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IN THE SUPREME COURT OF THE UNITED STATES
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UNITED STATES,)
Petitioner,)
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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9 Tennessee; on behalf of Respondents Jonathan
10 Skrmetti, et al.
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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 --

21 JUSTICE THOMAS: Well, I'm more --

22 GENERAL PRELOGAR: -- who was taking
23 those medications.

24 JUSTICE THOMAS: -- interested in
25 whether or not there is a difference in

1 testosterone and its reaction in a male as
2 opposed to in a female --

3 GENERAL PRELOGAR: So --

4 JUSTICE THOMAS: -- and vice versa for
5 estrogen.

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

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

25 JUSTICE JACKSON: General --

1 CHIEF JUSTICE ROBERTS: Counsel --

2 JUSTICE JACKSON: -- can I just --

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

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

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

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

25 GENERAL PRELOGAR: So let me respond

1 to that concern with a couple of different
2 points, Mr. Chief Justice.

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

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

1 wouldn't provide a basis to displace the state
2 legislatures altogether from weighing this
3 evidence.

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

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

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

21 GENERAL PRELOGAR: And I think the
22 Court could recognize that that concern can be
23 accommodated under intermediate scrutiny. It is
24 not like strict scrutiny, where states are
25 automatically prohibited from drawing lines

1 based on sex. They just have to come forward
2 and demonstrate that they do have an important
3 state interest.

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

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

25 So I don't think we're asking the

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

11 JUSTICE ALITO: General, can I ask you
12 a question about the state of medical evidence
13 at the present time?

14 In your petition, you made a sweeping
15 statement, which I will quote: "Overwhelming
16 evidence establishes that the appropriate
17 gender-affirming treatment with puberty blockers
18 and hormones directly and substantially improves
19 the physical, psychological well-being of
20 transgender adolescents with gender dysphoria."
21 That was in November 2023.

22 Now, even before then, the Swedish
23 National Board of Health and Welfare wrote the
24 following: They currently assess "that the
25 risks of puberty blockers and gender-affirming

1 treatment are likely to outweigh the expected
2 benefits of these treatments," which is directly
3 contrary to the sweeping statement in your
4 petition.

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

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

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

25 But I stand by that there is a

1 consensus that these treatments can be medically
2 necessary for some adolescents, and that's true
3 no matter what source you look at. You
4 mentioned both the Cass report and Sweden --

5 JUSTICE ALITO: Well, can be --

6 GENERAL PRELOGAR: -- but neither of
7 those jurisdictions --

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

16 GENERAL PRELOGAR: I --

17 JUSTICE ALITO: Do you dispute that?

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

22 The Cass report says at multiple
23 points that this care can be medically indicated
24 for some transgender adolescents. And, of
25 course, it's true that they have called for a

1 more individualized approach to these issues and
2 have questioned whether it should be readily
3 applied to all adolescents as a matter of
4 course.

5 JUSTICE ALITO: Is it not --

6 GENERAL PRELOGAR: But what that
7 supports --

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

10 GENERAL PRELOGAR: Yeah.

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

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

1 medications are necessary for a particular
2 patient, they will be provided.

3 And that is a --

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

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

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

25 If the Court wants to go ahead and

1 look at what's happening in Europe, the U.K. has
2 not categorically banned this care. Sweden,
3 Finland, and Norway, the other jurisdictions
4 that my friends point to, have not banned this
5 care, and I think that's because of the
6 recognition that this care can provide critical,
7 sometimes life-saving, benefits for individuals
8 with severe gender dysphoria.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas, anything further?

12 Justice Alito?

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

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

1 like what Tennessee is doing here, which is to
2 categorically ban it no matter the need.

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

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

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

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

1 same way and it works exactly the same way.

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

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

14 And this is not a question of
15 statutory interpretation. It's a question of
16 the application of the Equal Protection Clause
17 of the Fourteenth Amendment, and the Court has
18 addressed the -- the question of how an equal
19 protection claim should be analyzed when the law
20 in question treats a medical condition or
21 procedure differently based on a characteristic
22 that is associated with just one sex. And that
23 was *Geduldig* in 1974, reaffirmed in *Dobbs* in
24 2022.

25 And neither *Bostock* nor *Dobbs* saw any

1 connection between the Bostock reasoning and the
2 Geduldig/Dobbs standard. Bostock did not
3 mention Geduldig, and Dobbs did not mention
4 Bostock. So why should we -- we look to this
5 Bostock-type reasoning here?

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

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

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

1 You asked why this case isn't
2 controlled by *Geduldig* and *Dobbs*. The Court's
3 reasoning there was that when you have a statute
4 that doesn't classify based on sex on its face
5 at all, the fact that the medical condition
6 might be something that only one sex can
7 experience isn't a basis to necessarily say
8 that's facial sex discrimination.

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

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

25 JUSTICE ALITO: Well, I -- I -- I'm

1 sure -- I'm not sure that's anything more than a
2 play on words.

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

11 Would you say the same thing about
12 that?

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

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

23 GENERAL PRELOGAR: I see. So, if
24 you're hypothesizing a statute where, in
25 essence, the legislature is trying to get at the

1 idea of prohibiting access to these medications
2 for gender dysphoria reasons or otherwise, then
3 maybe you would apply an Arlington Heights type
4 of analysis.

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

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

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

25 One could make the same argument in

1 Geduldig that you've made here. A man cannot --
2 which concerned whether a pregnant woman was
3 entitled to disability benefits for -- for time
4 missed at work when a man would be entitled to
5 disability -- to benefits for time missed at
6 work.

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

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

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

1 GENERAL PRELOGAR: And that's because
2 the Court said that there was no facial sex
3 classification insofar as using pregnancy does
4 not automatically mean that that's a proxy for
5 sex.

