Nos. 94-1941 and 94-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner*
v.
COMMONWEALTH OF VIRGINIA, *et al., Respondents.*

COMMONWEALTH OF VIRGINIA, *et al., Cross-Petitioners,*
v.
UNITED STATES OF AMERICA, *Cross-Respondent.*

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

AMICI CURIAE BRIEF OF WOMEN'S SCHOOLS TOGETHER, INC.; BOYS' SCHOOLS: AN INTERNATIONAL COALITION; ROBERT BOBB;

(Additional Amici Listed on Inside Front Cover)

IN SUPPORT OF RESPONDENTS, CROSS-PETITIONERS

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Questions Presented

1. Whether a state or political subdivision is ever permitted to offer the benefits of same-gender education to one sex without offering them to the other.

2. Whether a state or political subdivision is permitted to offer different educational methodologies to each sex when providing same-gender education to both sexes.

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INTEREST OF AMICI CURIAE

This brief amici curiae is submitted by a diverse array of individuals concerned about the potential implications of the Court's resolution of this case. While all of the amici do not necessarily endorse the overall educational philosophy at VMI, they share a concern that this Court's decision will have consequences for what they believe is an important pedagogical alternative: single-sex education.

Some of the amici on this brief represent urban school districts which have developed or are considering the development of elementary or secondary same-gender programs. In the exercise of their professional judgment, these educators maintain that same-gender public schools or classes benefit young people, and they are concerned that a decision against VMI in this case will not only set back VMI but will also crush their fledgling programs. In addition, most of these educators teach at-risk, disadvantaged children. They do not want the Constitution interpreted in a way that permits only those who can afford private education to have access to the proven benefits of same-gender education.

Other amici are scholars, both women and men, who have spent years studying the educational system. These experts believe firmly, and with good cause, that single-sex education can help both boys and girls. They are concerned that a decision against VMI in this case could deny the benefits of same-gender education to future generations of young women and young men.

Other amici represent or teach at single-sex private schools. They are apprehensive about the implications of this decision for their schools. Some students at their institutions receive federal funds. Many of the institutions themselves are exempt from federal taxation as nonprofit organizations. Others receive substantial forms of federal or state aid. As the district court stated, "the public-private shibboleth is more apparent than real. It cannot be gainsaid that private colleges receive substantial

infusions of both federal and state money. Thus, the distinction [ ] draw[n] is illusory." Pet'r App. at 71a. These amici worry about the implications of this decision for same-gender private schools.

Descriptions of the amici are set forth in the attached appendix.[1]

STATEMENT OF THE CASE

Virginia offers a wide selection of publicly supported and privately funded colleges and universities. Pet'r App. at 187a. Fourteen of fifteen state-supported, four-year colleges in Virginia are now coeducational, the Virginia Military Institute (VMI) being the only exception. *Id.* at 185a, 187a. The Commonwealth currently has five private all-women's colleges and one private all-men's college. *Id.* at 189a. The hallmarks of Virginia's educational policy are "diversity and autonomy," with the Boards of Visitors of each institution having broad autonomy in the determination of its mission. *Id.* at 187a. The Commonwealth now offers three public programs of higher education targeted specifically at promoting leadership in military and civilian life. *Id.* at 107a, 202a-203a, 214a.

The Virginia Polytechnic Institute (VPI) offers both men and women the opportunity to pursue together this education in the VPI Corp of Cadets. *Id.* at 214a. The VPI method differs significantly from the system used at VMI, using "positive motivation" and recognizing individual differences in a more informal environment. *Id.* at 218a.

VMI offers men the opportunity to pursue together this leadership education through a unique, adversative method found by experts, the district court, and the court of appeals to be suited specifically for a sexually homogeneous environment. *Id.* at 148a, 171a, 173a. The adversative system includes physical

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

rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values for VMI cadets. *Id.* at 191a-192a.

The Virginia Women's Institute for Leadership (VWIL), in its first year, offers women the opportunity to pursue together a leadership education through an analogy to the holistic VMI program, using a "cooperative method which reinforces self-esteem rather than the leveling process used by VMI." *Id.* at 63a-64a.

This case originated from a complaint filed in 1990 by the United States Department of Justice on behalf of a female high school student seeking admission to VMI. *Id.* at 160a. After a six-day trial, *id.*, the district court found three important governmental interests: (1) the diversity added by a same-gender VMI; (2) the substantial educational benefits flowing to each sex from same-gender education; and (3) the benefits flowing specifically to men from the adversative method:

> "[t]he evidence in the case, which is virtually uncontradicted, supports Virginia's view that substantial educational benefits flow from a single gender environment, be it male or female, that cannot be replicated in a coeducational setting." *Id.* at 176a-177a.

The court then held that Virginia's provision of same-gender education at VMI survived constitutional scrutiny under this Court's decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). *Id.* at 177a.

The Fourth Circuit agreed with the district court about the undisputed and unique educational benefits associated with same-gender education, *see id.* at 150a-151a, but disagreed about the Commonwealth's ability, consistent with the Fourteenth Amendment, to provide this benefit only to men. *Id.* at 151a. In the process, however, the court affirmed the district court's *factual* findings that such a single-gender education is educationally justifiable. *Id.* The court also affirmed findings of

fact that "coeducation would destroy aspects of VMI's program which lie near the core of its holistic system ... deny[ing] those women the very opportunity they sought." *Id.* at 6a.

