NO. 93-2030

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SHANNON RICHEY FAULKNER,
individually and on behalf of
all others similarly situated,

Plaintiff-Appellee,

and the

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

JAMES E. JONES, JR., *et al.*

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

The plaintiff, a female high school graduate and citizen of the State of South Carolina, alleges that her denial of admission to The Citadel Corps of Cadets because of its all-male admission policy violates the Equal Protection Clause, U.S. Const. Amend. XIV, § 1. The district court has subject matter jurisdiction over the plaintiff's claim by virtue of 28 U.S.C. § 1331.

This appeal is from the district court's order of August 12, 1993, granting a preliminary injunction compelling the plaintiff's admission to day classes at The Citadel. Defendants timely filed a notice of appeal on August 16, 1993. This Court stayed the injunction pending the appeal and

ordered an expedited briefing. This Court has jurisdiction to hear the appeal by virtue of 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court committed legal error or abused its discretion when it granted a preliminary injunction requiring defendants to coeducate The Citadel by admitting the plaintiff to day classes with the Corps of Cadets in contravention of The Citadel's longstanding, pedagogically justified, single-sex admission policy.

STANDARD OF REVIEW

An abuse of discretion standard applies in reviewing the district court's grant of preliminary relief. *See Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 358 (4th Cir. 1991). However, "a judge's discretion in granting or denying relief is not boundless and an appellate court will overturn a district court's decision if made under an improper legal standard." *Id.* (quoting *Virginia Chapter, Associated General Contractors v. Kreps*, 444 F. Supp. 1167 (W.D. Va. 1978)). It is also reversible error if a court, in granting or denying interim relief, "failed to exercise its discretion in some respect, or else exercised it counter to established equitable principles." *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193 (4th Cir. 1977) (internal citations omitted).[1]

The factual findings of the district court must be reversed where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Rum Creek Coal*, 926 F.2d at 358 (quoting *Zepeda v. United States INS*, 753 F.2d 719 (9th Cir. 1983), and *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

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[1]Thus, in cases where the grant or denial of injunctive relief was based upon an error of law, reversal is warranted without inquiring into the appropriateness of the district court's exercise of discretion. *See, e.g., American Can Co. v. Mansukhani*, 742 F.2d 314 (7th Cir. 1984); *Bill's Coal Co. v. Board of Public Utilities*, 682 F.2d 883 (10th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

STATEMENT OF THE CASE

A. Procedural History.

Shannon Richey Faulkner ("Faulkner") commenced this action on March 2, 1993, claiming that she had been denied admission to The Citadel Corps of Cadets based on her gender, that this denial violated the Equal Protection Clause, and that she is entitled to a permanent injunction compelling The Citadel to abolish its single-sex admissions policy and admit her to the Corps of Cadets. Faulkner asserted these claims both individually and on behalf of all others similarly situated. Her motion for class certification is pending below.

More than four months after she instituted this lawsuit -- on July 6, 1993 -- Faulkner filed a motion requesting that the district court issue a preliminary injunction compelling her admission to the classroom component of the Corps of Cadets program commencing in the 1993-94 term and continuing during the pendency of the case. After argument by counsel and brief testimony by the plaintiff on August 12, 1993, the district court granted the preliminary injunction. *See generally* A 12-94.[2] Defendants made application to the district court for a stay of the preliminary injunction order pending appeal, which application the district court denied. A 91.

On August 24, 1993, this Court granted a stay and directed the district court not to enforce the preliminary injunction during the pendency of this appeal. In so ruling, this Court observed that "whether a constitutional violation is established by showing that The Citadel pursued a male-only admissions policy in the circumstances of this case remains to be decided." Order filed August 24, 1993; slip op. at 3. With respect to the balance of hardship, this Court noted that, "[i]f . . . a military education and training of the kind offered at The Citadel is the object, the preliminary injunction does not meet it," and that "the harm to Faulkner if the preliminary injunction in the form

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[2]References to the Joint Appendix herein are indicated by the abbreviation "A" followed by the pertinent Appendix page number(s).

entered is stayed does not outweigh the harm caused by the disruption to the structure of The Citadel's program if co-education were mandated, even on a token basis." *Id.* at 3-4. Judge Hall dissented on the ground that appellants had not made the requisite "strong showing" of probable success on appeal because of the similarity of the factual situation here and in *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. denied sub nom., Virginia Military Institute v. United States*, -- U.S. --, 113 S. Ct. 2431 (1993) ("*VMI*"). *Id.* at 5 (Hall, J., dissenting).

Faulkner's motion below for an interim order compelling her admission to classes at The Citadel was filed jointly with a renewed motion by the three female plaintiffs in *Johnson v. Jones*, Civil Action No. 2:92-1674-2. The *Johnson* action was commenced on June 11, 1992, and has been consolidated with Faulkner's action for purposes of discovery.[3] The plaintiffs in *Johnson* are female veterans who seek to compel reinstatement of The Citadel's former policy of admitting veterans to day classes and to gain admission to day classes under the reinstated policy by invalidating the male-only admissions requirement. Although the district court granted Faulkner's motion for admission to day classes, it took the identical motion of the *Johnson* plaintiffs under advisement and has not yet ruled on it.[4]

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[3]Counsel for the *Johnson* plaintiffs, including the American Civil Liberties Union, also undertook to represent Faulkner.

[4]More than a year ago, the *Johnson* plaintiffs sought -- and were *denied* -- a preliminary injunction compelling their admission to day classes. *See* A 99. Thereafter, The Citadel terminated the policy of admitting veterans to day classes effective at the conclusion of the fall 1992 semester, rendering the *Johnson* action moot. *See* A 593-94. The Citadel's motion to dismiss the *Johnson* action on grounds of mootness, and its related motion for an injunction prohibiting The Citadel from reinstituting the terminated veterans day program, are pending in the district court.

The Citadel's termination of veteran admissions to day classes effective at the start of the spring 1993 semester spawned a separate lawsuit, *Waters v. The Citadel*, Civil Action No. 2:92-3500-2, filed December 14, 1992, by two male veterans who had been enrolled in day classes before termination of the program. The Citadel undertook voluntarily to assist the incumbent veteran students with completing their studies by creating new course offerings in The Citadel's coeducational Evening College and by arranging for the veteran students' enrollment in classes offered at other institutions in the Charleston area. The Citadel offered to make the same accommodations and arrangements for the *Johnson* plaintiffs

(continued...)

Faulkner also has filed a motion for summary judgment that is pending below. On May 24, 1993, the U.S. Supreme Court denied Virginia Military Institute's petition for a writ of certiorari. *See Virginia Military Institute v. United States*, -- U.S. --, 113 S. Ct. 2431 (1993). Three days later, on May 27, 1993, Faulkner filed a motion for summary judgment substantially predicated on her interpretation of this Court's ruling in *VMI*. As of August 6, 1993, the motion had been fully briefed by the parties, but no hearing has been scheduled.

On June 7, 1993, the district court granted the motion of the United States to intervene in this action in support of Faulkner and to add the State of South Carolina as a defendant. The State of South Carolina has answered by declaring its unequivocal support for the single-sex educational program at The Citadel, and opposes the plaintiff's motion for summary judgment. The State of South Carolina also joins in this appeal.

B. The Citadel's Single-Sex Educational Program.

The Citadel's adversative military-style program has been in existence since 1842, as has its policy of admitting only males to the Corps of Cadets.[5] At various times during its 150-year-history, The Citadel also has had a policy of admitting certain active-duty personnel and veterans of the United States Armed Forces to study in day classes with the cadets, but this policy similarly has been limited at all times to the admission of qualified males.[6] Currently, the only non-cadets permitted to attend day classes at The Citadel with the cadets are male active-duty Navy and Marine

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[4](...continued)
and any similarly situated female veterans, but the offer was declined by their counsel.

The *Waters* plaintiffs sought a preliminary injunction requiring their continued admission to day classes, but the district court (Houck, J.) denied the requested relief. Shortly thereafter -- on March 2, 1993 -- the *Waters* plaintiffs voluntarily dismissed their action.

[5]*See 1991-92 Bulletin of The Citadel*, p. 12 (Exhibit to Memorandum of Authorities In Opposition to Plaintiffs' Motion for Summary Judgment (in consolidated case, *Johnson v. Jones*, *supra*)).

[6]*See* A 593-94, 597-99.

Corps personnel. The Citadel thus maintains a single-sex classroom environment in the academic program in which cadets participate, and has done so since its founding.

The Corps of Cadets program constitutes the core educational program and mission of The Citadel. The Citadel Corps of Cadets serves educational objectives closely similar to those served by the undergraduate program at VMI, and it achieves these objectives through a holistic educational experience and adversative methodology closely similar to the experience provided and the methodology employed at VMI. A 235-48, 251-52, 254-55, 260-61, 263-66, 272-75, 332-33, 335-38; *see United States v. Commonwealth of Virginia*, 766 F. Supp. 1407, 1412-13, 1435-43 (W.D. Va. 1991), *vacated and remanded on other grounds*, 976 F.2d 890 (4th Cir. 1992), *cert. denied sub nom., Virginia Military Institute v. United States*, -- U.S. --, 113 S. Ct. 2431 (1993). The plaintiff has described The Citadel's single-sex policy as "identical" to that at VMI. Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, at 11 (DE 25).[7] In *VMI*, this Court concluded that "single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so." *VMI*, 976 F.2d at 898; *see generally id.* at 896-98.

Administratively separate and distinct from the Corps of Cadets, The Citadel operates a coeducational Evening College and summer program, which are designed to serve the educational needs of the Low Country of South Carolina. These programs are similar in character to the coeducational evening and summer programs which are in operation at VMI.

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[7]References to Docket Entries herein are indicated by the abbreviation"DE" followed by the pertinent Docket Entry number(s).

C. South Carolina's Policy in Favor of Single-Sex Education.

The State of South Carolina has recently reiterated its policy in favor of single-sex education, and has expressed its strong support for the all-male admission policy of The Citadel. In its most recent legislative session, the South Carolina General Assembly adopted a Concurrent Resolution declaring "the public policy objectives and state interests of the State of South Carolina in establishing single-gender institutions of higher learning for the purpose of providing single-gender post-secondary education opportunities to its citizens." A 630-39. The House adopted the Concurrent Resolution on May 12, 1993 by a vote of 96 to 17 (A 605-14); it was approved by the Senate on May 27, 1993, by a vote of 29 to 14 (A 626-29). The Concurrent Resolution declares that the State of South Carolina "has historically supported and continues to support single-gender educational institutions as a matter of public policy based on legitimate state interests where sufficient demand has existed for particular single-gender programs thereby justifying the expenditure of public funds to support such programs." A 630-39. Through this legislative action, the State of South Carolina reiterated the state policy sustained in *Williams v. McNair,* 316 F. Supp. 134, 137-38 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971) (upholding the single-gender admissions policy of Winthrop College).

