No. 94-1941

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

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

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QUESTIONS PRESENTED

1. Whether a State that provides a rigorous military-style public educational program for men can remedy the unconstitutional denial of the same opportunity to women by offering them a different type of single-sex educational program deemed more suited to the average woman.

2. Whether coeducation is the required remedy in the context of this case.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties to the proceedings in the courts below: George F. Allen, Governor of the Commonwealth of Virginia; Virginia Military Institute; Joseph M. Spivey, III, President of the Virginia Military Institute Board of Visitors; John Williams Knapp, Superintendent of Virginia Military Institute; The Board of Visitors of Virginia Military Institute; VMI Foundation, Incorporated; VMI Alumni Association; The Virginia State Council of Higher Education and its Members and Officers; Thomas N. Downing; Elizabeth P. Hoisington, Brig. Gen.; Robert Q. Marston; A. Courtland Spotts, III; Daniel F. Flowers; B. Powell Harrison, Jr.; Robert H. Spilman; Samuel E. Woolwine; James W. Enochs, Jr.; William A. Hazel; Harvey S. Sadow; Douglas K. Baumgartner; Daniel D. Cameron; Glen N. Jones; John W. Roberts; and Gordon K. Davies.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals regarding remedy (App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (App. 53a-131a) is reported at 852 F. Supp. 471. The opinion of the court of appeals regarding liability (App. 134a-157a) is reported at 976 F.2d 890. The opinion of the district court regarding liability (App. 158a-245a) is reported at 766 F. Supp. 1407.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1995. The court of appeals voted sua sponte not to rehear the case en banc, and entered an order to that effect on April 28, 1995 (App. 246a-257a). On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. The Virginia Military Institute (VMI) is a public, state-supported military college in Lexington, Virginia. Since its founding in 1839, VMI has maintained a policy of admitting only men to its four-year undergraduate degree program. All of the fourteen other public colleges in Virginia are coeducational. Approximately 1300 male students are enrolled at VMI. VMI has a strong reputation for producing leaders, and has an exceptionally loyal and powerful alumni network that includes men who have distinguished themselves in military and civilian life. App. 137a-138a. "VMI alumni overwhelmingly perceive that their VMI educational experience contributed to their obtaining personal goals," *id.* at 205a, and VMI enjoys the largest endowment on a per-student basis of any undergraduate institution in the United States, *id.* at 130a.

VMI's mission is to produce "citizen-soldiers," described as "educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." App. 6a, 139a. VMI uses an "adversative" method of character development and leadership training not used by any other college. The adversative method is based on "English public schools" and "earlier military training," although it is no longer in use at the United States military academies. *Id.* at 139a, 192a. The method "emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values." *Id.* at 139a; see *id.* at 191a-192a. "As a consequence of completing the rigorous tasks [required by the adversative method], succeeding, and actually graduating from VMI, VMI cadets have a sense of having overcome almost impossible physical and psychological

odds. They have been put through great physical pressures and hazards, and just to have made it yields a feeling of tremendous accomplishment." *Id.* at 205a.

VMI's adversative method is implemented through a pervasive military-style system. App. 140a-141a, 191a-200a. At VMI, the method includes the "rat line," which is a seven-month regimen, comparable to Marine boot camp, during which first-year cadets, or "rats," are "treated miserably," like "the lowest animal on earth." *Id.* at 194a-195a. "Rats" are subjected to a strict system of punishments and rewards that creates "a sense of accomplishment and a bonding to their fellow sufferers and former tormentors." *Id.* at 194a. The "class system" assigns roles to each class of cadets within a rigid hierarchy in order to "cultivat[e] leadership." *Id.* at 196a. "After the rat line strips away cadets' old values and behaviors, the class system teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote." *Ibid.* VMI's program also includes the "dyke system," an arrangement by which each rat is assigned a senior as a mentor to give him some "relief from the extreme stress of the rat line." *Id.* at 196a-197a. VMI requires cadets to "live within a military framework; they wear the cadet uniform at the Institute, eat most meals in the mess hall, live in a barracks, and regularly take part in parades and drills." 91-1690 (*VMI I*) C.A. App. 52, ¶ 35 (Stipulations of Fact). "[T]he most important aspects of the VMI educational experience occur in the barracks." App. 197a-198a.[1] There, cadets live at close quarters with one another, three to five together in stark and unattractive rooms, with poor ventilation, unappealing furniture, windowed doors with no locks and no coverings on the windows. *Id.* at 199a. In the barracks, "a cadet is totally removed from his social background," and placed in an environment the

[1] An expert called by VMI testified that "[p]roducing a VMI graduate without the barracks experience would be equivalent to dressing someone up in the uniform of a Marine without first sending them to boot camp." App. 198a.

principal object of which is "to induce stress." *Ibid.* The educational program at VMI includes liberal arts, science and engineering courses, and VMI confers both Bachelor of Arts and Bachelor of Science degrees. *Id.* at 200a.

Although VMI has always restricted admission to men, some women "would want to attend [VMI] if they had the opportunity." App. 174a; see also *id.* at 231a, 232a (recruitment of women would likely yield a 10% female student body at VMI). Despite its male-only admissions policy, between the fall of 1988 and the summer of 1990 VMI received 347 letters from women inquiring about admission, or otherwise indicating interest in attending VMI. *Id.* at 229a. It is not disputed that some women can succeed within the VMI-type methodology and are capable of doing all of the individual activities required of VMI cadets, including the physical training and military drills. *Id.* at 76a, 223a, 234a. Thus, the VMI methodology "could be used to educate women." *Id.* at 76a; see *id.* at 155a.

