

In the

ORIGINAL

Supreme Court of the United States

MISSISSIPPI UNIVERSITY FOR
WOMEN, ET AL.,

Petitioners,

v.

JOE HOGAN

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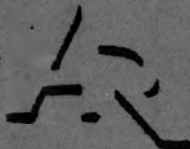
NO. 81-406

Washington, D. C.

Monday, March 22, 1982

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REPORTING

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 MISSISSIPPI UNIVERSITY FOR :
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5 Petitioners, :
6 v. : No. 81-406
7 JOE HOGAN :

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9 Washington, D. C.
10 Monday, March 22, 1982

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:03 o'clock a.m.

14 APPEARANCES:
15 HUNTER M. GHOLSON, ESQ., Columbus, Mississippi; on behalf
16 of the Petitioners.
17 WILBUR O. COLOM, ESQ., Columbus, Mississippi; on behalf
18 of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Mississippi University for Women against Hogan.

Mr. Gholson, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF HUNTER M. GHOLSON, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. GHOLSON: Mr. Chief Justice, and may it please the Court, this argument is presented on behalf of the Constitutional Board of Trustees which administers and sets policy for all higher learning in the state of Mississippi. The case reviews a holding that any single-sex campus for females is unconstitutional, absent the maintenance of a single-sex campus for males. It is not limited to any narrow holding with respect to nursing programs, but it applies campus-wide.

The defendant Board of Trustees operates eight university campuses in Mississippi in different locations. Seven of them are co-educational, and one is female. The Board of Trustees sets the policies and decides which universities may award which degrees.

I would like to say at the outset that we are not here to perpetuate a nineteenth century finishing school to teach young women needlecraft and kindergarten keeping. Mississippi University for Women is a contemporary

1 university which tries to prepare women to meet the
2 challenges of today.

3 Our oponents have said that MUW offers such
4 programs as fashion modeling and that sort of thing. It
5 also offers, in accordance with the bulletin which has been
6 introduced, Air Force ROTC, computer sciences, accounting,
7 pre-dentistry, pre-medical education, pre-law, and other
8 such courses.

9 I think it is interesting to look for a moment at
10 the history of this institution. It was the first
11 state-supported institution for the higher education of
12 women in the country. It was founded in 1884 after the
13 University of Mississippi had become co-educational, so it
14 cannot be said that it was founded for the purpose of
15 relegating women to some inferior school. On the contrary,
16 as the bulletin indicates, it was the result of the efforts
17 of a woman named Salley Renault and a number of other very
18 progressive women of that era seeking higher education for
19 women. The holding of the --

20 QUESTION: Do we know what their reason was, if
21 the University of Mississippi was then co-educational?

22 MR. GHOLSON: I think, Mr. Justice Rehnquist, that
23 the reason was that women perceived a special need for some
24 of them for education especially tailored to the needs of
25 women, and I would certainly say that not all women

1 perceived this need. Neither did they then, nor do they
2 today, but our argument is that under the theory of
3 federalism, if it is not in violation of the Fourteenth
4 Amendment, that Mississippi should be permitted to allow
5 women who want single-sex education to get it.

6 Now, Mississippi used to have a single-sex higher
7 educational institution for men, but that no longer exists,
8 and I think the answer is, it no longer exists because the
9 demand no longer exists, but the demand continues for
10 single-sex education for women, and we believe that this
11 option is Constitutionally permissible.

12 QUESTION: Mr. Gholson, do you know whether there
13 are many single-sex tax-supported institutions in the
14 country other than this one?

15 MR. GHOLSON: Yes, Mr. Justice Blackmun, to the
16 extent that federal funds are granted under Title IX to all
17 single-sex institutions who fit within the exception of
18 Title IX, there are approximately 180 such institutions in
19 the country, and one of our concerns in this case is, what
20 will the fallout be should this Court adjudicate that no
21 single-sex institution that receives state or federal funds
22 passes Constitutional muster. Where will the Department of
23 Education be left in the administration of funds under Title
24 IX as to which Congress has made a specific single-sex
25 undergraduate exception?

1 QUESTION: Mr. Gholson, is it true that men are
2 allowed to audit classes?
3 MR. GHOLSON: Yes, Mr. Justice Marshal --
4 QUESTION: And it is done, considerably?
5 MR. GHOLSON: Not considerably, Your Honor. It is
6 done --
7 QUESTION: But it is done. Well, why can't they
8 get a degree?
9 MR. GHOLSON: Because, Your Honor --
10 QUESTION: Is that the only difference?
11 MR. GHOLSON: No, sir. The testimony which was
12 presented by President Strobel and by Vice President Kraft
13 clearly indicates that auditing courses takes place largely,
14 almost exclusively, at night, and that they relate to items
15 of community service rather than the true academic field.
16 QUESTION: Well, I mean, how can you have an
17 all-female school with male students?
18 MR. GHOLSON: Well, the --
19 QUESTION: That is the problem I have.
20 MR. GHOLSON: I understand, sir. I understand,
21 Your Honor.
22 QUESTION: It must be horrible to have men there,
23 but they are there.
24 (General laughter.)
25 MR. GHOLSON: But they are not there --

1 QUESTION: But they are there.

2 MR. GHOLSON: They are not there during the
3 regular day.

4 QUESTION: Well, they are sort of second-class
5 citizens.

6 MR. GHOLSON: They are there for special courses
7 such as real estate, salesmanship, and other things that the
8 university perceives to be of community interest, and the
9 very fact that they don't receive credit, according to Dr.
10 Kraft, is self-limiting, and there will be very few of them,
11 but when you give credit to men, then that makes it in all
12 respects a co-educational institution.

