No. 16-273

In the Supreme Court of the United States

GLOUCESTER COUNTY SCHOOL BOARD, PETITIONER

v.

G.G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUALITY FEDERATION IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Equality Federation Institute (Equality Federation) is a strategic partner to state-based organizations advocating for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. Equality Federation works to build partnerships between state-level organizations through peer learning opportunities and strategic support. Currently, Equality Federation counts forty state-based organizations among its partners.

[1] Both parties have consented to the filing of this amicus curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Those state-based groups represent the interests of LGBTQ people across this country, including tens of thousands of same-sex couples and transgender persons who live and work in every community, and who seek to enjoy the same freedom and equality as others. The Equality Federation submitted an amicus brief in *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015), urging this Court to recognize that same-sex couples and their families have a constitutionally protected right to be treated equally under our nation's marriage laws. The Equality Federation submits this brief now on behalf of the many families in our partner state-based groups whose members include transgender children and youth who urgently need legal protection. Equality Federation is committed to the belief that all transgender children have the right to a safe and supportive school setting, including but not limited to the right to use the same facilities on the same terms and conditions as other students, without being subjected to unlawful discrimination based on their sex.

SUMMARY OF THE ARGUMENT

Petitioner and its amici assert that policies excluding transgender students such as Gavin from the same restrooms used by other students do not discriminate, but rather merely reflect the "physiological differences between the sexes." Pet. Br. 20. That claim echoes arguments used to defend state laws excluding same-sex couples from marriage, on the ground that such laws merely reflected the physiological differences involved in procreation.

In the marriage cases, this Court and many others subjected that biological rationale to careful review,

and concluded that it was riddled with inconsistencies and did not account for the many different purposes of marriage. Nor was that rationale found sufficient to justify the harm caused to same-sex couples and their families by their disparate treatment under marriage laws.

As in the marriage cases, in this case petitioner and its amici invoke a purportedly neutral biological rationale for the exclusion of transgender students from communal school restrooms. Their arguments cast that exclusion as a mere reflection of biological facts, entirely divorced from any intent to stigmatize or discriminate against transgender students. The invitation is plain: Petitioner and amici ask the Court to sidestep meaningful scrutiny of its policy by disregarding its facially discriminatory impact and treating its deliberate isolation of Gavin as a mere reflection of "biological facts."

The Court should decline that invitation just as it did in the marriage cases. Meaningful review of petitioner's rationale shows that it lacks any coherent or consistent definition, is not actually applied to other students, and was expressly designed only for one purpose: to exclude transgender students.

ARGUMENT

I. Biology-Based Rationales Were Advanced To Justify Marriage Bans, But Were Ultimately Rejected

In response to initial challenges to state laws excluding same-sex couples from the right to marry, those defending such laws claimed that the laws did not dis-

criminate, but rather merely reflected the biological realities of procreation. Initially, some courts accepted that rationale at face value, declining to subject state marriage bans to careful review. Yet as the serious harms caused by such bans became more apparent, courts began to examine that biology-based rationale more carefully. By the time this Court resolved the issue in 2015, most courts had concluded that appeals to procreation to justify state marriage bans were both under- and overinclusive, failing to account either for the inclusion of different-sex couples who are infertile or simply do not wish to have children, or for the exclusion of the many same-sex couples raising children. See, *e.g.*, *Baskin* v. *Bogan*, 766 F.3d 648, 656 (7th Cir.) (describing such laws as "overinclusive in ignoring the effect of the ban on the children adopted by same-sex couples" and "underinclusive in extending marriage rights to other non-procreative couples"), cert. denied, 135 S. Ct. 316 (2014); see also *Kitchen* v. *Herbert*, 755 F.3d 1193, 1221 (10th Cir.) (same), cert. denied, 135 S. Ct. 265 (2014); *Bostic* v. *Schaefer*, 760 F.3d 352, 381-382 (4th Cir.) (same), cert. denied, 135 S. Ct. 308 (2014). Particularly in light of the significant harms to same-sex couples and their children caused by such unequal treatment, courts increasingly subjected discriminatory marriage laws to searching review, which they could not withstand.

A. Some Courts Initially Accepted Biology-Based Arguments At Face Value, Declining To Subject Them To Careful Review

In 1993, after the Hawaii Supreme Court called the constitutionality of a state marriage ban into question, see *Baehr* v. *Lewin*, 852 P.2d 44, 59 (Haw. 1993), state

officials and others defending state marriage bans increasingly turned to arguments based on biological procreation to defend them. No doubt cognizant that simply expressing disapproval of lesbian and gay persons would not provide sufficient justification for laws excluding same-sex couples from a right "of fundamental importance for *all individuals*," *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) (emphasis added), advocates turned to biology as a seemingly neutral rationale that would be more likely to deflect judicial scrutiny.