D. Faulkner's Educational Objectives And Request For Injunctive Relief.

Shannon Faulkner is a resident of Powdersville, South Carolina. A 542. She graduated from high school this spring, and, upon information and belief, is currently a freshman at the University of South Carolina, Spartanburg ("USC-Spartanburg"). *See* A 37.

In November 1992, Faulkner applied for admission to The Citadel Corps of Cadets for the 1993-94 school year. She directed her high school guidance counsellor to delete all references to gender from her academic transcript. A 36. In January 1993, The Citadel notified Faulkner of her

provisional acceptance, but this provisional acceptance was revoked in February after The Citadel learned of her gender. A 34.

Faulkner desires to pursue a degree in Education, and she was accepted for admission commencing with the 1993-94 school year at two state-supported institutions that have degree programs in Education -- USC-Spartanburg (where she is currently enrolled) and the College of Charleston. A 35. Faulkner expresses a preference, however, to pursue her studies at The Citadel, which also has an Education degree program. A 33-34.

Faulkner also asserts that she desires to obtain certain benefits that she believes to be associated with admission to and/or successful completion of the Corps of Cadets program. In the hearing below, she identified three such benefits -- the military discipline, the "bonding" experience, and access to the alumni network. A 33-34.

Faulkner has not, however, sought an interim order compelling her admission to the Corps of Cadets. Rather, she requested that she be granted admission to The Citadel to study in day classes, where members of the Corps of Cadets receive their classroom instruction. In her written submissions and brief testimony below, Faulkner did not describe how admission to the day classes would afford her any of the benefits she claims are unconstitutionally denied her as a result of her exclusion from the Corps of Cadets. Nor did she identify any material differences between the education she would receive in day classes at The Citadel and that which she would receive at USC-Spartanburg or the College of Charleston. *See* A 33-39.

E. The District Court's Ruling.

In deciding Faulkner's motion, the court made clear that it would not have granted a preliminary injunction compelling her interim admission to the Corps of Cadets:

> Now, if I were going to guarantee to Ms. Faulkner that she was going to suffer no irreparable harm because of the denial of her equal protection, then I would say put her in the Corps [of Cadets], because that gives her basically what the Fourth Circuit says she's entitled to. But then it comes right back with the Catch-22, and says if

> you put her in the Corps, then you deny her the rights that she is entitled to by getting in the Corps, because once she gets in there, there is no more single-sex because she is in there with men and men are in there with her. *But if you start talking about letting her get in the Corps, then the irreparable harm to The Citadel rises tremendously and . . . causes the denial of the preliminary injunction.*

A 41-42 (emphasis added). The court concluded, however, that The Citadel would suffer no significant harm from Faulkner's admission to day classes, and that Faulkner's admission to day classes would "diminish" the harm caused by her exclusion from the Corps of Cadets. A 85-87. The court did not indicate what, if any, irreparable harm Faulkner would suffer from denial of the requested relief, nor did it state how the relief granted would diminish her harm. *Id.*

The district court also found -- based explicitly on its reading of this Court's decision in *VMI*, *supra* -- that Faulkner has a "great" likelihood of succeeding on the merits of her constitutional claim. A 86. However, the court below did not "[hold] that Appellants had denied Faulkner her right to equal protection . . . ," as Faulkner asserted in opposing the stay pending this appeal. Plaintiff-Appellee's Memorandum of Law in Opposition to Motion to Suspend Preliminary Injunction Pending Appeal ("Faulkner's Stay Opp."), at 3. To the contrary, the court emphasized that it was not prejudging the merits of her claim, and it stressed that it deemed Faulkner's constitutional right to have been violated only "if [*VMI*] applies to this case." A 85; *see also* A 89.

Though the court acknowledged the South Carolina General Assembly's resolution endorsing The Citadel's single-sex admission policy, the court did not address the significance of that declaration of state policy favoring single-sex education, nor of the State's active defense of this litigation. *See* A 86-87. The court merely stated conclusorily that, notwithstanding the expression by the elected representatives of the people of South Carolina, the public interest would be served by contravening The Citadel's single-sex admission policy in the manner contemplated in Faulkner's request for preliminary relief. A 86-87.

SUMMARY OF ARGUMENT

In opposing a stay pending this appeal, Faulkner and the United States emphasized the extraordinary nature of a stay and the defendants' heavy burden in seeking such relief, which they correctly characterized as more stringent than The Citadel's burden on this appeal. Defendants met that burden, and for similar reasons they should prevail in this appeal.

In peremptorily imposing coeducation on The Citadel, the district court committed multiple errors of law.

First, the court erred in granting the preliminary injunction (1) without requiring proof that Faulkner would suffer *irreparable* harm as a consequence of being denied admission to day classes at The Citadel, and (2) in failing to measure the balance of hardship by the harm that would result from Faulkner's admission to or exclusion from *day classes*. As this Court recognized in granting the stay pending appeal, Faulkner is not harmed by exclusion from day classes at The Citadel because comparable academic programs are available to her at other state-supported universities in South Carolina. And, denial of the requested relief will not deprive her of the benefits of the Corps of Cadets program because she would not derive those benefits even if the relief were granted. *See* slip op. at 3-4.

Second, in purporting to weigh the balance of hardship, the district court abused its discretion -- or failed to exercise its discretion -- by summarily disregarding the importance of the single-sex classroom environment to The Citadel's Corps of Cadets program. This Court's ruling in *VMI*, numerous other court decisions, and the record in this case all establish that single-sex education has pedagogical value, and that the presence of opposite-sex students in classrooms undermines the pedagogical value of the single-sex setting.

Third, the district court erred in concluding that Faulkner is likely to prevail on the merits. The district court ignored or overlooked the State of South Carolina's clear and unambiguous policy

favoring single-gender education. The district court also ignored or overlooked the fact that the State is prepared to show that the absence of a Citadel-type program for females in the South Carolina higher education system is fully justified by the lack of demand for such a program and by the array of educational opportunities, including single-gender programs, afforded at other institutions operated or substantially funded by the State. This meets the equal protection standards enunciated in *VMI*.

Fourth, in its assessment of both the balance of hardship and the plaintiff's likelihood of success on the merits, the district court failed to take into account the limitations on a court's remedial powers under *VMI*. Even if there were to be an adjudication of unconstitutionality, the court would be powerless to compel abandonment of a pedagogically justified single-sex policy if constitutionally adequate alternatives are available.

Fifth, the district court erred in concluding that the public interest would be served by its peremptory order compelling coeducation at The Citadel even without a determination of the constitutional validity of its single-sex admissions policy.

ARGUMENT

I. THE DISTRICT COURT FAILED TO DETERMINE WHETHER THE PLAINTIFF WOULD SUFFER IRREPARABLE HARM AS A CONSEQUENCE OF DENIAL OF THE REQUESTED INJUNCTION.

This Court has adopted a balance-of-hardship test that focuses in the first instance on the relative impact on the parties that is likely to occur as a consequence of the grant or denial of the requested preliminary injunction. In determining the appropriateness of preliminary relief, four factors must be considered:

(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied;

(2) the likelihood of harm to the defendant if the requested relief is granted;

(3) the likelihood that the plaintiff will succeed on the merits; and

(4) the public interest.

L.J. ex rel. Darr v. Massinga, 838 F.2d 118, 120 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989). The "two more important factors are those of probable irreparable injury without a decree and of likely harm to the defendant with a decree." *Blackwelder*, 550 F.2d at 196. "The 'balance of hardship' test does not negate the requirement that the [plaintiff] show some *irreparable* harm." *Rum Creek Coal*, 926 F.2d at 360. The "plaintiff bears the burden of establishing that each of these factors supports granting the injunction." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991).

The district court erred by not applying these settled principles to Faulkner's request for a preliminary injunction compelling her admission to day classes at The Citadel.

A. Faulkner Is Not Irreparably Harmed By Denial Of Admission To The Citadel's Day Classes.

The plaintiff did not, and cannot, show that she will suffer irreparable harm unless permitted to attend day classes at The Citadel during the pendency of this litigation. She does not live in Charleston. A 542. She plans to major in Education, and she has already been accepted at two other public colleges -- the University of South Carolina at Spartanburg and the College of Charleston -- which have degree programs in Education. A 35-37. Notwithstanding the assertion in this Court by her counsel that Faulkner's harm "can not be alleviated by . . . enrolling in another college" because the "deadline for [her] to enroll in her second-choice college, the University of South Carolina, Spartanburg, has passed" (Faulkner's Stay Opp. at 23), Faulkner recently enrolled in that college and is currently attending classes there.

Because of the existence of these viable alternatives, Faulkner could not meet her burden under *Blackwelder* without establishing that she would be irreparably harmed if forced to receive her classroom instruction at USC-Spartanburg or the College of Charleston rather than at The Citadel. Not surprisingly, Faulkner made no such showing. Instead of addressing the harm that she would

suffer if not admitted to day classes at The Citadel, Faulkner's written submissions and live testimony below emphasized the benefits she perceives in The Citadel's Corps of Cadets program -- the military discipline, the "bonding" experience, and access to the alumni network. A 33-34. These benefits are the basis for her request for a permanent injunction compelling her admission to the cadet corps, but nothing in the record or in the district court's ruling establishes that her admission to day classes at The Citadel would afford her any of these benefits.[8] Indeed, aside from the district court's conclusory assertion that her admission to day classes would in some unexplained way "diminish" the harm to Faulkner caused by her exclusion from the cadet corps (A 87), the record below is devoid of any indication that she would suffer irreparable harm absent the requested preliminary relief.[9] The district court abused its discretion by granting the preliminary injunction in the absence of proof of irreparable harm. *See Rum Creek Coal*, 926 F.2d at 360.

As this Court observed in granting the extraordinary relief of a stay pending this appeal,

> To require South Carolina and The Citadel to admit [Faulkner] only to classes and thereby make only the classroom experience co-educational may not be materially different from requiring South Carolina to admit her to the University of South Carolina, also a state funded co-educational school of presumably comparable quality. The question of whether she is able to receive a state-funded education in a non-military, co-educational context is not, however, an issue because she has already been admitted to the University of South Carolina, and we assume South Carolina remains prepared to let her begin there. If, on the other hand, a military education and training of the kind offered at The Citadel is the object, the preliminary injunction does not meet it.