In finding a violation of the Fourteenth Amendment, the appellate court ultimately drew three significant conclusions:

> "(1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex; (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and (3) the Commonwealth of Virginia, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." *Id.* at 155a.

Instead of mandating that women be admitted to VMI or that public funds be withdrawn from the institution, the Fourth Circuit remanded the case, permitting VMI to explore alternatives and specifically suggesting that VMI "might establish parallel institutions or parallel programs." *Id.* at 156a.

After the Fourth Circuit's decision, the Governor approved the proposed Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College (MBC), a private women's college. *Id.* at 102a, 122a. A task force, comprising faculty, staff and students at MBC, with the input of external education experts, developed an implementation proposal promoting the same goals and values as VMI, but intentionally using a different methodology. *Id.* at 102a-103a. Through a contractual arrangement with the state, *id.* at 104a, VWIL now is a "publicly-supported, single-sex education program with military training for women." *Id.* at 107a.

On remand, the district court was persuaded by the testimony of three experts that VWIL is "a pedagogically sound and justified program." *Id.* at 73a. Specifically relying on this expert testimony, the district court found that "the differences between

VWIL and VMI are justified pedagogically and are *not based on stereotyping*." *Id.* at 76a (emphasis added). Accordingly, the court concluded

> "[that] controlling legal principles in this case do not require the Commonwealth to provide a mirror image VMI for women. Rather, it is sufficient that the Commonwealth provide an all-female program that will achieve substantially similar outcomes in an all-female environment and that there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends. VWIL satisfies the Fourth Circuit's requirement that the Commonwealth adopt a parallel program for women which takes into account the differences and needs of each sex." *Id.*

On the second appeal, the Fourth Circuit affirmed the district court, using a "heightened intermediate scrutiny test specially tailored to the circumstances..." *Id.* at 5a. The court observed that "[j]ust as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many." *Id.* at 21a. The court then concluded that "the only way to realize the [educational] benefits of homogeneity of gender is to limit admission to one gender." *Id.* at 22a.

Instead of ending the "*Hogan* analysis" with the two steps articulated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), the Fourth Circuit added a third step, asking whether excluded men and excluded women have reasonable opportunities to obtain benefits substantively comparable to those they are denied. *Id.* at 24a.

After specifically rejecting the government's argument that a comparable opportunity requires an identical program, *id.* at 25a, 27a, the court of appeals held that the programs are substantively comparable in design and approved the remedy condi-

tioned on Virginia's maintaining a high level of commitment to VWIL. *Id.* at 27a-28a. The court of appeals issued a judgment accordingly, remanding the case to the district court with instructions regarding appropriate oversight of the implementation of the VWIL program. *Id.* at 30a.

SUMMARY OF ARGUMENT

Under the test in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), a gender-based classification must serve important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives.

Virginia has both a broad and a narrow important objective in employing the means of same-gender education. The first objective is the obvious responsibility of every state government to provide a superior education to all of its students. The second, narrower objective, which is related to the first, is to provide the discrete benefits of higher academic achievement, greater self esteem, and greater career advancement that have been proven to result from single-sex education.

If the objectives are sufficiently important, *Hogan* requires that the gender-based classification be substantially related to the achievement of those objectives. 458 U.S. at 724. Thus, a state or a school board must not use gender reflexively as an overbroad proxy for more relevant criteria. The creation of same-gender schools or classes is not an overbroad proxy. In fact, the educational benefit of same-gender education for *some* young people is beyond dispute. The evidence is strong and growing that same-gender education both improves the educational achievement of some young people and achieves the important goals of increased self-esteem, increased academic focus and *less* gender stereotyping.

Unquestionably, single-sex schools and classes substantially serve the important governmental interest of providing a superior education to some students. The issue in this case then

becomes: What constraints does the Constitution place on an educational authority's use of this important educational tool? Specifically, (1) is an educational authority ever permitted to offer the benefits of same-gender education to one sex without offering them to the other? And (2) is an educational authority permitted to offer different educational methodologies to each sex when providing single-sex education to both sexes?

Amici are concerned about the legal standard announced by the Fourth Circuit in this case. In order to provide guidance to lower courts, and more importantly to educators, this Court should lay to rest the notion that a state or school district is always required by the Constitution to provide parallel programs in order to initiate same-gender educational experimentation. A requirement of parallel programs in every instance will chill the revived interest in this important educational method.

In the case of urban school districts, which have the legitimate and substantial goal of providing a quality education to all their students, single-sex education can be warranted to ensure increased achievement for a subset of the overall student population for whom the current range of classroom settings is inadequate. In the best judgment of educators, the particular educational needs of some boys in certain urban areas, and some girls in others, cry out for alternative single-sex educational settings.

State governments and school districts operate under finite budgets to provide the range of educational programs that will best meet the educational needs of the total student population. School districts should not always be constitutionally required to offer parallel programs in each instance of experimentation with single-sex education. That requirement could force school districts to shift limited funds from other beneficial educational programs to create what may be, in their professional judgment, a much less needed same-sex program. The most likely outcome of a parallelism requirement for these school districts struggling to use their limited resources in the most effective manner

possible would be to abandon single-sex experimentation altogether — a tragic outcome, as this method is gaining in popularity and beginning to produce positive results for many children in our inner cities.

