

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

BRADLEY LITTLE, GOVERNOR OF IDAHO,)
ET AL.,)
Petitioners,)
v.) No. 24-38
LINDSAY HECOX, ET AL.,)
Respondents.)

Pages: 1 through 133

Place: Washington, D.C.

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3 BRADLEY LITTLE, GOVERNOR OF IDAHO,)
4 ET AL.,)
5 Petitioners,)
6 v.) No. 24-38
7 LINDSAY HECOX, ET AL.,)
8 Respondents.)
9 - - - - -
10
11 Washington, D.C.
12 Tuesday, January 13, 2026
13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 10:04 a.m.
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7 Petitioners.

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9 California; on behalf of the Respondents.

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1 PROCEEDINGS

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-38,
5 Little versus Hecox.

6 Mr. Hurst.

7 ORAL ARGUMENT OF ALAN M. HURST

8 ON BEHALF OF THE PETITIONERS

9 MR. HURST: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 Idaho's law classifies on the basis of
12 sex because sex is what matters in sports. It
13 correlates strongly with countless athletic
14 advantages, like size, muscle mass, bone mass,
15 and heart and lung capacity. Tragically but
16 not surprisingly, male athletes have even
17 injured female athletes in many sports. If
18 women don't have their own competitions, they
19 won't be able to compete.

Gender identity does not matter in sports, and that's why Idaho's law does not classify on the basis of gender identity. It treats all males equally and all females equally regardless of identity, and its purpose is exactly what the legislature said,

1 preserving women's equal opportunity.

2 In fact, it's our friends on the other
3 side who want to classify based on gender
4 identity. They're seeking special treatment
5 for males who allegedly lack an unfair
6 advantage but only if those males also identify
7 as transgender.

8 Denying special treatment isn't
9 classifying on the basis of transgender status.
10 It's consciously choosing not to. Idaho's
11 sex-based classification would get intermediate
12 scrutiny if Hecox challenged it. But Hecox's
13 requested relief presupposes separate women's
14 sports. All Hecox challenges is the law's
15 application to a tiny subset of males who
16 identify as transgender and suppress their
17 testosterone.

18 But that's not how intermediate
19 scrutiny works. Idaho's law is a substantial
20 fit for 99 percent of males, and a perfect fit
21 is not required. If it were, that would be the
22 end of all sex-based classifications.

23 Finally, a word about mootness. When
24 trying to avoid mootness below, Hecox told the
25 court: I intend to play women's club soccer

1 this semester, next semester, and through the
2 remainder of my time at B.S.U. A contradictory
3 post-cert affidavit does not make it absolutely
4 clear this controversy is over. So Hecox's
5 formidable burden isn't met, and this case
6 isn't moot.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: There will probably
9 be some questions about mootness, but I'd like
10 you to, in focusing on the equal protection
11 analysis, the -- and, here, the sex
12 classifications in sports is not being
13 challenged.

14 MR. HURST: That's correct.

15 JUSTICE THOMAS: How does that work in
16 this -- in this case, when we're talking about
17 one individual being excepted from a
18 particular -- or included in a particular
19 category?

20 MR. HURST: There's no basis for
21 heightened scrutiny, intermediate scrutiny in
22 that situation, Your Honor. If the sex-based
23 line passes intermediate scrutiny, which no one
24 disputes that it does, then the edge cases, the
25 potential exceptions, that's all rational basis

1 review.

2 JUSTICE SOTOMAYOR: That makes no
3 sense to me, all right, and I don't know how
4 you can say sex classification is not being
5 challenged.

6 There's no question here that a male
7 who identifies as a female, but it's a male, is
8 being include -- excluded from a female sport,
9 correct?

10 MR. HURST: That's correct.

11 JUSTICE SOTOMAYOR: All right. By its
12 nature, that's a sex classification, and all
13 sex classifications we have said repeatedly in
14 our case law require intermediate scrutiny.

15 Now what you're saying is, well, she's
16 not challenging a -- males generally not
17 playing. She just doesn't want to be the one
18 male excluded. So it's a subclass of people
19 that she's challenging, correct?

20 MR. HURST: Yes, I think that is
21 correct.

22 JUSTICE SOTOMAYOR: All right. So how
23 do you square our various case law -- Caban,
24 Lehr, Cleburne, VMI in particular -- all of
25 whom involved a subclass of people who

1 challenged on equal protection grounds their
2 exclusion from a definition?

3 MR. HURST: I'm happy to take those
4 cases in order, Your Honor, starting with
5 Caban. There was no notion of as-applied
6 anything in Caban. In Caban, it was a facial
7 challenge to the statute, and individual
8 circumstances were used as examples to prove
9 that the statute was overbroad and lacked a
10 substantial fit.

11 JUSTICE SOTOMAYOR: That's the point.
12 That's what she's saying here, that the state
13 interest here is the safety of women, correct,
14 and promoting competitive -- competition?

15 MR. HURST: Fairness --

16 JUSTICE SOTOMAYOR: That's the state
17 interest.

18 MR. HURST: Fairness to safe --

19 JUSTICE SOTOMAYOR: In Caban, the
20 state interest was in ensuring that only
21 children with active parents, let's say, were
22 given a state benefit, correct?

23 MR. HURST: Yes. And Caban was a --
24 was struck down facially. The statute was
25 considered unjustified.

1 JUSTICE SOTOMAYOR: She's not -- how
2 about Lehr?

3 MR. HURST: In Lehr, we had the
4 same -- we had --

5 JUSTICE SOTOMAYOR: That's the
6 opposite. That's the subclass, the people who
7 were excluded.

8 MR. HURST: In Lehr, the Court said
9 the law would be justified with respect to you,
10 you know, plaintiff, and because the law would
11 be justified with respect to you, you are not
12 able to challenge the law elsewhere.

13 JUSTICE SOTOMAYOR: All right.

14 MR. HURST: So the Court says --

15 JUSTICE SOTOMAYOR: How about VMI?

16 MR. HURST: Well, V --

17 JUSTICE SOTOMAYOR: That distinction
18 doesn't make any sense to me. It's still an
19 exception. It's a subclass of people who are
20 covered by the law and others are not. That's
21 what we said.

22 MR. HURST: The VMI case is the flip
23 side of Idaho's law. The VMI case, equal
24 opportunity required letting women in to
25 previously single-sex spaces. In this case,

1 equal opportunity for women requires giving
2 women separate spaces. And VMI said that was
3 okay. VMI said separate housing --

4 JUSTICE SOTOMAYOR: Wait a minute.

5 That -- that's begging the very question at
6 issue here. You can have a sex classification
7 based on sex. You just have to have a reason
8 for it and one that matches your exclusion.

9 What you're trying to say is we don't
10 even look at the reason to see if it has a
11 scientific basis.

12 MR. HURST: The reason we don't look
13 at the reason in this case to see whether
14 there's a scientific basis is because no one
15 disputes that there is a scientific basis for
16 separate women's sports.

17 JUSTICE SOTOMAYOR: Oh, but there is
18 --

19 JUSTICE KAGAN: Are -- are --

20 JUSTICE SOTOMAYOR: -- a dispute of
21 that.

22 JUSTICE KAGAN: I'm sorry.

23 JUSTICE SOTOMAYOR: Go ahead.

24 JUSTICE KAGAN: Are you then saying,
25 Mr. Hurst, that there really is no such thing

1 as an as-applied equal protection challenge?

2 MR. HURST: No, Your Honor. But what
3 I'm saying is that equal protection, the
4 question is whether the classification is valid
5 and not whether it makes sense in individual
6 situations.

7 JUSTICE KAGAN: But that sounds to me
8 as though -- and, you know, I think our -- our
9 precedent is -- is actually very sparse in this
10 area, sort of surprisingly sparse. But it
11 sounds to me as what you're saying is, as long
12 as the -- the classification is facially valid,
13 a person does not get to come in and say that
14 with respect to some subclass, a small subclass
15 in this case, a person doesn't get to say, with
16 respect to some subclass, there's a mismatch,
17 that the justification has run out, that the
18 justification doesn't apply.

19 You're saying that that really is just
20 not an available argument.

21 MR. HURST: I -- I agree that is not
22 an available argument. And I think this Court
23 has taken that approach, our approach, in cases
24 from Kahn v. Shevin all the way to Nguyen. And
25 Nguyen is the best example because, there,

1 the -- the petitioner had been raised in the
2 United States by the U.S. citizen father, and
3 the Court said Congress's interest in making
4 sure there's a connection between the United
5 States is enough to justify the classification.

6 Well, it -- this Petitioner obviously
7 had the connection with the United States.
8 There was no basis to apply these
9 justifications to that petitioner, didn't
10 matter.

11 JUSTICE KAGAN: I mean, one thing that
12 this case could be about is -- and this case, I
13 mean generally this litigation -- is whether
14 the plaintiffs are right here that there is a
15 mismatch, right, you know, and -- and -- and
16 some of your briefing addresses that question,
17 right?

18 You can take all the hormones in the
19 world, you can take all the puberty blockers in
20 the world, you say, and there still will be a
21 competitive advantage. That's one thing that
22 this litigation could be about and one way to
23 resolve this litigation.

24 Another thing that this litigation
25 could be about is this deeper and, as I say,

1 surprisingly unanswered in my mind equal
2 protection question about what -- what -- what
3 an as-applied equal protection challenge is and
4 whether they exist.

5 And I -- I guess, you know, you're
6 suggesting that we should -- well, I don't
7 really know what you're suggesting because,
8 here, you're saying, look, just do it that way.
9 They could be right on the science and we would
10 still win. A lot of your briefing really
11 contests their view of the science.

12 So which way should we think about
13 this case?

14 MR. HURST: We think that equal
15 protection jurisprudence is about the validity
16 of classifications. It takes a classification
17 to trigger the doctrines to begin with, and
18 then you ask is the classification justified
19 under intermediate scrutiny.

20 And so we think that's the right
21 approach, is the classification justified, not
22 is it justified in each individual instance
23 because, as Nguyen said, the -- this Court has
24 never held, Nguyen said, that a law has to be
25 capable of achieving its ultimate objective in

1 every instance.

2 And as soon as that possibility of
3 forcing legislature to justify the law with
4 respect to individual plaintiffs is on the
5 table, intermediate scrutiny is over.

6 JUSTICE JACKSON: But can I --

7 MR. HURST: That is strict scrutiny.

8 JUSTICE JACKSON: -- can -- can I --
9 can I question the premise that you are putting
10 forward?

11 Even if I agree with you that equal
12 protection is about is this classification
13 justified, I think that begs the question what
14 is the classification.

15 And so, to the extent that you have an
16 individual who says what is happening in this
17 law is that it is treating someone who is
18 transgender but who does not have, because of
19 the medical interventions and the things that
20 have been done, who does not have the same
21 threat to physical competition and safety and
22 all of the reasons that the state puts forward.
23 That's actually a different class, says this
24 individual.

25 So you're not treating the class the

1 same and you're not -- how do you respond to
2 that? In other words, the as-applied challenge
3 essentially redefines the class or one could
4 think of it as that. And so what's wrong with
5 that, number one?

6 And how do you square that with our
7 holdings in Caban, which Lehr later described
8 in this way. In other words, Lehr suggested
9 that Caban was establishing that as-applied
10 challenges of this nature do exist.

11 MR. HURST: Certainly. The -- the --
12 I'll take the second question first.

13 JUSTICE JACKSON: Yes.

14 MR. HURST: Caban says nothing about
15 as applied. I know that Lehr says later this
16 was an as-applied case, but simply reading
17 Caban, it does not say that. It simply applies
18 intermediate scrutiny.

19 JUSTICE JACKSON: No, I understand.
20 But those two cases were in juxtaposition with
21 one another.

22 MR. HURST: Yes.

23 JUSTICE JACKSON: And Lehr comes out
24 the way it does distinguishing Caban on the
25 basis that it's an as-applied challenge. And

1 we in Lehr have a facial challenge. And it's
2 basically the same facts.

3 So, if those -- if you're right,
4 that -- those two cases can't come out the way
5 they do.

6 MR. HURST: Our -- I don't think so,
7 Your Honor. Again, Lehr was actually briefed
8 as a standing argument of maybe you might be
9 able to argue that this law is overbroad, but
10 you individually are not in the overbroad part,
11 and, therefore, you don't get to challenge it.

12 The Court didn't use standing
13 language, like express standing language in the
14 opinion, but that is the logic of the opinion.

15 JUSTICE GORSUCH: Mr. Hurst?

16 MR. HURST: Yes.

17 JUSTICE GORSUCH: There's another way
18 to think about the case that your friends on
19 the other side posit, and that is that
20 transgender status should be conceived of as a
21 discrete and insular class subject to scrutiny,
22 heightened scrutiny, in and of itself given the
23 history of de jure discrimination against
24 transgender individuals in this country over
25 history in immigration and family law,

1 cross-dressing statutes, they get a long
2 laundry list. And I'd like you to respond to
3 that.

4 MR. HURST: Certainly, the de jure
5 discrimination point specifically. There has
6 been some discrimination against transgender
7 people, significant discrimination against
8 transgender people in the history of this
9 country. The same can be said of many groups.
10 The same could have been said of the mentally
11 disabled in Cleburne, et cetera, et cetera.

12 I think Justice Alito's concurrence in
13 Skrmetti is helpful to this in saying this
14 quasi-suspect class or suspect class process,
15 what we're really looking for is classes that
16 look like race or like sex.

17 And if you compare the discrimination
18 in this case, where not one of the laws they
19 cite actually classifies expressly on the basis
20 of transgender status, if we look at that
21 history and we compare it to the history of
22 African Americans and women who were not able
23 to vote, who were not able to own property, who
24 had express classifications based on their
25 status written into the law for most of this

1 country's history, these things don't compare.

2 They're just not alike.

3 JUSTICE SOTOMAYOR: Well, how --

4 JUSTICE GORSUCH: Well, I --

5 JUSTICE SOTOMAYOR: I'm sorry.

6 JUSTICE GORSUCH: No, please.

7 JUSTICE SOTOMAYOR: No, go ahead.

8 JUSTICE GORSUCH: Okay. You -- you --
9 there are two things in that answer that are
10 kind of at odds with one another. You -- you
11 start by saying you don't question that there's
12 a history of discrimination, I assume de jure,
13 in this country.

14 MR. HURST: Mm-hmm.

15 JUSTICE GORSUCH: And then you say,
16 well, but they don't classify on that basis.

17 How should we think about that?

18 MR. HURST: The -- I think that the --
19 the, you know, famous Footnote 4 helps, right?
20 This has been a discrete and insular minority.
21 Has it been a group of people that were
22 recognized as a group where laws were passed on
23 the basis of their membership in that group
24 demonstrating that they lacked the political
25 power to protect themselves in the political

1 process. This is from Justice Barrett's
2 concurrence, of course.

3 We just don't have any of that here.

4 All they can point to is conduct. It says, you
5 know, no cross-dressing, no drag performances
6 in bars, these kinds of things. As I think our
7 friends on the other side would admit, people
8 cross-dress who aren't transgender. This is
9 not a classification on that basis.

10 JUSTICE SOTOMAYOR: What do you do
11 with the legislative history in this case where
12 the people who introduced the bill called it a
13 transgender bar? So you -- you -- in answering
14 Justice Gorsuch, you said there's no evidence
15 of that, but there's certainly a lot of
16 comments in this bill when it was passed.