Slip op. at 3-4.

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[8]While the absence of evidence on the point is dispositive since Faulkner bore the legal burden below, we note that it strains credulity to suggest that "bonding" with cadets or assistance from alumni are benefits that likely would accrue to one who, like Faulkner, has been granted a special status -- civilian day student -- enjoyed by no other student attending The Citadel, and who has gained this status only on an interim basis, by compulsion of a court, and without any determination that coeducation at The Citadel is required under the Constitution.

[9]The court did not say *how* the admission of Faulkner to day classes would diminish the harm resulting from her exclusion from the Corps of Cadets. It did, however, describe the supposed diminution of her harm as "meager" and "inadequate." A 87.

If the district court had focused on the relative harm associated with the grant or denial of the preliminary relief requested and had measured the balance of hardship by the impact of Faulkner's admission to or exclusion from *day classes*, it would have avoided the incongruous result identified by this Court. Under the *Blackwelder* standard, the court was obliged to consider "the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied" and the "likelihood of harm to the defendant if the requested relief is granted." *Rum Creek Coal*, 926 F.2d at 359. The court's failure to direct its inquiry to the relative hardships associated with Faulkner's admission to or exclusion from *day classes* was legal error under *Blackwelder*.[10]

B. Faulkner's Allegation Of An Equal Protection Violation Does Not Establish the Existence of Irreparable Harm.

Faulkner's argument that the constitutional character of her claim suffices to establish irreparable harm also fails. The mere allegation of a constitutional violation does not prove that the plaintiff will suffer irreparable harm; rather, the existence of an actual violation must be shown. *See, e.g., L.J. ex rel. Darr v. Massinga*, 838 F.2d at 121; *Henry v. Greenville Airport Commission*, 284 F.2d 631, 633 (4th Cir. 1960) (interim relief appropriate where it was "clearly establish[ed] by undisputed evidence that [plaintiff was] being denied a constitutional right"); *Johnson v. Bergland*,

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[10]Even if Faulkner had shown that there is some distinctive benefit to attending The Citadel as a day student, a mere *delay* in obtaining this opportunity would not constitute irreparable harm. Faulkner invokes *Jones v. Board of Governors*, 704 F.2d 713 (4th Cir. 1983), for the proposition that she would suffer irreparable harm if not granted the requested relief. But *Jones* involved a student who was *already enrolled* in an educational institution and who sought to complete studies there -- not a student seeking to compel admission in the first instance through preliminary relief.

Courts have consistently distinguished between cases in which a preliminary injunction issues to maintain the *status quo* by allowing a student to *remain* in an educational program in which he or she is already enrolled, and cases such as this one, in which the plaintiff seeks to upset the *status quo* by compelling her *entry* into an educational program for which she has never been eligible. As the court observed in *Martin v. Helstad*, 699 F.2d 387, 391-92 (7th Cir. 1983), "a delay in obtaining admission to [an institution of higher education], as distinguished from interruption or termination of attendance already in progress, is not ordinarily considered irreparable injury warranting injunctive relief." *Accord, Monahan v. State of Nebraska*, 645 F.2d 592, 598 (8th Cir. 1981); *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981).

586 F.2d 993, 996 (4th Cir. 1976) (Hall, J., dissenting) (noting that irreparable harm may not be established by "presuppos[ing] success" on the central constitutional issue). Faulkner has not proven the existence of irreparable harm here because, as we demonstrate in section III *infra*, her theory as to the existence of a constitutional violation rests completely upon a misreading of this Court's ruling in *VMI*.

Moreover, whether irreparable harm flows from a constitutional violation inevitably depends as much on the available remedy as it does on the right allegedly abridged. Stated simply, there can be no causal relationship between a claimed constitutional violation and any alleged irreparable harm if the violation could be fully remedied without alleviating that harm. Thus, the appropriateness of any requested preliminary relief necessarily will depend on the permanent relief that may be lawfully granted. *See, e.g., Black United Fund v. Kean*, 763 F.2d 156, 161 (3d Cir. 1985).[11]

This limitation applies with particular force here. Faulkner has consistently maintained that only admission to The Citadel will vindicate her constitutional rights, and that the denial of those rights constitutes irreparable harm as a matter of law. But even if she were to establish an equal protection violation, the finding of liability would not entitle her to admission to The Citadel Corps of Cadets (or to any component of the cadet undergraduate program, including day classes). Rather, this Court necessarily would follow *VMI* and "remand the case to the district court to give the [State of South Carolina] the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied." *VMI*, 976 F.2d at 900. The State of South Carolina would then have the remedial options this Court identified in *VMI* -- admitting women to The Citadel,

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[11]Because the Equal Protection Clause confers a right to equal treatment at the hands of state actors, rather than a substantive right to any particular program or benefit provided by the state, the U.S. Supreme Court has repeatedly recognized that the remedy for an equal protection violation is a mandate of equal treatment -- a mandate which may be achieved, at the election of the state, by extending the program or benefit to all persons similarly situated or by denying it to all such persons. *See* section IIID *infra*.

establishing parallel institutions or parallel programs, abandoning state support of The Citadel, or other more creative options or combinations. *Id.*[12] In light of these constitutionally valid alternatives to coeducation, Faulkner is wrong in contending that her exclusion from The Citadel results in irreparable harm.

The court below initially seemed to acknowledge that the legally cognizable harm to Faulkner was circumscribed by this Court's recognition of alternatives to coeducation in *VMI*. *See* A 42-43.[13] Plaintiff's counsel argued, however, that this Court's remedial discussion in *VMI* could be

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[12]The record establishes that the State of South Carolina likely would opt to create a separate institution or program for women rather than abandon the single-sex admission policy that is critical to The Citadel's successful program. The South Carolina General Assembly has strongly endorsed single-gender education, both in general and at The Citadel in particular, and it has established a committee to study the adequacy of demand and the need for additional state-supported single-sex programs for women. *See* A 630-39. Faulkner's claim that this alternative is unavailable is based solely on an expression of opinion by Fred R. Sheheen, the South Carolina Commissioner of Higher Education. *See* Faulkner's Stay Opp. at 12. According to his own testimony, however, Commissioner Sheheen merely "formulate[s] policy recommendations" for the South Carolina Higher Education Commission, and the Commission has *already rejected* his recommendation that The Citadel admit women. A 122 (pp. 161-63).

[13]The district court questioned how letting Faulkner attend day classes could reduce her irreparable harm:

> Does it reduce the harm she is receiving because of the denial of her constitutional right to single-sex education? I don't see how it does, because she is not getting single-sex education if this preliminary injunction is granted, she is getting an education at The Citadel. . . . But the Fourth Circuit doesn't say that she is entitled to that. The Fourth Circuit says, they can deny her that at The Citadel provided they give it to her somewhere else. Because that's exactly what Judge Niemeyer said when he says as follows:
>
> > Consistent therewith, the Commonwealth might properly decide to admit women to VMI and [adjust] the programs to implement that choice, or it might establish parallel institutions or parallel programs or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution. While it is not ours to determine, there might be other more creative options or combinations [that will give women equal protection of the law]. . . .
>
> The problem I'm having is seeing how the granting of this preliminary injunction reduces the irreparable harm that Ms. Faulkner is going to suffer.

A 42-43.

disregarded as "dicta" (A 23), that it was "wrong," (A 48), and that, in any event, the court should order Faulkner's admission to day classes notwithstanding the court's inability to compel coeducation after a decision on the merits because "at least [she] would have been compensated in the meantime." A 30. The court apparently embraced these arguments.[14]

Faulkner argued forcefully below that the court could simply disregard the remedial options accorded the defendants in *VMI* in assessing the harm to the plaintiff and in passing upon her request for an order requiring her admission to day classes at The Citadel. Now she offers a different rationale in defense of the district court's ruling. In ostensible fidelity to the remedial mandate of *VMI*, the plaintiff argues here that the district court's preliminary injunction compelling Faulkner's admission "complied with *VMI*" because the court determined "that an immediate remedy was required to correct the violation of [Faulkner's] constitutional rights and that no alternative remedies are currently available." *See* Faulkner's Stay Opp. at 17-18. Once again, however, the plaintiff seeks cover in a conflating of the alleged effects of her exclusion from the cadet corps and of her exclusion from day classes. Only the latter was implicated by her motion for preliminary relief, and, with respect to that requested relief, it was uncontroverted below that adequate alternatives indeed *are available* to Faulkner -- at USC-Spartanburg and the College of Charleston -- as this Court

[14]In granting the plaintiff's motion, the court invoked vague notions of "equity" (A 89-90), and went so far as to observe that it would be "unfair to the plaintiff and an improper solution to the irreparable harm issue to consider only the extent to which [Faulkner's] admission to the day program will diminish the harm suffered by her as a result of the denial of her constitutional right." *See* A 85. Earlier in the hearing, however, the court expressed the opposite view. It indicated that the legally cognizable harm to Faulkner is that "irreparable harm [which] is caused by the denial of the constitutional right in question." A 41.

recognized in granting defendant's motion for a stay pending appeal. Slip op. at 3-4.[15] Faulkner is now availing herself of the USC-Spartanburg alternative.

C. The Preliminary Injunction Was Not Intended To, And Will Not, Affect The District Court's Ability To Grant Permanent Relief To Faulkner After A Decision On The Merits.

The "rationale behind a grant of a preliminary injunction [is] preserving the *status quo* so that the court can render a meaningful decision after a trial on the merits." *Rum Creek Coal*, 926 F.2d at 359; *see also Maryland Undercoating Co., Inc. v. Payne*, 603 F.2d 477, 481 (4th Cir. 1979). In *Blackwelder*, this Court stated:

> The balance-of-hardship test correctly emphasizes that, where *serious* issues are before the court, it is a sound idea to maintain the *status quo ante litem*, provided that it can be done without imposing too excessive an interim burden upon the defendant, for otherwise effective relief may become impossible: "The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated."

550 F.2d at 194-95 (internal citations omitted; emphasis in original) (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 743 n.10 (2d Cir. 1953)). More recently, this Court has explained:

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[15]Like the argument that the constitutional character of her claim suffices to establish irreparable harm, Faulkner's allegation that she is irreparably harmed by the stigmatizing effect of The Citadel's single-sex admission policy is completely circular and without merit. The only authority cited by the plaintiff is *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), a case that did not relate to single-sex education and that did not even involve an alleged violation of the Equal Protection Clause. *See* Faulkner's Stay Opp. at 25.

