

No. 03-863

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**In The  
Supreme Court of the United States**

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JOSIAH BUNTING, III, Superintendent Emeritus, and  
J. H. BINFORD PEAY, III, General, USA (Retired),

*Petitioners,*

v.

NEIL J. MELLEN and PAUL S. KNICK,

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fourth Circuit**

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**REPLY BRIEF**

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## REPLY BRIEF OF PETITIONERS

Nothing in respondents' brief in opposition calls into question the need for this Court to review and reverse the decision below.<sup>1</sup> Indeed, the more respondents' brief is studied, the more apparent it becomes that certiorari should be granted.

1. *The Circuit Split*: Respondents invite this Court to ignore the split in the circuits, a split recognized by both the panel and the judges dissenting from denial of en banc review. *See* App. 31, 74. Respondents insist that the decision below is consistent with *Chaudhuri v. State of Tennessee*, 130 F.3d 232 (6th Cir. 1997), and *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997). Br. Opp. at 15. Their argument cannot withstand scrutiny.

a. Respondents attempt to gloss over the circuit split by ignoring the language of the opinion below (never citing it in this portion of their brief) and by exaggerating the factual differences among the cases. For example, respondents say that "in neither case did the university itself have any role in composing the prayer, other than to direct that they be non-sectarian." Br. Opp. at 15. Yet, in both of those cases, it was the university that decided to include a prayer in its public meeting and that chose the person to compose and deliver it. *See Chaudhuri*, 130 F.3d at 232; *Tanford*, 104 F.3d at 983.<sup>2</sup> By its reliance on *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999), the Fourth Circuit made it plain that it regards even this minimal level of involvement as excessive entanglement. In its view, the Establishment Clause is violated whenever a public entity "decide[s] to include prayer in its public meetings [and] chose[s] which member of the

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<sup>1</sup> This brief will use the abbreviation "Br. Opp." to designate respondents' brief in opposition. Other abbreviations will have the same meaning as in the petition.

<sup>2</sup> Moreover, the instructions in *Tanford* were *not* just that the prayer be non-sectarian; the university also asked that the prayer be "unifying and uplifting." 104 F.3d at 986. These adjectives also fairly describe the VMI prayers.

local religious community would give those prayers. . . . ” App. 72 (quoting *Coles*, 171 F.3d at 385).

b. Respondents correctly note that the prayers at VMI are said daily, while those in *Chaudhuri* and *Tanford* were said less often.<sup>3</sup> However, if the Fourth Circuit panel wanted to harmonize its jurisprudence with *Chaudhuri* and *Tanford* – based on a difference in the frequency of the prayers, or on any other factor – it would have said so. It drew no such distinction. Given its view of the law, the panel surely recognized – but regarded as unavoidable – the “deep conflict with two other circuits.” App. 31 (Niemeyer, J., dissenting from denial of reh’g en banc). It is a conflict this Court should now resolve.

2. *Factual Omissions*: In places, respondents seem to forget that this case was decided on summary judgment, and that conclusions adverse to VMI are rulings of *law* – not factual finding based on weighing the evidence. Moreover, respondents build their arguments on a highly selective recitation of facts, insinuating that VMI seeks to indoctrinate cadets with an official religious belief. The omitted parts of the record correct any misapprehension. For example:

a. Respondents leave out undisputed testimony that VMI makes no attempt to inculcate religious belief and

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<sup>3</sup> Respondents contend that these prayers cannot serve the function of solemnizing an event because they are said every day. *See* Br. Opp. at 15. The argument is a *non sequitur*. The legislative prayers approved in *Marsh v. Chambers*, 463 U.S. 783 (1983), were said every day, and the brief invocations said at the opening of federal and state courts are said every day those courts are in session. Here the prayers are not just a prelude to eating supper. They come as part of a larger military ceremony, Supper Roll Call. It is a ceremony designed to re-assemble the Corps at the end of a rigorous day and, in so doing, to remind these young men and women who they are and why they are there. It is an occasion brimming with solemnity and purpose, and it presents a legitimate opportunity for “expressing confidence in the future, and encouraging the recognition of what is worthy of respect in society.” *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring).

