chance to see if -- I'm not
19 sure if you named all of the laws when we were
20 talking about de jure discrimination before.
21 You mentioned bans on cross-dressing and bans on
22 military service. And I had thought of the
23 military service, but I had not -- I didn't know
24 about the statutes prohibiting cross-dressing.

25 Could you think of others? Are

1 there --

2 MR. STRANGIO: I mean, I would -- I
3 would say that there -- there are -- there
4 are -- there are other examples that exist in
5 which sometimes homosexuality and transgender
6 status are -- are sort of lumped together in --
7 in discriminatory frameworks as -- as language
8 has -- has changed. But I think the most
9 salient to me would be the -- the -- the
10 cross-dressing bans and the explicit bans on --
11 on military service for transgender individuals.

12 JUSTICE BARRETT: Okay. And thinking
13 about, you know, when we identify and, you
14 know -- when we identify suspect classes, the
15 factors that we've considered, one of the ones
16 that the Sixth Circuit addressed was political
17 power.

18 Do you want to -- do you have a
19 reaction to the Sixth Circuit's discussion of
20 that?

21 MR. STRANGIO: I -- I would just say,
22 Justice Barrett, that I -- I think looking out
23 at -- at the country at the -- at the moment,
24 that there is a significant challenge for
25 transgender people to protect themselves in --

1 in the political process where you do have laws
2 excluding transgender people from places where
3 they need to go in -- in all aspects of -- of
4 life, and there is a difficulty in that type of
5 majoritarian protection. I think that's
6 precisely what the political powerlessness prong
7 of the -- the test accounts for.

8 JUSTICE BARRETT: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: So I guess I'm
12 suddenly quite worried about the role of the
13 core questions and the constitutional allocation
14 of authority concerns because I had understood
15 that it was bedrock in the equal protection
16 framework that there was a constitutional issue
17 in any situation in which the legislature is
18 drawing lines on the basis of a suspect
19 classification, that it's a constitutional
20 question that is being raised when that is
21 happening as a threshold matter. And then you
22 may get into why is it happening, what is the
23 justification.

24 And you've said here at the podium
25 today that the different levels of scrutiny

1 account for how strong the government's evidence
2 has to be for doing that. And we really -- the
3 Court really holds them to it in certain -- in a
4 heightened scrutiny scenario. But the kind of
5 initial issue is that a law is drawing lines on
6 the basis of some suspect classification.

7 Am I -- is that -- does that accord --

8 MR. STRANGIO: Yes.

9 JUSTICE JACKSON: -- with your
10 understanding of what we normally do? And
11 that's a question for the Court because it's a
12 constitutional question, is the statute doing
13 this, right?

14 MR. STRANGIO: Yes. I completely
15 agree with that, Justice Jackson. That's
16 precisely why we think heightened scrutiny
17 applies here, because this is a statute that on
18 its face draws that --

19 JUSTICE JACKSON: All right. And to
20 answer the question, is this statute doing this,
21 I understood that we had a sort of two-step
22 framework for looking at it, that we don't just
23 kind of launch into an assessment of the
24 evidence or what the state is -- why the state
25 is saying that they're doing this or the

1 scientific basis for it, that we're looking at
2 something else when we're trying to determine is
3 a classification being made, right?

4 MR. STRANGIO: Yes.

5 JUSTICE JACKSON: And I guess my real
6 concern, and I -- maybe I'll just ask you to
7 react to my Loving parallel because I'm getting
8 kind of nervous -- is that in Loving, those same
9 kinds of scientific arguments were made. So
10 I'm -- I'm reading here where the Court says:
11 "The argument is that if the Equal Protection
12 Clause does not outlaw miscegenation statutes
13 because of their reliance on racial
14 classifications, the question of
15 constitutionality would thus become whether
16 there was any rational basis for a state to
17 treat interracial marriages differently from
18 other marriages. On this question, the State
19 argues the scientific evidence is substantially
20 in doubt and, consequently, the Court should
21 defer to the wisdom of the state legislature in
22 adopting its policy of discouraging interracial
23 marriages."

24 And so, for me, this kind of idea that
25 the way we look at it is not, first, are you

1 drawing these classifications and then, State,
2 give us your evidence so we can make sure that
3 there's a proper fit. If, instead, we're just
4 sort of doing what the state is encouraging here
5 in Loving, where you just sort of say, well,
6 there are lots of good reasons for this policy
7 and who are we as the Court to say otherwise,
8 I'm worried that we're undermining the
9 foundations of some of our bedrock equal
10 protection cases.

11 MR. STRANGIO: I -- I share your
12 concerns, Justice Jackson. And I think one of
13 the things that's happening in this case is
14 we're seeing a lot of concerns that come in at
15 step two of the analysis being imported into
16 that threshold question of whether a
17 classification has been drawn in the first
18 instance.

19 Concerns about real differences
20 between males and females, that is exactly what
21 heightened scrutiny is -- is intended to test in
22 the application of heightened scrutiny. If
23 Tennessee can have an end run around heightened
24 scrutiny by asserting at the outset that biology
25 justifies the sex-based differential in the law,

1 that would undermine decades of this Court's
2 precedent.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Rice.