Certainly, when a state or school district offers the benefits of publicly funded same-gender education to both sexes, as Virginia has done in this case, the Constitution does not serve as an educational micromanager, second-guessing the methodologies recommended. In the case at hand, an independent group of experts in women's education recommended a non-adversative system as the most effective methodology to teach leadership and military skills to women. Virginia has provided substantial resources for the project. VMI has pledged both monetary and nonmonetary aid. Thus, the Commonwealth, having studied the issue thoroughly, has provided the resources and the support necessary to offer the significant benefits of single-sex education to both sexes. The Constitution requires no more, and the vast majority of parents and students would be disappointed with any less.

ARGUMENT

I. Publicly-Sponsored Single-Sex Educational Programs Are Constitutionally Permissible If They Are Substantially Related to the Achievement of an Important Governmental Objective.

In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), the Court articulated the standard for analyzing the constitutionality of a public university's policy of admitting members of only one gender to a particular educational program. Under this test, a gender-based classification is permissible if (1) "the classification serves 'important governmental objectives'" and (2) "'the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980).

A. The Promotion of Academic Achievement Constitutes an Important Governmental Objective.

This Court's Equal Protection jurisprudence requires that those using an explicit gender classification must put forward an "important governmental objective" as justification. *Hogan*, 458 U.S. at 724. The Court repeatedly has found objectives such as administrative ease and convenience insufficient to justify gender-based classifications. *Craig v. Boren*, 429 U.S. 190, 198 (1976), *citing Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion). The Court also has scrutinized carefully the "statutory objective itself" to insure that it does not reflect "archaic and stereotypic notions" or is not designed to "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap." *Hogan*, 458 U.S. at 725. *See also J.E.B. v. Alabama*, 114 S.Ct. 1419, 1426 (1994).

In contrast, the Court has accepted as important governmental objectives the protection of public health and safety, *Craig v. Boren*, 429 U.S. at 199-200; the raising and supporting of armies, *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981); and the prevention

of illegitimate pregnancies. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 470 (1981) (plurality opinion).

Although the cases do not offer a bright line for drawing distinctions between important and unimportant objectives, they indicate that an objective is important if it is a responsibility traditionally assigned to government and highly valued by citizens. *Cf. Craig v. Boren*, 429 U.S. at 199-200 (public health and safety represents "an important function of state and local governments").

Certainly, increasing academic achievement is more analogous to the interests found important by this Court than to those which have been rejected. "Today, education is perhaps the most important function of state and local governments." *Plyler v. Doe*, 457 U.S. 202, 222 (1982), *citing Brown v. Board of Education*, 347 U.S. 483, 493 (1954). In addition, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Id.* "The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance." *Vorcheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 888 (3d Cir. 1976), *aff'd by equally divided Court*, 430 U.S. 703 (1977).[2]

B. The Use of Same-Gender Education is Substantially Related to Achieving the Important Governmental Objective of Increasing Academic Achievement.

"If the State's objective is legitimate and important, [the Court] next determine[s] whether the requisite direct, substantial

[2] In *Vorcheimer*, the Third Circuit, utilizing emerging heightened scrutiny, permitted Philadelphia to retain an all-male high school and an all-female high school, finding the objective of a quality education sufficiently important. *But see Newburg v. Board of Public Education*, 9 Phila. 556 (C.P. Phila. County 1983), *aff'd*, 478 A.2d 1352 (Pa. Super. Ct. 1984) (state court found inequities between Central High School for boys and Girls High School for girls in violation of federal and state constitutions).

relationship between objective and means is present." *Hogan*, 458 U.S. at 725. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 725-726.

In explaining how to determine the existence of a substantial relationship between means and ends, the Court in *Hogan* cited a series of cases in which the Court struck down statutes for unthinkingly applying traditional assumptions about the sexes. *Hogan*, 458 U.S. at 726 nn.11, 12. In those cases, state legislatures or the United States Congress reflexively used gender as an overbroad proxy for more relevant criteria. *See Craig v. Boren*, 429 U.S. at 201-02 (gender as a proxy for "drinking and driving"); *Stanton v. Stanton*, 421 U.S. 7, 13 (1975) (gender as a proxy for likelihood of attending college); *Weinberger v. Weisenfeld*, 420 U.S. 636, 643 (1975) (gender as a proxy for wage earning).

Rather than being an overbroad proxy, the gender distinction itself in single-sex education creates the desired unique educational benefits for both sexes. As noted by both courts below, the concrete benefits of same-gender education cannot be achieved for one sex unless the other is not present.[3] For that reason, the district court found and the Fourth Circuit agreed that "it would be impossible for a female to participate in the 'VMI experience' ... her introduction into the process would change it." *See* Pet'r App. at 155a, 175a. The benefits from this experience, like all same-gender experiences, flow from its homogeneity. Once a member of the other sex is introduced into the educational mix,

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[3] Of course, because co-education is the norm and same-gender education is optional, no one is forced to receive those benefits.

the class becomes coeducational and loses the distinctive benefits of same-gender education for both sexes.[4]

Both the district court's findings of fact and significant independent research demonstrate the close fit between the objective of higher academic achievement and the means of single-sex education.[5] The district court's findings of fact, upheld by the court of appeals, establish that "a substantial body of 'exceedingly persuasive' evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college." *Id.* at 168a. The benefits found by the district court include growth in self-esteem, pursuit of non-traditional careers, and higher starting salaries after graduation. *Id.* at 169a.

