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

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, B'NAI B'RITH WOMEN, CENTER FOR ADVANCEMENT OF PUBLIC POLICY, CENTER FOR WOMEN POLICY STUDIES, COALITION OF LABOR UNION WOMEN, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, EQUAL RIGHTS ADVOCATES, FEDERALLY EMPLOYED WOMEN, INC.,

(Additional Amici Continued on Inside Cover)

IN SUPPORT OF THE PETITION

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NATIONAL WOMEN'S POLITICAL CAUCUS,
NOW LEGAL DEFENSE AND EDUCATION FUND,
TRIAL LAWYERS FOR PUBLIC JUSTICE,
WOMEN EMPLOYED,
WOMEN'S LAW PROJECT, AND
THE WOMEN'S LEGAL DEFENSE FUND

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WOMEN EMPLOYED, WOMEN'S LAW PROJECT, AND THE WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE PETITION

INTERESTS OF *AMICI*

Amici curiae are organizations strongly committed to achieving equity for women and have a demonstrated record in pursuing that goal. Each has an abiding interest in assuring the sound interpretation and application of the protections guaranteed by the Fourteenth Amendment. Descriptions of the individual organizations are set forth in the attached appendix.[1]

REASONS FOR GRANTING THE PETITION

This is as important a Constitutional gender-discrimination case as this Court has ever addressed. For 150 years, Virginia has offered men the opportunity to attend the prestigious Virginia Military Institute ("VMI"), and has denied that opportunity to women. The court below properly found that this practice violates the Equal Protection Clause. Virginia responded not by integrating VMI or by withdrawing state funding, but by creating a pallid alternative open only to women—the Virginia Women's Institute for Leadership ("VWIL"), a four-hour-per-week leadership program at nearby Mary Baldwin College, a women's school.

VWIL is completely different from and inferior to VMI in virtually every way. Under VMI's distinctive educational model, cadets must reside in spartan barracks, where they are subject to constant scrutiny and minute regulation; VWIL students would live in a standard dormitory among non-VWIL students at Mary Baldwin. VMI imposes a stringent military system under

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[1] The parties' written consent to the filing of this brief has been filed with the Court.

which discipline permeates every aspect of daily life; VWIL students will merely take part in standard ROTC training. VMI employs the rigorous adversative method —including the first-year "rat line"—to instill leadership qualities in its cadets; VWIL has no such fundamental component. VMI offers degree programs in engineering; Mary Baldwin College (and therefore VWIL) provides a limited science curriculum and no Bachelor of Science degree. And, of course, VWIL lacks altogether the reputation, tradition, and prestige that distinguish VMI and provide special opportunities to VMI graduates.

In determining whether Virginia had remedied its equal protection violation by creating VWIL, the court below agreed that VMI and the four-hour-per-week women's leadership institute were not equal. Moreover, the court below did not find that the State had an "exceedingly persuasive jusification" for discriminating against women, or that the State had advanced an "important state interest." This Court's long established equal protection jurisprudence therefore required the court to rule against Virginia.

Instead, the court below invented out of whole cloth what it described as a "special intermediate scrutiny test." Not only is that test less protective than the intermediate scrutiny standard applied by this Court for over two decades, but it is even more lax than the "separate but equal" doctrine discarded by this Court forty-one years ago. The new test requires only that the state not have a "pernicious" purpose in offering single-gender education, that the gender-based classification be substantially related to that purpose, and that the state offer men and women "substantively comparable" benefits. A. 17a. This toothless new standard conflicts with numerous decisions of this Court, including *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994); *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); and *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

To make matters worse, in applying the "substantively comparable" prong of its new test, the court relied on overbroad and outmoded stereotypes of the relative capabilities of men and women. A. 22a, 25a-26a. The court then concluded that Virginia had satisfied the demands of the Equal Protection Clause.

That the court below so badly misinterpreted the intermediate scrutiny test indicates that it is time for this Court to declare that gender discrimination against women must be subject to strict scrutiny.

If this Court allows the decision below to stand, it will have a devastating impact on both women and men. The Court will have endorsed a decision authorizing states to track men and women into different careers and social roles, without the searching inquiry such discriminatory practices demand. Allowing the states to determine an individual's opportunities based upon his or her sex is antithetical to the Equal Protection Clause, is contrary to clearly established law, and is fundamentally unfair. This Court should grant the petition and reverse.[2]

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT

A. The Alternative Program Offered To Women Fails To Satisfy Intermediate Scrutiny

This Court's gender discrimination precedents are clear. Gender-based classifications require an exceedingly persuasive justification. *J.E.B.*, 114 S. Ct. at 1425; *Hogan*,

[2] A decision by the Court in this case will also directly affect Shannon Faulkner, who is not a party to this case. In parallel litigation, Faulkner is seeking admission to the Citadel, a South Carolina institution that, like VMI, excludes women. South Carolina, at the direction of the Fourth Circuit, *see Faulkner* v. *Jones*, 51 F.3d 440 (4th Cir. 1995), is now developing a program for Faulkner modeled on VWIL, even though Faulkner has consistently maintained that if given the choice required by the Equal Protection Clause, she would choose the Citadel over a VWIL-style women-only program.

