Case No. 20-03

==========

IN THE
SUPREME COURT OF THE STATE OF SIERRA

---------- ♦ ----------

JANE DOE,
Appellant-Plaintiff

v.

MARIN COUNTY BOARD OF EDUCATION,
Appellant-Defendant

---------- ♦ ----------

BRIEF FOR RESPONDENTS

---------- ♦ ----------

QUESTIONS PRESENTED

1. Are sex-segregated locker rooms a violation of Title IX?
2. Are sex-segregated locker rooms a violation of the Equal Protection Clause?
3. If sex-segregated locker rooms are NOT a violation of Title IX, is there another Title IX violation in this case?
4. Are public schools "business establishments" within the meaning of the Unruh Act?
5. If so, do sex-segregated locker rooms violate the Unruh Act?

TABLE OF CONTENTS

1. Questions Presented
2. Table of Contents
3. Table of Authorities
4. Arguments

5. Conclusion

TABLE OF AUTHORITIES

Cases

Backus v. Baptist Medical Ctr., 510 F. Supp. 1191 (E.D. Ark. 1981)

Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 604 (6th Cir.2005)

Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489, 494 (6th Cir.2008)

Brown v Board of Education, 347 U.S. 483, 495 (1954)

Carcano v. McCrory, 203 F. Supp. 3d 615, 644 (M.D.N.C. 2016)

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

Craig v. Boren, 429 U.S. 190 (1976)

Everson v. Michigan Dept. of Corrections, 391 F.3d 737 (6th Cir. 2004)

Doe v. Luzerne Cnty., 660 F.3d 169, 176-77 (3d Cir.2011)

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Constr. Trades Council, 485 U.S. 568, 575-76 (1988).

Isbister v. Boys Club of Santa Cruz, Inc., 40 Cal.3d 72 (1985)

Jane Doe v. Marin County Board of Education, 1 West Supp. 1, 8 (First Ct. App. 2020)

Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir.1981)

Local 567 Am. Fed'n of State, Cty., & Mun. Employees v. Michigan Council 25, Am. Fed'n of State, Cty., & Mun. Employees, 635 F. Supp. 1010, 1012(1986)

Sepulveda v. Ramirez, 967 F.2d 1413, 1416 (9th Cir.1992)

United States v Virginia, 518 US 515 (1996)

Warfield v. Peninsula Golf & Country Club, 896 P.2d 766 (Cal. 1995)

Statues

Sierra Unruh Civil Rights Act

Sierra Indecent Exposure

Federal Regulations

34 C.F.R. § 106.41(c)

34 C.F.R § 106.33

ARGUMENTS

I. The Appellate Court correctly ruled that under existing Department of Education regulations sex-segregated locker rooms are not a violation of Title IX and should be deferred to

The Department of Education has established a set of guidelines to determine whether athletes have received fair and non-discriminatory treatment in athletics under Title IX. As highlighted by Judge Griffin, writing for the majority in Sierra's First Court of Appeals, Doe was afforded equal treatment and opportunity under these guidelines (34 C.F.R. § 106.41(c)). *Jane Doe v. Marin County Board of Education*, 1 West Supp. 1, 8 (First Ct. App. 2020). Her exclusion from pre-game banter with her teammates and coaches, while unfortunate, inevitably follows from the existence of locker rooms that are segregated based on sex, which the federal Department of Education permits under Title IX for a variety of reasons and which the Board believes further an important government interest.

34 C.F.R section 106.33 states that under Title IX schools "may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."[1] The plaintiff alleges that the locker room provided to her was not comparable to the men's locker room due to differences in the water pressure of the showers, and thus a violation of Title IX. If the only difference between the two facilities is variations in water pressure, then the facilities could definitely be considered "comparable," if not equal. It is impossible that two different facilities will be equal in every single regard. Perhaps the women's locker room is cleaned slightly more often, or one of the sinks is slightly less prone to breaking. Maybe it is closer to the track by several feet making movement between the track and locker room slightly more convenient. Two different facilities will never be equal in every imaginable way, but for all intents and purposes, the facility provided to Doe was equal to the facility provided to her male counterparts. However, the petitioner alleges that whether the facilities are equal is irrelevant, instead arguing that the Equal Protection Clause outlaws any discrimination based on sex. This claim is evaluated in the section pertaining to the Fourteenth Amendment. For the purposes of whether sex-segregated locker rooms violate Title IX, the Court should defer to the Department of Education's regulations.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) established the legal test for when a court should grant deference to an executive agency's interpretation of a statute. The majority in *Chevron* held that "If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the