13 QUESTION: Mr. Gholson, is a finding that the
14 Board of Regents had a belief that single-sex education
15 benefits women sufficient in and of itself for us to uphold
16 the provisions for that institution? And what level of
17 scrutiny do we have to apply?

18 MR. GHOLSON: I think, Your Honor, that Craig
19 versus Boren certainly sets out that there must be a
20 necessary state purpose, and this must serve as an essential
21 element of fulfilling that purpose.

22 QUESTION: Something more than than a mere
23 rational basis test?

24 MR. GHOLSON: I think that's correct, but I think
25 that Rostka versus Goldberg indicates that the majority of

1 the Court certainly stopped short of saying that all gender
2 classifications are suspect in the highest sense of the
3 word, and I would submit --

4 QUESTION: Some mid-level scrutiny you would
5 believe is in place and in order for the review?

6 MR. GHOLSON: Yes, Your Honor. I think that's
7 correct, and --

8 QUESTION: Mr. Gholson, am I correct as to my
9 factual assumption that Mr. Hogan could have entered a
10 state-supported school of nursing at Pascagoula or at
11 Jackson?

12 MR. GHOLSON: At Hattiesburg or Jackson or now at
13 Tupelo.

14 QUESTION: But there were other university --

15 MR. GHOLSON: Yes.

16 QUESTION: -- schools of nursing open to him. He
17 just wanted to go to one in Columbus, in his back yard.

18 MR. GHOLSON: Because it was convenient in the
19 same way that it would have been convenient for the
20 plaintiffs in Williams versus McNair to have gone to
21 Winthrop College. His complaint is not that Mississippi and
22 the defendant Board of Trustees will not give him a nursing
23 education, and it is not that he can't get the best nursing
24 education that is offered by the state. As Your Honor
25 points out, his complaint is that it is not as convenient

1 for him as he would like it to be to receive such an
2 education.

3 QUESTION: Mr. Gholson, does the record below
4 indicate whether Mississippi University for Women ever
5 obtained funds under the Nurse Training Act of 1971?

6 MR. GHOLSON: It has not, and did not apply for
7 such funds. That is in the testimony of Dr. Strobel, Your
8 Honor.

9 We would certainly submit with respect to the
10 burden of proof, which is an issue which has been brought up
11 in the briefs, that Mr. Hogan filed his suit and he proved
12 that he was denied admission because he didn't meet the
13 qualification of being a woman, but he did no more than
14 that. He took discovery, his counsel did, and in this
15 discovery, both the depositions of Dr. Strobel, the
16 president, Dr. Harvey Kraft, the vice president for academic
17 affairs, and other representatives of the university were
18 taken, and live testimony was taken at the preliminary
19 injunction hearing.

20 The district judge decided in his discretion that
21 he was not entitled to a preliminary injunction, and then he
22 specifically -- the district judge specifically invited the
23 plaintiff to offer any evidence of any disputed fact, saying
24 that absent any evidence of a disputed fact, that summary
25 judgment would be entered.

1 Mr. Hogan did not see fit to put on any testimony
2 to contradict the educational theories that were advanced in
3 the testimony of Dr. Strobel and Dr. Kraft. Now, I don't
4 think it's necessary for this Court to adopt those
5 educational theories or to decide that the Mississippi
6 legislature is correct in affording credence to the theories
7 that women in the 1980's can benefit from single-sex
8 education. I think that under Parrum versus Hughes, it is
9 only necessary that this Court find that such theories are
10 not totally without reason, and therefore the legislature is
11 within its reasonable prerogative in accepting those
12 theories of education along with the co-educational theories
13 which, of course, are afforded full play.

14 I think that it is very interesting in these
15 depositions to see some of the things that Dr. Kraft and Dr.
16 Strobel said about the role and the mission of MUW. Dr.
17 Kraft said, "In the absence of males, women are assured
18 leadership roles in all regards. The entire society is led
19 by women officers. The faculty is predominantly female,
20 showing women leadership roles."

21 He said, "We know that in our society at this time
22 there are several groups that are not readily admitted to
23 the mainstream of life in business and the professions and
24 government, and that certain measures have to be taken to
25 assure these people proper access to roles in government,

1 business, and the professions. At this time, we still need
2 some stepping stones for women into the larger world, and I
3 think this institution can provide that stepping stone."

4 QUESTION: Mr. Gholson, the Respondents claim that
5 the senior faculty at the school is primarily male. Is that
6 true or untrue?