7 ORAL ARGUMENT OF J. MATTHEW RICE

8 ON BEHALF OF RESPONDENTS JONATHAN SKRMETTI, ET AL.

9 MR. RICE: Mr. Chief Justice, and may
10 it please the Court:

11 Tennessee lawmakers enacted SB1 to
12 protect minors from risky, unproven medical
13 interventions. The law imposes an
14 across-the-board rule that allows the use of
15 drugs and surgeries for some medical purposes
16 but not for others. Its application turns
17 entirely on medical purpose, not a patient's
18 sex. That is not sex discrimination.

19 The challengers try to make the law
20 seem sex-based this morning by using terms like
21 "masculinizing" and "feminizing." But their
22 arguments conflate fundamentally different
23 treatments. Just as using morphine to manage
24 pain differs from using it to assist suicide,
25 using hormones and puberty blockers to address a

1 physical condition is far different from using
2 it to address psychological distress associated
3 with one's body.

4 The Equal Protection Clause does not
5 require the states to blind themselves to
6 medical reality or to treat unlike things the
7 same, and it does not constitutionalize one
8 side's view of a disputed medical question.
9 Half of the states, Sweden, Finland, and the
10 U.K. all now restrict the use of these
11 interventions in minors and recognize the
12 uncertainty surrounding their use. These
13 interventions carry often irreversible and
14 life-altering consequences. And the systematic
15 reviews conducted by European health authorities
16 have found no established benefits.

17 Politically accountable lawmakers, not
18 judges, are in the best position to assess this
19 evolving medical issue. The Sixth Circuit
20 should be affirmed.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Both the SG and
23 Petitioner have suggested that a better approach
24 would be the approach of West Virginia.

25 What's your reaction to that?

1 MR. RICE: Your Honor, the -- my
2 friends' arguments with respect to the
3 alternative approaches is pure policymaking. As
4 Justice Kavanaugh recognized throughout his
5 questioning, they cannot stand up here and say
6 that if these alternatives were imposed that
7 there would be no de-transitioners. So there --
8 there is -- there -- they cannot eliminate the
9 risk of de-transitioners.

10 So it -- it becomes a pure exercise
11 of -- of weighing benefits versus risk. And the
12 question of how many minors have to have their
13 bodies irreparably harmed for unproven benefits
14 is one that is best left for the legislature.

15 JUSTICE SOTOMAYOR: I'm sorry,
16 counselor. Every medical treatment has a risk,
17 even taking aspirin. There's always going to be
18 a percentage of the population under any medical
19 treatment that's going to suffer a harm.

20 So the question in my mind is not do
21 policymakers decide whether one person's life is
22 more valuable than the millions of others who
23 get relief from this treatment. The question
24 is: Can you stop one sex from the other -- one
25 person of one sex from another sex from

1 receiving that benefit?

2 So, if the medical condition is
3 unwanted hair by a nine-year-old boy who can
4 receive estrogen for that because, at nine years
5 old, if he has hair, he gets laughed at and
6 picked on and his puberty is coming in too
7 early, but a girl who has unwanted hair says --
8 or wants -- unwanted -- has unwanted breasts, or a
9 boy at that age can get that drug, but the other
10 can't, that's the sex-based difference. It's
11 not the -- the medical condition is the same.

12 MR. RICE: We don't agree.

13 JUSTICE SOTOMAYOR: But you're saying
14 one sex is getting it and the other's not.

15 MR. RICE: We do not agree that the
16 medical condition is the same. We do not think
17 that giving puberty blockers to a six-year-old
18 that has started precocious puberty is the same
19 medical treatment as giving it to a minor who
20 wants to -- to transition.

21 Those -- those are not the same
22 medical treatment. And once you recognize --

23 JUSTICE SOTOMAYOR: What you're saying
24 is you're -- you're still depending on sex to
25 identify who can get it and who can't.

1 MR. RICE: I don't think so, Your
2 Honor. If -- if a minor comes up to -- a boy
3 goes to the doctor and says, I want puberty
4 blockers to transition, the answer will be no.
5 If a girl goes up to the doctor and says, I
6 want --

7 JUSTICE SOTOMAYOR: If a -- if a -- if
8 a sex-neutral-looking child walks into a doctor
9 and says, I don't want to grow breasts, doesn't
10 the doctor have to know whether it's a girl or a
11 boy before they prescribe the drug?

12 MR. RICE: I don't think so, Your
13 Honor.

14 JUSTICE SOTOMAYOR: I -- I know --

15 MR. RICE: It needs to know --

16 JUSTICE SOTOMAYOR: I've got to tell
17 you I've made that mistake on children often.
18 Look at one of them and think it's a boy, and
19 I'm corrected and it's a girl, and vice versa.

20 I -- I hope that you're not going to
21 tell me you haven't made that mistake.

22 MR. RICE: Well, I -- I may have made
23 that mistake, Your Honor, but I don't think that
24 that is an example of where a sex-based line is
25 being drawn because --

1 JUSTICE JACKSON: Why not? Yeah,
2 please. Why not?

3 MR. RICE: Because all that matters
4 is -- is the medical purpose for which the drug
5 is used. So, if the minor comes up -- if you
6 have a biological boy --

7 JUSTICE JACKSON: No, it's the same
8 medical purpose. Her hypothetical is: I don't
9 want to grow breasts. The same medical purpose.
10 I'm trying to stop the development of breasts.

11 MR. RICE: Well, Your Honor, I think
12 that that likely would not be allowed under SB1
13 for a -- a girl.

14 JUSTICE JACKSON: For a woman who
15 is -- for a -- a girl. But it would --

16 MR. RICE: I'm sorry. Yeah, and it
17 would also not be allowed under Tennessee law
18 with respect to -- to a biological boy.

