

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.*,
Respondents.

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

BRIEF FOR THE COMMONWEALTH OF VIRGINIA,
ET AL., IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Commonwealth of Virginia's single-sex admissions policy for the Virginia Military Institute and the Virginia Women's Institute for Leadership is constitutional given the findings by both courts below that this policy is substantially related to the achievement of important state objectives.
2. Whether the Commonwealth's policy of providing substantively comparable single-sex educational programs to men and women is constitutional where the programs are not identical in every detail but instead incorporate the judgments of educational experts as to the methodologies that will best achieve the same educational benefits for the women and men in each program.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION.....	1
STATEMENT	2
A. Background	2
1. Mary Baldwin College.....	3
2. Virginia Military Institute.....	4
B. Initial Proceedings Below.....	5
1. The District Court's Liability Decision	5
2. The Court of Appeals' Liability Decision	8
3. VMI's Petition for Writ of Certiorari	9
C. Proceedings on Remand.....	10
1. Virginia Women's Institute for Leadership.....	10
2. The District Court's Remedial Decision	15
3. The Court of Appeals' Remedial Decision	17
REASONS FOR DENYING THE WRIT	18

A.	The Judgment Below Does Not Conflict With Any Decisions of This Court Or Of Any Other Appellate Court	19
1.	<i>Sweatt v. Painter</i> is Inapposite ..	20
2.	The Alleged Conflict Asserted by Petitioner Reflects Nothing More Than Disagreement With the Facts Found Below	21
3.	No Decision of this Court Supports the Contention that Admission of Women to VMI is the Only Acceptable Remedy	25
B.	The Questions Presented In The Petition Are Not Of Recurring Or Widespread Importance	29
	CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adarand Constructors, Inc. v. Pena</i> , No. 93-1841 (U.S. June 12, 1995).....	26
<i>Craig v. Boren</i> , 429 U.S. 190 (1976)	27
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973)	26,27
<i>Goodman v. Lukens Steel Co.</i> , 482 U.S. 656 (1987)	24
<i>J.E.B. v. Alabama ex rel. T.B.</i> , 114 S. Ct. 1419 (1994).....	21,27
<i>Metro Broadcasting, Inc. v. FCC</i> , 497 U.S. 547 (1990), overruled in part, <i>Adarand Constructors, Inc. v. Pena</i> , No. 93-1841 (U.S. June 12, 1995)	26
<i>Mississippi Univ. for Women v. Hogan</i> , 458 U.S. 718 (1982)	5,27
<i>Regents of the University of California v. Bakke</i> , 438 U.S. 265 (1978).....	20
<i>Schlesinger v. Ballard</i> , 419 U.S. 498 (1975)	26
<i>Schweiker v. Hogan</i> , 457 U.S. 569(19)	18
<i>Sweatt v. Painter</i> , 339 U.S. 629(1950)	20
<i>United States v. Doe</i> , 465 U.S. 605 (1984)	24
<i>United States v. New York Telephone Co.</i> , 434 U.S. 159 (1977).....	18
<i>VMI v. United States</i> , 113 S. Ct. 2431 (1993)	10

- Vorcheimer v. School Dist.*, 532 F.2d 880
(3d Cir. 1976), *aff'd by equally divided*
Court, 430 U.S. 703 (1977) 19, 20
- Williams v. McNair*, 316 F. Supp. 134
(D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971) 19

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**BRIEF FOR THE COMMONWEALTH OF VIRGINIA,
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Respondents 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 brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The Commonwealth of Virginia offers students of either gender the opportunity to enroll in a state-supported single-sex college program that is designed to develop leadership and character through a comprehensive system of curricular and co-curricular activities including military training. Male students are offered this opportunity through the

Virginia Military Institute (VMI), an historically all-male undergraduate institution; women students are offered this opportunity through the Virginia Women's Institute for Leadership (VWIL), a state-supported program at Mary Baldwin College (MBC), an historically all-female private undergraduate institution. The question on which petitioner seeks review in this case is whether the Commonwealth's decision to offer this unique combination of single-sex educational opportunities for men and women violates the Equal Protection Clause merely because the VWIL and VMI programs do not use identical educational methods to achieve their admittedly identical goals.

STATEMENT

The petition filed by the Solicitor General glosses over crucial facts found by the district court and approved by the court of appeals below. Because the extensive factual record provides a complete refutation of petitioner's contention that further review is warranted, respondents set forth below a more complete statement of the relevant facts.

A. Background

There are 15 public four-year undergraduate institutions in Virginia; these institutions enrolled 72,819 men and 85,441 women in 1989. Historically, many of these institutions maintained single-sex admissions policies, but nearly all are now coeducational. VMI and VWIL are at present the only single-sex college programs supported directly by the Commonwealth. Pet. App. 10a, 185a-189a.¹

¹There are also five private single-sex four-year colleges in Virginia, four of which admit only women and one of which admits only men. The Commonwealth provides financial aid to Virginia residents who attend these and other private colleges in Virginia. Pet. App. 189a-191a.

1. Mary Baldwin College

MBC, the home of the VWIL program, was founded in 1842. Beginning in the 1860s, MBC provided a program of study for women patterned on the curriculum of mathematics, classics, and science then offered only to men at the University of Virginia. In recent decades, MBC has responded to the changing role of women in society by expanding its curriculum "to include the new options open to women in business and the professions." Pet. App. 122a. Accordingly, MBC has "developed an emphasis on career planning," has "computerized the campus," and has added "new facilities for the communications and computer science disciplines" and "new state of the art equipment for its science labs." *Id.* at 122a-123a. In short, MBC "is committed to the education of women for a world of expanding opportunity." *Id.* at 122a.