Research regarding the benefits of same-gender schools at both the college and secondary school level supports the district court's findings of fact. In November 1995, a new study by Mikyong Kim and Rodolfo Alvarez concluded that "attending women-only colleges advantageously affects students' academic ability."[6] The researchers also believe that students in women-only colleges have better opportunities to be actively involved in

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[4] The government argues that excluded women who meet VMI's entrance requirements have a right to experience the "distinctive educational method" used at VMI. Again, the district court correctly found that the remedy would be illusory. "A coeducational VMI would offer neither males nor females the VMI education that now exists. The changes would substantially affect the method now used to educate citizen-soldiers." Pet'r App. at 227a. The district court found that it would be necessary to adapt VMI for privacy, to change certain physical training programs, and most importantly, to create different treatment for different classes, thus destroying the egalitarian ethic. *Id.* at 237a.

[5] The brief of amici curiae filed in support of the government by the American Association of University Professors, *et al.* argues that "the lower courts relied on palpably insufficient evidence to justify continuing sex discrimination." Brief for Amici Curiae, AAUP at 20 (No. 94-1941). The challenged findings of fact not only are not clearly erroneous, they are supported by the vast weight of the testimonial and scholarly evidence.

[6] Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 Higher Educ. 640, 661 (1995).

student organizations, to exercise leadership, and to improve their social self-confidence.[7]

Cornelius Riordan, who has written a book and conducted numerous studies on the benefits of single-sex schools,[8] supports this notion emphatically:

> "[s]ingle gender schools generally are more effective academically than coeducational schools. This is true at all levels of school, from elementary to higher education. Over the past decade, the data consistently and persistently confirm this hard-to-accept educational fact."[9]

In the same article, Riordan summarized the intense interest of educators, parents and students in same-gender education:

> "Single-gender schools work. They work for girls and boys, women and men, whites and nonwhites. Research has demonstrated that the effects of single gender schools are greatest among students who have been disadvantaged historically — females and racial/ethnic/religious minorities (both males and females)."[10]

At the secondary school level, researchers have found strong evidence that same-gender education enhances academic achievement and promotes greater self-esteem. A 1990 study by Lee and Marks found that both males and females attending single-sex schools were more likely than students in coeducational high

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[7] *Id.*

[8] *See* Cornelius Riordan, *Girls and Boys in School: Together or Separate?* (1990); Cornelius Riordan, *The Case for Single Sex Schools, reprinted in* Office of Educ. Research & Improvement, U.S. Dept. of Educ., *Single Sex Schooling: Proponents Speak* [hereinafter DOE Report] Vol. II, 47 (1992); Cornelius Riordan, *Public and Catholic Schooling: The Effects of Gender Policy*, Am. J. of Educ., Aug. 1985, at 518.

[9] Cornelius Riordan, *Reconsidering Same Gender Schools: The VMI Case and Beyond*, Educ. Wk., February 23, 1994, at 48.

[10] *Id.*

schools to attend selective four-year colleges and were more likely to consider applying to graduate schools.[11] The study also determined that young women in all-girls schools showed higher educational aspirations, more active political involvement, and ultimate satisfaction with academic and social aspects of college environment.[12]

At the same time, recent research has also questioned whether gender equity actually exists in public coeducational schools.[13] Indeed, three researchers have found evidence that "coeducational schools may foster stereotypical sex roles."[14]

Hence, the district court's conclusion that same-gender education provides educational benefits to *some* young people is more than amply supported in the record and by independent research.[15] Moreover, this Court has frequently noted its reluc-

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[11] V.E. Lee and H.M. Marks, *Sustained Effect of the Single-Sex School Experience on Attitudes, Behaviors, and Values in College*, 1990 J. of Educ. Psychol. 82, 578-592, *summarized in* DOE Report Vol. I, 13, 37-38 (1992).

[12] *Id.*

[13] Am. Ass'n of Univ. Women Educ. Found., *How Schools Shortchange Girls* 147 (1992) (girls do not receive equitable teacher attention, equitable attention in course materials or encouragement in math and science).

[14] Mary Moore et al., *Single Sex Schooling and Educational Effectiveness: A Research Overview*, *reprinted in* DOE Report Vol. I, 11 (1992).

[15] *See* Richard Hawley, *A Case for Boys Schools*, *reprinted in* DOE Report, Vol II, 11 (boys in boys schools do better than boys in coeducational schools on some measures — never, apparently, worse); Richard Hawley, *A Progressive Case for an Ancient Reform*, 92 Tchrs. College Rec. 433, 440 (1991) (schooling boys within structure designed to realize distinctive developmental features has resulted in high count of most longstanding and most demonstrably effective schools in world); Diane Ravitch, *Things Go Better in Single-Sex Schools*, Wash. Post, August 31, 1995, at A23 (of top 150 schools in Great Britain, only 14 were coeducational); Ann Zanders, *A Presentation of the Arguments For and Against Single-Sex Schooling*, *reprinted in* DOE Report, Vol. II, 15 (research shows that girls benefit from single-sex schools and shows promise and documented successes for African American children).

tance to disturb findings of fact concurred in by two lower courts. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 614 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

II. A State is Constitutionally Permitted to Provide Same-Gender Education for One Sex Without Providing it for the Other.

