No. 94-1941

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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

v.

UNITED STATES OF AMERICA,
*Cross-Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI


JAMES S. GILMORE, III
*Attorney General of Virginia*
WILLIAM H. HURD
*Deputy Attorney General*
900 East Main Street
Richmond, Virginia 23219

THEODORE B. OLSON
*(Counsel of Record)*
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

RICHARD K. WILLARD
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

ROBERT H. PATTERSON, JR.
ANNE MARIE WHITTEMORE
WILLIAM G. BROADDUS
MCGUIRE, WOODS, BATTLE & BOOTHE
One James Center
Richmond, Virginia 23219

GRIFFIN B. BELL
WILLIAM A. CLINEBURG, JR.
KING & SPALDING
191 Peachtree Street
Atlanta, Georgia 30303

*Counsel for Cross-Petitioners*

## QUESTION PRESENTED

Whether the court of appeals erred in holding that a State's single-sex admissions policy for a public undergraduate educational institution is unconstitutional unless the State provides substantively comparable single-sex educational opportunities for members of both genders.

## PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, cross-petitioners include George F. Allen, Governor of the Commonwealth of Virginia; the State Council of Higher Education of Virginia; the Virginia Military Institute, its Board of Visitors and Superintendent; the VMI Foundation, Inc.; and the VMI Alumni Association. The following were also parties to the proceedings in the courts below: Joseph M. Spivey, III; John Williams Knapp; Thomas N. Downing; Brig. Gen. Elizabeth P. Hoisington; 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; Gordon K. Davies.

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Pursuant to this Court's Rules 12.3 and 13.5, cross-petitioners the Commonwealth of Virginia, Governor George F. Allen, the Virginia State Council of Higher Education, the Virginia Military Institute, its Board of Visitors and Superintendent, the VMI Foundation, Inc., and the VMI Alumni Association respectfully submit this conditional cross-petition for a writ of certiorari to review the judgment of the court of appeals in this case.

## OPINIONS BELOW

The opinion of the court of appeals regarding liability is reported at 976 F.2d 890, and is reproduced at pages 134a-157a of the appendix to the petition for a writ of certiorari in *United States v. Virginia*, No. 94-1941 (filed May 26, 1995) (hereinafter "Pet. App."). The opinion of the district

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

## JURISDICTION

The judgment of the court of appeals regarding liability was entered on October 5, 1992. That judgment vacated and remanded the case to the district court for further proceedings. Pet. App. 156a. This Court denied a petition for a writ of certiorari seeking interlocutory review of that judgment. *VMI v. United States*, 113 S. Ct. 2431 (1993) (No. 92-1213).

After remedial proceedings in the district court on remand, cross-respondent filed a notice of appeal, and cross-petitioners filed a timely notice of cross-appeal challenging the original finding of liability. C.A. App. 407-09. The judgment of the court of appeals affirming and remanding the case for further proceedings (Pet. App. 30a) was entered on January 26, 1995.

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. Cross-respondent the United States filed a petition on that date seeking review of the judgment below. *See United States v. Virginia*, No. 94-1941. Cross-petitioners received that petition on May 26, 1995. This cross-petition is therefore timely pursuant to this Court's Rules 12.3 and 13.5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part that "[n]o State shall . . .

deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT

The factual and procedural background relevant to the question presented in this conditional cross-petition is set forth in the statement included in the brief in opposition filed in No. 94-1941. In the event that the Court grants the petition in No. 94-1941, cross-petitioners ask that the Court also grant this cross-petition, which seeks review of the original determination of the court of appeals that in the absence of a parallel educational program for women the single-sex admissions policy maintained by the Virginia Military Institute (VMI) violates the Equal Protection Clause. Cross-petitioners do not seek this Court's review if certiorari is denied in No. 94-1941, however, because cross-petitioners are committed to supporting the Virginia Women's Institute for Leadership and are fully prepared to accept the remedial ruling below.

The court of appeals' finding of a constitutional violation was made in an earlier appeal in this case (Pet. App. 134a-157a) which resulted in a remand to the district court for remedial proceedings. Pet. App. 156a. This Court denied cross-petitioners' petition for a writ of certiorari to review that interlocutory judgment. *United States v. Virginia*, 113 S. Ct. 2431 (1993) (No. 92-1213).[1]

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[1] It is well settled that this denial of certiorari did not affect cross-petitioners' right to seek certiorari at a later stage of the proceedings. *See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-59 (1916); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993) ("[d]enial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought").

On remand, cross-petitioners proposed to remedy the purported constitutional violation by establishing a single-sex educational program for women, known as the Virginia Women's Institute for Leadership (VWIL). The district court approved that remedy. Pet. App. 53a-131a.[2]

On appeal, the court of appeals reaffirmed the legal standard that led to its original finding of liability, but upheld the remedy proposed by cross-petitioners and approved by the district court. The court then remanded for further remedial proceedings. Pet. App. 1a-52a.

## REASONS FOR GRANTING THE WRIT

The court of appeals' liability determination is squarely inconsistent with the legal standard enunciated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). *Hogan* makes clear that a single-sex admissions policy for a state-supported undergraduate institution is constitutional if the State shows [1] that "the classification serves 'important governmental objectives and [2] that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* at 724.

