

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 94-1667, 94-1712

UNITED STATES OF AMERICA, Appellant,

v.

COMMONWEALTH OF VIRGINIA, et al., Appellees.

On Appeal from the United States District Court
for the Western District of Virginia

BRIEF OF AMICI CURIAE,
NATIONAL WOMEN'S LAW CENTER,
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
AMERICAN CIVIL LIBERTIES UNION, CALIFORNIA WOMEN'S LAW CENTER,
CENTER FOR WOMEN POLICY STUDIES,
CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND,
EQUAL RIGHTS ADVOCATES, FEDERALLY EMPLOYED WOMEN, INC.,
FEMINIST MAJORITY FOUNDATION, HUMAN RIGHTS CAMPAIGN FUND,
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW,
NATIONAL ASSOCIATION FOR GIRLS & WOMEN IN SPORT,
NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN,
NATIONAL COUNCIL OF NEGRO WOMEN,
NATIONAL EDUCATION ASSOCIATION,
NATIONAL GAY AND LESBIAN TASK FORCE,
NATIONAL HOOKUP OF BLACK WOMEN,
NATIONAL ORGANIZATION FOR WOMEN,
NOW LEGAL DEFENSE AND EDUCATION FUND,
NATIONAL WOMEN'S CONFERENCE COMMITTEE,
NATIONAL WOMEN'S PARTY, NORTHWEST WOMEN'S LAW CENTER,
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WOMEN'S LEGAL DEFENSE FUND, and YWCA OF THE U.S.A.,
IN SUPPORT OF APPELLANT,
THE UNITED STATES OF AMERICA

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Amici Curiae, the National Women's Law Center, et al.,¹ submit this brief in support of appellant, the United States of America.

The decision of the district court, allowing continued sex segregation of the Virginia Military Institute ("VMI") and offering women a pallid alternative, is based on a stigmatizing stereotype -- that women are not tough enough for VMI. The opinion of the district court in this matter is telling. It identifies young women's purported lower level of self-confidence, their lack of self-esteem, and the danger of anorexia as justifications for the continued exclusion of women from a VMI-type program.

Discrimination based on such stereotypes cannot survive under the Equal Protection standard most recently set forth, and strengthened, by the Supreme Court in J.E.B. v. Alabama ex rel. T.B.. Indeed, far from complying with this standard, the district court's opinion retrogresses 100 years from modern equal protection analysis. Separate but unequal is the

¹ Statements of interest for amici are set forth in the Motion for Leave to Participate as Amici Curiae, submitted with this brief.

Amici gratefully acknowledge contributions to this brief by law students working at the National Women's Law Center and at Arnold & Porter: Jenifer Bosco, Jodi Danis, Jared Goldstein, Caitlin Halligan, Susan Huhta, Richard Katskee and Joel McElvain.

measure of the segregated proposal the court adopted. That proposal is inadequate under J.E.B. and nearly 25 years of jurisprudence regarding the Fourteenth Amendment's prohibition of sex discrimination. It is inadequate under this Court's prior opinion in this case. And it is inadequate as a matter of fundamental fairness.

STATEMENT OF THE CASE

In 1992, this Court ruled that the Commonwealth of Virginia could no longer maintain one state-run military academy only for men.² The Court gave Virginia a choice -- either start providing women a publicly-funded military education (at VMI or in a program parallel to it) or stop funding the Commonwealth's last bastion of all-male education.

Last year, Virginia returned to court with a plan amounting to nothing more than a dressed-up ROTC program for women at Mary Baldwin College.³ The Commonwealth offered the classic (and long discredited) protectionist rationale that it had women's best interests at heart in refusing them the opportunity to be educated with men at

² See United States v. Virginia, 976 F.2d 890 (4th Cir. 1992) (cited hereinafter as the "1992 Opinion"), cert. denied, 113 S. Ct. 2431 (1993).

³ See United States v. Virginia, No. 90-0126-R (W.D. Va. 1994) (Mem.) (cited hereinafter as "Mem. Op.")

VMI. It suggested that women need a "cooperative method" of education that "reinforces self-esteem" (Mem. Op. at 10), that women are "generally raised with a lower self-image than men" (id. at 19, n.10), that "anorexia is rampant among young college women" (id. at 19) and that a VMI-type program could make it worse. The proposal accepted below suggests that all women thus will be better off with a watered-down military academy using none of VMI's methodology, offering none of its programs, bestowing none of its prestige, and affording none of its access to well-placed alumni.

In actuality, the plan, couched in the bland, careful language of consultants and education experts, rests on the stigmatizing notion that women cannot cope with VMI's adversarial atmosphere and demanding requirements. The proposed program would not provide women with certain key aspects of the VMI experience, such as the adversative educational approach, the opportunity to train alongside those men with whom they could serve as soldiers in the future, and the chance to develop the kinds of professional and social ties that provide influence and prestige to VMI's graduates. It also does not include key aspects of the VMI methodology that the Fourth Circuit specifically identified as contributing to its unique educational system and methodology. Specifically, the program omits:

- (1) rigorous military training that goes beyond the ROTC program, including living by military etiquette and regulations, wearing military uniforms, residing in stark barracks, eating in a mess hall, attending daily reveille and flag ceremonies, marching to meals in formation, and attending classes taught by retired members of the armed forces who must be treated as superior officers;
- (2) the "rat line," which encompasses the imposition of physical rigor and mental stress through military drills, indoctrination, and frequent punishments;
- (3) rigorous physical education and training throughout the year;
- (4) the mission of producing "citizen soldiers" by providing "undergraduate education of the highest quality -- embracing engineering, science, and the arts -- conducted in, and facilitated by, the unique VMI system of military discipline";

- (5) a holistic program that integrates leadership training; and
- (6) a strict honor code with expulsion the only punishment.

The proposal makes no allowance for the women who can handle the VMI environment as well as some men do. As the district court concluded when adopting the plan, "simply because a small handful of women may desire a mirror image VMI . . . does not mean that the Commonwealth is constitutionally obliged to provide such." Mem. Op. at 12. In other words, according to the district court, fully qualified women are not entitled to the same rights and benefits the Commonwealth offers men.

SUMMARY OF ARGUMENT

The Supreme Court, in J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994), recently amplified the burden that states must bear to justify sex-based classifications. The Court made it crystal clear that it will not accept as a defense to gender-based classifications "'the very stereotype the law condemns.'" Id. at 1426 (citation omitted). Explaining that "[u]nder our equal protection jurisprudence, gender-based classifications require 'an exceedingly persuasive justification' in order to survive

constitutional scrutiny" (id. at 1425),⁴ the Court demanded that such classifications bear a substantial relationship to an important government purpose. Id. at 1425, n.6. The Court drew significant parallels between the experiences of women and African-Americans and held that its prohibition on stereotypes to justify sex-based classifications is particularly pointed in cases where women and minorities share similar burdens of historic bias.

The Commonwealth's proposal, a diluted women's "military program" at Mary Baldwin College adopted without modification by the Court below, ostensibly sought to cure the constitutional violation found by this Court. The proposal is no cure, and it does not meet the exacting inquiry followed in J.E.B.. It is predicated on precisely the overbroad and stigmatizing stereotypes the Supreme Court has expressly rejected as inadequate to state the necessary "exceedingly persuasive justification" for a sex-based classification. Moreover, like the classification in J.E.B., it is subject to a particularly exacting scrutiny given the strong parallels between the history of discrimination against women and African-Americans at

⁴ Citing Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979); also citing Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

VMI, in military education and in education more broadly, including Virginia's own educational system.

Indeed, the district court, which has freely acknowledged the major differences between the two programs, would turn the last hundred years of Equal Protection jurisprudence on its head. The Court has approved a "military academy" for women that is separate but admittedly unequal, denying women the "unique benefit[s] of VMI's type of education," 976 F.2d at 899, and basing that denial on presumed feminine frailties. Not even Plessy v. Ferguson, 163 U.S. 537 (1896), embraced such a regressive standard.

Finally, the proposal does not meet the requirements articulated by this Court in its 1992 Opinion. Previously, this Court allowed the possibility that the continued exclusion of women from VMI might satisfy the Fourteenth Amendment. J.E.B. dictates that the Court revisit that tentative acceptance of exclusion, particularly given the discriminatory program proposed for women and the patronizing justifications offered to support it. This Court should demand that the Commonwealth develop an acceptable method to integrate VMI or discontinue support of the institution.

ARGUMENT

I. GENDER-BASED DISCRIMINATION THAT DISADVANTAGES WOMEN AND RESTS UPON STIGMATIZING STEREOTYPES VIOLATES EQUAL PROTECTION

In J.E.B., the Supreme Court reexamined sex discrimination under the Equal Protection Clause for the first time since 1982. It emerged from this 12-year hiatus with a vigorous reaffirmation that sex-based classifications are subject to exacting scrutiny and emphasized just how exacting that scrutiny must now be. The Court applied the "heightened" standard of scrutiny it had last enunciated in Mississippi University for Women v. Hogan, 458 U.S 718, 724 (1982) -- that states must have "exceedingly persuasive justification[s]" for sex-based classifications. That burden is met only when classifications serve "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." Id. (citation omitted).

Moreover, it highlighted the rigorous burden governments must meet to justify gender-based classifications where there is a history of exclusion of women, and where the classifications rest on and perpetuate stereotypes and "gross generalizations." J.E.B., 114 S. Ct. at 1426-27. In enunciating this demanding standard, the Court drew close parallels

between harms inflicted as a result of race and gender discrimination. Indeed, the Court explicitly reserved the question whether gender discrimination should be accorded the same strict standard of review that applies to race-based classifications.

A. Development of Heightened Scrutiny

Since 1971, the Supreme Court has applied a "heightened" standard of scrutiny to gender-based classifications. Prior to J.E.B., the Court's last statement of its standard governing gender discrimination was in 1982, when it ruled in Hogan that the state could not exclude men from a public all-female nursing school. Mississippi had argued that the single-sex school provided students a diversified education. But the Court held that the state's discriminatory policy had to be very closely related to an important government objective to provide an "exceedingly persuasive justification" for the discrimination. Hogan, 458 U.S. at 724. The Court demanded such a justification to ensure that the classification rested on reasoned analysis, not the application of "traditional, often inaccurate, assumptions about the proper roles of men and women." Id. at 726. Moreover, it expressly recognized that efforts to exclude and "protect" women are simply two sides of the same coin. The Court held,

[t]hus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

Id. at 725.

Under heightened scrutiny, the Court has consistently struck down gender-based classifications based on overbroad sex-based stereotypes. See Kirchberg v. Feenstra, 450 U.S. 455 (1981) (statute making husbands the "head and master" of household with sole right to manage and dispose of jointly owned property without the wife's consent unconstitutional due to stereotype of women as dependents rather than heads of households); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (law requiring men, but not women, to show financial dependence on deceased spouse to recover workers' compensation benefits declared unconstitutional because based on stereotype of women as financially dependent); Orr v. Orr, 440 U.S. 268 (1979) (unconstitutional to order only men to pay alimony following divorce; sex cannot be used as proxy for need), cert. denied, 444 U.S. 1060 (1980); Craig v. Boren, 429 U.S. 190 (1976) (unconstitutional to permit women to purchase "nonintoxicating" beer at 18, men at 21, due to stereotypes of young women and men involved); see also Stanton v. Stanton, 421 U.S. 7 (1975) (women

reached majority at an earlier age than could men; held unconstitutional because based on notion that women did not need to prepare for careers); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (unconstitutional to permit widows, but not widowers, to collect "mothers'" benefits under the Social Security Act because assumes women do not support their families); Frontiero v. Richardson, 411 U.S. 677 (1973) (unconstitutional to require spouses of female, but not male, service members to prove financial dependence to be eligible for spousal benefits based on stereotype that devalued service of women); Reed v. Reed, 404 U.S. 71 (1971) (statute that preferred men to women as administrators of estates unconstitutional; classification was arbitrary and assumed men had more relevant experience).

The Court, however, has sustained sex-based classifications in limited situations where they serve a benign and compensatory purpose for women. Thus, the Court has occasionally sanctioned denial of benefits to men in order to compensate women for historical disadvantage. See, e.g., Hogan, 458 U.S. at 728 (recognizing that "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened"); see also Califano v. Webster, 430 U.S. 313 (1977) (women

permitted to exclude more low-earning years for computation of social security benefits to compensate for historical discrimination in employment); Schlesinger v. Ballard, 419 U.S. 498 (1975) (women naval officers allowed longer time period than men to be promoted prior to discharge for lack of promotion because of fewer opportunities for promotion); Kahn v. Shevin, 416 U.S. 351 (1974) (upholding \$500 property tax exemption for widows but not widowers to cushion disproportionately heavy impact of spousal loss).⁵

B. J.E.B.'s Invigorated Review

In J.E.B., the Court revealed just how "exceedingly persuasive" it would require a justification for gender classifications to be in order to pass constitutional muster. There, the state had tried to secure a favorable jury in a child support case

⁵ For this reason, this case does not present the question of the constitutionality of single sex education for women where such education is designed to redress the effects of historic discrimination or disadvantage. This Court's holding that VMI's male-only admissions policy is unconstitutional was based on its rejection of Virginia's reliance on a policy of educational diversity as a sufficient governmental interest to justify the discrimination at issue and its accompanying conclusion that "Virginia has failed to articulate an important objective which supports the provision of [VMI's] unique educational opportunity to men only." Mem. Op. at 5. Virginia advanced no remedial justification for its exclusion of women from VMI, as it could not. A determination by this Court that VMI must admit women will not affect the constitutional vitality of women's education where a compensatory purpose is served.

by using nine out of ten of its peremptory strikes to remove male jurors, believing that female jurors would sympathize more with the mother. An all-female jury was impaneled. Alabama's courts upheld the state's actions, ruling that the prohibition against race-based peremptory strikes in Batson v. Kentucky, 476 U.S. 79 (1986),⁶ did not extend to sex-based peremptory strikes.

The Supreme Court granted certiorari to settle a split in the circuits -- the Ninth Circuit had extended Batson to challenges based on gender; this Circuit and the Fifth and Seventh Circuits had not. See J.E.B., 114 S. Ct. at 1422 n.1. The Supreme Court ruled that Batson is properly applied to sex-based peremptory challenges.