MBC has over 1300 students, approximately 700 of whom are residential undergraduate students. MBC has a Phi Beta Kappa chapter, is accredited by the Southern Association of Colleges and Schools, and has repeatedly been ranked among the top ten liberal arts colleges in the Southeast. MBC's 55-acre campus in Staunton, Virginia, includes the facilities of the former Staunton Military Academy, residence halls, classroom buildings, computer and science laboratories, a 40,000-square-foot physical education facility, playing fields, tennis courts, and a swimming pool. Pet. App. 123a, 125a-129a.

The student-faculty ratio in MBC's residential program is eleven to one. MBC offers 28 undergraduate majors, including degrees in mathematics, sciences, business, and the arts. MBC also offers pre-law and pre-med programs, as well as joint-degree engineering programs with Washington University and with the University of Virginia. Pet. App. 123a-124a; App., *infra*, 17a, 19a-23a. MBC is "geared in the direction of trying to encourage women to persist in math and physics." *Id.* at 126a.

MBC enjoys "a record of success in developing new programs and operating distinctive and unique programs within the larger traditional undergraduate residential community." Pet. App. 125a. For example, MBC has successfully established a unique residential educational program for academically gifted, high-school-age female students. The program is tailored to "the academic, emotional and developmental needs of young women." *Id.* at 126a.

2. Virginia Military Institute

VMI, which was founded in 1839, has an enrollment of about 1300 students. It employs a unique "adversative" system for developing character and leadership in young men. The adversative method is intended to create doubts about students' previous beliefs and experiences and thereby prepare them to accept the values and behavior taught by VMI. Pet. App. 175a n.10, 189a, 191a-192.

"Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the VMI educational experience." Pet. App. 191a-192a. First-year VMI students are subjected to an extreme form of the adversative model known as the "rat line," which "is comparable to Marine Corps boot camp in terms of both the physical rigor and mental stress of the experience." *Id.* at 194a-195a.

Students at VMI live in a four-story barracks housing one class per floor. "There is a total lack of privacy" in the barracks: there are no door locks or window shades, and the doors to the students' rooms contain open windows that permit "the officer in charge to . . . see every cadet without anything being hidden." Pet. App. 198a-199a. The barracks features group bathrooms² and "close and intimate

²There is one bathroom on each floor, serving up to 400 students. Each bathroom has group showers with about 24

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quarters." *Id.* In short, "there is literally no place in the barracks that physically affords privacy," and students are thus "under constant scrutiny." *Id.* at 198a, 199a. This total lack of privacy and constant scrutiny is an integral part of the VMI experience. *Id.* at 199a.

Also of crucial importance to the VMI method is its strict egalitarianism. "The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way." Pet. App. 237a. The spartan and public nature of life in the barracks "is an aspect of the egalitarian ethic at VMI," as is the fact that VMI imposes the same physical requirements on all students, regardless of ability. *Id.* at 198a, 233a.

Each VMI student must participate in an ROTC program like those offered at other undergraduate institutions. Unlike the federal military academies, which exist to prepare their graduates for career service in the armed forces, VMI's military emphasis is primarily a teaching device; only 15 percent of VMI graduates choose military careers. Pet. App. 116a-117a, 200a, 206a, 218a-219a.

B. Initial Proceedings Below

1. The District Court's Liability Decision

The United States brought suit against respondents in 1990, seeking admission of women to VMI. After a six-day trial, the district court found for respondents under the standard enunciated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), which asks whether a challenged gender-based classification "'serves important gov-

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heads, and there are no doors on the partitions separating each toilet. Pet. App. 128a, 240a.

ernmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives.'" Pet. App. 165a.

Based on the unrebutted expert testimony and academic studies in the record, the court found that a "substantial body of 'exceedingly persuasive' evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college." Pet. App. 168a; *see id.* at 167a-170a, 174a, 176a, 225a-227a. The court further found that VMI's adversative method is beneficial to adolescent males, but ill-suited to most adolescent females. Pet. App. 171a-172a, 223a-225a.³

These findings were based, not on stereotypes or preconceived notions, but rather on the informed judgments and testimony of leading professional educators and social scientists. As the court explained, a "substantial body of contemporary scholarship and research supports the proposition that, although males and females have significant areas of developmental overlap, they also have differing developmental needs that are deep-seated," and thus that "there are important differences between men and women in learning and developmental needs." Pet. App. 223a-224a. Moreover, the court expressly found that "[these] psychological and sociological differences between men and women are real differences, not stereotypes." *Id.* at 225a.⁴

³These findings, of course, refer to the developmental characteristics of college-age male and female students, and reflect the sensitive and sometimes difficult nature of the transition from late adolescence to adulthood that such students are experiencing. The district court made no such findings with respect to students at the graduate or post-graduate educational levels.

⁴Even petitioner's education expert conceded this point, agreeing that "there clearly are differences between men and women, and not only obvious physiological ones, but ones

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The district court also found that "key elements of the adversative VMI educational system . . . would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were . . . to make changes necessary to accommodate [the] needs and interests" of female students. Pet. App. 167a. Substantial changes would inevitably be required to crucial aspects of VMI's educational method, including the rigorous physical training program⁵ and the constant scrutiny and total lack of privacy in the barracks.⁶ And the belief that these changes would occur "is well-founded in empirical evidence, and not based on stereotype." *Id.* at 171a.

These changes would necessarily lead to differential treatment of distinct groups of VMI students on the basis of gender, thereby contradicting VMI's core principle of absolute equality of treatment.⁷ Moreover, coeducation "would

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having to do in part with how they interact, how they learn and so on." 91-1690 C.A. Br. 24; 91-1690 C.A. App. 625.

⁵See Pet. App. 233a ("If women were admitted to VMI, it would be necessary to change certain physical training program courses and to set different standards. . . . Either [some aspects] would have to be abandoned, or there would have to be accommodations that would result in a dual track for women."); *id.* at 234a ("If VMI were coeducational and females were subjected to the same physical demands as male cadets, females would suffer on the order of 300% more injuries than males."); *id.* at 221a.