Moreover, whatever stigma may be said to result from one's unconstitutional exclusion from a single-sex institution -- and Faulkner has proven none -- the existence of such harm must at least depend upon a determination that the exclusion is in fact unconstitutional. There has been no such determination here. The claim of injury in the form of stigma is closely associated with the plaintiff's charge that The Citadel's single-sex admission is the product of impermissible gender-based stereotypes rather than valid pedagogical considerations. This Court's ruling in *VMI* affirming the value of single-sex education and rejecting allegations of wrongful stereotyping against VMI (*see* 976 F.2d at 897) should be more than sufficient to negate Faulkner's vague claim that she has been stigmatized by stereotyped views that women are "second best" because of her exclusion from a single-sex educational program. *See* A 34-35.

> The phrase, "preservation of the *status quo,*" . . . does not symbolize an additional separate test. We prefer not to label a particular moment in the past the "*status quo.*" When the [existing policy] is alleged to be unconstitutional, and continued adherence to the [policy] pending the trial may affect the court's ability to render a meaningful decision, the *Blackwelder* standard properly applies.

926 F.2d at 360 (internal citations omitted). The same legal analysis and the same object -- preserving the court's ability to render meaningful relief after a decision on the merits -- applies whether the preliminary injunction is characterized as "prohibitory" or "mandatory." *Id.* Moreover, this Court has emphasized that the power to grant preliminary injunctions which are mandatory in character should be "exercised sparingly" and that such injunctions should be granted "only in those circumstances when the exigencies of the situation demand such relief." *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th Cir. 1980).

Here, there is no substantial connection between the preliminary relief granted the plaintiff and the court's ability to render permanent relief after ruling on the substance of her claims. The district court granted the permanent injunction without any prospect, as a legal or practical matter, that the plaintiff would ultimately become entitled to a permanent injunction compelling her admission to The Citadel. The court acknowledged that even if Faulkner were to prevail on liability, she would not be entitled to such an order under this Court's ruling in *VMI*. A 42-43. And the court concluded that Faulkner would be foreclosed from obtaining any permanent relief by the longevity of the litigation. A 54.[16] The court's statements preclude any inference that the requested preliminary relief was granted for the purpose of preserving the court's ability to render a meaningful decision after a trial on the merits. *See Rum Creek Coal*, 926 F.2d at 359. The district court's grant of a preliminary injunction requiring Faulkner's admission to day classes thus represents a special

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[16]The court expressed the view that this Court's ruling in *VMI* "opened up an entirely new ball game," the resolution of which, through all appeals, will take "years and years and years." A 54. It concluded, "[T]herefore I think it's predictable that if I don't give Shannon Faulkner the [interim] relief she prays for here, . . . she will never spend a day at The Citadel." *Id.*

dispensation unconnected to any constitutional violation she has alleged or any harm that could be said to flow from such a violation.

II. THE HARM TO THE CITADEL FROM THE INJUNCTION WOULD FAR OUTWEIGH ANY BENEFIT TO FAULKNER.

The abuse-of-discretion standard applicable to preliminary injunctions does not insulate the district court's ruling from reversal for clear factual errors under Rule 52(a), Fed. R. Civ. P., or for failure by the court to *exercise* its discretion. *Blackwelder*, 550 F.2d at 193. Either or both of these grounds for reversal are present here. The district court abused its discretion here by summarily dismissing the significance of, or completely disregarding, the irreparable harm The Citadel is likely to suffer as a result of the peremptory nullification of its single-gender admission policy. That harm -- *to nearly 2,000 Citadel cadets* -- would far outweigh any minimal burden Faulkner would bear as a consequence of attending day classes at USC-Spartanburg rather than The Citadel.

Invoking the *Blackwelder* test, the court below stated conclusorily that The Citadel would suffer no significant harm as a result of the forced admission of the plaintiff to its otherwise single-sex classes. A 86. The court made no subsidiary findings nor provided any illumination of the basis for this conclusion. Having summarily discounted the harm to The Citadel resulting from the forced termination of single-sex classroom instruction, the district court proceeded to the clearly erroneous conclusion that the balance of hardships decidedly favors Faulkner. *Id.*

The district court apparently assumed that no significant educational consequences would flow from interruption of the single-sex classroom environment at The Citadel for a period that the court predicted would extend four years or more. A 54. The court's assumption was wrong. In the *VMI* litigation, the district court made findings, affirmed by this Court, that the undergraduate military-style program at VMI provides a holistic educational experience, and that changes cannot be made

in one component of the program without consequences for all other components and for the program as a whole. *See VMI*, 766 F. Supp. at 1412-13, 1422, 1435-43, and 976 F.2d at 896-98.[17]

At bottom, the district court's preemptive conclusion that Faulkner's admission would have no impact on The Citadel amounts to a broad-brush rejection of the educational value of a single-sex classroom environment. The court's summary rejection of the importance of the single-sex educational setting is remarkable in light of this Court's recent, explicit recognition of the pedagogical value of single-sex education in the *VMI* case. *See VMI*, 976 F.2d at 897 (noting value of single-sex education had been "amply demonstrated"); *id.* at 897-98 (stating that "data support a pedagogical justification for a single-sex education"); *id.* at 898 (concluding that "single-sex education is pedagogically justifiable"); *id.* (observing that, in light of the evidence of the value of single-sex education, it is "not remarkable . . . that the [United States] in its brief conceded, '[I]t is not our position that the Fourteenth Amendment embodies a *per se* bar to public single-sex education.'").

Indeed, to our knowledge, no court in the country has ever held that a single-sex classroom environment is without pedagogical value. Rather, the proposition that educational instruction in a single-sex setting is a respected and valuable alternative form of education methodology has been consistently recognized in the courts, heretofore without contradiction. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 721 (1982) (citing lower court finding that single-sex education is respected educational theory); *id.* at 730 (stating that presence of opposite-gender students in classrooms undermines claim to benefits of single-sex education); *id.* at 734-35 (Blackmun, J., dissenting) (decrying "needless conformity" to coeducational norm); *id.* at 736-39 (Powell, J.,

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[17]The danger also exists that gender integration of The Citadel's day classes will jeopardize the cadet corps' status as an undergraduate higher education program that "traditionally and continually from its establishment has had a policy of admitting students of one sex," and is thus exempt from the non-discrimination mandate of Title IX, the 1972 Education Amendments to the Civil Rights Act, 20 U.S.C. § 1681(a)(5). The parties briefed, but the district court did not address, this issue.

dissenting) (citing historical success of single-sex education); *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 882, 888 (3d Cir. 1975) (recognizing that single-sex education is a respected educational methodology), *aff'd per curiam by an equally divided Court*, 430 U.S. 703 (1977) *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1411-12, 1434-35 (discussing data showing the value of single-sex education); *id.* at 1434-35 (stating that United States' expert witness acknowledged the broad empirical support for the value of single-sex education, and also described himself as a "believer in single-sex education"); *Williams v. McNair*, 316 F. Supp. 134, 137-38 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971) (citing respected pedagogical theory underlying single-sex education).

Importantly, in the one case in which the United States Supreme Court has addressed the validity of a public single-sex educational program on its merits -- *Hogan*, *supra* -- the pedagogical value of instruction in a single-gender setting was not questioned. To the contrary, the Supreme Court's invalidation of the single-sex admission policy at the Mississippi University for Women (MUW) nursing school was based substantially on the fact that some male students were allowed to audit nursing classes notwithstanding the school's all-female admission policy. Justice O'Connor's opinion for the Court concluded that this fact "fatally undermine[d]" any claim by MUW that the pedagogical advantages of a single-sex environment supplied justification for the gender-based admission policy of the nursing school. 458 U.S. at 730. Consistent with the Supreme Court's ruling in *Hogan*, the expert testimony in this case establishes that it is the *fact*, rather than the *number*, of opposite-gender students in classrooms that undermines the educational value of a single-sex instructional setting.

The record here contains extensive evidence, including the testimony of expert and fact witnesses, that preservation of the single-sex classroom environment at The Citadel is educationally important, and that a shift to mixed-gender classes would have adverse implications not only for

classroom instruction, but also for other aspects of the holistic undergraduate cadet program.[18] As explained by Dr. Richard Richardson, a leading expert in higher education and a consultant to the South Carolina Commission on Higher Education,

> [T]he many institutions that during the past 25 years made the transition from single gender to co-education provide evidence of the irreversible changes that occur when the first members of the opposite sex are admitted. An institution is either single gender or coeducational; it cannot be both. Creating a coeducational classroom experience for cadets at The Citadel would impact on all aspects of their educational program, particularly during the critical and vulnerable fourth class year.

A 104-08.

Similarly, Dr. Thomas W. Mahan, who taught education and psychology at The Citadel for almost twenty years, testified that admitting women into the classroom component of the Corps of Cadets program would alter the educational experience of the cadets because they would "start to behave differently *vis a vis* one another because there's a woman there." A 474. This would lead, among other things, to a breakdown in the sense of community within the Corps of Cadets, which is one of the most important elements of the educational experience provided through the Corps of Cadets. *See* A 478.

In opposing the defendants' motion for a stay pending appeal, the plaintiff selectively and disingenuously cited statements by various witnesses to the effect that admitting women to classes would not affect some aspects of the academic instruction and would not defeat The Citadel's overall academic objectives. Defendants, of course, have never contended that all of The Citadel's academic

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[18]*See* Affidavit of Richard Richardson, Ph.D. (A 104-08); Report of Thomas Mahan, Ph.D. and Aline Mahan, Ph.D. (A 419-28); Deposition of Cynthia H. Tyson, Ph.D. (A 187-94, 199-207); Deposition of David Riesman (A 314-25); Deposition of Richard Richardson, Ph.D. (A 396-98, 404-08, 416-18); Deposition of Thomas Mahan (A 473-77); Deposition of Aline Mahan (A 510 (pp. 74-78)); Deposition of Josiah Bunting (A 235-40, 244-49, 257-58, 260-64, 268-69); Deposition of Clauston L. Jenkins, Jr., Ph.D. (A 345-51); Deposition of John Ripley (A 355, 358-60); Deposition of Claudius E. Watts, III (A 164-67, 169-75); Deposition of James Jones (A 124-28); Deposition of Carol M. Young (A 290-95, 297); Deposition of Celia Childress Halford (A 276-84).

objectives would be undermined by loss of the single-sex instructional setting -- nor, we would venture, has there been such a contention in any of the cases in which the pedagogical value and constitutional legitimacy of single-sex education have been recognized in the courts. Rather, as the testimony of Dr. Richardson, Dr. Mahan, and other experts emphasized,[19] the adverse impact of introducing opposite-gender students into an otherwise single-sex classroom is felt primarily in terms of the *affective* aspects of student behavior and performance. What distinguishes single-gender colleges such as The Citadel and VMI from other colleges is that they undertake to provide a holistic learning experience which includes character development in addition to academic instruction.[20]

The plaintiff's contention that the presence of female professors and other women on campus has already destroyed the single-gender educational experience is specious. As Drs. Thomas and Aline Mahan stated in their report on the single-gender policy at The Citadel,

> The critical issue for the effectiveness of The Citadel system is that the components (classroom, barracks) of the system be all male in terms of the peer membership. . . . The presence of the opposite sex in other roles (faculty, staff) does not impact upon the program's potency.