The basis of the Court's opinion was that any sex-based distinction resting on stereotypes is unconstitutional: Alabama had argued that gender-based peremptory challenges are appropriate because men may be more sympathetic to the alleged father in a paternity suit, while women might be more receptive to the arguments of the mother. In other words, Alabama assumed, as VMI did here, that women think alike and that they think differently from men. The Court berated that justification:

⁶ Batson held that the Equal Protection Clause demands that jurors not be chosen based on racial stereotypes rooted in historical prejudice.

We shall not accept as a defense to gender-based peremptory challenges 'the very stereotype the law condemns.'

J.E.B., 114 S. Ct. at 1426 (citation omitted). As Justice Kennedy noted in his concurrence, but as the lower court here failed to recognize, women, like minorities, do not come before the Court as representatives of a group, but as individuals. Id. at 1434. Constitutional laws apply to individuals and their characteristics -- not to groups and their collective attributes (id.), and certainly not when those supposed attributes are hollow generalities. Thus, the Court held:

Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.

Id. at 1422.

Moreover, the Court held that it does not matter whether some factual basis may underlie the stereotypes, relying on Weinberger v. Weisenfeld, 420 U.S. 636, 645 (1975) (holding unconstitutional a classification in the Social Security Act authorizing benefits to widows but not to widowers, even though the justification for the differential was "not entirely without empirical support") and Craig v. Boren, 429 U.S. 190, 201 (1976)

(invalidating an Oklahoma law establishing different drinking ages for men and women, even though the evidence supporting the difference was "not trivial in a statistical sense"). See J.E.B., 114 S. Ct. at 1427

n.11. As the Court reiterated,

The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.

Id.

In addition, the Court squarely addressed the many similarities between race and gender discrimination, concluding that such parallels are relevant in Equal Protection analysis. It noted that, "[r]espondent seems to assume that gross generalizations that would be deemed impermissible if made on the basis of race are somehow permissible when made on the basis of gender." Id. at 1427. The decision rejected that assumption. Recognizing that "the similarities between the experiences of racial minorities and women, in some contexts, overpower [their] differences" (id. at 1425⁷), the Court refused in J.E.B. to treat the two groups

⁷ Quoting Note, Beyond Batson: Eliminating Gender-Based Peremptory Challenges, 105 Harv. L. Rev. 1920, 1921 (1992).

differently. It determined that, with respect to jury service, women and African-Americans "share a history of total exclusion, a history which came to an end for women many years after the embarrassing chapter in our history came to an end for African-Americans." 114 S. Ct. at 1425. Given that parallel history of exclusion, the Court refused to consign women to a second-class status under the law and extended the protections it had already provided on the basis of race.

Of particular note, although the Court did not need to use strict scrutiny to ban gender-based peremptory challenges, it specifically left open the question "whether classifications based on gender are inherently suspect." Id. at 1425 n.6.; see also Harris v. Forklift Sys., 114 S. Ct. 367, 373 (1994) (Ginsburg, J., concurring) ("[I]t remains an open question whether 'classifications based on gender are inherently suspect.'" (citation omitted)).⁸

⁸ Certainly, if strict scrutiny were to apply in this case, there would be no argument that gender segregation at VMI would not survive. Under strict scrutiny, the Court demands that race-based classifications "be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose." Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (citations omitted). No such justification has been raised, nor could it be. Indeed, the only interest which has been advanced -- diversity -- was rejected under mid-level scrutiny. 1992 Opinion, 976 F.2d at 899.

Regardless of the standard used and regardless of any claimed underlying factual basis, J.E.B. outlaws the use of stereotypes to justify sex-based classifications. Particularly where, as here, women and African-Americans have borne the brunt of similar historic bias, classifications based on stereotypes perpetuate the stigma of women as inferior to men. As Justice Ginsburg, in an article published in 1992, recognized:

[R]eservation of any institution to males is 'likely to be a witting or unwitting device for preserving tacit assumptions of male superiority, assumptions for which women eventually must pay.'⁹

II. THE REMEDY ADOPTED BY THE DISTRICT COURT VIOLATES THE EQUAL PROTECTION CLAUSE

In its 1992 Opinion, this Court called single-sex education and training "pedagogically justifiable" (976 F.2d at 897) and left open whether exclusion of women from VMI could be substantially related to any constitutionally cognizable state goal. Given the subsequent case history and the Supreme Court's intervening decision in J.E.B., it has become clear that the answer here is a resounding "no." Under J.E.B., the state cannot use group generalizations to justify segregation. It cannot exclude women from a state

⁹ Ruth Bader Ginsburg, Sex Equality and the Constitution: The State of the Art, 14 Women's Rights Law Rptr. 361, 365-66 (Spring/Fall 1992).

program based on the ostensible way they think. And it cannot establish a single-sex program that rests on or perpetuates stereotypes. This is particularly so given the close and troubling parallels between the history of discrimination on the basis of race and sex at VMI, in military education, and in education in general, including Virginia's system of higher education. The decision of the district court in this case violates the requirements of Equal Protection and must be reversed.

A. Impermissible Stereotypes Pervade the Court's Decision

1. The decision below is expressly based on sex-based stereotypes

The District Court's findings and its approval of Virginia's proposal "serve[] to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." J.E.B., 114 S. Ct. at 1422. These improper and stigmatizing stereotypes fatally infect both the proposal and the district court's approval of it.

In justifying its exclusion of women from VMI, the district court cited the testimony of the Commonwealth's expert that VMI's adversative "model of education is simply inappropriate for the vast majority of women." United States v. Virginia, 766 F. Supp. 1407, 1413 (W.D. Va. 1991). It noted, for example, that

"[m]ost men perform far better than most women in activities which require explosive power"; that the "speed of movement in women is, on the average, slower than in men"; that while men need conflict, women "tend to thrive in a cooperative atmosphere in which the teacher is emotionally connected with the students." Id. at 1432, 1434. In attempting to justify the proposed plan the district court cited the testimony of one defense witness for the proposition that "most women reaching college generally have less confidence than men." Mem. Op. at 10. The court credited speculation that "there would be little demand for a female VMI but there would be much more significant demand for VWIL." Id. at 19. And, the court relied on an elaborate theory of female psychology -- involving anorexia, "emotional stress," and self-discipline -- to justify its conclusion that VMI's adversative educational model is inappropriate for women. Id.

By excluding women from VMI and denying them any semblance of a VMI-style education, the decision of the court below necessarily determines that women are too frail for harsh military training. For the "gentler sex," a cooperative rather than an adversative teaching method would be used, no serious military training would be required, and daily physical training would not be demanded. Further, no engineering course would be

offered. As in Hogan, where the Supreme Court found that excluding men from an all-woman nursing school perpetuated the myth that nursing is "women's work," denying women an engineering major creates a self-fulfilling prophecy.

Women's supposed inability to stomach "the ugliness and depravity of trials" offered no justification in J.E.B. for excluding them from juries; likewise, the image of women as "too fragile and virginal to withstand the polluted courtroom atmosphere" failed to rise to the level of an "exceedingly persuasive justification." J.E.B., 114 S. Ct. at 1423, 1425. At their core, the generalizations and stereotypes relied on by the district court in this case are the same as these historical arguments that kept women from jury service. That portrait of young women as diffident, anorexic, and emotionally vulnerable furnishes no better (or different) a justification for excluding them from a VMI education.

Under the guise of solicitude for women's supposed differences and in a classic application of those long-rejected efforts to justify discrimination against women under the theory of protectionism, VMI's plan instead places "a brand upon them, affixed by law, an assertion of their inferiority." Strauder v. West Virginia, 100 U.S. 303, 308 (1880). Rather than

recognizing that VMI's single-sex policies arise from historical patterns of discrimination grounded in impermissible stereotypes, the district court chose to endorse those stereotypes.¹⁰ But as in Frontiero, those stereotypes "put women, not on a pedestal, but in a cage." Frontiero, 411 U.S. at 684. They cannot justify an entrenched policy of denying public educational benefits based on nothing but the sex of the applicant.

2. The district court improperly relied on expert evidence of group characteristics to bolster discriminatory conclusions

The district court's attempted resort to expert evidence to bolster its generalizations about women's shortcomings cannot survive scrutiny. Such evidence of pedagogical justifications for the Mary Baldwin program

¹⁰ Prior to J.E.B., this Court, too, has relied on generalizations about the sexes in gender-based constitutional analysis. For example, it cited "[c]ommon human experience, common sense, psychosociological studies, and public opinion polls (United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988), cert. dismissed, 439 U.S. 1094 (1089), and cert. denied, 493 U.S. 1069 (1990), overruled by J.E.B., 114 S. Ct. 1419 (1994)), in support of its conclusion that gender-based peremptory strikes do not violate the Fourteenth Amendment. Moreover, in its earlier opinion in this case, this Court based, in part, its conclusion that VMI may not necessarily have to admit women by noting the differences between the sexes that "common experience" and expert opinion recognize. 976 F.2d at 897. However, just as J.E.B. clarified that so-called "common experience" -- or any other generalized assumptions about differences between men and women -- cannot be used to support gender-based challenges to jurors, so, too, it cannot be used to deny women the opportunity to attend VMI.

is irrelevant -- only the rights of individuals, as required under the governing constitutional analysis, matter here.

For example, even if it were true that there is relatively little demand for a female "military institution" otherwise identical to VMI or that "most women reaching college . . . have less confidence than men" (Mem. Op. at 10), that would be no justification for the stigmatizing segregation of the proposed program. It is no answer to argue, as VMI must, that the adversative model is inappropriate for most women; it likely is inappropriate for most men as well.

The Supreme Court in J.E.B. rejected the "conjuring up" of statistical support for discrimination for one simple reason: such illogic would eviscerate the Equal Protection Clause. 114 S. Ct. at 1427 n.11. As J.E.B. stressed, statistics and generalizations about most women or group "tendencies" (766 F. Supp. at 1434), cannot justify discrimination, because individual rights are at the heart of Equal Protection guarantees. See also University of Cal. Regents v. Bakke, 438 U.S. 265, 289 (1978) (constitutional rights, including those delineated in Fourteenth Amendment, are personal); McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151, 161-62 (1914) ("It is the individual who is entitled to the equal protection of the laws").

In Brown v. Board of Education, 347 U.S. 483, 494 nn.10-11 (1953), the Supreme Court implicitly acknowledged that African-American children were in the aggregate less educationally advanced than their white peers. Under the reasoning used below in this case, the Brown Court could freely have concluded that African-American pupils would not thrive in the "rarefied" atmosphere of white schools, and that their introduction would harm the "special" experience of white students in all-white schools. The Supreme Court rejected such sophistry; this Court should do so as well.

B. History of Both Race and Sex
Discrimination Demands Integration

Arguments against exclusion of women from VMI due to the resulting stigma are particularly weighty given the strong parallels between the historic treatment of women and African-American men at VMI, in military education and in education more generally, including Virginia's system of higher education. Under J.E.B., distinctions that cannot be made on the basis of race in a situation where women and African-Americans have suffered similar discrimination likewise cannot be made on the basis of gender.

To begin with, VMI was not racially integrated until 1968 -- fully fourteen years after the Supreme

Court's decision in Brown and 130 years after it was established by the Commonwealth of Virginia.¹¹ Women, of course, are still excluded. Thus, for nearly all of VMI's history, it has categorically excluded African-American men and all women. This shared experience of exclusion is also reflected in the history of the United States military academies. The first African-American men did not graduate from military academies until mid-century: from West Point in 1932¹² and from the U.S. Naval Academy in 1949.¹³ Congress did not open the doors of the three major military academies to women until 1976.¹⁴

Moreover, African-Americans and women have long faced many similar barriers to educational opportunity more generally. In the early years of our history, formal education was available only to white males. Prior to the Civil War, the "[e]ducation of Negroes was almost nonexistent, and practically all of the race were

¹¹ See Negro Accepted at VMI, Richmond Times-Dispatch, Feb. 15, 1968, at 12B.

¹² Maj. Fred L. Borch, America's First Black General and Benjamin O. Davis, Jr.: American, 134 Mil. L. Rev. 245, 247 (1991).

¹³ Blacks in America: A Long History, Detroit Free Press, Feb. 1, 1987, at 4B.

¹⁴ Department of Defense Appropriations Authorization Act, 1976, Pub. L. No. 94-106, § 803, 89 Stat. 537 (Oct. 7, 1975).

illiterate." Brown, 347 U.S. at 490. Similarly, "[f]or almost two centuries, American education, following European traditions, barred girls from school."¹⁵ For example, "'[i]n the early history of Massachusetts, and long after provision for Public Free Schools had been made . . . it was a common thing for boys only to attend them.' . . . Harvard College, the Latin grammar schools that prepared young men for college, and most publicly supported town English grammar schools admitted males only."¹⁶

Even as some educational opportunities began to open up, major barriers continued to be imposed on the basis of both race and sex. For example, in United States v. Fordice, 112 S. Ct. 2727, 2732 (1992), the Supreme Court described in detail the historical development of the de jure segregation of the higher education system of the state of Mississippi, which was typical of education throughout the Southern and border states and was devastating to the educational opportunities of African-Americans. Women, too, in the nineteenth century were largely consigned to separate

¹⁵ Myra and David Sadker, Failing at Fairness: How America's Schools Cheat Girls 15 (1994).

¹⁶ David Tyack and Elisabeth Hansot, Learning Together: A History of Coeducation in American Public Schools 13 (1990) (quoting Horace Mann, "A Few Thoughts on the Powers and Duties of Women" 57 (1853)).

institutions and programs with a second-class status.¹⁷ Limitations of access to higher education for both women and African-Americans have persisted well into the twentieth century. See Fordice, 112 S. Ct. at 2732 (de jure segregation of Mississippi higher education continued until 1962 when the University of Mississippi was integrated by court order); United States v. Louisiana, 718 F. Supp. 499, 503 (E.D. La. 1989) ("[i]t was not until some time after the enactment of the Civil Rights Act of 1964 that the State of Louisiana discontinued official recognition of state universities as single race institutions"). Women were not admitted to much of the Ivy League as well as to other prestigious men's colleges and universities until the 1960s and 1970s. See also Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor, 91st Cong., 2d Sess. 299-300 (1970) (Statement of Dr. Bernice Sandler) (describing broad use of sex-based quotas disadvantaging women in

¹⁷ See, e.g., Sadker and Sadker at 21-28 (describing the development of separate women's education during the nineteenth century as a response to women's exclusion from existing opportunities; also describing the lack of equality in emerging women's education); Hogan, 458 U.S. at 727 n.13 (concluding that "in Mississippi, as elsewhere in the country, women's colleges were founded to provide some form of higher education for the academically disenfranchised.")

undergraduate admissions at, among other institutions, the University of North Carolina and the University of Michigan, as well as at many graduate and professional schools).