2. On March 1, 1990, the United States sued the Commonwealth of Virginia, the Governor of Virginia, VMI, its Superintendent and Board of Visitors, and others responsible for the operation of VMI and for coordination of Virginia's system of higher education in the United States District Court for the Western District of Virginia.[2] The suit was filed pursuant to 42 U.S.C. 2000c-6 in response to a complaint filed with the Attorney General by a female high school student seeking admission at VMI. The United States alleged that VMI's male-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment, and sought an

[2] As a result of the then-Governor's position that no person should be denied admission to a state-supported college on account of sex, neither he nor the Commonwealth of Virginia participated at the liability phase in defending VMI's male-only admissions policy. App. 142a. The VMI Foundation and the VMI Alumni Association, both private organizations, intervened as defendants. *Id.* at 160a.

order enjoining the respondents from excluding women and from otherwise discriminating on the basis of sex in the operation of VMI. App. 141a.

On June 14, 1991, the district court entered judgment in favor of respondents. App. 158a-245a. It concluded that VMI's male-only admissions policy met the test for permissible gender classifications set forth in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982). Under that test, the Commonwealth was required to show that the exclusion of women from VMI was supported by an "exceedingly persuasive justification." *Id.* at 724. "Th[at] burden is met only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (internal quotation marks omitted).

The district court held that the male-only admissions policy was substantially related to the important state objective of promoting a diversity of educational offerings, including "single-gender diversity," within Virginia's system of higher education. App. 167a. The court found that "[i]nstitutions of higher education that admit only males contribute greatly to diversity in higher education, and should be preserved." *Id.* at 188a. The validity of VMI's exclusionary admissions policy was further reinforced for the district court because "some aspects of the distinctive [VMI] method would be altered if it were to admit women." *Id.* at 173a; see *id.* at 170a. The court credited testimony of one of VMI's expert witnesses that "the adversative model of education is simply inappropriate for the vast majority of women." *Id.* at 171a. Thus, although "some women will thrive in the adversative environment," such exceptional women need not be admitted because "educational systems are not designed for the exception, but for the mean." *Id.* at 172a. In sum, although the court found that "[w]omen are denied a unique educational opportunity that is available only at VMI," *id.* at 218a, "[t]he VMI Board has decided that

providing a distinctive, single-sex educational opportunity is more important than providing an education equally available to all," *id.* at 170a.

3. The court of appeals vacated and remanded. App. 134a-156a (*VMI I*). It held that respondents "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type education to men and not to women." *Id.* at 155a.[3] The court specifically rejected the district court's conclusion that Virginia has a policy of providing single-gender education to promote a diverse array of options. *Id.* at 152a-153a.[4] In addition, Virginia's delegation of authority to individual institutions to set educational policy undermined the stated goal of system-wide diversity, because "no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." *Id.* at 154a. Therefore, "[a]s the record stands, * * * evidence of a legitimate and substantial state purpose is lacking." *Id.* at 155a.

The court of appeals nonetheless concluded that VMI's institutional mission of "developing citizen soldiers" could justify its male-only admissions policy, App. 145a-151a,

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[3] See App. 137a (Virginia had not "advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women"); *id.* at 152a ("the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women"); *id.* at 153a-154a ("If VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender.").

[4] The court noted that the only policy statement in the record "in which the Commonwealth has expressed itself with respect to gender distinctions" required that its colleges and universities treat students *"without regard to sex, race, or ethnic origin."* App. 153a.

as long as women would also have an opportunity to obtain "the unique benefits of a VMI-type of education," *id.* at 155a-156a. The court agreed with the district court that "single-sex education is pedagogically justifiable," *id.* at 151a, and that "changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology," *id.* at 148a. Those changes, the court believed, would stem not from the presence of women, but from the shift to coeducation: "It is not the maleness, as distinguished from femaleness, that provides justification for [VMI's] program. It is the homogeneity of gender in the process, regardless of which sex is considered, that has been shown to be related to the essence of the education and training at VMI." *Ibid.* In its view, however, "[t]he problems that could be anticipated by coeducation at VMI, which are suggested by VMI generally to arise from physiological differences between men and women, needs for privacy, and cross-sexual confrontations, would not be anticipated in an all-female program with the same mission and methodology as that of VMI." *Id.* at 150a. The court added that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." *Id.* at 155a.

Although the court of appeals thus found a violation of the Equal Protection Clause, the court declined, "[i]n light of * * * the generally recognized benefit that VMI provides," to "order that women be admitted to VMI if alternatives are available." App. 155a. The court instead "remand[ed] the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied." *Id.* at 156a. The court stated that, consistently with its opinion,

> the Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its

> own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations.

Ibid.

The respondents sought review in this Court, which denied certiorari. *VMI* v. *United States,* 113 S. Ct. 2431 (1993). App. 132a-133a.

4. On remand, respondents proposed a remedial plan developed by a task force chaired by the Dean of Mary Baldwin College (MBC), a private women's liberal arts college in Staunton, Virginia. App. 8a. Although the task force observed that "some women would be suited to and interested in experiencing a 'women's VMI,' " it concluded that "aspects of VMI's military model, especially the adversative method, would not be effective for women as a group." *Ibid.* The task force proposed the creation of an all-female Virginia Women's Institute for Leadership (VWIL) offering a minor in leadership at Mary Baldwin College. See generally *id.* at 7a-11a, 101a-129a. It anticipated that VWIL would have about 25-30 students in its first year. *Id.* at 10a.