458 U.S. at 724; *Kirchberg*, 450 U.S. at 461. Where, as here, a state employs a classification which on its face discriminates against women, the state bears the burden of proving that "the classification serves 'important governmental objectives and that the discriminatory means employed' are substantially related to those objectives" *Hogan*, 458 U.S. at 724; *see also J.E.B.*, 114 S. Ct. at 1425-26; *Craig* v. *Boren*, 429 U.S. 190, 197 (1976).

There is no question that Virginia's exclusion of women from VMI fails this test. The state premised VMI's exclusion of women, and the alternative women-only VWIL program, on overbroad assumptions about women's capacity and desire to succeed at VMI, *see*, *e.g.*, A. 22a, 25a-27a, 64a, 72a-76a, 84a—" 'the very stereotype the law condemns.' " *J.E.B.*, 114 S. Ct. at 1426 (quoting *Powers* v. *Ohio*, 499 U.S. 400 (1991)).

B. The "Special Intermediate Scrutiny" Test Invented Below Conflicts With This Court's Precedents

Rather than follow established law, the court below invented out of whole cloth what it described as a new "special intermediate scrutiny test." A. 13a. Under this "special intermediate scrutiny," the state must show three things:

> (1) that its objectives are "not pernicious" and "fall[] within the range of . . . traditional governmental objective[s]." A. 22a;
>
> (2) that "the gender classification adopted is directly and substantially related to that purpose;" A. 17a; and
>
> (3) that it provides men and women benefits which are "substantively comparable." A. 17a.

This new test conflicts squarely with this Court's well-established precedents. First, this Court has made clear that the government must do more than show that its objectives are not pernicious. As the Court has often repeated, most recently in *J.E.B.*, gender classifications

require an "exceedingly persuasive justification." *J.E.B.*, 114 S. Ct. at 1425; *Hogan*, 458 U.S. at 724. Accordingly, the state must show the classification serves an "important state purpose," not simply a non-pernicious one. *See, e.g., Hogan*, 458 U.S. at 730 (all-women nursing school unconstitutional because state failed to articulate a sufficiently important objective).

Second, this Court has time and again stressed the importance of scrutinizing carefully the fit between the state purpose and the gender classification. *See, e.g., Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150-51 (1980) (state purpose valid, but unconstitutional because gender classification unnecessary to serve that purpose); *Orr* v. *Orr*, 440 U.S. 268, 281-82 (1979) (same); *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 651-52 (1975) (same). Though reciting that such scrutiny was required, the court below effectively eliminated it by finding the provision of single-gender education itself to be an acceptable end.[3] There will always be a fit between this end and the employment of gender classifications, and the second prong of the "special intermediate scrutiny" test thus carries no weight.

Finally, the Fourth Circuit added an entirely unprecedented prong to the test by permitting the exclusion of one gender from a state program if the state offers some members of that gender "substantively comparable" alternatives. This "substantively comparable" test is contrary to, and even more lax than, the "separate but equal" test of *Sweatt* v. *Painter*, 339 U.S. 629 (1950), a test this Court rejected as too lenient in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

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[3] While single-gender education may be justified by a compensatory purpose, *see Hogan*, 458 U.S. at 728, there is no such purpose here.

In *Sweatt,* this Court considered the plight of an African-American student denied admission to the University of Texas Law School on the basis of his race. Although Texas proposed to open a separate law school for non-whites (and thereby to comply with the separate-but-equal regime permissible under pre-*Brown* jurisprudence), the Court rejected this half-measure:

> [W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of the number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior.

339 U.S. at 633-34. Moreover, the Court explicitly noted that "position and influence of the alumni, standing in the community, traditions and prestige" all weighed so heavily in favor of the established school as to render a parallel institution inherently unequal. *Id.* at 634.

The similarities between *Sweatt* and this case are striking. There, as here, the lower courts recognized that an equal protection violation had taken place, yet improperly permitted the establishment of a parallel program as the remedy. In this case, too, the separate VWIL program is an anemic imitation of the original, lacking not only VMI's physical facilities and educational rigor, but also those intangible factors (reputation, tradition, prestige) whose importance the Court underscored in *Sweatt.* For all these reasons, it is as difficult to believe here as it was in *Sweatt* that a person who desired a VMI education and "had a free choice between these . . . schools would consider the question close." *Id.* at 634.