A 420; *see also* A 283 at 66-67, 360.

In granting the preliminary injunction compelling Faulkner's admission to The Citadel as a day student, the district court did not discuss any of this extensive expert testimony, nor did it address any of the sensitive and difficult educational issues involved in assessing the impact of a change from a single-sex to a mixed-gender classroom environment at The Citadel. The court did, however, acknowledge the potentially irreparable effects of such a change a year ago -- in *denying* requests for preliminary injunctive relief by three female veterans who, like Faulkner, sought to be

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[19]*See supra* note 18.

[20]The expert testimony in this case is consistent with the conclusion of the experts and the finding by the district court in *VMI* that the program of "leadership and character development must be understood holistically" and that "[a]ltering any system will affect the educational experience as a whole." *VMI*, 766 F. Supp. at 1422. Among the systems referenced was the academic program. *Id.* at 1424-25.

admitted to day classes at the Citadel on an interim basis. Explaining that ruling earlier this year, the court stated:

> If I did grant [the three female plaintiffs' motion for a preliminary injunction compelling their admission to day classes at The Citadel], I don't think there is any question but The Citadel could make a strong case out of irreparable harm.
>
> Irreparable harm is irreparable harm. When you're dealing with sensitive matters such as this, it's difficult to say what really will result if you take one action as opposed to another. And if I can't say positively they will suffer irreparable harm, . . . I can say that in [*Hogan*], the opinion that Justice Sandra Day O'Connor wrote involving the black [*sic*] female nursing school, the presence of students of the other sex in the classroom was given great weight by her. Such that, as I recall it, . . . the State of Mississippi pretty well had to abandon their arguments in the Supreme Court . . . because of the presence of those male students in the classroom.
>
> So, I don't mean to ramble, but we are dealing in a very unsettled area, unpredictable area, and that makes all harm take on the look and the possible air of irreparable harm. Because a mistake, a misstep, could cause The Citadel to be affected in lasting ways . . . .

A 102-103. In granting Faulkner's similar motion, the court cited no facts that could distinguish the impact of her admission to day classes from the effects of granting admission to the three female veterans whose motion he previously denied.

In denying the female veterans' motion for admission to day classes, the district court recognized that "[a]nytime a court such as this intervenes in the operation of a public institution for whatever purpose or for however long, it leaves a lasting effect upon that institution." A 99. The court's observation was correct a year ago, and the same consideration should have guided its disposition of Faulkner's motion. The defendants are charged under state law with responsibility for achieving the educational mission of The Citadel, *see* South Carolina Code Ann. § 59-121-50 (Law. Co-op. 1976), and they, too, have a constitutionally grounded interest at stake here. The essential freedoms of a university include the freedom to choose, on academic grounds, who may be admitted to study. *See Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978). Though this right grounded in the First

Amendment is obviously not absolute, its denial will inevitably produce hardship -- especially if the district court is permitted to substitute its unsupported opinion gainsaying the importance of the single-sex classroom environment for the informed judgment of the education professionals who are responsible for administering The Citadel's successful program.

The preliminary injunction granted below also ignores Justice Scalia's recent opinion upon the denial of certiorari in *VMI*. Seemingly anticipating eventual Supreme Court consideration of the important constitutional issues in *VMI* and also presented here, Justice Scalia declared:

> Whether it is constitutional for a State to have a men-only military school is an issue that should receive the attention of this Court before, rather than after, a national institution as venerable as the Virginia Military Institute is compelled to transform itself.

Virginia Military Institute v. United States, -- U.S. --, 113 S. Ct. 2431 (1993). If the district court's order requiring Faulkner's immediate admission to The Citadel's single-sex day classes is allowed to stand, the effect will be to "compel [The Citadel] to transform itself" *before* any court determines the important constitutional issues presented in this case.

The Citadel is likely to suffer additional hardship by being required to devise and implement a special academic program for Faulkner. The plaintiff sought and was granted admission to The Citadel as a civilian day student, but there are no other civilian day students at The Citadel.[21] The prospect of disputes and additional burdensome litigation over the adequacy or appropriateness of various aspects of this specially created program is very real. Indeed, immediately after the court issued its ruling below, the United States asked the district court to enter collateral orders to "ensure

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[21]The United States Marine Corps and Navy have programs wherein enlisted personnel may be given orders to attend college to obtain a degree. The Citadel accepts a limited number of these personnel, who attend classes as day students. For a description of the admissions requirements for the MECEP (Marine Corps) and ECP (Navy) programs, *see* A 149-53.

The Citadel formerly admitted some veterans to study in day classes, but the Board of Visitors abolished that policy by Resolutions dated September 3, 1992 and November 7, 1992. *See* A 593-94, 597-99.

that Ms. Faulkner, while she is in attendance at The Citadel, is treated with respect and kindness." A 88.

In addition, there is the disruptive impact on the Corps of Cadets that likely would result from the notoriety, attention and controversy that would accompany the admission of the first female to The Citadel in contravention of the College's 150-year-old single-sex policy. Particularly in light of Faulkner's national television appearances and extensive other publicity since the district court's August 12, 1993 ruling, it seems neither implausible nor unfair to suppose that the high-profile, ground-breaking nature of her "achievement" partly explains her desire for admission to the day classes during this litigation. While Faulkner's motives are not an issue here, this Court need not turn a blind eye to the adverse educational impact likely to flow from the swirl of media attention that assuredly would attend Faulkner's arrival at The Citadel. The condition that the district court's order has thrust upon The Citadel is certain to be disruptive and damaging to a system that is grounded upon order, uniformity, intense effort and single-mindedness of purpose.

Finally, Faulkner and the Government assert that The Citadel's single-sex program will not be harmed by having "one woman temporarily sitting in a few classes."[22] However, Faulkner has consistently argued below that there is more than *de minimis* demand among women for admission to The Citadel Corps of Cadets, and that this action must be certified as a class action.[23] The district court has strongly indicated its intention to grant Faulkner's class certification motion. A 64-65, 71. And, in granting her request for an injunction compelling her admission to day classes, the court recognized that others similarly situated will be entitled to admission to day classes on the same

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[22]Memorandum of the United States in Opposition to Appellants' Emergency Motion for Stay of Preliminary Injunction, at 12; *see* Faulkner Stay Opp. at 27.

[23]*See, e.g.*, Plaintiffs' Reply Memorandum of Law In Support of Motion for Preliminary Injunction, at 34-37 (DE 38) (referring to unidentified "evidence that tens of thousands of women seek a military-style education").

basis as Faulkner. A 93.[24] Thus, if one accepts Faulkner's own arguments about the demand for a Citadel education among women, there is every reason to expect *numerous* women to seek and obtain admission to day classes at The Citadel under the district court's ruling, especially if this litigation proves as protracted as the district court has predicted.

The balance of hardships thus tips decidedly in defendants' favor. The cumulative effect of the district court's failure to focus specifically on the hardship associated with grant or denial of Faulkner's request for an order compelling her admission only to day classes, and its summary rejection of the value of the single-sex classroom environment, was to reverse this balance. These errors are sufficient alone to require reversal of the district court's order. *See Blackwelder*, 550 F.2d at 193.

III. FAULKNER DID NOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF HER CONSTITUTIONAL CLAIMS.

Because the balance of hardship tips decidedly in favor of the defendants, the plaintiff was required to make a strong showing that she is likely to prevail on the merits of her claims. *Rum Creek Coal*, 926 F.2d at 359; *see also Blackwelder*, 550 F.2d at 195. Faulkner made no such showing. The district court's conclusion that Faulkner has a strong likelihood of success on the merits was based wholly upon its misinterpretation of this Court's ruling in *VMI*. Because the express policy of South Carolina favors single-gender education where adequate demand exists to make such programs viable, and because this policy justifies the absence of an all-female Citadel-type program in South Carolina, the equal protection standards established in *VMI* have been met.

Faulkner did not contend below that she is likely to prevail on the merits because the defendants cannot satisfy the *Hogan* intermediate scrutiny standard in the context of The Citadel's

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[24]The district court was of the view, however, that few additional women would seek admission to The Citadel on the same basis as Faulkner because of the lack of demand among women for the Corps of Cadets experience. *See* A93; *see also* A 51.

institutional mission. She acknowledged that the admission policy here in issue is the same in all relevant respects as that which was examined and sustained in the VMI litigation.[25] In *VMI*, this Court affirmed the district court's findings that VMI's male-only policy was justified based on the value of single-sex education in general and the school's mission and adversative methodology in particular.[26] This Court held, however, that the Commonwealth of Virginia had failed to justify the absence of a single-sex program for women elsewhere in the Virginia higher education system. 976 F.2d at 898-900.

Faulkner based her motion for preliminary injunction, like her motion for summary judgment pending in the district court, on the claim that the Citadel's males-only admission policy is unconstitutional as a matter of law under *VMI*. The legal infirmity she identified was the failure by the State of South Carolina to provide an identical Citadel-type program for women.[27] Similarly, the Government argues that, under *VMI*, "South Carolina cannot offer the benefits of a single-sex education or a military-style education to men, but not to women." Memorandum of the United States in Opposition to Appellants' Emergency Motion for Stay of Preliminary Injunction, at 14; *see*

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[25]In her preliminary injunction submission below, Faulkner described The Citadel's admission policy as "identical" to that which was deemed pedagogically justified in the VMI litigation. Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, at 11 (DE 25).