7 MR. GHOLSON: Our response to that, Your Honor, is
8 that the bulletin shows that of the four vice presidents,
9 two are female and two are male. A majority of the deans
10 are female. And according to Dr. Kraft's unrebutted
11 testimony, a majority of the faculty is female.

12 QUESTION: What is the situation as to the nursing
13 school itself?

14 MR. GHOLSON: The nursing school, Your Honor,
15 which did not --

16 QUESTION: Your other answer had to do with the
17 entire university. .

18 MR. GHOLSON: Yes, sir. The nursing school was
19 not founded until 1971. The nursing school, to my
20 knowledge, is entirely female.

21 QUESTION: Is there anything in the record to that
22 effect?

23 MR. GHOLSON: Well, the testimony of the director
24 or dean of the nursing school is in the record, as well as
25 her deposition.

1 QUESTION: We are talking about the nursing
2 school, are we not?

3 MR. GHOLSON: No, I don't think we are, Your
4 Honor. I think we are talking about the entire university,
5 because the Fifth Circuit's opinion strikes down the right
6 of Mississippi to operate MUW per se, and not the nursing
7 school. I think that is one of the inaccuracies of some of
8 the briefs that have been filed.

9 I would like also to allude to Dr. Strobel's
10 testimony, when he said that in his experience, both as an
11 administrator and a faculty member, he had never encountered
12 a positive reinforcement system which seems as prevalent as
13 that on the campus of MUW, that he firmly believes that the
14 special needs of women are uniquely served by this
15 institution.

16 QUESTION: Did you have any women that testified
17 to that?

18 MR. GHOLSON: Your Honor, the dean of the --

19 QUESTION: It is a very simple question. Yes or
20 no?

21 MR. GHOLSON: Yes.

22 QUESTION: You did? And what did they testify,
23 that this was --

24 MR. GHOLSON: The dean of the nursing school
25 testified that she felt that the maintenance of the

1 all-female atmosphere was important to fulfill the mission
2 of MUW.

3 QUESTION: And what other women said that?

4 MR. GHOLSON: That's the only woman who testified.

5 QUESTION: That's the only woman, but all the men
6 said the --

7 MR. GHOLSON: Well, there were only two men, Your
8 Honor.

9 QUESTION: But they were the top men.

10 MR. GHOLSON: One was the top --

11 QUESTION: You say they are trained in leadership,
12 and a man is the leader.

13 MR. GHOLSON: Your Honor, the president and two of
14 the four vice presidents are men. Two of the four vice
15 presidents are women.

16 QUESTION: Mr. Gholson, are there any findings
17 that graduates of MUW are better able to compete than
18 graduates of co-educational schools?

19 MR. GHOLSON: May I respond to that by saying that
20 Dr. Strobel testified that the results were extremely good
21 with respect to the admission of MUW graduates to law
22 schools, medical schools, and dental schools, as compared to
23 women applicants from co-educational institutions in the
24 area. He also cited the work of Dr. Tidbull and Alexander
25 Astin, which we have mentioned in our brief, and those

1 educators have advanced those theories, that women graduates
2 of women's colleges have unusual records of achievement.

3 QUESTION: That is undisputed in this record,
4 isn't it?

5 MR. GHOLSON: Yes, sir. It certainly is. There
6 was no evidence put on at all to contradict the educational
7 theories that the MUW people advanced.

8 I think that the Title IX argument that this Court
9 need consider is an interesting one, and I don't want to
10 overstate it. I clearly am not going to argue that the
11 Congress can abridge Fourteenth Amendment rights and narrow
12 anybody's Constitutional rights.

13 QUESTION: Before you get into Title IX, may I ask
14 you another -- following up on Justice O'Connor's question,
15 I understand you agree the standard of review must be higher
16 than merely rational. That is what I understood you to say.

17 MR. GHOLSON: I believe that the majority of this
18 Court, as I read the cases, would come out on a sort of
19 mid-level --

20 QUESTION: And as I read the district court, he
21 found specifically that it was rational, but it was only
22 rational. Therefore, under the district court's findings,
23 don't you necessarily lose if your legal position is the one
24 you have just described?

25 MR. GHOLSON: I don't think so, Mr. Justice

1 Stevens. I think he found that the state had proved that it
2 was a rational way to exercise an important state function,
3 and I don't read his --

4 QUESTION: Well, at Page A-3 of the cert petition,
5 "The court finds that the maintenance of MUW as an
6 institution of higher learning for females only bears a
7 rational relationship," and so forth.

8 MR. GHOLSON: Well --

9 QUESTION: And then he goes on and says that is
10 enough.

11 MR. GHOLSON: I think he clearly finds that it
12 bears a rational relationship. I think if you will read
13 into it --

14 QUESTION: But you think we should --

15 MR. GHOLSON: -- that it doesn't bear any more, an
16 iota more than a rational relationship, it is certainly
17 dicta at the very best, because he did find it rational. I
18 think at that time he was dealing and the arguments were
19 dealing with standards of review, and he certainly came out
20 on the side that rational is enough, but my argument today
21 is that we have met Craig versus Boren every way I believe
22 you can look at it with the testimony that has been
23 presented and that is uncontradicted.