The proposed VWIL at Mary Baldwin College would have a mission similar to VMI's of producing "citizen soldiers," and the Commonwealth would provide VWIL the same amount of financial support per student as it provides to VMI. App. 8a, 10a. VWIL, however, would "not rely on the pervasive military life and adversative methods to achieve its goals," but would be addressed to "the different educational needs of most women." *Id.* at 10a. Whereas "the VMI model is based on the premise that young men come with [an] inflated sense of self-efficacy that must [be] knocked down and rebuilt," "[w]hat [women] need is a system that builds their sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes." *Id.* at 10a-11a.

Instead of the "rat line," VWIL would thus have "training in self-defense and self-assertiveness through a

Cooperative Confidence Building program." App. 111a-112a. Residential life for VWIL students would also "vary significantly" from VMI. *Id.* at 66a. There would be no barracks at VWIL. VWIL students would instead live in Mary Baldwin student housing, in which privacy would be respected. *Id.* at 127a-128a.[5] VWIL freshman students would room together in separate sections of the Mary Baldwin residence halls "to facilitate the development of group identity while also encouraging good relationships and friendships with other freshmen." *Id.* at 114a. "VWIL participants will be encouraged to participate in MBC activities and class functions." *Id.* at 114a-115a. Unlike students at VMI, VWIL students would not be required to eat meals together. *Id.* at 111a.

Military training for VWIL students would be provided by the standard, pre-existing ROTC program at Mary Baldwin College. App. 109a-111a. VWIL students would also participate in a newly established, largely ceremonial Virginia Corps of Cadets. *Id.* at 9a, 110a. VWIL students would not wear uniforms except when participating in ROTC or Virginia Corps of Cadets activities. *Id.* at 111a. VWIL students would be required to participate in eight semesters of physical and health education. *Id.* at 10a, 111a.[6] Unlike VMI, Mary Baldwin College does not have a math and science focus and does not offer a Bachelor of Science degree. *Id.* at 131a. VWIL students would thus be offered a substantially different curriculum from that at VMI and, for example, would be able to obtain a Bachelor's degree in engineering only by partici-

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[5] MBC student dorms include a "wide range of living arrangements," such as "[r]esidence halls * * * elegantly equipped with brass chandeliers, plush carpeting and mahogany furniture." App. 127a. Many are converted single-family homes, furnished by the college, and each with "its own distinct character." *Ibid.* Some have "televisions, cable hook-ups and microwave ovens." *Ibid.*

[6] VWIL students would also participate in a leadership externship, participate in organizing a speaker series, and organize and carry out community projects. App. 9a.

pating in a joint program requiring three years of course work at MBC and two years at Washington University in St. Louis, Missouri. *Ibid.*[7] The athletic and physical training facilities at VMI are far more extensive and sophisticated than those at MBC. *Id.* at 130a-131a. In addition, MBC "maintains a faculty holding significantly fewer Ph.D.'s than the faculty at VMI." *Id.* at 129a.

5. The district court approved VMI's proposed remedial plan. App. 53a-131a. The court acknowledged that the proposed VWIL "differs substantially from the VMI program," *id.* at 55a; see *id.* at 12a, 67a-68a, but found the differences to be justified. The court concluded that expert witness testimony regarding "developmental and emotional differences between the sexes" supported the different educational methodologies reflected in the VWIL and the VMI programs. *Id.* at 72a; see *id.* at 62a, 76a.[8] The court accepted the conclusions of the Task Force that "a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women for leadership roles," and

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[7] While at Washington University, VWIL students would not receive any tuition discount, and would thus be "denied the opportunity to receive an engineering degree on a publicly-supported basis like VMI students." App. 131a.

[8] The court credited research showing that "an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive," because "most women reaching college generally have less confidence than men." App. 64a. Young women "do not need to have uppityness and aggression beaten out of them." *Id.* at 73a-74a. Women thus "do not need the leveling experience of a rat line and adversative methods." *Id.* at 74a n.10. Because VWIL "is planned for women who do not necessarily expect to pursue military careers," the Plan "incorporates the element of public service" instead of "the entirely militaristic experience of VMI." *Id.* at 68a. See also *id.* at 224a (because of sex-based "developmental differences," "[m]ales tend to need an atmosphere of adversativeness or ritual combat in which the teacher is a disciplinarian and a worthy competitor," while "[f]emales tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students").

found VWIL's cooperative method to be more appropriate for most women. *Id.* at 63a. The court predicted that the cooperative method "will produce the same or similar outcome for women that VMI produces for men." *Id.* at 64a; see *id.* at 75a-76a. The court acknowledged curricular differences between VMI and VWIL, but found those differences to be justified because "[t]he very concept of diversity precludes the Commonwealth from offering an identical curriculum at each of its colleges." *Id.* at 66a.

6. The court of appeals affirmed. App. 1a-52a. For purposes of this case, it created and applied a "special intermediate scrutiny test" with which to evaluate VMI's proposed remedy. *Id.* at 17a-18a. The court thus took a "cautious approach" to *Hogan*'s requirement that sex-based classifications be justified by exceedingly persuasive and important state objectives, *id.* at 15a, calling instead for "deference" to a State's policy "so long as the purpose is not pernicious and does not violate traditional notions of the role of government," *id.* at 18a. The court stated that respondents' purpose at the remedial stage of this case was "providing the option of a single-gender college education"; single-sex education provides "the assumed benefit that [the] students are not distracted by the presence of the other sex." *Id.* at 20a, 22a. Exclusion of women from VMI is also "directly related to achieving the results of an adversative method in a military environment." *Id.* at 23a. The adversative method "has never been tolerated in a sexually heterogeneous environment," because "[i]f we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." *Ibid.* The court acknowledged that the pedagogical value of single-sex education is disputed, but cautioned that "we should defer to a state's selection of educational techniques when we conclude, as we do here, that the purpose of providing a single-gender educa-

tion is not pernicious and falls within the range of the traditional governmental objective of providing citizens higher education." *Id.* at 21a-22a.

