CERTIFIED UNCONSTITUTIONAL: MEDICAL GATEKEEPING AND THE 2026 TRANSGENDER AMENDMENT'S THREE PROPORTIONALITY FAILURES

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ABSTRACT

The Transgender Persons (Protection of Rights) Amendment Act, 2026 makes three amendments of the type that become operative: there is now a requirement in §6 for a recommendation by a Medical Board; §7(1A) introduces a new requirement for the hospital to report; and §7 introduces a new requirement for a revised certificate. Existing commentary has framed the challenge as a binary contest between parliamentary nullification of National Legal Services Authority v. Union of India and the substratum doctrine, a framing both imprecise and analytically insufficient. This article maps each operative change against a distinct limb of the proportionality framework from K.S. Puttaswamy v. Union of India: §6 fails the antecedent legality condition for absence of any defined evaluation criteria, §7(1A) fails the necessity prong as a universal surveillance sweep disproportionate to the State's welfare-delivery purpose, and §7 fails the balancing prong as a redundant compulsion delivering zero informational benefit to the State. Two counter-arguments, misuse prevention and the substratum doctrine, are addressed and resolved. The article concludes by proposing a constitutional minimum the bench must establish even if it declines to strike down the Amendment in full.

I. INTRODUCTION

On 4 May 2026, a three-judge bench of the Supreme Court heard the constitutional challenge to the *Transgender Persons (Protection of Rights) Amendment Act, 2026* ('2026 Amendment').[1] Senior Advocate Singhvi submitted that the Amendment renders the right to self-identification of gender legally nugatory by reintroducing the precise medical gatekeeping the Supreme Court condemned in *National Legal Services Authority v. Union of India*.[2] Justice Bagchi observed that Parliament may have simply changed the statutory substratum of *National Legal Services Authority v. Union of India*'s interpretation, potentially rendering that holding inapplicable to the new framework. The bench declined an interim stay and referred the matter to a larger bench.

The exchange crystallised the constitutional tension, but also exposed its framing's limitation. The existing commentaries have viewed this as a dichotomy between parliament's power to negate NALSA and the 'substratum doctrine', which is imprecise and analytically inadequate. Whether Parliament changed *NALSA*'s substratum is one question. Whether the three specific mechanisms Parliament chose survive independent scrutiny under *K.S. Puttaswamy v. Union of India*[3] is another, and it is the second question that yields arguments more constitutionally useful to the bench. This article addresses the second question with the precision the substratum framing cannot supply.

The 2026 Amendment introduces three operative changes to the *Transgender Persons (Protection of Rights) Act, 2019* ('2019 Act'): §6 inserts a mandatory Medical Board recommendation before the District Magistrate ('DM') may certify;[4] §7(1A) mandates that every hospital performing gender-affirming surgery furnish individual details to the DM;[5] and §7 converts a permissive revised certificate into a mandatory post-surgical obligation.[6] Each change is structurally distinct. Each fails a different limb of *Puttaswamy*'s proportionality framework, §6 the legality prong, §7(1A) the necessity prong, and §7 the balancing prong. This structural mapping, one provision, one limb, one constitutional failure, is the article's analytical

[1] Debby Jain, *SC Refers Transgender Amendment Act Challenge to Three-Judge Bench, Declines Stay*, LIVE LAW, May 4, 2026, available at https://www.livelaw.in/top-stories/supreme-court-pleas-challenging-transgender-persons-protection-of-rights-amendment-act-self-perceived-gender-identity-532714 (Last visited on May 11, 2026).
[2] National Legal Services Authority v. Union of India, (2014) 5 SCC 438, ¶¶124–129 ('NALSA').
[3] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, ¶¶154–174 ('Puttaswamy').
[4] The Transgender Persons (Protection of Rights) Amendment Bill, 2026, Bill No. 79 of 2026, Cl. 4.
[5] The Transgender Persons (Protection of Rights) Amendment Bill, 2026, Bill No. 79 of 2026, Cl. 5(b).
[6] The Transgender Persons (Protection of Rights) Amendment Bill, 2026, Bill No. 79 of 2026, Cl. 5.

contribution. Part II establishes the pre-amendment constitutional baseline. Part III describes the three operative changes. Part IV applies the framework and defeats both counter-arguments. Part V concludes.