C. The Fourth Circuit's Application Of The "Special Intermediate Scrutiny" Test Is Directly Contrary To This Court's Decision In *Mississippi University for Women v. Hogan*

In *Mississippi University for Women* v. *Hogan*, the Court struck down Mississippi's all-women nursing school. The lower court's approach is so far out of line with this Court's teachings that *Hogan* would likely come out the other way under "special intermediate scrutiny." First, the State purpose deemed sufficient by the Fourth Circuit in the present case—the provision of single gender education—is equally applicable to Mississippi's operation of the all-female nursing school in *Hogan*. Second, the gender-based classification at issue in *Hogan*, the exclusion of men from a nursing school, was no less related to the State's desire to provide single-gender education than is the case here. Finally, had the *Hogan* Court inquired into whether substantively comparable benefits were available to the excluded gender—which it refused to do—Mississippi's exclusion of men from a nursing school may well have passed such a test. If a totally different and inferior program at VWIL can be considered substantively comparable to VMI, then it would be hard to imagine that the alternative Mississippi offered—two nursing schools available to men in other locations—would not be substantively comparable to the all-women nursing school under the Fourth Circuit's test. Yet the *Hogan* Court properly applied intermediate scrutiny to strike down the single-gender school. The Fourth Circuit should have done likewise.

In short, "special intermediate scrutiny" is a misnomer for the test invented by the court below. That test has nothing in common with the intermediate scrutiny this Court has developed. The lower court's test had only one purpose—to allow Virginia to preserve anachronistic and blatantly discriminatory institutional practices. This Court should grant the petition and reverse the decision below.

II. THE COURT SHOULD TAKE THIS OPPORTUNITY TO RECOGNIZE THAT SEX-BASED DISCRIMINATION WARRANTS STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE

This Court has explicitly left open the question whether gender-based classifications should be analyzed under the intermediate scrutiny described in *J.E.B.* and *Hogan*, or whether, like racial classifications, they are subject to strict scrutiny. *See J.E.B.*, 114 S. Ct. at 1425 n.6; *Hogan*, 458 U.S. at 724 n.9; *Harris* v. *Forklift Sys.*, 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring). While Virginia's denial of a VMI education to women does not survive intermediate scrutiny as properly interpreted under this Court's precedents, this Court should now take the opportunity to apply strict scrutiny to gender-based discrimination.

First, this Court has often recognized the long and tortured history of discrimination against women in this country. *See, e.g., J.E.B.*, 114 S. Ct. at 1425 (recognizing similarities between historic discrimination against women and minorities); *Hogan*, 458 U.S. at 725 n.10 ("History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function."); *Frontiero* v. *Richardson*, 411 U.S. 677, 684-85 (1973) (acknowledging that "our Nation has had a long and unfortunate history of sex discrimination," and recognizing that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes") (plurality opinion). This history, coupled with the continuing reliance on gender-based stereotypes to limit women's opportunities, as has occurred in this case, supports the application of strict scrutiny to gender-based classifications which disadvantage women.

Second, the difficulty lower courts like the Fourth Circuit have had in properly applying intermediate scrutiny warrants that this Court now hold that gender-based discrimination requires strict scrutiny. The decision below, which relies on gender-based stereotypes to support the State's denial of equal opportunity to women, and which creates a special new test out of whole cloth, exemplifies the misapplication of intermediate scrutiny to gender-based qualifications.

Another similar misapplication is the Fourth Circuit's recent decision in *Faulkner* v. *Jones,* 51 F.3d 440 (4th Cir. 1995), which left open the possibility that South Carolina will be permitted to deny women the benefits of a Citadel education by operating an alternative, inferior leadership training program for women. *See id.* at 450 (Hall, J., concurring) (". . . I am convinced that we have embarked on a path that will inevitably fall short of providing women their deserved equal access to important avenues of power and responsibility."). Moreover, the *Faulkner* court in dicta espoused yet another curious wrinkle in its misinterpretation of intermediate scrutiny, suggesting that while an absence of demand among women as a group may not justify the deprivation of an individual's civil rights based on gender, it may justify a deprivation of "an economic benefit" such as "single gender education," based on that individual's gender. *See id.* at 445. This suggestion is entirely without support in this Court's precedents.

Other courts have also misapplied intermediate scrutiny to uphold invidious gender-based classifications. For example, before this Court decided *J.E.B.*, numerous courts had upheld gender-based peremptory strikes based on traditional and overbroad stereotypes about the relative abilities of men and women. *See, e.g., United States* v. *Broussard,* 987 F.2d 215, 218-20 (5th Cir. 1993); *United States* v. *Nichols,* 937 F.2d 1257, 1262-64 (7th Cir.

1991), *cert. denied*, 502 U.S. 1080 (1992); *State* v. *Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989).

