APPEAL NO. 23-2807

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REBECCA ROE, by and through her parents and next friends, et al.,

Plaintiffs-Appellants,

v.

DEBBIE CRITCHFIELD, in her official capacity as Idaho State Superintendent of Public Instruction, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Idaho
Case No. 1:23-cv-00315-DCN

DEFENDANTS-APPELLEES' MOTION FOR EXPEDITED ORAL ARGUMENT

INTRODUCTION

This Court enjoined Idaho from enforcing its S.B. 1100, a law that protects schoolchildren from having to expose their naked bodies to members of the opposite sex in showers, locker rooms, bathrooms, and similar intimate spaces. This injunction—entered in a 2–1 order with no analysis—infringes Idaho's "paramount" power "to enact and enforce any laws that do not conflict with federal law." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 277 (2022). Every day the injunction remains in place, Idaho cannot protect its citizens through a democratically enacted law, and the State's sovereignty is impaired.

Idaho's law codifies the "nearly universal" proposition that public schools should designate shower rooms, locker rooms, bathrooms, and overnight sleeping quarters

based on students' biological differences. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F. 4th 791, 796 (11th Cir. 2022) (en banc). And it requires schools to accommodate any student who for any reason would prefer a single-user facility—no questions asked. Idaho Code § 33-6605. So the law neither targets nor harms anyone.

Conversely, enjoining the law invades privacy interests this Court has long recognized: "the desire to shield one's unclothed figure from the view of strangers, and particularly strangers of the opposite sex," which is a matter of "elementary self-respect and personal dignity." *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011) (cleaned up) (collecting cases). And it takes sides in a circuit split without providing any reasons for the choice. *Compare Adams*, 57 F.4th at 791, *with Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d. 586, 618 (4th Cir. 2020).

Given the weighty issues at stake in this appeal and Idaho's sovereign interest in enforcing its laws and protecting its citizens, Idaho asks this Court to expedite oral argument and bring this matter to a speedy resolution.[1]

BACKGROUND

In Idaho Senate Bill 1100 ("S.B. 1100"), Idaho codified the "unremarkable" and "nearly universal" practice of designating students to showers, locker rooms, bathrooms, overnight sleeping quarters, and other intimate spaces by sex. *Adams*, 57 F.4th at 796; Idaho Code § 33-6703. This commonsense measure protects students' "natural right to privacy and safety" and avoids the "potential embarrassment, shame, and psychological injury" of being forced to share intimate spaces with members of the

[1] According to Plaintiffs' counsel, Plaintiffs had not determined their position on this motion as of the time of its filing.

opposite sex. Idaho Code § 33-6701. Doubling down on privacy and safety, the law requires schools to provide single-user facilities for any student who for any reason desires that accommodation. Idaho Code § 33-6706.

The practice of designating intimate spaces by sex "preceded the nation's founding." W. Burlette Carter, *Sexism in the "Bathroom Debates": How Bathrooms Really Became Separated by Sex*, 37 Yale L. & Pol'y Rev. 227, 229 (2018). And courts have long recognized the need for "afford[ing] members of each sex privacy from the other sex" in intimate spaces. *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996). Recent events highlight these interests, as schools across the country wrestle with problems attendant to shower rooms, locker rooms, and bathrooms admitting members of the opposite sex. *See, e.g.*, Salvador Rizzo, *Victim of School Bathroom Sexual Assault Sues Virginia School District.*, Wash. Post (Oct. 5, 2023), https://bit.ly/4181FrB; Corrine Hess, *U.S. Department of Education is Opening an Investigation into Sun Prairie Locker Room Incident*, WPR (Nov. 30, 2023), https://bit.ly/3t5ao0W.

Idaho acted to protect its students' privacy and safety because schools did not know how to handle requests to use opposite-sex facilities. Without statewide guidance, schools faced a "no-win situation," 3-ER-444, in which they were subject to dispute and controversy "[n]o matter what" they did. 3-ER-420. Idaho's legislature filled the gap by codifying the traditional norm of sex-specific intimate spaces.

PROCEEDINGS

Plaintiffs—a middle-school student and a student organization—contend that S.B. 1100 somehow violates equal protection, Title IX, and substantive due process.

They moved for a TRO, which the district court granted despite reservations about the merits to preserve what it saw as the status quo.

But after full briefing and a hearing, the district court denied Plaintiffs' motion for a preliminary injunction in a comprehensive, 37-page order. 1-ER-2–38. The district court rejected Plaintiffs' equal protection challenge because the law advances Idaho's legitimate interest in privacy "based upon the inherent differences between male and female bodies." 1-ER-17. And the law does not violate Title IX because it merely codifies what Title IX and its implementing regulations have always allowed: designating students to intimate spaces by sex. 1-ER-28. Nor does the law violate a due process right to "informational privacy" because it doesn't implicate a fundamental liberty interest. 1-ER-32. Finally, the court found that Plaintiffs failed to show irreparable harm because their argument relied on subjective feelings and speculation rather than actual evidence, and likewise failed to show that the balance of equities or public interest favored them. 1-ER-33.