24 QUESTION: And it is your view, I take it, that
25 the advantages of single-sex education that justify this --

1 the refusal to allow males into this school would not apply
2 -- would not justify a male-only school.

3 MR. GHOLSON: I don't think that's before the
4 Courtt. I think the reason that Mississippi doesn't have a
5 male-only school is that the legislature came to the
6 conclusion that there was no longer a demand for it.

7 QUESTION: Well, it is before the Court in the
8 sense that it was the theory of the court of appeals. They
9 said that if you justify single-sex education, you must
10 provide single-sex education to the members of both sexes.
11 That was the rationale of the court of appeals.

12 MR. GHOLSON: And our argument with respect to
13 that, Your Honor, is that Mississippi affords both sexes
14 access to all educational programs, and --

15 QUESTION: Yes, but they don't afford males access
16 to the advantages of having a single-sex educational
17 institution they can attend.

18 MR. GHOLSON: Well, the reason we think that there
19 are not enough males who believe that they need single-sex
20 education to justify it within the prerogative of the
21 legislature. One might, of course, analogize to Mr. Justice
22 Marshal's opinion in Fullilove, in which, if you change the
23 words "race" to "gender" and "white" to "male" and "black"
24 to "female", it is a beautiful argument for the existence of
25 MUW, because the disadvantaged male here is a member of a

1 class which this Court has never traditionally found to be
2 in need of some special help.

3 QUESTION: Well, they did in Craig against Boren.
4 They found the males needed some help.

5 MR. GHOLSON: Yes, sir, but I again think we can
6 meet the Craig versus Boren test. Mr. Hogan's disadvantage
7 is the same as the disadvantage of a resident, say, of
8 Hattiesburg who wants to be a veterinarian. Mississippi
9 doesn't offer him veterinary schooling in Hattiesburg, where
10 they have a university. They offer it only in Starkville.

11 QUESTION: But, Mr. Gholson, you keep forgetting
12 your original point, which is that the respondent here is
13 not asking for a separate school for men.

14 MR. GHOLSON: I agree with that, Your Honor.

15 QUESTION: He is asking to go to this school.

16 MR. GHOLSON: I agree with that, Your Honor.

17 QUESTION: And that is all that is before us.

18 MR. GHOLSON: But I think the conclusion is that
19 going to this school is only a disadvantage to him, I mean,
20 not being able to go this school is just a disadvantage, as
21 if he were someone seeking a curriculum that was only taught
22 at another institution.

23 QUESTION: Mr. Gholson, you have referred to the
24 demand for a single-sex institution as being its
25 justification. Would you make the same argument if there

1 were a demand for an all-white publicly funded education?

2 MR. GHOLSON: No, I would not, because that case
3 has been clearly decided, that people who go to school with
4 only members of their own race are denied the educational
5 opportunities, Brown versus Board of Education. Clearly,
6 that could not be done.

7 The Title IX argument which I mentioned a moment
8 ago is not that Congress can change the Constitution, but
9 that in a number of cases, most recently, I think, Rostka
10 versus Goldberg, this Court has indicated an interest in
11 deferring in certain areas to the expressed and rationed
12 conclusions of Congress. In making the Title IX exception,
13 it is very clear that Congress intended to continue to
14 appropriate money for state supported and other single-sex
15 institutions that traditionally were so. Congress certainly
16 couldn't intend to appropriate money for an unconstitutional
17 purpose.

18 So, the view of Congress at least has been clearly
19 expressed in this regard, and I wonder what the Title IX
20 fallout could be if the Fifth Circuit's opinion is permitted
21 to stand. Will we next be facing challenges of whether we
22 have co-educational versus single-sex dormitories, or where
23 those dormitories may be located with respect to convenience
24 to the students, whether or not we could have co-educational
25 versus single-sex athletic programs, and if a student has a

1 right to participate in such a program that is only
2 available to one of another sex?

3 So, I think that this case bears considerable
4 interest and effect Constitutionally, not just for this
5 single institution but in the administration of the Title IX
6 program at large, and if I may, I will reserve the remainder
7 of my time.

8 CHIEF JUSTICE BURGER: Very well.

9 Mr. Colom.

10 ORAL ARGUMENT OF WILBUR O. COLOM, ESQ.,

11 ON BEHALF OF THE RESPONDENT

12 MR. COLOM: Mr. Chief Justice, and may it please
13 the Court, the question presented for resolution to this
14 Court today is whether one nurse, Joe Hogan, will be barred
15 from receiving academic credit toward a BS degree in nursing
16 simply because he is a male. The question is not whether
17 Joe Hogan may attend nursing classes at the university.
18 Indeed, he can attend and participate fully in classes, and
19 theoretically he could audit a complete course load.
20 Indeed, the president of the university said at Page 62 of
21 this transcript that he could theoretically audit a complete
22 course load. Joe Hogan testified on Page 26 of the
23 transcript that he was told that he could audit as many
24 classes as he wanted.

25 The question is not whether single-sex schools are

1 per se violative of the equal protection clause of the
2 Fourteenth Amendment. The court of appeals did not make
3 such a holding, and Mr. Hogan has never requested such a
4 ruling from any court.