17 MR. HURST: Your Honor, I -- I
18 respectfully disagree. I am aware of nothing
19 in the legislative record that says that. I
20 know that the Ninth Circuit opinion says that,
21 but if you'll notice, the key quote that the
22 Ninth Circuit relies on puts the words
23 "transgender women" in brackets.

24 And if you look up that colloquy in
25 the legislative record, in their transcript

1 that they provided in the district court, the
2 word "transgender," "gender identity," et
3 cetera, do not appear in that -- in that
4 section of the transcript.

5 JUSTICE SOTOMAYOR: Can I go back to
6 the mootness question that Justice Thomas
7 talked about but not addressed here at all.

8 Yes, this Respondent made certain
9 allegations about her intent at a certain
10 point, but she signed an affidavit with this
11 Court attesting that she has permanently
12 stopped playing sports covered by the ban. She
13 will not try for any school-sponsored women's
14 sports. And, in fact, I think she'll finish
15 school very shortly.

16 And there's no reason to question the
17 sincerity of that belief given that dropping
18 out of sports puts you at a disadvantage where
19 you lose your competitive edge. And she's
20 going to graduate soon.

21 How is this different than Acheson
22 Hotel, where the person in the litigation made
23 representations that she intended to visit and
24 continue visiting hotels in the future, and
25 then, when the case got before us, she

1 voluntarily dismissed those suits, like here,
2 with prejudice, and we then directed that the
3 case be considered moot? How is that
4 different?

5 MR. HURST: To begin with --

6 JUSTICE SOTOMAYOR: I -- I add one
7 further difference between the two cases.

8 MR. HURST: Certainly.

9 JUSTICE SOTOMAYOR: Here, it's not
10 like she's attempting to avoid us reaching the
11 question. In just a little while, we're going
12 to reach the identical question in another
13 case. So we don't have a subterfuge in
14 attempting to stop the Court from reaching an
15 important legal question.

16 MR. HURST: I'll start with Acheson
17 Hotels, Your Honor. In Acheson Hotels, no one
18 disputed that plaintiff's plans going forward.
19 In this case, even the district court does not
20 credit the plaintiff's plans going forward.
21 The district court struck the notice of
22 dismissal and said Hecox's plans have changed
23 before; Hecox's plans could change again. And
24 also, the court feels that this is somewhat
25 manipulative in order to escape the Supreme

1 Court's jurisdiction.

2 None of that existed in Acheson
3 Hotels. And that puts us in City of Erie
4 territory, where, in that case, the premises
5 were sold, the business was closed, the owner
6 was in his 70s. And they said that's not
7 enough. You could still reopen this business.
8 Your company is still incorporated. Under
9 these circumstances, where it's the Respondent
10 seeking through post-certiorari maneuvers to
11 moot the case, that isn't enough. This case
12 isn't moot.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 JUSTICE THOMAS: Does a -- the
17 justification for a classification as you have
18 in Title IX, male/female sports, let's take,
19 for example, an individual male who is not a
20 good athlete, say, a lousy tennis player, and
21 does not make the women's -- and wants to try
22 out for the women's tennis team, and he said
23 there is no way I'm better than the women's
24 tennis players.

25 How is that different from what you're

1 being required to do here?

2 MR. HURST: It's not all different,
3 Your Honor, and that's exactly what we're
4 concerned about, that their arguments about
5 needing to make exceptions from intermediate --
6 from an otherwise valid classification for
7 people for whom that classification doesn't
8 make sense, those arguments don't limit
9 themselves to people who identify as
10 transgender. Many males could say I can't
11 really compete with the women's basketball
12 team, and, therefore, I should be able to try
13 out.

14 And I haven't seen an answer from the
15 other side as to why they couldn't beyond -- I
16 correct myself. They say that, well, those
17 people don't face the same dignitary harm as
18 transgender people. But I don't see how that's
19 relevant to the intermediate scrutiny analysis.
20 The analysis is, is this classification
21 substantially related -- related to a
22 legitimate state interest? The person's
23 reasons for wanting to violate the
24 classification don't come into the analysis.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 JUSTICE ALITO: Justice Sotomayor
2 raised the question whether the issues here are
3 identical to the issues in the case we're going
4 to hear in a couple of minutes, and I'd
5 appreciate your views on that.

6 Suppose we affirm or reverse in this
7 case -- I'm sorry, in the other case. Would
8 that leave something undecided with respect to
9 your case?

10 MR. HURST: Yes, Your Honor. Our case
11 involves the issue of the constitutional
12 definition of sex, which the Ninth Circuit made
13 a decision about, what sex means for
14 constitutional purposes. The Fourth Circuit
15 did not make that decision. We would be bound
16 by that decision going forward unless the Court
17 reaches that question.

18 That said, I would -- I would dispute
19 the -- the premise of the question because
20 whether or not the Court has Article III
21 jurisdiction in this case does not depend on
22 what the Court might do another day in a
23 different case.

24 JUSTICE ALITO: No, that wasn't the
25 premise of the question. It was just an

1 attempt to explore the consequences of deciding
2 the mootness issue one way or the other. Thank
3 you.

4 MR. HURST: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Justice --

6 JUSTICE SOTOMAYOR: There's a
7 Munsingwear --

8 CHIEF JUSTICE ROBERTS: -- Sotomayor?

9 JUSTICE SOTOMAYOR: There's a
10 Munsingwear GVR that's being agreed to here, so
11 you're not bound by anything in this case, and
12 our decision there will inform any new decision
13 in the Ninth Circuit on this issue, correct?
14 Whatever analysis we adopt in the Little case
15 will control what happens in a new case.

16 MR. HURST: That is law, Your Honor,
17 yes.

18 JUSTICE SOTOMAYOR: All right. With
19 respect to the Erie case, there, the
20 90-year-old man never said he didn't intend to
21 open another business. He just said this
22 business. And that was a distinction we saw.

23 Here, she has said: I don't intend to
24 do this. Now every other promise that she made
25 in this litigation, that she was going to

1 continue trying out, that she was going to stay
2 in sports, held true until this case and the
3 negative attention she received, correct? To
4 say she misrepresented her intent is going a
5 little extreme when she honored all her
6 previous intent -- intents and only changed her
7 mind when new circumstances arose, i.e., the
8 notoriety of this case, correct?

9 MR. HURST: No, Your Honor, nothing
10 changed externally to -- to the plaintiff. The
11 plaintiff's affidavit filed in this Court says
12 that there has been negative attention and so
13 forth since the beginning of this case. The
14 only thing that changed is this Court granted
15 certiorari. And then, after that, the
16 plaintiff said: I want out and so I will stop
17 playing sports.

18 JUSTICE SOTOMAYOR: Do you dispute
19 that having a case named after you makes your
20 infamy -- infamy live forever? Think of --

21 MR. HURST: No, Your Honor.

22 JUSTICE SOTOMAYOR: No? You don't
23 think that Brown and any of the other named
24 plaintiffs that we have in famous cases draw an
25 attention to those people as people? Have you

1 studied your law cases? Students do all the
2 time. I think one of my colleagues had a
3 course where they looked at the lives of the
4 plaintiffs.

5 Do you doubt that having a named case
6 with such an eventful event is going to
7 continue attention on this person?

8 MR. HURST: I don't doubt there will
9 be attention. And I -- I confess I --

10 JUSTICE SOTOMAYOR: Negative
11 attention.

12 MR. HURST: And I confess I have
13 studied a few law cases, but --

14 JUSTICE SOTOMAYOR: Have you studied
15 the people?

16 MR. HURST: To some degree, Your
17 Honor. What I would disagree with is there's
18 no background principle of plaintiffs get to
19 leave the litigation whenever they want.
20 Even -- even Rule 41, even in just the district
21 court, the rule is that once the litigation
22 hits a certain point --

23 JUSTICE SOTOMAYOR: So what --

24 MR. HURST: -- you can't leave.

25 JUSTICE SOTOMAYOR: -- what you're

1 going -- assume, I know you don't want to, that
2 you were to lose this case. You would -- you
3 would say that we have to force an unwilling
4 plaintiff who has offered to dismiss with
5 prejudice, promised not to incur this activity
6 again, we would force that person to continue
7 prosecuting this case?

8 MR. HURST: The Court did in City of
9 Erie.

10 JUSTICE SOTOMAYOR: That -- it did
11 there, but is it the right thing to do? We
12 didn't do it in Acheson.

13 MR. HURST: In Acheson, no one
14 disputed that the case was moot. The only
15 question was which Article III question would
16 be decided first. In this case, we dispute the
17 case is moot. We dispute all of the facts that
18 this is based on.

19 This is a formidable burden that Hecox
20 bears -- that's from Nike, Already v. Nike --
21 to show that it is absolutely clear that this
22 conduct cannot be reasonably expected to
23 reoccur. We think, as the -- the district
24 court said in its -- in its striking order,
25 that based on the changing history here, based

1 on the past conduct, as Scalia mentioned in his
2 Footnote 3 of his City of Erie concurrence,
3 there is a reasonable basis to doubt whether
4 Hecox's current plans are the final plans.

5 And as long as there's a reasonable
6 basis not to credit the current plans, Article
7 III lets the Court hear the case.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Mr. Hurst, I want to
10 take you back to our conversation about whether
11 there's such a thing as as-applied equal
12 protection challenges and ask you for two
13 things. The first is -- is I do think that
14 that runs counter to a couple of things that we
15 think of as basic principles of constitutional
16 law and maybe equal protection law
17 particularly.

18 In constitutional law, we often say
19 as-applied challenges are the preferred mode of
20 constitutional adjudication. Certainly, we
21 have not erected, like, bars to them in any
22 other area as far as I understand it.

23 And then, in equal protection law, we
24 say all the time things like people need to be
25 treated as individuals and not as -- just as

1 members of a group. And I'm wondering whether
2 both of those principles don't suggest that any
3 bar on equal protection -- as-applied equal
4 protection challenges is -- is just wrong, is
5 off.

6 And then the second thing I want you
7 to do after you do that is -- is assume for me
8 that there is such a thing and to tell me how
9 in your view an as-applied equal protection
10 challenge ought to work in this case.

11 MR. HURST: Certainly, Your Honor.

12 The -- the first answer would be I -- I
13 recognize those principles that -- that Your
14 Honor is alluding to. The -- the contrary
15 principle would be the very nature of
16 intermediate scrutiny analysis, that it is
17 always possible, if you only have a substantial
18 fit supporting -- supporting legislation, then
19 it is always possible to find people whom it
20 doesn't fit, and then we're in strict scrutiny.

21 JUSTICE KAGAN: So I completely take
22 that point --

23 MR. HURST: Yeah.

24 JUSTICE KAGAN: -- Mr. Hurst. I mean,
25 you're exactly right. And, of course,

1 intermediate scrutiny is different from strict
2 scrutiny. It doesn't require the, you know,
3 almost perfection that strict scrutiny does.
4 Completely take the point.

5 But isn't that point really addressed
6 to what we often consider in these areas, which
7 is to facial challenges, right? So, when you
8 bring a facial challenge, of course, that's
9 right, that you're allowed to have
10 over-inclusiveness and under-inclusiveness and
11 a lack of a perfect fit, but that the nature of
12 an as-applied challenge is different.

13 MR. HURST: Certainly, the Court could
14 do that, Your Honor. The Court has not done
15 that before, as -- as I think we both agree.

16 And the -- the result of that would be
17 judge-made exceptions to laws anytime judges
18 thought they didn't make sense for particular
19 classes of plaintiffs. And the deference to
20 the legislature that should exist to some
21 degree even under intermediate scrutiny
22 would -- would be done -- done away with. It
23 would be gone.

24 And then the administrability
25 justification for many sex-based

1 classifications, including this one, would also
2 be gone because you could no longer administer
3 the classification evenly. You would have to
4 make as many exceptions as courts thought you
5 needed to make. So it's really an
6 institutional competence thing or
7 institutional --

8 JUSTICE KAGAN: Yeah.

9 MR. HURST: -- power thing between
10 courts and legislatures.

11 JUSTICE KAGAN: So -- so you're
12 suggesting to me that the whole thing is just
13 unworkable and we shouldn't -- but flip to
14 my -- the second prong of my question, which is
15 suppose we said, yeah, we're -- as-applied
16 equal protection challenges exist as as-applied
17 anything challenges do.

18 What would it look like, do you think?

19 What should it look like?

20 MR. HURST: Yeah. I'm -- I'm not sure
21 what it should look like. I can say what it
22 does look like in this case and -- and why we
23 think there's a problem with it.

24 JUSTICE KAGAN: So you're not willing
25 to take me on my second path, which is, like,

1 let's assume that there is such a thing as this
2 challenge.

3 MR. HURST: Yes.

4 JUSTICE KAGAN: How should we view it?

5 MR. HURST: I mean, the most I can
6 say -- I doubt this is a satisfactory answer,
7 Your Honor, but the most I can say is that the
8 as-applied nature of a challenge might go to
9 the remedy. The legal analysis still focuses
10 on the classification and the justification for
11 the classification. And once we're talking
12 about individuals, we're not talking about a
13 classification anymore.

14 JUSTICE KAGAN: Yeah. I mean, that
15 doesn't seem like much of an as-applied
16 challenge, right? You have to prove the exact
17 same things you do in a facial challenge.

18 MR. HURST: Mm-hmm.

19 JUSTICE KAGAN: But don't worry
20 because you only get relief as to you. So
21 that's -- that's not a true as-applied
22 challenge.

23 MR. HURST: And this is -- I'm having
24 trouble coming up with what it could look like
25 because it will always be possible to carve the

1 class down further, right, I mean.

2 So, if they say that their class,
3 their subclass, I guess, subclass of males is
4 males who identify as transgender, then we
5 would come back and say: Well, only something
6 like 10 percent of males who identify as
7 transgender take the testosterone suppression.

8 And then they might say: Well, okay,
9 no, the class is just the males who take the
10 testosterone suppression. And then we might
11 come back and say, well, according to the
12 record, according to their own expert, of males
13 who take testosterone suppression, only one
14 quarter of them are able to achieve the
15 appropriate -- you know, like, able to achieve
16 ordinary levels of testosterone for women. And
17 the other three quarters would still have an
18 advantage and, therefore, we'd be justified,
19 75 percent, pretty good fit under intermediate
20 scrutiny, and we'd be justified with the law.

21 But then they can just change the
22 class again and they can say: A-ha, no, our
23 class is males who identify as transgender who
24 suppress their testosterone and who suppress
25 their testosterone successfully and are able to

1 get it down to where they don't have a
2 competitive advantage.

3 And at that point, we can say, if --
4 if you can define the class so precisely,
5 you're going to force the state to -- you know,
6 to define the class that precisely. It's going
7 to be enormously burdensome for everyone. And
8 the state can't ever win because, whenever the
9 state points to the fit in the statute, they
10 just redefine their class as only the people
11 who are outside the fit.

12 JUSTICE KAGAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: To follow up on
17 something you were talking about with Justice
18 Sotomayor, would your constitutional position
19 be different if the law explicitly stated that
20 transgender women and girls cannot participate
21 in women's and girls' sports?

22 MR. HURST: My -- my answer to that
23 depends on what's in the rest of the law. So
24 I -- I would refer back to Skrmetti and say
25 it's not a magic words test. The mere presence

1 of the word "transgender" in the statute is not
2 enough to make it a transgender-based
3 classification.

