No. 94-1941

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

COMMONWEALTH OF VIRGINIA, ET AL.

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether a State that provides a rigorous military-style public educational program for men can remedy the unconstitutional denial of the same opportunity to women by offering them a different type of single-sex educational program deemed more suited to the typical woman.

2. Whether coeducation is the required remedy in the context of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals regarding remedy (Pet. App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (Pet. App. 53a-131a) is reported at 852 F. Supp. 471. The opinion of the court of appeals regarding liability (Pet. App. 134a-157a) is reported at 976 F.2d 890. The opinion of the district court regarding liability (Pet. App. 158a-245a) is reported at 766 F. Supp. 1407.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1995. The court of appeals voted sua sponte not to rehear the case en banc, and entered an order to that effect on April 28, 1995 (Pet. App. 246a-257a). On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. The petition

for a writ of certiorari was filed on May 26, 1995, and was granted on October 5, 1995 (116 S. Ct. 281). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. *The Virginia Military Institute.* The Virginia Military Institute (VMI) is a state military college in Lexington, Virginia. Since its founding in 1839, VMI has maintained a policy of admitting only men to its four-year undergraduate degree program. The fourteen other public colleges in Virginia are all coeducational. Approximately 1300 male students are enrolled at VMI. Pet. App. 137a-138a, 141a.

VMI's mission statement declares that VMI's goal is to produce "citizen-soldiers," described as "educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." Pet. App. 6a, 139a. The VMI curriculum includes liberal arts, science and engineering courses, and VMI confers both Bachelor of Arts and Bachelor of Science degrees. *Id.* at 200a.

As the district court found, VMI has a strong reputation for producing leaders, and has an exceptionally loyal and powerful alumni network. Pet. App. 137a-138a. That network is "enormously influential," 94-1667 & 94-1717 (*VMI II*) Tr. 1227, especially in the male-dominated fields of engineering, the military, business, and public service in which VMI graduates tend to pursue careers, *id.* at 1228. "VMI alumni

overwhelmingly perceive that their VMI educational experience contributed to their obtaining personal goals." Pet. App. 205a. VMI enjoys the largest endowment on a per-student basis of any undergraduate institution in the United States. *Id.* at 130a.

VMI employs an "adversative" method of character development and leadership training not currently used by any other college-level institution. That method is based on techniques used in "English public schools" and "earlier military training," although it has long been abandoned at the United States military academies. Pet. App. 139a, 192a. The method "emphasizes physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values." *Id.* at 139a; see *id.* at 191a-192a. "As a consequence of completing the rigorous tasks, succeeding, and actually graduating from VMI, VMI cadets have a sense of having overcome almost impossible physical and psychological odds. They have been put through great physical pressures and hazards, and just to have made it yields a feeling of tremendous accomplishment." *Id.* at 205a.

VMI's adversative method is implemented through a pervasive military-style system. Pet. App. 140a-141a, 191a-200a. The system includes the "rat line," which is a seven-month regimen during which first-year cadets, or "rats," are "treated miserably," like "the lowest animal on earth." *Id.* at 194a-195a.[1]

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[1] The term "rat line" derives from the prescribed route through the barracks that first-year cadets must traverse during most of the first year in a position of rigid attention. Gov't Exh. 73, at 17, Lodged Materials From The Record (referred to herein as L. __) at 268.

"Rats" are subjected to a strict system of punishments and rewards that creates "a sense of accomplishment and a bonding to their fellow sufferers and former tormentors." *Id.* at 194a. The "rat line" experience is accompanied by "rat training," "a tough physical training program" "designed to foster self-confidence and physical conditioning in fourth classmen [i.e., freshmen] by creating training situations which are stressful enough to show them that they are capable of doing tasks which surpass their previously self-imposed limits." *Id.* at. 195a; 91-1690 (*VMI I*) C.A. App. 1668 (L. 192).

The "class system" assigns roles to each class of cadets within a hierarchy in order to "cultivat[e] leadership." Pet. App. 196a. "After the rat line strips away cadets' old values and behaviors, the class system teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote." *Ibid.* VMI's program also includes the "dyke system," an arrangement by which each "rat" is assigned a senior as a mentor to give some "relief from the extreme stress of the rat line." *Id.* at 196a-197a. VMI's honor code—providing that a cadet "does not lie, cheat, steal nor tolerate those who do"—provides "the single penalty of expulsion for its violation." *Id.* at 140a.

VMI requires cadets to "live within a military framework; they wear the cadet uniform at the Institute, eat most meals in the mess hall, live in a barracks, and regularly take part in parades and drills." *VMI I* C.A. App. 52. "[T]he most important aspects of the VMI educational experience occur in the barracks." Pet. App. 197a-198a. There, cadets live at close quarters with one another, three to five together in stark and unattractive rooms, with poor

ventilation, unappealing furniture, windowed doors with no locks and no window coverings. *Id.* at 199a. "[A] cadet is totally removed from his social background," and placed in an environment the principal object of which is "to induce stress." *Ibid.*

Although VMI has always restricted admission to men, some women "would want to attend [VMI] if they had the opportunity." Pet. App. 174a; see also *id.* at 231a, 232a (recruitment of women would likely yield a 10% female student body at VMI). Between 1988 and 1990 VMI received 347 letters from women inquiring about admission, or indicating interest in attending VMI. *Id.* at 229a; see Gov't Exhs. 104, 105 (*e.g.*, L. 156). It is not disputed that some women can succeed within the VMI-type methodology and are capable of doing all of the individual activities required of VMI cadets. Pet. App. 76a, 146a, 223a, 234a. The district court expressly found that the VMI methodology "could be used to educate women." *Id.* at 76a; see *id.* at 155a.

2. *The Liability Determination.* On March 1, 1990, the United States sued the Commonwealth of Virginia, the Governor of Virginia, VMI, its Superintendent and Board of Visitors, and others responsible for the operation of VMI and for coordination of Virginia's system of higher education, in the United States District Court for the Western District of Virginia. The suit was filed pursuant to 42 U.S.C. 2000c-6 in response to a complaint filed with the Attorney General by a female high school student seeking admission to VMI. The United States alleged that VMI's men-only admissions policy violated the Equal Protection Clause of the Fourteenth Amendment, and sought an order enjoining respondents from excluding women and from otherwise

discriminating on the basis of sex in the operation of VMI. Pet. App. 141a.

Neither the Governor nor the Commonwealth of Virginia participated at the liability phase in defending VMI's admissions policy.[2] The VMI Foundation and the VMI Alumni Association, both private organizations, intervened as defendants. Pet. App. 160a. They maintained that VMI's exclusion of women was substantially related to two "important governmental objectives": "educating cadets for lives as 'citizen-soldiers,'" R. 152 (VMI Defendants' Proposed Findings of Fact and Conclusions of Law (liability phase) (Apr. 26, 1991)), at 114 (¶ 28), and fostering "system-wide diversity by providing an opportunity for single-sex education and by providing a distinctive program of military-style education," *id.* at 115 (¶ 38).

On June 14, 1991, the district court entered judgment in favor of respondents. Pet. App. 158a-245a. It held that the exclusion of women was substantially related to respondents' asserted important state interests because "[t]he single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women." *Id.* at 173a.

On appeal, a panel of the Fourth Circuit held that VMI's admissions policy violated the Equal Protection Clause and remanded to the district court for remedial proceedings. Pet. App. 134a-156a (*VMI I*). The court concluded that the Commonwealth "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type

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[2] The then-Governor took the position that no person should be denied admission to a state college on account of sex. Pet. App. 142a; see also Answer at ¶¶ 15-16 (L. 7-8); *VMI I* C.A. App. 131-132 (L. 22-23).

education to men and not to women." *Id.* at 155a. Noting that the only policy statement in the record "in which the Commonwealth has expressed itself with respect to gender distinctions" required that its colleges and universities treat students *"without regard to sex, race, or ethnic origin,"* *id.* at 153a (emphasis added by court of appeals), the court rejected the district court's conclusion that Virginia has a policy of providing single-sex education to promote a diverse array of options, *id.* at 152a-153a. Moreover, "[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." *Id.* at 153a-154a.