The evidence clearly indicates that single-sex education can be substantially related to achieving an important governmental objective. Of course, offering the educational opportunity to both sexes is the ideal in that both sexes benefit from the experience. However, these amici are concerned that transforming this ideal into an inviolable constitutional principle would impose rigidities on educators that would limit their abilities to provide promising alternatives to children in their schools. For many students, single-sex education is beneficial to higher educational achievement, greater self-esteem and enhanced career advancement. The important issue then becomes whether a state or political subdivision is free to use same-gender education to meet the needs of one gender without always offering a parallel program for the other gender. The Fourth Circuit, at the liability phase of this trial, found that Virginia had violated the Constitution by not making the benefits of same-gender education available to both sexes. Whether or not this Court agrees with the court below as to VMI's liability, the Court should clarify that the Constitution does not require this parallelism every time a state or school district determines that providing same-gender education for one sex would serve an important governmental objective.

A school district's ability to experiment constitutionally with single-sex schools or classes for only one sex turns on the Court's interpretation of footnote 17 in *Hogan*. 458 U.S. at 731 n. 17. In that footnote, the Court made clear that the issue is not whether

the benefited class profits from the classification, but whether the state's decision to confer a benefit only upon one class by means of such a classification is substantially related to achieving a legitimate and substantial goal. *Id.* This determination, of course, depends on the facts and circumstances of each case.

A. Local Communities and Educators Must Be Permitted to Prioritize the Use of Scarce Resources in Experimenting with Optional Same-Gender Programs.

Whether it is at the level of higher or elementary education, the practical impact of the Fourth Circuit's decision will be to discourage states and cities from offering the option of a single-sex education to students of one gender unless a "substantively comparable" parallel program is offered to students of the other gender, regardless of the need or resources required for such a program. A rigid requirement of parallelism simply is not useful to the real-life problems faced by school superintendents, administrators and teachers.

In 1991, the City of Detroit attempted to establish three all-male academies.[16] The task force recommending the male academies cited a series of dispiriting statistics to justify its important interest in exploring the possibilities of same-gender education. "Males of White, Hispanic and African American ethnic groups [were] at the greatest risk of dropping out of Detroit public schools."[17] Of the 24,000 males enrolled in the Detroit public high schools, fewer than 30% had cumulative grade point averages above 2.0.[18] Boys were suspended from Detroit public schools at three times the rate of girls.[19] Sixty

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[16] Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1742 (1992).

[17] Detroit Public Schools, Male Academy Grades K-8: A Demonstration Program for At-Risk Males 15 (December 7, 1990) (working draft).

[18] *Id.*

[19] *Id.* at 16.

percent of the drug offenses in Wayne County were committed by 8th and 9th grade dropouts, and 97% of the offenders were African American males.[20] In sum, urban males suffered "a multitude of educational, social, health, and economic problems ... [M]ales appear[ed] to suffer disproportionate rates of school failure, poverty, violence, delinquency, unemployment, incarceration, illness and death."[21]

The report demonstrated that Detroit had previously responded to the problems of young, urban females. "When it was determined that 40% of the females who drop out of school, do so because of pregnancy, three schools and several programs were established to prevent, as well as address, the problems facing pregnant and parenting teens."[22] The report also showed a disparity in academic performance between boys and girls in the Detroit school system. Girls were suspended less often and did not drop out at the rate of boys. In addition, they outperformed boys on standardized tests.[23]

The Detroit academy demonstration program was designed to offer to boys the educationally sound benefits accompanying attendance at a single-sex school: self esteem, rites of passage, role model interaction and academic improvement.[24] The idea was popular, with 1200 applying for 560 spots.[25] The city had plans to open up similar Female Academies, but resource allocation forced it to prioritize the implementation of the program, believing males to be more at risk.[26]

[20] *Id.*

[21] *Id.* at 3.

[22] *Id.* at 15. *See* Kristin Caplice, *The Case for Single Sex Education*, Harv. J. L. & Pub. Pol'y 227, 276 (1994) [hereinafter *Single Sex Education*] (Detroit has existing single-sex schools, three for pregnant girls and one for boys in danger of expulsion).

[23] Caplice, *Single Sex Education*, at 276.

[24] *Id.* at 275.

[25] *Id.*

[26] *Id.*

Misapplying *Hogan*, a federal district court preliminarily enjoined the academies, finding that "there is no evidence that the educational system is failing urban males because females attend school with males." *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1008 (E.D. Mich. 1991). But neither *Hogan* nor its progeny required such a showing. The "means-ends" test should not be interpreted to require a strict correlation between a coeducational environment and educational impairment. Instead the burden is a positive one of demonstrating that single-sex schools and programs contribute to higher academic achievement, self-esteem and prospects for attending college.[27] Providing these concrete benefits to urban males is an important governmental interest, and the single-sex admissions standard of a school has been shown in independent research to be related, directly and substantially, to achieving that interest.

