Nos. 94-1941 and 94-2107

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED STATES OF AMERICA
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE CROSS-PETITIONERS

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REPLY BRIEF FOR THE CROSS-PETITIONERS

In its brief as cross-respondent in No. 94-2107 ("Br."), the Government makes clear that it seeks the elimination of essentially all public single-sex education in the United States. Under the Government's view of the law, neither the proven and essentially unquestioned pedagogical advantages of single-sex education for some students, nor the informed judgments of educators about how best to use scarce educational resources to meet the needs and interests of students of both sexes, can permit any deviation from a single-minded insistence on coeducation. But the Equal Protection Clause cannot and should not be construed to constitutionalize the Government's misguided conception of equality at the expense of the proven educational interests

and needs of the Nation's young men and women.

In its quest to impose coeducation as the only permissible pedagogical option, the Government disregards the informed opinions of expert educators and the careful fact-finding of the courts below. The intermediate scrutiny test calls for detailed factual analysis of all relevant circumstances relating to a challenged classification. Nevertheless, the Government repeatedly ignores or dismisses as "stereotypes" the reasoned findings of both courts below, even though those findings are based on overwhelming expert evidence that demonstrates the positive educational benefits of single-sex education and the impossibility of duplicating the distinctive qualities of VMI's method in a coeducational setting. In effect, the Government argues that lawyers, not experienced educators applying the conclusions of contemporary research, should determine "what is 'current' and what is 'outmoded' in the perception of" male and female college students. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 n.6 (1981) (plurality opinion). That approach must be rejected.

I. VMI'S ADMISSIONS POLICY SERVES IMPORTANT GOVERNMENTAL OBJECTIVES

A. Providing The Proven Benefits Of Single-Sex Education And The VMI Method Are Important Governmental Objectives

The Government makes no effort to, and could not in any event, refute the established fact that single-sex education provides substantial pedagogical benefits to some college students that cannot be supplied by a coeducational program. *See* Va. Br. 24-28; Va. Resp. Br. 19-21. The Government instead contends that the Equal Protection Clause prohibits Virginia and VMI from offering those benefits because, in its view, VMI's single-sex admissions policy "reinforce[s] restrictive roles for men and women" and is based on the stereotype that "rigorous, military-style train-

ing is not appropriate for women." Br. 14, 35. There is no merit in those contentions.

VMI's single-sex admissions policy is not founded on impermissible stereotypes about the "proper" roles of men and women. To the contrary, Virginia has acted pursuant to its conviction that women students are well suited for all courses of study and roles in life. The vast majority of Virginia's institutions of higher education, including the "rigorous, military-style training" program at Virginia Polytechnic Institute and State University (VPI), are open to women, and there is no subject or course of study offered at VMI that is not available to women at other prestigious public institutions in Virginia.

Rather than embodying stereotypes about gender roles, VMI's single-sex admissions policy instead reflects the obvious truth that the benefits of single-sex education can only be offered by an institution that limits admission to one sex, and the additional fact (found by both courts below) that VMI's educational methodology is not practicable in a coeducational setting. *See* Va. Br. 33-36; Va. Resp. Br. 43-47. As both courts below found, moreover, single-sex education in fact helps to combat gender stereotypes by encouraging students to pursue careers once associated primarily with the opposite sex. Pet. App. 149a-50a, 226a-27a.[1]

The Government also argues (Br. 15-16, 23-26) that there

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[1]The Government inaccurately characterizes this factual *finding* as "cross-petitioners' *suggestion*," and purports to find it "bewildering." Br. 14-15 (emphasis added). The Government's bewilderment cannot change the reality that this unambiguous factual finding was affirmed on appeal and is supported by overwhelming expert evidence. *See* I DX 73J (II DX 216J); Riesman Dep. (I DX 60) at 58, 106-07 (I JA 194, 242-43); *see also* Br. *Amicus Curiae* of Mary Baldwin College at 17-20.

can be no valid governmental interest in providing the benefits of single-sex education absent identical programs for both genders.[2] That argument rests on a misreading of this Court's decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). The women-only admissions policy at issue in *Hogan* was not and could not be defended on the ground that single-sex education provides unique benefits that are lost in a coeducational environment; the "uncontroverted record" in that case was "flatly inconsistent with the claim that excluding men . . . [wa]s necessary to reach any of [the nursing school's] educational goals." *Id.* at 730-31.