The court of appeals then concluded that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." Pet. App. 155a. Admission of women, however, would lead to some changes at VMI. The court therefore declined, "[i]n light of * * * the generally recognized benefit that VMI provides," to "order that women be admitted to VMI if alternatives are available." *Ibid.* The case was remanded to the district court "to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied":

> [T]he Commonwealth might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private

> institution. While it is not ours to determine, there might be other more creative options or combinations.

Id. at 156a.

This Court denied certiorari. *VMI* v. *United States*, 113 S. Ct. 2431 (1993). Pet. App. 132a-133a.

3. *The Virginia Women's Institute for Leadership Remedial Plan.* On remand, respondents proposed as a remedy the reservation of VMI exclusively for men, and, for women, the creation of a women-only Virginia Women's Institute for Leadership (VWIL), a separate program to be located on the campus of Mary Baldwin College, a private women's liberal arts college located 35 miles from VMI. Pet. App. 8a. That program, reflecting respondents' views of "the differences and the needs of college-age men and women," *id.* at 62a, would be based on "a cooperative method which reinforces self-esteem rather than the leveling process used by VMI," *id.* at 63a-64a. The program would be "equivalent to a [curricular] minor, that would explore various aspects of women's leadership." Gov't Exh. 52, at 1 (L. 248).

The program was developed by a Task Force selected by respondents and composed entirely of faculty and administrators at Mary Baldwin. VWIL would be consistent with Mary Baldwin's "historical mission" because "we couldn't insert into Mary Baldwin something that would be VMI but would not be Mary Baldwin." *VMI II* C.A. App. 436 (testimony of Dean of Mary Baldwin College). The Task Force did not consult anyone at VMI in planning the curriculum; the president of Mary Baldwin stated that "[w]e are the experts on educating women." *Id.* at 418. VWIL would be funded by the Commonwealth and the VMI

Board of Visitors, and would be anticipated to have about 25-30 students in its first year. Pet. App. 10a.

The Task Force adopted for VWIL the VMI mission of producing "citizen-soldiers," Pet. App. 8a,[3] but it rejected every component of VMI's system. Finding that "[y]oung women will be for the foreseeable future products of a culture which encourages them to find their sense of self in relationships," *VMI II* C.A. App. 255 (L. 329), the Task Force "determined that a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women for leadership roles." Pet. App. 63a.[4]

The Task Force rejected VMI's military lifestyle for VWIL. *VMI II* C.A. App. 471-472.[5] VWIL would

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[3] VWIL's mission statement, however, omits the VMI mission statement's commitment to producing graduates who are "advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril." Pet. App. 202a.

[4] One Task Force member, the Dean of Students at Mary Baldwin, relied on her experience as a sorority advisor to conclude that women would not benefit from VMI training. *VMI II* C.A. App. 591. She observed that, while young men "will paddle their pledges," "make them consume alcohol" and "eat disgusting things," young women "will give flowers [and] write poems." *Id.* at 599. She had "never met a young woman who would seek out a program like" VMI's. *Id.* at 598-599. Another Task Force member, the Dean of Mary Baldwin, stated that VMI's adversative training method would have a parallel in a different adversary for the women of VWIL: For the young woman, "[p]erhaps the adversary is herself and her sense that she's never been expected to do this before." *Id.* at 459.

[5] A mailing Mary Baldwin College sent to alumnae and friends of the college posed the question "Is Mary Baldwin going to turn into a military school?" and answered "No! Mary

provide no military framework or training other than the Mary Baldwin ROTC program, involving two hours of training per week for freshman and sophomores and four hours per week for juniors and seniors. Pet. App. 109a-111a.[6] VWIL students would also participate in a newly established, largely ceremonial Virginia Corps of Cadets. *Id.* at 9a, 110a. VWIL students would not wear uniforms except when participating in ROTC or Virginia Corps of Cadets activities. *Id.* at 111a. VWIL students would participate in a leadership externship, keep a journal, participate in organizing a speaker series, and organize and carry out community projects. *Id.* at 9a. When the President of Mary Baldwin presented the VWIL concept to the college faculty, the discussion about possibly having military marching and parades on the campus "was fraught with humor." *VMI II* C.A. App. 482-483. In contrast with "the entirely militaristic experience of VMI," "VWIL * * * incorporates the element of public service." Pet. App. 68a; see also *VMI II* C.A. App. 464.

Instead of the "rat line," VWIL would have "training in self-defense and self-assertiveness through a Cooperative Confidence Building program." Pet. App. 111a-112a. Residential life for VWIL students would also "vary significantly" from VMI. *Id.* at 66a. There would be no barracks at VWIL. VWIL students would

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Baldwin will retain its identity, daily life on campus would not be any different." *VMI II* C.A. App. 633.

[6] When VWIL was planned, only one Mary Baldwin student was participating in ROTC. No Mary Baldwin student had been commissioned in the preceding three years. *VMI II* C.A. App. 640.

live in Mary Baldwin student housing, in which privacy would be respected. *Id.* at 127a-128a.[7] VWIL freshman students would room together in separate sections of the Mary Baldwin residence halls "to facilitate the development of group identity while also encouraging good relationships and friendships with other freshmen." *Id.* at 114a. "VWIL participants will be encouraged to participate in MBC activities and class functions." *Id.* at 114a-115a. VWIL students would not be required to eat meals together. *Id.* at 111a. VWIL would not use class or dyke systems, but instead would have a mentoring requirement. *VMI II* C.A. App. 460, 894-895. VWIL also would also not use VMI's expulsion-only honor code. Pet. App. 114a-115a.

Mary Baldwin College does not have a math and science focus and does not offer a Bachelor of Science degree. Pet. App. 131a. Its faculty "hold[s] significantly fewer Ph.D.'s than the faculty at VMI," *id.* at 129a, and receives significantly lower salaries, *VMI II* C.A. App. 493. The physical training facilities at Mary Baldwin are far less extensive and sophisticated than those at VMI. Pet. App. 130a-131a.

4. *The Remedial Decisions Below.* The district court approved VMI's proposed remedial plan. Pet. App. 53a-131a. The court acknowledged that the proposed VWIL "differs substantially from the VMI program," *id.* at 55a; see *id.* at 12a, 67a-68a, but found

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[7] Mary Baldwin student dorms include a "wide range of living arrangements," such as "[r]esidence halls * * * elegantly equipped with brass chandeliers, plush carpeting and mahogany furniture." Pet. App. 127a. Many are converted single-family homes, furnished by the college, and each with "its own distinct character." *Ibid.* Some have "televisions, cable hook-ups and microwave ovens." *Ibid.*

the differences to be "justified pedagogically" based on "developmental and emotional differences between the sexes." *Id.* at 72a, 76a; see *id.* at 62a. The court accepted the conclusions of the Task Force that "a military model and, especially VMI's adversative method, would be wholly inappropriate for educating and training most women for leadership roles," *id.* at 63a, and found VWIL's cooperative confidence building method to be more appropriate for "the different educational needs of most women," *id.* at 10a.

The court concluded that the adversative method was "inappropriate for most women" because "most women reaching college generally have less confidence than men." Pet. App. 64a. Young women therefore "do not need to have uppityness and aggression beaten out of them." *Id.* at 73a-74a. Whereas "the VMI model is based on the premise that young men come with [an] inflated sense of self-efficacy that must [be] knocked down and rebuilt," "[w]hat [women] need is a system that builds their sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes." *Id.* at 10a-11a. "[T]he 'nature of an experience that is growth-producing for a majority of women, according to the literature, is one that is supportive, is one that emphasizes positive motivation.'" *Id.* at 223a. See generally pages 37-40, *infra*. Based on those notions of "what women need," the court predicted that VWIL's method "will produce the same or similar outcome for women that VMI produces for men." Pet. App. 64a; see *id.* at 75a-76a. The court concluded that "[i]f VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination." *Id.* at 84a.

The court of appeals affirmed, Pet. App. 1a-30a (*VMI II*), with Judge Phillips dissenting, *id.* at 31a-52a. The panel majority devised a new "special intermediate scrutiny test" with which to review the constitutionality of VMI's proposed remedy. It interpreted this Court's decision in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982),[8] to require only:

1. that the governmental objective be "consistent with a legitimate governmental role" and "not pernicious," *id.* at 14a, 16a, 22a; and

2. that the sex-based classification be "important in serving" that objective, *id.* at 14a-15a, 16a.

