

SUPREME COURT OF THE UNITED STATES

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.)
- - - - -

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Wednesday, December 4, 2024

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1 P R O C E E D I N G S

2 (10:05 a.m.)

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

6 General Prelogar.

7 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
8 ON BEHALF OF THE PETITIONER

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

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

19 It doesn't matter what parents decide
20 is best for their children. It doesn't matter
21 what patients would choose for themselves. And
22 it doesn't matter if doctors believe this
23 treatment is essential for individual patients.
24 SB1 categorically bans treatment when and only
25 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 for --

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 I -- it doesn't
19 strike me that they're intensely affected by
20 medical 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 -- I certainly take the point that
4 you 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's -- it's more in the area
13 of evolving standards --

14 GENERAL PRELOGAR: Yeah.

15 CHIEF JUSTICE ROBERTS: -- and
16 technical treatment issues and the effect of --
17 certain -- prescribing of particular
18 medications.

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

24 GENERAL PRELOGAR: And I think the
25 Court could recognize that that concern can be

1 accommodated under intermediate scrutiny. It is
2 not like strict scrutiny, where states are
3 automatically prohibited from drawing lines
4 based on sex. They just have to come forward
5 and demonstrate that they do have an important
6 state interest.

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

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

1 a more tailored law to try to safeguard against
2 that important state interest?

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

14 JUSTICE ALITO: General, can I ask you
15 a -- a question about the state of medical
16 evidence at the present time?

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

1 Now, even before then, the Swedish
2 National Board of Health and Welfare wrote the
3 following: They currently assess "that the
4 risks of -- puberty blockers and
5 gender-affirming treatment are likely to
6 outweigh the expected benefits of these
7 treatments," which is directly contrary to the
8 sweeping statement in your petition.

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

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

22 GENERAL PRELOGAR: I, of course,
23 acknowledge, Justice Alito, that there is a lot
24 of debate happening here and abroad about the
25 proper model of delivery of this care and

1 exactly when adolescents should receive it and
2 how to identify the adolescents for whom it
3 would be helpful.

4 But I stand by that there is a
5 consensus that these treatments can be medically
6 necessary for some adolescents, and that's true
7 no matter what source you look at. You
8 mentioned both the Cass report and Sweden --

9 JUSTICE ALITO: Well, can be --

10 GENERAL PRELOGAR: -- but neither of
11 those jurisdictions --

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

20 GENERAL PRELOGAR: I --

21 JUSTICE ALITO: Do you dispute that?

22 GENERAL PRELOGAR: -- I do dispute
23 that because, if you actually look at how those
24 jurisdictions are addressing this issue, they
25 have not outright banned this care.

1 The Cass report says at multiple
2 points that this care can be medically indicated
3 for some transgender adolescents. And, of
4 course, it's true that they have called for a
5 more individualized approach to these issues and
6 have questioned whether it should be readily
7 applied to all adolescents as a matter of
8 course.

9 JUSTICE ALITO: Is it not --

10 GENERAL PRELOGAR: But what that
11 supports --

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

14 GENERAL PRELOGAR: Yeah.

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

23 GENERAL PRELOGAR: So the approach in
24 the U.K. right now is to allow hormone therapy
25 for anyone 16 and older, and, with respect to

1 puberty blockers, the U.K. has restricted new
2 prescriptions outside of research settings. But
3 the Cass implementation plan itself makes clear
4 that if a medical team determines that these
5 medications are necessary for a particular
6 patient, they will be provided.

7 And that is a --

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

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

21 To the extent that you think that this
22 needs to be taken into account in the
23 application of heightened scrutiny, there's a
24 time and a place for that, and it's with record
25 evidence on remand. We think the Court here

1 just needs to recognize the sex-based
2 classification in this statute and send the case
3 back.

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas, anything further?

16 Justice Alito?

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

22 GENERAL PRELOGAR: -- so, Justice
23 Alito, with respect to the developments, there
24 has been no change in the law that I'm aware of
25 in Sweden, Finland, and Norway. Each of the

1 medical authorities in those states has called
2 for an individualized approach to care. They've
3 said it shouldn't be routinely applied. But
4 they have not changed their laws to do anything
5 like what Tennessee is doing here, which is to
6 categorically ban it no matter the need.

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

14 JUSTICE ALITO: The -- your primary
15 argument in the -- in your oral presentation
16 this morning is based on Bostock-like reasoning,
17 is that not correct?

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

25 It's no different than saying you

1 can't dress inconsistent with your sex. My
2 friends concede on page 25 of their brief that's
3 obviously a facial sex classification. But our
4 primary argument is SB1 is worded exactly the
5 same way and it works exactly the same way.

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

14 So my question is: Why should we look
15 to Bostock here? Bostock involved the
16 interpretation of particular language in a
17 particular statute.

18 And this is not a question of
19 statutory interpretation. It's a question of
20 the application of the Equal Protection Clause
21 of the Fourteenth Amendment, and the Court has
22 addressed the -- the question of how a -- an
23 equal protection claim should be analyzed when
24 the law in question treats a medical condition
25 or procedure differently based on a

1 characteristic that is associated with just one
2 sex. And that was Geduldig in 1974, reaffirmed
3 in Dobbs in 2022.

4 And neither Bostock nor Dobbs saw any
5 connection between the Bostock reasoning and the
6 Geduldig/Dobbs standard. Bostock did not
7 mention Geduldig, and Dobbs did not mention
8 Bostock. So why should we -- we look to this
9 Bostock-type reasoning here?

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

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

24 So, for purposes of identifying
25 whether facial sex classification is happening

1 at the outset, we think it's equal protection
2 principles, as much as Bostock, that carries the
3 day, although, of course, Bostock reinforces
4 those principles.

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

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

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

1 anything like pregnancy, where the Court found
2 that the medical condition itself was expressly
3 limited to one sex.

4 JUSTICE ALITO: Well, I -- I -- I'm
5 sure -- I'm not sure that's anything more than a
6 play on words.

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

16 Would you say the same thing about
17 that?

18 GENERAL PRELOGAR: So, I'm sorry, if
19 I'm understanding the hypothetical correctly,
20 the statute says you can't take puberty blockers
21 before the time when you would ordinarily have
22 puberty, so it's ruling out precocious puberty?

23 JUSTICE ALITO: You cannot -- no, it
24 doesn't rule out precocious puberty. It rules
25 out the administration of a puberty blocker for

1 the purpose of preventing puberty from occurring
2 at the time when it generally does.

3 GENERAL PRELOGAR: I see. So, if
4 you're hypothesizing a statute where, in
5 essence, the legislature is trying to get at the
6 idea of prohibiting access to these medications
7 for gender dysphoria reasons or otherwise, then
8 maybe you would apply an Arlington Heights type
9 of analysis.

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

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

1 their sex.

2 JUSTICE ALITO: Well, let me ask one
3 final question that addresses Geduldig and
4 Dobbs. Let's take Geduldig first.

5 One could make the same argument in
6 Geduldig that you've made here. A man cannot --
7 which concerned whether a pregnant woman was
8 entitled to disability benefits for -- for time
9 missed at work when a man would be entitled
10 to -- to benefits for time missed at work.

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

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

1 So you can make exactly the same
2 argument that you make here under Geduldig and
3 under Dobbs, and yet there was no equal
4 protection problem in either of those cases.

5 GENERAL PRELOGAR: And that's because
6 the Court said that there was no facial sex
7 classification insofar as using pregnancy does
8 not automatically mean that that's a proxy for
9 sex.

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

21 JUSTICE ALITO: All right.

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

24 JUSTICE ALITO: Thank you, General.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: General, just to
3 unpackage some of this argument, your point, I
4 think, is very clear that Bostock is pertinent
5 only to the extent that, whether it's Title VII
6 or the Equal Protection Clause, the first
7 question is, is the legislature using sex as a
8 classification, correct?

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

22 JUSTICE SOTOMAYOR: Now Bostock is
23 very different than this case because, in
24 Bostock, what we said is, if you use sex at all,
25 unless you have a statutory exemption, you can't

1 do it, correct?

2 GENERAL PRELOGAR: Exactly. And I
3 think that's an important --

4 JUSTICE SOTOMAYOR: And, here, in --
5 under the Equal Protection Clause, we recognize
6 there are inherent differences between the
7 sexes.

8 GENERAL PRELOGAR: And that can
9 sometimes provide a legitimate basis for
10 classification.

11 JUSTICE SOTOMAYOR: That's the point,
12 isn't it?

13 GENERAL PRELOGAR: So you're exactly
14 right. The standards for liability are
15 different.

16 JUSTICE SOTOMAYOR: Now --

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

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

1 GENERAL PRELOGAR: That's right.

2 JUSTICE SOTOMAYOR: And that is
3 recognized by all the European countries,
4 correct?

5 GENERAL PRELOGAR: Yes. I think it's
6 reflected in the laws of those countries, which
7 have not outright --

8 JUSTICE SOTOMAYOR: All right.

9 GENERAL PRELOGAR: -- banned the care.

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

20 And some -- some people rightly
21 believe that gender dysphoria may cause -- may
22 be changed by some -- in some children. But the
23 evidence is very clear that there are some
24 children who actually need this treatment, isn't
25 there?

1 GENERAL PRELOGAR: Yes. I think the
2 evidence is uniform on that, whether you look at
3 the standard of care, whether you look at the
4 view of every major American medical association
5 that has taken a position, many of whom are
6 amici here. It's reflected in the clinical
7 practice. The nation's leading children's
8 hospitals for decades have been providing this
9 care.

10 JUSTICE SOTOMAYOR: Some -- some
11 children suffer incredibly with gender
12 dysphoria, don't they?

13 GENERAL PRELOGAR: Yes. It's a very
14 serious medical condition.

15 JUSTICE SOTOMAYOR: They think some
16 attempt suicide?

17 GENERAL PRELOGAR: Yes. The rates of
18 suicide are -- are striking --

19 JUSTICE SOTOMAYOR: Some --

20 GENERAL PRELOGAR: -- and it's a
21 vulnerable population.

22 JUSTICE SOTOMAYOR: Drug addiction is
23 very high among some of these children because
24 of their distress, correct?

25 GENERAL PRELOGAR: It is a serious

1 condition, yes.

2 JUSTICE SOTOMAYOR: One of the
3 Petitioners in this case described throwing up
4 every day, going almost mute because of his --
5 because of their inability to speak in a voice
6 that they could live with.

7 These are physically challenging
8 situations as well too, correct?

9 GENERAL PRELOGAR: Yes, that's
10 correct.

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

21 GENERAL PRELOGAR: Yes, in a
22 circumstance where the state has an important
23 interest. And we don't think that that means
24 the states are entirely barred from regulating
25 in this space. Obviously, they are grappling

1 with these issues in a variety of contexts, but
2 you're right to say that when the state is using
3 sex-based line-drawing, a court needs to look at
4 that.