4 JUSTICE KAVANAUGH: What would make
5 it?

6 MR. HURST: If the law either
7 expressly or through its effect let all males
8 except males who identify as transgender
9 participate in female sports but made it so
10 that somebody's ability to play in female
11 sports depended on transgender identity --

12 JUSTICE KAVANAUGH: No, assume that
13 the -- assume that the law does not allow males
14 to play in women's and girls' sports --

15 MR. HURST: Mm-hmm.

16 JUSTICE KAVANAUGH: -- and then
17 explicitly says in a separate provision
18 transgender women and girls, biological males
19 who identify as female, cannot play in women's
20 and girls' sports.

21 Would your constitutional position be
22 any different in that situation?

23 MR. HURST: No, Your Honor. I -- I
24 think that's Skrmetti. I think that would be a
25 reference to transgender identity, but the

1 law's application would never turn on
2 transgender identity, so it wouldn't be a
3 transgender status question.

4 JUSTICE KAVANAUGH: Even if it says
5 transgender?

6 MR. HURST: The word "transgender" in
7 the statute might be relevant to a pretext
8 analysis, but it wouldn't be relevant to the
9 facial classification if that word did not
10 change how the statute applied in practice.

11 JUSTICE KAVANAUGH: How many states
12 allow biological males who identify as females,
13 transgender, women and girls, to play in
14 women's and girls' sports?

15 MR. HURST: Statutorily, I'm aware of
16 27 states that take our side and do not permit
17 that and 23 states that take the other side and
18 do permit it.

19 JUSTICE KAVANAUGH: And those states
20 who do allow it, are they -- is your position
21 that they are violating the Constitution, the
22 Equal Protection Clause rights of biological
23 girls and women by allowing that, or do you say
24 that's up to each state to decide and that the
25 Constitution gives discretion to the state

1 whether to allow it or not to allow it?

2 MR. HURST: I have not yet been
3 persuaded by a constitutional theory that would
4 let us use the Equal Protection Clause to
5 impose our policy on other states in this
6 matter.

7 JUSTICE KAVANAUGH: Okay.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: I have some
11 questions about the implications of your
12 theory.

13 So how would your theory play out if
14 we're talking about six-year-olds, where
15 there's no difference between boys and girls in
16 terms of athletic ability, testosterone levels,
17 et cetera.

18 Could you have sex-separated teams
19 then -- or, sorry, sex-separated teams by
20 biological sex and not allow trans girls on
21 them?

22 MR. HURST: Certainly, Your Honor.

23 First, I'd like to explain how the statute
24 applies to that situation so I can put my
25 answer in context. There are no six-year-olds

1 in the state to whom the statute applies
2 because there are no school-sponsored sports
3 for six --

4 JUSTICE BARRETT: That's why it was a
5 hypothetical.

6 MR. HURST: Okay. Right. Yes. Like,
7 there would be the normal intermediate scrutiny
8 analysis. And are we saying it applies only to
9 six-year-olds or to everybody across the board?

10 JUSTICE BARRETT: Well, I'm just
11 trying to give you a hypo -- I mean, yours --

12 MR. HURST: Yeah.

13 JUSTICE BARRETT: -- is driven by
14 testosterone levels and differences in athletic
15 capability. So I'm asking you what if you
16 tried to take that out of the equation and
17 you're just drawing the line based on
18 biological sex and saying that trans girls can't
19 be on the girls team in an age group that's
20 prepubescent.

21 MR. HURST: The record in this case
22 does not support the notion that males lack an
23 athlete advantage at six years old. That --
24 that's about as early as the science goes from
25 what's in the record. And even at that age,

1 males have about a 5 percent athletic advantage
2 over girls in most situations.

3 Now, if this is not a level of
4 competition where anybody cares about that, the
5 simple solution is the solution you see in most
6 places, which is you have co-ed sports, you
7 don't divide the teams based on sex, and
8 everybody can play, and Idaho's law does
9 nothing to interfere with that.

10 JUSTICE BARRETT: And remind me
11 whether Idaho's law -- and I guess this --
12 this -- your -- your answer made me think of
13 this, and I guess this goes to the question of
14 whether the law discriminates on the basis of
15 trans status.

16 Is it true that biological girls,
17 trans boys, can play on boys' teams?

18 MR. HURST: Anyone can play on boys'
19 teams, Your Honor.

20 JUSTICE BARRETT: Anyone can play on
21 boys' teams, okay. And -- and to this point
22 about medical uncertainty and scientific
23 uncertainty, you were talking about what
24 advantages you might have even that are apart
25 from testosterone levels.

1 MR. HURST: Mm-hmm.

2 JUSTICE BARRETT: Your friends on the
3 other side say that, listen, science is
4 uncertain and so we need more factual
5 development, it's not really clear how much of
6 an athletic advantage boys and men have if
7 their testosterone levels are below a certain
8 point.

9 How does that play out? Tell me why
10 we don't need more fact finding or what is the
11 state's burden in -- in -- in showing what the
12 state of scientific certainty is.

13 Do we have to defer to the state?
14 Presumably, at some point, if deference is due,
15 the state would have too little scientific
16 evidence to really get that deference? Tell
17 me -- tell me how to think about that.

18 MR. HURST: The -- the first question
19 would be are we applying intermediate scrutiny,
20 and we argue that the Court shouldn't.

21 But leaving that aside, if the Court
22 is applying intermediate scrutiny, then we'd
23 say it's Turner Broadcasting that says the
24 legislature -- a first Amendment case applied
25 intermediate scrutiny and said under

1 intermediate scrutiny, the legislature has to
2 draw reasonable inferences from substantial
3 evidence. It does not need to act only on
4 scientific consensus, which is what the
5 district court in this case assumed
6 incorrectly.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: So I guess I'm going
11 back to your discussion with Justice Kagan.
12 I -- I -- I'm not sure I understand why you're
13 characterizing the as-applied challenge in
14 practice as the individual coming back and
15 proposing a different classification, as though
16 we're doing an analysis of the classification
17 in the way that you suggest.

18 I thought that the state has a
19 classification that is its general rule, no
20 individuals who identify as female but were sex
21 at birth male can play in women's sports and
22 that the individual then is merely seeking an
23 exception based on their individual --
24 individual capacity because the state's general
25 rule is based on fairness and -- and medical

1 science and all of these things.

2 Do I have this -- like, they're not
3 proposing an alternative class necessarily.

4 They are just saying that I don't -- I should
5 be excepted from that general rule on this
6 basis.

7 MR. HURST: We -- we agree that an
8 exception is what they are seeking, Your Honor.
9 And -- and it's an exception based on
10 transgender status, again.

11 JUSTICE JACKSON: But that's the way
12 the rule used to work, right? Am I -- I just
13 want to be clear what we're talking about here.

14 MR. HURST: Sure.

15 JUSTICE JACKSON: I -- I understood
16 that this law originally was exactly that, that
17 you -- you basically said no transgender women
18 in girls' sports but we'll look at your
19 evidence and look at your circumstances and
20 decide whether or not you, individually, can be
21 included.

22 MR. HURST: So I --

23 JUSTICE JACKSON: Is that -- is that
24 what used to happen?

25 MR. HURST: As a matter of Idaho law,

1 there was no law whatsoever before this. It
2 was --

3 JUSTICE JACKSON: Is that what was
4 happening on the ground in Idaho law?

5 MR. HURST: That's what NCAA policy
6 permitted from 2010 to 2022. Before 2010, the
7 NCAA policy matched ours. Since 2025, the NCAA
8 policy has matched ours.

9 JUSTICE JACKSON: Okay.

10 MR. HURST: So --

11 JUSTICE JACKSON: But what I'm asking
12 is if that is -- if that is the ask here, not
13 that all transgender women be allowed but that
14 this particular plaintiff be allowed based on
15 their circumstances, why is that so not
16 administrable or proposing a different
17 classification that we're not going to be able
18 to sustain? I don't understand that.

19 MR. HURST: So, first -- first as to
20 administrability, Your Honor, making sure that
21 a -- a transgender athlete does lack an -- or
22 does not have an unfair advantage would require
23 ongoing testosterone monitoring because
24 testosterone can fluctuate. That is invasive,
25 that is intrusive, and that's expensive.

1 JUSTICE JACKSON: Well, that's the
2 burden of the person. The person who wants to
3 play has to demonstrate to you, to whatever
4 degree of scientific certainty, that they don't
5 have a competitive advantage. Why -- why would
6 you not allow that? I guess I don't
7 understand.

8 MR. HURST: The second answer is that
9 -- the second answer is that there's nothing in
10 that argument that limits itself to
11 transgender-identifying athletes. If this
12 athlete doesn't have an advantage over women
13 and therefore can compete safely, then there
14 are other athletes that could say for -- for
15 different reasons, that they don't have an
16 unfair advantage and therefore they could
17 compete safely.

18 JUSTICE JACKSON: Yes.

19 MR. HURST: And --

20 JUSTICE JACKSON: I -- I -- I
21 understand that. And there are -- there are
22 legal arguments.

23 Let me ask you something about the
24 classification. I guess I'm struggling to
25 understand how you can say that this law

1 doesn't classify on the basis of transgender
2 status. The law expressly aims to ensure that
3 transgender women can't play on women's sports
4 teams. So I -- why is that not a
5 classification on the basis of transgender
6 status?

7 MR. HURST: I'd apply Skrmetti again.
8 The question is whether the application of law
9 turns on transgender status. And it doesn't;
10 it turns on sex. The legislature did not want
11 to exclude transgender people from sports. It
12 wanted to keep women's sports women-only and
13 exclude males from women sports.

14 JUSTICE JACKSON: No, I understand,
15 but with respect to two individuals, a
16 cis-woman and a trans-woman, who both want to
17 play on a team that reflects their gender
18 identity, this law operates differently based
19 on their sex, right?

20 MR. HURST: The law does separate
21 differently based on their sex, as Your Honor
22 just said. It does not operate differently
23 based on their transgender identity.

24 JUSTICE JACKSON: But it treats
25 transgender women different than -- than

1 cis-women, doesn't it?

2 MR. HURST: It has a disparate impact
3 because men who identify as -- as transgender
4 have a different reason for wanting to play
5 women's sports than -- than women -- than, you
6 know, biological females do, right? But if
7 that were enough, then Skrmetti would have come
8 out a different way, Geduldig would have come
9 out a different way, other cases would have
10 gone a different way. I'm blanking on the
11 other ones.

12 JUSTICE JACKSON: Right. Finally, let
13 me just ask you about mootness, because it's a
14 little odd, I think, that a defendant would not
15 want a case dismissed. Ordinarily, the
16 defendant is the one who's claiming mootness
17 because they've been sued.

18 So this plaintiff has brought a claim
19 against -- against you, and the claim relates
20 to your policy about college sports. And as I
21 understand, the plaintiff is about to graduate.
22 So wouldn't we have a mootness problem
23 potentially, notwithstanding any
24 representations that the plaintiff made?

25 MR. HURST: I don't think so, Your

1 Honor. I'd look to Camreta as the case that
2 tells us how we -- the best case for telling us
3 how we -- how we analyze mootness in this
4 situation. It's does the Petitioner still have
5 an interest in continuing the litigation? And
6 does the --

7 JUSTICE JACKSON: Only for a few more
8 months. What if -- what if this decision
9 doesn't come out until June and she graduates
10 in May? Isn't -- what --

11 MR. HURST: It's my understanding at
12 this point -- I defer to my friends here. It's
13 my understanding at this point that May
14 graduation is not possible.

15 JUSTICE JACKSON: For this individual?

16 MR. HURST: For this individual,
17 that's correct.

18 JUSTICE JACKSON: All right. Thank
19 you.

20 MR. HURST: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Mooppan.

24

25

1 ORAL ARGUMENT OF HASHIM M. MOOPPAN
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONERS

4 MR. MOOPPAN: Mr. Chief Justice, and
5 may it please the Court:

6 It is undisputed that states may
7 separate their sports teams based on sex in
8 light of the real biological differences
9 between males and females. States may equally
10 apply that valid sex-based rule to biological
11 males who self-identify as female.

12 Denying a special accommodation to
13 trans-identifying individuals does not
14 discriminate on the basis of sex or gender
15 identity or deny equal protection.

16 All of that remains true even assuming
17 a man could take drugs that eliminate his
18 sex-based physiological advantages.

19 The law is reasonably tailored,
20 regardless of whether it is perfectly tailored,
21 as applied to any such tiny subset of men. And
22 states are not required to redefine sex or
23 monitor the testosterone levels of female
24 athletes.

25 In short, male athletes who take

1 performance-altering drugs are not similarly
2 situated to female athletes, and states need
3 not treat them the same.

4 I welcome this Court's questions.

5 JUSTICE THOMAS: Would you -- would
6 you elaborate on what you alluded to, and that
7 is that -- whether or not the state has to --
8 its asserted interest in classifications has to
9 bear out in each individual case? That seems
10 to be what the applied challenges in individual
11 cases would require.

12 MR. MOOPPAN: That's right. So
13 intermediate scrutiny requires a substantial
14 relation or a reasonable fit, which is not a
15 perfect fit. And this Court has recognized --
16 and I'd point this Court to Edge Broadcasting
17 in particular. It focused on this exact issue
18 of, if the law is substantially related in
19 general, can an individual come in and say,
20 well, as applied to me individually, it's not?
21 And the Court said no we're not going to allow
22 you to do that because that would essentially
23 convert intermediate scrutiny into strict
24 scrutiny on an as-applied basis.

25 Now, I'm not disputing that you can

1 sometimes bring as-applied claims under
2 intermediate scrutiny. So if, for example, you
3 had a law that applied -- this sort of law that
4 applied to sports but also math and also chess,
5 it might be that, as applied to math or chess,
6 it was invalid, but it was valid as to sports
7 because it -- for math and chess at the level
8 of the classification, it's not reasonably
9 tailored.

10 But here, critically, everyone agrees
11 that for sports, for 99 percent of men, it's
12 reasonably tailored. It's just the 1 percent
13 of trans-identifying individuals who take drugs
14 and then those drugs are effective that's a
15 problem. And this Court's decision in Michael
16 M. makes clear that that's not a viable as
17 applied claim.

18 In Michael M., this Court upheld a
19 statutory rape law that applied differently to
20 men than women. And the rationale was because
21 women faced a unique risk of pregnancy. But
22 of, course, if either the male rapist or the
23 female victim was infertile, there would be no
24 pregnancy. So on their theory, you could have
25 come in and said, well, I have an as-applied

1 claim that I was infertile so it was okay to
2 rape this under-age girl.

3 And this Court not only rejected that;
4 the Court said it would be ludicrous,
5 ludicrous, to say that you could be an
6 as-applied claim for pre-pubescent girls.

7 That's just not the way as-applied scrutiny
8 works in intermediate scrutiny cases.

9 That's equally true, as my friend said
10 in Nguyen. In the Court's decision in Nguyen,
11 the justification for the law was making sure
12 that there -- the parent knew that they were
13 the parent and had an opportunity to have a
14 relationship with the parent. But Nguyen --
15 Nguyen's father knew about the birth, was
16 present with -- when -- the whole time and
17 brought Nguyen to the United States.