In the court's view, Virginia's asserted objective of "providing the option of a single-gender college education," *id.* at 20a, sufficed to meet that test, and the challenged exclusion of women from VMI was "by definition necessary for accomplishing th[at] objective," *id.* at 16a.

Recognizing that, without more, its analysis would provide "little or no scrutiny" of single-sex educational programs, the court then added a new "third step," applicable to cases in which the State's objec-

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[8] The intermediate-scrutiny equal-protection test for sex-based classifications set forth in *Hogan*, 458 U.S. at 724, requires an "exceedingly persuasive justification" for excluding members of one sex from an institution of higher education. "Th[at] burden is met only by showing at least [1] that the classification serves important governmental objectives and [2] that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (internal quotation marks omitted).

tive is to achieve "homogeneity of gender" in separate educational programs. Pet. App. 16a-18a. Under that third step:

> 3. The benefits provided to each sex through separate programs must be "substantively comparable." *Id.* at 17a.[9]

The court then concluded that VWIL would be substantively comparable to VMI, because

> both VMI and VWIL * * * seek to teach discipline and prepare students for leadership. The missions are similar and the goals are the same. The mechanisms for achieving the goals differ—VMI utilizing an adversative and pervasive military regimen and VWIL proposing to utilize a structured environment reinforced by some military training and a concentration on leadership development—but the difference is attributable to a professional judgment of how best to produce the same opportunity.

Id. at 26a.

In approving the continued exclusion of women from VMI, the court reasoned that, "[i]f we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." Pet. App. 23a. The

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[9] The court emphasized that it was not requiring "separate but equal," Pet. App. at 18 n.*, nor that the programs be "the same," *id.* at 17a, because "equal methods and equal results" are not required for "different classes of people," and any suggestion to the contrary "is justified only by a needless, and indeed baseless, demand for conformity," *id.* at 25a.

court acknowledged that the VWIL degree will lack the historical benefit and prestige of a VMI degree, but stated that those intangible benefits "must be the byproduct of a longer-term effort." *Id.* at 27a.

The Fourth Circuit voted, sua sponte, not to reconsider the case en banc. Pet. App. 246a-250a. Judge Motz wrote an opinion dissenting from that decision, in which Judges Murnaghan, Michael, and Hall joined. *Id.* at 251a-257a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since its founding in 1839, the Virginia Military Institute has not admitted women. That practice has correctly been held to violate the Equal Protection Clause, and the question before the court in this case is how that violation should be remedied. Respondents have argued that the value to men of a men-only VMI is an absolute barrier to women's admission. The remedy they chose continues to maintain VMI exclusively for men, and offers an alternative for women that is admittedly separate, different, and unequal. They defend that plan on the basis of harmful sex-role stereotypes, and continue to resist the determination of liability. The program for women that they sponsored—itself a constitutionally inadequate remedy—in their view provides women *more* than they constitutionally deserve.

Women are entitled to equal access to all the benefits that VMI seeks to provide exclusively to men. Women who, but for their sex, are qualified for VMI and want to go to VMI are entitled to an equal opportunity to attend the program they find more valuable; they cannot be relegated to a separate and substantially different education. The only adequate redress for women's unconstitutional exclusion from

VMI is to order that VMI's men-only admissions policy be ended.

I. A. Traditional remedial principles demand a remedy that closely fits the violation. Once a constitutional violation is identified, the court's remedial order must eradicate, to the greatest extent possible, the harm caused by the unconstitutional conduct. Application of that principle makes it evident that an order enjoining VMI's men-only admission policy is the only adequate remedy in this case, and that the remedy approved by the court of appeals falls far short of the goal of providing complete relief.

VMI's men-only admissions policy has caused and continues to cause both tangible and intangible harms. It has deprived women of the VMI educational experience, which is unlike the experience at any other college in Virginia. VMI has an intensive, highly structured military-style educational program that challenges students to achieve more than they might otherwise have accomplished, and that has been remarkably successful in producing leaders in male-dominated careers. Women barred from VMI are also excluded from membership in the circle of VMI's powerful alumni and from the particular prestige carried by a VMI degree. Finally, VMI's admissions policy has communicated a message that, in the eyes of the Commonwealth, women do not possess the qualities of self-discipline, ability to withstand stress, and respect for hierarchy that are widely associated with VMI. The only way to offer women the benefits of VMI, and to cure the stigma imposed on women by their historical exclusion, is to prohibit its men-only admissions policy.

B. The court of appeals viewed the prospect of women's admission to VMI as presenting a "Catch

22" for women, because, in its view, women's admission would "destroy" the very opportunity women seek to share. Under that theory, respondents' interest in preserving VMI's benefits exclusively for men outweighs women's right to equal treatment. That theory is, not surprisingly, completely without support in modern equal protection doctrine. Preserving a benefit for one sex is not an adequate reason for denying it to the other; sex discrimination is not self-justifying.

Respondents have not, in any event, shown that integration of women at VMI would be impossible, or even that the changes that might be required at VMI when women are admitted would have a substantial or significant negative impact on the character or the effectiveness of VMI's educational program. Accommodations necessary to preserve privacy or account for physical differences would not change the fundamental nature of the program. The court of appeals' concern that the "decency that still permeates the relationship between the sexes" would suffer as a result of women's admission to VMI is constitutionally invalid; it is another example in a long history of official discriminations against and exclusions of women in the name of protecting them. The experience of coeducation at the federal military service academies also shows that the admission of women into a rigorous, military-style educational program does not impair any governmental interest in producing military personnel, let alone "citizen-soldiers."

II. A. The court of appeals approved a remedy that is itself unconstitutional. It would be appropriate for the Court to review that remedy under strict scrutiny, because differences in treatment based solely on

sex are inherently suspect. The long history of discrimination against women, the general irrelevance of sex as a ground for official decision-making, and women's continuing underrepresentation in government, all support the application of strict scrutiny here.

B. The constitutional violation in this case is, however, plain even under intermediate scrutiny. The approved remedy was designed, defended, and approved through the use of impermissible sex-stereotypes and overgeneralizations about the capacities and aspirations of "most" men and "most" women. Equal protection precludes reliance on such stereotypes and generalizations to foreclose individual opportunity. The inequality of treatment caused by the substantial differences between the sex-segregated VMI and VWIL programs is invalid under intermediate scrutiny.

Respondents' asserted interest in providing single-sex education cannot support the VWIL remedy. Respondents have shown no real interest in providing single-sex education, but have asserted it post hoc, in order to reserve VMI for men only. An interest in providing single-sex education would, in any event, not validate a program that offers substantially different programs and benefits to men and women and that bases those differences on invalid assumptions about the limited abilities of women.

ARGUMENT

Respondents violated the Equal Protection Clause by excluding women from VMI solely on the basis of their sex. The unconstitutionality of that practice was clear. This Court held in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982), that a

State cannot prohibit enrollment in a state institution of higher education on the basis of sex without an "exceedingly persuasive justification" for doing so. The court of appeals in *VMI I* correctly held that Virginia "failed to articulate an important objective which supports the provision of [VMI's] unique educational opportunity to men only." Pet. App. 137a.

The court of appeals erred, however, in its remedial analysis. The only adequate remedy in this case is for VMI to stop excluding women from its student body on the basis of their sex. VMI's men-only admissions policy was unconstitutional because it excluded all women regardless of their individual abilities and characteristics. The remedy necessary to end that harm is an admissions policy based on individual qualifications and not on sex. When the women-only policy at the Mississippi University for Women was held to violate equal protection, qualified men were required to be admitted. *Hogan*, *supra*. When the men-only admissions policy at the University of Virginia was invalidated for the same reasons, qualified women were required to be admitted. *Kirstein* v. *Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970). And when exclusion of girls from Philadelphia's Central High School was found to violate equal protection, qualified girls were required to be admitted. *Newberg* v. *Board of Pub. Educ.*, 478 A.2d 1352 (Pa. Super. Ct. 1984).[10] Women

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[10] *Newberg* was decided under both the Equal Protection Clause to the United States Constitution and the Equal Rights Amendment to the Pennsylvania Constitution, Pa. Const. Art. I, § 28. The same remedial principles apply to violations of either provision.

who, but for their sex, meet VMI's admissions standards must likewise be admitted to VMI.

