No. 94-1978

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

- versus -

JAMES E. JONES, JR., et al.

Defendants-Appellants.

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

BRIEF OF APPELLEE SHANNON RICHEY FAULKNER

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STATEMENT OF THE CASE

I. Nature of the Case

Shannon Richey Faulkner commenced this action on March 2, 1993, in the United States District Court for the District of South Carolina, on behalf of herself and all others similarly situated, asserting that The Citadel's males-only admission policy violates the Constitution's Equal Protection Clause. She seeks a permanent injunction compelling her admission to The Citadel's Corps of Cadets. Ms. Faulkner does not seek a sex-segregated education. She desires access to the rigorous and disciplined education in a military environment offered by the Corps of Cadets program, which Defendants concede is unique in South Carolina.

The Citadel excludes all women from admission to its Corps of Cadets solely on the basis of their gender. Findings of Fact and Conclusions of Law of District Court dated July 22, 1994 at JA 1441, 1445. It is the only public institution of higher education in South Carolina that offers either education in a military-style environment or sex-segregated education. Id. at JA 1447. There is no comparable institution to The Citadel in South Carolina that can offer Ms. Faulkner the military-style education she desires. Id.

II. Prior Proceedings

A. The Preliminary Injunction

Ms. Faulkner filed a motion for summary judgment on May 27, 1993. When it became apparent that the merits of this case would not be resolved before the 1993-94 school year commenced, Ms. Faulkner filed a motion for a preliminary injunction on July 7, 1993 to gain admission to classes at The Citadel for her first semester in college. The district court granted Ms. Faulkner's motion on August 17, 1993 and ordered her admission into the Day Program at The Citadel.

Defendants obtained a stay of that ruling pending appeal to this Court.

B. The Fourth Circuit Decision Finding a Likelihood of Success

On November 17, 1993, this Court affirmed the district court's decision granting the preliminary injunction. This Court held that it was probable that Ms. Faulkner would prevail on her claim that The Citadel's males-only admission policy violated her right to equal protection. Faulkner v. Jones, 10 F.3d 226, 233 (4th Cir. 1993). This Court also rejected South Carolina's argument that the lack of demand for sex-segregated or a military-style education justified its failure to offer women the benefits of The Citadel, concluding that "we can perceive no reason why our holding in VMI would not apply in this case." Faulkner, 10 F.3d at 232. Defendants filed a petition for rehearing and suggestion for rehearing in banc on December 1, 1993, which this Court denied on January 5, 1994. On January 11, 1994, this Court denied Defendants' motion for a stay of the mandate pending filing of a petition for a writ of certiorari with the United States Supreme Court.

C. The Supreme Court's Denial of Defendants' Request For A Stay

Defendants filed an emergency application for a stay of the injunction with the United States Supreme Court on January 12, 1994. Chief Justice Rehnquist denied South Carolina's application "in all respects." Supreme Court Of The United States, No. A-569, Order Dated January 18, 1994. Ms. Faulkner began classes at The Citadel on January 20, 1994.

D. Defendants' Motion to Bifurcate Liability and Remedy

On February 17, 1994, the district court heard arguments on Ms. Faulkner's motion for summary judgment and on a motion for summary

judgment filed by South Carolina. The district court later in February ordered the Defendants to file a proposed remedial plan with the court by April 1, 1994. See JA 87. On March 1, 1994, the court held a status conference by telephone with the parties. Defendants sought to postpone the trial schedule and the proposed date to submit a remedial plan. At Defendants' request, the district court scheduled a pre-trial conference in court on March 8, 1994.

On March 7, 1994, Defendants filed a Motion to Bifurcate the Trial. Defendants represented to the district court that it would take at least ninety days to formulate a remedial plan. Defendants sought to bifurcate the trial and to postpone submitting a remedial plan until sixty days after the court ruled on the issue of liability. (Memorandum in Support of Defendants' Motion to Bifurcate or, in The Alternative, For A Continuance, at 8.) After hearing extensive argument from four of Defendants' attorneys for nearly two hours, the district court denied the motion on March 8. JA 80-139.

E. Defendants' Refusal to Develop or Submit a Remedial Plan

Under the district court's order to propose a remedy by April 1, 1994, as well as this Court's decision in United States v. Virginia, 976 F.2d 890 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993) ("VMI"), Defendants were well aware that they could attempt to propose an alternative remedy to coeducation to be considered if The Citadel's males-only admissions policy was declared unconstitutional. JA 105-106; JA 83-84.[1] Defendants nevertheless refused to formulate or

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1 Defendants were on notice since 1990 that their discriminatory policy would likely be subject to judicial review, when they received an inquiry from the Department of Justice concerning their admissions policy. The Citadel promptly sought legal counsel and followed the VMI case closely. JA 1265-68; Tr. Vol. XIII, 11:3 - 13:8.

submit any specific remedial alternative for judicial review. They never contacted representatives of Columbia College or Converse College to further discuss a Mary Baldwin plan. JA 411; 506; 518. In fact, Columbia had refused in the fall of 1993 to agree to such a proposal. JA 1269; JA 492. Nor did Defendants consult with any experts to develop any other alternative. JA 742-743.

Defendants submitted a Proposed Remedial Plan on April 1, 1994, which they concede merely recites "possibilities" for remedies that South Carolina might propose following a finding of liability. JA 658. Defendants' Proposed Remedial Plan states: "Within sixty days of the Court's determination of the liability issues, the Defendants will supplement this remedial plan by setting forth a specific proposed remedy that responds to the liability determination." JA 1183. Defendants had formally asked the court to grant them exactly the same extension of time and had been denied. Their unilateral decision to submit a "plan to plan" was in direct violation of the district court's order. Numerous experts in higher education testified at trial, and Defendants' counsel conceded, that the so-called "plan" is neither a remedial alternative, nor capable of evaluation or review. Tr. Vol. XI at 4:10 - 5:11; JA 798, 801-802; Tr. Vol. XVI, 30:8 - 32:11.[2]

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2 On October 4, 1994, Defendants filed a supplement to their proposed remedial plan in the district court, which is not part of the record on this Appeal. Plaintiff regards the supplemental plan as wholly inadequate even if Defendants succeed in implementing it, but recognize the plan must in the first instance be reviewed by the district court. The legislature has not acted, or even been contacted, concerning this "proposal." Even though seven months have now passed since the district court ordered Defendants to submit a plan, and Defendants themselves promised to submit a plan within sixty days of a finding of liability, Defendants still have only a "plan to plan."

The United States filed a motion to strike Defendants' Proposed Remedial Plan on or about April 8, 1994. JA 140-144. During a status conference on April 11, the district court reiterated that it had provided Defendants the opportunity to propose a remedial plan, that the court would not rule on its adequacy at that time, and that the issue of remedy would be tried during the May hearing. See JA 160-162.

F. The Trial

A ten-day trial on this action commenced on May 16, 1994. Given the decision of this Court in VMI, which held as a matter of law that a policy of diversity does not justify offering a unique educational program to men but not to women, the district court ordered a trial on the limited issues of (1) whether Defendants could articulate any fact or argument that distinguished this case from the decision in VMI; and (2) if liability were found, the appropriate remedy for the violation of the rights of Ms. Faulkner and other similarly situated women. Plaintiffs and the district court accepted the findings and conclusions of VMI as binding solely for purposes of determining Plaintiff's motion for summary judgment. The district court specifically reserved Plaintiff's right to challenge at a future trial the alleged value of single-sex education or the asserted pedagogical value of The Citadel, or any other issue that distinguishes The Citadel from VMI. See JA 1444, n.5.

G. Plaintiff Shannon Richey Faulkner

Plaintiff Shannon Richey Faulkner is a nineteen year old female resident of South Carolina. JA 874. She was an honors student and 1993 graduate of Wren High School, where she participated in various academic and extracurricular activities, including a national

academic honor society; varsity basketball; varsity softball; marching band; and high school yearbook. She was one of ten senior students selected by the faculty to Wren High School's Hall of Fame. In addition, she was chosen to represent Wren High School as a delegate to the National Youth Leadership Conference in Washington, D.C. and to the Palmetto Girls' State. JA 872-873.

Ms. Faulkner applied for admission to The Citadel Corps of Cadets in January 1993. On January 22, 1993, The Citadel's Director of Admissions notified Ms. Faulkner by letter that she had been provisionally accepted into the Corps of Cadets. JA 1201, 1205. On February 10, 1993, The Citadel revoked her provisional acceptance and rejected her application, after it discovered that she was a female. Ms. Faulkner is fully qualified and satisfies all the requirements for admission to the Corps of Cadets other than gender. Tr. Vol. XVII, 114:17 - 114:23, JA 875.

H. The Unique Educational Opportunity Offered By The Citadel

Defendants do not and cannot contest that The Citadel offers a unique educational experience, unmatched by any institution, public or private, in the State of South Carolina. South Carolina provides the opportunity for sex-segregated education only to men; similarly, it provides the opportunity for holistic military training only to men. JA 727-728, 731-732, 752-753; JA 322-324; JA 758.

