No. 04-1152

IN THE

Supreme Court of the United States

DONALD RUMSFELD, *ET AL.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *ET AL.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

The Solomon Amendment, 10 U.S.C. § 983, requires law schools to distribute and post military recruiting literature, to invite military recruiters to school-sponsored forums, and to coordinate student interviews, on pain of a university-wide withdrawal of federal funding. This command conflicts with law schools' longstanding and evenhanded policies of refusing to assist employers that invidiously discriminate against their students. Was the court of appeals correct that the Solomon Amendment unconstitutionally conditions funds on schools' relinquishment of their First Amendment rights?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners are U.S. Secretary of Defense Donald H. Rumsfeld; U.S. Secretary of Education Margaret Spellings; U.S. Secretary of Labor Elaine Chao; U.S. Secretary of Health and Human Services Michael O. Leavitt; U.S. Secretary of Transportation Norman Y. Mineta; and U.S. Secretary of Homeland Security Michael Chertoff, all in their official capacities.

Respondents are the Forum for Academic and Institutional Rights, Inc. ("FAIR"); the Society of American Law Teachers, Inc.; the Coalition for Equality; the Rutgers Gay and Lesbian Caucus; Pam Nickisher; Leslie Fischer; Michael Blauschild; Erwin Chemerinsky; and Sylvia Law.

Pursuant to Rule 29.6 of this Court's rules, respondents incorporate by reference the disclosure statement in their opposition to the petition for writ of certiorari.

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BRIEF FOR THE RESPONDENTS

INTRODUCTION

Law schools have long expressed the view that discrimination is morally wrong and fundamentally incompatible with the values of the legal profession. They have consistently expressed that view by word and by deed. If an employer intends to discriminate against a school's students on the basis of race, gender, or any other characteristic that is unrelated to merit, the school will not offer the employer affirmative assistance in recruiting.

By extending their antidiscrimination policies to sexual orientation, law faculties have taken a stand on one of the most divisive moral issues of our time. Through these policies, law schools protest sexual-orientation discrimination directed at their students and teach the leaders of tomorrow that it is wrong to abet invidious discrimination of any sort.

When law schools' antidiscrimination policies clashed with the military's discrimination on the basis of sexual orientation, Congress passed the Solomon Amendment, which punishes the entire university with the loss of virtually all federal funds if any department adheres to such a policy. In its current form, the Solomon Amendment requires law schools to provide not merely "access to campuses" and "access to students ... on campuses," but much more. 10 U.S.C. § 983(b)(1). Law schools must furnish affirmative assistance "in a manner that is at least equal in quality and scope to the access ... that is provided to any other employer." *Id.* That means the school must disseminate the military's recruiting brochures, post its bulletins, make appointments with students, and reserve spots for the military in its private forums for exchange of information, on pain of losing virtually all federal contracts or grants. In some schools hundreds of millions of dollars are at stake, for

projects as diverse (and unrelated to military recruiting) as cancer research, particle accelerators, and investigations into the promise of school voucher programs.

As much as the government tries to portray its position as a plea for equal treatment, it is nothing of the sort. It is a demand for exceptional treatment—a demand to be the only discriminatory employer that a law school will assist. It is, moreover, not just a demand that law schools stay neutral with regard to the government policy they protest, and just suffer military recruiters in their own forums. Nor is it just a demand that they lend military recruiters some assistance. It is a demand that a law school accord the military "most-favored-recruiter" status, even as the recruiters discriminate against the school's own students.

Congress could not directly command that private institutions disseminate or host the military's message, that schools suspend their antidiscrimination policies, or that they collaborate with another enterprise in an advocacy cause they consider immoral. Congress cannot achieve the same ends by couching the penalty as a denial of the "benefit" of millions of dollars in unrelated funding.

STATEMENT

This case reaches the Court on undisputed facts. As the courts below noted, "the Government has not challenged or substantially supplemented Plaintiffs' factual assertions," P.A. 87a-88a, and did not "proffer a shred of evidence," P.A. 24a; *see* P.A. 45a & n.26.[1]

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[1] The joint appendix is cited as "J.A." and the appendix to the petition for certiorari is cited as "P.A." The government's merits brief in this Court is cited as "U.S. Br."; its petition for writ of certiorari is cited as "Pet'n"; and its brief in the court of appeals is cited as "U.S. CA Br." Amicus briefs are cited as "___ Br.," according to the name, or abbreviation, of the lead amicus.

Law Schools Refuse to Actively Assist Discrimination Against Their Own Students

Law schools are more than just vocational schools that teach students to draft briefs and close deals. J.A. 53. Law schools are, and define themselves as, normative institutions. They aspire to shape future lawyers who "can profoundly change our society, its mores and values," J.A. 54; *see* J.A. 66, 135, and who will urge their visions of justice on society at large, J.A. 228, 230. Law schools admonish their students that "issues of justice are at the core of [their] mission," and urge students "to accept the challenge of more clearly defining a just system." J.A. 194-95.

These principles animate the antidiscrimination policies adopted by the faculties of virtually every law school in the nation. P.A. 94a; *see* J.A. 251-52. The wording varies, but the content is the same:

> [The] School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation.... Before using any of the Career Services interviewing facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy.

J.A. 33-34 (internal quotation marks omitted); *see* P.A. 94a-95a.

Law schools are not unique in adopting antidiscrimination policies, but the feature of the policy that is central to this case is uncommon outside the legal academy: The law schools' commitment to resist discrimination is more than just a ban on discrimination on the part of faculty, admissions officers, and registrars. J.A. 57-58, 196. The commitment extends to a refusal to actively

assist others who discriminate against the school's own students. As law schools see it, affirmatively assisting the discrimination of others is immoral. J.A. 196-97, 235-36. The prevailing view is that "if the Law School [is] going to operate a Placement Office, it must take responsibility for discrimination that occur[s] under its auspices.... This [is] an obligation of community," not some matter "external to the school." J.A. 70.

It goes without saying that a major purpose of this extension is to protect students from being victims of discrimination on campus. But as the district court found, and the court of appeals underscored, the policies also "serve both pedagogical and instrumental purposes by teaching values students would not otherwise learn from case books and by fostering an environment of free and open discourse." P.A. 95a; *see* P.A. 18a; J.A. 71-73 (describing the impact that Yale Law School's extension of protection to sexual orientation had on discourse and scholarship). At the same time, "the policies have also placed modest pressures on employers to re-think the stereotypical notions that underlie prejudice and discrimination." J.A. 228.

These were the motives behind law schools' decisions to add sexual orientation to their list of protected classes, beginning in the 1970s. P.A. 94a; *see* J.A. 69-71, 151-52, 211. By 1990, the trend was so pervasive, and the principle so fundamental, that the Association of American Law Schools ("AALS") voted unanimously to endorse this extension. *See* P.A. 95a. Virtually every law school in the country that had not already extended its antidiscrimination policy to cover sexual orientation followed suit. *Id.*; *see* J.A. 215, 251-52.

Law Schools Apply Antidiscrimination Policies to All Recruiters

For employers that agree to judge law students on their own merits, career services personnel offer a range of

services: They distribute the employer's leaflets into student mailboxes; maintain the employer's literature in binders; post the employer's announcements on bulletin boards; send emails to students about the employer's imminent arrival; publish the employer's précis in printed catalogs; make appointments for the employer with interested students; and invite the employer to private forums for the exchange of information between employers and students. J.A. 34, 94, 169-70, 171, 268-69. *See generally* NALP Br. at 9-16 (cataloging numerous sorts of assistance). But law schools will not provide these communicative services to any employer with an avowed racist or sexist hiring policy—or to any employer that discriminates on any other basis that the law school considers invidious. *E.g.*, J.A. 33-34, 235-36.

The military has an explicit policy of discriminating on the basis of sexual orientation. *See* 10 U.S.C. § 654(b). Because of this policy, the military's Judge Advocate General ("JAG") Corps are unable to supply the requisite certification that they do not discriminate. Law schools have historically refused to make an exception for any employer with a discriminatory policy. J.A. 77-78, 152-53. And they refused to make exceptions for the military.

The vast majority of law schools did not, however, apply their policies to bar military recruiters from the campus entirely; for the most part, as the AALS policy permitted, J.A. 252, they allowed military recruiters to recruit on campus on their own initiative or at the invitation of student groups. *E.g.*, J.A. 59-60, 114, 137-38. Law schools merely declined to offer JAG recruiters affirmative assistance.

The Solomon Amendment Compels Schools to Disseminate and Facilitate Military Recruiting Messages

The federal government demands an exemption that no other employer enjoys. The demand comes in the form of the Solomon Amendment, named for its original sponsor, Representative Gerald Solomon of New York. First passed

in 1994, and reenacted in progressively harsher and more intrusive permutations, the current version of the Solomon Amendment provides that an entire university loses virtually all federal funds if the "institution (or any subelement of that institution) has a policy or practice ... that either prohibits, or in effect prevents" military recruiters "from gaining access to campuses, or access to students ... on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer ...." 10 U.S.C. § 983(b). The breadth of the current version manifests itself along two dimensions: (1) the accommodations demanded, and (2) the penalty imposed.

To take the latter dimension first, the penalty for violating the Solomon Amendment is a cutoff not just of grants and contracts administered by the Department of Defense ("DOD"), but of virtually any federal grant or contract available to academic institutions, including funds administered under the umbrella of the Departments of Health and Human Services, Education, Labor, Transportation, and Homeland Security, and the scores of agencies within their domains, such as the Centers for Disease Control and Prevention, the National Institutes of Health, and the Food and Drug Administration, to name a few. *Id.* § 983(d)(1).[2] Moreover, if a law school declines to offer the requisite support to military recruiters, the federal government cuts off not just the law school's funds, but all federal grants and contracts directed to any branch of the university. For some academic institutions, the penalty for violating the Solomon Amendment is in the hundreds of millions of dollars. *See, e.g.*, J.A. 85 (over $300 million for Yale), 147 (same for Harvard), 163 ($130 million for New York University).