To be sure, single-sex academies have different and concrete benefits for girls. But the Detroit School Board, with very limited resources, prioritized its needs. The community, with the input of educational experts, decided first to create schools for pregnant teenagers, then to turn its attention to at-risk males. Of course, if Detroit may not constitutionally provide male academies, then it raises the question whether Detroit was permitted under the Constitution to initiate schools for pregnant mothers, without parallel schools for boys. Amici believe strongly that schools for pregnant mothers are constitutional in that "the gender classification is not invidious, but rather reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. at 469 (plurality opinion).

A city's prioritizing decisions are not invidious gender classifications, but rather *realistic* reflections of the fact that males and females are not fungible. *Id.* Just as "a legislature may provide

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[27] *See* Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1750-51 (1992).

for the special problems of women," *id.*, *citing Weinberger v. Weisenfeld*, 420 U.S. 636, 653 (1975), a city should be able to respond to the very real needs of urban males, provided that it has done so in a reasoned way, without relying on "archaic and stereotypic notions," *Hogan*, 458 U.S. at 725, or in a way which "demean[s] the ability or social status of the affected class." *Michael M. v. Superior Court*, 450 U.S. at 469, *citing Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion). If the Fourth Circuit's emphasis on "parallelism" is interpreted to require that every time a school district initiates an educational experiment designed to address real problems with one gender it must simultaneously initiate a "substantively comparable" educational experiment with the other gender, the courts will have placed an inadvisable straitjacket on school districts and parents in the use of single-sex schooling:

> "[C]ities [should not be] categorically prevented from doing what they c[an] to address the particular needs of specific elements of [their] school-age population simply because [they] [cannot] simultaneously offer a solution to every problem facing every group. This is the kind of flexibility that is essential to the education reform that the country desperately needs."[28]

The Constitution does not require absolute and simultaneous parallelism. "The Constitution requires that [government] treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Rostker v. Goldberg*, 453 U.S. at 79.

The practical effect of the Fourth Circuit's test in a poor city will not be to expand opportunities for girls but instead to quash the experimentation for boys. If Detroit cannot afford to create male academies and female academies concurrently, the lower court's standard effectively requires them to abandon both projects.

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[28] Caplice, *Single Sex Education*, at 276.

B. Local Communities and Educators Must Be Permitted to Make an Honest Assessment of Needs Rather than to Engage in Gestures of Superficial Equality.

In Ventura, California; Manassas, Virginia; Baltimore, Maryland; and Philadelphia, Pennsylvania, among other areas, school districts have offered or proposed to offer classes, programs or entire schools targeted at girls.[29] Ventura was told by the Department of Education to rename classes aimed at females as classes for the "mathematically challenged," presumably to avoid a loss of federal funds or a constitutional challenge.[30] Philadelphia and Baltimore each has an all-girls high school, although each says that boys are free to apply.[31]

According to one strong supporter of single-sex schools, "[c]lasses like those in Ventura County ... survive constitutional challenge by formally opening their doors to men, with a wink and a nod to keep them from coming in."[32] Statutory requirements aside,[33] amici believe that the Constitution does not

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[29] *See* Eric Wee, *A Lesson in Confidence: Va. Middle School Tries All-Girl Classes*, Wash. Post, May 1, 1995, at A1; Catherine Saillant, *Ventura's All-Girl Math Classes Pass Test on Bias; U.S. Civil Rights Authorities Suggest Courses Be Renamed but Find They Do Not Discriminate Against Boys*, L.A. Times, March 8, 1995, at B1; Laura Rehrmann, *Where the Smart Girls are Away from Boys, Western Students Excel*, Balt. Sun, January 27, 1990, at 3B.

[30] Catherine Saillant, *Ventura's All-Girl Math Classes Pass Test on Bias; U.S. Civil Rights Authorities Suggest Courses Be Renamed but Find They Do Not Discriminate Against Boys*, L.A. Times, March 8, 1995, at B1.

[31] Laura Rehrmann, *Where the Smart Girls are Away from Boys, Western Students Excel*, Balt. Sun, January 27, 1990, at 3B.

[32] Susan Estrich, *For Girls' Schools and Women's Colleges; Separate is Better*, N.Y. Times, May 22, 1994, § 6, at 39.

[33] Amici realize that these schools may still encounter opposition from the federal government under two federal statutes, *see* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994) and the Equal Educational Opportunity Act, 20 U.S.C. §§ 1701-1758 (1994).

require the cities of Baltimore, Philadelphia and Ventura to maintain "gestures of superficial equality," *see Rostker v. Goldberg*, 453 U.S. at 79, by permitting boys to apply to their all-girls math classes and high schools when the boys' presence will change the dynamic believed by educators and researchers to provide the desired benefits for girls.

Ventura launched high school classes aimed at females because studies had shown that girls' grades and interest in math begin to fall off markedly during junior high.[34] The Unified School District conducted a survey to identify barriers that deter female students from taking advanced math classes. The school district then launched an experimental program described as follows: "[o]ur project, E.D.G.E. (Educational Diversity for Gender Equity), addresses negative perceptions through the vehicle of an algebra 2 class exclusively for female students."[35] As has been demonstrated, same-gender classes have been proven extremely effective in addressing this specific need.[36]

Just as Detroit should be free to respond to research regarding urban males, Ventura should be permitted to do so for females.[37]

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[34] Catherine Saillant, *Ventura New Math Class Recruiting Method*, L.A. Times, February 4, 1995, at B2.