The court recognized that its deferential approach to *Hogan*'s first prong "effectively redirects the court's focus" to the second prong, which requires the Court to "evaluat[e] the state's means for obtaining its objective." App. 15a. The court further recognized that, if the State's goal is single-sex education, the second prong of the *Hogan* analysis effectively drops out, providing "little or no scrutiny," *id.* at 16a-17a, because exclusion of one sex is "by definition necessary for accomplishing the objective" of single-sex education, *id.* at 16a.

The court accordingly added a "third step" to the *Hogan* test, applicable only to cases in which the State's objective is to achieve "homogeneity of gender" in separate, parallel programs. App. 17a-18a. Under that third step, the court held that the benefits provided to each sex through separate programs must merely be "substantively comparable." *Id.* at 17a. The court emphasized that it was not requiring "separate but equal," *id.* at 18a n.*, or that the programs be "the same," *id.* at 17a, because "equal methods and equal results" are not required for "different classes of people," and any suggestion to the contrary "is justified only by a needless, and indeed baseless, demand for conformity," *id.* at 25a.

Applying its test, the court held that VWIL would be substantively comparable to VMI, because

> both VMI and VWIL are focused on results beyond simply awarding an undergraduate degree. Both seek to teach discipline and prepare students for leadership. The missions are similar and the goals are the same. The mechanism for achieving the goals differ—VMI utilizing an adversative and pervasive military regimen and VWIL proposing to utilize a structured environment reinforced by some military training and a concentration on leadership development—but the difference is attributable to a profes-

> sional judgment of how best to produce the same opportunity.

App. 26a. The court conceded that the VWIL degree will lack the historical benefit and prestige of a VMI degree, but stated that those intangible benefits "must be the byproduct of a longer-term effort." *Id.* at 27a. The court affirmed and remanded with instructions that the district court take additional steps to assure that "a high level of state support continues" for the implementation of VWIL as planned. *Id.* at 30a.

7. Judge Phillips dissented. App. 31a-52a. He believed that under *Hogan* and *Sweatt* v. *Painter*, 339 U.S. 629 (1950), no arrangement of separate single-sex schools "could be found *substantially* related to any conceivable governmental objective unless the benefits to be separately distributed by the arrangement were *substantially* equal across the board of the relevant criteria for evaluating educational institutions." App. 48a.[9] Here, "the contrast between the two [schools] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation. If every good thing projected for the VWIL program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all of those criteria." *Id.* at 50a.[10]

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[9] Judge Phillips observed that the original 1839 policy of excluding women from VMI "unquestionably has been driven unchanged since its origins by a stereotyped view of the proper role and capabilities of women in society." App. 44a-45a. He thus doubted whether respondents' asserted objectives, see *id.* at 40a-41a, were their actual purposes.

[10] Judge Phillips criticized the majority for evaluating the proposed remedy from the perspective of the narrow category of women who would select VWIL primarily for its single-sex environment. App. 51a. He believed that "[t]he proper perspective from which to measure substantial equality of available benefits is that of the potential student who *could* be admitted to either school and has a choice." *Ibid.* From that perspective, it is difficult to believe that anyone "would consider the question close." *Ibid.* (quoting *Sweatt*, 339 U.S. at 634).

8. The Fourth Circuit, sua sponte, voted not to reconsider the case en banc. App. 246a-250a.[11] Judge Motz wrote a dissent from that decision, in which Judges Murnaghan and Michael joined. *Id.* at 251a-257a. She pointed out that, under *Hogan*, a state-supported single-gender program cannot be constitutionally justified "simply because it is a single-gender program," *id.* at 253a, but must be substantially related to furthering some separate goal, and the asserted goal of producing citizen-soldiers does not require a male-only admissions policy, *id.* at 253a-254a. Assuming that adversative training is desirable and essential to the VMI program, Judge Motz stated that without such training VWIL cannot be "substantively comparable" to VMI. *Id.* at 254a-255a. Conversely, if VWIL is truly "substantively comparable," the " 'adversative' training must not be critical to the VMI program, and so there is nothing to prevent the abolition of 'adversative' training and admission of women to VMI." *Id.* at 255a.

Judge Motz also viewed "VMI's reputation, the opportunity to know and learn from other students, faculty, and graduates, and the ability to rely on those connections and friendships in later life" as at least as important as the course work or citizenship and military training to the opportunity denied to women. App. 255a. Finally, while many women would not want to attend VMI, it is "equally probable that many men would not want to be educated in such an environment." *Id.* at 256a-257a. The issue is not whether anyone should be forced to attend VMI, but whether women should be given the same opportunity as men to do so. *Id.* at 257a.

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[11] Six judges voted in favor of rehearing, four voted against, and three judges disqualified themselves. Under Fourth Circuit Local Rule 35(b), a case may be reheard en banc only when a majority of the active judges, including those who are disqualified, vote to rehear the case. See App. 251a n.1. A judge's disqualification thus counts as a vote against rehearing.

REASONS FOR GRANTING THE PETITION

The Commonwealth of Virginia has closed the Virginia Military Institute to women for more than 150 years. In its initial decision in this case, the court of appeals correctly found that that policy violates equal protection. In its decision affirming the district court's remedial order, however, the court of appeals fashioned a new equal protection standard in direct conflict with this Court's sex discrimination cases, and applied that standard to approve a remedy that does not provide for equal treatment. Indeed, the court's remedial decision actually compounds the original constitutional violation by invoking harmful gender stereotypes to justify offering vastly different state-supported leadership programs to women and men.

