No. 94-2107

In the Supreme Court of the United States

OCTOBER TERM, 1995

COMMONWEALTH OF VIRGINIA, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that a policy of admitting only men to the Virginia Military Institute's rigorous military-style educational program, while offering no parallel program to women, violated the Equal Protection Clause.

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On May 26, 1995, the United States filed a petition for a writ of certiorari (No. 94-1941) seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 26, 1995 (*VMI II*). In that decision, the court of appeals upheld the Commonwealth of Virginia's plan to remedy its unconstitutional sex-based exclusion of women from the Virginia Military Institute by offering women a separate and substantially different program at Mary Baldwin College. Cross-petitioners have filed an opposition to that petition, along with a conditional cross-petition for a writ of certiorari (No. 94-2107)

seeking review of the court of appeals' underlying decision on liability (*VMI I*). Cross-petitioners assert that their conditional cross-petition should be granted if the Court grants the United States' petition in No. 94-1941. As set forth below, the conditional cross-petition for a writ of certiorari should be denied.

OPINIONS BELOW

The opinion of the court of appeals regarding liability (*VMI I*) (App. 134a-157a)[1] 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. The opinion of the court of appeals regarding remedy (*VMI II*) (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.

JURISDICTION

The judgment of the court of appeals regarding liability (*VMI I*) was entered on October 5, 1992. A petition for rehearing was denied on October 5, 1992. This Court denied a petition for a writ of certiorari. *VMI* v. *United States*, 113 S. Ct. 2431 (1993). The district court on remand approved a remedy. The United States appealed to challenge the remedy as inadequate, and cross-petitioners cross-appealed to challenge the original finding of liability. The judgment of the court of appeals regarding remedy (*VMI II*) was entered on January 26, 1995. The court of appeals voted sua sponte not to grant rehearing en

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[1] References to the appendix are to page numbers in the appendix to the petition for a writ of certiorari in *United States* v. *Virginia*, No. 94-1941 (filed May 26, 1995).

banc, and entered an order to that effect on April 28, 1995 (App. 246a-257a).

On April 28, 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 United States filed a petition on that date (No. 94-1941). The conditional cross-petition for a writ of certiorari was filed on June 23, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The procedural and factual background is set forth in the statement in the United States' petition for a writ of certiorari in No. 94-1941. Cross-petitioners conditionally challenge the court of appeals' initial decision in *VMI I* that providing a military-oriented education at the Virginia Military Institute (VMI) exclusively to men, while admittedly providing no opportunity for such an educational experience to women, violates the Equal Protection Clause. Cross-Pet. 3-4. They thus seek to argue, in the event that this Court grants certiorari in No. 94-1941, that the Commonwealth of Virginia may constitutionally maintain an all-male admissions policy at VMI and take no remedial steps whatsoever.

The court of appeals held in *VMI I* that VMI's male-only admissions policy violated the Equal Protection Clause under *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982). The court concluded that neither prong of the *Hogan* test was satisfied. First, VMI had not advanced the "exceedingly persuasive" justification for excluding women from VMI that *Hogan* requires. *Id.* at 724. In fact, cross-petitioners had not "advanced *any* state policy by which it can justify its determination * * * to afford VMI's

unique type of program to men and not to women." App. 137a (emphasis added); see also *id.* at 152a-155a. Second, even if the Commonwealth had demonstrated that it had a policy of providing single-gender education, and even if that policy constituted an important governmental interest, the court of appeals concluded that VMI's male-only admissions policy was not substantially related to furthering such an interest: "[T]he explanation of how [the Commonwealth's] 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." *Id.* at 153a-154a. The court of appeals thus held that cross-petitioners had violated the Equal Protection Clause, and remanded for consideration of an appropriate remedy.

The district court approved a remedial plan that establishes an all-female Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, a private, women's liberal arts college. App. 53a-131a. The VWIL plan was not based on the VMI model, and admittedly "differs substantially from the VMI program." *Id.* at 55a. The court of appeals affirmed. *Id.* at 1a-52a. Our petition for a writ of certiorari (No. 94-1941) to review the remedial decision is now pending.

ARGUMENT

The court of appeals' holding that the Equal Protection Clause prohibits the Commonwealth of Virginia from offering the benefits of the Virginia Military Institute's unique educational program only to men, while offering no parallel program to women,

turns on a straightforward application of *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982). The parties and courts below all recognized that VMI's male-only admissions policy must satisfy the *Hogan* test, and the court of appeals correctly concluded that it failed to do so. That decision does not conflict with any decision of this Court or any other court of appeals. As this Court has already determined in denying the cross-petitioners' earlier petition for a writ of certiorari to review the liability judgment, that decision warrants no further review.