It is an established fact in this case, by contrast, that VMI's single-sex admissions policy *is* necessary to achieve the goals of offering students the proven benefits of single-sex education and the VMI method. *Hogan* simply cannot be read to reject the constitutional validity of single-sex education under these circumstances.[3] Indeed, as the Government concedes (Br. 26), *Hogan* suggests that single-sex education *is* permissible "where its benefits for particular populations serve legitimate, important governmental objectives that cannot be served by sex-neutral alternatives."

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[2]Of course, Virginia does provide the benefits of single-sex education to both women and men through the parallel and comparable VWIL and VMI programs, as the courts below found.

[3]Thus, the Government's reliance on footnote 17 in *Hogan* is misplaced. That footnote reflects only the commonsense notion that a single-sex program cannot automatically be justified merely by a showing that it provides generic benefits -- unrelated to its single-sex status -- for anyone who participates in it. The proponents of such a program must show instead that there is a substantial relationship between the program's exclusion of one gender and its ability to provide the particular educational benefits it offers. That showing was not attempted in *Hogan*, but it has been made here.

VMI's single-sex admissions policy has been found to provide benefits for its students that cannot be replicated in a coeducational environment, and that finding demonstrates its constitutional validity.[4]

Contrary to the Government's suggestions (Br. 24, 26), the validity of VMI's single-sex admissions policy does not mean that all single-sex programs are "constitutional *per se*" or that a State could "designate its only engineering or medical school for men" or limit most of its educational offerings to students of one sex. Each public single-sex program must be examined against the backdrop of the State's overall educational offerings to determine whether the exclusion of the opposite sex actually increases educational diversity and enhances educational benefits without unduly restricting opportunity. The extreme hypotheticals offered by the Government would be impossible to justify under that standard. The facts of this case demonstrate, by contrast, that VMI's single-sex policy provides substantial pedagogical benefits and enhances educational diversity without depriving women of any educational opportunity they could obtain if VMI were coeducational.

B. Achieving The Benefits Of Single-Sex Education And The VMI Method Are The Actual Reasons For VMI's Admissions Policy

The Government contends (Br. 18-23) that the justifications advanced for VMI's admissions policy are not the

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[4]The Government confuses the means with the end in arguing (Br. 26) that the exclusion of one gender from a particular institution "is clearly not a valid end in itself." VMI's single-sex admissions policy is not an "end in itself" but a *sine qua non* for the proven pedagogical advantages for some students that flow from a single-sex environment and the VMI method. It is those proven advantages, not the exclusion of one sex, that cross-petitioners seek.

actual reasons for that policy. First, the Government asserts (*id.* at 19) that VMI's policy was originally founded upon invalid "assumptions about men's and women's proper roles." That bald assertion is unsupported by any citation to the record, nor could it be. And more to the point, VMI reexamined its admissions policy years before this litigation commenced and decided after careful analysis to maintain that policy in order to continue providing the benefits of single-sex education and the VMI method. *See* Va. Br. 13-14, 30-31; *see also Rostker v. Goldberg*, 453 U.S. 57, 74-75 (1981) (rejecting contention that gender-based classifications must be judged by reference to the original reasons for their adoption); *Michael M.*, 450 U.S. at 470-72 & nn.6-7 (same).