In holding that VMI's male-only admissions policy violates equal protection, the court of appeals made clear that the constitutional violation lay in denying women "the unique benefit of VMI's type of education and training," including its "unique" educational "methodology." *E.g.*, App. 152a, 155a. The court also specifically found that the VMI methodology is not "inherently unsuitable to women." *Id.* at 155a. The plan that the court has now approved, however, fails to make available to women the very opportunity to benefit from VMI's educational methodology that Virginia has unconstitutionally denied them. *Ibid.* In addition, the court of appeals' invocation of sex stereotypes to perpetuate an equal protection violation conflicts with this Court's modern sex discrimination cases. That decision thus raises questions of exceptional importance to the meaning of the Constitution's protection against discrimination on the basis of sex.[12]

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[12] The remedy approved by the court of appeals also conflicts with decisions in which this Court has repeatedly made clear that a district court is "required to tailor the scope of the remedy to fit the nature and extent of the * * * violation." *Hills* v. *Gautreaux*, 425 U.S. 284, 293-294 (1976) (internal quotation marks omitted). In other words, "[a]s with any equity case, the nature of the

1. The court of appeals assumed that state maintenance of separate single-sex schools for men and women constitutionally may be justified in appropriate circumstances. Even accepting that assumption, however, either such schools must provide educational programs that are genuinely equal or the State must justify any inequality under a standard of heightened constitutional scrutiny.[13] The court of appeals instead used a constitutional standard that requires no heightened justification for separate and *unequal* treatment. Its decision thus conflicts with *Sweatt* v. *Painter*, 339 U.S. 629 (1950), and with this Court's line of equal protection sex discrimination cases culminating in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982), and *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994).

a. The VWIL program is not equal to the military-style leadership program respondents have reserved for

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violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); see also *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1445 (1992) (judicial power is invoked "to remedy particular constitutional violations"). The remedy must be "related to the *condition* alleged to offend the Constitution" and "must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977) (internal quotation marks omitted). That is so because, under the Equal Protection Clause, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). The remedy approved below plainly does not cure the constitutional violation that gave rise to this case—the complete exclusion of women from VMI's unique and celebrated program.

[13] This case does not require the Court to address the validity of public single-sex education generally. The remedy adopted here is not invalid merely because VMI and VWIL are single-sex schools, but because VMI has been found to be unique, because VWIL falls far short of replicating for women the educational opportunity VMI provides to men, and because the bases for creating different schools are gender-stereotyped views of the roles and capacities of women and men.

men at VMI. In *Sweatt* v. *Painter*, *supra*, this Court invalidated an assertedly "separate but equal" remedy for black students denied entry to the University of Texas Law School because the opportunities extended exclusively to whites at that school were superior to those the State afforded to blacks "[i]n terms of the number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities." 339 U.S. at 633-634. Where segregation is by sex, the presumptive requirement of equal treatment is no less applicable. See *Hogan*, 458 U.S. at 720 n.1.[14]

The court below found that VWIL will fail in many tangible ways to offer to women what VMI provides for men. See App. 7a-12a; see generally pp. 2-4, 8-10, *supra*. VWIL will, for example, lack adversative training, although that is the feature of VMI that the court and respondents repeatedly pointed to as making VMI "unique." VWIL will have no barracks life, despite the court's view that the barracks are fundamental to VMI.

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[14] The Court in *Hogan* invalidated the policy of excluding men from the Mississippi University for Women's School of Nursing. Although plaintiff there admittedly had opportunities elsewhere in the State for nursing education of the same quality as that which he was denied at MUW, 458 U.S. at 723 n.8; see *id.* at 734 (Blackmun, J., dissenting); *id.* at 735 (Powell, J., dissenting), the inconvenience to him of traveling to one of those locations made his opportunity materially unequal to those of a similarly situated woman.

This Court has not discussed the circumstances (if any) in which parallel single-sex programs for men and women might be constitutional. But in the two cases in which this Court affirmed such dual systems without opinion, the lower courts had required that the separate programs involved be essentially equal. See *Vorchheimer* v. *School Dist.*, 532 F.2d 880, 881-882, 886 (3d Cir. 1976) (plaintiff "d[id] not allege a deprivation of an education equal to that which the school board makes available to boys"), aff'd by an equally divided court, 430 U.S. 703 (1977); *Williams* v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970) (finding that no special features made the women's college better than the men's college), aff'd mem., 401 U.S. 951 (1971).

The military culture of VMI will be lacking at VWIL. The Mary Baldwin campus, where the VWIL program will be situated, has only a fraction of the athletic and physical training facilities present at VMI. VWIL women would, in addition, be denied the opportunity to major in engineering at Mary Baldwin or to obtain a Bachelor of Science degree there. *Ibid.* The court of appeals thus freely acknowledged that VWIL would not offer women an educational program equal to that offered to men by VMI. App. 18a n.*; see *id.* at 24a-28a.