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[2] The only notable exception is funding for student financial a*id.* *See* 10 U.S.C. § 983(d)(2).

As to the accommodation demanded: The current Solomon Amendment, codifying the most-favored-recruiter principle the military adopted four years ago, requires more than just "entry to campuses" and more than just "access to students." In demanding "access to students ... that is at least equal in quality and scope to the access ... that is provided to any other employer," 10 U.S.C. § 983(b)(1), Congress codified a requirement that law schools offer military recruiters affirmative assistance in disseminating their recruiting messages. If a law school posts announcements, disseminates literature, makes appointments, prints information in a catalog, or sends emails for any employer—as every law school does—the law commands it to do the same for military recruiters. If a law school hosts any sort of job fair or any other job-related forum, it must invite military recruiters.

A couple of examples illustrate how the most-favored-recruiter principle operates in practice. Yale Law School was typical in the access and assistance it offered the military. Military recruiters were welcome to arrange to visit the Yale campus anytime and were free to borrow a classroom at the law school for informational presentations. J.A. 113-14. Any student could reserve any available location in a law school building to interview with military recruiters. J.A. 110, 114. Armed with the student contact information that Yale was statutorily required to provide, *see* 10 U.S.C. § 983(b)(2), recruiters could contact students directly. J.A. 79. At a military recruiter's request, Yale would even facilitate interviews with law students, by providing Yale personnel to coordinate the scheduling of interviews in a reserved room on campus. J.A. 114.

The military declared these accommodations a violation of the most-favored-recruiter requirement, mainly because the law faculty continued to adhere to a single expression of its antidiscrimination policy, an expression that had no effect on recruiting: The Yale personnel who would schedule the

interviews would be from *Yale College* (whose antidiscrimination policy, like the typical non–law school policy, did not extend to employers) and not from the *law school*. J.A. 83-84, 122, 133. At stake, the Army threatened, was $300 million in funds headed toward the medical school, the physics department, and other schools across the university. J.A. 85-86, 108. Yale relented. JAG Corps recruiters from each of four branches descended on Yale's campus and sat in empty interview rooms. J.A. 90.

The University of Southern California Law School, for its part, invited military recruiters to interview at the ROTC offices *on campus*. J.A. 59. USC helped schedule interviews for military recruiters; announced the military recruiting efforts in its weekly career-services newsletter; disseminated the military's literature to students; and supplied military recruiters with the same information as all other employers. *Id.* The Air Force declared that these accommodations, too, violated the most-favored-recruiter principle, because USC did not invite military recruiters to a school-sponsored forum—*off-campus*. J.A. 59-61; *see* P.A. 102a. Millions in university funds were at stake. J.A. 64. USC gave in.

These are not isolated anecdotes. Under the most-favored-recruiter principle, the military has routinely threatened law schools for any gesture of protest that treats military recruiters differently, even if the difference could have no material effect on recruiting efforts. The military threatened Harvard, for example, when it allowed military recruiters *on campus*, to recruit at the Harvard Law School Veterans Association, but would not volunteer its placement personnel to arrange the interviews. J.A. 137-38; *see also* J.A. 181. Boston College drew the military's ire when its law school allowed military recruiters *on campus* to interview, but maintained the military's recruiting literature in the library rather than in the career services office. J.A. 219; *see also* J.A. 154-55.

The Solomon Amendment's Origins

The Solomon Amendment chronology reveals that the measure has never been aimed at ensuring the success of military recruiting efforts. Congress did nothing about law school antidiscrimination policies until 1994, some 16 years after the first law school applied its antidiscrimination policy to sexual orientation and years after the policy proliferated. Congress was spurred to action by members who condemned what co-sponsor Representative Richard Pombo described as "nothing less than a backhanded slap at the honor and dignity of service in our Nation's Armed Forces." 140 Cong. Rec. 11,441 (1994). He inveighed against "policies of ambivalence or hostility towards our Nation's armed services" on the part of "[s]ome institutions of higher education in this country." *Id.* He threatened:

> These colleges and universities need to know that their starry-eyed idealism comes with a price. If they are too good—or too righteous—to treat our Nation's military with the respect it deserves[,] ... then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America.

Id. Representative Solomon echoed these sentiments when he introduced the law, declaring the intention to:

> tell[] recipients of Federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your first-amendment right[]. But do not expect Federal dollars to support your interference with our military recruiters.

Id. at 11,439. The sponsors urged their colleagues "to support the Solomon amendment, and send a message over the wall of the ivory tower of higher education." *Id.* at 11,441 (Rep. Pombo).

Sending the message was Congress' preeminent concern. Congress held no hearings and gathered no evidence about the actual effect of antidiscrimination policies on recruiting. DOD, for its part, actively opposed the Solomon Amendment, which it dismissed as "'unnecessary'" and "'duplicative.'" P.A. 5a-6a (quoting 140 Cong. Rec. 11,440 (Rep. Underwood)). In fact, a similar discretionary statute was already in effect, but pervasive antidiscrimination policies had had so little impact on military recruiting that DOD had rarely invoked the power to force its way onto campuses. *See* 140 Cong. Rec. 11,440. Congress overrode the military's needs assessment.

The first incarnation was limited to punishing those few schools that barred military recruiters at the campus gates. *See id.* at 11,438 (Rep. Solomon). Specifically, it denied funds only to an "institution of higher education that has a policy of *denying*, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes ... *entry to campuses* or access to students on campuses." National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994) (emphasis added). It did not require a school to provide any affirmative assistance to military recruiters, much less most-favored-recruiter assistance.

The penalty in the original version, too, was more modest: It applied only to DOD funds. Moreover, under DOD's interpretation, the penalty was imposed only on the particular school, or "subordinate element[]," within the larger university, that declined to assist the military. 48 C.F.R. § 209.470-1(c) (1996). If a law school violated the Solomon Amendment, the law school alone was punished.

Despite Recruiting Success, the Solomon Amendment Grows Harsher

Over the ensuing decade, both the penalty and the demand for assistance escalated. Beginning in 1997,

Congress applied the Solomon Amendment's penalty to a wider range of federal funds, to the point where, as we have seen, it now applies to virtually all funds or contracts that can be directed toward an academic institution. *See* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, div. A, § 101(e), sec. 514(b), 110 Stat. 3009, 3009-271 (1996). At the same time, Congress adopted the current "subelement" language, which penalizes all schools within a university for the acts of any autonomous faculty group. *Id.* sec. 514(f), 110 Stat. at 3009-271.

As the penalties toughened, most law schools found ways to accommodate military recruiters even while reaffirming their opposition to invidious discrimination by withholding from military recruiters some of the services they offered employers that did not discriminate. *See* P.A. 99a; J.A. 155, 184-85, 241. The disparity in services did not undermine recruiting efforts. Competition for legal jobs in the military remained so intense that recruiters routinely noted that even "very qualified applicants will not be selected for a position," P.A. 100a (quoting J.A. 156, 169); *see* J.A. 60. There is not "a shred of evidence" in the record that the military was having difficulty filling JAG ranks with superlative officers before Congress passed the Solomon Amendment or before each successive iteration of the law, much less that any shortfall was attributable to law school antidiscrimination policies. P.A. 24a. The record shows a glut of highly qualified applicants. *E.g.*, J.A. 60, 161, 165.

Despite its successes in recruiting lawyers, in the wake of the September 11 attacks, the military executed an about-face. P.A. 100a. In December 2001, DOD sent dozens of letters to law schools threatening them to stop treating the military differently. *E.g.*, J.A. 61, 107-08, 147. The letters declared that each school was "inappropriately limit[ing]" military recruiting if it did not provide a "degree of access by military recruiters that is at least equal in quality and scope to that offered to other employers," even though the statutory

language, at the time, required no such thing. *E.g.*, J.A. 107-08; *see* J.A. 197-98, 220.

DOD broadcast that this unwritten policy change was not a matter of military need, but rather was motivated by the same indignation that had moved Congress seven years earlier. "[I]n today's military climate," said one DOD lawyer, "the Department of Defense ... 'doesn't want to play games' with the law schools." J.A. 63. A top DOD official explained that application of an antidiscrimination policy to the military is objectionable, because it "sends the message that employment in the Armed Forces ... is less honorable or desirable than employment with ... other organizations." J.A. 132. The Air Force's chief JAG recruiter conveyed the same theme in response to a letter from a law dean advising that AALS policy called for the school to take "ameliorative action ... includ[ing] programs, teach-ins and demonstrations critical of the military[,] ... accompanied by posters ... and buttons worn by ... faculty, also critical of the military hiring practices." J.A. 185. The chief recruiter's answer was that even these "ameliorative actions ... would be contrary to requirements of law," if the military concluded they "intimidate interested students." J.A. 187.

It was the demand for affirmative assistance, and especially the most-favored-recruiter principle, that triggered this lawsuit. When the district court in this case suggested a view that DOD's demand for affirmative assistance was unjustified by the statutory language, *see* P.A. 180a, Congress responded by amending the statute, this time to expand the substantive scope of the Solomon Amendment to reflect DOD's most-favored-recruiter interpretation, yielding the current language. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004).

None of the versions of the Solomon Amendment was accompanied by congressional findings justifying the intrusion. Congress never so much as held a hearing to

consider whether the military needed the Solomon Amendment, and the military never provided Congress with statistics supporting any such need.