18 Nevertheless, the Court held, for the class of
19 men overall, it was reasonably tailored and
20 they weren't going to focus on the specific
21 facts of Nguyen. You know --

22 JUSTICE KAGAN: You started,
23 Mr. Mooppan, by saying that you can -- did
24 think that there were as-applied equal
25 protection challenges and giving an example of,

1 well, if it also applied to the chess team or
2 something.

3 But that doesn't seem like an
4 as-applied challenge to me. That seems as
5 though there's just a provision of the law that
6 facially invalid, right? So -- so let's put
7 those kinds of cases aside where you can split
8 the law up and say this part is facially
9 invalid; this part isn't, and -- and focus
10 instead on, like, real as-applied challenges.

11 Your classification is basically okay,
12 let's posit, because it -- it's -- there's a
13 substantial relationship to your goal. Is
14 there ever a time where a person can come in,
15 either on behalf of herself or on behalf of a
16 subclass, and say notwithstanding that there is
17 no valid facial challenge here, there is an
18 as-applied challenge; this subclass has to be
19 exempted?

20 MR. MOOPPAN: So it's a hard -- I
21 don't think this Court's cases have ever
22 squarely addressed that. I think if it could
23 be brought, it would have to be a very
24 substantial percentage. So to give you a
25 stylized hypothetical, if you had a law that

1 regulated on the basis of sex and you could
2 imagine three subgroups of males. For subgroup
3 1 and subgroup 2, each of whom are a third of
4 men, it was reasonably tailored. But, for
5 subgroup 3, which was a third of men, it
6 wasn't.

7 Maybe, in a circumstance like that,
8 the third subgroup could come in and say, for a
9 third of the applications of this law, it's not
10 reasonably tailored. That's not enough of a
11 substantial fit at least for us even if you're
12 going to uphold the law for the other two
13 thirds of that.

14 JUSTICE JACKSON: But why does it have
15 to be --

16 MR. MOOPPAN: But wherever you --

17 JUSTICE JACKSON: -- that many people?
18 Why, why? I don't understand why that subclass
19 can't make this showing and get the remedy as
20 to them.

21 MR. MOOPPAN: Because, if it's one
22 person, you're basically converting the law
23 under strict scrutiny.

24 JUSTICE JACKSON: But you're not,
25 you're not, I mean, because what you're doing

1 is you're allowing that individual to get the
2 remedy that we've said in cases like CASA is
3 the only thing that's available, that you can't
4 have this flow to everybody. It's just about
5 this individual and whether or not he's been
6 unconstitutionally treated.

7 MR. MOOPPAN: So, again, because, if
8 the law is reasonably tailored for
9 99.99999 percent of people and you come up with
10 a point fraction of percent and say that that
11 percent has a viable claim, that's -- that's
12 more than you would ever require under strict
13 scrutiny. I don't know of any claims that's
14 ever done that.

15 JUSTICE JACKSON: No, but, I mean,
16 what's the result of that? If you're making a
17 facial challenge, I understand that you're
18 saying that if the law has such a broad sweep
19 of constitutionality, then we're not going to
20 strike this thing down just because we can
21 identify one person for whom it doesn't apply.

22 But, if you are that one person and
23 you can show that this is unconstitutional as
24 applied to you, I guess I don't understand why
25 it matters that it's constitutional as applied

1 to 99.9 percent of the other people?

2 MR. MOOPPAN: Well, because I think
3 you're begging the question when you say it's
4 unconstitutional applied to you, laws that
5 classify on the basis of state -- sex only to
6 be reasonably related. And so, if it's
7 reasonably related because it's tailored for
8 99 percent of people, then it is constitutional
9 even applied to you.

10 JUSTICE JACKSON: Even as applied?

11 MR. MOOPPAN: Yes.

12 JUSTICE JACKSON: So you are saying
13 there is no such thing as an as-applied
14 intermediate scrutiny challenge.

15 MR. MOOPPAN: I'm saying -- no, again,
16 if you -- if there was one where it was a third
17 of the people, I could maybe understand the
18 claim that the third of people, it's not
19 reasonably related for them even though it is
20 for two thirds of the people.

21 I'm just saying that when the numbers
22 get as small as they are here, that claim's not
23 viable. And we know that from this Court's
24 cases. Again, Michael M, every infertile man
25 and every victim --

1 JUSTICE JACKSON: No, I understand.

2 But we didn't do that same kind of quantitative
3 analysis in Caban, right?

4 MR. MOOPPAN: Right. So --

5 JUSTICE JACKSON: We didn't ask the --
6 the -- the -- the husband in Caban to figure
7 out where he stood relative to all husbands
8 who -- who --

9 MR. MOOPPAN: Right.

10 JUSTICE JACKSON: -- who were -- to
11 whom this was applied.

12 MR. MOOPPAN: Right. So, yeah, let me
13 talk about both Caban and Lehr.

14 JUSTICE JACKSON: Please. Please.

15 MR. MOOPPAN: So Caban is not an
16 as-applied challenge. Caban did not say that
17 there was some set of people for whom that law
18 was valid, the differential treatment on the
19 basis --

20 JUSTICE JACKSON: Itself. Lehr said
21 that about Caban.

22 MR. MOOPPAN: Right, right. But -- so
23 Lehr -- what Lehr held was the father in Lehr
24 had abandoned the child, and what Lehr
25 essentially said is, if the mother had

1 abandoned the child, the mother wouldn't get a
2 veto either.

3 JUSTICE JACKSON: Can I -- can I read
4 to you what Lehr said about Kahn? Discussing
5 Caban, Lehr explained: "We have held that
6 these statutes may not constitutionally be
7 applied in that class of cases where the mother
8 and father are, in fact, similarly situated
9 with regard to their relationship to the
10 child."

11 So Lehr is interpreting Caban as an
12 as-applied challenge, isolating a subset of
13 people where there's not actual similarly
14 situated circumstances, and Lehr is different.

15 It -- it is a facial challenge. It --

16 MR. MOOPPAN: I --

17 JUSTICE JACKSON: -- is in opposition.

18 No?

19 MR. MOOPPAN: What that sentence in
20 Lehr -- the facts of Lehr, there was no
21 differential treatment. The father in Lehr had
22 abandoned the child and the Court basically
23 rejected his claim because, if the mother had
24 abandoned the child, the mother also wouldn't
25 get a veto.

1 So Lehr is a case where the plaintiff
2 lost because there was no differential
3 treatment at all. Caban is a case where the
4 plaintiff won because the classification
5 couldn't be justified.

6 The only way those cases would support
7 their position is if either Caban or Lehr had
8 said there is some set of cases where the woman
9 gets a veto but the father doesn't and that's
10 fine. And neither Caban nor Lehr said that.

11 This Court has never said in those
12 lines of cases that the mother could get a veto
13 but the father doesn't and that's perfectly
14 okay. So that's what they're arguing, and
15 neither of those cases support it.

16 JUSTICE SOTOMAYOR: Counsel, I -- I --

17 MR. MOOPPAN: You had also asked about
18 VMI, so let -- if I could just briefly address
19 why VMI doesn't support them either.

20 In VMI, the point was yes, lots of
21 women couldn't -- wouldn't want to go to VMI,
22 but also lots of men wouldn't want to go to
23 VMI.

24 As to the set of people who were
25 actually burdened by the exclusion, all of the

1 women the law was not fairly tailored. The
2 argument that VMI was -- that Virginia was
3 making VMI was essentially equivalent to the
4 following.

5 If MIT said, you know, most women and,
6 frankly, most men can't meet our math and
7 science standards, so we're just not going to
8 allow women to come to MIT at all, of course,
9 this Court would reject that argument. That
10 was the argument that they were making in VMI,
11 that just very few women wanted to attend.
12 But, for the set of women who wanted to attend,
13 the law was not properly tailored because there
14 was no justification for excluding them.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Justice Alito?

19 JUSTICE ALITO: Under Title IX, what
20 does the term "sex" mean?

21 MR. MOOPPAN: We think it's properly
22 interpreted pursuant to its ordinary
23 traditional definition of biological sex and I
24 think probably given the time it was enacted,
25 reproductive biology is probably the best way

1 of understanding that.

2 JUSTICE ALITO: All right. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

5 JUSTICE SOTOMAYOR: You know, the
6 problem I'm having with what you're doing now
7 is you're doing exactly what Justice Stevens
8 said should be done, and he admitted later in
9 O'Connor that the Court roundly rejected that
10 in Caban and Lehr. He wanted to do exactly
11 what you said.

12 He said, in dissent, this Court should
13 be -- should be analyzing equal protection,
14 contending that if the classification is
15 justified in those cases in which the rule has
16 its most frequent applications, then it doesn't
17 violate equal protection.

18 And then he said the Court should
19 presume that the law is entirely valid and
20 require the challenger to demonstrate that it's
21 unjust applications are sufficiently numerous
22 and serious to render it invalid. It's exactly
23 what you said we should be doing.

24 So you want us to accept what the
25 dissent did and not what the majority said it

1 was doing in Caban or Majure.

2 In VMI, Justice Scalia said the same
3 thing, that taking the majority's logic to its
4 logical conclusion, a single woman who wanted
5 to attend could satisfy the -- and satisfy the
6 admissions requirement, would be enough for an
7 as-applied challenge and that shouldn't be the
8 law.

9 You're asking the Court to adopt views
10 expressed by two minority dissenting judges in
11 this case. We've been doing an awful lot of
12 that lately, but -- you're smiling because it's
13 true. But you're asking us to adopt an
14 approach that we have rejected as a majority
15 court and accept what dissenters are doing,
16 correct?

17 MR. HURST: With all respect, no.

18 Again, in Caban, nowhere in the majority
19 opinion of Caban did they say this law is
20 reasonable for certain classes of men, but it's
21 not reasonable --

22 JUSTICE SOTOMAYOR: Oh, but it
23 exact -- it did exactly. It said it's
24 reasonable for -- it's reasonable for fathers
25 who -- who don't support their children and

1 won't be reasonable for fathers who don't.

2 MR. MOOPPAN: With all respect, Your
3 Honor, it did not. Caban did not uphold that
4 law as applied to any men who hadn't abandoned
5 their child. Now it is true Lehr upheld the
6 law for someone who had abandoned their child,
7 but the reason it upheld the law is because --

8 JUSTICE SOTOMAYOR: But the logic
9 of --

10 MR. MOOPPAN: -- women who abandoned
11 their child --

12 JUSTICE SOTOMAYOR: -- but the logic
13 of the -- of the opinion is that if the reverse
14 had been true, it would have ruled the way it
15 did.

16 MR. MOOPPAN: I don't think that's
17 true, but even if you thought that was --

18 JUSTICE SOTOMAYOR: Counsel, then I
19 have --

20 MR. MOOPPAN: Sorry.

21 JUSTICE SOTOMAYOR: No, I -- I just
22 have one last question.

23 What's percentage enough? There are
24 2.8 million transgender people in the United
25 States. That's an awfully big figure. I do

1 understand that in Idaho, this was the first
2 transgender child, but that just happenstance
3 as to location.

4 What makes a subclass meaningful to
5 you? Is it 1 percent, 5 percent, 30 percent,
6 15 percent? One is not enough for you, but
7 why?

8 MR. MOOPPAN: Well, so I'll say --

9 JUSTICE SOTOMAYOR: When the numbers,
10 this -- the numbers don't talk about the human
11 beings.

12 MR. MOOPPAN: So I'll say a couple
13 things about that, Your Honor. The first I'll
14 say is, if the distinction between intermediate
15 scrutiny and strict scrutiny is the difference
16 between a perfect fit and a reasonable fit,
17 1 percent surely has to be on the side that's
18 reasonable.

19 But, if you don't want to just take
20 the 1 percent on its own face, I would
21 point the Court -- if you want to focus on
22 majority opinions or opinions for the Court,
23 Michael M rejected the challenge even though
24 that law wouldn't, for an infertile couple,
25 infertile, either infertile rapists or

1 infertile victims, the justification didn't
2 apply. There are certainly more infertile
3 people --

4 JUSTICE SOTOMAYOR: But they did it --
5 they did it on a different basis, which had to
6 do with different harms to a previous --

7 MR. MOOPPAN: No, that's not true,
8 Your Honor, with all respect.

9 JUSTICE SOTOMAYOR: Well, I can read
10 the decision and tell you.

11 MR. MOOPPAN: With all respect, that
12 paragraph, it says, even setting aside the
13 physical differences, it is ludicrous to think
14 we have to exclude infertile children from this
15 rape law.

16 And there are certainly more infertile
17 people than there are trans-identifying
18 individuals who take these drugs and eliminate
19 all their physical advantages. So, if we just
20 focus on holdings of this Court, we know that
21 this percentage is too small.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: Mr. Mooppan, just
24 assume with me that there is such a thing as an
25 as-applied equal protection challenge. What

1 would -- what would it take to bring that
2 challenge? What should the plaintiff have to
3 show?

4 MR. MOOPPAN: I think they would have
5 to show that, A, they are a substantial enough
6 percentage to be able to bring an as-applied
7 claim and then, as to that group, the law
8 wasn't reasonably tailored for them.

9 JUSTICE KAGAN: And that they would
10 have the burden on that? It's not -- it's not
11 for the state to come back and say -- the state
12 does not have to satisfy that burden initially?

13 MR. MOOPPAN: I -- certainly not the
14 first of the two respects. I think if you
15 thought that you could have a valid as-applied
16 claim and they had made it through the gate of
17 saying they were a big enough class, then I
18 think -- consistent with normal intermediate
19 scrutiny, I think the state does bear the
20 burden of showing justification for that class.

21 So I think the state would have it on
22 the second step. The plaintiff would have it
23 on the first step.

24 JUSTICE KAGAN: I see. So they have
25 to sort of get through the gate of we're big

1 enough for you to take us seriously, but then
2 the state has it?

3 MR. MOOPPAN: I think -- I think that
4 would be how you would analyze it.

5 JUSTICE KAGAN: Uh-huh. And I think
6 you were asked this, but big enough to be taken
7 seriously, like, how do we decide that?

8 MR. MOOPPAN: You know, again, the
9 Court's cases haven't really talked about it.
10 I think the way I would think about it
11 analytically is the difference between
12 intermediate scrutiny and strict scrutiny is
13 the difference between a perfect fit and a
14 reasonable fit. So is there enough of a group
15 here that we think that we're not essentially
16 holding the state to perfection?

17 If it's so close to perfection, then
18 you're really undermining the difference
19 between the two. If it's a big enough group
20 that it -- we're not asking for perfection --

21 JUSTICE KAGAN: I mean, are you really
22 undermining the difference between the two?
23 Because usually we think of the difference
24 between the two with respect to facial
25 challenges. So you have to do a whole lot less

1 to show that the facial classification that
2 you're making is okay.

3 MR. MOOPPAN: I don't think so. I do
4 think that you would very much be undermining
5 the difference between the two if you said that
6 even a single person could bring an as-applied
7 intermediate scrutiny case. And, again, I
8 would urge Your Honor to read Edge
9 Broadcasting. There's the whole section of the
10 opinion that's on this exact issue and says
11 exactly what I'm saying. Now, admittedly, it's
12 a First Amendment case, but it's an
13 intermediate scrutiny First Amendment case.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

17 JUSTICE GORSUCH: If the class is big
18 enough, in your discussion, say, a third as you
19 discussed, might it just fail intermediate
20 scrutiny facially? I mean, at some point, do
21 they collapse?