The Citadel is one of just four colleges designated as essential military colleges by the United States Congress, as well as the only college in the Charleston area that offers an accredited engineering degree program. JA 758; JA 102. General Claudius C. Watts, the President of The Citadel, described the regimented military structure employed at The Citadel at some length, and concluded that

"no other institution in South Carolina offers an equivalent experience." Tr. Vol. XII, 92:24 - 97:18; 99:19 - 100:11.

The Citadel provides its students with unparalleled educational and future career development opportunities. Robert C. Gallagher, the Chairman of South Carolina's Commission on Higher Education, conceded that The Citadel's holistic military education was unique. He, and former Governors West and Edwards, testified that offering the unique military program at The Citadel to men, but not to women, violates the state's policy of providing women with equal educational opportunities. JA 556, 594; see also JA 581.

The accomplishments, attainments and prestige of its alumni, and the promise of training and experiences that will make similar success possible for future graduates, make The Citadel attractive to women as well as men. The Citadel's alumni include a United States Senator for South Carolina, former governors of South Carolina, a sitting Associate Justice on the South Carolina Supreme Court, two sitting United States District Court Judges, the current President of the University of South Carolina, a United States Ambassador, and the current mayors of Charleston and Greenville, South Carolina, as well as numerous state legislators and prominent business leaders.[3] Tr. Vol. XII, 103:1-11; Plaintiff's Exh. 236; see also Tr. Vol. V, 11:13-14; JA 445-446.

Finally, The Citadel is distinguished by the resources made available to it by the State and by its alumni. The Citadel itself has an endowment of almost $20 million, and the Citadel Development

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3 By way of contrast, the President of Converse College, a private single-gender college, testified that its alumnae included no senators or governors, and only a single judge. Tr. Vol. VII, 99:20-100:3.

Foundation has assets of at least $65 million.[4] JA 763, 764. In the 1992-93 academic year alone, The Citadel Development Foundation provided over $2 million in funding to The Citadel. Tr. Vol. XII, 109:23 - 110:6; Plaintiff's Exh. 88. In the same year, The Citadel received $12 million in state appropriations. JA 778-779.

R.O.T.C. training at an otherwise "civilian" college does not provide students with an experience equivalent to a cadet's experience at The Citadel. Major General Robert Wagner, the former commanding general of the United States Army R.O.T.C. Cadet Command, a witness called by The Citadel, conceded that there was "a profound difference between . . . the experience provided by a military school and army strictly military training." JA 469-470. In fact, General Wagner testified that The Citadel employs a military methodology in order to produce a "good citizen, one that hopefully will make a contribution to society" while "R.O.T.C. is military art, leadership, combat, gunnery, land navigation, thinking under terrible stress. There are some linkages but they are not directly compatible, and they are distinct." Tr. Vol. VII, 24:16 - 25:10. Similarly, Ronald Vergnolle, a 1991 graduate of The Citadel, testified that R.O.T.C. training is "a very, very, very minor part of The Citadel's whole man education," primarily involving technical skills such as taking apart an M-16 rifle and firing a grenade launcher. JA 649.

I. <u>The Absence of a Policy of Offering Single-Sex Education Based on Demand</u>

There is no state statute, regulation, or written policy in South Carolina of providing sex-segregated education where there is

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4 By contrast, Columbia College has an endowment of just $13 million, and derives 81% of its operating revenues from tuition and fees. JA 504-505.

sufficient demand. JA 313; JA 727, 746-748; JA 654. To the contrary, all of the public colleges in the state that were formerly sex-segregated have become coeducational to better serve the educational needs of all citizens of the state, with the glaring exception of The Citadel. JA 318-319; JA 494.

Contrary to Defendants' assertion, the Tuition Grant Program does not constitute state support for women's colleges. Private colleges are not part of the state system of higher education, nor subject to state control. JA 318-319, 494. Governor Edwards testified that the Tuition Grants Law was not adopted to support sex-segregated education, but rather to provide support for students who choose to attend private colleges, whether coeducational or sex-segregated. JA 314-315. The program is not available to all students, only those whose grades and family income meet specified criteria. JA 489-490. The average award is approximately $2,500 and has declined by 25% to 30% over the years, despite an increase in college costs. JA 501-502. The gap between tuition grants and tuition charges is approximately $5,042. JA 1021.

Robert Gallagher, the Chairman of the South Carolina Commission on Higher Education, testified that the State does not attempt to determine the amount of demand for any existing or potential program. JA 551-552. Defendants have never studied the level of demand among women for a military-style education or sex-segregated education, nor have they determined if men are more interested in military training in a sex-segregated or coeducational environment. See JA 326-7; JA 403.

Governor Edwards testified that he did not know the demand among men for a Citadel education, or even the number of men who

apply. He also testified that he did not know of any study of demand by women for sex-segregated education before Winthrop was converted to coeducation, or any comparison of enrollment of women at Winthrop to enrollment of men at The Citadel. Tr. Vol. IV, 109:16 - 20; JA 376, 377; Tr. Vol. V, 79:23 - 80:4. Governor West dismissed as irrelevant the notion of comparing demand by women for a sex-segregated education (at Winthrop College) to the demand by men for such an education (at The Citadel). JA 376.

There is more demand on the part of women in South Carolina for a sex-segregated college than there is by men. Converse and Columbia, the two private women's colleges in South Carolina, have a combined attendance of over 2,300 women, almost all of whom live in the State. Tr. Vol VII, 52:22 - 53:17; JA 507. These private schools cost more than The Citadel; tuition, room and board at Columbia, for example, is $13,500. JA 502. The Citadel, by contrast, has approximately 1800 cadets, approximately 50% of whom are from out of state, even though it charges South Carolina residents approximately $7,500 after the first year, and just $9,800 for the first year. JA 360; Tr. Vol. V, 57:12-18; Tr. Vol. XII, 119:6-13, JA 377. This is the highest percentage of out-of-state students of all the public colleges in South Carolina. Nevertheless, the State does not provide a sex-segregated school for women.

J. Demand Among Women for a Military-Style Education

Numerous women have demonstrated an interest in attending The Citadel, notwithstanding its well-known policy of rejecting all female applicants. At least 43 women have written to The Citadel requesting applications for admission to its Corps of Cadets between March, 1993 and the May, 1994 trial. JA 1284-1324. High school

females have also made inquiries of Citadel recruiters who were visiting high schools. Id. The Citadel has received at least five applications for admission from young women. JA 1283-84.

The Citadel does not retain or record letters, inquiries or applications from women about admission to its Corps of Cadets. JA 783-784. The 43 letters produced by Defendants in this litigation were retained coincidentally by a staff member of the Admissions Office. JA 783-784. Accordingly, it is impossible to determine the exact number of women who have inquired or applied to the Corps of Cadets.

Two young women (in addition to Ms. Faulkner) testified at trial that they wish to join the Corps of Cadets program. Katherine Lee Brown is a nineteen year old female high school graduate who lives in Columbia, South Carolina. She wants to attend The Citadel and is interested in its disciplined military-style program. JA 895; JA 898-899. Ms. Brown's father, aunt, uncle, grandmother and grandfather all served in the United States armed forces, and she is considering following this family tradition. JA 895-899. By letter dated April 27, 1994, Ms. Brown wrote to The Citadel requesting the information and forms necessary for her to apply for admission to the Corps of Cadets. She never received an application. JA 897, 900, 903.

Pamela Carol Jordan is a seventeen year old high school junior in Greenville, South Carolina. She first became interested in attending The Citadel in March, 1992, when she assisted with the Special Olympics held on The Citadel's campus. JA 888. In September of 1993, Ms. Jordan wrote to The Citadel requesting information and an application for admission to the Corps of Cadets. The Citadel did not

respond. JA 887. In March, 1994, she attended an Educational Opportunities Workshop, and tried to pick up a brochure about the school. The Citadel representative, however, gathered up all of the brochures in his arms and informed Ms. Jordan that The Citadel was all-male, and would remain all-male even though Ms. Faulkner was attending day classes. JA 887-888.

Defendants concede that demand will materially increase once The Citadel begins to accept women. Defendants' own expert, Dr. Richardson, testified that the demand among women will increase once they are admitted to The Citadel. JA 693-695; see also JA 802. He estimated that up to 90 to 100 women would enroll in The Citadel. JA 695.

K. Winthrop College

The decision of Winthrop twenty years ago to admit men was based upon a myriad of reasons, the most important of which was a desire to provide educational opportunity for men and to make the area more attractive for business. JA 346, 363-365, 371, 792-793. The district court specifically found that "the primary reason behind Winthrop University going coeducational was the desire of its Board of Trustees to better serve the educational needs of the citizens of South Carolina." JA 1447. The Board of Trustees had supported coeducation since at least 1954. JA 279. From 1970-1974, enrollment at Winthrop increased 24.4%; during the same period, the Citadel's enrollment declined by 9.2%. JA 997. From 1973-1974, Winthrop's enrollment declined by 8.6%; but The Citadel's fell by a comparable 5.9%. Id. Winthrop's enrollment in 1974 was still 30% higher than that of The Citadel. Id.