Indeed, the recent history of public higher education in Virginia, itself, underscores the point. The University of Virginia -- Virginia's flagship institution of higher education and one of the most distinguished universities in the country -- excluded both African-Americans and women for most of its history.

Until school segregation was declared illegal in the 1950s, Virginia's colleges were divided along racial lines. Blacks were barred from 13 four-year colleges, including . . . the University of Virginia. . . .¹⁸

Women were not admitted to Virginia until 1970, when a federal district court found that only sexual integration could guarantee women equal protection.¹⁹

¹⁸ Celestine Bohlen, U.S. Rejects Virginia's Plan on Desegregation, Wash. Post, June 19, 1982, at B1.

¹⁹ Under the far more forgiving rational review standard in use at the time, the district court held out the theoretical possibility that separate facilities with equivalent opportunities might be constitutional, but held that the opportunities provided to men through the University of Virginia could not be duplicated and, accordingly, ordered the admission of women. Kirstein v. University of Virginia, 309 F. Supp 184 (E.D. Va. 1970). The court based its decision in part on the findings that many courses at the university, as well as its "prestige factor," were unavailable at other state [Footnote continued on next page]

Where, as here, women and African-Americans have faced similar histories of exclusion, J.E.B. demands that classifications based on gender be rejected, just as they would be rejected on the basis of race.

C. Separate But Unequal Program Sets
Law Back More Than 100 Years

The court below began its opinion with an explicit acknowledgment that under Sweatt v. Painter, 349 U.S. 629 (1950), "separate but equal" treatment does not suffice under the Equal Protection Clause. Having recognized this crucial fact, however, the court then remarkably concluded that because "separate but equal" is unconstitutional and unattainable in this case, this Court's prior order permits VMI to offer a separate and unequal program to remedy its discrimination against women:

[Footnote continued from previous page]
schools. Id. at 187. The court emphasized that the state "may not now deny to women, on the basis of sex, educational opportunities . . . that are not available elsewhere." Id. See also McLaurin v. Oklahoma State Regents, 339 U.S. 637, 642 (1950) (not enough that an African-American student was allowed to obtain a doctoral degree; also had to be treated equally). The same principle should apply here.

In other words, the United States reads the Fourth Circuit opinion to require a "separate but equal" institution.

The sophistry of the "separate but equal" concept was roundly rejected in Sweatt v. Painter, 349 U.S. 629 (1950). . . .

Thus, if "separate but equal" is the standard by which the Commonwealth's plan must be measured, then it surely must fail because, as the United States pointed out time and time again during the trial, 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.

Mem. Op. at 6-7 (emphasis supplied; footnote omitted).

Thus, notwithstanding its explicit recognition that "the rationale of [Sweatt] applies to this case" (Mem. Op. at 6), the district court proceeded to determine the validity of the proposal under a lesser standard completely at odds with Sweatt and Brown, as well as over twenty years of jurisprudence regarding the analysis of sex-based classifications under the Fourteenth Amendment. Instead of recognizing that the proposal's conceded inferiority marks it as inherently unconstitutional, the district court asserted that this deficiency somehow brings the Proposed Remedial Plan into line with the Constitution's requirements -- reasoning, it appears, that because no separate program could ever equal the benefits of VMI, then a clearly inferior alternative will suffice. Even Plessy v.

Ferguson, 163 U.S. 537 (1896) (accepting separate but equal accommodations as constitutional), offered more protection than this chimerical approach.

Had the district court followed its reasoning to a proper conclusion, it would have been compelled to order the relief sought by the United States: The admission of women to VMI as the sole appropriate means of offering Virginia women equal treatment under the law.

D. District Court Flouted This Court's Opinion

In 1992, this Court ordered the "defendants to formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment." 976 F.2d at 900. The district court, in approving the defendant's Proposed Remedial Plan, misapplied this court's analysis and evaded its mandate.

This Court never stated that the Commonwealth was "free" to establish any "parallel programs" or "parallel institutions" nor that any such parallel facilities could survive constitutional scrutiny. The Court merely suggested that parallel programs might be an alternative to admitting women to VMI. Indeed, the Court never determined that there actually are any constitutionally acceptable alternatives to admitting women short of ending state support for VMI. Rather, in full

recognition of the Supreme Court's repeated admonition that there must be a "direct, substantial relationship between [the state's] objective and [the] means" employed to achieve it (Hogan, 458 U.S. at 725), the court simply stated, "we do not order that women be admitted to VMI if alternatives are available." 976 F.2d at 900 (emphasis supplied). However, as the Kirstein court recognized (under the rational basis test) when it held that a parallel program might be constitutional as a conceptual matter, it would be impossible, in practice, to duplicate the University of Virginia. Equally here, under J.E.B., it would be impossible to duplicate VMI.

The Commonwealth chose to pursue, and the district court to ratify, an option outside the Fourth Circuit's mandate: to continue state-supported discrimination against women by creating a watered down "military institution" for women off the VMI campus and outside the VMI methodology. However, this Court strictly limited the type of parallel program that it might find acceptable. It held that such a plan would have to provide "the same mission and methodology as VMI." 976 F.2d at 898. Moreover, in the Court's view, in an all-female environment, only the physical training aspect of VMI's program would have to be adjusted for women:

Although it is readily apparent from the evidence that the rigor of the physical training at VMI is tailored to males, in the context of a single- sex female institution, it could be adjusted without detrimental effect. No other aspect of the program has been shown to depend upon maleness rather than single-genderedness.

Id. at 898 (emphasis supplied). Indeed, the Fourth Circuit unequivocally concluded that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." Id. at 899.

But the district court rejected the idea that the Fourteenth Amendment requires the Commonwealth to provide the "unique benefits" of a VMI-type of education to women. The district court erroneously stated that only a "fragmented reading[]" of the 1992 Opinion could support such a claim. Mem. Op. at 6. It took this position even though this Court repeatedly stated in its prior opinion that the constitutional issue at stake was whether the Equal Protection Clause of the Fourteenth Amendment permits the Commonwealth to offer the "unique benefit[s] of VMI's type of education and training to men and not to women." 976 F.2d at 898 (emphasis supplied). Thus, the district court misunderstood precisely what it is that "the Fourth Circuit's opinion require[s] of a proposed plan in order to pass constitutional muster." Mem. Op at 6.

The program offered at Mary Baldwin College abandons VMI's "implementing methodology." It dilutes far more than the rigor of physical training. There is no adversative method, no rat line, no "hostile, spartan environment," no "class system," not even an engineering program.

A dainty imitation of the VMI program, that abandons its methodology and offers few if any of its benefits, that presents a paradigm of separation and inequality, is not what this Court envisioned. Indeed, it borders on recalcitrance and merits reversal.

CONCLUSION

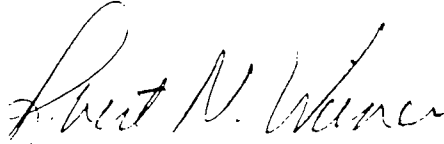
As the district court stated, some men may indeed march to the beat of a drum and some women to the melody of a fife. Mem. Op. at 28. The symbolism may be an appealing use of language. Its meaning and underlying assumptions are not appealing. Not all men and women march in lock-step -- some men and some women would thrive under the rigors of VMI; some would prefer the proposed program at Mary Baldwin. But the Commonwealth may not shut all women out of VMI because it believes that most of them could not, or would not wish to, cope with that school's harsh methodology.

J.E.B. holds that classifications resting on and perpetuating group generalizations and stigmatizing stereotypes cannot withstand Equal Protection scrutiny, particularly where, as here, women have borne the same sorts of historic bias as have African-Americans. Far from curing that problem, the proposal accepted by the court below -- a second-rate, semi-military program at a liberal arts school, a "separate but unequal" version of VMI -- exacerbates the stigmatic harm.

No one would suggest that VMI will not change if women are admitted. Certainly, racially segregated educational institutions -- including VMI -- changed when they admitted African-Americans. But preserving VMI's exclusionary and discriminatory character on the grounds that women are not good enough for VMI or that, by their very presence will change VMI, can be no more availing. As this Court has recognized, some women (like some men) are strong enough, both mentally and physically, to survive and thrive at VMI. If they are not strong enough, they will fail. But they must be given the chance to try. If women want to march to a drum, as men do, they have a constitutional right to do so.

Amici urge this Court to reverse the district court and remand with orders to integrate VMI.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert N. Weiner", written over a horizontal line.

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A handwritten signature in cursive script, appearing to read "Stefanie L. Raker", written over a horizontal line.

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Dated: July 12, 1994

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July 12, 1994

Nos. 94-1667 & 94-1717

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

COMMONWEALTH OF VIRGINIA, et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 94-1667 & 94-1712

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

COMMONWEALTH OF VIRGINIA, et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS APPELLANT

STATEMENT REGARDING JURISDICTION

The United States brought this suit pursuant to Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6. The district court had jurisdiction under 28 U.S.C. 1345. The district court entered its final order on April 29, 1994 (App. 330).¹ A notice of appeal was timely filed on May 13, 1994 (App. 404). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the Commonwealth of Virginia's proposed remedial plan creating a program for women at Mary Baldwin College, called the Virginia Women's Institute for Leadership, satisfies the Commonwealth's obligation under the Equal Protection Clause to

¹References to "App. __" are to page numbers in the Joint Appendix filed along with the United States' opening brief. References to "R. __" are to docket numbers on the district court's docket sheet (which is included in the Joint Appendix at App. 1-31).

afford women the Virginia Military Institute's unique type of educational program.

STANDARD OF REVIEW

The question whether the Commonwealth's proposed remedial plan satisfies the Equal Protection Clause is a question of law subject to plenary review.

STATEMENT OF THE CASE

This is the second appeal in this case, which challenges the Virginia Military Institute's (VMI) male-only admissions policy. In the first appeal, this Court held that defendants violated the Equal Protection Clause by denying women "VMI's unique type of program" and its "unique educational opportunity." United States v. Commonwealth of Virginia (VMI), 976 F.2d 890, 892 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993). The court suggested that one remedial alternative might be to create a parallel program or institution for women. Id. at 900. Following that suggestion, the Commonwealth of Virginia has proposed to create the "Virginia Women's Institute for Leadership" (VWIL) at Mary Baldwin College (MBC). The district court approved that remedy, and this appeal by the United States followed.

A. Procedural History

1. In March 1990, the United States filed suit against the Commonwealth of Virginia, VMI, and others alleging that the defendants discriminated on the basis of sex by limiting admission to the four-year undergraduate program at VMI to males (App. 32-39). The suit alleged that the discrimination violated

the Equal Protection Clause of the Fourteenth Amendment, and sought to permanently enjoin the defendants "from discriminating on the basis of sex in the operation of VMI, including [its] admission policies" (App. 35).

In April 1991, trial was held on the issue of liability. On June 14, 1991, the district court issued its Memorandum Opinion and Order finding for the defendants. United States v. Commonwealth of Virginia (VMI), 766 F. Supp. 1407 (W.D. Va. 1991). The court held that the defendants met the test for gender classifications set forth in Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), and therefore justified the exclusion of women from VMI.

2. This Court vacated and remanded. VMI, 976 F.2d 890. The Court held that defendants had not justified offering the unique VMI-type education to men and not to women. Although the Court found a violation of the Equal Protection Clause, it declined, "[i]n light of * * * the generally recognized benefit that VMI provides," to "order that women be admitted to VMI if alternatives are available." 976 F.2d at 900. The Court instead "remand[ed] the case 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." Ibid. The Court stated that, consistently with its opinion, "the 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." Ibid.

The Court denied defendants' petition for rehearing and suggestion for rehearing en banc. See ibid. The Supreme Court denied defendants' petition for a writ of certiorari.

3. In September 1993, following this Court's mandate, the defendants filed in the district court a proposed remedial plan providing for the creation of the VWIL at Mary Baldwin College, a private four-year college for women (App. 40-60). The United States filed an opposition to defendants' proposed remedial plan (App. 61-112). On February 9-15, 1994, an evidentiary hearing was held on the remedial plan. On April 29, 1994, the court issued its memorandum opinion and order approving defendants' plan to create the VWIL (App. 330-403).

On May 13, 1994, the United States filed a notice of appeal (App. 404). On May 25, 1994, defendants filed a cross-appeal (App. 407).

B. Facts

1. VMI's unique educational program

a. This Court detailed the central attributes of VMI's unique educational program in the first appeal, see VMI, 976 F.2d at 893-894, and we addressed them at length in our brief as appellant in that appeal. See Brief for the United States as Appellant, No. 91-1690 at 6-13; see also VMI, 766 F. Supp. at 1415-1443. Accordingly, we summarize them only briefly here.

VMI offers a unique educational method, based on the adversative model, that emphasizes "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values." VMI, 976 F.2d at 893. At the core of the program is the military system, which "characterizes life at VMI." R. 50 at 6; see also VMI, 976 F.2d at 894. The cadets at VMI "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." R. 50 at 7. Military training is also "one of the basic goals that VMI seeks to promote in fulfilling its mission of preparing leaders." VMI, 766 F. Supp. at 1427. Further, the military regulations, etiquette, and drills "furnish a rationale for the rigorous activities that are features of the other VMI systems, including the comprehensive regulation of behavior." Id. at 1424.

Several other components are central to VMI's unique educational program: (1) the "rat line" -- the harsh treatment given to entering students (rats), which includes a rigorous physical training program, minute regulation of individual behavior, frequent punishments, and training marches; (2) the "class system" -- a peer system of assigning responsibilities to each class of cadets, including supervision of cadets, tutoring, and dispensation of rewards; (3) the "dyke system" -- whereby each rat is assigned a first classman (senior) as a mentor in order to relieve some of the stress of the rat line; (4) the

honor code -- a stringently enforced code of conduct that entails the single penalty of expulsion for an honor code violation; and (5) barracks life -- with its spartan furnishings, lack of privacy, and emphasis on egalitarian treatment. See generally VMI, 976 F.2d at 893-894.