5 The question that the defendants have recently
6 presented is whether this is affirmative action for women,
7 and in their brief they use specifically affirmative action
8 for women, and I would point out to this Court that
9 throughout this litigation, and at the district court level,
10 the defendants invited the district court to use the low
11 scrutiny, the low scrutiny of Williams versus McNair. They
12 invited the court of appeals to use that same level of
13 scrutiny. It is only when they get to the Supreme Court
14 that they now admit that Craig v. Boren gives the proper
15 standard.

16 We never heard anything regarding affirmative
17 action for women as a purpose for the W, as they call it, at
18 the trial level. We never heard it at the Fifth Circuit.
19 It wasn't even brought up on the petition for rehearing
20 before the Fifth Circuit, and it didn't even appear on the
21 petition for certiorari submitted to this Court.

22 QUESTION: Nevertheless, it is a response to your
23 claim of a denial of equal protection.

24 MR. COLOM: Yes, Mr. Justice --

25 QUESTION: And it is not a new Constitutional

1 theory being injected, is it?

2 MR. COLOM: To extent that waiver means anything
3 in the law, I think they have waived that, and what this is
4 is an after the fact justification. They didn't -- that was
5 not the purpose for the W. It has never been the purpose.
6 They stated in Interrogatory 3 -- I go back to the very
7 beginning of this case, when we first filed it. We
8 submitted the interrogatories saying, tell us all the
9 reasons you want the W, and they put it -- gave us a sheet
10 of paper that said that we have always had the W, we like
11 the W, we want to keep it like it is. Never said anything
12 else throughout this litigation.

13 QUESTION: Then aren't all the reasons why
14 underlay that called to your notice? I don't quite
15 understand your surprise or waiver suggestion.

16 MR. COLOM: Well, it was never suggested that
17 affirmative action or correcting past discrimination against
18 women was a purpose for the university throughout the
19 litigation. Indeed, when we presented our case at
20 preliminary hearing, they called no witnesses. They
21 rested. Not a single witness.

22 They invited the district judge to use this low
23 level scrutiny, and now they complain about it.

24 QUESTION: I understand his position is that you
25 were offered proof and you did not accept it.

1 MR. COLOM: Well, Your Honor --

2 QUESTION: Is that right?

3 MR. COLOM: Yes, sir. Your Honor, when we

4 presented our case --

5 QUESTION: Well, don't you think that should be

6 explained?

7 MR. COLOM: Your Honor, we presented our case. We

8 felt that we met our burden. The district judge gave us an

9 opinion using what we considered to be an improper

10 standard. We had submitted our briefs stating what we felt

11 was the proper standard. He apparently accepted the

12 argument of the state that this low level scrutiny was

13 appropriate. At that point, we felt that there was no

14 further need for us to prove, for Craig v. Boren tells us

15 clearly that the burden is on the state to justify the

16 gender classification.

17 QUESTION: And if you were wrong, you lose.

18 MR. COLOM: If the burden is upon us to prove that

19 the gender classification --

20 QUESTION: All I am saying is, as a matter of

21 fact, you could have put in evidence and it wouldn't have

22 hurt you. But if we find that you should have put it in and

23 you didn't put it in, you are really hurt.

24 MR. COLOM: Yes, sir, but we are convinced that

25 there was no necessity for us to go forward at that time,

1 because the burden was on them, was upon the state.

2 QUESTION: Under your own theory, though, didn't
3 you support the Craig against Boren reasoning in the
4 district court?

5 MR. COLOM: Yes, sir, we argued the Craig v. Boren
6 standard in the district court, but the district court did
7 not accept that standard. It adopted a low level scrutiny,
8 the rational relation standard.

9 QUESTION: But that is a conclusion of law,
10 really, which you are free to appeal.

11 MR. COLOM: Yes, sir, and we did appeal that,
12 based upon -- the record in the Fifth Circuit specifically
13 held that the district court applied the incorrect standard,
14 and then they proceeded to apply the correct standard.

15 QUESTION: Well, isn't that just what we should do
16 now? Regardless of what standard the district court
17 applied, we should simply apply the correct standard.

18 MR. COLOM: Yes, sir, and I believe that is the
19 standard applied by the Fifth Circuit, which would require,
20 we believe, an affirmance.

21 QUESTION: Does the Fifth Circuit opinion in your
22 view go beyond the relief which you are claiming?

23 MR. COLOM: We did not file this as a class
24 action, so we have not sought relief for males as a group,
25 and that was an intentional decision by counsel. We have

1 not sought -- We have not sought to have all single-sex
2 schools declared unconstitutional. We seek to get our
3 client in the School of Nursing.

4 QUESTION: Well, do you think the court of appeals
5 decision and opinion goes beyond that which you are seeking?

6 MR. COLOM: I do not believe it goes beyond the
7 law, but I believe it goes beyond the specific relief my
8 client seeks. Your Honor, another important --

9 QUESTION: Did you suggest to the court of
10 appeals, or was it part of your theory from the outset that
11 the result might be different if Mississippi had all-male
12 schools as well as all-female schools? Or was that the
13 product of the Fifth Circuit?