The Government thus errs in asserting (Br. 19) that Virginia did not identify any legitimate basis for maintaining VMI's single-sex admissions policy before this suit was instituted. In recommending continuation of VMI's admissions policy in 1986, the Mission Study Committee specifically relied on its concern that VMI's system would not achieve the same results in a coeducational environment. I DX 40 at 2-3 (I JA 1721-22; L. 196-97). The VMI Board of Visitors, which is "convinced of the value of single sex education," looked to its own expertise and experience as well as the Mission Committee's report and concluded that VMI's single-sex status was "absolutely essential" to the successful implementation of its educational methodology. I Tr. 947-48, 951-52, 971 (I JA 1193-94, 1197-98, 1217).

Thus, the district court was amply justified in finding that VMI's admissions policy "has been continued only after reasoned and careful analysis by the Board of Visitors" and is based on the Board's conclusion "that providing a distinctive, single-sex educational opportunity" is an "important" goal. Pet. App. 170a, 214a; *see id.* at 173a. In short, VMI's admissions policy has been retained only after careful consideration of the coeducational alternative. That

reasoned and legitimate policy choice cannot be dismissed as an unthinking stereotype. *See Rostker v. Goldberg*, 453 U.S. at 74; *Michael M.*, 450 U.S. at 471 n.6 (plurality opinion).[5]

The Government is also wrong in characterizing as "post hoc" Virginia's interest in providing diverse educational offerings including single-sex education. Br. 20. There is no dispute that Virginia has long had an official policy of emphasizing diversity of educational offerings through delegation of substantial decisionmaking authority to each individual public institution of higher education. Pet. App. 81a, 152a, 187a-88a; Va. Br. 28-30. VMI's 1986 decision to continue to offer the benefits of single-sex education is plainly consistent with and in direct furtherance of that official state policy. As explained in the 1990 Report of the Commission on the University of the 21st Century to the Governor and General Assembly of Virginia, the "diversity and autonomy" of Virginia's "formal system of higher education" is demonstrated by its "great array of institutions," specifically including the option of "*single-sex*" education. Stips. 37-38 (I JA 82-83; L. 64-65) (em-

[5]The Government asserts (Br. 4) that the Commonwealth previously "denied that VMI's discriminatory policy fostered *any* state objectives." That assertion is patently false. In the district court, the Commonwealth took the position that "VMI's academic mission contributes to the diversity and balance of Virginia higher education, thereby serving the important governmental interest of the Commonwealth in offering its citizens a wide diversity of educational choices." R.5 at 5 ¶ 17 (I JA 35). Thereafter, the Commonwealth chose not to participate separately in the liability proceedings because VMI and the Governor were already represented by different counsel and thus "the separate participation of the Commonwealth would be superfluous," R.68 at 6 (I JA 128; L.19). At *no* time did the Commonwealth change its position that VMI's admissions policy serves important state interests (*see* Pet. App. 81a).

phasis added).[6]

The Government asserts (Br. 21 & n.21) that Virginia has no policy favoring single-sex education because no Virginia statute mandates single-sex admissions policies in higher education.[7] But there is no constitutional requirement that governmental goals must be codified before they can be considered legitimate. VMI's Board exercises the full authority of the Commonwealth in determining VMI's admissions policies, and thus its decision to pursue the benefits of single-sex education and the VMI method necessarily and by definition constitutes state policy.[8] To be sure, the

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[6]The court of appeals noted the 1990 Report's admonition that institutions should "'deal with faculty, staff, and students without regard to sex.'" Pet. App. 153a (emphasis eliminated). The Government misinterprets this statement to mean that Virginia policy opposes single-sex education. Br. 21 n.21. That reading, however, is contrary to the Report's recognition that single-sex institutions further the Commonwealth's interest in diversity. The quoted statement does not address admissions policies at all. Instead, the Report merely reflects the requirements of Title IX, which prohibits gender discrimination in higher education but expressly approves public single-sex schools like VMI. 20 U.S.C. § 1681(a) and (a)(5).