22 MR. MOOPPAN: So I -- I -- I -- I
23 agree that that's part of why these are so
24 unusual. If there's a big enough group that
25 you've excluded, you -- you're exactly right,

1 it -- it might not be reasonably related as a
2 whole, so then it facially fails. But I could
3 at least conceptualize a situation where it
4 covers enough people validly that a facial
5 challenge fails, but it covers a big enough
6 group that it can't be justified for, then
7 maybe you could bring an as applied claim.

8 I just -- I don't think this Court
9 really needs to grapple with these fairly
10 tricky analytical questions because this is the
11 world's easiest as-applied claim to reject. It
12 is a fraction of a percent. Whatever
13 as-applied claim you could bring, you cannot
14 possibly be a fraction of a percent. That
15 would be totally inconsistent with this Court's
16 decision in Michael M. and Nguyen, both of
17 which rejected claims by people who had a much
18 greater percentage than a fraction of
19 a percent.

20 JUSTICE KAVANAUGH: As you know, a lot
21 of states allow biological males who identify
22 as female, transgender women and girls, to play
23 in women's and girls' sports. And you heard
24 Idaho say that the state's -- those states,
25 other states, constitutionally may allow that,

1 consistent with the Equal Protection Clause.

2 Do you agree with that?

3 MR. MOOPPAN: We have been challenging
4 those laws under Title IX in lower courts. And
5 as we said in our brief, we would urge the
6 Court to just reserve judgment --

7 JUSTICE KAVANAUGH: Can you answer the
8 Equal Protection Clause question that I just
9 asked?

10 MR. MOOPPAN: I believe -- you know,
11 I'm not sure if we've taken a position on the
12 equal protection piece.

13 JUSTICE KAVANAUGH: Do you have a
14 position?

15 MR. MOOPPAN: I -- I don't, right now.
16 I'm sorry.

17 JUSTICE KAVANAUGH: Okay. And on
18 Title IX, footnote 2 of your brief seemed to
19 say that you don't have a position on how Title
20 IX applies to those states as well.

21 MR. MOOPPAN: No. So we do have -- we
22 are actively litigating in lower courts, and we
23 are saying that they are violating Title IX.
24 What the footnote said is it's a very different
25 question, and we would urge this Court to make

1 clear it's not resolving that question one way
2 or the other by what it says in this case.

3 JUSTICE KAVANAUGH: Okay. So you have
4 a position on it, but you don't want us to say
5 anything about that --

6 MR. MOOPPAN: Right.

7 JUSTICE KAVANAUGH: -- issue, correct?

8 MR. MOOPPAN: It's a very different
9 question analytically, and so we --

10 JUSTICE KAVANAUGH: I understand.

11 That's why I'm asking.

12 MR. MOOPPAN: Yes.

13 JUSTICE KAVANAUGH: Yeah. Okay.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Barrett?

17 JUSTICE BARRETT: So, Mr. Mooppan,
18 when Justice Kagan started asking the questions
19 early on about the as-applied equal protection
20 challenges, she pointed out that there was kind
21 of a surprising dearth in the case law really
22 grappling with this. But I think you wouldn't
23 be getting all the questions that you're
24 getting about Caban and Lehr and, you know,
25 Michael M. and VMI if it weren't the case that

1 you can read some lines of cases either way.

2 So let's say that there is this
3 uncertainty, we haven't really confronted it.

4 As far as I can tell, it's because it just
5 wouldn't be relevant in strict scrutiny because
6 it's often fatal in fact -- or typically or
7 almost always fatal in fact. So it's really an
8 intermediate scrutiny problem. Maybe it's a
9 rationale basis problem too. I mean, maybe
10 this would have implications for all kinds of
11 review, because it seems to me that if you're
12 never talking -- in -- in any case in which
13 scrutiny is not talking about a perfect fit,
14 you might have this problem.

15 What would it do essentially -- I'm
16 just trying to think about the ramifications of
17 allowing as-applied challenges. It seems like
18 it's at war with the theory of intermediate
19 scrutiny for some of the reasons that Idaho
20 said, because all lines, all classifications
21 overshoot or undershoot, right?

22 So can you imagine how intermediate
23 scrutiny works? And this is -- I'm not -- I'm
24 not -- this isn't designed to be a lay-up or
25 something. It's honestly just something I'm --

1 I'm grappling with. How would it even work
2 going forward?

3 MR. MOOPPAN: So I'm not sure I can
4 say a whole lot more than what I've already
5 said, which is I do think it's a problem. The
6 reason I think it's a problem is it's
7 conflating the difference between strict
8 scrutiny and a perfect fit --

9 JUSTICE BARRETT: Yeah.

10 MR. MOOPPAN: -- and intermediate
11 scrutiny in a reasonable fit. And I worry that
12 if you allow as-applied claims to a small
13 enough group, you're essentially collapsing the
14 difference because you're essentially requiring
15 a perfect fit, because whenever you have a
16 reasonable but not perfect fit, the subset who
17 falls within that will come in and bring an
18 as-applied claim. And so the state will
19 essentially have to have perfectly tailored
20 laws because any single person who -- for whom
21 you don't have a perfect fit could come in and
22 bring an as-applied challenge.

23 JUSTICE BARRETT: Including, say, you
24 know, boys who just couldn't make the team
25 because they weren't good enough, because the

1 law, to the extent that it's designed to
2 protect competitiveness and safety, et cetera,
3 wouldn't pose the same danger in the case of a
4 boy who just isn't good enough to make the male
5 team but perhaps could make the girl team.

6 MR. MOOPPAN: At least arguably,
7 depending on what their exact theory is --

8 JUSTICE BARRETT: Definition is.

9 MR. MOOPPAN: -- for the
10 justification.

11 JUSTICE BARRETT: Thanks.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: I guess I'm still
15 struggling to understand why the state would
16 have to have perfectly tailored laws. I would
17 think the state would just have to make
18 exceptions where people can demonstrate that
19 the justification that makes the state's
20 conduct constitutional doesn't apply to them.

21 MR. MOOPPAN: So making exceptions is
22 tailoring your law. That's literally what it
23 means, to tailor your law --

24 JUSTICE JACKSON: No, but from --

25 MR. MOOPPAN: -- is --

1 JUSTICE JACKSON: Yes from the
2 standpoint of a facial challenge when we're
3 asking because whether this law has to be
4 stricken completely because it isn't, you know,
5 perfectly tailored. What we're doing is a
6 different exercise in the as-applied challenge.
7 We're asking whether -- even though this law is
8 overbroad, we're assuming it's overbroad now
9 because you've got in there some people to whom
10 it should not be applied.

17 MR. MOOPPAN: Right.

18 JUSTICE JACKSON: And I don't
19 understand why that is. Why wouldn't -- when
20 we identify people for whom this law operates
21 unconstitutionally -- that's the premise,
22 because now I'm in remedy, right? The premise
23 is that you have a person who successfully made
24 an as-applied challenge. This, to me,
25 unconstitutional. You say too bad, unless you

1 can show that it's also unconstitutional with
2 respect to a sizable number of other people.

3 And I don't understand why that's the
4 case.

5 MR. MOOPPAN: Because I don't agree
6 with the premise that the -- the law operates
7 unconstitutionally as to an individual person
8 just because it doesn't -- the justification
9 for the law doesn't apply to that person.

10 That's what this Court held in both Nguyen and
11 Michael M. It recognized that the
12 justification that was put forth for the law
13 might not be proof for each and every person
14 the law applied to, but this Court said that's
15 fine because --

16 JUSTICE JACKSON: And if we read Caban
17 and Lehr to say something different, if I
18 disagree with you, then -- then we just --

19 MR. MOOPPAN: Well, Nguyen is the most
20 recent of the cases.

21 JUSTICE JACKSON: Okay.

22 MR. MOOPPAN: So even if you read the
23 cases that way, and Nguyen is explicit about
24 this. Nguyen explicitly says -- I believe it's
25 -- I'm not going to get the page number right,

1 but Nguyen explicitly says that we recognize
2 that there are some men who were present at the
3 birth of their child, who have a DNA test to
4 prove that they were the father, that have been
5 with their kids their entire life --

6 JUSTICE JACKSON: Yeah.

7 MR. MOOPPAN: In fact, that was
8 probably true of Nguyen father. Tough luck.

9 JUSTICE JACKSON: Okay.

10 MR. MOOPPAN: You lose.

11 JUSTICE JACKSON: So Justice Barrett
12 is worried, I think she said, about the
13 implications of allowing as-applied challenges.
14 I guess I am worried about the implications of
15 not, because, as Justice Kagan said, we have
16 consistently said that facial challenges are
17 really hard to get, that as-applied is really
18 all there is.

19 So now we're in a world in which you
20 are setting up new barriers, in my view, to
21 establishing an as-applied challenge. So at
22 the end of the day, is your position that, you
23 know, no matter how clear it is that the
24 particular prescription is operating to
25 disadvantage a particular group, classifies

1 you, treats you differently, you're just not
2 going to be able to get a remedy for that
3 individually in -- anymore?

4 MR. MOOPPAN: Let me take a step back,
5 and then maybe this will help.

6 Laws that classify, in general, are
7 subject to rational basis review. Now there's
8 higher scrutiny for classifications on some
9 things. For race, we have strict scrutiny.
10 For sex, we only have intermediate scrutiny.

11 What that means is it is okay to have
12 a classification that doesn't operate perfectly
13 for each and every person. So it's not the
14 problem that it's unconstitutional but there's
15 no remedy. The point is that it is
16 constitutional even though it's overbroad.

17 JUSTICE JACKSON: I don't necessarily
18 think that's the take-away. I think what that
19 means is it's okay because we realize that in
20 some circumstances, maybe even in many
21 circumstances, this classification is
22 justified.

23 But, when we can identify a situation
24 in which it's not, I don't understand why a
25 person can't bring that challenge.

1 MR. MOOPPAN: Well, I can't say
2 anything better than, in both Michael M and
3 Nguyen, the Court recognized that there were
4 people who it wasn't tailored for.

5 JUSTICE JACKSON: Got it.

6 MR. MOOPPAN: They didn't give them a
7 remedy.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Ms. Hartnett.

12 ORAL ARGUMENT OF KATHLEEN R. HARTNETT
13 ON BEHALF OF THE RESPONDENTS

14 MS. HARTNETT: Mr. Chief Justice, and
15 may it please the Court:

16 Idaho concedes that H.B. 500 draws a
17 sex-based line by categorically excluding all
18 students with a biological sex of male from
19 women's teams. Sex classifications like that
20 are closely scrutinized under the Equal
21 Protection Clause to ensure they rest on
22 evidence, not supposition.

23 Idaho's articulated justification for
24 this line is to protect women's sports from
25 birth sex males because of their "biological

1 advantages." That means H.B. 500 is aimed at
2 controlling for sex-based biological
3 advantages, not for all the many reasons one
4 athlete may be better than another that have
5 nothing to do with sex.

6 On the preliminary record in this case
7 and as the experts below agreed, circulating
8 testosterone after puberty is the main
9 determinant of sex-based biological advantage
10 that H.B. 500 sought to address.

11 And on this record, Lindsay Hecox has
12 mitigated that advantage because she has
13 suppressed her testosterone for over a year and
14 taken estrogen.

15 H.B. 500 thus fails heightened
16 scrutiny as applied to Lindsay and transgender
17 women like her who have no sex-based biological
18 advantage as compared to birth sex females.

19 That analysis would come out the other way for
20 the untalented cisgender boy. He would have
21 the same sex-based advantage, the circulating
22 testosterone. He just would not be as good at
23 sports.

24 It also would come out the other way
25 here, for example, if a transgender woman had

1 gone through a male puberty and had not
2 mitigated that advantage.

3 This Court's cases have recognized
4 that when the government's justification for a
5 sex-based classification does not apply to a
6 discrete subgroup of those classified, that
7 classification is unconstitutional regarding
8 that subgroup.

9 And that holding in Caban, which I'm
10 sure we'll discuss further, has been repeatedly
11 referred to and reaffirmed, including more
12 recently than Nguyen and Morales-Santana.

13 Because the Court can affirm based on
14 sex discrimination, it's not necessary to reach
15 the question of transgender status
16 discrimination, but H.B. 500 also fails on that
17 basis. If the Court does not find the case
18 moot, the preliminary injunction should be
19 affirmed.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Couldn't you make a
22 similar argument with respect to Title IX
23 itself and the sex difference, the -- the --
24 the fact that you can have male and female
25 sports?

1 MS. HARTNETT: No, Your Honor. So I
2 think the point would be -- the question would
3 be would the sex line that's drawn in --

4 JUSTICE THOMAS: Yeah.

5 MS. HARTNETT: -- sports, and that's a
6 line that does exist, you know, as a
7 commonplace line, is that substantially related
8 to the important state interest particularly.

9 JUSTICE THOMAS: Well, you could have
10 individuals who, for example, don't present the
11 problem of physically out-matching women in a
12 particular sport or a group of people who
13 don't.

14 MS. HARTNETT: Right. And the
15 broader -- the broader goal here, of course, is
16 not sex separation for its own sake. The idea
17 is to have equality in sports, and that's the
18 ultimate objective that I think we're all
19 talking about, not separation for its own sake.

20 JUSTICE THOMAS: Well, I -- well, my
21 point is the argument that you're making now
22 with respect to this subcategory, could it not
23 also be made with respect to the sex separation
24 in Title IX generally?

25 MS. HARTNETT: Occasionally, there

1 have been examples of a -- of a boy challenging
2 the separate teams because they want access to
3 a team that's not available for the boys
4 because of the way Title IX works.

5 To be clear, we've never -- we have
6 not aware of an example of somebody, a boy
7 challenging the sex separation so that they can
8 be on the girls team where there's a boys team
9 that exists.

10 In that case, they -- they -- the
11 courts do look at that under intermediate
12 scrutiny and they determine that the overall
13 goal of ensuring equality in sport opportunity
14 for women and men allows for the distinction.

15 CHIEF JUSTICE ROBERTS: Counsel, I
16 wonder if you could address what has been, I
17 think, the basic focus of the discussion up
18 until now, which is, as I see it anyway,
19 whether or not we should view your position as
20 a challenge to the distinction between boys and
21 girls on the basis of sex or whether or not you
22 are perfectly comfortable with the distinction
23 between boys and girls, you just want an
24 exception to the biological definition of
25 girls.

1 MS. HARTNETT: Thank you, Your Honor.
2 We're not asking for a particular
3 definition or even really an exception. I -- I
4 think what we're asking for, it is similar to
5 the -- the nature of the challenge that was
6 brought in Caban.

7 There, they were -- they were -- so
8 the situation there were they were unmarried
9 fathers that were barred completely from --
10 from objecting to their child's adoption. And,
11 there, the fathers said we'd like to be able to
12 have that objection, we have a substantial
13 relationship with the children.

14 And in the -- in the group -- and
15 there was actually a pretty tailored group in
16 that case. In Justice Stevens' dissent, he
17 points out it has to be an older child and
18 there has to be participation in the rearing.
19 For that subgroup, they were allowed to
20 challenge that and get the relief.

21 And so I do note too that Justice
22 Stevens pointed out that it was an
23 indeterminately small subgroup of an unknown
24 number of fathers. So I think that's the
25 analogy that we would draw here to what we're

1 asking.

2 CHIEF JUSTICE ROBERTS: So what would
3 be the appropriate inquiry, and it's asking you
4 basically for your response to Mr. Mooppan
5 in -- in particular, that going sort of
6 challenge by challenge, whether it's based on
7 transgender status or anything else in this
8 situation, is really transforming intermediate
9 scrutiny to strict scrutiny.

