No. 94-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

COMMONWEALTH OF VIRGINIA, *et al.*,

Cross-Petitioners,

vs.

UNITED STATES OF AMERICA,

Cross-Respondent.

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

AMICUS BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF CROSS-RESPONDENT UNITED STATES OF AMERICA

HERBERT J. HANSELL, Co-Chair
PAUL C. SAUNDERS, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
PACE J. MCCONKIE

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
1450 G Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

December 15, 1995

DANIEL F. KOLB
(Counsel of Record)
MICHELE S. WARMAN
JINA L. CHOI

DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, N.Y. 10017
(212) 450-4000
Counsel for Amicus Curiae

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

No. 94-2107

IN THE

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

VS.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

COMMONWEALTH OF VIRGINIA, *et al.*,

Cross-Petitioners,

VS.

UNITED STATES OF AMERICA,

Cross-Respondent.

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

INTEREST OF AMICUS

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonprofit organization established in 1963 at the request of President Kennedy to marshall the involvement of private lawyers in a national effort to ensure civil rights and equal protection to all Americans. The Lawyers' Committee has enlisted the services of thousands of members of the private bar in cases involving discrimination in, primarily, education, employment, voting and housing.

The Lawyers' Committee has a long history of participation in equal educational opportunity and school desegregation cases before this Court[1] and in the lower courts. *Amicus* submits that its experience in obtaining relief for educational inequalities at the elementary, secondary and higher education levels enables it to provide a perspective different from the parties and other *amici* on the issues before this Court. *Amicus* also maintains a profound interest in the development of sound precedent regarding the means of desegregating this nation's public institutions and eliminating the effects of discrimination.

The written consents of the parties to the submission of this brief have been lodged with the Clerk pursuant to Rule 37.2.

INTRODUCTION

The Virginia Military Institute ("VMI") was founded one hundred and fifty six years ago, in 1839, at a time when women in this country were prohibited from voting, practicing law, holding political office, and serving in the United States military. *See Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973). At the time of VMI's founding, African Americans were in slavery.

Born of its age, VMI made its mission the education of "citizen-soldiers," characterized as "educated and honorable men who are suited for leadership in civilian life and who can

---

1. *See, e.g.*, amicus briefs submitted in *Missouri* v. *Jenkins*, 115 S. Ct. 2038 (1995); *Kirwan* v. *Podberesky, cert. denied*, 115 S. Ct. 2001 (1995); *Freeman* v. *Pitts*, 503 U.S. 467 (1992); *Board of Educ.* v. *Dowell*, 498 U.S. 237 (1991); *Missouri* v. *Jenkins*, 495 U.S. 33 (1990); *Grove City College* v. *Bell*, 465 U.S. 555 (1984); *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983); *Board of Educ.* v. *Harris*, 444 U.S. 130 (1979); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

provide military leadership when necessary." *United States* v. *Virginia*, 766 F. Supp. 1407, 1425 (W.D. Va. 1991), *vacated by* 976 F.2d 890 (4th Cir. 1992) (hereafter, "*VMI I*"). VMI would admit neither women nor African Americans for such training.

One hundred twenty-nine years later, in 1968, well after this Court's decisions in *McLaurin* v. *Oklahoma State Regents*, 399 U.S. 637 (1950), *Sweatt* v. *Painter*, 339 U.S. 629 (1950), and *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (barring racial discrimination in schools), VMI finally opened its admissions to African-American men. In 1995, VMI still refuses to admit women and the Commonwealth of Virginia instead seeks to create a separate and unequal institution for them.

Consistent with its mission, the Lawyers' Committee urges this Court to reject VMI's asserted "state interests" and its stereotyped, class-based reasoning for excluding *all* women from VMI regardless of individual ability. The Lawyers' Committee urges this Court to affirm the Fourth Circuit's judgment of VMI's liability for operating an all-male institution but on broader grounds than those relied on below.

Amicus submits that the analysis of the Court of Appeals was insufficient because it failed to demand an "exceedingly persuasive justification" for excluding women from the unique educational opportunities offered by VMI. It likewise failed to demand that VMI's sex-based admissions policy be demonstrated to be "substantially related to the achievement" of such a justification, a deficiency which inexorably led it to approve an unconstitutional "remedy" which would provide for a separate and unequal educational institution for women. *See Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982).

If the Fourth Circuit had properly scrutinized VMI's men-only admissions policy — as required by this Court's decisions — it would have ordered, as the only suitable remedy, VMI's admission of qualified women. That same result may be obtained by reversing the Fourth Circuit on the Petition filed by the United States.

