No. 94-1941

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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Nothing in respondents' brief in opposition calls into question the need for this Court to review and reverse the decision below.

1. Respondents contend (Br. in Opp. 29-30) that this case raises no issue of substantial importance, but the central issue it addresses is a recurring one in anti-discrimination law. All individuals belong to racial, gender, and ethnic groups. The "average" or "typical" aspirations or abilities of the members of those groups often differ substantially from group to group. Those differences raise the question whether an individual may be denied an opportunity because he or she has aspirations or abilities that differ significantly from those of the

average member of the group to which the individual belongs.

The Court's answer to that question has always been that equal protection rights are individual rights, not group rights. Individuals have a fundamental right to be treated on the basis of their *own* abilities and capacities. They may not be denied opportunity because most members of their race have different characteristics from their own. Thus, at a time when racial segregation was constitutionally permissible, the Court nevertheless held that a black person could not be denied admission to a white law school on the ground that not enough blacks were interested in studying law to justify the establishment of a black law school as well. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). The equal protection right of the black law school applicant was "a personal one," and he was entitled to be furnished an educational program equal to that provided to whites "whether or not other negroes sought the same opportunity." *Id.* at 351. And as early as 1914 the Court held that the failure to offer black travelers luxury railroad accommodations that whites enjoy could not be justified on the ground that too few black travelers could afford such accommodations. The rights of black travelers who could afford the accommodations were equal to those of whites who could afford them. *McCabe* v. *Atchison T. & S.F. Ry.*, 235 U.S. 151. See also Pet. 19-26. This case raises the question whether the protection against sex discrimination that the Equal Protection Clause affords provides the same level of individual protection as was provided by *Gaines* and *McCabe*.

Respondents argue that sex-segregated education is justified, and that separate educational programs may then be tailored to what "most" women or the "average"

woman would want or enjoy. As a result, respondents say that women can be excluded from a unique program that they wish to attend and for which they qualify, and be relegated instead to a substantially different program that they do not want and that does not meet their needs, solely because most women would not be inconvenienced by that result. At a time well before the adoption of strict scrutiny for racial classifications, when separate but equal racial treatment was constitutionally permissible, the Court repeatedly rejected that contention when it would have excluded individual black people from securing treatment or opportunity equal to whites. The question now before the Court is whether the same analysis applies in the law of sex discrimination.

2. Respondents assert that this case does not warrant further review because the United States "simply disagrees with the factual findings" made by the district court that the substantial differences between VMI and VWIL are justified by "non-stereotypical differences" between most men and most women. Br. in Opp. 19; see also *id.* at 21-25. They contend that VMI's sex-based exclusionary policy is justified by factual findings showing "psychological and sociological differences" between men and women that are "real differences, not stereotypes." *Id.* at 22. Those findings, they assert, are "fatal" to the petition, dissolving any conflict between the judgment below and the decisions of this Court. *Id.* at 24.

The district court's factual findings in no way affect the need for this Court's review. The court of appeals' decision approving the remedy in this case is squarely in conflict with this Court's equal protection cases even assuming the complete correctness of the district court's factual findings. As we have noted, Pet. 23, the district court did not find that the sex-based differences it

identified were generally true of all women and all men. See Pet. 23-26. Rather, the district court found, for example, that "most women" of college age are less confident than men, App. 64a, that a cooperative as opposed to an adversative method would be more appropriate for "most" women, *id.* at 63a, and that women "tend to" thrive in certain educational settings, while men "tend to" have certain educational needs, *id.* at 224a.

At the same time, the district court expressly found that some women are fully suited for a VMI education. It found, for example, that some women "would want to attend [VMI] if they had the opportunity," App. 174a, that "the VMI methodology could be used to educate women" and that some women "may prefer the VMI methodology to the VWIL methodology," *id.* at 76a.[1] The court also found that "some women are capable of all of the individual activities required of VMI cadets." *Id.* at 170a. The district court found that "15% of females in the applicant pool could successfully meet the requirements of the current VMI physical fitness test," *id.* at 234a, and respondents' own expert testified that "successful recruitment of women would likely yield VMI a cadet corps of approximately 10% women," *id.* at 231a. The 10% figure "was accepted by VMI's Mission Study Committee," *id.* at 232a. In other words, the only "real" differences the district court even purported to find were differences between *most* women and *most* men, not differences that could possibly be described as accurate as applied to all or even almost all women and men.

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[1] See also App. 223a (quoting respondents' expert's testimony that "I'm not saying that some women don't do well under an adversative model, undoubtedly there are some who do.").