[7]The Government also relies (Br. 21 n.21) on then-Governor Wilder's statement of his "personal philosophy" regarding public single-sex education. R.43 at 4 (I JA 41; L. 7). However, then-Governor Wilder's personal philosophy was *contrary* to the Commonwealth's position, as evidenced by the fact that he was represented by special counsel in this case because of "the conflicts between his interest and that of the Commonwealth." R.68 at 2 (I JA 124; L. 15). And in any event, former Governor Wilder and all current high-ranking Virginia officials support single-sex education at VWIL and VMI. Pet. App. 81a-83a; Va. Br. 31 n.15.

[8]Indeed, the Government concedes this point elsewhere in its brief, asserting (Br. 14) that VMI's admissions policy reflects

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Virginia General Assembly has the ultimate authority to change VMI's admissions policy if it deems that policy contrary to the Commonwealth's educational objectives, but it has consistently declined to mandate coeducation at VMI.

Contrary to the Government's suggestion (Br. 22), therefore, Virginia *does* have a policy in favor of single-sex education "at the state level."[9] The fact that Virginia also pursues other educational goals, and thus has devoted most of its educational expenditures to coeducational programs, is fully consistent with that goal. Virginia has continued to provide substantial financial support for women attending private single-sex colleges. Nothing in this Court's precedents suggests that a proffered governmental objective must be ignored unless it has been implemented to the point of excluding the accomplishment of other goals. Virginia provides diverse and beneficial educational programs in accordance with student needs and interests, and VMI's decision to retain its single-sex program is one important element of that overarching goal. Virginia could advance that objective still further by offering a comparable public single-sex opportunity to women, and has done precisely that with the establishment of VWIL, but the fact that Virginia for a time focused its support for women's single-sex education exclusively through its financial assistance to private colleges does not demonstrate that Virginia lacks an interest

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"the Commonwealth's official view."

[9]Of course, the Constitution does not specify the "level" of government at which an important objective must be asserted. As it happens, VMI's admissions policy is reflective of state policy, but *Hogan* requires only an "'important *governmental* objective[],'" not that the objective be asserted by the State as a whole. 458 U.S. at 724 (emphasis added).

in providing the benefits of single-sex education where educational need, student demand, and institutional interest make that option feasible and important.

II. VMI'S SINGLE-SEX ADMISSIONS POLICY IS SUBSTANTIALLY RELATED TO ACHIEVING IMPORTANT GOVERNMENTAL OBJECTIVES

The Government asserts (Br. 28-31) that VMI's single-sex environment is not substantially related to achieving the benefits of VMI's particular educational method. That assertion is contrary to the factual findings of both courts below. Indeed, the Government does not dispute that VMI's single-sex admissions policy is necessary to the goal of providing the advantages of single-sex education. That concession in itself demonstrates that VMI satisfies the second prong of the *Hogan* test.

The Government argues, however, that VMI cannot justify excluding women who could succeed in its program. That argument is flawed, because VMI could no longer offer the benefits of single-sex education or its particular methodology if it were to become coeducational. *See* Va. Br. 34-36. The Government disputes the latter finding, contending (Br. 28-29) that VMI is "strikingly different" from all other schools in Virginia and that admission of women would thus not interfere with Virginia's goal of offering diverse educational opportunities. That argument simply ignores the loss of diversity and pedagogical advantages that would result from the elimination of public single-sex education in Virginia. Moreover, the courts below found that the very attributes that differentiate VMI's methodology from the residential military educational programs at VPI and other schools would disappear with coeducation, further reducing the diversity of Virginia's educational offerings.[10] In short, "if VMI were to admit women, it

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[10]Contrary to the Government's mischaracterization (Br. 29

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would become more similar to the military barracks at VPI, so its uniqueness would be lost." Pet. App. 173a.[11]

Conceding that some changes would be necessary if VMI were to become coeducational, the Government next challenges the extent of those changes, asserting that only "minimal" changes would be required that would not "adversely affect" VMI's "military-style program."[12] But the

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n.27), cross-petitioners did not argue in their opening brief that VMI and VPI now offer the same educational experiences. What cross-petitioners argue (Va. Br. 36), and the courts below found (Pet. App. 6a-7a, 172a n.8, 173a), is that VMI's distinctive methodology could not accommodate a coeducational student body, and thus that coeducation would force VMI to modify its methodology to conform to the approach already followed at VPI and West Point.