Each of these individual components are crucial to the VMI experience, as the "various systems in place at VMI are integrated and interdependent, and several of them cannot be changed without materially affecting others." Id. at 894. It is this particular educational system that prepares VMI graduates to be "citizen-soldiers," namely, "educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." VMI, 766 F. Supp. at 1425.

b. Some applicants apply for admission to VMI "because it is known to be the most challenging military school in the United States." Id. at 1421. Cadets also attend VMI "because of the rigor of the experience, which represents a challenge and which [they] believe[] will test [them] to the ultimate." Id. at 1426. Cadets also appreciate certain attributes of VMI, including "the openness and the fact that they hear very directly and very candidly about their shortcomings as well as the things they do well; * * * the intensity of the experience, and the extent that it challenges them to be better," and "the absence of distinctions between cadets, and the egalitarian environment." Ibid. Finally, "[a]s 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." Ibid.

c. "The system of education at VMI is not offered elsewhere in the United States." Id. at 1421. Therefore, "[w]omen are denied a unique educational opportunity that is available only at VMI." Id. at 1432; see also VMI, 976 F.2d at 898 & n.8.

Nevertheless, it is not disputed that some women could do the physical training and military drills required of VMI cadets, pass the VMI physical fitness test, and do everything that happens on the rat line. E.g., VMI, 766 F. Supp. at 1412 ("some women are capable of all of the individual activities required of VMI cadets"); id. at 1438; VMI, 976 F.2d at 896; App. 352 ("This is not to say that some women cannot succeed within a VMI type methodology. The evidence at trial indicated that the VMI methodology could be used to educate women and, in fact, some women * * * may prefer the VMI methodology to the VWIL methodology.").

2. Mary Baldwin College and the proposed Virginia Women's Institute for Leadership

a. Mary Baldwin College, located in Staunton, Virginia, is a private, women's liberal arts college founded in 1842 (App. 394, 399). Although historically the college anticipated that most of its graduates would be wives and mothers (App. 641), in the late 1960's and early 1970's it "broadened its curriculum to include new options open to women in business and the professions

and developed an emphasis on career planning" (App. 395). There are currently 600 undergraduate residential women students (App. 395). Another 600 students are in MBC's coeducational Adult Degree Program (which is a non-residential program conducted at branch facilities), and approximately 135 students are enrolled in various other programs offered by MBC (App. 395-396). There are currently eight male students at MBC who attend some classes with traditional MBC undergraduate women (App. 382).

MBC offers 28 undergraduate majors in the arts, sciences, business, and mathematics (App. 396). It does not offer a bachelor of science degree, and does not have a math and science focus (App. 403). Currently, about 15% of MBC students major in mathematics or science (App. 403). There is no residential engineering program (App. 396). MBC requires each student to take an externship equivalent to three semester hours (App. 396).

There are 16 residence halls on the MBC campus, which together house approximately 650 students (App. 399). No two residential halls are alike. Traditional residence halls house from approximately 40 to 160 students. They "are elegantly equipped with brass chandeliers, plush carpeting and mahogany furniture" (App. 399). Students also live in college-owned apartment buildings and converted single-family dwellings (App. 399). There are also two theme houses for upperclass students, one for honors students and one for community volunteers, both of which are equipped with televisions, cable hook-ups, and microwave ovens (App. 400). Residential life is designed to

provide "an experience in flexibility, creativity, accountability and compassion with goals of personal growth and development and self-responsibility in the living community" (App. 397).

MBC has 73 full-time faculty and approximately 40 part-time faculty; 68% of the faculty holds a Ph.D. (App. 396, 401-402). It has an endowment of approximately \$19 million. The average combined SAT score of MBC entering freshmen is approximately 930 (App. 397).²

MBC is not a military school. It has no tradition of producing military leaders, or of training its students for the military (App. 398). Although ROTC is available to MBC students through the program at James Madison University, in the past three years no MBC student has been commissioned. Currently, there is one MBC student participating in ROTC (App. 398).

b. Prior to this Court's decision in the first appeal, MBC was considering the possibility of developing a leadership program (App. 374). After the Court's decision (which then raised the possibility of a state-sponsored VMI-type program for women), The President of MBC (Cynthia Tyson) and its Dean (James Lott) discussed the possibility of developing a program "for the education and training of women citizen-soldiers" (App. 374-375). Ultimately, the VWIL program was developed and approved by the

²To put these figures in context, 86% of VMI's faculty holds a Ph.D.; VMI's endowment is \$131 million (the largest endowment on a per student basis of undergraduate institutions in the country); and average combined SAT scores for entering cadets at VMI is approximately 100 points higher than those for entering MBC students (App. 397, 401-402).

MBC faculty (App. 375). Subsequently, a MBC Task Force was created to refine the program and plan for implementation (App. 376). On January 17, 1994, the Task Force, co-chaired by Dean Lott and Dean of Students Heather Anne Wilson, issued a Status Report that sets forth its conclusions and the programmatic components of VWIL (App. 253-269, 376-377).

c. The VWIL plan offers a publicly-supported, single-sex educational program with a mission to produce "citizen-soldiers," i.e., "women who are trained for leadership in both civilian and military life" (App. 340). Since 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," (App. 341), the program "proposes a cooperative method which reinforces self-esteem rather than the leveling process used by VMI" (App. 341). The Task Force concluded that the VWIL program, although differing substantially from the VMI program, would "produce the same or similar outcome for women that VMI produces for men" (App. 341).

The central components of the proposed VWIL program include:

1. Military Training. The military program at VWIL will be the pre-existing MBC ROTC program (App. 450). There are academic classes, as well as organized lab activities, some of which may be at the VMI facilities (to which MBC will provide transportation). The total number of semester hours credit for four years of ROTC is 12. A six week intensive summer camp between the junior and senior years will provide externship

credit for students seeking a commission (App. 383). VWIL students will constitute a corps of cadets, and will become part of the Virginia Corps of Cadets, which the plan proposes will be established to consist of the all-female VWIL cadets, the all-male VMI cadets, and the coed Virginia Tech cadets (App. 383). Non-VWIL Mary Baldwin students are not precluded from taking ROTC with the VWIL students (App. 496).

2. Academic Life. The general education requirements and academic majors for VWIL students will be the same as those for regular MBC students (App. 381). The admission standards for the VWIL would also be the same as for the traditional MBC program (App. 381). VWIL students, however, will also be required to complete several specific types of courses, including a calculus course, science courses with labs, and certain courses in leadership theory (App. 381-382). Although a few male students currently attend MBC, no male students will attend classes with VWIL students. Non-VWIL Mary Baldwin students will otherwise be able to participate in the leadership curriculum (App. 382, 635).

In addition to studying leadership theory, VWIL students will be required to take a leadership externship, which will be related to her major (App. 381). Although MBC already has an externship program, the VWIL externship will provide "an opportunity to experience and reflect on leadership in practice" (App. 381). The student "may * * * be required to keep a journal in which she analyzes and evaluates the leadership styles and strategies she encounters in the externship" (App. 381). VWIL

students will also participate in various seminars throughout the semester, and organize a Leadership Speaker Series (App. 382). Like non-VWIL MBC students, VWIL students will have the opportunity to obtain an engineering degree only by participating in the 3-2 program with Washington University in St. Louis (App. 382).

3. Physical Education and Training. This component of the VWIL "is designed to enhance the student's level of physical fitness, her ability to defend herself, her understanding of health issues, her skill in developing cooperative strategies, and her self confidence" (App. 260). VWIL students will be required to take eight semesters of physical and health education courses, which will include advanced fitness (a course designed for VWIL students), swimming, tennis, golf, racquetball, and two health courses (App. 384). Students will also be required to take a course in self-defense, and to complete a fitness assessment at the beginning of the first year and at the end of all subsequent semesters (App. 384-385).

The MBC physical education department will develop a Cooperative Confidence Building program (CCB) as a co-curricular component. CCB will be held twice a week, and will consist of physically and mentally challenging events, including obstacle course, a rope course, and team building activities (App. 385). Freshman will be required to participate in the CCB program unless they are in varsity athletics; other VWIL students will

participate in either varsity athletics, the CCB program, or a personal workout program (App. 385).

4. Residence. Freshmen VWIL students will be required to room together and live in a separate section of a MBC residence hall (App. 387). They will be subject to some additional rules concerning room neatness (rooms will be subject to spot inspection), smoking, changing roommates, and required study halls (App. 387). They will, however, be free to decorate their rooms as they please, and there will be no limitations or restrictions on what they may have in their rooms (App. 510).

Upperclass VWIL students will be required to live with other VWIL students for at least one year in the VWIL House, a residence hall that will also be the center of VWIL meetings and activities (App. 388). The VWIL House will not be operated on a military format (App. 388).

5. Co-curricular Activities. Other elements of the VWIL program include a one-week wilderness-type orientation in the summer before freshman year. Run by upperclass VWIL students, it will provide the freshmen with a mentally and physically challenging experience to foster bonding (App. 386-387). VWIL students will also be mentored by upper class VWIL students (App. 389). Further, the upper class students will lead the VWIL contingent of the Virginia Corps of Cadets, enforce regulation, maintain esprit de corps, and play a central role in the VWIL orientation and the CCB (App. 389). In addition, as MBC students

VWIL participants will be encouraged to participate in MBC activities and class functions (App. 387).

d. MBC proposes to offer the VWIL program pursuant to a contract for services between MBC, the Commonwealth of Virginia, and VMI (App. 52). The plan proposes that the Commonwealth fund the contract for services by a payment to MBC for each Virginia student enrolled in the program. As a result, the Commonwealth would provide the same amount of financial support to MBC for in-state cadets in the VWIL program that it provides to VMI on a per full time equivalent student basis (App. 781).

The VMI Foundation will endow the VWIL program with a permanent endowment of \$5.4625 million, in addition to other financial contributions (App. 392). The VMI Alumni Association has pledged to support VWIL graduates by making its placement services and networks available to VWIL graduates (App. 393-394).

e. MBC has made clear that VWIL will be a small subpart of the college that "will take its place amid the other programs that make up Mary Baldwin College" (App. 639). It has also made clear that the VWIL will not affect its identity and traditions. In a document produced by MBC and distributed to MBC alumnae, it is stated that the school would not turn into a military school but would "retain its identity" and "[d]aily life on campus would not be any different" (App. 633). MBC officials also have stated that the school's traditions, such as Apple Day, would continue (App. 634). Further, when President Tyson presented the VWIL concept to the MBC faculty in September 1993, the discussion

about possibly having military marching and parades on the MBC campus "was fraught with humor" (App. 482-483). Tyson testified that she would never advocate having a military atmosphere at MBC (App. 622).

MBC will develop a leadership program even if VWIL is not approved as a remedy in this litigation. MBC would raise money from other sources to pay for it, and the program would look a lot like the VWIL program (App. 636).

C. The District Court's Decision

On April 29, 1994, the district court issued its order approving defendants' plan to create the VWIL at Mary Baldwin College. The court rejected the view that any separate program for women must closely resemble the VMI program, but noted that if this was the standard the United States would prevail because the proposed plan "differs substantially from VMI" (App. 333-334). Instead, the court concluded, a separate program could use a different methodology and still be satisfactory if it attained an "outcome" for women that is comparable to that received by male graduates of VMI (App. 333-334). The court rested this conclusion on its view that this Court's finding "that VMI employed unique methods to teach young men was simply an added dimension to the already pedagogically justifiable policy" of single-gender education (App. 339).

The court thus examined the proposed program for women to determine whether its educational methods would produce the same or similar outcome for women that VMI produces for men. The

court acknowledged that the educational method to be used would not be VMI's adversative model, accepting the development Task Force's finding that it would "be wholly inappropriate for educating and training most women for leadership roles" (App. 341). The court stated that "[i]n lieu of the adversative methods employed by VMI, the VWIL concept proposes a cooperative method which reinforces self-esteem rather than the leveling process used by VMI" (App. 341).

The court concluded that (App. 352):

[T]he differences between VWIL and VMI are justified pedagogically and are not based on stereotyping. * * * [T]he 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.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court found that VMI's admissions policy denied women the equal protection of the laws by denying them access to VMI's unique educational methodology. The Court did not impose a remedy for that violation, but remanded the case to the district court, noting that there might be several possible remedies, including establishing a parallel school or program for women modeled on VMI's educational methodology. On remand, defendants proposed a program for women at Mary Baldwin College.

The proposed remedy is wholly inadequate, however, because it does not correct the constitutional violation, i.e., the denial to women of VMI's unique educational methodology. As the district court recognized, the program "differs substantially" from the educational program offered at VMI. Nevertheless, the court decided the Commonwealth was not obligated to offer the VMI program to women, and in doing so accepted the Task Force's finding that a VMI-type education is inappropriate for most women.

The district court's conclusion is inconsistent with this Court's prior decision, which specifically held that women could participate in and benefit from a VMI-type education. It also rests on impermissible generalizations and stereotypes. In excluding women from VMI, defendants have discriminated against women by relying on false stereotypes and generalizations -- that women are not tough enough to succeed in VMI's rigorous, military-style program. Instead of remedying that discrimination, the remedial plan approved by the district court perpetuates it by employing the same stereotypes and generalizations to argue that even a separate program for women should not utilize VMI's educational methodology. This separate program carries the same stigmatizing message as VMI's original exclusion of women -- that women simply are not up to the challenge of VMI's demanding program.

The fact that most women might choose a different type of educational program does not lessen the stigma and, in any event,

is beside the point. A program based on generalizations about women and education may stand or fall on its own merit, but it is not a remedy for VMI's exclusion of women. The Equal Protection Clause protects individuals, and prohibits the use of stereotypes and generalizations to deny women benefits and opportunities not thought desirable or suited for them. Indeed, there is no case (decided under the heightened scrutiny standard) that has upheld the denial of a valuable benefit to all women simply because some task force or other group believes it is inappropriate for women.