19 JUSTICE JACKSON: Really?

20 MR. RICE: Tennessee law doesn't just
21 allow doctors to prescribe drugs without a
22 medical purpose. They can't prescribe
23 testosterone --

24 JUSTICE JACKSON: No, no, no. But the
25 way I understood the law to work is it has to be

1 inconsistent with your sex in order for it to be
2 blocked. So I don't understand why a boy -- you
3 know, I -- I don't understand why it would work
4 in the way that you're -- that you're saying.

5 Why wouldn't it be differentiating on
6 the basis of gender?

7 MR. RICE: Well --

8 JUSTICE JACKSON: A girl who doesn't
9 want to grow -- grow breasts for whatever reason
10 could -- could -- could or could not get it?

11 MR. RICE: Does not want to grow
12 breasts --

13 JUSTICE JACKSON: Yes.

14 MR. RICE: -- without a medical
15 reason, could not get it.

16 JUSTICE JACKSON: And a boy who
17 doesn't want to grow breasts could or could not
18 get it?

19 MR. RICE: Could not get it if there
20 was no medical purpose. There has to be a
21 medical purpose for these drugs.

22 All my -- my friends' arguments rest
23 on conflating different medical purposes.
24 They --

25 JUSTICE JACKSON: But they couldn't

1 get it, not under this law, right, because this
2 law is operating around the inconsistency. So,
3 if they couldn't get it, it couldn't -- it would
4 be for some other reason, right?

5 MR. RICE: Well, we have other laws
6 in -- in Tennessee law that -- that prevent
7 malpractice and that prevent the use of drugs
8 for a non-medical purpose.

9 JUSTICE JACKSON: I understand. But
10 this law is the one that is being challenged
11 today, and we're trying to decide whether or not
12 it's operating on a sex-based basis. And we --

13 MR. RICE: Well, I don't think we --

14 JUSTICE JACKSON: -- we have a -- so
15 what about my -- what about my lower voice
16 hypothetical?

17 MR. RICE: Yeah.

18 JUSTICE JACKSON: All right. So a
19 biological boy comes in and asks for a hormone
20 treatment to deepen his voice in order to affirm
21 his masculinity because it hasn't come and he'd
22 like to deepen his voice. Can he get it?

23 MR. RICE: If there's no medical
24 purpose, no.

25 JUSTICE JACKSON: No, that's a

1 medical -- the -- the medical purpose --

2 MR. RICE: I don't know the --

3 JUSTICE JACKSON: I don't understand
4 what you mean. The purpose is to bring on a
5 deepening of their voice.

6 MR. RICE: Let me try to rephrase.

7 JUSTICE JACKSON: Yes.

8 MR. RICE: If there's no medical
9 condition, the answer is no.

10 JUSTICE JACKSON: But --

11 MR. RICE: You cannot use testosterone
12 for purely cosmetic reasons. It's a Schedule
13 III drug. You are not allowed.

14 JUSTICE JACKSON: In this statute or
15 in another statute?

16 MR. RICE: In another statute.

17 JUSTICE JACKSON: Okay. So setting
18 aside that other statute, we're looking at this
19 one and how it operates. This statute says
20 something about inconsistency with your
21 biological sex, and that's what I'm trying to
22 test.

23 The boy comes in, he asks for a
24 hormone treatment to deepen his voice to affirm
25 his masculinity. Can he get the treatment under

1 this statute?

2 MR. RICE: Under this statute, no.

3 But, under Tennessee Code Annotated 63 --

4 JUSTICE JACKSON: The boy -- the boy
5 could not, under this statute, to get -- get
6 a -- a medication that would deepen his voice?

7 MR. RICE: If there was no medical
8 condition, no.

9 JUSTICE JACKSON: That's the other
10 statute. Under this statute --

11 MR. DAVIS: Under this statute --

12 JUSTICE JACKSON: -- with respect to
13 consistency, he could?

14 MR. RICE: Under this statute, he
15 could.

16 JUSTICE JACKSON: Okay.

17 MR. RICE: But, under 63-6-214(12), he
18 could not.

19 JUSTICE JACKSON: I understand.
20 Setting aside that other statute, under this
21 statute, he could.

22 Now, looking at this statute, a girl
23 comes in, biologically, and asks for a hormone
24 to deepen her voice in order to affirm the
25 identity that she chooses, which is masculinity.

1 I'm asking you: Would, under this statute, she
2 be precluded from getting that treatment?

3 MR. RICE: She wants to -- I'm sorry,
4 one more time, Your Honor.

5 JUSTICE JACKSON: She wants to get the
6 medication in order to deepen her voice and
7 affirm her masculinity.

8 MR. RICE: Your Honor, I think, if
9 it's for the purpose of identifying inconsistent
10 with their sex, she would be barred from doing
11 that under this statute.

12 JUSTICE KAGAN: But isn't that the
13 point, Mr. Rice, that if it's for the purpose of
14 identifying with their sex?

15 I mean, the prohibited purpose here is
16 treating gender dysphoria, which is to say that
17 the prohibited purpose is something about
18 whether or not one is identifying with one's own
19 sex or another sex.

20 The whole thing is imbued with sex. I
21 mean, it's based on sex. You might have reasons
22 for thinking that it's an appropriate
23 regulation, and those reasons should be tested
24 and respect given to them, but it's a dodge to
25 say that this is not based on sex, it's based on

1 medical purpose, when the medical purpose is
2 utterly and entirely about sex.