To provide time to implement its Order, the district court extended its TRO for 21 days following its denial of the preliminary-inunction motion. 1-ER-37. Plaintiffs appealed the preliminary-injunction denial and requested an injunction pending appeal. This Court granted the request in a 2-1 order that provided no analysis. ECF 11. Since then, both parties have filed their opening briefs, and this matter is ready for oral argument and disposition.

ARGUMENT

This Court should expedite oral argument and resolution of this case because (I) the injunction irreparably harms Idaho's sovereign interest in protecting its citizens.

Further, (II) the issues at stake are weighty—they are the subject of a circuit split, and they implicate important matters of student privacy and safety. This Court should resolve them quickly by a full opinion rather than a temporary unreasoned injunction. Finally, (III) briefing is nearly complete, and no party will be prejudiced by an expedited hearing.

I. The Injunction Irreparably Harms Idaho's Sovereignty.

In our federal system, states "retain 'a residuary and inviolable sovereignty.'" *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting The Federalist No. 39, at 245 (C. Rossiter ed. 1961)). This includes "the power to enact and enforce any laws that do not conflict with federal law." *Cameron*, 595 U.S. at 277.

Courts presume that duly enacted laws serve the public interest. *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) (deferring to San Francisco's conclusion that ordinance was in the public interest). Thus, federal courts "should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943). This means that requests to enjoin a duly enacted state law "demand[] a significantly higher justification" than other requests—entitlement to relief must be "indisputably clear." *Lux v. Rodrigues*, 561 U.S. 1306, 1306-07 (2010) (Roberts, CJ., in chambers).

Here, the Court enjoined without analysis a duly enacted state law aimed at protecting schoolchildren. This interferes with the right of Idaho's "responsible public officials" to weigh the public interest and decide matters for their citizens. *Golden Gate Restaurant Ass'n*, 512 U.S. at 1127. And it ties Idaho's hands in addressing the threats to

its citizens' privacy and safety identified in the legislative findings of S.B. 1100. Idaho Code § 33-6701. To mitigate the harm to Idaho's sovereignty, this Court should schedule oral argument immediately and resolve this case as quickly as possible.

II. The Injunction Decides Weighty Issues Without Giving Reasons.

The circuits are split on the constitutionality of state laws designating students to bathrooms by sex. But they are not split on the importance of the issues involved in these cases. In *Adams*, the en banc Eleventh Circuit upheld a policy designating school bathrooms by sex because it advanced the important "objective of protecting the privacy interests of students to use the bathroom away from the opposite sex and to shield their bodies from the opposite sex in the bathroom." 57 F.4th at 805. Though reaching the opposite conclusion, the Fourth and Seventh Circuits did not "question[] that students have a privacy interest in their body when they go to the bathroom." *Grimm*, 972 F.3d at 613; *accord Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1052 (7th Cir. 2017) (recognizing "a legitimate interest in ensuring bathroom privacy rights are protected").

This Court, too, has recognized the importance of privacy in intimate spaces, acknowledging that there is no "more basic subject of privacy than the naked body." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963). Having to shower or use the bathroom in front of the opposite sex violates that privacy. *See, e.g.*, *Vazquez v. County of Kern*, 949 F.3d 1153, 1161 (9th Cir. 2020) (prison showers); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (prison bathroom). And this Court has recognized that privacy in school spaces raises "deeply personal issues" because "adolescence and the bodily and mental changes it brings can be difficult for students, making bodily exposure to other

students in locker rooms a potential source of anxiety." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1217 (9th Cir. 2020).

Idaho's citizens deserve a speedy determination of whether an unreasoned injunction should hamstring them from safeguarding these critical interests. Children visit locker rooms, shower rooms, and bathrooms in public schools across Idaho every single school day. They should not have to wait to know whether the laws protecting them in these spaces are enforceable.

III. Expediting Oral Argument Will Prejudice No One.

Hearing argument immediately will not harm or prejudice anyone. Both parties have submitted their opening briefs. Plaintiffs' reply brief is due in 21 days,[2] and the Court can schedule oral argument soon after that brief is submitted. With briefing completed before oral argument, there is no prejudice from an expedited hearing. Plus, the parties have briefed and argued this case extensively in the district court, so both sides are familiar with the arguments and are amply prepared.

There is no reason to delay the disposition of this matter. Idaho's citizens deserve to have their democratically enacted laws enforced. An unreasoned injunction pending appeal should not compromise their privacy and safety any longer than necessary. Idaho therefore respectfully requests that this Court schedule oral argument immediately and resolve this case as quickly as possible.

[2] Plaintiffs are requesting a 7-day extension on their reply brief. Idaho does not oppose this request, nor does it affect Idaho's request for an expedited oral argument shortly after that brief is filed.

CONCLUSION

For the foregoing reasons, the Court should expedite oral argument.

Dated: December 20, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with FRAP 27(d)(2) because it contains 1,770 words. It was prepared in a proportionally spaced typeface using Word for Microsoft 365 in Garamond 14-point font.

/s/John J. Bursch
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December 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ John J. Bursch
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December 20, 2023