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

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

1 these decisions and trying to make those
2 trade-offs.

3 JUSTICE SOTOMAYOR: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: General, I wanted to
6 get your thoughts first on why one should think
7 of this as primarily a sex-based classification,
8 because there's another way of looking at a law
9 like this, maybe a more obvious way, which is
10 that it's a classification based on transgender
11 status. In other words, there are trans young
12 people on one side of the line and cis young
13 people on the other side of the line, both male
14 and female on both sides of the line.

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

23 GENERAL PRELOGAR: I think you can
24 conceive of the law in that way, and we
25 certainly do think that this law discriminates

1 on the basis of transgender status, and that,
2 likewise, should trigger heightened scrutiny,
3 both because that's inherently a sex-based
4 classification and because we think transgender
5 status discrimination warrants heightened
6 scrutiny in its own right.

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

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

23 And, here, it wasn't accidental or --
24 or incidental. This is threaded throughout the
25 statutory scheme because the legislature was

1 quite upfront that part of the interest here is
2 in ensuring that minors appreciate their sex and
3 not become disdainful of their sex, or, as Judge
4 White put it in dissent below, that they look
5 and live like boys and girls.

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

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

23 GENERAL PRELOGAR: So I think those
24 aren't exclusive. I think they're reinforcing
25 here. And I guess what I would say is I think

1 this is an even easier sex classification than
2 maybe the one the Court confronted in Bostock or
3 the one the Court would confront if the statute
4 simply discriminated on the basis of transgender
5 status because, here, the legislature actually
6 put the sex classification into the face of the
7 law and made the first-order restriction here
8 one that prohibits inconsistency with sex.

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

18 JUSTICE KAGAN: Let me flip now to
19 what it means to do heightened scrutiny in this
20 this area because, as you point out, this law
21 and I think almost all of the similar -- or
22 maybe all of the similar laws that have been
23 passed like this allow this exact same kind of
24 treatment for the opposite purpose, if you will,
25 for, you know, a person -- a -- a -- a -- a --

1 a -- a person born male who wants to get to
2 puberty already.

3 GENERAL PRELOGAR: Right.

4 JUSTICE KAGAN: And -- and you say
5 that that's a kind of underinclusion problem.
6 And, you know, it strikes me that on formal
7 equal protection analysis, it is, unless the
8 State can come forward with some piece of
9 medical evidence that says that the risks are
10 greater in the one area than in the other area,
11 which you say Tennessee has not done.

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

21 GENERAL PRELOGAR: So I think it is
22 true. To be sure, we think that a categorical
23 ban like this one is severely underinclusive and
24 also severely overinclusive, which is an
25 important ingredient here, and so should be

1 invalidated.

2 And if other states likewise have this
3 kind of sweeping ban, then they would fail under
4 heightened scrutiny. But I don't think that
5 means that heightened scrutiny ties the hands of
6 the states in this regard.

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

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

1 a set of guardrails that are far more precisely
2 tailored to concerns surrounding the delivery of
3 this care.

4 West Virginia requires that two
5 different doctors diagnose the gender dysphoria
6 and find that it's severe and that the treatment
7 is medically necessary to guard against the risk
8 of self-harm.

9 The West Virginia law also requires
10 mental health screening to try to rule out
11 confounding diagnoses. It requires the parents
12 to agree and the primary care physician to
13 agree.

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

20 JUSTICE KAGAN: Thank you, General.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: First, I want to
25 ask about our role here and pick up on the Chief

1 Justice's questions at the beginning, who
2 decides.

3 You've put forth forceful policy
4 arguments to allow these medical treatments, and
5 Justice Sotomayor's questions elaborated on --
6 on that. But the 20-plus states on the other
7 side put forth very forceful arguments against
8 allowing these medical treatments for minors.

9 So it seems to me that we look to the
10 Constitution, and the Constitution doesn't take
11 sides on how to resolve that medical and policy
12 debate. The Constitution's neutral on the
13 question. At least that's one way to look at
14 it. I want to get your reaction to that.

15 You know, if the Constitution doesn't
16 take sides, if there's strong, forceful
17 scientific policy arguments on both sides in a
18 situation like this, why isn't it best to leave
19 it to the democratic process?

20 GENERAL PRELOGAR: Well, I do think
21 that the Constitution takes a position that
22 individuals are entitled to equal protection of
23 the law. And I totally understand the force of
24 your intuition that states need space to
25 regulate and to try to take into account

1 concerns like adolescent health. We're not
2 denying that that's an important interest here.

3 But, when you look at how this law
4 actually operates, what it is doing is denying
5 individual plaintiffs the ability to access
6 medications on the basis of their sex. And that
7 doesn't mean that the states are disabled from
8 taking into account the actual biological
9 differences between males and females, but that
10 has to be channeled to the heightened scrutiny
11 stage.

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

19 If you are concerned, Justice
20 Kavanaugh, about moving too fast in this space
21 and maybe restricting the ability of states to
22 take a close look at these issues, I think the
23 Court could write a very narrow opinion in
24 this -- in this case, and -- and the Court could
25 say simply that when you prohibit conduct that's

1 inconsistent with sex, that is a sex-based line,
2 so you do have to apply heightened scrutiny.

3 But the Court has made clear that
4 that's an intermediate standard, and if the
5 State can come forward with an important
6 interest and substantiate that it needed to draw
7 those sex-based lines to substantially serve the
8 interest, that's going to be okay. And --

9 JUSTICE KAVANAUGH: Just on -- keep
10 going, sorry.

11 GENERAL PRELOGAR: Well, and the final
12 point is then you can send it back and let the
13 Sixth Circuit grapple with this in the first
14 instance.

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

22 GENERAL PRELOGAR: Well, I think
23 the -- the problem with trying to put that
24 "transitioning" label on it as a basis to avoid
25 the sex classification is that transition itself

1 is inherently tied to sex.

2 In other words, the prohibited purpose
3 here are those treatments that would allow a
4 minor to live and identify inconsistent with
5 sex, and the statute would permit anyone to have
6 those treatments for the non-prohibited purpose,
7 which, again, is when it's consistent with sex.

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

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

19 And the State says its justification
20 here is health and safety for minors. You say
21 there are benefits from allowing these
22 treatments. But there are also harms, right,
23 from allowing these treatments -- at least the
24 State says so -- including lost fertility, the
25 physical and psychological effects on those who

1 later change their mind and want to
2 detransition, which I don't think we can ignore.

3 We can't ignore what you're talking
4 about and what Justice Sotomayor raised, I agree
5 with that, but you can't ignore, I think, the
6 risks on the other side of the balance.

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

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

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

24 But I totally take the point that, of
25 course, when a state is coming forward with an

1 important interest like protecting adolescent
2 health, that may well justify the lines the
3 state has drawn. And it's not about asking
4 courts to step in and make a -- a first-order
5 determination about how to weigh risks -- risks
6 and benefits, but I do think that the State is
7 under a basic obligation to first substantiate
8 its concern -- and, here, there were extensive
9 factual findings by the district court that many
10 of the risks that the State was asserting are
11 not uniquely tied to gender-affirming care at
12 all -- and also to take into account the -- the
13 harms that would come from categorically banning
14 access to medications on the basis of drugs,
15 including the benefits that I was discussing
16 with Justice Sotomayor.

17 You mentioned fertility and regret,
18 and I'd like to take both of those concerns
19 head-on. I do want to acknowledge that there is
20 evidence to suggest that gender-affirming care
21 with respect to hormones can have some impacts
22 on fertility. Critically, puberty blockers
23 are -- are -- have no effect in and of
24 themselves on fertility, so I don't think that
25 concern can justify the ban on puberty blockers,

1 which is just pressing pause on someone's
2 endogenous puberty to give them more time to
3 understand their identity.

4 With respect to hormone use, there are
5 some effects on fertility, but the court found
6 that many individuals who are transgender remain
7 fertile after taking these medications. They
8 can conceive biological children. There are
9 fertility preservation measures that they can
10 undertake and that they have to be counseled on
11 those risks.

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

20 I would also say that if you are
21 concerned about fertility, there are measures
22 the State could undertake, like requiring
23 warnings, more informed counseling, trying to
24 ensure that there's informed consent in this
25 area.

1 You also mentioned the possibility of
2 regret. The record evidence demonstrates that
3 the rates of regret are very low because, for
4 the population that has access to this
5 treatment, so these are adolescents who have
6 marked and sustained gender dysphoria that has
7 worsened with the onset of puberty, they are
8 very likely to persist in their gender identity.

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

17 So, essentially, what this law is
18 doing is saying we're going to make all
19 adolescents in the state develop the physical
20 secondary sex characteristics consistent with
21 their gender or with their sex assigned at
22 birth, even though that might significantly
23 worsen gender dysphoria, increase the risk of
24 suicide, and, I think critically, make it much
25 harder to live and be accepted in their gender

1 identity as an adult because, if you're
2 requiring someone to undergo a male puberty and
3 they develop an Adam's apple, that's going to be
4 hard to reverse, and they're more likely to be
5 identified as transgender and subject to
6 discrimination and harassment as adults.

7 JUSTICE KAVANAUGH: Yeah.

8 GENERAL PRELOGAR: So I think the
9 relevant question is you have this population of
10 adolescents and there are documented, very
11 essential benefits for a large number of them
12 and maybe a small number that will regret this
13 care just like with any other medical care, but,
14 for the State to come in and just say, across
15 the board, you can't have the medication because
16 of your birth sex, we don't think that's a
17 tailored law.

18 JUSTICE KAVANAUGH: You acknowledge
19 there is some group, though, who later changes
20 their mind and wants to detransition? That
21 doesn't defeat your case. I just want to make
22 sure you acknowledge there is, as a factual
23 matter, some group of people?

24 GENERAL PRELOGAR: Yes, yes. We're
25 certainly not denying that some people might

1 detransition or regret this care, but all of
2 the -- available evidence shows that it's a very
3 small number.

4 JUSTICE KAVANAUGH: Then, to pick up
5 on the Chief Justice and Justice Alito's
6 questions, it's a obviously evolving debate. I
7 mean, just in the last couple years in Europe,
8 there's big changes in terms of how they're
9 thinking about it and how they're thinking about
10 these risks and benefits that you and I have
11 just been talking about and you've been
12 elaborating.