14 MR. COLOM: We did point out, Mr. Justice, that in
15 Vorsheimer and in Williams versus McNair, and the whole line
16 of cases where single-sex schools were upheld, that they
17 were considered essentially equal. Now, I read the oral
18 argument in Vorsheimer, and that was a major point of
19 discussion before this Court, were the two schools in
20 Philadelphia essentially equal. We did make that argument
21 before the court of appeals. Yes, sir.

22 QUESTION: So the decision below wouldn't
23 necessarily apply if Mississippi did have schools for men as
24 well as for women.

25 MR. COLOM: The court used both standards in the

1 Fifth Circuit.

2 QUESTION: Well, I know, but it wouldn't control
3 that case, would it, the decision below? If Mississippi now
4 started an all-male school, and had a female school too, the
5 decision below wouldn't necessarily outlaw that system.

6 MR. COLOM: It possibly could, Your Honor, because
7 you would still have to have the Craig v. Boren standard
8 applied, because you would still have a gender
9 classification.

10 QUESTION: But you could say that there was no
11 discrimination. And you don't have to have a justification
12 until you've got a discrimination, do you?

13 MR. COLOM: I understand you have to have a
14 justification when you have a gender classification, and
15 that would have to be justified.

16 QUESTION: Well, you have to have an unequal
17 gender classification.

18 MR. COLOM: There are some suggestions of that in
19 the lower court decisions.

20 QUESTION: Well, you must have thought so or you
21 wouldn't have made the argument based on Vorsheimer.

22 MR. COLOM: Yes, sir. We made several arguments
23 in the alternative.

24 (General laughter.)

25 MR. COLOM: The other argument that the defendants

1 now present, and it suffers from the same ailment as the
2 affirmative action argument, is that somehow Title IX
3 provides some exemption for Mississippi University for
4 Women. Again, that was not presented to the court until the
5 petition for rehearing. The purposes were stated from the
6 beginning of this case. We asked the president, we asked
7 the university at the very beginning of the case in
8 Interrogatory Number 3 that appears in the file, give us all
9 your reasons. They gave them to us, and they were
10 essentially, we like it this way.

11 I wanted to correct one thing that was mentioned
12 by Mr. Gholson. The two women who did testify with the
13 nursing school, both deans of the school of nursing, the
14 graduate school and the undergraduate school, stated that
15 the presence of men would not affect their students or their
16 teaching techniques. We questioned them at length about
17 what they would change in their teaching programs. They
18 could identify nothing.

19 QUESTION: Well, I am a little puzzled why that
20 bears on it, on the issue here.

21 MR. COLOM: Because our client seeks to get in the
22 nursing program. He is a nursing -- he is a nurse already
23 who is employed as a nurse, and he seeks admission to a
24 nursing program which is predominantly women, exclusively
25 women, a profession that is predominantly women. There is

1 no need for affirmative action for women in the area of
2 nursing. If there is any need, it is for affirmative action
3 for men.

4 Another point, Your Honor, I think is important
5 here is that the state of Mississippi has decided to set
6 aside over 3,000 seats in its school system, its collegiate
7 school system just for women, that men cannot compete for.
8 Yet these same women can compete for every other seat in the
9 system.

10 QUESTION: Well, supposing a statement of your
11 opposing counsel is correct that Mississippi at one time had
12 an all-male university, and there is simply -- the demand
13 for it so slackened that it was no longer economically
14 feasible to keep the place open. Now, would you say that
15 was a discrimination if it happened under those
16 circumstances?

17 MR. COLOM: There is no support for that in the
18 record.

19 QUESTION: Well, assume that that was the case.
20 Treat it as a hypothetical question.

21 MR. COLOM: Still, this universe would be subject
22 to the same standard of scrutiny, because the enrollment at
23 the W has gone down from 3,000 to about 1,800 now, and they
24 are suffering a dramatic reduction in enrollment. So the
25 state has chose to maintain the single-sex school but not

1 maintain the male school because of enrollment.

2 QUESTION: Well, is there anything in the record
3 to indicate that they have applied different criteria to the
4 women's school as opposed to the men's school in determining
5 whether to keep it on when enrollment is declining?

6 MR. COLOM: Your Honor, there is nothing in the
7 record regarding the all-male school, and if it did exist,
8 it existed many, many decades ago, in an entirely different
9 context of education, and I am really unable to answer that.

10 We have highlighted in our brief the absence of
11 any evidence to support the W's affirmative action argument,
12 but I think we have clearly shown that the experts that they
13 cite would be shocked that the W uses them. They point out
14 the leadership roles as one of the most important
15 characteristics in a single-sex school for women. Yet of
16 the ten presidents of this college, this university, all
17 have been male.

18 The vice president for academic affairs, the dean
19 of many schools, the director of admissions personnel,
20 extended services, the library, the great, great weight of
21 leadership has been by men, and indeed, how can they provide
22 the role models that Mrs. Tidbolt points out? The studies
23 that they have referred to have no relationship to this
24 particular school. They are general studies about other
25 schools, primarily schools in the northeast, who had

1 entirely different purposes in their creation.