In virtually every case in which same-sex couples challenged state marriage bans, state officials relied on biology-based arguments to defend them. They asserted that laws barring same-sex couples from marriage did not impose constitutionally suspect discrimination, but rather merely neutrally reflected the biological facts of life. In the words of one dissenting justice, "[t]he ancient definition of marriage as the union of one man and one woman has its basis in biology, not bigotry." *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 516 (Conn. 2008) (Zarella, J., dissenting); see also *Lewis* v. *Harris*, 875 A.2d 259, 276 (N.J. Super. Ct. App. Div. 2005) (Parrillo, J., concurring) (describing "[p]rocreative heterosexual intercourse" as a "fundamental, originating reason why the [s]tate privileges marriage" (citation omitted)), aff'd in part, modified in part, 908 A.2d 196 (2006).

Initially, some courts accepted these justifications at face value, declining to subject the bans to careful review. See, *e.g.*, *Hernandez* v. *Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (upholding New York's ban on the ground that "it remains true that the vast majority of children are born as a result of a sexual relationship between a

man and a woman, and the Legislature could find that this will continue to be true"); *Andersen* v. *King Cnty.*, 138 P.3d 963, 982 (Wash. 2006) (reasoning that "procreation is a legitimate government interest justifying the limitation of marriage to opposite-sex couples").[2] But over time, as explained below, more and more courts examined these biology-based arguments more carefully, recognizing that they failed to account either for the breadth of the purposes that marriage serves or for the thousands of children being raised by same-sex couples.

B. This Court And Others Recognized That Attempts To Justify The Marriage Bans Based On Biology Were Riddled With Inconsistencies And Merely Masked Harmful Discrimination

Ultimately, this Court and others recognized that arguments based on biological procreation were riddled with inconsistences and could only be understood as post hoc rationalizations for discrimination. In the words of the Massachusetts Supreme Judicial Court, "[t]he 'marriage is procreation' argument single[s] out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage." *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003).

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[2] Similarly, the circuit court opinion reversed by this Court's decision in *Obergefell* upheld the state marriage bans challenged in that case based on "the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes" *DeBoer* v. *Snyder*, 772 F.3d 388, 405 (6th Cir. 2014), rev'd, *Obergefell* v. *Hodges*, 135 S. Ct. 2584 (2015).

In *Obergefell*, this Court explained that "[i]n light of precedent protecting the right of a [heterosexual] married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate." *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2601 (2015); see also *Goodridge*, 798 N.E.2d at 961 (noting that "[f]ertility is not a condition of marriage" and that "[p]eople who have never consummated their marriage, and never plan to, may be and stay married"). And as this Court also recognized, marriage serves important purposes unrelated to procreation, such as providing autonomy to couples and stability to the larger society. "The constitutional marriage right has many aspects, of which childbearing is only one." *Obergefell*, 135 S. Ct. at 2601.

The *Obergefell* decision found that reducing marriage to biological procreation also defined procreation too narrowly, conflating the ability to procreate biologically with the ability to raise children and create families through other means. In *Obergefell*, this Court recognized that "same-sex couples provide loving and nurturing homes to their children, whether biological or adopted." 135 S. Ct. at 2600. Thus, insofar as marriage is designed to protect children, the Court found that the marriage bans were fatally underinclusive. *Id.* at 2600-2601; see also *Bostic*, 760 F.3d at 383 ("[B]arring same-sex couples' access to marriage does nothing to further Virginia's interest in responsible procreation").

In short, biology-based rationales for excluding same-sex couples from marriage were "nothing more than post-hoc justifications." *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010). Shorn of a failed biological justification, that exclusion could only

be understood as discrimination—an intentional decision to exclude an entire class of persons from the right to marry.

II. This Court Should Reject A Similar Effort In This Case To Use Biology-Based Arguments To Mask Anti-Transgender Discrimination

Like defenders of marriage bans, petitioner and its amici argue that petitioner's restroom policy does not discriminate against transgender students, but merely reflects "the physiological differences between the sexes." Pet. Br. 20. As with the purportedly objective justifications for excluding same-sex couples from marriage, petitioner's claim that it merely applies a neutral rule based on "biological gender" (which is never defined) is riddled with inconsistencies, and does not reflect the actual practices petitioner and other institutions generally have followed with respect to restroom access. Like the biology-based defense of exclusionary marriage laws, a similar justification here reveals the discrimination behind the policy.