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

24 GENERAL PRELOGAR: We certainly are
25 not asking the Court to set forth some

1 bright-line constitutional rules in this space
2 that is going to -- to really take further
3 debate and evaluation of regulatory options away
4 from states. We think, as I mentioned, that the
5 Court really only needs to decide the
6 first-order question here of whether this law
7 classifies based on sex.

8 I think that's entirely distinct from
9 some of the concerns you've identified about
10 what justifications the State has.

11 JUSTICE KAVANAUGH: Do you think that
12 West Virginia law you mentioned is
13 constitutional?

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

24 JUSTICE KAVANAUGH: And last topic, on
25 the heightened review -- and you -- you say all

1 we need to do is do heightened review and that's
2 kind of a minimal -- step, I mean, I'm not sure,
3 really, that the follow-on effects of that could
4 be pretty significant. I think Justice Kagan
5 alluded to that in her question or at least
6 raised that as a question.

7 And I want to ask in particular about
8 one thing. If you prevail here on the standard
9 of review, what would that mean for women's and
10 girls' sports in particular? Would transgender
11 athletes have a constitutional right, as you see
12 it, to play in women's and girls' sports,
13 basketball, swimming, volleyball, track, et
14 cetera, notwithstanding the competitive fairness
15 and safety issues that have been vocally raised
16 by some female athletes seen in the amicus brief
17 of the many women athletes in this case?

18 So can you explain how intermediate
19 scrutiny would apply to women's sports?

20 GENERAL PRELOGAR: Yes. And -- and
21 just as a threshold clarifying point, I want to
22 be clear that when it comes to access to
23 sex-separated spaces, like sports and bathrooms,
24 courts already recognize that those are facial
25 sex classifications that trigger heightened

1 scrutiny. So it's actually not the question
2 teed up here about how to classify the law in
3 the first place or how to identify whether it's
4 a sex classification. Instead, that's taken as
5 given in that litigation. And the entire focal
6 point of the disputes in those cases has been,
7 well, does the state have an important
8 governmental interest and does it need to draw
9 the lines to exclude --

10 JUSTICE KAVANAUGH: If we -- if we --

11 GENERAL PRELOGAR: -- transgender
12 people.

13 JUSTICE KAVANAUGH: Right. But how
14 would it -- how would intermediate scrutiny,
15 which we may not -- if we went to intermediate
16 scrutiny, there's a possibility we would apply
17 it here. How would it apply to, in your view --
18 and maybe you don't have fully informed views,
19 which would be fine -- but how do you think they
20 would -- it would apply to sports?

21 GENERAL PRELOGAR: So courts have
22 split on that issue, and I hesitate to -- to try
23 in -- you know, in a vacuum without an actual
24 factual record to try to opine on the State's
25 justification and whether it will satisfy that

1 standard.

2 It's obviously a different set of
3 governmental interests that are being asserted
4 there, and those would have to be analyzed in
5 their own right. But I -- I -- I think that
6 this Court, if it wants to preserve space to
7 make clear that nothing here should be
8 understood to affect the -- the separate
9 questions that are arising there, the Court
10 could very well do so.

11 And we would have no objection --

12 JUSTICE KAVANAUGH: Do you think --

13 GENERAL PRELOGAR: -- to explicit
14 language saying this decision does not in any
15 way or should not be understood to affect the
16 separate state interests there that have to be
17 evaluated on their own terms.

18 JUSTICE KAVANAUGH: Okay. But looking
19 ahead, do you think it's logically possible as a
20 matter of constitutional decision-making to say
21 that laws like the ones at -- one at issue here
22 do not satisfy intermediate scrutiny, but laws
23 that restrict women's and girls' sports in a way
24 that transgender athletes cannot participate
25 would satisfy intermediate scrutiny? Is that

1 logically possible?

2 GENERAL PRELOGAR: Oh, yes,
3 definitely.

4 JUSTICE KAVANAUGH: Okay.

5 GENERAL PRELOGAR: So we do think
6 intermediate scrutiny applies in both contexts,
7 but there are a different state of -- of -- a
8 different set of state interests at play. And I
9 think one readily apparent difference is that in
10 the context of sports, there are arguments made
11 that that affects the rights of cisgender women
12 and that the ability to allow transgender women
13 to compete on those teams is going to be other
14 regarding in the sense of having those external
15 impacts.

16 There's nothing like this here.
17 Allowing transgender individuals who have
18 carefully thought about this and consulted with
19 their parents and their medical team to access
20 these medications that have health benefits
21 recognized here and abroad in no way affects the
22 rights of other people. And so I think the
23 Court could well understand the statute here to
24 fail intermediate scrutiny even if it would
25 survive there.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE BARRETT: Good morning,
5 General.

6 I want to pick up on one of Justice
7 Kavanaugh's early questions. You know, he -- he
8 pointed out that the burdens of the law fall
9 equally on boys and girls because neither can
10 transition. And you responded that it's kind of
11 the -- the sex classification or the expectation
12 that one will conform to one's, you know,
13 biological or gender assigned at birth.

14 Why isn't that more of an Arlington
15 Heights argument about intentional
16 discrimination than if what you're really saying
17 or what the legislature is really saying is the
18 burden of this is going to be equally
19 applicable, neither boys nor girls can have
20 access to these drugs, but the reason why is
21 because we want girls to be girls and boys to be
22 boys at least until they're old enough to decide
23 otherwise?

24 GENERAL PRELOGAR: So I think it would
25 be wrong to overlook the fact that even separate

1 and apart from any interest in conformity here
2 or sex stereotyping, this is a law on its face
3 that does not subject boys and girls to equal
4 treatment.

5 And you can see that if you look at
6 how the law applies to some of the individual
7 plaintiffs. You know, take Ryan Roe, who is one
8 of the individual plaintiffs here. He wants to
9 take testosterone in order to live and identify
10 as a boy, and he's prohibited by SB1 from doing
11 so because his birth sex was female.

12 But, if you change Ryan's birth sex
13 and suppose he was assigned male at birth, then
14 SB1's restriction lifts. So he is not being
15 treated the same as a boy in -- as a boy who was
16 assigned male at birth. And I think that is the
17 kind of quintessential test the Court has
18 applied for purposes of identifying when there's
19 a sex classification.

20 JUSTICE BARRETT: So what would your
21 argument be if a new drug is developed within,
22 say, two or three years that just the only
23 purpose of the drug, it -- it -- there's no
24 precocious puberty purpose or anything like
25 that, the only reason to give this drug is it

1 targets minors who have gender dysphoria
2 particularly?

3 And a state passes a law -- you know,
4 the FDA approves it, so it's available in some
5 states, but a state passes a law saying no one
6 has access to it. So now you don't have that --
7 that whole thing falls out.

8 GENERAL PRELOGAR: Yeah. So that
9 would not be a facial sex classification. And,
10 there, I do think that you would have to apply
11 an Arlington Heights type of analysis to see
12 whether the context and history demonstrate that
13 actually the state was intending to treat
14 people -- differently based on their sex. But I
15 think that would function very differently from
16 SB1.

17 JUSTICE BARRETT: Well, why don't you
18 have an Arlington Heights argument here too?
19 Because I take it one thing you think would be
20 wrong with that law is the stereotyping
21 function.

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

1 And I take your point about that's
2 applying some equal rules to boys and girls, but
3 that's true anytime you have a law that says you
4 can't act inconsistent with a characteristic.
5 That means that there's going to be a
6 restriction on males and a restriction on
7 females. It's true of any other factor too,
8 inconsistent with race, inconsistent with
9 religion.

10 You might say: Well, that's not just
11 singling out one religion or one race or one sex
12 for disparate treatment. But I think it
13 actually increases the number of classifications
14 when you're applying parallel restrictive rules
15 on the basis of a protected characteristic
16 across the board.

17 JUSTICE BARRETT: So let me return to
18 Justice Kagan's questions.

19 You know, she asked you whether,
20 really, the more natural way to think about this
21 is that it is discriminating on the basis of
22 transgender status rather than -- you know, I --
23 I feel like trying to make the Bostock-like
24 argument, holding all things equal or that you
25 have to do this by reference to, you know,

1 biological sex, feels like an odd way to solve
2 the problem and kind of that hypothetical I gave
3 you about the drug that just has the
4 transitioning purpose.

5 So, if we just head-on confront the
6 question which you raise in the second part of
7 your brief about whether transgender status
8 should be a suspect class, one question I have
9 is: Least as far as I can think of, we don't
10 have a history of de jure -- or that I know of,
11 we don't have a history of de jure
12 discrimination against transgender people,
13 right?

14 It's -- you -- you point out in -- in
15 your brief that in the last three years there
16 have been these laws, but before that, we might
17 have had private societal discrimination. But
18 I -- I don't know of, but am I miss -- you know,
19 is there a history that I don't know about where
20 we have de jure discrimination?

21 And my concern about it is this. All
22 of the other suspect classes that we've
23 recognized so far do have that long de jure
24 history of discrimination. And, you know, the
25 Equal Protection Clause applies to state action,

1 so it feels like an odd fit to say that in their
2 private lives, people have discriminated against
3 transgender people; therefore, we're going to
4 treat it as a suspect class for purposes of the
5 Equal Protection Clause.

6 GENERAL PRELOGAR: So I think you may
7 be right that the discrimination -- historical
8 discrimination against transgender people may
9 not have been reflected in the laws, but I think
10 there's no dispute that there is a broad history
11 here, and it hasn't just been confined to
12 private actors.

13 I -- I -- I think that if you actually
14 looked at the facts, there's a wealth of
15 evidence to suggest that transgender people
16 throughout history have been subjected to -- to
17 violence and discrimination and maybe lost
18 employment opportunities or housing
19 opportunities even in contexts where there might
20 be state public employment at play.

21 And, of course, that's especially
22 reflected now in the law, where there has been
23 this, I think, attention and focus on trying to
24 limit transgender people from being able to live
25 and identify -- consistent with their gender

1 identity in our society.

2 So I don't even understand the State
3 to be disputing the historical discrimination
4 point. But, if you're approaching this from the
5 standpoint of saying is this a group with a
6 distinguishing characteristic that has no
7 bearing on their ability to contribute and that
8 needs some protection from the courts, I think,
9 if any group qualifies, this one does in light
10 of the current laws and what might come in the
11 future.

12 And our -- our basic argument is, if
13 you can look ahead and say maybe the states will
14 ban medical care for adults who are transgender,
15 maybe they'll ban adoption by transgender people
16 or not allow them to be teachers, you know, that
17 doesn't look anything like the workaday economic
18 regulation that just gets rational basis review.
19 And I think the Court could give effect to that
20 intuition.

21 JUSTICE BARRETT: Yeah, and I don't
22 want to be misunderstood to say that I don't
23 think there's a problem or that there hasn't
24 been private discrimination.