Defendants did not establish that the decline in enrollment at Winthrop was due to a decline in demand by women for sex-segregated education. See, e.g., JA 410 (Legislative Committee did not attempt to determine reasons for Winthrop's declining enrollment). To the contrary, former Governor Edwards, for example, noted that there was insufficient demand "at this particular institution" for that type of education. Tr. Vol. IV, 55:3. Dr. Charles Vail, the President of Winthrop at the time and the man who guided it to coeducation, also testified at length concerning a number of institutional problems at Winthrop which caused its declining enrollment, and his efforts to seek coeducation to permit Winthrop to serve the entire population of the area. JA 786-789; Tr. Vol. XIV, 25:15 - 27:1; 32:3 - 34:11; JA 792-793. Even Defendants' retained expert, Dr. Richardson, testified that the decision for Winthrop to go coeducational was motivated by a variety of factors, including the promotion of equity for women, the provision of an economic base to the community, and permitting the school to expand to a university. Significantly, he does not mention declining demand in this litany of reasons. Tr. Vol. XII, 44:1 - 45:3.[5]

L. Exclusion of The Committee Report

After this Court's decision in VMI, counsel for The Citadel, the President of The Citadel and the Chairman of its Board of Visitors

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5 Ruth Williams Cupp testified that enrollment at Winthrop declined in one particular year by 235 students. Her support for coeducation, however, predated that decline in enrollment by ten years. In addition, she did not know what the total enrollment at Winthrop was at the time, how much it had declined on a percentage basis, or how the enrollment, even after the decline, compared to earlier years. Tr. Vol. III, 25:19 - 26:14, JA 279. Ms. Cupp did recall that her own class of 1950 had 200 students, a small fraction of the number of students enrolled when Winthrop went coed. Tr., Vol. III, 26:8-11.

met with several prominent alumni, including Francis P. Mood, who then met with the Speaker of the House of the South Carolina General Assembly.[6] JA 444-445. Mr. Mood provided the Speaker with a draft copy of a Concurrent Resolution eventually sponsored by five Citadel alumni in the House. JA 439-443, 445-447. The Concurrent Resolution established a Legislative Committee to study possible alternatives to provide women of South Carolina with opportunities for sex-segregated education. Mr. Mood served as Chairman of the Committee. JA 414-415.

A hotly contested evidentiary issue at trial was the admissibility into evidence of the report prepared by Mr. Mood's committee, which was addressed on at least three separate occasions during the trial, argued repeatedly, and briefed by both sides. The district court clearly, explicitly and properly ruled that the Report would not be admitted for its truth.[7] In briefing this case to the

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6 Mr. Mood is a 1960 graduate of The Citadel, which also awarded him an honorary degree in 1985. He has been extensively involved in Citadel activities. JA 434, 436. Mr. Mood was a member of The Citadel's Board of Governors from 1973 through 1979, and was again elected to the Board of Governors for a second six year term commencing July 1994. JA 434. At one time, he was also a candidate for the presidency of The Citadel. JA 437. Mr. Mood is a member of the board of directors of The Citadel Development Foundation, of which he was president from 1982 through 1986. The CDF has contributed $500,000 to The Citadel's defense of this litigation. JA 436; JA 765, Tr. Vol. XII, 112:9-12; JA 1258-1259.

7 The district court's exclusion of the Report was entirely proper. The Legislative Committee Report lacks trustworthiness because it post-dates the commencement of this litigation; the committee was dominated by Citadel graduates, most particularly Mr. Mood, creating an overwhelming appearance of partiality; and it purports to address matters that were outside the scope of the Committee's assignment. See F.R.E. 803(8)(C).

Six of the ten persons serving on the Legislative Committee were Citadel graduates. JA 447-449; JA 462. During the course of the work of the Legislative Committee, Mr. Mood communicated regularly with counsel to The Citadel in this action. JA 453-454. The Legislative Committee met on only four occasions prior

(footnote continued on next page...)

Fourth Circuit, Defendants simply ignore these rulings (just as they ignore the district court's earlier ruling to submit a remedy by April 1) and proceed to base much of their appeal on the findings and conclusions of the Report in violation of basic rules of appellate advocacy.

In their Opening Brief, Defendants rely extensively on the Legislative Committee Report in attempting to "establish" the purportedly long-standing policy of the State of South Carolina to support sex-segregated education, the "gender neutral" reasons behind other sex-segregated institutions' decision to abandon sex-segregated education, the alleged lack of demand by women for sex-segregated educational opportunities, and the availability of other remedial

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7(...footnote continued from preceding page)
to issuing its report. Many of the Committee members did not read the written materials circulated to them. JA 409; Tr. Vol. VI, 100:11-20. The Report was written by Mr. Mood and one other Committee member, without material change by other Committee members. JA 454-455.

The Committee Report also does not contain findings of fact resulting from an investigation made by a public office or agency pursuant to authority granted by law, as required by F.R.E. 803(8)(c), because (i) the Committee was not a public agency, (ii) it did not conduct an investigation and (iii) its Report exceeded its mandate. None of the Committee members were civil servants. Accordingly, the Legislative Committee Report was not the report of a public office or agency.

The Legislative Committee did not hear testimony from experts on the value of single-gender education or the alleged existence of developmental differences between men and women. It did not conduct a study to determine the level of demand or interest among men or women for The Citadel's Corps of Cadets program, or to determine the demand for single-gender education in South Carolina. JA 403; JA 409.

It was not the duty or mission of the Legislative Committee to study the value of single-gender education, or to determine the reasons for the declining enrollment at Winthrop or its decision to admit men. JA 408; JA 410.

options.[8] Appellants' Opening Brief at 7-11, 46. For example, Defendants rely on the Committee Report as evidence regarding Winthrop College's decision to become coeducational.[9]

The District Court explicitly ruled that the Committee Report failed to meet the standards for admission under the Federal Rules of Evidence, and that, even if the Report was admissible "I wouldn't give it any weight. I would totally disregard it, because I don't think it has any probative value." Tr. Vol. XIX, 67:13-17.

The Court ruled that the Committee Report was hearsay, and that it failed to meet the requirements of Rule 803(8)(c) of the Federal Rules of Evidence, under which rule the State sought its admission. Specifically, the Court found that it was not established that the Committee Report qualified as the report of a public office or agency, as required by the rule, or that the Committee had any authority granted by law to conduct the investigation. Tr. Vol. XIX, 61:4 - 63:16. Finally, the District Court ruled that the Report lacked trustworthiness, based primarily on the circumstances of the Committee's formation and its composition, both of which were dominated by Citadel graduates. Tr. Vol. XIX, 63:17 - 67:3; see also Tr. Vol. VI, 61:17 - 62:11; JA 441-442; 67:13 - 74:10.

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8 Defendants also rely on testimony from witnesses at the trial as to what the Committee did and what its findings were. See, e.g., J.A. 401, 417-418, 420-421, 425-26 (cited on pages 9-11 of Appellants' Opening Brief). The Court excluded such oral statements of what the Committee did for the same reasons that it excluded the Report itself. See, e.g., Tr. Vol. V, 96-97, 99.

9 Paula Bethea, a member of the Committee, conceded that the Committee's mission was not to determine why Winthrop went coeducational and that the Committee did not interview anyone involved with Winthrop's decision. JA 410. Francis Mood, the chair of the Committee, also conceded that the Committee did not meet with any of the people involved in the coeducation of Winthrop, and simply read a student's thesis on the issue. JA 452-454.

The Court accordingly excluded the Committee Report from evidence, except to establish the actions taken by the Committee. Tr. Vol. XIX, 68. The Court also admitted the Journals, including the Senate Journal in which the Committee Report was published, only as evidence of the Senate's actions, and not for the truth of any of the matters asserted therein. Tr. Vol. VI, 85, 109-112; Tr. Vol. XIX, 58-59.[10] Defendants were fully aware of the Court's repeated rulings that the Report would not be admitted for its truth. See, e.g., JA 398 ("It's not coming in for its truth, I understand, but it is an exhibit."); see also Tr. Vol. V, 96; 99-100; Tr. Vol. VI, 29-30; Tr. Vol XIX, 59-68. In fact, counsel for The Citadel Defendants explicitly and repeatedly concurred in the District Court's ruling that the Concurrent Resolution, the Committee Report and the exhibits to the Report were inadmissible hearsay. Tr., Vol. V, 83; Tr., Vol VI, 108-09; Tr. Vol. XIX, 68.