[26]However, Faulkner contends that her proof will establish, notwithstanding *VMI*, 976 F.2d at 897-98, that single-sex education *for males* lacks pedagogical value. For the reasons stated in section II *supra*, this contention is without merit.

[27]In opposing a stay pending this appeal, Faulkner asserted that "[t]his Court [in *VMI*] held that an 'announced policy of diversity' and VMI's 'unique methodology' did not permit the state to offer the benefits of an educational opportunity to men but not to women." Faulkner's Stay Opp. at 14. In support of her pending motion for summary judgment below, she has contended that "The Citadel's male-only admissions policy is unconstitutional as a matter of law" because this Court "held [in *VMI*] that a state may not offer the benefits of an educational opportunity to men but not to women under a policy of diversity." Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, at 11, 14 (DE 12). According to Faulkner, "Under *Hogan* and *VMI*, South Carolina cannot offer men the benefits of a single-sex education or a military-style education, and not women." *Id.* at 17. This, she contends, is because of a flat constitutional prohibition: "Whatever benefits may be provided by an educational method, the United States Constitution mandates that a state provide such benefits equally to men and women." *Id.* at 16.

also id. at 8. Both Faulkner and the Government are wrong in their contention that *VMI* establishes such a *per se* rule.

Though Faulkner's theory of liability is predicated on this Court's *VMI* ruling, she contends that this Court erred in *VMI* in recognizing the constitutional validity of remedies other than coeducation. A 48. Faulkner argues that she is entitled to summary judgment on remedy as well as liability, and that the district court must order her prompt admission to The Citadel Corps of Cadets.[28] This argument contradicts settled equal protection principles and must fail. Even if a constitutional violation were established under the reasoning of *VMI*, Faulkner would not be entitled to a permanent injunction compelling her admission to the Corps of Cadets.

Faulkner therefore cannot show that she is likely to prevail either on the merits of her constitutional claim or on the remedy she seeks. The Citadel's single-sex admission policy withstands scrutiny under *Hogan* for the same reason that VMI's closely similar policy does. Furthermore, the State of South Carolina has by legislative resolution expressly reaffirmed both its longstanding state policy favoring single-gender education and its unequivocal support for The Citadel's single-gender admission policy. In opposing Faulkner's pending motion for summary judgment, the State of South Carolina has declared:

> [T]he State's overall system of higher education is a balanced, diverse system which is substantially related to the achievement of important state goals and is therefore constitutional under the intermediate scrutiny standard. The Citadel's single-gender educational program furthers important state interests in promoting diversity, quality, efficiency and autonomy among South Carolina's institutions of higher learning. The absence of a women's military college in South Carolina is justified by the lack of any anticipated demand for such an institution.

The State of South Carolina's Memorandum in Opposition to Motion for Summary Judgment, at 4 (DE 44).

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[28]See Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment, at 18-19 (DE 12).

A. Neither *Hogan* Nor *VMI* Requires Parallel Single-Sex Programming As A Matter Of Law.

Contrary to Faulkner's claim, neither the decision of the U.S. Supreme Court in *Mississippi University for Women v. Hogan*, *supra*, nor this Court's ruling in *VMI* establishes a *per se* rule that conditions the constitutionality of an educationally sound single-sex program on the existence of a parallel program for the other gender. Rather, the intermediate scrutiny analysis applicable to gender classifications generally, and employed in *Hogan* and *VMI*, requires a fact-bound assessment of the relationship between a state's education policies and its decision to offer a specialized single-gender program to only one sex.

The mid-level standard of review applicable to gender classifications is designed "to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Hogan*, 458 U.S. at 725-26. The Equal Protection Clause does not, however, "require things which are different in fact . . . to be treated in law as though they were the same." *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). "Accordingly, a statute containing a gender-based classification must be upheld 'where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.'" *Liberta v. Kelly*, 839 F.2d 77, 82 (2d Cir.), *cert. denied*, 488 U.S. 832 (1988) (quoting *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981)); *see also Rostker v. Goldberg*, 453 U.S. 57, 79 (1981). As this Court recognized in *VMI*, "[m]en and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated." 976 F.2d at 897. This increasing knowledge has spurred renewed interest in single-sex education as a pedagogical tool.

As we noted in section II *supra*, the Supreme Court's decision a decade ago in *Hogan* did not question the pedagogical value of single-sex education. To the contrary, Justice O'Connor's

opinion for the Court emphasized that MUW was foreclosed from arguing that its single-sex environment provided educational benefits to students because MUW's nursing school did not, in fact, have single-sex classrooms. *Hogan*, 458 U.S. at 730-31. In focusing narrowly on evidence that the advantages of single-sex education actually neither were sought nor were even available at the MUW School of Nursing, the Supreme Court in *Hogan* declined to adopt the *per se* separate-but-equal rule that had been applied by the court of appeals in that case. Though the Fifth Circuit had ruled MUW's single-sex policy constitutionally infirm because "the state does not maintain a corresponding all-male nursing school," *Hogan v. Mississippi University for Women*, 646 F.2d 1116, 1119 (5th Cir. 1981), *aff'd*, 458 U.S. 718 (1982), Justice O'Connor's opinion for the Court did not suggest that the absence of a separate program for women had constitutional significance. *See Hogan*, 458 U.S. at 720 n.1.[29] If the *Hogan* Court had intended to establish a sweeping rule making the absence of separate-but-equal single-sex programming dispositive under the Equal Protection Clause, it is fair to suppose that Justice O'Connor's majority opinion would have said so. One will search that opinion in vain, however, for the slightest support for the *per se* rule that Faulkner and the Government have asserted in claiming that the plaintiff will prevail on the merits.

Nor did the majority in *Hogan* "expressly reject the argument that the exclusion of men from [MUW's] nursing program could be justified under a policy of diversity," as Faulkner claims. Faulkner's Stay Opp. at 14-15. Enhancing a diverse system of public and private education by providing an opportunity for single-sex education is an important governmental objective nowhere disfavored in the *Hogan* decision. Footnote 17 in *Hogan*, on which the plaintiff relies exclusively,

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[29]The Supreme Court expressly confined its ruling in *Hogan* to the nursing school's admission policy and declined to pass upon the validity of the single-sex admissions policy applicable to other MUW programs. 458 U.S. at 723 n.7. The Court so limited its ruling notwithstanding that Mississippi provided no public all-male higher education programs for men. In contrast, the Fifth Circuit had ruled flatly that "maintenance of MUW . . . as the only state-supported single-sex collegiate institution in the State cannot be squared with the Constitution." 646 F.2d at 1119.

rejected the dissenting argument of Justice Powell that single-sex programs for women should be immune altogether from heightened equal protection scrutiny because such programs expand the educational choices available to women. *See Hogan*, 458 U.S. at 731 n.17. Footnote 17 merely stands for the proposition that, where a state offers an educational opportunity to only one gender, it must show that its "decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial state goal." *Id.* In other words, under the intermediate scrutiny standard, the relationship between a school's single-sex admissions policy and the school's achievement of important and legitimate educational goals cannot be presumed, but rather must be proven in each case.[30]

Faulkner and the Government claim that this Court's ruling in *VMI* supports their contention that separate-but-equal programming is required, as a matter of law, whenever a publicly supported single-sex education program is offered. Nowhere in its opinion in *VMI*, however, did this Court enunciate such a *per se* rule. Rather, this Court ruled that a state which operates a single-sex educational program must "justify" under intermediate scrutiny its decision to provide such a program to one gender without providing a corresponding single-sex program to the other gender. *VMI*, 976 F.2d at 898-900.

Under well-established constitutional principles applicable to gender discrimination, if the decision not to provide an identical single-sex program to members of the opposite sex is substantially related to legitimate and important governmental objectives, then the Equal Protection Clause is not offended. *See Rostker v. Goldberg*, 453 U.S. at 78-79; *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 473-74 (1981). Or, stated another way, if the array of educational opportunities a state provides to young women and men, taken in its entirety, bears a substantial

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[30]The Citadel's defense in this action is not based solely on the state's interest in higher education diversity, but also on the benefits of the character development, leadership training, and other educational goals reflected in The Citadel's mission.

relationship to the objective of providing educational programming responsive to the physical and developmental characteristics and the interests of students, then the intermediate scrutiny standard is met. *See, e.g., Clark ex. rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131-32 (9th Cir. 1982), (upholding gender-based exclusion from scholastic sports team based on "average physiological differences") *cert. denied*, 464 U.S. 818 (1983); *Petrie v. Illinois High School Ass'n*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979) (requiring overall comparability of male and female opportunities in scholastic athletics but rejecting the imperative of separate male and female teams in every sport).[31] Considerations such as the level of demand for a particular program, gender-based physiological and developmental differences that bear upon the suitability of a particular program, and efficiency and economy in the allocation of scarce public resources for education, are all plainly relevant in evaluating the overall adequacy of educational opportunities provided to males and females in a diverse higher education system. *See, e.g., Clark*, 695 F.2d at 1131; *Smith v. Bingham*, 914 F.2d 740, 742 (5th Cir. 1990), *cert. denied*, 111 U.S. 1116 (1991).

This Court in *VMI* plainly did not purport to establish a legal rule requiring the provision of a parallel single-sex program whenever a state offers a single-gender educational opportunity to one sex. Rather, this Court faulted the Commonwealth of Virginia for failing to demonstrate the existence of a state "*policy that explains* why it offers the unique benefit of VMI's type of education and training to men and not to women." *VMI*, 976 F.2d at 898 (emphasis added). The defect perceived by this Court was a deficiency in the record:

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[31]While some courts have ruled that corresponding male and female programs or teams are necessary, the focus in such cases has been on the state interests asserted in justification of gender-based exclusion and the adequacy of the other opportunities made available to the excluded gender in the circumstances of each case. *See, e.g., Force ex rel. Force v. Pierce City R-VI School District*, 570 F. Supp. 1020, 1027-30 (W.D. Mo. 1983); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 171 (D. Colo. 1977). Regardless of the outcome in particular cases, the court's analysis has focused on the facts and circumstances relevant under the intermediate scrutiny test, and has not been based on any *per se* rule requiring identical programs for both sexes.

> Although neither the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women, the Commonwealth has elected, through delegation or inaction, 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.*

Id. at 899-900 (citations omitted; emphasis added). Nor did this Court in *VMI* hold that "a state may not offer the benefits of an educational opportunity to men but not to women under a policy of diversity," as the plaintiff contends below. Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, at 14 (DE 12). Rather, this Court limited its ruling to the factual record before it:

> VMI has adequately defended a single-gender education and training program to produce "citizen-soldiers," but it has not *adequately explained* how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the governmental objective advanced to support VMI's admission policy, a desire for educational diversity.

