United States v. Skrmetti – Oral Arguments

By Paul Engel

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- Is so-called “gender affirming care” safe for minors?
- Do the states have a duty to protect minors from such care, even if the parents and doctors approve?
- Do transgender prohibitions violate the Equal Protection Clause?

The transgender agenda has been moving fast the last few years. That said, several states have moved to slow their progress, especially among our young people. One state, Tennessee, is being sued by the federal government. Oral arguments were heard by the Supreme Court in November. While the question posed to the court regarded a restraining order preventing the state from enforcing the law, a lot of time was spent on the primary question of the lawsuit: Does the Tennessee law violate the Equal Protection Clause of the Fourteenth Amendment?

Background

Before we get into the oral arguments, let’s start with a little background. In March 2023, the Tennessee Legislature passed, and the governor signed, a bill known as SB 1. In this bill we find:

A healthcare provider shall not perform or offer to perform on a minor, or administer or offer to administer to a minor, a medical procedure if the performance or administration of the

procedure is for the purpose of:

(1) Enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex; or

(2) Treating purported discomfort or distress from a discordance between the minor's sex and asserted identity.

TN SB0001

As you would expect, this law was challenged in court. Three "transgender" teens and their families sued, and the Biden administration Department of Justice sought an injunction to prevent the law from going into effect. The U.S. District Court for the Middle District of Tennessee granted the injunction, but the Sixth Circuit Court of Appeals stayed it. This led the Biden Department of Justice to appeal the Sixth Circuit's decision to the Supreme Court, which heard oral arguments December 4, 2024.

United States Argument

As the petitioner, Solicitor General Elizabeth Prelogar opened with the arguments for the United States.

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

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

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

inconsistent with the patient's birth sex.

United States v. Skrmetti – Oral Arguments

Let's start with two truths and a lie. The first truth is that this law does prohibit the use of certain treatments for minors for the purpose of changing their body to appear different than their sex. The second truth is that the law claims to overrule the decision of the minor, parent, and doctors. The lie is one we're going to see a lot in these arguments: The concept of "birth sex." More on that later.

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

United States v. Skrmetti – Oral Arguments

There are many laws that place the state's view of what is best for a child above the decisions of their parents and others. The state also regulates the uses of drugs and treatments. This can be a tricky situation, having the state overrule the decisions of a parent. If the state can remove a child from their parents for the child's safety though, why not prevent treatments that both the state, and much of society, find harmful to the child? In other words, is it irrational to protect children from drugs and other procedures that have long-term negative consequences?

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

United States v. Skrmetti – Oral Arguments

Here’s another lie, the idea of sex being assigned by someone. It’s not like a baby is born and the doctor decides for themselves what sex to “assign” them. A person’s sex isn’t even determined at birth, but at conception. When the sperm meets the egg, the sex is determined. It does not happen at birth, and it is not assigned.

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

United States v. Skrmetti – Oral Arguments

We will find that the plaintiffs and several of the justices will focus on sex, as if drugs cannot have drastically different effects when given to people of different sexes. It appears they believe there is no real difference between male and female. Again, more about that later.

Rather than impose measured guardrails, SB1 bans the care outright no matter how critical it is for an individual patient, and that approach is a stark departure from the State’s regulation of pediatric care in all other contexts. SB1 leaves the same medications and many others entirely unrestricted when used for any other purpose, even when those uses present similar risks.

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

I welcome the Court’s questions.

United States v. Skrmetti – Oral Arguments

Part of the petitioners argument focuses on who specific drugs can be used on. This is a case of missing the forest for the trees, as we'll see later.

After giving her opening argument, General Prelogar answered questions from the justices, the first of which came from Justice Alito.

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

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

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

United States v. Skrmetti – Oral Arguments

General Prelogar claims that there is overwhelming evidence that so-called "gender-affirming" treatment improves both the physical and psychological well-being of the patient. (I say "so-called gender-affirming care" since the care actually denies a person's gender in favor of their mental confusion.) However, the Swedish National Board of Health and Welfare reports that the risk of such care is likely to outweigh its benefits.

After the filing of your petition, of course, we saw the – the release of the Cass report in the United Kingdom, which found a complete lack of high-quality evidence showing that the

benefits of the treatments in question here outweigh the risks.

United States v. Skrmetti – Oral Arguments

A one-two punch from Justice Alito. First the Swedes and now the UK, point out the fact the evidence that these treatments are beneficial are of questionable quality. I guess it's a question of who should you believe: An attorney or a nation's board of health?

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

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

But I stand by that there is a consensus that these treatments can be medically necessary for some adolescents, and that's true no matter what source you look at.