[1] In 2016 the Department of Education issued guidance on Title IX and transgender students. They reaffirmed their previous regulation permitting separate facilities based on sex as long as transgender students were treated in accordance with their gender identity: "The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity." Due to the updated Title IX guidance, the current case at hand will not have implications for transgender students, as the plaintiff warns.

statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Only an extreme textualist reading of Title IX would seem to imply that it tears down any differentiation between the sexes that would demand the desegregation of locker rooms. Certainly it was obvious in the decades following Title IX's passage that sex-segregated locker rooms were permissible as the current case at hand is the first to claim that Title IX demands the desegregation of bathrooms not involving a transgender plaintiff. The Education Department's interpretation of Title IX to allow separate changing facilities, based on sex is a completely reasonable interpretation based on centuries of social custom and rooted in privacy and safety concerns. In accordance with Chevron, the Court should not, as the plaintiff desires, break with DEA guidance and impose an alternative reading of Title IX when the DEA has already offered a reasonable interpretation. As Judge Griffin wrote for the majority in Sierra's First Court of Appeals, "To do away with regulatory deference, the regulations in question must be more than speculatively problematic but rather have 'serious constitutional problems.' *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. Constr. Trades Council*, 485 U.S. 568, 575-76 (1988)." The Constitutionality of sex-segregated bathrooms is hardly "constitutionally suspect" and definitely does not raise a "serious constitutional problem." As we will expand on in the next section, changing facilities segregated by sex are constitutionally permissible.

II. Brown v. Board is not relevant to the current case; "separate but equal" in regards to sex is constitutionally permissible especially in the context of bathrooms

The plaintiff argues, "Even if the facilities provided were equal in quality, 'separate is not equal'; accordingly, requiring her to use sex-segregated facilities excluded her from participation in, denied her the benefits of, and subjected her to discrimination on the basis of her sex." While the Supreme Court ruled in the landmark Brown v. Board of Education that separate facilities are inherently unequal and thus a violation of the Equal Protection Clause in regards to racial discrimination, the Supreme Court ruled in United States v. Virginia that "separate

but equal" in regards to sex discrimination was constitutionally permissible. In United States v. Virginia, the Supreme Court did not rule that the Virginia Military Institute's male-only admission policy was in itself a violation of the Equal Protection Clause, but rather that Virginia's failure at offering a comparatively equal alternative to women was unconstitutional. *United States v Virginia,* 518 US 515 (1996) ("In myriad respects other than military training, VWIL does not qualify as VMI's equal"; "Virginia, in sum, while maintaining VMI for men only, has failed to provide any 'comparable single gender women's institution.' *Id*., at 1241. Instead, the Commonwealth has created a VWIL program fairly appraised as a 'pale shadow' of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence"; "Virginia chose not to eliminate, but to leave untouched, VMI's exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities"). The Court's focus on the inequalities between the two institutions, but not the inherent inequality of a sex-based admissions policy, has established a practical "separate but equal" doctrine in regards to sex-based discrimination.

If the Court ruled in US v. Virginia that sex-based admissions were not unconstitutional, then it hardly seems to follow that sex-segregated bathrooms are inherently a violation of the Equal Protection Clause. While ordering the integration of the Virginia Military Institute, Justice Ginsburg wrote in a footnote that "admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." Justice Ginsburg and the rest of the Court took it for granted that sex-segregated facilities were not violations of the 14th Amendment.