II. THE PRE-AMENDMENT CONSTITUTIONAL FRAMEWORK

A. NALSA'S THREE HOLDINGS ON MEDICAL INVOLVEMENT

National Legal Services Authority v. Union of India ('*NALSA*') held that gender identity is "the most fundamental aspect of life" and its recognition cannot be made conditional on any external authority's determination.[7] *NALSA* was decided by a two-judge bench (Radhakrishnan J and Sikri J). Its three holdings on medical involvement have nonetheless been treated as controlling constitutional law in every subsequent engagement with the question, most recently affirmed by the Constitution Bench in *Supriyo @ Supriya Chakraborty v. Union of India* and by the five-judge majority in *Navtej Singh Johar v. Union of India*.[8]

Three holdings bear directly on the 2026 Amendment. First, no medical or surgical requirement, surgery, sterilisation, or hormonal therapy may be a precondition for recognition of self-identified gender.[9] Second, no external authority holds the power to declare or withhold transgender status.[10] Third, the Court directed governments to provide gender-affirming medical services through government hospitals,[11] demonstrating that *NALSA* opposed not State medical involvement per se, but its use as a gatekeeping mechanism. This distinction between medical delivery and medical gatekeeping is the conceptual core of the pre-amendment framework, and its violation is the central wrong the 2026 Amendment commits.

NALSA's dominant strand was reaffirmed in *Navtej Singh Johar v. Union of India* and *Supriyo @ Supriya Chakraborty v. Union of India*.[12] Tarunabh Khaitan has identified a tension within *NALSA* itself: Sikri J.'s separate opinion contains passages that may suggest surgery could precede certain forms of recognition, a tension not present in Radhakrishnan J.'s

[7] NALSA, supra note 2, ¶71.
[8] NALSA, supra note 2, ¶129(4).
[9] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶¶135–136.
[10] Tarunabh Khaitan, *NALSA v Union of India: What Courts Say, What Courts Do*, *UK CONSTITUTIONAL LAW BLOG*, April 24, 2014, available at https://ukconstitutionallaw.org/2014/04/24/tarunabh-khaitan-nalsa-v-union-of-india-what-courts-say-what-courts-do/ (Last visited on May 11, 2026).
[11] The Transgender Persons (Protection of Rights) Act, 2019, §4(1) ('2019 Act').
[12] 2019 Act, §§4(1), 6.

dominant holding.[13] The self-identification holding has governed every subsequent judgment and remains the applicable standard.

B. THE 2019 ACT'S MINISTERIAL ARCHITECTURE

The 2019 Act translated *NALSA*'s directions into statute. Section 4(1) expressly recognised the right to self-perceived gender identity;[14] §6 provided a self-declaration affidavit route to the DM;[15] and §7 made a revised post-surgical certificate permissive, a voluntarily elected right, not an obligation.[16] The DM's role was ministerial: administrative facilitation, with no evaluative discretion over identity.

The legislative arc is revealing. The 2016 Bill had proposed a District Screening Committee with medical composition. The Standing Committee on Social Justice specifically required that any medical official's role in certification must be "clearly defined."[17] Parliament eliminated the committee entirely in 2019. The 2026 Amendment reintroduces a medical board nine years later without addressing the precise constitutional objection Parliament had been given in 2017.

III. THE THREE OPERATIVE CHANGES

A. THE MEDICAL BOARD (§6)

The 2026 Amendment inserts into §6 the requirement that the DM examine the recommendation of a designated Medical Board before issuing any certificate.[18] The Board is headed by the Chief Medical Officer or Deputy CMO; it may include psychologists and social work professionals; and may consult "any other medical experts as may be deemed necessary."