that it seeks to impart a classic, liberal education. *See* Br. Opp. at 1-2. At the same time, respondents do not deny these facts or challenge those parts of VMI's petition setting them out. *See* Pet. at 3 (citing JA-113).

b. Respondents discuss how they went about making their objections known before filing suit, but they fail to mention VMI's response. *See* Br. Opp. at 5. In denying respondents' request to stop the prayers, General Bunting explained that no one was required to participate:

Those present during the recitation, who do not subscribe to the statements offered, are not obliged to endorse them, agree with them, or pay them any particular heed. In the old phrase, there is no reason why, for them, the return of thanks – “grace” – should not go in one ear and out the other.

JA-268.

c. Respondents point to a footnote where the court of appeals said it would assume “that they were required to listen to the prayer in order to eat in the mess hall.” Br. Opp. at 4 n.8 (quoting App. 44 n.4). Yet, respondents fail to mention that, despite its footnote, the court of appeals used a different factual predicate in the body of its opinion. At the beginning of its coercion discussion, the court acknowledges that “[a]t all relevant times, VMI's upper-class cadets could avoid the mess hall in order to shield themselves from the prayer.” App. 23. Thus, the court of appeals produced an opinion of even broader sweep than might be suggested if it had adhered to the approach described in its footnote.<sup>4</sup>

3. *Procedural Clarification*: Respondents contend that petitioners were granted “full relief” below. Br. Op. at 6 n.4. This is plainly wrong. Although the award of qualified

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<sup>4</sup> On a related point, respondents claim – inaccurately – that, “[b]efore this lawsuit was filed, all cadets were required to attend the entire SRC ceremony, *including the prayers* in order to eat during the first seating of supper.” Br. Opp. at 4 n.3 (emphasis added). Their suggestion that VMI reversed its position in the trial court is also off the mark, but the point is irrelevant and need not be belabored here.

immunity was upheld, this case involves far more than a claim for nominal damages. It involves the question of whether VMI may read a prayer before supper without violating the Constitution. The question was decided against VMI, and respondents do not deny that this adverse ruling gives petitioners “a stake in the appeal satisfying the requirements of Art. III.” *See* Pet. at 11 n.15 (quoting *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 334 (1980)).<sup>5</sup>

4. *The Lemon Test*: Respondents’ discussion of the test found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), makes the need for certiorari all the more evident.

a. While asserting that the court of appeals took “full account” of the fact that VMI cadets are adults, respondents cite no part of the opinion below supporting that assertion. Instead, they quote excerpts of the opinion which quote, in turn, cases involving only school children. *See* Br. Opp. at 9 (re-quoting lower court’s quotations from *Wallace v. Jaffree*, 472 U.S. 38 (1985), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

b. While any prayer undoubtedly has *some* religious effect, VMI has explained why, in this context, the *principal* effects of the supper prayers are secular. In so doing, it has identified not just the mature age of the audience,<sup>6</sup> but a series of other factors as well.<sup>7</sup> Judge Wilkinson has also

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<sup>5</sup> Whether or not respondents are a “prevailing party” for purposes of attorneys’ fees under 42 U.S.C. § 1988 – the issue at stake in *Hewitt v. Helms*, 482 U.S. 755, 763 (1987) – is an entirely different question not at issue in this petition.

<sup>6</sup> Respondents concede the age of the audience is relevant in discussing whether “coercion” is present, but suggest that maturity is irrelevant in discussing “endorsement.” Br. Opp. at 10. However, this Court has already recognized that the age of the audience is relevant to any discussion of endorsement. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (“University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University’s policy is one of neutrality toward religion.”).