6 But, here, there's a facial sex
7 classification. No one can take these
8 medications if it would be inconsistent with
9 their sex. And that's imposing on the face of
10 the statute two parallel rules on classes of
11 people according to their sex: all adolescent
12 males who want to take these medications to
13 feminize their bodies and all adolescent females
14 who want to take these medications for
15 masculinizing purposes. That's a facial sex
16 classification through and through --

17 JUSTICE ALITO: All right.

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

20 JUSTICE ALITO: Thank you, General.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 JUSTICE SOTOMAYOR: General, just to
24 unpack some of this argument, your point, I
25 think, is very clear that Bostock is pertinent

1 only to the extent that, whether it's Title VII
2 or the Equal Protection Clause, the first
3 question is, is the legislature using sex as a
4 classification, correct?

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

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

23 GENERAL PRELOGAR: Exactly. And I
24 think that's an important --

25 JUSTICE SOTOMAYOR: And, here, under

1 the Equal Protection Clause, we recognize there
2 are inherent differences between the sexes.

3 GENERAL PRELOGAR: And that can
4 sometimes provide a legitimate basis for
5 classification.

6 JUSTICE SOTOMAYOR: That's the point,
7 isn't it?

8 GENERAL PRELOGAR: So you're exactly
9 right. The standards for liability are
10 different.

11 JUSTICE SOTOMAYOR: Now --

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

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

21 GENERAL PRELOGAR: That's right.

22 JUSTICE SOTOMAYOR: And that is
23 recognized by all the European countries,
24 correct?

25 GENERAL PRELOGAR: Yes. I think it's

1 reflected in the laws of those countries, which
2 have not outright --

3 JUSTICE SOTOMAYOR: All right.

4 GENERAL PRELOGAR: -- banned the care.

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

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

21 GENERAL PRELOGAR: Yes. I think the
22 evidence is uniform on that, whether you look at
23 the standard of care, whether you look at the
24 view of every major American medical association
25 that has taken a position, many of whom are

1 amici here. It's reflected in the clinical
2 practice. The nation's leading children's
3 hospitals for decades have been providing this
4 care.

5 JUSTICE SOTOMAYOR: Some -- some
6 children suffer incredibly with gender
7 dysphoria, don't they?

8 GENERAL PRELOGAR: Yes. It's a very
9 serious medical condition.

10 JUSTICE SOTOMAYOR: I think some
11 attempt suicide?

12 GENERAL PRELOGAR: Yes. The rates of
13 suicide are -- are striking --

14 JUSTICE SOTOMAYOR: Some --

15 GENERAL PRELOGAR: -- and it's a
16 vulnerable population.

17 JUSTICE SOTOMAYOR: Drug addiction is
18 very high among some of these children because
19 of their distress, correct?

20 GENERAL PRELOGAR: It is a serious
21 condition, yes.

22 JUSTICE SOTOMAYOR: One of the
23 Petitioners in this case described throwing up
24 every day, going almost mute because of his --
25 because of their inability to speak in a voice

1 that they could live with.

2 These are physically challenging
3 situations as well too, correct?

4 GENERAL PRELOGAR: Yes, that's
5 correct.

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

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

25 And the problem with Tennessee's law

1 here is not that it's just a little bit
2 overinclusive or a little bit underinclusive but
3 that it's a sweeping categorical ban where the
4 legislature didn't even take into account the --
5 the significant health benefits that can come
6 from providing gender-affirming care, including
7 reduced suicidal ideation and suicide attempts,
8 and where the state leaves unregulated entirely
9 access to these treatments in all other
10 pediatric contexts where there's a similar
11 risk/benefit trade-off.

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

23 JUSTICE SOTOMAYOR: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: General, I wanted to

1 get your thoughts first on why one should think
2 of this as primarily a sex-based classification,
3 because there's another way of looking at a law
4 like this, maybe a more obvious way, which is
5 that it's a classification based on transgender
6 status. In other words, there are trans young
7 people on one side of the line and cis young
8 people on the other side of the line, both male
9 and female on both sides of the line.

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

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

1 scrutiny in its own right.

2 But I don't think it's unduly formal
3 to look at this as a sex classification, and the
4 reason for that is because of the first
5 operative provision of SB1, which says: You
6 can't have these medications to live or identify
7 in a manner inconsistent with your sex.

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

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

1 And I think that adds on an additional
2 layer of sex classification here insofar as it
3 shows that part of what the State was attempting
4 to do is ensure that adolescents conform their
5 bodies to the State's physical expectations of
6 how males and females should appear. It's not
7 at all surprising to think of that as a sex
8 classification.

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

18 GENERAL PRELOGAR: So I think those
19 aren't exclusive. I think they're reinforcing
20 here. And I guess what I would say is I think
21 this is an even easier sex classification than
22 maybe the one the Court confronted in Bostock or
23 the one the Court would confront if the statute
24 simply discriminated on the basis of transgender
25 status because, here, the legislature actually

1 put the sex classification into the face of the
2 law and made the first-order restriction here
3 one that prohibits inconsistency with sex.

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

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

23 GENERAL PRELOGAR: Right.

24 JUSTICE KAGAN: And -- and you say
25 that that's a kind of underinclusion problem.

1 And, you know, it strikes me that on formal
2 equal protection analysis, it is, unless the
3 State can come forward with some piece of
4 medical evidence that says that the risks are
5 greater in the one area than in the other area,
6 which you say Tennessee has not done.

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

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

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

1 the states in this regard.

2 One of the problems with the State's
3 approach here is that although it has targeted
4 this gender-affirming care for disparate
5 treatment on the basis of sex, as we say, it has
6 leaved these exact same medications entirely
7 unregulated for all other purposes and also
8 turned its back on how it handles the
9 risk/benefit calculus with respect to all other
10 pediatric treatments.

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

24 West Virginia requires that two
25 different doctors diagnose the gender dysphoria

1 and find that it's severe and that the treatment
2 is medically necessary to guard against the risk
3 of self-harm.