What §6 specifies is the Board's *composition*. What §6 does not specify, anywhere, is the *standard* the Board applies. No clinical threshold is prescribed. No evaluation framework is mandated. No criterion is stated by which the Board must determine that an applicant is

[13] 2019 Act, §§4(1), 7.
[14] STANDING COMMITTEE ON SOCIAL JUSTICE AND EMPOWERMENT, Sixteenth Lok Sabha, *Report on the Transgender Persons (Protection of Rights) Bill, 2016*, Twenty Third Report (July, 2017), available at https://loksabha.nic.in (Last visited on May 10, 2026).
[15] Puttaswamy, supra note 3, ¶¶298–310.
[16] Puttaswamy, supra note 3, ¶81.
[17] The Digital Personal Data Protection Act, 2023, §§4–6.
[18] The Transgender Persons (Protection of Rights) Act, 2019, §7(1A), *inserted vide* The Transgender Persons (Protection of Rights) Amendment Act, 2026 (w.e.f. date to be notified).

transgender. An applicant before the Board cannot know what will be assessed, by what standard, or what must be demonstrated to obtain a recommendation. Parliament received precise advice in the 2017 Standing Committee report that any CMO role must carry clearly defined criteria.[19] It eliminated the committee entirely; the 2026 Amendment reintroduces the medical authority without supplying the criteria Parliament was told were constitutionally required. The absence of any defined evaluation standard raises a precise question under the legality prong, examined in Part IV.A.

B. MANDATORY HOSPITAL REPORTING (§7(1A))

Section 7(1A) requires every medical institution performing gender-affirming surgery to furnish the individual's details to the DM and a designated authority.[20] This is triggered automatically upon surgery, no individual application, no consent requirement.

What §7(1A) specifies is mandatory disclosure. What it does not specify is: the purpose of collection; what use the DM may make of the data; how long it is retained; who may access it; or what data protection framework governs it. The *Digital Personal Data Protection Act, 2023,* requires consent and a defined purpose for the processing of sensitive personal data.[21] Of the 4,87,803 transgender persons in the 2011 Census, only approximately 32,500 hold identity cards as of March 2026.[22] Hospitals have already begun declining gender-affirming surgeries, citing the reporting liability under §7(1A), a concrete chilling effect that serves no welfare purpose.[23] The provision serves no real purpose on its own – it requires mass disclosure with no rationale as to what it is being used for. There is a specific question under the necessity prong where a purpose limitation and/or data protection framework were not found, which is discussed in Part IV.A.

C. THE MANDATORY REVISED CERTIFICATE (§7)

The third operative change is formally a single word. The original §7 of the 2019 Act

[19] HUMAN RIGHTS WATCH, *India: Transgender Amendment Would Harm Rights*, March 26, 2026, available at https://hrw.org/news/2026/03/26/indias-transgender-rights-bill-a-huge-setback (Last visited on May 10, 2026) ('HRW Report').
[20] The Transgender Persons (Protection of Rights) Act, 2019, §7.
[21] 2019 Act, §7(1A), *inserted vide* The Transgender Persons (Protection of Rights) Amendment Act, 2026 (w.e.f. date to be notified).
[22] Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶¶16–33 ('Shreya Singhal').
[23] K.S. Puttaswamy (Aadhaar-5J.) v. Union of India, (2019) 1 SCC 1, ¶¶503–508 ('Puttaswamy (Aadhaar)').

provided that a person who had undergone surgery *may* apply for a revised certificate.[24] The amended §7 provides that such a person *shall* obtain one.[25]

'May' and 'shall' are not interchangeable. The original 'may' reflected the premise that surgery and any post-surgical administrative act are the individual's autonomous elections. The 'shall' converts this into a State-mandated obligation regardless of the person's wishes in the immediate aftermath of surgery. Read alongside §7(1A), this creates a structurally anomalous architecture: the hospital has already reported the surgery to the DM; the individual must now also apply to the DM. The DM receives identical information through two independent channels. The conversion of a voluntary right into a compelled obligation, where the State already holds the operative information, generates zero additional informational benefit while imposing a positive constitutional cost on decisional autonomy. This raises a direct question under the balancing prong.

IV. PUTTASWAMY APPLIED: THREE LIMB FAILURES, TWO COUNTER-ARGUMENTS, TWO RESOLUTIONS

A. THREE PROVISIONS, THREE LIMBS

The proportionality framework requires four cumulative conditions: legitimacy, suitability, necessity, and balancing.[26] Each operative change fails a separate limb.