2 And I am very uncomfortable, to be frank with you,
3 to have Constitutional rights depend upon what some
4 sociologist or psychologist says, and I feel uncomfortable
5 even citing them in behalf of my client, Mr. Hogan, but it
6 has become a central issue here. Mrs. Tidbolt did not
7 testify, and we value cross examination, because we would
8 question her analysis substantially.

9 Looking at the problem from another vantage point,
10 the inquiry as to a compensatory purpose is not even
11 appropriate until there is a showing of past discrimination
12 and continuing effects of that discrimination as to women.
13 We have -- There has been no showing by the state of
14 Mississippi, and the burden is upon them to make the
15 showing, that their system has discriminated against
16 females, and that they must take this extraordinary step in
17 order to correct that discrimination.

18 Further, they would have to show that in the area
19 of nursing, there had been discrimination against women, and
20 that the W exists to correct that past discrimination, and
21 that it is necessary to bar men from that program to further
22 that purpose. Again, I must constantly return to the
23 record, for it was our conclusion from the beginning of this
24 litigation that the burden was upon the state to support
25 their gender classification, and every holding by this Court

1 since 1973 has said that, and clearly the state has not met
2 their burden.

3 If there are unique opportunities to be offered to
4 women in an educational atmosphere, there was no showing by
5 the state that it could not be done in a co-educational
6 environment. All we have in the record are declarations by
7 administrators that single-sex education has some important
8 educational value. I would point out to the Court that the
9 president of the university, prior to coming to the W, had
10 never taught females in a single-sex atmosphere before. And
11 I would not consider his statements to be authoritative in
12 that area. He was not in administration, but a scientist.

13 QUESTION: May I go back for a moment to the --
14 you mentioned, I think, that your client was offered the
15 opportunity to audit as many classes as he wanted to.

16 MR. COLOM: Yes, sir.

17 QUESTION: Would he have had to pay tuition to do
18 that?

19 MR. COLOM: Yes, sir.

20 QUESTION: He would have paid the same tuition as
21 if he was enrolled?

22 MR. COLOM: Yes, sir.

23 QUESTION: So he could have done everything,
24 attended the class and all, but he just couldn't have taken
25 the exams and gotten a degree. That is the only thing that

1 he couldn't do?

2 MR. COLOM: Both my client testified to that and
3 the president of the university testified that theoretically
4 he could audit the entire course load. He said that is not
5 practical, that the university would limit audits because
6 they are paid by the state, based upon head count, and a
7 student who is auditing is not counted for purposes of
8 funding from the state, so they would limit them for that
9 reason.

10 QUESTION: I see.

11 MR. COLOM: Another argument that I think this
12 Court should treat as having little merit is that Title IX
13 somehow provides an exception to the Fourteenth Amendment.
14 I think the defendant, the state, has backed off of that
15 argument themselves at this point. But they also suggest
16 that Congress somehow intended Title IX to constitute
17 affirmative action for women, that the exemption for women's
18 schools buttresses their argument that this is affirmative
19 action and that Congress approved of it, but the problem
20 with that --

21 QUESTION: Do you think any inference can be drawn
22 at all from the exclusion from Title IX of single-sex
23 schools?

24 MR. COLOM: I don't think any --

25 QUESTION: Do you suppose if Congress had thought

1 that they were unconstitutional, would they have excepted
2 that from Title IX?

3 MR. COLOM: You can draw the inference that
4 Congress may or may not be wrong --

5 QUESTION: Yes.

6 MR. COLOM: -- in making that exemption. I think
7 one clear inference can be drawn that they did not intend
8 this to constitute affirmative action for women's schools,
9 because they limited the existence of it. Only those
10 schools then existing could continue. So they didn't want
11 to encourage single-sex schools. That was an action to stop
12 them, and to allow at least those that were existing at that
13 time to continue to receive federal funds, and since this
14 Court has held in Cannon versus University of Chicago that
15 Title IX is a spending powers action by Congress, then it
16 certainly would have no application to the Fourteenth
17 Amendment, and Mr. Justice Rehnquist, writing for this
18 Court, specifically stated in the Penhurst School case that
19 Congress has to specifically invoke Section 5 of the
20 Fourteenth Amendment to use its powers under that amendment.

21 Your Honors, for the reasons we have stated, we
22 submit that the decision of the court of appeals for the
23 Fifth Circuit should be affirmed.

24 Thank you very much.

25 CHIEF JUSTICE BURGER: Very well.

1 Do you have anything further, counsel?

2 ORAL ARGUMENT OF HUNTER M GHOLSON, ESQ.,

3 ON BEHALF OF THE PETITIONERS - REBUTTAL

4 MR. GHOLSON: Yes, Mr. Chief Justice.

5 Mr. Colom would have us be required to prove that
6 women have been discriminated against in the United States,
7 perhaps in the state of Mississippi in particular. In
8 response to that, I would refer to the language of Mr.
9 Justice Brennan in *Frontiero versus Richardson*, beginning
10 with the statement, "There can be no doubt that our nation
11 has had a long and unfortunate history of sex
12 discrimination. It can hardly be doubted that in part
13 because of the high visibility of the sexual characteristic,
14 women still face pervasive, although at times more subtle,
15 discrimination in our educational institutions, in the job
16 market, and in the political arena."