The court of appeals' reliance in *VMI II* on generalizations about gender that are admittedly not universally valid is a factor that weighs in favor of this Court's review. This Court's cases uniformly hold that sex cannot be used as an inexact proxy for more relevant bases of classification. See Pet. 24-26 & nn.20 & 21 (citing cases).[2] Respondents do not—and cannot—identify a single case since Justice Bradley's discredited concurrence in *Bradwell* v. *The State*, 83 U.S. (16 Wall.) 130, 141 (1872), that upholds a sex-based classification based on psychological or sociological comparisons between most women and most men; the Court has upheld sex as a proxy only when different treatment was based on differences that were universally applicable because of biological or legal requirements.[3] The conflict between

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[2] This Court recently reaffirmed "the basic principle" that the Fourteenth Amendment "protect[s] *persons*, not *groups*." *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2112 (1995); see also *id.* at 2113 (emphasizing that the right to equal protection is a "personal right"). Additional considerations may of course be brought to bear in devising remedies for discrimination. See *id.* at 2117: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."

[3] This Court in *J.E.B.* v. *Alabama*, 114 S. Ct. 1419 (1994), invalidated sex-based peremptory challenges precisely because they amount to reliance on such sex-based generalizations. "Striking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by law, an assertion of their inferiority.'" *Id.* at 1428 (quoting *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879)). In approving a statutory rape law that applied differently to men and women, this Court expressly disavowed relying, as the district court did here, on males' greater aggressiveness, and instead relied on the anatomical fact that "females can become pregnant as the result of sexual

the Fourth Circuit's decision and this Court's precedents could hardly be more direct: Under the court of appeals' analysis, had the district court in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1952), simply found as a fact, as it certainly could have, that more women than men preferred to be nurses, or that women "tend to" be better suited for nursing because "most" women had more nurturing and tolerant personalities than "most" men, the sex-based exclusion from an educational program would have been upheld. *Hogan* does not rest on such a slender reed.

3. Respondents similarly assert (Br. in Opp. 27-29) that women cannot be admitted to VMI because their presence would "destroy" VMI, and they contend that question is a factual one not worthy of review. Their assertion is contrary to the holding of the court of

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intercourse; males cannot." *Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464, 475, 478 (1981) ("the statute does not rest on the assumption that males are generally the aggressors").

Respondents rely on *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975) (Br. in Opp. 26 n.23). The Court there upheld a federal statute that afforded women Naval officers longer than men to gain promotion or face mandatory discharge, not because of any notion that women's personalities or sociological role make them achieve promotions more slowly, but because legal restrictions on all women in combat and sea duty—which were not challenged—made women and men "*not* similarly situated with respect to opportunities for professional service." 419 U.S. at 508. The Court emphasized that, in those Navy corps in which promotion opportunities would be unaffected by the combat and sea-duty restrictions, men and women officers were treated the same. *Id.* at 509. See also *Rostker* v. *Goldberg*, 453 U.S. 57, 78 (1981) (upholding draft registration for men and not for women because unchallenged combat restrictions on all women made the sexes "simply not similarly situated for purposes of a draft or registration for a draft").

appeals, which expressly approved the admission of women to VMI as a viable remedial alternative.

In any event, the district court's determination that the presence of women would "destroy" VMI is a legal, as opposed to factual, conclusion. It addresses the materiality of changes in VMI's program likely to occur as a result of coeducation. The district court viewed any change, no matter how slight, as tantamount to the wholesale obliteration of VMI; it then concluded that preservation of VMI exactly in its existing form, and for the exclusive benefit of men, is more important than making a VMI education equally available to women. Both those legal conclusions are incorrect: The minor changes the district court predicted as a result of coeducation would not materially alter the essential attributes of a VMI education, and the effect, if any, that such changes would have on men's experience at VMI cannot outweigh the equal protection rights of individual and admittedly qualified women to be considered for admission to VMI without regard to their sex. It is, of course, well established that a benefit cannot be denied to one sex merely to preserve it for the other. *Hogan*, 458 U.S. at 731 n.17.

The district court's factual findings themselves show that VMI can admit women without materially changing its program. For example, the district court found that at least some women could perform all the rat line tasks, the current physical training and military drills, and could pass the VMI physical fitness test. App. 233a-234a.[4]

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[4] See defendants' witnesses' testimony compiled in *VMI I*, 91-1690 C.A. App. 357-358 (regarding the physical training and military drill, "we probably could have women come in here and many of them probably could do some of these things, or maybe all of them"); *id.* at 362 (women could "whack through mechanically a rat line and they could go through the motions of a rat line," but it would affect the

Admission of women would "have little or no effect" on the ROTC program, and would not materially affect the academic program. App. 241a-242a; 91-1690 (*VMI I*) C.A. App. 989. There was no evidence that the admission of women would affect the class system, the dyke system, or the honor code.