In Brown v. Board of Education, the court ruled that separate was not equal, and could never be equal, in regards to race due to the feelings of inferiority that resulted: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone….for the policy of separating the races is usually interpreted as denoting

the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn." *Brown v Board of Education,* 347 U.S. 483, 495 (1954). Unlike other forms of sex-based discrimination, separate bathrooms for men and women are in no way subordinating and do not carry any connotation of inferiority. One of the leading feminists and jurists of the 20th century Ruth Bader Ginsburg, prior to her nomination to the Court, wrote an article arguing that the Equal Rights Amendment would not prohibit sex-segregated bathrooms: "the ERA would not interfere with sex-segregated spaces such as bathrooms because they 'protect privacy without implying inferiority.'"[2]

Despite being cited by the Trial Court, the Appellate Dissent, and the Plaintiff, Brown v. Board of Education is not applicable to the current case.

III. Sex-segregated bathrooms and locker rooms do not violate the 14th Amendment

The standard for review in sex-discrimination cases is intermediate scrutiny requiring the state to prove it furthered "important governmental objectives" through means "substantially related". *Craig v. Boren*, 429 U.S. 190 (1976). The Board believes that protecting the privacy and safety of its students through sex-segregated bathrooms is not only an important objective, but one that they are constitutionally required to enforce.

The Supreme Court has recognized a right to privacy. *See Griswold v. Connecticut,* 381 U.S. 479 (1965)*; Eisenstadt v. Baird,* 405 U.S. 438 (1972)*; Roe v. Wade,* 410 U.S. 113 (1973)*, Lawrence v. Texas,* 539 U.S. 558 (2003). Sex-segregated public bathrooms and locker rooms are not only constitutionally permissible but constitutionally mandated as the right to privacy guarantees an individual the right to protect one's naked body from unwanted exposure, particularly from the opposite sex. *See, e.g., Doe v. Luzerne Cnty.,* 660 F.3d 169, 176-77 (3d Cir.2011) (recognizing that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" and that this

[2] Ruth Bader Ginsburg, The Fear of the Equal Rights Amendment: Taking Exception, WASH. POST, Apr. 7, 1975,

"reasonable expectation of privacy" exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cnty. Sch. Bd.,* 516 F.3d 489, 494 (6th Cir.2008) (explaining that "the constitutional right to privacy ... includes the right to shield one's body from exposure to viewing by the opposite sex"); *Beard v. Whitmore Lake Sch. Dist.,* 402 F.3d 598, 604 (6th Cir.2005) ("Students of course have a significant privacy interest in their unclothed bodies"); *Sepulveda v. Ramirez,* 967 F.2d 1413, 1416 (9th Cir.1992) (explaining that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" require recognizing it in a parolee's right not to be observed by an officer of the opposite sex while producing a urine sample); *Lee v. Downs,* 641 F.2d 1117, 1119 (4th Cir.1981) (recognizing that, even though inmates in prison "surrender many rights of privacy," their "special sense of privacy in their genitals" should not be violated through exposure unless "reasonably necessary" and explaining that the "involuntary exposure of [genitals] in the presence of people of the other sex may be especially demeaning and humiliating"). The right to privacy also ensures that an individual is free from the unwanted exposure of another individual's (of the opposite sex) genitalia. *See Carcano v. McCrory,* 203 F. Supp. 3d 615, 644 (M.D.N.C. 2016)(the court asserted a privacy interest in "ensuring that 12-year-old girls who are not familiar with male anatomy are not exposed to male genitalia by somebody older who's showing that to them, a mature adult"). It is for this reason that indecent exposure is a criminal offense in Sierra, as it is in nearly all states. In addition, another privacy interest exists in preventing exposure of the intimate bodily functions (and the sounds and smells that accompany such functions) that occur in the bathroom/locker room from the opposite sex. *See, e.g., Local 567 Am. Fed'n of State, Cty., & Mun. Employees v. Michigan Council 25, Am. Fed'n of State, Cty., & Mun. Employees, 635 F. Supp. 1010, 1012(1986) (*sex-segregated bathrooms respect "the sanctity of the right of privacy in the performance of excretory functions."); *Carcano v. McCrory* ("It is also possible that sex-segregated facilities protect against embarrassment from engaging in intimate bodily functions in the immediate vicinity of the opposite sex, regardless of whether one's body is subject to view."). Desegregating bathrooms, in any arena but especially in a high-school with immature teenagers "chock-full of hormones"

(as Justice Griffin put it), would lead to a countless number of embarrassing and stressful encounters preceded and followed by anxiety, humiliation, and shame.