One of the House Armed Services Committee reports on the 2004 amendment, for example, merely stated that the intended effect of the provision was (as the statute said) to provide military recruiters access to campuses and students that is equal in quality and scope to that provided other employers, without suggesting that the goal was driven by anything other than pique. H.R. Rep. No. 108-491, at 328 (2004). The only "evidence" offered in support of the amendment came in a letter to the committee from the Under Secretary of Defense for Personnel Readiness, who asserted that "some colleges and universities remain intransigent or outright opposed to compliance" with the Solomon Amendment's requirement that "military recruiters receive access to students." H.R. Rep. No. 108-443, pt. 1, at 7 (2004). By way of illustration, he offered a "particularly egregious" example, which was nothing but a failure to stifle student protest: He complained that "military recruiters and prospective recruits have been forced to endure verbal abuse and harassment," and "gauntlets of taunting fellow students and faculty impeding the path to designated interview rooms." *Id.* The letter contained no evidence as to the need for affirmative assistance, much less justifying the most-favored-recruiter principle. It declared only that "[u]nder normal circumstances, such intransigence and opposition to the established laws of the land would be unacceptable—but now, at a time when our nation is at war, this situation is intolerable." *Id.*

The Law Schools' Efforts to Respond

Forced to abandon their chosen method of teaching principles of antidiscrimination and of protesting employers that discriminate on any basis unrelated to merit, law schools have resorted to various alternative mechanisms of delivering their message—so-called "ameliorative"

measures. They have sponsored forums that they would not otherwise have sponsored, delivered speeches they would not otherwise have delivered, and posted announcements they would not have otherwise needed to post. *E.g.*, J.A. 141-43, 157-58, 222-23.

But these measures are no substitute for the message they were delivering by abiding by the antidiscrimination policies they promulgated. To the distress of law deans and faculties, members of their communities have concluded that the schools are not committed to antidiscrimination, and that the law schools have lost credibility to preach values of equality, justice, and human dignity. J.A. 231-32; *see* J.A. 40-41, 264-65.

The chilling effect within law school communities has been palpable. The shift in policy has made some students feel like second-class citizens, marginalizing them. J.A. 208-09, 213, 264-65. Discourse has suffered. J.A. 231-32; *see* J.A. 160. Faculty attest to student expressions of cynicism and cries of hypocrisy when the lessons turn to topics such as equality, human dignity, and other underpinnings of a just society. J.A. 231-32. They feel inhibited to preach about integrity, adhering to principle, and fighting for a worthy cause. *Id.*

The Preliminary Injunction Proceedings

Plaintiffs moved for a preliminary injunction on First Amendment grounds. In response, the government offered no evidence of military necessity. It offered no statistics to suggest that the military was having difficulty recruiting lawyers, no statistics to justify the military's insistence that schools offer affirmative assistance, and no evidence to suggest that other less intrusive recruiting devices could not be adapted to enhance recruiting. *See* P.A. 87a-88a.

The district court found that "[l]aw school recruiting policies have First Amendment value and the Solomon Amendment has an effect on Plaintiffs' First Amendment

interests." P.A. 138a. It also found that a law school's antidiscrimination policy is critical to its expressive mission. P.A. 144a-145a. But it denied a preliminary injunction mainly because it believed that the Solomon Amendment—which at the time did not include the requirement of affirmative assistance—"operates primarily to compel or limit conduct, not speech or expression." P.A. 84a.

The Court of Appeals Orders a Preliminary Injunction

The United States Court of Appeals for the Third Circuit reversed, ordering the district court to issue a preliminary injunction against enforcement of the Solomon Amendment. P.A. 48a. In an exhaustive opinion, the court of appeals held that the Solomon Amendment impermissibly compels a school to use its personnel and resources to propagate recruiting messages despite its objections to the military's exclusionary recruiting policies. P.A. 25a-40a. The nature of the assistance offered by schools, and the purpose of that assistance, the court of appeals held, were all laden with First Amendment expression. P.A. 34a-35a & n.19. The court also found that the Solomon Amendment burdens a school's right to expressive association by restricting its ability to teach its antidiscrimination commitment through a refusal to associate with employers that discriminate against qualified students on the basis of irrational stereotypes. P.A. 15a-25a.

In the face of these intrusions on constitutional rights, the court of appeals applied strict scrutiny. The court observed that the government had adduced "no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting," P.A. 45a, nor even "a shred of evidence that the Solomon Amendment materially enhances its stated goal," P.A. 24a. In fact, the court opined, there is ample reason to believe that the Solomon Amendment "actually impedes recruitment." *Id.* Moreover, the court held, "the Solomon Amendment could barely be tailored more broadly." P.A. 23a.

The court of appeals rejected the government's argument that the Solomon Amendment should be analyzed under the intermediate scrutiny analysis of *United States v. O'Brien*, 391 U.S. 367 (1968), which applies to regulation of conduct with only an incidental impact on expression. P.A. 41a-43a. But the court also examined the statute under this lower standard, and concluded that the Solomon Amendment would fail that level of scrutiny as well. P.A. 43a-47a.

Judge Aldisert dissented. P.A. 48a-81a.

SUMMARY OF ARGUMENT

The military has a message when it recruits. Law schools have a message when they refuse to assist employers that discriminate against their own students. When Congress penalizes a law school for adhering to its message and refusing to assist military recruiters to disseminate theirs, it infringes three First Amendment freedoms—the right to be free from compelled speech; the right to speak; and the freedom to associate—all against the backdrop of an academy that enjoys heightened protection.

First, the Solomon Amendment requires law schools to give military recruiters more than just "access to campus" and more than just "access to students ... on campus." It requires schools to serve military recruiters affirmatively, with services that are "at least equal in quality and in scope" to the services that the school provides to employers that do not discriminate. Those services are communicative to the core: distributing, posting, and printing literature; making introductions; and sponsoring private forums for exchange of information. The doctrine of compelled speech prohibits government efforts to compel a private speaker to disseminate, carry, or host a message against its will.

Second, the Solomon Amendment requires law schools to suspend their antidiscrimination policies. These policies both protest discriminatory policies directed at the schools'

students and teach the lesson that assisting discrimination is immoral. The First Amendment protects a law school's interest not just in uttering the words, but in conveying the message as it chooses. A law school's choice to punctuate its message by refusing to assist discrimination deserves at least as much protection as a civil rights group's choice to punctuate its antidiscrimination protest by boycotting businesses that discriminate. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982).

Third, the Solomon Amendment requires law schools to collaborate with military recruiters in an effort—discriminatory recruiting—that the schools consider fundamentally unjust. This requirement violates the schools' freedom to associate, the right to choose for themselves which causes to assist or resist. The freedom of association is not limited to circumstances in which the government interferes with an organization's internal composition, but extends to the full range of causes an expressive organization may choose to embrace or to reject.

These three infringements are treated the same under the First Amendment whether Congress imposes them by command or by penalizing schools with a withdrawal of federal funds and contracts. This Court has maintained for half a century that: "To deny [a benefit] to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Speiser v. Randall*, 357 U.S. 513, 518 (1958). The only exception to this rule—where the government has designed a specific program and is "simply insisting that public funds be spent for the purposes for which they were authorized," *Rust v. Sullivan*, 500 U.S. 173, 196 (1991); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 211 (2003) (plurality)—has no bearing here. An entire university does not become a government mouthpiece—bound to carry the message of any government agency and suppress its own—just because a researcher or

department clear across campus has opted to accept federal funds or to provide a contractual service to the government.

The government cannot sustain its burden of justifying the Solomon Amendment's infringement on First Amendment rights. Strict scrutiny applies because the Solomon Amendment governs expression, both the government's expression and the school's expression, and because it is directed at promoting one viewpoint above all others. But the Solomon Amendment fails even under intermediate scrutiny. To be sure, military recruiting is a compelling interest. But the government has not demonstrated the necessary fit between the "disease sought to be cured" and the means it has chosen. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality) (internal quotation marks omitted). There is no evidence, and no reason to believe, that the government needs to demand any affirmative assistance from law schools in order to achieve its recruiting goals, and there is even less justification for Congress' insistence that a school must provide to military recruiters every single communications service it provides to some other employer, even if the denial of some service or another could have no bearing on recruiting success.

ARGUMENT

I. THE SOLOMON AMENDMENT INFRINGES UPON LAW SCHOOLS' EXERCISE OF THEIR FIRST AMENDMENT RIGHTS.

This case involves speakers on both sides.

Military recruiters are speakers. When military recruiters demand that schools assist them in recruiting, they are demanding assistance in disseminating their messages—requiring schools to disseminate and post recruiting literature, print the military's job listings, and invite military spokespersons to private forums for the exchange of

information. To be sure, their speech is directed toward a goal, to fill the ranks of the JAG Corps, but there is no denying that what they are doing, and seeking help in doing, is advocacy about the benefits of the JAG experience and the satisfaction of service to country.

The schools, too, are engaged in speech of their own. When a law school declares it will not assist a discriminatory employer—by disseminating or hosting its messages—it is, of course, protecting its own students against discrimination. But it is also taking a public stand against discrimination, and here, more specifically, protesting a governmental policy of discrimination directed against its students. And it is also teaching a lesson to its students and community. The lesson is not just about the injustice of discrimination, but also about the immorality of assisting others who discriminate.

Thus, when Congress fired its shot "over the wall of the ivory tower of higher education," 140 Cong. Rec. 11,441 (1994) (Rep. Pombo), it hit not one, but three distinct constitutional rights: the right to be free from compelled speech; the right to express a message in the most effective manner; and the freedom to associate. We address each in turn, below.