[11]To be sure, VMI would remain smaller than VPI (Pet. App. 173a-74a), but the Government does not pretend that the constitutional injury allegedly suffered by women is denial of the opportunity to attend a small college.

[12]The Government also asserts (Br. 30 n.28) that the dispute between the parties "focuses . . . on the legal conclusions to be drawn regarding such changes" rather than on the factual question of the extent of the changes that would be required. That assertion is incorrect. The courts below found *as a fact* that coeducation would necessarily change the distinctive aspects of VMI's educational system, including the physical program, the total absence of privacy, and the extreme adversative method, to such an extent that those "'unique characteristics of VMI's program would be destroyed by coeducation.'" Pet. App. 6a-7a, 148a. The Government cannot plausibly maintain that it is raising only a legal challenge to the rulings below, because it refuses to accept these *factual* findings about the extent of the changes that would occur.

Government cannot simply substitute its opinions for the amply supported factual findings below. The record is clear that the strict egalitarianism that lies at the core of the adversative method would necessarily be lost with coeducation. Pet. App. 146a-47a, 237a-38a.

The Government mislabels this factual *finding* as nothing more than an "assertion" of cross-petitioners, and characterizes it as "absurd." Br. 31 n.29. There is nothing "absurd," however, about the fact that VMI would be forced to adopt different physical fitness standards and grading criteria for men and women, just as West Point has done. Pet. App. 146a-47a, 235a-36a; I Tr. 489, 520-22, 625-26 (I JA 736, 767-69, 872-73). As West Point's experience demonstrates, there are inevitable consequences of these necessary gender-based differences in treatment. Pet. App. 146a-47a.[13] Nor was it "absurd" for the courts below to find, based on expert testimony and the experience of the service academies, that the creation of privacy rights for gender classes and the inevitability of cross-gender relationships would further eviscerate the egalitarianism that is so crucial to the effectiveness of the VMI method. Pet. App. 147a, 233a, 237a-39a; *see also* I Tr. 514 (I JA 761).[14]

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[13]A 1990 West Point study, for example, found continuing resentment and perceptions of inequality, including a belief on the part of most women cadets that they are treated differently and are not fully accepted. I PX 123 (II DX 231); I Tr. 528-29, 533-34 (I JA 775-76, 780-81).

[14]The Government errs in analogizing VMI's successful integration of black students to the impact of coeducation. None of the aspects of VMI's system characterized as unique by the Government or the courts below had to be changed to accommodate black male students; the physical standards, the strict egalitarianism, the total absence of privacy, and the extreme adversative system were entirely unaffected. The service academies and the courts below found the reverse to be true of

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The Government makes no effort to refute the finding below that VMI's adversative method, including the intentional intimidation and pressures inflicted on new students by upperclassmen, could not survive in a coeducational environment. Pet. App. 6a-7a, 146a-47a, 172a n.8, 237a-39a. Instead, the Government brushes aside that finding on the ground that it purportedly rests on an impermissible concern for "decency" between the sexes. In reality, however, that finding reflects the actual experience of the service academies and is based on expert testimony demonstrating that it is unrealistic to expect late adolescents to engage in cross-gender harassment in an intense and pressure-laden environment without producing tensions and perceptions of unequal treatment that are wholly incompatible with the VMI method. Pet. App. 147a, 238a-41a. The coeducational setting inevitably entails sexual distractions and attractions, posturing, emotional involvements, and jealousies not found in a single-sex environment, and it ignores reality to ask young men and women to participate in institutionalized peer-induced stress and intimidation while avoiding the appearance of impermissible sexual harassment. *See* Va. Resp. Br. 45-46 & n.35.