25 I guess it doesn't seem analogous to

1 me to say race or gender or national origin,
2 those kinds of things, because we did have de
3 jure discrimination to point to.

4 And so I guess what my -- what I'm
5 thinking is, when we are in the business of
6 identifying suspect classes, you know, in
7 Cleburne, we expressed -- and I'm not saying
8 that this is analogous to Cleburne in that
9 respect, but we expressed in Cleburne hesitancy,
10 you know, to identify groups such as the
11 elderly, you know, or the mentally disabled as
12 suspect classes, in part because those are
13 judgments that are pretty hard for courts to
14 make.

15 And at least de jure discrimination of
16 the sort experienced by women, you know, or
17 people on the basis of race gives us something
18 to point to if we're going to be identifying a
19 new suspect class, which we haven't done for a
20 long time.

21 GENERAL PRELOGAR: Yeah -- and I, of
22 course, take that point. And I should
23 reiterate --

24 JUSTICE BARRETT: Yeah.

25 GENERAL PRELOGAR: -- we don't think

1 the Court has to confront it here.

2 But, in -- in the cases involving age
3 and disability, I understand the -- the Court to
4 have approached those issues with somewhat
5 different reasoning, that age is something we
6 all experience, that disability is a broad and
7 diverse group, and that individuals with
8 disabilities have been able to harness the
9 majoritarian political forces to protect their
10 rights. And none of that is true here.

11 Transgender individuals are a discrete
12 minority. I think there's no dispute that they
13 are being subject to a wave of legislation
14 across the states today, and -- and I think that
15 this is the kind of circumstance where the Court
16 could rightly recognize that heightened scrutiny
17 should apply.

18 JUSTICE BARRETT: Last question. Do
19 you agree with me that the resolution of this
20 case has no impact on the parental rights claim
21 that the Sixth Circuit also addressed?

22 GENERAL PRELOGAR: That's right. I --
23 I think we are not making a substantive due
24 process parental rights claim here, and this
25 Court obviously didn't -- grant review of that

1 issue.

2 I will say that I think parental
3 rights are actually relevant to the Equal
4 Protection Clause as well insofar as it's
5 significant to me that Tennessee, in choosing to
6 categorically ban this care, is taking a -- a
7 sharp turn away from how it ordinarily handles
8 parental rights in the medical decision-making
9 space.

10 Justice Kavanaugh said: Who decides
11 here? But, when it comes to medical risks and
12 benefits, the State's general approach is to say
13 parents get to decide, along with their doctors
14 and their children.

15 And so I think, from the standpoint of
16 underinclusivity, it's pretty significant that
17 Tennessee now is completely overriding parents'
18 wishes when they are best positioned to know
19 their individual child and to have a good sense
20 of whether the risks of this treatment are
21 outweighed by the benefits.

22 JUSTICE BARRETT: But this isn't -- I
23 guess my point is, even if we decided that this
24 wasn't a sex-based classification that triggered
25 intermediate scrutiny, that would not prevent

1 parents from still asserting the substantive due
2 process right.

3 GENERAL PRELOGAR: Yes, yes, of
4 course. I agree with that. I do think that the
5 sex-based classification under Equal Protection
6 Clause is the most straightforward way to think
7 about what's going on here, though. Yeah.

8 JUSTICE BARRETT: Thanks.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: So I'm glad that
12 you've clarified that how we characterize this
13 law is really the issue on the table today, not
14 the risks or benefits or the policies that
15 justify it but how we characterize it.

16 And I guess I -- I think there might
17 be some confusion a little bit, at least I'm
18 confused, because there's so many lines that
19 this statute could draw. The classification, as
20 far as I can tell, is a line-drawing, is the
21 statute drawing lines, and there are lots of
22 different ones.

23 And Tennessee says this is drawing a
24 line between people on the basis of age and
25 purpose. And I totally see that. You say this

1 is drawing a line on the basis of sex. I see
2 that as well. But I guess my sort of initial
3 question is: Are those mutually exclusive? Do
4 we have to choose between those
5 characterizations?

6 Isn't there a world in which this
7 statute is doing both of those things, and the
8 question for equal protection purposes is, if
9 you're right that there is a sex-based line
10 being drawn, then, to the extent the plaintiffs
11 are implicated by that line, don't we have to
12 apply heightened scrutiny in evaluating their
13 claims?

14 GENERAL PRELOGAR: Yes, that's exactly
15 right. And I think, of course, you could say
16 this is a statute that classifies based on age
17 and purpose and sex. Critically, we think that
18 purpose incorporates sex here because the
19 purpose is expressly defined in terms of
20 treatments that are inconsistent with sex.

21 JUSTICE JACKSON: Right.

22 GENERAL PRELOGAR: So I think the
23 problem with the State's approach is to say,
24 well, it's just purpose going on. You take one
25 look at that, and that just dissolves down into

1 drawing a sex-based line itself.

2 JUSTICE JACKSON: Can we put -- can we
3 put more flesh on that, though? Because, I
4 mean, even -- even if we separate out their age
5 and purpose and we just say okay, so how is this
6 actually drawing a line on the basis of sex, I
7 think I heard you say it a couple times with
8 respect to some examples, but I think it would
9 be helpful to get on the table exactly who's
10 falling on what sign -- side of the line in a
11 particular situation related to sex.

12 GENERAL PRELOGAR: Yes. So the -- the
13 way that the sex-based classification is working
14 here is that from the standpoint of any
15 individual who wants to take these medications,
16 their sex determines whether SB1 applies.

17 John Doe, one of the plaintiffs, wants
18 to take puberty blockers to undergo a typical
19 male puberty, but SB1 says that because John's
20 sex at birth was female, he can't have access to
21 those medications. And if you change his sex,
22 then the restriction under SB1 lifts and it
23 changes the result.

24 And my friends say, well, that also
25 simultaneously changes the medical purpose of

1 using these medications. We don't dispute that
2 point, that it might also inherently change
3 purpose when you're changing sex.

4 JUSTICE JACKSON: But it doesn't have
5 to, right? I thought of an example in which we
6 have a plaintiff, a -- a person who -- a minor
7 who would like to take this medication to affirm
8 their gender as a male because the medication
9 deepens their voice, for example. They want a
10 deeper voice, and they are biologically male.
11 They're taking the medication because that's
12 what they want.

13 They, I think, can get that
14 medication.

15 GENERAL PRELOGAR: That's right. And
16 so --

17 JUSTICE JACKSON: But a person who is
18 biologically female who wants to take the
19 medication for that same purpose, to deepen
20 their voice because they would like to live as a
21 male, can't get it? Is that right?

22 GENERAL PRELOGAR: That's correct.

23 JUSTICE JACKSON: All right. So
24 the --

25 GENERAL PRELOGAR: And that is on the

1 basis of their sex.

2 JUSTICE JACKSON: So the purpose is
3 held constant with that example. It's not
4 changing. What is changing is just the
5 biological sex of the individual?

6 GENERAL PRELOGAR: I think that that's
7 correct. But, even in a circumstance where you
8 might characterize that as treating delayed
9 puberty instead of gender dysphoria, if you
10 said, well, there is a different purpose there,
11 even though the effects are exactly the same and
12 they want the medications for exactly the same
13 reason, that doesn't eliminate the sex-based
14 classification because sex only has to be one
15 but-for cause of disparate treatment.

16 And I think the State will say it's
17 perfectly reasonable to treat different medical
18 purposes or uses differently. We don't
19 disagree, but that's something that's channeled
20 to the application of heightened scrutiny. And
21 if the State has a really good reason to say
22 there's a danger in using these drugs if your
23 birth sex was female and you want to deepen your
24 voice --

25 JUSTICE JACKSON: Right. That's --

1 GENERAL PRELOGAR: -- and it's
2 different --

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

5 GENERAL PRELOGAR: That all --
6 exactly.

7 JUSTICE JACKSON: That -- that can
8 come in at that point?

9 GENERAL PRELOGAR: That all goes to
10 the application of heightened scrutiny. And
11 maybe the State can prove it up and show they
12 have an important state interest and they really
13 have a reason to distinguish between who can
14 have these drugs for which purposes based on
15 their sex. But that doesn't eliminate the
16 facial sex classification or provide a reason
17 for this Court to turn its back on 50 years of
18 precedent saying, if you classify based --

19 JUSTICE JACKSON: Yeah.

20 GENERAL PRELOGAR: -- on sex, you have
21 to justify that.

22 JUSTICE JACKSON: And it's interesting
23 to me -- that you mentioned precedent because
24 some of these questions about sort of who
25 decides and the concerns and legislative

1 prerogatives, et cetera, sound very familiar to
2 me. They sound in the same kinds of arguments
3 that were made back in the day, the '50s, '60s,
4 with respect to racial classifications and
5 inconsistencies.

6 I'm thinking in particular about
7 Loving, and I'm wondering whether you've thought
8 about the parallels, because I see one, as to
9 how this statute operates and how the
10 anti-miscegenation statutes in Virginia
11 operated?

12 GENERAL PRELOGAR: Yes. And -- and I
13 think the Court has recognized that the Equal
14 Protection Clause was -- was intended to force
15 some changes in society and get us to think more
16 closely about the way that people were being
17 classified, including when that was based on
18 overbroad generalizations of how we expect them
19 to -- to live and order their affairs.

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

22 JUSTICE JACKSON: Well --

23 GENERAL PRELOGAR: -- it said
24 sometimes these laws operate to disadvantage
25 someone who falls outside the average

1 description, and that person needs the
2 protection of the courts.

3 JUSTICE JACKSON: Well, and a thing I
4 thought -- was most interesting about the
5 potential comparison to Loving is that in that
6 case, everyone seemed to concede upfront that a
7 racial classification was being drawn by the
8 statute. That was sort of like the starting
9 point. The question was whether it was
10 discriminatory because it applied to both races
11 and it wasn't, you know, necessarily invidious
12 or whatever.

13 But, you know, as I read the statute
14 here, the -- excuse me, the case here, you know,
15 the Court starts off by saying that Virginia is
16 now one of 16 states which prohibit and punish
17 marriages on the basis of racial
18 classifications.

19 And when you look at the structure of
20 that law, it looks in terms of -- you know, you
21 can't do something that is inconsistent with
22 your own characteristics. It's sort of the same
23 thing. So it's interesting to me that we now
24 have this different argument, and I wonder
25 whether Virginia could have gotten away with

1 what they did here by just making a
2 classification argument the way that Tennessee
3 is in this case.

4 GENERAL PRELOGAR: Yes. I -- I think
5 that's exactly right, that there is absolutely a
6 parallel between any law that says you can't act
7 inconsistent with a protected characteristic.
8 And, in all other contexts, the Court has
9 recognized that as a facial classification based
10 on that characteristic. And Tennessee even
11 concedes the point when it comes to dress codes
12 and to seeking a profession inconsistent with
13 sex.