Appellants have not contested on appeal the district court's decision to exclude the Report from evidence, and cannot rely on it now in support of their appeal. An appellate tribunal can only consider evidence presented to the lower court.[11] The findings and

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10 On three separate occasions in their brief, Defendants assert that the General Assembly "approved and accepted" or "approved and adopted" the Legislative Study Committee Report. See Appellants' Opening Brief at 7, 11 and 26 n.13. In support of this claim, Defendants cite only to a page of the Journal of the Senate of the State of South Carolina which notes that the Committee Report was "ordered printed" in the Senate Journal. In fact, when the State's attorney offered the Journals into evidence, he specifically noted that the Legislative Committee Report was simply "published in the journal of the Senate." Tr. Vol. XIX at 58-59. Similarly, Mr. Mood noted that the Report was published in the Senate Journal, but not that it was adopted or approved by the Senate. Tr. Vol. VI, 25.

11 Thus, in Smith & Wesson, Div. of Bangor Punta Corp. v. U.S., 782 F.2d 1074 (1st Cir. 1986), the court granted a motion to strike

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conclusions of the Legislative Committee Report are not in evidence and should be given no consideration on appeal.

III. The Decision of The District Court on July 22, 1994

On July 22, 1994, the district court filed its findings of fact and conclusions of law in its Opinion of that date. In its findings, the district court held that The Citadel's males-only admission policy violates the right of Ms. Faulkner and other women to equal protection under the law as guaranteed by the Fourteenth Amendment. The court found that "[t]he type of education available at The Citadel is not available at any other institution in South Carolina." JA 1447. It found as a fact that

> [t]he unique feature of The Citadel is the requirement that all undergraduate day students be members of the South Carolina Corps of Cadets, subject to military discipline at all times, and enrolled in programs of study which qualify graduates for commissions in the active or reserve armed forces.

It further found that

> The Citadel is also unique in that it is the only public institution in South Carolina which offers single-gender education to its students by admitting only males to its Corps of Cadets.

The court expressly rejected Defendants' argument that the exclusion of women from The Citadel was justified by a state policy favoring single-sex education as part of a diverse educational system, where sufficient demand existed. JA 1468. The district court held as

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11(...footnote continued from preceding page)
from the appellant's reply brief pages which argued facts and contained material, as part of the addendum to the brief, which were not part of the record. Similarly, in Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988), the court struck from a prisoner's brief on appeal, correspondence which was never part of the District Court record. Defendants' blatant disregard of the district court's rulings and the rules of appellate procedure should not be tolerated by this court.

a matter of law that South Carolina cannot deprive Ms. Faulkner of her constitutional right to equal protection based upon an alleged lack of demand among other women for a Citadel education. Id. Noting that Defendants did not cite a single authority in support of their novel proposition that a lack of demand justifies providing single-sex education to men, but not to women, the district court held that the United States Supreme Court "continues to clearly proclaim that those rights created by the Equal Protection Clause of the Fourteenth Amendment are personal, individual rights." JA 1470.

Even assuming that demand would be a relevant criterion, the district court continued, "[d]emand is not the sole criterion for implementing new programs in South Carolina." JA 1455.[12] Contrary to Defendants' assertion, the court did not find that there was "insubstantial demand" among women for a Citadel education, or for single-sex education in general. Id. Rather, the court found that "The Citadel would attract between twenty and fifty women annually to its Corps of Cadets if it were to become coeducational." JA 1458.

The district court likewise rejected Defendants' argument that the reasons behind the decision of Winthrop College to become coeducational in 1974 are relevant to whether The Citadel's present males-only policy violates the Equal Protection Clause. Because the classification that must withstand constitutional scrutiny is the exclusion of women from The Citadel, a facially discriminatory policy, the district court held that Plaintiff need not prove that Winthrop's

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12 The district court found that necessity for certain programs can justify a new program even absent significant demand by students for such a program. Id. The district court also found that South Carolina, like Virginia, has given each public institution autonomy and independence, including in its admissions policies. JA 1453.

decision to admit men resulted from South Carolina's intent to discriminate against women. JA 1472. The district court found no evidence that Winthrop admitted men due to a lack of demand for single-sex education. Instead it found that Winthrop's primary reason for coeducating was to provide educational opportunities for men. JA 1447.

Turning to the issue of remedy, the district court found that the only available remedy to redress the violation of Ms. Faulkner's rights was to order her immediate admission into the Corps of Cadets program. The court found that the remedial "plan" offered by Defendants "does not select any remedy nor even prioritize those suggested." JA 1459. The court found that "no effort has been made to determine the feasibility of any specific remedy. Indeed, neither the South Carolina Commission on Higher Education nor the South Carolina General Assembly has been contacted by the Defendants concerning the matter." Id. The court also determined that "[n]ot a single defendant signed the proposed remedial plan or testified in court as to their intentions or desire in regard thereto." JA 1475.

The district court concluded that "there is nothing before the court at this time that permits it to determine what the defendants will do or can do to guarantee to the plaintiff her constitutional rights . . . ." Id. The court found that The Citadel could not afford to go private. JA 1476. Even if Defendants ultimately proposed creating a separate institution for women pursuant to VMI, it would take up to ten years before the necessary approvals and construction were completed. JA 1461. The court noted that, as a matter of law, South Carolina could not satisfy the Fourteenth Amendment by sending its female citizens to another school out of

state. JA 1470. Assuming that Defendants were to propose a compact agreement with a women's college in South Carolina, the court found that the approval process alone, not including implementation, for such an arrangement would take one to two years. JA 1461.

The district court found that "[t]ime is not on the side of Faulkner." JA 1476. Because of the inevitable appeals that would follow in this case, the court calculated that, a final judgment could not be expected until the summer of 1996. By that time, the court continued, Ms. Faulkner will have completed her junior year, and the South Carolina General Assembly will be recessed sine die until January, 1997, the middle of Ms. Faulkner's senior year. JA 1461-1462. At that point, Ms. Faulkner no longer would be eligible to enter the Corps of Cadets and would lose her right to receive any meaningful relief. JA 1476.

Under all of these circumstances, the district court held that Ms. Faulkner was entitled to an order granting her immediate admission into the Corps of Cadets under the terms and conditions set by the court. The district court found that Defendants had failed to offer any remedial proposal that would provide Ms. Faulkner with equal protection under the law, despite ample notice and opportunity. JA 1475. In contrast, the court found that Defendants have refused to propose or develop any remedial plan that could be an alternative to coeducation while still doing their utmost to keep Ms. Faulkner out of The Citadel. The court concluded, "[n]ot once has a defendant done anything to indicate that it is sincerely concerned to any extent whatsoever about Faulkner's constitutional rights." JA 1476.

The court entered a final judgment on August 5, 1994, ordering that Ms. Faulkner be admitted to the Corps of Cadets and

specifying the details of her admission. The court also filed an order denying Defendants' application for a stay of its judgment permitting Ms. Faulkner to attend the Corps of Cadets pending the appeal of this matter. Order of District Court dated August 5, 1994, JA 1506-1511.

PRELIMINARY STATEMENT

After a ten-day trial, the district court entered judgment finding that The Citadel's arbitrary exclusion of Shannon Richey Faulkner and other qualified young women from its Corps of Cadets violates their constitutional right to equal protection guaranteed by the Fourteenth Amendment of the United States Constitution. The district court held that, under United States v. Virginia, 976 F.2d 890 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993) ("VMI"), the Defendants cannot deny women access to the unique military-style education offered to men at The Citadel under a state policy of offering educational diversity, including sex-segregated education, where sufficient demand exists. Because Defendants refused to formulate or propose any remedial proposal, the district court held that there was no alternative that would remedy the continued violation of Ms. Faulkner's constitutional rights other than immediate admission to the Corps of Cadets.

Defendants do not dispute that there is presently no alternative that would provide Ms. Faulkner with the military-style education she seeks. Rather, Defendants advance two limited issues on appeal: whether the district court erred in (1) refusing to analyze the exclusion of women from The Citadel under the rational basis test; and (2) ordering the immediate admission of Ms. Faulkner into the

Corps of Cadets. Both arguments are frivolous attempts to postpone the inevitable conclusion that South Carolina, which cannot afford to fund its present educational programs, has no alternative but to admit women to The Citadel.

Defendants' bizarre theory that the exclusion of women from The Citadel should be reviewed under the rational basis test is nonsense. In upholding the preliminary injunction issued by the district court, this Court expressly held that The Citadel's arbitrary exclusion of women is a facial gender classification that is entitled to heightened scrutiny. Defendants cannot offer a single authority to warrant a contrary result. This is hardly surprising. Under Defendants' theory, a state could always justify a facially discriminatory policy by asserting a "neutral" justification. This is contrary to well-established Supreme Court precedent on gender discrimination.