It is irrelevant that not all women would qualify for admission to VMI, since the vast majority of men are also unsuited to attend the school, and many of the men who do attend fall short of the overall standards in some respects. For example, almost 50% of new cadets fail the physical fitness test and are offered remedial training. 91-1690 (*VMI I*) C.A. App. 564-565. Toleration of women's performance at VMI at a range of levels would no more undermine the VMI ethic of "egalitarianism" than do those allowances already made for men.[5]

"brother rat" spirit); *id.* at 984 ("there isn't anything that happens in the rat line that I know about, that a woman could not do"). Although the district court found that "a majority" of women could not perform rat training "at the same levels as males," App. 234a, the relevant question is not, as we have said, what a majority of women can do. See pages 4-6, *supra*.

[5] Allowing women and men privacy from the opposite sex when dressing or using the bathroom need not, of course, affect the cadets' lack of privacy from members of their own sex, and respondents have identified no reason why close scrutiny of individuals by the entire group in all other respects could not be maintained.

The special steps taken to address the needs of black students (first admitted to VMI in 1968) additionally suggest that minor efforts to facilitate the introduction of women at VMI would not destroy the institution. For example, VMI's 1990-1991 budget proposed that it expend $22,000 for "Retention of Black Cadets," a special program for blacks identified in the budget. App. 229a-230a. In the Fall of 1983, "[a] program for the retention and effective performance of black freshmen was initiated at VMI." 91-1690 (*VMI I*) C.A. App. 1435. That program addressed, among other things, the "[s]ocial-cultural support

4. Contrary to respondents' contention (Br. in Opp. 22), the "special intermediate scrutiny" test the court of appeals devised for dual single-sex schools is plainly wrong, conflicts with *J.E.B.* v. *Alabama*, *supra*, *Hogan*, and *Sweatt* v. *Painter*, 339 U.S. 629 (1950), and requires correction by this Court. The court of appeals' approval of VWIL was possible only because the court invented a new, weakened, and incorrect constitutional test.

a. Whereas *Hogan* requires that the State have at least an important policy to support any sex-based classification, the court of appeals' test defers to the State's articulated rationale so long as it is "not pernicious." App. 18a. Under that test, the court of appeals accepted providing "single-gender education" as Virginia's non-pernicious objective. *Ibid.* The correct constitutional analysis, however, inquires whether the State's use of a sex-based classification (including single-sex college admissions policies) serves important interests; a State's desire to provide education on a single-sex basis is not, without more, automatically an important interest under *Hogan*. That desire is particularly inadequate to support the maintenance of the very single-sex admissions policy that the court of appeals had already correctly held violated the Equal Protection Clause.

b. Respondents erroneously assert that *Sweatt* v. *Painter*, *supra*, is inapplicable (Br. in Opp. 20-21), and that even the court of appeals' toothless "substantive comparability" requirement imposes an "unduly high burden on respondents" (*id.* at 22 n.17). Although *Sweatt* addressed the appropriate remedy for racial discrimination and this case seeks a remedy for discrimina-

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and black student morale within a dominantly white institution." *Id.* at 1438.

tion based on sex, equality of treatment is required in both areas absent a justification that is compelling (in the case of race) or exceedingly persuasive (in the case of sex).

The court of appeals' failure to require such equality of treatment, and its application instead of a wholly novel test of "substantive comparability" that tolerates relegating women to VWIL notwithstanding that it "differs substantially from the VMI program," App. 55a, squarely conflicts not only with *Sweatt*, but also with this Court's cases requiring heightened constitutional scrutiny of sex-based classifications. This Court acknowledged the importance of that conflict when it granted the writ of certiorari in *Vorchheimer* v. *School Dist.*, 532 F.2d 880 (3d Cir. 1976), cert. granted, 429 U.S. 893 (1976), aff'd by an equally divided court, 430 U.S. 703 (1977). The Court granted review of the question whether dual, single-sex schools are constitutional where they "reserve to males and deny to females access to the school distinguished by its national reputation, superior resources and scientific facilities." Pet. at 2, *Vorchheimer* v. *School Dist.*, No. 76-37. Because the Court was equally divided in *Vorchheimer*, it did not resolve the issue. It should do so now.

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For the reasons stated above and in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1995