[35] Ventura Unified School District, *Educational Diversity for Gender Equity Proposal*, (undated manuscript) at 2 (characterized by Assistant Superintendent Patricia L. Chandler Ed.D., Ventura Unified School District, as a "proposal which describes need, goals, and program design" in letter to Peter Leibold (November 21, 1995)).

[36] *See generally* DOE Report Vols. I and II (1992).

[37] Although amici for petitioner argue that programs on behalf of women should be subject to less scrutiny than those for men, *see* Brief for Amici Curiae, Employment Law Center, et al. at 25-30 (Nos. 94-1941, 94-2107), this view is shortsighted since optional same-gender education has different benefits, and few costs, for each sex. In addition, those favoring "affirmative action" for women alone at the college level must, in making their case, deal with recent statistics regarding the greater percentages of women in higher

(Footnote 37 continued on next page)

Of course, the decision must be reasoned, without employing archaic stereotypes, and must be targeted at obtaining tangible benefits. *See Hogan*, 458 U.S. at 724-25. In addition, the system as a whole must provide diverse opportunities, with programs targeted at producing beneficial outcomes, for the other sex.

Amici do not contend that it would be permissible for a school district to concentrate all of its attention at improving the educational achievement of one gender while systematically ignoring the other. This is not to say, though, that a rigid parallelism is required or that it is always impermissible to improve the achievement of one gender without improving the other, if the opportunity presents itself. In addition, efforts on behalf of each gender should not have to be exactly the same. For instance, if Ventura's educational experts do not believe that an all-male math class would benefit boys but that a coeducational program to stimulate interest in the arts would be more beneficial, the Constitution should not require a "gesture of superficial equality," *see Rostker v. Goldberg*, 453 U.S. at 79, in order to justify an all-female math class.

In sum, this Court should clarify the Fourth Circuit's standard to rid the decision of its foreseeable consequences: a slavish fidelity to parallelism, regardless of the circumstances facing a state or school district.

(Footnote 37 continued)

education in every year since 1978. Anita Blair, *Separate and Equal*, N.Y. Times, November 20, 1995, at A15. Following this Court's decisions in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc v. Peña*, 115 S.Ct. 2097 (1995), "invidious" or "benign" discrimination receives the same level of scrutiny. This does not mean, of course, that increased scrutiny will not permit a court from taking "relevant differences" into account. *Adarand*, 115 S.Ct. at 2113. "[A] gender based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Hogan*, 458 U.S. at 728. The burdens accompanying life as an urban male need to be addressed as well.

III. When Offering Single-Sex Education to Both Sexes, Educators Are Constitutionally Permitted to Use Different Educational Methodologies for Each Sex.

In the case at hand, the remedy for the alleged constitutional violation, extending the benefits of publicly-funded same-gender education to women in a manner considered most effective by educational experts, certainly meets the standard enunciated in *Hogan*.[38] As has been shown, the objective of providing women and men with the establishebenefits of single-sex education is a legitimate and important one. The remaining question, then, is whether the means of providing same-gender education, using different educational methodologies for each sex, substantially serves the achievement of that objective.

As stated previously, "[i]f the State's objective is legitimate and important, [the Court] next determine[s] whether the requisite direct, substantial relationship between objective and means is present." *Hogan*, 458 U.S. at 725. "The purpose of requiring that close relationship is to assure that the validity of the classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the sexes." *Id.* at 725-26.

Virginia's remedy of creating a VWIL to complement VMI and VPI substantially serves the important governmental objectives of providing a public education and offering the established

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[38] The Fourth Circuit felt compelled to add a third "substantive comparability" prong to the *Hogan* test. Although amici understand the court's goal, this requirement is unnecessary. If the government's objective is to provide the benefits of same-gender education to both sexes, and it does so in a way that reasoned analysis dictates will not succeed for both genders, the second prong in *Hogan* has not been satisfied. The means employed are not substantially related to achieving the Commonwealth's important goals. In the case before the Court, however, Virginia has done everything in its power to see that both programs succeed, including choosing the educational methodologies which experts believe will make for both a successful VMI *and* a successful VWIL.

benefits of increased academic achievement and superior leadership training for both men and women. Respondents have articulated forcefully and at some length the reasoned analysis by the Commonwealth and by VMI's Board of Visitors used in deciding to retain VMI's single-sex policy. Brief for Cross-Petitioners, at 28-32 (No. 94-2107). For present purposes, it is enough to say that VMI, in exercising its delegated authority from the Commonwealth, appointed a Mission Study Committee to consider carefully the "legality and wisdom of VMI's single-sex policy." Pet'r App. at 208a. After extensive study and site visits, the Mission Committee recommended remaining a single-sex institution because attracting women would be difficult and their admission would "alter the mission of VMI." *Id.* at 212a, 214a.