3 MR. RICE: Justice Kagan, we think
4 that is a slightly -- we think that's a request
5 for a substantive right to engage in
6 non-conforming behavior. We don't think it's
7 actually drawing a line based on sex.

8 And, again, the only way that my
9 friends can point to a sex-based line is to
10 conflate the use of puberty blockers to address
11 precocious puberty with the use of puberty
12 blockers to transition. And those are
13 fundamentally different treatments. They have
14 different effects on the body. They're used for
15 different purposes.

16 I -- I actually think my -- my
17 friends' response to -- to Justice Alito's
18 hypothetical regarding puberty blockers is
19 devastating because that law draws no different
20 lines than the law that's drawn in our -- in
21 SB1.

22 It just doesn't use the words
23 "inconsistent with sex." So we use the words
24 "inconsistent with sex" to describe a single
25 prohibited medical purpose. We do not use it to

1 draw lines between males and females.

2 CHIEF JUSTICE ROBERTS: Counsel, I
3 want to be clear about this. I assume you agree
4 with me that no matter how difficult the science
5 may be and no matter how evolving it may be, at
6 the end of the day, legislation on this subject
7 is subject to judicial review?

8 MR. RICE: Yes, Your Honor.

9 CHIEF JUSTICE ROBERTS: Is that
10 correct?

11 And I also want to be clear that the
12 issue about the difficulty of regulating the
13 science and attempting to figure out where to
14 sort of stop and place the scale in -- in the
15 evolution is a matter that goes to the level of
16 judicial review, is that right, the level of the
17 scrutiny that's applied?

18 MR. RICE: Yes, Your Honor.

19 CHIEF JUSTICE ROBERTS: Okay. Thank
20 you.

21 JUSTICE SOTOMAYOR: Counselor, given
22 your argument, you're saying your state can
23 block gender treatment for adults too?

24 MR. RICE: Your Honor, we think that
25 if we're assuming a similarly worded statute,

1 that there still would not be a -- a sex- or a
2 transgender-based classification. So we think
3 that --

4 JUSTICE SOTOMAYOR: So you're --
5 you're licensing states to deprive grown adults
6 of the choice of which sex to adopt?

7 MR. RICE: Your Honor, I don't think
8 that's a fair character- --

9 JUSTICE SOTOMAYOR: That's -- that's
10 what you're telling me because you're saying to
11 me rational basis would be the review for that
12 kind of law for adults as well.

13 MR. RICE: And this Court has not
14 hesitated to hold laws unconstitutional under
15 rational basis review when they are rooted in
16 unsubstantiated fears and prejudices. That's
17 exactly what this Court did in Cleburne.

18 And to the extent --

19 JUSTICE SOTOMAYOR: That's quite an
20 interesting way to protect a population.

21 MR. RICE: And to the extent, Your
22 Honor --

23 JUSTICE SOTOMAYOR: I thought that
24 that's why we had intermediate scrutiny when
25 there are differences based on sex, to ensure

1 that states were not acting on the basis of
2 prejudice.

3 MR. RICE: Well, Your Honor, of
4 course, we -- our position is there is no
5 sex-based classification, but to -- to finish
6 the answer, that to the extent that -- that
7 there -- that a law dealing with adults would
8 pass rational basis review, that just means it's
9 left to the democratic process and that
10 democracy is the best check on potentially
11 misguided laws.

12 JUSTICE JACKSON: So when --

13 JUSTICE SOTOMAYOR: When you're
14 1 percent of the population.

15 JUSTICE JACKSON: Sorry, Mr. --

16 JUSTICE SOTOMAYOR: When you're
17 1 percent of the population or less, very hard
18 to see how the democratic process is going to
19 protect you.

20 MR. RICE: Well, Your Honor.

21 JUSTICE SOTOMAYOR: You -- blacks were
22 a much larger part of the population, and it
23 didn't protect them. It didn't protect women
24 for whole centuries.

25 JUSTICE BARRETT: Mr. Rice, I -- I

1 have one factual question and one legal
2 question. The factual question is the Sixth
3 Circuit mentioned that there is an off-label use
4 that the FDA has not authorized. Is -- is that
5 still true? And is that just for children or is
6 it for adults too?

7 MR. RICE: It's still true, I think
8 with respect to both children and adults. I
9 know with respect to children. I'm not certain
10 with respect to adults.

11 But we do think that -- that that's
12 relevant in the sense that the FDA, when it
13 approves drugs, it does so based off of -- of
14 the purpose for which the drugs are being used.
15 And we think that we are drawing the same type
16 of distinction in our law between using one drug
17 for -- for different purposes.

18 JUSTICE BARRETT: Okay. My legal
19 question is I wondered if you had a response --
20 you know, I was asking your friends on the other
21 side about de jure discrimination and what we
22 should take account of if we're thinking about
23 whether transgender people should be a suspect
24 class for purposes of the Fourteenth Amendment.

25 Do you have a response to that? What

1 we should be thinking about or whether -- do you
2 know the history of de jure discrimination?

3 MR. RICE: I do not know the history
4 of de jure -- de jure discrimination. And our
5 front-line position is that the Court has gotten
6 out the business of creating new quasi-suspect
7 classes precisely because it's a very
8 unprincipled test when it comes to creating
9 these classes. In -- in some of the cases,
10 political powerless -- powerlessness means that
11 you need project -- protection from the
12 majoritarian process; in other cases, it means
13 can you gain the attention of lawmakers in the
14 most recent Cleburne test.