Males and females disrobing and showering in close vicinity with one another raises many safety concerns. The exposure of private body parts would almost certainly prompt sexual harassment, and could very well even lead to sexual assault. In addition to preventing sexual harassment and assault, sex-segregated facilities advance an interest in avoiding any allegations of and liability for sexual assault. *See, Everson v. Michigan Dept. of Corrections*, 391 F.3d 737 (6th Cir. 2004) (to justify prohibiting male guards in a women's prison the court cited "allegations of sexual abuse, whether true or not, [which] create a poisoned atmosphere "). Sex-discrimination in bathrooms and prisons not only reduces the risk for sexual assault/harassment, but also reduces the perceived risk in these locations where nudity is prevalent.

The Supreme Court ruled in United States v. Virginia, as highlighted by the plaintiff, that differentiation between the sexes "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." However, the Board's interest in protecting the privacy and safety of its students are rooted in biology, not stereotypes. In US v. Virginia, Justice Ginsburg wrote that while "supposed inherent differences are no longer accepted as a ground for race or national origin classifications . .. physical differences between men and women" might justify differential treatment and that "Physical differences between men and women ... are enduring." This is the case here, where the basis for sex-segregated locker rooms lies not in stereotypes about the students but rather the physical differences (genitalia) that give rise to a host of privacy concerns.

IV. The Appellate Court Correctly Ruled The Unruh Act Does Not Apply to Public Schools

The Sierra Supreme Court ruled in Isbister that the Unruh Act must be interpreted in "the broadest sense reasonably possible." *Isbister v. Boys Club of*

Santa Cruz, Inc., 40 Cal.3d 72 (1985). Even when read in the "broadest sense reasonably possible," public schools are not "business establishments." No ordinary English speaker, either at the time of Unruh's passage or in the present day, would have imagined that the statute's prohibition of discrimination in "business establishments" would have applied to public schools.

The plaintiff highlights Unruh's legislative history in an attempt to demonstrate that public schools are within the meaning of the act, writing that "one draft of the current iteration of the Act listed public schools as one of the organizations covered." While legislative history may help judges in determining the intent and meaning of ambiguous statutes, the current case at hand does not involve an ambiguous statute, but rather one with an abundantly plain meaning. As Justice Jackson wrote in Northwestern Public Service Co, "It is only the words of the bill that have Presidential approval, where that approval is given. It is not supposed that, in signing a bill, the President endorses the whole Congressional record." The text, and only the text, of the Unruh Act is what survived bicameralism and presentment; Unruh's legislative history, the unexpressed intentions of its authors, and its previous versions did not survive along with it. Furthermore, the initial inclusion of "public schools" in Unruh and their subsequent removal should demonstrate that California's legislators actively decided against including "public schools" in the act and instead favored limiting it to "business establishments"

Citing *Warfield v. Peninsula Golf & Country Club,* 896 P.2d 766 (Cal. 1995), the plaintiff asserts that an "an important factor to take into account [in determining whether something is a business establishment] is whether the organization in question does business entirely with members, completely open to the public, or a combination of the two." While the court determined that the private golf club in *Warfield* was a business establishment, it was not due to the fact that they were simply open to the public (in the way that a public school is open to to the public and not exclusive) but because they did business with the public as nonmembers were permitted into the golf and tennis pro shops. While a public school is open to the public and not exclusive, it is not an institution of commerce or business so the

extent to which it is “public” is not relevant as it is not conducting business with the public.

Perhaps a law expanding Unruh beyond simply business establishments, would be good policy. Perhaps, for the sake of argument, Unruh was intended to apply to schools (if this was the intent, then these legislators chose a very strange way of writing such a statute). But that is not the place of Sierra’s judicial system to decide as the text is beyond clear. While ambiguities may arise as to whether a country club or even a private school constitutes a business establishment, a public school clearly is not.

Conclusion

For the reasons stated above, the Court should uphold the Appellate Court’s ruling.