<sup>7</sup> *See, e.g.,* Pet. at 18 and 29 (noting that this case involves both an organizational meal and a military ceremony; that the prayers are

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done so.<sup>8</sup> Yet, respondents pretend that these factors have never been identified; and, on this pretense, they seek to excuse the court below for failing to consider any secular effects in applying *Lemon's* second prong. *See* Br. Op. at 10. The reason for the court's failure cannot be so easily disguised. Instead of weighing secular effects against any perceived endorsement, the court of appeals viewed any hint of endorsement as *per se* fatal, a step that this Court has never taken and that warrants review.<sup>9</sup>

c. Respondents seek to bolster their second prong argument by complaining that the prayers at issue were written by a "school official." Br. Opp. at 9. That "official" is the VMI chaplain, Colonel James S. Park, whose role in composing these prayers is consistent with the role of other chaplains in military settings. For this chaplain – an experienced Army officer – to compose the prayers is not only constitutionally innocuous, it ensures that the

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brief, non-denominational and non-proselytizing; that they are said at an institution of higher education where cadets attend by choice and where they serve academic purposes and implicate academic decision-making, not the political community).

<sup>8</sup> As noted in the petition, Judge Wilkinson summarized the three categories of secular purposes as academic, expressive and accommodationist. Pet. at 5 (quoting App. 19 (Wilkinson, J., dissenting from denial of reh'g en banc)). Similarly, Judge Wilkinson explained, "the prayer principally solemnizes the meal, encourages reflection, and promotes VMI's core training mission." Pet at 17 (quoting App. 22 (Wilkinson, J., dissenting from denial of reh'g en banc)). Judge Wilkinson's view that the prayers promote VMI's mission is supported by the expert report of Colonel John W. Brinsfield, Ph.D., reprinted at App. 119, an important witness whom respondents also wholly disregard.

<sup>9</sup> Respondents do assert *their own* opinion that the religious effects of the prayer predominate over the secular; however, they cannot point to any language suggesting the *court of appeals* attempted to make any comparison. *See* Br. Opp. at 10. Moreover, even if respondents' language had been adopted by the court below, it still would be highly problematic. While purporting to take secular effects into account, respondents cast their argument in terms so sweeping and extreme as to jeopardize the ability of prayer to survive in *any* government setting.

prayers are non-sectarian, non-denominational and otherwise mirror those heard in the United States military, thereby promoting VMI's secular purposes.

d. In discussing *Lemon's* third prong, VMI explained that the Fourth Circuit broke with this Court's precedents in two ways. First, it found "excessive entanglement" even though no religious institution was present. Second, it followed the erroneous approach adopted in *Coles*, under which a public official may neither *invite* someone to say a prayer nor select *himself* to say a prayer, thereby eliminating all options for prayer at public assemblies based on the third prong alone. *See* Pet. at 21-22. Respondents do not challenge VMI's discussion of the third prong, nor do they explain why the lower court's dramatic departure from this Court's jurisprudence should escape this Court's review.

5. *The "Coercion" Theory*: Respondents' discussion of the lower court's "coercion" theory fares no better than its *Lemon* analysis. Here, too, the brief in opposition merely serves to highlight the need for review by this Court.

a. VMI has pointed out that the only "requirement to participate" alleged below by respondents was the requirement that they stand. The "social pressures" on which the court of appeals based its decision were never part of their case. *See* Pet. at 24. Respondents do not dispute this characterization of their position. Even so, they now take up the same broad brush employed by the court of appeals, arguing that VMI's adversative system coerces cadets into entering the mess hall and participating in the prayers. Br. Opp. at 24. If the "social pressures" of an adversative system can constitute unconstitutional coercion – even though never noticed by respondents at the time – then it is difficult to see how prayer could survive in *any* military setting.<sup>10</sup> Review by this Court is needed to reverse this ill-conceived precedent.