A. Petitioner Invokes Biology In Order To Shield Its Policy From Meaningful Review

As did many state officials in the marriage cases, petitioner and its amici urge the Court to accept its biological rationale at face value, without examining either its internal inconsistencies or implausibility as an explanation of how schools actually decide which restrooms students may use.

Just as some early decisions accepted biology-based rationales for marriage bans, so too some courts

have accepted the assertion that disparate treatment of transgender people is not discrimination, but rather merely reflects the biological reality of the physiological differences between the sexes. *E.g.*, *Kirkpatrick* v. *Seligman & Latz, Inc.*, 475 F. Supp. 145, 147 (M.D. Fla. 1979) (finding that transgender plaintiff "has failed to allege any manner in which she is treated other than as all other (biological) men are"). As the United States Court of Appeals for the Fourth Circuit recognized in this case, however, such a "'biological gender' formulation" does not explain "how [petitioner's] regulation would apply in a number of situations," Pet. App. 20a, nor does it describe how schools actually determine which restrooms students may use.

B. Petitioner's Invocations Of Biology Are Under- And Overinclusive, And Warrant Careful Review

The Court should decline petitioner's invitation to rely on an unexamined appeal to purported "biological facts" to resolve this case, just as it declined to permit unexamined claims about biological procreation to deflect meaningful scrutiny of the marriage laws in *Obergefell*.

At the outset, the purportedly biological criteria asserted by petitioner and its amici are rife with internal inconsistencies. Petitioner and amici insist that a policy based on "biological gender" is nondiscriminatory and justifies excluding transgender people from communal restrooms. But they never define "biological gender" or clarify what they contend the basis for that definition of that term may be. The imprecision of petitioner's appeal to "biological gender"

means that this approach cannot possibly explain, let alone justify, petitioner's actual practices concerning restroom access, and therefore this purported justification, which is in fact a cover for discrimination against transgender people.

Both medical science and courts have recognized that a variety of characteristics—including gender identity—collectively make up a person's sex. See, *e.g.*, *Schroer* v. *Billington*, 424 F. Supp. 2d 203, 212-213 (D.D.C. 2006) (noting "real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other"); Pet. App. 21a (citing dictionaries defining "sex" as "the character of being either male or female" or "the sum of those anatomical and physiological differences with reference to which the male and female are distinguished" and "the sum of the morphological, physiological, and behavioral peculiarities of living beings * * * typically manifested as maleness and femaleness"). A person's sex includes that person's gender identity, lived experience, and interactions with others, just as it may include various other characteristics. Cf. *Students & Parents for Privacy* v. *U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *23 (N.D. Ill. Oct. 18, 2016). Moreover, while the exact cause of a person's gender identity is not known, medical science recognizes that it has a biological component. See, *e.g.*, Aruna Saraswat et al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199 (2015).

Although for most people those components of sex all align, there are situations in which that is not the case, such as being transgender. Petitioner's simplistic

appeal to "biological gender" fails to explain how its policy would apply in many of these cases, as the court below recognized. "For example, which restroom would a transgender individual who had undergone sex-reassignment surgery use? What about an intersex individual? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia in an accident?" Pet. App. 20a. Petitioner thus fails to offer any meaningful explanation of what "biological gender" means in the context of its restroom access policy.

In addition to that fundamental flaw, petitioner's reliance on "biological gender" suffers from a fatal under- and overinclusivity similar to that which led this Court and others to reject the comparable rationales offered to defend state marriage bans. Although petitioner claims to restrict access to restrooms based on students' "biological gender," in fact its policy applies only to students who are known to be transgender. For other students, there is no chromosomal, hormonal, or genital test to use the restroom, nor could one be enforced in practice. Petitioner simply permits a student to use the facilities that correspond with that student's "appearances, social expectations, or explicit declarations." Pet. App. 24a n. 8. In other words, petitioner's policy permits all students *except for those who are known to be transgender* to use the restrooms that correspond to their gender identity.

To cure that underinclusivity, petitioner would have to require *every* student to prove their "biological gender" (however defined). Petitioner does not propose or endorse such a test for all students, and would likely agree that any such practice would raise signifi-

cant constitutional concerns. See, *e.g.*, *Brannum* v. *Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008); *Beard* v. *Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005). Instead, it imposes such a requirement only on Gavin and other students with "gender identity issues," as the text of the policy itself makes clear. Pet. App. 144a.