But first, a note about the backdrop of this First Amendment clash: That Congress chose the "ivory tower of higher education" as the battleground—and law schools in particular—is no small matter from a First Amendment perspective. "This Court has recognized that [First Amendment] right[s] [are] nowhere more vital than in our schools and universities." *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (internal quotation marks omitted). The academy has traditionally been the launching pad for challenges to government orthodoxy, which is why the courts have routinely subjected infringements on speech and expressive association to especially heightened scrutiny in that context. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835-36 (1995); *Rust v. Sullivan*, 500

U.S. 173, 200 (1991); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). The scrutiny should be all the more rigorous in the context of the legal academy, in light of the role lawyers have historically played in amplifying protests against government policies and advancing minority interests against politically entrenched majorities. *See, e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001); *NAACP v. Button*, 371 U.S. 415, 429-30 & n.12 (1963); *see also Grutter v. Bollinger*, 539 U.S. 306, 332-33 (2003) (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

The government might disagree with a law school's judgment—as it often does when it confronts acrid dissent. The government might believe that helping an employer that discriminates to disseminate its recruiting message will not undermine the school's protest or pedagogical designs too much, or that the academic environment is not unduly poisoned when the school affirmatively helps an outsider discriminate against its own students after vowing to establish the school as a discrimination-free zone. *See* U.S. Br. at 29, 31. But academic freedom means that the decision is the law school's to make, free from government interference. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." (citations omitted)). "A university ceases to be true to its own nature if it becomes the tool of ... [the] State ...." *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (internal quotation marks omitted). *See generally* Am. Ass'n of Univ. Professors (AAUP) Br. at 8-16 (discussing academic freedom ramifications of Solomon Amendment); Columbia Univ. Br. at 16-19.

Because of the academy's unique societal role, its First Amendment rights are arguably broader than the rights of

other sorts of private institutions. *See, e.g.*, *Rust*, 500 U.S. at 200. At a minimum, this much is clear: Whatever First Amendment protection the courts offer other expressive associations is especially heightened in the legal academy. The legal academy's agitation for change deserves at least as much protection in this simmering cultural battle as the efforts of Boy Scouts, veterans, or others bent on preserving the status quo.

A. The Solomon Amendment Infringes the Law Schools' Right to Be Free from Government-Compelled Speech.

1. *The Solomon Amendment Requires Law Schools to Disseminate, Facilitate, and Host Military Recruiting Messages.*

This is what the Solomon Amendment directs law schools to do for military recruiters: • *Disseminate our literature in student mailboxes.* • *Post our job announcements on your bulletin boards.* • *Maintain our leaflets in your binders for reference by students.* • *Publish our précis in your printed catalogs.* • *Email students about our imminent arrival.* • *Negotiate appointments for us with students.* • *Supply us with private meeting rooms for discussion with candidates.* • *Reserve for us spots at your private forums where we can post our "JAG Corps" banners and discuss career options with your students.* *See supra* at 4-5, 7-8; NALP Br. at 9-17 (describing varied modes of recruiting assistance).

Thus, what the government characterizes throughout its brief as "access to students" is nothing less than a demand that law schools distribute, post, print, email, negotiate, and otherwise provide forums for the speech of military recruiters. If a law school performs any of these communicative services for any employer—and they all do—it must provide the same communicative services for the military. The military is demanding "access" only in the

same sense that a writer seeks "access" to a newspaper's editorial page, a consumer advocate seeks "access" to a utility's billing envelope, or a propagandist seeks "access" to a private forum.

Compelling a law school to carry or host the government's recruiting message against its will is a violation of the doctrine of compelled speech. Just as the government may not compel a private company to disseminate an unwanted brochure in its billing envelopes, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12-17 (1986) (plurality), it cannot force a private university to disseminate military brochures. Just as the government may not force a motorist to display a four-word state motto on his license plate, *Wooley v. Maynard*, 430 U.S. 705, 714-17 (1977), it cannot force a private institution to display the military's postings on its bulletin boards. Just as the government may not force a newspaper to publish specified opinion pieces, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974), it cannot force a school to print specified recruiting messages. Just as the government may not force a parade organizer to include an unwanted marching contingent bearing "a message it did not like," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 574-81 (1995), it cannot force a private forum to admit an unwanted contingent of recruiters to unfurl its banner at a private information fair.

The government concedes that recruiting is speech. *See* U.S. Br. at 13 (referring to "[t]he speech of the recruiters" as "the speech of the government"); *id.* at 28-29 (law schools "create an opportunity for an exchange of information between students and outside employers"). Specifically, as one amicus brief from military officials attests, recruiting is advocacy "to promote service in the nation's military and to present information about the ... benefits of such service." Abbot Br. at 21 n.14. The government concedes also that the Solomon Amendment's most-favored-recruiter principle

requires schools to use these various vehicles of communication to disseminate and host the government's recruiting message. U.S. Br. at 37. That should be the end of the inquiry under the compelled speech cases.

But the government tries to avoid this body of precedent by mischaracterizing, first, the theory of the claimed violation and, second, the compelled message the law schools are resisting.

As to the theory, the government frames it thus: "The court of appeals' compelled speech holding ultimately appears to rest on the notion that the First Amendment gives a property owner a right to exclude from its property anyone engaged in expressive advocacy," contrary to *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980). U.S. Br. at 31. This characterization overlooks both the nature of the co-opted forum and the types of services demanded. *PruneYard* established only that a shopping mall cannot invite the general public onto its property and then assert a right to exclude invitees from engaging in any public speech at all, at least where the proprietors do not object in any way to the content of the messages disseminated. *See Pac. Gas & Elec.*, 475 U.S. at 12 & n.8 (distinguishing *PruneYard* on this basis). If the Solomon Amendment merely required a school to let student activists make unobjectionable speeches on campus, a citation to *PruneYard* would be a stretch, but a plausible one. But *PruneYard* does not come close to justifying a law that demands a school's active assistance in helping a specified outsider disseminate a specific message that is deeply objectionable to the institution.

As to the message resisted: Law schools resist being forced to disseminate and host the military's recruiting messages. In arguing that there is no infringement, the government says nothing about those compelled messages. The government pretends that the only message the schools resist is a message endorsing "Congress' policy on the service of homosexuals in the military," insisting, at every

turn, that there is no compelled speech violation so long as "the Solomon Amendment does not seek to induce a school 'personally to express' its agreement with that policy," U.S. Br. at 26; *see also id.* at 13, and "[t]he recruiters are ... not ... mak[ing] speeches in support of Congress's policy concerning service by homosexuals," *id.* at 27. This analysis is flawed both factually and legally.

As a matter of fact, while recruiters may not be expatiating about gays in the military, the record demonstrates that military recruiters do, indeed, find themselves advising students, "Son, you have no place in the JAG Corps because you are gay." *See* P.A. 32a; J.A. 39-40. And even when they do not say it explicitly, law schools are justified in perceiving that every time the military says, "Uncle Sam wants you," it carries with it the implicit caveat, "but not if you are gay." J.A. 236; *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

Legally, the government's analysis conflates message with motive. The military's discriminatory policy is why law schools refuse to disseminate the military's message and to host military spokespersons. But, as the court of appeals understood, the main focus of this compelled speech claim is, necessarily, on the speech that is compelled, not on the schools' motive for resisting. *See* P.A. 33a. "*[W]hatever the reason*," the refusal to host or assist another speaker "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575 (emphasis added). That a law school's resistance is rooted in a longstanding and deep-seated principle—on a controversy that is riling the nation—only makes its interest that much weightier.

The government's conflation of message with motive seems to derive from an equally erroneous view that there is no compelled speech violation unless the host "'disagrees with'" the literal content of the message it is forced to host,

rather than having a bona fide basis for declining to disseminate it. *See* U.S. Br. at 26 (quoting *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055, 2060 (2005)). Under this view, a school that refuses to assist military recruiters out of a religiously based pacifism, *see* 10 U.S.C. § 983(c)(2), could be required to assist military recruiters so long as it is not compelled to utter, "War is good." It is enough, according to the government, that "[i]nstitutions need not utter any words of endorsement for that policy; nor must their representatives carry a sign expressing support for that policy." U.S. Br. at 13.

This, of course, has never been the law. This Court routinely allows speakers to resist a government-compelled message even though the speaker does not claim to disagree with the message's literal content, and, indeed, even when the precise content is not known at the time of the challenge. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977); *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001). For that matter, the doctrine applies with full force not just to "compelled statements of opinion," but also to "compelled statements of 'fact,'" which is to say that the speaker cannot disagree with the statement, but simply prefers not to carry it. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988). That is because a government command that a private party foster its (or anyone else's) message is a compelled speech violation, whether or not the unwilling host disagrees with the message.[3]

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[3] Contrary to the government's insinuation, *see, e.g.*, U.S. Br. at 25-26, 30 n.5, this Court did not silently overrule this line of cases when it distinguished "'compelled subsidy' cases" from "true 'compelled speech' cases," noting that the latter category includes cases "in which an individual is obliged personally to express a message he disagrees with." *Livestock Mktg.*, 125 S. Ct. at 2060. The Court there was addressing the consequences of the "compelled subsidy" label, and had no occasion and

2. *This Court Has Rejected Each of the Government's Efforts to Trivialize the Violation.*

The government offers several additional rationales to remove the Solomon Amendment from the ambit of the compelled speech doctrine. This Court has rejected each.

Endorsement. Forcing one speaker to carry another's message implicates the compelled speech doctrine even if most reasonable listeners would not be confused about the identity of the real speaker, and the "students or ... outside world" might not be tricked into believing "that law schools endorse the existing rules concerning service by homosexuals in the military." U.S. Br. at 29. These traits are common in compelled speech cases. There is never a danger that readers will think that a newspaper is endorsing an op-ed piece labeled as a counterpoint to the paper's own editorial. *See Tornillo*, 418 U.S. at 244, 256. There is no danger that the outside world would mistakenly believe that a motorist actually wants others to "Live Free or Die," just because his license plate says so. *See Wooley*, 430 U.S. at 720-22 (Rehnquist, J., dissenting). Yet, this Court concluded these speakers were entitled to resist disseminating those messages. *See also Pac. Gas & Elec.*, 475 U.S. at 15 n.11.