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<sup>10</sup> As described by the respondent, Neil Mellen, one such setting is the Marine Corps officer candidate school, which he attended in the summer before his final year at VMI. "Each night at the end of the training day, when the [officer] candidates were preparing for bed, line[d] up facing their

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b. Respondents insist that “standing politely” while a prayer is read is tantamount to “participation” in it and, on this basis, too, contend that VMI cadets are unconstitutionally coerced. Br. Opp. at 13.<sup>11</sup> None of the three cases they cite in support of this proposition involve standing in the context of a military ceremony. All three cases involved only schoolchildren.<sup>12</sup> As this Court has explained, it is an open question whether the same Establishment Clause analysis that applies to children also applies to adults. *Lee v. Weisman*, 505 U.S. 577, 593 (1992). Respondents do not explain why certiorari should not be granted to resolve this question.

c. Moreover, the court of appeals did not base its decision on the requirement that cadets must stand. If this were its concern, it would have been an easy enough matter for the court to have said so, and for VMI to have remedied the perceived violation with action far less drastic than complete abolition of the prayers. Instead, the court of appeals perceived unconstitutional coercion based merely on the fact that dissenting cadets *heard* the prayers. Such an approach is akin to the one followed by

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beds in a World War II style barracks . . . the command was given by the sergeant instructor that prayers were to be given.” JA-49.

<sup>11</sup> Respondents admit that “VMI cadets are often required to stand, on a variety of occasions, for a variety of purposes, and hear words spoken by other cadets, Institute officials, and third party visitors.” JA-189. Among such occasions are the entry of an officer into the room; the entry of a professor into the classroom; VMI football games, where cadets stand during the entire game; parades; formations, where they receive admonition or instruction from the commandant; inspections (for some cadets), where they receive corrections from the inspecting officer. JA-25-26 (Knick); JA-46-47 (Mellen). Respondents concede that standing on *these* occasions indicates respect – or is simply a response to an order – and does *not* indicate agreement with what is being said. *Id.*

<sup>12</sup> See Br. Opp. at 13 (citing *Engel v. Vitale*, 370 U.S. 421 (1961) (invalidating practice of prayer composed by state agency and recited in public school classrooms); *Lee* (striking down practice of inviting clergy to deliver invocations and benedictions at middle school and high school graduations); and *Santa Fe* (striking down practice of school-sponsored prayer at high school football games)).

the Ninth Circuit in the context of school children who hear the Pledge of Allegiance. *See Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002), *cert. granted sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 384 (2003). Respondents make no attempt to defend this radical view of coercion followed by the Fourth Circuit.

6. *Consequences for the Military*: Respondents seek to obfuscate the probable adverse effect of the decision below on the United States Naval Academy, ROTC programs and military installations in the Fourth Circuit. Br. Opp. at 14. Yet they fail to offer any principled grounds for treating these government institutions more favorably than VMI.

a. Respondents do not deny that VMI is an important source of commissioned officers for the United States military.<sup>13</sup> Nor do they deny that the practice they challenge – like the comparable practice at Annapolis – is “reasonably calculated” to advance the goal of training military leaders.<sup>14</sup> Nor do they repudiate the efforts now underway to stop mealtime prayers at Annapolis based on the decision below.<sup>15</sup> Instead, respondents base their arguments on the Fourth Circuit’s comment that “[t]he Virginia General Assembly, not the Department of Defense, controls VMI.” Br. Opp. at 14 (quoting App. 73 n.13). The distinction is irrelevant. While military preparations

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<sup>13</sup> *See* Pet. at 3 n.1 (noting VMI’s record of producing commissioned officers). *See also* Mary Leonard and Tatsha Robertson, “For Colonel, Search Mission Was a Perfect Fit,” *Boston Globe*, Dec. 16, 2003, A-31 (noting that Saddam Hussein was captured in raid directed by U.S. Army Colonel James B. Hickey – a 1982 VMI graduate).

<sup>14</sup> *See* Pet. at 5 n.6 (noting expert report of Colonel John W. Brinsfield, Ph.D.). *See also* Br. Opp. at 1 (acknowledging that “VMI attempts to promote the development of qualities important to effective combat leadership . . .”).