⁶Pet. App. 233a ("Adaptations would have to be made in order to provide for individual privacy, for the sake of the men as well as for the sake of the women. . . . The introduction of privacy required by admission of women at VMI would contradict the principle that everyone is constantly subject to scrutiny by everyone else.").

⁷Pet. App. 237a ("The VMI experience is based on absolute

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produce cross-sex relationships among cadets that would significantly alter the character-building and leadership-development aspects of the VMI experience." Pet. App. 239a. As a result, "it would be impossible for a female to participate in the 'VMI experience,'" because "her introduction into the process would change it. Thus, the very experience she sought would no longer be available." *Id.* at 175a; *see also id.* at 176a, 227a.

The district court therefore concluded that VMI's admissions policy was constitutional under *Hogan*, because it was substantially related to the important state objectives of increasing educational diversity and providing the "substantial educational benefits" of single-sex education and the VMI method. Pet. App. 173a, 176a-177a.

2. The Court of Appeals' Liability Decision

The court of appeals affirmed the district court's findings of fact but vacated and remanded for further proceedings. In particular, the court of appeals upheld the district court's findings that "VMI's unique methodology justifies a single-sex policy" and that "the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system . . . even more so." *Id.* at 151a; *see id.* at 137a, 150a, 155a.

The court also affirmed the district court's findings "that VMI's mission can be accomplished only in a single-gender

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equality, which is achieved through treating everyone in exactly the same way. . . . Given the actual physiological, psychological, and sociological differences between males and females, it would be impossible to treat everyone fairly by continuing to treat them the same if women were admitted to VMI. Equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism.").

environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology." Pet. App. 148a. Admission of women would require creation of "a dual track physical training program" which would in turn lead to perceptions of unequal treatment, jealousy, and resentment. *Id.* at 146a-147a. The total lack of privacy engendered by the barracks system would no longer be possible. *Id.* at 147a. And the VMI system would be unable to accommodate the cross-sex confrontation and harassment that would necessarily occur if VMI attempted to maintain its adversative method in a coeducational setting. *Id.*⁸

Accordingly, the court of appeals concluded that the admission of women to VMI "would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." Pet. App. 148a. Nonetheless, the court held that the Commonwealth had failed to justify its policy of providing single-sex education only to men. *Id.* at 151a-154a. The court remanded the case to permit the Commonwealth to formulate an acceptable remedy such as "establish[ing] parallel institutions or parallel programs." *Id.* at 156a.

3. VMI's Petition for a Writ of Certiorari

VMI filed a petition for a writ of certiorari seeking review of the court of appeals' liability determination. *VMI v. United States*, No. 92-1213. Petitioner filed a brief in opposition, asserting that certiorari was not warranted because of the fact-bound nature of the court of appeals'

⁸Importantly, the court of appeals expressly rejected petitioner's claim that this finding was based on stereotyping: "the evidence supported the district court's finding that cross-sexual confrontation and interaction introduces additional elements of stress and distraction which are not accommodated by VMI's methodology." Pet. App. 147a.

decision and because this case involves only the constitutionality of VMI's "unique" educational program and therefore does not present important or recurring legal issues. 92-1213 Br. in Opp. 9-20. This Court denied certiorari. 113 S. Ct. 2431 (1993).

C. Proceedings on Remand

1. Virginia Women's Institute for Leadership

Believing that its educational goals would best be served by continuing to provide the option of single-sex education, the Commonwealth chose to extend that option to women through creation at MBC of a state-supported program known as the Virginia Women's Institute for Leadership (VWIL). VWIL will provide single-sex undergraduate education with military training in an integrated program designed "to produce the 'citizen soldier,' *i.e.*, women who are trained for leadership in both civilian and military life." Pet. App. 63a.

In 1993, MBC formed a task force of professionals in the field of single-sex education to plan and implement VWIL. The task force "made an in-depth study of the published literature on the developmental psychology of women and the cognitive development of women" and "consulted outside experts" in addition to drawing on its own collective experience in women's education. Pet. App. 63a, 103a. After conducting "a detailed study of the appropriate methods by which the leadership program should be structured," including an examination of "the VMI methodology and outcomes" (*id.* at 63a, 104a), the task force concluded that VMI's adversative method "would be wholly inappropriate for educating and training most women for leadership roles." *Id.* at 63a.⁹

⁹Petitioner has sought to discredit these conclusions by labeling them "stereotypes." The factual findings below are to the

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Accordingly, the task force developed a program that is specifically designed to develop women leaders through use of a "method which reinforces self-esteem rather than the leveling process used by VMI." Pet. App. 64a. Like VMI, VWIL offers an integrated and "highly structured program" that combines "the co-curricular and the curricular to promote the student's development in all phases of her life" and that pursues "the same five goals as those pursued at VMI: education, military training, mental and physical discipline, character development, and leadership development." *Id.* at 8a, 63a, 103a-104a. More than 40 young women have now accepted admission to VWIL's entering class and paid nonrefundable deposits. App., *infra*, 16a.

As part of the VWIL program, students must demonstrate computer and foreign language proficiency and complete courses in calculus, statistics, and laboratory sciences. In addition, they must complete an extensive leadership development curriculum, a leadership externship, leadership laboratory activities, two Leadership Speaker Series, and community service projects. *Id.* at 9a, 64a-65a, 108a-109a.¹⁰ No male students will attend classes with VWIL

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contrary, however, and petitioner's unsupported characterizations ignore the fact that the task force was composed largely of women whose profession it is to educate female students for leadership roles in society. C.A. App. 269. These individuals have spent their professional lives in this field and would be the very first to detect and reject harmful stereotypes about female college students.