Perhaps even more important, VWIL would also be unequal because VMI "possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a * * * school," including "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Sweatt*, 339 U.S. at 634. The district court in this case correctly found that, "even if all else were equal between VMI and [VWIL], the VWIL program cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years." App. 60a (footnote omitted). VMI is the nation's oldest military college, and its alumni occupy distinguished positions in private professions and public life. The program offered to women at VWIL is therefore patently unequal to the program offered to men at VMI.

b. The court of appeals' conclusion that the establishment of VWIL at Mary Baldwin would satisfy equal protection requirements, despite the substantially different programs offered by Virginia to men and to women, rests on a clearly incorrect equal protection analysis, in conflict with this Court's precedents. Expressly declining to follow *Sweatt*, the court of appeals first disavowed any requirement that the sex-segregated VWIL and VMI programs in fact be "equal," and instead demanded only that they be "substantively comparable." App. 17a-18a & n.*. That separate-but-substantively-comparable standard is satisfied, in the court's view, by unequal sex-

segregated programs that are merely "aimed at achieving similar results." *Id.* at 26a. The court then held that the requirement of substantive comparability was met by VMI and VWIL in this case because "[t]he missions are similar and the goals are the same," even though "[t]he mechanism[s] for achieving the goals differ." *Ibid.*

The separate-but-substantively-comparable standard that the court created incorrectly affirmatively incorporates and authorizes sex discrimination, rather than requiring, as it must to be consistent with this Court's decisions, an important and closely tailored justification for it. The new standard disavows the constitutional requirement of equality of treatment and instead *presumes*, without any constitutionally established justification whatsoever, that there are differences between men and women that *a priori* permit substantial differences in the programs and opportunities offered by the State to each sex. Such a standard squarely conflicts with this Court's requirement that any difference in treatment based on sex be supported by an "exceedingly persuasive justification" that exists only if the difference in treatment serves important governmental objectives and is substantially related to the achievement of those objectives. *Hogan*, 458 U.S. at 724; see also, *e.g.*, *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980); *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). Respondents failed to provide an exceedingly persuasive justification for the inequality in the treatment afforded to women. In fact, they failed to provide any acceptable justification at all.

i. The decision below instead relies on stereotypes that reflect and reinforce archaic notions about women in conflict with this Court's cases. The court of appeals approved providing women with an admittedly unequal program at VWIL on the ground that personality and preference differences between men and women justify the differences between the VMI and VWIL programs. App. 67a-76a. As a basis for its decision, the court relied on sex-based generalizations that women are more psychologically and sociologically suited than men to a confidence-

building, public-service-oriented program, while VMI's rigorous military-style training is more suitable to men. See pp. 10-11 & n.8, *supra*. The court thus embraced, among other things, the stereotyped view that women are less confident and less aggressive than men, App. 64a, 73a, and that many women "do not necessarily expect to pursue military careers," *id.* at 68a.[15]

The court of appeals' acceptance of those sex-based characterizations conflicts with *Hogan*.[16] The Court in *Hogan* invalidated a nursing school's women-only admissions policy in part because that policy "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job." 458 U.S. at 729. It rejected the State's putative compensatory rationale because the admissions policy "len[t] credibility to the old view that women, not men, should become nurses, and ma[de] the assumption that nursing is a field for women a self-fulfilling prophecy." *Id.* at 730. *Hogan* thus opened to men the opportunity to enter a traditionally women's institution to train for an overwhelmingly female-dominated field. *Id.* at 723 & n.8. Just as nursing has historically been associated with women, the military has been associated with men. *J.E.B.*, 114 S. Ct. at 1429 n.16. Excluding women from VMI and providing to them an all-female alternative that is not a military school perpetu-

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[15] The court's reliance on this rationale for approving a program at VWIL that is not pervasively military is particularly unjustified given the fact that most men who attend VMI similarly do not plan to pursue military careers. App. 206a, 219a.

[16] This Court in *Hogan* held that the determination whether a challenged sex-based classification is substantially related to an important governmental objective "must be applied free of fixed notions concerning the roles and abilities of males and females." 458 U.S. at 724-725. The Court there recognized that "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function." *Id.* at 725 n.10. Thus, "[c]are must be taken in ascertaining whether the [government's] objective itself reflects archaic and stereotypic notions." *Id.* at 725.

ates exactly the same kind of archaic, exclusive association of each sex with particular professions—here the premise that men, and not women, are fit to be military leaders.

The decision below also conflicts directly with *J.E.B.* v. *Alabama ex rel. T.B.*, *supra*. There, this Court refused to accept, as a defense of the State's use of sex-based peremptory challenges, "the very stereotype the law condemns." 114 S. Ct. at 1426. The *J.E.B.* Court reasoned that government must not "ratify and reinforce prejudicial views of the relative abilities of men and women" nor perpetuate "stereotypes [that] have wreaked injustice in so many other spheres of our country's public life." *Id.* at 1427; see also *id.* at 1424-1425 (quoting *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975) (disapproving "archaic and overbroad" generalizations)).[17] The particular stereotypes upon which the court below relied are, in fact, distressingly similar to Justice Bradley's discredited conclusion in *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring in the judgment), that "[t]he natural and proper timidity and delicacy which belongs to the female sex" supported the exclusion of women from the practice of law in favor of "the domestic sphere as that which properly belongs to the domain and functions of womanhood."

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[17] See also *Orr* v. *Orr*, 440 U.S. 268, 283 (1979) (statute requiring payment of alimony to women but not to men carried "the baggage of sexual stereotypes"); *Califano* v. *Goldfarb*, 430 U.S. 199, 217 & n.18 (1977) (statutory distinction between widows' and widowers' social security survivors' benefits was based on "archaic and overbroad" generalizations); *Craig*, 429 U.S. at 198-199 (distinction between ages at which males and females can purchase 3.2% beer reflected "outdated misconceptions"); *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975) (statute setting different ages of majority for girls and boys relied on "role-typing society has long imposed"); see also *Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753, 759 (1993) (describing as "objectively invidious" under 42 U.S.C. 1985(3) the purpose of "'saving' women *because they are women* from a combative, aggressive profession such as the practice of law").