After the decision on liability in this case, the Commonwealth again made a reasoned study of the most effective way to "provide women the access to a single-sex educational program which would prepare them for leadership positions in civilian and military life." *Id.* at 101a. The district court found as a fact that "[t]he methods by which this goal could be achieved were the subject of intensive study and planning by professionals who are leaders in the field of designing and implementing educational programs for women." *Id.* at 63a. Thus, the decisions regarding admissions and teaching methodology were not made reflexively, but with care, in a reasoned, informed manner. *See Hogan*, 458 U.S. at 726 nn. 11, 12.

The Commonwealth and VMI have crafted a meticulous plan to make VWIL a success. Virginia, among other things, will contribute "dollar-for-dollar for VWIL students as it pays for VMI." Pet'r App. at 80a n.18. The VMI Foundation will endow the VWIL program with a contribution of $5.4625 million in addition to its other contributions. *Id.* at 120a. The VMI alumni association will support VWIL graduates with its alumni network. *Id.* at 120a, 121a. Thus, in its remedial plan, the

Commonwealth has used a reasoned approach in making available the distinct benefits of same-gender education for each sex.[39]

As stated earlier, the benefits from the single-sex experience flow from its homogeneity. Thus, underlying the decision to provide same-gender schools is not an overbroad generalization based on sex which is entirely unrelated to any differences between men and women or which demeans the ability or social status of the affected class. *See Michael M. v. Superior Court*, 450 U.S. at 469 (plurality opinion). The Equal Protection Clause does not "'demand that a statute necessarily apply equally to all persons' or require 'things which are different in fact to be treated in law as though they were the same.'" *Id.* This Court has consistently upheld state action where the gender classification is not invidious but rather realistically reflects the fact that boys and girls, men and women, do not always have the same needs and do not always benefit equally from a given approach. *Id.*

In deciding to offer public single-sex education to both women and men, Virginia has a right to depend on the reasoned, respected views of relevant experts in determining the educational methodology which would be most advantageous to fulfill each school's respective mission. As the court of appeals stated, "we should not reject programs that are aimed at achieving

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[39] The government argues that the forced coeducation of VMI is required because excluded women must have access to the "intangible qualities" which make for the greatness of the school. Brief for Petitioner, at 25 (No. 94-1941). If taken to its logical conclusion, this argument does nothing less than require the abolition of public single-sex schools or at least those schools deemed to have intangible benefits. There will always be intangible differences in distinct schools. Not borne of malice or invidious discrimination, some schools will have better teachers. Others will have wealthier alumni. These "intangible qualities" are the product of the fact that all schools are unique. If any individual of one sex has a right to obtain admission to another school, limited to the opposite sex, because that school is different, public single-sex schools by definition will be a thing of the past.

similar results, not generally available from other institutions of higher learning, simply because they differ in approach." Pet'r App. at 26a. The Constitution does not require cookie-cutter, single-sex schools, all forced to offer their students the exact same educational methodology for fear of being dragged into court. Such a requirement would go well beyond *Hogan* or anything this Court has even implied.

CONCLUSION

Virginia's remedy in this case fully satisfies the requirements of the Fourteenth Amendment. The result of a holding against VMI would be to threaten every single-sex public school in the country and possibly to endanger numerous single-sex private schools.[40]

Recent experimentation with same-gender classes for both sexes in Baltimore and other cities, which have a track record of

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[40] In an amici curiae brief submitted in support of the government, 26 private women's colleges struggle mightily to distinguish themselves from VMI. While citing numerous cases on the "state action" doctrine, the brief contains no persuasive argument to differentiate this Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973). In *Norwood*, this Court found that the provision of free textbooks to students attending racially discriminatory schools constituted unconstitutional state action: "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of *giving significant aid* to institutions that practice racial or *other invidious discrimination*." *Norwood*, 413 U.S. at 467 (emphasis added). The amici women's colleges offer the following less-than-convincing distinction: "th[is] Court's broad reading of the state action in th[is] case has been limited to circumstances in which the challenged action involves invidious racial discrimination." Brief for Amici Curiae, Twenty-six Private Women's Colleges, at 19 n.12 (Nos. 94-1941, 94-2107). If this Court accepts the government's invitation to make gender a suspect class or requires all public schools to be coeducational, we do not feel as confident as those amici that aid given to private, same-gender schools would be insulated from attack.

increasing achievements among disadvantaged children,[41] would be jeopardized. This would be a tragedy for those children — one not required by the Constitution or this Court's precedents. We urge the Court to find Virginia's chosen remedy for the alleged constitutional violation below consistent with the Fourteenth Amendment, and at the very least, to clarify the standard enunciated below regarding the need for a strict parallelism in the offering of same gender opportunities. For the foregoing reasons, the judgment of the Fourth Circuit in No. 94-1941 should be affirmed.

Respectfully submitted.

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[41] *See* Caplice, *Single-Sex Education*, at 277 (reporting the success of same gender classes for both boys and girls in Baltimore, Milwaukee, Washington, D.C., Norfolk, and Dade County); *see also* Letter from Cornelius Riordan to Senator John C. Danforth (June 30, 1994), *reprinted in* Cong. Rec. S10,205 (daily ed. August 1, 1994) (preliminary data on single-sex classrooms in a public elementary school that is 98 percent African- and Hispanic-American showed that students in single-gender classes outperformed co-educational classes in NCE reading and mathematics tests, higher attendance rates, lower suspension rates and higher parental participation rates).