10 MS. HARTNETT: We agree there would
11 have to be a group. I don't think -- in our
12 view, in a way, at least the way that the cases
13 have worked out, and this is Caban and Lehr, it
14 also goes through Nguyen and Sorales --
15 Morales-Santana.

16 I would also direct the Court to
17 the -- the illegitimacy or the non-marital
18 children case. Those are Trimble and Lalli.
19 They're cited in the BPJ brief.

20 In the same way that I think the Court
21 looks is there a definable group that's not
22 just a person who happens to not meet the --
23 the fit but actually a group where the
24 rationale doesn't make sense for the subgroup.

25 But the group can be somewhat

1 specific, like, in the case of Caban, it was
2 actually unmarried fathers who had acknowledged
3 paternity and had a substantial relationship.

4 CHIEF JUSTICE ROBERTS: Well, the --

5 MS. HARTNETT: In the Trimble case, it
6 was -- it was, you know, non-marital children
7 who had had confirmation of paternity and a
8 relationship with the father.

9 CHIEF JUSTICE ROBERTS: Well, that
10 sounds an awful lot like strict scrutiny. Or,
11 unless you're going to say whenever you can
12 come forward with anything that is an exception
13 to the boy/girl distinction, any case at all,
14 you have -- you -- you can go forward with --
15 with a strict scrutiny challenge, whether
16 it's -- whether it's, you know, 1 percent or
17 whether it's 12 people, and I'm just not quite
18 sure -- grasping why your position isn't really
19 an effort to apply strict scrutiny to a
20 distinction that we haven't applied it to.

21 MS. HARTNETT: Thank you, Your Honor.

22 I mean, all I can say, and I do agree
23 the cases are not that many in this context. I
24 think it's possibly because facial challenges
25 were more in vogue before and now as-applied

1 challenges are more preferred. And so that may
2 be explaining why a statute in Caban, for
3 example, wasn't viewed as carving out the
4 statute for the people it couldn't be applied
5 to versus facially invalidating it.

6 But I do think it matters because it's
7 not just a matter of fit that makes
8 intermediate scrutiny different. There also
9 has to be an important government interest, not
10 a compelling one. And this is really critical.
11 You can burden the right in intermediate
12 scrutiny.

13 So, in Nguyen, for example, that
14 person failed because he actually didn't take
15 the steps that would be needed to confirm the
16 paternity. So you're allowed to actually --
17 he -- he may have had a compelling case on a
18 one-off basis that, hey, I actually do have
19 that relationship with the citizen, father,
20 when I was born abroad, but he didn't take the
21 steps that he needed to do.

22 The same thing with Lehr and the same
23 thing with Lalli in the Trimble/Lalli line. So
24 you --

25 CHIEF JUSTICE ROBERTS: And --

1 MS. HARTNETT: -- you can actually
2 burden the right by saying Lindsay Hecox has to
3 actually submit testosterone tests or something
4 else different than other people and that would
5 not be allowed if it were strict scrutiny.

6 CHIEF JUSTICE ROBERTS: And if we
7 follow your approach, which allows a challenge
8 to even a fairly small group that's affected,
9 in what way would we not -- that would apply
10 across an entire range of things where there's
11 a distinction currently between boys and girls
12 quite apart from just athletics, is that
13 correct?

14 MS. HARTNETT: Your Honor, I -- I -- I
15 do think that the question would -- I -- I
16 think we're not trying to invent something
17 here. I think we were trying to draw from what
18 we understood to be precedent from the Court.

19 And I would direct you to the equal
20 protection scholar's brief. They have scholars
21 that have actually focused on this question of
22 what does an as-applied challenge mean in the
23 equal protection context. But I think taking a
24 step back, the question always would be looking
25 at what the state's asserted interest is here.

1 And, here, the state is not asserting
2 an interest of having the boys teams be better
3 and the girls teams be worse. What they're
4 trying to do is control for a sex-based
5 biological advantage. And so I think a lot of
6 the hypotheticals that you can -- maybe
7 understandably think about, what about the
8 untalented cisgender boy? What about the
9 transgender women who didn't mitigate? You
10 know, what about this or that? That gets taken
11 care of because the testosterone is the
12 advantage on this record. And almost all the
13 people that might want to try to get an
14 as-applied challenge under some other
15 idiosyncratic framework would not be able to
16 show that their exclusion actually was --

17 JUSTICE KAGAN: And Ms. Hartnett --

18 CHIEF JUSTICE ROBERTS: Okay. And
19 this will be my last question --

20 MS. HARTNETT: No, no, please.

21 CHIEF JUSTICE ROBERTS: -- for my --
22 my point was more that how we approach the
23 situation of looking at it not as boys versus
24 girls but whether or not there should be an
25 exception with respect to the definition of

1 girls.

2 That would -- if we adopted that, that
3 would have to apply across the board and not
4 simply to the area of athletics.

5 MS. HARTNETT: I mean, I think it's a
6 general framework for equal protection
7 challenges that, again, predated this case,
8 this litigation. There have been boys that
9 have tried these challenges in the past. They
10 generally have failed because they actually
11 don't lack the opportunity or actually are
12 treated -- they're not being treated
13 differently than similarly situated
14 individuals.

15 JUSTICE KAGAN: You said,
16 Ms. Hartnett, that you're not talking about
17 individual by individual by individual; it has
18 to be a defined group.

19 So how big does the group have to be?
20 How does it have to be defined? And why are
21 there those requirements? If what you're
22 saying is right about equal protection law, why
23 wouldn't it extend to individual by individual
24 by individual?

25 MS. HARTNETT: I don't think the Court

1 has foreclosed that, other than this -- this
2 actual obvious conceptual question of, like,
3 when do we get towards strict scrutiny? I
4 think what I could tell you is that in the way
5 that the Court looked at it from Caban to Lehr
6 to Nguyen to Morales-Santana, and also Trimble
7 and Lalli for the case of non-marital children,
8 the Court seems to usually be trying to figure
9 out not just is this individual somehow
10 idiosyncratic, but are they part of a group
11 that actually doesn't make sense to exclude?
12 And that makes sense because usually you're
13 trying to figure out is the interest served by
14 the exclusion? And there's usually some
15 principle why a subgroup was not properly
16 included.

17 JUSTICE KAGAN: And what are the
18 requirements of -- what does that group have to
19 look like? Mr. Mooppan suggested that it has
20 to be, you know, fairly sizable. It can't be
21 1 percent or less.

22 You know, why not? Why? What are the
23 other requirements? Like how do you go about
24 defining which group -- which -- which
25 subclasses get to make this challenge and which

1 subclasses don't?

2 MS. HARTNETT: The -- that's a good
3 question, Your Honor. I think in Trimble --
4 this is again the non-marital children case
5 cited in the B.P.J. brief -- they said discrete
6 categories that were unnecessarily excluded,
7 that was the notion there.

8 So I think that's where we were trying
9 to make clear that we don't think it can just
10 be we have a person that is extraordinarily
11 idiosyncratic and they should get their case.
12 And I don't think anything in your -- your
13 cases rules that out. I guess that's not
14 actually the case presented here. We think we
15 have an easier case because we actually have
16 identified a discrete subgroup, transgender
17 women who do not have an athletic advantage. I
18 --

19 JUSTICE JACKSON: But I don't think
20 you're answering Justice Kagan's question,
21 which is fine, if you -- if you buy into the
22 you have this subgroup as you've identified it.
23 Mr. Mooppan says that subgroup has to be big
24 enough.

25 Do you agree? And if so, how do we

1 evaluate that?

2 MS. HARTNETT: I don't agree with
3 that. I think that is -- I think in a way this
4 is the Caban dissent kind of coming back after
5 many decades because there, Justice Stevens
6 said in the dissent he's assuming -- that the
7 case in that -- in that case, was assuming the
8 case extended only to himself and by
9 implication to an unknown number of fathers and
10 went on to say "indeterminately small part."

11 So I think there's never been a
12 numerical requirement. It's more of a question
13 of whether there's a principle that -- some
14 sort of a principle that allows for the
15 exception in light of the failure to align with
16 the interest that the state is asserting.

17 And here I think the record -- and
18 we're in a preliminary injunction stage, but
19 the preliminary record was that the exclusion
20 of our client actually was not going to advance
21 the interests, nor the exclusion of other
22 transgender women who do not -- who have taken
23 efforts to mitigate their testosterone, which
24 was -- on the record here, again, was the main
25 driver of differential athletic performance.

1 JUSTICE GORSUCH: Counsel, one might
2 wonder whether the efforts to refashion our
3 equal protection jurisprudence here that we've
4 been discussing at length on sex discrimination
5 is really a fallback from what might be -- one
6 might wonder might have been your primary
7 argument, which is that transgender status is
8 itself a discreteness or a class.

9 And I -- I'm curious why you haven't
10 brought that up and what thoughts you want to
11 share with us?

12 Your friend on the other side said the
13 laws you pointed to in your brief don't address
14 transgender persons as such, and that makes all
15 the difference. Thoughts?

16 MS. HARTNETT: Well, you're -- thank
17 you for the opportunity to address that. I
18 think we were trying to find the most
19 straightforward way to help the Court to an
20 answer here. And I think we do this --

21 JUSTICE GORSUCH: Well, I've been
22 wondering what's straightforward after all this
23 discussion.

24 (Laughter.)

25 MS. HARTNETT: No, I understand. And

1 I think these are -- these are older cases, but
2 they are -- it's very interesting to see the
3 debate between the majority and Justice
4 Stevens, and Justice Stevens and O'Connor kind
5 of admitting that he was applying his dissent
6 in Caban. So these are cases from the Court.
7 We think they have some --

8 JUSTICE GORSUCH: Of course.

9 MS. HARTNETT: But to the question
10 you've asked, I do think it's important to -- I
11 think, to begin with. You heard my friend on
12 the other side talk about, not about
13 cross-dressing or other laws. They didn't have
14 any response to our point because there isn't
15 one, that transgender people were categorically
16 excluded from immigration to this country under
17 an overall umbrella of being a psychopath.
18 That was the way -- that was the actual
19 decision of this Court in the Boutilier case.
20 It was interpreting language of Congress that
21 determined that when Congress used the term
22 "psychopathic personality" to exclude people,
23 they meant to include homosexuals and other sex
24 perverts. And then that --

25 JUSTICE GORSUCH: Perhaps not our

1 finest hour.

2 MS. HARTNETT: Well, it's not your
3 thought, but I think that --

4 (Laughter.)

5 JUSTICE GORSUCH: Thank you for that.

6 (Laughter.)

7 MS. HARTNETT: No, no, no. Well, and
8 I -- and I -- it was by reference to a
9 congressional report. They were trying to
10 figure out what did Congress mean, and there
11 actually was a Public Health Service report. I
12 would direct your attention to it because I
13 think it really does go to the level -- I was
14 surprised when I read this document. It's 1952
15 U.S.C.C.A.N. 1653 at 1701, trying to explain
16 why sex perverts would include homosexuals,
17 transvestites, which was the name of the day
18 for transgender people. The term "transgender"
19 did not become more common until now. So I
20 think reading Boutilier and reading the
21 U.S.C.C.A.N. that's cited in Boutilier is
22 instructive.

23 I also think that the laws on
24 cross-dressing, I think that's an interesting
25 point because what that actually means as a

1 practical matter for the transgender person,
2 was that they weren't allowed to leave their
3 home as themselves to enjoy all of their civil
4 rights. And I don't think -- we don't
5 exaggerate it, but we also don't want to
6 underestimate it. There were major cities in the
7 country, Chicago, others, that actually barred
8 you under subject to criminal penalty for
9 leaving your house in clothes that weren't
10 matching your gender. And people were actually
11 prosecuted under those laws.

12 So, again, I appreciate it, and we're
13 not saying you have to have the same history.
14 We're certainly not equating the experience of
15 the transgender community to that of Black
16 Americans or women, but just as a illegitimacy
17 for non-marital children has been recognized as
18 a class that gets a closer look, I think we
19 respectfully submit here it would make sense to
20 do so.

21 We appreciate, though, this is a
22 question that the Court hasn't recognized a
23 suspect class for a long time. They also
24 haven't shut the door to a suspect class since
25 Cleburne. So I think we'd prefer -- to the

1 extent the Court was still finding another path
2 forward, the reason why we tried to help you
3 find a way answer the question here based on
4 sex discrimination.

5 JUSTICE ALITO: Well, to pick up on
6 the issue of discrimination on the basis of
7 transgender status, let me just go back to --
8 let me go to some basics.

9 Do you agree that a school may have
10 separate teams for a category of students
11 classified as boys and a category of students
12 classified as girls?

13 MS. HARTNETT: Yes, Your Honor.

14 JUSTICE ALITO: If it does that, then
15 is it not necessary for there to be, for equal
16 protection purposes, if that is challenged
17 under the Equal Protection Clause, an
18 understanding of what it means to be a boy or a
19 girl or a man or a woman?

20 MS. HARTNETT: Yes, Your Honor.

21 JUSTICE ALITO: And what is that
22 definition? For equal protection purposes,
23 what does -- what does it mean to be a boy or a
24 girl or a man or a woman?

25 MS. HARTNETT: Sorry, I misunderstood

1 your question. I think that the underlying
2 enactment, whatever it was, the policy, the
3 law, the -- would have to -- we'd have to have
4 an understanding of how the state or the
5 government was understanding that term to
6 figure out whether or not someone was excluded.
7 We do not have a definition for the Court. And
8 we don't take issue with the -- we're not
9 disputing the definition here. What we're
10 saying is that the way it applies in practice
11 is to exclude birth-sex males categorically
12 from women's teams and that there's a subset of
13 those birth-sex males where it doesn't make
14 sense to do so according to the state's own
15 interest.

16 JUSTICE ALITO: Well, how can you --
17 how can a court determine whether there's
18 discrimination on the basis of sex without
19 knowing what sex means for equal protection
20 purposes?

21 MS. HARTNETT: I think here we just
22 know -- we -- we basically know that the --
23 that they've identified pursuant to their own
24 statute, Lindsay qualifies as a birth-sex male.
25 And she's being excluded categorically from the

1 women's teams as the statute -- so we're taking
2 the statute's definitions as we find them and
3 we don't dispute them. We're just trying to
4 figure out, do they create an equal protection
5 problem?

6 JUSTICE ALITO: All right. Suppose
7 this school that has a boys', let's say, track
8 team and a girls' track team. A school has
9 that. And a student who has the genes and the
10 reproductive system of a male and had those at
11 birth and has never taken puberty blockers,
12 never taken female hormones, never had any
13 gender-altering or affirming surgery, says,
14 nevertheless, I am a woman. That's who I am.