¹⁰Petitioner complains (Pet. 9-10 & n.7, 18) that VWIL students cannot obtain a bachelor of science degree or a state-financed engineering degree. In fact, however, VWIL students can choose from a variety of science and mathematics majors

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students. *Id.* at 65a.

Women enrolled in VWIL are also required to complete four years of an ROTC program through cross-enrollment agreements between MBC and the ROTC units at VMI.¹¹ These ROTC programs will utilize the uniform ROTC curriculum and methods including standardized military physical training and evaluation activities, and will provide the same leadership training and military career opportunities as all other ROTC programs. Pet. App. 67a, 109a, 116a-117a; App., *infra*, 12a-13a. VWIL students will also constitute a corps of cadets with military rank, will wear uniforms, will drill in ROTC, and will participate in the Virginia Corps of Cadets, which consists of all VMI and VWIL cadets together with the coeducational Virginia Polytechnic Institute and State University (VPI) Corps. *Id.* at 110a.¹²

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offered at MBC (Pet. App. 123a), and will have an opportunity to obtain a state-supported degree in engineering through a newly established dual degree program with the University of Virginia. App., *infra*, 17a, 19a-23a. The district court found that there would be only "a very slight demand for an engineering program at an all female VWIL." Pet. App. 65a.

¹¹The military's ROTC programs do not utilize adversative training methods, and it is not necessary for students to be exposed to those methods or to the other aspects of the VMI program in order to succeed in ROTC and the military. Pet. App. 67a, 118a.

¹²VPI's Corps of Cadets has a mission similar to that of VMI and VWIL, but seeks to achieve the same results in the setting of a large coeducational university, thereby enhancing the diversity of the Commonwealth's educational offerings. The VPI Corps is a residential ROTC unit with about 400 male and female students. VPI cadets who are single must live in the Corps residence hall, and all cadets wear uniforms and adhere

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In addition to their ROTC physical training and drill, VWIL students will be required to complete eight semesters of physical and health education, including self-defense and an advanced fitness course designed for VWIL students. Pet. App. 111a. VWIL students will also receive special "training in self-defense and self-assertiveness" as part of a program "designed to be analogous to the VMI 'rat challenge'" and consisting of a variety of "physically and mentally challenging events." *Id.* at 112a. In sum, VWIL's physical training program "is designed to be comparable in rigor and challenge to the physical training test for men at VMI." *Id.*

Before the start of their freshman year, VWIL students will participate in a special "cadre week orientation" to be run by upperclass VWIL students and designed to provide "a physically and mentally demanding experience which will foster bonding and which will be a paradigm for VWIL itself." Pet. App. 110a, 114a. Freshmen VWIL students will room together in freshman residence halls and will be subject to a variety of regulations, including spot inspections and a required study hall. "[T]he VWIL program will use the highly disciplined schedule of the VMI model." *Id.* at 66a-67a, 114a.

After their freshman year, VWIL students will be required to live for at least one year in the VWIL House, which will be the center for VWIL meetings and activities. Pet. App. 115a. Upperclass VWIL students will serve as mentors for incoming VWIL students and will play an important role in orienting incoming students, enforcing rules and regulations, teaching VWIL standards and expec-

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to military-type regulations and discipline. Pet. App. 214a-218a.

tations, organizing and directing drills, and leading the VWIL Corps. *Id.* at 115a-116a. VWIL students will be subject to MBC's honor code system. *Id.* at 114a-115a.

Both the Commonwealth and VMI have provided extensive financial and other support for the development and implementation of VWIL, and they and MBC are committed to the program's success. Pet. App. 68a, 81a-83a, 102a-106a. The Commonwealth has expressed "unambiguous and unequivocal support of single-sex education for men and women," and all relevant Virginia officials "have strongly supported VWIL." *Id.* at 81a, 83a.¹³ The Virginia General Assembly has enacted legislation mandating equal funding (on a per-student basis) for VWIL and VMI without any limit on the maximum number of VWIL students. *Id.* at 10a, 80a & nn. 18-19; App., *infra*, 12a.

VMI has cooperated extensively in the development of VWIL, and "has committed to support the VWIL program." Pet. App. 102a, 105a. VMI and MBC have jointly formed a leadership education advisory board that will study "the advancement of leadership training at VMI and MBC" and will monitor the outcomes of the two programs. *Id.* at 105a; App., *infra*, 6a, 14a; *see also id.* at 17a, 24a-26a. The VMI Foundation has provided substantial financial support for the implementation of VWIL and is committed to providing VWIL with an additional \$5.5 million endowment once final court approval has been obtained. Pet. App. 120a; App., *infra*, 6a-7a, 12a.

VMI is also committed to providing VWIL with full access to and support from its alumni network. VMI alum-

¹³Petitioner notes (Pet. 4 n.2) that former Governor Wilder expressed personal opposition to the exclusion of students from public educational institutions on the basis of gender, but Governor Wilder subsequently submitted an affidavit in support of VWIL, stating that it "will remedy all current discrimination." Pet. App. 81a n.20.

ni and admissions personnel assist in recruiting applicants for VWIL. Pet. App. 120a-121a; App., *infra*, 3a, 5a, 10a, 14a. The VMI Alumni Association has extended its placement services and networks to VWIL, will assist VWIL students in obtaining leadership externships, and has begun to develop joint alumni networking opportunities with MBC. Pet. App. 121a; App., *infra*, 6a. In short, "[t]he attitude of VMI alumni toward VWIL is extremely supportive. They are committed to making VWIL work." Pet. App. 121a.