The court of appeals in *VMI I* erred when it suggested that "parallel" single-sex programs might be an adequate remedy for VMI's unconstitutional exclusion of women. Point I below demonstrates that, in view of the distinctiveness of VMI's educational program, VMI's powerful prestige, exceptionally strong alumni support, and the harmful message about the different capabilities of men and women created by VMI's long-standing exclusion of women, a new, wholly separate school for women cannot possibly be an adequate remedy for the constitutional violation in this case. Predictably, the separate VWIL program is not. Point II demonstrates that reserving VMI for men only, while creating a separate and substantially different program for women at Mary Baldwin College, is itself unconstitutional. The separate VWIL program cannot, for that additional reason, be a remedy for the exclusion of women from VMI.

I. INVALIDATING VMI'S MEN-ONLY ADMISSIONS POLICY IS THE ONLY ADEQUATE REMEDY FOR THE CONSTITUTIONAL VIOLATION IN THIS CASE

A. Allowing Qualified Women To Attend VMI Is The Relief That Will Most Fully Remedy The Constitutional Violation

Remedial principles require a close fit between the constitutional violation and the remedy. The remedy "must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 433 U.S. 267, 280 (1977) (internal

quotation marks omitted). "[T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965); see also *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

Where persons have been unconstitutionally excluded from an institution in violation of equal protection, removing the exclusionary bar should be the presumptive remedy. That is true both because the tangible and intangible benefits offered at separate institutions are likely to differ (thus perpetuating the unequal treatment), and because reservation of any institution to males is "likely to be a witting or unwitting device for preserving tacit assumptions of male superiority."[11] Moreover, where the State's purposes are "as well served by a gender-neutral classification"—here, by a sex-neutral admissions policy—"as one that gender classifies and therefore carries with it the baggage of sex-stereotypes, the State cannot be permitted to classify on the basis of sex." *Orr* v. *Orr*, 440 U.S. 268, 283 (1979). As the Court emphasized in *Orr*, "this is doubly so where the choice made by the State appears to redound * * * to the benefit of those without need for special solicitude." *Ibid.* Maintaining VMI's current admissions policy will benefit only men, will continue to foster negative stereotypes, and denies women the complete remedy that admission to VMI would provide.

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[11] C. Jencks & D. Riesman, *The Academic Revolution* 297-298 (1968).

1. *Allowing qualified women to attend VMI is the only way to assure them equal access to VMI's unique attributes*

Women who have been barred from VMI have been denied the opportunity to experience its distinctive educational method, and have been foreclosed from the career possibilities and other "intangible" life-long benefits associated with attending and graduating from VMI. Both courts below recognized that fact. See Pet. App. 152a (court of appeals) (Virginia fails to offer women "the unique benefit of VMI's type of education and training"); *id.* at 192a (district court) ("women have no opportunity anywhere to gain the benefits of [VMI's] education"); see also *id.* at 218a. The only remedy that can provide women the equal opportunity they have been denied is admission to VMI. The leadership program at Mary Baldwin, which would be "equivalent to a [curricular] minor," Gov't Exh. 52, at 1 (L. 248), does not come close to matching the comprehensive VMI program from which women have been excluded. Given VMI's distinctive benefits, a separate program, however designed, could not possibly provide an adequate remedy.

As the district court found, a new program at a separate, all-female institution also cannot "supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years." Pet. App. 60a-61a. VMI's own expert compared VMI and its traditions to "English cathedrals," that were "built over a period of 150 years." *VMI I* C.A. App. 1249. VMI's students and graduates enjoy the benefits of association with an established and renowned institution with a distinctive reputation.

VMI has one of the oldest alumni organizations in the country, and its alumni network is "exceptionally close to the school." Pet. App. 192a. "Those who survive the [VMI] experience are forever set apart in their own minds and those of their colleagues as a special breed. * * * It is clearly an advantage to * * * be part of such a network." *VMI I* C.A. App. 1750 (L. 218). The alumni network is "enormously influential," *VMI II* Tr. 1227, especially in the historically male-dominated fields of engineering, the military, business, and public service in which VMI graduates tend to pursue careers, *id.* at 1228. See also *VMI II*, Pet. App. 50a-51a (Phillips, J., dissenting). Respondents have consistently asserted that VMI alumni disproportionately serve in military leadership positions, see R. 152, at 12 (¶ 62), and disproportionately achieve influential and lucrative positions in public and private life, *id.* at 17 (¶ 87); see also *VMI II* Tr. 1228-1231. In *Sweatt* v. *Painter*, 339 U.S. 629 (1950), this Court deemed such intangible qualities to be "more important" than tangible resources when comparing the quality of separate educational institutions. *Id.* at 634. In so holding, the Court emphasized "those qualities which are incapable of objective measurement but which make for greatness in a * * * school." *Ibid.* Such qualities included "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." *Ibid.* A new and separate program for women cannot possibly match VMI in those enormously important respects.

2. *Allowing qualified women to attend VMI is the only way to cure the state-sponsored sex stereotyping and stigma resulting from VMI's exclusionary policy*

VMI stands as an official monument to the discredited view that women are categorically different from, and in many respects inferior to, men. VMI's men-only admissions policy is a relic of an era when women were generally considered unfit for higher education of any type, and especially unfit for leadership or military service. VMI celebrates the fact that its male tradition harks back to that "time when society expected men to achieve adult status through experiences that differed from those considered appropriate for women." *VMI I* C.A. App. 1752 (L. 220).[12] The continued exclusion of women from VMI thus imparts the impermissible message that, as a matter of official policy, Virginia continues to believe that women are not suited for rigorous military training, or for military service or other leadership positions that require such training. In that respect, women's continued exclusion from VMI is "practi-

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[12] VMI's men-only admissions policy was adopted when it opened in 1839, and the school's current mission "was established early in the life of the institution." Pet. App. 214a. Women at that time were "academically disenfranchised." *Hogan*, 458 U.S. at 727 n.13. In the early 19th century, there was "great resistance towards the idea of providing higher education for women, because it was believed that they were mentally and physically inferior to men and therefore unable to attend class on a regular basis." United States Commission on Civil Rights, *More Hurdles to Clear* (1980) (Clearinghouse Publication No. 63), reprinted in *Yellow Springs Exempted Village School Dist. Bd. of Educ.* v. *Ohio High School Athletic Ass'n*, 647 F.2d 651, 670 (6th Cir. 1981).

cally a brand upon them, affixed by law, an assertion of their inferiority" that "denigrates the dignity" of the excluded women, and "reinvokes a history of exclusion." *J.E.B.* v. *Alabama ex rel T.B.*, 114 S. Ct. 1419, 1428 (1994) (quoting *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1880); see also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 625 (1984) (referring to "stigmatizing injury" caused by private club's exclusion of women).

VMI's admissions policy conveys the message that, while men can surmount their limitations and exceed their expectations, for women, biology truly is destiny.[13] When government thus inflexibly prejudges individuals' capabilities based on their sex, it announces that, in the eyes of the State, men and women are not truly equal. The only remedy that can counteract that message is to consider women eligible for admission to VMI.

B. Respondents Failed To Show That It Would Be Impossible To Admit Women To VMI

Respondents argued below that, "[i]f women were admitted to VMI, the whole program would col-

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[13] The district court found that VMI had substantial transformative potential: "VMI takes students that are average from an academic perspective and, through the character development program, graduates people who have more than average commitment and motivation as well as character." Pet. App. 206a. VMI accepts all qualified Virginia applicants. Gov't Exh. 75, at 32 (L. 148). The minimum combined SAT score for admission to VMI is 700, *VMI I* C.A. App. 425, and the average score of men admitted to VMI is 1053, *id.* at 1789 (L. 234). Matriculants must meet the national ROTC fitness standard, but they are not required to be particularly athletic. Yet even women with superior academic and athletic ability are barred from competing alongside men at VMI.

lapse."[14] In response, the court of appeals "did not direct the Commonwealth of Virginia to change VMI to a coeducational college," Pet. App. 7a, because women's admission to VMI might create a "Catch 22," whereby "the change caused by [women's] admission would destroy the opportunity," *ibid.* (quoting *VMI I*, *id.* at 148a).