The Government also contends that there is no governmental interest in preserving VMI's system in its present form. In making this contention, the Government seeks to have it both ways. On the one hand, it argues (Br. 13) that women are denied an important educational opportunity because they cannot enjoy the "unique" VMI program. On the other hand, it argues (*id.* at 29-30) that the changes required for VMI to become coeducational are inconsequential because no constitutional significance can be at-

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coeducation.

tached to those elements of VMI's method that would have to be rejected -- even though those elements are precisely what distinguishes VMI's system from the programs already offered to women at VPI and elsewhere. The Government's argument is at war with itself.

In any event, Virginia does have a legitimate and important interest in maintaining VMI's present system. As the record and findings below demonstrate (*see* Va. Br. 14-18, 26-28), VMI's program is particularly successful in educating the students who choose it, and both its single-sex nature and the adversative system are essential to that success. To be sure, other educational programs (like that at VWIL) can achieve equivalent results with other students, but VMI's program has been shown to be optimal for and attractive to a substantial number of male students (as VWIL's program has been shown to be for female students). The Government's insistence on coeducation would thus frustrate Virginia's legitimate interest in providing diverse educational opportunities in response to differing educational needs and interests and deny all students the opportunity to benefit from single-sex education.[15]

III. VMI'S SINGLE-SEX ADMISSIONS POLICY DOES NOT DENY EDUCATIONAL OPPORTUNITY TO WOMEN STUDENTS

The Government incorrectly contends (Br. 13) that cross-

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[15]The Government offers its opinion (Br. 31) that the benefits of attending VMI "would probably be enhanced, rather than diminished," if it were to become coeducational. That pronouncement, however, is impossible to square with the findings below. *See* Pet. App. 149a-51a, 176a, 225a. The Government's persistence in substituting its own unsubstantiated beliefs for the judgments of professional educators and the factual findings below underscores the Government's inability to prevail on the actual record in this case.

petitioners seek to preserve VMI "without offering any alternative whatever to women." Virginia provides women students an opportunity to receive a college education with public financial assistance at a wide variety of institutions, large and small, public and private, coeducational and single-sex. Those institutions offer to women every academic course and degree available at VMI and more, including the opportunity to receive military training and pursue a military career. And both the public institutions of higher education and the private single-sex colleges in Virginia (all of which receive substantial state financial assistance) enroll more women than men. *See* Va. Br. 5-10, 45-46.[16]

In addition, Virginia offers women the opportunity to participate in VPI's coeducational barracks-based Corps of Cadets program. While the VPI program does not replicate VMI's adversative method, it does place similar emphasis on physical and mental rigor, character development, and military training and discipline. *See* Va. Br. 9-10; Pet. App. 214a-18a; Stips. 49-53 (I JA 94-98; L. 76-80). The Government errs in asserting (Br. 29 n.27) that VPI "lacks the traditions, prestige and alumni ties that VMI enjoys." VPI has been listed among the Nation's finest undergraduate institutions, and its engineering program is one of the very best in the Nation. Stips. 41-42 (I JA 86-87; L. 68-69); U.S. NEWS & WORLD REP. 138 (Sept. 18, 1995). The VPI Corps also has a proud tradition of military service. VPI was designated as one of 12 "distinguished military

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[16]The Government argues (Br. 28 & n.26) that Virginia's extensive financial support for women attending private single-sex colleges is irrelevant, but offers no support for that counter-intuitive proposition. The Constitution reflects no preference for public over private education. As long as Virginia uses its tax-generated revenue to educate both men and women overall, the Equal Protection Clause is indifferent to the mix of public and private institutions used to offer those educational benefits.

colleges" by the War Department after World War I in recognition of the contributions made by its graduates, and VPI alumni have held numerous positions of senior leadership in the military and have received six Congressional Medals of Honor. Stips. 49-50 (I JA 94-95; L. 76-77).