2. The District Court's Remedial Decision

After conducting a six-day trial and considering the testimony of 18 expert witnesses (Pet. App. 87a-98a), the district court found that the Commonwealth had satisfied the requirements of the Equal Protection Clause by offering VWIL as a single-sex leadership education program for women. Rejecting petitioner's argument that the Commonwealth was required to provide a mirror-image VMI for women, the court expressly found that "VWIL is a good design for producing female citizen-soldiers" and that "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping." *Id.* at 67a, 76a.¹⁴

¹⁴This finding is supported not only by evidence introduced by respondents but also by statements of petitioner's witnesses. For example, according to petitioner's expert Dr. Alexander Astin, "[s]ome of the largest gender differences occur in the area of psychological well-being: the declines in psychological well-being (feeling depressed, feeling overwhelmed, low self-rating on emotional health) are all stronger among women than among men during the undergraduate years." C.A. App. 278. See also Pet. App. 225a (noting that petitioners' witness Colonel Patrick Toffler, Director of the Office of Institutional Research at West Point, conceded that "[t]he psychological and sociological differences between men and women are real differences, not stereotypes").

In support of these findings, the court relied on expert testimony that "the VWIL approach towards educating and preparing women leaders was preferable to the VMI approach" and indeed that "the demand for an all-women's VMI would be so small as to make the project unfeasible," whereas "there would be much more significant demand for VWIL." *Id.* at 73a, 75a & n.12.

Indeed, as the court noted, Dr. Elizabeth Fox-Genovese, "one of the leading experts on the educating of women," testified that "an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive," because it would be destructive of women's self-confidence. Pet. App. 64a, 74a. Petitioner offered *no* experts in single-sex education, leaving this testimony effectively unrebutted. Moreover, the court expressly rejected the testimony of Dr. Carol Jacklin, petitioner's expert in psychology, who asserted that the differences in methodology at VMI and VWIL were based on stereotypes. *Id.* at 72a-73a. The court explained that Dr. Jacklin's "testimony was contradicted by most of the evidence in the record," including her own admissions that women students tend to be less aggressive in the classroom and would "have more chances for leadership at single-sex institutions." *Id.*

The district court also found that VWIL was likely to attain its goal of producing "citizen-soldiers" well prepared for leadership roles in civilian and military life. Pet. App. 83a. Based on the experts' conclusions that "the methods adopted for the VWIL will produce the same or similar outcome for women that VMI produces for men" (*id.* at 64a) and that "VWIL will produce the kind of self-assurance in the face of accomplishment of difficulties that VMI offers and requires of its cadets" (*id.* at 75a-76a), the district court rejected petitioner's argument that VWIL must mirror VMI. Instead, the court held that VWIL satisfied the Commonwealth's constitutional obligations because it

"will achieve substantially similar outcomes in an all-female environment and . . . there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends." *Id.* at 76a.

3. The Court of Appeals' Remedial Decision

The court of appeals affirmed and remanded for further proceedings. The court made clear at the outset that, in addition to the two-pronged test applied by this Court in *Hogan*, it was requiring the Commonwealth to satisfy a third requirement, which entails "carefully weighing the alternatives available to members of each gender denied benefits by the classification" in order to determine whether those alternatives are "substantively comparable." Pet. App. 17a.

Turning to the first prong of the *Hogan* test, the court reaffirmed the factual finding that "single-gender education at the college level is beneficial to both sexes," and concluded that "a state's opting for single-gender education as one particular pedagogical technique among many" is "a legitimate and important governmental objective." Pet. App. 20a, 21a. The court next concluded that the Commonwealth's decision to provide single-sex education through VMI and VWIL was directly related to the Commonwealth's legitimate and important objectives, because "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." *Id.* at 22a. In addition, the court found 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 essential "'characteristics of VMI's program would be destroyed by coeducation.'" *Id.* at 6a-7a, 23a.

Finally, the court concluded that the benefits offered by VMI and VWIL were "substantively comparable." Pet. App. 24a-28a. After scrutinizing the two programs, the

court found that "the mission and goals are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution." *Id.* at 27a. Moreover, the differences in the two programs are justified because they are "attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 26a.

Indeed, as the court explained, providing women with a program identical to VMI would not be practicable, because "[e]ducational experts for the Commonwealth testified that women may not respond similarly" to an adversative approach and that a women's program identical to VMI "would attract an insufficient number of participants to make the program work." Pet. App. 27a. Accordingly, the court of appeals upheld the remedy approved by the district court. In order to ensure the effective and successful implementation of VWIL, the court remanded the case to the district court with instructions to oversee the remedy. Pet. App. 30a.

REASONS FOR DENYING THE WRIT

The petition meets none of this Court's criteria for the exercise of its certiorari jurisdiction. In the first place, the petition is limited to remedial issues, but threshold questions about the correctness of the court of appeals' liability determination would likely preclude the Court from reaching those issues in this case.¹⁵ Moreover, as set forth

¹⁵Respondents have filed a conditional cross-petition challenging the court of appeals' liability determination. *See Virginia v. United States*, No. 94-_____. Regardless of the disposition of that cross-petition, however, the threshold question of liability will arise in this case if the Solicitor General's petition is granted, because a judgment may be defended on any ground supported by the record. *Schweiker v. Hogan*, 457 U.S. 569, 585 n.24 (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). Of course, respondents fully

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below, there is no conflict among the circuits, nor (despite petitioner's contentions to the contrary) is there any inconsistency between the decisions of this Court and the decision below. Indeed, petitioner's challenge to the court of appeals' ruling rests fundamentally on petitioner's rejection of explicit factual determinations rather than on any legal question of substantial or recurring importance. Petitioner simply disagrees with the factual findings by both courts below that the differences between the VMI and VWIL programs reflect pedagogically justified responses to non-stereotypical differences between male and female college students. That fact-bound disagreement is not worthy of review, and the petition should therefore be denied.