Because of the strong presumption that admission of women to VMI is the correct remedy in this case, respondents face the heaviest burden of justification in not adopting that remedy. A desire to maintain the benefits of VMI in their current form exclusively for men clearly is not such a rationale:

> 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 benefitted 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.

Hogan, 458 U.S. at 731 n.17.[15] Nor is the tautology that women, if admitted, could not partake of the

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[14] R. 152, at 48 (¶ 270).

[15] The preservation of advantages for a favored class of beneficiaries is obviously not a valid reason for excluding others. See, *e.g.*, *Cooper* v. *Aaron*, 358 U.S. 1, 13 (1958) ("adverse effect upon the educational program" is insufficient reason to delay school desegregation); *Buchanan* v. *Warley*, 245 U.S. 60, 82 (1917) (assertion that "acquisitions [of houses] by colored persons [would] depreciate property owned in the neighborhood by white persons" cannot justify racial exclusion); *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 448

special ethos of a men-only institution. VMI's mission of educating "citizen-soldiers" also plainly does not require that women continue to be excluded. See, *e.g.*, Pet. App. 254a-255a (opinion of Motz, J., dissenting from denial of rehearing en banc). Indeed, respondents have repeatedly asserted that citizen-soldiers are successfully produced elsewhere in Virginia, and would be at VWIL.[16]

1. *The admission of women would not "destroy" VMI*

The court of appeals discussed three areas in which the admission of women would require changes at VMI—"physical training, the absence of privacy, and the adversative approach." Pet. App. 147a-148a. Respondents have not demonstrated that any of the changes that might be necessary in those areas justifies continued exclusion of women from VMI.

a. *Privacy.* If women were admitted to VMI, "[a]llowance for personal privacy would have to be made." Pet. App. 171a. Respondents have not shown, however, that affording members of each sex privacy from members of the other sex for sleeping, and for those few minutes each day required for personal hygiene and changing clothes, would materially interfere with VMI's practice of providing cadets with a minimum of privacy. All cadets could continue to lack privacy vis-a-vis their own gender when sleeping,

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(1985) ("[T]he city may not avoid the strictures of [the Equal Protection Clause] by deferring to the wishes or objections of some fraction of the body politic" to support ordinance with exclusionary effect on disabled persons.).

[16] See, *e.g.*, R. 152, at 97 (¶ 536) (referring to "other state institutions that produce citizen-soldiers").

dressing and using the bathroom. And at all other times, individuals of both sexes could be subjected to close scrutiny by the entire group. Thus, if VMI so chose, men could continue (as at present) to lack privacy from other men, and women could lack privacy from other women.

b. *Physical training standards.* The court of appeals relied on evidence regarding strength differences between men and women to support its conclusion that admission of women would materially alter VMI. Pet. App. 147a-148a. It is conceded, however, that some—indeed many—women are able to meet VMI's current physical standards.[17]

In addition, the various physical challenges that VMI provides are not ends in themselves. They are part of the means of "adversative" training, designed to "creat[e] training situations which are stressful enough to show [the students] that they are capable of doing tasks which surpass their previously self-imposed mental and physical limits." *VMI I* C.A. App. 1668 (L. 192). There are a number of well-known methods for dealing with variations of physical ability within a student or similar population. Certain tasks can be adjusted according to sex-neutral ability

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[17] The district court found that "some women are capable of all of the individual activities required of VMI cadets," Pet. App. 170a, including all the rat line tasks, the current physical training drills, and the VMI physical fitness test. *Id.* at 233a-234a; see also *id.* at 234a ("15% of females in the applicant pool could successfully meet the requirements of the current VMI physical fitness test"); and see respondents' witness's testimony in *VMI I* C.A. App. 357-358 (regarding physical training and military drill, "we probably could have women come in here and many of them probably could do some of these things, or maybe all of them").

groupings based on persons' size, strength or experience, or limited accommodations can be made in response to physical differences between women and men. VMI has completely failed to show that it cannot use one or more such methods when women are admitted, nor has it identified any interest that would justify its failure to make an accommodation.

Indeed, VMI already makes accommodations for many of its male cadets. Those who participate in NCAA sports, including less strenuous sports such as golf, see *VMI I* C.A. App. 1658 (L. 182), are excused from "rat training" while practicing their sport. Pet. App. 195a. In addition, many current male VMI cadets fall short of VMI's physical fitness standards. VMI cadets take a physical fitness test each semester, consisting of a set of calisthenics and a timed 1.5-mile run. L. 285-288. Almost 50% of new cadets fail the test and are offered remedial training. *VMI I* C.A. App. 564-565. Some male students graduate from VMI still unable to pass the fitness test. *Ibid.* Admitting women to VMI would not for the first time introduce physical disparities among cadets; they already exist.

c. *The adversative approach and "decency between the sexes."* The court of appeals rejected the prospect of women participating with men in adversative training because it would "destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes." Pet. App. 23a. "[G]rating egos and setting the aggressiveness of one person against another through conflict, egalitarianism, lack of privacy, and stress" is, the court believed, inappropriate in an environment in which both women and men are present. *Ibid.*

That view is an impermissible basis for decision in this case. The conclusion that it is unseemly for men to behave in a harsh and disciplinary way toward women, or for women to do so toward men, reflects a "romantic paternalism" that cannot constitute a legitimate—let alone an important—state interest.[18] Women in the United States engage every day in activities that may require harsh "cross-gender confrontation." They arrest disobedient suspects, command emergency medical teams, cross-examine recalcitrant male witnesses, discipline rowdy youths, and serve as drill sergeants in the armed forces. The idea that women cannot—or should not—engage with men in activities that require aggression and "grating egos" is just as unacceptable as a justification for a State barring women from a renowned leadership educational program as it would be for a state to prohibit their participation in any other educational program or profession.

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[18] The unconstitutional exclusion of women from jury service was similarly historically based on States' asserted interests in protecting women from "ugliness and depravity" and experiences that would "prove humiliating, embarrassing and degrading to a lady," or because "[r]everence for all womanhood would suffer in the public spectacle of women . . . so engaged." *J.E.B.*, 114 S. Ct. at 1423; see also *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948) (upholding law prohibiting women from obtaining bartenders' licenses except to work in bars owned by their husbands or fathers based on the "moral and social problems" predicted if women independently tended bar); *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, 141, 142 (1873) (Bradley, J., concurring in the judgment).

2. *The example of the federal military service academies*

The experience of the federal military academies in admitting women also shows that citizen-soldiers can be trained in a coeducational environment without "destroying" the institution.[19] The district court acknowledged that "the introduction of women did not significantly change West Point," Pet. App. 209a,[20] and that "[n]othing has changed at the [Naval] Academy [since the admission of women] except some physical training requirements and some facilities," *id.* at 210a.[21] At West Point, "women perform and

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[19] On October 7, 1975, President Gerald Ford signed Public Law 94-106, § 803, 89 Stat. 537-538 (codified at 10 U.S.C. 4342 note), requiring the Military, Naval, and Air Force Academies (located at West Point, Annapolis, and Colorado Springs) to admit women as cadets starting in 1976. The law provides that "the academic and other relevant standards required for appointment, admission, training, graduation, and commissioning of female individuals shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals." 10 U.S.C. 4342 note. Congress enacted a similar provision for integration of women into the Coast Guard Academy, see Public Law 94-572, § 1, 90 Stat. 2708 (codified at 14 U.S.C. 182(a)), and regulatory authorization opened the way for women's admission to the Merchant Marine Academy starting in 1974. 46 C.F.R. 310.53 (1974).

[20] See generally Pet. App. 208a-209a (quoting Gov't Exh. 68).