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

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

15 JUSTICE KAGAN: Thank you, General.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 Justice Kavanaugh?

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

23 You've put forth forceful policy
24 arguments to allow these medical treatments, and
25 Justice Sotomayor's questions elaborated on --

1 on that. But the 20-plus states on the other
2 side put forth very forceful arguments against
3 allowing these medical treatments for minors.

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

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

15 GENERAL PRELOGAR: Well, I do think
16 that the Constitution takes a position that
17 individuals are entitled to equal protection of
18 the law. And I totally understand the force of
19 your intuition that states need space to
20 regulate and to try to take into account
21 concerns like adolescent health. We're not
22 denying that that's an important interest here.

23 But, when you look at how this law
24 actually operates, what it is doing is denying
25 individual plaintiffs the ability to access

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

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

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

23 But the Court has made clear that
24 that's an intermediate standard, and if the
25 State can come forward with an important

1 interest and substantiate that it needed to draw
2 those sex-based lines to substantially serve the
3 interest, that's going to be okay. And --

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

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

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

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

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

1 those treatments for the non-prohibited purpose,
2 which, again, is when it's consistent with sex.

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

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

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

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 -- the
8 harms 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
8 understand that that could be a hard trade-off,
9 but it's not unique to this care. There are
10 other treatments for adolescents that likewise
11 affect fertility, including some of those that
12 SB1 expressly permits, like on intersex
13 individuals, who often have surgeries as infants
14 that might 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 detransition? 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 detransition or regret this care, but all of the
20 available evidence shows that it's a very small
21 number.

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

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

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

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

1 I think that's entirely distinct from
2 some of the concerns you've identified about
3 what justifications the State has.

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

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

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

25 And I want to ask in particular about

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

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

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

1 governmental interest and does it need to draw
2 the lines to exclude --

3 JUSTICE KAVANAUGH: If we -- if we --

4 GENERAL PRELOGAR: -- transgender
5 people.

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

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

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

1 the -- the separate questions that are arising
2 there, the Court could very well do so.

3 And we would have no objection --

4 JUSTICE KAVANAUGH: Do you think --

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

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

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

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

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

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: Good morning,
20 General.

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

1 the -- the sex classification or the expectation
2 that one will conform to one's, you know,
3 biological or gender assigned at birth.

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

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

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

1 so because his birth sex was female.

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

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

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

23 GENERAL PRELOGAR: Yeah. So that
24 would not be a facial sex classification. And,
25 there, I do think that you would have to apply

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

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

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

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

24 You might say: Well, that's not just
25 singling out one religion or one race or one sex

1 for disparate treatment. But I think it
2 actually increases the number of classifications
3 when you're applying parallel restrictive rules
4 on the basis of a protected characteristic
5 across the board.

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

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

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

1 discrimination against transgender people,
2 right?

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

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

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

1 private actors.

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

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

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

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

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

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

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

1 suspect classes, in part because those are
2 judgments that are pretty hard for courts to
3 make.

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

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

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

23 Transgender individuals are a discrete
24 minority. I think there's no dispute that they
25 are being subject to a wave of legislation

1 across the states today, and -- and I think that
2 this is the kind of circumstance where the Court
3 could rightly recognize that heightened scrutiny
4 should apply.

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

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

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

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

1 and their children.

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

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

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

20 JUSTICE BARRETT: Yeah. Thanks.

21 CHIEF JUSTICE ROBERTS: Justice
22 Jackson?

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

1 the risks or benefits or the policies that
2 justify it but how we characterize it.

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

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

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

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

8 JUSTICE JACKSON: Right.

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

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

24 GENERAL PRELOGAR: Yes. So the -- the
25 way that the sex-based classification is working

1 here is that from the standpoint of any
2 individual who wants to take these medications,
3 their sex determines whether SB1 applies.

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

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

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

25 They, I think, can get that

1 medication.

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

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

9 GENERAL PRELOGAR: That's correct.

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

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

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

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

1 classification because sex only has to be one
2 but-for cause of disparate treatment.

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

12 JUSTICE JACKSON: Right. That's --

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

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

17 GENERAL PRELOGAR: That all --
18 exactly.

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

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

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

6 JUSTICE JACKSON: Yeah.

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

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

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

23 GENERAL PRELOGAR: Yes. And I think
24 the Court has recognized that the Equal
25 Protection Clause was -- was intended to force

1 some changes in society and get us to think more
2 closely about the way that people were being
3 classified, including when that was based on
4 overbroad generalizations of how we expect them
5 to -- to live and order their affairs.

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

8 JUSTICE JACKSON: Well --

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

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

23 But, you know, as I read the statute
24 here, the -- excuse me, the case here, you know,
25 the Court starts off by saying that Virginia is

1 now one of 16 states which prohibit and punish
2 marriages on the basis of racial
3 classifications.

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

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

24 But I think one other way to look at
25 this, Justice Jackson, is that, to me, it would

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

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

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Strangio.

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

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

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

1 and identify as a girl if her birth sex is
2 female but not male.

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

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

18 I welcome the Court's questions.

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

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

25 JUSTICE THOMAS: So, in practical

1 terms, what would it be? What would you get?
2 Wouldn't you get the -- the -- you would get
3 different treatment based on sex?

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

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

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

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

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

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

24 MR. STRANGIO: I don't dispute,
25 Mr. Chief Justice, that at the application of --

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you.

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

1 be intermediate or strict, require courts to
2 make the judgment, the means-ends calculation,
3 in this kind of medical context?

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

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

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

22 But, when they do so in ways that
23 classifies based on suspect lines or infringes
24 constitutional rights, then heightened scrutiny
25 remains the -- the standard that the courts

1 apply to ensure that the state is advancing an
2 important governmental interest.