The cross-petition is based entirely on the erroneous assertion that "the court of appeals conceded that VMI's single-sex admissions policy satisfies both prongs of the *Hogan* test."[2] Cross-Pet. 4. The court of appeals made no such "concession." Rather, as to the first prong, the court of appeals held in *VMI I* that the Commonwealth "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type education to men and not to women." App. 155a.[3] Even assuming that the

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[2] Under that test, the Commonwealth had the burden to show "an exceedingly persuasive justification" for VMI's exclusion of women, *i.e.* that VMI's admissions policy (1) serves important governmental objectives, and (2) is substantially related to the achievement of those objectives. *Hogan*, 458 U.S. at 724; see also *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 (1994).

[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 155a

Commonwealth had asserted the required "important governmental objective," *Hogan*, 458 U.S. at 724, the court further held in *VMI I* that VMI's male-only admissions policy was not substantially related to achieving that objective. The court stated that Virginia "has not adequately explained how the maintenance of one single-gender institution gives effect to * * * the governmental objective advanced to support VMI's admissions policy, a desire for educational diversity." App. 154a.[4]

Cross-petitioners attempt to characterize the court of appeals' liability judgment in *VMI I* as conflicting rather than comporting with *Hogan* by quoting out-of-context from the decision in *VMI II* upholding the *remedy* in this case. They thus suggest (Cross-Pet. 4-6) that the court's conclusions in *VMI II* about the importance of single-sex education when provided to both men and women supports providing single-sex education to men only. They further suggest (*id.* at

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("As the record stands, * * * evidence of a legitimate and substantial state purpose is lacking."). Indeed, the court noted that the only policy statement in the record "in which the Commonwealth has expressed itself with respect to gender distinctions" requires that its colleges and universities treat students "*without regard to sex, race, or ethnic origin.*" App. 153a (emphasis in opinion).

[4] See App. 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."); *id.* at 154a ("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").

5-6) that the court's characterization of the exclusion of women from VMI and men from VWIL as a means "perfectly tailored" to the achievement of dual single-sex schools helps to justify a policy of excluding women from VMI without providing them *any* parallel opportunity. As the court held in *VMI I*, providing single-sex education exclusively to males is not an important objective under *Hogan*;[5] at no stage of this litigation did the court of appeals hold otherwise.

Petitioners also contend that the court of appeals in *VMI I* "impermissibly engraft[ed] a third requirement onto the two-pronged *Hogan* test." Cross-Pet. 6. Here, again, cross-petitioners quote out-of-context from the court of appeals' *VMI II* decision regarding remedy,[6] attempting to attack the court's liability

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[5] The *Hogan* Court expressly rejected the same argument—*i.e.*, that the women-only admissions policy of the Mississippi University for Women's School of Nursing was justified by the State's interest in preserving for women the benefit of an all-women's school:

> Since any gender-based classification provides one class a benefit or choice not available to the other class, * * * that argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

458 U.S. at 731 n.17; see also *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 151 (1980).

[6] In evaluating the VWIL remedy, the court of appeals concluded that:

> the alternatives left available to each gender by a classification based on homogeneity of gender need not be the

determination by reference to the three-part "special intermediate scrutiny test" announced in its remedy decision—a test that did not even exist at the time liability was established. And even if that three-part test were applicable to review of the liability judgment, the third step would not come into play because the court of appeals at the liability stage correctly held that the first two steps had not been satisfied.[7]

> same, but they must be substantively comparable so that, in the end, we cannot conclude that the value of the benefits provided to one gender tends, by comparison to the benefits provided to the other, to lessen the dignity, respect, or societal regard of the other gender. We will call this third step an inquiry into the substantive comparability of the mutually exclusive programs provided to men and women.

App. 17a.

[7] In defending the judgment of liability, we do not endorse all aspects of the reasoning of the court of appeals' liability decision; nor, of course, would this Court implicitly do so by denying the cross-petition. Correspondingly, to the extent that the court of appeals' remedial determination seeks support in that court's earlier opinion on liability, this Court would remain free, in reviewing No. 94-1941, to reject any of the reasoning of the lower court in either opinion. See *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); R.L. Stern, E. Gressman, S.M. Shapiro & K.S. Geller, *Supreme Court Practice* 363-364 (7th ed. 1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
DEVAL L. PATRICK
Assistant Attorney General
JESSICA DUNSAY SILVER
THOMAS E. CHANDLER
Attorneys

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