Even where stereotypes may in part reflect current realities, the Court has condemned them both because present practices may themselves result from historical sex-based bias, and because the law must not operate to freeze men and women into socially assigned roles. The gender stereotypes upon which the court of appeals relied, like those this Court has repeatedly rejected, impermissibly "reflect and reinforce patterns of historical discrimination." *J.E.B.*, 114 S. Ct. at 1428; see also *Craig*, 429 U.S. at 202 n.14.[18] The lower court's finding that, for example, women are less aggressive than men may well reflect the effects of long-standing sex-based limitations on social roles that have often discouraged aggressive behavior in women while encouraging it in men. And, as the Court explained in *Hogan*, sex-based treatment can make the generalizations upon which it is based "self-fulfilling prophec[ies]." 458 U.S. at 730. Barring women from VMI's adversative and pervasively military-style training deprives them of any opportunity to learn to adapt to it; it thus makes women's presumed unfitness for such training, and for the leadership opportunities it

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[18] The Court in *Craig* recognized that stereotypes themselves may have played a role in creating the observed statistical differences between women's and men's conduct through which the State sought to justify a law imposing different minimum ages at which men and women could purchase 3.2% beer. "The very social stereotypes that find reflection in age differential laws are likely substantially to distort the accuracy of these comparative statistics. Hence, 'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home." 429 U.S. at 202 n.14 (citation omitted).

Similarly, in rejecting the argument in *Stanton* that a statute establishing a lower age of majority for girls than for boys was justified because boys often stay in school and require parental support for longer than girls, the Court observed that "[t]o distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed." 421 U.S. at 15.

creates, as much a "self-fulfilling prophecy" as the presumption about natural sex roles rejected in *Hogan*.[19]

ii. The decision below also conflicts sharply with numerous holdings of this Court that reliance on overbroad sex-based generalizations about women and men cannot support sex-based classifications that are applied to foreclose individual opportunity. In employing generalizations about the preferences and personalities of women and men as a basis for its decision, the court of appeals did not purport to find—nor could it possibly have found—that *all* women are less aggressive or less confident than *all* men, or that VMI's program was educationally inappropriate for *all* women. It acknowledged instead that VMI's adversative methodology is not "inherently unsuitable to women," App. 155a, and that some women would indeed be qualified for, would prefer, and would benefit from that methodology, *id.* at 76a, 155a; see *id.* at 74a, 223a, 234a. The court nonetheless acted on the premise that psychological and sociological differences between the sexes justify denying all women admission to VMI's "masculine" program as long as the VWIL "feminine" alternative program is available to them. That decision conflicts with this Court's cases prohibiting reliance on overbroad sex-based generalizations. The fact that many —perhaps most—men are not suited to VMI's educational

[19] For the reasons the Court offered in *J.E.B.*, the assumption that women have a particular psychological or sociological orientation—like the assumption that they hold particular views—also causes stigmatic harms. Women's exclusion from VMI can accurately be characterized as "practically a brand upon them, affixed by law, an assertion of their inferiority" that "denigrates the dignity" of the excluded women, and "reinvokes a history of exclusion." 114 S. Ct. at 1428 (quoting *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880)); see also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 625 (1984) (referring to "stigmatizing injury" caused by private club's exclusion of women). The fact that VMI is a celebrated institution with historic standing in the community thus makes its male-only admissions policy particularly problematic because it intensifies the stigma associated with women's exclusion.

methodology does not foreclose VMI to men who would benefit from it. There is no reason why the fact that not all women are so suited should foreclose that opportunity to women who would also benefit.[20]

This Court "has frequently noted that discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 625 (1984). Thus, even where there are statistically significant differences between the behavior or attitudes of men and women, the Court has consistently invalidated absolute legal generalizations based on those differences as wholly incompatible with equal protection values. In *J.E.B.*, for example, the Court rejected the argument that, because sex might be an accurate predictor of jurors' attitudes, sex-based peremptory challenges were permissible. "[A] shred of truth may be contained in some stereotypes," but this Court has "made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the gen-

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[20] See, *e.g.*, *J.E.B.*, 114 S. Ct. at 1429 ("gender simply may not be used as a proxy for bias"); *id.* at 1432 (O'Connor, J., concurring); *id.* at 1433-1434 (Kennedy, J., concurring in the judgment); *Hogan*, 458 U.S. at 726 (rejecting "outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification' ") (quoting *Craig*, 429 U.S. at 198); *Wengler*, 446 U.S. at 151; *Orr*, 440 U.S. at 280-281, 283; *Goldfarb*, 430 U.S. at 204-207 (plurality opinion); *id.* at 219-220 (Stevens, J., concurring in the judgment); *Stanton*, 421 U.S. at 14-15; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677, 686-687 (1973) (plurality opinion); *Reed* v. *Reed*, 404 U.S. 71, 76-77 (1971); but see *Bradwell*, 83 U.S. (16 Wall.) at 141-142 (Bradley, J., concuring in the judgment) (upholding sex-based exclusion of women from law practice even though the rationale for disqualifying women does not apply to all women, because "the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases").

eralization." 114 S. Ct. at 1427 n.11 (citing *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975)).[21] As Justice O'Connor stated in her concurring opinion in *J.E.B.*, sex may as a factual matter correlate with certain attitudes, but the Equal Protection Clause deems sex, like race, "irrelevant as a matter of constitutional law" to the government's assessment of a person's attitude. 114 S. Ct. at 1432. The constitutional determination that sex does not determine attitude or personality is thus "a statement about what this Nation stands for," even where it may not be "a statement of fact." *Ibid.*

The Equal Protection Clause condemns the use of sex-based generalizations both because they deny to women who do not fit those generalizations opportunities afforded to all men (whether they fit them or not), and because it offends the most basic equal protection principles to treat women not as individuals, but only as members of a group that is conclusively presumed to lack certain capaci-

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[21] See also *Craig* v. *Boren*, *supra*; *Weinberger* v. *Wiesenfeld*, *supra*; *Frontiero* v. *Richardson*, *supra*. Despite statistics in *Craig* showing that young men in the relevant age group presented greater safety risks as a result of drunk driving than did young women, 429 U.S. at 200-201, the Court struck down a law setting sex-based differential ages for beer purchase because it was not satisfied "that sex represents a legitimate, accurate proxy for the regulation of drinking and driving," *id.* at 204.