3 CHIEF JUSTICE ROBERTS: So you --

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

6 CHIEF JUSTICE ROBERTS: I'm sorry.

7 JUSTICE BARRETT: Can I just --

8 CHIEF JUSTICE ROBERTS: Sure.

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

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

17 Do you agree?

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

24 It is not the role of the Court
25 necessarily to say definitively these risks

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

8 That type of tailoring inquiry, I
9 believe, is precisely the -- the role of the --
10 the Court.

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

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

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

1 state interest was different than just a pure
2 medical issue, correct?

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

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

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

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

23 And when it concerns underlying
24 questions of medicine or science, the -- the --
25 the -- the judges and just -- and just -- judges

1 in the lower courts have every ability to assess
2 the testimony before them, as the district court
3 did here.

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

12 JUSTICE SOTOMAYOR: I have --

13 JUSTICE ALITO: But -- but --

14 CHIEF JUSTICE ROBERTS: Counsel --

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

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

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

1 who receive these treatments expressing regret
2 and the 85 percent?

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

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

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

1 And I think what's important here --
2 and the Solicitor General mentioned this -- is
3 that is -- that is exponentially lower than the
4 rates of regret of treatments that are expressly
5 permitted by SB1.

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

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

11 So the Solicitor General, on pages
12 4 -- on page 48 of her brief, lists a lot of
13 things that -- she says: Well, if Tennessee
14 were really concerned about the health and
15 welfare of these minors, it would have taken
16 into account a variety of things.

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

24 So she -- she mentions things like
25 two-parent -- two-parent consent or counseling,

1 readiness criteria, age recommendations,
2 licensing, certification, or reporting
3 requirements for physicians, and other
4 guardrails which are not specified.

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

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

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

23 There has been no litigation over --
24 over West Virginia's law, and if there were, as
25 if there were in -- in other contexts, the

1 question would remain whether or not the state
2 could make out the showing that this is being
3 treated in such a substantially different way
4 than -- than other forms of medical care.

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

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

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

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

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

25 MR. STRANGIO: I do -- I do think it

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

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

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

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

24 However, there are multiple studies,
25 long-term, longitudinal studies that do show

1 that there is a reduction in -- in suicidality,
2 which I -- I -- I think is a -- is a positive
3 outcome to this treatment.

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Sure.

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

1 That is distinguishing and -- and discrete.

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

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

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

13 MR. STRANGIO: I -- I think --

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

16 MR. STRANGIO: Yes.

17 (Laughter.)

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

20 (Laughter.)

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

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

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

14 (Laughter.)

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

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

23 And if this is similar to that, I
24 think that would be very troubling to say that
25 in such a evolving situation, we are going to

1 decide what the right approaches are. I mean,
2 you said at some point that the -- the Tennessee
3 court or -- or not the Tennessee court -- that
4 this Court is just as qualified as the -- as
5 Tennessee to make the decisions here.

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

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

23 MR. STRANGIO: Well --

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

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

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

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

1 treatment for minors or for adults, that in all
2 other contexts, what Tennessee does is recognize
3 that there are risks and there are benefits.

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

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

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

20 And what would that be in this case?

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

23 I think that what the birth males can
24 do that birth females cannot do is receive
25 medical treat -- treatment to -- to live and

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

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

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

25 And I also think, under this Court's

1 precedents for determining whether something is
2 a suspect or quasi-suspect classification, a
3 distinguishing characteristic is sufficient.

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

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

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

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

1 JUSTICE ALITO: So it's not an
2 immutable characteristic, is it?

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

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

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

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

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

9 How would we distinguish that?

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

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

24 JUSTICE ALITO: Well, I understand
25 that, but would you dispute the proposition that

1 transgender status is a very broad category?
2 Doesn't the American Psychological Society --
3 Association say it's an umbrella term?

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

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

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

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

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

1 MR. STRANGIO: That's correct, Your
2 Honor.

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

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

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

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

25 MR. STRANGIO: Yes.

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

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

16 JUSTICE SOTOMAYOR: Got it. Thank
17 you.

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

21 JUSTICE KAVANAUGH: Two -- two basic
22 questions. So, whether we apply rational basis
23 or intermediate scrutiny, either way, you end up
24 looking at the State's justification, and they
25 are articulating a health and safety

1 justification, so it's not simply morals
2 legislation, as they've described it. It's
3 health and safety justification.

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

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

21 And then for us to come in -- and this
22 is repeating what I said earlier, but I want
23 your reaction to it -- for us to come in and to
24 choose one side of that, knowing that either way
25 people are going to be harmed, this is --

1 there's no kind of perfect way out, at least as
2 I've read the briefs here, where everyone
3 benefits and no one is harmed, right?

4 The -- the -- the -- the difficulty of
5 the issue is some people are going to be harmed.

6 MR. STRANGIO: Well --

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

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

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

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

19 MR. STRANGIO: Okay.

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

1 discussion as I see it. So just to get you
2 thinking about that too.

3 Go ahead. Have at it.

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

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

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

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

1 who may come to regret this -- this treatment,
2 which are much, much smaller than those who
3 benefit and -- and find it medically necessary,
4 something like West Virginia did.

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

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE KAVANAUGH: And then, on the
25 sports question, I want to get your reaction as

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

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

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

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

1 Could you think of others? Are
2 there --

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

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

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

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

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

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

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

25 And you've said here at the podium

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

8 Am I -- is that -- does that accord --

9 MR. STRANGIO: Yes.

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

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

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

1 is saying that they're doing this or the
2 scientific basis for it, that we're looking at
3 something else when we're trying to determine is
4 a classification being made, right?

5 MR. STRANGIO: Yes.

6 JUSTICE JACKSON: And I guess my real
7 concern, and I -- maybe I'll just ask you to
8 react to my Loving parallel because I'm getting
9 kind of nervous -- is that in Loving, those same
10 kinds of scientific arguments were made.