Petitioner's policy also suffers from fatal overinclusivity. While petitioner claims to base its policy on biology, it fails to take into account transgender students, like Gavin, who have undergone medical treatment for gender dysphoria resulting in significant changes to bring their bodies into alignment with their gender identities. Even taken at face value, and disregarding the fact that no biological test is actually applied to other students, an invocation of "biological gender" cannot justify the exclusion of these students from restrooms that correspond to their identity and to the gender that everyone in their lives understands them to be.

The purpose of petitioner's policy, as these inconsistencies make plain, is to exclude transgender students. As this Court noted in *Obergefell*, different-sex couples are not barred from marriage based on their inability or failure to procreate. Similarly here, non-transgender students are not barred from using restrooms based on some undefined "biological" attribute or test. In each case, what purports to be a universal biological rule is in fact applied only to the disfavored and excluded class. This is the sure sign of a post hoc rationalization, or pretext, for discrimination. In the marriage cases, "[t]he 'marriage is procreation' argument single[d] out the one unbridgeable difference between same-sex and opposite-sex couples, and trans-

form[ed] that difference into the essence of legal marriage," while ignoring the children actually raised by same-sex couples. *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003). Similarly here, petitioner's "biological" rationale singles out the one presumed difference between transgender and non-transgender students and transforms that difference into the essence of restroom access. Cf. *Richards* v. *U.S. Tennis Ass'n*, 93 Misc. 2d 713, 714 (N.Y. Sup. Ct. 1977) (finding unlawful sex discrimination where tennis association intentionally selected a particular criteria "for purposes of excluding [transgender] individuals from sports events on the basis of gender").

For all other students, petitioner treats them as whole persons, able to use restrooms consistent with their gender identities as boys or girls with no "test" for admission. But for transgender students, petitioner adopts an undefined "biological" rule, disregarding their identities, and purporting to reduce them only to isolated biological traits, considered in isolation from who they actually are.

C. Petitioner's Biology-Based Justification Is A Pretext For Harmful Discrimination

Petitioner's attempted reliance on "biological gender" to justify its policy has no grounding in any medical, practical, or social reality. As with the purportedly neutral arguments presented in defense of marriage bans, when petitioner's claims about biology are subjected to any meaningful analysis, it is plain that they serve only to mask a purpose to single out transgender students for exclusion. That purpose is also overwhelmingly apparent from the facts of this case, which

include ample evidence of disparaging comments made by many adults at the School Board meeting at which the policy was adopted, as well as the policy's overt targeting of students with "gender identity issues." Pet. App. 144a; see also Public Advocate of the United States Br. 19 (describing gender dysphoria as a "dangerous illusion" and arguing that "physiological changes" resulting from medical intervention "give [at best] only the appearance of something, but they are not reality—they are simply a mask").

Discriminatory restroom policies such as petitioner's subject transgender students like Gavin to unwarranted "differentiation," *United States* v. *Windsor*, 133 S. Ct. 2675, 2694 (2013), causing the same sort of "harm and humiliat[ion]" that this Court rejected in *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2590 (2015). Transgender students who are singled out by discriminatory restroom policies are subject to "stigma and exclusion" that causes "severe and persistent emotional and social harms" because they are "set[] * * * apart from" their peers and given "a daily reminder that the school views [them] as" different or defective. Pet. App. 11a (citation and quotation marks omitted); accord *Dodds* v. *U.S. Dep't of Educ.*, 845 F.3d 217, 221–222 (6th Cir. 2016); *Whitaker* v. *Kenosha Unified School Dist. No 1. Bd. of Educ.*, No. 16-cv-943, 2016 WL 5239829, at *5 (E.D. Wis. Sept. 22, 2016).

Especially in light of those serious harms, this Court should reject petitioner's invitation to rubberstamp its policy based on the mere invocation of "biological facts." In *Obergefell*, this Court found justifications based on biology to be insufficient to define either the actual eligibility criteria to marry or the purpose of

marriage as a legal institution. The Court recognized arguments based on biological procreation for what they were: post-hoc rationalizations designed to mask discrimination.

The same is true here. Petitioner's invocation of undefined "physiological differences between the sexes" does not provide a plausible account of petitioner's actual restroom access criteria for students not identified by petitioner as transgender, nor can it explain why such criteria are applied only to exclude transgender students. Rather than providing a coherent explanation for why transgender students are excluded from the same restrooms used by others, petitioner's biology-based rationale is a post-hoc rationalization for discrimination.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit reinstating the Title IX claim should be affirmed, and the stay of the preliminary injunction should be dissolved.

Respectfully submitted,

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MARCH 2017

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