

No. 95-100454

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1995

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UNITED STATES OF AMERICA,  
Petitioner,

v.

DAVIS MILITARY INSTITUTE,  
Respondent.

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ON WRIT FOR CERTIORARI FROM THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

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BRIEF FOR RESPONDENT

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September 1995

Counsel for Respondent

Best Brief

## **QUESTIONS PRESENTED**

1. Did the Court of Appeals for the Fourteenth Circuit err in holding that the admissions policy at Davis Military Institute violated the Equal Protection Clause?
2. Did the Court of Appeals for the Fourteenth Circuit err in holding that the proposed remedy of a parallel educational program at Davis Women's Institute for Leadership satisfied Equal Protection?

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## STATEMENT OF THE CASE

The United States Department of Justice filed a complaint on behalf of five female high school students who sought admission to Davis Military Institute (DMI). DMI, a 163 year old institute of higher education offering bachelor degrees in a military school environment, has an all-male admissions policy. The United States claimed that this policy violated the Equal Protection Clause of the Fourteenth Amendment. The suit, filed in the United States District Court for the Western District of Davis, was bifurcated so that the issues of liability and remedy could be decided separately.

At the liability phase of the trial, the district court applied a mid-level scrutiny standard of review and held that the all-male admissions policy at DMI violated the Equal Protection Clause. Although concluding that DMI's institutional mission justified its admissions policy, the court concluded that no state interest existed justifying the policy. The court determined that the asserted justification of diversity in education was not furthered by an admissions policy which conferred benefits on only one gender.

At the remedy phase of the trial, the district court held that the State of Davis's proposed remedy of a parallel program at Davis Women's Institute for Leadership satisfied the requirements for equal protection. Although recognizing that DMI and DWIL utilized different methodologies, the court attributed this difference to professional judgment of how best to provide the same benefits to males and females. Thus, the district court concluded, the programs were substantively comparable and the parallel program a sufficient remedy under the Equal Protection Clause.

On cross-appeals to the United States Court of Appeals for the Fourteenth



Circuit, the case was affirmed as to both liability and remedy. The circuit court again applied both mid-level scrutiny and the substantively comparable test. After affirming the lower court's decision as to liability, the circuit court examined the remedy, specifically focusing on whether the programs at DMI and DWIL were substantially related to an important state goal and whether they were substantively comparable. The court concluded that the programs were substantially related to the achievement of the government objective of providing single-gender education. Furthermore, the court concluded that the programs were substantively comparable as the different methods in each program were attributable to the different educational needs of females as opposed to males. Thus the court affirmed the lower court's finding that the remedy satisfied Equal Protection. This court granted a petition for certiorari on August 16, 1995.

#### SUMMARY OF THE ARGUMENT

The Court of Appeals for the Fourteenth Circuit erred in holding that the admissions policy at Davis Military Institute violates Equal Protection. The admissions policy's exclusion of females creates a gender classification subject to mid-level scrutiny under the Equal Protection Clause. Gender classifications can only be upheld under such a standard of review if they substantially relate to legitimate and important government objectives. When judged under these standards, the admissions policy at Davis Military Institute complies with Equal Protection.

The admissions policy at Davis Military Institute substantially relates to the legitimate and important state objectives of diversity in education, and excellence in education. The circuit court found that the admissions policy could not be justified under an objective of

educational diversity as long as only males benefitted from the policy. The circuit court, however, erred in not recognizing the presence of legitimate justification for the differing treatment males and females receive as a result of the admissions policy. Because females, unlike males, would fail to benefit from DMI's unique educational program, the State of Davis had sufficient reason to offer the benefits of DMI only to males under policies of diversity and excellence in education.

The Court of Appeals for the Fourteenth Circuit was correct in holding that the proposed remedy of a parallel educational opportunity for females at the Davis Women's Institute for Leadership sufficiently remedied the Constitutional violation. The admissions policies at the resulting separate single-gender institutions of Davis Military Institute and Davis Women's Institute for Leadership also involve gender classifications reviewable under mid-level scrutiny. These classifications withstand this level of scrutiny because they substantially relate to legitimate and important government interests in diversity and excellence in education. Moreover, because the schools offer the same unique benefits to males and females, Davis Military Institute and Davis Women's Institute for Leadership are substantively comparable.