The record makes clear that VMI is not for most people -- whether men or women. It is a special kind of education sought by a small minority of students. Nevertheless, the fact remains that men have the special educational opportunity available to them and women do not, and that as a result VMI graduates have been very successful in both public and private careers. This suit was brought on behalf of those women who want to go to VMI precisely because it is such a demanding and challenging school. The remedial plan approved by the district court does nothing for them.

After many months spent developing a program and conducting a remedial hearing, we are no closer to vindicating the rights of women than when this suit was filed. The proposed "parallel" program and the extensive record in this case demonstrate that VMI and the Commonwealth still do not have a policy of providing VMI's unique educational methodology to men and women. They also demonstrate that there is no separate program for women that will

satisfy defendants' remedial obligation under the Equal Protection Clause. The United States filed this lawsuit seeking the admission of women to VMI. Notwithstanding this Court's suggestion that women might theoretically be provided an equal educational opportunity in a separate school, the Commonwealth has not and, we believe, cannot offer to women in a separate program what men get by attending VMI. Admitting women to VMI is thus the only lawful and appropriate remedy in this case.

ARGUMENT

I

DEFENDANTS' PROPOSED REMEDIAL PLAN CREATING A PARALLEL PROGRAM FOR WOMEN AT MARY BALDWIN COLLEGE DOES NOT SATISFY DEFENDANTS' OBLIGATION UNDER THE EQUAL PROTECTION CLAUSE TO OFFER WOMEN VMI'S UNIQUE TYPE OF EDUCATIONAL PROGRAM

A. The Equal Protection Clause Requires Defendants To Offer Women VMI's Unique Educational Methodology

The district court approved the VWIL program, despite its acknowledgement that it "differs substantially" from VMI (App. 333), based on its conclusion that VMI's educational methodology is "inappropriate for most women" (e.g., App. 341). As a matter of law, however, that conclusion cannot justify the Commonwealth denying those women who this Court (and the district court) found can succeed in VMI's type of educational program, equal access to that type of program. Moreover, this Court made clear in its previous decision that a constitutionally acceptable parallel program for women must offer women VMI's unique educational methodology.

1. The Equal Protection Clause protects individuals from being treated on the basis of group stereotyping. See, e.g., Sweatt v. Painter, 339 U.S. 629, 635 (1950) ("It is fundamental that these [Equal Protection Clause] cases concern rights which are personal and present."); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938). As this Court stated in rejecting the suggestion that it would be better for black law students generally to go to an all-black school rather than a white school: "The duty of the federal courts * * * is clear. We must give first place to the rights of the individual citizen, and when and where he seeks only equality of treatment before the law, his suit must prevail. It is for him to decide in which direction his advantage lies." McKissick v. Carmichael, 187 F.2d 949, 954 (4th Cir.), cert. denied, 341 U.S. 951 (1951). Indeed, the very purpose of the enhanced scrutiny afforded gender classifications under the Equal Protection Clause is to ensure that individuals not be denied opportunities and benefits based on predominant group traits. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 686-687 (1973) (plurality opinion of Justice Brennan) ("statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members"); Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984). Thus, the VWIL does nothing to vindicate the rights of the women (like Shannon Faulkner at The Citadel) who have decided that their advantage

lies in participating in VMI's rigorous, military-style educational program.³

The notion that the Commonwealth need not afford women a VMI-type education because of an irrelevant stereotype about most women is also fatally flawed because it rests the vindication of individual women's constitutional rights on impermissible stereotypes and generalizations. Recently, in J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994), the Supreme Court addressed whether the Equal Protection Clause prohibits the government from making gender-based peremptory challenges. In holding that it does, the Court emphasized that "gender-based classifications require an exceedingly persuasive justification in order to survive constitutional scrutiny." Id. at 1425 (internal quotation marks omitted). The Court stated that it "consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about

³Courts have emphasized the necessity of focusing on an individual's capabilities, not on group generalizations, when girls have sought to compete in contact sports that were restricted to boys. See, e.g., Force by Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020 (W.D. Mo. 1983) (court strikes down prohibition on girls competing for a place on junior high football team, stating that generalizations about the "typical" female could not be used to preclude individual females from trying out for the team on an equal basis with the males); Hoover v. Meiklejohn, 430 F. Supp. 164, 170 (D. Colo. 1977); Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651, 662-666 (6th Cir. 1981) (Jones, J., concurring in part and dissenting in part) (discussing cases); Brenden v. Independent Sch. Dist. 742, 477 F.2d 1292, 1302 (8th Cir. 1973).

gender." Id. at 1424 (internal quotation marks omitted). The Court also stated that in many contexts blacks and women "share a history of total exclusion," which "warrants the heightened scrutiny we afford all gender classifications today." Id. at 1425.⁴

The Court thus rejected the state's argument that gender was an accurate predictor of juror's attitudes, stating:

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have 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.

Id. at 1427 n.11. The Court added that the Equal Protection Clause "acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination." Ibid.; see also 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."); Force by Force v. Pierce City R-VI School Dist., 570

⁴Indeed, the Court left open the question whether gender classifications are inherently suspect. 114 S. Ct. at 1425 n.6. The remedial plan here would, of course, fail under this standard, as it does under J.E.B.'s heightened scrutiny standard.

F. Supp. 1020, 1029 (W.D. Mo. 1983) (the Equal Protection Clause prohibits the "use of broad generalizations which[,] while perhaps empirically supported as generalizations[,] do not hold true for all members of a sex").

Thus, defendants cannot afford men, but not women, the valuable benefit of VMI's unique educational methodology -- which the record reflects some women (and some men) desire, could succeed in, and would find appropriate⁵ -- based on "fixed notions concerning the roles and abilities of males and females." Hogan, 458 U.S. at 725.⁶ Just as defendants relied on stereotypes to justify excluding women from VMI (i.e., because it is thought too difficult for them), they now repeat the same stereotypes to attempt to deny women the rigorous, VMI-type educational program even in a separate all-women program. But

⁵The district court acknowledged that "[t]he evidence at trial indicated that the VMI methodology could be used to educate women and, in fact, some women * * * may prefer the VMI methodology to the VWIL methodology" (App. 352).

⁶Thus, the generalization that men and women should be educated and trained as leaders in a different manner cannot justify denying women VMI's educational methodology. See App. 341 (district court finds women need an educational methodology "which reinforces self-esteem, rather than the leveling process of VMI"); but see App. 821-849. The record makes clear that whatever differences there may be between the genders in approaches to learning, there are greater individual differences within each gender. See, e.g. App. 821-823. Cf. Hoover v. Meiklejohn, 430 F. Supp. at 170 ("If the purpose of the exclusionary rule is the protection of health, safety and welfare of the students, it is arbitrary to consider only the general physiological differences between males and females as classes without any regard for the wide range of individual variants within each class."). Thus, any generalized learning differences that may exist between the genders cannot justify denying all women VMI's unique educational methodology.

the Commonwealth's approach would permit states to exclude women from jobs such as police officer, firefighter, or even lawyer, but give women "parallel" jobs that are less rigorous, simply by showing that most women are not as strong in certain respects as most men. This is the very type of generalization the Court condemned in J.E.B.⁷

2. Consistent with these principles, this Court made clear in VMI that if defendants' attempt to remedy their constitutional violation by creating a "parallel institution[] or parallel

⁷The Equal Protection Clause also precludes the Commonwealth from justifying denying women VMI's unique educational program on the basis of its conclusion that there is insufficient demand among women for that type of education. In Missouri ex rel. Gaines v. Canada, the Court squarely rejected the argument that the state was not obligated to provide a legal education for blacks (albeit in a separate facility) because there was a limited demand for such an education, stating:

[Such an argument makes] the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is a personal one.

It was as an individual that [petitioner] was entitled to the equal protection of the laws, and the State was bound to furnish him * * * facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

305 U.S. at 351 (internal quotation marks omitted). In any event, the district court already found that there would be an adequate demand among women for a VMI-type of education. See VMI, 766 F. Supp. at 1437-1438; see also VMI, 976 F.2d at 894. Thus, the court's statement that "there would be little demand for a female VMI but there would be much more significant demand for VWIL" (App. 350) is both contradicted by its own findings (at least the first part of the statement), and legally irrelevant to the adequacy of defendants' proposed remedial plan.

program[]'", VMI, 976 F.2d at 900, the separate program for women must offer VMI's unique educational methodology. The Court made clear that women, like men, can benefit from VMI's unique educational methodology. The Court stated, for example, that "[i]t is not the maleness, as distinguished from femaleness, that provides justification for the program." Id. at 897. Thus, although the Court concluded that the presence of women at VMI would affect three aspects of VMI's program -- privacy, physical training, and cross-sexual confrontations -- it emphasized that "[t]he problems that could be anticipated by coeducation at VMI * * * would not be anticipated in an all-female program with the same mission and methodology as that of VMI." Id. at 897-898 (emphasis added). The Court explained that although "physical training at VMI is tailored to males, in the context of a single-sex female institution, it could be adjusted without detrimental effect. No other aspect of the program has been shown to depend upon maleness rather than single-genderness." Id. at 898. This conclusion is supported by the Court's finding that "neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women." Id. at 899.⁸

With this background, the Court explained that the nature of the constitutional violation was denying women "VMI's unique type

⁸Thus, although the Court concluded that the presence of women would change the VMI program, those changes were the justification for permitting a separate program for women, not for making the separate program any different from VMI.

of program" and its unique educational "methodology." Id. at 892. The Court stated:

The parties agree that VMI offers a unique combination of education and training that makes a positive contribution offered by no other institution. And the district court found, apparently without exception from any party, that "VMI's military program is absolutely unique. No other school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI." The decisive question in this case therefore transforms to one of why the Commonwealth of Virginia offers the opportunity only to men.

Id. at 898 (footnote omitted). The Court concluded that the Commonwealth had not explained "why it offers the unique benefit of VMI's type of education and training to men and not to women." Ibid. In numerous other instances the Court similarly emphasized that the constitutional violation is denying women VMI's unique educational program. E.g., id. at 899-900 (no evidence of a state purpose for offering "the program" only to men).

In sum, the Court made clear that if the defendants chose, as they have here, to offer an alternative program to women instead of admitting them to VMI, the program must provide VMI's unique educational methodology.⁹ Otherwise, the program would

⁹Thus, to say, as the district court does, that VMI's educational methodology is simply an "added dimension" to the single-gender program (App. 339), is to ignore the very essence of VMI and why students want to go there.

not remedy the denial of VMI's unique educational program to women.¹⁰

3. This Court's opinion in Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993), supports this conclusion. In that case, addressing Shannon Faulkner's interim admission to day classes at The Citadel, the Court elaborated on the nature of separate facilities that might be provided to men and women. Id. at 232. Using the common sense example of public rest rooms, the Court stated that when "a gender classification is justified by acknowledged differences, identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender." Ibid. (hence urinals for men). The Court concluded that:

[t]herefore, any analysis of the nature of a separate facility provided in response to a justified purpose, must take into account the nature of the difference on which the separation is based, the relevant benefits to and the needs of each gender, the demand (both in terms of quality and quantity), and any other relevant factor. In the end, distinctions in any separate facilities provided for males and females may be based

¹⁰Requiring a parallel program for women to offer VMI's educational methodology is consistent with the fundamental rule that the court is "required to tailor the scope of the remedy to fit the nature and extent of the * * * violation." Hills v. Gautreaux, 425 U.S. 284, 293-294 (1976); see also Freeman v. Pitts, 112 S. Ct. 1430, 1445 (1992) ("the nature of the violation determines the scope of the remedy") (internal quotation marks omitted); see generally Kirstein v. Rector & Visitors of Univ. of Virginia, 309 F. Supp. 184, 187 (E.D. Va. 1970) (three-judge) (Commonwealth violates women's equal protection rights by denying them admission to University of Virginia; "Commonwealth * * * may not now deny to women, on the basis of sex, educational opportunities at the Charlottesville campus that are not afforded in other institutions operated by the state").

on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences.

Ibid.

Following this language, it is plain that defendants might offer a parallel program for women that provides different rest room facilities and possibly a different physical training program. But nothing in the opinion provides a basis for denying women a rigorous military-type educational program. This Court in Faulkner stated that "[w]hile providing a single-gender military education was held to constitute an appropriately important state purpose, [the Court] could find no state policy justifying Virginia's decision to offer this unique type of education only to men. No evidence was presented that women might not also benefit from a program of military training designed to produce women citizen soldiers." Id. at 232 (citation omitted; emphasis added).

Thus, while this Court gave defendants the opportunity to prove that the violation could be remedied by providing a separate program, it was clear that not just any single-sex program would satisfy defendants' remedial obligation. VMI and Faulkner make clear that to satisfy the Equal Protection Clause such a program must be a military-style program with the central attributes of VMI's program.

B. The VWIL Does Not Afford Women VMI's Unique Educational Methodology

The district court found that the VWIL "differs substantially from VMI" (App. 333-334). That finding is correct, and it is dispositive. Since the VWIL does not provide for women any of the central attributes of VMI's unique educational program, it does not remedy defendants' violation of the Equal Protection Clause.

The central differences between VMI's educational program and the proposed VWIL can be summarized as follows, beginning with the "six interrelated components" that characterize VMI's "unique and intense" process called the "adversative" method. VMI, 976 F.2d at 893.

a. Military Training. The military system characterizes life at VMI, as cadets live within a military framework with its attendant regulations, etiquette, and drills (see page 5, supra). The military training is extremely rigorous, so that "VMI alumni are prepared to find the military benign in comparison with much of what they experienced at VMI." VMI, 766 F. Supp. at 1427. Although each cadet is required to participate in ROTC all four years at VMI, ROTC operates independently of the other systems at VMI. Id. at 1424.

By contrast, VWIL provides no military framework or training for its students other than the pre-existing ROTC program, which entails two hours per week for freshmen and sophomores, and four hours per week for juniors and seniors (see pages 10-11, supra). Indeed, VMI's 24-hour a day military life style was expressly

rejected (App. 471). Thus, unlike VMI, under the VWIL plan there will be no military environment, including military lifestyle, etiquette, and procedures (apart from ROTC training); students will not have the opportunity to participate in a school-wide system of military discipline; students will not be required to wear uniforms during the school day (except during ROTC or Virginia Corps of Cadets activities); students will not participate in daily marches and formations, reveille, and flag ceremonies; and students will not be required to eat meals together (App. 501-502, 582, 642-644).