17 QUESTION: But, counsel, your opponent suggests
18 that that reasoning doesn't necessarily apply to the field
19 of nursing.

20 MR. GHOLSON: I understand that, Mr. Justice
21 Stevens, is his argument, but I understand that the Fifth
22 Circuit did not decide that question, but decided that a
23 single-sex institution for women across the board must be
24 stricken unless there is a male institution.

25 QUESTION: Would you comment just a little further

1 -- I have tried to think about it a little bit during the
2 argument -- on when there are advantages of single-sex
3 education for women, how can those advantages be preserved
4 by allowing male students to audit courses but simply
5 saying, you can't take the exams and get the degrees?

6 MR. GHOLSON: I think the Court would be bound to
7 accept the unrefuted testimony of Dr. Kraft and Dr. Strobel
8 that the auditing that exists is a very limited program
9 which primarily takes place at night --

10 QUESTION: Well, but I suppose it is also true
11 that the male applicants for the nursing school are limited
12 in number.

13 MR. GHOLSON: Well, as a matter of fact, the
14 record shows that two more have applied since Mr. Hogan's
15 application.

16 QUESTION: But is your limitation on auditing such
17 that the three could not have audited?

18 MR. GHOLSON: My understanding is that the
19 professor, and the record shows this, a professor must give
20 his or her permission for a student to audit a class, and
21 auditing, while there are no specific guidelines that say
22 you cannot audit a class during the regular course of the
23 day, the situation that exists is that that just doesn't
24 take place, and there is a list of every male who has ever
25 audited a course at MUW, and it is quite short, and Dr.

1 Kraft says it is short because the fact that they don't get
2 credit is self-limiting, and that that distinguishes it and
3 doesn't cause it to invade the all-female atmosphere of the
4 student body.

5 QUESTION: Or primarily female atmosphere is what
6 you are trying to maintain, I guess.

7 MR. GHOLSON: Yes, sir.

8 Mr. Colom indicated that we had never talked in
9 terms of affirmative action to help women by the operation
10 of MUW. I don't think that you can read Dr. Strobel's
11 testimony or Dr. Kraft's testimony and conclude that they
12 are describing anything less than a program of very positive
13 affirmative action to help women fulfill their full
14 potential in today's society.

15 It is certainly true that, as has been mentioned
16 in the other argument, that the plaintiff stopped short when
17 he filed his suit and said, I have been excluded. He
18 listened to Dr. Strobel, he listened to Dr. Kraft, he saw
19 the references to the educators who endorsed their theories,
20 and he did nothing to refute that. It is interesting that
21 counsel says that these experts would be shocked if they
22 could see the W. I know I am not here to testify, but Ms.
23 Tidbolt has been to the W numbers of times, and is coming
24 again next month, and I hope she won't be any more shocked
25 than she has been.

1 QUESTION: Mr. Gholson, does the state still rely
2 basically on the statement of purposes and goals contained
3 in the charter of MUW?

4 MR. GHOLSON: I certainly don't, Your Honor. That
5 was an 1884 statement of purposes --

6 QUESTION: And it has not been changed, as I
7 understand it.

8 MR. GHOLSON: It has not been changed as such, but
9 legislative appropriations have been made annually, and the
10 programs and curricula of the institution have been
11 constantly revised. The language of the 1884 enabling Act
12 sounds a good bit like the kind of language this Court might
13 have used in Muller versus Oregon, which was a little later,
14 in 1908, and it spoke of the need of women to achieve a
15 greater parity with her brother, who was the superior
16 animal, and things that were very Victorian in phraseology,
17 and not the kind of thing we would say or believe today.

18 But I think the important point is that MUW has
19 evolved with the times, and the question is, what are they
20 doing today to help women in education, and is Dr. Strobel
21 right? I don't think you have to believe he is right. I
22 think you just have to believe that there is a rational
23 basis for the legislature to believe that it is right that
24 an institution devoted exclusively to women can help them
25 fulfill their potential in a unique way.

1 QUESTION: By that you are not arguing a rational
2 basis test implied though?

3 MR. GHOLSON: No, no. No, I think we fit Craig
4 versus Boren, Your Honor.

5 QUESTION: But if it is so great for women, it
6 does help men.

7 MR. GHOLSON: Single-sex education?

8 QUESTION: Yes.

9 MR. GHOLSON: There are those who certainly
10 believe that, and who operate --

11 QUESTION: See, that is where I have trouble. It
12 is all for women, it is great for women, but it also helps
13 men.

14 MR. GHOLSON: It can be argued that, yes, sir.
15 Thank you very much.

16 CHIEF JUSTICE BURGER: Thank you, gentlemen. The
17 case is submitted.

18 (Whereupon, at 11:55 o'clock a.m., the case in the
19 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Mississippi University for Women, Et Al., Petitioners, v.
Joe Hogan No. 81-406

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BY Reene Hammond

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