## **ARGUMENT**

### **I. THE CIRCUIT COURT ERRED IN CONCLUDING THAT THE ADMISSIONS POLICY AT DAVIS MILITARY INSTITUTE VIOLATES EQUAL PROTECTION.**

Davis Military Institute's admissions policy is a gender classification properly analyzed under a mid-level scrutiny standard of review. When judged under this standard, DMI's policy is consistent with the Equal Protection Clause because it substantially relates to

the achievement of important state interests in diversity and excellence in education:

Furthermore, real differences between the sexes justify the state of Davis conferring the unique benefits of a DMI education on males only.

**A. THE PROPER STANDARD OF REVIEW FOR THE ADMISSIONS POLICY AT DAVIS MILITARY INSTITUTE IS MID-LEVEL SCRUTINY.**

The admissions policy at DMI is state action providing that different treatment be accorded to different individuals on the basis of their sex. As a result, it creates a gender classification subject to scrutiny under the Equal Protection Clause. See Reed v. Reed, 404 U.S. 71, 75 (1971). Since the case of Craig v. Boren, 429 U.S. 190 (1976), a majority of the Supreme Court justices have agreed on a standard of mid-level scrutiny in cases involving gender discrimination. Under this standard, the party seeking to uphold a statute that classifies individuals on the basis of their gender bears the burden of showing an exceedingly persuasive justification for the classification. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982). This burden can only be met by showing at least that the classification serves important governmental objectives, and that the classification is substantially related to the achievement of those objectives. Id. While neither the classification itself, nor the statutory objective, can be based on outdated stereotypes or over broad generalizations about the roles and abilities of men and women, legitimate differences between the sexes can form the basis for differing treatment. Reed, 404 U.S. at 75.

**B. THE ADMISSIONS POLICY AT DAVIS MILITARY INSTITUTE PASSES MID-LEVEL SCRUTINY.**

- 1. DMI'S ADMISSIONS POLICY SERVES THE LEGITIMATE AND IMPORTANT GOVERNMENT OBJECTIVES OF DIVERSITY AND EXCELLENCE IN EDUCATION.**

The State of Davis stresses diversity as one of the primary goals of its educational system. The Supreme Court has repeatedly acknowledged that education is a legitimate and important government objective. See Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (stating that "education is perhaps the most important function of state and local governments."). Furthermore, states have an interest in promoting diversity in education. See Regents of Univ. of California v. Bakke, 438 U.S. 265, 311-12 (1978) (stating that attainment of diverse student body is clearly a constitutionally permissible goal).

The State of Davis also seeks excellence in its educational system. Excellence in education has also been recognized as a legitimate and important government objective. See Vorheimer v. School Dist., 532 F.2d 880, 888 (3d. Cir. 1976) (stating that the "primary aim of any school system must be to furnish an education of as high a quality as is feasible").

**2. DMI'S ADMISSIONS POLICY IS SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF THESE LEGITIMATE AND IMPORTANT GOVERNMENT OBJECTIVES.**

DMI's males-only admissions policy is substantially related to achieving the objective of diversity in education because it enables the creation of a school with a unique educational method unlike that available at any other institution in Davis. DMI offers a single-gender educational experience stressing leadership training through military training and adversative methods. Because this type of education is not offered elsewhere in Davis, DMI contributes to diversity by offering a unique alternative to traditional college education. The unique education available at DMI also promotes excellence in education. Studies show that all-male learning environments designed for the unique learning needs of men, especially those



with a disciplinary focus, have positive effects in encouraging male academic achievement. See Valerie E. Lee & H.M. Marks, Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Value in College (1988) (revealing that graduates of all-male high schools more likely than coed school graduates to attend private and four year colleges).

The all-males admission policy substantially relates to the achievement of these objectives because it is the only way to create a student body in which these educational methods can be utilized. The unique DMI educational program, stressing adversative methods, can only be accomplished in a single-gender setting. Such aspects of the DMI program as the deprivation of cadet privacy and the requirement that all cadets live in one barracks could not be accomplished in a coeducational environment. Additionally, the lower court specifically found that a coeducational DMI would be forced to change the physical education requirements, the physical training methods as incorporated in the rat system, and the complete equality that is a central attribute of the DMI system. (R. at 8). Because the DMI system is a holistic one in which each component is crucial to the overall educational experience, and a coeducational DMI would be forced to make changes, DMI would no longer be able to offer the educational program it does in a mixed-gender setting. It is this educational program that contributes to diversity and excellence in education, thus, an admissions policy that allows for the continuance of this program is necessary to achieve these goals.