14 But I think one other way to look at
15 this, Justice Jackson, is that, to me, it would
16 be a remarkable proposition for this Court to
17 say that a statute that on its face says you
18 can't have medications inconsistent with your
19 sex, and in part, that's because we want you to
20 appreciate your sex, isn't drawing a sex-based
21 line in the first place.

22 That would have no correspondence to
23 or grounding in the text of the statute or how
24 it works in operation or what effects it
25 produces for individuals on the ground.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Strangio.

5 ORAL ARGUMENT OF CHASE B. STRANGIO
6 ON BEHALF OF RESPONDENTS L.W., ET AL.,
7 SUPPORTING THE PETITIONER

8 MR. STRANGIO: Mr. Chief Justice, and
9 may it please the Court:

10 On its face, SB1 bans medical care
11 only when it is inconsistent with a person's
12 birth sex. An adolescent can receive medical
13 treatment to live and identify as a boy if his
14 birth sex is male but not female. And an
15 adolescent can receive medical treatment to live
16 and identify as a girl if her birth sex is
17 female but not male.

18 Tennessee claims this sex-based
19 line-drawing is justified to protect children.
20 But SB1 has taken away the only treatment that
21 relieved years of suffering for each of the
22 adolescent plaintiffs. And, critically,
23 Tennessee's arguments that SB1 is sex-neutral
24 would apply if the State banned this care for
25 adults too.

1 By banning treatment only when it
2 allows an adolescent to live, identify, or
3 appear inconsistent with their birth sex, SB1
4 warrants heightened scrutiny under decades of
5 precedent. Because the Sixth Circuit failed to
6 apply that standard, this Court should vacate
7 and remand.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: If you are
10 successful, what would your remedy be?

11 MR. STRANGIO: Your -- Your Honor,
12 if -- if we're successful here, the remedy would
13 be to enjoin the State of Tennessee defendants
14 from enforcing SB1 as applied to our individual
15 plaintiffs.

16 JUSTICE THOMAS: So -- in practical
17 terms, what would it be? What would you get?
18 Wouldn't you get the -- the -- you would get
19 different treatment based on sex?

20 MR. STRANGIO: In practical terms,
21 what it would mean is that an individual like
22 John Doe, who was receiving medical treatment to
23 undergo a typical male puberty prior to SB1 and
24 is now barred from doing so because his birth
25 sex is female, could then receive that treatment

1 as he had been doing with the -- with the
2 consent of -- of his parents. So his sex would
3 no longer be the basis for the denial of the
4 medical care that his doctors recommended and
5 his parents consented to.

6 CHIEF JUSTICE ROBERTS: Counsel, is
7 there any significant respect in which your
8 position departs from that of the Solicitor
9 General?

10 MR. STRANGIO: No, Your Honor. The
11 only thing that -- the only argument that we
12 make before the Court here that the Solicitor
13 General has -- has not advanced is that this is
14 a law that fails under any standard of -- of
15 review, that it is so discontinuous with the
16 asserted interests in protecting children and,
17 therefore, fails under -- under any standard,
18 but we think, as -- as the Solicitor General
19 made clear in her remarks, that it is clearly a
20 sex classification on -- on its face and should
21 be resolved on -- on that basis and remanded for
22 the Sixth Circuit to apply that standard in the
23 first instance.

24 CHIEF JUSTICE ROBERTS: Is there
25 anything you would like to add, and maybe there

1 isn't, but with respect to the Solicitor
2 General's responses to my concern that this is
3 unlike a case like Craig versus Boren, unlike a
4 case like Morales, and those where it was quite
5 clearly simply stereotyping with respect, you
6 know, can men have the same rights as women with
7 respect to adoption and the liquor laws.

8 This does strike me, whether --
9 whatever you think about the disagreements
10 between where Europe was some years ago and
11 where Europe is now, where Europe is, where the
12 United States is -- in that, that it is quite a
13 distinct type of inquiry that involves medical
14 expertise, predictive judgments in medical area
15 than in -- in those cases?

16 MR. STRANGIO: I don't dispute,
17 Mr. Chief Justice, that -- Justice that at the
18 application of -- of heightened scrutiny there
19 will be particular considerations that involve
20 the underlying medical evidence, as -- as there
21 always is, but I -- I don't think that it would
22 break new ground to apply heightened --
23 heightened scrutiny here.

24 The purpose of applying heightened
25 scrutiny has been because, in part, we don't

1 know at the outset whether a classification is
2 benign. And -- and many justifications for
3 sex-based differential treatment in law were
4 defended on the ground of biological differences
5 and were upheld by the Court under rational
6 basis.

7 And the role of heightened scrutiny is
8 not to make -- sex a proscribed classification.
9 It is just to shift the burden to the state to
10 show -- to show their work and show that, in
11 fact, this is a law that substantially advances
12 an important governmental interest.

13 CHIEF JUSTICE ROBERTS: Thank you.

14 JUSTICE BARRETT: Counsel, are there
15 other situations -- the Chief Justice's question
16 just made me think of this -- in which any of
17 our levels of heightened scrutiny, whether they
18 be intermediate or strict, require courts to
19 make the judgment, the means-ends calculation,
20 in this kind of medical context?

21 Because I agree with you -- I mean, I
22 can see your point, like, well, you know, as a
23 matter of logic, we should shift this to that
24 stage, assuming that the -- the suspect class
25 is -- is triggered and we say this is sex

1 classification.

2 But is there any other situation in
3 which courts get into that in the tiers of
4 scrutiny?

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

15 But, when they do so in ways that
16 classifies based on suspect lines or infringes
17 constitutional rights, then heightened scrutiny
18 remains the -- the standard that the courts
19 apply to ensure that the state is advancing an
20 important governmental interest.

21 CHIEF JUSTICE ROBERTS: So you --

22 JUSTICE BARRETT: Yeah, I guess I'm
23 thinking of some -- oh.

24 CHIEF JUSTICE ROBERTS: I'm sorry.

25 JUSTICE BARRETT: I -- can I just --

1 CHIEF JUSTICE ROBERTS: Sure.

2 JUSTICE BARRETT: -- this last
3 follow-up?

4 But, even in those COVID-19 cases, you
5 know, courts weren't, and we certainly weren't,
6 diving deep into the medical evidence and
7 comparing Europe and America and looking at
8 research. I mean, this would be, I think, of a
9 different order.

10 Do you agree?

11 MR. STRANGIO: I -- I -- I don't
12 agree, Justice Barrett, in the -- in the sense
13 that I do think it is precisely the -- the role
14 of -- of the courts to assess the tailoring
15 and -- and look at the evidence, whether it's
16 presented through expert testimony or not.

17 It is not the role of the Court
18 necessarily to say definitively these risks
19 out -- outweigh these benefits or -- or vice
20 versa, but do what the district court did here,
21 which is to look at the assertions of harm, make
22 comparisons to how Tennessee treated all other
23 medical care, and then see whether or not
24 Tennessee has met -- had met its burden under --
25 under heightened scrutiny.

1 That type of tailoring inquiry, I
2 believe, is precisely the -- the role of the --
3 the Court.

4 JUSTICE SOTOMAYOR: Counsel, in the
5 COVID, I have a colleague to my right whom I
6 think very highly of who spoke about the need
7 to -- of the courts to look at that evidence to
8 ensure that there wasn't suppression of
9 religion, correct?

10 MR. STRANGIO: That's correct, Justice
11 Sotomayor.

12 JUSTICE SOTOMAYOR: Now, with respect
13 to Justice Barrett's question on COVID, in my
14 mind, it's a little -- more similar to the
15 bathroom situation because, there, COVID was a
16 risk not just to the individual and the threat
17 to their own life, but their contact with others
18 could threaten others. So it -- it -- the
19 compelling state interest was different than
20 just a pure medical issue, correct?

21 MR. STRANGIO: That -- that's --
22 correct. I totally agree, the state interest
23 was different.

24 JUSTICE SOTOMAYOR: All right. With
25 respect to treating that issue -- you can hear

1 from some of my colleagues that they're worried
2 that -- and there is a plethora of science in
3 this area, both -- that developed in Europe, and
4 the lower court hasn't really looked at it, no
5 one has -- that courts are ill-suited to that.

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

9 MR. STRANGIO: Well, I -- I think,
10 first, Justice Sotomayor, the role of the Court
11 is to ensure that when the government draws
12 lines based on suspect classifications, that
13 the -- the states are tested to ensure that
14 they're substantially advancing an important
15 governmental interest.

16 And when it concerns underlying
17 questions of medicine or science, the -- the --
18 the -- the judges and just -- and just -- judges
19 in the lower courts have every ability to assess
20 the testimony before them, as the district court
21 did here.

22 This is not an area where I suggest --
23 I -- I believe Tennessee is saying that medicine
24 is altogether an area in which suspect
25 classifications have no bearing on the -- on the

1 judicial inquiry. It is precisely the role of
2 the Court to ensure that the government of
3 Tennessee has -- has substantially advanced
4 an -- an important governmental interest.

5 JUSTICE SOTOMAYOR: I have --

6 JUSTICE ALITO: But -- but --

7 CHIEF JUSTICE ROBERTS: Counsel --

8 JUSTICE SOTOMAYOR: -- a small
9 question to finish with.

10 The regret issue that was raised to
11 the Solicitor General, Respondents cite a figure
12 of 85 percent of children expressing gender
13 dysphoria regret later.

14 You use a figure of 1 percent of
15 minors who receive this treatment expressing
16 regret. Can you tell me where that -- where
17 those figures lie and exactly what the
18 difference is between that 1 percent of children
19 who receive these treatments expressing regret
20 and the 85 percent?

21 MR. STRANGIO: Certainly, Justice
22 Sotomayor. And so -- so the first point I -- I
23 would say about the 85 percent -- and we
24 addressed this on -- on page 22 of our reply
25 brief -- that's a misleading figure for -- for

1 two reasons.

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

12 And then, as to the question of the
13 1 percent, the question of regret, which is a
14 different question than what happens with
15 prepubertal children, the record shows there
16 that the rate of regret when people receive this
17 medication after the onset of puberty is as low
18 as 1 percent. And that's in JA 131 to 133.

19 And I think what's important here --
20 and the Solicitor General mentioned this -- is
21 that is -- that is exponentially lower than the
22 rates of regret of treatments that are expressly
23 permitted by SB1.

24 JUSTICE SOTOMAYOR: Thank you,
25 counsel.

1 JUSTICE ALITO: Could we explore what
2 intermediate scrutiny might look like in
3 operation in assessing laws like Tennessee's?