Nor may Defendants justify their failure to provide women with a military-style education by asserting a "lack of demand" for an "all-female Citadel." The right to equal protection is a personal one and does not depend on the number of other members of a group who seek access to the same benefit. Even if demand were relevant, Defendants failed to demonstrate that it explains the exclusion of women from The Citadel. Indeed, they have never studied the level of demand among women for <u>either</u> a military-style education <u>or</u> for sex-segregated education. Based on testimony by defendants' own expert and the experience of the federal service academies, the district court found that between 80 and 200 women would be enrolled in the Corps of Cadets at any time. Refusing to accept that many young women today seek a

rigorous military-style training, Defendants fundamentally rely upon outdated stereotypes about women's interests and roles.

The district court was not only permitted, but obligated, to immediately remedy the violation of Ms. Faulkner's rights. As this Court recognized in upholding the preliminary injunction permitting Ms. Faulkner to attend day classes, "denying Faulkner's access . . . might likely be permanent for her, due to the extended time necessary to complete this litigation." Faulkner v. Jones, 10 F.3d 226, 226-233 (4th Cir. 1993). Recognizing that "time is of the essence" for college students such as Ms. Faulkner, the United States Supreme Court repeatedly has required the immediate admission of students unlawfully excluded from higher education programs. See, e.g., Hawkins v. Board of Control of Florida, 350 U.S. 413 (1956).

Having lost a motion to bifurcate the trial and postpone submission of a remedial plan, Defendants refused to submit a specific remedial plan for judicial review. Evidencing their lack of good faith, Defendants even refused to make any attempt whatsoever to formulate a remedial plan before trial. Their egregious default is not merely an act of contempt, but evidence of the absence of any viable alternative. The Citadel admits that it cannot afford to go private; neither Columbia nor Converse College, the only two private sex-segregated schools for women, will agree to participate in a "parallel" plan. Defendants should not be permitted to defer providing any remedy for Ms. Faulkner until they have exhausted yet another round of lengthy and inevitable appeals.

For 151 years, South Carolina has preserved The Citadel, one of the most prestigious and unique state colleges in the South, as a bastion of male privilege. Determined to cling to outdated notions of

men and women that "could be tolerated [only] in the nineteenth century," South Carolina "continues to deny its daughters the educational opportunities to which they are entitled." Faulkner v. Jones, No. 94 - 1978, (4th Cir. Aug. 12, 1994) (order granting appellants' motion to stay pending appeal) (Hall, J. dissenting). As the district court held, The Citadel cannot justify refusing admission to young women who seek the benefits of the unique military-style education offered to their male peers. Whatever educational opportunities South Carolina offers its sons must be shared on an equal basis with its daughters.

ARGUMENT

I.

DEFENDANTS CANNOT JUSTIFY DENYING THE CITADEL'S UNIQUE MILITARY-STYLE EDUCATION TO WOMEN

A. South Carolina Cannot Offer Its Unique Military Program Only To Men Under An Asserted Policy Of Educational Diversity

This court explicitly held in VMI and Faulkner that "a policy of diversity is not advanced by the establishment of an institution for only one gender." Faulkner, 10 F.3d at 232; VMI, 976 F.2d at 892. In affirming the preliminary injunction issued in this case, this court held that it could "perceive of no reason why our holding in VMI would not apply in this case." Id. While this court noted that the General Assembly had adopted a resolution declaring that "South Carolina has historically supported and continues to support single-gender educational institutions . . . where sufficient demand has existed," it nevertheless explicitly rejected Defendants' argument that a lack of demand explained its failure to offer women

the same opportunities as men for a single-gender or military-style education. Id.

Defendants cannot justify denying women a military-style education by alleging that sex-segregated education is pedagogically justifiable. Even assuming that The Citadel's males-only policy is pedagogically justified (a factual issue that the district court has not addressed), this court in VMI and Faulkner held that a state may not offer the benefits of an educational opportunity to men, but not to women under a policy of diversity. In VMI, this court relied on factual findings by the Virginia district court that "VMI's unique methodology" would be substantially changed by coeducation, which were not appealed by the United States. VMI, 976 F.2d at 892, 899.[13] However, these factual findings concerning VMI's "unique" program, which were based on evidence entirely different from the record in this case, do not apply as a matter of law to The Citadel. Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 343 (4th Cir. 1992);

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13 This Court acknowledged that the holding in VMI was based upon the factual findings of the district court which, inter alia, "recognized physical and psychological differences between men and women" and "that if women were admitted to VMI, differences in physical ability between men and women, as well as concerns of privacy, would require VMI to adopt a 'dual-tracking' program . . . that would yield effects that might be unequal between the sexes . . ." Faulkner, 10 F.3d at 231.

There is no evidence in the record in this case that the same would be true of The Citadel. While the district court refused to consider the alleged value of single-sex education, Dr. Richardson testified that the admission of women to the Corps of Cadets would not affect the ability of The Citadel to fulfill its mission. JA 746. Another Citadel witness testified that women could fulfill all of the requirements of the Corps of Cadets. JA 237, 238, JA 739. While the district court excluded all testimony on the value, or lack of value, of single-sex education, plaintiff is prepared to show, through the testimony of Dr. Alexander Astin, that coeducation does not eliminate the educational outcomes associated with single-sex colleges. See Plaintiff's Offer of Proof Through Affidavit of Alexander Astin dated January 8, 1993.

Virginia Hospital Ass'n v. Baliles, 830 F.2d 1308, 1311 (4th Cir. 1987).

A state policy that expressly discriminates on the basis of gender is subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. See J.E.B. v. Alabama, 114 S.Ct. 1419, 1424 (1994); Mississippi University for Women v. Hogan, 458 U.S. 718, 723-724 (1982); Craig v. Boren, 429 U.S. 190 (1976).[14] A party seeking to uphold a state policy that classifies individuals on the basis of their gender must demonstrate an "exceedingly persuasive justification" for the classification. See J.E.B., 114 S.Ct. at 1425; Hogan, 458 U.S. at 724; Kirschberg v. Feenstra, 450 U.S. 455, 461 (1981). To meet this burden, the state must show that its classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Hogan, 458 U.S. at 724 (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)). The heightened scrutiny applicable to gender classifications "will reject regulations based on stereotypical and generalized conceptions about

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14 Although it has made clear that the level of scrutiny applied to gender classifications is at least "intermediate," the Supreme Court has reserved the question whether strict scrutiny applies to such classifications. See J.E.B., 114 S.Ct. at 1425 n.6 (the Court "once again need not decide whether classifications based on gender are inherently suspect"). However, in its recent decision in J.E.B., the Court made clear that a number of parallels exist between racial and sexual discrimination and that an analogous equal protection analysis should apply to both cases. In fact, the Court struck down jury selection based on gender under reasoning similar to that it had previously used to invalidate jury selection based on race. As the Court explained in that case, "[w]hile the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences . . . 'overpower the differences.'" J.E.B., 114 S.Ct. at 1425 (citation omitted).

the differences between males and females." Faulkner, 10 F.3d at 231. The test is to be applied "free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the . . . objective itself reflects archaic and stereotypic notions." Hogan, 458 U.S. at 724-725; see also J.E.B., 114 S.Ct. at 1424-1427 & n.11; Heckler v. Mathews, 465 U.S. 728, 750 (1984); Craig v. Boren, 429 U.S. 190, 199 (1976); Stanton v. Stanton, 421 U.S. 7, 14-15 (1975); Frontiero v. Richardson, 411 U.S. 677, 684-685 (1973).

In VMI, the United States sought to compel the admission of women to the all-male Corps of Cadets at VMI. This Court in VMI assumed, for purposes of its analysis, that Virginia in fact had articulated an "announced justification" of supporting single-sex education as part of a policy of providing diversity in higher education. It nevertheless held that, as a matter of law, a state cannot offer such a unique educational opportunity to men and not women. See VMI, 976 F.2d at 892, 899. This Court explicitly held that "[a] policy of diversity which aims to provide an array of educational opportunities, including sex-segregated institutions, must do more than favor one gender." Id. at 899. In Faulkner, this Court further explained its ruling in VMI:

> No evidence was presented that women might not also benefit from a program of military training designed to produce women citizen soldiers. The state offered only diversity as an announced justification. We concluded, however, that a policy of diversity is not advanced by the establishment of an institution for only one gender.

Faulkner, 10 F.3d at 232 (emphasis added).

This Court further rejected as inadequate Virginia's argument that its public institutions of higher education are

"autonomous" and free to determine their own admissions policies. This Court held that, "if responsibility for implementing diversity has somehow been delegated to an individual institution, no explanation is apparent as to how one institution with autonomy, but no authority over any other state institution, can give effect to a state policy of diversity among institutions." VMI, 976 F.2d at 899.