Not only is it necessary in achieving the objectives of diversity and excellence that DMI not be coeducational, it is also necessary that DMI be all-male. This is attributable to

the fact that differences between males and females result in DMI's unique educational program, with its use of adversative methods, not working in an all-female setting. See Patricia A. Bauch, Single-Sex Schooling and Women's Education 10 (1989). Because females would not stand to benefit from adversative education, an all-female DMI would contribute nothing to the state's goals of promoting diversity and excellence in education. Thus DMI's contribution to diversity and excellence in education is dependent upon an all-male student body. An admissions policy employing gender classifications is absolutely necessary to achieve this type of student body. Thus the gender classification involved in DMI's admissions policy substantially relates to the achievement of diversity and excellence in education.

**C. THE STATE OF DAVIS HAS AN ADEQUATE JUSTIFICATION FOR CONFERRING THE BENEFITS OF A DMI EDUCATION ON MALES ONLY.**

The trial court in this case found DMI's admissions policy not substantially related to any state interest in diversity because the admissions policy only favored one gender - males. (R. at 2). A policy of diversity seeking to increase the range of educational opportunities through provision of single gender schools, the court asserted, must favor both genders. (R. at 2). Because both males and females would stand to benefit from the availability of single-gender schools, the state violates Equal Protection when it makes this benefit available only to one.

However, the State of Davis has chosen to pursue its objectives of diversity and excellence in education not through the provision of single-gender schools, but through the provision of schools with varying missions. See (R. at 4) (explaining that Davis's current

plan for higher education states a support for diversity in educational missions). Consistent with this, DMI's contribution to diversity and excellence comes not because it is single-gender, but because it offers a unique type of education, that of a college focusing on leadership development through military training and adversative methods. This conclusion is supported the fact that historically DMI's all-male status contributed nothing to diversity and excellence in education for there were several all-male state schools already existing. (R. at 3). What made DMI unique, and thus the aspect of DMI that contributed to these goals, was its unique educational mission and programs.

Viewed in this proper light, the State is justified in giving the benefit of the DMI educational program to males only. The Equal Protection Clause allows the states to treat differently situated groups in different ways. Women are differently situated than men when it comes to DMI's unique educational program. This is because a one key component in this holistic program is the adversative method and strong evidence suggests that women, unlike men do not benefit from this educational method. Providing women with a DMI type education, therefore, would not promote any objectives of diversity and excellence in education. The State of Davis, therefore, is justified in conferring the benefits of a DMI education on males alone. Cf. Rostker v. Goldberg, 453 U.S. 57 (1981) (refusing to hold that females must register for the draft because as draft was designed for combat readiness, and only men eligible for combat, requiring females failed to promote the government interest).



**II. CIRCUIT COURT WAS CORRECT IN CONCLUDING THAT THE STATE OF DAVIS'S PROPOSED REMEDY OF A PARALLEL EDUCATIONAL OPPORTUNITY AT DAVIS WOMEN'S INSTITUTE FOR LEADERSHIP SATISFIES EQUAL PROTECTION.**

Single-gender schools involve admissions policies that must be analyzed under the mid-level scrutiny test imposed on all gender classifications. In addition, separate single-gender schools for males and females must be substantively comparable. When analyzed under these standards, the State of Davis's proposed remedy of separate single-gender schools at DMI and DWIL clearly complies with equal protection. The schools substantially relate to important state interests in diversity and excellence in education, and offer substantively comparable educational opportunities to males and females.

**A. THE PROPER STANDARD OF REVIEW OF THE PROPOSED REMEDY IS MID-LEVEL SCRUTINY PLUS THE SUBSTANTIVELY COMPARABLE TEST.**

The Supreme Court, in Brown v. Board of Education, rejected the separate but equal doctrine of Plessy v. Ferguson, 163 U.S. 538 (1896), finding that separate race schools were "inherently unequal." 347 U.S. 483, 495 (1954). This decision basically created a rule of per se invalidity for schools separated by race. The decision, however, has never been extended to prohibit single-gender schools. See Vorchheimer v. School District, 532 F.2d 880, 881 (3d Cir. 1976), aff'd per curiam, 430 U.S. 703 (1977) (upholding single-sex public high schools); Williams v. McNair, 316 F.Supp. 134 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971). This is because of fundamental differences between race and gender.