Today, both men and women serve in the military and in leadership roles. Pursuant to their right to the equal protection of the laws, women should have equal access to the unique reputation, prestige, alumni network and tangible and intangible benefits of VMI's cadet training. *Cf. Sweatt*, 339 U.S. at 637.

ARGUMENT

VMI'S MEN-ONLY ADMISSIONS POLICY VIOLATES THE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION

The Equal Protection Clause requires a court to answer two questions regarding a challenged policy: (1) whether there is a legitimate and important state interest served by the challenged policy; and (2) whether the challenged policy is substantially related to the achievement of that legitimate state interest. *Hogan*, 458 U.S. at 724-25.

While the court below was faced with a clear violation of equal protection, it mistakenly accepted as a legitimate interest sex-segregated education for its own sake. The court thus confused the question at issue — the propriety of the policy of sex-segregated education in this setting — with the legitimate and important state interest the policy is claimed to serve. The court then compounded its confusion by failing to determine whether the policy of sex-segregated education was substantially related to the achievement of a legitimate state interest. Instead, the court merely sought to justify the

admissions policy on the basis of pedagogical techniques such as adversative training, physical training standards, stress, and distraction, related to class-based assumptions about the sexes.

Rather than employ a "searching analysis," the court below accepted class-based stereotypes to justify both the end and the means. Departing from established equal protection analysis, the court failed to examine the assumptions behind VMI's pedagogy. This permitted the lower court mistakenly to conclude that a proper remedy could include "parallel institutions or parallel programs" which could depart from equality. Its opinion thus departs from the holdings of this Court that the Equal Protection Clause is violated when public education is separate and unequal. *See, e.g., Sweatt*, 339 U.S. 629; *McLaurin*, 339 U.S. 637.

It is only by admitting women that VMI's archaic discriminatory policies can be remedied.

A. The Constitution Guarantees All Persons Equal Protection under the Law.

The Constitution's Fourteenth Amendment guarantees all individuals — men and women — equal protection under the law. To withstand equal protection scrutiny, a sex-based classification must be shown: (1) to serve a legitimate and important governmental objective; and (2) to be substantially related to the achievement of that objective. *Hogan*, 458 U.S. at 724-25. This equal protection test is to be applied "free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-725.

The Fourteenth Amendment protects the rights of persons *as individuals* and the state may not abridge those individual constitutional rights based on generalizations about group identifications such as race or gender. As this Court instructs,

the "Equal Protection Clause . . . acknowledges that a shred of truth may be contained in some stereotypes, but *requires that state actors look beyond the surface* before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination." *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1427, n.11 (1994) (declaring unconstitutional peremptory juror challenges based on gender) (emphasis added); *id.* at 1434 (" '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.' ") (Kennedy, J., concurring) (quoting *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal quotation marks omitted)).

B. VMI Does Not Establish a Legitimate and Important State Interest That Justifies Excluding Women

The Court must employ a "searching analysis" of asserted state objectives to determine whether an important state interest exists which justifies a sex-based classification. *See Hogan*, 458 U.S. at 728. As this Court cautions, "[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." *Hogan*, 458 U.S. at 725 n.10. But rather than employ a "searching analysis," the Fourth Circuit applied a "cautious approach" which accorded "deference" to an asserted interest in single-sex education and approved it "so long as the purpose is not pernicious and does not violate traditional notions of the role of government." *United States* v. *Virginia*, 44 F.3d 1229, 1236-37 (4th Cir.), *cert. granted* 116 S. Ct. 281 (1995), (hereafter "*VMI IV*"). By failing searchingly to scrutinize the purported state objectives, the Fourth Circuit erred in its constitutional analysis.

Long after its origins, VMI claims that its men-only admissions policy is justified by a state interest in single-sex education as one of a variety of educational opportunities. Cross-Pet'r. Br. at 24-27. Notwithstanding the lower court's "deference" to the state legislature, it questioned the importance of such an objective in serving the interest of educational diversity. The court found: "[i]f 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." *United States* v. *Virginia*, 976 F.2d 890, 898 (4th Cir. 1992), *cert. denied* 113 S. Ct. 2431 (1993) (hereafter "*VMI II*"); *see also VMI I*, 766 F. Supp. 1407, 1420. The Court of Appeals found unconstitutional Virginia's maintenance of only an all-male single-gender institution. *VMI II*, 976 F.2d at 899.