15 Can the school say no, you cannot
16 participate on the girls' team?

17 MS. HARTNETT: Sorry. So your
18 hypothetical -- just a birth-sex male who has
19 all the --

20 JUSTICE ALITO: Right. Exactly.

21 MS. HARTNETT: -- advantages a
22 birth-sex male, hormones?

23 JUSTICE ALITO: Yes.

24 MS. HARTNETT: And can the school bar
25 him from the women's team?

1 JUSTICE ALITO: Yes.

2 MS. HARTNETT: Yes, they can.

3 JUSTICE ALITO: But that person -- is
4 that person not a woman in your understanding?

5 If the person says, I sincerely believe I am
6 woman, I am, in fact, a woman --

7 MS. HARTNETT: I think we --

8 JUSTICE ALITO: -- is that person not
9 a woman?

10 MS. HARTNETT: I -- I would respect
11 their self-identity in addressing the person,
12 but in terms of the statute, I think the
13 question is, does that person have a sex-based
14 biological advantage that's going to make it
15 unfair for that person to be part of the
16 women's team. And that -- that's the rationale
17 for the regulation, and so that's the reason --
18 that's the way we would be testing that
19 hypothetical.

20 JUSTICE ALITO: Well, the reason I'm
21 asking has to do with discrimination on the
22 basis of transgender status. So what you seem
23 to be saying is, yes, it is permissible for the
24 school to discriminate on the basis of
25 transgender status because, if this person is a

1 transwoman, a transgirl, and is barred from the
2 team, from the girls' team, then that person is
3 being subjected to differential treatment based
4 on transgender status, right?

5 MS. HARTNETT: Well, that would be --
6 then the question would be whether it was --
7 the scrutiny would be satisfied. So, from our
8 perspective, that would be a transgender
9 classification. It would get heightened
10 scrutiny. And it may be satisfied here because
11 of the need to have -- to curtail unfair
12 athletic advantage. That would be the
13 analysis.

14 We are not pressing in this case the
15 notion and the case does not require the Court
16 to decide whether transgender women who have
17 gone through puberty and have not suppressed
18 their testosterone would be able to play on a
19 men's team. And the record here is a
20 preliminary one where that doesn't present that
21 question for the Court.

22 JUSTICE ALITO: I mean, this does
23 present a particular factual situation and we
24 have to decide that case, but looking to the
25 broader issue that a lot of people are

1 interested in, there are an awful lot of female
2 athletes who are strongly opposed to
3 participation by trans athletes in competitions
4 with them.

5 What -- what do you say about them?

6 Are they -- are they bigots? Are they deluded
7 in thinking that they are subjected to unfair
8 competition?

9 MS. HARTNETT: No, Your Honor. I
10 would never call anyone that. And I -- I think
11 what we're saying here is that you have to --
12 that's the reason why there is intermediate
13 scrutiny or even in -- in rational review, you
14 don't legislate based on undifferentiated
15 fears. You base it on trying to make a
16 rational response to what is a perceived issue.

17 I think, here, although I would take
18 issue with the notion that there was no
19 reference to transgender individuals in the
20 creation of this law, I really would direct
21 your Court -- the Court to JA -- again, this is
22 not about animus. I'm just saying that if you
23 look at JA -- pardon me, I need my -- JA 105
24 through 112, there are numerous references
25 to -- from the sponsor of the law saying the

1 way we're going to try to protect women's
2 sports is to not have transgender women play on
3 the women's teams, and that was the fear that
4 they had at the time.

5 Again, that is not an accusation of
6 animus. It's just a question of what was the
7 statute doing. And then we go to the point of
8 does the statute survive heightened scrutiny.

9 That would be the inquiry.

10 JUSTICE ALITO: Do you think that the
11 success of trans athletes in women's sports is
12 proportional to the percentage of trans
13 athletes who participate in women's sports?

14 MS. HARTNETT: I think we -- I would
15 direct your attention to -- there's a -- let me
16 make sure I have the right amicus. There's an
17 amicus brief that talks about the -- actually,
18 some of the -- there are examples, obviously,
19 of some transgender people that have
20 participated and excelled. They actually are
21 few and far between.

22 You know we have our client here who
23 tried to make the NCAA team because of the
24 injunction. She was too slow. She played club
25 soccer, club running. She was even an officer

1 in one of those clubs, just doing what you
2 would hope a college student would do.

3 You'll hear from my colleague about
4 the other case, but I do think that -- and
5 there is a brief that you -- in the amicus
6 briefs that will share the examples of showing
7 that's a bit overstated.

8 JUSTICE KAVANAUGH: Would the analysis
9 be different if they were more successful?

10 MS. HARTNETT: No, I think it would
11 be, to the extent -- I mean, we've already
12 covered that transgender people are a slice --
13 a meaningful slice of the population but a
14 small slice.

15 I think the state, if there actually
16 were a concern of women's sports being fully
17 overrun by an outbreak of a huge new number of
18 transgender people, that might be a different
19 factual situation.

20 At the end of the day, we understand
21 that there were legislatures that --
22 legislators who were concerned about that. The
23 legislative history makes that clear here, but
24 that wasn't the factual basis before the court.

25 If there were actually a threat to

1 women's participation in women's sports, that
2 could be a different analysis because,
3 obviously, the goal of sex equality in sports
4 is a very important goal. We don't take issue
5 with that.

6 We just would say that I think this is
7 an important moment to just take a step back
8 and say is this law actually responding to a
9 problem in a rational manner, or is it actually
10 overreacting on the presumption that
11 transgender women are categorically going to be
12 strong athletes when that's not the case.

13 JUSTICE KAVANAUGH: Well, just to put
14 the big picture, and you know this table and
15 let you respond to it, but, obviously, one of
16 the great successes in America over the last 50
17 years has been the growth of women and girls'
18 sports, and it's inspiring.

19 And, there -- you know, some states
20 and the federal government and the NCAA and the
21 Olympic Committee, so these are a variety of
22 groups who study this issue, think that
23 allowing transgender women and girls to
24 participate will undermine or reverse that
25 amazing success and will, you know, create

1 unfairness because, you said, if large numbers.

2 Well, for the individual girl who does
3 not make the team or doesn't get on the stand
4 for the medal or doesn't make all league,
5 there's a -- there's a harm there, and I think
6 we can't sweep that aside.

7 And I just -- I think that's what's
8 undergirding some of the concerns. Big
9 picture, and there are harms on both sides, so
10 I completely understand that. But I just want
11 to let you respond to that because that is, you
12 know, the NCAA, the Olympic Committee, a lot of
13 states, federal government, that's a lot of
14 people who are concerned about women's sports
15 and think this raises a big problem. And I
16 just want to make sure you can explain that.

17 MS. HARTNETT: Thank you, Your Honor.

18 And just to be clear, Title IX is a
19 huge triumph and I'm a veteran of women sports
20 myself, I'm glad it exists. It's made a huge
21 difference in our society.

22 That's not what we're talking about
23 here. But I do think to the point of, you
24 know, for the podium question, I think the
25 question is, is there an unfair biological

1 advantage. That would be the question.

2 So I understand the point, if there's
3 somebody who's coming in with an unfair
4 biological advantage, that would undermine the
5 entire point of separate sports in the first
6 place, which was to allow women to have a place
7 to thrive, to be strong, to win, not to just be
8 the B team.

9 The question in this case is, if the
10 person had actually mitigated their sex-based
11 advantage, which maybe interestingly, maybe
12 counter-intuitively actually is more about
13 circulating testosterone after puberty than a
14 lot of the other things we might think are
15 sex-related, then that -- that girl that's come
16 in second to a transgender person that's
17 mitigated actually may just have come in second
18 because the transgender person had not -- was
19 similarly situated but was stronger in that one
20 competition.

21 That's why we are here not proposing a
22 rule of absolute inclusion but saying that in
23 the case of people like our client who have
24 mitigated, their exclusion doesn't match the
25 statutory interest.

1 JUSTICE BARRETT: Counsel, can I ask
2 you a question about analytically in the
3 discrimination on the basis of transgender
4 status, since trans boys can play on boys'
5 teams, how would we say this discriminates on
6 the basis of transgender status when its effect
7 really only runs towards trans girls and not
8 trans boys?

9 MS. HARTNETT: We -- we understand the
10 point. And I think that might be relevant to
11 a, for example, animus point, right, that we're
12 not a complete exclusion of transgender people.
13 There was an exclusion of transgender women.
14 But I think, on that piece, this Court has
15 never required the whole class to actually be
16 excluded to look at the cases to whether the
17 exclusion of a subclass was --

18 JUSTICE BARRETT: I'm talking about
19 for triggering intermediate scrutiny if
20 transgender status is a suspect class.

21 MS. HARTNETT: Right. So, like Craig
22 v. Boren, for example --

23 JUSTICE BARRETT: Yeah.

24 MS. HARTNETT: -- that's the one about
25 the men that couldn't get --

1 JUSTICE BARRETT: Alcohol here, yeah.

2 MS. HARTNETT: -- the 18- to
3 20-year-olds -- right. That wasn't all men, it
4 was a subset of men. And yet the Court still
5 viewed that as a sex classification subject to
6 heightened scrutiny. And likewise here, even
7 though it's just transgender women in our view
8 that are being barred and not transgender men,
9 that also would trigger heightened scrutiny.

10 And I think there's the Rice v.

11 Cayetano case from 2000, there's other examples
12 of the Court making clear that just because a
13 subset of the protected class is being
14 excluded, you still would apply heightened
15 scrutiny.

16 JUSTICE BARRETT: Another question
17 about the science. So you were talking about
18 circulating testosterone being kind of the
19 marker.

20 Idaho is saying, well, that's not the
21 only indication. There are other -- when I
22 asked the question about six-year-old teams
23 before that, that there are other just kind of
24 genetic hard-wired differences maybe in size,
25 et cetera, that don't have to do with

1 circulating testosterone.

2 Is it your understanding that
3 testosterone is it?

4 MS. HARTNETT: So my colleague --

5 JUSTICE BARRETT: Yeah.

6 MS. HARTNETT: -- who will present --

7 JUSTICE BARRETT: Yeah.

8 MS. HARTNETT: -- the argument in the
9 next case is that the record there was more
10 about prepubertal and puberty.

11 JUSTICE BARRETT: Right.

12 MS. HARTNETT: I think that the
13 5 percent even is not clear whether that's just
14 environmental or biological actually.

15 JUSTICE BARRETT: Right.

16 MS. HARTNETT: But I do think -- so
17 there are other things that I think, like
18 height, you know, bone size. There have been
19 some other discussions of this. This is an
20 underdeveloped record, by the way. This needs
21 to go back and have a full trial except that
22 it's moot.

23 (Laughter.)

24 MS. HARTNETT: But -- but I think the
25 point there is that -- no, I'm not trying to

1 make a point on that.

2 JUSTICE BARRETT: Yeah. No, no, no, I
3 know. I know. I take the point.

4 MS. HARTNETT: I just -- I'm not
5 trying to pretend that I'm going to have a
6 trial when we're not.

7 JUSTICE BARRETT: I take the point,
8 yeah.

9 MS. HARTNETT: But I think the point
10 is that sometimes counter-intuitively it's like
11 having a larger frame but not having the muscle
12 and the testosterone to drive it could actually
13 put the person in a worse position. And that's
14 a study that was commissioned by the Olympic
15 Committee -- it's Footnote 6 of our brief --
16 indicates that actually it could be actually
17 put the transgender woman at a disadvantage if
18 they happen to have larger bones and less
19 testosterone or muscle to drive those bones.

20 JUSTICE BARRETT: Last question. So
21 below, as I understand it, your client
22 challenged the verification procedures?

23 MS. HARTNETT: Yes.

24 JUSTICE BARRETT: Except when we were
25 talking about how this might be administered, I

1 -- I understood you to say that it would be by
2 checking testosterone levels because it would
3 be okay to say -- to Justice Alito's
4 hypothetical about the cisgender male who has
5 taken no steps and who is now trans, to exclude
6 that person.

7 But would that be an invasion -- would
8 that be a violation itself or too invasive to
9 require someone to -- and -- and maybe not just
10 once but maybe to periodic testing to make sure
11 that the circulating testosterone was low
12 enough?

13 MS. HARTNETT: That's --

14 JUSTICE BARRETT: Why wouldn't be that
15 invasive?

16 MS. HARTNETT: So that's an ordinary
17 blood work that a transgender person would get.
18 And that's why I think it's of the nature of
19 the minimal burdens like in Nguyen and the
20 other cases where the Court has said
21 intermediate scrutiny applies and you actually
22 can -- you know, if there is minimal things you
23 have to do to make yourself fall in the
24 category that we want to keep protected, you
25 can -- we can require that of you. But --

1 JUSTICE BARRETT: Didn't you challenge
2 it?

3 MS. HARTNETT: Well, that was
4 different, actually, because the three things
5 that you'd have to prove under the state's
6 novel verification thing would have to be your
7 genetic -- your reproductive anatomy, which
8 would require actually, like, a pelvic
9 examination or examination of someone's, you
10 know, nude area. It would be chromosomes,
11 which would require chromosomal testing.
12 That's not what we're talking about. Or it
13 would be endogenous testosterone. And the
14 reason why that wasn't a problem is not because
15 of a blood test, it's not invasive; it's
16 because it would have required the transgender
17 person to stop their hormone treatment to get
18 back to an endogenous level to be able to show
19 they're endogenous.

20 JUSTICE BARRETT: Ah, okay. So the
21 distinction between circulating and endogenous?

22 MS. HARTNETT: Right. The point was
23 -- that was actually in a way like -- and I'm
24 not trying to cast aspersions, but kind of a
25 false requirement for transgender people

1 because they aren't on their endogenous
2 testosterone when they're on hormone therapy.
3 They're on a non-endogenous medical treatment.

4 JUSTICE BARRETT: Got it.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: I'd like you to
11 address mootness because you raised it with
12 Justice Barrett. Is this case moot? Could you
13 respond to the other side's positions or
14 arguments as to why it wasn't, and -- and how
15 do you respond to that?

16 Secondly, Justice Barrett did raise
17 earlier this law applies even to primary --
18 primary schools, correct?

19 MS. HARTNETT: Taking your second
20 question first, yes. I don't think it's in the
21 record whether or not there are any primary
22 schools, whether they sex separate or not, but
23 that -- that is the law.

24 JUSTICE SOTOMAYOR: And -- and so at
25 least as to that subgroup, no one could doubt

1 that primary school children might have the
2 strongest argument that there's no difference
3 in their -- in their physical makeup that would
4 cause harm or otherwise create an advantage,
5 correct?

6 MS. HARTNETT: That would be our
7 position, Your Honor. In this case, we had
8 both the -- our client who was at college at
9 the time, then we had a high school intervenor
10 who was worried about being subject to the sex
11 verification. So we didn't get into the --
12 building a record on the --

13 JUSTICE SOTOMAYOR: But the point is
14 that the law might be overbroad --

15 MS. HARTNETT: Oh, certainly. Yeah.

16 JUSTICE SOTOMAYOR: -- and there's
17 still -- as you noted, this is a very -- this
18 -- Idaho was the first or the second state to
19 pass this law?

20 MS. HARTNETT: It was the first. I
21 mean, these cases come to you because --

22 JUSTICE SOTOMAYOR: The first.

23 MS. HARTNETT: -- they're early ones.

24 JUSTICE SOTOMAYOR: And the record
25 here was the most underdeveloped, correct?

1 MS. HARTNETT: Including because it
2 was a preliminary injunction. There was a
3 substantial amount of expert material in the
4 record that allowed the district court to make
5 appropriate findings, but it was not the level
6 that you build out for a trial.

