

December 2, 2024

## Media Guide on *U.S. v. Skremetti*

What to look for in this week's oral arguments

### *Brief Background*

On Wednesday, December 4th, the Supreme Court will hear oral arguments in *U.S. v. Skremetti*, a case in which three transgender children, their parents, and a doctor who treats transgender youth have challenged a Tennessee law banning gender-affirming care for transgender people under 18 on the grounds that it discriminates against trans children on account of their sex. Like many states over the past several years, Tennessee passed a law prohibiting transgender youth from accessing necessary treatments endorsed by all major medical authorities. The law requires trans youth receiving gender-affirming care to end that care within nine months of the law's effective date of July 1, 2023, or by March 31, 2024, and establishes a private right of action against medical providers who give medically necessary care to trans youth. The Tennessee law does not, however, prevent cisgender youth from accessing the same medical treatments. The Solicitor General has intervened to support their claim, and the case will be argued by ACLU attorney Chase Strangio, the first openly trans lawyer to argue a case before the Supreme Court.

### *Three Things to Listen For in the Arguments*

#### 1. What level of scrutiny applies?

In Equal Protection cases like this, the constitutionality of a law largely depends on what level of scrutiny the Supreme Court applies to it. Sex- and gender-based classifications warrant heightened scrutiny and are presumptively unconstitutional. In such cases, the Court asks whether the government is advancing an important government interest in a way that is substantially related to that interest. However, the appellate court did not apply the intermediate scrutiny standard because it did not consider the Tennessee law to be a sex-based classification. The Justices are likely to push the parties to explain why the law is or is not a sex classification, and by extension, what level of scrutiny applies. In *Bostock v. Clayton County*, the Court held that anti-trans discrimination is prohibited by federal law barring sex discrimination in employment. *Skremetti* prompts the Justices to decide whether the same logic applies to constitutional sex discrimination, presenting an opportunity to extend or roll back *Bostock*.

## 2. What is a sex classification anyway?

Fifty years ago in *Geduldig v. Aiello*, the Supreme Court ruled that pregnancy discrimination is not a sex classification, so it does not get heightened scrutiny. While the government cannot act based on stereotypes about sex, the Court ruled that it could rely on (supposedly) objective judgments about reproduction. But over the intervening decades, the Court came to understand that pregnancy regulations are often justified by stereotypes about women - like the stereotype that women are naturally suited to domestic life. *Geduldig* was considered passively overruled —until *Dobbs v. Jackson Women's Health Organization*.

In a brief, non-binding paragraph of the *Dobbs* decision, the Court dispensed with Equal Protection arguments for abortion rights by resurrecting *Geduldig*. Now Tennessee relies on *Dobbs*' invocation of *Geduldig* to argue that transgender medicine is similarly classified as “medical procedure[s] that only one sex can undergo.” Besides assuming that only women can get pregnant, this argument re-opens the constitutional distinction between stereotypes and purported biological reasons for government action. We can expect the Justices to disagree about whether and how *Geduldig* might bear on this case.

## 3. Are the sexes treated similarly or differently by Tennessee's law?

If you're tuning in to oral argument, listen for the way the Justices describe cis- and transgender kids. The parties disagree about whether the Tennessee gender-affirming care ban treats all similarly situated young people alike – none can access gender-affirming care until they reach the age of maturity. Precocious puberty and gender dysphoria are different diagnoses from which different treatments flow, they contend, meaning that the boy receiving testosterone for precocious puberty is not similarly situated to the boy not receiving it for gender dysphoria.

This should not be a difficult doctrinal question. Tennessee raises an equal application argument, suggesting that a sex classification is not constitutionally suspect if it applies equally to men and women. This is the argument famously rejected in *Loving v. Virginia* in the context of race discrimination, throwing out a law prohibiting interracial marriages for people of all races. As the Court explained, “The fact of equal application does not immunize the statute,” from its objective to further white supremacy. A law can affect everyone and nevertheless violate Equal Protection. Courts similarly rejected it in the same-sex marriage context, where several states argued that men and women were equally prohibited from entering same-sex marriages, and equally authorized to enter into a heterosexual marriage. In the Supreme Court's 2015 *Obergefell* decision, the Court rejected that argument as well, finding that same-sex marriage is the only route to marriage equality for gay people. The Tennessee law at issue in *Skermetti* treats transgender girls differently from cisgender girls; it treats transgender boys differently from cisgender boys – thus, the plaintiffs argue, it discriminates on the basis of sex.