11 So I'm -- I'm reading here where the
12 Court says: "The argument is that if the Equal
13 Protection Clause does not outlaw miscegenation
14 statutes because of their reliance on racial
15 classifications, the question of
16 constitutionality would thus become whether
17 there was any rational basis for a state to
18 treat interracial marriages differently from
19 other marriages. On this question, the State
20 argues the scientific evidence is substantially
21 in doubt and, consequently, the Court should
22 defer to the wisdom of the state legislature in
23 adopting its policy of discouraging interracial
24 marriages."

25 And so, for me, this kind of idea that

1 the way we look at it is not, first, are you
2 drawing these classifications and then, State,
3 give us your evidence so we can make sure that
4 there's a proper fit. If, instead, we're just
5 sort of doing what the state is encouraging here
6 in Loving, where you just sort of say, well,
7 there are lots of good reasons for this policy
8 and who are we as the Court to say otherwise,
9 I'm worried that we're undermining the
10 foundations of some of our bedrock equal
11 protection cases.

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

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

1 justifies the sex-based differential in the law,
2 that would undermine decades of this Court's
3 precedent.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Rice.

8 ORAL ARGUMENT OF J. MATTHEW RICE
9 ON BEHALF OF RESPONDENTS JONATHAN SKRMETTI, ET AL.

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

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

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

1 using hormones and puberty blockers to address a
2 physical condition is far different from using
3 it to address psychological distress associated
4 with one's body.

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

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

22 I welcome the Court's questions.

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

1 What's your reaction to that?

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

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

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

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

1 person of one sex from another sex from
2 receiving that benefit?

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

13 MR. RICE: We don't agree.

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

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

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

24 JUSTICE SOTOMAYOR: What you're saying
25 is you're -- you're still depending on sex to

1 identify who can get it and who can't.

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

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

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

15 JUSTICE SOTOMAYOR: I -- I know --

16 MR. RICE: It needs to know --

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

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

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

1 being drawn because --

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

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

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

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

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

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

20 JUSTICE JACKSON: Really?

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

25 JUSTICE JACKSON: No, no, no. But the

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

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

8 MR. RICE: Well --

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

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

14 JUSTICE JACKSON: Yes.

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

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

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

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

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

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

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

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

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

18 MR. RICE: Yeah.

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

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

1 JUSTICE JACKSON: No, that's a
2 medical -- the -- the medical purpose --

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

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

7 MR. RICE: Let me try to rephrase.

8 JUSTICE JACKSON: Yes.

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

11 JUSTICE JACKSON: But --

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

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

17 MR. RICE: In another statute.

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

24 The boy comes in, he asks for a
25 hormone treatment to deepen his voice to affirm

1 his masculinity. Can he get the treatment under
2 this statute?

3 MR. RICE: Under this statute, no.
4 But, under Tennessee Code Annotated 63 --

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

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

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

12 MR. DAVIS: Under this statute --

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

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

17 JUSTICE JACKSON: Okay.

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

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

23 Now, looking at this statute, a girl
24 comes in, biologically, and asks for a hormone
25 to deepen her voice in order to affirm the

1 identity that she chooses, which is masculinity.
2 I'm asking you: Would, under this statute, she
3 be precluded from getting that treatment?

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

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

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

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

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

21 The whole thing is imbued with sex. I
22 mean, it's based on sex. You might have reasons
23 for thinking that it's an appropriate
24 regulation, and those reasons should be tested
25 and respect given to them, but it's a dodge to

1 say that this is not based on sex, it's based on
2 medical purpose, when the medical purpose is
3 utterly and entirely about sex.

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

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

17 I -- I actually think my -- my
18 friends' response to -- to Justice Alito's
19 hypothetical regarding puberty blockers is
20 devastating because that law draws no different
21 lines than the law that's drawn in our -- in
22 SB1. It just doesn't use the words
23 "inconsistent with sex."

24 So we use the words "inconsistent with
25 sex" to describe a single prohibited medical

1 purpose. We do not use it to draw lines between
2 males and females.

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

9 MR. RICE: Yes, Your Honor.

10 CHIEF JUSTICE ROBERTS: Is that
11 correct?

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

19 MR. RICE: Yes, Your Honor.

20 CHIEF JUSTICE ROBERTS: Okay. Thank
21 you.

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

25 MR. RICE: Your Honor, we think that

1 if we're assuming a similarly worded statute,
2 that there still would not be a -- a sex- or a
3 transgender-based classification. So we think
4 that --

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

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

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

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

19 And to the extent --

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

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

24 JUSTICE SOTOMAYOR: I thought that
25 that's why we had intermediate scrutiny when

1 there are differences based on sex, to ensure
2 that states were not acting on the basis of
3 prejudice.

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

12 JUSTICE JACKSON: So when --

13 JUSTICE BARRETT: Mr. --

14 JUSTICE SOTOMAYOR: When you're
15 1 percent of the population.

16 JUSTICE JACKSON: Sorry.

17 JUSTICE BARRETT: Mr. --

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

22 MR. RICE: Well, Your Honor --

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

1 for whole centuries.

2 JUSTICE BARRETT: Mr. Rice, I have one
3 factual question and then one legal question.

4 The factual question is the Sixth
5 Circuit mentioned that this is an off-label use
6 that the FDA has not authorized. Is -- is that
7 still true? And is that just for children, or
8 is it for adults too?

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

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

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

1 class for purposes of the Fourteenth Amendment.

2 Do you have a response to that, what
3 we should be thinking about or whether -- do you
4 know the history of de jure discrimination?

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

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

25 So we don't think the Court should --

1 should even open the door for further judicial
2 creation of new quasi-suspect classes.

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

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

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

1 challenge and not a sex-based challenge if you
2 are not actually challenging the sex
3 classification that is at issue.