First, there is not the same history of gender discrimination as there is with race discrimination. The primary reason for the Supreme Court's rejection of separate schools for the races in Brown was the Court's belief that the long history of racial discrimination made

forced segregation in single-race schools convey a stigma of inferiority on black schoolchildren. Brown, 347 U.S. at 494. While gender discrimination is also part of our history, discrimination against females has never been as prevalent nor taken the extreme forms of racial discrimination. Single-gender schools, therefore, are far less likely to result in a stigma of inferiority. This conclusion is supported by the fact that, unlike the situation in Brown, the women choosing to attend a single gender school, at least at the collegiate level, are making a voluntary choice and not having separation forced upon them.

Second, while there are no real differences between the races, there are fundamental differences between the genders. The rejection in Brown of separate but equal white and black schools was also premised on a recognition that racial classifications are invalid because they are not based on relevant differences between the races. In the context of gender, the law recognizes the presence of genuine psychological and physiological differences between the sexes which may, in limited circumstances, justify disparity in law. See Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1971).

Though not *per se* unconstitutional, single-gender schools can still violate the Equal Protection Clause. This is because they involve admissions policies that discriminate on the basis of a person's sex. The constitutionality of these policies must be judged under the same mid-level scrutiny applied to other gender classifications. However, even if a state provides both males and females separate single-gender schools, equal protection can still be violated if one of the schools offers opportunities to one gender not available to the other gender anywhere else in the state educational system. This is because the Equal Protection Clause prevents a state from offering fewer benefits to one gender than the other solely on

the basis of sex, unless legitimate reason exists for the distinction. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 n.17 (1981) (stating that with gender classification the issue is whether the State's decision to provide a benefit to only one class substantially relates to achievement of a legitimate goal). This inquiry is reflected in the requirement that single-gender schools be substantively comparable.

**B. THE STATE OF DAVIS'S PROPOSED REMEDY PASSES MID-LEVEL SCRUTINY.**

**1. SINGLE-GENDER SCHOOLS SERVE THE STATE OF DAVIS'S LEGITIMATE AND IMPORTANT OBJECTIVES OF DIVERSITY AND EXCELLENCE IN EDUCATION.**

As discussed above in Section I(B)(1)supra, the federal courts have repeatedly recognized diversity and excellence in education as legitimate and important state objectives.

**2. THE CLASSIFICATIONS INVOLVED IN DMI AND DWIL ARE SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF THESE LEGITIMATE AND IMPORTANT OBJECTIVES.**

The gender classifications involved in the admissions policies at DMI and DWIL substantially relate to diversity because they are the only means possible to create single-gender educational alternatives to an overwhelmingly mixed-gender state educational system. Currently all public colleges in Davis, excepting DMI, are coeducational. (R. at 3). This results in only 1312 individuals in a total public college enrollment of 158,260 currently attending a public single-gender school in Davis. (R. at 3). Providing additional single-gender educational opportunities through DMI and DWIL promotes diversity by making available options to both sexes that wouldn't be there otherwise. In a state offering single-sex as well as coeducational options, students are able to select the type of education most tailored to the individual's own needs. Single-gender schools promote educational diversity,

even though a student's opportunity to attend one specific school is eliminated, because options in the state-wide system as a whole are increased. See Heaton v. Bristol, 317 S.W.2d 86, 98-99 (Tex.Civ.App. 1958) (upholding state-wide view of educational diversity), cert. denied, 359 U.S. 230 (1959)

The admissions policies at DMI and DWIL also substantially relate to the achievement of excellence in education by enabling the creation of two single-gender schools that are likely to more effectively educate students. Many sociological studies conclude that single-gender schools, including colleges, are superior to coeducational schools in terms of promoting academic achievement, intellectual self-esteem, and other factors. See, e.g., Valerie E. Lee & Anthony S. Bryk, Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes, 78 J. of Educ. Psych. 381 (1986) (explaining sociological study revealing that students attending single-sex schools outperform students attending coeducational schools in wide range of areas); Alexander Astin, Four Critical Years: Effects of College on Beliefs, Attitudes and Knowledge (1977) (contending that single-sex schools lead to higher academic and professional achievement). In addition, many commentators contend that single-gender schools promote a better learning environment by providing relief from distracting sexual pressures, and enabling development of a learning environment tailored to the needs of the unique learning dispositions of each gender. See Deborah J. Mixell, An Annotated Bibliography of the Research Comparing Academic Achievement and Attitudes of Students in Coeducational and Single-Sex Secondary Schools 10 (1989). Courts have also recognized the benefits stemming from single-gender schools. See Williams v. McNair, 316 F.Supp. 134, 137 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971)

(acknowledging that "a respectable body of educators believe in benefits of single-gender education).