4 So the Solicitor General, on pages
5 4 -- on page 48 of her brief, lists a lot of
6 things that -- she says: Well, if Tennessee
7 were really concerned about the health and
8 welfare of these minors, it would have taken
9 into account a variety of things.

10 So one is waiting periods. Another is
11 whether puberty blockers should be exempted.
12 Another concerns things to make sure that the --
13 the future of these minors is properly respected
14 even though they personally cannot make mature
15 judgments about potentially irreversible
16 procedures.

17 So she -- she mentions things like
18 two-parent -- two-parent consent or counseling,
19 readiness criteria, age recommendations,
20 licensing, certification, or reporting
21 requirements for physicians, and other
22 guardrails which are not specified.

23 So, if intermediate scrutiny were the
24 regime that would apply, would it not be the
25 case that individual -- that judges would have

1 to decide which -- whether a particular package
2 containing this much of that and that much of
3 the other thing is sufficient? Wouldn't this be
4 endless litigation based on -- with a decision
5 based on determinations by lay judges regarding
6 complicated medical issues?

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

9 And -- and the first is going back to
10 the Solicitor General's example of -- of West
11 Virginia, where West Virginia looked at the
12 underlying science and, instead of categorically
13 banning this medical treatment, created pathways
14 with guardrails for individuals to access
15 medical care.

16 There have been no litigation over --
17 over West Virginia's law, and if there were, as
18 if there were in -- in other contexts, the
19 question would remain whether or not the state
20 could make out the showing that this is being
21 treated in such a substantially different way
22 than -- than other forms of medical care.

23 I do think that judges are equipped to
24 make those determinations, as they do in many --
25 many other contexts.

1 JUSTICE ALITO: A -- a lot of
2 categorical statements have been made this
3 morning in argument and in the briefs about
4 medical questions that seem to me to be hotly
5 disputed, and that's a bit distressing. One of
6 them has to do with the risk of suicide.

7 Do you maintain that the procedures
8 and medications in question reduce the risk of
9 suicide?

10 MR. STRANGIO: I do, Justice Alito,
11 maintain that the medications in question reduce
12 the risk of depression, anxiety, and
13 suicidality, which are all indi -- cators of
14 potential suicide.

15 JUSTICE ALITO: Do you think that's
16 clearly established? Do you think there's
17 reason for disagreement about that?

18 MR. STRANGIO: I do -- I do think it
19 is clearly established in the science -- and
20 in -- in the record. I think, as with all
21 underlying questions of it -- looking at
22 evidence, there can be disagreement. I don't
23 dispute that.

24 But, here, and -- and sort of going
25 back to questions about the Cass review, for

1 example, the Cass review only looked at studies
2 up until 2022. After --

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

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

18 However, there are multiple studies,
19 long-term, longitudinal studies that do show
20 that -- there is a reduction in -- in
21 suicidality, which I -- I -- I think is a -- is
22 a positive outcome to this treatment.

23 JUSTICE ALITO: Let me ask a -- a
24 question about another issue that came up during
25 Justice Kagan's questioning and Justice

1 Barrett's questioning in particular, and that is
2 whether transgender status should be regarded as
3 a quasi-suspect classification.

4 And Justice Barrett referred to one of
5 the things that our cases have mentioned in
6 explaining when something should be classified
7 as a quasi-suspect classification, and that is a
8 history of discrimination.

9 Another one is immutability. Is
10 transgender status immutable?

11 MR. STRANGIO: May I answer, Mr. Chief
12 Justice?

13 CHIEF JUSTICE ROBERTS: Sure.

14 MR. STRANGIO: I -- so I would -- I
15 would say that under this -- this Court's
16 consideration of that criteria, it -- it -- it
17 is a distinguishing characteristic. Transgender
18 people are characterized by having a gender
19 identity that differs from their birth sex.
20 That is distinguishing and -- and discrete.

21 And -- and that also within the -- the
22 characterization, I would also point, if I
23 could, to the history of discrimination, and
24 there are many examples of in -- in-law
25 discrimination, exclusions from the military,

1 criminal bans on cross-dressing, and others.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 I -- I think I lost track of the
5 discussion you were having about COVID. What --
6 what was the point you were trying to make?

7 MR. STRANGIO: I -- I think --

8 CHIEF JUSTICE ROBERTS: Or somebody
9 was trying to make?

10 MR. STRANGIO: Yes.

11 (Laughter.)

12 MR. STRANGIO: I -- I -- I think it
13 was me.

14 (Laughter.)

15 MR. STRANGIO: And I -- the -- the --
16 the point about -- about COVID and the question
17 of whether or not this Court has ever considered
18 applying heightened scrutiny to contexts in
19 which states are grappling with evolving medical
20 evidence -- and I -- I would point to Justice
21 Gorsuch's statement in -- in South -- South Bay
22 United Pentecostal, in which the -- the purpose
23 of heightened scrutiny, even when the government
24 is grappling with experts of -- of a medical
25 character, is to still test whether or not that

1 infringement on an individual right or that use
2 of a suspect classification meets the heightened
3 scrutiny standard. It is not exempt simply
4 because it is in the context of public health or
5 medicine.

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

8 (Laughter.)

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

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

17 And if -- if this is similar to that,
18 I think that would be very troubling to say that
19 in such a evolving situation, we are going to
20 decide what the right approaches are. I mean,
21 you said at some point that the -- the -- the --
22 the Tennessee court or -- or -- not the
23 Tennessee court -- that this Court is just as
24 qualified as the -- as Tennessee to make the
25 decisions here.

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

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

18 MR. STRANGIO: Well --

19 CHIEF JUSTICE ROBERTS: Anyway, what
20 do you think?

21 MR. STRANGIO: -- Mr. Chief Justice,
22 if I could first respond to the -- to the first
23 half of your -- your question about whether or
24 not this is comparable in terms of the
25 underlying science with respect to COVID-19, and

1 I think absolutely it is not. I merely used
2 that example to say that the Court has not
3 hesitated to suggest that heightened scrutiny
4 applies in contexts that deal with -- with
5 medicine and science.

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

17 And so, if what is left here is just
18 bare rationality review, Tennessee is in essence
19 saying let's not look at the evidence at all,
20 whether this is a law that bans this medical
21 treatment for minors or for adults, that in all
22 other contexts, what Tennessee does is recognize
23 that there are risks and there are benefits.

24 And, usually, the State regulates by
25 informing patients of the risks and tailoring

1 to -- to minimize them. Here, what they've done
2 is impose a blunderbuss ban overriding the very
3 careful judgment of parents who love and care
4 for their children and the doctors who have
5 recommended the treatment.

6 CHIEF JUSTICE ROBERTS: Thank you.
7 Justice Thomas?

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

15 And what would that be in this case?

16 MR. STRANGIO: So -- so two point --
17 points, Your Honor.

18 I think that what the birth males can
19 do that birth females cannot do is receive
20 medical treat -- treatment to -- to live and
21 identify as boys. And what birth females can do
22 that birth males can't do is receive medical
23 treatment to -- to live and identify as girls.
24 That's at the group level.

25 JUSTICE THOMAS: Okay. Let's -- let's

1 change. What if -- would you make the same
2 argument if we were only talking about puberty
3 blockers?

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

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

16 MR. STRANGIO: And -- and so what --
17 what I would say, Justice Thomas, is that the --
18 a birth sex male can receive puberty blockers to
19 undergo a typical male puberty, and a birth sex
20 female cannot -- and if I could slow it down and
21 just -- explain a little bit how that works,
22 if -- if you're someone who was born male and
23 you are going through puberty too early, you
24 want to be able to have a final adult height
25 that is typical of -- of boys. You may receive

1 puberty blockers so that you can develop as a
2 typical boy. Someone who has a sex of female at
3 birth is also receiving puberty blockers so that
4 they can undergo a puberty like other boys.

5 And so it is the same purpose, and
6 what makes the treatment prohibited for the
7 birth sex female is their sex.

8 CHIEF JUSTICE ROBERTS: Justice Alito?

9 JUSTICE ALITO: Counsel, I don't think
10 you had a chance to finish answering my question
11 whether transgender status is immutable. You
12 cited a bunch of other criteria, but is it
13 immutable?

14 MR. STRANGIO: I -- I think that the
15 record shows that the -- the discordance between
16 a person's birth sex and gender identity has a
17 strong biological basis and would satisfy an --
18 immutability test.

19 And I also think, under this Court's
20 precedents for determining whether something is
21 a suspect or quasi-suspect classification, a
22 distinguishing characteristic is sufficient.

23 JUSTICE ALITO: Does the category
24 of -- does transgender status apply to
25 individuals who are gender fluid?

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

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

18 MR. STRANGIO: There are such people.
19 I agree with that, Justice Alito.

20 JUSTICE ALITO: So it's not an
21 immutable characteristic, is it?

22 MR. STRANGIO: Well, I think people's
23 understanding of -- of it -- of it shifts, but
24 the evidence shows that there is at least a
25 strong underlying basis. And the -- I think the

1 normative reason for that particular
2 consideration is whether or not this is
3 something that someone should or could change
4 and whether they should have to change it in
5 order to receive constitutional protections, and
6 I think transgender status squarely fits within
7 that.

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

17 And I'm not suggesting that gender
18 dysphoria is a disease, a mental illness. I'm
19 not suggesting that at all. I'm just saying,
20 how could we justify the different treatment?

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

22 JUSTICE ALITO: It's -- it's immutable
23 in the sense that there isn't any cure for it.
24 There's been severe discrimination against
25 people suffering from schizophrenia. At one

1 point, they were locked up in hellish
2 institutions. They can make a valuable
3 contribution to society. Think of John Nash.

4 How would we distinguish that?

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

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

19 JUSTICE ALITO: Well, I understand
20 that, but would you dispute the proposition that
21 transgender status is a very broad categories --
22 category? Doesn't the American Psychological
23 Society -- Association say it's an umbrella
24 term?

25 MR. STRANGIO: I don't -- I don't know

1 exactly what the American Psychological
2 Association says, but I -- I don't dispute that
3 there are people who fall within a transgender
4 identity who may not fit into a binary identity.

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

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

13 JUSTICE ALITO: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor?

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

22 MR. STRANGIO: That's correct, Your
23 Honor.

24 JUSTICE SOTOMAYOR: Now you think, as
25 does the other side, that each of you should win

1 on that question, but are you differing from the
2 SG that that should be remanded to the court
3 below to -- to apply strict -- intermediate
4 scrutiny in the first instance?