This Court's rulings in VMI and Faulkner adhere to the analysis applied by the United States Supreme Court. In Hogan, a male plaintiff sought admission to the all-female nursing program offered by Mississippi University for Women ("MUW"), a public university. The Supreme Court, employing the intermediate scrutiny test, held that the exclusion of men from MUW's nursing program was not substantially related to its proposed objective of compensating women for past discrimination and violated the Equal Protection Clause of the Fourteenth Amendment. See Hogan, 458 U.S. at 730, 733. Hogan expressly rejected the argument that MUW's sex-segregated admissions policy could be justified under a governmental objective of diversity in education:

> Justice Powell's dissent suggests that a second objective is served by the gender-based classification in that Mississippi has elected to provide women a choice of educational environments. . . . Since any gender-based classification provides one class a benefit or choice not available to the other class, however, that argument begs the question. The issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

458 U.S. at 731 n.17 (emphasis added).

Applying Hogan, "the issue is not whether [Citadel cadets] profit[] from the [males-only admission policy] but whether [South

Carolina's] decision to confer a benefit upon only [men] by means of a discriminatory [admissions policy] is substantially related to achieving a legitimate and substantial goal." Id. Even assuming that South Carolina has a true state policy supporting sex-segregated higher education as part of offering educational diversity, such a policy does not justify offering a military-style education to men and not to women. Defendants' asserted objective is the same justification rejected by this Court in VMI. Unless a state provides choice to both men and women, it cannot as a matter of law justify its exclusionary policy under a policy of diversity. Like VMI, The Citadel has no control over the admissions policies of other state institutions and, as this Court held in VMI, neither The Citadel nor South Carolina can give effect to an asserted policy of diversity.

Rather than further an important governmental interest, The Citadel's discriminatory admissions policy blatantly violates South Carolina's interest in providing equal educational opportunity to women. As set forth in the South Carolina Higher Education Law, it is an express goal of South Carolina to "assure the maintenance and continued provision of access to and equality of educational opportunity in South Carolina." S.C. 59-104-610(4). Defendants' witnesses, including two former governors and the Commissioner of Higher Education for South Carolina, all testified that the exclusion of women from the unique military-style education offered at The Citadel denied women equal educational opportunity, in violation of clear state policy. See page 7 supra.

B. The Citadel's Males-Only Admission Policy Is Facially Discriminatory

Defendants advance the bizarre proposition that the exclusion of women from The Citadel should be reviewed under the

rational basis test. While Defendants agree that The Citadel's exclusionary policy is a facial gender classification, subject to intermediate scrutiny, they inexplicably claim that the classification that really should be the subject of constitutional review is their asserted justification, i.e. offering single-sex education as part of a diverse range of educational programs, where sufficient demand exists. Claiming that this justification (but not the policy itself) is "facially neutral," Defendants assert that the proper standard of review in this case is under the rational basis test. This is nonsense.

Defendants confuse the challenged classification with the purported governmental objective that they assert justifies that classification. Not only is there no authority to support Defendants' argument, but in Faulkner and VMI, this Court agreed that it is the exclusion of women that is subject to review under the intermediate scrutiny standard, not the state's alleged objective of "diversity" or consideration of educational "demand." Faulkner, 10 F.3d at 231. Under both Hogan and Faulkner, Defendants bear the burden of proving that exclusion of women from The Citadel is substantially related to their supposed justification of diversity. Reciting a facially "neutral" justification or governmental objective does not change the level of judicial review or trigger the application of the rational basis test. If Defendants' theory were correct, a state could always avoid heightened scrutiny by asserting a "neutral" justification for unlawful discrimination.

Neither Geduldig nor Feeny are remotely relevant. Both of these cases involved a classification that the courts determined to be facially neutral. In Geduldig v. Aiello, 417 U.S. 484 (1974), the

Supreme Court held that a state's refusal to insure the costs of pregnancy was not a facial gender classification, but a classification based upon a class of "pregnant persons." In Feeny, the plaintiff challenged a state's decision to confer benefits upon "veterans," which it conceded was not a facial gender classification, since "veterans" include both men and women. Personnel Adm'r v. Feeney, 442 U.S. 256 (1979). In this case, Defendants concede that The Citadel's admission policy explicitly discriminates on the basis of sex. While this Court noted in Faulkner and VMI that women are qualified to participate in and benefit from the military-style education offered at VMI and The Citadel, South Carolina has chosen to offer men that educational choice, and not women. To assert that this case involves a "neutral" classification is frivolous.

C. The Citadel's Exclusion Of Women Is Not Justified By Alleged Lack Of Demand For An "All-Female Citadel"

1. Demand Is Constitutionally Irrelevant

There is no constitutional justification for denying women the same military-style education provided men based upon an asserted "lack of sufficient demand." If a state chooses to offer a public institution of higher education, "[it] must be made available to all [students] on equal terms." Brown v. Board of Education, 347 U.S. 483, 493 (1954). A lack of demand or "economic considerations" cannot serve as a defense for unequal treatment based upon race or gender.

The right to equal protection does not depend on the number of other members of a class that seek access to a program from which they have been excluded. Under the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." In the context of gender discrimination cases, the Supreme Court has held that the law protects the right of individuals,

not those of the group as a whole. See, e.g., Connecticut v. Teal, 457 U.S. 440, 454-456 (1982); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938) ("It is the individual who is entitled to the equal protection of the laws.").

No state may deny a woman, or any individual, equal access to a state education by asserting that there is a limited or insufficient demand by others for an educational program. See Canada, 305 U.S. at 351; Mitchell v. United States, 313 U.S. 80, 97 (1941) (low demand by blacks for first-class railroad transportation did not justify failure to provide equal facilities); McCabe v. Atchison, T & S.F. Ry. Co., 235 U.S. 151, 161 (1914) (same); Carter v. School Bd. of Arlington County, 182 F.2d 531, 535 (4th Cir. 1950) (small student population at black high school did not justify inferior curriculum). Indeed, the Supreme Court in Hogan declared that the exclusion of one man from MUW's all-women nursing school violated his individual right to equal protection, despite the fact that he could have attended a state nursing school sixty miles away from MUW. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); see also Teal, 457 U.S. at 454-456.

In McCabe, the United States Supreme Court rejected the argument that a "lack of demand" among black citizens justified a state's decision to provide white citizens with Pullman car service, but not black citizens. Following McCabe, the Supreme Court in Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), likewise rejected the argument that a state could refuse to provide black students with a legal education offered to white students based upon an asserted "lack of demand" among black students. The Supreme Court

unambiguously held that a justification based upon a "lack of demand" among other members of a class for a particular type of education:

> makes . . . the constitutional right [to equal protection] "depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. . . . It is the individual who is entitled to the equal protection of the laws."

Id., 305 U.S. at 351, quoting McCabe, 235 U.S. at 161-162.

Defendants cannot deny women access to a unique military-style education because it is "too expensive" or "impracticable" to provide two sex-segregated military schools for both men and women. If a state decides to provide an educational benefit, it must provide the benefit equally to men and women. Brown, 347 U.S. at 493. Access to constitutional rights cannot depend upon considerations of cost. As the Supreme Court has held, "[the] vindication of . . . constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." Watson v. Memphis, 373 U.S. 526, 537 (1963). This fundamental principle applies with equal force to gender classifications. Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (gender discrimination cannot be justified by cost or administrative convenience); Reed v. Reed, 404 U.S. 71, 76 (1971) (same); Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (same).

The young men of South Carolina do not have a constitutionally protected right to attend a military-style college without the company of women. If a state does not have enough money to offer equal educational opportunity to both men and women, it cannot as a matter of law choose to provide an opportunity to only one gender. Rather than deny an entire gender equal access to a holistic military education, South Carolina must share the unique opportunities provided at The Citadel with qualified young women.

Defendants cannot cite a single case in which a court has upheld a gender classification (or any classification subject to heightened scrutiny) which is based upon considerations of cost or demand. Faced with an impenetrable wall of Supreme Court precedent rejecting this precise argument, Defendants conjure two arguments. First, Defendants make a nonsensical attempt to distinguish Canada, 305 U.S. 337, by arguing that the exclusion of blacks from the only law school in Missouri involved a discriminatory state policy, while the identical exclusion of women from the only military school in South Carolina does not. Appellants' Opening Brief at 38. The assertion that the deliberate exclusion of women from The Citadel is not discriminatory deserves no response.

Second, Defendants argue that, assuming that a state had two schools, one for men and one for women, it should be able to close one if there were inadequate demand. This argument is a meaningless hypothetical that is not raised by the facts of this case. Ms. Faulkner does not seek access to an all-female college, but the unique Corps of Cadets program. Moreover, South Carolina does not have a system of education that offers single-sex colleges for both men and women, nor has it ever offered women a military-style education. Even if South Carolina offered women a sex-segregated college, it would not justify denying Ms. Faulkner access to the unique military-style education at The Citadel.

Defendants' argument, by making individual rights ultimately dependent on considerations of demand and cost, also ignores applicable Supreme Court precedent that a state that offers an educational program must make it available on equal terms to all persons, regardless of the level of demand among groups for the

program. See supra at 32-34. The assumption that a state may decide whether or not to afford equal protection based upon "demand" or cost, as Defendants suggest, would make the guarantee of individual rights fluctuate with time based on temporary changes in social or economic circumstances. Individual rights afforded in the federal constitution would become transitory, rather than permanent and enduring. This notion is fundamentally at odds with the nature of the individual liberties guaranteed to all persons in this nation.