The Medical Board under §6 fails the *legality* prong. Legality, a precondition to proportionality analysis, demands that any State limitation on a fundamental right be prescribed in law with sufficient precision to give fair notice and prevent unconstrained official discretion. In *Shreya Singhal v. Union of India*, the Court struck down §66A for employing undefined terms that vested unlimited discretion in officials without fair notice.[27] Section 6 presents the identical defect: it specifies the Board's composition but prescribes no evaluation criterion. The phrase "any other medical experts as may be deemed necessary" is an open-ended conferral of discretionary power without limit. The infirmity is not curable by executive guidance; legislative precision must be inherent in the statute. Parliament was advised of this requirement

[24] Puttaswamy (Aadhaar), supra note 25, ¶¶1124–1132.
[25] Puttaswamy, supra note 3, ¶¶315–320.
[26] HRW Report, supra note 21.
[27] *PRS INDIA*, *Legislative Brief: The Transgender Persons (Protection of Rights) Amendment Bill, 2026*, available at https://prsindia.org/billtrack/the-transgender-persons-protection-of-rights-amendment-bill-2026 (Last visited on May 9, 2026).

in 2017 and chose not to address it.

Section 7(1A) fails the *necessity* prong. Accepting the Government's welfare-integrity aim as legitimate, the necessity inquiry asks whether §7(1A) is the least restrictive means of achieving it. It is not. The *Aadhaar* majority upheld §7's welfare-targeted identification precisely because it was proportionate to the welfare purpose; mandatory bank-account linkage was struck down as a disproportionate sweep extending beyond that purpose.[28] Section 7(1A) is structurally equivalent to the struck-down bank linkage: its sweep, every surgery, every person, far exceeds the purpose of benefit integrity. Chandrachud J.'s necessity analysis, whose structural reasoning on bank linkage the majority adopted,[29] confirms that treating every individual as a potential fraudster without requiring the State to establish even a reasonable belief is constitutionally disproportionate. The less restrictive alternative is self-evident: verify welfare eligibility at the point of welfare application, not at surgery.

Section 7 fails the *balancing* prong. The benefit to the State from the mandatory revised certificate is zero: the hospital has already reported the surgery under §7(1A); no new information reaches the DM. The constitutional cost is positive: the individual is compelled into a post-surgical administrative interaction that Chandrachud J.'s decisional autonomy analysis in *Puttaswamy* places within the protected domain.[30] Zero benefit plus positive constitutional cost is a constitutionally failed balancing exercise. The provision cannot survive it.

B. THE COUNTER-ARGUMENTS AT FULL STRENGTH

Both counter-arguments deserve engagement at their strongest, not at a weakened version designed to facilitate defeat.

The misuse-prevention argument has genuine constitutional force. The Statement of Objects and Reasons invokes the need to ensure welfare benefits reach genuine beneficiaries. The Chief Justice of India echoed this concern at the May 4 hearing, observing that self-identification creates the theoretical possibility of misuse. The *Aadhaar* majority accepted

[28] Youth for Equality v. State of Bihar, 2023 SCC OnLine Pat 1273, ¶84 ('Youth for Equality').
[29] Jayna Kothari, *Trans Equality in India: Affirmation of the Right to Self-Determination of Gender*, Vol. 13(3), NUJS L. Rev., 1, 18–22 (2020).
[30] NALSA, supra note 2, ¶¶19 – 21.

welfare integrity as a constitutionally recognised interest.[31] At full strength, the argument is that Parliament may legitimately require a minimum verification mechanism for welfare claims and is not constitutionally bound to rely on self-declaration alone. This argument must be presented at full strength before it can be answered.

The substratum doctrine is the more formidable counter-argument. As articulated in Justice Bagchi's bench observation,[32] Parliament may have changed the statutory framework under which *NALSA* operated. The doctrine holds that when Parliament changes the factual or statutory basis of a court's interpretation, that interpretation loses its foundation. On this view, *NALSA* examined a statutory landscape that no longer exists; Parliament has enacted a new one; *NALSA*'s conclusions do not automatically migrate. If this argument succeeds, the Amendment survives regardless of how constitutionally intrusive its medical requirements are, it is therefore the argument the bench must address first.