VMI also claimed that its men-only admissions policy advances a state interest in the so-called "adversative" teaching method. *See* Cross-Pet'r. Br at 33-36. Yet nowhere does the Court of Appeals question why the "adversative" method in itself would constitute a legitimate and important state objective. The method is outlawed in 30 states. *See* Bruce Smith, *Watchdog Says Campus Harassment by Upperclassmen Has Declined*, Associated Press, Oct. 21, 1991, *available in* LEXIS, News Library, Wires. None of the federal military academies allow it. *See* 10 U.S.C. § 4352 (1959) (outlawing hazing in U.S. Military Academy); 10 U.S.C. § 6964 (1959 and Supp. 1995) (same for U.S. Navel Academy); 10 U.S.C. § 9352 (1959) (same for U.S. Air Force Academy). The adversative method — said by VMI to be more important than the rights of individual women — is based on instructing cadets to treat entering students like rats as "the rat is 'probably the lowest animal on earth.'" *VMI I*, 766 F. Supp. at 1422 (citation omitted).

Contrary to the approach taken by the Court of Appeals, courts must weigh purported state objectives to see that they are sufficiently compelling. *Hogan*, 458 U.S. at 724. *See, e.g., Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980) (rejecting claimed objective of administrative convenience as insufficiently weighty to justify discriminatory granting of widow's death benefits); *Reed* v. *Reed*, 404 U.S. 71, 76-77 (1971) (rejecting administrative efficiency as reason to exclude women from serving as estate administrators). Instead, the court simply accepted VMI's pedagogical justifications, especially the adversative method, and concluded that it "would not be effective for women as a group . . ." *See VMI IV*, 44 F.3d at 1233. Were it allowed, such uncritical deference to asserted pedagogical interests would permit states to justify a range of discriminatory classifications by merely asserting that such discrimination had educational benefits, however tenuous and class-oriented.

C. VMI Does Not Show A Substantial and Direct Relationship Between Its Purported State Interests and Its Exclusion of Women

The lower court failed to identify an important and legitimate state interest to which single-sex education was directed and instead sought to justify single-sex education by relying upon gender stereotypes. It did so notwithstanding the decisions of this Court that individuals *cannot* be denied equal protection on the basis of class stereotypes. *See, e.g., Weinberger* v. *Wiesenfeld*, 420 U.S., 636, 645 (1975) (gender-based generalizations "cannot suffice to justify the denigration of the [individual] efforts of women. . .").

Sex-based classifications by state actors cannot "serv[e] to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B.*, 114 S. Ct. at 1422. Since "sex, like race and national origin, is an immutable characteristic determined solely by the

accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate '*the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .*'" *Frontiero*, 411 U.S. at 686 (plurality opinion) (citation omitted) (emphasis added)). *See also Craig* v. *Boren*, 429 U.S. 190, 209 (1976) (striking down gender-specific drinking ages as relying on "loose-fitting generalities" of the genders); *Orr* v. *Orr*, 440 U.S. 268, 283 (1979) (striking down statutory scheme whereby only husbands may be required to pay alimony as "carr[ying] with it the baggage of sexual stereotypes"); *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975) (striking down gender-specific ages of majority as reflecting societal "role-typing"); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981) (holding unconstitutional statute granting only husbands the right to manage or dispose of jointly owned property without consent).

Ignoring these precedents, VMI attempts to justify its men-only admissions policy by asserting that since *some* women cannot meet the current physical training requirements, *all* women should be excluded from VMI. *VMI II*, 976 F.2d at 896.

Such an argument is constitutionally unacceptable because the record shows that 15% of women *could* successfully meet VMI's current physical fitness requirements. *See VMI I*, 766 F. Supp. at 1438. Indeed, the Fourth Circuit noted that the parties agreed that "some women can meet the physical standard." *VMI II*, 976 F.2d at 896. Notwithstanding this, the court proceeded to group all women together — including those who could meet the physical fitness requirements — and conclude that "dual-track" physical training was required. *Id.* In doing so, the court also ignored the record that 50% of new male cadets at VMI fail the physical fitness requirements and need remedial training. *See* Pet'r. Brief at 31. It ignored too the evidence that West Point successfully uses sex-neutral

ability groups during basic training. *See VMI I*, 766 F. Supp. at 1437.