2. There Is Demand In This Case

Even assuming demand were a legally relevant justification, Defendants have failed to prove that (i) the level of demand explains Defendants' decision to exclude women from The Citadel, or (ii) there is a lack of demand by women for the military-style education provided at The Citadel. As a threshold matter, Defendants must prove that a "lack of demand" is the reason for the exclusion of women from The Citadel. See Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) (court rejected state's attempt to justify discriminatory gender classification under an asserted purpose which, upon examination of the legislative scheme and history, could not have been a goal of the legislature). The record is clear that the Defendants never considered the level of interest among women for a Citadel education before restricting admission to men. Further, Defendants did not offer a single study, report, survey, or any other evidence of a lack of demand among women either for a military-style Citadel education or for an all-female non-military style college. JA 1458.

The record does show that The Citadel's admissions office received at least 43 letters of inquiry from women interested in the Corp of Cadets. Citadel witnesses testified that The Citadel does not

systematically retain inquires from women, so the 43 inquiries do not even reflect the total received. Moreover, The Citadel actively frustrates women from expressing their interest in attending the Corps of Cadets. Two young women who sought to apply for admission to the Corps of Cadets testified at trial that The Citadel refused to provide them with applications.

Moreover, it is impossible to determine that there is a lack of demand among women for an educational opportunity from which they have been notoriously excluded. By telling women in no uncertain terms that they are not wanted, The Citadel precludes an accurate estimate of the number of women who would attend if women were welcomed rather than shunned. As Alexander Astin, a leading expert on higher education, testified, "students respond to the opportunities that exist. As women are not entitled to enroll in the Corps of Cadets, it is very hard to judge what the demand would be. Women do not apply to The Citadel because they know that they are not acceptable." JA 850-851; see also JA 801-802. Historically, demand among women for educational programs that were traditionally restricted to men, such as business and law school, has increased dramatically once women are admitted. JA 851.

Defendants' assertion of a "lack of demand" is entirely at odds with the voluminous record in this case. Based on the testimony of Defendants' expert, Dr. Richardson, and the experience of the service academies, the district court found that between 20 and 50 women each year would enroll at The Citadel if it became coeducational. JA 1458. Accordingly, between 80 and 200 women would be enrolled in all four classes at any given time. The total number

of minority students enrolled at The Citadel, by contrast, is only six per cent of the student body. JA 735.

If "demand" explained South Carolina's allocation of its resources, South Carolina would not support The Citadel at all. In the last five years, the volume of applications to the Corps of Cadets has declined; in several of these years, The Citadel has been unable to fill its barracks. JA 766, Tr. Vol. XII, 126, JA 769; JA 775-776. The number of applications has plummeted from 1627 to 1427 from 1989 to 1993, forcing The Citadel to increase from 68% to 84% the percentage of applicants accepted, with a corresponding drop in its selection criteria. For example, S.A.T. scores of accepted applicants declined from 1010 to 967, as compared to a national decline of 1 point. JA 1393; Tr. Vol X, 20:7-12. Further, some 2,300 women attend sex-segregated private colleges in South Carolina, compared to 1800 men at The Citadel. From 1970-1974, Winthrop's enrollment increased 24%, as compared to a decline of 9% at The Citadel. JA 997. The other coeducational colleges in South Carolina, on the other hand, experienced a dramatic increase in enrollment. Obviously, demand does not explain the exclusion of women from The Citadel, let alone its continued existence.

3. The Argument That Women Are Not Interested In A Military-Style Education Is Based On Impermissible Gender Stereotypes

Discrimination against women in education often has been "justified" by stereotypical conclusions as to the proper role of women in society and their relative abilities. JA 798. The argument that there is insufficient demand among women for an educational program has been used historically to justify depriving women of access to educational opportunities. JA 799, 800. The assertion that

there are only a handful of women who would desire a rigorous military education is based solely on stereotypical thinking about the traditional roles and interests of men and women that the Fourteenth Amendment condemns. The military traditionally has been considered as a "man's" field, in contrast to "women's" fields such as teaching and nursing. Just as the Supreme Court found that "MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job," (see Mississippi University For Women v. Hogan, 458 U.S. 718, 729 (1982)), so does the exclusion of women from The Citadel's Corps of Cadets perpetuate the stereotyped view of the military as exclusively a man's job. This makes a mockery of the interests and goals of a new generation of young women eager to participate just as fully as men in the future of this nation.

4. The Demand For Sex-Segregated Education for Women is Irrelevant

Throughout its argument, Defendants persist in focusing exclusively on the demand for an all-female education as opposed to a military-style education. This case is not about "single-sex" education; it is about a unique military-style college that discriminates on the basis of sex. The district court did not find that The Citadel was unique only because it is a sex-segregated college, but because it offers a holistic, military-style education within its Corps of Cadets system. JA 1447. Defendants cannot justify her exclusion by alleging a lack of demand among women for a sex-segregated education.

By claiming that it is a "single-gender" college, The Citadel sidesteps the fact that it is a public military-style college that excludes qualified female applicants solely on the basis of their

sex. Defendants' agenda is patently obvious: if they can persuade this Court to close its eyes to this distinctive and unique holistic military education, then this Court will focus on the value of single-sex education and ignore the fact that South Carolina denies women the same opportunity for a military-style education that it provides men.

Taken to its logical conclusion, Defendants' argument would justify any public college excluding women on the grounds that it is providing "single-gender" education, i.e. education for men only. For example, the University of South Carolina Law School, which is the only law school in the state, could decide to exclude women and then claim that it is not a law school that discriminates against women, but rather a "single-gender" school which is entitled to judicial deference because of the "recognized" benefits to men. This Court should not permit Defendants to obscure the real issue in this case: whether young women are entitled to a unique and holistic military-style education that is already offered to young men. The answer is plainly yes.

D. Winthrop's Decision to Admit Men In 1975 Is Irrelevant To This Action

Ironically, Defendants seek to justify the exclusion of women from The Citadel by arguing that Winthrop, a formerly all-female liberal arts public college, admitted men in 1975. Winthrop's decision to admit men does not justify the exclusion of women from the only military-style college in South Carolina, but evidences an overriding policy of providing men and women equal educational opportunity which is inconsistent with the exclusion of women from The Citadel.

The decision of Winthrop to admit men fails to explain why South Carolina denies women the opportunity for a military-style

education. Winthrop was not a military-style college, but primarily a teaching college. The reasons for its move to coeducation have nothing whatsoever to do with the level of demand among women for a military-style education. Even if Winthrop were still in existence as an all-female college, it would not justify the exclusion of women from The Citadel because it is not a military-style college. In Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1974), aff'd without opinion, 401 U.S. 951 (1971), a South Carolina district court explained that, under the rational basis test then in effect for gender classifications, a state could not offer a unique educational program or course of study to only one gender.

Even assuming arguendo that the demand for an all-female college were relevant, the level of interest nearly twenty years ago in Winthrop College says nothing about the demand by women today for an all-female college. Moreover, South Carolina failed to prove that Winthrop College decided to admit men in 1974 because of a lack of demand for an all-female college. District court's opinion, JA 1447. Consistent with its goal of providing each individual with the opportunity for a higher education, South Carolina eliminated Winthrop's gender-based admissions policy to better serve the educational needs of the state and region, and to expand men's access to educational opportunities previously available only to women. District court's opinion, JA 1446-1447.

II

THE DISTRICT COURT PROPERLY EXERCISED ITS REMEDIAL POWERS IN ADMITTING MS. FAULKNER INTO THE CORPS OF CADETS

A. Ms. Faulkner Is Entitled To Immediate Admission To The Citadel

The district court did not abuse its discretion in ordering the admission of Ms. Faulkner to the Corps of Cadets, a remedy which this Court specifically approved in VMI. 976 F.2d at 900. Having asserted that Ms. Faulkner likely will be foreclosed from any meaningful relief due to the length of expected appeals, Defendants refused to formulate or propose any alternative to coeducation. Brief of Appellant in Support of Appeal from Preliminary Injunction, dated September 20, 1993 at 19. The district court expressly found that, absent immediate relief, Ms. Faulkner would graduate from college before she ever passed through The Citadel's gates as a cadet. South Carolina is not entitled to waste an additional year of Ms. Faulkner's college career while it attempts to propose a remedy for its discriminatory admissions policy.

Unlike VMI, this case involves a live plaintiff whose constitutional rights have been and continue to be violated. Explicitly distinguishing this case from VMI in Faulkner, this Court held that, unlike the United States in VMI, it is probable that Ms. Faulkner will lose her ability permanently to receive any relief.

> Denying Ms. Faulkner access to [The Citadel] might likely become permanent for her, due to the extended time necessary to complete the litigation. The most telling aspect of this case, and that which distinguishes this case from VMI, is the presence of this time pressure, combined with an absence of present opportunity for Faulkner.