Moreover, VWIL students will be in an environment -- Mary Baldwin College, with its liberal arts, cooperative, nurturing environment -- that is the very antithesis of VMI's military atmosphere. Thus, for example, as first-year "rats" at VMI celebrate "Breakout" (the end of rat training) by slogging through the mud in their military uniforms, students at MBC will be celebrating Apple Day. In short, VMI is a military-type school, and VWIL is not. VWIL students' experience in ROTC will not be comparable to the all-pervasive military experience of VMI.¹¹

¹¹The comparative inadequacy of VWIL's military component may be the result of Dean Lott's view that "what counts most [in VWIL's military training] is the opportunity to be commissioned in a service of [VWIL students'] choice" (App. 449-450). That is not the case of VMI. At VMI, the military system characterizes all of school life. A majority of VMI cadets do not have military service as a vocational objective (R. 50 at 9). See also R. 50 at 6 ("The role of VMI is not primarily to develop career military men for the U.S. armed services.").

b. Barracks Life. At VMI, all cadets are required to live in the barracks all four years. "Unlike most colleges, where the library is central and the dormitories are peripheral, the most important aspects of the VMI educational experience occur in the barracks * * * [, which] are crucial to the VMI experience. VMI, 766 F. Supp. at 1423. As this Court explained:

The barracks life, described as important to VMI's ethos of egalitarianism, is dictated by the nature and functioning of the barracks. Each class is assigned to one floor of the four-story barracks structure and three to five cadets are assigned to a room. The rooms are stark and unattractive. There are not locks on the doors and windows are uncovered. Access to bathrooms is provided by outside corridors visible to the quadrangle, and there is a total lack of privacy in the barracks, where cadets are subjected to constant scrutiny and minute regulation, all intended to foster cadet equality and to induce stress.

VMI, 976 F.2d at 894 (emphasis omitted).

By contrast, only first-year VWIL students will live together, and they will do so in a section of a MBC residence hall that will be consistent with the compassionate and supportive MBC residence hall philosophy (App. 604). They will be free to decorate their rooms as they please, and there will be no restrictions on what they have in their rooms. They will be subject to some additional regulations, but they are relatively benign, such as keeping their rooms neat and not smoking. Upperclass VWIL students will be required to live for one year in the VWIL House (which will not be operated on a military format); during other years nothing prevents them from living off campus.

In short, the residential facilities at VMI and MBC are on opposite extremes with regard to privacy, self-expression, and personal comfort (App. 818). Not surprisingly then, the district court concluded that "[t]he residential life for VWIL students will vary significantly from the residential life of VMI students" (App. 343). See also App. 704-705 (VWIL will not similarly provide for an absence of privacy).

c. Rat Line. VMI's rat line is the "harsh orientation process to which all new cadets ('rats') are subjected to during their first seven months at VMI." VMI, 976 F.2d at 893. As this Court further explained, "[d]esigned to be comparable to the Marine Corps' boot camp in terms of physical rigor and mental stress, the rat line includes indoctrination, minute regulation of individual behavior, frequent punishments, rigorous physical education, and military drills." Ibid. Although this Court found that VMI's "implementing methodology is [not] inherently unsuitable to women," VMI, 976 F.2d at 900, defendants' proposed remedial plan specifically provides that unlike VMI, the VWIL will not utilize a rat line (App. 49). Indeed, while acknowledging that the rat line "is integral to [VMI's] program" (App. 620), MBC simultaneously rejects it for VWIL.

d. Class System and Dyke System. "The class system at VMI is a system of privileges and responsibilities aimed at developing the character and leadership of cadets." VMI, 766 F. Supp. at 1422. "Each class has specific responsibilities," and 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." Id. at 1422-1423. The dyke system "is closely linked to the class system, and is the arrangement by which each rat is assigned a first classman [senior] as a mentor." Id. at 1423. As defendants have asserted:

The class system epitomizes the unique character of the VMI experience. Through the class system, VMI organizes hierarchically the peer pressure so essential in shaping individual and group behavior and values during adolescence. The class system inculcates the values and standards defined by VMI as appropriate replacements for those called into question by the rat experience.

* * * * *

In addition to the rat line, the class and dyke systems are the most significant elements in supplying VMI men with the qualities necessary for leadership in combat
* * *.

R. 152 at 28, 30. Although the class and dyke system are so central to VMI, VWIL will simply have a mentoring requirement (App. 460, 894-895).

e. Honor Code. VMI's honor code "is a stringently enforced code of conduct applying to all aspects of life at VMI and providing the single penalty of expulsion for its violation." VMI, 976 F.2d at 894.¹² "The VMI honor code dominates all facets of institutional life," and "is stringently enforced by an honor court comprised of cadets elected from the upper two classes." VMI, 766 F. Supp. at 1423. As defendants have

¹²The honor code provides that a cadet "does not lie, cheat, steal nor tolerate those who do." VMI, 766 F. Supp. at 1423.

asserted, it "is one of the imperative sources of values at VMI" (R. 152 at 31).

By contrast, VWIL students will be governed by the same honor code that governs non-VWIL MBC students (App. 649). Although that honor code prohibits the same conduct, it provides for "minor" and "major" penalties to be decided by the Honor Council (App. 649-650).

3. In addition to rejecting every component of the adversative system, the VWIL differs from VMI in other key respects. For example, VWIL will operate as a small subset of a larger liberal arts institution, and will be fully integrated into that institution (App. 639), one that has no tradition of producing military leaders (App. 728). As a result, VWIL students will be involved with non-VWIL MBC students in classes and extracurricular activities, which will result in a different kind of atmosphere and experience than at VMI.¹³ VWIL students, for example, will not experience the same egalitarian environment that defendants assert is a "fundamental aspect of the VMI experience" (R. 152 at 21). In addition, VMI emphasizes engineering, science, and mathematics, whereas VWIL emphasizes arts and sciences and offers an engineering program only by participating in a 3-2 program with Washington University in St. Louis (App. 403). Further, VWIL will not offer its students an

¹³Analogously, the district court recognized in the liability trial that the institutional environment of the VPI Cadet Corps differs greatly from that of VMI because "only 2-3 % of VPI students live in the Cadet Corps barracks, [and thus] the military experience is more diffuse." VMI, 766 F. Supp. at 1432.

opportunity for physical training that is comparable to that provided men at VMI, where physical training is part of the daily experience of the cadets (App. 899-900).

4. The VWIL not only fails to provide women with the same educational methodology and experience of VMI, it offers little that is not already offered to women at MBC. MBC currently offers the same ROTC program that will be the military component of the VWIL, virtually the same academic program, externships, most of the same physical and health education, a leadership program, and even a summer outward bound type program (App. 637-638). Thus, VWIL more closely represents MBC than VMI; indeed, Dean Lott called the VWIL program an "extension" of what MBC already does (App. 472). Moreover, MBC was considering developing a leadership program prior to this Court's decision in VMI, and MBC's President testified that the VWIL plan is a "natural evolution" of MBC's mission to educate women in a single-sex environment (App. 617). This suggests that VWIL was designed not so much to offer women VMI's unique type of educational program, but to fit into MBC's existing educational program. See App. 436. Dean Lott testified, for example, that the Task Force had to make certain that the program would be consistent with MBC's "historical mission so that we couldn't insert into Mary Baldwin something that would be VMI but would not be Mary Baldwin" (App. 436).

In the final analysis, VWIL is fundamentally different from VMI because it was not designed for women who want a military

style education, which is precisely what VMI offers (App. 693-694). Moreover, while VMI was designed for the atypical man, VWIL was designed for "most" women (App. 542). Indeed, Dean Lott testified that, in his opinion, the VMI program is inappropriate for most men (App. 542-543). (He also testified that there may be some women for whom the adversative method of educational would be optimal (App. 525).) Dr. David Riesman, one of defendants' experts, similarly testified that VMI's hostile, spartan environment is not appropriate for most men (App. 676). Thus, those who crafted the VWIL program made no effort to create a program that would attract the type of women that would be attracted to VMI in the first place, and thus who suffer the violation of their Equal Protection rights because the Commonwealth denies them a VMI-type education solely because of their gender (App. 540).

C. Defendants Cannot Justify Denying Women The Benefits Of VMI's Unique Educational Program On The Basis Of The Purportedly Similar "Outcome" Of VWIL's Educational Program

1. Since the VWIL is substantially different from VMI, it is not surprising that the defendants argued below that "[t]he opportunity to become citizen-soldiers, not the discrete pedagogical means used to achieve that outcome, which includes a 24-hour a day military format, is the benefit women were denied" (Defendants' Proposed Findings of Fact and Conclusions of Law at 22-23). But defendants know best of all that without their particular pedagogical means their notion of being a citizen-soldier rings hollow. They asserted in the liability trial that

"[t]he VMI concept of a 'citizen-soldier' is inextricably tied to the distinctive method of education and character formation employed at VMI" (R. 152 at 19). General Knapp, the Superintendent of VMI, similarly testified that although other institutions can produce citizen-soldiers, VMI's methodology was unique (Tr. 64-65 (liability trial)).¹⁴

Thus, as defendants well know, the essence of VMI is its extremely challenging, physically and mentally rigorous, military-style educational program. Students who apply to VMI obviously want that kind of educational experience, otherwise they would not choose VMI. Indeed, the district court expressly found in the trial on liability that students attend VMI "because of the rigor of the experience, which represents a challenge and which [they] believe[] will test [them] to the ultimate." VMI, 766 F. Supp. at 1426. The court also found, for example, that it is "the intensity of the barracks-centered lifestyle that makes VMI so attractive to many applicants." Id. at 1414. See generally pages 6-7, supra. Women who want to go VMI (like Shannon Faulkner at The Citadel) also want that kind of educational experience. In short, characterizing the crux of what women are denied as the particular "outcome" of being a

¹⁴Defendants' derisive dismissal of the types of changes West Point made when women were admitted also shows that VMI's central focus is on methodology, since few would contend West Point no longer produces men and women trained for leadership positions in both civilian and military life. See Brief of Appellees at 31-35, United States v. Virginia, No. 91-1690.

leader (or citizen-soldier) wholly fails to capture the essence of the unique program that defendants so vigorously defend.

2. In addition, a focus on outcomes, from drastically different types of educational programs, provides far too amorphous a standard by which to measure the vindication of women's Equal Protection rights. The district court described the outcomes as producing citizen-soldiers -- men and women trained for leadership in both civilian and military life (App. 340). But most colleges would cite leadership training as a goal.¹⁵ One of defendants' expert witnesses (Richard Richardson) similarly described VMI's outcomes as the "concept of the educated and honorable man, * * * who is qualified to serve the country both in times of peace and in times of war" (App. 737). Another of defendants' experts (Elizabeth Anne Fox-Genovese) described the desired outcomes this way: "When I think of outcomes, I think of * * * where one would like to see a student at about 30 launched on her life, and * * * from that perspective, I think the outcome of the [VWIL] program will be in important ways fully compatible to VMI" (App. 568). And Dean Lott acknowledged that if outcomes are described in general

¹⁵E.g., Illinois Wesleyan University Catalog (1992-93) at 11 (mission is "to prepare our students for responsible citizenship and leadership in a democratic society and global community"); see also VMI, 766 F. Supp. at 1430 (mission of the VPI Corps of Cadets is to prepare men and women "to be effective leaders in the varied work of military and civilian life"). The district court found that despite its nearly identical mission, the VPI Corps of Cadets was not sufficiently similar to VMI to avoid the conclusion that "[w]omen are denied a unique educational opportunity that is available only at VMI." Id. at 1432.

enough terms, a law school and a medical school could be said to have the same outcomes (App. 527-528).¹⁶ In short, using the "broad umbrella" of the definition of a citizen-soldier to develop the VWIL plan (App. 436), and gauging outcomes by the generalized definition of that term (or, as defendants have stated, by the "qualities associated with citizen-soldiers" (Defendants' Proposed Findings of Fact and Conclusions of Law at 23)), cannot provide a meaningful way of measuring whether the plan affords women the unique education and training of the VMI experience.¹⁷

¹⁶VMI's mission is to produce "citizen-soldiers, educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." VMI, 976 F.2d at 893. The stated mission of VWIL is also to produce "citizen-soldiers," who are "educated and honorable women, prepared for the varied work of civilian life, [and] qualified to serve in the armed forces" (App. 380). The similarity of the mission statements is not remarkable, since defendants seek to justify the VWIL program not by showing how it actually provides women the same type of educational program that VMI offers men, but rather by asserting that the schools have the same mission and thus will produce the same outcomes. But VMI's mission statement goes on to state that "[t]o accomplish this result, [VMI] shall provide to qualified young men undergraduate education of [the] highest quality -- embracing engineering, science, and the arts -- conducted in, and facilitated by, the unique VMI system of military discipline." VMI, 766 F. Supp. at 1425 (emphasis added).

¹⁷A number of witnesses testified for the United States, including Dr. Alexander Astin, that the outcomes of VMI and VWIL would not be the same. See, e.g., App. 794-795, 905-906, 965-967). Although defendants had experts testify to the contrary, the United States objected to the qualifications of many of the defendants' experts to testify to a comparison of outcomes (e.g., App. 588-589, 608-609). For example, neither Dean Lott nor President Tyson had any experience in assessing whether two institutions could produce comparable outcomes (App. 530, 534; Tr. 375 (remedial trial)). Moreover, there is an ipse dixit quality to much of defendants' expert testimony on this matter

(continued...)

II

THE COURT SHOULD ORDER VMI TO ADMIT WOMEN
TO REMEDY THE CONSTITUTIONAL VIOLATION

This Court conditioned VMI's continued status as a state supported all-male school on the Commonwealth remedying the constitutional violation of affording men, but not women, the benefits of VMI's unique educational program. The Court gave the Commonwealth the responsibility to select a remedial course, which "might" include establishing a parallel program for women. VMI, 976 F.2d at 900. When the Court suggested this remedial alternative, the record did not address whether a particular program for women could approximate the VMI experience and its attendant benefits, or even whether any program for women could do so, since the parties had no occasion to address that issue. This has now been done, and what may have been a theoretical possibility is not, at least in this case, a practical reality. A parallel and separate educational program cannot in this case be equal.