In its decision below, the court of appeals conceded that VMI's single-sex admissions policy satisfies both prongs of the *Hogan* test. *See* Pet. App. 6a-7a, 20a-23a. First, the court found that "a state's opting for single-gender education as one particular pedagogical technique among many" is "a legitimate and important governmental objective." *Id.* at 21a. The court also reaffirmed its prior finding that VMI's adversative method offers additional educational benefits for adolescent males and is pedagogically justifi-

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[2] Cross-petitioners properly preserved their objections to the finding of liability by raising that issue in the subsequent proceedings below. *See* C.A. App. 407-09; Appellees' C.A. Br. 48.

able for that reason as well. *Id.* at 6a, 23a, 151a. And in this case, unlike *Hogan*, it is undisputed that attainment of these benefits through diversity of educational opportunities is the actual purpose underlying the single-sex admissions policies at VMI and VWIL. *Id.* at 23a, 81a-83a.[3] Thus, the first prong of the *Hogan* test is plainly satisfied here.[4]

Second, the court of appeals found that the Commonwealth's decision to provide single-sex education through VMI and VWIL was directly related to the achievement of the Commonwealth's legitimate and important objectives. As the court explained, "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." Pet. App. 22a.[5] In addition, the court concluded

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[3] Moreover, the record demonstrates conclusively that the Commonwealth's policy of providing the benefits of single-sex college education for men has not precluded women from benefiting in equal measure from the Commonwealth's system of higher education. The Commonwealth provides a wide array of educational opportunities for women at its 14 coeducational public undergraduate institutions, including the opportunity to attend highly regarded research institutions such as the University of Virginia, to obtain degrees in all of the subjects offered at VMI (and others as well), and to participate in a residential Corps of Cadets and ROTC program at Virginia Polytechnic Institute. Indeed, substantially more women than men enjoy the benefits of the Commonwealth's public system of higher education. The Commonwealth also provides financial assistance to female residents of Virginia who choose to attend one of the several private women's colleges in Virginia. Pet. App. 185a-191a, 200a-201a, 214a-218a.

[4] *Accord Vorchheimer v. School Dist.*, 532 F.2d 880, 887-88 (3d Cir. 1976), *aff'd by equally divided Court*, 430 U.S. 703 (1977).

[5] That fact serves to distinguish this case from *Hogan*, in which the record was "flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to

[Footnote continued on next page]

that "[t]he classification for single-gender education at VMI is also directly related to achieving the results of an adversative method in a military environment," because "'the unique characteristics of VMI's program would be destroyed by coeducation.'" *Id.* at 6a-7a, 23a; *see also id.* at 146a-148a, 167a, 175a-176a. Thus, VMI's single-sex admissions policy is perfectly tailored to the achievement of the Commonwealth's legitimate objectives, and the second prong of the *Hogan* test is satisfied in this case.

Nonetheless, the court of appeals held that VMI's policy is invalid unless the Commonwealth provides a parallel program for women that offers "substantively comparable" educational opportunities. Pet. App. 17a, 155a. That holding impermissibly engrafts a third requirement onto the two-pronged *Hogan* test. As a result, it is directly contrary to *Hogan*, which made clear that a State *may* "confer a benefit only upon one class" as long as the "classification is substantially related to achieving a legitimate and substantial goal," *i.e.*, as long as the two prongs of the *Hogan* test are satisfied. 458 U.S. at 724, 731 n.17.[6]

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[Footnote continued from previous page]

reach any of [the State's] educational goals." 458 U.S. at 731.

[6] In *Hogan*, of course, the State could not meet this requirement because, as a factual matter, the State's asserted goal was not "the actual purpose underlying the discriminatory classification" and the single-sex admissions policy was *not* "necessary to reach any of [the State's] educational goals." 458 U.S. at 730, 731. In this case, by contrast, the record conclusively demonstrates that VMI's single-sex admissions policy *is* substantially related to (and indeed absolutely necessary to) the valid and legitimate goals of providing the

[Footnote continued on next page]

Accordingly, the court of appeals has "decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c). Review of this question is therefore warranted in the event the Court grants the petition in No. 94-1941.

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distinct benefits of single-sex education and the VMI method. Pet. App. 6a-7a, 22a-23a.

## CONCLUSION

For the reasons set forth in the brief in opposition filed in No. 94-1941, the petition for a writ of certiorari in No. 94-1941 should be denied. If that petition is granted, however, this conditional cross-petition should also be granted in order to ensure the fullest consideration of all the issues presented by this case.

Respectfully submitted.

James S. Gilmore, III
*Attorney General of Virginia*
William H. Hurd
*Deputy Attorney General*
900 East Main Street
Richmond, Virginia 23219

Richard K. Willard
Steptoe & Johnson
1330 Connecticut Ave., N.W.
Washington, D.C. 20036

Griffin B. Bell
William A. Clineburg, Jr.
King & Spalding
191 Peachtree Street
Atlanta, Georgia 30303

Theodore B. Olson
*(Counsel of Record)*
Thomas G. Hungar
Gibson, Dunn & Crutcher
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500
Robert H. Patterson, Jr.
Anne Marie Whittemore
William G. Broaddus
McGuire, Woods, Battle & Boothe
One James Center
Richmond, Virginia 23219

*Counsel for Cross-Petitioners*

June 23, 1995