United States v. Skrmetti – Oral Arguments

Yes, there's a lot of debate about the effectiveness of these treatments, but let's not worry about that. Could these treatments be medically necessary? Yes, and the law states:

(1) It is not a violation of subsection (a) if a healthcare provider performs, or offers to perform, a medical procedure on or administers, or offers to administer, a medical procedure to a minor if:

(A) The performance or administration of the medical procedure

is to treat a minor's congenital defect, disease, or physical injury;

Senate Bill 1

Which brings up another question: Is a drug or surgical treatment medically necessary for a psychological condition? This is where Justice Sotomayor started asking questions.

JUSTICE SOTOMAYOR: Some – some children suffer incredibly with gender dysphoria, don't they?

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

JUSTICE SOTOMAYOR: I think some attempt suicide?

GENERAL PRELOGAR: Yes. The rates of suicide are – are striking –

JUSTICE SOTOMAYOR: Some –

GENERAL PRELOGAR: – and it's a vulnerable population.

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

GENERAL PRELOGAR: It is a serious condition, yes.

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

These are physically challenging situations as well too, correct?

GENERAL PRELOGAR: Yes, that's correct.

United States v. Skrmetti – Oral Arguments

Do young people suffer from gender dysphoria? Yes? In fact most of us suffered through puberty. Some adolescents even

consider suicide. Again, the question remains: Is the proper treatment for a mental disorder drugs and surgery?

In response to one of the questions, General Prelogar pointed out that one of the states that restricted access to such treatments used a more targeted approach.

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

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

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

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

United States v. Skrmetti – Oral Arguments

West Virginia chose a different path. They require two doctors to diagnose the gender dysphoria, and mental health screenings. That was how West Virginia's elected legislators decided to deal with the issue, but should Tennesseans be forced to follow the same path? There's still the question of the medical necessity of drug and surgical treatments for

mental disorders. Especially when those treatments lead to infertility.

I do want to acknowledge that there is evidence to suggest that gender-affirming care with respect to hormones can have some impacts on fertility. Critically, puberty blockers are – are – have no effect in and of themselves on fertility, so I don't think that concern can justify the ban on puberty blockers, which is just pressing pause on someone's endogenous puberty to give them more time to understand their identity.

United States v. Skrmetti – Oral Arguments

Are using puberty blockers simply "pressing pause" on a person's puberty? If that were true, then why would these drugs be used to chemically castrate sex offenders? From my research puberty blockers are used in women to treat endometriosis, but only for six months. A second six month treatment can be used, but only when supplemented with the female hormones estrogen and progesterone. While puberty blockers may "pause" puberty, what happens when a person's body passes the age where puberty can happen? If their body hasn't developed the ability to be fertile, then they are infertile.

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

United States v. Skrmetti – Oral Arguments

Since the purpose of these cross-sex hormones is to prevent the development of the very things that make us male or female, I find it difficult to see how they cannot adversely affect fertility. Is it a question of the people remaining fertile, or being made fertile with the use of more hormones?

Petitioner’s Argument

Next up was Chase Strangio representing the respondents to the case. While there aren’t many differences between Ms. Strangio’s arguments, her main claim to fame is being the first declared “transgender” attorney to argue before the Supreme Court.

That’s right, Ms. Strangio presents as a man. Some people may be offended by that statement but my purpose is not to offend, and I will use a person’s preferred name. While the court may be willing to do so, I will not lie to you and claim this woman is a man. Since, in the English language, the proper title for a woman of unknown marital status is “Ms.”, that is how I will refer to her.

1. STRANGIO: Mr. Chief Justice, and may it please the Court:

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

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

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

I welcome the Court's questions.

United States v. Skrmetti – Oral Arguments

Again we see the lie of "birth sex," the focus on individual drugs rather than what they are claiming to treat, and the lack of concern for whether or not these drugs are the proper treatment for a mental disorder. One concern that Justice Alito did explore with Ms. Strangio is that of suicide.

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

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

1. STRANGIO: I do, Justice Alito, maintain that the medications in question reduce the risk of depression, anxiety, and suicidality, which are all indicators of potential suicide.

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

1. STRANGIO: I do – I do think it is clearly established in the science and in – in the record. I think, as with all underlying questions of looking at evidence, there can be disagreement. I don't dispute that.

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

JUSTICE ALITO: Well, I – I don't regard the Cass review as – necessarily as – as the Bible or as something that's, you know, true in every respect, but, on page 195 of the Cass report, it says: There is no evidence that gender-affirmative

treatments reduce suicide.