VMI, 976 F.2d at 899 (emphasis added).

As this Court stated in staying the district court's preliminary injunction, "While the *VMI* case articulated established principles of equal protection in factual circumstances similar to those before us, whether a constitutional violation is established by showing that The Citadel pursued a male-only admissions policy in the circumstances of this case remains to be decided." Slip op. at 3. That is because *VMI* did not establish a *per se* rule requiring parallel programming for both sexes whenever a state operates a single-sex institution or program, as Faulkner and the Government contend. The court below embraced their erroneous interpretation of this Court's *VMI* decision in concluding that there is a strong likelihood that Faulkner will prevail on the merits of her constitutional claim. In so doing, the court erred on a critical question of law, and its ruling should be reversed.

B. South Carolina Has An Explicit State Policy Favoring Single-Gender Education.

South Carolina has an explicit policy favoring single-gender education as an element of diversity in its higher education system, and the State is actively defending this litigation. The South Carolina General Assembly has specifically reiterated its approval of single-gender education in general and of The Citadel's males-only admission policy in particular. The Concurrent Resolution adopted overwhelmingly earlier this year by both houses of the South Carolina General Assembly reiterates the existing "public policy considerations and state interests" that have guided South Carolina "in establishing, supporting, and providing for single-gender institutions of higher learning." A 630.[32]

In her summary judgment submission below, the plaintiff dismissed the Concurrent Resolution as an "eleventh-hour attempt to manufacture *post hoc* a new state policy." Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, at 16 (DE 12). This characterization was erroneous, since the Concurrent Resolution reiterates longstanding state policy. *See, e.g.*, *Williams v. McNair*, 316 F. Supp. at 135-36 (sustaining South Carolina's defense of the constitutionality of Winthrop College's single-gender admission policy).

Moreover, the fact that the Concurrent Resolution was adopted during the instant litigation does not diminish its importance. This Court deemed *post hoc* statements by Virginia's governor and attorney general probative of state policy in *VMI*. *See* 976 F.2d at 899. The same consideration must be accorded the South Carolina legislature's explicit statement of the state policy in issue in this case. The U.S. Supreme Court has routinely credited *post hoc* declarations of purpose, legislative and otherwise, in assessing the constitutionality of state measures under the Equal Protection Clause.

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[32]*See* A 605-14, 626-29. The Concurrent Resolution was also incorporated, practically verbatim, as a proviso in the 1994 State Appropriations Bill and has thus become part of the statutory law of South Carolina. *See* A 619-25.

See, e.g., Michael M. v. Superior Court of Sonoma County, 450 U.S. at 470-71 & n.6. Though the Supreme Court has stated that a court "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose *could not have been* a goal of the legislation," *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975) (emphasis added), the opposite is true here. The legislative record and other evidence of state policy demonstrate longstanding support in South Carolina for single-gender educational offerings where sufficient demand for such programming exists.

The General Assembly resolution found, much like the district court and this Court did in *VMI*, that "studies conducted by several scholars have concluded that for a variety of reasons single-gender institutions have advantages over coeducational institutions in numerous areas, and the data developed suggests that the differences between a single-gender student population and a coeducational one justify a state's offering single-gender education." A 630. The Concurrent Resolution identifies five separate but related state interests that are served by single-gender education. These are the interests in fostering diversity, in meeting student need and demand, in promoting institutional autonomy, in using resources economically, and in enhancing choice. A 630-39. Underlying all of these interests, of course, is the State's interest in providing the best possible quality higher education for the citizens of South Carolina.

The interests cited in the Concurrent Resolution have been part of the public policy of the State for many years. In 1980, the General Assembly adopted the *South Carolina Master Plan for Higher Education*, which the Commission on Higher Education had completed in 1979. A 565-68. The *Master Plan* included the mission statements of each of the state's public colleges and universities, including The Citadel. It expressly made diversity one of the goals for post-secondary education in South Carolina, stating that "[t]he system must include an appropriate diversity of

programs to meet a wide range of needs." This policy also is reflected in the published mission statements of the various institutions of higher learning in South Carolina. The *Master Plan* approved by the General Assembly in 1980 identified additional goals which are reflected in the Concurrent Resolution, including "to assure the most effective and efficient use of all resources" and "to improve the quality of post-secondary education." A 565-68. Those goals were reiterated in *Choosing South Carolina's Future: A Plan for Higher Education in the 1990's*, published by the Commission on Higher Education in 1991. A 577-80.

The Concurrent Resolution was presaged by the action of the Commission on Higher Education last November, when the Commission rejected the recommendation of Commissioner Sheheen that The Citadel be asked to abandon its all-male admission policy for the Corps of Cadets. The Commission voted to accept Sheheen's recommendation as information only, with the express proviso that "nothing contained in the memorandum [setting forth his recommendation] should be construed as representing the policy of the State of South Carolina with regard to single-gender education." A 122 (pp. 161-62).

The Concurrent Resolution also explains, as this Court deemed necessary in *VMI*, "how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the governmental objective advanced to support [The Citadel's] admission policy." *VMI*, 976 F.2d at 899. The Concurrent Resolution acknowledges that "presently in South Carolina single-gender educational opportunities exist for men at The Citadel, but do not exist for women in all areas." A 635. The reason for this difference is the lack of demonstrated demand for a state-supported single-gender program for women, particularly a women's military college. The Concurrent Resolution states, "South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy based on legitimate state interests *where sufficient demand has existed for particular single-gender programs thereby justifying the expenditure of public funds*

to support such programs." A 635 (emphasis added). This is an accurate statement of state policy. Indeed, in 1970, the State of South Carolina successfully defended the right of Winthrop College to remain an all-women's college. *See Williams v. McNair*, 316 F. Supp. at 137. In that case, the State demonstrated that it had "established a wide range of educational institutions at the college and university level consisting of eight separate institutions, with nine additional regional campuses. The several institutions so established vary in purpose, curriculum, and location." *Id.* at 135-36. In upholding the constitutionality of Winthrop's admission policy, the court observed:

> It must be remembered, too, that Winthrop is merely a part of an entire system of State-supported higher education. It may not be considered in isolation. If the State operated only one college and that college was Winthrop, there can be no question that to deny males admission thereto would be impermissible under the Equal Protection Clause. But, as we have already remarked, these plaintiffs have a complete range of state institutions they may attend.

Id. at 137.[33]

The existence of an explicit legislative articulation of state policy favoring single-gender education meets the standards established by this court in *VMI*. Moreover, as we discuss below, the evidence establishes that, in the context of a diverse educational system which provides a wide array of educational opportunities to women, South Carolina's decision not to provide an all-female version of The Citadel for which there would be no meaningful demand amply satisfies intermediate scrutiny.

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[33]With the approval of the General Assembly, Winthrop College thereafter became coeducational. The president of the College at the time, Dr. Charles Vail, testified that the College was facing drastically declining enrollment when he assumed its presidency in 1972, and that it sought coeducation as a means of reversing that trend. A 370-79. Far from casting doubt on the State's policy favoring single-gender education where sufficient demand exists, the State's defense of the policy on constitutional grounds, followed by the school's independent decision to adopt coeducation in response to declining demand for single-gender education among women, provides strong confirmation that South Carolina's policy long has been as stated in the Concurrent Resolution.

C. The Array Of Educational Opportunities South Carolina Provides To Females Satisfies Intermediate Scrutiny.

The system of higher education in South Carolina is a balanced and diverse system that substantially serves the State's legitimate and important educational goals, among which is the objective of providing a wide array of beneficial educational opportunities for women. Last year, South Carolina colleges and universities graduated over thirty percent more women than men. A 601-04. Fewer than three percent of full-time undergraduates at public institutions in South Carolina attend The Citadel. A 601-04. Women are afforded opportunities for military training through ROTC programs at nine public and private colleges in South Carolina; nevertheless, only 13.9% of all students enrolled in ROTC programs in South Carolina are females. A 595-96. Since Winthrop College responded to waning demand for single-sex education by moving to coeducation, single-sex educational opportunities have been provided at two independent women's colleges -- Converse College and Columbia College -- which receive substantial financial assistance from the State. A 574-75, 581-86, 600.[34]

The lack of demonstrated demand fully explains the absence of a single-sex Citadel-type institution for women in the South Carolina higher education system. It is true, of course,

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[34]The policy of the State of South Carolina is "to preserve a strong non-public sector of post-secondary education." A 566, 579. According to the *Plan for Higher Education in the 1990's*, "The high degree of state support for these [private] institutions demonstrates [the State's] commitment to assist them in carrying out their missions effectively." A 579. To this end, the State's Tuition Assistance Grants program is "the second most generous program of aid to private institutions in the country." A 121 (pp. 148). In the 1990-91 and 1991-92 school years, the most recent years reported, females accounted for sixty-four percent (64%) of the Tuition Assistance Grant awardees. A 575, 583. Over the past three years, the program provided over $4.8 million in direct tuition grants to women attending Columbia College and over $2.2 million to women attending Converse College. A 575, 583, 600. Dr. Richardson testified that "[o]ffering single gender experiences within a state system of higher education, whether through tuition grants to independent institutions or through state appropriations that offset the need for tuition grants, is an important and educationally sound part of a state plan for serving a diverse population through a variety of educational experiences." A 104-08.

that under this Court's *VMI* decision, South Carolina could satisfy constitutional requisites by establishing a single-sex Citadel-type institution for women. But there has never been such an all-female military school in our Nation's history, and one of the plaintiff's witnesses, Dr. Charles Vail, former president of Winthrop College, testified that there never would be sufficient demand to sustain an all-women's military college. A 384. In the absence of demand sufficient to make such a novel institution viable, the Constitution plainly does not require such a "gesture of superficial equality." *Rostker v. Goldberg*, 453 U.S. at 79.