Similarly, the Court in *Weinberger* struck down a statute granting widows but not widowers social security survivors' benefits even though there was "empirical support" for the government's assertion that men are more likely than women to be the primary supporters of their spouses and children. 420 U.S. at 645.

A plurality of the Court in *Frontiero* likewise invalidated a statute presuming that spouses of male service members are dependents for purposes of benefits determinations but that spouses of female service members are not, notwithstanding that, "as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives." 411 U.S. at 688-689. Justice Brennan observed that "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Id.* at 686-687.

ties. As Justice Kennedy stated in his opinion concurring in the judgment in *J.E.B.*,

> [t]he neutral phrasing of the Equal Protection Clause, extending its guarantee to "any person," reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual rights in question). At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.

114 S. Ct. at 1433-1434 (internal quotation marks omitted). Insofar as they are valid, respondents' concerns that many women may lack the aggressiveness and self-confidence needed to benefit from the rigors of the adversative method are appropriately addressed by making individualized determinations regarding which women are suited to that method, just as individual determinations currently are made to determine which men to admit to VMI.[22]

2. In the circumstances of this case, the only remedy consistent with equal protection principles is to admit women to VMI.[23] The VMI program has been in place for a century and a half, and VMI's students and graduates accordingly enjoy the benefits of association with an established and renowned institution with great prestige, rich traditions and exceptionally strong alumni support. Those benefits cannot now be replicated for women in a newly established program at a separate, all-female

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[22] See *Orr*, 440 U.S. at 281-283 (invalidating statute under which husbands, but not wives, may be required to pay alimony because "individualized hearings at which the parties' relative financial circumstances are considered *already* occur," so that there is no reason "to use sex as a proxy for need").

[23] From the inception of this litigation, the United States has consistently sought admission of women to VMI as the appropriate remedy. See App. 54a n.2.

institution. See pp. 16-18, *supra;* App. 60a-61a. Since a new program for women cannot match VMI in those enormously important respects, the remedy this Court ordered in *Sweatt* v. *Painter, supra*, is also required here: admission of qualified members of the excluded class to the established school from which the State has historically excluded them. 339 U.S. at 636.

Moreover, sex segregation, which may be appropriate in some educational settings, is inappropriate here because, in the context of VMI's historical exclusion of women, the continued segregation of men and women in connection with the VMI program has powerful stigmatizing effects. Continuation of an all-male VMI must inevitably send a message that, insofar as VMI and the Commonwealth are concerned, women are incapable of coping with, or succeeding in, its program. Continued segregation also suggests that there is something inappropriate or unworkable about women and men commingling in a military or leadership setting—an implication that is particularly harmful because military service, as well as many other leadership positions, have traditionally been, but are no longer, the exclusive province of men. The history of sex discrimination in the United States has been replete with official assumptions that women and men properly belong in restrictive separate spheres and play different societal roles according to sex. This Court's equal protection jurisprudence correctly and emphatically rejects such assumptions. The exclusion of women from VMI impermissibly recognizes one such assumption—that where military-style education can be preserved in its "true" and most rigorous form, women simply do not belong.

The court of appeals concluded not only that VWIL would be better for women, but also that coeducation at VMI would be an impossibility—and thus that single-sex leadership education was required. The latter conclusion

was based on the court's determination that coeducation would

> deny those women [interested in attending VMI] the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation. The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.

App. 6a-7a (quoting *VMI I*, *id.* at 148a). That determination, in turn, was based in large part on the court's belief that coeducational adversative training would destroy "any sense of decency that still permeates the relationship between the sexes." *Id.* at 23a. This chain of reasoning is based entirely on a use of sex-based generalizations that is plainly prohibited under the Equal Protection Clause.[24] The valid aspects of the adversative method can be maintained and privacy and sex-specific physical differences accommodated,[25] consistent with ex-

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[24] To the extent that respondents and the court view an adversative method as incompatible with coeducation because they believe it is unseemly for men to behave in a harsh and disciplining way toward women, or for women to do so toward men, App. 23a, that view itself appears to reflect notions of gender relations that cannot constitute an important state interest under this Court's equal protection jurisprudence. See, *e.g.*, *J.E.B.*, 114 S. Ct. at 1423 (criticizing decisions that affirmed sex-based classifications based on state interests in protecting women from "ugliness and depravity" and experiences that would "prove humiliating, embarrassing and degrading to a lady," or because "[r]everence for all womanhood would suffer in the public spectacle of women . . . so engaged").

[25] As it stands, not all VMI men meet VMI's demanding physical fitness requirements. The roughly 50% of new cadets, and smaller percentages of upperclassmen, who cannot pass the fitness test administered each semester do not automatically fail out, but may participate in VMI's remedial fitness program. Thus, some male students graduate from VMI still unable to pass the fitness test. See 91-1690 (*VMI I*) C.A. App. 564-566; 91-1690 (*VMI I*) Gov't C.A. Br. 11-12; App. 233a.

tending to women who wish to attend VMI the benefits of that educational program. The marginal extent, if any, to which coeducation at VMI might alter the benefits that VMI now offers exclusively to men cannot outweigh the importance of providing women access to a unique program from which they have unconstitutionally been excluded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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