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

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

15 MR. RICE: Yeah.

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

20 MR. RICE: Your Honor, we think that
21 in a case like Loving, when you look at the
22 individual level, which we agree with our
23 friends on the other side that the protection of
24 the Equal Protection Clause operates at the
25 individual level, that if there is a line that

1 is being drawn based off of race, like in
2 Loving, where you had a white male who could
3 not -- who could not marry an African American
4 female under that law, that is a race-based
5 line. You are creating multiple groups of
6 permissible and impermissible behavior based off
7 of race.

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

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

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

25 MR. RICE: We think it's different

1 because we think, in their use of "inconsistent
2 with sex" in all of these examples that they
3 have in the briefing, those actually do create
4 separate categories of conduct that is
5 permissible either based on sex or based on
6 race.

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

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

22 MR. RICE: I -- I don't think it
23 operates on -- on the body in the same way.
24 Take testosterone. If you give a boy with a
25 deficiency testosterone because he has

1 constitutional delay of puberty, that allows him
2 to go through the -- the -- and develop the
3 reproductive organs associated with being a
4 male. If you give it to a girl, it renders the
5 girl infertile. So we have 8- to 12-year-olds
6 being asked --

7 JUSTICE JACKSON: Oh, I'm sorry. I
8 thought your reasons for them being different
9 was that you said they were for different
10 purposes. I had heard --

11 MR. RICE: Well --

12 JUSTICE JACKSON: -- you say at the
13 beginning the reason those two are different is
14 because one wants them to transition and the
15 other wants them for some medical purpose other
16 than that.

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

25 And once you take out and you

1 recognize medical reality, then there is no
2 argument that our law differentiates between
3 treatments for males and females.

4 JUSTICE KAGAN: Can I ask you about
5 one of the purposes of this law? And I note
6 that your brief does not talk a lot about this,
7 but one of the articulated purposes of this law
8 is essentially to engender -- encourage gender
9 conformity and to discourage anything other than
10 gender conformity. And I'm wondering how you
11 think that plays into the analysis.

12 MR. RICE: We -- I disagree with that
13 characterization of our law.

14 JUSTICE KAGAN: Well, "encourage
15 minors to appreciate their sex and ban
16 treatments that might encourage minors to become
17 disdainful of their sex" sounds to me like we
18 want boys to be boys and we want girls to be
19 girls.

20 MR. RICE: If I could --

21 JUSTICE KAGAN: And that's an
22 important purpose behind the law. And I
23 understand that sentiment, but it's -- it's a --
24 it's a fundamentally different sentiment and
25 it's a fundamentally different understanding of

1 what produced this law than the one that you are
2 talking about now.

3 MR. RICE: Your Honor, if I could make
4 a few points.

5 First of all, it sounds like the
6 question is rooted in a potential improper
7 purpose-based argument under an Arlington
8 Heights argument, which, as Chief Judge Sutton
9 pointed out below, this -- that argument was
10 never raised until it got to this Court.

11 JUSTICE KAGAN: Well, I -- I -- I'm
12 less interested in sort of like the legal box to
13 put this in and more interested in, you know,
14 you're --

15 MR. RICE: Sure.

16 JUSTICE KAGAN: -- you're -- you're --
17 you're spending a lot of time talking about what
18 exactly the classification is here. And I think
19 we've talked a good deal about that.

20 But what produced this classification
21 might be relevant to understanding what the
22 classification is about.

23 MR. RICE: Absolutely. And I would
24 love to address --

25 JUSTICE KAGAN: And -- and what seems

1 to have produced this classification is that we
2 want to ban children, treatments that might
3 encourage minors to become disdainful their sex.
4 So we think that there's something fundamentally
5 wrong, fundamentally bad, about youth who are --
6 are trying to transition. And that's the way
7 this purpose seems to me.

8 MR. RICE: If I could try to unpack
9 both of those, Your Honor, because I think both
10 of those, read in context, do not support the
11 narrative that Tennessee wants boys to live as
12 boys and girls to live as girls.

13 So the "appreciate their sex"
14 reference in -- detailed in legislative
15 findings, that is simply the recognition that
16 given the high desistance rate among minors and
17 given the tragic regret of detransitioners, that
18 there is an interest in making sure that minors
19 have enough time to appreciate their sex before
20 undergoing life-altering changes.

21 So I think that that has to be viewed
22 in the context of the legislative findings,
23 with -- which both emphasize the detransitioners
24 and the high rate of desistance.

25 With respect to "become disdainful of

1 their sex," the -- the challengers have never
2 explained why it would be problematic to prevent
3 interventions that could affirmatively cause
4 minors to become disdainful of their sex and
5 thus at issue for psychiatric conditions. And,
6 in fact, there are multiple studies, I would
7 point to this Court JA 400, where minors --
8 actually, their mental health and suicidality
9 got worse after taking these interventions.

10 Now my friends on the other side may
11 disagree with that research and that assessment
12 of whether -- the findings of that study, but
13 the legislature specifically noted those
14 studies. So I think that statement was rooted
15 in the notion that, actually, this is causing
16 affirmative harm to minors who are undergoing
17 the interventions, and that's why they were
18 saying we don't want these interventions that
19 will cause minors to become disdainful of their
20 sex.

21 JUSTICE KAVANAUGH: At a --

22 JUSTICE KAGAN: Go ahead.

23 JUSTICE KAVANAUGH: You go ahead.

24 JUSTICE KAGAN: No, go ahead.

25 (Laughter.)

1 JUSTICE KAGAN: No, go ahead. I'll be
2 back.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 (Laughter.)

6 JUSTICE KAVANAUGH: At a -- at a -- at
7 a big-picture level, I think the argument on the
8 other side, putting aside some of the details,
9 is why not trust parents rather than the state,
10 particularly in a situation, as General Prelogar
11 said, where there's not the kind of direct harm
12 to third parties that you might see in other
13 contexts like sports.