1. STRANGIO: What I think that is referring to is there is no evidence in some – in the studies that this treatment reduces completed suicide. And the reason for that is completed suicide, thankfully and admittedly, is rare and we're talking about a very small population of individuals with studies that don't necessarily have completed suicides within them.

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

United States v. Skrmetti – Oral Arguments

I do have a few concerns about Ms. Strangio's position here. One is the question of suicide vs. suicidality, or the thoughts about suicide. Suicidality is an emotional problem, and therefore harder to quantify. Add to that the heightened levels of suicidality that come with puberty and it's hard to differentiate whether the cause is puberty or gender dysphoria. I also wonder about the timeframe for the longitudinal studies she basis her position on. If someone is gender confused, and expects a treatment to reduce their thoughts about suicide, there could be a placebo effect that I would expect to be short-term. Did these studies follow their patients for the years, or even the decades, that would show a long-term solution? Compare that with the Cass report that looked at actual suicides, something that can be better measured, and I would think have a greater impact than a person's feelings, which can be managed without making life altering decisions about one's body.

Tennessee's Argument

Finally we get to Tennessee's argument, presented by J. Matthew Rice, Solicitor General of Tennessee, on behalf of

Jonathan Skrmetti, the Attorney General.

1. RICE: Mr. Chief Justice, and may it please the Court:

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

The challengers try to make the law seem sex-based this morning by using terms like "masculinizing" and "feminizing." But their arguments conflate fundamentally different treatments. Just as using morphine to manage pain differs from using it to assist suicide, using hormones and puberty blockers to address a physical condition is far different from using it to address psychological distress associated with one's body.

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

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

I welcome the Court's questions.

United States v. Skrmetti – Oral Arguments

Does SB1 discriminate based on sex or medical purpose? Wading through all of these arguments, that seems to be the core question. Plaintiffs say yes, respondents say no. This led to a rather contentious debate between Mr. Rice and Justices Sotomayor, Jackson, and Kagan. I think Mr. Rice made an excellent point when he said:

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

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

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

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

1. RICE: Well –

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

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

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

United States v. Skrmetti – Oral Arguments

United States Rebuttal

As the lead petitioner, Solicitor General Prelogar was allowed to rebut what had been argued before the court.

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

United States v. Skrmetti – Oral Arguments

The problem with this argument is that Congress is not constitutionally authorized to regulate medical treatment. That hasn't stopped them in the past, but it should at least be pointed out here. And really, is the question any different for a state law vs a federal one? In my opinion, this argument is a misdirection.

Finally, I think the Court should think about the real-world consequences of laws like SB1. Consider its effects on Ryan Roe. As Justice Sotomayor noted, Ryan's gender dysphoria was so severe that he was throwing up before school every day. He thought about going mute because his voice caused him so much distress. And Ryan has told the courts that getting these

medications after a careful consultation process with his doctors and his parents has saved his life. His parents say he's now thriving. But Tennessee has come in and categorically cut off And the State says it doesn't even want the courts to take a look at whether this protects adolescent health. But the reason Ryan can't have these medications is because of his birth sex, and a sex-based line like that can't stand on rational basis review.

United States v. Skrmetti – Oral Arguments

Again, the role of the court is not to consider the consequences of law; that's the role of the legislative branch. The court is there to apply the laws to the controversy before them. Justice Sotomayor similarly used a young woman who wants to live as a boy to make an emotional argument rather than a legal one. What the justice described, and the Solicitor General repeated here, are the effects of a mental disorder. Her nausea and psychosomatic muteness were not caused by a medical condition or a problem with her body, but a problem with her mind. Yet before she reaches the age of consent, her parents and her doctor wants to put her on drugs, the long-term use of which can cause serious medical harms. And that is just for the puberty blockers. If Ms. Roe truly wishes to modify her body to look like a boy, she will also have to take testosterone, which in women causes hyperandrogegism, atrophy of the lining of the uterus, blood cell disorders, and an increased risk of a heart attack.

Conclusion

There was a lot more in the oral arguments I could have written about, but I think this article is long enough, and I did cover what I think are the most important points. The claims of both the United States and the petitioners is that, since Tennessee prohibits them from receiving the same drugs as a person of the opposite sex, the law is sex discrimination and requires heightened scrutiny to pass the court's review.

However, they ignore the fact that the prohibitions in the law do not restrict drugs from someone because of their sex, but because of the effect they would have on their body.

Several court watches I follow believe that the majority of the court seemed favorable to Tennessee's position. As usual, we'll have to wait until the court releases its decision, probably in June. Regardless of how the court finds, I think it was a worthwhile exercise to review the arguments from both sides. This allows us to see which side seems more anchored in the facts and law and which side seems more interested in emotions.

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