VMI attempts to justify its all-male admissions policy by claiming that the presence of women would tend "to distract" male students from their studies. *VMI I*, 766 F. Supp. at 1412, 1440. The Fourth Circuit credits this "stress" argument and elevates it to a "cross-sexual confrontation." *VMI II*, 976 F.2d at 896. But the Fourth Circuit fails to explain how a man's interest in being free from distraction is greater than a woman's constitutional claim to equal protection of the laws. Cases such as those of an earlier era, which gave constitutional weight to "the passion of man," *see, e.g., Muller* v. *Oregon*, 208 U.S. 412, 422 (1908), could not possibly survive constitutional scrutiny today.

VMI claims that the admission of women would "destroy" VMI. Cross-Pet'r. Br. at 35-36; *VMI II*, 976 F.2d at 897. This claim ignores the fact that women attend military colleges throughout this country with notable success. *See* Pet'r. Brief at 32 n. 19 (women are admitted to the federal military, naval and air force academies, the Coast Guard and the Merchant Marines (citing 10 U.S.C. § 4342 note; 14 U.S.C. § 182(a); and 46 C.F.R. Pt. 310)). Indeed, the district court found that the admission of women "did not significantly change" West Point or the Naval Academy, *VMI I*, 766 F. Supp. at 1428-29, and that "VMI graduates will 'probably be considered disadvantaged in the coed Army' because they do *not* come from a coed environment." *Id.* at 1428 (citation omitted) (emphasis added).

Women participate fully in the modern military and in civilian leadership roles. Nowhere in the record is there evidence to support VMI's threatened extinction should women arrive and be trained there as leaders alongside male cadets.

D. VMI Impermissibly Seeks to Deny All Women Equal Access to the Tangible and Intangible Benefits of an Established State School

Having found VMI's exclusionary policies unconstitutional, the Fourth Circuit devised its own remedy — separate but "substantively comparable" facilities. *VMI II*, 976 F.2d at 900. According to the Court, separate institutions would have to provide "substantively comparable benefits." *VMI IV*, 44 F.3d at 1240. By its very nature, this separate but "substantively comparable" test is predicated on class-based reasoning that women require a separate school better suited to their characteristics as a class.

In stark contrast to the Court of Appeals' discrimination analysis, this Court remedies racial discrimination in public education by ordering equality of opportunity, not segregation. *See, e.g., Sweatt*, 339 U.S. 629; *McLaurin*, 339 U.S. 637. In *Sweatt*, the Court ordered an all-white state law school to admit an African-American law student notwithstanding the fact that a separate African-American law school was being formed. The Court found that the existing state law school "possesses to a far greater degree" those qualities such as "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige" than did the newly created school. *Sweatt*, 339 U.S. at 633-34. In so finding, this Court flatly rejected the segregationist argument that "the furnishing of equal facilities at separate schools is best for both races and is necessary to preserve the public peace and welfare . . . ." Brief for Respondents in *Sweatt* at 78; *see also McLaurin* 339 U.S. at 641 (declaring unconstitutional seating restrictions of African-American student in state graduate school).

It is unnecessary to decide whether the principle of separate as inherently unequal applies to single-sex public educations because here VMI's exclusion of women calls indisputably for separate and *unequal* treatment. The proposed VWIL program for women offers fewer degrees, different courses, a different method of teaching, no alumni network, no prestige, no history, and no great reputation associated with it. As the district court found, "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." *United States* v. *Virginia*, 852 F. Supp. 471, (W.D. Va. 1994), *aff'd* 44 F.3d 1229 (4th Cir. 1995) ("*VMI III*") (footnote omitted); *VMI IV*, 44 F.3d at 1241.

Following its decisions in *Sweatt* and *McLaurin*, this Court should declare unconstitutional VMI's continual exclusion of women from its tangible and intangible educational benefits. As this Court instructs in the context of racial segregation: "[t]he removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving [an individual] of the opportunity to secure acceptance by [his/her] fellow students on [his/her] own merits." *McLaurin*, 339 U.S. at 641-4.

CONCLUSION

For all the reasons stated above, this Court should hold that VMI's policy of excluding women violates the Equal Protection Clause.

Respectfully submitted,

DANIEL F. KOLB
(Counsel of Record)
MICHELE S. WARMAN
JINA L. CHOI

DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, N.Y. 10017
(212) 450-4000
Counsel for Amicus Curiae

HERBERT J. HANSELL, Co-Chair
PAUL C. SAUNDERS, Co-Chair
NORMAN REDLICH, Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
PACE J. MCCONKIE

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
1450 G Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 662-8600

December 15, 1995