A. The Judgment Below Does Not Conflict With Any Decisions Of This Court Or Of Any Other Appellate Court

As petitioner implicitly concedes, there is no circuit conflict on the questions raised in the petition. Indeed, the decision below is consistent with the only lower court opinions (and judgments of this Court) addressing the constitutionality of dual single-sex educational programs. *Compare Vorchheimer v. School Dist.*, 532 F.2d 880, 882, 887-88 (3d Cir. 1976) (upholding separate boys' and girls' high schools because they were "comparable" but not identical), *aff'd by equally divided Court*, 430 U.S. 703 (1977), and *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970)

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support the VWIL program and accept the remedial ruling below, but the absence of a proper basis for the court of appeals' liability determination will provide an alternative (and logically prior) ground for affirmance in the event of review by this Court.

(upholding separate public "school for young ladies" where State also supported a single-sex "military school" for men), *aff'd*, 401 U.S. 951 (1971), *with Pet. App.* 25a, 28a (State must "affor[d] to both genders benefits comparable in substance, but not in form and detail").

Petitioner instead asserts that certiorari is warranted because of purported conflicts between this Court's precedents and the decision below. These purported conflicts do not exist, however, and further review is therefore not warranted.

1. *Sweatt v. Painter* is Inapposite

Petitioner errs in contending (Pet. 16, 18) that the decision below "conflicts with" *Sweatt v. Painter*, 339 U.S. 629 (1950). *Sweatt* involved a *racial* classification, not a gender-based classification, and this Court has never applied (or even cited) *Sweatt* in a case involving the latter issue.¹⁶ Petitioner cites this Court's decision in *Hogan* for the proposition that the "separate but equal" test applied in *Sweatt* is also applicable here (Pet. 17, citing 458 U.S. at 720 n.1), but the cited footnote instead reveals that the *Hogan* Court did not address that issue, which was not presented on the facts of that case.

Moreover, even petitioner is apparently unwilling to take

¹⁶Indeed, in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a case involving racial classifications in education, Justice Powell's controlling opinion relied in part on *Sweatt* (*see id.* at 287, 313-14) but expressly rejected the relevance of the legal standards applied in cases involving gender-based classifications, noting that "the Court has never viewed [gender-based] classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis." 438 U.S. at 303; *accord Vorchheimer*, 532 F.2d at 886 (holding that *Sweatt* is "inapplicable" in analyzing constitutionality of dual single-sex schools).

the position that the Court's analysis in *Sweatt* is applicable without modification in the context of single-sex schools. Instead, petitioner suggests (Pet. 16) that differential treatment of the genders is permitted if the State "justifies] any inequality under a standard of heightened constitutional scrutiny." But that is not the test set forth in *Sweatt*, and the fact that petitioner feels compelled to rewrite *Sweatt* before attempting to extend it to gender-based classifications is simply further evidence of the inapplicability of that decision in this context. And in any event, the findings below demonstrate that VMI and VWIL would satisfy the hybrid test proposed by petitioner, so there is no possibility of a conflict. See Pet. App. 76a ("there is a legitimate pedagogical basis for the different means employed [by VMI and VWIL] to achieve the substantially similar ends"); *id.* at 26a, 27a.

2. The Alleged Conflict Asserted by Petitioner Reflects Nothing More Than Disagreement With the Facts Found Below

Petitioner also asserts (Pet. 16, 19) that the decision below conflicts with *Hogan, J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), and similar cases involving the constitutionality of gender-based classifications. According to petitioner, this purported conflict arises because the court of appeals did not apply the test enunciated in those cases, which asks whether "the difference in treatment serves important governmental objectives and is substantially related to the achievement of those objectives." Pet. 19.

Petitioner's attempt to manufacture a conflict with this Court's gender-discrimination precedents rests upon a misreading of the decisions below. Both courts below expressly acknowledged and applied the precise legal standard

quoted by petitioner. *See* Pet. App. 13a, 145a, 165a.¹⁷ Petitioner disagrees with the conclusion reached by the lower courts in applying that standard to the facts of this case, but that fact-bound disagreement hardly justifies the exercise of this Court's certiorari jurisdiction.

Indeed, a careful reading of the petition demonstrates that petitioner's real objection to the decision below is aimed at the factual underpinnings of that decision, not the legal standard applied by the court of appeals. Petitioner's principal and often-repeated claim is that the court of appeals allegedly based its ruling on "stereotypes" and "archaic notions" about women and their proper role in society. *See, e.g.*, Pet. 15, 19-24. That assertion, however, is directly contrary to the factual findings below, and the issues raised in the petition effectively disappear once those findings--rather than petitioner's characterizations--are examined.

As the district court found, modern scholarship and research demonstrates that "there are important differences between men and women in learning and developmental needs," and these "psychological and sociological differences are real differences, not stereotypes." Pet. App. 224a, 225a. Moreover, the court found that VWIL was carefully designed to achieve the same results as VMI by taking account of these differences in its student body, and thus "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping." *Id.* at 76a.¹⁸ The court of appeals agreed, explaining that "the

¹⁷As noted above, the court of appeals went beyond *Hogan*'s two-pronged test by creating a *third* prong that also had to be satisfied by the Commonwealth, but petitioner obviously does not and cannot contend that the creation of this additional requirement (which did not affect the result below and merely imposed an unduly high burden on respondents) provides a basis for review.

¹⁸Indeed, even petitioner's expert witnesses did not assert that

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difference [between VWIL and VMI] is attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 26a.

These findings demonstrate conclusively that this case is wholly unlike *Hogan, J.E.B.*, or the other cases cited by petitioner (Pet. 19-21 & n.17). Rather than relying on outdated stereotypes or unfounded presumptions about the respective roles of the genders, the courts below considered the most up-to-date sociological, psychological, and physiological research and expert opinion and found, based on a "reasoned analysis" of the evidence, that real differences between adolescent men and women and between the optimum methods of educating them justify the methodological differences between VWIL and VMI. Neither the Constitution nor this Court's cases require more.¹⁹

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the VWIL program would be inappropriate or ineffective for women. Pet. App. 68a, 76a. Petitioner's expert on curricular and co-curricular offerings admitted that neither VMI's program nor VWIL's program was "better than the other." *Id.* at 69a n.5, 96a. Petitioner's contention in this Court that VWIL reflects harmful stereotypes and prejudicial views of women is thus contrary to the record and findings below.