The Government's claim thus reduces to the assertion that women cannot be denied access to the particular educational methodology offered at VMI. But that argument simply ignores the findings below that women will not obtain the benefits of VMI's methodology if VMI becomes coeducational. Instead, that methodology will inevitably be replaced by a system analogous to that already offered to women through the VPI Corps of Cadets.[17]

The Government challenges (Br. 33-35) cross-petitioners' showing that there is insufficient demand among women to make practicable a single-sex program utilizing VMI's ad-

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[17]The Government also argues that women are improperly denied the benefits of access to VMI's allegedly powerful alumni network. The only evidence cited to support the Government's exaggerated characterization of the influence of VMI's alumni is the remedial-phase testimony of one of its experts, Dr. Alexander Astin. *See* Br. 13 (citing II Tr. 1227-28); II Tr. 1237-38 (pages of transcript where cited testimony actually appears). Dr. Astin's testimony, however, was largely discredited by the district court. Pet. App. 70a-71a. And in any event, the Government points to no basis for believing that the influence of VMI's alumni approaches that of the graduates of other institutions in Virginia. Of the 140 members of the 1994-95 Virginia General Assembly, for example, twelve received their undergraduate degrees from VPI, eight from the College of William & Mary, seven from the University of Virginia, and only one from VMI. *See* MANUAL OF THE SENATE, GENERAL ASSEMBLY OF VIRGINIA 74-100 (1994-95); VIRGINIA HOUSE OF DELEGATES MANUAL 95-188 (1994-95).

versative method.[18] Cross-petitioners introduced extensive evidence to that effect, however, and the district court and court of appeals found that evidence persuasive. Pet. App. 27a, 73a, 75a n.12; *see* Va. Br. 43-44 & n.22; L. 300.[19]

This evidence demonstrates that Virginia better serves women students by devoting its scarce educational resources to programs of interest to larger numbers of them

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[18]The Government also claims (Br. 32 n.30, 33-34) that cross-petitioners waived this argument and that evidence introduced at the remedial phase should not be considered in reviewing the liability determination. The demand issue was fully litigated during the remedial phase, however, and this Court reviews "the entire case," not merely one portion of it. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). In any event, Virginia and VMI are respondents in No. 94-1941, and as such are entitled to defend the judgment below on any ground supported by the record. *See Schweiker v. Hogan*, 457 U.S. 569, 585 n.24 (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *see also* 94-1941 Br. in Opp. 18 n.15.

[19]The Government's attempt to reargue the facts is both improper and without merit. Even though the Nation's ROTC programs have been open to women for many years, the number of women attending even *non*-adversative residential military programs is quite small (250 nationwide in 1990), and interviews with women cadets reveal that only a tiny fraction of them would have considered an adversative program like VMI's. II Tr. 613-15 (II JA 743-45); I DX 62L (L. 233). Also significant is the fact that the experts in women's education who designed VWIL found little or no demand for a women's program identical to VMI. II Tr. 127, 340-41 (II JA 473, 598-99). The Government's reliance on female attendance at West Point is misplaced, both because West Point does not use the adversative method and because VMI (unlike West Point) cannot offer free tuition, room and board, and a salary to its students, nor can it guarantee them an active-duty commission upon graduation.

than it would by attempting to create a program for women identical to that offered to men at VMI, an attempt that would be doomed to fail because such a program could not attract the necessary critical mass of interested students. The Government's contrary argument rests entirely on cases involving *racial* discrimination. Unlike racial segregation, which is abhorrent, inherently suspect, and which offers no valid educational benefits, the gender classification at issue in this case provides substantial and proven educational advantages that would be lost if coeducation were required. The cases cited by the Government are irrelevant to a proper legal analysis of the issues in this case.[20]