Faulkner has contended below that the absence of demand for an all-female military program modeled on The Citadel is not "constitutionally relevant" in assessing the validity of the State's decision to forego operating such a program,[35] but she has cited no authority to support her contention, and we are aware of none. Intermediate scrutiny requires a "fact-intensive examination of the practical considerations underlying the challenged policy." *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1411. In the real world of finite education resources, institutions of higher learning inevitably compete with one another for students and operating funds, and expenditures for one program inevitably come at the expense of greater funding for other programs. The record establishes that South Carolina has sought to achieve the optimal array of education programming options for young women and young men by maintaining a system that is responsive to student demand. To create and fund a higher education program even in the absence of sufficient demand to make it viable would constitute both economic and educational waste. It cannot be reasonably contended that avoidance of such waste in the pursuit of a state's overall educational goals is other than a legitimate and important state interest entitled to weight under the Equal Protection Clause. The plaintiff has offered nothing to support her contrary view.

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[35]Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction, at 20 (DE 25).

Faulkner's theory is that the absence of a Citadel-type program for women in South Carolina is fatal under *VMI*. The issue with respect to demand, then, is whether there exists sufficient demand in South Carolina to justify creation of a single-sex program for females modeled on The Citadel's undergraduate cadet program -- not whether some women would attend The Citadel if it were to become coeducational. This is a critical point, because this Court's *VMI* ruling, on which Faulkner predicates her argument, *sustained* the exclusion of women from VMI, holding only that Virginia had failed to demonstrate that it had made a reasoned and justifiable decision not to provide a single-sex program to women. Glossing over this point entirely, Faulkner has relied below on evidence of interest among women in existing coeducational military programs -- interest which is still exceedingly meager[36] -- and upon speculation that some women would attend The Citadel if it were ordered to admit women. *See* Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction, at 20 (DE 25).

Consistent with the declared policy of the State of South Carolina, which seeks the optimal allocation of available public dollars for the purpose of providing a diverse higher education system responsive to student demand, South Carolina currently subsidizes single-sex education for women but does not provide a single-sex military-style education in a residential setting to women. This decision is a reasoned one that is fully justified under the intermediate scrutiny standard where, as here, the State operates a system of higher education that affords women a wide array of educational opportunities responsive to their interests and needs. South Carolina is an active participant in the

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[36]Currently, only about 250 women nationwide attend *residential* ROTC military programs, which are based at Texas A&M University, Norwich University, North Georgia College, and Virginia Tech. *See United States v. Commonwealth of Virginia, supra,* 766 F. Supp. at 1431. Faulkner's reliance upon demand among women for admission to the national service academies is self-evidently specious for a number of reasons, most notably the fact that students admitted to the service academies have the full cost of their undergraduate education paid for them.

proceedings below and a party to this appeal. It is ready, willing and able to justify under intermediate scrutiny the array of educational options it provides to young women.

D. The Existence of Remedial Alternatives Other Than Coeducation Defeats Faulkner's Claim to Admission.

Even if Faulkner were to establish a constitutional violation under *VMI*, she would not succeed in obtaining an order compelling her admission to The Citadel Corps of Cadets. Unless, as she contends (A 48), this Court was wrong when it stated in *VMI* that Virginia was free to choose alternatives to coeducation on remand -- such as creating a parallel program for women, making VMI a private institution, or other "creative" combinations or options -- Faulkner cannot establish a right to a remedial order requiring her admission to The Citadel. *See VMI*, 976 F.2d at 900.

This Court's discussion of remedial alternatives in *VMI* was in accord with the fundamental principle, "consistently expounded" by the Supreme Court, that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1973). "[T]he [remedial] task is to correct . . . 'the condition that offends the Constitution.'" *Id.* at 738 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). The imperative of a remedy tailored to the nature of the violation has application here in two ways.

First, it is well-established that discrimination in government programs or benefits can be eliminated by providing the program or benefit to all similarly situated persons on an equal basis, or by denying the program or benefit to all such persons. As the United States Supreme Court stated in a 1984 equal protection ruling on gender discrimination, "[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 738-40 (1984) (quoting *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931)). Thus, the choice of remedy -- *i.e.*, whether to

withdraw the benefit or to extend it to all -- is reserved to the responsible state officials. *See Heckler, supra*; *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152-53 (1980); *Orr v. Orr*, 440 U.S. 268, 272-73 (1979); *Stanton v. Stanton*, 429 U.S. 501, 504 (1977); *Craig v. Boren*, 429 U.S. 190, 210 n.24 (1976); *Stanton v. Stanton*, 421 U.S. 7, 17 (1975).[37]

Second, if liability were found in this case based on *VMI*, it necessarily would be because The Citadel and the State of South Carolina were deemed not to have provided educational opportunities for women sufficient -- given the existence of a male-only Citadel -- to satisfy intermediate scrutiny. If the nature of the violation is a failure by South Carolina to meet the intermediate scrutiny test, then, under the principles of *Milliken*, *Swann*, and *Heckler*, the remedy for such a violation must be to require South Carolina to select and implement measures that will bring about a higher education system that does pass muster under the intermediate scrutiny test.

This Court's discussion of remedial alternatives in *VMI* is consistent with these remedial principles. Of the three specific remedies suggested in *VMI*, two -- adopting coeducation or establishing a parallel program or institution -- would remedy the violation by extending a comparable benefit to those women who seek it. The third option specified by this Court -- abandoning public support -- would remedy the violation by withdrawing the government benefit entirely and thus denying it equally to all.

It is significant that this Court did not limit the remedial options to the three specified, but instead indicated that "other more creative" alternatives might be developed and adopted. *VMI*, 976 F.2d at 900. This reflects the Court's recognition that the only limitation upon the state in fashioning a remedy is that the remedy chosen must yield an array of educational opportunities for men and

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[37]*See also Harper v. Virginia Dep't of Taxation*, -- U.S. --, 113 S. Ct. 2510 (1993); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 818 (1989); *Black United Fund v. Kean*, 763 F.2d at 161; *Hogan v. Mississippi Univ. for Women*, 646 F. 2d 1116, 1119 (5th Cir. 1981), *aff'd*, 458 U.S. 718 (1982); *Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659, 660 (D.R.I. 1979), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 172 (D. Colo. 1977).

women that can meet the intermediate scrutiny test. Such a result may be achieved in educationally creative ways other than the three remedial options specified.

Faulkner rejects these principles wholesale, relying instead on the remedial standards applied in race discrimination cases. In support of her motion for summary judgment below, she argued:

> Once a court finds that state officials have refused to provide an educational program on an equal basis to all of its citizens, it must admit the excluded class to the program and remedy the effects of the prior discrimination. The United States Supreme Court in *Brown v. Board of Education* and its progeny has mandated that federal courts exercise their equitable powers to remedy the invidious exclusion of a protected group from educational opportunities by extending those opportunities to the excluded class. . . . "[I]n the field of public education the doctrine of separate but equal has no place. Separate facilities are inherently unequal."

Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment, at 18-19 (DE 12) (quoting *Brown v. Board of Education*, 347 U.S. 483, 495 (1954)).

The fallacy in Faulkner's theory is self-evident. She has asked the court below to grant summary judgment in her favor as a matter of law based on South Carolina's failure to operate a Citadel-type program for women. But she argues that, as a matter of law, The Citadel and South Carolina cannot remedy that alleged violation by creating such a separate program. Faulkner can hardly establish that she is likely to prevail on the merits based upon a legal theory that the State of South Carolina is both constitutionally *required* to maintain a parallel single-sex program for females and is constitutionally *forbidden* from creating one.

IV. THE PUBLIC INTEREST WOULD NOT BE SERVED BY THE PEREMPTORY IMPOSITION OF COEDUCATION AT THE CITADEL.

The district also court erred in concluding that the public interest would be served by a peremptory mandate of coeducation at The Citadel even before a ruling on the constitutional validity of the college's male-only admission policy. This Court has frequently recognized that the public interest is served by "preserving the *status quo ante litem* until the merits of a serious controversy can be fully considered by a trial court." *Maryland Undercoating Co., Inc. v. Payne*, 603 F.2d at

481. The district court's order stands this salutary principle on its head. With the stroke of a pen, the court below has commanded the end of a century-and-a-half-old single-sex program that has demonstrated pedagogical value and a proven record of educational success. As Justice Scalia recognized in *VMI* and this Court's remedial instructions there indicated, "a national institution as venerable" as The Citadel should not be compelled to institute such fundamental change unless and until it is determined that the Constitution leaves no other option. *Virginia Military Institute v. United States*, 113 S. Ct. at 2431 (Opinion of Scalia, J.); *see also* 976 F.2d at 900 ("[W]e do not order that women be admitted to VMI if alternatives are available.").

The public interest may also be found in the reasonable expectations of the nearly 2,000 cadets who have enrolled at The Citadel in order to pursue their college education in a single-gender environment. Their expectations will be frustrated if The Citadel is required to transform itself before the constitutionality of its admissions policy is adjudicated. Further, it would be unfair to turn what for them was to be an intense, keenly focused, holistic learning experience into a public spectacle, with its attendant intrusions and distractions.

The South Carolina General Assembly -- a body comprised of elected representatives accountable to the majority of taxpayers, who happen to be women -- has emphatically and overwhelmingly endorsed single-sex education and The Citadel's single-sex admission policy. *See* A 630-39. What the United States Supreme Court said in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 n. 6 (1981), applies equally here:

> Certainly this decision of the [South Carolina] Legislature is as good a source as is this Court in deciding what is "current" and what is "outmoded" in the perception of women.

The court below, offering no explanation, substituted its judgment as to the public interest for that of the elected representatives of the people of South Carolina. This was an abuse of discretion.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the order of the district court granting the plaintiffs's motion for preliminary injunction be reversed.

Respectfully submitted,

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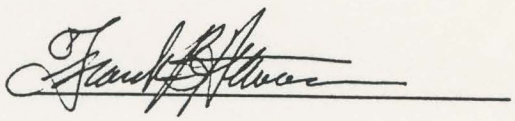

ADDENDUM

UNITED STATES CONSTITUTION AMENDMENT XIV, § 1

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULE OF CIVIL PROCEDURE 52(a)

Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

20 UNITED STATES CODE § 1681(a)(5)

§ 1681. Sex

(a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(5) Public educational institutions with traditional and continuing admissions policy. In regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

SOUTH CAROLINA CODE ANN. § 59-121-50 (Law. Co-op. 1976)

§ 59-121-50 Powers of board in educational matters.

Said board may establish such regulations as it may deem necessary for the organization and good government of said college and establish such bylaws for the management thereof as shall not be inconsistent with the laws of this State or of the United States. It may appoint professors qualified to give instruction in military science and other branches of knowledge which it may deem essential and may fix their salaries and the period for which they shall serve. And the board may confer degrees on graduates of the college and confer honorary degrees on such persons of distinction as it shall deem proper.