15 So the Court has not applied any form
16 of principled analysis when it comes to creating
17 these tests. It's been an exercise of judicial
18 power. And in the intermediate scrutiny
19 analysis that accompanies the quasi-suspect
20 class, classification is no more principled, and
21 -- and the Court has often struggled to apply
22 that as well.

23 So we don't think the Court should --
24 should even open the door for further judicial
25 creation of new quasi-suspect classes.

1 JUSTICE BARRETT: Okay. And -- and
2 last legal question -- I was just going to ask
3 you one; I have a second one. Could you address
4 Justice Kavanaugh's questions about what the
5 implications of this case would be for the
6 athletic context or the bathrooms context?

7 MR. RICE: I would love to, Your
8 Honor. So we think this is -- we differ with
9 our friends on the other side with respect to --
10 their argument is that, well, there's a
11 sex-based classification and sex separates
12 sports. So, necessarily, that means that --
13 that we're -- there's a sex classification and
14 intermediate scrutiny applies.

15 We are not actually seeing challenges
16 to the sex classification. When these
17 challenges are being brought, they're not
18 arguing that we don't want there to be boys and
19 girls sports. They're arguing we want there to
20 be boys and girls sports. We just want to be --
21 we just want to be classified based off of our
22 gender identity. And so we think that is --
23 that is a -- fundamentally a transgender-based
24 challenge and not a sex-based challenge, if you
25 are not actually challenging the sex

1 classification that is at issue.

2 JUSTICE JACKSON: Can I ask you, so in
3 -- in my sort of Loving parallel, Virginia in
4 your view would not have been making a racial
5 classification if they had just reworded their
6 statute to say no person can get a license to
7 marry for the purpose of uniting with another
8 person whose race is inconsistent with their
9 own.

10 I took you to say that the use of the
11 term "inconsistent with their sex" was drawing a
12 line to prohibit one use of the medication.

13 MR. RICE: Yes --

14 JUSTICE JACKSON: So why couldn't
15 these statutes have been interpreted as drawing
16 a line to prohibit one use of a marriage
17 license?

18 MR. RICE: Your Honor, we think that
19 in a case like Loving, when you look at the
20 individual level, which we agree with our
21 friends on the other side that the protection of
22 the Equal Protection Clause operates at the
23 individual level, that if there is a line that
24 is being drawn based off of race, like in
25 Loving, where you had a white male who could not

1 -- who could not marry an African American
2 female under that law, that is a race-based
3 line. You are creating multiple groups of - of
4 permissible and impermissible behavior based off
5 of race.

6 Where we differ from -- from our
7 friends on the other side is we just don't think
8 that there is any sex-based line in this -- in
9 this factor.

10 JUSTICE JACKSON: But I don't
11 understand why not? I mean, these laws -- the
12 law here operates in the same way. There,
13 there, the question of can you marry this other
14 person depended upon what your race was. You
15 could marry the other person if it was the same,
16 consistent with your race. You couldn't if you
17 couldn't.

18 I -- I take your law to be doing
19 basically the same thing, that we can get these
20 blockers if doing so is consistent with your
21 sex, but not if it's inconsistent. So how are
22 they different?

23 MR. RICE: We think it's different
24 because we think in their use of "inconsistent
25 with sex" in all of these examples that they

1 have in the briefing, those actually do create
2 separate categories of conduct that is
3 permissible either based on sex or based on
4 race.

5 But in this case, the only way that
6 they can point to a sex-based line is to equate
7 fundamentally different medical treatments.
8 Giving -- giving testosterone to boy with a
9 deficiency is not the same treatment as giving
10 it to a girl who has psychological distress
11 associated with her body. These are -- this is
12 -- this is not only --

13 JUSTICE JACKSON: And what's your
14 basis for saying that? I'm sorry. Is it just
15 because of the why they're asking for it, or is
16 there some kind of medical -- I -- I took the SG
17 to be saying that it operates on the body in the
18 same way. So what -- what's your basis for
19 saying that they're not the same?

20 MR. RICE: I -- I don't think it
21 operates on -- on the body in the same way.
22 Take testosterone. If you give a boy with a
23 deficiency testosterone, could be because he has
24 constitutional delay of puberty, that allows him
25 to go through the -- the -- and develop the

1 reproductive organs associated with being a
2 male. If you give it to a girl, it renders the
3 girl infertile. So we have 8- to 12-year-olds
4 being asked --

5 JUSTICE JACKSON: Oh, I'm sorry. I
6 thought your reasons for them being different
7 was that you said they were for -- for different
8 purposes. I had heard you say at the beginning
9 the reason those two are different is because
10 one wants them to transition and the other wants
11 them for some medical purpose.

12 MR. RICE: Well, to go back to my --
13 my example in the -- in the introduction, I
14 don't think anyone would say using morphine to
15 assist suicide is the same treatment as using
16 morphine to manage pain. It's the same drug,
17 just like it's the same drug here. But they're
18 being used for fundamentally different purposes.
19 They have different effects on the body.

20 And once you take out and you
21 recognize medical reality, then there is no
22 argument that our law differentiates between
23 treatments for males and females.