IV. THE GOVERNMENT'S VIEW OF THE LAW WOULD EFFECTIVELY PRECLUDE ALL PUBLIC SUPPORT FOR SINGLE-SEX EDUCATION

The Government contends that adoption of its view of the law "will not . . . invalidate single-sex public education in all circumstances." Br. 26. It is unable, however, to point to any circumstance in which its approach would permit public single-sex education, with the "possible" exception of instances (now virtually nonexistent) in which single-sex education is necessary to "compensate" for past discrimination. *Id.* at 11. Thus, adoption of the Government's view of the law would necessarily lead to elimination of those public single-sex programs that now exist and frustrate the worthy efforts of public educators across the country who

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[20]Those cases are also inapposite because they do not involve situations in which the ability to offer a particular program depends on the willingness of a significant number of other individuals to participate in that same program. VMI's adversative method, which depends on the active participation of numerous students as leaders, disciplinarians, mentors, and peers, cannot possibly be implemented in the absence of a sufficient number of other students all seeking the same experience.

are achieving success with single-sex programs at all levels of the educational system.[21]

As previously explained (Va. Br. 41-42), the Government's strained reading of the Constitution also threatens the survival of private single-sex schools. The fact that public aid may not convert private colleges into state actors is irrelevant, because this Court has held that government *itself* violates the Constitution by providing educational aid to private schools whose discriminatory admissions policies would violate equal protection if practiced by the government. *E.g.*, *Norwood v. Harrison*, 413 U.S. 455 (1973).

The Government's attempt to distinguish *Norwood* is unpersuasive. That decision does not, as the Government would have it (Br. 37), rest on a determination that Mississippi "was under a federal desegregation order, and . . . therefore had an affirmative constitutional duty to dismantle its segregated system of education." To the contrary, the *Norwood* Court accepted the "finding that Mississippi's public schools '*were fully established as unitary schools*,'"

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[21]The Government asserts (Br. 26-27 n.25) that public single-sex education is "extremely rare," and that Title IX prohibits most single-sex classes in coeducational schools. It is beyond dispute, however, that the number of single-sex programs in public school districts across the Nation is increasing (*see* Va. Br. 39-41; *see also* Br. *Amici Curiae* of Women's Schools Together, Inc., at 21-22, 27-28 & n.41; Br. *Amici Curiae* of Dr. Kenneth E. Clark, *et al.*, at 12-13), and a bill is currently pending in Congress that would authorize additional experimentation with single-sex programs at the elementary and secondary levels. *See* S.B. 829 (introduced May 18, 1995, by Sen. Hutchison). The growing consensus among educators that single-sex education is optimal for some students in some settings suggests that this trend will continue unless the Government succeeds in mandating coeducation as the only permissible approach for all public schools.

but concluded that the State's compliance with constitutional requirements in its public school system did not justify its aid to discriminatory private schools. 413 U.S. at 467 (emphasis added).[22] Thus, the Government offers no colorable basis for its assertion that public aid to private single-sex schools could survive a ruling that the Equal Protection Clause prohibits public single-sex education like that offered at VMI and VWIL.[23]

CONCLUSION

The court of appeals' finding of liability should be rejected, and the judgment below should be affirmed on that ground.

January 3, 1996 Respectfully submitted.

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[22]The Government's reliance on *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), is equally unpersuasive. Indeed, the *Norwood* Court expressly distinguished *Moose Lodge* on the ground that it involved a form of generalized governmental assistance that could be obtained only from the State. 413 U.S. at 465. Unlike liquor licenses, police protection, and the like, public financial aid for students attending private single-sex colleges is "provided only in connection with schools" and is "a form of assistance readily available from sources entirely independent of the State." *Id.*

[23]Any attempt to distinguish *Norwood* would be particularly difficult if, as the Government now requests, strict scrutiny were to be applied to gender classifications. Of course, that issue is not properly presented in this case, and the Government cannot identify any sufficient basis for rejecting the intermediate-scrutiny standard for gender classifications. *See* Va. Resp. Br. 47-50.

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