Freedom to protest, rebut, or disclaim. A dissenting motorist is, of course, free to cry out in protest or emblazon his car with a contrary message, "The state motto is bunk." *Cf. Wooley*, 430 U.S. at 707-08 & n.4. And a newspaper is free to emphasize its disclaimer in bold print. But this Court held in each instance that the option to ameliorate, protest, or disclaim does not cure a compelled speech violation. To the contrary, the ameliorative statements are but ripples of the compelled speech harm. Compelling one speaker to convey another's message is impermissible in part because the renitent host will often feel compelled to respond when he

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no need to redraw the traditional contours of the category of "true 'compelled speech' cases" it was distinguishing.

would otherwise "prefer to remain silent." *Pac. Gas & Elec.*, 475 U.S. at 18; *see Hurley*, 515 U.S. at 575-76.

By this principle, the government's observation that law schools "are free to criticize the military," U.S. Br. at 29, and "free to disavow" the military's message, *id.* at 31—and that they actually do engage in extensive "ameliorative" speech that they would not otherwise have undertaken, *id.* at 17—only underscores the constitutional violation. And as the AALS itself cogently explains, the ameliorative speech is, in any event, no substitute for the schools' chosen method of expression. *See* AALS Br. at 25-30. That said, as the court of appeals pointed out, the military has supplied every reason to expect that it will succumb to the temptation to invoke the Solomon Amendment to suppress "verbal abuse," H.R. Rep. No. 108-443, pt. 1, at 7, protests, or any other speech it thinks will suppress student interest in military jobs. P.A. 36a; J.A. 187-88; *see supra* at 12-13.

Communicative services to others. Nor is the violation tempered by the schools' willingness to supply to other employers the communicative services that they refuse to extend to military recruiters. The First Amendment has no volume discount. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Hurley*, 515 U.S. at 569-70. A private forum may "decide[] to exclude a message it d[oes] not like from the communication it cho[oses] to make." *Id.* at 574. Just as a newspaper or on-line service that publishes classified ads would have a right to exclude the government's recruiting ad, so, too, a school has the right to make the same editorial judgments as to which messages it will facilitate and which it will resist. In any of these contexts, the government's forced participation would interfere with the host's "autonomy over [its] message." *Id.* at 576; *see also Tornillo*, 418 U.S. at 258.

Only by ignoring every one of the 17 substantive declarations filed in this case could the government argue that "when engaged in the activities to which the Solomon Amendment is addressed, institutions are not involved in their own expressive enterprise, let alone in the editorial function of deciding what point of view to take." U.S. Br. at 29. It certainly is true that a school does not certify every employer for quality or moral purity. But, as every declarant confirms, law schools *are* expressing a message—one that is foundational to them—when they adopt antidiscrimination policies and enforce them evenhandedly against all employers. *E.g.*, J.A. 38, 57-58, 76-78, 152-54, 196, 227-30; *see infra* at 28-30. Along that metric, they exercise their editorial function vigilantly—much more vigilantly than the St. Patrick's Day parade organizers whose editorial control was upheld even though the organizers "had no written criteria and employed no particular procedures for admission, voted on new applications in batches, ... and did not generally inquire into the specific messages or views of each applicant." *Hurley*, 515 U.S. at 562 (internal quotation marks omitted). As *Hurley* confirms, the sponsors of a forum do not lose the freedom to screen speakers on a criterion that is important to them just because they decline to apply multiple other screens.

B. The Solomon Amendment Suppresses the Law Schools' Protest and Right to Teach Their Lesson in the Most Effective Way.

The academy is a normative institution. By adopting and living by an antidiscrimination policy, a law school instills a lesson in its students and its community: "We do not discriminate. We do not assist others who discriminate. No exceptions." From the law schools' perspective, the principle that it is immoral to *assist* discrimination is integral to the antidiscrimination lesson. *See* J.A. 38, 195-96, 213, 229-30. Beyond pedagogy, when a law school applies its antidiscrimination principles to the government, it is lodging

its protest against a government policy that is the focal point of a raging national debate.

That is not to say that the antidiscrimination policies serve *only* to teach and to protest. To be sure, law schools designed these policies *also* to protect students from the affront and injury of being victims of discrimination, at least within the confines of their own schools. J.A. 228. But that purpose does not detract from the additional communicative purposes that the record establishes.

When the Solomon Amendment forces a law school to help an employer that discriminates, it undermines not just the law school's interest in protecting students from discrimination, but also the lesson and the protest. A law school cannot effectively teach that it is immoral to assist discrimination when it affirmatively assists an employer that openly discriminates against the school's own students. To be sure, the law school can still *say*, "Thou shalt not assist discrimination." *See* U.S. Br. at 17. But in a law school, of all places, to preach the principle while defying the dictate teaches nothing but cynicism. *See* J.A. 229. At the same time, the government is squelching the law school's chosen means of protest—a limited sort of boycott of any institution that discriminates. One need not embrace the law school's view on the matter or consider the ultimate outcome of the national debate inevitable to recognize that the law school has a First Amendment interest not just in preaching and not just in protesting, but in doing both through the means it deems most effective. *See* Cato Inst. Br. at 1-4, 11-13.

That was the right this Court recognized in *NAACP v. Claiborne Hardware Co.*, when it held that an advocacy group was entitled not just to speak out in protest against an institution that discriminates, but to punctuate the message by refusing to support or assist the targeted institution. 458 U.S. 886, 907 (1982). There, community leaders organized a boycott of businesses that discriminated on the basis of race. *Id.* at 889. The Court held that the organizers had a

constitutional right to do "more than assemble peaceably and discuss among themselves their grievances against governmental and business policy." *Id.* at 909. Law schools, pressing their civil rights position, have at least as much freedom to refuse to assist or support entities that discriminate, especially when the discrimination would be perpetrated by the government itself, on the law school's own campus, under its own auspices, and against its own students.

C. The Solomon Amendment Infringes the Law Schools' Freedom Not to Associate with Military Recruiters in a Cause They Consider Unjust.

As the court of appeals recognized, the Solomon Amendment infringes the law schools' freedom of association, as well. P.A. 15a-25a. The court of appeals' analysis of the parallels between this case and *Boy Scouts of America, Inc. v. Dale*, 530 U.S. 640, is so thorough and persuasive that we will not burden the Court by repeating it here. Instead, we adopt that analysis, and embellish with two additional observations.

First, the Boy Scouts were hard-pressed to demonstrate that their aversion to homosexuality was integral to what they stood for as an organization. This Court ultimately deferred to the organization's assertion of its own mission, but it was by no means self-evident. *See id.* at 647; *id.* at 685-86 (Stevens, J., dissenting). In contrast, the ardent stance against discrimination—and specifically, the refusal to assist discriminatory employers—has been an explicit and earnest article of faith among law schools for decades.

More importantly, the scoutmaster in *Dale* was not using his affiliation within the Boy Scouts to express anything. He never discussed sex with the scouts within his troop, much less advocated homosexuality. *Id.* at 654-55; *see id.* at 689-90 (Stevens, J., dissenting). In contrast, here, military recruiters descend on campuses specifically to speak. And

they demand the schools' affirmative assistance to inflict on the schools' own students the very act—discriminatory hiring—that the law schools find so abhorrent.

The government's challenge to the court of appeals' analysis relies mainly on the assertion that two particular characteristics of the government action in *Dale* are "crucial" to establishing an expressive association violation: (1) the challenged law must "interfere[] with an expressive organization's interest in determining its own internal composition"; and (2) the government must "force[] an expressive organization to communicate a message that [is] contrary to its beliefs." U.S. Br. at 19. "Because the Solomon Amendment does neither," the government asserts, "it does not implicate the First Amendment right to associate." *Id.* at 23. Beyond those two contentions, the government analogizes the Solomon Amendment to antidiscrimination laws this Court has upheld. *See id.* at 24-25. All three arguments fail.

Internal composition. Far from suggesting that the government is free to compel association in any way, so long as it does not interfere with an organization's "internal composition," *Dale* recognized the opposite: "Government actions that may unconstitutionally burden this freedom [of expressive association] *may take many forms*." *Dale*, 530 U.S. at 648 (emphasis added).

This reference underscored the point the government now elides: *Dale* is not the only freedom-of-association case this Court has confronted. *Dale* emerged against a backdrop of almost half a century of precedent prohibiting the government from interfering with associational rights in a variety of ways. The government may not burden an organization's choice of strategic alliances. *See Button*, 371 U.S. at 437-39 (lawyers); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (paid political advocates). The government may not demand that an institution ally itself with the government's favored political cause. *See O'Hare Truck Serv., Inc. v. City*

of Northlake, 518 U.S. 712, 720-26 (1996); *Elrod v. Burns*, 427 U.S. 347, 360-72 (1976) (plurality). The government may not even intrude on an institution's decision whether (or not) to lend financial support to a political cause. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-88 (1978); *Abood*, 431 U.S. at 233-36. This Court has disapproved of even the most indirect burdens, not just on membership, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958) (disclosure of membership lists), but on other sorts of affiliation as well, *see Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-93 (1982) (disclosure of donors to unpopular party); *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960) (disclosure of organizations contributed to).