[21] A VMI committee that studied the feasibility of coeducation at VMI reported in 1986 that the Naval Academy's coed plebe indoctrination system "imparts stress and pressure for the entire first year," and "[w]omen are totally integrated into the entering class except for the obstacle course and some of the physical aptitude exercises." Pet. App. 210a

compete as well as men in cadet basic training, cadet field training, and cadet advanced training," *id.* at 209a, and at Annapolis "[m]ale and female midshipmen do equally well," *id.* at 210a.[22] In 1984, a woman graduated first in her class at Annapolis. Gov't Exh. 67, at 7 (L. 109). In 1989, a female cadet attained the position of First Captain of the Corps of Cadets, the highest ranking position a cadet can hold at West Point, commanding approximately 4200 cadets. *VMI I* C.A. App. 738-739; General Accounting Office, *Report to Congressional Requesters, Military Academy: Gender and Racial Disparities* 10 (1994).

In sum, as the court of appeals' own remand order in *VMI I* recognized, enjoining VMI from continuing to use a men-only admissions policy is a feasible remedy; it is the only remedy that satisfies the constitutional command of equal treatment of women.

II. THE ESTABLISHMENT OF A WOMEN-ONLY LEADERSHIP TRAINING PROGRAM AT MARY BALDWIN COLLEGE DOES NOT REMEDY THE UNCONSTITUTIONAL EXCLUSION OF WOMEN FROM VMI BECAUSE THE SEPARATE, DIFFERENT VMI AND VWIL PROGRAMS THEMSELVES VIOLATE EQUAL PROTECTION

As we have shown above, the court of appeals erred in assuming in its original remand order that separate "parallel programs" might be an appropriate remedy for the constitutional violation in this case. Pet. App. 156a. The court further erred in finding

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[22] The Air Force Academy at Colorado Springs was not included in the 1986 VMI study regarding the predicted effects if VMI were to admit women, and was not addressed in the district court's findings. The Air Force Academy's student body is now approximately 15% women.

VWIL's program an adequate "parallel" to VMI under the Equal Protection Clause. There are substantial, undisputed differences between VMI and VWIL that render VWIL unable to provide to women what they are denied at VMI. Nor are those differences the product of happenstance; they are deliberate and are unconstitutionally premised on explicit and archaic sex-based stereotypes and generalizations about the sociological and psychological characteristics of women and men. Especially in view of the role of education in shaping individual skills and aspirations, reliance on stereotypes to exclude women from VMI unconstitutionally "reflect[s] and reinforce[s] patterns of historical discrimination." *J.E.B.*, 114 S. Ct. at 1428.

A. Classifications That Deny Opportunities To Individuals Based On Their Sex Should Be Subjected To Strict Judicial Scrutiny

We demonstrate herein that respondents have failed to offer the "exceedingly persuasive justification" necessary to justify their proposed remedy under intermediate judicial scrutiny. See *Hogan*, 458 U.S. at 724. But we believe that strict scrutiny is, in fact, the correct constitutional standard for evaluating differences in official treatment based on sex, and that the complete exclusion of women from VMI's unique and valued public educational program should be reviewed under that standard. VMI should be permitted to maintain its men-only admissions policy only if that policy is narrowly tailored to serve a "compelling" state interest. See *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 440

(1985); *Frontiero* v. *Richardson*, 411 U.S. 677, 682 (1973) (plurality opinion).[23]

This Court has recognized—and this case illustrates—that sex "generally provides no sensible ground for differential treatment." *Cleburne*, 473 U.S. at 440. Although the phenomena of sex and race discrimination differ from each other in some important respects, sex, like race, is an immutable and highly visible characteristic that "frequently bears no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686 (plurality opinion). Governmental decision-making based on stereotypical views and "gross generalizations" about women and men nevertheless persists. *J.E.B.*, 114 U.S. at 1427. The fact that a person's sex is readily observed yet rarely relevant makes it both a common

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[23] Regardless of the level of judicial scrutiny, federal executive and congressional policies and programs having to do with the conduct and control of military affairs should continue to receive the judicial deference they have traditionally been accorded. See, *e.g.*, *Weiss* v. *United States*, 114 S. Ct. 752, 760 (1994) ("[C]ourts must give particular deference to the determination[s] of Congress, made under its authority to regulate the land and naval forces.") (internal quotation marks omitted); *Goldman* v. *Weinberger*, 475 U.S. 503, 507 (1986) ("Our review of military regulations * * * is far more deferential than constitutional review of similar laws or regulations designed for civilian society."); *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981) ("[P]erhaps in no other area [than Congress's authority over military affairs] has the Court accorded Congress greater deference."); *Parker* v. *Levy*, 417 U.S. 733, 756, 758 (1974) ("Congress is permitted to legislate both with greater breadth and with greater flexibility" when the statute governs military society); *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953). VMI is not part of the United States military, and its interests are not entitled to any special deference.

and presumptively impermissible basis for official decision. Special judicial vigilance is required to prevent sex from serving as a convenient, but harmful and constraining, proxy for actual abilities and needs.

Members of the Court have also noted the many parallels between women's and racial minorities' experience of official discrimination. When four Justices in *Frontiero* maintained that classifications based on sex, like those based on race, national origin, or alienage,[24] were "inherently suspect," they particularly noted this country's "long and unfortunate history of sex discrimination," including the historical similarities in the treatment of women and blacks. 411 U.S. at 684-685. In *J.E.B.*, that history continued to inform the level of scrutiny through which the Court reviews sex-based differences in treatment. 114 S. Ct. at 1425. Respondents here seek to perpetuate a sex-based exclusion that dates from a time when women could neither vote nor "hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Ibid.* (quoting *Frontiero*, 411 U.S. at 685). This case is a particularly vivid illustration of the ways in which the hand of the past can continue to control current attitudes and opportunities for women.

Despite the fact that women are a numerical majority in the United States, women remain vastly

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[24] Alienage and national origin classifications are suspect, although, like sex classifications, they do not share all of the characteristics of racial classifications. See, *e.g.*, *Graham* v. *Richardson*, 403 U.S. 365, 370-375 (1971); *Sugarman* v. *Dougall*, 413 U.S. 634, 641-643 (1973).

politically underrepresented in state and federal government. That relative political powerlessness also demonstrates the need for searching judicial analysis when government treats men and women differently. *Frontiero*, 411 U.S. at 684-686 & n.17.

Over the past two decades, decisions by this Court striking down a variety of policies and practices that discriminate on the basis of sex have evidenced "a strong presumption that gender classifications are invalid." *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring in the judgment). To remove any remaining ambiguity about the general illegitimacy of classifications that deny valuable benefits to individuals based solely on their sex, this Court should now hold that such classifications are inherently suspect and subject to strict judicial scrutiny.[25] This Court, however, has not previously applied that level of scrutiny to sex-based classifications. See, *e.g.*, *id.* at 1425 n.6 (finding it "once again" unnecessary to decide whether sex-based classifications are "inherently suspect"); *Hogan*, 458 U.S. at 724 n.9. We therefore argued in the courts below, and we show in the balance of this brief, that VMI's policy of excluding women cannot stand under the "intermediate" scrutiny applied by this Court in its prior cases. Reversal would, of course, also be compelled under a strict scrutiny standard.

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[25] Strict scrutiny of such classifications based on sex will not necessarily be "fatal in fact." For example, where discrimination persists, "government is not disqualified from acting in response to it." *Adarand Constructors, Inc.* v. *Peña*, 115 S. Ct. 2097, 2117 (1995). The compelling interest in respecting individuals' privacy would clearly justify separate arrangements for men and women while sleeping and while using bathroom and shower facilities.

B. The VWIL Remedy Plainly Violates Equal Protection Under Intermediate Scrutiny

1. *VWIL is materially different from VMI in ways that impermissibly reflect and reinforce archaic stereotypes about women and men*

Both courts below acknowledged that the proposed VWIL, in the words of the district court, "differs substantially from the VMI program." Pet. App. 55a. Stark differences exist in the curricula and educational techniques used at the two institutions. See *id.* at 7a-12a, 18a n.*, 24a-28a, 67a-68a; see pages 2-5, 8-11, *supra*. And as the district court tellingly 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." Pet. App. 60a (footnote omitted); see pages 22-23, *supra*.