5 MR. STRANGIO: No, Justice Sotomayor,
6 we're not -- we're not disagreeing.

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

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

21 MR. STRANGIO: Yes.

22 JUSTICE SOTOMAYOR: -- which would
23 present a very different -- an Arlington
24 Heights, perhaps, question, but -- but the point
25 is that what the relief is is still something

1 that has to be determined as well.

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

12 JUSTICE SOTOMAYOR: Got it. Thank
13 you.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?
15 Justice Gorsuch?
16 Justice Kavanaugh?

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

25 And it seems that there are risks and

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

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

17 And then for us to come in -- and this
18 is repeating what I said earlier, but I want
19 your reaction to it -- for us to come in and to
20 choose one side of that, knowing that either way
21 people are going to be harmed, this is --
22 there's no kind of perfect way out, at least as
23 I've read the briefs here, where everyone
24 benefits and no one is harmed, right?

25 The -- the -- the -- the difficulty of

1 the issue is some people are going to be harmed.

2 MR. STRANGIO: Well --

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

8 So I just throw that out there and
9 take your reactions and anything you want to say
10 on that.

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

13 JUSTICE KAVANAUGH: Well, can I add
14 one -- one more point, sorry --

15 MR. STRANGIO: Okay.

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

24 Go ahead. Have at it.

25 MR. STRANGIO: So -- so -- so a few

1 points, Justice Kavanaugh, and the first is I
2 don't see this as -- as the Court choosing what
3 is the appropriate response here. What -- what
4 I see the role of the Court is assessing whether
5 the choice that Tennessee made is one that they
6 can justify under heightened scrutiny.

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

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

18 That doesn't mean that a more tailored
19 response would not advance that interest in
20 which you may be able to actually come up with a
21 solution to ensure that you are protecting those
22 who may come to regret this -- this treatment,
23 which are much, much smaller than those who
24 benefit and -- and find it medically necessary,
25 something like West Virginia did.

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

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

15 And to the question of, well, is
16 remand, you know, a sufficient --

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

22 So I -- I guess, in the end, you still
23 come down to there are risks and benefits both
24 ways, either way you go here, and I don't know
25 whether rational basis or intermediate scrutiny,

1 however that gets applied, you still have to
2 kind of look, is there a real justification
3 here? I think you look at that either way.

4 MR. STRANGIO: And -- and I think the
5 difference under heightened scrutiny, there's --
6 there's a chance to look at -- at the -- the
7 evidence in -- in a much more --

8 JUSTICE KAVANAUGH: Mm-hmm.

9 MR. STRANGIO: -- substantial way
10 and -- and have the State come forth and --
11 and -- show whether they've -- they've met their
12 burden.

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

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

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

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

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

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

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

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

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

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

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

25 Could you think of others? Are

1 there --

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

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

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

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

1 in -- in the political process, where you do
2 have laws excluding transgender people from
3 places where they need to go in -- in all
4 aspects of -- of life, and there is a difficulty
5 in that type of majoritarian protection. I
6 think that's precisely what the political
7 powerlessness prong of the -- the test accounts
8 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 -- that, Justice Jackson.
17 That's precisely why we think heightened
18 scrutiny applies here, because this is a statute
19 that on 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 -- if, instead, we're
5 just sort of doing what the state is encouraging
6 here in Loving, where you just sort of say,
7 well, there are lots of good reasons for this
8 policy and who are we as the Court to say
9 otherwise, I'm worried that we're undermining
10 the 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.
5 The -- as Justice Kavanaugh recognized
6 throughout his questioning, they cannot stand up
7 here and say that if these alternatives were
8 imposed that there would be no detransitioners.
9 So there -- there is -- there -- they cannot
10 eliminate the 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. I --

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

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

9 MR. RICE: Well --

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

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

15 JUSTICE JACKSON: Yes.

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

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

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

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

1 They --

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

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

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

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

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

19 MR. RICE: Yeah.

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

25 MR. RICE: If there's no medical

1 purpose, no.

2 JUSTICE JACKSON: No, that's a

3 medical -- the -- the medical purpose --

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

5 JUSTICE JACKSON: I don't understand

6 what you mean. The purpose is to bring on a

7 deepening of their voice.

8 MR. RICE: Let me try to rephrase.

9 JUSTICE JACKSON: Yes.

10 MR. RICE: If there's no medical

11 condition, the answer is no.

12 JUSTICE JACKSON: But --

13 MR. RICE: You cannot use testosterone

14 for purely cosmetic reasons. It's a Schedule

15 III drug. You are not allowed.

16 JUSTICE JACKSON: In this statute or

17 in another statute?

18 MR. RICE: In another statute.

19 JUSTICE JACKSON: Okay. So setting

20 aside that other statute, we're looking at this

21 one and how it operates. This statute says

22 something about inconsistency with your

23 biological sex, and that's what I'm trying to

24 test.

25 The boy comes in, he asks for a

1 hormone treatment to deepen his voice to affirm
2 his masculinity. Can he get the treatment under
3 this statute?

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

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

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

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

13 MR. DAVIS: Under this statute --

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

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

18 JUSTICE JACKSON: Okay.

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

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

24 Now, looking at this statute, a girl
25 comes in, biologically, and asks for a hormone

1 to deepen her voice in order to affirm the
2 identity that she chooses, which is masculinity.
3 I'm asking you: Would, under this statute, she
4 be precluded from getting that treatment?

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

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

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

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

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

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

1 and respect given to them, but it's a dodge to
2 say that this is not based on sex, it's based on
3 medical purpose, when the medical purpose is
4 utterly and entirely about sex.

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

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

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

25 So we use the words "inconsistent with

1 sex" to describe a single prohibited medical
2 purpose. We do not use it to draw lines between
3 males and females.

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

10 MR. RICE: Yes, Your Honor.

11 CHIEF JUSTICE ROBERTS: Is that
12 correct?

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

20 MR. RICE: Yes, Your Honor.

21 CHIEF JUSTICE ROBERTS: Okay. Thank
22 you.

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

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

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

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

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

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

20 And to the extent --

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

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

25 JUSTICE SOTOMAYOR: I thought that

1 that's why we had intermediate scrutiny when
2 there are differences based on sex, to ensure
3 that states were not acting on the basis of
4 prejudice.

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

13 JUSTICE JACKSON: So when --

14 JUSTICE BARRETT: Mr. --

15 JUSTICE SOTOMAYOR: When you're
16 1 percent of the population.

17 JUSTICE JACKSON: Sorry.

18 JUSTICE BARRETT: Mr. --

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

23 MR. RICE: Well, Your Honor --

24 JUSTICE SOTOMAYOR: You -- blacks were
25 a much larger part of the population, and it

1 didn't protect them. It didn't protect women
2 for whole centuries.

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

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

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

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

22 JUSTICE BARRETT: Okay. My legal
23 question is I wondered if you had a response --
24 you know, I was asking your friends on the other
25 side about de jure discrimination and what we

1 should take account of if we're thinking about
2 whether transgender people should be a suspect
3 class for purposes of the Fourteenth Amendment.

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

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

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

1 apply that as well.

2 So we don't think the Court should --
3 should even open the door for further judicial
4 creation of new quasi-suspect classes.

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

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

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

1 gender identity. And so we think that is --
2 that is a -- a -- fundamentally a
3 transgender-based challenge and not a sex-based
4 challenge if you are not actually challenging
5 the sex classification that is at issue.

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

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

17 MR. RICE: Yeah.

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

22 MR. RICE: Your Honor, we think that
23 in a case like Loving, when you look at the
24 individual level, which we agree with our
25 friends on the other side that the protection of

1 the Equal Protection Clause operates at the
2 individual level --

3 JUSTICE JACKSON: Mm-hmm.

4 MR. RICE: -- that if there is a line
5 that is being drawn based off of race, like in
6 Loving, where you had a white male who could
7 not -- who could not marry a -- an African
8 American female under that law, that is a
9 race-based line. You are creating multiple
10 groups of permissible and impermissible behavior
11 based off of race.

12 Where we differ from -- from our
13 friends on the other side is we just don't think
14 that there is any sex-based line in this -- in
15 this statute.

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

24 I -- I -- I take your law to be doing
25 basically the same thing. You can get these

1 blockers if doing so is consistent with your sex
2 but not if it's inconsistent. So how are they
3 different?

4 MR. RICE: We think it's different
5 because we think, in their use of "inconsistent
6 with sex" in all of these examples that they
7 have in the briefing, those actually do create
8 separate categories of conduct that is
9 permissible either based on sex or based on
10 race.

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

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

1 MR. RICE: I -- I don't think it
2 operates on -- on the body in the same way.
3 Take testosterone. If you give a boy with a
4 deficiency testosterone, could be because he has
5 constitutional delay of puberty, that allows him
6 to go through the -- the -- and develop the
7 reproductive organs associated with being a
8 male. If you give it to a girl, it renders the
9 girl infertile. So we have 8- to 12-year-olds
10 being asked --

11 JUSTICE JACKSON: Oh, I'm sorry. I
12 thought your reasons for them being different
13 was that you said they were for -- for different
14 purposes. I had heard --

15 MR. RICE: Well --

16 JUSTICE JACKSON: -- you say at the
17 beginning the reason those two are different is
18 because one wants them to transition and the
19 other wants them for some medical purpose other
20 than that.

21 MR. RICE: Well, to go back to my --
22 my example in the -- in the introduction, I
23 don't think anyone would say using morphine to
24 assist suicide is the same treatment as using
25 morphine to manage pain. It's the same drug,

1 just like it's the same drug here. But they're
2 being used for fundamentally different purposes.
3 They have different effects on the body.

4 And once you take out and you
5 recognize medical reality, then there is no
6 argument that our law differentiates between
7 treatments for males and females.

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

16 MR. RICE: We -- I disagree with that
17 characterization of our law.

18 JUSTICE KAGAN: Well, "encourage
19 minors to appreciate their sex and ban
20 treatments that might encourage minors to become
21 disdainful of their sex" sounds to me like we
22 want boys to be boys and we want girls to be
23 girls.

24 MR. RICE: If I could --

25 JUSTICE KAGAN: And that's an

1 important purpose behind the law. And I
2 understand that sentiment, but it's -- it's a --
3 it's a fundamentally different sentiment and
4 it's a fundamentally different understanding of
5 what produced this law than the one that you are
6 talking about now.

7 MR. RICE: Your Honor, if I could make
8 a few points.

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

15 JUSTICE KAGAN: Well, I -- I -- I'm
16 less interested in sort of like the legal box to
17 put this in and more interested in, you know,
18 you're --

19 MR. RICE: Sure.

20 JUSTICE KAGAN: -- you're -- you're --
21 you're spending a lot of time talking about what
22 exactly the classification is here. And I think
23 we've talked a good deal about that.