In each of these contexts, the government is constrained because these sorts of intrusions undermine the ultimate purpose of associating in the first place: "[e]ffective advocacy of both public and private points of view, particularly controversial ones." *Patterson*, 357 U.S. at 460. The government infringes this freedom when it dictates to a normative institution (a law school) that it must associate with outside advocates (military recruiters) and help them affirmatively and publicly advance a cause (military recruiting) on behalf of a specific governmental entity that engages in acts it finds abhorrent (employment discrimination) against the institution's own constituency (its students).[4]

Endorsement. Similarly, in each of the contexts enumerated above, the "crucial" feature is not whether some audience or constituent would misinterpret the forced association as an endorsement (the government's second

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[4] It matters not that the government thinks of the intrusion as "temporary" or "episodic," U.S. Br. at 20. *See Hurley*, 515 U.S. at 560-61 (a single parade lasting a few hours). But as both the court of appeals and the district court recognized, it is neither. The military demands frequent and ongoing assistance. *See* P.A. 34a, 102a. It is not just a visit; it is a collaboration.

purported element). For purposes of the right not to associate, it is not dispositive whether "[s]tudents and the public both can readily understand that military recruiters speak for the military." U.S. Br. at 20. Nor, as *Dale* itself illustrates, is the infringement excused just because the institution is free "to explain why" it is associating against its principles. *Id.* at 22; *see Dale*, 530 U.S. at 653-55.

Rather, as in the analogous compelled speech context, *see supra* at 23-25, the central question is the extent to which the forced association violates some political, moral, or religious value the group shares. *See Dale*, 530 U.S. at 655; *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). That is what this Court means when it defines the right of "expressive" association as emerging out of a shared interest in "advocat[ing] public or private viewpoints." *Dale*, 530 U.S. at 648.

The inapt analogy to antidiscrimination laws. Of course, just because an organization claims an expressive purpose in declining to associate with some individual or institution does not mean that the government can never force the association anyway. Like any other First Amendment right, the freedom not to associate must be balanced against the government's asserted interest in forcing the association. Antidiscrimination laws illustrate the balance. *See Roberts*, 468 U.S. at 623. The government may prohibit an employer from declining to associate with an employee for racist or sexist reasons. *See, e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). It may prohibit a business association or social club from refusing to associate women or African Americans as members. *See, e.g.*, *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13-14 (1988) (race and sex); *Roberts*, 468 U.S. at 623-25 (sex). It may prohibit a university from discriminating in admissions. *See, e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). In each context, this Court has held that the government's compelling interest in eradicating discrimination outweighs

the asserted interest in discriminating. *See, e.g.*, *Roberts*, 468 U.S. at 628; *see also Hurley*, 515 U.S. at 572 (antidiscrimination statutes "do not, as a general matter, violate the First ... Amendment[]").

Even so, the Court has emphasized that there can be circumstances where the balance falls the other way, where discrimination is so integral to an organization's identity, or to the message its members have gathered to communicate, that the right not to associate trumps even the government's weighty interest in opposing discrimination. *Dale* and *Hurley* were such cases. *See also Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 288-90 (D. Md. 1988) (Ku Klux Klan cannot be forced to admit Jews or African-Americans to its ranks or to its parades).

From these principles, it follows that the government is absolutely correct that "[e]ducational institutions do not have any unique constitutional immunity" from antidiscrimination laws and that "[a] school could not, for example, assert a '*Dale* right' to exclude minority-owned enterprises from the recruiting process." U.S. Br. at 19, 20. But that is not because a school has no constitutionally protected interest in deciding, on the basis of principles and values, whether or not to associate with, or assist, a particular outsider. Rather, it is because the balance of interests falls decidedly against a school's claimed right to discriminate invidiously. This proposition is undoubtedly true where (as is almost always the case) discrimination is not a central tenet of a school's expressive identity, *see Runyon*, 427 U.S. at 176; *Grove City Coll. v. Bell*, 465 U.S. 555, 575 (1984), and, because of the singular imperative of eradicating discrimination in education, perhaps even when it is, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983); *Norwood v. Harrison*, 413 U.S. 455, 463-68 (1973). Simply put, "'the Constitution ... places no value on discrimination,'" *Runyon*, 427 U.S. at 176 (quoting *Norwood*, 413 U.S. at 469), and a

high priority on "eradicating discrimination," *Roberts*, 468 U.S. at 623.

That a state may prohibit the ordinary school from discriminating invidiously in admissions, hiring, or business interactions, then, simply does not prove that the government has *carte blanche* to require schools to associate with military recruiters by assisting them in their recruiting efforts. And it certainly does not prove that forced assistance to military recruiters entails no infringement on associational rights. Whether this particular infringement is permissible depends here, as it always does, on a discrete balancing of the degree of infringement (addressed up to this point in this argument) against the government's asserted need to infringe as it has chosen to do (addressed *infra* at 41-50).

It is, indeed, incongruous that the government would invoke laws directed at prohibiting discrimination to justify punishing schools for refusing to assist discrimination. U.S. Br. at 19. The irony is only deepened by the government's suggestion that the *law schools* are the ones denying students "equal access to employment opportunities." *Id.*

II. UNDER THE FIRST AMENDMENT, THE SOLOMON AMENDMENT'S PENALTY, A UNIVERSITY-WIDE BAN ON ALL FEDERAL FUNDING, IS TREATED THE SAME AS A COMMAND.

Representative Solomon drew the linkage that is anathema to the First Amendment when he described the premise of his legislation: It "tell[s] recipients of Federal money ... that if you do not like the Armed Forces, if you do not like its policies, ... [t]hat is your first-amendment right[]. But do not expect Federal dollars ...." 140 Cong. Rec. 11,439. Congress has since taken to the furthest possible extreme Representative Pombo's pithier formulation that the academy's "starry-eyed idealism comes with a price." *Id.* at 11,441.

The price is dear for a law school's right to stand by its antidiscrimination policy: The government cuts off almost every penny of federal money to the law school and to any department within the university from Astrophysics to Zoology. If a law school faculty refuses to disseminate and support the military's recruiting messages, the federal government will cancel not just funding for recruiting, not just funding for the law school, not just funding for national security or defense initiatives, but *any* federal funding to anyone on campus. So when the government describes the Solomon Amendment as covering "specified federal funds," *see* U.S. Br. at I, 6, 16, that is a coy way of describing a penalty that encompasses almost all grants and contracts administered by every agency that funds academic institutions. The price tag for some academic institutions is as high as several hundred million dollars. *E.g.*, J.A. 85-86, 147, 163. Never in First Amendment history has the government tried to exact a price that high for expression that remote. As the court of appeals held, Congress' effort to do so here is a classic case for application of the doctrine of unconstitutional conditions. P.A. 11a-12a & n. 9.

Generally, Congress has plenary power under the Spending Clause to impose conditions on the receipt of federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). But as the leading Spending Clause case recognized, the Spending Clause, like all other powers enumerated in the Constitution, is constrained by the Bill of Rights. *See id.* For almost half a century, this Court has confirmed that when it comes to civil liberties, the government cannot attach strings to a benefit to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In short, the doctrine holds that the government may not exact a "price" for "starry-eyed idealism" or any other expression it disfavors.

The prototype for the unconstitutional conditions doctrine is *Speiser*, a compelled speech case, where this Court held that a state could not condition a property tax exemption for veterans on their willingness to sign a loyalty oath. 357 U.S. at 518. In striking the condition on First Amendment grounds, this Court held: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Id.*; *see, e.g.*, *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Sherbert v. Verner*, 374 U.S. 398, 405-06 (1963). The principle is especially apt here, since a university-wide cut-off of the "benefit" of all federal funds and contracts is harsher than the penalty Congress attaches to almost any direct command, including the prohibition against criminal fraud—so harsh, in fact, that every school in the country that was receiving federal money has relented. *Cf. NEA v. Finley*, 524 U.S. 569, 596 (1998) (Scalia, J., concurring in the judgment) ("[D]enial of participation in a tax exemption or other subsidy scheme ... does not, as a general rule, have any significant coercive effect.").

The only exception this Court has ever recognized is where the government creates a *program* and wishes "simply [to] insist[] that [those specified] public funds be spent for the purposes for which they were authorized," and not for other purposes. *Rust v. Sullivan*, 500 U.S. 173, 196 (1991); *see Finley*, 524 U.S. at 587-88; *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 211 (2003). Only in that context has the Court ever held, as the government broadly asserts, "that Congress has authority under the Spending Clause to establish criteria for the receipt of federal funding 'that would be impermissible were direct regulation of speech ... at stake.'" U.S. Br. at 40 (quoting *Finley*, 524 U.S. at 588). But this Court has never departed from the core principle of the doctrine of unconstitutional conditions, that the government may not "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service,

thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust*, 500 U.S. at 197 (emphasis in original); *see Am. Library Ass'n*, 539 U.S. at 210-11; *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

Under these cases, the federal government could make grants earmarked to promoting military recruiting. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); *cf.* Texas Br. at 11-12. But if the First Amendment does not permit the direct command, it does not permit the government to threaten to cut off almost every penny in unrelated funds to a school—much less to an entire university—for the refusal to support the government's message, for a simple reason: *An entire university is not a government program. See generally* AAUP Br. at 22-30 (discussing unconstitutional conditions doctrine). Harvard University does not become a government program, and especially not a program obliged to carry the government's message, just because one of its professors or one of its departments secures support from some federal agency or provides the agency with a contractual service. It would be absurd to claim that funds for cancer research or particle accelerators are not "spent for the purposes for which they were authorized," *Rust*, 500 U.S. at 196, just because the law school across campus declines to service JAG Corps recruiters. The very notion runs afoul of this Court's admonition that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). That is why the government did not even suggest to the court of appeals—as it does to this Court—that the constitutional strictures are relaxed because "the Solomon Amendment is a condition on funding, not a direct regulatory mandate." U.S. Br. at 13; *see* U.S. CA Br. at 44.