Despite those differences, the district court approved the creation of a separate VWIL as a remedy by relying on the generalization that women are more psychologically and sociologically suited than men to a confidence-building, public-service-oriented program, while VMI's rigorous military-style training is more suitable for men. The court, for example, expressly embraced the view that women are less confident and aggressive than men. Pet. App. 64a, 73a.

The district court's stereotypical sex-based generalizations reflect the justifications presented by respondents at trial. Respondents' witnesses' testimony, including the testimony of their experts, frequently employed impermissible stereotyping. One of respondents' experts, for example, declared that "aggressiveness [and] the fear of failure[] are not

incentives that propel women to want to succeed and to achieve success" to "the same extent as seen in males." *VMI I* C.A. App. 1177. Another stated that women are "not capable of the ferocity requisite to make the program work, and they are also not capable of enduring without * * * psychological trauma if they went through the rat program." *Id.* at 202. A third proclaimed that "women basically have not the same threshold on emotion as men do. * * * [T]hey break down emotionally." *Id.* at 1057-1058. "[I]n the rat line with a bunch of upperclassmen all over her, [a woman would] break[] down crying." *Id.* at 1058. An expert also insisted that "even * * * those women who * * * are more macho than thou would not make up a cohort who would be able to deal with rats in the invariant way that VMI now deals with rats." *Id.* at 192.

VMI's expert on higher education concluded that VMI's focus on "absolute equality" would be inappropriate for women because women "respond more naturally to an ethic of care," premised on the notion that "no one should be hurt," rather than an egalitarian "ethic of justice." *VMI I* C.A. App. 1754 (L. 222) (emphasis omitted). The same expert found the "doubting" aspect of the adversative model inappropriate for women, because, for women, "confirmation" is "a prerequisite rather than a consequence of development." *Id.* at 1755 (L. 223). And VMI would be inappropriate for women, he concluded, because women develop through "a relationship of connection" and "a sense of community" rather than through self-discipline and self-reliance. *Ibid.* VMI's experts also relied on "the different vulnerabilities of men and women," *VMI II* C.A. App. 684, to conclude that the strain imposed by men on the rat line would be

matched at VWIL by exposure to "fields in which women at the present so often flounder. Spatial things, geometric things, topology, math and physics, and leadership itself." *Id.* at 684-685.

Another of VMI's expert witnesses analogized women who would be attracted to VMI and women who would be attracted to VWIL to two types of women in the late 19th century: Women who would prefer VMI were like those earlier women with "high-roller ambition" who aspired to become lawyers, *VMI II* C.A. App. 578-579—aspirations the expert deemed "as much fancy as * * * reality," *id.* at 579. The women who would prefer VWIL were more like realistic 19th-century women who "became nurses, teachers, librarians because those were the professions they could enter." *Ibid.* Another expert stated that even women who are confident and outgoing, as opposed to "overdisciplined, oversubdued, and self-mistrustful," could benefit from VWIL, because they would be "reminded that their leadership styles, while impressive, have also the hazard of being oppressive." *Id.* at 681-682. Those women would "profit" from VWIL "by discovering limitations to their strenuousness." *Ibid.*

One of respondents' experts concluded that admission of women would impair the VMI system because of "the dating" and young women's "aspirations" to marry that are "still in the south very common." *VMI I* C.A. App. 196-197. "[W]omen in such a setting are almost inevitably cheerleaders. Girls don't follow sports the same way boys do." *Id.* at 221-222.[26] Admis-

[26] The same expert commented "[o]ne reason I suspect [girls] don't do as well on verbal tests, they don't read as many sports stories as boys do." *VMI II* Tr. 546.

sion of women to VMI would not work, in part because, "in Virginia, there are still men who divide the women into two classes, the good girls and the bad girls." *Id.* at 197. Women could not be "rats" because "[t]hey can't shed their gender. They can't shed their physical attributes." *Id.* at 193.

This Court's decisions preclude basing different treatment of men and women on such stereotypical characterizations of the sexes. *Hogan* clearly instructs that "[c]are must be taken in ascertaining whether the [government's] objective itself reflects archaic and stereotypic notions." 458 U.S. at 725. The Court there invalidated a single-sex admissions policy in part because the policy "tend[ed] to perpetuate the stereotyped view of nursing as an exclusively woman's job," and "ma[de] the assumption that nursing is a field for women a self-fulfilling prophecy." *Id.* at 729, 730. Excluding women from VMI, and providing them with an all-female alternative that is not a rigorous military school, perpetuates exactly the same kind of impermissible association of each sex with particular professions—here the premise that men, and not women, are fit to be strong leaders in the military and other fields that require leaders to cope with adversity.[27]

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[27] The particular stereotypes upon which the court below relied are distressingly similar to Justice Bradley's discredited conclusion in *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring in the judgment), that women's "natural and proper timidity and delicacy" supported the exclusion of women from the practice of law. See generally *Orr*, 440 U.S. at 283 (statute requiring payment of alimony to women but not to men carried "the baggage of sexual stereotypes"); *Califano* v. *Goldfarb*, 430 U.S. 199, 217 & n.18 (1977) (plurality opinion) (statutory distinction between widows' and widowers' social

Even where stereotypes may in part reflect current realities, the Court has condemned them, both because present practices may themselves result from historical sex-based bias, and because the law must not operate to restrict men and women to socially assigned roles. *J.E.B.*, 114 S. Ct. at 1428 (law must not "reflect and reinforce patterns of historical discrimination").[28] The lower court's finding that, for example, women are less aggressive than men may reflect the effects of traditional sex-based limitations on social roles that have often discouraged aggressive behavior in women while encouraging it in men.

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security survivors' benefits was based on "archaic and overbroad" generalizations); *Craig* v. *Boren*, 429 U.S. 190, 198-199 (1976) (distinction between ages at which males and females can purchase 3.2% beer reflected "outdated misconceptions"); *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975) (statute setting different ages of majority for girls and boys relied on "role-typing society has long imposed"); see also *Bray* v. *Alexandria Women's Health Clinic*, 113 S. Ct. 753, 759 (1993) (describing as "objectively invidious" under 42 U.S.C. 1985(3) the purpose of "'saving' women *because they are women* from a combative, aggressive profession such as the practice of law").

[28] In rejecting the argument in *Stanton* that a statute establishing a lower age of majority for girls than for boys was justified because boys often stay in school and require parental support for longer than girls, the Court observed that "[t]o distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed." 421 U.S. at 15. See also *Craig*, 429 U.S. at 202 n.14 ("The very social stereotypes that find reflection in age differential laws are likely substantially to distort the accuracy of * * * comparative statistics" regarding drinking and driving).

Barring women from VMI's adversative training makes women's presumed unfitness for it, and for the leadership opportunities it creates, as much a "self-fulfilling prophecy" as the presumption about natural sex roles rejected in *Hogan*. 458 U.S. at 730.

2. *Generalizations about women and men cannot support sex-based classifications, such as VMI's admissions policy, that foreclose individual opportunity*

The Mary Baldwin College Task Force developed a significantly different program for VWIL because it concluded that "aspects of VMI's military model, especially the adversative method, would not be effective for *women as a group*." Pet. App. 8a (emphasis added). But the Task Force, and the court that approved VWIL as a remedy, did not purport to find—nor could they possibly have found—that *all* women are less aggressive or less confident than *all* men, or that VMI's program was educationally inappropriate for *all* women. Indeed, they candidly acknowledged that VMI's adversative methodology is not "inherently unsuitable to women," *id.* at 155a, and that some women would indeed be qualified for, would prefer, and would benefit from that methodology, *id.* at 76a, 155a; see *id.* at 74a, 223a, 234a. The court nonetheless approved the VWIL program on the premise that *average* psychological and sociological differences between the sexes can justify denying *all* women admission to an educational program that some fully qualified women want to enter.