7 JUSTICE SOTOMAYOR: And both courts
8 said that the record had to be looked at more
9 carefully.

10 MS. HARTNETT: Expressly they did.

11 JUSTICE SOTOMAYOR: All right. So
12 answer the mootness question.

13 MS. HARTNETT: Your Honor, all I can
14 say is that we've tried to provide the Court
15 with accurate information as soon as it came to
16 pass. In 2024, when we opposed certiorari, our
17 client still was active and intending to play
18 sports. The Court granted the case. We were
19 -- she was preparing for what she hopes is her
20 final year of college. She was concerned about
21 the increasing hostility and the visibility. I
22 mean, we're here now and that's okay, she
23 understands she brought the case.

24 But that was the basis for her trying
25 to end her sports career, and it isn't contrary

1 to what she said before. She did intend to
2 play sports through college. Her college has
3 taken a long time. She has now sworn she will
4 not play sports that are covered again and she
5 won't do that even if she happens to somehow
6 win this case. So that -- that is just the
7 truth.

8 But whether the Court believes it's
9 moot, that's -- you know, we put the facts
10 before you for you to decide.

11 JUSTICE SOTOMAYOR: How -- how about
12 her graduating this year?

13 MS. HARTNETT: So, on that --

14 JUSTICE SOTOMAYOR: There was
15 suggestion she might not.

16 MS. HARTNETT: As you can tell, we
17 have -- college students have their -- so she
18 is trying her best to get through college. I
19 think at this point, and I am just basing it on
20 what I know as of today, she's unlikely to
21 graduate by May, as my friend said, but is
22 hoping to make -- through summer credits, could
23 graduate in the fall.

24 JUSTICE SOTOMAYOR: Finally, in terms
25 of the sports teams, the Olympic team, that all

1 happened in 2025, after our president directed
2 them to --

3 MS. HARTNETT: We do think that's
4 worth parsing out. Again, there's been a lot
5 of contentions made on both sides that are
6 extra-record, but I do think a lot of those
7 things flowed from the executive order. There
8 were some other sports orgs that were doing
9 different things, but I think we have to be
10 careful not to broad-brush that because some of
11 it may have been political, some of it may have
12 been scientific, and the record really isn't
13 fully before the Court.

14 CHIEF JUSTICE ROBERTS: Justice Kagan?

15 JUSTICE KAGAN: Ms. Hartnett, I just
16 want to get your understanding of what
17 constitutional review would look like in this
18 context. So you said it's not individual by
19 individual. You have to come in and say
20 there's a class that's not being treated
21 appropriately.

22 What is that class here?

23 MS. HARTNETT: Thank you, Your Honor,
24 and I would say I haven't -- I don't think the
25 court has ruled out the individual case. I

1 just think we weren't presenting it that way
2 because we were trying to align ourselves with
3 how the court had looked at it.

4 I think we would say we represent the
5 group of people that do not have an athletic
6 advantage, that have mitigated their male --
7 their biological advantage of being born male.

8 JUSTICE KAGAN: So who do not have an
9 athletic advantage for reasons of taking
10 certain medications or hormones or --

11 MS. HARTNETT: Yeah. No -- no
12 sex-based biological advantage. So that would
13 -- it -- it would encompass both people that
14 had gone through the male puberty and had
15 mitigated; it would also encompass others,
16 like, that have not yet gone through puberty or
17 that staved off puberty with the puberty
18 blockers.

19 JUSTICE KAGAN: And as to those
20 people, who has the burden of -- of -- of
21 showing that the justification doesn't fit?

22 MS. HARTNETT: I think that is on the
23 -- that is the -- I think once we've identified
24 the subclass, under intermediate scrutiny, it
25 is the state's burden to show a substantial

1 relationship for that group. And they failed
2 to, and that's how those other cases proceeded.

3 JUSTICE KAGAN: You wouldn't think
4 that because we -- we are talking about an
5 as-applied challenge to a law that -- that's
6 facially, everybody concedes, legitimate, that
7 the burden should shift to you?

8 MS. HARTNETT: I don't think that's
9 how the cases looked at it when they were
10 assessing. They were kind of assessing whether
11 the state had provided enough to allow the
12 exclusion. For example, in Lehr, the state had
13 -- it made an adequate showing to show why the
14 -- the -- the parent in that case was properly
15 excluded.

16 JUSTICE KAGAN: And how do you think
17 the question of scientific uncertainty should
18 play out in an analysis like this?

19 MS. HARTNETT: Thank you. That's a
20 good question. And I know this was something
21 the Court did address in Skrmetti, a rationale
22 review case, but citing Carhart, which also
23 talked about that.

24 I think the one thing we definitely
25 want to have is complete findings. So that's

1 why we really were urging to have a full record
2 developed before there were a final judgment of
3 scientific uncertainty.

4 I think the Court has not fully
5 grappled with what does scientific uncertainty
6 mean and how does it come into conflict with
7 heightened equal protection scrutiny, but I
8 think we don't need to present that yet
9 because, on this record, there was not
10 uncertainty. This person had mitigated.
11 Testosterone was the determinant. Maybe on a
12 later record, that would come out differently
13 --

14 JUSTICE KAGAN: Yeah.

15 MS. HARTNETT: -- but I don't think
16 that --

17 JUSTICE KAGAN: Just play it out a
18 little bit, if there were scientific
19 uncertainty.

20 MS. HARTNETT: I mean, if it really
21 were in equipoise, then I think that that is a
22 situation where the -- I think it's -- it's
23 still heightened scrutiny. So under heightened
24 equal protection scrutiny, the burden is on
25 state to justify the law. And if they hadn't

1 been able to justify that, that usually fails.

2 If it's really a question of they're
3 at 50/50, do we give the -- do we allow the
4 state some leeway? I could see -- I don't
5 think that's been answered in the Court's
6 cases. Normally, the heightened scrutiny
7 controls and there's not a deference on top of
8 that in the equal protection context.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 JUSTICE GORSUCH: Just to follow up on
13 that, I wonder if that starts to sound like
14 strict scrutiny because if there -- the point
15 of intermediate scrutiny, of course, is some
16 leeway for the state, not a perfect fit, at
17 least in the facial area.

18 But if there's scientific uncertainty
19 about whether puberty blockers and testosterone
20 suppressants completely or mostly or some
21 percentage of the time eliminate all
22 competitive advantage, some competitive
23 advantage -- I mean, you -- you've been very
24 careful, I think, and rightly so to talk about
25 mitigating advantage.

1 But I don't know -- you know, does the
2 state have to show that it eliminates advantage
3 and it doesn't eliminate -- you know, some
4 percentage of advantage remains in each
5 individual case? Or for the group as a
6 whole -- I'm -- I'm struggling to understand
7 your response to Justice Kagan on that score.
8 Maybe I am inartfully posing the question, but
9 I hope you understand.

10 MS. HARTNETT: I do understand your
11 question. I think the question is at some
12 level -- I mean, I think the question is where
13 you have science that's developing in real time
14 at some level, what happens, how does that
15 dovetail with trying -- a state that's trying
16 to regulate and do that?

17 I think what we can say on this record
18 is the categorical exclusion is really not
19 supported I don't think by any science.
20 There's been a -- this, again, was from
21 kindergarten through college, and so there
22 would be some subgroups at least.

23 And I appreciate -- I think there has
24 to be an effort to try to tailor it. I think
25 here the problem was there was a reaction of

1 transgender women, a picture of what that would
2 be, kind of an undifferentiated fear, frankly,
3 from the Cleburne case. And so I think there's
4 a --

5 JUSTICE GORSUCH: I appreciate all of
6 that, but it seems to me from my glance at the
7 record, and quite a record it is, that there is
8 a healthy scientific dispute about the efficacy
9 of some of these treatments, and -- and that's
10 understandable.

11 And I'm just wondering how does that
12 fit with -- assume -- assume there is some
13 dispute, and I understand the record remains to
14 be developed further. But how does that fit
15 with intermediate versus strict scrutiny?

16 MS. HARTNETT: At the end of the day,
17 it's the -- it's the state's burden to show a
18 substantial relationship. And I think in the
19 case of something where they're doing their
20 best and have the best evidence to -- some
21 evidence to support what they're doing --

22 JUSTICE GORSUCH: Some evidence? The
23 best evidence? Exactly. I mean, that's the --

24 MS. HARTNETT: A level of evidence
25 that wasn't met here. Let's put -- so the --

1 the one -- the study and the findings --

2 JUSTICE GORSUCH: Yeah.

3 MS. HARTNETT: -- I mean, the district
4 court made a really good point. That study had
5 actually been retracted and it --

6 JUSTICE GORSUCH: Right.

7 MS. HARTNETT: -- didn't pertain to
8 transgender athletes. So, in a way, this is
9 not the hardest case. I appreciate it as a
10 hypothetical. I guess what I would just urge
11 in this area that's sensitive, obviously,
12 politically but also as a matter of science --

13 JUSTICE GORSUCH: Yeah.

14 MS. HARTNETT: -- to at least let a
15 record develop in one of these cases that lets
16 you decide actually is this --

17 JUSTICE GORSUCH: No, I totally agree
18 with that.

19 MS. HARTNETT: -- 50/50 versus 80/20.

20 That's --

21 JUSTICE GORSUCH: Well, all right.

22 But 50/50, does the government win, does 70/20,
23 the government win? That's what I'm getting
24 at. That -- I -- I understand the -- the
25 complexity of the record and the difficulty of

1 science, but if we're -- if we're going to have
2 individual cases brought, that's the kind of
3 question we're going to ultimately have to
4 answer, not the science question but the
5 percentage question, if you will.

6 MS. HARTNETT: No, I understand that.
7 I mean, VMI does provide some sort of a -- a --
8 a metric of what we would do there, which was
9 we look to see there were kind of evidentiary
10 debates on both sides of that, but even if you
11 could say that a lot of women may not have ever
12 made the cut, the fact that there were some
13 that did was enough to invalidate the entire
14 policy. So I -- I think there are ways for
15 courts to make those judgments.

16 And I think the Court has not yet, I
17 think, encountered a case where heightened
18 scrutiny puts a heavy burden on the state.
19 It's not an insurmountable one, like strict
20 scrutiny normally is.

21 And then what happens if it ends up
22 with the evidence being a tie or close to it
23 when we go back to the trial court? I think
24 that would be a -- that -- that -- that would
25 be breaking some new ground because I don't

1 think there's an equal protection case that
2 decides that issue. Usually, the evidence is
3 kind of clear on one side or the other about
4 whether the restriction is justified.

5 JUSTICE GORSUCH: So that will remain
6 for us to decide at a later point?

7 MS. HARTNETT: I -- I do think that's
8 the most prudent but definitely on a record
9 that's more developed because I think a lot of
10 the -- I think, in the end of the day, it might
11 end up being a surprise to -- we don't know
12 yet, but I think we have some good evidence
13 that, actually, at the end of the day, being a
14 transgender woman actually to the extent there
15 are -- and you repressed your testosterone,
16 you're at some somewhat of a disadvantage in
17 many ways because you have, again, this larger
18 frame with weaker muscles and no testosterone.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: Just to follow up
23 on Justice Gorsuch's question, a broader frame
24 about the role of this Court when there's
25 scientific uncertainty and there will be

1 different district courts who do different
2 things almost certainly in different cases,
3 and, in an area of scientific uncertainty,
4 where there's strong assertions of equality
5 interests on both sides, and so it's going to
6 come to this Court and we have to decide for
7 the whole country, constitutionalize this.

8 And I guess, given that half the
9 states are allowing it, allowing transgender
10 girls and women to participate, about half are
11 not, why would we at this point just the role
12 of this Court jump in and try to
13 constitutionalize a rule for the whole country
14 while there's still, as you say, uncertainty
15 and debate, while there's still strong interest
16 in the other side?

17 And I think one of the themes of your
18 argument has been the more people learn, the
19 more they'll agree with you. At least I --
20 I -- I've detected that theme in your argument.

21 So why would we get involved at this
22 point and constitutionalize?

23 MS. HARTNETT: I understand the
24 question, Your Honor, and I do think that the
25 Equal Protection Clause's demands have never

1 been viewed as kind of a -- you know, a
2 separate avenue from the legislative process.
3 They can and do often coexist. And, here, I
4 think the point is we have two as-applied
5 challenges to early laws. They have their
6 unique cases in their own right. I don't think
7 this Court needs to set rules forever in this
8 area.

9 I think the most important thing would
10 be to allow a record to develop even in areas
11 of controversy. And we look back, you cited
12 to, in Skrmetti, you cited Carhart.

13 There, there were extensive findings.
14 There also were findings in VMI. There were
15 findings in Craig v. Boren. I'm learning
16 things by reading these cases over again.
17 There were findings in those cases.

18 And so I think that at least before
19 the Court decides to either step back fully or
20 to embrace its role here of providing the
21 scrutiny that should be attended to groups when
22 there's a worry that the democratic process
23 isn't actually going to fairly respond to their
24 concerns, I think the point at least at a
25 minimum would be get a full record, which we

1 don't have here. That would be my request.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 Justice Jackson?

6 Thank you, counsel.

7 Rebuttal.

8 REBUTTAL ARGUMENT OF ALAN M. HURST

9 ON BEHALF OF THE PETITIONERS

10 MR. HURST: Thank you, Mr. Chief
11 Justice. A few points.

12 I heard just a moment ago that there
13 is no real threat to women's sports. We
14 strenuously disagree. We cite the Court -- we
15 cite Your Honors to the U.N. Special
16 Rapporteur's report that says 600 women have
17 lost 890 medals in 29 different sports. That's
18 what we're talking about. It is a real threat.

19 Medical transition does not reliably
20 suppress all male athletic advantages. I'd
21 cite Your Honors to our record in which our
22 expert, Dr. Brown, shows the experience of one
23 CeCe Telfer, an elite track athlete who -- who
24 underwent a medical transition and whose track
25 times did not change. That is the story in

1 many situations. And unless we can reliably
2 distinguish between those situations and the
3 situations in which testosterone suppression
4 does reliably eliminate the advantage, then we
5 can't do that. We need a broader
6 classification, and sex is the right one.

7 And if it were merely politically
8 motivated, I would add we wouldn't see this
9 same rule being implemented by World Athletics,
10 World Boxing, the NAIA, these different groups
11 that were not influenced by recent politics but
12 came to these decisions after studies, after
13 lengthy examination, and reached the same
14 decision that Idaho has.

15 Justice Gorsuch, in your colloquy with
16 Respondents' counsel, she agreed with us that
17 this is not the same as the -- as the
18 discrimination that has been faced on the basis
19 of race or on the basis of sex in this country.

20 We agree it's not close to the
21 discrimination that has -- that people have
22 faced on the basis of race or sex in this
23 country. That said, the Court does not need to
24 reach that answer here because, if there is no
25 quasi -- excuse me. If there is no transgender

1 status classification in Skrmetti, there
2 certainly cannot be one in this case.

3 In fact, as our briefs argue, the
4 Court can and should avoid all these questions
5 by applying rational basis review.

6 Bottom line, sports are assigned by
7 sex because sex is what matters in sports. It
8 is the fairest and the safest and the most
9 administrable way to assign sports teams. It's
10 been widely accepted for many decades because
11 it's necessary for fair competition because,
12 where sports are concerned, men and women are
13 obviously not the same.

14 If Idaho can't enforce a sex-based
15 line here in sports, where nobody disputes that
16 biological differences matter, then no line
17 based on biological sex can survive
18 constitutional scrutiny. The Court should
19 uphold the Fairness in Women's Sports Act and
20 reverse.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 11:57 a.m., the case
25 was submitted.)

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