24 JUSTICE KAGAN: Can I ask you about
25 one of the purposes of this law? And I note

1 that your brief does not talk a lot about this,
2 but one of the articulated purposes of this law
3 is essentially to engender -- encourage gender
4 conformity and to discourage anything other than
5 gender conformity.

6 And I'm wondering how you think that
7 plays into the analysis.

8 MR. RICE: We -- I disagree with that
9 characterization of the law.

10 JUSTICE KAGAN: Well, encourage minors
11 to appreciate their sex and ban treatments that
12 might encourage minors to become disdainful of
13 their sex sounds to me like we want boys to be
14 boys and we want girls to be girls.

15 MR. RICE: If I could --

16 JUSTICE KAGAN: And that's an
17 important purpose behind the law. And I
18 understand that sentiment, but it's a -- it's a
19 fundamentally different sentiment and it's a
20 fundamentally different understanding of what
21 produced this law than the one that you are
22 talking about now.

23 MR. RICE: Your Honor, if I could make
24 a few points. First of all, it sounds like the
25 question is rooted in a potential improper

1 purpose-based argument under an Arlington
2 Heights argument, which, as Chief Judge Sutton
3 pointed out below, this -- that argument was
4 never raised until it got to this Court.

5 JUSTICE KAGAN: Well, I -- I -- I'm
6 less interested in sort of like the legal box to
7 put this in and more interested in, you know,
8 you're --

9 MR. RICE: Sure.

10 JUSTICE KAGAN: -- you're -- you're
11 spending a lot of time talking about what
12 exactly the classification is here. And I think
13 we've talked a good deal about that.

14 But what produced this classification
15 might be relevant to understanding what the
16 classification is about.

17 MR. RICE: Absolutely. And I would
18 love to address --

19 JUSTICE KAGAN: And -- and what seems
20 to have produced this classification is that we
21 want to ban children, treatments that might
22 encourage minors to become disdainful their sex.
23 So we think that there's something fundamentally
24 wrong, fundamentally bad, about youth who are --
25 are trying to transition. And that's the way

1 this purpose seems to me.

2 MR. RICE: If I could try to unpack
3 both of those, Your Honor, because I think both
4 of those, read in context, do not support the
5 narrative that Tennessee wants boys to live as
6 boys and girls to live as girls.

7 So the "appreciate their sex"
8 reference in -- detailed in legislative
9 findings, that is simply the recognition that,
10 given the high desistance rate among minors and
11 the tragic regret of detransitioners, that there
12 is an interest in making sure that minors have
13 enough time to appreciate their sex before
14 undergoing life-altering changes.

15 So I think that -- that has to be
16 viewed in the context of the legislative
17 findings, with -- which both emphasize the
18 detransitioners and the high rate of desistance.

19 With respect to become disdainful of
20 their sex, the -- the challengers have never
21 explained why it would be problematic to prevent
22 interventions that could affirmatively cause
23 minors to become disdainful of their sex and
24 thus at issue for psychiatric conditions. And,
25 in fact, there are multiple studies, I would

1 point to this Court, JA 400, where minors --
2 actually their mental health and suicidality got
3 worse after taking these interventions.

4 Now, my friends on the other side may
5 disagree with that research and that assessment
6 of whether -- the findings of that study, but
7 the legislature specifically noted those
8 studies. So I think that statement was rooted
9 in the notion that actually this is causing
10 affirmative harm to minors who are undergoing
11 the interventions.

12 And that's why they were saying we
13 don't want these interventions that will cause
14 minors to become disdainful of their sex.

15 JUSTICE KAVANAUGH: At a --

16 JUSTICE KAGAN: Go ahead.

17 JUSTICE KAVANAUGH: You go ahead.

18 JUSTICE KAGAN: No, go ahead.

19 (Laughter.)

20 JUSTICE KAGAN: No, go ahead. I'll be
21 back.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 (Laughter.)

25 JUSTICE KAVANAUGH: At a -- at a big

1 picture level, I think the argument on the other
2 side, putting aside some of the details, is why
3 not trust parents, rather than the state,
4 particularly in a situation as General Prelogar
5 said where there's not the kind of direct harm
6 to third parties that you might see in other
7 context like sports.

8 MR. RICE: Yes, Your Honor. So as my
9 friends recognize, the parental rights question
10 is not before this Court. And we --

11 JUSTICE KAVANAUGH: She explained how
12 it informs, so just take the question --

13 MR. RICE: Sure.

14 JUSTICE KAVANAUGH: -- as best you
15 can.

16 MR. RICE: Yeah. I think our position
17 is that there are certain times in medicine,
18 history has shown, where the states in their
19 traditional role as regulators have -- have had
20 to intervene. And that's not because -- of
21 course the parents are trying to do the best
22 they can and get the best treatment for -- for
23 their kids, but we've had multiple instances in
24 somewhat recent history where we have stuff like
25 lobotomy, eugenics, that had wide -- widespread

1 acceptance among the medical community, and the
2 state had to intervene as a regulator to protect
3 the children.

4 JUSTICE BARRETT: Mr. Rice, just to
5 let you kind of finish what you started to say
6 to Justice Kavanaugh, you agree that the
7 parental rights question is not before the
8 Court, so it would be open to parents to
9 continue to press that point in other cases?

10 MR. RICE: We agree. And we think
11 Chief Judge Sutton got it right, but we agree.

12 JUSTICE JACKSON: Can I just ask you
13 about, I don't understand at all the
14 similarly-situated argument that you make. And
15 I hope that you can help me, because I don't
16 know how you can say both that girls and boys
17 are not similarly situated at step 1, when this
18 law is being evaluated, and it's not making a
19 sex-based classification.