The Equal Protection Clause condemns such a use of sex-based generalizations, both because they deny to women who do not conform to those generalizations opportunities afforded to all men (whether they fit

them or not), and because the most basic equal protection principles require that women and men be treated as individuals, not as members of groups that are conclusively presumed to have or to lack certain capacities or ambitions. Women whose choices or abilities are different from those of the "typical" or "average" woman cannot be denied an important educational opportunity, and be relegated instead to a substantially different program that they do not want and that does not meet their needs, solely because most women would not be inconvenienced by that limitation.[29]

Even where there are statistically significant differences between the behavior or attitudes of men and women, the Court has consistently invalidated legal restrictions or generalizations based on those

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[29] See, *e.g.*, *J.E.B.*, 114 S. Ct. at 1429; *id.* at 1432 (O'Connor, J., concurring); *id.* at 1433-1434 (Kennedy, J., concurring in the judgment); *Jaycees*, 468 U.S. at 625 ("overbroad assumptions about the relative needs and capacities of the sexes force[] individuals to labor under stereotypical notions that often bear no relationship to their actual abilities"); *Hogan*, 458 U.S. at 726 (rejecting "outdated assumption that gender could be used as a 'proxy for other, more germane bases of classification'") (quoting *Craig*, 429 U.S. at 198); *Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980); *Orr*, 440 U.S. at 280-281, 283; *Goldfarb*, 430 U.S. at 204-207 (plurality opinion); *id.* at 219-220 (Stevens, J., concurring in the judgment); *Stanton*, 421 U.S. at 14-15; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975); *Frontiero*, 411 U.S. at 686-687 (plurality opinion); *Reed* v. *Reed*, 404 U.S. 71, 76-77 (1971); but see *Bradwell*, 83 U.S. (16 Wall.) at 141-142 (Bradley, J., concurring in the judgment) (upholding sex-based exclusion of women from law practice even though the rationale for disqualifying women does not apply to all women, because "the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases").

differences. Although some "truth may be contained in some stereotypes," this Court has "made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization." *J.E.B.*, 114 S. Ct. at 1427 n.11 (citing *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975)).[30] Sex may as a factual matter correlate with certain attitudes, but the Equal Protection Clause deems sex, like race, "irrelevant as a matter of constitutional law" to the government's assessment of an individual's predispositions. 114 S. Ct. at 1432 (O'Connor, J., concurring). The constitutional determination that sex does not determine attitude or personality is "a statement about what this Nation stands for," even where it may not be "a statement of fact." *Ibid.*

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[30] See also *Craig*, 429 U.S. at 200-201 (invalidating sex-based differential ages for beer purchase despite statistics showing that young men in the relevant age group presented greater safety risks as a result of drunk driving than did young women); *Weinberger*, 420 U.S. at 645 (invalidating sex-based social security survivors' benefits despite "empirical support" that men are more likely than women to be primary breadwinners); *Frontiero*, 411 U.S. at 688-689 (plurality opinion) (invalidating presumption of wives' but not husbands' dependency for purposes of benefits determinations despite "empirical" fact that "wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives").

3. *Respondents have not demonstrated an interest in single-sex education, and such an interest would not, in any event, justify excluding women from VMI*

The court of appeals mischaracterized the issue in this case as "whether a state may sponsor single-gender education without violating the Equal Protection Clause of the Fourteenth Amendment." Pet. App. 4a. That is *not* the issue.[31] Assuming that a State may be able, consistent with equal protection principles, to establish single-sex educational programs in appropriate circumstances,[32] Virginia nevertheless cannot continue to reserve VMI only for men.

The exclusion of one sex from a college program reserved for the other involves sex-based classi-

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[31] Moreover, the result we urge in this case would not affect the constitutionality of private single-sex colleges, even when they receive public funds or tax exemptions. The provision of public funding, even when accompanied by extensive government regulation, does not convert privately controlled institutions into government actors subject to constitutional restriction, or render the government constitutionally responsible for a private entity's policies. *Blum* v. *Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982).

[32] Contrary to the assumption of the court of appeals, single-sex education is not self-justifying. See Pet. App. 253a (Motz, J., dissenting from denial of rehearing en banc). The exclusion of one sex from a program reserved for the other, however, can be a means to achieve an important (or compelling) governmental goal, such as eradication of the effects of discrimination in the existing educational system. For example, public single-sex education may be permissible based on a "compensatory purpose" if it were shown that "members of the gender benefited by the classification actually suffer a disadvantage related to the classification." *Hogan*, 458 U.S. at 728.

fications. Such classifications must be constitutionally justified. *Hogan* requires an "exceedingly persuasive justification" for them when they result in the sex-based denial of access to an educational program solely on the basis of sex. 458 U.S. at 724. The relevant inequality caused by respondents' exclusion of women from VMI in this case lies in the fact that it reserves the benefits of VMI's program, prestige and powerful alumni network exclusively to men. It is undisputed that no school in Virginia—including VWIL—offers to women the same or even a closely similar program, with its associated prestige and alumni support. In light of the dramatic differences between the two programs, respondents must establish an important governmental interest in offering VMI's benefits to men, but not women, and they must also prove that the exclusion of women from VMI is needed to serve that interest.[33]

Respondents' invocation of a generalized interest in single-sex education cannot justify single-sex programs that are vastly different in content and in the value of the degrees they offer. Moreover, establishing a justification for offering a single-sex educational opportunity on the ground that some students may learn better in such an environment does not support confining all students seeking a military-style leadership education to such programs. And respondents have failed in this case to demonstrate that they do,

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[33] In *Hogan*, the material benefit that plaintiff was denied (given his access to other, equal nursing schools in the State) was Mississippi University for Women's proximity to his home. Yet the Court held that he should be admitted to MUW. Women denied admission to VMI suffer a significantly greater deprivation.

in fact, have a genuine interest in providing single-sex education to college students in Virginia. Respondents asserted such an interest at the liability phase, but that contention was obviously pretextual: Respondents could not explain why, if they sought to provide Virginians with the option of single-sex education, such an option was provided to men but not to women. Pet. App. 151a-152a. Virginia also had no law or official policy statement supporting single-sex education. *Id.* at 153a. The Commonwealth's general abandonment of all other single-sex education years ago, including the conversion to coeducation of each of its four previously all-female public colleges, further demonstrated the absence of any genuine and important, sex-neutral state interest in single-sex education. *Id.* at 154a.[34]

The court of appeals upheld respondents' remedial choice because it did not correctly apply *Hogan*. Through the use of its "special intermediate scrutiny" test, it did not meaningfully question—as it was required to—whether the separation of men and women into substantially different programs at VMI and VWIL was needed in order to serve an important state purpose, or whether that separation was, instead, impermissibly premised on overbroad and archaic generalizations. That court's legal analysis

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[34] See *Weinberger*, 420 U.S. at 648 n.16 (court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation"); see also *Hogan*, 458 U.S. at 730; *Califano* v. *Westcott*, 443 U.S. 76, 86-88 (1979); *Goldfarb*, 430 U.S. at 212-213 (plurality opinion).

was wholly inconsistent with this Court's constitutional sex discrimination cases.[35]

The court of appeal's deferential approach to respondents' asserted interests was especially inappropriate here in view of the remedial posture of this case. Respondents violated the Constitution. VMI's exclusionary policy, dating from 1839, was indisputably based from its inception on archaic assumptions about men's fitness and women's incapacity for military-style leadership training. Respondents failed at the liability stage of this case to provide any constitutional justification whatever for having elected to continue to maintain that anachronistic and harmful policy through the late 20th century.[36] They bear a heavy burden to prove that they have erased all effects of that discrimination, that any prospective interest they now assert in single-sex education is, at the very least, important and genuine, and that exclusion of women from VMI is necessary to achieve that interest. They have not satisfied that burden.

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[35] The court of appeals' "special intermediate scrutiny" test reduces to a requirement that separate single-sex programs be sufficiently "comparable" so that the benefits provided to one gender do not "tend[], by comparison to the benefits provided to the other, to lessen the dignity, respect, or social regard of the other gender." Pet. App. 17a. That analysis is reminiscent of *Plessy* v. *Ferguson*, 163 U.S. 537, 549-550 (1896), which approved racial segregation so long as it was "reasonable," and "not for the annoyance or oppression or a particular class."

[36] Although single-sex education may not necessarily send a stigmatizing message that renders it "inherently unequal," cf. *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954), the exclusion of women from VMI *does* send a powerful, harmful message. See pages 24-25, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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