10 F.3d at 233. (emphasis added). Given the undisputed exigencies of these circumstances, the district court was not only empowered, but required, to admit Ms. Faulkner into the Corps of Cadets.

Rights guaranteed by the United States Constitution, including Ms. Faulkner's right to equal protection, are not trivialities that South Carolina can bestow at its leisure. "The rights asserted here are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and, unless there is an overwhelming compelling reason, they are to be promptly fulfilled." Watson v. Memphis, 373 U.S. 526, 533 (1963) (emphasis in original).

Guaranteeing access to public education is "perhaps the most important function of state and local governments." Brown, 347 U.S. 483, 493 (1954). United States v. Fordice, 112 S. Ct. 2727 (1992). Indeed, this Court has held that the delay in a plaintiff's college education itself imposes irreparable harm. Jones v. Board of Governors of the University of North Carolina, 704 F.2d 713, 716 (4th Cir. 1983) (granting preliminary injunction because plaintiff would "obviously" suffer irreparable harm resulting from a delay of her education at the University of North Carolina).[15]

Where a plaintiff is seeking admission to a college or program of higher education, the court "should be sensitive to the necessity for speedy justice." Meredith v. Fair, 305 F.2d 343, 352 (5th Cir. 1963). Because "time is of the essence" for college

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15 See also United States v. Texas, 628 F. Supp. 304, 313 n. 17 (E.D. Tex. 1985), rev'd on other grounds sub nom., United States v. LULAC, 793 F. 2d 636 (5th Cir. 1986) (delay in certification of teachers whose rights to equal protection and due process were allegedly violated constitutes irreparable harm).

students, federal courts are obligated by law to immediately order the admission of a student unlawfully excluded from a college program to remedy the violation of the plaintiff's rights. Alexander v. Holmes Cty. Bd. of Education, 396 U.S. 19, 20 (1969) ("continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible"); Green v. County School Bd. of New Kent Cty., 391 U.S. 430, 438-40, 442 (1968) (same); Hawkins v. Board of Control of Florida, 350 U.S. 413 (1956); Sipuel v. Board of Regents of the University of Oklahoma, 332 U.S. 631, 633 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); see also McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).

In Sipuel, a black female student was denied admission to the School of Law of the University of Oklahoma, the only state-supported law school in Oklahoma, solely on the basis of her race. The Supreme Court held that the plaintiff was "entitled to secure legal education afforded by a state institution," despite the fact that "separate but equal" was permitted in 1948. The Supreme Court held that the state "must provide [a legal education] for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group." Sipuel, 332 U.S. 632-633. Similarly, in Meredith, 305 F.2d 343, the Court of Appeals held that the exclusion of James Meredith, a black man, from the University of Mississippi was unconstitutional. Rejecting the state's request for additional time to propose a remedy, the court held that "[a]s a matter of law, the principle of 'deliberate speed' has no application at the college level; time is of the essence." Id. at 352.

In Watson v. Memphis, 373 U.S. 526 (1963), the Supreme Court held that the delay countenanced in Brown II is an "adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification." Watson, 373 U.S. at 532-533. Affirming an order of a district court ordering the immediate desegregation of municipal parks and recreational facilities, the Supreme Court rejected Defendants' argument that a federal court may not enjoin unconstitutional action until the state is afforded time to propose a remedy. Id. Distinguishing the extraordinary problems in desegregating an entire primary and secondary school system where "attendance is compulsory, the adequacy of teachers and facilities crucial, and questions of geographic assignment are often of major significance," the Supreme Court held that the plaintiffs were entitled to immediate injunctive relief. Id. at 532.

None of the cases cited by The Citadel prohibits a federal court from compelling the admission of Ms. Faulkner to the Corps of Cadets. To the contrary, each held that federal courts are obligated to exercise their remedial power when necessary to remedy the violation of constitutional rights, including where, as here, state officials ignore the violation. See Voinovich v. Quilter, 113 S. Ct. 1149, 1156-57 (1993) (federal courts are not barred from intervening in state apportionment where there is a violation of the Constitution or a federal statute); Heckler v. Mathews, 465 U.S. 728, 739 n.5 (1984) (federal district court may select final remedy for unconstitutional federal benefits statute). None of these cases involved access to higher education. To the extent that these decisions provided state officials time to propose a remedy, they do

not overrule long standing Supreme Court precedent requiring the immediate admission of students excluded from higher education.

There is no alternative for Ms. Faulkner that would afford her the education to which she is entitled. The reality is that the immediate admission of Ms. Faulkner to The Citadel can be accomplished expeditiously, as the District Court's order of August 10, 1994 makes clear. The circumstances of her participation in the Corps, including housing arrangements, uniform, and similar issues have all been resolved, and have not been raised on appeal. Regardless of the changes that VMI demonstrated might occur upon coeducation, the record in this case establishes that this is not the case with The Citadel. As a matter of law, she is entitled to immediate admission into the Corps of Cadets.

B. Defendants Failed To Propose Any Remedial Alternative to Coeducation

Even assuming that the Defendants were entitled to propose a remedy, they refused to formulate or offer any alternative to coeducation. In cases where the constitutional right to equal educational opportunities has been violated, the "burden on [the defendants] . . . is to come forward with a plan that promises realistically to work, and promises realistically to work now." Green v. County School Bd., 391 U.S. 430, 439 (1968). In the context of constitutional rights, the courts have long since rejected remedies that amount to "a plan to plan" – requiring instead that the remedial plan promise to work now, and finding "intolerable" any plan that does not provide the court with the "assurance of a prompt and effective [remedy]." Id. at 438.

Defendants concede that a court may order the admission of Ms. Faulkner if South Carolina cannot or does not propose any remedial

alternative. Appellants' Opening Brief at 40, 44-46. The district court expressly found that Defendants failed to offer any remedy for the violation of Ms. Faulkner's rights. Instead, Defendants offered a so-called "proposed remedial plan" unilaterally granting themselves an additional sixty days after the court determined liability in which to propose a specific remedy. After the district court on March 8, 1994 denied Defendants' motion to bifurcate the trial, Defendants refused to even begin the process to formulate a remedial plan. Defendants failed to propose any alternative remedy to coeducation prior to the close of trial on May 28, nearly three months after the court denied their motion to bifurcate and nearly four months after the court initially ordered Defendants to propose a remedy. More importantly, Defendants have been on notice since this court decided VMI over a year ago that they could offer a remedy. By the Defendants' own admission, they have had ample time to propose a remedy. Their inability to do so cannot be attributed to a lack of time.

Defendants' refusal to propose a remedy is simply the latest tactic in its strategy to delay adjudication of this case. The district court found that "not once has a defendant done anything to indicate that it is sincerely concerned to any extent whatsoever about Faulkner's constitutional rights." District court's opinion, JA 1475-1476. To the contrary, "The Citadel has made no secret of the fact that its primary goal in this case is to keep Faulkner out of the Corps of Cadets," employing "many of the sentiments and tactics" used to maintain whites-only education. Id. at 1476, 1479.

Defendants, who have "almost total control over the development and implementation of a parallel institution or program," have "done nothing to indicate that they would be inclined to hasten

that process." Id. Because Defendants alone can develop and fund a parallel program, the court found that "they can easily delay that process beyond the point in time that Faulkner would ever benefit from such a program." Id. The court found that "all of the actions witnessed by this court clearly and unequivocally indicate that the defendants would exert all of their considerable influence to insure that Faulkner would never have the opportunity to enroll in such a parallel institution or program." Id.

Defendants' complete and utter failure to develop or propose a remedial plan for Ms. Faulkner and other qualified women is inexcusable. Ms. Faulkner loses her right to receive a Citadel education each day that Defendants succeed in unlawfully barring her from the Corps of Cadets. The district court had no alternative but to order her immediate admission to the Corps of Cadets. Under an unbroken line of Supreme Court precedent, she is entitled to nothing less.

CONCLUSION

For all the foregoing reasons, the judgment of the District Court should be affirmed.

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* Admission Pending

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 **UNITED STATES OF AMERICA**,	
Plaintiff-Appellee,	
v.	
JAMES E. JONES, JR., et al.,	Case No. 94-1978
Defendants-Appellants,	
v.	
THE STATE OF SOUTH CAROLINA; THE CITADEL, THE MILITARY COLLEGE OF SOUTH CAROLINA; AND THE BOARD OF VISITORS OF THE CITADEL, THE MILITARY COLLEGE OF SOUTH CAROLINA;	
Additional Defendants-Appellants.	

CERTIFICATE OF SERVICE

I, Thomas F. Swift, hereby certify that on October 11, 1994, I caused true and exact copies of the Brief and Supplemental Exhibits of Plaintiff-Appellee Shannon Richey Faulkner, together with a Motion for Leave to File Supplemental Exhibits, to be served by overnight mail upon the following counsel of record:

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