<sup>15</sup> *See* Pet. at 11 (noting ACLU’s demand that the Naval Academy end mealtime prayer, based on decision in VMI case).

are chiefly a matter of federal concern, they are not exclusively so. For example, state militias – often known today as the National Guard – date back to the founding of the Republic. Thus, the special constitutional considerations that attach to military interests cannot be limited to training programs operated by the federal government. This is especially so when, as here, the state-operated program is closely linked to federal military service.

b. The close links between VMI and federal military service have been codified in a federal law designating the Institute as one of only six “senior military colleges” nationwide. 10 U.S.C. § 2111a (making the designations and special provisions for support from the Department of Defense). This designation accompanies a Congressional finding that VMI “consistently [has] provided substantial numbers of highly qualified, long-serving leaders to the Armed Forces.” Act Nov. 18, 1997, P.L. 105-85, Div A, Title V, Subtitle E, Part I, § 544(a)-(c), 111 Stat. 1744.

c. Military officers commissioned through VMI confront dangers and difficulties no different from those confronted by graduates of the federal service academies, a point underscored by events in Iraq.<sup>16</sup> Respondents present no constitutional theory that precludes state-trained military officers from being as well-prepared – in all respects – as their federally-trained counterparts. Thus, if prayers are forbidden at VMI’s Supper Roll Call ceremony, it is difficult to see how they could be allowed in federal service academies or other military settings. Indeed, a distinguished group of retired military officers and civilian military leaders has filed an *amicus* brief supporting VMI. As they recognize, “the decision below threatens to undermine the long tradition of religious elements in military ceremonies and activities.” *Amicus* Br. of Admiral Charles S. Abbot, *et al.* at 7.

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<sup>16</sup> See Imran Vittachi, “Deaths in Iraq Occur in Pairs,” *Chicago Tribune*, Nov. 12, 2003, p. 7 (reporting combat deaths of two VMI graduates: U.S. Army Captain John R. Teal (Class of 1994) and U.S. Army 1st Lieutenant Joshua C. Hurley (Class of 2001)).

7. *Consequences for Other Public Colleges*: Respondents also contend that the decision below does nothing to jeopardize the ability of other public colleges and universities to include an invocation or benediction at their official events. Br. Opp. at 14-15. The distinction, they suggest, is that the prayers at VMI are said daily while other institutions reserve them for “important” occasions. *Id.* at 15. However, respondents have not cited any passage in the decision below suggesting that the case turned upon such a distinction. Indeed, the court of appeals did not base its decision on the frequency of the prayers, but upon far broader legal theories that implicate much more than supper prayers at VMI. As recognized by the *Amici States*, “the decision threatens to destroy the ability of public colleges and universities to include non-sectarian prayers and benedictions in their convocations, graduation ceremonies, and other formal school events.” Br. of *Amici States* at 4.

8. *Other Considerations*: VMI has pointed out the refusal of the court of appeals to take into account the Institute’s discretion in academic decision-making as a factor bearing upon its constitutional boundaries. Pet. at 9 n.14 and 29 n.30. *See also* App. 59 n.8. In light of *Grutter v. Bollinger*, 123 S.Ct. 2325, 2339 (2003), such an omission is problematic. Yet, respondents fail to address it. Respondents also fail to comment on *Marsh v. Chambers*, 463 U.S. 783 (1983), an omission difficult to reconcile with their concession that “prayers [in] the military or at meals are part of the fabric of our society.” Pet. at 7 (quoting JA-340). *See Amicus* Br. of Admiral Charles S. Abbot, *et al.* (explaining that decision below conflicts in principle with *Marsh* and splits with Second Circuit); *Amicus* Br. of First Principles, Inc. (detailing split in circuits on use of *Marsh* in Establishment Cause cases). Respondents’ failure to address the constitutional principles found in *Grutter* and *Marsh* underscores the need for certiorari.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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