The government now constructs much of its appeal around the opposite view, couched both as several arguments that the nature of the penalty means there is no First Amendment infringement at all, *see* U.S. Br. at 18, 24-25, and as an argument that conditions on funding are evaluated by a lower standard, *see id.* at 39-43. They are all different ways of saying the same thing, and they all run headlong into almost half a century of doctrine. For example, even if it is true that "[t]he United States is doing no more than any donor to an institution of higher education might reasonably do," *id.* at 24, the point is constitutionally irrelevant. So, too, is the suggestion (which the record disproves) that universities with hundreds of millions of dollars at stake have "the same option anyone has to decline to accept a contract offer that he believes is not justified." *Id.* at 40; *see also* Columbia Univ. Br. at 11-16. The very premise of the unconstitutional conditions doctrine is that the government is not just "any donor" and is unlike any other contract partner. *See Speiser*, 357 U.S. at 526; *Perry*, 408 U.S. at 597. Unlike all other donors and contracting partners, the government is bound by the Bill of Rights. So, when constitutional rights are in play, it is simply no answer to say, as the government repeatedly does, that "[i]f institutions of higher education do not wish to associate with military recruiters, they may simply decline to associate themselves with the government's money." U.S. Br. at 23-24; *see id.* at 13, 16. One researcher's decision to "associate ... with the government's money" may preclude him from bragging he does not "associate" with the government, but it does not convert him and everyone else in the university into the mouthpiece of every government agency with a message to deliver or a cause to press.

Contrary to the government's assertion, *Grove City College v. Bell*, 465 U.S. 555 (1984), does not carve out some huge exception to the doctrine, and certainly not one that turns entire universities into government lackeys. *See* U.S. Br. at 24. The case held that if a university receives a

specified type of federal funding—there, a voucher program that defrays certain costs for some students—the school may not administer *that specific* program in a manner that violates the government's prohibition against gender discrimination. 465 U.S. at 575. Thus, the case, as framed by the Court, was a classic case of the government specifying how it wanted its own funds expended. The Court expended five sentences on the school's First Amendment objection, which warranted "only brief consideration" because the peculiar right asserted was trivial. *Id.* The school did not discriminate on the basis of gender, and claimed no First Amendment right to do so. *See id.* at 577 (Powell, J., concurring); Brief for Petitioners at 3, *Grove City Coll.*, 465 U.S. 555 (No. 82-792), 1982 U.S. Briefs LEXIS 792. The right it asserted was the rather transcendental right to *choose*, of its own free will, to refrain from invidious discrimination, but not to *obligate* itself to the government to do so. Brief for Petitioners (No. 82-792), at 47-50.[5] *See generally* Bay Area Lawyers for Indiv. Freedom (BALIF) Br. at 19-30 (rejecting argument that striking the Solomon Amendment would endanger civil rights laws); AAUP Br. at 29-30 (same).

The government argues in various ways that the doctrine does not apply to the particular categories of First Amendment rights at issue here. For example, when the government argues that "[e]ducational institutions covered by the Solomon Amendment have not been *compelled* to do

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[5] Congress has since amended the statute to suspend the relevant funds if any portion of the school discriminates. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28-29 (1988). But even those strictures are distinguishable from the Solomon Amendment for two reasons. First, as demonstrated above, the command not to discriminate would be constitutional at least as applied to the usual school. *See supra* at 34-35. Second, antidiscrimination legislation is unique in that this is the only arena in which the government not only has a compelling interest in regulating conduct—there, "eradicating ... discrimination"—but also an independent interest "in denying public support to racial discrimination in education." *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 & n.29 (1983).

anything," for they are free to "decline federal assistance," U.S. Br. at 32 (emphasis in original), it is arguing that the doctrine of unconstitutional conditions does not apply to compelled speech violations. And when the government rejects the "view that an educational institution may voluntarily associate itself with the government's money, and then claim a First Amendment right not to associate with the government," *id.* at 18, it appears to be arguing that the doctrine of unconstitutional conditions has no application to claims of free association.

The cases prove otherwise. The doctrine of unconstitutional conditions applies to the entire panoply of First Amendment rights, from free exercise, *see, e.g.*, *Sherbert*, 374 U.S. at 404-06, to free speech, *see, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), to free press, *see, e.g.*, *League of Women Voters*, 468 U.S. at 399-401, to the right to petition government, *see, e.g.*, *Regan v. Taxation with Representation*, 461 U.S. 540, 545-46 (1983), to the right to associate and not to associate, *see, e.g.*, *O'Hare Truck Serv. Inc. v. City of Northlake*, 518 U.S. 712, 716-17 (1996); *Elrod v. Burns*, 427 U.S. 347, 358-59 (1976), to the right that launched the doctrine in the first place—the freedom *not* to speak, *see Speiser*, 357 U.S. at 526.

III. THE SOLOMON AMENDMENT CANNOT SURVIVE CONSTITUTIONAL SCRUTINY.

A. The Solomon Amendment Is Subject to Strict Scrutiny.

The court of appeals was correct in concluding that the Solomon Amendment is subject to strict scrutiny. *See* P.A. 41a-43a. That conclusion flows in the first instance from the simple fact that the military has a message. The statute is directed at requiring schools to provide a particular level of access to military personnel to engage in one activity—"*for purposes of military recruiting*," which is to say, to advocate a particular career path. 10 U.S.C. § 983(b)(1) (emphasis

added). The conclusion flows also from the undisputed reality that the law schools must disseminate speech to comply with the most-favored-recruiter command. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 9 (1986). And it flows from the manner in which the Solomon Amendment overrides a school's own choices about what causes to support and what speakers to associate with. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 576 (1995).

Abandoning yet another concession it made below, *see, e.g.*, U.S. CA Br. at 22, the government rejects not just strict scrutiny, but *even intermediate scrutiny*, arguing, now, that even the more permissive standard of *United States v. O'Brien*, 391 U.S. 367 (1968), is inapplicable. *See* U.S. Br. at 32-35. This position revolves around characterizing the Solomon Amendment as a regulation of "conduct" alone, with virtually no speech implications—akin to "walking down the street," *id.* at 33 (internal quotation marks omitted), or "arson of a government building," *id.* at 35. But like its incantation of the word "access," the government's invocation of the term "conduct" masks the reality that all the "conduct" the Solomon Amendment requires is communicative to the core. *See supra* at 21-22. These modes of expression depend upon physical activity (or forbearance from action), but that hardly transforms them from speech into conduct. As this Court has held, the conduct component does not even suffice to downgrade the scrutiny level from strict to intermediate, much less obviate all scrutiny. *See Wooley v. Maynard*, 430 U.S. 705, 713 & n.10 (1997); *Dale*, 530 U.S. at 659.

Strict scrutiny is the appropriate standard for an additional reason: The Solomon Amendment regulates speech on the basis of viewpoint, which necessarily requires strict scrutiny—even if the law school's expressive activity would otherwise deserve diminished First Amendment

protection. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (viewpoint-based regulations are "presumptively unconstitutional in funding, as in other contexts" (internal quotation marks omitted)). The viewpoint-based nature of the regulation appears on the face of the statute. The Solomon Amendment promotes exactly one viewpoint—the government's pro-military viewpoint—triggering the admonition that "[t]he government may not regulate [speech] based on hostility—*or favoritism*—towards the underlying message expressed." *R.A.V.*, 505 U.S. at 386 (emphasis added); *see Bd. of Regents of Univ. of Wisc. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (mandatory student activity fee is unconstitutional to the extent funds are allocated on the basis of majority's viewpoint); *Hurley*, 515 U.S. at 579 (viewpoint discrimination is "*promoting an approved* message or discouraging a disfavored one" (emphasis added)); ACLU Br. at 15-20.[6]

B. The Solomon Amendment Cannot Survive Strict or Intermediate Scrutiny.

The government does not even try to justify any of the demands Congress made—including the demand of campus entry alone—under strict scrutiny, which would require proof that the goals "'cannot be achieved through means

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[6] The viewpoint-specific scope of the regulation is starker when the focus shifts beyond what the Solomon Amendment covers toward what it excludes. The Solomon Amendment, as written by Congress and implemented by DOD, does not penalize every school that declines to assist the military, but only those schools that target the military *in protest*. Exempt from the penalty is any law school that bars military recruiters at the gates because "all employers are similarly excluded," 32 C.F.R. § 216.4(c)(3), because students have not expressed interest, *id.* § 216.4(c)(6)(ii), or because of "a longstanding policy of pacifism." 10 U.S.C. § 983(c)(2). Every conceivable non-protest reason to exclude the military is exempted. *See Texas v. Johnson*, 491 U.S. 397, 417 (1989). *See generally* BALIF Br. at 15-19.

significantly less restrictive of [First Amendment] freedoms.'" *Dale*, 530 U.S. at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)). The government reserves its energies for intermediate scrutiny, which requires it to prove that "'the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Turner Broad. Sys.*, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377).

Obviously, military recruiting is an important, even compelling, government interest. *See* U.S. Const. art. I, § 8, cl. 12. So, too, we may presume, is the interest in recruiting lawyers. But where, as here, constitutional rights are at stake, the government must do more than just waft around an interest and call it a day. *See* P.A. 45a. The government must also demonstrate that it is addressing an actual problem, rather than "simply posit[ing] the existence of the disease sought to be cured." *Turner Broad. Sys.*, 512 U.S. at 664 (plurality) (internal quotation marks omitted). And it must justify the "means chosen" to advance the interest. *Id.* at 662; *see also Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The government has done neither, arguing, incorrectly, that it need not.