The classifications involved in the admissions policies at DMI and DWIL are not based on gender stereotypes, but rather on the strong evidence establishing that males and females have different educational needs. Vast psychological evidence exists indicating that biological differences between the sexes include differences in temperamental disposition and cognitive functioning. See Kingsley R. Browne, *Biology, Equality and the Law: The Legal Significance of Biological Sex Differences*, 38 Sw. L.J. 618 (1984). These differences affect how each gender learns, resulting in different educational environments being best for each gender. See Richard A. Hawley, *About Boys' Schools: A Progressive Case for Ancient Form*, Teacher's College Record, Spring 1991, at 440. While men tend to do best in an adversative environment, women respond best to a supportive educational environment. See Richard Reisman, *Constraint and Variety in American Education* (1956). These are just the sort of differences between the sexes that the Equal Protection Clause allows the states to take into account.

**C. THE STATE OF DAVIS'S PROPOSED REMEDY PASSES THE SUBSTANTIVELY COMPARABLE TEST.**

**1. THE SUBSTANTIVELY COMPARABLE TEST DOES NOT REQUIRE THAT DMI AND DWIL BE IDENTICAL.**

The substantively comparable test applied by the lower courts has no clearly established standards as to its meaning. Nonetheless, it clearly does not require equality or identical treatment. One reason is that no two schools can ever be identical in all respects. Moreover, single-gender schools will never be identical because by their very nature single-



gender schools are designed to meet the different needs of male and female students.

The closest analogue to a substantively comparable test is found in the cases applying the separate but equal standard to racially segregated schools in the years before the separate but equal doctrine was rejected in Brown v. Board of Education. See, e.g., Sweatt v. Painter, 339 U.S. 629 (1950). These cases did require equality in the separate educational facilities. However, the requirement of equality in these cases is attributable the fact that we recognize no fundamental differences between the races, and as a result there can be no legitimate justifications for giving dissimilar treatment on the basis of race. The segregated schools, therefore, had to be equal. With gender, however, there are fundamental differences that can justify dissimilar treatment, as the Equal Protection Clause allows states to treat differently situated groups in different ways. See Reed v. Reed, 404 U.S. 71, 75 (1975). Equality or identical treatment is therefore not the standard separate gender schools must satisfy under the substantively comparable test.

**2. SUBSTANTIVELY COMPARABLE TEST ONLY REQUIRES THAT DWIL OFFER FEMALES THE BENEFITS OF A DMI EDUCATION THAT ARE UNAVAILABLE TO FEMALES ELSEWHERE IN THE STATE EDUCATIONAL SYSTEM.**

The trial court found that DMI contributed unique benefits to the state educational system. (R. at 4). These benefits are unique because they are not available elsewhere in any state educational institution. However, because these benefits are not available elsewhere, DMI's males-only admissions policy serves to offer males greater opportunities in the state educational system than females are offered. This violates the Equal Protection Clause, which prevents a state from offering fewer benefits to one gender than the other solely on the basis of sex. To remedy this violation, Davis can either stop providing the unique benefits

of DMI to males, or can offer the unique benefits of DMI to both sexes. Separate single-gender schools can accomplish the latter alternative if the all-female school offers the unique benefits of a DMI education that are currently made available only to males. This is what must be analyzed under the substantively comparable test.

This view of substantively comparable is consistent with the approach taken in prior cases. Separate single-gender schools have been upheld when they don't result in either sex having available benefits to them in the state educational system that are not available to the other gender. See Vorcheimer, 532 F.2d at 888; Williams, 316 F.Supp. at 138; Heaton v. Bristol, 317 S.W.2d 86, 100 (Tex. Civ. App. 1958), cert. denied, 359 U.S. 230 (1959).

The unique benefits of DMI that must be analyzed under the substantively comparable test are those aspects of DMI that make it different from educational opportunities available elsewhere in the state-wide educational system. The two aspects of DMI not available at other public colleges are single-gender education, and the unique educational program focusing on special training in leadership. Substantive comparability thus requires that DMI and DWIL each provide the opportunity for single-gender education with special training in leadership. This ensures that neither males nor females are receiving benefits not available elsewhere in the system.

**3. DWIL OFFERS FEMALES THOSE ASPECTS OF A DMI EDUCATION UNAVAILABLE TO FEMALES ELSEWHERE IN THE STATE EDUCATIONAL SYSTEM.**

Under these standards, the educational opportunities available at DMI and DWIL are substantively comparable. Both DMI and DWIL offer publicly subsidized college education in a single-gender environment, leading to a bachelor degree, and focusing on development



of leadership skills. The programs are aimed at achieving similar results, namely the development of individuals better suited for leadership than those graduating from other state institutions of higher learning.