Finally, the Court's recent decision in *Adarand Constructors, Inc.* v. *Pena*, 63 U.S.L.W. 4523 (U.S. June 12, 1995), subjecting race-based affirmative action programs to strict scrutiny, coupled with its earlier decision in *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), provides yet another reason for extending strict scrutiny to gender-based discrimination. It would hardly be justified under equal protection principles if the government had more leeway to discriminate against women than to enact affirmative action programs, such as that at issue in *Adarand*, designed to remedy discrimination against minorities. Unless all gender classifications are subject to strict scrutiny, such an anomaly results.

Moreover, as a practical matter, it may be easier for the government to discriminate against women than to enact affirmative action programs designed to remedy discrimination against women. Many affirmative action programs, like that at issue in *Adarand*,[4] are designed to remedy discrimination against both minorities and women. Although not required by this Court's precedents, public policy-makers may continue to treat women and minorities similarly under these programs, thereby applying the

[4] One of the federal programs discussed in *Adarand* presumed that women as well as members of minority groups were "socially and economically disadvantaged individuals," and created incentives to encourage the awarding of federal contracts to such individuals. While nothing in *Adarand* or in *Croson* supports the application of strict scrutiny to gender-based affirmative action programs, some courts have already improperly subjected such programs to strict scrutiny. *See Brunet* v. *City of Columbus*, 1 F.3d 390 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1190 (1994) (applying strict scrutiny to gender-based affirmative action plan); *Conlin* v. *Blanchard*, 890 F.2d 811 (6th Cir. 1989) (same); *Cone Corp.* v. *Hillsborough Cty.*, 723 F. Supp. 669 (M.D. Fla. 1989) (same). *But see Associated General Contractors* v. *San Francisco*, 813 F.2d 922, 941 (9th Cir. 1987) (applying intermediate scrutiny to gender-based affirmative action plan).

strict scrutiny standard to affirmative action programs benefitting women that they now must apply to affirmative action programs benefitting minorities. Consequently, unless gender-based discrimination is subjected to strict scrutiny, the government may as a practical matter be more lenient in assessing its ability to adopt programs and policies which discriminate against women than it will be with respect to policies designed to overcome such discrimination. Such a miscarriage of justice has no place in this country's equal protection jurisprudence.

III. THE DECISION BELOW THREATENS THE EQUALITY OF WOMEN ACROSS THE COUNTRY

As this Court has observed repeatedly, the rights delineated in the Fourteenth Amendment are *individual* rights. *See, e.g., Adarand Constructors, Inc.* v. *Pena*, 63 U.S.L.W. 4523, 4530 (U.S. June 12, 1995) (reaffirming "the basic principle that the Fifth and Fourteenth Amendments protect *persons*, not *groups*") (emphasis in original); *Sweatt* v. *Painter*, 339 U.S. 629, 635 (1950); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337, 351 (1938).

In the decision below, the Fourth Circuit set aside this core principle of equal protection law. Instead, it based its approval of the VWIL alternative on generalized (and stereotyped) notions of how most young women would respond to a VMI-type adversative environment.[5] Instead of recognizing (as did one of VMI's own expert witnesses) that many young women would benefit from a VMI-style education,[6] the court below justified the

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[5] "Educational experts for the Commonwealth testified that women *may not* respond similarly and 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." A. 27a (emphasis supplied).

[6] *See* A. 223a (testimony of Dr. Richard Richardson that "undoubtedly" there are women who will do well under an adversative model).

watered-down VWIL program by speculating that *other* women would want a less confrontational environment. In so doing, the lower court ignored the fact that the VMI program may be equally inappropriate for (and undesirable to) most male students.

In effect, the Fourth Circuit traded off the rights of individual women who want a VMI education against those of a hypothetical group of women who fit the court's stereotyped assumptions and who might prefer something different. The analytical question the lower court should have posed instead—and the one consistent with this court's individual-rights view of equal protection—is whether the State's refusal, solely on gender grounds, to provide a VMI education to qualified individual women who may want one is substantially related to an important government interest.

By setting aside the rights of individual women who desire a VMI education, the decision below invites the states to perpetuate and reinforce stereotypical conceptions of proper gender roles by providing specific benefits, whether educational or otherwise, only to those who fit the state's preferred stereotypes. Today Virginia seeks to provide rigorous, adversative, and prestigious military education to men, and genteel leadership training to women. In the telling phrase of the district court, Virginia will teach men to march "to the beat of a drum" and women "to the melody of a fife." A. 84a. Tomorrow, another state might decide to offer vocational training in construction to men and home economics to women; or to offer math classes to young boys and sewing classes to young girls. The unconstitutionality of such gender tracking is clear, whether or not the benefits of math and sewing classes are "substantively comparable." To foreclose the potential for mischief inherent in the Fourth Circuit's invidious standard, this Court should grant the petition, and reverse.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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