24 But what produced this classification
25 might be relevant to understanding what the

1 classification is about.

2 MR. RICE: Absolutely. And I would
3 love to address --

4 JUSTICE KAGAN: And -- and what seems
5 to have produced this classification is that we
6 want to ban children, treatments that might
7 encourage minors to become disdainful their sex.
8 So we think that there's something fundamentally
9 wrong, fundamentally bad, about youth who are --
10 are trying to transition. And that's the way
11 this purpose seems to me.

12 MR. RICE: If I could try to unpack
13 both of those, Your Honor, because I -- I think
14 both of those, read in context, do not support
15 the narrative that Tennessee wants boys to live
16 as boys and girls to live as girls.

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

25 So I think that that has to be viewed

1 in the context of the legislative findings,
2 with -- which both emphasize the detransitioners
3 and the high rate of desistance.

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

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

25 JUSTICE KAVANAUGH: At a --

1 JUSTICE KAGAN: Go ahead.

2 JUSTICE KAVANAUGH: You go ahead.

3 JUSTICE KAGAN: No, go ahead.

4 (Laughter.)

5 JUSTICE KAGAN: No, go ahead. I'll be

6 back.

7 CHIEF JUSTICE ROBERTS: Justice

8 Kavanaugh?

9 (Laughter.)

10 JUSTICE KAVANAUGH: At -- at a -- at

11 a -- at a big-picture level, I think the

12 argument on the other side, putting aside some

13 of the details, is why not trust parents rather

14 than the state, particularly in a situation, as

15 General Prelogar said, where there's not the

16 kind of direct harm to third parties that you

17 might see in other contexts like sports.

18 MR. RICE: Yes, Your Honor. So, as my

19 friends recognize, the parental rights question

20 is not before this Court. And -- and we can --

21 JUSTICE KAVANAUGH: But she explained

22 how it informs, so just take the question --

23 MR. RICE: Sure.

24 JUSTICE KAVANAUGH: -- as best you

25 can.

1 MR. RICE: Yeah. I think our position
2 is that there are certain times in medicine,
3 history has shown, where the states in their
4 traditional role as regulators have -- have had
5 to intervene. And that's not because -- of
6 course, the parents are trying to do the best
7 they can and and -- get the best treatment
8 for -- for their kids, but we've had multiple
9 instances in -- in -- in somewhat recent history
10 where we have stuff like lobotomy, eugenics,
11 that had wide -- widespread acceptance among the
12 medical community, and the state had to
13 intervene as a regulator to protect the
14 children.

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

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

23 JUSTICE JACKSON: Can I just ask you
24 about -- I -- I don't understand at all the
25 similarly situated argument that you make, and I

1 hope that you can help me because I -- I don't
2 know how you can say both that girls and boys
3 are not similarly situated at step one, when
4 this law is being evaluated, and it's not making
5 a sex-based classification.

6 It seems to me that recognizing their
7 lack of similarity, as you do, in making the
8 argument is making a sex-based classification.
9 So --

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

19 JUSTICE JACKSON: Right. But, when
20 you're doing that, you're making a sex-based
21 classification. I mean, the very argument
22 carries with it the characterization that we're
23 trying to identify here.

24 You -- you start by saying it's
25 different to treat a boy who's using this

1 medication for a particular reason from a girl
2 who's -- okay, so that's a sex-based
3 classification. Haven't we dealt with step one,
4 now we should be going on to step two --

5 MR. RICE: No.

6 JUSTICE JACKSON: -- intermediate --
7 intermediate scrutiny applies by -- by the terms
8 of what you're arguing.

9 MR. RICE: I -- I -- I don't think
10 that we agree that we've checked the box at step
11 one because there is no medical treatment that
12 boys can receive that girls cannot, so we -- we
13 disagree with the notion --

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

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

3 JUSTICE JACKSON: Okay. So what is
4 your argument?

5 MR. RICE: Our -- we are not arguing
6 that -- that you can discriminate and draw lines
7 so long as you do so both against boys and
8 against girls. We're arguing there is no
9 sex-based line. If you're a boy and you go in
10 to get puberty blockers, you can get the puberty
11 blockers if you're going to use them for
12 precocious puberty. You cannot get the puberty
13 blockers if you're going to use them to
14 transition. That is not a sex-based line. That
15 is a purpose-based line.

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

25 JUSTICE JACKSON: And the treatments

1 are different on -- because of the biological
2 sex of the person, right? I mean, that's what
3 you've said. The purposes are different because
4 of the biological sex and why you're going in to
5 get them?

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

13 I'm happy to take more questions if
14 the Court has them.

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas?

17 JUSTICE THOMAS: A number of time
18 you've mentioned off-label uses of -- of these
19 hormones. The -- what are some of the other
20 off-label uses that are not legal in Tennessee?

21 MR. RICE: So, for example, Your
22 Honor, testosterone, we have a -- a separate law
23 that -- that prohibits the use of testosterone
24 for hormonal manipulation intended to increase
25 muscle mass strength or weight without medical

1 necessity.

2 We have -- like every state, we
3 regulate medicine and we regulate the use of
4 drugs. You cannot use drugs in the State of
5 Tennessee if it's not for a -- a legitimate,
6 viable medical purpose.

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

14 JUSTICE THOMAS: A number of times
15 you've tried to say that -- what the
16 classification that the State of Tennessee has
17 advanced in this legislation. Would you spend a
18 few minutes on that?

19 MR. RICE: Yes, Your Honor. So,
20 again, we think that our law fundamentally draws
21 a distinction based on medical purpose. I'll go
22 back to puberty blockers.

23 If a boy wants puberty blockers, the
24 answer is yes if you have precocious puberty, no
25 if you're doing this to transition. If a girl

1 wants puberty blockers, the answer is yes if you
2 have precocious puberty, no if you're doing this
3 to transition.

4 That -- that is fundamentally a
5 different treatment, and what is turn -- what is
6 dictating under this law is the use for which
7 you are putting the drug.

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

18 So the notion that the risks are --
19 are the same when you give testosterone to a boy
20 as when you give it to a girl are -- are simply
21 not borne out by medical reality.

22 CHIEF JUSTICE ROBERTS: Justice Alito,
23 anything?

24 Justice Sotomayor?

25 Justice Kagan? No?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: Just one
4 clarification. It's an obvious point, but I
5 want to make sure you agree with it --

6 MR. RICE: Okay.

7 JUSTICE KAVANAUGH: -- which is you're
8 not arguing that the Constitution takes sides on
9 this question. You, as I understand it, you are
10 arguing that each state can make its own choice
11 on this question.

12 So, from your perspective, as I
13 understand it, it's perfectly fine for a state
14 to make a different choice, as many states have,
15 than Tennessee did and to allow these
16 treatments --

17 MR. RICE: Yes.

18 JUSTICE KAVANAUGH: -- correct?

19 MR. RICE: Yes, Your Honor, that's
20 correct. And -- and we think that's because of
21 what Your Honor has pointed out, that the -- no
22 matter how you draw -- draw these lines, there
23 are risk and benefit -- potential benefits
24 and -- and harms to people on both sides.
25 And -- and the question of how to balance those

1 harms is not a -- a question for the judiciary.

2 It's a question for the legislature.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: Can states make a
7 different choice if doing so means that a
8 state's law operates to treat its citizens
9 differently on the basis of -- name the suspect
10 classification. I thought that was the work of
11 the Constitution and the Equal Protection
12 Clause.

13 MR. RICE: Your Honor, we don't think
14 that the -- it draws any lines based off any
15 suspect classes --

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

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

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Rebuttal, General Prelogar?

17 REBUTTAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
18 ON BEHALF OF THE PETITIONER

19 GENERAL PRELOGAR: Thank you,
20 Mr. Chief Justice. Two quick clarifying points.
21 I want to make clear that Tennessee
22 here is not regulating based on off-label use.
23 Off-label use is extremely common in pediatrics,
24 and we have pointed to a number of uses of these
25 medications on page 40 of our brief, the very

1 same medications that likewise are off-label
2 use. If there are problems with safety and
3 effect -- and effectiveness, then that would not
4 become the standard of care, and there are
5 self-regulatory measures to address that issue.

6 Justice Kavanaugh, you said this might
7 be a space where each state can make its own
8 choice, but I think it's important to recognize
9 that my friend's arguments would equally apply
10 to a nationwide ban if this were enacted by
11 Congress. And so I think that the Court should
12 keep that in mind when thinking about the level
13 of scrutiny here.

14 There were a lot of questions about
15 how to take account of disputed medical evidence
16 when there might be some uncertainty, and I want
17 to make a few points. As my friend
18 acknowledged, that doesn't go to the level of
19 scrutiny. So that doesn't mean that you should
20 ignore a sex classification when one exists in
21 the statute. But, at the point of applying
22 heightened scrutiny, the Court can take context
23 into account. And we're not asking courts to
24 step in here and say we want to figure out as a
25 matter of policy exactly what the right approach

1 is. But you can ask the familiar judicial
2 questions like does the state actually have any
3 evidence to support its claims that there's a
4 harm to adolescent health and is this law
5 severely over- and underinclusive.

6 And if the Court conducts the analysis
7 here in the first instance, this law doesn't
8 look anything like a typical medical regulation
9 to protect adolescent health. That would look
10 like the West Virginia law, where you're
11 tailoring it but still living -- leaving some
12 possibility for care when it can have enormous
13 benefits.

14 And the reason it doesn't look like a
15 typical medical regulation is because the -- the
16 legislature was doing something different in
17 trying to get minors to appreciate their sex and
18 not become disdainful. That's not a
19 medical-based justification, but I think it
20 shows exactly why the State drew the lines where
21 it did.

22 Finally, I think the Court should
23 think about the real-world consequences of laws
24 like SB1. Consider its effects on Ryan Roe. As
25 Justice Sotomayor noted, Ryan's gender dysphoria

1 was so -- severe that he was throwing up before
2 school every day. He thought about going mute
3 because his voice caused him so much distress.
4 And Ryan has told the courts that getting these
5 medications after a careful consultation process
6 with his doctors and his parents has saved his
7 life. His parents say he's now thriving. But
8 Tennessee has come in and categorically cut off
9 access to Ryan's care, and -- and they say this
10 is about protecting adolescent health, but this
11 law harms Ryan's health and the health of all
12 other transgender adolescents for whom these
13 medications are a necessity.

14 And the State says it doesn't even
15 want the courts to take a look at whether this
16 protects adolescent health. But the reason Ryan
17 can't have these medications is because of his
18 birth sex, and a sex-based line like that can't
19 stand on rational basis review.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, 12:28 p.m., the case was
25 submitted.)

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