20 It seems to me that recognizing their
21 lack of similarity, as you do, in making the
22 argument is making a sex-based classification.
23 So --

24 MR. RICE: Your Honor, I think our
25 position is that if you're in the point where

1 we're treating giving testosterone to a boy with
2 a biological deficiency as the same thing as
3 giving testosterone to a biological -- healthy
4 biological girl who wants to transition, then
5 there has to be some threshold inquiry that
6 recognizes the biological differences between
7 those two.

8 JUSTICE JACKSON: Right. But when
9 you're doing that, you're making a sex-based
10 classification. The very argument carries with
11 it the characterization that we're trying to
12 identify here.

13 You start by saying it's different to
14 treat a boy who's using this medication for a
15 particular reason from a girl who's -- okay, so
16 that's a sex-based classification. Haven't we
17 dealt with step 1, now we should be going on to
18 step 2, intermediate scrutiny applies by -- by
19 the terms of what you're arguing.

20 MR. RICE: I -- I don't think that we
21 agree that we've checked the box at step 1,
22 because there is no medical treatment that boys
23 can receive that girls cannot, so we disagree
24 with the notion --

25 JUSTICE JACKSON: Didn't we already

1 dispose of that kind of reasoning with our equal
2 protection cases that looked at things like
3 interracial marriage, where we said even though
4 it applies to both, it's still making a racial
5 classification? Even though whites can't marry
6 -- marry non-whites and non-whites can't marry
7 whites in the statute, right, so both are
8 equally disadvantaged, we said, that's not an
9 argument for why you shouldn't have a heightened
10 scrutiny or why the statute is not making a
11 race-based classification.

12 MR. RICE: And that's not the argument
13 that we're making, Your Honor.

14 JUSTICE JACKSON: Okay. So what is
15 your argument?

16 MR. RICE: We are not arguing that you
17 can discriminate and draw lines so long as you
18 do so both against boys and against girls.
19 We're arguing there is no sex-based line. If
20 you're a boy and you go in to get puberty
21 blockers, you can get the puberty blockers if
22 you're going to use them for precocious puberty.
23 You cannot get the puberty blockers if you're
24 going to use them to transition. That is not a
25 sex-based line. That is a purpose-based line.

1 So our fundamental point here is not
2 that you can discriminate against both sexes --
3 both sexes an equal agree. Our fundamental
4 point is there is no sex-based line. And the
5 only way to get to is a sex-based line is by
6 equating fundamental -- fundamentally different
7 treatments that defy medical reality and defy --
8 defy how the statute itself sets out what is a
9 treatment.

10 JUSTICE JACKSON: And the treatments
11 are different because of the biological sex of
12 the person, right? I mean, that's what you've
13 said. The purposes are different because of the
14 biological sex and why you're going into get
15 them?

16 MR. RICE: Not at all. I mean, with
17 puberty blockers, the purpose -- nothing turns
18 on -- on sex. Take puberty blockers. There's
19 nothing that turns on sex as to whether there's
20 a sex-based classification there. Everything
21 depends on what is the reason that you are using
22 those puberty blockers for.

23 I am happy to take more questions, if
24 the Court has them.

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas?

2 JUSTICE THOMAS: A number of times you
3 have mentioned off-label uses of these hormones.
4 What are some of the other off-label uses that
5 are not legal in Tennessee?

6 MR. RICE: So, for example, Your
7 Honor, testosterone. We have a separate law
8 that prohibits the use of testosterone for
9 hormonal manipulation intended to increase
10 muscle mass strength or weight without medical
11 necessity.

12 We have -- like every state, we
13 regulate medicine and we regulate the use of
14 drugs. You cannot use drugs in the state of
15 Tennessee, if it's not for a legitimate viable
16 medical purpose.

17 Here through this law, all that we
18 have done is make clear that these treatments,
19 which are irreversible often, have significant
20 effects on minors and often leave them with
21 bodies that are infertile and -- and permanently
22 damaged, that you have to wait until you turn 18
23 to receive those type of treatments.

24 JUSTICE THOMAS: A number of times
25 you've tried to say that what the

1 classification -- that the state of Tennessee
2 has advanced in this legislation. Would you
3 spend a few minutes on that?

4 MR. RICE: Yes, Your Honor. So,
5 again, we think that our law fundamentally draws
6 a distinction based on medical purpose. I'll go
7 back to puberty blockers.

8 If a boy wants puberty blocker, the
9 answer is yes, if you have precocious puberty;
10 no, if you're doing this to transition. If a
11 girl wants puberty blockers, the answer is yes,
12 if you have precocious puberty; no, if you're
13 doing this to transition.

14 That -- that is fundamentally a
15 different treatment and what is -- what is
16 dictating under this law is the use for which
17 you are putting the drug. And just to kind of
18 build out on -- on the notion that these are not
19 the same treatments, we talked about earlier
20 testosterone.

21 If you give it to a biological boy, it
22 allows the boy to develop a normal body and
23 healthy body; whereas providing it to a girl
24 causes a physical condition, hyperandrogenism.
25 And that -- that results in clitoromegaly,

1 atrophy of the lining of the uterus, blood cell
2 disorders, increased risk of heart attack.