DMI and DWIL do utilize different educational methods. While both have military components, DMI is run on an adversative education model, while DWIL is run on a cooperative education model. This different approach encompasses many specific differences in the programs at DMI and DWIL including: the absence of the "rat line" at DWIL, the increased privacy of DWIL cadets, the fewer regulations governing the behavior of DWIL cadets, and overall absence of conditions designed to promote stress at DWIL. This difference in methods, however, is not significant under the substantively comparable test.

As explained, the substantively comparable test only imposes the requirement that DWIL offer females those unique benefits DMI offers males in the state educational system. The unique benefit DMI offers is its single-gender educational program focusing on leadership development. Both DMI and DWIL provide this benefit. The educational methodologies used within this overall program can differ based on the differing needs of males and females. Equal Protection allows the states to treat differently situated groups in different ways, and the genders are differently situated when it comes to adversative education. This conclusion is not based on stereotypes, but on the strong sociological evidence suggesting that females react differently to the adversative educational method, and would not stand to benefit from it. See Patricia A. Bauch, Single-Sex Schooling and Women's Education 10 (1989). Under the substantively comparable test, DMI and DWIL need only offer similar single-gender education with training in leadership. The schools

remain free to take legitimate gender differences into account in determining the methodologies needed for each institution to succeed in its objective.

DMI and DWIL also differ in that DWIL lacks an engineering program. This difference cannot be accounted for by the differing educational needs of each gender. This difference in course offerings, however, does not violate equal protection, because DWIL need not offer all the same courses of study as are offered at DMI to be substantively comparable. The State of Davis, through DWIL, need only provide to females those aspects of the DMI program that are unique and not available elsewhere in Davis. These are the only benefits Davis currently being conferred on men alone due to the discriminatory admissions policy at DMI. DMI's academic program is not unique, but rather offers the same courses widely available at other public colleges in the State of Davis. (R. at 7). Because courses of study in engineering can be obtained by females elsewhere, the State of Davis does not deny females a benefit granted to men when DMI, but not DWIL offers courses in engineering. This is the view taken by one of the few cases to address separate single-gender schools, Vorcheimer v. School District of Philadelphia. The Third Circuit, in Vorcheimer, found two single-sex high schools to be substantially equal, despite the fact that the offerings as to one discipline were unequal. Vorcheimer, 532 F.2d at 882 (accepting lower court's finding that separate single-sex high schools were substantially equivalent despite fact that boys school had superior science facilities).

Another differences between DMI and DWIL is a disparity in intangible factors such as prestige sure to exist at the newly formed DWIL as opposed to the 163 year old DMI. One could argue that intangible factors arising out of attending DMI, such as prestige and

tradition, are unique benefits not available to females at any other state education facility. However, even if this is true, it is unclear whether intangible factors are relevant in determining the substantive comparability of the educational opportunities a state grants to each gender.

The pre-Brown separate but equal cases did find intangible factors to be significant in determining whether two schools are equal. However the case law is unclear as to whether intangible factors are relevant in comparing single-gender educational opportunities. The Fourth Circuit, in Kirstein v. Rector and Visitors of University of Virginia, a case in which females sought entry to the all-male University of Virginia, did find relevant the fact that the all-male school offered prestige factors not available to females at any other state institution. 309 F.Supp. 184, 187 (E.D. Va. 1970). However the primary factor in the court's decision seems to have been the fact that the all-male school offered courses of instruction not available at any other Virginia institution. Id. The differences in prestige were merely an additional factor demonstrating that male and female education options in Virginia were not equal. Because it has been established that DMI does not offer any academic offerings not available to females elsewhere, the prestige factor alone should be insufficient under Kirstein to find that the schools are not substantively comparative.

The lack of clear precedent for finding intangible factors such as prestige and tradition relevant by themselves in determining substantively comparable educational opportunities, should prevent the Court from taking them into account in this case. This is especially true in light of the fact that the DWIL proposal attempts to lessen the impact of such intangible factors through a pledge by the DMI Alumni Association to support DWIL graduates.

## CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court to reverse the ruling of the United States Court of Appeals for the Fourteenth Circuit as to the Equal Protection violation, and affirm the ruling as to the remedy.

Respectfully submitted,

Counsel for Respondent