C. THE RESOLUTION

The misuse-prevention argument fails on two independent grounds. First, it lacks an empirical foundation. 5,566 applications were rejected and zero instances of misuse have been recorded in six years of operation under the self-declaration framework.[33] The Government's own parliamentary data, 32,500 certificates against 4,87,803 persons, establishes that the framework was not being exploited. Singhvi's submission that the hypothetical misuse figure is "probably 0.01%" is empirically consistent with these numbers.[34] The Patna High Court in *Youth for Equality v. State of Bihar* held that constitutional invalidity must be demonstrated through concrete evidence, not theorised from hypothetical possibilities.[35] No evidence exists. Second, comparative data from self-identification frameworks in Argentina, Ireland, and Denmark demonstrate that such frameworks produce no evidence of systemic misuse after years of operation.

The substratum doctrine fails because of a distinction that existing commentary has not drawn with precision, this article's most original contribution. The substratum doctrine applies

[31] *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225 ('Kesavananda Bharati').
[32] Dipika Jain & Kavya Kartik, *Unjust Citizenship: The Law That Isn't*, Vol. 13(2), NUJS L. Rev., 1, 15–17 (2020).
[33] Puttaswamy (Aadhaar), supra note 25, ¶¶440–448.
[34] Yogyakartaprinciples.org, *The Yogyakarta Principles Plus 10*, November 10, 2017, Principle 9, available at https://yogyakartaprinciples.org/principles-en/yp10/ (Last visited on May 9, 2026).
[35] Youth for Equality, *supra* note 30, ¶¶22 – 26.

when Parliament changes the statutory basis of a judgment that interpreted a statute. *NALSA* did not interpret the 2019 Act; that Act did not exist in 2014. *NALSA* interpreted Articles 14, 19, and 21 directly, in a complete statutory vacuum.[36] Its prohibition on medical preconditions is a direct constitutional holding. Parliament can remove the statutory expression of *NALSA*'s direction, which it has done, but it cannot remove the constitutional prohibition itself, which inheres in the Constitution, not in any statute.

The *Shreya Singhal* analogy is decisive: Parliament cannot restore §66A by re-enacting it in different words, because the infirmity inheres in Article 19(1)(a), not the statutory text; by parity of reasoning, Parliament cannot restore the medical gatekeeping *NALSA* prohibited by re-enacting it through a different statutory vehicle. To extinguish *NALSA*'s constitutional holding requires an amendment under Article 368, not an amendment to the Transgender Persons Act. *Kesavananda Bharati* establishes the principle: Parliament's legislative power is constitutionally bounded; fundamental constitutional holdings cannot be abrogated through ordinary legislation.[37] *Navtej Singh Johar v. Union of India* forecloses legislative regression in the domain of intimate identity independently.

V. CONCLUSION

Each of these changes fails a different pillar of the proportionality test that was laid down in Puttaswamy. For lack of any specified criteria for evaluation, Section 6's Medical Board fails the legality prong. The sweeping obligation of Section 7(1A) to report to the hospital is not a requirement, and is not limited to the specific purpose of welfare delivery. Section 7's requirement for a new certificate misses this balancing test; it does not provide any state-helping information and introduces a positive constitutional harm to decisional autonomy. The Misuse Prevention and the substratum arguments have been addressed and resolved. The argument of misuse is without any scientific basis and the substratum doctrine doesn't apply since NALSA's decision is a holding under Article 14, 19 and 21 of the Constitution and not a statutory interpretation which Parliament can legislatively overturn. For the bench, there are two observations. First of all it would be incorrect to mix up the issues of whether these specific mechanisms are constitutional or whether any State mechanism for gender recognition might exist. The first must be answered in the negative, the second in the affirmative, carefully

[36] NALSA, supra note 2, ¶20.
[37] *Kesavananda Bharati, supra note 33.*

designed. Second, a Constitutional minimum should be set: there should be statutory evaluation criteria to prevent the Medical Board from going under; §7(1A) can have no meaning without purpose limitation and data protection safeguards; and mandatory reporting to the hospital cannot co-exist with mandatory certification. The template to be followed is the partial strike-down of Aadhaar. The question now is whether proportionality is a real limitation on the Constitution or simply a point that welfare goals can reach at any time.