

COMMENTARY **Gender**

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An activist takes part in a rally outside of the U.S. Supreme Court as the justices hear arguments in United States v. Skrmetti on December 04, 2024 in Washington, D.C.

Kevin Dietsch / Getty Images

KEY TAKEAWAYS

to resemble the opposite sex.

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On Wednesday, December 3, the U.S. Supreme Court heard oral arguments in one of the term's marquee cases: *United States v. Skrametti*. At issue is the constitutionality of a Tennessee law, SB1 (codified at [Tenn. Code Ann. § 68-33-103\(a\)\(1\)](#)), which prohibits any medical procedure for the purpose of “Enabling a minor to identify with, or live as, a purported identity inconsistent with the minor’s sex,” and “Treating purported discomfort or distress from a discordance between the minor’s sex and asserted identity.”

Tennessee is one of [26 states](#) that have enacted such restrictions on surgeries and drugs designed to change a minor’s appearance so as to better resemble the opposite sex.

Challenges to laws of this type are generally brought by parents who seek medical interventions for their minor children professing a gender identify that differs from their biological sex. The parents in the underlying litigation, *L.W. v. Skrametti*, had argued that SB1 violated the 14th Amendment’s Due Process Clause by depriving them of their parental right to make medical decisions for their children. The plaintiffs also alleged that the law offended that amendment’s Equal Protection

The 6th Circuit Court of Appeals found SB1 to be constitutional under both a due process and equal protection analysis and upheld the law. Last year, the 8th Circuit struck down a similar Arkansas law, but only on equal protection grounds. The United States thereafter intervened in the Skrametti case to advance the Equal Protection Clause argument.

>>> [It's Time for the Supreme Court to Repudiate Gender Ideology](#)

U.S. Solicitor General Elizabeth Prelogar and American Civil Liberties Union (ACLU) attorney Chase Strangio argued for the government and the parents, respectively, contending that SB1 should be seen as a sex-based restriction and assessed under intermediate scrutiny review, which requires that any gender-based distinction in a law must be substantially related to achieving an important government objective—a burden the state had failed to meet.

Tennessee Solicitor General J. Matthew Rice argued that rather than discriminating based on sex, the law merely restricted access to certain medical interventions based on age and the type of medical purpose for which such interventions would be used. Therefore, Rice argued that, as a routine exercise of the state's power to regulate medicine generally, rational basis review—requiring only that a law be rationally related to achieving a legitimate government objective—was appropriate.

During the two-and-a-half hour arguments, five of the Court's conservative Justices seemed skeptical of the benefit of providing largely experimental gender affirming care for minors, and of the notion that the Court should have a role in making determinations about the complex medical issues underlying the dispute—rather than leaving these decisions to the legislatures. In one line of questioning, the Chief Justice John Roberts pressed ACLU attorney Strangio, saying that the case involved a “question of constitutional allocation of authority . . . [M]y understanding is that the Constitution leaves that question to the people's representatives rather than to nine people, none of whom is a doctor.”

Justice Brett Kavanaugh echoed the Chief's concerns, asking Prelogar, “[I]f the Constitution doesn't take sides, if there's strong, forceful scientific policy

protecting the democratic process in this area, it could author a narrow opinion that simply declares that intermediate scrutiny review applies and then sends the case back to the lower court to reconsider the merits under that standard rather than the rational basis standard of review.

Justice Samuel Alito was particularly concerned with what he saw as Prelogar's cavalier dismissal of the increasing body of scientific evidence casting doubt on the benefits of gender affirming care for minors. Among recent developments in western Europe indicating a growing distrust for early gender intervention, Alito cited the landmark [Cass Report](#) released earlier this year, noting that the report indicated "There is no evidence that gender-affirmative treatments reduce suicide;" he chided Prelogar, saying she had "relegated the Cass report to a footnote."

The Court's three liberal Justices seemed to accept Prelogar's argument that by incorporating the "sex classification into the face of the law and ma[king] the first-order restriction here one that prohibits inconsistency with sex . . . the legislature was doing something different in trying to get minors to appreciate their sex and not become disdainful. That's not a medical-based justification."

Justice Sonia Sotomayor in particular pushed Rice on his characterization of the law as simply a restriction based on age and medical purpose, arguing that a doctor would have to know whether the child seeking gender transition drugs is male or female to know whether SB1 would ban the use of those drugs. She argued that was "very hard to see how the democratic process" would protect transgender individuals, much as it didn't protect women or people of color for decades. Justice Elena Kagan also expressed the view that SB1 was a sex-based classification, saying the medical purpose of SB1 "is utterly and entirely about sex."

>>> [Wisconsin Public Schools' Gender Policies Shut Out Parents, Violate Their Rights](#)

A brief line of questioning concerned whether transgender status could qualify as a suspect or quasi-suspect class for purposes of equal protection analysis—as the government had requested in the second half of its brief. As Justice Amy Coney Barrett was quick to point out, the suspect classes previously recognized by the

the Court has been asked to identify new suspect classes based on characteristics such as age and disability, but has so far declined. Barrett also emphasized that whatever the Court's decision, the separate, due process-based question of whether SB1 infringes on the fundamental rights of parents to make medical decisions for their children would remain active.

Notably quiet throughout the entirety of oral arguments was Justice Neil Gorsuch —author of the majority opinion in the Court's only other gender identity case to date, 2022's [Bostock v. Clayton County](#). In *Bostock*, the Court found that sex discrimination under Title VII of the Civil Rights Act of 1964 includes discrimination based on sexual orientation and gender identity because sexual orientation and transgender status are “inextricably bound up with sex.” In his analysis for the *Bostock* majority, Gorsuch wrote that when an employer tolerates attitudes or behaviors in one sex but not in another, and then terminates an employee based on such attitudes or behaviors, impermissible sex-based discrimination has occurred.

It was perhaps the Court's ruling in *Bostock* that prompted Justice Ketanji Brown Jackson's allusion [to the court's decision in 1967 in *Loving v. Virginia*](#) striking down Virginia's ban on interracial marriage. In a dialogue with Prelogar, Jackson argued that both cases involved “generalizations of how we expect [certain groups] to—to live and order their affairs.” Prelogar agreed, noting that there was “a parallel between any law that says you can't act inconsistent with a protected characteristic.”

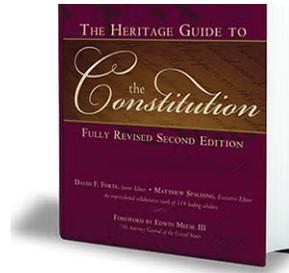
Whether Gorsuch was simply being thoughtful or was preoccupied with misgivings about *Bostock*'s impact on the burgeoning field of transgender rights, we'll only know when the decision comes down next year.

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