Indeed, defendants, by their own admission, have made no effort to provide for women the central attributes of VMI's educational program. See, e.g., App. 49, 50. For example,

¹⁷(...continued)
(e.g., App. 531 (Dean Lott testified that when he approved the plan he "assumed that different methodologies could result in similar outcomes")). As a practical matter, it may be that it is simply impossible to determine whether the outcomes would, in any meaningful sense, be comparable (see App. 1009-1010, 1024-1025). In any event, as a legal matter it is legal error to conclude that predicted generalizations concerning an educational outcome satisfy a women's right to access to VMI's unique educational methodology.

defendants have expressly rejected offering women an adversative model of education, although that is the model "on which the VMI system is based." R. 152 at 19. The Commonwealth still does not have a policy (much less a viable program) for providing a VMI-type education to women. Since it would have been in the defendants interest to do their best to create a program for women that would approximate VMI, their failure to come anywhere close to VMI's educational program is telling.

Defendants have vigorously defended VMI for over four years, and in so doing they have repeatedly emphasized the uniqueness of its educational methodology, which has produced its rich heritage and made it one of the nations most respected colleges (e.g., R. 152 at 24, 96-97). Indeed, that fact was the centerpiece of defendants' defense of the program. They have asserted, for example, that the "principal difference between VMI and other state institutions that produce citizen-soldiers is the methodology. The VMI methodology is unique" (R. 152 at 97). They have also expounded that "VMI's dedication to honor, duty and service makes it one of the nation's unique and most respected colleges," that it "has provided the Commonwealth and the nation with exemplary leaders in all fields," that it "consistently appears on all lists of the nations finest colleges while maintaining the spartan lifestyle of its corps of cadets [and] offering quality education within the disciplined framework of a military environment," and that it "is one of the greatest assets of the Commonwealth of Virginia" (R. 152 at 18). The

district court likewise found that "VMI is sought out by some applicants for admission because it is known to be the most challenging military school in the United States, and because its alumni are exceptionally close to the school." VMI, 766 F. Supp. at 1421. The district court also concluded in its remedial decision that "the VWIL program cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years" (App. 338), which suggests that there cannot really be a parallel program for women that offers them the benefits of VMI's educational program.

Defendants now contend that VMI is not about a particular methodology, but about a particular outcome -- producing citizen-soldiers. They also suggest that it is really not so hard to produce citizen-soldiers, that the existing program at Mary Baldwin College can be fine-tuned to accomplish that end, even without incorporating any of the elements of VMI's educational program that we were told make it so unique and attractive.

It seems clear that the defendants will not -- indeed cannot -- establish a program that gives women an education equal to VMI. The only appropriate remedy is to order women admitted to VMI.¹⁸

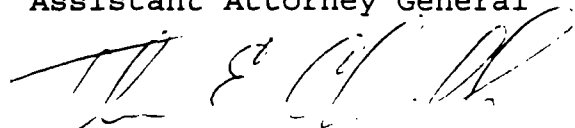
¹⁸We recognized that this Court in VMI also suggested that defendants might remedy their constitutional violation by "abandon[ing] state support of VMI." 976 F.2d at 900. Defendants have not elected to pursue this remedial option, but instead sought to create a parallel program for women. Since defendants have had their opportunity to select a remedy, and the parallel program does not remedy the constitutional violation, defendants must admit women to VMI.

CONCLUSION

The judgment of the district court should be reversed. Since defendants have failed to select a course that "bring[s] the circumstances into conformity with the Equal Protection Clause," VMI, 976 F.2d at 900, the case should be remanded with an order directing that VMI admit women.

Respectfully submitted,

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A handwritten signature in dark ink, appearing to read 'D. L. Patrick', is written over a horizontal line.

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REQUEST FOR ORAL ARGUMENT

The United States believes that oral argument would be useful to this Court in resolving the issue on appeal.

CERTIFICATE OF SERVICE

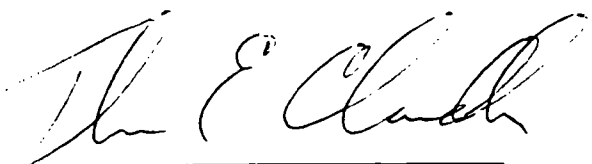
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This 12th day of July, 1994

Nos. 94-1667 & 94-1717

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

COMMONWEALTH OF VIRGINIA, et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

REPLY AND ANSWERING BRIEF FOR THE UNITED STATES
AS APPELLANT/CROSS-APPELLEE

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Plaintiff-Appellant

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Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

REPLY AND ANSWERING BRIEF FOR THE UNITED STATES
AS APPELLANT/CROSS-APPELLEE

ARGUMENT

This brief responds to the arguments made by the Commonwealth of Virginia, the Virginia Military Institute (VMI), et al., in the Answering and Opening Brief of Appellees/Cross Appellants.^{1/}

1. It is not disputed that defendants' proposed remedy -- the all-female Virginia Women's Institute for Leadership (VWIL) -- is substantially different from the educational program at VMI. The government argued in its opening brief that, as a result, the proposed remedy does not correct the constitutional

^{1/} References in this Reply Brief to "Br. ____" are to the defendants/appellees' answering and opening brief. References to "U.S. Br. ____" are to the opening Brief for the United States as Appellant. References to "App. ____" are to the three-volume Joint Appendix. References to "Tr. ____" are to the transcript of the remedial trial where not included in the Joint Appendix. References to "R. ____" are to docket numbers on the district court docket sheet (See App. 1-31).

violation found by this Court -- i.e., offering men, but not women, VMI's distinctive, military-style educational methodology. United States v. Commonwealth of Virginia (VMI), 976 F.2d 890, 899 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993). The government also argued that, consistent with the Equal Protection Clause, those differences cannot be justified on the basis that VMI's unique educational methodology is thought inappropriate for "most" women (U.S. Br. 19-28); that VWIL, although substantially different from VMI, will produce a similar "outcome" (U.S. Br. 36-39); or that there is insufficient demand among women for a VMI-type education (U.S. Br. 24 n.7).

Defendants respond that the issue is not whether they have offered the unique VMI methodology to women, but rather whether the proposed VWIL offers to women "a single-gender education that offers the benefits provided to young men at VMI" (Br. 23). They also assert (1) that consistent with the Constitution, they may rely on predominant group traits to conclude that women, as a whole, would not benefit from VMI's adversative methodology, and (2) that "[e]ven in the absence of pedagogical reasons for programmatic differences, gender differences in student demand alone constitutionally justify the differences between VMI and VWIL" (Br. 3).^{2/} As set forth in our opening brief, and for the following additional reasons, these arguments are unavailing.

^{2/} The district court did not rely on the alleged lack of demand for an all-female VMI-type program in upholding defendants' remedial plan.

a. Defendants first assert that "[t]he United States is simply wrong in the argument that the constitutional violation which must be remedied is the denial of the unique VMI methodology to young women" (Br. 23). But this is precisely what this Court held in VMI, and reiterated in Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993). See U.S. Br. 24-28 (addressing this Court's decisions in those cases and mandate in VMI). For example, this Court in VMI stated:

Although neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women, the Commonwealth has elected * * * to maintain a system of education which offers the program only to men. In the proceedings below, Virginia had the opportunity to meet its burden of demonstrating that it had made an important and meaningful distinction in perpetuating this condition. As the record stands, however, evidence of a legitimate and substantial state purpose is lacking.

976 F.2d at 899-900 (emphasis added; citation omitted).

There is, moreover, no basis for defendants' contrary assertion that the relevant inquiry is whether VWIL offers women the opportunity to achieve the same goals that VMI provides for men. Although defendants recognize that "[u]nder well-established remedial standards, the scope of the remedy is determined by the nature and extent of the constitutional violation" (Br. 22 (internal quotation marks omitted)), they do not look to the violation to justify the remedy, but instead assert that the remedial plan itself passes the intermediate level of scrutiny that applies to gender classifications (see, e.g., Br. 23). This is so, we are told, because the "VWIL

methodology is 'substantially related' to the remedial purpose of providing young women the opportunity to achieve the goals of VMI" (Br. 37).

The remedial plan, however, is not an independent gender classification that must be analyzed under the intermediate scrutiny test. This Court has already held that offering VMI's distinctive educational program to men but not to women violates the Equal Protection Clause; the question now is whether the proposed remedial plan cures that constitutional violation. The Court in VMI suggested that a parallel institution or program might do so (but did not say that there necessarily is such a program). 976 F.2d at 900. The Court also stated that "[t]he problems that could be anticipated by coeducation at VMI * * * would not be anticipated in an all-female program with the same mission and methodology as that of VMI." Id. at 898 (emphasis added). It follows that in assessing whether the proposed parallel program satisfies defendants' remedial obligation, the proposed remedy must be compared to VMI's educational program to determine if women are really getting that which defendants have unlawfully denied them. As we have set forth in detail, the VWIL not only "differs substantially from VMI" (as the district court found (App. 333-334)), it does not provide women with any of the central attributes of VMI's unique educational program. See U.S.

Br. 29-36; see also Br. 28 ("VWIL is not a military school").^{3/}

b. Defendants' attempt to justify their failure to offer women VMI's rigorous, military-style educational program on the basis of comparable benefits (Br. 32-38). They assert that they relied on experts to design "the optimum environment for the single-gender education and training of women leaders" (Br. 33), and that based on the predominant group traits of women the adversative VMI methodology would not be beneficial to women but the VWIL methodology would be (Br. 24-25, 32-38).

First, it is simply not true, as defendants suggest, that VWIL was designed the way it was because of the intensive studying and planning by educational professionals, and that the Task Force had no pre-conceived approach to methodology. As stated in our opening brief (U.S. Br. 35), Mary Baldwin College (MBC) was considering developing a leadership program prior to this Court's decision in VMI, and MBC's President testified that the VWIL plan is a "natural evolution" of MBC's mission to educate women in a single-sex environment (App. 617). Likewise,

^{3/} Defendants are wrong in asserting that it is the government's position that the remedy "must replicate every aspect of VMI's unique methodology" (Br. 23), and that "the mere existence of differences between VMI and VWIL" renders VWIL unconstitutional (Br. 27). As we have made clear, any proposed parallel program must, at the least, be a military-style program with the central attributes of VMI's program. See, e.g., U.S. Br. 28. Otherwise, women are simply not getting as a remedy that which defendants have unconstitutionally denied them. At the same time, the government has recognized that a parallel program could take into account matters such as privacy issues and actual physical differences.

Dean Lott testified that the Task Force had to make certain that the program would be consistent with MBC's "historical mission so that we couldn't insert into Mary Baldwin something that would be VMI but would not be Mary Baldwin" (App. 436). Moreover, when President Tyson presented the VWIL concept to the MBC faculty, the discussion about possibly having military marching and parades on the MBC campus "was fraught with humor" (App. 482-483).^{4/}

In any event, at the heart of defendants' argument is the notion that men and women learn differently, and thus "VMI's extreme adversative method would not accomplish for most young women the goals of education and training" that VMI accomplishes for men (Br. 33 (emphasis added)). But that is not the point. The Equal Protection Clause protects individuals, and does not permit state actors to deny women a valuable benefit on the basis of the stereotype that it is not thought appropriate for them. See U.S. Br. 20-24. Thus, even if it were demonstrable that, as a generalization, most men and most women learn differently, the Equal Protection Clause forbids reliance on such generalizations about character traits which, "while perhaps empirically supported as generalizations -- do not hold true for all members

^{4/} Moreover, defendants' assertion that VWIL was designed by experts in women's education (e.g., Br. 3) is greatly exaggerated. The only expert involved in the remedial plan's formulation was Dr. Richard Richardson (an expert in higher education). For example, Dean Lott, co-chair of the Task Force, testified that he was not one of the experts who determined what components of VMI were appropriate for women (App. 536). Similarly, neither Dr. Fox-Genovese nor Dr. Riesman were involved in formulating the VWIL plan (see Tr. 284, 543-544).

of a sex." Force by Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1029 (W.D. Mo. 1983) (emphasis omitted). Indeed, as a generalization, the record is clear that the VMI-type education is not the preferred approach for most women or most men (see, e.g., Br. 36; U.S. Br. 36; App. 676), but nevertheless those atypical men who might be attracted to such an education can get one, while such women cannot.

It thus does not follow as a matter of logic (in addition to as a matter of law) that, even assuming that as a generalization men and women learn differently (a matter which we do not concede (see generally App. 349 n.8)), a parallel program for women should be substantially different from VMI. Both the men and the women interested in a VMI-type education constitute a small, self-selected subset of all men and women and, as noted above, neither are typical of their gender. As Dr. Carol Nagy Jacklin testified, there are greater individual differences within each gender in approaches to learning than there are such differences between each gender (App. 821-823). See U.S. Br. 23 n.6. Indeed, if the Commonwealth were really concerned about offering educational programs based on average or generalized learning traits, VMI would not exist. Thus, the testimony of defendants' experts that a parallel program for women need not include the central attributes of VMI's rigorous program, since they would not be suitable for most women, is beside the point (see Br. 33-34). But see Tr. 1236, 1239, 1320 (testimony of Dr. Alexander Astin that he is not aware of any developmental characteristics

of women that make an educational methodology that is appropriate for men inappropriate for women; that there is no evidence that women would respond differently than men in an environment that had an absolute equality of treatment, induced mental stress, and the minute regulation of behavior; and that there is no evidence that an educational model that is beneficial to men would not be beneficial to women).