14 MR. RICE: Yes, Your Honor. So, as my
15 friends recognize, the parental rights question
16 is not before this Court. And we can --

17 JUSTICE KAVANAUGH: But she explained
18 how it informs, so just take the question --

19 MR. RICE: Sure.

20 JUSTICE KAVANAUGH: -- as best you
21 can.

22 MR. RICE: Yeah. I think our position
23 is that there are certain times in medicine,
24 history has shown, where the states in their
25 traditional role as regulators have -- have had

1 to intervene. And that's not because -- of
2 course, the parents are trying to do the best
3 they can and get the best treatment for -- for
4 their kids, but we've had multiple instances
5 in -- in somewhat recent history where we have
6 stuff like lobotomy, eugenics, that had wide --
7 widespread acceptance among the medical
8 community, and the state had to intervene as a
9 regulator to protect the children.

10 JUSTICE BARRETT: Mr. Rice, just to
11 let you kind of finish what you started to say
12 to Justice Kavanaugh, you agree that the
13 parental rights question is not before the
14 Court, so it would be open to parents to
15 continue to press that point in other cases?

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

18 JUSTICE JACKSON: Can I just ask you
19 about -- I don't understand at all the similarly
20 situated argument that you make, and I hope that
21 you can help me because I don't know how you can
22 say both that girls and boys are not similarly
23 situated at step one, when this law is being
24 evaluated, and it's not making a sex-based
25 classification.

1 It seems to me that recognizing their
2 lack of similarity, as you do, in making the
3 argument is making a sex-based classification.
4 So --

5 MR. RICE: Your Honor, I think our
6 position is that if you're in the point where
7 we're treating giving testosterone to a boy with
8 a biological deficiency as the same thing as
9 giving testosterone to a biological -- a healthy
10 biological girl who wants to transition, then
11 there has to be some threshold inquiry that
12 recognizes the biological differences between
13 those two -- those two --

14 JUSTICE JACKSON: Right. But, when
15 you're doing that, you're making a sex-based
16 classification. I mean, the very argument
17 carries with it the characterization that we're
18 trying to identify here.

19 You -- you start by saying it's
20 different to treat a boy who's using this
21 medication for a particular reason from a girl
22 who's -- okay, so that's a sex-based
23 classification. Haven't we dealt with step one,
24 now we should be going on to step two --

25 MR. RICE: No.

1 JUSTICE JACKSON: -- intermediate --
2 intermediate scrutiny applies by -- by the terms
3 of what you're arguing.

4 MR. RICE: I -- I -- I don't think
5 that we agree that we've checked the box at step
6 one because there is no medical treatment that
7 boys can receive that girls cannot, so we -- we
8 disagree with the notion --

9 JUSTICE JACKSON: Didn't we already
10 dispose of that kind of reasoning with our equal
11 protection cases that looked at things like
12 interracial marriage, where we said, even though
13 it applies to both, it's still making a racial
14 classification? Even though whites can't
15 married -- marry non-whites and non-whites can't
16 marry whites in the statute, right, so both are
17 equally disadvantaged, we said that's not an
18 argument for why you shouldn't have a heightened
19 scrutiny or why the statute is not making a
20 race-based classification.

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

23 JUSTICE JACKSON: Okay. So what is
24 your argument?

25 MR. RICE: We are not arguing that --

1 that you can discriminate and draw lines so long
2 as you do so both against boys and against
3 girls. We're arguing there is no sex-based
4 line. If you're a boy and you go in to get
5 puberty blockers, you can get the puberty
6 blockers if you're going to use them for
7 precocious puberty. You cannot get the puberty
8 blockers if you're going to use them to
9 transition. That is not a sex-based line. That
10 is a purpose-based line.

11 So our fundamental point here is not
12 that you can discriminate against both sexes --
13 both sexes in equal degree. Our fundamental
14 point is there is no sex-based line here. And
15 the only way to get to a sex-based line is by
16 equating fundamental -- fundamentally different
17 treatments that defy medical reality and defy --
18 defy how the statute itself sets out what is a
19 treatment.

20 JUSTICE JACKSON: And the treatments
21 are different because of the biological sex of
22 the person, right? I mean, that's what you've
23 said. The purposes are different because of the
24 biological sex and why you're going in to get
25 them?

1 MR. RICE: Not at all. I mean, with
2 puberty blockers, the purpose -- nothing turns
3 on -- on sex. Take puberty blockers. There's
4 nothing that turns on sex as to -- to whether
5 there's a sex-based classification there.
6 Everything depends on what is the reason that
7 you are using those puberty blockers for.

8 I'm happy to take more questions if
9 the Court has them.

10 CHIEF JUSTICE ROBERTS: Justice
11 Thomas?

12 JUSTICE THOMAS: A number of times
13 you've mentioned off-label uses of -- of these
14 hormones. The -- what are some of the other
15 off-label uses that are not legal in Tennessee?

16 MR. RICE: So, for example, Your
17 Honor, testosterone, we have a separate law
18 that -- that prohibits the use of testosterone
19 for hormonal manipulation intended to increase
20 muscle mass strength or weight without medical
21 necessity.

22 We have -- like every state, we
23 regulate medicine and we regulate the use of
24 drugs. You cannot use drugs in the State of
25 Tennessee if it's not for a legitimate, viable

1 medical purpose.

2 Here, through this law, all that we
3 have done is make clear that these treatments,
4 which are irreversible often, have significant
5 effects on minors and often leave them with
6 bodies that are infertile and permanently
7 damaged, that you have to wait until you turn 18
8 to receive those type of treatments.

9 JUSTICE THOMAS: A number of times
10 you've tried to say that -- what classification
11 that the State of Tennessee has advanced in this
12 legislation. Would you spend a few minutes on
13 that?