1. *The Disease Congress Sought to Cure Is Not Real.*

If the "disease sought to be cured" was the one the Solomon Amendment sponsors posited most vocally and the military has stressed almost exclusively—the perceived "backhanded slap at the honor and dignity of ... our Nation's Armed Forces," 140 Cong. Rec. 11,441 (Rep. Pombo), and the "message that employment in the Armed Forces ... is less honorable," J.A. 132—then, it goes without saying, that the Solomon Amendment would fail under any standard of review. The asserted purpose must be "unrelated to the suppression of ideas." *Roberts*, 468 U.S. at 623; *see O'Brien*, 391 U.S. at 377.

The government posits that the disease sought to be cured was the "harm to military recruiting that arises" from the "act of restricting campus access." U.S. Br. at 35. But there is no reason to believe that was a real disease. *See generally* Servicemembers Legal Def. Network (SLDN) Br. at 17-23 (reviewing evidence on need for Solomon Amendment). The congressional sponsors spoke only of "some" schools, *e.g.*, 140 Cong. Rec. 9292 (1994), and the record in this case reflects that virtually no law school barred military recruiters at the gates, but merely offered them something less than most-favored-recruiter status. Even so, the record demonstrates that the JAG Corps has had a glut of highly qualified applicants. *See supra* at 11. The disease was the recruiting equivalent of a wart—annoying, perhaps, and embarrassing, but hardly incapacitating.

Several of the government's amici raise the prospect of mass evictions of military recruiters from undergraduate campuses, and the government faults the court of appeals for its focus on recruiting at law schools. U.S. Br. at 39 n.6. But the record is devoid of evidence that undergraduate institutions have been any more inclined than law schools to bar military recruiters from campus. If anything, the record suggests that their antidiscrimination policies tend not to cover recruiting assistance. *See* J.A. 32-33, 56, 150-51. The reason is that this case was brought by law schools, law faculty, and law students, and the relief requested was to enjoin enforcement of the Solomon Amendment against law schools. *See* P.A. 55a; J.A. 29-30. If the government wishes to justify infringing the First Amendment rights of law schools, it has to prove that the disease festers there, not clear across campus. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263-65 (1986).

2. *The Solomon Amendment's Means Are Not Fitted to the Disease.*

Most-favored-recruiter status. If, as the government asserts, the disease was the "harm to military recruiting"

from "restricting campus access," U.S. Br. at 35, the ill fit is immediately apparent. This harm would be addressed completely by requiring campus access. But since the "means chosen," was not just a demand to enter campus, nor merely a demand to have access to students, it is not enough for the government to prove (nor, obviously, to assert without proof) that "on-campus recruiting furthers the government's interest," *id.* at 36, or that "personal access to students on campus enhances recruitment," *id.* at 36-37. Since Congress chose to demand that military recruiters get the benefit of *every single communicative service* the school might provide to some other employer, these are the means the government must justify.

The government has not even tried to explain, under any level of scrutiny, why Congress needed to codify into law the military's recent most-favored-recruiter policy, penalizing schools for treating the military differently in ways that, while rich in symbolic protest, could not have harmed recruiting results.[7] There is no plausible reason, for example, why Congress needed to adopt a rule that punishes Yale for relying on its *college* personnel to make appointments for recruiters, rather than *law school* personnel. J.A. 122. No plausible recruiting need is served by punishing Boston College for putting military recruiting literature on reserve in the library rather than in the career services office, J.A. 218-19, except perhaps for the unlikely need to recruit only lawyers who are lazy or allergic to libraries.

The government cannot make up for the poor fit by asserting that "the Solomon Amendment relies on the

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[7] Tellingly, the government's various amici follow suit, addressing only the effects of "[b]anning military recruiters from campus," Abbot Br. at 19, "halt[ing] military recruiters at the[] gates," Am. Legion Br. at 4, and preventing "face-to-face interaction" between recruiters and students, Judge Advocates Ass'n Br. at 15 (internal quotation marks omitted).

educational institutions' own assessments of what is *required* for effective recruiting on their campuses." U.S. Br. at 37 (emphasis changed). When law schools choose to expend their scarce resources to promote certain employers, that is not a judgment of what is "required" for any particular employer to recruit effectively, and it certainly is not a judgment of what assistance is "integral" to a military with more resources and vehicles of recruiting than any other employer. *Id.* It is simply a judgment to associate with, and promote, one group of employers and not another, for the benefit of the school's students. That judgment cannot support the government's demand for like treatment any more than a newspaper's judgment to allot editorial space to some candidates entitles others to insist that equal space is "required." *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974).

In truth, the observation that "the Solomon Amendment does not prescribe any fixed level of access that educational institutions must afford to military recruiters," U.S. Br. at 16, only underscores the poor fit between the disease and the cure. If any incursion into First Amendment rights is justified at all, it would be only that level of intrusion that would satisfy *the military's* actual needs. Without so much as an assertion that the military cannot fill its needs unless it gets what Congress demands—every single service that might be provided to some other employer—the Solomon Amendment must fail. *See* NALP Br. at 9-16 (explaining employers' differential recruiting needs, and especially differences between unknown and prominent recruiters).

Entry to campus. Even as to the Solomon Amendment's more modest commands—that law schools provide some affirmative support, or simply allow entry to campus—the government did not produce a "shred of evidence." P.A. 24a.[8] That is why the court of appeals concluded that "the

[8] Contrary to the government's suggestion, the evidentiary vacuum was a matter of litigation strategy, not limited time. *See* U.S. Br. at 8;

Solomon Amendment could barely be tailored more broadly." P.A. 23a.

Instead, as it did below, the government appeals to "common sense," P.A. 45a, citing cases where additional evidence was not required, because the match between the government's purpose and the means chosen was self-evident. *See* U.S. Br. at 38. But, as the court of appeals found, this is not such a case. P.A. 45a. It is not at all obvious that the various alternative recruiting methods the military has at its disposal would be inferior. *See generally* SLDN Br. at 26-27 (describing vehicles). The government points to no evidence that the military would fail to recruit qualified candidates by approaching them directly, armed with the contact information that schools are legally obligated to supply, *see* 10 U.S.C. § 983(b)(2); by participating in or organizing recruiting events and symposia not affiliated with law schools; by offering attractive financial incentives, in the form of loan repayment and tuition remission; or by purchasing media advertising (as it already does) on a scale that is beyond the capacity of virtually any other employer. P.A. 23a; *see* Judge Advocates Ass'n Br. at A-1 (reporting military's $1.2 billion budget for recruiting and advertising). As the court of appeals noted, these other approaches "might actually fare better than the current system," because "the Solomon Amendment, which has generated much ill will toward the military on law school campuses, actually impedes recruitment." P.A. 24a (footnote omitted); *see* J.A. 183-87 (law dean urges military to interview off campus because it will be more effective).

Pet'n at 6. The district court did not rule on the preliminary injunction for almost two months, during which time the government could have supplemented its papers. In a parallel case, the government pursued the same strategy, on a more leisurely summary judgment schedule, resisting the legal claims without presenting evidence. *See Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 164-65 (D. Conn. 2005).

3. *The Solomon Amendment Is Not Entitled to Deference.*

The government's main defense, as to both the disease and the cure, is to argue that it does not need to prove either because (1) the very passage of "[t]he Solomon Amendment reflects Congress's judgment" on the matter, U.S. Br. at 36; and (2) this Court should defer to Congress, *id.* at 38. Both the premise and the conclusion are flawed.

The premise is flawed because there is little reason to think Congress made any such judgment about military necessity. All Congress did was to enact the demand. Without legislative findings, there is no way to confirm which of the two posited diseases it was curing—the perceived "slap" or the hypothetical, but undocumented, impact on recruiting. The legislative record suggests that a needs assessment was not foremost on Congress' mind. Congress held no hearings. So far as appears from the debate, and from a review of every committee hearing on military needs in the past decade, Congress had no data about how well various sorts of recruiting efforts worked. In the first instance, Congress was acting against the military's recommendation, and later the only formal input it received from the military was the letter (described *supra* at 13) bemoaning student protests and stating the bare conclusion that the most-favored-recruiter principle was necessary and "intransigence ... is intolerable." H.R. Rep. No. 108-443, pt. 1, at 7.

As to the conclusion, Congress does not get deference just because it passes a law. *See United States v. Morrison*, 529 U.S. 598, 614 (2000). Even under intermediate scrutiny, the government must prove "that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys.*, 512 U.S. at 666.

The ordinary rules of judicial scrutiny are not suspended just because the *military* is the entity infringing on the academy's constitutional rights. *See generally* SLDN Br. at 9-16 (exploring military deference). The courts traditionally defer to the military, and to political branches on matters of military affairs, when it comes to the "complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force," *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), including its personnel policies, judgments about troop morale, regulation of troop behavior, regulation of activities on its own bases, and, of course, strategic decisions on how to win wars. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986); *Rostker v. Goldberg*, 453 U.S. 57, 69-70 (1981); *Greer v. Spock*, 424 U.S. 828 (1976). Deference is appropriate, in other words, in matters on which the military and the political branches are especially expert and the judiciary is especially naïve. *See Goldman*, 475 U.S. at 507-08.

The Solomon Amendment is not about such matters. It is about the military's insistence on reaching beyond its own sphere to compel private organizations to reorganize *themselves* to accommodate and issue its message. This sort of intrusion into the civilian sector is precisely where judicial skepticism of Congress and the military is at its height, especially in light of the "traditional and strong resistance of Americans to any military intrusion into civilian affairs." *Laird v. Tatum*, 408 U.S. 1, 15 (1972). And this Court, which is no stranger to the law student market, is perfectly competent to assess claims about what services the largest and richest military in history needs from private institutions in order to attract the attention of brilliant young lawyers.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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