¹⁹Petitioner contends (Pet. 22) that the Constitution forbids educators to take account of demonstrable differences in the educational needs of male and female adolescents because such differences "may well reflect the effects of long-standing sex-based limitations on social roles." Petitioner offers no support for this *ipse dixit*, however, and whatever its validity, it would hardly follow that educators must ignore these real differences in formulating education programs. Instead, the approach most in keeping with the Constitution's mandate of equal opportunity would be for educators to develop programs that are designed to *eliminate* any lingering effects of past societal stereotyping by developing self-confident graduates who are well-equipped to seek and obtain positions in all facets of

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In short, the factual findings by the courts below are fatal to petitioner's attempt to create an inconsistency between the judgment below and the decisions of this Court. Petitioner's quarrel is with the record, not the law, but this Court does not sit to review facts found by two lower federal courts. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 614 (1984).²⁰ The purported "conflict" identified by petitioner

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American society, regardless of archaic notions about which gender is better suited to a particular job. The findings and expert evidence in the record demonstrate that single-sex education tends to *reduce* the effects of societal stereotyping on both men and women by making students "more likely to take the risk of choosing a career normally associated with the other sex," Pet. App. 226a, and that VWIL will be *more* effective than a mirror-image VMI at preparing most women students to assume leadership roles in modern society. *Id.* at 27a, 63a-64a, 73a-74a.

²⁰Petitioner's cavalier treatment of the facts is also apparent from its argument (Pet. 20, 21) that exclusion of women from VMI perpetuates an "archaic, exclusive association of each gender with particular professions--here the premise that men, and not women, are fit to be military leaders." Exclusion from VMI sends no message of unfitness for a military career, because (with the exception of the service academies) *all* undergraduate institutions--including VMI, VWIL, and the coeducational University of Virginia and VPI--produce military leaders in precisely the same way: through standardized ROTC programs that are the same across the Nation. The district court specifically found that (1) "nothing about the ROTC programs at VMI is unique to VMI other than the absence of women," (2) non-VMI students perform marginally *better* than VMI students in their ROTC programs, and (3) VWIL's ROTC programs will offer "the opportunity to be commissioned in the armed services." Pet. App. 116a-117a, 119a. Thus, women enrolled at VWIL have at least as good

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simply does not warrant review.

3. No Decision of this Court Supports the Contention that Admission of Women to VMI is the Only Acceptable Remedy

Petitioner also errs in contending (Pet. 23-26) that the decision below conflicts with precedents of this Court holding that "overbroad . . . generalizations" cannot be used to justify "sex-based classifications that are applied to foreclose individual opportunity." In the first place, as already noted, the differences between VMI and VWIL are not based on "'archaic'" and "'outdated'" assumptions or "'stereotypical'" notions containing at most a "'shred of truth'" (Pet. 24 & n.20), but are instead predicated on the expert knowledge, advice, and research of highly regarded professional educators and social scientists. The cases cited by petitioner are therefore inapposite.

Second, the cases on which petitioner relies involved gender-based classifications that were overbroad in that they excluded all members of the disfavored class even though the governmental justification for the classification was not applicable to many of the excluded individuals and thus was not served by their exclusion. In this case, by contrast, the gender-based classification is not overbroad. Rather, it is directly and precisely tailored to the Commonwealth's legitimate and substantial interest in providing a diverse educational system that offers the unique benefits of a single-sex college education, and those benefits simply cannot be achieved without a gender-based admissions policy.

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an opportunity to become military leaders as they would if they were enrolled at VMI, and there is no basis for petitioner's assertions to the contrary.

Third, petitioner is simply wrong in suggesting that a classification is invalid if there are any members of one gender as to whom the classification is not accurate. This Court has never held that there must be a paradigmatically perfect fit between a gender-based classification and the interests served by it, and petitioner points to no authority to the contrary. Instead, petitioner cites cases holding that a gender-based classification must be "substantially related" to the achievement of the underlying objective.²¹ As this Court made clear in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990),²² however, a classification need not be accurate "in every case" in order to survive intermediate scrutiny. Rather, as long as the empirical evidence suggests that the classification will, "in the aggregate," advance the underlying objective, the classification will be upheld as the "product of 'analysis' rather than a 'stereotyped reaction' based on '[h]abit.'" 497 U.S. at 579, 582-83.²³ That approach is particularly appropriate in the con-

²¹Petitioner also cites (Pet. 24 n.20, 25 n.21) Justice Brennan's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973). That opinion, however, applied "strict judicial scrutiny" to a gender-based classification. *Id.* at 688. That approach has never been adopted by the full Court, and petitioner has not asked the Court to revisit that issue (which was, in any event, neither pressed nor passed upon below). Petitioner's reliance on the *Frontiero* plurality is therefore inappropriate.

²²In *Adarand Constructors, Inc. v. Pena*, No. 93-1841 (U.S. June 12, 1995), slip op. 26, this Court overruled *Metro Broadcasting*'s holding that certain federally mandated race-based classifications are subject only to intermediate scrutiny. The *Adarand* Court did not suggest that *Metro Broadcasting* represented an inaccurate illustration of the intermediate-scrutiny standard, however, and thus *Metro Broadcasting* continues to provide guidance on that issue.

²³*Accord Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)

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text of higher education, because educational programs must of necessity be designed to accommodate group characteristics and preferences rather than the desires of individual students.