14 MR. RICE: Yes, Your Honor. So,
15 again, we think that our law fundamentally draws
16 a distinction based on medical purpose. I'll go
17 back to puberty blockers.

18 If a boy wants puberty blockers, the
19 answer is yes if you have precocious puberty, no
20 if you're doing this to transition. If a girl
21 wants puberty blockers, the answer is yes if you
22 have precocious puberty, no if you're doing this
23 to transition.

24 That -- that is fundamentally a
25 different treatment, and what is turn -- what is

1 dictating under this law is the use for which
2 you are putting the drug.

3 And just to kind of build out on -- on
4 the notion that these are not the same
5 treatments, we talked about earlier
6 testosterone. If you give it to a biological
7 boy, it allows the boy to develop a normal body
8 and healthy body, whereas providing it to a girl
9 causes a physical condition, hyperandrogenism,
10 and that -- that results in clitoromegaly,
11 atrophy of the lining of the uterus, blood cell
12 disorders, increased risk of heart attack.

13 So the notion that the risks are --
14 are the same when you give testosterone to a boy
15 as when you give it to a girl are simply not
16 borne out by medical reality.

17 CHIEF JUSTICE ROBERTS: Justice Alito,
18 anything?

19 Justice Sotomayor?

20 Justice Kagan? No?

21 Justice Gorsuch?

22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: Just one
24 clarification. It's an obvious point, but I
25 want to make sure you agree with it, which is

1 you're not arguing that the Constitution takes
2 sides on this question. You, as I understand
3 it, you are arguing that each state can make its
4 own choice on this question.

5 So, from your perspective, as I
6 understand it, it's perfectly fine for a state
7 to make a different choice, as many states have,
8 than Tennessee did and to allow these
9 treatments --

10 MR. RICE: Yes.

11 JUSTICE KAVANAUGH: -- correct?

12 MR. RICE: Yes, Your Honor, that's
13 correct. And -- and we think that's because of
14 what Your Honor has pointed out, that no matter
15 how you draw -- draw these lines, there are risk
16 and benefit -- potential benefits and -- and
17 harms to people on both sides. And the question
18 of how to balance those harms is not a question
19 for the judiciary. It's a question for the
20 legislature.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: Can states make a
25 different choice if doing so means that a

1 state's law operates to treat its citizens
2 differently on the basis of -- name the suspect
3 classification. I thought that was the work of
4 the Constitution and the Equal Protection
5 Clause.

6 MR. RICE: Your Honor, we don't think
7 that it draws any lines based off any suspect
8 classes.

9 JUSTICE JACKSON: No, I understand.
10 I'm not talking about this law. I'm going back
11 to Justice Kavanaugh's suggestion that the
12 Constitution doesn't play a role if the state is
13 making a policy choice regarding issues such as
14 these. And I'm -- I guess I'm still seeing a
15 role for the Constitution in circumstances in
16 which the claim that is being made is that the
17 state's choices are implicating the equal
18 protection rights of its citizens.

19 MR. RICE: Your Honor, I think the --
20 I think the point -- I don't want to misstate
21 the point, but I think the point is that the --
22 the Constitution is neutral in the sense that it
23 does not provide heightened protection based on
24 any suspect classification, and, thus, rational
25 basis review applies in the presumption of

1 legislative validity and the presumption that
2 these types of policy choices are best left to
3 the democratic process. I -- I think that is
4 exactly what -- the correct way to think about
5 this case.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Rebuttal, General Prelogar?

10 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
11 ON BEHALF OF THE PETITIONER

12 GENERAL PRELOGAR: Thank you,
13 Mr. Chief Justice. Two quick clarifying points.

14 I want to make clear that Tennessee
15 here is not regulating based on off-label use.
16 Off-label use is extremely common in pediatrics,
17 and we pointed to a number of uses of these
18 medications on page 40 of our brief, the very
19 same medications that likewise are off-label
20 use. If there are problems with safety and
21 effect -- and effectiveness, then that would not
22 become the standard of care, and there are
23 self-regulatory measures to address that issue.

24 Justice Kavanaugh, you said this might
25 be a space where each state can make its own

1 choice, but I think it's important to recognize
2 that my friend's arguments would equally apply
3 to a nationwide ban if this were enacted by
4 Congress. And so I think that the Court should
5 keep that in mind when thinking about the level
6 of scrutiny here.

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

24 And if the Court conducts the analysis
25 here in the first instance, this law doesn't

1 look anything like a typical medical regulation
2 to protect adolescent health. That would look
3 like the West Virginia law, where you're
4 tailoring it but still leaving some possibility
5 for care when it can have enormous benefits.

6 And the reason it doesn't look like a
7 typical medical regulation is because the -- the
8 legislature was doing something different in
9 trying to get minors to appreciate their sex and
10 not become disdainful. That's not a
11 medical-based justification, but I think it
12 shows exactly why the State drew the lines where
13 it did.

14 Finally, I think the Court should
15 think about the real-world consequences of laws
16 like SB1. Consider its effects on Ryan Roe. As
17 Justice Sotomayor noted, Ryan's gender dysphoria
18 was so severe that he was throwing up before
19 school every day. He thought about going mute
20 because his voice caused him so much distress.
21 And Ryan has told the courts that getting these
22 medications after a careful consultation process
23 with his doctors and his parents has saved his
24 life. His parents say he's now thriving. But
25 Tennessee has come in and categorically cut off

1 access to Ryan's care, and they say this is
2 about protecting adolescent health, but this law
3 harms Ryan's health and the health of all other
4 transgender adolescents for whom these
5 medications are a necessity.

6 And the State says it doesn't even
7 want the courts to take a look at whether this
8 protects adolescent health. But the reason Ryan
9 can't have these medications is because of his
10 birth sex, and a sex-based line like that can't
11 stand on rational basis review.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

16 (Whereupon, 12:28 p.m., the case was
17 submitted.)

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Official - Subject to Final Review

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