Defendants seek to justify their reliance on group traits by arguing that the intermediate scrutiny test permits them to make "predictive judgments of group behavior based on substantial evidence" (Br. 25). But under the heightened scrutiny applied to gender classifications, the use of gender-based generalizations can never be permissible to exclude and further stigmatize a historically disadvantaged group, since in such cases it reinforces "fixed notions concerning the roles and abilities" of the group. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982). And in those gender discrimination cases that suggest that under intermediate scrutiny the challenged statute need not be drawn as precisely as they might have been, the challenged classification was intended to remedy past discrimination against women. See, e.g., Associated General Contractors v. City & County of San Francisco, 813 F.2d 922, 939-942 (9th Cir. 1987). Indeed, defendants have no answer to the fact that there is no case (decided under the heightened scrutiny standard) that has upheld the denial of a valuable benefit to all women simply because some task force or other group believes it

is inappropriate for most women. In addition, use of generalizations in gender discrimination has routinely been rejected when, as here, procedures such as individual determinations can be made to determine whether the sex-centered generalizations comport with fact. See, e.g., Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151-152 (1980); Orr v. Orr, 440 U.S. 268, 281-282 (1979); Craig v. Boren, 429 U.S. 190, 199 (1976); Force by Force, 570 F. Supp. at 1028-1030.^{5/}

There is, moreover, an obviously patronizing message implicit in defendants' argument -- that women should have access to a VWIL-type education (a "feminine" leadership school), but not a VMI-type education (a "masculine" leadership school), because it would not be good for them to participate in a VMI-type program. In other words, defendants maintain that they can deny women a VMI-type education -- even those women that this Court (and the district court) found can succeed in a VMI-type program and might prefer it, see VMI, 976 F.2d at 896; App. 352 -- because it is for their own good. This argument, however, is indistinguishable from asserting the discredited notion that women's "need for special protection" justifies their exclusion

^{5/} Defendants cite Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), to support their assertion that, under the intermediate scrutiny test, they may rely on "predictive judgments" of group behavior in fashioning their remedy (Br. 25-26). But permitting Congress to use predictive judgments about group behavior in enacting legislation to enhance diversity in broadcasting (by including more minority groups) is far removed from using such judgments to perpetuate historical discrimination against a disfavored class by excluding them from a valuable benefit. See 497 U.S. at 579-584.

from a governmental benefit. Orr, 440 U.S. at 283; see also Hogan, 458 U.S. at 725 ("if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate"); Parham v. Hughes, 441 U.S. 347, 354 (1979) (state cannot make overbroad generalizations based on sex that "demean the ability or social status" of women); Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (D. Colo. 1977) ("Any notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality.").^{6/}

Finally, defendants are wrong in characterizing the violation as, chiefly, the absence of a single-gender educational program for women (e.g., Br. 21). As we have repeatedly noted, the United States has never sought the creation of separate VMI-type school for women (and defendants did not raise this possibility at the liability trial). Rather, this case was

^{6/} Defendants repeatedly assert that its witnesses testified that VWIL would be a good program, and that the United States has not shown that the program would not be educationally beneficial. See, e.g., Br. 2 (VWIL is "unique" and "innovative"), 37. That point is irrelevant. VWIL may be a fine program that would benefit women who participate in it. But so too would many types of programs. Nevertheless, defendants cannot remedy the denial of women's right to the benefit of VMI's unique educational program by giving them some other type of educational program. That would be like saying that although the state denies women admission to its only engineering school, it will create a business school for them. This is especially inappropriate where, as here, the exclusion of women is stigmatizing and the record makes clear that some women can do everything that is required at VMI. See 976 F.2d at 896.

brought so that women, like men, could benefit from VMI's distinctive and challenging educational program, and enjoy all of the attendant benefits of graduating from that program (prestige, job opportunities, etc.). To be sure, the Court did state that single-gender education is pedagogically justifiable, 976 F.2d at 898, but that finding was relevant only to the Court's conclusion that although defendants had not justified offering VMI's unique educational program only to men, the Court would not order that women be admitted to VMI if alternatives were available, id. at 900. That conclusion did not describe the core of what women were deprived of, which the Court made clear was an educational program with the same distinctive methodology as VMI. E.g., id. at 898. Indeed, students want to go to VMI precisely because of its extremely challenging, military-style educational experience (see U.S. Br. 36-38).^{2/}

^{2/} Defendants argued below, and the district court found (see App. 333-334, 352), that although VWIL differs substantially from VMI it will result in "outcomes" for women that are comparable to those received by men at VMI. Defendants now focus on comparable "benefits," not outcomes, although it is unclear whether the change is one of nomenclature or theory. We argued in our opening brief (U.S. Br. 38-39) that the focus on outcomes (i.e., becoming a citizen-soldier) was too amorphous a standard by which to measure the vindication of women's Equal Protection rights. The same holds for a focus on comparable "benefits." In any event, defendants' attempt to show that VWIL, despite its substantial differences from VMI, will produce the same benefits is not persuasive (see Br. 28-32). For example, defendants assert that although VWIL will not have VMI's single-sanction honor code, VWIL's honor code will result in the same "character development goal" (Br. 31 n.17). But defendants themselves have shown that that is hardly possible. They argued during the liability trial that its single-sanction honor code dominates all facets of life at VMI, is one of VMI's "imperative sources of values," and is an important part of emphasizing "the absolute
(continued...)

c. Defendants argue that, apart from any other justification for their remedial plan, "the lack of demand for an all-female VMI is a wholly adequate justification for the remedy proposed by the Commonwealth" (Br. 45). This argument is wrong.

As we have stated in our opening brief, the Equal Protection Clause precludes justifying denying women VMI's unique educational program on the basis of speculation that there would be insufficient demand for that type of program. See U.S. Br. 24 n.7.^{2/} This Court's decision in Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993), does not suggest the contrary. Defendants emphasize (Br. 43-44) language in Faulkner stating that an analysis of separate facilities must take into account "the demand (both in terms of quality and quantity)." 10 F.3d at 232. But this language cannot mean that demand can provide an excuse for not providing an educational opportunity on an equal basis to men and women. Rather, the language manifests the common sense understanding that separate facilities need not, for example, offer as many dorm rooms, classrooms, or physical education facilities if there would not be enough women to use them.

^{2/} (...continued)
boundaries that separate the VMI community from the outside world" (R. 152 at 31-32).

^{3/} Defendants assert that our reliance on Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), is misplaced because that case involves race and "has long been superseded by * * * strict scrutiny" (Br. 44). But the fact that the law applied to racial classifications has changed since that case was decided is irrelevant. That case was decided in a time when separate facilities for the races could be constitutional. In the instant case, this Court's remand instructions presume the same thing in the context of gender.

Indeed, the next sentence in Faulkner provides that "[i]n the end, distinctions in any separate facilities provided for males and females may be based on real differences between the sexes, both in quality and quantity, so long as the distinctions are not based on stereotyped or generalized perceptions of differences." Ibid. That language does not suggest that an assessment of demand can determine, in the first place, whether those women who desire a VMI-type educational program (and could succeed in one) are entitled to have one.

The district court in Faulkner recently rejected The Citadel's argument that South Carolina could justify denying women single-gender educational opportunities because there is insufficient demand for them. Faulkner v. Jones, No. 2:93-488-2 (D.S.C. July 22, 1994). The court first stated that "[t]he defendants have called the court's attention to no case that supports the proposition that lack of demand is a sufficient justification for the State of South Carolina providing single-sex education to men but not to women," and a "thorough search by this court has also failed to find any such precedent." Slip op. at 29.^{2/} The court also stated, after addressing the Supreme Court's decision in Canada (see note 8, supra), that "[t]here is no indication that the United States Supreme Court has done anything to alter * * * the legal principal stated in [Canada]. To the contrary, it continues to clearly proclaim that those

^{2/} Likewise, defendants cite no cases to support their demand argument.

rights created by the Equal Protection Clause * * * are personal, individual rights." Id. at 31. The court added that "[t]o suggest that a lack of demand for a certain type of equal protection can somehow justify the denial of another person's constitutional right thereto undermines the express intent of the Fourteenth Amendment." Id. at 29. The court concluded that "the policy of demand * * * does not justify the * * * policy of providing a Citadel-type education to men and not to women." Id. at 31-32.

Since demand cannot, as a matter of law, justify denying women a VMI-type of education, defendants' assertion (citing several of their witnesses) that "[t]he Commonwealth reasonably concluded that demand was inadequate to support a mirror-image VMI for women" is irrelevant (Br. 41). In any event, even assuming demand has any relevance to fashioning a remedy, the assessment of demand cannot be based simply on the experiences of West Point and Virginia Tech (see Br. 39-40 (discussing basis for Dr. Richardson's conclusions regarding demand)). Moreover, Dr. Riesman, also relied upon by defendants, admitted that lack of women in his Harvard Law School class was not due to a lack of demand for such an education among women, but a result of society's "clear assumption that law was a boy's game" (Tr. 519-520). The same, of course, could be said for any lack of demand by women for a VMI-type education.

Further, as Michael Kimmel testified (a government expert in historical sociology and sociology of gender), historically

opponents of women's efforts to achieve equal opportunities in higher education have argued, in part, that there was a lack of demand for these opportunities (Tr. 939, 943). But, he explained, the historical evidence shows that "demand is impossible to assess in the absence of opportunity. Opportunity creates demand and when the opportunities are available, the demand is there" (App. 892).^{10/} Thus, even if demand had any bearing on this case, before the Commonwealth makes a decision as important as banning all women from a VMI-type education (because of the predilections of other women), it should at least be required to make a realistic effort to gauge demand by, e.g., first "spread[ing] the word about the valuable education [an all-women VMI] offers," just as it does with VMI. United States v. Virginia, 766 F. Supp. 1407, 1436 (N.D. Va. 1991).^{11/}

In any event, the district court already decided that there would be an adequate demand among women for a VMI-type education. See U.S. Br. 24 n.7 (noting finding that VMI would be able to achieve a 10% female enrollment). Defendants dismiss this finding (see Br. 42 n.24), asserting that it relates to a VMI-type program that would be coeducational, not one that would be

^{10/} This may be especially true where, as here, VMI actively recruits students to encourage demand, but discourages demand among women. See United States v. Virginia, 766 F. Supp. 1407, 1436 (W.D. Va. 1991).

^{11/} Defendants make the related argument that there would be a substantial demand for VWIL (Br. 42). This assertion, like their assertion that VWIL would be a good program, is irrelevant to whether the proposed program satisfies defendants' remedial obligation to offer women the benefits of VMI's unique educational program. See note 6, supra.

all-female. But there is no basis for assuming (and no evidence to support such an assumption) that the women who would want to go to VMI do so because it would be co-educational. Rather, as we have explained (see U.S. Br. 37), women who seek to go to VMI, like the men who seek to go there, want the challenge of VMI's rigorous, military-style educational program. See VMI, 766 F. Supp. at 1421, 1426 (lists of reasons why students attend VMI do not include because it is single-sex). In short, defendants seek to use speculation over demand for a non-existent all-female VMI (when they have not even proposed establishing such a school) to obscure the fact that, as the district court found, there is demand for a VMI-type education among women.^{12/}

At bottom, defendants argue that it does not make sense for the Commonwealth to allocate its limited resources to create a school -- a VMI-type school for women -- for what it assumes will be a handful of students. But even if defendants are correct that it would be impractical to create a separate VMI for women, the result must be that they admit women to VMI, not that they completely deny women access to VMI's unique methodology. And

^{12/} During the remedial proceedings, the district court ruled that the government could not take additional discovery concerning further demand among women for VMI, since it had already ruled that there was demand by women for VMI. See generally VMI, 766 F. Supp. at 1437-1438. Thus, reliance on the district court's findings concerning demand (during the liability phase of the case) is particularly appropriate. Moreover, since defendants never proposed a VMI for women, defendants' assertion that the government never offered any evidence that there was demand for a VMI for women is irrelevant. There is no reason why the government should have tried to establish demand for something that was not proposed as a possible remedy.

even if that (coeducation) "materially alter[s]" certain aspects of VMI's current (all-male) program, see VMI, 976 F.2d at 899, the rights guaranteed women under the Fourteenth Amendment to equal protection outweigh the desire of state actors to preserve one particular type of educational program, no matter how successful that program might be.^{13/} That conclusion is reinforced by the fact that the exclusion of women from VMI perpetuates the stereotype that women simply are not suited for a vigorous, military-style education, and must be directed to the nurturing environment of a Mary Baldwin College. "That such a situation could be tolerated in the nineteenth century is not surprising, but we are about to embark on the twenty-first." Faulkner v. Jones, No. 94-1978 (Order granting motion to stay pending appeal, 4th Cir. Aug. 12, 1994) (Hall, J., dissenting).

2. Defendants finally argue (Br. 49 n.28) that if this Court concludes that their remedial plan is unconstitutional, the Court should afford them the opportunity to modify the plan to render it constitutional. We do not agree. As set forth in our opening brief, the theoretical possibility of creating a

^{13/} Certainly this Court contemplated such a result in stating that it would not order that women be admitted to VMI if alternatives are available. VMI, 976 F.2d at 900. One of those alternatives -- going private -- has not been pursued. This Court's decision in VMI thus makes clear that if a satisfactory parallel program is not established (and the Court did not assume one could be, it just suggested one might), VMI must admit women. Preserving VMI's all-male status is thus not something of such paramount importance that it permits the Commonwealth to simply wink at its constitutional obligation to provide equal educational opportunities to women by offering a watered-down substitute.

parallel program for women that would be equal to VMI is not, in this case, a practical reality. See U.S. Br. 40-43. Moreover, defendants have already modified their remedial plan once. The January 17, 1994, Status Report substantially modified the proposed remedial plan of September 1993. Cf. App. 40-58 with App. 253-269. In addition, the constraints of Mary Baldwin College make meaningful change in that location impossible (i.e., such as providing women the central VMI attributes of an all-encompassing military environment and barracks life). This case will be nearly five years old by the time this Court decides this appeal. Defendants should not be permitted to further delay the vindication of women's right to equal protection.^{14/}

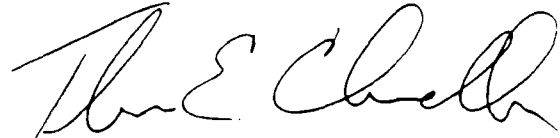
^{14/} Defendants filed a notice of appeal as cross-appellants. In their brief as appellee/cross-appellant they state that they filed the cross-appeal to preserve for possible Supreme Court review the issue whether this Court erred in its liability determination. See Br. 48. Since "[t]he Commonwealth accepts the decision of this Court respecting liability as the law of the case at this stage of the remedy proceedings," ibid, no response by the government to their cross-appeal is necessary.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening Brief for the United States as Appellant, the judgment of the district court should be reversed and the case remanded with an order directing that VMI admit women.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read 'Th E Chandler', written over a horizontal line.

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