Finally, petitioner's argument in this regard, as well as its requested remedy (Pet. 26-29), rests on the false assumption that those few women who might be interested in experiencing the unique elements of a VMI-type education could do so if a different remedial approach were mandated by the courts. That assumption is belied by the record and findings below, which demonstrate conclusively that it

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(rejecting argument that separate classification of male and female Navy officers was based on impermissible "archaic and overbroad generalizations" where facts demonstrated that women "will not *generally* have compiled records . . . comparable to those of male[s]") (emphasis added). Petitioner's argument that perfect tailoring is required rests on a misreading of the relevant precedents. For example, petitioner cites *Craig v. Boren*, 429 U.S. 190 (1976), in support of this argument (*see* Pet. 25 n.21), but the classification invalidated in *Craig* was almost absurdly imprecise. *See* 429 U.S. at 201-202, 203 n.16 ("if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit,' and the alleged "statistical disparities between the sexes are not substantial"). Likewise, petitioner relies (Pet. 24-25) on *J.E.B.*, but most of the empirical evidence in that case refuted the existence of *any* correlation between gender and juror attitudes. 114 S. Ct. at 1426-27 & n.9. *See also Hogan*, 458 U.S. at 731 (record was "flatly inconsistent" with assertion that classification was related to proffered justification); *Frontiero*, 411 U.S. at 689 ("[t]he Government offer[ed] no concrete evidence . . . tending to support its view that" the challenged classification advanced the proffered governmental interest).

would be impossible to duplicate the VMI experience for women with the mathematical precision expected by petitioner.

In the first place, a separate women's program identical to VMI would be unworkable and financially impossible because too few women would be interested in participating in such a program. As the court of appeals noted, petitioner did not offer sufficient evidence to refute respondents' showing at trial that "if the state were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work." Pet. App. 27a; *see id.* at 73a, 75a & n.12.²⁴

Likewise, as both courts below found, women cannot be admitted to VMI itself without destroying the very aspects of its program that serve to distinguish it from VPI, VWIL, and other institutions. Pet. App. 6a-7a, 24a-25a, 146a-148a, 170a-173a, 227a, 233a-234a, 237a-239a. The fundamental characteristics of VMI's educational method, including the adversative system, the total absence of privacy, and the strict egalitarianism that pervades all aspects of the program, would undergo radical change or disappear altogether with the admission of women, thus denying those women "the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." *Id.* at 6a-7a.

Petitioner disputes the accuracy of the latter finding, arguing (Pet. 27-29) that it is factually inaccurate and is

²⁴Based on West Point's experience in recruiting for its non-adversative, coeducational program, the district court concluded (Pet. App. 174a) that "some women" would want to attend a *coeducational* VMI (with the modified educational program entailed by coeducation). Petitioner offered *no* evidence of any significant interest in a mirror-image VMI for women, however, and thus it is undisputed that such a program would not be feasible.

improperly based on "sex-based generalizations." This challenge to the findings of both lower courts is not worthy of review, of course, and it is also incorrect. The evidence at trial--as distinct from the conclusory and baseless assertions of petitioner's counsel--demonstrates that VMI's adversative method would necessarily go the way of West Point's similar system if VMI were to become coeducational.²⁵ Indeed, the Marine Corps has been able to preserve the harsh regimen of its boot camps only by returning to a single-sex methodology (Pet. App. 235a), and petitioner points to no basis for concluding that VMI would have a different experience. In short, petitioner's characterizations of the facts of this case are simply false, and further review of these fact-bound issues is neither warranted nor appropriate.

B. The Questions Presented In The Petition Are Not Of Recurring Or Widespread Importance

For the reasons set forth above, the decision below does not conflict with any decisions of this Court or other appellate courts, and petitioner's disagreement with the court of appeals' ruling involves nothing more than case-specific

²⁵As the district court found, West Point modified and then abandoned the adversative model altogether after women were admitted, and it also rejected fixed physical training standards in favor of "comparable" training, thereby creating inequalities and resentment among the cadets. Pet. App. 235a-241a. Even petitioner made clear below that coeducation would require substantial changes in VMI's method, including the introduction of separate sports teams and dual-track physical education activities for women, the creation of privacy rights on the basis of gender, and the elimination of "harassment" deemed inappropriate for women. C.A. App. 99-103, 107-108. The result of these changes, of course, would be the complete demise of VMI's core ethos of equal treatment for all. Pet. App. 237a.

questions about the accuracy of the factual determinations made by the courts below. Nor does petitioner suggest that a decision on the merits in this case would have widespread impact or significance such that a grant of certiorari would be appropriate even absent any of the usual justifications for this Court's review. According to the petition, this case "does *not* require the Court to address the validity of public single-sex education generally." Pet. 16 n.13 (emphasis added). Instead, petitioner repeatedly emphasizes the purported *narrowness* of the questions presented, arguing that the judgment below is wrong because this case involves the "unique" educational methodology of a "unique" school. Pet. 15, 16 n.13. Indeed, petitioner even suggests (Pet. 27) that the remedy allegedly required here may be inapplicable in other cases involving single-sex schools, again because of the unique facts of this case.

Taking petitioner at its word, this case is simply not of sufficient general or recurring importance to merit review. Indeed, as petitioner explained in opposing review at an earlier stage of this case, further review is not warranted at this time because the rulings below rest on facts that "primarily involve VMI, an institution that petitione[r] [has] consistently described as 'unique.'" 92-1213 Br. in Opp. 19. "There is only one other all-male public college [in the Nation] besides VMI, and the fact that a challenge to its single-gender policy might raise issues similar to those of this case does not, standing alone, warrant further review." *Id.* at 19-20.

Petitioner's earlier objections to certiorari are at least equally applicable here. The Court previously denied certiorari in this case, and the petition identifies no persuasive reason for reaching a different result now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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