3 So the notion that the risks are the
4 same when you give testosterone to a boy as when
5 you give it to a girl are simply not borne out
6 by medical reality.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 Justice Sotomayor?

9 Justice Kagan? No?

10 Justice Gorsuch?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: Just one

13 clarification. It's an obvious point, but I
14 want to make sure you agree with it, which is
15 you're not arguing that the Constitution takes
16 sides on this question, you, as I understand it,
17 you are arguing that each state can make its own
18 choice on this question.

19 So from your perspective, as I
20 understand it, it's perfectly fine for a state
21 to make a different choice, as many states have,
22 than Tennessee did and to allow these
23 treatments --

24 MR. RICE: Yes.

25 JUSTICE KAVANAUGH: -- correct?

1 MR. RICE: Yes, Your Honor, that's
2 correct. And we think that's because of what
3 Your Honor has pointed out, that no matter how
4 you draw -- drawn these lines, there are risks
5 and benefits -- potential benefits and -- and
6 harms to people on both sides.

7 And the question of how to balance
8 those harms is not a question for the judiciary.
9 It's a question for the legislature.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: Can states make a
14 different choice if doing so means that a
15 state's law operates to treat its citizens
16 differently on the basis of -- name the suspect
17 classification? I thought that was the work of
18 the Constitution and the Equal Protection
19 Clause?

20 MR. RICE: Your Honor, we don't think
21 that it draws any lines based off any --

22 JUSTICE JACKSON: No, I understand.
23 I'm not talking about this law. I'm going back
24 to Justice Kavanaugh's suggestion that the
25 Constitution doesn't play a role if the state is

1 making a policy choice regarding issues, such as
2 these.

3 And I'm -- I guess I'm still seeing a
4 role for the Constitution in circumstances in
5 which the claim that is being made is that the
6 state's choices are implicating the equal
7 protection rights of its citizens.

8 MR. RICE: Your Honor, I think the --
9 I think the point -- I don't want to misstate
10 the point, but I think the point is that the
11 Constitution is neutral in the sense that it
12 does not provide heightened protection based on
13 any suspect classification; and, thus, rational
14 basis review applies in the presumption of
15 legislative validity and the presumption that
16 these types of policy choices are best left to
17 the democratic process. I -- I think that is
18 exactly what -- the correct way to think about
19 this case.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Rebuttal, General Prelogar?
24
25

1 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR

2 ON BEHALF OF THE PETITIONER

3 GENERAL PRELOGAR: Thank you,

4 Mr. Chief Justice.

5 Two quick clarifying points. I want
6 to make clear that Tennessee here is not
7 regulating based on off-label use. Off-label
8 use is extremely common in pediatrics, and we
9 pointed to a number of uses of these medications
10 on page 40 of our brief, the very same
11 medications that likewise are off-label use. If
12 there are problems with safety and -- and
13 effectiveness, then that would not become the
14 standard of care, and there are self-regulatory
15 measures to address that issue.

16 Justice Kavanaugh, you said this might
17 be a space where each state can make its own
18 choice, but I think it's important to recognize
19 that my friend's arguments would equally apply
20 to a nationwide ban if this were enacted by
21 Congress. And so I think that the Court should
22 keep that in mind when thinking about the level
23 of scrutiny here.

24 There were a lot of questions about
25 how to take account of disputed medical evidence

1 when there might be some uncertainty. And I
2 want to make a few points. As my friend
3 acknowledged, that doesn't go to the level of
4 scrutiny. So that doesn't mean that you should
5 ignore a sex classification when one exists in
6 the statute. But at the point of applying
7 heightened scrutiny, the Court can take context
8 into account. And we're not asking courts to
9 step in here and say we want to figure out as a
10 matter of policy exactly what the right approach
11 is. But you can ask the familiar judicial
12 questions like does the state actually have any
13 evidence to support its claims that there's a
14 harm to adolescent health? And is this law
15 severely over- and under-inclusive?

16 And if the Court conducts the analysis
17 here in the first instance, this law doesn't
18 look anything like a typical medical regulation
19 to protect adolescent health. That would look
20 like the West Virginia law where you're
21 tailoring it but still leaving some possibility
22 for care when it can have enormous benefits.
23 And the reason it doesn't look like a typical
24 medical regulation is because the -- the
25 legislature was doing something different in

1 trying to get minors to appreciate their sex and
2 not become disdainful. That's not a
3 medical-based justification, but I think it
4 shows exactly why the state drew the lines where
5 it did.

6 Finally, I think the Court should
7 think about the real-world consequences of laws
8 like SB1. Consider its effects on Ryan Roe. As
9 Justice Sotomayor noted, Ryan's gender dysphoria
10 was so severe that he was throwing up before
11 school every day. He thought about going mute
12 because his voice caused him so much distress.
13 And Ryan has told the courts that getting these
14 medications after a careful consultation process
15 with his doctors and his parents has saved his
16 life. His parents say he's now thriving. But
17 Tennessee has come in and categorically cut off
18 access to Ryan's care, and they say this is
19 about protecting adolescent health, but this law
20 harms Ryan's health and the health of all other
21 transgender adolescents for whom these
22 medications are a necessity.

23 And the state says it doesn't even
24 want the courts to take a look at whether this
25 protects adolescent health. But the reason Ryan

1 can't have these medications is because of his
2 birth sex. And a sex-based line like that can't
3 stand on rational basis review.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 The case is submitted.

8 (Whereupon, 12:28 p.m., the case was
9 submitted.)

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